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Articles

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Editorial

Is there a peculiarly *Australian* way of doing law and religion? Over the past few years, an interesting conversation has taken place in conference hallways, podcasts, and (increasingly) print about whether there is an 'Australian School' of law and religion: a concentration of scholars who approach legal questions from an explicitly theological orientation. Many Australian law and religion scholars are proud to wear the mantle, as reflected in the title of an important new edited collection *Jurisprudence and Theology: The Australian School*.[1] Although the term was coined by a foreigner,[2] could it be that, like Tocqueville's voyage to America, an outsider's perspective can reveal valuable truths unnoticed by those on the inside?

This issue of the *Australian Journal of Law and Religion* participates in the ongoing conversation. It contains examples that seem to fit the premise, such as a discussion by Oscar Kawamata and Matt Watson on whether Buddhism and natural law are compatible, William MacNeil's close reading of a Hollywood blockbuster movie for its treatment of Christianity and paganism, and a review by Myriam Hunter-Henin of a recent monograph written by one of us (Alex Deagon) on Christian conceptions of natural law and their relationship to religious freedom. Aligned with the Australian School's approach, even if not written by an Australian, is Shaun de Freitas' plea for Christian legal scholars to form stronger communities — both personally and professionally. On the other hand, the issue contains examples of work where a theological orientation to scholarship is clearly (though quietly) set to the side, such as in Andrew Hemming's critique of the verdicts in a criminal case involving a small religious group called The Saints, a review by Tom White of a new edited collection on adopting comparative approaches in law and religion scholarship, and Miles Pattenden's discussion of academic freedom at Catholic law schools. Another one of us (Jeremy Patrick) makes a provocative frontal attack on the Australian School, recognising its existence but calling for it to change direction.

The health of any scholarly sub-discipline depends not just on existing participants, but the addition of new ones. The *AJLR* is proud to encourage emerging law and religion scholars, and a promising development will certainly make that work easier. In 2025, the University of Southern Queensland launched the country's first student essay prize in law and religion. The competition, open to any student enrolled in an Australian undergraduate law program, offered cash prizes for the best essay on a topic drawn from a short list of suggestions (or of the student's own devising). Winning entrants are also offered publication of their work, and this issue contains Jacob Carson's first place winning essay and Ruairi Grant's third place entry.

In sum, this issue of the *AJLR* — and the broader debate about the Australian School — reveal the vitality of the scholarly field of law and religion in the country.

Alex Deagon
Jeremy Patrick
Co-Editors

[1] See Jonathan Crowe, Constance Youngwon Lee, and Joshua Neah (eds), *Jurisprudence and Theology: The Australian School* (Routledge, 2025).
[2] Marc DeGirolami, 'The Australia School', *Law and Religion Forum* (Forum Post, 27 March 2022) <https://lawandreligionforum.org/2022/03/27/the-australia-school/>.

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Freedom of Religion in Communities of Legal Scholarship: A Christian Perspective

Shaun de Freitas*

Legal scholarship (as with a range of other disciplines) inextricably relates to its author's foundational beliefs (comprised of, for example, ontological and cosmological views, moral convictions, and the like). For the Christian legal scholar, therefore, the alignment of scholarship with a Christian world view is paramount. The relevance of this is bolstered by current challenges in liberal democracies regarding the marginalising of religion in many spaces within the public domain, not least at many of the public universities. To address such challenges, this article argues in support of Christian communities of legal scholarship against the background of substantively Christian theological approaches. Consequently, this article aims to advance not only the Christian legal scholar's right to freedom of religion in the activity of legal scholarship, but also Christian legal scholarship in general. The relevance of this for Christian scholars in disciplines other than those pertaining to legal scholarship is not excluded.

INTRODUCTION

Stephen Young, reflecting on his working relationship with the prominent legal scholar Harold Berman, refers to Berman's developing disenchantment with his faculty colleagues because of their disinterest in questions on the meaning and purpose of legal institutions and the source of justice.[1] Young also refers to the time when Berman confided in him that, after Berman had distributed a note amongst his colleagues in the faculty on the publication of his monograph titled *The Interaction of Law and Religion*, no congratulatory responses were forthcoming.[2] Berman's growing disenchantment because of his colleagues' apathy towards questions on meaning and purpose regarding legal education is symptomatic of the generally strict divide between church and state in academic circles in liberal democracies. Of interest is that, irrespective of this strict divide between church and state, there are numerous persons who identify as Christians and the halls of academia in such democracies are, in many instances, occupied by those ascribing to a religious belief.[3] Robert Vischer, referring to the current context of legal practice in Western society, comments that the attorney's relationship with the client is comprised of a relationship with the law that is far distanced from a space where the conscience can flourish.[4] Similarly, and as qualified in this article, many legal scholars who label themselves as Christian find themselves (knowingly or unknowingly) within such a disconnected space of legal scholarship where the conscience struggles to flourish. What is the Christian legal scholar to do who is caught up between an ethos in the work environment that

* Professor, University of the Free State. A draft of this article was presented as a paper at the 5th Annual Theology and Jurisprudence Symposium, 14 February 2025, School of Law, Queensland University of Technology.

[1] Stephen B Young, 'Founding the *Journal of Law and Religion*: A Reflection Forty Years On' (2023) 38(2) *Journal of Law and Religion* 183, 185.

[2] Ibid.

[3] Steven D Smith, 'The Rise and Fall of Religious Freedom in Constitutional Discourse' (1991) 140(1) *University of Pennsylvania Law Review* 149, 175 ('The Rise and Fall of Religious Freedom').

[4] Robert Vischer, *Conscience and the Common Good: Reclaiming the Space between Person and State* (Cambridge University Press, 2010) 269.

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is not conducive to religious expressions (albeit being frequently subtle and indirect) and that of a conscience that seeks a convictional (in a religious sense) approach? Contemplating the dilemmas confronting the Christian scholar in liberal democracies where there is generally a disconnect between religious expressions and public spaces resting beyond the family and church, Steven Smith presents a range of questions, namely:

> So, what is the Christian academic to do? Check his or her faith at the door upon entering the office or the classroom? Attempt to sneak disguised Christian truths into his or her scholarship, or to translate those truths (likely in diluted or distorted form) into some more acceptable academic vocabulary — Kantian, maybe, or Rawlsian, or Marxist? Openly present his or her religious perspectives, in defiance of academic conventions and expectations, and thereby risk marginalization or even denial of tenure? These also are difficult questions. How is the Christian academic to answer them?[5]

In a later publication, Smith responds: 'Aren't people of faith supposed to make a choice? To take a stand?'[6] Surely, for the legal scholar, the option of taking a stand resonates with living up to one's foundational convictions, and surely, a logical extension of this is to firstly, consult scholarship on what taking a stand for one's faith in the exercise of scholarship should entail. With this in mind, this article aims to contribute to scholarship related to the advancement of the Christian scholar's religious convictions by arguing in support of legal scholarship against the background of community (association) and which includes a substantive theological dimension.[7] Before making a case for such advancement, it is important to set the scene by uncovering the challenges confronting the protection of freedom of religion. An awareness (or reminder) of such challenges also serves to bolster the importance of arguments in support of the promotion of community in legal scholarship pertaining to the Christian scholar, also against the background of an essential overlap with Christian theology.

THE MARGINALISING OF RELIGION

William Stuntz, in reviewing a book titled, *Christian Perspectives on Legal Theory*, responds with much respect for the book's authors being Christian law professors who expressed joy in writing on law without feeling restricted by the former in order to mention the latter. In this regard, Stuntz states: 'imagine telling women they must pretend they are men, or African Americans that they must think and talk white, when entering into conversations about politics or law'.[8] In other words, community with those who share the same fundamental interests or ontology forms part of what it means to practise one's religion freely, and the same therefore applies to the Christian legal scholar who practises his or her scholarship with likeminded legal

[5] Steven D Smith, 'One Step Enough' (2020) 47(2) *Pepperdine Law Review* 549, 555 ('One Step Enough').
[6] Ibid 557.
[7] Ibid. And here the caveat that in no manner should this imply the irrelevance of scholarly practices beyond that of community (or association), and that we should bear in mind Richard Niebuhr's cautionary view that '[t]he conclusions at which we arrive individually in seeking to be Christians in our culture are relative in at least four ways. They depend on the partial, incomplete, fragmentary knowledge of the individual; they are relative to the measure of his faith and his unbelief; they are related to the historical position he occupies and to the duties of his station in society; they are concerned with the relative values of things': Richard Niebuhr, *Christ and Culture* (Harper & Row, 1951) 234. These insights by Niebuhr should also be viewed as promoting ongoing debate and scholarship on the theme of 'Christian scholarship', something which this article also endeavours to do.
[8] William J Stuntz, 'Book Review: Christian Legal Theory' (2003) 116(6) *Harvard Law Review* 1707, 1712.

(and other) scholars.[9]

Alasdair MacIntyre comments that

> [m]an is in his actions and practice, as well as in his fictions, essentially a storytelling animal. He is not essentially, but becomes through his history, a teller of stories that aspire to truth. But the key question for men is not about their own authorship; I can only answer the question 'What am I to do?' if I can answer the prior question 'Of what story or stories do I find myself a part?'[10]

George Marsden comments that 'scholars, as is the case with everyone else, depend on communities, and therefore, if like-minded scholars do not form their own sub-communities, then they will be dependent entirely on already existing communities'.[11] Also, the family, church, and the sub-communities of Christian scholars, says Marsden, can play vital supporting roles bearing in mind the importance of communal worship, fellowship, intellectual camaraderie, as well as simple caring.[12] However, the associational dimension regarding the exercise of religious interests is plagued by numerous challenges.

Liberal democracies no longer find themselves within a context where, for example, the statesman, lawyer, and writer, Thomas More (1478–1535) lived; a time, says Steven Smith, in which every important event during one's life was marked by ecclesiastical ritual, which included the sacraments (baptism, marriage, and the Mass).[13] Smith observes that for Thomas More, it was Christianity that influenced the conscience, whilst for the fourth president of the United States, namely James Madison (1751–1836), it was the conscience that influenced Christianity,[14] the latter understanding enjoying much popularity today. In the words of Smith,

> Madison could affirm, 'I must do what (I believe) God wants me to do'. But the emphasis is subtly shifting from an accent on 'God' to an accent on the 'I'. 'I must do what (I believe) *God* wants me to do' is becoming '*I* must do what *I believe*

[9] Although not part of the focus of this article, it suffices to mention the plethora of scholarship dealing with the importance and autonomy of associational structures within society. Also related to this is scholarship on major themes such as the principle of subsidiarity and the principle of sphere sovereignty. The principle of, for example, sphere sovereignty accentuates the attributes of a societal entity being of a solidary unitary character, as well as having a permanent authority structure; examples of which are faith communities, the family, a firm, social club, language association, and academic institutions. Each of these societal entities have a foundational function (purpose) unique to itself and no single sphere-sovereign societal entity should be subordinated to such a whole. See Danie Strauss, 'A Philosophical Approach to Law and Religion: Background Considerations' in Pieter Coertzen, M Christian Green, and Len Hansen (eds), *Law and Religion in Africa: The Quest for the Common Good in Pluralistic Societies* (African Sun Media, 2015) 379, 382–4.

[10] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Gerald Duckworth, 1981) 216.

[11] George M Marsden, *The Outrageous Idea of Christian Scholarship* (Oxford University Press, 1997) 101.

[12] Ibid 107. Irrespective of the high level of relegation of religion to the private sphere, there is a large degree of authority and influence that remains in the broader Christian community; a fact that is rather uplifting. Thomas Bender states that: 'The privatization of belief is not the same as its dissolution. Our private belief is not diminished by being disestablished. They are relocated and shorn of formal authority, but they are not isolated from public culture. As our daily experience reveals, private beliefs contribute to the making of a particular thinking self that offers an individual and distinctive contribution to the public discussion of scholarship': Thomas Bender, 'Putting Religion in Its Place' (1994) 3(3) *CultureFront*, quoted in Marsden (n 11) 51.

[13] Steven D Smith, *The Disintegration of the Conscience and the Decline of Modernity* (University of Notre Dame Press, 2023) 40–1, 121–2 ('*The Disintegration of the Conscience*').

[14] Ibid 126, 173.

> (God wants me to do)'.[15]

This shifting of the emphasis from 'what God commands' to the autonomy and liberty of the individual would strengthen in the West over the 20th and into the 21st century.

Liberal democracies abound with a combination of challenges and critiques about the inclusion of religious practices in the public domain.[16] Related to this is a popular attitude confirming what John Senior refers to as the failure to 'raise our eyes, minds and hearts up to the stars, to the reasons for things, and beyond'.[17] Similarly, Robin Collingwood comments that

> [o]urs is an age when people pride themselves on having abolished magic and pretend that they have no superstitions. But they have as many as ever … So it is a special characteristic of modern European civilization that metaphysics is habitually frowned upon and the existence of absolute presuppositions denied.[18]

Compare this to, for example, the Medieval period where

> men's single objective was the assurance of heaven and escape from hell. Life was an angry river into which men were cast. Demons were on every hand to drag them down. The only aim could be, with God's help, to reach the celestial shore. There was no time to consider whether the river might be made less dangerous by concerted effort, through the deflection of its torrents and the removal of its sharpest rocks. No-one thought that human efforts should be directed to making the lot of humanity progressively better by intelligent reforms in the light of advancing knowledge. The world was a place to escape from on the best terms possible.[19]

The context within which the West finds itself today is far removed from these convictions directed at God and the urgency in seeking inclusion in God's Kingdom (even pertaining to activities related to scholarship!). The non-religious ethos that permeates especially public spaces in liberal democracies, including the judiciary as well as schools and public universities, bolsters the relegation of the Christian religion to the background. The strangeness and circumspection with which explicitly Christian terminology is met with in especially prominent

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[15] Ibid 126–7.

[16] This also relates to themes on the separation of rationality and religion, the fragmentation of law, the dominance of law as well as of *techne* over *telos*, and the removal of religion from public education. In this regard, see, eg, Ryszard Legutko, *The Demon in Democracy: Totalitarian Temptations in Free Societies* (Encounter Books, 2016); Patrick Deneen, *Why Liberalism Failed* (Yale University Press, 2018); Stephen Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (Basic Books, 1993); George Grant, *Technology and Empire* (House of Anansi Press, 2018); Christopher R Dawson, *The Crisis of Western Education* (Catholic University of America Press, 2010). There are of course numerous other sources in this regard, also spanning various disciplines such as law, political theory, education, theology, and sociology.

[17] John Senior, *The Death of Christian Culture* (IHS Press: 2008) 100, 126–7.

[18] Robin Collingwood, *An Essay on Metaphysics* (Clarendon Press, 1940) 46. Collingwood adds '[i]n my own experience I have found that when natural scientists express hatred of "metaphysics", they are usually expressing this dislike of having their absolute presuppositions touched': at 44. Collingwood, referring to the present age, also comments that 'the very possibility of metaphysics is hardly admitted without a struggle, and when, even if its possibility is admitted, its importance as a *conditio sine qua non* of science and civilization is almost universally denied', 224.

[19] James Robinson, *The Mind in the Making: The Relation of Intelligence to Social Reform* (Harper & Brothers, 1921) 137–8.

public spaces such as public universities, national as well as international media platforms, and political events, is everywhere.[20] Added to this is that, irrespective of proclamations of inclusivity and tolerance within a public university regarding research initiatives, projects, and related structures, it frequently comes to light that, on closer investigation, these initiatives, projects, and related structures exemplify a loyalty to schools of thought that may not be conducive to religious views. This explains Steven Smith's asking whether, if it is permissible for scholars to take for example, Lockean, Marxist, or Freudian approaches to their subjects, why should it not be permissible to take an unapologetically Christian approach?[21] How outlandish would it appear to a diverse audience in today's public domain (including the public university) to proclaim, for example, that justice should be understood as demanding the worshipping of the true God,[22] or that scholarship should be viewed as primarily glorifying God, or that the meaning of life should be primarily understood as entailing service to God? This also pertains to, simply put, the absence of references to God as well as the inclusion of theology in disciplines such as law in our public universities.[23]

James White points to what he refers to as a peculiar division between academic and religious thought in that we, in the academic world, lean towards communicating in a manner that assumes an encompassing rationality.[24] This aligns with an underlying threat, as pointed out by Stephen Carter, that those whose morality overlaps with their religious beliefs are welcomed into public debate on condition that they speak the same language as everyone else;[25] the language of the so-called 'rational'.[26] It is no wonder that even theologians are tempted to transform a theological language into a language agreeable to everyone. Stanley Hauerwas comments that the more theologians seek to find the means to translate theological convictions into terms acceptable to the non-believer, the more they substantiate the view that theology has

[20] References to for example: God, God the Father, God the Son, God the Holy Spirit, The Trinity, Jesus Christ, the Holy Spirit, salvation, Saviour, the Bible, Scriptures, sacred, idolatry, sin, depravity, heaven, worship, the devil, demons, angels, the soul, righteousness, blasphemy, regeneration, holiness, the wrath of God, creation, the rising of the dead, Covenant, repentance, Ten Commandments or the Decalogue, prophet, rising from the dead, evil, ascension into Heaven, eternal damnation, redemption, hell, and eternal life.

[21] Smith, 'One Step Enough' (n 5) 557. Stephen L Carter, 'The Inaugural Development Fund Lectures: Scientific Liberalism, Scientistic Law' (1990) 69 *Oregon Law Review* 471, 523 ('Lecture Two'). Carter similarly states that '[i]t is relatively easy for well-educated liberals to scoff at the idea that God's will is relevant to moral decisions in the liberal state, but the citizen who is religiously devout might ask why John Rawls' will … or, for that matter, the will of the Supreme Court of the United States is more relevant to moral decisions than God's. Opinions abound and emanate from foundational beliefs whether religious or not. And so far, at least, I do not think that liberal theory has presented an adequate answer': Carter, 'Lecture Two' (n 21) 523. Also see Richard Neuhaus, 'A New Order of Religious Freedom' (1992) 60(3) *George Washington Law Review* 620, 621. According to Stephen L Carter, 'The Inaugural Development Fund Lectures: Scientific Liberalism, Scientistic Law' (1990) 69(3) *Oregon Law Review* 471, 480 ('Lecture One') 'no major liberal theorist dissents – that none of the fundamental principles of liberal reasoning can be justified without looking outside the principle itself'.

[22] Smith, *The Disintegration of the Conscience* (n 13) 121.

[23] Something similar to what Jeremy Waldron says of his experiences as a scholar, namely, '[i]n the circles in which I move, it is not infrequently asserted that secular morality, secular ethics, secular conceptions of human rights, and secular jurisprudence can all get by perfectly well on their own without any input from religion … They can do it all on their own by reading and rereading Aristotle, Immanuel Kant, Jeremy Bentham, and John Rawls, or by the logic of their own considered judgments and intuitions or those of their friends …': Jeremy Waldron, 'The Injury Done by Christian Silence to Public Debate over America's Use of Torture' (2008) 2(1) *Journal of Law, Philosophy & Culture* 3–4.

[24] Smith, 'The Rise and Fall of Religious Freedom' (n 3) 173.

[25] Carter, 'Lecture One' (n 21) 492–3.

[26] Ibid 490.

little of importance to say in the area of ethics.[27] One can therefore understand the powerful influences on the Christian legal scholar at the public university to write and speak in a language that aims at being agreeable to everyone. This can especially be challenging in the areas of human rights; the relationship between law, religion, and the state, and stemming from this, scholarship on the advancement of the protection of religious rights and freedoms.

According to Stephen Carter, our theories of religious freedom are not theories about religion, but rather theories about the State and its needs, and where the judiciary typifies this partisanship. Although judges are called upon in the final instance, the fact is that they are affiliated to the State, so what matters most are the interests of the State.[28] This, according to Carter, is the problem pointed out also by the Critical Legal Studies scholars and the Legal Realists before them, namely that the judges 'are not (despite what we tell our students) a *check on* the state – they are a *part of* the state'.[29] In this regard, says Carter, rights are understood as emanating from the State. This specifically relates to matters before courts that relate to freedom of religion. Carter states that if the religious freedom claimant loses, it is because the State's interest is too strong — not because religion's interest is too weak. Referring to the Alaska Supreme Court judgment of *Swanner v Anchorage Equal Rights Commission*,[30] Carter asks what a fair-minded court was to weigh (and against what else) in deciding whether the State's interest in protecting unmarried couples from discrimination is sufficiently compelling to trump the religionist's interest in following God's ban on allowing fornication?[31] The State leans on God when it suits the reigning non-religious ideology of the day. In this regard, Carter asks whether there really is 'a defensible difference in motivation between the statements, "[o]ppression of black people is contrary to God's will" and "[k]illing of foetuses is contrary to God's will"'.[32] With reproductive rights included in the ideologies dominating the public spaces of liberal democracies (for example, the public university and school), God will most certainly not be cited as the authority on the protection of reproductive rights, but most certainly regarding views against racism. All of these refer to the embeddedness of an ethos that is unfavourable towards the protection of religious interests in the public domain,[33] including the religious convictions of the Christian legal scholar. There is, in other words, an instrumental and rhetorical use of religion/religious terms when it suits the preferred argument and its omission when it does not.

The Christian legal scholar may find it very challenging to navigate within such tempestuous contexts, where the pull towards writing in a language conducive to public universities and the civil authorities (including the judiciary) may prove to be too strong to resist. The advancement of themes related to, for example, inclusivity, diversity, tolerance, accommodation, the rule of law, democracy, transformation, equality, and public interest, become ends in themselves and

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[27] Stanley Hauerwas, *The State of the University: Academic Knowledges and the Knowledge of God* (Wiley-Blackwell, 2007) 69.
[28] Stephen L Carter, *God's Name in Vain: The Wrongs and Rights of Religion in Politics* (Basic Books, 2000) 168.
[29] Stephen L Carter, 'Religious Freedom as if Religion Matters: A Tribute to Justice Brennan' (1999) 87(5) *California Law Review* 1059, 1066–7 ('Religious Freedom as if Religion Matters').
[30] *Swanner v Anchorage Equal Rights Commission,* 874 P 2d 274 (Alaska, 1994). The Court held that the State's interest in preventing discrimination against unmarried heterosexual couples is sufficiently great to trump the objections of landlords who believe they are forbidden by God to permit 'fornication' on their property: Carter, 'Religious Freedom as if Religion Matters' (n 29) 1072.
[31] Carter, 'Religious Freedom as if Religion Matters' (n 29) 1072.
[32] Carter, 'Lecture Two' (n 21) 508.
[33] With due regard that not all Christians regard themselves as members of, to put it simply, the pro-life camp.

it is (directly or indirectly) expected from the legal scholar to remain within the ideals and expectations of a consensually orientated reasoning when practising legal scholarship. Implied in this is the exclusion of anything theological. Similarly, academic topics related to race, equality, gender, class, reproductive rights, and human dignity are viewed as separate from religion, missing the point that ideas on these emanate from foundational beliefs such as religious beliefs. A perusal of many of the law journals in liberal democracies points to a language in legal scholarship that excludes anything theological, and the same can be said regarding conference themes on law. Challenges that the Christian legal scholar may be confronted with from a belief or conscience point of view should not be underestimated. In this regard, and also against the background of the general challenges sketched earlier on, confronting the Christian legal scholar in a society where religion finds it difficult to flourish in the public sphere, the focus of this article moves to possibilities related to the interplay between legal scholarship, community, and Christian theology, in order to advance the Christian legal scholar's right to freedom of religion.

COMMUNITIES OF LEGAL SCHOLARSHIP AND CHRISTIAN THEOLOGY

This section approaches Christian legal scholarship from a community (or associational) angle based on a substantive overlap with theology. It is not disputed that there are many roads that lead to insights in this regard. In fact, it is argued that scholarship on these very matters should never be regarded as final; rather, it should be understood as being continuous. In what follows, there are some pointers to understand the community and substantive theological dimensions of Christian legal scholarship.

George Marsden comments that '[k]eeping within our intellectual horizons a being who is great enough to create us and the universe, after all, ought to change our perspectives on quite a number of things'[34] and 'if one puts the doctrine of a creator into the picture it will substantially change how one thinks about such issues as human rights and moral principles'.[35] So, to begin with, a true awareness of God and His magnitude is bound to change perspectives on many matters, and this awareness relates also to the desire to obey God.[36] This is also revealed in what Richard Niebuhr refers to as the virtue of love in Jesus' character, which is the virtue of the *love of God and of the neighbour in God*, not the virtue of the love of love.[37] In this regard, love, to be sure, is characterised by what Niebuhr refers to as 'a certain extremism in Jesus'. This extremism is one of devotion to the one God, uncompromised by love of any other absolute good. Therefore, says Niebuhr 'the love of God in Jesus' character and teaching is not only compatible with anger but can be a motive to it, as when he sees the Father's house made into a den of thieves'.[38] The Synoptic Gospels are clear on the understanding that Jesus emphasised faith in God and humility before Him much more than love.[39] Consequently, says

[34] Marsden (n 11) 4.
[35] Ibid 88.
[36] According to John Calvin, 'the principal requisite to understanding is piety and the earnest desire to obey God', John Calvin, *Commentaries on the Gospel according to John*, Ch 7 ¶ 17, tr William Pringle (1948) cited in William S Brewbaker III, 'Theory, Identity, Vocation: Three Models of Christian Legal Scholarship' (2009) 39(1) *Seton Hall Law Review* 17, 29.
[37] Niebuhr (n 7) 16.
[38] Ibid.
[39] Ibid. Niebuhr further explains '[t]he tendency to describe Jesus wholly in terms of love is intimately connected with the disposition to identify God with love. Fatherhood is regarded as almost the sole attribute of God, so that when God is loved it is the principle of fatherhood that is loved': at 16–17. Niebuhr disagrees that Jesus practices and teaches a double love, namely, of the neighbour and of God, and says that Jesus' ethics focuses on 'God, the

Niebuhr, 'if the nature of this virtue in Jesus is to be understood, some attention must be given to his theology',[40] and therefore the Christian legal scholar has all the more reason to be interested in theology. Similarly, the awareness of God alluded to earlier is to be intertwined with an urgency in reading the Bible (as a whole) and relates to a category of Christians whom James Barr depicts as 'a great central body of people in the churches who attribute a high status and authority to the Bible' (albeit being, says Barr, a body of people also 'suffering a considerable uncertainty about this').[41]

Building on this is Michael Welker's suggestion of an understanding of a Christian theology that can have an impact on law as being comprised of an academically embedded and controlled theology, pursued by well-educated professionals, a theology invigorated by the ethos, the pathos, and the agreed practices of truth-seeking communities.[42] More specifically, this includes the search for rational, consistent, and scripturally bound theological insight and entails the gathering of the academy, the canon, and truth-seeking communities. This understanding should exclude a negative theology that claims the impossibility of knowing and speaking of God, and that we can only acknowledge God's mysterious being; that God is unadorned transcendence.[43]

According to Welker, a mere idea of God is insufficient in grounding theology and to present productive impulses to disciplines of the law. Rather, 'God has to be conceived as a living eternal reality …'[44] Although focusing on God's spirit (or on God the Spirit), Christian theology also witnesses to the pre-Resurrection life of Jesus Christ, 'which witnesses to the life-furthering diaconal, prophetic, and priestly powers here on earth — powers that are universally extended in the work of his Spirit after the Resurrection'.[45] Welker is of the view that God is interested in 'righteousness being intended for humanity itself, and this bestowal should prompt humans in their own turn to be grateful to God and to practice justice and righteousness among themselves'.[46] However, adhering to an academically embedded and controlled theology is not an easy path to follow. Welker comments:

Father' and the 'infinite value of the human soul'. To do so, says Niebuhr, would be to forget 'that the double commandment, whether originally stated or merely confirmed by Jesus, by no means places God and neighbour on a level, as if total devotion were due to each. It is only God who is to be loved with heart, soul, mind and strength …' According to Niebuhr, Jesus does not speak of worth apart from God; 'The value of man, like the value of sparrow and flower, is his value to God … Because worth is worth in relation to God, therefore Jesus finds sacredness in all creation, and not in humanity alone — though his disciples are to take special comfort from the fact that they are of more value to God than are the also valued birds': at 17–18.

[40] Ibid 16.

[41] James Barr, *The Bible in the Modern World* (SCM Press, 1973) 11. From the early 1960s onwards, says Barr, the intensely authoritative form of theology focusing on the centrality of revelation has considerably weakened: at 5. Barr adds that there is a lack of trust in the Bible as a whole and, included in this, a discreditation of 'Hebrew thought' (and, by implication, the Old Testament) as a guide to the coherence of the Bible: at 6. In the words of Barr (written already in 1973!): 'The situation then is somewhat as follows. We have a great central body of people in the churches who attribute a high status and authority to the Bible, but who also suffer a considerable uncertainty about this, an uncertainty which has been increasing during the last ten or fifteen years, as the glow of the post-war biblical revival in theology has faded': at 11.

[42] Michael Welker, 'What Could Christian Theology Offer to the Disciplines of the Law?' (2017) 32(1) *Journal of Law and Religion* 46, 46. Welker's topic is to be applauded for its express reference to 'a Christian way of doing things'!

[43] Ibid 47.

[44] Ibid 48.

[45] Ibid 48–9.

[46] Ibid 49.

> In the midst of a creation … that despite certain features that do indeed attest to order and beauty is nonetheless incontrovertibly predatory, frail, and transient – in the midst of all this, extraordinary and remarkable counterforces are nonetheless at work: forces of compassion, mercy, and love; forces accompanying the search for truth and justice … forces that direct us toward a life beyond the natural inclination for self-preservation. This whole package of insights does not only generate a theological realism, *it also invites an intimate partnership between religion and law, theological and legal thinking*, and their common radiation into everyday religious, legal, and moral orientation.[47]

Also, associational activities regarding Christian legal scholarship should be viewed as an end in and of themselves; scholarship to be understood as a form of worship and as an integral part of the free exercise of religion. In this regard, there is the sharing of foundational convictions common to all the participants, hereby a bolstering of the activity of fellowship (*koinonia*) which is inherently theological.[48] Ultimately, there is the comfort that, in the words of Richard Niebuhr:

> To make our decisions in faith is to make them in view of the fact that no single man or group or historical time is the church; but that there is a church of faith in which we do our partial, relative work and on which we count. It is to make them in view of the fact that Christ is risen from the dead, and is not only the head of the church but the redeemer of the world. It is to make them in view of the fact that the world of culture — man's achievement — exists within the world of grace —– God's Kingdom.[49]

How empowering these words by Niebuhr can be for the Christian legal scholar! The Christian legal scholar's contributions, even though partial and relative, belong to the church of faith and, in turn, exist within the world of grace which is God's Kingdom. Activities involving communities of Christian legal scholarship constitute theology in the sense of worship, praise, and glorification; a gathering of the faithful in intimate conversion with the Living Word. This, in turn, relates to activities that are in and of themselves an end; something ultimate, complete, and comforting; a free religious practice.

Zachary Calo observes that '[l]aw contains its own reason that transcends and ultimately judges the particularistic claims of theology'[50] and that secularism not only denotes 'the absence of religion, but is an ideology that furthers a normative account of the world'.[51] Therefore, says Calo, what is required is the advancement of 'distinct and particularistic accounts of human rights that challenge the hegemony of the secular tradition'.[52] This hegemony is accompanied by the understanding that law is an 'objective ontological reality', and it is this same problem, says Calo, that confronts human rights talk.[53] According to Calo, the cultivation of pluralism

[47] Ibid 51 (emphasis added).
[48] For example, Matthew 18:20 (KJV): 'For where two or three are gathered together in my name, there am I in the midst of them'.
[49] Niebuhr (n 7) 256.
[50] Zachary R Calo, 'Religion, Human Rights and Post-Secular Legal Theory' (2011) 85(2) *St John's Law Review* 495, 507.
[51] Ibid 508-509.
[52] Ibid 503.
[53] Ibid 517. This secular tradition emanating from the Enlightenment, says Calo, 'is but one' historically contingent tradition among many, not the tradition to end tradition': at 515.

regarding human rights should not only take place within law, but also 'within our approach to the construction of legal meaning'.[54] What is required is a shift 'of focus from the universal to the particular', including religious traditions, as well as the replacement of a universal logic with a theological one. Implicated in this is an invitation to religious communities 'to participate in discourse on human rights and human goods without starting from a secular premise'.[55]

Calo is of the view that 'the constructive development of religious legal theory' must take as its point of departure 'the captivity of legal theory to the secular norms of modernity, particularly the idea of law as grounded in an autonomous moral logic'.[56] All of this, says Calo, 'entails a critical yet constructive engagement over the nature of the human person' (as well as his or her freedom). It is also religious communities or traditions that hold unique views on the meaning of the human (and his or her freedom) that should be central 'to contests over the meaning and content of human rights norms'.[57] Implicated in these views by Calo is support for the relevance of Christian scholars also interacting with one another on matters related to law, and doing so within a Christian theological context. But doing so should not carry the implication that the Christian legal scholar should refrain from participating in scholarly domains that include a diversity of belief-commitments.

The associational dimension of Christian legal scholarship against the background of a substantive theological base also goes deeper than the 'individual-versus-state paradigm' regarding the relationship between law and conscience. In this regard, Robert Vischer comments that although the moral authority employed by conscience is substantively personal, it is not self-contained.[58] If law is to represent our concern for conscience, says Vischer, then it also needs to signify concern for the associational aspect which represents shared moral commitments.[59] For religious believers, conscience is substantially a product of truth claims that stem from a tradition of faith,[60] also bearing in mind that normative conversations within communities do not take place primarily through law or politics.[61] This means that the state must respect that part of the common good that is not defined by the collective will and that the state's self-restraint in this regard promotes an understanding of the common good as something that materialises from the bottom up, instead of being imposed downwards onto society by the state.[62] Vischer adds that

> [b]y providing a collective voice to sentiments that likely would go unheard if left to be expressed by an individual standing alone, associations serve as a megaphone for members' most deeply held beliefs and opinions, including, of course, the moral convictions that make up conscience.[63]

[54] Ibid 504.
[55] Ibid 510.
[56] Ibid 516.
[57] Ibid 513.
[58] Vischer (n 4) 23, 78, 80–1.
[59] Ibid 71–2.
[60] Ibid 76.
[61] Ibid 95.
[62] Ibid 103. This understanding is of course accompanied by the caveat that such self-restraint cannot be absolute due to the common good necessitating a degree of social justice that only the state authority ensure.
[63] Ibid 134.

Specific examples of what associational activities related to Christian legal scholarship with a substantive theological angle should be are the following: Although there are a number of academic events such as conferences on law and religion that cater for a wide spectrum of religions and beliefs, the Christian legal scholar should pursue the advancement of academic events that exclusively cater for matters related to Christian theology and law. The same applies to the expansion of scholarly journals, magazines, and related electronic platforms that focus on the sharing of insights specifically pertaining to Christian theology and law (including efforts at contributing to already existing scholarly platforms that focus on Christian theology and law). Christian legal scholars should be both innovative in finding ways in which interaction between themselves and Christian communities, associations, and members of civil society can take place and here leverage could be gained through what is regarded by many institutions of higher learning as an integral facet to being an academic, namely that of scholarship of engagement. Although prone to be a challenging exercise, the establishment of team research initiatives as well as the creation of units or centres at public universities that specialise in 'Christianity and law' should also enjoy attention.

Scholarship resultant from these activities should include discussion on what an approach emphasising Christian theology itself should entail, also bearing in mind theology as related to significant themes such as philosophy, natural law, logic, and reasoning. As alluded to earlier, such discussion should be of a continuous nature. Scholarship on Christian approaches to legal scholarship also should be the focus, with the aim of, for example, critical analysis and advancement of existing thought on the topic. Then there is also the inter-disciplinary avenue, which, for example, allows for collaboration between those who are jurists by vocation and those who are either theologians, sociologists, or political scientists by vocation. Christian associational practices can also include discussion on ways in which the Christian legal scholar should deal with the various forms of limitation (or threats thereof) that the practising of his or her theologically inclined legal activities may attract. Participation of small numbers should not be avoided, and the mere realisation of association should be viewed as an end in itself.[64] This by no means should imply that communities of Christian legal scholarship with a strong theological component should exclude scholarship that aims to provide a more consensual approach also on major topics directed at, for example, socio-economic and humanitarian challenges.

It is also important that the Christian legal scholar be aware of attractive avenues leading to increased outputs and accompanying accolades, but which may result in an abandonment of her religious convictions in the process. William Brewbaker warns against the scholar's tendency to 'self-love' reflected in the scholar's focus on his or her individual reputation, also being constantly tempted to channel his or her work towards ends related to prosperity instead of loving God and others.[65] Practices related to legal scholarship within the Christian associational paradigm which includes the theological element can also assist in nurturing the Christian legal scholar's awareness and consequent cautioning against such unwanted influences. These are but a few pointers towards understanding Christian community related to legal scholarship with a strong theological component. These pointers should also serve as a catalyst towards further unpacking and elaboration within practices of Christian community in legal scholarship.

[64] Here, for example, Matthew 18:20 (KJV) again comes to mind: see above n 48.
[65] Brewbaker (n 36) 58.

CONCLUSION

Christian views related to matters on political, moral, and legal issues (which includes the overlap of these with one another) find themselves inhabiting the same limited space with the impossibility of escape. The Christian legal scholar is caught in a maelstrom of foreignness and is highly likely to be nudged into conforming to the existing dominant narrative, which in turn can have dire implications for the Christian scholar's right to freedom of belief (and of the conscience). Nicholas Wolterstorff, referring to the 19th century English poet Gerard Manley Hopkins' introduction of the term 'inscape' into the English language, explains that

> [w]hat Hopkins called the inscape of thing was its distinctiveness —
> the distinctiveness of a particular tree, for example, of a particular melody, of a particular ploughed field. He writes of the grief he felt when a tree in his garden was cut down and its inscape destroyed.[66]

Similarly, this article seeks the protection of the inscape of the Christian legal scholar (and Christian scholars in other disciplines as well). In doing so, it is not the aim of this article to delve deeply and expansively into the terrain of specific theological (and philosophical) arguments on what the Christian's approach to legal scholarship should be, with due cognisance of the broad variety of views past, present, and future.[67] Having said this, this article argues that more be accomplished regarding legal scholarship from within the confines of community and a Christian theology, something that is in and of itself, qualified by a Christian theology.

[66] Nicholas Wolterstorff, 'John Witte, Jr's Contributions to the Study of Human Rights and Religious Freedom' in Rafael Domingo, Gary S Hauk, and Timothy P Jackson (eds), *Faith in Law, Law in Faith: Reflecting and Building on the Work of John Witte, Jr* (Brill, 2024) 52, 52.
[67] Brewbaker (n 36) 54.

Is a Belief in a God Now Incorporated Into the Subjective Test for Murder by Reckless Indifference to Human Life Following *The King v Struhs*?

Andrew Hemming*

In an earlier article in this journal, the author posed the question of whether leaving God to make the choice was an answer to a charge of murder by reckless indifference to human life. The earlier article explored the ramifications of importing into s 302(1)(aa) of the Criminal Code 1899 (Qld) *the common law subjective test for reckless murder of an act or omission committed with an awareness that death would probably arise from that act or omission, where the defendant's awareness is affected by a religious belief that his or her religious faith required God to make the decision of life or death. In the wake of the not guilty of murder verdict handed down in a bench trial by Justice Martin Burns in* The King v Struhs *[2025] QSC 10, where his Honour found there was a reasonable possibility Jason Struhs never came to a full realisation his eight-year old daughter Elizabeth would probably die from his withdrawal of her insulin because, in the cloistered atmosphere of the Church which enveloped him, Jason Struhs believed instead God would not allow that to happen, it is timely to revisit the common law subjective test for reckless murder. In this article, the author respectfully contends that the judgment of Burns J is so narrow and restrictive in its interpretation of awareness, given the slow and agonising death Elizabeth suffered over five days as her body collapsed under diabetic ketoacidosis, as to effectively equate intention in s 302(1)(a) with recklessness in s 302(1)(aa), thereby rendering s 302(1)(aa) otiose. The author further argues that the precedent set by Burns J in* The King v Struhs*, in incorporating a belief in a God into the subjective test for murder by reckless indifference to human life, should be statutorily overruled through the adoption of an objective test of recklessness which would legislatively establish a clear divide between intention and reckless indifference to human life.*

I. INTRODUCTION

The background to my earlier article on murder by reckless indifference to human life[1] was the death on 7 January 2022 of an eight-year-old girl named Elizabeth Struhs. Elizabeth had Type 1 diabetes, and she was denied insulin over a period of five days by her parents, Jason and Kerrie Struhs, who were members of a small religious sect called 'The Saints'.[2] The Saints

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[1] Andrew Hemming, 'Is Leaving God to Make the Choice an Answer to a Charge of Murder by Reckless Indifference to Human Life or Manslaughter? A Case Study of Queensland Criminal Law' (2023) 3 *Australian Journal of Law and Religion* 69.

[2] The use of the word 'religious sect' is perhaps generous as eight of the fourteen members belonged to the Stevens family and the group was dominated by the head of the family, Brendan Stevens. This faith group, which eschewed any role for medicine, more resembled a cult as it was led by a forceful leader who demanded strict adherence to its doctrines. All religions start as cults. To become a religion, a cult must long out-survive its founder. Regarding how to recognise false prophets, Jesus is quoted as having said, 'You will know them by their fruits' (Matthew 7:15). Every member of The Saints is now in prison. It is arguable that The Saints do not meet all five indicia of 'a religion' as identified by Wilson and Deane JJ in the *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 173–4 [18], such as adherents 'constitute an identifiable group or identifiable groups'.

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held the belief that God's will prevails and God makes the decision over life and death. Elizabeth's cause of death was diabetic ketoacidosis, and her symptoms included excessive urination, thirst, abdominal pain, vomiting, weakness, lethargy, altered levels of consciousness, incontinence, and coma. She eventually died of respiratory failure. Thus, Elizabeth's death would have been slow and painful, with her decline obvious to all fourteen members of The Saints who attended the Struhs's home over the five days it took for the young girl to die.

In April 2023, reckless murder charges were laid against Elizabeth's father, Jason Struhs, and the leader of The Saints, Brendan Stevens. The other twelve members of The Saints, including Elizabeth's mother, Kerrie Struhs, were charged with manslaughter. Kerrie Struhs had been released from prison in December 2021, a month before Elizabeth's death, for failing to get medical assistance for her daughter in 2019.[3] As a result of Kerrie Struhs's imprisonment, Jason Struhs had been required to sign a legal document stating he would take responsibility for ensuring Elizabeth received her insulin medication.[4] Consequently, it was Jason Struhs's decision to withhold and to continue to withhold Elizabeth's insulin even in the face of her medical deterioration. However, as will be seen, his decision was heavily influenced by the unrelenting pressure from the other thirteen members of The Saints led by Brendan Stevens.

The earlier article was concerned with the absence of a definition of 'reckless indifference to human life' in s 302(1)(aa) of the *Criminal Code 1899* (Qld) and the consequent necessity for the judiciary to import the subjective common law test for reckless murder of actual knowledge of the probability of death resulting from the act or omission. To avoid the need for the jury to infer actual knowledge from the objective circumstances of the case, the earlier article contended for an objective test for recklessness based on the natural and probable consequences test.

Now, the trial has been concluded and verdicts have been reached. As will be discussed in Part IV, I contend that the effect of Burns J's judgment in the *Struhs* case is to equate intention with recklessness for the purpose of the subjective test for reckless murder, which reinforces the argument in the earlier article supporting an objective test.

It follows that it is an error to view Burns J's judgment as consistent with the common law test for reckless murder because his Honour sets the subjective bar for reckless murder so high that the requirement of proof of actual knowledge of the probability of death resulting from the act or omission by the accused encompasses the 'unknowing' of medical knowledge acquired prior to an alleged religious conversion. The subjective bar is further raised when it is understood that his Honour failed to take into account that Jason Struhs and The Saints accepted Elizabeth Struhs would probably die on earth but believed she would rise again. In other words, the concern expressed in the earlier article that the failure to define 'reckless indifference to human life' in s 302(1)(aa) of the *Criminal Code 1899* (Qld) could result in a narrow window for reckless murder has been fully realised.

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[3] David Chen, Georgie Hewson, and Anthea Moodie, 'Fourteen people are accused of murdering Elizabeth Struhs: Here's what we know about the case against them', *ABC News* (online, 26 November 2022) <https://www.abc.net.au/news/2022-11-26/elizabeth-struhs-alleged-murder-and-the-14-people-to-stand-trial/101671336>.

[4] Talissa Siganto, 'Instead of giving her life-saving insulin, Elizabeth Struhs's parents prayed over her dying body', *ABC News* (online, 30 January 2025) <https://www.abc.net.au/news/2025-01-30/elizabeth-struhs-religous-group-guilty-manslaughter/104859334>. For over two years, Jason Struhs 'diligently ensured his daughter' Elizabeth 'received her daily medication' of insulin.

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The *Struhs* case was conducted as a trial by judge alone following a Crown application which was not opposed by the fourteen defendants (see Part III). The defendants were not legally represented and called no witnesses. The central evidence tendered by the Crown at trial dealt with the evidence given by medical and hospital witnesses and the video evidence of the police interviews with the fourteen defendants. The strength of the Crown case meant there was little doubt that at a minimum all fourteen defendants would be convicted of manslaughter (see Part IV). The prime interest in the case was whether the trial judge, Burns J, would convict Jason Struhs and Brendan Stevens of murder by reckless indifference to human life and the reasons given by his Honour for his verdicts. A secondary interest was the length of the sentences to be served for manslaughter.

As will be seen in Part IV, Burns J found both Jason Struhs and Brendan Stevens not guilty of murder by reckless indifference to human life. The basis of his Honour's decision was that he could not be satisfied that Jason Struhs had actual knowledge his daughter Elizabeth would probably die because of his decision to withdraw her insulin as he believed God would intervene to prevent her death. Consequently, Burns J further held he could not be satisfied that Brendan Stevens knew Jason Struhs had actual knowledge his daughter Elizabeth would probably die.

The author respectfully disagrees with Burns J's findings for three reasons (see Part IV). First, there was more than sufficient evidence that Jason Struhs had actual knowledge of the probability of Elizabeth's death from the objective circumstances to be able to draw the inference. Secondly, Burns J failed to comprehend that Jason Struhs and all members of The Saints believed Elizabeth would 'rise' and therefore she was 'alive' in heaven. This belief amounted to a *de facto* confession to knowledge of the probability of her death on earth. Thirdly, it was an error to absolve Brendan Stevens of criminal responsibility for reckless murder based on his lack of knowledge of Jason Struhs's state of mind given Brendan Stevens was instrumental in changing Jason Struhs's state of mind when he showed signs of weakening and restoring Elizabeth's insulin injections.

There is a double irony in the Crown's decision to apply for a trial by judge alone because the outcome of the trial was that (1) none of the defendants were found guilty of reckless murder, and (2) the Crown is now faced with the legal precedent of a very narrow test for reckless murder for future cases. In the first place, based on the harrowing evidence of Elizabeth's death over five days and given any one of them could have rung 000 at any time, a jury could have convicted all fourteen defendants of reckless murder if the Crown had not downgraded the original reckless murder charges to manslaughter for twelve of the defendants. Why Elizabeth's mother, Kerrie Struhs, was one of the twelve is surprising. In the second place, as a trial by judge alone requires the trial judge to give reasons for the verdicts, the reasons given by Burns J set a precedent for the interpretation of s 302(1)(aa) of the *Criminal Code 1899* (Qld). The author argues that this precedent brings the need for an objective test of murder by reckless indifference to human life into sharp focus.

As it transpired, Burns J sentenced the three principals, Jason and Kerrie Struhs and Brendan Stevens, to between thirteen and fourteen-and-a-half years' imprisonment for manslaughter, while the other eleven defendants received terms of imprisonment of between six and nine years for the same offence.

II. PRECEDENT SIGNIFICANCE OF *STRUHS* CASE

The significance of the *Struhs* case[5] is that it provided the first real precedent in Queensland dealing with the application of the test to be applied to s 302(1)(aa) of the *Criminal Code 1899* (Qld) which states if death is caused by an act done, or omission made, with reckless indifference to human life, the person is guilty of murder. In the absence of any definition of reckless indifference to human life in s 302, the judiciary has imported the common law test for reckless murder into s 302(1)(aa), namely, the defendant must actually have known the death would probably result from the defendant's acts or omissions and it is not enough that that danger may have been obvious to a reasonable person or to members of the jury.[6]

However, what constitutes actual knowledge of a probable result is open to wide interpretation because of the very nature of the subjective test. Thus, the precedent significance of the *Struhs* case lies in whether the judicial verdicts are considered to sit comfortably within the common law test for murder by reckless indifference to life or, conversely, the judicial reasons for the verdicts are considered to be so perverse based on the circumstances of the case so as to require statutory intervention to overrule the unfortunate precedent which has been established.

As reckless indifference involves a subjective analysis, the defendant's personal circumstances are relevant to the determination of the defendant's state of mind at the time of the act or omission, which circumstances may include age, educational and social background, emotional state, and state of sobriety.[7] Significantly, in the *Struhs* case, Jason Struh's emotional state was affected by his wife's ultimatum, first issued when Kerrie Struhs was in prison,[8] that their marriage was over unless Jason became a member of The Saints.[9] Furthermore, 'social background' encompasses religious beliefs, and Jason Struhs's 'religious' belief (notwithstanding his last minute conversion to save his marriage)[10] that God would not allow his daughter to die was to play a crucial role in determining Justice Martin Burns's verdict of manslaughter rather than murder by reckless indifference for Jason.[11]

It will be argued the better view is that Jason Struhs's 'religious' conversion was driven by Kerrie Struhs's ultimatum to end their marriage. Jason was faced with the choice of either losing his family or joining The Saints before Kerrie Struhs was released from prison in December 2021. In choosing the latter, Jason knew he was signing his daughter's death warrant.[12] Effectively, Kerrie Struhs was exerting coercive control over her husband, which is

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[5] *The King v Struhs* (2025) QSC 10.

[6] *Queensland Supreme and District Court Benchbook*, 183A. Murder by reckless indifference: s 302(1)(aa), citing *Pemble v The Queen* (1971) 124 CLR 107; *R v TY* (2006) 12 VR 557; *R v Barrett* (2007) 171 A Crim R 315. <https://www.courts.qld.gov.au/__data/assets/pdf_file/0008/641429/sd-bb-183a-unlawful-killing-murder-s-302-1-a-a.pdf>.

[7] Ibid, citing *Pemble v The Queen* (1971) 124 CLR 107; *R v Barrett* (2007) 171 A Crim R 315.

[8] Kerrie Struhs received an 18-month sentence for failing to provide the necessaries of life to Elizabeth in 2019 when she nearly died of prolonged and extreme symptoms from her then-undiagnosed Type-1 diabetes.

[9] *The King v Struhs* (2025) QSC 10, [857] (Burns J). When interviewed at the crime scene on 8 January 2022, Kerrie Struhs confirmed to police 'she was planning to end the marriage when she got out of prison'.

[10] *The King v Struhs* (2025) QSC 10, [492] (Burns J). In a telephone conversation with Kerrie Struhs on 12 September 2021, Brendan Stevens referred to the conversion of Jason Struhs.

[11] *The King v Struhs* (2025) QSC 10, [761] (Burns J).

[12] Ibid [494] (Burns J). 'On 24 September 2021,' Kerrie Struhs 'emailed Jason Struhs a letter in which she stated that she expected "to see victory in Elizabeth very soon".' By 'victory', Kerrie meant 'the healing of Elizabeth manifest[ing] itself through Jason's faith'.

a form of domestic violence.[13] The significance of Kerrie's coercive control is that it rebuts the argument that Jason's conversion was religious or real, but rather was entirely pragmatic, especially in light of the fact he joined 'after 17 years of staunch opposition'.[14]

The timing is crucial to an understanding of the sequence of events that led up to Elizabeth's death. Kerrie Struhs had a meeting with the parole duty officer, Melanie Ford, on 23 December 2021, and was due to have a meeting with her parole case manager, Eleanor Savill, at 9.30 am on 6 January 2022, but Kerrie rang to say she was unwell.[15] When Kerrie made that phone call, she knew Elizabeth was near death. It was no coincidence that the cessation of Elizabeth's insulin was orchestrated by The Saints to occur immediately after the New Year celebrations: during the extended school holidays, without school staff monitoring, and at a time when many people were away. This was the window of opportunity for The Saints to pursue their extreme religious beliefs on the role of medicine and the supremacy of God.

As regards extreme religious beliefs, it is instructive to consider the findings of Mason ACJ and Brennan J in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*:

> [T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, *though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion*.[16]

This article will explore the question of where Burns J's decision leaves the subjective test for reckless indifference. Is the logical consequence that no matter how extreme, bizarre, or absurd the religious view, a subjective test is still applied? Is a point ever reached where a claimed lack of awareness becomes so extreme as to amount to wilful blindness? Indeed, more generally, what of the mother who claims she was unaware that leaving a baby in a locked car in 40 degrees centigrade heat would probably lead to the baby's death?

III. TRIAL BY JUDGE ALONE

The trier of fact in the *Struhs* case was not a jury but the trial judge, Burns J, which resulted from an order made by Bowskill CJ pursuant to s 614(1) of the *Criminal Code 1899* (Qld), that all the defendants be tried by a judge sitting without a jury.[17] As all fourteen defendants wished to be tried together, any no-jury order would have to have been made in relation to all the defendants.[18] In addition, because the prosecutor had applied for a no-jury order, the court could only make the no-jury order if each of the accused persons consented to it,[19] and because the accused persons were not represented by a lawyer, the court had to be satisfied the accused

[13] See s 334B 'What is *domestic violence*' and s 334C 'Coercive Control' of the *Criminal Code 1899* (Qld).
[14] *The King v Struhs* (2025) QSC 10, [22] (Burns J).
[15] Rex Martinich, 'Accused killer mum due for parole meet before daughter's death', *Brisbane Times* (online, 23 July 2024) <https://www.brisbanetimes.com.au/national/queensland/accused-killer-mum-due-for-parole-meet-before-daughter-s-death-20240723-p5jvy1.html>.
[16] (1983) 154 CLR 120, 136 [17] (Mason ACJ and Brennan J) (emphasis added).
[17] *The King v Struhs & Ors* [2023] QSCPR 19.
[18] *Criminal Code 1899* (Qld) s 615A(2).
[19] Ibid ss 615(2), 615A(3)(a).

persons properly understood the nature of the application[20] as the defendants were entitled to be tried by a jury.[21]

In this regard, Bowskill CJ, having asked each of the defendants, who had been provided with (a) an information memorandum prepared by the trial judge, Justice Burns, and (b) the Crown's written submissions, was satisfied the defendants understood the nature of the Crown's application for a no-jury order.[22] Unsurprisingly, each of the defendants also told Bowskill CJ that they consented to the making of a no-jury order.[23] The defendants would have realised their chances of acquittal were better before a judge than a jury, especially once the jury had been told of the harrowing manner of Elizabeth's death.

