LAW AND MORALITY

Sir Anthony Mason[*]

In this paper I do not intend to review the historic debates about law and morality which trace back to the views of Plato and Aristotle and involve the interpretation of John Stuart Mill's writings. They culminated in the celebrated dispute between Professor Hart and Lord Devlin arising out of the Wolfenden Report on Homosexual Offences and Prostitution in 1957 in England.[1] The issues canvassed in that dispute have simmered ever since and have generated continuing commentary. That commentary is no more than a background for this discussion. My primary concern is to discuss the relationship between law and morality as it stands today in Australia.

That relationship is very different from the relationship as it was seen in the days when I was a law student at the end of the Second World War and when I entered the legal profession shortly afterwards. Then, the adherents of legal positivism were in the ascendant and my mentors held strongly to the view that there was a division between law and morality. In insisting upon this division, they made the mistake of misunderstating the relationship between law and morals, a criticism made by Lord Devlin of Professor Hart, and, more tellingly, by Professor Lon L. Fuller.[2]

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1 Report of the Committee on Homosexual Offences and Prostitution (CMD 247) 1957 (The Wolfenden Report).

2 L.L. Fuller, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593; 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630; and *The Morality of Law,* rev edn, Yale University Press, New Haven, 1969.

The dichotomy between law and morality favoured by the legal positivists was associated with the 'command' theory of law, a theory which no longer enjoys widespread acceptance. In the context of the command theory of law, it was only natural that discussion of the suggested dichotomy between law and morality centred on the relationship between the principles of criminal law on the one hand and, on the other, the precepts of morality and ethical values. That relationship was the focus of the Hart–Devlin controversy, as one might have expected of a controversy arising out of a report.[3] which recommended decriminalising homosexual conduct on grounds advocating a separation between criminality and morality.

It is, of course, impossible to deny that law is, and always has been, influenced by fundamental precepts of morality and ethical values. Lawyers, even today, sometimes forget that Hart was careful to acknowledge the influence of morality on law. In *Law, Liberty and Morality*, he asked the question 'Has the development of law been influenced by morals?'.[4] His unequivocal response to the question was '[t]he answer to this question is plainly "Yes"'.

A negative response would deny the very considerable contribution to the development of our law by ecclesiastical law. Indeed, the Ten Commandments are reflected in the principles of the criminal law, the civil law and family law, though the nature of the sanctions vary from time to time and from jurisdiction to jurisdiction. For example, adultery, once regarded as serious misconduct, is not regarded with the same disfavour and is not visited with the same consequences by law, at least in Australia, as it once was.

The Impact of Religious Decline and of Liberalism and the Emphasis on Regulation of Human Conduct by Law

The decline in the power of organised religion, indeed the decline in adherence to the religious ethic, in conjunction with the rise of liberalism, has seen a retreat on the part of the law from the regulation of

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3 The Wolfenden Report, *above* n 1.

4 H.L.A. Hart, *Law, Liberty and Morality,* Oxford University Press, Oxford, 1984, 1.

private conduct, for example unorthodox sexual conduct, which was thought to be aberrant and abhorrent to the majority in the community. No doubt there are various reasons for non-regulation of conduct of that kind between consenting adults, one of them being that it is essentially a private affair. But there is no denying that, in earlier times, such conduct was regarded as highly immoral to the point of being evil, indeed so evil that it was made a criminal offence. Though some still regard such conduct as immoral, many do not, and strong disagreement about that issue is itself a reason for non-regulation.

The liberal idea that the law should not extend to the regulation of private conduct also lies behind the move to decriminalise the smoking of marijuana, though, in this instance, the debate is affected by other cross-currents, such as the question whether marijuana leads to the taking of dangerous drugs of addiction. Compare the treatment of tobacco where increasing regulation is aimed at making the hazards of smoking manifest and at the prohibition of smoking in places where it affects others.

At the same time, the law now regulates areas of human conduct in order to put an end to practices which are now considered to be violations of fundamental rights. There is a strong strand of modern liberal philosophy which is opposed to discrimination against race and gender. In these and other areas, discriminatory conduct has been proscribed or subjected to sanctions.

The most interesting example has been the much-debated racial vilification law. Opposition to that law was based on various grounds. They included the notion that the criminal law should not be employed to proscribe private conduct unless it is harmful to the community, together with the argument that to criminalise all racial vilification was to go too far. Indeed, it is difficult to resist the conclusion that harnessing the criminal law to deter and punish hate speech is a high water mark in the modern tendency to seek to reform human conduct by imposing criminal sanctions. The strength of the criticism of the racial vilification law induced the Federal Attorney-General to play down the expectation that offences against the law would be prosecuted and to suggest that its principal purpose would be educational, a justification

for a criminal law advanced more often in Communist societies than in Western societies.

