

RELATIVISM AND HUMAN RIGHTS:

Can they Coexist?

Contributions to a seminar at Warrane College
University of New South Wales
7 April 2007

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FOREWORD

Phillip Elias

Assistant Dean (Studies), Warrane College

Exactly 60 years have passed since the drafting of the United Nations Universal Declaration of Human Rights. The theme of human rights still occupies a significant corner of the public square, not least because, in many places, human rights are still abused.

Australia is not an exception. Earlier this year, a graphic Northern Territory Board of Inquiry report found that Central Australian communities are being poisoned by toxic levels of child sexual abuse. Amidst the frantic search for a cause some have recognised the role of moral relativism in the crisis. In the names of self-determination and value-free government, Central Australian communities have been left ill-equipped to face the challenges to personal responsibility that modern freedoms entail.

The phrase 'human rights abuse' conjures up images of a dark and systematic power structure- usually a government- exploiting a particular subpopulation. It is self-evident that a breach of human rights involves some differential of power. It is less evident, but true nevertheless, that an abrogation can occur in

broad day, in the light of freedom, of self-determination, of empowerment. If morality is relative, autonomy rules absolutely.

The Warrane College Easter Seminar took for its theme: Relativism and Human Rights: Can they Coexist? The tensions between human rights and relativism were set out as follows:

Human rights are taken for granted in the West. But we also exalt autonomy and the 'right' to be free from the moral constraints of others. Given the latter, can we really pretend to safeguard the human rights of other people? Can we really talk about them at all?

Professor Tony Shannon's paper points out not just the absurdity but in fact the dangers of moral relativism. The best 'cure' for the threat of, for instance, AIDS, is first of all an unmuddled approach to morality. Dr. John Lamont, of the Catholic Institute of Sydney, writes on 'Historical Notions of Rights and Freedom.' He outlines the history of the concept of rights, emphasizing the dependency of subjective or personal rights on the more fundamental concept of objective right. Dr. Lamont specifically mentioned human dignity as a facet of objective right, and this is the particular focus of Dr. Joseph Azize, lecturer in law at the University of Technology, Sydney. Dr. Azize's paper demonstrates the need to discuss dignity in a universalist sense- anything less would be an injustice. The paper then highlights importance of human dignity in debates over euthanasia legislation in Australia.

Roger Sandall, anthropologist and a regular contributor to Quadrant magazine, writes on 'Prudential Relativism and the Problem of Ignorance'. Mr. Sandall's entertaining and thought provoking paper considers those situations in which ignorance can temporarily suspend the need for moral decisiveness. His essential argument, however, is that tolerance and cultural allowances are not synonymous with moral relativism.

The booklet concludes with a paper by Jenness Warin, a registered nurse who has worked extensively in education in remote Australian communities. Ms. Warin emphasised that many of the issues affecting indigenous Australians are attributable to a 'values-free' approach to their government. Her words take on particular significance in the light of recent administrative upheavals in remote regions. Delivered three months before the public outcry, they are not only timely; they are prescient.

Relativism, Subjectivism & Human Rights

Professor Tony Shannon AM

Master, Warrane College

Introduction

In welcoming you to Warrane College, I cannot resist a few comments on the theme of your seminar.

A common saying is that “beauty is in the eye of the beholder”: that is, beauty is subjective. However, try telling that to painters or composers when you say that you think that their paintings or music are no good! Yet the accepted wisdom of the age is that truth, goodness and beauty are all subjective and relative.

Relativism

Relativism considers ideas and values to be conditioned by time and place, so that individuals’ attitudes determine their moral philosophy, independently of both the rights of others and the unwritten law of human nature, the natural moral law. Thus, for John Dewey and his pragmatism which has so influenced Australian education, truth was “warranted assertability” (*cf.* Westbrook, 1991: 130-137).

Nowhere is this seen more than when conscience is invoked. In the words of Bishop Anthony Fisher *op*: “by the 1960s it [conscience] meant something like a strong feeling, intuition or sincere opinion”. My

opinions that is, because the opinions of others count for less, especially the opinions of Popes!

Thus Pope John Paul II was consistently condemned for not permitting condoms despite widespread promiscuity in HIV/AIDS affected regions of Africa. As though those who ignore one aspects of the Church's moral teaching are going to worry about another. As though there is no scientific evidence about the ineffectiveness of condoms; as though there is no sociological evidence that they actually encourage promiscuity.

The Natural Moral Law

All 'moral' laws would actually be arbitrary if they had no foundation in the natural moral law. They might be based on convention or force or prejudice, or even goodwill, and might seem to be binding, but there could be no real obligation to obey them. On the other, hand when a law is seen to be bound up with human nature, and therefore to be reasonable, it carries an inherent obligation. And moreover, when we see its reasonableness, it is relatively easier to accept than when it seems to be arbitrary.

The consequences of flouting the natural moral law are real, even if, at times, we do not want to see them. Even to mention the natural law is seen to be simplistic.

A Medical Example

An example from medicine might help. Kuru (or laughing sickness or shaking death) is a transmissible spongiform encephalopathy first

described in 1957. It occurred as an epidemic fatal disease confined to the inhabitants of several adjacent valleys in the remote eastern highlands of Papua New Guinea. They had a stone-age-like culture in which the women practised ritual endocannibalism (cannibalism of their deceased relatives). The asymptomatic incubation period of the disease was between four and thirty years. Because children stayed with the mother (males too until they were initiated), they too became infected.

There are weird and ominous similarities between the epidemiology of AIDS and of kuru. Both diseases were detected only because of their concentration in time and place. Both were eventually correlated with patterns of social behaviour. Both AIDS and kuru are slow infections, caused by viruses of types that were not known to infect humans before epidemics gradually unfolded.

Both diseases first became manifest in communities in which the associated social behaviour had become elaborate cults within minority groups: cults which historically most societies have abhorred. Termination of the kuru epidemic followed rigorous control by the state of a single form of deviant behaviour, but there is no equally simple option available to halt the spread of AIDS.

Australian colonial administrators, when they arrived there in the 1950s, promptly outlawed the practice on ethical grounds. They thereby controlled the spread of the disease several years before Gajdusek and his colleagues demonstrated its infectious nature (Gajdusek, 1973), for which Gajdusek won the Nobel Prize in Physiology or Medicine in 1976.

Since 1967 no child has died of the disease, and it is now virtually extinct among adults.

Modern medicine contributed nothing towards the eradication of kuru. Gajdusek had, in fact, first diligently tested the false hypothesis that it was a sex-linked recessive genetic disorder, although local missionaries and police had already concluded intuitively that it was an infectious disease transmitted by cannibalism.

The rapid spread through humankind of a slow virus with a pathogenesis similar to kuru is the ultimate virological nightmare. Yet the response to AIDS by public health authorities has been bizarre. Society's only defence to halt the epidemic is declared to be education for those already involved, or thinking about it, on how to modify the techniques of what is called their 'lifestyle', without actually forsaking it.

As Seale (1987) put it: "A similar approach to the prevention of kuru would have been for the Australian authorities to have distributed free rubber gloves and pressure-cookers to the villagers. Education lectures on safe cannibalism would have been funded by Canberra. The cannibal lobby would have insisted that kuru was a civil rights issue, and that nothing should be done to curtail the newly liberated lifestyle of an historically oppressed minority, now threatened by reactionary elements in society. The Australian Medical Association would have urged that kuru should not be a notifiable disease, that infection was a strictly confidential matter between doctor and patient, and that the word 'kuru' should never be entered on a death certificate. Meanwhile the

Australian government would have meticulously recorded deaths from the disease as they continued undiminished.”

This analogy is not a sick joke. On the contrary, it is deadly serious.

Conclusion

A firm foundation of perennial principles is necessary for a healthy society. Such a society will acknowledge objective truth and absolute moral norms (*cf.* Finnis, 1991: 99).

Welcome to the Warrane Easter Seminar 2007: “Relativism and Human Rights: can they coexist?”

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Historical Notions of Rights and Freedom

John Lamont

An account of the history of the notion of human rights should begin with the thesis of the French scholar of jurisprudence Michel Villey.¹ His account of the development of the concept of human rights can be set out in terms of the development of the meaning of the term 'ius'. Villey points out that in ancient philosophy and law, this referred to a feature of the world that either obtained or was to be brought about; a just ordering of the division of goods and punishments between members of a society. This understanding, Villey rightly points out, was the primary one held by St. Thomas, in the *Summa*, 2a2ae q. 57 (in a derivative sense, St. Thomas also understood 'ius' to mean the art of determining this just ordering, the art that is proper to the jurist). This primary sense of 'ius' Villey termed 'objective right'. Villey contrasts it with the notion of 'subjective right', which he credits Ockham with originating. Subjective rights are not features of a just order that subjects should conform to, but are instead attributes of the subjects themselves; they are powers to act or refrain from acting that belong to a subject – hence the name.

Villey explains Ockham's transformation of the notion of right by attributing it to Ockham's nominalism, voluntarism, and divine command theory of morality. The notion of objective right, on the other hand, is founded on a teleological account of human beings and human society, where human nature has a goal or end that specifies the good for man,

¹ See Michel Villey, 'Bible et philosophie Greco-romaine de saint Thomas au droit moderne', *Archives de Philosophie du Droit*, 18 (1973); *La Formation de la pensée juridique moderne* Presses Universitaires de France - PUF (15 mars 2003) *Le droit et les droits de l'homme*, PUF, Paris, 1990.

and that provides the motivation for all human action. The basis for right, in this account, is the social nature of man, which directs men towards living in society; the goodness of society, which fulfils the social nature of man, and which the social aspect of human nature is directed towards, consists in an ordering of things where goods and evils are distributed between the members of society according to desert. Ockham drops out this fundamental teleological structure of the good. He founds the good entirely on God's choice, so that if God had commanded idolatry, murder, or sodomy, those things would have been good, and not doing them would have been evil. There is thus no such thing as objective right in St. Thomas's sense in Ockham's account. There are only subjective rights, which are the freedoms to act conferred by God's decree.

Villey holds this evolution to be disastrous. Claims to rights in the subjective sense – claims to a just freedom to act belonging to a subject – are supposed to be prescribed by, and based upon, law and justice; they do not and cannot provide the basis for justice and law. The notion of subjective right has led to a proliferation of absurd and baseless claims to rights, with no rational way of arbitrating between their conflicting demands. He thinks that the notion of subjective right should be scrapped, and that we should return to the sound notion of objective right.

Villey's account of the history of the notion of subjective right has been attacked by Brian Tierney, who claims that the notion of subjective right

was anticipated by 12th century canonists.² Tierney's argument, however, shows no understanding of the philosophical content of the notion of subjective right as defined by Villey. He seems to think that his contention can be established by giving examples of uses of the Latin word 'ius' that understand it as a power of individuals. Such uses can indeed be found in these canonists. Rufinus, ca. 1160, writes; 'Natural *ius* is a certain force instilled in every human creature by nature to do good and avoid the opposite.' [Tierney: 1997, p. 62] Odo of Dover, ca. 1170, writes; 'More strictly, natural *ius* is a certain force divinely inspired in man by which he is led to what is right and equitable.' [Tierney: 1997, p. 63] Simon of Bisignano says that 'Natural *ius* is said to be a force of the mind the superior part of the soul, namely reason which is called *sinderesis*.' [Tierney: 1997, p. 63] The realities indicated by these meanings of *ius*, as the quotations provided by Tierney himself make clear, are ones that are postulated by St. Thomas himself. The definition of Rufinus allows the expression *ius* to be understood as either one's natural understanding of what is good and evil, or as the natural drive of the will towards what is good and away from what is evil. The definition of Simon of Bisignano narrows down the sense of the term to our natural understanding of the basic notions of what is good – a natural understanding that St. Thomas himself describes, using the very term *synderesis* (cf. 1a q. 79 a. 12, 1a2ae q. 94 a. 1 ad 2). None of these 12th century understandings correspond to the notion of subjective right that is absent in St. Thomas, and that is attacked by Villey. This notion is not just the idea of a subjective power of some sort that is connected with good and evil; it is the idea of a subjective power to act and refrain from

² Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta: Scholars Press, 1997)

acting that belongs to men by nature, whose exercise must be respected by others as a matter of natural justice, and which is a fundamental principle of justice rather than arising from some other feature of reality such as St. Thomas's objective right.

Tierney does make a valuable historical point about the origins of the notion of subjective right, by connecting it with debates over Franciscan poverty. The Franciscans wished to follow what they imagined to be Christ's example in having absolutely no property. Their access to the necessities of life that could not be secured by begging from day to day, such as a place to live, was secured by giving the ownership of these things to others – such as the pope – while securing the use of them to themselves. This notion of use is clearly a subjective right: and it is so described in Nicholas III's bull 'Exiit' (1279), on Franciscan poverty, which speaks of a 'ius utendi', and distinguishes it from 'simplex usus facti' (the simple fact of use). This bull speaks of a 'law of heaven', 'iure poli', by which those in extreme necessity are entitled to take from others what is needed to sustain life. Here we have a clear case of a subjective right prior to law: what is not clear – given its name – is whether or not it is a *natural* right, or instead a right springing from divine positive law. It does look as though Villey was right in seeing Ockham as the principal, if not absolutely the first, originator of a full-fledged notion of subjective right in Villey's sense; a development that arose both from the Franciscan disputes, in which Ockham was involved, and Ockham's denial of the existence of final causes in nature, and consequent rejection of St. Thomas's understanding of objective right.

This basic vindication of Villey's historical picture leads us to the question of what to make of the notion of subjective right as he defines it. Once the notion is clarified, his criticism of it is convincing. If we reject Ockham's divine command account of ethics – as I will presume we should – there are no grounds for believing in the existence of such rights. The fact that most human cultures do not possess this notion militates against the idea that they can really belong to human beings as such, as does the impossibility of settling disputes about conflicting claims to subjective rights. We can say with Alasdair Macintyre³ that

It would of course be a little odd that there should be such rights attaching to human beings simply qua human beings in light of the fact, which I alluded to in my discussion of Gewirth's argument, that there is no expression in any ancient or medieval language correctly translated by our expression 'a right' until the close of the middle ages; the concept lacks any means of expression in Hebrew, Greek, Latin or Arabic, classical or medieval, before about 1400, let alone in Old English or in Japanese even as late as the mid-nineteenth century. From this it does not follow that there are no natural or human rights; it only follows that no one could have known that there were ... the truth is plain: there are no such rights, and belief in them is at one with belief in witches and unicorns. [Macintyre: 1984, p. 69]

³ Alasdair Macintyre, *After Virtue: A Study in Moral Theory*, 2nd ed. (Notre Dame: University of Notre Dame Press, 1984).

