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WHO SPEAKS FOR “WE” SPEAKS NOT FOR “ME” — THE VACCINATION DEBATE

DR STEPHEN S HOLDEN*

Vaccinations are widely regarded as one of the greatest advances of modern medicine, having saved many lives and prevented many disabilities. However, their very success has stirred up a conflict between the ethics of the common good versus the ethics of individual rights. Growing vaccine hesitancy and policies increasing pressure on non-vaccinators to vaccinate are inflaming the debate. The key question examined is whether there is justification for limiting individual rights, particularly in the removal of conscientious objection as implemented in Australia's "no jab no pay" policy. The conclusion is that targeting conscientious non-vaccinators has few benefits. Herd immunity levels in Australia (approximately 90 per cent) ensure that the risk of disease outbreaks are low. Mortality risks, contingent on infection, are also typically low, especially in the Western world. While approximately 10 per cent of children are unvaccinated or incompletely vaccinated, it is difficult to justify targeting conscientious non-vaccinators who are a small part of this segment. They are likely to be hard-headed and probably willing to accept the withdrawal of benefits as a price they pay for their beliefs. Rather, attention and resources might be better directed at vaccinating the larger group who are unvaccinated for other reasons (access to health resources, single parent, psychological distress, etc.). In general, the ongoing vaccination debate distracts efforts from more promising unvaccinated target groups (those lacking access), and more generally, from other more useful public goods. It is concluded that promoting vaccination for the common good is to be encouraged, but so is the option allowing an individual to conscientiously object.

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I INTRODUCTION

[Y]our zeal is invaluable, if a right one; but if wrong, the greater the zeal,
the greater the evil.¹

Vaccination is regarded as one of the major advances in modern medicine. However, its success has given rise to a different problem, a war between two opposing ethical factions: the utilitarian ethics of the “common good” versus the deontological ethics of individual rights. This is the central dilemma of public health: a private medical practitioner’s concern is for the best interests of their patient, but a public health practitioner’s concern is for the best interests of the community.²

¹ Plato, *Crito* (Benjamin Jowett trans, ebooks@Adelaide, 2014) 46b [trans of: *Crito* (first published 360 BCE)].

² S Dandoy, 'A Piece of My Mind: Have You Ever Practiced Medicine?' (1988) 260(14) *The Journal of the American Medical Association* 2113; Stephen S Holden and Damian Cox, 'Public Health Marketing: Is it Good and is it Good for Everyone?' (2013) 52(1) *Journal of International Marketing* 15; Stephen Holland, *Public Health Ethics* (Polity, 2007).

In Australia, the vaccination debate has been intensifying of late. On the one hand, the proportion of the population who refuse to vaccinate has been steadily increasing. The percentage of adults conscientiously objecting to their child being vaccinated (based on the parent's 'personal, philosophical or religious belief' that immunisation should not occur)³ has doubled from 0.86 per cent in 2004 to 1.77 per cent in 2014.⁴

On the other hand, the Australian government, 'extremely concerned at the risk non-vaccinated children pose to public health',⁵ has implemented a "no jab no pay" policy as of 1 January 2016 which will withdraw childcare and parenting benefits of up to \$15,000 per annum to parents with incompletely vaccinated children.⁶ To some extent this shores up and extends existing policies limiting benefits to non-compliant parents so as to encourage childhood vaccinations. However, the more significant and more draconian element of the new policy is to remove the exemption for conscientious objection. The only legitimate basis for exemption now is one based on a medical opinion that a vaccine is contraindicated.

The immunisation debate has long been characterised by polarised views reflecting the balance of risks and benefits. The earliest evidence of the practice of inoculating individuals with material from smallpox sores as a means of immunising against smallpox comes from China 500–1000 years ago.⁷ While the practice saved many lives over the centuries, it has long been acknowledged as risky. The inoculation procedure could lead to various effects including full-blown smallpox and attendant risks: disfigurement, disability, or death.

³ Department of Human Services, *Changes to immunisation requirements starting January 2016* (24 November 2015) Australian Government: Department of Human Services <<https://www.humanservices.gov.au/health-professionals/news/changes-immunisation-requirements-starting-1-january-2016>>.

⁴ Immunise Australia, *ACIR - National Vaccine Objection (Conscientious Objection) Data* (11 February 2016) Immunise Australia Program <<http://www.immunise.health.gov.au/internet/immunise/publishing.nsf/Content/acir-cons-object-hist.htm>>.

⁵ Michael Klapdor and Alex Grove, *Budget Review 2015-16: "No jab no pay" and other immunisation measures* (May 2015) Parliament of Australia <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201516/Vaccination>.

⁶ Immunise Australia, *No Jab, No Pay – New Immunisation Requirements for Family Assistance Payments* (2 December 2015) Immunise Australia Program <<http://www.immunise.health.gov.au/internet/immunise/publishing.nsf/Content/fact-sheet-no-jab-no-pay>>.

⁷ Joseph Needham, Lu Gwei-Djen and Nathan Sivin, *Science and Civilization in China: Volume 6, Biology and Biological Technology, Part 6, Medicine* (Cambridge University Press, 2000) 134, 154.

In his *Lettres Philosophiques*, Voltaire outlined with some clarity the two sides of the debate in his remarks about the practice of inoculation with smallpox. He noted that Europeans regard the English as ‘madmen because they wantonly communicate a certain and dreadful distemper to their children, merely to prevent an uncertain evil’,⁸ while the English regard Europeans as ‘cowardly because they are afraid of putting their children to a little pain; [and] unnatural, because they expose them to die one time or other of the small-pox.’⁹

The vaccination polemic continues today with zealous champions representing both sides. More importantly, the polemic from each side appears to insist on one side ceding to the other. That is, the imposition of increasingly coercive policies to achieve the common good will necessarily deny some individual autonomy, and allowing individuals the choice to not vaccinate may threaten the common good. Does one side have greater justification than the other? How do the two sides stand up?

II COMMON GOOD

Vaccination is widely recognised as a major medical advance that has saved the lives of many millions of people, and prevented the hospitalisations, lifelong injuries, and disabilities of many more.¹⁰ For example, the World Health Organisation (‘WHO’) estimates the measles vaccine alone has saved over 17 million lives worldwide since 2000.¹¹ Vaccination offers a spectacularly successful removal of at least some of the scourges that plague the human population.

Vaccination confers two benefits, one direct and the other indirect. The first benefit is to directly reduce the probability of the vaccinated individual contracting the disease. The second is to indirectly reduce the probability of the disease spreading through a community and therefore, reducing the probability that individuals without immunity will be infected. This indirect benefit is conferred by what is termed “herd immunity” —

⁸ François Marie Arouet de Voltaire, *Letters on the English* (Charles Eliot William trans, Bartleby.com, 2001) Letter XI: On Inoculation [trans of: *Lettres Philosophiques* (first published 1733)].

⁹ Ibid.

¹⁰ Sandra W Roush, Trudy V Murphy and the Vaccine-Preventable Disease Table Working Group, ‘Historical Comparisons of Morbidity and Mortality for Vaccine-Preventable Diseases in the United States’ (2007) 298(18) *Journal of the American Medical Association* 2155.

¹¹ World Health Organisation, ‘Measles vaccination has saved an estimated 17.1 million lives since 2000’ (News release, 20 November 2015) <<http://www.who.int/mediacentre/news/releases/2015/measles-vaccination/en/>>.

as the number of immune individuals in a community increases, and in particular, when the proportion exceeds some threshold, the chances of anyone lacking immunity contracting the disease are significantly reduced. In the best-case scenario, coordinated vaccination programs providing both direct and indirect benefits can eliminate a vaccine-preventable disease ('VPD') from a community, a region, a country, or even the world as was achieved with smallpox in the late 1970s.¹²

Given the direct and indirect benefits of vaccination, public health authorities around the world have been understandably keen in their promotion of mass vaccination and such efforts have resulted in marked success with high levels of compliance. Australia, for example, enjoys high childhood vaccination rates in general. For instance, 92.3 per cent of children at 12-15 months and 89.3 per cent at 24-27 months were up-to-date on all vaccines in the schedule at December 2015.¹³

III INDIVIDUAL RIGHT

Those reluctant to vaccinate express concern about the danger of adverse events associated with vaccination; that the vaccination could cause a side effect, a negative reaction, an infection, etc.

The risks of vaccination are typically fairly small, but they vary in probability and severity. For instance, the procedure of immunising people against smallpox by variolation (inoculation with smallpox) was, as previously noted, dangerous — and so approximately 1–2 per cent of those immunised, died.¹⁴ While modern vaccines are generally considered to be much safer, they are not risk-free. For instance, a systematic review of the effects and side effects of the measles, mumps and rubella ('MMR') vaccine acknowledge that side effects such as aseptic meningitis, febrile convulsions, and thrombocytopenic purpura (an autoimmune disease) can result.¹⁵

¹² Edward A Belongia and Allison L Naleway, 'Smallpox Vaccine: The Good, the Bad, and the Ugly' (2003) 1(2) *Clinical Medicine and Research* 87.

¹³ Immunise Australia, *ACIR – Annual Coverage Historical Data* (27 April 2016) Immunise Australia Program <<http://www.immunise.health.gov.au/internet/immunise/publishing.nsf/Content/acir-ann-cov-hist-data.htm>>.

¹⁴ U.S. National Library of Medicine, *Smallpox: A Great and Terrible Scourge* (30 July 2013) U.S. National Library of Medicine <https://www.nlm.nih.gov/exhibition/smallpox/sp_variolation.html>.

¹⁵ Vittorio Demicheli et al, 'Vaccines for measles, mumps and rubella in children (Review)' (2012) 2 *Cochrane Database of Systematic Reviews* <<http://www.mrw.interscience.wiley.com/cochrane/clsysrev/articles/CD004407/frame.html>>.

The concern that individuals express about the dangers of vaccination are valid — even if the events are rare and of variable severity. At times, pro-vaccinators appear inclined to minimise these risks and even argue that they are non-existent. Disturbingly, this tendency may even extend to those providing primary research results with the abovementioned systematic review of MMR noting that the ‘design and reporting of safety outcomes in MMR vaccine studies... are largely inadequate.’¹⁶

Is it reasonable to dismiss small risks? In treating any patient, it is typically considered important, even obligatory, that the patient is fully informed about possible offsetting risks of the treatment such as the list of possible side effects provided in the product information accompanying a medication. In short, vaccines can have negative effects, and most clinical settings would consider it proper that an individual only be treated if they provide informed consent.

That the risks of vaccination are unduly minimised is also reflected in the lack of any formalised system within Australia for compensating those who should be unfortunate enough to experience an adverse reaction to a recommended vaccination. Saba Button was an 11-month old child who became brain-damaged and quadriplegic after receiving Fluvax in 2010, a then-recommended flu vaccination.¹⁷ The parents pursued a claim for compensation through legal action and ultimately received an undisclosed multi-million-dollar settlement through mediation in 2015.¹⁸

Individuals are therefore faced with two competing risks. One is the risk of contracting a vaccine preventable disease (‘VPD’) and, if contracted, a risk of suffering morbidity or mortality. The second is the risk of suffering a negative reaction to the vaccination. Accordingly, it may be reasonable, even “logical” for an individual to choose not to

¹⁶ Ibid.

¹⁷ Immunise Australia, *Australian Technical Advisory Group on Immunisation (ATAGI) advice for immunisation providers regarding the administration of seasonal influenza vaccines in 2016* (2 March 2016) Immunise Australia Program <<http://www.immunise.health.gov.au/internet/immunise/publishing.nsf/Content/ATAGI-advice-influenza-vaccines-providers>>.

¹⁸ ‘Girl left disabled by flu jab wins millions’, *The Australian* (online) 7 June 2014 <<http://www.theaustralian.com.au/national-affairs/health/girl-left-disabled-by-flu-jab-wins-millions/story-fn59nokw-1226946277194>>; ‘Settlement for Saba Button, severely disabled after flu vaccine’, *ABC News* (online) 8 June 2014 <<http://www.abc.net.au/news/2014-06-06/settlement-for-saba-button-severely-disabled-by-flu-vaccine/5505632>>.

vaccinate when immunity levels are high, and especially if they are above the herd immunity threshold, and/or equal to the risk of consequences from the disease.¹⁹

Some parents are concerned about vaccinations for diseases which they do not perceive as representing high threats. For instance, measles is highly infectious, but is, in the vast majority of cases, at least in the West, a fairly mild disease. It can lead to hospitalisation, complications (pneumonia), and in rare instances even death. The Centers for Disease Control and Prevention ('CDC') information site indicates that '[f]or every 1,000 children who get measles, one or two will die from it.'²⁰ However, another CDC report based on an outbreak of measles in France in 2008-2011 shows that, of over 22 000 reported infections, 10 people died.²¹ This implies a considerably lower mortality rate of 0.45 persons per 1000, and the real rate may be lower still as up to 50 per cent of infections were thought to have been unreported.²²

IV OVERCOMING NON-VACCINATION

Public health is therefore confronted by a problem. While the benefits of mass-vaccination in terms of protection both to individuals and to the community at large through herd immunity are solid, are the benefits sufficient to justify limiting individual choice about vaccination? What justification can be offered for applying more pressure to ensure compliance?

A Threat to herd immunity

A key concern for public health is that if individual choice about whether to vaccinate or not is allowed, the objective of achieving the herd immunity threshold will be undermined if too many choose not to vaccinate. Public health advocates are therefore understandably concerned as growing numbers exhibit 'vaccine hesitancy.'²³ The extreme form of vaccine hesitancy is those that refuse to vaccinate; those who in Australia in the past were entitled to register as conscientious objectors. However,

¹⁹ Paul E M Fine, 'Herd Immunity: History, Theory, Practice' (1993) 15(2) *Epidemiologic Reviews* 265.

²⁰ Centers for Disease Control and Prevention, *Complications of measles* (3 November 2014) Centers for Disease Control and Prevention <<http://www.cdc.gov/measles/about/complications.html>>.

²¹ Denise Antona et al, 'Measles Elimination Efforts and 2008–2011 Outbreak, France' (2013) 19(3) *Emerging Infectious Disease Journal* 357 <http://wwwnc.cdc.gov/eid/article/19/3/12-1360_article>.

²² *Ibid.*

²³ Eve Dubé et al, 'Vaccine Hesitancy' (2013) 9(8) *Human Vaccines & Immunotherapeutics* 1763.

vaccine hesitancy is a broader concept that reflects a crisis of confidence in which a growing proportion of the general public is beginning to have doubts about the safety, the efficacy, and the number of required vaccinations. While not all those who are vaccine-hesitant refuse to vaccinate, historical evidence suggests the number of conscientious non-vaccinators has been growing.²⁴

However, any person lacking immunity — not just those who are conscientious non-vaccinators — threatens the herd immunity. Any individuals susceptible to the disease can serve as a vector for an outbreak of the disease. Those lacking immunity and who therefore threaten herd immunity, are made up of four groups.

One group comprises persons who are exempt from required vaccinations based on medical advice. These may be individuals who are too young, immunocompromised, or are otherwise considered to be at risk of an adverse outcome in response to the vaccination.

Another group, the one of primary interest here, are those unvaccinated of their own cognisance. The individual or parent may refuse due to a medical belief, or for some other personal, philosophical or religious belief.

Yet others remain unvaccinated due to a range of other issues that might be loosely labelled as problems of accessing the vaccination. Many children are unvaccinated due to parental lack of social contact, limited access to services, psychological distress, and other reasons.²⁵

A final group is made up of individuals who have been vaccinated, but who may remain susceptible to the disease. That is, they lack immunity due to vaccine failure highlighting that vaccinations may offer ‘imperfect immunity.’²⁶

These four groups together threaten or undermine herd immunity thresholds. While conscientious objectors may be the most visible target, they are recognised as representing a minority of non-vaccinators.²⁷ While approximately 90 per cent of children were vaccinated up until December 2015 (it varies by age and by disease), just

²⁴ Immunise Australia, above n 4.

²⁵ Anna Pearce et al, 'Barriers to Childhood Immunisation: Findings from the Longitudinal Study of Australian Children' (2015) 33(29) *Vaccine* 3377.

²⁶ Paul Fine et al, "'Herd Immunity": A Rough Guide' (2011) 52(7) *Clinical Infectious Diseases* 911.

²⁷ Klapdor and Grove, above n 5.

1.8 per cent of children had been registered by their parents as conscientious objectors.²⁸ That is just 20 per cent of incompletely vaccinated children. Longitudinal research offers further support showing that only 16 per cent of incompletely immunised infants have a mother who disagrees with vaccination.²⁹ This implies that the remainder — the majority — are unvaccinated for other reasons such as being cared for by a solo parent, having recently moved, experiencing psychological distress, etc. Depending on estimates, vaccine failure can also be fairly significant, for example between 2-10 percent for measles.³⁰

Conscientious non-vaccinators do not help in the effort to achieve or maintain herd immunity thresholds, but it is difficult to see that they are the principal problem. More importantly perhaps, even if they were forced to vaccinate, it is unclear that herd immunity thresholds and therefore, the common good, would be much changed. While the concept of a herd immunity threshold is valuable and a worthy objective, it is an extremely complex, even elusive, concept.³¹ For instance, threshold immunity estimates vary by disease and, importantly, even by source, with different estimates being expressed by different experts.³²

While herd immunity is a useful goal, in practice, it appears to be insufficient for elimination and/or eradication of vaccine preventable diseases. Reasons for this are that thresholds typically assume that populations mix randomly and that the vaccinated are randomly spread throughout the population.³³ Neither of these assumptions are likely to hold as has been shown in the field where global eradication of smallpox and the regional elimination of poliomyelitis appeared to rely on selective vaccination within unprotected pockets, and quarantine to fully achieve their goals.³⁴

B *Free-riding*

²⁸ National Health Performance Authority, *Healthy Communities: Immunisation rates for children in 2012-2013* (2014) My Healthy Communities <http://www.myhealthycommunities.gov.au/Content/publications/downloads/NHPA_HC_Report_Imm_Rates_March_2014.pdf>.

²⁹ Pearce et al, above n 25.

³⁰ Gregory A Poland and Robert M Jacobson, 'The Re-Emergence of Measles in Developed Countries: Time to Develop the Next-Generation Measles Vaccines?' (2012) 30(2) *Vaccine* 103.

³¹ Fine et al, above n 26.

³² Fine, above n 19.

³³ Fine et al, above n 26.

³⁴ Fine, above n 19; Fine et al, above n 26.

One frequently mentioned concern relates to the distribution of costs and benefits associated with vaccination. While the majority of the population are vaccinated, a key concern is presented by those who gain a benefit via herd immunity, without having borne any of the cost.

The argument raises a legitimate moral harm relating to justice, but it is unclear that it justifies limiting the freedom of those that are opposed to vaccination. Public health advocates are in a bit of a bind when raising this issue. First, there has to be some notion that the vaccinators are shouldering the “cost” while the non-vaccinators are not. Public health must therefore acknowledge that vaccination *does* have risks, exactly those risks that the conscientious non-vaccinators are seeking to avoid. Public health goes on to argue that it is only fair that everyone share in those risks and that everyone participates in the lottery whereby negative effects might be experienced.

However, the argument would appear to fail to some degree on utilitarian grounds if the non-vaccinators are not sufficient to threaten herd immunity. While it may well be objectionable that someone would choose to not vaccinate, it is unclear that there is a moral justification for rectifying the problem. Expending resources to force people to vaccinate without changing the common good (because herd immunity is unchanged, or irrelevant due to other risks like non-random distribution of vaccination and non-random mixing) is difficult to justify from a utilitarian point of view.

If vaccines work as intended, forcing free-riders to vaccinate seems churlish to a degree, as individual immunity and herd immunity are unchanged. The effort appears to have little to do with the common good.

C Misinformation

While vaccination does have risks, conscientious non-vaccinators are often criticised for focusing on sensational, even false, claims. One much repeated defence for not vaccinating is the claimed link between the MMR vaccine and autism. The purported evidence is from a paper published in *Lancet*.³⁵ The paper styled as an “early report” provided evidence on just 12 cases. A retraction was later published by (most of) the

³⁵ A J Wakefield et al, 'RETRACTED: Ileal-Lymphoid-Nodular Hyperplasia, Non-Specific Colitis, and Pervasive Developmental Disorder in Children' (1998) 351(9103) *The Lancet* 637.

authors, then retracted formally by Lancet, and ultimately challenged as a case of intellectual fraud.³⁶ Despite being debunked, the claim continues to be debated by many.

Another issue that frequently arouses concern is the presence of mercury in thimerosal (also known as thiomersal) used as a preservative in some vaccines. Public health authorities typically proffer assurances that the mercury poses no risk of harm.³⁷ In any case, and perhaps in order to allay any fears, Australia — like the United States — has not used thimerosal in routine childhood vaccines since 2000.³⁸

Does the fact that individuals may be misinformed and/or lack the expertise to even judge the evidence justify the application of more coercive pressure to vaccinate? In this regard, it is perhaps instructive to observe that at least some misinformation has been sown by medical and public health experts as a community with changing opinions and policies:

- While Fluvax was recommended and used for young children in Australia up to 2010, the reporting of a series of adverse events in Australia in 2010 (including the earlier reported case of Saba Button) led to the vaccine being not recommended for children under nine unless there were no alternatives, and not registered for use at all for those under five.³⁹
- The claimed (and now debunked) link between MMR and autism appears to have originated with a peer-reviewed publication accepted and published by the respected medical journal, Lancet.⁴⁰ That the article was later retracted highlights that even among experts, mistakes can be made.
- The concern about thimerosal perhaps reflects an earlier public health concern about the dangers of mercury and that exposure to this substance should be avoided if at all possible. It can be understood that a later claim that thimerosal is safe is likely to appear contradictory to the general public. The subsequent elimination of the use of thimerosal from all vaccines may be

³⁶ T S Sathyanarayana Rao and Chittaranjan Andrade, 'The MMR Vaccine and Autism: Sensation, Refutation, Retraction, and Fraud' (2011) 53(2) *Indian Journal of Psychiatry* 95.

