

Chapter 1

When Respectability Loses Her Virtue

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May I begin by thanking you for the invitation to address this conference of The Samuel Griffith Society. It has been a very enjoyable experience, darkened for me only by the knowledge that this present moment was bound to arrive eventually and expose both my lack of knowledge of Australian law and culture and my inability to benefit from the inspiration of the moment. As science has established, the human brain starts working from birth and continues doing so right up to when someone rises to make a public speech. But I look forward, having survived tonight, to enjoying the debates of tomorrow without reserve.

Those debates are very necessary – if sadly so. In all the nations of the Anglosphere, with the partial exception of the United States, law was until recently a political battleground mainly at the stages of electoral debate and parliamentary law-making. The courts very occasionally had to make judgments that had serious political implications. One major instance of this was the judicial decision in 1901 on Taff Vale establishing labour union immunities in British law that was partly reversed (that is, made conditional upon union strike ballots) only as late as the labour reforms of the Thatcher administration. You will know better than I of similar cases in Australia. But there was usually a general understanding that decisions of the court that made law rather than merely interpreting it could be reversed by the legislature. And the legislature's decision, like that of an editor, was final.

All that has changed in recent years with the *Human Rights Act* in the United Kingdom, the *Mabo* decision in Australia, and the growing power of Supreme Courts in Canada (where the Court recently rejected the Government's nominee on grounds that seem constitutionally dubious and politically biased) and in the United States (where the Court has taken to discerning constitutional rights founded solely in the musing of its members on the meaning of life).

In the great majority of these decisions, the political direction of change has been leftwards, and their political content has been supplied in great measure from ideas and values floating in the cultural atmosphere. That cultural atmosphere is not drawn, however, from the beliefs of the whole of society, or even of a majority of its citizens but, as the late Robert Bork used to complain, from the mindset of the academic-media-philanthropy complex that has *metastasised* since the 1960s and replaced the military-industrial complex as the dominant ideological force in political life throughout the Anglosphere.

So an organisation such as The Samuel Griffith Society, like the Federalist Society in the United States, has two responsibilities thrust upon it. The first is to make a case for returning law-making to democratic and accountable institutions, such as Parliament from the courts. The second is to make arguments within the legal community that unmask, resist, and counter the proposals for major political change that come disguised as legal reforms or constitutional necessities or sometimes as the unanticipated consequences of a myriad of minor regulations. The liveliness of your debates tells me that you are doing a fine job in relation to both responsibilities. The fact that your internal disputes are more interesting and better argued than

most of the political debates across the parliamentary floor, let alone on the ABC, suggests that the intellectual advantage remains with the liberal and conservative Right. And I fervently hope that your counsels will stiffen the spines of the governing Right here and in other countries.

They have certainly inspired me. I do not usually offer innovative constitutional advice to the people of a country where I have been living for a few weeks. I usually wait at least six months. But your debate on mentioning the First Nations in a constitutional preamble inspires me to suggest that this could work if supplemented by reference to a second notional category of Australians. We might call this group “the First Citizens,” being the descendants of those Australians who settled in Australia between the First Fleet and the passage of the Constitution and who could undoubtedly claim a special role in creating the Australian polity. I think that might solve your problem.

But how would it work? Might it not stigmatise people who were neither First Nations nor First Citizens? Would it undermine the equality of all Australians? Would it encourage the legal creation of separate rights on an ethnic basis?

Well, I have given you the solution. These are essentially *technical* questions of how to implement it, and I cannot be expected to provide answers to all of them. But I can assure you that if First Citizens were to be written into a new preamble, there is no prospect at all that the courts might use it to create special rights for or otherwise favour them. On that, at least, I can confidently give you complete reassurance.

Let me turn now to the first of three ways in which culture and law interact with damaging political consequences. These three ways are: first, how a multitude of regulations, if their growth is unchecked, risks creating a passive and dependent population; second, how the attempt to change social beliefs by law and regulation pardons the criminal and stigmatises the respectable; and, third, how the post-modern belief that truth and justice are merely masks for the exercise of power creates an ideological tyranny.

