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HOW RELIGION CONSTRAINS LAW AND THE IDEA OF CHOICE

> Render unto Caesar the things which are Caesar's, and unto God the things that are God's
>
> Matthew 22:21

In its broadest sense, this article is about the exercise of religious influence on and within law. Its focus is on the Christian religion and especially those of the Christian faithful who seek to influence law: who proselytise. Specifically it concentrates on the ideas of the Catholic Church. It considers the nature, desirability and legitimacy of such influence, especially in light of liberal Enlightenment principles which entail a commitment to human reason, equality and choice.

Inevitably it begins with certain preoccupations, beliefs and presuppositions and with certain expectations. Always one needs a reason to engage with an intellectual enterprise and a set of triggering interests. Its particular interest is in the way religious believers declare their authority over some of the most fundamental human matters – life, sex and death – and seek to make law conform to their beliefs, and the degree of legal receptivity and susceptibility to these interventions. It is critical of such interventions, regarding them as constraining of human choice and against human interests, and tends to be critical of jurists who permit them.[1] It is polemical in style: it seeks to kindle debate between the secular and the religious about the role religion does and should play in the shaping of laws, especially those which limit human choice in the most personal spheres of life.

I Two Stories

I begin with the classical liberal understanding of law, the individual and the Church and their respective roles in determining life's meaning. In this official liberal story, our liberal law permits us to find our own meaning of life and assiduously guards our right to do so. It respects freedom of belief (and non-belief); it does not impose religious doctrine.

I then consider what I believe is the truer story: that law, in many ways, dictates the meaning of life, tells us what has value and how we are to live in the most intimate parts of our lives, and that it does so with the assistance of its spiritual advisor, the Church.

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1 This is not to say that religion invariably plays a destructive legal role. Compassion, altruism, helping the weak, respecting humanity, are all beneficial Christian principles.

II The Official Liberal Story

I tell the official liberal story in a stark and simple manner, in order to accentuate its central message.[2] My intention is to draw out of the story what seems to matter most. I acknowledge that many contemporary liberal legal thinkers have introduced subtleties, refinements, qualifications and complications to their accounts of liberalism, often in response to their critics. In telling the official story, I do not wish to caricature what has emerged as a rich liberal legal scholarship. Rather my intention is to simplify the liberal story in order to draw out what I believe is its most important moral proposition: that human beings are most honoured and respected as persons when they are permitted to exercise maximum choice and control over their lives: to decide for themselves how to live their lives.

The official story is infused with Enlightenment values and derives from liberal political theory. It tells of a formal commitment to the importance of human agency and autonomy and a correspondingly constrained state which respects the autonomy of the individual. This is a dignifying theory of society made up of persons who are creatures of reason, who are engaged in rational arms-length *public* relations of choice and who are entitled to their *private* beliefs, free from state intervention.

According to this official liberal story, law respects and preserves human choice by constructing two sectors of life: the public sector and the private sector. This division is thought to be vital for the preservation of individual freedom, *especially* the individual right to determine life's deepest meaning.

A *The public sector*

In the public sector, power is ceded to the state for the purpose of securing the conditions of public order (including orderly market transactions) and personal security, while preserving a private sector, ostensibly free from state intervention. In the public sector, the market is permitted to operate and is notionally given a loose rein as it is guided by the decisions of market individuals. Law enables and regulates the commercial decisions of these economic actors through its laws of agreement, largely respecting their individual choices. People relate at arms length as market actors, for these are not intimate relations.

The state also adopts and imposes the harm principle, for its duty is to provide a safe setting for these public relations: it instructs public persons that they must respect the bodily integrity of each other and that they must not harm one another as they engage with one another and further that they will be held accountable for their harmful actions. They will be treated as rational agents who chose their harmful conduct and hence are punishable as choosing agents by the state.

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2 The official liberal story can be regarded as a type of heuristic device, designed to stimulate further intellectual inquiry and dialogue.

In the public sector, people therefore relate to one another in a limited human capacity: as economic actors and as human agents respecting the agency and also the boundaries of all others.

B *The liberal (secular rationalist) private sector*

By contrast in the private sector[3] the individual is permitted to flourish as a whole person. Here individuals devise their personal conception of the good; they exercise their religious beliefs, their deepest convictions. Here they also come together in loving and altruistic relations *of choice*. They become authors of their own biographies, to invoke an idea of personal autonomy developed by Ronald Dworkin.[4] The private sector of the liberal story is importantly an arena of rich *personal freedoms*: spiritual, of the heart, of personal creativity, of conviction. This is the sector of deep belief and also of personal intimacy: where the person is meant to be able to live out *their individual* conception of the good; to determine the meaning of their own life.