Regulation of discriminatory conduct is but an example of the massive expansion in legal regulation of human conduct and activity which has taken place in recent times. It would be a mistake to assign one cause for this development. But it is fair to say that the decline in organised religion and in the religious ethic has probably played some part in encouraging the belief on the part of the governing class that it is necessary to resort to legal compulsion on a large scale to induce society to conform to desired standards of conduct, including standards of neighbourly conduct.

The emergence of the nuclear family is another factor. Along with other factors, including the decline in religion, the disintegration of old social and economic conventions and standards, and the decline in a strong sense of national identity and purpose, it has contributed to an erosion in the core of common assumptions which united the community, or large segments of it, in earlier times, and even as recently as fifty years ago. That erosion has led to single issue political movements and aggressive pursuit of political goals, accompanied by increased resort to litigation with a view to protecting and enforcing group and political interests. These developments have in turn accentuated the importance of law in our society and generated expectations, no doubt exaggerated in many cases, that law will provide an answer to pressing political and social problems or a means of achieving political and social goals.

While politicians and administrators resort to law in the form of legislation to regulate and mould social conduct according to desired standards, resort to law in the form of litigation, according to the adversarial model, may well have a disintegrating, atomistic effect.

On the other hand, the impact of internationalisation or globalisation is having a profound effect on domestic law. The formulation of international conventions by the United Nations and other agencies which are designed to introduce legal regimes spanning national boundaries is leading inevitably to the adoption of legal rules and values with a universal flavour. Very often those rules and values have a natural law foundation and are expressed in such general and alluring terms as to defy rejection. These conventions therefore attract ratification by many

nations and in this way ultimately influence the shape of domestic law. The world-wide acceptance of fundamental rights is a powerful illustration of this process at work.

Courts are Called Upon to Decide Philosophical and Moral Issues

Just as important philosophical issues are arising for executive and legislative judgment, so also such issues are confronting the courts with increasing frequency. *Marion's Case* is a striking illustration.[5] There it was recognised that the Family Court had jurisdiction to authorise sterilisation in appropriate circumstances of a child who was intellectually and emotionally impaired. The High Court affirmed the proposition that it is for the courts to make decisions of this kind, decisions which involve issues of ethics and medical practice. As Lord Templeman observed in the House of Lords in *In re B*:

> [N]o one has suggested a more satisfactory ... method [than proceedings before a judicial tribunal] of reaching a decision which vitally concerns an individual but also involves principles of law, ethics and medical practice,[6]

particularly in a case which concerns the fundamental right of a girl to bear a child.

Although the issue in *Marion's Case* and its successor, *P v P*,[7] was one concerning the welfare jurisdiction of a court to make a sterilisation order, the interpretation of the relevant statutory provisions relating to the welfare jurisdiction required examination of the general policy of the law. Thus, the majority referred to the principle of personal inviolability as stated by Cardozo J in these words:

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5 (1992) 175 CLR 218.

6 [1988] AC 199 at 206.

7 (1994) 181 CLR 583.

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault.[8]

The majority went on to say:

> The conclusion (that sterilisation is a special case and needs court authorisation) relies on a fundamental right to personal inviolability existing in the common law.... Our conclusion does not, however, rest on a finding which underpins many of the judgments discussed; namely, that there exists in the common law a fundamental right to reproduce which is independent of the right to personal inviolability. We leave that question open. It is debatable whether the former is a useful concept, when couched in terms of a basic right and how fundamental such a right can be said to be.[9]

Brennan J, in his dissenting judgment in *P v P*, was also influenced by what he regarded as a fundamental principle of the law, namely that 'every person's body is inviolate'.[10] This led His Honour to say that, in the absence of legal imperatives, he would deny to any agency of the State power to authorise the invasion of the physical integrity of any person except to save life or save the person from serious physical harm.

The Influence of Moral Values on the Shaping of Modern Criminal Law

The decisions of the High Court of Australia in the past decade or so support the view that the long-standing principles governing criminal liability and punishment have been shaped with moral and ethical values very much in mind. The Court has reinforced the fundamental principle that criminal intent is the central element in criminal culpability.