The Explosion of Regulations

First, therefore, the explosion of regulations that the administrative state produces. I will begin this with a parable from Jon Donnison who, in 2014, was made BBC correspondent in Australia, and who in one of his first broadcasts told the following story:

I was fined A\$71 (US\$51, £32) and threatened with court for crossing the road on a red light, unbeknown to me an offence in the State of New South Wales.

The jovial policeman who stopped me asked, out of the blue, what would happen if I were to punch him in the face.

“I wouldn’t want to try it,” I replied, looking up at his bulky frame.

“Don’t worry,” he said. “Nothing would happen.”

He told me the courts would probably let me off if I argued I was having a stressful day.

But jaywalking, he said, “the courts take that very seriously.”

Donnison concluded:

The laid-back, easy-come, easy-go, throw-another-shrimp-on-the-barbie stereotype of Australia is encapsulated in the vibe of its unofficial anthem, *Waltzing Matilda*, where a swagman pinches a local sheep for his supper.

In reality, these days our jolly swagman would probably be pulled up for pitching his tent

without a proper permit, lighting an illegal fire or sparking up a ciggie in a public place.

Australia is without doubt one of the most rule obsessed and bureaucratic places I have ever lived.

Now, ladies and gentlemen, let me introduce you to the Cantuar Paradox: This holds that if the Archbishop of Canterbury says he believes in God, well, he is simply doing his job; but if he says he does not believe in God, well, he must really have discovered something. Equally, when a BBC correspondent criticises Australia for stopping the boats, well, he is simply doing his job. But if he says that Australia is more constricted by regulations than a blonde in a bondage magazine, then he really must be onto something.

And what Mr Donnison is onto is something that is more damaging in practice than in theory. Regulations like those to which he drew our attention are generally not objectionable in themselves. Some may be too costly for any benefit they bring; some may be too intrusive in their applications; some may not achieve their objectives. But they are intended to protect us from contaminated food, poisonous liquids, financial fraud, and any number of other risks – all of which are praiseworthy or at least defensible aims. They reflect a reasonable cultural preference, found, indeed, in most cultures, not to be poisoned or defrauded. Their bad effects mainly stem from their number, their freedom from effective democratic control, their uncontrolled multiplication, and their growing influence on ordinary citizens to be too nervous of risks and too demanding of protection. Regulatory expansionism gives bureaucracies too much control of our lives and breeds an unhealthy dependency in the general population.

When I mention dependency, I am not referring to welfare dependency. That is a bad thing, too, and it is made worse when the regulations surrounding welfare benefits offer perverse incentives – for example, for single mothers to break off relations with the fathers of their children. But the dependency bred by excessive regulations in the general population is a more general kind of passivity that gradually erodes its attachment to – and even knowledge of – its own actions and rights. We are encouraged by over-regulation to rely more and more on government officials to do for us what we could equally well do for ourselves – and, maybe more important, *not* to do what might help us solve our own problems. And the authorities themselves come to believe that they should enjoy a monopoly of action in areas where regulations covering “health and safety” are concerned.

In Britain this has led to some extraordinary interventions by the authorities on what commonsense suggests is the wrong side. In one case police prevented, by physical force, men attempting to rescue three children from a burning house on the grounds that they were not trained to do so. They were compelled to wait for the arrival of firefighters. They, alas, arrived too late and the children were burned to death. There have been several such perverse official interventions – which have made “health and safety” a popular synonym in Britain for cruel idiocy. Richard Littlejohn, the *Daily Mail* columnist, has made a speciality of writing about such occurrences.

Any idea of self-protection is discouraged by the authorities and increasingly by the surrounding elite culture. One symptom is the universal hostility in the media to the private ownership of guns and thus its absolute unwillingness outside America even to examine any arguments or statistics that might justify it. I noticed this same feature in the recent Australian coverage of shootings in America.

How likely is it that a populace that is continually encouraged, both verbally and by excessive regulation, to rely on others to protect it will show self-reliance, initiative, and courage when these are needed to save themselves or others. To take one example: would the passengers of United Airlines 93, who fought back on 11 September 2001 for others despite the certainty of death for themselves sixteen years ago, be likely to do the same in sixteen years' time. Not, I fear, if there are any Health and Safety officers on that plane.