Thus, with the Crown applying for a no-jury order and the defendants consenting to such an order, the crucial question before Bowskill CJ was whether it was in the interests of justice to make a no-jury order.[24] Without limiting the relevant considerations, the court may make a no-jury order if it considers that the trial, because of its complexity or length (or both) is likely to be unreasonably burdensome to a jury; or there has been significant pre-trial publicity that may affect jury deliberations.[25] The court may refuse to make a no-jury order if it considers the trial will involve a factual issue that requires the application of objective community standards.[26]

The Crown's submission focused on the length and complexity of the trial, with the trial estimated to last three months and include 100 hours of extended police interviews with each of the accused as well as a large volume of medical material and phone records.[27] In effect, it would be fourteen trials in one.[28] The Crown also argued the level of media attention created an inherent risk of prejudice.[29] The foregoing is a fair representation of the situation, albeit slanted to the Crown's convenience.

More tendentious was the Crown's assertion that objective community standards were not involved in the *Struhs* case.

> The prosecutor also submits there is no factual issue in this case requiring the application of objective community standards. That appears to be so, having regard to the case against each of the defendants, but even if there was an issue of this kind, as a matter of principle this would not militate against the making of the order, where other factors overwhelmingly support it.[30]

With respect, it is difficult to understand why Bowskill CJ agreed with the Crown that there was 'no factual issue in this case requiring the application of objective community standards'.[31] The *Struhs* case was a classic example where a jury, in coming to a verdict on a charge of

[20] Ibid s 615(3).
[21] Ibid s 604.
[22] *The King v Struhs & Ors* [2023] QSCPR 19, [12] (Bowskill CJ).
[23] Ibid [24] (Bowskill CJ).
[24] *Criminal Code 1899* (Qld) s 615(1).
[25] Ibid s 615(4).
[26] Ibid s 615(5).
[27] *The King v Struhs & Ors* [2023] QSCPR 19, [17] (Bowskill CJ).
[28] Ibid [18] (Bowskill CJ).
[29] Ibid [20] (Bowskill CJ).
[30] Ibid [22] (Bowskill CJ), citing *The Queen v Pentland* [2020] QSC at [9(f)].
[31] Ibid.

murder by reckless indifference to human life, should apply objective community standards to a situation where an eight-year-old girl with Type 1 diabetes[32] was denied insulin by her parents. The jury would have been able to apply their collective common knowledge in assessing Jason Struhs's awareness of the probability of his daughter dying as a direct result of his withdrawal of her insulin. Their assessment would have reflected both the general knowledge ordinary Australians possess of the implications of withdrawing insulin from a child with Type 1 diabetes, which in turn would have been informed by Elizabeth's medical history and evidence of Jason Struhs's specific knowledge of his daughter's condition provided to him by medical authorities at the time of his daughter's near death in 2019.[33] At that time, both Jason and Kerrie Struhs were charged under s 285 (*Duty to provide necessaries of life*) of the *Criminal Code 1899* (Qld). Kerrie received a prison sentence while Jason, who pleaded guilty, was given a suspended sentence in order to care for Elizabeth on the condition that he give a signed undertaking to provide Elizabeth with insulin and give evidence against his wife.[34]

Thus, it is not to the point that the test for murder by reckless indifference to human life is subjective, namely, an awareness of the probability of death resulting from an act or omission, in the application of objective community standards. A properly instructed jury would have been quite capable of assessing Jason Struhs's subjective state of mind against the criminal standard of proof of beyond reasonable doubt. It is respectfully submitted that Bowskill CJ made an error of judgment in determining there was 'no factual issue in this case requiring the application of objective community standards'.[35]

Furthermore, with respect, there was no justification for Bowskill CJ's conclusion that 'in the unusual circumstances of this case the potential for prejudice as a result of the significant pre-trial publicity and media reporting that has already and will continue to take place, may be difficult to neutralise'.[36] If this were to be the test, then no case where there had been a blaze of publicity would come before a jury.

However, for all the reasons relied upon by the prosecutor, Bowskill CJ was satisfied it was in the interests of justice to make a no-jury order.[37] Rather, in the author's opinion, the driving force behind the decision was the convenience to the Crown, which was aided by the consent of all the defendants who astutely realised their chances of acquittal, or in the case of Jason Struhs and Brendan Stevens, of receiving a manslaughter conviction rather than a conviction for murder, were better before a judge alone than a jury.

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[32] Type 1 diabetes is a chronic condition where the pancreas makes little or no insulin. Insulin is a hormone the body uses to allow sugar (glucose) to enter cells to produce energy. Type 1 diabetes has no cure and treatment is directed at managing the amount of sugar in the blood using insulin, diet, and lifestyle to prevent complications. See Diabetes Australia, 'Type 1 diabetes' *Diabetes Australia* <https://www.diabetesaustralia.com.au/about-diabetes/type-1-diabetes/>.

[33] When Elizabeth Struhs was admitted to the intensive care unit of the Queensland Children's Hospital in South Brisbane on 17 July 2019, she was examined by Associate Professor Conwell who gave evidence Elizabeth 'was extremely emaciated, weighing only 13 kilograms with protrusion of all bony prominences' (average child of her age and height usually 21 kilograms), and 'that Elizabeth was the "most seriously unwell child" she had ever seen in 20 years of practice': *The King v Struhs* (2025) QSC 10, [406] (Burns J).

[34] *The King v Struhs* (2025) QSC 10, [454] (Burns J): 'The benefit to him of pleading guilty and giving evidence against his wife was that it allowed him to remain in the community and, of course, this meant he was able to care for their children.'

[35] *The King v Struhs & Ors* [2023] QSCPR 19, [22] (Bowskill CJ), citing *The Queen v Pentland* [2020] QSC at [9(f)].

[36] *The King v Struhs & Ors* [2023] QSCPR 19, [25] (Bowskill CJ).

[37] Ibid.

IV. THE *STRUHS* TRIAL, VERDICTS, AND SENTENCES

A. *The* Struhs *Trial*

Jason Struhs and Brendan Stevens were charged with the murder of Elizabeth Struhs on or about 7 January 2022 at Toowoomba. Twelve other accused, including Elizabeth's mother Kerrie Struhs and her brother Zachary Struhs, were each charged with the manslaughter of Elizabeth. Each of the accused refused to enter a plea and consequently, in accordance with s 601 of the *Criminal Code 1899* (Qld),[38] the trial judge, Burns J, directed that a plea of not guilty be entered for each of the accused. As previously mentioned, the trial took place without a jury and ran between 10 July and 6 September 2024. None of the accused chose to be legally represented, and neither did any of the accused give or call evidence.

After the Crown opened its case, Burns J invited all the accused to make an opening statement. Only the leader of The Saints, Brendan Stevens, took up the offer, although he purported to be speaking on behalf of all the accused. Stevens's statement reflected the attitude of The Saints to the charges they faced in describing the trial as 'just a religious persecution' and claiming all members of the religious sect 'did not "have any particular care"' as to the outcome of the trial and 'did not "come to fight the charge"'.[39] However, as will be seen, at the end of the trial all fourteen accused addressed the court, with most advancing 'submissions to the effect that he or she should be acquitted of any wrongdoing'.[40]

In his opening statement, Brendan Stevens portrayed the charges 'as a prosecution for believing in God'.[41] Nevertheless, by the end of the trial, the collective belief of The Saints in the healing power of God had been supplemented by the claim they had played no role in Jason Struhs's decision to cease giving Elizabeth insulin or in his failure to resume insulin treatment.

> All they had done, it was submitted, was to encourage Mr Struhs to believe in God. To the point, they submitted they had done nothing to persuade, encourage or support Mr Struhs in the decision and choice he made. Any influence in those respects, it was said, must have come from God, and Mr Struhs agreed with that proposition in his closing address.[42]

This pivot from a choice to follow God, even if it ran afoul of the criminal laws of Queensland, to reliance on the claim that Jason Struhs made an independent decision to cease providing Elizabeth with insulin was likely influenced by the Crown case that all the accused except Elizabeth's parents, who owed Elizabeth a duty to provide the necessaries of life,[43] were

[38] Section 601(1) of the *Criminal Code 1899* (Qld) states: 'If an accused person, on being called upon to plead to an indictment, will not plead or answer directly to the indictment, the court may, if it thinks fit, order a plea of not guilty to be entered on behalf of the accused person.'
[39] *The King v Struhs* (2025) QSC 10 [7] (Burns J).
[40] Ibid.
[41] Ibid [26] (Burns J).
[42] Ibid [27] (Burns J).
[43] Section 286(1)(a) of the *Criminal Code 1899* (Qld) states: 'It is the duty of every person who has care of a child under 16 years to (a) provide the necessaries of life for the child … and he or she is held to have caused any consequences that result to the life and health of the child because of any omission to perform that duty, whether the child is helpless or not.'

criminally responsible for Elizabeth's death because 'they both counselled and aided[44] the unlawful killing of Elizabeth by intentionally encouraging Jason Struhs to cease providing insulin as well as medical care and treatment to Elizabeth, and by intentionally supporting his choice to continue to do so'.[45]

Consequently, the depiction of Jason Struhs by the thirteen other accused members of The Saints as having made an *independent* decision to cease Elizabeth's insulin went to the heart of the case. The trial judge, Burns J, was presented with a conundrum. On the one hand, the objective circumstances pointed strongly to pressure being brought to bear on Jason Struhs, while, on the other hand, Jason Struhs himself was accepting sole responsibility through the healing power of God for his decision. If Burns J accepted Jason Struhs's version of events, then the reckless murder charge against Brendan Stevens and the manslaughter charges against the other twelve accused all fell away, leaving the sole judicial decision to be whether Jason Struhs was guilty of murder by reckless indifference to human life or the manslaughter of his daughter.

1. Murder by Reckless Indifference to Human Life

Murder by reckless indifference to human life was inserted into the *Criminal Code 1899* (Qld) in 2019[46] as another circumstance of murder by virtue of s 302(1)(aa) if death is caused by an act done, or omission made, with reckless indifference to human life. The Explanatory Notes to the Criminal Code and Other Legislation Amendment Bill 2019 (Qld) gave the following background as to the reasons behind the proposed expanded definition of murder in the *Criminal Code 1899* (Qld):

> Including recklessness as an element of murder in section 302 of the Criminal Code will capture a wider range of offending as murder in Queensland. Reckless murder exists in a number of other Australian jurisdictions reflecting that intention and foresight of probable consequences are morally equivalent – that is a person who foresees the probability of death is just as blameworthy as the person who intends to kill.[47]

In the Second Reading Speech for the Bill, the Attorney-General, the Honourable Yvette D'Ath, observed that the added circumstance of murder was based on s 18(1)(a) of the *Crimes Act 1900* (NSW) and was intended to capture conduct at the 'higher end of culpability or blameworthiness'.[48] As is common place with amendments to the *Criminal Code 1899* (Qld), the legislature devolved considerable discretion to the judiciary, which reflects the view that allowing judicial discretion within a codified framework prevents overly rigid application of the law and ensures adaptability consistent with changing community values.

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[44] Section 7(1)(c) and (d) of the *Criminal Code 1899* (Qld) state: 'When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say … (c) every person who aids another person in committing the offence; (d) any person who counsels or procures any other person to commit the offence.'

[45] *The King v Struhs* (2025) QSC 10, [25] (Burns J).

[46] *Criminal Code and Other Legislation Amendment Act 2019* (Qld) s 3.

[47] Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2019 (Qld) 2 <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-101>.

[48] Queensland, *Parliamentary Debates*, Legislative Assembly, 30 April 2019, 1241, 1253.

> While ultimately the application of the amendment will be a matter for the courts, it is therefore expected that New South Wales jurisprudence will be of some guidance. Further, insertion of any related definition may further complicate this issue and have serious unintended consequences.[49]

With respect, the failure to include any related definition of murder by reckless indifference to human life *per force* required the judiciary to turn to the common law, with its own unintended consequences in the form of a 'wilderness of single instances'.[50]

Thus it was Burns J, having determined there was no material difference between s 302(1)(aa) of the *Criminal Code 1899* (Qld) and s 18(1)(a) of the *Crimes Act 1900* (NSW), who held that because the latter was authoritatively considered by the High Court in *Royall v The Queen*,[51] the former should be interpreted in a similar manner.[52]

> Accordingly, proof of murder by reckless indifference to human life under s 302(1)(aa) of the *Criminal Code* requires proof by the Crown that the act or omission causing death was done by the accused in the knowledge of the probability that the act or omission would cause death. It is not sufficient that the Crown prove that the accused adverted to the possibility that the act or omission would cause death. Nothing less than proof that the accused was *aware* of the probability that the act or omission would cause death will suffice.[53]

It follows from the use of 'knowledge' and 'awareness' to denote the standard of proof required for murder by reckless indifference to life that a subjective test is applied by the courts. 'That calls for an assessment of the subjective state of mind of the accused, and not what a reasonable person might or would have foreseen as a probable consequence of their conduct.'[54]

As previously mentioned, whether the accused fully realised the probable consequences of his act or omission is governed by the accused's circumstances such as age, background, education, emotional state, state of sobriety, and religious beliefs.[55] However, as Burns J pointed out in citing Callinan J's observations in *R v Lavender*,[56] '[a] person's store of knowledge … evolves over time'.[57]

> Indeed, to the point of the case on knowledge against Jason Struhs, a person's prior knowledge about a particular fact may be completely altered by a later-acquired belief regarding the same fact. What matters is the accused's knowledge, however constituted, at the time of the act or omission causing death.[58]

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[49] Ibid 1253.
[50] Lord Alfred Tennyson, 'Aylmer's Field', *The Poetical Works of Alfred Tennyson, Poet Laureate* (Strahan, 1869) 341. It will be recalled that in Tennyson's poem, Leolin went and toiled: 'Mastering the lawless science of our law, That codeless myriad of precedent, That wilderness of single instances.'
[51] (1991) 172 CLR 378.
[52] *The King v Struhs* (2025) QSC 10, [124] (Burns J).
[53] Ibid (emphasis added).
[54] *The King v Struhs* (2025) QSC 10, [125] (Burns J), citing *Pemble v The Queen* (1971) 124 CLR 107, 135; *La Fontaine v The Queen* (1976) 136 CLR 62, 77.
[55] *Pemble v The Queen* (1971) 124 CLR 107, 120; *La Fontaine v The Queen* (1976) 136 CLR 62, 77–78.
[56] (2005) 222 CLR 67, 111.
[57] *The King v Struhs* (2025) QSC 10, [128] (Burns J).
[58] Ibid (Burns J).

Nevertheless, whilst acknowledging the quote often attributed to John Maynard Keynes – 'When the facts change, I change my mind – what do you do, sir?'[59] – there is an important distinction between a logical, evidence-based change of mind and an irrational, emotionally driven one.

Using the biblical example in Genesis 22 of God commanding Abraham to sacrifice his beloved son Isaac as a test of his faith and obedience, if Jason Struhs had sacrificed Elizabeth as a test of his willingness to give everything to God and no ram was caught in a thicket to provide the substitute offering, would Burns J have adopted the same approach as he did to the withdrawal of insulin – by requiring full knowledge of Elizabeth's probable death irrespective of how extreme Jason Struhs's religious beliefs might be? Presumably, human sacrifices constitute 'canons of conduct which offend against the ordinary laws [and] are outside the area of any immunity, privilege or right conferred on the grounds of religion'.[60] Alternatively, if Jason Struhs had stabbed Elizabeth to death under the belief he was using a feather and not a knife, then he would have been found not guilty of murder on the grounds of insanity under s 27(1) of the *Criminal Code 1899* (Qld) if the court was satisfied on the balance of probabilities that Jason was deprived of the capacity to understand what he was doing.[61]

In this context, it is worth noting that 'insanity' is a legal concept and not a specific medical diagnosis. While the test for insanity is subjective, the court will often hear conflicting expert medical opinion evidence based on clinical knowledge using structured assessment tools as to the accused's mental health at the time of the alleged offence and whether the accused was suffering from a mental disease or defect that prevented the accused from understanding the nature of his or her actions or from differentiating right from wrong.[62] These expert opinions comprise both objective (structured assessment tools) and subjective (whether the person met one of the criteria in s 27(1) to be considered legally insane) components. However, the trier of fact (jury or judge) ultimately determines whether the accused was legally insane at the time of the alleged offence and may reject any expert opinions given in court.

Because of the presumption of sanity under s 26 of the *Criminal Code 1899* (Qld) where '[e]very person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved', the accused faces a legal onus to prove on the balance of probabilities that he or she is legally insane. The term 'balance of probabilities' means a fact is considered proven if it is more likely than not to have happened, which is typically interpreted as 51%. This percentage, although applied to the civil standard

[59] See Unsigned, 'Quote Origin: When the facts change, I change my mind. What do you do, Sir?' *Quote Investigator* (Blogpost, 22 July 2011, updated 25 November 2024) <https://quoteinvestigator.com/2011/07/22/keynes-change-mind/> (discussing evidence that Keynes expressed the general sentiment, if not the exact words of the famous quotation).

[60] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136 [17] (Mason ACJ and Brennan J).

[61] In *R v Porter* (1933) 55 CLR 182, 188, Dixon J gave the following example: 'In a case where a man intentionally destroys life he may have so little capacity for understanding the nature of life and the destruction of life, that to him it is no more than breaking a twig or destroying an inanimate object.'

[62] Section 27(1) of the *Criminal Code 1899* (Qld) states: 'A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission.'

of proof, is worth bearing in mind when considering whether Jason Struhs knew his act or omission would probably cause his daughter's death.

Although the test for reckless murder is subjective, there is also an objective component based on the proven circumstances surrounding a particular case, such as the documented prior medical advice given to Jason Struhs and his own knowledge as to how close his daughter was to death when he took her to hospital. The author contends that in the context of the subjective test for reckless murder, 'probably' as it relates to knowledge of the likely result of an act or omission contains an objective component. In other words, especially in the context of a case involving religious beliefs, the test for reckless murder is not 100% subjective: a religious conversion cannot somehow absolve Jason Struhs from prior knowledge of his daughter's medical condition and the need for medication.

Throughout his judgment on murder by reckless indifference to human life, Burns J emphasises the test is subjective and not objective, as though there is a clear red line between the two tests. If, figuratively, a veritable potpourri of irrational subjective beliefs constitutes the state of knowledge of an accused, then the subjective test either moves to wilful blindness or mental infirmity. The point being that, as with the subjective test of 'honest' in the defence of mistake of fact,[63] there must be a point reached in a subjective test where the trier of fact determines the belief is too extreme to countenance.

Moving on from the subjective test, the next question to be determined is: when must there be knowledge of the probability of death? In every case, there must be a concomitance between the act or omission that causes death and knowledge on the part of the accused of the probability of death.[64] The Crown case was that the offence was a continuing one, running from the initial cessation of insulin until Elizabeth's death, which was a period of four days of missed insulin dosages.

For a continuing omission, it is not necessary that the accused held the relevant state of mind at every stage of the omission; it is sufficient if it was held at some point in the period of the continuing omission.[65] Hence, '[e]ven a 'momentary realisation' during the continuing omission that death is a probable consequence will be enough.[66]

> Section 18(1)(a) of the *Crimes Act 1900* (NSW) requires that the relevant state of mind accompany the relevant act or omission causing death. It is irrelevant that, at the time of death, an accused no longer had that state of mind or acquired it after the occurrence of his or her act or omission.[67]

On its face, the above authority of *Royall v The Queen* and *SW v R* would appear to have made the Crown's task easier in proving that at some point in the four day ordeal suffered by Elizabeth, her father fully realised his daughter would probably die, especially as her condition continued to deteriorate and replicate Elizabeth's condition back in 2019 when she attended hospital near death weighing just 13 kilograms.

[63] See s 24 of the *Criminal Code 1899* (Qld).
[64] *Koani v The Queen* (2017) 263 CLR 427, [21]; *Pemble v The Queen* (1971) 124 CLR 107, 135.
[65] *Royall v The Queen* (1991) 172 CLR 378, 405.
[66] *SW v R* [2013] NSWCCA 103, [81].
[67] *Royall v The Queen* (1991) 172 CLR 378, 458.

Indeed, in an interview with police on Saturday 8 January 2022 after Elizabeth had died, Jason Struhs said that on the previous Thursday (6 January) 'he saw Elizabeth "was goin' to where she went last time"', and in response to a question of whether he 'was aware Elizabeth was deteriorating because she was not getting any insulin', Jason Struhs replied, 'yeah, oh, she wasn't getting any so it's pretty obvious'.[68] More importantly, given a 'momentary realisation' of death being a probable consequence is enough to sheet home criminal responsibility for reckless murder.[69] When asked by police what he thought would happen when Elizabeth started vomiting on the previous Tuesday (4 January) and he continued to withhold her insulin, Jason Struhs replied, '[w]ell, that was the only time that I probably thought that she was gonna die'.[70] In sum, the Crown case against Jason Struhs built upon his breach of his duty to provide the necessaries of life under s 286(1) of the *Criminal Code 1899* (Qld) because his state of mind was such that he knew (fully realised) Elizabeth would probably die from his failure to provide her with insulin and/or medical care and treatment. Crucially, this knowledge crystallised at some point between when the administration of insulin was ceased until Elizabeth's death.[71]

> 2. Evidence that Jason Struhs knew his daughter Elizabeth would probably die because of his cessation of her insulin and his subsequent refusal to provide her with medical care and treatment

In assessing the evidence admissible against Jason Struhs, Burns J divided Jason's state of mind regarding Elizabeth's reliance on insulin to stay alive into before and after he joined The Saints.[72] 'In the first bracket,' Burns J was satisfied there was 'ample evidence' that Jason Struhs 'well knew prior to joining the Church that, without insulin, Elizabeth would die'.[73] Burns J based his view on the documented evidence against Jason Struhs associated with Elizabeth's admission to hospital in 2019 and Jason's cooperation with police in giving evidence against his wife in her 2021 trial.[74]

'In the second bracket,' Burns J included as 'principal sources of evidence' the text messages Jason Struhs sent and received after he joined The Saints and the various versions of events Jason gave to emergency services and police after Elizabeth had died.[75] In his interviews with the police, Jason made three principal arguments directed at absolving himself and his fellow members of The Saints from criminal responsibility for Elizabeth's death: (1) Elizabeth wanted to cease taking insulin;[76] (2) his decision to withdraw Elizabeth's insulin was not influenced by any pressure from the thirteen other members of The Saints;[77] (3) God gave him complete confidence Elizabeth was healed.[78]

[68] *The King v Struhs* (2025) QSC 10, [721] (Burns J).
[69] *SW v R* [2013] NSWCCA 103, [81].
[70] *The King v Struhs* (2025) QSC 10, [721] (Burns J).
[71] Ibid [137] (Burns J).
[72] *The King v Struhs* (2025) QSC 10, [703] (Burns J).
[73] Ibid [704] (Burns J).
[74] Ibid.
[75] Ibid [705] (Burns J).
[76] Ibid [706]–[707] (Burns J).
[77] Ibid [733] (Burns J).
[78] Ibid [734] (Burns J).

I consider each of these arguments to be without foundation, especially since The Saints waited 36 hours after Elizabeth died before reporting her death to the authorities,[79] giving them ample time to work out their respective stories. Asked by the ambulance officers about the reason for the delay in reporting Elizabeth's death, Jason Struhs answered: 'We were praying that God would bring her back'.[80] Jason's reply is instructive as it demonstrates The Saints did not see Elizabeth's death as a tragedy, rather 'that God had "allowed" Elizabeth to die so that He could raise her from the dead and, in that way, show them a miracle to re-affirm their faith.'[81] Furthermore, Jason Struhs exhibited no remorse at the death of his daughter at his own hands when he told police: 'I'm fully at peace in the heart ... I don't feel sorry. I feel happy because I know now she, she's at peace.'[82] This latter statement by Jason Struhs is open to the interpretation that Eizabeth was not at peace with insulin and arguably is a *de facto* admission of his guilt as Elizabeth had just moved location from earth to heaven without mortal death being a relevant consideration.

For present purposes, the focus here is on (3) above and Jason Struths's trust in God. Burns J's division of Jason Struths's state of mind into pre- and post- his becoming a member of The Saints appears to be predicated on the assumption that his knowledge of the consequences of withdrawing his daughter's insulin either evaporated or was overridden to such an extent as to be irrelevant. The author respectfully argues such mental compartmentalisation of knowledge is flawed. Jason Struhs cannot 'unknow' in the space of a few days over Christmas and New Year 2021/2022 a fact he had accepted and lived by since 2019 when Elizabeth was taken to hospital very near death.

By contrast, despite the obvious implications of the release of Kerrie Struhs from prison on 15 December 2021, Burns J appears to have accepted Jason Struhs's narrative of not looking through his normal eyes but through his spirit eyes.[83] Thus, post Jason Struhs's 'conversion', Burns J is prepared to accept the possibility that Jason sincerely believed God would save his daughter, and therefore could not exclude the possibility that Jason did not know his withholding of Elizabeth's insulin would probably result in her death. The author respectfully challenges Burns J's conclusion on the basis that the objective circumstances overwhelmingly supported the inference that Jason Struhs possessed the necessary knowledge.

There were inconsistencies in the various statements Jason Struhs gave to police best illustrated by a record of interview on 5 February 2022 when Jason Struhs was visited in custody by Detectives Hering and Piers-Blundell. The purpose of the visit was to ask Jason Struhs to sign a statement that had been prepared in draft and was based on what Jason Struhs had previously told police about Elizabeth's death. At paragraph 123 of the draft statement, Jason Struhs told police corrections were required. The following is the corrected part of the statement. The words in brackets were taken out and the underlined words inserted.

> During Tuesday I had thoughts of [taking] <u>giving</u> Elizabeth <u>insulin</u> [to hospital]. The feelings of the flesh got in the way and I was having thoughts of doubt, should I shouldn't I be doing this to Elizabeth. I was having thoughts [that Elizabeth was

[79] Ibid [625] (Burns J). Elizabeth died in the early morning of 7 January 2022, but Jason Struhs did not call emergency services until late afternoon on 8 January 2022.
[80] *The King v Struhs* (2025) QSC 10, [630] (Burns J).
[81] Ibid [642] (Burns J).
[82] Ibid [711] (Burns J).
[83] Ibid [721] (Burns J).

> going to die] and doubts if I was doing the right thing and I was tempted to give her insulin.[84]

This corrected statement could be interpreted as Jason Struhs admitting that his relationship to God exceeded his lawful responsibility to his daughter. Jason Struhs was making a choice. The author suggests these corrections made by Jason Struhs reflected his realisation that his previous admissions of thoughts about taking Elizabeth to hospital and thinking she was going to die would lead to a murder conviction. In sum, contrary to Burns J's conclusion, the author contends that Jason's claim to an eleventh-hour spiritual conversion, akin to Saul's conversion on the Road to Damascus,[85] was nothing more than an attempt to immunise himself from criminal responsibility for Elizabeth's death.

In his closing address to the court on 6 September 2024, Jason Struhs repeated his previous assertions that the decision to cease giving Elizabeth insulin 'was only me and Elizabeth' and rejected the proposition that he joined the The Saints to save his family.[86] This is not an accurate statement as Kerrie Struhs was on probation after her conviction for failing to provide the necessaries of life to her daughter Elizabeth. As to the Crown proposition that he knew his daughter had not been healed of diabetes when he made the decision to withdraw insulin from her, Jason Struhs had this to say:

> It's been said that I knew Elizabeth wasn't healed from diabetes, which is completely contrast to our belief, or my belief. Especially after I declared God had healed Elizabeth on Sunday before we stopped insulin. After that moment in time, God gave me complete confidence in peace she was healed … Just this time, I handed it to God because of His promise of healing. To all of you, it looks like God has failed. But I know Elizabeth is only sleeping and I will see her again. Because God has promised, and she is healed. Amen.[87]

The last sentence of the above passage is again a *de facto* admission of guilt revealing Jason Struhs's indifference to earthly life and its lack of relevance.

The author argues that while the unrelenting pressure from Kerrie Struhs and Brendan Stevens might have propelled Jason Struhs, seeing through his spirit eyes, to declare God had healed Elizabeth on 2 January 2022, by 4 January 2022 Jason Struhs's normal eyes could clearly observe Elizabeth's rapidly deteriorating condition which caused him to have doubts and be tempted to give her insulin. After two days without insulin, a Type 1 diabetes patient like Elizabeth would be experiencing symptoms of intense thirst, frequent urination, headache, fatigue, nausea, vomiting, and fruity breath odour.[88] Jason Struhs had seen it all before in 2019 and knew his daughter was not healed of diabetes. The author contends that by 4 January 2022 Jason Struhs knew Elizabeth would not just probably but almost certainly die if he did not restore her insulin injections.

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[84] Ibid [729] (Burns J).
[85] Acts 9:1-19.
[86] *The King v Struhs* (2025) QSC 10, [733] (Burns J).
[87] Ibid [734] (Burns J).
[88] 'Diabetic ketoacidosis, Symptoms and Causes', *Mayo Clinic* (Web Page) <https://www.mayoclinic.org/diseases-conditions/diabetic-ketoacidosis/symptoms-causes/syc-20371551>.

3. Burns J's findings for murder by reckless indifference to human life against Jason Struhs

At the outset of his Honour's findings on whether Jason Struhs was guilty of murder by reckless indifference to human life, Burns J emphasised two legal principles: (1) In the absence of a reliable confession by Jason Struhs that Elizabeth would die after her insulin was withdrawn, the Crown was inviting him to draw an inference as to Jason Struhs's state of mind based on the circumstances of his omission and his conduct between 2 January and 7 January 2022;[89] and (2) there was no other reasonable possibility consistent with Jason Struhs's innocence.[90]

Against these two legal principles, Burns J found that 'Mr Struhs was quickly immersed in the teachings of the Church and the belief held by its members in the healing power of God to the exclusion of any medical care or treatment'[91] and 'exhibited a strength of devotion to the beliefs of the Church that would be difficult to feign'.[92] This led Burns J to conclude there was a reasonable possibility that Jason Struhs genuinely believed God had or would cure Elizabeth of her diabetes at the time he ceased Elizabeth's insulin injections.

> [T]here remained a reasonable possibility that what Mr Struhs well knew prior to joining the Church – that is to say, without insulin, Elizabeth would die – had been so affected by his indoctrination into the beliefs of the Church as to induce in him a state of mind to the effect that insulin and/or medical care and treatment were, in fact, unnecessary because God had promised Elizabeth would be healed and that she would therefore be healed and, further, that any thoughts to have recourse to medicine or doctors were products "of the flesh" and not of God and, as such, were not to be acted on.[93]

Burns J acknowledged the offence against Jason Struhs was continuing in nature and the possibility that at some time after 2 January 2022 Jason Struhs fully realised Elizabeth would probably die. However, as to the evidence to support this proposition, Burns J found the evidence to be limited and almost exclusively reliant on what Jason Struhs told police about his state of mind.[94]

In this regard, Burns J identified the high point of the Crown case on the evidence relating to Jason Struhs's state of mind to be on the afternoon of 4 January 2022 when he sent a text message to Brendan Stevens saying:

> [H]e was "still really struggling with [his] flesh with Elizabeth still [being] sick" and that he could not "seem to [break] out of this even with prayer and songs". He added he was "so scared and lost in [his] thoughts" and that he "thought [he] was ready for this step but now [he seemed] to be questioning it".[95]

[89] *The King v Struhs* (2025) QSC 10, [739] (Burns J).
[90] Ibid [740] (Burns J).
[91] Ibid [742] (Burns J).
[92] Ibid [744] (Burns J).
[93] Ibid.
[94] Ibid [745] (Burns J).
[95] Ibid [746] (Burns J).

Burns J accepted 'there can be no doubt Mr Struhs was "struggling" and "scared"',[96] and he gave conflicting accounts across his interviews with police which involved a degree of reconstruction, well-illustrated by the corrections Jason Struhs sought to make to his draft statement on 5 February 2022 seeking to deny his statement of 8 January 2022 that he had thoughts of taking Elizabeth to hospital on 4 January 2022.[97]

However, while Burns J had little hesitation in finding Jason Struhs entertained the real possibility Elizabeth might die, his Honour concluded none of Jason Struhs's answers amounted to an admission that he knew Elizabeth would probably die.[98] Burns J stressed the need to assess Jason Struhs's answers in context and not in isolation.[99] In particular, to find Jason Struhs knew Elizabeth would probably die necessarily involved a realisation that God would not heal her. Burns J held such a finding would be at odds with everything else Jason Struths said to police and with the wider circumstances. Burns J took the view 'had Mr Struhs fully realised God was not going to save Elizabeth and that she would therefore probably die, it is to my mind inconceivable a loving father such as he would have continued to sit on his hands'.[100]

With respect, this interpretation overlooks the binary choice Jason Struhs faced in choosing between keeping his marriage and family together versus losing his daughter. In the author's view, no loving father would have watched his daughter slide inexorably towards death over five days, especially a father who had knowledge of his daughter's previous near-death experience in 2019. Only wilful blindness would have led a loving father not to have fully realised that with each day of Elizabeth's decline the possibility of Elizabeth's death steadily moved to her probably dying and in her last few hours to almost certainly dying. God's intervention with a miracle became an ever-receding outcome. Furthermore, God's earthly intervention was not relevant to Jason Struhs with his view of Elizabeth's 'afterlife'.

With respect, it is not to the point that in the ensuing days and nights after 4 January 2022 Jason Struhs maintained to police that 'the fears he had about the possibility of Elizabeth dying had abated' or that 'God "wasn't gonna let [Elizabeth] die"' or that 'he "trusted the Lord that nothing would happen to her"'.[101] In the face of overwhelming evidence to the contrary, this is nothing more than a reconstruction to avoid criminal responsibility. Burns J set the bar at requiring an admission before his Honour was prepared to find Jason Struhs knew his daughter was probably going to die, which the author respectfully argues prevented the Crown from being able to draw an inference as to Jason Struhs's state of mind based on the circumstances of his omission and his conduct between 2 January and 7 January 2022.

In the absence of an admission from Jason Struhs that he knew Elizabeth was probably going to die, Burns J reached the following conclusion:

> On the evidence before me, there remained a reasonable possibility that, in the cloistered atmosphere of the Church which enveloped Mr Struhs, and which only intensified once he made the decision to cease the administration of insulin, he was

[96] Ibid [747] (Burns J).
[97] Ibid [748] (Burns J).
[98] Ibid [749] (Burns J).
[99] Ibid [753] (Burns J).
[100] Ibid [754] (Burns J).
[101] Ibid [757] (Burns J).

> so consumed by a particular belief promoted without pause by all its members, that he never came to the full realisation Elizabeth would probably die, believing instead God would not allow that to happen.[102]

Leaving aside the somewhat fanciful analogy between a cloistered Church and the small three-family religious sect known as The Saints, it is not easy to understand why Jason Struhs's belief in God's intervention would intensify as Elizabeth's condition worsened. Nevertheless, Burns J held that at no time between the cessation of Elizabeth's insulin injections on 3 January 2022 and her death on 7 January did Jason Struhs know 'his failure to provide her with insulin and/or medical care and treatment would probably cause her death'.[103]

The author contends the fundamental flaw in Burns J's finding is, with respect, his Honour's failure to grasp that Jason Struhs did not differentiate at any time between earthly life and heavenly life and rejected the notion of death as used in the criminal justice system.

4. Burns J's findings for murder by reckless indifference to human life against Brendan Stevens

The Crown case against Brendan Stevens was that he procured the unlawful killing of Elizabeth in circumstances amounting to murder under s 7(1)(d) of the *Criminal Code 1899* (Qld) by counselling Jason Struhs to cease providing insulin to Elizabeth knowing that Jason Struhs knew that the failure to provide insulin to her would probably cause her death.[104] Self-evidently, the Crown also needed to prove that Brendan Stevens knew himself that the failure to provide insulin to Elizabeth would probably cause her death.[105]

The record of police interviews with Brendan Stevens reveals a studied picture of feigned ignorance on the probable death of Elizabeth following the withdrawal of her insulin and a denial of any influence over Jason Struhs. The following extract from a police interview with Brendan Stevens on 5 July 2022 amply demonstrates the line of his answers. Brendan Stevens accepted that by 4 January 2022 Elizabeth had deteriorated and was obviously very sick, but when asked why no one called a doctor or an ambulance he gave the following response:

> Because we believe in the healing power of God. We don't trust in man. And had we gone to hospital we could've suffered the, exactly the same results, as many do. And if you'd open your eyes, you'd see there were many articles even that week in the news about children the same age dying in hospital.[106]

A more chilling response can be seen in Brendan Stevens's agreement 'that he would "rather have seen God's plan come to fruition" even if that resulted in Elizabeth's death, than to give her "insulin or medical attention".'[107] Burns J appears to have overlooked the fact all fourteen members of The Saints were accepting of Elizabeth's death because they believed she would

[102] Ibid [761] (Burns J).
[103] Ibid [762] (Burns J).
[104] Ibid [156] (Burns J).
[105] Ibid [187] (Burns J).
[106] Ibid [784] (Burns J).
[107] Ibid [786] (Burns J).

rise again,[108] and that in Australia there is no general common law or constitutional exemption for criminal acts done with religious motivations.

In his submission to the court, Brendan Stevens sang from the same hymn sheet as Jason Struhs by claiming Elizabeth herself wanted to cease the insulin injections, and that he had not counselled Jason Struhs to withdraw Elizabeth's insulin because it was entirely her father's decision. Brendan Stevens's only admission was that 'he suggested Elizabeth might be weaned off insulin … to "test the waters"'.[109] This submission is inconsistent with his previously expressed belief in the healing power of God and not trusting in man.

Brendan Stevens concluded his submission by stating 'it's absolutely disgusting, but totally wrong, that the phrase 'reckless indifference of human life' would be applied to us and certainly … neither I nor Jason nor anyone else, I believe, saw the possibility of death'.[110] Thus, Brendan Stevens claimed he did not even contemplate the possibility of Elizabeth's death, despite knowing her history since 2019 and acknowledging she was very sick before she died. However, as with Jason Struhs, Brendan Stevens was referring to immortal life as Elizabeth was going to live with God if the earthly healing failed.

In his Honour's findings, Burns J stated, 'what must be proved … is that Mr Stevens knew Mr Struhs knew of the *probability*, as opposed to the *possibility*, of death'.[111] In the absence of an admission from Brendan Stevens as to what he knew of Jason Struhs's state of mind, Burns J observed it was necessary to focus on any evidence which might reveal such knowledge on Brendan Stevens's part, but '[o]n that, the evidence was scant, to say the least'.[112]

Burns J noted that in response to a question from police as to whether he knew that Jason Struhs knew the failure to provide insulin and/or medical care and treatment to Elizabeth would probably cause her death, Brendan Stevens 'denied anyone realised Elizabeth could die'.[113] As to events on the afternoon of 4 January 2022 when Jason Struhs texted Brendan Stevens to say he was 'struggling with my flesh with Elizabeth still be[ing] sick'[114] and as a result Brendan Stevens came round to talk to him, Brendan Stevens told police that 'I simply encouraged him to continue to believe in God. I in no way steered him away from insulin or anything like it. His decision was to remove it and his decision was to continue on that path'.[115] According to Brendan Stevens all Jason Struhs was wanting was 'to be encouraged just to continue to trust God and pray to God and believe God that God can't fail'.[116]

When Brendan Stevens was asked by police whether Jason Struhs 'was prepared for Elizabeth's death', and he said Jason Struhs 'was "prepared for anything"', Burns J took the view 'that does not mean Mr Stevens knew Mr Struhs knew Elizabeth would probably die'.[117] Burns J concluded it was not possible from the evidence to draw a rational inference that at some point Brendan Stevens knew Jason Struhs knew his withdrawal of insulin would probably

[108] Chen, Hewson, and Moodie (n 3).
[109] *The King v Struhs* (2025) QSC 10, [790] (Burns J).
[110] Ibid [800] (Burns J).
[111] Ibid [803] (Burns J).
[112] Ibid [804] (Burns J).
[113] Ibid [805] (Burns J).
[114] Ibid [809] (Burns J).
[115] Ibid [812] (Burns J).
[116] Ibid.
[117] Ibid [815] (Burns J).

cause Elizabeth's death.[118] Indeed, Burns J dismissed the Crown's proposition that such an inference could be drawn from Jason Struhs's message on 4 January 2022 and that it stood out 'especially as speculation, at best'.[119]

Consequently, Burns J held he could not be satisfied that at any point Brendan Stevens knew Jason Struhs knew Elizabeth would probably die and therefore Brendan Stevens must be acquitted of the charge of murder by reckless indifference to human life.[120] As a result, it was therefore unnecessary for Burns J to decide whether Brendan Stevens 'knew himself that the failure to provide insulin and/or medical care and treatment to Elizabeth would probably cause her death'.[121]

Self-evidently, as a matter of logic, if you set up the question of criminal responsibility as being whether B knew that A knew death was a probable outcome of X act or omission, then in the absence of A's knowledge, a criminal charge against B must fail. It also follows as a matter of proof, if the bar of criminal responsibility is set at an admission, then any evidence that falls short of an admission will be insufficient. Thus, it was inevitable in the absence of an admission by Jason Struhs (A) that he knew Elizabeth would probably die when he ceased her insulin injections (X), that the result would be the acquittal of both Jason Struhs and Brendan Stevens (B) of the charge of murder by reckless indifference to human life.

With respect, it is difficult to understand why Brendan Stevens's criminal responsibility hinged on Jason Struhs's knowledge of Elizabeth's probable death. If B counsels A to include death cap mushrooms as one of the ingredients of a meal in full knowledge that anyone who consumed such a meal would probably die, but A only believes death is a possibility, then why is B absolved from a charge of murder by reckless indifference to human life? In effect, B is the principal offender and A is B's pawn. When Jason Struhs showed signs of weakening in his resolve not to administer insulin to Elizabeth, Brendan Stevens immediately came round on 4 January 2022 to shore up his resolve. Thereafter, the other twelve members of The Saints, taking their lead from Brendan Stevens, maintained the pressure until Elizabeth died three days later.

Similarly, it is equally hard to comprehend why nothing short of an admission was required by Burns J for murder by reckless indifference to human life, when no such requirement is necessary for murder where the fault element is intention to kill or cause grievous bodily harm. As Barwick CJ in *Pemble v The Queen*[122] pointed out, the jury will normally have to infer the accused's state of mind from what the accused has actually done and the surrounding circumstances. If A claims that in shooting B, he was not intending to kill B or cause B grievous bodily harm, but the grouping of the bullets makes this claim totally implausible, then the jury is entitled to draw the necessary inference to convict A of murdering B. By the same token I argue there was ample evidence to convict Brendan Stevens of reckless murder by virtue of what he actually did and the surrounding circumstances over the five days it took Elizabeth to die.

[118] Ibid [816] (Burns J).
[119] Ibid [817] (Burns J).
[120] Ibid [818] (Burns J).
[121] Ibid [819] (Burns J).
[122] (1971) 124 CLR 107, 120–1 (Barwick CJ).

B. *The Verdicts*

After finding neither Jason Struhs nor Brendan Stevens guilty of reckless murder, no one who had followed the *Struhs* case would have been surprised when Burns J handed down verdicts of manslaughter against all fourteen members of The Saints (given any one of them could have rung 000 at any time). Criminal negligence was clearly established under the objective test set out in *Nydam v The Queen* of whether the act or omission which caused the death involved 'such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment'.[123] The High Court explained in *Patel v The Queen* that '[t]he only criterion necessary is an intention to do the act [or omission] which inadvertently causes death or grievous bodily harm'.[124]

The process of sheeting home criminal responsibility to all fourteen members of The Saints was as follows: (1) Jason and Kerrie Struhs breached a duty of care to Elizabeth to provide her with the necessaries of life under s 286(1) of the *Criminal Code 1899* (Qld); (2) the other twelve members of 'The Saints' by their words and actions, counselled and/or procured Jason Struhs or Kerrie Struhs or both of them under s 7(1)(d) of the *Criminal Code 1899* (Qld) to unlawfully kill Elizabeth Struhs by encouraging one or both of them: (a) to cease providing insulin to Elizabeth Struhs; and/or (b) not to provide medical care and treatment to Elizabeth Struhs. The evidence of counselling and/or procuring came primarily from records of interviews with the police and messages sent to both Jason and Kerrie Struhs.

C. *The Sentencing*

The maximum sentence for manslaughter under s 310 of the *Criminal Code 1899* (Qld) is life imprisonment, but a trial judge has considerable discretion in fixing the sentence based on the circumstances of the case. In the *Struhs* case, it was inevitable that Elizabeth's parents, Jason and Kerrie Struhs, and the leader of The Saints, Brendan Stevens, would receive the heaviest sentences, with the other eleven members receiving sentences commensurate with their level of involvement in counselling Jason and Kerrie Struhs to unlawfully kill Elizabeth.

Jason Struhs was sentenced to fourteen-and-a-half years imprisonment. Kerrie Struhs was sentenced to fourteen years, but because she was on parole she was also sentenced to the unserved portion of her previous sentence of failing to provide the necessaries of life of 373 days, taking her total period of imprisonment to slightly more than fifteen years. Brendan Stevens was sentenced to thirteen years imprisonment. Burns J declared all three convictions were serious violent offences by reason of s 161A(a) of the *Penalties and Sentences Act 1992* (Qld), which means Jason and Kerrie Struhs and Brendan Stevens will be required to serve at least 80 per cent of their respective sentences before being eligible for parole under s 182(2) of the *Corrective Services Act 2006* (Qld).[125]

The other eleven members of 'The Saints' each received terms of imprisonment of between six to nine years. Burns J made no recommendations regarding parole, which means all of the

[123] [1977] VR 430, 445 which the High Court approved in *The Queen v Lavender* (2005) 222 CLR 67, [17], [60], [72], [136] and *Burns v The Queen* (2012) 246 CLR 334, [19] (French CJ).
[124] (2012) 247 CLR 531, [88] (French CJ, Hayne, Kiefel and Bell JJ).
[125] Sentencing Remarks, Justice Burns, Supreme Court of Queensland, Brisbane, 26 February 2025, *The King v Struhs*.

eleven members will be eligible to apply for parole after having served 50% of their respective sentence under s 184(2) of the *Corrective Services Act 2006* (Qld).[126]

It would appear that Burns J, having found Jason Struhs and Brendan Stevens not guilty of murder by reckless indifference to human life, determined to dispense justice to the principal offenders through his Honour's sentencing discretion for manslaughter. Only the Crown Prosecution Service can answer the question as to why Kerrie Struhs was not also charged with reckless murder, especially as she was out on parole for failing to provide Elizabeth with the necessaries of life. In my view, Kerrie Struhs was the Lady Macbeth[127] in this tragic case, as until his wife was released from prison Jason Struhs was resisting pressure from The Saints to cease his daughter's insulin injections. Kerrie's coercive control over her husband meant she bore the greater criminal responsibility for their daughter's death.

V. CONCLUSION

The essential question to consider is the precedent that has been established because of Burns J's judgment in *The King v Struhs* for the test for murder by reckless indifference to human life in s 302(1)(aa) of the *Criminal Code 1899* (Qld). Given the religious aspect of the case, can Burns J's judgment (in requiring nothing short of an admission to satisfy the subjective test of full knowledge of the probability of death) be distinguished on its facts? Alternatively, if the Queensland government were to decide the precedent sets the bar too high, will it move to amend the legislation and introduce a more objective test?

If the original intention of inserting s 302(1)(aa) into the *Criminal Code 1899* (Qld) was to capture conduct at the 'higher end of culpability or blameworthiness',[128] then it is difficult to see how this will occur under Burns J's narrow interpretation of the subjective test as to effectively equate intention in s 302(1)(a) with recklessness in s 302(1)(aa), thereby rendering s 302(1)(aa) otiose. The author respectfully contends that Burns J's judgment in *The King v Struhs* should be statutorily overruled through the adoption of an objective test of recklessness which would legislatively establish a clear divide between intention and reckless indifference to human life.

In an earlier article in this journal,[129] I proposed an objective definition of 'reckless indifference' could be inserted into a new s 302(6) in the *Criminal Code 1899* (Qld) as follows:

> (6) For the purpose of sub-section 302(1)(aa) above, 'reckless indifference' is to be determined against the standard of what the ordinary responsible person would, in all the circumstances of the case, have contemplated as the natural and probable result of the act or omission.

There is a certain irony in the decision by the Crown to seek a judge-only trial because, in my opinion, having listened to the graphic account of Elizabeth's drawn out and painful death, a jury would have convicted both Jason Struhs and Brendan Stevens of murder by reckless indifference to human life on the basis of all the circumstantial evidence presented by the

[126] Ibid.
[127] In Shakespeare's play *Macbeth*, Lady Macbeth is the ambitious and manipulative wife who persuades her husband to kill King Duncan and claim the throne for himself.
[128] Queensland, *Parliamentary Debates*, Legislative Assembly, 30 April 2019, 1241, 1253.
[129] Hemming (n 1) 83.

Crown, starting from 2019 when Elizabeth nearly died in hospital through to Kerrie Struhs's ultimatum to her husband that their marriage was over unless he joined The Saints and her release from prison in December 2021 just before Elizabeth died.

Juries are not required to give reasons for their verdicts, but such is not the case for judges. Burns J's judgment and his Honour's reasons have set a precedent for the interpretation of s 302(1)(aa). The author respectfully disagrees with his Honour's findings in contending there was sufficient evidence to be able to draw the necessary inference of knowledge of Elizabeth's probable death from the withdrawal of her insulin. In any event, it is the precedent set by *The King v Struhs* for the test for murder by reckless indifference to human life that needs to be addressed.

The author respectfully contends that the judgment of Burns J is so narrow and restrictive in its interpretation of awareness, given the slow and agonizing death Elizabeth suffered over five days as her body collapsed under diabetic ketoacidosis, as to effectively equate intention in s 302(1)(a) with recklessness in s 302(1)(aa), thereby rendering s 302(1)(aa) otiose. The Queensland Parliament should legislate to insert an objective test for 'reckless indifference' into s 302(1)(aa) of the *Criminal Code 1899* (Qld), which would legislatively establish a clear divide between intention for murder under s 302(1)(a) of the *Criminal Code 1899* (Qld) and murder by reckless indifference to human life.

Buddhism, Nature, and Law: Natural Law Thinking in Early Buddhism

Oscar H Kawamata[*] and Matt Watson[**]

Natural law is a broad and ancient intellectual tradition united by a central concern to derive—from (supposedly) objectively existent higher principles—norms to guide human conduct. Nevertheless, the natural law tradition is sometimes regarded as narrow. Natural law theorists have disproportionately been Catholic scholars and their theories are often underpinned by Christian assumptions. Several scholars have argued that natural law thinking is identifiable in Jewish, Islamic, Hindu, and Confucian thought, on the grounds that thinkers within these traditions often conceive of morality as deeply intertwined with notions of human good. But, published works explicitly comparing Buddhism to natural law theories are very few indeed. The central question we explore—and ultimately answer in the affirmative—in this paper is: is it coherent to conceptualise the basic teachings of Buddhism as manifesting natural law thinking? By holding up these two schools of thought for comparison, and carefully exploring precisely where and to what extent they overlap and chafe, we seek to help advance a richer understanding of them both.

I. INTRODUCTION

Natural law is a broad and ancient intellectual tradition united by a central concern to derive—from (supposedly) objectively existent higher principles—norms to guide human conduct. Nevertheless, the natural law tradition is sometimes regarded as simultaneously narrow. It is true, for instance, that—notwithstanding attempts at secularisation—natural law theorists have disproportionately been Catholic scholars and their theories are often underpinned by Christian assumptions. For example, both ostensibly secular and overtly Christian natural law theories are often very congenial to, if not derived from, Christian ideals (eg, individual responsibility and a plural view of flourishing which reflects the variety of our God-given gifts).

However, several scholars have also argued that natural law thinking is identifiable in Jewish, Islamic, Hindu, and Confucian thought,[1] on the grounds that thinkers within these traditions often conceive of morality as deeply intertwined with notions of human good. On the other hand, published works explicitly comparing *Buddhism* to natural law theories are very few

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[1] See, eg, Anver M Emon, Matthew Levering, and David Novak (eds), *Natural Law: A Jewish, Christian & Muslim Trialogue* (Oxford University Press, 2014); Martin Ganeri, 'Natural Law and Hinduism' (2013) 8(2) *Journal of Comparative Law* 127; Norman P Ho, 'Natural Law in Confucianism' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019) 164.

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indeed.[2] This is perhaps surprising, given it is not uncommon to see rather flippant references to Buddhism as endorsing a kind of 'natural law'.[3]

A problem with the existing literature on Buddhism and natural law, moreover, is that none of it has analysed, in any depth, the central question we explore—and ultimately answer in the affirmative—in this paper: is it coherent to conceptualise the basic teachings of Buddhism as manifesting natural law thinking? That is, we ask whether Buddhism's basic teachings manifest an understanding of ethics and law which is fundamentally congruent with the theories of ethics and law advanced by Western natural law theories.[4]

In asking and answering the question of whether early Buddhism manifests natural law thinking, our paper does not merely contribute to an under-explored corner of the history of ideas. Instead, by holding up these two schools of thought for comparison, and carefully exploring precisely where and to what extent they overlap and chafe, we seek to help advance a richer understanding of them both. Further, it is our belief that gaining an appreciation for the affinities and points of tension between natural law and early Buddhism has potential personal benefits for adherents of both traditions. Specifically, an adherent of either school of thought, having become aware of its deep affinity with the other, may find the other tradition mutually reinforcing of her prior beliefs. Additionally, she is likely to be more amenable to seeing the other tradition as having something of value to teach her than would be the case if she viewed it as an oppositional or alien worldview.

Before proceeding, three additional points of clarification are needed. First, in referring to 'Buddhism's basic teachings', we refer to the teachings found in the Pāli and Chinese early Buddhist texts—collectively, 'early Buddhism'—which are the doctrinal foundation of all Buddhist schools.[5] We have deliberately employed this narrow scope because it would be impossible to deal comprehensively with all Buddhist groups in an exploratory paper of this kind. We rely primarily on the Pāli Canon, whose discourses ('*sutta*s') have been entirely translated into English, unlike the equivalent Chinese texts. Accordingly, we also primarily use the relevant Pāli terminology and generally quote from translations (principally by Bhikkhu

[2] Rebecca Redwood French, 'On Buddhism and Natural Law' (2013) 8(2) *Journal of Comparative Law* 141; Damien Keown, *Buddhism and Bioethics* (Palgrave, 2001); Sallie B King, 'From Is to Ought: Natural Law in Buddhadasa Bhikkhu and Phra Prayudh Payutto' (2002) 30(2) *Journal of Religious Ethics* 275; Daisetz T Suzuki, 'The Natural Law in the Buddhist Tradition' (1953) 5 *Natural Law Institute Proceedings* 91; Chao-Hwei Shih, 'The Buddhist Viewpoint of Natural Law and Natural Moral Law' (2006) 33(3) *Philosophy & Culture* 83; Shohei Ichimura, 'Buddhist Dharma and Natural Law: Toward a Trans-Cultural, Universal Ethics' in Charles Wei-Hsun Fu and Sandra Ann Wawrytko (eds), *Buddhist Ethics and Modern Society: An International Symposium* (Greenwood Press, 1991).