The principles of respect for autonomy (relations of choice) and bodily integrity are therefore carried over into the private sector. We touch by choice;[5] we love by choice; we are intimate by choice; we procreate by choice. As the Supreme Court of Canada said in *Malette v Shulman*:

> The right to determine what shall be done with one's own body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based.[6]

We therefore exercise sovereignty over ourselves, to invoke the words of John Stuart Mill.[7]

We also form and exercise our own beliefs, by choice, and this idea of the free exercise of belief is at the heart of the various constitutionally secured freedoms of religion. But as this is also the place of the heart, of the spirit, of intimacy, the market is notionally excluded. We do not do it for money.

Respect for religious belief is therefore part of liberal respect for the private sector: the place where the individual has an absolute right to devise their conception of the good, of the meaning of life. Religious belief must not be imposed but it must be permitted. The state must not impose its own religion or favour one set of religious

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3 Or what Charles Reich terms 'the individual sector'; 'the zone of individual power'; Charles Reich, 'The Individual Sector' (1990) 91 *Yale Law Journal* 1409, 1442.

4 See Ronald Dworkin, *Life's Dominion* (1993).

5 *Collins v Willcox* [1984] 3 All ER 374.

6 (1990) 67 DLR (4th) 321, 336.

7 See John Stuart Mill, *On Liberty* (1869).

convictions over another. Thus, the law treats religion and the religious with deep respect, with 'solicitude'.[8]

In the private sector, each person is treated as an *individual* centre of belief and as a little sovereign, over their bodies and over their personal lives and therefore over their intimate relations and over their spirituality. They must determine what is to give their own life value.

In this liberal understanding of the place and nature of religious belief, they are deep personal matters which are to be taken utterly seriously because they are matters of profound conviction. It is acknowledged that, to many, religion defines life's meaning. Religious commitment is most importantly to be based on personal choice and it is to be respected once chosen. It is not for the state to judge the relative value of different religious belief systems.

Choice is therefore at the centre of the idea of the private sector, in the liberal story, for it is here that we are meant to make and exercise our deepest, most significant and most life-defining choices. The state is therefore to abstain from criticising and limiting private conceptions of these goods, precisely because they are the values that most define us.

The private sector, in the liberal account, is therefore the place (mental, physical, spiritual, emotional) of critical freedoms: of intimacy, of belief, and it is a place of state-secured personal security and safety. To exercise freedom of intimacy and of belief, one must be safe. There must be 'a haven in a heartless (economic) world', to quote Christopher Lasch.[9]

This is the liberal ideal, schematically presented: it is the official story. It describes a metaphysically *thin* individual operating in the public sector, a metaphysically *rich* individual operating in the private sector, but an individual of her own making, who determines her own meaning of life; and a state which secures the freedoms of the two lives of the person as they operate in both sectors. I now want to describe what I think is really happening and why it means that the state is strongly implicated in the imposition of religion – that the state is behaving in ways which undermine its own avowed liberal ideals for the public and private sector.

III The Real Story: The Coexistence of a Liberal Secular and an Illiberal Religious Sector

I suggest that, in truth, the private sector comprises the individual sector of the liberal story (the place of personal freedoms) as well as a religious sector, of imposed belief. In other words, law also subscribes to some basic religious tenets which stand in tension with the principles of assiduous liberalism. I have mentioned

8 Denise Meyerson, 'Religion' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (2008) 1002,1003.

9 Christopher Lasch, *Haven in a Heartless World* (1977).

the liberal legal principles of *autonomy* and *bodily integrity*, which are strongly endorsed for *both* public and private sectors. But there are two other cross-cutting legal principles, which stand in direct tension with these supposedly basic liberal rights and can serve to undermine them.