³⁷ National Centre for Immunisation Research & Surveillance, *Thiomersal Fact Sheet* (December 2009) National Centre for Immunisation Research & Surveillance
<http://www.ncirs.edu.au/assets/provider_resources/fact-sheets/thiomersal-fact-sheet.pdf>.

³⁸ *Ibid.*

³⁹ Immunise, above n 17.

⁴⁰ Wakefield et al, above n 35.

viewed as being a positive response to public concern, but might also have unfortunately served to further undermine the faith that individuals may place in expert opinions.

While policy-makers and public health may hope that the words “expert” and “expertise” offer some confidence, at least some individuals realise that the words do not ensure certainty: experts can disagree, the truth may be disputed. For important medical decisions, at least some individuals will actively seek a second opinion for personal medical problems. In public health, alternative opinions are unhelpful. They can be accommodated in an individual rights view, but can undermine confidence in public health announcements promoting a common good such as mass vaccination.

The truth is uncertain, and differing expert opinions highlight that this is so. Policies for vaccinations vary over time: the vaccines included in the schedule, the age of administration, the timing of boosters are all subject to change. Moreover, policies vary between countries highlighting that one country’s experts do not necessarily agree with experts in other countries. Japan’s policies for example, differ a great deal from other countries for a variety of public and historical reasons.⁴¹ Notably, the Japanese government withdrew the multi-vaccine MMR in 1993 due to reports of adverse events. In its place, the monovalent options for measles and rubella (but not mumps) were recommended.⁴²

Much is known about vaccinations, but when talking about and dealing with low-probability risks (to be discussed more in the following section), what is certain is less clear. This inevitably contributes to some of the confusion that might be experienced by individuals with concerns about vaccinations. While the individual’s misinformation may be unhelpful, it is not clear that this offers sufficient reason to move the individual to an act that they prefer not to do.

D Incompetence

A criticism of conscientious non-vaccinators (related to the idea of misinformation) is that they misunderstand the risks of vaccination, are poor at assessing those risks, or

⁴¹ A Saitoh and N Okabe, ‘Current issues with the immunization program in Japan: Can we fill the “vaccine gap”?’ (2012) 30(32) *Vaccine* 4752, 4752-4756.

⁴² *Ibid* 4753.

both. Does this provide a condition where applying more coercive pressure would be considered reasonable? If a person was unaware that she was about to be killed by a runaway vehicle because she failed to see it or hear it, we would generally permit that she could be pushed out of the way even without her consent being sought or granted. That is, their incompetence does not preclude coercion.

However, a problem is that danger of infection with a disease (and of serious consequences) is only probabilistic; what *will* happen is uncertain. We are not pushing someone out of the road of a vehicle, but pushing them out of the road because there *might* be an oncoming vehicle.

The criticism continues that non-vaccinators may overplay vaccination risks and underplay disease risks. However, the rates of vaccination reaction, vaccine-failure, herd immunity thresholds, and even risks of infection, morbidity, and mortality are not known with certainty. Indeed, they are frequently contested by various experts. There are significant “differences of opinion” among authorities such that herd immunity thresholds are necessarily approximate and best reported as ranges.⁴³ The risks of infection if unvaccinated, and of morbidity or mortality if infected, can also be contested. As noted earlier, the CDC gives the probability of death from measles to be one to two cases per 1000 infections at one page, and as 0.45 deaths per 1000 infections at another.⁴⁴

However, if we leave aside the issue of uncertainty about the risks, does the claim that lay people misunderstand the risks and lack the expertise to make assessments validate stronger interventions?

What assurance do we have that the public health experts are better at assessing risks than individuals? Unfortunately, not much. Humans, expert or otherwise, tend to be subject to many biases in their decision-making.⁴⁵ Just one such important bias, especially in the context of the highly controversial and divided topic of vaccination, is that people tend to find evidence to support what they believe: a confirmation bias. In this respect, given that the debate about vaccination is so heated, most participants

⁴³ Fine, above n 19.

⁴⁴ Antona et al, above n 21.

⁴⁵ J S Blumenthal-Barby and Heather Krieger, 'Cognitive Biases and Heuristics in Medical Decision Making: A Critical Review using Systematic Search Strategy' (2015) 35(4) *Medical Decision Making* 539 <<http://www.ncbi.nlm.nih.gov/pubmed/25145577>>.

enter with an established point of view and then marshal data that confirms their point of view. Given the different diseases, the different balancing risks associated with each, and the differing expert opinions about those risks, both sides will likely find support for the risks they consider important.

To illustrate the point about how difficult it is to manage risks, we might consider what would happen if Australia was to experience a measles outbreak as observed in France between 2008 and 2011 where over 22 000 from a population of 64 million were infected, and 0.45 per 1000 reported as infected died. If a similar pattern was observed in Australia, then approximately 8080 people out of 24 million Australians would be infected, and just under four people (3.6) would die. While we of course do not wish to see any fatalities, these four deaths are contingent on whether there is a disease outbreak or not. In short, we are dealing with very low probabilities relative to other much more numerous, and arguably preventable deaths: annually, about 1100 people die in road fatalities,⁴⁶ 300 are murdered,⁴⁷ 260 drown,⁴⁸ and about one person each year dies in a shark attack.⁴⁹

Vaccination is still important because there are hospitalisations and morbidities aside from the few deaths to consider. Moreover, the consequences often appear among young children, which can evoke a great deal of compassion. But the issue remains, is it even possible to conduct a real analysis of the costs versus benefits at all?

Another issue is that while public health and policy-makers deal with probabilities, individuals deal with eventualities. Public health and policy-makers speak in terms of base-rate information: x per cent of children will experience a vaccination reaction, y per cent of infected people will die in the event of an outbreak. Parents however, deal with case-based information: “my child reacted” or “my child died.”

⁴⁶ Department of Infrastructure and Regional Development, *Road Deaths Australia – Monthly Bulletins* (13 May 2016) Department of Infrastructure and Regional Development
<http://bitre.gov.au/publications/ongoing/road_deaths_australia_monthly_bulletins.aspx>.

⁴⁷ Australia Institute of Criminology, *Homicide statistics* (7 July 2015) Australia Institute of Criminology
<<http://www.aic.gov.au/statistics/homicide.html>>.

⁴⁸ Royal Life Saving Society – Australia, *Royal Life Saving National Drowning Report 2014* (2015) Royal Life Saving Society
<http://www.royallifesaving.com.au/_data/assets/pdf_file/0007/11995/RLS_NDR2014_LR.pdf>.

⁴⁹ Taronga Zoo, *Australian Shark Attack File* (2016) Taronga Zoo
<<https://taronga.org.au/conservation/conservation-science-research/australian-shark-attack-file>>.

An important corollary highlights an oft-overlooked limitation of evidence-based medicine, namely that base-rates fail to capture the inevitable variability within the population. Most people will not be allergic to peanuts, but we make a potentially grave error when we treat *all* as being the same. This is, of course, the role of medical exemptions, but even allowing such exemptions acknowledges that not all individuals can be assumed able to tolerate a vaccination. With or without expertise about base-rates, case-based information, or both, the decision to not vaccinate may be a mistake, whether made by a doctor or a parent. We hope that the doctor makes a “better” judgment, but that does not help if the wrong decision is made.

The decision of whether to vaccinate the community is one of greys. The decision of whether to vaccinate an individual is black and white. The individual has “more skin in the game.” The difference is perhaps best illustrated by understanding how a decision-maker responds to mistakes. A public health vaccination program can be changed if concerns arise — for example, replacing oral polio vaccine (‘OPV’) with inactivated polio vaccine (‘IPV’), or removing thimerosal from vaccines. However, an individual who makes a “mistake” cannot correct the mistake.

If the probabilities are clearly in favour of promoting universal vaccination, the public health agency operating from a utilitarian perspective may feel justified in proceeding even if there are known risks for some few unknown individuals. The policy may achieve its objectives, even allowing for the cost borne by some individuals. But now those individuals bear an unfair portion of the burden. While compensation programs might help to alleviate their loss, the issue is different for an individual than the community, even if the two are linked.

V RESISTING COERCION

The problem is that efforts to ensure higher vaccination rates may require, as per Australia’s new “no jab no pay” policy, more coercive pressure. However, the evidence for the harms caused by non-vaccinators is arguably more equivocal than the polemic might encourage us to believe. Even if it were less equivocal, do the ends justify the means?

A Over-claiming

How much pressure is it appropriate to apply to non-vaccinators to ensure their compliance with the policy? The enthusiasm to encourage vaccination sometimes leads to some morally dubious claims. A recent newspaper poll suggested that a solid majority (86 per cent) supported compulsory vaccinations.⁵⁰ While those for vaccination have might through numbers, do they have right through ethics? Allowing individual rights is an apt cure for an appeal to popularity.

At times, the effort to encourage broader vaccination coverage seems to press too far. A 2011 book, *Deadly Choices: How the Anti-Vaccine Movement Threatens Us All* reflects good intentions, but overstated claims.⁵¹ Only some are threatened by the unvaccinated, mostly the unvaccinated themselves, and also vaccine failures. With vaccination rates of 90 per cent, the threat is not to “all” but rather, to a small and relatively difficult-to-measure minority.

B Motivation

Medical experts, like others, are inclined to be subject to self-serving biases.⁵² Accordingly, the zeal of those supporting vaccination may at times encourage omission of inconvenient facts, misrepresentation of information and over-claiming. But even if stretching what is true, does the public good that results offer sufficient justification for the action? Is the harm suffered by a few justified by the greater good? We might be tempted to say yes, but this might be challenged by the scenario of the transplant surgeon faced with five mortally-ill patients in need of life-saving organs.⁵³ Meanwhile, one patient who is in hospital for a routine check-up happens to be compatible with the five who need organs. Is it right to kill the one for the benefit of the five?

The promoter of universal vaccinations, like the surgeon, must make a decision about whether it is right to harm a few for the benefit of the many. The decision is likely to

⁵⁰ Samantha Maiden, ‘Galaxy Poll: 86 per cent of Australians want childhood vaccination to be compulsory’, *The Sunday Telegraph* (online) 4 April 2015 <<http://www.dailytelegraph.com.au/news/nsw/galaxy-poll-86-per-cent-of-australians-want-childhood-vaccination-to-be-compulsory/story-fni0cx12-1227290503812>>.

⁵¹ Paul Offit, *Deadly Choices: How the Anti-Vaccine Movement Threatens Us All* (Basic 2011).

⁵² Shashi S Seshia, Michael Makhinson and G Bryan Young, ‘“Cognitive Biases Plus”: Covert Subverters of Healthcare Evidence’ (2016) 21(2) *Evidence Based Medicine* 41, 41-45.

⁵³ Philippa Foot, ‘The Problem of Abortion and the Doctrine of Double Effect’ (1967) 5 *Oxford Review* 1.

depend critically on the motivations of the decision-maker. In particular, is she seeking to maximise the greater good, or treat each and every individual as deserving dignity and autonomy?

Are we even aware of our true motivations and intentions? Is the Australian Government's new "no job no pay" policy for the common good or are there other hidden objectives, other motives at play? The intention to help the common good seems undermined by the lack of evidence or even rationale for how this policy will help:

The Government holds that removing non-medical exemptions will 'reinforce the importance of immunisation and protecting public health' and that 'the choice made by families not to immunise their children is not supported by public policy or medical research nor should such action be supported by taxpayers in the form of child care payment.'⁵⁴

The Government shows a marked lack of concern about the effectiveness of the policy in increasing the vaccination rate. Rather, the primary benefit declared by the government is that it will save \$509 million in the budget over five years. Perhaps the view is that the conscientious non-vaccinators are so hardened in their views that they will be unlikely to change, and this policy is simply a means of recouping moneys to pay for the additional health expenses that will be incurred by their continued non-vaccination. More usefully perhaps, in the same 2015 budget, the government has committed to spending \$26 million over the same five-year period in efforts to improve vaccination rates, especially among children.

Meanwhile, in addition to the doubtful benefits of the "no job no pay" policy in increasing vaccination rates, it creates additional costs and burdens for some who are arguably ill-equipped to cope with extra stresses. Incompletely vaccinated children tend to come from socio-economically disadvantaged parents (lower education, lower income), and are unvaccinated for reasons such as psychological distress, not objection to vaccines.⁵⁵

Ultimately, motivations offer a poor basis for ethical action as they are often, unfortunately invisible. Some motivations and intentions may even be invisible to the

⁵⁴ Klapdor and Grove, above n 5.

⁵⁵ Pearce et al, above n 25.

individual themselves. Just as non-vaccinators may be deluded in the real reasons for their stance, so too may those promoting vaccination.

VI CONCLUSION

Vaccination brings into conflict the common good and individual rights. The question examined here is whether, in the case of vaccination, the common good can legitimately dominate the individual right to refuse to vaccinate. The general benefits of vaccination are not disputed. But the indirect benefits, those gained by achieving a herd immunity threshold, are more contested. Moreover, the threat posed by conscientious non-vaccinators in reducing herd immunity, this indirect benefit, is questioned.

There are other bases that might be used for building a moral claim for applying more pressure to non-vaccinators to vaccinate (non-vaccinators are free-riders, that they are misinformed and/or they are incompetent to make the decision), but most fail to be compelling.

Inevitably, the nature of the polemic has led both sides to engage in deception and misinformation. Coupled with cognitive biases, each side inevitably mines the complex labyrinths of arcane and contradictory evidence and opinions. Ultimately, the arguments reduce to discussing for most purposes, very low probability risks. In effect, it probably matters little whether non-vaccinators vaccinate or not. What inflames the debate perhaps is the success of mass vaccination programs, which, through herd immunity, have made the risks of infection and consequent morbidity/mortality very low. So the individual who vaccinates is unlikely to react, and the individual who does not vaccinate is unlikely to be infected.

So what value is there in pursuing a small minority of the population that refuse to vaccinate? The apparent gain is minimal — herd immunity levels will be little changed. In any case, other unvaccinated groups probably offer greater promise for conversion, both in numbers and susceptibility to influence. The cost is a curtailment of conscientious non-vaccination: removal of a relatively minor individual liberty with relatively low risk. Promoting vaccination for the common good is to be encouraged, and so too is the option allowing an individual to conscientiously object.

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OBSTRUCTION IS JUSTICE: THE JUSTIFICATION OF OBSTRUCTION FOR THE OCEANS, AND AN INSIGHT INTO THE WESTERN AUSTRALIAN SHARK CULL

MADISON STEWART*

Madison Stewart has known sharks all her life. Being certified to scuba dive at 12 years old instead of learning to ride a push-bike, she has always had a passion for the ocean and exploring the great reefs off the coast of Australia. The ocean became her home, and sharks her family, but not everyone can understand the placidity of sharks like Madison. When her family was threatened to be killed by shark culling laws introduced by the Western Australian Government, she was quick to retaliate and defend the innocent creatures. This is her story about the battle against the laws that seek to destroy what she loves and how the law can sometimes lead to injustice.

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I INTRODUCTION

Injustice thrives in the cracks of our society, with cruelty to animals remaining legal as long as it is profitable. We live under the illusion of trust and believe that only low-life criminals break the law, when really they are bent for large corporations. We lace our beaches with nets that kill protected species because we expect impunity when entering another animal's hunting grounds. After years of attacking the system in order to change and enforce the law for the good of the oceans I love, I came to a sudden realisation. I realised that laws are created to justify the destruction of our last wild things, because it is profitable, and because no public pressure has changed them. It was with this realisation that I understood that I might need to break the law.

My most recent short film contains the line: 'I want your children to grow up to be criminals, because the world they are growing up in is unjust, and they may hope to maintain some grasp of the natural world, by fighting the laws that allow its destruction'.¹ I am not promoting fire starters, or advocating cheap vandalism, or driving without a seat belt. However, examine the laws I refer to in this story, and perhaps you will agree I was in the right when I broke them. I have broken laws that I will not talk about openly in this narrative. I have also broken these laws with no regrets and with the understanding that the law and justice are sometimes two different things.

The story I've chosen to share with you today, however, is a story of an animal that did not get the justice she deserved. This is a story of an animal betrayed by the very laws meant to protect her and the very people assigned to enforce them. This is the story of one of the many tiger sharks killed off the Western Australian coast during the shark cull, and to this date, my most confrontational interaction with the law.

II EXAMPLE ONE: DISREGARD OF NATIONAL AND INTERNATIONAL LAW AND TREATIES

For millions of years, sharks have roamed the vast seas of the world.² However, only through our interference in their habitat and identifying their importance in our way of

¹ *My World* (a film by Madison Stewart, 2014), 0:3:54.

² Thomas P. Peschak, *Sharks and People: Exploring Our Relationship with the Most Feared Fish in the Sea* (University of Chicago Press, 2014) 28.

life,³ sharks, including the great white shark, are claimed to be protected by both national and international law. The great white shark is listed as vulnerable under the *Environment Protection and Biodiversity Conservation Act*.⁴ As a result of being classified as vulnerable, the Commonwealth Government has enacted an Australian National Recovery Plan for the white shark that aims to increase population growth, thus, lifting its classification as vulnerable.⁵ Furthermore, the shark is also protected under the *Convention on International Trade in Endangered Species of Fauna and Flora* ('CITES').⁶ CITES was adopted in 1973 to address the unsustainable international trade of wildlife.⁷ To date, around 166 countries have become parties to this Treaty, making it 'one of the world's most important agreements on species conservation and non-detrimental use of wildlife'.⁸ Again, the great white shark is also protected by international conventions as it is also listed under Appendices I and II of the *Convention on Migratory Species* ('CMS').⁹ Even though Australia was seen as the one of the forerunners in shark conservation by identifying great white sharks as vulnerable in 1997 and becoming advocates for shark protection,¹⁰ the Western Australian government still implemented systems to hunt and kill the great white shark.

Following a series of shark attacks in Western Australia, the State government made the decision to cull great white sharks. The word 'cull' means to slaughter, kill, destroy, reduce the numbers of, or thin out the population of.¹¹ In 2014, Greg Hunt declared that

³ Sharks are immensely important in relation to marine preservation, tourism and our economy. Also, we have an undeniable moral duty to protect these great creatures from destruction. See Stijn van Osch, 'Save our Sharks: Using International Fisheries Law within Regional Fisheries Management Organizations to Improve Shark Conservation' (2012) 33(2) *Michigan Journal of International Law* 383, 386-7.

⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Pt 13, s 178; see also Australian Government (Department of Environment), White Shark (*Carcharodon carcharias*) <<https://www.environment.gov.au/marine/marine-species/sharks/whiteshark>>.

⁵ Department of Sustainability, Environment, Water, Population and Communities, Australian Government, *Recovery Plan for the White Shark (Carcharodon carcharias)* (2013) 17.

⁶ *Convention on International Trade in Endangered Species of Fauna and Flora*, opened for signature 3 March 1973, UNTS No. 14537 (entered into force 1 July 1975) app II.

⁷ CITES, *Governments propose new CITES trade rules for dozens of wildlife species* (12 May 2004) <https://cites.org/eng/news/pr/2004/040512_cop13_prop.shtml>.

⁸ *Ibid.*

⁹ *Convention on Migratory Species*, opened for signature 22 June 1980, [1991] ATS 32 (entered into force 11 January 1983) app 1 and 2.

¹⁰ Romney Philpott, 'Why Sharks May Have Nothing to Fear More Than Fear Itself: An Analysis of the Effect of Human Attitudes on the Conservation of the Great White Shark' (2002) 13(2) *Colorado Journal of International Environmental Law and Policy* 445, 455-6.

¹¹ Oxford Dictionary, The definition of 'cull' <<http://www.oxforddictionaries.com/definition/english/cull>>.

the shark cull would operate under an exemption from Part 3 of the federal *Environment Protection and Biodiversity Conservation Act (1999)* (Cth).¹² Section 158 of the Act was used to justify the shark cull by declaring it a matter of ‘national interest’.¹³ However, ‘national interest’ has not been defined in the Act.¹⁴ Exemptions that have been issued include vegetation clearance in response to the Black Saturday Bushfires in 2009,¹⁵ and the release of water from Lake Crescent Tasmania to supplement human resources.¹⁶ Protection of species under the law is evidently an illusion.

III EXAMPLE TWO: IRRATIONAL SHARK CULLING LAWS

It was a routine day for me on 20 March 2014. My life was put on hold as I travelled to the other side of the country to be amongst the blood and hooks offshore. Like all previous mornings, we woke before dawn to speed across the beachfront to check what had been captured by the hooks that night. Many of us hadn’t slept in four weeks. Throughout those weeks numerous people had left their jobs and bills behind to help the sharks that were exposed to actions against nature, the likes of which I thought were reserved for third world countries. What we experience would ultimately shape the way we felt about our oceans and our government. There was conflict between the boats on the water that day. Everyone struggles to do things their way, and this causes debate. However, this time, we would all work together, as one enemy had united us.

