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PROFESSOR IVAN SHEARER AM RFD FAAL RAN (RTD)
1938 – 2019
This issue of the *Adelaide Law Review* is dedicated to the memory of our dear friend and colleague Ivan Shearer. Ivan’s 63-year involvement with Adelaide Law School began when he commenced his undergraduate law studies here in 1956. He later became a member of the academic staff, served as Dean of Law, and in his retirement returned as an Adjunct Professor. Ivan also served for many years as a member of the Advisory Board of the *Adelaide Law Review*.

We introduce here a series of short tributes presenting personal reminiscences about Ivan and his contributions, from some of the many whose lives he touched. This collection does not attempt to provide a comprehensive account of Ivan’s life, intellectual contributions, academic and professional achievements (of which there are many) or service to the Royal Australian Navy. Instead, the reflections we have collated present a patchwork of Ivan as a person, from the perspectives of those who knew him. The breadth and calibre of international law scholars and practitioners represented here, however, gives a clear sense of the extraordinary impact that Ivan had.

In a sense, Ivan enjoyed three very distinguished careers — as a legal academic, a naval officer and advisor to governments, and a jurist. In the first of these, he was a consummate international law scholar, a generous mentor and teacher, and a distinguished leader. After his law studies at the University of Adelaide, Ivan completed a doctorate (SJD) at Northwestern University in the United States. Following his return to Australia, Ivan rose rapidly through the academic ranks. He served as Dean of Law at both the University of Adelaide and subsequently at the University of New South Wales, before accepting the Challis Chair of International Law at the University of Sydney. He also held the distinguished Charles H Stockton Chair of International Law at the US Naval War College. Naturally, Ivan was made a Fellow of the Australian Academy of Law.

Ivan was a proud and loyal officer of the Royal Australian Navy, rising to the rank of Captain. He had been a protégé of the renowned international lawyer Professor Daniel O’Connell (himself a Commander in the Navy and, like Ivan, a member of academic staff at Adelaide Law School). Possibly because of that close connection,
Ivan transferred from the Royal Australian Air Force (‘RAAF’) to the Navy in the
1970s. Throughout the subsequent decades, Ivan’s role in advising the Australian
Defence Force (‘ADF’) in the field of international law grew exponentially and his
own global reputation as a leading international law scholar became firmly estab-
lished. In the early 1990s, at the time of the first Gulf War, Ivan was fully engaged in
providing advice to senior Navy and ADF Commanders which decisively shaped the
legal framework under which the ADF was deployed. That set the high standard for
legal compliance that all subsequent ADF operations have followed.

Thereafter, the Navy and ADF increased their commitment to developing interna-
tional law skills for all permanent and reserve legal officers. Ivan was an active and
insightful supporter of this emerging expansion of international and operational law
expertise. Ivan was undoubtedly the leading Australian scholar on the Law of the
Sea and the Law of Naval Warfare, two critical areas of law relevant to the ADF.
He ensured that the international scholarly networks he had created in these fields
were accessible to ADF legal officers. His world-class academic reputation was well
known by all junior officers and while demands on his time were constant, he always
found opportunities to train and engage with junior ADF legal officers about the law.

Ivan was a kind and patient mentor and an ideal role model. He strongly supported
scholarship within the ADF and often found the time to compliment young legal
officers on a paper they had published or a presentation they had just delivered. It
was always a wonderful moment to receive a hand-written note from Ivan following
some personal achievement. Ivan’s legacy will live on in the work and commitment
of ADF Legal Officers for decades to come. His 40 years of service to the RAAF
and Navy was recognised with the Reserve Forces Decoration, and in 1995 Ivan was
made a Member of the Order of Australia. Marking Ivan’s passing, Rear Admiral the
Honourable Justice Michael Slattery AM RAN (Judge Advocate General, ADF) and
Commodore Peter Bowers RAN (Director-General, ADF Legal Service) observed:

> CAPT Shearer’s selfless commitment to teaching and advising in international
> law and its application inspired a generation of ADF officers to understand and
> respect the international rule of law. We salute his service to the Navy, the ADF
> and to Australia.²

Ivan’s service to Australia encompassed not only his military service, but included
extensive civilian service on foreign affairs matters, including involvement in Aus-
tralia’s defence of the proceedings brought against it in the International Court of
Justice by Portugal in respect of Timor-Leste.³ Yet Ivan was not only a trusted advisor
of his own government; he also served the Kingdom of Lesotho so well that he was
offered (but declined) the position of Attorney-General. Closer to home, he served
Nauru and Kiribati as well.

² MJ Slattery and PW Bowers, ‘Vale CAPT Ivan Shearer, AM, RFD, RAN (Rtd)’
(Minute, Department of Defence, 12 July 2019) 4 [24].
³ This dispute culminated in East Timor (Portugal v Australia) ( Judgment) [1995] ICJ
Rep 90.
Ivan’s career as a jurist commenced in parallel with his academic and naval work, but after his retirement from the latter two roles, Ivan’s service to national and international dispute resolution increased. He served as a Senior Member of the Administrative Appeals Tribunal, as a member and later Vice-President of the Human Rights Committee, twice as a judge ad hoc of the International Tribunal for the Law of the Sea, five times as an arbitrator in UNCLOS 4 Annex VII Tribunals, and was a member of the Panel of Arbitrators of the Permanent Court of Arbitration. There is no doubt that Ivan stands among the most distinguished of Australia’s international jurists.

However, in our view there is perhaps an even better measure of Ivan as a person than all of these remarkable professional achievements: his engagement with law students in his ‘retirement’. Of course, retirement from full-time university teaching was accompanied for Ivan by a marked increase in his distinguished service as an international arbitrator. Yet, notwithstanding the pressures of that important work, Ivan would always make the time to attend research proposals by our PhD students in international law, providing detailed and helpful feedback to the next generation of international law scholars.

Ivan was also a generous supporter of international law mooting. His leading role in bringing the Philip C Jessup International Law Moot to Australia, and his stalwart

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support for the competition over many years, is well known. Even in retirement, Ivan continued to coach Jessup teams from the University of South Australia. He was equally generous in his support of the Manfred Lachs International Space Law Moot when Adelaide Law School hosted it in 2017 and 2018. Ivan invested time in mastering the moot problems, and was an engaged and generous judge (as pictured above) for diverse teams of competitors from around the Asia-Pacific region. The many law students who had come from India, China, Japan and a dozen other countries had the opportunity to witness the brilliance of a scholar who was still at the top of his game. The rest of us recognised that we were in the presence of a master international lawyer whose commitment to this body of law, and to making the world a better place, was absolute.
James Crawford

A review of the career of Ivan Shearer reveals both a remarkable breadth and a fine consistency. He trained at Adelaide Law School (1955–9) in the last years of its operation as a predominantly local institution for training legal practitioners (who also undertook much of the teaching). He went through the various stages of professional qualification as barrister and solicitor, and acted as a judge’s associate in the Supreme Court of South Australia. He did not study international law as a subject — it was not yet offered, despite the presence of DP O’Connell as a member of the Faculty. But he opted for an academic career, moving to the Law School in 1961 first as a tutor, eventually rising to the level of reader, before being promoted to successive chairs at the Universities of New South Wales, Sydney and South Australia. His academic career was initially focused on public law — constitutional and administrative in particular. At Adelaide, he also taught Elements of Law, a basic introduction to legal studies with an emphasis on case reading, statutory interpretation and judicial process. The first lecture in law that I had at Adelaide was given by Ivan in Elements of Law.

Ivan became an international lawyer through a series of incidents, if not accidents. He undertook an LLM under O’Connell’s guidance on extradition, and it was also O’Connell who recruited him to do research on state succession in Heidelberg, Paris and London (his German was fluent). Later episodes included a doctorate, also on extradition, at Northwestern University, which eventually led to his first book, Extradition in International Law. Despite the many changes in the law and practice of extradition since the 1960s, the book is still remembered, and gained him a reputation in this field.

But those who thought of him as an extradition lawyer did not keep up with developments. He retained an interest in that and cognate subjects (such as refugees), but he was concurrently undertaking research on state succession. The latter was a result of O’Connell’s interest in that field and the work done for him by Shearer, especially in relation to the Commonwealth. He worked on law of the sea (including fisheries, navigation, enforcement, the new maritime zones), the relations between international law and the common law, international humanitarian law, jurisdiction, use of force, and so on. He became by degrees a general international lawyer, with few limitations of field.

He was a fine teacher, especially with students who had not necessarily done their best; he could encourage and move them beyond that, whereas the brightest could

* Judge, International Court of Justice; BA, LLB (Hons) (Adel), DPhil (Oxon).

1 Ivan Shearer, Extradition in International Law (Manchester University Press, 1971).

2 In his foreword, Professor Jescheck describes it as follows: ‘for the first time in the twentieth century a scholar of international criminal law from a common law country reappraises all the basic problems of extradition in the light of the needs and difficulties of the modern world’: ibid xi.
sometimes look after themselves. He was enthusiastic about mooting, especially
the Jessup competition, which he played an important role in introducing to
Australia in 1979. That interest was integral, I think, in establishing the Jessup
as an Australian international fixture, in which Australia’s role since has been
remarkably successful.

And his work was not limited to the library, the classroom or the study. His time
abroad in Europe, in the United States, and in Africa (notably Lesotho, where he
was legal adviser on treaties to the Government) gave him perspective and a clearer
understanding of the world and how it worked. He might have stayed in Lesotho
(where he was offered the position of Attorney-General) but he decided to return to
Australia. In 1975 he accepted a chair at the University of New South Wales, where
he subsequently served as Dean for two separate terms, with great success. He was
then elected to the Challis Chair of International Law at Sydney in 1993, from which
he retired in 2004, eventually moving home to Adelaide. Other episodes included
his long part-time service in the Royal Australian Naval Reserve; he retired in 2000
with the rank of Captain. His nomination by Australia to the United Nations Human
Rights Committee in 2001 was slightly more controversial — he was not a human
rights lawyer and was accused of furthering the Australian Government’s sceptical
position on international human rights. In fact, he served with distinction and was
re-elected in 2004. In 1991 he served as academic-in-residence at the Department
of Foreign Affairs and Trade. In 2000–01 he was Stockton Professor of International
Law at the US Naval War College.

Notable among his scholarly works was his completion of O’Connell’s The Inter-
national Law of the Sea. In his ‘Editor’s Preface’ Shearer explains that O’Connell
had written a draft of every chapter before his sudden death in 1979, but that more
remained to be done to prepare the book for publication at the time of the conclusion
may have been so, but Shearer’s contribution in updating and referencing was very
substantial, and the book is still in use today.

In addition to his teaching and research and his involvement in university and pro-
fessional administration, Ivan contributed to the subject in other ways. In particular,
he had an active role as ad hoc judge or arbitrator. He was ad hoc judge nominated

3 He was elected on 14 September 2000 and re-elected on 9 September 2004. He served
on the Committee from 1 January 2001 to 31 December 2008: see Office of the United
Nations High Commissioner for Human Rights, ‘Membership of the Human Rights
Committee 1977 to 2014’ (PDF File) <https://www.ohchr.org/Documents/HRBodies/

4 DP O’Connell, The International Law of the Sea, ed Ivan Shearer (Clarendon Press,
1982–84) vol 1; DP O’Connell, The International Law of the Sea, ed Ivan Shearer
(Clarendon Press, 1982–84) vol 2.

5 DP O’Connell, The International Law of the Sea, ed Ivan Shearer (Clarendon Press,
1982–84) vol 1, vii.
by Australia in several cases under UNCLOS, served as a member of an Annex VII arbitration panel in one case, and chaired another.

This is not the occasion for a fuller analysis of Shearer’s work. Instead, I should like to focus, as many of the other contributors to this section, on Ivan himself. He was, of course, highly educated and had strong likes and dislikes — many more of the former. He loved music (classical, especially Wagner), good cars, wine (not at all confined to Australian wines, though definitely including them), friendships (the longer the better and irrespective of the location of the friends), good food preferably in good places, and books of all kinds. But he was also open, helpful, available to students and (subject to his workload) generally relaxed. If he could help anyone, especially students, he would go to great lengths to do so. With a rural Australian background, and an Adelaide private school education, he was not easy to place socially, but he did not care one way or the other about that. Having adopted Catholicism at university, he was intensely but unobtrusively religious. He had a wicked sense of humour. He loved cats and dogs, and kept both kinds until their extreme old age.

He was also deceptively hard-working, meticulous in preparing for and chairing meetings or hearings, but capable of a light touch and tolerance when called for. He cared about process, but was capable of adapting the agenda to meet sudden needs, if reasons could be given. He was gentle and generous, but nonetheless with a clear sense of regular process and procedure. He was naturally good natured and equable with young and old — though about the very youngest he had some reservations: his good nature competed slightly with his apprehension as to controlling the intruder.

He also cared greatly about international law, but was concerned at the unreasonable demands sometimes made in its name. Some things could be thought but not codified, he would suggest.

The fact that he was in the world, though distant, I think made the world a better, certainly a happier, place.

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6 See Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures) (UNCLOS Arbitral Tribunal, 27 August 1999) 320–9 (Judge ad hoc Shearer), in which he wrote a separate opinion; The ‘Volga’ Case (Russia v Australia) (Judgment) (UNCLOS Arbitral Tribunal, 23 December 2002) 66–72 (Judge ad hoc Shearer), in which he wrote a dissenting opinion.

7 Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v Singapore) (Award on Agreed Terms) (Permanent Court of Arbitration, 1 September 2005); see also Arbitration Under the Timor Sea Treaty (Timor-Leste v Australia) (Permanent Court of Arbitration, Case No 2015-42, 15 September 2015).

8 Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award) (Permanent Court of Arbitration, 18 March 2015).

9 See, for a brief account, James Crawford, ‘Ivan Shearer: International Lawyer and Teacher’ (2005) 24 Australian Year Book of International Law I. The volume includes 13 essays on different aspects of Ivan’s work. A select list of his publications is at: 10–12.

10 Ivan’s family has been engaged in the design and manufacture of agricultural machinery since 1877. The Shearer company has its headquarters in Adelaide but has many affiliates in rural areas. Its vehicles bear the name ‘Shearer’.
The last time that I was with Ivan was when he delivered a lecture for the South Australian chapter of the International Law Association about his life in international law. The talk was held in April 2019 and was entitled ‘International Law Now and Then’. It was a wonderful talk filled with reflections, humour and insights drawn from a lifetime of experience and dedication to international law. In attendance were, among others, international law teachers, Ivan’s past students, and law students (so very keen to hear from Ivan). That was a characteristic I observed over the years — how law students gravitated to Ivan, finding a natural wisdom in his words but also it seemed to me they were inspired by his wisdom, civility and dignity, seeing something they might aspire to.

I first met Ivan at the University of South Australia on his return to Adelaide. Ivan would freely give of his time and deliver guest lectures on international law. He would offer mentoring at staff presentations and was a true pleasure to work with, always generous, encouraging and supportive.

When I moved to the Adelaide Law School, where Ivan was Adjunct Professor from 2013–19, we would meet for lunch and share dinner from time to time. In our conversations international law merged with life generally. I can recall vividly a lunch at which we discussed many interesting matters of international law and then visited the Art Gallery of South Australia to stand together in front of a painting by South Australian artist Robert Hannaford of his neighbour, entitled ‘Portrait of Miss Bachelor’. Ivan and I discussed the artwork — it had always struck me as a magnificent painting because Miss Bachelor, as she sits there, seems to be hesitating or permitting the portrait to be painted by her neighbour, rather than seeking out the image of herself. The effect of this hesitation is to create an expression of Ms Bachelor’s real individuality. The discussion between Ivan and me was around international law and how we could ever account for such profound individuality in each other within the discipline. We spoke about Ivan’s views on this and then we stood together in silence for quite a while. Ivan said at the time that Miss Bachelor seemed regal like the Queen. It was a comment that stayed with me because it was both accurate and yet not immediately obvious, as Miss Bachelor was definitely an older Australian woman and in modest attire. Ivan was speaking about her dignity, her sense of self, and her sovereignty. At Ivan’s funeral, he had prepared the prayers of the faithful and one of them began ‘[f]or Queen Elizabeth II, Sovereign of Australia …’ I thought of Ivan’s comments before Miss Bachelor and about seeing dignity.

Ivan and I were both on the committee for the South Australian chapter of the International Law Association. It was in our last meeting that Ivan generously
agreed to give his lecture on ‘International Law Now and Then’. I am so grateful he did, as all those in the room have a memory of Ivan’s overview of his life and his truly exemplary work in international law. But also at this presentation, through the gentle tone, humour and reflective anecdotes, there was a picture of Ivan himself, in dignity and completeness. I will miss Ivan’s conversations, company, wisdom and knowledge.
It is a tremendous honour to share a few words of tribute to Ivan Shearer, my mentor and friend of 19 years. Unsurprisingly for anyone who knew Ivan, he inspired my loves for international law and cooking, and my most cherished remembrances of Ivan involve both.

Ivan and I both arrived in Newport, Rhode Island in the summer of 2000. He was reporting for a one-year appointment as the prestigious Charles H Stockton Professor of International Law at the US Naval War College, while I was reporting as a quite junior military professor of international law. Ivan was a retired naval officer, a former Captain in the Royal Australian Navy, and renowned international law expert; and I a young naval officer whose assignment was more serendipitous than earned. The Naval War College had attempted to lure Ivan for years and the timing finally worked out. The conversations we shared over the ensuing year proved formative for me and inspire my views on international law to this day.

Ivan’s foundational beliefs in natural law and the innate decency of humankind inspired his enlightened conviction that international law can and should be a force for good in the world. In the introduction to a paper he wrote during his year in Newport, addressing ‘Rules of Conduct During Humanitarian Intervention’, Ivan alluded to his belief that international law is derived from more than the treaties and actions of states. After noting his ‘fantasy’ that the author of what we know as the ‘Martens Clause’, Baron Feodor de Martens, should be considered for sainthood, Ivan quoted the Martens Clause verbatim, as found in the Preamble to the Second Hague Convention of 1899:

> Until a more complete code of the laws of war is issued, the high contracting parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.\(^1\)

The Martens Clause, Ivan declared, ‘is a powerful reminder that in situations of armed conflict, of whatever kind, there is never a total gap in the law, never a situation in which there cannot be an appeal to law in order to mitigate the horror

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* Commander, United States Navy; Deputy Legal Advisor, Resolute Support Mission/Deputy Staff Judge Advocate, US Forces Afghanistan.
and the suffering’.\(^2\) Ivan wrote these words while introducing his analysis of the laws applicable to humanitarian intervention, which was then an emerging concept under international law, and his words proved prescient to the conflict that emerged in 2001. Notwithstanding the efforts of ‘unscrupulous commanders and their cunning legal advisors’ who ‘might seek to exploit loopholes or ambiguities in the written law’, any perceived lacuna in the international laws related to warfare is always filled by the Martens Clause.\(^3\)

Ivan wrote this paper and delivered versions of it in talks at Duke University in April of 2001, and again during a conference on the Kosovo conflict at the US Naval War College in August of 2001, just a month before the horrific attacks of 9/11. The ensuing conflict, even more than the Kosovo conflict, proved once again the importance of Ivan’s reminder that our interpretations of the laws of war must always be guided by ‘standards of civilized behavior deriving from custom, humanity and the public conscience’.\(^4\)

Over the intervening years, it has been my honour to advise many warfighters in multiple conflicts, and each time we were faced with a situation seemingly without applicable law, I reflected back on my conversations with Ivan, and conceptions of ‘humanity and the public conscience’ provided the answers we needed. Ivan is sorely missed, yet his spirit lives on in the lives and legal philosophy of those of us he touched with his brilliant mind, giving spirit, and beautiful humanity.

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\(^2\) Shearer (n 1) 72.
\(^3\) Ibid.
\(^4\) Ibid.
I first came across Ivan through his work on the law of the sea, and in particular his edition of DP O’Connell’s *The International Law of the Sea*,¹ which I appreciated for the clarity of structure and lightness of touch, in not imposing upon the reader an inflexible interpretation of legal text. From this work I sensed an openness of spirit, a view confirmed by James Crawford, his pupil and friend.

We got to know each other better in October 2013, travelling around the Bay of Bengal. Ivan had been appointed a member of the *United Nations Convention on the Law of the Sea* (‘UNCLOS’) Arbitral Tribunal in the maritime boundary dispute between Bangladesh and India,² and enthusiastically supported the idea of a site visit, which involved travelling by car, coach, helicopter, plane, boat and hovercraft. His enthusiasm was infectious, not least when we stopped off at the military airport at Jessore, prompting recollections of his time with the Royal Australian Air Force, and the delights of a military lodging. His attention to detail — both legal and factual — was pronounced, as was his commitment to collegiality amongst his colleagues and two opposing sets of counsel. The trip would have been memorable under any conditions, but Ivan’s presence added a particular sense of warmth and occasional irreverence.

*Professor of Law and Director of the Centre on International Courts and Tribunals, University College London; Member (QC) of Matrix Chambers.*


² *Bay of Bengal Maritime Boundary (Bangladesh v India) (Award)* (UNCLOS Arbitral Tribunal, 7 July 2014).
He was an attentive and punctilious arbitrator. You always had the sense of openness and absolute independence and integrity, with no prejudgment of any issue. His ability to inspire a general sense of satisfaction amongst counsel meant that he was a logical choice to preside at another UNCLOS Arbitral Tribunal, established to resolve a dispute between Mauritius and the United Kingdom over the latter’s purported creation of a marine protected area.3

Once again, Ivan’s diligence and collegiality went a long way in contributing to a memorable case, not least the two-week hearing held in the basement of the legendary Pera Palas Hotel in Istanbul (a location settled on by the parties, with the eager support of the Tribunal, for being neither in Africa nor Europe), in May 2014. The residence in the hotel of both parties and their counsel, as well as the members of the Tribunal and secretariat, made breakfast and early morning visits to the gym (for some, although I never saw Ivan in that particular room) especially delicate, in the best of ways.

Ivan was a wonderful presiding arbitrator. Fair and balanced, open-minded and acute, firm yet with humour, he was actively engaged in bringing the best out of both parties. Indeed, he presided over one of the finest long moments I have ever had the privilege to witness in an international courtroom: a three-way exchange between counsel James Crawford SC and arbitrators Christopher Greenwood and Rüdiger Wolfrum centred on the precise moment — if any — at which the right to self-determination crystallised into a rule of international law.4 It was one of those times when everyone present understood the joy and privilege of being an international lawyer. Somehow, I have the feeling that Ivan played a crucial role in allowing that to happen, the lightness of his presiding touch coupled with a recognition of the vitality and significance of the point being debated.

We last saw each other last year, when I visited Adelaide for the first time. Ivan was keen for me to see the sights, an area he truly loved, and offered to take me on what he described as a ‘short driving tour’. Six and a half hours of road and food later — starting at the Law School, followed by strudel in Hahndorf, coffee on the ocean, dinner at a vineyard restaurant — he was as full of energy and talk as when we started out.

It was a joy to know Ivan. From him I learned much about international law, the joys of life and the meaning of collegiality.

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3 Chagos Marine Protected Area (Mauritius v United Kingdom) (Award) (UNCLOS Arbitral Tribunal, 18 March 2015).

4 Transcript of Proceedings, Chagos Marine Protected Area (Mauritius v United Kingdom) (UNCLOS Arbitral Tribunal, PCA Reference MU-UK, Professor Shearer, Sir Greenwood QC, Judge Hoffmann, Judge Kateka and Judge Wolfrum, 5 May 2014) 980–5 <https://pcacases.com/web/send/Attach/1578>. The International Court of Justice recently endorsed the submissions of James Crawford, to the effect that the right to self-determination had crystallised as a rule of customary international law by 1965: Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) (International Court of Justice, General List No 169, 25 February 2019) [161].
Rüdiger Wolfrum*

Ivan Shearer stands like a lighthouse at the beginning of my interest in the law of the sea. For my first articles on the subject, I intensively consulted the two volumes of DP O’Connell on *The International Law of the Sea* edited by Ivan.1 The outstanding feature of these two books is that they deeply delve into the history of the international law of the sea. This keen interest in the historical basis of law was typical for Ivan.

We met frequently at the Max Planck Institute for National Public and International Law in Heidelberg, which Ivan visited frequently, but more intensively at the International Tribunal for the Law of the Sea where he served as judge three times. We were also together in the delimitation dispute between *Bangladesh v India*2 and in the Chagos Archipelago case, *Mauritius v United Kingdom*, where Ivan acted as presiding arbitrator.3 Though in that case we were not on the same side, this did not spoil our relationship at all. Ivan was tolerant, eager to find compromises and to ensure collegiality amongst the arbitrators.

Having spoken about Ivan as a law of the sea expert does not do him justice. He had highly diverse interests, such as human rights, humanitarian law and refugee law. However, he always emphasised that in spite of any specialisation one should remain an international lawyer.

My last contact with him, only some months ago, was in relation to his research on where the principle *opinio juris sive necessitatis* had originated from. Unfortunately, we could not finish this research.

Finally, I should mention that Ivan was fond of music (he was particularly interested in Wagner), spoke excellent German and was even able to read the gothic script. Hardly any Germans of the younger generation can do this.

I shall remember Ivan as a leading scholar of international law, an experienced arbitrator and judge, a colleague you could fully rely on, and, a very good friend.

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2 *Bay of Bengal Maritime Boundary (Bangladesh v India) (Award)* (UNCLOS Arbitral Tribunal, 7 July 2014).

3 *Chagos Marine Protected Area (Mauritius v United Kingdom) (Award)* (UNCLOS Arbitral Tribunal, 18 March 2015).
Ivan Shearer was a colleague and a friend; I mourn his passing. When I arrived in Adelaide in July 1959, Ivan was in his last undergraduate year and served in articles of clerkship with Genders Wilson Bray. He visited the University only to attend lectures, so I did not get to know him until 1963 when he joined the Law School staff as a lecturer. In 1964 he completed his LLM with a thesis on extradition in the British Commonwealth. I recall his excellent presentation of this research at a staff seminar in 1964. Two further papers soon followed; in 1971 his book on the subject was published. Much more on extradition was to come. Once a subject had his attention, it remained on his radar. This kind of follow-up is, in itself, an indication of the quality of his academic work. In 2005, the *Australian Year Book of International Law* published the whole of volume 24 as ‘a collection of essays to honour Professor IA Shearer’. James Crawford contributed an assessment of Ivan’s achievements as a scholar, teacher and practitioner which includes a bibliography. Donald Rothwell’s introduction to the volume is a detailed account of Ivan’s career.

Our academic interests did not intersect by much. He was essentially an international lawyer and I was chiefly interested in private law, legal history and comparative law. While he developed a fruitful relationship with the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, I developed a connection with its counterpart (Comparative and International Private Law) in Hamburg. However, we were Law School colleagues for many years. He was one of the most solid and effective teachers on our staff. In 1970, when the students became restive about the quality of the teaching of the introductory course (Elements of Law), Ivan took it

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4 (2005) 24 *Australian Year Book of International Law* [i].


over and there were no more complaints. I was very sorry when we lost him to a chair at the University of New South Wales in 1975. He often returned to Adelaide to visit his mother and his sisters, Jan and Sara. On such occasions, he would sometimes pay us a visit, first in Medindie and then in Semaphore where we had moved in 1985. It was always a great pleasure for Ruth and me to see him again; he seems to have felt the same way.7

We were both close to Professor Daniel Patrick O’Connell who was Ivan’s mentor and guided his way into an academic career once he chose teaching and scholarship rather than practice. O’Connell made all the arrangements to bring me and my family to Australia and gave me generous and friendly guidance when I took my first steps in this country. Ivan and I both had visiting fellowships at All Souls College in Oxford, he in 1978, I in 1968. We shared a knowledge of German, my native tongue and his second language of which he had an excellent command. For confidential communications, he occasionally switched to German.8 We were temperamentally compatible and became friends — good friends, if not close ones.

Ivan possessed many admirable qualities. As his stature grew with his successes in Australia and internationally,9 he retained his inborn modesty. There never was even a touch of haughtiness. Conceit and self-aggrandisement were foreign to his nature. One of Dan O’Connell’s sons, Sean O’Connell, knew Ivan well; he told me: ‘His personable character was self-evident and he was marvellously “grounded” with no hint of the over-confidence of the great achiever.’10

The Hon Margaret White had this to say about Ivan’s companionability:

He had a huge circle of friends both at home and abroad. He was wonderful company and could engage on many different topics with interest and a great sense of fun. He was an enthusiastic diner — perhaps too enthusiastic, he admitted to me, when we lunched together in Adelaide once more recently! He had been a long-time member of ‘The Modern Pickwick Club’ in Adelaide counting among its members many prominent South Australians who enjoyed red wine, rich food and the escapades of Mr Pickwick and his friends. His crack of laughter was a wonderful sign that one had touched his keen sense of humour. He was an ardent fan of PG Wodehouse.11

Courtesy and good manners were part of his nature. On 22 July 2019, in his homily for Ivan at the funeral Mass, Father Shinnick mentioned that civility in public life

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7 ‘Wonderful to see you again’ — his last entry in our guestbook.
8 It reminded me of the telephone conversations of German Catholic bishops during the Nazi regime which were sometimes held in Latin.
9 He held visiting positions at Heidelberg (1962), Oxford (1978), Thessaloniki (1985, 1992) and the Stockton Chair at Newport in 2000–01. He served in the Royal Australian Naval Reserve, reaching the rank of Captain.
10 Letter from Sean O’Connell to Horst Lücke, 28 July 2019.
11 Email from Margaret White to Horst Lücke, 6 August 2019.
was one of Ivan’s deep concerns. A good example is an issue Ivan raised in 1973 with the Common Law Committee of the Law Society of South Australia of which, as Dean of the Faculty of Law, he was an ex officio member. It concerned ‘the publication of names by newspapers without the ordinary courtesy title Mr, Mrs or Miss (or … we should nowadays add Ms)’. He protested that the Premier’s wife had been referred to simply as ‘Dunstan’ by a newspaper in a report of a minor traffic offence. Courtesy in personal relations remained just as important to him to the very end. His invitation to my 90th birthday celebration reached him when, as he told me, the side-effects of his cancer treatments caused him extreme lethargy. I could hardly have complained if he had left me without a response. Only a day later, on 15 May 2019, his answer arrived: ‘First, let me thank you for the invitation to your 90th. What a fantastic milestone. Unfortunately, I shall not be able to come because of my medical condition. But I wish you many further good years.’

Another of Ivan’s virtues was his unswerving loyalty to his friends. Before his untimely death at age 54, O’Connell had asked Ivan to finish his two-volume treatise on the law of the sea. As Ivan explained:

I remember visiting Dan in Calvary Hospital in Adelaide when he was laid low by this infection. He did not think he would survive and he gave me instructions as to how to finish the two volume treatise on law of the sea which he had written.

Ivan would not have hesitated or considered whether this was compatible with his own plans; he accepted without question and completed the work.

In 1972, Dan O’Connell had been elected to the Chichele Professorship in Public International Law at the University of Oxford. After his death in 1979 the Warden of All Souls College, Francis Patrick Neill, suggested to Ivan that an anthology of reminiscences and sketches might be compiled. Ivan gladly undertook this task. His own contribution to the anthology was more personal in tone and content than

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13 Letter from Ivan Shearer to JW Perry, Chairman of the Common Law Committee, 27 June 1973.
14 Email from Ivan Shearer to Horst Lücke, 15 May 2019.
15 Ibid.
18 I was pleased when he invited me to contribute. The final product was not published but made available to friends, contributors and university libraries.
his account of O’Connell’s life in the *Australian Dictionary of Biography*. There are comments on the hospitality which O’Connell and his family extended to friends and colleagues in their 18th century house on Boar’s Hill near Oxford and on his plan eventually to return to Adelaide.

Dan O’Connell and later also his wife Renate and their family were greatly enriched by Ivan’s devotion. He remained close to the family after O’Connell’s death. As Sean O’Connell explained: ‘Ivan was much loved by his students and younger friends who would quite comfortably call him “Uncle Ivan”.’ Sean remembers many of Ivan’s loves and likes: his love of his nieces, nephews and godchildren, his attachment to his sister’s property in Naracoorte, his love of the Australian bush, his interest in blind wine tasting, his love of opera and of Wagner in particular which took him all the way to Bayreuth.

Our religious orientation was not the same. Ivan was religiously committed. My agnosticism is best summed up in the words of John McKellar Stewart, Professor of Philosophy in Adelaide from 1922–53: ‘We are not provided with thought instruments sufficiently penetrating to bring the universe into anything like a complete subjection to our thinking.’ Beginning in 2013, the intense interest of the students of the 1950s and ’60s in the Christian faith were at the centre of my academic attention. There had been, at that time, a surprisingly large number of students in Adelaide who had converted to the Roman Catholic faith. Though raised as an Anglican, Ivan became one of these converts. He generously gave me a thoughtful explanation of this and allowed me to publish it in full. Emotion was an important factor:

At the emotional level I was greatly moved by universality of the Church, that it existed in virtually every country, and was not a branch or national church like that of Canterbury. That it should have survived at all the excesses, abuses and scandals of the past seemed to demonstrate its inherent validity and divine guidance.

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20 In a letter from Dan O’Connell to Horst Lücke, 18 February 1975, O’Connell, situated in Oxford, stated: ‘The winter is very mild, the daffodils are out, but this last week has been rather damp and foggy. Which makes me homesick for Adelaide.’

21 Email from Sean O’Connell, 28 July 2019.


24 Ibid 236.
His fellow students, David St Leger Kelly, Helen Bardolph (who became Kelly’s wife), Gervase and Hilary Coles were Catholics and became Ivan’s friends. An even more important emotional trigger for his conversion was his admiration for Dan O’Connell:

We were … taught by Professor Daniel O’Connell, who in his jurisprudence lectures introduced us to natural law theory. O’Connell also represented a figure whose evident commitment to his faith commanded a certain degree of wonder and respect.

However, once at the ‘frontier of faith’, the essential step was what he called a ‘leap of faith’: ‘Of course, reason and emotion can take one just so far: to the edge of faith. The final step was a leap of faith, one I have never regretted.’ Some see such a commitment as a vice. As Richard Dawkins has said:

Religion is an insult to human dignity. With or without it, you’d have good people doing good things and evil people doing evil things. But for good people to do evil things, it takes religion.

This may be true for some or even for many, but I must insist that Ivan’s Christian faith was one of his great virtues; it was a true expression of his nature.

I had agreed with Professor Paul Babie, the Director of the Research Unit for the Study of Society, Law and Religion at the University of Adelaide, that I would present my thoughts on these student conversions in Adelaide on 28 April 2014. The lecture was well attended by former colleagues, friends and people with a special interest in the topic. Ivan was unable to be there because he was in Istanbul, engaged in a law of the sea arbitration. I sent him a transcript; my conclusion was a personal confession:

I have been a religious sceptic ever since my revered religion teacher, the Lutheran Pastor Hanusch, announced at our matriculation party in Wuppertal in 1949: ‘Do I know that my redeemer liveth? The honest answer is that I don’t.’ That caused a great éclat in the Lutheran Church and it caused me to give up my plan to study theology. It seemed too risky an enterprise. Am I the wrong person to conduct this enquiry? The honest answer is: I don’t know.

25 These friendships were quite close. Ivan and Gervase Coles toured France together (information provided by Ben, Gervase’s son). Ivan and David Kelly joined and wrote to On Dit, the student Newspaper, in defence of the Catholic Church — see Ivan Shearer and David Kelly, ‘Pride and Prejudice’ (1958) 26(12) On Dit 5.

26 See ‘Appendix Shearer’ in Lücke (n 23) 235.

27 ‘Frontier of faith’ is an expression coined by Ivan.

28 See ‘Appendix Shearer’ in Lücke (n 23) 236.

Ivan was concerned when he read this. He told me that I had taken a wrong turn:

Your conclusion was very moving. I think your pastor in 1949 was saying that ‘knowing’ and ‘believing’ are two different things. This demonstrates the leap of faith of which I spoke. We are impelled by our natures to go on questioning the very reason for our existence, on either side of that divide, throughout our lives.30

I had nearly asked Paul Babie for a postponement of the lecture because my wife had died after a long illness, on 1 April. We were then living in Brisbane, having moved there from Adelaide in 2007. I sent Ivan the sad news and his faith inspired him to find words of true comfort: ‘It was with great sadness that I received your news. Ruth was a gracious and wonderful person. Please accept my condolences and deepest sympathy to your family. I pray for you all. May her good soul rest in peace.’31 After much hesitation I decided not to seek a postponement and was relieved when Ivan approved:

I am sure that you are right to go ahead with your lecture in Adelaide later this month, and, indeed, with other work as well. It is a blessing that those of us who have professional and other obligations, taking us outside of ourselves, can find a quiet place of separation from our grieving, without in any way diminishing the reality of our loss.32

His Christian faith sustained him to the very end as he was battling his deadly disease. Father Ben Hensley OP has told me that Ivan participated in the planning of his funeral Mass, choosing the Beatitudes (St Matthew chapter 5, verses 1–12) for the service.33 There might even have been a touch of humour in Ivan’s choice of ‘When The Saints Go Marching In’ as the recessional.

In his homily to Ivan at the funeral service, Father Maurice Shinnick mentioned Ivan’s deepest concerns: ‘peace and international humanitarian law, civility in public life, healing for victims of abuse, service of the poor and sick through the Sovereign Order of St John of Malta’. The first of these concerns is reflected in a number of his publications.34 I am not familiar with the role he played in the Order of St John of Malta.

30 Email from Ivan Shearer to Horst Lücke, 3 June 2014.
31 Email from Ivan Shearer to Horst Lücke, 4 April 2014.
32 Ibid.
33 I am grateful to Father Hensley for information about the preparations for the funeral Mass.
34 See, eg, Ivan Shearer’s publications provided in the bibliography of Crawford (n 5) 10–12. In particular, see, Ivan Shearer, ‘The Legal Position on Aliens in National and International Law in Australia’ in J Abr Frowein and T Stein (eds), The Legal Position of Aliens in National and International Law (Springer Verlag, 1978) 43–90; Ivan Anthony Shearer, ‘International Humanitarian Law and Naval Operations’ in Quatre Études du Droit International Humanitaire (Institut Henry-Dunant, 1985) 17–34; Ivan Shearer, ‘Rules of Conduct During Humanitarian Intervention’ in A E Wall (ed),
In my tenth decade the religiously formative period of my life has become a distant memory, yet I still feel deeply moved by Ivan’s religious faith. It prompts me to conclude by quoting the words of Father Shinnick who said, referring to Ivan’s assistance with the preparation of his own funeral Mass, that it shows ‘his deep faith in Jesus Christ, his devotion to the Church, … his love of family — living and departed’. This passage concludes:

As Ivan lived and worked for others in Church, professional and personal life, so he desires that all of us might be ever open to the channels of God’s grace.

HKL
2 August 2019

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Fr Roderick O’Brien*

The funeral for Emeritus Professor Ivan Anthony Shearer was held at Saint Lawrence’s Church, North Adelaide. Anticipating his death, Professor Shearer planned the liturgy for the funeral Mass, and incorporated two eulogies: the first, to focus on his family life, by his nieces Annabel Mugford and Rebecca Tilly, and the second, to focus on his legal career, by his former student Fr Roderick O’Brien. It is the second eulogy that we reproduce here.

A few years ago, the Permanent Court of Arbitration at the Hague delivered its decision in the case Bangladesh v India.1 Ivan was one of the arbitrators. At an age when many people are thinking only of their next cruise, Ivan brought his formidable intellect to maritime boundaries.

It is a lawyer’s case, of course. The award fills 181 pages, and doubtless a small forest has suffered from the printing. But, especially when compared to India’s ongoing conflict with its other neighbour, Pakistan, no blood has been shed, no ships sunk, no civilians fleeing bombed villages, no window for foreign intervention.

This reflects many of Ivan’s admirable traits as a lawyer. At the top of my list, Ivan was a man of peace, and he ably contributed to institutions that might serve peace. Ivan worked in an imperfect international world order, but this rule-based order is better than the roar of guns and the shattering of human hopes. He never forgot the ordinary victims of armed conflict, both combatants and civilians. I am sure that you recognise that Ivan wrote his own prayers of intercession which we prayed earlier — he included a prayer for the promotion of international humanitarian law, the legal system which protects the victims.

Ivan valued tradition. He could not wear ‘the black armband’ of history, because he looked for the good in the past. Of course, he was never a Pollyanna — he was rigorously realist about the woes we have accumulated.

As his grateful student, I know that Ivan flourished as a teacher as he was thorough, methodical, and caring. I won’t list his professorships, his civil and military decorations, his fellowships. But I will quote his colleague Horst Lücke, who wanted to be with you but at 90 cannot travel. Horst recalls Ivan’s brilliant scholarship, and writes that Ivan was the kindliest man he had ever met.

Ivan was a consummate scholar: first assisting DP O’Connell, and then later in his own writings including his doctoral work on extradition. He published widely on the

* Former Student of Ivan Shearer, LLB (Adel), Parish Priest Lefevre Catholic Community.
1 Bay of Bengal Maritime Boundary (Bangladesh v India) (Award) (UNCLOS Arbitral Tribunal, 7 July 2014).
law of the sea. Among his peers, he was trusted, collegial, and supportive. For about forty years, Ivan served Queen and country first in the Royal Australian Air Force, and then in the Royal Australian Navy. His rules of engagement for the Gulf War are still valued today.

Locally and internationally, Ivan served as an advocate, as adviser to governments, and as a judge on a variety of tribunals. His membership of the arbitral tribunal with which I began this account was just one of a long list of quiet service. He also served two terms on the United Nations Commission on Human Rights. As my classmate James Crawford described the effect of Ivan’s work:

> [O]ne is left with the impression of thorough good sense, of an often intuitive understanding of legal structure associated with a robust realism, but at the same time an unobtrusive sense of law as the pursuit of an ideal of order.²

Of course it is good to have an international lawyer at the highest echelons. But it can be useful for family and friends too. Ben Coles recalls that, when he was about 10 or 11 years old, his family was with Ivan on a trip which included the French Riviera. With authority and aplomb, Ivan assured Ben that it was perfectly legal to walk along the private beachfronts provided they did not stray above the high tide mark. This taught an impressionable youth the importance of the international law of the sea.

If you look at the portrait of Ivan in the University of South Australia, you will see a serious face — perhaps appropriate for a man who had a serious sense of duty to serve others. But we will remember Ivan as someone with a smile, with a deep sense of humour, with a gentle chuckle at the richness of law and life.

Ivan had a favourite prayer, the peace prayer. He asked you to pray it with him today. It is printed in your booklet, and I invite you to join with me, and with Ivan, now.

> Lord, Make me an instrument of your peace
> Where there is hatred, let me sow love,
> Where there is injury, pardon,
> Where there is doubt, faith,
> Where there is despair, hope,
> Where there is darkness, light,
> Where there is sadness, joy.
> O Divine Master grant that I may not so much seek to be consoled as to console,
> To be understood as to understand,
> To be loved as to love.
> For it is in giving that we receive,
> It is in pardoning that we are pardoned,
> And it is in dying that we are born to eternal life.

Tim Stephens*

I first met Professor Ivan Shearer in 1998, the final year of my LLB degree at the University of Sydney Law School, when I was a student in Ivan’s classes in Advanced Public International Law. In that year, Ivan also assisted the Philip C Jessup International Law Moot team of which I was a member. Ivan had a long association with the Jessup Moot, having introduced the competition to Australia from the United States in 1977. In the decades to follow he coached teams from several law schools and travelled with them to Canberra for the national rounds. Ivan was a thorough and caring teacher, and an exceptionally patient coach and judge in the Jessup competition. Ivan was never directly critical; instead he offered warm and encouraging advice, such as the value of ‘conversational’ rather than ‘confrontational’ advocacy.

Several years later, I had the great fortune to have Ivan appointed as one of my PhD supervisors. Ivan was always meticulous in his review and commentary on draft work. Ivan’s guidance as a supervisor was as forgiving as his teaching and his judging; he was charitable and constructive in his commentary, gently correcting misunderstandings of principle, and rectifying any faulty use of French, German and Latin terms (the latter which I had included on Ivan’s sound advice that if an international legal proposition is expressed in Latin it is generally true). Ivan kindly continued to have a hand in supervising my thesis after his retirement as Challis Professor of International Law.

As teacher, supervisor, and colleague I particularly enjoyed Ivan’s fondness for digression. He was always keen to explain tangential, incidental and coincidental points of history or law, not only out of pure interest and curiosity, but also because they often cast light on issues of major importance. Ivan had a masterful ability to teach international law through personal anecdote, and he was able to captivate a room in recounting these with characteristic good humour, and with his smile and infectious chortle. Ivan was a truly captivating raconteur and many of his tales remain etched in the minds of his students and they continue to be told and retold.

Ivan had a great love of music, none more so than for Richard Wagner’s Ring Cycle. However, I often thought of Ivan as having some similarity to the protagonist in another great Germanic musical cycle — Gustav Mahler’s Songs of a Wayfarer — in that Ivan was a journeyman, happy to serve dutifully and humbly, wherever his scholastic or professional calling took him (whether it be the mountain Kingdom of Lesotho, the Pacific microstate Kiribati, the Hanseatic City of Hamburg, or the United Nations’ headquarters in New York).

Ivan’s contributions were legion, but he was unfailingly humble. It was this contrast — between Ivan’s stellar career and his modesty — that earned him the description

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‘International Man of Mystery’ in a profile in the 1998 volume of Blackacre, the yearbook for University of Sydney law students.¹ In that profile, Ivan offered sage advice to students entering the legal profession: make sure that the urgent never triumphs over the important, he said; achieve self-discipline but never lose humanity; and above all make sure that practice does not wear away one’s vibrancy, attractiveness and intellectual curiosity.

Ivan certainly kept true to his own counsel. Ivan declined to follow his mother’s suggestion that he take up tax law on graduation from the University of Adelaide in 1960. He was interested in broader topics. But he was nonetheless a very fine ‘lawyer’s lawyer’ in every respect, bringing to extradition, the law of the sea, human rights, and myriad other topics of international law his formidable and persuasive analytic and forensic skills, and his commitment to values of humanity and dignity.

Ivan was a most warm, generous and supportive teacher, colleague and friend, and one of the great characters of Australia’s international law community. He was held in tremendous affection by all of those he taught, and he will be very dearly missed.

I am sitting in a lecture theatre at one of the east coast Universities attending my first Australian conference on international law. A melodious male voice hushes the crowd and proceeds to query some of the ideas put forward by the panel. The voice is entrancing, but the ideas are not in accord with my understanding of the development of international law — particularly international human rights law. During a break I seek to engage with this man whose voice I admire but whose ideas I want to contest. Ever calm but resolute Ivan Shearer continues to set out his views. He listens intently to my arguments, displaying that consummate respect for the exchange of ideas that would mark our discussions years later in Adelaide after an evening movie.

Although our paths crossed at other conferences and seminars, it was his return to Adelaide that led to opportunities to spend greater amounts of time together — both professionally and socially. Others have detailed his significant achievements in the law. They are to be admired. But so too was his commitment to working on projects in a collegial manner. He never assumed that his time was more valuable than that of others, or that his ideas had to be given precedence. Those seeking his assistance, particularly students and younger academics, were given meaningful feedback. Having been copied on a series of emails to students and early career researchers, I can attest to his willingness to give his time and energy to others, and his desire to approach all queries with the precision that marked the work he undertook as a member of international committees and panels.

Sitting at dinner with Ivan after a movie could, at times, be a bit like participating in a university seminar. The plot was to be analysed, the quality of the acting to be dissected and the effect of filming scenes in a particular manner to be considered. Although not all the films we saw matched our expectations (both of us preferring somewhat serious films with moral dilemmas, whilst our companions were pleased by those that had light-hearted scenes and were not intended to offer any insight into the human condition), Ivan always expressed his pleasure at having a night out. Unfortunately for the remainder of our group, each movie somehow provoked a discussion about an aspect of international law. I have never asked the others but I suspect that they were bemused by the idea that every movie we saw somehow connected to recent developments in international humanitarian or international criminal law. Segues can be an art form and I will give Ivan the credit for creating the stage on which valued and, at times, challenging discussions occurred.

I will miss that melodious voice that could as easily deliver a warm-hearted joke as a significant insight into international law. *Ave atque vale* Ivan Shearer.

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*Associate Professor, College of Business, Government and Law, Flinders University.*
LAW, WAR, ETHICS AND CONSCIENCE: AN ENDURING CONUNDRUM

I Introduction

We are delighted to introduce this forum on law, war, ethics and conscience. It is fitting that this forum appears in the issue of the *Adelaide Law Review* dedicated to our friend and colleague Ivan Shearer, who contributed so much to the humanitarian calling, and who is so deeply missed. War represents perhaps the most demanding moment of the human experience. It is the ultimate ‘hard case’, putting to the test our conceptions of law’s relationship to ethics and conscience. The pieces in this forum explore the interrelationship of law, professional ethics and personal conscience in the context of armed conflict and military operations. They ask a series of related questions — how ethics are inculcated within military forces, how the laws of war incorporate matters of conscience, how military lawyers contribute to the rule of law and to the achievement of military objectives, and what should be done when the dictates of law deviate from those of ethics and conscience. This is not an area where simple conclusions can be drawn; this forum instead explores how we can most effectively attempt to meet the great challenges identified.

II The Profession of Arms and the Profession of Law

Military officers and lawyers each regard themselves as members of a profession, with the privileges and responsibilities that membership entails. This is not to say that these professions are identical — but the shared acknowledgement that membership of each profession brings both privileges and responsibilities is important and demands principled discipline in the exercise of judgement in each case.

At its most basic, the profession of arms is a profession because its unique monopoly on the lawful use of lethal force must be accompanied by a particular professional discipline. As Richard D Rosen puts it, ‘precisely because the military holds a monopoly on the nation’s instruments of war, military professionals must recognise a commitment to moral and ethical constraints’. The moral warrior is, therefore,
the epitome of military professional identity. A similar ethical orientation can also
be justified on a pragmatic, as opposed to philosophical, basis. As General Sir John
Hackett famously argued, ‘[w]hat the bad man cannot be is a good sailor, or soldier’.2
The professional military ethic is therefore that the ends do not justify the means,
notwithstanding that the means open to a military officer are otherwise extensive.
As such, the particular responsibilities of members of the profession of arms are
twofold:3 to serve in an environment of ‘unlimited liability’ (that is, where the
ultimate personal sacrifice can be required of any member of the profession),4 and to
be an ethical warrior.

The legal profession similarly enjoys a monopoly by virtue of its position as a
gatekeeper to the justice system,5 which is a privilege that must be accompanied by
a set of professional disciplines — the duties to the client, to the court and to justice
more broadly.6 These professional obligations can also be seen from a pragmatic
viewpoint — duties in respect of client confidentiality, for example, facilitate access
to advice and ultimately to justice by clients.7 A lawyer, of course, is not subject to
the unlimited liability of sacrifice of a military officer, but the scope of the lawyer’s
duty of fidelity to their client — backed by legal and equitable remedies, in addition
to professional disciplinary consequences — is nonetheless significant.8

Lawyers and military officers share a professional orientation towards ethics
because each profession accepts that there are limitations and boundaries placed
on decision-making arising from membership. In both cases, these limitations arise
from a number of different sources: the law, professional ethical commitments, and

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2 Sir John Winthrop Hackett, ‘The Military in the Service of the State’ in Malham
M Wakin (ed), War, Morality, and the Military Profession (Westview Press, 2nd ed,
1986) 104, 119.

3 For a more extensive statement of the obligations of a military officer, see Richard

4 Sir John Winthrop Hackett, The Profession of Arms: The 1962 Lees Knowles Lectures
Given at Trinity College, Cambridge (Times Publishing Company, 1963), quoted in
ibid 15.

5 See, eg, Lizzie Barmes and Kate Malleson, ‘The Legal Profession as Gatekeeper to
the Judiciary: Design Faults in Measures to Enhance Diversity’ (2011) 74(2) Modern
Law Review 245.

6 See, eg, Rondel v Worsley [1969] 1 AC 191, 227 (Lord Reid): ‘Every counsel has a
duty to his client … But, as an officer of the court concerned in the administration of
justice, he has an overriding duty to the court, to the standards of his profession, and
to the public’.

7 See, eg, Christine Parker and Adrian Evans, Inside Lawyers’ Ethics (Cambridge

8 Law Society of New South Wales v Harvey [1976] 2 NSWLR 154, 170 (Street CJ):
‘Where there is any conflict between the interest of the client and that of the solicitor,
the duty of the solicitor is to act in perfect good faith and to make full disclosure of his
interest’.
of course) individual conscience. In each case, the potential for conflicts between these three normative universes is manifest. What sets war apart, however, is the raising of the stakes — normative conflicts between law, professional ethics and individual conscience can literally be matters of life and death.

III THE LIMITS OF LAW’S CAPACITY TO INTERVENE IN WAR

As the articles in this forum demonstrate, law has much to say about war — although it by no means says all that needs to be said. The military officer is constrained legally by their subjugation to civilian authority (at least in liberal democracies), by principles of international humanitarian law (‘IHL’) (which limit the pursuit of military objectives through, inter alia, the principles of distinction, humanity and proportionality), as well as by government policy and military command dictates reflected in Rules of Engagement and various instructions and orders. Overlaying these legal constraints are professional ethical commitments and personal conscience. These latter restraints are often overlooked by positivist approaches, but should not be underestimated as a source of limitations on action in practice, because the law’s dictates can be malleable in skilled hands,9 and the law itself can be indeterminate at the extremes.10 Where law ceases to run, ethics and conscience carry on. This point is nowhere better illustrated than in the Martens clause, which provides that

In cases not covered by [international humanitarian law] … civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.11

In this form, the law itself acknowledges that ethics and conscience, in the form of the principles of humanity and dictates of public conscience, may be needed as supplements.

The increasing understanding of the importance of ethics and conscience as dimensions of compliance with IHL is well illustrated by two studies issued by the International Committee of the Red Cross (‘ICRC’).

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10 See, eg, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 263 [97] (‘Nuclear Weapons’): ‘the Court … cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake’.