The first is the principle of *human sanctity,* usually referred to as the sanctity of life, which is also considered a fundamental legal principle. The legal-religious principle of *human sanctity* is that life is a blessing, a gift from God, something of inestimable value; it is distinct from the personal capacities or inclinations of the individual. It is independent of human choice; it is independent of personal achievement or personal abilities. Human beings cannot help but have it, even if they do not want it; animals cannot help but not have it. It has nothing to do with what one chooses to do or be. Being human is enough. The corollary, which normally follows from the principle, is that it is wrong to end human life, whether or not the end is wanted and chosen by the individual.[10]

The second (illiberal) principle, the second piece of theology, which I suggest is firmly embedded within law of the private sector is *the sanctity or sacrament of marriage*. This is less often explicitly endorsed as a fundamental legal principle, but nevertheless it is basic to, and structures, intimate institutions of the private sector and it is powerfully endorsed by both law and religion. According to the Catholic Catechism: 'God Himself is the author of marriage'[11] and it is to be between one man and one woman. Here the guiding idea is that the sexes have a correlative nature. Rather than functioning as distinct choosing individuals, forming intimate associations unrelated to our sex, we are expected to form intimate relations only across the sexes and then, ideally, to reproduce naturally and so produce a family. In other words, there is a wholesome, honourable, God-given form to the heterosexual family. It is paradoxically both the natural and required unit of being: the man, his woman, and their offspring.

The principles of the sanctity of life and the sacrament of marriage tend not to be understood as religious principles; nor are they necessarily seen as constraining of choice. Rather they are thought to be simply the natural setting or natural order against which human choices are exercised, indeed naturally directed.[12] In other words, it is taken as a given, just part of the background and the horizon, that human life has sanctity and that human intimacy will assume a heterosexual form: that choices will naturally be made in conformity to these principles. And yet both

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10 Reverence for human life does not always have a religious basis. Secular rationalists can be said to revere in human beings the capacity for reason and so be said to revere life. However secular rationalists are likely also to respect human choice: to allow the individual to decide for herself how best to honour her life. On the religious and rationalist bases of respect for human life see Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009).

11 Catechism of the Catholic Church (Homebush, NSW, Society of St Paul, 1994) [1603].

12 On our background of assumed meanings which can be invisible to us see Susanne K Langer, *Philosophy in a New Key* (1957).

principles are fundamental to Christian theology, are matters of great concern to the Church and perceived departures from these principles are often associated with strong political lobbying and church intervention in legal matters.

If we consider the types of cases in which the Catholic Church has intervened in Australia, they demonstrate a clear concern for both principles: for the sanctity of life and the sacrament of marriage. In *CES v Superclinics (Australia) Pty Ltd*,[13] for example, which was about a negligent failure to diagnose a pregnancy thereby excluding the opportunity for a safe and early termination, the Catholic Church intervened and argued that termination was not a lawful option. Implicitly it was declaring the sanctity of life before birth. In *Re BVW; Ex Parte Gardiner*[14] the Catholic Church intervened to argue the unlawfulness of withdrawal of nutrition and hydration (by percutaneous endoscopic gastrostomy tube) from a woman suffering profound dementia. Implicitly it was declaring the sanctity of life absent all cognition. In *McBain v Victoria*[15] and *Re McBain; Ex Parte Australia Catholic Bishop's Conference*,[16] the Catholic Church intervened and argued against the availability of IVF to a single woman. Implicitly it was supporting the sanctity of marriage and the traditional family unit.

It is true that the number of cases in which the Church has pushed hard for a right to intervene is small. However this may be explained by the fact that the principles of sanctity of life and heterosexual marriage are already internal to law and so usually they do not need to be imposed from without. Indeed the life, sex and death matters are in important ways legal repositories of pre-Enlightenment religious values, infused with religious thinking (rather than based on modern contractual principles). They are also the matters which the religious seek to influence further (to further diminish choice).

IV Catholic Theology

Christian doctrine, especially Catholic doctrine, is particularly concerned about matters of life, sex and death; indeed the very meaning of life. The Catholic Church positively seeks to influence law in these areas. These are the areas of life in which the Church asserts its particular competence and authority and with which it is particularly exercised.[17] They relate to important parts of Christian theology. In these parts of life, the religious story is particularly rich. Indeed as Ian McEwan

13 (1995) 38 NSWLR 47.

14 (2003) 7 VR 487.

15 (2000) 99 FCR 116.

16 (2002) 209 CLR 372.

