Symposium on Community Values in Law

Community Values and Australian Jurisprudence

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1. *Community Opinion: Superficial and Deep*

The then Chief Justice of Australia, delivering the 1987 Fullagar Lecture, contended that, "[it is unrealistic to interpret any instrument, whether it be a constitution, a statute, or a contract, by reference to words alone, without any regard to fundamental values".[1] Earlier, in his Menzies lecture, Anthony Mason contended that when judges take account of values,

> they should be acknowledged and should be accepted community values rather than mere personal values. The ever present danger is that 'strict and complete legalism' will be a cloak for undisclosed and unidentified policy values.... As judges who are unaware of the original underlying values subsequently apply that precedent in accordance with the doctrine of *stare decisis*, those hidden values are reproduced in the new judgment — even though the community values may have changed.[2]

The purpose of this article is to refine the rationale for recent Australian judicial opinion that appellate courts ought to be responsive to "community values" in exercising their responsibility to keep the law in good repair, by which the judges mean relevant to contemporary Australia. A good account of the judicial reasoning I seek to justify is provided by Brennan J:

> 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. Had the courts not kept the common law in serviceable condition throughout the centuries of its development, its rules would now be regarded as remnants of history which had escaped the shipwreck of time.... 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.... The contemporary

* Professor, Law Program, Research School of Social Sciences, Austraian National University. I wish to thank Clive Bean, Valerie Braithwaite, Frank Brennan, Frank Callaway, Peter Drahos, Paul Finn, Ian Holloway, Susanne Karstedt, Philip Pettit, Cheryl Saunders, Ruth Scott, Michael Smith, Gary Sturgess, Leslie Zines, and participants at a Law and Government Seminar held at ANU in August 1994 for helpful comments on this paper and Nathan Harris and Tonia Vincent for research assistance.

1 Mason, A F, "Future Directions in Australian Law" (1987) 13 *Mon ULR* 149 at 158–9.

2 Mason, A F, "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience" (1986) 16 *FLR* 1 at 5.

> 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.... The responsibility for keeping the common law consonant with contemporary values does not mean that the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values. Although the courts have a broad charter, there are limits imposed by the constitutional distribution of powers among the three branches of government and there are limits imposed by the authority of precedent not only on courts bound by the decisions of courts above them in the hierarchy but also on the superior courts which are bound to maintain the authority and predictability of the common law.[3]

There are obvious challenges to such a view. In the eighteenth and nineteenth centuries, when courts in England and various American states delivered a plethora of judgments restricting and then abolishing slavery,[4] it is fair to say that those courts were both right and generally ahead of public opinion. From 1976,[5] when the United States Supreme Court progressively backed away from its effective abolition of the death penalty in *Furman v Georgia*,[6] it engaged in an unprincipled surrender to public opinion. In this article, I introduce a critical distinction between community values and community attitudes that helps resolve the dilemma such cases pose for the "community values" doctrine.

According to this distinction, when the courts supported the abolition of slavery, they correctly applied community values about which there was substantial consensus. The key values at issue were freedom and equal respect for human beings. From consensually held *values*, they derived judgments which flew in the face of dissensus in community *attitudes* toward slavery. Similarly, what courts can do on capital punishment is to reject majoritarian community

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3 *Dietrich v R* (1992) 109 ALR 385 at 402-3. See also Stephen J in *Onus v Alcoa of Australia Ltd* (1982) CLR 27 at 42: "Courts necessarily reflect community values ..."; Davies, G L, "The Judiciary: Maintaining the Balance" in Finn, P (ed), *Essays on Law and Government, vol 1* (forthcoming) at 41: "As part of that function, the judiciary bears responsibility for articulating and, within legally permissible bounds, developing the body of legal principles which governs the resolution of disputes in the way which will best serve Australian society; that is, in accordance with community values. It must generally do so in a way which will maintain the stability, coherence and consistency of the law"; Brown, S, "Courts and the Community: The Courts, Legal and Community Standards" (1994) *National Conference: Courts in a Representative Democracy*. Thomas J of the High Court of New Zealand is sympathetic to these views but laments that "the reference to 'community values' is altogether too imprecise. Is it therefore possible to give these norms or values any firmer or more specific content?" Thomas J's answer is "both yes and no", given that we must avoid making "the judges interpreters and ciphers of public opinion and the law the slave of the public mood": see Thomas, E W, "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) *Victoria U Wellington LR Monograph No 5* 1 at 56. The objective of this article is to clarify the "yes" and the "no" to accomplish both the autonomy and the responsiveness Thomas J seeks.

4 Finkelman, P, *Slavery in the Courtroom* (1985); Finkelman, P, *The Law of Freedom and Bondage: A Casebook* (1986). In drawing attention to the role of the courts in the demise of slavery, no implication is intended that their role was as important as the role of legislatures and anti-slavery social movements.

5 Friedman, L M, *Crime and Punishment in American History* (1993) at 316–23.

6 408 US 238 (1972).

attitudes in favour of capital punishment by arguing from consensual community values, such as respect for human life, to the conclusion that capital punishment is an overreaching of state power. The moral reasoning of the judges can be superior to the attitudes of the people, but only if it is reasoning from the foundation of values shared by the people. One reason for this is that most people do not have the time or interest on most issues to argue through the implications of their values for their attitudes on specific subjects like capital punishment. They do not have the expertise to marshal the empirical evidence on whether the introduction of capital punishment would reduce the homicide rate, or whether it would result in many executions of individuals who would subsequently be found to be innocent. As a result, populist attitudes are readily dominated by media stereotypes.

The contention of this article is, therefore, that it is community values and not community attitudes which ought to be the foundation of judicial deliberation about sustaining contemporarily relevant law. While the article begins from the premise that judge-made law is both inevitable and desirable, this is not to devalue the rule of law, particularly since the rule of law is one of the very values which I will show to be subject to an Australian community consensus. Most judicial work does not and should not make law. But we cannot escape the fact that it is the judges who created the common law, and the judges who are therefore responsible for renovating it in contemporary and responsive ways. While the Constitution, statutes and the pre-existing common law should be the main constraints on judicial discretion, when interpretive gaps remain and when changing circumstances require adaptation, judicial law-making becomes inevitable. It is in this judicial work that judges ought to argue from foundations of community values rather than community attitudes.

Section 2, below, explains the distinction between attitudes and values that has come out of the discipline of social psychology since the 1970s. The fact that near-universal consensus exists in Australia over several dozen values will be demonstrated empirically in Section 3. Section 4 then argues that values are a superior foundation for judicial deliberation than attitudes because near-universal values are more likely than attitudes to represent moral truth. Section 5 considers the critique that values which attract near-universal support are so vague and platitudinous as to be of little practical use. Section 6 addresses the concern that grounding of judicial deliberation in consensus values will inhibit the diversity of ideas that might enrich the court's deliberation. Section 7 considers options for incorporating a more principled commitment to considering community values in judicial decision-making, while Section 8 advances the specific notion of a republican Bill of Values and Rights as an alternative to a liberal Bill of Rights.