We checked many drum lines before we found our first dead shark at Scarborough Beach. A drum line was the government’s chosen method for killing sharks. It is a flotation buoy with a long chain and a giant hook on the bottom, usually baited with fish. They are anchored to the ocean floor and the hook dangles a few meters below the surface. As soon as we came across something, I would enter the water to film it. Under the Western Australia shark culling laws, people are not allowed within 50 meters of the

¹² Commonwealth, *Statement of Reasons for Granting an Exemption Under s 158 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, Parl Paper (15 January 2014).

¹³ *Ibid.*

¹⁴ See *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*.

¹⁵ Commonwealth, *Exemption Under Section 158 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, Parl Paper (11 February 2009).

¹⁶ Commonwealth, *Exemption Under Section 158 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, Parl Paper (7 November 2007); see also Australian Government (Department of the Environment), *Exemption Notices* (5 November 2014) EPBC Act Public Notices <<https://www.environment.gov.au/epbc/notices/exemptions.html>>.

drum lines.¹⁷ However, in order to film the dead sharks and check the hooks, we must be next to them. Without breaking this law, no dead sharks or other victims would be filmed. Thus, we broke it on a daily basis.

I filmed this one particular tiger shark for a while; the sound of her teeth clashing on the chain links in the murky water still resonates with me. After filming, I got out and we waited a good hour for Fisheries to show up. They would stop at every drum line, and we had to sit and wait until they reached ours. We retreated and watched from a distance as Fisheries hauled the dead tiger shark onto their boat. Then, the chase began immediately. Before Fisheries could dump sharks offshore after the processing was done, they would try and outrun us and zigzag so we could not film it happening. We had done this many times. We knew their movements and the unforgettable sight of a shark falling into the abyss.

The suspense of hearing their engines shut off, and knowing at that time we would only have a few split seconds to get into the water, was a familiar feeling. However, this time, it would be different. Fisheries' boat came to a halt far offshore with us trailing just behind them. The shark's body was then tossed off the long metal platform that was once used to hold a spare boat but was now used to haul suffering animals on and off their deck. We jumped in immediately, as the white wash cleared to reveal the sight of the abyss. On this occasion, however, we knew something wasn't right; we saw no shark falling to the ocean floor. It was then I looked up at the surface, only to see that the shark did not sink to the bottom because one of our own had caught it.

We pulled it up beside her small rib, with rope wrapped tightly around its tail. The shark was so big she exceeded the boat length. She just hung there, moving with the water. From here we all gathered around and watched her. I don't know what sparked the inspiration to grab her. I guess we wanted to know either if she was pregnant, or to film her up close, or, quite possibly, we wanted to defy the authorities in some way. Whatever it was, we now had in reaching distance a graphic sight of what had just taken place at the hands of Western Australian Fisheries officers. A hook was still lodged in her throat, her eyes were pale without life, and scars covered her body from the struggle.

¹⁷ Western Australia, *Government Gazette*, No 171, 24 October 2014; see also *Western Australia Marine Act 1982* (WA) s 66.

That shark was like all the others we had witnessed being killed, but I had no idea how significant she was.

IV EXAMPLE THREE: DISREGARD OF MARITIME LAW AND OBSTRUCTION OF JUSTICE

She was the first up-close proof of the disgrace and inhumanity that was fueled by our fear. Australians were happy to see the evil man-eaters culled for our own safety, purely because what is out of sight is out of mind. I think Fisheries had reached the same conclusion. Now, since we were filming that mutilated shark, the cull was no longer out of sight, and this made them angry. I was so wrapped up with being in choppy water, and face to face with a dead tiger shark, I failed to notice how much danger we were in. The giant metal-hulled Fisheries vessel was descending on us, and I could hear the engines reversing from under the water. I realised that they had seen us, and they were coming back. Two uniformed Fisheries officers were on the front of the boat, which was now only meters from our tiny rib. They started yelling at us.

Fisheries had broken the law by approaching an idle vessel with divers in the water. Under Western Australian maritime law, a vessel must not approach within 50 metres,¹⁸ but we were only meters away from their steel hull. This showed me how adamant they were in keeping this atrocious act out of the public eye. They began to yell 'let go of the shark, you are interfering with our fishing operations'. Our crew yelled back, 'we're not keeping it'. It became a screaming match on the water. My inability to hear anything and the ability to shut off the logical part of my brain was strong at this point. As I eventually turned around to see their hull, the motto of the Western Australian Fisheries was right in my face. The words 'Fish for the Future' were spread across the hull of a boat that had just dumped a breeding sized female tiger shark into the abyss.

Those few minutes felt like seconds, it all happened so fast. Eventually, after ignoring Fisheries cries, we let her go. I watched as if the rest of the world had stopped completely and nothing else required my attention. Those few minutes watching her white belly disappear into the deep, deep green were surreal; this tragedy and the shock of what had just happened rushed over me. We got back into the boat, and Fisheries were hanging around but now keeping their distance. After minutes of tears shed and

¹⁸ *Western Australian Marine (Infringements) Regulation 1985 (WA)* sch 1, s 10A.

comprehending what had just happened we headed back to the marina, and each boat went their separate way.

On the way back in, one of the officials on the boat demanded I take my memory card out of my go pro. Now, I may be young, but I've seen and done this numerous times already. As a result, my attitude was at a place that needed adjusting. I thought the idea was laughable, but I humored her and gave her my camera's memory card. It went into a pile with all the others. Before boarding the Fisheries' vessel, however, all our footage was placed in a small ziplock bag and tucked into the bra of one of our crew.

As soon as our boat hit the marina, Fisheries officers were waiting for us. This was the moment I realised we were about to be in a lot of trouble. Up until that moment, I had not taken our actions or the Fisheries opposition seriously. First of all, I did not even know how Fisheries knew where we docked. Somehow they managed to be there, waiting for us. The officer in possession of our memory cards got off the boat. The officers then said something to her I did not hear. Suddenly, amidst their conversation, she just said, 'talk to them' while pointing to us. She then walked away immediately. Then the two Fisheries officers, in full uniform and notebooks in hand, turned their attention to us.

The rest is a blur. I remember quickly setting my phone to video record in case I needed to refer to it later. They told us they had pictures of us in the water, and evidence of what we had done. At this point, one other person and I stepped forward to confess to being the ones in the water, and I didn't think much of it. I was well trained to what my rights were, and I knew I had to tell them my name and address and nothing else. Therefore, they asked me questions to which I did not respond. Something hit a nerve during the questioning though; why would they need evidence, and what was it we had done? It was then Fisheries officers dropped the ball. They were about to charge us with possession of a protected species.¹⁹ The protected species laws are in place to stop people profiting from the deaths of marine animals, such as tiger sharks. Thus, when we caught that shark, we were in possession of a protected species. However, the irony is that we were being accused of possession of a protected species by the very people that just killed it.

¹⁹ *Wildlife Conservation Act 1950* (WA) s 16A.

They demanded our memory cards be given to them, because apparently we had footage that was considered evidence of what we had done. We, of course, refused. They then told us they had the right to search the boat, and us. I replied, 'you are more than welcome to', knowing they wouldn't find anything. I took my jacket off and handed it to the Fisheries officer as if to say, 'go ahead, search'. He just stood and looked at me. I never lied to them. I had no idea where my memory cards were at that point. I remember being asked if I had any interactions with the shark. I started to sort my backpack and ignore the Fisheries officer; he knew I had no obligation to answer. He then said something along the lines of, 'that was a potentially dangerous animal and interaction'. I stopped and looked at him sarcastically. Having had multiple interactions with six meter tiger sharks before my 16th birthday, I was wondering if it was worth pointing out to him that the shark was dead, and that every single interaction I've had with sharks has been safer than being in the water with a Fisheries driven vessel. Fisheries told me that if the footage we shot that day was released we would be going to court for obstruction of justice.

According to Western Australian law, the charge of obstruction of justice, that is attempting to pervert etc. the course of justice, gives rise to a maximum penalty of 7 years imprisonment.²⁰ Obstruction of justice charges are usually reserved for serious offences like continuing to contravene bail,²¹ providing information that falsely convicts another²² and interfering with a witness.²³ We claimed to have no footage. Therefore, if we released it after refusing to supply it as evidence, it would amount to an obstruction of justice. At the same time, if we gave it to Fisheries, they would have the right to destroy it. We were not about to lose the most powerful footage we had ever obtained. Fisheries did not want us to release this footage, but their idea of stopping us from doing so was to use the law and to make us think our footage contained evidence of a crime. The truth is that the footage showed them breaking the law by presenting a close depiction of a defenseless animal, dead, as a result of their actions.

Shortly after this confrontation, we gave our SD cards with all our footage to our lawyer.

²⁰ *Criminal Code Act 1913 (WA)* s 143.

²¹ See *Murphy v The State of Western Australia* [2013] WASCA 178.

²² See *Penny v The State of Western Australia* [2010] WASCA 65.

²³ See *Librizzi v State of Western Australia* [2006] WASCA 237.

I was now faced with a dilemma: I could either release the footage and go to court for obstruction of justice, or never release it and keep the victims of the shark cull and actions of the government hidden from public eyes. A week later my film was online, receiving more than 100,000 views overnight.²⁴ It grabbed the attention of those who had never previously cared about sharks. They were shocked to witness the battle taking place in their defense. It was one of the most powerful films I've ever made; it is shown in schools and has been seen around the world. To this day, the footage brings tears to my eyes. Being the smart ass I am, I called the film *Obstruction is Justice*, in honor of the law we could have been charged with.

IV CONCLUSION

The Fisheries Department later dropped their investigation, and we were out of the woods. I will never forget that tiger shark, the amazing people on the boat with me, or our willingness to go to jail for my film. The shark cull has now stopped, and they did not catch a single great white. However, more than 100 tiger sharks were caught, and many died in the atrocity,²⁵ although tiger sharks have not been responsible for a fatality in WA in over 80 years.²⁶ We, as a society, have lost our direction, and our foundation of fear and ignorance causes desolation. Sometimes we are not the dominant species, and in a world where we rely on nature to survive, why are the laws not in place to prevent her destruction or protect her apex predators? I hope your children do grow up to be criminals, because if I was not fighting for the species I love, our government would be silently killing them with no one seeing it. Through breaking the unjust laws, we have gained entry into our future by protecting our greatest inheritance: the natural world. Animals will die, but they will not die in vain if we are willing to break the laws for them. In this case, obstruction was justice.

²⁴ See *Obstruction is Justice* (a film by Madison Stewart, 2014).

²⁵ Courtney Bembridge and David Weber, 'WA shark cull: 172 caught on drum lines off popular beaches', ABC News (online), 7 May 2014 <<http://www.abc.net.au/news/2014-05-07/shark-catch-and-kill-data-released/5435682>>.

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SURROGACY AND DIGNITY: RIGHTS AND RELATIONSHIPS

KATE GALLOWAY*

In this Journal, Rachel Kunde shared her experiences as an altruistic surrogate, advocating for greater government support for surrogate mothers. Based on personal experience, her argument focusses on the recognition of women's bodily autonomy, and suggests that surrogacy arrangements need not impair the dignity of the surrogate mother. In particular, her advocacy appears to presuppose reproductive rights, both in the intending parents to found a family, and for the surrogate to bear a child. This article responds to Kunde. While acknowledging the importance of Kunde's contribution to the discourse through her personal narrative, it takes a broader approach to the question of regulation. This article first addresses the question of rights for each of the intending parents and the surrogate mother, suggesting that even if reproductive rights have some standing at law, they are not sufficient to justify liberalisation of altruistic surrogacy. Instead, it examines an alternative rationale to altruistic surrogacy based on a relational approach to regulation, looking beyond the individualised rights-based experience to that of national, and indeed global, relationships. Central to this position is articulating dignity and autonomy as the principal values at stake.

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I INTRODUCTION

In this *Journal*, Rachael Kunde has written of her relationship with two couples as an altruistic surrogate.¹ Her choice to become a surrogate, she says, was made on the basis of these relationships. Kunde writes of the desire of the two couples to complete their family, and to have a family, respectively.² She describes the barriers they faced, preventing them from fulfilling their desire. She is pleased to have assisted these couples to create their families, and in doing so, to extend her own family.

In making a case for improved and somewhat freed-up regulation of altruistic surrogacy in Australia, Kunde presents surrogacy as an affirming act for the surrogate mother, saying she ‘believe[s her] decision to become an altruistic surrogate mother was the epitome of true autonomy.’³ She sees great value in the role she has played in assisting couples to create a family, and suggests that reforms allowing for compensation and subsidised IVF procedures would make surrogacy more achievable and more widely available in Australia.⁴ She argues that promoting accessible, altruistic, compensated surrogacy in Australia would stem the tide of the more problematic international surrogacy arrangement.⁵ Kunde distinguishes between commercial surrogacy, where

¹ Rachel Kunde, ‘Australian Altruistic Surrogacy: Still a Way to Go’ (2015) 3 *Griffith Journal of Law and Human Dignity* 227.

² *Ibid.*

³ *Ibid* 238.

⁴ *Ibid* 241–2.

⁵ See, for an overview of international surrogacy and human rights, John Tobin, ‘To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?’ (2014) 63(2) *International and Comparative Law Quarterly* 317.

the pregnancy is generally managed by the intending parents and for which the birth mother might charge a fee; and compensated surrogacy, where the birth mother remains in control of her pregnancy and can lawfully recover the costs associated with pregnancy and birth.⁶ This article responds to arguments for compensated surrogacy only.

Although not expressly stated, I have interpreted Kunde's story to be founded on an assumption that consenting adults have the freedom to procreate and that the law should therefore support — indeed promote — surrogacy as an expression of this freedom.⁷ For Kunde, the surrogacy arrangement was 'something [she] felt [she] needed to do.'⁸ The second couple she assisted had been looking into 'other possible options to create their family' when Kunde met them,⁹ and so Kunde considers that her 'family has helped create other families'.¹⁰ In arguing against the legal restrictions on altruistic surrogacy, on my reading, Kunde implies that existing laws inhibit the freedom of those involved to either become parents, or to carry someone else's child.¹¹ Government support through *legal* "protection" of the intending parents and rebates for counselling,¹² from an Anglo-Australian legal perspective, requires justification based on an underlying right or freedom.

This article responds to the thrust of Kunde's article, expanding on the themes I see arising from her case in favour of government support for surrogacy. Despite the positive *personal* experiences of Kunde and other surrogate and gestational mothers, I suggest that there is a much wider context for considering the regulatory framework of surrogacy that needs to centre on the values at stake — wider than what I see expressed as personal rights to procreate. There is little to be gained through an individualistic, rights-based approach to surrogacy.

The first part of this paper articulates the problem for law from the perspective of legal rights and freedoms. It not only identifies the limits of a rights-based approach for the

⁶ Kunde, above n 1, 241.

⁷ Ibid 241–2 (Kunde suggests extending Medicare rebates to IVF to 'encourage couples to undergo domestic surrogacy').

⁸ Ibid 234.

⁹ Ibid.

¹⁰ Ibid 236.

¹¹ Ibid 239.

¹² Ibid 240.

intending parents in particular, but also for the surrogate in entering the surrogacy arrangement. While the welfare of the child is often at the forefront of the surrogacy debate, instead the focus here assumes the child's dignity and welfare are addressed,¹³ and discussion will revolve around the relationship between intending parents and the surrogate as the key tension to be navigated.

The following part then situates the individual experience of reproductive freedom within a relational framework, picking up on Kunde's theme of the importance of relationships in her own experience.¹⁴ Nedelsky's relational approach to analysing law focuses on the way in which the law supports relationships that either foster or inhibit autonomy. In a relational approach, rights per se do not promote autonomy. Instead, values such as autonomy depend upon a structuring of relationships — nested relationships — that generate the capacity for people to be autonomous. In a surrogacy arrangement these "nested relationships" include the mother, intending parents, and the child, but also encompass the relationships that touch people beyond those directly involved in the surrogacy arrangements.

Central to a relational approach is rejection of the central role of boundaries in the law.¹⁵ Thus to the extent that the law operates to promote a bounded or "separative" self, it inhibits our capacity to focus on the relationships it is actually structuring. Therein lies the crux of Nedelsky's approach: it is relationships that generate our capacity to be autonomous beings, rather than isolation.

This article thus questions whether "legal rights" are an appropriate foundation for a regulatory framework. Instead, it posits that the law should focus on relationships in pursuance of values.¹⁶ Establishing the values of dignity and autonomy as paramount, this article creates a framework from which to critique the way the law structures the parties' relationships. Further, it is likely to offer a more rounded framework within which rights might then be considered.

¹³ For issues affecting children, see, eg, Tobin, above n 5.

¹⁴ See, eg, Kunde, above n 1, 229.

¹⁵ See also the earlier work of Jennifer Nedelsky, 'Law, Boundaries and the Bounded Self' (1990) 30 (Spring) *Representations* 162.

¹⁶ See generally Nedelsky's relational method in Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012).

My reading of Kunde and the framing of my response both arise from my reading of her narrative, and the law, as a non-Indigenous woman. I have limited my analysis to an Anglo-Australian socio-legal perspective.

II THE PROBLEM OF LAW

Surrogacy offers a problem for the law not because it is a new practice, but because it operates in a largely “negative” legal space. Apart from the rights of the child, it is difficult to identify clearly positive legal rights that subsist in any of the parents. Indeed, the roles generally ascribed to parents by the law — and therefore also their rights and responsibilities — are deliberately disassembled in surrogacy. The elements traditionally understood as integral to parenthood: a procreative act, genetic inheritance, gestation, and the social roles of mother and father, are no longer united. Aligned with the law’s habituated control over women’s bodies, particularly as to their reproductive agency, it is perhaps also inevitable that the law tends towards restriction of surrogacy. I think Kunde’s article, however, presupposes some kind of extant right or freedom invested in both the surrogate and the intending parents. Her own experience indicates a view that the surrogacy arrangement gives expression to reproductive freedom for all parties.

There is a general tendency in the literature to use the concept of reproductive freedom in the context of a woman’s right to “bodily self-determination”, or “control over one’s body”.¹⁷ It is discussed, for example, in the context of constraints on sexual behaviours, contraception, abortion, and sterilisation of women,¹⁸ as well as reproductive health and obstetric care.¹⁹ Hernández-Truyol points out that it comes into play both when a woman chooses to have an abortion, and when she chooses not to. The context for her analysis is the imposition of State regulation on women’s reproductive choices.²⁰

More broadly, reproductive freedom might be considered to cover the full gamut of choices made by a person in relation to their procreative capacity, from choosing sexual

¹⁷ See, eg, Rosalind Pollack Petchesky, ‘Reproductive Freedom: Beyond “A Woman’s Right to Choose”’ (1980) 5 *Signs* 661, 663; See also Tobin’s interpretation in Tobin, above n 5, 324.

¹⁸ See, eg, Stephen L. Isacacs, ‘Reproductive Rights 1983: An International Survey’ (1983) 14 *Columbia Human Rights Law Review* 311; Berta E. Hernández-Truyol, ‘To Bear or Not to Bear: Reproductive Freedom as an International Human Right’ (1991) 17 *Brooklyn Journal of International Law* 309.

¹⁹ See, eg, Petchesky, above n 17.

²⁰ Hernández-Truyol, above n 18.

partners, contraception and sterilisation, pregnancy, pregnancy termination, gamete donation, artificial reproductive technologies ('ART'), surrogacy, adoption, obstetric care, and sexual health. In exercising choices relating to the capacity to become a parent, free from State intervention, one is exercising one's reproductive freedom.

Where the law protects such freedoms, they tend to take the form of rights. The UN considers reproductive rights as human rights:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international laws and international human rights documents and other consensus documents. These rights rest on the recognition of the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.²¹

Reproductive freedom is not limited to women's experiences. It would similarly breach a man's reproductive freedom, and his right to bodily integrity, to coerce his sterilisation. However, although both men and women can experience hardship and conflict at law through gamete donation, women's biological role in procreation where it extends to gestation and labour, is unique to women — and conflicted at law. The pregnant woman is often characterised by law as two people instead of one, resulting in a conflict of rights as between woman and foetus.²² Thus, women's claims for reproductive freedom as a form of bodily autonomy diverge from those of men whose body is always seen by the law as singular — even where the law might remain problematic concerning sperm donation.

Beyond the biological process of conception and gestation, and integral to the consideration of reproductive freedom, is the social construction of motherhood specifically, and parenthood more broadly. Reproductive freedom subsists in an

²¹ Office of the United Nations High Commissioner for Human Rights, *Reproductive Rights are Human Rights: A Handbook for International Human Rights Institutions* (2014) <<http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>> 13.