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8 *Schloendorff v Society of New York Hospital* 105 NE 92 (1914) at 93.

9 (1992) 175 CLR at 253–254.

10 *Above* n 7 at 611.

The Queen v O'Connor[11] is a good illustration. The respondent was charged with stealing and with wounding with intent to resist arrest. He was acquitted of these charges but was convicted of the alternative charge of unlawfully wounding. The evidence was that he was so intoxicated as to be incapable of forming an intent to steal or wound. In refusing to follow the decision of the House of Lords in *Majewski v The Queen*,[12] a majority of the High Court concluded that, in the absence of some statutory qualification, proof of blameworthy intention to commit the offence charged was a fundamental requirement of the common law.

The same insistence on a blameworthy state of mind as a core element in criminal responsibility was evidenced in *The Queen v Crabbe*,[13] where the Court said:

> The conduct of a person who does an act knowing that death or grievous bodily harm is a probable consequences, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or do grievous bodily harm. Indeed, on one view a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur.... If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the world 'probable' means 'likely to happen'.[14]

Accordingly, the Court concluded that knowledge that death or grievous bodily harm will result from an act was enough to sustain a conviction for murder under the Northern Territory *Criminal Code*, though knowledge that death or grievous bodily harm would possibly

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11 (1980) 146 CLR 64.

12 [1977] AC 443.

13 (1985) 156 CLR 464.

14 *Id* at 469.

result was not enough.[15] Such knowledge did not amount to a sufficient blameworthy intent to satisfy the concept of criminal responsibility.

The same insistence on a blameworthy intent or state of mind was also evident in *Georgianni v The Queen*.[16] There the appellant was convicted of six counts of culpable driving under s 52A of the *Crimes Act* 1900 (NSW), an offence which did not require the prosecution to prove any state of mind on the part of the driver. The prosecution sought to prove that the appellant, who was not the driver, aided, abetted, counselled or procured the commission of the offences. The prosecution's case was that, as a mechanic who worked on the relevant vehicle and procured the use of it by the driver, either he was aware of serious defects in the vehicle's brakes and that they could fail or that he acted recklessly not caring whether those facts existed or not. Wilson, Deane and Dawson JJ held that, notwithstanding that the principal offence did not require proof of any state of mind, to make out secondary participation it was necessary to establish that the person charged intentionally participated in the principal offence and so had knowledge of the essential matters which went to make up that offence, whether or not he knew that those matters amounted to a crime.[17]

Another settled principle of criminal law, rooted in moral and ethical values, which has been authoritatively affirmed by the High Court, is the principle that the punishment must fit the crime. Or, to state the principle more accurately, a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.[18] In other words, the notion of preventive detention has no part to play in sentencing except in so far as the principles relating to sentencing permit the sentencing judge to have regard to the protection of society within the framework of proportionality. Extending a sen-

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15 See also *Boughey v The Queen* (1986) 161 CLR 10 at 42–43 where Brennan J regarded acting with knowledge or probable consequences as just as heinous as acting with intent to bring about those consequences.

16 (1985) 156 CLR 473.

17 (1985) 156 CLR 473.

18 *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at 472.

tence merely for the purpose of imposing preventive detention is not permissible. The joint judgment of Mason CJ, Brennan, Dawson and Toohey JJ in *Veen v The Queen (No. 2)*[19] calls attention to the illuminating controversy on the topic between Mr C.S. Lewis on the one hand, and on the other, Dr Norval Morris, Donald Buckle and Professor J.J.C. Smart, which is to be found in *Res Judicatae*.[20]

Courts insist on fair and proper standards of conduct in the administration of the criminal law. In Australia, we have recognised the existence of a judicial discretion to exclude illegally procured evidence. And in *Ridgeway v The Queen*,[21] the High Court held that the trial judge possesses a discretion to exclude, on public policy grounds, evidence of an offence or of an element of an offence in circumstances where its commission has been brought about by unlawful conduct on the part of law enforcement officers. Further, three members of the Court concluded that the discretion extends to the exclusion of evidence where a criminal offence has been induced by improper, though not unlawful, conduct on the part of the authorities.[22]

In *Ridgeway*, a majority of five members of the court held that evidence tending to show that the heroin supplied to the appellant had been, or was reasonably suspected of having been illegally imported, should be rejected on public policy grounds. That was because the evidence of the illegal importation of the heroin, which was an essential element of the offence charged, was of an importation deliberately arranged by police officers in contravention of the relevant statute. In the result, the appellant's conviction for having in his possession a prohibited import, which had been imported in contravention of the statute, was quashed and a permanent stay was granted.