How the attempt to change social beliefs by law and regulation pardons the criminal and stigmatises the respectable

Let me now come to the second set of ill-effects. This is produced by laws and regulations that stem not from the cultural beliefs of society but from the cultural beliefs of those in and out of government who want to transform society radically. As commonsense – which is the first target of such reformers – would suggest, a policy of transforming the beliefs of most citizens by law is likely to require much more coercion than one where regulations reflect popular opinions.

We know more about how such experiments work out from abroad than, until recently, from Anglosphere countries. Obvious examples from history are the attempts to create New Soviet Man, Aryan Man, and Yugoslav Man. Eventually these all failed. I recall the late Colm Brogan, a brilliant satirical journalist, justly beloved of Mrs Thatcher, rejoicing in the stories of drunkenness and idleness filtering out of Moscow in the 1960s. They were happy proof, he reasoned, that the Old Adam had triumphed over the New Soviet Man.

Cultural revolutions in the Anglosphere seem to be tamer affairs. They go most obviously under such names as multiculturalism, biculturalism, affirmative action. They re-define such matters as national identity to drain them of historical content and make them into safe social democratic concepts. They identify such new evils as “institutionalised racism” and conduct campaigns against them and those unfortunates in their grip such as the police or the white working class. They arrange a hierarchy of rights in which, say, gay or feminist rights trump the right of a religion to employ believers in sensitive posts. They undermine traditional markers of identity, virtue, and patriotism by treating them as bigotry or worse. And they stigmatize whole social groups such as blue collar workers who are seen as hotbeds of socially conservative bigotry.

But the wholesale transformation of society and social values inevitably goes far beyond these obvious political effects. They seek more wholesale and more subtle changes in social attitudes. To explain, let me cite a judicial quotation:

It is a principle of English law that a person who appears in a police court has done something undesirable, and citizens who take it upon themselves to do unusual actions which attract the attention of the police should be careful to bring these actions into one of the recognised categories of crimes and offences, for it is intolerable that the police should be put to the pains of inventing reasons for finding them undesirable.

As most of you know, this was once a well-known quotation among lawyers. It is a comic parody that one legal authority took seriously. An American legal textbook in the 1960s cited it as one of the rare cases of English judges making law in the American sense. It is, in fact, an episode in A.P. Herbert's brilliant parodies of *Times* law reports that appeared originally in *Punch*, later

collected as *Misleading Cases*, which I recommend unreservedly and which refutes any argument that legal humor is no laughing matter.

It is *not*, of course, a principle of English law that someone who appears in a police court must have done something undesirable. But it was until recent decades a principle of English culture. That principle was entitled “Respectability.” Philosophers and theologians look down on respectability as a tepid imitation of true virtue. Virtue consists of doing good when no-one else is looking; respectability consists of doing good because others *might* be looking. Samuel Butler replied to critics of respectability in *Erewhon*, pointing out that those who rejected respectability as inadequate were usually the very same people who never managed to live up to its unexacting standards.

To return to the main theme, however, appearing in a police court very definitely violated the tenets of respectability in the England of my youth and doubtless in the Australia of that time. But if you are changing society, then you must either undermine respectability or invert it. Thus, we gradually find ourselves reversing what society treats as vicious or virtuous. A new progressive *lumpenintelligentsia*, from kindergarten teachers to Critical Legal Theory lecturers, becomes the vehicle for transmitting these new orthodoxies to ordinary citizens on a regular daily basis. Under this transforming officialdom, respectability becomes a middle class privilege and thus itself a stigma.

At the same time the stigma of appearing in a police court, even of being convicted, is reduced or disappears entirely. Crime becomes a sign that society has offended against the criminal. In order to avoid the appearances of being either enforcers of middle class interests or gripped by institutionalised racism, the police become the paramilitary wing of *The Guardian*.

Initially, at least, parties of the Left are generally the carriers of these ideas. As my late friend from *Daily Telegraph* days, Frank Johnson, said of the UK Labour Party: “They can’t nationalise industries anymore; so they nationalise people instead.” But, after a while, soi-disant “progressive” members of centre-right parties tend to go along with them as well. And politics slowly evolves into a battle between progressive forces that seek to impose these new versions of respectability on conservative citizens who have to puzzle out what is going on before they can effectively resist indoctrination.