17 One might have thought that religious intervention into law would be triggered by perceived human rights abuses, perhaps by the ill treatment of the vulnerable, by poverty and social inequality, or the use of armed force. But these are not the 'bads' at which religion tends to be directed when it moves into law. Rather life, sex and death are the strongest religious preoccupations connected with the marshalling of strong political Church forces to assert control of law and to effect legal change which will ensure legal compliance with religious principle.

says of our culture generally, it lacks a simple story of life, death, and the meaning of life, which is anywhere near as satisfying and digestible as that offered by religion.[18]

It is perhaps within the very nature of religion that it should present itself as expert in these matters. As John Haldane observes:

> religion is best characterised as a system of beliefs and practices directed towards a transcendent reality in relation to which persons seek solutions to the observed facts of moral and physical evil, limitation and vulnerability, particularity and especially death.[19]

The Catholic religious doctrinal attitude, as I understand it, is that life is a blessing (a gift from God and subject to his giving and taking away), that is a good; that chosen or inflicted death is an evil – a bad (the most powerful form of punishment for the wicked; religion promises immortality for the good); and that the sexes are correlative, by nature and by God and therefore non-conformist sex and reproduction represent a perversion of nature. In each of these three areas, religion dictates that there should be conformity with God's choice, not human choice and there is legal collusion with these views. These departures from the liberal legal principle of human choice entail paternalism, patriarchy and homophobia.

V The Cash Value

So what is the cash value of this legal complex of secular and religious principles, to borrow from William James?[20] In practical terms, often the individual secular sector and the religious sector coexist without obvious tension and therefore we may not notice that both are operating in tandem. In other words, the secular principle of autonomy and the religious principle of the sanctity of life do not compete. But there is also a well-known catalogue of matters which are religiously sensitive and which typically trigger religious interest and for which the religious typically seek to restrain choice. Cross strains between legal principles are generated. The fundamental secular legal principles of *autonomy* and *bodily integrity* are in tension with other fundamental religious principles of *human sanctity* and the *sacrament of marriage*. Freedom of individual belief and individual choice are typically compromised.

These internal tensions are to be observed in a range of laws governing a broad range of human activities, human choices and agreements. They encompass decisions about the use of human eggs, the decision to terminate a pregnancy, the refusal of medical treatment by pregnant women (life); saying 'no' to (heterosexual)

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18 Ian McEwan 'End of the World Blues' in Christopher Hitchens (ed), *The Portable Atheist* (2007) 351.

19 John Haldane, *An Intelligent Person's Guide to Religion* (2005) 17; quoted in Tamas Pataki, *Against Religion* (2007) 3.

20 William James, *Pragmatism* (1995) 21.

marital sex, saying 'yes' to homosexual sex and marriage, or to change of sex (sex); refusal of life support, the request to end life, even decisions about the use of organs after death (death). Indeed they are evident across the private sector, notionally the site of maximum freedom.

VI The Cross Cutting Principles

In the cases that follow, we will see that the secular principles of respect for autonomy and bodily integrity are directly in tension with the legal-religious principles of human sanctity and the sacrament of marriage.

A *The Sanctity of Life versus Bodily Integrity and Autonomy: Anthony Bland*

In *Airdale NHS Trust v Bland*,[21] the English Law Lords were asked to consider the legality of withdrawal of nutrition and hydration from Anthony Bland who was diagnosed as permanently comatose. Lord Hoffman (Court of Appeal) explicitly contrasted the secular and sacred principles and held them in tension. His Lordship said:

> the sanctity of life is only one of a cluster of ethical principles … Another is respect for the individual human being and in particular his right to choose how he should live his own life. We call this individual autonomy or the right of self determination.[22]

By contrast, Munby QC, who acted for the Official Solicitor as guardian *ad litem* (and who argued that it would be murder or manslaughter to withdraw treatment), asserted the primacy of the religious principle. He said that '[i]t is fundamental that all human life is sacred and that it should be preserved if at all possible.'[23] He maintained that the court was incompetent to judge on such a matter. It was 'unable to evaluate the consequence of death, that is, non-existence' and thus 'the question of life as against death is one wholly outside the competence of judicial determination'.[24] Neither the Court of Appeal nor the House of Lords agreed. They declared that Anthony Bland had a dignity interest in the cessation of the invasion of his bodily integrity; that what he would have wanted as an autonomous self-determining being was legally relevant; that he had no interest left in being alive and that the sanctity of life did not trump all, though it was a highly relevant consideration.

However the sanctity of life principle still exerted a powerful influence. It ensured that the life of Anthony Bland could not be ended quickly and deliberately but that nature must take its course. Clearly this entailed a compromise to dignity. As Lord Mustill observed at the end of his judgment:

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21 [1993] AC 789.