The decision is an instance of the proposition stated by Holmes J that it may be 'a less evil that some criminals should escape than that the

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19 *Id* at 473–474.

20 (1953) 6 *Res Judicatae* 224, 231, 368.

21 (1995) 129 ALR 41.

22 *Id* at 52 per Mason CJ, Deane and Dawson JJ.

government should play an ignoble part',[23] a proposition endorsed by Stephen and Aickin JJ in *Bunning v Cross*.[24] In that case, their Honours went on to say that 'the courts should not be seen to be acquiescent in the face of the unlawful conduct of those whose task it is to enforce the law'.[25] *Ridgeway* stands in a close relationship with the strand of recent Australian cases, of which *Jago v District Court of NSW*[26] is the best known example, where a permanent stay of a criminal proceeding has been granted on the ground of abuse of process.

But the best example of the courts' insistence on the absence of improper purpose in the bringing of proceedings is *Williams v Spautz*[27] where it was held that proceedings brought for an improper purpose constitute an abuse of process whether or not a fair trial can be had.

The Impact of Moral and Ethical Values in the Development of the Law of Negligence

The influence of moral values in the development of negligence has been evident for all to see since Lord Atkin enunciated his famous 'neighbourhood' principle in *Donoghue v Stevenson*.[28] The later formulation of the duty of care in terms of the concept of foreseeability is also an instance of the moulding of legal principle in conformity with moral values. That tendency can be seen even more clearly in the modern articulation of the duty of care in terms of proximity in cases such as *Jaensch v Coffey*[29] and its successors. The concept of proximity is based on the neighbourhood principle, the neighbour being, in the view of the common law, a person who is so closely and directly affected by my act that I ought reasonably to have him in mind as being

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23 *Olmstead v United States* 277 US 438 (1927) at 470.

24 (1978) 141 CLR 54 at 78.

25 *Id* at 78.

26 (1989) 168 CLR 23.

27 (1992) 174 CLR 509.

28 [1932] AC 562.

29 (1984) 155 CLR 549.

so affected when I am directing my mind to acts or omissions which are called in question. In other words, the duty of care and the law of negligence generally are centred on the notion of responsibility to have reasonable regard for the interests of others.

Australian reliance on the concept of proximity as a criterion of the existence of a duty of care has been stronger than the use of proximity made by courts in the United Kingdom, Canada and New Zealand. The use of proximity as a determinative concept or criterion has been criticised on the ground that it expresses a result rather than a principle.[30] It is said that proximity is not susceptible of precise definition; nonetheless it is a useful idea stressing as it does the need for a sufficient relationship between the parties with respect to the alleged negligent class of act and the particular kind of damage sustained by the plaintiff.[31] The criticism of this use of proximity is by the way. In other common law jurisdictions, proximity is a relevant, though not a decisive, consideration. For present purposes, it simply evidences the concern of the law of negligence to recognise a responsibility to have reasonable regard for the interests of others.

The same notion can be detected in *Rogers v Whitaker*,[32] where the High Court decided that, except in the case of an emergency or where disclosure would prove damaging to the patient, a medical practitioner has a duty to warn the patient of a risk inherent in treatment which the practitioner proposes. Here the notion that one has a responsibility to have reasonable regard to the interests of others was applied in a context where an expert is required to respect the autonomy of the individual whom he is advising so that the individual is enabled to make an informed decision as to what is in his best interests.

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30 *CNR v Norsk Pacific Steamship* (1992) 91 DLR (4th) 289 at 344, 386–387; R. Cooke, 'An Impossible Distinction' (1991) 107 *Law Quarterly Review* 46, 54.

31 *Hawkins v Clayton* (1988) 164 CLR 539 at 576.

32 (1992) 175 CLR 479.