[3] See, eg, Keown (n 2) 14; Damien Keown, *Buddhism: A Very Short Introduction* (Oxford University Press, 2nd ed, 2013) 112; Andrew Huxley, 'Positivists and Buddhists: The Rise and Fall of Anglo-Burmese Ecclesiastical Law' (2001) 26(1) *Law & Social Inquiry* 113, 115–16.

[4] Our inquiry is therefore fundamentally different from that in Redwood French (n 2), which defines natural law narrowly as either 'Thomism' or irreligious 'universalism'.

[5] See generally Stephen J Laumakis, *An Introduction to Buddhist Philosophy* (Cambridge University Press, 2012) ch 4.

Bodhi) of the Pāli texts.[6] However, we do cite from the Chinese texts and footnote relevant differences between the Chinese and Pāli versions.[7]

Second, in referring to the concept of 'natural law thinking', we acknowledge that the natural law tradition is a diverse one and that there is, therefore, a danger of obscuring that diversity in attempting to distil natural law into its supposed 'essentials'. Nevertheless, we believe there exists, among works widely recognized as important contributors to the natural law tradition, a clear family resemblance. At the highest level of generality, for instance, natural law theories seek to advance norms by which to guide human behaviour, so as to help human beings flourish and act in a morally upright way. However, to avoid a distorting flattening of natural law, we proceed by separating ethical natural law ('ENL') and jurisprudential natural law ('JNL') theories, and by identifying the core commitments that characterise these respective strands of natural law thought.

In our view, ENL theories can be identified by the following characteristics: (i) a belief that there exist inherently normative human goods whose normativity is accessible to humans, and which are the only intelligible reasons for action;[8] (ii) a rejection of both deontological and utilitarian ethics;[9] and (iii) an adoption, instead, of ethical principles based on a rational interaction with the goods identified in (i).[10] Similarly, we consider that JNL theories are characterised by: (i) the claim that law is necessarily a morally-laden, purposive enterprise;[11]

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[6] *The Long Discourses of the Buddha: A Translation of the Dīgha Nikāya*, tr Maurice Walshe (Wisdom Publications, 2nd ed, 1995); *The Middle Length Discourses of the Buddha: A Translation of the Majjhima Nikāya*, tr Bhikkhu Ñāṇamoli and Bhikkhu Bodhi (Wisdom Publications, 1995); *The Connected Discourses of the Buddha: A Translation of the Saṃyutta Nikāya*, tr Bhikkhu Bodhi (Wisdom Publications, 2000); *The Numerical Discourses of the Buddha: A Translation of the Aṅguttara Nikāya*, tr Bhikkhu Bodhi (Wisdom Publications, 2012). Pinpoints to these texts will be to the translations in the first instance with bracketed pinpoints in the conventional form to the *sutta* numberings and the Pali Text Society ('PTS') editions of the Pāli. Quotations of Pāli texts are from the Mahāsaṅgīti edition.

[7] Where we quote translations of the Chinese texts, unless otherwise stated, this is from the following translations published by the *Bukkyō Dendō Kyōkai* in America: *The Canonical Book of the Buddha's Lengthy Discourses*, tr Shohei Ichimura (BDK America, 2015–18); *The Madhyama Āgama: Middle Length Discourses*, tr Marcus Bingenheimer, Bhikkhu Anālayo, and Roderick S Bucknell (BDK America, 2013–23). Pinpoints to Chinese texts are to the available published translations with bracketed pinpoints to the conventional *sūtra* numberings and the *Taishō Tripiṭaka*. There is one instance where we cite from the partial translation of the *Ekottarika Āgama* by Thích Huyên-Vi, Bhikkhu Pāsādika, and Sara Boin-Webb published in the *Buddhist Studies Review*. Otherwise, as there are no complete published translations of the *Ekottarika* and *Saṃyukta Āgama*s, citations to these are to the originals only.

[8] See John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 66, 73, 97; Thomas Aquinas, *The Summa Theologica of St Thomas Aquinas*, tr Fathers of the English Dominican Province (Burns Oates & Washbourne, 2nd ed, 1927) pt I-II qq 91, 93, q 95 a 3. See also Germain Grisez, Joseph Boyle, and John Finnis, 'Practical Principles, Moral Truth, and Ultimate Ends' (1987) 32 *American Journal of Jurisprudence* 99, 103–109, 119–20; Robert P George, *In Defense of Natural Law* (Clarendon Press, 1999) 21, 45, 93, 233.

[9] For the standard ENL claim that fundamental human goods are incommensurable, see eg, Matthew Shea, 'Value Comparability in Natural Law Ethics: A Defence' (2024) 58 *Journal of Value Inquiry* 383; Ruth Chang, 'Value Incomparability and Incommensurability' in Iwao Hirose and Jonas Olson (eds), *The Oxford Handbook of Value Theory* (Oxford University Press, 2015) 205. For the claim that ENL theories cannot sustain utilitarian (cost-benefit) analyses, see Timothy Chappell, 'The Implications of Incommensurability' (2001) 76(1) *Philosophy* 137. And see Robert P George, 'Natural Law' (2007) 52(1) *American Journal of Jurisprudence* 55, 65–6 for the claim that ENL theories, since they insist that moral norms cannot be 'identified and justified' in the absence of careful consideration of 'what is humanly fulfilling and … what is contrary to human well-being' are also necessarily not deontological.

[10] Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) 23; Finnis (n 8) ch 5; Mark C Murphy, *Natural Law and Practical Rationality* (Cambridge University Press, 2001) ch 5.

[11] See Brian H Bix, 'Natural Law: The Modern Tradition' in Jules L Coleman, Kenneth Einar Himma and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2004)

and (ii) the claim that it is possible to evaluate laws, *qua* laws, by reference to normative criteria that laws must by and large satisfy in order for the legal system to serve its purpose.[12]

Third, it is not our intention to argue that early Buddhism—much less the entire Buddhist tradition—can or should be reduced to a mere variant of natural law theory. That is, we do not argue that the core claims of early Buddhism are 'just' those of Western natural law in another guise. We are open to the notion that the ultimate moral bases of all Buddhist traditions are best thought of as *sui generis*, and not fully cognisable within existing Western intellectual categories. Rather, our aim is to demonstrate that early Buddhism's core claims about ethics and law 'manifest natural law thinking'—a more generic phrase intended to indicate the basic similarities between early Buddhist and natural law modes of explaining ethics and law, without necessarily forcing a categorisation of early Buddhism as 'a natural law theory' per se.

Having clarified the scope of the ideas being compared in this paper, in Part II we examine whether early Buddhism and natural law thinking are incompatible, and conclude there is no incompatibility. Part III then investigates the extent to which early Buddhist texts in fact manifest natural law thinking.

II. ARE EARLY BUDDHISM AND NATURAL LAW INCOMPATIBLE?

Assessing whether early Buddhism and natural law thinking are incompatible is an important first step in view of the distinct cultural backgrounds and assumptions of these two traditions. In this Part, we discuss whether early Buddhism is incompatible with natural law thinking, in the sense that any of the key commitments of one must be rejected by the other. More specifically, we consider: (i) whether ENL's rejection of deontology and utilitarianism is incompatible with early Buddhism's ethical outlook, which appears at times to contain both deontological and utilitarian reasoning; and (ii) whether ENL's commitment to the reality of free will is incompatible with the apparently deterministic early Buddhist doctrine of 'dependent origination'.

A. *Deontology and Utilitarianism*

As noted, ENL rejects both deontology and utilitarianism. However, it is arguable that strands of both these moral systems can be seen within early Buddhist ethics. For instance, the basic ethical requirement prescribed for lay Buddhists in the early texts is apparently deontic, in that

61, 77; Jonathan Crowe, 'Natural Law Theories' (2016) 11(2) *Philosophy Compass* 91, 91; Jonathan Crowe, 'Law as an Artifact Kind' (2014) 40(3) *Monash University Law Review* 738; Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1965) 96.

[12] See Bix (n 11) 76–7; Finnis (n 8) ch 1, 359–60; Crowe, 'Natural Law Theories' (n 11) 91–2; Fuller (n 11) ch 2. This second claim that we identify as characteristic of JNL has deliberately been articulated in broad terms, so as to be ecumenical across two important distinctions within JNL. The first of these distinctions is that between the 'strong' JNL thesis (which holds that norms which do not satisfy specified criteria—typically, morality or rationality—are not 'laws' whatsoever) and the 'weak' JNL thesis (which, by contrast, claims that if such norms exhibit all the conventionally accepted trappings of legal validity, then they are technically 'laws', but are necessarily defective as law): see Crowe, 'Natural Law Theories' (n 11) 91–2. The second distinction relates to the specific normative criteria relevant to determining whether a putatively legal norm is invalid or defective. Specifically, while most JNL theorists focus on what we might call 'substantive' normative criteria, for 'procedural' JNL theorists like Lon Fuller, the legal validity of a norm turns on whether it satisfies certain procedural requirements, rather than, say, right reason or sound morality: Fuller (n 11) ch 2.

lay people are expected to strictly abstain from five proscribed actions ('the five precepts').[13] These actions are:

1. killing (any sentient being, including, for example, insects);
2. stealing;
3. committing sexual misconduct;
4. lying; and
5. consuming intoxicants.[14]

However, other texts suggest the moral quality of a given action depends on whether it reduces suffering for oneself and others (similarly to utilitarianism).[15] We must accordingly ask whether the early texts in fact endorse deontology or utilitarianism and therefore—in either case—are incompatible with ENL.

1. Deontology

Broadly speaking, deontological theories classify actions according to whether they are 'morally required, forbidden, or permitted'.[16] That is, they describe our moral duties (*deonta*). The five precepts certainly appear to be moral duties, and many Buddhists—lay and ordained—do view the precepts in this way. Indeed, early texts sometimes present their breach as impermissible even to save one's own life.[17]

However, deontology is not the focus of the early texts' moral outlook. Rather, consistent with early Buddhism's overall soteriological goal, their primary ethical concern is the elimination of suffering.[18] There are texts which state that fulfilling these 'moral duties' will benefit oneself,[19] or that the ultimate importance of doing so is to attain a good birth or *nibbāna*.[20] For example, the Buddha is recorded to have said that he did not prescribe anything which did not contribute to the elimination of suffering:

> If this abandoning of the unwholesome led to harm and suffering, I would not tell you to abandon it. But because the abandoning of the unwholesome leads to welfare and happiness, I say to you: '[Monks,] abandon the unwholesome!'[21]

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[13] See Christopher W Gowans, *Buddhist Moral Philosophy: An Introduction* (Routledge, 2014) 125–6; Sīlavādin Meynard Vasen, 'Buddhist Ethics Compared to Western Ethics' in Daniel Cozort and James Mark Shields (eds), *The Oxford Handbook of Buddhist Ethics* (Oxford University Press, 2018) 331–2.

[14] *Aṅguttara Nikāya* (n 6) 1174–5 (AN 8.39—A iv 245–7); *Dīrgha Āgama* (n 7) vol 2, 19 (DA 12—T1 i 59c12–14).

[15] *Majjhima Nikāya* (n 6) 524–6 (MN 61—M i 415–16), 724–6 (MN 88—M ii 114–15); *Madhyama Āgama* (n 7) vol 1, 80–3 (MA 14—T26 i 436c7–437b2), vol 4, 339 (MA 214—T26 i 798a22–798b4).

[16] Larry Alexander and Michael Moore, 'Deontological Ethics', *The Stanford Encyclopedia of Philosophy* (Winter ed, 2021) <https://plato.stanford.edu/archives/win2021/entries/ethics-deontological/>.

[17] *Aṅguttara Nikāya* (n 6) 1143 (AN 8.19—A iv 201). The Chinese equivalent says that disciples would not break a precept 'until the end of their lives': *Madhyama Āgama* (n 7) vol 1, 278 (MA 35—T26 i 476b28–c5).

[18] Peter Harvey, *An Introduction to Buddhist Ethics: Foundations, Values and Issues* (Cambridge University Press, 2000) 50–1.

[19] *Aṅguttara Nikāya* (n 6) 213 (AN 3.17—A i 114); *Saṃyukta Āgama* (SA 1245—T99 ii 341b17–24).

[20] *Majjhima Nikāya* (n 6) 116–17 (MN 6—M i 33–6); *Madhyama Āgama* (n 7) vol 2, 290–92 (MA 105—T26 i 595c12–596b7).

[21] *Aṅguttara Nikāya* (n 6) 150 (AN 2.19—A i 58). The Chinese parallel omits this section: *2nd Ekottarika Āgama* (EA2 41—T150A ii 881b18–22).

Further, the Buddha explicitly criticised excessive attachment to 'rules and observances' themselves rather than their underlying soteriology.[22] That is, forbearing from φ-ing because φ-ing is 'just wrong'—as is the deontological line—doesn't make sense within the context of the early Buddhist texts. Instead, if we have a moral duty not to φ, that is so because φ-ing causes suffering while not φ-ing reduces suffering (at least comparatively). In other words, the imperative force of moral duties only derives from their relevance to suffering. If that is so, they are not moral duties in the conventional deontological sense.

2. Utilitarianism

If early Buddhism has it that moral duties are only coherent in the context of suffering, this would suggest that early Buddhist ethics is in fact utilitarian.

In broad terms, utilitarianism considers that the only inherently normative phenomena are 'pleasure' and 'pain' (however broadly defined).[23] Further, an action's moral rightness or wrongness is determined solely by the extent to which it will (or can be expected to) maximise pleasure and minimise pain.[24]

Utilitarian theories are not monolithic, however, and differ in how moral agents are to assess an act's consequences. Act utilitarianism, for example, demands that moral agents assess each and every potential act for its possible consequences.[25] Rule utilitarianism, on the other hand, 'claims that an action is right just in case it conforms to a rule the general acceptance of which by humanity would have consequences at least as good for humanity as any alternative rule'.[26] These varieties of utilitarianism will be discussed within a Buddhist framework in due course.

For now, let us focus on the fundamental utilitarian ideas that: (i) 'pleasure' and 'pain' are inherently normative concepts and the *only* such concepts; and (ii) that an act's moral rightness or wrongness depends on whether it maximises pleasure and minimises pain.

In this context, the most basic question is whether early Buddhism considers pleasure to be intrinsically choiceworthy. On the classical Benthamite formulation of utilitarianism—which uses a rather hedonic definition of pleasure—the answer would seem to be 'no'. After all, the early texts consider so-called pleasure (other than the pleasure of *nibbāna*, of course) really to be suffering. Nevertheless, Charles Goodman has argued the Pāli *sutta*s *do* accept the intrinsic value of such pleasure by their frequent invocation of the heavenly rewards attributable to the kammic merit accrued for one's virtuous behaviour.[27]

However, while the *sutta*s certainly accept that some experiences are innately *pleasant*, they never accept their innate *goodness*. For example, both enlightened and unenlightened beings

[22] *Majjhima Nikāya* (n 6) 161–2 (MN 11—M i 66); *Madhyama Āgama* (n 7) vol 2, 269 (MA 103—T26 i 591b8–10); Rupert Gethin, 'Keeping the Buddha's Rules: The View from the Sūtra Piṭaka' in Rebecca Redwood French and Mark A Nathan (eds), *Buddhism and Law: An Introduction* (Cambridge University Press, 2014) 63, 66.
[23] See, eg, Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789) ch 1; John Stuart Mill, *Utilitarianism* (1863) ch 2.
[24] Walter Sinnott-Armstrong, 'Consequentialism', *The Stanford Encyclopedia of Philosophy* (Winter ed, 2022) <https://plato.stanford.edu/archives/win2022/entries/consequentialism/>.
[25] David O Brink, 'Some Forms and Limits of Consequentialism' in David Copp (ed), *The Oxford Handbook of Ethical Theory* (Oxford University Press, 2007) 383.
[26] Ibid 384.
[27] Charles Goodman, *The Consequences of Compassion: An Interpretation and Defence of Buddhist Ethics* (Cambridge University Press, 2009) 63–6.

experience 'pleasant', 'painful', and 'neutral' feeling.[28] That is, pleasure is not a figment of ignorance.[29] However, these sensations are also inherently 'impermanent, suffering, and subject to change'.[30] Indeed, the Buddha went so far as to tell monks that they should be 'repelled, humiliated, and disgusted' with the proposition that they followed him 'for the sake of rebirth in [heaven]'.[31] If there is any sense in which pleasure is desirable, it is simply that it entails freedom from pain;[32] while both are forms of suffering, the former is more subtle and therefore less easily perceptible to ordinary people than the latter.

Goodman's claim also ignores the important fact that heavenly pleasures were typically only held up as a benefit of virtue when the Buddha was teaching new disciples.[33] Once a disciple learns about *kamma* and rebirth in heaven, the truths of suffering then follow, but only when the Buddha knows the disciple's 'mind [is] pliant, softened, [and] rid of hindrances',[34] and 'strong enough to receive the true teaching'.[35] By becoming inculcated in virtue by understanding *kamma*, a disciple's wisdom would also have grown,[36] and they would then be ready to know that such pleasures are themselves suffering. That is, the use of heavenly pleasures to change the behaviour of new disciples—who do not (and are perhaps not able to) understand the true nature of suffering—was always premised on the idea that this would—or at least *should*—give way to motivations not premised on sensual pleasures. Consequently, we should reject the claim that the early texts reproduce the hedonic consequentialism of Benthamite utilitarianism.

Of course, Mill famously espoused a utilitarianism based on 'higher pleasures'.[37] Accordingly, a utilitarian might wish to embrace a definition of 'pleasure' as non-suffering in the Buddhist sense—ie, *nibbāna*. In other words, a moral act would be that which most promotes (or is expected to promote) *nibbāna* for the greatest number of beings, or which conforms to a rule of action which does the same.

This view has some superficial support in early Buddhist texts. For example, it is said that one should not perform acts that 'lead to [one's] own affliction, or to the affliction of others, or to the affliction of both'.[38] However, utilitarianism simply cannot account for the decisive role that immoral intentions play in deciding one's *kamma*.[39]

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[28] *Saṃyutta Nikāya* (n 6) 1263–5 (SN 36.6—S iv 207–10); *Saṃyukta Āgama* (SA 470—T99 ii 119c29–120a2).
[29] Indeed, one cannot become enlightened without understanding sensual pleasures' gratification: *Majjhima Nikāya* (n 6) 182–3 (MN 13—M i 87–88); *Madhyama Āgama* (n 7) vol 2, 243 (MA 99—T26 i 585c13–17).
[30] *Majjhima Nikāya* (n 6) 185 (MN 13—M i 90); *Madhyama Āgama* (n 7) vol 2, 245 (MA 99—T26 i 586a22–3).
[31] *Aṅguttara Nikāya* (n 6) 213 (AN 3.18—A.i.115). See also *Saṃyutta Nikāya* (n 6) 226–27 (SN 5.6–7—S i 132–33); *Saṃyukta Āgama* (SA 1205—T99 ii 328b3–13).
[32] See Daniel Breyer, 'The Cessation of Suffering and Buddhist Axiology' (2015) 22 *Journal of Buddhist Ethics* 533, 541, 548–9.
[33] An exception is MN 129, addressed to monks (who might be expected to be rather advanced). However, monks are not always the best practitioners. See, eg, the various *sutta*s where monks espouse clearly heterodox views, including that there is no danger in sensual pleasures(!): *Majjhima Nikāya* (n 6) 224 (MN 22—M i 130); *Madhyama Āgama* (n 7) vol 4, 177 (MA 200—T26 i 763b3–5).
[34] *Dīgha Nikāya* (n 6) 124 (DN 3—D i 110); *Dīrgha Āgama* (n 7) vol 2, 176 (DA 20—T1 i 88a14–19).
[35] *Madhyama Āgama* (n 7) vol 1, 292 (MA 38—T26 i 479c22–480a2), vol 3, 36 (MA 133—T26 i 630b28–c8).
[36] On the reciprocal relationship between wisdom and virtue, see *Dīgha Nikāya* (n 6) 131 (DN 4—D.i.124); *Dīrgha Āgama* (n 7) vol 3, 46 (DA 22—T1 i 96b16–21).
[37] Mill (n 23) ch 2.
[38] *Majjhima Nikāya* (n 6) 524–6 (MN 61—M i 415–16), 724–6 (MN 88—M ii 114–15); *Aṅguttara Nikāya* (n 6) 213 (AN 3.17—A.i.114), 253 (AN 3.55—A i 159); *Madhyama Āgama* (n 7) vol 1, 80–3 (MA 14—T26 i 436c7–437b2), vol 4, 339 (MA 214—T26 i 798a22–798b4); *Saṃyukta Āgama* (SA 1245—T99 ii 341b17–24).
[39] Damien Keown, *The Nature of Buddhist Ethics* (Palgrave, 2001) 177.

As expounded in the early texts, the doctrine of *kamma* states that all mental, physical, and verbal actions have pleasant, unpleasant, or neutral results for their agent according to the moral quality of the agent's intention.[40] Intentions grounded in three 'unwholesome' immoral roots—greed, hatred, and delusion—have unpleasant results, while intentions grounded in their 'wholesome' moral opposites have pleasant results.[41] That an act reduces suffering, was intended to do so, or will generally do so, cannot render the act moral if it was rooted in hatred, for example; nor can an act's negative consequences render it immoral if it was rooted in love.[42]

Indeed, because kammic consequences necessarily reflect the relevant act's moral quality, it is impossible to foresee those consequences without first knowing that quality.[43] That is, an act's morality is metaphysically prior to its consequences. It is also said that unenlightened beings should not try to divine kammic consequences, as 'one who [does so] would reap either madness or frustration'.[44] Such ideas simply cannot co-exist with consequentialist ethics,[45] and in fact a careful reading of many if not all of the passages said to endorse utilitarianism reveals that they state that immoral conduct *necessarily* harms both oneself and others—rather than defining such conduct by reference to such consequences.

Of course, practical applications of Buddhist ethics might resemble utilitarianism very closely, and individual Buddhists might interpret Buddhist ethics to be something approaching utilitarianism.[46] However, we conclude that, strictly speaking, the early texts do not adopt either utilitarian or deontological ethics, and are thus far still theoretically compatible with natural law.

B. *Free Will*

We turn now to a different obstacle that might obstruct the harmonisation of early Buddhism and natural law thinking: divergent views on free will. Many natural law theorists seem committed—implicitly or explicitly—to a libertarian conception of free will. One example is Robert P George, who has stated: '[A] complete theory of natural law will include … a defense of free choice as a genuine possibility. This entails the rejection of [the view that] all phenomena are … caused.'[47]

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[40] *Aṅguttara Nikāya* (n 6) 963 (AN 6.63—A iii 415); *Madhyama Āgama* (n 7) vol 2, 310–311 (MA 111—T26 i 600a26–b3).
[41] *Majjhima Nikāya* (n 6) 1058–65 (MN 136—M iii 207–15); *Madhyama Āgama* (n 7) vol 3, 380–92 (MA 171—T26 i 706b14–708c28).
[42] Charles K Fink, 'The Cultivation of Virtue in Buddhist Ethics' (2013) 20 *Journal of Buddhist Ethics* 668, 687–8.
[43] Keown (n 39) 179.
[44] *Aṅguttara Nikāya* (n 6) 463 (AN 4.77—A ii 80). The Chinese equivalent does not refer to *kamma* explicitly, but rebirth (which, however, is inextricably linked with *kamma*): *Ekottarika Āgama* (EA 29.6—T125 ii 657a18–24).
[45] One *possible* exception is the Mahāyāna doctrine of 'skillful means', which holds that breaches of moral duty might be justified if suffering would be diminished overall: Harvey (n 18) 134–5; Keown (n 39) 150–63. For example, it is said that (in a previous life) the Buddha killed one robber to save 500 merchants: *The Skill in Means (Upāyakauśalya) Sūtra*, tr Mark Tatz (Motilal Banarsidass, 1994) 73–6. In doing so, he did not receive the normally disastrous consequences for killing but simply trod on a thorn. However, that an immoral act might ultimately be 'justified' necessarily presumes a basic immorality which *persists* even where its consequences make it all-things-considered permissible: cf Keown (n 39) 162.
[46] See generally Katsu Masaki and Jit Tshering, 'Exploring the Origins of Bhutan's Gross National Happiness' (2021) 16(2) *Journal of South Asian Development* 273.
[47] George (n 8) 66.

To George's name can be added those of Aquinas[48] and most natural law theorists of the 'new natural law' variety.[49] For such theorists, the concept of free and rational choice is 'essential to any natural law … theory worthy of the name', since natural law theories posit inherently choiceworthy goods, and since the concept of 'choice' would be incoherent if it were not free.[50]

Conversely, early Buddhism indeed views all phenomena (other than *nibbāna*) as caused (or at least 'conditioned'),[51] including all aspects of our so-called 'self'.[52] This relationship of 'dependent origination' is expressed in early texts by the formula: 'When this exists, that comes to be; with the arising of this, that arises. When this does not exist, that does not come to be; with the cessation of this, that ceases.'[53] Such determinism is clearly incompatible with Finnis and George's labelling of moral agents as 'uncaused causing[s]'.[54] If all phenomena are conditioned—in the way early Buddhism tells us they are—then surely there is no room for human beings to autonomously and rationally exercise truly free choice—as natural law theorists tell us we should.

However, it is an oversimplification to suggest that all natural law theorists embrace libertarian free will. Many natural law theorists make no specific claims about the nature of free will—including, for example, Aristotle, who does not appear to have viewed the so-called 'problem of free will' as a problem at all.[55]

To be sure, it would appear that natural law theory is irreconcilable with hard determinism, since natural law exhorts us to make free choices guided by rationality. That is, since 'ought' implies 'can', the natural law theorist is committed to the view that we can make (or refrain from making) such choices. As such, natural law's prescriptions only make sense if hard determinism—which denies the possibility of free will—is false.

However, none of the core natural law claims identified above imply the truth of libertarian free will and the falsity of the intermediate position known as 'soft determinism' or 'compatibilism'—which has it that human beings are free, morally responsible agents, notwithstanding that determinism is true.[56] In other words, natural law theory's claims are coherent provided that *either* libertarian free will *or* soft determinism is true. And since dependent origination appears incompatible with libertarian free will, early Buddhism will

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[48] Aquinas (n 8) pt I q 83.
[49] Patrick Lee, 'The New Natural Law Theory' in Tom Angier (ed), *The Cambridge Companion to Natural Law Ethics* (Cambridge University Press, 2019) 73.
[50] John Finnis, 'Aquinas and Natural Law Jurisprudence' in George Duke and Robert P George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press, 2017) 17, 31.
[51] *Saṃyutta Nikāya* (n 6) 575–6 (SN 12.37—S ii 64–65); *Saṃyukta Āgama* (SA 358—T99 ii 100a13–19). This does not imply a binary chain of cause and effect but, rather, a multiplicity of 'conditions', none of which might act as a direct 'cause': see Bhadantācariya Buddhaghosa, *Visuddhimagga: The Path of Purification*, tr Bhikkhu Ñāṇamoli (Buddhist Publication Society, 4th ed, 2010) 559–60.
[52] *Saṃyutta Nikāya* (n 6) 871 (SN 22.20—S iii 24); *Saṃyukta Āgama* (SA 12—T99 ii 2b4–14); *Saṃyutta Nikāya* (n 6) 1172–73 (SN 35.93—S iv 67–69); *Saṃyukta Āgama* (SA 273—T99 ii 72b25–73a1); *Majjhima Nikāya* (n 6) 1131–33 (MN 148—M iii 282–84); *Saṃyukta Āgama* (SA 304—T99 ii 86c23–87a26); *Saṃyutta Nikāya* (n 6) 979 (SN 22.151—S iii 181–82); *Madhyama Āgama* (n 7) vol 4, 183–84 (MA 200—T26 i 764c15–27).
[53] *Saṃyutta Nikāya* (n 6) 575–6 (SN 12.37—S ii 64–5); *Saṃyukta Āgama* (SA 358—T99 ii 100a13–19).
[54] Finnis (n 8) 386; George (n 8) 59.
[55] See Aristotle, *Aristotle's Categories and De Interpretatione*, tr John Lloyd Ackrill (Oxford University Press, 1963) ch 9. Whether Aristotle should be viewed as an outright natural law theorist is sometimes disputed: see Mark C Murphy, *Natural Law and Practical Rationality* (Cambridge University Press, 2001) 7.
[56] Michael McKenna and D Justin Coats, 'Compatibilism', *The Stanford Encyclopedia of Philosophy* (Winter ed, 2023) <https://plato.stanford.edu/archives/win2023/entries/compatibilism/>.

therefore only be incompatible with natural law theory if the former rejects soft determinism and embraces hard determinism.

It is true that several scholars of Buddhism have favoured a hard determinist interpretation, on the basis that dependent origination—together with certain exhortations to deal with wrongdoers compassionately—evinces a denial of moral responsibility grounded in hard determinism.[57] Charles Goodman supports such arguments by reference to, for example, Śāntideva's statement that '[w]hatever transgressions … there are, all arise through the power of conditioning factors.'[58] Similarly, Gregg D Caruso argues that Buddhists must be free will sceptics 'if they wish to take Buddhist ethics seriously'—referring to exhortations to be compassionate to wrongdoers because they act based on conditioning factors.[59]

However, to take these exhortations as definitively requiring Buddhists to be hard determinists would ignore the strong undercurrent of personal spiritual responsibility in the early texts.[60] One of the most fundamental aspects of Buddhist practice—'right effort'—is where a practitioner 'makes an effort, arouses energy, applies [the] mind, and strives' to destroy unwholesome states and cultivate wholesome ones.[61] Such exhortations would be pointless if there were not a real sense in which an agent can choose to make an effort, and a real sense in which those efforts might make a practical difference in that agent's spiritual life.

The Buddha also explicitly criticised those who adopted hard determinism's implications regarding our inability to author our own spiritual progress. For example, he argued that those who thought '[a]ll beings … are without mastery, power, and energy [and are] moulded by destiny, circumstance, and nature … [would] not see in unwholesome states the danger … nor [would] they see in wholesome states the blessing of renunciation'.[62] Indeed, at least one reason why the early texts refuse to posit God's existence is because one could write off one's actions as morally indifferent since they would all be due to God's act of creation.[63]

Goodman has addressed such passages by claiming that the Buddha did not criticise hard determinism itself but, rather, the 'fatalist' idea that things just happen for no reason and cannot be shifted by any cause.[64] Hard determinism, on the other hand, claims that all events are predetermined as part of an integrated causal network in which everything that happens is the causal outgrowth of antecedent events.

It is true that the Buddha criticised the quasi-fatalist view that '[t]here is *no* cause or condition for the defilement [or purification] of beings'.[65] But the true object of disavowal is the idea that one's spiritual progress is out of one's hands. And this idea is common to fatalism and hard

[57] Goodman (n 27) 154–63; Gregg D Caruso, 'Buddhism, Free Will, and Punishment: Taking Buddhist Ethics Seriously' (2020) 55(2) *Zygon* 474, 481–5.
[58] Śāntideva, *The Bodhicaryāvatāra*, tr Kate Crosby and Andrew Skilton (Oxford University Press, 1995) 52–3. See also Buddhaghosa (n 51) 296.
[59] Caruso (n 57) 492.
[60] *Dīgha Nikāya* (n 6) 245 (DN 16—D ii 100); *Dīrgha Āgama* (n 7) vol 1, 88 (DA 2—T1 i 15b8–9).
[61] *Saṃyutta Nikāya* (n 6) 1709–12 (SN 49—S v 244–48); *Saṃyukta Āgama* (SA 875–9—T99 ii 221a9–c8). See also the preponderance of 'effort' in the 37 'aids to enlightenment': *Saṃyutta Nikāya* (n 6) 1488–9.
[62] *Majjhima Nikāya* (n 6) 513–14 (MN 60—M i 407–408). See also *Majjhima Nikāya* (n 6) 621–2 (MN 76—M i 517); *Saṃyutta Nikāya* (n 6) 995 (SN 24.7—S iii 210–11); *Saṃyukta Āgama* (SA 155—T99 ii 44a3–8).
[63] *Aṅguttara Nikāya* (n 6) 267 (AN 3.61—A i 174); *Madhyama Āgama* (n 7) vol 1, 75 (MA 13—T26 i 435b15–27).
[64] Goodman (n 27) 153.
[65] *Majjhima Nikāya* (n 6) 513–14 (MN 60—M i 407–408), 621 (MN 76—M i 516–17) (emphasis added); *Saṃyukta Āgama* (SA 157–8—T99 ii 44a22–b4).

determinism, which both hold that our futures are, ultimately, *inevitable*. In that context, surely one cannot take the Buddhist path seriously *without* some sort of free will. In short, if the Buddha rejected the fatalist thesis because it undermined his teaching that one could further one's wellbeing through effort—as he did—then he must have also rejected hard determinism.

The apparent commitment of the texts cited by Goodman and Caruso can, we think, be explained as a meditative technique. They are not—and were not intended to be—a comprehensive explanation of the Buddhist metaphysics of choice. Rather, they are simply a means of reducing the suffering one experiences due to others' poor behaviour. They certainly do so by drawing attention to the ultimate metaphysical unreality of human agents as uncaused, unified selves. However, just as determinism need not entail hard determinism, neither must the texts' appeal to conditionality.

We acknowledge that early Buddhism's espousal of the seemingly deterministic doctrine of dependent origination,[66] and its simultaneous emphasis on personal spiritual responsibility, gives rise to at least an apparent conflict. This conflict has resulted in the compatibilist explanation being the most popular among scholars of Buddhism. Proponents of the compatibilist view argue that, since the Buddha 'rejected the idea that we exist outside the causal nexus [of dependent origination]' but at the same time 'rejected the idea that the will is impotent' and instead 'advocated that by making the right choices, we can progress towards enlightenment', he must therefore be taken to have endorsed compatibilism.[67]

We agree with this view. While the Buddha was not moved to give an explicit defence of free will, what emerges from the early texts is the idea that the will is free in the sense of having causal efficacy, and that things can be 'choiceworthy' (and 'chosen' by the will) in the absence of *libertarian* free will. For example, just after an exposition on dependent origination, the Buddha said that '[c]onsidering your own good … is quite enough to strive for the goal with diligence'.[68] This statement evidences a belief not only that what is 'good' is choiceworthy, but also that one has a choice to 'strive … with diligence', *or not*, in pursuit of that good—and all in the immediate context of an affirmation of dependent origination and therefore a rejection of libertarian free will.

In summary, to the extent dependent origination bears on free will, it does not imply that free will is nonsense, but merely that *libertarian* free will does not exist. And, we argue, the opposing view that libertarian free will does exist is not essential to natural law thinking. So, early Buddhism and natural law remain compatible.[69]

III. NATURAL LAW THINKING IN EARLY BUDDHIST TEXTS

Thus far, we have encountered no reason to regard Buddhism and natural law as incompatible at the level of theory. As such, we can now examine the extent to which natural law thinking

[66] Whether dependent origination should be seen as analogous to Western conceptions of causal determinism has been disputed: see Karin Meyers, 'False Friends: Dependent Origination and the Perils of Analogy in Cross-Cultural Philosophy' (2018) 25 *Journal of Buddhist Ethics* 785.

[67] Riccardo Repetti, 'Recent Buddhist Theories of Free Will: Compatibilism, Incompatibilism, and Beyond' (2014) 21 *Journal of Buddhist Ethics* 279, 319–20 (citations omitted), citing Asaf Federman, 'What Kind of Free Will Did the Buddha Teach?' (2010) 60(1) *Philosophy East & West* 1.

[68] *Saṃyutta Nikāya* (n 6) 553 (SN 12.22—S ii 28–29); *Saṃyukta Āgama* (SA 348—T99 ii 98b1–2).

[69] Of course, if one viewed the whole natural law outlook as necessarily committed to libertarian free will, then dependent origination *would* appear to make early Buddhism incompatible with natural law so understood.

in fact exists within early Buddhist texts by digging deeper into their substantive views on ethics and jurisprudence.

To avoid unreasonably shoehorning early Buddhist texts into a natural law framework, we will first expound what we take their fundamental positions on ethics and jurisprudence to be, and only then evaluate whether they evidence natural law thinking.

A. *Ethics*

1. Buddhist Metaethics

We have already noted the tension between deontological and utilitarian strands in early Buddhist metaethics: we have seen that early texts take a strict stance towards compliance with their moral precepts, but we have also seen that these exhortations are only binding because they help eliminate suffering. Clearly, there is a tension here—one the early texts themselves never explicitly resolve. However, we think one solution is to examine the relationship between the *dhamma*, the moral duties it imposes, and suffering.

Let us consider the paradigmatic example of ethical conduct in early Buddhism—the Buddha.[70] What makes him paradigmatic is of course his perfect enlightenment regarding the *dhamma*.[71] This is not just the Buddha's *dhamma* (ie, his teachings), but the broader *dhamma* that is 'the natural order … that underpins the operation of the universe [including] in the … moral spher[e]' (let us call this '*dhamma*-as-natural/moral-order').[72] This order exists independently of the Buddha, and all Buddhas know the same *dhamma*.[73] In short, the Buddha 'discovered' rather than 'invented' the *dhamma*.

The most plausible inference, therefore, is that ethical behaviour is defined as what someone with perfect knowledge of the *dhamma*-as-natural/moral-order would do in acting on this knowledge. Indeed, a frequently endorsed scriptural definition of ethical conduct is that it is synonymous with the behaviour of the wise or which is praised or taught by the wise (ie, those with knowledge of the *dhamma*-as-natural/moral-order).[74]

From this—and when one considers that the Buddha taught the *dhamma* (including its moral duties) solely because it would reduce suffering—it follows that the *dhamma*-as-natural/moral-order and suffering simply cannot be conceptually separated. That is, the moral duties prescribed by the *dhamma*-as-natural/moral-order alleviate suffering *by definition*, and this is precisely *because* they accord with the true nature of the universe.[75] To paraphrase a line from Finnis: were the universe's nature different, so would be a Buddhist's duties.[76]

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[70] *Saṃyutta Nikāya* (n 6) 233–5 (SN 6.2—S i 138–40); *Saṃyukta Āgama* (SA 1188—T99 ii 321c18–322a27); Keown (n 39) 31.
[71] *Majjhima Nikāya* (n 6) 263 (MN 26—M i 171); *Madhyama Āgama*, vol 4, 243 (MA 204—T26 i 777b16–19).
[72] Damien Keown, *A Dictionary of Buddhism* (Oxford University Press, 2003) '*Dharma*'.
[73] *Saṃyutta Nikāya* (n 6) 235 (SN 6.2—S i 140); *Aṅguttara Nikāya* (n 6) 363–4 (AN 3.136—A i 286); *Dīgha Nikāya* (n 6) 403–4 (DN 26—D iii 75–6); *2nd Saṃyukta Āgama* (SA2 101—T100 ii 410b4–8); *Saṃyukta Āgama* (SA 1188—T99 ii 322a22–7); *Dīrgha Āgama* (n 7) vol 1, 7–61 (DA 1—T1 i 1b12–10c29), 240 (DA 6—T1 i 41c29–42a7).
[74] *Majjhima Nikāya* (n 6) 1016–28 (MN 129—M iii 163–78); *Madhyama Āgama* (n 7) vol 4, 159 (MA 199—T26 i 759a19–763a22).
[75] Cf Keown (n 2) 177. It is worth noting that, because of rebirth, this is so even if one sacrifices one's life for a moral precept.
[76] Cf Finnis (n 8) 33.

Of course, natural law theorists may still regard early Buddhism's ethics as retaining an uncomfortably consequentialist flavour, given its soteriology—ie, given its *telos* of *nibbāna*.[77] However, virtue ethics—which, although not coextensive with ENL per se, is highly congenial to it—is also strongly teleological.[78] Indeed, the positing of *eudaimonia* (roughly, 'flourishing') as the *summum bonum* of human existence by Aristotle—whose theory of virtue ethics has profoundly influenced contemporary virtue ethicists—is routinely analogized to *nibbāna* by scholars attempting to tease out Buddhism's metaethical commitments.[79] In any case, however, early Buddhist ethics clearly does *not* manifest the utilitarianism—with its single-minded prescription to maximise happiness without special regard for virtue—that ENL rejects.

2. Buddhist ENL Thinking

The question can and should now be asked: does early Buddhism's ethical outlook recognisably manifest ENL thinking? In taking up this question, we should first recall the key characteristics ascribed to ENL theories, namely: (i) a belief that there exist inherently normative human goods whose normativity is accessible to humans, and which are the only intelligible reasons for action; (ii) a rejection of both deontological and utilitarian ethics; and (iii) an adoption, instead, of ethical principles based on a rational interaction with the goods described in (i). We have dealt with early Buddhism's approach to deontology/utilitarianism in Part II. We turn now, then, to the question of whether early Buddhism considers anything to be inherently choiceworthy and cognisably so.

Damien Keown has proposed three goods of this kind within Buddhism: life, knowledge, and friendship.[80] However, we believe this view is misguided, or at least misleading. Although Buddhism does hold these to be good, this goodness is always qualified in a manner that is at odds with the paradigmatic ENL claim that fundamental human goods have intrinsic value.

For example, all forms of Buddhism indeed highly value life, as is clear from the first precept. Nevertheless, one clear and immediate objection is that Buddhism could hardly conceive of life as inherently choiceworthy given its emphasis on the suffering inherent in most beings' lives. Keown responds to this point with two arguments: first, 'the negative statements one finds in Buddhist sources about life are usually in the context of life when it is lived wrongly';[81] and, second, 'when Buddhism points to the inherent unsatisfactoriness of life … it is not saying that life as we now know it is not good, but only that it is *less* good than the more perfect form of life attained in final nirvana.'[82]

[77] This is the more so if focusing on Mahāyāna ethics, which 'tend[s] to emphasize … the consequences of actions for the suffering of all living beings': Abraham Vélez de Cea, 'The Criteria of Goodness in the Pāli Nikāyas and the Nature of Buddhist Ethics' (2004) 11 *Journal of Buddhist Ethics* 123, 139.
[78] The key difference between virtue ethics and consequentialist ethical theories, therefore, is not that the former lacks a *telos* but, rather, that it specifically posits virtue as the path to that *telos*.
[79] See, eg, Keown (n 39) 22, 195–9; Seth Zuihō Segall, *Buddhism and Human Flourishing: A Modern Western Perspective* (Palgrave, 2020) 33–61.
[80] Keown (n 2) 42–3.
[81] Ibid 49.
[82] Ibid (original emphasis).

Two things should be said here. First, while Buddhist texts do criticise life largely when it is lived wrongly, they also utterly reject the choiceworthiness of rebirth wholesale.[83] Certainly, life may have 'good' moments, but their impermanence is precisely why Buddhism considers non-nibbānic existence to be unsatisfactory. In the usual definition of suffering, '[re]birth' heads the list.[84] Second, both of Keown's arguments assume that life is only good insofar as one is on the path to *nibbāna*.[85] Respectfully, however, something cannot have 'intrinsic' value only insofar as it is a means to something else.[86]

As to friendship, Keown relies on the Buddha's statement in the Pāli Canon that 'good' friendship is 'the whole of the holy life'.[87] However, the word translated as 'good' here—*kalyāṇa*—is more specifically associated with virtue and spiritual progress than that broad translation suggests.[88] Further, the fact that 'friendship' constitutes 'the holy life' implies its subordinance to that life's ultimate goal—*nibbāna*—as is, in fact, indicated by the *sutta* Keown cites.[89] Indeed, rather than extolling the virtue of friendship per se, the Buddha instructed monks only to discuss the *dhamma*—when not doing so, they should keep 'noble silence'.[90] And, as to knowledge, the Buddha explicitly criticised the pursuit of purely speculative knowledge which does not lead to the elimination of suffering.[91] So, Keown's goods are not '*inherently* choiceworthy' in the relevant sense.

The above analysis might, however, appear to indicate that *non*-suffering (ie, *nibbāna*) is a fundamental good in the ENL sense. As we have noted, the *dhamma*'s normative force derives from its relationship to suffering. That is, the most basic oughts in the Buddhist vocabulary can only be suffering and its opposite of *nibbāna*.[92] It is only there that the regression stops, since early Buddhism's soteriology simply assumes both that suffering is something all sentient beings *ought* to avoid, and that all beings in fact desire to avoid it. In other words, suffering and its escape are inherently normative, and this normativity is accessible to humans.

A problem, however, is that the goodness of *nibbāna* itself (as opposed to the evilness of suffering) is not readily cognisable, since *nibbāna* is incomprehensible to the unenlightened.[93] For this reason, *nibbāna* is typically only presented as choiceworthy insofar as it is the *absence* of suffering.[94] This causes an additional problem for the notion that *nibbāna* might be not only

[83] *Saṃyutta Nikāya* (n 6) 226 (SN 5.6—S i 132–33); *Saṃyukta Āgama* (SA 1205—T99 ii 328b3–5); *2nd Saṃyukta Āgama* (SA2 221—T100 ii 455c11–12).
[84] *Saṃyutta Nikāya* (n 6) 1844 (SN 56.11—S v 421); *Madhyama Āgama* (n 7) vol 3, 229 (MA 153—T26 i 673a6–7).
[85] See also Keown (n 2) 46.
[86] Of course, as Keown points out, *nibbāna* is enjoyed as part of life in a formal sense, even after death (the idea of *nibbāna* as annihilation is utterly denied): ibid 49. However, substantively, *nibbāna* is starkly distinct from unenlightened existence—'life' in its usual sense.
[87] Keown (n 2) 52, citing SN 45.2—S v 2–3.
[88] See *The Pali Text Society's Pali English Dictionary* (1921) '*kalyāṇa*'; Keown (n 72) '*kalyaṇa-mitra*'. The Chinese equivalent '善' is again more typically used to refer to goodness in terms of virtue.
[89] See also *Saṃyukta Āgama* (SA 768; T99 ii 200c3–10).
[90] *Majjhima Nikāya* (n 6) 254 (MN 26—M i 161); *Madhyama Āgama* (n 7) vol 4, 236–7 (MA 204—T26 i 775c29–776a1).
[91] *Aṅguttara Nikāya* (n 6) 463 (AN 4.77—A ii 80); *Saṃyukta Āgama* (SA 407—T99 ii 108c28–109a26).
[92] *Saṃyutta Nikāya* (n 6) 984–5 (SN 23.1—S iii 188–89); *Madhyama Āgama* (n 7) vol 4, 301 (MA 210—T26 i 789c22–790a18).
[93] See generally Peter Harvey, *An Introduction to Buddhism: Teachings, History and Practices* (Cambridge University Press, 2nd ed, 2013) 74–6.
[94] *Majjhima Nikāya* (n 6) 255–6, 260 (MN 26—M i 162–63, 167); *Madhyama Āgama* (n 7) vol 4, 241–2 (MA 204—T26 i 777a13–17). See Harvey (n 93) 74–5.

an inherent good and cognisably so, but—in accordance with a Finnissian understanding of the nature of basic goods—also *self*-evidently good.

The best conclusion instead seems to be that for Buddhism suffering is a fundamental evil.[95] Of course, natural law theorists might want to insist on a fundamental good rather than an evil. However, like conventional fundamental goods, suffering is inherently and cognisably normative, and is the only intelligible reason for action. Accordingly, we consider that early Buddhism's fundamental evil serves an equivalent function to fundamental goods, and therefore allows for natural law analysis.

The next question, then, is whether early Buddhism posits an objectively rational way of interacting with suffering which informs the content of morality. For this to be the case, it seems early Buddhism must: (i) impose relevant rational requirements on agents; (ii) prescribe an objective way of responding to such requirements; and (iii) hold that such a response frames the content of morality.

This appears to be precisely what is the case. First, because early Buddhism assumes both that suffering ought to be avoided *and* that all beings in fact desire to avoid it, it must also assume that all beings are rationally required to do so. Indeed, those who have attained enlightenment are said to have done 'what had to be done'.[96] Second, because, as noted, the *dhamma* is the objective means to escape suffering, it is the objectively correct way to act rationally. Third, as we have seen, moral duties gain their 'moral' quality precisely because of their relationship to the *dhamma*. That is, what is *dhamma*-conforming action (ie, rational) is what is moral.

Of course, natural law theorists might object that there simply cannot be only one fundamental form of flourishing (in this case, *nibbāna*), and that this precludes early Buddhism from manifesting ENL thinking.[97] However, we think there are at least three reasons to reject such a claim. First, the Buddhist good of *nibbāna*—as the complement to the evil of suffering—seems sufficiently capacious as a form of human flourishing that natural law theorists should be able to embrace it without abandoning their fondness for fundamental categories of human good. Second, although early Buddhism certainly holds the *goal* of human existence to be singular, it does not expect everyone to approach that goal in exactly the same way or at the same time. One example of this is the teaching of *kamma* first to new disciples and suffering last. The Buddha, that is, was aware of sentient beings' different capacities and knew that some would not be able to fully pursue *nibbāna* with their present abilities. However, he taught something they would understand so they could alleviate suffering (at least relatively) either in this lifetime or future lifetimes.[98] So, the singularity of the *telos* of *nibbāna* is consistent with a variety of human pursuits at any given time.[99] Thirdly and finally, the chief concern with unidimensional flourishing appears to be that this collapses into a consequentialist commensuration of human goods.[100] But as we argued above, early Buddhism does not sustain utilitarian analysis.

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[95] Cf Breyer (n 32).
[96] *Saṃyutta Nikāya* (n 6) 548 (SN 12.17—S ii 22); *Madhyama Āgama* (n 7) vol 2, 263 (MA 182—T26 i 589c21).
[97] See, eg, Finnis (n 8) 113.
[98] See n 34 and text. Cf the early texts' segmentation of progress along the path into four stages: *Dīgha Nikāya* (n 6) 491 (DN 33—D iii 227); *Dīrgha Āgama* (n 7) vol 1, 312 (DA 10—T1 i 53b22–24). One who has reached the first stage and become a 'stream-enterer'—itself a great accomplishment—will nevertheless not achieve *nibbāna* for up to seven more lifetimes: *Aṅguttara Nikāya* (n 6) 319 (AN 3.87—A i 233); *Saṃyukta Āgama* (SA 820—T99 ii 210b27–29).
[99] Breyer (n 32) 549.
[100] See, eg, Finnis (n 8) 112–18.

In sum, early Buddhism holds that suffering is an inherently normative, fundamental evil whose normativity is cognisable. It should therefore be understood to see suffering as—to paraphrase Finnis once more—the only thing 'one could reasonably want [not] to do, to have, and to be'.[101] Further, early Buddhism also asserts that the *dhamma* provides an objectively rational/moral way of interacting with the evil of suffering. This certainly sounds like an ENL outlook, if a slightly unorthodox one.

B. *Jurisprudence*

1. Buddhist Jurisprudence

In the West, Buddhism's 'transcendental' qualities have contributed to the view that it is apolitical (or even anti-political).[102] However, in early texts, not only do the Buddha and his disciples regularly give kings advice,[103] they collectively endorse a particular view of what legal institutions (such as kingship) are meant to achieve.

For example, it is said that, when the current cosmos first expanded, the beings which populated it were morally pure.[104] However, they steadily grew attached to sensual pleasures, which caused suffering, moral decline, and eventually anarchy.[105] Seeing this, the beings elected one who would 'censure those who deserved it, and banish those who deserved banishment'.[106] This being became king, a title the Pāli version defines as 'He [Who] Gladdens Others With Dhamma'.[107] In other words, the very existence of rulers is premised on their ability to keep order, subject human conduct to the *dhamma*, and thereby reduce suffering.[108]

That picture is reinforced by the model of the *cakkavatti* ('wheel-turning [monarch]'): the ideal king who rules according to the *dhamma*, 'depending on the Dhamma, honouring it, revering it, cherishing it, doing homage to it and venerating it, having the Dhamma as [his] badge and banner, [and] acknowledging the Dhamma as [his] master.'[109] Such a king promotes the *dhamma* and guides his subjects towards dhammic conduct,[110] leading the kingdom to prosper

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[101] Cf ibid 97.
[102] See, eg, Max Weber, *The Religion of India: The Sociology of Hinduism and Buddhism*, tr Hans Gerth and Don Martindale (Free Press, 1958) 207.
[103] *Dīgha Nikāya* (n 6) 91–109 (DN 2—D i 47–86), 231–32 (DN 16—D ii 72–75); *Dīrgha Āgama* (n 7) vol 1, 63–6 (DA 2—T1 i 11a8–11b19), vol 3, 107–22 (DA 27—T1 i 107a21–109c21).
[104] *Dīgha Nikāya* (n 6) 409–10 (DN 27—D iii 84–5); *Dīrgha Āgama* (n 7) vol 1, 216 (DA 5—T1 i 37b27–c6); *Madhyama Āgama* (n 7) vol 3, 235–6 (MA 154—T26 i 674b15–c1).
[105] *Dīgha Nikāya* (n 6) 410–12 (DN 27—D iii 85–92); *Dīrgha Āgama* (n 7) vol 1, 216–21 (DA 5—T1 i 37c6–38b20); *Madhyama Āgama* (n 7) vol 3, 236–42 (MA 154—T26 i 674c4–676a8).
[106] *Dīgha Nikāya* (n 6) 413 (DN 27—D iii 92); *Dīrgha Āgama* (n 7) vol 1, 221 (DA 5—T1 i 38b21–c2); *Madhyama Āgama* (n 7) vol 3, 242–3 (MA 154—T26 i 676a8–22).
[107] *Dīgha Nikāya* (n 6) 413 (DN 27—D iii 93). The Chinese equivalents lack this definition but contain similar sentiments: *Dīrgha Āgama* (n 7) vol 1, 221 (DA 5—T1 i 38c1–2); *Madhyama Āgama* (n 7) vol 3, 242–3 (MA 154—T26 i 676a19–21).
[108] Peter Harvey, 'The Buddhist Just Society' in Daniel Cozort and James Mark Shields (eds), *The Oxford Handbook of Buddhist Ethics* (Oxford University Press, 2018) 391–2; Balkrishna G Gokhale, 'Early Buddhist Kingship' (1966) 26(1) *Journal of Asian Studies* 15, 18; Balrkishna Govind Gokhale, 'The Early Buddhist View of the State' (1969) 89(4) *Journal of the American Oriental Society* 731, 733.
[109] *Dīgha Nikāya* (n 6) 396–7 (DN 26—D iii 61); *Dīrgha Āgama* (n 7) vol 1, 227 (DA 6—T1 i 39c5–7).
[110] *Dīgha Nikāya* (n 6) 397 n 789 (DN 26—D iii 61); *Dīrgha Āgama* (n 7) vol 1, 125–6, 227–8, 230–1 (DA 6—T1 i 22a10–11, 39c5–9, 40a16–18, 40a22–3); *Madhyama Āgama* (n 7) vol 1, 484 (MA 70—T26 i 520c8).

and the king's enemies to submit peacefully to his rule.[111] Conversely, an unprincipled king who 'rule[s] the people according to his own ideas'[112] leads his kingdom into ruin and suffering.[113]

The relationship of just governance to the *dhamma* and suffering is further emphasised by the strong analogy of the *mahāsammata* and *cakkavatti* to the Buddha.[114] In later texts, the *mahāsammata* is said to be one of the Buddha's past lives or ancestors.[115] As for the *cakkavatti*, the descriptor 'wheel-turning' reflects the fact that, when the Buddha began teaching, he is said to have set the 'wheel of *dhamma*' in motion.[116] A Buddha's funeral is also supposed to be conducted like a *cakkavatti*'s,[117] and the 32 'marks of a great man' with which the Buddha was born are said to have indicated he would become either a *cakkavatti* or a Buddha.[118] In the Pāli Canon, moreover, a *cakkavatti*'s use of the *dhamma* for his subjects' benefit is explicitly equated with the Buddha's ministry.[119]

In sum, early texts argue that legal institutions exist to keep order and reduce suffering, and that only institutions which rule according to the *dhamma* can do so.[120]

2. Buddhist JNL Thinking

In light of our earlier exposition of JNL, determining whether the preceding sketch of Buddhist jurisprudence manifests JNL thinking requires us to ask whether early Buddhism claims that: (i) law is necessarily a morally-laden, purposive enterprise; and (ii) it is possible to evaluate laws, *qua* laws, by reference to normative criteria that laws must by and large satisfy in order for the legal system to serve its purpose.

