The Nature of Legal Identity

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Abstract

The dissertation explores the nature of fundamental constructs in Australian social and legal relationships. Legal identities are protean and culturally contingent. They involve subversible signifiers of authority, disability and individuation. The dissertation uses legal pragmatism in an original analysis of legal identity *per se* and of a range of contemporary and historic identities that are foundational or derivative. In doing so it offers an understanding of authority and registration in the liberal democratic information state. It grounds recent anxieties about identity theft. It addresses tensions inherent in 'seeing like a state'. It engages with statute law, case law and administrative practice. It refers to theorists such as Nussbaum, Schmitt, Bell, Kant and Foucault.

Acknowledgments

Those who made this possible know who they are and what they mean to me.

> I have carefully pointed out the sources from which I have derived information, and have cited the writers on whose authority I rely with a minute exactness, which might appear to border upon ostentation, if it were possible to be vain of having read books, many of which nothing but the duty of examining with accuracy whenever I laid before the publick, could have induced me to open. As my inquiries conducted me often into paths which were obscure or little frequented, such constant recourse to the authors who have been my guides, was not only necessary for authenticating the facts which are the foundations of my reasonings, but may be useful in pointing out the way to such as shall hereafter hold the same course, and in enabling them to carry on their researches with greater facility and success.
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> William Robertson, 'The History of the Reign of Charles V' in Robertson, *Works* (Pickering, 1825) vol 3, ix.

Contents

Preamble: the dissertation at a glance

This dissertation explores a key element of the Australian legal system and, by extension, of all legal systems.

Specifically, it addresses the question 'What is the nature of legal identity?'.

Conceptualising 'legal identity'

The dissertation argues that a legal identity – as distinct from attributes that may be of importance to an individual's sense of themselves and their place in the world but have no legal significance – is an identity that has legal consequences.

Those consequences are a matter of rights, privileges, duties and disabilities. They are evident in identities that range from citizenship to authorisation to drive a vehicle and act on behalf of the state in inspecting an apiary or restriction on acting as a company director. Everyone in Australia has multiple legal identities, with some (such as nationality) being fundamental and many only of interest in specific circumstances.

The consequences mean that individuals have an incentive (and on occasion an imperative) to enhance their flourishing through subversion of legal identity, for example by asserting an identity to which the person is not entitled or by pretending not to have a particular legal disability such as identity as a bankrupt or sex offender.

That subversion is both assisted and inhibited through signifiers of identity such as passports, identity cards and registers. Law regarding identity provides a framework for the assignment, recognition and protection of those signifiers.

Theoretical basis

In answering the question the dissertation embodies both a positive and normative approach.

The dissertation thus analyses how legal identity is manifested (created, signified, subverted, defended). The analysis is founded on detailed reference to statute law, case law and administrative practice in contemporary Australia and the past.

The dissertation evaluates that manifestation, offering an analysis of what should be the purpose of legal identity (and the legal system in which that identity plays a part). Notably, it argues that law should foster the flourishing of all people, with law-makers for example seeking to alleviate disadvantage. Viewed through a lens of legal identity much law reform has been a matter of freeing people from disabilities inherent in historic identities such as dissenter, apostate, slave, serf, sodomite or woman.

In answering the question the dissertation engages with theorists such as Foucault and Butler whose work offers insights about legal and non-legal identities alike but who are often reductive and whose articulation of normative theory, notably Carl Schmitt, is demonstrably antithetical to the flourishing of people who did not enjoy a privileged status on the basis of ethno-religious affinity or another attribute. Critiques of those theorists are provided in the Appendix. The dissertation is not concerned with the 'philosophy of mind' and long-standing philosophical debates about mind-body dualism.

Contentions

The methodology used in the dissertation tests twelve interrelated contentions, that is hypotheses regarding legal identity.

That testing for example demonstrates the validity of the contention that valorisation of particular attributes though legal identities is culturally and temporally contingent. Examples of those attributes are gender, age, ethnicity, religious affiliation and sexual affinity. Societies over time have valued specific attributes in terms of privileges or disabilities. That valorisation is dialectical, with law both shaping and being shaped by values – such as the perceived cognitive weakness of women or subordinate classes – that are not timeless.

The testing also demonstrates that we can discern a taxonomy of foundational and derivative legal identities (with for example identity as a building inspector being a derivative identity that presupposes the foundational identity of being a live natural person who is an Australian citizen and that does not presuppose derivative identities relating to gender or non-legal identities such as the inspector's hair colour and membership of a bowling club). The testing highlights both the importance and historical basis of the expression of legal identities through mechanisms such as identity cards, signifiers that may be conflated with the actual identity and that may be subverted.

It demonstrates that law creates and revokes identities, with many identities in contemporary Australia being a manifestation of the modern liberal democratic 'entitlement state' in which citrizenship involves the receipt of indirect or direct benefits (for example on the basis of legal identity as a parent, child, student or aged person).

Methodology

The dissertation methodology involves explaining legal identity in the abstract by asking six questions about specific legal identities. Those identities were chosen on the basis that they were foundational or were representative of the class of derivative identities.

The first question is what is the function of the identity – what legal purpose does it serve? An attribute that serves no legal purpose may be important to an individual but is not a legal identity. The dissertation explains similarities and differences between natural and other legal persons.

The second question is how is the legal identity signified? Signification has two facets: one indicating that the entity has a specific legal status (for example as a citizen or licensed driver) and the other individuating that entity from other entities with the same status. The dissertation demonstrates that legal identity may for

example be marked by a uniform, a card, or registration number or instead by some aspect of physiology such as the patterns on an individual's retina.

The third question is where does the identity come from? Is it assigned by a nongovernment entity and that exists independently of the state but is recognised by the state?

The fourth question is how does the identity come into being? Does it for example require formal registration, or a ceremonial assignment of authority?

The fifth question is who or what is eligible? Is the identity dependent for example on being alive (rather than a corporation), being an adult, being a citizen, not being bankrupt or other prerequisites or preconditions?

The final question is how is it validated or verified when contested – through for example reference to a master register or protocols regarding capacity or a physical examination to determine gender and death?

In asking and answering those questions the dissertation draws on legal pragmatism, that is an attentiveness to the operation of legal identity within the overall legal system. That attentiveness for example highlights the reflexive nature of law – valorisation results in an incentive for subversion addressed by mechanisms such as 'proof of identity' documents that in turn enable subversion. Pragmatism is however not normative; it is in essence value neutral and potentially results in outcomes that from the perspective of flourishing are abhorrent.

The dissertation accordingly critiques contemporary legal identity by drawing on the notion of flourishing articulated by Aristotle, Nussbaum, Gewirth and other theorists. The notion is respectful of diversity, autonomy and the importance of alleviating disadvantage. In evaluating legal identity one conclusion in the dissertation is that Australia should constitutionally enshrine a justiciable Bill of Rights as a mechanism to foster flourishing through for example protection against disregard of human rights.

The dissertation draws on historic and contemporary law, resulting in citation that is somewhat longer than usual. One rationale for discussion of legal identities that no longer feature in Australian law is that this demonstrates the cultural contingency of legal identity (and implicitly the scope for law reform to foster flourishing). In understanding contemporary legal identities, and thence law's construction of identity *per se*, insights are also available through an examination of past identification mechanisms.

That scrutiny allows readers to discern patterns or principles that represent a 'deep structure' common to multiple seemingly disparate identities, statutes and practices. In endeavouring to understand what is the nature of legal identity we do not need to tabulate every legal identity; it is sufficient to examine representative past and present foundational and derivative identities.

Originality and significance

The dissertation is original for two reasons.

It is the first Australian dissertation to consider legal identity *per se*, that is legal identity as an abstraction evident in all legal systems rather than particular identities such as 'citizen' and 'criminal' or aspects such as gender, ethnicity and age. It is the first dissertation to use the methodology to elicit insights about particular legal identities and about the nature of legal identity in contemporary Australia.

The dissertation is significant in offering a useful lens for understanding contemporary legal practice and policy-making (for example tensions inherent in adoption of population-scale identity registers). It is also significant in identifying a normative basis for constitutional and other law reform to foster individual and collective flourishing. The final chapter accordingly brings together insights about identity to suggest specific reforms.

Chapter One: Introduction

The magic carpet that we call the law – able for example to transport a person from poverty to riches, provide a shroud to protect the dead, transform the commonplace into the miraculous (or vice versa), justify authority, and reinforce or relieve inequalities – features the golden thread of justice and the crimson thread of power. Those threads have preoccupied legal scholars, administrators, political theorists, historians and civil society advocates. The carpet also features a less-remarked, indeed often unnoticed, thread – that of legal identity. That term has been used in different ways by legal scholars and others, a use that as demonstrated in the following chapters reflects different contexts, functions, interests, understandings and ideologies. This dissertation explores the nature of the thread and its conceptualisation in past and contemporary polities.

Legal identity as a thread is less prominent than other components of the carpet because it does not glitter. It frequently involves the mundane realities of day to day social interaction, of risk allocation and of legal administration rather than the grand dialogues about society, the individual, the corporation and the state that have engaged the attention of leading political theorists over the past five centuries.[1] On occasion it is taken for granted as the concept of the 'legal person', in other words an entity (human or otherwise)[2] on which a legal system confers powers, imposes duties and recognises rights.[3]

It is also less prominent because it is mutable and dynamic, varying over time, changing from place to place, embodying different values, blending into the

[1] Conceptualisation of the state and the corporation as legal persons is discussed in Chapters Three and Seven respectively.
[2] *Acts Interpretation Act 1901* (Cth) s 2C(1) for example states 'In any Act, expressions used to denote persons generally (such as 'person', 'party', 'someone', 'anyone', 'no-one', 'one', 'another' and 'whoever'), include a body politic or corporate as well as an individual.
[3] Ngaire Naffine, 'Who Are Law's Persons? From Cheshire Cats To Responsible Subjects' (2003) 66(3) *Modern Law Review* 346 identifies potentially incompatible conceptualisations of personhood, including those advanced by theorists who view personhood as a convenient legal fiction independent of metaphysical speculation (at 357), as founded on biological and metaphysical definitions of humanity such as possession of a soul that distinguishes man from beasts, invokes moral claims on peers (at 350) and prompts speculation about when life commences (at 358). Steven Wise, 'Nonhuman Rights To Personhood' (2013) 30(3) *Pace Environmental Law Review* 1270 refers to the legal person as a 'rights container', an analogy that emphasises rights and thus legal standing but elides responsibilities. See also Winfried Brugger, 'The Image of the Person in the Human Rights Concept' (1996) 18(3) *Human Rights Quarterly* 594.

background or appearing with striking vividness when contested or encountered in a new context.

It is both volatile and enduring, so that in making sense of contemporary Australian law and working toward a legal regime that more strongly fosters individual and collective flourishing there is value in looking at past legal systems and at specific identity concepts (for example ‘the child’ and ‘the citizen’) or mechanisms (for example the passport, testamur or identity card).

The research question

The dissertation addresses the research question ‘what is the nature of legal identity?’

The dissertation draws on historic and contemporary law (as of April 2017) to answer a question that is salient for legal practice and principle.

The following chapters demonstrate that the question is of relevance to legal theorists, political scientists, public policymakers, legal practitioners and criminologists.

The dissertation offers five core arguments that are substantiated through detailed reference to the law.

The first is that legal identity is a protean, multi-faceted concept. The second is that the concept and its characterisation are culturally and thus temporally contingent. The third is that examination of the concept and its use in statute/case law tells us something useful about law as a set of principles, practices and administrative mechanisms. The fourth is that the construction of legal identity is of fundamental importance for the lives of contemporary Australians and people who seek to become Australians, rather than of narrow academic interest. The fifth core argument is that any legal identity regime can be evaluated in terms of whether that regime fosters individual and collective flourishing, through for example recognition of dignity and alleviation of disadvantage that inhibits individual/collective fulfilment. (The concept of flourishing as a tool for evaluation of positive law is discussed at page 21 below.)

Identity is fundamental to human flourishing and the liberal democratic state, which can be fostered through adoption of recommendations in the concluding chapter of this dissertation.

Originality and salience

This dissertation makes an original contribution to knowledge in asking and addressing the question.

It draws on legal and other subdisciplines to make sense of several hundred recent and historic judgments and statutes, a resource base that is significantly wider and deeper than that in any Australian dissertation on legal identity *per se* and that appears to be more extensive than other work on specific aspects of legal identity such as ethnicity or gender. it critiques leading theorists who are preoccupied with identity and who often problematically regard particular facets of identity as being strongly determinative. It also offers a comparative law perspective, drawing on law from other legal systems (such as that in classical Rome and Nazi Germany) to demonstrate claims regarding the mutability of some identities and their positive or negative consequences.

Why is discussion of legal identity challenging, useful and important?

Legal identity is protean and fundamental. It is built into much statute law, with for example specific references to particular identities (documented in subsequent chapters). It is assumed in much common law.[4] Ignore or strip out legal identity and the carpet falls apart. Valorisation by the state and by society means that particular identities are contested. We can construe much law as an exercise in limiting the subversion of legal identities in order to preserve the structural integrity of the carpet, thereby restricting or eliminating indeterminacy (in other words uncertainty).

[4] This dissertation identifies and discusses many of those identities but does not provide an exhaustive formal taxonomy. The following chapters offer insights about how taxonomies are made and unmade rather than offering a new schema for the classification of identities.

We can also construe much law as embodying tensions inherent in attempts to systematise and sort identities, resulting in taxonomies that facilitate public administration and commerce but potentially disregard the self-fashioning, self-realisation or self-respect that is integral to a liberal democratic conceptualisation of human rights.[5] Those taxonomies elide difference and potentially reduce personhood[6] by treating individuals as expressions of attributes such as age, gender, nationality or educational attainment – as subjects of the state or abstractions to be addressed through mechanisms that embody bureaucratic rationality – rather than unique flesh and blood.[7] The following chapters are instead written 'as if people matter', to use a phrase evident in much literature that has humanistic values and that as discussed in the following chapter is consistent with Kant's categorical imperative.[8] It embodies a wariness about the consequences for justice of abstracting people as embodiments of particular attributes and about 'the conceptual apparatus with which society assigns some human beings to darkness and others to light'.[9] Cotterell thus dubbed the legal person as the foundation of all legal ideology, something that

> allows legal doctrine to spin intricate webs of interpretation of social relationships, since the law defines persons in ways that empower or disable, distinguish and classify individuals for its special regulatory purposes.[10]

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[5] John Rawls, *A Theory of Justice* (Harvard University Press, 1st ed, 1971) 440 and *Political Liberalism* (Columbia University Press, rev ed, 2005) 31. See also Jill Marshall, *Personal Freedom Through Human Rights Law: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhof, 2009) 96; Peter Morton, *An Institutional Theory of Law: Keeping Law in Its Place* (Clarendon Press, 1998) 109; Jason Hannan, 'Justice Implicit: The Pragmatism of Amartya Sen' (2015) 12(2) *Contemporary Pragmatism* 317, 336-337; and Michael Walzer, *Spheres of Justice* (Basic Books, 1983) 273.

[6] The implications for law and for legal identities of philosophical notions of personhood (in particular personhood in terms of a potential 'flourishing' that goes beyond a Kantian conceptualisation of the person as an entity that has autonomy) are discussed later in this chapter. Points of entry to debate among philosophers and political scientists are John Rawls, *A Theory of Justice* (Harvard University Press, rev ed, 2003) 397; Harry Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68(1) *The Journal of Philosophy* 5; Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989) 4 read alongside Judith Shklar, 'Review: Sources of the Self by Charles Taylor' (1991) 19(1) *Political Theory* 105, 106; Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality* (Ashgate, 2001); and Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need The Virtues* (Open Court, 1999) 78.

[7] Theodor Adorno, *Negative Dialectics* (E B Ashton trans, Routledge, 1990) [trans of *Negative Dialektik* (first published 1966)]. See also Jay M Bernstein, *Adorno: Disenchantment and Ethics* (Cambridge University Press, 2001) 72; Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society (Lewis Henry Morgan Lectures)* (Cambridge University Press, 1989) 16; Alan Norrie, 'Freewill, Determinism and Criminal Justice' (1983) 3(1) *Legal Studies* 60, 73; and John Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (University of California, 1976) 150 and 152.

[8] Peter Berger, *Invitation to sociology: A humanistic perspective* (Anchor Books, 1963) 166 and 178; and Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor trans, Cambridge University Press, 1997) [trans of *Grundlegung zur Metaphysik der Sitten* (first published 1785)] 14, 31.

[9] Peter Berger, *Invitation to sociology: A humanistic perspective* (Anchor Books, 1963) 159.

[10] Roger Cotterrell, *The Sociology of Law* (Butterworths, 2nd ed, 1992) 124.

The following chapters demonstrate that we can step beyond a broad notion of 'personhood' or 'the legal person' to look at specific legal identities, in effect legal personhoods.

We can see that an individual may have several concurrent legal identities (for example as someone who is alive, who is a citizen, who is female, who is an employee rather than a subcontractor, who is the parent of a small child, who is not bankrupt), some of which are foundational. Those identities can be read as manifestations of a single legal personality,[11] a broad concept that encompasses both natural persons and artificial entities such as companies.[12]

We can also see that bureaucratic rationality[13] abhors indeterminacy in favour of binary states – for example you are or are not dead, a citizen, an adult, guilty – and struggles with ambiguity. That rationality may be as determinist as the theorising of authors such as Foucault, Marx, Schmitt, MacKinnon and Bell who are critiqued later in this dissertation, although justified on the basis that treating 'like with like' results in a formal equality that is 'a central element in the idea of justice'.[14]

The dissertation is concerned with the nature of legal identity, a notion that encompasses a wide range of legal constructs that are apparent – once looked for – in law about contract, criminal liability, citizenship, eligibility to vote, the professions,

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[11] The existence of multiple identities does not mean that there are multiple persons. See *Smadu v Stone* [2016] WASC 80, [5], [7] and [11].

[12] For personality see in particular Ngaire Naffine, 'Who Are Law's Persons? From Cheshire Cats To Responsible Subjects' (2003) 66(3) *Modern Law Review* 346; Richard Tur, 'The 'Person' in Law', in Arthur Peacocke and Grant Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Blackwell, 1987) 116; Margaret Radin, 'Property and Personhood' (1982) 34(5) *Stanford Law Review* 957; Lawrence Solum, 'Legal Personhood For Artificial Intelligences' (1991-92) 70 *North Carolina Law Review* 1231; and Sheryl Hamilton, *Impersonation: Troubling the Person in Law and Culture* (University of Toronto Press, 2009). See also Stephen Schnably, 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1993) 45(2) *Stanford Law Review* 347.

[13] For public administration and modern court or tribunal systems as an 'iron cage' at odds with respect for individuality see Barbara Townley, *Reason's Neglect: Rationality and Organising* (Oxford University Press, 2008); Bernard Silberman, *Cages of Reason: The Rise of the Rational State in France, Japan, the United States and Great Britain* (University of Chicago Press, 1993) 266; Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (Yale University Press, 1983) 28 and other writers drawing on the insights in Max Weber, *Economy and Society* (Günther Roth and Claus Wittich trans, University of California Press, 1968) [trans of *Wirtschaft und Gesellschaft* (first published 1922)] 882.

[14] H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 159. Note Hart's warning of the need to 'treat different cases differently' if the injunction to treat like cases alike is to be more than 'an empty form' and the critique in David Lyons, *Moral Aspects of Legal Theory: Essays on Law, Justice and Political Responsibility* (Cambridge University Press, 1993) 28. Later chapters in the current dissertation discuss how contemporary Australian law on occasion aspires to a Rawlsian substantive equality in construing particular legal identities when dealing with 'like cases' but also addresses problems with inconsistency or 'poor fit' through a pragmatic reference to exemplars, in other words ideal types.

gender, spent convictions, Indigenous authenticity, childhood, marriage, the Australian head of state, corporations, refugees, the unborn, vagrancy, defamation, the handling of explosives, employment, the official inspection of plumbing and other matters.[15] The identities involve what jurists have variously characterised as obligations, duties, powers, abilities, rights, disabilities, capacities and penalties.

The following chapters are concerned with the functioning of those identities, why they arise, why some are no longer recognised, what they mean in legal frameworks and what they mean in social life that co-exists with and is shaped by (and shapes) the law.[16]

The dissertation is not primarily concerned with the development of evidence law, with forensic tools such as fingerprints, DNA and retina scans, or with identification/authorisation mechanisms such as the Australia Card, the passport, the driver's licence and police badge. However, signification and verification are discussed throughout the dissertation as part of a Geertzian 'thick' description of what identities mean, with a detailed analysis of principles and processes in Chapters Eight and Nine.[17]

The following chapters demonstrate that legal identity is a construct – an administratively convenient fiction, something that is contingent. It overlaps but is **not** identical with many uses of the word in contemporary Australian and overseas culture, where we can discern a preoccupation with 'identity' as a matter of belonging or exclusion, taste and status, authenticity, grievance or authority. It is not reducible to a query about the presence of a legal person (whether natural or corporate). It is also not reducible to questions about fingerprints, names, cards or faces.[18]

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[15] For a perspective on legal constructs see David Goldman, 'Legal Construct Validation: Expanding Empirical Legal Scholarship To Unobservable Concepts' (2007) 36(1) *Capital University Law Review* 79.
[16] Niklas Luhman, *A Sociological Theory of Law* (Routledge, 1985) 1; and Jack Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105, 107.
[17] For a concise introduction to thick description see Clifford Geertz, 'Thick Description: Toward an Interpretive Theory of Culture' in *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973) 3. The concept and its application in this dissertation is discussed immediately below and in Chapter Two.
[18] *Witness Protection Act 1991* (Vic) s 8 identity includes any individual characteristics by which a person is recognised, such as their name, nick-name, depiction or physical description, a physical feature or biometric identifier, their personal association with another person or anything that may reasonably lead to their identification.

In prefacing the discussion in the following chapters it is useful to note other uses of the term 'identity', which has become a focus of much scholarly writing and is a common feature of political discourse. There is for example considerable interest in the notion of 'cultural identity' (including the manufacture of tradition), 'cultural citizenship' or multiculturalism, and 'national character', with the latter potentially reflected in analyses of positioning on a scale of individualism and collectivism. Questions about who belongs, who determines belonging and what mechanisms are used in that determination are evident in the notion of identity politics, representations and cultural resilience. Other scholars have looked at the 'inner man', considering self-conceptualisation and self-respect, psychological maturation and wellbeing, roleplaying in social interactions, or identity in terms of the meaning of life.[19] The imperatives of contemporary market economies and 'spectacular identity' are apparent in literature that construes identity in terms of 'persona' and consequent 'personality, 'image' or 'publicity rights'.

This dissertation provides and tests twelve interrelated contentions, explored in the following chapters. That exploration is founded on a discussion of statute/case law and day by day practice. That foundation is evident in frequent but non-exhaustive citation of contemporary Australian statutes and, as the reader progresses, in both citation and exegesis of case law to strongly demonstrate claims made by the author.

It embodies what might be characterised as legal pragmatism, a philosophy discussed in more detail below and reflected in the discrete methodology identified in Chapter Two. The engagement with identities in the following chapters is informed but not determined by legal theory, in other words Marxist and other critiques of law are applied where the results of that analysis appear fruitful.[20] That assimilation of what is useful is one feature of pragmatism. Atiyah commented that

> the truth is that the inclination towards pragmatism, and the aversion to theory which I have suggested are characteristic of the English legal system, turn out to be an aversion to explicit theory rather than an aversion

[19] See for example Seymour Epstein, 'The Self-concept Revisited: Or A Theory of a Theory' (1973) 28(5) *American Psychologist* 404; Mary Midgley, *Are You an Illusion?* (Acumen, 2013); Herbert Marsh, 'A Multidimensional, Hierarchical Model of Self-Concept: Theoretical and Empirical Justification' (1990) 2(2) *Educational Psychology Review* 77; and Susan Jones and Marylu McKewen, 'A Conceptual Model of Multiple Dimensions of Identity' (2000) 41(4) *Journal of College Student Development*.405.

[20] Alfonso Morales, 'Foreword: Pragmatism as a Discipline – (Re)Introducing Pragmatist Philosophy to Law and Social Science', in Alfonso Morales (ed), *Renascent Pragmatism: Studies in Law and Social Science* (Ashgate, 2003) xi, xvi.

> to all theory. Implicit theories exist all around us in the law and the legal system, sometimes half acknowledged, sometimes understood but not thought suitable for discussion, and sometimes probably not appreciated at all.[21]

Explanations of social processes are rarely susceptible to the empirical verification that is used in validating claims regarding chemistry, physics or physiology.[22] The claims made in this dissertation are however theoretically coherent and consistent with the resource material (in other words that claims that are not controverted by the statute/case law and by reports on the practice of, for example, public administrators and 'identity thieves').

What is the importance of the questions? What is their use? Two discrete responses are discernable.

The first is that concerns regarding identity and identification practice are apparent in contemporary Australian public administration, commerce, justice, politics and popular culture. Put simply, a preoccupation with 'identity', belonging, authenticity, authority and entitlement is part of the national *zeitgeist* and likely to remain so.

The questions in this dissertation reflect the reality that identity – and particular legal identities – are meaningful for individuals and for Australian society rather than merely as the bases for the academic writing about for example intersectionality.

The second basis for the questions is that specific legal identities and legal identity as an abstraction are ripe for scholarly analysis. That analysis is useful because questions of identity, as demonstrated in later chapters of this dissertation, infuse

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[21] P S Atiyah, *Pragmatism And Theory In English Law (The Hamlyn Lectures, 39)* (Stevens & Son, 1987) 148. See also Morton Horwitz, *The Transformation of American Law, 1870-1960* (Oxford University Press, 1992) 271: 'Only pragmatism, with its dynamic understanding of the unfolding of principle over time and its experimental appreciation of the complex interrelationship between law and politics and theory and practice, has stood against the static fundamentalism of traditional American conceptions of principled jurisprudence.'

[22] The following pages however are predicated on recognition that the 'disproof' of an assertion about a chemical process has a different character to the 'disproof' of an assertion regarding a social process. See for example the discussion in Karl Popper, *The Logic of Scientific Discovery* (Routledge, 2nd ed, 2002) [trans of *Logik der Forschung* (first published 1935)] 36; Geoffrey Samuel, 'Can Gaius Really Be Compared To Darwin' (2000) 49(2) *International and Comparative Law Quarterly* 297, 325; Pierre Bourdieu, *The Logic of Practice* (Richard Nice trans, Stanford University Press, 1990) [trans of *Le sens pratique* (first published 1980)] 135; and Murray Leaf, 'Ethnography and Pragmatism', in Alfonso Morales (ed), *Renascent Pragmatism: Studies in Law and Social Science* (Ashgate, 2003) 92, 102. Kenneth Gergen, 'Toward generative theory' (1978) 36(11) *Journal of Personality & Social Psychology* 1344 suggests that 'generative questioning' rather than fact-seeking may be productive of understanding of social structures and behaviours.

much public and private administration at the level of practice and politics. As a society we are for example preoccupied with disagreements about refugee policy and the specifics of that policy's administration (including the deportation discussed in Chapter Three below and authentication of identity documents discussed in Chapter Eight). Scholarly analysis matters because, in essence, legal identity matters. The analysis is timely. Why has it not been undertaken in the past? Chapter Two suggests that the absence of a large-scale analysis, particularly an analysis informed by legal pragmatism and an emphasis on flourishing that goes beyond formal measures of equality,[23] reflects the absence of models for emulation – this dissertation is in that sense both original and useful – and because much writing about legal identity although excellent has been determined by a legal theorisation, such as Critical Race Theory, that ignores complexities.

As the following pages indicate, there has not been a major work that considers different facets of the legal person in Australia. Individual identities have been the subject of academic research (or commentary by public sector and civil society bodies) and there has been publication regarding specific identification mechanisms or challenges, such as the proposed Australia Card and whole-of-population DNA profiling. However, as yet there is no comprehensive study of identity as a thread in the legal carpet.

The dissertation is a response to that lacuna in the research literature, dealing with major principles, examining a range of legal identities from multiple perspectives as the basis for a original and realistic explanation, and drawing on an ethos of flourishing that moves beyond the essentialism of some theorists who – as discussed in the following chapters – construe law through the lens of particular gender, ethnic, class or other interests.

The body of this dissertation facilitates an understanding of specific legal identities, how they are constructed, how they are subverted and how subversion is minimised. That understanding is of value in informing community debate and public policy-making (for example through an awareness that particular 'silver bullet' solutions are

[23] Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) 69.

likely to shift rather than solve problems). More broadly, in extending the knowledge base for legal academics, information technology specialists, sociologists and historians the dissertation provides a context and base for further research.

As the following chapters demonstrate, there is a very large but uneven literature on specific legal identities and on particular identification mechanisms. That research base for example includes works on citizenship, sanity, physical disability, marriage, childhood, the passport, the limited liability company and the electronic signature. It also includes works on law's response to subversion of identities and identifiers, including material on cross-dressing, bigamy, forgery, the 'conman', contractual restrictions on online pseudonymity and '100 Points' identification schemes.

The body of knowledge represented by that literature encompasses academic works by legal scholars and political scientists or historians, popular writing (particularly on contemporary offences and offenders such as Bourdin, 'M Butterfly' and Gerhartsreiter),[24] industry studies and official reports on what has been characterised as 'identity theft' or 'identity crime', with identity often being conflated with identification and enthusiasm for new identification tools such as digital biometrics eliding the difference between entity, legal identity and signifier (an elision discussed in detail in later chapters).

Parts of the field, to use Bourdieu's characterisation,[25] are growing very rapidly and will continue to do so because of factors such as commercial opportunities in

[24] Mark Seal, *The Man in the Rockefeller Suit: The Astonishing Rise and Spectacular Fall of a Serial Imposter* (Viking, 2012); David Grann, 'The Chameleon: The Many Lives of Frederic Bourdin' in Grann, *The Devil and Sherlock Holmes: Tales of Murder, Madness and Obsession* (Simon & Schuster, 2010) 79; Dorinne Kondo, 'M Butterfly: Orientalism, Gender and a Critique of Essentialist Identity' (1990) 16 *Cultural Critique* 5; Emmanuel Carrère, *The Adversary: A True Story of Monstrous Deception* (Linda Coverdale trans, Metropolitan Books, 2001) [trans of *L'Adversaire* (first published 2000)] and Blake Eskin, *A Life in Pieces: the Making and Unmaking of Binjamin Wilkomirski* (Norton, 2002). Works on historical antecedents include Sheila Fitzpatrick, 'The World of Ostap Bender: Soviet Confidence Men in the Stalin Period' (2002) 61(3) *Slavic Review* 535; Hilary Spurling, *La Grande Therese: The Greatest Scandal of the Century* (HarperCollins, 2000); Rohan McWilliam, *The Tichborne Claimant* (Continuum, 2007); Partha Chatterjee, *A Princely Impostor? The Strange and Universal History of the Kumar of Bhawal* (Princeton University Press, 2002); Philip Longworth, 'The Pretender Phenomenon in Eighteenth-Century Russia' (1975) 66(1) *Past & Present* 61; Mary Kietzman, *The self-fashioning of an early modern Englishwoman: Mary Carleton's Lives* (Ashgate, 2004); Ron Howard, *The Fabulist: The Incredible Story of Louis de Rougemont* (Random House, 2006); Benjamin Reiss, *The Showman and the Slave: Race, Death, and Memory in Barnum's America* (Harvard University Press, 2001); Harriet Muraev, *Identity Theft: The Jew in Imperial Russia and the Case of Avraam Uri Kovner* (Stanford University Press, 2003); Lovat Dickson, *Wilderness Man: The Strange Story of Grey Owl* (Macmillan, 1974); and Laura Browder, *Slippery Characters: Ethnic Impersonators and American Identities* (University of North Carolina Press, 2000).

[25] Pierre Bourdieu, 'The force of law: towards a sociology of the juridical field' (1987) 38(5) *Hastings Law Journal* 805, 816.

identification technologies (at and within borders),[26] private uptake of devices such as drones,[27] debate about liability in relation to social network services and other digital interactions, and academic interest in social preoccupations with individual belonging, exclusion and cultural difference.

This exploration extends existing scholarship (critiqued in the Appendix) in that it looks beyond the particular in articulating the nature of legal identity *per se* through an examination of fundamental characteristics and insights about why some potential identities are not recognised in contemporary Australian law.[28] There have been no major works that pull together different characterisations of identity, analyse law's construction of legal identity and offer an integrated account of how that law has changed over time and will do so in future. Legal scholars writing about identity have typically concentrated on a specific facet such as gender or indigeneity or class and have not used what philosophers would characterise as a hermeneutic circle[29] (in other words recursive examination of a range of identities to discern the essence of legal identity). That concentration potentially results in reductive theoretical discussions that are determined by philosophies articulated by Marx, Foucault, Butler, Aquinas and other grand theory exponents whose conceptualisation of identity is discussed in the Appendix to this dissertation.

This dissertation seeks to offer insights about the nature of legal identity *per se* (rather than for example gender) by looking at law and practice regarding numerous identities, their origin, their function and their implications. It explores matters such as capacity, rights, responsibilities, authority and authentication that are of immense practical importance in the liberal democratic state (for example in relation to the development of national security policy, migration, the implementation of biometric

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[26] Edgar Whitley and Ian Hosein, *Global Challenges for Identity Policies* (Palgrave Macmillan, 2009).
[27] Roger Clarke, 'Appropriate regulatory responses to the drone epidemic' (2016) 32(1) *Computer Law & Security Review* 152.
[28] Mathias Siems, 'Legal Originality' (2008) 28(1) *Oxford Journal of Legal Studies* 147.
[29] Hans-Georg Gadamer, 'Hermeneutics and Social Science', (1975) 2(4) *Cultural Hermeneutics* 307. See also Jean Grondin, *Introduction to Philosophical Hermeneutics* (Yale University Press, 1997) 1; Michael Foster, 'Hermeneutics', in Brian Leiter and Michael Rosen (ed), *The Oxford Handbook of Continental Philosophy* (Oxford University Press, 2007) 30; and Joel Weinsheimer, *Gadamer's Hermeneutics: A Reading of Truth and Method* (Yale University Press, 1985). For its application in legal analysis see for example the essays in Francis Mootz III (ed), *Gadamer & Law* (Ashgate, 2007); Don Lavoie (ed), *Economics & Hermeneutics* (Routledge, 1990); and Gregory Leyh (ed), *Legal Hermeneutics: History, Theory & Practice* (University of California Press, 1992) or the discussion in Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) and Michael Moore, 'The Interpretive Turn in Modern Theory: A Turn for the Worse?' (1989) 41(4) *Stanford Law Review* 871, 871.

identity cards and debate about same-sex marriage). The concluding chapter accordingly argues that technologies are facilitating a 'soft' version of what has traditionally been characterised as the 'national security state'[30] or even the 'information state',[31] resulting in what might be dubbed 'the identity state'. That state is one in which, if we are committed to the flourishing discussed at page 18 below, law reform is both imperative and achievable.

This dissertation also poses questions about what we mean about law as an abstract set of principles, as a body of rules and administrative practices situated in a world of conflict or uncertainty, and as theories of social behaviour. If we are concerned to encourage human flourishing through for example the reduction of injustice and enhancement of opportunity it is important to understand the nature of law as concepts and practices, an understanding that for instance addresses Shklar's concerns regarding 'legalism' and arguments by exponents of Critical Race Theory, Critical Legal Theory and Feminist Legal Theory that teaching in law schools in emphasising dogma perpetuates inequities.

A receptivity to different ideas and the varieties of human existence, norms or legal formulas is not antithetical to boundaries. This dissertation does not cover all matters through what some writers have promoted as a totalising Theory of Everything.[32]

Firstly, the dissertation is concerned with *legal* identity, rather than all identity. Although it draws on insights about phenomenology, the psychology of personality, identity politics, religious faith, the distribution of risk through the notion of the corporate person, and cultural or sexual affinity it is concerned with a specific class of legal constructions.

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[30] See for example Mark Rix, 'Australia's Anti-Terrorism Legislation: The National Security State and the Community Legal Sector' (2006) 24(4) *Prometheus* 429; Norrin Ripsman and T V Paul, *Globalization and the National Security State* (Oxford University Press, 2010); Douglas Stuart, *Creating The National Security State* (Princeton University Press, 2008); Jonathan Moreno, 'Bioethics and the National Security State' (2004) 32(2) *Journal of Law Medicine and Ethics* 198; and Marcus Raskin, 'Democracy versus the National Security State' (1976) 40(3) *Law and Contemporary Problems* 189.

[31] Edward Higgs, *The Information State in England: The Central Collection of Information on Citizens since 1500* (Palgrave Macmillan, 2004).

[32] See for example Aleksander Peczenik and Jaap Hage, 'Legal Knowledge About What?' (2000) 13(3) *Ratio Juris* 326 or recent work such as Amar Dhall, 'Neo-Naturalism: A Fresh Paradigm in International Law' (2010) 66(5) *World Futures* 363 that encompass precognition, telepathy, remote healing and other notions that have not been embraced by Australian courts in recent years. Among critiques see Michael Shermer, 'Quantum Flapdoodle and other Flummery' in Victor Stenger (ed), *The Unconscious Quantum: Metaphysics in Modern Physics and Cosmology* (Prometheus, 2009) 7, 8.

Secondly, the dissertation does not purport to explain all law, all legal structures and all identity or identification mechanisms. The conclusions drawn in the following pages, particularly in Chapter Eleven, are applicable to contemporary and past legal systems outside Australia. They provide one rationale for a Bill of Rights as a mechanism that fosters flourishing through a formal and substantive recognition of dignity and through promotion of agency on the part of people who are disadvantaged.[33] The conclusions are also applicable to past identities (such as witch, heretic, nonjuror, slave or vagrant) and historic mechanisms (yellow stars and pink triangles, branding, sumptuary law). The focus is however on contemporary Australian law, with historic and non-Australian information being used for illustration.

Thirdly, the dissertation does not purport to provide the only or best theory for identifying and analysing legal processes. It offers useful insights into the nature of legal identity in contemporary Australia but should be regarded as an addition to the interpretive repertoire rather than a definitive statement of where legal identity comes from, why specific identities have ceased to be apparent and what legal identity involves.

The grounding in legal pragmatism means that it does not seek to be reductive. The following chapters test the arguments through reference to case/statute law but do not offer an exhaustive catalogue of every identity-related statute.

Finally, the dissertation does not seek to cover every identity in detail and, given constraints on time for research/writing or the reader's patience, does not purport to provide a detailed critique of all theories or analyse every identity mechanism in depth. It offers a broad taxonomy rather than a detailed and exhaustive catalogue.[34]

That approach reflects the criticism implicit in Shklar's comment that

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[33] Bede Harris, *A New Constitution For Australia* (Cavendish, 2002) 7, 8 and 70. For objections to an Australian Bill see Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 57-71; and George Williams, *A Bill of Rights For Australia* (UNSW Press, 2000) 35-36.

[34] Emily Sherwin, 'Legal Taxonomy' (2009) 15(1) *Legal Theory* 25. See also the discussion of legal taxonomics in the following chapter, including an engagement with exponents such as Peter Birks.

> The urge to draw a clear line between law and non-law has led to the constructing of ever more refined and rigid systems of formal definitions. This procedure has served to isolate law completely from the social context within which it exists. Law is endowed with its own discrete, integral history, its own "science," and its own values, which are all treated as a single "block" sealed off from general social history, from general social theory, from politics, and from morality. The habits of mind appropriate, within narrow limits, to the procedures of law courts in the most stable legal systems have been expanded to provide legal theory and ideology with an entire system of thought and values.[35]

The Methodology & Materials chapter discusses the process through which identities considered in this dissertation were chosen.

In essence, that process involved determination of some foundational identities: identities (such as life and citizenship) that as noted above are implicit or express prerequisites for exercise or enjoyment of derivative legal identities. The choice of derivative identities explored in the body of this dissertation reflects two groups of criteria.

The first group involves what Gewirth, Rawls and other proponents of 'flourishing' or self-fulfilment – discussed below – see as critical aspects of life, aspects of social interaction (such as marriage and other intimate relationships) and opportunity that are articulated for example in human rights charters.

The second group involves identities and identifiers that are important for the modern liberal democratic state, such identities within comprehensive taxation and health/welfare regimes and identities that embody credentialism.

There is inevitably some arbitrariness in the selection of derivative identities and in the level of detail accorded to discussion of particular foundational identities. That subjectivity is not significant in terms of the dissertation objectives, because there is sufficient information to demonstrate the arguments made above and to provide a useful analysis that both highlights legal identity principles and offers a broader view of law.

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[35] Judith Shklar, *Legalism* (Harvard University Press, 1st ed, 1964) 9.

Flourishing and Pragmatism

As foreshadowed in preceding pages, this dissertation takes a normative approach, using a notion of flourishing as the basis for evaluating law regarding identity.

'Flourishing' is not referred to in the Australian Constitution and does not appear in the Commonwealth, state and territory human rights statutes.[36] It is not a well-recognised term in Australian jurisprudence.[37] If we think of legal identity as a matter of consequences, for example the authority to undertake a particular task or a constraint on opportunities enjoyed by peers (such as education, intimacy, access to health services, recreation and space for quiet contemplation), flourishing is however a useful tool for considering the rationales for a specific identity and the appropriateness of legal and administrative mechanisms for the creation, protection or removal of that identity.

That claim is consistent with theorisation regarding substantive 'fairness', 'flourishing' or 'fulfilment' articulated by philosophers such as Rawls,[38] Nussbaum,[39] Gewirth[40] and Aristotle.[41] Those thinkers recognised that people differed in their pursuit of personal goods, acknowledging that individuals and cultures have diverse views of happiness, success, meaning and the 'good life', along with differing scope to achieve individual and collective ends. That diversity could be respected and addressed through a conceptualisation of flourishing as something that provided

[36] It is consistent with the values featured in a succession of human rights agreements such as the Universal Declaration of Human Rights, the Convention on the Rights of the Child, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.
[37] To use an analogy employed by Iredell Jenkins, it is sub-aquatic, because common law and statute law refer to facets such as privacy, intimacy, quiet enjoyment and discrimination. Flourishing serves as a high order abstraction for a set of values that are present in much law and that are not tied to an overarching conceptualisation of the objectives of law (and of the state) through for example an interpretive preamble or justiciable Bill of Rights in the Constitution.
[38] John Rawls, 'The Sense of Justice', in Samuel Freeman (ed), *John Rawls: Collected Papers* (Harvard University Press, 1999) 115. See more generally John Rawls, *A Theory of Justice* (Harvard University Press, 1st ed, 1971).
[39] Martha Nussbaum, *Sex and Social Justice* (Oxford University Press, 1999) 4, *Cultivating Humanity* (Harvard University Press, 1997) 118, and Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press, 2011) 33.
[40] Alan Gewirth, *Self-Fulfillment* (Princeton University Press, 1998).
[41] For *eudaimonia* (flourishing) see Aristotle, *Nicomachean Ethics* in Jonathan Barnes (ed), *The Complete Works of Aristotle II* (W D Ross trans, Princeton University Press, 1984) 1729, 1752 and 1791 and *Politics* in Jonathan Barnes (ed), *The Complete Works of Aristotle II* (B Jowett trans, Princeton University Press, 1984) 1986, 2104. See also Robert Heinaman, 'The Improvability of Eudaimonia in the Nicomachean Ethics' (2002) 23 *Oxford Studies in Ancient Philosophy* 99; Anthony Kenny, *Aristotle on the Perfect Life* (Clarendon Press, 1992); Thomas Nagel, 'Aristotle on Eudaimonia' (1972) 17(3) *Phronesis: A Journal for Ancient Philosophy* 253; and Hans-Georg Gadamer, *The Idea of the Good in Platonic-Aristotelian Philosophy* (Robert Sullivan trans, Yale University Press, 1986) [trans of *Die Idee des Guten zwischen Plato und Aristotles* (first published 1978)].

benefits for society and individuals through recognising people as having properly having agency, rights and responsibilities. Such a recognition is consistent with law as a mechanism for enshrining public virtues.

Fairness and flourishing are universalist, that is should underpin all legal systems, provide legitimacy for those systems and enable the self-realisation of all people. Pragmatist John Dewey in conceptualising 'the good life' referred to 'An end at once enduring and flexible: the liberation of individuals so that the realisation of their capacities may be the law of their life'.[42] Flourishing encompasses the normative 'autonomy'[43] and 'dignity' enshrined by Kant[44] and many subsequent legal philosophers.[45] A conceptualisation of law as aspiring towards justice (a liberal justice founded on the fairness that promotes agency, opportunity, respect for diversity and on occasion necessitates redistribution of private assets for the common good) thus differs from Hart's[46] emphasis on compliance with the rules of a language game or from validation through reference to revelation[47] or what Finnis[48] considers to be natural and thus right.

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[42] John Dewey, 'Liberalism and Social Action' in Jo Ann Boydston (ed), *The Later Works, 1925-1953* (Southern Illinois University Press, 2009) vol 11, 1, 41.

[43] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988) and Jerome Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge University Press, 1998).

[44] Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans, Cambridge University Press, 1996) [trans of *Die Metaphysik der Sitten* (first published 1797)] 186. A salient expression of judicial recognition is *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* [1992] HCA 15; (1991-1992) 175 CLR 218, Brennan J at 266. See further Mason CJ, Dawson, Toohey and Gaudron JJ at 253. For the concepts see George Kateb, *Human Dignity* (Harvard University Press, 2011); Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 44(4) *Metaphilosophy* 444; Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) 44; Mirko Bagaric and James Allan, 'The vacuous concept of dignity' (2006) 5(2) *Journal of Human Rights* 257; John Rawls, 'The Sense of Justice', in Samuel Freeman (ed), *John Rawls: Collected Papers* (Harvard University Press, 1999) 115; Susan Shell, 'Kant on Human Dignity', in Robert Kraynak and Glenn Tinder (eds), *In Defense of Human Dignity: Essays for Our Times* (University of Notre Dame Press, 2003) 53; and Arthur Chaskalson, 'Human Dignity as a Constitutional Value' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in human rights discourse* (Martinus Nijhoff, 2002) 133..

[45] See for example John Rawls, 'The Sense of Justice', in Samuel Freeman (ed), *John Rawls: Collected Papers* (Harvard University Press, 1999) 115; Rex Glensy, 'The Right To Dignity' (2011) 43 *Columbia Human Rights Law Review* 65; George Kateb, *Human Dignity* (Harvard University Press, 2011); and Matthew Festenstein, *Pragmatism and Political Theory* (Polity Press, 1997) 66.