²² Anne Morris and Susan Nott, 'The Law's Engagement with Pregnancy' in Jo Bridgeman and Susan Millns (eds), *Law and Body Politics: Regulating the Female Body* (Dartmouth, 1995) 53, 56; For an example of the separate treatment of mother and foetus, see discussion about 'Zoe's Law' in *Foetal Personhood Bill* ("Zoe's Law") (20 November 2014) Women's Legal Service New South Wales <<http://www.wlsnsw.org.au/law-reform/past-campaigns/zoes-law/>>.

individual, but within a social context. Procreation is an inherently social act, as well as an intensely personal one. Thus Petchesky points out that ‘woman's reproductive situation is never the result of biology alone, but of biology mediated by social and cultural organization’.²³

The social aspects of surrogacy are borne out by Kunde's narrative which provides a case study of arrangements involving a set of differentiated parental relationships, freed from the nexus of a sexual encounter and mediated instead by technology.²⁴ Not only can surrogacy consist of reproduction without sex, in contrast to a ‘traditional’ conception between heterosexual partners — mother and father — in a surrogacy arrangement there are actors who variously embody genetic, gestational, and social elements of parenthood.²⁵ For this reason, the legal implications of surrogacy cannot be considered in the same terms as ‘conventional’ conception.

In discussing the case of baby Gammy, the child born to a Thai mother and abandoned by the Australian intended parents,²⁶ Kunde agrees that surrogacy ‘can go wrong’, but counters that any conception can go wrong. She draws an analogy with abandoned babies born from ‘conventional’ conception, suggesting that ‘circumstances like this happen in every day life’ and that when they do, ‘the nature of their conception is never called into question’.²⁷ Kunde fails to explain that baby Gammy's mother took on the pregnancy at the behest of the intending parents, through invasive medical procedures, using their genetic material, for their benefit, in exchange for payment. The mother came from a poor background and was left with a baby who had health problems, without the means to pay for medical assistance. It is difficult to see this as an “every day life” occurrence. Women do of course give birth to children with specialist medical needs, and indeed may even have been coerced into intercourse and subsequently abandoned. However, the expression of women's agency in the case of a surrogacy arrangement is mediated through and serves different relationships from those of a sexual encounter in

²³ Petchesky, above n 17, 667.

²⁴ “Technology” here extends from self-insemination through to ART.

²⁵ Enohumah Kingsley Osagie, ‘Surrogacy: Whose Child Is It?’ (2010) 1 *Journal of Medicine and Medical Sciences* 505.

²⁶ See, eg, Kate Galloway, ‘Surrogacy: Whose Reproductive Liberty?’ *Right Now* (online), 13 October 2014 <<http://rightnow.org.au/writing-cat/surrogacy-whose-reproductive-liberty/>>.

²⁷ Kunde, above n 1, 237.

a way that challenges the law's default — and traditional — understanding of parenthood.

Kunde thus neatly sidesteps the issues that lie at the heart of the surrogacy arrangement and challenge the construction of surrogacy necessarily as an expression of reproductive freedom. Becoming pregnant as a result of a sex act involves only two parties in whom traditionally recognised elements of parenthood converge. Conception may be planned or unplanned, but regardless each party has a well-defined legal relationship with the child. The State will enforce the relationship and certain obligations, recognising without more the status of each of the two parents as such. The law does not however recognise obligations as between the two parents,²⁸ unless they have a recognised marriage or marriage-like relationship.²⁹

In contrast, a surrogate pregnancy involves an agreement between various possible parents, designed deliberately to fragment and then reorder the traditional Anglo-Australian elements of parenthood that are implicit in an understanding of reproductive freedom. It does so by providing privately for rights and obligations between parents and child as well as between the parents, in relation to that child. For better or worse, the relationship between surrogate mother and intending parents is not, without more, a relationship known to the common law. In contrast with conventional conception from a sex act, whether intended or not, the intentional distributed parentage upsets the law's traditional attribution of responsibilities for children, and challenges assumptions about reproductive freedom. This freedom, however, takes a different form as between intending parents and the surrogate mother.

A Intending Parents

Kunde's story tells of two couples that wished to complete their family, but were unable to. Central to her advocacy is the desire to assist couples to have a family. Yet while couples are entitled to have a family, it appears that going beyond their personal reproductive capacities poses a challenge for the law. The law has for some time catered for gamete donation — the genetic component of parenthood. However, regulation has

²⁸ Except for a biological mother's right to seek costs relating to gestation and birth from a biological father in some situations (see *Family Law Act 1975* (Cth) s 67B).

²⁹ Marriage and de facto relationships are governed variously according to the *Family Law Act 1975* (Cth) and state *de facto* legislation.

for a long time fallen short of the introduction of an embodied reproductive service, or the gestational component of motherhood. Part of the challenge for intending parents is whether there can be said to be any *right* to enlist the assistance of a surrogate. In Kunde's terms, such a right might be to engage in a surrogacy arrangement in the first place, free from state interference, but also to seek state assistance and support to exercise that right.

Individuals in jurisdictions with constitutionally protected individual rights, such as the US, might have a claim to legal protection of a 'right to reproduction'. For example, it is on the basis of a tradition of constitutionally enshrined individual freedoms (the freedom of personal action and personal expression without state intervention) that Robertson argues for married couples' right to procreate within a sexual relationship. He suggests that this right to beget and rear children,³⁰ regardless of whether they are biologically related to the parent,³¹ extends to artificial reproductive techniques and to surrogacy.

Also within a rights-based framework, Article 16 of the *Universal Declaration of Human Rights* ('UDHR') provides specifically for a right to family, although it does not provide for a right to procreate *per se*.³² Although dealing with "family" and therefore potentially concerning procreation, the meaning of this right in terms of surrogacy is unclear. Without more it is difficult to interpret this as a positive right to engage a surrogate. To illustrate the boundaries of the right by analogy, the law protects property rights without investing in citizens the inherent right to a distribution of property. Property rights exist only once the citizen has acquired property. In the same way, arguably, the right to a family might exist once one has a family. The form the family takes pursuant to the right is less uncertain.

In contrast, Tobin suggests that there may be a right to contract for surrogacy services. He cites *dicta* in a decision of the Grand Chamber of the European Court of Human Rights,³³ in which he analogises from the issue of a right to an assisted pregnancy, to

³⁰ John A Robertson, 'Liberalism and the Limits of Procreative Liberty: A Response to My Critics' (1995) 52 *Washington and Lee Law Review* 233.

³¹ John A Robertson, 'Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction' (1986) 59 *Southern California Law Review* 939.

³² *United Nations Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc. A/810 (10 December 1948).

³³ *SH and Others v Austria* (2011) 3 Eur Court HR.

suppose a right also to surrogacy — all based on the right to a private life.³⁴ While possible, and with respect, the proposition is likely to be largely speculative at this stage.

In the absence of any articulated rights at law, it would be strained to argue in the present Australian context for any kind of substantive, positive reproductive right (including in Robertson's or Tobin's extended sense), or positive right to have a family.³⁵ There is however growing public sympathy for 'the childless' and consequently public support for women who use artificial reproductive technologies to conceive, and for both surrogacy and international adoption.³⁶ In recent years, this has translated into parliamentary recognition in Queensland of the 'liberty of consenting adults to conceive a child and to parent'.³⁷ A Committee was established to 'investigate and report to the Parliament on the possible decriminalisation and regulation of altruistic surrogacy in Queensland'. The recommendations resulted in the enactment of the *Surrogacy Act 2010* (Qld).³⁸ While not expressing a positive right to reproductive freedom, it might be argued that increasingly the Australian regulatory framework surrounding altruistic surrogacy is warming to the idea.

If intending parents have no clearly identifiable reproductive freedom that includes surrogacy, they might be considered under classical liberal theory to have a right to enter into contract. It is this contractual element that has traditionally been the focus of the regulation of surrogacy, rather than any procreative right or freedom implied at law. The problem for the law with this right, which is one known to the common law,³⁹ is the object of the contract. For many writing about surrogacy, the critical and analytical focus is on the child as the contractual object, and concerns tend to lie in the potential for commodification of the child, stemming from the possibility of the sale of children, and trafficking, both of which are unlawful.⁴⁰ For example, there is a raft of Australian

³⁴ Tobin, above n 5, 324.

³⁵ Following the decision in *McBain v Victoria* [2000] FCA 1009 (28 July 2000), it is possible to suggest a right not to be refused access to reproductive services, for those with characteristics of a protected class under anti-discrimination legislation.

³⁶ See, eg, Surrogacy Australia, *Home* <<http://www.surrogacyaustralia.org/>>; Australian Families for Children, *About Us* <<http://www.australiansadopt.org/AboutUs.php>>.

³⁷ Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Report* (2008) 22.

³⁸ *Ibid* 1.

³⁹ This right is normally referred to in a commercial context (see, eg, *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613).

⁴⁰ See, eg, Kajsa Ekis Ekman, *Being and being bought: prostitution, surrogacy and the split self* (Suzanne Martin Cheadle trans, Victoria Spinifex Press, 2013) ch 4 [trans of: *Varat och varan: Prostitution, surrogatmödraskap och den delade människan* (first published 2010)].

legislation criminalising human trafficking, which is supported at international law.⁴¹ The courts would thus tend, even in the absence of legislation, to find the contract void as against public policy — and resultantly unenforceable.

The present regulatory framework in Australia permits intending parents a limited freedom to contract in relation to the subject matter of procreation, but to an extent that this remains short of a positive procreative right. While Kunde was not explicit in identifying a normative basis for government support of surrogacy, her own motivations lay in assisting couples to have a family. A curtailed right to contract does not afford a right to have a family.

For Kunde's argument of government support for surrogacy to be taken up, the law requires a clear rationale for surrogacy itself. As the existing legal framework stands, it is not sufficient simply to declare that a couple (or a single person) wants to start a family. To interrupt the law's traditional, heteronormative understanding of parental relationships as a legal construct with legal implications requires something stronger: an underlying rationale to explain the purpose of the law and allowing full consideration of the multiple parties' interests.

B Surrogate Mother

Since the notorious *Baby M* case in the US,⁴² the position of the surrogate mother has, in addition to the rights of the child, drawn commentary both in terms of her role as a party to the arrangement, and also as its object.⁴³ Both roles converge in considering whether the surrogate mother has some kind of reproductive right, which she exercises through the arrangement.

As with the intending parents, Australian law cannot be said to recognise a reproductive right per se in the surrogate mother. But her position is quite different from that of the

⁴¹ See, eg, *Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003).

⁴² *In re Baby M*, 109 NJ 396 (1988).

⁴³ See, eg, Margaret Radin, 'What, if Anything, is Wrong with Baby Selling?' (1995) 26 *Pacific Law Journal* 135; Michael J Sandel, 'What Money Can't Buy: The Moral Limits of Markets' (The Tanner Lectures on Human Values delivered at Brasenose College, Oxford, 11–12 May 1998) <http://tannerlectures.utah.edu/_documents/a-to-z/s/sandel00.pdf>; Phyllis Chesler, 'Mothers on Trial: Custody and the "Baby M" Case' in Dorchen Leidholdt and Janice G Raymond (eds) *The Sexual Liberals and the Attack on Feminism* (Pergamon Press, 1990) 95.

intending parents. She is both effectively extending her own family as Kunde put it,⁴⁴ and is also contributing to the family of another couple. She is entitled to become pregnant and thus to exercise her bodily autonomy. However, in legal terms because of the intention to relinquish the child to the intending parents, entry into the surrogacy arrangement is not exercising a right to a family. In the absence of specific (surrogacy) legislation, nor is she generally permitted by law to relinquish her child pursuant to a private arrangement. Without a legal framework as to parentage, generally she will remain the child's guardian with the legal responsibilities that entails.⁴⁵ The call for the law's intervention by those such as Kunde, is for the State to enforce and support a private parentage arrangement. In one sense, this is perhaps more an argument for enacting freedom of contract than support for any other freedom, including reproductive freedom.

In contrast to this positivist interpretation, Kunde's assertion of her own autonomy through her surrogacy experiences is her performance of freedom, if not articulated legal rights. As an individual, she freely decided to carry children who would grow up with other parents. Such action is clearly at the heart of the liberal project, permitting the flourishing of individuals through self-determination. Additionally, Kunde had rationalised possible harms to herself and to others, meeting any objections to the exercise of her own autonomy.

In making her recommendations for reform, Kunde expands on these concepts seeking active government support for surrogacy, intending a more concrete and institutionalised approach to reproductive freedom. The legislative support for surrogacy that she seeks implies (though need not enact) a legal reproductive right. Problematically, the right must vest both in the intending parents and the surrogate mother herself. This requires lawmakers to look beyond the individual experiences of people such as Kunde, and to consider the broader contexts within which such arrangements might occur. In doing so, questions of freedom and its relationship to autonomy become significantly more complex.

⁴⁴ Kunde, above n 1, 242.

⁴⁵ See *Family Law Act 1975* (Cth) pt VII.

III THE CHALLENGE FOR SURROGACY

Kunde's article is a personal account of her experience, and argues a case for improved government support of surrogacy as a positive expression of personal rights. She addresses the underlying value of dignity through her having experienced personal bodily autonomy from acting as surrogate. Further, she summarily dismisses arguments against surrogacy as failing to comprehend the complexity of dignity.⁴⁶ While I agree with Kunde's assessment of complexity, I disagree that objections can be so easily dismissed. In view of the normative importance of dignity, a value that should underpin and inform the law,⁴⁷ this part explores the values at stake in the surrogacy arrangement that should inform the regulatory approach.

Kunde has staked her own argument on her experience of personal liberty and personal autonomy. In invoking the concept of autonomy, I take Kunde to have implicitly raised the conceptual framework of liberalism and its attendant rights as a means of supporting her case for surrogacy and State support for those who undertake it. Autonomy is central to a western conception of the individual and their personhood, implicated in both politics and the law. However various feminist theories have raised alternative accounts of autonomy as it is traditionally understood within liberalism. Rather than relying on an atomistic individualism that prefigures society and relationships, a feminist critique of liberalism recognises the omission from this account of relations of dependence and interdependence.⁴⁸

Self-determination and autonomy for women are, for many, at the heart of feminism. Yet the liberal construct of "individual" and its associated form of autonomy, pervasive in the Western liberal context, are inimical to the "social" — and to relationships. Part of the challenge for feminisms in the West has been to navigate these pervasive tenets of liberalism in a way that gives voice to women. This requires a reframing of the very meaning of these central ideas so as to reflect women's experience.

⁴⁶ Kunde, above n 1, 236–7.

⁴⁷ See, eg, Kate Galloway, 'Theoretical Approaches to Dignity, Human Rights and Surrogacy' in Paula Gerber and Katie O'Byrne (eds), *A Human Rights Perspective of Surrogacy* (Ashgate, 2015) 13.

⁴⁸ See, eg, Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004); Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7.

For some feminists, the shortfall of the individualism practised by the law and more broadly in the liberal tradition, is its negation of relationships. Aligned with communitarian accounts (broadly speaking), feminist critiques of law recognise the self as a relational being, deriving self-expression and indeed autonomy through society: that is, society prefigures the individual, not vice versa. Relationships thus constitute us and it is through the expression of relations that we experience autonomy.⁴⁹

I see this relational experience as featuring strongly within Kunde's analysis, which recognises the social aspects of reproduction. Her story is not only about her, but also about how she has related to intending parents, her partner, and her children. Her proposed policy amendments are directed at facilitating familial and parenting relationships for others who would otherwise not have the opportunity to do so.

But at the same time I see Kunde's analysis — if not necessarily her story — as deeply individualistic. On one level, and aligned with a feminist approach of promoting women's bodily autonomy, Kunde has (in her own words) achieved self-determination through her reproductive agency. However I see Kunde's experience reflecting a more atomistic individualism when seen in a broader social context — or through what Nedelsky calls 'nested relationships'.⁵⁰

In using this term, Nedelsky recognises the multiple networks of relationships to which each of us is a party. Within Kunde's story, for example, she paid attention to her relationship with her partner. She developed a relationship with the commissioning parents, and she was attentive to her relationship with her children. These relationships all co-existed, informing and informed by each other.

From her story, it appears that the decisions that Kunde made were also inevitably shaped by other "nested" relations. Her role in society, her views on motherhood and family, her earning capacity and her other economic relations will all have worked towards the reproductive choices Kunde describes. According to this view, the fact of Kunde's reproductive autonomy is an aspect of her social positioning. Similarly, the intending parents have been shaped by their own nested relations including society's

⁴⁹ Nedelsky, above n 16.

⁵⁰ Ibid, 45.

views on parenthood, the social construction of family, and perhaps also embedded understandings of self as constituted through familial relations.

This is not to say that the parties to a surrogacy arrangement are not autonomous or exercising autonomy. The point is more that autonomy is exercised relationally and must be understood within a social context. Thus despite her dismissal of concerns for dignity, Kunde's experience does not resolve structural questions around the practice of surrogacy and women's selves constituted within nested relationships and a society that continues to embody unequal and gendered power relations.⁵¹

The challenge for surrogacy therefore is not so much one of enacting individual rights. Rather, it is one of justifying the practice through recognising the need to mediate power relations in private parenting arrangements, to uphold values of dignity. The need to do so arises not from a rights basis, but from the reality of human practices and relationships, and the consequences for dignity itself. In Nedelsky's terms, regulation of surrogacy recognises the need for the law to structure relationships that will foster the desired values — in this case, dignity.⁵²

There is no inherent reason that surrogacy is inimical to dignity.⁵³ Conversely, not all who engage in surrogacy arrangements are exercising the freedom expressed by Kunde. This is particularly the case where autonomy, and with it dignity, is eroded through structural disadvantage and unequal power relations, either tacit or express. In response to such concerns, Kunde has outlined a number of suppositions about best practice in negotiating surrogacy arrangements that reflect a commitment to procedural fairness. For example, she proposes that: the intending parents have no input into the pregnancy; there is no payment for the service, but that compensation is provided; the surrogate mother has a safety net in relation to medical risk; and there is a process to ensure informed consent before embarking on the arrangement.

The need for reform of Australian surrogacy regulation is recognised, including dealing with the question of relative bargaining power between the parties. Millbank, for

⁵¹ See, eg, Kate Galloway, 'The Unwritten Rules' (2013) 40 *Griffith Review* 1; Janice G Raymond, *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom* (Melbourne Spinifex Press, 1993); Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989); Debra Satz, *Why Some Things Should Not be for Sale: The Moral Limits of Markets* (Oxford University Press, 2010).

⁵² Nedelsky, above n 16, 236.

⁵³ Galloway, above n 47.

example, identifies the UK's 'broader and more flexible' approach as preferable to that in Australian jurisdictions.⁵⁴ She points out that while Australian surrogacy reforms have been inspired by those in the UK, Australian jurisdictions have introduced increasing complexity and consequently have departed considerably from the UK framework.

In addition, despite suggesting a more supportive regulatory environment for surrogacy arrangements, Kunde's conclusion that this will stem the problem of overseas surrogacy arrangements appears to be an assumption only. Notably, in light of the global illegal trade in children and the contemporary social imperative of having children, the question of dignity — and human rights more broadly — of overseas surrogates and children will remain. Any overhaul of Australian surrogacy regulation must align with global efforts to protect both children born to surrogacy and the women who carry them.⁵⁵ It cannot alone stem the tide.

IV CONCLUSION

Kunde's recommendations for opening up altruistic surrogacy necessarily focus on her own experiences within the Australian context — including those of the people for whom she advocates. Her experiences, expressed in her article, are an important addition to the discourse around contemporary surrogacy practices. The purpose here however, has been to broaden those horizons. In the first place it is suggested that a positive rights-based approach to surrogacy fails to conceive of the divergent claims made by intending parents and surrogate mothers. If surrogacy can be considered as an exercise of reproductive liberty, in the absence of an express parliamentary declaration, for the intending parents it is likely a negative liberty alone without a substantial claim to positive legislative support.

In contrast, the surrogate mother might lay claim to both negative and positive liberty. On the one hand, a claim to freedom from legal interference with her capacity to enter into a contract to relinquish a child, but on the other the right to take positive action to become pregnant and give birth. In reality however, a rights focus is unlikely to resolve

⁵⁴ Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?' (2011) 35 *Melbourne University Law Review* 165, 186.

⁵⁵ See, eg, John Pascoe, 'State of the Nation - Federal Circuit Court of Australia' (FMCA) [2014] *Federal Judicial Scholarship* 21; Tobin, above n 5.

the inherent tension between the values at stake for the parties to the surrogacy arrangement, quite apart from the welfare of the child.

Considering a rationale for more than a ‘tightly controlled tolerance’ approach to surrogacy regulation,⁵⁶ the issue becomes one of balancing the values at stake in light of the relative power at play within the relationships involved. The solution suggested here is the adoption of a relational approach to considering the legal framework around surrogacy — an approach whose purpose is to structure relationships that foster these values. Drawing on Kunde’s reflection and the debate more broadly, the values at stake include autonomy and dignity. To see these values in an individual sense however, is to ignore the broader or ‘nested’ relationships each of us experiences and to which the law must also pay attention.

To this end, Kunde is right to observe that dignity is possible within the surrogacy arrangement, although this conclusion does not engage with highly problematic questions about what some might consider reification of family and children within contemporary Australian society.⁵⁷ Despite these questions, it is no answer to ban or criminalise surrogacy out of hand on the basis of an assumed exploitation. To do so will not stop exploitation and the consequences for dignity. By all accounts the practice will continue and in doing so without regulatory oversight will instead promote exploitation of both women and children.

We are all constituted by our relationships — including social construction of family and procreation. While there are staunch critiques of the patriarchal nature of institutions including the family,⁵⁸ so too are there arguments for reclaiming the feminine self, including expression of self through pregnancy.⁵⁹ While feminist thought and practice must continue to challenge the status quo and the ongoing imposition of patriarchal structures on women’s autonomy, in the meantime the dilemma remains of women and children who are, unlike Kunde, exploited. Neither of these frames of thought advances the dignity of those most at risk of an existing social practice.