In the 2004 *Roots of Behaviour in War* report, the emphasis was squarely on law. Accordingly, the principal conclusions related to enforcement (‘supervision of weapons-bearers, strict orders relating to proper conduct and effective penalties for failure to obey’) and legal norms (‘make international humanitarian law a judicial and political rather than a moral issue’). The ultimate conclusion was remarkably positivist:

[W]e must focus our efforts on drawing attention to the legal nature of the standards that IHL lays down for the treatment of protected persons rather than to the moral obligations of weapons-bearers and other persons in a position to violate the law.

This approach is open to the critique that its focus on the law to the exclusion of ethics and conscience is at best incomplete.

This legal focus is to be contrasted with the ICRC’s subsequent 2018 *Roots of Restraint in War* report, which openly acknowledged a broader perspective: ‘the informal socialization processes of the peer group can have as strong an influence on behaviour as formal mechanisms like training, and thus can strengthen or undermine adherence to IHL’. The ultimate conclusion reached is a striking engagement with the importance of ethics and conscience in understanding compliance with international humanitarian law:

[An exclusive focus on the law is not as effective at influencing behaviour as a combination of the law and the values underpinning it. … The role of law is vital in setting standards, but encouraging individuals to internalize the values it represents through socialization is a more durable way of promoting restraint. A downward spiral of reciprocal IHL violations seems less likely to occur if norms of IHL are intrinsic to a combatant’s honour.

This represents a remarkable, and welcome, broadening of perspective.

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13 Ibid 110.
14 Ibid 111.
15 Ibid 112.
18 Ibid 65.
19 Ibid.
Our point here is that engaging with the interrelationship between law, ethics and conscience is increasingly regarded as essential to understanding the behaviour of actors in wartime. The five pieces in this forum contribute to this growing international discussion.

**IV Ethics as an Element of Military Education and Training**

Martin Cook’s reflections on ethics in the military stem from decades of experience as a civilian academic ethicist within the United States military. He asks the important question — perhaps unsettling for lawyers of the positivist tradition — of whether the rules of IHL are better seen as ‘metaphorically a “stop motion” photograph of an older, deeper and ever-fluid ethical tradition’.21 The natural consequence of taking such a perspective is that there should be a central place in the education and training of military officers to equip them with ‘independent ethical reasoning skills and resources’.22

Of course, acceptance of this proposition begs another question: what form(s) of ethics education and training will be effective? Cook suggests that we need to focus more on equipping individuals to operate with integrity in diverse contexts, and less on generic building of ‘character’. Drawing on social science literature, he argues that ‘continually monitoring the environment and situational factors within which military personnel operate is a vital aspect of military ethics’.23 His suggestion is that increasing the focus on the ethical commitments of members of the profession of arms, in order to boost the sense of professional identity among its members, is likely to be the most effective approach to strengthening the professional ethics of the military. This will supplement the external restraints of the law with internal professional ethical commitments.

**V The Martens Clause: Celebrating the Inclusion of Morality within Law**

Mitchell Stapleton-Coory examines the Martens clause, welcoming it as an attempt to include conceptions of ethics and conscience within IHL which fits with ‘our desire to view IHL as a moral creation, and not simply as the rules by which the carnage of war is regulated’.24 Tracing the history underlying the Martens clause, Stapleton-Coory notes that, on one perspective, it was merely a placeholder solution.

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22 Ibid.
23 Ibid 496.
to a political impasse in the negotiations at the 1899 Hague Conference. However, he proceeds to demonstrate that it has become something much more significant.

First, Stapleton-Coory explores the role played by the Martens clause in injecting ‘an elastic quality’ to IHL that has enabled it to ‘expand and absorb issues well beyond the scope that was foreseeable’, noting in particular the value ascribed to the Martens clause by the International Court of Justice in the Nuclear Weapons Advisory Opinion as a means of adapting the law to meet the challenges posed by technological advances. Second, he addresses instances where the principles of humanity and public conscience enshrined in the Martens clause have provided important interpretive guidance in the exposition of IHL treaty provisions. Stapleton-Coory argues that, notwithstanding some continuing (and perhaps perennial) questions about the precise scope of its application, we should celebrate the Martens clause for providing ‘a glimpse of the type of moral jeopardy that should be embraced in decision-making under the law in a time of armed conflict’.

VI THE RELATIONSHIP BETWEEN CONSCIENCE AND LEGALITY

Angeline Lewis offers a critique of the attempts by international lawyers to give legal form to requirements of conscience. Commencing with the Martens clause, Lewis examines the difficulties of interpretation that have resulted from attempts to apply it. She finds a trend towards a positivist conception which addresses legality more than an individual’s ‘independent sense of right or justice’, spurred by concerns about whether a meaning informed by a non-legal conception of conscience is too vague to have value.

Turning to Australian domestic discourse, Lewis notes with concern that it is often treated as a sufficient answer to questions of ethics and conscience regarding military operations that they were conducted in accordance with the law. Within the field of international criminal law, Lewis argues that conscience occupies a difficult place. Examining attempts to rely on conscience as a defence, she finds the legal responses to be equivocal but draws from individual cases a number of instances where defendants were acquitted on the basis that they had made efforts in accordance with their conscience to ameliorate particular orders or policies which they were charged to implement.

Lewis concludes that, notwithstanding the tendency to adopt legalistic conceptions of conscience in the materials she examines, incorporating conscience into the law ‘offers the international community the legal scope to demand individual consideration of right and justice in the exercise of lawful powers such as the taking of lives

25 Ibid 477.
26 Nuclear Weapons (n 10) 257 [78].
27 Stapleton-Coory (n 24) 483.
in armed conflict’, provided it is a form of individual conscience that is taken into account and not merely a collective, legalised version of conscience more generally.

VII ETHICS AND CONSCIENCE AS LIMITS ON LAW

Richard Adams explores the appropriate limits of the law, arguing that ethics and conscience must, at least at the extremes, be given scope to operate. In particular, he argues that s 8(2) of the *Defence Act 1903* (Cth), which requires the Chief of the Defence Force to ‘comply with’ directions of the Minister, represents (in some situations) an overreach by the law that inappropriately subjects the military to political direction. For Adams, it is necessary that we introduce ‘space in law for human virtue’.

Adams acknowledges the importance of civilian control over the military, but argues that this control should not extend to require military officers to follow unconscionable directions from their political masters. In essence, Adams paints the picture of an intelligent and experienced General in ultimate command, and argues that subservience to the rule of law does not require that the General be a mere postman for political directions no matter their content. Adams illuminates the danger of automatic, unquestioning obedience to the law, and argues for reform to address the dissonance between legal and moral obligations, positing that Generals ought to be given some discretionary space to implement their own view of ethics and conscience in the face of an extreme political direction.

VIII THE ROLE OF THE MILITARY LAWYER

Duncan Blake contributes to the emerging scholarship on the unique challenges faced by military lawyers in giving operational legal advice. He begins with the critique of scholars including David Kennedy and Gerry Simpson that law has risen to too dominant a position in our thinking about the conduct of war, and notes that it is not only law that is wrongly seen as a panacea but also — on some accounts, at least — lawyers too. As Blake notes, ‘too much is sometimes expected of the law and legal advisers’. The particular insight of Blake’s article is his powerful critique

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29 Ibid 469.
of the construction of the military lawyer as a secular version of a high priest whose role is to sanctify the killing in the name of the State that is a necessary consequence of the deployment of military forces in armed conflict.

Blake examines the dangers of permitting law to dominate our thinking about the relevance of ethics and conscience to warfighting, highlighting in particular the risk of bureaucratisation of targeting decision-making. He then reflects on the relationship between the rule of law and the political choices that result from the essential principle of civilian control of the military and the role of States in international law-making, placing the decisions of individuals within the broader context in which they are made. Ultimately, Blake’s argument is that in armed conflict, issues of morality and conscience are not the exclusive province of the lawyer, but should be the shared responsibility of all involved.

IX Conclusion

The articles in this forum provide insights into the interrelationships between law, war, ethics and conscience. Martin Cook demonstrates both the importance and the difficulty of effectively inculcating professional ethical values. Mitchell Stapleton-Coory celebrates the Martens clause for its attempt to integrate a conception of morality within law. Angeline Lewis examines how IHL — as manifested in international criminal law — incorporates matters of public and individual conscience in its requirements, and reflects on the difficulties inherent in doing so. Richard Adams examines how the principle essential to the rule of law in a constitutional democracy — the primacy of civilian law over military conduct — has a dark side if it is applied uncritically. Duncan Blake charts a path for military lawyers in providing operational legal advice, highlighting the role played by promoting critical thinking and shared responsibility.

Taken together, these contributions sketch a picture of the complex relationship between law, war, ethics and conscience. The public has a critical stake in the resolution of these issues. After all, it is in the name of the Australian public that the Australian Defence Force acts and wields considerable lethal power. Naturally, the accounts provided for in this edition are not definitive — they address issues which are perennial. However, collectively they offer insights into the complex ways in which the law interacts with ethics and conscience in the context of war and military operations.

Ultimately, they serve to remind us that it is a combination of law, professional ethics and personal conscience that will guide military officers in their conduct of war. To think that any one of these alone is sufficient would be a mistake. Rather, we should cautiously approach a purely positivist legal account of the regulation of war, and remember that the inculcation of professional ethics, acceptance of shared responsibility for the legal and ethical dimensions of military operations, and the allowance of some latitude for personal conscience, remain essential ingredients in a responsible approach to the regulation of war.
CONSCIENCE AND COERCION: JUSTICE AND THE DEFENCE ACT

‘Salus populi suprema lex esto.’1

I INTRODUCTION

Speaking to the need for coercive powers to be treated with caution in a liberal democracy, this article argues against the requirement in s 8(2) of the Defence Act 1903 (Cth) that ‘the Chief of the Defence Force … must comply with any directions of the Minister’. Accepting, by and large, that generals should comply with the lawful wishes of civilian government, and that nothing must compromise national security, this article argues that the law should allow generals discretionary space so that they might resist the unconscionable directions of politics. If we are going to take the moral claims of military service seriously, and if we are going to expect our generals to act at anything except a modest administrative level of responsibility, then we must reform the law.

As we recognise that some wars are unconscionable, we must question the morality of commanding such a war. Illustrating this claim, the philosopher Jeff McMahan asks us to consider a soldier:

fighting in a war that is intended to achieve only aims that are unjust. Suppose that he is not under threat, so that his purpose in firing his weapon is not self-defence but only to contribute to winning the war. He is therefore killing soldiers on the opposing side, who have done nothing wrong, as a means of achieving unjust aims. His reason for killing them is only that they are attempting to defend themselves and others from unjust aggression — that is, he is killing them as a...
means of preventing them from justifiably preventing the achievement of unjust aims. It is difficult to see how that could be morally permissible.\(^2\)

In fact, it is easy to see how a soldier might reasonably fight in wars as McMahan describes. Soldiers are often young, they are trained (sometimes very forcibly) to obedience, and very often they lack the capacity to determine the justice or injustice of war. We might understand — even if we might not accept — as Augustine has it, that the soldier ‘bound to service under orders, [is merely] a sword … the [blameless] tool of him who employs it’.\(^3\) However, this is not the case with generals. Very senior, widely experienced, and inhabiting the marchlands of politics, generals are well placed to resist the misdeeds of politics. But they are frustrated by the legislation.

Section 8(2) of the *Defence Act 1903* (Cth) stipulates that ‘the Chief of the Defence Force … *must* comply with *any* directions of the Minister’. It follows that the executive sends soldiers to war,\(^4\) and the general is powerless to contest injustice or folly.

This article seeks reform to the law. Reform sought would recognise that generals, and also admirals and air chief marshals who serve as Chief of the Defence Force, have a moral obligation to refuse an exercise of executive power that, in their judgement, is unconscionable.

Even if generals bear a positional and legal obligation to comply with ministerial direction, this obligation does not depend on the justice of the cause.\(^5\) In other words, following RM Hare, legal duty does not entail moral duty.\(^6\) This means when generals recognise ministerial direction as unconscionable, the moral obligation to refuse — so as to not do an unconscionable thing — overrides the legal duty to obey.

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\(^4\) Phil Larkin and John Uhr, ‘Bipartisanship, partisanship and bicameralism in ‘Australia’s ‘War on Terror’: Forcing limits on the extension of executive power’ in John E. Owens and Riccardo Pelizzo (eds), *The ‘War on Terror’ and the Growth of Executive Power* (Routledge, 2010) 142. See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2003, 12505–6 (John Howard). The then Prime Minister, Mr Howard, announces to the House that Australian troops have been deployed to the Gulf in the campaign against Iraq.


II Unconscionability

In the *Crito*, Socrates sets down a standard that one ought to try to avoid wrong and try to do right.\(^7\) Taking this cue, the term ‘unconscionable’ connotes the most morally urgent expectation people have of themselves. Bernard Williams describes it as ‘the [moral] incapacity to do a certain thing knowingly’.\(^8\) This is ‘the kind of incapacity that is in question when we say of someone, usually in commendation of him, that he could not act or was not capable of acting in certain ways’.\(^9\) Moral incapacity is ‘expressive of, or grounded in, the agent’s character or personal dispositions’\(^10\) and ‘moral deliberations’.\(^11\) For some people, no matter the acuteness of a crisis or the demands of an emergency, certain things will be morally impossible.\(^12\) This is the implication of the *Defence Act 1903* (Cth), which states in s 4(3) that a conscientious belief

involves a fundamental conviction of what is morally right and morally wrong, whether or not based on religious considerations … [which] is so compelling in character for that person that he or she is duty bound to espouse it …

III For All of Us as One of Us

The demands of national security and the practical stringencies of military service make the infringement of individual liberties inevitable. However, there are limits. Locke makes this point:

the serjeant [cannot] command a soldier to march up to the mouth of a cannon, or stand in a breach where he is almost sure to perish, [or] that the soldier give him one penny of his money; nor the general that can condemn him to death for deserting his post, or for not obeying the most desperate orders, can yet with all his absolute power of life and death, dispose of one farthing of that soldier’s estate, or seize one jot of his goods; whom yet he can command any thing, and hang for the least disobedience.\(^13\)

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\(^7\) Plato, ‘Crito’ in John M Cooper (ed), *Plato: Complete Works* (Hackett Publishing Company, 1997) 37, 49 [45d]. At [49b], Plato says ‘one must never in any way do wrong willingly’. At [54b] he says: ‘Do not value either your children, or your life, or anything else more than goodness, in order that when you arrive in Hades you may have all of this as your defence’.


\(^9\) Ibid 59.

\(^10\) Ibid 60.

\(^11\) Ibid 66.

\(^12\) Bernard Williams, *Moral Luck* (Cambridge University Press, 1999) 127.

The same point was made in the Australian Senate in 1983, where in the course of debate concerning conscience and military service, Senator Tate said

that as legislators we ought to be reinforcing the individual conscience – an activity which culturally marks us as a free society where the common good cannot be relentlessly pursued by means which destroy the individual’s personality.14

Similarly, the Senate Standing Committee on Constitutional and Legal Affairs’ 1985 report on *Conscientious Objection to Military Service* recorded the following:

Australia, as a democracy, even when engaged in armed conflict [should recognise] conscientious belief in order to protect the integrity of the individual against the coercive power of the State.15

Paraphrasing Prime Minister Keating, speaking at the interment of the Unknown Soldier at the Australian War Memorial on 11 November 1993, the generals serve all of us as ‘one of us’.16 Generals are also citizens who share the ‘perfect freedom’ and ‘the equality of men by nature’.17 To treat generals differently by denying them the elemental rights of their citizenship is unmerited. This claim was deep seated in *Liversidge v Anderson*,18 when Lord Atkin said laws must speak the same language in war as in peace, being the language of justice, and not the language of political repression.19

Besides the fact that generals are citizens, with a claim to the rights of citizens, they bear positional onuses that call for conscientious independent deliberation. The work of generals is not ordinary. Generals are not city workers, and their business is very far from the daily to-and-fro.

To go to war, observes David Kennedy, is distinctively and momentously far-reaching. He states that ‘[w]hen we call what we are doing, “war”, we mean to stress its discontinuity from the normal routines of peacetime’.20 War is a world apart. Lives are at stake and cultures face extinction. Generals must be conscientious, not merely compliant.

14 Commonwealth, Parliamentary Debates, Senate, 31 May 1983, 1027 (Michael Tate).
17 Locke (n 13) 101.
19 Ibid 244.
IV Generals not Postmen

War is a deliberate, devastating, shocking circumstance, for which politics is the origin, but for which the generals bear a special responsibility. By and large generals should obey the Minister. But, generals should not do what they believe to be unconscionable, and the law should not force them to infringe the call of their conscience.

Being a general is different to being a soldier. Generals are expected to be generals, not postmen transmitting orders without responsibility. Isolated from politics and immersed in the functioning of the military instrument, the soldier can do little about political injustice and executive overreach. The general, however, links the executive to the military. It is the general who turns political direction into military command.

Generals are not flunkies in the bureaucratic mobocracy, which Dennis F Thompson criticised when he spoke of the problem of many hands. Thompson said that

[b]ecause many different officials contribute in many different ways to decisions and policies of government, it is difficult even in principle to identify who is morally responsible for political outcomes. Even if we can decide that a policy is morally wrong, we may not be able to locate anyone who made it.

On the path to war, the general is a single, significant figure. Individual responsibility is not dissolved or made obscure by the collective. The general acts distinctively alone. The entire spread-out chain of command is unified in the general. It is the general who offers the only connection between the military and politics. Only the general, serving as Chief of the Defence Force, might turn political direction into military command and thus instigate the undertaking of war. As the philosopher Robert Nozick says, ‘some bucks stop with each of us’, and since we ‘reject the morally elitist view that [ordinary] soldiers cannot be expected to think for themselves’, we must expect generals to think independently and to act conscientiously.

Generals are expected to be more than docile; doing as the minister tells them to do. Generals are expected to be generals. They are expected to act – as Bernard Williams

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25 Ibid.
would have it — morally, which means ‘autonomously, not as the result of social pressure’.[26] Especially since the Nuremberg trials, generals are relied on to be more than gofers who merely pass on government direction. Generals are expected to lead.

V The Obligation of Leadership

Robert McNamara, Secretary of Defense to US Presidents Kennedy and Johnson during the Vietnam War, described the onerous burden of leadership: ‘leaders are supposed to lead, to resist pressures or forces … to understand more fully than others, the range of options and [the] implications of choosing such options’.27 In McNamara’s view, generals are not expected to be speechless in the face of political injustice or guile. McNamara would understand that the law does not limit the general’s responsibilities. The law might be silent, or might apply to work an injustice in the circumstances. The general must decide. The general must act. The citizens and soldiers expect generals to think independently, to act rightly, and to be a check on unjust conflict and executive overreach.

Yet, recalling Thoreau, law overstates the primacy of the civil power and puts generals ‘on a level with wood and earth and stones’.28

VI The Duty to Obey

In Commonwealth v Quince,29 Williams J, in his dissenting judgment, described obedience as the ‘first, second and third duty of a soldier at all times’.30 Samuel Huntington said, similarly, ‘[w]hen the military man receives a legal order from an authorised superior, he does not argue, he does not hesitate, he does not substitute his own view; he obeys instantly’.31

Likewise, Peter Feaver stated that ‘civilian principals are to be obeyed even when they are wrong about what is needed for national security’.32 By the lights of the present article, these claims go too far. Even if we accept Feaver’s claim that generals should be bound by executive directions that are ‘dumb’, it is unreasonable to accept

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28 Henry David Thoreau, Civil Disobedience (Black and White, 2014) 5.
29 (1944) 68 CLR 227.
30 Ibid 254.
his claim that generals should also be bound by foolhardy executive direction. Foolhardy is a word we would apply to the sort of reckless or thoughtlessly venture-some direction which would imperil the nation’s security, occasion unjust war, expand an extant war in unjust ways, waste lives in a needless squander, or lead to some other grievously bad outcome. Such foolhardiness seems unconscionable, and it is irrational to suggest generals do the right thing when they obey utterly or obviously senseless direction without question.

In asking for generals to have the right to refuse executive directions they find uncon-scionable, this article recalls Brigadier SLA Marshall who, in his book, *Men Against Fire*, said that generals should never be put under the necessity of humouring the ‘lunatic fringe’, even those elected to Congress. However, this article does not ask that generals be allowed a free rein to do whatever they might like to do.

This article does not dispute that the military must be subordinate to the civil power and obedient to government direction. Mark Osiel is correct in stating that ‘obedience to command … must still remain the rock upon which states are built’. However, it is unreasonable to suggest generals bear an obligation to observe legal direction when the effects are unconscionable, flagrantly heinous, and appalling beyond description. And it is not sensible to tolerate laws that pin generals between a rock and a hard place, denying them the right to refuse, and thus forcing them to comply or resign.

The onus on generals exceeds the obligation of obedience. Generals bear an obligation to safeguard the principles of justice and common interest. These principles found their first formal outline in the Lieber Code, a field manual drafted in 1863, on the command of President Abraham Lincoln as *General Order 100 for the Government of United States Armies in the Field*. The Lieber Code speaks *inter alia* of ‘principles of justice, honor and humanity — virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms’. Offering a sharpened emphasis to the paramount obligations of people, the Lieber Code reverberates in the Martens Clause. Part of the law of armed conflict since its statement in the preamble to the Hague Convention (II) of 1899 concerning the laws and customs

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33 Ibid.
36 US War Department, *Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War*, General Orders No 100 (24 April 1863), as produced by Francis Lieber (D van Nostrand, 1863) 4 [4].
of war on land, the Martens Clause asks parties in conflict to respect ‘the laws of humanity and the dictates of the public conscience’. The significance of the Martens Clause is in abstraction and universal principle. The Martens Clause is expressive and important because it is not specific. Laws and dictates of public conscience are not itemised. The Clause avoids the use of precise legal terms to evoke a common-sense appreciation of circumstantial reasonableness and moral obligation. Asking generals to act conscientiously, with a common sense mind for good in the circumstances, the Martens Clause illuminates the abyss between the duty of obedience to politics, and the onus to act rightly.

VII The Larger Duty to Act Rightly

In an address to the Massachusetts legislature in July 1951, General Douglas MacArthur gestured to the contesting obligations to act obediently and rightly when he said:

I find in existence a new and heretofore unknown and dangerous concept that the members of the armed forces owe their primary allegiance and loyalty to those who temporarily exercise the authority of the executive branch of the Government, rather than to the country and the Constitution they are sworn to defend. No proposition could be more dangerous.

Similarly, former Chief of the German General Staff, General Ludwig Beck, saw ‘limits … to one’s allegiance to the Supreme Commander where conscience, knowledge and responsibility forbade carrying out an order’.

This idea defined proceedings at Nuremberg, where the United States chief prosecutor, Justice Jackson, saw ‘the fundamental question of the trial was that of individual moral responsibility’. Jackson dismissed the notion that only states could be held responsible before international law, stating that ‘[m]en who exercise great power cannot be allowed to shift their responsibility on to the fictional being, the State’.

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38 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, opened for signature 29 July 1899, 187 CTS 429 (entered into force 4 September 1900) preamble.
43 Ibid.
The United States prosecutor, Telford Taylor, was pithy: ‘[T]he man who commits crimes cannot plead as a defence that he committed them in uniform’.44 A statement of similar effect was made by Starke J in the 1940 Australian High Court decision of Shaw Savill & Albion Co Ltd v Commonwealth,45 where his Honour stated that ‘a public officer cannot defend himself by alleging generally that he has acted from necessity in the public interest and for the defence of the realm, whether he has or has not the express or implied command of the Crown’.46 Restating Taylor, generals are not a race apart, above and beyond the moral requirements that apply to others, and incapable of exercising moral judgement.47 The philosopher A J Simmons sums up this point when he stated that we feel no sympathy for the Nazi generals since we see it is absurd to claim a legal duty to commit heinous crimes.48

VIII BY AND LARGE GENERALS SHOULD COMPLY

On the account offered up by Joseph Raz, ‘[t]here is a sense in which if one accepts the legitimacy of an authority one is committed to following it blindly’.49 Raz claims that ‘the fact that an authority requires performance of an action is a reason for its performance’.50 For Raz, the claims of legitimate authority pre-empt all other relevant reasons an agent might consider, when assessing what to do, even excluding and taking the place of some of them. So far as Raz might explain things, the general would be morally justified in following ministerial direction without question — and should follow direction without question — since, for the most part, practical benefits — perhaps in the form of safety, security, efficiency, or fairness — follows from obedience.51 Raz offers an analogy:

We all know the benefits from allowing traffic lights to regulate one’s action rather than acting on one’s own judgement. We tend to forget that a significant part of the benefit is that we give up attempting to form a judgement of our own. When I arrive at a red traffic light I stop without trying to calculate whether there

44 Ibid 436; Taylor (n 21) 249.
45 (1940) 66 CLR 344. On 3 September 1940, MV Coptic was steaming from Brisbane to Newcastle. The warship, HMAS Adelaide, was on the reciprocal course. There was a collision. Shaw, Savill & Albion sued the Commonwealth for damages. The Court found, though the warship was on operations in wartime, the officers were not relieved of the obligation to keep a proper lookout, or the obligation to abide by the conventions of navigation at sea.
46 Ibid 355, citing Mackenzie-Kennedy v Air Council (1927) 2 KB 517, 532 and Raleigh v Goschen [1898] 1 Ch 73, 77.
47 Taylor (n 21) 252–53; Tusa and Tusa (n 39) 438.
51 Ibid 53.
is, in the circumstances, any reason to stop … [T]he question does not arise since the answer (there is no reason) is plain.\(^5^2\)

Traffic laws, like other laws ordering the routines of daily life, function because people comply without question. There is no call for people to discover a reason to stop when they come upon a red light. People know, in advance of meeting red lights, the advantage obtained from unhesitating compliance with the law. So far as it goes, the traffic lights analogy illuminates conventional opinion. But the analogy goes no further.

By and large, generals should comply with politics. But not automatically, not blindly in the way Raz would have generals behave, since automatic conformability entails significant peril. As Stanley Milgram explains,

\[\text{[i]t has been reliably established that from 1933 to 1945 millions of innocent people were systematically slaughtered on command. Gas chambers were built, death camps were guarded, daily quotas of corpses were produced with the same efficiency as the manufacture of appliances. These inhumane policies may have originated in the mind of a single person, but they could only have been carried out on a massive scale if a very large number of people obeyed orders.}\]^5^3

### IX Law should make space for conscience

Milgram does not make particular mention of generals. He should have, and he should have considered their circumstances. Thomas Scanlon explains that

\[\text{[t]he blameworthiness of an action depends, in ways that wrongness generally does not, on the reasons for which a person acted and the conditions under which he or she did so. So it can be appropriate to say things such as, ‘Yes, what she did was certainly wrong, but you shouldn’t blame her. She was acting under great stress’.}\]^5^4

\(^{52}\) Raz (n 50) 25.

\(^{53}\) Stanley Milgram, *Obedience to Authority* (HarperPerennial, 2009) 1: Milgram explains the failure or inability of most people to resist unjust, unreasonable or irrational authority, and to follow their conscience. See also Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* (Random House, 2007). The predilection to obey authority, which Milgram revealed and explained, was illuminated powerfully by Zimbardo. In the influential 1971 Stanford Prison Experiment, Zimbardo revealed the power of situations, explaining how organisational systems can overcome autonomous individual choice. Zimbardo demonstrates how the military culture amplifies human susceptibility toward obedience. Whilst the Zimbardo and Milgram experiments were ethically flawed, the results remain compelling: see, eg, Timothy Recuber ‘From obedience to contagion: Discourses of power in Milgram, Zimbardo, and the Facebook experiment’ (2015) 12(1) *Research Ethics* 44.

The intentions of people and the influence of background conditions, such as laws and conventions arising from the laws, can be relevant to blame even when they are not relevant to the rightness or wrongness of what the person did. Scanlon appreciates the generative influence of laws and conventions that obtain. He appreciates that individual wrongs can have their foundation in larger, shaping social contexts, and he motions to the claim of this article: laws, which make it difficult for generals to act upon the calls of conscience, should be reformed.

War is more than a purely legal or an entirely political enterprise. War is defined most richly by moral ideas. In Western culture, our understanding of war is obtained from a culturally ingrained, ‘consensually shaped’ moral tradition.\(^55\) The moral character of war entails that generals bear larger duties than that of wholesale obedience to the executive. The law should make allowance for these obligations.

X Reform

Generals bear a duty to obey laws, which protect important moral values and make our lives possible. Yet, generals also have a duty to refuse when a direction is unconscionable. The philosopher Massimo Renzo offers the example of the nurse and the doctor. Doctors place nurses under a limited duty to follow direction. The doctor cannot get the nurse to do anything, as some things fall outside the doctor’s authority. For example, doctors cannot ask nurses to sing. Equally, if the doctor asks the nurse to do something that is medically inattentive or unconscionable, the nurse bears an obligation to refuse so as to safeguard the interests of the patient.\(^56\)

This article recognises the overarching nature of moral obligation, and asks for a decrement of the law’s hard-line. The reform sought is amendment that offers space in law for human virtue.

Arguing for human virtue and individual judgement, this article is against Raz, who claims ‘[t]here is no point in having authorities unless their determinations are binding even if mistaken … The whole point and purpose of authorities … is to pre-empt individual judgement on the merits of a case’.\(^57\) On the account of this article, laws are miscast when they are shaped in Hobbesian proportions, and presumed ‘just’ no matter how iniquitous.\(^58\) Reform needs to redress the misconstruction of law as a determining reason and over-riding justification for action.

Recognising what Lon Fuller called ‘a morality external to law, which makes law possible’,\(^59\) this article contests the claim that legal authority might be followed

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56 Renzo (n 5) 9–10.
57 Raz (n 50) 47–8.
without question. Raz is right: ‘if every time a directive is mistaken … it were open to challenge as mistaken, the advantage gained by accepting the authority as a more reliable and successful guide … would disappear’. But, says Renzo, ‘accepting this claim does not commit us to the conclusion that we should never challenge the authority when its directives are mistaken’, or refuse the authority when directives are unconscionable.

The special value of generals lies in their moral agency and deliberative independence, in conscience, knowledge and responsibility. This special value ought to be admitted and confirmed in law. This asking is not unusual. For example, the Law Officer’s Act 1964 (Cth) s 12(b) operates to guarantee the autonomous agency of the Solicitor General.

Like generals who serve as Chief of the Defence Force, the Solicitor General is ‘positioned at the intersection of law, politics and the public interest’ and is central to the regulation of public power. Like generals, who bear the burden of political coercion, the Solicitor General faces pressure to meet political objectives, which may compromise the public interest or integrity of the law. For example, government lawyers in the United States seemed to face political pressure in the notorious matter of the 2002 ‘torture memos’. And, in the United Kingdom, the Foreign Secretary would seem to have exerted pressure on the Attorney General to declare the Iraq War a ‘legal’ war.

In Australia, the Solicitor General is insulated from the improper exercise of executive power by a statutory appointment, which places the officeholder outside politics and beyond pressures arising from appointment to the salaried civil service.

This is significant in promoting ideas of independence and impartiality. The Solicitor General is offered the type of appointment that enables objectivity and disinterest, since independent thinking and conscientious decision-making are recognised as crucial features of the office. In this way, the office of the Solicitor General provides a general example for reform of the Defence Act 1903 (Cth).

To be clear, the Law Officer’s Act 1964 (Cth) does not offer the right answer. The Act creates for the Solicitor General a form of statutory independence which might not reasonably be applied to the Chief of the Defence Force. But the Act puts moral agency and public responsibility on centre stage.

60 Raz (n 50) 61 cited by Renzo (n 5) 14.
61 Renzo (n 5) 14.
64 Appleby (n 62) 42–3.
65 Ibid 90, 254.
If reform does not lie in statutory independence, the solution may lie in legal drafting, to recognise generals as decision-makers who bear a responsibility to decide conscientiously with reference to the Martens Clause. Such a solution would be informed by the standard Mason J applied in Ansett Transport Industries (Operations) Pty Ltd v Commonwealth.\(^6^6\) In this case, Mason J said that

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\text{[t]he Regulations vest … discretion in the Secretary of the Department [the decision-maker]; they therefore contemplate a decision by him. If in truth he is bound as a matter of law to accept a direction from his Minister it cannot be said that the decision is his decision; it then becomes the decision of the Minister.}\(^6^7\)
\]

His Honour acknowledged that, having regard to government policy, the Secretary must nevertheless

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\text{decid[e] for himself whether the existence of the policy is decisive of the application. Whether it is so decisive will depend upon the nature and terms of the policy and the circumstances of the particular case. But I cannot think that this means that the Secretary is entitled to abdicate his responsibility for making a decision by merely acting on a direction given to him by the Minister.}\(^6^8\)
\]

But independently conscientious choice does not mean decision-makers are absolutely sovereign. Asking for discretionary moral space in law is not asking for freewheeling decision-making powers. In Minister for Immigration and Citizenship v Li,\(^6^9\) French CJ found proper, independent decisions to be

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\text{exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself.}\(^7^0\)
\]

French CJ found that ‘reasonable minds may reach different conclusions about the correct or preferable decision’,\(^7^1\) but reasonableness ‘cannot be construed as … arbitrary or capricious or to abandon common sense’.\(^7^2\) Reasonableness ‘reflects a limitation imputed to the legislature on the basis of which courts can say that Parliament never intended to authorise that kind of decision’.\(^7^3\) Similarly, Hayne,
Kiefel and Bell JJ found that an unreasonable exercise of a discretion would be ‘arbitrary, vague and fanciful’, and lacking of an evident intelligible justification.\textsuperscript{74}

These ideas hint to the way law might offer generals discretionary space for responsible, independent decision-making, thus reforming relations between the general and the executive. The asking is not for freedom from legal control. As Dixon J said in \textit{Shrimpton v Commonwealth},\textsuperscript{75}

\begin{quote}
[complete freedom from legal control is a quality which cannot ... be given under our Constitution to a discretion [since such a discretion would be] capable of being exercised for purposes, or given an operation, which would or might go outside the power from which the law or regulation conferring the discretion derives its force.\textsuperscript{76}
\end{quote}

The asking is for discretionary space in the law, so as generals might act with reasonable independence, conscientiously, and with a mind to principles which find the best expression in the Martens Clause.

This asking gives rise to concern that the military instrument will come to be ill-disciplined and reluctant. Such a concern is ill-founded. Asking for discretionary space is not asking to compromise ideas of military discipline, which are foundational to national security.

\section*{XI Nothing Must Compromise National Security}

Nothing must prejudice national security. For this reason, military discipline must not be compromised, since an ill-disciplined military would be powerless to safeguard the state.

Military discipline finds clear expression in the machine coordination of soldiers on parade, and in the skilled effecting of immediate-action drills. An immediate action drill is a procedure such as soldiers undertake when a weapon stops firing. For example, when the FN L1A1 self-loading rifle stops, the immediate action drill goes something like: pull back the cocking handle; lock the cocking handle; look in (confirm the magazine is empty); remove the magazine; attach a new magazine; release the cocking handle; regain a sight picture; and resume firing. Typically, this drill would be abbreviated to a rote slogan like ‘cock, lock, look, load, aim, fire.’

Since a foul-up can have dire consequences, drills like this must be well learned. But the importance of systematic drills can be over-inflated and when this happens other, more important ideas, come to be overlooked.

\textsuperscript{74} Ibid 363, 367 (Hayne, Kiefel and Bell JJ).
\textsuperscript{75} (1945) 69 CLR 613
\textsuperscript{76} Ibid 629–30 (Dixon J).

the case against [military drill] is strong. It is time wasting, excruciatingly boring for those with more than the most mediocre intellect, and a poor substitute for thought. Since it aims to govern behaviour by a set of rules and defines a rigid programme for different occasions, it cannot meet the unanticipated event. This may have fatal consequences, such as the possibility of admirals standing stiffly to attention, hands at the salute, while their battleships sink slowly under them.77

Dixon’s point is that the fixation with routine and the fetish for orders and obedience that goes with it soaks the fabric of the military institution to usurp time and energy, which might be devoted to more constructive endeavours. For example, the Brigade of Guards persisted with inefficient battlefield routines, because these practices accorded with ceremonial drills.78 The Royal Navy was equally obtuse. Remembering that one of the chief purposes of a navy is to sink the adversary’s ships, and that this is very often achieved by gunfire:

It might be supposed that much time would have been spent on practising gunnery. But in the [Royal] Navy in the years before the First World War, ship commanders were actively discouraged from gunnery practice because the smoke might mark the paintwork and soil the gleaming decks.79

In a nutshell: drill, good order, and categorical wait-for-orders obedience have a place. But properly effective militaries work against machine automatism. This claim — rejected routinely by diehard conservatives — is not new. For example, the 1902 British Army doctrine, *Combined Training*, emphasised the need for tactical flexibility, noting that

[s]uccess in war cannot be expected unless all ranks have been trained in peace to use their wits. Generals and commanding officers are, therefore, not only to encourage their subordinates in doing so by affording them constant opportunities of acting on their own responsibility but, they will also check all practices which interfere with the free exercise of their judgement, and will break down by every means in their power, the paralysing habit of an unreasoning and mechanical adherence to the letter of orders and routine, when acting under service conditions.80

78 Ibid 179.
79 Ibid.
The need for soldiers to decide for themselves is most powerfully expressed in the German *Auftragstaktik*.81

XIII SOLDIERS MUST DECIDE

Perceived and realised in the Napoleonic Wars, the *Auftragstaktik* has its most fabled provenance in the German Armies of the First and Second Wars.82 Deeply thought through, the doctrine finds forceful and famous expression in the 1933 *Truppenfuhrung* — the German Army manual for troop command. The *Truppenfuhrung* underlines the value of individual soldiers amidst the confusion of conflict, arguing ‘the emptiness of the battlefield … requires soldiers who can think and act independently, who can make calculated decisions and daring use of every situation’.83 Written largely by Generals Beck, von Fritsch and von Stülpnagel, the *Truppenfuhrung* recalls von Seeckt.84 It argues that ‘the principal thing now is to increase the responsibilities of the individual man, particularly his independence of action, and thereby to increase the efficiency of the entire army’.85

The sense of independent tactical nous resonant throughout the *Truppenfuhrung* summons up General Charles Krulak, Commandant of the United States Marine Corps, who coined the phrase ‘the Strategic Corporal’ to conjure the actuality of military service.86

Krulak understood that efficient soldiers must think, improvise, and make calculated decisions. Soldiers must decide what the circumstances demand. And soldiers must decide right from wrong — if this were not the case, why would so many of the world’s militaries invest in military ethics education? Generals must be expected — and allowed — to think for themselves, and to refuse.


84 Generals Beck, von Fritsch and von Stülpnagel were three Nazi officers who opposed Hitler: Ibid.

85 Ibid 4.

XIV THE OBLIGATION TO REFUSE

More harm is likely to ensue when generals are — or feel they are — coerced by the law. Aggressive war was waged, gas chambers were built, death camps were guarded, and daily murder was possible on a massive scale only because people obeyed orders.87

The general operates in the sort of environment where reflexive obedience is not valuable; an environment where argument and questioning are practical, possible, and constructive. The general is not a ‘combatant’ who must do as ordinary soldiers do. The general must resist injustice and political folly. If the word ‘must’, needs justification, then the First World War offers up the paradigm case.

There is no case in history where forcing a general made a state more secure. Such cases would be notorious. But there are no such actual cases, and neither are there fictive accounts that demonstrate how a general, by refusing unconscionable executive direction, might imperil the nation. The reform proposed in this article would offer generals a choice. The proposal does not jeopardise the state, and neither does the proposal promise the riddance of evil doings. Bad things will happen. But bad things will not happen because generals find the right in law to refuse unconscionable executive direction.

XV SHOULD LAW OFFER A CHOICE?

For the realist, there is no reason for law to offer generals a choice. So long as the nation is secure, the realist is unconcerned that generals pay a disproportionate price. Unprepared, in a phrase from Williams, to pick up the world’s ‘moral luggage’,88 the realist is hostage to utilitarian notions of public advantage and blind to the liberal idea that rights might be circumscribed, only when their exercise is incompatible with justice.89

For the realist it would be irrational squeamishness to let moral concern get in the way of functional value. The trivialising implication of quiescence is dismaying. The implication is that moral preferences frustrate real-world considerations. But we cannot, says Williams, regard our moral feelings as merely elements of the utilitarian calculus. Williams says that

[b]ecause our moral relation to the world is partly given by such feelings, and by a sense of what we can or cannot ‘live with,’ to come to regard those feelings from a purely utilitarian point of view, that is to say, as happening outside one’s moral self, is to lose a sense of one’s moral identity; to lose, in the most literal

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87 Milgram (n 53).
88 Bernard Williams, ‘A Critique of Utilitarianism’ in JCC Smart and Bernard Williams (eds), Utilitarianism: For and Against (Cambridge University Press, 2008) 136, 137.
way, one’s integrity. At this point utilitarianism alienates one from one’s moral feelings. 90

We think intuitively along realist, utilitarian lines, and for the most part it would be undesirable to think any other way. 91 But intuitive rules of thumb offer a poor justification for laws that are unresponsive to the imperatives of individual conscience.

XVI The Liberalism of Fear

The realist accounts imperfectly for intrinsic value: the worth of everything is instrumental. The value of action is in outcomes. The realist finds it implausible that a general might find some actions so morally repellent, despite favourable consequences, that they should not be done — or even contemplated. In her essay, The Liberalism of Fear, Judith Shklar asks us to be disquieted.

Shklar recognises that an undiscriminating focus on utilitarian outcomes opens the door to the misuse of executive power. 92 Shklar accepts the state’s power must be used to uphold law and good order. But if there are no constraints, the solution becomes the problem. As Williams says, the problem of good order requires a solution all the time. It is not a matter of arriving at a solution to the problem of good order in the state of nature and then going on to the rest of the agenda. The problem of good order requires constant attention, and solving it constantly is elemental to liberalism. 93

On Shklar’s account, liberalism is jeopardised by ‘a summum malum, which all of us know and would avoid if only we could. That evil is cruelty and the fear it inspires’. 94 Liberalism, says Shklar, will fail unless the political order acts deliberately to prevent ‘cruelty’, by which she means the abuse of public power. Deliberate, and inflicted upon the weak by the strong in order to achieve some end, 95 ‘cruelty is an absolute evil’. 96 It is not occasional. Rather, cruelty obtains from coercive means built into the bureaucratic systems of government. 97 Observing the history of the world since 1914, Williams follows Shklar to say the following:

In Europe and North America, torture had gradually been eliminated from the practices of government, and there was hope that it might eventually disappear.

90 Williams (n 83) 103–4.
91 Hare (n 6) 97–8.
93 Bernard Williams, ‘Realism and Moralism in Political Theory’ in Geoffrey Hawthorn (ed) In the Beginning was the Deed (Princeton University Press, 2005) 1, 3.
94 Shklar (n 92).
95 Ibid.
96 Ibid 23.
97 Ibid 29.
everywhere. With the intelligence and loyalty requirements of the national warfare that states quickly developed at the outbreak of hostilities, torture returned and has flourished on a colossal scale ever since. We say ‘never again,’ but somewhere someone is being tortured right now, and acute fear has again become a common form of social control.98

The point is, utilitarian presumptions of raison d’état are cited artfully to justify anything. Shklar says that

[g]iven the inevitability of the inequality of military, police and persuasive power which is called government, there is evidently always much to be afraid of. And one may, thus, be less inclined to celebrate the blessings of liberty than to consider the dangers of tyranny and war that threaten it. For … liberalism the basic units of political life are not discursive and reflecting persons, nor friends and enemies, nor patriotic soldier-citizens, nor energetic litigants, but the weak and the powerful. And the freedom it wishes to secure is freedom from the abuse of power and intimidation of the defenceless that this difference invites.99

This is not to ignore the categorical practical importance of security and political good order, which depend upon reasonable force. Law, social stability, civil cooperation, and the like depend upon the coercion and constraint of individuals. But the state ought not be ignorant of, or disinterested in, human rights and dignities. We do not need to specify what we mean, Williams says:

We have a good idea of what human rights are. The most important problem is not that of identifying them but that of getting them enforced. The denial of human rights means the maintenance of power by torture and execution; surveillance of the population; political censorship; the denial of religious expression; and other such things. For the most gross of such violations, at least, it is obvious what is involved.100

The short of it is, governments must operate to safeguard the state, and they must use legal powers to do this. But governments will use coercive power unduly, in trivial or in momentous ways, unless they are prevented.101 A liberal order will establish legislative protections for rights. A liberal state that fails to restrict public cruelty and safeguard elemental rights, fails a basic criterion of legitimacy.102

98 Bernard Williams, ‘The Liberalism of Fear’ in Geoffrey Hawthorn (ed) In the Beginning was the Deed (Princeton University Press, 2005) 52, 55.
99 Shklar (n 92) 27.
100 Bernard Williams, ‘Human Rights and Relativism’ in Geoffrey Hawthorn (ed) In the Beginning was the Deed (Princeton University Press, 2005) 62, 62.
101 Shklar (n 92) 27–8.
102 Williams ‘Realism and Moralism in Political Theory’ (n 93) 4, 7, 10.
XVII Conclusion

‘Now and around here’, says Williams, legitimate politics ‘permit only a liberal solution: other forms of answer are unacceptable. In part, this is for the Enlighten-
ment reason that other supposed legitimations are now seen to be false and in
particular ideological’.103 This is not to say that we regard non-liberal states as ille-
gitimate. But an illiberal state would be illegitimate for us.104

The point is: we must take liberalism seriously.

Liberalism will fail, if we merely look on devising theories to fit the real-world; for
example, offering up slogans and catchwords about security and military efficiency
to justify the coercion of generals.

This is not to say that practice should not inform ideas. But things must make sense
beyond the level of custom, or circumstantial convenience. Things must make
sense in theory and in practice. The strict coercion of the generals makes little sense,
either at the level of practice, or in theory.

There will be moments when generals must comply with ministerial direction. Hard-edged political realities will oblige and constrain individual choice. But the
occasional real-life moment does not justify legislation’s emphatic and utter pro-
scription of conscience. General George Marshall captured this implication. Serving
as the United States Secretary of State in 1948, Marshall observed that

[g]overnments, which systematically disregarded the rights of their own people,
were not likely to respect the rights of other nations and other people and were
likely to seek their objectives by coercion and force in the international field.105

Marshall gestures to an essential liberal broadmindedness. He speaks for freedom
of thought, expression and conscience, and he calls attention to the state’s almost
unlimited capacity for violence. For Marshall, political rationalisations offer insuf-
ficient reason for war. He would agree — law should allow generals discretionary
space, so they might resist political foolhardiness.

103 Ibid 8.

104 Ibid 15–16.

105 UN GAOR, 3rd sess, 139th plen mtg, UN Doc A/PV.139 (23 September 1948) [36]–[37].
CONFLATING CONSCIENCE AND LEGALITY IN INTERNATIONAL LAW: IMPLICATIONS FOR THE FUTURE

‘Law could never accurately embrace what is best and most just for all at the same time, and so prescribe what is best. For the dissimilarities between human beings and their actions, and the fact that practically nothing in human affairs ever remains stable, prevent any sort of expertise whatsoever from making any simple decision in any sphere that covers all cases and will last for all time.’

I Introduction

Informed by Locke and Rawls, Richard Adams has cogently argued in this volume that space should be left in the application of domestic legislation for the exercise of conscience at the highest levels of military leadership. The idea of conscience in international law is at once more specific in its acknowledgement and less welcome in its application. It is explicit in the Martens clause, and has been sought in international criminal prosecutions both as a potential defence and as a mitigating response. Yet, in practice, international judicial consideration and public discourse of such conscience has drifted distinctly toward positivism. This article seeks to identify that drift and offer reason to be vigilant against it, lest international law comes to be inhospitable to urgently important ideas of right and justice in individual decisions.

This article begins with the classic position of the Martens clause, with its reference to the ‘dictates of public conscience,’ as the first format in which conscience is represented in international law. With it is the shock to the global conscience which defines crimes against humanity as they emerged in the years following the Second World War. Together these form the public or communal conscience in international law. Identifying the content of this shared conscience, however, appears to have been slowly reduced in practice to compliance with law, effectively substituting a positivist approach to law as authority for visible consideration of right. In a circular

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development, this appears now to be reflected in the public discourse originally thought to give rise to Martens’ ‘public conscience’.

The article then compares the communitarian idea of a collective, shared or public conscience with the treatment of individual conscience in international criminal law. The immanent tension between the individual and the collective moral sense was made obvious in the so-called ‘Nazi Judges’ and ‘High Command’ cases before the United States Military Tribunal in Nuremberg in 1948. In these cases, international law (and the judges administering it) wrestled with the culpable collapse of individual conscience and grievous wrong in war. An almost hybrid form of conscience emerged from the analysis, on the basis that special moral and legal duties obtain from professional vocations against which the exercise of individual conscience is to be measured. Even so, the Tribunal ultimately held on the evidence before it that these obligations did not offer a sufficient defence to international crimes of the most repugnant type. The cases contrast with the explicit acceptance of a moral defence in the Nazi and Nazi Collaborators (Punishment) Law and the trial of Jews accused of collaboration in the Nazi genocide — a moral position distinct from the perpetrator who would not have otherwise become a victim of the crime in which they participated.

The difficulty with the reduction of ‘public conscience’ to a positivist approach to legal compliance, first in law and then in practice — which affects in turn the continuing development of law — is its conceptual incompatibility with the retention of some form of ‘individual conscience’ in international criminal law. The reduction not only risks the limited defence of conscience at least notionally available to those accused of international crimes, and with it the more often accepted mitigation of punishment, but it also deprives the international community of the legal scope to demand individual consideration of right and justice in the exercise of the lawful power to take lives in armed conflict.

3 United States v Altstötter et al (Judgement) (United States Military Tribunal, 3 TWC 1, 4 December 1947) (‘Nazi Judges’).
4 United States v von Leeb et al (Judgement) (United States Military Tribunal, 12 TWC 1, 27 October 1948) (‘High Command’).
5 Constituted under ‘Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity’ (1948) 3 Official Gazette for the Control Council for Germany (‘Control Council Law 10’). The two cases were part of a series of 12 conducted by the US Military Tribunal, addressing thematic groupings of defendants: in the Nazi Judges case (Case No. 3), Nazi judges and justice officials, and in the High Command case (Case No. 12), senior officers of the German High Command.
II ‘Public Conscience’ and the Martens Clause

The Martens clause was first suggested by Russian delegate Professor Martens as a compromise measure on a disputed rule regarding civilians taking up arms against an occupant in the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land.7 It was expressed in the preamble as:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

For the purposes of this article, the key terms are the ‘requirements of the public conscience,’ although it is also useful to observe as background the moral imperative underpinning the clause evident in the parties’ thinking it ‘right’ to include it.

A similar recitation to Martens’ original clause was included in the preamble to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land,8 adjusted to the now more familiar phrase ‘dictates of public conscience.’9 It also appeared in the 1949 Geneva Conventions10 and in 1977’s Additional Protocol I,11 although those drafters relocated references to the principles of humanity and the dictates of public conscience to the denunciation clauses.12 It has been suggested that the purpose of this change was to ensure that the Martens clause preserved the

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7 Opened for signature 29 July 1899 (entered into force 4 September 1900) (‘1899 Hague Convention (II)’).
8 Opened for signature 18 October 1907 (entered into force 29 January 1910).
9 Ibid Preamble.
12 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) Preamble; Convention on Prohibitions or Restrictions on the Use of Certain
application of customary minimum standards to any state withdrawing from the

treaties. Notwithstanding this repetition, the meaning and legal effect of the

Martens clause is debated. It has been variously argued to be a ‘reminder’ of the

continued application of custom despite the conclusion of the treaties, an assurance

that an inhumane act not explicitly prohibited by the treaty is not therefore permitted,

and a substantive rule by which conduct in armed conflict is to be measured.

The International Court of Justice (‘ICJ’) has considered the clause representa-

tive of customary law, without giving a determinative view on the interpretation of

‘public conscience.’ Rather, in its Advisory Opinion on the Legality of the Threat

or Use of Nuclear Weapons, the ICJ simply observed that the clause as a whole

was ‘an effective means of addressing the rapid evolution of military technology.’

Its reasoning focussed primarily on the application of the ‘established principles of

humanity,’ including that of distinction and the prohibition of unnecessary suffering,

rather than the separate content of ‘public conscience.’

Among the dissenters, Judges Shahabuddeen and Weeramantry gave greater weight

to conscience. Judge Weeramantry considered that the dictates of public conscience

were necessarily affected by the ‘universal acceptance’ of human rights. Judge

Shahabuddeen considered Martens’ public conscience an independent source of

normative value, along with the principles of humanity and customary law. Its

content was ‘to be ascertained in light of changing conditions, inclusive of changes in

the means and methods of warfare and the outlook and tolerance levels of the inter-

national community.’ Nauru had contended in its submissions in the matter that the

public conscience in this sense was to be determined by legal communications and

‘[g]eneral principles of law recognised by civilised nations,’ including as evidenced

Conventional Weapons Which May be Deemed to be Excessively Injurious or to

Have Indiscriminate Effects, opened for signature 10 October 1980, 1342 UNTS

137 (entered into force 2 December 1983) Preamble.

Georges Abi-Saab, ‘The Specificities of Humanitarian Law’ in Christophe Swinarski
(ed), Studies and Essays on International Humanitarian Law and Red Cross


See Antonio Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky’

See Theodor Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of


Ibid 405–6.

Ibid 406. Australia also advocated for this view in its oral submissions in the matter,

arguing that public conscience was not ‘static:’ ‘Oral Statement of the Government

of Australia’, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)
in General Assembly resolutions. With this Judge Shahabudeen appeared to agree only to an extent; setting aside the status of such resolutions as law, he thought they should be given ‘weight … on the point of fact as to the state of “human conscience and reason” … more particularly in view of the fact that that finding accords with the general tendency’ of the legal evidence in the matter. Overall, Judge Shahabuddeen considered conscience to favour prohibition.