[46] H L A Hart, *Law, Liberty and Morality* (Stanford University Press, 1963) and *The Concept of Law* (Clarendon Press, 2nd ed, 1994). Among critiques see Mark Burton, 'The Song Remains the Same: The Search for Interpretive Constraint and Rhetoric of Legal Theory in Hart and Hutchinson' (1997) 20(2) *UNSW Law Journal* 407; and John Finnis, 'HLA Hart: A Twentieth Century Oxford Political Philosopher' (Oxford Legal Studies Research Paper No. 30/2009, 2009).

[47] Anver Emon, *Islamic Natural Law Theories* (Oxford University Press, 2010) 9 and 11; Jan Otto (ed), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010); and Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (Cambridge University Press, 2000).

[48] John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980). His valorization of a pre-Wolfenden morality as 'natural' and thus imperative is evident in John Finnis, 'Law, Morality and 'Sexual Orientation'' in John Corvino (ed), *Same Sex: Debating the Ethics, Science and Culture of Homosexuality*

Put simply, when the veil of ignorance is removed you might not want to be stigmatised with identifiers such as a yellow star, pink triangle or witch's hat,[49] irrespective of whether the rules for signifiers are consistent, whether the veil was hauled aloft by a particular deity or whether the subalterns were silent.

You might want the substantive respect implicit in Nussbaum's capabilities that for example encompass life, livelihood, bodily integrity, leisure, use of the mind in ways protected by guarantees of freedom of expression regarding both political and artistic speech, attachments to things and people outside ourselves, freedom of religious exercise, and treatment as an entity whose worth is equal to that of others (with consequent non-discrimination on the basis of race, gender, sexual orientation, ethnicity, caste, religion and national origin).[50]

If we are concerned with flourishing – and thence the happiness or survival of other people and of nonhuman animals – we might similarly move beyond a legalism in which the construction, enjoyment and enforcement of legal identity is assessed in terms of compliance with rules and adherence to an ideology that privileges form over content.[51] The enshrinement of fundamental disadvantage through identities in the historic US Deep South or Nazi Germany may well have been formally lawful (and indeed imperative) according to jurists of that epoch but from the perspective of flourishing should be regarded as deeply abhorrent.

Flourishing at a collective level requires recognition at a both a formal and substantive level of the dignity of all people, for example irrespective of their nationality, ethno-religious, political or sexual affinity. It means that those people are not treated as mere instruments for the ends of others, an instrumentalism in which the ends might be those of the community at large, of policymakers and administrators

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(Rowman & Littlefield, 1997) 31. In contrast see Bernard Williams, 'Identity and Identities' in A W Moore (ed), *Philosophy as a Humanistic Discipline* (Princeton University Press, 2006) 57, 64.

[49] John Rawls, *A Theory of Justice* (Harvard University Press, 1st ed, 1971) 136.

[50] Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press, 2011) 33-34.

[51] Judith Shklar, *Legalism* (Harvard University Press, 1st ed, 1964) 9; and Michael Kirby, 'The Rule of Law Beyond the Law of Rules' (2010) 33(3) *Australian Bar Review* 195. For a discussion of the revival of ethical inquiry in legal theory see Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5(2) *Social & Legal Studies* 131.

within the state (that is entities speaking for the community), or of dominant individuals. As Nussbaum comments, it also requires that we are sensitive to individuality, rather than reducing people to a specific attribute or cipher.[52] We should respect the private realm, in which individuals may exercise their private conceptions of the good and into which the state should be hesitant to enter.[53] As Chapters Ten and Eleven note, new identification technologies both potentially encourage flourishing and erode dignity through pervasive surveillance that is contrary to that flourishing, meaning that government intervention must be necessary and proportionate rather than a matter of bureaucratic convenience.

It is important to note that in using flourishing as a tool for assessing legal identity on a universalist basis we are not restricted to the removal of arbitrarily discriminatory law or to the alleviation of disadvantage (and thereby fostering the agency of individuals and social groups) through for example free education, merit-based scholarships or a comprehensive public health system. Flourishing for many people may be a function of certainty about the identity of other people, with for example trust in commercial transactions and in the provision of professional services by an individual who has been certified as possessing the requisite knowledge and character. From that perspective much of the law documented in the following chapters is about encouraging the wellbeing of both individuals and society by ensuring the stability of identity as a thread in the legal carpet.

Flourishing encompasses the enjoyment of attributes such as agency and liberty,[54] with the authority of Australian law being underpinned by potential deprivation of liberty through imprisonment or imposition of a disability such as removal of a driver's licence. Flourishing involves attributes such as respect and freedom from fear or denigration, important in considering law's construction of identities that result in stigma, for example the historic denial of suffrage to women or Indigenous people.[55]

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[52] Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) 69.
[53] Susan Okin, 'Political Liberalism, Justice and Gender' (1994) 105(1) *Ethics* 22, 26 notes the importance of the family as part of the private realm giving effect to liberal principles of justice.
[54] John Rawls, *The Basic Liberties and Their Priority: Tanner Lectures on Human Values* (University of Utah Press, 1982) 16; and Allan Gewirth, 'Why There Are Human Rights' (1985) 11 *Social Theory and Practice* 235.
[55] For an overview see Ellen Paul, Fred Miller and Jeffrey Paul (eds), *Human Flourishing* (Cambridge University Press, 1999).

It also involves the enjoyment of opportunities for individuals to take responsibility, through for example engagement with the state by electing or serving in a legislature, an idea that is discernable at least from the time of Aristotle.[56] Václav Havel commented that

> Responsibility means vouching for ourselves, and doing so even in the wider perspective of "what everyone should do." It means vouching for ourselves in time, knowing everything we have ever done and why, and what we have decided to do. It means standing behind everything we do and being prepared to defend our position or existentially bear witness to it anywhere and at any time. (That is why responsibility is also the main key to human identity).[57]

That self- and collective-realisation is a manifestation of and enabler of flourishing. In a liberal democratic state we reasonably expect people to take responsibility for themselves and for the community at large by participating in political processes that are concerned with the development, implementation and revision of law regarding both identities and the mechanisms for the assignment, verification and enforcement of identities. On that basis the foundational identity of 'citizen' and derivative identity of 'voter' (underpinned by identification mechanisms such as birth registers, voter registration, and electoral rolls) are of particular significance.

As the following **Methodology** chapter indicates, the dissertation has been informed by a range of legal theories but does not rely on a single theoretical lens for viewing law's construction of identity and does not aim to cage the reader's understanding through imposition of a restrictive theoretical model.

Instead the underpinning is provided by what has been variously characterised as legal pragmatism, legal neo-pragmatism or even sociological jurisprudence. Those characterisations are amorphous but serviceable labels for what in practice is an inquiring state of mind rather than a discrete body of dogma or detailed suite of epistemological tools.[58]

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[56] See for example Aristotle, 'The Politics' in Stephen Everson (ed), *The Politics and the Constitution of Athens* (Cambridge University Press, 1996) 1281a1.

[57] Václav Havel, *Letters To Olga* (Paul Wilson trans, Henry Holt, 1989) [trans of *Dopisy Olze* (first published 1983)] 232.

[58] Among discussions of legal pragmatism see Margaret Radin, 'The Pragmatist and the Feminist' (1990) 63(6) *Southern California Law Review* 1699; Richard Posner, 'What Has Pragmatism To Offer Law?' (1990) 63(6) *Southern California Law Review* 1653, 1661; Michael Sullivan, 'Pragmatism and Precedent: A Response to Dworkin' (1990) 26(2) *Transactions of the Charles S. Peirce Society* 225 and *Legal Pragmatism: Community, Rights, and Democracy* (Indiana University Press, 2007); Thomas Grey 'Holmes and Legal Pragmatism' (1989)

That state of mind is marked by an interest in what actually happens in law (particularly the statutory characterisation of identity and judicial interpretation of legal identity) rather than in what has variously been dubbed grand theory or macrotheory.[59] It emphasises the identification of outcomes rather than what are claimed to be foundational principles and transcendent truths.

It is also marked by willingness to ask questions that do not result in clear, definitive answers – an absence that is consistent with the varieties of human experience and social relationships. It complements approaches evident in anthropology and other disciplines, for example Geertz's influential analysis of legal practices in Islamic and non-Islamic societies.[60]

An openness to different qualities and values is captured in the early comment by William James that pragmatism as a philosophy

> has, in fact, no prejudices whatever, no obstructive dogmas, no rigid canons of what shall count as proof. She is completely genial. She will entertain any hypothesis, she will consider any evidence.[61]

Oliver Wendell Holmes Jr, in the words of Brian Tamanaha, drew on philosophical pragmatism when he

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41(4) *Stanford Law Review* 787; Robin West, 'Disciplines, Subjectivity and Law' in Austin Sarat and Thomas Kearns (eds), *The Fate Of Law* (University of Michigan Press, 1993) 125; Ronald Dworkin, 'Pragmatism, Right Answers and True Banality' in Michael Brint and William Weaver (eds), *Pragmatism in Law and Society* (Westview Press, 1990) 359; Frederic Kellogg, 'American Pragmatism and European Social Theory: Holmes, Durkheim, Scheler, and the Sociology of Legal Knowledge' (2012) IV(1) *European Journal of Pragmatism and American Philosophy* 107; Daniel Farber, 'Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century' (1995) *University of Illinois Law Review* 163; and the cogent critique in David Luban, *Legal Modernism* (University of Michigan Press, 1997) 126-129. A compendium of recent characterisations is provided in Susan Haack, 'On Legal Pragmatism: Where Does 'The Path of the Law' Lead Us?' (2012) 3(1) *Pragmatism Today* 8, 9.

[59] Quentin Skinner, 'The Return of Grand Theory' in Quentin Skinner (ed), *The Return of Grand Theory in the Human Sciences* (Cambridge University Press, 1985) 1.

[60] Clifford Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective' in Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983) 234. See also Clifford Geertz, 'Common Sense As A Cultural System' (1975) 33(1) *The Antioch Review* 5.

[61] William James, 'What Pragmatism Means', in Bruce Kucklick (ed), *William James: Writings 1902-1910* (Library of America, 1987) 505, 522. See also Doris Olin (ed), *William James: Pragmatism in Focus* (Routledge, 1992); and Harvey Cormier, *The Truth Is What Works: William James, Pragmatism, and the Seed of Death* (Rowman & Littlefield, 2000). Note that legal pragmatism is inspired by the pragmatism of *fin de siècle* figures such as James but is not a strict application of that philosophy. For a provocative critique of James and CS Peirce see John Diggins, *The Promise of Pragmatism: Modernism and the Crisis of Knowledge and Authority* (University of Chicago Press, 1995), with a more generous view in Allen Mendenhall, 'Pragmatism on the Shoulders of Emerson: Oliver Wendell Holmes Jr.'s Jurisprudence as a Synthesis of Emerson, Peirce, James, and Dewey' (2015) 48(1) *The South Carolina Review* 93. US jurist Oliver Wendell Holmes Jr characterised James' metaphysics, in contrast to his pragmatism, as 'an amusing humbug': Mark DeWolfe Howe (ed), *The Pollock-Holmes Letters: Correspondence of Sir Frederick Pollock and Mr Justice Holmes 1874-1932* (Cambridge University Press, 2nd ed, 2015) vol 1, 139.

> irreverently pierced the prevailing mode of analyzing common law concepts as if they were essentialist notions of timeless provenance with a necessary internal structure and set of external relations. His favorite debunking technique was to employ historical analysis to demonstrate that these abstract concepts have a terrestrial origin in a specific context, derived from particular and contingent needs, and not infrequently based upon mistake. Holmes argued that legal rules should serve human purposes and must therefore be shaped to meet these purposes.[62]

Richard Posner, an advocate of 'practical reason'[63] in jurisprudence, more recently characterised legal pragmatism as 'practical, instrumental, forward-looking, activist, empirical, skeptical, antidogmatic, experimental'.[64] Posner more usefully claimed that legal pragmatism has three essential elements:

> The first is a distrust of metaphysical entities ... viewed as warrants for certitude whether in epistemology, ethics, or politics. The second is an insistence that propositions be tested by their consequences, by the difference they make – and if they make none, set aside. The third is an insistence on judging our projects, whether scientific, ethical, political, or legal, by their conformity to social or other human needs.[65]

James Kloppenberg similarly argued that pragmatism's great strength is its

> denial of absolutes, its admission of uncertainty, and its resolute commitment to the continuing vitality of the ideal of democracy as a way of life[66]

before going on to characterise democracy as the form of social life 'uniquely consistent with pragmatism.[67]

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[62] Brian Tamanaha, 'Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction' (1996) 41 *American Journal of Jurisprudence* 315, 315. Among critiques see Michal Albertein, *Pragmatism and Law: From Philosophy to Dispute Resolution* (Ashgate, 2002) 41-99; and Jerome Frank, 'A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism' (1954) 9(2) *Rutgers Law Review* 425.

[63] Richard Posner, *The Problems of Jurisprudence* (Harvard University Press, 1990) 73 describes practical reason as 'a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'experience', intuition and induction'.

[64] Richard Posner, *Overcoming Law* (Harvard University Press, 1995) 11. For a response see Ronald Dworkin, 'In Praise Of Theory' (1997) 29 *Arizona State Law Journal* 364 and, more broadly, Michael Sullivan and Daniel Solove, 'Can Pragmatism Be Radical: Richard Posner and Legal Pragmatism' (2003) 113 *Yale Law Journal* 687, 691; or Jeremy Waldron, 'Ego-Bloated Hovel' (2000) 94(2) *Northwestern University Law Review* 597, 600. Posner in 'What Has Pragmatism To Offer Law?' (1990) 63(6) *Southern California Law Review* 1653, 1663 criticises legal formalism as predicated on the notion that legal questions may be answered solely through inquiry into 'the relation between concepts and hence without need for more than a superficial examination of their relation to the world of fact'.

[65] Richard Posner, 'What Has Pragmatism To Offer Law?' (1990) 63(6) *Southern California Law Review* 1653, 1660. See also Posner's twelve-point characterisation of his pragmatism at Richard Posner, *Law, Democracy and Pragmatism* (Harvard University Press, 2003) 59-60.

[66] James Kloppenberg, 'Pragmatism: An Old Name for Some New Ways of Thinking' (1996) 83(1) *The Journal of American History* 100, 131.

[67] Ibid, 130.

Receptivity to ideas and evidence does not mean uncritical acceptance of all claims or a disregard of scholarly rigour. This dissertation for example seeks to discern key attributes of legal identity in order to determine what is common to different identities and what is unique.

Legal pragmatism is not inherently conservative or antithetical to law reform. Instead, it offers what Morales characterises as 'a consistent, comprehensive and productive understanding of social life'.[68] It can be construed as enabling a methodology for understanding the law rather than an ideology. That understanding can be imbued with a commitment to fostering the flourishing that was highlighted earlier in this Chapter.

Scepticism about grand theory risks the charge that legal pragmatism is conceptually woolly or simply eclectic, with the pragmatist rummaging unsystematically through a grab bag in a way that consciously or otherwise reinforces the legal status quo.

As noted above, grand theory is ontologically appealing because it reduces complexity. Thomas Grey commented that

> Theories that make their mark in the world tend to be bold, sweeping and dramatic – it is their drama that wins them an audience. They have the prestige that, as William James noted, tends to attach to absolutisms. Over the clatter and squeak of practical affairs a theory will be better heard if it offers either the bang-bang of intellectual entertainment or the trumpet call of spiritual uplift [so that legal pragmatism as the] modest theory of the middle way will often be rejected.[69]

Grand theory also provides adherents with an invigorating response to what David Luban dubs the intellectual vertigo of modernity,[70] a modernity in which – to adapt

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[68] Alfonso Morales, 'Foreword: Pragmatism as a Discipline – (Re)Introducing Pragmatist Philosophy to Law and Social Science', in Alfonso Morales (ed), *Renascent Pragmatism: Studies in Law and Social Science* (Ashgate, 2003) xi, xvii. Morton Horwitz, *The Transformation of American Law, 1870-1960* (Oxford University Press, 1992) 50 and 142 notes the impact of progressivism on early US theorising about legal pragmatism, in other words a concern for social betterment rather than continuation of custom.

[69] Thomas Grey, 'Hear The Other Side: Wallace Stevens and Pragmatist Legal Theory' (1990) 63(6) *Southern California Law Review* 1569, 1591. For a perspective on the reception of theory see Kathy Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful' (2008) 9(1) *Feminist Theory* 67, 78.

[70] David Luban, *Legal Modernism* (University of Michigan Press, 1997) 128. See also David Bloor, *Knowledge and Social Imagery* (Routledge, 1976); and Pierre Schlag, 'The Faculty Workshop' (University of Colorado Law Legal Studies Research Paper No. 11-12) (2011) 7.

Marx and Engels – all that is solid melts into air[71] but in which man is not 'at last compelled to face with sober senses, his real conditions of life and his relations with his kind'.[72] However, as the following chapters demonstrate, grand theory is potentially egregiously reductive and in parsing legal identities may exclude attributes that are significant but do not fit into a conceptual cage of, for example, 'whiteness', 'patriarchy', 'neoliberalism', 'heteronormativity' or 'capital'.

Grand theory in essentialising human experience, attributes and social interactions also fails to provide useable questions and answers about anonymity, pseudonymity, risk allocation and verification in the post-modern online environment. It offers answers, but not answers that are useful for many legal practitioners and administrators.

In advocating a legal analysis that is normative (a vision of what law should be on the basis of human rights) rather than narrowly descriptive of law 'as is' Minow and Spelman in discussing pragmatism have thus noted the importance of looking at context rather than reductively at abstractions. They comment that

> the demand to look at the context often means a demand to look at the structures of power, gender, race, or class relationships, or the effects of age and physical vulnerability on people's abilities to protect themselves.[73]

They further comment that insight comes

> not from turning away from human relationships in search of some essential form of reason, but instead from encountering the differences among people, the critical perspectives afforded by the facts of our differences, and the struggle to move between contexts in the search for temporary solutions to our problems.[74]

That awareness of difference and willingness to look outside the law in order to understand the law – as doctrine and as process – contrasts with claims that law can only be understood from within, claims exemplified by Ernest Weinrib's comment

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[71] Marshall Berman, *All That Is Solid Melts Into Air: The Experience of Modernity* (Verso, 2001).
[72] Karl Marx and Friedrich Engels, *The Communist Manifesto* (Marshall Berman trans, Penguin, 2011) [trans of *Manifest der Kommunistischen Partei* (first published 1848)] 68.
[73] Martha Minow and Elizabeth Spelman, 'In Context' (1990) 63(6) *Southern California Law Review* 1597, 1651. See also Brian Tamanaha, 'Pragmatism in US Legal Theory: Its Application to Normative Jurisprudence, Socio-Legal Studies and the Fact-Value Distinction' (1996) 41 *American Journal of Jurisprudence* 315, 315.
[74] Martha Minow and Elizabeth Spelman, 'In Context' (1990) 63(6) *Southern California Law Review* 1597, 1649.

that 'Nothing is more senseless than the attempt to understand law from a vantage point extrinsic to it'.[75]

A contention underpinning this dissertation is that the conceptual validity of legal pragmatism is indicated by the extent to which legal pragmatism provides a useable understanding of the law,[76] that is an understanding that is consistent with the operation of the justice system (and hence has the predictive character highlighted by Holmes' encapsulation of law as the 'prophecies of what the courts will do in fact' and 'prediction, the prediction of the incidence of public force through the instrumentality of the courts')[77] and is conceptually coherent.

A corollary is that answers to the questions posed in this dissertation can be assessed on the basis of whether firstly they are consistent with reality (indicated through for example reference to statute/case law) and secondly they advance the reader's understanding of law at the level of principle and practice.

In contrast to some constructionists, for whom all 'facts' are social[78] or deconstructionists such as Lyotard[79] for whom the legal meaning of facts is (or should be) aleatory, this dissertation is grounded in an acknowledgement that there are physical realities. Those realities are facts rather than constructions.

The following chapters demonstrate the author's contention that the values assigned to particular facts are culturally and temporally contingent. Legal identities have thus

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[75] Ernest Weinrib, 'Legal Formulation: On The Immanent Rationality of Law' (1988) 97(6) *Yale Law Journal* 949, 953. In contrast see Roger Cotterrell, *Law's Community* (Clarendon Press, 1995) 77 and Tamanaha's description of Holmes noted above.

[76] Alfonso Morales, 'Foreword: Pragmatism as a Discipline – (Re)Introducing Pragmatist Philosophy to Law and Social Science', in Alfonso Morales (ed), *Renascent Pragmatism: Studies in Law and Social Science* (Ashgate, 2003) xi, xv-xvi. See also Tony Milligan, 'The Political Turn In Animal Rights' (2015) 1(1) *Politics and Animals* 6, 9.

[77] Oliver Wendell Holmes Jr, 'The Path Of The Law' in Sheldon Novick (ed), *The Collected Works of Justice Holmes* (University of Chicago Press, 1995) vol 3, 393. That is an echo of John Marshall's 'It is emphatically the province and duty of the Judicial Department to say what the law is', *Marbury v Madison* 5 US (1 Cranch) 137, 176 (1803). See also *PGA v The Queen* (2012) 245 CLR 355, Heydon J at 406.

[78] Ian Hacking, *The Social Construction of What?* (Harvard University Press, 1999). Chapter Eleven, in referring to Nietzsche as the father of postmodernism, suggests that legal identity provides an illustration that interpretations – such as the meaning we give to particular facts – are social.

[79] Jean-François Lyotard and Jean-Loup Thébaud, *Just Gaming* (Wlad Godzich trans, University of Minnesota Press, 1985) [trans of *Au Juste* (first published 1979)] 84. See also Perry Bennett, Elisabeth Weber and Jean-François Lyotard, 'Before the Law, After the Law: An Interview with Jean-François Lyotard conducted by Elisabeth Weber' (1999) 11(2) *Qui Parle* 37 and Allen Dunn, 'A Tyranny of Justice: The Ethics of Lyotard's Differend' (1993) 20(1) *Boundary* 192.

appeared and disappeared over the centuries. They will continue to do so in future. In answering the question 'why is that so', this dissertation embraces legal pragmatism in looking outside the law or in practice looking outside what parts of the academy say is the law.

The chapters also highlight that contemporary Australian law in constructing identity serves to reinforce or erode some values, with contestation reflecting social disagreements and the disappearance of meaning from some traditional markers of identity rather than merely personal advantage.[80] It is axiomatic for example that there are verifiable physical differences between people. It is axiomatic that the social values assigned to differences in maturation, gender, marital status or ethnicity have varied over time and have resulted in changing legal identities.

Given the preceding comments regarding flourishing there is also little utility in adopting a cultural relativism that implies every legal identity is of equal value.

Can we move beyond analysis of identity's role within the legal carpet to an evaluation, a movement from what is to what should be?

The legal pragmatism used in this dissertation to understand legal identities bridges positive and normative theories. Positive theories of law employ analytical and empirical methods to describe what the law is, how it came to be, and what its consequences may be for individuals, states and societies. Normative theories evaluate and endorse law through reference to values that should be embodied and promoted by that law. The following chapters evaluate Australian law through reference to flourishing, a reference that draws in places on comparative law to highlight discussion

The nature of legal identity

What then is legal identity?

[80] Zygmunt Bauman, *Identity* (Polity Press, 2004). See also Rawi Abdelal, Yoshiko Herrera, Alastair Johnston and Rose McDermott, 'Identity as a Variable' (2006) 4 *Perspectives on Politics* 695 and Jürgen Habermas, *The Future of Human Nature* (Hella Beister and William Rehg trans, Polity Press, 2003) [trans of *Die Zukunft der menschlichen Natur* (first published 2001)].

In discussing identity, philosopher Alasdair MacIntyre commented that

> I am what I may justifiably be taken by others to be in the course of living out a story that runs from my birth to my death; I am the subject of a history that is my own and no one else's, that has its own peculiar meaning.[81]

Joseph Raz similarly affirmed the importance of identity, arguing that

> All aspects of one's identity become a positive force in one's life only if embraced and accepted as such. They are the sources of meaning in one's life, and sources of responsibilities: my special responsibilities are those of a citizen, a parent, a lover, an academic. They are normative because they engage our integrity. We must be true to who we are, true to it even as we try to change. Thus identity-forming attachments are the organizing principles of our life, the real as well as the imaginative. They give it shape as well as meaning. In all that, they are among the determinants of our individuality. And they are partly, to repeat, past dependent.[82]

The introductory paragraphs of this dissertation in setting the scene have noted that people visualise themselves in different ways, seek different personal goods, assign different values to particular actions or attributes, and disagree about both the meaning and authorship of life as a personal narrative.

The Australian legal system – statute law, case law and its application in the public and private sectors – does not recognise every 'attachment' or relationship and does not respect the 'meaning' given by an individual to every episode or action in that person's life narrative. It heeds some identities and disregards others. It assigns value to some identities (and as a corollary, assigns value to some identifiers) and not others.

This dissertation makes sense of that selectivity by using five concepts in addressing the dissertation question: Legal Identity, Identification, Signifier, Law and Digital Environment. Given the notion that flourishing provides a universalist tool for the assessment of law the dissertation considers those concepts in relation to specific

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[81] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 1984) 221.
[82] Joseph Raz, *Value, Respect and Attachment* (Cambridge University Press, 2001) 33. Raz's 'special responsibilities' is an example of self-concept rather than something that is universal, as is Ágnes Heller's self-characterisation as having four identities (Hungarian patriot, Hungarian Jew, woman, and a philosopher), noted in Anna-Verena Nosthoff, 'Ágnes Heller and 'Everyday Revolutions'' (2015) http://www.publicseminar.org/2015/12/agnes-heller-and-everyday-revolutions.

statute/common law and to a constitutionally enshrined Bill of Rights, and to associated identification mechanisms such as tax file numbers, Medicare numbers and passports.

A **legal identity** is that which has legal consequences.

Those consequences involve entitlements and responsibilities, powers and disabilities. They may provide or restrict agency. They may, more subtly, have consequences simply through legal sorting, in essence through a process of administrative differentiation or discrimination that is authorised by law.[83]

Legal identities may be considered as manifestations of legal personhood or as discrete facets for study or administration, given that an individual has a number of legal identities.

Not all identities are legal identities. Citizenship is a legal identity because it invokes protection by the state, is the basis for voting and obligations under tax or other law. Having freckles or a passion for chess on the other hand is *not* a legal identity because those non-legal identities – although potentially central to the person's self-conception or life narrative and to identification by peers – have no legal consequences, with law being indifferent. What is inconsequential is not legally recognised in relation to identity, although – for example red hair and a tattoo and a motor vehicle with a particular registration number – might have a forensic value in identification.

Legal identity extends beyond official positions that are specified in statute law. It also extends beyond positions or roles that are signified through identity documents held by an individual or through reference to identity records. Being alive is a legal identity. So is being a citizen or a corporation or a child or male or bankrupt.

[83] Williams famously defined 'crime' in similar terms, as 'an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal'. Glanville Williams, 'The Definition of Crime' (1955) 8(1) *Current Legal Problems* 107, 130.

Legal identity involves a status in relation to law, rather than a process.[84] That status may be a function of or expressed through an action, with marriage for many years being construed in terms of an Austinian speech act (in other words the legal identity came into being through the authorised celebrant's declaration that the two people were man and wife).[85]

A legal identity can be created, recognised or revoked. An individual's status as an inspector under the *Apiaries Act 1985* (NSW) for example comes into being when that person is appointed (no-one is born an inspector) and can be removed if the individual ceases to properly exercise her authority under the statute or if the statute is repealed.[86] Identity as a NSW Detained Sex Offender comes into being through a continuing detention order regarding a sex offender in custody in a correctional centre; it does not predate the offence, conviction and the order.[87]

Identification is the process through which a legal identity is discerned, asserted or assigned.

That identification might be the result of certification, for example admission to practice as a lawyer. It might instead involve provision of signifiers, for example a passport that signals a person is an Australian citizen for the purposes of international travel,[88] a card that indicates the bearer's authority to conduct an inspection relating to gene technology or a public pool or to manage a zoo,[89] or a driver's licence that indicates the person is legally entitled to drive a car or truck carrying explosives.[90] It might involve a handwritten mark or signature, or use of a corporate seal.[91] It might involve an electronic signature,[92] such as that discussed in Sullivan's *Digital*

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[84] For a useful discussion of status see Jeremy Waldron, *Dignity, Rank and Rights* (University of California Press, 2012) 57-61.
[85] J L Austin, *How To Do Things With Words* (Harvard University Press, 1962) 6. See also Richard Mohr, 'Authorised Performances: The Procedural Sources of Judicial Authority' (2000) 4(1) *Flinders Journal of Law Reform* 63 and Marianne Constable, 'Law as Language' (2014) 1(1) *Critical Analysis of Law* 63.
[86] *Apiaries Act 1985* (NSW) s 5.
[87] *Crimes (High Risk Offenders) Act 2006* (NSW) ss 13B(2), 5D and 5G.
[88] *Australian Passports Act 2005* (Cth) s 3.
[89] *Gene Technology Act 2001* (SA) s 151; *Public Pools Act 2015* (ACT) s 37; and *Zoological Parks Authority Act 2001* (WA) s 28.
[90] *Road Safety Act 1986* (Vic) s 19; *Road Transport (Driver Licensing) Act 1998* (NSW) s 4; and *Dangerous Goods (Explosives) Regulations 1988* (Vic) r 560.
[91] *Corporations Act 2001* (Cth) s 127; *Bills of Exchange Act 1909* (Cth) s 97.
[92] *Electronic Transactions Act 1999* (Cth) s 10.

Identity.[93] It might be through reference to biometric information held on a networked database or a comparison of fingerprints and mugshots.

A **signifier** is a representation, an indicator or sign of identity – something that serves to indicate the legal identity and potentially to disambiguate one person with that identity from another individual who has the same identity.

That sign might be immutable and innate to the person (such as a fingerprint or genetic profile). It might instead be external to the person, such as a uniform or mode of dress, a government-issued identity card, a credit card, a badge of office, a passport, an ABN or TFN, a fob or key, or even a password. The NSW *Crimes Act* thus refers to

> information relating to a person (whether living or dead, real or fictitious, or an individual or body corporate) that is capable of being used (whether alone or in conjunction with other information) to identify or purportedly identify the person.[94]

It is common to conflate signifiers with the entity that they represent. An identity card for example signifies that an individual – the authorised bearer of that card – has particular rights and responsibilities. It provides a basis for individuation, in other words differentiating that individual from peers who have the same rights and responsibilities. The state in that instance is delegating authority to a live natural person with attributes of expertise and good character for the exercise of state power. It is not delegating authority to a laminated card. A personal or corporate name is a signifier rather than a legal identity, something that serves to disambiguate the entity from similar or dissimilar entities rather than being its legal identity or providing its legal identity.[95] The *Witness Protection Act 1991* (Vic) in characterising identity as

> any individual characteristics by which a person is recognised, such as their name, nick-name, depiction or physical description, a physical feature or biometric identifier, their personal association with another person or anything that may reasonably lead to their identification[96]

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[93] Clare Sullivan, *Digital Identity: An Emerging Legal Concept* (University of Adelaide Press, 2011).
[94] See for example *Crimes Act 1900* (NSW) s 192I.
[95] This dissertation takes a wider, and from the perspective of legal pragmatism more efficacious, view of legal identity than that in Margaret Jackson and Gordon Hughes, *Private Life In A Digital World* (Lawbook, 2015), which centres on identifiers rather than rights, duties, disabilities and consequences.
[96] *Witness Protection Act 1991* (Vic) s 8.

thus deals with signifiers and by extension bases for identification as a process rather than providing a legal identity.

Law encompasses a system of rules that are made or formally sanctioned by the state, the processes that are enforceable under that sanction and the body of knowledge concerning those rules and processes.

Ronen Shamir offered an elegant and realistic encapsulation, explaining that law

> Is not only a system of authoritative commands constituting the language of the state but also a body of knowledge, which is shaped by the various groups of experts who comprise the legal profession. Judges, academic jurists, government lawyers and a host of practitioners in private practice participate in the discursive game of law making. Laws as texts are raw materials that assume practical and theoretical meaning only in the course of ongoing work by these carriers of the law. Courts, for example, are reactive institutions. Judges 'find' laws, interpret statutes and contextualise relevant precedents only in reaction to a legal process in which practitioners enjoy considerable gatekeeping powers.[97]

Kletzer comments that

> The law orders society by schematising interpretation. It orders society not by demanding or prohibiting action, but by allowing a certain interpretation of states of affairs, ultimately, the interpretation of violence as legally irrelevant. By allowing to interpret certain forms of violence as legally irrelevant, the law monopolises force and thus creates a coercive order that pacifies the land. The function of the law is to create peace and it achieves this peace by interpretation.
>
> We are used to thinking about the law as being a body of norms enhanced by some kind of coercive apparatus. We are used to thinking that the law needs the state to enforce it. This view, however, obfuscates the insight that law and state are co-original. The law does not need a coercive apparatus to enforce it, rather the law consists in declaring certain forms of coercion lawful and thus turning these forces into a coercive apparatus.[98]

Shamir might have gone further, recognising that non-specialists outside legal communities engage with law as a body of knowledge, an engagement that includes construing the law and perceiving legal identities. That reception of what is said in courts and in books is significant when we consider law as a matter of practice and law as something that is shaped by (and in turn shapes) society's construction of

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[97] Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (Duke University Press, 1995) 3.
[98] Christopher Kletzer, 'Primitive Law' (2013) 4(2) *Jurisprudence: An International Journal of Legal and Political Thought* 263, 272.

reality. Perceptions of risks, responsibilities and uncertainties regarding for example 'the crime of the millennium' are affected by the statements of people such as the national Attorney-General, head of the Australian Crime Commission and head of the Australian Federal Police.

Law might explicitly refer in a statute to a specific identity (for example to the Governor-General[99] or a veterinarian[100] or a legal practitioner[101] or a citizen[102] or an alien[103] or a child[104] or 'dead'[105] or tradesperson[106] or a security patient).[107] It might involve reference in a statute to an identification mechanism (for example to an identity card or a Tax File Number).[108] Given the pervasive role of identity in the legal vocabulary – a thread running through the legal carpet – that reference might be to a definition of the identity or to information collection/generation or other activity associated with that identity, for example the registration of a birth[109] or evidence of a health practitioner's identity.[110] It might instead involve expectations in common law and in practitioner codes or other protocols regarding the behaviour of people with particular identities, for example legal and medical practitioners.

The **digital environment** is a commonly used[111] but rarely defined shorthand for physical infrastructure (for example wireless computing, mobile phones, the Australian National Broadband Network, biometric scanners), information applications (for example one-click online shopping, cloud computing, blogging, social network services such as Facebook and electronic funds transfer) and associated government, commercial and social practice. It embodies tensions that are pertinent to this dissertation and more broadly to a consideration of legal identity.

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[99] *Governor-General Act 1974* (Cth).
[100] *Veterinary Surgeons Act 2015* (ACT) s 7.
[101] *Legal Profession Act 2006* (ACT) s 8.
[102] *Australian Citizenship Act 2007* (Cth) s 4.
[103] *Pochi v Macphee* [1982] HCA 60; (1982) 151 CLR 101.
[104] *Sex Offenders Registration Act 2004* (Vic) s 3; *Young Offenders Act 1997* (NSW) s 4; *Children, Youth & Families Act 2005* (Vic) s 3; and *Children & Young People Act 1999* (ACT) ss 7, 8 and 9.
[105] *Human Tissue Act 1983* (NSW) s 33.
[106] *Tradespersons' Rights Regulation Act 1946* (Cth).
[107] *Mental Health Act 1986* (Vic) s 3(1).
[108] *Income Tax Assessment Act 1936* (Cth) s 202A; *Taxation Laws Amendment (Tax File Numbers) Act 1988* (Cth); *Justices Act 1886* (Qld) s 154; and *Unclaimed Moneys Act 1918* (Tas) s 17.
[109] *Births, Deaths & Marriages Registration Act 1996* (SA) s 13.
[110] *Health Practitioner Regulation Act 2009* (NSW) s 134.
[111] See for example Ramon Compaño and Wainer Lusoli, 'The Policy Maker's Anguish: Regulating Personal Data Behaviour Between Paradoxes and Dilemas' in Tyler Moore, David Pym and Christos Ionnides (ed), *Economics of Information Security and Privacy* (Springer, 2010) 169; and Tomas Lipinski, *The Communication of Law in the Digital Environment: Stability and Change Within the Concept of Precedent* (University of Illinois Press, 1998).

Those tensions include anonymity or pseudonymity versus comprehensive 'awareness' (for example large-scale profiling of individuals and cohorts), reification versus erosion of the 'local' through globalisation, the persistence (even strengthening) versus weakening of the state or of the corporation in an era where all borders supposedly become permeable and large organisations become extinct, and a disembodiment versus 'immediacy' of institutions. They are not unprecedented.

One reason for this dissertation's recurrent reference to the history of law, government and commerce is that the past demonstrates law's framing of responses to new technologies, an associated construction of new identities such as the public company[112] and the deployment of identification mechanisms such as the mugshot and the fingerprint register.

From the perspective of a legal analyst, in contrast to a theorist such as Kelly or Negroponte,[113] there is little truly new – or uniquely intractable – under the legal sun. Vocabulary changes but the overall syntax persists despite technological innovations such a VOIP, HTTP and Photoshop.[114] Three contentions advanced in later chapters are that the internet does not fundamentally disrupt the nature of legal identity *per se*, that disruption has precedents and that disruption in the past was addressed through changes to the body of legal knowledge (including new statutes and application of new technologies). Those contentions are explored in Chapters Eight, Nine and Eleven below.

Contentions and Findings

In addressing the research questions the following chapters feature several contentions, substantiated through concluding 'Observations' at the end of most chapters.

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[112] See for example Paul Johnson, *Making The Market: Victorian Origins of Corporate Capitalism* (Cambridge University Press, 2010).
[113] Nicholas Negroponte, *Being Digital* (Vintage, 1995); and Kevin Kelly, *New Rules For The New Economy* (Viking, 1998).
[114] *Slaveski v State of Victoria & Ors* [2010] VSC 441; and *Tirtabudi and Minister for Immigration and Citizenship* [2007] AATA 1905.

Contention One: discovering meaning

We can discover the nature of legal identity by looking at what identities are constructed, how they are constructed, what they represent (why they are constructed and why they are contested) and how they are subverted … in essence understanding legal identity as a concept by 'telling it slant' through an examination of multiple identities.[115]

Contention Two: valorisation

Law valorises particular identities and attributes; in essence it ignores some attributes and rewards, protects or discriminates against other attributes. All people have multiple identities, many of which are not apparent to the community at large, are evanescent, are unrecognised by the justice system and have no legal consequences. Law recognises only some of those identities. It values some more highly than others, a valuation reflected in responsibilities, entitlements or disabilities.[116] Valorisation is culturally, economically and politically contingent.

Contention Three: foundational and derivative identities

We can discern first order and second order legal identities, in other words those with a foundational character (for example alive versus dead, natural versus corporate person, citizen versus alien) and those that are derivative (having authority under the *Building Act 1993* (Vic) and identification under s 75JA of that Act is for example dependent on the person being alive at the time the authority is exercised; eligibility for election as an Australian MP is currently dependent on citizenship).[117]

Contention Four: individuation

Australian law, in contrast for example to Maori customary law[118] and historic law in China,[119] is based on individuation, in other words individual rather than collective

[115] Emily Dickinson, 'Tell all the Truth but tell it slant' in Ralph Franklin (ed), *The Poems of Emily Dickinson: Reading Edition* (Harvard University Press, 1999) 494.
[116] It is common to see references to 'we are what we eat', adapting Feuerbach's 1863 'Der Mensch ist, was er ißt' or Brillat-Savarin's 1826 aphorism 'Dis-moi ce que tu manges, je te dirai ce que tu es'. In understanding the interaction of law and society an observer might conclude that 'we are what value' and what has consequences, with value being expressed through legal identities and their protection/subversion.
[117] Michael Pryles, 'Nationality Qualifications for Members of Parliament' (1982) 8(3) *Monash University Law Review* 163.
[118] John Patterson, *Exploring Mäori Values* (Dunmore Press, 1992).

responsibility. Many people for example have the legal identity of 'parent', and 'male' and 'Indigenous person' and 'adult' and 'taxpayer' and 'licensed driver' and 'author' but law will address the specific individual rather than all people with a particular identity when that individual has killed someone while intoxicated. Possessive individualism – in what Kelsen in the aftermath of Nazi-era atrocities dubbed a move away from 'primitive'[120] – rewards or sanctions the individual, not the collective, although action by an individual may result in changes to law's characterisation of identities that are evident in the lives of many individuals.

Contention Five: signifiers

Law often expresses legal identities through mechanisms such as identity cards and papers,[121] signifiers that may be conflated with the actual identity. Such signifiers are apparent in premodern and early modern states, were particularly important over the past century and are increasingly being 'virtualised' through 'soft' technologies such as biometrics and pervasive use of public and private sector identity numbers that function through electronic linkage to one or more population-scale databases.[122]

Contention Six: subversion

Valorisation provides an incentive, on occasion an imperative, for subversion of the legal identity and of signifiers such as identity cards or passports. Law is reflexive or dialectical and seeks to minimise that subversion. It accordingly features both general restrictions on fraud and misrepresentation[123] and specific restrictions on unauthorised production, alteration or misuse of particular identifiers,[124] alongside penalties for

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[119] Joanna Waley-Cohen, 'Collective Responsibility in Qing Criminal Law' in Karen Turner Gottschang, James Vincent Feinerman and R Kent Guy (eds), *The Limits of the Rule of Law in China* (University of Washington Press, 2000) 112, 112.

[120] Hans Kelsen, 'The Law As A Specific Social Technique', in Kelsen, *What Is Justice?: And Justice, Law and Politics in the Mirror of Science: Collected Essays* (University of California Press, 1971) 231, 249. Note the cautions in Sally Moore, 'Legal Liability and Evolutionary Interpretation: Some Aspects of Strict-Liability, Self-Help and Collective Responsibility' in Max Gluckman (ed), *The Allocation of Responsibility* (Manchester University Press, 1972) 51, 55.

[121] As an illustration of the range of those provisions see *Road Racing Act 2002* (Qld) s 264; *Gas Industry Act 2001* (Vic) s 54; *Animal Welfare Act 1985* (SA) s 29; *Local Government Act 1993* (Tas) s 208; *Social Security Act 1991* (Cth) s 1061ZF and the detailed discussion in Chapter Nine below.

[122] For wariness about softness see Raymond Geuss, *Politics and the Imagination* (Princeton University Press, 2010) 39.

[123] See for example *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW); and *Criminal Code 1899* (Qld) s 514.

[124] See for example *Casino Control Act 1991* (Vic) s 153B; *Road Safety Act 1986* (Vic) s 72; *Australian Federal Police Act 1979* (Cth) s 63; *Apiaries Act 1985* (NSW) s 41; *Defence Act 1903* (Cth) s 83; *Second-Hand Dealers & Pawnbrokers Act 2003* (Qld) s 98; and *Australian Passports Act 2005* (Cth) s 36.

impersonation of specific identities.[125] It also authorises some subversion, notably that involving witness protection and 'undercover' law enforcement.[126]

Contention Seven: contingency

Valorisation is historically and culturally contingent, with law both reflecting and shaping social attitudes and relationships.[127]

Australian law for example no longer conceptualises women as 'half a man' or – in Blackstone's summation of the common law – as absorbed by the legal personality of her husband 'under whose wing, protection and cover she performs everything' (and thus unable to enjoy particular legal identities).[128]

Law in liberal democratic states no longer excludes male adults from a range of official positions merely because those people profess Roman Catholicism or Judaism. Despite arguments by contemporary jurists such as Finnis[129] about the timeless nature of homosexuality as in its essence always harmful, degrading and thus contrary to natural law, Australia no longer assigns a criminal identity to individuals who engage in consensual activity with another of the same gender. Presumably their relationships of affection will in time be recognised through the legal identity known as marriage, in the same way that law reform saw recognition of Indigenous Australian as having the same voting rights as their peers.[130] Skin tone or facial

[125] As an illustration of the range of those provisions see *Road Safety Act 1986* (Vic) s 149; *Adoption Act 2000* (NSW) s 182; *Taxation Administration Act 1997* (Vic) s 89; *Crimes Act 1900* (NSW) s 546D; *Transport (Compliance and Miscellaneous) Act 1983* (Vic) 228WA; *Returned Servicemen's Badges Act 1956* (Vic) s 2; *Nursing Act 1992* (Qld) s 124; *Police Service Act 2003* (Tas) s 78; *Australian Military Regulations 1927* (Cth) r 803; *Social Security (Administration) Act 1999* (Cth) s 216; and *Water Act 1989* (Vic) s 291C.

[126] See for example *Crimes (Assumed Identities) Act 2004* (Vic); *Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW); *Crimes Act 1914* (Cth) ss 15KA and 15KP; *Witness Protection Act 1995* (NSW) ss 5(2)(f) and 14. Among studies see Paul Lewis and Rob Evans, *Undercover* (Faber, 2013); Gary Marx, *Undercover: Police Surveillance in America* (University of California Press, 1989); and Gary Marx and Cyrille Fijnaut (eds), *Undercover: Police Surveillance in Comparative Perspective* (Kluwer Academic, 1995).

[127] Jim Phillips, 'Why Legal History Matters' (2010) 41(3) *Victoria University of Wellington Law Review* 293, 295.

[128] William Blackstone, *Commentaries on the Laws of England* (facsimile of 1765 1st edition, University of Chicago Press, 1979) vol 1, 430.

[129] John Finnis, 'Law, Morality and 'Sexual Orientation'' in John Corvino (ed), *Same Sex: Debating the Ethics, Science and Culture of Homosexuality* (Rowman & Littlefield, 1997) 31.

[130] Note for example changes to the explicit exclusion of Indigenous Australians and other groups through for example the *Commonwealth Franchise Act 1902* (Cth) s 4; *Queensland Elections Act 1885* (Qld) s 6; *Commonwealth Nationality Act 1920* (Cth) and *Northern Territory Welfare Ordinance 1957* (NT). See also Pat Stretton and Christine Finnimore, 'Black fellow citizens: Aborigines and the Commonwealth Franchise' (1993) 25(101) *Australian Historical Studies* 521; and John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997).

architecture is an unpersuasive attribute for the denial of suffrage or capacity to enter into contracts.[131]

More broadly, Australian law, unlike some other legal systems, does not regard fate, demons, ghosts or deities as having legal personhood[132] and is wary about supposedly privileged communications from the 'beyond'.[133] In construing responsibility it reflects a secular culture's notion of causation and therefore does not attribute a road accident or the collapse of a bridge to 'fate', the agency of a *kadaitcha* man, a karmic reward for past transgression or the intervention of an angry spirit rather than a driver's intoxication or the engineer's incompetence.[134] (It may however acknowledge the importance of pre-modern belief systems to Indigenous and other people, including systems in which cosmological entities are deemed to have agency.)[135]

Contention Eight: binaries and norms

Much identity construction involves reference to an 'other', for example through absence of a particular normative identity (such as 'I am not a criminal', 'I do not have a criminal record', 'I am not homeless', 'I am not disabled', 'I am not an Australian citizen'). Much law regarding identity has a binary form that addresses indeterminacy and thereby distributes risk: people are or are not citizens, alive, capable, male, adult, bankrupt, married, homeless. In terms of legal identity law is typically essentialist – concerned with the 'essence' that preoccupied Marcus

[131] As a point of entry to the literature on conundrums in ethnic classification see Christopher Ford, 'Administering Identity: The Determination of "Race" in Race-Conscious Law' (1994) 82(5) *California Law Review* 1231; and Stephen Gould, *The Mismeasure of Man* (Norton, 1981). The consequences of classification are demonstrated throughout the following chapters.