2. *The Difference Between Attitudes and Values*

The seminal clarifying work on the distinction between attitudes and values was by Milton Rokeach in *Beliefs, Attitudes, and Values*[7] and *The Nature of Human Values*.[8] Rokeach defined an attitude as a set of beliefs about a specific object or situation (such as an attitude toward slavery). A value, in contrast, is a single belief of a specific kind. It is a trans-situational guide to attitudes, actions and judgments. It lifts us above attitudes about specific objects and situations, to more ultimate goals that affect how we should judge a wide sweep of objects and situations. While a value is a standard that transcends objects and situations, an attitude is not a standard. An attitude is simply an organised[9] set of beliefs focused on the specific object or situation that gives the attitude its name. Rokeach contended that:

> a person has as many values as he has learned beliefs concerning desirable modes of conduct and end-states of existence, and as many attitudes as direct or indirect encounters he has had with specific objects and situations. It is thus estimated that values number only in the dozens, whereas attitudes number in the thousands.[10]

Subsequent empirical work, including work done in Australia, seems to have confirmed Rokeach's model that with fewer than a hundred values one can cover exhaustively all of the values that matter for almost all people.[11]

Many values correspond to needs — for example, one could describe freedom from hunger as either a value or a need. But values differ from needs in being an accomplishment of human cognition learned in a community of human beings. "Values are the cognitive representations and transformations of needs, and man is the only animal capable of such representations and transformations."[12] Moreover, sometimes those cognitive transformations are considerably greater than in the case of hunger — for example, the transformation of a need for sex into a value for love or intimacy. Many values, moreover, are not cognitive representations of needs but of societal and institutional demands. Schwartz and Bilsky see values as cognitive representations of three universal requirements: biological needs; interactional requirements for interpersonal coordination; and societal demands for group welfare and survival.[13] Values are finite in number because they tend to be standards grounded in a finite number of trans-situational demands of the human condition. Moreover, their grounding in universal demands is one reason for the near-universal consensus which characterises the most important values. Kluckhohn and Strodtbeck state it this way:

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7 Rokeach, M, *Beliefs, Attitudes, and Values* (1968).

8 Rokeach, M, *The Nature of Human Values* (1973).

9 "Organized" for psychologists means intercorrelated in ways that enable psychometrically satisfactory scales to be formed.

10 Above n8 at 18.

11 See the data in Section 3 below.

12 Above n8 at 20.

13 Schwartz, S H and Bilsky, W, "Toward a Universal Psychological Structure of Human Values" (1987) 53 *J Personality Soc Psych* 550 at 550.

> First, it is assumed that *there is a limited number of common human problems for which all peoples at all times must find some solution.* This is the universal aspect of value orientations because the common human problems to be treated arise inevitably out of the human situation. The second assumption is that *while there is variability in solutions of all the problems, it is neither limitless nor random but is definitely variable within a range of possible solutions.*[14]

3. *Values and Consensus*

Public debate over attitudes is characterised by division and dissensus. People irreconcilably hold different attitudes to abortion. During abortion debates, however, they tend not to disagree on the underlying values — respect for human life, health, freedom of choice — on which their attitudes are grounded. The pro-abortionist does not say, "who cares about human life?", but rather argues about the proper context for applying this value and the relative weight to be given to other values.[15] The empirical evidence is that most, though not all, values are characterised by high consensus both internationally and in Australia.

The values paradigm in social psychological research asks citizens to accept or reject certain values "as a guiding principle in my life",[16] or for other people's lives, or public policy. The best studies then ask respondents to think hard about whether there are any other guiding principles not covered by the list they have been given. There are various strategies for prompting the discovery of excluded values. Iteratively, this research literature has therefore built up lists of values that fairly exhaustively cover the domain.

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14 Kluckhohn, R and Strodtbeck, F L, Variations in Value Orientation (1961) at 10 (my emphasis). See also Brown, D E, *Human Universals* (1991).

15 The Australian sterilisation cases provide interesting examples of how the High Court has grappled with such debates over the proper context for applying and weighting conflicting values. See *Secretary, Department of Health and Community Services v JWB* (1992) 106 ALR 385; *P v P* (1994) 120 ALR 545.

16 This is the wording Schwartz has used in his leading studies in 35 nations, including Australia and New Zealand. See Schwartz, S H, "Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries" (1992) 25 *Advances in Experimental Soc Psych* 1; Schwartz, S H, "Are There Universal Aspects in the Structure and Contents of Human Values?" (1994) unpublished paper presented to International Congress of Applied Psychology, Madrid, 16 July 1994.

The most important Australian contributors to this literature have been Feather,[17] Bill and Ruth Scott,[18] and Valerie Braithwaite.[19] I will illustrate the consensus over values with one of Valerie Braithwaite's data sets, not because it is necessarily superior to the others (in fact, it's rather out of date) but because it is a general population study rather than a study of university students, because it explores the comprehensiveness issue and includes a "values justification study" (interviews in which citizens are asked to give justifications for their values)[20] and because I could get ready access to her raw data!

The study was based on interviews with a stratified random sample of 483 Brisbane adults in 1975. Three types of values were included in the study. Two sets concerned goals in life: personal and social goals. For the personal goals, citizens were asked to say what they felt about the value "as a principle for you to live by". For the social goals, they were asked to accept or reject them as "principles that guide your judgments and actions". Table 1 lists results for these two types of values combined in descending order of community acceptance. Seven response categories were given: "Reject this"; "Inclined to reject this"; "Neither reject nor accept this"; "Inclined to accept this"; "Accept this as important"; "Accept this as very important"; "Accept this as of the greatest importance". In Table 1, the last four response categories

17 See the following works by Feather, N T: "Educational Choice and Student Attitudes in Relation to Terminal and Instrumental Values" (1970) 22 *AJ Psych* 127; "Value Systems in State and Church Schools" (1970) 22 *AJ Psych* 299; "Similarity of Value Systems as a Determinant of Educational Choice at University Level" (1971) 23 *AJ Psych* 201; "The Measurement of Values: Effects of Different Assessment Procedures" (1973) 25 *AJ Psych* 221; "Values and Income Level" (1975) 27 *AJ Psych* 23–9; *Values in Education and Society* (1975); "Value Importance, Conservatism and Age" (1977) 7 *European J Soc Psych* 241; "Human Values and the Work Situation: Two Studies" (1979) 14 *A Psychologist* 131; "Value Correlates of Conservatism" (1979) 37 *J Personality Soc Psych* 1617; "Value Systems and Social Interaction: A field study in a Newly Independent Nation" (1980) 10 *J Applied Soc Psych* 1; "Reasons for Entering Medical School in Relation to Value Priorities and Sex of Student" (1982) 55 *J Occupational Psych* 119; "Protestant Ethic, Conservatism, and Values" (1984) 46 *J Personality Soc Psych* 1132; "Masculinity, Femininity, Psychological Androgyny, and the Structure of Values" (1984) 47 *J Personality Soc Psych* 604; "Attitudes, Values, and Attributions: Explanations of Unemployment" (1985) 48 *J Personality Soc Psych* 876; "Cross-Cultural Studies with the Rokeach Value Survey: The Flinders Program of Research on Values" (1986) 38 *AJ Psych* 269; Feather, N T and Cross, D G, "Value Systems and Delinquency: Parental and Generational Discrepancies in Value Systems for Delinquent and Non-Delinquent Boys" (1975) 14 *Brit J Soc Clinical Psych* 117; Feather, N T and Peay, E R, "The Structure of Terminal and Instrumental Values: Dimensions and Clusters" (1975) 27 *AJ Psych* 151.

