

# FAITH, CONSCIENCE AND LEGISLATION

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## I INTRODUCTION

Conscience votes are, depending upon whom one talks to, either an example of our democratic processes at their best or a blight on our liberal democratic polity. Former Prime Minister of New Zealand, David Lange, held the latter point of view. Lange described the outcome of conscience votes as ‘a shambles, a kind of legislative lottery in which consistency is the first casualty’.<sup>1</sup> One can understand why politicians in Westminster democracies, being concerned first and foremost with their ability to implement their party platforms when in office, would take this attitude. One can also understand why some in the wider community, believing that they voted for a candidate on the basis of that candidate’s identification with a particular party platform, object to conscience votes on the basis that a legislator is free to bring religious and other personal convictions to bear upon the matter before Parliament.

While these objections are *understandable*, they reveal a number of potentially controversial assumptions about the nature of Anglo-Australian parliamentary democracy. The objections assume that members of Parliament are elected to represent the concrete *will* of those who voted for them, so as to implement a particular basket of measures. Furthermore, the understanding of a conscience vote as a rare exception to the general principle that legislators should follow the ‘party line’ assumes that the program of government is largely fixed by the results of elections and that parliamentary procedures are merely a formality in the implementation of the government’s election promises. This casts doubt upon the role of Westminster Parliaments as true legislative bodies which are functionally independent from the executive branch of government. It is argued, in this paper, that this understanding of the individual legislator’s role is a cramped and inadequate understanding which suits the purposes of party *apparatchiks* and sundry social engineers but undermines good lawmaking. The paper proposes a richer understanding of the legislator’s role, which is informed by the notion that members of Parliament are *delegates* of their constituents for the purposes of a deliberative exercise, rather than *agents* of their constituents for the purposes of carrying out their will.

It should be noted from the outset that this paper does not enter directly into the debate between scholars such as John Rawls and Robert Audi, on the one hand, and scholars such as Jeremy Waldron, on the other hand, as to whether there are certain types of beliefs or opinions which cannot be used by legislators as reasons for their decisions. As it happens, the author leans towards Waldron’s view that the terms of political discussion need not be restricted to a pre-existing common stock of values but that ‘justificatory consensus may be invented in or constituted by a political discourse that does not presuppose or assume its existence’.<sup>2</sup> The author would not exclude certain types of reasons – what Rawls calls ‘comprehensive doctrines’ – from political discussion on the basis that they do not apparently form part of a pre-

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<sup>1</sup> David Lange, ‘Lawmaking and the Political Process’ [1995] *New Zealand Law Journal* 245-248, 247.

<sup>2</sup> Jeremy Waldron, ‘Religious Contributions in Public Deliberation’ (1993) 30 *San Diego Law Review* 817, 838. See also, Jeremy Waldron, *Law and Disagreement* (1999).

existing consensus of values.<sup>3</sup> That said, this paper does not aim to present one or other of those views as rationally justified and the other as philosophically defective. The aim of the paper is to propose an interpretation of Anglo-Australian political traditions and the Australian constitutional settlement which emphasises the deliberative function of legislative bodies.

## II WHAT IS A CONSCIENCE VOTE

### A *Positive and Negative Conceptions of Conscience*

In the Australian political system, a conscience vote is widely understood as a vote in Parliament in which members of Parliament are, when exercising their vote, not bound to follow the direction of the political parties to which they belong. Australian politics has been characterised by an assumption that party solidarity ought, in the ordinary course of affairs, to override individual beliefs.<sup>4</sup> A similar understanding seems to prevail in New Zealand or, at least, it did so prior to the advent of multi-member proportional representation in that country's single-chamber legislature. Lange defined a conscience vote as one 'in which Members of Parliament, freed from the rigours of party discipline, cast their vote [*sic*] as their own opinions or a poll of their constituents dictate'.<sup>5</sup> Lange's definition is a negative one, in so far as the critical feature which marks a vote as a conscience vote is the absence of party discipline. This leaves each legislator free to do one of two things, namely, *either* vote according to her or his own opinion *or* in accordance with the outcome of polls of her or his constituents. Where the member adopts the latter course, the member does not form her or his own opinion about the legislation but substitutes the directive of a majority of her or his constituents for the directive of the political party to which she or he belongs.

There is another understanding of a conscience vote which identifies the critical factor as freedom from the dictates of constituents. This competing understanding has been associated, most famously, with Edmund Burke. Burke made the following remarks in a speech to his constituents in Bristol:

My worthy colleague says his will ought to be subservient to yours. If that be all, the thing is innocent. If government were a matter of will upon any side, yours, without question, ought to be superior. But government and legislation are matters of reason and judgement, and not of inclination; and what sort of reason is that in which the determination precedes the discussion? [I]n which one set of men deliberate, and another decide? [A]nd where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?<sup>6</sup>

<sup>3</sup> John Rawls, *Political Liberalism* (1996); John Rawls, 'The Idea of Public Reason Revisited' (1997) 64 *University of Chicago Law Review* 765; Robert Audi, *Religious Commitment and Secular Reason* (2000).

<sup>4</sup> John Warhurst, 'Religion and Politics in the Howard Decade' (2007) 42 *Australian Journal of Political Science* 19-32, 20.

<sup>5</sup> Lange, n 1, 247; See also, Mark W Gobbi, 'The Trial of Socrates: A matter of Conscience (Is the party whip system justifiable?)' [1988] *New Zealand Law Journal* 451-452.

<sup>6</sup> Edmund Burke, Speech at Bristol Guildhall, 3 November 1774 (reproduced in Brian MacArthur, *The Penguin Book of Historic Speeches* (1996), 116).