Standards Reflecting Notions of Fairness and Fair Dealing as Applied to Transactions

The array of decisions revitalising equitable principles beginning with *Taylor v Johnson*[33] and *Commercial Bank of Australia Ltd v Amadio*,[34] and culminating with the estoppel cases ending with *Commonwealth v Verwayen*,[35] have in the minds of some imposed standards of fairness and fair dealing on the parties to transactions. In a very broad sense, that comment may be true, but it is neither precise nor strictly accurate. The High Court has vigorously reaffirmed the jurisdiction to set aside transactions where a party has been guilty of unconscionable conduct, either in bringing the transaction about or in exercising powers under or in relation to a contract. However, unconscionable conduct has not yet been equated to conduct which is not fair; so far it has been used in the sense of conduct which is harsh or oppressive, something that is 'against conscience' in the sense that it shocks the conscience.[36]

Unconscionability has two faces. It may be a ground for relief itself, as it was in *Amadio*, where the Bank took advantage of the ignorance of the guarantors in circumstances where they were plainly influenced to act otherwise than in accordance with their own interests by their own son who stood to gain from the giving of the guarantee, as did the bank. Further, unconscionability as a concept underlies other remedies such as relief against forfeiture, estoppel and restitution. In both estoppel and restitution, much of the reasoning in the modern decisions — not only in Australia but also in England, Canada and New Zealand — centres on conceptions of justice and equity. The modern law of restitution favours an approach through unjust enrichment with an emphasis on what is unjust, while the doctrine of estoppel is often elaborated in terms of

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33 (1983) 152 CLR 422.

34 (1983) 151 CLR 447.

35 (1990) 170 CLR 394.

36 Note, however, *Stern v McArthur* (1988) 165 CLR 489 at 528–529 (where the vendor's conduct in rescinding the contract, even though it amounted to an exercise of the vendor's legal rights under the contract, was held to be unconscionable because it defeated the reasonable expectation that the purchaser would obtain the advantage of any increase in the value of the property).

holding a party to a promise or representation, departure from which is unjust or inequitable or, if not holding the party to that promise or representation, at least providing a remedy in some other form.

In *Thompson v Palmer*, Dixon J pointed out that:

> the object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends upon the part taken by him in occasioning its adoption by the other party.[37]

His Honour then proceeded to provide instances where the part played in the adoption of the assumption was sufficient to raise an estoppel. Subsequently, in *Grundt v Great Boulder Pty Gold Mines Ltd*,[38] His Honour discussed the matter further. The discussion in the two judgments shows how a doctrine, founded in a notion of justice and equity, is refined into a set of principles capable of application so as to give guidance in the resolution of particular problems.

The important feature of the equity-contract cases is the open discussion of notions of justice, equity and unconscionability. Here, perhaps more than anywhere else, the moral values which inform the formulation of legal principle and doctrine, move from the wings to the very centre of the stage. The reason lies in equity's origins in the hands of the early Lord Chancellors who were influenced by natural law ideas.

Objections to Recent Development of Legal Principles by Reference to Moral Values

Developments of legal principle by reference to moral values, whether expressed in terms of neighbourly regard for the interests of others, good faith or unconscionability, have encountered objections. Sometimes the objection takes the form of criticism of unconscionability as a standard

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37 (1933) 49 CLR 507 at 547.

38 (1937) 57 CLR 641.

that is too vague. That criticism is expressed by practitioners who speak of the difficulty of advising clients when there is no rigid rule to be applied. And it has also been said that vague standards lead to uncertainty about one's rights, inconsistency in judicial decision-making and consequential erosion of confidence in the judicial system.[39]

The significance of the objection directed to unconscionability on the score that it is vague should not be lightly rejected. But we should recall that the concept has been used as a criterion in equity for a long time. *Blomley v Ryan*[40] did not spring out of a void. And the two elements in the concept are that the weaker party is at a special disadvantage and the stronger party unconscientiously takes advantage of that position of special disadvantage. Further, such force as the criticism may have is bound to decrease as there comes into existence a body of case law dealing with particular instances of unconscionability. Case law will provide the same guidance as it has done in the field of negligence. That comment has an element of irony in it as unconscionability, like the standard of the reasonable man, is largely a matter of fact.

Professional antagonism to the development of unconscionability as a remedy and as a concept underlying other doctrines stands in marked contrast with legislative initiatives, both federal and State. It is sufficient for me to refer to the Part IVA of the *Trade Practices Act* 1974 (Cth) and the *Contracts Review Act* 1980 (NSW). The developments in judge-made law have a parallel in the strong legislative initiatives which require the courts to apply similar standards.[41] There seems to be little point in railing against the hurricane. Indeed, that is more likely to erode confidence in the administration of justice than anything else.

Lying behind what I have just said is the endless debate between legal positivists and natural lawyers. The former see the object of law in order, the latter in justice. Plainly enough, in formulating legal prin-

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39 McHugh J, 'The Growth of Legislation and Litigation' (1995) 69 *Australian Law Journal* 43.