[132] See for example *R v McLaren* [2009] SASC 225; *R v Healey* [2008] SASC 83, [32]; *Re JGB* [2004] QMHC 29; *R v Miller* [2008] NSWSC 1038; and *R v Shepherd* [2007] NSWSC 1416. See also *Spain v Commonwealth of Australia* [2015] QSC 258, [7] and [21]-[22].

[133] *State of New South Wales v Kamm (Final)* [2016] NSWSC 1, [2]-[3]; the less florid *Brumen v State Of Queensland* [1999] QSC 238, [3]; *SXY* [2015] VMHT 117, [4]; and *IWH* (No 2) [2015] VMHT 9, [4].

[134] David Engel, 'Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand' (2005) 30(3) *Law and Social Inquiry* 469; Bruce Kapferer, *The Feast of the Sorcerer, Practices of Consciousness and Power* (University of Chicago Press, 1997) 41 and 44; Hallie Ludsin, 'Cultural Denial: What South Africa's Treatment of Witchcraft Says for the Future of Its Customary Law' (2003) 21(1) *Berkeley Journal of International Law* 62; Heather Douglas and Mark Finnane, 'Obstacles to 'a proper exercise of jurisdiction' – Sorcery and Criminal Justice in the Settler-Indigenous encounter in Australia' in Lisa Ford and Tim Rowse (eds), *Between Indigenous and Settler Governance* (Routledge, 2012) 59; Audrey Verma, 'Black Magic Women: On the Purported Use of Sorcery by Female Foreign Domestic Servants in Singapore' in Helen Bonavita (ed), *Negotiating Identities: Constructed Selves and Others* (Rodopi, 2011) 25; and Clifton Crais, *The Politics of Evil: magic, state power and the political imagination in South Africa* (Cambridge University Press, 2002).

[135] See for example *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803, [66].

Aurelius[136] – and thus for example is more interested in whether you are of a fixed address rather than whether the address is grand, owned outright, rented, borrowed or otherwise.[137]

Contention Nine: abstraction

There are inherent tensions in 'seeing like a state' by treating people as 'ciphers' or 'digits' (in other words as abstractions or manifestations of a particular identity)[138] rather than as individuals, with bureaucratic indifference to the individual potentially resulting in both a beneficent welfare state and the state of genocide,[139] and pervasive registration schemes providing the basis for inclusion and exclusion in social policies.[140]

Contention Ten: creation and revocation

States, through law (and through administrative processes that reflect that law) create identities. On occasions they uncreate or revoke identities, whether on an individual basis or through denial of identity to a particular class or simply through abandonment of a specific construct such as the early modern English legal identity of Dissenter (an

[136] Marcus Aurelius, *Meditations* (Robin Hard trans, Oxford University Press, 2011) 72: 'The object in question, what is it in itself, in its own constitution? What is its substance and material, and its formal cause? What part does it play in the world? And how long does it subsist?'

[137] Identities may be signaled by particular addresses. If your residence is provided by the state in the form of a correctional or psychiatric institution that address generally signifies a particular identity, for example that you cannot stand for parliament and cannot autonomously engage in some commercial transactions or even give effect to a personal decision about what you want to eat for lunch or when you want to get out of bed. See Chapter Four below.

[138] Michael Herzfeld, *The Social Production of Indifference: The Symbolic Roots of Western Bureaucracy* (Berg, 1992); and James Scott, *Seeing Like A State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1999) 2.

[139] That contention may strike some readers as egregious hyperbole; a point of reference for the coexistence of welfare and mass murder is provided in Götz Aly, *Hitler's Beneficiaries: Plunder, Racial War, and the Nazi Welfare State* (Jefferson Chase trans, Verso, 2009) [trans of *Hitlers Volksstaat* (first published 2005)]; Martin Dean, *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust, 1933–1945* (Cambridge University Press, 2010); and Adam Tooze, *The Wages of Destruction: The Making and the Breaking of the Nazi Economy* (Allen Lane, 2006).

[140] See for example Fei-Ling Wang, *Organizing through division and exclusion: China's Hukou system* (Stanford University Press, 2005); Wayne Logan, *Knowledge As Power: Criminal Registration and Community Notification Laws in America* (Stanford University Press, 2009); Edward Higgs, *The Information State in England: The Central Collection of Information on Citizens since 1500* (Palgrave Macmillan, 2004) 149; and Michael Froomkin, 'Identity Cards and Identity Romanticism' in Ian Kerr (ed), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 245.

identity involving a civil disability less severe than that of Roman Catholic)[141] or Witch (as in criminal and agent of darkness).[142]

Contention Eleven: identities as the basis of the entitlement state

The historic shift from a premodern 'punitive state' to a contemporary 'entitlement state' has resulted in a proliferation of legal identities, reflecting increasing bureaucratic capacity and expectations throughout the population of liberal democratic nations that citizenship involves receipt of direct or indirect benefits (as for example a parent, child, student, mother, aged person, rural person, indigenous person). Tudor law criminalised beggars, in other words what we would now characterise as disadvantaged people with 'no fixed address'.[143] In contemporary Australia the homeless can use the entitlement identity of eligibility to be a welfare recipient. The poor may be particularly susceptible to police harassment but being homeless *per se* is no longer a crime.[144]

Contention Twelve: a historical lens

In understanding contemporary legal identities, and thence law's construction of identity *per se*, insights are available through an examination of past legal identities and past identification mechanisms. That examination allows readers to discern patterns or principles that represent a 'deep structure' common to multiple seemingly disparate identities, statutes and practices.[145]

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[141] Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 14-18; John Seed, *Dissenting Histories: Religious Division and The Politics of Memory in Eighteenth-Century England* (Edinburgh University Press, 2008) 124-126.

[142] See for example Oma Darr, *Marks of an Absolute Witch: Evidentary Dilemmas in Early Modern England* (Ashgate, 2011); Peter Hoffer, *The Salem witchcraft trials: a legal history* (University Press of Kansas, 1997); Richard Kieckhefer, *European Witch Trials: Their Foundations in Popular and Learned Culture, 1300-1500* (University of California Press, 1976); Erik Midelfort, *Witch Hunting in Southwestern Germany, 1562-1684: The Social and Intellectual Foundations* (Stanford University Press, 1976); Edward Peters, *The Magician, the Witch, and the Law* (University of Pennsylvania Press, 1978); and Wolfgang Behringer, *Witchcraft Persecutions in Bavaria: Popular Magic, Religious Zealotry, and Reason of State in Early Modern Europe* (Cambridge University Press, 1997). Note the comment by McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 265.

[143] A L Beier, *Masterless Men: The Vagrancy Problem in England 1560-1640* (Methuen Press, 1985). For continuities note for example the *Vagrants, Gaming and Other Offences Act 1931* (Qld), repealed recently under the *Summary Offences Act 2004* (Qld), and inclusion of the 'begging or gathering alms' offence in *Summary Offences Act 1966* (Vic) s 49A through the *Vagrancy (Repeal) and Summary Offences (Amendment) Act 2005* (Vic) s 5.

[144] Tamara Walsh, *Homelessness and the Law* (Federation Press, 2011).

[145] For the notion of deep structure see in particular Clifford Geertz, *The Interpretation of Cultures* (Basic Books, 1973).

Law enforcement challenges relating to legal identity in the digital environment are not unique or unprecedented. Instead they are situated in a continuum marked by law's management of risk and harm associated with the introduction of new communication systems and new social practices (a shift from village to industrial and postindustrial relationships).

More broadly, although the language used in examples above about the right of 'IVF children' to know their biological parents, the age of alleged people smugglers, the National Identity Security Strategy as a basis for the 'war' on 'identity crime' and 'terror' is modern if we look backwards we can see a history of anxieties and legal responses about particular identities. From a national security perspective recent efforts to criminalise association with 'outlaw motorcycle gangs' – identity on the basis of who you know – resemble action in the 1950s and 1920s about communism and anarchism.[146] Fears about child molestation echo *fin de siècle* alarms about white slavery. Concerns about gender, contestation about signifiers of identity, and disagreements about the recognition of relationships are apparent from at least the time of Boulton and Park.[147] Law's attention to particular identities is not constant but legal identity as such continues to be a thread in the legal fabric because identities matter to people.

Structure

The following chapters initially outline the methodology and relate the research to the Australian and overseas literature, before examining specific identities and issues.

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[146] See for example *Unlawful Associations Act 1916* (Cth), *Communist Party Dissolution Act 1950* (Cth); *Serious and Organised Crime (Control) Act 2008* (SA); *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; *South Australia v Totani* [2010] HCA 39; *Wainohu v New South Wales* [2011] HCA 24. See also Verity Burgman, *Revolutionary Industrial Unionism: The Industrial Workers of the World in Australia* (Cambridge University Press, 1995) and George Williams, 'Communist Party Case' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 122; George Winterton, 'The Communist Party Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136; and Bridget Dunne, 'Wainohu v New South Wales' (2011) (2011) 30(2) *University of Tasmania Law Review* 144.

[147] For Boulton and Park as an inflection point in the creation of the 'homosexual identity' through criminal law see Matt Cook, *London and the Culture of Homosexuality, 1885-1914* (Cambridge University Press, 2003). The tangled history of precursors to contemporary debate about gay marriage is highlighted in works such as Stephen Cretney, *Family Law in the Twentieth Century: A History* (Oxford University Press, 2005) and Henry Finlay, *To Have But Not to Hold: A history of attitudes to marriage and divorce in Australia 1858-1975* (Federation Press, 2005).

In particular Chapter Two outlines a set of tests that are applied to different legal identities in answering what is the nature of legal identity according to Australian law and are traditional mechanisms for the construction of legal identity viable in the digital environment. Chapters Three through Ten use those tests in discussing what is recognised as a legal identity, how does the identity come about (or cease), how is it signified and how is it subverted (for example through the identity theft highlighted earlier in this chapter as a preoccupation of the mass media and public policymakers).

The chapter structure broadly reflects the contention that there are foundational and derivative legal identities, with for example the foundational identity of being a human animal and a citizen being presupposed in much contemporary Australian law. Chapter Eleven provides integrative comments to draw together matters discussed in the preceding chapters and also provides recommendations concerning what the nature of legal identity according to Australian law *should* be and how concerns regarding the adequacy of identity law in the digital environment can be realistically addressed.

In outline, those chapters are as follows.

Chapter Two ('Methodology and Material') identifies the approach taken in addressing the questions and highlights the absence of discrete synoptic works in a subdiscipline of 'legal identity', with a consequent use of literature across legal subdisciplines.

The approach involves applying a suite of questions to foundational and derivative legal identities in an effort to discern the essence of legal identity *per se* and the nature of specific identities (for example how are they characterised, what are their relationships with other identities, how are they subverted and protected, what is their role).

The chapter discusses the basis of the generative questions and their application. It explains why and how the author chose the identities that are discussed in the following chapters, given that the dissertation does *not* consider every legal identity in contemporary Australian law.

In setting the scene for the body of the dissertation Chapter Two offers concise critiques of major theorists of legal identity, on the basis that in making sense of identities we need to be conscious that theorists such as Foucault and MacKinnon have looked for and found particular attributes in discussing the nature of law and (often implicitly) the nature of legal identity.

The third chapter ('States, Subjects and Objects') deals with foundational legal identities, those that are presupposed in identities discussed in later chapters of the dissertation and that exist in the absence of one or more of the derivative identities.

It argues that consideration of foundational identities is of use in understanding identities *per se* and, more broadly, law as a framework developed and maintained by the state. Foundational identities include that of the citizen, along with non-citizen identities such as refugee and foreign national. It uses a discussion of Australian law's differentiation between live human animals, other animals and inanimate legal persons (such as corporations and states) to highlight what are essential characteristics for legal identities.

The discussion includes consideration of law's changing construction of life and death. It also includes an exploration of the nation as a legal identity that both makes and is subject to law, of gender and of identities in the settler state (principally the changing status of Australia's Indigenous peoples) in discussing what is and is not foundational. It notes the demise of some foundational identities and the changing significance of others, including historic frameworks for decency and anti-discrimination law's shaping of community norms.[148] The discussion grounds exploration in Chapters Nine and Eleven of the implications of the objectification implicit in 'seeing like a state', for example administrative and social reliance on comprehensive identification measures such as birth registration and driver licensing.

[148] Charles Taylor, *The Language Animal: The Full Shape of the Human Linguistic Capacity* (Harvard University Press, 2016) comments that 'moral change' is deeply connected with, and even partly driven by, semantic change. A contention in this dissertation is that law as a mechanism for a shared conceptualisation of rights and wrongs both reflects and influences changing social perceptions of what is moral.

The fourth chapter ('Capacity, Character and Disability') considers capacity as a foundational legal identity. Capacity is a basis for contract, criminal and other law. It is founded on legal presuppositions regarding psychology, causation and social relationships. Chapter Four deals with mental and physical disability, advance directives, guardianship, intoxication, age and economic or cultural impediments to agency. In unpacking foundational aspects the chapter looks at expectations about rationality, the professions and occupations, with law's construction of elite legal identities representing a dialectic that both provides the privileged with greater agency and imposes higher expectations about their activity. The chapter revisits the notion that modern states reserve to themselves a monopoly of legitimate violence,[149] a monopoly reflected in construction of two positive legal identities (police and armed forces) and a negative identity (the criminal).

Classical philosophers construed identity in terms of political participation, with a taxonomy differentiating between the active citizen and those who lacked agency, such as women, slaves and outsiders. Chapter Five ('The Political Animal') considers law's construction of the political animal, including discussion of voting restrictions, requirements on eligibility for some public office, boundaries on speech, associational autonomy and restrictions on the self-realisation of convicted criminals. It includes a discussion of embodiment of the state in for example the person of the monarch and military personnel.

The discussion argues that contemporary law retains a traditional bias towards real property ownership despite abolition of the identity of 'vagrant'. It also suggests that there are revealing inconsistencies in theorisation or practice regarding possessive individualism,[150] for example consensual sado-masochism, body modification or suicide and the legal status of bodies as 'property'.

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[149] Max Weber, 'Politics as a Vocation', in Hans Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Hans Gerth and C Wright Mills trans, Routledge, 2nd ed, 1991) [trans of 'Politiks als Beruf' (first published 1919)] 77, 78.

[150] For historical antecedents and reception see C B Macpherson, *Political Theory of Possessive Individualism: Hobbes to Locke* (Clarendon Press, 1962); Alan Macfarlane, *The Origins of English Individualism: The Family, Property and Social Transition* (Blackwell, 1978); and Alan Ryan, *The Making of Modern Liberalism* (Princeton University Press, 2012). For a critique see Etienne Balibar, ''Possessive Individualism' Reversed: From Locke to Derrida' (2002) 9(3) *Constellations* 299.

Identity for many people centres on their affinity: their family, religious and ethnic relationships, their sexuality, their cultural affiliations. Chapter Six ('Affinities') analyses marriage, lineage (including adoption), faith and ethnicity. Australian law for example, through restrictions on marriage constructs gay people as having a more restricted identity than straight peers. It restricts polygamy and imposes inconsistent bounds on fertility, for example donor conception.

Chapter Seven ('Unnatural Identities') looks at corporate legal identity, entities such as companies that are undead, are legal constructs that have no natural basis but for many purposes have an identity that is similar to that of individuals and can thus for example engage in trade, hold real property, have discrete tax liabilities and be held responsible for breaches of the law. The chapter provides a perspective on the preceding discussion and serves as a preliminary for the thematic analysis in the Conclusion.

Chapter Eight ('Signifiers and Subversions') analyses the mechanisms that law uses to signify legal identity. Those mechanisms include identity cards, passports, stigma such as yellow stars or clothing required by sumptuary regulation, diplomas and CVs.

The chapter considers the dialectical relationship between law's reliance on signifiers and their subversion, with valorisation of particular attributes and of particular mechanisms driving their subversion and in turn driving both legal responses and use of verification mechanisms such as networked biometrics that provide for a legible body that is indelibly marked through physical attributes such as retina patterns rather than through documents provided by the state. The discussion includes reference to privacy and critiques problematical mechanisms, such as the Aviation Security Identity Card, that ostensibly determine particular legal identities.

Chapter Nine ('Identity Crime') explores identity offences, arguing that if we construe legal identity as a matter of consequences we can discern a range of offences that extend from impersonation of an official, cheque forgery and reliance on a faked testamur or vita through to the defamation that erodes an individual's capacity through false statements about character and history. The chapter suggests that some mechanisms will displace rather than eliminate particular identity crimes.

Chapter Ten (‘Identity And Its Discontents’) considers anti-association statutes (deleterious identity on the basis of associates), anonymity as an aspect of the autonomy that is foundational for liberal democracy, profiling (including credentialism) and reinvention. It also suggests that in practice the provision of comprehensive social services is impractical without bureaucratic abstraction of individuals and cohorts as government subjects or inanimate objects rather than people who are more than the sum of the identifiers with which they have been assigned. The digital environment fosters the emergence of a liberal democratic ‘identity state’, a style of governmentality that involves the soft power of pervasive sorting rather than physical force.

The final chapter (‘Conclusion’) revisits analysis throughout the dissertation, discussing themes discernable in those chapters. For example it suggests that valorisation of particular identities and particular attributes drives a subversion of those characteristics. If something has no consequences, no value, there is no incentive (indeed no imperative) to appropriate an identity and to fake the signifiers of authority.

The chapter teases out tensions throughout the dissertation. In particular it suggests that many legal identities in a liberal democratic state reflect conflicting demands, with efforts to reduce indeterminacy through law both promoting and inhibiting a Gewirthian ‘flourishing’.

The chapter provides recommendations for a pragmatic approach to identity law reform. That reform includes establishment of a justiciable Bill of Rights for all residents (rather than merely citizens). It also includes action to address the legal identity of the Australian monarch – an anomalously hereditary position – through establishment of a republic. A Bill of Rights should serve as guidance for legislators and the courts in giving effect to the notions of fairness or flourishing and thereby reducing the identity-based injustices demonstrated in the preceding chapters. Given the emphasis on what works rather than rhetoric, the recommendations also warn against an over-investment in use of pervasive identifiers (such as an Australia

Card).[151] The discussion in preceding chapters demonstrates that a national card scheme, for example, will be subverted and thus foster rather than eliminating 'identity theft'. Such a scheme will also have costs in terms of both the erosion of privacy and exacerbation of tendencies in contemporary liberal democratic states for governments and private sector identities to construe people as data profile, as abstractions or manifestations of particular identity attributes rather than as individuals whose dignity must be respected.

The chapter concludes by pulling together the theme underlying all chapters, in suggesting that much Australian law is an exercise in creating and protecting that which we characterise as legal identity as a key element of the legal carpet. Once accepted that observation goes without saying but it is an observation that does not appear to have occurred to many policymakers and administrators. A conclusion is that law, rather than merely legal identity, has a chameleon quality, with this dissertation representing an effort in identifying assumptions that on close examination melt into air. Legal identities are contingent: legal theory offers guidance about why and how we should restructure identity as a thread in the legal carpet to foster human happiness and achievement rather than reducing opportunities by essentialising identities on the basis of gender, class, ethnicity, citizenship or other attributes.

[151] For the Australia Card, intended as a uniform population-scale identity document scheme, see Graham Greenleaf and Jim Nolan, 'The Deceptive History of the 'Australia Card'' (1986) 58(4) *The Australian Quarterly* 407; Dean Wilson, 'The Politics of Australia's Access Card' in Colin Bennett and David Lyon (eds), *Playing the identity card: surveillance, security and identification in global perspective* (Routledge, 2008) 180; and the detailed discussion in Chapter Eight below.

Chapter Two: Methodology and Material

This dissertation is concerned with the nature of legal identity. It is a search for meaning, one that demonstrates the contingency of legal constructs and the mutability of meaning.[1]

The methodology for the dissertation, founded on the legal pragmatism discussed in the preceding chapter, is predicated on the belief that we can best discern the nature of legal identity through a 'plain matter of fact' scrutiny of a range of particular identities, centred on outcomes rather than abstractions. That scrutiny provides the basis for drawing credible conclusions about legal identities in general and, by extension, conclusions about the nature of law.

The dissertation thus looks at legal identities in terms of consequences – the rights, powers, duties and disabilities that constitute a legal identity and that engender the subversion and protection of that identity. Those consequences are what give identities a legal meaning and differentiate them from identities, such as subjective self-conceptualisation about beauty or goodness or prowess as a lover, that do *not* have a legal status.

As previously noted this dissertation eschews the macrotheory of figures – Isaiah Berlin's hedgehogs rather than foxes – such as Schmitt, Butler, Foucault and Marx, people whose critique of law, politics and other social relationships is tacitly or explicitly founded on notions of identity.[2] They have gained major influence within the legal academy and the social sciences. However their theorisation is potentially egregiously reductive, a way of seeing that (in contrast to the modesty of legal pragmatism) claims special authority because it is transcendent and offers an answer

[1] Charles Sanders Peirce, quoted in Frederic Kellogg, 'Law and Science as Forms of Inquiry: Toward a Comparison of Legal and Scientific Knowledge' (University of Edinburgh School of Social and Political Studies Working Paper, 2009) 1.

[2] Isaiah Berlin, *The Hedgehog and the Fox: an essay on Tolstoy's view of history* (Weidenfeld and Nicolson, 1st ed, 1954). Note however the apocryphal response to Berlin's dichotomy: 'There are two kinds of theorists in the world: those who think that the world can be divided into two kinds of theorists and those who do not'. Comments on conceptualisation through dichotomies and disambiguation in the law and the humanities are provided in Chapter Eleven.

for everything that is important.[3] It involves a distorting lens that filters out or blurs particular identities and what those identities mean.

At its best, through use of fictions and parody, their metanarrative encourages readers to question certainties about identities, authority and understanding.[4] At its worst, it is escapist because it denies analysis. MacKinnon commented that postmodernism's 'main target is, precisely, reality', arguing that postmodernism

> derealizes social reality by ignoring it, by refusing to be accountable to it, and, in a somewhat new move, by openly repudiating any connection with an "it" by claiming "it" is not there[5]

and that

> Part of the problem in coming to grips with postmodernism is that, pretending to be profound while being merely obscure (many are fooled), slathering subjects with words, its self-proclaimed practitioners fairly often don't say much of anything.[6]

This dissertation instead seeks to offer a view of legal identities that captures their diversity and something of the 'sub-aquatic' nature of much law as a matter of experience and assumptions rather than abstraction.[7] The answers found through that search may disappoint people looking for a grand theory. However, they embody a realism that is consistent with the objectives articulated in Chapter One.

This chapter frames a search for meaning by outlining the dissertation methodology and resource base. It initially discusses the determination of the foundational and derivative legal identities that are examined in the following chapters. Why, for example, is there an emphasis on nationality as a foundational identity, given claims in the literature that the nation state is increasingly less significant in a globalised economy or that citizenship is a pernicious concept? Why is gender important, given

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[3] For a peer's criticism of Foucault, for example, as offering a new metanarrative see Jean Baudrillard, *Forget Foucault* (Phil Beitchman and Nicole Dufresne trans, The MIT Press, 2007) [trans of *Oublier Foucault* (first published 1977)] 38 and 41.

[4] See for example Allan Megill, *Prophets of Extremity: Nietzsche, Heidegger, Foucault, Derrida* (University of California Press, 1987) 228-229, 231 and 234 on parody and fictions in the work of Foucault. An emphasis on reading as experience at the expense of historicity is evident in Foucault's comments quoted in Fabienne Brion and Bernard Harcourt, 'The Louvain Lectures in Context' in Michel Foucault, *Wrong-Doing Truth-Telling: The Function of Avowal In Justice* (Stephen Sawyer trans, University of Chicago Press, 2015) [trans of 'Le Pouvoir de la Verité' (first published 2010)] 271, 306.

[5] Catharine MacKinnon, 'Points Against Postmodernism' (2000) 75 *Chicago-Kent Law Review* 687, 693.

[6] Ibid, 693.

[7] Iredell Jenkins, *Social Order and the Limits of Law* (Princeton University Press, 1980) 9.

persuasive arguments that gender is a social construct? Why is age a second order, in other words derivative, identity?

The chapter outlines and evaluates the basis of the analysis used in Chapters Three through Eleven. That discussion considers the specific suite of questions used in examining each legal identity.

The evaluation demonstrates that those questions are intellectually robust.[8] They are not idiosyncratic, not applied on a capricious basis and are, in summary, productive of insights about 'essences' and 'appearances'. They also directly reflect the emphasis on 'fulfilment', 'flourishing' or liberal 'justice' and dignity that was stated in Chapter One of this dissertation, consistent with both Kant's categorical imperative[9] and classical writing about 'the good life' of people as social animals.[10]

The respect for personhood advocated by Kant as a transcendental value requires us to respect and thence promote the dignity (in particular autonomy),[11] associated happiness and 'natural purposes' of all people on the basis that those individuals are people. In devising and implementing legal systems – and giving effect to law through our own behaviour – we must act in ways that are expressive of our respect for that personhood, action that encompasses a refusal to take pleasure in the suffering of others, that eschews demeaning processes and identifiers, that avoids disregard of potential through neglect of talents and servility in dealing with the powerful.

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[8] For robustness see Nancy Levit, 'Listening to Tribal Legends: An Essay on Law and the Scientific Method' (1989) 58(3) *Fordham Law Review* 263, 268-272.

[9] Immanuel Kant, 'Groundwork of the Metaphysics of Morals' [*Grundlegung zur Metaphysik der Sitten Metaphysik der Sitten* (first published 1785)] in Mary Gregor (ed and trans), *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (Cambridge University Press, 1996) 82 and 92. In the same volume see 'The Metaphysics of Morals' [*Die Metaphysik der Sitten* (first published 1797)] 380. Matthew Festenstein, *Pragmatism and Political Theory* (Polity Press, 1997) 66 draws on pragmatism in considering autonomy as a basis of flourishing in the contemporary liberal democratic state.

[10] Martha Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton University Press, rev ed, 2009); Brad Inwood, *Ethics After Aristotle* (Harvard University Press, 2014); and Hans-Georg Gadamer, *The Idea of the Good in Platonic-Aristotelian Philosophy* (Robert Sullivan trans, Yale University Press, 1986) [trans of *Die Idee des Guten zwischen Plato und Aristotles* (first published 1978)] have proved more fruitful in the development of this dissertation than writing by contemporaries such as Bhabha and Mouffe.

[11] See for example Immanuel Kant, 'Groundwork of the Metaphysics of Morals' [*Grundlegung zur Metaphysik der Sitten Metaphysik der Sitten* (first published 1785)] in Mary Gregor (ed and trans), *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (Cambridge University Press, 1996) 85. See further the discussion in Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012).

The emphasis on fulfilment is important as a way of reducing subjectivity. Given its association with a potentially lethal legal identity few people would wish to be identified with the yellow star, noted in the first chapter, when the Rawlsian veil of ignorance is removed.

The emphasis encompasses individuals, communities and people on the margins of society or the state and thus differs from the values evident in some non-liberal 'Asian' or 'communitarian' – or crudely homogenous and majoritarian – conceptions of the well-ordered society.

The emphasis on flourishing, respect and autonomy is also important because it encourages the reader to consider law as something that has a deep and pervasive impact on both the actions and the self-conceptualisation[12] of individuals or groups rather than something that is a set of language games[13] with a tenuous link to transcendent values about human needs and capabilities.[14] Hart, Austin and Kelsen for example indicate that a particular legal regime is valid because systematic and coherent but their analysis is at a remove from law on the ground – from how people experience the justice system and how law shapes their perceptions of themselves and of their peers.

Jenkins claimed that

> Law is very like an iceberg: only one-tenth of its substance appears above the social surface in the explicit form of documents, institutions and professions, while the nine-tenths of its substance that supports the visible fragment leads a sub-aquatic existence, living in the habits, attitudes, emotions and aspirations of men. In a sense we all know this.[15]

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[12] For a liberal democratic assessment of the importance of self-conceptualisation see John Rawls, *Political Liberalism* (Columbia University Press, rev ed, 2005) 31. More traditionally much Marxist political theorisation over the past 150 years (echoed in Critical Race Theory and Radical Feminist Legal Theory) has centred on the notion of hegemonic false consciousness or self-conceptualisation: the proletariat for example, once enlightened about its true identity, would inevitably throw off capital's shackles. The notion of class identity as ideology was critiqued in Michael Rosen, *On voluntary servitude: false consciousness and the theory of ideology* (Harvard University Press, 1996).

[13] Among critiques see Allan Hutchinson, *It's All in the Game: A Nonfoundationalist Account of Law and Adjudication* (Duke University Press, 2000) 55 and 64; Mary Neal, 'Dignity, law and language-games' (2012) 25(1) *International Journal for the Semiotics of Law* 107; Ronald Dworkin, *Justice For Hedgehogs* (Harvard University Press, 2011) 404; and Andrei Marmor, *Interpretation and Legal Theory* (Hart, 2nd ed, 2005) 102.

[14] Hart for example refers to a 'minimum content of natural law': H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 189.

[15] Iredell Jenkins, *Social Order and the Limits of Law* (Princeton University Press, 1980) 9.

The methodology in this dissertation reflects a humanistic interest in how formal law is experienced rather than merely what (and how) identities are referred to in statute/case law. We can gain some sense of both form and experience by asking questions.

Understanding identity by asking questions

This dissertation argues that we can understand legal identity by asking questions about individual legal identities.

Understanding legal identity and particular legal identities is useful for people concerned with law as a system of rules or a body of knowledge.[16] It is also useful for people who are devising, enforcing or subverting legal identities. The questioning in the following pages is not concerned with all identities, although it potentially provides the reader with insights about non-legal conceptualisations and processes.

The Six Generative Questions

We can understand a legal identity by asking the following generative questions.

The first question is: what is the function of the identity – what legal purpose does it serve?

The second question is: how is it signified – is it marked by a uniform, or a card, or a testamur, or a letter, or some aspect of physiology such as the patterns on a finger or retina?

The third question is: where does it come from – is it assigned by a government agency or by a nongovernment entity? Is it something that exists independently of the state but is recognised by the state?

[16] Leslie Green, 'General Jurisprudence: A 25th Anniversary Essay' (2005) 25(4) *Oxford Journal of Legal Studies* 565.

The fourth question is: how does it come into being – does it for example require formal registration, or a ceremonial assignment of authority?

The fifth question is: who or what is eligible – is it dependent on being alive, being sane, being an adult, being a citizen, not being bankrupt or other prerequisites or preconditions?

The final question is: how is it validated or verified when contested – through for example reference to a master register or protocols regarding capacity or a strip-search?

The emphasis is on generative questioning, in other words questioning productive of understanding, rather than a narrower collection of facts.

Does such questioning provide an undifferentiated description rather than analysis and that, more importantly, fails to address what is the entity to which those questions are applied. The definition of legal identity in the first chapter of this dissertation centred on 'legal consequences'. The identities in the following chapters are accordingly differentiated from non-legal identities on the basis that they are identities with legal consequences, consequences that can be assessed in terms of individual and collective flourishing. They are differentiated from each other on the basis of function, derivation, revocation, subversion and protection. A rough taxonomic division is provided by the chapter structure (in other words grouping of identities in Chapters Three to Seven), discussed in more detail towards the end of this chapter.

What are those consequences, in essence their legal meaning and the basis for their inclusion in this dissertation? Why are they relevant to the overall dissertation question?

The methodology is based on determining legal identity through reference to consequences. Specifically, does the identity bring into being or embody legal duties, rights, powers and disabilities?

Given the emphasis on consequences rather than mere form or labeling we can further understand the nature of legal identity by recognising that those consequences potentially provide an imperative for subversion (for example the illicit assumption of powers or removal of disabilities) and that the mechanisms used for signifying legal identity potentially provide opportunities for subversion of the signification.

To extend an earlier example, the legal identity of 'Jew' in Nazi Europe in 1942 – an identity with a statutory definition and enforcement by the state – had consequences beyond denial of suffrage, confiscation of property and prohibition of pet ownership. (That latter disability is contrary to both dignity – the individual's autonomy – and flourishing in terms of the bonds of affection and comfort between the owner and nonhuman animal.)[17]

A signifier of that identity – and by implication of lethal consequences – was the yellow star. People whose identity was indicated by the star had an imperative to illegally remove the stigmatic identifier and thus in practice gift themselves with a new identity, given that it was assumed people without the star lacked the disadvantageous identity.[18] Chapter Nine notes that in contemporary Australia we see people 'enhancing' their identities by subverting identifiers using tools such as

[17] Victor Klemperer, *To The Bitter End: The Diaries of Victor Klemperer 1942-1945* (trans Martin Chalmers, Weidenfeld & Nicolson, 1999) [trans of *Ich will Zeugnis ablegen: Tagebücher 1933-1945* (first published 1995)] 83. See more broadly Beate Meyer, Hermann Simon and Chana Schütz, *Jews in Nazi Berlin: From Kristallnacht to Liberation* (University of Chicago Press, 2009) 92.

[18] Raul Hilberg, *The Destruction of the European Jews* (Quadrangle, 1961) 121; and Jeffrey Herf, 'The War and the Jews': Nazi Propaganda and the Second World War' in Jörg Echternkamp (ed), *Germany and the Second World War Volume IX/II: German Wartime Society 1939-1945: Exploitation, Interpretations, Exclusion* (Derry Cook-Radmore trans, Clarendon Press, 2014) [trans of *Das Deutsche Reich und der Zweite Weltkrieg* (first published 2008)] 163, 194.

Photoshop[19] and traditional pen and ink,[20] misuse of a police badge[21] or a fake driver's licence[22] or illicit passport.[23]

The methodology accordingly involves a scrutiny of subversion and of the legal response, given the contention that law is reflexive, through for example prohibitions on subversion by criminalisation of forgery or false claims to authority. Scrutiny of the response and thus of the nature of legal identity involves questions about the extent to which subversion is prosecuted. The answers to those questions tell us something about law's priorities and the state's capacity.[24]

We can also discern that legal identities embody particular values, values that are temporally and culturally contingent. Proponents of the metatheories noted above (and critiqued in the Appendix) have tended to read all legal identity in terms of specific attributes, such as gender or subservience, that are common to a broad class of law's subjects, that fundamentally shape their interaction with both the state and other people and that broadly override both contingent values and personal agency.[25] A theme running through this dissertation is legal pragmatism's skepticism about such reductive analysis; the following chapters indicate a range of values that have shaped and been shaped by law. Discussion based on the questioning highlighted in the preceding paragraphs demonstrates changes in valorisation of particular attributes.

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[19] See for example *Commonwealth Bank of Australia v Mohamad Saleh and Ors* [2007] NSWSC 903, [231]; *Tirtabudi and Minister for Immigration and Citizenship* [2007] AATA 1905.
[20] *Elfar v Registrar General of New South Wales* [2010] NSWSC 539, [13]; *Hamwi v Omar* [2012] FamCAFC 174, [20]; and *Siddiqui and Siddiqui v Asraf and Asraf* [2012] NSWDC 117, [33].
[21] *Michael v The State of Western Australia* [2008] WASCA 66, [4] and [367]; and *Smith v Rowe* [2012] WASC 215, [6].
[22] *Wignall v Commissioner of Police* [2006] WASAT 206, [135]; *Santillan v Queensland Police Service* [2008] QDC 33, [6]; and *Ihemeje v R* [2012] NSWCCA 269, [22].
[23] *Tomov v The Queen* [2011] WASCA 1989, [2], *Leung v R* [2003] NSWCCA 51, [16] and [17]; *R v Cole* [2012] QCA 344, [11]; and *Michael Hennessy v R* [2012] NSWCCA 241, [10].
[24] There are indications for example that substantial numbers of young people use illegitimate proof of age cards to gain entry to nightclubs and other entertainment venues, thereby subverting an 'age' identity. In practice the contemporary Australian legal regime does not feature comprehensive checking and systematic prosecution, partly because of costs, partly because of risk allocation (in other words the cards serve as a filter mechanism for the private sector in dealing with licensing laws, excluding some people from venues and thereby keeping club operators 'in the clear' rather than gathering under-age people on behalf of the state for prosecution by the state). See also Darren Palmer, Ian Warren, and Peter Miller, 'ID scanning, the media and the politics of urban surveillance in an Australian regional city' (2012) 9(3) *Surveillance & Society* 293.
[25] Thomas Hill Jr, 'Autonomy and Agency' (1999) 40(3) *William and Mary Law Review* 847. See also John Rawls, *Political Liberalism* (Columbia University Press, rev ed, 2005) 33; Bert van Den Brink, *The Tragedy of Liberalism: An Alternative Defense of a Political Tradition* (SUNY Press, 2000); Marilyn Friedman, 'Autonomy and Social Relationships: Rethinking the Feminist Critique' in her *Autonomy, Gender, Politics* (Oxford University Press, 2003) 81; and chapters in John Christman and Joel Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press, 2005).

The consequences are **relevant** to the dissertation question because they are the stuff of which law is made and why law on the ground (or under Jenkins' waterline) matters to people.

Choosing the identities for study

The initial chapter referred to conceptual economy as an expository principle in legal pragmatism. That chapter indicated that it was neither feasible nor necessary to scrutinise every legal identity or to provide a comprehensive tabulation. In understanding the nature of legal identity it is sufficient to scrutinise a selection of identities as indicated in Chapter One: identities that are foundational and identities that are examples of the broader class of derivative identities.

Those identities fall into several clusters.

The following chapters refers to legal identities that are no longer evident (such as slave, witch, dissenter), demonstrating claims in this dissertation regarding contingency and continuity. As such it reflects the relevance of the study of legal history for both the understanding of contemporary law and for demonstrating the scope for reform that fosters flourishing.[26] The dissertation highlights identities involving representation or embodiment of the state (such as monarch, judge, inspector), for example demonstrating claims regarding authority. It notes identities that are legal manifestations of affection or other affinity (marriage, ethnicity, religious adherence, gay person), demonstrating claims regarding reinforcement or weakening of norms. It further notes identities involving objective tests of skills and subjective tests of character (such as legal practitioner, visa-holder). It discusses entities, in particular people, at the borders of the state and the legal system, on the basis that liminality is useful in illustrating what is taken for granted, how law deals with indeterminacy and how law creates, reinforces, alleviates or ignores disadvantage (for example Indigenous person, refugee).

[26] For a perspective by a preeminent Australian jurist see Michael Kirby, 'Living with Legal History in the Courts' (2003) 7(1) *Australian Journal of Legal History* 17, 27 and 'Is Legal History Now Ancient History?' (2009) 83(1) *Australian Law Journal* 31, 39.

How were those identities selected? Is the selection idiosyncratic, reflecting subjective biases?

The selection of identities considered in the following chapters has two bases: one structural, one a manifestation of the flourishing, liberal democratic values or attentiveness to a Rawlsian view of justice noted in Chapter One.

The structural base had two elements.

The first was an effort to discern legal identities – those characterised in previous pages as 'foundational' – that are presupposed by other legal identities. The effort reflects legal pragmatism's emphasis on 'matter of fact' and 'commonsense'. Contemporary Australian law for example in conceptualising 'the legal person' differentiates between natural and artificial persons, with an emphasis on the agentic,[27] sometimes glossed as 'liveness' – a characteristic associated with substantive or potential agency. The dead cannot vote, enter into contracts, marry, be convicted and imprisoned, or be defamed. A nonhuman animal, although alive and potentially more sentient than some natural persons (for example those with severe brain injury), similarly cannot vote, marry, serve as a legislator or become a magistrate. Being human or a corporation is a foundational identity; entities that fall outside that category do not enjoy derivative legal identities.

The process for selection of the foundational identities involved looking at what appear to be legal identities in an effort to discern what is presupposed. Chapters Three and Eleven highlight that discernment is non-trivial.

There are for example arguments in favour of recognising nonhuman animals as having some attributes of personhood,[28] in particular a justiciable right to 'humane

[27] The notion of being agentic is discussed in detail in Chapter Three in grounding the exploration of foundational legal identities.

[28] See for example Dale Jamieson, *Morality's Progress: Essays on Humans, Other Animals and the Rest of Nature* (Clarendon Press, 2002) 149-151; Paola Cavalieri, *The Animal Question: Why Nonhuman Animals Deserve Human Rights* (Oxford University Press, 2001); Robert Garner, *A Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford University Press, 2013); Will Kymlicka and Sue Donaldson, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press, 2013) and Peter Singer, *Animal Liberation* (New York Review Books, 1st edn, 1975). See however John Rawls, *A Theory of Justice* (Harvard University Press, 1st ed, 1971) 4,

treatment' in terms of crowding, body modification, experimentation and entertainment.[29] Animals in the past have been considered as legal actors and thus subject to trial, conviction and capital punishment.[30] That status tells us something about law, about identity and implicitly about the potential usefulness of legal history in understanding the contingency of legal conceptualisations.[31]

Jurisprudence in Europe and the United States has similarly moved towards recognition of what would otherwise be regarded as human rights for corporations,[32] a development that throws light on legal identities generally.

How were the derivative legal identities selected for discussion? Choice reflected the values indicated in the preceding chapter. Some identities, such as 'married' and 'bankrupt', were chosen because they are important for flourishing or because they are preoccupations in the contemporary discourse about identity noted in that chapter. Some were chosen because they offer serviceable illustrations of the functioning of legal identity in the 'information state'.

What about values, the second base? Chapter One indicated that assessment of legal systems and institutions using the notion of flourishing in conjunction with legal pragmatism allows scholars to move beyond relativism, in other words to address the dilemma posed by claims that there are no transcendent values and that all legal

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questioned in Tess Vickery, 'Where the Wild Things Are (Or Should Be): Rawls' Contractarian Theory of Justice and Non-Human Animal Rights' (2013) 11 *Macquarie Law Journal* 23.

[29] David Macdonald, 'Pushing the Limits of Humanity? Reinterpreting Animal Rights and "Personhood" Through the Prism of the Holocaust' (2006) 5 *Journal of Human Rights* 417 and Martha Nussbaum, 'The Moral Status of Animals' (2006) 52(22) *Chronicle of Higher Education* B6; with the latter critiqued as inconsistent in Anders Schinkel, 'Martha Nussbaum on Animal Rights' (2008) 13(1) *Ethics and the Environment* 41.

[30] Piers Beirne, 'A note on the facticity of animal trials in early modern Britain; or, the curious prosecution of farmer Carter's dog for murder' (2011) 55(5) *Crime, Law and Social Change* 359; Jen Girgen, 'The historical and contemporary prosecution and punishment of animals' (2003) 9 *Animal Law* 97; and Paul Friedland, *Seeing Justice Done: The Age of Spectacular Capital Punishment in France* (Oxford University Press, 2012) 111.

[31] Jim Phillips, 'Why Legal History Matters' (210) 41 *Victoria University of Wellington Law Review* 293. For a different perspective, emphasizing the autonomy of legal history as a discipline, see Jonathan Rose, 'English Legal History and Interdisciplinary Legal Studies' in Anthony Musson (ed), *Boundaries Of The Law: Geography, Gender And Jurisdiction In Medieval And Early Modern Europe* (Ashgate, 2005) 169.

[32] See for example Marius Emberland, *The Human Rights of Companies: Exploring the structure of ECHR protection* (Oxford University Press, 2006); Anna Grear, 'Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) *Human Rights Law Review* 511; Floyd Abrams, 'Citizens United and its critics' (2010) 120 *Yale Law Journal Online* 77; and *Citizens United v Federal Election Commission* 558 US 310, 130 S.Ct. 876 (2010).

artefacts are equal.[33] Selection of identities in the following chapters demonstrates the extent to which legal identities foster, deny or are indifferent to flourishing.

A taxonomy of identity?

Collins asked

> Can we wrench the topic of legal classification from lawyers' hand for a moment? They hold it tight, for it is the master key to legal discourse. That space, like the quadrangle of the old Bodleian library, contains doors marked by the classifications of legal knowledge, such as public law and private law, contract, property and tort. Behind each door lurks the complex structure of categories, conceptions and rules, through which legal knowledge interprets events in the world and proposes standards of behaviour. If we resist the temptation to investigate the mysteries which lie within and abide in the open quadrangle, then we can examine the architecture of this system of knowledge.[34]

The first chapter of this dissertation disavowed an intention to provide a comprehensive taxonomy of current and historic legal identities,[35] with no attempt to emulate the achievement of taxonomists such as Gaius,[36] Vattel,[37] Hohfeld,[38] Birks,[39]

[33] Among critiques of the relativism evident in work by Hart and Kelsen see Philip Hesch and Christopher Grabarek, 'Towards The Deconstruction Of Legal Relativism' (1994) 6 *St. Thomas Law Review* 349; and R George Wright, 'The Consequences of Contemporary Legal Relativism' (1990-91) 22 *University of Toledo Law Review* 73; and Torben Spaak, 'Relativism in Legal Thinking: Stanley Fish and the Concept of an Interpretive Community' (2008) 21(1) *Ratio Juris* 157.

[34] Hugh Collins, 'Legal Classifications as the Production of Knowledge Systems' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 57, 57.

[35] Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003); Emily Sherwin, 'Legal Taxonomy' (2009) 15(1) *Legal Theory* 25; Hanoch Dagan, 'Legal Realism and the Taxonomy of Private Law' (Tel Aviv University Law Faculty Papers Working Paper 38 (2006); and Kelvin Low, 'The use and abuse of taxonomy' (2009) 29(3) *Legal Studies* 355.

[36] Gaius, *The Institutes of Gaius* (William Gordon and Olivia Robinson trans, Duckworth, 1988). See also A M Honoré, *Gaius: A Biography* (Oxford University Press, 1962); and Donald Kelley, 'Gaius Noster: Substructures of Western Social Thought' (1979) 84(3) *American Historical Review* 619.