Something resembling the Burkean understanding has been raised to constitutional status in one European democracy. Section 56 of the Constitution of Denmark states that members of Parliament (*Folketing*) are to be bound only by their consciences and should not be bound by any direction of their voters.<sup>7</sup> The Danish understanding places conscience voting in opposition to acting upon the dictate of constituents. On this view, voting in accordance with party policy is not necessarily incompatible with conscience voting. Party divisions in Western democracies are informed, at least in part, by competing philosophies about the role of government and the appropriate use of legislative power.<sup>8</sup> Individual party members (and, *a fortiori*, their constituents) are not always masters of the detail as to how broad political philosophies bear upon particular issues which come before the Parliament. Political parties, at their best, perform an interpretative role. The evil to be avoided is the reduction of the legislator to a mere agent charged with the performance of her or his constituent's wishes. According to the Burkean view, a legislator is meant to exercise judgement on their behalf as to which measures advance the general good.<sup>9</sup> That judgement may be exercised by reference to a set of broad principles espoused by a political party. The candidate's party affiliation provides information to voters about which set of principles is likely to receive the allegiance of a candidate for Parliament. Nevertheless, while a party vote may, in a particular instance, be a conscience vote, freedom from party discipline would seem to be an element of the Burkean understanding. A particular legislator's opinions about the general good may include matters upon which the political party's principles are silent. Furthermore, particular policy measures which the party proposes may be seen by some party members to be incompatible with more basic values which are considered, by those members at least, to be part of the party's creed. In those circumstances, voting according to conscience may involve voting other than in accordance with the *will* of the party chiefs.

Both of these understandings define conscience voting in negative terms. They focus upon the *absence* of a particular kind of restraint. The absence of restraint is presumably to be justified by reference to the desirability of leaving the legislator free to follow another cue – that is, the will of constituents or the legislator's own opinion formed in the light of her or his own value judgements. An understanding of conscience votes which proceeds simply in terms of the absence of party discipline will not suffice, because a principle that one ought to follow the will of one's constituents (or a majority of them) is, in practice, likely to come into frequent conflict with the principle that one ought to act according to one's own assessment as to what is right. Members of a legislative assembly will sometimes need to make choices between obeying their constituents and acting according to their own

<sup>7</sup> 'Folketingsmedlemmerne er ene bundet ved deres overbevisning og ikke ved nogen forskrift af deres vælgere.' *Danmarks Riges Grundlov* is reproduced at <[www.leksikon.org/art.php?n=3717](http://www.leksikon.org/art.php?n=3717)> at 12 June 2007.

<sup>8</sup> See John H. Hallowell, *The Moral Foundation of Democracy* (Delivered in six lectures given at the University of Chicago, Charles R. Walgreen Foundation for the Study of American Institutions, spring of 1952) (2007), 47; Hallowell said that 'a political party exists as the principal means of helping the electorate to choose among conflicting views of the best means of promoting the common good'. Hallowell cited Burke for the proposition that a political party is 'a body of men united, for promoting by their joint endeavours the national interest, upon some particular principle in which they are all agreed'.

<sup>9</sup> 'Parliament is a deliberative assembly of one nation with one interest – that of the whole: where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole'. (Burke, above n 6, 115-116).

assessments. To resolve this dilemma, a positive conception of the good to be served by conscience is needed. There would seem to be two possible candidates, which might be described as the good of *representation* and the good of *truth*.

### B *The Good of Representation*

Australian parliamentary democracy embraces a strong notion of representation. Both houses of the Federal Parliament are to be 'directly chosen by the people'.<sup>10</sup> While casual vacancies in the Senate are to be filled by an appointee of the Parliament of the relevant state, the 1977 amendment to the Constitution, by providing that the replacement Senator shall belong to the same political party as the Senator who died or retired, ensures that the composition of the Senate shall continue to reflect the outcome of the previous general election.<sup>11</sup> An assumption underlying the passage of this amendment must have been that the Senate represents people (and how they voted at the previous general election) rather than the governments of the states.

Notwithstanding the prominence of the representative principle in the Australian constitutional settlement, there are good reasons for believing that the good of representation cannot be the ultimate good served by conscience voting. The characterisation of the members of legislative assemblies as representatives of the people who live in a particular locality or region begs a question as to what it is about those people that the members must represent. There are two possibilities. They may represent their *will* that a particular set of outcomes shall be achieved or they may represent their *opinions* about matters of right and wrong.

The Burkean understanding of a conscience vote assumes that members of legislative assemblies represent the latter phenomenon. It assumes that members of the assembly are chosen to take part in a deliberative process which is meant to select those laws which are most consistent with the general good of the community. Representatives do not represent what their constituents *want* so much as they represent the interests, values and sentiments of various sections of the community. There is a tension between this 'deliberative' view of representation and the view that those elected to legislative assemblies (or at least those who form the majority faction in the assembly) have a mandate to implement the particular basket of measures described in their party's election manifesto.

Burke has not been alone in taking the deliberative view. Sunstein has noted the strong resemblance between the Burkean view and the views articulated by James Madison and Alexander Hamilton in *The Federalist*.<sup>12</sup> Sunstein summarised the position of the federalists in this way:

Whereas the antifederalists accepted representation as a necessary evil, Madison regarded it as an opportunity for achieving governance by officials devoted to a public good distinct from the struggle of private interests. Representatives would have the time and temperament to engage in a form of collective reasoning...The representatives of the people would be free to engage in the process of discussion and debate from which the common good would emerge.<sup>13</sup>

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<sup>10</sup> *Constitution (Cth)* ss 7, 24.

<sup>11</sup> *Constitution (Cth)* s 15.

<sup>12</sup> Cass Sunstein, 'Interest Groups in American Public Law' (1985) 38 *Stanford Law Review* 29-87, 41-42.

<sup>13</sup> *Ibid* 42.