Much follows in train. Social legislation designed on such matters as gay marriage, gender parity, or ethnic proportionalism is passed with only modest resistance because many or even most people see the laws as essentially liberal measures expressing a “live and let live” attitude.

It then turns out, however, that the new laws also demand changes in the social attitudes and opinions of those who still resist the original reforms. Live and let live is replaced by the enforcement of public conformity. Speech opposing or criticising such measures is increasingly regulated, therefore, sometimes in extravagant ways. Thus, Christian bakers have been compelled by the courts not merely to sell cakes for same-sex weddings (itself a reasonable application of anti-discrimination laws) but even to inscribe words celebrating same-sex marriage on them contrary to their own beliefs. Official housing agencies in America have sought to criminalise political opposition to its social housing programs as “racist” and to ban public meetings called to resist them. New crimes are created and ordinary citizens punished for expressing traditional social or religious attitudes.

But whenever some conventional crime or social evil emerges as a major political problem – such as public drunkenness by young people – the notion of punishment disappears. Legal and police authorities propose to deal with it by raising the price of alcohol and running public health campaigns aimed at middle-aged home drinkers. In response to violent crimes, the police strongly warn ordinary citizens from “having a go” to protect their property or to save others from attack. They suggest that ordinary citizens should invest more in burglar alarms etc. In short, regulation of the law-abiding replaces the punishment of criminals as the criterion of wise public policy.

And when ordinary citizens resist or intervene against ordinary criminality, however, and their actions cause the death or injury of the criminals concerned, the police are much more zealous in prosecuting them than in pursuing the crimes of burglary or robbery that caused the fracas in the first place.

Far more punitive attitudes take over when vigilantism, race, religion, or sex are at issue since these are seen as the battle-grounds of government-mandated social change and popular resistance to it. Thus, the US Government knowingly propagates the use of false statistics that greatly exaggerate the incidence of rape, especially on college campuses, and is seeking both to remove traditional procedural protections for defendants accused of rape and to make the definition of rape cover a far larger range of sexual activities. Similarly, the Crown Prosecution Service in the United Kingdom has called for higher rates of conviction in rape cases and issued new instructions for the jury designed to bring this about. These measures reflect the feminist belief (or myth) that rape is less a rare and brutal crime of violence than the extreme end of conventional male sexual behaviour. If implemented wholeheartedly, moreover, it will confirm that view by generating more false rape convictions.

Nor, increasingly, are ordinary citizens even allowed to opt out of government-mandated social attitudes. There is currently a serious campaign, supported by governments and non-government organisations, to remove any right of conscientious objection by doctors and nurses to performing abortions. Abortion used to be a crime. It is now in many countries an individual right, though one defended as “safe, legal, and rare” and regulated in that cautious spirit. In this proposal for restricting conscientious objection, however, abortion is being treated as a public good. If the proposal succeeds, it will effectively compel pro-life doctors to leave obstetrics and other medical specialisms without having committed any professional wrong-doing and in order to further officialdom’s promotion of a more than dubious social benefit.

What makes this process of inverting respectability treacherous even for its practitioners, let alone the perplexed majority, is that no one can depend upon the new progressive conventions staying upside down. The 2007 UK documentary for Channel Four, *Undercover Mosque*, demonstrates this almost too completely. Hidden cameras recorded imams in six British mosques calling for the execution of homosexuals, the murder of Jews, the bombing of Indian businesses, the deaths of British soldiers in Afghanistan, jihad against non-Muslims in England, child marriage, “hitting” young women who refuse to wear the hijab, and much else contrary to laws against inciting racial hatred and other liberal values.

On being given the video, the West Midlands Police proposed to “give equal priority” to prosecuting both imams and documentary-makers. After watching 56 hours of video footage, the police and the Crown Prosecution Service then concluded that neither could be prosecuted for lack of evidence but that the documentary had edited the imams’ comments unfairly out of

context. As always with this excuse, one wonders what context could have made these comments reasonable. No matter, the imams were out of legal peril.