18 Scott, W A, "International Ideology and Interpersonal Ideology" (1960) 24 *Public Opinion Q* 419; *Values and Organizations: A Study of Fraternities and Sororities* (1965); Braithwaite, V A and Scott, W A, "Values", in Robinson, J P, Shaver P R and Wrightsman L S (eds), *Measures of Personality and Social Psychological Attitudes* (1991) at 661.

19 Braithwaite, V A, "The Structure of Social Values: Validation of Rokeach's Two Value Model" (1982) 21 *Brit J Soc Psych* 203; "Beyond Rokeach's Equality-Freedom Model: Two Dimensional Values in a One Dimensional World" (1994) 50 *J Soc Iss* 67; Braithwaite J and Braithwaite V A, "Delinquency and the Question of Values" (1981) 23 *Int'l J Offender Therapy Comparative Criminology* 129; Braithwaite, V A and Law, H G, "Structure of Human Values: Testing and Adequacy of the Rokeach Value Survey." (1985) 49 *J Personality Soc Psych* 250; Braithwaite, V A, Makkai, T and Pittelkow, Y, "Inglehart's Materialism/Postmaterialism Concept: Clarifying the Dimensionality Debate Through Rokeach's Model of Social Values" (1994) (unpublished).

20 Braithwaite, V A, *Exploring Value Structure* (1979) at 277–90.

are combined into an "Accept" category and the first two into "Reject". Excluded from the table is a another list of 71 ways of behaving, as opposed to goals in life. These have been excluded because most of them are of limited relevance to judicial decision-making. While it is important to know that there is community consensus about the value of "BEING POLITE" or "BEING GENEROUS", such virtues are rarely relevant to the outcomes of judicial decisions.[21] A few of these ways of behaving that enjoy overwhelming consensus in the Australian community are relevant to judges, however, including: "BEING FORGIVING"; "RESPECTING THE PRIVACY OF OTHERS"; and "BEING TOLERANT".

Table 1

Rejection and Acceptance of Guiding Principles in Life by 483 Brisbane Citizens

	Reject %	Neither reject nor accept %	Accept %
HUMAN DIGNITY Allowing each individual to be treated as someone of worth	0	1	99
THE PROTECTION OF HUMAN LIFE Taking care to preserve your own life and the life of others	0	2	98
WISDOM Having a mature understanding of life	0	2	98
A WORLD OF BEAUTY Having the beauty of nature and of the arts (music, literature, art, et cetera)	0	5	95
SECURITY FOR LOVED ONES Taking care of loved ones	1	1	99
GOOD HEALTH Physical well-being	1	1	99
A WORLD AT PEACE Being free from war and conflict	1	1	98
EQUAL OPPORTUNITY FOR ALL Giving everyone an equal chance in life	1	1	98
SELF-RESPECT Believing in your own worth	1	1	98
HAPPINESS Feeling pleased with the life you are leading	1	2	97
THE RULE OF LAW Punishing the guilty and protecting the innocent	1	2	97
FREEDOM Being able to live as you choose whilst respecting the freedom of others	1	2	97
PRESERVING THE NATURAL ENVIRONMENT Preventing the destruction of nature's beauty and resources	1	2	97
MATURE LOVE Having a relationship of deep and lasting affection	1	2	96

21 I am indebted to Leslie Zines for pointing out a recent case where the Full Federal Court invoked the value of "generosity". See *Chaudhary v Minister for Immigration and Ethnic Affairs* (1994) 121 ALR 315 at 318: "True national interest has a concern for Australia's name in the world, and may at times involve a measure of generosity".

	Reject %	Neither reject nor accept %	Accept %
INNER HARMONY Feeling free of conflict within yourself	1	3	96
TRUE FRIENDSHIP Having genuine and close friends	1	3	96
SELF-IMPROVEMENT Striving to be a better person	1	4	95
SOCIAL PROGRESS AND SOCIAL REFORM Readiness to change our way of life for the better	1	5	93
THE PURSUIT OF KNOWLEDGE Always trying to find out new things about the world we live in	1	6	93
NATIONAL SECURITY Protection of your nation from enemies	2	1	97
A SENSE OF ACCOMPLISHMENT Feeling that you have achieved something worthwhile in your life	2	2	96
COMFORT BUT NOT LUXURY Being satisfied with the simple pleasures of life	2	2	96
A GOOD LIFE FOR OTHERS Improving the welfare of all people in need	2	4	94
SELF-KNOWLEDGE OR SELF-INSIGHT Being more aware of what sort of person you are	2	4	94
NATIONAL ECONOMIC DEVELOPMENT Having greater economic progress and prosperity for the nation	2	5	92
PHYSICAL DEVELOPMENT Being physically fit	2	7	91
RESPECT FROM OTHERS Being thought well of by others	2	10	88
ACCEPTANCE BY OTHERS Feeling that you belong	2	11	88
REWARD FOR INDIVIDUAL EFFORT Letting the individual profit from initiative and hard work	3	3	94
SEXUAL INTIMACY Having a satisfying sexual relationship	3	7	90
PRIVACY FOR YOURSELF Being able to keep your business to yourself	4	8	88
A SENSE OF OWNERSHIP Knowledge that the things you need and use belong to you	5	6	89
SELF-SUFFICIENCY Being able to make the things you need yourself	5	15	79
GREATER ECONOMIC EQUALITY Lessening the gap between the rich and the poor	6	13	80
A SENSE OF TRADITION Having respect for the achievements of our forefathers	6	13	81

	Reject %	Neither Reject nor accept %	Accept %
RULE BY THE PEOPLE Involvement by all citizens in making decisions that affect their community	7	9	84
ECONOMIC PROSPERITY Being financially well-off	7	18	75
NATIONAL GREATNESS Being a united, strong, independent and powerful nation	8	9	93
AN ACTIVE SOCIAL LIFE Mixing with other people	8	17	75
PERSONAL SUPPORT Knowing that there is someone to take care of you	9	14	77
BEING ALWAYS ON THE GO Keeping busy by having lots of interests	9	14	76
PHYSICAL EXERCISE taking part in energetic activity	9	20	71
AN EXCITING LIFE A life full of new experiences or adventures	9	25	66
STABILITY A life not liable to sudden or unexpected change	12	15	73
UPHOLDING TRADITIONAL SEXUAL MORAL STANDARDS Opposing sexual permissiveness and pornography	13	14	73
SALVATION Being saved from your sins and at peace with God	13	19	68
RELIGIOUS OR MYSTICAL EXPERIENCE Being at one with God or the universe	13	21	66
A LEISURELY LIFE Being free from pressure and stress	14	13	73
CAREFREE ENJOYMENT Being free to indulge in the pleasures of life	14	24	62
RECOGNITION BY THE COMMUNITY Having high standing in the community	15	26	58
AUTHORITY Having power to influence others and control decisions	21	29	49
MAN'S DOMINATION OF NATURE Controlling nature and making use of the forces of nature	22	16	61