First, the tale of the *mahāsammata* indeed indicates that legal institutions are purposive by their nature. Before beings had become corrupted, they simply did not need laws. It was only when their moral decline led to a collapse of social order and a concomitant increase in suffering that it became necessary to invent such things. That is, kingship only exists—both conceptually and empirically—for the *purpose* of keeping order and decreasing suffering. More specifically, because of the relationship between suffering and the *dhamma*, the purpose of legal institutions like kingship is to subject human conduct to rules in accordance with the *dhamma*.

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[111] *Majjhima Nikāya* (n 6) 1023–4 (MN 129—M iii 172–3); *Dīgha Nikāya* (n 6) 397–8 (DN 26—D iii 63); *Dīrgha Āgama* (n 7) vol 1, 124–6 (DA 1—T1 i 21c23–22a13), 229–31 (DA 6—T1 i 40a7–26).

[112] *Dīgha Nikāya* (n 6) 398 (DN 26—D iii 64); *Dīrgha Āgama* (n 7) vol 1, 232 (DA 6—T1 i 40b15); *Madhyama Āgama* (n 7) vol 1, 488ff (MA 70—T26 i 521b27).

[113] *Dīgha Nikāya* (n 6) 398–402 (DN 26—D iii 64–73); *Dīrgha Āgama* (n 7) vol 1, 232–6 (DA 6—T1 i 40b14–41a29); *Madhyama Āgama* (n 7) vol 1, 488–96 (MA 70—T26 i 521b23–523b6).

[114] See generally *Saṃyutta Nikāya* (n 6) 1594–5 (SN 46.42—S v 99); *Madhyama Āgama* (n 7) vol 1, 359 (MA 58—T26 i 493a11–22); *Ekottarika Āgama* (EA 39.7—T125 ii 731b14–25); *Saṃyukta Āgama* (SA 721–2—T99 ii 194a5–10); Uma Chakravarti, *The Social Dimensions of Early Buddhism* (Oxford University Press, 1987) 176, 181; Keown (n 72) '*cakravartin*'.

[115] See, eg, Buddhaghosa (n 51) 412; Stanley J Tambiah, 'The King Mahāsammata: The First King in the Buddhist Story of Creation, and His Persisting Relevance' (1989) 20(2) *Journal of the Oxford Anthropological Society* 101, 108.

[116] *Saṃyutta Nikāya* (n 6) 1846 (SN 56.11—S v 423); *Madhyama Āgama* (n 7) vol 4, 243 (MA 204—T26 i 777b27).

[117] *Dīgha Nikāya* (n 6) 274 (DN 16—D ii 161); *Dīrgha Āgama* (n 7) vol 1, 115 (DA 2—T1 i 20a24–26).

[118] *Majjhima Nikāya* (n 6) 744 (MN 91—M ii 134); *Dīrgha Āgama* (n 7) vol 1, 24 (DA 1—T1 i 4c27–5a1).

[119] *Aṅguttara Nikāya* (n 6) 208–10 (AN 3.14—A i 109–10).

[120] For completeness, we note that later Mahāyāna texts present similar views: see Matthew J Moore, *Buddhism and Political Theory* (Oxford University Press, 2016) ch 3.

The texts are perhaps more equivocal on whether they support the claim that legal institutions can be assessed—*qua* legal institutions—based on whether they fulfil this purpose. In the tale of the *cakkavatti*, for instance, although the overall moral is that kings should rule in accordance with the *dhamma* and that failing to do so will lead to suffering for the king's subjects, it is never explicitly stated that a king who does not fulfil this ideal is defective precisely as a king. However, that is certainly implicit. For one thing, the king who fails to rule according to the *dhamma* loses the 'wheel-treasure'—the most important of the seven treasures a *cakkavatti* possesses that distinguish him from a regular (and, we must infer, lesser) king.[121] But we also think that something very like claim (ii) arises when one reads the *mahāsammata* and *cakkavatti* texts together. That is, when one considers the purposive interpretation of the concept of legal institutions in the former, together with the disastrous consequences which arise from non-dhammic governance in the latter, the only reasonable inference is that non-dhammic legal institutions are simply not functional as such, and can therefore be deemed defective as such. In the *cakkavatti* story, for example, the ultimate result of non-dhammic governance is a complete breakdown of the legal and social order.[122]

Our view is that these ideas can easily be translated to modern conceptions of JNL. For instance, while it must be conceded that the early texts do not explicitly address the question of whether non-dhammic laws are no laws at all, or are merely defective as laws—and therefore do not explicitly endorse either the strong or the weak JNL thesis[123]—we nevertheless think the weaker interpretation emerges from a close reading of the texts. This is because unprincipled kings are always still 'kings',[124] and—more specifically—'anointed kings of the aristocrat class'.[125] That is, provided a non-*cakkavatti* king exhibits all the conventionally accepted trappings of royal authority—such as ceremonial anointment and being of the proper class—he is still technically a 'king', but necessarily a defective one.

The strong interpretation is undermined by the fact that the *cakkavatti*'s semi-mythical status indicates it is extremely difficult to become one. If many, or even most, epochs of history lack a *cakkavatti*, then, in line with the strong natural law thesis, this would mean that very few 'legal' systems would in fact be legal. Such a view is extremely pessimistic about the possibility of genuine legal authority and does not seem to accord with other texts. For example, on one occasion, the Buddha endorsed the authority of existing customs as binding on a particular community.[126] If no *cakkavatti* meant no legal authority then this would be incoherent, since the *cakkavatti* story clearly implies there can be no *cakkavatti* contemporaneous with the Buddha.[127]

[121] *Dīgha Nikāya* (n 6) 398 (DN 26—D iii 64); *Majjhima Nikāya* (n 6) 1023–6 (MN 129—M iii 172–73); *Dīrgha Āgama* (n 7) vol 1, 229 (DA 6—T1 i 40a1–6); *Madhyama Āgama* (n 7) vol 1, 485 (MA 70—T26 i 520c22–26).
[122] *Dīgha Nikāya* (n 6) 402 (DN 26—D iii 72–73); *Dīrgha Āgama* (n 7) vol 1, 236 (DA 6—T1 i 41a21–29); *Madhyama Āgama* (n 7) vol 1, 496 (MA 70—T26 i 523b1–3).
[123] On the distinction between these two theses, see n 12.
[124] *Dīgha Nikāya* (n 6) 398–400 (DN 26—D iii 64–69); *Dīrgha Āgama* (n 7) vol 1, 232–4 (DA 6—T1 i 40b14–41a1); *Madhyama Āgama* (n 7) vol 1, 488 (MA 70—T26 i 521b24–522c12).
[125] Translated by Oscar Kawamata for '*rājā khattiyo muddhābhisitto*'. Cf the rendering simply as 'King' in the Walshe translation: *Dīgha Nikāya* (n 6) 398 (DN 26—D iii 65). See also *Madhyama Āgama* (n 7) vol 1, 488 (MA 70—T26 i 521b24–522c12).
[126] *Dīgha Nikāya* (n 6) 232 (DN 16—D ii 74); *Dīrgha Āgama* (n 7) vol 1, 64 (DA 2—T1 i 11b1–4).
[127] *Dīgha Nikāya* (n 6) 401 (DN 26—D iii 70–71); *Dīrgha Āgama* (n 7) vol 1, 235 (DA 6—T1 i 41a10–12); *Madhyama Āgama* (n 7) vol 1, 495 (MA 70—T26 i 523a11–12).

Of course, the Buddha would probably not have said the same if the customs were sufficiently wicked. So, the early Buddhist stance seems something close to that of natural law theorist Robert Alexy, who argues that while some laws may be defective but still law, putative 'laws' that exceed a threshold level of injustice simply cannot, for that reason, amount to law.[128]

IV. CONCLUSION

In this article, we asked whether it is coherent to interpret the basic teachings of Buddhism as manifesting natural law thinking. We believe the foregoing analysis reveals the answer to be 'yes'.

It is true that early Buddhism and conventional natural law can appear to chafe considerably in some respects—specifically, relating to freedom of the will and monism about the good. But we contend that, notwithstanding these possible tensions, their ways of looking at both ethics and law are basically the same or very similar. This is revealed by the following conclusions reached throughout the article.

First, ENL is characterized by the vaunting of ethical principles based on rational interaction with categories of human good, and a rejection of deontological and utilitarian ethics. Early Buddhist ethics accords very well with this picture, since it is best viewed as also rejecting both deontology and utilitarianism. Further, early Buddhism's derivation of morality's dictates from correct interaction with the *dhamma* to solve the problem of suffering is analogous to ENL's derivation of morality's dictates from the concepts of rationality and human good. Second, JNL is characterized by a commitment to law as a purposive concept which can be assessed against criteria that are, in some sense, 'moral'. The conception of law adopted by early Buddhist texts—which has it that law is purposive, morally-laden, and ideally *dhamma*-conforming—is in that regard of a piece with JNL conceptions of law.

These conclusions, we think, make it appropriate, and clarifying, to view early Buddhism as manifesting natural law thinking.

[128] Robert Alexy, 'The Dual Nature of Law' (2010) 23(2) *Ratio Juris* 167, 176–7; Robert Alexy, 'On the Concept and the Nature of Law' (2008) 21(3) *Ratio Juris* 281, 287–90.

Theologising with a Hammer: Deicide, the (W)hole of Creation, and Judeo-Christian *a*-Theism in *Thor: Love and Thunder*

William P. MacNeil*

The most recent outing in the Marvel Cinematic Universe's Thor *series,* Thor: Love and Thunder, *takes a surprising, indeed astonishing, 'spiritualising' turn, at once philosophical* and *theological. With the death-dealing character of Gorr, the film reprises the old Nietzschean chestnut that 'God is dead'—or will be soon enough, as one clapped-out deity after another is gruesomely dispatched, emptying the universe of their so-called 'enchantment'. That is, a twilight of the* idols*– but with feet of clay, each instantiating the worst excesses of what Walter Benjamin might call 'mythic violence'. By way of contrast, Gorr exemplifies, at least initially, a kind of Benjaminian 'divine violence', his deicidal rampage not only disrupting creation itself, but disclosing a hole in the fabric of the universe. In this sublime encounter with 'the Real',* Thor: Love and Thunder *offers us something more than just a choice between being and nothingness; indeed, it proffers the radical possibility of a being* predicated *on nothingness: in short, a* w/hole *that is barred, castrated, even crucified. In so doing, this supposedly 'escapist' movie may suggest not only how to* philosophise *with Thor's hammer, but to* theologise *with it as well: that is, as a transvalued (Judeo-Christian?)* a-*theism which sublates faith and doubt, belief and nihilism, being and nothingness in its embrace of a law spiritualised by love's sacrifice.*

I. *LOVE AND THUNDER'S* PECULIAR PAGANISM: ALLEGORY, PHILOSOPHY, THEOLOGY

This article inhabits that most *pagan* of postmodernity's narrative spaces: specifically, the Marvel Cinematic Universe, its blockbuster films being populated by a host of gods and monsters, forever engaged in seemingly endless – Manichean? – struggle. Not that the MCU's wide fanbase would necessarily recognise this *as* paganism. Indeed, such recognition would imply not only a knowledge of sources beyond the graphic novel or video game – *e.g.*, the *Poetic Edda*,[1] the *Theogony*[2] – but an awareness of paganism's most prevalent counter-narrative: that of Scriptural monotheism, especially (but not exclusively) its New Testament 'good news'. Yet, for all the *ignorantia Dei* that may characterise the MCU's reception, one of

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[1] Jackson Crawford (ed), *The Poetic Edda* (Hackett Publishing, 2015).

[2] Hesiod, *Theogony and Works and Days*, tr M.L. West (Oxford University Press, 2008).

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the series' most recent outings, *Thor: Love and Thunder* (hereafter *Love and Thunder*),[3] resonates with rich theological themes, *topoi*, and tropes that can only be described as Judeo-Christian: that of sacrifice, resurrection, and love.[4]

This paper will take up *Love and Thunder's* theological invitation to read it otherwise, exploring first its *peculiar* paganism. 'Peculiar', because, as in *The Lord of the Rings*[5] or the 'Narnia' series,[6] paganism here is a kind of fancy dress, masking – but, also, paradoxically, throwing into bold allegorical relief – the film's spiritual subtext. To that end, Section 1 of this paper will address the 'anti-road to Damascus' travelled by the deicide, Gorr, exploring the psychic turmoil – subjective destitution[7] – which occasions not only his loss of faith, but his maniacal revenge against the gods. Section 2 will contextualise Gorr's deicidal rampage in terms of (largely, German) philosophy: that of Friedrich Nietzsche's (in)famous death of God thesis[8] and Walter Benjamin's twin notions of 'mythic' and 'divine' violence.[9] Section 3 returns this paper to its properly Judeo-Christian problematic, reading the film's dual sacrifices (Jane, Gorr) as quintessential acts of love, simultaneously Abrahamic and Christological. Section 4 will speculate on the consequences of this sacrifice, arguing that *Love and Thunder* may, *contra* Nietzsche,[10] *theologise with a hammer* by dramatising a new theism; namely, an *a*-theism[11] which sublates and moves beyond binary logic of being and nothingness, of belief and nihilism, of faith and doubt in its embrace of a law spiritualised by the *objet petit a*[12] of love.

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[3] *Thor: Love and Thunder* (Marvel Studios, 2022) [hereinafter, '*Love & Thunder*']. The film is, in the main, based on an amalgamation of several story-lines – Gorr the Godbutcher; Jane Foster as 'Mighty Thor' – developed during Jason Aaron's outstanding tenure, throughout the 2010s, as writer of Marvel's 'Thor' comics. See Jason Aaron, *Thor by Jason Aaron: The Complete Collection* (Marvel Comics, 2019) vol 1; Jason Aaron, *Thor by Jason Aaron: The Complete Collection* (Marvel Comics, 2020) vol 2.

[4] The internet has been quick to pick up on *Love and Thunder's* Christian thematics. For example, see Joel Hodge's thoughtful 'All you need is love: The theology of "Thor: Love and Thunder"', *ABC Religion & Ethics* (Australian Broadcasting Corporation, 27 July 2022) <https://www.abc.net.au/religion/joel-hodge-thor-love-and-thunder-theology/13991298>.

[5] J.R.R. Tolkien, *The Lord of the Rings* (HarperCollins, 2001).

[6] C.S. Lewis, *The Chronicles of Narnia* (Lions, 1980).

[7] Slavoj Žižek, 'Love Beyond Law: A Review of Bruce Fink's *The Lacanian Subject: Between Language and Jouissance*' (1996) 1 *Journal for the Psychoanalysis of Culture and Society* 160.

[8] Friedrich Nietzsche, 'Thus Spoke Zarathustra: A Book for Everyone and No One' in Keith Ansell Pearson and Duncan Large (eds), *The Nietzsche Reader* (Blackwell, 2006) 245.

[9] Walter Benjamin, 'Critique of Violence', in Peter Demetz (ed), *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken Books, 1978) 297-300.

[10] The full title of *Twilight of the Idols* being *Twilight of the Idols; Or How to Philosophise with a Hammer*. Friedrich Nietzsche, '*Twilight of the Idols' with 'The AntiChrist' and 'Ecce Homo'*, tr Anthony Ludovici (Wordsworth, 2007).

[11] Although we may travel down different theological paths, I acknowledge a general indebtedness to the always thought-provoking Slavoj Žižek, especially his recent text, *Christian Atheism: How to be a Real Materialist* (Bloomsbury, 2024).

[12] Literally, the 'object little other', and to be distinguished from the Symbolic's *Grand Autre* or 'Big Other'. While this core term shifts and changes in Lacan's *oeuvre*, the *objet petit a* is linked, fundamentally, to the subject's desire. First, as desire's Imaginary part-object (principally, the phallus), being mathematised in the formula for fantasy as *$ <>*a. Jacques Lacan, *Desire and Its Interpretation: The Seminar of Jacques Lacan Book VI*, ed Jacques-Alain Miller, tr Bruce Fink (Polity Press, 2019) 95-110. Second, as desire's object-cause, triggering the choice of object around which the drives (and part-drives) circle. Jacques Lacan, *The Four Fundamental Concepts of Psychoanalysis*, ed Jacques-Alain Miller, tr Alan Sheridan (Hogarth Press, 1977) 177-186 ('Lacan, *Four Fundamental Concepts*'). Third, as desire's left-over – that is, as a remainder of the *Real* and its *plus-de-jouir,* or a surplus *jouissance* – after Symbolic integration has occurred. Jacques Lacan, *From an Other to the other: The Seminar of Jacques Lacan Book XVI*, ed Jacques-Alain Miller, tr Bruce Fink (Polity Press, 2024). Fourth and finally, as desire's *semblant* that sits, as the *a*, at the centre of the Borromean knot, and its interlocking

II. *LOVE AND THUNDER'S* SCENE OF SUBJECTIVE DESTITUTION: DOUBT, DELUSION, DEICIDE

With its opening shot of a desiccated wasteland, a dying child, and a despairing parent desperate to have his prayers answered,[13] is there in current popular culture a more tragic scene of subjective destitution[14] than in the prologue of the most recent 'Thor' filmic offering,[15] *Love and Thunder*? Unusually, in an *oeuvre* notable for its glibness of tone, here we, the audience, are confronted with two characterological subjects who are not only dead before the socio-Symbolic but, for whom, *the Symbolic is dead to them*, their prayers unanswered, their lives forfeit. No wonder this dissolution of his lifeworld, and the faith that sustains it, provokes in the parent, Gorr, what might be called, according to psychoanalysis, a *passage à l'acte*;[16] namely, a psychotic break, dramatised in the susurrus of spectral voices he hears, urging him onto the lush oasis that awaits at a distance.[17] There, a delusion takes hold that forestalls the collapse of Gorr's existence, one emboldened by that most castrative of instruments, the Necrosword,[18] the *cut* of which will indeed slay *the* Father of all fathers, God.

Here, the pagan avatar of God is Rapu.[19] Not just utterly indifferent to his worshippers, but gleefully contemptuous of them, this emptiest of Big Others is easily dispatched[20] – a crime of, seemingly, little cosmic significance (Rapu being but a 'low level' deity).[21] But Zeus' later offhand dismissal to Thor of this deicide[22] misreads its real import; for with Rapu's murder, Gorr constructs a new phallic phantasy that will provide purpose to his life and meaning to his world, transforming him from a true believer in the paternal signifier, the *Nom-du-Père*,[23] God the Father, into its greatest menace, as its principal agent of castration's *coupure* (or 'cut').[24] The development thus proves the truth of the Lacanian adage that with psychosis, what is foreclosed from the Symbolic (here the collapse of the paternal function, imaged in the death of the child and the attendant loss of faith in the God the Father, the *Nom-du-Père*) returns as delusion in the Real:[25] of 'Gorr the God-Butcher', who will destroy all 'fathers' – that is, the heavenly host – and *their* children, Asgardian or otherwise.[26]

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orders of Symbolic, Imaginary, and Real. Jacques Lacan, *The Sinthome: The Seminar of Jacques Lacan, Book XXIII*, ed Jacques-Alain Miller, tr Adrian Price (Polity Press, 2016) 57.

[13] *Love & Thunder* (n 3) 0:05-2:15.

[14] Žižek (n 7).

[15] Others include *Thor* (Marvel Studios, 2011); *Thor: The Dark World* (Marvel Studios, 2013); *Thor: Ragnorok* (Marvel Studios, 2017).

[16] Jacques Lacan, *Anxiety: The Seminar of Jacques Lacan, Book XX*, ed Jacques-Alain Miller, tr Adrian Price (Polity Press, 2014) at 114-131; Geneviève Morel, 'Transgression et Identification dans le passage à l'acte' (2003) 3 *Savoirs et Clinique* 2, 19-26. Also, a term used in French criminology that constitutes something like a trigger of what the Anglo-Commonwealth common law might call the 'insanity defence'.

[17] *Love & Thunder* (n 3) 2:15-2:50.

[18] Ibid 5:40-6:05.

[19] Ibid 3:36-6:40.

[20] Ibid 5:45-6:40.

[21] Ibid 58:11-1:03.

[22] Ibid 58:11.

[23] Jacques Lacan, *The Psychoses: The Seminar of Jacques Lacan, Book III*, ed Jacques-Alain Miller, tr Russell Grigg (Routledge, 1981) 96, 193 ('Lacan, *The Psychoses*'). Jacques Lacan, 'On Any Question Prior to the Treatment of Psychosis' in Jacques Lacan, *Écrits*, tr Bruce Fink (Norton & Co, 2002) 481-485.

[24] Lacan, *Four Fundamental Concepts* (n 12) 43, 153, 206, 237, 270.

[25] Lacan, *The Psychoses* (n 23) 13, 81, 85-86.

[26] *Love & Thunder* (n 3) 35:20-37:50.

III. (POST)MODERNITY'S DEATH – AND ETERNAL RETURN? – OF GOD IN *LOVE AND THUNDER*: NIETZSCHE, BENJAMIN, VIOLENCE

This, of course, runs against the grain of a certain strain of theological nihilism that characterises (post)modernity. After all, isn't God always/already *dead*, famously proclaimed so, in the 19th century, in *Thus Spake Zarathustra*,[27] a fictional philosophical dialogue by that child of the Lutheran manse and, later, committed atheist, philosopher of eternal recurrence, Friedrich Nietzsche?[28] If God is dead, what, then, is there to kill? Equally, if God is dead, then, surely, at one point, he must have been *alive* – even if only as an idea. And it is to this destruction of an idea, literalised here in *Love and Thunder's* mythological pantheon, to which Gorr commits himself, becoming a serial killer of gods and, in turn, ironically, something of a god, himself – or, at least, its daemonic parody. What sort of parody of god is he? Surely, a god gone mad; not that this is unique, the history of religion being replete with gods whose wrath, be it vengeful or jealous, approaches the point of insanity. But, here, the specific nature of Gorr's divinity lies in not so much who he is – mad, bad, and dangerous to worship – but *what he does*. And what Gorr does is crystal clear: *he smashes idols*. Which is why his target is polytheism's innate iconicity, and a pantheon which, though global in sweep (*e.g.*, Aztec Mexico's Quetzacoatl) and often satirical in form (*e.g.*, Bao, the god of dumplings), is, largely, Hellenic in its aesthetic: *e.g.,* the statue-like Greek gods of Minerva, Dionysos, and, above all, Zeus.[29]

Mid-century German-Jewish cultural critic and jurisprude Walter Benjamin had a name for this sort of god-butchering *iconoclasm*: in a celebrated essay, he called it 'divine violence'.[30] According to French philosopher Jacques Derrida[31] and American political theorist James Martel,[32] divine violence aligns with the Hebraic tradition as distilled in the Mosaic Second Commandment: 'Thou shalt not make to thyself any graven image, nor the likeness of anything that is in heaven above, or in the earth beneath, nor of those things that are in the water under the earth./Thou shalt not adore them, nor serve them'.[33] Nowhere is that prohibition more flagrantly transgressed, in both spirit and letter, than in Omnipotence City, the home of the gods, the ostentatious vulgarity of which – all gold leaf and marble surfaces – resembles more a Las Vegas nightclub than an idol's temple.[34] And at its very centre, surrounded by his claque of toadies, sycophants, hangers-on, and eye-popping arm-candy is the king of the gods, Zeus

[27] Nietzsche (n 8) 255.
[28] See also Friedrich Nietzsche, *The Gay Science* in Keith Ansell Pearson and Duncan Large (eds), *The Nietzsche Reader* (Blackwell, 2006) 219.
[29] *Love & Thunder* (n 3) 53-55.
[30] Benjamin (n 9) 294-300.
[31] Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority', in Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992) 3-67.
[32] James Martel, 'Waiting for Justice: Benjamin and Derrida on Sovereignty and Immanence' (2011) 2(2) *Republics of Letters: A Journal for the Study of Knowledge, Politics, and the Arts* 158-172.
[33] *Douay Rheims Bible* (TAN Books, 1989), Exod 20:4-5. Other versions in English include, for example, the King James Version of *The Holy Bible*, where this verse reads: 'Thou shalt not make to thyself a graven thing, nor the likeness of anything that is in heaven above, or in the earth beneath, nor of those things that are in the water under the earth./Thou shalt not adore them, nor serve them'. *King James Version* (The World Publishing Co., 1957), Exod 20:4-5. For more contemporary versions, see first the *New Revised Standard Version*, *Catholic Edition*: 'You shall not make for yourself an idol, whether in the form of anything that is in heaven above, or that is on the earth beneath or in the water under the earth./You shall not bow down to them or worship them'. *NRSV, Catholic Edition* (Thomas Nelson, 1995), Exod 20:4-5. Second, *The New Jerusalem Bible*: 'You shall not make yourself a carved image or any likeness of anything in heaven above or on earth beneath or in the waters under the earth. You shall not bow down to them or serve them'. *The New Jerusalem Bible* (Darton, Longman, and Todd, 1985), Exod 20:4-5.
[34] *Love & Thunder* (n 3) 53:20-53:43.

himself, played to banal perfection by Russell Crowe as part Melbourne kebab-shop owner (with a comic caricature of the Graeco-Australian accent) and part Caesar's Palace headliner (*Cirque du Soleil*?), wielding Thunderbolt as if it were a baton in a *son et lumière* performance.[35]

No wonder Gorr wants to destroy this ragtag lot who are all sizzle and no steak; idols who turn out to have, most definitely, feet of clay – and whom even Thor cannot rally to their own, let alone their worshippers', defence. For these gods are the film's most committed *atheists*, knowing full well – and, interestingly, erroneously, as Jane's post-scriptural appearance in Valhalla indicates[36] – that there is 'no Other to the Other': that is, no salvation, no redemption, no afterlife. Not that these theistic *poseurs* are incapable of what Benjamin would call 'mythic violence';[37] that is, policing and patrolling their realms, punishing any and all infractions, real and imagined. To that end, *Love and Thunder* concludes with a postscript in which a revivified Zeus, restored to life (like the symptomatic return of the repressed?), is depicted plotting Thor's demise with son and accomplice, Hercules.[38] A scene and sentiment which, in its vindictiveness, functions like the counterpart to Gorr's divine violence, the two – Hellenic and Hebraic, iconoclastic and idolatrous, law-making and law-breaking – as two sides of the same juristic coin, pointing, as Benjamin reminds us, to an inherent 'rotten[ness]'[39] in the *means* of law itself.

IV. THE *VIA DOLOROSA* OF *LOVE AND THUNDER*: SACRIFICE, RESURRECTION, LOVE

What is missing here may very well be an 'end' – or even a stopper that will mediate between means and ends, preservation and destruction, law and justice, and all the other binaries Benjamin itemises[40] and the film dramatises. For a fracture, even a breach, undergirds *Love and Thunder*, installing a *non-rapport*, something like that of sexuation in Lacanian psychoanalytic theory, ever divided between the masculine/feminine rift[41] at its very centre. Which, in the film, amounts to an impasse only capable of saying 'My retribution for your wrong' – and *vice versa*. What will call a halt to the ever-intensifying spiral of tit-for-tat violence in *Love and Thunder*? What is its instrument or agent of suture here? The answer lies in the title of the film, nominating, with all due respect to my Byron Bay neighbour, Chris Hemsworth, that of its eponymous character**:** specifically, 'Love' (played, incidentally, by Hemsworth's daughter, India Rose), whose recall to life at the film's close by the gift of Eternity[42] not only concludes Gorr's god-butchering rampage, but personifies the theme of love, lost and found, narrated in the Jane/Thor subplot.

What is it though that makes Love's recuperation – as both character and theme – possible? By what mechanism is love enabled? Here, the film takes a genuinely theological turn, complicating its hitherto nihilistic, Nietzschean atheism and plotting, instead, a narrative course which is distinctly *imitatio Christi*: a *via dolorosa* in pagan fancy-dress – the Stations, as it were, of the Hammer. For it is *sacrifice* that allows Love's restoration: a sacrifice that is made not once, but, in true typological fashion, twice: Gorr for his child, thereby recalling the Old

[35] Ibid 54:00-55:00.
[36] Ibid 1:57-1:58.
[37] Benjamin (n 9) 294-300.
[38] *Love & Thunder* (n 3) 1:50-1:51.
[39] Benjamin (n 9) 286.
[40] Benjamin (n 9).
[41] Jaques Lacan, *Television: A Challenge to the Psychoanalytic Establishment,* ed Joan Copjec, tr Dennis Hollier, Rosalind Krauss, and Ann Michelson (W.W. Norton & Co, 1990) 8.
[42] *Love & Thunder* (n 3) 1:41.

Testament's Abraham and Isaac; Jane for the community writ large, the '*ecclesia*' of New Asgard, thereby evoking the Gospels' Crucifixion. This narrative doubling reveals what Slavoj Žižek[43] might call *Love and Thunder's* ideological core: a Judeo-Christian parable on the moral paramountcy of free will, its coal-face ethics predicated on choice. In each case here, sacrifice is based on a choice made freely. 'I chose love' says Thor to a dying Gorr,[44] opting to be with Jane in what remains of her life, the two tenderly renewing their vows of love.[45] An exchange which the viewer knows is only possible by reason of Jane's earlier choice to sacrifice herself by wielding, in her intervention in the final showdown with Gorr,[46] the energy-draining hammer, '*Mjölnir*', that saves Thor's life but ends her own, accelerating her Stage 4 cancer.[47]

V. *LOVE AND THUNDER'S* CHRISTIAN *A*-THEISM: INFINITY, W/HOLE, *OBJET PETIT A*

What enables these choices? What vouchsafes free will? *Love and Thunder* provides us, the audience, with a highly unorthodox, even nihilistic version of theism. For it attributes both being and nothingness, and its corollaries, belief and scepticism, to a reconceived higher power, at once cataphatic (affirmative) and apophatic (negative). Consider the representative of that power in *Love and Thunder*: Eternity, the horned outline of which looks like any vaguely Asiatic idol, a deific 'orientalisation' if there ever was one.[48] Further, it is to this idol that Gorr petitions, making his wish – for Love's resuscitation – and, from which, his wish is granted.[49] So far, so *transactional*, with prayer as a kind of pagan *quid-pro-quo* between believer and idol. What elevates this exchange is the way in which Eternity is embodied – or not, as the case may be here. For beyond its serpentine outline, sharply carved into the background's *Simpsons*-esque fluffy clouds, infinity stretches.[50] An outline of a skull – Eternity's – can be espied, but it is transparent, and, through it, time-space looms in all its endless infinitude of nothingness, as if we are witnessing a rip in the very fabric of the universe, a hole as it were in 'the Real'.[51]

A rip or hole which is, as it turns out, creative, even *creationist*. For not only does it clear a space in which the film's characters are free to choose independent of divine *diktat*, this higher 'power of nothing'[52] – as Italian philosopher Andrea Emo would put it – gifts the film's world with its principal *objet petit a*, Love.[53] It is this *a*-theism – the universe's theistic rip or hole as free will's *dio negativo*,[54] consubstantial with its (w)holistic agent of suture, Love-as-*objet petit a* – that will call forth from the Marvel Cinematic Universe a worthy bearer of the signifying Law that its (and our!) subjectivities need, and that the socio-Symbolic requires. For make no mistake about it: Gorr's death is not the end of violence in this world, be it divine or mythic; the violent onslaught continues, not only with Zeus and his scheming sidekick son,

[43] Slavoj Žižek, *The Plague of Fantasies* (Verso, 1997) 145.
[44] *Love & Thunder* (n 3) 1:39.
[45] Ibid 1:42-1:43.
[46] Ibid 1:34-1:36.
[47] Ibid 1:43.
[48] Ibid 1:38-1:39.
[49] Ibid 1:38-1:39, 1:41.
[50] Ibid 1:40-1:41.
[51] Ibid.
[52] Luca Viglialoro, 'Andreas Emo and the Metaphysics Notebooks: Interview with Massimo Donà' (2007) *Giornale di Filosofia* <http://www.giornaledifilosofia.net/public/scheda.php?id=81>.
[53] *Love & Thunder* (n 3) 1:41.
[54] Andreas Emo, *Il Dio Negativo: Scritti Teoretici 1925-1981*, eds Massimo Donà and Romano Gasparotti (Marsilio, 1989).

Hercules,[55] but with the *daemonic* hordes that continue to attack New Asgard and which constitute the close of film's *diegesis* proper.[56]

This is why Law – Thunder/Thor as law creator and law preserver – is needed so urgently here, but spiritualised by Love, so that Thor can not only 'philosophise with a hammer' – as Nietzsche claimed to do in *Twilight of the Idols*[57] – but *theologise* with it too. How, though, is this to be accomplished? Specifically, by converting the endless roundabout of divine/mythic violence into the regulated efficacy of law's *force*. That is the jurisprudential *potentia* Thor-as-Thunder, the bearer of '*Mjölnir*', materialises. In so doing, he *fulfils* rather than 'destroy(s)' the Law.[58] Central to this fulfilment is the recognition and acceptance of Law's principal fiduciary obligation: in this case, the duty owed to Love, Thor's (and Gorr's) *object petit a* as *cestui que trust*. So, Thor's law is a Law *of* Love, the swing of his hammer ensuring her personal safety and guaranteeing her subjective flourishing. But equally operative here is its juridical inverse: a Love *of* Law that Love, herself, participates in, but also *exceeds* as Equity incarnate. Last seen, incidentally, joyfully (*Jouis*?!) repulsing the enemy with her adoptive uncle, a *prosopopoeia* of law's spirit (Love) abetting law's letter (Thor). The end-result: a Judeo-Christian *a*-theism that, structurally sublates and goes *beyond* binaries such as the transcendent and the immanent, the teleological and the contingent, the sacred and the secular.

That 'beyond', however, is not chaos. Instead, another structure intervenes, one which takes its shape along triangulated lines with each of its three points corresponding to the Lacanian orientation's Real-Symbolic-Imaginary triad. *Thor: Love and Thunder* can be precisely mapped onto this triadic structure: its impossible Real, instantiated in Eternity's rupture; its specular Imaginary, mirrored in Love-as-*objet petit a*; its legal Symbolic, signified in Thor's gavel-like hammer, with its colliding force rendering judgment over – and ruling out *ultra vires* – the ego's 'looking glass' lures. At the centre of this structural triad is *violence* itself – or, simply, *jouissance* of the most phallicised kind, emblematised, especially, in the 'Necrosword', but also in 'Stormbreaker' and '*Mjölnir*'. Within this phallic *jouissance*, warring oppositions obtain: first, 'divine violence' – Gorr, Jane – is at loggerheads with the gods' 'mythic violence'; second, divine violence turns upon itself, as Jane does with Gorr, and *vice versa*. By the film's close, however, Jane and Gorr's mutual self-sacrifice not only annuls the *impasse* of mythic/divine violence but (re)activates the creative powers of the barred Big Other's negativity. For, paradoxically, it is precisely through this sacrifice-occasioned *bar* – God as a crucified sign, empty of content, *no*-thing – that Love is resurrected and Thor redeemed, the two becoming inextricably and juridically linked as ward and guardian, *cestui que trust* and trustee, *aequitas* and law, *jouissance* and desire.

So, *Thor: Love and Thunder* concludes with a vision of comic (and Christian) fusion, rather than tragic (and Classical/pagan) fission. In its final scene, the film vividly dramatises Law's desire as a desire for Law by figuring Thor-as-guardian: nurturing, caring for, and fighting in tandem with his equitable counterpart and ward, Love. A counterpart, now revealed as Law's inner core, in the law more than itself:[59] that is, Love as Law's Platonic *agalma*[60] vouchsafing its teleological purpose as well as pointing beyond the Law to the St Theresa-like mysticism

[55] *Love & Thunder* (n 3) 1:50-1:51.
[56] Ibid 1:47-1:48.
[57] Nietzsche (n 10).
[58] *Douay Rheims Bible* (n 33) Matt 5:17; see also, *King James Bible* (n 33), Matt 5:17.
[59] Lacan, *Four Fundamental* Concepts (n 12) 263-276.
[60] Jacques Lacan, *Transference: The Seminar of Jacques Lacan, Book VIII*, ed Jacques-Alain Miller, tr Bruce Fink, (Polity Press, 2015) 135-148.

of feminine *jouissance*.[61] Together, this interlinked 'two' of Law and Love – more 'Il y a les deux' than 'Yadlun'[62] – proclaim a double ukase that is as necessary in the film's world as our own, both beset as they are by ever-intensifying conflict. Here, the film's embattled, though resolute, New Asgard stands in for any number of current trouble spots: The Ukraine, Israel, The Palestinian Authority, Gaza, The Lebanon, Syria, and so on. Within this widening gyre of 'forever wars', what set of material and/or metaphysical conditions will finally, to quote John Lennon,[63] 'give peace a chance'? To that end, *Love and Thunder*'s two-fisted juridicism takes up whole-heartedly, not only the Prince of Peace's affective call – 'love thy neighbour(s) as thyself'[64] – but, equally, its more thunderous corollary of law-*full* force: simply, 'protect and defend' them as well.

[61] Jacques Lacan, *On Feminine Sexuality, The Limits of Love and Knowledge 1972-1973 Encore: The Seminar of Jacques Lacan Book XX*, ed Jacques-Alain Miller, tr Bruce Fink (W.W. Norton, 1998), 76.
[62] Jacques Lacan, *…Or Worse, The Seminar of Jacques Lacan Book XIX*, ed Jacques-Alain Miller, tr Adrian Price (Polity Press, 2018) 35.
[63] Plastic Ono Band, 'Give Peace a Chance' (Apple Records, 1969).
[64] *Douay-Rheims Bible* (n 33), Lev 19:18 and Matt 22:39; see also *King James Bible* (n 33), Lev 19:18 and Matt 22:39.

The Incompatibility of Theology and Jurisprudence: A Friendly Rejoinder to the Australian School

Jeremy Patrick*

After encountering several prominent Australian law and religion scholars, the co-director of the Center for Law and Religion at St John's University in New York observed in print that there seems to be an 'Australian School' of law and religion. The Australian School is said to be notable for approaching the legal protection of religious freedom and related issues from an explicitly theological perspective. And indeed, an assemblage of the most prominent law and religion scholars in Australia would likely include a majority who approach legal scholarship in this sub-discipline from a theological perspective. To stimulate further efforts to develop the field of law and religion in Australia, this paper is a friendly rejoinder to the Australian School. It addresses three related themes embraced by different members. First, it discusses the natural law approach that underpins the theological orientation to law and religion scholarship in Australia from prominent advocates such as Jonathan Crowe. Second, the paper discusses the proposals by Alex Deagon in a recent book to recognise Australia as a 'Christian Democracy'. Third, the paper responds to Joel Harrison's efforts to develop a 'post-liberal' theory of religious liberty. The paper concludes with congratulations to the Australia School on its success, and an appeal that it broadens its scope for the sake of the future of the field as a whole.

I. AN INTRODUCTION, IN WHICH I BITE THE HAND THAT FEEDS ME

There's gonna be opposition
Ain't no way around it

—The Killers, 'Dying Breed'[1]

After encountering several Australian law and religion scholars at a conference in 2022, Professor Mark DeGirolami, then the co-director of the Center for Law and Religion at St John's University in New York, wrote that there seems to be an emerging 'Australian School'.[2] In this 'fresh and interesting development in the law and religion world', the Australian School of 'young upstart scholars' was said to be notable for approaching religious freedom and related issues from an explicitly theological perspective.[3] Similar comments were made in an episode of the Center's podcast, *Legal Spirits*, which featured an interview with an Australian legal

* Senior Lecturer, University of Southern Queensland. The author discloses a formal affiliation with the *Australian Journal of Law and Religion*. The *AJLR*'s conflict-of-interest procedure was followed in the acceptance of this article for publication. The first draft of this paper was presented at the 5th Annual Theology and Jurisprudence Symposium at the Queensland University of Technology on 14 February 2025. Written feedback was also provided by Renae Barker, Jonathan Crowe, Alex Deagon, Marcus Harmes, and Joel Harrison. Any errors in the final product are surely their fault, as the first draft was perfect.

[1] The Killers, 'Dying Breed', *Imploding the Mirage* (EMI, 21 August 2020).

[2] Marc DeGirolami, 'The Australia School' *Law and Religion Forum* (Forum Post, 27 March 2022) <https://lawandreligionforum.org/2022/03/27/the-australia-school/>.

[3] Ibid.

https://doi.org/10.55803/K562V

scholar about 'growing scholarly interest in the connection between law and theology (in Australia and elsewhere!)'.[4]

Although describing these well-established mid- and late- career Australian academics as 'young upstarts' might be overdoing it, DeGirolami's overall observation is certainly a plausible one. An assemblage of the most prominent law and religion scholars in Australia would likely be comprised primarily of academics who, to varying degrees of explicitness, incorporate theological arguments into their writings.[5] Indeed, there is an annual and quite successful symposium on 'Theology and Jurisprudence', the output of which has been published as individual journal articles, an edited book collection,[6] and a special issue of the *Australian Journal of Law and Religion*.[7] Major Australian monographs and edited collections in law and religion tend to concentrate around traditionalist Christianity, theories of natural law, and concerns about evolving societal views on sex and gender. There are exceptions,[8] but if one considers the field as a whole, DeGirolami's "Australian School" of law and religion scholars is certainly visible.

The premise of the present article is that the prominent joinder of theology and jurisprudence in Australian law and religion scholarship is unfortunate. It argues that, the DeGirolamis of the world notwithstanding, such a focus narrows the scope and appeal of Australian law and religion scholarship. In a country like Australia, where Christians now make up less than half the population, and in a global context where this is not unusual among pluralist western liberal democracies, dwelling on theological perspectives on law seems, in a word, parochial. Such scholarship is preaching to the choir while excluding those who do not share the particular metaphysical commitments that underlie the positions posited. And even for those in the choir and singing from the same hymn sheet, such scholarship largely consists of repeating arguments and rehearsing debates that have been well covered in the academic literature for centuries. Despite Ecclesiastes, it would be nice to see something new under the (southern) sun. Thus, to stimulate the field of law and religion in Australia, this paper is a friendly rejoinder to the 'Australian School'. It addresses two major themes embraced by members.

First, it discusses the natural law approach that underpins much of the theological orientation to law and religion scholarship in Australia from prominent advocates such as Nicholas Aroney, Constance Lee, and Jonathan Crowe. The paper argues that the effort to articulate 'objective moral truths' results only in a subjective effort of wish-fulfillment and should be abandoned. It suggests that Finnis' and Crowe's efforts to found natural law on supposedly self-evident universal goods reveals the impossibility of finding a one-size-fits-all answer to human 'flourishing'. As an abstract moral and jurisprudential theory (which is the way the Australia School usually discusses it), natural law is incoherent but largely harmless. But real problems manifest when efforts are made to transform 'natural law' into *actual* law because there is an interface problem. The vague and inchoate 'principles' of natural law cannot be

[4] 'Episode 047: Christianity and Constitutionalism', *Legal Spirits Podcast* (Law and Religion Forum, 17 January 2023) <https://lawandreligionforum.org/2023/01/17/legal-spirits-january-13/>.

[5] An early call for such a development can be found in Paul Babie, 'Theology, Law, and the Australian Legal Academy' (2012) 39(2) *Religion & Education* 172. Babie argues that 'the Australian legal academy seems to have forgotten the historical relationship between theology and law' and that 'Australian law schools ought to be studying and teaching about the relationship between theology and law': at 173.

[6] See Jonathan Crowe, Constance Youngwon Lee and Joshua Neah (eds), *Jurisprudence and Theology: The Australian School* (Routledge, 2025).

[7] See Volume 4 (2024) of the *Australian Journal of Law and Religion*.

[8] These exceptions include scholars like Luke Beck and Renae Barker. For the rest of this paper, I will endeavour to not allow inconvenient facts to get in the way of my narrative.

distilled into actual legislation untainted by the personal policy preferences of the legislator. And perhaps worse, because natural law is purportedly based on unchanging and eternal moral truths built into the very fabric of the universe (and deducible through revelation or pure reason), it lacks the greatest virtue of consequentialist approaches: the ability to study, learn, and adapt through lived experience and accumulated evidence. In effect, natural law suffers from the fatal flaw of lacking inherent error detection and correction. A cursory look into its history shows its most prominent contemporary advocates repeatedly taking the wrong stance on some of the great moral issues of the time while confidently asserting that 'natural law' justifies their position. Whether it be slavery, religious tolerance, women's suffrage, the decriminalisation of homosexuality, voluntary assisted dying, and most recently, same-sex marriage and transgender equality, 'natural law' advocates have not been on the side of the just and merciful. Since natural law theories can be traced at least as far back as the pre-Socratics, it becomes reasonable to ask: if advocates are still trying and failing to make it run almost 2,500 years later, perhaps the problem is with the vehicle's engine, not the paint job?

Second, this paper discusses the Australian School's predominantly Christian approach to law and religion issues. In works by scholars such as Patrick Parkinson, Neil Foster, and Augusto Zimmerman, the consistent theme (sometimes implicitly, and other times, explicitly) is that Christianity and Christian values should form the backdrop to resolving current legal disputes and controversies. As an example of this theme in the Australian School, this paper focusses on two important books by members. It first examines the proposal by Alex Deagon in *A Principled Framework for the Autonomy of Religious Communities*[9] to recognise Australia as a 'Christian Democracy'. The paper argues that the fact such a proposal would almost surely be rejected if made in a democratic institution (like Parliament) or actually put to the voters (through a plebiscite or referendum) is fatal to the claim. The alternative, pragmatic neutrality, embraces pluralism, whereas a vision of Australia as a Christian Democracy guarantees that 'everyone is equal but Christians are more equal than others'. Next, the paper focusses on Joel Harrison's efforts to develop a 'post-liberal' theory of religious liberty. Harrison's 'theo-political' and Christian 'ecclesiological' account of religious liberty fails to recognise just how successful the liberal approach to religious freedom has been when considered from a historical perspective. Viewing religion as something that should be supported by civil authorities to enable 'human flourishing' fails to recognise the lessons of history: religion flourishes most when 'supported' by government the least. In response to both books, the paper re-engages the long-running debate over secularism and neutrality, and argues that, just like democracy is to political systems, neutrality is the worst of all relationships between state and religion; *except for the alternatives*. It argues that neutrality towards religion is achievable in the ways that matter in the real world even if the 'moderate hegemony of liberalism' is not 'neutral' in an abstract philosophical sense.

The theological orientation of the Australian School may make it distinctive, but also cabins off its appeal. Arguments premised on a belief in God (and often, the Christian God) are simply non-starters for non-believers, whose numbers (according to recent statistics) are growing and must be taken into account for democratic legitimacy. Thus, in the admittedly polemical sections that follow, I hope to show the limitations of the theological approach and why law and religion scholarship Down Under should be more than just oft-regurgitated exegeses of Aquinas and Augustine.

[9] Alex Deagon, *A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination* (Hart, 2023) ('*A Principled Framework for the Autonomy of Religious Communities*').

II. A DISCUSSION OF NATURAL LAW, IN WHICH I DON STILTS TO TALK NONSENSE

It is philosophy that supplies the heretics with their equipment.

—Tertullian, *The Prescriptions Against Heretics*[10]

The favourite pastime of members of the Australian School is rehearsing the baroque subtleties of natural law. For readers unfamiliar with the term, I am loathe (as a critic) to offer a definition, as even its supporters seem unable to agree on what exactly it means.[11] At least two major strands can be identified.[12] The first is 'classical' natural law which posits that 'God' created the universe with hard-coded (as in objectively *real*) standards of right and wrong, which humans can discern (largely trusting in their God-given consciences) to make good choices. It all gets more complicated when one has fun throwing around terms like *synderesis* or figuring out how our Original Sin-corrupted souls can trust our guts (Calvin's objection[13]), but in any event, the major unifying principle of this theme is 'we should believe in natural law because we believe in God, and He wouldn't leave us hanging'.[14] Many of the major figures in the Australian School are adherents to classical natural law theory and their work is replete with discussions of it.[15] The second strand is the 'new' natural law, which is usually ascribed

[10] Tertullian, *The Prescriptions Against Heretics,* tr SL Greenslade in SL Greenslade (ed), *Early Latin Theology: Selections from Tertullian, Cyprian, Ambrose, and Jerome* (SCM Press, 1956) 35.

[11] See Brian H Bix, 'Natural Law: The Modern Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 61. 'What makes a theory a "natural law" theory? There are almost as many answers to the question as there are theorists writing about natural law theory, or calling themselves "natural law theorists"': at 63–4; 'As we have seen from the preceding historical survey, "natural law" or the "law of nature" has had multiple connotations. Such divergence seems to be inevitable. Erik Wolf came to the conclusion that, in view of the varying meanings of both "nature" and "law", there are 120 conceivable definitions of natural law!': Howard P Kainz, *Natural Law: An Introduction and Re-examination* (Open Court, 2004) 55 citing Erik Wolf, *Das Problem der Naturreschtslehre: Versuch einer Orientierung* (Muller, 1955).

[12] This paper discusses 'classical' and 'new' natural law theories, but further subdivisions ('medieval', 'modern', 'natural rights', etc) are made by some scholars. See, eg, Douglas Kries, *The Problem of Natural Law* (Lexington Books, 2007) xix-xx. Along with sheer laziness, the desire for a streamlined discussion precludes me from entering further into these distinctions.

[13] See Kries (n 12) xvii. 'Theologians, particularly those of the Reformed tradition of Christianity, tend to reject natural law teaching because, as a concept imported into Christianity from arrogant philosophy, it underestimates the complete fallenness of human nature, including the human intellect's inability to grasp moral truth on its own'. 'John Calvin's is, of course, the most luminous name in the tradition that has come to be known as Reformed Protestantism. His reforming efforts were not focused principally or even explicitly on the various scholastic doctrines of natural law theory, but his teachings on the corruption of human nature because of original sin and the resulting inadequacies of human reason have resulted in a widespread criticism of all such doctrines within at least those Protestant traditions that stem from Calvin's Geneva, if not within Protestantism *tout court*': at 62.

[14] See Jeffrie G Murphy and Jules L Coleman, *Philosophy of Law: An Introduction to Jurisprudence* (Westview Press, rev ed, 1990) 15: 'Classical natural law theory can be understood as a commitment to the following two claims: (1) Moral validity is a logically necessary condition for legal validity — an unjust or immoral law being no law at all; and (2) The moral order is a part of the natural order — moral duties being in some sense 'read off' from essences or purposes fixed (perhaps by God) in nature.' Or, in more interesting prose, 'The law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original': William Blackstone, *Commentaries on the Laws of England* i: 41, quoted in Bix (n 11) 73.

[15] See, eg, Alex Deagon, 'Christian Natural Law and a Foundation for Religious Freedom: Love, the True, and the Good' (2024) 4 *Australian Journal of Law and Religion* 34 ('Christian Natural Law and a Foundation for Religious Freedom'); Constance Youngwon Lee, 'The Secularisation of Conscience: A Natural Law Critique' (2024) 4 *Australian Journal of Law and Religion* 57; Augusto Zimmerman, 'A Law Above the Law: Christian Roots of the English Common Law' (2013) 1(1) *Global Conversations* 85.

to John Finnis. Finnis, though a deeply devout Catholic, has strived to present a theory of natural law that does not necessarily require a belief in God and can instead ostensibly be built on a purely rational basis by reference to supposedly self-evident truths about what is required for humans to flourish.[16] If successful, this means that theists and non-theists alike should believe in natural law. Bertrand Russell and CS Lewis can shake hands in heaven! The Australian School has one prominent member, Jonathan Crowe, who is a devotee of the new natural law approach even if he differs with Finnis on some key points (and has waffled a bit recently on how much easier it is to believe in natural law if one already believes in God).[17]

The primary difficulty with classical natural law theory is that it depends on deep metaphysical and teleological commitments, each of which must be adopted, before one can believe in it. In the ancient Greek tradition, the theory depended on an elaborate metaphysical conception of 'souls' and how different 'parts' of the soul have different capacities and can be ranked hierarchically.[18] In the classical Christian natural law tradition, in addition to the existence of 'souls', one must also believe that there exists a supernatural entity ('God'), that that deity is intelligent, omnipotent, created the world and cares about what takes place in it,[19] assembled an unwritten list of rules for humans to follow while on it (in addition to whatever explicit revelations may have been handed down), that those unwritten rules are good, and that knowledge of those rules have been implanted into human hearts and minds.[20] For a modern rationalist, *each* of these metaphysical assertions would have to be independently established through logic and evidence before the question of what makes natural law 'obligatory' even arises.[21] As Howard Kainz explains,

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[16] See John Finnis, *Natural Law & Natural Rights* (Oxford University Press, 2nd ed, 2011). This paper devotes substantial space to Finnis' views on natural law as his are the most prominent non-theological arguments for its adoption.

[17] See Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019); Jonathan Crowe, 'Natural Law With and Without God' (2024) 4 *Australian Journal of Law and Religion* 17.

[18] See Kries (n 12) 48–9. See also Hans Kelsen, 'Plato and the Doctrine of Natural Law' (1960) 38 *Vanderbilt Law Review* 23. It is important not to dismiss the ancient Greek discussion of souls as simply metaphors for human consciousness. Platonic philosophy is 'realist' in the sense that souls, the ideal forms, and other (what we might call metaphorical) constructs *actually* (objectively) exist.

[19] Cf David Hume, 'Dialogues Concerning Natural Religion', in David Hume, *Writings on Religion* ed Anthony Flew (Open Court Publishing, 1992) 232. 'While we are uncertain whether there is one deity or many; whether the deity or deities, to whom we owe our existence, be perfect or imperfect, subordinate or supreme, dead or alive; what trust or confidence can we repose in them? What veneration or obedience pay them?'.