Macintyre's dating of the first appearance of such language is a bit late, as Tierney emphasises, but that does not affect his basic point. As he says, 'the best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason we possess for asserting that there are no witches and the best reason which we possess for thinking that there are no unicorns: every attempt to give good reasons for believing that there are such rights has failed.' [Macintyre: 1984, p. 69] Parts of Macintyre's argument were anticipated by Jeremy Bentham, who in his *Anarchical Fallacies* responded to the French National Assembly's *Declaration of the Rights of Man and the Citizen* in 1789 by denouncing it as 'pestiferous and pestilential', and declaring that '*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts.' Bentham's preferred basis for natural justice, and for the formulation of legal rights to implement it, was utilitarianism. The flaws and unworkableness of utilitarianism, which I will not rehearse here, have in turn led to a revival of the conception of ethics, and of objective right, that is found in St. Thomas; a revival led by Macintyre, but involving a number of other thinkers, not all of whom are Catholic (Macintyre converted after writing *After Virtue*; an important non-Catholic figure in this revival is Philippa Foot⁴). I will take it that St. Thomas and Willey are right in seeing objective right as the key to the notion of justice. The question for subjective right then becomes; is there any room for something like an idea of subjective right within a Thomist perspective?

⁴ See Philippa Foot, *Natural Goodness* (Oxford: Oxford University Press 2001).

The idea of natural subjective rights as primitive attributes whose demands form the basis for a just order contradicts the notion of objective right. So it is a question of whether a limited and derivative notion of subjective right, that is restricted to the idea of a power to make just claims upon others to act or forbear from acting, and that inheres in individual humans as a consequence of their nature, can find a place within an account of justice that is based on objective right.

In one way, the notion of there being subjective rights that are derivable from the objective order of justice makes sense. We can use the analogy of a piece of a jigsaw puzzle. There will be certain ways in which such a piece can and cannot be fitted into a puzzle, that are determined by the shape of the piece on its own; and we can, if we wish, call these ways powers of the piece itself. Analogously, there will be certain ways in which a given man can and cannot be fitted in to a just ordering of society, and we can describe these ways as powers or claims of the man himself, that a just ordering of society must accept – and hence as natural subjective rights. But this analogy reveals a difficulty with the idea of subjective *human* rights, specific claims that belong to human beings as such. Pieces of jigsaw puzzles have different shapes – otherwise the puzzles wouldn't work; and analogously, men have different qualities. They differ from each other, and differ from themselves over time – a child is as such significantly different from an adult. These differences are an ineradicable feature of human nature as such, and they mean that men differ in the ways in which they can be fitted into a just social order. Why suppose that there are some specific ways that are shared by human beings as such, any

more than there are specific shapes that are shared by all jigsaw puzzle pieces as such?

The answer would have to be that human nature as such imposes constraints upon the way in which men can be fitted into a just order. Examples would be the right not to be forced to marry, the right not to be enslaved, the right (mentioned by Nicholas III) to take what is needed for life in extreme necessity. The usefulness of the idea of such rights is more a practical than a theoretical one, since their content is already contained in the idea of objective right; however, this practical usefulness is substantial – the availability of the idea makes the defence of such rights easier, because more readily understood, and it provides a useful basis for legislation. The explanation for the lack of universality of the notion of natural human subjective rights would be that they require, for their development, the notion of human dignity that flows from the Christian teaching that man is made in the image of God, and the freedom from the darkening of the intellect and the slavery of the will to sin that results from the grace that is given in Christ. (We might make a comparison with monotheism; this position is provable by philosophical means independently of revelation, but in fact no philosophers managed to attain it prior to encountering the influence of divine revelation.) These foundations for the notion of natural subjective rights do not take away the necessity for a long chequered intellectual development, of the sort that mankind typically needs for an important intellectual advance.

If we admit subjective rights of this kind, must we hold that Villey is wrong in claiming that objective right leaves no room for any idea of

subjective right? Villey argues that 'ius naturale', understood as objective right, is changeable, so it is not clear how far he would accept the existence of natural subjective rights as defended here. However, it is implausible to claim that objective right can change with circumstances to such a degree that there are no substantive subjective rights that flow from them. The right not to be kept and raised for the sake of being eaten is one example of something that flows necessarily from the dignity of human nature as such. It should be acknowledged however that there is a strong point that can be made in favour of banishing any notion at all of subjective right, or 'ius'. An essential part of the meaning of the term 'ius' is the idea of 'what's right, what's fair'; and this idea in turn contains the notion of being the basis in reality for true judgments about what can rightfully be done. In this sense, justice is found in the objective order; the subjective rights of individuals get their character from this order. The connotation of being a basic principle that goes along with the term 'individual right' does contradict the notion of objective right; the acceptable sense of 'subjective right' sketched out above is a non-natural one, a term of art that requires explanation in order to be understood. This fact is of particular concern for Catholics, given the fact that magisterial teaching has begun to emphasise the notion of human rights. In the absence of proper explanation, this is liable to be understood as an endorsement of the mythical notion of primitive subjective rights, since this is the understanding of human rights that is generally assumed in Western culture. A grasp of its actual meaning, and of its roots in Thomist thought, is essential if this teaching is to bear any good fruit.

Human Dignity, Relativism and Euthanasia Law

Joseph Azize

Abstract

The NSW law relating to euthanasia is briefly set out and considered in the light of 'human dignity'. The term 'dignity' has its etymological roots in Latin *DEC+NUS, meaning 'the quality of worthiness'. Both in Latin and in modern English, it implied worthiness on a particular scale, what one might call the scale of life. The concept of 'human dignity' should be understood as an absolute concept: the value which every human intrinsically possesses, by virtue of human life, not by virtue of qualities associated with that humanity, such as rationality. Relativist concepts of 'human dignity' are critiqued. Liberal euthanasia legislation cannot be supported on the grounds of human dignity, as human dignity is not, and cannot be, compromised by virtue of personal defects or suffering, whether congenital or otherwise.

1. Euthanasia in NSW

The word "euthanasia" is perhaps best defined as: "A gentle and easy death", and, in recent usage: "The action of inducing a gentle and easy death". As OED notes, in this sense, the word is "Used *esp.* with reference to a proposal that the law should sanction the putting painlessly to death of those suffering from incurable and extremely painful diseases." As we shall be considering moral philosophy, we might note the comments of the Sacred Congregation for the Doctrine of the Faith, which on 5 May 1980 issued a *Declaration on Euthanasia*. In Part II, it states:

By euthanasia is understood an action or an omission which of itself or by intention causes death, in order that all suffering may in this way be eliminated. Euthanasia's terms of reference, therefore, are to be found in the intention of the will and in the methods used.

In this paper, I shall be concentrating upon physician-assisted euthanasia if only because most proposals for reform, and indeed, legislation such as the *Oregon Death with Dignity Act* and the *Rights of the Terminally Ill Act 1995 (N.T.)*⁵ feature physician-assisted euthanasia. Often, different questions arise when euthanasia is implemented not by a physician but by a lay person, often a partner, a member of the family, or a close friend. Yet, in all these various circumstances, the mental element is critical in assessing criminal liability. Generally speaking, there would be criminal liability for one of two offences, murder, or assisting suicide. In New South Wales, the starting point is section 18 *Crimes Act 1900* (NSW) which relevantly provides:

18 (1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict

⁵ The Northern Territory legislation was repealed by the Commonwealth *Euthanasia Laws Act 1997*. Schedule 1,1 of that Act added s 50A to the *Northern Territory (Self-Government) Act 1978 (C'th)*, effectively stripping the N.T. Legislative Assembly of the power to make laws which permitting euthanasia or the assisting of a person to terminate his or her life. Schedule 1 2, "Application" reads: "For the avoidance of doubt, the enactment of the Legislative Assembly called the Rights of the Terminally Ill Act 1995 has no force or effect as a law of the Territory, except as regards the lawfulness or validity of anything done in accordance therewith prior to the commencement of this Act."

grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

(b) Every other punishable homicide shall be taken to be manslaughter.

(2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.⁶

This provision covers not only acts of commission, but also acts of omission: the “thing by him or her omitted to be done”. The distinction between “active” and “passive” euthanasia is pertinent, even if the term ‘passive’ is infelicitous, as ‘passive euthanasia’ will not necessarily comprise murder. Halsbury’s Laws of Australia observes:

... it is lawful under the common law to withdraw from even a young person invasive treatment initiated without the consent of the patient and which confers no benefit; the principle of the sanctity of life, which is not absolute, is not violated and the duty of care no longer applies in such circumstances.⁷

⁶ This provision refers only to murder: *The Queen v Lavender* [2005] HCA 37.

⁷ *Halsbury’s Laws of Australia* 80-900

As authority for this proposition, the editors cite *Airedale NHS Trust v Bland* [1993] AC 789; [1993] 1 All ER 821.⁸ Legislative intervention has quite substantially amended the common law position on suicide. Section 31A *Crimes Act 1900* provides:

The rule of law that it is a crime for a person to commit, or to attempt to commit, suicide is abrogated.

The key provision is now s.31C, which reads:

(1) A person who aids or abets the suicide or attempted suicide of another person shall be liable to imprisonment for 10 years.

(2) Where:

(a) a person incites or counsels another person to commit suicide, and

(b) that other person commits, or attempts to commit, suicide as a consequence of that incitement or counsel,

the first mentioned person shall be liable to imprisonment for 5 years.

The offence created by section 31B covers the survivors of “suicide pacts”, but exonerates them of murder. It is not unknown for suicide

⁸ There have been numerous discussions of this case. Accessible and readable commentaries, taking different positions, may be found in Keown (1992) 217-238 and, more briefly, Harris (1995).

pacts to effectively comprise the euthanasia of one of the parties, and the suicide of the other. Suicide pacts, can of course, fail to work out as planned. In *R v Duthie* [1999] NSWSC 1224, the accused managed to slay the other member of the pact, but not himself. Both euthanasia and assisted suicide can mitigate the sentence otherwise appropriate for murder. In *R v Hoerler* [2004] NSWCCA 184, Spigelman CJ, with whom Hulme and Adams JJ relevantly agreed, held at [27]:

... there are situations in which the charge of murder may be accompanied by circumstances which reduce the objective gravity of the offence, e.g. a case of euthanasia or a suicide pact. Such matters can result in an appropriate sentence being well below the maximum permissible for manslaughter.

In addition, there are occasions when “euthanasia” might not be considered to be either murder or assisting suicide. I refer especially to the circumstances where a physician may “withhold life-prolonging treatment from a patient in a persistent vegetative state” to use the terminology of *Airedale NHS Trust v Bland* [1993] AC 789.

I shall start with a decision of the Supreme Court of NSW in which treating doctors were allowed to cease treatment and permit the patient to die. In *Isaac Messiha (By His Tutor Magdy Messiha) v South East Health* [2004] NSWSC 1061, 11 November 2004, the patient’s family’s made an application for an injunction that the relevant hospital where Mr Messiha was a patient continue to treat him. Howie J accepted medical evidence which made him decidedly sceptical of the family’s claims that

the patient continued to make responsive eye movements [13]-[14], and held:

[28] Apart from extending the patient's life for some relatively brief period, the current treatment is futile. I believe that it is also burdensome and will be intrusive to a degree. I am not satisfied that this Court's jurisdiction has been enlivened by the evidence before me from the family members. The Court is in no better position to make a determination of future treatment than are those who are principally under the duty to make such a decision. The withdrawal of treatment may put his life in jeopardy but only to the extent of bringing forward what I believe to be the inevitable in the short term. I am not satisfied that the withdrawal of his present treatment is not in the patient's best interest and welfare.

Although his Honour decided this case on the basis that the arguments for the exercise of the court's jurisdiction were not sufficiently strong, it is clear that he also took the view that the best interests of the patient were served by allowing treatment to cease. (I suggest that there is, in fact, no rigid distinction between the two tests in these circumstances. If the patient's best interests did lie in continuing treatment, the exercise of the court's *parens patriae* jurisdiction would be invoked). Thus, while it would shorten the patient's days to take the patient off the hospital's regime and provide only palliative care, this was allowable, and would therefore not be murder. The case turned on medical evidence, and it was held that the court did possess jurisdiction to require the hospital to continue treatment.

We now come to *Northridge v. Central Sydney Area Health Service* [2000] NSWSC 1241. On 12 March 2000, Mrs Northridge sought from the Duty Judge, O’Keefe J, an order to stop the Royal Prince Alfred Hospital, Camperdown withdrawing treatment and life support from her brother, Thompson, who was a patient in the hospital. His Honour eventually telephoned the hospital doctor, and the upshot was the hospital agreed to resume Thompson’s treatment. Thompson had been admitted unconscious on 2 March 2000. Within four days, Northridge had been given to understand that the hospital considered that her brother had “no hope” and “was not going to make it”. [26]. Northridge had her brother examined by her own doctor, Prof. Lance. He noted that Thompson’s Glasgow coma score (GCS) had increased over several days from 3 out of 15 to 9, “and by 5 March 2000 he responded to his name and focussed on the speaker.” [46] Indeed, on 9 March:

[47] ... Professor Lance observed Mr Thompson to be alert, look at the examiner upon his entry into the room, move his upper limbs on request and be able to make sounds. However, because he had undergone a tracheostomy he was unable to speak. His GCS had increased to 12 out of 15, a further improvement. [48] Mr Thompson obeyed requests made to him, his eye movements were full, his pupils symmetrical and reactive to light and his facial sensation presented as intact, although facial movement was limited. ... Mr Thompson was able to protrude his tongue to an extent, to flex and extend his fingers on the right side and to write answers to questions posed to him, albeit his writing was not good. Upon Professor

Lance leaving Mr Thompson, the Professor waved and said goodbye whereupon Mr Thompson responded by extending his right wrist in a farewell gesture. ...