⁵⁶ Millbank, above n 54, 173.

⁵⁷ See, eg, a radical feminist critique in Raymond, above n 51.

⁵⁸ See, eg, Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (Paladin, 1972).

⁵⁹ See, eg, the discussion in Linda M Blum, ‘Mothers, Babies, and Breastfeeding in Late Capitalist America: The Shifting Contexts of Feminist Theory’ (1993) 19 *Feminist Studies* 291.

Kunde's recommendations for uniform regulation of compensated surrogacy, and government assistance for IVF and counselling for surrogate mothers, will go only part of the way towards resolving some of the intractable issues at stake in surrogacy, framed as they are in terms of individual experiences in the domestic context. Now that surrogacy is a global movement carried out in the global context of structural inequality arising from our inevitably nested relationships, dignity and autonomy are likewise at stake on a global scale. The relations to which the law must attend therefore extend beyond those existing neatly within jurisdictional boundaries. In the national context, they extend beyond even the positive experiences of individuals, no matter how liberating.

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RIGHT-OF-REPLY TO 'SURROGACY AND DIGNITY: RIGHTS AND RELATIONSHIPS'

RACHEL KUNDE*

After reading Galloway's article 'Surrogacy and Dignity: Rights and Relationships', I deduce that Galloway does not understand the truly complex nature of surrogacy in Australia.

Galloway's article suggests that surrogacy is not encouraged, nor explicitly accepted as part of Australian law, which is far from the truth. Galloway fails to acknowledge that every Australian state has current legislation that supports altruistic surrogacy, with some states even extending to condone the use of overseas commercial surrogacy. This legislation was founded on clearly pro-surrogacy rationale which Galloway suggests does not exist.

Furthermore, she fails to acknowledge the government's commitment to the solidity of Australia's surrogacy landscape, evident in a recent parliamentary inquiry into surrogacy chaired by MP George Christensen. The tabled report recommends that a model national law should be created that upholds four key principles - the best interests of the child, the surrogate's ability to make free and informed decisions, ensuring the surrogate is protected from exploitation, and legal clarity for resulting parent-child relationships. In my opinion, honouring these principles allows for the protection of the dignity of all parties that are involved with — or may result from a surrogacy arrangement.

Galloway's article suggests that people do not have a right to reproduce, and in doing so I feel that she has disregarded the emerging global change that is currently occurring, seeing more countries legalising surrogacy either in its commercial or altruistic form. This suggests a phenomenological shift whereby people's lived experiences of infertility

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are being translated into laws that govern the right to reproduce through surrogacy, disregarding Galloway's suggestion that surrogacy occupies negative legal space.

Throughout her article, Galloway cites the Gammy and Baby M cases as examples that challenge assumptions of reproductive freedom. It cannot be ignored that, while Galloway purports to focus only on arguments regarding compensated surrogacy, both of these cases were commercial surrogacy arrangements. In these arrangements, a surrogate's autonomy is threatened as a result of contracts and laws that promote a power imbalance, particularly as intended parents are often given stronger legal rights than the surrogate mother. Australian surrogacy is vastly different, offering all parties a more balanced approach, something which Galloway has hinted at in her paper by not specifically opposing surrogacy in Australia, however admitting that horizons need to be broadened.

Due to surrogacy in Australia being relatively new, I believe it is important for academics to familiarise themselves sensitively to lived experiences in order to give insightful comments on the practice. Australian surrogacy is like no other surrogacy in the world, with the possible exception of Canada. Australian surrogates are not motivated by incentives, and are given autonomy over conception, pregnancy and birth. Although contracts are involved, they are not enforceable, which is completely unique in the world of global surrogacy. Until longitudinal studies are available which assess the impact that surrogacy has on children born through the practice, and the effect it has on society as a whole, all current studies on surrogacy are effectively redundant as they all surround the concept of commercial surrogacy and what some advocates against surrogacy call "baby trafficking". Clearly this does not realistically translate to the altruistic nature of surrogacy in Australia, which is a point that Galloway has conveniently avoided throughout her paper.

When it comes to sensitive topics like surrogacy, there will always be polarising views. I accept that there are people who do not agree with my will to carry babies for others; however, there is great value in giving weight to the commentary of those closest to the heart of surrogacy in Australia, as lived experience clearly extends beyond what academia comprehends. We live in a growing, diverse world where society's norms are ever-changing.

My experience is that there is a general acceptance of surrogacy by the Australian public. As I work within the infertility community running various support networks for Australians undergoing surrogacy, I witness first-hand the overwhelming support that we all receive from our families and extended community. I certainly would not have decided to become a surrogate for a third time, helping a new family become parents this October, if I was not greatly supported by those around me.

I feel as though academics such as Galloway conveniently turn a blind eye to the lived experience of surrogacy in Australia, and thus are unable to commentate with any great weight. Academia would be wise to listen intently to, and collaborate with, those with first-hand surrogacy experience. Surrogacy is a highly emotive topic, and cannot easily be translated into mere theoretical concepts.

THE ISLAMIC STATE AND THE QUESTION OF CHANGE IN SHARIA

MAHMOUD PARGOO*

This paper is a response to An-Na'im's thesis opposing the notion of the Islamic state. It begins by critiquing the premises of his arguments and goes on to propose the thesis of underdetermination of Sharia rulings by their textual sources. My main criticism of An-Na'im is that he overlooks the potential for change in Islamic law and considers it unable to accommodate new concepts of democracy, human rights, and gender equality. I argue, in contrast, that Sharia has the potential to diverge from what is considered the literal meaning of its textual sources and accommodate new theories, concepts, and values. My argument is based on a detailed exploration of the three-step exegetical procedure through which religious rulings are shaped. Throughout this procedure, there is extensive room for any jurist to insert their own personal preferences. Based on this, I conclude that sacred texts proper do not determine Islamic legal rulings and that extra-textual factors play a more important role than the text itself in determining the content of final rulings.

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I INTRODUCTION

In this piece, I argue against an externally imposed Western secular state for regulating the relationship between the state and religion in Muslim-majority countries as might be an implication of — at least — some statements of An-Na‘im as I would explain. Theories promoting a secular state for Muslim-majority countries generally suffer from two intertwined and mutually corroborating critical problems. First, they downplay the potential for change in Islamic law and thus consider it unable to cope with the requirements of the modern age and values like human rights and gender equality. Second, they consider secularity a context-free, ahistorical, and culturally neutral phenomenon which can be applied with minimal adjustments to non-Western societies. If horizons of change in Islamic law and in the more general realm of Islamic *Weltanschauung* are considered to be so narrow and limited as to not allow for the incorporation of modern values, then one is likely to look for alternative options which are external to the traditional Islamic framework. On the other hand, if one holds that the secular state is so neutral and universal that it can be applied to any society, European or not, then one is more likely to look for external solutions for regulating the relationship between the state and religion. I criticise the theory of separation in its first pillar by showing how Sharia has systematically devised dynamisms of change over its long evolution. This means that the traditional framework has the capacity to

incorporate modern values. I will propose a theory of underdetermination of religious rulings by sacred texts, by which I mean that the text in itself is not sufficient for a jurist to derive a Sharia ruling, and that there are many other factors involved in the process which are irrelevant to the literal meaning of the text. The second pillar has been discussed in detail by others and I will not touch upon it in this paper.¹

I will begin by investigating An-Na'im's theory of the secular state, as elaborated in his *Islam and the Secular State*.² I argue that An-Na'im downplays the potential for change in Sharia and explain how jurists have coped with change in a systematic way through a three-stage conceptual apparatus within traditional legal theory. The general conclusion is that since the Law is capacious and has flexible methodological tools, and because imposing an external value framework is not viable in Islamic countries, it is theoretically more consistent and pragmatically more viable to implement an internally developed theory of the state which is responsive to modern values as well as fundamental Islamic values.

II AN-NA'IM'S THEORY OF THE SECULAR STATE

An-Na'im argues for the secular state and against the Islamic state and the implementation of Sharia as a positive law of the state. His principal argument is that Sharia is, in essence, a voluntary individual task of all Muslims which should be practised as a religious obligation and that this is not compatible with its implementation by the state: 'By its nature and purpose, Sharia can only be freely observed by believers; its principles lose their religious authority and value when enforced by the state'.³ He also states that since the knowledge and implementation of Sharia is possible only through human agency, it cannot be regarded as God's rule.⁴ Furthermore, if we accept the implementation of Sharia, there would emerge such unsolvable problems as the *dhimma* religious tax and gender equality, which are neither acceptable nor implementable within the current nation-state political structure. These problematic areas within

¹ See, eg, Talal Asad, *Formations of the secular: Christianity, Islam, modernity* (Stanford University Press, 2003); José Casanova, *Public religions in the modern world* (University of Chicago Press, 2011); Saba Mahmood, *Religion Difference in a Secular Age: A Minority Report* (Princeton University Press, 2016) 212.

² Abdullahi Ahmed An-Na'im, *Islam and the secular state: Negotiating the future of Sharia* (Harvard University Press, 2009).

³ Ibid 4.

⁴ Ibid 20.

Sharia are so strongly supported through many of its passages that changing them is almost impossible within the traditional legal framework.

An-Na'im alludes to the difference between the traditional minimal state and the centralised, bureaucratic, and powerful modern state and explains why Muslims should not expect Sharia to be implemented in the modern state as it was in the imperial states in the past. However, he passes without further elaboration over this significant point.⁵ He then proceeds to show that religious and state authorities have always been separate over the history of Islam and the example of the Prophet should not be extended to others. '[R]eligious leaders achieve recognition among believers because of their piety and their knowledge, which can be determined only by the private judgment of individual persons, who need to get to know potential religious leaders through daily interactions.'⁶ While the political leaders have always derived their authority from their political or military skills, which were at times immoral, as the very practice of politics tends towards immorality and corruption. This is An-Na'im's objection to the model of complete conflation of political and religious authorities, derived from his examination of the Mamluk and Fatimid dynasties as evidence for his argument.

An-Na'im, however, admits that "the religious neutrality of the state" should not be interpreted as the separation between Islam and politics. The call for a secular state is not equal to the call for the secularisation of the society. Islam can remain within the spheres of public policy and legislation, but advocates of this should debate in the public sphere with civic reasoning instead of religious reasoning because '[w]hen the policy or

⁵ Ibid 46, 86–7, 125, 285. In my view, the main reason behind all of the problems with the implementation of Sharia and the zeal of the Islamic state is this changing role of the state. The traditional state was only a military unit at best without any cultural, judiciary, or religious policy making-powers, in which much of society's educational functions were delivered by religious institutions. The judiciary was fully provided by the religious institutes, and though heads of states had remarkable political influence on the judiciary, this did not mean that different schools of law were imposed upon people when the religious affiliation of the king and the people were different. Even in cases like the Shiite Fatimid kings who held majority rule in Sunni Egypt, the judiciary kept its doctrinal independence from the rulers and the Law was implemented according to the people's dominant legal school, as is attested at 72. Likewise, trade and business was regulated by people themselves according to their beliefs. There was no state intervention, regulation, or policy making. The state functioned more like a big security farm with minimum intervention in other aspects of life. The modern state, in contrast, intervenes in and regulates almost all facets of private and public life including education, healthcare, family, and many other areas. The surge of Islamism in the 20th century, I suggest, should be seen as a form of resistance to this sweeping intervention of the state, which has never been religiously neutral but rather essentially Western in even the most Islamic states implemented. Detailed consideration of this, however, falls outside the scope of this essay.

⁶ Ibid 51.

law is presented as mandated by the “divine will of God,” it is difficult for the general population to oppose or resist it.⁷ But, An-Na‘im affirms that the very principles and institutions of constitutionalism and equal human rights for all citizens have to be justified and internalised for all people using religious reasoning, since the lack of such internal validity may result in resistance to the whole system.

The main problem with An-Na‘im’s *Islam and the Secular State* is the ambiguity of its core concepts, such as the secular state, Islamic state, and Sharia. Sometimes, he hails the secular state since it helps one to be a ‘Muslim by conviction and free choice,’⁸ though sometimes he denounces the *coercive* implementation of Sharia as an argument against it.⁹ He allocates almost an entire chapter of the book to proving that there once was a separation between the religious authority and the state authority (the so-called men of faith and men of administration) in the Umayyad, Abbasid, Mamluk, and Fatimid dynasties. This distinction is then used as an argument for secularism, but one needs to notice the fact that all advocates of the implementation of Sharia do not believe in the full conflation of the state and religion. There are diverse models of an Islamic state put forward by different scholars which do not require the full conflation of the state and religion. For example, the model of Ayatollah Khomeini in Iran is very different from the Islamic state as is conceived by Saudi muftis in which there is no need for conflation.

As An-Na‘im has not precisely demarcated the core concepts of his theory, it is difficult to distinguish exactly what he defends and what he objects to. The Islamic state is often equated with any state in which Sharia (no matter how loosely and partially) is implemented,¹⁰ and sometimes as a state in which there is total conflation of religion and the state, exemplified in the teachings of the Prophet Muhammad.¹¹ Therefore, An-Na‘im’s primary goal of defending the secular state turns out to be a full-fledged opposition against the enforcement of Sharia, which he considers coercive. When it comes to Sharia in An-Na‘im’s book, we are faced with an essentialist, solid set of unchangeable religious rulings throughout the entire Islamic world. Considering An-Na‘im’s objections, one may reconstruct his understanding of Islamic state as a fierce

⁷ Ibid 29.

⁸ Ibid 1–4, 268.

⁹ Ibid 4, 278.

¹⁰ Ibid 7.

¹¹ Ibid 52–53.

and coercive implementation of a Salafi — a narrow-minded and immutable reading of Sharia by a despot ruler-jurist. This is how a typical extremist group like ISIS may portray the true Islamic state. But criticising this weak, indefensible, and maximalist version of the Islamic state does not rule out other intelligible, minimalist, and conventional theories of the Islamic state.

Some of An-Na‘im’s objections to the notion of the Islamic state or the implementation of Sharia seem to be objections or challenges to all other theories of the state as well. For example, An-Na‘im claims that since Sharia is so diverse and each group of people believes in a different Sharia legal school,¹² choosing one school over many others would be a problem because whichever school is selected, it would not be representative of the adherents of the other schools. To demonstrate how this argument is a drawback for all political systems and not specifically for the Islamic state, I quote An-Na‘im in sentence 1 below, and then substitute “Islamic” with “democratic” to produce sentence 2. One can realise that substituting “Islam” with “democracy” does not change the validity of the sentence.

Sentence 1 (An-Na‘im’s sentence):

- ‘Given the realities of inevitable individual variations in the comprehension and realization of *Islamic* values, why should some of them constitute the *Islamic* basis of the state to the exclusion of others?’¹³

Sentence 2 (“Islamic” substituted with “democratic”):

- Given the realities of inevitable individual variations in the comprehension and realization of *democratic* values, why should some of them constitute the *democratic* basis of the state to the exclusion of others?

A similar comparison can be made using An-Na‘im’s argument in sentence 3:

- ‘When the policy or law is presented as mandated by the “*divine will of God*,” it is difficult for the general population to oppose or resist it’.¹⁴

¹² There are four major Sunni schools of law as well as some other schools with minor followers. Shi’ites also have different schools including the majority Ja‘farī school, predominant in Iran, Iraq, and Lebanon and some other schools with less followers than the latter.

¹³ An-Na‘im above n 2, 52-53.

New sentence produced by substituting *divine will of God* with *divine will of the people*:

- ❖ When the policy or law is presented as mandated by the “*divine will of the people*,” it is difficult for the general population to oppose or resist it.

This shows that those arguments, even if valid or sound, are a problem for all political systems, not merely for the Islamic state.¹⁵ In a secular democracy too, people who are not able to create a political party are not represented in government, and those who are against the very framework of democracy are not represented within the political system at all. So, these could be in all systems and are not exclusively a problem for Islamic state.

In another case, An-Na‘im argues that since political groups often promote their interests in the name of implementing Sharia,¹⁶ Sharia should therefore be abandoned. But again, this is a general problem with all political systems in which some people claim a monopoly on generally accepted values like freedom, liberty, and justice while accusing others of lacking in them. This does not mean that those values should be abandoned. The fact of violation of basic human rights (consider the Guantanamo torture scandal) by the very countries that consider human rights as the cornerstone of their legitimacy does not justify repudiation of the notion of human rights. Sharia, human rights, and other notions should be evaluated on their own terms rather than by looking at those who misuse them.

III MU‘AMALAT AND ‘IBADAT

An-Na‘im’s key objection to the Islamic state and the implementation of Sharia is that being a ‘Muslim by conviction and free choice’ requires a secular state because if Sharia is enforced by the state then its practice is not voluntary and hence not Islamic.¹⁷ Because all practices of Sharia should be voluntary, ‘claiming to enforce Sharia principles as state law is a logical contradiction’.¹⁸ This argument is repeated several times in the book and is considered the canonical argument of the book: ‘Religious compliance must

¹⁴ Ibid 29.

¹⁵ See Ibid 284–285 for similar arguments.

¹⁶ Ibid 26, 34, 79.

¹⁷ Ibid 1.

¹⁸ Ibid 2.

be completely voluntary according to personal pious intention (*niyah*), which is necessarily invalidated by coercive enforcement of those obligations'.¹⁹

But this argument is based on a very simple yet plainly false presupposition: that *all* Sharia practices should be voluntary and performed only for the sake of God, as An-Na'im has clearly asserted:

The essentially religious nature of Sharia and its focus on regulating the relationship between God and human believers mean that believers can neither abdicate nor delegate their responsibility. No human institution can be religious in this sense, even when it claims to apply or enforce principles of Sharia. In other words, the state and all its institutions are by definition secular and not religious, regardless of claims to the contrary.²⁰

This is simply not the case. Sharia rulings fall into two parts: firstly, the personal and private part for regulating the relationship between the individual and God (worship, ritual acts or *'ibadat*), such as rules governing daily prayers, fasting and other rituals. Secondly, the other part for regulating the relationships between people, state, groups and so on, including profane activity, social acts, practical matters or *mu'amalat*.²¹ In the traditional books of Sharia, four differences are mentioned between *'ibadat* and *mu'amalat*. First, the ultimate goal of *'ibadat* is approximation to God, fulfilling his orders and guaranteeing compensation in paradise, while the ultimate goal of *mu'amalat* is the realisation of a worldly end or the regulation of relationships between individuals or groups. Second, the specific reasons or ends behind *'ibadat* are unknown for humans. They are as they are and humans should practice them according to the Law. Nobody knows why the Dawn Prayer is performed in this or that specific form or why one has to go on their pilgrimage to Mecca only at a specified time of the year. In *mu'amalat*, however, generally the *ratio legis* behind a ruling is known to our reason. Third, *'ibadat* is to be accomplished for the sake of God (intentionality), while in *mu'amalat*, the accomplishment of the practice is not predicated on intending it for the sake of God; what is important is to observe the Law. Imagine the difference between a prayer and

¹⁹ Ibid 4.

²⁰ Ibid 15.

²¹ A Kevin Reinhart, 'Ritual Action and Practical Action: The Incomprehensibility of Muslim Devotional Action' in A Kevin Reinhart and Robert Gleave (eds), *Islamic Law in Theory: Studies on Jurisprudence in Honor of Bernard Weiss* (Brill, 2014) 37, 55.

some business contract: with the latter there is no requirement to perform the practice for the sake of God, while the former is acceptable only if performed for the sake of God. The fourth difference, according to some schools, is that the default in *mu'amalat* is lawfulness, unless one can find a relevant ruling within Sharia.²² Summing up, intentionality (performing an act for the sake of God) is not a precondition for *mu'amalat*. This means An-Na'im's argument against the Islamic state is not relevant here. Sharia is not mainly about belief or disbelief; at least parts of Sharia are positive law, just like other laws.²³

IV AN-NA'IM'S SALAFI UNDERSTANDING OF ISLAMIC LAW

As mentioned earlier, one reason behind proposing alternative, external frameworks of reform could originate in a failure to acknowledge the mechanisms of change in the Law. This, in turn, could be the result of subscribing to a specific school of Law which renders all other unorthodox legal interpretations illegitimate. In other words, according to some legal views, the legitimate boundaries of legal variations are so narrow and limited that any interpretation outside the demarcated area is conceived heretic. Thus, the more firmly one subscribes to a Salafist understanding of Sharia (which allows for very limited possibilities for change), the more inflexible would be one's conception of Sharia, and hence, the more one would be inclined to offer external solutions for the Islamic state dilemma. Thus, it is of utmost importance to make it clear at the outset which jurisprudential school or theory one chooses as one's basis in the legal theory. What makes An-Na'im different from scholars who insist on the possibility of an Islamic state while being able to incorporate notions like human rights and women's equality is their understanding of the capabilities of Islamic law and legal theory. Therefore, disagreements should be negotiated at a more fundamental level (i.e. within legal

²² See, eg, Tabet Koraytem, 'Two Surprising Aspects of Islamic Saudi Liberalism in Public and Private Law' (2013) 27(1) *Arab Law Quarterly* 87. Koraytem explores how adoption by Saudi Arabia of the principle of the distinction between *mu'amalat* and *'ibadat* and the primary principle of the lawfulness of the former is changing Saudi laws and introduces more liberal elements into it. The distinction is traced back to the second century of Islam and is considered among hadith scholars to be well established, when the word *Shari'a* primarily meant ritual parts of the religion (see 55–104 for more important notions of irrationality about the rituals as against *mu'amalat*).

