Review of: *Jurisprudence of Liberty* (2nd ed)

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When the first edition of *Jurisprudence of Liberty*[1] was published in 1996, there was a dearth of good jurisprudence books, so its arrival was somewhat of a boon for legal theorists. Fifteen years later, there is still a dearth of good jurisprudence books, so the new edition of *Jurisprudence of Liberty*,[2] two hundred pages longer and with eight more essays than its predecessor, is an even bigger treat for legal theorists. However, this compilation is not only a useful resource for those teaching, specialising, or doing higher research in legal theory, it is also a good introduction to those thinking of braving the turbulent, though invigorating, waters of legal theory for the first time.

The essays in the new edition of *Jurisprudence of Liberty* are arranged thematically in six parts, namely: *Constitution and Liberty, Liberty and the Evolutionary Tradition in Jurisprudence, Natural Law and the Defence of Liberty, Utilitarian and Economic Theories of Law, Contemporary Threats to Freedom under Law,* and *Rights and Liberties.*[3] The book's contributors have varied backgrounds and many are international experts in legal theory. The essays are written in both a scholarly and engaging fashion applying legal theory to a range of contemporary issues, thus bringing what is often considered a 'dry' academic subject to life.
Although dealing with a number of strands of legal theory, the over-arching theme for both editions of *Jurisprudence of Liberty* is, obviously, 'liberty'. While jurisprudence is often

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[1] Suri Ratnapala and G A Moens (eds), *Jurisprudence of Liberty* (Butterworths, 1996).
[2] Suri Ratnapala and Gabriel Moens, (eds), *Jurisprudence of Liberty* (LexisNexis Butterworths, 2nd ed, 2011).
[3] Ibid vii, viii.

concerned with other major themes such as equality or fraternity, the concept of liberty has arguably had the most significant role in the shaping of jurisprudence throughout history and in turn being shaped by it, as some form of liberty, whether liberty to or liberty from seem to inevitably prefix almost every other human right or aspiration be it equality, fraternity, or anything else– even the view there are no human values presupposes the liberty to hold, or the liberty from interference of holding, such view.

Yet 'liberty' as a concept is hard to pin down. As the book's editors, Ratnapala and Moens, observe 'the concept of liberty means different things to different persons, and yet it is clear that all human beings cherish liberty in some form or another'.[4]

In jurisprudence, attempts to understand liberty have often been through the lens of natural law which, of course, is covered in the book. But, as Ratnapala and Moens note 'There is, however, another, jurisprudential tradition which has contributed significantly to the cause of liberty, but which has been studiously neglected in legal circles. This is the tradition which embraces a diverse group of scholars who explain law as an endogenous 'bottom up' phenomenon rather than as an exogenous imposed 'top down' projection of authority'.[5]

Therefore, jurisprudence is examined in this book not only through the lens of natural law, but also through that of evolutionary legal theory. A further lens, through which the various essays examine jurisprudence in this book, is constitutionalism, the very framework of the law. Thus, while natural law is primarily concerned with the content of law, evolutionary legal theory and constitutionalism are also concerned with the social conditions and structures which give rise to and support laws. As can be seen from the various essays in this book, the pursuit of liberty depends on all of these aspects being addressed in jurisprudence.

In order to do proper justice in this review to the individual works and their respective authors, I have briefly summarised the book's six parts and their constituent essays, and have footnoted the author's details in exactly the same way that they appear in the book. Where an essay is one

[4] Ibid ix.
[5] Ibid.

which did not appear in the 1996 edition, I have indicated as much in the footnote following the essay's title.

Part 1 Constitutionalism and Liberty

This part contains six essays, which examine various aspects of constitutionalism as it pertains to liberty, each contained in separate chapters (as all essays are throughout the book).

In the chapter *Republican Liberty* [6] after referring to George Washington's inaugural speech to the American people reminding them that it was their duty to preserve the 'sacred fire of liberty',[7] Professor MNS Sellers[8] boldly states his aim is 'to identify the nature and origins of the sacred flame Washington sought to preserve, and its association with republican government'.[9] What follows is an illuminating history of republicanism (which Sellers describes as 'the parent of liberalism in modern law and politics'[10]) from Ancient Rome and Italy during the Renaissance and late Middle Ages, through to England (the Cromwell years), and the US and French Revolutions.[11] Sellers notes that the most successful periods in these various republican governments were those where the commitment was strongest, through the use of mixed government models and an effective separation of government powers, to achieve a balance between popular sovereignty, the pursuit of the common good and the rule of law – these three things, Sellers confidently concludes in his essay 'together constitute 'the sacred flame' George Washington embraced in his inaugural address'.[12]

In *Separation of Powers: The Cornerstone of Liberty under Law*[13] Suri Ratnapala,[14] further explores the separation of powers theme as a means of pursuing liberty, and the extent that this principle has been applied in republican and other types of constitutional governments