[37] Emmerich de Vattel, *The Law of Nations; Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Joseph Chitty trans, Cambridge University Press, 2011) [trans of *Le Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (first published 1797)]; and Rafael Domingo, 'Gaius, Vattel, and the New Global Law Paradigm' (2011) 22(3) *The European Journal of International Law* 627, 629.

[38] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Ashgate, 2001). See also Pierre Schlag, 'How To Do Things With Hohfeld' (2015) 78(1/2) *Law and Contemporary Problems* 185, 186 and 233.

[39] In particular see Peter Birks (ed), *English Private Law* (Oxford University Press, 2000), 'Equity in the modern law: an exercise in taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1 and 'Book Review: *Meagher Gummow and Lenane's Equity*' (2004) 120 *Law Quarterly Review* 344, 346. For application see James Lee, 'Confusio: Reference to Roman Law in the House of Lords and the Development of English Private Law' (2009) 5 *Roman Legal Tradition* 24.

the authors of the German *Bürgerliches Gesetzbuch* and similar codes,[40] or Blackstone.[41]

That disavowal has two bases.

The first is that articulation of a comprehensive taxonomy is outside the scope and objectives of this dissertation. Birks commented that

> Information which cannot be sorted is not knowledge. And information which can be sorted only by the alphabet is knowledge only of the spelling of names.[42]

In offering serviceable insights about the nature of legal identity it is unnecessary to undertake the exhaustive systematisation found in the life sciences, with for example the articulation of genera and species through a close examination of physical attributes such as beaks, backbones and bristles or through large-scale sequencing of genetic data.[43] To understand legal identity as a construct, consistent with this dissertation's stated objectives, we do not need to map every contemporary and past identity.

The second base for disavowal is the legal pragmatism discussed in Chapter One, which emphasises both practical outcomes[44] and a modesty in approaching complex social phenomena – the phenomena that pragmatist William James characterised as a 'great blooming, buzzing confusion'.[45]

Holmes famously questioned legal scholasticism and recognised contingency, asserting that

> the life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges

[40] Reiner Schulze, 'A Century of the Bürgerliches Gesetzbuch: German Legal Uniformity and European Private Law' (1999) 5(3) *Columbia Journal Of European Law* 461.
[41] Alan Watson, 'The Structure of Blackstone's Commentaries' (1988) 97(5) *Yale Law Journal* 795.
[42] Peter Birks, 'Introduction' in Peter Birks (ed), *English Private Law* (Oxford University Press, 2000) vol 1, li. See also Peter Birks, 'Definition and Division: A Meditation on the Institutes 3.13' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 1, 33.
[43] Geoffrey Samuel, 'English Private Law: Old and New Thinking in the Taxonomy Debate' (2004) 24(2) *Oxford Journal of Legal Studies* 335, 358 and 'Can Gaius Really Be Compared To Darwin' (2000) 49(2) *International and Comparative Law Quarterly* 297, 319.
[44] See for example the emphasis on action and outcomes that meet human needs in Pound's 1923 discussion of legal pragmatism: Roscoe Pound, *Interpretations of Legal History* (Cambridge University Press, 1923) 11.
[45] William James, *The Principles of Psychology* (Harvard University Press, first published 1890, 1981) 462.

> share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[46]

Over fifty years later Australian High Court justice WJV Windeyer argued that

> The history of law should not be merely an account of old rules and obsolete formalities, scraps and curiosities of antiquarian research, chronologically strung together. It deals rather with the growth and development of legal institutions, legal methods and principles. Law is not, in essence, a body of technical rules, uncouth formulae, and inexorable commands, mysteries which only the learned may know and with the subtle distinctions of which only a dialectician can wrestle. It is really a simpler and a grander thing. It is that which makes it possible for men to live together in communities, to lead a peaceful, organised, social life. In particular communities, its rules will at times lag behind the demands which social development makes and it may seem out of harmony with the people's sense of justice. And, in the complex conditions of modern civilisation, the rules of law in any community must tend to be complex and technical. But always and everywhere, the fundamental purpose is the same.[47]

Given that skepticism, is taxonomy useful in articulating and analysing legal identities, and more broadly in imposing a logic through systematisation?

The question is pertinent because Australian courts, along with their UK counterparts, have been resistant to formal taxonomisation and unsympathetic to Birks' response that the common law needs more logic. They have for example referred dismissively to pigeonholes, 'abrupt and violent collision' resulting from 'all-embracing theory', 'a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development and law as 'a practical instrument which does not develop by reference only to considerations of theoretical harmony and taxonomic elegance'.[48]

From the perspective of legal pragmatism taxonomies are valuable to the extent that they assist understanding of what is actually happening in the law, an understanding

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[46] Oliver Wendell Holmes Jr, 'The Common Law' in Sheldon Novick (ed), *The Collected Works of Justice Holmes* (University of Chicago Press, 1995) vol 3, 115.

[47] WJV Windeyer, *Lectures on Legal History* (Law Book Company, 2nd ed, 1957) 3. See also Michael Kirby, 'Is Legal History Now Ancient History?' (2009) 83(1) *Australian Law Journal* 31, 39.

[48] See for example *The Queen v The President and Certain Other Members of the Commonwealth Conciliation and Arbitration Commission; Ex Parte The Association of Professional Engineers, Australia* (1959) 107 CLR 208 Windeyer J at 272; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, [85]-[98]; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 Gummow J at 544; *Harriton v Stevens* (2006) 226 CLR 52 Hayne J at 102; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 156.

highlighted in the dismissal by Birks of 'knowledge only of the spelling of names'.[49] A taxonomy is an ontological tool rather than something that is an end in itself.

Morales thus commented that

> Pragmatism eschews labelling for the analyst's sake, privileging instead a concern for understanding behaviour in its many perspectives.
>
> The heart of pragmatism is not a set of deductive first principles to impose on experience but a self-discipline to avoid such imposition. By examining analysts' assumptions, pragmatism renders the complexity of labelling schemes and competing traditions of social theory more intelligible and presents these schemes and traditions as a byproduct of those assumptions. By comprehending the connection between philosophical assumptions, problem formulation, data collection, theory and problem solving, pragmatist-inspired scholars bring a scepticism to analysis, one tempered by the desire to solve human problems; they address them as economically as possible which is itself only by stripping methods and theories to what work.[50]

That desire to solve human problems, Posner's emphasis[51] on 'consequences' and 'human needs' noted in the preceding chapter of this dissertation, is different to the theorists such as Derrida and Deleuze (noted in Chapter Two and the Appendix) whose questioning of language and individuation is provocative but potentially represents a nihilistic 'escape into theory' rather than a substantive basis for achievable solutions.[52]

The answer to the question about usefulness is therefore 'yes, to a sufficient degree'. That usefulness is demonstrated in the following chapters.

The preceding pages have articulated several basic concepts, notably legal identity (construed in terms of consequences), identifier and identification. That conceptualisation is not all-encompassing; it is internally consistent but draws in other

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[49] Peter Birks, 'Introduction' in Peter Birks (ed), *English Private Law* (Oxford University Press, 2000) vol 1, li.
[50] Alfonso Morales, 'Foreword: Pragmatism as a Discipline – (Re)Introducing Pragmatist Philosophy to Law and Social Science', in Alfonso Morales (ed), *Renascent Pragmatism: Studies in Law and Social Science* (Ashgate, 2003) xi, xv.
[51] Richard Posner, *Overcoming Law* (Harvard University Press, 1995) 11.
[52] Richard Rorty, 'The Banality of Pragmatism and the Poetry of Justice' in Richard Rorty, *Philosophy and Social Hope* (Penguin, 1999) 93, 102 notes suggestions that if you are conversant with Dewey and Wittgenstein you do not need Derrida, a dismissal that presumably includes figures such as Deleuze and Lacan whose writing is noted in the following chapter. Nietzsche more tautly quipped 'There are no facts, only interpretations', a claim to which this dissertation returns in Chapter Eleven below. See Friedrich Nietzsche, *The Will To Power* (Walter Kaufmann and RJ Hollingdale trans, Vintage, 1968) [trans of *Der Wille Zur Macht* (first published 1901)] 267.

concepts such as nation, contract, powers, disabilities and court. It does not purport to cover all law, although it embraces both public and private law because legal identities are found throughout Australian law.

The taxonomy in this dissertation is modest, compared to that of the ambitious – and overreaching – systematisation found in Gaius' *Institutes* or Birks. As the first chapter indicated, it embodies a two-tier hierarchical schema: the foundational and derivative identities. Those identities are not reductive; the operation of law in Australia for example typically involves an individual having multiple derivative identities. As noted earlier, in understanding law we can regard those various entities as facets of the abstraction known as legal personhood.

A contention in the preceding chapter was that identities are contingent because they embody valorisations that are mutable. The taxonomy used in this dissertation is accordingly qualitatively different to taxonomies in the natural sciences. A bird for example does not gain a new identity as a fish or a fox by flying into a new jurisdiction. Its beak, feathers and other physical attributes used by the taxonomist as the basis of identification in relation to an ideal type – an exemplar – are stable irrespective of which way the wind blows.

A useable taxonomy of legal identities is more modest, because the characteristics that form the basis of a particular identity are subjective. A person may for example be an adult in one jurisdiction but a child in another. Adherence to a particular creed may be a matter of official indifference in one jurisdiction and of profound importance for flourishing, through for example severe sanctions for apostasy, in another jurisdiction. Physical facts *are* found in Australian law but differing valorisation of facts results in legal fictions that are unstable and thus are different to the verifiable and unchanging reality that is described using biological, chemical or geological taxa.

That modesty is useful in encouraging a realistic view of law because it is wary about the reductive or totalising taxonomisation implicit in the theories of identity espoused by figures such as MacKinnon and Bell. As noted in discussion throughout the body of this dissertation and the Appendix, grand theory has tended to construe the

examination of identities within a single attribute such as gender, class or ethnicity, potentially an ontological cage that is timeless.

That essentialism is at odds with the diversity apparent in the construction of legal identities. From the perspective of law as a mechanism for fostering flourishing it is pernicious because it potentially fosters a culture that denies agency and that elides the benefits of particular identities.[53] Much of the essentialism is ahistorical and anti-rational, with Nussbaum for example commenting that

> What sets philosophy apart from popular religion, dream-interpretation and astrology is its commitment to rational argument. What sets stoicism apart from other forms of philosophical therapy is its very particular commitment to the pupil's own active exercise of argument. For all these habits and routines are useless if not rational. And the basic motivation behind the whole business is to show respect for what is most worthy in one-self, for what is most truly one-self. One does not do this by anything except good argument. At the end we have not the images of habituation and constraint so prominent in Foucault's writings, but an image of incredible freedom and lightness, the freedom that comes of understanding that one's own capabilities and not social status or fortune or rumor or accident are in charge of what is important. The procedures of Stoic argument model a kingdom of free beings – the ancestors (in terms of both content and causal influence) of Kant's kingdom of ends, a kingdom of beings who are bound to each other not by external links of hierarchy and convention, but by the most profound respect and self-respect, and by their sense of the fundamental commonness in their ends. It is doubtful whether the view of the world contained in Foucault's work as a whole could admit the possibility of such a kingdom, or its freedom. For Foucault, reason is itself just one among the many masks assumed by political power.[54]

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[53] Simon Green, 'Transcending the Carceral Archipelago: Existential, Figurational and Structurational Perspectives on Power and Control' (2015) 5(3) *Oñati Socio-legal Series* 919, 920.

[54] Martha Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton University Press, rev ed, 2009) 353. See also discussion of the emancipatory potential of knowledge on 'structures' such as law and self-concept, in for example Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Polity Press, 1991) 93. Friedrich comments

> Foucault was a voluptuary of power. Detestable to Foucault is only that kind of power that wraps itself insidiously in the language of truth, rationality, science, knowledge, jurisprudence, democracy, popular sovereignty, humanitarianism, and morality; that effaces itself in order to be able to rule with an invisible hand, so that it cannot be combated—detestable is, in short, the power/knowledge régime, the disciplinary power prevalent in the democratic republics. That's the kind of power Foucault urges resistance to. When calling it, as he occasionally does, productive and creative, Foucault is referring primarily to its ability to invent ever more, and more sophisticated, forms of camouflage and vehicles for its hidden hand ... it is overt authentic power that provides Foucault's Grand Narrative with its criterion for indicting disciplinary power on the charge of establishing the carceral in modernity's democratic societies. The implication of its crypto-normativity is somewhat disconcerting. It appears that any regime, any society, any social formation where the will to power is exercised freely, assertively, and overtly, without masking itself as some form of non-power, is preferable to liberal or social democracy.

Rainer Friedrich, 'The Enlightenment Gone Mad (II): The Dismal Discourse of Postmodernism's Grand Narratives' (2012) 20(1) *Arion* 67, 73-75.

Before proceeding it is useful to note that in Australia there is no discrete identity *grundnorm*, no formal codification or other articulation of that hierarchy in the national Constitution or other primary statutes, and no explicit division in terms of rights, things and actions (on the model of Gaius) or of persons, procedure and rights (on the model advanced by Birks).

'Identity' or 'Identity Law' is not a discrete 'field of research' in the Australian & New Zealand Standard Research Classification,[55] there is no 'Identity Law Journal' and the law reports – in contrast to the mass media – feature very few references to 'identity crime' *per se*. As the following chapters indicate, definitions of particular identities and articulations of the consequences are scattered across the statute and case law.

The structure of this dissertation is thus *not* based on discrete chapters that reflect legal subdisciplines such as evidence, privacy, human rights or law enforcement. Those matters are instead aspects found throughout the following chapters. The dissertation has been written in the expectation that a specialist could profitably read isolated chapters or the dissertation as a whole and thereby gain a new view of the legal fabric, a fabric that has been reworked over time.

The research process and material

US jurist Felix Frankfurter asked 'what is research' and answered

> It is not a method, it is not an object, it is a behavior. "It is a behavior … directed to answering something which exists in nature." Research is the systematic indulgence of one's curiosity – that is, the kind of research that I am talking about, for I am concerned with research that aims at the extension of knowledge. Its spring is curiosity; and when systematically pursued for the elucidation of events, we call it science.[56]

Origins and processes matter, because for example they potentially determine outcomes.[57] The following paragraphs reflect the claim by philosopher Hans-George

[55] Australian Bureau of Statistics, Australian and New Zealand Standard Research Classification (2008).
[56] Felix Frankfurter, 'The Conditions for, and the Aims and Methods of, Legal Research' (1930) 15 *Iowa Law Review* 129, 129.
[57] Among critiques see Robert Berring, 'Legal Research and Legal Concepts: Where Form Molds Substance' (1987) 75(1) *California Law Review* 15; and Steven Barkan, 'Deconstructing Legal Research: A Law Librarian's Commentary on Critical Legal Studies' (1987) 79 *Law Library Journal* 617.

Gadamer that in reading a text – and it is axiomatic that law can be regarded as a text, a communication requiring interpretation[58] – we cannot wholly divorce ourselves from our own times and from subjectivity. An interpreter should accordingly aspire to make prejudgments explicit (and identify those prejudgments through recurrent examination of a text) rather than ignore or purport to eliminate them.[59]

The dissertation embraces multiple legal subdisciplines and, as noted in Chapter One, a wide body of case and statute law. Citation in the following chapters demonstrate that there are sufficient primary and secondary sources for analysis that provides credible conclusions. The field embodies bibliographic heterogeneity.

This dissertation thus does not 'shadow' a small number of authoritative works that are particular to a subdiscipline,[60] provide an exegesis of a landmark text (monograph, statute, judgment)[61] or test doctrine by applying an identity theorist's broad pronouncement to a specific matter (for example to provide a Foucauldian or Butlerian analysis of law regarding circumcision, 'prisonfare', preventive detention of sex offenders or female genital mutilation).[62] There is no discrete and authoritative set of works that are specific to questions about the nature of legal identity. Both the author and readers must therefore rely on a range of vantage points. That diversity in terms of perspectives and resources is a strength rather than a weakness, because it fosters an understanding of the dynamic nature of legal identity and identity's role within the legal carpet.

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[58] See for example Ronald Dworkin, 'Law As Interpretation' (1982) 9(1) *Critical Inquiry* 179; Ino Augsberg, 'Reading Law: On Law As A Textual Phenomenon' (210) 22(3) *Law and Literature* 369; and Igor Grazin, 'Law is myth' (2005) 18(1) *International Journal for the Semiotics of Law* 23.

[59] Hans-Georg Gadamer, *Truth and Method* (Joel Weinsheimer trans, Continuum, 2nd ed, 2004) [trans of *Wahrheit und Methode* (first published 1960)] 271.

[60] Mathias Siems, 'Legal Originality' (2008) 28(1) *Oxford Journal of Legal Studies* 147; and Hugh Collins, 'Legal Classifications as the Production of Knowledge Systems' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 57, 58.

[61] For example Matthew Chapman, *The Snail and the Ginger Beer: The Story of Donoghue v Stevenson* (Wildy Simmonds & Hill, 2009); Nonie Sharp, *No Ordinary Judgment: Mabo, the Murray Islanders' Land Case* (Aboriginal Studies Press, 1996); Kermit Hall and Melvin Urofsky, *New York Times v. Sullivan: Civil Rights, Libel Law, and the Free Press* (University Press of Kansas, 2011); and George Winterton, 'The Communist Party Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108.

[62] Jude Roberts, ''Circumcision: everyone's talking about it': legislation, social pressure and the body' (2011) 20(4) *Journal of Gender Studies* 347. For a perspective on that view and on conflicting claims regarding circumcision as an 'embodiment' of identity see Tasmanian Law Reform Institute, *Non-Therapeutic Male Circumcision* (Issues Paper 14, 2009) and Chapter Eight below. For applications of Foucault's conceptualisation of the 'neoliberal' state as inherently penal see Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Polity Press, 2008), *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press, 2009) and 'The wedding of workfare and prisonfare revisited' (2011) 38(1-2) *Social Justice* 1.

How, then, to proceed in articulating an initial hypothesis, developing subsidiary or associated hypotheses on a consequential basis, and then testing those hypotheses through reference to statute/case law and other parts of the knowledge base (in other words primary and secondary material)?

It was clear that a 'brute force' approach to the identification of relevant statutes and cases would not be viable, for example because the diversity of law regarding identity means that there are several hundred contemporary Australian statutes referring to identity cards or other signifiers and that there is extensive case law regarding rules of evidence in the judicial treatment of identification.

An effective research strategy thus involved reading in several paths – simultaneously looking at published works in multiple areas, with an alertness to cross-references provided by those works and potential conjectures that could be tested through further reading in the primary and secondary material that is outlined below.

At a theoretical level the strategy was justified by the 'open' and 'modest' values of legal pragmatism noted in Chapter One. It was also justified through engagement with theorists such as Foucault, Aries and Butler whose grounding in history is on occasion weak,[63] who in providing an ahistorical schematic that ignores salient aspects of how legal identity has arisen and functioned over time, and who have been criticised by peers for a hermetic language that is contrary to the rationality and communication valorised by Nussbaum.[64]

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[63] Among examples see Erik Midelfort, 'Reading and Believing: On the Reappraisal of Michel Foucault' in Arthur Still and Irving Velody (eds), *Rewriting the history of madness: studies in Foucault's Histoire de la folie* (Routledge, 1992) 105; Mitchell Dean, *Critical and Effective Histories: Foucault's Methods and Historical Sociology* (Routledge, 1994); Allan Megill, 'The Reception of Foucault by Historians' (1987) 48(1) *Journal of the History of Ideas* 117; and Michael Ignatieff, 'State, civil society, and total institutions: A critique of recent social histories of punishment' (1981) 3 *Crime & Justice* 153. Note also Daniel Maier-Katkin**,** 'On Sir Leon Radzinowicz Reading Michel Foucault: Authority, Morality and the History of Criminal Law at the Juncture of the Modern and the Postmodern' (2003) 5 *Punishment & Society* 155; and Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law As Governance* (Pluto Press, 1994).

[64] Note Searle's comment in Steven Postrel and Edward Feser, 'Reality Principles: An Interview with John R Searle' (2000) 31(9) *Reason* 42, 43:

> With Derrida, you can hardly misread him, because he's so obscure. Every time you say, "He says so and so," he always says, "You misunderstood me." But if you try to figure out the correct interpretation, then that's not so easy. I once said this to Michel Foucault, who was more hostile to Derrida even than I am, and Foucault said that Derrida practiced the method of *obscurantisme terroriste* (terrorism of obscurantism). We were speaking French. And I said, "What the hell do you mean by that?" And he said, "He writes so obscurely you can't tell what he's saying, that's the obscurantism part, and then when

As noted throughout this dissertation, claims by some theorists appear to have been accepted uncritically, have a weak factual basis, ignore law's accommodation of new technologies or social practices and – significantly – deny an agency that is apparent in the life of many people who are ostensibly caged by identities such as gender. Notions of hegemony and soft power[65] are useful but if we are concerned with law reform as a means to foster flourishing we should be wary about embracing Foucault's vision that knowledge is necessarily an expression of power by the empowered at the expense of the powerless. If realism is important we should not hesitate to acknowledge that some people and groups have escaped from deleterious identities. Others have exploited their ostensible imprisonment, an agency that should not be derided as 'false consciousness' or 'inauthentic'. States potentially both imprison and liberate, prevent flourishing and foster flourishing.

The 'consequentialist' characterisation of legal identity and the specific questions highlighted above were used to 'interrogate' or analyse the identities that are discussed in the following chapters, with scrutiny of several hundred published judgments and a similar number of statutes, some of which are cited in the following chapters. The breadth and depth of that citation of substantive law, accompanied by reference to interpretive material, is without precedent in Australian writing about the nature of legal identity *per se* and offers sufficient 'analytical purchase', to use the words of Brubaker and Cooper,[66] on legal processes and concepts to substantiate the conclusions in the final chapter of this dissertation.

From a methodological perspective this dissertation does not offer a new 'grand theory'. It is not strikingly synthetic. Instead, to adopt a characterisation by Lippen or Rigney and Barnes,[67] it is an exercise in interstitiality. It respects complexity. It fills

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you criticize him, he can always say, 'You didn't understand me; you're an idiot.' That's the terrorism part."

The slipperiness of terminology is traditional. Some readers will recall Vilfredo Pareto's 1902 criticism in *Les Systèmes Socialiste* that Marx's 'words are like bats: one can see in them both birds and mice'.

[65] Joseph Nye, *Soft Power: The Means to Success in World Politics* (PublicAffairs, 2004) 37: 'If I can get you to want what I want, then I do not have to make you do it'. That observation is a central trope in classical rhetoric and thus predates contemporary discourse theory.

[66] Rogers Brubaker and Frederick Cooper, 'Beyond Identity' (2000) 29(1) *Theory and Society* 1, 1.

[67] Ronnie Lippen, 'The Interstitial and Creativity: Bergson and Fitzpatrick on the Emergence of Law' (2010) 2(2) *Journal of Theoretical and Philosophical Criminology* 1, 1; and Daniel Rigney and Donna Barnes, 'Patterns of Interdisciplinary Citation in the Social Sciences' (1980) 61(1) *Social Science Quarterly* 116, 116.

in gaps between doctrines and observations, working along the borders of subdisciplines rather than trapping legal and social processes in a new conceptual schema that denies the existence and significance of attributes that are not valued (or merely not recognised) by the essentialism of macrotheorists such as Schmitt, Butler, MacKinnon and Mouffe who as noted in the Appendix to this dissertation construe identity in terms of ethnicity, gender or class.

This dissertation demonstrates that there are diverse literatures of legal identity, rather than a single coherent literature that centres on a handful of canonical works and that provides a foundation for a discrete legal subdiscipline.[68] Interrogation of those literatures is the basis for an original, realistic and intellectually fruitful understanding of identity law and legal identities *per se*. It differentiates the dissertation from a theoretical literature that has a strong rhetorical – and on occasion polemical – flavour rather than providing statistics or documenting case/statute law to substantiate the theorist's claims.

Saliently, there is no discrete and coherent scholarly literature on 'the law of identity', in contrast for example to work regarding legal subdisciplines such as evidence, taxation, family, admiralty, succession, equity or intellectual property law.[69] In terms of the research base the dissertation is original because it draws together literature from across subdisciplinary silos and looks for common elements.

[68] Georges Gurvitch, *Sociology of Law* (Transaction, 2001) xi; and Pierre Schlag, 'Normativity and the Politics of Form' in Paul Campos, Pierre Schlag and Steven Smith (eds), *Against The Law* (Duke University Press, 1996) 29, 93. An indicator of a mature scholarly discipline or subdiscipline (for example torts or intellectual property in the discipline of law) is that it has its own authority figures, language and synoptic texts. Those texts provide an overview of the dominant arguments, highlight leading texts and note authority figures. As this dissertation demonstrates, there is no discrete subdiscipline of 'identity law' and there are no synoptic texts that cover the field and for example map the scholarly literature. The following chapters draw on writing from numerous subdisciplinary silos; part of the significance of the dissertation is the identification and assessment of material that offers insights about different facets of legal personhood rather than reiterating scholarship in one part of the field.

[69] There is no overarching authoritative monograph on 'the law of identity' *per se* and as the following chapters demonstrate scholars in writing about legal identity have instead focussed narrowly, and often exclusively, on specific facets such as the capacity of intoxicated adults, the guardianship of minors, the legal admissibility of biometric evidence, slavery, gay marriage and the status of refugees under Australian or international law.

Chapter Three: States, Subjects and Objects

Overview

The preceding chapter argued that we can gain insights about the nature of legal identity by asking a set of questions of any entity that we perceive to be a legal identity, for example what legal purpose does that identity serve, where does it come from, how does it come into being, are there any preconditions and how is it signified. The chapter also argued that we can discern what this dissertation characterises as foundational and derivative legal identities, providing a broad taxonomy that encompasses diversity and recognises that some identities are more important that others because the latter presuppose the existence of a foundational identity. This chapter discusses those foundational identities, demonstrating that they are functional but that functionality is culturally contingent. It highlights the implications for flourishing that result from historic and contemporary exclusion of some entities on the basis of nationality, species, ethnicity and other attributes. In doing so it addresses the contentions articulated in Chapter One.

Friel commented that 'We name a thing and – bang! – it leaps into existence!'.[1] This chapter discusses foundational identities, in other words those (such as citizenship, being human and alive or otherwise being agentic) that are generally presupposed in Australian law's consideration of questions about derivative identities such as mental capacity, authorisation as a representative of the state and marriage. In the absence of those foundations any identities that are perceived as existing have no legal meaning.

The discussion tells us something useful about law (usefulness being a central value of pragmatism) and provides a basis for the exploration of legal identities and issues in the subsequent chapters.

[1] Brian Friel, *Translations* (Faber, 1981) 45.

The following paragraphs argue that jurisdiction – ultimately the articulation and implementation of state power on a 'hard' or 'soft' basis[2] – is fundamental in the attribution of contemporary legal identities, which are contingent rather than timeless and universal.

One foundational identity is that the entity, such as an individual, is subject to Australian law. That is evident in historic characterisations such as 'British Subject' and 'Royal Subject' or 'Subject of the Queen',[3] which reflected the premodern Western notion that justice (or merely legitimacy) flowed from a particular God through the person of the monarch.[4] It is also evident in the large and diverse Australian bureaucracies that are concerned with formally assigning, verifying and using foundational and/or derivative identities in for example administration of the social security system, taxation and criminal justice.[5] Being subject to Australian law – and subject to the Australian state on an ongoing or short-term basis – is not synonymous with being an Australian citizen or human. The entities subject to Australian law (and that have legal identities under that law) include citizens, non-citizens (lawfully present in Australia or otherwise; held on Australia's behalf in facilities on Manus Island and Nauru or otherwise), corporations, states and territories. (Extraterritorial legislative competence thus means that the identity of subjection to Australian law potentially one which includes everyone in the world.)

In essence, nation states make the rules about what is a legal identity and what is not.[6]

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[2] Steven Lukes, 'Power and the Battle for Hearts and Minds' (2005) 33(3) *Millennium: Journal of International Studies* 477, 485. For a use of Nye's soft/hard power dichotomy see Paul Carresse, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (University of Chicago Press, 2003) 74-75.

[3] See for example *Drum and Drum v Price* [1843] TasSupC 55; and *Davies v Western Australia* [1904] HCA 46; (1904) 2 CLR 29. Note reference in the *Australian Constitution* preamble and s 117; and discussion in Kim Rubenstein, 'Citizenship and the Constitutional Convention Debates: A Mere Legal Inference' (1997) 25(2) *Federal Law Review* 295.

[4] Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (Routledge, 1962) 127; and Ernst Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press, new ed, 1981) 5 and 21. The Australian monarch and viceregal 'avatars' (the Governor-General and Governors) as legal identities with symbolic and substantive functions are discussed in Chapter Five below.

[5] A marker of the modern state was that much public sector employment related to the delivery of social services, in contrast to predecessors where employment in the rudimentary bureaucracies was concentrated in revenue collection and defence. In a postmodern state, such as contemporary Australia much of that activity is being undertaken on the state's behalf by autonomous state agencies and private sector surrogates such Anglicare, some of which may be imposing private values in excluding people with legal identities, such as a same-sex affinity, that would otherwise be protected under discrimination law and that are discussed in Chapter Six below.

[6] In contrast to some premodern natural law theorists and the animists noted later in this chapter, the author contends that states rather than a deity make the law (although states may conceptualise their lawmaking as a manifestation of divine or otherwise transcendent requirements and principles).

As a corollary this chapter argues that Australian law strongly valorises (and in turn is based on) what is agentic,[7] in other words a 'liveness' encompassing attributes of sentience and expressiveness – attributes that are consistent with an empiricist rationality regarding psychological and physical processes.

In contrast to some of the theorists noted in Chapter Two, a contention in this dissertation is that all facts *per se* are not social and contingent.[8] Although the interpretation and valorisation of facts *is* social, there are physical realities that can be identified on an empirical basis. An empiricist (tacitly secular) rationality in contemporary Australian law excludes metaphysical explanations for physical phenomena.

In considering responsibility and aspiring to the consistency that is conducive to fairness and thence flourishing Australian law now accordingly does not accept that a person's criminal action is attributable to possession by a demon,[9] orders from satan[10] or magic (potentially addressed through prohibitions on the practice of magic.

The comment will strike some readers as trite but in thinking about law it is useful to remember that demonic/divine possession, black/white magic and other metaphysical explanations for physical and mental states are social and thus legal 'givens' in several cultures – for example in Australian Indigenous traditional law – and were evident over several centuries in premodern UK law, affecting the flourishing of individuals deemed to have practiced the dark arts.[11]

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[7] The notion of the agentic and its implications is discussed in the second half of this chapter.

[8] As points of entry to the literature see Ian Hacking, *The Social Construction of What?* (Harvard University Press, 1999); and Trevor Pinch and Wiebe Bijker, 'The social construction of facts and artefacts: or how the sociology of science and the sociology of technology might benefit each other' (1984) 14(3) *Social Studies of Science* 399.

[9] *R v Miller* [2008] NSWSC 1038; *R v Healey* [2008] SASC 83; *R v Lavell* [2002] WASC 200; *R v Noyes* [1999] NSWSC 397; *R v Gjf, R v Gff, R v Khf* [2002] NSWSC 737; *R v David Maxwell Shepherd* [2007] NSWSC 2007; *R v Morrison* [2006] SASC 344; *R v Brett Wayne Smith* [2009] NSWSC 1337; and *R v John Charles Maxwell* [1999] NSWSC 281. For an instance where the court and medical witnesses were skeptical about an offender's supposed belief in demons see *Button v Director of Mental Health & Anor* [2005] QCA 67. See also Sarah Ferber and Adrian Howe, 'The man who mistook his wife for a devil: Exorcism, expertise and secularisation in a late twentieth-century Australian criminal court', in Dieter Bauer, Juergen Schmidt and Hans de Waardt (eds), *Demonic Possession: Interpretations of a Historico-Cultural Phenomenon* (Verlag fur Regionalgeschichte, 2005) 299.

[10] *The Queen v Kalala* [2015] VSC 713, [30] and [43].

[11] Those explanations are apparent in the customary law of Australia's Indigenous peoples, discussed in for example Heather Douglas and Mark Finnane, 'Obstacles to 'a proper exercise of jurisdiction' – Sorcery and Criminal Justice in the Settler-Indigenous encounter in Australia' in Lisa Ford and Tim Rowse (eds), *Between Indigenous and Settler Governance* (Routledge, 2012) 59, 64; and Ronald Berndt, 'A Profile of Good and Bad in Australian Aboriginal Religion' in Max Charlesworth (ed), *Religious Business: Essays on Australian Aboriginal Spirituality* (Cambridge University Press, 1998) 24. For cultural comparisons see works such as David Pratten, *The*

Australian contemporary law regarding identities does not rely on metaphysical explanation. In making sense of physical and mental phenomena its categorisation of what is agentic instead encompasses corporate persons and human animals, along with the state, but excludes other animals, plants, artificial intelligence and entities such as demons or ghosts that have been a major feature of past legal regimes. In terms of rationality that exclusion is unsurprising but, as discussed below and in Chapters Five, Seven and Eleven, is noteworthy because it highlights questions about the nature of legal identity and is accordingly relevant to this dissertation.

This chapter initially explores what is meant by a 'foundational legal identity', highlighting attributes found in all Australian legal identities. The chapter demonstrates claims in preceding pages regarding contingency by looking at the categorisation and identities – such as that of the slave – that although once profoundly significant for the state and individuals no longer have the same meaning and same impact.[12] It notes that names and other identifiers are administratively convenient, in particular as the basis of disambiguation between similar entities, and may be important for an individual's self-concept[13] and thus flourishing but are not foundational. You are, for example, a legal person in the absence of a personal name or readily discernable birth date or signature, albeit as incidents such as the detention of Cornelia Rau and deportation of Vivien Alvarez demonstrate, the absence of agreed identifiers may inhibit the assertion of rights.[14]

Man-Leopard Murders: History and Society in Colonial Nigeria (Indiana University Press, 2007); Nancy Caciola, *Discerning Spirits: Divine And Demonic Possession in the Middle Ages* (Cornell University Press, 2003); and Juanita Chaves, 'Latin America: Criminal Justice and Indigenous People in Colombia' (1999) 4(23) *Indigenous Law Bulletin* 26.

[12] The taxonomy from Justinian that forms an epigraph to this chapter for example, after dividing law into that concerning persons, things and actions, states 'The chief division in the rights of persons is this: men are all either free or slaves'. Alan Watson (ed), *The Digest of Justinian* (Alan Watson trans, University of Pennsylvania Press, 1998) vol 1, 1:III.

[13] Dietz Bering, *The Stigma of Names: Antisemitism in German Daily Life, 1812-1933* (University of Michigan Press, 1991) 51 and 214; Julia Kushner, 'The Right To Control One's Name' (2009) 57 *UCLA Law Review* 313; Elizabeth Emens, 'Changing Name Changing: Framing Rules and the Future of Marital Names' (2007) 74(3) *University of Chicago Law Review* 761; and Aeyal Gross, 'Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names' (1996) 9 *Harvard Human Rights Journal* 269. Naming regimes are discussed in Chapters Five and Eight.

[14] Australian Department of Immigration and Multicultural and Indigenous Affairs, *Report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005); and Australian Department of Immigration and Multicultural and Indigenous Affairs, *Report of the Inquiry into the circumstances of the Vivian Alvarez matter* (2005).

The chapter next discusses the state as the basis of legal identity in contemporary Australia. It notes demarcation through the identity of 'citizen' and non-citizen. The latter is an exclusory or 'others' categorisation that includes identities of 'alien' or 'refugee' and has non-trivial consequences for the flourishing discussed in the earlier chapters. The chapter indicates how the identities come into being and how they are signified. Characterisation in domestic and international law of the state as a legal person – including its personification as 'the Crown'[15] – is noted, as a basis for a more detailed discussion in Chapter Five of identities such as the monarch that have a functional and/or symbolic significance.

The chapter then considers questions about what is agentic, in particular the status of the live and dead human animal. The chapter discusses why life, or qualities of 'liveness', is foundational. It notes tensions in contemporary law's reception of ethno-religious belief that attributes agency to metaphysical entities such as Dreamtime creatures or the deity featured in the Governor-General's oath of office, arguing that although belief in the metaphysical is tacitly encouraged through the taxation system and discrimination law the 'spiritual' is not regarded as agentic and accordingly does not have a legal identity. (Australian law's recognition of inanimate legal persons such as corporations is explored in more detail in Chapter Seven).

In contrast to some theorists highlighted in the preceding chapter, the author argues that ethnicity, class, religious affiliation and gender are significant but not foundational features of contemporary Australian law. As with other attributes such as sexual affinity, they may be profoundly important for an individual's self-concept.[16] They are however *not* foundational. Much social and thence legal activity in Australia is blind to colour, class, religion or gender; those identities are derivative rather than being legally presupposed and thus foundational. The chapter accordingly places gender and ethnicity in context as non-foundational features – patterns in the carpet – in the current Australian identity regime and discusses their greater significance in historic law.

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[15] For example Rebecca LaForgia, 'Attorney General, Chief Law Officer of the Crown: But where is the law?' (2003) 28(4) *Alternative Law Journal* 163; *Work Health and Safety Act 2012* (Tas) s 247; *Work Health and Safety Act 2011* (NSW) s 247; *Bell v Cribb* [2012] WASCA 234; and *R v Dalton* [2011] SASCFC 125.

[16] Jeffrey Weeks, 'Questions of identity' in Pat Caplan (ed), *The Cultural Construction of Sexuality* (Routledge, 1987) 31, 31.

The chapter concludes with a discussion of implications. Those implications include how contemporary law deals with uncertainties and inconsistencies regarding identity categorisation. The discussion notes the significance of anti-discrimination measures in shaping community values and thereby reducing perceptions that particular attributes, such as being an Indigenous person or an adherent of the Church of England, constitute a foundational identity. The discussion also grounds the exploration in Chapters Seven, Nine and Eleven of the objectification or abstraction inherent in 'seeing like a state', in other words regarding individuals as manifestations of a category of identities rather than unique people. In essence, it suggests that we should aspire to see like Kant or Nussbaum rather than see like a state.

Understanding by categorising identities

The initial chapter of this dissertation indicated that people in Australia have multiple legal identities – a cluster of identities.

A cluster for example might include the identities of natural person, male, adult, parent, licensed driver, real property owner rather than vagrant, taxpayer, citizen, Indigenous person, disabled person, or legal practitioner.

Those identities may reflect social roles or physical attributes. They are often elided as 'the legal person'. Different identities may instead be unrecognised by some observers in day to day life or disregarded by theorists who – consistent with Isaiah Berlin's 'hedgehog and fox' analogy[17] noted in Chapter Two – know 'one big thing', that thing being class or gender or ethnicity or other determinative attribute used by identity theorists such as Bell or MacKinnon.

Some identities are unimportant for the person's self-concept. Others may be important to the individual but unrecognised by the state or perceived by the individual as being undervalued by the state.[18] Some can be adopted and abandoned

[17] Isaiah Berlin, *The Hedgehog and the Fox: an Essay on Tolstoy's View of History* (Weidenfeld and Nicolson, 1st ed, 1954).
[18] A person who has a physical or psychological disability, such as blindness, may consider that attribute as being determinative of their flourishing relative to peers and in isolation. See Chapter Four below.

with little effort and few consequences. Some rarely come into question – they are invisible because normative – or are not subverted.

University students may, for example, need to formally specify an ethnic identity for the first and only time when they are asked to meet the expectations of the 'information state' or 'therapeutic state'[19] by ticking boxes to indicate that they are/not an Aboriginal or Torres Strait Islander Person (two contemporary legal identities) or that they are from a Non English Speaking Background,[20] the latter serving as a surrogate measure of ethnicity. In contrast to some regimes, ethnicity or ethno-religious affiliation is not legally determinative in the Australia of 2017 when using public transport,[21] buying a coffee, visiting a public park or playground,[22] owning a pet,[23] marrying[24] or other matters relevant to the enjoyment of life and participation in civil society.[25] (It may result in discourtesy, violence or other discrimination addressable through criminal, anti-discrimination or other Australian law that recognises or does not recognise particular attributes.)[26]

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[19] James Nolan Jr, *The Therapeutic State: Justifying Government at Century's End* (New York University Press, 1998); Andrew Polsky, *The Rise of the Therapeutic State* (Princeton University Press, 1993); and Michael Humphrey, 'Reconciliation and the therapeutic state' (2005) 26(3) *Journal of Intercultural Studies* 203.

[20] For issues with NESB categorization and data collection see in particular Helen Borland and Amanda Pearce, 'Categories And Categorisation in the NESB Debate: Making Sense of Student Success' in *Proceedings of the 1997 HERDSA Annual International Conference: Advancing International Perspectives* (Higher Education Research & Development Society of Australasia, 1998) 104. Use of other labels such as CALD (Culturally & Linguistically Diverse) in identity construction and associated notions of 'cultural competency' do not appear to have gained substantial traction outside the healthcare sector, discussed in Bronwyn Fredericks and Marlene Thompson, 'Collaborative voices: Ongoing reflections on cultural competency and the health care of Australian Indigenous people' (2010) 13(3) *Journal of Australian Indigenous Issues* 10.

[21] Among writing on past instances of ethno-religious sorting see Gordon Pirie, 'Law, Lawyers and Racially Segregated Public Transport in South Africa' (1992) 51(2) *African Studies* 243; Peter Tibor Nagy, 'The Numerus Clausus In Inter-War Hungary' (2005 35(1) *East European Jewish Affairs* 13; and Randall Kennedy, 'Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott' (1989) 98(6) *Yale Law Journal* 999.

[22] Ruth Rogaski, *Hygienic Modernity: Meanings of Health and Disease in Treaty-Port China* (University of California, 2004) 133; Jacob Borut, 'Struggles for Spaces: Where Could Jews Spend Free Time in Nazi Germany?' (2011) 56(1) *Leo Baeck Institute Yearbook* 307; and Victoria Wolcott, *Race, Riots, and Roller Coasters: The Struggle over Segregated Recreation in America* (University of Pennsylvania Press, 2012) 183.

[23] Beate Meyer, Hermann Simon and Chana Schütz, *Jews in Nazi Berlin: From Kristallnacht to Liberation* (University of Chicago Press, 2009) 92.

[24] Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford University Press, 2009); Patricia Jacobs, 'Science and Veiled Assumptions: Miscegenation in Western Australia 1930-37' (1987) II *Australian Aboriginal Studies* 15; Katherine Ellinghaus, 'Absorbing the "Aboriginal problem": controlling interracial marriage in Australia in the Late 19th and Early 20th centuries' (2003) 27 *Aboriginal history* 183; and Mitchell Rolls, 'The changing politics of miscegenation' (2005) 29 *Aboriginal History* 64. For perspectives see Andrew Koppelman, 'Same-Sex Marriage and Public Policy: The Miscegenation Precedents' (1996) 16 *QLR* 105; and Patricia Szobar, 'Telling sexual stories in the Nazi courts of law: race defilement in Germany, 1933 to 1945' (2002) 11(1) *Journal of the History of Sexuality* 131.

[25] As the immediately preceding footnotes indicate, segregated public transport, parks and other 'social spaces' were a feature of parts of the United States, Nazi Germany and Western concession cities (such as Shanghai) last century. Statute-based restrictions on the sale of alcohol and adult videos/magazines within some parts of the Northern Territory at the moment tacitly discriminate against Indigenous people.

[26] See for example *Racial Discrimination Act 1974* (Cth); *Racial Vilification Act 1996* (SA); *Racial and Religious Tolerance Act 2001* (Vic); and *Anti-Discrimination Act 1977* (NSW).

The cluster of identities may vary over time. No one, for example, is born a mother[27] (and thus eligible to receive a range of allowances[28] and be protected against discrimination on the basis of motherhood)[29] or is born as an 'aged person', an identity with consequences such as entitlement of the individual and other entities to state support.[30] Changing social practice and health technologies mean that gender identity may change through gender reassignment, [31] a mutability of what was for most of history considered to be a stable body, and that public administration may recognise a gender identity beyond the male/female binary.[32]

Foundational and Derivative Identities

Within the cluster some identities are functionally more significant than others. Some are the prerequisites for other legal identities. Those prerequisites are **foundational** identities. They are identities that must be discernable for the derivative identities (such as person of fixed address, bankrupt, divorced person, police officer) to have a legal meaning, in other words ultimately be determinative in judicial proceedings. Meaning as what is juridically determinative is consistent with pragmatism's answer – encapsulated in the aphorism by Holmes about 'prediction' – to the question 'what is law?'.

The identity of 'natural person' (discussed below) is for example the foundation for the legal identity of licensed driver; a company – another entity that has a legal identity[33] – may own a fleet of cars but is not licensed to drive them.[34] A natural

[27] Note that being a female parent, popularly known as a mother, does not necessarily involve giving birth. See for example *Assisted Reproductive Treatment Act 2008* (Vic) and *Family Relationships Act 1975* (SA) regarding the identity of 'surrogate mother'.
[28] *Australia Constitution* s 51(xxiiiA).
[29] *Sex Discrimination Act 1984* (Cth) ss 7 and 7AA; and *Anti-Discrimination Act 1991* (Qld) s 7.
[30] *Aged Persons Hostels Act 1974* (Cth); *Aged Care Act 1997* (Cth); *Passenger Transport Regulation 2007* (NSW) Reg 68*: Seating on buses for aged persons or persons with a disability*; and *Formosa and Secretary Department of Family and Community Services* [2002] AATA 303.
[31] See for example *Sexual Reassignment Act 1988* (SA); *Gender Reassignment Act 2000* (WA); and Laurie Schrage, 'Sex and Miscibility', in Laurie Schrage (ed), *You've Changed: Sex Reassignment and Personal Identity* (Oxford University Press, 2009) 175.
[32] *Norrie v NSW Registrar of Births Deaths and Marriages* [2013] NSWCA 145; *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11; and Theodore Bennett, ''No Man's Land': Non-binary Sex Identification in Australian Law and Policy' (2014) 37(3) *UNSW Law Journal* 847.
[33] *Corporations Act 2001* (Cth) s 124(1).
[34] *Road Transport (Driver Licensing) Act 1999* (ACT) ss 3 and 10; and *Road Transport (Driver Licensing) Regulation 2000* (ACT) Reg 28: *Eligibility requirements for licence classes*.

person who is a Swedish citizen may be an adult, may be sane, may be married, may be wealthy and may be sober but those attributes are irrelevant in terms of the Australian franchise because the identity of voter is dependent on the foundational identity of citizenship.[35]

As another example, real property may be held in trust for a deceased person's pet but that feline, as a nonhuman animal, cannot be a trustee or (unlike the artificial persons discussed in Chapter Seven below) own land.