Further medical evidence supported this [54]-[56]. Once the hospital had come to the conclusion that Thompson should be marked “not for resuscitation”, it took steps only to see that he was comfortable [71]. On 20 March 2000, Thompson had a respiratory arrest. He was revived only because the NFR had been lifted [77]. His Honour ordered that:

1. Until further order and whilst ever John Robert Thompson remains in a hospital or other institution within the area and under the control of the defendant:

a) John Robert Thompson be provided with necessary and appropriate medical treatment directed towards the preserving of his life and the promoting of his good health and welfare;

b) no Not for Resuscitation Order be made in respect of John Robert Thompson without prior leave of the court.

The conclusion then, is that in New South Wales, physician-assisted euthanasia is still a crime against the *Crimes Act 1900*, but that there are circumstances in which failing to intervene to save a life, or even switching off a life support system, is allowable. Equally, as *Northridge* and *Messiha* show, these circumstances are not universal, and physicians are subject to supervision by the courts. The different

conclusions in those two cases are to be attributed to their different facts, especially the medical evidence. *Northridge* is also important in this context, as the behaviour of the hospital staff, and even the doctors, raises significant questions and concerns as to their attitude and, one might say, the medical or bioethical culture which subsists today, at least in certain places.

The existence of such a culture, the fact that doctors and nurses could act as those in *Northridge* did, demonstrates the importance of the public debate in ethics, if such demonstration were needed.

2. Defining 'Human Dignity'

It is desirable to try and capture some of the aura, as it were, of our phrase. We will start with 'dignity', which etymologically comes from the Latin DIGNITAS < *DEC+NUS, meaning 'the quality of worthiness', 'the quality of being valuable'.⁹ In Republican Rome, the term was an important and charged one, and so came to have many shades of meaning. It was both a social and a political term. The most important surviving treatment is Cicero's, in *De Officiis*, where at I.105-106, he writes:

[105] But it is essential to every inquiry about duty that we keep before our eyes how far superior man is by nature to cattle and

⁹ The finer points of the meaning of the *DEC root are dealt with in Hellegouarc'h (1963) 389-90. As Hellegouarc'h (1963) notes at 394, the nasal suffix "sert à former une catégorie d'adjectifs verbaux ..."

other beasts: they have no thought except for sensual pleasure and this they are impelled by every instinct to seek; but man's mind is nurtured by study and meditation; he is always either investigating or doing, and he is captivated by the pleasure of seeing and hearing. ...

[106] From this we see that sensual pleasure is quite unworthy of the dignity of man ... And if we will only bear in mind the superiority and dignity of our nature, we shall realize how wrong it is to abandon ourselves to excess and to live in luxury and voluptuousness, and how right it is to live in thrift, self-denial, simplicity, and sobriety.¹⁰

So, 'human dignity' was known as a term which referred to the superiority of man to animals, in the ways described. 'Dignitas' is not simply 'worth'. Were it so, the word would be redundant. It is, rather, a value which is recognized as distinguishing humanity from beasts. For this reason, when applied in the political sphere, it referred to a distinction among people, "the esteem and standing enjoyed by an individual because of the merit that was perceived to exist in him."¹¹

Politically, 'dignitas' did not lead to notions of human equality, rather, it was the opposite: it led to the notion that those possessed of the greatest 'dignitas' were to be entrusted with the greatest 'auctoritas' (authority).¹² Thus, in such a context, Cicero said:

¹⁰ Translation by Walter Miller, available at http://www.constitution.org/rom/de_officiis.htm @ 4 April 2007. In Latin, Cicero uses the words 'dignam hominis' and 'dignitas' at I.106.

¹¹ Mitchell (1991) 47.

¹² Mitchell (1991) 54-55.

*... dignitas est alicuius honesta et cultu et honore et verecundia digna auctoritas.*¹³

*Dignity is a person's worthy influence (or 'authority') with honesty, reverence, honour and modesty.*¹⁴

These social and political domains were not the only sense of 'dignitas': it also had the aesthetic meaning of 'beauty', or more specifically, male beauty, as opposed to 'venestas', female beauty.¹⁵ Once more, it marks a distinction. As such, the Latin word is cognate not only with our own word 'dignity' but also with words such as 'decorum'. In her treatment of dignitas in Latin, Carpino notes the connection, and states of 'decorum':

*Il decorum, corrispondente al Greco πρόπον ... implica un ideale di temperanza, moderazione, misura, considerate segno indicativo di un'intima armonia spirituale (σωφροσύνη), cui esteriormente corrisponde un'armonia delle membra, che suscita piacere estetico negli altri uomini.*¹⁶

Decorum corresponds to the Greek prepon ... implying an ideal of temperance, moderation, measure, being a sign indicative of innermost spiritual harmony (sophrosune), which outwardly corresponds to a harmony of the members, which inspires aesthetic pleasure in other men.

¹³ Cicero, *De Inventione* II.166.

¹⁴ Cicero's Latin is a little repetitive and perhaps circular, but Hubbell (1949) 333 renders 'dignitas' as 'rank', and the entire clause as: "Rank is the possession of a distinguished office which merits respect, honour and reverence."

¹⁵ Hellegouarc'h (1963) 394.

¹⁶ Carpino (1979) 261-62.

The connection between these two words persists into modern English. “Decorum” is defined by OED as:

1. That which is proper, suitable, seemly, befitting, becoming; fitness, propriety, congruity. †a. esp. in dramatic, literary, or artistic composition: That which is proper to a personage, place, time, or subject in question, or to the nature, unity, or harmony of the composition; fitness, congruity, keeping. Obs.

b. That which is proper to the character, position, rank, or dignity of a real person

Note the connection in definition 1b between the concepts of “decorum” and ‘dignity’. But our word means more than simply “worthy” or “valuable”; it has significant overtones. As stated, in Latin, “dignitas” came to mean the quality of worth possessed by a living thing, as evaluated on a scale, of being held in respect, and of specifically male beauty. With the possible exception of the last sense, these overtones are found also in modern English. The OED relevantly defines ‘dignity’ as:

1. The quality of being worthy or honourable; worthiness, worth, nobleness, excellence.

2. Honourable or high estate, position, or estimation; honour; degree of estimation, rank.

3. *An honourable office, rank, or title; a high official or titular position.*

4. *Nobility or befitting elevation of aspect, manner, or style; becoming or fit stateliness, gravity.*¹⁷

5. *Astrol. A situation of a planet in which its influence is heightened, either by its position in the zodiac, or by its aspects with other planets.*

The concept of ‘degree of estimation’ distinguishes ‘dignity’ from ‘worth’ or ‘value’. Its other historically attested meanings are subsidiary to these, or obsolete, or both. It is apparent then, that ‘dignity’, as shorthand for ‘human dignity’ does have two broad senses, united by the notion of a scale of values: there is the quality of dignity as worth, and the recognition of someone’s individual value, the ascribing to them of dignity.¹⁸ Hence, by easy steps, one can speak of a person being ‘raised to the dignity of the priesthood’, of the astrological dignity referred to by OED as sense 5, and one can refuse to ‘dignify’ a silly question with a reply. It is as if answering the foolishness would elevate it beyond its desert.

The notion of ‘human dignity’, however, is more than simply a noun with an adjective, the way that ‘human hair’, for example, serves simply to

¹⁷ This sense may echo the meaning of ‘dignitas’ as (male) beauty, a sense which was found in Johnson’s definition of ‘handsome’. But as we saw, Johnson does not restrict it to males.

¹⁸ There is a vast bibliography on human dignity available, especially from Europe. I have omitted a great deal, but the interested reader could consult Smith (1995) and the annotated bibliography in Bayertz (1996).

distinguish our hair from fur and pelt. 'Human dignity' is a difficult concept to define in a way which meets general assent, and emotional responses to it are so strong. 'Human dignity' can be applied in diametrically opposite ways in one and the same debate. For example, in the euthanasia debate, some persons appeal to human dignity in support of the call for a relaxation of the laws against physician-assisted suicide, while others make the same appeal in support of maintaining the laws, resisting relaxation.¹⁹ Yet, despite the controversy, the concept is not manifestly nonsensical. The notion of human dignity has roots in the ancient world, and was adopted in early Christianity, but it was probably most thoroughly explored, and its modern sense defined through the efforts of thirteenth century Christian theologians in Europe, who taught that humans possess a "moral nature, which commands unconditional respect."²⁰ This concept of 'human dignity' asserts that:

*... there is something in human beings that makes them unique and gives them incomparable value. This implies that human dignity is not derived from anything external to their very nature but is intrinsically bound up with what makes them human. ... human dignity defines the duties and prohibitions to others as well as to the actor; it has implications for objective as well as for subjective decisions about the end of life.*²¹

¹⁹ See, for example, Schwöbel (2006) 44, Beyleveld and Brownsword (2001) 233 and Bedjaoui (1995).

²⁰ Becker (2001) 268. Soulen and Woodhead (2006b) 3-8 deal with the concept in early Christianity.

²¹ Becker (2001) 268. The theological basis of this view is also given, with reference to scripture and Aquinas, in Fisher (1995) 316-317.

In England, and perhaps echoing Cicero, Hobbes (1588-1679) wrote in *Leviathan*:

*The Value, or WORTH of a man, is as of all other things, his Price; that is to say, so much as would be given for the use of his Power: and therefore is not absolute; but a thing dependant on the need and judgment of another. ... The publique worth of a man, which is the Value set on him by the Common-wealth, is that which men commonly call DIGNITY. And this Value of him by the Common-wealth, is understood, by offices of Command, Judicature, publike Employment; or by Names and Titles, introduced for distinction of such Value.*²²

It is difficult to imagine a more relativistic concept. Few today would agree that Hobbes' view was an exhaustive treatment of 'human dignity'. However, in Hobbes' system, "the order of priority ... is: power, law, justice."²³ The modern history of the phrase 'human dignity' in law and ethics, especially in Europe, is more profoundly influenced by the treatment of Immanuel Kant (1724-1804). In *Grundlegung zur Metaphysik der Sitten* (1785), he wrote (in translation):

But a human being regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price, for as a person (homo noumenon) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity (an absolute

²² Hobbes (1651) 44 = *Leviathan* Part 1, Chapter 10.

²³ Brown (1996) 40, see also 37-41.

inner worth) by which he exacts respect for himself from all other rational beings in the world.

... The respect that I have for others or that another can require from me is therefore recognition of a dignity (dignitas) in other human beings, that is, of a worth that has no price, no equivalent for which the object valued could be exchanged ...²⁴

Pullman distinguishes two different, if related, concepts of dignity: 'basic dignity' and 'personal dignity'. Pullman's 'basic dignity' is a universalist concept: it refers to the dignity of all humans, and has the corollary that humans have inalienable rights because they possess this dignity:

To refer to dignity in this manner is to invoke a species referenced conception that ascribes worth to human beings simply on the basis of their humanity.²⁵

By contrast, 'personal dignity' is a "socially referenced"²⁶ concept derived from particularist notions of human dignity, as Pullman states:

Particularist conceptions of dignity include all those that are tied to particular historical, traditional, cultural, or otherwise personal perspectives on what gives life – whether individual or corporate – meaning and purpose.²⁷

²⁴ Kant (1996) 186 and 209. The German edition was not available to me at the time of writing.

²⁵ Pullman (2001) 341, see also 342.

²⁶ Pullman (2001) 349.

²⁷ Pullman (2001) 342, see also 348-9.

These two concepts can also be distinguished in that 'basic dignity' is not contingent upon the individual qualities of any given person. Therefore, basic human dignity mandates "moral recognition" (perhaps, one might say, 'respect') even for the human corpse, for the human foetus, and human genetic material.²⁸

It is important to have an intellectual grasp of the different spheres of these two related concepts, for communitarian ethics tends, on Pullman's analysis, to give priority to particularist, rather than universalist, conceptions of human dignity.²⁹ And yet, Pullman argues, the concept that all human beings, as humans, are possessed of dignity, must be a "fundamental axiom in moral discourse".³⁰ Therefore, to claim that there is no moral distinction between torture and kindness is to make a statement which is nonsensical "within a language intended to communicate moral meaning."³¹ Pullman makes a link here to Wittgenstein's concept of language games,³² but perhaps one can find an analogy in games more generally. For example, were a Chess Association meeting to debate the rules of chess, and one of their number contended that they should not be playing chess at all, no time spent arguing that would be useful in resolving the issue before them.

Then, there are definitions which are unworkable because of their elasticity. For example, Eric Poole, the Member for Araluen in the

²⁸ Pullman (2001) 349-50.

²⁹ Pullman (2001) 344.

³⁰ Pullman (2001) 346.

³¹ Pullman (2001) 346.

³² Pullman (2001) 346.

Northern Territory Parliament, told the (Australian Commonwealth's) Senate Legal and Constitutional Legislation Committee:

*Dignity in death is solely to be defined by the individual and his or her own set of values. Undignified deaths are those in which the moral values of others are imposed on the dying individual against the values, judgment and wishes of the patient.*³³

If 'dignity' is solely to be defined by each individual for themselves, then there is no point in discussing the issue, and it disappears from coherent discourse. I submit, contrariwise, that the concept of 'human dignity' should be more frequently discussed, and more effectively employed. It is, after all, one of the few concepts upon which diverse systems of thought and belief might find common ground.

To restate the conclusion: 'dignity' is the quality of worth possessed by a living thing, as evaluated on a scale. 'Human dignity' refers to the intrinsic value of humans as humans, and can be thought of in terms of 'basic' and 'personal' dignity, depending upon perspective. In speaking of basic dignity, we distinguish humans as more valuable than animals and plants. In speaking of personal dignity, we focus on the cultural and social value of individuals. But notions of personal dignity do not, and cannot, undercut basic dignity. They are simply different ways of speaking drawn from the one central concept.

³³ Cited by the Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee, Euthanasia Laws Bill 1996*, 6.16.