[6] Ibid 19-52.
[7] G Washington, 'The First Inaugral Speech' (30 April 1789) in *George Washington: A Collection* (ed WB Allen), (Liberty Classics, 1988) 462.
[8] Regents Professor, University System of Maryland; Visiting Professor, Georgetown University Law Center.
[9] Ratnapala and Moens, above n 2, 19.
[10] Ibid.
[11] Ibid 20-50.
[12] Ibid 52.
[13] Ibid 53-82.
[14] Professor of Public Law and Fellow of the Centre for Public, International and Comparative Law, TC Beirne School of Law, University of Queensland and Fellow of the International Centre for Economic Research, Turin.

throughout various times in history including; Hellenic Greece, Republican Rome, Renaissance Italy, Middle Ages Germany, and England before and after the Glorious Revolution of 1688 and in particular the 19th Century period of reforms.[15] Ratnapala's discussion is based on two separation of power theses: the 'diffusion thesis' where different powers are exercised by different branches of government,[16] and the 'methodological thesis' where one branch of government does not exercise a power that ought to have been more properly exercised by another.[17] Ratnapala observes that copious amounts of subordinate legislation and the fact that governments of the day (the executive) effectively drive the legislative agenda in Parliament has posed a threat to the diffusion thesis of separation of powers in Australia,[18] but notes that these have so far been kept in check by extensive administrative review powers and bodies and various 'watchdogs' such as the media and interest groups, as well as the 'practical survival' of the methodological thesis which he warns only has 'a precarious hold without the aid of the diffusion thesis'.[19]

In *Rule of Law and the Democratic World Order,*[20] Professor Geoffrey Walker[21] observes that since neither absolute power (or discretion) nor absolute legalism are desirable for achieving liberty, a balance between the two is only possible if there exists in a democracy a number of factors to ensure the rule of law will not only be followed but also respected. He identifies and discusses the following such factors: normativism of the law, enforcement of the law, government action in accordance with the law, judicial independence, independent legal representation, natural justice (ie due process), accessibility to the courts, impartial enforcement of the law, and a 'geist' of legality.[22]

This last point is highlighted in Dr Augusto Zimmerman's[23] dynamic essay *Legal Culture and the Rule of Law in Latin America*[24] where he discusses the problems that arise in transplanting

[15] Ratnapala and Moens, above n 2, 56-80.
[16] Ibid 53-54.
[17] Ibid 53-54.
[18] Ibid 79.
[19] Ibid 81.
[20] Ibid 83-92.
[21] Emeritus Professor of Law, TC Beirne School of Law, University of Queensland.
[22] Ratnapala and Moens, above n 2, 87-92.
[23] Senior Lecturer and Associate Dean, Research, Murdoch University, School of Law.
[24] Ratnapala and Moens, above n 2, 115-137– new entry - did not appear in the 1996 edition.

ready-made constitutions, similar to ones based on the US model, into post-colonial and other developing countries like those in South America, where there has not been the necessary culture of legality to ensure the rule of law will be respected in those countries. As Dr Zimmerman notes: 'The rule of law cannot subsist without the assistance of a social context of respect for legality'[25] and he identifies four significant factors that shape the legal culture, namely: populism and the cult of the strong, charismatic (even messianic) but usually undemocratic, leader;[26] presidentialism, a consequence of populism which sees power vested in one individual with a broader scope for unilateral power and fewer checks and balances than in the main alternative model of government, namely parliamentarianism;[27] intellectuals in Brazil who Dr Zimmerman notes often 'have little respect for liberal-democratic traditions and legal institutions of the most developed countries in the world'[28] and he further ventures that 'With few exceptions, therefore, it would be appropriate to affirm that the vast majority of universities in Latin America are archaic repositories of old-fashioned Marxist conceptions of law and society';[29] and, finally, resurgent radicalism in discussing which Dr Zimmerman debunks the popular conception of politics in Latin America as being a conflict between a landholding oligarchy backed by a right wing military and democratic forces of the left, fighting for greater freedom and social justice (Che Guevara-style) while describing a much more complex Latin America with several left wing governments across Latin America 'bent on establishing a regime based on a disguised form of elected dictatorship' including Ecuador, Nicaragua, and Brazil and the efforts of the latter to influence other countries in the region such as Honduras.[30] Born and raised in Brazil, and having spent much of his adult life working there, Dr Zimmermann has first-hand knowledge of the region and offers an erudite and engaging account of the region's legal culture (or rather want of it) making this chapter somewhat of a cultural eye-opener and a salient reminder that the best laws are only as good as the social forces that support them.

[25] Ibid 136.
[26] Ibid 119-120.
[27] Ibid 120-123.
[28] Ibid 123.
[29] Ibid.
[30] Ibid 126-128.