²³ Shalakany criticises the Western scholarship of the Islamic law because it limits the law to Sharia while it has constituted only a small portion of the laws being executed in many Muslim territories. So, other laws including customary ('c whil laws and administrative laws (*siyāsa*) of the states are put outside of the historical researches in the West (see Amr A Shalakany, 'Islamic legal histories' (2008) 1 *Berkeley Journal of Middle Eastern & Islamic Law* 1).

theory). Logically, if one chooses Western values as one's fundamental rational framework and, in addition, one believes that the capacities of the Law for change are limited, then one inevitably would suggest an external framework. It is worth noting, however, that this does not mean that An-Na'im is Salafi but rather that the arguments he puts forward run against a Salafist reading of Sharia.

The fact that An-Na'im views Sharia from a highly Salafist point of view can be vindicated by his attempt to illustrate how human agency is involved in the process of jurisprudence. He is, in fact, responding to an entirely Salafist objection which is not shared by the majority of classical or modern jurists. In contrast, the involvement of human agency in the process of the Law is acknowledged in the body of classical jurisprudence wherein can be found an interesting controversy which basically relates to the humane nature of the practice of *ijtihad*. It runs like this: if jurisprudence is a humane activity and thus is exposed to error and mistake, a jurist might be correct in his endeavour and discover the true ruling of God or he might make a mistake and issue an incorrect *fatwa* (legal opinion). The majority of jurists admitted that the very act of *ijtihad* carried out by a qualified scholar (*mujtahid*) for discovering the sacred ruling is sufficient for the performance of religious duty and whatever ruling is reached should be applied. There is not a separate true ruling of God distinct from that the *mujtahid* has obtained.²⁴ The minority position, however, is that there is always a true ruling of God and the jurist may or may not reach this ruling. The majority of Muslim jurists believed that God's ruling is the same ruling as the one the jurist derives from the sources using a sound methodology.²⁵ Viewed from a different perspective, this means that laws in themselves do not carry essential good or evil properties; what is important is that humans do *ijtihad* for the sake of God and using its due methodology.²⁶ But what is important here is that the very existence of this debate within Islamic law demonstrates that jurists were fully aware of and acknowledged the role of human agency in the process of making laws. This is against An-Na'im's emphasis that implementation of Sharia contradicts human agency as the prerequisite of Sharia.

²⁴ This position was called *taswib* as against *takhtae*.

²⁵ For more details, see Joseph Lowry, 'Is There Something Postmodern about Uṣūl Al-Fiqh? Ijmā', Constraint, and Interpretive Communities' in A Kevin Reinhart and Robert Gleave (eds), *Islamic Law in Theory* (Brill, 2014) 37, 283 (Lowry discusses the similarities between the pre-modern Islamic legal theory and the postmodern philosophy of law).

²⁶ The majority of Asharites believe in *taswib* in the Islamic law, as opposed to the consensus among Imamites and Mu'tazilites, who believe in the *takhtae*.

As mentioned earlier, part of what leads An-Na'im to such views about Islamic law is his view of it as fixed and essentialist. Because An-Na'im considers that Islamic law is unable to cope with the requirements of change and is fully pessimistic about its capacities, he believes there is a need to go around it and initiate political reform from scratch. He mentions several times that many reforms like women's rights, human rights, and non-Muslim rights cannot be solved from within the traditional apparatus of Islamic law. Even such measures as the *maslaha* (public benefit) and *maqasid* (higher objectives) apparatus,²⁷ he suggests, are not enough to establish a completely indigenous Islamic but democratic framework for politics.²⁸ Once again, one can see how downplaying the potential for change within the traditional framework can result in proposing alternative, non-indigenous frameworks.

I argue against this, proposing that reform within the traditional jurisprudential methodology is possible. I begin with one of the most difficult cases in terms of Sharia being considered immutable, fixed and unchangeable, the case of *nass* (text), showing how it once was subject to constant change. I outline a systematic procedure contained within legal methodology, which is designed to facilitate modifications in interpretations of text.

Ambiguities continue to be widespread in the concepts of religious neutrality of secularism and related concepts in An-Na'im's theory. One cannot understand, based on An-Na'im's book, why civic reasoning is vested with great value while faith-based reasoning is relegated outside of public debate. Why is secularism seen as a context-free, ahistorical, and neutral notion that is applicable to all human societies? There is still less

²⁷ An-Na'im, above n 2.

²⁸ Ibid 109. For example, he asserts that:

verse 4:34 of the Qur'an has been taken to establish a general principle of men's guardianship (*qawama*) of women, thereby denying women the right to hold any public office involving the exercise of authority over men (Ali 2000, 256–263). While jurists differ on a range of relevant issues, none of them would grant women equality with men in this regard. This general principle is applied in interpreting, and is reinforced by, various specific verses that apparently grant women unequal rights compared to those of men regarding marriage, divorce, inheritance, and related matters.

We may also consider his view on inapplicability of *maqasid*: 'But the problem with this view is that the so-called basic objectives of Shari'a are expressed at such a high level of abstraction that they are neither distinctly Islamic nor sufficiently specific for the purposes of public policy and legislation' (35). Several exegetical works by Islamic feminists indicates the capacity of these apparatus as regards the verse in question above. See, eg, Amina Wadud, *Qur'an and woman: Rereading the sacred text from a woman's perspective* (Oxford University Press, 1999); Aysha A Hidayatullah, *Feminist Edges of the Qur'an* (Oxford University Press, 2014).

said about how — and under which conditions — an imagined difference between an Islamic society and its Western counterpart would be regarded as legitimate and thus allowed to exist and be implemented. What are the criteria used to highlight the problematic parts of Sharia, and thus explain it away in favour of a relevant Western law? Or, to ask frankly: what is Islamic at all if every substantive difference with the West is going to be interpreted away in favour of the latter?

I suppose An-Na'im's call for democracy, human rights, and constitutionalism to be a reactionary call to homogenisation and assimilation out of the pragmatic inevitability and domination of the West rather than a genuine endeavour (Islamic in its origin and its ends) to solve an Islamic dilemma. To put it more clearly, his primary framework of value is a Western one and he tries to incorporate Islam into that Western frame. This is different from a Muslim who tries to tackle the issue of Western values; and here arises the problem of fundamental commitment: what are one's basic fundamental values or beliefs for which one is willing to sacrifice all other ones? This makes a discourse a genuine Islamic or a pure Western one. This fundamental question remains untapped throughout the book.

Any theory trying to solve the problem of friction between Western and Islamic values should answer this fundamental question: where and under which conditions should a Western value be rejected? In what situation exactly may one say *no*? What exactly distinguishes you from the West if you are going to assimilate everything Western?

To understand this, it may serve to explore more deeply the example of banking interest (usury or *riba*) highlighted in An-Na'im's book.²⁹ Usury, according to some verses of the Qur'an, is prohibited. Many Islamic scholars have tried to contextualise this issue historically and uncover the rationale behind this ruling. One view is that usury is illegal, according to Sharia, in order to prevent class differences. Instead, there are other business contracts allowed under Sharia, which allow the possibility of financial investment while prohibiting it whenever it becomes a unilateral moneymaking machine. For example, in the contract of *mudharaba*, one party provides capital and the other brings in labour, expertise, and entrepreneurship with the profit or loss shared as agreed. The difference is that with usury, whatever the outcome of the business, the

²⁹ An-Na'im, above n 2.

party providing the labour has to pay the interest; while with *mudharaba*, if the business is successful, both parties benefit from it, and if not, the labour party is not forced to pay anything to the capital owner. Thus, the prohibition of usury was primarily about social justice and avoiding the imbalanced accumulation of wealth in the hands of a minority of rich people.³⁰

One may wonder why An-Na‘im so easily accepts usury as a universally rational practice which should be adopted by the state as a basis for its financial and monetary structure, while other forms of financial settings should go private. What makes the current Western banking system so appealing other than its hegemony and domination?

One may go deep into Sharia, find the reasons and goals behind such prohibitions and defend them based on those rationales, and thus resist the mainstream financial world order. On the other hand, one may merely accept and assimilate the current dominant institutions. These are two different approaches at two extremes: resistance vs assimilation.

All cultures, ideologies, and belief systems (including Islam) need to go back to their traditions and return with something critically innovative rather than surrendering to Western hegemony and giving up all their points of difference. The world is in need of novel ideas and insights from different traditions and the capacity to resist this terrible capitalist world order rather than succumb to compromise and assimilation. There may be a contradiction between an Islamic insight and “premises of modernity”, but in fact, that is what “genuine cosmopolitanism” does mean; as Mehta has suggested: ‘any genuine cosmopolitanism will have to allow the serious possibility of complicating, if not outright questioning, the premises of modernity itself. If these premises are not allowed to be questioned, then the demand for reflection becomes a trap. It obligates one to conform to what are, in effect, particular views of the world’.³¹

One problem with An-Na‘im’s proposed secularity is that it makes personal integrity almost impossible for a believing Muslim individual by making multiple commitments for him: a secular commitment in the public sphere and an individual commitment for

³⁰ Mallat, in a similar approach on usury in Islamic law, explores the subject in depth from a Shi‘ite perspective (Chibli Mallat, *The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and the Shi‘i International* (Cambridge University Press, 2003) 29, 158).

³¹ Pratap Bhanu Mehta, ‘Cosmopolitanism and the Circle of Reason’ (2000) 28(5) *Political Theory* 619, 634.

his private belief. This is not tenable. An-Na'im imposes a law from outside people's normative system and even if such a secular system becomes established, people will not hold on to it because of the internal inconsistencies.

V UNDERDETERMINATION THEORY

As mentioned earlier, the failure to acknowledge the dynamisms of change in legal theory results in denying the possibility of such change in the future; thus, suggesting alternative ways of reform rather than an internal, genuine, indigenous one.

The view that Islamic law has been resistant to change and impotent to comply with conventional rationality is limited, incomprehensive, and idiosyncratic. Islamic law has changed on a par with the dominant rationality of the time. An-Na'im claims that *ijtihad* is allowed only if it is exercised 'in matters that are not governed by the categorical texts (*nass qatt'i*) of the Qur'an and Sunna'.³² It entails that radical change is impossible because *ijtihad* is not allowed in regards to certain key problems which are supported by categorical texts. Investigation of the history of Islamic law points to the contrary. Abundant cases of extreme divergences from the literal, conventional, and apparent meanings of holy texts vindicate this reality. Jurists, like all other people, hold a repertoire of beliefs, only a small part of which is the literal meaning of the texts. So, when any conflict arises between a literal meaning of a text and the other beliefs of a jurist, it is not necessarily the latter which gets left behind; in many cases the former is given up. When a new belief enters into one's web of beliefs, it may result in inconsistencies, which require a response from the agent to resolve the tensions in a way that does the minimum possible harm to the other beliefs. All beliefs do not have the same epistemological weight, and thus it is important in such epistemic operations of conflict resolution to be attentive to the weight of each belief. The literal meaning of the text has been only one of many beliefs held by the traditional jurist. Though this belief was significant and central, it was not unalterable when a set of other important beliefs was at stake. Consider the example of early theological debates about the material transcendence of God. In spite of numerous instances of references to a personal and material God in the Qur'an, a majority of theologians did not take those verses at their face value but rather interpreted them away using this or that hermeneutical ploy. When

³² An-Na'im, above n 2, 13

the very intelligibility of the system is at stake, interpreting away a few verses of the Qur'an is not catastrophic. This has happened a myriad of times throughout history. To cope with such situations, jurists have devised a very sophisticated hermeneutical apparatus to enable them to rule out problematic elements in a legitimate way. The process of *ijtihad* (derivation of a ruling from different sources of the Law) is in itself a kind of theory of reconciliation between religious texts and many other beliefs held by a jurist. Texts in themselves do not dictate this or that specific ruling; rather, there are many other social, cultural, and philosophical backgrounds that fix or determine the ruling.

Inspired by a similar discussion in philosophy of science, I am proposing underdetermination of jurisprudential rulings by their textual sources — that textual sources are insufficient to determine what rulings a jurist should derive out of them. Quine writes in the same spirit with his *two dogmas*:

The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field. ... But the total field is so underdetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to re-evaluate in the light of any single contrary experience. No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole.³³

Similarly, the exploration of Islamic legal theory shows that no particular text determines any particular ruling in isolation from other background knowledge. Viewed with this holistic approach, a single mismatch between a verse and a ruling is not enough to rule it out as illegitimate: it is only one of the factors against which we are evaluating our legal rulings.

If one realises that there is an inconsistency between one's belief about gender equality and one's belief about the validity of a hadith or verse in the Qur'an denoting the

³³ Willard V Quine, 'Main trends in recent philosophy: Two dogmas of empiricism' (1951) *The philosophical review* 20, 39–40.

contrary, one can revise the former to resolve the conflict; however, if that belief is so central that dismissing it may put the very framework of rationality at stake, then there is an option of dismissing the validity of the hadith. Interestingly enough, disqualifying a hadith will not render you a heretic or apostate; rather, it will be considered only an intra-legal view. Thus, what is important is to make the web of beliefs consistent.

As I shall elaborate, if ever such an inconsistency occurs in the web of beliefs of a jurist, the methodological apparatus to get rid of problematic elements (be it an authentic text, a consensus on a ruling or whatever else) is abundant. To put it very simply, any problematic pieces of the scripture can be neglected or overlooked in the process of *ijtihad* in three different stages. First, its very authenticity may be questioned by casting doubt on its chains of transmission and narration or (in the case of the Qur'an) by resorting to the theory of abrogation. Second, if any text passes the first stage and qualifies as a source of Law, then there is a chance of word-level semantic analysis and pragmatics to find alternative meanings for it or interpret away its literal, apparent, and conventional meaning. And third, if the text is still strong enough to pass through and reach the next stage, there are other options available: to explain away the text at the expense of the spirit of the law or its ultimate goals.

VI THREE-STAGE CONFLICT RESOLUTION APPARATUS

As I will discuss, unlike the belief held by An-Na'im, *ijtihad* has been a holistic hermeneutical practice in which literal meaning is only one element among others. It could have been explained away if preserving it would have cost the system more expenses than more gains. Of course, the weight of literal meaning varies from one scholar to the other, but in general, text is not the only governing rule in *ijtihad*.

The divergence from literal meaning was justified with different explanations: sometimes a specific verse was deemed to be against a self-evident rational principle; at other times a literal reading of the Qur'an was resisted since it was perceived to contradict certain "definite" theological principles; and sometimes it was not accepted because its practice was considered to be too demanding and beyond the capacity of ordinary believers. Whatever the reason, there have always been strategies to explain away the literal meaning of a text in favour of what seemed more consistent with the

web of belief of the community at the time.³⁴ There are several other Islamic disciplines in which one can trace these strategies of holistic conflict resolution against literal meaning, but the core idea of this research is to explore it merely within Islamic legal theory (*usul al-fiqh*) according to mainstream Sunni legal jurisprudence.

VII THE EVOLUTION OF THE TEXT IN ANCIENT ARABIA

The view that a text itself, isolated from the context of its utterance, has a clear, uncontested, and objective meaning is controversial.³⁵ In many of the cases, there exist various layers of meaning for a certain word or phrase and different people from different geographical locations have different understandings of the same passage. To have a better view of this, in the context of Islamic law, a brief exposition of the early evolution of the Islamic law should prove helpful.

Before Islam, the Bedouin and sedentary tribes of the Arabian Peninsula were governed by customary law, which although scant in written form, comprised complex procedures and nuances;³⁶ but, lacked any specific administrative body to establish laws or enforce it.³⁷ Later on, with Medinans embracing Muhammad as the Prophet and arbitrator (as was the role of soothsayers in ancient Arabia) of the disputes they had before, the Qur'an replaced customary tribal laws as the governing legislating source.³⁸ The worldly arbitrator became a divine lawgiver, whose rulings were to be abided by religious duty. Thus, the Prophet and the governor became united in a single man and it became difficult to separate out two different deeds of the man; those that stemmed from him as a prophet in a divine role and those as mundane everyday statesmanship. It can be argued that had the Prophet not migrated to Medina as a head of state and stayed in

³⁴ I use the term *web of belief* in its precise Quinian context. See Willard Van Orman Quine and Joseph Silbert Ullian, *The web of belief* (Random House New York, 1978) 2. For example, Shi'ites got the Q 9:28 (truly, the idolaters are unclean) for its face value thus adopted the view of ritual impurity of the non-believers while Sunnis explained away this verse by several interpretational ploys and adopted the absolute purity of the human kind. See Ze'ev Maghen, 'Strangers and Brothers: The Ritual Status of Unbelievers in Islamic Jurisprudence' (2006) 12(2) *Medieval Encounters* 173; A Kevin Reinhart, 'Impurity/no danger' (1990) 30(1) *History of Religions* 1; Marion Holmes Katz, *Body of text: the emergence of the Sunni law of ritual purity* (SUNY Press, 2012). There are a huge number of other occasions in which what appears as the categorical meaning of the text at question is explained away and another meaning is adopted.

³⁵ See Robert Gleave, *Islam and literalism: literal meaning and interpretation in Islamic legal theory* (Oxford University Press, 2012) for a brief discussion of the philosophical debates about literal meaning.

³⁶ Joseph Schacht, *An introduction to Islamic law* (Clarendon Press Oxford, 1964).

³⁷ Noel James Coulson, *A history of Islamic law* (AldineTransaction, 2011).

³⁸ Ibid 11.

Mecca as merely a spiritual leader, the course of events would have been entirely different; maybe there would be no divine law as it exists today. The Sharia is a result of the coincidence of prophethood and statesmanship in one man. The scant distribution of legal verses in the Qur'an (80 verses as compared to 6000 with 500 of them dealing with rituals like prayers, fasting, and pilgrimage), as well as Sharia's ad hoc approach to them rather than dealing with them in a comprehensive systematic manner shows how this has been the case.³⁹ This gave the Qur'an a unique status as the source of the Law. On the issues where the Qur'an was silent, however, the customary laws were considered valid as far as they were not expressly changed by the Prophet.⁴⁰ However, the whole conceptual turn was of utmost significance; that the law should be decreed by God. Customary pre-Islamic law, however, continued to exist decades after the Prophet and into the conquest period.⁴¹ With the coming to centre of the Qur'an as the primary source of the law, attention was paid to its collection. While it was originally oral and memorised by its reciters, by the time of third caliph Uthman (23-35 AH), the Qur'an was collected and codified, although there are several other variants available which are considered valid and canonical as well.⁴² And so, a text formed which was deemed to be the ultimate source of the law.

The tensions between textualists and their opponents may be traced back to the Senior and Junior (*Kibar* and *Siqar*) Companions and later on between the pros and cons of Qur'anic interpretation. The Senior Companions believed that the Qur'an, by itself, is evident enough and there is no need for exegesis, while the Junior Companions considered exegesis as necessary to understand the text. Beginning with the rule of the third caliph, two groups of Muslims, the reciters of the Qur'an and the interpreters of the Qur'an, stood in opposition to one another, and each associated with different geographical, tribal and political tendencies.⁴³ This shows how deep and longstanding the split between the textualists and the rationalists has been. As Pakatchi has demonstrated, these tendencies were more a result of political, economic, and tribal

³⁹ Ibid 13; Wael B Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge University Press, 1999).

⁴⁰ Coulson, above n 37; Hallaq, above n 39.

⁴¹ Hallaq, above n 39.

⁴² Fred M Donner, 'The historical context' in Jane Dammen McAuliffe (ed), *The Cambridge Companion to the Qur'an* (Cambridge University Press, 2007) 23.

⁴³ Ahmad Pakatchi, *tarikhe tafsire Qur'ane karim* [The History of the Qur'an Exegesis] (Imam Sadiq University Press, 2011).

rivalries than pure theological or theoretical disputes.⁴⁴ The *Kharijites* started their rebellion and schism in the same period.

With the Muslim conquests and the incorporation of people with very diverse cultural and religious backgrounds into the Islamic empire, new legal problems faced ruling, which were not expressly addressed in the Qur'an or in Arabian customary laws. The first four caliphs considered themselves the legitimate interpreters of the Qur'an and the holders of the powers of positive legislation,⁴⁵ although, others known for piety had the right to have a say in disputes. At times, caliphs even sought their advice on legal issues as well.⁴⁶ By the demise of the caliphs and the start of the Umayyad dynasty, the need for a more authentic source of Law emerged and the Sunna of the Prophet started to gain attention and orally transmitted reports written down. The first Sunna reports date back to the first century of Islam,⁴⁷ although there are scholars like Schacht who believe it to be a few decades later than that.⁴⁸ The text solidified and became more canonised, replacing the *ra'y*, which was more rational legal activity. This was opposed to textual legal reasoning as a response to Umar II's emphasis on Prophetic traditions in legislation rather than *ra'y*.⁴⁹ Decades later, Al-Shafi'i (d. 820) in his *Risalah*, theorised the Sunna as the source of the Law; much the same as the Qur'an and regulated its conditions of validity and scope of applicability. His aim was reconciliation between extreme rationalists under the influence of *Mu'tazilites* and textualists who emphasised the hadith. Al-Shafi'i accomplished this by regulating two different realms: Sunna as the traditionalist textualist source and *ijtihad* or *qiyas* as the rationalist source of the Law.⁵⁰ So from the beginning there was awareness of the balance between the blind text and human agency, understanding it through independent rational procedures. Al-Shafi'i established formal legal theory and inserted a few presuppositions into it that remained unquestioned for the centuries to come: 'law must be exclusively derived from revealed scripture.'⁵¹ This leaves no room for independent reasoning while harnessing it to the scripture as in *qiyas*. He consolidated the rule of the Sunna as the second most important

⁴⁴ Ibid 72–60.