The lack of definition of the ‘public conscience’ by the majority in the Nuclear Weapons Advisory Opinion has led to continued judicial debate as to its place in law. Cassese found jurisprudence applying three interpretative approaches to the clause as a whole: first, to confirm interpretation of extant rules of international law, as suggested in parts of the Nuclear Weapons opinion; second, to suggest a new interpretation of existing rules with reference to human rights as the measure; and third, in a single Colombian case, to exclude contrary interpretations of extant rules. None of the three clearly incorporates the independent normative value which Judge Shahabuddeen attributed to public conscience, a view specifically rejected by the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) in its Kupreskic decision. There, the ICTY used the Martens clause to support interpreting ‘as narrowly as possible the discretionary power to attack belligerents and, by the same token, … to expand the protection accorded to civilians.’ Both the ‘principles of humanity’ and ‘dictates of public conscience’ were to apply to interpretation ‘any time a rule of international humanitarian law [was] not sufficiently rigorous or precise,’ but the ICTY concluded that they were not ‘independent sources’ of law. What the ICTY did allow was a role for ‘public conscience’ in the formation of customary law in this interpretative sense, giving opinio iuris sive necessitates as informed by the Martens clause decisive weight in circumstances ‘where State practice is scant or inconsistent.’ However, this too relies on the ‘public conscience’ reflecting a view as to legality, rather than an independent sense of right or justice. Thus, in applying the Martens clause, there is a distinct positivist tendency across different approaches to relate the purpose of conscience in the Martens clause to the interpretation of legal standards.

There is a second significant difficulty inherent in these varying interpretative approaches. That is, identifying through evidence the content of the public conscience. With respect to the similar formulation of ‘elementary considerations

21 Ibid.
22 Ibid.
23 Cassese (n 14) 202.
24 Prosecutor v Kupreskic (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [525] (‘Kupreskic’).
25 Ibid [525].
26 Ibid. On the role of the public conscience with respect to the formation of customary law, and particularly opinio iuris, see also Meron (n 16) 83.
27 Kupreskic (n 24) [527].
of humanity’ in ICJ jurisprudence, Cassese has asked ‘how does one establish their scope and purport or, in other words, by what yardstick can one determine whether or not certain obligations are imposed by them?’28 Given the similarity of terms, comparison should be available with the treatment of the ‘collective conscience’ of the global community as the measure of gravity of both genocide and crimes against humanity in international criminal law.29 Yet this term too has not been clearly defined except for a general sense of abhorrence of grievous wrong. Other than in an interpretative sense, Cassese concluded that the ambiguity of the Martens clause makes it incapable of legal meaning, other than by reference to extant law, and therefore one of the ‘contemporary legal myths of the international community.’30 Greenwood similarly suggested that the concept of the ‘public conscience’ is simply too vague for use as an independent rule of law.31 This may be the practical driver of the reductionist approach in individual cases where the Martens clause has been raised.

Others have taken a more optimistic view. Ticehurst argued that the term ‘public conscience’ appeals to natural rather than positive law, presuming ‘the prevalence of right and justice,’ with particular reference to the reasoning employed at Nuremberg.32 He thought that this global ‘moral code’ allowed states other than major military powers to influence the development of the laws of armed conflict. In essence, the clause is a link between positive and natural law and an ‘objective means’ of determining the content of the latter — although Ticehurst conceded that the ICJ had not gone so far in its consideration.33 Meron, also more optimistic than Cassese, saw in the clause a perspective for ‘public opinion that shapes the conduct of the parties to a conflict and promotes the development’ of law, conceding that ‘popular opinion, the vox populi, may be different from the opinion of governments,’ but may shape the latter in developing customary law through opinio juris.34 Meron did question whether the dubious but ‘common assumption … that public opinion is a force for good and that it invariably serves humanitarian causes’ meant that public opinion

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28 Cassese (n 14) 213. This phrase was first employed by the ICJ to derive legal principles applicable in peacetime: Corfu Channel (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4, 22.

29 See, eg, Prosecutor v Kambanda (Judgement and Sentence) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No. ICTR-97-23-S, 4 September 1998) [61-62]; Prosecutor v Ruggiu (Judgement and Sentence) (International Criminal Tribunal for Rwanda, Trial Chamber, Case No. ICTR-97-32-I, 1 June 2000) [48]; Prosecutor v Ndindabahizi (Judgement and Sentence) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-2001-71-I, 15 July 2004) [499].

30 Cassese (n 14) 187.


33 Ibid 133.

34 Meron (n 16) 83.
and the public conscience were necessarily the same. More importantly, while the Martens clause has ‘made itself felt by governments, international conferences and the media,’ he was ‘far less confident’ that it ‘has had any influence on the battlefield, especially in bloody internal conflicts.’

Meron’s doubt appears to be reflected in Australian governmental discourse on its participation in armed conflict, to the extent that the latter appears to offer no room for Martens-style conscience beyond the framework of existing international law, and certainly not for Ticehurst’s natural law. The discourse is a good example of the positivist conflation of the evidence for law and conscience, which tends to eliminate any room for the formulation of conscience on other terms.

**A Appeal to Law Rather than ‘Right’ in Public Operational Narratives**

In light of the public quality of conscience required by the Martens clause, it is significant that Australian discourse markedly prefers the language of legality to that of right or conscience. Official commentary on the expansion of Iraq air operations into Syria in 2015 is a case in point. The criticality of Iraqi (legal) consent and the principle of collective self-defence meant expanded air strikes would, according to then-Prime Minister Abbott, target only the Islamic State organisation and ‘not the Assad regime, evil though it is.’ While Abbott did make associated moral claims about the destruction of the ‘death cult,’ they existed only within the legal framework he had identified. The Opposition supported ‘this proportional action within international law.’ At the tactical level, in acknowledging credible reports of civilian casualties involving Australian aircraft, the Government typically emphasised the Defence Force’s compliance with ‘strict rules of engagement designed to protect our forces, minimise the risk of injury to civilians and strictly comply with Australia’s obligations under domestic and international law’ and asserted that it ‘always complies’ with international law.

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It may be that this point of view is based on a presumption of the completeness of the body of international law as it applies to targeting. That would be an important step reflecting on the continued relevance of the Martens clause, which was originally proposed as an interim compromise ‘until a more complete code of the laws of war is issued.’

41 Russia took this very position in its submissions in the Nuclear Weapons matter. However, the Australian press description appears founded on a different nuance; it appears to argue that it is a sufficient answer to moral critique if the actions of Australian forces complied with the rules of engagement, which are representative of international law. The press statements do not suggest, for example, that the rules of engagement include moral or conscientious proscriptions which draw on sources other than positivist rules.

The framing of this discourse — which fits the sources Meron would link with Martens’ ‘public conscience’ — suggests clearly that, questions of the evidentiary proof of individual allegations aside, Australian involvement in incidents could not have been wrongful because it complied with law (that is, the argument is based on the reasoning that since what is lawful equals what is legitimate, therefore what is unlawful must equal that which is wrong). The contrasting critique contends that Australian and other countries’ activities could not have been right, because they were unlawful. Both perspectives play to David Kennedy’s criticism of the gap between the content of law and of human conscience, in which ‘the new law of force has captured war in a legal vocabulary.’

43 Gerry Simpson too is critical of the subsuming of the originally moral ideas of crimes against humanity, genocide and human rights violations into legal technical terms ‘to be debated and reinvented.’ This may be the case in fact but is it not inevitably so; in comparison, the North Atlantic Treaty Organisation’s (‘NATO’) 1999 air campaign in Kosovo was described as

illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population.

45 Interestingly, the equation of positivist legality with morality appears not only in government discourse, but in criticism by humanitarian and other organisations, who might be expected to appeal to right, justice or humanity in conjunction with, if not independently of, law. They also show a tendency to frame their critique using the

\[\text{1899 Hague Convention (II) (n 7) Preamble.}\]
\[\text{‘Written Statement and Comments of the Russian Federation on the Issue of the Legality of the Threat or Use of Nuclear Weapons’, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1995] ICJ Pleadings 1, 13.}\]
specific language of humanitarian law. There is evidence of a similar approach by NATO, and its critics, during its air campaign in Libya in 2011.

These developments would seem to reflect Cassese’s conclusion that the significant achievement of the Martens clause was actually to approach the laws of humanity in positivist and not just moral terms by converting it to a treaty clause. However, in doing so, it has also reduced the independent value of the clause’s ‘rhetorical and ethical code words,’ and undermined their plain meaning. It is to be compared with the treatment of individual conscience as a defence in international criminal law, which has remained fairly stable in its application since 1945, but is equally problematic in its approaches.

### III Individual Conscience in International Criminal Law

Given that the essence of the crime against humanity is its shock to the conscience of humankind, the place for individual conscience as a defence is curious. This section canvasses the argument, made before international criminal tribunals, that a moral decision not to resign one’s responsible position, or to continue to contribute to an act so as to avoid worse consequences should another be appointed in one’s stead, should negate the consciousness of international guilt. The response of the tribunals has been mixed, leaving open the possibility that such a defence exists, but generally evidencing a preference for considering the argument in mitigation following a finding of guilt.

This approach to individual conscience as a negation of guilt is distinct from the treatment of individual conscience, as an expression of remorse or repugnance for acknowledged criminal acts, in mitigation during sentencing. As examples of this

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48 Cassese (n 14) 188.

49 Meron (n 16) 89.
usage, the ICTY accounted for one defendant’s ‘remorse,’ including his wish to ‘testify because of his conscience’ at the proceedings,\(^ {50}\) and another’s ‘propulsion of his own conscience’ towards rehabilitation for his crimes.\(^ {51}\) There is also some indications of ‘conscience,’ in the sense of character and personal qualities, being used as evidence to assess the credibility of allegations against an individual. Jean Mpambara, for example, was acquitted by the International Criminal Tribunal for Rwanda (‘ICTR’), after it received evidence that he ‘wanted to flee but his conscience and his sense of responsibility obliged him to hold out … He felt like fleeing in order not to be involved but, on the other hand, he felt obliged to stay — in order to live up to his responsibilities’.\(^ {52}\) In other contexts, morally-laden terms are used in non-conscientious contexts; for example, criteria such as ‘should have known,’ in the context of superior responsibility, are used synonymously with ‘had reason to know’ from a factual perspective.\(^ {53}\)

**A Individual Conscience as a Perpetrator’s Defence**

Two key cases in which individual conscience was advanced as a defence were tried by the US Military Tribunal at Nuremberg, which appeared to leave the defence open as a matter of law although not generally persuaded of it on the evidence in individual matters. It did, however, suggest that the measure of individual conscience, or the values to which an individual ought to be held in good conscience, may be qualitatively different depending on the values ascribed to their profession as a judge or a senior military commander.

1 *The Nazi Judges Case and Judicial ‘Consciousness of Injustice’*

The 16 indicted defendants in the *Nazi Judges* case included five judges, four prosecutors and eight officials from the Reich Ministry of Justice, including the erstwhile acting Minister of Justice (one defendant, Karl Engert, was both a judge and a Ministry official). They were charged with war crimes and crimes against humanity during the war in Europe, conspiracy to commit such crimes between 1933 and 1945, and membership of certain organisations declared criminal by the International Military Tribunal, contrary to Control Council Law 10. Although all pleaded not guilty, 10 of the defendants were convicted of one or more charges and sentenced

\(^{50}\) *Prosecutor v Erdemovic (Sentencing Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-96-22-T, 29 November 1996) [96].

\(^{51}\) *Prosecutor v Obrenovic (Sentencing Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No. IT-02/60/2-S, 10 December 2003) [144].

\(^{52}\) *Prosecutor v Mpambara (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-01-65-T, 11 September 1996) [161]–[162].

\(^{53}\) See, eg, *Prosecutor v Ndimuliyimana (Military II Case) (Judgement and Sentence)* (ICTR, Trial Chamber II, Case No. ICTR-00-56-T, 17 May 2011) [1218]–[1219], with respect to General Bizimungu.
to terms of imprisonment, and four were acquitted. Charges against two were discontinued — Carl Westphal died before the trial commenced, and Engert’s illness meant he attended only two days of hearing. Other key defendants were missing from the trial, including those with potentially the greatest responsibility: Roland Freisler, the ‘hanging judge’ of the extraordinary People’s Court, was killed in an air raid in 1945; the President of the Reichsgericht and both Nazi Ministers of Justice were also dead.

It was a trial less of the defendants individually than one in which ‘the judicial system of the Third Reich as a whole’ was indicted. That is, the Tribunal looked to both Nazi legislation and to the ‘law in action,’ in terms of Hitler’s direct influence on the judiciary, including through the distribution of secret ‘guidance’ to judges by the Ministry of Justice, as the substance of the international crime:

The charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts.

The key features of the criminal Nazi system were the erosion of predictability through use of a rule of analogy which discounted pre-1935 judicial interpretations, institutionalisation of double jeopardy through the filing of so-called ‘nullity pleas,’ receipt of torture-tainted evidence, and abuses of process contrary to international law. These procedural features were in addition to unlawful substantive statutes, which purported to authorise torture, disappearances or discriminatory measures; the establishment of a range of special or extraordinary courts; and judicial oversight of murder, illegal imprisonment, brutalities, atrocities, transportation of civilians, and other inhumane acts.

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54 Nazi Judges (n 3) 954–5 (for a summary of the charges and pleas), 1081 (for individual determinations).
55 Ibid 954.
56 See Ingo Müller, Hitler’s Justice: The Courts of the Third Reich, tr Deborah Schneider (Harvard University Press, 1991) 270.
58 Nazi Judges (n 3) 992, 1009–10, 1017. With respect to the Ministry’s guidance documents, the Tribunal considered their secrecy determinative in finding that they were not issued in good faith: Nazi Judges (n 3) 1018.
59 Ibid 985.
61 The unlawful characteristics of the Nazi judicial system are described at length in the judgment: Nazi Judges (n 3) 1010–80.
To the extent that matters of conscience were argued before the Tribunal, they were put in two ways. The first involved both legal and values-based arguments, contending that judicial action even in the Nazi system was based on the principle of Gesetz ist Gesetz (‘law is law’) in which the judge had no ethical discretion not to apply the law as written. That is, the decision to administer Nazi law, notwithstanding its content, could be consistent with the proper exercise of judicial values and conscience, particularly in the German civil law tradition. The second drew on the moral relativity of the actions taken by judges, compared to their inaction or the possible abdication of action by resignation, as evidence of their individual ‘consciousness’ of guilt.

The Tribunal conceded that, as a matter of domestic law, judges were required to comply with the law as written even when it was contrary to international law. However, as both the Tribunal’s jurisdiction and the charges themselves drew from international law, it could not be an effective defence. Similarly, the administration of a domestic legal system could not be effectively placed beyond the reach of individual criminal liability by characterising it as an act of state. Thus, for defendant Ernst Lautz, the Tribunal considered his determination that he was obliged to comply with German law and his ‘resistance’ to Nazi influence except as he believed to be required by that law as matters in mitigation of punishment but not relevant to the question of international guilt.

For others, the Tribunal’s real concern was the quality of the supporting evidence, rather than the argument itself. Günther Joel, for example, was a senior advisor in the Ministry of Justice and liaison officer with the SS (Schutzstaffel). He also submitted that he ‘felt obligated by the existing laws and so complied with them.’ He was convicted because he had, in this role, ‘obtained extensive information and exercised far reaching power in the execution of the law against Jews and Poles,’ therefore taking an active part in the plan for their persecution. Interestingly from this perspective, the Chief of the Legal Division in the German High Command testified that certain extraordinary powers given to the Gestapo and the judiciary with respect to the disappearance of civilians in occupied territories followed in part from Hitler’s frustration that ‘the administration of justice by the armed forces … did not sufficiently support his manner of conducting the war’ to these ends.

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62 Ibid 983, 1010. See also 972–3 on the exclusion in Control Council Law 10 of compliance with national law as a defence to violations of international law.

63 Ibid 1061, adopting verbatim the ruling of the International Military Tribunal that crimes ‘against international law are committed by men, not by abstract entities:’ *Trial of the Major War Criminals* (International Military Tribunal, *Official Documents*, vol 1, 1947), 222–3. See also *Nazi Judges* (n 3) 983, on governmental involvement as an element of the crime against humanity.

64 Ibid 1127.

65 Ibid 1140.

66 Ibid 1141.

67 Ibid 1037–8, citing testimony of Rudolf Lehmann, who was also a defendant in the *High Command* case.
This legal technical analysis neatly avoided discussion of judges’ moral responsibility to judicial institutions in terms of criminal guilt. It was reinforced by the Tribunal’s finding that, as Nazi judges lacked independence and were not administering ‘impartial justice,’ there was ‘no merit in the suggestion’ that they were ‘entitled to the benefit of the Anglo-American doctrine of judicial immunity.’ Subsequent German courts took a different approach, but with the same result, ascribing primary blame to Nazi leaders and convicting judges and Ministry officials as accessories to the crimes of these ‘indirect perpetrators.’ In some cases, defendant jurists were acquitted for lack of evidence that they had ever ‘doubted the validity’ of Nazi regulations. In the Rehse Case, for example, the Bundesgerichtshof held that the Nazi judge was ‘independent under the then-valid law … subject only to law and responsible to his conscience. His duty demanded that he follow only his own conviction of the law.’

The second way in which the Nazi Judges Tribunal dealt with individual conscience related to the cognitive element of crimes against humanity when committed by judges. The Tribunal sought evidence that

the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organised system of injustice and persecution shocking to the moral sense of mankind and that he knew or should have known that he would be subject to punishment if caught.

In the Tribunal’s view, it was not contrary to the principle against retroactivity of criminal law to impose liability for crimes against humanity in this sense because ‘notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the states at war with Germany.’

The Tribunal drew heavily on constructive knowledge based on an individual’s judicial appointment in ascertaining what they ‘should have known’ in this sense, including what they ought to have known to be contrary to international law despite their view that they were bound to apply domestic law. This included the place of the Martens clause in reinforcing legal proscriptions. Lautz, for example, as ‘a lawyer of ability … must have known that the proposed procedure was in violation of international law,’ but ‘if German law were a defense, which it is not, many of his acts would

69 See, eg, the discussion in Müller (n 56) 250–1 of the Augsburg Landgericht trial of Judges Walter Huppenkothen and Otto Thorbeck (15 October 1955). The judges had sentenced the leaders of the 20 July 1944 plot to assassinate Adolf Hitler.
70 Ibid 222. The Karlsruhe Appeal Court concluded in 1964 that Public Prosecutor Fränkel could not be prosecuted in these circumstances.
72 Nazi Judges (n 3) 976–7 (emphasis added).
be excusable.’74 A similar approach was applied generations later by the Iraqi High Tribunal, in determining that Awwad Hamad al-Bandar as-Saadoun, who conducted a 1984 trial against the Dujail villagers said to have attempted to assassinate Saddam Hussein, as a judge and law graduate ‘had qualifications that others among the common people who contribute in the perpetration of a crime may not have.’75

Of all the defendants, the question of conscience was considered at greatest length by the Tribunal in the case of Franz Schlegelberger, a judge of long standing and acting Minister of Justice, who was released from office on his own request in 1942. He submitted to the Tribunal that he had attempted to ameliorate the worst impacts of Nazi laws and therefore was not guilty of participation in its excesses. The Tribunal accepted as ‘true’ the premise of the defence, that the administration of German justice was ‘under persistent assault’ by the functionaries of the Nazi police state, and if they were to take control ‘the last state of the nation would be worse than the first.’76 In Schlegelberger’s case, he argued that ‘if he were to resign, a worse man would take his place,’ a standpoint in which the Tribunal also found ‘much truth’ based on the course of events when Otto Thierack replaced Schlegelberger in 1942.77

The Tribunal described Schlegelberger’s moral defence as ‘plausible,’ but ultimately rejected it as inconsistent with ‘truth, logic, or the circumstances.’78 For example, they found that in 1936 Schlegelberger had supported the policy of sentencing people in accordance with ‘the sound instincts of the people’ even where there was no relevant codified law;79 he had supported anti-Jewish measures, even if not as brutally as others;80 and had himself signed the so-called Night and Fog decree as Acting Minister of Justice, initiating the ‘systematic rule of violence, brutality, outrage, and terror against the civilian population’ of Nazi-occupied territories.81 The Tribunal

74 Ibid 1076, 1128. See also the dismissal of defence submissions for Curt Rothenberger: 1109.
76 Nazi Judges (n 3) 1086.
77 Ibid 1085–6.
78 Ibid 1085.
79 Ibid 1021, with reference to NG-538, Prosecution Exhibit 21.
80 Ibid 1081.
81 Ibid 1037. This decree had originally been signed by Keitel in the German High Command on 7 December 1941, and was reissued under Schlegelberger’s signature on 7 February 1942 to transfer ‘Night and Fog’ operations to the Ministry of Justice. Under the decree, ‘civilians of occupied countries accused of alleged crimes in resistance activities against German occupying forces were spirited away for secret trial by special courts of the Ministry of Justice within the Reich: … the victim’s whereabouts, trial, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorizing the victim’s relatives and associates and barring recourse to evidence, witnesses, or counsel for defense’: at 1030.
also rejected the argument that the conduct of the defendants generally was a lesser wrong than the crimes of the Gestapo and Nazi police, calling it a ‘poor excuse,’ as the ‘prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.’ Thus, the measure of judicial conscience by which the tribunal rejected the defence argument appeared to have been used in fact to reinforce the consciousness of guilt in criminal findings; that is, rather than a defence, it was almost an aggravating aspect of the crime that the acts were committed under colour of judicial authority.

For Schlegelberger, the Tribunal considered his resignation ‘too late’ — ‘We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security.’ They gave weight to his receipt, on release from office, of a large monetary gift from Hitler (von Leeb, as below, would receive a similar gift), indicating that his resignation did not register as a conscientious protest with the Nazi regime. Schlegelberger was convicted of war crimes and crimes against humanity and sentenced to life imprisonment, although he served only three years before release and was, for a time, awarded a full pension.

Where in Schlegelberger’s case the Tribunal appeared open to accepting a defence of individual conscience that would affect the shock to global conscience underpinning a charge of crimes against humanity, their approach to Hermann Cuhorst appeared considerably more closed. In acquitting him for lack of evidence, after records of cases he had tried were lost during the war, the Tribunal commented that certain things can be said in his favor. He was severely criticized for his leniency … He was tried by a Party court for statements considered to reflect upon the Party, which he made in a trial involving Party officials. Subsequently he was relieved as a judge in Stuttgart because he apparently did not conform to what the State and Party demanded of a judge. This Tribunal does not consider itself commissioned to try the conscience of a man or to condemn a man merely for a course of conduct foreign to its own conception of the law.

That is, for Cuhorst, individual conscience did not appear relevant at all, perhaps influenced by the separate and unrelated lack of surviving evidence of his criminal wrongdoing.

These approaches to the problem of reconciling moral collapse, the defence of conscience, and criminal guilt in the Nazi era can be compared with suggestions

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82 Ibid 1085.
83 Ibid 1085–6.
84 Ibid 1082.
86 Nazi Judges (n 3) 1157 (emphasis added).
in the judgment that the Tribunal members allowed some room for conscience and morality in ascertaining their own jurisdiction. The Tribunal remarked that it ‘would have been possible’ to treat Control Council Law 10 ‘as a binding rule regardless of the righteousness of its provisions, but its justification must ultimately depend upon accepted principles of justice and morality’ — in determining punishment for international crimes, the Tribunal felt it should consider ‘the moral principles which underlie the exercise of power.’ Later, however, the Tribunal insisted it was ‘keenly aware of the danger of incorporating in the judgment as law its own moral convictions or even those of the Anglo-American legal world,’ despite their ‘abhorrence’ of certain Nazi laws, refocussing itself on the legal elements of war crimes and crimes against humanity. To that end, the Tribunal did not hold the passage and enforcement of certain legislation, such as restrictions on freedom of speech ‘in the presence of impending disaster,’ as inherently a crime against humanity, although its discriminatory application was so.

The Nazi Judges case is important given its treatment of individual conscience, especially relative to public conscience, but it is equivocal in significant respects. The Tribunal appeared to have left open the possibility of a defence based on individual conscience, as a cause for action as well as inaction, and set the expected standard at a level particular to the values and judgment inherent in judicial office — a form of ‘professional conscience’ as well as individual conscience. The Tribunal gave some indication that they had themselves applied this standard to their judgment, tempering it with the positivist call to laws as clearly written, but without any supporting reference to the Martens clause as normative authority. Importantly, the professional judicial conscience appeared to be employed in fact to reinforce criminal guilt rather than excuse it, as a judicial ‘conscience of injustice,’ reflecting the Tribunal’s moral shock that the ‘dagger of the assassin was concealed beneath the robe of the jurist.’

2 The High Command Case and the Commander’s Conscience

The concept of professional duty informing individual conscience reappeared the very next year in the US Military Tribunal’s consideration of the criminal liability of field commanders of the German forces. They again appeared to allow room for conscience in the assessment of individual guilt, and appeared more willing to accept it on the evidence, although not to the extent of entirely acquitting the major defendants.

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87 Ibid 962.
89 Ibid 1025–6, 1062. See also High Command (n 4), where the Tribunal conceded that cutting off supplies to the besieged civilians of Leningrad was not contrary to international law and therefore did not entail criminal responsibility, much as they ‘might wish the law were otherwise’: at 84.
90 Nazi Judges (n 3) 983–4.
In the *High Command* case, the Tribunal considered that moral opposition from a military commander to an illegal order could be expressed in four forms, by: countermanding it (for which the Tribunal observed that the commander would lack ‘legal status or power’ and it would have been ‘utterly futile’ at the time); resigning, which ‘was not much better,’ probably not available under wartime military regulations and likely to have resulted in ‘the most serious consequences’ for the individual; sabotaging its enforcement, which a commander ‘could do only verbally by personal contacts’ and which would not ‘annul its enforcement;’ or doing nothing. Of these, they gave credence to the third. This very argument had been made by von Leeb, in his closing statement on behalf of all the defendants, that under the dictatorship of Hitler, we found ourselves faced with a development which was in contrast to our principles and nature … In regard to Hitler’s instructions, which went against our humane and soldierly feelings, we were never merely his tools without a will of our own. We did oppose his instructions as far as we deemed this to be possible or advisable, and we have toned their wording down and rendered them ineffective or mitigated them in practice.

Applied in the case of the ‘Commissar Order,’ which directed the execution of Soviet political commissars and others in occupied territories, the Tribunal accepted evidence that von Leeb had only ‘passed on’ the order in an administrative sense, and ‘he had protested against the order in every way short of open and defiant refusal to obey it,’ notwithstanding that his subordinates had ‘permitted’ its enforcement. He was not guilty of the crimes committed as a result.

In comparison, von Leeb was convicted for transmitting an order known as the ‘Barbarossa Jurisdiction Order’ while he was commander of Army Group North, without such opposition. The Tribunal accounted for his conscience-based explanation only in mitigation of sentence. This time, they were satisfied that he

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91 *High Command* (n 4) 74.
92 Ibid 15.
93 Ibid 27. The Tribunal made similar findings in the case of Hans von Salmuth (at 28), but not other defendants. The Tribunal was referring to the ‘Directive for the Treatment of Political Commissars,’ issued by the Führer Headquarters on 6 June 1941. It characterised ‘political Commissars of all types’ as ‘the actual leaders of the resistance’ in occupied Russian territory, directing that they were ‘to be liquidated at once when taken in combat or offering resistance’: at 24.
94 Ibid 94. The Barbarossa Jurisdiction Order was issued by General Keitel on 13 May 1941, titled ‘Decree on Exercising Military Jurisdiction in the Area of Barbarossa and Special Measures by the Troops.’ The Tribunal summarised its effect as having ‘dispensed with court-martial jurisdiction over the civilian population and provided that civilians in the occupied areas would be subjected to arbitrary punishment upon the decision of an officer. The second part provided that there was no obligation to prosecute members of the Wehrmacht or its auxiliaries who committed crimes against enemy civilians except in cases involving discipline which were restricted to certain types of offences’: at 31.
was not a friend or follower of the Nazi Party or its ideology. He was a soldier and engaged in a stupendous campaign with responsibility for hundreds of thousands of soldiers, and a large indigenous population spread over a vast area. It is not without significance that no criminal order has been introduced in evidence which bears his signature or the stamp of his approval.95

As the Nazi Judges Tribunal imposed a high standard of moral duty from the defendants’ role as jurists, the Tribunal in the High Command case appears to have assessed the culpability of the defendants in light of the perceived professional duties and honour of a senior military commander. In the context of the charge of waging aggressive war, for example, the Tribunal observed specifically that the refusal of commanders to implement the Nazi war of aggression ‘would have been the honourable and righteous thing to do … But however much their failure is morally reprimandable,’ they did not consider that field commanders without policy responsibility were then liable in international law for the crime.96 Thus, like the Nazi Judges case, the Tribunal’s acceptance of conscience as relevant was not complete, and their evidentiary doubts with respect to defendants who were part of the Nazi machine, but never targeted by it, leaves the judgments equivocal in key respects.

3 Subsequent Application of the Nuremberg Judgments

The High Command judgment, and with it the same Tribunal’s judgment in the Hostages case,97 in so far as they concern individual conscience, have been subsequently applied by the ICTR. In Bagilishema, the defendant argued that he had remained in his provincial government role during the 1994 Rwandan genocide ‘for the purpose of “serving the people”, not the government; he stayed on “to save human lives”.’98 While allowing that as bourgmestre he had to follow ‘some’ government directives, Bagilishema ‘denied that he would ever implement a policy that went against his conscience’.99 Bagilishema’s evidence was that he had told his superiors ‘he was not prepared to accept sole responsibility for the management of the refugees, and that if the Prefect did not assist him he was “ready to resign”’, and that he had seen to the departure of refugees in his area when informed that attackers were on the way.100

The ICTR specifically turned its mind to the ‘tangent’ question of whether ‘remaining as bourgmestre, with the full knowledge of the interim government’s criminal

95 Ibid 94 (emphasis added).
96 Ibid 69.
97 United States v List et al (Judgement) (United States Military Tribunal, 11 TWC 757, 19 February 1948).
98 Prosecutor v Bagilishema (Judgement with Separate Opinion of Judge Gunawardana and Separate Dissenting Opinion of Judge Güney) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-95-1A-T, 7 June 2001) [132].
99 Ibid.
100 Ibid [135]–[136].
objectives, gives rise to personal liability.' It did not consider the question ‘novel,’ and relied on its interpretation of the High Command and Hostages cases (but not the Nazi Judges case) in finding the need for the ‘intentional commission of a criminal act or the wanton failure to fulfill a legal duty,’ manifested in both knowledge of illegal activities and authority or power over them, to found guilt of an international crime. This, thought the ICTR, could only be determined case by case. For Bagilishema, the ICTR considered at length his argument as to conscience, finding no evidence that he was ‘associated with a criminal “conspiracy” which he positively assisted or from which he declined to extricate himself.’ It did, however, accept on the evidence that he had ‘remained at his post voluntarily’ rather than by moral compulsion; his intention to resign arose from ‘practical rather than principled considerations … It was not the grain of governmental policy that disturbed him, but he felt that his capacity to manage had been exceeded.’ Interestingly, the prosecution led expert evidence that the defendant was a ‘political conformist’ seeking to maintain his own position in supporting the interim government’s policy to counter the conscience-based argument, but the Tribunal rejected this particular argument as one outside the indictment as framed.

These decisions could be explained on the basis that there was to be no moral justification for an act which contributed to a crime against humanity, genocide or a war crime — that is, that conscience could never apply as an excuse — but closer study shows that the issue has been left open. The tribunals considered individual conscience might be, but was in fact generally not, relevant to the establishment of guilt; indeed, the measurement of individual conscience by professional values was used to reinforce the required consciousness of guilt and criminal responsibility, that is, what the defendants ‘should have known’ to be wrong, particularly in the Nazi Judges case. This reflects a conscience-based judgment on the part of the Tribunals themselves, and their difficulty in reconciling their own moral appreciation of the law with positivist interpretation and the contention that a person could at once participate in a crime shocking to the global conscience and yet have a clear individual conscience.

The treatment of alleged Jewish ‘collaborators’ in Israeli law offers an alternative viewpoint in circumstances in which, had the defendant not engaged in the act charged, they would have been at risk regardless because they were a member of the group targeted for persecution.

101 Ibid [142].
102 Ibid [142]–[144].
103 Ibid [144].
104 Ibid [146].
105 Ibid [138].
106 Ibid.
107 Ibid [138]–[141].
Instances of explicit provision for a conscience-based defence, as a negation of guilt, are uncommon in international criminal law. Perhaps the clearest model is set out in an Israeli domestic law instrument, the *Nazi and Nazi Collaborators (Punishment) Law 1950* (Israel), criminalising crimes against humanity, war crimes and, as sui generis, crimes against the Jewish people. Without a mitigating circumstance specified in sections 10 or 11, the penalty on conviction was mandated to be death. The statute was used in 1961 to prosecute Adolf Eichmann and later John Demjanjuk as perpetrators of the Holocaust, though it has been suggested that it was initially envisaged as a means to address the emotive question for Israeli society of collaboration by Jewish people with the Nazis.\(^{108}\) The statute did follow a practice of non-legislative, community-based ‘Courts of Honour’ in the immediate post-war period in Europe, in which members of the Jewish community accused of collaboration in genocide were ‘tried,’ and either ‘sentenced’ to exile from the Jewish community or ‘rehabilitated’ within the group.\(^{109}\)

Use of the law to this end was highly sensitive. Trial records of Jewish people charged under it with having been camp *kapos* — prisoners with a supervisory role over others — were sealed for 70 years following trial, so researchers are unable even to say with confidence how many there were other than an estimate of 30 to 40 prosecutions from 1951 to 1964.\(^{110}\) However, it appears that no members of the Jewish Councils, which were established by the Nazis as governing bodies in many major towns of Eastern Europe, were tried under the law.\(^{111}\)

This involvement of individuals on the one hand as victims, having been Jews in Europe during the Nazi era, and on the other as collaborators in the persecution of their own people, gave greater scope than ordinary international law for conscience-based defences. In fact, the statute provided explicitly that individuals would be acquitted if the charged crime was committed to ‘save himself from the danger of immediate death threatening him and the court is satisfied that he did his best to avert the consequences of the act or the omission,’ or ‘with intent to avert consequences more serious than those which resulted from the act or omission, and actually averted them.’\(^{112}\) This was a true defence, as negation of guilt. In addition, as the kind of mitigation accounted for in Nuremberg and Arusha, punishment following a finding of guilt could be reduced to a minimum of 10 years if ‘the person … did his best to reduce the gravity of the consequences of the offence,’ and ‘the offence was

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110 Bazyler and Scheppach (n 108) 429.

111 Trunk (n 109) 562.

112 *Nazi and Nazi Collaborators (Punishment) Law 1950* (Israel), ss 10(a)–(b).
committed with intent to avert, and was indeed calculated to avert, consequences more serious than those which resulted from the offence.113

A notable case tried under these provisions was the prosecution of Hirsch Berenblatt, who commanded the Jewish police in the Polish ghetto of Bedzin. His case was heard shortly before, but determined after, the Eichmann trial. He was initially convicted under section 5 of the statute, for ‘delivering up a persecuted person to enemy administration’.114 That is, he had, with others, assisted the Nazis in rounding up his townspeople for deportation, including handing over children from the orphanage, and had prevented people potentially identified for deportation to their death from rejoining the groups staying in the ghetto or being sent for labour.115 The trial court relied on the evidence of a single ‘reliable’ witness, sentencing Berenblatt to five years in prison.116

The question of conscience and morality in the commission of crimes against humanity occupied the court both at first instance and on appeal. The trial court rejected the argument advanced by the Jewish Council in Bedzin that some people would be saved by ‘severing the [gangrened] arm.’117 The court considered this kind of argument was not within the intention of the statute but was ‘a paraphrase for the sacrifice of thousands of souls, mostly of old people, children, the ill, and the weak, in order to delay the war of destruction.’118 Neither did the statute justify decisions as to ‘what part of the people was to be considered the gangrened arm,’ the court finding that ‘synonymous with the decision as to who is superior to whom.’119 The court did, however, doubt that ‘the historical and psychological criteria of this case [would always] correspond to the legal criteria of the legislator,’ although they felt bound to apply the intent of the legislation as written as a reflection of the ‘will of the people.’120 Finally, the court found that Berenblatt could have resigned but chose not to for ‘egoistic reasons,’ even though after a time he knew what would happen to those who were deported.121

113 Ibid ss 11(a)–(b).
114 Ibid s 5.
115 Trunk (n 109) 564–5, citing Bet hamishpat hamkhozi, Tel­Aviv­Yafo, tik plili 15/63, psak din. As the original judgment is in Hebrew and various sections have been translated in slightly different terms in different publications, this article identifies the quoted source with the original reference as cited.
117 Trunk (n 109) 564, quoting Bet hamishpat hamkhozi, Tel­Aviv­Yafo, tik plili 15/63, psak din, 9–10 [author trans].
118 Trunk (n 109) 564.
119 Ibid.
120 Ibid.
121 Ibid 567.
Berenblatt appealed successfully to the Israeli Supreme Court in 1964 in reliance on section 10 of the statute. The Court issued separate judgments. Judge Landau, who had sat on Eichmann’s trial the year before, found that those who were not there should not be critical of these ‘puny people’ because they did not rise to a high moral level at a time when they were being persecuted by an authority whose supreme aim was to deprive them of God’s image. We should not interpret the basis of the individual crime, as formulated in the Nazi and Nazi Collaborators (Punishment) Law, by a yardstick of moral behaviour of which only a few were capable. … Everyone cares for himself and his family, and the prohibitions of the criminal law … were not written for heroes, extraordinary individuals, but for simple mortals with their simple weaknesses.122

Unlike the Tribunal members at Nuremberg, Judge Landau’s individual quality of conscience was marked in his observations and, in the circumstances of an individual also faced with persecution, the measure of conscience required was not exacting.

Judge Olshan, the President of the Court, who had sat on Eichmann’s 1962 appeal, agreed that the question of collaboration in these circumstances was ‘a question for history and not for the courts.’123 His Honour considered that section 10 did encompass the possibility that some people might be forcibly delivered up to the Nazis in order to save the majority of others, a conscience-based act not entailing criminal responsibility. However, such determinations could only be case by case, he cautioned, for the argument of ‘avoiding worse consequences’ did not encompass all of the actions of the Bedzin Jewish authorities.124

The distinction in the treatment of individual conscience in Berenblatt’s case and in the Nazi and Nazi Collaborators (Punishment) Law 1950 (Israel) on the one hand, and the Nuremberg and ICTR jurisprudence on the other, is remarkable. Where the latter equivocally conceded the relevance of individual conscience to determining guilt where the crime shocked the public conscience, but generally rejected it on the facts, the former allowed explicit room for conscience-based defences, provided that the basis of the criminal act was both a moral intent to avoid a worse outcome and success in doing so. The difference is in the character of the defendant and the likelihood that, not having involved themselves in any criminal act, they would nonetheless have been among the victims of the broader crime. This is in itself a moral relativity affecting the legal relevance of conscience.


123 Ben-Naftali and Tuval (n 122) 174.

124 Trunk (n 109) 565.
The treatment of conscience in international law is troubled. The public conscience in the much-lauded Martens clause has been reduced to a positivist approach to authority, not just jurisprudentially but increasingly in public discourse, including in the Australian governmental narrative with respect to its military operations. This is at odds with the treatment of individual conscience from an international criminal perspective, itself equivocal. There, individual conscience, while apparently preserved as a potential defence, as a matter of fact has not been given precedence over the ‘public conscience’ (with its attendant difficulties), except in the moral quandary of the victim as perpetrator/collaborator. Moreover, the quality of individual conscience has been measured externally with reference to the qualitatively different professional values of the judiciary and of military command. The effect of this externalisation of moral duty at Nuremberg was to use the individual professional conscience in effect as an element of the public conscience, not as a defence but instead to reinforce criminality by characterising what the defendants ‘should have known,’ on this standard, to be wrong as evidence of their criminal responsibility.

This is a problematic result, because the possibility of the defence of conscience offers to those charged with making the most difficult of decisions reassurance in a principled approach. This would include Adams’ commander receiving an executive direction to commence hostilities which conflicts with the deepest registers of individual conscience. At the same time, it offers the international community the legal scope to demand individual consideration of right and justice in the exercise of lawful powers such as the taking of lives in armed conflict. Subsuming individual conscience into different forms of a collective conscience, and then conflating the source of that public conscience with a positivist approach to law as the ultimate authority (although perhaps the consequence of including conscience in law and thus making it the preserve of lawyers), is both circular and defeating of the safeguards implicit in this ethical code. It is the viable preservation in law of conscience, but with an acknowledged meaning greater than positivist law alone, that could meet Plato’s doubts in the opening epigraph as to the completeness of legal systems.
THE ENDURING LEGACY OF THE MARTENS CLAUSE: RESOLVING THE CONFLICT OF MORALITY IN INTERNATIONAL HUMANITARIAN LAW

Abstract

The true meaning of the Martens Clause has bewildered legal scholars for centuries. There are multiple and competing views as to how the legal effect of this Clause should be correctly defined, each with sufficient credible support in case law, treaty provisions and academic commentary. This article explores three of the most commonly advanced interpretations of the Martens Clause, including the ways in which the Clause is used to nullify *a contrario* arguments, reference to the Clause in aid of judicial interpretation, and finally the perspective that the operative content of the Clause has acquired the status of a peremptory norm of customary international law. Rather than attempting to analyse each position in order to find the one true meaning of the Clause, this article instead takes a holistic view of the history of the Clause in an attempt to understand why it has been so difficult to agree on its meaning definitively. In doing so, specific attention is paid to the intractable moral dilemmas that are brought about during times of armed conflict and, with reference to such extreme circumstances, it is concluded that the ambiguity of this Clause is what allows it to be so useful. There is something subtle and nuanced about the intention of the Martens Clause which has been impossible to distil for over a century, yet it continues to provide a moral safe harbour that we are evidently loath to forego.

I Introduction

There is an inescapable discomfort that exists within international humanitarian law (‘IHL’). On one hand, humanity has shown its insatiable appetite for war and violence throughout the ages. Paradoxically, as we have evolved systems of law to civilise ourselves, these same systems have been required to regulate the inevitable chaos of war. Faced with the knowledge that armed conflict will certainly occur, whereby disgraces upon humanity and dignity will lash and scar the lives of undeserving peoples while leaving a trail of death and destruction in their wake, it
follows that there must be a concerted effort on the part of the international community to develop and apply a system of IHL, so as to quell and pacify belligerents, and to ameliorate human suffering, where possible. Yet on the other hand, such a system of laws necessarily entails the reduction of innocent human life into units of measurement, the kind that can be traded for military advantage and extinguished with relative impunity. Such a system must ascribe positive value to intangibles like pain, grief, destruction, torture and murder if it is to be effective at all. The discomfort, therefore, is in attempting to reconcile this contradiction with our moral conscience.

The Martens Clause is a curious artefact of IHL. Having emerged in history as little more than a cunning ‘diplomatic ploy’, many scholars are quick to dismiss its relevance within the modern context of international law, citing the ulterior motives behind its origin as evidence of an intended lack of positive legal value. Despite this, the Clause has been consistently cited, restated and referred to in treaties, case law, jurisprudence and academic commentary since the Hague Peace Conference of 1899 (‘Hague Conference’). This has led to a prolific, yet convoluted debate as to the true meaning and application of the Clause within contemporary IHL. The many disparate viewpoints cover the full gamut of potential interpretations of the Martens Clause, from merely acting to nullify a contrario arguments, to serving as an aid to judicial interpretation, and even so far as establishing new peremptory norms of international law. However vexed this debate has become, there nonetheless appears to be an alluring quality to the operative content of the Clause, which refers to

the laws of humanity, and the dictates of the public conscience.

What is it about these two seemingly modest concepts that have been so difficult to define? And if they are to be properly treated as mere relics of a bygone era, when IHL was a fledgling and rudderless domain of international law, why then have we been unable to confine them to history and put the debate to rest? It would seem that amidst the endless conjecture, there is something deeply attractive and precious in these words. It is something that stokes our desire to view IHL as a moral creation, and not simply as the rules by which the carnage of war is regulated.

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This article explores the history of the Martens Clause, and then proceeds to assess the various ways in which the Clause has influenced the interpretation and application of IHL. In pursuing the theme of inherent moral conflicts within IHL and the struggle to reconcile them, this article argues that the Martens Clause is to be viewed properly as a serendipitous opportunity — something that was brought about by circumstance, and has since unwittingly infused IHL with a natural, moral character, to the benefit of all that fall beneath its authority.

II HISTORICAL CONTEXT

In the late 19th century the nature of war was changing. The industrial revolution had exponentially improved the capacity of nations to wage war, having delivered an enhanced ability to manufacture weapons more precisely and en masse, together with frightening new weapon systems like exploding bullets and poison gas, which emboldened the devastating consequences of combat. Further, the activation of universal military conscription following the French Revolution also played a role in swelling the ranks of armies, leading to a proliferation of the effects of warfare well beyond that which had been previously experienced. As the brutality of post-industrial armed conflict began to materialise on the battlefield, the international community recognised the need to adapt new systems of law to regulate the effects of these changes.

The Hague Conference was a product of the groundswell movement towards the codification of IHL that was gaining momentum towards the turn of the 20th century, including: the signature of the Lieber Code in 1863; the 1864 Geneva Convention; the 1868 St Petersburg Declaration; the establishment of the Institut de Droit

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7 Ibid 18–19.
11 *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, opened for signature 29 November 1868, (1907) 1(2) *American Journal of International Law* 95 (entered into force 11 December 1868).
International in 1873;\(^\text{12}\) and the failed Brussels Conference of 1874.\(^\text{13}\) At the Hague Conference, the second sub-commission, chaired by one Friedrich Martens, was tasked to

revise the declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels, which has remained unratified to the present day.\(^\text{14}\)

Of relevance were the ensuing negotiations that would attempt to address the question of how to deal with the status of the so-called *Francs-Tireurs*\(^\text{15}\) — what would today be regarded as civilians taking ‘direct part in hostilities’. During the course of the Franco-Prussian War, the *Francs-Tireurs* wreaked devastation over the Prussian forces by exploiting their ability to conduct military operations under the guise (and protection) of civilian status.\(^\text{16}\) The greater state powers at the conference, such as the Russian and German Empires, considered the conduct of the *Francs-Tireurs* to be disingenuous and undeserving of any protected status.\(^\text{17}\) Surreptitiously, they held the *Francs-Tireurs* in great contempt for their ability to frustrate their military campaigns, and accordingly preferred to retain unfettered rights to deal with them harshly through lengthy prison sentences and executions upon capture.\(^\text{18}\) The voice of the lesser state powers was led by the Belgian delegate Auguste Beernaert, who advanced a contrary argument that demanded it was a fundamental right, if not a patriotic responsibility, of all inhabitants of a country to resist the invasion of an enemy.\(^\text{19}\) Accordingly, he was resolute in demanding the recognition of some form of protected status for these forces in the face of great pressure.

This impasse between the greater and lesser powers produced a diplomatic deadlock — the kind that Martens feared might fundamentally jeopardise the success of the Conference.\(^\text{20}\) If the Conference was to fail, in addition to casting aspersions on the reputation of Tsar Nicholas II (convenor of the Conference and Martens’ direct


\(^{13}\) Project of an International Declaration Concerning the Laws and Customs of War, opened for signature 27 July 1874, (1907) 1(2) American Journal of International Law 96 (entered into force 27 August 1874).


\(^{18}\) Kahn (n 6) 21.

\(^{19}\) Ibid 23; Cassese (n 2) 194.

\(^{20}\) Cassese (n 2) 196.
superior), Martens also feared that armies would thereafter consider themselves to be unconstrained by IHL.

In reference to the impending failure of the Conference, Martens warned the delegation that

[t]wice, in 1874 and in 1899, two great international conferences have gathered together the most competent and eminent men of the civilised world on the subject. They have not succeeded in determining the laws and customs of war. They have separated, leaving utter vagueness for all these questions. These eminent men, in discussing these questions of the occupation and the rights and duties of invaded territories, have found no other solution than to leave everything in a state of vagueness and in the domain of the law of nations! How can we, the commanders in chief of the armies, who are in the heat of action, find time to settle these controversies, when they have been powerless to do so in time of peace, amid worldwide absolute calm and when the governments had met for the purpose of laying down solid bases for a common life of peace and concord? Under these circumstances, it would be impossible to deny to belligerents an unlimited right to interpret the laws of war to suit their fancy and convenience.

Thus, in order to give some ground to the Francs-Tireurs, while stopping well short of a protective regime that would have been unpalatable to the greater state powers, the infamous Martens Clause was proposed. In its original form, it reads as follows:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

While it was evident to the lesser powers that the Clause merely contemplated a potential argument that the Francs-Tireurs were lawful combatants, their leverage was very slight, and with the fate of the entire conference riding on their accession, a compromise was reached and the Clause was adopted.

This combination of circumstances that produced the Martens Clause is often relied upon to subvert its legal rigour. Academics are quick to point to the fact that Martens — himself a man evidently willing to extol his own virtues — never celebrated the Clause as a personal humanitarian triumph in the wake of the Hague

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21 Ibid.


24 Ibid 208 (emphasis added).
Conference. Consequently, it is argued by inference that the Clause operates merely as a ‘stopgap measure fully determined by its original historical context’. This view however fails to account for the scope, variety and authority of subsequent matters that have since invoked the Clause as something a great deal more significant.

Consequently, the question remains — how should one properly construe the legacy of the Martens Clause in IHL?

III ARGUMENTUM A CONTRARIO

Notwithstanding the evident political gamesmanship that inspired the drafting and ratification of the Martens Clause, its substance does align with more pure motives as well. Delegates to the Hague Conference were cognisant of the generality of the clauses they adopted, and readily conceded the fact that it would be impossible to ‘concert regulations covering all the circumstances which arise in practice’. This necessarily resulted in significant gaps within the regulations as they applied to state practice, which some states have subsequently sought to rely upon as constituting an ‘implicit legal authorisation’ of conduct that would otherwise be in direct contravention of the object and spirit of the regulations. Such exploitation of these legal vacuums is best encapsulated by a strictly positivist interpretation of the Lotus principle — namely that ‘when it is unclear whether rules of international law apply to a situation, it is presumed that there are no rules and that States are free to act’. However, the intention of the delegates to the Hague Conference was expressly that unforeseen cases should not, in the absence of written undertaking, be left to the arbitrary judgement of military commanders.

Thus, on one rather popular (albeit narrow) reading of the Martens Clause, it functions in a residual capacity to nullify an argumentum a contrario, or an ‘argument to the contrary’. Viewed through this lens, the Clause lies dormant until such time as state actors seek to exploit a gap in the law so as to legitimise conduct that would be abhorrent to standards of humanity and public conscience. In such a scenario, the Martens Clause would operate to remind states that even in the absence of regulation,
there exist fundamental duties of international law from which no derogation is permitted, and which can lead to criminal sanction if breached.32

While this interpretation stops well short of elevating the content of the Martens Clause to that of an independent legal norm, it does inject an elastic quality to the law of armed conflict, by establishing a legal foundation for IHL to expand and absorb issues well beyond the scope that was foreseeable throughout the 20th century. This was explicitly recognised by the International Court of Justice (‘ICJ’) in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (‘Nuclear Weapons Advisory Opinion’):

The Court would likewise refer, in relation to these principles, to the Martens Clause … which has proved to be an effective means of addressing the rapid evolution of military technology.33

And further:

[T]he Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted.34

This is evidence of the continued relevance of the Clause in the modern context of IHL, where this particular function may become increasingly relevant in the near future. In much the same way that the industrial revolution exponentially accelerated the rate of military advancement towards the close of the 19th century, and thus galvanised the international community to take action to regulate the shifting landscape, we are again faced with a similar dilemma today. With the rise of artificial intelligence, machine learning, autonomous weapons systems and cyber warfare,35 humanity is wading into an era of military technology that was entirely unimaginable to the founders of IHL. These new forms of technology develop much faster than the law,36 and may in fact pose an existential threat to entire states, if not to all of humanity. In this context, the Martens Clause can be relied upon to charge those standards of ‘humanity’ and ‘public conscience’ with authoritative legal weight, and consequently constrain these advances in military technology.37 Within this context of unprecedented technological advancement, the utility of the Martens Clause enables us to circumvent the correspondingly slow and ineffectual process of legal reform that would leave humanity exposed to the gravest of consequences. It does so

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32 Salter (n 4) 409.
33 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 257 (‘Nuclear Weapons Advisory Opinion’).
34 Ibid 260.
36 Ticelhurst (n 3) 142.
by allowing recourse to an existing interpretive device, the limitations of which are bound only by our conceptions of humanity and morality.

Notwithstanding the operation of the Martens Clause outlined above, there remains significant evidence to suggest that the Clause represents more than simply a residual device that applies solely to plug gaps in the law. To end the enquiry at this point would be negligently premature.

Two broader interpretations of the Clause will be discussed at length below, namely: its use as an aid to judicial interpretation; and the argument that the ‘laws of humanity’ and the ‘public conscience’ have been elevated to the status of *jus cogens*, or peremptory norms of customary international law.

### IV AID TO JUDICIAL INTERPRETATION

The Martens Clause begins to meaningfully impact the course of IHL when it is applied beyond gaps in treaty or custom, and is empowered to bring its influence to bear on questions of judicial interpretation and construction. On this view, when faced with the need to resolve ambiguities in the law produced by two or more conflicting interpretations, ‘the [C]lause authorises judges to select that interpretation of fact and law which best gives effect to the standards endorsed by this measure’.38

In vesting the Martens Clause with the ability to directly influence the interpretation and application of the concrete provisions of IHL, the ‘standards of humanity’ and ‘public conscience’ become defining factors of its development.

In order to correctly assess how these standards influence judicial interpretation, it becomes necessary to explore their definitions in greater depth. On the standards of ‘humanity’, Jean Pictet expounded his views in the following quote:

> [C]apture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible.39

This perspective beautifully encapsulates the harrowing moral conflict of IHL, and by deference to the standards of humanity, succeeds in framing the conduct of warfare as a regrettable yet necessary truth that should be permitted only so far as is absolutely necessary to achieve a precise military objective — and not an inch further. Implicit in Pictet’s words are recognitions of the humanity of the enemy, of

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38 Salter (n 4) 413.

the intractable moral dilemma of war, of the injustice ascribed to the soldiers who are imperilled on the battlefield, and of the urgent need for some moral infusion to find its way into the interpretive framework.