Lael Daniel Weinberger's[31] essay *Enforcing the Bill of Rights in the United States*[32] examines the relationship between rights and the US constitution and discusses how the judicial approach to the conception of rights in the US has gone from one where rights were seen to exist independently of the US Constitution and inherent in the structure of the Constitution to one where individual rights are not seen to exist independently but have to be found in the wording of the Constitution, so that rather than the Constitution being considered to be an instrument which prevents the derogation of eternal self-evident rights, it is merely a source of such rights. Weinberger traces this change back to the introduction of the Fourteenth Amendment adopted in 1868 shortly after the end of the Civil War to remedy the inevitable discrimination by states which arose following adoption in 1865 of the Thirteenth Amendment ending slavery.[33] Weinberger notes that the Fourteenth Amendment's prohibition of the states from abridging privileges and immunities of citizenship of the US and the deprivation by any state of the life, liberty or property of any person without due process significantly broadened the powers and reach of the Constitution into state affairs, as did the dramatic expansion of the federal government in the twentieth century[34] particularly after a change in the composition and attitude in the Supreme Court from being seemingly hostile towards Roosevelt's New Deal legislation in their decisions to one of being in favour of it.[35] This, in turn, and rather ironically, lead to more Bill of Rights litigation (against unrestrained expanded government action) and thus more individual rights from case precedents.[36] Weinberger sums up this development as follows:

> The move by the Supreme Court to enforce the individual rights guarantees of the Bill of Rights, rather than enforce structural limits of the rest of the Constitution, is not an indication that freedoms and liberties are being protected better than they used to be in the United States. Rather, it is an indication that modern government tends to overreach its structural bounds, and the original redundancies of the Bill of Rights are coming into play as a last ditch defence against the state's encroachment on individual freedom.[37]

[31] Law Clerk for the Honorable Daniel Eismann, Chief Justice, Idaho Supreme Court; JD summa cum laude, Oak Brook College of Law.
[32] Ratnapala and Moens, above n 2, 93-113 – new entry – did not appear in the 1996 edition.
[33] Ibid 99.
[34] Ibid 99-100.
[35] Ibid 101-102.
[36] Ibid 102-103.
[37] Ibid 113.

Part 2 Liberty and the Evolutionary Tradition in Jurisprudence

This part comprises four essays and, true to the theme of inter-disciplinarity which the reader will have discerned as emerging throughout the book so far, it puts particular emphasis on the need to look to a number disciplines, and to engage in some creative thinking, in the pursuit of liberty.

In his second essay in the book, *Law as a Knowledge Process*,[38] Professor Ratnapala notes that although 'law school jurisprudence has been largely untouched by the perennial controversy in philosophy as to whether there is a world outside the mind'[39] one of the reasons why law school philosophers have lately become a 'quarrelsome bunch'[40] is that 'it is no longer possible to ignore this question now that the issue of the possibility of objective knowledge and its implications for legal theory have been raised unequivocally by postmodernists in the legal academy'[41] and, further, 'a re-examination of the epistemological basis of jurisprudence in the wake of the post-modern critique promises rich rewards in the form of the exposure of alternative theoretical approaches within the broader liberal tradition'.[42] With those comments in mind, Ratnapala espouses a unique theoretical approach which he describes as being 'modeled on a basic Darwinian theme of natural selection that re-centres the debate concerning natural knowledge that exposes the inadequacy of the postmodern critique',[43] and cites his influences to be such diverse sources as Karl Popper, Donald T Campbell, Konrad Lorenz, Peter Munz and FA Hayek[44] (who is also discussed in other essays in this part of the book). Ratnapala answers the post-modern critique that all knowledge is subjective and has no source but convention or authority by effectively agreeing with the post-modernists that all theory knowledge is dependent on theory and thus provisional (and there is no absolute foundation of all knowledge), but disagrees with the post-modernists that knowledge is merely arbitrary preference, noting how 'theories' or laws proposed by legislators (arguably arbitrary preferences) often fail as the self-

[38] Ibid 161-174 – new entry – did not appear in the 1996 edition.
[39] Ibid 175.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid 176.
[44] Ibid.

ordering nature of societies (ie a process of evolution of knowledge) severely limits the scope of any such social engineering.[45]

In *Hayek's Theory of Rules and the Modern State*,[46] Professor Viktor Vanberg[47] identifies another important component of Hayek's jurisprudence other than the one for which he is best known (what Vanberg calls 'critique of constructivist rationalism I'– namely the rejection of the claim that man can achieve a desirable order of society by concretely arranging all its parts in full knowledge of all the relevant facts).[48] This other component of Hayek's theory is the need to devise proper rules of conduct to ensure a desirable beneficial 'spontaneous' order to result and be maintained (ie what Vanberg calls 'constructivist rationalism II')[49] and has often been portrayed by Hayek's critics not as an additional component of the Hayekian scheme but an inconsistency with the main thrust of the scheme (ie the critique of constructivist rationalism I). Vanberg discusses a type of constitutional reform that Hayek proposed that ensures governments are organised in such a way that they do not mix their executive and legislative functions as they often do now, but rather have a non-executive branch of government committed to the way the laws are made.[50] Notably missing, however, at this point in the essay, is a discussion of why another layer of government would be required to achieve this end when a court such as the High Court of Australia fulfils this role or how such an extra layer of government would do things different to or better than a court. Nevertheless, this omission does not take any potency out of Vanberg's key argument that while Hayek's proposals for constitutional reform appear to contradict his critique of constructivist rationalism I, it is rather a 'logical extension of his general argument on the interrelation between the order of rules and the order of actions, and his understanding on how we may hope to improve our 'social conditions' by improving the 'rules of the game'[51] - or in other words, a second equally important, component of the Hayekian scheme.