⁴⁵ Coulson, above n 37.

⁴⁶ Ibid 25.

⁴⁷ Hallaq, above n 39.

⁴⁸ Schacht, above n 36.

⁴⁹ Hallaq, above n 39.

⁵⁰ Ibid 18.

⁵¹ Ibid 30.

source of the Law and justified this using evidence from the Qur'an. He believed that legal theory itself should be supported and even deduced from the Qur'an. This gave his theories a more religious colouring. This was the beginning of a full-fledged theory of text.⁵²

In ancient Arabia, with the absence of any standard language, any written grammar, spelling or pronunciation, or worse, any standardised codification rules, the problem was even deeper. There were linguistic differences between the southern and northern parts of Arabia as well as between the northern tribes themselves. The abundance of reports from the first century of people asking for the meanings of Qur'anic phrases confirm that "text" — as we understand it today — could not have had the same function in first century Arabia.⁵³ Thus, *literal meaning*, as distinct from *figurative meaning*, was indistinguishable then. However, the closer proximity to the time of the Prophet assisted understanding the context, and by extension, the meaning of the texts. It was only later linguistic contemplations that made clear, outstanding, and literal meaning distinct from ambiguous and/or figurative meaning. Later on, when the text of the Qur'an became solidified as a legal text, disputes among scholars over certain phrases of the Qur'an gave rise to rudimentary semantic and syntactic theories, which were later elaborated and developed into a full division of legal theory called *usul al-fiqh*. The rudimentary theories of semantics developed in the Islamic law were the result of purely practical needs which, later on and under the influence of translated books of Greek logic and philosophy, developed into an abstract legal theory. One of the primary distinctions within those rudimentary semantics was that of *ambiguous* as opposed to *clear* words; that is, words whose meaning is disputed, versus words whose meaning is agreed upon. The latter were called *nass*: '[words] their meaning so clear as to engender certitude in the mind. [For example] to know what "four" means we have no need for other language to explain the denotation of the word'.⁵⁴ But again controversies arose. Each jurist in his own geographical region construed the meaning of the phrases differently from other jurists. Resorting to the original Medinan meanings of words by Malik emerged out of this context. Thus, firstly there was no agreement about what makes a proposition of the

⁵² Joseph Lowry, 'Does Shafi'i Have A Theory of 'Four Sources' of Law?' in Bernard G Weiss (ed), *Studies in Islamic Legal Theory* (Brill) 23; A more detailed account of the literalist tendencies in early Islamic history can be found in Gleave, above n 35.

⁵³ Pakatchi, above n 43, 45–48.

⁵⁴ Hallaq, above 39, 45.

Qur'an or hadith clear, unambiguous and assertive, and what makes it ambiguous and polysemic. Secondly, even if there was a common view that a specific verse is a *nass*, there was a myriad of ways to dismiss it if the overall meaning of the text was not according to the opinion of the jurist. A jurist's agency was disrupted with the dictation of the text and his social and cultural inclinations found their way into *fatwa*. This happened in three different stages: first, in the process of the evaluation of the chain of transmission of a text and its authenticity; second, once the text is accepted as authentic, the semantical evaluation begins, in which each jurist interprets the text according to his own opinion rather than necessarily to an objective meaning of it; and finally, the jurist had another tool to transcend all of these atomic perspectives of the text and give a systematic comprehensive account of the spirit of the Law. I will discuss each of these stages under separate headings below.

VIII DISQUALIFY THE TEXT AS A LEGAL TEXT

According to legal theory, before we start to establish any argument in any text — be it the Qur'an or hadith — a jurist has to verify if the text is authentic and original or not. That is to say, the jurist has to make sure that the text they are referring to, and justifying their ruling on, is really issued from the Prophet or his Companions and is not a fabricated one. When applied to the Qur'an, it functions with a different dynamism. According to the general belief of jurists, the Qur'an, in its current composition, is words of God verbatim and is sacred, letter by letter, though some rulings of it are abrogated by others. Thus, even with the Qur'an, prior to making any legal ruling, one has to ascertain that the verse in question has not been abrogated. So, while the form is different, the general concept both in the Qur'an and in hadith remains the same: to evaluate the eligibility of the text to act as the basis for a legal ruling. In hadith it comes through transmission chain evaluation and in the Qur'an through abrogation theory. At first sight, both procedures seem to be of a formal nature, that what is the object of evaluation is the chain of transmission, regardless of the content of the passage being transmitted. However, further contemplation shows that the content of the text is heavily involved in evaluating its transmission. This means, in turn, that jurists have tried to disqualify reports which were not consistent with their understanding of Islam and the whole frame of their rationality.

In general, each hadith is comprised of two parts: one is its chain of transmission (*sanad*), which lists the people who have narrated the hadith from the Prophet or Companions, and the other is its content or body (*matn*). It is generally understood that if the transmission chain of a hadith is authentic enough, the body of the hadith, or its content, is authentic and binding. In evaluating the chain of transmission of a hadith, scholars assess two different factors: first, the frequency of narration of a report, and second, the authenticity of its narrators. If, for example, a hadith is transmitted from the Prophet by five different Companions in parallel and independently, it is considered more authentic than a hadith narrated through only one Companion. Similarly, if all narrators of a certain hadith are famous for piety and truthfulness, that hadith will be more authentic than one with some narrators in its chain who are notorious for fabrication or untruthfulness. The evaluation process seems, at first sight, clear-cut and formal, but in practice, it is more than just formal “objective” assessment: it is a holistic conflict-resolution and consistency-making process which involved many factors, including jurists’ philosophical and theological beliefs governing the case in question, public opinion and customs about the case, and the rationally accepted stance on it.

The most qualified hadiths with reference to the number of transmitters are known as Concurrent (*mutawatir*) hadiths: a hadith ‘with so many transmitters that there could be no collusion’.⁵⁵ While this definition appears to demarcate quite clearly the boundaries between Concurrent and Solitary hadiths (*non-mutawatir* or *Akhbar Ahad*), problems arise when applying it to real cases: what are the practical criteria on the ground? Even when on such criteria some kind of agreement is reached, the number of Concurrent hadiths is tiny compared to the total body of hadith literature.

It is often said that the validity of a tradition depends not on the text but on the *isnād*. While this is generally true, it is not the whole story. For example, al-Ḥākim (Maʿrifat ‘ulūm al-ḥadīth, 59 ff.) mentions some traditions with very reliable men in the *isnād* which he holds to be faulty and weak. He argues that one requires considerable knowledge to detect this, and can arrive at a conclusion only after discussion with people learned in the subject.⁵⁶

⁵⁵ J Robson, 'Hadith' in P Bearman, Th Bianquis, C E Bosworth, E van Donzel, and W P Heinrichs (eds) *Encyclopedia of Islam, Second Edition* (Brill Online, 2016) accessed on 07 June 2016 <http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/hadith-COM_0248> .

⁵⁶ Ibid.

So, the main substantive source of Law, besides the Qur'an, is the Solitary hadith, which does not have the same authenticity as the Qur'an or the Concurrent hadith. One of the discussions in which we can discover jurists' views about the weight of reason as compared to other sources is when a conflict happens between a Solitary hadith and other sources like the Qur'an or the other beliefs of a jurist. For example, in the case of inconsistency between two sources of Law (say, the Qur'an and Consensus), which one has priority? In the case of the Qur'an, it is almost unanimously agreed that if there is a clear verse in the Qur'an about a legal case, it has final say over all other sources of Law.⁵⁷ But the majority of inconsistencies occur in more contentious sources, like between two Solitary hadiths, a hadith and a Legal Analogy (*qiyas*), a *mutawatir* hadith and the Qur'an, and the like, which makes it very difficult for a jurist to favour one source over the other. This has been the main motive behind legal theorists who have developed a detailed and sophisticated problem-solving apparatus to achieve reconciliation between conflicting sources — often called *tarajih* or legal preponderances.

The significance of *tarajih* literature is partly because it reveals the epistemic status of each Legal source for any jurist. Evidently enough, if a jurist considers a verse of the Qur'an as giving certain knowledge and a Solitary Report as only probable knowledge, then he will consider the Qur'an as the governing indicant. But if there is an inconsistency between a Solitary report and a rational principle, the conflict is between the epistemic weight of the hadith and reason, and the result will depend on how textualist or rationalist a jurist is. For *Mu'tazilites*, reason was so central that anything contradicting it was deemed unacceptable and should therefore be dismissed by this or that hermeneutical tool.⁵⁸

⁵⁷ As we will see, some scholars, including Al-Tufi, believed that even a Qur'anic ruling is subject to *maslaha*.

⁵⁸ The possibility of disqualifying a holy text as a source of Law was not limited to hadith; it also included the Qur'an, though in a more delicate way which did not infringe on its verbatim sacredness. Invalidation of a hadith was possible by questioning the genuineness of its transmission chain. This, however, was absolutely inapplicable to the Qur'an: belief in its verbatim origin was a necessary condition of the faith. Abrogation theory was devised as a response to this impasse, which preserved the holiness of the text while at the same time berefted it of its legal significance (see Joseph Burton, *The sources of Islamic law* (University of Edinburgh Press, 1990)). With abrogation theory, scholars were able to keep the wordings as holy even while dismissing a ruling. Abrogation theory opened up another space of manoeuvring for jurists to disqualify the verses of the Qur'an as a source of Law.

IX ALTERNATIVE MEANINGS

A traditional jurist starts with the authenticity of the text. Once the text is established as eligible to be a source of Law, then the struggle over its meaning begins. Dispute over the meaning of passages in the Qur'an is as old as the Qur'an itself. In ancient Arabia there was no standard Arabic language, and the linguistic differences between the southern and northern Arabian peninsula were remarkable.⁵⁹ There are reports traced back to the time of Omar, the second caliph, who, when asked by Companions of the Prophet about the meaning of the word "abban" in Qur'an 80:31, replied: 'I do not know, we are responsible unto which we have a knowledge'.⁶⁰ Later on, Ibn Abbas wrote a treatise on the problematic lexicon of the Qur'an in response to some Companions.⁶¹ On the other hand, there were many variations in the recitations of the Qur'an, all of which were considered to be canonical and binding; yet the differences between them were significant and leading to different legal and theological propositions. While modern scholars and exegetes of the Qur'an advertently or inadvertently have erased the question of differences between recitations, it was of great importance in the early formative period of Islam. One of the main manoeuvring spaces for jurists was the textual variants of the Qur'an, which could pave the way for new ways of understanding text.

While there was no written standard and agreed-upon Arabic syntax in the peninsula, there were immigration flows after the conquests which intensified this complexity. People from South Arabia were unable to understand many of the passages in the Qur'an, which was written in Northern Arabic. Even in close geographical proximity, the dialect of each tribe was different from the next and not all tribes were able to fully grasp the Qureshi dialect of the Prophet.⁶²

Jurists were not unaware of those variations in meaning, however. From the second century there were detailed lexicographical compendiums in the Arabic language to record all of its subtleties of meaning. In legal theory, they developed a full word-level semantics, which normally occupies a voluminous part of any legal theory book. Again,

⁵⁹ Michael CA Macdonald, 'Reflections on the linguistic map of pre-Islamic Arabia' (2000) 11(1) *Arabian archaeology and epigraphy* 28.

⁶⁰ Al-Tabari, *Tafsir al-Tabari* (Dar Al-Kutub Al-'Ilmiyya, 1999) Volume XXIV, 120.

⁶¹ Pakatchi, above n 43, 47.

⁶² *Ibid* 49.

the jurist is endowed with numerous tools to choose between alternative meanings of the scripture and understand the text according to his/her own web of belief rather than being exposed to an objective and clear meaning of the text. In this sense, meaning is a dialogical, reciprocal process between the jurist and the text and the jurist's agency has more to do with meaning formation than the voiceless, silent text which is open to different interpretations.

A tool for explaining away a literalist reading of a text is the distinction between the literal and metaphorical interpretation of the passage. It was during theological debates of early Muslim history about the meaning of verses which ascribe certain bodily attributes to God — which was against the beliefs of the majority of theologians on the immortality, immateriality, and transcendence of God — that this way out was devised. These theologians held that bodily verses are uttered in metaphorical language, not literal language. Take, for example, this anthropomorphic passage in the Qur'an: 'and thy Lord cometh, and His angels, rank upon rank' (89:22). A majority of theologians interpreted this verse in a way that evaded the materiality of God or His having incorporeal attributes by stating that the verse should be construed in a metaphorical way. Here one can observe how theologians struck an epistemic balance between inconsistent elements in their web of beliefs by abandoning the literal meaning of a text rather than jeopardising a theological belief which they deemed more central. The epistemic status of the proposition that "God is immaterial" was considered a necessity, while the belief in its literal meaning was viewed with less epistemic vigour (merely a contingent truth).⁶³ This was also the case for many other problematic verses in the Qur'an, and in almost every book of legal theory or Qur'anic sciences there is a separate, independent section allocated to this topic. The same strategy could be employed in different cases of Law to dismiss problematic texts in favour of progressive principles, provided those principles are situated at the centre of the web of belief of a jurist. After all, the core issue is not the existence of this or that verse, but the strength of the challenge it poses to one's web of beliefs and one's willingness to dismiss such verses in order to preserve other core beliefs.

⁶³ Not surprisingly, Ibn Taymiyyah, the forefather of Salafism, rejected the whole taxonomy of meaning into literal and metaphorical in his famous *Book of the Faith* Taqi Al-din Ibn Taymiyyah, *kitab al-iman* [The Book of the Faith] (Al-maktab Al-Islami, 1996).

The space open to a jurist for understanding a text in a non-literal way is not limited to the dichotomy of literal/metaphorical — there are many other conceptual apparatuses, including *general* and *particular*, *unconditioned* and *conditioned* phrases, *ambiguous* and *clear*, and so on. On the other hand, there is the option of rejecting an immediate, literal meaning by referring to the context of the utterance or original meaning. There are apparatuses for understanding the pragmatics of a text as well. There are traditions which explain the historical context of revelation of each verse in the Qur'an, known as Occasions of Revelation (*asbab al-nozool*). These are noteworthy, especially for the purpose of limiting the applicability of some general verses of the Qur'an by situating such verses in a specific historical context, thus preventing them from being generalised unconditionally.

X THE SPIRIT OF THE LAW: JURISTIC ANALOGY AND *MASLAHA*

Even if a text is vigorous in its transmission chain and clear and assertive in its denotation, there remains another significant way of nullifying it: to approach the sources holistically as a whole of interconnected propositions serving an ultimate divine purpose. This is a game-changer in Islamic jurisprudence. Muhammad Abed al-Jaberi believes that Arab rationality is a specific kind of rationality which reflects the Arab lifestyle of solitary, Bedouin, self-contained and independent Arabs.⁶⁴ This is reflected in the epistemology of Arabs by an over-emphasis on atomic units of meaning or single sentences instead of a system of meaning or its holistic content which reflects the relationality of the meaning. This explains why the hadith always has been seen as an independent, self-sufficient unit — one that can be read and understood, act as a source of Law without reference to other hadiths, and without being interpreted within a wider body of literature. The very style of hadith collection, which places special emphasis on single sentences rather than a book or a systematic body of texts, reveals this reality. Whether we accept this justification or not, from the early centuries of Islamic jurisprudence the inadequacy of the atomic text-based method of jurisprudence led jurists to devise tools for a more systematic understanding of legal texts.

⁶⁴ Abed Mohammed Al-Jaberi, *Naqd al-'Aql al-'Arabi* [The Critique of Arab Reason] (Arab Cultural Centre, 1991).

In the 11th century, Al-Ghazzali developed a comprehensive theory of Purposes of the Law which was almost fully retained in later legal theory books. According to Al-Ghazzali, every legal ruling is associated with one of the main five Purposes of the Law, which are the preservation of religion, life, mind, family, and property.⁶⁵ This was a step forward compared to previous theories, where each legal ruling was considered self-sufficient and independent of other rulings. Though the theory of Purposes of the Law was accepted by the majority of later jurists, it had suffered from a lack of instantiating criteria and remained on the level of theory rather than practice. Al-Ghazzali believed that it is God who knows the *ratio legis* of all rulings, and although in theory all rulings are made according to *maslaha*, it is outside of human rational capacity to capture it in a case-by-case basis.⁶⁶ According to this, the applicability of *maslaha* was confined to cases where there was no textual evidence or where inconsistencies existed between multiple indicants.⁶⁷ Later, scholars were more or less of the same mind as Al-Ghazzali (in terms of the ineligibility of independent human rationality to grasp the *maslaha* of a legal ruling). It was Najm al-Din Al-Tufi who established a theory of *maslaha*, which placed *maslaha* considerations above all other legal indicants. Al-Tufi's theory rests on three main pillars. First, unlike earlier scholars, recourse to *maslaha* was not confined to cases without textual evidence; rather, he believed in the validity of what is known as unattested *maslaha* (*maslaha mursala*). Furthermore, he believed that *maslaha* should be considered in all legal rulings, not only in contested ones. Moreover, in cases of conflict or incompatibility, *maslaha* should be given preponderance over all other indicants of the Law. For the second pillar, unlike earlier scholars, Al-Tufi believed that God has endowed humans with the faculty of recognising the purposes of legal rulings not only in principle (conceptually) but also in their instantiation. This equates to considering rationally identified *maslaha* as a source of Law on par with the Qur'an and the Sunnah. Thirdly and most importantly, he places *maslaha* at the top of the sources of the Law and able to invalidate all other sources, including the Qur'an and the Sunnah, in case of any inconsistency between them. He lists 19 indicants of the Law (Qur'an,

⁶⁵ Asifa Quraishi, 'Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American jurisprudence' (2006) 28(1) *Cardozo Law Review* 67, 102.

⁶⁶ Ibid.

⁶⁷ The Arabic word for indicant is *dalil* (pl. *dalael*).

Sunnah, Consensus, Analogy, among others) and considers *maslaha* to be the strongest indicant of Sharia, with priority over all the others.⁶⁸ As Opwis stated:

[Al-Tufi] considers safeguarding *maslahas* to be the strongest indicant of the Law. All rulings except those which concern matters of worship and ordinances fixed in the authoritative texts have to comply with the imperative of safeguarding *maslahas*.⁶⁹

Surprisingly, Al-Tufi ascribed this belief to all other jurists, stating that ‘except for negligible textualist dogmatists, other jurists believe in the priority of *maslaha* over all other legal indicants’.⁷⁰

When there was a conflict between *maslaha* and legal analogy, views differed in terms of which has priority over the other. *Hanafis* considered any textual document prior to and governing any conflicting rational legal analogy. Whatever has even a faint trace of scripture, such as a contentious hadith, was to be prioritised over other non-scriptural sources of the Law.⁷¹

Al-Razi, a Shafi’ite scholar with substantive rational tendencies, sided with Hanafis, though favouring a more nuanced, case-by-case approach. Malikis considered legal analogy to have the final say since, as al-Baji puts it, ‘singular tradition may be subject to abrogation, error, negligence, lying, and specification whereas legal analogy is void in only one way, namely, when the *ratio legis* is wrongfully established. Therefore, legal analogy enjoys preponderance’.⁷² Al-Qarafi, another Maliki-inclined jurist, argues that ‘legal analogy concurs with the precepts of the Law because it encompasses attaining *maslahas* and averting harms (*mafasid*). In contrast thereto, the singular hadith does not necessarily encompass such precepts’.⁷³ But even Al-Qarafi did not place reason above Scripture: he believed in only prioritising one kind of textually driven proof over another of the same type.⁷⁴

⁶⁸ Najm al-Dīn al-Ṭūfī, *Risāla fī ri‘āyat al-maṣlaḥa* (Dār al-miṣriyya al-lūbnāniyya, 1993).

⁶⁹ Felicitas Meta Maria Opwis, *Maslaha: An Intellectual History of a Core Concept in Islamic Legal Theory* (PhD Thesis, Yale University, 2001) 195.

⁷⁰ Al-Ṭūfī, Najm al-Dīn, *Risāla fī ri‘āyat al-maṣlaḥa* (Dār al-miṣriyya al-lūbnāniyya, 1993), 30–31.

⁷¹ Ibid 129.

⁷² Ibid.

⁷³ Ibid 130.

⁷⁴ al-Ṭūfī, above n 69.