3. The Ethical Basis and Content of Human Dignity

Having now defined 'dignity' and briefly touched upon the general meaning of 'human dignity', the question arises, what is the basis, in ethics, of human dignity? Can one ever find an absolute basis for the value of 'human dignity'? I mean here 'absolute' in the original grammatical sense of 'independent, free of condition'. This absolute sense is opposed to a relativistic one, which would make human dignity dependent upon some other quality. Does human dignity pertain to all people in the same way? I shall be arguing that it does, although the understanding of human dignity, if, indeed, it is understood at all, may well be influenced to a significant degree by the concrete social, cultural and religious context in which people find themselves.³⁴ But this does not mean that human dignity is no more than a culturally conditioned concept, any more than a mountain is other than a mountain because different cultures describe mountains in diverse terms, for example, some cultures revere mountains as sacred and others do not.

Although I have introduced Pullman's distinction between 'basic dignity' and 'personal dignity', we have not split the concept of 'human dignity' into two. Rather, we will here consider the one concept from two different perspectives. If we think of all the people of the world, we can ascribe to each of them 'basic dignity', that is, the worth which they possess "simply on the basis of their humanity". But once we narrow our perspective upon an individual, then the concept of 'human dignity' can

³⁴ Wagner (2005) 206 notes that the ideas of the "good life" and "rights" have also, traditionally, been understood within a concrete context.

be analysed with respect to: “particular historical, traditional, cultural, or otherwise personal perspectives on what gives life ... meaning and purpose”, as Pullman has described. For example, if we took a topic such as ‘human thought’ or ‘responsibility’, we would be justified in speaking of them in a general or basic sense, but equally, any discussion of the thought of, say, Aristotle, would be far richer than a discussion of the thought of David Duke.³⁵

This is a vital concept to grasp. One can possess a human quality, yet not manifest it with any pre-eminence, or at all. It requires, then, more understanding from the observer to divine its presence. Perhaps, one might say, more feeling, or sympathy, or better yet, *compassion*, in its etymological sense of ‘togetherness-feeling’. Similarly, while one can recognize the basic ‘human dignity’ of any person, including infants born with spinal bifida and elderly persons with dementia, the ‘personal dignity’ of these people is not manifested to the same degree as it is with others. This also means that the human dignity of the demented cannot be affronted in so many ways as that of many others, because their social world is so much smaller. However, it does not mean that their intrinsic human dignity is diminished.

One could reply that there is no reason to accept that human dignity is anything but an idea which happens to be socially current until we have, for example, outgrown our ‘speciesism’, “the view that it is morally justifiable to treat human life differently from other relevantly similar non-

³⁵ A quondam member of the Ku Klux Klan and founder of the National Association for the Advancement of White People.

human life, simply because it is human.”³⁶ This is effectively the position of Singer and Kuhse.³⁷ Singer has described talk of ‘human dignity’ as ‘waffle’ and ‘high sounding phrases’, predicated upon a belief that “men (humans?) had some worth that other beings did not ...”.³⁸ In a recent op-ed piece concerning a young girl who was being treated with hormones to remain below normal height and weight, Singer stated:

As a parent and grandparent, I find 3-month-old babies adorable, but not dignified. Nor do I believe that getting bigger and older, while remaining at the same mental level would do anything to change that.

*Here’s where things get philosophically interesting. We are always ready to find dignity in human beings, including those whose mental age will never exceed that of an infant, but we don’t attribute dignity to dogs or cats, though they clearly operate at a more advanced mental level than human infants. Just making that comparison provokes outrage in some quarters. But why should dignity always go together with species membership, no matter what the characteristics of the individual may be?*³⁹

³⁶ Kuhse (1987) 14.

³⁷ Shortly before completing this paper, Fr Amin Abboud kindly sent me a copy of Abboud (2006). I have not incorporated his research into this paper. He offers a thorough assessment of Singer’s philosophical position, and a critique of it. For Abboud’s treatment of human dignity, see esp. 261-287. Where my comments overlap with Abboud’s this is entirely accidental, as is immediately apparent from the significant superiority and fullness of his treatment.

³⁸ Singer (1989) 157.

³⁹ Singer (2007)

For several reasons, I would contend that this is misconceived. First, I will be mounting an argument that three month old babies do indeed possess human dignity, whether or not this is recognised by others – but I am inclined to think that in ordinary usage, one could say that even a baby on the day of its birth possesses human dignity. In addition, I shall be contending that this usage is soundly based. As for babies being ‘adorable’, but ‘not dignified’, it seems to me, that there is a trick of the eye here: ‘human dignity’ is one thing, and the quality of appearing ‘dignified’ is another. For example, many sights which people say possess beauty, nonetheless do not appear to be “beautified”. It is not that the concepts of ‘dignity’ and ‘dignified’ are not related: it would be idle to assert otherwise. But the relationship is not one of equivalence: it is in the nature of languages to coin anomalous uses, and it happens that the word ‘dignified’ has overtones of bearing oneself with “lofty self-respect without haughtiness”, as OED puts it.

Neither is it clear to see why mental level should determine the possession of dignity: although this is confidently assumed.⁴⁰ Also assumed, it seems to me, is that “dogs or cats ... clearly operate at a more advanced mental level than human infants.”⁴¹ This is not the place to go into this in detail. It is sufficient for me here to point out that this is an assumption. But to adumbrate my thoughts here, children are learning from the moment of birth, if not indeed, in utero. They are learning language, if nothing else, to an extent and in a manner impossible for dogs and cats. But they evidently do learn far more than

⁴⁰ To like effect, see also Gewirth (1992) 18.

⁴¹ If Singer has proved this assertion, I have not found this. For example, this is not done in Singer (1989).

language, even if it is not intellectually expressed on day one. Babies possess an extraordinary emotional life. They recognize and respond to relationships, they are sensitive to the people they come into contact with. A crying baby will stop when picked up by someone collected and sympathetic, but will howl if taken by someone distressed.⁴²

Kuhse states that young children and the senile lack rationality.⁴³ I doubt this is so: they both possess 'rationality', but the ability to manifest may be lesser or greater in individual cases. For example, children avoid sources of pain, and that is a rational activity. Singer and Kuhse perhaps attribute too much importance to intellect alone: I think it is truer of the human experience to think in terms of the 'human psyche' rather than 'mental level' or 'rationality'. The psyche includes intellect, but also emotion and organic instinct, both of which possess an intelligence.

Then, many people do attribute dignity to animals, but we don't attribute 'human dignity' to them.⁴⁴ Animals have usually been placed lower on

⁴² This is not the place for a full study, but I note that Wikipedia, under "Common-sense metaphysics", http://en.wikipedia.org/wiki/Common-sense_metaphysics#endnote_primer @ 5 April 2007, states: "Infants make the following metaphysical inferences: (1) that the world contains rigid objects that are continuous in space and time; (2) they treat any surface that is cohesive, bounded, and moves as a unit as a single object. When one solid object appears to pass through another, these infants are surprised; (3) Babies less than a year old distinguish causal events from non-causal ones that have similar spatio-temporal properties; (4) they distinguish objects that move only when acted upon from ones that are capable of self-generated motion (the inanimate/animate distinction); (5) they assume that the self-propelled movement of animate objects is caused by invisible internal states - goals and intentions - whose presence must be inferred, since internal states cannot be seen; (6) When an adult utters a word-like sound while pointing to a novel object, toddlers assume the word refers to the whole object, rather than one of its parts." I have substituted numbers for bullets.

⁴³ Kuhse (1985) 146.

⁴⁴ Article 120 of the Swiss Constitution recognizes the "dignity of creation". See also Meyer (2001) *passim*.

this hierarchy than humans, and plants beneath them. Indeed, in some states one may have a sense, even a mystic sense, of the dignity of any aspect of creation. I knew one mystic who possessed this sense, and said that some trees had ‘a magnificent presence’. There is no contradiction in acknowledging the dignity of nature, and animals in particular: as we saw from Cicero, a hierarchy is fundamental to the idea of ‘dignity’.⁴⁵

More fundamentally, perhaps, in the present context we are only discussing ‘human dignity’ and how that should be reflected in the law. I think that the exclusion of animals from the discussion has to be reasonable *prima facie*.⁴⁶ However, I shall make one brief observation: to my mind, it is futile to deny that humans possess qualities which animals do not. As Cicero noted in *De Officiis* (see above), animals do not engage in a myriad of activities which human do, from writing to building cities. Further, there is no reason to believe that they have any mystical experience, but reason to think that they do not: indeed very few people do, but they possess the potential.⁴⁷ Xenophanes of Colophon (c.570-480 BCE) said that if horses and cattle could draw or

⁴⁵ Schwöbel (2006) 51 provides material which shows how, in Christian theology, humans are placed above animals.

⁴⁶ Kuhse (1987) 212-3 argues that ‘speciesism’ is indefensible, because it would leave us with no reply to racists. Singer does the same in several places. Apart from the fact that ‘species’ can be ‘genetically identified, whereas ‘race’ cannot, this is not a watertight *argument*, for a racist could then consistently embrace speciesism. It is, rather, a *consideration* which, they hope, would dissuade one from taking a ‘speciesist’ view. And besides, if we are to take it as certain that racism is to be rejected, why should we not take any other position, such as affirming human dignity?

⁴⁷ This is not the place to go into it, but humane treatment of animals is enjoined by human virtue and human dignity. There are explicit statements to this effect in religious literature, and even to the effect that animals and indeed, all of the creation, has a role in what is sometimes called ‘the universal adoration’. For examples, see the psalm in Daniel 3 and Francis’ ‘Canticle of Brother Sun’.

sculpt, they would depict gods in their own shape.⁴⁸ In terms of our argument, that misses the point: and that point is that animals cannot draw and cannot sculpt, while nothing they do leads us to imagine that they conceive of gods.

Some have attempted to find a basis for 'human dignity' in the capacity to assert a claim, although as Gewirth states, that capacity is simply not possessed by all people or in equal measure.⁴⁹ As with 'mental level', the assertion of claims is one way in which human dignity is manifested; one could easily agree with that. But this would hardly be a complete and satisfactory understanding of human dignity, as it would apparently allow more dignity to those who could more powerfully assert their claims, which in effect, is the same as saying that might makes right. If human dignity is predicated upon power, then it is merely descriptive of a certain prerogative which is extracted by force. But in fact, it was long argued by reformers that the mistreatment of the poor and helpless was an affront to their human dignity. Of artists and writers like Coleridge, Arnold, Ruskin and William Morris, Schilling states: "... they wrote on social and economic subjects to defend the dignity of man, violations of which they could not endure ...".⁵⁰ In other words, 'human dignity' cannot be ethically based on power, rather, it may ground ethical demands for a redistribution of power.

⁴⁸ Cited and translated in Kirk, Raven and Schofield (1983) 168-169

⁴⁹ Gewirth (1992) 12.

⁵⁰ Schilling (1946) 176.

Rights are, as Aquinas contended, in truth “a description of what justice requires in a given circumstance”.⁵¹ The modern tendency to speak of “rights” can ground an absolute individualism if the dependence of rights themselves upon a broader concept of justice is not borne in mind, and such an individualism may well prove inimical to respect for human dignity.⁵² As MacIntyre has shown, ethical systems become “incommensurable” when they appeal variously to rights or to justice as exemplified in stated norms, because “there is and can be no independent standard or measure by appeal to which their rival claims can be adjudicated, since each has internal to itself its own fundamental standard of judgment.”⁵³

However, this much is clear: justice must be prior to rights, unless one actually holds that there is no fundamental principle of justice, except insofar as ‘justice’ describes the implementation of a conventional system for the protection of human rights, such as a constitution. This must be so, because without a notion of justice, there is no obligation to respect, let alone enforce another’s ‘rights’. Note that Aquinas has not said that no one has rights. Rather, that these rights are dependent upon the application of justice in any particular situation. For example, rights may be endowed by contract, statute, custom. But the construction of these contracts, statutes and customs, and any conflict of rights, falls to be resolved by appeal to some higher standard, and that standard must include a right to justice.⁵⁴

⁵¹ As paraphrased by Wagner (2005) 208, citing Aquinas at 208-9.

⁵² This is some of Wagner’s thesis: see in particular Wagner (2005) 215, and also 220 in respect of the relativisation of traditional belief systems.

⁵³ MacIntyre (1990) 4. Kuhse (1996) 19-20 makes a similar point.

⁵⁴ “One can only have a right to something good” Brown (1996) 100.

I suggest that Kant's philosophy, although it is tremendously important in the history of these questions, especially in Germany and Europe, provides another example of a 'false absolute', for if 'human dignity' is a function of 'rationality' then it is no longer really *human* dignity, but the dignity of rationality. This is not a tautology, for not all human beings are rational at all times of their life – a point which Kuhse and Singer make.⁵⁵ If human dignity is a property which based upon rationality, then the concept of human dignity is resolved into a chemical property, as it were, of rationality, and can be dispensed with. Further, if rationality is compromised, so is human dignity. Once more, I am sure that human dignity is often vindicated in and by rationality and autonomy, but human dignity is nonetheless a larger concept, by virtue of being inherent in all humans.

When these issues are treated in Christianity, and in some other religions, humanity as a whole is treated as being utterly dependent upon God, who is of course an absolute.⁵⁶ Values therefore, need not be relativistic. This is reflected in Milton's 'On his Blindness', where the poet ponders his disability, asking: "Doth God exact day-labour, light denied?" Milton's issue here is actually whether he can discharge his duties as God requires. The answer which comes subverts Milton's notions of human duties, and thus of the value of his actions:

*... God doth not need
Either man's work or his own gifts: who best*

⁵⁵ Kuhse (1987) 212.

⁵⁶ Sheikholeslami (2004) 6: "Man's nobility is, in fact, a sacred gift from God".

Bear His mild yoke, they serve Him best: His state

*Is kingly; thousands at his bidding speed
And post o'er land and ocean without rest: -
They also serve who only stand and wait.*

Few philosophers are properly qualified to critique religious views. For example, Kuhse and Singer argue that the “supporters of the Sanctity-of-Life Principle” are inconsistent in that they base their practical judgments upon quality-of-life considerations.⁵⁷ But from a religious point of view there is no rigid distinction between the two: the quality of life is related to its sanctity. Life is sacred because it is bestowed for a divine purpose. It is also, since ‘the Fall’, limited. Eventually, a life returns to God (see for example *Ecclesiastes* 12:7). One could say that when illness and feebleness diminish the quality of life to a degree where that divine purpose can no longer be served, the life does not lose its sanctity, but it has run its course (*Ecclesiastes* 3:2). Today, perhaps, one should say that it would do so without the intervention of modern medicine. Hence it is obligatory, as Kuhse quotes Pius XII, to employ only ‘ordinary means’.⁵⁸ It may be very difficult to distinguish ‘ordinary means’ from ‘extraordinary means’, but that is not an objection to the soundness in logic or ethics of the position, it only indicates complexity.