[20] See Mark Murphy, 'The Natural Law Tradition in Ethics' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2019 Summer Edition) <https://plato.stanford.edu/archives/sum2019/entries/natural-law-ethics/>. 'To summarize: the paradigmatic natural law view holds that (1) the natural law is given by God; (2) it is naturally authoritative over all human beings; and (3) it is naturally knowable by all human beings': at s 1.4; 'Classic natural law theorists had more leeway than their modern counterparts. Natural law was not a secondary analogate but real law, laid down by the Creator, and accompanied by serious *sanctions*': Kainz (n 11) 64 (emphasis in original); 'In order to say that what is by nature just or right is actually natural law, what is naturally right must be promulgated, for law implies promulgation. How is natural law promulgated? Thomas [Aquinas]. . . answers it by saying that God instills the natural law into the human mind: "The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him natural."': Kries (n 11) 54. Cf Friedrich Nietzsche, *Thus Spake Zarathustra* (Dover, 1999) 185: 'How he raged at us, this wrath-snorter, because we understood him badly! But why did he not speak more clearly? And if the fault lay in our ears, why did he give us ears that heard him badly? If there was dirt in our ears, well! Who put it in them? Too much miscarried with him, this potter who had not learned thoroughly! That he took revenge on his pots and creations, however, because they turned out badly . . .'.

[21] Cf Austin Farrer, 'Introduction' in G W Leibniz, *Theodicy* (Open Court Classics, 1996) 7: 'To many people now alive metaphysics means a body of wild and meaningless assertions resting on spurious argument. A professor of metaphysics may nowadays be held to deal handsomely with the duties of his chair if he is prepared to handle metaphysical statements at all, although it be only for the purpose of getting rid of them, by showing

> Obviously many of the classical theories . . . have at least implicit religious or theistic moorings. The existence of God and notions of divine law are either inferred with concomitant metaphysical arguments, or taken for granted as a faith commitment complementing the ethical system. A strictly secular natural-law theory would need to assert independence from faith commitments and also from a theistically-oriented metaphysics.[22]

But establishing any of these metaphysical propositions require entering the long-standing philosophical debates between theists and atheists, and thus a problem of near-endless recursion arises. We would have to move outside the pages of a law journal and attend a (surely more amusing) debate between Plantinga and Dawkins. In effect, classical natural law runs into a variation of Rawls' objection to bringing arguments that directly depend on 'comprehensive doctrines' into the 'public political forum';[23] one can't buy into those arguments without buying into the comprehensive doctrines that support them.[24] Legal arguments premised on classical natural law theory are doomed to fail from the outset to persuade anyone who does not already subscribe to a particular set of religious beliefs, which means there's a built-in limitation to their appeal in a secular democracy.[25] Natural lawyers in modern day secular Australia are a little like Trotskyites appearing before the World Economic Forum in Davos and wondering why the billionaire attendees don't seem inclined to listen.

On the other hand, the 'new' natural law theory (which is now almost as old as I am) asserts that anyone (indeed, *everyone*!) should be rationally persuaded by its account of human flourishing. Thus, the next section will turn to Finnis' and Crowe's accounts of basic human goods.

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them up as confused forms of something else. A chair in metaphysical philosophy becomes analogous to a chair in tropic diseases: what is taught is not the propagation but the cure'.

[22] Kainz (n 11) 88.

[23] See John Rawls, 'The Idea of Public Reason Revisited' in John Rawls, *The Law of Peoples* (Harvard University Press, 2001). This position is oft-criticised but oft-misunderstood. Rawls limits the 'public political forum' to judicial discourse, statements by government official, and political campaigning by candidates for public office (and their representatives): at 133–4. In addition, Rawls adds a proviso that religious arguments may be advanced for a policy as long as its advocates are ready to also advance secular arguments for the same policy. See Jonathan Chaplin, 'Beyond Liberal Restraint: Defending Religiously Based Arguments in Law and Public Policy' (2000) 33 *University of British Columbia Law Review* 617, 617.

[24] 'Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity': Rawls (n 23) 132. Indeed, depending on the circumstances and location, arguing the truth or falsity of religious beliefs in public may be considered anything from simply gauche to an actual incitement to violence.

[25] A natural law counter-argument to this point could build off MacIntyre, to the effect that meaningful political discourse *requires* a shared substantive tradition like natural law. If this is true, the logical conclusion is that we do not have meaningful political discourse in the West given the vast and disparate ideological, religious, and political traditions operative in the public forum today. It then follows that *modus vivendi* liberalism (a 'thin' account of the good) is the closest we can come to a 'lowest common denominator' understanding that allows these (non-meaningful) political discourses to exist without violence or suppression of basic freedoms. See generally John Gray, *Two Faces of Liberalism* (New Press, 2000).

A. A Critique of Basic Goods, in Which I Become Indefensible

> *Talk nonsense, but talk your own nonsense, and I'll kiss you for it. To go wrong in one's own way is better than to go right in someone else's. In the first case you are a man, in the second you're no better than a bird.*
>
> —Dostoyevsky, *Crime and Punishment*[26]

The fundamental premise of Finnis' God-free argument for natural law is that there exists a discrete, identifiable set of 'basic goods' that are essential for 'human flourishing'. Once these basic goods are articulated, they provide the moral recipe for evaluating and formulating positive legal prescriptions to ensure that individuals and communities will prosper. The good news, according to Finnis, is that we don't have to argue about what's in the set of basic goods; they are 'self-evident',[27] and he has already written the list out for us! The seven are life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion.[28] '[T]hose seven purposes are all of the basic purposes of human action, and any other purpose which you or I might recognize will turn out to represent, or be constituted of, some aspect(s) of some or all of them.'[29]

Finnis spends several pages of *Natural Law & Natural Rights* establishing, ostensibly just as an example, why knowledge is a self-evident basic good:[30]

> Is it not the case that knowledge is really a good, an aspect of authentic human flourishing, and that the principle which expresses its value formulates a real (intelligent) reason for action? It seems clear that such indeed is the case, and that there are no sufficient reasons for doubting it to be so. The good of knowledge is self-evident, obvious. It cannot be demonstrated, but equally it needs no demonstration.[31]

And again:

> It is obvious that those who are well-informed, etc., simply *are* better-off (other things being equal) than someone who is muddled, deluded, and ignorant, that the state of the former is better than the state of the latter, not just in this particular case

[26] Fyodor Dostoyevsky, *Crime and Punishment* (1866) pt 3, ch 1. This is, of course, an example of a devil quoting literature for his own purposes, as Dostoyevsky is also responsible for a famous remark that could be construed as supportive of natural law. See Dostoyevsky, *The Brothers Karamazov* (Bantam, 1981) 80: 'And here he added parenthetically that if there was any natural law, it was precisely this: Destroy a man's belief in immortality and not only will his ability to love wither away within him but, along with it, the force that impels him to continue his existence on earth. Moreover, nothing would be immoral then, everything would be permitted, even cannibalism'.

[27] Finnis, *Natural Law & Natural Rights* (n 16) 92. See Kries (n 12) 140: 'According to the "new" natural law theory, there are a number of human goods, the securing of which human reason naturally apprehends as self-evident. They are not derived from previous propositions but are said to be self-evident precisely because they have the characteristic of underivability'.

[28] See Finnis, *Natural Law & Natural Rights* (n 16) 86–9.

[29] Ibid 92.

[30] See Kainz (n 11) 48: '[T]he reader is left with the question why, if this proposition is so self-evident, such lengthy explanations are necessary'.

[31] Ibid 64–5.

> or that, but in all cases, as such, universally, and *whether I like it or not*. Knowledge is better than ignorance. Am I not compelled to admit, willy-nilly?[32]

Lest any 'Doubting Patrick' come along and quibble, we then learn that '[s]cepticism about this basic value is indefensible'.[33] The reason is that any assertion contrary to the proposition that knowledge is a universal basic human good contains within it the hidden premise that the assertion should be believed because it is *true*, and that assertion would not be made unless the speaker was 'committed to the proposition that one believes that that truth is a good worth pursuing or knowing' in the first place.[34] Catch-22! It's a cute tactic, a little like when an undergraduate philosophy student says 'there are no absolutes!' and the teacher says 'but that's an absolute statement', or when 'all things in moderation' is met with 'including moderation?'[35]

But, at the risk of becoming indefensible, one might, just for the sake of argument, feel compelled to ask: is it 'true' that truth is *always* ('in all cases') better than falsehood and that knowledge is better than ignorance when it comes to human flourishing? When the underground member of the French Resistance is asked by the Nazi patrol whether there are any Jews hidden under the tarp in the wagon, would a true answer contribute to anyone's (the Resistance fighter, the Jews, or the Nazis) human flourishing? It is *true* that if certain chemicals are mixed in a certain way, a gel that clings to the skin while burning can be manufactured, but no one (perhaps except Dow Chemical) flourished from the deployment of napalm during the Vietnam War. Does *knowledge* of how to construct and launch intercontinental ballistic nuclear missiles and biological weapons contribute to human flourishing more than if we were 'muddled, deluded, and ignorant' about how to make such things?[36] 'A thing could be *true*,' writes Nietzsche, 'although it were in the highest degree injurious and dangerous; indeed, the fundamental constitution of existence might be such that one succumbed by a full knowledge of it — so that the strength of a mind might be measured by the amount of "truth" it could endure.'[37]

Having ostensibly, through a clever bit of language and logic, established knowledge as a basic good, Finnis does not go on to justify the other six goods on his list. He does tell us that they are self-evident in the sense that they are 'grasped by intelligent reflection on data presented by experience'.[38] This makes one assume that the 'outlines of everything one could reasonably want to do, to have, and to be'[39] have been (despite millennia of contestation in religion, philosophy, and politics) conclusively articulated after an in-depth exploration of all human history and society in all times and in all contexts, and not just by looking out one's office window in Oxford and having a go.[40] Curiously, there is actually an entire scholarly sub-field devoted to empirical studies of human happiness and flourishing,[41] but Finnis makes no

[32] Ibid 72 (emphasis in original).
[33] Ibid 73.
[34] Ibid 74–5.
[35] This saying has been attributed to Oscar Wilde, along with many others. I am muddled and ignorant about who actually said it first.
[36] One might plausibly argue that nuclear technology, for example, also allows for the generation of electricity and is crucial for various medical tests and treatments that save thousands of lives every year.
[37] Friedrich Nietzsche, *Beyond Good and Evil,* tr Helen Zimmerman (Dover, 1997) 28.
[38] See Bix (n 11) 87.
[39] Finnis, *Natural Law & Natural Rights* (n 16) 97.
[40] See Kries (n 12) 140–3 for a critique of 'self-evident moral propositions' from within the natural law tradition.
[41] See, eg, the *Journal of Happiness Studies* (Springer).

mention of it or things like surveys, questionnaires, polling, and so forth in his *ex nihilo* account of what people 'need' in order to live fulfilling lives.

Thus, a quibbler might say that many of the basic goods Finnis identifies are personal and subjective values, not objective universal necessities to have a good life. Despite 'friendship' being on Finnis' list (something plausibly supported by empirical research[42]), there have always been people who find their lives more fulfilling by *avoiding* other people as much as possible;[43] in the past they would be called hermits and recluses, though now labelling them extreme introverts is more common. Initially, it makes sense that 'life' is on the list—it is hard to 'flourish' when you're dead! But what do we make of the martyrs and heroes who knowingly sacrificed their lives in pursuit of something they thought was more important (faith, duty, etc.)? Perhaps they did not exercise 'practical reasonableness' and thus failed to develop a 'coherent plan of life'?[44] Nor does the list account for what in other times and other cultures would have been seen as *the most important characteristics* of what it takes to be a flourishing human being, such as having 'honour' in certain medieval cultures[45] or embodying 'filial piety' in Confucian-influenced cultures.[46] And notably, several years after announcing the initial list, Finnis announced an *additional* basic good: (opposite-sex only) marriage.[47] One must assume that, during the interval, it was paradoxically both a self-evident and a well-hidden 'basic good'.

Instead of Finnis' seven (later eight) self-evident basic goods, Crowe has nine: life, health, pleasure, friendship, play, appreciation, understanding, meaning, and reasonableness.[48] 'Each of these goods plays a central role in social institutions across many different cultures. A life affording full participation in these goods is obviously more fulfilling than one where they are absent or denuded.'[49] At first glance, a major advantage Crowe seems to have over Finnis is an understanding that the things people value are socially embedded and historically contingent:

> The way we discover the nature of the basic goods and principles of practical reasonableness is by interpreting social practices. We will generally start looking at practices in our own community, asking what goals we value for their own sake and what constraints we place on practical reasoning. We will then compare these

[42] See Robert Waldiner and Marc Schulz, 'What the Longest Study on Human Happiness Found is the Key to a Good Life' (2023, 19 January) *The Atlantic* (reporting the results of the Harvard Study of Development into 'What Makes People Flourish' which concluded 'having healthy, fulfilling relationships').
[43] For those who believed spiritual flourishing could come from isolation, see, eg, Wolfgang Riehle, *Hermits, Recluses, and Spiritual Outsiders in Medieval England,* tr Charity Scott-Stokes (Cornell University Press, 2014); Henry David Thoreau, *Walden; or, Life in the Woods* (Ticknor & Fields, 1854). A more recent example is Ken Smith and Will Millard, *The Way of the Hermit: My Incredible 40 Years Living in the Wilderness* (Hanover Square, 2024). 'I've spent the majority of my life living outside the conventions of mainstream society, and I'll tell you what I think is weird, and it ain't the hermit. It's how entire generations of people have been conned into believing that there is only one way to live, and that's on-grid, in deepening debt, working on products you'll probably never use, to line the pockets of people you'll never meet, just so you might be able to get enough money to buy a load of crap you don't need, or, if you're lucky, have a holiday that takes you to a place, like where I live, for a week of the happiness I feel every day': Smith and Millard (n 43) quoted in Laurie Hertzel, 'What One Man Learned Living Alone in the Wilderness for 40 Years', *Washington Post* (online, 31 May 2024).
[44] Finnis, *Natural Law & Natural Rights* (n 16) 105.
[45] See, eg, James Bowman, *Honor: A History* (Encounter Books, 2007).
[46] See, eg, Alan KL Chan and Sor-Hoon Tan (eds), *Filial Piety in Chinese Thought and History* (Routledge, 2004).
[47] See Finnis, *Natural Law & Natural Rights* (n 16) 448. This will be discussed in much further detail below.
[48] See Crowe, *Natural Law and the Nature of Law* (n 17) 35.
[49] Ibid.

> ideas with our intuitions about particular cases and perhaps also the practices of other communities that we know about. . . . Human history is, at least in part, the story of the human quest to work out how best to live flourishing and fulfilling lives in a range of different natural, social and economic environments.[50]

And yet, somehow, Crowe too reaches the idea that *his* list of basic goods is an overall better answer to the questions of what it takes for humans to flourish: '[B]y observing the practices of different human communities we can identify those fundamental values and principles that humans have in common. These universal precepts have a plausible claim to be regarded as objective components of human flourishing.'[51] Crowe might be looking out an office window in Toowoomba rather than Oxford, but both he and Finnis share confidence they can list the elements of the good life simply by 'observing' humanity, despite neither man's work showing a whit of sociology, anthropology, or interest in empirical accounts of human behaviour and happiness.[52] And similarly, both accounts are almost hopelessly idealistic, completely sidelining a myriad of less savoury things that humans have *also* desired and fought and died for throughout history, such as wealth, power, control, fame, influence, prestige, sex, and success. Do these things help people flourish? We can be sanctimonious and say no, but as a group of young Newcastle philosophers sagely noted many years ago:

> *You say that money, isn't everything*
> *But I'd like to see you live without it*[53]

Armchair theorising about what humans want and need can only result in an extended look in the mirror.[54] *These are the things that I, and people like me, value, and I am fulfilled, so these things must be what everyone everywhere forever needs in order to be fulfilled*. As Kries explains:

> If one asserts that this [basic good] is self-evident, that one 'just knows' it to be so, how does one respond to the person who says, 'I don't see it,' or 'I don't just seem to know it'? One is left responding, 'Yes, it is self-evident, but you just don't see it,' or 'You really do know this, but you just don't recognize it.' And at this point it is impossible to see how the discussion can be advanced.[55]

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[50] Ibid 6.

[51] Ibid 7. 'It is not that the basic goods are valuable for humans because humans are disposed to value them; rather, the fact that humans are disposed to value the goods provides evidence of their value for humans': at 33. To be fair (something I avoid doing when possible), Crowe does explicitly 'doubt that there is one uniquely best account of the basic values': at 36. Still, the general approach of listing basic human goods and then debating those lists begs the question: what if humans consistently value the *wrong* things and aren't flourishing as much as they could? If instead they valued other things that are not on the list of 'basic goods', would they flourish *more* than they do now? Because there are no objective or empirical ways to measure 'human flourishing' (as opposed to, say, survey-based self-reports of happiness), these questions cannot be answered.

[52] Cf Scott Greer, *The Logic of Social Inquiry* (Transaction Publishers, 1989) 25–6: '[T]he ancient epigram is still valid: *de gustibus non disputandum est*. For disputes over taste cannot be settled logically or empirically, since subjective states cannot be proven to be identical. Thus a wide range of human experience cannot be explained by social science, nor can beliefs about it be objectively validated.'.

[53] Silverchair, 'Tomorrow', *Frogstomp* (Murmur Columbia, 27 March 1995).

[54] The classic example is Aristotle, a philosopher, unsurprisingly asserting that 'the life of the intellect is the best and pleasantest life for man, inasmuch as the intellect more than anything else is man; therefore this life will be the happiest': Aristotle, *The Nicomachean Ethics* (Wordsworth Editions Limited, 1996) 275. See also James Rachels, *The Elements of Moral Philosophy* (McGraw-Hill, 2nd ed, 1993) 16–17: 'Our own way of living seems so natural and right that for many of us it is hard to conceive of others living so differently. And when we do hear of such things, we tend immediately to categorize those other peoples as "backward" or "primitive"'.

[55] Kries (n 12) 157.

And of course, all of this theorising is based on the premise that 'human flourishing' (which an embrace of the 'basic goods' is supposed to result in) has an ascertainable meaning, whereas a deep exploration of the term would result in just as many different answers as there are people in the world.[56] 'Even if morality is necessarily "about" vital human interests as they present themselves in a social context, there is striking philosophical disagreement about what makes any interest vital or central or basic . . .'[57] Abstract reason alone cannot answer the question of what the ends of human life *are*, either in a comprehensive (empirical) descriptive sense as the new natural law promises or in a normative sense as implied by classical natural law.[58] Law can be handy as an instrumental means to achieve any given end, but not even the 'new natural law', despite its ominous promise to be 'the master principle of morality',[59] can tell us what those ends must be.

B. A Look at How the Legislative Sausage is Made, In Which I'm Glad to Be a Vegetarian

> *Someone has dared to compare God's course of action with that of Caligua, who has his edicts written in so small a hand and has them placarded in so high a place that it is not possible to read them.*
>
> —Leibniz, *Theodicy*[60]

Let us now assume, just for the sake of argument, that we *can* rationally identify the discrete list of basic human goods necessary for human flourishing. What then? We run into what I will call natural law's 'interface' problem: how to objectively turn high-level philosophical abstractions like 'basic goods', 'human flourishing', and the 'common good' into policy

[56] See Murphy and Coleman (n 14) 13: 'The modern mind finds it difficult to accept that people have ends or purposes other than those they have set or accepted for themselves'; Marjorie Grene, *Introduction to Existentialism* (University of Chicago Press, 1963) 11 (emphasis added): 'Values are created, in other words, only by the free act of a human agent who *takes* this or that to be good or bad, beautiful or ugly, in the light of his endeavor to give significance and order to an otherwise meaningless world'; John-Paul Sartre, *Being and Nothingness* tr Hazel E Barnes, *Being and Nothingness* (Gramercy Books, 1994 [1956]) 443–4 :'[H]uman reality in and through its very upsurge decides to define its own being by its ends. It is therefore the positing of my ultimate ends which characterizes my being and which is identical with the sudden thrust of the freedom which is mine'; Gray (n 25) 21: 'Common experience and the evidences of history show human beings thriving in forms of life that are very different from one another. None can reasonably claim to embody the flourishing that is uniquely human. If there is anything distinctive about the human species, it is that it can thrive in a variety of ways'.

[57] Murphy and Coleman (n 14) 71.

[58] Cf Bertrand Russell, *Why I Am Not a Christian* (Simon & Schuster, 1957) 60: 'All moral rules must be tested by examining whether they tend to realize ends that we desire. I say ends that we desire, not ends that we *ought* to desire. What we 'ought' to desire is merely what someone else wishes us to desire'. See H Tristam Engelhardt Jr, 'Taking Moral Difference Seriously: Morality after the Death of God' in Douglas Farrow (ed), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (McGill-Queen's University Press, 2004) 134: 'A metaphysical and moral chasm thus opens between those whose point of reference is a transcendent personal Creator and those who regard all of existence as ultimately purposeless'.

[59] John Finnis, 'Natural Law: The Classic Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 28 ('Natural Law: The Classic Tradition').

[60] GW Leibniz, *Theodicy* (Open Court Classics, 1996) 227.

preferences, judicial precepts, and, ultimately, legislation. In other words, how do we get from 'natural law' into *actual* law?[61] My argument is that we cannot get there from here.

Finnis tells us that 'the principles of natural law . . . are traced out not only in moral philosophy or ethics and "individual" conduct, but also in political philosophy and jurisprudence, in political action, adjudication, and the life of the citizen'.[62] Assume then, as a thought experiment, that every member of Parliament has duly read their *Natural Law & Natural Rights* and is convinced by his list of the seven (or maybe eight?) basic goods required for human flourishing. Is this the beginning of a new golden age of consensus about which polices should be pursued, which problems should be solved, and how various crises should be addressed? Take the thought experiment a step forward. If a bill to authorise voluntary assisted dying for the terminally ill comes before this legislative body, do they vote *no* because 'life' is on the list and the bill would hasten the end of a life? Or do they vote *yes* because a life perhaps devoid of 'play' or 'aesthetic experience' is less flourishing and all the items on the list are to be assumed equal?

At its core, the problem is this: to assemble an ostensibly 'universal' list of basic goods, they must be described at a high level of generality; but at such a high level of generality, they become largely useless for resolving specific problems.[63] At best, these lists of 'basic goods' provide a 'rough list of things to consider' (presumably, alongside cost, effectiveness, political repercussions, etc.) while at worst they become meaningless slogans. Pursuing the 'common good' can easily become what in the US are called 'Motherhood and Apple Pie' promises; things no one would disagree with because everyone can easily interpret them to mean what they want them to mean. The basic goods create enough interpretive ambiguity to allow partisans from every point on the political spectrum to plausibly justify the positions they would have held anyway.

At least in the above example of voluntary assisted dying, there is a clear connection to at least one basic moral good (life); but this will not be the case in the vast majority of issues that actual voters, judges, and legislators must resolve. More money for highways or for schools? Invest in coal or solar — or maybe nuclear? A new stadium or cost of living relief? Tax benefits for renters or for owners? It is a long bow to draw to connect these questions to the basic goods, and truly a stretch to assume that, even if it were done, clear answers would be forthcoming. But these are the sorts of questions that drive real-world politics and lawmaking. Outside of a narrow subset of hand-picked moral issues (typically, euthanasia, abortion, and same-sex marriage), natural law has little if anything to say about the things that concern most people, most of the time.[64] This is the interface problem between natural law and positive law.

[61] Or as Finnis explains about the natural law tradition, 'Its guiding purpose is to answer the parallel questions of a conscientious individual or a group or a group's responsible officer (eg a judge): "What should I do?" "What should we decide, enact, require, promote?"': Finnis, 'Natural Law: The Classic Tradition' (n 59) 3–4. For some writers in the natural law tradition, this question is of no particular import, as their focus is on what it takes, as an individual, to live a good, moral life. See Bix (n 11) 62.

[62] Finnis, *Natural Law & Natural Rights* (n 16) 23-24.

[63] Throwing other vague concepts like 'practical reasonableness' or the 'common good' into the pot does not fix this problem.

[64] This criticism can be made of the natural law tradition as a whole: the vast majority of it is abstract and theoretical, with little guidance on how it should actually be implemented. But as the next section shows, when it is implemented, the results are not appealing.

C. A Recital of the Dangers of Natural Law Righteousness, In Which I Inexplicably Discuss 1990s' Nebraska

To do evil a human being must first of all believe that what he's doing is good, or else that it's a well-considered act in conformity with natural law.

—Alexander Solzhenitsyn, *The Gulag Archipelago*[65]

From this point forward, let us put theoretical objections to one side and turn to a crucial question: when the natural law tradition spoke on matters of pressing moral concern, did it reach the right answers? If we judge a philosophy by its fruits, does the history of natural law lend us confidence that — intellectual thrust and riposte aside — it consistently (or at least generally) came out on the side of the angels? And if the answer is in the negative, if the natural law tradition repeatedly reached the *wrong* outcome on the great moral controversies of the day, can we not finally set it aside and move on to a better alternative? When faced with a difficulty, a lawyer makes a distinction; but at what point do we stop trying to salvage a theory that is fundamentally wrongheaded?

In the Western tradition, natural law thinking can be traced to the Stoics, but most accounts choose to start with Aristotle.[66] In Aristotle's view, we can find in nature itself a set of fixed, immutable principles, and should strive to live in accord with them. One of those universal principles is that some people are simply born to be slaves, and, in accordance with the natural order of things, should submit to a slave master.[67] Alas, Aristotle was not idiosyncratic in his views that natural law endorsed slavery, as Howard Kainz demonstrates:

> Aristotle condoned slavery for 'natural slaves,' including many non-Greeks; St. Paul in his epistle, *Philemon*, exhorts a slave master to be kind to a runaway slave converted to Christianity and returned by Paul to his master; Aquinas, following Aristotle, allows slavery in cases where it will be 'useful for someone to be ruled by a wiser person'; Grotius waffles regarding slavery, approving its legitimation by Aristotle and St. Paul, but also finds the institution of slavery objectionable; Pufendorf has no problem with slavery, and seems to think that many or most slaves have become enslaved through free choice, as a means of subsistence.[68]

Slaveholders in the American South, although by no means natural law theorists on par with those listed above, also found their practices divinely sanctioned through scripture.[69]

Finnis notes correctly that '[t]he principal bearer of an explicit theory about natural law happens, in our civilization, to have been the Roman Catholic Church.'[70] But on what today seems like such an *obvious* question — should people be allowed to have their own religious

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[65] Alexander I Solzhenitsyn, *The Gulag Archipelago 1918-1956: An Experiment in Literary Investigation,* tr Thomas P Whitney (Harper & Row, 1974) 173.
[66] Kainz (n 11) 1, 5.
[67] Ibid 7.
[68] Ibid 89. See also at 90: '[c]ertainly the variety of positions regarding slavery has been a major source of cynicism about natural law'.
[69] See, eg, Donald G Mathews, '"Christianizing the South": Sketching a Synthesis' in Harry S Trout and DG Hart, *New Directions in American Religious History* (Oxford University Press, 1997) 89–90.
[70] Finnis, *Natural Law & Natural Rights* (n 16) 124. See also at vi: 'I refer occasionally to the Roman Catholic Church's pronouncements on natural law, because that body is perhaps unique in the modern world in claiming to be an authoritative exponent of natural law'.

beliefs — it took the Catholic Church approximately *nineteen centuries* as natural law's 'principal bearer' to finally reach that conclusion.[71] Indeed, for the majority of that span, the idea was not even seriously considered:

> To the medieval church and papacy, coexistence with heretics was unthinkable, and its possibility was never considered. Thus it was only with the appearance and steady expansion of Protestantism in the sixteenth century that ecclesiastical authorities, secular rulers, and European intellectuals were forced for the first time to confront the issue of reconciling themselves to some degree of toleration and coexistence.[72]

The consequences of 'natural law' getting religious liberty wrong for so long prior to that point are well known to history: crusades, inquisitions, persecutions, and enormous societal disruptions. As students of history, of course, we also know that's an enormously over-simplistic account. Political, cultural, institutional, economic, and other macro-level causes can be invoked for the great and bloody wars and repressions of medieval Europe. But as philosophers, the question remains: how could 'rational', 'universal', and 'objective' natural law struggle so much and for so long with the idea of simply letting people believe what they want to believe?

Just as natural law entertained the notion that some people were inferior to others (on the basis of non-citizenship, race, or capture in war) and should be enslaved, it also long entertained (and in some quarters still entertains) the notion that some people are inferior to others because of their sex. The subordination of women in the Western world has long been rhetorically justified as a 'natural' outcome of different God-given attributes at Creation. Whether it was the right to own property, to vote, or to govern, women's movements often had to overcome natural law accounts of their inferiority (or 'complementary' roles) in order to make social progress. And again, we see that the institutions most identified with natural law are the same institutions most reluctant to admit women as full and equal partners. Kainz notes:

> During the 1960s an additional impetus towards a renewed interest in, or reaction against, natural law, arose from the publication of Pope Paul VI's encyclical letter *Humanae vitae*, in which the People supported his opposition to artificial contraception by appealing to Thomistic natural-law theory as well as to religious or theological considerations. The predictable reactions by proponents of birth control against the papal pronouncement were complemented by arguments by ethicists against the very idea of natural law, which could lead to allegedly idiosyncratic interpretations of human sexuality. But Catholic moralists such as Germain Grisez and John Finnis came to the Pope's defense, developing 'natural law' arguments against contraception, as well as against homosexuality, abortion, and other issues on which the Church had taken a stand.[73]

Ideas and beliefs that may seem abstract and philosophical in one sense have a way of filtering down with real consequences. I was a teenager in a very conservative American State

[71] The Catholic Church formally endorsed religious freedom with the release of *Dignitatis Humanae* in 1965. Prior to that, '[t]he Church had long resisted the normative idea of liberal religious freedom in both its individual and societal expressions': Zachary R Calo, 'Catholic Social Thought, Religious Liberty and Liberal Order' in Md Jahid Bhuiyan and Darryn Jensen (eds), *Law and Religion in the Liberal State* (Hart, 2020) 54.
[72] Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton, 2006) 5.
[73] Kainz (n 11) xiv-xv.

(Nebraska) in the 1990s when a phrase popularised by Pat Buchanan at the Republican National Convention in 1992 entered the lexicon: 'culture war'.[74] I remember quite vividly newspaper op-eds and letters to the editor filled with screeds about why women and gay men shouldn't be allowed in the military. Sometimes these writers justified their positions with absurd (but secular) fears: 'what if a female sailor is in a submarine and gets pregnant?' and 'what if having a gay soldier destroys a combat unit's morale right before a battle?' were memorable talking points. But often these writers invoked what was 'natural': it was allegedly 'unnatural' to expect women to show strength and courage on a battlefield, and 'unnatural' homosexual conduct should be grounds for discharge from the military (which it was, until the infamous 'Don't Ask, Don't Tell' compromise). One of the first court cases as I worked on as a young law student was a (failed) constitutional challenge to Nebraska's ban on gay couples fostering or adopting children.[75]

Natural law's most famous modern advocate, Finnis, was a leader in the anti-gay movement during this time period. In 'expert witness' testimony and affidavits, he participated in Colorado's 1993 defence of a state law that prohibited municipalities from making discrimination against gay, lesbian, and bisexual people illegal.[76] In subsequent journal articles, he wrote about what he called the 'standard modern position' on homosexuality:

> States which adhere to the standard modern position make it clear by laws and policies . . . that the state has by no means renounced its legitimate concern with public morality and the education of children and young people towards truly worthwhile and against alluring but bad forms of conduct and life. Nor have such states renounced the judgment that a life involving homosexual conduct is bad even for anyone unfortunate enough to have innate or quasi-innate homosexual inclinations.[77]

And a few pages later:

> The standard modern position involves a number of explicit or implicit judgments about the proper role of law and the compelling interests of political communities, and about *the evil of homosexual conduct*. Can these be defended by reflective, critical, publicly intelligible and rational arguments? I believe they can.[78]

Finnis' 'reflective, critical, publicly intelligible and rational arguments' about the 'evil' of homosexual conduct are infused with natural law reasoning. He writes at length about how the usual suspects of ancient natural law thinkers (including Aristotle) condemned homosexuality, stating that they made 'the very deliberate and careful judgment that homosexual conduct . . .

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[74] Pat Buchanan, 'Culture War Speech: Address to the Republican National Convention' (Speech, Republican National Convention, 17 August 1992).

[75] See *In re Adoption of Luke*, 640 NW 2d 374 (2002). The ruling was finally overturned in *Stewart v Heineman*, 296 Neb 262 (2017), the 'last State ban on adoption or fostering by LGBT people in [the] U.S. to fall': American Civil Liberties Union, 'Nebraska Supreme Court Strikes Down Ban on Gay and Lesbian Foster Parents' (Press Release, 7 April 2017) available at <https://www.aclu.org/press-releases/nebraska-supreme-court-strikes-down-ban-gay-and-lesbian-foster-parents>.

[76] See Randall Baldwin Clark, 'Platonic Love in a Colorado Courtroom: Martha Nussbaum, John Finnis, and Plato's Laws in *Evans v Romer*' (2000) 12 *Yale Journal of Law and the Humanities* 1. See also *Romer v Evans*, 517 US 620 (1996).

[77] John M Finnis, 'Law, Morality, and Sexual Orientation' (1995) 9 *Notre Dame Journal of Law, Ethics and Public Policy* 11, 14 ('Law, Morality, and Sexual Orientation').

[78] Ibid 17 (emphasis added).

is radically incapable of participating in, actualizing the common good of friendship…'.[79] Indeed, as mentioned earlier, so worked up does Finnis get about same-sex couples that he revises his initial list of the 'basic goods' to add 'marriage'.[80] Of course, he means *only* opposite-sex marriage:

> The deliberate genital coupling of persons is repudiated . . . It is not simply that it is sterile and disposes the participants to an abdication of responsibility for the future of humankind. Nor is it simply that it cannot *really* actualize the mutual devotion which some homosexual persons hope to manifest and experience by it, and that it harms the personalities of its participants by its disintegrative manipulation of different parts of their one personal reality. It is also that it treats human sexual capacities in a way which is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage in the understanding that its sexual joys are not mere instruments or accompaniments to, or more compensations for, the accomplishment of marriage's responsibilities . . . Homosexual orientation in this sense is, in fact, a standing denial of the intrinsic aptness of sexual intercourse to actualize and in that sense give expression to the exclusiveness and open-ended commitment of marriage as something good in itself. All who accept that homosexual acts can be a humanly appropriate use of sexual capacities must, if consistent, regard sexual capacities, organs and acts as instruments for gratifying the individual "selves" who have them. Such an acceptance is commonly (and in my opinion rightly) judged to be *active threat to the stability of existing and future marriages*.[81]

Crowe aptly notes that it seems awfully convenient that the 'timeless and unchanging goods [Finnis] describes just happen to support his highly conservative Catholic worldview—including his strong opposition to contraception, premarital sex, abortion, and same-sex marriage'.[82] But I have already discussed the inherent subjectivity involved in natural law accounts; the crucial point here is that natural law accounts are *often wrong* and *often deeply problematic for society*. An account of homosexuality as 'evil' and an 'active threat' can mean one thing in the pages of a scholarly journal, but a very different thing in the context of a political environment in which a Matthew Shephard or a Brandon Teena can be murdered in anti-LGBTIQ+ hate crimes.

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[79] Ibid 28 (emphasis omitted).

[80] See Finnis, *Natural Law & Natural Rights* (n 16) 447: 'Marriage is a distinct fundamental human good because it enables the parties to it, the wife and husband, to flourish as individuals and as a couple, both by the most far-reaching form of togetherness possible for human beings and by the most radical and creative enabling of another person to flourish, namely the bringing of that person *into existence* as conceptus, embryo, child and eventually adult fully able to participate in human flourishing on his or her own responsibility.' This may astonish Finnis and JD Vance of 'childless cat ladies' fame, but some individuals do *not* find it self-evident that marriage and parenthood will lead to human flourishing. Marx, for example, said '[t]here is no greater stupidity than for people of general aspiration to marry and so surrender themselves to the small miseries of domestic and private life': David McLellan, *Karl Marx* (Penguin Books, 1975) 11. Marriage is a good example of how a 'self-evident universal basic good' is of subjective and contestable value.

[81] Finnis, 'Law, Morality, and Sexual Orientation' (n 77) 32 (emphasis added).

[82] Crowe, *Natural Law and the Nature of Law* (n 17) 4. See also at 47: '[t]here is much that is puzzling about the marital good. In the first place, when viewed within Finnis's wider theory of the basic goods, it smacks of *ad hocery*. A basic good, for Finnis, is a good that is valuable in and of itself and cannot be reduced to any other good. However, it is unclear what the marital good adds to a theory of the basic goods that already includes such values as friendship, play and spirituality'.

D. On Error Detection Mechanisms, in Which I Praise Flip-Flopping

The effectiveness of a doctrine does not come from its meaning but from its certitude. No doctrine however profound and sublime will be effective unless it is presented as the embodiment of the one and only truth.

—Eric Hoffer, *The True Believer*[83]

A cyclical pattern emerges every time a new societal consensus is formed on a moral issue with which 'natural law' has been proven wrong about: advocates maintain that natural law *principles* are correct, it's just that there were simply mistakes made in their *interpretation* due to erroneous reasoning or insufficient knowledge (which are now corrected). A new focus is found. Condemnation of birth control pills gives way to condemnation of homosexuality in general, which gives way to condemnation of same-sex marriage in particular, which now, apparently, gives way to condemnation of transgender rights.[84] For the latter, the underlying argument is the same: there's something 'natural' and 'essential' about male and female bodies, such that the binary status quo must be maintained despite changing understandings of gender as a social construct. The cycle will recur in a few years when another social consensus is reached.[85] In this way, natural law comes across as more of a 'conservative worldview' or 'general disposition towards the status quo' or '1950s nostalgia' than a safe and principled guide to moral virtue.

A key reason for the problems of natural law theory is that it lacks inherent error correction.[86] Like a software program that cannot be debugged or a scientific experiment that cannot be replicated, there is no way to test whether its premises are true. Because it consists of a series of abstract theological and philosophical propositions, it is not grounded in reality and its promises are not subject to empirical verification. Like all deontological systems, it invites an endless discourse consisting of logic and language games detached from concern about the real-world consequences of its pronouncements. Because it is an abstract system of allegedly eternal and universal laws, it cannot logically take into account developments in psychology, sociology, or history. For a system in which knowledge is a self-evident basic good, natural law is, by definition, incapable of incorporating new knowledge. Why would it? It's allegedly perfect as is.

What a deontological theory like natural law lacks, a consequentialist theory has in spades. Take, for example, Mill's harm principle — the proposition that the criminal law should not be invoked to prohibit conduct unless a non-consenting individual is harmed by that conduct.[87]

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[83] Eric Hoffer, *The True Believer* (Time Incorporated, 1963) 83–4.

[84] Cf Walter Lippman, *A Preface to Morals* (MacMillan, 1964) 82: 'The family is the inner citadel of religious authority and there the churches have taken their most determined stand. Long after they had abandoned politics to Caesar and business to Mammon, they continued to insist upon their authority to fix the ideal of sexual relations'.

[85] Exactly 20 years ago, Kainz listed the following 'controversial moral problems . . . which are susceptible of clarification by natural law': abortion, contraception, homosexuality, cohabitation, assisted suicide, terrorism, affirmative action, stem-cell research, and political correctness: Kainz (n 11) 116. Apart from abortion in the United States and political correctness (now relabelled 'woke' or 'cancel culture'), none of these issues are particularly controversial in mainstream Western politics.

[86] In other words, the peculiar problem with advocates of natural law is not they are the *only* people to have taken deeply problematic stances on moral issues that subsequent members of the same tradition later see as regrettable — we can find examples of that phenomenon in every moral tradition — but that the natural law approach contains no inherent logic for determining *when* or *why* it has gone wrong and how to keep it from happening again.

[87] JS Mill, *On Liberty* (Norton Critical Edition, 1975) 11.

We can interrogate this from both a conceptual level (what types of burdens and intrusions should count as 'harms'?[88]) but *also* from an empirical level (are our fears of harm actually warranted and have unanticipated harms manifested?). And as empirical knowledge accumulates about the amount of harm caused (or not caused), our conclusions about regulating that behaviour can change accordingly.[89] A consequentialist approach is a contingent one, because if consequences change or are better understood, so too can the approach taken. Such an approach has been far more likely than a natural law approach to take the right side of the moral controversies discussed above — slavery, contraception, homosexuality, and more. But the key point in this context is that *evidence matters* to a consequentialist theory: alcohol may be legal, illegal, then legal again because the American experiment in the 1920s and 1930s showed prohibition was worse than toleration,[90] while some hard drugs were first illegal, then legal, and now illegal again in 2024 Oregon because the evidence showed toleration was worse than prohibition.[91] Instead of deciding purely in the abstract and apparently for all time whether something is 'natural' or 'unnatural' or 'moral' or 'immoral' or 'conducive to human flourishing' or 'not conducive to human flourishing', a consequentialist approach fosters experimentation, evolution, and, ideally, social progress.

Crowe presents an admittedly vexing response to this critique of natural law, arguing for an evolutionary approach through 'a social and historical process of trial and error':[92]

> I have argued . . . for a view of natural law as socially embodied, historically extended and dependent on facts about human nature. It is socially embodied because its content is partly derived from social institutions and practices; furthermore, we know about it primarily by interpreting those practices. It is historically extended because it reflects human efforts to survive and flourish in a changing natural and social environment. And it depends on human nature because it is shaped by both our biology and our social conditions. Natural law is what is good for humans given our biological, social and historical predicament.[93]

The response is vexing because it fundamentally reinterprets the meaning of 'natural law' into something that neither its supporters nor its critics could recognize under that name. For supporters of natural law, the intuitive appeal of a set of principles that are timeless, consistent, in continuity with the ancients, and consonant with unchanging religious strictures — 'a certain bedrock of objective moral values'[94]— is erased. For critics of natural law, it is hard to argue

[88] There is an extensive scholarly literature on this, but an excellent starting point is Joel Feinberg's four volume series on the harm principle. See, eg, Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Oxford University Press, 1984) 188, 190, 193 (suggesting legislatures weigh the magnitude of the harm, the probability of the harm, and aggregative harms in determining whether conduct should be made unlawful).

[89] Of course, as an abstract philosophical approach, consequentialism has its critics. But practically speaking, can we imagine a (desirable) world in which the *actual effects* (consequences) of a law or policy play absolutely no part whatsoever in our decision-making process about whether to maintain, modify, or abolish that law or policy? Only if our all-too-human legislators and judges had perfect wisdom and perfect foresight would there be no need for law reform commissions.

[90] See, eg, Edward Behr, *Prohibition: Thirteen Years That Changed America* (Little Brown, 1996).

[91] See, eg, Dani Anguiano, 'Oregon Undoes Groundbreaking Drug Decriminalization Law' *The Guardian* (online, 3 March 2024) available at: <https://www.theguardian.com/us-news/2024/mar/02/oregon-overturn-drug-decriminalize-law>.

[92] Crowe, *Natural Law and the Nature of Law* (n 17) 6.

[93] Ibid 241.

[94] Kainz (n 11) 133. I note Crowe's argument that his version of natural law theory *is* Aquinas' view; this would mean that everyone has been reading Aquinas wrong for about 750 years. Nonetheless, should the Crowe-Aquinas

against the need to gauge human flourishing in changing conditions and contexts, but nor does the prescription add much beyond a vague policy aspiration to look after the common welfare of the people.[95] Similarly, a Finnis-like list of 'basic goods' remains in Crowe's account, but it is not clear where the list comes from or how it is to be used in practice (the interface problem discussed above). The whole endeavour is a little like fixing a listing boat by taking it on land, adding wheels, and turning it into a car. It will no longer sink, but neither will it ever float.

E. A Final Word on Natural Law, in Which a Tirade Connects to a Thesis

Sometimes a concept is baffling not because it is profound but because it is wrong.

—Edward O Wilson, *Consilience*[96]

Although cathartic for the writer, a critique of natural law like the one above is unlikely to change anyone's mind. A belief in natural law is deeply embedded in the identity-forming worldview and metaphysics that form the essential and abiding core of a traditionalist religious mindset. Nor is there anything particularly new or novel to say for or against natural law; after a few centuries of philosophical debate, we all get the gist. Despite my earlier criticism of rehashing and rehearsing tired old arguments, I have done the very same thing.

Yet, there is something new to say about the incorporation of natural law into the explicit alignment of theological and legal perspectives in the Australian School of law and religion. It will limit the field's growth and appeal. Despite Finnis' best efforts to give a secular justification for it, natural law is a niche topic in contemporary legal philosophy.[97] Most scholars, judges, legislators, and lawyers are positivists. The more the Australian School operates on the premise of a natural law worldview, the less their scholarship is comprehensible or meaningful to those outside of the School. A field that should be of universal appeal becomes only of parochial interest.

(?) account become the predominant account of natural law, it would lead the tradition in a more progressive, humane direction and for that reason has much to recommend it.

[95] Cf Murphy and Coleman (n 14) 14: 'When they do attempt to be clear, natural law theorists often offer clarity at the price of uselessness, as when Aquinas offers the following as the first principle of natural law theory: "Do good and avoid evil." One can hardly quarrel with the sentiment expressed here, but one troubled with a moral problem is going to find this piece of highly general advice of very little use'.

[96] Edward O Wilson, *Consilience: The Unity of Knowledge* (Alfred A Knopf, 1998) 249.

[97] See, eg, Crowe, *Natural Law and the Nature of Law* (n 17) 1: 'Contemporary philosophy of law focuses strongly on the idea that law is a socially recognised standard for conduct' and describing legal positivism as 'the dominant tradition in contemporary jurisprudence'. Proof comes in Finnis' own contribution to *The Oxford Handbook of Jurisprudence and Philosophy of Law*. See Finnis, 'Natural Law: The Classic Tradition' (n 59). Finnis is clearly irked by the editors' selection of topics and authors and spends most of his chapter shoehorning in a natural law take on every other chapter. See, eg, 'Contemporary legal philosophy is marred by its inattention to the human person, an inattention exemplified (one may think) by this *Handbook*'s selection of topics, and reparable only by taking up again the systematically complex and ambitious enterprise pursued by classic natural law theory': Finnis, 'Natural Law: The Classic Tradition' (n 59) 25. This pigeonholing of natural law is quite common. For example, the *Blackwell Companion* on legal philosophy devotes just 17 of its 206 pages on 'Contemporary Schools and Perspectives' to natural law. See Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2nd ed, 2010) ch 13.

III. A DISCOURSE ON CHRISTIAN ESTABLISHMENTARIANISM IN WHICH, AS IF WALKING ON WATER, I HAD BETTER TREAD CAREFULLY

Look out for a people entirely destitute of religion: If you find them at all, be assured, that they are but a few degrees removed from brutes.

—David Hume, *A Natural History of Religion*[98]

When the Australian School of law and religion is described as notable for the confluence of theology and jurisprudence in the work of its members, we can be frank in acknowledging that it is a specifically *Christian* theology that is being pursued. There are probably multiple explanations for this — the demographics of the Australian legal academy, self-selection by those with a natural desire to integrate one's faith into one's vocation, etc — but for present purposes what is relevant is that the predominance of one religious tradition in the Australian School shapes the direction of its scholarship and policy prescriptions. There is nothing nefarious in this, of course. But we should be aware of how it can further the mistaken view by outsiders that the academic sub-field of law and religion is simply a scholarly analogue for something like the Christian Legal Society.

There's no shortage of examples of Christian-oriented scholarship in the Australian School. Augusto Zimmerman, for example, writes about how 'the ongoing divorce of the common law from its own Christian foundations will only bring disaster to the legal system'.[99] Patrick Parkinson thoughtfully collates Christian views in opposition to human rights legislation in Australia.[100] In a paper on 'legal pressure points' for Christians, Neil Foster notes how 'some of us may have to bear a real cost for standing firm for the gospel in today's society'.[101] Exceptions certainly exist, but common themes in the scholarship of the Australian School include natural law, the preservation of traditional/historical understandings of sex and gender, and the preservation and maintenance of Christian moral values in a rapidly-changing society. Perhaps remarkably, two well-written and well-received books by noted members of the Australian School — Alex Deagon and Joel Harrison — have even called for the (mild) establishment of Christianity. For the rest of this section, I am going to focus on this development because it provides an excellent demonstration of the perspective and limitations of the Australian School.

[98] David Hume, 'A Natural History of Religion' in David Hume, *Writings on Religion,* ed Anthony Flew (Open Court, 1992) 182.
[99] Augusto Zimmerman, 'A Law Above the Law: Christian Roots of the English Common law" 1 *Global Conversations* 85, 98 (2013).
[100] See Patrick Parkinson, 'Christian Concerns About an Australian Charter of Rights' 15(2) *Australian Journal of Human Rights* 83.
[101] Neil Foster, 'Legal Pressure Points for Christians in 21st Century Australia' Unpublished Paper (27 January 2014) 25, available at: <https://works.bepress.com/neil_foster/73/>.

A. A Mini Book Review, in Which I Show How a Principled Framework Becomes a Parochial One

We can't put antidisestablishmentarianism in the dictionary because there's hardly any record of its use as a real word.

—Merriam-Webster, 'No, Antidisestablishmentarianism is Not in the Dictionary'[102]

Alex Deagon's 2023 book, *A Principled Framework for the Autonomy of Religious Communities*,[103] begins with a deep, careful, and nuanced account of how the twin demands of religious liberty and LGBTIQ+ equality have been managed in Australia, the United States, and England. Its proposals for legislative reform are realistic and sensitive to the concerns of both religious and sexual/gender autonomy. But occasionally, the book takes a surprising detour, such as when it proposes a 'mild establishment' of religion by 'recognising Australia as a 'Christian Democracy'.[104] This would, apparently, 'improve democracy (especially for religion) by promoting inclusion, compassion and responsibility in accordance with the theological virtues such as love, kindness, forgiveness, and patience'.[105] This so-called 'recognition' would presumably consist symbolically through some type of political and legal acknowledgement (the precise nature of which — legislative or constitutional — is not clear) of the country's status and practically in the form of ongoing financial support for religion.[106] 'Since Christian democracy is ultimately grounded in virtues shared by all, it provides a principled framework for peaceful coexistence which entails a reasonable, proportionate accommodation of difference, and reconciles freedom with equality.'[107] To be clear, Deagon is not proposing a true national church or coercive imposition of religious belief.[108]

The proposal is, paradoxically, perfectly understandable and astounding at the same time. From within the Australian School, a formal recognition of the country as a Christian one seems like a natural evolution of themes articulated by the Howard and Morrison governments, as well as decades old institutional funding for Christian religious schools, chaplains, and charities.[109] But from *outside* that tradition, it seems like an almost desperate attempt to preserve a preeminent role for Christianity in a rapidly changing political and social environment in which, for the first time since the census started keeping track, Christians make up less than half the population.[110]

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[102] Merriam-Webster, 'No, Antidisestablishmentarianism is Not in the Dictionary' Merriam-Webster (Website) available at <https://www.merriam-webster.com/grammar/no-antidisestablishmentarianism-is-not-in-the-dictionary>.
[103] Deagon, *A Principled Framework for the Autonomy of Religious Communities* (n 9).
[104] Ibid 165.
[105] Ibid 166.
[106] See ibid. 169.
[107] Ibid. 173–4.
[108] See ibid 169.
[109] Cf Adam Possamai and David Tittensor, *Religion and Change in Australia* (Routledge, 2022) 14: '[W]hile Australia is multicultural, multi-faith, spiritual, and non-religious at the micro level, the further we move to the macro level, the more it is Christian'.
[110] See Australian Bureau of Statistics, *Religions Affiliation in Australia* (4 July 2022) available at <https://www.abs.gov.au/articles/religious-affiliation-australia>. The survey notes that, at 43.9%, Christianity is still the largest religion in Australia, but that 'over the past 50 years, there has been a steady decline in the proportion of Australians who reported an affiliation with Christianity. The same period has seen a consistent rise in 'Other religions' and 'No religion', particularly in the last 20 years'.

The dichotomy is reflected in the very term 'Christian democracy'. Christianity is certainly compatible with democracy, but it is not indispensable to it. So, one is forced to asked: what if the democracy noun in the equation does not (or does not any longer) want the Christian adjective? From a coarse realpolitik analysis, a constitutional referendum or plebiscite to formally recognise Australia as a 'Christian democracy' would seem doomed to failure. If this is so, in what way could the country be described as such?

But objections to the proposal should be based on more than just political forecasting—after all, great (re)awakenings have been known to happen, and one can imagine a future Australia where such a referendum would pass easily. The principled reason the proposal should be resisted is that it explicitly elevates a single religion above all others in a clear violation of the fundamental democratic norm of equal citizenship. It does not matter what percentage of the population is Christian, whether the country has a Christian 'heritage' (in addition, presumably, to its Aboriginal, English, colonialist, and myriad other heritages), or that financial assistance will be given to religions other than Christianity. It would still create, at least symbolically if not practically, an *in* group and an *out* group — everyone would be equal, but some would be more equal than others. This is the reply to Ahdar's and Leigh's argument that, although equality is formally breached by an established religion, this fact should not stand in the way because '[c]onceivably, an historic religion supported by a majority of citizens performing valuable social, educational, and cultural functions might well be more "deserving", in a broad sense, of state assistance than a recent, tiny, insular religious community'.[111] This is special pleading in the purest sense ('my religion is older or more influential or has more adherents and should therefore get more perks!'), but more importantly, raises the obvious question: do we really think it's a good idea for democratic majorities to publicly debate which religions are and are not 'deserving' of state assistance? I would suggest leaving the worms in the can.

A final concern is that, whatever vague benefits may accrue to society from reinforcing 'universal theological/Christian virtues',[112] the proposal could easily be hijacked by the surging Christian nationalist movement present in many Western countries,[113] including Australia. I want to be very clear that the violent and white supremacist ideologies associated with this type of Christian nationalism are the polar opposite of the mild establishment discussed in Deagon's book, and we must not mistake one for the other. However, they do share the underlying premise that there is something *special* about Christianity that makes it deserving of an elevated political status — and this veering away from the norm of equal citizenship is deeply problematic. A similar critique can be made of extremist forms of Islamic nationalism in Indonesia, Hindu nationalism in India, and so forth. It's perhaps natural for people of faith to want reassurance that their beliefs will be something their government cherishes and protects

[111] Rex Ahdar and Ian Leigh, 'Is Establishment Consistent with Religious Freedom?' (2004) 49(3) *McGill Law Journal* 635 [88].

[112] Deagon, *A Principled Framework for the Autonomy of Religious Communities* (n 9) 165. Deagon simultaneously ascribes these 'theological virtues' to Christianity (as if none of them existed or were recognised as such beforehand, and sidelining the important question of whether Christian societies today display them more often than non-Christian societies) and as 'universal' (thus raising the same problems of subjectivity and vagueness as the 'basic goods' of natural law theorising). Indeed, we can tie the previous section of this paper together with this section by noting that Deagon explicitly relates his proposal for Christian democracy to Christian natural law theory. See ibid at 168.

[113] See, eg, Andrew Whitehead and Samuel Perry, *Taking America Back for God: Christian Nationalism in the United States* (Oxford University Press, 2020). As Ahdar and Leigh note, '[t]he institutional trappings of establishment may be seen as symbolizing the now controversial idea of "Christian nationhood"': Adhar and Leigh (n 111) [28].