[45] Ibid 204.
[46] Ibid 141-160.
[47] Emeritus Professor of Law, TC Beirne School of Law, University of Queensland.
[48] Ratnapala and Moens, above n 2, 142.
[49] Ibid 145.
[50] Ibid 159.
[51] Ibid 160.

The late Professor Neil McCormack[52] in his essay *Spontaneous Order and Rule of Law: Some Problems*[53] applauds Hayek's arguments of the futility and dangers of constructivist rationalism: 'It brings us to the truth that humans are not gods and cannot act as though they have divine knowledge'. This Hayekian insight adds special force to the warning to humans not to play God'.[54] However, he highlights a number of major objections to Hayek's own application of his critique of constructivist rationalism (ie this application being to the effect that welfare programs are effectively against the economic spontaneous order), perhaps the main one being that it does not impose duties of positive justice.[55] Professor McCormack argues that a conscious undoing of some of the constructivist rationalism of the post war years in the '80s onwards (eg Reaganism and Thatcherism) in an attempt to restore the 'spontaneous' economic order of pre-welfare times, could be having the same sort of damaging effect as constructivist rationalism itself (even from a Hayekian perspective), or looked at another way, these targeted welfare programs themselves might have emerged as part of the spontaneous order as necessary correctives to unbridled economic rationalism.[56] In advancing erudite logical arguments such as these, Professor McCormack reminds us that perhaps more often than not it is the application of a theory that is open to challenge rather than the theory itself and often it is the theory's founder who becomes, inadvertently, its own worst advocate and enemy.

Professor Alan Fogg's[57] *Dworkin, Hayek and the Declaratory Counter-revolution Revolution*[58] offers yet another perspective on Hayek, and by placing Hayek in the esteemed company of Richard Dworkin, describes these intellectuals as counter revolutionaries against the modern climate of legal realism.[59] Professor Fogg observes that Dworkin's faith in finding the right legal principle to solve 'hard cases' and Hayek's preference for spontaneously evolved judge-made law effectively put them at odds with Hart's notion of a judge choosing between completing principles and 'relying like a conscientious legislator on his sense of what is best and not on any

[52] The late Neil MacCormack was Regius Professor of Public Law and the Law of Nature and Nations, and Provost of the Faculty Group of Law and Social Sciences, University of Edinburgh.
[53] Ratnapala and Moens, above n 2, 161.
[54] Ibid 164.
[55] Ibid 174.
[56] Ibid.
[57] Emeritus Professor of Law, TC Beirne School of Law, University of Queensland.
[58] Ratnapala and Moens, above n 2, 205-244.
[59] Ibid 205.

established order of priorities among principles already prescribed for him by law'.[60] Fogg, citing Geoffrey Walker, notes that legal positivism and legal realism are only factional disputes since realism is arguably just a form of positivism,[61] and legal realism is what currently characterises the US judicial context with its emphasis on 'beneficient results rather than identification of the historical origins of the common law or acknowledgment of restraints inherent in spontaneous order systems'.[62] In a colourful metaphor, Professor Fogg notes that positivism and realism 'came from the stable, and share the common assumption that law has an identifiable author and is an act of will'.[63] Fogg concludes that Hayek's approach is more useful than Dworkin's in the counter revolution against legal realism in that the former 'explodes the realist myth that sterile logic necessarily controls development of the common law under old ideas, and thus can be the vehicle for a successful counter-revolution based on genuine community opinion rather than the constructivist ideas of an intellectual elite'.[64]

Part 3 Natural Law and the Defence of Liberty

This part considers more familiar territory for legal theory and liberty: that of natural law (but with a few novel twists).

Professor Aroney[65] and Assistant Professor Miller[66] in their essay *Finnis on Liberty*[67] discuss one of natural law's most recent prolific figures, John Finnis, and identify four types of liberty present in his system of thought: existential, moral, legal and political.[68] By existential liberty, the authors refer to 'Finnis's claim that human beings characteristically find themselves with a capacity to make choices about courses of action and his assertion that these choices are free of

[60] Ibid 210, cited: HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) 7.
[61] Ibid 211, cited: G de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 173.
[62] Ratnapala and Moens, above n 2, 212.
[63] Ibid.
[64] Ibid 244.
[65] Professor of Law, Centre for Public, International and Comparative Law, TC Beirne School of Law, University of Queensland.
[66] Assistant Professor of Law, Faculty of Law, University of Western Ontario.
[67] Ratnapala and Moens, above n 2, 247-270 – new entry – did not appear in the 1996 edition.
[68] Ibid 248.