⁵⁷ Kuhse and Singer (1985) 34 and Kuhse (1987) in many places, but see esp. 21-24.

⁵⁸ Kuhse and Singer (1985) 30-33. See also Kuhse (1987) 198-9 citing Pius XII’s address of 24 February 1957.

There are very many matters where the application of a rule is attended with controversy: one only has to think of the principles of sentencing in Australia. However, at the time Kuhse was writing, the euthanasia debate had already moved on. In its *Declaration on Euthanasia* of 5 May 1980, the Sacred Congregation for the Doctrine of the Faith stated:

*In the past, moralists replied that one is never obliged to use 'extraordinary' means. This reply, which as a principle still holds good, is perhaps less clear today, by reason of the imprecision of the term and the rapid progress made in the treatment of sickness. Thus some people prefer to speak of 'proportionate' and 'disproportionate' means.*⁵⁹

So Kuhse's critique does not adequately address the absolutist position on sanctity of life and deciding when to exercise only proportionate palliative care. Yet, Kuhse is correct to address the issue of consistency.⁶⁰ A theological view may not be susceptible to rational proof or disproof, but it should at least be consistent. But so too, should an ethical position exhibit consistency, and ethical relativism is not a consistent and coherent ethical position. As Brown states:

Relativism expressed as a moral judgment would look something like this: "It is better to be a relativist than an absolutist," or "It is good that there are no moral absolutes." While such judgments might arise out of a fear of oppression by

⁵⁹ This document may be read at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_euthanasia_en.html @ 3 April 2007.

⁶⁰ Kuhse (1987) 24-29.

*absolutists, or in the spirit of tolerance and respect for others, they are internally incoherent. The one thing that simply cannot be meaningfully said about moral relativism is that it is good and should be embraced.*⁶¹

Finally, it seems to me that Kuhse's moral philosophy ultimately rests upon assertions, acts of faith, as it were. In an instance where she discusses her philosophical imperative, Kuhse writes: "... to the extent that morality demands the equal consideration of all interests ...we are 'speciesists'...".⁶² But why does morality demand the equal consideration of all interests? For the reasons I have sketched above, even if this is not the place to set out all the reasoning and counter-arguments in detail, human dignity militates in favour of giving greater consideration to humans. More fundamentally, without an absolute standard of right or wrong to appeal to, I cannot see how Kuhse can establish that "morality *demand*s the equal consideration of all interests" (my italics).

Kuhse's second act of faith is her acceptance that morality is related to interests, and that only 'conative life' or 'sentience', bringing the capacity for suffering and enjoyment, is capable of enjoying interests.⁶³ Realizing that painless killings would present her theory with an immediate problem, Kuhse argues that such murders would be wrong because they "would leave a whole range of future-directed desires unsatisfied – including the desire not to be killed against one's

⁶¹ Brown (1996) 11.

⁶² Kuhse (1985) 146.

⁶³ Kuhse (1985) 147.

wishes.”⁶⁴ But what is wrong with leaving these desires unsatisfied? Kuhse merely asserts that this is wrong. If she is understood to say that this is because the person has interests, then this act of faith is simply buttressed by her first one. Indeed, on her analysis, if the person is killed while sleeping or unconscious without arousal, they are killed when they have no interests. It is true that a sleeping person will awaken unless they die in their sleep or drift into a coma, but then a foetus will almost certainly be born, and Kuhse argues that “killing a foetus ... is not a direct wrong to the being killed because it does not override that being’s desire for, or interest in, continued existence.”⁶⁵ But even if it did have desires or interests, so what? Why should anyone else respect anyone else’s desires or interests? If, on the other hand, one approaches the entire question from the point of view of ‘human dignity’ as something implicit in the quality of human life itself, these tangled arguments are sidelined, and an absolute criterion of values can be appealed to.

4. Conclusion

⁶⁴ Kuhse (1985) 148.

⁶⁵ Kuhse (1985) 149.

As we have seen, it is not satisfactory to ground human dignity upon any other quality unless that quality is an absolute.⁶⁶ Ultimately, one needs to go further, and not only show what is incorrect, but to establish a positive position, otherwise the critique appears incomplete, and we could conclude that in fact there are no ethical principles at all over and above what each person selects as their principles from time to time, should they even bother to do so. We are engaged in an exercise at the intersection of law and bioethics. I would suggest that the argument so far has been sufficient to establish two important points: first, that the law would be unsound not to adopt an absolute view of human dignity. That is, that ‘basic dignity’ applies to each and every human by virtue of their humanity.⁶⁷ And the second point, which is now clear, is that there is little effective difference between the position of the law in New South Wales and a position which protects human dignity as a quality adhering to the individual by virtue of their existence as humans.

In New South Wales, as we have seen, suicide is not illegal, but assisting suicide is. Therefore, physician-assisted suicide is illegal. Ordinarily, if one may do something, one may seek assistance. But the prohibition in question respects the dignity of human life. In other words, it recognizes that there is something special about human life, and that even if one cannot be prohibited from ending one’s own life, yet that life is so valuable that no one should be allowed to render aid to the intending suicide. Further, the rules for the withdrawal of medical

⁶⁶ Bedjaoui (1995) 139 asserts this, but while he demands it, he does not venture a positive thesis of what this ‘platform of incontestable values’ would look like. In a way, this essay is a first step in taking up Bedjaoui’s challenge.

⁶⁷ I am aware of the debate concerning whether ‘human’ and ‘person’ are synonymous. I agree with Spaemann (2004) 48-9 that they are.

treatment from the terminally ill and irremediably comatose are not very different from the rules which an absolutist view of human dignity would dictate. Thus, in *Northridge* the hospital was enjoined not to cease treatment, whereas in *Messiha* this was allowable. One could say that the medical means taken in *Northridge* were proportionate to Thompson's situation. On the other hand, further efforts to keep *Messiha* alive were disproportionate: it was sufficient to take palliative care with the result that he would shortly die.

There is a widely shared perception that the ill, the incontinent, and the dying lose their dignity. Why? Could it be that we are now teaching ourselves to speak and think as if they had? Clearly, if human dignity is an inalienable human characteristic, there can only be one answer, that is, these people's dignity subsists despite these frailties and events, and even though they may themselves believe otherwise. If this is so, it follows that euthanasia, if it is to be justified, cannot be justified on the basis of an appeal to 'death with dignity'. Rather, the way forward in such cases is to restore their sense of dignity to these people, and treat them with all available means of therapy, including palliative care where needed. This is a part of what Cassell speaks of when he contends that too frequently "the profession of medicine appears to ignore the human spirit".⁶⁸ One could take this line of enquiry further, for example, Twycross says that "where there is hope, there is life", and that hope is essential in hospice care, and goal setting is integral to it.⁶⁹

⁶⁸ Cassell (1991) 43, and also 46.

⁶⁹ Twycross (1995) 143.

Ira Byrock, a physician who specialises in care for the dying, argues that slow decline and dying is not indignity, even if many terminally ill people suffer tremendously when they feel that they have lost their dignity. This sense of loss, Byrock observes, is often related to losing the ability to perform the countless small activities one barely thought about, and especially perhaps, from losing and control over one's body, for example, being unable to feed oneself, or control toilet functions.⁷⁰ Indeed, Byrock concludes that patients can accept the care needed with grace and dignity.⁷¹ This immediately raises the possibility that it may be possible to educate people to retain their sense of dignity, or at least to challenge their sense that they have lost their dignity.⁷² If I understand Byrock correctly, he argues that this very sense of loss is itself a learned response:

*Unfortunately, society reinforces the belief that the loss of capability and independence renders a person undignified. Our society reserves its highest accolades for youth, vigor, and self-control and accords them dignity, while their absence is thought to be undignified. The physical signs of disease or advanced age are considered personally degrading, and the body's deterioration, rather than being regarded as an unavoidable human process, become a source of embarrassment.*⁷³

⁷⁰ Byrock (1997) 85.

⁷¹ Byrock (1997) 86.

⁷² "... we can forget that dignity is not recognized by telling the old, infirm or comatose how undignified their condition is, or how they would be better off dead ... Dignity in old age, handicap, unconsciousness, and suffering are above all recognized by our showing the infirm love and respect." Fisher (1995) 325-326.

⁷³ Byrock (1997) 86.

Byrock's work provides examples from clinical experience of how a physician who can see, and respect, the dignity of his or her patients, can assist those people to "achieve a sense of meaning and value about who (they are)".⁷⁴ This is in accord with both Twycross' clinical experience,⁷⁵ and with the ethical position we have explored above. For example, Gewirth concludes that human dignity subsists even if a person is not treated with respect: "certain modes of treatment may violate but not remove their (sc. the people's) dignity."⁷⁶

Our exercise in rejecting relativistic theories has been useful in that it has at least established where one cannot look to find a moral absolute which will justify and give content to our ideas of 'human dignity': one cannot appeal to particular human qualities or properties. These qualities such as rationality and autonomy may be forceful reminders of human dignity, and provide reasons to respect others' dignity, but they cannot ground it. Rather, the only foundation of 'human dignity' must be in human nature, as an integral whole. It is futile, and ultimately incoherent to try and break 'human dignity' up into a spectrum like white light, or to resolve it into respect for rationality or the ability to assert a claim.

Insofar as considerations of 'human dignity' have any weight, they militate in favour of maintaining the euthanasia law as it is in New South Wales, for human dignity is not, and cannot be, compromised by virtue of personal defects or suffering, whether congenital or otherwise.

⁷⁴ Byrock (1997) 114.

⁷⁵ Twycross (1995) 144.

⁷⁶ Gewirth (1992) 16.

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Prudential Relativism and the Problem of Ignorance

Roger Sandall

What do I mean by Prudential Relativism? To start with, what I have in mind is the old adage “When in Rome, do as the Romans do.” In Nero’s time, presumably, some visitor to Rome failed to do as the Romans did, and ended up thrown to the lions. That it is prudent to trim one’s ethical sails to the wind was the conclusion quickly drawn by his surviving friends—and they were not just being opportunistic. Prudence is admittedly only a contingent virtue, what Immanuel Kant might have called a “maxim”, not an imperative, but in certain contingencies it may indeed help you survive.

Next, what do I mean by “the problem of ignorance”? Here we might also put ourselves in Rome in Nero’s time. And also in the shoes of a visitor. The year is about 50AD. Let’s say our visitor has just arrived in Rome from some barbarous place like Siberia or Scotland, he has not heard the aforementioned famous adage, he is deeply ignorant, and so he asks someone along the Appian Way: What DO the Romans do? Let us also assume that this visitor has heard about the lions, and he wants desperately to do the right thing. Trouble is, he doesn’t know what the right thing is.

Something like this same problem of ignorance arises today, and arises in numerous contexts in our multicultural world, when we have newcomers from cultures A and B and C who quite simply don’t know what the right thing in the host culture is. Originally, say 50 years ago,

most immigrants wanted to know what the right thing was and made efforts to find out. Recently, however, another complexity has been added, with entire government departments set up to tell them that their thing is the right thing, whatever sort of a thing it might be, and they should do their thing willy-nilly, and, indeed, that they have an internationally certified human right to do so... But of course that's another story. Or not really the story I'm telling here.

So back to my argument... which involves a little thought experiment trying to compare and contrast a pure condition of ethical knowledge, on the one hand, and of ethical ignorance, on the other, and trying to see how and when prudential relativism becomes a part of our moral environment.

First, let's imagine a small village in the jungle where everyone knows the rules. Or a medieval village in the 12th century. In this ethical universe there are three absolutely binding commands: do not lie, do not kill, and do not paint graffiti on your neighbour's walls. Not only are they absolutely binding, everyone knows them, everyone respects them, and everyone obeys them. Just as economists propose states of perfect equilibrium between economic demand and economic supply, what I am here proposing is a state of stable equilibrium in which ethical demand (the law) is in perfect equilibrium with ethical supply (lawful human conduct). And this could of course be any small and virtuous community in times gone by.

[Or for that matter it might be a monastic community today. I saw an ABC documentary about New Norcia in WA last evening. They have a

Benedictine monastery there, and this kind of closed religious community exemplifies the sort of indissoluble combination of law and conduct I am talking about, where rules that are known are dutifully and invariably performed.]

But now let us consider the opposite case. Not a universe of knowing ethical agents in stable equilibrium. Instead, a situation where nobody knows what the rules are—and chaos threatens. A primeval tribal world where man is wolf to man. A world so unstable that at any moment the air may become thick with arrows, spears, clubs, flying stones and profanity. Not a village, either—and certainly not a monastery—but a path through no-man’s land in the jungle. So there is territorial uncertainty too: nobody is quite sure whose turf it is. This sort of situation is found not only in parts of the Persian Gulf, as we have seen in the past few days, where marine boundaries are notoriously hard to see: it can also be found in parts of the Amazon and in places like Papua New Guinea, when tribesmen of one group encounter men of another group, and are uncertain about each other’s rules of engagement.

* * *

But first a little digression... There’s a recent book on ethics by the very aggressive unbeliever Anthony Grayling with the challenging title “What is **Good**?” This is a perfectly reasonable question, with a lineage going back to Socrates and I suppose before him too, and it’s just the sort of question academics love to ask. But in the primeval world another question of much greater urgency must usually be dealt with first—

especially if you are on the trail, and you dimly see a party of strange warriors with bows and arrows coming toward you.

That question is, “What is **Safe**?” Having first established What is Safe, you can draw up a chair beside the fire, and get out the port, and discuss “What is Good?” later.

End of digression. Now it happens that a recent BBC documentary about West Papua actually showed a situation of primeval uncertainty of the kind I was talking about a moment ago. And to cut a long story short, when they had overcome their initial fear and suspicion—we’re talking about different tribal groups intermittently at war—each man embraced his opposite number, hugging him firmly, and smiling determinedly, smiling incessantly, smiling desperately and smiling non-stop. Because that was the safe thing to do. They were obviously reluctant to stop hugging each other, because it was only while being hugged that they felt secure.