As for ‘public conscience’, this standard appears to imbue IHL with a democratic quality, whereby the collective voice of the public could be theoretically sufficient to sway judicial interpretation in a direction that accords with public opinion.40

Thus, if the true essence of the Martens Clause is that of an aid to judicial interpretation, whereby in cases of ambiguity, IHL ‘should be construed in a manner consonant with standards of humanity and the demands of public conscience’,41 then judges have at their disposal these concepts of natural law to inform the progressive evolution of positivist doctrines. In this sense, the Clause has been described as ‘a translator of moral imperatives into concrete legal outcomes’,42 and has enabled judges to import such moral imperatives into their decision making without the need to jeopardise their independence or integrity.

This stance has found strong support in the relevant case law. At Nuremberg, the Military Tribunal was forthcoming about its interpretive approach that favoured principles of humanity and moral standards over approaches that ran counter to such principles.43 In the the case of KW,44 the Conseil de guerre de Bruxelles was guided by the Universal Declaration of Human Rights45 to attribute definitive standards of conduct to the principles of humanity, which enabled an interpretation of the facts as amounting to a violation of the customs of war. In the case of Kupreškić,46 the

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41 Cassese (n 2) 187.
42 Salter (n 4) 437.
46 Prosecutor v Kupreškić (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case IT-No 95-16-T, 14 January 2000) (‘Kupreškić’).
Martens Clause was invoked first and foremost as an aid to judicial interpretation. As stated by Judge Cassese:

> [T]his Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates.\(^{47}\)

Endorsements of this magnitude are demonstrative of the perceived value of the Clause. By virtue of its application as an aid to judicial interpretation, the Martens Clause has succeeded in establishing a baseline of moral accountability in circumstances of armed conflict.

However, this approach does not provide for instances in which there is no existing rule to be interpreted, thereby rendering the Martens Clause essentially ‘parasitic upon a pre-existing and clearly pertinent rule’.\(^{48}\) Additionally, the option to invoke the Clause ultimately lies with the judge, and there is no requirement that they exercise that discretion.\(^{49}\) This subjects the idealistic vision of the Clause to the political leanings of individual judges, and is thus left on shaky ground. As such, the final perspective to be analysed is also the most radical, and would impute to the Clause the most concrete of assurances — namely, its elevation to the status of *jus cogens*.

**V Jus Cogens**

The basic argument for ascribing the status of *jus cogens* to the Martens Clause is that, throughout its storied history since 1899,\(^{50}\) the ‘laws of humanity’ and the ‘dictates of public conscience’ have acquired the same normative value as that of *usus*, or state practice\(^{51}\) (referred to in the Clause as ‘the usages established between civilised nations’).\(^{52}\) Certain courts have gone so far as to equate these principles with the legal yardstick applied to circumstances not otherwise covered by specific regulations\(^{53}\) —

\(^{47}\) Ibid [525].
\(^{48}\) Salter (n 4) 419 (emphasis omitted).
\(^{49}\) Ibid 420.
\(^{50}\) Ibid 405.
\(^{51}\) Cassese (n 2) 214.
\(^{53}\) *United States of America v Krupp (Opinion and Judgment)* (Nuremberg Military Tribunal Under Control Council Law No 10, Military Tribunal IIIA, Case No 10, 31 July 1948) IX Trials of War Criminals Before the Nuremberg Military Tribunals 1327 (‘Krupp’).
a view that has greatly strengthened the argument for peremptory status among various commentators.54

This stance comes under fire however when assessed against the standard process for the creation of norms of customary international law, which historically requires that two elements be present. First, the objective element of state practice, and second the subjective element, being the belief on the part of a state that its practice was carried out in adherence to a legal obligation, referred to as opinio juris.55 In the context of the amorphous words of the Martens Clause, evidence of usus is commonly absent, leading to condemnation from positivist commentators of apparent disobedience to these criteria in the process of creating peremptory norms.56

However, one might argue that to require evidence of usus as a prerequisite to give effect to the humanitarian objects of the Clause at law would be equivalent to mounting a legal intervention ‘only after thousands of civilians have been killed contrary to imperative humanitarian demands’.57 This perverse scenario was well captured by the dissenting Judge Shahabuddeen in the Nuclear Weapons Advisory Opinion:

If state practices are regulated decisively only by norms derived from such practices themselves, then in effect the status quo becomes its own criteria for justification.58

Thus in the specific context of the Martens Clause, jurists have been willing to concede that the customary process can rely upon the demands of humanity or the dictates of public conscience to support the emergence of new peremptory norms, ‘even where state practice is scant or inconsistent’.59 In these circumstances, opinio juris is regarded as ‘the decisive element heralding the emergence of a general rule or principle of humanitarian law’,60 while the requirements for usus are correspondingly loosened.61

56 Salter (n 4) 436.
57 Cassese (n 2) 215.
58 Nuclear Weapons Advisory Opinion (n 33) 406.
59 Kupreškić (n 46) [527].
60 Ibid.
61 Cassese (n 2) 214.
This evolution of customary international law to accommodate an expansive interpretation of the Martens Clause betrays a deep commitment to the sentiments it contains. The trend towards the humanisation of armed conflict appears to be borne of a sincere appetite amongst international law jurists to expand humanitarian protections, with the Martens Clause providing a coherent and legally defensible pathway towards their expansion. For example, courts and tribunals were willing to invoke the Martens Clause in a number of cases following World War II in order to block the defence of retrospective criminalisation, essentially laying a foundation for criminal breaches prior to the subsequent enactment of the provisions relevant to the conduct. By a deductive assessment, the Martens Clause appears to have been the only normative device capable of attributing culpability, and thus should be seen to have ‘acquired the status of [an] independent norm whose violation constitutes an international crime’.

However useful the Clause may have been to ensure that justice could be done in these cases, where war criminals may otherwise have escaped punishment, the question remains as to the ongoing normative relevance of the Clause in the contemporary context — these legal loopholes having since been closed. Absent more recent examples of the Clause being invoked in this manner, one may speculate as to whether peremptory status was ascribed merely as a desperate means of avoiding unthinkable injustices during an extreme chapter of human history. Would it be fair then to say that the normative status of the Martens Clause persists today, though it holds no operational relevance? And how long will it be before humanity again needs to rely upon its content for the normative authority to avert a moral disaster? As humanity continues to flirt with this myriad of hypotheticals, it might be said that we are never more than a breath away from dependence on the safe harbour of the Clause. Would it not therefore be preferable to know whether they will in fact constitute peremptory norms when the time comes?

VI Conclusion

The impact of the Martens Clause in IHL is a complicated topic and does not lend itself easily to any obvious conclusions. There are multiple and competing views, some of which can coexist, and others which are mutually exclusive. Rather than selecting one of these options and arguing in its favour, I instead contend that this debate represents a dialectic enquiry into the merits of positive and natural law,

62 Kupreškić (n 46) [529].
63 See, eg, Krupp (n 53); Trial of Hans Albin Rauter (Judgment) (Netherlands Special Court in ‘S-Gravenhage [The Hague], Case No 88, 4 May 1948) XIV Law Reports of Trials of War Criminals 89; KW (n 44); Public Prosecutor v Klinge (Judgment) (Supreme Court of Norway, 27 February 1946) 13 Annual Digest and Reports of Public International Law Cases 262.
and their proper places within the developmental framework of the laws of armed conflict.\cite{65}

In most other areas of international law, it is uncontroversial to advance a strictly positivist position. The black letter of the law is definitive, distinct and unambiguous. This gives effect to legal certainty, and is accordingly inflexible to moralistic and natural law concepts.\cite{66} In cases where the zeitgeist outgrows a particular legal position, the meandering pace of reform is merely inconvenient. In other words, \textit{it is not life or death.}

The laws of armed conflict are different. They regulate the means by which people are killed, property is destroyed, and the geopolitical landscape is altered. Here we are dealing with the most numinous and sacrosanct elements of the human experience, the seriousness of which demand the utmost scrutiny and attention. It must always be remembered that when a human life is reduced to a unit of measurement, we are not measuring in inches but rather in miles. Where there are defects, loopholes and technicalities in the black letter of the law, irrevocable damage is inflicted upon people for which no atonement is ever possible. When the law lags behind, where are we to seek refuge before the necessary changes are made? How much injustice can we live with, or will we accept, while the interval plays out? And what should we say to those — the faceless victims owed to the inflexible tenets of positivism — who succumb to the powerlessness of their position? When we truly confront the gravity of these questions, it becomes obvious that natural law must have a place in IHL.

Writers such as Kennedy have observed that

\begin{quote}
[a]bsolute rules lead us to imagine we know what violence is just, what unjust, always and for everyone. But justice is not like that — it must be imagined, built by people, struggled for, redefined, in each conflict in new ways. Justice requires leadership — on the battlefield and off.\cite{67}
\end{quote}

Indeed there is a long line of academic critique on the triumph of the law in dealing with armed conflict and what may be missed in its reduction of bloodshed on the battlefield to procedural rules.\cite{68} It is here, resident within the law, that the Martens Clause offers a glimpse of the type of moral jeopardy that should be embraced in decision-making under the law in a time of armed conflict.

\begin{footnotes}
\footnote{65 Ticehurst (n 3) 140–1.}
\footnote{66 Salter (n 4) 410.}
\footnote{67 David Kennedy, \textit{Of War and Law} (Princeton University Press, 2006) 104.}
\end{footnotes}
The Martens Clause drew its first breath as little more than a diplomatic ploy, forced upon weak states by Russia and Germany in order to save the Hague Conference, and in many ways this culture of domination has continued ever since. As stronger states have driven the philosophical evolution of IHL to be primarily positivist, it follows that through the selective ratification of treaties and consent to emerging customary norms, the greatest military powers can ‘control the content of the laws of armed conflict’, much to the detriment of those beneath them.

Accordingly, the greatest achievement of the Martens Clause in IHL has been simply to provide a positivist basis for the incorporation of natural law concepts. This clause may be one of the most contentious features of the law of armed conflict, constantly subject to competing interpretations and characterised with regard to its dubious history. It may never be possible to reach a consensus and distil the true meaning of the Clause. Perhaps no such precise definition exists. But if nothing else, regardless of power, status or political leanings, it has succeeded in making two things impossible to ignore — the laws of humanity and the dictates of public conscience.

If we can agree that these principles are important and should not be overlooked, then the legacy of the Martens Clause has been to ensure that they are afforded the respect they deserve. Consequently, I argue that the Martens Clause is best understood as a gift from the ‘wiles of reason’, which is said to ‘use individuals as mere tools to build the most significant edifices of history’. Martens likely never considered the importance of his work during the Hague Conference, yet more than a century later we are discussing it with the sincere belief that it has impacted the course of history in a significant and positive manner. Thus, it is not what was meant by the Clause that counts, but rather what it has meant to us in previous years.

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69 Cassese (n 2) 197.
70 Ticehurst (n 3) 142.
REFLECTIONS ON THE RELATIONSHIP BETWEEN LAW AND ETHICS

I Introduction

Law and ethics share important characteristics. They are both normative—that is, they specify how things ought to be. They both provide rules and principles that are intended to guide action. In the military context, they set the boundaries of acceptable and unacceptable action. Law involves reasoning with reference to general principles and by analogy to prior judgments regarding the legality of particular acts. So do many schools of ethical theory, most notably Kantian/deontological and utilitarian schools of thought. But, of course, law differs from ethics in one obvious respect: it is enforceable using well-understood procedures, while ethics is not, unless it becomes codified as law as well.

Nevertheless, law and ethics are so similar that, perhaps inevitably, many military members tend to think that ethics can be completely reduced to legal questions. When I first arrived as the professor of ethics at the United States Army War College, a crusty old Judge Advocate General (‘JAG’) from the Vietnam era said ‘why do we need you? I write rules of engagement. What else does the Army need?’

At least in the US military, recent decades have witnessed a proliferation of JAGs (military lawyers) at all levels of the organisation, including embedded JAGs with special knowledge of operational law at the level of operational military planning. Since part of the function of JAGs at that level is to assist commanders in formulating rules of engagement for their specific tactical and operational context, one might reasonably assume that operational law is the de facto exclusive normative guide for military operations.

The conflation of law and ethics is further reinforced, at least in the US military, by the fact that all Department of Defense employees, civilian and military, receive an annual ‘ethics brief’. This brief is presented by the JAGs, and concerns rules regarding things like receiving gifts, proper use of government rental cars and credit cards, and booking hotels and transportation in accordance with the Joint Ethics Regulation.

* Admiral Stockdale Professor of Professional Military Ethics (Emeritus), United States Naval War College, Newport, Rhode Island. Although this article is being published in an Australian journal, it draws almost entirely on the author’s own experience of almost twenty years working closely with the military forces of the United States. I leave it to my Australian readers to determine to what degree US examples have equivalents and parallels in the Australian context.
So in both the operational military context, and in the day to day business of a Department of Defense employee, one is continually being reminded to conduct oneself in conformity with those relevant bodies of law. Little wonder, therefore, that many think that ethics can be reduced wholly to legal guidance.

This paper will attempt to demonstrate that in both the operational military context (or Law of Armed Conflict (‘LOAC’)) and in conduct by military members and units, there are important issues and questions of ethics that are not reducible to legal questions.

II LAW OF ARMED CONFLICT AND THE INTERNATIONAL ORDER

LOAC is a body of law governing military operations. It derives from a wide number of sources — treaty law such as the Hague and Geneva Conventions, customary international law, and law manuals promulgated by national militaries. Of course, national military manuals may differ on some points insofar as they reflect unique national understandings of the shared body of international law. Law provides the normative structure which operational law experts use as the basis for advising commanders regarding lawful and unlawful military operations. Because military lawyers are ready at hand to military commanders, it is inevitable that they are the first recourse for normative guidance regarding military operations.

Granting all that, however, does not entail the reducibility of ethics to law. For one thing, the tradition of just war in the Western intellectual tradition goes back thousands of years before even a portion of it was codified as law. Consequently, there are aspects and elements of the ethical tradition that were never captured in that legal codification.

For another, as technology, international relations and operational concepts change and evolve, the law requires time and formal processes to gel in ways that fully accommodate those changes. Most obviously, this is the case when new formal international agreements and treaties are required to address those changing circumstances. But even if the processes are less formal, any emerging consensus regarding what the law permits and prohibits will require time and some mechanism for reaching that consensus. An excellent contemporary example of that process is the Tallinn Manual’s proposed norms in cyberwar. At present, of course, the Tallinn Manual is only the product of discussion among a segment of international lawyers (about 20 in number) from NATO countries. As a consequence, the norms it articulates are at best an initial attempt to state some agreed norms. Whether those norms will, indeed, emerge as something like customary international law — let alone eventual treaty law — will take considerable time and effort to determine.

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Consequently, one might suggest that international law at any given moment is metaphorically a ‘stop motion’ photograph of an older, deeper and ever-fluid ethical tradition. Indeed, when attempts must be made to expand the law to cope with novel circumstances, to what can we turn for guidance? Obviously we may turn to the existing principles of LOAC, which can be extended by analogy and derivation to deal with the new. But since those principles themselves emerge from the millennia-old just war tradition, it may be helpful to bring to that discussion a deeper historical grasp of the origins and sources of that older philosophical and theological ethical tradition.

Another limitation of the law is, of course, that it specifies only a lower limit to the permissible. A moment’s reflection makes it apparent that it is often important and necessary to observe in a specific case that, ‘yes, that would be legal. But is it ethically the best course of action?’ Indeed, it is an understandable tendency for military personnel to prefer the straightforward and unambiguous answer even to a complex question. Encouragement of the reduction of complex ethical issues to questions of black letter law may militate against the development of appropriate ethical sensitivity and moral reasoning skills in our military personnel. Obviously, if immediate and decisive action is required, one would be reluctant to encourage dangerous hesitation. But when confronted with an ethically complex situation, we would be remiss to fail to do what we can to give personnel independent ethical reasoning skills and resources and to discourage outsourcing such reasoning to their JAGs.

Another example where we need to think long and hard about the limits of law to solve all of our questions is the contemporary heated debate about lethal autonomous weapons systems. Clearly, at first blush the central ethical and legal issues concern the principles of discrimination/distinction and proportionality. Indeed, viewing the question solely through the legal lens generates an argument that, if lethal autonomous weapons can satisfy those requirements to a degree at least equal to those of human beings, there is really no further issue to discuss. That may in the end be the right answer. But it is important to note that many voices in the debate feel strongly that there is something fundamentally ethically wrong with allowing machines to kill human beings without a human being bearing direct ethical responsibility for the act and meaningfully participating in the decision. The reasons given for that intuition are indeed various, and those who see the issue entirely in terms of discrimination and proportionality as a full and adequate framework may be inclined to dismiss

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such hesitations as irrational or emotional. Perhaps they are. But whether they are is not a question to be settled only by citing a narrow conception of law. It is, indeed, a philosophical and ethical question that asks precisely whether the legal framework is a full and sufficient framework for assessing the issue.5

III The Historical and Cultural Location of Law of Armed Conflict

In addition to all I have said so far, there is a deeper cultural and historical question to raise about the adequacy of the LOAC tradition to deal with future challenges. That has to do with the ‘stop motion’ framework not only of LOAC, but of the entire international system that gave rise to it; of the international institutions that are its custodians, and indeed of the future of global cooperation and governance.

Although we often think that the international system of sovereign states, international treaties such as the Hague and Geneva Conventions and the system of international organisations such as the United Nations and the International Criminal Court are global and universal, a little historical reflection will give us pause regarding those assumptions.

We begin with the most important example: the Westphalian state system. It is, of course, a human creation from a particular point in time in response to a local (from a global perspective) set of challenges. Specifically, it was an attempt to put an end to the Post-Reformation wars of religion in Europe as each of the major Christian groups of Europe attempted by force of arms to restore a unitary Christendom. The fact of those wars, indeed, proves that the ‘solution’ of Westphalia was perceived as sub-optimal. The ideal was restoration of a unitary Christendom — an idea as old as Constantine’s aspiration to ‘one god, one church, one emperor’.6 Only the realisation that none of the players were strong enough to bring about that restoration caused the powers of Europe to accept the permanent religious division of Europe into sovereign states with territorial integrity. That compromise, it was hoped, would bring peace to Europe (in vain as it turned out).

Some reflection on deeper human history will reveal how historically abnormal this European ‘solution’ was. As we have already seen, for most of Christian history, the ideal was a unified Christendom.7 For the Islamic world, it was an ever-expanding

5 It is important to note that even legal voices who question the legality of lethal autonomous weapons systems can be found. But my point here is that there is also a meta-legal discussion going on regarding the question.
For China, it was China as the Middle Kingdom, governed under the Mandate of Heaven, receiving respect and tribute from rightfully subordinate states in deference to its superior status.

After Westphalia, as Europe created colonial empires and rose in global dominance, it ‘stamped’ the semblance of the Westphalian state system around the globe. As the colonial empires retreated, they left in their wake nominal Westphalian states with borders, capitals and central governments. In many of the conflicts ongoing throughout the world, of course, the artificiality and imposed nature of those borders and states continues to feed strife, conflict, and civil war.

Needless to say, later international legal and institutional structures built on the Westphalian foundation and attempting to further restrain conflict are equally products of the parochial issues of the West. The Hague and Geneva Conventions are attempts to restrain the violence of European wars. The League of Nations and the United Nations, while ostensibly universal, clearly arose from the attempts of the West to end major war after the World Wars.

One can make the legalistic case that these legal and institutional structures are universal in the sense that almost all nations have signed the relevant treaties, joined the organisation, and ‘on paper’ pledged commitment to their founding ideals. Still, as I indicated above, the historical and cultural reality is that the roots for those ideals, institutions and legal frameworks are, in many nations and cultures, shallow or non-existent. Now, as the global dominance of the West continues to erode, there is good historical reason to suspect that other competing cultural traditions may reassert themselves to challenge or undermine what seemed to be a pretty well-established Post-World War II set of international norms.

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8 See, eg, John Kelsey, Arguing the Just War in Islam (Harvard University Press, 2007); James Turner Johnson, The Holy War Idea in Western and Islamic Traditions (Penn State University Press, 1997).


Indeed, we can see precisely such challenges evolving as we speak. The very idea that a European state would be invaded and its territory annexed to another state seemed unthinkable a decade ago — yet that is precisely what Russia has done to Crimea and Eastern Ukraine. The idea that a signatory state to the Law of the Sea Convention would flagrantly violate the terms of the Convention by building submerged rocks up by dredging, placing military equipment and structures, and claiming national territorial waters based on features that, in their natural state, are underwater at high tide, would have seemed unimaginable. Yet of course, this is precisely what China has done, and continues to do, as this is being written.

In both the Russian and Chinese cases, there is a sense in which they see themselves as restoring their appropriate place in the world order — places lost during periods of historic weakness which, now that their power is resurgent, they are positioned to restore.

Added to these trends, of course, is the retreat of the US and other core members of the Post-World War II community that created those institutions from many of the institutions and structures of international cooperation.

The recently published book *The Internationalists: How a Radical Plan to Outlaw War Remade the World* provides a very useful and stimulating arc of these historical trends. Contrary to many scholars in international relations, they argue that in fact the 1928 Kellogg-Briand Pact, which made aggressive war illegal, did indeed modify the behaviour of states more fundamentally than is generally believed. In particular, they argue that it fundamentally shifted the international order from one in which acquisition of territory by conquest was not only common but legal, to one in which conquest was no longer legal, acceptable or, more interestingly, successful.

But the book ends on the sombre note that this order may have been a period piece, now showing signs of erosion both by the behaviour of states such as China and Russia, described above, but also by the loss of leadership and energy to sustain the international institutions that shored up that structure.

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13 See *The Republic of the Philippines v The People’s Republic of China (Award)* (Permanent Court of Arbitration, Case No 2013-19, 12 July 2016).


16 Ibid 329–35.

The implication of these trends is that the system of law, LOAC, and the international order, the stability of which we have assumed, may now be fundamentally contested in ways it has not been for centuries. If that is correct, then the global dialogue about what replaces that order will in some senses have to start over. We may well have to engage in a far more complex and cross-cultural ethical dialogue if we are to establish a commonly agreed international order to succeed the one we have taken for granted for so long. It will probably no longer be possible to assume that the ethical, historical, and religious traditions that framed the formation of the Westphalian system and all the subsequent additions and supplementations to it are universal.

IV Law, Ethics and Military Training and Organisational Behaviour

We turn now from the international system and LOAC to questions of the guidance and regulation of the behaviour of military personnel and military organisations. Most Western militaries devote a good deal of time to speaking of ethics, attempting to inculcate values, and generating laws, policies and regulations intended to ensure proper behaviour of military individuals and organisations. Despite those efforts, however, examples of ethical failure within those organisations occur with depressing regularity. Furthermore, often the failures are those of relatively senior members of the profession — precisely those who, if all the rhetoric and education were effective, would presumably be as thoroughly trained and educated on the standards as one could hope. To cite only one example, the massive scandals the US Navy is now experiencing with the ‘Fat Leonard’ cases in Pacific Command were actions mostly committed by relatively senior officers. How do we explain such failures and, more importantly, is there anything to be learned about how to minimise the probability of future failures?

Possible explanations are the following. First, there are always a few ‘bad apples’ in any organisation, and these individuals were bad apples all along who finally got caught. Second, there is a widespread and systematic deterioration of ethical standards in the military — or perhaps in society at large. Third, behaviours that were in earlier times tolerated (or even encouraged) no longer are, perhaps due to increased media scrutiny, social media, and so on. But the fourth possibility is the

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19 As an aside, there is certainly some truth in this claim. If one listens to stories of acceptable behaviour decades ago in most military services, it is absolutely true that behaviours unthinkable today were indeed routine. Usually when an individual makes this observation, it is almost an appeal to how unfair this is. But in fact, it seems to me the right response is ‘true, but irrelevant. The standards have in fact changed!’
most intriguing — that individuals who have been ethically ‘squared away’ for years or even decades rise to ranks and positions where they then lose their way or are put in unfamiliar environments where their moral armour fails.

Years of observation and reflection have led me to believe that the assumptions that guide ethical education and training in the military are only partially true and that the elements not considered have strong effects that go a long way toward explaining ethical failure. If that is correct, then supplementing standard military education with neglected elements may help us to improve our thinking in ways that go further in the direction of preventing ethical lapses.

V The Limits of ‘Character’ and ‘Integrity’

If one listens to military people talk about ethics, one quickly notes that their favourite words are ‘character’, ‘integrity’, and ‘professional’. Further, the way they talk about those terms suggests that they provide a full and sufficient defence against ethical failure — that, for example, if one has integrity they can be counted on to act properly under all circumstances.

If one examines the philosophical root of these ways of speaking, it quickly becomes apparent that, whether the speaker knows it or not, they are presuming a broadly Aristotelian framework. Aristotle taught that we come into the world as a bundle of capacities, and that some of these capacities are developed through repetitive practice into habits — ideally, good habits (but potentially bad ones as well). Once those good habits are formed, that way of performing the activity becomes ‘second nature’ and the subject performs those activities spontaneously, unreflectively and with accompanying pleasure. It becomes, to use the athletic term, ‘muscle memory’.

Much of military training is based on precisely these assumptions and, for training skills such as dismantling and reassembling a rifle, it works quite well. Similarly, there are military virtues such as courage which are essential if military personnel are to function effectively in highly dangerous situations. Military training deliberately ratchets up danger over the course of training to instil the virtue of courage through the formation of habit.

Things can be somewhat misleading, over-optimistic and dangerous in setting individuals up for moral failure when the ‘character assumption’ is uncritically applied to ethical behaviour. It can create the belief in both individuals and in military organisations that because individuals have been properly trained and educated by their organisation, they can be relied upon to function ethically in all circumstances. Indeed, the suggestion that this may not be true would often be seen as insulting by military members. ‘Are you questioning my integrity?’ he or she might exclaim.

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Philosopher John Doris summarises ‘the character assumption’ as follows:

It’s commonly presumed that good character inoculates against shifting fortune … the person of good character will do well, even under substantial pressure to moral failure, while the person of bad character is someone on whom it would be foolish to rely. In this view, it’s character, more than circumstance, that decides the moral texture of a life; as the old saw has it, character is destiny.21

Despite the millennia-long reputation Aristotle’s theory has enjoyed, its embrace by Thomistic Roman Catholic theology, and the grounding of so much military ethical rhetoric in it, what if it turns out the character assumption is much less reliable than the tradition would have us believe? If that were the case, and there were other important aspects to the determination of individual behaviour not captured or neglected in the Aristotelian frame, military training only on those assumptions might be setting itself up for risk of failure. Indeed, the fact that we see serious ethical and legal lapses in military personnel who have served honourably and well for decades, only to fail in often nearly unbelievable ways, would suggest that perhaps something else is going on. What might that be?

Two empirical fields have developed tremendously in recent decades that begin to shed light on precisely these phenomena: moral psychology and the closely related field of behavioural economics.22 In general, what this research indicates is that the idea of fixed and reliable individual character is far less reliable than the Aristotelian view, and the military’s rhetorical version of it, would suggest.23 In particular, often to a truly shocking degree, it shows that small variations in the context and situation of individual behaviour can have dramatic and wildly counterintuitive effects on how people actually behave.24 Individuals in fact behave differently — often startlingly differently — in different contexts.25 That fact shows that what John Doris called ‘the character assumption’ is dangerously unreliable and that, if we wish to ensure ethical behaviour, we should attend as much to the situation and environment of that behaviour as we do to the individual’s character and moral virtues. This research seems especially important and promising if we are to explain the patterns of moral

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24 See, eg, Dan Ariely, The Upside of Irrationality (Harper, 2010).
25 See, eg, Dan Ariely, Predictably Irrational (Harper, 2008).
failure among long-serving military members — failure that would seem almost inexplicable if the character assumption were in fact unqualifiedly true.

Among the famous ‘situational’ experiments conducted many years ago now and therefore fairly commonly known is the Milgram Experiment, in which subjects were willing to administer what appeared to be ever-more painful electrical shocks to an actor merely because the experimenter in a lab coat calmly instructed them that ‘the experiment must continue’. The Milgram experiment is commonly thought to show that most individuals are willing to act in ways they would not otherwise think possible if an apparent authority figure orders them to do so.26 More recent research has advanced our understanding of the impact of situations and environment on behaviour considerably.27

The work of behavioural economist Dan Ariely is especially engaging and, in many cases, highly relevant to describing, explaining and predicting ethical behaviour in military individuals and organisations. For example, Ariely conducted research on cheating among students at Carnegie Mellon University in Pittsburgh.28 In his study, students enter a classroom and sit at desks on each of which is a set of maths problems and an envelope containing cash. In the default condition, they are asked to solve as many problems as they can in a fixed amount of time, tear up their answers (so that it appears they can cheat with impunity) and then to pay themselves out of the envelope for each correctly solved problem. In that default condition, most students cheat a little, paying themselves for a couple of problems more than they actually solved. Interestingly, however, none of them takes all the money. Ariely’s explanation for this is that each of us has what he calls a personal ‘fudge factor’.29

We are willing to cheat a little, but not too much, because we want to feel okay about ourselves and not too immoral.

Then Ariely changes the experimental conditions. He introduces an actor who appears to be a student into the group. As soon as the experiment is explained, the experimenter leaves the room. The actor promptly announces, ‘I’ve solved them all’, takes the entire envelope of cash from his desk and walks out of the classroom. The experimental question is whether the presence of the actor will increase or decrease cheating in the rest of the students.

Surprisingly, the answer depends on what clothing the actor wears. If the actor appeared to be a student at Carnegie Mellon (the school where the experiment was


27 See Doris (n 21) for a fairly exhaustive review of the literature as of 2002.

28 This is a summary of an experiment described in Ariely, The Honest Truth (n 22) 197–206.

29 Ibid 26–9.
conducted) they continued to cheat a little bit, but when the actor wore clothing that indicated he was a student at the University of Pittsburgh (the other major school in Pittsburgh), the cheating went down among the others. The best explanation, Ariely reasons, has to do with whether the cheating behaviour is seen as being done by a member of one’s own group (and therefore somehow tolerated or accepted by ‘one of us’), or whether it was by an outsider from a group with whom the subjects felt some rivalry and wanted to feel ‘better than’.30

This is only one of many fascinating experiments from Ariely’s work, but it is highly relevant to explaining and predicting behaviour in military organisations. More than most human groups, military units develop strong bonds of group loyalty and identity. Indeed, one of the goals of military training and indoctrination is to develop such bonds.31

But one consequence of that fact about military units is that, regardless of the officially espoused values and expected behaviours of the large organisation, individual military units will develop their own local versions of actual behavioural expectations. So to return to the Fat Leonard scandal in the US Navy, it has long been known throughout the Navy that the Pacific Navy had a different culture in many respects from the rest of the fleet. Although obviously there were some ‘bad apples’ in the US Pacific Command, it seems likely that some pretty ‘good apples’ got corrupted by being placed in a ‘bad barrel’, long corrupted by general acceptance of Fat Leonard’s corrupting influence.

VI Implications of Empirical Studies of Ethics and Situationism

One need not merely speculate and extrapolate from psychological research that, for military organisations, features of the environment and situation can have decisive effects on behaviour. A study conducted by Leonard Wong and Stephen Gerras of the Strategic Studies Institute at the United States Army War College conclusively demonstrated the point in the US Army.32 The resulting report, entitled Lying to Ourselves: Dishonesty in the Army Profession (‘Lying to Ourselves’) showed that there is so much mandatory training required of Army personnel that it results in routine lying in official reports. The combined effects of trying to ensure that Army personnel are trained on so many subjects and requiring units to certify that all the required training has been accomplished (often, more training than there is time to

accomplish it) means that units routinely lie and say it has been completed when it has not.³³

In other words, when training requirements are levied over and over, regardless of realistic time requirements needed to accomplish them, leaders feel forced to lie and find ways to use their time for purposes they view as more vital to unit training and mission accomplishment. Further, since those receiving the reports were once in the position of those unit leaders, Wong and Gerras further documented that nobody believes the reports regarding training either.³⁴ In other words, in attempting to achieve the perfectly reasonable goal of guaranteeing training, the Army has managed to create an entire Potemkin Village of artificial compliance certification of training completion.

An even more horrific example of situational factors exacerbating the potential for truly awful behaviour is found in the book *Black Hearts: One Platoon’s Descent into Madness in Iraq’s Triangle of Death.*³⁵ The book documents how a platoon of the 101st Airborne Division in Iraq conspired to rape a fourteen year old girl, kill her family, burn down the family home and attempt to cover up their crimes. While there were definitely ‘bad apples’ in this platoon, the whole platoon was placed for an extended period of time in a very precarious place, subject to constant attack. Furthermore, although leaders at various levels were aware both of the platoon’s exposed location and of the presence of psychologically disturbed individuals in the unit, no effective measures were taken to reduce their stress or to ensure that the potential for misconduct was restrained.

The individuals involved were, of course, court-martialed for their individual actions. But what the book clearly shows is that situational factors were a significant component of what led to this atrocity. Clearly, the illegality of their actions was not a deterrent to their misbehaviour, nor could legal punishment redress the wrong.

The point of this section is this: it is clear from both social science and observing actual cases of military conduct that neither clearly articulated legal standards nor the individual character of military members are sufficient to regulate military ethical conduct in practice. The evidence clearly indicates that continually monitoring the environment and situational factors within which military personnel operate is a vital aspect of military ethics. In particular, two features stand out from these reflections: first, the incredibly counterintuitive but demonstrably strong effects of situational factors on actual behaviour and second, the often completely unintended effects of policies and actions initiated for the best of motives in bringing about ethically unwelcome results (as in the *Lying to Ourselves* study). These two considerations together highlight the extremely circumscribed effectiveness of an approach to ethics that emphasises only ‘character’ and ‘integrity’. They clearly indicate that, regardless

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³³ Ibid 4–8.
³⁴ Ibid 12.
³⁵ Jim Frederick, *Black Hearts: One Platoon’s Descent into Madness in Iraq’s Triangle of Death* (Crown, 2010).
of individual character, virtually anyone placed in inauspicious circumstances is likely to behave in surprising and unanticipated ways — even to themselves. These considerations strongly indicate that, insofar as we wish to maximise the probability of ethical behaviour, situational factors should receive at least equal consideration as encouraging individual character.

In fact, military organisations already know this. They simply fail to connect the two areas of reflection they are already engaged in articulating. On the one hand, when asked to speak about ethics, the language is almost entirely Aristotelian character language.\(^{36}\) On the other hand, when speaking of leadership in military organisations, the importance of good unit climate, discipline, and unit cohesion predominates.\(^{37}\) It is ironic that these two areas are rarely explicitly connected, even though it is common knowledge that unit cohesion, discipline, and leadership are very strong predictors of ethical behaviour and are among the strongest protections against unethical or illegal conduct.\(^{38}\) Recognising the connections between these two aspects of military organisations allows a more rounded and adequate account, giving equal attention to development of ‘good apples’, while also doing everything possible to ensure ‘good barrels’.

**VII The Limitations of Law and Regulation in Ensuring Ethical Behaviour**

In this section of the article, we turn to the questions of the limits of ensuring ethical behaviour by means of law and regulation, to important reasons to be cautious about excessive efforts to do so, and to some suggestions of alternative methods of attempting to improve ethical behaviour.

If one studies the ways military organisations deal with major ethical lapses and scandals, a remarkably consistent pattern of response is apparent. I have come to call it the ‘holy trinity’ fix, because it always involves three responses. First, the organisation fires the leadership. Then, it issues a new policy in an attempt to impose new training, or to regulate how the problem area will be dealt with in the future. And lastly, it mandates additional mandatory training to ensure that everyone in the organisation clearly understands the organisation’s expectations.

There are a number of problems with the ‘holy trinity’ fix, both in adequately dealing with specific cases of failure, and even more so when it is repetitively applied to an organisation.

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\(^{36}\) See ‘Integrity, Service, Excellence’ (n 23).


On the first point, there are many situations in which one might reasonably doubt that the ‘holy trinity’ fix is actually getting to the root of the problem. For example, take Wong and Gerras’ *Lying to Ourselves* findings. One could, correctly, accuse individual unit leaders of lying. In falsifying their training records, they are in fact deliberately and intentionally stating something to be true which they know is not true. If that is not a lie, what is? If one chose to frame the situation in that way, one could imagine the organisation firing the individual leader (after all, they lied, didn’t they?). You could issue a new policy that emphasised the wrongness of lying regarding training status of units. And you could require some form of mandatory training be added that explicitly reminds everyone that lying regarding training status reports is wrong. Problem solved!

But of course the ‘holy trinity’ fix will not fix the *Lying to Ourselves* problem at all. No one part of the fix, nor all three together, even approaches the true cause of the lying. As long as the training requirements exceed feasibility, and as long as reporting less than 100% completion is not culturally acceptable, the lying will continue. This pattern is repeated all over the military in various ways, and is common knowledge.39

In both cases, clearly a ‘holy trinity’ fix will not begin to get at the real issue driving the behaviour. The issue is systemic, and the system drives the behaviour. No individual leader or unit can ever truly fix it unless someone with real authority changes the system in some fundamental way by reducing training requirements and/or making less than 100% reporting acceptable. It would be boneheaded in the extreme to blame individuals or units for these practices. They cannot fix the behaviours because the behaviours are embedded in a system that requires them!

The first point, therefore, is that for many apparent ethical failures, the ‘holy trinity’ fix will fail to address the problem at all. Further, for such systemic problems, they generate an additional negative ethical consequence: they lead to widespread cynicism about ethics in general and ethical numbing across the organisation. Individuals become completely numb to the fact that they are making ethical choices about these matters in the first place. For example, the officers interviewed for the *Lying to Ourselves* study were incensed that Wong and Gerras called what they were doing lying. So accustomed were they to their actions and so used to the ‘that’s just how it really works’ view, they had an entirely different way of speaking about and seeing what they were doing and were angry and shocked when Wong and Gerras called it flatfooted lying.40

The second, and in some ways even more pernicious negative consequence of applying the ‘holy trinity’ fix is the consequence for military organisations when it

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40 See, eg, Wong and Gerras (n 32) 17–18.
is applied in response to virtually every failure iteratively over time. Since failure so frequently results in firing the leadership, leaders may become excessively risk averse. If failures lead to the issuing of new policies, policies may proliferate to the point that no one even knows them all, or feels the need to ‘bend’ or choose among them in order to get things done. And if most failures result in new mandatory training requirements (coupled with an expectation of 100% training completion), you eventually find yourself in Lying to Ourselves territory, where the training requirements begin to crowd out mission accomplishment and true mission accomplishment training, or lead to the kind of downright lying about training we saw above. In other words, iterative application of the ‘holy trinity’ fix risks creating a risk-averse organisation, micromanaged to the point of leaving little leader discretion, and hamstrung with a vast set of mandatory training requirements.41

VIII The Importance of Understanding the Military as a True Profession

These observations cumulatively suggest that any military organisation that wants to remain flexible, creative, innovative and to create bold leaders who exercise judgement and inspire confidence should hesitate and carefully consider whether to apply the ‘holy trinity’ fix to every, or even most, problems.42

If that is true, then it raises the obvious question: if ‘holy trinity’ fixes are often not real solutions or generate negative consequences, what other approaches might be effective?

In the past 20 or so years, the US military, beginning with the US Army, has tried (in my opinion fairly effectively) to develop a less legal and rule-bound approach to ethics by means of a robust development of the idea of the military as a professional organisation.43

41 When I left the Naval War College in 2016, there was an employee whose full-time job was making sure everyone was 100 per cent on their training requirements! I once cancelled an important trip to Norway because, before Travel would approve the trip, I had to complete a day long computer training on how a soldier lost behind enemy lines should attempt to evade capture, call in rescue, and conduct himself if captured. All this so I, a civilian professor, could go to a conference at a luxury hotel in a highly developed country!

42 Of course, the political reality is that often the ‘holy trinity’ fix is applied as much because of the organisation and its leaders to be perceived as ‘doing something’ by external observers, media, and political leaders. But even though that is true, it still remains the case that the fix may do more damage than good. When that is the case, the challenge to leaders is to be articulate enough to explain why they are not going to apply the fix, and why other approaches to the challenge are more appropriate and better ensure the long-term health of the organisation and its leaders.

Of course in ordinary speech, ‘profession’ often means something one does for
pay, as opposed to as an amateur (as in ‘professional athlete’) or it serves as an all-
purpose term of praise (as in ‘she’s a real professional’) and is used in military speak
along with ‘character’ and ‘integrity’ as a somewhat amorphous positive adjective.

But ‘professional’ as is being used in the military normative discussion has a
deeper and more precise meaning, derived from a fairly large and robust literature
in sociology. Professions are regarded as a distinctive way of organising work and
relating to the ambient society the profession serves.\(^{44}\) In the early modern period
of the West, only three kinds of work were organised as true professions: clergy, medicine and law.

In the robust sociological sense, professions are distinguished from other kinds of
labour by the following features (obviously, different scholars give slightly varying
lists, but for our purposes those details are not critical):\(^{45}\)

1. Professions provide a service deemed essential to the society they serve
   (in the case of the three original ones, salvation, health and justice).

2. Professions possess a highly developed technical knowledge and
   vocabulary.

3. Professions make discretionary judgment about how to apply their
   knowledge to the client or the professional problem at hand (in other
   word, professional behaviour cannot be reduced to standard operating
   procedures).

\(^{44}\) This discussion began with the work of Don Snider, a retired Army Colonel at
West Point. He sensed that the Army was losing its sense of being a profession and
convened a group of 54 scholars who studied that issue from a number of perspectives.
Their work cumulatively resulted in the publication of a collection of essays: Lloyd J
leadership fully embraced the vocabulary and framework of the Army Profession,
and created the Center for the Army Profession (‘CAPE’) to create education and
training materials to inculcate that framework across the Army: ‘Center for the Army
Profession and Leadership’, *US Army* (Web Page, 6 May 2019) <cape.army.mil>. The
other US services have followed suit (although honestly, none as thoroughly as the
Army). But each created its own version of CAPE. The Air Force has Profession of
Arms Center of Excellence, the Navy the Navy Leadership and Ethics Center and
the Marines the Lejeune Leadership Institute: ‘PACE’, *Profession of Arms Center of
Excellence* (Web Page) <https://www.airman.af.mil>; ‘Naval Leadership and Ethics
mil/netc/centers/nlec/Default.aspx>; ‘Lejeune Leadership Institute’, *Marine Corps
University* (Web Page) <https://www.usmcu.edu/lli/>. Further, the then Secretary of
Defense Hagel designated Rear Admiral Margaret ‘Peg’ Kline as the point person
for ethics and leadership in the Department of Defense, and her office provided a
mechanism for all the services to coordinate their efforts across service boundaries.

\(^{45}\) See, eg, Andrew Abbott, *The System of Professions: An Essay on the Division of
4. Professions have a high degree of autonomy, granted by their society, to manage their own affairs and to discipline their own members.

5. Professions manage and control their own standards for admission to the profession and promotion according to shared professional standards.

6. Professions have a high degree of trust from the society they serve and must continually maintain that trust if they are to retain their autonomy and ability to exercise discretionary judgment. Consequently, professions have an interest in maintaining that trust and an ethical requirement to do so lest the society withdraw those permissions.

7. Professionals are primarily motivated by an ethic of service (as opposed to mere monetary gain) and have a life-long commitment to the profession and an obligation to continually engage with new professional knowledge and skills.

For individuals truly imbued with a sense of professional identity, it remains the bedrock and touchstone of their ethic. A professional doctor, for example, can be relied on to always place the welfare of their patient above all other considerations. They don’t need, and indeed would chafe under, a highly regulated regime — as many doctors in the US now do in response to what they perceive as excessive insurance company second-guessing of their clinical judgment. A professional attorney will not violate the rules of discovery even though some of the information he is required to disclose may work against the interest of the client. For a priest in the confessional, while of course there is some shared sense of appropriate penances for various sins, there remains a great deal of discretion in the application of pastorally sensitive peneance to the individual penitent.

These early modern models of professionals apply with greatest accuracy to sole practice attorneys, physicians, and clergy. In the modern world, most professionals are embedded in various bureaucratic structures, and bureaucracies in the sociological literature are ways of organising work that contrast sharply with professions. They too may have specialised knowledge, but it is relatively easily trained and in most cases reducible to standard procedures and repetitive and non-discretionary application.

Military organisations are inevitably both bureaucracies and professions, except in the cases where they have been reduced entirely to (in Snider’s term) ‘little more

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than an obedient military bureaucracy’. Every military organisation is engaged in the continual struggle to sustain the best of the professional elements if it is to be effective. But the bureaucratic impulse is strong and is continually making inroads into the profession. Indeed, the attempt to ensure proper behaviour and compliance through law, regulation, and policy is precisely the means of that bureaucratic encroachment. Every application of the ‘holy trinity’ fix is a further bureaucratic advance.

This is the most significant departure of the most fundamental place of ethics, as distinct from law, in military organisations. To be effective, flexible and creative, it is vitally important that military organisations maintain the appropriate space for unfettered professional judgement and conduct in the face of the bureaucracy that will encroach if leaders don’t jealously guard the appropriate balance between the bureaucratic and professional imperative.

There is obviously no formula for getting this balance right. Of course, in peacetime and in garrison, it is perhaps inevitable that the bureaucracy will blossom at the expense of the professional aspects of the military. While it will be difficult, a core function of the stewards of the military profession is to sustain vigilance to prevent letting the bureaucracy stifle the necessary professional aspect of the military.

IX Conclusion

The question driving this article was: ‘what is the role and importance of ethics over and above law in regulating military organisation and military behaviour?’ We have seen that ethics offers a great deal to the military; that it needs to supplement the law. In LOAC, ethical principles must provide enduring guidance as law evolves to help individuals to think above mere legal minimums.

Regarding individual conduct, we have seen that moral psychology and behavioural economics provide vital insights into what drives human behaviour. This helps us to understand ethical failure that would otherwise seem inexplicable if character and knowledge of the requirements of law and policy were a comprehensive and effective set of guides.


49 See Andrew Gordon, The Rules of the Game: Jutland and British Naval Command (Naval Institute Press, 1996) for a fascinating and exhaustive examination of this tendency. Gordon documents the many ways in which the long-unchallenged and successful British Navy lost its warfighting edge during the period between Trafalgar and the World War I Battle of Jutland (which they nearly lost through incompetence). He demonstrates how the shininess of brass and the complexity of signal flag books supplanted naval war fighting skills entirely. Although the tendency is typical of all militaries in times of peace and complacency, Gordon’s is a wonderfully detailed and exhaustive illustration of how the slow slide occurs and why the organisation seems incapable of correcting itself until it sees military failure staring it in the face!
Lastly, we examined why it is vital that military personnel and organisations nurture and sustain the professional nature of their identity and work, and continually strive to maintain optimal balance between this and the unavoidably bureaucratic aspects of the military organisation. That will require resisting bureaucratic, legal compliance based, and regulation/training focused responses to every problem. Periodic pruning of the bureaucratic weeds is required if *Lying to Ourselves* consequences are to be kept at bay.
I AM NOT A HIGH PRIEST IN A SECULAR MILITARY!

I Introduction

I made this remark to a colleague from the Canadian Department of National Defence in the margins of a seminar in 2015 in Montreal. It was a facetious remark intended to affirm my colleague and his excellent points, through a satirical device. I had not, at the time, fully explored the meaning behind the remark, but in retrospect I find that there is a lot of meaning and that it is a useful tool to organise my arguments in this paper. First, the remark is true because too much is sometimes expected of the law and legal advisers. Secondly, the reference to ‘high priest’ suggests a formal, stratified regime of pontification on the law and its related elements. Thirdly, I do belong to a secular military. Fourthly, it does raise a question: if the lawyer is not responsible for moral elements of operational decisions, who is? Fifthly, I suggest that we do not need to allocate responsibility to a particular person for the moral element. Sixthly, the remark is facetious because the concern does not actually warrant formal escalation — and, of course, I’ll explain why I take that position. Finally, I’ll suggest an antidote — notwithstanding that it involves a difficult ‘pill to swallow’.

II Law’s Place in Armed Conflict

My paper is firmly situated in the growing discourse that has critiqued the law’s socio-political impact in the context of armed conflict. The point is not that law is a negative force, nor that it seeks nefarious aims, but rather that it is used far too often to debate issues of legitimacy and even morality concerning armed conflict. The work of David Kennedy in particular has been at the forefront of this growing critique. Kennedy observes that the law of armed conflict (‘LOAC’) has become so expansive that it seeks to provide explanation and justification for much that is undertaken in armed conflict. This in turn results in the abdication of other avenues of social or moral inquiry. Hence, Kennedy observes that

* LLB, BEc (UWA); LLM (Melb); LLM (McGill). Duncan Blake served as a permanent forces Legal Officer in the Royal Australian Air Force from 1994 to 2016 and continues to serve in a Reserve capacity. Nevertheless, the views expressed in this paper, and any mistakes or omissions are his alone, and do not represent the views of the Australian Department of Defence, nor any other part of the Australian government. He draws on experiences from deployed operations with the Australian Defence Force (‘ADF’) and shares them in generic terms to avoid issues of security classification. An earlier version of this paper was delivered at a seminar on ‘Legal Hegemony and Effective Statecraft’ at the University of Adelaide in December 2016.
The legal language has become capacious enough to give the impression that by using it, one will have ‘taken everything into account’ or ‘balanced’ all the relevant competing considerations.¹

This is indeed reinforced by the fact that LOAC provides multiple layers and channels of decision-making capacity such that personal responsibility can become fused with the articulation of abstract principles. This is overlaid with the promised capacity to meaningfully weigh up all considerations, and an attribution of legal responsibility that has the ability to absolve everything else. Hence he notes that

[parceling out responsibility and ensuring that everyone evaluates the proportionality of what they do can also ensure that no one notices the likely deaths from cholera. And, if no one noticed, and it was no one’s job to notice, then perhaps no one was responsible, no one did decide — they just died.]²

This critical approach has also found expression in the work of Gerry Simpson, who queries whether the ‘juridification’ project of war and, in particular, international criminal law, has led to the conclusion that the horrors of mass atrocity in war are seen as just another legal issue and asks ‘had law, by now, explained too much?’³

Similarly, my observations share something of the critical approach taken by Dale Stephens in his observation that law’s dominant role and accepted methodological preferences can mask deeper considerations of legitimacy in decisions taken by commanders in armed conflict.⁴

### III Too Much is Sometimes Expected of the Law and Legal Advisers

First, with the growing ‘enchantment’ of the law as a presumed panacea, I believe that too much is sometimes expected of the law and legal advisers.

In my experience, there is a deep-rooted desire among military personnel for some form of absolution.⁵ What is it that distinguishes us from the common murderer?

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² Ibid 145, referring to the wartime destruction of generators, leading to an outbreak of cholera.
⁵ This is supported by the research of Dave Grossman, a former US Army psychologist, who describes the importance of group absolution as a precondition for preparedness to kill: Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Back Bay Books, rev ed, 2009) 149–55.
We both kill people, and arguably the military are worse, we do so on a mass scale in a very cold, premeditated way.\(^6\)

I have two anecdotes that I believe will demonstrate this point. In 2003, I was deployed to the Middle East, engaged in operations in Iraq — a conflict that was controversial then and has remained controversial ever since.\(^7\) Having heard about the controversy in Australia and elsewhere, I had several troops deliberately seek me out to ask whether what we were doing there in the Middle East was ‘right’. Of course, I explained that it was not for me to dictate to them whether it was right or not, although I was happy to discuss my thoughts, my role formally was only about whether it was legal.\(^8\)

Before I deployed in 2016,\(^9\) my six year old daughter, who had heard a bit about war at school, especially around the centenary of the landing of Australian forces at ANZAC Cove in 1915, said to me: ‘Daddy, are you going to kill people when you’re deployed? But that’s good, that’s OK, because they’re really bad!’ I told her that it is never good to kill other people, it is just sometimes necessary. It’s a simple retort, a façade over the discomfort I felt at being involved in killing people. You only have to see the ‘predator porn’, the ‘eye in the sky’, a couple of times and observe the still-writhing bodies of our enemy after a strike, to feel some difficulty reconciling what you do with what you believe.\(^10\) Even if they are particularly ‘evil’ people, that does not provide solace about participating in killing. What made it worse was that as I explained my legal assessment of the particular target to the commander, it often felt that the responsibility was on me to ‘sanctify’ the killing.

\(^6\) Grossman devotes a whole book (and more) to describing the conditioning that must form part of the training of a soldier to prepare him or her for what is otherwise (for most people) an abhorrent act: ibid. In respect of the number of people killed by military forces, the death toll from wars is staggering. There are many sources of statistics, but the following provides a well-researched and easily-accessible summary: Matthew White, ‘Death Tolls for the Major Wars and Atrocities for the Twentieth Century’, *Historical Atlas of the 20th Century* (Web Page, June 2011) <http://necrometrics.com/20c1m.htm>.


\(^8\) My oral response in the deployed operational environment was probably less eloquent than this written format!


\(^10\) A good representation of this is given in *Eye in the Sky* (Entertainment One, 2016).
IV Who is Responsible for the Moral Element?

That is not the case, of course. The responsibility was not on me to ‘sanctify’ the killing. Which brings me to my second point. If not the legal officer, who is responsible for the moral element of decisions about killing?

In 2009, I deployed to the Middle East. Every morning there was a short meeting in the headquarters to review the activities, events, orders, requests, progress and so on of the past 24 hours and to allocate responsibility among the staff to take actions in light of that review. The Intelligence Officer had a short slot in the morning meeting to discuss analysis of the collected intelligence from the previous 24 hours. On one day, he observed that the enemy, the Taliban, must have deduced our Rules of Engagement (‘ROE’) because they were using child soldiers to avoid targeting. I immediately thought this was a strange statement, but deferred my comment to the end. At that time, I pointed out that the use of child soldiers by the Taliban does not mean they have deduced our ROE. The law does not preclude us from shooting and killing child soldiers. The J3 (the person responsible for coordinating and advising on current operations), turned towards me and said (in jest, I’m sure): ‘You are the

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13 While there is a general principle of International Humanitarian Law that belligerents must distinguish between civilians and combatants, there is nothing that necessarily excludes children from the categories of combatants: see III Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 4.A. In fact, it is expressly acknowledged that children, even under the age of 15, may be regarded as prisoners of war and therefore also as combatants and may be targeted: see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 77.3 (‘Additional Protocol I’). See also Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002). This is the closest that the international community has come to prohibiting the targeting of children in armed conflict. For all the laudable intent in the negotiation of this optional protocol, only the preamble expressly condemns the targeting of children in armed conflict. Whereas the operative provisions relate to recruitment of child soldiers.

most evil legal officer I know!' I pointed out that I was not recommending that we do kill them, just pointing out that we’re not legally constrained from doing so. I also added that I was happy to participate in the discussion about whether we should be prepared to return fire and kill the children, just so long as everyone was clear that I did so as a general staff officer, not as a legal officer, with no special authority in the subject matter. It is not for me to say what decision was ultimately made, but I observe that choosing not to return fire against child soldiers would send a message to the Taliban that using child soldiers offered them an advantage.15

The author Janina Dill comments that

it is [LOAC] that allows conscientious actors at all levels to assume that being part of this bureaucratised [legal] process is enough for doing the right thing …16

I partly disagree and partly agree. As my anecdote demonstrates, my military colleagues do actively distinguish between the law and the assertions of lawyers on the one hand, and what is the ‘right thing’ on the other hand.