The first 45 values listed in Table 1 are all values that can be described as attracting consensus in the Australian community. The final nine on the list — "STABILITY", "UPHOLDING TRADITIONAL SEXUAL MORAL STANDARDS, SALVATION", "RELIGIOUS OR MYSTICAL EXPERIENCE", "A LEISURELY LIFE", "CAREFREE ENJOYMENT", "RECOGNITION BY THE COMMUNITY", "AUTHORITY" and "MAN'S DOMINATION OF NATURE" — are rejected by over 10 per cent of the population and accepted by fewer than three quarters.[22] It might be argued

22 Of course the 10 per cent rejection cut-off is quite arbitrary. Yet the two least supported

that none of them qualifies as the kind of value that courts ought to require themselves to further. A common reason for the lack of consensus with most of these nine values is that they are associated in the minds of good numbers of citizens with past or present state tyrannies on behalf of majorities ("AUTHORITY") — religious tyrannies ("SALVATION, RELIGIOUS OR MYSTICAL EXPERIENCE"), sexual tyrannies ("UPHOLDING TRADITIONAL SEXUAL MORAL STANDARDS"), and tyranny over nature ("MAN'S DOMINATION OF NATURE").

In 1994, Russell Blamey used 18 of these values in the *National Forest Attitudes Survey* of 1680 Australians.[23] Responses were very similar to the 1975 results, the biggest changes being an increase in acceptance of "GREATER ECONOMIC EQUALITY" from 80 per cent to 86 per cent and a drop in acceptance of "NATIONAL SECURITY" from 97 per cent to 90 per cent.

4. *Are Values Moral Truths?*

One can accept the claim that community values and not community attitudes ought to ground judicial deliberation without believing that community values are more likely to represent moral truth than community attitudes. Indeed, one can do so even while believing that moral truth does not exist. For example, one can justify values-grounding and reject attitudes-grounding because of the empirical evidence that the people can agree on their values but not on their attitudes (combined perhaps with some view that the people should ultimately be sovereign in a democracy).

No attempt will be made here at any serious argument that moral truth exists and that the near-universal values listed above count among these truths. Better for readers to go to the work of philosophers who argue that there is a fact of the matter about what is right and wrong, such as Michael Smith's recent tour de force, *The Moral Problem*.[24] My objective is the more modest

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values on the reduced list — "PHYSICAL EXERCISE" and "AN EXCITING LIFE" — may be especially attractive consensus values for Australia, if not for other lands. Some jurists might think of "PHYSICAL EXERCISE" and "AN EXCITING LIFE" as peculiar values for purposes of judicial deliberation, and it must be admitted that cases where these values were at issue would be rare. Yet it may be that the citizens who think of an exciting life as a particularly important value, mainly young citizens, think of High Court judges as "fossils" precisely because of judges' attitudes to their values. And isn't the point of taking community values seriously to correct such judicial myopias? Interestingly, the natural law theorist, Finnis, does include "play" among his list of basic values. His other choices are: knowledge; life; aesthetic experience; sociability (friendship); practical reasonableness; and religion. See Finnis, J M, *Natural Law and Natural Rights* (1980) at 87. Equally, psychologists find a strong biological basis for this value. For example, Schwartz concludes that: "[s]timulation values derive from the presumed organismic need for variety and stimulation in order to maintain an optimal level of activation (Berlyne, 1960; Houston & Mednick, 1963; Maddi, 1961)". See Schwartz, "Universals" above n16 at 7; citing Berlyne, D E, *Conflict, Arousal, and Curiosity* (1960); Houston, J P and Mednick, S A, "Creativity and the Need for Novelty", (1963) 66 *J Abnormal Soc Psych* 137; Maddi, S R, "Exploratory Behavior and Variation-Seeking in Man", in Fiske, D W and Maddi, S R (eds), *Functions of Varied Experience* (1961) 253.

23 Blamey, R, *Citizens, Sumers and Contingent Valuation: An Investigation into Respondents' Behaviour* (1995) Unpublished PhD dissertation, Centre for Research in Environmental Studies, ANU, Canberra.

24 Smith, M, *The Moral Problem* (1994).

one of showing why philosophers who have profoundly incompatible accounts of truth — perhaps cognitivist, perhaps realist, perhaps subjectivist — might agree that moral truth is more likely to reside in the consensus values listed in Table 1 than in community attitudes.

We can and do make moral progress, just as we regress morally at times. The abolition of slavery, the slow lifting of the subjugation of women to men, are examples of moral progress. When such progress comes, it often results from challenging prevailing attitudes with the fundamental truth in underlying values like equal treatment. When moral regress occurs, it is often from failing to do so. The moral progress in the *Mabo* decision[25] was enabled by the near-universal acceptance of the underlying "principle of non-discrimination".[26] Non-discrimination was among the "fundamental values of our common law" that Brennan J found to be trampled upon by the doctrine of *terra nullius*.[27]

One reason why community attitudes are less likely to represent moral truth than values is that attitudes are more dominated by the circumstances of the particular situations which are their objects. Across a range of situations, people acquire an appreciation of the value of equal respect, partly through personal experiences of unequal respect in a number of those situations. However, when it comes to a specific object — say, Aborigines — particular histories of dominating practices in a person's life distort the moral truth of equal respect. One has a racist father. As Leader of the Opposition, one is dominated by the imperative to oppose the government, even on the *Native Title Act* 1993 (Cth). One is dominated by the opportunity to win needed political support from an angry mining lobby. Attitudes to political parties may be dominated by the fact of whether one's parents were Labor or Liberal, and so on. Attitudes are more dominated by churches, husbands, parties, mass media, peers and employers, because they are cognitions focussed on a specific terrain within which one or another agent of domination holds sway. Values, as cognitive standards that transcend all domains, are comparatively more free from specific dominations.

Moreover, it makes sense for agents of domination to invest their scarce resources in shaping attitudes of interest to them rather than in changing values. It makes more sense for husbands to dominate wives into an attitude of subservience to the family than it does to assail the fundamental value of equality because it is the attitude that directly benefits them. Indeed, in other spheres — for example, treatment of their children — the dominating husband may want the wife to respect the principle of equality. In short, as we move from attitudes to values, we move from (a) cognitions more dominated by the forces of domination that prevail in specific situations, to (b) trans-situational cognitions where dominations are dissipated or cross-cutting. The practical upshot is that values are more likely to speak moral truth than attitudes. While attitudes within Australia are racist, patriarchal, homophobic and bigoted in a

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25 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

26 Brennan, F, "Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia" (1994) *Constitutional Centenary Foundation Paper* at 22.