absolute determinism, whether it be psychological, physiological, social or economic'.[69] By moral liberty, the authors refer to Finnis's closely related claim that as free moral agents, we have the liberty, and also the responsibility, to make practical choices among a plurality of rational goods.[70] By legal liberty, the authors refer to 'the freedom to make choices between courses of action unconstrained by positive law…(which) has two distinct aspects: first, the absence of a countervailing legal duty and, second the absence of a legal power to impose a contradictory duty'.[71] Political liberty, the authors describe as 'freedom from legal constraint (ie legal liberty) by the coercive force of government'.[72] The authors argue that the existential (and moral) side of Finnis's conception of liberty is 'in the nature of freedom from – it is a liberty to make choices from absolute determinism (which) acknowledges the liberty of human subjects to choose to act in ways that are either rational or irrational'.[73] On the flip-side of this coin, Finnis argues that our lived experience as human beings does not just involve freedom in the sense described above but also 'as involving moral freedom shaped by our capacity for reasoned judgment about our actions, including …capacity to apprehend certain things or states of being as rationally good – as valuable and desirable'.[74] This involves a 'liberty *to* (my emphasis) choose among the vast range of rationally desirable affairs'[75] To inform and facilitate this choice, be it for one's own self or for others, the authors refer to the seven 'self-evident' human goods for which Finnis is perhaps best known as a jurist (life, knowledge, play, aesthetic experience, friendship, practical reason, and religion),[76] but there is also discussion of Finnis' political thoughts such as his notion of the common good, subsidiarity, and the legitimate role of government[77] and his views on commutative and distributive justice and the role of the latter in ensuring an individual's flourishing as well as that of the rule of law and the constitutional arrangements and type of governance that Finnis suggests would be desirable to support them.[78] Finally, there is also discussion of Finnis' own interpretation of the application of his seven self evident goods: human goods on issues such as contraception, abortion, cloning and embryo

[69] Ibid.
[70] Ibid.
[71] Ibid 248-249.
[72] Ibid 249.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid 250, citing *Natural Law and Rights* (Oxford University Press, 1980) chapters 3 and 4.
[77] Ibid 254-259.
[78] Ibid 259-264.

research, euthanasia and assisting suicide, and the nuclear deterrent.[79] Here, we see some questionable gymnastics of logic by Finnis on many of these issues and other issues on which he weighed-in to the public debate (eg homosexuality: he was against it as he said it failed to respect the marriage good – a good which he later added to his list of seven -while seeming not to see he had completely ignored the friendship good, and at the same time apparently having shackled himself to his own form of absolutism, one that George W Bush and equally unimaginative politicians of a conservative stripe everywhere publically adopt, if only disingenuously – 'a marriage must be between a man and a woman'). Thus, we are perhaps again reminded how the personal interpretation and application of a theory by its founder perhaps fails to reveal the true beauty and potential of that theory.

Professor Gabriël Moens'[80] essay *The German Border Guard cases*[81] examines the application of natural law principles in a number of cases in West Germany involving the murder prosecutions of former East German border guards for shooting people attempting to flee to West Germany. While the cases that resulted in convictions appear, at first blush, to be victories for justice, Professor Moens argues that these decisions were not soundly based, and if anything, could do more harm than good to the cause of natural law, in particular to the principle that imposes a duty upon individuals to disobey a law clearly recognisable as violating higher moral principles (the 'Nuremberg Principle')[82] Professor Moens observes that proper consideration was not given to the social histories and backgrounds of the border guards on trial, in particular their enculturation with a code of obedience to the law (which he refers to as 'the German tradition')[83] – something that was ubiquitous in former East Germany at the time of the shootings and the exact opposite of the liberal attitudes of its western contemporaries (most tellingly, West Germany right next door where the trials took place) where a more robust defiance of immoral laws might reasonably be expected as the norm (which Professor Moens describes as 'the critical tradition'[84]). Without proper attention being paid to such matters, Professor Moens says there

[79] Ibid 265-268.
[80] Pro-Vice Chancellor, Professor of Law, Murdoch University Law School; Adjunct Professor of Law , City University of Hong Kong; Deputy Secretary-General, Australian Centre for International Commercial Arbitration; *Membre Titulaire*, International Academy of Comparative Law.
[81] Ratnapala and Moens, above n 2, 271-292.
[82] Ibid 271.
[83] Ibid 290.
[84] Ibid.

would be 'difficulties involved in the identification of the minimum content of the natural law by people who have not been sufficiently exposed to 'the critical tradition'[85] which effectively 'erodes the certainty of the law and the legitimate expectations of the border guards'.[86] Professor Moens concludes his provocative essay on the following poignant note: 'Although the border guard cases appear, on the surface, to have delivered substantive justice, the legal system of the reunified Germany failed to achieve a satisfactory resolution to the perennial problem of whether citizens have a duty to disobey immoral laws'.[87]