In terms of legal identity the feline has the same invisibility or non-recognition that was challenged in *R v Knowles, ex parte Somerset* by a slave who argued that contact with English soil ended his identity as chattel,[36] a demonstration that – contrary to some readings of Foucault – knowledge is not necessarily repressive, that identity construction is jurisdictionally contingent and that individual agency may result in flourishing. People are not necessarily caged by past identities.

A human cadaver[37] – the inanimate remains of the entity that was formerly a legal person – cannot enter into a contract, marry, sue for defamation, become a corporate director or prime minister or otherwise enjoy a range of derivative identities that are dependent on the foundational identity of being alive.[38] That non-agentic status is unaffected by the legal and non-legal attributes of the deceased person. In Australia, being agentic precedes the derivative identities.

At the most abstract level, what can we say about a foundational identity?

Firstly, that it relates to an entity that both exists within a **jurisdictional** framework (discussed below) and might be recognised within that framework as an entity that has particular qualities. In Australian law the qualities are those that in combination give

[35] *Commonwealth Electoral Act 1918* (Cth) s 93.
[36] *R v Knowles, ex parte Somerset* (1772) 20 State Tr 1. Pointers to work on the legal identity of 'slave' and its consequences are provided later in this chapter.
[37] *Williams v Williams* (1982) 20 Ch D 659; and *Doodeward v Spence* [1908] HCA 45; (1908) 6 CLR 406.
[38] An individual or corporation similarly cannot act as a proxy for the cadaver; criminalisation of offences regarding 'mistreatment' of the cadaver – evident in for example *R v NQ* [2013] QCA 402 and *Crimes Act 1958* (Vic) s 34B – involves action by the state on behalf of the community rather than as an agent for the dead person.

the entity the status of a legal person and that potentially inhibit or facilitate its flourishing.

Secondly, that it relates to an entity that is **agentic**, a term sometimes used to highlight that people are producers rather than merely products of social systems or to highlight people as having the capacity to make choices and impose those choices on the world.[39] In this dissertation the term is used to characterise an entity that has all three qualities of sentience, expressiveness and engagement. Those qualities might be latent or immediately discernable. They imply prospective and retrospective responsibility.[40]

Sentience for the purposes of this dissertation means reception and processing of information about the entity's environment.[41] Expressiveness means doing or refraining from doing, physically or otherwise; typically by interacting with similar entities (other legal persons). It means a purposive reaction to the environment, choice, a non-mechanistic or non-instinctual movement towards an outcome … qualities that are different to the expression evident in automatons and in much of nature. Engagement means adherence to, development of and manipulation of social rules – a dynamic engagement with rules that as Collins notes 'change from place to place, circumstance to circumstance, and time to time'.[42]

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[39] See for example Albert Bandura, 'Social cognitive theory: An agentic perspective' (2001) 52(1) *Annual review of psychology* 1; Diana Coole, 'Rethinking agency: A phenomenological approach to embodiment and agentic capacities' (2005) 53(1) *Political Studies* 124; and Catherine Hartung, *Governing the 'agentic' child citizen: A poststructural analysis of children's participation* (2011 PhD thesis, Faculty of Education, University of Wollongong) 160.

[40] Among works on the notion of responsibility see H L A Hart, 'Legal Responsibility and Excuses' in Hart, *Punishment and Responsibility* (Oxford University Press, 1968) 90; Alexander Brown, *Personal Responsibility: Why It Matters* (Continuum, 2009) 66; Aristotle, *Nicomachean Ethics* in Jonathan Barnes (ed), *The Complete Works of Aristotle II* (W D Ross trans, Princeton University Press, 1984) 1729, 1752 and 1791; Michael Moore, *Placing Blame* (Clarendon Press, 1998); Thomas Nagel, 'Comments: Individual Versus Collective Responsibility' (2004) 72(5) *Fordham Law Review* 2015; Ngaire Naffine, 'Who Are Law's Persons? From Cheshire Cats To Responsible Subjects' (2003) 66(3) *Modern Law Review* 346; Suzanne Uniacke, 'Responsibility and Obligation: Some Kantian Directions' (2005) 13(4) *International Journey of Philosophical Studies* 461; and Thomas Scanlon, 'Justice, Responsibility and the Demands of Equality' in Christine Sypnowich (ed), *The Egalitarian Conscience: Essays in Honour of G A Cohen* (Oxford University Press, 2006) 70.

[41] Bostrom and Sandberg offer an alternative characterisation, with 'cognition' defined as 'the processes an organism uses to organize information. This includes acquiring information (perception), selecting (attention), representing (understanding), and retaining (memory) information, and using it to guide behaviour (reasoning and coordination of motor outputs)'.
Nick Bostrom and Anders Sandberg, 'Cognitive enhancement: methods, ethics, regulatory challenges' (2009) 15(3) *Science and Engineering Ethics* 311, 312.

[42] Harry Collins, *Tacit and Explicit Knowledge* (University of Chicago Press, 2013) 124.

Ontologists, some of whom are highlighted in Chapter One, have grappled with those concepts over at least two millennia and in characterising legal persons have relied on language such as 'intelligence', 'actor', 'will', 'alive', 'reasoning', 'human', 'autonomy', 'animal', 'thinking', 'volitional', 'non-mechanistic' or 'in the image of God'. In categorising entities some thinkers have concentrated on similarities in relation to appearance or capability. Others have parsed entities into groups on the basis of differences.[43] All categorisations – and by implication all of the identities discernible in Australian law – involve both some subjectivity and some difficulty in dealing with inconsistencies.

A severely handicapped child, for example, may have lower communication skills and lower intelligence (in terms of problem solving) than a monkey, crow or parrot[44] but in law that cognitive and communication deficit does not mean that the child ceases to have the legal identity of a human. Pigs and cows can be bought and sold, killed by the owner of those chattels or turned into food (thereby ending their flourishing), on the basis that they are nonhuman animals. Vegetative seniors[45] as manifestations of the foundational identity of 'human' cannot be so commodified. Their qualities of advanced communication and ratiocination are latent, sometimes fictively latent. Former exercise of 'human' attributes privileges them by providing a legal identity that categorically cannot be enjoyed by nonhuman animals, even though on an instance by instance basis those nonhuman animals may be more sentient and expressive than the brain-dead person.

In considering what is agentic in Australian law we can discern three basic categories. The first is Humans (aka live human animals or natural persons). The second is Corporate Persons (also known as artificial persons, including corporations[46] and

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[43] For a perspective see Geoffrey Bowker and Susan Star, *Sorting Things Out: Classification and its Consequences* (MIT Press, 1999) and works on taxonomics noted in preceding pages.

[44] As a point of entry to the very large literature on cognition and communication in nonhuman animals see Edward Wasserman and Thomas Zentall (eds), *Comparative Cognition: Experimental Explorations of Animal Intelligence* (Oxford University Press, 2009); Duane Rumbaugh and David Washburn, *Intelligence of Apes and Other Rational Beings* (Yale University Press, 2003); Irene Pepperberg, *The Alex Studies: Cognitive and Communicative Abilities of Grey Parrots* (Harvard University Press, 2002). See however Thomas Nagel, 'What is it like to be a bat?' (1974) 83(4) *The Philosophical Review* 435; and Michael Tye, 'The problem of simple minds: Is there anything it is like to be a honey bee?' (1997) 88(3) *Philosophical Studies* 289.

[45] *Powers of Attorney Act 1998* (Qld) s 36(2)(a)(ii); *Consent to Medical Treatment and Palliative Care Act 1995* (Tas) s 7; *MC, Re* [2003] QGAAT 13, [2]; and *Tu Tran v Dos Santos* [2008] NSWSC 1216, [191].

[46] Under *Corporations Act 2001* (Cth) s 124(1) a company has 'the legal capacity and powers of an individual both in and outside this jurisdiction'. Overseas jurisdictions may, however, not recognise that capacity and powers.

some unincorporated bodies).[47] The third is Nation States (also artificial persons but with an autonomy that is fundamentally greater than that enjoyed by corporate persons)[48] and subordinate jurisdictions such as the Canadian provinces, German Länder and Australian states/territories.

That categorisation and its consequences are discussed below and in Chapters Seven and Eleven.

We can also discern that law addresses inconsistency or 'poor fit' regarding categorisation through a pragmatic reference to exemplars,[49] that is ideal types that represent or epitomise the key qualities of a class of entities (in other words a legal identity).[50]

That reference is generally tacit. It is for example commonly discernable in jurisprudence featuring the exemplar of the reasonable (and now genderless) man[51] … the 'Man on the Bondi Tram' or 'Clapham Omnibus':[52] respectable, responsible, neither risk-phobic nor especially adventurous, neither stupid nor extraordinarily discriminating,[53] and apparently unemotional in the stoical way enshrined in both

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[47] *Acts Interpretation Act 1901* (Cth) s 2C; *Legislation Act 2001* (ACT) s 160; *Interpretation Act 1987* (NSW) s 21; *Interpretation Act* (NT) s 17; *Acts Interpretation Act 1954* (Qld) s 36; *Acts Interpretation Act 1915* (SA) s 4; *Acts Interpretation Act 1931* (Tas) s 41; *Interpretation of Legislation Act 1984* (Vic) s 38; and *Interpretation Act 1984* (WA) s 5. The 'unnatural' – and potentially 'undead' – identity is explored in Chapter Seven below.

[48] The categorisation on the basis of what is agentic differs from some definitions in Australian statute and case law, which conflate nonhuman person – the corporate person – with 'body politic'. See the discussion in DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) 245-246.

[49] Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685, 1690; Simon Evans, 'The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches' (2006) 29(3) *University of New South Wales Law Journal* 207; and Ron Chen and Jon Hanson, 'Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory' (2004) 77(6) *Southern California Law Review* 1103.

[50] Max Weber, ''Objectivity' in the Social Sciences and Policy', in Edward Shils and Henry Finch (eds), *Methodology of Social Sciences* (Edward Shils and Henry Finch trans, Transaction, new ed, 2011) [trans of 'Die Objektivität sozialwissenschaftlicher und sozialpolitischer Erkentniss' (first published 1904)] 49, 90.

[51] John Cartwright, 'The Fiction of the 'Reasonable Man'' in A G Castermans, J Hijma and K J O Jansen (eds), *Ex Libris Hans Nieuwenhuis* (Kluwer, 2009) 143; and Randy Austin, 'Better Off with the Reasonable Man Dead, or the Reasonable Man Did the Darndest Things' (1992) 2 *Brigham Young University Law Review* 479. See also Michael Saltman, *The Demise of the Reasonable Man: A Cross-Cultural Study of a Legal Concept* (Transaction, 1991); and Susanna Blumenthal, 'The Default Legal Person' (2007) 54 *UCLA Law Review* 1, 35.

[52] *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100, Collins J at 109. Note also *Vaughan v Menlove* (1837) 132 ER 490.

[53] *Nomikos Papatonakis v Australian Telecommunications Commission* [1985] HCA 3; (1985) 156 CLR 7, Deane J at [36]. As illustrations of law's reliance on notions of the 'ordinary' or 'reasonable' man see *Australian Woollen Mills Ltd v F S Walton & Co Ltd* (1937) 58 CLR 641; *Sungravure Pty Ltd v Meani* [1964] HCA 16; *Kiriwellage v Best & Less Pty Ltd* [2012] VSC 620; *R v T, TL* [2012] SADC 156; and *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34.

popular cultural representations about 'the Aussie bloke'[54] and jurisprudence regarding psychiatric injury.[55]

It is pragmatic because Australian courts in interpreting statutes are sensitive to context,[56] the sensitivity highlighted[57] by Minow and Spelman (quoted in Chapter One and consistent with Nussbaum's respect for diversity), rather than for example being epistemologically straitjacketed by narrow dictionary definitions.

Contingency and Categorisation

In thinking about foundational and derivative identities it is useful to be conscious that this dissertation centres on contemporary Australian law, in other words a post-industrial liberal democratic regime that relies on certain social norms, economic structures and legal identities.

Australia is however one regime among many. If we momentarily look beyond that regime we can see that foundational identities, along with the legal system of which they form a part, are culturally and temporally contingent.[58] As indicated in Chapter One, that contingency reflects public/private power and the changing ways that communities rather than individuals conceptualise the world, including valorisation of dignity, the balance between individual rights and social duties, and differing notions of justice or simply what is human.[59]

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[54] Susan Dermody and Elizabeth Jacka: 'The essential Australian is male, working-class, sardonic, laconic, loyal to his mates, unimpressed by rank, an improviser, non-conformist, and so on. These virtues are defined and redefined under the harsh conditions of the bush, workplace, war or sport, in which women, and the feminine qualities, are considered to be beside the point'. Susan Dermody and Elizabeth Jacka, *The Screening of Australia: Anatomy of a National Cinema* (Currency Press, 1988) vol 2, 62.
[55] Note *Tame v New South Wales* [2002] HCA 35; (2002) 211 CLR 317; *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 214 CLR 269; and *Jaensch v Coffey* [1984] HCA 52; (1984) 155 CLR 549.
[56] D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) 245.
[57] Martha Minow and Elizabeth Spelman, 'In Context' (1990) 63(6) *Southern California Law Review* 1597, 1651.
[58] As noted in Chapter One, value schemas such as those espoused by Rawls, Nussbaum and Gewirth (or by theorists such as Evgeny Pashukanas, John Finnis, Thomas Aquinas, Catherine MacKinnon and Muhammad ibn Abd al-Wahhab) provide a basis for appraising different regimes and by extension specific theorists.
[59] Paul de Hert and Serge Gutwirth, 'Rawls' Political Conception of Rights and Liberties: An unliberal but pragmatic approach to the problems of harmonization and globalisation' in Mark van Hoecke (ed), *Epistemology and Methodology of Comparative Law in the light of European Integration* (Hart, 2004) 317.

The legal identity of 'slave', in other words a human animal who was a chattel ('like stock on a farm' in the words of Lord Hardwicke),[60] was for example a feature of Western legal history since before the Roman empire. It was an identity accepted by many jurists as unremarkable, as proper or as a regrettable necessity.[61] Identity as a slave[62] determined that person's existence, along with that of the individual's offspring. It was more important than attributes such as age, gender, fertility, language.[63] The identity might have come into being when the person was born, in other words through being born as the child of slaves (and thus inheriting their legal identity), or through the imposition of civil death in conjunction with war or another misfortune.[64] As Davis notes, it represented the negation of personal choice and desire, a legal negation – enforceable through the courts – that excluded the person from humanity and fundamentally affected opportunities for flourishing.[65]

Chapter One of this dissertation contended that, contrary to much postmodern theorisation, all facts are not equal and valorisation need not be arbitrary.

From the perspective of flourishing we can accordingly celebrate the contingency that means the identity has passed out of existence in Australia, the United Kingdom[66] and United States.[67] Instead, in current Australian law a slave is firstly a person rather

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[60] *Pearne v Lisle* (1749) 27 ER 47. See also James Oldham, 'New light on Mansfield and slavery' (1988) 27(1) *The Journal of British Studies* 45; and A Leon Higginbotham Jr and Barbara Kopytoff, 'Property First, Humanity Second: The Recognition of the Slave's Human Nature in Virginia Civil Law' (1989) 50(3) *Ohio State Law Journal* 511.

[61] See for example Peter Garnsey, *Ideas of Slavery from Aristotle to Augustine* (Cambridge University Press, 1996); Alan Watson, *Roman Slave Law* (Johns Hopkins University Press, 1987); James Muldoon, 'Spiritual Freedom - Physical Slavery: The Medieval Church and Slavery' (2005) 3(1) *Ave Maria Law Review* 69; David Brion Davis, *The Problem of Slavery in Western Culture* (Cornell University Press, 1966); Eugene Genovese and Elizabeth Fox-Genovese, *The Mind of the Master Class: History and Faith in the Southern Slaveholders' Worldview* (Cambridge University Press, 2005); Paul Finkelman, 'Defining Slavery Under a 'Government Instituted for the Protection of the Rights of Mankind' (2012) 35 *Hamline Law Review* 551; and Jean Allain (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary* (Oxford University Press, 2012).

[62] In construing legal identity in terms of consequences, in line with the conceptualisation in Chapter One above, we can see that the consequences potentially encompassed involuntary branding or other marking, castration or other injury, separation from loved ones, restrictions on movement and attire, sexual servitude and inability to own real property … identity as the denial of what goes to make life meaningful, desirable or merely bearable for many people.

[63] Those attributes might be reflected in valuation of the slave within a market; measures of personal esteem, language or other skills and experience are typically not legal identities although they may signify or assist an individual's attainment of a legal identity through for example appointment to a statutory position.

[64] Changing conceptions of civil death are explored in Chapter Five below.

[65] David Brion Davis, *The Problem of Slavery in Western Culture* (Cornell University Press, 1966) 64.

[66] *R v Knowles, ex parte Somerset* (1772) 20 State Tr 1; *Slavery Abolition Act 1833* (Imp) 3 & 4 Will. IV c 73. See also George Van Cleve, 'Somerset's Case and its Antecedents in Imperial Perspective' (2006) 24(3) *Law and History Review* 601.

[67] *13th Amendment to the US Constitution* (1865). See also Harold Holzer and Sara Gabbard (eds), *Lincoln and Freedom: Slavery, Emancipation, and the Thirteenth Amendment* (SIU Press, 2007).

than a commodity and secondly a victim – someone who has been illegally denied rights.[68] In essence, the identity of slave represents a denial of that person's opportunities for self-fulfilment and is contrary to the dignity that is central to the flourishing discussed in the first chapters of this dissertation. In contemporary Australia it also encourages us to regard the individual as someone who should be assisted to escape from that deleterious identity.

If we use notions of flourishing to differentiate between desirable and undesirable legal frameworks we can similarly celebrate the demise of *ancien regime* legal identity schemes that divided humans into members of the aristocracy (highly individuated 'lords of creation'[69] with substantial legal immunities, privileges and social markers such as duelling)[70] from an 'others' category of humans – such as peasants and the urban poor – that embodied civil disabilities. Skinner for example has suggested[71] that the birth of the modern state was marked by ongoing winding-back of 'benefit of clergy' exemption from taxation[72] and forced labour,[73] and ending the exemption of elites from ordinary judicial processes.[74] What is less commonly noted is that such valorisation both provided the 'lower orders' with an incentive to become an aristocrat, for example by purchasing a patent of nobility (buying a desired legal identity that would thereafter be transmissible by blood),[75] and simultaneously led the blue-blooded to advocate restrictions on the inflation of a particularly valuable

[68] Note in particular *R v Tang* (2008) 237 CLR 1; and *Criminal Code Act 1995* (Cth) ss 270.1 and 270.3(1)(a). See also Irina Kolodizner, 'R v Tang: Developing an Australian Anti-Slavery Jurisprudence' (2009) 31(3) *Sydney Law Review* 487.
[69] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Vintage, 1979) [trans of *Surveiller et punir: Naissance de la Prison (*first published 1975)] 193.
[70] Victor Kiernan, *The Duel in European History: Honour and the Reign of Aristocracy* (Oxford University Press, 1988). For emulation of that social signifier see Markku Peltonen, *The Duel in Early Modern England: Civility, Politeness and Honour* (Cambridge University Press, 2003); Kevin McAleer, *Duelling: The Cult of Honor in Fin-de-Siecle Germany* (Princeton University Press, 1994); Mika LaVaque-Manty, 'Dueling for Equality: Masculine Honor and the Modern Politics of Dignity' (2006) 34(6) *Political Theory* 715; Jeremy Horder, 'The Duel and the English Law of Homicide' (1992) 12(3) *Oxford Journal of Legal Studies* 419; and Harwell Wells, 'The End of the Affair? Anti-Duelling Laws and Social Norms in Antebellum America' (2001) 54(4) *Vanderbilt Law Review* 1805.
[71] Quentin Skinner, *The Foundations of Modern Political Thought, Vol. 2: The Reformation* (Cambridge University Press, 1978) 58.
[72] John Kautsky, *The Politics of Aristocratic Empires* (Transaction, 1997) 155; George Rude, *Europe in the Eighteenth Century: Aristocracy and the Bourgeois Challenge* (Harvard University Press, 1972) 75 and 113; William Doyle, *Aristocracy and its Enemies in the Age of Revolution* (Oxford University Press, 2009) 174.
[73] William Doyle, *Aristocracy and its Enemies in the Age of Revolution* (Oxford University Press, 2009) 13.
[74] Michael Bush, *The English Aristocracy: A Comparative Synthesis* (Manchester University Press, 1984) 20-23; Michael Bush, *Noble Privilege* (Manchester University Press, 1983) 69; and Colin Lovell, 'The Trial of Peers in Great Britain' (1949) 55(1) *American Historical Review* 69.
[75] Quentin Skinner, *The Foundations of Modern Political Thought, Vol 2: The Age of Reformation* (Cambridge University Press, 1978) 258; Michael Bush, *Rich Noble, Poor Noble* (Manchester University Press, 1988) 52; Anthony Cardoza, *Aristocrats in Bourgeois Italy: The Piedmontese Nobility, 1861-1930* (Cambridge University Press, 2002) 40. Contemporary scams involving 'lord of the manor' rackets – ie deception in relation to acquisition of status rather than legal immunities – are referred to in Chapter Nine below.

legal identity.[76] Those restrictions – an expression of category policing – responded to an ongoing shift to a money economy in which cash was a solvent of the mediaeval identity framework centred on lineage, a patriarchal 'blood' based identity ultimately derived from physical force and contingency, such as which sovereign lawmaker was fatally injured at the Battle of Hastings. Aristocratic lineage as a constitutional basis of UK law making was durable, being fundamentally reshaped as late as 1999.[77]

'Category policing' is a feature of most legal systems. In celebrating our contemporary regime we should acknowledge that restrictions on legal recognition as an Australian have been a theme of the nation's history and are an inherent aspect of the modern nation-state rather than an isolated anomaly in identity law.

Such celebration is worth bearing in mind when considering contemporary Australian demarcations noted below, with the identity of refugee[78] for example potentially having profound consequences for that person and family.

States as Identity-makers

Contemporary legal identity is made by the state. That law, overall, is the law of the nation state within which the identity operates.[79]

In terms of legal identities states are important for several reasons.

The first, for many observers the most important reason, is that states provide the framework for the construction of identities in the locations under their control. That framework includes the articulation of particular identities through specific references or definitions in statute and common law, along with supplementary administrative

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[76] Lawrence Stone, 'The Inflation of Honours 1558-1641' (1958) 14 *Past and Present* 45; and Thomas Esper, 'The Odnodvortsy and the Russian Nobility' (1967) 45(104) *The Slavonic and East European Review* 124.
[77] *House of Lords Act 1999* (UK) Eliz II c 34.
[78] *United Nations Convention Relating to the Status of Refugees* (1951). As introductions to the literature see Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (Pluto Press, 1996); Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007); Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers: Refugees and Irregular Migration in Australia* (Federation Press, 2nd ed, 2006); and Kim Rubenstein, 'The Lottery of Citizenship: The Changing Significance of Birthplace, Territory and Residence to the Australian Membership Prize' in Savitri Taylor (ed), *Nationality, Refugee Status and State Protection: Explorations of the Gap Between Man and Citizen* (Federation Press, 2005) 45.
[79] The qualification 'overall' acknowledges that some but not all legal identities within a particular jurisdiction are likely to be determined through reference to formal international agreements and through practice norms.

statements and tests used by public/private sector entities. It also includes determination by courts and tribunals, agencies of the state, on an instance by instance basis. Recall that a legal identity is what *law* regards as an identity, irrespective of an individual's self-concept or beliefs of a small group of people contrary to the law.

From that perspective identity is what is subject to validation in court when contested. A foundational identity therefore is being subject to a state's law. Legal identity is a matter of jurisdiction and rule-making, rather than something that is transcendent.

One consequence is that some theorists have argued that justice demands the elimination or restriction of the state, a thought experiment that raises questions about the state as a discrete legal identity (discussed in later pages of this dissertation) and as the entity that in providing a framework for legal identities has popular legitimacy.

Stevens, for example, in *States Without Nations*[80] calls for the ending of laws regarding birthright citizenship, inheritance, marriage, and private ownership of land (all involving legal identities) to end violence, poverty and injustice.[81] Others, such as Weissbrodt,[82] have emphasised the need for recognition of the rights of citizens and non-citizens alike, irrespective of whether 'aliens' are seeking refuge from persecution or merely engaging in short/long term 'economic migration' with no expectation of gaining citizenship.[83] Wilsher warns that the contemporary liberal democratic state preserves its autonomy by restricting membership.[84] There are

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[80] Jacqueline Stevens, *States Without Nations: Citizenship for Mortals* (Columbia University Press, 2010). See however questions about potential consequences of 'unmooring law from the state' in Karen Knop, 'State Law Without Its State' in Austin Sarat, Lawrence Douglas and Martha Umphrey (eds), *Law Without Nations* (Stanford University Press, 2010) 66.

[81] Amy Brandzel goes somewhat further, claiming that there is 'nothing redeemable about citizenship, nothing worth salvaging or sustaining in the name of 'community', practice, or belonging', with citizenship being 'a violent dehumanizing mechanism that makes the comparative devaluing of human lives seem commonsensical, logical and even necessary'. Amy Brandzel, *Against Citizenship: The Violence of the Normative* (University of Illinois Press, 2016) jacket.

[82] David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008).

[83] See for example Paul de Guchteneire and Antoine Pecoud, 'The UN Convention on Migrant Workers Rights' in Richard Cholewinski, Paul de Guchteneire and Antoine Pecoud (eds), *Migration and Human Rights* (Cambridge University Press, 2009) 1; and Graziano Battistella, 'Migration and Human Rights: The Uneasy but Essential Relationship' in the same volume, 47. Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge University Press, 2000) discusses the English origins of a fundamental Australian division of people into citizens and non-citizens, a demarcation that is potentially as significant in daily life as the gender binary examined in Chapters Five and Six of this dissertation and central to the way that identity theorists such as Butler understand law.

[84] Daniel Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge University Press, 2012) 17. See also Anna Yeatman, 'Global Ethics, Australian Citizenship and the 'Boat People': A Symposium' (2003) 39(1) *Journal of Sociology* 15.

discernable tensions in both public policy and jurisprudence in Australia regarding who gets 'rescued' by being allowed to become a citizen (with full rights and responsibilities) or is allowed half-way across the legal border between 'citizen and man'[85] as a resident without citizenship or instead is excluded through for example forced return to the jurisdiction of origin. That is illustrated through recent judgments such as *Plaintiff M68-2015*.[86]

In essence, states provide the framework for making, enforcing and contesting identity rules.

The second reason that states are important is that states determine membership, full or otherwise, of the 'national community' in areas where state power is effective.[87] As an individual I can assert various identities. In the absence of power an assertion that is contrary to law will not have legal effect (will not be legally recognised as legitimate) and is likely to result in sanctions – one of the consequences referred to in the initial chapters as the basis for conceptualising identity – that include imprisonment.

Readers may wish to conduct a thought experiment: contemplate the difference between major disregard of road rules as an ordinary Australian (one legal identity) and as a diplomat of an overseas government (an 'other' legal identity, one that in the hypothetical would be salient if the disregard had resulted in death of a pedestrian).[88] Individuals who declare that they are independent states and thus not subject to Australian law regarding taxation, defamation, intellectual property infringement, child sex offences, drug trafficking and corporate regulation would similarly find their claims are ineffective.[89]

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[85] I owe this image to Savitri Taylor, 'Introduction' in Savitri Taylor (ed), *Nationality, Refugee Status and State Protection: Explorations of the Gap Between Man and Citizen* (Federation Press, 2005) 1.
[86] *Plaintiff M68-2015 v Minister for Immigration and Border Protection* [2016] HCA 1.
[87] Christian Joppke, 'Transformation of Citizenship: Status, Rights, Identity' (2007) 11(1) *Citizenship Studies* 37, 38.
[88] *Diplomatic Privileges and Immunities Act 1967* (Cth) ss 7 and 11. For an indication of how courts interpret that statute's characterisation of identity see *Naoum (Consul General for Lebanon in Sydney) v Dannawi* [2011] NSWSC 23.
[89] Note the comment in *ACCC v Purple Harmony Plates Pty Ltd (No 3)* [2002] FCA 1487, Goldberg J at [31]: 'Mr Lyster is labouring under a delusion that he is the head of a non-existent state and that his conduct is beyond the reach of the laws of Australia. Mr Lyster should realise he is quite wrong in this respect'. The self-styled Prince John, Grand Duke of Avram, Cardinal Archbishop, Earl of Enoch, Marquis of Mathra, Viscount Ulom, Lord Rama, Knight of Bountiful Endeavours, Knight of Sword, Knight of Merit (aka John Rudge) is reported to have a similar delusion: Mark Dapin, *Strange Country* (Pan, 2008) 8-9. See also *Australian Prudential Regulation*

The third reason is that the state is embodied through legal identities that have symbolic and substantive power, for example the Australian monarch and vice-regal 'avatars' such as the NSW Governor,[90] the police officer who is authorised to enforce law about speeding[91] or in exceptional instances to exercise the state's monopoly of lethal force, and the judge who is authorised to determine the legality of that officer's actions.[92]

Hobbes, in the frontispiece[93] to *Leviathan*, pictured the state as an amalgamation of faces and bodies – a composite body made up of the myriad and legitimised through the assent of those people. We can think of the state as discrete, autonomous and an abstraction. We can instead think of it as a Leviathan-like collection of interacting legal identities: police,[94] the Commonwealth Auditor-General,[95] prison officers,[96] abattoir inspectors,[97] magistrates,[98] national census personnel,[99] and the Inspector-General of Intelligence & Security.[100] An attribute common to all of those positions – the collection of derivative identities – is that they are established under Australian law. Jurisdiction is the basis of the foundational identity.

The state is the maker – and breaker – of legal identities within Australia. Its 'word' – to use Friel's characterisation – is responsible for bringing into being whatever is legally made. We conceptualise 'failed states' as those polities that are unable to devise and implement identity rules on a coherent and systematic basis, thus lacking

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Authority v Siminton (No 6) [2007] FCA 1608 dealing with the Principality of Camside; *Casley v Commissioner of Taxation* [2007] HCATrans 590 and *Deputy Commissioner of Taxation v Casley* [2017] WASC 161 regarding the Hutt River Principality; *Roman & Anor v Commonwealth of Australia & Ors* [2004] NTSC 9; *Williamson v Hodgson* [2010] WASC 95, [37]-[45]; *Maxwell (also known as Harley Robert Williamson) v Bruse* [2012] WASC 12, [22]-[24]; and the non-recognition of the Avram Grand Duchy's autonomy implicit in *Avram v Official Trustee in Bankruptcy* [2001] FCA 1480. See also Chapter Five below.

[90] Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2009).

[91] *Road Traffic Act 1961* (SA) s 37; and *Road Safety Act 1986* (Vic) ss 13 and 84ZC.

[92] See Max Weber, 'Politics as a Vocation', in Hans Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Hans Gerth and C Wright Mills trans, Routledge, 2nd ed, 1991) [trans of 'Politiks als Beruf' (first published 1919)] 77, 78.

[93] Noel Malcolm, 'General Introduction' in Thomas Hobbes, Noel Malcolm (ed), *Leviathan (The Clarendon Edition of the Works of Thomas Hobbes)* (first published 1651, Clarendon Press, 2012) vol 1, 128 and 134.

[94] *Police Regulation Act 1958* (Vic) s 8(1).

[95] *Auditor-General Act 1997* (Cth) s 8(1) and 8(2).

[96] *Prisons Act 1981* (WA) s 13.

[97] *Meat Hygiene Act 1985* (Tas) s 6.

[98] *Magistrates Act 1991* (Qld) s 5.

[99] *Census and Statistics Act 1905* (Cth) s 16.

[100] *Inspector-General of Intelligence and Security Act 1986* (Cth) s 6.

legitimacy. Stilz, for example, in discussing legitimacy in international law, comments

> a state has rights to a territory if and only if it meets the following four conditions: (a) it effectively implements a system of law regulating property there; (b) its subjects have claims to occupy the territory; (c) its system of law "rules in the name of the people," by protecting basic rights and providing for political participation; and (d) the state is not a usurper.[101]

The final reason is that the state is itself a legal identity – a discrete legal person in international and national law,[102] an entity that for example can sue and be sued,[103] can enter into contracts,[104] be held accountable for breaches of law, can spawn autonomous bodies that are held to have a separate legal identity,[105] and is assumed to act with some rationality. Liberal democratic states exercise constraint in their use of authority, respect diversity and broadly hold themselves – wording that reflects our personification of the state as a legal identity – to be both subject to the law[106] and members of an international community.[107]

From the perspective of flourishing it is preferable for identity as a human or corporation to be situated within a liberal democratic state rather than in Hobbes' anarchic state of nature or 'rule by law' (as distinct from 'rule of law') regimes such

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[101] Anna Stilz, 'Nations, States, and Territory' (2011) 121(3) *Ethics* 572.
[102] Roland Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010) 80; Oleg Tiunov, 'The International Legal Personality of States: Problems and Solutions' (1993) 37 *St Louis University Law Journal* 323.
[103] For example *Kockums AB v Commonwealth of Australia* [2001] FCA 398; *Fernando v Commonwealth of Australia* [2010] FCA 753; *Spencer v Commonwealth of Australia* [2012] FCAFC 169.
[104] See Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 4th ed, 2009) 55; and *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* [1977] HCA 71; (1977) 139 CLR 54, Mason J at 74. As the entity generating the rules for the construction of legal identity the state may – on occasion – exploit mechanisms that give it or its peers immunity from suit. Statutory provisions include *Judiciary Act 1903* (Cth) s 64; *National Health Act 1953* (Cth) s 99ZR; *Australian Sports Anti-Doping Authority Act 2006* (Cth) s 78; *Navigation Act 2012* (Cth) s 324; and *Australian Securities & Investments Commission Act 2001* (Cth) s 246. Instances of litigation include *Commonwealth v Mewett* (1997) 191 CLR 471; *Bell v Western Australia* (2004) 28 WAR 555, 563-564; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575; and *Australian Competition & Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, [64]-[68]. For discussion see Australian Law Reform Commission, *The Judicial Power of the Commonwealth – A Review of the Judiciary Act 1903 and Related Legislation (Report No 92)* (2001); Bede Harris, *A New Constitution for Australia* (Cavendish, 2002) 115-119; Richard Garnett, 'State Immunity and Employment Relations in Canada' (2014) 18 *Canadian Labour & Employment Law Journal* 643; and Bruce Feldthusen, 'Public Authority Immunity from Negligence Liability: Uncertain, Unnecessary, and Unjustified' (2014) 92(2) *Canadian Bar Review* 211.
[105] See for example the discussion in Chapter Seven below of corporations, local government and institutions.
[106] John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 36-37.
[107] Andrew Linklater, *Critical Theory and World Politics: Citizenship, Sovereignty and Humanity* (Routledge, 2007) 63; Jorg Kustermans, 'The state as citizen: state personhood and ideology' (2011) 14(1) *Journal of International Relations and Development* 1.

as the contemporary Peoples' Republic of China,[108] the Kingdom of Saudi Arabia[109] or North Korea.[110]

States as legal identities

We can unpack the notion of foundational identities in relation to jurisdiction – the reach of the state – by looking at citizenship (and non-citizenship identities) and at embodiment. That examination uses generative questions highlighted in Chapter Two.

In grounding the examination it is useful to initially consider what is a state and, by extension, the state as both a discrete political and legal identity.

It is axiomatic – given international law's recognition of the Territorial or Westphalian Principle[111] – that a state is a social, political and administrative entity that is free to legislate and enforce its legislation within its territory (subject to restraints in international law).[112] It is an entity that has a permanent population, identifiable territory, a central government, independence in external relations and recognition by other states.[113] In a liberal democratic nation the state is an autonomous expression of the citizens of that country, an abstraction that is embodied in entities such as a legislature, courts, executive agencies and individuals acting on an official basis (notably implementing law made by the legislature and courts) but is not for example identical with 'the Crown'. That expression is bounded by international and domestic law.[114]

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[108] Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge University Press, 2002) 8; and Richard McGregor, *The Party: The Secret World of China's Communist Rulers* (Penguin, 2010).

[109] Larry Catá Backer, 'Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering' (2009) 16(1) *Indiana Journal of Global Legal Studies* 85, 110; and Muhammad Al-Atawneh, 'Is Saudi Arabia a theocracy? Religion and governance in contemporary Saudi Arabia' (2009) 45(5) *Middle Eastern Studies* 721.

[110] United Nations, Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea (A/HRC/25/63), See also Michael Kirby and Sandeep Gopalan, ''Recalcitrant' States and International Law: The Role of the UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of North Korea' (2015) 37(1) *University of Pennsylvania Journal of International Law* 229.

[111] *Charter of the United Nations* (1945) Art 2(1), reflected in for example *Foreign States Immunities Act 1985* (Cth) s 9. See however the cautions in Keith Suter, *Global Order and Global Disorder: Globalization and the Nation-State* (Praeger, 2003) 82.

[112] Trudy Jacobsen, Charles Sampford and Ramesh Thakur (eds), *Re-envisioning Sovereignty: The End of Westphalia?* (Ashgate, 2008); and Malcolm Shaw, *International Law* (Cambridge University Press, 4th ed, 1997) 331 and 337.

[113] See for example *Montevideo Convention on the Rights and Duties of States 1933*. See also Malcolm Shaw, *International Law* (Cambridge University Press, 4th ed, 1997) 140; and *Ure v The Commonwealth of Australia* [2016] FCAFC 8.

[114] Duncan Kelly, *The Propriety of Liberty: Persons, Passions and Judgement in Modern Political Thought* (Princeton University Press, 2011) 274-275.

The state, on behalf of the citizens – or those citizens with most power[115] – determines the foundational identities of individuals and other entities within its control, a control that is potentially exercised both at the state's borders (and beyond, through reciprocity with other states) and within those borders.[116] Control includes public rules and practices regarding characterisation and testing of what is agentic, as discussed below. Alongside recognition of what is agentic the state is responsible for foundational identities of the citizen and the non-citizen.[117]

The function of that demarcation in Australia reflects the territorial principle. Citizens have both particular rights and obligations to the specific state. People who are non-citizens (a foundational identity that might be parsed as foreign national or stateless person, refugee, foreign resident or otherwise on a functional basis) are subject to the state's laws but typically enjoy weaker rights and potentially fewer obligations,[118] a status discernable in writing from at least the time of Aristotle.[119]

Australian law, for example, regards foreign citizens who are on Australian territory as human animals entitled to some respect (for example to hold real and personal property)[120] irrespective of their nation of origin, but in principle does not allow those aliens[121] to vote in state and national elections or referenda[122] and to become members

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[115] Differentials in power are recognised by authors that range from Aristotle and Aquinas to Buchan, Marx, Butler and Bhabha. Those authors disagree about the appropriateness of particular differentials and about the extent to which individuals/societies can (or should) effect change in legal structures that are founded on nature, the mode of production, knowledge or other heuristic used by the identity theorist.

[116] Roxanne Doty, 'Sovereignty and the nation: constructing the boundaries of national identity' in Thomas Biersteker and Cynthia Weber (eds), *State sovereignty as social construct* (Cambridge University Press, 1996) 121. See also Nick Barber, *The Constitutional State* (Oxford University Press, 2010) analysing the state as a unique social grouping comprising people, territory and institutions bound together by rules.

[117] Kim Rubenstein, 'Citizenship and the Centenary: Inclusion and Exclusion in 20th Century Australia' (2000) 24(3) *Melbourne University Law Review* 576.

[118] Historic and contemporary obligations in Australia, Italy, Israel, Switzerland and other liberal democratic states include compulsory national service, an obligation that on occasion has led some individuals to change their nationality. Issues regarding the benefits of national identity documentation are highlighted in Brad Blitz and Maureen Lynch (eds), *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* (Elgar, 2011).

[119] See for example the discussion in Aristotle, *Politics* in Jonathan Barnes (ed), *The Complete Works of Aristotle II* (Benjamin Jowett trans, Princeton University Press, 1984) 1986, 2023.

[120] See for example *Aliens Act 1913* (Tas) s 3; *Property Law Act 1958* (Vic) s 27; *Property Act 1974* (Qld) s 15A; *Law of Property Act 1936* (SA) s 24; reflecting 11 Will. III c 6 (1698) and 32 Hen. VIII c 16 (1540). See also restrictions on property acquisition under *Foreign Acquisitions and Takeovers Act 1975* (Cth) ss 52, 67(2) and 69(2).

[121] *Australian Constitution* s 51(xix). See *Pochi v Macphee* (1982) 151 CLR 101, Gibbs CJ at 109; and *Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 75 ALJR 1439.

[122] *Commonwealth Electoral Act 1918* (Cth) s 93 is reflected in *Electoral Act 1992* (ACT) s 72; *Parliamentary Electorates and Elections Act 1912* (NSW) s 22; *Electoral Act* (NT) s 21; *Electoral Act 1992* (Qld) s 64; *Electoral*

of the national legislature. (The reference to 'in principle' reflects tacit international acceptance of notions of dual citizenship[123] and moves to allow the Immigration minister to remove Australian citizenship from dual nationals that he deems to be terrorists or terrorist supporters.)[124] Given that non-citizens can be excluded from Australia the law does not regard them as necessarily having the same implied freedom of political communication as Australian citizens.[125] Non-citizens typically require a visa for entry to Australia,[126] remain in Australia at the state's pleasure[127] and if deemed to be present without the state's authorisation can, for example, be detained indefinitely.[128] They can be deported[129] to the nation of which they are citizens, even though they may never have visited that nation and may not speak the national language.[130] Their access to a range of 'non-political' benefits that foster flourishing, such as income support, is more restricted; financial rationality reserves most benefits to those subjects with nationality.[131] Their acquisition of real property and other assets faces restrictions under the Foreign Investments Review regime.[132]

Act 1985 (SA) s 29; *Electoral Act 2004* (Tas) s 31; *Aliens Act 1913* (Tas) s 3; *Electoral Act 2002* (Vic) ss 20 and 87; and *Electoral Act 1907* (WA) s 17.

[123] For Australia see *Re Patterson; Ex parte Taylor* [2001] HCA 51, Gaudron J at [34]. For implications see Tanja Brøndsted Sejersen, '"I Vow to Thee My Countries": The Expansion of Dual Citizenship in the 21st Century' (2008) 42(3) *International Migration Review* 523; and Katharine Betts, 'Democracy and dual citizenship' (2002) 10(1) *People and Place* 57, 66.

[124] See in particular *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth) ss 33AA and 35.

[125] *Newman-Mariotti v Minister for Immigration and Border Protection* [2015] HCATrans 251.

[126] *Migration Act 1958* (Cth) s 29.

[127] *Migration Act 1958* (Cth) ss 4, 7A, 201-203, 501. See for example *Vella v Minister for Immigration and Border Protection* [2015] FCAFC 53 and *Vella v Minister for Immigration and Border Protection & Anor* [2015] HCASL 170, relating to deportation 'in the national interest' of a long-term resident on the basis of character, in other words an executive position with the Rebels motorcycle gang. Other instances of cancellation include *Demillo and Minister for Immigration and Citizenship* [2012] AATA 805; *Sebastian and Minister for Immigration and Multicultural and Indigenous Affairs* [2004] AATA 497, [72]; *Jia Le Geng v Minister for Immigration & Multicultural Affairs* [1999] FCA 951, [18] and [27]; and *Mehta v Minister for Immigration and Border Protection* [2015] FCA 1096, [1] and [12].

[128] *Al-Kateb v Godwin & Ors* [2004] HCA 37; (2004) 219 CLR 562; 208 ALR 124; and *Migration Act 1958* (Cth) ss 183, 189, 191 and 196(4).

[129] *Migration Act 1958* (Cth) s 198.

[130] *Moore v Minister for Immigration and Citizenship* [2007] FCAFC 134; *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121; and *Toia v Minister for Immigration and Citizenship* [2009] FCAFC 79. See also Michael Grewcock, 'Multiple punishments: the detention and removal of convicted non-citizens' (University of New South Wales Faculty of Law Research Series 41, 2009); Michelle Foster, ''An 'Alien' by the Barest of Threads': The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33(2) *Melbourne University Law Review* 483; and Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (UNSW Press, 2007). For denationalization, in other words removal of citizenship, see Chapters Five and Nine below.

[131] See for example the 'ten years residence' requirement in *Social Security Act 1991* (Cth) s 94(1) regarding the Disability Support Pension, illustrated in *El-Menchawy and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2011] AATA 93, [105]-[108]. In contrast see *Health Insurance Act 1973* (Cth) ss 3, 6 and 7; and *National Health Act 1953* (Cth) s 86 regarding eligibility for subsidised medical services and pharmaceuticals respectively. The Productivity Commission in its 2015 draft report on migration noted the privileged status of New Zealanders:

> Under the Trans-Tasman Travel Arrangement, New Zealand citizens can generally enter and live indefinitely in Australia. Under this 'temporary' visa, New Zealand citizens gain unrestricted access to Australia's labour markets. They gain immediate access to family payments and health care under Medicare. But they also face limitations on access to social security and student loans unless they qualify

Identity involves signification, being associated with an identifier and recognised through that association. If the Australian nation state has a legal identity, how is that signified?

We can discern identification at two levels.

One level is that the state is named – the Commonwealth of Australia[133] (and, as a synonym, the Australian Government) – and uses symbols such as the national coat of arms,[134] flag,[135] currency,[136] anthem[137] and holidays.[138] Those symbols serve as shibboleths[139] and may be statutorily protected. Australia is recognised in international law as being a state,[140] through for example discrete membership of international bodies such as the World Intellectual Property Organization and United Nations, exchange of ambassadors with other nations and signature of international agreements.[141]

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for permanent residency under a permanent visa stream. There is no limit on the number of New Zealand citizens permitted to enter and remain in Australia, and more than 600,000 New Zealand citizens are currently 'temporary' residents in Australia.

Productivity Commission, *Draft Report: Migrant Intake* (2015) 23.

[132] For the overall framework see the *Foreign Acquisitions and Takeovers Act 1975* (Cth); and Megan Bowman, George Gilligan and Justin O'Brien, 'Foreign investment law and policy in Australia: a critical analysis' (2014) 8(1) *Law and Financial Markets Review* 65. Complementary legislation includes the *Banking Act 1959* (Cth); *Airports Act 1996* (Cth); *Financial Sector (Shareholdings) Act 1998* (Cth) and *Shipping Registration Act 1991* (Cth).

[133] *Australian Constitution*.

[134] The current national coat of arms was granted by King George V in 1912. Unauthorised use of the Arms may be in breach of the *Criminal Code Act 1995* (Cth) s 145; *Trade Marks Act 1995* (Cth) s 39(2); and *Competition and Consumer Act 2010* (Cth). Importation of goods bearing the Arms is prohibited under Item 15 of Schedule 2 of the *Customs (Prohibited Imports) Regulations*. Individual Australian states protect their 'provincial' arms, flags and emblems, for example *Emblems of Queensland Act 2005* (Qld) ss 3 and 4; and *State Arms, Symbols and Emblems Act 2004* (NSW) ss 4 and 5.