27 Above n25 at 41–2.

great variety of ways, the consensus Australian values listed in Table 1 are not. Since domination distorts truth and undominated dialogue is the road to the discovery of truth,[28] and since attitude formation is subject to concerted contextual domination in a way that value formation is not, values are more likely to represent moral truth than attitudes.

This is why we might reject Sadurski's claim that "it is *not* the case that people agree about the fundamental principles while disagreeing about some other, less basic values [read 'attitudes']".[29] Rather, Sadurski argues that the specific attitudes are "the proper test of what one means by the general principle ... it is not that they follow from the principle under certain interpretation, but rather they are constitutive of it".[30] My theory is that attitudes are constituted by dominations and by misunderstandings of the world to a degree that values are not. Therefore, to say that a person's values are constituted by their bundle of attitudes, or worse, by their actual behaviour in circumstances of domination, is to reconstitute values so as to make them as morally flawed as our attitudes and actions. Often, an attitude (X) will be shaped by not one value, but by a set of conflicting values ($V_1...V_n$) , a set of empirical beliefs ($E_1...E_n$), a set of conflicting social structures ($S_1...S_n$), and some biological needs ($N_1...N_n$). To read attitude X simply as constituting a value V_X[31] is altogether too simple, as well as collapsing a distinction that has analytic and normative advantages.

5. *Values and Vagueness*

Cynics, of course, reject the propositions that values can be moral truths and are more likely to be morally true than attitudes. It is hard for cynics to lose this debate because, even if they concede that there might be moral truth in values, they switch tack to the contention that they are "motherhood" truths which are so obvious and general as to offer little guidance to practical action. The jurist who believes in the possibility of moral progress, however, sees the challenge as one of progressively expanding the domain of motherhood truth (of sound agreement on a truth that becomes banal because of that agreement). Yesterday's controversy — equal respect for all, including slaves — becomes today's motherhood truth.

For judges who reject both Dixonian "strict and complete legalism" on grounds that it is impossible, and Masonian "community values" on grounds of vagueness, there are alternatives. They can believe that they must sometimes make law, but when they do they should simply rely on their own values because there is no moral fact of the matter to be discovered from others. In this case, moral argument is at bottom no more than a bare exercise of power by judges, an attempt to impose their preferences on the preferences of others.[32] Critics of Murphy J would construe this as the Murphy alternative. Another alternative is for judges to find values that are "immanent" in the law,

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28 See the references below in nn48–56.

29 Sadurski, W "Conventional Morality and Judicial Standards" (1987) 73 *Virginia LR* 339 at 378.

30 Id at 379.

31 Or attitude X and attitude Y as constituting value (X+Y).

32 See Smith, M, "Realism" in Singer, P (ed), *Companion to Ethics* (1991) at 403–4.

and then apply those values by analogical reasoning to new legal problems. Finally, judges who believe that values-as-motherhood-truth are unhelpful in practical situations, a sham for grounding of judicial deliberation in the will of a sovereign people, can ground their interpretation of the law in community attitudes of a more specific sort.

Judges who take this last path can be led by community attitudes under the sway of a dictator or a sensationalist media to judgments that are oppressive of freedom, or of other values shared by the same community. Paul Finn has raised three objections to the manner in which Australian judges have used "community values" to justify decisions.[33] I will contend that the practices that concern him most are what I would call using community attitudes rather than community values to justify decisions.

First, Finn objects that "there is little in the cases to suggest that the standards or values attributed to the community are grounded in cogent empirical evidence which could sustain the claim made for them".[34] Accountable judicial decision-making does require that judges cite grounds and sources when they allow community opinion to influence their decisions. In general, they dare not do this, for fear of a storm of controversy if they get the empirical facts of community opinion wrong, and for fear that they rely on data extrinsic to the evidence the parties have had an opportunity to rebut. This fear of the judges is well placed when they allow their interpretation of community *attitudes* to influence decisions. They will generally not find the data; when they do, they will find one opinion poll disagreeing with another; and where they do find empirical agreement, it will usually be about the existence of deep divisions in community attitudes, rather than consensus. Community values are a different story, however. There we can find the data rather easily; it tends to greater consistency; and as shown in Section 3 of this article, the evidence is of near-universal community acceptance of the most critical values.

Second, because of the aversion judges prudently have toward citing opinion polls to support their interpretation of community views, they tend to cite authority external to the community — for example, comparative law materials — in their desire to obscure the impression that they are imposing their own value or policy preferences.[35] When an Australian court cites the United States Supreme Court and an international treaty, and then equates the standard therein with community values, these values are actually imposed on the Australian community. Judges marching under the banner of popular sovereignty then actually push sovereignty out the door. Again, however, if judges follow community *values* (according to one of the methodologies described in Sections 7 and 8), they can refer directly to the authority of the Australian people rather than impose upon them beliefs from a foreign forum. From the foundations of Australian law and Australian values, they can still draw on the

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33 Finn, P, "Of Power and the People: Ends and Methods in Australian Judge-Made Law" (1994) 1 *Judicial Review* 255 at 277–8.

34 Id at 277.

35 Finn cites Gummow J's judgment in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 117 ALR 393 at 405: "Invocation of 'community standards' may be no more than an invention by the judicial branch of government of new heads of 'public policy'".

wisdom in non-Australian deliberation about how to deliver the objectives of our law and community.

Third, Finn maintains that "to the extent that there is a majoritarian implication in the formula, it is one which in a variety of contexts the courts have every reason to resist and no more so than in the areas of human rights and criminal procedure".[36] Finn is right here when it is majoritarian community attitudes that are at issue. Where the law allows the leeway to choose, judges have a duty to resist majoritarian support for trampling on human rights or cutting corners on just criminal procedures. But which of the consensus Australian values discussed in Section 3 would Finn suggest judges have reason to resist?

Finn is right that much invocation of community values is a contrivance by judges who wish to impose values. Yet in the end he concedes that there may be some "core values" that are so "intrinsic to the social and governmental order we have created in this country" that judges can act upon them in their law-making.[37] Because values tend to be "deeply engrained standards" that "encapsulate the aspirations of individuals and societies",[38] they can indeed be found by culturally knowledgable single judges applying their own cognitions to the institutional order, though they can be found more reliably, less refutably, and more democratically by applying the paradigm of values research to statistically adequate random samples of the people.

My contention is that Finn's arguments should lead us to the conclusion that judicial guidance by community attitudes is a dangerous, if not impossible, path, imposition by judges of their personal values is unacceptable, and total judicial avoidance of law-making cannot be sustained. While judicial guidance by community values (or values immanent in the institutional order) when filling legal silences is the only alternative left standing, the vagueness critique of it has not been answered.