XI CONCLUSION

The main argument of this paper, in philosophical terms, is the underdetermination of legal rulings by scripture. That is, that there are far more factors involved in jurisprudence than the literal reading of texts. The sacred text is not a set of propositions perfectly combined to provide a very definite ruling through a neat legal/logical line of reasoning. I have tried to show in detail how a jurist is left with ample room to interpret a text holistically according to his web of beliefs. I have not argued in a normative way to provide jurists with guidelines as to how to diverge from literal readings, but only described what their counterparts have done in previous times. They can use the same toolbox now to argue for progressive causes like democracy and gender equality, as they did centuries ago in a myriad of occasions and cases. As I have shown in this paper, the main problem with legal rulings is not the capacity of a text to be read differently or the conceptual apparatus to provide a jurist with such reading, but the very hierarchy of values a jurist holds, which dictates to him/her which evidence to keep and which to ignore. To reiterate, these tools are available in traditional legal theory and are not constructed innovations of modern scholarship. They are well rooted in Islamic legal history and, more or less, are agreed upon by the majority of jurists.

One may wonder why, with such elaborate dynamisms of change, Islamic law contains such strange rulings as stoning, women's inequality, and the like. My answer to such questions would again refer to the web of beliefs, reiterating that the problem lies not in jurisprudence but in the beliefs of the jurist. If such inconsistencies between their web of beliefs and the problematic rulings of Sharia existed, they would have had sufficient tools to resolve it. Again, it is not the case that the epistemological status or weight of some texts are so central and crucial that removing them would result in the collapse of the whole system, but that such inconsistencies do not exist in the first place. One who is versed in the long history and the twists and turns of Islamic law will admit that such core, central beliefs (if any) have been always subject to change. So, what is the problem and why does change not occur?

I firmly believe that change in Islamic law is a function of change in the overall framework of rationality of the individual and the society. Whenever and wherever the general mindset of people changes, the Law adjusts itself to those changes. A comparative and chronological investigation of Sharia rulings will demonstrate that

change has been remarkable. Examples of jurists having changed their views extensively can be pointed to in almost all areas of life.

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RE-MAKING LAW'S REALITY: AN AVENUE TOWARDS SEXLESS AND GENDERLESS LAW

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Gender is all-pervasive. It has been such a readily accepted aspect of humanity that our legal systems — the systems that order our society — take its form and permanence as a given. Although it is deeply interwoven into our system of laws, it is not fundamental to its operation. A system of laws that never depends on sex or gender as its touchstone has considerable advantages, and is not as radical a change in thinking as it might at first seem. The past two decades have shown a tendency towards flexibility and sensitivity in the case law concerning the fluidity of gender and sex, but this has not necessarily been reflected in legislation. This experience suggests that legislative attempts to facilitate such fluidity will fail so long as they depend on rigid categories of identity, and that the path towards a genderless and sexless legal system will be better achieved by way of the flexible approach found in case law.

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I INTRODUCTION

It’s not that pink is intrinsically bad, but it is such a tiny slice of the rainbow, and, though it may celebrate girlhood in one way, it also repeatedly and firmly fuses girls’ identity to appearance.¹

The question of “blue for boys, pink for girls” is no longer novel. It features in classroom discussions in secondary school sociology classes and even the household dining table — and there can be few greater measures of non-novelty. The world was nonetheless rocked when it was revealed that a family in Canada had chosen to raise their new child, Storm, without a gender. The case of Storm is unsettling perhaps because it forces us to question one of the most basic aspects of our identity — our gender. One criticism levelled at the concept of a genderless child came from a specialist in gender identity disorder in children, who argued that the important thing for a child is not to have their gender identity dictated to them, but instead that they have some anchor or reference point from which to define themselves. This suggestion indicates a contrary reality to that assumed by law. Historically, law has examined our personal histories and, through our interactions with it, moulded and shaped them, adding an extra piece or embellishment here and there. Law has always preferred that it knows us. The legal process demands our names and authentication of our identity: one must use passports, licenses, and other permits, all of which attach to *us* and assume continuity to *us*. But this permanency to identity is largely a legal fabrication. As early as the 18th century, the

¹ Peggy Orenstein, *Cinderella Ate My Daughter: Dispatches from the Front Lines of the New Girlie-Girl Culture* (Harper Collins, 2011) 58.

German scientist George Christoph Lichtenberg recognised that identity was essentially something that man chose himself.²

Our identity has long been the source of our authenticity, as both citizens and as human beings. Through its insistence on our continuity and its demands that we *exist*, law compels us to seek that authenticity. The rub is that only certain types of identity are acceptable to law. So far the problems to which identity gives rise have been answered, unsuccessfully, by identity politics. Its lack of success is a result of its inherent requirement that we fit neatly into categories that are capable of in-group protection. Those who do not “tick-the-boxes” of one identity can be left without adequate protection from discrimination, neglect, or mal-treatment.

Lamentably, our identity is not only how we seek authenticity before the law, but it is also integral to how we live our lives — how we interact. It is more than the labels that we ascribe to ourselves (or have ascribed to us); they are also relied upon as adjectives and verbs. They describe what we are through their connotations and they proscribe our behaviour — identities are performed and performative.³ They have drawbacks in that they tend towards results in subjective assumptions, but they are nonetheless identities — we need them to identify *us*. A solution to the crisis of sexual identities that defy normative assumptions is to alter law; not in the usual sense of law reform but instead by altering the way in which law uses and defines identities. Not the usual fare of chopping and changing, consolidating and unifying. Rather, *reform* in the sense of re-making, and doing so in a very fundamental way.

II LAW'S REGULATORY POWER

Through its administrative functions and formal requirements, law structures our lives. Traditionally, law has sought to be informed by other disciplines in certain matters. For example, the law looks to the advice of forensic experts in criminal matters, psychologists and other medical practitioners in sentencing, and to biology on matters of sex. One Australian case provides a prime example of the significance of science in

² 'I believe that man is in the last resort so free a being that his right to be what he believes himself to be cannot be contested.' See George Christoph Lichtenberg, *The Waste Books* (R J Hollingdale trans, New York Review Books, 1990) L 98 [trans of: *Sudelbücher* (first published 1799)].

³ Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40(4) *Theatre Journal* 519.

matters of sex and gender. *Re Jamie* concerned a 10-year-old boy who had been diagnosed with gender identity disorder.⁴ Throughout the judgement, Dessau J referred to Jamie as a female, and was persuaded by Jamie's repeatedly *identifying* as a girl. The law had, for the 10 years and 10 months prior to the judgement, treated Jamie as a boy merely on the basis of his (her) biological make-up.⁵

There were two central themes in Dessau J's judgement: medical testimony and Jamie's testimony. The law relied, as has been its custom, upon medical (read: biological) evidence in coming to conclusions about the appropriate "identity" for Jamie. This included the affidavits of two specialist psychiatrists, an endocrinologist, and a separate 'Family Report' (also prepared by a Doctor).⁶ Through its positioning as *expert*, science (in particular, psychology) was given *pseudo-law* making powers. With each case in which this occurs, the particular scientific viewpoint becomes increasingly interwoven with the law 'til the two appear as if a seamless cloth. This has tacitly been the fashion in which law has carried on. However, this leaves many in the dark and ignores shortcomings in other disciplines, each of which are subject to internal disputes not readily apparent to outsiders. It is worth noting the criticisms that have been levelled at the pathologisation of 'gender identity disorder'.⁷ Dessau J failed to enter into any discussion as to whether gender can necessarily be the subject of mental illness in this way. It is somewhat at odds with an earlier case on family law that placed the test of sex on the mind, rather than the body.⁸

Law frequently bows to the expertise of other disciplines, perhaps seeing them as more certain or concrete. Nevertheless, it does from time to time create its own reality without outside assistance.

⁴ *Re Jamie (Special medical procedure)* [2011] FamCA 248.

⁵ An issue, not the subject of this article but nonetheless pertinent, is the conflation between sex and gender. The issue has been discussed in numerous other publications. See, eg, 'Gender Dysphoria' in American Psychiatric Association (eds), *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 5th ed, 2013); Australian Government, *Australian Government Guidelines on the Recognition of Sex and Gender*, July 2013, 4.

⁶ Australian Government, above n 5, 6.

⁷ Katherine K Wilson, 'The Disparate Classification of Gender and Sexual Orientation in American Psychiatry' (Paper presented at the Annual Meeting of the American Psychiatric Association Toronto, Ontario Canada, 2 June 1998).

⁸ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.

III LAW'S REALITY

Law, through its functioning and its privileged position in society, is able to shape a certain reality. It is in this reality, rich with ceremony and protocol, that law carries out those functions that subsequently leave a mark on the world.⁹ It is the law's power as an authorising and legitimising force that allows its reality to impact the world at large. There is a limitation intrinsic to this system — the law's own perceived omniscience. For example, in colonial India the Commonwealth powers ignored the subtle distinctions between different groups and instead collapsed them into a single homogenous group.¹⁰ The reality was and is far more complex. For instance, the group now identified as '*hijra*' were treated as 'eunuchs'.¹¹ This re-casting ignored important cultural differences and the significant role of *hijra* in native customs and practices.¹² The loss of distinct identity suffered by the *hijra* occurred within law's reality, the result was a stripping, and subsequent reassignment of identity.¹³ Reassignment that was not, in theoretical terms, forced — it simply happened. By re-classifying some groups as "criminal tribes", the colonial powers effectively limited citizenship to those groups to which it could readily recognise and which were 'acceptable' to the law of the time. The lasting impact of this substitution of the previous reality with one of law's own can still be seen in India today.¹⁴

Although law does to an extent rely upon other disciplines in arriving at its decisions, it has also chosen to ignore them to the extent it feels appropriate. Some of the extreme examples are to be found in regards to sexuality. The law in one instance ignored expert testimony to the effect that a boy was in fact capable of obtaining an erection and could thus be charged with sodomy. The bench drew a distinction between the *physical* possibility of a boy obtaining an erection, and the *legal* one. The judge found as a matter of law that a boy of 14 could not become erect, despite medical and eyewitness

⁹ *Why are Ritual and Ceremony Important in Courts?* (28 January 2007) Alan Macfarlane <<http://www.youtube.com/watch?v=VfESgFRiDkQ>>.

¹⁰ *Criminal Tribes Act 1871* (Imp) 34 Vict.

¹¹ *Ibid* ss 24, 26, 27.

¹² Serena Nanda, *Neither Man nor Woman* (Wadsworth Publishing Company, 2nd ed, 1990) ix.

¹³ It should be noted that the *Criminal Tribes Act* had the same effect on many other groups who had a special and significant identity within their culture.

¹⁴ Ratna Kapur, 'Out of the Colonial Closet, But Still Thinking "Inside the Box": Regulating "Perversion" and the Role of Tolerance in Deradicalising the Rights Claims of Sexual Subalterns' (2009) 2(3) *National University of Juridical Sciences Law Review* 381.

testimony to the contrary.¹⁵ In another instance the law ignored biological definitions of sex, instead choosing to create its own definition based on more than physical biology.¹⁶ In yet another case, from India, the law in essence ‘falsified’ sexual identity when Judge Vimal Kumar recorded two females as being married despite laws restricting marriage to man and woman.¹⁷

Historically, the law is notoriously slow to change. However, in 2001, the case of *Re Kevin* illustrated how the law may alter its reality in order to deal with the challenges presented by a more sexually diverse world.¹⁸ The innovation was the decision of Chisholm J to split from the sciences and make a separate ‘legal’ construct of sex. This is not in itself a solution to the problem of identity, but is indicative of a pragmatic way forward. Although it fails to address the problem of sexuality based identities, it does provide an interesting precedent for how law can make its own constructions of identities; constructions which, through careful judicial creativity, overcome some, though not all, the hurdles to which identity gives rise. Chisholm J’s reasoning suggests that law need not be so pre-occupied with the biological. Instead, there is a ‘freedom to be ... what we believe ourselves to be.’¹⁹

However, we must not be so hasty to praise Chisholm J’s reasoning. It was cunning and served that particular case well; the applicant had to live and to be seen to exist as his ‘new’ gender. In regards to marriage equality, *Re Kevin* is at risk of privileging transsexualism, and, for the purposes of family law, assimilating transsexualism into the category of the hetero-normative. This case allows a person to change their gender identity completely, but its result is insufficient to answer the problems presented by other aspects of identity. It is, nonetheless, a step forward. It is a specimen that demonstrates how the law may, for its own ends, alter its reality in order to conceive of something that may not otherwise be possible — a man with an XX chromosome.

¹⁵ See generally Yorick Smaal, ‘Consent and Capacity: Boys, Sex and the Law in the British World’ (Paper presented at the 30th Annual Conference of the Australian and New Zealand Law and History Society, Griffith South Bank Graduate Centre, Griffith University, 13 December 2011).

¹⁶ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.

¹⁷ Dipak Kumar Dash and Sanjay Yadav, ‘In a First, Gurgaon Court Recognizes Lesbian Marriage’, *The Times of India* (online), 29 July 2011 <<http://timesofindia.indiatimes.com/city/gurgaon/In-a-first-Gurgaon-court-recognizes-lesbian-marriage/articleshow/9401421.cms>>.

¹⁸ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.

¹⁹ Lichtenberg, above n 2.

Although it did not eliminate the place of identity as an important construct in law, *Re Kevin* has eroded its reliability. By recognising the more fluid, and thus elusive nature to identity, Chisholm J has changed the previously concrete nature of identity into something that has limitations as a foundation law. Nevertheless, the law must still find a way of creating a reality in which identity is not a foundation. If it succeeds in doing so, then the barriers experienced in law shall be lessened. The language of law will no longer have to *work* to be inclusive, it will simply *be* inclusive.

IV SANCTIONING NON-BINARY GENDER/SEX

The regulatory grip, somewhat loosened by *Re Kevin*, has been somewhat tightened in more recent years by reform targeted at 'inclusive' policy with regards to people of 'unspecified sex/gender'.²⁰ In some respects, such an approach represents a move towards a more inclusive political environment, cognisant of members of society that do not fit "traditional" hetero-normative identities. However, this approach does not necessarily afford the flexibility appropriate to the issue at hand.

Despite a trend in medicine away from treating non-conformity to binary sex/gender identities,²¹ legal instruments still place reliance on medical statements as support for sex/gender identities.²² The issue was not live, though it was present, in *NSW Registrar of Births, Deaths and Marriages v Norrie*.²³ *Norrie* was concerned with whether the NSW Registrar for Births, Deaths and Marriages ('BDMR') was confined to registering a person's sex as 'male' or 'female'. The High Court of Australia upheld the decision of the NSW Court of Appeal, finding that the BDMR was not so confined, and that he was in a position to register *Norrie's* sex as 'non-specific'.²⁴

The statute that was the primary concern in *Norrie* still provides that the registrar should place reliance on medical reports as to a person's gender identity,²⁵ as do

²⁰ Australian Government, above n 5, 4 ('Indeterminate', 'intersex' and 'unspecified' are the terms used to describe a 'third option' for people not identifying as 'male' or 'female').

²¹ 'Gender Identity Disorder' is no longer considered to be a form of illness. Gender dysphoria is however described as the 'distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender' (American Psychiatric Association, above n 5).

²² See, eg, *Births, Deaths and Marriages Registration Act 2003* (Qld) s 24(4)(b).

²³ *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 ('*Norrie*').

²⁴ *Ibid.*

²⁵ *Births, Deaths and Marriages Registration Act 1995* (NSW) s 32DB requires statutory declarations from two doctors, or registered medical practitioners, verifying that an applicant has undergone a sex affirmation procedure.

equivalent statutes in other Australian jurisdictions.²⁶ In this way, they restrain law from taking the somewhat flexible approach hinted at by Chisholm J in *Re Kevin*. In Queensland, for example, a person must have undergone some surgical procedure to have a different sex recorded on their birth certificate.²⁷ Such procedures are not readily available, nor are they viable options for many people who do not identify with the sex/gender ascribed to them at birth, but for whom an alteration to their sex as recorded on the BDM Register is appropriate.²⁸ A person wishing to have such an alteration (to the Register) is hamstrung by an inexplicably rigid legislative regime that fails to realise the realities “on the ground” as it were, for people who experience greater (relative) fluidity in their sex or gender identities.

V SHIFTING THE FOUNDATION OF LAW’S REALITY

The movement in law is generally towards giving words their *contemporary* ordinary meaning.²⁹ However, the ruling in *Re Kevin* suggests that in the context of sex and gender, greater weight ought to be given to the way in which a person is treated and lives when determining their gender. Thus the ‘ordinary and contemporary meaning’ might be found by asking, without anything more than a cursory glance, ‘is this person a man or a woman?’ Chisholm J’s approach was outstanding for its acquaintance with the nuanced aspects of transsexualism, but it failed, for good reason,³⁰ to break into a broader discussion on the challenges of working within the ‘two-sex, two-gender’ system of regulating sexual identity.³¹

It has been suggested that, due to the embedded nature of our assumptions about gender and identity, it is ‘probably impractical for the law to abandon the two-sex assumption.’³² Given the tendency of the (common) law to favour ordinary language, this is probably correct — in our “ordinary” language people are either one or the other.

²⁶ See Australian Government, above n 5, 4.

²⁷ *Births, Deaths and Marriages Registration Act 2003* (Qld) s 24(4)(b), Sch 2.

²⁸ It was submitted, and favourably treated, in *Norrie* at [30], that the purpose of the BDMR is to state ‘the truth about matters recorded in the Register to the greatest extent possible’.

²⁹ *NSW Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509, 514 (Kitto J) cited in *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074.

³⁰ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074 [18].

³¹ *Ibid* [17] (Chisholm J) quoting Vivienne Muller, ‘Trapped in the Body – Transsexualism, the Law, Sexual Identity’ (1994) 3 *Australian Feminist Law Journal* 103.

³² Douglas K Smith, ‘Transsexualism, Sex Reassignment Surgery, and the Law’ (1971) 56 *Cornell Law Review* 963, 972.

Instances of “other” sexual identities are experienced as novel, not ordinary. It is, however, possible for the law to move to a ‘no-sex’ model — an approach that echoes a number of writers on the subject of transsexualism and law.³³ The question is whether or not sex and gender are necessary for our authenticity before the law. *Re Kevin* perpetuates the idea that with a certain identity there is a certain set of characteristics. Whilst Chisholm J notes that there are ‘no doubt different ways of being a man’,³⁴ there are telling examples in his Honour’s extracts of affidavits which suggest that what was persuasive was the extent to which Kevin was perceived as a “manly-man”. For example, the description of his home as having a ‘bachelor-like, Spartan appearance’,³⁵ and that his ‘physique, mannerisms, speech, attitude, and interests all demonstrate his maleness.’³⁶ These extracts, if not read in the proper context in which they were given, risk perpetuating the idea that there is a “correct” way of *performing* gender identities. The result may be a perpetuation of fixed concepts surrounding outward appearance and superficial aspects of ‘maleness’ if future cases do not pay heed to the check that Chisholm J placed on the evidence. These examples are useful *only* to the extent to which they demonstrate that Kevin’s being seen and treated as male, for all intents and purposes, was the crucial factor.³⁷ He is not seen as a woman pretending to be a man, but is *believed* to be a man. The reasons for which people around him perceived him as a man are irrelevant in determining gender.

In some cases, regimes have come to recognise the importance of a fluid understanding of sex and gender identities. The introduction of sex-X on Australian passports, as an alternative to male or female, affords greater flexibility to those not identifying with either of the “traditional” binary-sexes. Such policies are an improvement over older arrangements, however they need to be approached with some caution. The passport policy allows for individuals who may more strongly identify as X to still be identified on

³³ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, [17] (Chisholm J). His Honour noted a number of works which advocated that the gender question ought not be asked at all, including: Isis Dunderdale, ‘The Human Rights of Transsexuals’ (1992) 17(1) *Alternative Law Journal* 23; John Mountbatten, ‘Priscilla’s Revenge: Or the Strange Case of Transsexual Law Reform in Victoria’ (1996) 20 *Melbourne University Law Review* 871; A Sharpe, ‘Judicial Uses of Transsexuality: A Site for Political Contestation’ (1996) 21(4) *Alternative Law Journal* 153.

³⁴ *Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074, [69].

³⁵ *Ibid* [59].

³⁶ *Ibid* [57].

³⁷ *Ibid* [68].

their passport as ‘male’ or ‘female’ for safety purposes.³⁸ That nuanced aspect of the policy juxtaposes rather curiously with the treatment of sex and gender in other regimes, such as the State-based BDM Registers, where deviation from ‘male/female’ is still treated somewhat pathologically — as something requiring medical evidence, rather than self-identification of the individual. In allowing someone who identifies with ‘sex-X’ to do so, whilst still allowing them to be identified on paper as ‘male’ or ‘female’, the policy shows a greater connection with the day-to-day realities of the world, in which people who deviate from the “norms” of sex or gender face discrimination and mal-treatment.

VI CONCLUSION

Law, as an omnipotent discourse community, has profound effects on our identities. It makes assumptions about what we are and ascribes a permanency to that identity. Identity is central not only to our existence in the legal realm, but also our social and cultural realms. Identity is largely about what makes us different and the ways in which we make ourselves unique. Identity is a safe haven, to the extent that it is unique to us, and is representative of a freedom to be us. The limitations to which it gives rise are found when regulations are grounded in matters of identity. Since law must be generally consistent and certain, it is not possible to create a legal system that caters for all identities. Instead, it is necessary to create a legal system capable of treating identities as fluid and unfixed. Ideally, such a legal system would consider identities to be ultimately meaningless. The result would be a legal system better equipped to deal with the new, unusual, or unique.

³⁸Australian Passport Office, *Sex and Gender Diverse Passport Applicants*, Australian Government, Department of Foreign Affairs and Trade
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