[135] *Flags Act 1953* (Cth). See Carol Foley, *The Australian Flag: Colonial Relic Or Contemporary Icon?* (Federation Press, 1996); Elizabeth Kwan, *Flag and Nation: Australians and their National Flags since 1901* (UNSW Press, 2006); and Jock Given, 'Red, Black, Gold to Australia: Cathy Freeman and the Flags' (1995) 75 *Media Information Australia* 46. For overseas perspectives on the flag as shibboleth see Carolyn Marvin and David Ingle, *Blood Sacrifice and the Nation: Totem Rituals & the American Flag* (Cambridge University Press, 1999); and Michael Geisler (ed), *National Symbols, Fractured Identities: Contesting the National Narrative* (University Press of New England 2005). Recent populist proposals include the *Upholding Australian Values (Protecting Our Flags) Bill 2015* (Vic). 'Flag desecration' is discussed in Chapter Nine below.

[136] *Australian Notes Act 1910* (Cth) and *Currency Act 1965* (Cth).

[137] John Warhurst, 'Nationalism and republicanism in Australia: the evolution of institutions, citizenship and symbols' (1993) 28(4) *Politics* 100; and Australian Bureau of Statistics, *Year Book Australia 2003* (2003) 59. Note that the anthem is not enshrined in the Constitution or in statute. It is instead declared by the national government and has changed over the past century, serving as a shifting marker of national identity.

[138] *ANZAC Day Act 1995* (Cth) s 2; *ANZAC Day Act 1958* (Vic) s 3; *Fair Work Act 2009* (Cth) s 115(1)(ii); and *Holidays Act 1958* (ACT) s 3(1)(a)(ii). See also Kenneth Inglis, 'Australia Day' (1967) 13(49) *Australian Historical Studies* 20.

[139] Bernard Yack, *Nationalism and the Moral Psychology of Community* (University of Chicago Press, 2012) 31.

[140] Hersch Lauterpacht, *Recognition in international law* (Cambridge University Press, 2nd ed, 2013).

[141] *Statute of Westminister Adoption Act 1942* (Cth). See also Senate Legal and Constitutional References Committee, Parliament of Australia, *Trick or Treaty?: Commonwealth Power to Make and Implement Treaties*

At a second level it is embodied through executive and non-executive agencies, through persons (notably the Australian monarch, formally vested with the executive power of the Commonwealth under s 61 of the Constitution and discussed in Chapter Five below)[142] and through identifiers such as the Australian passport[143] that have a statutory basis and that are discussed in Chapters Five and Eight. Given that those signifiers are meaningful, for example possession of an Australian passport ensures readmission to the country from overseas and can serve as proof-of-identity 'breeder document' for commercial transactions, identity as a matter of legal consequences results in a dynamic imperative for subversion and protection of those signifiers.[144]

How did the Australian nation state come about, a question that encourages inferences about its nature? What made it formally leap into being?

From a narrowly legal perspective the state – a national polity – was formally brought into being by a UK statute signed by the British monarch. That statute is the Constitution that now bounds the power of Australia's national government – the legal identity of the national executive is circumscribed – and for example means that state/territory governments through enactment and implementation of non-Commonwealth law continue to have a fundamental role in the creation of legal identities.[145]

From a broader legal perspective, one that takes a pragmatic view of processes and forms, the nation is a result of agreement by people of the British colonies, the UK

(1995); and Hilary Charlesworth, Madeleine Chiam, Devika Hovell and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423.

[142] Note *Australian Constitution* s 59; *Barton v Commonwealth* (1974) 131 CLR 477 and the convention of restraint in the exercise of prerogative powers noted in Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart, 2011) 23. See also Bradley Selway, 'All at Sea: Constitutional Assumptions and the Executive Power of the Commonwealth' (2003) 31 *Federal Law Review* 495; and George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 422.

[143] Jane Doulman and David Lee, *Every Assistance and Protection: A History of the Australian Passport* (Federation Press, 2008). Renaming of the passport in 1949, in other words as an expressly 'Australian' rather than 'British' passport, both reflected and reinforced the progressive emergence of a discrete Australian legal and cultural identity.

[144] Reflexive subversion and protection is discussed in Chapter Eight below.

[145] For 'patriation' as a progressive matter after 1900, through for example the *Statute of Westminster Adoption Act* and *Australia Acts*, see Chapter Five below.

legislature and the British monarch regarding establishment of a federal nation with strong legal ties to the United Kingdom.[146]

Federation as identity generation

In considering that perspective, five comments about identity and federation are important.

The first is that the 'people' were British citizens, an identity that excluded Australian Indigenous people who (as discussed in Chapters Four and Six) were regarded as lacking capacity – or even a future – and thus experienced a range of civil disabilities such as denial of the franchise. The state may, in Homi Bhabha's appropriation of Renan, be a matter of performativity through a 'daily plebiscite' but the legal framework in place in 1900 prevented some Australians from either endorsing federation or claiming another nationality.[147] The 'settler state' disregarded the traditional law of Indigenous people and assigned those people a disadvantageous legal identity.[148] Comprehensive removal of that disadvantage to ensure substantive equality and foster a flourishing that is blind to ethnicity remains an ongoing project for the Australia of 2017.

The second, typically unremarked in studies of Australian law but pertinent to questions of legal identity, is that federation progressively created a new legal identity – that of Australian[149] – and superseded some colonial legal frameworks regarding identity.[150] As the preceding pages have noted, state/territory law in matters ranging

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[146] Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2008) 2; Peter Boyce, *The Queen's Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Federation Press, 2008).

[147] Homi Bhabha, 'DissemiNation: Time, Narrative and the Margins of the Modern Nation' in Homi Bhabha (ed), *Nation and Narration* (Routledge, 1990) 291, 311.

[148] P McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-determination* (Oxford University Press, 2004); and Lester Rigney, 'Epilogue: Can the Settler State Settle with Whom it Colonises? Reasons for Hope and Priorities for Action' in Sarah Maddison and Morgan Brigg (eds), *Unsettling the Settler State. Creativity and Resistance in Indigenous Settler-State Governance* (Federation Press, 2011) 206.

[149] *Statute of Westminster Act 1931* (Imp); *Statute of Westminster Adoption Act 1942* (Cth); *Royal Style and Titles Act 1973* (Cth); and *Australia Act 1986* (Cth). See in particular Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010).

[150] Kirby J in *ACCC v Baxter Health Care Pty Ltd* [2007] HCA 38, [[93] comments

> It is plain from the constitutional text, purpose and history that the [Commonwealth, States and Territories] are not merely a continuation of pre-existing colonies under a different appellation. This would be an impossible notion in the case of the Commonwealth and the Territories of the Commonwealth, which had no earlier existence, as such. But it is equally impossible in the case of the States for, after federation, they existed as

from the registration of births and driver licencing through to admission as a legal practitioner still matters: the Constitution enshrined a federal rather than unitary state. It also reflected and reinforced colonial legislation and jurisprudence superseding what some Australians, as discussed in Chapter Nine, quixotically regard as foundational law and identities under for example the Magna Carta.[151]

Non-discrimination between people in the different states/territories,[152] freedom of movement between those jurisdictions and the tendency towards a common jurisprudence (through adoption of uniform legislation[153] and the binding effect of High Court decisions)[154] mean that we cannot regard a 'state identity' (distinct from the national identity, as in 'Victorian' or 'Queenslander' or 'Territorian') as being foundational.[155]

The third comment is that although the federation movement was an expression of aspirations for a liberal democratic, just and prosperous nation[156] those aspirations were offset by an exclusionism based on anxieties about a non-Anglo-Saxon 'other',[157] and expressed through a succession of statutes that sought to physically exclude members of that 'other' from the new nation's jurisdiction rather than merely

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new governmental entities deriving their legal character and status from the Constitution itself, not from the pre-federation colonies which were thereby terminated'.

[151] *Jackson v Western Australia Police* [2014] WASC 72; *Skyring v Australia & New Zealand Banking Group Ltd* [1994] QCA 143; *Stearman v Taylor* [2014] WASC 247; *Re Patrick Leo Cusack v Australian Electoral Commissioner* [1984] FCA 328, [7]; *Carnes v Essenberg & Ors* [1999] QCA 339; *Nibbs v Devonport City Council* [2015] TASSC 34, [10]; *Lohe v Gunter* [2003] QSC 150; *Re Christopher Robin Fisher and Fay Annette Fisher v Westpac Banking Corporation* [1992] FCA 390, [14]; *Chia Gee v Martin* [1905] HCA 70, (1906) 3 CLR 649, 652; *Shaw & Ors v The State of Western Australia Attorney General Mr Jim McGinty & Anor* [2004] WASC 144 [18]-[19]; *Baker v NSW Police Force* [2014] NSWSC 907, [3]; *Kobylski v Queensland Police Service* [2007] QCA 50; and *Daniels v Deputy Commissioner Of Taxation* [2007] SASC 114, [15].

[152] *Australian Constitution* ss 117 and 109. Note *Street v Queensland Bar Association* (1989) 168 CLR 461, Mason CJ at 485, Dawson J at 541 and Deane J at 522.

[153] Legislative Assembly Standing Committee On Uniform Legislation and Intergovernmental Agreements, Western Australian Parliament, *Uniform Legislation* (1998) 5.

[154] *Australian Constitution* ss 73 and 109.

[155] See further the discussion of local government in Chapter Seven below, and *ACCC v Baxter Health Care Pty Ltd* [2007] HCA 38, Kirby J at [94] and [107].

[156] Ian Marsh, 'The Federation Decade' in John Nethercote (ed), *Liberalism and the Australian Federation* (Federation Press, 2001) 69; George Winterton, 'The Acquisition of Independence' in Robert French, Russ Vince and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 45; Helen Irving, *To Constitute a Nation: a Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 134. See also *Roach v Electoral Commissioner* [2007] HCA 43, Gleeson CJ at [1].

[157] Charles Price, *The Great White Walls are Built: Restrictive Immigration to North America and Australasia 1836-1888* (ANU Press, 1974); Anne Curthoys, 'Liberalism and exclusionism: a prehistory of the White Australia Policy' in Laksiri Jayasuriya, David Walker and Jan Gothard (eds), *Legacies of White Australia: Race, Culture and Nation* (University of Western Australia Press, 2003) 8; and Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men's Countries and the Question of Racial Equality* (Melbourne University Press, 2008) 26.

deny them suffrage or other rights.[158] It is echoed in contemporary 'offshore solution' processing of asylum seekers.[159] Legal action by the Department of Immigration & Border Protection under the *Migration Act 1958* (Cth) and *Australian Citizenship Act 2007* (Cth) along with interpretation by the High Court provides a foundational determination of identity.[160]

The Australian Government, on behalf of the 'Australian People',[161] determines who can become Australian (or visit the jurisdiction) and on what terms. In relation to a sustained legal identity in international law that ability to exclude and police is a marker of the Australian state's effectiveness, in other words identity construed as power rather than individual flourishing and as what Galloway characterises as a legitimate function of the liberal democratic state in contrast to arguments that borders should be open.[162] In formal terms it is a prerogative rather than merely statutory power.[163]

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[158] *Immigration Restriction Act 1901* (Cth); *Pacific Island Labourers Act 1901* (Cth); *Naturalization Act 1903* (Cth); *Contract Immigrants Act 1905* (Cth); *War Precautions Act 1914* (Cth). For an overview of exclusion as a foundation of Federation-era national identity see John Kane, 'Racialism and Democracy' in Geoffrey Stokes (ed), *The Politics of Identity in Australia* (Cambridge University Press, 1997) 122; and Alastair Davidson, *From Subject to Citizen: Australian Citizenship in the Twentieth Century* (Cambridge University Press, 1997) 143.

[159] See *Migration Act 1958* (Cth) ss 4 and 5 regarding 'excised offshore place'; *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* [2010] HCA 41; and *Plaintiff M68-2015 v Minister for Immigration and Border Protection* [2016] HCA 1. For international perspectives questioning notions of Australian exceptionalism in relation to the 'Pacific Solution' see Angus Francis, 'Bringing protection home: healing the schism between international obligations and national safeguards created by extraterritorial processing' (2008) 20(2) *International Journal of Refugee Law* 273; and Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe' (2008) 43(2) *Government and Opposition* 249.

[160] The renaming of the Department of Immigration & Citizenship to the Department of Immigration & Border Protection sends a message to Australians about national values, priorities and anxieties. For a perspective on 'the security message' see Francesco Ragazzi, 'Diasporas, Security, Citizenship' in Xavier Guillaume and Jeff Huysmans (eds), *Citizenship and Security: The Constitution of Political Being* (Routledge, 2013) 147, 147 and 153.

[161] That phrase appears in *Telecommunications Act 1975* (Cth) s 6; *Postal Services Commission Act 1975* (Cth) s 7; *National Library Act 1960* (Cth) s 6; *Fringe Benefits Tax Assessment Act 1986* (Cth) s 136; *Special Broadcasting Service Act 1991* (Cth) s 6 and in a range of other statutes but not in the Australian Constitution. It has increasingly appeared in Australian political rhetoric as a synonym for the nation, often in association with reference to a 'national character' rather than ethnicity or culture, in contrast to past usage in for example Europe where the reference might be to a community dispersed across multiple jurisdictions. Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995); James Crawford, *The Rights of Peoples* (Clarendon Press, 1988); and Omar Dahbour, *Illusion of the Peoples: A Critique of National Self-Determination* (Lexington Books, 2003) pose questions about the problematical nature of 'people' as an identity in contemporary international and national law. Summers succinctly comments that 'people' is 'effectively undefined and legendarily undefinable' and 'famously undefined'. James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Martinus Nijhof, 2007) at xxxiii and 1 respectively.

[162] Donald Galloway, 'Liberalism, Globalism, and Immigration' (1993) 18(2) *Queen's Law Journal* 266; and Thierry Baudet, *The significance of borders: why representative government and the rule of law require Nation States* (Martinus Nijhoff, 2012).

[163] *Ruddock v Vadarlis* [2001] FCA 1329, [127].

The fourth comment is that establishment of the Constitution and the new nation involved the British monarch, a person who was not born in Australia, who never visited Australia and who – as discussed in Chapter Five – was an embodiment of the state (variously the United Kingdom, the Australian colonies under the aegis of that constitutional monarchy, and the new nation). Her signature, giving assent to the UK statute, made 'Australia' as a legal construct leap into being and provided the basis for the range of Australian statute/case law that provides the thread of identity in contemporary Australia. A tension between legal form and politics, in other words two competing 'realities', is evident if we recognise that Victoria's signifier would have been meaningless without the implicit support of most Australians for continuation of strong ties with Britain and a modification rather than revolutionary change to the legal system in which they experienced their identities. Chapter Five of this dissertation argues that flourishing is fostered through equality of opportunity and that in the Australia of 2017 it is accordingly time to respectfully abandon the inequality implicit in a hereditary monarchy. The establishment of a republic is a matter of national self-fulfilment and self-realisation, the culmination of incremental pragmatic change rather than a fundamental break with the past.

The final comment is that federation established a nation state that was bound by law, in particular by a constitution that enshrined a judicature and state governments with considerable autonomy.[164] If we think of the Commonwealth as itself an identity it is an identity that the people have chosen to cage through law,[165] resulting in a state that is considered by most Australians to be legitimate (irrespective of opposition to or disquiet about the policies of the Executive at particular times).[166] As such it is different to Schmitt's vision of the state as a polity that is appropriately above the law

[164] A salient example is the Bank Nationalisation Case, with the High Court constraining expansion of the national Executive (both in terms of the financial institution and purported ousting of the Court's jurisdiction) and – as significantly – the Commonwealth accepting that constraint. See *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497; [1950] AC 235. See also *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518, 574; and *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476; 195 ALR 24; 77 ALJR 454. For disquiet about state rather than the Commonwealth governments fettering the courts see *South Australia v Totani* [2010] HCA 39.
[165] For one expression see *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* [1920] HCA 54; (1920) 28 CLR 129, [151]-[152].
[166] Legitimacy is evident in the absence of secessions, civil wars and fundamental reconstructions such as those evident in France's successive Third, Fourth and Fifth Republics last century. As Hart and Kelsen noted in criticising Austin's command theory of law, legitimacy matters and force is insufficient. See John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995) 21; H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593, 602-603 and *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 41; and Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55(1) *Harvard Law Review* 44, 54. Note however Frederick Schauer, 'Was Austin right after all? On the role of sanctions in a theory of law' (2010) 23(1) *Ratio Juris* 1, 1.

and enjoying legitimacy because of that supra-legal status and elimination of political conflict – and thence 'politics' – through a godlike Executive that ends the 'disorder' inherent in a pluralist society. The Commonwealth's legitimacy in part reflects perceptions by voters and the courts that although the Executive will pursue what is in the national interest the nation will be bound by international agreements and the international norms evident in relationships between other liberal democratic states.

Raz argues that both legitimacy and citizenship involve trust, with 'full citizenship' (a problematical notion, as discussed in later chapters of this dissertation) properly enjoyed by those

> who either feel, where their feeling is not unreasonable, or who would be unreasonable to deny, that the state or government recognises them as people who matter in their own right, that their fate is a matter of intrinsic value in the eyes of the state and its government.[167]

Given the emphasis in Chapter One on flourishing, the response from a legal pragmatist would be an acknowledgement that states in shaping identities (and thus fates) do not treat all people, citizens or otherwise, equally.

A consequential response would be that core tasks of the contemporary liberal democratic state are to both foster the opportunity highlighted by Rawls as one facet of justice and to engage in self-restraint when there are calls for substantive erosion of civil liberties in relation to supposedly existential threats from terrorism.[168] Identity as a state from that perspective includes action for human betterment rather than merely a Razian grammar of assent or a Hayekian non-interference, in other words what Berlin dubbed a negative freedom.[169]

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[167] Joseph Raz, 'Liberty and Trust' in Robert George (ed), *Natural Law, Liberalism and Morality* (Clarendon Press, 1996) 113, 124. Among critiques see Christopher Wolfe, *Natural Law Liberalism* (Cambridge University Press, 2006) 91; Paul Burrows, 'Analyzing legal paternalism' (1995) 15(4) *International Review of Law and Economics* 489; Simon Clarke, 'A Trust-based Argument Against Paternalism' in Pekka Mäkelä and Cynthia Townley (eds), *Trust: Analytic and Applied Perspectives* (Rodopi, 2013) 53, 54; and Joel Feinberg, 'Legal paternalism' (1971) 1(1) *Canadian Journal of Philosophy* 105.

[168] In contrast see Carl Schmitt's strong endorsement in 'The Führer Protects The Law' of killings during Germany's 'Night of the Long Knives': 'In truth, the Act of the Führer was true justice. It is not subordinated to justice but was itself the highest form of justice. ... Content and scope of justice is determined by the Führer himself'. Schmitt, 'Der Führer schütz das Recht' (1 August 1934) quoted in Anthony McElligott, *Rethinking the Weimar Republic: Authority and Authoritarianism 1916-1936* (Bloomsbury, 2014) 219.

[169] Isaiah Berlin, 'Two Concepts of Liberty' in Berlin, *Four Essays On Liberty* (Oxford University Press, 1969) 118, 121. See also John Rawls, *Political Liberalism* (Columbia University Press, rev ed, 2005) 291-292; the discussion in John Gray, *Liberalisms: Essays in Political Philosophy* (Routledge, 2nd ed, 2010) 45-68; and Quentin Skinner, 'A third concept of liberty' (2002) 117 *Proceedings of the British Academy* 237.

Hermann Heller argued in 1926 that flourishing, fragility and self-respect mattered. He for example commented that

> We call citizens the individuals who themselves construct their social and political order. Our respect for the way of life of citizenship is ever proportionate to the motives for this ordering. We may not refuse this respect to the citizen who clearly sees the social and historical relativity of custom and law and nevertheless subjects himself to them, because he knows the human, all too human nature of the common life of human beings.[170]

Citizens and others

John Perry Barlow, in his 1996 'Declaration of the Independence of Cyberspace', announced

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.
>
> We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. …
>
> Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live. …
>
> Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here.[171]

Popular culture in liberal democratic states has been receptive to cyber-utopian visions of imminent state incapacity or of a world in which the state is about to evaporate like a mothball,[172] a legal inflection point that would render national jurisdictions meaningless and free individuals from restrictions based on gender,

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[170] Hermann Heller, Die Politischen Ideenkreise der Gegenwart [1926] quoted in David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herman Heller in Weimar* (Oxford University Press, 1997) 188.
[171] John Barlow, 'A Declaration of the Independence of Cyberspace' in Peter Ludlow (ed), *Crypto Anarchy, Cyberstates, and Pirate Utopias* (MIT Press, 2001) 27, 28.
[172] Nicholas Negroponte, *Being Digital* (Vintage, 1995) 238. A succinct response was provided by Bart Kosko, *Heaven In A Chip: Fuzzy Visions of Science and Society in the Digital Age* (Three Rivers Press, 2000) 43: 'we'll have governments as long as we have atoms to protect'. See also Michael Birnhack and Niva Elkin-Koren, 'The Invisible Handshake: The Reemergence of the State in the Digital Environment' (2003) 8(2) *Virginia Journal of Law and Technology* 1, 6.

class, ethnicity, physical disability and citizenship.[173] The reality of the digital environment is somewhat different.

Digital technologies have strengthened the state's capacity to frame, verify and discriminate on the basis of identities – in particular foundational identities – at and within national borders. That enhanced ability is evident in the use of biometric-based passports and visas[174] and national identity cards.[175] It is also evident in pervasive use of surrogates such as the Tax File Number[176] alongside 'soft power' practices such as large-scale data mining to minimise fraud in receipt/delivery of social services (such as falsely claiming an entitlement to receive government income support)[177] or otherwise allow policy-makers and administrators to 'see like a state'.[178]

That framing of identities centres on the foundational identities of citizen and non-citizen, the latter being divisible into several identities on a continuum from people who are conditionally accepted within Australia (tourists, diplomats, crew of international vessels) to those whose presence within Australia is *ab initio* illegal.[179]

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[173] Among critiques of US digital transcendentalism see Richard Barbrook and Andy Cameron, 'The Californian Ideology' (1996) 26(6) *Science of Culture* 44; Thomas Streeter, 'That Deep Romantic Chasm: Libertarianism, Neoliberalism and the Computer Culture' in Andrew Calabrese and Jean-Claude Burgelman (eds), *Communication, Citizenship and Social Policy: Rethinking the Limits of the Welfare State* (Rowman & Littlefield, 1999) 49; and Paulina Borsook, *Cyberselfish: A Critical Romp Through the Terribly Libertarian Culture of High Tech* (PublicAffairs, 1999).

[174] European Commission Joint Research Centre, *Biometrics at the Frontiers: Assessing the Impact on Society for the European Parliament Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (LIBE)* (2004); Dean Wilson, 'Biometrics, Borders and the Ideal Suspect' in Sharon Pickering and Leanne Weber (eds), *Borders, Mobility and Technologies of Control* (Springer, 2006) 87; and Benjamin Muller, *Security, Risk and the Biometric State: Governing Borders and Bodies* (Routledge, 2011). For concerns regarding disregard of dignity and other aspects of justice see also Rhian Beynon, 'The compulsory biometric registration of foreign nationals in the UK: policy justifications and potential breaches of human rights' (2007) 21(4) *Journal of Immigration, Asylum and Nationality Law* 324; and Gerrit Hornung, 'The European regulation on biometric passports: legislative procedures, political interactions, legal framework and technical safeguards' (2007) 4(3) *SCRIPT-ed: A Journal of Law, Technology and Society* 246.

[175] Colin Bennett and David Lyon 'Understanding the significance of Identity Card Systems' in Colin Bennett and David Lyon (eds), *Playing the identity card: surveillance, security and identification in global perspective* (Routledge, 2008) 3; and Graham Greenleaf and Jim Nolan, 'The Deceptive History of the 'Australia Card'' (1986) 58(4) *The Australian Quarterly* 407.

[176] *Taxation Laws Amendment (Tax File Numbers) Act 1988* (Cth). See also Kathryn Cole, 'Just Tell Me Your Name, Bank and Tax File Number' (1992) 17 *Alternative Law Journal* 52.

[177] Senator the Hon Kim Carr, Minister for Human Services Media Release 8 May 2012: 'New capability to ensure integrity of the welfare system'; and Tim Prenzler, *Responding to welfare fraud: The Australian experience (Australian Institute of Criminology Research and Public Policy Series, AIC Reports 119)* (2012). See also Paul Henman and Greg Marston, 'The social division of welfare surveillance' (2008) 37(2) *Journal of Social Policy* 187; and Roger Clarke, 'Big Data Prophylactics' in Anja Lehmann, Diane Whitehouse, Simone Fischer-Hübner, Lothar Fritsch and Charles Raab (eds), *Privacy and Identity Management: Facing up to Next Steps* (Springer, 2016) 3.

[178] The image is drawn from James Scott, *Seeing Like A State: How Certain Schemes to Improve the Human Condition have Failed* (Yale University Press, 1998).

[179] Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers: Refugees and Irregular Migration in Australia* (Federation Press, 2nd ed, 2006).

Aristotle, in one of the fundamental texts on the nature of identity, defined citizenship as political participation, commenting

> He who has the power to take part in the deliberative or judicial administration of any state is said by us to be a citizen of that state, and, speaking generally, a state is a body of citizens sufficing for the purposes of life.[180]

As the following chapter notes, during Aristotle's lifetime and for several centuries thereafter many people – notably slaves and free-born adult women – formally lacked capacity and did not meet his definition of citizenship, a definition that influenced figures such as Locke and that in the absence of arbitrary civil disabilities such as gender would not necessarily disquiet Australian courts. What then is the nature of contemporary Australian citizenship, the legal identity that most Australians take for granted and ceases to be invisible only when contested?

Theorists have advanced different conceptions of citizenship or nationality. Kant saw membership of a national community, something that might be lost through conviction for a crime or that was unavailable to foreigners as non-citizens, as a basis of human dignity.[181] Belonging matters for flourishing, and not just at borders.[182] Anderson commented that 'nation-ness is the most universally legitimate value in the political life of our time'.[183] Renan similarly referred to a 'rich legacy of shared memories' in characterising the nation as

> a large-scale solidarity, constituted by the feeling of the sacrifices that one has made in the past and of those that one is prepared to make in the future. It presupposes a past; it is summarized, however, in the present by a tangible fact, namely, consent, the clearly expressed desire to continue a common life. A nation's existence is, if you will pardon the metaphor, a daily

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[180] Aristotle, *Politics* in Jonathan Barnes (ed), *The Complete Works of Aristotle II* (B Jowett trans, Princeton University Press, 1984) 1986, 2024. See also 2104.

[181] Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans Cambridge University Press, 1996) [trans of *Die Metaphysik der Sitten* (first published 1797)] 104. Among discussions see Jeremy Waldron, 'Citizenship and Dignity' (New York University School of Law Public Law & Legal Theory Research Paper Series 12-74) (2013) 2-6.

[182] Penny Green and Mike Grewcock, 'The War against Illegal Immigration: State Crime and the Construction of a European Identity (2002) 14(1) *Current Issues in Criminal Justice* 87; Thomas Spijkerboer, 'The Human Costs of Border Control' (2007) 9(1) *European Journal of Migration & Law* 127; Suvendrini Perera, ''They give evidence': Bodies, borders and the disappeared' (2006) 12(6) *Social Identities* 637; Julia Baird and Anthony Kevin, *A certain maritime incident: The sinking of Siev X* (Scribe, 2004); and Peter Andreas, *Border Games: Policing the US-Mexico divide* (Cornell University Press, 2001).

[183] Benedict Anderson, *Imagined Communities* (Verso, 1991) 3.

> plebiscite, just as an individual's existence is a perpetual affirmation of life.[184]

That mythologisation of 'true memories' and national character[185] as the basis of 'imagined communities'[186] and thence of citizenship has fuelled disputes about authority (whose memories, 'telling' and cultural markers are privileged),[187] about programs for the development or reinforcement of norms and civic identities (for example 'civics' initiatives)[188] as an expression of soft power, and about exclusion (defining 'belonging' or 'authenticity' through reference to an ethnic, cultural or even class 'other'). All of those disputes are about identity.[189] Analysts of nationality and citizenship, categories typically conflated, have proposed several conceptual bases for citizenship.[190]

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[184] Ernest Renan, 'What is a Nation?' in Homi Bhabha (ed), *Nation and Narration* (Routledge, 1990) [trans of 'Qu'est-ce qu'une nation?' (first published 1882)] 8, 19.

[185] Joseph Leerssen, 'The Rhetoric of National Character: A Programmatic Survey' (2000) 21(2) *Poetics Today* 267; John Hirst (ed), *About The Australians: Insiders and Outsiders on the National Character since 1770* (Black Inc, 2011); John Rickard, 'National character and the 'typical Australian': An alternative to Russell Ward' (1979) 3(4) *Journal of Australian Studies* 12; Alex Inkeles, *National Character: A Psycho-social Perspective* (Transaction, 1997); Peter Mandler, *The English National Character: The History of an Idea from Edmund Burke to Tony Blair* (Yale University Press, 2006); and Lung-Kee Sun, *The Chinese National Character: From Nationhood to Individuality* (Sharpe, 2002).

[186] Benedict Anderson, *Imagined Communities* (Verso, 1991), critiqued in Yael Tamir, 'The Enigma of Nationalism' (1995) 47(3) *World Politics* 418, 421-423. See also Azar Gat, *Nations: The Long History and Deep Roots of Political Ethnicity and Nationalism* (Cambridge University Press, 2012) and Hans Kohn, *The Idea of Nationalism: A Study in Its Origins and Background* (Transaction, 2nd ed, 1961).

[187] As points of entry to the literature see Geoffrey Cubitt, *Imagining Nations* (Manchester University Press, 2008); Jeffrey Olick, Vered Vinitzky-Seroussi and Daniel Levy (eds), *The Collective Memory Reader* (Oxford University Press, 2011); Katharyne Mitchell, 'Monuments, Memorials, and the Politics of Memory' (2003) 24(5) *Urban Geography* 442; Karin Tilmans and Frank van Vree (eds), *Performing the Past: Memory, History, and Identity in Modern Europe* (Amsterdam University Press, 2010); John Seed, *Dissenting Histories: Religious Division and The Politics of Memory in Eighteenth-Century England* (Edinburgh University Press, 2008); Maurice French, 'The Ambiguity of Empire Day in NSW 1901-1921: Imperial Consensus of National Division' (1978) 24(1) *Australian Journal of Politics and History* 61; Jan-Werner Müller (ed), *Memory and Power in Post-War Europe: Studies in the Presence of the Past* (Cambridge University Press, 2002); Ken Inglis, *Sacred Places: War Memorials in the Australian Landscape* (Miegunyah Press, 3rd ed, 2008); Peter Carrier, *Holocaust Monuments and National Memory Cultures in France and Germany since 1989* (Berghan, 2006); and Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge University Press, 2009).

[188] See for example Elizabeth Kwan, 'Making 'good Australians'' (1991) 15(29) *Journal of Australian Studies* 38; Joan Dejaeghere and Libby Tudball, 'Looking back, looking forward: Critical citizenship as a way ahead for civics and citizenship education in Australia' (2007) 3(2) *Citizenship teaching and learning* 40; Judith Gill and Sue Howard, 'Under the power lines: reflections on schooling, civics education and citizenship' (2000) 3(1) *Change: Transformations in Education* 35; and Helen Hastie, 'Citizenship Education: A Critical Look at a Contested Field', in Lonnie Sherrod and Judith Torney-Purta (eds), *Handbook of Research on Civic Engagement in Youth* (Wiley, 2010) 161.

[189] In Australia for example there is a political rather than merely consumer protection dimension to law dealing with the descriptor and thus identity of 'ANZAC', such as the *Returned Servicemen's Badges Act 1960* (ACT); *Ex-Servicemen's Badges Act 1967* (Tas); *Returned Servicemen's Badges Act 1956* (Vic); *ANZAC Day Act 1958* (Vic); *War Precautions Act Repeal Act 1920* (Cth) s 22; *Protection of word 'ANZAC' Regulations 1921* (Cth); and *Customs (Prohibited Imports) Regulations 1956* (Cth) r 4V. See also Bram Van Melle, 'W(h)ither Anzac day? The legal protection for "Anzac"' (1998) *New Zealand Law Journal* 119.

[190] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009); Christian Joppke, 'Exclusion in the Liberal State: The Case of Immigration and Citizenship Policy' (2005) 8(1) *European Journal of Social Theory* 43; and Patrick Weil, 'Access to Citizenship: A Comparison of Twenty-Five Nationality Laws' in T Alexander Aleinikoff and Douglas Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Brookings Institution Press, 2001) 17.

One is *jus sanguinis*, the bloodline basis, with citizenship typically being an attribute of natural or adoptive parentage:[191] I am a citizen because my parents were citizens, irrespective of the geographical location of my birth or their birth or their parents' birth. The emphasis on blood might institutionalise racism, whether expressly in Nazi Germany (and valorised through Schmitt's us/them dichotomy) or tacitly in colonial Australia.

Another conceptualisation is *jus soli*, the territorialist basis,[192] with citizenship a legal artifact of having been born in the jurisdiction, typically born of a mother who was legally resident in that territory.[193] Historically that has resulted in questions about birth on board vessels or aircraft[194] and in incidents such as women seeking to secure their offspring's nationality by arranging to give birth on the 'national soil' of their embassy.[195] It has also posed conundrums when national borders have shifted or political changes have resulted in incidents[196] of what is euphemistically labeled as 'ethnic cleansing' or mass denationalisation,[197] discussed in Chapters Five and Nine below, and contrary to Article 15 of the Universal Declaration of Human Rights.[198]

In Australia statutory provisions regarding *jus soli* have varied considerably. Under the *Nationality and Citizenship Act 1948* (Cth) people born in Australia between 26

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[191] *Australian Citizenship Act 2007* (Cth) ss 12 and 13.
[192] For the importance of territory associated with a common identity see David Miller, *On Nationality* (Oxford University Press, 1995) 22; Will Kymlicka, *Multicultural Citizenship* (Oxford University Press, 1995) 18; and Yael Tamir, *Liberal Nationalism* (Princeton University Press, 1993) 66.
[193] Note *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277 with the dictation test used to exclude the appellant, born in Australia of a Chinese father, from returning from abroad. Language as a filter reappears in *R v Wilson; Ex parte Kisch* [1934] HCA 63; (1934) 52 CLR 234 noted in this chapter.
[194] *Australian Citizenship Act 2007* (Cth) s 7; and 1961 *Convention on the Reduction of Statelessness* Art 3.
[195] Among works on notables see Anne Sebba, *Jennie Churchill, Winstone's American Mother* (John Murray, 2007) 58; Nicholas Shakespeare, 'Somerset Maugham' in Robert Dessaix (ed), *Best Australian Essays 2004* (Black Inc, 2004) 97, 105; and Matthew Sweet, *The West End Front* (Faber, 2011) 256.
[196] For an overview see Paul Weis, *Nationality and Statelessness in International Law* (Sifthoff & Noordhoff, 2nd ed, 1979) 119-123. Studies include R M Douglas, *Orderly and Humane: The Expulsion of the Germans after the Second World War* (Yale University Press, 2012); Norman Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe* (Harvard University Press, 2002); Benjamin Frommer, *National Cleansing: Retribution against Nazi Collaborators in Postwar Czechoslovakia* (Cambridge University Press, 2005); and Klejda Mulaj, *Politics of Ethnic Cleansing: Nation-State Building and Provision of In/Security in Twentieth-Century Balkans* (Lexington, 2010).
[197] John Hagan and Todd Haugh, 'Ethnic Cleansing as Euphemism, Metaphor, Criminology, and Law' in Leila Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011) 177; Herbert Kelman, 'Negotiating national identity and self-determination in ethnic conflicts: The choice between pluralism and ethnic cleansing' (1997) 13(4) *Negotiation Journal* 327; and Donald Bloxham, 'The Great Unweaving: The Removal of Peoples in Europe, 1875-1949' in Richard Bessel and Claudia Haake (eds), *Removing Peoples: Forced Removal in the Modern World* (Oxford University Press, 2009) 167.
[198] See also *Convention on the Reduction of Statelessness* (1961) Art 8.

January 1949 and 20 August 1986 were automatically regarded as Australian citizens, irrespective of whether one or both biological parents were citizens but subject to two exclusions. Those exclusions were that the parent was not a diplomat or an enemy alien.[199] Amendment of the Act in 1986 provided that one of the parents needed, at the time of the person's birth, to be a citizen or permanent resident. However, under s 10(2) of the amended Act a child who was born and 'ordinarily resident' in Australia might become a citizen on the child's tenth birthday, irrespective of whether the parents were Australian citizens or illegally resident in Australia over that decade. Following *Kioa v West*[200] the *Australian Citizenship Act 2007* (Cth) provides that a person born in Australia on or after 1 July 2007 automatically becomes an Australia citizen if one of the parents is an Australian citizen or permanent resident at that time and is not an enemy alien.[201] Children born in Australia to people who are not permanent residents or Australian citizens gain Australian citizenship on their tenth birthday if they are ordinarily resident over the decade.[202]

A third basis is the complementary *jus nexi*, 'earned' citizenship, encompassing acquisition of citizenship through mechanisms such as marriage, naturalisation on the basis of investment (*jus pecuniae*)[203] or desirable skills[204] (including prowess as an Olympic athlete),[205] and demonstrated knowledge of and adherence to values and creeds of behaviour as long-term residents (sometimes characterised as creedal citizenship).[206] Shachar comments that

> The race for talent highlights today's new global reality in which those select few emigrants with abundant talent are offered an exponentially expanded range of options for mobility, permitting them to expect that an ever-larger welcome mat will be rolled out by the competing recruiting nations in the form of heavily incentivized migration. At the same time, most other categories of international migrants are facing steeper

[199] *Nationality and Citizenship Act 1948* (Cth) s 10(2)(a).
[200] *Kioa v West* (1985) 159 CLR 550. See also the discussion in Senate Standing Committee on Migration, Parliament of Australia, *Australians All: Embracing Australian Citizenship* (1994) 100.
[201] *Australian Citizenship Act 2007* (Cth) s 12.
[202] *Australian Citizenship Act 2007* (Cth) ss 12(1)(b) and 3.
[203] Shaheen Borna and James M. Stearns, 'The ethics and efficacy of selling national citizenship' (2002) 37(2) *Journal of Business Ethics* 193; Laura Johnston, 'A Passport at Any Price? Citizenship by Investment Through the Prism of Institutional Corruption' (Edmond J. Safra Working Papers No. 22, 2013); and Jelena Dzankic, 'The pros and cons of ius pecuniae: investor citizenship in comparative perspective' (EUI Working Paper RSCAS 2012/14) (2012).
[204] Ayelet Shachar and Ran Hirschl, 'Recruiting "Super Talent": The New World of Selective Migration Regimes' (2013) 20(1) *Indiana Journal of Global Legal Studies* 71.
[205] Peter Spiro, 'The End of Olympic Nationality' (Temple University Legal Studies Research Paper 2011-13) (2013); and Ayelet Shachar, 'Picking winners: Olympic citizenship and the global race for talent' (2010) 120 *Yale Law Journal* 2088.
[206] Mark Tushnet, 'Creedal Citizenship' (2011) 9(1) *Issues in Legal Scholarship* 1.

> restrictions that make even initial admission harder to obtain, let alone the holy grail of securing membership and the full package of rights and protections accompanying it.[207]

The Administrative Appeals Tribunal in 2015 commented

> The grant of Australian citizenship is a privilege not bestowed lightly. It is given to those who uphold the values of the Australian community and who are willing to make a positive contribution to the country they want to call home. The refusal to grant citizenship is not a second form of punishment, which is the domain of the Criminal Courts. It is simply the right of the Australian community to decide whom they wish to have included as fellow citizens, which is a function of State.[208]

Jus nexi might involve formal citizenship tests,[209] such as that in Australia,[210] or the revocation of citizenship if an individual misbehaves, that is in some regimes the retention of nationality granted to migrants is conditional on them not being subsequently convicted of a serious criminal offence, thereby encouraging good behaviour. It might involve notions of the character of long-term residents or merely people seeking entry to Australia,[211] along with traditional eugenic or cost-based[212] restrictions on short/long-term access by people who are categorised as disabled.[213]

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[207] Ayelet Shachar, 'Picking winners: Olympic citizenship and the global race for talent' (2010) 120 *Yale Law Journal* 2088, 2139.
[208] *LHJS and Minister for Immigration and Border Protection (Citizenship)* [2015] AATA 842, [7].
[209] Amitai Etzioni, 'Citizenship Tests: A Comparative, Communitarian Perspective' (2007) 78(3) *The Political Quarterly* 353; Thom Brooks, 'The British Citizenship Test: The Case for Reform' (2012) 83(3) *The Political Quarterly* 560; Gerard de Groot, Jan-Jaap Kuipers and Franziska Weber, 'Passing Citizenship Tests as a Requirement for Naturalisation: A Comparative Perspective' in Elspeth Guild and Sergio Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate, 2009) 51; Ingrid Piller, 'Naturalization language testing and its basis in ideologies of national identity and citizenship' (2001) 5(3) *International Journal of Bilingualism* 259; and the scepticism evident in Chris Rojek, *Brit-myth: Who do the British think they are*? (Reaktion, 2007) 202 and 204.
[210] *Australian Citizenship Act 2007* (Cth) s 23A. See also Farida Fozdar and Brian Spittles, 'The Australian Citizenship Test: Process and Rhetoric' (2009) 55(4) *Australian Journal of Politics and History* 496; Tim McNamara and Kerry Ryan, 'Fairness Versus Justice in Language Testing: The Place of English Literacy in the Australian Citizenship Test' (2011) 8(2) *Language Assessment Quarterly* 161; Tim McNamara and Elana Shohamy, 'Viewpoint: Language Tests and Human Rights' (2008) 18(1) *International Journal of Applied Linguistics* 89; and Stuart Macintyre and Noel Simpson, 'Consensus and division in Australian citizenship education' (2009) 13(2) *Citizenship Studies* 121.
[211] *Migration Act 1958* (Cth) ss 5C and 501; and *Australian Citizenship Act 2007* (Cth) ss 17(4), 21(2)(h) and 24(4). Among judgments see *Seyfarth v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 105; *Minister for Immigration & Multicultural & Indigenous Affairs v Ball* [2004] FCAFC 91; and *Brown v Minister for Immigration and Citizenship* [2010] FCAFC 33.
[212] The then Department of Immigration and Citizenship for example in January 2013 explained the 'health requirement', in other words refusal of visas under the *Migration Act 1958* (Cth) excluding people 'likely to require health care and community services that would prejudice the access of Australian citizens and permanent residents to those services in short supply' and as a measure 'designed to protect the demand on the Australian health care system and ensure that additional pressure is not put on health care and community services that are in short supply'. Australian Department of Immigration & Citizenship, 'Overview of the Health Requirement' (2013), http://www.immi.gov.au/allforms/health-requirements/overview-health-req.htm.
[213] For refusal of visas to individuals and to families that include a member with particular disabilities see Joint Standing Committee on Migration, Parliament of Australia, *Enabling Australia: Inquiry into the Migration*

(The determination of character as identity and its implications are explored in Chapters Four and Ten.)

Shachar highlights questions about fairness and flourishing with those bases, commenting that

> full membership in an affluent society emerges as a complex form of property inheritance: a valuable entitlement that is transmitted, by law, to a restricted group of recipients under conditions that perpetuate the transfer of this precious entitlement to "their body", specifically, their heirs. This inheritance carries with it an immensely valuable bundle of rights, benefits and opportunities.
>
> Although they have a pernicious effect on distributing life prospects and human security, birth entitlements still dominate our laws when it comes to the allocation of political membership to a given state. In fact, material wealth and political membership (which are for many the two most important distributable goods) are the only meaningful resources whose intergenerational transfer is still largely governed by principles of heredity.[214]

Her awareness of consequences in terms other than formality has been echoed in other critiques of the state for example arguing that an emphasis on forms may hide substantial civil disabilities among citizens rather than merely those who are explicitly excluded. All female Australian adult citizens for example are indeed citizens but as noted in Chapter One they are legally restricted to marrying men – citizens or otherwise – rather than other women. That contrasts with regimes in other jurisdictions that more strongly foster human flourishing and expressly respect autonomy through a notion of sexual citizenship[215] or constitutional cosmopolitanism.[216]

In contrast to much of Europe and Japan, where a strong interest in ethno-religious homogeneity has driven law restricting citizenship (and long-term residence by non-citizens), Australia remains a 'settler state'. That characterisation recognises

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Treatment of Disability (2010) 8-12, 27, 66, and 108; and the discussion of 'disability' as identity in Chapter Four below.

[214] Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009) 5.

[215] Diane Richardson, 'Constructing Sexual Citizenship: Theorizing Sexual Rights' (2000) 20(1) *Critical Social Policy* 105; Nancy Naples, 'Sexual Citizenship in International Context: Towards A Comparative Intersectional Analysis of Social Regulation', in Nick Rumens and Alejando Cervantes-Carson (eds), *Sexual Politics of Desire & Belonging* (Rodopi, 2007) 3; and Barbara Sullivan, 'Sexual Citizenship', in Wayne Hudson and John Kane (eds), *Rethinking Australian Citizenship* (Cambridge University Press, 2000) 150.

[216] Alexander Somek, 'On Cosmopolitan Self-Determination' (2012) 1(3) *Global Constitutionalism* 405.

imposition of law on Australia's inhabitants at the time of initial colonisation by the British. It also recognises that, despite statutory restrictions on migration of people from Asia and other regions and natalist measures such as the 'baby bonus',[217] growth of the Australian population over the past sixty years is substantially due to naturalisation[218] of people from the other continents, including people who had the status of refugees.