It is true that values give only broad guidance, while attitudes can give quite specific direction to courts. Yet while we should want the courts to get rather specific guidance from the law (as the community value of the rule of law requires), highly specific forms of guidance from community opinion is not desirable. Judicial decision-making, like legislative decision-making, is better to the extent that it is based on rich deliberation where a plurality of community attitudes, interpretive principles and empirical data are available, where relevant, to inform the dialogue.[39] Put another way, the arguments against courts being required to be responsive to community attitudes are similar to the arguments against Citizen Initiated Referenda. Opinion poll democracy is not reflective, deliberative democracy and it risks a tyranny of the majority. Though the virtues of deliberative decision-making are the common reasons why both judicial commitment to reflect community attitudes and Citizen Initiated Referenda are dangerous, there is a key difference. While legislators are ultimately accountable to the people through the ballot box for

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36 Above n33 at 278.
37 Ibid.
38 Braithwaite and Scott, above n18 at 661.
39 In this respect, I am at one with Sadurski's conclusion, above n29 passim.

how they conduct their deliberation, judges are not (quite properly, given the risk the tyranny of the majority poses to judicial independence). Nevertheless, an accountability problem remains when judges apply moral precepts to resolve the indeterminacies in the law. A way to solve it is for judges to conduct their deliberation in ways that require them to justify decisions in terms of the law, and in terms of community values when the law is indeterminate or when the common law loses touch with societal change.

Community values can provide a sound, comparatively uncontroversial, non-arbitrary foundation in terms of which more controversial reasoning must be justified. Conceived as no more than foundations for the derivation of more controversial moral judgments, a "motherhood" quality is no longer a vice. The cut and thrust of deliberative contestation should focus on the soundness of the derivations rather than on premises which are better for being the people's premises. The judges' arguments: the people's premises.

The logic, interpretations, and empirical assumptions of the judges will ultimately have more effect on decisions than community values. So, of course, will the law. This is as it should be in a democracy that takes both the rule of law and deliberative decision-making seriously. Under the approach to community values advocated here, jurists still must have positions on the big questions of statutory interpretation: what kind of weight should be given to legislative history, to extrapolating the original purposes of the legislators to new situations; how legally mandated rules of statutory interpretation should be applied and so on. How judges come down on these questions will also have more influence on outcomes than community values.

However, one virtue of the community values approach is worth mentioning with regard to the dilemmas of statutory interpretation. The problem with narrow conceptualisations of statutes based on either legislative text, or history, or intention, is myopia.[40] The writers of texts fail to see their indeterminacies. The legislative history and known legislative purposes are silent on unintended consequences and on tacit purposes. Necessarily, these approaches to statutory interpretation therefore blind us to values that are affected by the law. Citizens get a bad deal from the democracy in furthering values they care about to the extent that myopic theories of statutory interpretation rule out of consideration those values that cannot be found in the text, the history, or the known intent. A judicial duty to consider community values when the meaning or relevance of the law is in doubt is the least myopic of all the theories of interpretation. This is because we know it is possible to generate a list of values which comprehensively defines the guiding principles in life that matter to most citizens. To the extent that judges incorporate systematic consideration of community values into their deliberations, they build in a safeguard against the myopias of text, history and intent. To that extent, they are less likely to short-change citizens in terms of the entire range of outcomes that matter to them.[41] Moreover, the empirical claim can be made that such fidelity to the

40 See Sunstein, C R, *After the Rights Revolution: Reconceiving the Regulatory State* (1990).

41 Equally, of course, good rules of statutory interpretation protect against these theoretical myopias. But my claim is that one of the grounds for rules of statutory interpretation being sound is that they leave space for the judges to interpolate consensus values into the indeterminacies of the legal text.

value-preferences of citizens is consistent with enhanced fidelity to the considered preferences of legislatures, as Mason commented on this article:

> In the case of statutes which impinge upon fundamental values, it is possible to say that an unambiguous and unmistakable expression of intention is required to justify an interpretation which trenches upon the values. To insist upon the expression of such an intention is to enhance the legislative process by compelling those who introduce legislation to make plain to the legislature what the effect of the legislation will be.[42]

It also should be remembered that for some types of problems the legislature chooses, and rightly chooses, to put less trust in the quality of its own deliberation than in the deliberation of judges or other public officials to whom it delegates discretion. What is the New South Wales Parliament saying when it enacts a *Contracts Review Act* 1980 that provides:

> [Where the Supreme Court] finds a contract or a provision of a contract to have been unjust in the circumstances relating to the contract at the time it was made, the Court may, if it considers it just to do so, and for the purpose of avoiding as far as practicable an unjust consequence or result [make certain orders or refuse to enforce the contract].[43]

My conjecture is that the parliament is saying to the courts: "Please rely on your own deliberation about the community's and the law's conception of justice when deciding what to do about an unjust contract, rather than looking for obscure clues in our text or our intent. All the values that should be considered in these judgments cannot be found there precisely because we do not trust our ability to think them all through".[44]

In such circumstances, a court that persists with strict legalism paradoxically flouts the rule of law, while the court that rigorously considers community values respects the rule of law in the sense of applying the law in the way the parliament implicitly requests. Equally, a judiciary that fails to update the common law in light of changing realities in the community shows scant respect for the rule of law.

6. *Consensus, Diversity and Deliberation*

One might ask if it is a good thing to search for a foundation of community consensus to ground judicial deliberation. Is there not virtue in diversity, in difference, that we should seek to preserve rather than reduce to a lowest common denominator? Indeed there is.[45] Yet there is a place for both consensus and difference in the way we structure our deliberative institutions. The problem with measuring judicial accountability against sets of contradictory community cognitions, rather than consensus cognitions, is that the former empower judges to select whichever of the contradictory cognitions suits as

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42 Personal communication.

43 See s7(1).

44 For other examples, and a different interpretation of their significance, see the judgment of Gummow J in *Brennan v Comcare* (1994) 122 ALR 615 at 633–6.