— but an establishment of religion, no matter how 'mild', almost inevitably proves in the long run to be, at best, meaningless, and at worst divisive or dangerous.

B. Speculation on 'Post-Liberalism', in Which the Grass is Not as Green as it Looks

Hang yourself, you will regret it; do not hang yourself, you will also regret it; hang yourself or do not hang yourself, you will regret both. That, gentlemen, is the summation of human wisdom.

—Kierkegaard, *Either-Or*[114]

In an important 2020 book titled *Post-Liberal Religious Liberty*,[115] Joel Harrison presents two competing visions of religious freedom. The predominant liberal account, he explains, 'understands religious liberty as signifying respect for conscience, identity, or authenticity. Religious liberty consequently is not limited to particular traditions of religious belief and practice, but concerns the broader value of personal autonomy or the individual's capacity for self-definition'.[116] But in what he labels a 'post-liberal' account, religious freedom is 'focused on persons in relationship or forming communities of solidarity, fraternity, and charity, oriented to God and neighbour. The liberty of such communities is grounded on this quest for a good end. . . . On this account, civil authority is to support this religious quest. It is a complementary arm for pursuing human flourishing or right relationship'.[117] Harrison concludes that we should strive to implement the second account.

My friend Kierkegaard and I imagine that either choice will come with regrets. The operative question then becomes: which will we regret *more*? Liberalism's 'thin' account of the moral universe asks the state to ensure freedom and equality, and leaves it to each individual to develop their own conception of the good life. Post-liberalism, in Harrison's telling, has a 'thick' account of morality in which the good is pre-determined: 'ordering our lives toward God'.[118] Harrison acknowledges that his 'ecclesiological'[119] and 'theopolitical'[120] account is 'shaped by Christian thought',[121] 'thickly housed in the Christian tradition',[122] 'means there must be a public commitment to religion',[123] and that 'civil authority must be attentive in all its actions to the claim of religion as central to the common good'.[124] The difference between the two accounts is certainly stark!

It might just be the devil of Secularism on my left shoulder speaking more loudly than the angel of True Religion on my right, but this account of post-liberal religious liberty seems to create far more problems than it (allegedly) solves.

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[114] Soren Kierkegaard, *Either/Or* (Princeton University Press, 1987) 38 as quoted in Grene (n 56) 22.
[115] Joel Harrison, *Post-Liberal Religious Liberty: Forming Communities of Charity* (Cambridge University Press, 2020).
[116] Ibid 225–6.
[117] Ibid.
[118] Ibid 3.
[119] Ibid 225–6.
[120] Ibid 60.
[121] Ibid 3.
[122] Ibid 99.
[123] Ibid 19.
[124] Ibid 231–2. Harrison's frequent references to the 'common good', 'human flourishing', and Augustine are, of course, markers of a natural law worldview.

First, despite assurances that it is not opposed to pluralism,[125] it is hard to see how atheists, agnostics, the 'spiritual but not religious', and other (no-religion) 'nones' fit, as equal citizens, into a nation-state publicly committed to religion. Currently making up 38.9% of the Australian population, this is not simply the rare and pesky 'village atheist' of days gone by standing in the way of overwhelming community sentiment. Harrison's frequent references to 'communities of solidarity, fraternity, and charity, oriented to God and neighbour' always seems to leave out what must be plenty of communities *not* interested in 'seeking the truth about God and instantiating this in manifold contexts'.[126]

Second, an expectation that the state affirmatively support religion (as opposed to simply refraining from burdening it) in order to promote the common good begs the crucial question: *is* religion part of the 'good life' or crucial to 'human flourishing'?[127] Harrison certainly believes so, but as he rightly notes, his position is, at its core, grounded in a theological belief and could not satisfy a Rawlsian demand for public reason.[128] Do we want the state to put a thumb on the scale for ultimate questions of metaphysical truth — and if so, do we *trust* it to always get the answer correct? And, as with Deagon's 'Christian democracy', we have no assurances that a 'mild' establishment will remain as such.

Third, it's very hard to picture what 'post-liberal religious liberty' would look like in concrete legal terms and thus to gauge whether it would actually be an improvement. Supporting religious communities and the search for truth is one thing as an abstract 'value proposition', but what does it mean in practice? We are told that 'civil authority is to respect and heed the exhortations of the Church as the trans-political community oriented to God',[129] but how does that relate to real-world disputes? Indeed, the vision for post-liberal religious liberty seems to be premised on multiple religious communities acting in good faith as they strive toward the common goal of finding 'true religion'. The picture is certainly a beautiful one, but isn't a more *realistic* one that presented by H Tristam Engelhardt Jr in 'Taking Moral Difference Seriously'?

> Moral difference is real. Moral difference is compounded by metaphysical difference. It is not simply that humans are divided by different rankings of value, or indeed, commitments to different values. Humans are divided by radically different accounts of the meaning of human life and of the universe. In the ruins of post-Christian societies such as those of the West, persons and communities are separated by fundamentally different appreciations of the human enterprise and of the significance of reality.[130]
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[125] Ibid 3.
[126] Ibid 1.
[127] Cf Marci A Hamilton, *God vs the Gavel: Religion and the Rule of Law* (Cambridge University Press, 2005) 6: '[T]here has been a temptation in the United States to treat religion as an unalloyed good. It is a belief one can embrace only at one's peril'.
[128] Harrison (n 115) 181: 'I do not have a foundationalist claim to make, one that is independent of theological argument or that transcends and adjudicates between alternative traditions or conceptions of the good. My account would not satisfy a requirement of "public reason"'. Cf John Locke, 'An Essay Concerning Human Understanding' in Edward L Miller (ed), *Classical Statements on Faith and Reason* (Random House, 1970) 99. 'I find every sect, as far as reason will help them, make use of it gladly: and where it fails them, they cry out, it is a matter of faith, and above reason'.
[129] Harrison (n 115) 231–2.
[130] Engelhardt (n 58) 136.

> There is not only moral pluralism, but a profound moral rupture in contemporary moral discourse. This rupture separates traditional Christians, Jews, Muslims, and others who recognize that the universe has deep meaning and purpose from those who prefer to act as if there were no God and as if religious difference were merely matters of culture rather than matters of truth. . . . In these circumstances, rather than pursuing a vain hope of consensus, we would do better to invest our energies in the articulation of political structures and procedures that can peaceably encompass substantial metaphysical and moral diversity without seeking either to discount it or to marginalize it.[131]

This is exactly why so-called *modus vivendi* liberalism has a 'thin' account of the good.[132] It recognizes that moral consensus is impossible, and that attempts by the state to choose one metaphysical account of the universe (for example, that God is real and religion is necessarily a personal and societal good) do an injustice to human freedom and equality of citizenship.[133] Hang yourself, or don't hang yourself — either way, you'll regret it, but at least it'll have been *your* choice, not the government's.

Fourth, and finally: you really ought to 'dance with the one what brung ya'. Since the Enlightenment, the liberal account of religious freedom has been enormously successful in safeguarding liberty of worship in the Western world. In the most practical sense, the vast majority of Australians the vast majority of the time are able to assemble, pray, preach, and worship with absolutely no hindrance from the government whatsoever.[134] This is a victory that came at enormous historical cost in the blood-soaked fields of Reformation Europe, and we should not let frustration with the treatment of a professional rugby player's tweets or a commercial baker's cakes blind us to the reality that, across the board, religious freedom is freer today in the West than ever before. Whatever 'post-liberal religious liberty' consists of, there is no guarantee it can match that track record of success. Alongside public libraries, running water, and sliced bread, the liberal account of religious freedom stacks up with the greatest achievements of human civilisation.

C. A Critique of a Critique of Neutrality, in Which an Old Canard Quacks Again

She's a myth that I have to believe in
All I need to make it real is one more reason

—Slipknot, 'Vermillion, Pt 2'[135]

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[131] Ibid 138–9.

[132] See Gray (n 25) 6: 'The aim of *modus vivendi* cannot be to still the conflict of values. It is to reconcile individuals and ways of life honouring conflicting values to a life in common. We do not need common values in order to live together in peace. We need common institutions in which many forms of life can coexist'. A thin theory of moral goods 'giv[es] us the bare framework for conceptualizing choice and agency but leav[es] the specific content of choices to be filled in by individuals': Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative' in Will Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press, 1995) 98.

[133] See Rawls (n 23) 150: 'While no one is expected to put his or her religious or nonreligious doctrine in danger, we must each give up forever the hope of changing the constitution so as to establish our religion's hegemony, or of qualifying our obligations so as to ensure its influence and success. To retain such hopes would be inconsistent with the idea of equal basic liberties for all free and equal citizens'.

[134] For example, Australia received a perfect score of 10 out of 10 for religious freedom in the *2016 Cato Human Freedom Index*. See Renae Barker, *State and Religion: The Australian Story* (Routledge, 2019) 101.

[135] Slipknot, 'Vermillion Pt 2', *The Studio Album Collection (1999-2008)* (Roadrunner Records, 2014) track 40.

A key premise of both Deagon's and Harrison's proposals is that the secular, liberal state is not *really* neutral.[136] Deagon writes, '[u]ltimately, secularism is not neutral, for it takes a particular position on religion (negative or at least indifferent) in the public sphere on the basis of ideological assumptions about the nature of religion and politics.'[137] Harrison adds that '[i]t is consequently not possible on a Christian account to have a 'secular' understanding of things in the world, if by this we mean an understanding autonomous from God or onto which God, if relevant, is simply an additional overlay. To claim such a space is to deny participation of all things in God's own life. Such a denial, creating a "secular" space, is not the neutral work of reason, but a contention that demands replacing one view of God's relationship to society with another.'[138] The 'myth of neutrality' is such a common refrain that it has become something of a shibboleth among those who advocate a closer union between religion and the state.[139]

The position is simultaneously absolutely correct and completely irrelevant. As a matter of pure logic, the liberal secular state[140] is, by definition, not completely neutral when it comes to religion. It takes the position that religion is something special:[141] something that many individuals cherish as *the* most important thing in their life, and thus deserving of protection from interference by the government, and at the same time, a belief so personal and inviolable that it would be ridiculous and unjust for the government to take a position on.[142] It guarantees

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[136] Neutrality towards religion as a key component of the liberal tradition is discussed in Janos Kis, 'State Neutrality' in Michel Rosenfeld and Andras Sajo, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 313: 'The theory of neutrality has its natural home in the liberal tradition. Liberalism has had a neutralist bent since its beginning'.

[137] Deagon, *A Principled Framework for the Autonomy of Religious Communities* (n 9) 189.

[138] Harrison (n 115) 15.

[139] See, eg, Ahdar and Leigh (n 110) [4]: 'Even if a state does not have an established church, it will have an established position on religion. A secular, liberal state is not "neutral"'; David M Brown, 'Freedom From or Freedom For? Religion as a Case Study in Defining the Content of Charter Rights' (2000) 33 *University of British Columbia Law Review* 551, [111]: 'the "neutrality of the secular" is simply a myth and should be recognized for what it is — a substitute moral construct supported by the power of the state'; MH Ogilvie, '*Adler v Ontario*: Preconceptions, Myths (or Prejudices) About Religion in the Supreme Court of Canada' (1997) 9 *National Journal of Constitutional Law* 79, 94: '[S]ecularism is also an ideology, not neutral, rational and value-free, as some mistakenly believe'. The 'secular neutrality is a myth' argument seems to follow the following syllogism:

> Major Premise: The secular state is not neutral.
>
> Minor Premise: ?
>
> Consequent: The state should have a mild establishment of Christianity.

[140] See Stephen V Monsma and J Christopher Soper, *The Challenge of Pluralism: Church and State in Five Democracies* (Rowan & Littlefield, 1997) 9: 'Enlightenment liberalism rested on three interrelated assumptions: that particularistic religion could be safely assigned to the purely private sphere without infringing on the religious beliefs and practices of its adherents, that a public realm stripped of all religious elements would be a neutral zone among the various religious faiths and between faith and nonbelief, and that religious freedom would flourish in the absence of governmental restraints and with no need for positive governmental actions to equalize the advantages enjoyed by religious and nonreligious groups.'

[141] See Alan E Brownstein, 'Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution' (1990) 51 *Ohio State Law Journal* 89, 93 n 21: 'The government cannot act neutrally with regard to religion because the Constitution insists that it does not. The most striking characteristic of religion in constitutional terms is that it is singled out for special consideration'. See also, Jeremy Webber, 'The Irreducibly Religious Content of Freedom of Religion' in Avigail Eisenberg (ed), *Diversity and Equality: The Changing Framework of Freedom in Canada* (University of British Columbia Press, 2006).

[142] See Robert Glenn Howard, 'The Double Bind of the Protestant Reformation: The Birth of Fundamentalism and the Necessity of Pluralism' (2005) 47 *Journal of Church and State* 91, 92: 'After the Protestant Reformation,

freedom of religion not because religion is necessarily *good*, and it prevents an establishment of religion not because religion is necessarily *bad*; it does both of these things because history shows us time and time again that the alternatives are deeply undesirable. The twin principles of the secularist state — freedom of religion and separation of religion and state — did not arise fully formed by Enlightenment thinkers through pure reason; they were also based on practical insights gleaned the hard way by political leaders after centuries of divisive wars and bloodshed caused by competing religious factions attempting to exert control and influence over the apparatus of the state.[143]

> For each sect is positive that its own faith and worship are entirely acceptable to the deity, as no one can conceive that the same being should be pleased with different and opposite rites and principles, the several sects fall naturally into animosity, and mutually discharge on each other that sacred zeal and rancour, the most furious and implacable of all human passions.[144]

Secularism is not neutral in the same way a rugby referee is not, as a matter of pure philosophy, 'neutral'—they probably want the rules to be followed rather than not followed, for the league to prosper rather than falter, for the players and fans to enjoy the sport rather than hate it, etc.

What is important is that, in a practical, everyday sense,[145] secularism *is* neutral toward religion *in the ways that matter to achieve the liberal promise of individual freedom and equality*.[146] As Stephen Macedo calls it, this is 'the moderate hegemony of liberalism'.[147] It does not favour some religions over other religions. It does not favour religion over nonreligion. It does not favour atheism over theism. The rugby referee favours rules-abidance over rules-trespass, but does not favour the home team over the visiting team. League officials do not decide first which team they want to win and then carefully sculpt league rules to make sure it happens. For all that critics complain about the 'privatisation' of religion in the liberal secular state, it is

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pluralism became necessary because a state that attempts to impose a shared belief about the divine could be challenged by individuals with conflicting beliefs if those beliefs were felt to be authorized by an individual experience of the divine. Such challenges held the dangerous potential of undermining the authority of any system of governance. As a result, state governments eventually sought to maintain a pluralist position toward divine truth.'

[143] See, eg, Zagorin's (n 72) discussion of toleration's origins in intellectual thought, religious thought, and practical political expediency. See also, Md Jahid Bhuiyan and Darryn Jensen, 'Introduction' in Md Jahid Bhuiyan and Darryn Jensen (eds), *Law and Religion in the Liberal State* (Hart, 2020) 3: 'Liberalism as a truce recognises the dangers of a situation in which competing religious worldviews are tempted to fight for political hegemony. . . . The state, as far as possible, maintains a neutral stance as between religious traditions and accommodates religious differences. It takes care not to coerce people in ways that are contrary to their religious beliefs or which prevent them from performing their religious duties. Moreover, religious communities are "sovereign" in respect of their internal affairs.'

[144] David Hume, 'The Natural History of Religion' in David Hume, *Writings on Religion,* ed Anthony Flew (Open Court Publishing, 1992) 146.

[145] The 'neutrality is impossible' argument is undermined by considering that most of those reading this paper will spend several hours each day in environments that are both formally and effectively secular. Whether we're at work in a university, shopping in a grocery store, or having a drink at the pub, our religious beliefs (or lack thereof) are neither suppressed nor encouraged by the institution or business. This is neutrality at play in a practical sense.

[146] See Monsma and Soper (n 140) 6. 'We define neutrality as government neither favoring nor burdening any religion, nor favoring or burdening religion as a whole or secular systems of belief as a whole. Governmental religious neutrality is attained when government does not influence its citizens' choices for or against certain religious or secular systems of belief, either by imposing burdens on them or by granting advantages to them. Instead, government is neutral when it is even handed toward people of all faiths and of none'.

[147] Stephen Macedo, 'Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism' (1998) 26(1) *Political Theory* 56.

that very privatisation that secures religious groups true autonomy and freedom from government interference[148] — which is, historically speaking, not a right to take for granted. The premise of liberalism and the promise of pluralism is that each individual can capably choose their own good — religion included — instead of needing the government to do it for them. As American history has shown, religion can flourish in an environment with a strict understanding of the separation of religion and the state.[149] As British and Australian history have shown, religion can decline even with a formal state church or where the government spends hundreds of millions of dollars to support private religious schools. In other words, a faith that is secure in its beliefs and self-confident about its potential can stand on its own without pleas for the government (or taxpayer) to prop it up.

In a more conciliatory vein, we can acknowledge the frustration and disrespect felt by people of faith when governments are dismissive, demeaning, or even hostile to their rights and moral concerns. With French *laïcité* the perfect example, secular states can indeed go too far. The dilemma of how to accommodate conflicting rights (for example, in anti-discrimination legislation) is a very real one: the guiding liberal values of freedom and equality can easily come into conflict with one another, especially in the context of 'the most furious and implacable of all human passions'. Even its most ardent advocates cannot argue that liberal secularism is a perfect model for government-religion interactions. But in a world torn by disagreement, violence, and strife, it is the most practical one. We aim not for the 'best of all possible worlds', but instead for the best of all *plausible* ones.[150]

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[148] See *Congregation des temoins de Jehovah St.-Jerome-Lafontaine v Lafontaine (Village)* [2004] SCJ No 45 [68]: '[I]t is no longer the state's place to give active support to any one particular religion, if only to avoid interfering in the religious practices of the religion's members. The state must respect a variety of faiths whose values are not always easily reconciled. . . . As a general rule, the state refrains from acting in matters relating to religion. It is limited to setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship, which is a fundamental, collective aspect of freedom of religion, and to organize their churches or communities. In this context, the principle of neutrality must be taken into account in assessing the duty of public entities. . . . to actively help religious groups.' This concern was borne out in Canadian history. See Robert Choquette, *Canada's Religions: An Historical Introduction* (University of Ottawa Press, 2004) 222: 'While financially benefiting from these government subsidies, the established churches paid a high price in their loss of autonomy, whether financial, political, or spiritual. The established churches became, for all practical purposes, departments of state and their clergy public functionaries. Their flocks were frequently not inclined to be financially generous, knowing that the Crown would provide.' I have engaged in a debate (in the best of all scholarly traditions, through footnotes) with Professor Reid Mortensen on whether this concern is 'paternalistic' and therefore improper. See Jeremy Patrick, 'Religion, Secularism, and the National School Chaplaincy and Student Welfare Program' (2014) 33(1) *University of Queensland Law Journal* 187, 188, 216 n 237.

[149] Cf Monsma and Soper (n 140) 8. 'Thus Enlightenment liberals typically called for a strict separation of church and state. They believed such a separation would spare the state from the dangerous divisions particularistic religion posed, yet would not harm particularistic religion, since it would continue to flourish in the purely private realm.' This was borne out in the American experience. See Thomas L Pangle, 'The Accommodation of Religion: A Tocquevillian Perspective' in Marian C McKenna (ed), *The Canadian and American Constitutions in Comparative Perspective* (University of Calgary Press, 1993) 3, 18: 'Tocqueville argues fervently and repeatedly that the strict but friendly separation of church and state in American democracy, so far from representing a compromise of religion's influence and strength, in fact creates the conditions under which religion's true strength and influence can flourish'.

[150] Cf John Milbank and Adrian Pabst, *The Politics of Virtue: Post-Liberalism and the Human Future* (Rowman & Littlefield, 2016) 21: '[A]t the core of a searching critique of liberalism lies the argument that it is a far too gloomy political philosophy. For liberalism assumes that we are basically self-interested, fearful, greedy, and egotistic creatures, unable to see beyond our own selfish ends, and, therefore, prone to violent conflict.' As for a gloomy outlook on humanity, I have to plead guilty as charged. My mitigating evidence: I read the newspaper every morning.

D. A Brief Afterword on Establishment and Democracy, in Which the Writer's Hobbyhorse is Finally Given a Rest

The existence of rival sects, the visible demonstration that none has a monopoly, the habit of neutrality, cannot but dispose men against an unquestioning acceptance of the authority of one sect.

—Walter Lippman, *A Preface to Morals*[151]

The fondness for a Christian establishment of religion by members of the Australian School raises concerns. Some of these concerns are principled ones. An established religion makes for an uneven playing field in the never-ending game of politics and lawmaking. Sometimes we win and sometimes we lose, but losing is really galling when one of the referees is also an assistant coach on the other team. As religions and ideologies naturally grow, diminish, and evolve, it seems both unfair and an act of special pleading for one (even our own) to get a permanent, elevated status above the others. Some of these concerns are professional ones. Law and religion is a nascent academic sub-discipline in Australia. If it becomes primarily identified with a particular religion (Christianity) and a particular political ideology (establishment of religion), its real potential for growth could instead lead to it being cabined off by the larger academy. In essence, we have to choose between being a broad church or an insular cloister.

IV. AT LAST, A CONCLUSION, IN WHICH I TRAVEL TO DISTANT SHORES TO GAZE AT SCHOLARLY NAVELS

NOTICE
Persons attempting to find a motive in this narrative will be prosecuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot.
BY ORDER OF THE AUTHOR

—Mark Twain, *The Adventures of Huckleberry Finn*[152]

As this paper was being written, two important publications came out which examine the status of law and religion as a scholarly field in other countries. A discussion of these works will shed light on the state of law and religion in Australia.

The first is Russel Sandberg's *Rethinking Law and Religion*,[153] which offers a critical appraisal of the development of the field in England. Sandberg begins his paper by stating something equally applicable to our discussion of law and religion in Australia: 'It is important to analyse the intellectual development of fields of study: what is included; what is excluded; how it interacts with other fields both within its own discipline and elsewhere.'[154] As he adroitly explains it:

> Academic fields of study are human constructs. They are dynamic entities that are in a constant state of flux; being continuously constructed, deconstructed, and

[151] Lippman (n 84) 70–1.
[152] Mark Twain, *The Adventures of Huckleberry Finn* (Webster & Company, 1885).
[153] Russel Sandberg, *Rethinking Law and Religion* (Edward Elgar, 2024). Sandberg's book is worth reading in full, and I have not been able to do justice to its central thesis in the brief treatment here.
[154] Ibid 4.

> reconstructed. . . . The process of formulating a field is always an exercise in power. It is a means of inclusion and exclusion: deciding what is analysed and what is not and where the borders of the intellectual pursuit will be drawn. Moreover, this takes place even if attention is not being afforded explicitly to questioning the definition or ambit of the field.[155]

As told by Sandberg, the story of law and religion as an academic field in England is one of neglect, followed by sudden growth and potential, followed by decline and pigeonholing. In a narrative that has some echoes of the Australian situation, Sandberg writes about the post-9/11 interest in law and religion and the concomitant rise of course electives, journals, and scholarly associations that are the sign of a thriving field.[156] Arguably, this is the position of the field in Australia today — on an upward trajectory. But then Sandberg writes that some of the very things that made it a success also contributed to law and religion being characterised by the academy as a 'specialism' and siloed off not just from other fields of law but also from the interdisciplinary approaches of sociology, history, and more that could have been fruitfully brought within its fold.[157] The result is that interest in the field has declined, with fewer courses in English law schools and fewer scholarly works about its themes.[158] Sandberg concludes that '[t]here is a real risk of ghettoization: a danger that law and religion scholars will be immune from and unable to shape wider debates within the discipline of law (not to mention the wider risks caused by the academic isolation of law and religion scholarship that comes from such work being mainly situated in law schools)'.[159]

Sandberg's conclusion is a much more articulate presentation of my concern with the success of the Australian School — that its focus on natural law, Christianity, and lack of interdisciplinary or methodological diversity will lead to the same problem here. The problem is not just that natural law or mild establishment are bad ideas (as I have argued), but that excessive focus on them narrows what the field of law and religion can become. As farmers know, cross-pollination and crop rotation lead to higher (and healthier) yields than reliance on monoculture planting.[160]

Serendipitously, the second new work brings us full circle. Marc DeGirolami, the author who first coined the term 'the Australian School', has published an article titled 'The Death and New Life of Law and Religion'.[161] Noting that some of the greatest American scholars of law and religion have retired over the past few years, DeGirolami suggests that 'this is a good moment to take stock of what law and religion once was, no longer is, and might become'.[162] The paper presents a fascinating contrast to Sandberg's, because while Sandberg lamented law

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[155] Ibid 8–9.
[156] See ibid 90.
[157] See ibid 91.
[158] See ibid 7.
[159] See ibid.
[160] Put another way, it is not the *presence* of theological perspectives in Australian law and religion scholarship I object to, it is the *predominance* of it. When you go to a concert, having one of the several musicians on stage play the triangle is nice. Having *all* of the musicians on stage playing the triangle is a problem. Unless, there are 1,521 of them attempting to achieve a world record. See Guiness World Records, 'Largest Triangle Ensemble' (Web Page) <https://www.guinnessworldrecords.com/world-records/largest-triangle-ensemble>.
[161] Marc O DeGirolami, 'The Death and New Life of Law and Religion' *Oxford Journal of Law and Religion* (forthcoming) available as SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4740692>. DeGirolami's paper is also worth reading in full.
[162] Ibid 4.

and religion being isolated from the rest of the academy in England, DeGirolami writes that law and religion in the United States is 'in its death throes'[163] because it has become *too* diffuse:

> I will argue that law and religion, at least as an academic discipline, has been, in some ways, the victim of its own successes. It was so effective in knocking down the separationist assumptions that kept religion a subject apart from law, fenced out of the garden of law as a kind of wilderness anathema, that it has today become altogether indistinct. The scope of religion within American law, and so, too, of religious freedom, has become hypertrophic, its legal terms and definitions unintelligible, with the result that the field has become a kind of jungle of sublimated political and culture war.[164]

Fortunately, this problem — hyper-polarised, partisan, culture war sparring thinly masked as law and religion scholarship — is nowhere near as serious in Australia as it is in the United States.[165] For all my criticisms, I respect the Australian School for its focus on serious scholarly, theological, and philosophical approaches to law. Its members include some of the best and brightest intellectuals Australia has to offer. We can be confident America's problems are not our own.

The title of this paper promised a friendly rejoinder to the Australian School, but it has often been a pointed, polemical, and sometimes silly one. I have offered many criticisms but have set forth few of my own positions for counter-attack.

> For only in destroying I find ease
> To my relentless thoughts[166]

But my motivation for writing it *is* heartfelt. Two paths diverge in front of law and religion in this yellow wood. One leads to a dynamic, accessible, and diverse field. One, currently trod by members of the Australian School, leads to a stale, insular, and homogenous field. We should take the path less well-trodden — it may make all the difference.

[163] Ibid 46.
[164] Ibid 7.
[165] Sometimes the excessive (to my mind) focus on opposition to transgender rights verges into this territory, but that's still only a small proportion of Australian law and religion scholarship as a whole.
[166] John Milton, *Paradise Lost* (Doubleday & Company, 1969) 196.

Academic Freedom and the Future of Catholic Universities in Australia: Some Notes from ACU

Miles Pattenden*

This article examines the challenges for preserving academic freedom and religious identity in Catholic universities in Australia, using a series of recent controversies at the Australian Catholic University (ACU) as a case study. ACU's problems once again highlight a fundamental tension between the expression of Catholic identity and the obligations of publicly funded institutions in pluralistic democratic societies. Debates about how to reconcile Catholic identity with open intellectual inquiry have been ongoing since the 1850s. However, contemporary challenges supersede arguments first raised in the 1960s which presume a binary between episcopal control and secular autonomy. The ACU case reflects the increasingly complex stakeholder landscape of a modern Catholic university, including the growth of competing claims to define Catholic identity, the subordination of mission to market imperatives, and multiple frameworks for governance and compliance. The article suggests that Catholic universities ought not to be able to claim full autonomy over institutional character if they are in receipt of substantial public funding and it advocates for more transparent governance mechanisms that balance competing stakeholder interests without privileging any one of them.

I. INTRODUCTION

When 90%+ of graduation attendees walked out of the Australian Catholic University's graduation ceremony in Melbourne in October 2024, they dramatised a fundamental question facing Catholic higher education worldwide: who determines authentic Catholic identity in a pluralistic democratic society? This issue, inseparable from questions of intellectual freedom, has dominated academic discourse about Catholic universities since at least the 1960s (and perhaps for a lot longer). Academics argue that Catholic identity cannot be reduced to simple episcopal diktat and that it must instead reflect the complex interplay between theological tradition, academic inquiry, and contemporary social engagement. This article nevertheless deconstructs elements of that scholarly consensus, using the examples of recent controversy at the Australian Catholic University to explain what is at stake in the contest to define Catholic university identity in the 2020s. A traditional binary between episcopal control and secular autonomy is clearly inadequate for contemporary institutions where the expansion of public funding has led to a diversification of stakeholders. Such institutions require new and transparent governance frameworks that balance the competing stakeholders so that they protect both academic freedom and authentic Catholic engagement without privileging any single interpretation of what it is to be Catholic.

II. CONTEXT: TOWARDS A PLURALISTIC CATHOLIC IDENTITY

The question of what constitutes authentic Catholic identity in higher education has evolved dramatically since John Henry Newman's seminal *Idea of the University* (1852), which first

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articulated a vision for Catholic liberal arts education in the mid-nineteenth century.[1] Newman envisioned a university where religious conviction would enhance rather than constrain scholarship—and he did his best to realise this vision through the Catholic University of Ireland (of which he was the founding Rector).[2] Critics like George Bernard Shaw quipped that 'a Catholic University is a contradiction in terms' and later tried to highlight a persistent tension between institutional religious commitments and academic freedom.[3] However, only when the Second Vatican Council's spirit of 'openness' and inquiry began to permeate Catholic university campuses in the 1960s were decisive actions to resolve this tension taken by university faculty or administrations.[4] Neil McCluskey's well-known *Land O'Lakes Statement* (1967), the first and one of the most influential of these attempts, set out principles for independent Catholic intellectual inquiry in university contexts.[5] It responded to a severe case of theological censorship of professors at St John's University, New York, in 1965, and was followed by the 1972 document *The Catholic University in the Modern World* (endorsed by the International Federation of Catholic Universities).[6] Most Catholic Universities in the United States had by then established new boards of trustees independent of ecclesiastical authority, which were intended to guarantee their intellectual independence.[7] The Vatican eventually developed its own provisions in the 1983 Code of Canon Law and via the Apostolic Constitution *Ex corde Ecclesiae* (1990), sometimes now seen as a rebuke to universities' rejection of ecclesiastical oversight.[8] The Code of Canon Law and *Ex corde Ecclesiae* both reassert the Church hierarchy's right to regulate Catholic universities, at least when they retain the word 'Catholic' in their titles. Pope Paul VI had previously expressed concern that Catholic universities under independent boards of trustees might not be willing or capable of ensuring that their faculties taught theological orthodoxies.[9] The matter has remained important to the hierarchy not least because many faculty at Catholic universities are still members of religious orders (e.g., Jesuits). They therefore remain subject to spiritual discipline even in vocational roles.

Ex corde Ecclesiae states that bishops have 'the right and duty to watch over the preservation and strengthening of their Catholic character' and that '[i]f problems should arise concerning this Catholic character, the local Bishop is to take the initiatives necessary to resolve the matter, working with the competent university authorities in accordance with established procedures

[1] John Henry Newman, *The Idea of the University* (University of Notre Dame Press, 1990).
[2] Colin Barr, *Paul Cullen, John Henry Newman, and the Catholic University of Ireland, 1845–1865* (Notre Dame University Press, 2003).
[3] Quoted in 'Education: God & Man at Notre Dame', *Time Magazine* (online, 9 February 1962) <https://time.com/archive/6871405/education-god-man-at-notre-dame/> [accessed 2 August 2025].
[4] Gerald O'Collins, *The Second Vatican Council: Message and Meaning* (Liturgical Press, 2014); John Sullivan, 'Relative Autonomy and the Catholic University' in Sean Whittle (ed), *Vatican II and New Thinking about Catholic Education* (Routledge, 2016) 215–35.
[5] Neil McCluskey, 'Land O'Lakes Statement' in Alice Gallin (ed), *American Catholic Higher Education: Essential Documents, 1967–1990* (Notre Dame University Press, 1992) 7–12.
[6] Luther Carter, 'Academic Freedom: Lessons from the Crisis at St John's' (1966) 154 (3755) *Science* 1428, 1428–30. See also, Charles Curran, *Catholic Higher Education, Theology and Academic Freedom* (University of Notre Dame Press, 1990) 26–111.
[7] James Jerome Conn, *Catholic Universities in the United States and Ecclesiastical Authority* (Rome: Pontificia Università Gregoriana, 1991) 153–84; Philip Gleason, *Contending with Modernity: Catholic Higher Education in the Twentieth Century* (Oxford University Press, 1995) 305–22.
[8] John Paul II, 'Ex corde Ecclesiae', *The Vatican* (Web Page, 15 August 1990) <https://www.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae.html> [accessed 1 August 2025]; Gleason (n 7).
[9] David J. O'Brien, *From the Heart of the American Church: Catholic Higher Education and American Culture* (Orbis Books, 1994) 60.

… and, if necessary, with the help of the Holy See' (Article 5, §2).[10] Canon 808 of the 1983 Code of Canon Law also contains provision for the Vatican to withdraw recognition of a university as Catholic if it does not comply with appropriate principles.[11] Catholic scholars since 1967 have nevertheless routinely pushed back against such presumptions.[12] Charles Curran, who was later dismissed by the Catholic University of America as part of a theological dispute, contended that authentic Catholic identity emerges not through compliance with episcopal directives but through intellectual engagement with Church teaching.[13] Dennis O'Brien developed this idea further, advocating a 'sacramental' model that rejected the Vatican's 'institutional-juridical' approach.[14] He argued for a framework that would respect different kinds of truth—scientific, artistic, and religious—while preserving both ecclesiastical and educational integrity. Most recently, Massimo Faggioli's *Theology and Catholic Higher Education* (2024) has documented threats from both reactionary Catholic tribalism and market-driven metrics (the neoliberal university).[15] Faggioli, like O'Brien, seeks to promote pluralistic approaches that recognise the diversity of Catholic thought and practice.

Unsurprisingly, most of this theorisation of threats to intellectual freedom from the Church's adherence to dogmatic positions on social, as well as theological questions, has been generated in the United States. However, the situation for Catholic universities in Australia differs markedly from the American case across several dimensions. First, Australia has only two Catholic universities: (1) the Australian Catholic University, a multi-campus public university formed through a merger of multiple Catholic further education institutions in 1991; and (2) Notre Dame, a private university that also receives public funding (it currently has Table A status). Second, Australian universities operate within a constitutional framework that lacks the explicit free speech protections of the First Amendment to the United States Constitution, which results in comparatively weaker traditions of intellectual freedom in all spheres. Third, Australian academic culture, even more than American, has become increasingly dominated by a market-driven education model that prioritises revenue generation through tuition fees and research grants over other institutional values.[16] Tensions between academic freedom and a university's wider objectives have been visible in a number of non-Catholic cases, most notoriously *Ridd v James Cook University* (2020) which crystallised debates about academics' rights to intellectual freedom against their obligations not to compromise their institution's broader objectives in their public conduct.[17] The Federal Circuit Court overturned an original

[10] Pope John Paul II, 'Ex corde Ecclesiae', *The Vatican* (Web Page, 15 August 1990) Art 5, §2 <https://www.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae.html>.

[11] 'Nulla studiorum universitas, etsi reapse catholica, titulum seu nomen universitatis catholicae gerat, nisi de consensu competentis auctoritatis ecclesiasticae', 'Codex Iuris Canonici, Liber III', *The Vatican* (Web Page) Can. 808 <https://www.vatican.va/archive/cod-iuris-canonici/latin/documents/cic_liberIII_la.html> [accessed 1 August 2025].

[12] Besides the texts cited in this paragraph, see Gerhart Neimeyer, 'The New Need for the Catholic University' (1975) 37 *Review of Politics* 475; Daniel C. Maguire, 'Can a University be Catholic?' (1988) 74 *Academe* 12; Stephen L. Trainor, 'A Delicate Balance: The Catholic College in America' (2006) 38 *Change: The Magazine of Higher Learning* 14, 14–21; Melanie M. Morey and John J. Piderit, *Catholic Higher Education: A Culture in Crisis* (Oxford University Press, 2010); John M. Breen and Lee J. Strang, 'Academic Freedom and the Catholic University: An Historical Review, A Conceptual Analysis, and a Prescriptive Proposal' (2019) 15 *University of St. Thomas Law Journal* 253.

[13] Charles E. Curran, 'Academic Freedom: The Catholic University and Catholic Theology' (1980) 66 *Academe* 126.

[14] Dennis O'Brien, *The Idea of a Catholic University* (University of Chicago Press, 2002) 146–63, esp. 160–63.

[15] Massimo Faggioli, *Theology and Catholic Higher Education: Beyond Our Identity Crisis* (Orbis Books, 2024).

[16] Hannah Forsyth, *The Modern Australian University* (University of New South Wales Press, 2014); Simon Marginson, *Education and Public Policy in Australia* (Cambridge University Press, 2011).

[17] *Ridd v James Cook University* (2021) 274 CLR 495.

judgment in favour of Dr Ridd. However, its verdict also established that employers cannot use general reputational concerns to suppress academic speech protected by enterprise agreements.[18] Some leading Australian legal scholars have argued that the court's decision to prioritise an internal university code of conduct over intellectual freedom rights may have negative consequences for Australian universities.[19]

The question of academic freedom in Catholic universities in Australia has been raised, and has become urgent, in the past two to three years, in part because contemporary higher education is witnessing unprecedented challenges in the exercise of free speech everywhere.[20] It also, however, stems from a series of specific events which made ACU a focal point for discussion about the ongoing intellectual-ecclesiastical balance.[21] Four incidents occurred in rapid succession and they raised fundamental questions about ACU's commitment to intellectual openness, as well as about how far episcopal influence penetrates its governance. An initial controversy in March 2023 concerned a prohibition against displaying the Pride Flag on campus.[22] A second incident, the sudden closure of the Dianoia Institute of Philosophy in October 2023 and the simultaneous redundancy of dozens of other staff in the Humanities, soon led to considerable scrutiny of how ACU was interpreting its Catholic mission.[23] A third incident, the appointment of Professor Kate Galloway, a prominent advocate for abortion rights, as Dean of the Law School—and then her near immediate reassignment, seemed to many to illustrate starkly how external political positions could override academic qualifications in senior appointments at a Catholic institution.[24] Finally, a fourth incident (that referred to in this article's opening paragraph) took place on 21 October 2024. Former union leader Joe de Bruyn delivered a speech at a graduation ceremony in which he denounced abortion as 'the single biggest killer of human beings in the world, greater than the human toll

[18] Ibid, paras 5, 24, 47, 51.

[19] Adrienne Stone, 'The Meaning of Academic Freedom: The Significance of *Ridd v James Cook University*' (2021) 43 *Sydney Law Review* 241, 241–58. The Federal Circuit Court's decision was confirmed on appeal by the High Court. See Joshua Forrest and Adrienne Stone, 'The High Court's Defence of Academic Freedom in *Ridd vs JCU*', *Australian Public Law* (Blog, 17 November 2021) <https://www.auspublaw.org/blog/2021/11/the-high-courts-defence-of-academic-freedom-in-ridd-v-jcu> [accessed 8 December 2025].

[20] Neal H. Hutchens and Frank Fernandez, 'Academic Freedom as a Professional, Constitutional, and Human Right: Contemporary Challenges and Directions for Research' in Laura W. Perna (ed), *Higher Education: Handbook of Theory and Research* (Springer, 2023) 149; Michael Ignatieff, 'The Geopolitics of Academic Freedom: Universities, Democracy & the Authoritarian Challenge' (2024) 153 *Daedalus* 194, 194–206.

[21] See e.g. John Ross, 'How Catholic should a Catholic University be?', *Times Higher Education Supplement* (online, 26 February 2025) <https://www.timeshighereducation.com/depth/how-catholic-should-catholic-university-be> [accessed 1 August 2025].

[22] Lucy Carroll and Christopher Harris, 'ACU orders staff to remove public display of rainbow flags', *Sydney Morning Herald* (online, 15 March 2023) <https://www.smh.com.au/national/nsw/university-orders-staff-to-remove-public-display-of-rainbow-flags-20230315-p5csaa.html> [accessed 1 August 2025].

[23] Hannah Forsyth, 'Solidarity but only among managers, or the Future of the University Sector', *Overland* (Web Page, 25 September 2023) <https://overland.org.au/2023/09/solidarity-but-only-among-managers-or-the-future-of-the-university-sector/> [accessed 5 August 2025]; Kate Fullagar, 'Reflections on the Hunger Games' (2024) 21 *History Australia* 534, 534–37; Justin Weinberg, 'ACU proposes closing Dianoia Institute', *Daily Nous* (online, 16 September 2023) <https://dailynous.com/2023/09/16/acu-proposes-closing-dianoia-institute/> [accessed 1 August 2025]; Sherryn Groch, 'ACU facing redundancy despite rocketing up university rankings', *Sydney Morning Herald* (online, 24 September 2023) <https://www.smh.com.au/education/an-australian-uni-headhunted-them-from-oxford-cambridge-and-yale-now-they-face-redundancy-20230915-p5e4y7.html#:~:text=Last%20week%2C%20ACU%20stunned%20staff,in%20its%20signature%20theology%20studies> [accessed 1 August 2025].

[24] John Ross, 'Catholic university pays A$1.1 million to abortion row dean', *Times Higher Education Supplement* (online, 26 August 2024) <https://www.timeshighereducation.com/news/catholic-university-pays-a11-million-abortion-row-law-dean> [accessed 1 August 2025].

of World War II' and declared that same-sex marriage contradicted 'every society on Earth'.[25] Most students, staff, and family members walked out of the Melbourne Convention Centre.[26] The university subsequently offered full refunds of graduation fees to affected students and provided free counselling services. It also, however, defended de Bruyn's right to express his personal beliefs.[27]

III. AN INSTITUTIONAL IDENTITY CRISIS

The incidents afflicting ACU suggest that the university is struggling to define its Catholic character in a pluralistic academic environment—and also, that its senior leadership engages in reactive crisis management rather than the proactive implementation of clear principles that would govern the relationship between Catholic teaching and academic freedom. The four incidents stemmed from different sources and they reflect the unusual breadth of stakeholders who now profess an interest in shaping ACU's values and identity. ACU's stakeholders include not only students and staff (both faculty and management) but also the Catholic Church, which retains ownership rights in the university (its public status notwithstanding). The Church is represented on the university's senior committees by leading members of its Australian hierarchy (archbishops, bishops, provincial leaders of religious orders, etc).[28] Staff and students clearly often hold to very different interpretations of Catholic values from these ecclesiastical stakeholders. In fact, many who were responsible for the campaign to display the Pride Flag on campus would appear to have sought to assert their own liberal values at the expense not only of Catholic social teaching but also of a policy of institutional neutrality. The redundancies of many Humanities academics and the brevity of Professor Galloway's tenure as Law School Dean on the other hand were (or have been reported as being) management-initiated actions which show the senior leadership's very different interpretation of values again. The management's own 'Change Plan' (a paper outlining and justifying a proposed restructure) argued that the university had to adapt to changing circumstances, reducing staff capacity where student recruitment was insufficient to sustain research culture and growing it in 'areas of contemporary significance and strategic priority' (i.e. where opportunities existed to expand student revenues).[29] It made no comment on the impacts of such changes on Catholic identity and mission, although the areas where cuts were to be made have traditionally been seen as central to those things.

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[25] Caitlin Cassidy, 'Former union head Joe de Bruyn's speech condemning abortion and same-sex marriage sparks walkout at Catholic university', *The Guardian* (online, 22 October 2024) <https://www.theguardian.com/australia-news/2024/oct/22/joe-de-bruyn-speech-acu-walkouts-abortion-same-sex-marriage-ntwnfb> [accessed 1 August 2025].

[26] 'Anti-abortion speech by former union boss sparks mass walkout at Australian Catholic University graduation', *ABC News* (online, 22 October 2024) <https://www.abc.net.au/news/2024-10-22/acu-melbourne-student-walkout-over-anti-abortion-speech/104500510> [accessed 1 August 2024]. The text of De Bruyn's speech is available here: <https://melbournecatholic.org/news/joe-de-bruyns-acu-graduation-speech>.

[27] Caitlin Cassidy, 'ACU to reimburse attenders and offer counselling after Joe de Bruyn's anti-same-sex marriage speech', *The Guardian* (online, 23 October 2024) <https://www.theguardian.com/australia-news/2024/oct/23/joe-de-bruyn-anu-speech-same-sex-marriage-tickets-reimbursed-ntwnfb#:~:text=In%20a%20statement%2C%20the%20ACU,experience%20for%20many%20who%20attended" > [accessed 1 August 2025].

[28] 'Leadership and governance', *Australian Catholic University* (Web Page) <https://www.acu.edu.au/about-acu/leadership-and-governance/governance/corporation>; 'Senate', *Australian Catholic University* (Web Page) <https://www.acu.edu.au/about-acu/leadership-and-governance/governance/senate>; 'Constitution', <https://policy.acu.edu.au/download.php?associated=1&id=192> [accessed 1 August 2025].

[29] Australian Catholic University, *Academic Draft Change Management Plan* (12 September 2023) 2–3.

ACU's difficulty in defining its Catholic character has certainly been exacerbated by local factors. However, it also, in fact, reflects a more fundamental pair of quandaries faced by all Catholic institutions: what constitutes 'Catholic identity' and who has the authority to define it? These problems are worth discussing in historical context in order to create a framework for understanding recent difficulties. The Catholic Church's traditional position is that bishops determine orthodoxy, which is Catholic identity's key component.[30] However, the sheer complexity of the Church's approach to social teaching and dogma ('teachings', 'beliefs', or 'values') has always impeded any straightforward assertion of episcopal authority in this area. Councils (i.e., gathered assemblies of bishops rather than individual bishops) served as the most effective formulating bodies in the Early Church, yet they were frequently subject to secular interference by Emperors and, in the Middle Ages, were superseded by papal claims.[31] Much of the Church's history can be understood as a story of ongoing tensions between competing presumptions to arbitrate the acceptable limits in relevant areas of teaching or the assertion of Catholic character. Tensions between popes, bishops, and theologians reached a modern climax at the First Vatican Council (1869–70), a body that declared that the pope could make infallible statements when speaking *ex cathedra*.[32] Popes have exercised this power of pronouncement only once post 1870—and their very reticence to use the power contradicts the notion of it as settled teaching.[33] Catholic historians continue to dispute the presumption that Catholic values exist (indeed, can exist) outside of specific contexts—and nowhere has their changing nature been more apparent than in precisely those areas of contention that sparked the ACU incidents. For most of the Church's history, abortion (for instance) was not synonymous with murder, as the Church treats it today, because medieval theologians, under Aristotle's influence, understood the 'animation' sequence of the foetus quite differently.[34] Ecclesiastical attitudes toward homosexuality have similarly varied over time, being radically altered by an eleventh-century 'clerical celibacy' movement whose leaders were the first to denounce 'sodomy' as a special category of sin.[35]

One conclusion which surely follows from this historical analysis is that legislators and policymakers need not recognise any source of authority (intellectual or juridical) as having a clear-cut or universally acknowledged right to determine or limit Catholic identity. The Vatican might be thought to hold such authority—indeed, this is implicitly the claim put forward by *Ex corde Ecclesiae*—and yet the pope's actual control over local Churches within the Catholic Communion has always been quite limited. Local bishops and metropolitans exercise autonomy over a wide range of matters including education. Governments therefore need not feel themselves obligated to accept Vatican statements, which are in any case the pronouncements of a foreign state (the Australian Government has long exercised vigilance regarding threats of foreign influence over higher education research, including on intellectual

[30] John Gilchrist, 'The Office of Bishop in the Middle Ages' (1971) 39 *Tijdschrift voor Rechtsgeschiedenis* 85, 85–101.
[31] Ramsey MacMullen, *Voting about God in Early Church Councils* (Yale University Press, 2006); Kenneth Pennington, *Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries* (University of Pennsylvania Press, 1984).
[32] Christian Washburn, 'The First Vatican Council, Archbishop Henry Manning, and Papal Infallibility' (2016) 102 *Catholic Historical Review* 712, 712–45; John O'Malley, *Vatican I: The Council and the Making of the Ultramontane Church* (Belknap Press, 2019).
[33] Anton Houtepen, 'Modernity and the Crisis of Spiritual Authority in the Nineteenth Century. The Case of Papal Infallibility' in Judith Frishman, Willemien Otten, and Gerard Rouwhorst (eds), *Religious Identity and the Problem of Historical Foundation* (Brill, 2004) 95, 109.
[34] Stefania Tutino, *Uncertainty in Post-Reformation Catholicism: A History of Probabilism* (Oxford University Press, 2018) 326–50.
[35] Mark D. Jordan, *The Invention of Sodomy in Christian Theology* (University of Chicago Press, 1997).

freedom grounds). Some of the arguments concerning state sovereignty also, in fact, still apply in the case of local bishops: the state has no need to grant extensive rights over institutions dependent on public funds to them when they are private third parties. Furthermore, why should the state necessarily recognise the view that bishops possess greater authority to determine Catholic identity than lay Catholics do just because bishops themselves claim this? If lay Catholics regard an institution as authentically Catholic, does that not suffice in a secular state whose representatives must arbitrate between competing claimants? Ultimately, a 'golden handcuffs' problem also arises here: any institution that accepts substantial public funding cannot exercise full autonomy over its character where to do so would conflict with general non-discrimination principles. Australian case law has not yet addressed explicitly whether accepting Commonwealth funding implicitly limits the ability to discriminate on religious grounds. However, *Bob Jones University v United States* (1983), in which the United States Supreme Court upheld a decision to revoke the university's tax-exempt status because of its racially discriminatory admissions policies, provides an international parallel.[36] Australian constitutional law differs substantially to United States law but it in general provides weaker religious freedom protections (as noted above).

Of course, in many respects, the controversies at ACU have concerned platforms as much as fundamentals, a distinction that illuminates the university's failure to establish appropriate forums for contentious discussions. The respected Australian Jesuit, and former rector of Newman College at the University of Melbourne, Bill Uren, has articulated this point with particular clarity. Uren argued, in relation to de Bruyn's graduation speech, that the subjects de Bruyn raised were simply too controversial to be appropriate for a celebratory forum in which those who dissented from his positions had no right of reply.[37] A seminar setting where students could engage critically with the arguments presented would have been far more suitable—and would have allowed de Bruyn and others who subscribe to what they identify as 'traditional' Catholic positions to articulate and defend their views against informed critique. ACU's provision of a core curriculum that exposes students to Catholic social teaching could be said to provide precisely this kind of appropriate platform for engaging with contested issues. Its funding of a major research project on the nature of 'Catholicity' is also a worthy endeavour in that respect, so long as its participants' academic independence is upheld.[38] De Bruyn cannot be held solely responsible for the broader dysfunction evident at ACU, in part because the choice to honour a figure so well-known for his conservative Catholic positions on social issues suggests a calculated attempt to regain the confidence of those alienated following Professor Galloway's appointment. ACU's alleged unwillingness to permit Professor Galloway to maintain private opinions on abortion independent of her professional role in the Law School might also be thought to indicate a worrying inability to adopt principled approaches to the separation of personal conviction and academic responsibility. Some Humanities academics targeted in the 2023 cuts have privately speculated whether their willingness to advocate for causes in tension with the interpretation of 'Catholic values' espoused by certain other university stakeholders influenced the university's decision to target them for redundancy.

[36] *Bob Jones University v United States*, 461 U.S. 574 (1983).

[37] Bill Uren, 'A controversial graduation address', *Eureka Street* 34(24) (Article, 11 December 2024): <https://www.eurekastreet.com.au/article/a-controversial-graduation-address> [accessed 1 August 2025].

[38] 'Major international project to reconstruct Catholic theologies for the 21st Century', *Australian Catholic University* (Article, 12 July 2021) <https://www.acu.edu.au/about-acu/news/2021/july/major-international-project-to-reconstruct-catholic-theologies-for-the-21st-century> [accessed 8 December 2025].

IV. CATHOLIC IDENTITY IN THE NEOLIBERAL UNIVERSITY

A further question relevant to ACU's example, and its challenges in safeguarding academic freedom, relates to how Catholic universities ought to maintain their distinctive identity within the contemporary neoliberal higher education sector. The neoliberal university model emerged in the 1980s from a premise that the university's primary function was to enhance corporate competitiveness within a global knowledge-based economy.[39] This premise has fundamentally reshaped institutional priorities and academic culture across all Anglosphere universities over a generation or more. In practical terms, it has meant course structures, content, and pedagogy have privileged immediate workplace integration over critical or 'blue sky' thinking (a philosophy encapsulated in Australia by the governmental emphasis on producing 'jobs ready graduates'). This market-oriented approach has also frequently required universities to assume greater financial independence from government support, collecting fees from students who are now expected to bear the full economic cost of their education (a policy justified on the assumption that higher education represents an individual investment that yields subsequent economic returns). The neoliberal model has faced—and continues to face—substantial criticism from those who argue that higher education should not merely serve corporate needs and/or that students should be allowed to engage with ideas for their intrinsic rather than instrumental value.[40] Critics further contend that universities cannot function as authentically capitalist enterprises since they operate outside genuine competitive market conditions: their established status hierarchies create inherently anti-competitive environments, and they lack owners who would seek profit maximisation. University leaderships typically measure institutional success not through conventional business metrics such as profitability but rather through bureaucratic ones such as revenue scale or enrolment numbers. This also negates the market comparison.

For Catholic universities, like ACU, these tensions are not just academic. They have become particularly acute because such universities need to navigate not only between (1) market demands for vocational relevance and secular academic expectations for intellectual freedom, but also between (2) both of those things *and* ecclesiastical requirements for doctrinal fidelity. This double constraint makes coherent institutional identity and free intellectual inquiry increasingly difficult to maintain. ACU's various controversial incidents in 2023 and 2024 demonstrate this. Many staff felt that the senior management's eventual decision to give in to staff-student demands over the Pride flag in 2023 owed more to concern about the impact of negative publicity on student recruitment than to any particular principles.[41] The proposal for large-scale redundancies amongst Humanities researchers likewise reflected the ascendancy of economic calculation over academic or Catholic mission in management calculations. In this case a previous opportunistic approach, by which ACU had pursued an expansion strategy in certain disciplines to capitalise on the fact that it was cheap to produce research in them (and also that other Australian universities had retrenched from them), was replaced by a new one when the Australian Government decided to suspend the ERA exercise in 2022.[42] With

[39] Gay Tuchman, *Wannabe U: Inside the Corporate University* (University of Chicago Press, 2009); Stefan Collini, *What are Universities For?* (Penguin, 2012); Christopher Newfield, *The Great Mistake: How We Wrecked Public Universities and How We Can Fix Them* (Johns Hopkins University Press, 2016); Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books, 2015).