Also of historical interest and significance, William Wagner's[88] essay *The Jurisprudential Battle over the Character of a Nation*[89] focuses on significant US rights cases which have been decided under the US Constitution and how judicial approaches have fallen into roughly two camps: one, 'an objectivist *Unalienable Worldview* that sees God as the source of law and rights - where ageless moral absolutes or objective reference points provide an inviolable fixed measure'[90] or 'Conversely, a subjectivist *Alienable Worldview* which sees man as the morally-relative evolving measure – and measurer of all things'.[91] Wagner notes that while the US Declaration of Rights itself describes rights such as life, liberty and property as unalienable, many US rights cases appear to have made these rights alienable and substituting for them rights not originally contained in the US Constitution. Perhaps one of the most well known instances of this is the celebrated 1973 case *Roe v Wade*,[92] where a right (to life) has been alienated (ie by allowing abortion) and in its place has evolved, through a series of decisions, a 'new' right not explicitly embodied in the Constitution, namely 'a right to privacy of personal autonomy involving reproductive choice to abort',[93] a right which has since been enshrined in subsequent US Supreme Court decisions.[94] Professor Wagner discusses a number of milestone US Supreme Court decisions on this and other social issues such as religion (the Establishment Clause), free

[85] Ibid 291.
[86] Ibid.
[87] Ibid 292.
[88] Prior to joining academia, Professor Wagner served as a judge in the United States Courts, as a diplomat and as a senior United States prosecutor in the Department of Justice and as legal counsel in the United State Senate. He currently serves as Professor of Law at the Thomas M Cooley Law School where he teaches constitutional law.
[89] Ratnapala and Moens, above n 2, 293-330 – new entry – did not appear in the 1996 edition.
[90] Ibid 296.
[91] Ibid.
[92] *Roe v Wade*, (1973) 410 US 113.
[93] Ratnapala and Moens, above n 2, 314.
[94] Ibid 314.

speech, and marriage. This essay is an excellent and entertaining insight into the US Constitution's rights history from someone who has been a US State prosecutor, US judge, and American Diplomat.

Part 4 Utilitarian and Economic Theories of Law

This part, with three chapters, brings the discussion of legal theory and liberty into the market place and the sphere of politics.

Professor James Allan,[95] in his essay *Utilitarian and Economic Theories of Law,*[96] provides a spirited defence of utilitarianism and its role in promoting liberty, and how liberty is best served not by judges but by legislation and parliamentary processes. Using the same reasoning, he argues against a bill of rights for Australia while noting, among other things, the increasing prevalence of the 'living document' and 'textualist' judicial approach to constitutional interpretation over an 'originalist' approach. Professor Allan opines that if we were to opt for a bill of rights, such 'fast-and-loose, expansive, interpretative approach – one that seems to me to place few, if any, external constraints on what they can decide, just their own sense of what is best, must and more appropriate – ought to be considered',[97] as should, he continues 'the potential politicization of the judiciary',[98] 'how judges are appointed'[99] and 'the extent of their enervated and indirect democratic warrant, if any'.[100] While I agree that Professor Allan makes a good point in effectively suggesting that while democratic decision-making seems to always cop it, the judiciary should not always be immune from some of the popular government critiques - for example there is a need 'to see that public choice theory (and its cynical acid) is applied to the judiciary'[101] - however, I cannot help but feel none too bright about the future of liberty in utilitarianism's hands and that Allan's essay seemed to be saying not a great deal more than democratic decision-making is the best of a bad bunch of decision making mechanisms we have – but then again, I guess that is all 'brand democracy' can ever aspire to be with hundreds of years of utilitarianism an indelible part of its pedigree.

[95] Garrick Professor of Law, TC Beirne Law School, University of Queensland.
[96] Ratnapala and Moens, above n 2, 331-342 – new entry – did not appear in 1996 edition.
[97] Ibid 341-342.
[98] Ibid 342.
[99] Ibid.
[100] Ibid.
[101] Ibid 341.

Professor Ian McEwin's[102] essay *Liberty Law and Economics*[103] discusses one of the main facets of the utilitarian perspective, namely efficiency, and provides a good discussion of this concept in economic terms as well as its emphasis in the different economic schools, from the view that efficiency is the sole concern (the Chicago school) to efficiency is only a means to an end in the pursuit of liberty (the classical liberals) and the libertarian position, somewhere in between.[104] Professor McEwin manages to put his finger on recent global economic trends, even if he doesn't make specific reference to them (that comes up in another essay later in the book) when he provides what is effectively a response to those who insist economic efficiency is a panacea to all society's ills, when he says that 'until economic efficiency can be defined in such a way as to incorporate values such as liberty more explicitly in the efficiency analysis, economic analysis should only play a limited, descriptive role in dealing with legal issues. Normatively, economics has little to say about the desirability of alternate legal rules and institutions'.[105]

Francesco Parisi,[106] in his essay *Law as a Voluntary Enterprise,*[107] discusses customary law, its emergence and role in the economic sphere and society generally (and, refreshingly unusual for a book on jurisprudence, identifies 'game theory' as a means of assessing the emergence, evolution and survival or otherwise of legal customs and practices).[108] We too often forget that law is not all formal case-based or statute-based law but is also 'informal law' in the form of legal customs and practices that gave rise to the formal laws and may (or may not) still exist alongside them or serve to fill the interstices in formal laws. Parisi suggests 'all welfare maximizing norms that have spontaneously emerged in society are already equipped with the community's authority and should, therefore, enjoy direct legal application. According to paradigms of efficient law-making, this decentralized process has a competitive advantage over more institutional processes'.[109] This essay thus nicely complements Neil McCormack's and

[102] Professor of Law, National University of Singapore.
[103] Ratnapala and Moens, above n 2, 343-360.
[104] Ibid 358.
[105] Ibid 360.
[106] Oppenheimer Wolff and Donnelly Professor of Law, University of Minnesota and Professor of Economics, University of Bologna.
[107] Ratnapala and Moens, above n 2, 361-378.
[108] Ibid 369-370.
[109] Ibid 376-377.