40 (1956) 99 CLR 362.

41 Cf Priestley JA, 'A Guide to the Comparison of Australian and United States Contract Law' (1989) 12 *University of NSW Law Journal* 4, 10.

ciples, judges cannot turn a blind eye to considerations of justice. They have not done so in the past; they will not do so in the future.

Another aspect of the opposition to the development of legal principles by reference to moral values or standards relates specifically to the world of commerce. The recognition by the courts in the nineteenth century of freedom of contract as a principle of public policy[42] was associated with a prevailing view that the courts should give effect to the parties' bargain and should not impose restraints upon the bargain they made. The application to commercial people of principles of law having a moral or ethical content was thought to be detrimental to commercial well-being and success. There was a conviction that English commercial success had been achieved by robust business people ruthlessly pursuing self-interest, people whose minds were uncluttered by any consideration for the interests of others. Contract was a relationship between parties who stood in an adversarial position of self-interest. Given this history, it is understandable that commercial people and those who represent them look back with nostalgia upon an imaginery legal world in which inequality of bargaining power was an irrelevance and assert that dealings between commercial people should be free from regulation.

But the world has moved on. Even in England, where the courts have been reluctant to abandon the pre-eminence of contract and freedom of contract as paramount values,[43] the common law duty of care is invading contractual relationships which were thought to be exclusively governed by the contractual dispositions of the parties to the contract.[44]

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42 *Printing and Numerical Registering Co. v Sampson* [1875] LR 19 Eq 462 at 485.

43 See *Tai Hing Cotton Mill v Liu Chong Hing Bank* (1986) 1 AC 80 at 107 (where the Privy Council denied that there was 'anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship').

44 See *White v Jones* (1995) 2 AC 207 (where the House of Lords, in holding that a solicitor instructed to prepare a will owed a duty of care to an intended beneficiary, rejected arguments that the solicitor's responsibility was exclusively governed by contract).

Moreover, the legislation to which I have referred makes no exception for commercial transactions. Section 52 of the *Trade Practices Act* applies a standard specifically to commercial dealings. It is not limited to consumer protection as that expression might be popularly understood. The legislative approach is that the world of commerce will be all the better if its conduct is not misleading and deceptive. Likewise, if it refrains from unconscionable conduct. And that makes very good sense.

So there is no prospect of commerce becoming a 'no go' area in terms of regulatory legal standards. Developments overseas point away from such an approach. In the United States, the Commerce Code imposes standards of good faith and fair dealing. And, in Europe, the EEC Directive on good faith has imposed a good faith standard on commercial transactions.

Of course, the fact that contracting parties enter into a bargain on an arms' length footing and that they possess equal bargaining power may well mean that they are unable to make out a case of unconscionability. But it does mean that there is scope for relief on the ground of misleading or deceptive conduct just as there has always been scope for relief on the ground of misrepresentation.

Fundamental Rights

Although we do not have an entrenched or statutory Bill of Rights, our laws have been shaped in such a way as to recognise and protect various fundamental rights. Such rights have been protected by Commonwealth and State statutes. Sometimes they have been protected by the courts by means of principles of statutory interpretation which require an expression of unmistakable and unambiguous intention to displace or qualify a fundamental right or a right recognised by the common law.[45] We also have instances in which the High Court has shown its willingness to have regard to the provisions of ratified but unincorporated treaties in formulating relevant common law principles.

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45 *Coco v The Queen* (1994) 179 CLR 427.

Minister for Immigration v Teoh,[46] and, to a lesser extent, *Dietrich v The Queen*,[47]are notable examples. In *Dietrich*, the Court drew attention to article 14 of the *International Covenant on Civil and Political Rights* which provides for representation by counsel similar to the representation which the Court evolved from the common law concept of a right to a fair trial.

I should mention also the free speech cases. Not that I identify them as recognising a fundamental right to free speech. Rather, they are instances of 'representation re-inforcing' interpretation. They recognise freedom of communication limited to political discussion, a freedom based on the structure of the Constitution and its provisions relating to voting which enable one to say that the Constitution provided for representative government. The implication of substantive equality recognised by some members of the Court in *Leeth v The Commonwealth*[48], stands in a somewhat different position, but this is not the occasion to discuss it.

The point I wish to make about these cases, like cases on fundamental rights, is that they invite, indeed compel, courts to balance interests and values directly so that the judgments come to grips with philosophical, moral and ethical values as well as relevant public interests. In the area of fundamental rights, it is simply not possible for judges always to take refuge in legal doctrine.