[40] Martha Nussbaum, *Not For Profit: Why Democracy Needs the Humanities* (Princeton University Press, 2024).

[41] 'Pride flag win at Australian Catholic University', *3CR Local Radio* (12 May 2023) <https://www.3cr.org.au/inyaface/episode/thea-ehre-till-end-night-noah-riseman-pride-flag-win-australian-catholic-university> [accessed 1 August 2025].

[42] Donna Lu, 'Academics welcome Australian Research Council overhaul following controversial grant decisions', *The Guardian* (online, 30 August 2022) <https://www.theguardian.com/australia-

research quality no longer measured by government agencies, what point was there paying for it? The same mindset would appear to have extended to senior appointments, the hiring pattern for which exhibited a preference for candidates with broader sector experience at mainstream universities over those with distinctive Catholic institutional backgrounds or demonstrated commitment to Catholic educational principles. ACU's senior leadership team since 2021 has, in fact, possessed notably limited Catholic credentials, with most administrators having developed their careers within the Australian public rather than in the global Catholic university sector.[43]

ACU's travails, though they have certainly reflected the tensions between neoliberal philosophies and Catholic identity, have also been affected by other factors—and these need to be acknowledged because they complicate any attempt to assess the link between these two phenomena within the university's evolution. One issue, raised variously, has been the quality of managerial judgment in relation to a series of decisions, both strategic and financial. Reports of serious financial mismanagement at ACU circulated extensively in both Australian and international media in 2023 and 2024. The university reportedly lost over a million dollars through an ill-conceived investment in an online educational company.[44] It also suffered a downturn in expected revenues from its own bespoke online learning platform ACU Online. Staff morale is reported to have deteriorated in both 2023 and 2024, its effect evident at a town hall meeting with Vice-Chancellor Zlatko Skrbis in Melbourne in September 2023 when Skrbis told the present author and other staff facing redundancy that they should pity him for the personal abuse he had endured as a result of his decision-making. In 2024, *The Australian* newspaper reported that a *Downfall* parody video mocking Skrbis was circulating amongst university staff.[45] Archbishop of Sydney, Anthony Fisher, resigned from ACU's Committee of Identity in November 2024 following the de Bruyn controversy while also writing to the Vatican's Dicastery for Culture and Education to urge a formal investigation into the university's governance and direction.[46] This implicit criticism of ACU's senior leadership suggests that Fisher had concluded the balance between market-driven strategy and Catholic identity had become fundamentally problematic and that only external intervention could resolve it. However, the Catholic bishops themselves appear to be divided on these issues. The (now emeritus) Archbishop of Brisbane, Mark Coleridge, was reportedly much more

news/2022/aug/30/academics-welcome-australian-research-council-overhaul-following-controversial-grant-decisions> [accessed 2 August 2025].

[43] Miles Pattenden, 'ACU and the demise of the Catholic University', *Catholic Leader* (online, 19 September 2023) This article has been removed from the newspaper's website but remains available: <https://dailynous.com/wp-content/uploads/2023/09/acu-and-the-demise-of-the-catholic-university-the-catholic-leader.pdf >.

[44] 'ACU makes strategic investment in OpenLearning', *Australian Catholic University* (Web Page, 29 November 2019) <https://www.acu.edu.au/about-acu/news/2019/november/acu-makes-strategic-investment-in-openlearning> [accessed 31 July 2025]; Yoni Bashan, 'ACU loses millions in failed bet', *The Australian Business Review*, Margin Call Column (online, 5 July 2024) <https://www.theaustralian.com.au/business/margin-call/acu-loses-millions-in-failed-bet-tara-moriartys-video-bloopers/news-story/bc47b9d0bb4d62cbad50ca0be5e54d7d> [accessed 13 July 2024].

[45] Yoni Bashan, 'ACU Chief gets a Downfall', *Australian Business Review*, Margin Call Column (online, 8 July 2024) <https://www.theaustralian.com.au/business/margin-call/nsw-libs-battling-trust-issues-acu-chief-gets-a-downfall-meme/news-story/38613b1ac2d9a53259c6191d61575d01> [accessed 1 August 2025].

[46] Luke Coppen, 'Archbishops urge Vatican probe of Australian Catholic University', *The Pillar* (online, 6 December 2024) <https://www.pillarcatholic.com/p/archbishops-urge-vatican-probe-of> [accessed 29 July 2025]; Fisher's resignation letter was also leaked to *The Australian* newspaper: 'Australian Catholic University cops a broadside from Sydney Archbishop', *The Australian* (online, 25 November 2024) <https://www.theaustralian.com.au/business/margin-call/australian-catholic-university-cops-broadside-from-sydney-archbishop-anthony-fisher/news-story/ba38f96b4a8087d3443cb814d9ecd856> [accessed 6 August 2025].

supportive of ACU management than Fisher and a report in that archdiocese's newspaper *The Catholic Leader* recently lauded ACU's claimed $73 million budget turnaround.[47] ACU may be split between a Brisbane faction (which would include Chancellor Martin Daubney) and a Sydney-based one that have formed very different assessments of the situation.[48] The resignation earlier this year of Sydney-based Dean of Arts Mary Ryan might also be indicative of ongoing tensions.[49]

Fisher's intervention, in fact, raises a further particularly complex question about academic freedom that extends beyond direct university governance: what might be the consequences if a bishop, who holds a role in ACU's governance structure *ex officio*, was to censor an academic in contexts outside their university employment? Given that bishops exercise considerable influence, both formal and informal, over Catholic institutions and media throughout Australia, such scenarios are far from hypothetical. Consider, for instance, what would transpire if a bishop removed an ACU academic's writing from a Catholic newspaper under his diocesan oversight or prevented publication of scholarly work in Catholic journals susceptible to his pressure. The university's enterprise agreement explicitly guarantees academic freedom to its staff, yet the potential for such external censorship means there is a practical gap in its protections which is not considered in *Ridd vs James Cook University*.[50] The legal and ethical implications of such episcopal intervention would likely depend on several critical factors. If the censorship concerned theological argument that would be one thing. But if it concerned direct criticism of ACU's management or policies, it could reasonably be argued that it constituted an indirect violation of the university's academic freedom commitments, effectively circumventing contractual protections through alternative channels of authority. The situation becomes even more complex when considering whether such censorship would be legally actionable. University enterprise agreements typically govern employment relationships, yet external censorship by institutional stakeholders might fall outside their direct purview, creating potential loopholes in academic freedom protections. The nature of the censored content would significantly influence both the legal standing and moral legitimacy of any episcopal intervention. Censorship of scholarly debate within the academic's area of expertise could represent an even more serious breach of intellectual freedom than restrictions on general political commentary. However, even this distinction could become problematic were a bishop to assert doctrinal authority over academic discourse and thus transform theological arguments into questions of ecclesial obedience rather than intellectual inquiry.

[47] Joe Higgins, 'ACU makes $73 million turnaround', *Catholic Leader* (online, 25 May 2025) <https://catholicleader.com.au/news/acu-makes-73m-turnaround-vice-chancellor-hopeful-for-future-of-sector/> [accessed 2 August 2025].

[48] Yoni Bashan, 'ACU told to cheer for its leaders', *Australian Business Review*, Margin Call Column (online, 10 December 2024) <https://www.theaustralian.com.au/business/margin-call/acu-told-to-cheer-for-its-leaders-twiggys-company-squares-off-against-tudor-jones/news-story/7ee770858fd3c584523abb9c142a68a3> [accessed 6 August 2025].

[49] Yoni Bashan, 'Promotion snub sparks another ACU departure', *Australian Business Review*, Margin Call Column (online, 28 April 2025) <https://www.theaustralian.com.au/business/margin-call/executive-dean-mary-ryan-quits-acu-after-promotion-snub-from-zlatko-skrbis/news-story/8ef6e3264d0c298a2d47f3521c03355e> [accessed 2 August 2025].

[50] 'ACU Staff Enterprise Agreement 2022–25: Intellectual Freedom', *Australian Catholic University* (Web Page) Section 1.10 <https://staff.acu.edu.au/people_and_capability/working-here/enterprise-agreements/acu-staff-enterprise-agreement-2022-2025/intellectual-freedom> [accessed 2 August 2025].

V. THE BISHOP WEARS TWO HATS

An important variant case for considering academic freedom in Catholic universities comes with the seminary. Such specialist training colleges for priests present unique challenges for institutional governance and intellectual freedom because they are not universities under either secular jurisdictions or canon law—a distinction Pope Francis emphasised through his promulgation of *Veritatis Gaudium* (2017).[51] Seminaries are sometimes found within, or are affiliated to Catholic universities, a particular circumstance that can create a complex jurisdictional arrangement that blurs the canonical distinction. ACU has offered one such example of an institution (via the Xavier Centre for Theological Formation), but others are found worldwide, including at the Catholic University of America and Holy Apostles College and Seminary (both in the United States), the University of Santo Tomás in the Philippines, and at other locations. Roman universities such as the Pontifical Gregorian University, Pontifical Lateran University, and Pontifical Salesian University also similarly incorporate a role as a centre for priestly formation within one as an institution for wider academic study. *Veritatis Gaudium* articulates a conception of academic freedom that differs fundamentally from secular university norms—and which is not necessarily compatible with broader sector expectations. The framework through which *Veritatis Gaudium* operates subordinates intellectual investigation to ecclesiastical authority. It mandates doctrinal conformity through required canonical missions for theological faculty, establishes Vatican oversight, and creates a detailed mechanism for removing faculty who deviate from orthodox teaching. Such restrictions flow from a theological rather than secular understanding of academic freedom, where conformity with Church teaching becomes a condition of scholarly legitimacy rather than an external constraint on it. Canon 812 of the 1983 Code of Canon Law also requires an individual to teach Catholic theology in accordance with Church doctrine and to hold a formal ecclesiastical authorisation (a *mandatum*) stating that they are doing this from the relevant bishop.

The 1983 Code of Canon Law attempts to distinguish Catholic Universities from Ecclesiastical Universities and Faculties (i.e., seminaries) [Canons 807, 815]. However, Canon 812 would appear to apply to both kinds of institution. The fundamental potential for overlap between these two types of institution creates a significant challenge for Catholic universities such as ACU. Because they incorporate the latter into the former, their leaders must develop practical mechanisms for managing the competing normative frameworks, including with respect to questions of intellectual freedom and obedience. While it does not necessarily seem unreasonable for the Church to require those employed as theologians in seminaries to teach orthodox ideas, the Church has not necessarily limited its claims to this scenario. Moreover, a question still remains as to how to reconcile a restrictive view of what constitutes appropriate academic discourse within such contexts with broader higher education sector norms. And what of the hybrid arrangements? What should be done, for instance, when mixed classes of seminarians and other students are taught? Or what if a faculty member in a seminary or university becomes known for exploring heterodox ideas in research or the public sphere but not in formal classroom teaching? Exactly what counts as a theological discipline is more nebulous than canonical legislation implies. The discipline of Church History, which includes historical theology, is (for instance) essentially unbounded. Should a faculty member in this field be required to point out not only that the Church now views the ideas they are discussing as erroneous but also that they *are* wrong*?* The potential to compromise scholarly integrity by

[51] Pope Francis, 'Apostolic Constitution *Veritatis Gaudium*', *The Vatican* (Web Page, 27 December 2017) <https://www.vatican.va/content/francesco/en/apost_constitutions/documents/papa-francesco_costituzione-ap_20171208_veritatis-gaudium.html> [accessed 1 August 2025].

subordinating analytical objectivity to contemporary doctrinal judgments is substantial—unsurprising, when the objective is to create a form of academic discourse more akin to catechesis than inquiry.[52] In practice, and perhaps for some of these reasons, enforcement of the requirement for a *mandatum* is not always enforced rigorously where *Ex corde Ecclesiae* applies but not *Veritatis Gaudium* (this has been the case at ACU).

Other parties, such as governments, ought to take an interest in how the 1983 Code of Canon Law, and subsequent Apostolic legislation, impose constraints on academic freedom. Yet what should they do? At one level, the issue might seem minor because Catholic seminaries, and most Catholic universities with seminaries attached, are private institutions operating under ecclesiastical rather than state authority. The state therefore has a more limited obligation to uphold freedom of expression within them. On the other hand, Australia aspires to prohibit discrimination based on religion or philosophical beliefs, a circumstance which could easily be viewed as pertaining if a faculty member were to lose their post for failing to obtain a *mandatum*. *Curran v Catholic University of America* (1986) constitutes an important precedent from the United States where a court did uphold a university's decision to terminate a faculty member's employment following theological disagreement.[53] Australian law regarding this issue remains complex, and Churches pressed for exemptions from the proposed Religious Discrimination Bill (2021) on freedom of religion grounds (the government ultimately shelved the bill citing lack of consensus).[54] However, the state obviously has a more direct interest in the governance and employment practices of a Catholic university that receives substantial public funding (the 'golden handcuffs' issue noted above). In the case of ACU, this heightened interest has already been acknowledged via a confirmation that Australia's Higher Education Regulator (TEQSA) is investigating governance oversight and accountability.[55] The case of Swiss Catholic priest and theologian at the University of Tübingen Hans Küng offers a further parallel to the Australian situation in these circumstances. Küng was stripped of his ecclesiastical licence to teach Catholic theology after he publicly disputed the doctrine of papal infallibility.[56] However, for historical reasons, theological faculties in German universities have separate Protestant and Catholic faculties and Küng was able to continue at Tübingen as a faculty member in 'Ecumenical Theology', maintaining his academic career outside direct ecclesiastical control.[57]

A crucial further question when discussing *Veritatis Gaudium* and even *Ex corde Ecclesiae* is this: how far do these documents really limit the actions of neoliberal university administrators? Massimo Faggioli's recent book *Theology and Catholic Higher Education: Beyond Our Identity Crisis* (2024) laments the 'Great Displacement of Theology' on progressive Catholic campuses, documenting a systematic marginalisation of theological education across American Catholic higher education.[58] Like Anthony Fisher, Faggioli laments that Faculties of Theology

[52] See O'Brien (n 14) 147–48.
[53] Michael Scott Feeley, 'A Historical Account of the Curran Controversy' (1988) 32 *Catholic Lawyer* 1, 1–26.
[54] Australian Human Rights Institute, 'What is happening with religious discrimination laws in Australia?', *UNSW* (Web Page, 26 March 2024) <https://www.unsw.edu.au/newsroom/news/2024/03/religious-discrimination-laws-australia> [accessed 2 August 2025].
[55] Yoni Bashan, 'Embattled Australian Catholic University under investigation', *The Australian* (online, 25 December 2024) <https://www.theaustralian.com.au/higher-education/embattled-australian-catholic-university-under-investigation-from-nations-higher-education-regulator/news-story/67677343d48c20c6e2399a77fb7b87ff> [accessed 6 August 2025].
[56] John Jay Hughes, 'Hans Küng and the Magisterium' (1980) 41 *Theological Studies* 368, 368–89.
[57] Hermann Häring, 'Hans Küng' in Ståle Johannes Kristianse and Svein Rise (eds), *Key Theological Thinkers: From Modern to Postmodern* (Routledge, 2013) 379.
[58] Faggioli (n 15) 1.

have been cut, with traditional obligatory religion courses dropped (some schools, such as Marymount University in Northern Virginia, have eliminated Theology altogether).[59] Faggioli, unlike Fisher, however, blames both sides: he is against both the reactionary conservatives who want Catholic academic culture and traditions to be ring-fenced from the secular academy but also against the secular-minded administrators whose lack of principle puts Catholic mission at risk. The conflicts between ACU's senior leadership and Archbishop Fisher could certainly be seen as operating within such a paradigm, with each side holding to one of these opposing approaches. In practice, canonical legislation has not proved very effective at curbing the designs of neoliberal administrators. Indeed, a notable feature of ACU's Change Plan was its failure to engage at all with the precepts set out in *Ex corde Ecclesiae* or to understand, or distinguish between, theological disciplines when proposing cuts to faculty. In the event, the Change Plan protected academic areas where the faculty was dominated by Protestant scholars (such as early Christianity and New Testament studies) while cutting those more readily associated with the Catholic intellectual tradition (such as Medieval Studies). Several of ACU's more prominent Catholic staff in the Faculty of Theology left the institution in 2023, or have departed since, whereas many Protestant faculty members have remained. Ironically, this outcome represents not a great victory over Archbishop Fisher—whose conservative vision for what a Catholic university should teach did not align with the scholarly priorities or specialisations of the departing Catholic staff—but simply a significant loss for the kind of Catholic pluralism that Faggioli advocates.

VI. CONCLUSION

The recent crisis at the Australian Catholic University illustrates some of the fundamental challenges that face Catholic higher education institutions worldwide. However, in crisis is also opportunity. ACU and other Catholic universities must consider how they can develop responses to the various problems highlighted in this article: (1) the need for more transparent stakeholder governance models that help them to avoid conflicts of values; (2) the need for platform-distinction policies that separate occasions when institutional values may be appropriately expressed from academic forums where open inquiry must prevail; (3) the need for hiring criteria that value academic excellence without requiring conformity to particular political or theological positions on contested social issues; and (4) the need to foster pluralistic intellectual frameworks that cultivate diversity of authentic Catholic thought while maintaining institutional identity through curricular offerings, research priorities, and community engagement. The Australian government should look to help Catholic universities in Australia make progress in these areas by creating guidelines that build on the Australian Law Reform Commission's 2023 recommendations to distinguish between appropriate preservation of religious character and inappropriate discrimination in publicly funded institutions.[60] Catholic universities that embrace intellectual pluralism while maintaining religious engagement will prove more sustainable than those that retreat into sectarian isolation or which dissolve into secular indistinguishability.

[59] 'Marymount University cuts English, several other majors', *Washington Post* (online, 2 February 2023) <https://www.washingtonpost.com/education/2023/02/24/marymount-university-humanities-majors-eliminated/> [accessed 1 August 2025].

[60] Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws: Consultation Paper* (27 January 2023) <https://www.alrc.gov.au/publication/adl-cp-2023/> [accessed 4 August 2025].

Book Review

Christian Natural Law and Religious Freedom: A Foundation Based on Love, the True, and the Good

Christian Natural Law and Religious Freedom: A Foundation Based on Love, the True, and the Good. By Alex Deagon. Routledge, 2025. Pp 153. ISBN: 978-1040385876.

Review by Myriam Hunter-Henin*

As John Witte Jr recalls in the foreword, Jacques Maritain once said: 'yes, we agree about the rights, on condition no one asks why'.[1] Yet, Alex Deagon's monograph precisely raises the question of the why. Not long after his previous monograph in which he put forward a 'principled framework' for solving recent controversies over religious freedom across several jurisdictions,[2] Deagon's newly published monograph examines the foundations for his proposals. Put together, the two monographs offer a pleasingly exhaustive and coherent view of how and why law should protect religious freedom. Deagon advocates that Christian theological values should not only guide legal reasoning but also ground its legitimacy. In his own words, he 'develops a Christian Natural Law to identify that religious freedom is grounded in the pursuit of love, the true, and the good and explains how religious freedom enhances these virtues both for the individual and communities'.[3] Echoing the characteristically conciliatory tone of his previous monograph,[4] Deagon argues that this Natural Law theological basis provides a common ground between Christian denominations as well as between Christian scholars. Contrary to the widely held assumption that natural law only resonates with Catholic traditions, Deagon indeed argues that Protestant and Catholic denominations can embrace Natural Law. Protestants can draw on the theme of enabling grace to overcome the limitations caused by sin and accept that divine moral guidance is achievable.[5] Theological values would also bridge the alleged gap between Natural Law authors such as Finnis, who refers to Natural Law but explicitly leaves aside questions of God's existence and will,[6] and those, like Deagon, who promote a transcendental perspective. For Deagon, the undeniable theological inspiration of Finnis' work reveals an implicit transcendental dimension, which would best be recognised.[7]

Throughout Deagon's book, theological Christian values thus provide the glue between seemingly different positions. Despite its resolutely Christian foundation, his Natural Law framework, according to Deagon, will also resonate with liberalism as well as with non-Christian denominations. In a conciliatory tone, he asserts that his framework 'still supports and undergirds the liberal virtues of freedom, equality and democracy'[8] and that Natural Law

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[1] Alex Deagon, *Christian Natural Law and Religious Freedom: A Foundation Based on Love, the True, and the Good* (Routledge, 2025) vi.

[2] Alex Deagon, *A Principled Framework for the Autonomy of Religious Communities: Reconciling Freedom and Discrimination* (Hart, 2023).

[3] Deagon (n 1) 2.

[4] See Myriam Hunter-Henin, 'Book Review: *A Principled Framework for the Autonomy of Religious Communities*' (2023) 3 *Australian Journal of Law and Religion* 91.

[5] Deagon (n 1) 22.

[6] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 48-49.

[7] Deagon (n 1) 46.

[8] Ibid 8.

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reason would meet the liberal requirement of public reason par excellence. As for non-Christian religious denominations, they can relate to Christian theological values, which are universal, and hence adhere to the proposed framework.[9]

In this brief review, I will highlight what I see as Deagon's main contributions both to the 'transcendental' and liberal scholarship on religious freedom. Along the way, I will query two aspects of Deagon's claims: the conciliatory force of theological affinities on the one hand and the compatibility between a transcendental perspective and liberalism on the other.

Theological Affinities and Conceptual Differences

Schematically, the question of 'why' law should protect religious freedom opens the following dividing lines in the scholarship. Some consider that direct protection of religious freedom threatens liberal values.[10] Others argue that religious freedom lies at the core of the liberal framework.[11] Some seek reasons for protecting religious freedom within a legal liberal democratic framework,[12] whilst others argue that the foundations for religious freedom are necessarily external, transcendent to liberalism and legal democratic legitimacy.[13] Through his Christian Natural Law framework as a foundation for the legal protection of religious freedom, Deagon adds his voice to those who seek a heightened protection of religious freedom on transcendental grounds. Within the transcendental jurisprudence, Deagon strives for conciliation. The conciliatory thread lies in theological affinities, which Deagon argues, expand the legitimacy of his framework for religious freedom beyond the Catholic tradition and transcendental scholarship. The question that remains unanswered, however, is why theological proximity guarantees agreement on what constitutes a legitimate legal framework for religious freedom. History has revealed that the lines of religious tolerance and intolerance depend on political rather than theological affinities and fractures.[14] Moreover, on a conceptual level, theological and transcendental dimensions need not coincide. It is one thing to unravel theological values within the liberal framework or offer legal solutions imbued by such values; it is quite another to argue that the legitimacy of legal outcomes lies in a transcendental source. Whereas the former focuses on substantive solutions, in other words, on how to protect religious freedom in specific circumstances, the latter aims at the theoretical question of the why. Theological affinities certainly point to common ground on the how but leave open potential radical divergences on the why. Moreover, if divergences underlying theological affinities may be undermined, the divergence between theological and secular perspectives may conversely be exaggerated. The implicit dichotomy between a disenchanted secular liberalism on the one hand and a transcendental Natural Law framework on the other relies on a 'destructive' version of liberalism based on autonomy,[15] which leaves out denser versions of liberalism amenable to an enhanced protection of religious freedom. Reciprocally, the transcendental Natural Law framework leaves out the line of work within theological jurisprudence which finds in theology, not a new fundamentalism for human rights and

[9] Ibid 9, 103.
[10] See, eg, Cécile Laborde, *Liberalism's Religion* (Harvard University Press, 2017).
[11] See, eg, Cass Sunstein, *On Liberalism: In Defense of Freedom* (MIT Press, 2025).
[12] See, eg, my own book: Myriam Hunter-Henin, *Why Religious Freedom Matters for Democracy: Comparative Reflections from Britain and France for a Democratic 'Vivre Ensemble'* (Hart, 2020).
[13] E.g. Joel Harrison, *Post-Liberal Religious Liberty: Creating Communities of Charity* (Cambridge University Press, 2020).
[14] For a sociological perspective on religious conflict amongst Christian denominations in 17th century Britain, see Anna Keay, *The Restless Republic: Britain Without a Crown* (William Collins, 2022).
[15] Deagon (n 1) 1, 4.

religious freedom, but a corrective to the dominant secular logic undergirding it.[16] In this more nuanced version of theological work, religion does not displace liberalism or the idea of rights but enters into a constructive engagement with secular liberal modernity.[17] The theological affinities between theological and transcendental authors does not therefore necessarily point to conciliatory positions. The genuine line of opposition, that cuts across secular and theological constructions, lies in the commitment (or not) to liberalism. In that regard, the compatibility between transcendental jurisprudence and liberalism is doubtful.

Transcendental Jurisprudence and Liberalism

Deagon argues that his Natural Law framework embraces liberal values. His previous monograph indeed positioned itself outside of secularism but within liberalism. As Deagon moves on in this book to questions of foundations, however, the opposition between his Natural Law framework and liberalism emerges clearly. First, the emphasis on (theological) values, without any concern for the institutional and procedural guarantees that might accompany the elucidation and implementation of these values in concrete cases, would fall short of the notion of safeguard at the core of liberal democracies.[18] For sure, Deagon explicitly leaves outside 'the epistemological question (how we know the natural law through reason)' to focus on 'the theological question (its source and grounding)',[19] but under a liberal framework, only the former could guarantee legitimate, fair, and equal protection of religious freedom. The impasse on the question is therefore revealing. The question for Deagon is not essential because, precisely, the essence of legal legitimacy under his framework would reside elsewhere, in its divine source. That is also probably why Deagon does not linger on the question—crucial for liberals—on the acceptability of the terms of legitimacy. As long as these terms are accessible and plausible to all, the difficulty that some may face in accepting them is, for Deagon, 'beside the point'.[20] Secondly, the insistence on the good and the true takes precedence, in Deagon's thoughts, on rights and freedoms. Certainly, the idea of the good and the true in Deagon's framework encapsulates rights and freedoms. However, in instances of clash, the good, as construed by collective religious organisations, will trump conflicting manifestations of religious freedom by dissident members.[21] By contrast, I would argue that the priority on rights is an incontestable feature of liberalism. In light of such radical divergence, the reader would have welcomed a systematic comparison between the proposed framework and the secular liberal alternatives in their diverse versions. In its absence, the reader might still wonder why Deagon's Natural Law framework should be characterised, not only as a translation exercise of secular liberal public reasons into Christian theological terms (in a traditional avoidance strategy that pushes deep disagreement aside[22] and leaves each and every one the task to make

[16] Zachary R Calo, *Faithful Presence and Theological Jurisprudence: A Response to James Davison Hunter*, (2013) 39(5) *Pepperdine Law Review* 495, 515.
[17] Ibid 503.
[18] Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, 1997).
[19] Deagon (n 1) 9.
[20] Ibid 2.
[21] See Deagon (n 2) 99.
[22] Christopher McCrudden, *Litigating Religion: An Essay on Human Rights, Courts and Beliefs* (Oxford University Press, 2018) 87. McCrudden notes that the use of public reason in the public forum may push the problem (of finding common intelligible grounds) aside rather than solve it.

sense of public reasons in their own terms) but, as Deagon claims, *the best option*[23] for all, one that lives up to solving disagreement on principles.[24]

Going back to John Witte Jr's quote from Jacques Maritain, 'yes, we agree about the rights, on condition no one asks why', it seems that disagreement that emerges when asking 'why' about religious freedom nowadays no longer merely refers to the content of the right, but to the very role of rights in our (liberal) societies. It is no surprise therefore that Deagon's new book on the foundations of religious freedom provokes disagreement. Whether one agrees with the proposed framework or not, however, we may all agree that Deagon hereby makes an important contribution both from 'within' what I would call the 'transcendental' scholarship on religious freedom and from 'outside', prompting further reflection on liberalism's core commitments.

[23] Deagon (n 1) 5.

[24] Cass Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' (2007) 74(1) *Social Research* 1. Sunstein argues that since people can often agree on constitutional practices, and even on constitutional rights, when they cannot agree on constitutional theories, well-functioning constitutional orders try to solve problems through incompletely theorized agreements.

Book Review

Comparative Approaches to Law and Religion: Methods and Epistemologies of Comparative Legal Analysis

Comparative Approaches to Law and Religion: Methods and Epistemologies of Comparative Legal Analysis by Renae Barker, Camilla Baasch Andersen, and Mohammad Rasmi Alumari (eds). Routledge, 2025. Pp. 424. ISBN: 1032478888.

Review by Thomas A J White*

Perhaps better titled with the conjunction Law *on* Religion rather than Law *and* Religion to counter any over-anticipation of subject breadth, this Routledge edited volume offers a mix of accessible chapters on the comparative regulation of religion — as per its modern secular-liberal definition — in different (mostly) anglophone nation-states. These chapters of varying length are, in the main, offered as exemplars of different approaches to comparing legal provisions, principles, and processes used to regulate religion, typically across two different jurisdictions, including Australia, Canada, USA, and the UK, but also Italy and the EU courts. With more than half of the contributors being Australian lawyers, the focus on Australia, the UK, and other anglo-settler states and their judicial decision-making is understandable. Such focus, however, rarely pushes the authors or their conceptual tools outside their methodological comfort zones, which a broader comparative net necessily would. The final few chapters, however, do branch out further, including comparative analyses of parliamentary inquiries on hate speech and religion (Scotland and Australia), religious freedom rulings in India, and women's reflections on gender legislation among the Pakistani and Brazilian diaspora in Australia.

The book's principal arguments arrive at the very end of the book and are offered as a thematic summarising of the preceding chapters. These are twofold. One, that different approaches to comparative legal analysis on religion — and here I paraphrase — can be fruitfully divided by the type of data analysed and the researchers' evaluative ends. The book's classificatory scheme names these overlapping methods as the doctrinal, the historical, the functional, the analytical, the cultural, and 'the yardstick'. And two, that the choice of method(s) for comparative legal analysis on religion is necessarily subjective and contingent upon the researcher's objectives. Any charge of superficiality, say, levelled at a doctrinal comparative analysis lighter on historical and cultural contextualisation can be mitigated, first, by establishing a clearly defined measure against which law on religion is comparatively evaluated, namely 'the yardstick' (eg: compliance with the *European Convention on Human Rights*), and second, with the recognition that all comparison involves a brute reduction of complexity anyway. A line must be drawn somewhere, and according to the book's editors, that is for the researcher to decide appropriate to *their* ends. In a rallying cry of intellectual liberation (and license), the editing contributors Barker, Andersen, and Alumari quote the comparativist Kahn-Freud: 'on the professor of comparative law the gods bestowed the most dangerous of gifts, the gift of freedom'.[1]

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[1] Mohammad Rasmi Alumari, Camilla Baasch Andersen, and Renae Barker, 'Comments on Comparative Methodology Used throughout the Book' ('Comments') in Renae Barker, Camilla Baasch Andersen, and

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Before digging into these claims and offering broader thoughts on the book, it is important to note that this book is aimed primarily for lawyers, legal scholars, and law students with an interest in religion. In other words, it will be of greater utility to those more interested in the practical application of comparative legal analysis than its theoretical critique. With this in mind, the book is a salutary accomplishment. The five chapters of Part I fill key knowledge gaps for those trained in law but not the academic study of religion and who thus need assistance to navigate religion's highly normative and semantically beguiling character. For example, Patrick's chapter 'How to Do Comparative Law and Religion' provides a solid, if short, primer regarding the complexity of 'religious' subject matter, such as cautioning against reductionist and category errors (eg 'Hinduism believes x') that religious studies undergraduates learn to avoid in their first year. While Erlings' chapter on minors and law on religion offers a fine example of how scientific studies can clarify where lived religiosity deviates from a uniformity of type that law on religion often assumes. Erlings' argument that studies on children's participation in mortuary rituals affecting levels of religious maturity can inform legal age thresholds for religious agency, is a case in point. Barker and Clarke's analysis of different models for global variation in religion-state relations is also both thorough and systematic. Whereas in Part II, by far the longest section, nine chapters give detailed case study analyses on jurisdictional differences in doctrine and practice on matters ranging from religion in schools, Jehovah Witness blood tranfusions, Kirpan wearing, and homophobic Christian bakers, each respectively leaning into the different methods thematised at the end of the book. Given that these controversies repeat in modern states across the world, these chapters not only provide clear accounts of the competing interests and rights at stake in such clashes, but also provide intelligent and varied methodological approaches for examining how and why ostensibly similar liberal democracies are at odds on how to resolve them. All this analysis will be helpful to those in legal studies seeking a more versatile toolkit for thinking through law on religion differences across national jurisdictions.

For readers wrestling with more critical questions of theory and method in comparative law and religion however, the book's promise to 'equip researchers with the tools to navigate the complexities of interdiscipilinary and comparative legal studies'[2] leaves a key area of analysis unexamined: that is, the *distinctiveness* of religion as a subject of comparative law.[3] Given my training in religious studies, rather than law, it is scratching this itch that absorbs the rest of this review, which I hope is received in the constructive spirit with which it is offered. For it was unclear to me in the book's closing arguments — described as 'the heart of the book'[4] — precisely why the otherwise smart classificatory scheme of comparative approaches should be understood as any more pertinant to a comparative law on religion, than, say, to any other politicised and complex subject of law, such as comparative family law or comparative law and custom. The book's concluding emphasis on 'multivalence', asserting the integrity of different approaches against charges of superficiality is fine in itself, but also seemed to be offered in lieu of a methodological critique on comparative law and religion as a whole. The contemporary challenge for scholars working on comparative law and religion is not to be

Mohammad Rasmi Alumari (eds), *Comparative Approaches to Law and Religion: Methods and Epistemologies of Comparative Legal Analysis* (Routledge, 2025) 379, 384 ('*Comparative Approaches*') (quoting Otto Kahn Freund, *Comparative Law as an Academic Subject* (Clarendon Press, 1965) 40-41)).

[2] *Comparative Approaches* (n 1) i.

[3] For a quick and accessible introduction to this core observation, see Ben Schonthal, 'Why Religion is Different: Five Contradictions of Religion in Law', *The Immanent Frame* (Web Page, 25 July 2019) <https://tif.ssrc.org/2019/07/25/five-contradictions-of-religion-in-law/>.

[4] Camilla Baasch Andersen, Mohammad Rasmi Alumari, and Renae Barker, 'Introduction' in *Comparative Approaches* (n 1) 1, 3.

perfectly versed on the minutiae of theological doctrines or cultural histories (which reads a little bit like a strawman). Rather, it is to remain alert to how religion as a legal category shields interests and funnels power through its extraordinarily tensile semantics, bending but not breaking with multiple and contradictory meanings deployed intuitively and strategically in legal arenas. As governments assume to regulate the bodies, behaviours, and beliefs of their citizenry, or quietly integrate majority identities, ideologies, and institutions within the state, it is from this deep ambivalence of law on religion — *both* in its inclusions *and* its omissions — that such transformative change often occurs. One might hope that a book drawing together various comparative legal analyses on religion, then, would not only explain how scholars may variously identify and explain jurisdictional difference, but would reach for some comprehensive and *critical* understanding of comparative 'law on religion' as a whole.

It is regarding this specialness of law on religion that Patrick's observation in the abovementioned chapter, that 'most people working in comparative law and religion are lawyers by training, not sociologists of religion or cultural anthropologists',[5] hits home. In a book on 'methods and epistemologies' there is a striking dearth of the critical comparative law and religion scholarship written over the last two decades[6] examining the covert normativity and semantic instability of the field's core concepts. Indeed, lawyers and legal scholars working in this area, themselves often with religious skin in the game, can seem more comfortable working with theologians than with social scientists of religion precisely because religion as imagined in law operates more like a theological concept than a scientific one. Scientific studies tend to understand human religiosity as an effect of our evolved cognitive faculties, culturally differentiated and adaptive to our diverse social and environmental conditions. Whereas modern law, privileging the transcendent over the immanent aspects of religiosity, constructs religion from a political philosophy rooted in a European history of modernity, and a liberal, Protestant notion of salvation and the individual soul. Arguably the undergirding intellectual task of comparative law on religion is less the reconcilation of expertise between outsider lawyers and insider believers (a concern the book is careful to address). Rather it is to understand that the persisting challenge nation-states encounter in demarcating the limits to religion is less a bug in secular lawmaking, and more its core feature. It is a high bar to expect an edited volume juxtaposing different comparative methods to resolve the incommensurability of religion as variously understood across law, the human sciences, and critical theory. But to skate across these deep differences, and pass over the critical literature altogether, presents the professional expediencies of law on religion as requiring a preference for sticking one's head in the sand. For example, when a more critical line of reflection availed itself in the final pages, such as when the question is briefly raised why United States jurisprudence is so over-represented in comparative law on religion,[7] the issue is declared as beyond the book's scope.

In the comparative study of religion, care is paid to minimise the 'epistemic violence' that occurs when emic (insider) and etic (comparative) perspectives blur and categories of comparison smuggle in observer bias. What then for the comparative lawyer looking at religion? Must they more diligently bracket the normative assumptions of their (secular) legal training, carefully signalling and mitigating the unevenness of their founding concepts? With

[5] Jeremy Patrick, 'How to Do Comparative Law and Religion' in *Comparative Approaches* (n 1) 11, 12.
[6] Some of the more important of these texts include Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton University Press, 2005); Hussein Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (University of Chicago Press, 2012); Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton University Press, 2015); Elizabeth Shakman Hurd, *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton University Press, 2015).
[7] Alumari, Andersen, and Barker, 'Comments' (n 1) 396.

the book's intended audience of legal *practitioners*, the relevance of this critical reflexivity may be deemed less important, overly-abstract, even vexatious. And to recap, taken chapter-by-chapter, and as a reflection on questions of method in comparative law looking at socially and culturally complex subjects, the book is important and meritorious. Yet with the book assuming that merely the shared topic of religion is a sufficient thread of connection between its chapters, without going deeper into precisely why religion makes for a such a uniquely thorny issue for comparative law, the assemblage of chapters risks reading more like a conference proceedings than a carefully marshalled, if diverse, set of interventions on a shared methodological challenge. The concluding each-to-their-own ideal in this regard is an outcome of this critical approach not followed, as too is the section heading titled 'Critiquing Comparative Approaches' with the proceeding text disavowing doing any such thing.[8]

To conclude with an eye to the intellectual heavy-lifting to come for the comparative, interdisciplinary study of law on religion, it is worth sharing a brief anecdote about the New Zealand Religious Liberty Conference held in Auckland in early 2025 — which several contributors of this book attended — where a venerable Australian law professor dared venture into unfamilar scholarly territory. In a plea for stronger legal protections for religious ways of life, he quoted the findings of the celebrated sociologist of religion Rodney Stark — broadly confirmed in the field — that religious belief and behavour is positively associated with better health and well-being. Yet when presented with the observation that the science of religion is less interested in correlation, but in causation, and as such, follows a line of enquiry very much in tension with liberal ideals of religious freedom — the *demystification* of religion — the penny refused to drop. The allure of interdisciplinary research for comparative law and religion, particularly the human sciences, is that it offers lawyers and lawmakers the possibility of traction on a subject that is notoriously elusive, ineffable, and contentious. Yet the science of religion is rooted in profaning logics that, in reducing projects of transcendence to their materialistic causes and effects, can be deeply repugnant to the integrity of religious beliefs. While hardly uncontentious, the reigning political philosophy in modern law on religion, harking back to John Locke's *A Letter on Toleration* and his advice that lawmakers ought not to look too deeply into the beliefs of others, remains far more acceptable to the diverse religious groups such law governs. Perhaps the bigger question of interdisciplinarity in comparative law and religion then is not merely how can it be done more effectively, *but whether it should*; a question involving probing issues of equality before the law and the democratic participation of religious citizens, as much as the unsettled questions of epistemological bias and empirical rigour.

[8] Ibid 379.

2025 Australian Law Student Essay Competition in Law and Religion: First Place Winner

State Support for Scripture in the Public Education System

Jacob Carson*

I. INTRODUCTION

The issue of how exactly religion and education ought to intersect has been described as 'probably the most passionate, fundamental and continual ideological conflict in Australian history'.[1] There is much to commend the accuracy and force of this statement. Schools sit in a tectonic hot spot in society, given their status as dominant values-shaping institutions and their positioning at the nexus between the private sphere of the family and the public sphere of the state.[2]

One battlefront of this public debate that continues to generate considerable controversy is the regulation of the system of Scripture teaching that operates in most public schools in Australia. It is apposite to open discussion of this issue with a brief historical overview of the role of religion in Australian education. This will then be followed by an outline of the current legal and policy foundations of Scripture teaching before concluding with critical analysis arguing that all Australian jurisdictions should retain Scripture teaching under the model used in New South Wales.

II. HISTORY OF RELIGION IN AUSTRALIAN EDUCATION

From the 1780s to the 1820s, the Church of England enjoyed a monopoly on the provision of education in Australia, due to its established status in the early colony of New South Wales.[3] This privileged position was formalised through the creation of a government-funded, Anglican institution called the Church and Schools Corporation, which was accomplished by a charter of incorporation authorised by letters patent in 1826.[4]

By the 1830s, confronted with the challenging plurality within colonial society, the government in New South Wales began to move away from support for strict establishment of the Church of England in favour of tolerance for a diversity of Christian denominations.[5] Following this, the Anglican monopoly on education was soon broken by the abolition of the Church and Schools Corporation and the introduction of denominational schools run by other churches,

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[1] Patrick O'Farrell, *The Catholic Church and Community: An Australian History* (Thomas Nelson, 1977) 138.

[2] Renae Barker, 'It Is Not Inevitable: The Future Funding of Faith-Based Schools after Ruddock' (2020) 97(2) *Australasian Catholic Record* 144.

[3] Stephen Chavura, John Gascoigne, and Ian Tregenza, *Reason, Religion and the Australian Polity: A Secular State?* (Routledge, 2019) 11; *Wylde v Attorney-General* (1948) 78 CLR 224, 284 (Dixon J) ('*Wylde*'). See also Paul Babie et al, *Religion and Law in Australia* (Kluwer Law International, 2015) 28.

[4] Babie (n 3) 29; Zehavit Gross and Suzanne D Rutland, *Special Religious Education in Australia and Its Value to Contemporary Society* (Springer, 2021) 29.

[5] Chavura, Gascoigne, and Tregenza (n 3) 2.

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many of which were at least partially funded by the colonial government.[6] However, further change was on the horizon.

After it became apparent that the denominational system was leading to inefficient allocation of resources and the production of poor educational outcomes, and in response to intense sectarian tensions within Australian society, colonial legislatures one by one introduced government schools and abolished state funding for religious schools.[7]

The colonies started to legislate on government schools in the Australian colonies in the following order: New South Wales (1848),[8] South Australia (1851), Tasmania (1868), Western Australia (1871), Victoria (1872), and Queensland (1875).[9] However, the colonies abolished state aid to denominational Christian schools in a different order: South Australia (1851),[10] Victoria (1872),[11] Queensland (1881), New South Wales (1883), Tasmania (1885), and Western Australia (1895).[12]

Importantly, there is now a heated contemporary debate over whether or not these secular education Acts were motivated by a desire to purge public education of all trace of religion, such that they fit within a 'greater secular liberal progress narrative in Australian culture'.[13] If this was so, then the current maintenance of Scripture teaching in public schools would arguably be a betrayal of the intent behind these legislative developments. However, scholars such as Hastie and Chavura, Gascoigne, and Tregenza have, with considerable force, rebutted the thrust of this argument, claiming that it is motivated by 'an explicit purpose of validating contemporary ideology'[14] and that it commits the fallacy of 'retrojecting [scholars'] own contemporary understanding of the secular–sacred distinction onto historic debates'.[15] In place of this ideological liberal view, Hastie and Chavura et al. have argued that the 'secular' education these statutes refer to, when read in context, denotes non-denominational Christian

[6] Babie (n 3) 29; Barker (n 2) 150. The very first Appropriation Act of the NSW Legislative Council provided hundreds of pounds for Presbyterian clergy and Catholic schools (although, it should be noted that it provided *thousands* of pounds for Anglican clergy and Anglican schools): *Appropriation Act 1832* (NSW) s 3.

[7] Barker (n 2) 149–50; David Hastie, 'The Latest Instalment in the Whig Interpretation of Australian Education History: Catherine Byrne's JORH Article "Free, Compulsory and (not) Secular"' (2017) 41(3) *Journal of Religious History* 386, 387 ('Whig Interpretation'); Gross and Rutland (n 4) 32.

[8] The *National Education Board Act 1848* (NSW) incorporated the Board of Commissioners for National Education to administer funds dedicated to establishing public non-denominational schools based on the Irish example (designated as 'Lord Stanley's National System of Education'). The *Appropriation Act 1847* (NSW) was then the first Appropriation Act to provide funds 'towards establishing Schools to be conducted under Lord Stanley's National System of Education'. Lord Stanley was a British politician who famously devised a proposal for public schooling in Ireland via a letter written in 1831.

[9] *State Education Act 1875* (Qld); *Education Act 1851* (SA); *Public Schools Act 1868* (Tas); *Education Act 1872* (Vic); *Elementary Education Act 1871* (WA).

[10] *Education Act 1851* (SA). Whilst this Act does not explicitly abolish funding to private schools, it did seem to shift all government expenditure to public schools. The next education Act in South Australia explicitly allowed funding of only non-denominational private schools where public schools could not be established: *Education Act 1874* (SA) s 10.

[11] *Education Act 1872* (Vic) s 10 provided a process of phasing out support over a maximum of five years.

[12] *Public Instruction Act 1880* (NSW) s 28; *State Education Act 1875* (Qld) s 13; *Education Act 1885* (Tas) s 5; *Assisted Schools Abolition Act 1895* (WA) s 2.

[13] Hastie, 'Whig Interpretation' (n 7) 391. See this view propounded in Marion Maddox, *Taking God to School: The End of Australia's Egalitarian Education?* (Allen & Unwin, 2014) ('*Taking God to School*'); Catherine Byrne, 'Free, Compulsory and (Not) Secular: The Failed Idea in Australian Education' (2013) 27(1) *Journal of Religious History* 20.

[14] Hastie, 'Whig Interpretation' (n 7) 390.

[15] Chavura, Gascoigne, and Tregenza (n 3) 4–5.

education, not religion-free education. As a result, nineteenth-century public schools are said to have operated along Christian lines, although admittedly to varying degrees.[16]

A close examination of the legislation in question indicates that non-sectarian Christian education was indeed part and parcel of early government schools in at least the states of New South Wales, South Australia, Tasmania, and Western Australia. The South Australian Act claimed that its aim was 'to introduce and maintain good secular instruction, based on the Christian Religion; apart from all theological and controversial differences on discipline and doctrine, and that no denominational catechism be used'.[17] The New South Wales Act similarly explicitly provided that government schools' 'teaching shall be strictly non-sectarian but the words "secular instruction" shall be held to include general religious teaching as distinguished from dogmatical or polemical theology'.[18] Further, the Tasmanian Act clarified its concept of 'secular education' by stating that all 'teaching shall be strictly non-sectarian', and the Western Australian Act only permitted catechisms to be used that were not 'distinctive of any particular denomination'.[19] Whilst the Queensland and Victorian Acts did not contain explicitly Christian definitions of 'secular education', Chavura, Gascoigne, and Tregenza argue that, in practice, the government schools in these colonies still incorporated non-denominational Christianity into their teaching.[20]

Moreover, although all colonies arguably incorporated elements of Christian teaching within their general curricula, they split evenly on whether denominational Scripture classes could occur within ordinary class hours and whether parents had to specifically opt-out to prevent their children's enrolment in them. New South Wales, Tasmania, and Western Australia provided an opt-out system within ordinary school hours,[21] whereas South Australia, Victoria, and Queensland provided an opt-in system outside of ordinary school hours.[22]

With this historical background established, the modern system of Scripture regulation that has subsequently emerged can now be considered.

III. Current Legal and Policy Foundations of Scripture Teaching

A. *General 'Secularity' of Public Schools*

Notably, the modern public education statutes of today[23] have, for the most part, changed surprisingly little in their traditional commitment to non-sectarian secularity. Tasmania, Victoria, South Australia, and the Australian Capital Territory are fairly standard and simple in their requirement for 'non-sectarian and secular education' and their corresponding prohibition on promoting 'any particular religious practice, denomination or sect'.[24] On the

[16] Hastie, 'Whig Interpretation' (n 7) 387; Chavura, Gascoigne, and Tregenza (n 3) 102, 119.
[17] *Education Act 1851* (SA) s 2.
[18] *Public Instruction Act 1880* (NSW) s 7.
[19] *Education Act 1885* (Tas) s18; *Elementary Education Act 1871* (WA) s 23.
[20] Chavura, Gascoigne, and Tregenza (n 3) 117–18.
[21] *Public Instruction Act 1880* (NSW) ss 17–18 (see predecessor in *Public Schools Act 1866* (NSW) s 6); *Education Act 1885* (Tas) ss 19–20; *Elementary Education Act 1871* (WA) s 22(2).
[22] *State Education Act 1875* (Qld) s 118; *Education Act 1874* (SA) s 9; *Education Act 1872* (Vic) s 12.
[23] *Education Act 2004* (ACT); *Education Act 1990* (NSW); *Education Act 2015* (NT); *Education (General Provisions) Act 2006* (Qld); *Education and Children's Services Act 2019* (SA); *Education Act 2016* (Tas); *Education and Training Reform Act 2006* (Vic); *School Education Act 1999* (WA).
[24] *Education Act 2004* (ACT) s 28(1); *Education and Children's Services Act 2019* (SA) s 7(4)(g); *Education Act 2016* (Tas) s 125(1); *Education and Training Reform Act 2006* (Vic) ss 1.2.2(2)(a)(i), 2.2.10(1).

other hand, New South Wales, Queensland, and Western Australia sit apart in their more overt allowance for a non-denominational Christian ethos in public education. New South Wales, for instance, has word-for-word retained its historical insistence that 'secular instruction' still allows for 'general religious education as distinct from dogmatic or polemical theology'.[25] Most surprisingly, non-denominational Bible lessons can still technically be taught in ordinary public primary school classes in Queensland, and 'prayers, songs and other material based on religious, spiritual or moral values' can still form part of the general school environment in Western Australia.[26] Lastly, the Northern Territory is *sui generis* in its replacement of terminology relating to secularism and non-sectarianism with the more modern-sounding guiding principle that 'learning environments should be culturally appropriate and reflect the diversity of the Territory'.[27]

This general 'secularity' noted, every jurisdiction still permits some form of denominational religious education in public schooling, known variously as 'religious instruction' (Queensland, Tasmania, Northern Territory), 'special religious instruction' (Victoria), 'religious education' (Australian Capital Territory), 'special religious education' (New South Wales and Western Australia), and 'religious and cultural activities' (South Australia). Due to the wide variation of terminology, I will continue to refer to the program simply by its colloquial title, 'Scripture'.

Each State and Territory regulates Scripture teaching through its own mix of statutes, delegated legislation, and government policies. As will become apparent below, although there are broad similarities in how Scripture lessons are administered, there are also significant differences that have a material impact on the uptake and prominence of Scripture classes within each state and territory.

B. *Operation of Scripture Classes*

In all jurisdictions bar New South Wales,[28] provision of Scripture classes is not guaranteed and is instead contingent upon factors such as principals' discretion,[29] availability of Scripture teachers,[30] and demand from parents.[31]

Where it is provided, it takes the form of 30 to 60 minute lessons conducted no more than once per week in nearly every state and territory except Victoria,[32] which has placed an upward limit

[25] *Education Act 1990* (NSW) s 30.
[26] *Education (General Provisions) Act 2006* (Qld) ss 76(2), 76(4); *School Education Act 1999* (WA) s 68(2)(b).
[27] *Education Act 2015* (NT) s 4(g).
[28] See *Education Act 1990* (NSW) s 32(1).
[29] See, eg, *Education and Children's Services Act 2019* (SA) s 82(1).
[30] See, eg, *Education (General Provisions) Act 2006* (Qld) s 76(1).
[31] See, eg, *Education Act 2004* (ACT) s 29(1).
[32] In New South Wales, it is 'at least 30 minutes, but no more than one hour': NSW Government, 'Special Religious Education and Special Education in Ethics Procedures', *Education* (Web Page, 10 May 2024) cl 2 <https://education.nsw.gov.au/policy-library/policies/pd-2002-0074-01> ('NSW Procedures'). In Queensland and Western Australia, it is a period not exceeding one hour: *Education (General Provisions) Act 2006* (Qld) s 76(1); *School Education Act 1999* (WA) s 69(2). In the Australian Capital Territory, it is 'no more than 40 minutes' per week: ACT Government, 'Religious Education in ACT Public Schools Policy', *Education* (Web Page, January 2016) cl 9.1 <https://www.education.act.gov.au/publications_and_policies/School-and-Corporate-Policies/curriculum/religion/religious-education-in-act-public-school-policy> ('ACT Policy'). Finally, in the Northern Territory, it must be at least half an hour per week: *Education Act 2015* (NT) s 86(4).

of 30 minutes on Scripture classes.[33] These classes must take place during school hours, again in nearly every state and territory except Victoria,[34] which restricts Scripture lessons to lunchtimes and 'the hour immediately preceding or after school hours' (despite the assumption in the state's statute that Scripture may be provided during school hours).[35] Further, three Australian states require parents to opt *out* of Scripture lessons for their children (Queensland, South Australia, and Western Australia),[36] whilst the other three states and two territories require parents to expressly opt *in* to Scripture lessons (New South Wales,[37] Victoria, Tasmania, the Australian Capital Territory, and the Northern Territory).[38]

C. *Provision of Scripture Classes*

In general, independent religious groups do the lion's share of work to organise and provide Scripture classes, with state governments simply fulfilling an oversight and gatekeeping role. The Scripture teachers who provide the lessons are themselves, with little variation, either ministers or other approved representatives of churches and other religious groups.[39] Further, the curriculum taught by Scripture teachers is developed by these churches and other religious bodies,[40] and they must typically be published online to inform parents of the content of Scripture lessons.[41] The exception to this relatively unobtrusive approach is, again, Victoria. It is the only jurisdiction in Australia to mandate the presence of a 'Big Brother' figure in the Scripture classroom — a teacher who is expressly charged with reporting to the principal if he or she hears any 'information, ideas, opinions or beliefs communicated to students' by the Scripture teacher that 'contradict the school's values, curriculum or an applicable law'.[42]

D. *Alternatives to Scripture Classes*

The States and Territories have taken a mix of differing approaches to accommodating children whose parents elect not to send them to Scripture classes provided within school hours. In New

[33] Department of Education (Vic), *Ministerial Direction No 145: Special Religious Instruction in Government Schools* (Direction No 145, 9 November 2015) cl 6(5) ('*Ministerial Direction No 145* (Vic)').
[34] See, eg, *Education Act 1990* (NSW) s 3A; *Education Act 2015* (NT) s 86(1); *Education (General Provisions) Act 2006* (Qld) s 76(1); *Education and Children's Services Act 2019* (SA) s 7(4)(g).
[35] *Ministerial Direction No 145* (Vic) (n 33) cl 6(4); *Education and Training Reform Act 2006* (Vic) s 2.2.11(2). See also the conclusion of Ginnane V-P in *Aitken v Victoria Department of Education & Early Childhood Development* [2012] VCAT 1547, [79] ('*Aitken*'): 'The history of the *Education Act* indicates that its purpose was to facilitate the provision of SRI in Government schools by enabling it to be provided during the normal school hours'. This is an example of how ministerial directives have surreptitiously made drastic changes to how Scripture teaching was designed to operate under the relevant Act.
[36] *Education (General Provisions) Act 2006* (Qld) s 76(5); South Australia Department of Education, 'Religious Activities in Schools and Preschools Policy' (Web Document, July 2023) 5 <https://www.education.sa.gov.au/policies/shared/religious-activities-in-schools-and-preschools-policy.pdf> ('SA Policy'); *School Education Act 1999* (WA) s 71.
[37] Although s 33 of the *Education Act 1990* (NSW) prima facie appears to provide for an opt-out system, the New South Wales Government's guidelines make it clear that, if parents have not replied to a schools' request for their preference to be nominated, 'the student is to participate in alternative meaningful activities pending a response': 'NSW Procedures' (n 32) cl 2.
[38] *Education Act 2004* (ACT) s 29(1); *Education Act 2015* (NT) ss 86(2)–86(3); *Education Act 2016* (Tas) s 126(5); *Ministerial Direction No 145* (Vic) (n 33) cl 13(3).
[39] 'ACT Policy' (n 32) cl 9.1; *Education Act 1990* (NSW) s 32(3); *Education Act 2015* (NT) s 86(3); *Education (General Provisions) Act 2006* (Qld) s 76(1); *Education and Children's Services Regulations 2020* (SA) reg 31(a); *Education and Training Reform Act 2006* (Vic) s 2.2.11(a); *School Education Regulations 2000* (WA) reg 48(1).
[40] *Education Act 2004* (ACT) s 29(3); *Education Act 1990* (NSW) s 32(3); *Education (General Provisions) Regulation 2017* (Qld) reg 28; *Ministerial Direction 145* (Vic) (n 32) cl 10(a).
[41] See, eg, 'NSW Procedures' (n 32) cl 1.
[42] See *Ministerial Direction 145* (Vic) (n 33) cl 12.