22 Ibid 826.

23 Ibid 836.

24 Ibid 837.

> Finally, the conclusion I have reached will appear to some to be almost irrational. How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them? I find it difficult to find a moral answer to that question. But it is undoubtedly the law and nothing I have said casts doubt on the proposition that the doing of a positive act with the intent of ending life is and remains murder.[25]

B *Reproductive Autonomy versus Life as a Blessing, a Gift from God: Mrs Melchior*

Cattanach v Melchior[26] is a decision of the Full Court of the High Court concerning a doctor's failure to advise about the continuing prospects of a pregnancy after a sterilisation procedure. The woman in question had a third child because of this failure and sued for the costs of the child's upbringing. It was conceded that the doctor had breached his duty to his patient in that he should have informed her of the possibility that she could still reproduce; he was negligent in his failure to do so and his negligence caused direct loss. At trial it was found that the woman could therefore recover. Her right of reproductive autonomy had been breached as a consequence of the doctor's failure to advise her about the possibilities that she could still conceive a child. She had decided not to reproduce and as a result of the doctor's negligence, she had reproduced.

The doctor and the State of Queensland appealed. The judges divided on the question of whether relatively straightforward principles of tort law should apply concerning the negligent infliction of damages and their quantification (here the costs of raising the child) or whether, as the doctor said, the case gave rise to special metaphysical considerations concerning the value of human life which made it exceptional, perhaps inherently religious in nature, and not actionable. In this view, life was a blessing and a birth could not form the basis of an actionable wrong.

In *Cattanach* we can see the tension between the secular liberal principles of autonomy, and the religious principle of the sanctity of human life and the view that life is always a blessing. Chief Justice Gleeson, in dissent, allowed the appeal. He asserted, *inter alia*, that

> The common law has always attached fundamental value to human life; a value originally based upon religious ideas which, in a secular society, no longer command universal assent. Blackstone, in his *Commentaries*, referred to human life as 'the immediate gift of God, a right inherent by nature in every individual'.[27]

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25 Ibid 885.

26 (2003) 215 CLR 1 ('*Cattanach*').

27 Ibid 10.

He observed that '[m]any people who now respect the same value, do so upon different grounds' but did not say what those grounds might be.[28] He went on to declare that '[t]he value of human life' was 'universal and beyond measurement' (an assertion which is more religious than empirical or legal) but then conceded that 'the problem to be addressed [was] legal' and that 'it may be doubted that theology provides the answer to a financial dispute, between a provider of sterilisation services and aggrieved parents, concerning the extent of the damages to be awarded on account of the birth of a child.'[29] Nevertheless he found the damages too difficult to quantify and was opposed to 'treating, as actionable damage, and as a matter to be regarded in exclusively financial terms, the creation of a human relationship that is socially fundamental.'[30]

Justice Heydon, also in dissent, agreed that 'human life is invaluable – incapable of effective or useful valuation.'[31] He cited approvingly the view of Meagher J in *CES v Superclinics (Australia) Pty Ltd* that: '[O]ur law has always proceeded on the premise that human life is sacred. That is so despite an occasional acknowledgement that existence is a "vale of tears".'[32]

Justices McHugh and Gummow, for the majority, said that it was inappropriate to think of this as a case of a 'wrongful birth', which might thereby undermine respect for human life; rather it was one of wrongful negligence. In effect, the matter was legal rather than religious or metaphysical, and there was law to cover the relevant action. 'To suggest that the birth of a child is always a blessing, and that the benefits to be derived there from always outweigh the burdens, denies the first category of damages awarded in this case; it also denies the widespread use of contraception'.[33]

Justice Kirby was more openly critical of what he saw as the religious basis for disallowing recovery in such a clear case of negligence and consequent damage. Observing that 'many of the judicial opinions' from other jurisdictions (disallowing recovery in similar cases) were supported by 'Biblical citations' about the value of human life,[34] he insisted that judges

> have no authority to adopt arbitrary departures from basic doctrine. Least of all may they do so, in our secular society, on the footing of their personal religious beliefs or 'moral' assessments concealed in an inarticulate premise dressed up, and described as legal principle or legal policy.[35]

28 Ibid.
29 Ibid.
30 Ibid 24.
31 Ibid 128.
32 Ibid 129.
33 Ibid 36.
34 Ibid 52.
35 Ibid 53.

It was not for the judges to become theologians, he said. 'If there is any area where the law has no business in intruding, it is in the enforcement of judicial interpretations of Scripture and in giving legal effect to judicial assertions about "blessings"'.[36] Such religious argument, he believed, was divorced from the modern social realities of Australia and other 'like countries' where 'millions of people use contraceptives daily to avoid the very result which the appellants would have the Court say is always to be viewed by the law as a benefit (except perhaps where the parent or child is disabled).'[37] Moreover, the law was quite capable of quantifying the costs of such 'nebulous items such as pain and suffering and loss of reputation'.[38] It could therefore quantify the costs of raising a child.