The police, however, continued the pursuit of the documentary, referring it to Ofcom, the official television regulator, for inciting racial hatred and undermining community safety. Even after Ofcom completely rejected the complaint, praising the documentary's fairness, the police persisted with their attacks on the program. This went on against a background of increasing controversy until the police were forced to withdraw, apologise, and pay a large sum in settlement following an action for libel mounted by Channel Four.

How on earth could such a kettle of absurdities happen? Incitement is a traditional target for legal restraint, usually on the grounds that it might disturb public order or provoke violence against individuals. Expanding the scope of such laws, however, has been part of a general political campaign to smooth the difficulties of the multicultural society and to discourage opposition to its further progress as, for instance, campaigns to restrict migration.

Undercover Mosque exposed a contradiction between these two purposes. There is little doubt that the imams were guilty of inciting racial hatred under a traditional interpretation rooted in preserving order; by pointing it out, however, the documentary-makers were guilty of undermining community cohesion and multiculturalism. It took some wriggling, but the police and the CPS plainly showed a preference for the second purpose. If the plain facts of the case (and public opinion) had not been on the side of Channel Four and Ofcom, this preference might well have prevailed.

Community cohesion, avoiding "bias," and other catchwords of multiculturalism are powerful *juju* in modern progressive bureaucracies, including those customarily thought to be conservative like the police. The Brits saw their mystical power in the recent urban scandals in which the police and local bureaucrats actually collaborated with gangs of Muslim rapists to coerce young white working-class girls into prostitution for fear of accusations of racism from "community leaders." Australians have still more recently learned that in the Martin Place siege (2014) the Sydney police gave at least equal priority to avoiding "bias crimes" against Muslims as to saving the lives of the hostages. As the television detectives say about serial killers, there's a pattern here.

And with every step in this progress, ordinary citizens become more alienated and hostile to the society they once felt was home. At best they withdraw into a private place. Social evils grow but the authorities are psychologically unable to tackle them seriously. Eventually, people rebel and social transformation meets more determined resistance. Whether that social transformation then comes to an end or resumes after a pause is not yet certain.

How post-modern belief that truth and justice are merely masks for the exercise of power creates an ideological tyranny

My third point will be very brief. It consists really of a paragraph from Orwell's 1941 essay, "England Your England." Orwell wrote:

The hanging judge, that evil old man in scarlet robe and horse-hair wig, whom nothing short of dynamite will ever teach what century he is living in, but who will at any rate interpret the law according to the books and will in no circumstances take a money bribe, is

one of the symbolic figures of England. He is a symbol of the strange mixture of reality and illusion, democracy and privilege, humbug and decency, the subtle network of compromises, by which the nation keeps itself in its familiar shape.

In a saner world, in an earlier England or Australia, that might very well have been the opinion held by, say, Bill Shorten or Dyson Heydon: namely, someone whose social and political views were unacceptably reactionary but who was a rock of integrity who would never allow his decision on the case before him to be influenced by his political sympathies. Maybe Shorten does privately hold that view – though he has strong personal incentives to disguise it from himself and from others.

But it is instructive that a socialist like Orwell could think and say what no ambitious left-wing politician could think or say today. The difference is explained by the triumph among progressives of post-modern views skeptical of the very notions of truth and justice which they see as mere masks for power and oppression.

Those views have made great progress in legal circles through the influence of Critical Legal Theory in the United States. They have made it possible for judges throughout the Anglosphere to think it reasonable and even virtuous to interpret the law in such a way as to impose their own personal political views on society. When the prevailing public opinion is that judges only interpret the laws, any damage is limited. Unrestrained by that, the notion of justice-as-power undermines the very notion of law and makes both law and politics arenas for conflict without end and ultimately without compromise. Orwell again:

In England such concepts as justice, liberty and objective truth are still believed in. They may be illusions, but they are very powerful illusions. The belief in them influences conduct, national life is different because of them. In proof of which, look about you.

I do not think truth and justice are illusions. But even if they are, we have a duty to fight to restore their cultural supremacy in law schools and in society. That is what The Samuel Griffith Society exists to do – and why it deserves your support. And mine.