However, my most recent experience is also partially consistent with the statement. There is a highly structured, bureaucratic process for developing targets from the first observation of an activity, people or facility whose destruction might offer us some military advantage, until the point at which a bomb is delivered.17 There are standards in terms of sources and quantity of intelligence, as well as on minimising delay in the time taken to work up a target. Such a detailed process is a testament to the importance that the relevant military forces place on compliance with LOAC. While such emphasis must be applauded, I became concerned that for some people (not all) involved in the process, especially those further back or abstracted from the consequences, the targeting process became a ‘box-ticking’ exercise and that any moral concern was assuaged by having faithfully applied the process. Often, the prescribed number of raw intelligence inputs were presented at target review meetings, without any apparent engagement of reasoning to explain why the intelligence should be regarded as compelling. They had met the criteria and that was sufficient. However, contrary to Dill’s argument, LOAC itself18 and the chain of

15 This suggestion has been made in relation to the use of child soldiers by the Islamic State, and the same concerns would apply equally to the use of child soldiers by the Taliban. See Kara Anderson, “‘Cubs of the Caliphate’: The Systematic Recruitment, Training, and Use of Children in the Islamic State” (Paper, International Institute for Counter-Terrorism, January 2016) 40–1 <https://www.ict.org.il/UserFiles/ICT-Cubs-of-the-Caliphate-Anderson.pdf>.


18 For example, Additional Protocol I art 57 requires ‘constant care’, that ‘everything feasible’ is done, that an attack should be cancelled or suspended if it becomes apparent that the target is no longer valid. These are difficult to satisfy through a discrete ‘tick and flick’ approach. Additional Protocol I (n 13) art 57.
command would condemn such an uncritical application of the law. As such, the fault lies not with the law, nor with the lawyers advising on it, but with some elements of the bureaucratic process.19

Does this all suggest that no one is responsible for the moral element of military decisions about killing? I will return to answer this question in Part VI.

V Stratiﬁcation in Legal Support

This brings me to my third point — concern about stratified ‘pontification’ on the law — a phrase that, unfortunately, could have been used to describe my own role in the past. Thus, for example, in spite of my own concerns at the operational level about the bureaucratised nature of the target development process, I had a significant role in drafting doctrine on which the target development process is based, when I was previously posted to a directorate at the strategic level. Concerns about a process from the operational level expressed to the strategic level sometimes meet the retort that the process was set out in doctrine that had been reviewed and approved by legal advisers at a higher level. With some shame, I am sure that I have given that retort in the past. I acknowledge the hypocrisy, but I use it to demonstrate a point. The legal review of doctrine about targeting, of course, is necessary and desirable, but it happens at the strategic level — at a time and in a context that is abstracted from the facts on the ground. Legal advisers at a strategic level quite properly insist on processes that are intended to ensure rigour in decision-making and legal validity in decisions, especially where those decisions involve killing people and destroying things. Strategic legal advisers properly introduce detail about how decisions should be made to ensure compliance with the law. But it is difficult for those legal advisers reviewing doctrine to foresee all the consequences of insisting on the detail of a process — to foresee, for example, that in a certain situation, in 2016, in respect of a particular target in Iraq, the mandated process is not the best way to ensure compliance with the law. Furthermore, the law is not the only consideration — the moral elements of a decision often do not become brutally clear until you directly contemplate the destruction that is about to be unleashed. For others involved in the process, it is not for us (legal advisers) to tell them how they should respond emotionally and morally to their role20 and it is not for us to prescribe, in infinite detail, how to come to morally cogent decisions. Thus, there needs to be some flexibility, and importantly some expectation too, that

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19 This should not be read as indicating that the chain of command were uninformed, unconcerned or unresponsive to this concern.

20 ‘Moral injury’ among those involved in warfare and how best to recover from such injury is a topic of increasing emphasis. It is beyond the scope of this paper and beyond my expertise and, furthermore, it is a relatively nascent concept. Nevertheless, on the basis of my own observations, I am confident in asserting that having others prescribe how a person should emotionally and morally respond to a situation is not helpful. The issue is explored in detail in Tom Frame (ed), Moral Injury: Unseen Wounds in an Age of Barbarism (University of New South Wales Press, 2015).
doctrinal process will be applied critically ‘on the ground’, taking into account the circumstances confronting operators at the time.\textsuperscript{21}

VI I Do Belong to a Secular Military

I do belong to a secular military.\textsuperscript{22} No one in the ADF is accepted as having an authoritative voice on moral issues and lawyers in particular have no great claim to transcendent truths.\textsuperscript{23}

Not only is the State secular, the State is amoral. We lawyers refer to States in terms that we overtly concede to be a fiction: that States are ‘persons’, that they have legal personality. Of course, they are not people and if a State has any moral identity at all, it is because of the people who make decisions on behalf of the State.\textsuperscript{24}

As lawyers, sometimes we advocate, sometimes we advise. I am always slightly bemused by the quip that if you ask two lawyers, you’ll get three opinions! My art as a lawyer is in making an argument. An assertion by someone that a particular proposition is the one and only correct legal position is almost a red rag to a bull — a challenge. Of course I’m going to disagree — if I could not make a contrary argument, I’m not very good at my art! As advisers, we should be presenting each of the most plausible arguments and engaging in a discussion about (rather than just asserting) the risks involved in acting consistently with one argument versus another.

In the case of government lawyers, if we present only our ‘preferred solution’, if we substitute our morality for the positions of the amoral State, then we create a legal oligarchy. We are advocates pretending to be advisers, and rather than being transparent about our advocacy, we cloak our advocacy with an air of authority.


\textsuperscript{22} The ADF has no official religion, but rather: ‘ADF members are encouraged to pursue and practice their religion/belief/faith according to their freedom of choice, subject to the considerations of operational effectiveness, health and safety, and business priorities’: see Department of Defence, \textit{Guide to Religion and Belief in the Australian Defence Force} (Guide, 2014) 2 <http://content.defencejobs.gov.au/pdf/triservice/Guide_to_Religion_and_Belief_in_the_ADF.pdf>.


\textsuperscript{24} There are some decisions made within a State that are not reducible to individual, natural persons. By virtue of the authoritative decision-making structures established within a State, it can be said to be an ‘institutional moral agent’: see Toni Erskine, ‘Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States’ (2001) 15(2) \textit{Ethics & International Affairs} 67.
Any governmental adviser, be they legal, political or otherwise, can commit the same sin. That is not to say that there is no place for moral advocacy by governmental advisers. Even though the State is ultimately amoral, we can and should talk to the real moral actors — that is, actual people — and suggest that the State’s position should be different.25

It would be a dangerous thing though, for military people to independently decide whether to support the military commitments made by the government. In a democracy, where military forces are under civil authority, it is fundamentally important that military people do as they are bid, regardless of any indefinite qualms they may have. Although, at some point indefinite qualms may crystallise into ethical standpoints that cannot be reconciled with military orders and moral integrity might require them to stand their ground and say: ‘This point and no further’. Those qualms, though, are seldom at the level of base moral values — more often they are about whether a particular course of action is the best means to pursue their base moral values. While we may have doubts about the morality, ethics and even lawfulness of some specific instances of collective behaviour of other people who constitute the belligerents involved in the conflict, we can at least choose to act with integrity to our own values and commitments. So on my part, for example, I had, and continue to have, significant doubts about whether the military campaign in Iraq and Syria was the best and most moral way to achieve our laudable objectives. But I am glad that the coalition at least tried something, rather than the political paralysis that had previously characterised the allied position on Syria.26 I have made a commitment to the Australian people to be a part of its military forces, subject to control by our elected representatives.27 If military people like me are concerned that the choice

25 For example, Australian Public Service (‘APS’) members are expected to act consistently with ‘APS Values’, which include provision of frank advice and ethical conduct. The moral foundations of ethical decision-making for APS members are not defined, leaving it open to APS members to determine for themselves what would be ethical in the circumstances, based on their own moral foundations, provided that they do so with integrity, respect, commitment, accountability and impartiality: see Australian Public Service Commission, ‘APS Values’, Working in the APS (Web Page, 2019) <https://www.apsc.gov.au/aps-values-1>; Public Service Act 1999 (Cth) s 10. The same is true of Defence members: see Department of Defence, ‘The Defence Values’ (Web Page, 2019) <http://www.defence.gov.au/publications/defence_values.pdf>. The Defence Values are: professionalism, loyalty, integrity, courage, innovation and teamwork.


27 By my Commission as an officer of the Royal Australian Air Force, I have committed ‘to observe and execute all such orders and instructions as [I] may receive from [my] superior officers.’ The Defence Act 1903 (Cth) and subordinate and related legislation establish the military hierarchy of which I am a part, including who are my superior officers. In turn the Minister of Defence has general control and administration of the ADF and the Chief of Defence Force and the Secretary of the Department of Defence are subject to their direction: Defence Act 1903 (Cth) s 8.
to use military force to address a situation like Syria may be inconsistent with our personal values, but we cannot suggest a better alternative, and yet we decline to deploy on orders, then it could paralyse governments who do seek to address such situations through military coalitions, and who do so with the mandate of the people they represent. Consistent with Defence Values and my own values, although I may have qualms, I choose to act with loyalty and integrity in light of my commitments.28 However, I also choose to act with the courage to provide frank and fearless advice to my commanders in the execution of my duties.

To say that the State is secular and amoral is not to say that there are no fundamental and common principles that form the foundation for the State. The ‘rule of law’ is a foundational principle of the State. As I previously described, the possibility that we may be no different from a murderer is an uncomfortable reality and in my experience, it is this discomfort that motivates a commitment to the rule of law, over and above any other concern (such as a belief in the inherent goodness of the law). Jared Diamond, an American scientist who draws on anthropology, ecology, geography and evolutionary biology to make explanatory conclusions about our world and its societies throughout history, observes how the motivating factor for people to be prepared to fight and die through the ages has progressed from the fight for survival, to alignment with the mighty (at a time when ‘might was right’), to religion, and settling most recently on the rule of law.29 It is not that the rule of law makes our killing morally right, but that a commitment to the rule of law preserves our place as valued members of society — a society whose effective function relies generally on commitment to the rule of law by the individuals that comprise it. That is, I hope to be embraced by Australian society on returning home, rather than ostracised, as the common murderer is.

Collectively, we the people of Australia have committed ourselves to the rule of law. Importantly, the Department of Defence has overtly done so too, although it has committed itself to the slightly broader concept of a ‘rules based global order’.30 In my experience, military personnel take that as an important and fundamental principle.

The rule of law is a process in which we all participate, not just the lawyers. When we find ourselves obliged to apply the terms of a treaty, it is because a political decision, not a legal decision, was made earlier to agree to some codification of complex issues of morality into legal rules.31 The whole political enterprise within a State is

28 Department of Defence, ‘The Defence Values’ (n 25).
(or should be) involved in decisions to ratify a treaty, or state a position on customary international law. This is especially important because when the State becomes bound by more rules of international law, it necessarily involves ceding some sovereignty of our nation to the whole community of nations.

That is the journey that we’re on. Ultimately, the most fundamental value of the law is the stability that comes from clarity about expectations between members of society and general compliance with those expectations. It involves codifying not morals necessarily, but the expectations between members of society that will be accepted, complied with and thereby provide the foundation for a functioning society. Any codification inevitably involves generalisation — that is, the codified rule is not fit for each and every future circumstance. Some of the value that lawyers should provide is in identifying these exceptional circumstances. One role of lawyers, especially in law reform, is as ‘engineer-designers’ of a rules-based system, seeking to articulate the desired expectations of society in the form of rules.

We can all agree on the ‘rule of law’ as a fundamental and common principle. Beyond that, in a secular society, my moral reasoning is no more valid than anyone else’s.

VII The Moral Element can be Incorporated without a ‘High Priest’

This brings me to my fifth point. Even though none of us, including myself as the legal adviser, can express the moral truth for all of us, this does not mean that morals form no part of military operational deployments. However, this moral element can be incorporated without a ‘high priest’.

Consistent with my experience in 2009, following the accusation that I was the most evil lawyer alive, we collectively saw the humanitarian outcomes in war as a joint enterprise and we came to a collective decision. It is not that moral issues are no one’s responsibility, but that they are everyone’s responsibility.

I am sometimes asked: ‘What is your legal interpretation of the facts?’ I dislike that question. Legal interpretation is about rules, not facts. Issues in the military with a legal dimension are seldom exclusively legal issues.

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32 See ibid. To ensure consistency in the expression of Australia’s positions, and the ultimate control of and responsibility for them by the Attorney-General, legal work on matters of public international law is ‘tied’ to (that is, can be performed for the Commonwealth Government only by) the Attorney-General’s Department, Australian Government Solicitor and (in some areas) the Department of Foreign Affairs and Trade: see Legal Services Directions 2017 (Cth) app A, para 2.

33 Some unfairness lies in lawyers insisting that everyone complies with the rules, but reserving for themselves the discretion to identify when not to comply with a rule (because it does not truly cover the circumstance confronting them)!
Beyond the rare, purely legal, issues just about every decision which lawyers are called to make involves multiple inputs. Some consequentialist, critical thinking would be valuable for everyone involved — that is especially the case in respect of moral decisions.

**VIII It Does Not Warrant Formal Escalation**

This brings me to my final point about high priests in a secular military. It is a facetious remark, but the fact is that the concerns do not warrant formal escalation. In my experience, more often than not, other staff do participate in critically challenging legal positions asserted by legal officers.

There is highly refined and informed thought about the law among commanders. My challenge is often to provide legal support on the overlapping application of multiple legal frameworks to a given set of facts and to do it with maximum brevity. On my

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34 In addition to LOAC, the legal rules that may apply to any specific circumstance may be a complex amalgam of a wide range of disparate laws. For example, in the first place, there is the legal mandate or basis (*jus ad bellum*) for our operations in a specific area, and that mandate or basis may differ depending on the region within the Area of Operations — consider operations in Iraq, with the consent of the Iraqi government, versus operations in neighbouring Syria, the legal basis for which is linked to the law of national self-defence and certainly not with the consent of the Syrian government. Alternatively, there could be a United Nations Security Council Resolution. Furthermore, in all cases, it will depend on the way in which the mandate is expressed or the particulars of the situation giving rise to the reliance on the principle of national self-defence. In addition, there may be a Status of Forces Agreement or Arrangement (*‘SOFA’*) between a nation hosting forces within its territory and the coalition as a whole — and then there may also be a SOFA between the hosting State and Australia specifically. The domestic laws in the territory of the State in which we are operating
most recent deployment, for example, I gave advice that, unusually, for this particular
target, not everything inside the target boundary could be assumed to be additional
damage, but some had to be considered collateral damage.\textsuperscript{35} My commander said
that he was going to need some time for me to explain that to him and that I would
need to take him back to the rules themselves. He asked the Intelligence Officer to
stay to participate in the discussion. We all recognised this as an exercise in critical
thinking, with significant consequences for destruction of property and taking of
lives depending on the decision made. None of us, not even the commander, claimed
to be in a better position to apply critical reasoning.

In another example, on my most recent deployment, I discussed a scenario with pilots
in which a coalition ship calls for air support from our jets to protect it from attacks
by the forces of a third country.\textsuperscript{36} It is a potential ‘no-win’ situation for Australia
and the pilots — if we engage to support our ally, then we embroil ourselves in a
conflict with another nation (and the pilots that are prospectively involved would be
likely to feel that more acutely than any others). If we decline to support our ally, we
undermine the alliance (and, again, the pilots that are prospectively involved would
be likely to feel that they have let down some mates more acutely than any others).
The details of my advice are classified; suffice it to say that the extant legal and
policy framework did not provide the pilots with clear options (and they were quite
right to want options and to want clarity, in my view). The pilots thanked me for the
advice and accepted that they might be put in the position of having to take a legal
and political risk themselves, until the issue was clarified by the chain of command.
That is, they did not need nor want me to be a moral arbiter, a ‘high priest’ in a
secular military.

\textsuperscript{35} Intelligence products typically identify a facility (such as a weapons store) as a target
and imagery analysts identify the boundaries (often, fences or walls) of the facility.
Targeting procedures then involve confirming that the target, as a whole, constitutes
a military objective for the purposes of LOAC. This works well for small, discrete,
single-purpose facilities, but becomes more complex for large, multiple-purpose
facilities. It is not possible to always rely upon where imagery analysts have drawn the
boundaries. See \textit{Additional Protocol I} (n 13) arts 51.4–51.5.

\textsuperscript{36} Consider, for example, the situation of the USS Mahan recently: see Barbara
us-iran-warning-shots/>.
In a similar example from a prior deployment, it was the deployed Policy Adviser (‘POLAD’) who, in my view, overstated his role in decision-making, to the detriment of effective statecraft. The POLAD unilaterally asserted the approach the pilots should take, relying on his privileged access back to strategic headquarters, thereby denying the commander at the operational level and his advisers the opportunity to inform this decision-making of the strategic headquarters. It is a potential fault by any adviser, including legal advisers, policy advisers and staff officers from every corps and specialisation across the three services.

IX An Antidote

Which brings me to my last point. The antidote. The real concerns here are not, in my view, about the law or lawyers, but are more universal — namely about the failure of critical discourse. What we need is robust reasoning, transparency and an openness to debate in, and among, all disciplines. It is not enough for individuals independently to undertake great critical thinking on the consequences of a prospective course of action — they cannot properly consider all the issues in the cost-benefit analysis by themselves. Consequentialist thinking itself can lead to bad decisions if individuals are doing the cost-benefit analysis independently of one another. Hence, if Secretary Rumsfeld had been undertaking the analysis alone, he might have approved a strike on Mullah Omar in spite of warnings by legal advisers of the excessive collateral damage that would likely result.37 Decisions to abandon the rule of law have potentially huge consequences going forward, and should never be dominated by any single group of advisers.

The moral, and arguably the political, dimension of military decisions, especially ones about death, are a shared responsibility. This is as important for mental health as for anything else. Internalising the consideration of those dimensions, or failing to think about them at all, seems likely to lead to bad mental health outcomes.38

Shared responsibility is also crucial for transparency. There is a degree of faith required between advisers in order for them to be prepared to lay out their reasoning

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37 It was reported that US Secretary of Defense, Donald Rumsfeld was livid about the apparent decision by a US Judge Advocate General (‘JAG’) — military lawyer — not to endorse a strike on Mullah Omar, the leader of the Taliban, in early October 2001, at the beginning of the campaign to remove the Taliban from power in Afghanistan. It appears that the JAG was concerned about excessive collateral damage and the application of LOAC in the circumstances and consequently Commander US Central Command, General Tommy R Franks, made a decision to proceed with the strike in a different way, probably resulting in the escape of Mullah Omar (among other consequences): see Seymour M Hersh, ‘King’s Ransom: How Vulnerable are the Saudi Royals?’, New Yorker (online, 14 October 2001) <https://www.newyorker.com/magazine/2001/10/22/kings-ransom>.

38 Again, as per my acknowledgement in (n 20) above, this is beyond the bounds of my expertise and the scope of the paper and based only on my observations and intuition. Nevertheless, it seems consistent with developing ideas about moral injury.
for critique. In this respect, electronic communications at virtual, if not actual, distance from one another, are not the same as face-to-face discourse. We need connectedness between people — not just between machines and processes and legal systems. And we need to make critical thinking a compulsory part of military training for all staff — even the legal officers.
The identification of the mouth of a river at law is a more difficult prospect than may first appear. Geography and the action of tides can make the location of a river mouth a difficult prospect. The law has had to face the question of identifying the mouth of a river over the centuries and a volume of statute and common law has built up, presenting a range of solutions. This article considers the historic approaches taken in statute and common law, with a view to distilling the key elements necessary to locate the mouth of a river.

I Introduction

It is a usual assumption that rivers run to the sea, although in practice not all rivers actually reach the ocean. The assumption may come with a mental picture of a wide sweeping river that meets the ocean, perhaps spanned by a bridge, the mouth of which can be completely viewed from either bank. Yet the geographical circumstances of rivers flowing into the sea vary greatly, ranging from narrow shallow openings that are often closed by sandbanks, through to wide estuaries that may stretch many miles across.

Through all the possible configurations, there is an important legal question to be borne in mind. The mouth of a river marks the point at which the law of the terrestrial world is replaced with the law of the sea. Sovereignty swings from the absolute, where a State determines what ships may enter and in what circumstances, to a more permissive regime, where foreign ships can assert a right of innocent passage, without reference to the permission of a coastal State.1 Similarly, certain rights may be held over land that are not possessed over water,2 and statutes enacted by a state

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2 See, eg, Risk v Northern Territory (2002) 210 CLR 392, where the High Court held that the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) only operated on land and not in the adjacent bays and gulfs of the Northern Territory.
Parliament will not typically operate extraterritorially. Identification of a river’s mouth is therefore a significant question, although not one that will necessarily arise frequently. This article will explore the applicable statute and common law that have been used to describe where the mouth of a river is located.

II Australian Statute Law

The term ‘mouth of the river’ is one found in many statutes in Australian law, although there is typically no definition provided for it. The most relevant use of the phrase is in s 7 of the Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2016 (Cth) (‘Proclamation’), which establishes the effective coastline from which Australia’s territorial sea is measured. Section 7(b) of the Proclamation provides that for rivers flowing directly into the sea on the coast, the baseline is

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3 The law of an Australian state or territory does not typically apply at sea. There are a number of reasons for this. At common law, there is a rebuttable presumption that legislation does not have an extraterritorial effect. The presumption can be rebutted explicitly by Parliament, or by necessary implication from the nature of the legislation: Ex parte Iskra; Ex parte Mercantile Transport Co Pty Ltd (1962) 5 FLR 219, 228 (Sugerman J); Jumbunna Coal Mine NL v Victorian Coal Miners’ Association (1908) 6 CLR 309, 363 (O’Connor J). Even where a state indicates elements of its criminal law will operate extraterritorially, it is also necessary to establish a nexus between the activity the state is trying to regulate and the state itself: Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1, 14. However, legislation enacted according to the Offshore Constitutional Settlement gives the states and the Northern Territory responsibility for their ‘coastal waters’, an area up to three nautical miles from their coasts, and commencing from the mouth of a river where appropriate. While this belt of territorial sea technically remains extraterritorial to the state or Northern Territory, the relevant legislature now has jurisdiction to pass laws over those waters. Accordingly, any law passed by a state legislature would apply inside the mouth of a river, but only laws deemed to have extraterritorial effect will apply beyond the river mouth: see Coastal Waters (Northern Territory Powers) Act 1980 (Cth); Coastal Waters (State Powers) Act 1980 (Cth); Constitutional Powers (Coastal Waters) Act 1979 (NSW); Constitutional Powers (Coastal Waters) Act 1980 (Qld); Constitutional Powers (Coastal Waters) Act 1979 (SA); Constitutional Powers (Coastal Waters) Act 1979 (Tas); Constitutional Powers (Coastal Waters) Act 1980 (Vic); Constitutional Powers (Coastal Waters) Act 1979 (WA). See also Stuart Kaye, ‘The Offshore Jurisdiction of the Australian States’ (2009) 1(2) Australian Journal of Maritime and Ocean Affairs 37.

4 The Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2016 (Cth) (‘Proclamation’) was made under the Seas and Submerged Lands Act 1973 (Cth) s 7. Although less than two years old, the Proclamation is only the most recent of a series of proclamations fulfilling this role under the Seas and Submerged Lands Act 1973 (Cth). They are updated periodically to reflect changes in the coastline and more accurate charting of the territorial sea baseline.
the straight line drawn across the mouth of the river between points on the low-water lines of its banks, except where that line is landward of a line mentioned in paragraph (c) or (d)…

Section 7 therefore provides that the effective coastline for the purpose of calculating the width of Australia’s territorial sea is across the mouth of a river. This indicates, from a statutory point of view at least, that the waters of a river are perceived as distinct and different from the sea. From a legal perspective, the character of a river will be distinct from the sea.

However, frustratingly neither the Proclamation, nor the Seas and Submerged Lands Act 1973 (Cth) from which it draws authority, provide any methodology for the calculation of a river mouth. Instead of proclaiming the baseline by representing it on a set of charts, the Proclamation nominates precise basepoints, rather than leave the interpretation of the location of such points to a diagrammatic representation. Basepoints are described to the nearest second of latitude and longitude, and while each relates to a particular physical feature, no such features are referred to by name. The Proclamation also specifies that where the coast itself provides the territorial sea baseline, it should be measured from the Lowest Astronomical Tide.

There are 397 ordinary baselines prescribed in the Proclamation, as well as four baselines specifically for historic bays in South Australia. While the Proclamation does set down the basepoints for these baselines, it also indicates that these lines are by no means exhaustive. Rather, it adopts general language, indicating the mouth of a river may be enclosed by a territorial sea baseline not otherwise described.

Since the Proclamation does not distinguish between the type of enclosure used for its designated 397 baselines, it is not clear which may be viewed as enclosing a river, or which baselines, if any, may represent a river mouth. The Proclamation does not define what a river is, nor how the mouth of a river should be identified. This can be contrasted with the detailed definition of what constitutes a bay for the purposes of drawing a territorial sea baseline across its mouth. That said, the language used to describe additionally enclosed rivers in ss 7–9 of the Proclamation indicates that the enclosure of a bay into which a river flows prevents the enclosure of the mouth of

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5 The reference to additional lines in s 7(c)–(d) applies to straight baselines that may be drawn to enclose certain bays, indent coastlines or fringing islands.

6 Proclamation (n 4) s 5.

7 In addition to the Proclamation (n 4) sch 2 pt 2 dealing with the four historic bays, there is also the Seas and Submerged Lands (Historic Bays) Proclamation 2016 (Cth). For a discussion of these bays, see Stuart Kaye, ‘The South Australian Historic Bays: An Assessment’ (1995) 17(2) Adelaide Law Review 269.

8 Proclamation (n 4): s 7(b) applies to mainland Australia; s 8(b) to mainland Tasmania; and s 9(b) to islands off the coasts of the states or the Northern Territory.

9 Proclamation (n 4) s 6.
river. From this it may be inferred that where a river discharges into a bay, the mouth of the bay will not be equated with the mouth of the river.10

The predecessor of the current baseline Proclamation was considered in the context of a river mouth in Wandarang v Northern Territory.11 In determining the land claimed by a native title application, Olney J in the Federal Court of Australia stated the definition of the claimed area with respect to the Roper River was ‘the portion of the bed and banks of the Roper River which is … described as being bounded by … the territorial sea baseline across the mouth of the river.’12

The baseline in question was not one for which coordinates are provided in the Proclamation, nor is it marked on nautical charts. It is represented in a sketch map accompanying the registered native title claim, the relevant portion of which appears in a diagram accompanying the judgment.13 It extends from the headland and follows the general direction of the coast, making use of land rather than low tide elevations, which are indicated on the charts for the area.

Other references to the ‘mouth of a river’ in state or territory legislation are relatively rare. In New South Wales, the only statutory reference to a river mouth is in the definition of a ‘coastal bar’ in the Marine Safety Regulation 2016 (NSW), where such a feature is described as an area of sediment ‘across a river mouth, lake, estuary or harbour entrance’.14 This perhaps suggests, given the list of items are distinct and different rather than categories of the same thing, that a river mouth is distinct from an estuary or harbour entrance. There is a similar definition in the Marine Regulations 2009 (Vic), referring to the mouth of a ‘bay, inlet, river or waterway’, as well as the Water Act 1999 (Vic), which makes it clear that the mouth of the Yarra River does not include Port Phillip Bay.15

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10 This approach is also consistent with that of the ICJ in Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening) (Merits) [1992] ICJ Rep 351 (‘Gulf of Fonseca Case’), where the ICJ had the opportunity to consider the location of the mouth of the Gaoscoràn River, which formed the boundary between El Salvador and Honduras. The Gaoscoràn River had been agreed as the boundary between the land territory, although it was disputed as to whether the boundary ought to follow the present course of the River, or an earlier ancient riverbed. The Court adopted the existing stream, and ultimately selected a branch opening into the Bay of La Unión. What is notable in the context of the river mouth is that it was the position of the Court, and that of both of the parties, that the mouth of the river was to be located at the point at which the Gaoscoràn River entered the Bay of La Unión, and not the opening of the Bay: at 27–8 [306]–[321].


12 Wandarang v Northern Territory (n 11) 429–30 [118].


14 Marine Safety Regulation 2016 (NSW) cl 3.

15 Marine Regulations 2009 (Vic) reg 104: the definition here is of an ‘ocean bar’; Water Act 1989 (Vic) s 188A.
Victoria goes further in its *Fisheries Regulations 1998* (Vic) with the following definition:

‘Mouth’ in relation to any water flowing permanently or intermittently into the sea or into any lake, bay or inlet connected with the sea, or into any other lake, means an imaginary line running between the extreme seaward or outward point of either bank or side, to the opposite extreme seaward or outward point…16

Again this would seem to indicate that the waters of a bay are distinct and different from the waters of any river flowing into the bay.17

There is less guidance as to where the mouth of a river might be in relation to an estuary, although a conservative approach seems to be favoured. The *Tasmanian Inland Fisheries (Seaward Limits) Order 2004* (Tas) indicates that the seaward limit of inland fisheries in the Derwent Estuary is at Dogshear Point at Claremont, which is north of central Hobart, beyond both the Tasman and Bowen Bridges.18 The other states provide no definitions at all.

The nature of a river and an estuary are considered at greater length within Northern Territory legislation. The Northern Territory has adopted a statutory approach to the calculation of a mouth of a river within the *Fisheries Regulations 1992* (NT), made pursuant to the *Fisheries Act 1988* (NT). Regulation 3 of the *Fisheries Regulations 1992* (NT) provides a definition of ‘coastline’, which is entirely congruent with the High Court’s approach in *Risk v Northern Territory*:19

\[
\text{coastline means:}
\]

(a) except in relation to the mouth of a river, an imaginary line drawn along the coast at the Highest Astronomical Tide; or

(b) in relation to the mouth of a river, an imaginary line, contiguous with the adjacent coastline, drawn across the mouth of the river.20

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16 *Fisheries Regulations 1998* (Vic) reg 105. The regulations go on to specify different mouths from the above definition for certain specific rivers, typically in relation to existing bridges and other human constructions.

17 Tasmania adopts a similar approach by distinguishing the waters of a bay from the waters of a river, although it does so by describing each river individually: *Inland Fisheries (Seaward Limits) Order 2004* (Tas). Queensland takes a similar approach: *Transport Operations (Marine Safety) Regulation 2016* (Qld).

18 *Inland Fisheries (Seaward Limits) Order 2004* (Tas) sch 1.

19 *Risk v Northern Territory* (n 2).

20 *Fisheries Regulations 1992* (NT) reg 3.
This is expanded upon in reg 3(3) of the *Fisheries Regulations 1992* (NT):

If, under these Regulations, a point, line, area or relative position is to be calculated by reference to the coastline or an imaginary line along the coastline (whether or not along a particular water line on the coast) the coastline or imaginary line along the coastline is taken to include:

(a) in relation to a river specified in Schedule 5 of the *Barramundi Fishery Management Plan* as in force from time to time, the river closure line specified in that Schedule for that river; and

(b) in relation to any other river, an imaginary straight line across the mouth of the river calculated in the same manner as for the calculation of the baseline for the purposes of the *Seas and Submerged Lands Act 1973* (Cth) had all off-lying islands and historical bays and waters been ignored.21

The *Barramundi Fishery Management Plan 1998* (NT) (‘*NT Fishery Plan’*), which is promulgated as subordinate legislation made under the *Fisheries Act 1998* (NT), goes further, and defines the mouth of a river as

an imaginary line drawn from the most seaward extremity at Mean High Water Springs of one bank of the river to the most seaward extremity of the next bank at the same height of tide.22

The *NT Fishery Plan* is particularly useful to consider in the present context because it permits the taking of barramundi in the territorial sea during the barramundi season, but closes access to rivers from fishing. It establishes a series of closure lines to achieve this, and where closure lines are not in place, the mouth of the river or stream is used. In effect, the *NT Fishery Plan* is a statutory instrument which distinguishes sea areas, where fishing can take place, from rivers, where it cannot.

What can be taken from consideration of the statutory provisions is that there is no clear indication of where to locate the mouth of a river. The Commonwealth in defining the baseline of the territorial sea does not give any real guidance, and the states do not definitively deal with the issue either. The assumption seems to be that an individual will know a river mouth when they see one, and while that may be true in some cases, it will not address more complex geography where there is a large tidal range or where movements in sediment flows see features appear and disappear over time.

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21 Ibid reg 3(3).
III Common Law

In the absence of meaningful statutory guidance, it is useful to consider what approach might be gleaned from the common law. This presents a challenge as there has been little case law with respect to the identification of a river mouth. There are a number of reasons for this. First, since it is clear that a river falls within the jurisdiction of a state, and states also typically possess an Admiralty jurisdiction, there is little reason to seek to determine the status of waters in harbours, bays or rivers with any great precision.23

Secondly, where issues do arise, it is typically in the waters of a bay or gulf. Where a river has a simple and easily defined mouth, there is no need for a dispute as to the river’s extent. Where the river widens into an estuary, the rules pertaining to bays are applied. It was on this basis, for example, that the Supreme Court of the Northern Territory in Kitaoka v Commonwealth found that Boucaut Bay was not within the common law limits of the Northern Territory, without any reference to the Blyth River, which flowed into Boucaut Bay.24

While the cases are relatively few in number, it is useful to consider how the courts have constructed a methodology around the identification of the mouth of a river. There are essentially two circumstances where courts have had to undertake this task. The first is where the river extends into a widening estuary, where the distinction between river and sea is a gradual process. The second is where there are low tide features in issue, making it unclear exactly where the river enters the sea, as the action of the tide makes a definitive location difficult to pinpoint.25 Both of these present some level of difficulty to a court as to the identification of a river mouth between two obvious headlands. However, the nature of the common law is only to form out of cases before the courts — and a case about a clear and obvious river mouth is unlikely to ever be brought, since by its nature, the location of the river mouth is obvious. The following analysis will consider in turn the common law in the context of estuaries, and then low tide elevations.

A Estuaries

An estuary is defined by the Encyclopaedia Britannica as a partly enclosed coastal body of water in which river water is mixed with seawater. In a general sense, the estuarine environment is defined by salinity boundaries rather than by geographic boundaries. The term estuary is derived from the Latin words aestus (‘the tide’) and aestuo (‘boil’), indicating the effect generated when tidal flow and river flow meet.26

23 The Admiralty Act 1988 (Cth) gives Admiralty jurisdiction to State Supreme Courts.
25 A low tide elevation is a piece of land which is clear of the water at low tide, but submerged at high tide. In areas where the tidal range is great, low tide elevations may be very substantial.
26 Encyclopedia Britannica (online at 29 March 2019) ‘estuary’.
Geoscience Australia estimates there are approximately 1,000 estuaries around Australia, varying substantially in size and configuration. Arguably the best-known estuary in Australia is the Derwent Estuary in Tasmania, which sees the Derwent River flow into an ever-widening embayment of the sea, ultimately becoming Storm Bay. Nonetheless, precise geographical criteria to identify an area of coastline as an estuary do not presently exist.

The common law has always sought to distinguish a river from the estuary into which it flows. In Kitaoka v Commonwealth, Wells J of the Supreme Court of the Northern Territory quoted Lord Blackburn in the Conception Bay Case quite extensively. The quotations include references that estuaries ought to be equated to bays in the assertion of jurisdiction. While a river will always be within the jurisdiction of a state, a bay will only typically be within the jurisdiction in more limited circumstances, where certain rules are met. Significantly, Lord Blackburn equated estuaries with bays:

The few English law authorities on this point relate to the question, as to where the boundary of counties ends and the exclusive jurisdiction at common law of the Court of Admiralty begins, which is not precisely the same question as that under consideration; but this much is obvious, that when it is decided that any bay or estuary of any particular dimensions is or may be a part of an English county, and so completely within the realm of England, it is decided that a similar bay or estuary is or may be part of the territorial dominions of the country possessing the adjacent shore.

The case relied upon by Lord Blackburn in this statement was R v Cunningham. There, the three defendants had been convicted of wounding a man on an American ship, anchored in the Penarth Roads in the Bristol Channel (Figure 1). They appealed on the basis that the convicting jury had been drawn from the county of Glamorgan, when it was unclear that the offence had taken place in Glamorgan at all.

28 Kitaoka v Commonwealth (n 24); Direct United States Cable Co Ltd v Anglo-American Telegraph Co Ltd (1877) 2 AC 394 (‘Conception Bay Case’).
29 Conception Bay Case (n 28) 416.
30 Ibid (emphasis added).
32 Strohl (n 31). Strohl notes that the offence occurred ‘when seagoing life could still be one of the more brutal of human experiences, and anti-social behaviour on board ships in port was annoyingly common’: at 291. Neither at the appeal nor at first instance were similar sentiments expressed.
The Court quickly rejected this argument, and stated that they were of the view that the Bristol Channel was an ‘inland sea’ and that the waters closest to the littoral of any county facing onto the Channel were part of that county — in this instance since the ship was closer to Glamorgan, that was where the offence had taken place.34 While the Court’s analysis of why the Bristol Channel should constitute an inland sea is unfortunately sparse,35 it is clear that the Court regarded the waters of the Channel as British territory, although its mouth exceeded 100 nautical miles across.36 What is clear is that whatever the basis, there was no suggestion that the Bristol Channel was the extension of the jurisdiction enjoyed over the River Severn.

34 R v Cunningham (n 31) 1177.
35 The judgment of the Court was only 17 lines long, while the report of the case runs over 7 pages, filled largely with the argument of counsel.
36 It is worth noting that the width of the Bristol Channel in the vicinity of Penarth is less than 20 miles across. However in a later case, Cornish Coast v Società Nazionale di Navigazione; The Fagernes [1926] P 185, Hill J held that the waters of the Channel at a point where it was over 20 miles wide were inter fauces terrae (‘within the territory of the United Kingdom’): at 196. This finding was later overturned by the Court of Appeal, largely due to the intervention of the Attorney-General, who indicated that the Minister for Home Affairs was of the view the place concerned was beyond ‘the territorial sovereignty of His Majesty’: Cornish Coast v Società Nazionale di Navigazione; The Fagernes [1927] P 311, 330; see also, Pleadings, ‘Memorial of the United Kingdom’ Fisheries Case (United Kingdom v Norway) [1951] ICJ Pleadings 13, 64–5 (WE Beckett); ‘Counter-Memorial of Norway’ Fisheries Case (United Kingdom v Norway) [1951] ICJ Pleadings vol II, 287–8 (Sven Arntzen).
There have been a number of estuary cases in the United Kingdom which may also be persuasive to an Australian court, that again strongly indicate that an estuary ought to be equated with the sea rather than the more constrained waters of a river. In Post Office v Estuary Radio Ltd, Lord Diplock considered the legality of a prosecution of a pirate radio station broadcasting from a disused fort in the Thames Estuary, the location of which can be seen in Figure 2 (Redsand Fort). While the fort was found to be within the jurisdiction of the United Kingdom, this was because the Estuary had been enclosed within a territorial sea baseline drawn to enclose the area as a bay. Lord Diplock was concerned that the Thames Estuary was not literally a bay, but accepted the evidence of Royal Navy officers that the application of the ‘semi-circle’ rule under art 7 of the Convention on the Territorial Sea and Contiguous Zone was a mechanical activity, applied to a coastline, whether it might be described as a bay or not. Significantly, his Lordship did not simply state the fort was within the

Figure 2: Mouth of the Thames River

Source: Google Maps.

37 [1968] 2 QB 740, 760.
38 Ibid 862.
Thames Estuary, and therefore was within the realm of England. In fact, it has long been settled that the mouth of the Thames River lies at its junction between Yantlet Creek and the Crowstone near Southend-on-Sea.41 This was provided for in a Charter granted by Richard I in 1197 to the City of London.42

A similar approach was taken in *Turbine Steamers Limited v McLaughlin*, where it was held that the Firth of Clyde was an ‘inlet of the sea’ and not a river for the purposes of a voyage between Greenock and Campbeltown.43 The Court expressed the view the entire voyage was on the sea, indicating an argument that the waters were enclosed or inland waters was rejected.44 The Firth originates in the River Clyde, which flows through Glasgow, and at Greenock is approximately two kilometres wide. The Firth of Clyde is illustrated in Figure 3.

Since the voyage terminated at Greenock, it was unnecessary to determine where the mouth of the Clyde might be. The extent of the Clyde Estuary was again considered in *Western Ferries (Clyde) Ltd v Commissioner for Her Majesty’s Revenue & Customs*,

**Figure 3: Firth of the Clyde**

![Firth of the Clyde](https://www.google.com/maps/place/Firth+Of+Clyde/@55.5718714,-5.4560244,9z/data=!3m1!4b1!4m5!3m4!1s0x4889ba1302f3eadd:0x2a0c681a3baac770!8m2!3d55.5253989!4d-4.9332546).

Source: Google Maps.45

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41 Marked as a red line on Figure 2.
43 1923 SLT (Sh Ct) 20, 22 (‘Turbine Steamers’).
44 Ibid.
45 ‘Firth of Clyde’, *Google Maps* (Web Page) <https://www.google.com/maps/place/Firth+Of+Clyde/@55.5718714,-5.4560244,9z/data=!3m1!4b1!4m5!3m4!1s0x4889ba1302f3eadd:0x2a0c681a3baac770!8m2!3d55.5253989!4d-4.9332546>.
where a definition of the Clyde Estuary in Scotland was relevant. The Tribunal stated that

[reference was made in evidence and in submissions to a number of EC Directives and United Kingdom subordinate legislation implementing them, which relate inter alia to the management and treatment of water and waste water. The purpose of this line of evidence and argument was to examine various definitions such as transitional waters and use those definitions to show what are the likely boundaries of the Clyde Estuary. While it is neither necessary nor appropriate to examine these Directives in their entirety or in great detail, it is relevant to quote some of the definitions in order to show how some of the witnesses, particularly expert witnesses have reached their conclusions on the boundaries of the Clyde Estuary.

Article 2.6 of the Water Framework Directive defines transitional waters as

'bodies of surface water in the vicinity of river mouths which are partially saline in character as a result of their proximity to coastal waters but which are substantially influenced by freshwater flows.'

The definition of transitional waters thus has a resonance with what the characteristics of an estuary might normally be assumed to have although not complete identity. Transitional waters probably cover a wider area than an estuary.

All of these cases equate the estuary with the sea, and therefore indicate that the mouth of the river must be where the waters are significantly more enclosed. The determination of where the river is placed appears to be based on where the court is of the view the influence of the sea is lost because of the constrained nature of the waters. This seems to have been the approach in a string of cases involving rivers discharging into bays, which were themselves constrained, with the courts preferring to treat the bay as an inlet of the sea. This includes the United States Supreme Court in Knight v United Land Association, where it held the waters of a creek entering San Francisco Bay had its mouth where the creek entered the Bay, and not at the Bay’s relatively constrained mouth. This was in spite of the fact that the entrance to San Francisco Bay is sufficiently narrow to be spanned by the Golden Gate Bridge.

It is significant however that that any assessment of the extent of an estuary and the mouth of its river is not based around salinity, nor the impact of the tides. The salinity of the water or tidal movement do not appear determinative of the status of a river or

46 [2011] UKFTT (TC) 243 (‘Western Ferries’).
47 Ibid [52]–[54] (Members Reid and Malcolm).
48 See, eg, Booth Fisheries Co v United States, 6 F 2d 500 (9th Cir, 1925); Rustad v United States, 258 F 2d 563 (9th Cir, 1958).
49 142 US 161 (1891).
the location of its mouth. What appears most critical is that the waters are regarded as an inlet of the sea, and are therefore not within the river, but are seaward of the mouth.

An exception to this jurisprudence appears to come from the High Court of Australia in *Gibbs v Mercantile Mutual Insurance (Australia) Ltd*. In that case the High Court was divided on whether the Swan River should be regarded as part of the sea for the purposes of maritime insurance. An accident occurred on an area of the Swan River known as Perth Water, many miles upstream from what would be viewed as the ‘logical’ mouth of the Swan River at Fremantle. There was a dispute as to whether the accident should be covered by the *Insurance Contracts Act 1984* (Cth), applicable to inland waters, or the *Marine Insurance Act 1909* (Cth), which applied on the ocean. While the case was not ultimately decided on this point, it did afford some opportunity to consider the status of the Swan River. Chief Justice Gleeson was of the view that anywhere affected by the range of the tide was estuarine, and therefore part of the sea, although his Honour did not provide authority for this proposition. On the other hand, McHugh J produced a detailed and exhaustive survey of marine insurance cases involving rivers and lakes, and was of the view that the Swan River was not part of the sea.

While the High Court did not reach a conclusion on the issue, there is authority to suggest that the presence of salt water is not determinative of a river mouth. Chief Justice Gleeson’s approach was largely based on the application of the *Navigation Act 1912* (Cth) to tidal waters, rather than the confines of a legally-defined river. There are good reasons why the regulation of shipping in tidal ports is under a common scheme, as it is logical that vessels passing to and from riverine ports to the open sea should be managed under the same regulatory and safety scheme. However, this motivation is not relevant in the context of other uses of rivers, and so this approach has not been relevant in other cases within Australia and overseas. As such, the detailed analysis of McHugh J is to be preferred in respect of the wider question of the location of a mouth of a river. His Honour was dismissive of the use of tides and salinity of the water. Depending on the rate of flow of a river, salt may be found some distance upstream. The courts in a number of jurisdictions appear to recognise

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52 *Gibbs v Mercantile Mutual Insurance (Australia) Ltd* (n 50).

53 Ibid 613–14, [16]–[18] (Gleeson CJ).

54 Ibid 634–9, [85]–[102] (McHugh J).

55 Ibid.
that the presence of salt of itself does not determine whether waters are within the confines of a river’s mouth.\footnote{As much was noted by Pepys LC in \textit{Horne} (n 50) at 380, where his Lordship noted that freshwater may predominate in the sea proper where large rivers discharge in the vicinity. A similar view was expressed in \textit{McAdam v Halliday}, summarised in John C Alcock and Sir Joseph Napier, \textit{Reports of Cases Argued and Determined in the Courts of King's Bench and Exchequer Chamber, in Ireland, from Trinity Term, 1 W IV, to Trinity Vacation, 3 W IV, 1831–1833} (Hodges and Smith, 1834) 459. See also, \textit{H Jones & Co} (n 50) 235 (Dixon J).}

Finally, the High Court has indicated that public international law can be a legitimate influence on the common law, and therefore it is potentially useful to consider whether international treaty law distinguishes between rivers and estuaries.\footnote{\textit{Mabo v Queensland} (No 2) (1992) 175 CLR 1, 42 (Brennan J); see, eg, Ivan Shearer, ‘The Relationship between International Law and Domestic Law’ in Brian Opeskin and Donald Rothwell (eds), \textit{International Law and Australian Federalism} (Melbourne University Press 1997) 34, 61; Sir Gerard Brennan, ‘The Role and Rule of Domestic Law in International Relations’ (1999) 10(3) \textit{Public Law Review} 185, 190; Wendy Lacey, ‘Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere’ (2004) 5(1) \textit{Melbourne Journal of International Law} 4, 5.} The \textit{Convention on the Law of the Sea} (‘\textit{Convention’}) does refer to the mouths of rivers.\footnote{\textit{Convention on the Law of the Sea} (n 1).} The \textit{Convention} is in part incorporated into the \textit{Seas and Submerged Lands Act 1973} (Cth), including art 9 dealing with river mouths.\footnote{\textit{Seas and Submerged Lands Act 1973} (Cth) sch 1 art 9.} Article 9 provides that the baseline of the territorial sea may be calculated as extending ‘[in] a straight line across the mouth of the river between points on the low-water line of its banks.’\footnote{\textit{Convention on the Law of the Sea} (n 1) art 9.}

Of itself, this does not provide guidance. However, the French version of art 9 deals directly with the existence of estuaries:

\begin{quote}
Embouchure des fleuves — si un fleuve se jette dans la mer sans former d’estuaire, la ligne de base est une ligne droite tracée à travers l’embouchure du fleuve entre les points limites de la laisse de basse mer sur les rives.
\end{quote}

\begin{quote}
[Mouths of rivers — If a river flows directly into the sea without forming an estuary, the baseline shall be a straight line across the mouth of the river between points on the low-water line of its banks.]
\end{quote}\footnote{Ibid art 9 (emphasis added).}

This notes that the closing of a river mouth is possible where it does not form an estuary. This makes it clear that estuaries are treated differently for the purpose of drawing a territorial sea baseline than rivers flowing directly into the ocean. The fact that Australia is an English-speaking country is not relevant in the interpretation
of art 9. The *Convention* is equally authoritative in each of the six languages of the United Nations, and each can be used as an aid to interpretation.62

This differentiation of estuaries from rivers in international law has a long history. Prescott and Schofield note that the differentiation was explicit as early as 1930, and is supported in the writings of numerous academic publicists.63 They note that there is no settled definition of an estuary, citing the difficulties in identifying sufficiently objective criteria.64

### B Low Tide Elevations

The action of the tide, and variations in the discharge of water from a river due to drought or seasonal rainfall, can mean that the banks of a river may not be stable. Movement of many metres may be common over a period of months or years, and in extreme cases, the entire river may significantly move to a new location. As such, any consideration of the location of the mouth of a river must take into account that the river is a dynamic environment, the course or even location of which may physically move.65

Further, some rivers discharge significant quantities of sediment into the sea, creating islands or banks which may appear at low tide and disappear again as the tide turns and the ocean rises. Consequently, small islands may appear and disappear where the river meets the sea, or parts of the river bank may be submerged by the ocean at low tide. Any methodology applied by a court to determine the mouth of a river must take this dynamic nature into account.

The question of river mouths and submerged banks and features has been considered by courts in the United Kingdom, although more commonly in Scotland than in other parts of the United Kingdom. The most oft cited case is that of the *Duke of Atholl v Maule* which pertained to the legality of fixed fishing nets in the estuary of the Tay River.66 To place nets in the Tay was unlawful, but to place nets in the sea was not unlawful, so the case turned on the extent of the river. The Court of Session found that the Tay River extended out from the land and included the waters enclosed by

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62 Ibid art 320.
63 John RV Prescott and Clive H Schofield (n 51) 130–4.
64 Ibid.
65 For example, the course of the Rio Grande moved substantially in the latter half of the 19th century, leading to a dispute between Mexico and the United States over the location of the border: see Convention between the United States and Mexico for the Arbitration of the Chamizal Case (1911) 5(2) (Supplement) American Journal of International Law 117.
Drumly Sands. This view was upheld by the House of Lords on appeal in *Dalgleish v Duke of Atholl*.

Some consideration of the basis of this decision needs to be given as it is referred to in most of the subsequent cases in the 19th and 20th centuries. The physical context can be seen in the following chart extract in Figure 4: here, beige shades represent land, green shades low tide elevations, and blue shades water (with water depths given in metres).

Figure 4: Drumly/Abertay Sands, Tay River

Drumly Sands (now renamed Abertay Sands) extend immediately to the east of Tentsmuir Point. While submerged at the highest tides, they are substantially out of the water at low tide — in the order of more than two metres at their highest point. The Sands are also connected to the land. An observer at low tide would see what appeared to be a classic narrow river mouth between Drumly/Abertay Sands to the south, and sandy low tide elevations off Buddon Ness to the north. In these

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67 Ibid 318.
68 *Dalgleish v Duke of Atholl* (n 50).
69 See, eg, *Earl of Kintore v Forbes* (1828) 5 ER 173; *Little v Grierson* (1824) 3 S 261; *Duke of Devonshire v Smith*, summarised in John C Alcock and Sir Joseph Napier, *Reports of Cases Argued and Determined in the Courts of King’s Bench and Exchequer Chamber, in Ireland, from Trinity Term, 1 W IV, to Trinity Vacation, 3 W IV, 1831–33* (Hodges and Smith, 1834) 442; *McWhir v Oswald* (1833) 11 S 552; *Horne* (n 50); *Turbine Steamers* (n 43).
circumstances, neither the Court of Session, nor ultimately the House of Lords, were prepared to locate a mouth further to the west.

What is clear from the case is that the banks of a river extending up to its mouth need not always be clear of water. As was the case in *Duke of Atholl v Maule*, the fact that what the court regarded as parts of the river bank were submerged at high tide was not relevant. What was important was the contiguity between the parts of the river clear of the water at high tide and those portions that were submerged.

The identification of headlands was also considered by the United States Supreme Court in *Georgia v South Carolina*. The case involved a dispute as to the location of the boundary between the states of Georgia and South Carolina, which had been designated in colonial times by agreement as running along the course of the Savannah River. The course of the River had changed over time, including the shifting of its mouth further southward as a result of the United States Corps of Engineers’ work on the creation of a safe channel for ships wishing to use the River. The lower reaches of the River were characterised by low swampland areas that consisted of mudflats and islands. In giving the judgment of the majority, Blackmun J stated the following:

> It seems to us that this portion of the controversy between the two States centers on the determination of the ‘mouth’ of the Savannah River and encounters no inconsistency with what this Court said in *Georgia v South Carolina*. The Savannah River’s ‘mouth’ was not defined in the *Treaty of Beaufort*. Georgia argues that the mouth, as referred to in the Treaty, must be located in the vicinity of Tybee Island, rather than somewhat upstream. Tybee lies south and east of Cockspur. We accept that submission and regard Tybee as forming the south side of the river’s mouth. Usually, there are two opposing ‘headlands’ marking and constituting the mouth of a river. See *Knight v United Land Association*. This is the ‘headland-to-headland’ principle used in defining the limits of bays and rivers. It is not always that simple, however. Sometimes the mouth of a river is difficult to delineate. Because of the absence of a reasonably close headland to the north, Georgia is driven to argue that the boundary at the mouth of the Savannah River must be the geographical middle between Tybee and the closest points of land in South Carolina, that is, Daufuskie Island, lying north and northeastward of Turtle Island, and Hilton Head Island, almost six miles north of Tybee.