Not having a common language in which to explain their particular ethical systems, or comfortable chairs in which to sit around arguing after dinner about “What is Good?”, they resorted to the universal symbolism of the embrace, and the friendly facial signification of the smile. All this, as I think I said, was in West Papua, where they also produced a continuous sound a little like an unbroken ululation, “wa-wa-wa-wa”, on and on and on, a vocal reiteration to strengthen the expressive symbolism of the smile. It was not clear to me whether they did or did not have a common language; but both parties did understand

that “wa-wa-wa-wa-wa” was a friendly noise, and that as long as you kept it up you meant well and would come to no harm.

* * *

Here we might add an anecdote from the past. This one from Mexico 500 years ago. Cortes and his chaplain Father Olmedo were on their way to conquer the Aztec capital of Tenochtitlan, when along the way they came to a large and impressive Indian town. Cortes was not a conquistador for nothing: and he didn't mess about when it came to conversion. Through his all-purpose Indian factotum, mistress, and interpreter Marina, he informed the Indian governor of the town—the ‘Cacique’—that human sacrifice was atrocious, that the stench near the sacrificial pyramid was disgusting, that the Indian idols were contemptible, and that the Indians were sunk in iniquity of the darkest and foulest kind. He had a statue of the Virgin Mary ready, and was about to climb the pyramid and place it on top. Prescott tells us that

The Cacique listened with civil, but cold indifference. Cortes, finding him unmoved, turned briskly round to his soldiers, exclaiming that now was the time to Plant the Cross! They eagerly seconded his pious purpose (but at this point) Father Olmedo, with better judgment, interposed.

He represented that to introduce the Cross among the natives, in their present state of ignorance and incredulity, would be to expose the sacred symbol to desecration, so soon as the backs of the Spaniards were turned.

The only way was to await patiently the season when more leisure should be afforded to instil into their minds a knowledge of the truth.

Prescott writes approvingly that

the sober reasoning of the good father prevailed over the passions of the martial enthusiasts.

I think we may take it for granted that Father Olmedo was in some sense sympathetic with the modern ideal of human rights. Certainly he felt that Aztec human sacrifice was a denial of just about everything human—or divine—that you can think of. He certainly did not believe that when in Mexico you should do as the Mexicans did. But, at the same time, he saw that a too peremptory policy would be counterproductive. The Indians were “ignorant”, and until their understanding and “knowledge” were improved, they could hardly be expected enthusiastically to embrace the faith. At the same time we can see that Cortes, although he clearly understood the horrors of Aztec human sacrifice, could himself be said to be deeply ignorant of many aspects of a civilization that had a number of other and more meritorious features.

* * *

What conclusions about “prudential relativism” can we draw from all this? From the examples of this moral dichotomy? On the one hand the closed village or closed community where there is perfect knowledge of

a particular ethical universe, and everyone knows how to behave. On the other hand, the more open and anarchic condition of dangerous ignorance we have now in many places, resulting in a state of deep ethical uncertainty, instability, and inevitable compromise.

Well, I suppose the first and obvious thing to say is that most of us live today somewhere in between these two worlds, compromising one way or another. I fear there's no going back to the world of solidary unity, of symmetrically matching belief and conduct, of the medieval village or the jungle tribe. All of us today—especially as we move from one country and one continent to another—find ourselves from time to time having to follow that wise travel advisory: “When in Rome, do as the Romans do.” As an initial guide, as a precautionary rule, it is prudent to do so, and, moreover, it may be regarded as basically safe.

On the other hand, it would be entirely erroneous to draw the conclusion drawn by professional relativists that different truths, different views, different values and different laws, are all “equally valid”—Aztec human sacrifice alongside the teachings of Jesus—and that this ridiculous dogma of ethical equivalence constitutes a rule we should all respect today.

Once again, only intellectuals in universities could ever believe this sort of thing. Father Olmedo knew it was rubbish. And every Papuan tribesman knows it is rubbish too. For consider what happened in the tribal situation I described. They did not in fact behave as if man is wolf to man. Both sides tacitly recognised the universal value of human life to human individuals; each side recognised that they had a common

interest in survival, whatever his particular tribal beliefs; no man wanted to die unprepared, unconfessed, “unhouseled” and far from home. Both sides probably included men with families they wanted to see again.

Looking a little more closely at the Papuan case, what probably happened was a compromise of a deeply human kind. On the one hand the tribesmen would have had the normal human instincts of qualified benevolence toward other men—even other men who may have trespassed on their territory. Aboriginal tribes had a keen sense of tribal territory: a keen sense of mine and yours. But transcending this were the sentiments emphasized by David Hume, who thought that human nature was much the same the world over (a view I, and I suspect most old-time Aborigines, happen to share). So if there was a severe drought and food shortage across wide areas of the Australian desert, Aboriginal territorial “rights” might be relaxed somewhat to allow the occasional starving or thirsty stranger to eat and drink.

On the other hand, in addition to a qualified benevolence of the sort Hume understood as universal, there would also be an element of calculation of a more harsh and Hobbesian kind, and a rational estimate of the costs and benefits of dealing civilly with strangers. We might note that, in the case of the Papuan tribes in the BBC movie, where both were in a kind of ethical no-man’s land, the men resorted to a universal language. They were smiling, hugging, and making reassuring friendly noise—wa wa wa wa wa. In this way they were communicating with each other, stranger to stranger, creating a safe environment where, whatever their differing beliefs about God and creation and the answer

to the philosophical question “What is Good?”, they could live for the time being safely side by side.

* * *

90% of the anthropologists you hear from are relativists of one kind or another. But to me the really interesting thing has always been that although there is indeed an amazing diversity of customs and beliefs, this variety is only superficial. Overall, the human picture is one where universals, categorical imperatives if you like—respect for truth (do not lie), respect for property (do not steal, or paint other people’s houses with graffiti), and respect for life (do not kill)—are an underlying moral foundation that can usually be found everywhere, in every culture, whatever the visibly colourful diversity of dress and cuisine displayed.

Remote Aboriginal Communities:
Human rights abuses and why they remain hidden

Jeness Warin
with James Franklin

Everyone knows something is seriously wrong with Aboriginal remote communities. The life expectancy figures speak for themselves. A difference of 20 years in life expectancy between aboriginals and whites is huge. Something major is happening out there to cause it. The figures for aboriginal education levels, health status and income are just as far from the norms for the white community. The dignity of human beings is being grossly violated when those changes have persisted in a rich country.

Although people know there is a problem, they don't understand its causes. There are two reasons for that. One is that remote communities are so full of endemic violence, intimidation, and abuse that it is unsafe for anyone to tell the truth. So information does not get out. The second is that white Australia has built up a smokescreen of politically correct myths about colonialism, reconciliation and a condescending "noble savage" picture of remote aboriginal Australia (think laughing black children with big white teeth cavorting in waterlilies) that any information that does get out is deflected or misinterpreted. And of course, the public cannot visit the communities to see for themselves – as in Mao's China, a permit is needed to visit.

What is happening out there?

In an article exploring the approach of universalism and cultural relativism to universal human rights Elizabeth More lists the kind of acts against women and children that are indicative of human rights abuses all over the world.⁷⁷ These abuses are all widespread in Australia, in remote communities cut off from mainstream Australia:

- Physical and sexual abuse
- Emotional and financial abuse
- Burning, beating, kicking, stabbing, cutting, rape
- Sexual harassment

These forms of abuse have been described by many authors.⁷⁸

- Under-age marriage

Under-age and non-consenting marriages continue to occur. Many marriages under age are not registered and polygyny is still practiced. Education of women is not enough. Economic development where men's situations are improved further entrenches the inequality of women and their female children in communities. Young girls are taken

⁷⁷ E. More, The Universal Declaration of Human Rights in today's world, *International Journal of Communication* 11 (2) (2005), <http://jic.tbi.com.au/issues/volume-11-no-2/the-universal-declaration-of-human-rights-in-today%E2%80%99s-world-.asp>

⁷⁸ Prof Bonnie Robertson (1999) 'ATSI Women's Taskforce on Violence' Griffith Uni avail http://www.qldwoman.qld.gov.au/Docs/ATSI/ATSI_Violence.pdf, Dr. S Gordon (2002) Gordon Inquiry, [Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities] <http://www.dia.wa.gov.au/gordon/faq.html> more recently Noel Pearson 'Vale Hope in Outback Hellhole, The Weekend Australian, Inquirer 17-18 February 2007 and Louis Nowra, *Bad Dreaming: Aboriginal men's violence against women and children* (Pluto Press, 2007); most recently H. Hughes, *Lands of Shame* (Sydney, 2007) and the Northern Territory "Little Children are Sacred" report, http://www.nt.gov.au/dcm/inquiry/saac/pdf/bipacsa_final_report.pdf.

by car or planes to the communities of their promised husbands. Females are designated marriage partners from birth marrying within, it is said, the kin-ship systems. Those having a relationship outside of the kin-ship system are frowned upon by community members and anecdotally at risk of payback.

1985 A young woman with a child attended the clinic. The scarring as a result of her burns to face, torso and arms and legs had caused severe contractures and loss of fingers and toes. Thick white sensitised welts marked where the skin did not retain her dark colouring. She was totally disfigured. The cause of her severe burns was her promised husband and his first wife placing her in a ring of spinifex and lighting it. This was because, as she told me, she didn't want to marry an old man and become his second wife. Her insights did not save her.

Some people have proposed cultural explanations for these sorts of injuries. Some elders supported by the academic industry are able to strengthen their authority by proposing interventions which do not reduce the horrific injury and generations of fear. To do so would diminish their power and control, particularly if the stories were available to the public.⁷⁹ Other aboriginal people who understand that these

⁷⁹ Few of the stories differ from those described by Lady Kidu, Papua New Guinea. Assault of women is excused as *sorcery*. Kidu states 'The methods of torture included beating (often with barbed wire), breaking bones, burning with red hot metal, raping, hanging over fire, cutting body parts slowly, amputating and pulling behind vehicles.' Lady Kidu continues with "'Mostly, however, if the victim is not dead she is then killed by one of the following methods: execution, being thrown over a cliff, into a river or cave, burned alive in a housefire, buried alive, beheaded, hanged, choked to death, starved, axed or electrocuted, suffocated with smoke, forced to drink petrol or hot liquid, stoned or shot"'.
<http://www.smh.com.au/articles/2003/06/19/1055828426206.html>

deaths and injuries are due to human behaviour establishing power are unable to present their cases due to the mythology which has been sustained. This cultural lying extends in some instances to autopsies, established 'facts' on unexpected deaths and even more simplistic explanations for the high rates of death and injuries. I have found that, when explained in rational ways, most aboriginal people understand clearly the way in which Marxist class structural 'explanations' have been manipulated to cover aboriginal deaths and injuries.

Young men, as noted decades ago in Hardy's *Unlucky Australians*⁸⁰ find it difficult to marry as the younger women are taken by the older men as second, third or fourth wives. However there are also other acts of violence by young men against marriage partners who try to escape.

1990 A young woman in her early twenties had not seen her husband for some eighteen months. He had already taken another wife. The former wife was living hundreds of kilometres away. He heard she was at a remote outstation and drove the 70 kilometres of two wheel dirt hunting track to find her. On arrival, he broke her lower leg and upper arm with a metal crowbar. He stabbed her numerous times and deeply; three hours of suturing was required later. Multiple lacerations and bruising also took place. Following this assault he drove her in the back of a station wagon 70 kilometres, waited until after the local clinic had closed and sent his mother to ask for help. By intimidating me with his

⁸⁰ F. Hardy, *The Unlucky Australians*, Pan Books Ltd, London First edition 1968, quoted from 1978 edition "sometimes old fellas have two wives, young fellas no wives at all" p257

aggressive behaviour in the health clinic he ensured that this 'first wife' received no pain relief such as morphine and stated that if she was evacuated he would kill her or the doctor arriving on the Royal Flying Doctor Service plane. Following a night where he made the woman return to a house, rather than the health clinic and continued to deny her pain relief he met the Flying Doctor at the airstrip the next morning.⁸¹ It was only when he was told the police were arriving on the Flying Doctor plane that he withdrew all intimidation at the last minute. I had spoken with the radio operator, described the situation and the police had been contacted. Of course he had effected his punishment; denying his victim adequate medical help and relief from acute pain for over twelve hours.

- Genital mutilation

There has been little said of genital mutilation in aboriginal communities. Hardy recounts an explanation by an older man about '*hole not big enough, makem bigger*' of his promised bride. Bill Jeffries, the ex-welfare officer of Wave Hill whom Hardy regards as a 'keen observer of aboriginal culture and social mores' had arranged this explanation after hearing a rumour of 'enlarging sexual organs of child brides promised to an elderly man under tribal law' marriage laws. There seems to be little

⁸¹ Because I had been informed so late in the day of the assault it was more likely that the RFDS plane would not land on a [dirt] non-accredited Civil Aviation airstrip in the night.

in the records detailing female genital mutilation of aboriginal girls in the submissions and amendments to the Crimes Act.⁸²

Circumcision of boys continues as communal practices in northern Australia while circumcision and sub-incision in the central desert communities continues. Some boys are circumcised in public hospitals whilst decisions are made by older men to conduct the practices as public ceremonies in communities and homelands. Such decisions have been publicised and national media invited to comment.⁸³ Paul Toohey commented on clan practices at Yirrkala, NT in 2001 when describing the tribal system of rivalry between two well known clan leaders.

Genital mutilation, known as circumcision ceremonies (initiation) is still practiced in differing forms in remote aboriginal Australia.⁸⁴ In the north-east of NT the practice has in some cases been transferred to hospitals. There has been concern expressed by some older men when the practice was revived and performed by men who were under the influence of alcohol (or marijuana or kava).⁸⁵ These stories from the

⁸² Crimes (Female Genital Mutilation) Amendment Bill 1994. The Family Law Council in their submission to their Attorney General quotes R.M. and C.H. Berndt, *The World of the First Australians*, Aboriginal Studies Press 1992, for some details of the practice by older women.