45 See Young, I M, *Justice and the Politics of Difference* (1990); Young, I M, "Justice and Communicative Democracy" (1993) unpublished paper presented at ANU, Canberra, February 1993. See also above n29 passim.

they impose their own attitudes. Where one wants diversity is in the judicial deliberation itself. First, one should aspire to a court which is itself somewhat diverse, perhaps at least in terms of sex, age, region, religion and ethnicity.[46] Second, one should aspire to a court which is exquisitely open to the diversity of ways of thinking in the community — a court which reads widely, which attends educational courses, which talks with ordinary Australians from all walks of life, which is encouraging to interventions of public interest groups and other institutions of civil society as *amicis curiae*, which is hospitable to "Brandeis briefs" on wider social and economic concerns relevant to a case, and perhaps even which commissions social science research to summarise the diverse ways of thinking about the problems before it.[47]

As Bernstein,[48] Handler[49] and Drysek[50] have pointed out, subjectivist philosophers such as Arendt,[51] Gadamer,[52] Habermas,[53] MacIntyre[54] and Barber[55] have very different views on what truth is and how one discovers it. For all their differences, however, they can agree that the way to attack the dilemmas of truth and method is through a plural dialogue, where many voices can be heard, unconstrained by forces of domination. At least they can agree that they are heirs of Aristotle. In addition, objectivists such as Popperian fallibilists can equally agree that robust, pluralist debate is essential for drawing out the refutation of that which is objectively false.[56]

Moreover, MacIntyre[57] may be right that disagreement on basic ethical paradigms is frequently compatible with consensus on the moral status of specific practical questions. Appellate court judges agree a lot of the time, but usually not for identical reasons, and often on the basis of mutually incompatible philosophical positions. This is why deconstructionists can play such havoc with their work. But if we take MacIntyre[58] seriously, nihilism is not justified in the face of such deconstruction. This is because dialogue between incompatible traditions can see one tradition generate solutions for the second in terms that are coherent within the second tradition. After all the wooing and wondering among justices, the High Court decision, woven together from

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46 One should not expect too much from this reform alone, however. Like so much in this paper, it is relevant only to appellate courts and irrelevant to the bread and butter work of trial courts where only one judge of one gender, age, religion etc presides.

47 On courts facilitating social science research, *amicis curiae* and Brandeis briefs, see Davies, above n3.

48 Bernstein, R J, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (1983).

49 Handler, J F, "Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community" (1988) 35 *UCLA LR* 999.

50 Drysek, J S, *Discursive Democracy: Politics, Policy and Political Science* (1990).

51 Arendt, H, *The Human Condition* (1958).

52 Gadamer, H R, *Truth and Method* (1975).

53 Habermas, J, *The Theory of Communicative Action I: Reason and the Rationalization of Society* (1984).

54 MacIntyre, A, *After Virtue: A Study in Moral Theory* (1984).

55 Barber, B R, *Strong Democracy: Participatory Politics for a New Age* (1984).

56 Mill is another interesting case here. See Mill, J S, *Utilitarianism; Liberty; Representative Government* (1964) at 95–8, 107, 111.

57 MacIntyre, A, "Does Applied Ethics Rest on a Mistake?" (1984) 67 *The Monist* 498 at 500–1.

58 MacIntyre, A, *Whose Justice? Which Rationality?* (1988) at 364–5.

slender and contrary opinion, can knit a fabric of communal conviction that inspires civic purpose and practical problem solving. Consider *Mabo*. The outcome can generally be regarded as sensible, but for several philosophically incompatible reasons. The realistic aspiration therefore is for consensus at the front end and the back end of the judicial process, but not in between. At the front end, there can be consensus on shared community values (pre-eminently, on the rule of law). At the back end, there can be consensus on agreeing to accept a practical solution to the problem, and on at least some shared reasons for that solution. Sandwiched in between the consensual acceptance of the solution and the consensus values that ground the deliberation, we should aspire to being open to the most plural, multicultural, theoretically eclectic deliberation.

Sadly, the dialogue needed between the judges to enable MacIntyre's solving of the problems of one tradition in the terms of another occurs in only a limited way in Australian appellate courts. Conferences to ensure a robust dialogue among the judges are not institutionalised across our highest courts in the way that they are in those of the United States and Canada. An implication of the position articulated in this article is that there is a need to reform the rugged individualism of the deliberative practices of our senior judges.[59] Dialogue can help the judges to help each other to see relevances of community values that they might neglect in their solitary chambers.

The prescription for collective deliberation applies with even greater force when it comes to how one should make judgments about how to balance conflicting community values. This is a topic for another article. Suffice it to say here that there are three basic options: (1) empirical evidence exists on how ordinary citizens balance and trade off existing values and on which values rank higher in a hierarchy of values — these data can be used to inform judicial balancing;[60] (2) the judges can construct or apply a normative theory of how to derive all the shared values from a common yardstick — such as happiness for utilitarians, or dominion (a republican conception of liberty) for republicans such as Philip Pettit and me[61] — then values are traded off according to their contribution to the overarching value; (3) judges can derive from one value conclusions about the contexts where other values ought to apply — for example, the rule of law as a value implies that the value of happiness ought not to be allowed as a reason for convicting an innocent person. Section 7 briefly begins to define a republican approach to trading off the values to be weighed in different fact situations. It would involve a mix of all three of the above strategies. Whichever approach to balancing or contextualising

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59 Michelman sees O'Connor J's dissenting judgment in *Goldman v Weinberger* 106 S Ct 1324 (1986) as a model of republican collegiality: "The tone of Justice O'Connor J's opinion is as dialogic as its method. Its implicit setting and sense are those of an equal speaking among several, not of solitary, self-contained pronouncement. It directly addresses each of the other four judicial speakers in the case, calling each by name, the only one of the five opinions to do so. It speaks in the voice of colloquy, not authority; of persuasion, not self-justification. Altogether, the opinion seems a model of judicial reconciliatory dialogue". See Michelman, F I, "The Supreme Court 1985 Term — Foreword: Traces of Self-Government" (1986) 100 *Harv LR* 4 at 36.

60 See the studies above in nn16–9.

61 Braithwaite, J and Pettit, P, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990).

values is espoused, it seems likely that collegial dialogue will enhance the quality of its implementation.

7. *How to Implement Responsiveness to Community Values*

The options for implementing responsiveness to community values to be considered here will be:

- Judges simply disciplining themselves to reason from shared community values;
- Judges using community values as evidence of moral truth (within a Dworkinian framework, for example);
- An entrenched Bill of Values and Rights;
- A non-entrenched Bill of Values and Rights subject to parliamentary amendment; and
- A Bill of Values and Rights subject to amendment by periodic constitutional conventions.

The straightforward option for implementing judicial responsiveness to community values would be simply for judges to discipline themselves to reason from values that empirical research shows to be consensually shared in the Australian community, just as they discipline themselves to reason from the law. Michael Smith has suggested a Dworkinian option of both pursuing fit with existing law and making the body of law as a whole as justified as possible:

> The task of judges is to make new decisions that make the law as a whole morally justifiable, and they appeal to community values because the fact that a value is embraced by a community is a useful bit of evidence to use in support of the claim that the value is correct.... Given that judges must justify their appeals to moral principle ... judges need to be aware of the distinction between community values and community attitudes, they need to be aware of why appeals to community values will provide better evidence of moral truth than community attitudes, and they therefore need to have available current data showing what the community's values are.[62]

To facilitate this, the kind of research discussed in Section 3 could be updated on a larger national sample. Moreover, and critically, wording of a number of the values would need to be modified so that they more concisely connect with concepts in Australian law.

The most sweeping response would be to entrench a Bill of Values and Rights in a way that was informed by research within the values paradigm. In addition to the political difficulty of accomplishing the bipartisan and interstate support to carry a referendum for an entrenched Bill, an argument against entrenched values (to which judges would be required to attend in interpreting the law) is that this would entrench the values of this generation.