As Bernadette Richards[39] has argued, the dissenting judges in *Cattanach* felt unable to apply quite straightforward principles of tort law concerning duty of care, its breach and occasioned loss, all of which were present, because they felt they were being asked to see human life as a loss rather than as a blessing and, worse still, to quantify the amount of loss occasioned by the birth of a child. In short, they believed they were being asked to challenge the principle of the sanctity of life and they were unwilling to do this. To Richards, this was a wholly inappropriate framing of the legal question: it was not about whether the child, as human life, had value but whether the parents in question, who were not well off, were now further out of pocket as a consequence of the doctor's negligence – and clearly they were. A third unplanned for child would prove very costly to them. Indeed we may see the willingness of High Court judges to depart from such settled legal principle as evidence of the strength of the sanctity of life principle – as a strong concession to openly religious thinking with the repeated invocation of life as 'a blessing'.

VII The Correlativity of the Sexes and the Sacrament of Marriage

The most dramatic tension between the secular principles of autonomy and bodily integrity and the sacrament of marriage is to be found in the criminal legal principle that the husband is immune from prosecution for the rape of his wife – a principle which persisted in Australia until 1991. The principle, of course, did not compromise the autonomy and bodily integrity of men, only women. It was clear evidence of a patriarchal religious order: rape was then in most common law jurisdictions a crime which could only be committed by a man against a woman and then there was the marital exemption which, in essence, deemed the wishes of the woman irrelevant. The husband and wife were not to be thought of as separate individuals but as a single unit in which there was no room for consent or refusal in intimate relations.

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36 Ibid 58-9.

37 Ibid 64.

38 Ibid 56.

39 Bernadette Richards, 'Life as Loss?' in Vic Pfitzner and Bernadette Richards (eds), *Issues at the Borders of Life* (ATF forthcoming 2009).

The continuing exclusion of people of the same sex from marriage shows a perfect unity between law and religion in their understanding of the sacrament. The emergence of rights to register a legally-recognised non-marital union suggest a tempering of this approach and a movement towards the principle of autonomy. But it is clear that marriage is still not for gay people.

It is difficult to find areas of life more personal, more life-defining, as these. And yet they are regulated, according to religious principles, despite the liberal legal theory of the inviolability of the private sector and the secular principles of autonomy and bodily self-determination. They positively impose a meaning of intimate life which is in conformity with religious precepts.

We could say that there has been a failure to make the move to contract, to a law based on personal choice, in certain areas of law which are (not-coincidentally) matters of strong concern to the Church (eg family law and same-sex rights and the spousal immunity; and euthanasia). These are areas of life arguably left behind in a pre-contractual state: where legal principle is based on religious principle.

The assertion that law's conceptual and doctrinal competence is strained in these supposedly difficult metaphysical areas must be questioned. (This was the suggestion of the minority in *Cattanach*.) Perhaps there is a case for saying that the orientation of law towards the able, rational, autonomous chooser weakens doctrine in areas of human vulnerability. But it can also be argued, as many judges do (witness Kirby J), that legal principle is general competent and apposite and it is legally inappropriate to stray from it in a bid to pronounce on the metaphysical meaning of life and death.

VIII Imposition of Dogma

The imposition of Church doctrine is troubling because of its potentially illiberal nature. By definition, the efforts of the religious to impose their views on law, to make it conform to their view of religious doctrine, are illiberal as they are endeavouring to inhibit or override the contrary views of others. Typically, these religious views are against individual choice.[40] They are therefore also in conflict with the legal principle of autonomy which is perhaps the most fundamental principle in legal thinking and in our liberal culture. They are also anti-Enlightenment because they are not based on reason and discovery or on human choice and representative democracy but on revelation and religious dogma.