*The Federalist* No 10 (written by Madison under his *nom de plume*, Publius) gave considerable attention to the inevitability of factions in government and suggested ways in which the adverse effects of factions might be minimised. Madison favoured delegation of the government to a small number of citizens elected by the rest of the people. The point of doing so was 'to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country'.<sup>14</sup> Simultaneously, the representatives of the people had to be sufficiently numerous so as to maximise the different interests represented and, accordingly, 'make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens'.<sup>15</sup>

John Stuart Mill's thoughts on representative government also emphasise the duty of representatives to exercise their own judgment. Mill thought that electors 'will not do wisely, if they insist on [their representative's] absolute conformity to their opinions, as the condition of his retaining his seat'.<sup>16</sup> Mill thought that it was desirable that representatives should be people of superior wisdom and ability than their electors. Where people of superior wisdom and instruction were elected, it was to be expected that they would sometimes have opinions which are different from those of a majority of their constituents.<sup>17</sup> Even where a representative of more modest ability is chosen, that person 'has greater opportunities of correcting an original false judgment, than fall to the lot of most of his constituents'.<sup>18</sup> While Mill acknowledged the need for representatives to be accountable to their electors for the way they perform their duty, that accountability cannot consist of a pledge to vote only in accordance with the directions of electors on particular matters:

A man of conscience and known ability should insist on full freedom to act as he in his own judgment deems best; and should not consent to serve on any other terms. But the electors are entitled to know how he means to act; what opinions, on all things which concern his public duty, he intends should guide his conduct. If some of these are unacceptable to them, it is for him to satisfy them that he nevertheless deserves to be their representative; and if they are wise, they will overlook, in favour of his general value, many and great differences between his opinions and their own.<sup>19</sup>

Stephen Holmes discerned a close connection between Mill's views on representation and his fallibilist approach to epistemology. Representatives, by engagement with the views of other representatives in the legislative assembly, have an opportunity to correct and refine their views which their electors do not necessarily have. Holmes said:

The decisive superiority of deputies over citizens lies not in higher intelligence, virtue, or education...but in the unusual nature of the legislative situation itself, a situation which, according to Mill, fosters self-correction. Voters are parochial. They are seldom exposed to the clashing viewpoints of fellow citizens who live in remote parts of the country...Voters should defer to representatives, therefore...not because

<sup>14</sup> James Madison, *The Federalist No 10, The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection (continued)*, *Daily Advertiser*, 22 November 1787, reproduced at <[www.constitution.org/fed/federa10.htm](http://www.constitution.org/fed/federa10.htm)> at 26 June 2007.

<sup>15</sup> *Ibid.*

<sup>16</sup> John Stuart Mill, *Considerations on Representative Government* (2<sup>nd</sup> ed, 1861), 227.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid* 233.

<sup>19</sup> *Ibid* 234.

members of an elected assembly are likely to be especially virtuous, but rather because representatives enjoy the eye-opening benefits of exposure to stinging criticisms and relentless debate.<sup>20</sup>

According to Holmes, Mill's grounding of the deliberative view of representation upon his fallibilist assumptions weakened Mill's position in one respect. Scientific truths differ from political truths in so far as the latter are not simple empirical matters to which one is, upon reviewing the evidence, able to *assent*. Political discussion involves a consideration of both empirical matters and 'rival, perhaps, irreconcilable, values'.<sup>21</sup> The process of discussion of these rival values and possible 'preference transformation' – that is, *consent* to one's opponents' proposal – in the light of this discussion is not always going to be achieved during the timeframe in which decisions have to be made.<sup>22</sup> This weakness does not ultimately defeat the argument in favour of free discussion. Holmes suggested that freedom of political discussion needs to be (and can be) justified on the basis of considerations other than the fallibilist assumption. For example, if everyone is given the chance to discuss political issues freely, the minority 'will probably be more willing than they otherwise would be to abide by the decisions made'.<sup>23</sup>

In any event, it appears that Mill understood and allowed for a distinction between *assent* to empirical matters and *consent* to value judgements. We have seen that Mill thought that electors were entitled to know what opinions would guide their representative's conduct as a representative. He did not think that electors had to acquiesce in being represented 'by one who intends to govern them in opposition to their fundamental convictions'.<sup>24</sup> Where these fundamental convictions exist in 'an appreciable portion' of the population, they are, according to Mill, 'entitled to influence in virtue of their mere existence, and not solely in that of the probability of their being grounded in truth'.<sup>25</sup> Herein lies a vital clue as to the distinction between matters for which representatives are answerable to their electors and matters for which they must form their own judgements. Electors are entitled to know about their representatives' opinions about matters of religion, ethics and political philosophy and to withdraw their consent from representation by one whose opinions about these matters are in conflict with their own. Electors are not, on the other hand, permitted to bind their representatives to implement the particular measures outlined in their election manifestos.

In Mill's insistence that representatives need not represent the particular *will* of their electors in relation to specific proposals but must represent the *opinion* of their electors in relation to the basic values whereby proposals are to be evaluated, there is an important link between Mill's position and Burke's position. Pitkin<sup>26</sup> has noted that Burke's thought about representation has two aspects. Firstly, Burke's emphasis upon Parliament as a forum for deliberating about what is right for the nation as a whole necessitated the representation of *interests*. This underpins what is often considered to have been an anti-democratic tendency in Burke's thought. There was no need for representation of different districts within the country in proportion to

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<sup>20</sup> Stephen Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (1995) 183.

<sup>21</sup> *Ibid* 197.

<sup>22</sup> *Ibid* 198.

<sup>23</sup> *Ibid* 197.

<sup>24</sup> Mill, n 16, 235.

<sup>25</sup> *Ibid* 234-235.

<sup>26</sup> Hanna Fenichel Pitkin, *The Concept of Representation* (1967).

their populations so long as the different interests which exist within the nation are represented in Parliament.<sup>27</sup> It is the different sets of values which hold sway among the people, rather than the concrete wills of those people, which need to be represented. Secondly, while the preferences of individual constituents about particular measures may not be reliable because they have not been formed in the light of a deliberative process, it is important that the deliberative body – that is, Parliament – has accurate information about the feelings and sentiments of the nation.<sup>28</sup> While people who do not participate in the deliberative process may not be able to discern the correct solution to their problems, their feelings can be taken to be a reliable indicator of the existence of an unaddressed interest.<sup>29</sup>