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62 Personal communication from Smith, M, commenting on this article.

An intermediate response would be for a non-entrenched Bill of Values and Rights.[63] Such a Bill could be up-dated from time to time by the parliament. One could take greater risks with it than with an entrenched Bill. If judges applied the values unwisely or autocratically, then parliament could change the Bill. Hence, a non-entrenched Bill of Values and Rights would have a judicial accountability advantage over an entrenched Bill, and an inter-generational flexibility advantage. At the same time, a non-entrenched Bill would absolve judges of the responsibility for selecting the values that should influence their deliberations, and for contracting the research leading to this selection. Another possible advantage of parliament voting on a list of values is that parliament, after due deliberation, might conclude that certain values which are not subject to extensive community consensus should nevertheless be included in the Bill. Because parliament is accountable to the people through election, it is proper for it to require judges to attend to values rejected by significant numbers of citizens — for example, values below the line in Table 1. Non-elected judges, however, cannot so properly foist values on the community that a substantial proportion of the community rejects.

A response intermediate between an entrenched and a non-entrenched Bill of Values and Rights subject to parliamentary amendment could be a constitutional convention every 10 years, for example, to consider amendments.[64]

8. *A Republican Bill of Values and Rights?*

The entrenchment question is one on which there is merit in being open-minded at this stage of the national discussion, as is the question of whether a period of judicial development of the jurisprudence of Australian community values would be superior to a rush to any kind of Bill. However, I should like to put on the agenda of the rights debate the alternative of creating a distinctively Australian institution called a Bill of Values and Rights as a response to the distinctively Australian debate about the jurisprudence of community values to which I have sought to contribute.

How would the values in such a Bill be different from the rights? Under a republican conception of a Bill of Values and Rights, the rights would be derived from the values. By republican lights, as Pettit and I have argued, rights should only be enshrined in law when doing so, and only when doing so, will have good consequences in terms of republican values.[65] The philosophical difference between values and rights is that values are targets while rights are constraints.

Consider one value from Table 1: "THE PURSUIT OF KNOWLEDGE". This is defined as a target; knowledge is something worth maximising. However, the value can be used to define a constraint as well as a target — free primary education guaranteed to all citizens, for example. The latter right is a constraint, meaning that we are required to choose one particular option which

63 For a discussion of the issues with a Bill of Rights and Freedoms not being entrenched, see Queensland Electoral and Administrative Review Commission, *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms* (1993) Electoral and Administrative Review Commission, Brisbane.

64 I am indebted to Cheryl Saunders for drawing this option to my attention.

65 Above n61; Pettit, P, "The Consequentialist Can Recognise Rights" (1988) 38 *Philos Q* 42.

exemplifies the value of knowledge and that option constrains us to guarantee free primary education. We can multiply the examples; "GREATER ECONOMIC EQUALITY" is a target we should pursue; the right to state support during periods of unemployment is a constraint we should honour.

According to the republican theory of justice elaborated by Pettit and me elsewhere, a considerable number of legal, social, economic and political rights can and should be grounded in republican values.[66] Contests about how to balance different values, in turn, can be decided against the yardstick of a master value — republican liberty. The mix of values that should be pursued, according to this view, is that mix which will best advance republican liberty. Republican liberty is the condition where citizens can make choices about their own lives under guarantees of freedom from coercion by those with greater power. This is liberty as a citizenship status of security against unchecked or arbitrary power. It is freedom of choice with domination held in check, a freedom that can therefore be enhanced by state intervention to check domination. This freedom as non-domination is contrasted to freedom as simply non-interference.

Hence, a republican Bill of Values and Rights could define:

1. A set of rights to be honoured, even in the face of a statute directing otherwise;
2. A set of fundamental values (that justify the above rights) upon which the interpretations of a court should only trench in the face of an "unambiguous and unmistakable expression of intention" by the legislature;[67] and
3. A privileging of liberty, defined in a republican way, as a yardstick against which to assess trade-offs between different values.

These three elements are separable. It is possible to have only (1) (a Bill of Rights), only (1) and (2) (a Bill of Values and Rights), or all three (a republican Bill of Values and Rights). For a republican, the first and second options could both amount to progress. Indeed, my own view is that pushing for the third option would be premature and a political mistake, pushing the republican agenda beyond the point where it has been clearly thought through, let alone debated. While Pettit and I feel we have thought through the implications of a republican yardstick for trading values in the limited domain of criminal justice,[68] I harbour doubts about its more general applicability, doubts that have to be the topic for another, longer article. Yet, so long as democratic institutions are put in place that allow space for dialogue about how to trade values against one another, republicans have their fora for arguing against classical negative liberty and for trade-offs that find more favour against the yardstick of republican liberty.

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66 Ibid.
67 See text accompanying n42.
68 Above n61.

9. *Conclusion*

Most scholars assume that public opinion is so fickle and divided as to provide a foundation of sand for judicial deliberation. This article has sought to show that this is true if by public opinion we mean community attitudes, but false if we mean community values. There are a set of values that enjoy near-universal support in the Australian community. Values such as health, peace, freedom and equality of opportunity, and some dozens of others enjoy robust community support across samples, and for different question wording. Most citizens are able to justify most of their attitudes and political choices in terms of this finite set of values. Values do not change dramatically from year to year in the way that attitudes to political parties, or to the punishment of criminals, sometimes do. Large value shifts do occur, such as the shift Inglehart has documented from materialist to post-materialist values, but these occur across decades or centuries rather than years.[69] Moreover, the shift from materialist to post-materialist values is typical in that it does not involve an outright rejection of materialist values such as "ECONOMIC PROSPERITY"; it simply means post-materialist values such as "PRESERVING THE NATURAL ENVIRONMENT" have acquired a relatively higher priority in comparison to the materialist values. An exception here is that perhaps "MAN'S DOMINATION OF NATURE" once was a consensus value in Australia; Section 3 shows it is no longer.

The most profound reason for a separation of powers with an independent, unelected judiciary is that the judges are given the backbone to stand firm against public opinion when it threatens the rule of law and community values (which include the rule of law). The vision of democracy here is not one of direct rule by the people. Rule by public opinion of the day is particularly dangerous in a world where control of the means of forming public opinion is concentrated in few hands; a busy world in which most citizens do not have time to talk with each other or to think deeply about most questions of public opinion. The vision of democracy here is a republican one, one based on the ballot box and on deliberation by an executive, a legislature, and a judiciary. The depth of democracy in a republic depends on the quality of that deliberation — its openness to participation and input from citizens, to plural and conflicting perspectives. In addition, I have contended, it depends on the level of commitment in the democracy to explaining how conflicts are resolved in terms of values shared by the people. The parliament's laws; the people's values; the judges' reasoning (where all are enriched by active institutions of civil society). A circle of accountability that is closed by the people's vote to change a parliament.

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69 Inglehart, R, *Culture Shift in Advanced Industrial Society* (1990).