South Wales, an alternative program with a comparable rationale is provided known as 'special education in ethics'.[43] According to the New South Wales Government, this program educates students 'in ethical decision making, action and reflection within a secular framework, based on a branch of philosophy'.[44] By contrast, Queensland simply requires 'other instruction in a separate location' for secular students, Western Australia requires 'meaningful' and 'educational' alternative activities to be provided, and South Australia and the Australian Capital Territory require curriculum-based education to continue uninterrupted.[45]

Finally, it should be noted that all Australian jurisdictions permit the more sociological topic of 'general religious education' to be taught at public schools for all students. Victorian and Western Australian legislation has defined 'general religious education' as 'education about the major forms of religious thought and expression characteristic of Australian society and other societies in the world'.[46] In practical terms, these world religions may be studied through stand-alone subjects or (perhaps more commonly) through topics within set subjects from primary school through to Year 10. Following that, students may elect to take the 'Studies of Religion' elective in Years 11 and 12.[47] These classes aim to 'support the development of religious understandings and tolerance', as opposed to cultivating moral and spiritual development.[48]

E. *Conclusions*

As has been highlighted, there is substantial congruence between most states and territories on the provision of Scripture, with the largest dividing issue being whether the classes are offered on an opt-in or opt-out basis. The most significant outlier overall is Victoria, which not only offers Scripture classes on an opt-in basis but also offers them outside of school hours for a minimal duration under close surveillance.

Far from a mere academic curiosity, the differences in Victoria's approach have had drastic practical consequences. The deliberate marginalisation and over-regulation of Scripture in Victoria has led to its near disappearance in the state, with student enrolments in the program dropping 99%, from 93,000 to 750, over the past 10 years.[49] By contrast, the more traditionally supportive state of New South Wales has recently experienced a five year high for Scripture enrolments, peaking at 350,000 in 2024.[50] Plainly, what may at first appear as minor changes to the legal and policy structure underlying Scripture teaching can have existential consequences for the program's viability.

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[43] *Education Act 1990* (NSW) s 33A.
[44] 'NSW Procedures' (n 32).
[45] *Education Act 2004* (ACT) s 29(2); *Education (General Provisions) Regulation 2017* (Qld) reg 31; 'SA Policy' (n 36) 5; Western Australia Department of Education, 'Guidelines for Religious Education' (Web Document, 17 November 2015) 4 <https://www.education.wa.edu.au/dl/3j6p3l8> ('WA Guidelines').
[46] *Education and Training Reform Act 2006* (Vic) s 2.2.10(3); *School Education Act 1999* (WA) s 66. Cf the similar definition in *Education Act 2016* (Tas) s 126(1).
[47] See Queensland Government, 'Religious Instruction Policy Statement: Frequently Asked Questions', *Education* (Web Page, 22 June 2022) <https://education.qld.gov.au/parents-and-carers/school-information/school-operations/policy-statement/faq#:~:text=RI%20is%20a%20program%20of,by%20the%20Department%20of%20Education.>.
[48] 'WA Guidelines' (n 45) 2.
[49] Madeleine Heffernan, 'Religion Class Enrolments Slump in State Schools in Decade Since Program Changes' *The Age* (online, 26 February 2023) <https://www.theage.com.au/national/victoria/religion-class-enrolments-slump-in-state-schools-in-decade-since-program-changes-20230221-p5cm6u.html>.
[50] Tara Sing, 'School Scripture Numbers are the Highest They Have Been in Five Years' *Sydney Anglicans* (online, 2 February 2024) <https://sydneyanglicans.net/news/wanted-more-scripture-teachers/53879>.

IV. CRITICAL REFLECTION ON SCRIPTURE IN PUBLIC SCHOOLS

A. *Support for Scripture Teaching*

1. *Opening Comments*

A state's position on most of the modern controversies surrounding Scripture classes (eg, whether they should be opt-in, whether they should occur during school hours, how long they should go for) is largely derivative of its attitude towards the religious freedom of parents and its tolerance of religion more generally. With this in mind, the following sections will first present the arguments for retaining Scripture in state schools, before discussing common objections.

2. *The Case for Keeping Scripture*

There are at least three compelling and interrelated reasons that tend in favour of a sympathetic approach to Scripture teaching from law and policymakers: it teaches important values, it supports holistic wellbeing, and it develops students' identities.

(a) Values and Virtues

Values-based education remains an essential aspect of schooling, both because parents expect it and because, in light of growing social issues such as family breakdown, alcohol and drug use, and domestic violence, broader society requires it.[51]

Importantly, although religion is no longer universally considered the foundation of individual morality,[52] research indicates that religiosity and values formation are deeply interrelated. Further, whilst a search for universal values in a pluralist context may be elusive,[53] all of the major religious traditions offered in Scripture classes (Christianity, Judaism, Islam, Baha'i, Hinduism, and Buddhism) effectively impart the same broad set of values necessary for good citizenship, all of which centre around concepts of honesty, compassion, responsibility, and righteousness.[54]

(b) Spirituality and Wellbeing

Although modern public education tends to focus on physical and intellectual development to the neglect of spiritual development,[55] there is a re-emerging recognition of the fact that 'man shall not live by bread alone'. For instance, both the *Melbourne Declaration* and the *Alice Springs (Mparntwe) Declaration* contain an explicit recognition of the need to cultivate

[51] Gross and Rutland (n 4) 76, 78.
[52] Tony Eaude, 'Spiritual and Moral Development' in L Phillip Barnes (ed), *Debates in Religious Education* (Routledge, 2012) 144, 145.
[53] Ibid 150–1.
[54] Gross and Rutland (n 4) 82, 93, 96.
[55] Ibid 136–7.

spiritual wellbeing in students,[56] and s 7(2)(c)(v) of the *Education Act 2004* (ACT) states that education should recognise the religious needs, *inter alia*, of all students.[57]

Crucially, Scripture classes plug a gap in this area, contributing to students' spiritual wellbeing by helping them to understand the meaning and purpose of life.[58] Not only that, religious practices encouraged by Scripture, such as church attendance, prayer, and giving to others, have been directly linked to improved mental and physical health and wellbeing, as well as a lowered probability of engaging in risky behaviours such as drug use and promiscuity.[59]

(c) Cultural and Religious Identity

Finally, Scripture classes may play an important role in the development of cultural and religious identity in students. For instance, it has been asserted that they provide students with both a sense of belonging and a practical support network of like peers who affirm the same fundamental beliefs — a particularly valuable asset for students from minority religions within the school community.[60]

3. *Common Objections*

(a) General Religious Education is a Preferable Substitute

The most common argument for the abolition of Scripture lessons is that General Religious Education ('GRE') is more suited to a modern, multicultural society than Scripture is.[61] (This was the underlying rationale for the Victorian Government's removal of Scripture lessons from ordinary school hours and their replacement with a form of GRE.[62])

However, there are serious inherent limitations within GRE. Chief among these is that GRE does not aim 'to nurture belief, promote community cohesion, find truth, develop character, increase a sense of identity, gain knowledge or deepen spirituality'.[63]

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[56] Ministerial Council on Education, Employment, Training and Youth Affairs, *Melbourne Declaration on Educational Goals for Young Australians* (Declaration, December 2008) 9 <https://files.eric.ed.gov/fulltext/ED534449.pdf> ('*Melbourne Declaration*'); Education Council, Department of Education, Skills and Employment (Cth), *Alice Springs (Mparntwe) Education Declaration* (Declaration, 13 December 2019) 6 <https://www.education.gov.au/indigenous-education/resources/alice-springs-mparntwe-education-declaration>.

[57] Notably, although spirituality may be a broader category than traditional religion, the close link between the two is indisputable. See Eaude (n 52) 147.

[58] Gross and Rutland (n 4) 78.

[59] Ibid 130, 133; Ying Chen and Tyler J VanderWeele, 'Associations of Religious Upbringing with Subsequent Health and Well-Being from Adolescence to Young Adulthood: An Outcome-Wide Analysis' (2018) 187(11) *American Journal of Epidemiology* 2, 355.

[60] Ibid 109, 115–19.

[61] See Maddox, *Taking God to School* (n 13) 148–53; Cathy Byrne, *Religion in Secular Education: What, in Heaven's Name, Are We Teaching Our Children?* (Brill, 2014); Anna Halafoff, Kim Lam and Gary Bouma, 'Worldviews Education: Cosmopolitan Peacebuilding and Preventing Violent Extremism' (2019) 40(3) *Journal of Beliefs & Values* 381.

[62] Victorian Government, 'New Curriculum Supports Students to Build Healthy Relationships and Understanding' (Media Release, 21 August 2015) <https://www.premier.vic.gov.au/new-curriculum-supports-students-build-healthy-relationships-and-understanding>.

[63] Terence Lovat, 'The New Values Education: A Pedagogical Imperative for Student Wellbeing' in Terence Lovat, Ron Toomey, and Neville Clement (eds), *International Research Handbook on Values Education and Student Wellbeing* (Springer, 2010) 3.

Not only that, but there are at least three reasons to believe that Scripture lessons actually serve multiculturalism *better* than GRE. First, Scripture teaching nurtures each individual's religious and cultural foundations, which in turn promotes a robust pluralism.[64] Second, allowing a degree of religious education incentivises parents of diverse religious backgrounds to keep their children in the public system, as they do not feel forced to choose private religious schools or home schooling to maintain their cultural and religious identity.[65] Third, tolerance for other people groups is arguably more effectively taught within a particularist religious context, paradoxical as that may sound. For instance, this value is regularly taught in Scripture classes by reference to religious ideas such as mankind being created in God's image and through foundational stories such as the Good Samaritan.[66]

(b) Scripture Has Lost its Social Relevance Due to the Decline in Religious Affiliation and Church Attendance

Although recent decades have seen a precipitous drop in denominational affiliation and church attendance in Australia, this has not had the impact on demand for Scripture one might suppose. Studies show that parents with a Christian upbringing, but with no active involvement with religion, still tend to send their children to Scripture lessons. Some of these parents continue the cycle by sending their children to Christian Scripture, wanting their children to learn the same basic religious values they grew up with. On the other hand, another group of these parents opt to send their children to Buddhist Scripture classes, perhaps due to a lingering sense that exposure to some kind of authentic spirituality still matters.[67]

Hence, since the demand for religious education in public schools is staying relatively stable, Scripture classes are arguably becoming *more* important in the modern era, standing as one of the only sources of religious knowledge and experience open to most Australian children today.

(c) Offering Scripture Disadvantages Non-religious Students

Finally, concerns have been raised that students who do not participate in Scripture 'are missing out on essential learning time'.[68] Further, it has been suggested that Scripture lessons may have an 'alienating', 'excluding' or 'isolating' impact' on students who do not participate in them.[69] If true, these concerns would indeed pose a real challenge to the fairness of maintaining Scripture classes. However, their legitimacy has been effectively called into question by the findings of the Victorian Civil and Administrative Tribunal in *Aitken v Victoria- Department of Education & Early Childhood Development* [2012] VCAT 1547 ('*Aitken*').[70]

In *Aitken*, the complainants argued that their children had been discriminated against as a result of their non-participation in Victorian Scripture classes.[71] However, in dismissing this claim, the Tribunal found, first, that the children were not missing out on essential learning time since 'other valuable activities' were offered to them during the Scripture period such as silent

[64] Gross and Rutland (n 4) 129.
[65] Ibid 61–2.
[66] Ibid 164, 170–1.
[67] Ibid 61, 96.
[68] See, eg, Victorian Government (n 62).
[69] See, eg, Maddox, *Taking God to School* (n 13), quoting Catherine Byrne, 'Rejecting the Secular: Religious Instruction in Queensland Public Schools' in Christopher Hartney and Zoe Alderton (eds), *Secularisation: New Historical Perspective* (Cambridge Scholars Press, 2013).
[70] This decision was upheld on appeal in *Aitken v Victoria (*2013) 46 VR 676.
[71] *Aitken* (n 35) [4] (Ginnane V-P).

reading and mathematics activities.[72] Second, the Tribunal also found no evidence of non-Scripture students being 'subject to any differential treatment' or being teased or bullied in any way.[73] Although the Tribunal's comments here were made in the limited context of three identified Victorian schools, they appear to have substantial relevance more broadly.

It might also finally be observed that such concerns relating to productive use of time and avoiding social isolation would be effectively addressed if a version of New South Wales' 'Special Education in Ethics' alternative to Scripture was provided in every other state and territory in Australia.

B. *Regulating the Content of Scripture Teaching*

1. *Opening Comments*

Another live controversy concerns whether Australian governments ought to do more to regulate the content of Scripture teaching.

The current situation, as previously noted, is that the government's role is limited to approving which religious bodies can provide Scripture teaching in schools, meaning total responsibility for the content and curricula taught lies with the religious bodies themselves.[74] One recent review of Scripture materials completed by the Queensland Department of Education rightly observed that 'the current legislation governing RI in state schools does not enable centralised regulation of RI content', and a 2015 review of the NSW Scripture system found that neither Scripture 'providers nor the Department monitors [Scripture teaching's] compliance [with departmental policies] in any systematic way'.[75]

Indeed, this minimal-interventionist approach from state governments has meant that very few prospective Scripture providers have been refused their applications to teach within schools; in fact, this has only occurred where the applicants were not true religious bodies at all, but rather secular activist groups posing as religious bodies for political purposes. The 2015 New South Wales review found that no Scripture providers had lost their approval in recent years and that the only provider to be refused initial approval was the 'Gordon Church of the Flying Spaghetti Monster' (a parody church created for the sake of a political stunt).[76] In such cases, however, the government's rationale for excluding the applicants appears to be their lack of denominational status and bona fide belief system, as opposed to any objection to the offensiveness or undesirability of the content they teach. A clear example of this is the Queensland Government's rejection of the application by the 'Noosa Temple of Satan' to provide Scripture teaching in public schools. Even there, the Government's focus was on the fact that the group's 'true purpose [was] political as opposed to religious' and that the group

[72] Ibid [349], [463]. It might also be noted that a mere 30 minutes per week is a fairly minor period of time to sacrifice, all things considered.
[73] Ibid [351], [425], [428].
[74] See above (text accompany nn. 39-42).
[75] Department of Education (Qld), *Report on the Review of the Connect Religious Instruction Materials* (Report, August 2016) i <https://cdn.newsnow.io/Un3zFxNgjZZYujEcmXfzcX/dba80bbc-b801-4931-96e2-99cb358cf3ef.pdf> (*Connect Review*); ARTD Consultants, '2015 Review of Special Religious Education and Special Education in Ethics in NSW Government Schools' (Web Document, 23 March 2016) xviii, 42 <https://education.nsw.gov.au/content/dam/main-education/about-us/educational-data/cese/evaluation-evidence-bank/2016-special-religious-education-and-special-education-in-ethics-in-nsw-government-schools-2015-review.pdf>.
[76] ARTD Consultants (n 75) 41.

did not hold any genuine belief in a divine being, rather than the offensiveness of the group's proclaimed content.[77]

It appears, therefore, that governments merely have 'soft power' in regulating Scripture content; the most they can do is conduct reviews and request Scripture providers update their materials in accordance with the review's recommendations.[78] However, although there is no clear legal authority compelling Scripture providers to comply with these recommendations,[79] they are still likely to do so, given the need for providers to maintain their social license and their relationship with the education system.

The question of how governments should use this soft power must be answered in conjunction with a broader consideration of the contentious policy issue of what limits should be placed on religious freedom generally within a secular state.

2. *Should Scripture Teachers Generally Be Allowed to Teach Non-mainstream Content?*

The first point to note is that the vast majority of Scripture content is not particularly controversial and does not sit uneasily with any government policies. In this vein, it is instructive to consider the Queensland Department of Education's conclusion following their comprehensive review of the content offered by *Connect* (a popular Christian Scripture provider in Queensland). Overall, the Department found that 'the vast majority of *Connect* materials align with the Department of Education and Training's legislation, policies, procedures or frameworks'. Further, the 'small number of concerns' they identified did not centre around the substance of the doctrines taught but instead focused on the way in which some of the content was conveyed and its age appropriateness for primary school children.[80] Not only that but, far from contradicting government policy, research has indicated that Scripture classes tend to promote the ethical value of living as a good citizen and a charitable neighbour within society.[81]

With that said, it is inevitable that people of faith will affirm some beliefs and practices that do not conform to the 'mainstream secular consensus'.[82] Particular examples of such non-mainstream beliefs taught within some Scripture classes that have been criticised are biblical inerrancy[83] and traditional views on sexual morality.[84] Whilst such beliefs do not receive majority support more broadly, given that Scripture is provided as an 'openly "confessional"

[77] *Bell v State of Queensland* (2022) 10 QR 568, 574–5 [9] (Burns J).
[78] See ARTD Consultants (n 75) xviii; Department of Education (Qld), *Connect Review* (n 75) 16.
[79] Note, however, that the Queensland Department of Education has speculated some authority might be derived from principals' legislative duty to 'promote a safe, supportive and productive learning environment', as well as their 'common law duty of care for students': Department of Education (Qld), *Connect Review* (n 75) 15. That said, the Department itself recognised that there is insufficient clarity regarding what exactly these duties require in the context of monitoring Scripture content: at 16.
[80] Ibid i.
[81] Gross and Rutland (n 4) 82.
[82] Ibid 46–7.
[83] See Maddox, *Taking God to School* (n 13) 133–5, citing Catherine Byrne, 'Ideologies of Religion and Diversity in Australian Public Schools' (2012) 14(4) *Multicultural Perspectives* 201, 205.
[84] These teachings have been highly criticised, despite the fact that many would consider them 'standard features of Christian thought', rather than beliefs 'at the fringes of Christianity': Neil Foster, 'Schools, Scripture, Banning of Books and Sexual Orthodoxy', *Law and Religion Australia* (Blog Post, 11 May 2015) <https://lawandreligionaustralia.blog/2015/05/11/schools-scripture-and-book-banning-in-nsw/> ('Banning of Books').

program' consented to by parents, it seems reasonable to permit the teaching of such non-mainstream religious beliefs within school Scripture classes.[85] In fact, the toleration of differences in belief that this would promote is essential to sustaining a robust pluralism that recognises parents' rights under international law to 'ensure the religious and moral education of their children in conformity with their own convictions'.[86]

Whilst many religious teachings that are out of step with mainstream secular thought should, therefore, be tolerated within Scripture lessons, it is undeniable that *some* limits should still exist to minimise risks such as radicalisation. Although the probability of such risks materialising in any given school is very low, the prospect is unfortunately not completely hypothetical. To take an extreme example, whilst not linked to Scripture classes, Islamic State ideology was disseminated through a voluntary religious club at a public high school within New South Wales in the recent past.[87] Therefore, the question becomes on what basis the line ought to be drawn between acceptable and unacceptable non-conformity within religious education.

3. *Where is the Line Between Acceptable and Unacceptable Non-conformity?*

A helpful starting point on this question is provided by art 18(3) of the *International Covenant on Civil and Political Rights*: 'Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'. Admittedly, this is a broad standard that may leave room for debate in its application to real-world controversies. However, what it does make clear is that religious freedom is paramount and should only be constrained in extreme circumstances for the benefit of the most fundamental of conflicting rights.[88] The natural corollary is that religious freedom must not, therefore, be diminished to protect 'pseudo rights like the right not to be offended', nor should it be diminished in pursuit of a sanitised secular consensus that suppresses differences of opinion on important issues of personal belief.[89]

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[85] Neil Foster, 'Schools, Same Sex Politics and Religion in NSW', *Law and Religion Australia* (Blog Post, 26 August 2015) <https://lawandreligionaustralia.blog/2015/08/26/schools-same-sex-politics-and-religion-in-nsw/>.

[86] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(4). Note that such a notion is consonant with Dr Michael Bird's promotion of 'confident pluralism' in Australia in Michael F Bird, *Religious Freedom in a Secular Age: A Christian Case for Liberty, Equality, and Secular Government* (Zondervan, 2022).

[87] See Neil Foster, '"Extremism" in Schools and Religious Freedom', *Law and Religion Australia* (Blog Post, 29 July 2015) <https://lawandreligionaustralia.blog/2015/07/29/extremism-in-schools-and-religious-freedom/> ('Extremism').

[88] Hastie comes to a comparable conclusion, though from a more utilitarian angle, arguing that religious texts in schools should only be censored in rare circumstances where 'two or more of the four key education stakeholders' (parents, students, society, and schools as institutions) are 'significantly ignored on a large scale':
David Hastie, 'Should We Ban Books in Schools? Arguments from the Public History of Australian School Text Censorship' (2018) 53(3) *English in Australia* 23, 32 ('Should We Ban Books').

[89] Foster, 'Extremism' (n 87); Bird (n 86) 102–6.

V. CONCLUSION

In sum, whilst there are limitations to available sociological data,[90] there are still a number of compelling policy arguments in favour of retaining Scripture lessons within school hours in Australia's public education system. It is submitted that the system in New South Wales, with its robust support for Scripture, its emphasis on parental choice, and its substantive alternative of 'Special Education in Ethics', is the best overall system, deserving of emulation by other Australian jurisdictions.

Moreover, the general posture of non-interventionism in Scripture curricula demonstrated by most states is commendable, and it is suggested that their soft power over content should continue to only be used in extraordinary cases. Although it may be unnecessary and undesirable to legislatively expand this power of intervention, a public clarification of its precise limits could be desirable, particularly to avoid overreach.[91]

Ultimately, if over 200 years of Australia's experience with religion in education has taught us anything, it is that we should not expect universal contentment with any Scripture system that we settle upon. With that said, a system that unbegrudgingly welcomes Scripture teachers into the public classroom appears to remain our greatest hope for a cohesive, pluralist society that chooses to support, rather than suppress, our inherent diversity.

[90] For instance, Gross and Rutland's qualitative data was gathered from a relatively small sample size of 58 Scripture teachers, mostly from New South Wales: Gross and Rutland (n 4) 18–20.

[91] This arguably occurred in 2015 when the New South Wales Department of Education sent schools a warning regarding certain Christian books used in Scripture because of their traditional teaching on sexual morality. But note that the Minister for Education advised these books were no longer banned within two weeks of the initial warning. See Foster, 'Banning of Books' (n 84); Neil Foster, 'Update – Schools, Scripture, Banning of Books and Sexual Orthodoxy', *Law and Religion Australia* (Blog Post, 21 May 2015) <https://lawandreligionaustralia.blog/2015/05/21/update-schools-scripture-banning-of-books-and-sexual-orthodoxy/>; Hastie, 'Should We Ban Books' (n 88) 29–30.

2025 Australian Law Student Essay Competition in Law and Religion: Third Place Winner

Legislating Religious Freedom and Discrimination in Schools: A Theoretical Critique

Ruairi Grant*

I. INTRODUCTION

Societal shifts that call for greater inclusion and the removal of discriminatory barriers in all areas of life have extended to religious schools and discrimination. Generally, discriminating against a person because of their sex, sexual orientation, gender identity, marital or relationship status, or pregnancy, among other protected characteristics, is prohibited in a broad range of contexts.[1] However, religious schools may discriminate against staff and students in all the listed traits to avoid injury to the susceptibilities of religious adherents.[2] The resulting concern is that persons with such traits may be denied the opportunity to work or study at a religious institution. Those discriminated against often offend the relevant religion's doctrine, illustrating the fundamental tension between religious freedoms and progressivist ideals. A vast array of arguments has been presented by many stakeholders, each with varying underlying values.[3] Positions taken can be broadly categorised into three policy outcomes regarding the *Sex Discrimination Act* (Cth) s 38 ('*SDA*')[4]: repealing it, amending it, or leaving it unchanged.[5]

Applying Thomas Aquinas' theory of classical natural law, it is submitted that the relevant section should be repealed and that certain necessary amendments should be made.[6] This is achievable by deriving a specific conclusion from first principles that religious schools should not discriminate. Such a conclusion is made possible by relying on the concept that all are made in God's image, that compassion is unconditional, and that Jesus' ministry displayed radical inclusivity. This outcome will ease enduring tensions and ensure all Australians can work and study at religious institutions.

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[1] *Sex Discrimination Act 1984* (Cth) ss 14(1)–(2) ('*SDA*').

[2] Ibid ss 38(1), (3); Australian Human Rights Commission, Submission No 384 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (2 March 2023) 4 [4]; Australian Law Reform Commission, *Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws* (Report No 142, December 2023) 26 [1.6] ('*Religious Schools and Discrimination: Final Report*').

[3] Australian Law Reform Commission, *Religious Educational Institutions and Anti-Discrimination Laws: What We Heard* (Background Paper ALD2, November 2023) 36 [132] ('*Religious Schools and Discrimination: Submissions*'); *Religious Schools and Discrimination: Final Report* (n 2) 26 [1.6].

[4] *SDA* (n 1).

[5] Queensland Human Rights Commission, Submission No 125 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (23 February 2023) 2 [3]; *Religious Schools and Discrimination: Submissions* (n 3) 3 [15].

[6] *SDA* (n 1) ss 23(3)(b), 37(1)(d), 38; *Religious Schools and Discrimination: Final Report* (n 2) 86 [4.4].

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II. AQUINAS' CLASSICAL NATURAL LAW

Drawing on Greek, Roman, and earlier medieval ideas, Aquinas outlined his theory of law in *Summa Theologica*,[7] published unfinished after he died in 1274.[8] Aquinas identified four types of law that fit within a hierarchical structure.[9] The eternal law is first and supreme, relating to God's rational plan and guidance for all created things in the Universe.[10] The divine law is lesser, referring to principles revealed through Scripture, and is particularly significant for guiding mankind toward salvation.[11] Lower still is the natural law, which governs human action in the temporal realm through reason and results in self-evident first principles.[12]

These general precepts derive from the basic impulse that good is to be done, and evil avoided.[13] Such principles are infinite in number, so Aquinas presents an inclusive list of five: preserve life, pursue knowledge, be sociable, procreate, and exercise practical reasonableness.[14] To narrow the submission's scope and avoid excess subjectivity, only the sociability precept is applied to the policy outcomes, as it is most relevant to discrimination.[15] In this sense, Aquinas' theory proves useful in facilitating a unique theoretical critique, wherein biblical principles provide a robust basis for evaluating the three discussed positions.[16]

Derivations can be made from the principle of sociability either as a conclusion or a determination of certain generalities, both of which are found in the weakest level of law: human law.[17] However, only conclusions are sanctioned by human and natural law, while determinations obtain validity solely from human law.[18] It is also acknowledged that human reason is inherently flawed, and specific conclusions deriving from first principles differ according to unequal reasoning, changing circumstances, the effects of passion, a lack of culture, bad habits, and an inability to argue rationally.[19] The divine law must be considered to remedy these deficiencies.[20]

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[7] Thomas Aquinas, *Summa Theologica*, tr Fathers of the English Dominican Province (Benziger Bros, 1947).
[8] Columba Ryan, *Light on the Natural Law*, ed Illtud Evans (Burns and Oates, 1965) 13–16; Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 9th ed, 2014) 126.
[9] Aquinas (n 7) q 91; Anton-Hermann Chroust and Frederick A Collins Jr, 'The Basic Ideas in the Philosophy of Law of St Thomas Aquinas as Found in the "Summa Theologica"' (1941) 26(1) *Marquette Law Review* 11, 13.
[10] Aquinas (n 7) q 91 art 1; Freeman (n 8) 127; John Finnis, *Aquinas' Moral, Political, and Legal Philosophy* ed Edward N Zalta (Stanford Encyclopedia of Philosophy, March 2021) <https://plato.stanford.edu/entries/aquinas-moral-political/>.
[11] Aquinas (n 7) q 91 arts 4–5; Raymond Bradley, 'The Relation Between Natural Law and Human Law in Thomas Aquinas' (1975) 21(1) *The Catholic Lawyer* 42, 49.
[12] Aquinas (n 7) q 91 art 2; Robert A Panev, 'Hans Kelsen and the Role of Religion in Natural Law Doctrine' (2012) 3 *Western Australian Jurist* 259, 263; Stephen L Brock, 'The Legal Character of Natural Law According to St Thomas Aquinas' (DPhil Thesis, University of Toronto, 1988) 1.
[13] Ryan (n 8) 26; RD Lumb, 'The Scholastic Doctrine of Natural Law' (1959) 3 *Melbourne University Law Review* 205, 207.
[14] Aquinas (n 7) q 94, arts 2–3; Mark Murphy, *The Natural Law Tradition in Ethics,* ed Edward N Zalta (Stanford Encyclopedia of Philosophy, June 2019) <https://plato.stanford.edu/entries/natural-law-ethics/>.
[15] Aquinas (n 7) q 94 arts 2–3; Finnis (n 10); Freeman (n 8) 129; Murphy (n 14); Ryan (n 8) 35.
[16] See above 5 and accompanying text; Aquinas (n 7) q 94 arts 2-3; Finnis (n 10); Freeman (n 8) 128; Murphy (n 14); Ryan (n 8) 35.
[17] Aquinas (n 7) q 95 art 2; Bradley (n 11) 43–4; Freeman (n 8) 130.
[18] Aquinas (n 7) q 95 art 2; Freeman (n 8) 130.
[19] Ryan (n 8) 31–7; Jonathan Crowe, 'Is Natural Law Timeless?' (2021) 33(1) *Bond Law Review* 1, 7.
[20] Aquinas (n 7) q 94 art 5; Ryan (n 8) 35–6.

Therefore, Aquinas defines law as a rational ordering of things concerning the common good, effected by whoever is responsible for governing.[21] A just human law conforms to natural law and, for present purposes, sociability specifically; if it does not, it is no law at all.[22]

III. SCOPE AND LIMITATIONS

The prominence of education in Australian society and the tension between religious freedom and anti-discrimination mean that every Australian is likely to be impacted by reform to laws permitting religious schools to discriminate.[23] However, the critical stakeholders are identifiable from the relevant section's framing as current and prospective staff and students who are sexual minorities, gender diverse, or unmarried pregnant women and religious school communities.[24] These encompass staff, students, and their families.[25]

Further, this submission focuses on religious schools discriminating against sexual minorities, unwed pregnant women, and gender diverse persons, despite the alternative grounds of sex and marital or relationship status.[26] While there is scope to construct a compelling argument on all grounds endorsing any outcome, the utilisation of classical natural law favours consideration of the focus grounds.[27] This is because the theory's Catholic roots support a presumption that sexual minorities, gender diverse persons, and unwed pregnant women resulting from premarital sex are sinful.[28]

This submission is limited by involving substantial biblical interpretation, an inherently subjective task.[29] The referenced background of classical natural law and the progressive

[21] Aquinas (n 7) q 90 art 4; Freeman (n 8) 127.
[22] Aquinas (n 7) q 95 art 2; Freeman (n 8) 130; Simona Vieru, 'Aristotle's Influence on the Natural Law Theory of St Thomas Aquinas' (2010) 1 *Western Australian Jurist* 115, 120.
[23] *Australian Constitution* s 116; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(4); Alex Deagon, Submission No 4 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (22 February 2023) 5.
[24] *SDA* (n 1) s 38; Deagon (n 23) 5; Australian Lawyers Association, Submission No 162 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (23 February 2023) 5 [5], 7 [11].
[25] Independent Schools Queensland, Submission No 119 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (23 February 2023) 2; The Association of Independent Schools of New South Wales, Submission No 154 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (22 February 2023) 1.
[26] *SDA* (n 1) s 38; Brent L Pickett, 'Natural Law and the Regulation of Sexuality: A Critique' [2004] *Richmond Journal of Law and the Public Interest* 39, 39.
[27] Mark Strasser, 'Natural Law and Same-Sex Marriage' (1998) 48(1) *DePaul Law Review* 51, 81; Rusi Jagose, 'Catholic Canon Law and Homosexuality: An Assessment of the Natural Law Justification for Homosexual Intolerance' (2022) 54 *Victoria University of Wellington Law Review* 709, 714.
[28] Christopher Lamb, 'Pope's Approval of Same-Sex Blessings Marks Historic Shift for Gay Catholics', *Cable News Network* (online, 19 December 2023) <https://edition.cnn.com/2023/12/19/europe/popes-aproval-of-same-sex-blessings-intl/index.html>; Eline Huygens, '"My Dream is That I Share the Bed with Only One Man": Perceptions and Practices of Premarital Sex Among Catholic Women in Belgium' (2021) 69(1) *Social Compass* 69, 70.
[29] John H Walton, 'Inspired Subjectivity and Hermeneutical Objectivity' (2002) 13(1) *Master's Seminary Journal* 65, 66; William W Klein, Craig L Bloomberg, and Robert L Hubbard Jr, *Introduction to Biblical Interpretation*, ed Kermit A Ecklebarger (Word Publishing, 1993) 8.

approach of the modern Church favour more liberal constructions.[30] The Church has historically been a traditional and conservative institution.[31] Depending on the interpreter, the provided meanings of explored verses may be sympathised with or opposed.[32]

IV. SOCIABILITY

From the general precept to be sociable, it is arguable that a specific conclusion to generally not discriminate is derivable.[33] Whether this extends to religious schools and those deemed sinners by the Catholic ethos is less clear.[34] If the basic impulse is turned to, excluding sinners may be perceived as good or evil.[35] Considering the divine law for guidance is necessary.[36]

A. IN THE IMAGE OF GOD

A cornerstone of the Christian ethos is stated in Genesis 1:27: 'So God created mankind in his own image, in the image of God he created them; male and female he created them'.[37] This has been interpreted to establish the equal dignity of every person, with contextual readings suggesting that the intent is to be liberating and empowering, rather than oppressive.[38] Saint Paul, in indicating 'there is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Jesus Christ', is often inconclusively cited in support.[39] Aquinas himself also supports such a construction, drawing on the earlier work of Saint Augustine of Hippo.[40] The Holy See has applied Genesis 1:27 to support religious freedom, lending substantial support to the idea that it supports the rights of persons who oppose the teachings of Christ.[41] The Vatican has even utilised the verse to endorse the environmental movement, describing how it justifies social movements which seek to uphold human rights

[30] See above n 28; Jay J Carney, 'Global Catholicism: Diverse, Troubled, Holding Steady' (2021) 46(1) *International Bulletin of Mission Research* 25, 26; Pedro Paulo Weizenmann, 'Pope Francis' Puzzling Political Views: Defying the Conservative-Progressive Binary' (2018) 39(2) *Harvard International Review* 8, 8.
[31] Francis G. Wilson, 'Liberals, Conservatives, and Catholics' (1962) 344(1) *ANNALS of the American Academy of Political and Social Science* 85, 86; Walton (n 29) 66.
[32] Klein, Bloomberg, and Hubbard (n 29) 8; Walton (n 29) 66.
[33] Aquinas (n 7) q 94, arts 2-3; Finnis (n 10); Murphy (n 14); Ryan (n 8) 35.
[34] Aquinas (n 7) q 94, arts 2-3; Finnis (n 10); Murphy (n 14); Ryan (n 8) 35; Michael Allen, 'First Principles and Last Things for a Theology of Work' (2024) 9(1) *Reformed Faith and Practice* 46, 47.
[35] Ryan (n 8) 35; Susan Dimock, 'The Natural Law Theory of St Thomas Aquinas' in Joel Feinberg and Jules Coleman (eds), *The Philosophy of Law* (Wadsworth, 6th ed, 2000) 10.
[36] Aquinas (n 7) q 94 art 5; Ryan (n 8) 35–6.
[37] Biblica, Genesis 1:27 (New International Version, 2nd rev ed, 2011).
[38] J Richard Middleton, 'The Liberating Image? Interpreting the Imago Dei in Context' (1994) 24(1) *Christian Scholars Review* 8, 16; Wojciech Szczerba, 'The Concept of Imago Dei as a Symbol of Religious Inclusion and Human Dignity' (2020) 25(1) *Forum Philosophicum* 13, 17.
[39] Biblica (n 37) Galatians 3:28. See Jakobus M. Vorster, 'The Theological-Ethical Implications of Galatians 3:28 for a Christian Perspective on Equality as a Foundational Value in the Human Rights Discourse' (2019) 53(1) *In Die Skriflig* 2494:1–9, 6; Rhoda Ayomiotan Bamisile, 'Interpreting Galatians 3:28 in the Light of Feminist Theology' (2020) 21(44) *American Journal of Biblical Theology* 4(1): 1–15, 12.
[40] Matthew Puffer, 'Human Dignity After Augustine's Imago Dei: On the Sources and Uses of Two Ethical Terms' (2017) 37(1) *Journal of the Society of Christian Ethics* 65, 78.
[41] The Holy See, 'Declaration on Religious Freedom', *Vatican Archive* (Web Page, 7 December 1965) [1], [15] <https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html>.

and ensure equal access to resources.[42] The movement seeking equality for sexual minorities and gender-diverse persons arguably falls within both of these categories.[43]

However, this interpretation is far from universal.[44] It has been claimed that Genesis 1:27 has no relation to human dignity, although a more moderate position, that it supports equality only among Christian adherents, is generally favoured.[45] However, Aquinas emphasised that the authoritative interpreter of the Bible is the Catholic Church.[46] Pope Francis, although maintaining moral reservations about homosexual conduct, stated in 2018 that God made a man gay and loved him, while elsewhere he rejected a rightly ordered love approach to justify deportations.[47] The understanding that this verse affirms dignity for all is accordingly preferred.

Applying this interpretation to laws permitting religious schools to discriminate, change is warranted. If Genesis 1:27 grants every person equal dignity irrespective of their personal characteristics or religious affiliation, by extension, it does not support religious schools discriminating against sexual minorities, gender diverse persons, and unwed pregnant women.[48] Approximately 90% of Australian private schools have some religious affiliation.[49] Denying the enrolment of students with such traits denies them the freedom of choice and may restrict their access to specific or superior opportunities associated with generally better-funded private schools.[50] Religious schools are also desirable for many over public alternatives, because of the moral ideals they promote regardless of the particular student's beliefs.[51]

Denying employment or career progression due to a specific characteristic could affect staff income, job prospects, and the ability to work in desired roles or near friends and family.[52]

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[42] The Holy See, 'Communion and Stewardship: Human Persons Created in the Image of God', *Vatican Archives* (Web Page, 2004) [73] <https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20040723_communion-stewardship_en.html>.

[43] *Religious Schools and Discrimination: Final Report* (n 2) 26 [1.6].

[44] Hendrikus Berkhof, *Christian Faith: An Introduction to the Study of the Faith*, tr Sierd Woudstra (William B Eerdmans Publishing, 1979) 179.

[45] Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press, 2009) 352; Walter Brueggemann, *The Message of the Psalms: A Theological Commentary* (Augsburg Books, 1984) 27.

[46] Anton ten Klooster, 'Thomas Aquinas on the Beatitudes: Reading Matthew, Disputing Grace and Virtue, Preaching Happiness' (DPhil Thesis, Tillburg University, 2018) 21.

[47] Stephanie Kirchgaessner, 'Pope Francis Tells Gay Man: "God Made You Like This"', *The Guardian* (online, 20 May 2018) <https://www.theguardian.com/world/2018/may/20/pope-juan-carlos-cruz>; Peter Smith, 'Vice President JD Vance, a Catholic, Acknowledges the Pope's Criticism of US Immigration Crackdown' *Associated Press* (online, 1 March 2025) <https://apnews.com/article/vice-president-jd-vance-pope-francis-immigration-4f05693320524f9976d3b9ebe31b3f97>.

[48] The Holy See, 'Letter of the Holy Father Francis to the Bishops of the United States of America', *Vatican Archives* (Web Page, 10 February 2025) [3] <https://www.vatican.va/content/francesco/en/letters/2025/documents/20250210-lettera-vescovi-usa.html> ('Letter of Pope Francis').

[49] Pat Loria, 'Religious Information Poverty in Australian State Schools' (2006) 49(3) *Journal of Christian Education* 21, 21.

[50] Centre for Policy Development, *Uneven Playing Field: The State of Australia's Schools* (Final Report, June 2016) 9.

[51] Umaru Zubairu, 'The Impact of Attending Religious Schools on the Moral Competencies of Accounting Students' (2016) 10(4) *Journal of Education and Learning* 355, 364; Education Scotland, *Religious and Moral Education 3–18* (Final Report, February 2014) 6.

[52] Australian Catholic Bishops Association, Submission No 406 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (3 March 2023) 6; *Religious Schools and Discrimination: Final Report* (n 2) 65 [3.14].

Pope Francis recently indicated that recognising the biblical right to dignity involves welcoming, protecting, promoting, and integrating society's fragile, unprotected, and vulnerable members, making it difficult to reconcile such detriments with Genesis 1:27.[53] As the inverse conclusion is necessary to submit that the *SDA* s 38 should remain unchanged, that outcome is not supported by Genesis 1:27.[54]

Some counterarguments suggest that discriminating is not contrary to Genesis 1:27, even if the provided interpretation is accepted, thereby justifying the amendment policy outcome.[55] These primarily revolve around balancing that verse with those that invalidate sexual minorities, gender diverse persons, and pregnancy without marriage, and the fear that removing the ability to discriminate would undermine religious teachings in such institutions.[56] Legitimacy is granted to such suggestions by the peculiarity of a conclusion that Genesis 1:27 supports the destruction or corruption of the teachings of Christianity and other religions.[57]

However, repealing the relevant section would likely not, and should not, if freedom of religion is to be maintained, alter the curriculum of religious schools.[58] It is also a practical reality that even if discriminating against staff and students is legal, most religious schools, particularly Christian ones considering Genesis 1:27, have not done so for several years, to little consequence.[59] The fundamental idea of Christianity that all are made in the image of God conclusively supports a repeal of the *SDA* s 38.

B. Unconditional Compassion

Another foundation of the Christian faith is that compassion is unconditional. The famous parable of the good Samaritan is often referenced to demonstrate this.[60] As described in Luke 10:25-37, Jesus utilises the parable to clarify the divine command that 'you shall love your neighbour as yourself'.[61] The story involves a man, commonly presumed Jewish, who is robbed and left for dead and is passed by two Jewish religious figures.[62] Eventually, a Samaritan, whose relationship with Jews was heavily strained, takes the man to an inn and pays for him to be cared for while he recovers.[63]

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[53] 'Letter of Pope Francis' (n 48) [5].
[54] *Religious Schools and Discrimination: Final Report* (n 2) 164 [5.65].
[55] Australian Catholic Bishops Association (n 52) 2; Law Council of Australia, Submission No 428 to Australian Law Reform Commission, *Inquiry into Religious Educational Institutions and Anti-Discrimination Laws* (24 March 2023) 7 [6]; *Religious Schools and Discrimination: Final Report* (n 2) 161 [5.53].
[56] Australian Catholic Bishops Association (n 52) 2, 6; Biblica (n 37) Corinthians 6:18-20; Biblica (n 37) Deuteronomy 22:5; Biblica (n 37) Genesis 1:27; Biblica (n 37) Leviticus 18:2; Biblica (n 37) Revelation 14:4.
[57] Australian Catholic Bishops Association (n 52) 2; Deagon (n 23) 27; Letter of Pope Francis (n 48) [4].
[58] Australian Catholic Bishops Association (n 52) 2; *Australian Constitution* s 116; Deagon (n 23) 27; Law Council of Australia (n 55) 7 [6].
[59] Australian Catholic Bishops Association (n 52) 2, 6.
[60] Maurice Ryan, 'Revisiting the Parable of the Good Samaritan' (2021) 16(1) *Studies in Christian-Jewish Relations* 1, 14; Patrick M Clark, 'Reversing the Ethical Perspective: What the Allegorical Interpretation of the Good Samaritan Parable Can Still Teach Us' (2014) 71(3) *Theology Today* 300, 303.
[61] Biblica (n 37) Leviticus 19:18; Biblica (n 37) Luke 10:25–37.
[62] Biblica (n 37) Luke 10:30–2. See Jeannine K Brown and Kazuhiko Yamazaki-Ransom, 'The Parable of the Good Samaritan and the Narrative Portrayal of Samaritans in Luke-Acts' (2021) 15(2) *Journal of Theological Interpretation* 233, 234.
[63] Biblica (n 37) Luke 10:33–5; Christopher Naseri-Mutiti Naseri, 'Jews Have no Dealings with Samaritans: A Study of Relations Between Jews and Samaritans at the Time of Jesus Christ' (2014) 11(2) *LWATI: A Journal of Contemporary Research* 75, 75.

Jesus describes the Samaritan as the only neighbour to the man.[64] Many interpretations accordingly suggest that the neighbourly principle and general moral responsibility surpass prejudicial barriers and cultural conditions.[65] This meaning is supported by other verses, such as the golden rule to 'in everything, do to others what you would have them do to you'.[66] The absence of any attached preconditions is particularly telling.[67] Some allegorical interpretations of the parable suggest that the injured man represents a sinner, the Samaritan represents Jesus, and the inn represents the Church. However, this analytical distinction yields the same message: moral responsibility is not altered by individual or social characteristics.[68]

This relatively consistent interpretation of the parable has led to its application in various contexts. Lord Atkin alluded to it rhetorically when establishing negligence.[69] Martin Luther King Jr referenced the tale to describe societal obligations for marginalised groups.[70] Several theologians argue that the Good Samaritan is a biblical authority for a mutual obligation of love between all, even and relevantly, non-believers.[71]

By analogy and considering that Jesus, referring to the Samaritan, called for us to 'do likewise', repealing the *SDA* s 38 aligns with the parable.[72] In Australia, all persons are required to participate in schooling until at least completing Year 10.[73] Therefore, offering an education is identifiable as aiding and extending compassion where needed, including to the current or prospective student who has been discriminated against.[74] The beneficiaries of such assistance arguably extend beyond the students, given the numerous familial and societal benefits a private education provides, which strengthens the argument.[75] A similar point, although less persuasive given that working in a school is optional, is available for employment matters related to current or prospective staff who may be victims of discrimination.[76] This is particularly true in light of the numerous unique benefits of working in a religious school, especially the superior compensation.[77]

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[64] Biblica (n 37) Luke 10: 36–7.
[65] JIH McDonald, 'The View from the Ditch – and Other Angles: Interpreting the Parable of the Good Samaritan' (1996) 49(1) *Scottish Journal of Theology* 21, 36.
[66] Biblica (n 37) Matthew 7:12. See The Holy See, 'Samaritanus Bonus: On the Care of Persons in the Critical and Terminal Phases of Life', *Vatican Archives* (Web Page, 22 September 2020) <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2020/09/22/200922a.html#:~:text=The%20Good%20Samaritan%20who%20goes,and%20the%20wine%20of%20hope">.
[67] Naseri (n 63) 76.
[68] Brown and Yamazaki-Ransom (n 62) 245; Naseri (n 63) 76.
[69] *Donoghue v Stevenson* [1932] AC 562, 580 (Lord Atkin).
[70] Douglas A Hicks and Mark R. Valeri, *Global Neighbours: Christian Faith and Moral Obligation in Today's Economy* (Eerdmans Publishing Company, 2008) 31.
[71] Calvin Jean, *Commentary on a Harmony of the Evangelists, Matthew, Mark, and Luke*, tr Reverend William Pringle (Calvin Translation Society, 1845–6) vol 3, 54; Francis Schaeffer, *The Mark of the Christian* (InterVarsity Press, 2006) 18.
[72] Biblica (n 37) Luke 10:37; *SDA* (n 1) s 38.
[73] Australian Curriculum, Assessment and Reporting Authority, *National Report on Schooling in Australia 2022* (Report, 26 June 2024) 14.
[74] *Religious Schools and Discrimination: Final Report* (n 2) 89 [4.17]; Naseri (n 63) 76.
[75] Mike Dockery, 'Does Private Schooling Pay? Evidence and Equity Implications for Australia', *National Centre for Student Equity in Higher Education* (Research Paper, April 2018) 9 <https://www.ncsehe.edu.au/app/uploads/2018/04/Dockery_Does_Private_Schooling_Pay.pdf>.
[76] *Religious Schools and Discrimination: Final Report* (n 2) 155 [5.27]; *SDA* (n 1) s 38.
[77] *Religious Schools and Discrimination: Final Report* (n 2) 230 [8.120].

Electing for the *SDA* s 38 to remain unchanged involves placing conditions based on individual traits and social considerations when exercising compassion.[78] Even the case for amendment, assuming an implementation to narrow the provision's application, would impose at least some restrictions related to personal traits.[79] Only a repeal, which extends compassion to sinners and non-believers without exception, implements the neighbourly principle as explained by the Samaritan.[80]

C. Christ's Radically Inclusive Ministry

On several occasions, Jesus extends love and compassion to sinners, including travelling through Samaria, touching and allowing himself to be touched by the morally and physically unclean, and eating with tax collectors and sinners.[81] The common and relevant perception is that Jesus offered forgiveness before requiring reformation in such instances.[82] This point and its relevance have attracted criticism, especially when applied as a precedent to include even sinners.[83] The distinction often raised is that while Jesus was radically inclusive, he also distinguished between tolerance and endorsement, so prior repentance was required.[84]

While tolerating persons may be perceived as distinct from endorsing behaviours, that is immaterial to inclusivity, considering Luke 7:47: 'I [Jesus] tell you, her [the sinful woman's] many sins have been forgiven — as her great love as shown. But whoever has been forgiven little loves little'.[85] Jesus thus elevates the sinful woman above the Pharisee Simon, his host and religious adherent, who declined to offer Jesus the same hospitality as the woman and judged her only 'a sinner'.[86] Accordingly, although humans cannot forgive sin as Christ and God can, forgiving the sins of others is necessary for their repentance to occur, so excluding the sinful denies that opportunity.[87]

Given that conclusion, Jesus' conduct towards sinners indicates that the *SDA* s 38 should be repealed.[88] To uphold the provision is to act as Simon did and impose personal self-righteousness to judge whether a sinner is worthy of forgiveness and, if not, deserves

[78] Australian Catholic Bishops Association (n 48) 2; Brown and Yamazaki-Ransom (n 62) 245; Naseri (n 63) 76; *SDA* (n 1) s 38; *Religious Schools and Discrimination: Final Report* (n 2) 164 [5.65].
[79] Australian Catholic Bishops Association (n 48) 2; Law Council of Australia (n 55) 7 [6]; Naseri (n 63) 76; *Religious Schools and Discrimination: Final Report* (n 2) 161 [5.53].
[80] Biblica (n 37) Luke 10:37; *SDA* (n 1) s 38; Schaeffer (n 71) 18.
[81] Biblica (n 37) Luke 5, 15:19; Biblica (n 37) Mark 2; Biblica (n 37) Matthew 9, 11.
[82] Parish Saunders (ed), 'Jesus and the Sinners' (1983) 6(19) *Journal for the Study of the New Testament* 5, 20; Mark Allen Powell, 'Jesus and the Pathetic Wicket: Re-visiting Sanders's View of Jesus' Friendship with Sinners' (2015) 13(2-3) *Journal for the Study of the Historical Jesus* 186, 188.
[83] Craig Blomberg, 'Jesus, Sinners and Table Fellowship' (2009) 19(1) *Bulletin for Biblical Research* 35, 36; Norman H Young, 'Jesus and the Sinners: Some Queries' (1985) 7(24) *Journal for the Study of the New Testament* 73, 74.
[84] Young (n 83) 74.
[85] Biblica (n 37) Luke 7:47.
[86] Ibid Luke 7:39. See Dorothea H Bertschmann, 'Hosting Jesus: Revisiting Luke's "Sinful Woman" (Luke 7:36-50) as a Tale of Two Hosts' (2017) 40(1) *Journal for the Study of the New Testament* 30, 46.
[87] Bertschmann (n 86) 46; Justyn Terry, 'The Forgiveness of Sins and the Work of Christ: A Case for Substitutionary Atonement' (2013) 95(1) *Anglican Theological Review* 9, 23.
[88] Queensland Human Rights Commission (n 5) 2 [3]; *Religious Schools and Discrimination: Submissions* (n 3) 3 [15].

exclusion.[89] An amendment may significantly avoid this.[90] However, short of a substantial change to the section's operation that effectively operates as a repeal, judging sinners is involved to some extent.[91] Even Simon let the sinful woman enter his home, while Jesus never discriminated against or declined to engage with a sinner.[92]

V. CONCLUSION

Considering the application of classical natural law, it is submitted that the *SDA* s 38 should be repealed. Specifically, from the general precept to be sociable, a specific conclusion that religious schools cannot discriminate is achievable, so a law enabling that in any form is unjust. This is derivable because it aligns with the idea that everyone is made in the image of God, the concept of unconditional compassion, and the fact that Jesus did not discriminate against sinners. The analysis is constrained by relying heavily on subjective biblical interpretation, but it is still submitted that repealing the *SDA* s 38 is optimal considering the literature and all the circumstances.

[89] Bertschmann (n 86) 37; Biblica (n 37) Luke 7:39; Terry (n 87) 23.
[90] Australian Catholic Bishops Association (n 48) 2; Law Council of Australia (n 55) 7 [6]; Naseri (n 63) 76; *Religious Schools and Discrimination: Final Report* (n 2) 161 [5.53].
[91] Bertschmann (n 86) 37; Biblica (n 37) Luke 7:47; Terry (n 87) 23.
[92] Biblica (n 37) Luke 7:37; Saunders (n 82) 20.