The foundational identities of people in Australia thus encompass what Shachar terms the 'birthright lottery' and *jus nexi*. People who were not born in Australia can acquire Australian citizenship. Citizens can become dual nationals (albeit not hold dual nationality as a member of the Commonwealth Parliament) or, as illustrated in the case of Rupert Murdoch, can renounce Australian citizenship in pursuit of personal goods.[219] Fraud in acquisition of citizenship is the basis for revocation of that citizenship, complemented with other penalties.[220]

In looking at current Australian law we can discern several 'citizen-level' identities: firstly the foundational identity of citizen[221] and secondly a foundational identity of non-citizen,[222] with the latter parsable as lawful non-citizens[223] (for example tourists, diplomats, citizens of Papua New Guinea in particular locations) and unlawful non-citizens[224] (in essence those not authorised to enter Australia or from whom the authorisation has been withdrawn).[225] The salient legislation is the *Australian Citizenship Act 2007* (Cth) and the *Migration Act 1958* (Cth), with the former referring to the national legislature recognising that Australian citizenship

> represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common

[217] Diana Wyndham (1996), *Striving for National Fitness: Eugenics in Australia, 1910s to 1930s* (PhD, History, University of Sydney) 192-193.
[218] *Australian Citizenship Act 2007* (Cth) ss 20, 21. As points of entry to the literature on naturalization see Thomas Janoski, *The Ironies of Citizenship: Naturalization and Integration in Industrialized Countries* (Cambridge University Press, 2010) and Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2008).
[219] *Australian Citizenship Act 2007* (Cth) s 36. Alastair Davidson, *From Subject to Citizen: Australian Citizenship in the Twentieth Century* (Cambridge University Press, 1997) 137; and Jane Doulman and David Lee, *Every Assistance and Protection: A History of the Australian Passport* (Federation Press, 2008) 179.
[220] *Australian Citizenship Act 2007* (Cth) s 34.
[221] *Australian Citizenship Act 2007* (Cth) s 4.
[222] *Migration Act 1958* (Cth) s 4.
[223] *Migration Act 1958* (Cth) s 13.
[224] *Migration Act 1958* (Cth) s 14.
[225] *Migration Act 1958* (Cth) s 15.

> bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.[226]

Pillai notes that although most rights in Australia are not contingent upon citizenship, those of citizens (and by extension some obligations) are materially different from those of non-citizens, with citizenship being an essential element of 'full and formal' community membership.[227]

Citizens and non-citizens alike are subject to Australian law in their daily lives while within Australian jurisdiction, consistent with comments at the beginning of this chapter regarding the role of the state. To adapt Orwell, all subjects of the law are equal but some are more subject than others.[228] In the absence of adherence to international conventions regarding human rights and other matters such as invention, the state is fundamental because it provides the 'right to have rights' and recognises rights selectively.

What are the consequences of those identities? One test of a viable state is that it can sustain itself, for example that its legal regime and administration is not replaced by that of another state. Another test is that it can choose who is allowed across its borders[229] and can remove people whose entry or residence is unauthorised.

Gleeson CJ in *Singh v The Commonwealth* commented that

> Everyone agrees that the term "aliens" does not mean whatever Parliament wants it to mean. Equally clearly, it does not mean whatever a court, or a judge, wants it to mean.[230]

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[226] *Australian Citizenship Act 2007* (Cth) Preamble. See *Roach v Electoral Commissioner* (2007) 233 CLR 162, [12]; and Richard Bernstein, 'Community in the Pragmatic Tradition' in Morris Dickstein (ed), *The Revival of Pragmatism: New Essays on Social Thought, Law and Culture* (Duke University Press, 1998) 141, 155.
[227] Sangeetha Pillai, 'The Rights and Responsibilities of Australian Citizens: A Legislative Analysis' (2014) 37(3) *Melbourne University Law Review* 1, 51.
[228] George Orwell, *Animal Farm* (Secker and Warburg, 1984) 99.
[229] That determination might involve language or other tests, as demonstrated for example in *R v Wilson; Ex parte Kisch* [1934] HCA 63; (1934) 52 CLR 234 (featuring the dictation test described by the NSW Attorney-General at 239 as designed primarily to preserve 'white' Australia from 'Asiatics') and the recent refusal of visas to controversial figures such as David Irving. See Laurence Maher, 'Migration Act Visitor Entry Controls and Free Speech: The Case of David Irving' (1994) 16(3) *Sydney Law Review* 358; Heidi Zogbaum, *Kisch in Australia* (Scribe, 2004); and Kevin Windle, *Undesirable: Captain Zuzenko and the Workers of Australia and the World* (Australian Scholarly Publishing, 2012) 86 and 141.
[230] *Singh v Commonwealth* [2004] HCA 43; (2004) 222 CLR 322; Gleeson CJ at [5]. See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCA 36; (2005) 222 CLR 439 and the discussion in Kim Rubenstein and Jacqueline Field, 'What is a "real" Australian Citizen: Insights from Papua New Guines and Mr Amos Ame' in Benjamin Lawrance and Jacqueline Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press, 2017) 100.

What then are Australian citizens and non-citizens?

At it simplest, as of 2017 the identity of Australian citizen means that – subject to any wrongdoing in acquisition of citizenship – that person cannot be expelled from Australia. There is no express reference to 'Australian citizenship' in the Constitution.[231] Citizenship is not construable through reference to a justiciable national Bill of Rights, which Harris cogently notes remains a serious lacuna in Australian constitutional law,[232] or in terms of jurisprudence enshrining what Shklar in a critique of legalism,[233] characterised as fundamental 'social citizenship' (for example both the rights and opportunities to vote and work) that vivifies formal duties.[234]

Some sense of what the identity means is however provided in the *Australian Citizenship Ceremonies Code*[235] identification of reciprocal rights and responsibilities.[236] One unmentioned attraction in that effort to shape minds is the

[231] See *Sue v Hill* (1999) 199 CLR 462 regarding s 44 of the *Australian Constitution*; and *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, Gaudron J at 54.
[232] Bede Harris, *A New Constitution For Australia* (Cavendish, 2002) 7, 8 and 70. The implications are discussed in the concluding 'Recommendations' in Chapter Eleven below. See also Margaret Thornton, 'The Legocentric Citizen' (1996) 21(2) *Alternative Law Journal* 72, 72.
[233] Judith Shklar, *American Citizenship: The Quest for Inclusion (The Tanner Lecture on Human Values)* (Harvard University Press, 1991).
[234] For critiques see in particular Bryan Turner, 'Judith N. Shklar and American citizenship' (2011) 15(6/7) *Citizenship Studies* 933; and Peter Dwyer, *Welfare rights and responsibilities: Contesting social citizenship* (Policy, 2000). See also Winton Higgins and Gaby Ramia, 'Social Citizenship' in Wayne Hudson and John Kane (eds), *Rethinking Australian Citizenship* (Cambridge University Press, 2000) 136; and John Murphy, Suellen Murray, Jenny Chalmers, Sonia Martin and Greg Marston, *Half A Citizen: Life On Welfare in Australia* (Allen & Unwin, 2011) 16. Disputes about formal versus substantive equality in citizenship are evident in Patrick Higgins, *Heterosexual dictatorship* (Fourth Estate, 1996); Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (University of British Columbia Press, 2000) and David Mercer, ''Citizen minus'?: indigenous Australians and the citizenship question' (2003) 7(4) *Citizenship Studies* 421.
[235] Department of Immigration and Citizenship, *Australian Citizenship Ceremonies Code* (Department of Immigration and Citizenship, 2011) 3. The Code is not justiciable.
[236] The Code refers to 'Responsibilities' (Obey the laws and fulfill your duties as an Australian citizen; Enrol on the electoral roll and vote at federal, state, territory and local government elections and referenda; Serve on a jury, if called on; and Defend Australia, should the need arise) and 'Privileges' (The right to vote and elect Australia's governments; The right to apply for appointment to any public office or to nominate for election as a member of parliament (subject to section 44(i) of the Constitution); The right to apply for an Australian passport and to leave and re-enter the country without a visa; The right to seek assistance from Australian diplomatic representatives while overseas; The right to apply to enlist in the defence forces and to apply for government jobs requiring Australian citizenship; and The right to register a child born to you overseas after you become an Australian citizen, as an Australian citizen by descent). The Code does not commit the Government to providing the citizen with a passport or invariably allowing the citizen to lawfully *leave* the country, with restrictions under several statutes such as *Taxation Administration Act 1953 (*Cth) s 14R(1). For passport cancellation and rejection of passport applications see for example *Thompson and Minister for Foreign Affairs and Trade* [2007] AATA 1244, [10] and [27]; *King and Minister for Foreign Affairs* [2006] AATA 636, [12]-[14]; *Idaayen and Minister for Foreign Affairs* [2007] AATA 1676, [25]; *Saad and Minister for Foreign Affairs* [2007] AATA 1675, [1] and [10]; and *Saad and Minister for Foreign Affairs* [2009] AATA 920, [9]-[10].

right to access a range of social services, such as the non-contributory Age Pension[237] that might be delivered while the citizen is resident in another country such as New Zealand[238] or subsidised healthcare under the current Medicare and Pharmaceutical Benefit Schemes, given that the state weights the distribution of 'benefits' (more aptly construed as entitlements) to people who are citizens or are likely to be accepted as citizens.[239] States, whether for advantage in international political fora or in response to the sensibilities of their citizens, may well offset poverty in other nations by providing humanitarian funding to public/private sector bodies in those nations but a reality of the global identity regime is that Australia does not provide pensions or other financial entitlements to people who are in need but have no connection to Australia. The nation state has not embraced Kant's notion of cosmopolitanism.[240]

The identity of lawful non-citizen broadly allows the individual to enter and remain in Australia on an indefinite basis[241] (such as a British citizen living in Australia as a permanent resident) or with a temporary visa[242] relating to a specified period, event or status[243] (such as a citizen of Japan or Germany who is authorized to remain in Australia while a student or for a particular period as a tourist). While in Australia the lawful non-citizen is, along with the citizen, expected to 'obey the laws' (with failure by the non-citizen to do so being grounds for withdrawal of authorisation to remain in Australia). Recognition as a lawful non-citizen is the basis for some of the derivative identities discussed in the following chapters.

Recognition as an unlawful non-citizen, whether during attempted entry to Australia or within Australia, for example through detection that an individual has chosen to illegally remain in Australia after expiry of a time-specific visa or that there was fraud

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[237] *Social Security Act 1991* (Cth). Differential payments under that statute reflect different legal identities, for example married versus single people.
[238] *Social Security (International Agreements) Act 1999* (Cth).
[239] See *National Disability Insurance Scheme Act 2013* (Cth) s 23. Note also Gilman's reference to health as a 'badge of national identity'. Sander Gilman, *Fat: A Cultural History of Obesity* (Polity Press, 2008) 8.
[240] Pauline Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge University Press, 2013) 26; and Garrett Wallace Brown, *Grounding Cosmopolitanism: From Kant to the Idea of a Cosmopolitan Constitution* (Edinburgh University Press, 2009) 31.
[241] *Migration Act 1958* (Cth) s 30(1).
[242] *Migration Act 1958* (Cth) s 30(2).
[243] For example the restriction under *Migration Act 1958* (Cth) s 40. See also *Kurniawan, Nani* [2000] MRTA 1647; and *Foley, Valerie Caroline* [2001] MRTA 2388.

in an application,[244] means that the person may be detained by the state (potentially indefinitely, if it is unfeasible to return the person to the state of origin) and/or deported.[245] Much of the litigation in the Federal Court of Australia relates to determinations about the legal identity of people who have been determined by officials (in for example the Department of Immigration & Border Protection and migration/refugee tribunals) to be unlawful non-citizens.

Those people embody Agamben's 'state of exception',[246] that is because they are on the borders of the law (literally and figuratively) they are denied most of the rights and obligations – and other manifestations of legal identity – that are potentially apparent in the lives of peers who are not unlawful non-citizens. Citizenship, and its absence, have consequences that should lead us to question Barlow's rhetoric and more broadly be wary of claims regarding the digital environment as necessarily productive of flourishing.

Becoming Australian

As preceding paragraphs indicated, Australian citizenship can come about in several ways, with corresponding identifiers.

For most of the population citizenship is automatic, on the basis that the individual was born in Australia and/or of parents who are Australian citizens. There is no whole-of-population register of citizenship and no population-wide identity card demarcating citizens and non-citizens.[247] That status is instead indicated in two ways.

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[244] *Brar v Minister for Immigration & Anor* [2011] FMCA 435; and *SZNZW v Minister for Immigration & Anor* [2010] FMCA 158.

[245] *Migration Act 1958* (Cth) ss 198, 196(4). Previous statutes include the *War-Time Refugees Removal Act 1949* (Cth).

[246] Giorgio Agamben, *The State of Exception* (Kevin Attell trans, University of Chicago Press, 2005) [trans of *Stato di Eccezione* (first published 2003)] 4. See also *Daniel v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 20; and *Al-Kateb v Godwin* [2004] HCA 37; 219 CLR 562; 208 ALR 124; 78 ALJR 1099.

[247] Herbert Kubicek, 'The Diversity of National E-IDs in Europe: Lessons from Comparative Research' (2010) 3(1) *Identity in the Information Society* 1; Adrian Beck and Kate Broadhurst, 'Policing the community: the impact of national identity cards in the European Union' (1998) 24(3) *Journal of Ethnic and Migration Studies* 413; Siddhartha Arora, 'National e-ID card schemes: A European overview' (2008) 13(2) *Information Security Technical Report* 46; Richard Sobel, 'The Demeaning of Identity and Personhood in National Identification Systems' (2002) 15(2) *Harvard Journal of Law & Technology* 319; and Michael Froomkin, 'Identity Cards and Identity Romanticism' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons From The Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 245. For recurrent proposals regarding an 'Australia Card' see Chapter Eight below and Dean Wilson, 'The Politics of Australia's

For many people there is a presumption that they are citizens, with the status being inferred (on rare instances where it is contested or more commonly for employment by the government) through reference to birth registers[248] and similar document collections discussed in Chapters Eight and Ten. Information confirming a person's citizenship may be provided by representatives of the state.[249] Some people seek an Australian passport as their primary identifier in place of the drivers' licence used by most Australian adults as the normative 'proof of identity' document in many commercial transactions. That passport is indicative of Australian citizenship. It is linked to a national register, albeit – as discussed later in this dissertation – not a register that is searchable online by all citizens. The foundational identity as a 'born' citizen comes into being at and through birth; documentation enables verification rather than bringing the identity into being.

Acquiring citizenship through naturalisation, otherwise known as conferral, involves satisfying eligibility requirements[250] (including a citizenship test)[251] and a pledge.[252] The latter represents an express manifestation of creedal citizenship, albeit one that as noted above has been questioned by some observers. People who have acquired citizenship through naturalisation receive a naturalisation certificate, again linked to a government database and – as with the passport – potentially useful as a breeder document for individuals opening bank accounts[253] and proving identity for welfare payments or enrolment at tertiary institutions. The foundational identity of those people as citizens comes into being through formal conferral by the Minister on behalf of the state and signified with the naturalisation certificate, typically provided in a 'life-defining moment'[254] at a formal ceremony.

Access Card' in Colin Bennett and David Lyon (eds), *Playing the identity card: surveillance, security and identification in global perspective* (Routledge, 2008) 180.

[248] For example in Victoria and Queensland under *Births, Deaths and Marriages Registration Act 1996* (Vic) and *Births, Deaths and Marriages Registration Act 2003* (Qld) respectively. See also Law Reform Commission of NSW, *Names: Registration and Certification of Births and Deaths* (Report No. 61) (Law Reform Commission of NSW, 1988); Victorian Law Reform Commission, *Birth registration and birth certificates: Consultation Paper* (Victorian Law Reform Commission, 2012); and more broadly Edward Higgs, *The Information State in England: The Central Collection of Information on Citizens since 1500* (Palgrave Macmillan, 2004).

[249] *Australian Citizenship Act 2007* (Cth) ss 37 and 40-41.

[250] *Australian Citizenship Act 2007* (Cth) s 21.

[251] *Australian Citizenship Act 2007* (Cth) ss 21(2A) and 23A.

[252] *Australian Citizenship Act 2007* (Cth) s 26. For the 'Les Murray' Pledge see Katharine Betts and Bob Birrell, 'Making Australian citizenship mean more' (2007) 15(1) *People and Place* 45, 46.

[253] *Anti-Money Laundering And Counter-Terrorism Financing Act 2006* (Cth).

[254] Mark Rimmer, 'The future of citizenship ceremonies' (2008) UK Government Citizenship Review [4].

Indigenous Identities in a Settler State

Preceding paragraphs indicated that some people were not asked about Federation and indeed might have rejected notions of participation in the then British Empire, an Australian state or – more broadly – an imported legal system that embodies principles and relationships contrary to a non-Western cosmology and emphasis on clan-based communities.

In thinking about the Australian state as a legal person and as generating frameworks for legal identities it is important to recognise what we often take for granted. In other words although Australia's Indigenous peoples[255] were not passive,[256] from the time of initial European settlement onwards they have been subject to what many are likely to have regarded (and still regard) as a foreign, hostile and thus illegitimate law.[257]

That law has selectively recognised an attachment to land[258] but has not recognised Indigenous sovereignty and has not recognised all customary law.[259] Separatists such as Murrumu Walubara Yidindji (formerly Jeremy Geia) are susceptible to prosecution, and presumably welcome that prosecution as a basis for consciousness raising, over disregard of traffic, fauna protection, taxation and other non-customary law.[260]

The same imposed law has largely disregarded (and often superseded) traditional law, has denied Indigenous individuals the dignity claimed in this dissertation as attributable to all people irrespective of circumstances and jurisdiction, and broadly

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[255] For historic classifications see John McCorquodale, 'The Legal Classification of Race in Australia' (1986) 10 *Aboriginal History* 7; and the discussion in Chapter Six below.
[256] The iconic study is Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (UNSW Press, rev ed, 2006).
[257] For questions about legitimacy in liberal democratic settler states see in particular Steven Curry, *Indigenous sovereignty and the democratic project* (Ashgate, 2004); and Henry Reynolds, *Aboriginal Sovereignty: reflections on race, state and nation* (Allen & Unwin, 1996).
[258] Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009). Among statutes see *Native Title Act 1993* (Cth); *Native Title Act 1994* (ACT); *Native Title (Queensland) Act 1993* (Qld); *Native Title (New South Wales) Act 1994* (NSW).
[259] *Mabo and Others v. Queensland (No. 2)* (1992) 175 CLR 1, discussed in Nonie Sharp, *No Ordinary Judgment: Mabo, the Murray Islanders' Land Case* (Aboriginal Studies Press, 1996).
[260] Paul Daley, 'The man who renounced Australia', *The Guardian Online* 26 August 2014, http://www.theguardian.com/world/postcolonial/2014/aug/26/-sp-the-man-who-renounced-australia; and Miranda Johnson, *The Land Is Our History: Indigeneity, Law, and the Settler State* (Oxford University Press, 2016) 162-163.

disrespects or simply fails to recognise metaphysical concepts and values dear to some Indigenous communities. In essence, it involves the construction of identities that were not chosen by Indigenous communities and that some Indigenous individuals might regard as janus-faced, for example scope for enhanced flourishing through restrictions on gendered infanticide and adult-minor sexual contact has been offset through ills such as 'loss of country' highlighted in a succession of Commonwealth and state/territory inquiries or judgments.[261]

Chapters Five and Six of this dissertation explore constructions of 'the Indigenous person' and Indigenous community over the past two hundred years, along with a discussion of consequences and policy conundrums.[262] In grounding that discussion, however, it is useful to initially look at questions of sovereignty as the basis of identity.

The articulation of a political consciousness that some Indigenous Australians may have had since the time of Dirk Hartog and Arthur Phillip is apparent in *Buzzacott*,[263] where the defendant argued that the ACT Supreme Court

> lacked jurisdiction to deal with the matter as the courts and governments of Australia were not entitled to exercise sovereignty over the descendants of the original inhabitants of Australia prior to European settlement from 1788. The submission is that the Commonwealth of Australia has no lawful jurisdiction over the original peoples of geographic Australia nor over their lands and laws. Further, the applicant sought that Connolly J disqualify himself from sitting on the matter because of his association, and indeed that of all Australian Judges, with the crime of genocide which denies jurisdiction to the government and the Australian courts in respect of the original inhabitants.[264]

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[261] As points of entry to the literature on the inquiries and litigation see Tim Rowse, 'The Royal Commission, ATSIC and self-determination: a review of the Royal Commission into Aboriginal Deaths in Custody' (1992) 27(3) *Australian Journal of Social Issues* 153; Anna Haebich, ''Between knowing and not knowing': Public knowledge of the Stolen Generations' (2002) 25 *Aboriginal History* 70; Peter Read, 'The Stolen Generations, the historian and the court room' (2002) 26 *Aboriginal History* 51; Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Australian Institute of Aboriginal and Torres Strait Islander Studies Research Paper) (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004); Sarah Joseph, 'Kruger v Commonwealth: Constitutional Rights and the Stolen Generations' (1998) 24(2) *Monash University Law Review* 486. For disputes regarding gender, authority and authenticity see Sarah Maddison, *Black Politics: Inside the complexity of Aboriginal political culture* (Allen and Unwin, 2009) 201.

[262] For a work that steps beyond debate in terms of genocide, 'black armband history' and cultural relativism see Peter Sutton, *The Politics of Suffering: Indigenous Australia and the End of the Liberal Consensus* (Melbourne University Press, 2009).

[263] *Buzzacott v R* [2005] ACTCA 7. See also Angela Pratt, 'Indigenous sovereignty-never ceded': sovereignty, nationhood and whiteness in Australia (PhD thesis, Faculty of Arts, University of Wollongong, 2003); and Shaunnagh Dorsett and Shaun McVeigh, 'Just So: The Law Which Governs Australia is Australian Law' (2002) 13(3) *Law and Critique* 289.

[264] *Buzzacott v R* [2005] ACTCA 7, Gray J at [3].

Those arguments were unsuccessful; the consequences of the foundational identity established by Federation are that Buzzacott and peers such as Murrumu are subject to Australian law, a framework that might accommodate their needs but is not vitiated by their claims the law is illegitimate.

One conclusion might be that the litigation reminds us that claims about identity are unpersuasive in a legal sense if not enforceable through reference to state authority. There is no international recognition of a single Australian Indigenous nation or alternative government of Australia; recognition by national governments is unlikely to develop.

Another conclusion is that the notion of a discrete Aboriginal or Indigenous nation is a modern construct, irrespective of whether that construct is a viable and appropriate tool for influencing policymaking by the national and state/territory governments through for example the Aboriginal Tent Embassy.[265] At the time of settlement the inhabitants of what is now Australia were culturally diverse, used over 200 languages[266] and might most accurately be characterised as a large number of peoples rather than a single nation conquered by European colonists whose legal system embodied identities of 'whiteness'. That diversity is played out in contemporary Australian law through conflicts over claims to authority[267] and rights over land, in particular between land councils or between a land council and a group of Indigenous people.[268]

A third conclusion is that the state, from the early colonial period onwards, has tended to address Indigenous Australians in terms of populations rather than discrete peoples

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[265] Geoffrey Stokes, 'Citizenship and Aboriginality: Two conceptions of identity in Aboriginal political thought' in Geoffrey Stokes (ed), *The Politics of Identity in Australia* (Cambridge University Press, 1997) 158.
[266] Barry Blake, *Australian aboriginal languages: a general introduction* (University of Queensland Press, 2nd ed, 1991) 6.
[267] See for example the Namadji/Ngambri disagreement evident in Tim Dauth, 'Group names and native title in south-east Australia' in Toni Bauman and Gaynor Macdonald (eds), *Unsettling Anthropology: The Demands Of Native Title On Worn Concepts And Changing Lives* (Australian Institute of Aboriginal & Torres Strait Islander Studies, 2011) 21, 28; in http://www.ngambri.org/statement.php, accessed 20 November 2012; and in documents as part of disclosure under the *Freedom of Information Act 1989* (ACT) at http://www.cmd.act.gov.au/open_government/foi/cmcd/foi-ngunnawal-protocol,-ngarigu-native-title-claim,-ngarigu-and-ellen-mundy, accessed 9 April 2013.
[268] *Roe v Kimberley Land Council Aboriginal Corporation* [2010] FCA 809. For intercommunity disputes regarding identity and authority see Sarah Maddison, *Black Politics: Inside the complexity of Aboriginal political culture* (Allen and Unwin, 2009) 115 and 121.

or a people.[269] Indigenous Australians have been conceptualised as lacking the current or nascent sovereignty (for example through geographical fixity and state capacity) held to be a perquisite for recognition as a nation by extension for construction of foundational and derivative Indigenous identities independent of those assigned by settler governments. Instead – along with varying sectors of the non-Indigenous population – they have been addressed as objects of bureaucratic identification and parsing, embodiments of statistics regarding disadvantage or difference.

That abstraction predates the therapeutic state evident from the 1880s onwards, in other words one in which governments intervene in social life through hard power (such as criminal law enforced by courts, police and custodial institutions) and soft power (education, tax or other behavioural incentives, and norm-making through non-criminal law) to address ills such as poverty, illiteracy, contagion, vilification, animal cruelty, unemployment and street crime. It coincides with anxieties about successive conceptualisations of Indigenous people as a problem, whether because they were perceived to be 'dying out' (or inconveniently not dying out)[270] or perceived to have socially and politically unacceptable rates of incarceration[271] and violence.[272]

Rowse suggests that there has been a shift in recent years to a presumption in public policy that Indigenous Australians are a discrete people in relation to land (native title), governance (recognition of collectives in corporations law and public administration) and in law reform (specifically debate about the contribution of 'customary law' to social order).[273] We could argue that it is implicit in measures such as national apologies, reflecting the reconciliation aspect of the therapeutic state.[274]

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[269] That analysis inverts the schema evident in Tim Rowse, *Rethinking Social Justice: From 'Peoples' to 'Populations'* (Aboriginal Studies Press, 2012), otherwise a work of particular insight.
[270] Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939* (Melbourne University Press, 1997); Anna Haebich, *For Their Own Good: Aborigines and Government in the Southwest of Western Australia, 1900-1940* (University of Western Australia Press, 1988).
[271] Commonwealth Royal Commission into Aboriginal Deaths in Custody, *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1997-1998).
[272] Joy Wundersitz, 'Indigenous perpetrators of violence: Prevalence and risk factors for offending' (Research and public policy series no. 105) (Australian Institute of Criminology, 2010) iii indicating that 'Indigenous people are 15 to 20 times more likely than non-Indigenous people to commit violent offences', an incidence arguably attributable to factors such as deprivation rather than a genetic predisposition to criminality mooted by Lombroso and by some theorists last century.
[273] Tim Rowse, *Rethinking Social Justice: From 'Peoples' to 'Populations'* (Aboriginal Studies Press, 2012).
[274] Michael Humphrey, 'Reconciliation and the therapeutic state' (2005) 26(3) *Journal of Intercultural Studies* 203.

In thinking about identities, however, there has been a shift over the past 150 years from 'Aboriginal' (and Torres Strait Islander') as a foundational identity. Indigenous people may continue to experience substantial disadvantage but changes symbolised by the 1967 constitutional referendum[275] mean that in contrast to the 1930s (and 1830s) Indigenous Australians are not denied suffrage on the basis of ethnicity, are not subject to miscegenation restrictions, and are able to exercise what the Citizenship Ceremonies Code highlights as a privilege – more accurately a right – to seek and receive a passport. They are free to move from particular locations, in contrast to some past practice.

A contention in this dissertation is accordingly that 'being Aboriginal' (or perceived to be Aboriginal, a perception explored in Chapter Six) is no longer foundational. The waning of ethnicity as a foundational status tells us something about identity and about the changing values evident in Australian law.

Being Agentic

If the state is fundamental as the basis of legal identity through its articulation and enforcement of law, what of being 'agentic' – a concept that many people regard as a synonym for being 'live'? With the generative questions in mind, what does being agentic encompass, what does it mean, how does it arise or is verified, how is it signified and what are its implications?

As indicated earlier in this chapter, 'agentic' is a concept from the humanities and social sciences rather than a term that is in regular, authoritative use as part of statutes or law reports. It is used in this dissertation on a pragmatic basis because it is convenient, a conceptual shorthand for attributes that we can group as 'sentience' and 'expressiveness'. Those attributes are evident in jurisprudence over several centuries in relation to animals and artificial persons.

[275] Bain Attwood, Andrew Markus and Dale Edwards, *The 1967 referendum: race, power and the Australian Constitution* (Aboriginal Studies Press, 2007); and John Chesterman and Brian Galligan, *Citizens without rights: Aborigines and Australian citizenship* (Cambridge University Press, 1997) 8.

In essence, they mean that the Australian legal system can recognise those entities as actually or potentially engaging in legal relationships, engagement that involves autonomy and agency. Recognition includes the notion of standing in litigation, in other words the capacity and context-based right to be heard in courts and tribunals.[276]

In explaining agency, in other words action, it is useful to first look at expressiveness and engagement. We can think of expressiveness as communication. That communication might be in the form of a written or oral direction, responding to another entity's action or seeking to elicit a response by another entity. The communication might be in the form of a physical act. We can also think of expressiveness as refraining from action, a restraint that in some law is held to signal assent or to preclude future action.[277]

Engagement encompasses notions that legal identities involve choice and judgment.[278] In other words individual human animals and other entities that have legal identities are assumed to be autonomous and, as noted above, not react on an autonomic or mechanistic basis. In contrast, nonhuman animals, plants, software and mechanical or electronic devices are conventionally assumed not to have the requisite degree of autonomy and rationality. In articulating what he characterises as 'social cartesianism' – 'a strong claim about the existence of a radical difference between humans and other entities'[279] – Collins comments that

> Humans differ from animals, trees and sieves in having a unique capacity to absorb social rules from the surrounding society – rules that change from place to place, circumstance to circumstance, and time to time … It is only humans who have the ability to acquire cultural fluency. It is only humans who possess what we can call 'socialness' … As opposed to humans there are no groups of vegetarian dogs, arty dogs, nerdy dogs, dogs that believe in witches and dogs that understand mortgages – they are all just dogs. That one dog is different in 'personality' from another dog is

[276] Among studies see Margaret Allars, 'Standing: the Role and Evolution of the Test' (1991) 20(1) *Federal Law Review* 83; Geoff Holland, 'Standing As a Barrier To Constitutional Justice - Can We Create a New 'Public Law Paradigm'?' (2010) 22(3) *Bond Law Review* 78; and Emilios Kyrou, 'Locus Standi of Private Individuals Seeking Declaration or Injunction at Common Law' (1982) 13(3) *Melbourne University Law Review* 453. Salient judicial authority includes *Allan v Transurban City Link Ltd* (2001) 208 CLR 167, 174, citing *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 624-632 [88]-[107].

[277] Recall for example the notion of laches in equity, with law placing the onus on potential litigants to initiate action within a particular time rather than be passive. In contract law silence may similarly signify consent.

[278] Those notions do not require that an individual, corporation or state possess all relevant information and accurately assess the risk of adverse outcomes in relation to choices (in other words exercise what we subjectively or otherwise regard as 'good judgment'). Being human involves learning by making non-lethal mistakes.

[279] Harry Collins, *Tacit and Explicit Knowledge* (University of Chicago Press, 2013) 126. See however Marc Bekoff and Jessica Pierce, *Wild Justice: The Moral Lives of Animals* (University of Chicago Press, 2009).

> beyond dispute, it is just that these personality traits do not correspond to any significant cultural differences.[280]

In the absence of engagement, nonhuman animals cannot be legal persons. Plants, although described by one philosopher as enjoying a 'non-cognitive, non-ideational and non-imagistic mode of thinking', lack the engagement that makes for legal identity.[281] Their responses to variations in their environment are autonomic (for example phototropism is involuntary). We might act to protect particular species or specific environs (in the same way that we might seek to preserve an architectural precinct, artifact or geological formation) but that does not mean the Australian legal system equates vegetation with legal personhood.[282]

Corporations, on the other hand, are social and have the quality of engagement because they act – act as, through and ultimately for human beings. That agency, discussed in Chapter Seven, and the sentience provided by the humans who direct the artificial person and receive/process information on its behalf, means corporations are recognisable as agentic and thus legal identities.

What of sentience? It involves some measure of intelligence, in other words receipt, recognition and decision-making on the basis of communication from the entity's environment and thereby potentially changing that environment. That communication will often be from other legal entities, directly or otherwise.

Later paragraphs in this chapter and the discussion in Chapter Four indicate convention is important in terms of formal assumptions regarding cognitive processes and capacities within nonhuman animals, Australian law's strong valorisation of rationality and categorisation of entities on the basis of the extent to which individuals approximate to the exemplar for that category.

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[280] Harry Collins, *Tacit and Explicit Knowledge* (University of Chicago Press, 2013) 124-125.
[281] Michael Marder, *Plant-Thinking: A Philosophy of Vegetal Life* (Columbia University Press 2012) 10. See also Matthew Hall, *Plants as Persons: A Philosophical Botany* (State University of New York Press, 2011); and Simcha Lev-Yadun, 'Bioethics: On the road to absurd land' (2008) 3(8) *Plant Signalling & Behaviour* 612.
[282] Christopher Stone, 'Should Trees Have Standing - Toward Legal Rights for Natural Objects' (1972) 45(2) *Southern California Law Review* 450.

We should accordingly beware of the temptation to assume that sentience equals human or that 'near-human' sentience (such as that evident in simians) implies legal identity in Australian law.

With those comments in mind we can see that sentience, expressiveness and engagement are interrelated; they are dynamic. They can be read as qualities of 'liveness', with a corporation (in other words a legal fiction) through the activity of humans functioning as if it is alive by engaging in communication and being held to make decisions that are comparable to that of natural persons. We can also read sentience, engagement and expressiveness in terms of responsibility, with people and other entities in a liberal democratic polity being assumed to have the capability to make choices and give effect to those choices on a rational basis. That rationality is presupposed. It is qualified in circumstances where the entity does not have access to necessary information or, in the case of a human animal, where the entity's rationality is considered to be affected by a disability such as intoxication or a neurological deficit.

It has been fashionable in recent decades to conceptualise human animals as thinking machines, a mix of carbon-based hardware and software. The conceptualisation replaces pre-modern views of humanity as specially privileged organisms that, in contrast to 'ordinary' animals, were made in the image of the Christian deity and were endowed with both 'reason' and a soul. That earlier conceptualisation embodied a two-class legal identity theory, albeit with permutations for those creatures (such as women and slaves or people of 'other' ethnicities) who were considered to be on the borders of humanity.

Animal rights theorists have questioned whether the 'thinking machine' model represents an ideology that is inconsistent with our growing understanding of cognitive processes in human and other animals, with difference for example being conceptualised as a cognitive deficit. Proponents of artificial intelligence have asked whether we can and indeed in future must regard some forms of artificial intelligence, in particular cloud-based and thereby disembodied 'learning systems', as being 'self-

aware' and agentic … and thus appropriately addressed as legal persons.[283] That emphasis on self-awareness (or, as Turing argued in his 1950 test,[284] on a 'thinking' indistinguishable from that of a person)[285] side-steps Bentham's conceptualisation of sentience and thence rights for nonhuman animals in terms of pain, in other words 'The question is not, Can they reason? nor, Can they talk? but, Can they suffer?'[286]

Chapter Eleven of this dissertation, in building on the discussion of the corporation (a legal identity) in contrast to the nonhuman animal (not currently a legal identity), suggests that convention is particularly important and that much of the basis for recognition of legal identity in contemporary Australian law is administrative convenience rather a coherent set of transcendent principles.

It also suggests that if engagement is a prerequisite, nonhuman animals cannot be regarded as legal identities, although law reform both can and should respect nonhuman life on the basis of criteria such as sentience and ecological diversity.

Matters of Life and Death

If being agentic as a basis of legal identity involves a liveness enjoyed by corporate entities and human animals but not nonhuman animals, what is life? Given the tests noted in Chapter Two, how is life signified? Why does life matter?

An immediate response is that life is a matter of convention, founded on bureaucratic and social convenience. Legal liveness and 'life' in terms of foundational legal identity are not the same as biological life. That difference reflects cultural values and is subjective.

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[283] Lawrence Solum, 'Legal Personhood for Artificial Intelligences' (1991-92) 70 *North Carolina Law Review* 1231.
[284] Alan Turing, 'Computing Machinery and Intelligence' (1950) 236 *Mind* 433.
[285] See Stuart Shieber (ed), *The Turing Test: Verbal Behavior as the Hallmark of Intelligence* (MIT Press, 2004); and Robert Epstein, Gary Roberts and Grace Beber (eds), *Parsing the Turing Test: Philosophical and Methodological Issues in the Quest for the Thinking Compute*r (Springer, 2008).
[286] Jeremy Bentham, *An introduction to the principles of morals and legislation* (Pickering, 1823) vol 2, 236.

In contemporary Australian law the life of a natural person commences at birth, rather than conception or at the 'quickening'.[287] That categorisation is culturally contingent. It is problematical for some bioethicists and civil society advocates who characterise the life of the human animal (sometimes conceptualised as having a soul and thus privileged over nonhuman animals) as beginning at the moment of conception or at a certain stage of development prior to birth. That conceptualisation is reflected in references to the 'rights of the unborn child'[288] and to abortion as murder, a demonstration that how we characterise identity potentially has substantial consequences. It is also reflected in claims that law relies on anachronistic medical information.[289]

That life might be attributable to *in vitro* fertilisation or other assisted fertility,[290] with law recognising the parentage of children born through assisted fertility technologies.[291] Law has addressed questions about 'the stuff of life' in for example requiring the disposal of unimplanted fertilised oocytes and stored gametes,[292] restricting postmortem extraction of gametes[293] and restricting some experimentation.[294]

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[287] Kristin Savell, 'Is the 'Born Alive' Rule Outdated and Indefensible' (2006) 28(4) *Sydney Law Review* 635; Gerard Casey, *Born Alive: The Legal Status of the Unborn Child* (Barry Rose Law Publishers, 2005); and Clarke Forsythe, 'Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms' (1987) 21(3) *Valparaiso University Law Review* 563. For recent Australian law see *Barrett v Coroner's Court of South Australia* [2010] SASCFC 70 and *Barrett v The Coroner's Court of South Australia & Anor* [2011] HCATrans 165.

[288] Carl Wellman, 'The Concept of fetal rights' (2002) 21(2) *Law and Philosophy* 65; Tania Penovic, 'Human Rights and the Unborn Child' (2011) 33(1) *Human Rights Quarterly* 229; and unpersuasive Rita Joseph, *Human Rights and the Unborn Child* (Martinus Nijhoff, 2009).

[289] In particular see Clarke Forsythe, 'Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms' (1987) 21(3) *Valparaiso University Law Review* 563. See also Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* (Oxford University Press, 2011) regarding the legal status of the unborn as a subject of contestation in US law and politics.

[290] As points of entry to the literature on assisted fertility see Bernard Dickens, 'The Ectogenetic Human Being: A Problem Child of Our Time' (1979-1980) 18(1) *University of Western Ontario Law Review* 241; and Senate Constitutional and Legal Affairs Committee, Parliament of Australia, *Donor Conception Practices in Australia* (2011).

[291] In particular *Family Law Act 1975* (Cth) s 60H. For a US perspective see Benjamin Carpenter, 'A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It' (2012) 21 *Cornell Journal of Law & Public Policy* 1; and Renee Sekino, 'Posthumous Conception: The Birth of a New Class' (2002) 8(1) *Boston University Journal of Science & Technology Law* 362.

[292] For example *Infertility Treatment Act 1995* (Vic) and *Assisted Reproductive Treatment Act 2008* (Vic).

[293] Andrew Lu, 'Life after death and post mortem sperm harvesting' (2012) 20(9) *Australian Health Law Bulletin* 130; Tom Faunce and Jatine Patel, 'Re Edwards (2011) 4 ASTLR 392: who owns a dead man's sperm?' (2012) 19(3) *Journal of Law and Medicine* 479; and Marett Leiboff, 'Post-mortem sperm harvesting, conception and the law: rationality or religiosity?' (2006) 6(2) *Queensland University of Technology Law & Justice Journal* 193.

[294] *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) and *Research Involving Human Embryos Act 2002* (Cth).

Law does not regard a foetus as being autonomous[295] and thus having a legal identity; action that causes a foetus to 'die'[296] in utero may be treated as a grievous bodily harm on the basis that the interests of the mother and potential child are intertwined[297] and a child may take action for injury suffered as a foetus.[298] The unborn child is not a citizen, cannot engage in commercial transactions or hold property but can prospectively be a beneficiary of a trust if it is born. The 'if' is important; Australian law allows the termination of a pregnancy in particular circumstances, so that the foetus does not become a legal person.[299]

Birth is what brings the person into existence. It is typically recognised through a birth certificate, a registration mechanism discussed in Chapters Nine and Eleven.[300] People are assumed to be alive until they die, although their sentience and agency on an instance by instance basis may vary considerably during that time, with the death of human animals being formally noticed by the 'information state' through a death certificate and inclusion in a state/territory deaths register.[301]

Death, as was said of Citizen Kane, comes to us all.[302] Life may be evanescent. The Court in *R v Iby* thus indicated that

> Authority is clearly in favour of a conclusion that the common law 'born alive' rule is satisfied by any indicia of independent life. There is no single test of what constitutes 'life'. The position is well-stated by one author: A child is live-born in the legal sense, when, after entire birth, it exhibits a clear sign of independent vitality; in practice, at least the evanescently persistent activity of the heart.[303]

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[295] *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276.
[296] See *Barrett v Coroner's Court of South Australia* [2010] SASCFC 70 and *Barrett v The Coroner's Court of South Australia & Anor* [2011] HCATrans 165.
[297] See for example *Crimes Act 1900* (NSW) s 5; *Crimes Act 1958* (Vic) s 15; *Criminal Code 1924* (Tas) s 184A; and *Criminal Code 1899* (Qld) s 313(2). Criminalisation of action that causes death of the child during birth, for example by strangulation after the child has uttered its first breath but is still attached to the mother, is covered in statutes such as *Crimes Act 1900* (NSW) s 20; *Crimes Act 1900* (ACT) s 42; *Criminal Code Act 1924* (Tas) s 165; *Criminal Code l899* (Qld) s 313(2); and *Criminal Code* (NT) s 170.
[298] *R v Iby* (2005) 63 NSWLR 278; (2005) NSWCCA 178; *Watt v Rama* (1972) VR 353; and *R v King* (2003) 59 NSWLR 472.
[299] See for example *Criminal Code 1924* (Tas) s 164; *Health Act 1911* (WA) ss 5(a), 7(b) and 334(a); *Criminal Law Consolidation Act 1935* (SA) s 82A. Among works on decriminalisation of abortion, consistent with theorising pregnant women as having possessive individualism, see Gideon Haigh, *The Racket: How Abortion Became Legal in Australia* (Melbourne University Press, 2009).
[300] Melissa Castan, Andy Gargett and Paula Gerber, 'A right to birth registration in the Victorian Charter? Seek and you shall not find!' (2010) 36(3) *Monash University Law Review* 1.
[301] See for example *Births, Deaths & Marriages Registration Act 1996* (SA); *Births, Deaths and Marriages Registration Act 1996* (Vic); and *Registration of Deaths Abroad Act 1984* (Cth).
[302] James Naremore, *Orson Welles' Citizen Kane: A Casebook* (Oxford University Press, 2004) 48.
[303] *R v Iby* (2005) 63 NSWLR 278, Spigelman CJ at 287. See also *R v Hutty* [1953] VR 338, Barry J at 339.

A consequence of that conceptualisation is that causing death of a freshly delivered baby, an older infant in a crib, a young person in a nightclub or an adult in an aged care home all potentially attract criminal or civil penalties, including those characterised through the concept of murder. There is no necessity to be agentic on a long term basis or to reach a statutory age of maturity before identity arises. What the court in *Iby* alluded to as 'tokens of vitality' – such as breathing, circulation and some brain activity – might be quite evanescent. In contrast to speech or written communication, however, they *do* need to be discernable in order for life to be recognised.

Forsythe characterised the 'born alive' rule as a legal anachronism attributable to a lag in judicial reception of recent medical knowledge. One response might be that courts are in fact aware of new medical conceptualisations of when life starts and the extent to which premature infants can be supported, with jurisprudence instead being informed by public policy concerns. Australian courts, along with overseas peers, are grappling with advances in knowledge and technologies regarding death. Does life – or the life needed for recognition in terms of legal identity – cease when a person's heart stops beating? What if circulation is attributable to a mechanical device? What if circulation continues unassisted but all higher functions in the person's brain have ceased and will not reappear?

Those questions pose conundrums for people who conceptualise life in terms of a pulse and unassisted breathing or that someone is dead because a medical practitioner has said so.[304] Fortunately Australian legislatures have provided statutory definitions that accommodate practices such as organ transplantation (a gifting of a non-renewable organ to enable the flourishing of the recipient) and elective ventilation[305] and might be reflected in a regime that embraces 'assisted dying',[306] given the tenet

[304] Ian Freckelton and David Ranson, *Death Investigations and the Coroner's Inquest* (Oxford University Press, 2006) 130 and 137. Russell Smith, 'Refining the Definition of Death for Australian Legislation' (1983) 14(2) *Melbourne University Law Review* 199 remains useful.
[305] *Transplantation and Anatomy Act 1978* (ACT) ss 30 and 45; *Human Tissue Act 1983* (NSW) ss 26 and 33; *Transplantation and Anatomy Act* (NT) ss 21 and 23; *Transplantation and Anatomy Act 1979* (Qld) s 45; *Death (Definition) Act 1983* (SA) s 2; *Human Tissue Act 1985* (Tas) ss 25A and 27A; and *Human Tissue Act 1982* (Vic) ss 26(7) and 41.
[306] Lorana Bartels and Margaret Otlowski, 'A right to die? Euthanasia and the law in Australia' (2010) 17(4) *Journal of Law and Medicine* 532. See also Penney Lewis, *Assisted Dying and Legal Change* (Oxford University Press, 2007).

that – with the exception of killing in self-defence[307] – the state reserves a monopoly on lawful ending of life.[308] Some individuals for example, with full capacity, might construe their personal goods in terms of assistance in ending a life that for them has become unduly burdensome through pain or deterioration/loss of body functions.

Lawmakers have also recognised that bodies sometimes are not available and have accordingly embraced assumptions such as the 'seven year rule', in other words the convention that an absence for seven years means the person is dead.[309] That convention has implications for marriage, insurance and other law, for example through identity frauds highlighted in later chapters of this dissertation. Australian has not yet had to address questions about property disputes, misrepresentation and negligence in relation to postmortem freezing for cryonic preservation and supposed eventual 'resuscitation' of dead humans,[310] cadavers whom proponents of cryonics characterise as 'in suspension' rather than dead, privileging a latency that if applied consistently would give personhood to embryos from the moment of fertilisation. [311] The legal status of zombies – academic thought experiments rather than plot devices in popular culture – perhaps offers a more useful foundation for considering personhood.[312]

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[307] See for example *Crimes Act 1900* (NSW) s 418; *Crimes Act 1958* (Vic) s 322K; and jurisprudence such as *Zecevic v DPP* (1987) 162 CLR 645. The statutes recognise action to defend family members or others in imminent risk of serious harm.