Friedrich Hayek placed a particularly strong emphasis upon the distinction between constituents' *will* as to particular ends and their *opinion* as to values. Will refers to 'particular actions serving particular ends' while opinion refers to 'matters of right and wrong' at an abstract level.<sup>30</sup> This distinction coincides with Hayek's distinction between administration – which is concerned with achieving particular concrete ends – and legislation properly so called – which is concerned with making general non-case-specific rules about how people ought to behave towards one another. Hayek embraced a strong doctrine of the separation of powers, whereby those two functions were to be exercised by different wings of government. The legislative assembly ought to be restricted to laying down rules of general application and, accordingly, forbidden from implementing the particular will of the electors. The legislative assembly must, to that end, 'not be placed in the hands of representatives of particular interests but in the hands of a representative sample of the prevailing opinion'.<sup>31</sup> It follows that individual members of the legislative assembly must put to one side the will of their constituents as to particular actions or ends. A well-constituted legislative assembly will reflect a cross-section of the values of the political community which it represents. It was to secure an assembly of this type that Hayek suggested that legislative assemblies should consist of people elected to office in their fortieth year, each for a term of fifteen years, who would be ineligible for re-election upon the expiry of their term. The franchise for the annual elections would consist of all people who were in their fortieth year, each person voting only once in her or his lifetime.<sup>32</sup> It is hard to imagine that this arrangement would ever receive widespread support where universal adult suffrage has been the norm, but Hayek seems to have placed less weight upon the specific features of the proposal than upon the need to have an institutional framework which insulates members of legislative assemblies from constituent pressure to use the coercive powers of government to implement their particular will as to specific ends.

Notwithstanding some terminological inconsistency, it can be seen that the tradition of thought extending from Burke and Madison, through Mill, to Hayek, charges legislative assemblies with the responsibility of exercising a detached judgement about where the general good of the community lies. Their task is one of deliberation, whereby the views of the members as to any particular measure may be

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<sup>27</sup> Ibid 174-175.

<sup>28</sup> Ibid 184. See also Gargarella's comment that, for Burke, '[t]he important thing was to have all the relevant arguments represented in the legislative forum'. (Roberto Gargarella, 'Full Representation, Deliberation, and Impartiality' in Jon Elster (ed), *Deliberative Democracy* (1998) 260-280, 264.

<sup>29</sup> Pitkin, n 26, 180, 183.

<sup>30</sup> F A Hayek, 'The Confusion of Language in Political Thought' in FA Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (1978) 71-97, 85.

<sup>31</sup> Ibid 95.

<sup>32</sup> Ibid.

deepened and, potentially, changed as a result of that deliberation. Legislative assemblies are, emphatically, not the means whereby the particular will of the majority as to specific projects or outcomes is imposed upon the minority or, where there being no clear majority, horse-trading about which projects will be pursued takes place. Nonetheless, it is desirable that legislative assemblies are representative of the people to the extent that their membership reflects the range of values which exists within the nation.

Notwithstanding the venerable pedigree of the deliberative view, it is the will-focussed view of the legislative function which bears the strongest resemblance to the typical conduct of business in Westminster Parliaments. This reflects the predominance, among the political class, of a *mandate* or *agency* view of representation, whereby the faction which secures a majority of the votes in the legislative assembly is assumed to have a mandate to implement the policies set out in its election manifesto. While members of the political class clearly behave as though the mandate view were valid – which behaviour is reinforced by a news media obsession with ‘broken promises’ – there are other features of Australian political practice which undermine the mandate view.

Firstly, the patterns of voting in Australian federal elections reveal that party preferences are remarkably stable. The overwhelming majority of voters would seem to have a primary loyalty to one or other of the major political parties and this loyalty is largely independent of the particular policies that are presented to the public in election campaigns. In elections for the House of Representatives between 1949 and 2007, the Labor Party’s shares of the first preference vote ranged between 37.6% and 50.1%, while the Liberal Party’s share ranged between 32% and 41.8%. The largest two-party preferred swing during the same period was 7.4% against the Labor Party in favour of the Liberal-National coalition in the 1975 election.<sup>33</sup> That election saw the lowest two-party preferred vote for the Labor Party – that is, 44.3%. The Liberal-National coalition’s worst two-party preferred vote was 46.77% in 1983.<sup>34</sup> A conclusion that the majority of Australian voters cast their vote on the basis of their identification with a set of values or a philosophy, which they associate with one or other of the major parties, would not be inconsistent with the statistics cited. Alternatively, it might be concluded that a large number of voters vote for a particular party for reasons of socio-economic class identification or out of sheer habit. One conclusion which is not supported by the statistics is that a large number of voters choose whom they will support on the basis of an evaluation of the particular policies set out in the election manifestos of the major parties.

Secondly, even in relation to the so-called ‘swinging’ voters, the inference that their votes translate into support for any particular policy of the party that received their vote is pure conjecture. Swinging voters may change their vote on the basis of a general impression they have formed about the performance of the government or the personalities of the candidates, rather than on the basis of their reflections upon the election manifestos of the parties. Parties present baskets of policies in their election campaign. It cannot be assumed that voters who change their vote endorse

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<sup>33</sup> Parliament of Australia, Department of Parliamentary Services, *Research Brief: Federal election results 1949-2004*, (7 March 2005) Parliament of Australia <[www.aph.gov.au/library/pubs/RB/2004-05/05rb11.pdf](http://www.aph.gov.au/library/pubs/RB/2004-05/05rb11.pdf)> at 21 June 2007; Australian Electoral Commission, *Virtual Tally Room* <<http://results.aec.gov.au/13745/Website>> at 3 July 2008.

<sup>34</sup> Australian Electoral Commission <[www.aec.gov.au/Elections/Australian\\_Electoral\\_History/House\\_of\\_Representative\\_1949\\_Present.htm](http://www.aec.gov.au/Elections/Australian_Electoral_History/House_of_Representative_1949_Present.htm)> (Last accessed 21 June 2007).



all of the policies in a particular election manifesto. They may have chosen the major party which they believe has, on balance, the better policies. This is a very weak basis for inferring the existence of a mandate in relation to individual policies.

Thirdly, Parliaments are elected for a term of years. The circumstances which influenced a party's policy formulation may change. Governments may make major policy changes during their term of office. If they do so, they are not obliged to call an election. It is plainly rational for voters to cast their votes on the basis of which party and which candidates they perceive to represent the *values* which they (i.e. the voters) espouse rather than upon the particular policies set out in an election manifesto.