But religion comes from the inside of law, as well as from the outside. And so we need also to reflect on and be willing to criticise religious views already interior to law which are accorded great respect. These religious views dictate (rather than negotiate) ways of coming into existence, of reproducing, of being a sex, of having sex (with whom and even how), of sexuality, of being or forming a family,

40 Witness the intense religious debates about the legality of abortion between those who are pro 'life' and those who are pro 'choice'.

of dying and treating the dead. They cover the entire human life cycle. They may be expressed tacitly, explicitly, and sometimes by force.

They tend to impose rigid, doctrinal, dogmatic, moral measures of what is good, bad and taboo. Life is sacred, a blessing, a gift from God; death is a bad,[41] possibly a form of punishment for human sin; single women should not be mothers; homosexual couples seeking legal recognition of their relationships offer a perversion of the sacrament of marriage. These measures are typically patriarchal and homophobic. They down play the competence of law; they also attack its liberal foundations (which are based on human choice). The embedded religiosity of law tends to reproduce the gender order of religion. The religious worldview is highly patriarchal. The Catholic order is explicitly patriarchal; the Anglican order more subtly so. Marriage ordered in a certain gendered way is at the heart of it.[42]

IX State Restraint and Respect for the Religious

A persistent problem is that the very liberal legal ideals which demand state restraint when it comes to our private lives and our deepest beliefs are likely to muffle and inhibit criticisms of religious principles as they operate within law. Indeed it may be said that law treats Christian religious principles and Christian representatives with respect, even reverence, with positive 'solicitude'. There is preparedness to find good in religion,[43] to find moral authority, to assume that the Church offers ethical expertise;[44] to assume that the religious are experts at being good; as if the secular were not; to slide between morality and the Church.[45]

There is therefore, paradoxically, a secular liberal humanist reason for the thin metaphysics of law in the public sector and the simultaneous respect for the thick metaphysics of the religious or at least a reluctance to take issue with religious metaphysics. As Tamas Pataki observes, 'religious tolerance is largely a creature of secular humanism, and in its spirit the majority of critics manqué have simply

41 For an analysis of the medico-legal attitude to death, as a bad, see Robert A Byrt, *Death is that Man Taking Names: Intersections of American Medicine, Law, and Culture* (2002).

42 This is a well-rehearsed feminist point and is dealt with in Carol Pateman, *The Sexual Contract* (1988)

43 See Jeremy Webber, 'Understanding the Religion in Freedom of Religion' in Peter Cane, Carolyn Evans and Zoe Robinson (eds), *Law and Religion in Theoretical Context* (2008) 26.

44 In *A Children* [2000] 4 All ER 148 for example, although the Archbishop's submissions were rejected Walker LJ said that the Archbishop's points were 'entitled to profound respect'.

45 Religion is treated as a good, as ethically sound, and the religious as thoughtful, as nicer, even as ethical experts. (Webber (ibid) suggests that the principle of freedom of religion and the protection of it as a right carries this necessary implication – it endorses a religious principle.) This is a view of the religious which Richard Dawkins, for one has explicitly refuted. See Richard Dawkins, *The God Delusion* (2006).

declined to fire'.[46] Thus law, in liberal spirit, out of respect for the religious, has often declined to criticise the contents of religious belief and indeed has treated such belief as intellectually respectable and has been willing to draw upon it when need is thought to arise.

There is certainly a great legal reluctance to challenge directly what are taken by the religious to be truths. There may well be a judicial or scholarly recognition that what once had a Biblical justification (say the principle of the sanctity of life) now has a secular justification (humanism). But judges and law makers and even legal scholars are reluctant to go further and say, in true atheistic humanistic spirit, that there is no basis for belief in God and that its tenets can be positively harmful.

The situation is therefore complex. Liberal law purports to respect, even to display solicitude for, the fact of personal religious belief and explicitly protects the right to believe. It therefore endeavours to forbear from offering a rich conception of the meaning of life, of the good, so that each individual can form their own conception. Autonomy, choice and bodily self determination are perhaps the strongest guiding liberal legal principles reflecting this position of metaphysical forbearance: respect for these principles means that these life choices are ceded to the individual and their protection is regarded as vital to liberal freedom.