Victor Vanberg's essays in addressing the problems raised in those essays about how to implement Hayekian principles of rules of the game, and how to make a Hayekian scheme address questions of positive justice (or social justice).

Part 5 Contemporary Threats to Freedom under Law

This part features two essays on politics and contemporary issues – contemporary radicalism in legal theory and the Global Financial Crisis ('the GFC') of 2008.

The essay *Contemporary Radicalism and Legal Theory*[110] is by Nazi Germany devastation survivor and internationally respected scholar Eugene Kamenka[111] and his wife, the late Ehr-Soon.[112] It opens with a tantalizing and thought-provoking fact to introduce its topic: 'When Karl Marx died in London in March 1883, just eleven people attended his funeral. Yet in the late twentieth century, more than one third of the world's population was led or governed in his name'.[113] The rule of law is examined in this essay and how it has (or has not) fared under 'classic' Marxist regimes as well as how it, and other trends in contemporary jurisprudence, are shaped by current trends in Marxist thinking. The authors trace current Marxism to the New Left that arose in the student upheavals of 1968 which they describe as 'a loose coalition of left radicals, neither pervasively Marxist nor welded to any common theoretical positions'.[114] The authors contend that the change of the working dynamic and growing middle class in developed countries has meant classical Marxism has only really been kept alive in underdeveloped countries where primarily agrarian populations may still suffer from feudal repression, military dictatorship and neo-colonial exploitation.[115] The authors observe that the hostility to the rule of law found in classical Marxism (where the 'rule of law' is seen as something completely defined and manipulated by the powerful elites to drive and sustain capitalism) has yielded to the more positive view of the role of law which has emerged under newer conceptions of Marxism,

[110] Ibid 381-405.
[111] Professor of History of Ideas, Research Institute of Social Sciences, Institute of Advanced Studies, Australian National University, Canberra.
[112] The late Alice Erh-Soon served as Challis Professor of Jurisprudence, Department of Jurisprudence, Faculty of Law, University of Sydney.
[113] Ratnapala and Moens, above n 2, 381.
[114] Ibid 386.
[115] Ibid 384.

concluding that there is 'the need to abandon a simplistic conception of the consensus-conflict opposition so as to facilitate a more adequate analysis of the forms of conflict and their conditions as well as their relationship to the forms of law and order existing in these states to more adequately address the problem of the role of law under socialism, communism, and for that matter under capitalism'.[116]

Professor Marc De Vos,[117] in his essay *The Financial Meltdown and its Threat to Freedom under the Law,*[118] provides an informative analysis of the causes of the 2008 Global Financial Crisis or 'GFC'. He identifies four: cheap foreign money, a booming housing market (to secure the foreign loans), the financial sector (with their 'innovative' derivative financial products such as pooled 'sub-prime' mortgages), and finally inadequate accounting rules.[119] Contrary to conventional wisdom, Professor De Vos does not blame lack of regulation. If anything, he says rather than an absence of oversight, the problem lay in an overabundance of oversight and in the cracks and overlaps that developed.[120] He notes that the commercial banking sector was already regulated, the US housing market probably the most highly regulated in the financial system and two of the biggest players, Fannie Mae and Freddie Mac were not free market players but government sponsored and protected institutions.[121] Nevertheless, De Vos feels the actual political response has lead to and will be likely to continue to lead to three things: an inherent impact of increased Keynesianism and state capitalism on international economic development; financial regulation and monetary policy that brings protectionism in through the back door (ie by effectively increasing the market entry cost for financial players and serving as a barrier to entry to economic international development); and third, the overall economic direction of the post-crisis world does not bode particularly well for the free trade agenda.[122] He foresees lots of increased but ultimately ineffective regulation and no real commitment to solving the structural and communication problems which caused the GFC in the first place and concludes with the rather glum, although probably realistic forecast: 'The news of economic freedom is not good

[116] Ibid 404.
[117] Professor of Law, Ghent University Law School, Belgium and Itinera Institute.
[118] Ratnapala and Moens, above n 2, 405-435 – new entry – did not appear in 1996 edition.
[119] Ibid 412-414.
[120] Ibid 416.
[121] Ibid.
[122] Ibid 423-424.

and the light of liberty shines less brightly than before',[123] This essay highlights an important theme in many of the essays in this book: that the legal infrastructure and framework for making laws is just as important as the content of the laws themselves – if the bodies that administer laws properly do not communicate with one another and co-ordinate their executive functions, their laws will rarely be worth the paper they are written on.