Fourthly, most Australian Parliaments are bicameral legislatures. Different methods are used for determining the composition of the two chambers. In the Federal Parliament, while members of the House of Representatives are elected as representatives of fairly small geographical constituencies for a term of three years, senators are elected for a term of six years as one of a group of twelve people who represent a whole state. States are equally represented in spite of the significant differences between their populations. There is a sense in which senators are less visible to and further removed from their constituents. They do not have to seek re-election as frequently as members of the House of Representatives do. It is, perhaps, not surprising that the Senate should be the more deliberative – in the sense that proposals have to be explained, opposition parties won over and compromises negotiated – of the two houses of Federal Parliament. This constitutional provision of two ways of counting heads produces, in practice, a compromise between will-implementation and deliberation. The government majority in the House of Representatives, combined with a double dissolution and joint sitting procedure which enables the superior numbers in the lower house to prevail in the event of a deadlock between the houses<sup>35</sup>, emphasises the notion of a government mandate to implement its program. The strikingly different composition of the Senate offers potential for a brake to be placed on the passage of controversial legislation, thereby enabling space for deliberation upon the legislation's merit. Even so, the Senate's behaviour does not always conform to the deliberative model favoured by Burke, Hayek and others. The historical dominance of the two major political parties, both of whom will typically be represented by close to a majority of votes in the Senate, will normally lead to a two-sided debate in which one side need only sway a small number of minor party and independent members to their point of view in order to carry the day. Accordingly, 'horse-trading' may be a more common strategy than genuine deliberation upon whether a measure is the *right* measure. Nevertheless, the Australian Senate provides us with a lesson as to how greater distance between representatives and constituents – that is, election to represent larger constituencies for a longer term – has the potential to yield a more deliberative approach to the legislative process.

All of these factors suggest that, in the Australian political tradition, the representative principle is at least as much concerned with representing the values of those eligible to vote as it is concerned with expressing the preferences of those people for concrete policies. If representing values is an important aspect of the good of representation, then the good of representation harmonises with the other concept of the good which has been suggested – namely, the good of truth.

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<sup>35</sup> *Constitution (Cth)* s 57.

### C *The Good of Truth*

The good of truth, as presented here, is not so much concerned with the grounding of legislative proposals in agreed truths which are discoverable by abstract reason as it is concerned to ensure that whatever decisions have to be made collectively by or for the community are compatible with the values which are espoused by the members of that community. Values are important because they provide information about what the members of a community have, by tradition and experience, come to believe to be true about the proper ordering of their life in community. Burke's emphasis upon 'the general reason of the whole'<sup>36</sup> as the phenomenon which a legislative body ought to represent treats the good of representation as an instrumental good which is supposed to reveal, however gradually and partially, the truth about the general good of the community.

Accordingly, the enquiry about truth is an enquiry informed by people's *opinions* about right and wrong rather than the *will* of constituents as to particular ends.<sup>37</sup> When one insists upon making one's own assessment, free from the dictates of party or constituents, the fact that it is an assessment which is uniquely *one's own* is less important than the fact that it is an *assessment*. One's conscience vote need not be and perhaps ought not to be a determination based solely upon one's subjective intuition. It may be and perhaps ought to be informed by the political, religious and social traditions of the communities to which one belongs. These traditions are repositories of information about right and wrong. Hayek emphasised this middle ground between complete subjective intuition and objective scientific rationalism:

[C]ustom and tradition stand *between* instinct and reason – logically, psychologically, temporally. They are due neither to what is sometimes called the unconscious, nor to intuition, nor to rational understanding...Learnt moral rules, customs, progressively displaced innate responses, not because men recognised by reason that they were better but because they made possible the growth of an extended order exceeding anyone's vision, in which more effective collaboration enabled its members, however blindly, to maintain more people and to displace other groups.<sup>38</sup>

The value of understanding the exercise of conscience as lying between instinct and scientific rationalism is that it recognises that individuals are fallible in their judgements while acknowledging that customary values provide a source of information which transcends the experience of any individual. John H Hallowell made the point that the very word 'con-science' refers to 'the shared or common knowledge of certain objective truths and values'.<sup>39</sup> Hallowell, in response to the argument that political representatives who vote according to their values are acting dictatorially, proposed the following counter-argument:

The conscientious individual...does not believe that he is the sole custodian of these truths and values or the final interpreter of their meaning. He does not claim...personal infallibility; but neither does his acknowledgment of fallibility

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<sup>36</sup> Burke, above n 9.

<sup>37</sup> Hayek, above n 30.

<sup>38</sup> FA Hayek, *The Fatal Conceit: The Errors of Socialism* (1989, Chicago, The University of Chicago Press) 23.

<sup>39</sup> Hallowell, above n 8, 38.

render the values themselves meaningless or nonexistent. The fact that no individual can know more than partial truth does not destroy the validity of the truth he does know and shares with others or render meaningless the final truth that can never be attained by anyone.<sup>40</sup>

Political representatives who act according to conscience are capable of compromising with others, but they know '*in advance* the limits of what may be safely conceded'.<sup>41</sup> They recognise that compromise is good in so far as 'it enables us to realize goals that are shared, principles that are mutually respected, and embodies a good that transcends particular interests'.<sup>42</sup> Hallowell's arguments identify how the good of truth and the good of representation harmonise with one another. In modern democracies, people bring a variety of values systems to political questions. An assembly which consists of representatives of different values systems is a forum in which a search for common ground can take place.

The types of legislative measures which have attracted conscience votes in recent times – for example, voluntary euthanasia, use of surplus IVF embryos in medical research and who should decide whether the RU486 'abortion' pill should be included in the pharmaceutical benefits scheme – have raised complex ethical questions on which there is deep disagreement within the community. Political philosophies, religious beliefs and other established values systems provide individuals with an evaluative framework within which they can reflect critically upon proposals before the legislature and form a judgement as to which outcome is *right* (within the limits of that evaluative framework). A representative legislative assembly should represent the different evaluative frameworks which exist within the relevant political community. Legislators have a duty to engage in critical reflection upon proposals within the framework of their deepest ethical commitments and the commitments of the communities from which they come. They should also listen to and consider the similar reflections of other members of the assembly. A conscience vote is a vote cast on the basis of an individual assessment of the proposal, which considers the arguments which have been made, in the light of values to which the representative attaches importance.