We conclude that this is not a realistic determination of the Savannah River’s mouth, and we agree with the Special Master in rejecting the argument.

The difficulty lies in the fact that Tybee Island, the most seaward point of land on the southern side of the river, has no counterpart of high land on the northern side. The geographical feature taking the place of the customarily present opposing

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72 Ibid.
headland is, instead, a shoal, long recognized as confining the river. It is true, of course, that the Corps of Engineers affected the flow by its training wall and hydraulic fill. But the shoal which directed that flow has been recognized for many years. Furthermore, Hilton Head Island and Daufuskie Island are so far distant that it is impossible to say that they even touch the Savannah River.

Given this somewhat uncommon type of river mouth, the Special Master’s conclusion that the northern side of the Savannah’s mouth is the underwater shoal is not unreasonable. To accept Georgia’s proposition here would result in having Georgia waters lie directly seaward of South Carolina’s coast and waters.

Georgia’s exception with respect to Oyster Bed Island and the mouth of the Savannah River is overruled.75

The extract of a chart below at Figure 5 illustrates the Court’s approach. Similarly to Figure 4, beige shades represent land, green shades low tide elevations, and blue shades water (with water depths given in metres).

**Figure 5: Savannah River, between Oyster Bed Island and Tybee Island**

Source: Fishing App GPS Nautical Charts. The original map is in colour and is accessible online.76


Oyster Bed Island on the northern side of the Savannah River is marked with a yellow marker. Tybee Island is to the south and south-east of the marker.

It is evident from the chart extract that much of Tybee Island is submerged at high water. While referred to as an island, the land can be seen as an extension of the southern bank of the River, broken only by shallow and swampy creeks.

The same approach is taken in the north, with Oyster Bed Island, which over time has lost its separated character and become affixed to Jones Island, forming the northern bank. In addition, the river mouth is extended to the east, by the partially submerged training wall constructed by the United States Corps of Engineers. This feature, although artificial, is also connected to the land at Oyster Bed Island, making for a continuous extension of the bank, albeit one that is submerged at high tide.

This approach is entirely consistent with the earlier British cases. Where there are islands or low tide elevations in the vicinity of a river entering the sea, such features form part of the mouth of the river and are directly associated with the banks of the river, not separated by deep water.77

IV Conclusion

As was stated at the outset, there is significance in the identification of the mouth of a river at law. The lack of precision in how that mouth is located is a concern, although given the tremendous variations in geographical features, finding a precise methodology to identify a river mouth might be difficult to do. However, the common law and limited statutory law do permit some conclusions to be made. First, there is a clear distinction in the common law, with limited support from the statutory sources, between rivers and estuaries, with the latter seen as inlets of the sea while the former are associated with the land. Estuaries are typically characterised by large embayments, relative to the size of any rivers or creeks that enter them.78 Second, salinity of the water or tidal movement are not determinative of the status of a river or the location of its mouth.79 That said, where waters are regarded as an inlet of the sea, they will not be within the river and will be seaward of the mouth.80 Third, as noted

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77 Georgia v South Carolina (n 73); Duke of Atholl v Maule (n 66), affirmed in Dalgleish v Duke of Atholl (n 50).

78 See Conception Bay Case (n 28); Simlesa v Perry (n 51); Gulf of Fonseca Case (n 10); Knight v United Land Association (n 49); Booth Fisheries Co v United States (n 48); Turbine Steamers (n 43); Post Office v Estuary Radio Ltd (n 37); Risk v Northern Territory (n 2); Western Ferries (n 46).

79 Gibbs v Mercantile Mutual Insurance (Australia) Ltd (n 50) 634–5, [86]–[87] (McHugh J); H Jones & Co (n 50) 325 (Dixon J); Horne (n 50) 380; Dalgleish v Duke of Atholl (n 50).

80 Post Office v Estuary Radio Ltd (n 37); Simlesa v Perry (n 51); Turbine Steamers (n 43); Risk v Northern Territory (n 2); Gulf of Fonseca Case (n 10); Convention on the Law of the Sea (n 1) art 9.
above, in cases where there are low tide elevations in the vicinity of a river entering
the sea, such features form part of the mouth of the river and are directly associated
with the banks of the river.\textsuperscript{81}

While there is clearly no simple definition, partly because of the variations in coastal
geography, it is possible to venture an opinion as to where the mouth of a river
might be. The critical element seems to be whether the waters in question are seen
as riverine in nature or as an arm of the sea. If the waters are an arm of the sea, then
the mouth must be closer to land. This will not be based on tides or salinity, as both
can impact upon waters which have been treated as riverine in cases and legislation.
Rather it will be based on the geographical configuration of the coastline in the
vicinity of which the river flows into the sea. A wide and open estuary will typically
be regarded as an arm of the sea, whereas islands close to the mainland near a river
will be deemed to be part of the rivers banks if they are physically attached to the
mainland at low tide, or at least separated only by shallow water.

Therefore, while the sources are scattered, rules for the determination of the mouth
of a river within Australian law can be identified, allowing the divide between the law
of the sea and that applicable to the land to be made clear. This in turn has important
regulatory consequences in terms of property and usufructuary rights, which have
increasing importance in the regulation of human activities.

\textsuperscript{81} Georgia v South Carolina (n 73); Duke of Atholl v Maule (n 66), affirmed in Dalgleish
v Duke of Atholl (n 50).
THE HIGH COURT’S MINIMALISM IN STATUTORY INTERPRETATION

Abstract

According to some, the High Court of Australia believes itself able to stipulate the law of any statute. According to others, the Court believes no such thing. The Court — on this alternative view — takes the laws of statutes to reside in the stable and interpreter-independent linguistic meanings of statutory texts. Here I offer a third view: that the Court tentatively indicates its commitment to both of these positions, so as to avoid strong commitments to either. This strategy — a form of minimalism — is intended to solve a difficult problem: the problem of justifying the courts’ interpretive practices within a value-pluralist society. However, the strategy encounters certain difficulties. After surveying these difficulties, I argue that a different strategy ought to be adopted. The Court should either develop its theoretical position in earnest, or commit to a stronger form of minimalism, thus avoiding high-level theories more completely.

I Introduction

A ‘theory of statutory interpretation’ is a theory of what determines the laws of statutes. For example, according to one theory — textualism — the law of a statute is determined by the linguistic meaning of the statute’s text. ¹ According to another theory — intentionalism — a statute’s law is determined by the apparent subjective intentions of legislators. ² Yet another theory — perfectionism — holds a statute’s law to be that which shows the statute in its best moral light,

* LLB (Monash), LLM (Cantab). The paper has benefited greatly from the insight, encouragement and criticisms of Peter Cane, Ron Levy, Dan Meagher, Dale Smith, Duncan Wallace and the student editors. All errors are my own.

all things considered. These are just some of the theories that, today, compete for our acceptance.

In Australia, the High Court has not committed to textualism, intentionalism, perfectionism, or any other established theory of statutory interpretation. Nor has the Court ventured to craft its own interpretive theory. With increasing frequency, however, the Court has made passing statements regarding what determines the laws of statutes. These meagre statements of theory — usually a passage or a paragraph long — serve as indicators of what the Court’s broader theory might be.

In recent times, there have been two separate attempts to collate these terse statements of theory, and to then — on the basis of these collations — demonstrate the Court’s commitment to some broader theory of interpretation. Interestingly, the articles containing these attempts have disagreed in their conclusions. The first article, authored by Jeffrey Goldsworthy and Richard Ekins, argues that the Court is committed to a ‘sceptical’ theory, according to which judges are able to ‘stipulate’ what the law of any statute is, and to thereby exercise strong discretion over the laws of statutes. The second article, authored by Dale Smith, argues that the Court is committed to an opposite theory. The Court, according to Smith, is committed to textualism. That is to say, the Court takes the laws of statutes to be expressed by the objective linguistic meanings of statutory texts, thus leaving judges with no discretion over a statute’s law.

In this article, I will advance a third, and quite different account of the Court’s theoretical approach. According to my account, the Court’s various statements of theory are intended to permit the very kind of disagreement that occurred between Goldsworthy and Ekins, and Smith. The Court’s various statements of theory are drafted so as to be heterogenous and indeterminate, and to thereby allow different spectators to come to different conclusions regarding the Court’s theoretical commitments.

Insofar as the Court does avoid publicly committing to any one interpretive theory, the Court can be said to partake in a form of minimalism. By ‘minimalism’, I mean a

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5 Ekins and Goldsworthy (n 2) 67.

particular judicial practice and ethic, brought to popular attention by Cass Sunstein.\footnote{See Cass Sunstein, \textit{One Case at a Time: Judicial Minimalism on the Supreme Court} (Harvard University Press, 1999).} Broadly speaking, minimalism entails that judges err on the side of giving fewer rather than more reasons for decisions.\footnote{Ibid 9–10.} More specifically, however, minimalism counsels against the giving of deeper reasons for decisions, such as reasons of political and moral theory, legal philosophy, or grand explorations of the constitution’s scheme of government and authority\footnote{Ibid 8–14. Sunstein originally defined minimalism as entailing not only shallowness of judicial reasons (in the sense of avoiding theory), but narrowness of judicial reasons (in the sense of avoiding the establishment of \textit{ex ante} legal rules that will bind future decisions). Later Sunstein described a leaner version of minimalism whereby the judge’s reasons are not narrow — the judge is not rule-averse — but they are shallow; Cass Sunstein, \textit{Constitutional Personae: Heroes, Soldiers, Minimalists and Mutes} (Oxford University Press, 2015) ch 3. In this paper I use minimalism in its latter, simpler sense, where it merely denotes the avoidance of theory.} — ‘heroic flights of theoretical fancy’.\footnote{Jeremy Waldron, ‘On the Supreme Court Battlefield’ (2016) 63(5) \textit{New York Review of Books} 23.}

In taking a minimalist approach to statutory interpretation, the High Court perhaps aspires to achieve the benefits commonly associated with minimalism. By prescinding from deep theories of interpretation, the High Court might, for example, aspire to decrease the complexity of the interpretive task, or reduce the contentiousness of the judiciary’s interpretive decisions. Furthermore, the Court might intend to defer the most vexing questions of theory and constitutional principle, so that they may be answered in the fullness of time, through the sustained, collective efforts of many minds in the judiciary and the polity more broadly, rather than be answered by the error-prone manifesto of any one group of judges. In the literature at least, these are the stated aspirations of the minimalist tradition.\footnote{See below Part V(A).}

The High Court, however, practises an untraditional form of minimalism, and — as I will argue — the approach is without prospect of achieving the ‘aspirations of the minimalist tradition’ just adverted to. What renders the Court’s approach unusual is that the Court does not simply omit to give deep theoretical reasons for its interpretive practices. Rather, the Court circulates conflicting and tentative statements of theory in support of its interpretive practices. The Court thus avoids committing to an interpretive theory not through silence, but through the maintenance of plural and incompatible positions. The Court does not practice minimalism simpliciter, but instead practices ‘mirrors minimalism’, as I shall call the approach.

Against that background, this article has three principal aims. The first, pursued across Parts III and IV, is to describe the Court’s practice of mirrors minimalism, and to explain the powerful reasons that the Court may have for engaging in the practice. The second principal aim, pursued in Part V, is to critically assess mirrors minimalism,
and to demonstrate that the approach, though well-motivated, is ultimately undesirable and unlikely to achieve the aspirations of the minimalist tradition.

The article’s final aim, pursued in Part VI, is to identify two alternative and superior strategies for publicly justifying the Court’s interpretive practices. The first of these strategies would be to pursue a simpler form of minimalism. The second strategy would be to follow in that American tradition — threaded through the works of Holmes, Easterbrook, Scalia, Breyer and Posner among others — of entertaining questions of theory in earnest, and developing a clear theoretical position from the bench.

Before visiting any of these subjects, I will lay out some necessary theoretical foundations. That is the task of Part II, to which I now turn.

II Theories, Believers and Sceptics

Moments ago, I observed that there is a great diversity of established interpretive theories, all with their own monikers, and their own proponents and opponents in the academy and judiciary. For all the diversity in the interpretive theories, however, the theories may be categorised as falling either side of a single cleft. Some theories, I will say, are believer’s theories. Others are sceptical theories. In this very brief Part, my aim is to stake out the differences between these two general varieties of interpretive theory. Though the discussion will be abstract, the distinctions and classifications I make will set the stage for the coming Parts. In those Parts, I will argue that the High Court’s approach to interpretive theory is to equivocally support both believer’s and sceptical theories.

A Believers and Sceptics

When I speak of a believer’s theory in this article, I speak of a theory that purports to describe what ‘interpretation just is’. In other words, a believer’s theory (as I am here defining it) is not offered as describing merely one interpretive method among many credible alternatives; nor is it argued for on the grounds that the theory, if adopted, would have better consequences than if other theories were adopted. Rather a believer’s theory is argued for on the grounds that it is the singularly correct theory — a description of the one way in which judges may legitimately determine the laws of statutes. The theories mentioned earlier — textualism, intentionalism and perfectionism — are all typically expounded as believer’s theories.

Believer’s theories have two hallmarks, the first of which is that the theories attempt to establish their own correctness from within legal discourse, rather than by direct


appeal to exogenous normative criteria, such as justice, fairness or utility. So, for example, a textualist such as Scalia, or an intentionalist such as Ekins, will not defend their theory on the bare political ground that the theories will leave society better off. Rather, each will insist that their theory is correct on the grounds that the theory is uniquely required by the constitutional grants of legislative and judicial power, and various aspects of the nature of law and law-making. Accordingly, believer’s theories have a distinctively absolutist and legalistic tenor. They are characterised not by unalloyed claims about what is politically ‘just’, ‘best’ or ‘right’, or by economic analyses concerning which interpretive methods will bring about the best results. Rather, believer’s theories are characterised by resort to distinctively legal concepts — ‘the act of law-making’, ‘authority’, ‘constitutional bounds’, ‘lawmaking intention’, ‘sovereignty’ — and claims about what lawmaking and interpretation ‘is and is entitled to be’.

The second and, for us, most important hallmark of a believer’s theory is that, according to such a theory, statutes necessarily have objective and stable laws, such that judges cannot exercise discretion over what the law of a statute is. Believer’s theories necessarily reach this conclusion, for upon committing to the view that one interpretive method is uniquely legitimate, one also commits to the view that a statute’s law is that which is yielded by applying this uniquely legitimate interpretive method. A perfectionist will therefore say that the law of a statute is, and is only, that which shows the statute in its best light. A textualist will instead say that a statute’s law is, and is only, that which is communicated by the statute’s text and so on. Because a believer’s theory does not afford discretion to judges regarding what the law of a statute is, believer’s theories deny to judges the power that would attach to such discretion.

To recapitulate, then, I define a believer as someone who believes that there is something that interpretation just is; that this ‘something’ is fully determined by the

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14 See Scalia (n 1) 22–3; Ekins (n 2) ch 9. Compared to textualists and intentionalists, perfectionists focus less on the constitution’s prescriptions, and more on the nature of interpretation: Dworkin (n 3) ch 2.

15 See, eg, Scalia (n 1) 22 ‘the text is the law, and it is the text that must be observed’.

16 See Dworkin (n 3) ch 9. Perfectionism, it must be mentioned, does entail ‘alloyed’ appeals to notions of justice and fairness. That is to say, for perfectionists, the law is not determined by the conceptions of justice and fairness subscribed to by the judge, but the conceptions of justice and fairness that happen to best explain and justify the statutory text, as well as established practices, such as the practice of respecting legislative supremacy.

17 All of these phrases are drawn from Richard Ekins, ‘Interpretive Choice in Statutory Interpretation’ (2014) 59(1) American Journal of Jurisprudence 1, 19.

18 Dworkin (n 3) 313.

19 Scalia (n 1) 22. See also Andrei Marmor, The Language of Law (Oxford University Press, 2014) 12: ‘What the law says is what the law is”; Ekins (n 2) 246: ‘[I]ntended meaning is the central object of statutory interpretation’.

20 See Scalia (n 1) 16–23; Ekins (n 2) 246; Dworkin (n 3) 338–43.
constitution or some timeless fact about the nature of law and law-making; and that statutes do have determinate laws, such that judges are bound by these laws and will either interpret them correctly or incorrectly.

The sceptic, by comparison, holds a different constellation of positions. The sceptic does accept that a judiciary ought to have a theory of interpretation. That is to say, the sceptic accepts that the judiciary ought to have some stable and known criteria for determining the laws of statutes. But for the sceptic, these criteria are not fixed by the constitution or the nature of law and law-making. As far as the sceptic can see, a judiciary may identify the law of the statute with legislative intentions or with the text’s meaning or with the proposition of law that would show the statute in its best moral light (or with something else). But nothing about the constitution or the law more generally entails that interpretation will involve one of these methods to the exclusion of all others. In short, ‘there is nothing that interpretation just is’.

That being so, the judiciary must choose its theory of interpretation, according to the sceptic. Theories of interpretation are thus to be looked upon as alternative available methods of interpretation, and not as different candidate descriptions of what interpretation just is and ought to be. Furthermore, if settling upon a theory of interpretation is an exercise in choice — as is the sceptic’s contention — then we can only go about that choice as we would any other. For any choice, be it a choice between theories of interpretation or TV channels, the choice can only be rationally made on the basis of some evaluative criteria. For a judge choosing between interpretive theories, then, they ought to make their choice based upon the criteria appropriate for evaluating the actions of any public institution; namely, the criteria of justice, fairness and utility.

Sceptical theories of interpretation are theories that take the above assumptions for granted. The more popular of these theories have been assigned various and daunting titles: pragmatism, operating-level formalism, and dynamic interpretation. Rather than describing the details of these particular theories however, we can serve our modest purpose — to know a sceptical theory when we see one, in the High Court’s jurisprudence especially — by noting what is distinctive about these theories, and about sceptical theories in general.

21 What I am here calling a sceptic, others would call a pragmatist. See Dworkin (n 3) ch 5.
23 Sunstein (n 12) ch 1. See also Richard Posner, Law, Pragmatism and Democracy (n 4) 11–13.
24 Sunstein (n 12) 19.
25 Vermeule (n 4) 66.
26 Ibid 76–86.
27 Ibid 6–41.
The first of these distinctive features is that a sceptical theory will typically be supported not by legal or legal-philosophical propositions, but by propositions regarding the valuable consequences that the theory will have once adopted. So for example, one well-known sceptical theory — operating-level formalism — recommends that judges give close effect to the clear meanings of statutory texts, and that they avoid the use of interpretive canons and legislative history, and defer to the interpretations of agencies where statutes are unclear. More to the point, the theory recommends this interpretive approach solely on the grounds that it will reduce the costs of litigation and the workloads of judges, and reduce the rate of judicial errors. While such terrestrial considerations are at home in the sceptic’s consequentialist line of reasoning, they could have no place in the principles-based theory of a believer.

A second and related feature of sceptical theories is that their validity is contingent upon their having good consequences. So for example, it is implicit in the theory of operating-level formalism that if the data came in, and interpretive canons, judicial creativity, and the use of legislative history were all found to drastically improve interpretive outcomes (by some agreed measure), reduce litigation costs, and so on, the theory would cease to be valid.

A third feature of the sceptic’s theory is that, because their theory is offered on the grounds that it will have the most desirable consequences, we may require the sceptic to give reasons for why the predicted consequences of their theory are desirable. Pushed to the wall, then, the sceptic must locate the ultimate foundation for their theory in political and moral convictions — in claims about what is valuable, and about how power ought to be distributed to the different institutions of government, all things considered. This is quite unlike the believer who, chased to the logical end of their reasoning, finds themselves in the realm of constitutional interpretation and perhaps legal philosophy.

A final feature of sceptical theories is that they do not see statutes as having objective and determinate laws. There being nothing that interpretation ‘just is’, there can be nothing that the law of a statute ‘just is’. And so the sceptic will say that the law is what judges decide it to be. That ‘the prophecies of what the courts will do in fact, and nothing more pretentious, are … the law’. Or, as another sceptic writes: ‘law is not a thing [that judges] discover; it is the name of their activity’. 

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28 Vermeule (n 4) 1.
29 Ibid 5.
30 Ibid.
III Mirrors Minimalism — in the High Court

In recent times, two believers, Goldsworthy and Ekins, have accused the High Court of adopting a stance of scepticism. These two authors have written:

The emergence of [a] new sceptical view [on the High Court] threatens to recast the practice of statutory interpretation, tacitly authorising the courts to stipulate the meaning of Parliament’s enactments … This mode of ‘interpretation’ is proscribed by the constitutional grant of legislative authority…33

But here things get puzzling. Another of our most respected theorists has claimed the opposite. According to Dale Smith’s recent article, the High Court is the truest of believers.34 Indeed, the Court not only equates the law of a statute with the meaning of the statute’s language, but the Court does so to a fault. The High Court, according to Smith, makes the ‘claim that the ultimate aim of statutory interpretation is to ascertain the meaning of the words contained in the provision being interpreted’. 35 Smith labelled this claim the ‘meaning thesis’ and proceeded to give reasons for why the thesis should be rejected.36

How could different theorists, reading the same cases, come to such diametrically opposed understandings of the Court’s theory of interpretation? The answer, I think, has not to do with any glaring mistake made either by Smith or by Goldsworthy and Ekins. Rather it has to do with the protean nature of the Court’s statements themselves. As I will argue in this Part, the Court’s theory of interpretation cannot be discerned for two reasons. Firstly, when the Court makes a statement of interpretive theory, the statement will typically have a probable meaning, but will also have some other possible meaning that contradicts the statement’s probable meaning. For the Court, this creates a level of plausible deniability regarding what the statement means. Secondly, the probable meanings of the Court’s different statements will often conflict; some statements seem to commit the Court to a believer’s theory, others to a sceptical theory. This creates a second order of plausible deniability.

As I will later argue, the Court is unlikely to have pursued this strategy consciously. It is more likely that that the strategy is a so-called ‘emergent strategy’:37 a strategy born not of thorough plans, but of reflexive responses to exogenous constraints (see Part IV). Either way, the strategy’s upshot is the same: it is to erect a hall of mirrors, in which the Court cannot be seen to certainly commit, or not commit, to any particular theory of interpretation. It is this approach to interpretive theory which I call mirrors minimalism, and which I will now describe in some detail.

33 Goldsworthy and Ekins (n 2) 67.
34 Smith (n 6).
36 Ibid 235–53.
A The High Court as Believer

Soon we will consider the hall of mirrors from the outside, as it were, paying particular attention to its architecture and possible functions. But first, let us experience it from the inside. We can do this by journeying with Smith in his attempt to prove the Court’s commitment to one particular believer’s theory of interpretation — ‘the meaning thesis’.

When Smith claims that the High Court accepts the meaning thesis, he simply means that ‘we can ascribe to the Court the view that a provision’s legal effect is equivalent to its linguistic content’.38 By now we will appreciate that this view — the meaning thesis — could only be the nub of a more complete theory, for while the meaning thesis claims there to be an identity between a statute’s law and its linguistic meaning, the thesis itself provides no extensive reasons for why that claim is true. Still, although the meaning thesis is a nub, it is distinctively the nub of a believer’s theory. As Smith makes clear, the meaning thesis is a theory about what interpretation just is and must be. Smith writes:

[T]he Court believes that a provision’s linguistic content determines its legal effect, in the sense that the contribution that the provision makes to the content of the law is a function of the meaning of the words contained in the provision. This explains why the Court claims that the ultimate aim of statutory interpretation is to ascertain the meaning of those words.39

Turning our attention more directly to Smith’s plight, it is significant that the High Court has never made the claims or expressed the beliefs that Smith, in this last paragraph, attributes to the Court. Indeed, Smith is clear that his claims regarding the Court’s position are based, not in mere reports of the Court’s statements, but in searching interpretations of them.40

The judicial statement central to Smith’s case was given in Project Blue Sky.41 Though the statement itself was made some 20 years ago, it has since been continuously endorsed by the High Court and the wider judiciary.42 The statement, which I will simply refer to as the Project Blue Sky statement, reads as follows:

the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of

38 Smith (n 6) 232.
39 Ibid 233 (emphasis in original).
41 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 (‘Project Blue Sky’).
42 See below n 58 and accompanying text for a discussion on the quantity of judicial references to Project Blue Sky. For one recent citation in the High Court, see Lacey v A-G (Qld) (2011) 242 CLR 573, 591–2 [43] (‘Lacey’).
the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.43

Smith offered the above dictum as sufficient evidence for the following claim: ‘according to the High Court, the role of a judge when interpreting a statutory provision is to ascertain the meaning — … the “linguistic content” — of that provision’.44 If we now look closely at the wording of the Project Blue Sky statement, we will see why Smith comes to the interpretation that he does. But we will also see why his interpretation necessarily lacks a solid foundation.

We should start by re-reading the first sentence of the Project Blue Sky statement. That sentence is amenable to the following two interpretations, one probably correct, the other possibly so:

(1) **Probable believer’s meaning**: The duty of a court is to give the words of a statutory provision the meaning that the legislature objectively appears to have intended them to have.

(2) **Possible sceptical meaning**: The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken — by the judiciary, and on grounds chosen by the judiciary — to have intended them to have.

The reason that the sentence is amenable to the second of these meanings is that the sentence says that a statute’s words are to bear the meaning that the legislature is ‘taken’ to have intended: yet the sentence does not state the permissible grounds upon which a judge may ‘take’ the legislature to have intended to communicate one meaning or another.

Now consider the remainder of the Project Blue Sky statement. In particular, note how it carries and keeps alive both divergent threads of meaning identified in the dicta’s first sentence. On the one hand, and as Smith stresses, the second half of the Project Blue Sky statement can be seen to reinforce the ‘probable believer’s meaning’ of the first sentence, and accord with a believer’s theory that the law of the statute is the statute’s apparently intended linguistic meaning.45 After all, why would the statute’s legally relevant meaning ‘ordinarily … correspond with the grammatical meaning’ of the statute, if not because the statute’s linguistic meaning was its law? As for the justices’ suggestion that ‘the context… [and] the purpose of the statute’ may cause the statute’s legal meaning to be other than its literal meaning, that also

43 Project Blue Sky (n 41) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).
44 Smith (n 6) 232.
fits with Smith’s interpretation of the passage. For, as any linguist would volunteer, the meanings of utterances are informed by their context and apparent purpose.46

But then, the justices give a further reason for why the literal or grammatical meaning of a statute may not convey the statute’s law; and here, what they say seems to signal scepticism, and align more with our second, sceptical reading of the statement’s first sentence. The justices say that ‘the canons of construction may require the words of a legislative provision’ to be read other than literally or grammatically.47 If this is to say that the legal meaning of a statute may be partially determined by a canon of construction, then it could not be that the Court’s true position is that the law of a statute is identical to its linguistic meaning. For, as Smith himself argues at length, the canons typically determine the laws of statutes on bases other than the statute’s linguistic meaning.48 What is more, if the Project Blue Sky statement communicates that a statute’s legal meaning is directly determined by canons of construction, then Project Blue Sky expresses a sceptical theory. Superior court judges profess to have the power to reassess and revise the canons of construction they use.49 It would therefore follow — on the present reading of Project Blue Sky — that judges have the power to choose what counts as the law of a statute.

B The High Court as Sceptic

Our interpretation of the Project Blue Sky statement will support the following, modest conclusion. If we assume that Project Blue Sky definitively expresses the Court’s theory of interpretation — that is, if we pay no regard to other judicial statements of interpretive theory — then we might be justified in saying that the Court is probably a believer, but possibly a sceptic.

Of course, we cannot rest with this conclusion, for the High Court has made many statements of theory since Project Blue Sky, and they too should inform our understanding of the Court’s position. Many of these recent statements have joined the Project Blue Sky statements in probably signifying a believer’s theory, but possibly signifying a sceptical theory.50 However, many of the Court’s recent statements have had precisely the inverse complexion. These statements are such that they probably signify a sceptical theory, but possibly signify a believer’s theory. Perhaps unsurprisingly, these were the statements that Goldsworthy and Ekins took as their target.51

47 Project Blue Sky (n 41) 384 [78]
48 Smith (n 6) pt IV.
49 Probuild Constructions Pty Ltd v Shade Systems Pty Ltd (2018) 351 ALR 221, 239 [58] (Gageler J); see also Corporate Affairs Commission (NSW) v Yuill (1991) 172 CLR 319, 322 (Brennan J) (‘Yuill’).
50 See Part III C below.
51 Goldsworthy and Ekins (n 2) 41.
One of these apparently sceptical statements — made by five justices in Zheng v Cai — has reached the heights of Project Blue Sky in its importance, such that it and Project Blue Sky now stand together as Australia’s axioms of statutory interpretation. Let us use Zheng v Cai, then, as our main working example of an apparently sceptical statement of theory. Below is the relevant passage from Zheng v Cai, and then an elaboration of that passage, given by six Justices in Lacey two years later. We can refer to these collectively as ‘the Cai statements’:

[J]udicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws … [T]he preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.

Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.

The Cai statements clearly do not embody a comprehensive sceptical theory. The statements do not, for example, provide an account of the non-objectivity of legal propositions, or of the need for interpretive theories to be chosen on moral and political grounds. However, the Cai statements do appear to be the nub of such a theory. That is because the Cai statements bear the characteristics that we know to be distinctive of sceptical theories generally (and that we described in Part II A).

Firstly, the Cai statements appear to justify an approach to interpretation not on the grounds that the approach will retrieve the statute’s true and objective law (if there is such a thing), but on the grounds that the approach, when implemented, will have other valuable consequences. The approach is not held out as yielding the correct results, or the correct construction, but the ‘preferred results’ and the ‘preferred construction’. The statements suggest that a construction or result will be ‘preferred’ on the basis of being reached by rules of interpretation ‘accepted by all arms of government in the system of representative democracy’; again, not on the basis that the construction or result is uniquely correct.

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52 (2009) 239 CLR 446 (‘Cai’).
53 The relevant passage has been endorsed in, eg, Dickson v The Queen (2010) 241 CLR 491, [32]; Lacey (n 42) 591–2 [43]; Momcilovic v The Queen (2011) 245 CLR 1, 83–7 [146], 95–6 [183] (Gummow J), 207 [534], 210 [545], 235 [638] (Crennan and Kiefel JJ) (‘Momcilovic’); Plaintiff S10 v Minister for Immigration (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ). It has now also been cited countless times in the lower courts.
54 Cai (n 52) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).
55 Lacey (n 42) 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
56 Ibid; Cai (n 52) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).
Secondly, the validity of the offered approach appears to be made contingent on it achieving the desired consequence: the acceptance of the judiciary’s practices in the context of a representative democracy. Our evidence for this is that we apparently can draw from the *Cai* statements the following inference: if the current rules of interpretation cease to be accepted by the arms of government in a representative democracy, then those rules will no longer yield the preferred construction.

Thirdly, the interpretive approach outlined in the *Cai* statements would most naturally be defended by resort to statements of moral and political theory. So, for example, if we asked the Court why we should prefer interpretations produced by rules accepted by the arms of government, the only intelligible responses would seem to be of the following kind: ‘because, that way, the will of the people — through the acceptance of their elected representatives — figures in the way that we interpret and apply the people’s laws, and that is valuable’, or ‘because, in a setting of value pluralism, it is appropriate to choose interpretive methods that can be endorsed by an overlapping consensus of different people with different outlooks’.

But for all this evidence that the *Cai* statements signify a sceptical theory of interpretation, we cannot say conclusively that the statements do have this significance. For the *Cai* statements also contain just enough resources and equivocations to allow a reader to plausibly make the opposing case. The Court says, after all, that findings of legislative intent ‘are an expression of the constitutional relations between the arms of government’. From this, one could infer that statutory interpretation is governed by the constitutional doctrine of legislative supremacy, and so does entail judicial obedience to a statute’s apparently intended meanings. Moreover, when the Court says that the ‘preferred results’ follow from rules ‘accepted … in the system of representative democracy’ the Court does not explicitly draw a causal link between the fact of any rules’ acceptance, on the one hand, and its legitimacy on the other. Indeed, the Court might have been making the moot observation that, as simply happens to be the case and for whatever reason, the customary rules of interpretation are accepted by the arms of government and do yield the preferred results. Of course, it seems unlikely that the Court intended this meaning, but the possibility is not foreclosed by the text of the *Cai* statements.

**C Rows of Mirrors**

We have come to see that, when the Court makes a statement of interpretive theory, the statement may come in different forms. In *Project Blue Sky*, the Court’s statement signified that the Court is probably a believer but possibly a sceptic. From now, let us refer to any such statement as a ‘~believer’s statement’ (where the ~ stands in place of the word ‘probable’). In the *Cai* statements, on the other hand, the Court’s statements signified that the Court is probably a sceptic but possibly a believer. We can now call this type of statement a ‘~sceptical statement’.

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57 *Cai* (n 52) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).
The *Project Blue Sky* and *Cai* statements are the most important examples of ~believer’s and ~sceptical statements, for they appear to be the most cited in the modern High Court and in the judiciary more widely. But they are not the only ~believer’s and ~sceptical statements that the High Court has made. Indeed, the same duality of positions runs throughout the High Court’s jurisprudence. Soon, we will follow through with Smith’s thesis and see what finally becomes of it. But first, let us survey some of the further ~sceptical and ~believer’s statements just averted to.

1 *Statements on Legislative Intention*

In the decade just passed, the High Court has made a series of statements defining the term ‘legislative intention’. These definitional statements ought to be significant indicators of the Court’s interpretive theory, for the Court has traditionally accepted that the ultimate aim of statutory interpretation is to effectuate the ‘legislative intention’. However, in what should now strike us as a pattern, the Court’s definitional statements have been of two kinds. Some statements have suggested that ‘legislative intentions’ are what one would naturally expect; the apparently intended meanings of statutory texts. Those statements — though equivocal in various respects — have indicated that legislative intentions and purposes are something ‘objective’, and discernible by ‘objective criteria’, that they are something not constructed by the judge, but ‘expounde[d] [from] the meaning of the statutory text’, ‘revealed’ to and not invented by the judge; something that does not ‘exist outside the statute [but] resides in its text and structure’, such that the judge must be ‘guide[d] to’ it by ‘the language [of the statutory text]’.

On other occasions — though sometimes on the same occasions — the Court has made statements suggesting that there is no necessary connection between ‘legislative intention’ and the meaning of the statute’s text. These statements, which echo the *Cai* statements, have further suggested that legislative intentions are not objective or interpreter-independent, but are in fact judge-made. Legislative intentions are here

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58 As at the time of writing, a search of AUSTLII shows that *Project Blue Sky* (n 41) has been cited in 4,728 cases. *Zheng v Cai* (n 52) — a much later judgment — has already been cited in 103 cases.

59 The cases are well collected in Ekins and Goldsworthy (n 2) 40.

60 *Momcilovic* (n 53) 136 [327] (Hayne J).

61 Ibid 83–7 [146] (Gummow J).


64 *Lacey* (n 42) 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

said to be ‘the product of [the processes of interpretation]’,66 to be a ‘conclusion reached about the proper construction of the law in question and nothing more’67; ‘a statement of compliance with the rules of construction, common law and statutory’.68 What renders these statements somewhat mysterious — and certainly equivocal — is that they at once endorse the notion that the object of interpretation is the legislative intention, and suggest that the term ‘legislative intention’ refers to an interpretive process unconnected to the intentions of legislatures.69

2 Statements on the Canon of Natural Justice

In recent years, the High Court has also made various statements regarding the normative foundations of its canons of construction. Again, these statements have implicated two different positions — one sceptical, the other not.

For example, consider the justifications given for the principle of natural justice: an interpretive canon requiring statutes to be interpreted such that they require executive officials to give fair hearings prior to making certain decisions. In Saeed v The Minister for Immigration, five High Court Justices endorsed the following justification for the canon:

[W]hen the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that ‘the justice of the common law will supply the omission of the legislature’. The true intention of the legislation is thus ascertained.70

This is a ~sceptical statement. The statement at first makes the sceptical claim that the judge-made canon of natural justice determines the statute’s law on the authority of the ‘justice of the common law’. But the statement then retreats somewhat, stating that the process just mentioned ascertains ‘the true intention of the legislation’; an odd proposition, but one that narrowly permits the passage to be interpreted as being non-sceptical.

Later in their Honours’ judgment, the same Justices make a further statement on the justification for the canon, only this time it is a ~believer’s statement. It is said that the canon of natural justice ‘proceeds upon the assumption that the legislature, being aware of the common law principles, would have intended that [the canon] apply…’.71 Quite unlike the statement above, this statement suggests that the operative legislative

67 Momcilovic (n 53) 141 [341] (Hayne J) (emphasis added).
68 Lacey (n 42) 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
69 A point made by Ekins and Goldsworthy (n 2) 49.
71 Saeed (n 70) 258–9 [12].
intention consists not in the outcome of applying the canon of natural justice, but in a real, genuine legislative intention — a subjective state of ‘aware[ness]’ presumably on the part of legislators — that stands apart from the canon, and justifies the canon’s use. Not that we can defend this interpretation with any certainty, for we will recall that the meaning of the term ‘legislative intention’ — on which our interpretation here relies — has been problematised by the Court in other judgments.

Notably, the statements in Saeed are only the Court’s most recent synthesis of the two alternative justifications for the natural justice canon. The same two justifications have been surfacing and resurfacing in the Court’s jurisprudence for some years.72

3 Statements on the Principle of Legality

Finally, we should briefly note the Court’s recent statements regarding the principle of legality: the principle that a statute should be interpreted so as not to infringe fundamental liberties unless the statute explicitly requires that result. As Brendan Lim has recognised, two competing types of rationale have been given for this principle, some ‘positive’ and the others ‘normative’.73 The positive rationales are believer’s rationales, and they claim that the principle of legality is a wholly standard instance of giving effect to the apparently intended meaning of the statutory text. According to this rationale, the so-called ‘principle of legality’ is short-hand for the following common sense proposition: legislatures can reasonably be assumed not to intend the infringement of fundamental liberties, and so the apparently intended meanings of statutory texts will tend not to communicate liberty-infringing laws.74 The normative rationales, on the other hand, justify the principle on sceptical grounds. According to these rationales, the principle is truly a substantive common law canon of construction, and its purpose is to ‘enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights’.75

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72 The two justifications for the fair-hearing rule were originally posed by Brennan and Mason JJ as genuine alternatives: see Matthew Groves, ‘Exclusion of the Rules of Natural Justice’ (2013) 39(2) Monash University Law Review 285, 286–9. However, in the recent era of mirrors minimalism, the two justifications have typically been raised or invoked together: see, eg, Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319, 352 [74]; Plaintiff S10/2011 v Minister for Immigration (n 53) 666 [97]; Re Minister for Immigration; Ex parte Miah (2001) 206 CLR 57, [89]–[90] (‘Ex parte Miah’). In the lower courts see, eg, Pulitano Pastoral Ltd v Mansfield Shire Council [2017] VSC 421, 81–3 [92]–[97] (Garde J).


74 Ibid 382–9, and the cases surveyed there; Potter v Minahan (1908) 7 CLR 277, 304 (O’Connor J).

75 Coco v The Queen (n 75) 427, 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ) (‘Coco’); The judgments drawing upon the normative rationale are surveyed in Lim (n 73), 389–94.
These two justifications are inconsistent, as Lim and Goldsworthy have noted.\(^{76}\) However, members of the Court have continued to invoke both forms of justification within the same judgments.\(^{77}\) In one case, two justices said that the normative rationale ‘reflect[s]’ the positive rationale, implying that the former derives from the latter.\(^{78}\) In circumstances where two apparently inconsistent rationales are asserted to be both consistent and equally valid, the Court’s true position is rendered equivocal. Because statements of the ‘positive’ rationale also contain that black box term — ‘legislative intention’ — the Court’s position becomes yet less scrutable.

4 What Becomes of Smith’s Claim?

Given all this, what becomes of Smith’s claim that the Court is a believer? When we first considered Smith’s claim, we saw that if we only considered ~believer’s statements, like Project Blue Sky, we could be persuaded that the Court was probably, though not certainly, a believer. Now, we can see what occurs if we widen our attention to encompass the Court’s ~sceptical statements too. In a setting where the Court has made ~believer’s and ~sceptical statements, a spectator such as Smith can indeed make a persuasive case that the Court is a believer. To do this, he will point to the ~believer’s statements and, if ever confronted with the Court’s ~sceptical statements, he will point to the possible believer’s meanings of those statements. However, we can now see that the opposite case may be made just as persuasively. To argue that the Court is a sceptic, another spectator may point to the ~sceptical statements and, when confronted with the Court’s ~believer’s statements, she may point to the possible sceptical meanings of those statements. The end result? Neither Smith’s claim, nor its negation, are provable or disprovable.

IV THE LOGIC OF MIRRORS MINIMALISM

A A Clean Slate

The last few sections have been relentlessly exegetical. Our aim, however, has not been to advance any particular conception of the Court’s theory of interpretation. Our aim has instead been to get a first-person view of what it is like to advance such a conception under the special circumstance that the Court makes both ~sceptical and ~believer’s statements of interpretive theory. Our efforts have yielded two insights.

\(^{76}\) Lim (n 73) 381–2, 394; Jeffrey Goldsworthy, ‘The Principle of Legality and Legislative Intention’ in Dan Meagher and Matthew Groves (eds), The Principle of Legality in Australia and New Zealand (Federation Press, 2017) 46–71.


\(^{78}\) Lee (n 77) 309 [310] (Gageler and Keane JJ).
The first is that, under this special circumstance, one is both able to construct a persuasive argument that the Court is a believer, and construct a persuasive argument that the Court is a sceptic. Our second insight has been that neither argument can be conclusively proven or disproven. Putting these insights together, we can now identify the Court’s overall approach as engendering a roundabout form of minimalism: by making a parallel series of ~sceptical and ~believer’s statements, the Court avoids strong commitments to high-level philosophical and constitutional theories.

Let us now lift ourselves from the first-person view, and the phantasmagoria it has presented us. From here on, we will look upon the phenomenon of mirrors minimalism from a greater distance. The task now is to assess whether the approach can be rationalised. In doing this, we will proceed by identifying the underlying problem for which mirrors minimalism is probably an emergent solution: namely, the problem that certain of the judiciary’s interpretive practices are potentially controversial, and are thus difficult to justify to the satisfaction of all. Having identified this problem, we will consider whether mirrors minimalism is the best solution.

B The Problem of Controversial Practices

The problem which, I will contend, explains and motivates mirrors minimalism, and which we will here describe, is that the courts engage in controversial practices. By controversial practices, we mean interpretive practices that will not be endorsed by all or nearly all defensible theories of interpretation. Controversial practices are to be contrasted with uncontroversial practices: practices that will be endorsed by all or nearly all defensible theories of interpretation.

In describing the problem, it should first be observed that the Court’s standard interpretive practice is an uncontroversial practice. The Court’s standard practice (as we will continue to call it) is to give legal effect to ‘the ordinary and grammatical sense of the statutory words … having regard to their context and [the] legislative purpose’. Absent special circumstances, when a court engages in this standard practice, different individuals with quite different theories of interpretation will agree on the practice’s legitimacy. At one end of the spectrum, conservative believers such as Ekins, Goldsworthy and Scalia — individuals who believe a statute’s law to be fully determined by the contextually enriched meaning of the statute’s language — will endorse the practice, for the practice is one of giving legal effect to the statute’s linguistic meaning. But at the other end of the spectrum, sceptics of all persuasions will also endorse the standard practice. Sceptics, after all, can only judge a practice’s legitimacy on grounds of justice and fairness; yet the judicial practice in question will be justified on any defensible conception of justice and fairness. That is because the standard practice is what allows for ‘the law to be what the law says’; the practice is therefore indispensable to democratic self-government and the rule of law.

79 Alcan (n 65) 31 [4] (French CJ).
While the standard practice is uncontroversial, other of the Courts’ practices do not have an unambiguous majoritarian rationale, and are controversial. These interpretive practices typically proceed in two steps. First, they identify certain rights and liberties that are said to be owed to individuals. Then, they protect these rights and liberties through non-standard practices of interpretation, in cases where the standard practice of interpretation would lead to infringements of the identified rights and liberties.82 Quite overtly, these non-standard practices give expression to a liberal-democratic conception of justice, which is to say a belief that individuals should have certain basic rights and liberties that are protected from interference by the decisions of the political majority.83 Call these non-standard practices ‘liberal practices’.

Australian courts maintain two major liberal practices, and the first of these is the principle of legality. The principle of legality requires that, ‘in the absence of express language or necessary implication to the contrary’, courts must not interpret statutes as infringing individuals’ fundamental rights and liberties.84 The rights and liberties protected by the principle include rights of property,85 the right to a fair hearing,86 fundamental common law rights,87 freedom from penalties under retrospective laws88 and, potentially, rights established under the major human rights treaties.89

The courts’ second major liberal practice consists of the use of certain common law principles of interpretation to constrain discretions that statutes confer upon executive officials. In particular, I have in mind those common law principles that saddle executive discretion with fair hearing requirements90 and conditions of reasonableness.91 We may simply refer to these practices as ‘judicial review’, though the term usually has a broader meaning.

Were judicial review and the principle of legality explicitly mandated by the Constitution, then those two practices could not be controversial. For in that situation, all or nearly all rationally defensible theories of interpretation would endorse an

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84 R v Secretary of State for the Home Department; Ex parte Simms [2000] 2 AC 115, 131 (Hoffman LJ).
87 Bropho v Western Australia (1990) 171 CLR 1, 18.
90 See Kioa (n 70); Mark Aronson and Matthew Groves, Judicial Review of Administrative Action (Thomson Reuters, 5th ed, 2013) ch 8.
91 See Minister for Immigration v Li (2013) 249 CLR 332; Aronson and Groves (n 90) Ch 5.
interpretation of the *Constitution* that permitted — indeed, mandated — the two practices. The reality, however, is that neither of the controversial practices are explicitly mandated by the *Constitution*. With regards to judicial review, the *Constitution* does explicitly vest the High Court with jurisdiction in all matters where certain writs (i.e. administrative law remedies) are sought against federal government officials;92 however, the *Constitution* ‘says nothing about the grounds upon which those writs may be issued.’93 With regards to the principle of legality, its strongest connection to the *Constitution* is that the principle is said to be ‘an aspect of the rule of law’94, while the rule of law is said to ‘form an assumption’ of the *Constitution*.95 However, if that is taken as an argument for why the principle of legality is constitutionally mandated, then the argument will not be endorsed by all (or nearly all) defensible theories of interpretation. A textualist or an intentionalist, for example, would observe that the principle of legality is itself not communicated by the apparently intended meaning of the *Constitution*’s text, and so — the argument would go — it is not a constitutionally mandated practice.96 One can then think of numerous sceptical theories that would instead offer political reasons against constitutionalising the principle of legality.97

So the two practices — judicial review and the principle of legality — are not rendered uncontroversial by the text of the *Constitution*. But nor can they follow the path of the standard practice, and be rendered uncontroversial by an overwhelming democratic justification. The reason for this is that judicial review and the principle of legality can each be seen as constraining and attenuating the law-making capacities of the democratically elected legislature. Both invoke what Bickel memorably termed ‘the counter-majoritarian difficulty’.98

The principle of legality invokes the counter-majoritarian difficulty because it may prevent the law from being that which is conveyed by the apparently intended meaning of the statute’s text.99 Take for example the case of *X7 v Australian Crime Commission*.100 That case concerned a statute that conferred powers of compulsory examination upon the Crime Commission. The question was whether a person who had been charged with offences could be summoned for compulsory examination. Although the statute did not limit who could be summoned, and in one section

92 *Constitution* s 75(v).
95 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon CJ).
96 See Goldsworthy (n 81).
97 See, eg, Vermeule (n 4) 198–202: Vermeule’s theory of ‘operating level formalism’, argues against the use of canons generally.
99 Lim (n 73) 399–400.
100 (2013) 248 CLR 92.
contemplated that ‘a person who has been… charged’ might be summoned,\textsuperscript{101} it was held that the statute did not authorise the summoning of a person who had been charged, for so much was not explicitly stated.\textsuperscript{102} The ultimate outcome was that the statutory text stated that the Crime Commission may conduct an examination of a person, the Crime Commission did seek to conduct an examination of a person, and still the statute was found not to authorise that action.

For similar reasons, the principles of judicial review also invoke the counter-majoritarian difficulty. Consider again, for example, the case of \textit{Saeed}. In that case, the question was whether the \textit{Migration Act 1958} (Cth) excluded the judicially imposed condition that a fair hearing (as defined by the courts) be granted to a visa applicant.\textsuperscript{103} The section of the statute that conferred the Minister’s discretion simply provided: ‘the Minister… if satisfied that [certain conditions are met] is to grant the visa; or… if not so satisfied, is to refuse to grant the visa.’\textsuperscript{104} The statute was intentionally drafted so as to prevent the courts from conditioning the exercise of this discretion upon the provision of a fair hearing, as defined by the courts. To this end, the statute stipulated its own fair hearing requirements under a subdivision whose head provision was entitled ‘[e]xhaustive statement of natural justice hearing rule’.\textsuperscript{105} The Minister’s second reading speech explained:

\begin{quote}
The purpose of this [B]ill is to make it expressly clear that particular codes in the Migration Act do exhaustively state the requirements of the natural justice or procedural fairness hearing rule. This will have the effect that common law requirements relating to the natural justice or procedural fairness hearing rule are effectively excluded.\textsuperscript{106}
\end{quote}

But still, the Court held that the statute did not exclude the judicially imposed requirement of a fair hearing.\textsuperscript{107} The Minister’s decision to refuse a visa was found not to meet this requirement, and so was held to not be authorised by the statute.\textsuperscript{108} In this case, as in other cases where the principles of judicial review apply, the ultimate result was that the apparently intended meaning of the text was defeated. Simply, the text said that the Minister, if satisfied that certain criteria are not met, must refuse a visa; the Minister was satisfied that the criteria were not met and did refuse the visa; and still, the Minister’s decision was held not to be authorised by the statute.

Because judicial review and the principle of legality cause such departures from the statutory text, the two practices are counter-majoritarian. This is a problem, but

\textsuperscript{101} Ibid, 110 [25]–[27] (French CJ and Crennan J).
\textsuperscript{102} Ibid, 128-9 [75]–[76] (Hayne and Bell JJ).
\textsuperscript{103} \textit{Saeed} (n 70) 256 [1] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
\textsuperscript{104} Ibid 269 [51].
\textsuperscript{105} Ibid 256 [3].
\textsuperscript{106} Ibid 264 [30].
\textsuperscript{107} Ibid 271 [59].
\textsuperscript{108} Ibid [60].
we must now be careful in explaining why it is a problem. The problem is not that
the two practices are necessarily without a strong rationale. The practices do lead
judges to depart from the standard practice of interpretation, and so from the safety
of the standard practice’s majoritarian rationale. But judicial review and the principle
of legality may be given alternative, non-majoritarian rationales. For example, we
could argue that the practices are each justified because they do justice, or because
they promote the rule of law, or because they uphold the best interpretation of the
Constitution. In the case of the principle of legality, a further common justification
is (we have seen) that it promotes public deliberation regarding the importance and
status of rights.

Where the problem truly lies is in the contentiousness of these alternative, non-
majoritarian rationales. In a heterogenous society, people are liable to have different
conceptions of justice, of the rule of law and of the proper constitutional function
of the judiciary. These diverse conceptions might produce an overlapping consensus
as to the validity of certain judicial behaviours, but any such consensus is apt to be
narrow and fragile. As we saw, the standard practice of interpretation does fall within
an overlapping consensus of the kind just mentioned. But as soon as we start to justify
the principle of legality, for example, on the grounds that it promotes public deliberation,
justice, the rule of law, or the Constitution’s proper interpretation, we will have
stepped outside of the overlapping consensus; we will already have offended various
views of what justice, the rule of law, and the Constitution require.109

C The Emergent Solution of Mirrors Minimalism

The Court, it seems, faces a problem in publicly justifying its controversial practices.
Now, I will consider how the strategy of mirrors minimalism might have emerged
in order to solve this problem. In doing so, my intention is not to give a textured
account of how the various judicial personalities, historical forces and happenstances
have converged to make up the Court’s present approach to interpretive theory. My
purpose is the more modest one of identifying the reasons why the Court, acting
rationally in its circumstances, might fall into a pattern of mirrors minimalism.
Such reasons, if they can be identified, would surely have a central place in a more
textured historical explanation for how the Court’s approach to interpretive theory
has developed. More importantly, however, upon rationalising mirrors minimalism,
we will be able to identify the potential value of the approach, allowing us to evaluate
whether the approach should be maintained or abandoned going forward.

109 For views of justice, the rule of law, and the Constitution that would, respectively,
deny that certain of the courts’ interpretive canons are justified by the requirements
of justice, the rule of law, or the Constitution, see Jeremy Waldron, ‘The Core Case
Rule of Law and its Virtue’ (1977) 93(2) Law Quarterly Review 198; Goldsworthy
(n 81) 304–18.
As we now proceed in this direction, we must make an assumption. The assumption
is that, in making statements of theory, a judiciary will have certain aims, and will be
under a certain constraint.

The judiciary’s immediate aim — the assumption goes — is to make the statements
that will maximise the perceived legitimacy of the judiciary’s interpretive practices,
among an audience consisting of executive and legislative officials, lower court
judges, lawyers, academics and the public more widely, over an extended period
of time (the ‘audience’). In seeking to maximise the perceived legitimacy of its
practices, the judiciary seeks to achieve a higher-order aim of ensuring the effective-
ness of the law as a mechanism for authoritatively settling disputes.110

In attempting to achieve its aims, the judiciary’s constraint is that the judiciary does
not know the ‘relevant values’ of its audience.111 By ‘relevant values’ we mean those
values that will determine whether a given audience member will respond to a given
statement of theory favourably (thus perceiving the courts’ controversial practices
as legitimate) or unfavourably (thus perceiving the controversial practices as ille-
gitimate). These relevant values will of course include any well-developed theories
of interpretation that an audience member might have. A statement of intentionalist
theory, to give an example, will be received unfavourably by any individuals who
defend non-intentionalist theories. But the relevant values will also include political
values. So, for example, if the Court justifies the judiciary’s controversial practices
on the grounds that these practices protect rights from a counter-majoritarian threat,
an audience member who subscribes to the maxim ‘the majority’s will must always
prevail’ will respond to the court unfavourably, whereas an individual with a more
liberal politics might react more favourably.