At the same time, the Catholic Church offers a strong defined dogmatic metaphysics, especially in relation to the intimate sphere of life and at the edges of life. Moreover it does not hesitate in coming forward because it is a proselytising faith offering a universal conception of the good. Liberal legal restraint and respect for religious belief countenances a respectful, even forbearant attitude, to such interventions. But in truth the concessions to faith are greater than this. For our liberal law has already accepted some of the most fundamental religious tenets as simply the natural, almost invisible, moral setting of personal choice. In other words, it is taken as a given that personal choices will be for life and for intimate union understood in a largely religious manner. Already it presupposes the contents of religious belief (life is sacred, death is bad, wrong sex is misguided if not perverted).

If modern, liberal law is a product of secular, rationalist, Enlightenment, liberal thinking, surely it should be, in the first instance, sceptical of positions based on faith and not on evidence (ie rationalist), it should always affirm personal choice, as the starting position, in all relations and also be sceptical of hierarchical religious institutions which purport to speak for all believers (which suppress or ignore internal dissent and plurality).

Judicial willingness to treat the religious as existential experts and to accord its representatives particular respect – this referral of life, sex and death matters to the Church or to God or to conscience, treating them as exceptional, deep, mysterious and metaphysically difficult or obscure – can entail, I suggest, a renunciation of

46 Tamas Pataki, *Against Religion* (2007) 11.

legal responsibility when law is actually fully up to the task (as Kirby J argues explicitly in *Cattanach v Melchior*, the legal principles are there).[47]

X A Thought Experiment: A Fully Realised Enlightenment, Secular, Rationalist, Contractual World

What if we engage in the thought experiment[48] of carrying through contract, that is self and other relations of choice, into all parts of life: of applying it in a thorough-going manner, in a comprehensive way? This may let us see more clearly the departures from secular principles which otherwise can be taken as a given; to render the unthought of thinkable; to bring prohibited or suppressed or unacknowledged relations into the realm of possibility. It can render mindless automatic habits of thinking mindful and apparent. It can make explicit what is currently fuzzy thinking about what is taken to be natural, beyond law, beyond contract. (It can reveal the repositories of religion within law.)

If motherhood (whether to become one), sexual intercourse (how and with whom), family formation (how we form a legal family unit), life and death decisions (such as voluntary euthanasia) were all a matter of choice, how different would our world be? If Enlightenment rationalism and liberal choice, based on the idea that we are creatures of reason who can govern our own lives, were carried through, what then? Would we be in a very different world? And who would be the main objectors to this world?

Or to put this in terms of permissible contractual relations, we need to consider contracts between mother and foetus, mother and baby, mother and doctor, human and animal, man and man, woman and woman, brother and sister, adult and child, and person and self. Who should have the right to contract, to be a party to relations? What sort of choices do we enable and prohibit?

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47 Birth, death and sex can signify lack of control over being human (see, eg, Burt, *Death is that Man Taking Names* (2002)) and lead to fear, irrationalism, disgust and religious deference. Thus the Church is brought in to bury people and to conduct the final rites: to offer explanation, security and solace. The Church baptises and marries. It provides authority and certainty, comfort and assurance. As Pataki observes: 'For many people religion is precious, the deepest expression of human value and longing. It provides hope, consolation, and the sense of being loved and of being worthy of love to multitudes.' Pataki, *Against Religion* (2007) 7. Indeed religion provides a structure and a set of life and death rituals – and the fact that it does this, still, suggests a wanting in the secular ethic. Religion is invited in because there is arguably a failing in secular rituals.

48 A thought experiment is just that. It is an experiment conducted within the imagination rather than in a laboratory. 'Thought experiments are strange: they have the power to present surprising results and can profoundly change the way we view the world, all without requiring us to examine the world in the way that ordinary scientific experiments do.' David C Gooding, 'Thought Experiments' in Edward Craig (ed), *The Shorter Routledge Encyclopedia of Philosophy* (2005) 1018.

We must keep reminding ourselves that law is capable of conceptualising and contractualising all or any of these relations. It is omnicompetent. Think of the inheriting embryo and the personified corporation. It is limited only by imagination and by the acceptable.[49]

Having isolated the areas where contract is disallowed or inhibited, we can consider the reasons for these departures. We can also consider the role religion plays in securing and defending these prohibitions on human choice. And if we now see more clearly, as a consequence of this experiment, the deviations from this contractual ideal, then what do we think of them? Do we regard them as legitimate? Do we want them? In other words, we are in a position to make informed decisions about the legal relations we should be permitted to make and to have, especially when they concern the most intimate aspects of our lives.

[49] This proposition is critically examined in Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009) especially the chapter on Legalism.