Part 6 Rights and Liberties

This part features two essays of a fairly disparate nature. They are perhaps the hardest to categorise in terms of the broad themes of the book, but for that they are no less interesting and instructive than the other essays and both throw light on liberty, the book's central topic.

Ben Brazil's[124] contribution, *Connecting the Hohfeldian Boxes:Towards a Technical Definition of Liberty*[125] appears to be an exercise in analytical philosophy and an attempt to re-define the Hohfeldian scheme of rights by showing a relationship between the two celebrated Hohfeld 'rights boxes' (one containing rights, liberties, duties and no-rights and the other, traditionally thought to be unconnected to the first, containing powers, immunities, liabilities and disabilities).[126] Probably of all the essays in this book, this is the most theoretical and requires some perseverance to follow it all the way through but one does suspect shades of genius lurking behind the text, especially since Brazil seems, through sheer force of logic alone, and quite credibly it would seem, to reduce the Hohfeldian scheme into just two irreducible legal statuses: a duty to do something and no-duty to do something, and thus one irreducible legal relationship between duty and no-duty.[127] Brazil boldly claims this basic dichotomy can be used so that liberty 'can at last be tied down and given a technical meaning'[128] although he acknowledges, somewhat more modestly and no doubt with a tad of realism, in spite of this impressive intellectual feat, that 'its (liberty's) potency to influence and inflame matters beyond its technical application is unlikely to be undimmed'.[129]

[123] Ibid 434.
[124] Solicitor of the Supreme Court of Queensland.
[125] Ratnapala and Moens, above n 2, 439-464.
[126] Ibid 441-442.
[127] Ibid 463.
[128] Ibid.
[129] Ibid.

Lorraine Finlay[130] in the final chapter of the book *The Erosion of Property Rights and its Effect on Individual Liberty*[131] briefly examines the history of property rights in the common law, its role in supporting the rule of law generally and its function as a fundamental check on arbitrary government action.[132] Finlay compares the limited constitutional 'guarantee' with respect to Australian Commonwealth Government acquisitions of property (which is not a prevention of acquisition of property per se but only the limitation to acquisition on the grounds of 'just compensation') compared to the situation in Australia's states where there are effectively no similar guarantees (or any guarantees at all) regarding government property acquisition and a right to just compensation.[133] Finlay then discusses some recent cases where well-meaning environmental legislation such as the 'wild rivers' legislation in Queensland has had, she notes, the unfortunate yet no doubt unintended effect of limiting the ability of indigenous persons to develop land adjacent to these protected rivers making small scale environmentally sustainable developments more difficult while at the same time failing to prevent large scale industrial developments such as mining.[134] Finlay also refers to the equally well-intentioned native vegetation legislation which, although designed to prevent mass clearing, paradoxically encouraged it, as a means of getting around the provisions of that legislation as it only effectively applied to land which had vegetation already on it while at the same time it effectively punished the individuals who tried to do the right thing and comply with the legislation without mass-clearing their property – such was the case with the honest albeit hapless New South Welshman Peter Spencer who Finlay notes commenced legal action on 12 March 2007 and had had over two hundred court appearances at the time of writing.[135] Finlay also discusses property issues arising under laws related to allocation of water entitlements and heritage listings.[136] She argues that to strengthen and protect property rights: 'Our ultimate aims should be threefold: firstly, to ensure that any necessary acquisitions are carried out in as fair a manner as possible; secondly, to reverse the current trend whereby property rights are regularly and easily attacked and undermined; and finally, to work towards establishing a renewed respect for the importance of

[130] Senior Lecturer in Law, Murdoch University.
[131] Ratnapala and Moens, above n 2, 465-494 – new entry – did not appear in the 1996 edition.
[132] Ibid 475.
[133] Ibid 474-475.
[134] Ibid 475-478.
[135] Ibid 478-480.
[136] Ibid 484-491.

private property rights.[137] While agreeing that it is certainly necessary to protect the environment, Finlay notes that these laws highlight an inadequacy in the existing mechanisms for the protection of property rights in Australia and concludes with the observation that the problem is as much political as legal – that is, the public's, politician's and bureaucrat's attitude to property rights in the first place.[138] This final point is reminiscent of the points made in essays earlier in the book about the importance of legal culture in supporting laws and law reform.

Conclusion

Perhaps more strongly than anything, the underlying message from the varied contributions in this book from talented authors but with obviously different world-views and political persuasions is that the pursuit of liberty is truly a 'whole of system' concern: an inter-disciplinary exercise in which no one discipline can hope to make any progress by 'going it alone'. The fields of philosophy, psychology, economics, mathematics, social and political sciences, and even emerging disciplines such as information systems science and chaos theory as they relate to social phenomena (law, politics, economics, etc) and the interrelations between them are all necessary to inform the many factors covered in these essays on which the fate of liberty rests, namely legal culture, legal and political infrastructure including constitutionalism, and the evolution of knowledge, economic conditions and even laws and law-like phenomena such as social customs and rules.

The current edition *Jurisprudence of Liberty* is well and truly a book for the twenty first century.

[137] Ibid 491.
[138] Ibid 493.