In addition to political and theoretical values, we can think of two further values of
relevance. The first is what we can call ‘interest’: meaning, an audience member’s
tendency to take an interest in the judiciary’s interpretive practices, and to form
independent views as to the legitimacy of those practices in light of the judiciary’s
statements of theory. The second is what we can call ‘credulity’: meaning, an audience
member’s disposition to accept the courts’ statements of theory as accurately repre-
senting the nature of the judiciary’s practices.

If we assume the Court to have the above-mentioned aims and constraints, then the
Court will face a risk no matter what strategy it takes. Suppose, for example, the
Court makes a strong claim that the meaning thesis is true: that all of the Court’s
practices, even the controversial practices, consist in the courts giving effect to the
apparently intended meanings of statutory texts. If the audience were uniformly and
highly credulous, then the audience would uniformly respond favourably: they would
all accept the Court’s ‘controversial practices’ to in fact be mere instances of the

110 See Cass Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press,

111 Game theorists will notice that I am here framing an identification problem. See
courts’ standard practice, and to therefore be perfectly democratic and legitimate on any view. But the Court does not know that its audience is uniformly credulous. Moreover, if the Court makes its statement, and some portion of its audience eventuate to be both interested and incredulous, those audience members will be apt to criticise the Court (as did Smith) on grounds that the Court’s statement is simply false.\(^\text{112}\) Call this the ‘criticism from incredulity’.

To avoid this possible criticism, the Court might instead make a strong statement of sceptical theory. The Court could say, for example, that the courts determine the laws of statutes according to judge-made principles that serve various ends, some democratic, but others rights-protecting. Again, it is possible that this will be the best strategy; certainly, it will be if the audience eventuates to be highly incredulous (such that they would have rejected the meaning thesis), sceptically-minded liberals. But again, the Court cannot depend on its audience having this composition. Indeed, if it eventuates that a proportion of the audience both are interested and are either believers or are conservative in their judicial politics, then those audience-members will be apt to criticise the Court (as Goldsworthy and Ekins did) on the grounds that the Court’s controversial practices – as now described by the Court – are in breach of democratic norms and the constitutional separation of powers, and are thus unlawful and undemocratic.\(^\text{113}\) Call this the ‘criticism from conservatism’.

The Court, it seems, is hemmed between two lines of potential criticism: the criticism from incredulity (Smith’s criticism), and the criticism from conservativism (Goldsworthy and Ekins’ criticism). It is in this setting that an approach of mirrors minimalism might emerge as the natural and obvious path of least resistance, given the Court’s aim of maximising the perceived legitimacy of its own practices. The overall effect of mirrors minimalism, recall, is to make it arguable both that the Court is a conservative believer (in satisfaction of the criticism from conservatism) and that the judiciary is a rights-defending sceptic (in satisfaction of the criticism from incredulity). By making this the case, mirrors minimalism affords the Court a boost and a defence as it goes about maximising the perceived legitimacy of its practices.

The Court is given a boost because it can rely on the more credulous and less interested of its audience — inevitably in the public and the non-judicial arms of

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\(^\text{113}\) Goldsworthy and Ekins (n 2). The criticism from conservativism has also emerged in other jurisdictions, eg, in the context of the British *ultra vires* debate. See Christopher Forsyth, ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review’ (1996) 55(1) *Cambridge Law Journal* 122; See also Scalia (n 1).
government — to find in the courts’ jurisprudence an account of statutory interpretation that will tally with their (the audience members’) diverse political values.

But against the more incredulous and interested of its audience — lawyers, judges, academics, drafters, legislators — mirrors minimalism will be a defence. And so we saw earlier that a confluence of ~sceptical and ~believer’s statements left each of Smith’s and Goldsworthy and Ekins’ criticisms of the Court without solid foundation, and to that extent impotent.

V The Higher Aspirations of Minimalism

In the way just described, mirrors minimalism is a potential solution to a problem: the problem of publicly justifying controversial practices to an audience with plural values. But is mirrors minimalism the best solution?

In this final Part, we will begin by stating the traditional aspirations of minimalism: the long-discussed and widely-understood reasons a judiciary may have for avoiding strong theoretical commitments. It will then be argued that mirrors minimalism does not hold or meet these lofty aspirations; whereas the traditional aspirations of minimalism are for the genuine settlement of controversies surrounding a judiciary’s practices, mirrors minimalism can only hold the lower aspiration of evading or delaying such controversy. With so much acknowledged, I will finally argue that, when the ledgers are balanced, and mirrors minimalism’s various costs and benefits are weighed, it becomes clear that the approach should be retired.

A The Traditional Aspirations of Minimalism

Putting mirrors minimalism aside momentarily, let us now ask the following, general question. Why might we want judges to engage in any kind of minimalism? That is, why should we ever want judges to avoid strong theoretical commitments, and so leave untheorised the limits of the judiciary’s powers?

Fortunately, we are not the first to ask. Various judges and scholars have discussed these matters, and through their discourse two persuasive rationales for minimalism have emerged. The first rationale is given by the tradition of legal formalism, and it emphasises the need for judges to avoid political considerations, and to be constrained by black-letter legal rules. The second arises from the works of Sunstein, and it emphasises the need to leave space for public consensus-making and democratic deliberation regarding the legitimate functions of public institutions. Both of these rationales — the formalist and the consensus-making — share an initial assumption, which is that individuals in society do not widely share the same political and moral outlook. Let us therefore reflect upon that assumption, before addressing minimalism’s two traditional rationales more directly.
1 The Assumption of Reasonable Pluralism

The assumption that I have in mind finds its classic expression in *Political Liberalism*, a major work by John Rawls. In that book, Rawls observed that, within any democratic society, different people have different world-views, where each world-view consists of a distinct system of inter-supporting beliefs about what is true, good and right, and what is false, bad and wrong. Rawls called these world-views ‘comprehensive doctrines’, such that, for Rawls, society contains a ‘diversity of reasonable comprehensive religious, philosophical and moral doctrines’. Rawls called this feature of free societies ‘reasonable pluralism’, and insisted that it was ‘not simply the upshot of self- and class interests’, but ‘the work of free practical reason within a framework of free institutions’. Because Rawls therefore saw reasonable pluralism as inherent to any free society, he also argued that the institutions of government need to accommodate, rather than take sides within, society’s reasonable pluralism of world-views. For Rawls, this meant that public institutions should be designed, and should function, so as to be endorsable by ‘an overlapping consensus of reasonable comprehensive doctrines’, such that all individuals, with their disparate world-views, could endorse the institutions ‘from [the individuals’] own point of view’, and for each individual’s own reasons. It is through such an overlapping consensus that democracies achieve political stability, or so Rawls wrote.

2 The Formalist Rationale

What does Rawls have to do with our subject? To begin, the formalist rationale for minimalism follows hard on the heels of the above Rawlsian picture.

The formalist rationale for minimalism is that, if judges make legal decisions on the grounds of clear and stable rules — and not on the grounds of high-level theories that may justify those rules — then the judges’ decisions are more likely to be broadly accepted in a setting of reasonable pluralism, and to thereby facilitate political stability. This contention is rooted in the tradition of legal formalism – a tradition which flourished in the 19th and 20th centuries, was then banished by the critical legal studies movement, and has since enjoyed something of a renaissance.

According to the legal formalist tradition, the reason that judges should deduce legal decisions from rules rather than from theories is that legal rules are more serviceable

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115 Ibid 36.
118 Ibid 143.
as ‘neutral principles’; principles from which judicial decisions may be derived as a matter of objective and universally acceptable logic, rather than as ‘the local triumph of some particular point of view’. According to the formalist tradition, the reason that rules serve as the better neutral principles is that they are expressed in words, and the meanings of words are a source of objectivity. If a judge disposes of a case based upon a high-level theory, a citizen could usually find some entry point into disputing the theory’s correctness, for such is the nature of theory. But on the other hand, if a judge disposes of the case by applying a rule that she is legally bound to apply, and whose linguistic meaning is clear, the citizen may be denied an entry point into disputing the decision, lest the citizen deny the plain meaning of words, or the authority of the law altogether. By rendering judicial decisions less disputable in this way, a close fidelity to rules can, in the formalist’s contention, allow judges to leave unignited the incendiary potential of reasonable pluralism, and to ‘negotiate the differences that would [otherwise] prevent us from living together.’

3 The Consensus-Making Rationale

The formalist rationale, then, insists that fidelity to rules and the avoidance of theory will promote political stability, not because rule-abiding judges can hope to procure wide acceptance of the content of legal rules, but because the form of legal rules are such as to make the act of their application impartial: the formalist judge thus avoids controversy with the refrain: ‘these are the rules and, legally, I must apply them’.

The consensus-making rationale, on the other hand, is more ambitious. According to this rationale, minimalism may be justified on the grounds that it promotes genuine consensus regarding the legitimacy of the contents of legal rules, and of judicial powers and decisions. According to Cass Sunstein — the originator of this rationale — minimalism can promote such a consensus through two mechanisms.

On the one hand, minimalism may promote consensus by leaving room for an overlapping consensus (or an ‘incompletely theorised agreement’, as Sunstein prefers to say) over judicial practices and decisions. Here, Sunstein’s argument is little more than an application of the Rawlsian logic described earlier. According to Sunstein, individuals may reach ‘agreements on concrete particulars amid disagreements or uncertainty about the basis for those concrete particulars…’. In such cases, the argument continues, it can be fruitful for individuals to partake in a ‘conceptual descent’, whereby they agree on certain concrete particulars without ever agreeing

121 Stanley Fish, There’s No Such Thing as Free Speech: And It’s a Good Thing, Too (Oxford University Press, 1994) 121.
122 Ibid.
123 Ibid 179.
124 Sunstein (n 7) 4–5, 11–14, 23–45.
125 Ibid 11.
on their basis. In the context of judicial practices, Sunstein suggests that this conceptual descent may be brought down to the level of particular rules — the level occupied by formalists. However, Sunstein observes that his rationale for minimalism may motivate a descent even further, such that the ‘concrete particular’ to be agreed upon is not even a particular rule, but the reasonableness of a particular outcome in a particular case.

One way that minimalism allows for consensus, then, is by ferreting out the potential for agreement on concrete propositions and outcomes, when an equivalent agreement on higher-level reasons would be impossible. As Sunstein notes, however, there is a second mechanism by which minimalism may promote consensus: namely, through showing deference to democratic deliberation. After all, reasonable pluralism is real, but so is unreasonable pluralism. That is to say, people in society, including judges, do have false and mistaken beliefs, and the correction of these false beliefs might be another method for improving the degree of consensus within a society. In a democracy, our principal method for curing misbeliefs and improving consensus is public deliberation. And so, the argument goes, the courts may be wise not to pass final judgement on the most fundamental constitutional issues, because such judgments may later be found mistaken, and discordant with some future consensus reached within the democracy, through deliberations among judges, other government officials, and the public; ‘law and life may outrun seemingly good rules and seemingly plausible theories’. Minimalism, then, may be justified out of a judiciary’s sense of humility, and of respect for the democracy’s collective wisdom and capacity for learning.

B The Case Against Mirrors Minimalism

Though the rationales just given may be persuasive, none could support the claim that judges always and everywhere should adopt a policy of minimalism. The rationales disclose the benefits of minimalism, but — before a judiciary commits to minimalism — these benefits must be weighed against the potential costs of minimalism. The potential costs of minimalism are as follows. Firstly, insofar as a judiciary’s legal decisions are not coordinated by unifying principles and reasons, the judiciary’s decisions will likely become less predictable, and litigants will therefore be treated less equally before the law. Secondly, under the same conditions, lower court judges will increasingly have to develop their own novel reasons for disposing of cases, thus increasing the costs of decision-making system-wide. Thirdly, insofar

126 Ibid 11–12.
127 Ibid 8–9.
131 Sunstein (n 7) 41.
as judges are unconstrained by authoritative theories and principles, they will be left a greater latitude to decide cases according to their own personal will. These potential costs of minimalism — costs in predictability, resources and legality — will be realised to different extents by different forms of minimalism.

The approach of mirrors minimalism should be rejected, I will now argue, because the approach fails cost-benefit analysis. On the one hand, it seems an especially costly form of minimalism. On the other hand, it tragically fails to realise the potential benefits of minimalism, imagined by minimalism’s formalist and consensus-making rationales.

1 The Costs of Mirrors Minimalism

Karl Llewellyn, a leader of the legal realism movement, once observed that the American courts maintained two parallel sets of interpretive canons. As Llewellyn demonstrated, the effect was that there were ‘two opposing canons on almost every point’, each canon leading in ‘happily variant directions’. Judges could thus pick and choose the canons that would lead to the preferred results. Mirrors minimalism is undoubtedly a related phenomenon. What marks mirrors minimalism as different, however, is that it provides the courts not with pairs of inconsistent canons, but with pairs of inconsistent justifications for a single, relatively stable regime of canons.

Therefore, to the extent that mirrors minimalism does introduce costly uncertainty into the law, that uncertainty will pertain to how judges use and develop the existing canons.

Revisit, for example, the principle of legality. While a formulation of that principle was given earlier, we ought now to admit that the principle has no single and agreed formulation. In a number of respects, the requirements of the principle are fundamentally contested. Consider the following inconsistent pairs of statements, each of which pertain to some unresolved aspect of the principle of legality, and each of which represent divergent positions that have been supported by different judges

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133 These are loosely the three problems identified by Scalia J as flowing from rule-avoidance (a more acute form of minimalism than is discussed here) in Antonin Scalia, ‘The Rule of Law as a Law of Rules’ (1989) 56(4) University of Chicago Law Review 1175.


135 Ibid 401.

136 Ibid 399.

137 It may be argued that the courts’ interpretive canons are formally inconsistent, and so can be marshalled strategically to achieve desired results if not organised under an interpretive theory: Goldsworthy and Ekins (n 2) 43. That argument seems to discount, however, the fact that canons such as the principle of legality and the grounds of judicial review are relatively well defined at common law, as are the circumstances of these canons’ application.
in different cases. Within each pair, the first statement expresses a position that is relatively uncooperative with the legislature, and the second expresses a position that is relatively cooperative with the legislature:

**Uncooperative position:** The principle of legality only permits statutes to infringe fundamental liberties where to interpret the statutes otherwise would render ‘the statutory provision…inoperative and meaningless’.138

**Cooperative position:** The principle of legality also permits legislative infringements of liberty where to deny such infringements would merely ‘hamper’ or ‘frustrate’ the legislative scheme in achieving its object.139

**Uncooperative position:** The principle of legality only permits statutes to infringe fundamental liberties where the statute unambiguously states that the statute will infringe fundamental liberties.140

**Cooperative position:** The principle of legality also permits legislative infringements of liberties where the statute unambiguously requires some action to be performed that incidentally would infringe fundamental liberties.141

**Uncooperative position:** The principle of legality may protect certain fundamental liberties against a statute, even where those liberties were not considered fundamental at the time that the given statute was passed.142

**Cooperative position:** The principle of legality only protects those rights known by the parliament to be protected at the time that the relevant statute was passed.143

A highly significant feature of these dyads is that the choices they present may each be made on grounds of interpretive theory. A judge who adopts the ‘positive’, believer’s rationale for the principle of legality will understand the principle to be essentially an exercise in cooperation with the legislature. Presented with any of the above dyadic choices, such a judge would thereby have most reason to choose the cooperative option. By contrast, a judge who accepts the ‘normative’, sceptical rationale for the principle should be more inclined to choose the uncooperative options, for they are

138  Coco (n 75) 436 (Mason CJ, Brennan, Gaudron and McHugh JJ).
140  Coco (n 75) 436–7 (Mason CJ, Brennan, Gaudron and McHugh JJ).
141  Al-Kateb v Godwin (2004) 219 CLR 562, 581 [33], [35], 661 [298], 643 [241], 662 [303]. See further Cardell-Oliver (n 139) 49–54.
142  Yuill (n 49) 322–3.
the options that will better protect liberties and induce public scrutiny of liberty-infringing legislation.

It is against this backdrop that mirrors minimalism may exact its costs. Rather than prescinding from higher-level interpretive theories, mirrors minimalism grants tentative authority to two alternative theories. Judges have then been able to tentatively use either available theory in justifying either cooperative or uncooperative outcomes, much as a judge in 1950s America could strategically choose between Llewellyn’s canons. And so we have often seen uncooperative decisions supported by ~sceptical statements of theory,144 and cooperative decisions supported by ~believer’s statements.145 A separate but related phenomenon is that judges will occasionally endorse or mention both available theories, and then leave unclear the true basis for their decision. This latter strategy has most frequently been adopted in cases considering whether statutes have excluded fair hearing requirements.146

The inevitable cost of this — of mirrors minimalism — will be the continuing existence of controversies concerning the contents and functions of interpretive canons. Such controversies, we saw, not only afflict the principle of legality, but also sundry other departments of the Courts’ interpretive practices, including the grounds of judicial review,147 and the use of extrinsic materials.148 Of course, if the Court left questions of theory unaddressed, these controversies might be solved on more pragmatic grounds (see Part VI below). If the Court instead addressed questions of theory earnestly, and with the aim of attaining answers, the controversies might be solved that way. But by merely stoking questions of theory, as mirrors minimalism does, we should expect the controversies of interpretive method to also only be stoked. The continuing existence of controversy and ambiguity in the Courts’ interpretive methods must result in the familiar concrete costs: decreased predictability in judicial decisions, expenses in time and effort incurred by lower courts in navigating the ambiguities, and decreased rule-boundedness of judicial decisions.

144 See, eg, Coco (n 75) 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ); R v Ioannidis [2015] SASFC 158, [131]–[133], [136] (Peek J); Coshott v Prentice (2014) 221 FCR 450, 472–3 (Siopis, Katzmann and Perry JJ); Director General Department of Family and Community Services v FEW [2013] NSWSC 1448, [21]–[25] (Fullerton J).

145 See, eg, Brennan J citing the principle of legality’s positive rationale in coming to a cooperative decision in: Yuill (n 49) 322; see also Ex parte Miah (n 72) [30]–[33] (Gleeson CJ and Hayne J); Arnold v Hickman [2016] TASSC 55, [14], [16], [27] (Pearce J); though it is a more complex example, see also McLeod-Dryden v Supreme Court of Victoria [2017] VSCA 60 [33]–[35] (Priest, Santamaria and McLeish JJA).

146 Plaintiff M61/2010E v Commonwealth (n 72) 352 [74]; Plaintiff S10/2011 v Minister for Immigration (n 53) 666 [97]; Ex parte Miah (n 69), [89]–[90].


2 The Foregone Benefits of Minimalism

These costs might be sufferable if mirrors minimalism brought the compensating benefits usually associated with minimalism: a greater consensus over the legitimacy of the Courts’ practices, and the further entrusting of important constitutional questions to democratic deliberation and the wisdom of many minds. But alas, there are strong reasons to doubt that the approach can deliver these benefits.

Firstly, mirrors minimalism proceeds not by furnishing a concrete statement of the Courts’ practices, over which an overlapping consensus may form. It instead proceeds by giving varying accounts of the Courts’ practices, such that different members of the Court’s audience might develop different understandings of what the judiciary’s interpretive practices are. The best outcome under this approach is that two separate and contradictory consensuses form: one that takes the Courts’ practices to be legitimate on the assumption that the practices consist in the courts’ standard practice of effecting statutes’ apparently intended linguistic meanings; and another that deems the practices legitimate on the assumption that the court does depart from that standard practice, but for legitimate reasons of justice and fairness. If that is mirrors minimalism’s highest achievable aspiration, the approach cannot aspire to foster any genuine overlapping consensus regarding the legitimacy of the Courts’ interpretive practices.

Secondly, mirrors minimalism does not leave a clear space for democratic deliberation regarding the appropriate methods of interpretation. By potentially promoting disagreement and confusion as to what the Courts’ interpretive practices are and why they are so, mirrors minimalism may deprive deliberants of a plateau of consensus from which to deliberate. On the whole, mirrors minimalism views officials and the public as being mostly credulous spectators who are to be appeased, rather than as potential partners in a continuous process of sounding-out, clarifying and optimising the Courts’ interpretive practices.

VI Conclusion – Two Paths Forward

One suspects that, twenty years from now, we will look back upon the practice of mirrors minimalism as marking the unsettled mid-point of some larger transition in the Court’s approach to interpretive theory. Or so we might hope. Mirrors minimalism would come at too great a cost to legal certainty, and the integrity of the Court’s doctrines, to be a permanent method for publicly justifying the Court’s interpretive practices.

But if the Court is to depart from the approach, what alternative approach should the Court depart for? I can conceive of two feasible destinations.

On the one hand, the Court might retreat to a more robust form of minimalism — one that is better placed to achieve the aspirations of permitting consensus-building and of yielding the fruits of democratic deliberation. In practice, this would entail a greater degree of formalism in the application and development of the Court’s
canons of construction. In the formalist tradition, the canons would be developed through a process of practical reasoning, as opposed to theoretical reasoning. Rather than airing questions regarding the canons’ fundamental justifications, the judiciary would take for granted the canons’ authority as principles of law. Their development may then proceed in the practical fashion that is characteristic of the common law with reference to ‘prior dicta, arguments by analogy [and] arguments seeking to avoid incoherence [with existing law]’. 149 That is, rather than reasoning the content of the canons from general theories of interpretation and of the nature of law, the canons’ contents may be reasoned anew from established ‘neutral principles’, such as principles of parliamentary supremacy, procedural fairness, and common law rights and freedoms. The theorist will complain: ‘but, if the Court does not provide theoretical justifications for its interpretive practices, the justifications for those practices will be incomplete’. The minimalist will respond: ‘so much is desirable, for it may be conducive to social stability’.150

On the other hand, the Court might eschew minimalism. Following Bickel’s advice, the Court might become a ‘leader of opinion, not a mere register of it’.151 On this approach, High Court Justices would seek to develop a coherent and monolithic theory of interpretation, as have various American judges before them.152 In doing this, the Court would leave the safety of minimalism, and open the Court’s practices up to criticism on theoretical and, perhaps, political grounds. However, if successful, the Court’s rewards would be a greater logical integrity and consistency in its interpretive practices, and the reduction in reasonable controversies over the contents of the Courts’ canons.

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150 To which the theorist will reply ‘yes, but at what cost to the integrity of our legal doctrines?’ – and so the argument will continue.

151 Bickel (n 98) 239.

In what way do rights guarantees in the Australian Constitution, most notably the implied freedom of political communication on governmental matters, effect change in the common law? Recently Jeffrey Goldsworthy has argued that ‘[a] comprehensive theory of the subordination of the common law to the Constitution has yet to be clearly articulated’.1 I have pointed to a modified version of the method followed in Canada and Germany — the latter being ‘perhaps the jurisdiction with the most sophisticated and developed doctrine of horizontal effect’2 of basic rights on the private law — as both most suitable to the Australian context and in tune with what the High Court of Australia has actually held, but Goldsworthy finds this theory ‘difficult to understand’.3 Unfortunately he did not attempt to enrich his understanding by reference to explanations offered by anyone besides me, for

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2 Gavin Phillipson and Alexander Williams, ‘Horizontal Effect and the Constitutional Constraint’ (2011) 74(6) Modern Law Review 878, 884. As this article went to press the Federal Constitutional Court of Germany provided another excellent example of its doctrine by publishing its reasons in a case involving the far-right politician Udo Voigt. His wife had booked a room for the couple at the Hotel Esplanade Resort & Spa in Bad Saarow near Berlin but the hotel cancelled the booking and he was officially banned from entering the property when the hotel proprietors realised who the booking was for. A three-judge panel of the Court, referring to earlier case law, upheld the ban on entering the property and held that the general right to equality in art 3(1) of the Grundgesetz für die Bundesrepublik Deutschland [Basic Law of the Federal Republic of Germany] and art 3(3)’s specific prohibition on political viewpoint discrimination simply did not apply in this situation: there were numerous other hotels Mr Voigt could use and constitutional anti-discrimination rights did not generally apply among non-state actors; limited exceptions to that principle did exist, for example for important public events that are put on by private bodies such as football associations, but the case in hand did not fall under them. Bundesverfassungsgericht [German Constitutional Court], 1 BvR 879/12, 27 August 2019. (Ordinary sub-constitutional anti-discrimination law in Germany was of no use to Mr Voigt, because it does not protect against discrimination on the basis of political opinion, at least partly owing to anxieties about the far right.)
3 Goldsworthy (n 1) 270.
example in other jurisdictions that actually apply the method advocated; there is a large international literature and vigorous debate on this topic. Cheryl Saunders has also declared that ‘[t]he question of how to characterise the relationship between the Constitution and the common law remains unanswered’. A renewed attempt is therefore in order.

In short, the position is that change in the common law can be mandated by the Constitution, but this change occurs indirectly. The Constitution may well say by implication that a pre-existing rule of the common law is not tenable. But it does not provide an alternative rule. Developing an alternative, constitutionally compliant rule is still a question for the common law and there remains a choice among various possible solutions — a choice which is to be made according to the time-honoured methods of the common law, not one determined by the Constitution. The Constitution thus allows a variety of solutions to the requirement for change it creates and does not dictate the final answer.

II Does this Question Matter?

According to Leslie Zines, getting the relationship between the Constitution and the common law right involves ‘no difference in result and only a superficial difference in method’. As I have pointed out elsewhere, however, this question matters not merely because we need to get the interpretation of the Constitution right — does it, or does it not, contain rules of defamation law? — but also because it is about the legislative capacity of Parliament. If a private law rule is dictated by the Constitution, Parliament cannot change it — even if it turns out that a solution that seemed logical and appealed to the judicial interpreters of the Constitution as a deduction

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4 See, eg, Dawn Oliver and Jorg Fedtke (eds), Human Rights and the Private Sphere: A Comparative Study (Routledge, 2007); Verica Trstenjak and Petra Weingerl (eds), The Influence of Human Rights and Basic Rights in Private Law (Springer International Publishing, 2016): this is a collection of essays on this topic in the law of 17 countries and Quebec based upon presentations to the 19th International Congress of Comparative Law in Vienna in 2014. A legal philosopher has also recently turned her attention to this field, with results that repay reading and form the background to some of what is said here but cannot adequately be summarised in this article: Jean Thomas, Public Rights, Private Relations (Oxford University Press, 2015).


from its express terms later turns out to cause unforeseeable difficulties in practice.\textsuperscript{8} On the other hand, if, as I say, the \textit{Constitution} merely rules out certain answers as constitutionally impermissible but otherwise leaves the matter to the common law, it also leaves Parliament a free hand to adjust the law within a range of constitutionally permissible solutions, given that the common law can always be changed by the legislature. This means that experience, different ideological perspectives and changes over time (such as with the constant development of the Internet and associated technologies and opportunities for expression) can all be reflected in the law. ‘There are serious competing visions of freedom of speech’\textsuperscript{9} as a constitutional and legal construct and the \textit{Constitution} is agnostic about some of them.\textsuperscript{10}

\section*{III First Principles}

Now the \textit{Constitution} could, of course, contain a rule of the private law and directly effect a change to the common law. All law, judge-made as well as statutory, is subject to ‘the nation’s supreme law’.\textsuperscript{11} According to Adrienne Stone, I have overlooked this extremely basic proposition. In cases such as \textit{Lange v Australian Broadcasting Corporation}:\textsuperscript{12} the High Court has, in effect, subjected the common law to the requirements of the \textit{Constitution}, something that [the] indirect account does not allow. Thus, Taylor’s analysis falls at the first hurdle: it does not adequately describe the Court’s actual doctrine.\textsuperscript{13}

\begin{thebibliography}{99}
\bibitem{footnote8} For examples see; Taylor, ‘The Horizontal Effect of Human Rights Provisions’ (n 7) 193.
\bibitem{footnote11} \textit{Roberts v Bass} (2002) 212 CLR 1, 51 [130] (Kirby J) (‘Roberts’).
\bibitem{footnote12} (1997) 189 CLR 520 (‘Lange’).
\end{thebibliography}
Jeffrey Goldsworthy makes a similar point, pointing to the Court’s statement that ‘the common law must conform with the Constitution’\textsuperscript{14} as evidence that ‘[t]he Constitution therefore exerts a direct controlling force over the common law’.\textsuperscript{15}

Now, it is not merely logically possible for constitutions to do so: there are some constitutions which actually do state that some or all of the rights in them are directly applicable in disputes between private persons and thus create private law rules,\textsuperscript{16} although on closer examination one often finds the constitution itself (via an escape clause),\textsuperscript{17} the courts and/or the commentators recoiling from the odd results caused by this choice, such as constitutionally based human rights litigation when a person is injured by a defective drink.\textsuperscript{18} Nevertheless in principle it is possible for a constitution, as the supreme law of the land, to do anything to the private law — and this point does not depend, as Graeme Hill and Adrienne Stone claim,\textsuperscript{19} on accepting a version of realism as the true description of the judicial method and characterising

\textsuperscript{14} Lange (n 12) 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

\textsuperscript{15} Goldsworthy (n 1) 269.

\textsuperscript{16} Even the Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany], generally thought to represent the classic case for indirect effect of rights on the private law, exerts a direct effect on the private law in one provision, art 9(3), which nullifies agreements restricting the right to form labour unions. Any constitution may do this sort of thing to a greater or lesser extent, in one, some or all areas of private law, depending upon its provisions.

\textsuperscript{17} See, eg, Constitution of the Republic of South Africa Act 1996 (South Africa) s 8(2): ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’ As a result of the out-clause in the second half of this sentence and other escape methods, it has been said that the Constitution provides for direct effect in theory but in practice this has been largely reduced to indirect effect: Oliver and Fedtke (n 4) 483.

\textsuperscript{18} Such recoiling merely reflects ‘the common opinion of constitutional lawyers worldwide’: Ulrich Preuß, ‘The German Drittewirkung Doctrine and its Socio-Political Background’ in Sajo and Uitz (n 5) 25. The example with the defective drink occurred in Kenya: see Brian Sang, ‘Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique of the Emerging Jurisprudence’ (2018) 26(1) African Journal of International and Comparative Law 1, 13. See also the amusingly sudden back-pedalling in Dickson, ‘The Horizontal Application of Human Rights Law’ in Angela Hegarty and Siobhan Leonard, Human Rights: An Agenda for the Twenty-First Century (Cavendish, 1999) 72. Sonu Bedi, ‘The Absence of Horizontal Effect in Human Rights Law: Domestic Violence and the Intimate Sphere’ in Tom Campbell and Kylie Bourne (eds), Political and Legal Approaches to Human Rights (Routledge, 2017) 198, does not appreciate that if we make domestic violence a matter for direct enforcement of human rights on the ground that bodily integrity is a right that all democracies must ensure, there is no reason to stop there: every assault, whether inside or outside the home, would be a constitutional matter!

\textsuperscript{19} Taylor, ‘The Horizontal Effect of Human Rights Provisions’ (n 7) 86. The point I make in the text is indeed made by the authors in Hill and Stone (n 9) 101.
judicial action as a form of governmental action. It depends simply upon the status of the Constitution as the supreme law; it can tell anyone to do anything and change any law in any way and is unconstrained by classifications of actions as governmental or not. This is a very basic point and I have not overlooked it, and nor have the

20 This is a complete red herring imported from the American ‘state action’ doctrine. It may be that the United States Constitution applies only to state action. But that is its contingent choice; other constitutions, including ours, may do more or less than apply to all cases of governmental action but no other action. Our starting point is always what the Constitution requires, expressly or impliedly, and nothing else. At any rate the ‘state action’ doctrine is becoming increasingly discredited; see, eg, Eric Barendt, ‘The United States and Canada: State Action, Constitutional Rights and Private Actors’ in Oliver and Fedtke (eds) (n 4) 415; Gardbaum, ‘The “Horizontal Effect” of Human Rights’ (2003) 102(3) Michigan Law Review 387, 412–22; Oliver and Fedtke (n 4) 495; Thomas (n 4) 22. The judgment of Thomas J in McKee v Cosby 139 S Ct 675 (2019) can be read as an attack on the doctrine from an originalist standpoint.

21 Nowadays, indeed, it is possible to express pretty much any claim in the private law in the language of human rights. However, if we invent new-fangled constitutional remedies where long-standing common law ones already exist, we should either duplicate existing remedies or, if we make a totally new start, needlessly cast aside many centuries of work in refining the private law. This is what Kumm (n 6) 362, does not consider: it is certainly true that, if we express and enforce private law claims as human and/or constitutional rights, we can take account of the value of private autonomy, as he suggests, so that we do not force private actors to act with the level of neutrality among opinions, races or religions that we expect from the state. There is not and never can be a legal remedy of any sort against a private person who refuses to associate with vegetarians, Serbians or Muslims, while human rights law demands that the state should treat them like everyone else. But private autonomy is not some amazing recent discovery on the part of constitutionalists or human rights lawyers. The private law has long known of it too, perhaps using different concepts, and tailored its doctrines accordingly both in statute law and in common law rules — such as the distinction between complete testamentary freedom to discriminate and the inability of a common innkeeper to refuse accommodation on the basis of race (Constantine v Imperial Hotels [1944] 1 KB 693; but compare the German case, involving political opinion rather than race but also a hotel, referred to above (n 2) which illustrates the greater freedom available to non-state actors to discriminate in accordance with personal opinion under that country’s law). The private law’s centuries of work in adjusting rights among private parties deserve respect, not dismissal by public lawyers who think they know everything because they have learnt a few simple principles. Cf Aharon Barak, ‘Constitutional Human Rights and Private Law’ in Daniel Friedmann and Daphne Barak-Erez (eds), Human Rights in Private Law (Hart, 2001) 22; Stone (n 9) 242–5; Thomas (n 4) 35.

It is also certainly true that privatisation, the increasing prominence of supranational agreements and changes in the way we communicate (eg social media) have made the distinction between public and private actors less sharp than it used to be; today, being banned on Twitter or Facebook is much more of a hindrance to free discussion than the mere non-publication of a letter to the editor in a newspaper: cf Murray Hunt, ‘Human Rights Review and the Public-Private Distinction’ in Grant Huscroft and Paul Rishworth (eds), Litigating Rights: Perspectives from Domestic and International Law (Hart, 2002) 73, 84; Oliver and Fedtke (n 4) 16–23. There is a good case
courts of Germany and Canada, to whose jurisprudence our own doctrine, as I try to explicate it, is closest.

But any constitution, ours included, says only what it says (including by implication). It is also not compulsory for constitutions to lay down rules of private law in every or indeed any field.\textsuperscript{22} The fact that it is logically possible for the Constitution to change the private law by implication, as Jeffrey Goldsworthy points out, does not mean that it actually does so in any particular case.\textsuperscript{23}

To say that all laws regulating relations between private actors are subject to the Constitution is not, of course, to say which laws of this sort violate it. This, the only genuine constitutional issue in every case, is a matter of substantive constitutional law.\textsuperscript{24}

What does the Constitution say, expressly or impliedly? That is the question. At first blush, it would be surprising if our Constitution laid down private law rules to any considerable extent, given that in 1901 there already were well-developed private law principles. Furthermore, as with the United Kingdom’s Human Rights Act 1998, it may truly be said of our Constitution, ‘a terse and extraordinarily uninteresting document that does not hold any great truths to be self-evident’\textsuperscript{25} in the words of Donald Horne, that ‘no provisions deal explicitly with the application of the rights to private law, while the common law goes wholly unmentioned’.\textsuperscript{26}

Our Constitution certainly does rule out certain types or effects of legislation, while leaving Parliament’s hands free to adopt any other legislation it chooses. For example, s 116 prohibits certain sorts of legislation on the topic of religion, while leaving Parliament otherwise free to enact legislation which has an effect upon religion. The Constitution does not enact a code of law on the topic of religion, or indeed any positive rules about religion at all — although it could do if desired\textsuperscript{27} — but merely withdraws certain powers from Parliament and stops there. There are therefore many

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\textsuperscript{22} Cf Saunders (n 5) 190 (on the law of Canada and South Africa).
\textsuperscript{23} Goldsworthy (n 1) 270.
\textsuperscript{24} Gardbaum (n 20) 392, 415, 418, 447.
\textsuperscript{25} Donald Horne, \textit{The Lucky Country} (Penguin, 3\textsuperscript{rd} ed, 1984) 155.
\textsuperscript{26} Phillipson and Williams (n 2) 880.
\textsuperscript{27} For example, the \textit{Federal Constitution} (Malaysia) art 3(1) declares Islam to be the religion of the country, and art 3(5) provides for the King to be the head of the Islamic religion in certain parts of that nation.
choices remaining for Parliament. For example, both the existence and the non-existence of an evidential privilege for religious confessions is permissible under s 116, as are any number of half way houses (such as privilege only for certain offences or, conversely, no privilege for some offences). The Constitution allows many states of affairs on this point; there is no express statement or implication on the topic in it, although it would be logically possible for such a thing to exist. It is up to the legislature, or, in the absence of any decision by it, it is up to the common law to make the choice among an endless variety of constitutionally permissible alternatives. Pointing these facts out is not to suggest that such choices are somehow outside or above the Constitution. All it means is that the Constitution has chosen a light touch in regulating this field and merely proscribes rather than fully prescribes.

So it is with the law of defamation: the Constitution rules out, by implication, certain solutions as inconsistent with the free speech required for the functioning of the polity, including some solutions previously adopted by the common law, but otherwise contains no rules of defamation law, neither expressly (this is obvious and beyond serious argument) nor by implication — ‘what is inherent in the text and structure of the Constitution’. Rules of defamation law therefore continue to be provided by statutes and the common law, the latter being developed to avoid rules that would clash with the prohibitions enacted by the nation’s supreme law just as statutes are invalidated if they overstep the same mark. Various forces have always shaped the development of the common law, and the need to avoid clashing with the Constitution is just another one of the many forces at work in its development. In this sense Adrienne Stone is right to say that ‘the Constitution’s effect on the common law, though mandatory, is partial’.

IV Conformity to the Constitution … and the Precedents

It is in this sense, then, that the common law is made to ‘conform with the Constitution’, as Lange requires and as Jeffrey Goldsworthy emphasises: the common law selects a rule that is not ‘precluded’ by the Constitution as the previous rule was, and

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28 This question has in fact been considered recently by Anthony Gray, ‘Is the Seal of the Confessional Protected by Constitutional or Common Law?’ (2018) 44(1) Monash University Law Review 112. My answer to the question posed in the title of that article is apparent from the text; this is not the place to elaborate on the reasons for it. If my view on that point turns out to be wrong, the main point still holds: s 116 only rules things out; it does not provide what might be called positive rules.


31 (1997) 189 CLR 520, 566.
that is all the *Constitution* requires.\(^{32}\) It is thus true beyond doubt that ‘the common law must give way’ to the supreme law, but to what new rule does it give way?\(^ {33}\) The *Constitution* does not say. In this respect the commands of the *Constitution* are the same towards legislation as towards the common law: what is unconstitutional must be avoided — here there is no choice — but otherwise the field is open.

Perhaps the *Constitution* can be likened to a parking inspector who tells people where they are not allowed to park. Where they actually do park is up to them; that is not the inspector’s concern; the inspector simply enforces negative prohibitions and does not mandate where among the available spaces one finds an appealing spot. To change the simile,

Parliament could modify the common law by providing even *more* protection to political communication. Accordingly, in circumstances like these, the *Constitution* operate[s] like a boundary or a fence around an aspect of the common law, preventing movement beyond the boundary but allowing movement within it. It precludes certain common law rules without determining the precise content of the new common law rule.\(^ {34}\)

If it did do that, of course, no legislative changes at all would be permitted; the legislature cannot change rules found in the *Constitution*. As Kirby J stated in *Roberts v Bass*,

fidelity to the *Constitution*, consistency in its application, and conformity to the Court’s authority in *Lange* and in other cases, deny the co-existence of inconsistent principles once the circumstances attract the operation of the *Constitution*. Then, it is only possible to have one legal rule. That is the rule of the common law adapted to the *Constitution*.

If the common law, in this case the law of qualified privilege in defamation as it has hitherto been understood, would otherwise impair the constitutionally protected freedom, it must be developed in order to make it consistent with the constitutional implication. It cannot be incompatible with that implication. *Lange* clarified the approach that must be taken in order to determine any inconsistency. That approach asks two questions: (1) does the law burden the freedom of communication about governmental or political matters; and (2) if so, is the law ‘reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of ... government’.\(^ {35}\)

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\(^{32}\) *Lange* (n 12) 556.

\(^{33}\) Saunders (n 5) 215.

\(^{34}\) Hill and Stone (n 9) 71–2 (emphasis in original), 81 (where a similar point is made); Foley (n 9) 144.

\(^{35}\) *Roberts* (n 11) 59–60. The plurality made a similar point at 26.
If an inconsistency is identified using this methodology, then it is up to the common law to reform itself by selecting a rule that is not inconsistent with the Constitution, including its implications — there will be quite a few possible rules that are consistent with the Constitution, and the Constitution allows all of them.36

The common law would certainly conform with the Constitution if a rule of the common law were directly amended by the Constitution, expressly or impliedly, which seems to be what Jeffrey Goldsworthy is looking for. But the Lange doctrine 'confers no rights on individuals', not even constitutional rights let alone private law ones, and conformity need not be achieved by dictation.37 It can also be achieved by stating a negative proposition about what is not in conformity and leaving the person or institution affected to make another choice within the boundaries of what is permissible. To employ another metaphor: the enrolments office may tell the student that it is not permissible to study two particular subjects together. That selection is not permitted. The student may, however, select any other combination of subjects. There may be good or bad selections from all sorts of points of view, but any other selection will be consistent with the rules of the university and it is up to the student to make the choice.

Nor is this mere theory. In defamation law a choice must be made, and was actually and very plainly made by the Court in Lange, between a common law rule providing some protection to those holding public office, and the extreme position previously advocated by Deane J, depriving public figures of all protection in defamation. The Court chose the former solution and gave its reasons in the usual common law form: people in public life deserved protection from knowingly false statements and such protection also enhanced the operation of the political system.38 Then the Court considered at some length the choice between a requirement of reasonableness only in the newly extended area of qualified privilege, across the board or not at all, and for the reasons it gave — again using classic common law reasoning — it chose the first option.39 In both cases all solutions considered were consistent with the Constitution; choosing any of them would have removed all inconsistency between the common law and the Constitution. Thus, the common law’s traditional lines of reasoning were employed to come to a solution on these common law questions.40

The fact that the same people, the Justices of the High Court of Australia, were

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36 As modified in Coleman v Power (2004) 220 CLR 1 and further clarified in McCloy v New South Wales (2015) 257 CLR 178. It is not necessary to follow this rabbit down its burrow in the present context; it suffices to note that the Constitution imposes certain requirements.

37 Roberts (n 11) 26; Lange (n 12) 567; Clubb v Edwards; Preston v Avery [2019] HCA 11 [8], [356]; Comcare v Banerji [2019] HCA 23 [20], [135], [164].

38 Lange (n 12) 568.

39 Ibid 572–4. As can be seen there, a statute of one state was also influential in reaching this conclusion. The point holds: it was not the Constitution.

40 It is true that, in a few cases, only one solution to an issue may be compatible with the Constitution, just as, in administrative law, it is not for the courts to make administrative decisions — yet it nevertheless rarely occurs in serious litigation (it is doubtless
involved both in determining the constitutional limitations and selecting the new
common law rule must not blind us to the fact that their method and the outcome
were different in each field. If we had a separate constitutional tribunal and supreme
ordinary court, the point would perhaps be clearer; but in the one field, the Court
is, so to speak, acting as our constitutional tribunal, and in the other as our supreme
appellate court.

The Court held that ‘[t]he common convenience and welfare of Australian society
are advanced by discussion — the giving and receiving of information — about
government and political matters’.\footnote{Lange (n 12) 571.} Thus it expanded the common law test for
qualified privilege set out in 1834 — ‘the common convenience and welfare of
society’ — to remove the clash between the common law and the \textit{Constitution}.
\footnote{Toogood \textit{v} Spyring (1834) 1 CM \& R 181; 149 ER 1044, 1050 (Parke B).}
The \textit{Constitution} had told us, by implication, that the previous common law was not
in accordance with it and had to change. But clearly the change selected used the
pre-existing categories of the common law and was not found, expressly or impliedly,
in the \textit{Constitution}. As the court noted in \textit{Lange},

\begin{quote}
[o]nly in exceptional cases has the common law recognised an interest or duty
to publish defamatory matter to the general public. However, the common law
doctrine as expounded in Australia must now be seen as imposing an unreason-
able restraint on that freedom of communication, especially communication
concerning government and political matters, which ‘the common convenience
and welfare of society’ now requires. Equally, the system of government
prescribed by the \textit{Constitution} would be impaired if a wider freedom for

The only possible example I know of is found in \textit{Roberts (n 11)} 70, when Kirby J stated
[a] rule of the common law that held [defendants] liable in damages for untrue
defamatory statements in electoral material simply because those publishing such
materials had no affirmative belief in their truth would be one that imposed an imper-
missible burden on electoral communication. Such a burden would be incompatible with
the constitutionally protected freedom of political communication. Even if the general
common law otherwise made a positive belief in the truth of a statement a condition of
the defence of qualified privilege (a question I do not need to decide in these appeals) it
would be inconsistent with the \textit{Constitution} to require that a publisher must have such a
belief in an electoral context such as the present.

The plurality made a similar point in \textit{Roberts (n 11)} 40, while making it very clear
that it is the common law that ‘would have to be developed to accord with the \textit{Con-
stitution’s requirements}’ if it contained the offending rule. It may be that in this type
of situation the common law would have a choice comparable to ‘any colour that he
wants so long as it is black’, as Henry Ford is supposed to have said of the colour
choice offered to purchasers of his cars. Perhaps such situations are most likely to
arise when there is a simple yes/no choice: should we have such a requirement as
Kirby J mentions or not? It is equally probable that most choices in the development of
the common law are not simple yes/no choices.
members of the public to give and to receive information concerning government and political matters were not recognised. The ‘varying conditions of society’ of which Cockburn CJ spoke in *Wason v Walter* now evoke a broadening of the common law rules of qualified privilege.\(^{43}\)

The new common law rule exists because the old one was not constitutionally valid; in that sense it owes its existence to the *Constitution*. But the change made by the supreme appellate court at the instance of the constitutional tribunal could have been to any number of new rules, such as complete immunity for statements about politicians, as Deane J advocated; such a rule would not attract the censure of the constitutional tribunal, whether a statutory or a common law rule. Thus, the need for change is dictated by the *Constitution*, but the change that is actually made is not: judicial or statutory choice is used to select the best rule from among the constitutionally available ones, and the rule selected remains a common law rule, not one derived directly from the *Constitution*.

None of this is to deny the possibility of more subtle influence on the common law by the *Constitution*. Just as the *Constitution* could directly enact a rule of private law (although the *Constitution* does not do that) or require the common law to abandon a rule, which our *Constitution* does do according to *Lange*, the *Constitution* is also part of the general legal environment against which the common law goes about its usual process of development. The development of the common law is a values-based enterprise, and a legal order’s supreme law is likely to contain quite a few values. ‘In the past, common law human rights infiltrated private law by means of private law value terms. Now constitutional human rights do the same.’\(^{44}\) Such a phenomenon occurred in *Lange*, for, as we have seen, the extreme position adopted by Deane J was rejected in part owing to the deleterious effect it would have had upon the operation of the constitutionally prescribed system of government.\(^{45}\) Yet there was no constitutional compulsion about this: if the common law or a statute chose such a solution, it might be unwise but it would not infringe any constitutional requirements. But the clearest example of such an influence of the common law on the *Constitution* is the new rule for interstate conflicts of laws adopted in *John Pfeiffer v Rogerson*.\(^{46}\) As this point has been made at length elsewhere by myself and others, I say no more about it here.\(^{47}\)

\(^{43}\) *Lange* (n 12) 570.

\(^{44}\) Barak (n 21) 22.

\(^{45}\) See discussion above (n 36).

\(^{46}\) (2000) 203 CLR 503.

V Conclusion

We can now understand why the Court appears to vacillate in Lange between the language of choice and the language of compulsion, as Cheryl Saunders has acutely pointed out: there was a constitutional need for change identified by the supreme constitutional tribunal. But the precise details of the change were a matter for choice by the highest common law court and not constitutionally dictated, beyond obviously the need to avoid selecting another constitutionally invalid solution but rather to choose among the numerous constitutionally valid ones. Let us read in full the statement of the Court in Lange which Jeffrey Goldsworthy thinks I have failed to take account of:

> Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds. The common law of libel and slander could not be developed inconsistently with the Constitution, for the common law’s protection of personal reputation must admit as an exception that qualified freedom to discuss government and politics which is required by the Constitution.

It should be obvious now that my theory completely reflects every word in this statement. It is all there in plain English in Lange, if only people will read what it says rather than try to impose their preconceived ideas upon it. Needing a label to describe this state of affairs compendiously, I borrow from abroad the word ‘indirect’, given that the common law rule is not one directly derived from the Constitution and the Court in Lange stated, in its orders no less, that a defence based directly upon the Constitution was bad in law; only the common law defence was good because the rule remains a common law rule:

> Broadly speaking, the effect of human rights protections in the private sphere will be ‘direct’ if parties can rely explicitly on human rights protections in their litigation; it will be ‘indirect’ if they may not do so, but may press the Courts to interpret, apply or develop the rest of the law so as to protect the interests in question in the light of constitutional rights and values.

48 Saunders (n 5) 212. See also Davis (n 47) 995; Stone, ‘The Common Law and the Constitution: A Reply’ (n 13) 651.
49 Lange (n 12) 566.
50 Most obviously the ‘state action’ doctrine from the United States: see discussion above (n 20).
51 Order of Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ in Lange (n 12) 577.
52 Oliver and Fedtke (n 4) 14.
Like many single-word labels, it is only a partial truth. In the case of *Lange*, the need for change was imposed directly by the *Constitution*. But the change that actually results, the new rule of the common law, is not. ‘The Court [has] thus remodelled the common law to make it consistent with the implied constitutional freedom.’

I close with one final point. In an earlier exchange of views on this topic I was told that my theory does not take account of the insights of realism. Realism should not be a shibboleth, particularly not if it is an unsophisticated version of realism that takes no account of the obvious differences between judicial change of the law and changing it by legislation. But it can now be seen, above all, that this criticism is misplaced. My account of what the Court did in *Lange* and other cases does not merely permit or acknowledge judicial creativity and choice in developing the common law: it positively requires it! When a rule of the private law is inconsistent with the *Constitution* and is set out in the judge made common law, the judges must ‘amend’ the common law and choose another rule, as we saw them doing repeatedly in *Lange* itself. Furthermore, I equate legislation and the judicial development of the common law in one important respect — by postulating that both are subject to negative prohibitions in the *Constitution* and both legislature and judiciary, in choosing rules of law, are in the same boat of having, constitutionally, a free choice among possible rules that do not infringe such prohibitions.

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53 Taylor, ‘The Horizontal Effect of Human Rights Provisions’ (n 7) 188. See further Gardbaum (n 20) 404, who has another, equally valid way of expressing the point: it is the indirectness of the effect on private actors, not on the private law (which may be directly affected) that provides the label. In Germany the equivalent labels are *mittelbar* and *unmittelbar*, literally ‘mediate’ (for indirect) and ‘immediate’ (for direct) effect. In English of course ‘immediate’, while comprehensible in this context if juxtaposed with ‘mediate’, would be an even more unfortunate choice for reasons which do not apply in German. Nevertheless, of the German labels Christoph Starck in Peter Huber and Andreas Voßkuhle (eds), *Grundgesetz: Kommentar* (CH Beck, 7th ed, 2018), says, at 152, that they are wenig geeignet (little suited).

54 Zines (n 6) 355.

55 Stone, ‘The Common Law and the Constitution: a Reply’ 660. The exchange perhaps revealed a greater measure of agreement on some points than disagreement, and it seems to me that Stone’s later publications have closed the gap still further; see discussion above (n 33).

56 See, eg, Phillipson and Williams (n 2) 883, 889.

57 *Roberts* (n 11) 29 [72] (Gaudron, McHugh and Gummow JJ).
TRIBUNALS AND TRIBULATIONS: EXAMINING THE CONSTITUTIONAL LIMITS ON THE JURISDICTION OF STATE TRIBUNALS

I Introduction

In Burns v Corbett,1 the High Court had the opportunity to address an issue which has been on the horizon for some time: the limits on the powers of state tribunals.2

The question before the Court — whether state tribunals could exercise jurisdiction in ‘federal matters’ of the kind in ss 75 and 76 of the Constitution3 — was answered in the negative. It was found that the Civil and Administrative Tribunal of New South Wales (‘NCAT’)4 did not have jurisdiction over matters between residents of different states (‘diversity jurisdiction’).5 Aside from providing much-needed clarity on a vexed constitutional question, the decision has broader implications for state tribunals, impacting a range of areas involving ‘federal matters’, including residential tenancy, anti-discrimination disputes, and other civil claims.

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3 Section 77(iii) of the Constitution enables Parliament to invest state courts with federal jurisdiction with respect to any of the matters in ss 75 and 76. Section 75 includes matters arising under any treaty, in which the Commonwealth is a party, between residents of different states, and in which a prerogative writ is sought against an officer of the Commonwealth. Section 76 includes any matter arising under the Constitution, arising under any laws made by the Parliament, of Admiralty and maritime jurisdiction, and relating to the same subject-matter claimed under the laws of different States.
4 Previously known as the NSW Administrative Decisions Tribunal (‘ADT’): Burns v Corbett (n 1) 393 [9]. However, the ADT was abolished on 1 January 2014 by the Civil and Administrative Tribunal Act 2013 (NSW) sch 1 cl 3, and NCAT was established by s 7 of that Act.
5 See Constitution s 75(iv).
II Facts

In 2013, Therese Corbett (a political aspirant residing in Victoria) made a number of controversial statements which were published on the front page of the Hamilton Spectator. This included allegations that people ‘should be able to discriminate’ and that she wanted no ‘gays, lesbians or paedophiles working in [her] kindergarden’. Senate Candidate Bernard Gaynor (a Queensland resident) publicly endorsed the statements. Gary Burns, an anti-discrimination activist residing in New South Wales, complained that the statements were public acts vilifying homosexuals contrary to s 49ZT of the Anti-Discrimination Act 1977 (NSW). Both Ms Corbett and Mr Gaynor contended that NCAT did not have jurisdiction to determine the disputes.

