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

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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

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[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.

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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]

[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.