Legal Doctrine and Values

Judgments sometimes contain references to values. That is not surprising. Legal principles and doctrines are based on values of various kinds, including policy considerations. For the most part, the arguments presented in cases about legal principles and doctrines do not turn on an examination of the values on which the principle or doctrine is based. The relevant values are generally understood or taken for granted.

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46 (1995) 128 ALR 353.

47 (1992) 177 CLR 292.

48 (1992) 174 CLR 455.

But that is not always the case. Take, for example, the well-known comments of Brennan J in *Mabo v Queensland (No. 2)*,[49] a judgment in which McHugh J and I concurred, namely:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectation of the international community accord in this respect with the contemporary values of the Australian people.[50]

His Honour went on to refer to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights*. His Honour was making the point that unjust discrimination in the enjoyment of civil and political rights was inconsistent with international standards and the fundamental values of the common law, these being standards and values reflected in contemporary Australian values, evidenced, for example, by such statutes as the *Racial Discrimination Act* 1975 (Cth). These references to standards and values were called in aid of the rejection of the unjust doctrine said to be supported by the earlier decisions. In other words, the values on which they were based were unacceptable.

Shortly afterwards, Brennan J, in *Dietrich*, explained what he meant by 'contemporary values'. His Honour said:

> The common law has been created by the courts and the genius of the common law system consists in the ability of the courts to mould the law to correspond with the contemporary values of society.... Legislatures have disappointed the theorists and the courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state, a function which calls for consideration of the contemporary values of the community....

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49 (1992) 175 CLR 1.

50 *Id* at 42.

> The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community.[51]

In other words, a clear distinction is to be drawn between values of an enduring kind and community attitudes and prejudices with respect to a particular issue or question. So, a Court of Criminal Appeal will not be induced to depart from settled principles governing the sentencing of offenders simply because the community believes that offenders of a particular class should be harshly dealt with or subjected to indeterminate imprisonment.

In his celebrated work *The Common Law,* published as long ago as 1881, Justice Oliver Wendell Holmes began with the celebrated passage:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.... In order to know what [the law] is, we must know what is has been and what it tends to become.[52]

That statement, influential though it has been, may possibly overemphasise current, as opposed to enduring, values.

A similar comment might be made about Justice Cardozo's views as expressed in his *The Nature of the Judicial Process*:

> Law is, indeed, an historical growth, for it is an expression of customary morality which develops silently and unconsciously from one age to another....

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51 *Above* n 47 at 319.

52 O.W. Holmes, Jr, *The Common Law*, facsimile edn, Dover, New York, 1991, 1.

> The standards or patterns of utility and morals will be found by the judge in the life of the community.[53]

But Justice Cardozo made it clear that 'logic and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law'.[54]

One object served by a Bill of Rights, whether entrenched or statute-based, is to identify authoratively a set of values which will inform judicial decision-making. Indeed, it is sometimes suggested that there should be set out in the preamble to the Constitution or in a statute, a set of appropriate values. It would be a mistake to expect too much from such an exercise. I doubt that the list of values would differ in any significant respect from those that judges would apply in any event.

More importantly, such a list of values would not provide assistance in resolving any conflict between values and the weight to be given to them in particular situations. The problem is that so much depends in a given situation, on the nature of the question which arises, the character of the particular value or policy consideration which is said to be relevant, and how it is to be balanced against any other factors which may be relevant.

In the absence of a Bill of Rights, or some statutory prescription, how do the courts identify community values of an enduring kind? Some values have been historically protected by the common law — the right to life, liberty and property, the right to a fair trial, to give some instances. Other values have achieved international recognition by means of Declarations and Conventions which have been ratified by Australia, particularly Declarations and Conventions which recognise universal fundamental rights. The courts have no difficulty in identifying, and may accept these values. So, in *Mabo*, the Court was able to discard earlier authority on the footing that it was at odds with the concept or value of non-discrimination acknowledged in international instruments, particularly the UN Convention against Racial Discrimi-

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53 B.N. Cardozo, *The Nature of the Judicial Process*, Yale University Press, New Haven, 1929, 104–5.

54 *Id* at 112.

nation in all its Forms, which was implemented by the *Racial Discrimination Act* 1975 (Cth). And, in *Marion's Case*,[55] Brennan J, in his dissenting judgment, was able to identify human dignity as a value common to our municipal law and international instruments relating to human rights. There were strong reasons for thinking that the values identified in these cases were enduring community values on which the courts are entitled to act.