III Proceedings in the Court of Appeal

The threshold issue before the New South Wales Court of Appeal was whether NCAT had jurisdiction to hear and determine a dispute arising under New South Wales legislation, between residents of different states. The Court of Appeal found no constitutional implication preventing state Parliaments from conferring diversity jurisdiction on state tribunals. However, the Court held that any state law purporting to have that effect would be inconsistent with s 39(2) of the Judiciary Act 1903 (Cth) (‘Judiciary Act’), and therefore invalid by operation of s 109 of the Constitution.

Mr Burns, the State of New South Wales and the Attorney-General for New South Wales each appealed by special leave to the High Court. The Attorneys-General of Queensland, Tasmania, Victoria and Western Australia also intervened in support of New South Wales.

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6 Burns v Corbett [2013] NSWADT 227, [17]–[19].
8 Ibid 392 [6].
9 Ibid 393 [12]–[13], 430 [155].
11 Ibid 262 [58].
12 Ibid 270 [95]–[97].
14 Burns v Corbett (n 1) 397 [33].
IV Issues

On appeal, it fell to the High Court to determine two issues:

1. the **implication issue** — whether the *Constitution* precludes state Parliaments from conferring diversity jurisdiction on a state tribunal; and

2. the **inconsistency issue** — in the alternative, whether a state law purporting to confer such jurisdiction on a tribunal is rendered inoperative by s 109 of the *Constitution*, for inconsistency with s 39 of the *Judiciary Act*.\(^{15}\)

V Decision of the High Court

The High Court (Kiefel CJ, Bell and Keane JJ; Gageler J agreeing on the implication issue; and Nettle J, Gordon J and Edelman J agreeing with the result in separate judgments) unanimously dismissed the appeals. Four of the seven judges held that there is an implied limitation under Ch III of the *Constitution*, which prevents a state law from conferring diversity jurisdiction on state tribunals.\(^{16}\) The resulting judgments have been described as a ‘smorgasbord of diverging constitutional reasoning’.\(^{17}\)

A The Majority Position

1. **Joint Judgment**

Chief Justice Kiefel and Bell and Keane JJ held that the implication issue had to be decided affirmatively, and that it was therefore unnecessary to resolve the inconsistency issue.\(^{18}\)

Their Honours began by canvassing the negative implications of Ch III of the *Constitution*,\(^{19}\) acknowledging the ‘autochthonous expedient’ which allows the use of state courts as repositories of federal jurisdiction.\(^{20}\) As Ch III restricts the scope of adjudicative authority that the Commonwealth Parliament may confer in relation

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\(^{15}\) Ibid 391 [1].


\(^{18}\) *Burns v Corbett* (n 1) 392 [4]–[5].

\(^{19}\) Ibid 398 [41].

\(^{20}\) *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (‘Boilermakers’).
to matters under ss 75 and 76 of the Constitution, any state law purporting to authorise a non-court body to determine such a dispute would be invalid.

In response to the arguments advanced by New South Wales and the interveners, their Honours reformulated the rhetorical question posed by the majority in Boilermakers:

what reason could there be in treating the arrangements made by Ch III for the adjudication of matters listed in ss 75 and 76 as an exhaustive statement only of the adjudicative authority that just happens to be exercised by the courts capable of comprising the federal judicature…?

According to the majority, there was ‘no good answer’ to this question and they concluded that

[the terms, structure and purpose of Ch III leave no room for the possibility that [federal judicial power] … might be exercised by … an organ of government, federal or State, other than a court referred to in Ch III of the Constitution.]

The historical context and purpose of Ch III shed further light on the question. The framers had sufficient confidence in the integrity of the Australian courts so as to confer federal jurisdiction on state courts by legislation made pursuant to s 77(iii), representing a divergence from the Constitution of the United States. Their Honours held that the fact that state administrative bodies did exercise judicial power at the time of Federation was not decisive in interpreting Ch III.

Consequently, ss 28(2)(a) and 32 of the Civil and Administrative Tribunal Act 2013 (NSW) were deemed invalid, and read down to the extent that they conferred jurisdiction on NCAT in relation to matters between residents of different states.

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22 Burns v Corbett (n 1) 399 [43].
23 Boilermakers (n 20) 272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
24 Burns v Corbett (n 1) 400 [46].
25 Ibid.
27 Burns v Corbett (n 1) 403 [56].
28 Ibid 405 [62]–[63].
29 Ibid 406 [64].
2 Justice Gageler

Justice Gageler agreed with the conclusion and substantially with the reasoning of the majority on the implication issue.30 His Honour held that the exception to state conferral of judicial power on a state tribunal, for matters contained in ss 75 and 76, was warranted ‘as a structural implication from Ch III’.31

With respect to the inconsistency issue, Gageler J emphasised the importance of demonstrating how the state law would ‘alter, impair or detract from’ the operation of s 39(2) of the *Judiciary Act*.32 The legislative power conferred by s 77(iii) went no further than investing a state court with federal jurisdiction.33 Absent any identifiable source of legislative power to exclude the adjudicative authority of non-court state tribunals, his Honour found no s 109 inconsistency.34

In considering the implication issue, Gageler J reinforced the requirement for implying a constitutional limitation on legislative power: that it be ‘logically or practically necessary for the preservation of the integrity of [the constitutional] structure’.35 His Honour’s support for a constitutional implication was strengthened by the ‘absence of Commonwealth legislative power to achieve the same result’.36 According to Gageler J, if the Ch III implication were not drawn, this would leave an unplugged ‘hole in the structure of Ch III’.37 Specifically, Ch III allows Parliament to enact laws enabling state courts to exercise federal jurisdiction.38 Permitting a possible extension of this jurisdiction to state tribunals, which need not possess the minimum characteristics required of Ch III courts, would undermine that system.39


In three separate judgments, the minority40 declined to recognise any constitutional implication imposing limitations on state tribunals.41 Instead, their Honours’
reasoning accorded with that of the Court of Appeal: that s 39(2) of the *Judiciary Act*
eviced an intention to exclude state tribunals from adjudicating federal matters.42

Justice Nettle agreed with Gordon J’s conclusions, offering separate reasons.43 After reviewing the competing views on the operation of s 39(2),44 his Honour held that the power contained in s 77(iii), to invest state courts with federal jurisdiction, imported with it an *implied* power to exclude the jurisdiction of state tribunals.45 This essentially relied on the same reasons articulated by the majority to find the Ch III implication — to avoid rendering Parliament powerless to prevent non-court state tribunals from adjudicating federal matters outside of the integrated judicial system.46 His Honour held that s 39(2) of the *Judiciary Act*, as an exercise of that implied power, invalidated any state legislation purporting to vest federal jurisdiction in a tribunal on the basis of a s 109 inconsistency.47

In a similar vein, Gordon J held that state Parliaments cannot vest diversity jurisdiction in administrative tribunals.48 The enactment of the *Judiciary Act* conferred exclusive jurisdiction on the High Court with respect to the matters in ss 75 and 76, and conditionally reinvested that jurisdiction in state courts, making the source of their jurisdiction exclusively federal.49 Her Honour rejected the Commonwealth’s primary submission (advanced by notice of contention) that there is an implied constitutional limit on legislative power, pointing out from the terms of s 77(ii) “that “federal control” over jurisdiction in relation to those matters is not pre-ordained by the *Constitution*, whether in s 77 or elsewhere.”50 On the inconsistency question, Gordon J set out the rationale behind s 109,51 finding that s 39 was intended to facilitate federal control over the exercise of federal jurisdiction by state courts.52 Accordingly, her Honour concluded that the provisions of the *Anti-Discrimination Act 1977* (NSW) purporting to confer jurisdiction on NCAT in relation to these matters were invalid for inconsistency.53

43 Ibid 421 [123].
45 *Burns v Corbett* (n 1) 426 [139], 427 [141].
46 Ibid 427 [140].
47 Ibid 428 [145]–[146].
48 Ibid 429 [148].
49 Ibid 429 [150], citing Felton (n 44) 412–13; *Burns v Corbett* (n 1) 432 [164].
50 *Burns v Corbett* (n 1) 436 [179].
51 Ibid 439 [189].
52 Ibid 440 [192]–[193].
53 Ibid 441 [199].
Justice Edelman, on the other hand, did not need to have recourse to s 109.54 His Honour accepted that ss 38 and 39 of the Judiciary Act could invalidate the conferral of diversity jurisdiction on any body other than a state court,55 but construed this as a direct exercise of the power to exclude in s 77(ii) of the Constitution.56 Importantly, Edelman J’s reasoning avoided the difficulties inherent in the reasons of Nettle J and Gordon J. Their Honours had relied upon an ‘incidental power’57 as the source of the power to exclude the jurisdiction of non-court state tribunals. This appears to exceed the express limits of the s 77(ii) power, namely to exclude the jurisdiction of state courts.58 Justice Edelman concluded that by avoiding any constitutional implication, he had avoided a significant practical dilemma: the requirement of a referendum should that legislative power need to be returned to the states.59

VI Comment

A Gap in Jurisdiction?

A number of consequences arise from the decision in Burns v Corbett. First, state tribunals can continue to exercise state judicial power. It is only the exercise of judicial power in relation to ‘federal matters’ of which state tribunals are deprived.60

Whilst the decision reaffirms that there is no strict separation of powers at state level,61 the implication established by the majority has potential relevance, albeit indirectly, to the Kable incompatibility doctrine.62 In particular, the rationale behind the Kable doctrine has previously been that state courts must remain ‘fit receptacles for the investing of federal jurisdiction’,63 meaning that they cannot be given functions incompatible with the exercise of federal judicial power.64 However, the concept of ‘federal jurisdiction’ merely refers to the source of adjudicative authority,65 not to

54 Ibid 443 [208].
55 Ibid 457 [252].
56 Ibid 457 [254].
58 McDonald (n 17).
59 Burns v Corbett (n 1) 458–9 [260].
60 Ibid 395 [21], 396 [27]; see also Qantas Airways Ltd v Lustig (n 2).
62 Kable (n 61) 103 (Gaudron J), 116–17 (McHugh J), 135, 143–4 (Gummow J).
63 Forge v ASIC (2006) 228 CLR 45, 82 [82] (Gummow, Hayne and Crennan JJ); Northern Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
the nature of the jurisdiction being exercised. The majority’s reasoning in *Burns v Corbett* — that only the judicial organs identified in Ch III may exercise jurisdiction over the matters contained in ss 75 and 76 of the *Constitution* — may signal a subtle shift in the justification for the *Kable* doctrine. Rather than needing to be fit repositories for federal jurisdiction, it can now be said that state courts (but not non-court state tribunals) must retain their independence and impartiality so as to remain suitable organs to exercise judicial power in ‘matters of specially federal concern’, irrespective of the source of that jurisdiction.

Further, tribunals occupy a more prominent position in our system of government today. Consequently, the decision in *Burns v Corbett* has the potential to disrupt the workings of state tribunals by leaving a jurisdictional gap. Prima facie, this may have far-reaching consequences, particularly given that many low-level disputes between members of the public are dealt with by these tribunals. As the submissions for the Attorney-General of Queensland highlighted, the subject matters in ss 75 and 76 cut across a wide range of areas and ‘may arise in potentially any topic…’. However, it should be remembered that the dispute must involve an exercise of federal *judicial power*. In the context of a dispute between residents of different states, where the power being exercised is administrative in nature, the jurisdiction of state tribunals would likely remain unaffected.

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66 *Burns v Corbett* (n 1) 394 [17], 401 [49]–[51] (Kiefel CJ, Bell and Keane JJ).
72 An example is a dispute that may arise between residents of different States in relation to a proposed order under the *Guardianship and Administration Act 1993* (SA), which is essentially administrative in nature: see David Bleby QC, 2017 *Statutory Review: South Australian Civil and Administrative Tribunal* (Report, 1 August 2017) 89.
Interestingly, in *Burns v Corbett* the parties had accepted it as uncontroversial that NCAT was not a ‘court of a State’. Accordingly, the High Court did not need to conclusively resolve the question of whether NCAT (or other state tribunals) can properly be characterised as ‘State courts’ within the meaning of Ch III, so as to have valid jurisdiction in federal matters. In the interim, a decision of the Appeal Panel of NCAT brought that conclusion into question. More recently, the New South Wales Court of Appeal definitively held that NCAT is not a ‘court of a State’ for the purposes of Ch III of the Constitution. By contrast, the Queensland Civil and Administrative Tribunal has been considered a ‘court’ of the State for the purposes of s 77(iii). Thus what the decision in *Burns v Corbett* leaves is an unresolved question which has already been met with differing responses on a state-by-state basis.

**B Affected Parties**

Aside from offering a comprehensive judicial commentary on federalism, the decision also has tangible practical implications. Although *Burns v Corbett* was specifically concerned with a matter ‘between residents of different states’ under s 75(iv) of the Constitution, it necessarily invites a more detailed consideration of the precise nature of the jurisdiction being exercised in any given case.

One area that will certainly be affected is residential tenancy disputes. In the wake of the High Court’s decision, where a tenant is resident in one state but their landlord resides in another, the dispute becomes one of federal jurisdiction and must be heard by a Ch III Court. Illustrative of this was a recent decision in South Australia, *Raschke v Firinauskas*, which involved an application for vacant possession by the

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73 *Burns v Corbett* (n 1) 398 [39].
75 See *Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45; cf *Zistis v Zistis* [2018] NSWSC 722, [68]–[72] (Latham J).
78 Fishburn (n 17) 90.
79 *Burns v Corbett* (n 1) 398 [38].
landlord who was an interstate resident. The Tribunal considered that it did not have jurisdiction to decide the dispute, where the exercise of that jurisdiction was judicial rather than administrative:

> The nature of the task of the Tribunal is to supervise the compliance of the parties with the terms of their agreement and make orders that largely mimic the remedies that flow from the enforcement of the agreement as if it were the subject of a contractual dispute in a court.

Importantly, the issue as to jurisdiction in *Burns v Corbett* was expressed in terms of matters involving residents in different *states*. State tribunals may continue to have jurisdiction in matters involving a resident of a territory or a party living overseas (there being only one state involved).

Further, a corporation is not considered a ‘resident’ of a state within the meaning of s 75(iv), meaning that the decision does not affect the jurisdiction of state tribunals to deal with applications in which one party is a corporate entity or organisation operating from another state. As such, the limits on state tribunals articulated in *Burns v Corbett* are somewhat diluted in the context of commercial lease disputes across different states (such as strata schemes), given that one of the parties will likely be an owners’ corporation, building manager, developer, construction company or similar. Nonetheless, caution should be exercised before parties commence tribunal proceedings to resolve such disputes, as (similar to residential tenancy disputes) they have the potential to attract the jurisdictional limitations imposed by *Burns v Corbett*.

**C Possible Reform**

The High Court’s decision confirms that state tribunals cannot exercise judicial power in respect of matters involving federal jurisdiction. However, as this case

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82 Ibid [27].
84 *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290.
88 *Burns v Corbett* (n 1) 405 [63] (Kiefel CJ, Bell and Keane JJ).
note highlights, it has direct practical implications for the exercise of judicial power by state tribunals more generally. There are a number of potential reform options available to overcome the constitutional problems identified.89

Maintaining the status quo, such that state tribunals continue exercising judicial power except in ‘federal matters’, is an option prone to abuse,90 and could lead to wasted resources as federal issues may not be immediately identifiable.91 Alternatively, the legislation conferring judicial power on a tribunal could provide an express exception to its exercise in ‘federal matters’. This may be a viable solution in jurisdictions which provide for orders of tribunals to be registered as a judgment of the court,92 whereby the tribunal could continue to determine such matters without exercising judicial power.

A further possibility is that states could designate their tribunals as ‘courts’,93 potentially enabling them to exercise federal jurisdiction.94 However, it is not easy to draw a distinction between the two adjudicative bodies, and there remains some ambiguity attaching to such a designation.95 Another approach, one which appears to have already found favour in some states, is for any federal matters that come before a tribunal to be referred to a state court.96 Jurisdictional issues may be overcome by issuing proceedings concurrently, so that a member of the court who is also appointed

89 Anna Olijnyk, ‘The High Court’s Decision in Burns v Corbett’ (Speech, Council of Australasian Tribunals Conference, 7–8 June 2018).
90 Olijnyk and McDonald (n 69) 106–7.
91 See, eg, Pioneer Express Pty Ltd v Hotchkiss (1958) 101 CLR 536, 543–4.
92 See, eg, Civil and Administrative Tribunal Act 2013 (NSW) s 78; State Administrative Tribunal Act 2004 (WA) ss 85, 86; Victorian Civil and Administrative Tribunal Act 1998 (Vic) ss 121, 122.
93 See, eg, the Queensland Civil and Administrative Tribunal, which has been designated as a ‘court of record’: Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 164(1); Owens v Menzies (n 77) 338 [17]–[20] (de Jersey CJ).
as a tribunal member determines the proceedings together.\textsuperscript{97} Finally, there may be scope for a ‘hybrid tribunal’, with a judicial section specifically for determination of federal matters.\textsuperscript{98} Each of these options may go some way towards restoring the primary objective of state tribunals: delivering accessible and efficient justice.\textsuperscript{99}

\section*{VII Conclusion}

\textit{Burns v Corbett} provides an important limit on the capacity of states to enable non-court tribunals to exercise judicial power.\textsuperscript{100} The High Court has clarified that the exercise of jurisdiction in respect of such matters under Ch III is exclusive to courts. Consequently, the decision, while reaffirming that there is no general separation of judicial power at the state level,\textsuperscript{101} extends the separation of judicial power in relation to matters of federal concern to the states. Although this constitutional implication may well have been ‘on the cards’,\textsuperscript{102} the decision represents a ‘truce’ of sorts, after the ongoing trials and tribulations in defining the limits on the jurisdiction of state tribunals post-\textit{Boilermakers}.\textsuperscript{103} It remains to be seen exactly how the states, and their tribunals, will respond to this latest piece in the constitutional puzzle.

\begin{thebibliography}{10}
\bibitem{98} See, eg, the former NSW Industrial Commission: \textit{Industrial Relations Act 1996} (NSW) ch 4 pt 3; \textit{South Australian Employment Tribunal Act 2014} (SA) s 5(2).
\bibitem{99} See, eg, \textit{Civil and Administrative Tribunal Act 2013} (NSW) s 3(d); \textit{South Australian Civil and Administrative Tribunal Act 2013} (SA) ss 8(1)(b)–(g).
\bibitem{100} McDonald (n 17).
\bibitem{101} \textit{Burns v Corbett} (n 1) 437 [183] (Gordon J), 443 [207] (Edelman J).
\bibitem{102} Olijnyk and McDonald (n 69) 106.
\end{thebibliography}
**STONE V CHAPPEL (2017) 128 SASR 165
IS THE DOCTRINE OF ECONOMIC WASTE A WASTE OF TIME?**

**I Introduction**

In 2009, the plaintiffs, Mr and Mrs Stone, entered into a contract with the defendants, Mr Chappel and Mr Smallacombe, to construct the shell and framework for an apartment in a retirement village. The contract specified that the ceiling height was to be 2,700 mm above floor level. However, upon construction, the height of the ceiling ranged from 32 mm to 57 mm below the specified height. The plaintiffs claimed approximately $330,000 in rectification damages to remedy the breach of contract.1

Whilst this case features a range of issues,2 this case note will focus on rectification damages and the Full Court’s analysis of whether the trial judge erred in denying rectification damages to compensate the plaintiffs for the cost of remedying the ceiling height. This case note will specifically analyse Kourakis CJ’s application of the doctrine of economic waste as a consideration in the question of reasonableness. It will be argued that his Honour’s application is unconventional in light of explicit and implicit High Court authority to the contrary and the inherent inconsistencies in the doctrine.

**II The Bellgrove Principle**

This case presented the Full Court with an opportunity to clarify the application of the Bellgrove principle.3 In cases of defective construction, the High Court in Bellgrove established the general rule, which provides that ‘the prima facie measure of damages is the cost of rectifying the work so that it conforms with the contract’.4

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2 For example, the Full Court of the South Australian Supreme Court also had to consider misleading and deceptive conduct, damages for loss of amenity, and damages for loss of use of money paid prematurely.

3 *Bellgrove v Eldridge* (1954) 90 CLR 613 (‘Bellgrove’). In this case, the appellant entered into a contract to build the respondent a house. However, the appellant used defective concrete and mortar, resulting in unstable foundations. The High Court held that it was both necessary and reasonable to demolish and rebuild the house in order to produce conformity with the contract, and upheld the award of rectification damages.

4 *Stone* (n 1) 205 [194] (Doyle J), citing ibid 617.
In doing so, the High Court rejected the approach of assessing damages as the difference between the value of the goods at the present time and the value they would have had if there was conformity with the contract. However, the High Court held that rectification damages are subject to two qualifications: the rectification work must be ‘necessary to produce conformity’ with the contract, and must be a ‘reasonable course to adopt’.

III Trial Judge

Whilst finding a breach of contract, the trial judge rejected the plaintiffs’ claim for rectification damages on three bases. Firstly, the trial judge held that the plaintiffs had elected to abandon their right to rectification, as their occupation of the apartment was inconsistent with their claim. Secondly, the trial judge did not apply the Bellgrove principle as the ceiling was still ‘substantially in accordance with the contract’. Thirdly, even if the principle was to apply, the trial judge concluded that this case fell within the qualification to the rule, as it would be unreasonable to undertake the necessary work to raise the ceiling. Rather than rectification damages, the trial judge awarded $30,000 for disappointment and loss of amenity. The plaintiffs appealed the decision and challenged the trial judge’s three bases of reasoning.

IV The Decision

In this instance, all three judges were in agreement that the trial judge erred on the first and second bases. The Full Court rejected the finding that the plaintiffs elected to forgo rectification damages by moving into the apartment. In addition, the Full Court rejected the trial judge’s interpretation by finding that there is no precondition to the Bellgrove principle. Substantial performance of the contract will not preclude rectification damages. Overall, each judge takes a different approach to the inquiry of reasonableness and adds their own interpretation to the Bellgrove principle.

A Chief Justice Kourakis

Chief Justice Kourakis applies the Bellgrove principle by considering whether rectification is a reasonable course to adopt, and the overarching question, whether there is
good reason to depart from the prima facie award of rectification damages.13 In determining whether there is a good reason to depart, his Honour lists a series of factors to take into account.14 Interestingly, Kourakis CJ lists ‘public interest in reducing economic waste’ as a relevant factor.15 His Honour goes on to acknowledge that if the relevant considerations were limited to the degree of departure from the contract,16 the reasons for the contractual term,17 and the nature of the defendant’s fault,18 he would have awarded rectification damages.19 However, due to the risk of damage to neighbouring properties and of collateral litigation from the potential rectification works,20 as well as the public interest against economic waste, awarding damages ‘on the basis of such a fraught undertaking’ would appear ‘particularly artificial, and unjust’.21 Chief Justice Kourakis also observes that ‘[t]he public interest against economic waste and against the promotion of unconstructive litigation is relatively strong in this case.’22 His Honour concludes that rectification is not a reasonable course to adopt and therefore falls within the Bellgrove qualification.23

B Justice Doyle

Justice Doyle notes that ‘[t]he general availability of rectification damages reflects the importance that the law of contract attaches to the plaintiff’s performance interest’,24 even if that interest represents some ‘subjective aesthetic’ or ‘eccentric benefit’.25 His Honour goes on to provide a comprehensive summary of defective building work cases following Bellgrove.26

Justice Doyle observes that in Tabcorp the High Court recently endorsed the Bellgrove general rule and qualification.27 In doing so, the High Court reaffirmed the ‘primacy’ of the plaintiff’s performance interest, whilst noting that ‘unreasonableness’ will only be satisfied in ‘exceptional circumstances’.28 However, his Honour

13 Ibid 181 [54], 185 [75].
14 Ibid 182 [55].
15 Ibid.
16 Ibid 183 [64].
17 Ibid 183 [65].
18 Ibid 183–4 [66].
19 Ibid 185 [72].
20 Ibid 185 [72].
21 Ibid 185 [74].
22 Ibid.
23 Ibid 185 [75].
24 Ibid 206 [200].
25 Ibid.
26 Ibid 207–21 [203]–[265].
27 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272 (‘Tabcorp’).
28 Stone (n 1) 218 [249]–[250].
notes that the High Court provides ‘little guidance’ regarding the application of this qualification.29

His Honour continues that ‘unreasonableness’ is a limit representing how far the law is prepared to go to give effect to the plaintiff’s interest in the performance of the contract.30 Despite no express authority on the policy underpinning this qualification,31 Doyle J approves Alexander FH Loke’s interpretation that the qualification is a way of balancing the plaintiff’s performance interest against the fairness of the burden imposed on the defaulting party.32 Thus it is relevant to consider proportionality, the triviality of the defendant’s departure from the contractual objective, and the nature and quality of the defendant’s breach.33

Justice Doyle agrees with the trial judge that it is appropriate that some weight be attached to the following factors — the impact on others,34 the fact that the defendants may be in breach of their contractual obligations to others,35 and fire safety.36 Nevertheless, Doyle J concludes that the most relevant matters are: the nature of the contractual objective, the extent of the departure from achieving the contractual objective, and the proportionality of the rectification work and costs.37 His Honour notes that in this instance the ‘functional objective was achieved, and the amenity or aesthetic objective was substantially achieved’.38 Justice Doyle ultimately concludes that the cost of rectification damages is disproportionate to the likely benefit, given the limited extent of departure from the contractual objective, and the limited aesthetic benefit likely to be achieved.39 Therefore, there was no error in the trial judge’s conclusion.40

C Justice Hinton

Justice Hinton notes that whilst Bellgrove is explicit that the second limb of the qualification, reasonableness, requires the court to consider two questions — ‘whether the proposed work method is reasonable’, and ‘whether it is reasonable to

29 Ibid 218 [250].
30 Ibid 218 [252].
31 Ibid 219 [254].
33 Ibid.
34 Ibid 224 [281].
35 Ibid 224 [282].
36 Ibid 224 [283].
37 Ibid 224–5 [284].
38 Ibid 225 [286].
39 Ibid 225–6 [288].
40 Ibid 226 [289].
award damages’ — there is little assistance regarding the latter question.\(^\text{41}\) However, in contrast to Kourakis CJ, Hinton J considers it ‘important to observe’ the High Court’s rejection of the qualification encompassing consideration of economic waste in \textit{Bellgrove}.\(^\text{42}\)

Justice Hinton goes on to evaluate the trial judge’s application of the \textit{Bellgrove} principle. His Honour agrees with Doyle J that it is irrelevant that the court is placed in the undesirable position of supervising the rectification work.\(^\text{43}\) Justice Hinton also agrees that the plaintiff’s performance interest was both aesthetic and functional. However, in regards to functionality, there was compliance with the contract.\(^\text{44}\)

Given the extent to which the performance benefit was met, and the minimal benefit gained for the money required, Hinton J distinguishes this case from contemporary authorities.\(^\text{45}\) Thus the trial judge was right to conclude that the cost would be disproportionate to the benefit and ‘not a reasonable method’ to adopt.\(^\text{46}\)

\section*{V Comment}

\textbf{A Flying in the Face of Seriously Considered Dicta}

Interestingly, Kourakis CJ applies the doctrine of economic waste,\(^\text{47}\) despite the High Court in \textit{Bellgrove} explicitly rejecting this test as going ‘too far’.\(^\text{48}\)

In \textit{Farah Constructions}, the High Court criticised appellate courts for changing the first limb of the test from \textit{Barnes v Addy}.\(^\text{49}\) The High Court condemned the Court of Appeal’s amendments, as they were ‘unsupported by authority and flew in the face of seriously considered dicta uttered by a majority of this Court’.\(^\text{50}\) \textit{Farah Constructions} serves as a warning to appellate courts, not to stray away from ‘seriously considered’ reasoning of the High Court.

In \textit{Bellgrove}, the unanimous High Court explicitly rejected ‘economic waste’ and reasoned that to apply this factor

\begin{itemize}
\item \textsuperscript{41} Ibid 251 [427].
\item \textsuperscript{42} Ibid 251–2 [428].
\item \textsuperscript{43} Ibid 257 [446].
\item \textsuperscript{44} Ibid 258 [448].
\item \textsuperscript{45} Ibid 258 [452], citing \textit{Bellgrove} (n 3); \textit{Tabcorp} (n 27); \textit{Willshee v Westcourt Ltd} [2009] WASCA 87; \textit{Wheeler v Ecroplot Pty Ltd} [2010] NSWCA 61; \textit{Unique Building Pty Ltd v Brown} [2010] SASC 106.
\item \textsuperscript{46} \textit{Stone} (n 1) 258–9 [453]–[454].
\item \textsuperscript{47} Ibid 182 [55].
\item \textsuperscript{48} \textit{Bellgrove} (n 3) 619.
\item \textsuperscript{49} (1874) LR 9 Ch App 244.
\item \textsuperscript{50} \textit{Farah Constructions Pty Ltd v Say-Dee Pty Ltd} (2007) 230 CLR 89, 159 [158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) (‘\textit{Farah Constructions’}).
\end{itemize}
would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract.51

The High Court went on to state that the only qualifications to the general rule are ‘to be found in the expressions “necessary” and “reasonable”, for the expression “economic waste” appears … to go too far’.52 Yet in spite of this, Kourakis CJ applies the economic waste doctrine. His Honour acknowledges that the doctrine was rejected in Bellgrove. However, rather than applying it as a qualification to the general rule, his Honour argues that the qualification of reasonableness incorporates the consideration of the doctrine of economic waste.53 Nevertheless, this still defies the High Court’s criticism of economic waste as inconsistent with achieving the contractual objectives, and the principle behind rectification damages. Overall, Kourakis CJ’s recent application raises the question of whether economic waste should be considered as a factor in the inquiry of reasonableness.

B Define the Doctrine of Economic Waste

Jacobs & Young is often cited as the origin of the economic waste doctrine.54 In this case, the contract provided that all pipes used in construction must be manufactured by Reading. However, the contractor utilised pipes made by other manufacturers, which were then encased into the wall. The pipes were in fact indistinguishable, except in regards to the name of the manufacturer. The majority held that

[t]he owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained.55

Whilst not expressly using the term, this case has been interpreted as invoking the economic waste doctrine.56

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51 Bellgrove (n 3) 618–19 (Dixon CJ, Webb and Taylor JJ).
52 Ibid.
53 Stone (n 1) 183 [63].
55 Jacobs & Young (n 54) 891 (Cardozo J). Notably, this statement of law is quoted by both Kourakis CJ and Doyle J: Stone (n 1) 170–1 [8], 209 [214].
56 Daniel and Marshall (n 54) 881.
In *Bellgrove*, the High Court referred to economic waste as a ‘term current in the United States’ and cited the *Restatement (First) of Contracts*.\(^{57}\) Section 346 provides that, in cases of defective construction, the party is entitled to reasonable costs of rectification or the difference in value if it does not involve unreasonable economic waste. The drafters also include a comment explaining that

> [s]ometimes defects in a completed structure cannot be physically remedied without tearing down and rebuilding, at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method requiring such economic waste.\(^{58}\)

The comment is reflected in both the facts of *Jacobs & Young* and *Stone*. In the latter, the ceiling would have to be demolished, and the existing steel beams cut and reinforced, in order to rectify the ceiling height.\(^{59}\) Notably, this statement is in stark contrast to the aforementioned reasoning of the High Court, which would allow demolition of a satisfactory structure if it was of a different character than that contracted for.\(^{60}\)

### C The Rationale

Chief Justice Kourakis argues for economic waste as a factor given the very ‘concept of reasonableness inevitably incorporates a consideration of the public interest in avoiding economic waste’.\(^{61}\) Moreover, his Honour argues that this factor takes into account the public interest in ‘minimising transactional costs in the building industry which may be increased if insurance is taken against damages based on rectification costs’.\(^{62}\) His Honour, at the beginning of his judgment, suggests this notion as a ‘countervailing legal policy consideration’ against rectification damages.\(^{63}\) Whilst acknowledging that this general observation is not in itself a ‘statement of legal rule’, Kourakis CJ suggests it informs the application of the reasonableness qualification.\(^{64}\)

However, economic waste has been criticised as being inconsistent in operation as well as with the purpose of compensatory damages.\(^{65}\) The purpose of damages is to put the plaintiff in the same position as if the contract had been performed.\(^{66}\)

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\(^{57}\) *Bellgrove* (n 3) 618, citing American Law Institute, *Restatement (First) of Contracts* (1932) § 346 (‘Restatement (First) of Contracts’).

\(^{58}\) *Restatement (First) of Contracts* (n 57) § 346 cmt (b).

\(^{59}\) *Stone* (n 1) 201 [166].

\(^{60}\) *Bellgrove* (n 3) 619.

\(^{61}\) *Stone* (n 1) 183 [63].

\(^{62}\) Ibid.

\(^{63}\) Ibid 172 [13]–[14].

\(^{64}\) Ibid 172 [15].

\(^{65}\) Loke (n 32) 201.

\(^{66}\) For the ‘ruling principle’ in assessing damages see *Robinson v Harman* (1848) 154 ER 363, 365; *Stone* (n 1) 205 [191].
In every case of rectification, by undoing work previously done, there would be economic waste.67 For example, in *Bellgrove*, the High Court gives the example of erroneously painting rooms the wrong colour.68 The High Court asserts that where a contractor paints a room in a different colour than specified, the owner is entitled to the reasonable cost of rectifying the departure from the contract.69 However, to repaint freshly painted rooms would breach the economic waste doctrine, as it would disregard the labour and material spent on the original paint, which achieves the same practical function.

Moreover, economic waste operates on two inconsistent premises. Rectification damages are based on the subjective performance interest of entering into the contract, whereas economic waste relates to the objective economic value.70 This is partially explored in *Stone*, where Doyle J notes that rectification damages facilitate the recovery of damages according to the plaintiff’s subjective performance interest, rather than the loss of the objective financial or economic benefits of performance.71 Therefore, ‘it would make for difficult conceptualisation of the reasonableness restriction if economic waste were adopted’.72

Significantly, the *Restatement (Second) of Contracts* no longer refers to economic waste in section 346.73 In the comments, the drafters state that economic waste was a ‘misleading expression’, as in some instances, the owner may be awarded rectification damages, but ‘will not…usually’ put that money towards rectifying the breach, thus resulting in no economic waste.74 It should be noted that in Australian jurisprudence, it is not necessary for an award of rectification damages that the owner actually evince an intention to rectify the defect.75

D Tabcorp on Economic Rationalism and Proportionality

Chief Justice Kourakis’ adoption of the economic waste doctrine is particularly unusual in light of the High Court’s decision in *Tabcorp*. In *Tabcorp*, the High Court considered rectification damages in the context of negative covenants. The tenant had covenanted that substantial alterations or additions must not be made to the premises

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67 Loke (n 32) 201.
68 *Bellgrove* (n 3) 617.
69 Ibid 617.
70 Loke (n 32) 201.
71 *Stone* (n 1) 206 [200].
72 Loke (n 32) 201.
74 Ibid § 348 cmt (c).
75 *Stone* (n 1) 210–11 [215]–[218], 211–12 [222]–[224], citing *De Cesare v Deluxe Motors Pty Ltd* (1996) 67 SASR 28; *Westpoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253. However, this reasoning has been questioned, as even if economic waste does not actually eventuate, the court is still encouraging this activity: Loke (n 32) 201.
without written approval of the landlord. The foyer had been built less than six months earlier, and was made of special materials, including San Francisco Green granite and sequence-matched crown-cut American cherry. In ‘contumelious disregard’ for the contract,76 the tenant destroyed the original foyer without permission, and rebuilt it in a different aesthetic style. The tenant argued that damages should be based on the diminution of value. However, the High Court applied the Bellgrove principle and upheld the Full Court’s award of $1,380,000 in damages.77

If there were a case for the High Court to apply the doctrine of economic waste, this would have been it. Whilst differently furnished, the landlord still had a functional foyer, appropriate for a commercial building, which was of similar value to the original. To demolish and reinstate the former foyer would be disproportionate to the value obtained — it would result in another new foyer, of like value, just of a different aesthetic style. The High Court was highly critical of the tenant’s argument for damages to be assessed at diminutive value, and cited the landlord’s submission in describing it as an ‘attempt “arrogantly [to] impose a form of ‘economic rationalism’”’.78 The High Court’s unanimous rejection of ‘economic rationalism’ has been interpreted as the High Court once again ‘squash[ing]’ the doctrine of economic waste.79

Moreover, it is also interesting to consider the absence of a proportionality discussion in the High Court’s judgment. As can be seen in Jacobs & Young, economic waste is related to a proportionality inquiry. In Tabcorp, the closest the High Court gets to proportionality is by quoting Ruxley, where the House of Lords summarised the trial judge’s conclusion that the cost of reconstructing the pool would be ‘wholly disproportionate to the disadvantage of having a [6 ft deep] pool … as opposed to 7 ft 6 inches’.80 Following this quote, the High Court criticises the House of Lords for arriving at a view ‘inconsistent’ with the principles of Bellgrove and Radford v De Froberville.81 Moreover, despite the landlord’s submissions directly raising the issue of proportionality, the High Court was silent on this point.82 Like economic waste, ‘Tabcorp was a case where it would seem that proportionality should loom large’.83 In light of the lack of a proportionality discussion and its criticism of Ruxley,

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76 Tabcorp (n 27) 282 [4].
77 Ibid 283 [5].
80 Tabcorp (n 27) 289 [18], quoting Ruxley Electronics & Construction Ltd v Forsyth [1996] AC 344, 354–5 (‘Ruxley’). In Ruxley, the House of Lords rejected a claim for rectification damages to remedy a pool, which was nine inches less in depth than the contract specified.
81 Tabcorp (n 27) 289 [18], citing Bellgrove (n 3); Radford v De Froberville [1977] 1 WLR 1262.
82 Tabcorp (n 27) 277 (NJ Young QC) (during argument).
commentators have suggested that the High Court signalled that proportionality is no longer relevant in the inquiry of reasonableness. Given its close proximity to proportionality, this judgment undermines the doctrine of economic waste, and suggests that it is unlikely to gain approval by the High Court. Despite the reasoning of the High Court, Doyle J and Hinton J still consider proportionality in their respective judgments. In fact, Doyle J notably criticises the High Court’s reasoning in Tabcorp for not considering proportionality as a factor. It will be curious to see whether other lower courts apply proportionality in light of this recent High Court authority.

VI Conclusion

The doctrine of economic waste is problematic in the context of the High Court’s strongly worded dictum in Bellgrove and the High Court’s warning in Farah Constructions. Moreover, the inconsistencies inherent in the doctrine as well as the implicit rejection of proportionality by the High Court in Tabcorp render Kourakis CJ’s application of economic waste questionable. It is unlikely to gain traction in Australian jurisprudence. Nevertheless, this discussion raises a broader question over Kourakis CJ, Doyle J and Hinton J’s reliance on proportionality against the backdrop of Tabcorp’s implicit rejection of proportionality as a factor in the inquiry of reasonableness. However, the High Court rejected the plaintiffs’ application for special leave, leaving this question open until the next rectification case.


85 Stone (n 1) 220 [260]–[261], 225–6 [288] (Doyle J), 258–9 [453] (Hinton J).

86 Ibid 220 [260]. Justice Doyle states that he does ‘not understand the High Court’s reasoning … to exclude consideration of any disproportion between the rectification work proposed and the benefit to be obtained’. Whilst acknowledging that the court must consider the contractual bargain between the parties, his Honour maintains that ‘disproportion remains a relevant consideration’.

TERMINATION OF TENANCY IN COMMON
BY ADVERSE POSSESSION: A COMPARATIVE
LESSON FROM THE UNITED STATES

I Introduction

The common law recognised four types of co-ownership: joint tenancy, tenancy in common, coparcenary, and tenancy by the entireties. Of these, only the joint tenancy and the tenancy in common retain relevance in Australian law. And of those, the tenancy in common is the simplest: tenants in common share possession, but otherwise each cotenant’s interest, although undivided, is alienable, devisable, and inheritable. Unlike joint tenancy, tenancy in common provides no right of survivorship, and there is no requirement that the cotenants’ shares be equal. Notwithstanding the simplicity of the estate, tenancy in common can cause some of the trickiest problems in one particular instance: the operation of the law of adverse possession.

In American law, adverse possession continues generally to operate according to common law principles. It is a common assumption that in Australian law the operation of Torrens title, and especially the concept of indefeasibility, obviates the operation of adverse possession. That misunderstands the Australian position. In fact, while it is true that adverse possession fundamentally undermines the operation of a system of title by registration, every Australian state nonetheless recognises circumstances in which an adverse possessor may still acquire either an enforceable interest or title to land over a registered owner with indefeasible title. The strength of


4 Moore, Grattan and Griggs (n 1) 122–3.
such a claim, however, varies significantly across different Australian jurisdictions.\textsuperscript{5} In Victoria and Western Australia, for instance, and to some extent in Tasmania, the
‘acquisition of title by possession applies fully to Torrens land’.\textsuperscript{6} In Queensland, the
legislation also recognises adverse possession as an exception to indefeasibility of
title, but only where the adverse possessor can demonstrate they have been in adverse
possession of the land for the requisite statutory period.\textsuperscript{7} In New South Wales, the
legislation provides that an adverse possessor may only make a claim to acquire
title against a registered title to land to the Registrar-General where ‘the title of the
registered proprietor would … have been extinguished’ under the limitation statute
and the application is made in respect of a ‘whole parcel of land’.\textsuperscript{8} And in South
Australia, subject to legislative conditions,\textsuperscript{9} title by adverse possession can only be
obtained over Torrens land where a person who would have extinguished the title of
the true owner of the land, would have done so if the land had been held under the
general law.\textsuperscript{10} The South Australian provisions

strike a balance between absolutely securing the title to a person’s estate or interest
and the competing principle that public interest demands that if a person chooses
to abandon those rights for a long period of time there should be a method of
clearing the title to the land so that it can be utilised for public benefit.\textsuperscript{11}

Australian Torrens title legislation seems therefore to allow the cutting short of an
otherwise indefeasible title through satisfying the conditions of adverse possession.

But what about a tenant in common? Typically, because all cotenants have an equal
right to possession, the possession of one cotenant is not considered adverse to the
rights of other cotenants: ‘[i]n the absence of wrongful exclusion and of statutory
intervention, possession by one co-owner for any period of time would not bar the
right and title of the co-owners out of possession’.\textsuperscript{12} To start the running of the
limitation period on which the doctrine of adverse possession is based, a cotenant
who claims more than the cotenant’s share must oust, or wrongfully exclude, the
other cotenants. A recent case decided by the Supreme Court of Montana addressed
the question of whether a deed (in Torrens, the registration of a transfer) by less than
all cotenants purporting to convey the entire estate to a third party constitutes ouster
or wrongful exclusion and begins the running of the limitation period. This remains

\textsuperscript{5} Ibid 122–3, 178–85.
\textsuperscript{6} Ibid 179–81. See also Transfer of Land Act 1958 (Vic) ss 42(2)(b), 60–2; Transfer of
Land Act 1893 (WA) ss 68(1A), 222–223A; Land Titles Act 1980 (Tas) ss 40(3)(h),
138T–138Y.
\textsuperscript{7} Land Title Act 1994 (Qld) pt 6 div 5, s 185(1)(d), sch 2 (definition of ‘adverse
possessor’); Limitation of Actions Act 1974 (Qld) s 13.
\textsuperscript{8} Real Property Act 1900 (NSW) s 45D(1).
\textsuperscript{9} Real Property Act 1886 (SA) ss 80A–80I, 251.
\textsuperscript{10} Ibid s 80A.
\textsuperscript{11} Douglas J Whalan, The Torrens System in Australia (Lawbook, 1982) 328.
\textsuperscript{12} Moore, Grattan and Griggs (n 1) 161.
an open question in both Australian and American law, and so the case provides
important guidance for both jurisdictions.\textsuperscript{13}

II THE FACTUAL BACKGROUND

The chain of events that resulted in the lawsuit began in 1987 when Rose Bisciglia
died intestate. The one-half interest in certain real property that she owned at death
passed in equal shares to her husband George Salituro and her daughter by a prior
marriage, Josephine Palese. Angelo Bisciglia, Rose’s brother and the owner of the
other one-half interest in the property, recorded an affidavit of heirship in the county
property records which listed Rose’s surviving child Josephine, but did not include
Rose’s surviving husband George.\textsuperscript{14} According to the record, neither Angelo nor
Josephine realised that George took an interest in Rose’s property by intestate suc-
cession.\textsuperscript{15} In 1988, Josephine and Angelo\textsuperscript{16} executed a deed purporting to convey
the entire estate to Josephine’s two children, Mary Jo Davis and Anthony Palese.\textsuperscript{17} From 1988 to 1997, Mary Jo and Anthony paid all the property taxes and executed
leases for grazing and farming. In 1997, they sold the property to Mark Nelson and
Jo Marie Nelson (‘the Nelsons’),\textsuperscript{18} reserving to themselves an undivided one-half
interest in ‘oil, gas, and other minerals in and under’ the property.\textsuperscript{19}

From 2006, the Nelsons began leasing the property for oil and gas development.
A subsequent title examination discovered the overlooked one-quarter interest that
had passed to George on the death of his wife, Rose. George died intestate in 1991
and his one-quarter interest passed in equal shares to his two children by a prior
marriage, George Salituro Jr and Rose Salituro (‘the Salituros’).

III THE DECISION OF THE MONTANA SUPREME COURT

The present action began when the Nelsons filed a quiet title action against Mary Jo
and Anthony, their grantors and claimants of a one-half interest in the mineral estate,

\textsuperscript{13} Nelson v Davis, 417 P 3d 333 (Mont, 2018) (‘Nelson’).
\textsuperscript{14} The judgment indicates that there were no intestacy proceedings, so it is unclear
in what capacity Angelo was acting when he filed the affidavit of heirship, nor is it
explained why George took no part in settling his wife’s estate.
\textsuperscript{15} Nelson (n 13) 335–6.
\textsuperscript{16} Josephine and Angelo were joined in the deed by their respective spouses, presumably
to waive any spousal survival rights: ibid 336.
\textsuperscript{17} The opinion does not mention whether the deed to Mary Jo and Anthony included
warranties of title, or whether Mary Jo and Anthony were purchasers for a valuable
consideration.
\textsuperscript{18} Although not stated in the judgment, Mark Nelson and Jo Marie Nelson are assumed
to be husband and wife.
\textsuperscript{19} Nelson (n 13) 336. It is not indicated whether the deed to the Nelsons included
warranties of title.
and the Salituros, joint claimants of an undivided one-quarter interest in fee as heirs of their father George. Concluding that Mary Jo and Anthony had extinguished the Salituros’ interest by adverse possession prior to 1997, the District Court granted summary judgment in favour of the Nelsons and quieted title in them, except for the one-half interest in the mineral estate reserved by Mary Jo and Anthony.

On appeal to the Supreme Court of Montana, the Salituros argued that they had received no notice of any adverse claim and that the acts of the other cotenants were consistent with their all holding together as tenants in common. In reply, the Nelsons, and Mary Jo and Anthony, argued that ‘a conveyance of the whole property to a stranger to the cotenancy, together with taking possession thereof, amounts to an ouster of one’s cotenants’. Montana law on adverse possession, like that in most American states, requires that an adverse possessor must prove ‘actual, visible, exclusive, hostile and continuous possession for the full statutory period’. In Montana, the statutory period is five years for an occupant who enters and founds a claim of title ‘upon a written instrument as being a conveyance of the property’, and pays the property taxes. A person enters under such a claim if the person holds the land under ‘any instrument purporting to convey the land or the right to its possession, provided the claim is made thereunder in good faith’.

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20 A quiet title action is an action commenced by a plaintiff against all adverse claimants to establish title to land. Because few American titles are registered in a Torrens-type system, the action provides a means to secure a judicial determination of title.

Nelson (n 13) 337.

21 Ibid, quoting Y A Bar Livestock Co v Harkness, 887 P 2d 1211, 1213 (Mont, 1994) (‘Y A Bar Livestock Co’). The principles in Australian law are virtually identical, requiring that the possession be ‘open, not secret; peaceful, not by force; and adverse, not by consent of the true owner’: Mulcahy v Curramore Pty Ltd [1974] 2 NSWLR 464, 475 (Bowen CJ in Eq). See also Re Riley and the Real Property Act [1965] NSW 994; Harris v Wagama Pty Ltd [1969] 1 NSW 245; Solling v Broughton [1893] AC 556; Cawthorne v Thomas (1993) 6 BPR 97,515.

22 Mont Code Ann § 70-19-407 (LexisNexis 2019). Such a written instrument is commonly said to give the claimant color of title. ‘[Color of title is created by] a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law’: Nelson (n 13) 338, quoting Y A Bar Livestock Co (n 22) 1216 (alterations in original).


Nelson (n 13) 337, quoting Fitschen Bros Commercial Co v Noyes’ Estate, 246 P 773, 779 (Mont, 1926) (‘Fitschen Bros Commercial Co’). The Court created some confusion when, later in the opinion, it stated that the deed from Angelo and Josephine gave Mary Jo and Anthony color of title ‘because the deed purported to convey the entirety of the Property, was not void on its face, and was made in good faith’: Nelson
Although traditionally ouster required notice to the other cotenant that the possessor was claiming an interest ‘hostile and adverse to the fellow cotenant’s interest’, a prior Montana judicial decision held that possession under a deed purporting to convey the entire property is hostile to another cotenant who is ‘charged with knowledge of the hostile character thereof’. Affirming the District Court’s ruling in favour of Mary Jo and Anthony, the Supreme Court held that ‘[t]heir entry under color of title constitutes ouster’.

Although the Court did not use the term in referring to the ouster, it would normally be described as ‘constructive ouster’, just as the notice charged to the Salituros would be described as ‘constructive notice’. For the statute of limitations to perform its title-clearing function in cases of cotenancies, there must be an ouster to begin its running. The ouster, whether actual or constructive as in this case, is the moment when the cause of action for possession accrues. Qualifying ouster and notice as ‘constructive’ is merely a legal fiction to reconcile the rules of cotenancies with a result the Court finds just under all the circumstances.

It is unclear what weight the Court attached to recordation in this case. While in its statement of facts the Court mentioned that the public records in the county ‘included an affidavit of heirship from Angelo purporting to account for all Bisceglia heirs’, only in the penultimate paragraph of the opinion did the Court add that the record also included the deed from Angelo and Josephine to Mary Jo and Anthony. And only in the last paragraph did the Court state that because Mary Jo and Anthony had ‘entered under a recorded deed that purported to convey to them the entirety of the Property, Davis and Palese’s [Mary Jo and Anthony’s] initial entry of the Property was “obviously consistent with the disclaimer and disavowal of other tenants’ interests”’ that is required for ouster. Further complicating the issue is the Court’s statement in a footnote that its holding was ‘consistent with the clear weight of authority that ouster occurs when one cotenant purports to convey the entire property to a party who is hostile to the other cotenant’s interests’. The proper test seems to be whether the grantees (Mary Jo and Anthony) took title in good faith, not whether the grantors (Angelo and Josephine) conveyed the property in good faith.

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27 Ibid, quoting Fitschen Bros Commercial Co (n 25) 780.
28 Ibid 339. Because the Court held that ‘[w]hen Davis and Palese conveyed the Property to the Nelsons in 1997, the Salituros’ interests in the Property already had been extinguished’, there was no need to discuss adverse possession of the mineral estate: at 339.
29 The only mention of constructive knowledge in the opinion was the finding that Mary Jo and Anthony had ‘no actual or constructive knowledge that they were cotenants with anyone’: ibid 338.
31 Nelson (n 13) 338.
32 Ibid 339, quoting Fitschen Bros Commercial Co (n 25) 779. Of course, had Angelo and Josephine not conveyed to Mary Jo and Anthony, there would have been no deed of record but only the affidavit of heirship.
that was not previously a cotenant, *a deed of transfer is recorded*, and the transferee takes possession of the property’.33

It is difficult to see what the Salituros should have done to get actual notice of the ‘disclaimer and disavowal’ of their interest. Even if they had learned of their father’s intestate succession to a one-quarter interest in the property, which passed to them on his death, observation of their cotenants’ occupancy would not necessarily have put them on notice that their cotenants were claiming sole ownership of the entire estate. As the Court recognised, ‘many of the acts upon which Mary Jo and Anthony rely to demonstrate possession and occupation would be consistent with holding an interest in a cotenancy if Mary Jo and Anthony’s interest were not hostile’.34 And it would be inconsistent with the usual effect attributed to recordation to charge the Salituros with record notice of the hostile claim. Although it is sometimes said that recording a deed gives constructive notice to all the world, it is generally recognised that it is ‘constructive notice only to those who are bound to search for it: [such as] subsequent purchasers and mortgagees, and perhaps all others who deal with or on the credit of the title’;35 a category of persons that does not include cotenants.

**IV Conclusion**

To a great extent, the doctrine of indefeasibility eliminates many common law principles relating to possessory title to land. In the initial period following the introduction of Torrens title in Australia, it was thought that adverse possession was one of those vestiges of the common law that would disappear with the operation of title by registration. That has not been the case, with all Australian jurisdictions either retaining, or reintroducing in statutory form, the operation of adverse possession. Questions remain unanswered, including those raised by the facts in *Nelson*. As such, the decision of the Supreme Court of Montana proves instructive not only for American law, but Australian too.

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33 Ibid 338 n 2 (emphasis added). The Court cited nine cases from other jurisdictions. ‘A minority of jurisdictions hold that a deed purporting to transfer the entire estate to a non-cotenant party does not meet the requirements of ouster’: at 338 n 2, citing *Johnson v McLamb*, 101 SE 2d 311 (NC, 1958).

34 Ibid 339. The fact that Mary Jo and Anthony paid the property taxes is not itself conclusive of their adverse claim since tax-paying cotenants are entitled to demand contribution from the other cotenants. See David A Thomas (ed), *Thompson on Real Property* (LexisNexis, 2nd ed, 2004) vol 4, § 31.07(b).

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