This understanding of voting according to one's conscience is not completely alien to Australian politics. Brett has suggested that the decision of Alfred Deakin's Protectionists to fuse with George Reid's Free Traders (thereby forming the core of what would eventually become the modern Liberal Party), rather than to join forces with the Labor Party, was influenced by Deakin's objection to Labor's insistence that its members 'subordinate their own views and judgements to the collective will of the party'.<sup>43</sup> Brett considered the emphasis upon freedom of judgement to be decisive in the strong historical association between Protestantism and the non-Labor side of Australian politics:

Freedom of judgement was the core conviction of both British liberalism and Protestantism, and its absence was the chief vice of the Labor Party in the eyes of Deakin's Liberals. It was also, of course, the chief vice of Protestantism's historic enemy, the Roman Catholic Church, and arguments about freedom of conscience and independence of judgement inevitably raised its spectre and in turn provided

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<sup>40</sup> Ibid 38-39.

<sup>41</sup> Ibid 39.

<sup>42</sup> Ibid.

<sup>43</sup> Judith Brett, 'Class, Religion and the Foundation of the Australian Party System: A Revisionist Interpretation' (2002) 37 *Australian Journal of Political Science*, 39-56, 47.

Liberal Protestants with a set of images and arguments with which to attack the Labor Party.<sup>44</sup>

Of course, the difference between the Labor and Liberal parties in terms of the control exerted by party whips over individual party members has, in practice, not been as great as Deakin might have hoped. Equally, it is a gross oversimplification to characterise the difference between the Roman Catholic and Protestant understandings of church authority in terms of a complete absence of freedom of judgement for the former and complete freedom of judgment for the latter. On the other hand, freedom of judgement appears to occupy an important place in the mythology of the Liberal Party and Brett's claim that it has had a potent effect upon the history of political alignments in Australia is plausible.

The freedom of judgement which is implicit in the notion of a conscience vote is a freedom which is subordinated to and instrumental towards the discovery of the truth about the good of the community. The best available understanding of the conscience vote phenomenon must surely be that it represents a freedom from the *will* of others as to concrete outcomes in order that one may act according to one's *opinion* about right and wrong. One's opinion may be and ought to be informed by the received wisdom of the communities to which one belongs.

### III CONSCIENCE AND RELIGIOUS AUTHORITY

The prominence of religious beliefs as truth-claims, which have a call upon the consciences of legislators, has been a major source of tension in relation to conscience votes. The tension has been most apparent when religious leaders have proposed how particular public policy issues ought to be resolved within the evaluative framework of the religious traditions which they represent. Religious leaders and religiously-motivated members of legislative assemblies regard their statements and actions as being compatible with freedom of religion and conscience.<sup>45</sup> What appears to disturb the critics of these religious contributions is the spectre of a body of Roman Catholic or Evangelical Protestant foot soldiers who blindly obey the commands of a religious leader in pursuit of sectarian interests rather than exercising their consciences in relation to the question of the general good.

The question of the proper relationship between church authority and individual conscience is a contested one, even within the religious communities themselves. It is perhaps not a coincidence that the most highly-developed analysis of the relationship has occurred within the most hierarchical of Christian churches, namely the Roman Catholic Church. Two of Australia's most prominent Roman Catholic figures have offered different formulae concerning Catholic legislators' responsibilities. Father Frank Brennan SJ has said:

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<sup>44</sup> Ibid 50.

<sup>45</sup> For a particularly forthright statement along these lines, see, eg, Pope John Paul II, *Message on the Value and Content of Freedom of Conscience and Religion*, (1 September 1980). <[www.vatican.va/holy\\_father/john\\_paul\\_ii/messages/pont\\_messages\\_1980](http://www.vatican.va/holy_father/john_paul_ii/messages/pont_messages_1980)> at 3 December 2007, in which John Paul identified (at par 4) a number of 'dimensions' of religious freedom, including a 'freedom to proclaim and communicate the teaching of the faith, whether by the spoken or the written word, inside as well as outside places of worship, and to make known their moral teaching on human activities and on the organization of society'.

You can be a religious person without renouncing your moral and mental freedom, and without having to place your civil loyalty and duty at the mercy of another. You may well be ably assisted in the discharge of your civil loyalty and duty by the wise guidance and teaching of another who happens to be a religious authority. In the public forum, all religious authorities need to acknowledge the primacy of the citizen's conscience over the teaching authority of the citizen's church when it comes to the Church's and the citizen's participation in the law and policy making of the state.<sup>46</sup>

George Cardinal Pell is somewhat more wary of the idea of primacy of conscience, believing that it suggests to the contemporary Australian mind a complete subjectivism which is not compatible with religious commitment:

[T]he view of positive freedom that I take is not one of increasing options and reducing guidance concerning them, but one of encouraging intelligent deliberation about which options best accord with real human fulfilment. Unlimited negative freedom, the absence of external restraints, would produce chaos in our society as surely as it would on our roads. A key need for thinking about freedom today is to explore further this notion of genuine human fulfilment in the face of the many crude versions of subjectivism and relativism sweeping our society.<sup>47</sup>

The difference between Father Brennan and Cardinal Pell is not as great as it may at first appear. Indeed, Father Brennan has suggested that the difference 'may simply be a difference of perspective with some seeing the glass half-full and warning against the limits of conscience in coming to truth, while others see the glass half-empty and espouse the potential of conscience in living the truth'.<sup>48</sup> Father Brennan has acknowledged that people should avoid two extremes, namely, on the one hand, choosing according to personal preference 'on the basis that there is no objective truth or verifiable good', and on the other hand, 'woodenly' applying church authority.<sup>49</sup>

Perhaps the most celebrated discussion of the relationship between conscience and church authority has been that of the nineteenth century English divine, John Henry Newman. Newman emphasised that conscience is to be understood 'not as fancy or an opinion, but as a dutiful obedience to what claims to be a divine voice, speaking within us'.<sup>50</sup> In Newman's thought, conscience was associated with practical judgement rather than abstract doctrine. Therefore, to the charge that Roman Catholics did not enjoy freedom of conscience in political matters, Newman could answer that there was no collision between conscience and papal infallibility. The infallible authority of the Pope related to matters of abstract doctrine. The Pope did not have the final word in his particular commands.<sup>51</sup> Newman gave the hypothetical examples of a papal direction to clergy to campaign in favour of

<sup>46</sup> Frank Brennan, *Acting on Conscience: How can we responsibly mix law, religion and politics?* (2006) 228.