However, as *Minister for Immigration and Ethnic Affairs v Teoh*[56] demonstrates, it is for the court to decide whether what is contained in an international convention ratified by Australia is to form part of the common law. In deciding that question, the court will look to a number of factors, including the relationship between the convention provision and the existing principles of the common law.[57]

The use of the expression 'contemporary community values', unless understood in the sense stated above, can give rise to difficulties. That is because it may suggest that the courts articulate legal principle by reference to transient community attitudes on particular issues, a notion that must be rejected. Indeed, an examination of those cases in which the courts have formulated legal principle by reference to values will reveal that the values in question have been values of an enduring kind.

It has been suggested that invocation of community standards in the sense of values may be no more than an invention by judges of new heads of public policy.[58] That might be so if the 'community standards' invoked fall short of the enduring values of which I have been speaking.

I draw a distinction between values on which the formulation of legal principle is based and community standards or beliefs which guide a court in determining particular issues, for the most part issues of fact. Stephen J in *Onus v Alcoa of Australia Ltd* seems to have been

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55 *Above* n 5 at 266–267.

56 *Above* n 46 at 353.

57 *Id* at 362–363.

58 *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 117 ALR 393 at 405 per Gummow J.

addressing such an issue when he said '[c]ourts necessarily reflect community values and beliefs'.[59] In resolving issues concerning the existence of a duty of care and the standard of care in negligence, heads of damage in compensation for personal injury, maintenance and other issues in family law cases, judges constantly have regard to community standards, relying not only on materials placed before them but also on their own experience. Standards of that kind are different from the values on which legal principles have been based.

Of course, the difference between the two may be difficult to detect. Take, for example, the discussion in *White v Barron*[60] of the question whether, in a family provision case, a court should confine to widowhood any provision made by a court for a widow. The High Court disapproved the earlier presumption in favour of confining such a provision, by reference to a perceived change in community understanding of the needs and welfare of the aged.

References to 'contemporary values' have generated some debate and, divorced from the context in which they have been used, have led to some misunderstanding. Contrary to what some people may think, judges do not decide questions of law *directly* by reference to their subjective values or contemporary values. Judges decide such questions by reference to principle and doctrine, except when the question, as some fundamental rights issues initially do, directly calls for a consideration of values. Even in such cases, the consideration involves contemporary values of an enduring kind, including values recognised as fundamental by Socrates, Plato and Aristotle. And, in the course of that consideration, the courts will evolve legal principles and doctrines so that in the fullness of time principles and doctrines become established and settled.

There is, of course, the problem that a judge may be tempted to identify accepted community values in terms of his own values. This is more likely to occur unconsciously than consciously. It is impossible to be precise about this. But it would be wrong to assume, as some

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59 (1981) 149 CLR 2 at 42.

60 (1980) 144 CLR 431 at 438–439.

commentators do, that this is an inevitable element in the judicial process. Identification of relevant values can, and should be, an objective process. The search for an objective standard is one explanation for the use by the courts of values declared and protected by international conventions.

Despite the generality and imprecision of the term 'values', in the context of formulation of legal principle, I use it to embrace an array of philosophical, moral, ethical and policy considerations. Considerations of that kind, or one or more of them, may be relevant whenever it becomes necessary to examine the shaping and the underpinnings of legal principle or doctrine. In the ultimate analysis, the courts are generally concerned to enunciate general principles, though there is an increasing tendency to require courts to exercise a broad discretionary judgment, by reference to factors which are to be evaluated and balanced. The *Family Law Act* 1975 (Cth) confers a significant part of the Family Court's jurisdiction in that way.

The question is often asked: how do judges inform themselves about contemporary community standards which are applied in determining issues of fact? Judges have the advantage of evidence and argument and they are members of the community in which they live; they are not a class apart. And their occupation, sitting day by day listening to evidence of events and transactions, gives them a unique window on the world in which they live.

I conclude with two comments. One is to call to mind Roscoe Pound's bold statement in his work 'The Spirit of the Common Law' that the endeavour to make morals and law coincide will be an important future goal.[61] The other is to say that the judges have been shaping the common law for 800 years or more with a keen eye to philosophical, moral, ethical and policy issues and that there is nothing at all remarkable about this.

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61 R. Pound, 'The Spirit of the Common Law' in M. Jones (ed) *The Philosophy of the Law in the Nineteenth Century*, 1921, 141–142.