⁸³ Dr. John Herron (Aboriginal Affairs minister) and Dr. Michael Wooldridge (Health minister) were invited to attend Gatjil Djekuurra's sons initiation (Yirrkala January 1998)

⁸⁴ F. Morphy (2005) *The Future of the Homelands in north-east Arnhemland* (final report), Centre for Aboriginal Economic Policy Research p2 (final report date is unclear) avail: http://www.anu.edu.au/caepr/Projects/Homelands_future_FMorphy.pdf

⁸⁵ Importance of initiation have been somewhat explored in the report 'Liquor licensing –issues pertaining to the Gove Peninsula', February 2006, Wearne Advisors and the School of Australian Indigenous Knowledge Systems (Charles Darwin University) p32 avail http://www.nt.gov.au/justice/licensing/liquor/Gove_Alcohol_Final_Report.pdf. It is unclear in the report whether 'cultural disconnection' resulted from fear of being unable to escape the ceremony of circumcision; that young boys were aware men under the influence of drugs/alcohol were attendant at these ceremonies; that there was animosity between the men who were given the task of surgery or whether young boys were drunk and couldn't attend. The report does not make comment to these realities. The animosity between clan leaders is well described in *The Weekend*

men relate to gross mutilation of penises of young boys during ceremonial initiation. Some boys required hospitalisation.⁸⁶

1987 A man in his mid-30s presented to the clinic in severe pain. He was a practicing Christian and assisting with translation of the bible but also attended tribal ceremonies. His pain was due he stated to having been unable to urinate for three days. On examination his bladder was grossly extended and he was in acute pain. He requested that I with the assistance of a male ex-reserve army health worker continue with the examination. He required urethral catheterisation to relieve the pressure. Because the catheter would not go into his urethra without considerable force he had to show me where he urinated from. He had been circumcised and sub-incised. Sub-incisions are repeated at intervals through men's lives. His penis had been split open ventrally. He urinated through the incision hole made, half-way down the underside of the shaft of his penis. This more recent sub-incision and a possible infection had caused the delicate tissue to scar over, thus blocking the passage of urine. I was unable to catheterise him and the doctor advised me over the radio to use another

Australian 25-26 November 2000 describing Galarrwuy Yunupingu and Gajjil Djerrkura - Paul Toohey, 'Murder, sorcery and tribal law spill bad blood between native leaders',

⁸⁶ The Royal College of Physicians Policy Statement on Circumcision recommends against routine circumcision. In non-neonates where circumcision is indicated they recommend general anaesthesia and adequate pain relief [regional block]. The policy also lists all possible complications resulting from the procedure.

brand. The Flying Doctor had to be called again. The nurse and the emergency doctor visiting by plane were unable to catheterise him. He had to attend an urban hospital where the pressure was released by intra-peritoneal catheterization of the bladder (puncturing the lower abdomen).

- Child prostitution

Whilst there have been some reports in the media of young people prostituting themselves for petrol there have been no substantiated reports. In 2000 following reports from youth services and non government organizations, the Department of Family and Communities initiated state programs under the banner of Strengthening Families. Four areas were of concern: prostitution and sex for favours; pornography; trafficking and sex tourism.⁸⁷

- Starving

⁸⁷ Tomorrow's Children: Australia's National Plan of Action Against the Commercial Sexual Exploitation of Children (2000), Department of Family and Community Services. The report states that little is known of the problem and the likelihood is that it is underestimated. The majority of sexual abuse occurs within families and institutions, and is non-commercial in character. The commercial sexual exploitation of children and young people in Australia is part of a combination of critical pathways such as family breakdown, prior experiences of sexual victimisation, homelessness, poverty, drug use, youth unemployment, a lack of suitable alternative accommodation, and social isolation. A year prior to the report Australia ratified the International Labour Organisation (ILO) Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. ILO defined "the worst forms of child labour as the sale of and trafficking in children and young people; the involvement of children and young people in prostitution or pornography or in any work likely to harm the health, safety or morals of children and young people." (Articles 34 and 35). The Catholic Women's League Australia Inc. provided a submission in 2003 addressing three terms of reference the last being the adequacy of the legislative code (Criminal Code Amendment (Slavery and Sexual Servitude Act) 1999. In 2004 the Australian Crime Commission Inquiry into the Trafficking of Women for Sexual Servitude was tabled.

Traditional practices called feast-famine by anthropologists and referred to by Noel Pearson persist in a modernized version, where children suffer hunger between the fortnightly welfare payments. The Cape York Institute has for some years worked toward a family income program where money is put aside for family shopping and savings are put aside for items such as refrigerators. NT and WA have reintroduced breakfast programs for school attendees. Starvation starts before birth. Babies are often born below birth-weight due to the young age of the mother, lack of adequate nutrition prior to and during pregnancy, and ongoing stress due to violence from the father or relatives. Many babies exhibit severe malnourishment because of foetal alcohol syndrome, the effects of which persist for life.⁸⁸

- Nutritional taboos

Traditional practices of particular food taboos may still hold in some aboriginal communities and in pregnancy. Women, if caught consuming a taboo food-stuff, are expected to pay compensation to the person they have offended. There is little documentation on this practice. I have found no research on the distribution patterns of store-bought food for family consumption. Similarly there has been no research found on the household distribution patterns of pre-prepared or home cooked foods. Food basket surveys which have been regularly reported since the late 1980's by researchers as a means to demonstrate remote costs and nutritional deprivation fail to take household distribution into account.

⁸⁸ S. Skull, A. Ruben and A. Walker, 'Malnutrition and microcephaly in Australian Aboriginal children', *Medical Journal of Australia* 166 (1997), most recently 'Alcohol damage to babies ignored', *The Australian* 27/7/2007. The NHMRC Australian Alcohol Guidelines (2001) and Royal College of Physicians (RACP) do not advocate abstinence in pregnancy. They advocate further research, minimising risk particularly in early pregnancy and education.

There is considerable evidence of misdirection of grant money for women's programs, including funding of motor vehicles and fuel. These specify cultural trips, where children are taken along and hunting and consumption of local foodstuffs occurs outside the community.

Stories recounted by staff were that men would go out bush hunting. If the hunt was successful, they cooked the captured kangaroo out bush where it was easier to dig into the sand and availability of cooking fuel was easy. They consumed their catch until they were so bloated they required many hours of rest. Meat which was left over from their feast was brought back later to the community for wives and children.

- Denial of education

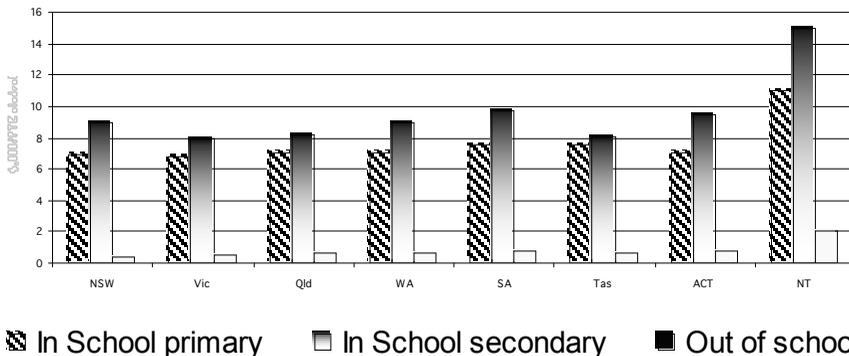
Education is in many cases not provided in remote communities or parents do not understand the importance of children attending school. This is perhaps surprising as people who were educated in missionary times state the value of the education they received by comparison with today. As adults are not gainfully employed and seek other activities, children, particularly girls, are left at home to house-sit younger siblings and relatives.

This graph demonstrates the recurrent expenditure for full time equivalent (FTE) students in each state and territory in 2003-4.⁸⁹

Graph 1

⁸⁹ Source: DEET Annual Report 2003-2004 p51 from "Report on Government Services 2004", Table 3A.7

Recurrent Govt Expenditure for full-time equivalent students
 Source: DEET Annual Report 2003-2004 p51 from "Report on Government Services 2004, Table 3A.7"



Though the information is a little old, it does demonstrate the disproportionate expenditure for NT compared to the more populous states. It is well known by locals in the NT that aboriginal children in remote communities do not attend school often for the full day and are often absent for days, even months at a time. Hence it does seem anomalous that this expenditure is for full-time students. Additionally it appears unusual that the NT's expenditure of \$2,000/student for out-of-school care is double that of every other state. Yet there has been by all reports little improvement in the education status of aboriginal children.

2003 A senior staff teacher asked me why I bothered teaching reading and writing and the use of computers while he viewed my luggage being loaded into a light aircraft. I did not answer. He responded to his own question by saying that 'they only need to know how to fill out forms anyway.' He was the same

senior teacher that ensured teaching colleagues who had higher expectations than he of behaviour and results from children and parents were bullied and eventually left their employment positions. His position was bolstered by ensuring that he pays for food, airfares and items requested at weekends from a land-owning family in a distant homeland. He states 'he has been adopted' by this family [given a skin-name]. This simplistic argument ensures that purported hunter-gatherer sharing and reciprocity are more important than professional service delivery, integrity and ethics. His conceit ranged to stopping the wages of a local aboriginal teacher because 'he had been interstate for a week and not notified him.' This event occurred after the community had requested proper teaching services and full teaching days from the senior teacher. He was well aware the local aboriginal teacher has not turned up regularly for work for many years and still received his wages. The senior teacher used his power whereby the man was forced to ask for food from family members and suffer public humiliation at the expense of speaking up for proper service delivery.

Other figures show that up to one third of some communities' 5-14 year olds are not enrolled in some educational institution.⁹⁰ One has to ask the question: why are these communities receiving funding for the full quota of 5-14 year olds yet not providing education for this group? This

⁹⁰ ABS Census 2001, AREG for each Community Local Gov and outstation/homelands (IREG 34: IARE 34001-340021)

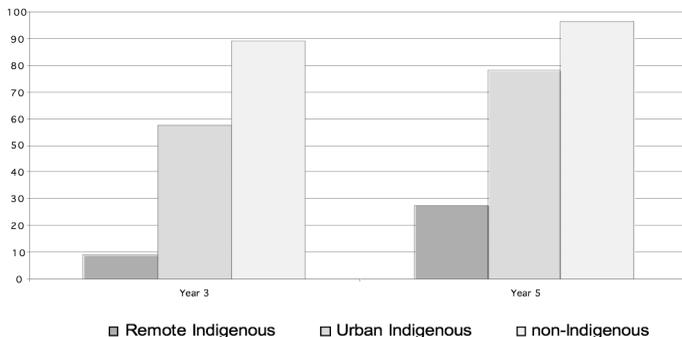
question cannot be answered until individual schools disaggregate their data.

Graph 2 shows the percentage of NT children reaching *reading benchmarks*. This information is taken from the DEET Annual Report 2003-04.⁹¹ Again it is well known by locals that when testing for benchmarks is performed, the testers selectively choose their communities AND students. Thus the percentages for the remote children are likely a gross over-estimate of the actual reading ability of kids. In homes where there are no books and where it is most likely that the parents do not work or are unable to read or write it would be fair to say that the next generation remains functionally illiterate.

The chapter on education in Helen Hughes' new book, *Lands of Shame*, has much further information along the same lines.

Graph 2

Percentage of NT children reaching 'reading benchmark'
NT DEET Annual Report 2003-2004 p53



- Denial of employment

Employment in Aboriginal communities has been well covered by Noel Pearson of the Cape York Institute, The Bennelong Society and lately by the Centre for Independent Studies. The Community Development Employment Program (CDEP), formerly the main provider of employment projects in remote communities, has undergone restructuring, with urban and rural communities expected to shift to Centrelink payments towards general employment opportunities. Some remote communities are looking to work with mining companies to improve pathways into training and employment.

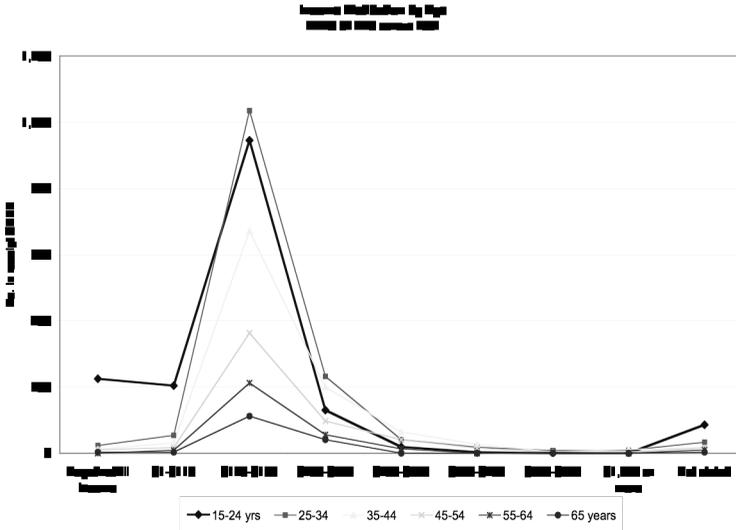
Graph 3 shows the income distribution for the aboriginal communities of East Arnhemland.⁹² It demonstrates that the majority of residents receive \$120-199/week income. Note that 15-19 year old group is disproportionately represented as receiving nil-low income. So we have a count of 200 people (nil income) and another 200 people (\$1-119) who live in an area which has two of the largest bauxite and manganese mines in the world. While much of the mining industry requires a basic level of literacy there are programs which offer manual labour.⁹³ However of this group, it is the 15-34 year olds that make up the majority of the adult generation, relaying skills and attitudes to the younger generation. This is the age bracket that is entering the workforce (under CDEP) and beginning to raise children.⁹⁴

⁹² ABS Census 2001, AREG for each Community Local Gov and outstation/homelands (IREG 34: IARE 34001-340021)

⁹³ Basic levels of literacy as delineated by the National Reporting System (NRS) range from 1-5. Most 15-34 yr olds have level 1 (lowest: recognize and copy name)

⁹⁴ CDEP is Community Development Employment Program. This scheme has been operating for some 20 years only for aboriginal participants, though in some aboriginal communities only within the past few years when people make a choice to move from unemployment benefits to CDEP. CDEP used to be provided through ATSIC and provided capital equipment grants with the scheme.