<sup>47</sup> George Pell, *Catholicism and the Architecture of Freedom* (Delivered at The Inaugural Acton Lecture on Religion and Freedom, Sydney, 4 August 1999) 10-11.

<sup>48</sup> Brennan, above n 46, 30.

<sup>49</sup> Ibid 32. See also, Ian Ker, 'Newman and Conscience' in D Riches (ed), *Authority and Conscience: Proceedings of a Symposium to mark the 150th anniversary of the reception of Cardinal Newman into the Catholic Church* (1995) 11-19, 11.

<sup>50</sup> John Henry Newman, 'A Letter addressed to His Grace the Duke of Norfolk on Occasion of Mr Gladstone's Recent Expostulation' in *Certain Difficulties felt by Anglicans in Catholic Teaching* (1876) 255.

<sup>51</sup> Ibid 256.

teetotalism and a similar direction to hold lotteries for fund-raising purposes. If a priest were to believe that teetotalism were 'practically a Gnostic error' or that lotteries were 'morally wrong', the priest would, in either case, commit a sin if he obeyed the Pope.<sup>52</sup> Newman's confidence that church authority and conscience could never come into conflict arose from his observation that Catholics were, on the one hand, free to form their own views of particular measures, policies and actions but, on the other hand, were obliged to form those views in the light of the articles of faith and the general principles of morality taught by the Church.

This distinction between the general and the particular has found a place in the official pronouncements of the Catholic Church. The Congregation for the Doctrine of the Faith has said that Church pronouncements on social or political matters are not intended to 'eliminate the freedom of opinion of Catholics regarding contingent questions', but are meant 'to instruct and illuminate the consciences of the faithful, particularly those involved in political life, so that their actions may always serve the integral promotion of the human person and the common good'.<sup>53</sup> The Church rejects some policies – for example, utopian socialist projects have been rejected on the basis that, since they deprive individual people of the possibility of owning property and of using their own initiative to make a living, thus making them dependent upon the state, 'the concept of the person as the autonomous subject of moral decision disappears'<sup>54</sup> – but the Church does not endorse whole economic programs or theories of political economy. It does not stipulate a binding rule for every conceivable matter that may become a matter for political decision-making. Nevertheless, if Catholics are to order their whole lives (which must include the public and political aspects of their lives) to the Church's teaching, they must recognise that their commitment to living out that teaching will inevitably place limitations on the types of political proposals that they may support.

The point at which the operation of the individual conscience begins (in order to rule out specific proposals) is sometimes difficult to discern in practice. Issues such as abortion and contraception have been matters of tension because the Church appears to have defined matters of morals in ways that do not allow the faithful very much room for personal judgement about particular situations. Those politicians who vote for restrictions upon the availability of abortion and contraception might be perceived by others to be engaged in 'wooden' obedience, rather than exercising their consciences. A passage from the 1993 encyclical of John Paul II, *Veritatis Splendor*, sought to explain how there may be a lot of room for the operation of individual consciences in particular types of matters but much less room in other cases:

In the case of the positive moral precepts, prudence always has the task of verifying that they apply in a specific situation, for example, in view of other duties which may be more important or urgent. But the negative moral precepts, those prohibiting certain concrete actions or kinds of behaviour as intrinsically evil, do not allow for any legitimate exception. They do not leave room, in any morally acceptable way, for the 'creativity' of any contrary determination whatsoever. Once the moral species of an action prohibited by a universal rule is concretely recognized, the only

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<sup>52</sup> Ibid 260.

<sup>53</sup> Congregation for the Doctrine of the Faith, *Doctrinal Note on some questions regarding The Participation of Catholics in Political Life* (24 November 2002) par 6.

<sup>54</sup> John Paul II, *Centesimus Annus* (1 May 1991) par 13.

morally good act is that of obeying the moral law and of refraining from the action which it forbids.<sup>55</sup>

The distinction made in this passage corresponds with a distinction which the Oxford jurist, John Finnis, draws between negative norms which ‘hold good always and on every occasion (*semper et ad semper*)’ and affirmative moral norms which ‘hold good *semper sed non ad semper*’.<sup>56</sup> In insisting that some moral stipulations apply always and on every occasion, Finnis sought to rule out that approach to moral reasoning which enjoins one to ‘[p]ursue the course which promises, in itself and its consequences, a net greater proportion of good states of affairs, or...a net lesser proportion of bad, overall, in the long run’.<sup>57</sup> Finnis gave the label ‘proportionalism’ to this approach. For Finnis, some actions are bad by reason of being actions of a particular type.

Some other Christian scholars have criticised aspects of Finnis’s approach while avoiding a collapse into proportionalism. Father Ian Ker, who has been one of the most prolific contemporary scholars of Newman’s life and work, has pointed out that a prohibition of a particular type of act does not entirely eliminate the role of the individual conscience. Ker acknowledged that it is ‘quite possible to formulate a negative moral teaching in such a way as to make it true by definition’, but observed that the reason why there cannot be any exceptions to that statement is that the words used carry ‘sufficient evaluative connotation to make the statement true by definition’.<sup>58</sup> In Finnis’s example concerned with the class of ‘warlike acts aimed indiscriminately’,<sup>59</sup> the word ‘indiscriminately’ carries a huge amount of evaluative connotation. Ker suggested that the conscience comes into operation ‘in deciding whether this act here and now would be an example of the act condemned’, i.e. an *indiscriminately-aimed* warlike act.<sup>60</sup> The conscience is concerned with the practical judgement as to whether a particular act contravenes the abstract moral stipulation.