Graph 3



Graph 4 shows a very detailed perspective on the distribution of income. By using the ATSIC Annual regional reports (as distinct from ABS) it is possible to present the distribution of income per individual community.⁹⁵ The majority of Commonwealth funds to aboriginal communities aside from welfare benefits are for health, education and housing. The welfare funds are provided as income, capital and recurrent (including wages) to individual communities. As can be seen, the income distribution for the CDEP (welfare) component is quite skewed. One community receives \$30,000/head population whilst others receive between \$12-15,000/head of population. It appears that

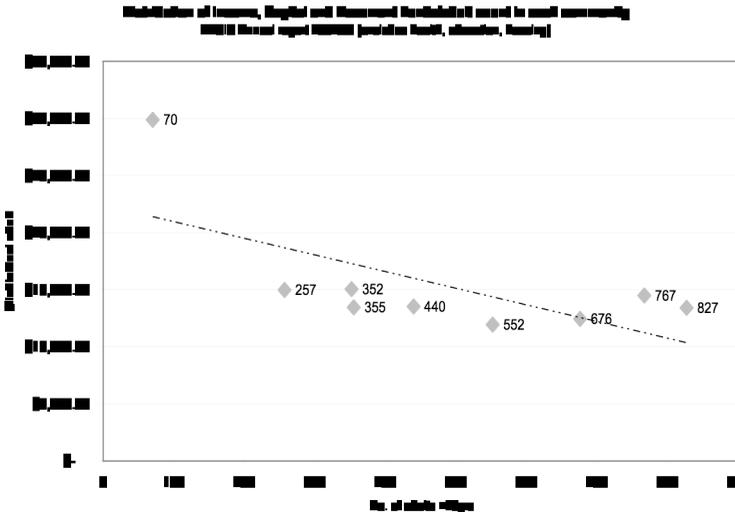
⁹⁵ ATSIC (the Aboriginal and Torres Strait Islander Commission) ceased in 23 March 2005 as a result of legislative change and the services and funding moved to mainstream organizations. Prior to this ATSIC operated the CDEP scheme which re-diverted unemployment benefits to aboriginal people. Annual reports obtained in hard copy were used as data for the income distribution in this graph.

one smaller community [homeland] received double the funding of the larger communities.⁹⁶ The two other communities, with populations of 767 and 827, operate outstations [homelands]. They receive more per head of population than non-homeland communities. Most homeland people spend much of their time living with relatives in the larger communities where services such as health, education, retail and recreation are livelier.

In some communities the big-men and women have houses in their homelands and in the main community. They place their families into these houses. Housing allocation is a constant source of grief for people who continually miss out. Particularly those families with many young children who have witnessed for many years the differences in housing renovations, size, siting and number being provided to big men and women. Each new change of Council and administrator is seen as hope that something will change. It rarely does.

⁹⁶ A population of 70 people received \$30,000/head CDEP, capital and recurrent funding.

Graph 4



- Denial of property rights

Property law remains under communal title of the stated traditional owners. Women and young people living or working in any communities are nevertheless forced to rent housing from traditional owners and conform to their cultural practices. Lack of home ownership is one reason for the overcrowded communal housing that is a major cause of the prevalence of preventable diseases that were common in mainstream communities a century ago.⁹⁷

⁹⁷ A. Brown, M. McDonald and T. Calma, 'Rheumatic fever and social justice', *Medical Journal of Australia* 186 (11), 2007, 557-558, http://www.mja.com.au/public/issues/186_11_040607/bro10249_fm.html; Hughes, *Lands of Shame*, pp. 134-5.

- Women's issues

Of course many women are particularly the victims of the sexual, physical and emotional abuse, as well documented above. In addition, financial abuse occurs due to physical and emotional abuse from relatives requesting money, and harassment by retailers of services such as taxis in some instances.⁹⁸ As kin may be employed in the community offices, preference may be given to family in distribution of income entitlements.⁹⁹ Women and youth who are not provided with an adequate education or training have little chance of employment. They remain in poverty. Sexual harassment occurs within the cultural practices as outlined by examples of child marriages, promised marriages and a focus by many anthropologists on patrilineal kinship systems.

‘Culturally appropriate’ education does not view gender issues including subordination of women within its agenda. For instance women may not walk towards the lavatory in line eye-sight of classificatory brothers.

⁹⁸ Book Up in the Bush – July 2006 refers to the widespread practice of withholding customer key cards and withdrawing funds without knowledge or consent. An earlier charter, the UN Charter of Consumer Rights (1985) lists access to food, clothing, shelter, health-care, education and sanitation. More recently the International Organization for Standardization (ISO) is developing the ISO 26000 standard as a means to measure social impact of production. This seems an oxymoron, at least for some remote aboriginal people, where as consumers, due to local practices of gender and age discrimination they cannot voice their concerns. Least of all to the local organizations, where delivery of services under claims of social responsibility lend support to the more powerful under such circumstances.

⁹⁹ For example CDEP places are applied for in annual grants, CDEP numbers are quotas and not available to all eligible people. Hence there is generally a mix of CDEP and unemployment benefits. It is usual to hear of complaints from aboriginal people that even though they have a place on the CDEP list, others have been allocated the place instead, or a family. Those that have better education are more likely to be employed in local government and aboriginal associations. These people are generally land-owning groups or those that receive the bulk of the royalty distribution.

Compounding this practice is that much of the day's activities are spent on the verandahs and in front yards. Congregations of men working on art, car engines or using home telephones thus impact on women's ability to conduct household activities with ease. The humiliation for women is compounded by circuitous walking routes and having to find and walk with a classificatory sister to access lavatories. The practice has not changed, and requests to build or separate facilities ensure the label 'culturally appropriate' persists.

Many Councils are dominated by men (elders), thus reinforcing maintenance of cultural practices in governing agencies that harm women, young people and children. There has been some adoption of women elders on councils. Some women also support and follow customary practices in many instances.

In 1987/8 a mother waited most of the morning at the local health clinic. It seemed she wanted to speak when it was safe to do so and realising this I continued my morning work. When the clinic was empty of clients she approached me to discuss a matter about her five year old daughter. The story related to the interference with her daughter by a senior man. I asked her what she wanted to do. She stated she wanted to report the situation to the police. She knew and I knew that confidentiality would be difficult over the radio and that she and her extended family would be at risk of later injury. The radio operator some 600km away understood the situation and arranged a coded discussion with the police. The detectives arrived promptly by the next available plane, interviewed the woman, investigated

the case and the man was apparently charged. However he returned to the community following what I was told was a 'court case'. I do not know the outcome. The woman left for another community with her children not long after.

One may well ask, if it's so bad, why don't people just leave? It is not so easy. The customary practices which provide the framework and boundaries of remote aboriginal communities and are enforced by elders (culture/custom) do not translate to a life free of fear and retribution in the urban setting, for those that wish to leave. No-one is allowed to be an individual. And the poor education in English and numeracy available means too that anyone fleeing a remote community knows they are poorly equipped to find a job in a city.

So there is a great range of problems, many of them extreme. Of course, it is not the whole truth to see remote aboriginal people as just 'a problem'. That can lead to seeing the victims as not quite people as much as the opposite 'noble savage' misperception.

Why we don't know

In the last two years, there have been a number of individual exposés by reporters and official inquiries into cases of extreme violence in remote aboriginal communities. In the few years before that, Noel Pearson raised the general issue of welfare dependency and aboriginal disadvantage. But there is still very little understanding of the overall

picture and its causes. The obstacles to the truth being known are many.

First, there is simple bias, the reasons that people cannot regard others as having human worth, of being humans in just the same way as themselves. The types of bias are:

1. Cognitive
2. Cultural
3. Notational

These biases form in people's minds a priori, before they meet an aboriginal person. It is difficult to describe what it is like to live in a tribal structure. A friend of mine asks 'why do people melt around aboriginal people?' I guess she means why don't people take aboriginal people as people, with much the same needs and hopes as themselves? This seems to me a good question.

The well-known history of aboriginal dispossession creates a ready-made explanation of present-day poor health, which is presumed to be due to the usual factors of colonialism, massacres, disease, loss of land and therefore loss of culture and social ties and economic disadvantage. That can make it seem somehow 'normal' to discover poor health measured in such highly abstract terms as DALY's (Disability Adjusted Life Years) and to 'explain' them by the influence of 'risk factors' like tobacco and blood pressure.¹⁰⁰ That covers up the human reality, that real people are sick and injured because they are assaulted from birth and before, sexually abused and forced into

¹⁰⁰ Y. Zhao *et al* 'Burden of disease and injury in Aboriginal and non-Aboriginal populations in the Northern Territory', *Medical Journal of Australia* 180 (1994) 17 May, p. 498.

servitude and addictions. Present effects are due in the first instance to present causes, whatever may be the historical roots of those causes themselves. The situation is made worse by the failure to record properly when violence causes ill-health. The massive epidemiological database of Fiona Stanley in Western Australia, which aims to find all causes of poor health, does not have fields to permit proper recording of violence or other abusive cultural practices. If potential causes are not listed in a database, no amount of statistical inference will reveal their role.¹⁰¹

Other barriers to the truth getting out include:

- The need for permits to visit remote communities¹⁰²
- Intimidation of anyone speaking to outsiders. I have witnessed the constraints, the backlash and manipulations by others as they seek to consider the forms which cultural relativism has been used to shape their lives and that of their children.
- Illiteracy of those wishing to communicate, a function of the poor education described above
- Different rules for autopsies requiring a higher level of 'suspicion' for black deaths¹⁰³
- Collusion of the white 'helping' and academic industries with community tyrants.¹⁰⁴ (Some anthropologists, for example, take

¹⁰¹ [http://www.saxinstitute.org.au/publicdocs/Sax_Institute - Fiona Stanley 061031 pps](http://www.saxinstitute.org.au/publicdocs/Sax_Institute_-_Fiona_Stanley_061031_pps)

¹⁰² <http://www.nit.com.au/Opinion/story.aspx?id=6693>

¹⁰³ http://www.hreoc.gov.au/social_justice/deaths_custody/ATSIC/ch_10.html recommendation 28; Green v. Johnstone (1995) 2 VR 176.

¹⁰⁴ As criminologist Paul Wilson suggested in 1982 quoting C.D. Rowley 'the reserves are institutions, spread throughout the state but virtually invisible to all but their inmates'. Many of the 'inmates' have been well aware of the tyrants and their actions, yet have been unable to voice their

a very relaxed and relativist moral approach to abusive practices in other cultures; in any case anyone studying remote communities needs a cosy relationship with the powerful in those communities.)

The problem is made worse by the desire of some on the political Left to use the aboriginal issue to blame the usual suspects, from colonialism to the Howard government. A typical instance was the attack by Peter Garrett on the article 'A New Deal for Aboriginal and Torres Strait Islanders in remote communities' that I wrote with the economist Helen Hughes. We blamed, as many do, 'Nugget' Coombs' ideologically-driven experimental policies on separating aboriginal people from Australian life for some of the present debacle.¹⁰⁵ Garrett used Parliamentary privilege to launch a vitriolic attack on our paper as allegedly lacking evidence. Though our paper was prepared with local people's input, Garrett complains of the few remote successes not mentioned in our paper, "*It did not fit the thesis and so it was not mentioned.*"¹⁰⁶ Garrett makes it clear that he is particularly incensed by our recommendation that remote aboriginals should have individual

stories because of the practices of the intimidators. It is only recently that the media has been able to write discernibly of the same atrocities Wilson wrote of in 1982 and misattributed to colonialism. P. Wilson, *Black Death: White Hands* Allen & Unwin, Sydney, 1985, first ed 1982, p. 81, quoting C.D. Rowley, *The Destruction of Aboriginal Society*, ANU Press, Canberra, 1970.

¹⁰⁵ H. Hughes and J. Warin, 'A New Deal for Aborigines and Torres Strait Islanders in Remote Communities', Centre for Independent Studies, Issue Analysis no. 54 (2005), <http://www.cis.org.au/IssueAnalysis/ia54/IA54.pdf>; see also on this issue G. Partington, *Hasluck versus Coombs: white politics and Australia's Aborigines*, Quakers Hill Press, 1996; and cf. Hardy *Unlucky Australians*, p.300: '..... whole Wattie Creek experiment', p. 238: '*Course I'm punkin' glad,....if only the Government through Welfare could encourage and help the Gurindji, this would be the greatest Aboriginal experiment ever.*'

¹⁰⁶ House of Representatives, Official Hansard No7, Wed 16th March 2005 p14 <http://www.aph.gov.au/hansard/reps/dailys/drl160305.pdf> also reiterated on his web-site <http://www.petergarrett.com.au/c.asp?id=37>

property rights. That those rights, taken for granted by him and everyone in mainstream Australian society, should be such a cause of heat shows how far we have to go to have true equality in our perceptions of all Australians, black and white.

Postscript:

In June 2007, the Federal Government, following the NT report 'Little Children are Sacred', declared a state of emergency in the Northern Territory. There has been considerable support for the move, but the news has also been replete with the usual arguments and the usual commentators stating their usual arguments based on relativism. The presence and work by army and police personnel will reduce the horrific fear and real injuries under which many people live. Assault, gross violations and hidden injustices should be exposed. I am sure the mass professionalism of these personnel now in the remote communities will achieve their purpose of reducing violence.

I do not believe that elder and leader councils, the very people who did not speak up for all these years, with their advisors from both community and urban networked enclaves should be allowed to be part of the solution. Not for one minute should the emergency professionals forget that many of the people they are speaking with have watched and experienced for years this control of 'culture' over their lives. Heinous miscarriages of justice have occurred under the proponents of dialectical historicism. There has been 'no fair go' for the young women and men, and the children in remote aboriginal communities. The only currency remaining to be named is trade where human beings are

denied any basic democratic rights as individuals. Being traded, by force or in 'culture' is life for many women and children in Australian aboriginal communities. There is little else to demonstrate outcomes after 30 years of CDEP support for aboriginal women and children. The staff, big men and women with their education, health, wages, networks, houses and positions of influence chose not to speak up, in kinship, of the shocking lives people led, under them.