The Anglican theologian, Oliver O’Donovan, has pointed out that moral absolutes are not necessarily negative in form and particular moral absolutes may exist in either affirmative or negative form – for example, ‘Feed your children’ could also be rendered in the form, ‘Do not leave your children unfed’.<sup>61</sup> O’Donovan pointed out these moral propositions permit no exceptions. They are always binding, in the sense that there are no circumstances in which one is permitted to leave one’s children unfed, but the possible range of application of the proposition is not known precisely because the proposition raises questions as to who are *my* children and at what point those children become adequately fed. The stipulation is not a demand for around-the-clock forced-feeding. O’Donovan said:

We can know in advance that an exceptionless moral norm will never be defeated by any *circumstance*, but we cannot know in advance precisely to which particular situations it will refer, because future particulars are not knowable in advance. Nor can we know to what *kinds* of situations it will apply, other than by thoughtful reflection on the implications of what it says. Discussion of what is included and what not is an

<sup>55</sup> John Paul II, *Veritatis Splendor* (6 August 1993) para 67.

<sup>56</sup> John Finnis, ‘Moral Absolutes: Tradition, Revision, and Truth’ (1991) 27-28.

<sup>57</sup> *Ibid* 14.

<sup>58</sup> Ker, above n 49, 16.

<sup>59</sup> Finnis, above n 56, 25; Finnis took this example from the Pastoral Constitution of the Second Vatican Council, *Gaudium et Spes*.

<sup>60</sup> *Ibid* 17.

<sup>61</sup> Oliver O’Donovan, ‘John Finnis on Moral Absolutes’ (1993) 6 *Studies in Christian Ethics* 50-66, 62.

inevitable condition of the thoughtful apprehension of the norm, and it cannot be foreclosed.<sup>62</sup>

Finnis seems to have been concerned that recognising this space for the operation of individual reflection upon the scope of the norm provides room for ‘malevolent prevarication’.<sup>63</sup> O’Donovan conceded that this is a legitimate fear but insisted that ‘the possibility of new questions arising from new experience is never absent’.<sup>64</sup> O’Donovan distinguished between ‘antithetical development’ and ‘complementary development’ of a norm. The former is impermissible because it suspends the operation of the norm, while the latter ‘identifies new kinds of application’. O’Donovan insisted that to refuse to allow complementary development is ‘to refuse to recognise the claim of the norm itself’.<sup>65</sup> After all, what are prohibited are all actions of a particular *type*. If we are to take the prohibition seriously, the question as to whether any particular act is an example of the type of act which falls within the prohibition must always be present. Finnis went close to conceding this when he suggested that ‘options can be transformed by conceptual clarification’ and ‘emotional biases which blocked differentiation... can be removed by changed social conditions’.<sup>66</sup>

The character of the disagreement points to a core of agreement. All of these thinkers are concerned about how religious devotees ought to go about performing their duty to ensure that their private and public lives are ordered in accordance with the truth revealed by their shared religious tradition. What unites all of them is an insistence that individuals engage thoughtfully with their religious tradition (which, for Roman Catholics, is embodied in the Church’s teaching on faith and morals) when making political decisions. This excludes *both* following the directions of others without thoughtful engagement with the tradition *and* acting on the basis of mere subjective intuition. Acting on conscience involves being free to discover and act upon the *correct* answer to a moral problem. There is a sense in which acting on one’s conscience involves finding one’s *own* answer to a concrete political question. Each individual’s answer may amount to a unique synthesis of precepts drawn from religious and ethical traditions and empirical knowledge about the world, but it is, nonetheless, purported to be an attempt to state the truth of the matter, as opposed to a mere subjective feeling or preference.

The extent to which leaders of faith communities should provide guidance on political matters and impose sanctions (such as refusing Holy Communion) upon those within the flock who fail to heed that guidance are important pastoral matters which have to be resolved within those faith communities. The critical question for the purposes of the present discussion is whether the fact that some members of legislative bodies are inclined to follow the guidance provided by church leaders undermines our liberal democratic polity.<sup>67</sup> Unless voting for Parliamentary

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<sup>62</sup> Ibid 62-63.

<sup>63</sup> Ibid 63.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid 64.

<sup>66</sup> Finnis, above n 56, 26; According to Finnis, the Catholic Church’s recognition of religious freedom as a proper principle of civil government is an example of the first phenomenon and the recognition of the wrongfulness of slavery is an example of the second phenomenon.

<sup>67</sup> It should be noted in passing that the association of a legislator with a particular faith community is not necessarily a reliable predictor of that legislator’s vote, even in relation to issues where the leaders of that faith community have been vocal. Consider,



representatives is interpreted as a simple mandate to vote in favour of the party platform of the elected member – in which event, the legislature will have no authority to determine matters which were not foreseen at the time of the election – members must vote according to what they consider to be *right* after thoughtful engagement with the philosophical or religious traditions with which they identify. Attempts by religious leaders to provide guidance on political questions, in so far as they represent honest and thoughtful engagement with the traditions which they represent, provide a salutary lesson to legislators about voting for what is *right*, rather than voting merely for what they or their constituents *want*.

#### IV CONCLUSION

If members of legislative assemblies are meant to be our representatives for the purposes of deliberating about whether legislative measures are the *right* measures in terms of the general good of the community, conscience votes are an essential element of the legislative process. Australian political institutions are a less than perfect embodiment of the deliberative view of the legislative process. The competing mandate view is deeply entrenched in the attitudes of the political class. Accordingly, the explicit designation of a vote as a conscience vote remains a rare event in Australian politics. In so far as members of legislative assemblies are free to vote according to their consciences, it is important for them to understand what a conscience vote ought not to be. It ought not to represent an occasion for merely substituting the concrete will of the member's constituents. Equally, members who vote according to mere subjective feeling or preference are not taking their responsibility seriously. The representative principle as understood by Burke, Mill and others, demands that members subordinate both their subjective intuitions and their personal interests in one outcome or another to their assessment as to the general good of the community. An assessment may and ought to be informed by the member's religious beliefs and other sources of traditional values. Since the religion and values of an elected representative are relevant in this way, electors are entitled to know about the religious beliefs and values systems with which their representative identifies.

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for example, the fact that the then New South Wales Premier, Morris Iemma, and Deputy Premier, John Watkins, who are both Catholics, voted in favour of a bill which removed a ban on therapeutic cloning of embryos. See, 'Pell 'regrets' stem cell approval', *The Australian* (Sydney) 7 June 2007. The tendency of church members towards 'wooden' compliance with the directions of church leaders may be somewhat exaggerated.