[308] That monopoly is most commonly exercised by the armed forces in military conflict. See also *Death Penalty Abolition Act 1973* (Cth); Lynne Forsterlee, 'Death penalty attitudes and juror decisions in Australia' (1999) 34(1) *Australian Psychologist* 64; William Schabas, *The abolition of the death penalty in international law* (Cambridge University Press, 2002); and James Wyman, 'Vengeance Is Whose: The Death Penalty and Cultural Relativism in International Law' (1996) 6(2) *Journal of Transnational Law & Policy* 543, with the latter indicating the usefulness of a Rawlsian test in addressing cultural contingency.

[309] The leading authority is *Axon v Axon* [1937] HCA 80; (1937) 59 CLR 395, Latham CJ at 401 and Dixon J at 404. See *Administration and Probate Act 1958* (Vic) s 7; *Administration and Probate Act 1929* (ACT) s 9A; *Re Jeanette Williams and Secretary, Department of Social Security* [1992] AATA 36; and *Peter Dale Hills* [2009] SASC 176. Among studies see D Stone, 'The Presumption of Death: A Redundant Concept' (1981) 44(5) *Modern Law Review* 516; and David Kelly and Julius Varsanyi, 'Declarations of Death: Reappearance and Status' (1971) 20(3) *International and Comparative Law Quarterly* 535. See also House of Commons Justice Committee, UK Parliament, *Presumption of death: twelfth report of session 2010-12* (2012); and Frances Jalet, 'Mysterious Disappearance: The Presumption of Death and the Administration of the Estates of Missing Persons or Absentees' (1968) 54 *Iowa Law Review* 177. For a comparative law perspective see Bernard Haykel, 'Dissembling Descent, or How the Barber Lost His Turban: Identity and Evidence in Eighteenth-Century Zaydī Yemen' (2002) 9(2) *Islamic Law and Society* 194, 209.

[310] George P Smith, 'Intimations of Immortality: Clones, Cyrons and the Law' (1983) 6(1) *University of New South Wales Law Journal* 119; D John Doyle, 'Cryonic Life Extension: Scientific Possibility or Stupid Pipe Dream?' (2012) 3(1) *Ethics in Biology, Engineering and Medicine: An International Journal* 9; and George P Smith, 'The iceperson cometh: cryonics, law and medicine' (1983) 1(2) *Health Matrix* 23. Note Queensland Law Reform Commission, *Review of the Law in Relation to the Final Disposal of a Dead Body* (QLRCWP Working Paper, 2004) 9: 'It is unclear as to whether the [cryonic] preservation of a dead body actually constitutes disposal of the body'.

[311] James Hughes, 'The future of death: cryonics and the telos of liberal individualism' (2001) 6(1) *Journal of Evolution and Technology* np.

[312] Bruce Baer Arnold, 'Is The Zombie My Neighbour? The Zombie Apocalypse As A Lens For Understanding

The preceding paragraphs have dealt with the life of the human animal. What of artificial persons, including the corporate entities discussed in Chapter Seven below?

Law regarding when a state comes into existence is unsettled; most new states mark their establishment with a formal ceremony as an indicator that formal autonomy (as opposed to power on the ground) has come into being). States exist *de jure* until there is sufficient non-recognition by other states, for example countries accept the fact of power on the ground after a period of military conflict.[313]

Corporations in the premodern period came into existence when the monarch or other head of state signed the charter or patent that gave the new entity legal authority or on a date specified in legislation or the patent.[314] In contemporary Australian law, with the proliferation of companies, corporate identities are typically 'live' from the moment of registration – ie from when a companies registrar formally recognises their existence through inclusion on the register[315] – or when legislation establishing the body comes into effect. Companies have a legal identity until deregistration.[316] That is a reminder that they exist at the pleasure of the state and, unlike humans, are not considered as having inalienable rights.[317] That alienability, as discussed in Chapter Seven, means that they resemble nonhuman animals.[318]

Legal Personhood' (2016) 14(1) *Canberra Law Review* 20.

[313] See for example John Dugard and David Raic, 'The Rule of Recognition in the Law and Practice of Secession' in Marcelo Kohen (ed), *Secession: International Law Perspectives* (Cambridge University Press, 2012) 94; Pål Kolstø and Helge Blakkisrud, 'Living with non-recognition: state-and Nation-building in South Caucasian Quasi-states' (2008) 60(3) *Europe-Asia Studies* 483; Stefan Talmon, 'The Constitutive Versus the Declaratory Doctrine of Recognition: Tertium Non Datur?' (2004) 75 *British Yearbook of International Law* 101; and David Lloyd, 'Succession, Secession, and State Membership in the United Nations' (1993) 26(4) *New York University Journal of International Law and Policy* 761.

[314] Maitland in echoing *Tipling v Pexall* (1613) 2 Bulst 233 commented that 'if the personality of the corporation is a legal fiction, it is a gift of the prince' rather than of god through his creation of humanity. F W Maitland, 'Moral Personality and Legal Personality' (1905) 6(2) *Journal of the Society of Comparative Legislation* 192, 195. We would now, consistent with the 1897 statement by Lord Halsbury, regard the corporation as 'a creation of the Legislature'. *Salomon v Salomon & Co Ltd* [1897] AC 22, Lord Halsbury LC at 29.

[315] *Corporations Act 2001* (Cth) s 119. See also *Corporations Act 2001* (Cth) s 5H.

[316] *Corporations Act 2001* (Cth) s 601AD.

[317] See however Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press, 2006) and the discussion in Vanessa Wilcox, *A Company's Right to Damages for Non-Pecuniary Loss* (Cambridge University Press, 2016) 29-53.

[318] Paola Cavalieri, *The Animal Question: Why Nonhuman Animals deserve Human Rights* (Oxford University Press, 2001); Cass Sunstein, 'The Rights of Animals: A Very Short Primer' (Public Law and Legal Theory Working Paper No. 30, University of Chicago Law School, 2002); and David Macdonald, 'Pushing the Limits of Humanity? Reinterpreting Animal Rights and "Personhood" Through the Prism of the Holocaust' (2006) 5 *Journal of Human Rights* 417. See also Alan Gewirth, 'Why There Are Human Rights' (1985) 11 *Social Theory and Practice* 235.

If identity is a matter of consequences, why do we care about life and death? One answer, as highlighted by Naffine,[319] is that both are freighted with metaphysical values that are important to individuals in making sense of their own existence and that by linking people to communities form a basis for a sense of belonging, rights and responsibilities. People define themselves through their relationships with past, current and prospective members of their society.

A more functionalist answer is that life and death bring into being or extinguish the rights, responsibilities, entitlements and obligations highlighted throughout this dissertation. As legal inflection points in liberal democratic states they invoke registration and investigation processes administered by state bureaucracies (such as the Australian state/territory registrars of births, deaths and marriages and coroner's offices that have a statutory basis)[320] and that involve nongovernment entities such as medical practitioners acting for the state.

Death has consequences, for example regarding the end of entitlement to income support (reflected in identity offences such as people illegally receiving the pension of a dead relative), potential disagreements about disposition of the deceased person's assets[321] or body,[322] opportunities for insurance fraud through fake deaths[323] and a changed status under defamation law. Dead people cannot sue for injury to reputation, irrespective of the pain experienced by their grieving survivors, because in legal terms that reputation dies with them.[324]

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[319] Ngaire Naffine, 'Who Are Law's Persons? From Cheshire Cats To Responsible Subjects' (2003) 66(3) *Modern Law Review* 346, 350.

[320] See for example *Births, Deaths & Marriages Registration Act 1996* (SA); *Registration of Deaths Abroad Act 1984* (Cth); *Coroners Act 2009* (NSW) ss 6 and 10. See also Bruce Baer Arnold and Wendy Bonython, 'Autopsies, Scans and Cultural Exceptionalism' (2016) 41(1) *Alternative Law Journal* 27; and Bruce Baer Arnold, Wendy Bonython and Skye Masters, 'Law, Cultural Exceptionalism and the Body' in Patricia Easteal and Skye Masters (eds), *Justice Connections II* (Cambridge Scholars Press, 2013) 197.

[321] See for example *Levy v Watt* [2012] VSC 539; *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64; *Brown v Wade* [2010] WASC 367; *Schneider & Anor v Sydney Jewish Museum Inc & Anor* [2008] NSWSC 1331; and *Kay v Fisher* [2009] WASC 193.

[322] For example *AB v CD* [2007] NSWSC 1474; *Burrows v Cramley* [2002] WASC 47; and *Calma v Sesar & Ors* (1992) 106 FLR 446. More broadly, Kieran McEvoy and Heather Conway, 'The Dead, the Law, and the Politics of the Past' (2004) 31(4) *Journal of Law and Society* 539; and Mavis Maclean, 'Letting Go … Patients, Professionals and the Law in Retention of Human Material After Post Mortem', in Andrew Bainham, Shelley Sclater and Martin Richards (eds), *Body Lore and Laws* (Hart, 2002) 79.

[323] *DPP v Stonehouse* [1978] AC 55. Accounts include Harry Gordon, *The Harry Gordon story: how I faked my own death* (New Holland, 2007); John Stonehouse, *Death of an Idealist* (WH Allen, 1975); Eunice Chapman, *Presumed Dead: The True Story of an Unsolved Mystery* (Time Warner, 1992); and Jeanne Carriere, 'The Rights of the Living Dead: Absent Persons in the Civil Law' (1990) 50(5) *Louisiana Law Review* 901.

[324] *Civil Law (Wrongs) Act 2002* (ACT) s 122; *Defamation Act 2005* (NSW) s 10; *Defamation Act 2006* (NT) s 9; *Defamation Act 2005* (Qld) s 10; *Defamation Act 2005* (SA) s 10; *Defamation Act 2005* (Vic) s 10; and *Defamation Act 2005* (WA) s 10.

Death takes the individual, although not the individual's estate (which is held to pass to heirs),[325] out of Australian jurisdiction: the person has migrated to death's kingdom, a jurisdiction from which there is no return.

Rivers, Gods and Monsters

Previous pages have argued that legal history and comparative law offer perspectives for understanding what legal identity means in the Australia of 2017.

Legal systems in other times and cultures have regarded metaphysical entities as being agentic. Those entities might be abstractions or take the form of rocks, trees and thunderclouds, all with agency.[326] As cosmic judges the entities might be invoked for support, might refrain from injury if beseeched through prayer and sacrifice, might engage in condign collective punishment of a wicked society and sinful polity,[327] might reinforce justice by swiftly smiting perjurers,[328] might be blamed when something went wrong or simply referred to in explaining matters in court.[329] As indicated by one deity in *Job*,[330] those entities were typically regarded as outside an earthly court's jurisdiction. In most cosmologies they lack qualities of engagement: they are for example timeless and unchanged by the environment (albeit their physical manifestation as a swan, stag, bull, satyr, burning bush, whirlwind or other 'avatar' may vary from instance to instance).

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[325] Death similarly does not vanquish debt or bankruptcy; see *Bankruptcy Act 1966* (Cth) s 63.

[326] Graham Harvey, *Animism: Respecting the Living World* (Wakefield Press, 2005) 39 for example notes that the Ojibwe regard clouds as 'intentional actors in an intimately related world. They can show great affection and great hostility, not only in individual acts but by forming lasting relationships of either intimacy or violence. They give gifts generously or attack viciously.'

[327] Todd Pettys, 'Sodom's Shadow: The Uncertain Line Between Public and Private Morality' (2010) 61(5) *Hastings Law Journal* 1161; and Andrew Murphy, *Prodigal nation: Moral decline and divine punishment from New England to 9/11* (Oxford University Press, 2008).

[328] J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 8th ed, 2010) 455; NSW Law Reform Commission, *Oaths and Affirmations (Discussion Paper 8)* (1980); Mark Weinberg, 'The Law of Testimonial Oaths and Affirmations' (1976) 3(1) *Monash University Law Review* 25 and Australian Law Reform Commission, *Uniform Evidence Law* (ALRC Report 102) (2006) 98. See also Giorgio Agamben, *The Sacrament of Language: An Archaeology of the Oath* (Adam Kotsko trans, Stanford University Press, 2010) [trans of *Il sacramento del linguaggio* (first published 2008)].

[329] Keith Thomas, *Religion and the Decline of Magic* (Allen Lane, 1971); and Todd Butler, 'The Haunting of Isabell Binnington: Ghosts of Murder, Texts, and Law in Restoration England' (2011) 50(2) *Journal of British Studies* 248.

[330] *Job* 38:4; 38:33; 39:9 and 41:1

As explored in Chapter Five, contemporary Australian law features a shadow of that conceptualisation, with for example references to God – implicitly a Christian entity – and practices such as prayer. That law does not, however, attribute justiciable agency to gods, demons, spectres or other cosmological entities and does not assign them a legal identity.[331] That non-recognition is distinct from respect for belief systems[332] and of religious institutions as promoting social goods.[333]

In essence it respects the belief in the metaphysical rather than recognising the agency of the claimed metaphysical entity. In a benign example, the court in *Cummins v Bond* attributed copyright in a report of a séance to the medium, rather than the spirit who communicated through that amanuensis.[334] The Chancery judge found that he lacked jurisdiction in 'the sphere in which the spirit moves' and was not prepared to hold that

> authorship and copyright rest with some one already domiciled on the other side of the inevitable river. That is a matter I must leave for solution by others more competent to decide than me.

More recently an individual's attribution of agency to a metaphysical entity has been taken to be indicative of psychological disorder[335] or a belief system that is incompatible with professional practice.[336] 'Spirits' are not credited as an explanation for criminal action;[337] courts refer to hallucinations rather than accepting the existence of extraterrestrials,[338] ghosts,[339] astral travel[340] or a person's realisation that he is

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[331] For the contemporary notion of 'Acts of God' see Linda Meyer, 'Catastrophe: Plowing Up The Ground of Reason' in Austin Sarat, Lawrence Douglas and Martha Umphrey (eds), *Law and Catastrophe* (Stanford University Press, 2007) 19. See also *Spain v Commonwealth of Australia* [2015] QSC 258, [7], [9], [12], [17] and [21]-[22].

[332] *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120; 49 ALR 65. See also *Pop v Queensland Building Services Authority* [2012] QCAT 388, [47]; and *Warrie (formerly TJ) (on behalf of the Yindjibarndi People) v State of Western Australia* [2017] FCA 803, [66].

[333] *Commissioner for Australian Capital Territory Revenue Collections v Council of Dominican Sisters of Australia* (1991) 101 ALR 417. See also Kerry O'Halloran, *Religion, Charity and Human Rights* (Cambridge University Press, 2014); and the spirited Max Wallace, *The Purple Economy: Supernatural Charities, Tax and the State* (Australian National Secular Association, 2007).

[334] *Cummins v Bond* (1927) 1 Ch. 167.

[335] *R v Gifford* [2002] NSWSC 498; *Re VRH* [2003] QGAAT 1; *Mallick v McGeown & Anor* [2008] NSWCA 230; *R v GU* [2009] NSWSC 25; *R v Gjf, R v GFF, R v KHF* [2002] NSWSC 737; *The Queen v Leach* [2004] NTSC 60, [118]; and *McHenry v The State of Western Australia (No 2)* [2010] WASCA 71, [25].

[336] *Health Care Complaints Commission v Tynan* [2010] NSWPST 1, [133].

[337] *R v McLaren* [2009] SASC 225; *R v Healey* [2008] SASC 83, [32]; *Re JGB* [2004] QMHC 29; *R v Miller* [2008] NSWSC 1038; *R v Shepherd* [2007] NSWSC 1416.

[338] *98-232* [1998] VMHRB 5*; Robinson v Commissioner of Police, NSW Police* [2005] NSWADT 5, [15]; *EVY* [2015] VMHT 23; *FYM* [2015] VMHT 167, [4]; and *EPH* [2014] VMHT 14.

[339] *Descas v Descas* [2013] FMCAfam 69, [43] features the robustly secular response by a property valuer: 'Exorcism is not one of our many speciality services and unless the ghost was held captive in the room to which we could not gain access it must have been at lunch', with the Court referring to schizophrenia rather than trespassing revenants.

[340] *IHM* [2015] VMHT 79; *98-232* [1998] VMHRB 5; *Clare, Re (deceased)* [2009] QSC 403, [17]; *LR v Saqu* [2007] QDC 151, [22]; *BRF v Children's Guardian* [2015] NSWCATAD 169, [51]; *QDM* [2015] VMHT 46; *DPP*

either the deity, the son of god or satan.[341] As a corollary, contemporary Australian law is uncomfortable in dealing with injury or death associated with exorcism.[342] It punishes deception in the form of gaining money through communication with the dead[343] and equivocally restricts the practice of mediumship.[344]

The Christian gospel that has informed the development of much Australian law indicates that all things were made by God and that 'without him was not any thing made that was made'.[345] Adherents of particular faiths may well believe that the particular deity is the beginning of all things, legal or otherwise, or that the devil is present in the world.[346] In contemporary law neither deities nor demons have legal standing or are legal identities, although as Chapter Five indicates they may have a symbolic power and be invoked in contemporary legal processes through for example public prayers.

Since at least the time of *Bowman v Secular Society* Australian courts have inclined to the view that offence to the Christian deity (as distinct from offence to a deity's adherents) is outside the reach of the law.[347] Mill in *On Liberty* had commented

> It remains to be proved that society or any of its officers holds a commission from on high to avenge any supposed offence to Omnipotence, which is not also a wrong to our fellow-creatures.[348]

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v Smith [2013] VSC 438, [16]; and *ZKI* [2015] VMHT 64. The Victorian decisions take some pains in differentiating between delusional and religious belief.

[341] *The Australian Capital Territory v Crowley, The Commonwealth of Australia and Pitkethly* [2012] ACTCA 52, [87]; *J H S v R* [1991] TASSC 110, [24]; *Regina v John Charles Maxwell* [1999] NSWSC 281, [5]-[6]; *HL* [1997] VMHRB 17; *Inspector Wade v North Coast Area Health Service* [2005] NSWIRComm 349, [119]; *R v Craft* [2003] NSWSC 588, [13]; *R v Zilic* [2010] SASC 70, [15]; *Zhong v Melbourne Health & Anor* [2015] VSCA 165, [38]; and *R v Trimarchi* [2002] NSWSC 62, [8]. See also *R v Della-Torre* [2005] NSWSC 703, [17]; *Attorney General of NSW v Doolan by his tutor Jennifer Thompson (No. 2)* [2016] NSWSC 107, [46]; and *R v Lopez* [2014] NSWSC 287, [47].

[342] Examples are *R v Vollmer & Ors* [1996] VicRp 9; *R v Mika and Sagato* [2000] NSWSC 852; *R v Amete* [2000] NSWSC 439; and *The Queen v Guy* [2015] VSC 559, [33]. See also *Fowler (a Pseudonym) v Secretary to the Department of Health & Ors* [2014] VSCA 231, [4].

[343] *R v Perera* [1907] VicLawRp 47.

[344] Steve Greenfield, Guy Osborn and Stephanie Roberts, 'From Beyond the Grave: The Legal Regulation of Mediumship' (2012) 8(1) *International Journal of Law in Context* 97.

[345] *Gospel According to St John* (King James Translation) 1: 1-3.

[346] In *R v Pawson* [1795] NSWSupC 2; [1795] NSWKR 2 the court anachronistically referred to Mary Pawson as 'charged for that she, not having the fear of God before her eyes, but being moved and seduced by the instigation of the Devil' attracted the attention of the law.

[347] *Bowman v Secular Society* [1917] AC 406, 466. See also Bede Harris, 'Pell v. Council of Trustees of the National Gallery of Victoria - Should Blasphemy Be a Crime? The Piss Christ Case and Freedom of Expression' (1998) 22(1) *Melbourne University Law Review* 217; Reid Mortensen, 'Blasphemy in a Secular State: A Pardonable Sin' (1994) 17(2) *UNSW Law Journal* 409; Russell Sandberg and Norman Doe, 'The strange death of blasphemy' (2008) 71(6) *Modern Law Review* 971; and Helen Pringle, 'Regulating Offence to the Godly: Blasphemy and the Future of Religious Vilification Laws' (2011) 34(1) *University of New South Wales Law Journal* 316.

[348] John Stuart Mill, 'On Liberty' in Stefan Collini (ed), *'On Liberty' And Other Writings* (first published 1859, Cambridge University Press, 1989) 1, 90.

What of nature? Considering non-recognition of the natural world or of particular nonhuman entities tells us something about law and about identity. In 2012 the New Zealand Minister for Treaty Negotiations announced[349] that as a consequence of the foundational Treaty of Waitangi and protracted negotiations by traditional owners the Whanganui River would be recognised in New Zealand law as a legal entity.[350] In effect it would be regarded as a legal person titled *Te Awa Tupua*, having legal standing, an 'independent voice' and able – through its guardians – to take action if it suffered an injury.[351]

In 2014 the *Te Urewera Act*[352] similarly established an 821-square-mile forest, the ancestral homeland and 'living ancestor' of the Tühoe people, as a legal person.[353] The Act states that 'Te Urewera has an identity in and of itself'[354] with 'legal recognition in its own right'[355] as 'a legal entity' with 'all the rights, powers, duties, and liabilities of a legal person'.[356] Te Urewera holds title to itself,[357] with representation by a board – its guardians.[358]

That recognition does not mean that individuals and corporations can sue the river or forest for injury that it causes, for example through flooding of a home or a death during whitewater rafting.[359] It does however give both entities a status in New Zealand different to that of individual animals and the 'environment'. Neither river nor forest can speak for itself. Outside the conceptualisation of some traditional

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[349] Christopher Finlayson, Minister for Treaty for Waitangi Negotiations, 'Whanganui River Agreement Signed' (Minister for Treaty for Waitangi Negotiations Media Release, 30 August 2012).
[350] Catherine Iorns Magallanes, 'Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment' (2015) 21(2) *Widener Law Review* 273, 314-316. See also Mick Strack, 'Land and rivers can own themselves' (2017) 9(1) *International Journal of Law in the Built Environment* 4.
[351] That agreement is reflected in the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ).
[352] *Te Urewera Act 2014* (NZ).
[353] Jacinta Ruru, 'Tühoe-Crown settlement – Te Urewera Act 2014' (2014) Oct *Maori Law Review* 16; Catherine J. Iorns Magallanes, 'Nature as an Ancestor: Two Examples of Legal Personality for Nature in New Zealand' (2015) 22 *VertigO - la revue électronique en sciences de l'environnement* http://vertigo.revues.org/16199 and 'Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment' (2015) 21(2) *Widener Law Review* 273, 320.
[354] *Te Urewera Act 2014* (NZ) s 3(3).
[355] *Te Urewera Act 2014* (NZ) s 3(9).
[356] *Te Urewera Act 2014* (NZ) s 11(1).
[357] *Te Urewera Act 2014* (NZ) s 12(3).
[358] Section 11(2) of the *Te Urewera Act 2014* (NZ) specifies that 'the rights, powers, and duties of Te Urewera must be exercised and performed on behalf of, and in the name of, Te Urewera' by the Te Urewera Board; and that 'the liabilities are the responsibility of Te Urewera Board, except as provided for in section 96'.
[359] James Douglas Kahotea Morris, *Affording New Zealand rivers legal personality: a new vehicle for achieving Maori aspirations in co-management?* (University of Otago LLM dissertation, 2009).

owners they lack cognition and therefore intention – qualities that form part of what we regard as being human. From a non-cosmological perspective they lack the quality of engagement and are thereby precluded from being legally agentic.[360] However, many human animals have limited cognition (for example through age or injury), low levels of communication and on an instance by instance basis do not have engagement but are recognised in law as being human, essentially because they sufficiently resemble the exemplar of the sentient, expressive and engaged person. Being human and thus having a fundamental legal identity is a matter of convention, a convention attributable to both history and convenience rather than transcendent uncontestable values.

From a Rawlsian perspective we might valorise being agentic yet protect both individual nonhuman life forms and collectivities (such as a specific river or 'the environment') for reasons outside the flourishing or imputed flourishing of those individuals and collectivities. The final chapter of this dissertation recommends that we can and should rework our law regarding nonhuman life without having to recognise a river or other entity as a legal identity or quasi-identity. In having regard to dignity, through for example a national Bill of Rights that aims to foster flourishing, we can move beyond what is administratively convenient or inherited, meaning that pragmatism can accommodate changing perceptions of public goods or of nonhuman animals and for example provide stronger protection (through perhaps a well-resourced public guardian) for the natural environment as something of benefit to all creatures with a timeframe extending beyond the quarterly return on investment and electoral cycle.

Objects, Subjects and Sorts

The preceding comments pose several implications.

One is that we can learn something about modern Australian law, and about law generally, by considering several questions. Why do legal systems choose foundational identities? How do they choose, articulate and protect those identities?

[360] Catherine Iorns Magallanes, 'Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment' (2015) 21(2) *Widener Law Review* 273.

Which institutions do the choosing? What values and interests do the identities represent? Answers to those questions are explored in Chapter Eleven below.

Pending that discussion we might conjecture that choosing involves flexibility. It reflects administrative convenience and bureaucratic capacity (the latter not a constant), changing notions of justice (and of the balance between justice and other matters such as cost or security), economic interests in liberal democratic states (where markets rather than non-commercial ideologies strongly influence policymaking and law enforcement), and advocacy by civil society bodies.[361] It also involves disagreement about notions of cultural identity and diversity, evident in disagreement about state programs for 'internal colonisation' or norm building through civics education, citizenship codes, tests of 'cultural competency', language policy and notions of the 'flag as civic religion' or marker of belonging.

Another implication is that the social compact underpinning the liberal democratic state is reflected in expectations that identification as a citizen brings with it entitlements and obligations. Those endowments range from potential eligibility to receive income support through to potential discomforts such as a requirement to pay tax or shoulder other burdens such as military service and jury duty.[362]

Such identification implies schemes of population-wide registration (for example under the statutorily-based tax file number[363] and Medicare number[364] regimes noted in Chapter Nine) and thus perception by the state through its officials that people are identity numbers – and the age, ethnicity or other demographic attributes associated with each number – and aggregate statistics rather than 'flesh and blood' individuals.[365] Chapter Eleven explores the tensions in such 'seeing like a state', in other words making the individual bureaucratically legible.[366] Convenience in identification of citizens and non-citizens alike encourages practices such as use and

[361] Roger Clarke, 'A framework for analysing technology's negative and positive impacts on freedom and privacy' (2016) 40(2) *Datenschutz und Datensicherheit* 79.
[362] Note the exemptions under the *Jury Act 1967* (ACT) sch 2, *Jury Exemption Act 1965* (Cth), *Navigation Act 2012* (Cth) s 89 in contrast with the broader coverage under the *Juries Act 2000* (Vic).
[363] *Taxation Laws Amendment (Tax File Numbers) Act 1988* (Cth) s 6.
[364] *National Health Act 1953* (Cth) s 84.
[365] William Seltzer and Margo Anderson, 'The dark side of numbers: The role of population data systems in human rights abuses' (2001) *Social Research* 481.
[366] James Scott, *Seeing Like A State: How Certain Schemes to Improve the Human Condition have Failed* (Yale University Press, 1998) 2.

formal acquisition of names[367] and of identifiers that mark capacities, identifiers that on occasion are subverted and reflexively protected because they are valuable.

More broadly, citizens and state representatives are likely to valorise 'belonging in different ways'. Waldron comments that

> citizenship is supposed to indicate the general quality of the relationship between the state and those subject to its power. By and large those subject to state power are not to be treated as mere subjects, but as active and empowered members of the political community for which the state is responsible. The close connection between the idea of citizenship and the idea of a popular republican or democratic constitution is supposed to indicate—as a fundamental premise of any good polity—that the government is always accountable to those over whom it rules.[368]

A fourth implication is that there is a tension in state practice. Individuation through naming and other identifiers enables social sorting and thus the targeted allocation of benefits or disabilities, for example social services. It provides some recognition of people as individuals rather than data objects and thereby potentially embodies respect for human dignity. Delivery of services in a large contemporary state, where existence is manifested through paperwork and databases rather than face to face contact and where social interactions are often framed by law rather than trust, is only possible if people are addressed as abstractions and that there is a 'rationing' of social goods through notions of need that may conflict with the realities of state capacity and social perceptions of legitimacy.

The Australian polity could, for example, aim to address human rights abuses and poverty in the Fourth World by dismantling policing of its borders. In doing so, however, it would cease to be the same polity and as Wilsher, Rudolph and Mogire[369] note it might cease to be a liberal democratic state. Migration law indicates both the capacity and the confidence of the liberal democratic state, in other words the belief of government and society that people from different cultures will embrace particular

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[367] James Scott, John Tehranian and Jeremy Mathias, 'The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname' (2002) 44(1) *Comparative Studies in Society and History* 4.
[368] Jeremy Waldron, 'Citizenship and Dignity' (New York University School of Law Public Law & Legal Theory Research Paper Series 12-74) (2013) 12.
[369] Daniel Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge University Press, 2012) 17; Christopher Rudolph, *National Security and Immigration: Policy Development in the United States and Western Europe since 1945* (Stanford University Press, 2006) 31; and William Mogire, *Victims As Security Threats: Refugee Impact on Host State Security in Africa* (Ashgate, 2011).

values,[370] that they will bring desired skills or other attributes while leaving unwanted affiliations and values behind (in other words they will shed the attributes that represent a 'bad' civil identity), and that they will be indistinguishable from the norm as soon as possible.[371]

A penultimate implication, one typically not noted in the literature, is that identity formation in contemporary Australia – in contrast to some premodern societies[372] – involves notions of individual rather than collective responsibility, individual rather than collective agency. People may be grouped together in social sorting under foundational and derivative identities (for example as a cohort of citizens or of women or of seniors or as bankrupts) but that parsing does not remove personal liability and as the following chapters demonstrate does not inevitably remove personal agency. Individuals are not necessarily caged within what some theorists have viewed as foundational identities of gender, ethnicity and class.

A final implication is that law – which reflects, reinforces and erodes social values – provides scope for alleviating disadvantage and on occasion freeing people from identities that fundamentally inhibit their flourishing. One example was the abolition of the former identity of slavery, in other words the removal of legal recognition of people as property.[373] To a less dramatic extent, law reform over the past two centuries has featured the reduction and often, albeit episodic, elimination of negative

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[370] Chris Bowen MP, then Minister for Immigration and Citizenship, commenting on decision to provide a visa to controversial Dutch politician Geert Wilders:

> I think our society is robust enough now, multiculturalism is strong enough, and our love of freedom of speech entrenched enough that we can withstand a visit by this fringe commentator from the other side of the world, and we should defeat his ideas with the force of our ideas and the force of our experience, not by the blunt instrument of keeping him out of Australia.

http://www.minister.immi.gov.au/media/cb/2012/cb190180.htm accessed 5 November 2012.

[371] Laurie Berg, ''Mate Speak English, You're in Australia Now': English Language Requirements in Skilled Migration' (2011) 36(2) *Alternative Law Journal* 110.

[372] See for example the discussion of individuation and collective responsibility in John Patterson, *Exploring Mäori Values* (Dunmore Press, 1992) 149; and Stanley Yeo, 'The Recognition of Aboriginality by Australian Criminal Law', in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah: Indigenous Peoples and the Law* (Federation Press, 1996) 228, 229. For discussions of philosophical notions of collective responsibility see Virginia Held, 'Can a random collection of individuals be morally responsible' in Larry May and Stacey Hoffman (eds), *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Rowman & Littlefield, 1991) 89; Martin Benjamin, 'Can Moral Responsibility be Collective and Non-Distributive?' (1976) 4(1) *Social Theory and Practice* 93; Joel Feinberg, 'Collective Responsibility (Another Defense)' in Larry May and Stacey Hoffman (eds), *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Rowman & Littlefield, 1991) 53; and David Copp, 'What Collectives Are: Agency, Individualism and Legal Theory' (1984) 23(2) *Dialogue* 253.

[373] See *Criminal Code* (Cth) s 270.1 and 270.3; and *Nantahkum v R* [2013] ACTCA 40, [4] and [29].

aspects of the ‘female identity’. The scope for legal change to free people from conceptual cages is highlighted in the following chapter.

Observations

Readers can draw several conclusions from the preceding discussion. One is that states provide legal frameworks for the generation (and contestation) of legal identities, including the identities of natural and artificial persons. Perhaps a more salient conclusion is that the identities reflect, reinforce and reshape social values. That means that legal identities are culturally (and thus temporally) contingent. Contingency is important for law reform, with – as highlighted in the first chapter of this dissertation – scope for the alleviation or erasure of deleterious identities to foster flourishing. More broadly, throughout this dissertation readers can discern foundational and derivative identities, with some (such as being human, alive and an Australian citizen) being presupposed or determinative in the operation of the justice system. That categorisation is novel and credible.

Chapter Four: Capacity, Disability and Character

Overview

Chapter Two argued that we can gain insights about the nature of legal identity by asking 'Who or what is eligible – are there prerequisites?'. This chapter considers legal identity as a matter of disability: impediments to agency on the basis of cognition, status as a incarcerated person or person with a criminal record, bankruptcy, 'bad character' and other barriers to the flourishing discussed in Chapter One. It demonstrates that the answers to questions about the nature of legal identity highlight both the usefulness of a historical perspective, the contingency of valorisation manifested through legal identities and the scope for law reform to improve the 'human condition'.

Rawls, in a conceptually elegant and persuasive discussion of fairness as the basis of justice, used the Veil of Ignorance thought experiment noted in Chapter One.[1] That experiment recognises that although all human animals share an inalienable dignity as people they are not identical. Some face disadvantages –vulnerabilities – relating to physical disability, problems of will or understanding, age, education or other attributes that are not obviated through reference to the 'differently abled'.[2]

The preceding chapter argued that Australian law is tacitly founded on an assumption about a normative legal identity, one that reflects conceptualisation since at least the time of Aristotle regarding the rational animal.[3] The default identity is currently that of the fictive woman in the Bondi taxi: someone who is self-possessed, adult, law-abiding, moderately prosperous, neither remarkably intelligent and well-informed nor

[1] John Rawls, *A Theory of Justice* (Harvard University Press, 1st ed, 1971) 136.
[2] Richard King, *On Offence: The Politics of Indignation* (Scribe, 2013) 79. For vulnerability as a lens for understanding agency and fairness see in particular Martha Fineman, 'The Vulnerable Subject: Anchoring equality in the human condition' (2008) 20 *Yale Journal of Law & Feminism* 8; and Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2014).
[3] See for example the discussion in Aristotle, *Eudemian Ethics* in Jonathan Barnes (ed), *The Complete Works of Aristotle II* (J Solomon trans, Princeton University Press, 1984) 1922, 1941-1943; Matthew Boyle, 'Essentially rational animals' in Günter Abel and James Conant (eds), *Rethinking Epistemology* (De Gruyter, 2012) 395; and Martha Nussbaum, *Poetic Justice* (Beacon Press, 1995) 72-78.

unduly credulous, cautious or self-involved.[4] That individual has some fortitude and resilience but is not indifferent to pain.[5] She experiences less than perfect health and on occasion may exhibit poor judgment or imbibe unwisely[6] but does not have persistent deficits in understanding or decision-making that would preclude her from entering into relationships of consequence or necessarily free her from responsibility for actions that that turn out badly. She lives in a world where, as Berlin comments, when we understand something

> it is not because we think inductively, but because we apply common sense knowledge. We choose putting together fragments that fit, that make sense. When, in fact, I am successful in this – when the fragments seem to me to fit – we call this an explanation; when in fact they do fit, I am called rational; if they fit badly, if my sense of harmony is largely a delusion, I am called irrational, fanciful, distraught, silly; if they do not fit at all, I am called mad.[7]

Our taxi or omnibus passenger is a jurisprudentially convenient fiction.[8] In practice, when The Rawlsian Veil is hauled aloft, we can discern that not all people are equal. Some have disabilities that affect their flourishing and serve as legal identities. Some, for example, are incarcerated in a psychiatric, aged care or correctional institution and thus do not get into the fictional taxi, Bondi tram or Clapham Omnibus. Some do not read English.[9] Others have an age-based disability, notably those people too young to independently hail and pay for the ride or through suffrage to determine who makes

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[4] *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100, Collins J at 109; and *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, Lord Radcliffe at 728. See also Chapter Three above; and J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 9th ed, 2012) 228-230 regarding 'ordinary human nature'.

[5] For 'normal fortitude' see *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Wrongs Act 1958* (Vic) ss 72 and 74; *Civil Law (Wrongs) Act 2002* (ACT) s 34; and *Civil Liability Act 1936* (SA) s 33; *Civil Liability Act 2002* (NSW) s 32; and *Civil Liability Act 2002* (WA) s 5S.

[6] *R v S* [1979] 2 NSWLR 1; and *R v Porter* (1936) 55 CLR 182. Judicial statements about the 'reasonable person' or 'ordinary intelligence and care' are evident in for example *Australian Woollen Mills v F S Walton* (1937) 58 CLR 641; *Parkdale Custom Built Furniture v Puxu* (1982) 149 CLR 191; and *Taco Co v Taco Bell* (1982) 42 ALR 177.

[7] Isaiah Berlin, 'The Concept of Scientific History' in *The Proper Study of Mankind* (Random House, 2013) 17, 45.

[8] Lord Reed in *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49, [1]-[4] comments:

> The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years. ... In recent times, some additional passengers from the European Union have boarded the Clapham omnibus. This appeal is concerned with one of them: the reasonably well-informed and normally diligent tenderer.

For pointers to the large literature on the 'reasonable man', such as Michael Saltman, *The Demise of the Reasonable Man: A Cross-Cultural Study of a Legal Concept* (Transaction, 1991) and Chapter Three above.

[9] Martha Minow and Todd Rakoff, 'Is the 'Reasonable Person' a reasonable standard in a multicultural world' in Austin Sarat (ed), *Everyday practices and trouble cases (2 Fundamental Issues in law and society research)* (Northwestern University Press, 1998) 40.

law about taxis and passengers. Some experience deficits of understanding or exhibit behaviour that vitiates contracts, justifies imposition of a guardianship or causes prosecutors to identify them as having a lower responsibility than our normative taxi passenger. Others may be experienced, astute and otherwise agentic but are barred from the ride because of undischarged bankruptcy or a particular offence for which they have been convicted, satisfied the formal punishment regime but remain subject to an ongoing civil disability. That disability reflects notions of risk and character.

In essence, particular identities are significant both in themselves (for example because a consequence of conviction may be incarceration) and because they disable the individual from exercising other identities to which that person would otherwise been entitled on the basis of experience, intelligence and association. They are culturally contingent; the 'harmony' referred to by Berlin for example once featured the agency by demons and diabolists that was formerly a legal given but, as highlighted elsewhere in this dissertation, is no longer credited by Australian statute and case law.

This chapter looks at legal capacity (which on occasion is a matter of age and of a person's life history), disability and character. It suggests that in thinking about the nature of legal identity it is useful to step back from preoccupation with transient/ongoing mental states, for example the very rich scholarly literature and jurisprudence regarding diminished responsibility in criminal proceedings or remedies in equity for exploitation of trust,[10] affection or emotional dependence,[11] absent understanding,[12] undue influence,[13] inebriation,[14] duress[15] and will.

It also suggests that although writers such as Foucault offer insights regarding correctional and psychiatric institutions, their identity theorisation offers a conceptually and historically inadequate explanation of issues such as changing understandings of the mind.

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[10] *Commercial Bank of Australia Ltd v Amadio* (1982) 151 CLR 447.
[11] *Louth v Diprose* (1992) 175 CLR 621 at 626; *Bridgewater v Leahy* (1998) 194 CLR 457 at 490, 491 and 493; and *Yerkey v Jones* (1938) 63 CLR 649.
[12] *Crago v McIntyre* [1976] 1 NSWLR 729; and *Gibbons v Wright* (1954) 91 CLR 423.
[13] *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Johnson v Buttress* (1936) 56 CLR 113; and *Whereat v Duff* [1972] 2 NSWLR 147.
[14] *Blomley v Ryan* (1956) 99 CLR 362.
[15] *Cumming v Ince* (1847) 11 QB 112; 116 ER 418.

The chapter initially argues that we can discern four aspects of capacity, which is not necessarily a matter of rationality or of understanding. It then discusses capacity in relation to cognitive and psychiatric disability, noting that the tests for determining capacity are functional rather than diagnostic. It discusses the 'criminal identity' (that is a legal identity embodying formal disabilities on the basis of an individual's conviction for criminal activity) and the role of perceived character in determining the acquisition or retention of an identity such as legal or medical practitioner.

The chapter concludes by highlighting the contingency of identity construction and the significance of information systems (explored in later chapters) for that construction.

In the Bondi Taxi

Capacity, as a facet of legal identity, is culturally contingent. As noted above it is a protean concept that concerns legal competence, responsibility and liability – notions that are salient in most areas of law and on an instance-by-instance basis might be contested or might more broadly be circumscribed by statute. The latter is relevant for readers in considering subsequent chapters of this dissertation, which for example highlight offences involving the unauthorised exercise of powers attributable to a specific role or position, in other words a form of what is often characterised as identity crime.

We can accordingly see four aspects of capacity.

The first, perhaps the most familiar to the lay public because of popular culture's reception of 'the insanity defence', concerns an accused person's ability to understand the significance of and thence make rational and voluntary choices to perform (or refrain from) certain acts.[16]

[16] *Vallance v R* (1961) 108 CLR 56; [1963] ALR 461. More broadly see Daniel Robinson, *Wild Beasts and Idle Humours: The Insanity Defense from Antiquity to the Present* (Harvard University Press, 1996).

Rationality and volition, which as Chapter Three noted formally differentiate human from nonhuman animals, are normative. Capacity in relation to criminal law is, in other words, a default or ideal state that is enjoyed by all people but subject to exceptions.[17] Those exceptions are recognised in Australian statute law, with minor variation in the statutory characterisation from one jurisdiction to another.

In essence they embody three differences from the norm, all of which fully or partly excuse the person from responsibility in relation to the actions and which embody legal identities (which earlier chapters have construed in terms of legal consequences). One difference is that the person is not criminally responsible[18] on the basis that the person's understanding and volition was impaired by a mental state such as insanity (discussed below) or automatism,[19] with the latter being attributable to a broader psychiatric disorder, to a neurological disorder such as epilepsy[20] or to 'external' factors such as intoxication (an alteration of the person's understanding and behaviour attributable to alcohol or other mind-altering substances).[21] The consequences are significant: a successful defence of sane autonomism entitles the person to a complete acquittal, whereas insane autonomism results in detention as a psychiatric patient, potentially on an indefinite basis.

Another difference – a separate identity – is that the person is deemed partially rather than wholly responsible for the action,[22] the defence of diminished responsibility that in criminal law is characterised as an abnormality of the mind attributable to arrested or retarded development of the mind (a developmental disorder), disease or injury.[23] The impact of diminished responsibility – of relevance to the individual's flourishing – might be a lower sentence for a particular conviction or a conviction for manslaughter rather than murder, consequences that are non-trivial because for example they affect how the individual is perceived by peers, whether that person is detained long-term in an institution and accordingly has scope to exercise autonomy,

[17] Airlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press, 2012). See also Bridgit Dimond, *Legal aspects of mental capacity* (Blackwell, 2008); and Mary Donnelly, *Healthcare decision-making and the law: Autonomy, capacity and the limits of liberalism* (Cambridge University Press, 2010).
[18] *R v Falconer* (1990) 171 CLR 30; 96 ALR 545; 50 A Crim R 244.
[19] *R v Pantelic* (1973) 1 ACTR 1.
[20] *R v Carter* [1959] VR 105.
[21] *R v O'Connor* (1980) 146 CLR 64; 29 ALR 449.
[22] *Crimes Act 1900* (NSW) s 23A; and *Criminal Code* (Qld) s 304A.
[23] *R v Byrne* [1960] 2 QB 396; All ER 1; and *Veen v R* (No 2) (1988) 164 CLR 465.

and whether employment or other opportunities (with consequent self-realisation) are restricted on the basis of the individual's record.

A second aspect is that of agency, the scope for commercial relationships that are important to almost all Australians through for example freedom in a liberal democratic state to acquire or dispose of goods, services and real property or to become an employee/employer as a basis for such acquisition.[24] The default position is again that all people of sound mind are competent to act as principals or agents, including minors.[25] On reflection that is what we might expect, given that contemporary experience of childhood valorises the importance of autonomy (including learning through experience) for minors and thus for example the scope for young people to make independent purchases of goods and services such as icecreams and bus tickets.[26] The norm is subject to statutory prohibitions, in other words restriction or non-recognition of particular interactions. It is bounded by law, such as the Australian Consumer Law,[27] that seeks to inhibit deceptive or otherwise fraudulent behaviour, particularly that directed at people who are especially vulnerable because of youth, old age age, developmental problems or other potential disadvantages such as intoxication or inadequate familiarity with English as Australia's national language.

On occasion the capacity, and thus identity, of particular actors is in question. We see, for example, disputes about whether elders understood provisions in a will or deed of gift, expressions of intent that if successfully contested may be held by a court to be invalid in part or as a whole.[28] Potential contestation places an onus on legal

[24] Chapter Three above noted that under *Corporations Act 2001* (Cth) s 124(1) a company – an artificial person, discussed in Chapter Seven below – has 'the legal capacity and powers of an individual both in and outside this jurisdiction'.
[25] For presumption of capacity on the part of adults see *Borthwick v Carruthers* (1787) 1 TR 648; *R v McNaughten* (1843) 10 Cl & Fin 200, Tindal CJ at 210; *Boughton v Knight* (1873) LR 3 P & D 64, Hannen J at 71; *Cosham v Cosham* (1899) 25 VLR 418, Madden CJ at 428; *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698, 706; *Dalle-Molle v Manos* (2005) 88 SASR 193, Debelle J at 197; *Lawrence v Federal Magistrate Driver* [2005] FCA 394, [12]; *SA v Manonai* [2008] WASCA 168, Pullen JA at [2] and [23]; and *Frizzo v Frizzo* [2011] QSC 107, [23]. For notions of a differentiation between competence and capacity see Ben White, Lindy Willmott and Shih-Ning Then, 'Adults Who Lack Capacity: Substitute Decision Making' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 2010) 149, 151.
[26] Ellie Lee, Jan Macvarish and Jennie Bristow, 'Risk, health and parenting culture' (2010) 14(4) *Health, Risk & Society* 293, 296.
[27] *Competition & Consumer Act 2010* (Cth) sch 2 and the corresponding state/territory consumer protection statutes such as the *Australian Consumer Law and Fair Trading Act 2012* (Vic).
[28] *Veall v Veall* [2015] VSCA 60; *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64; *Brown v Wade* [2010] WASC 367; and *Saunders v The Public Trustee* [2015] WASCA 203. See more broadly Louise Kyle, 'Out of the Shadows - A Discussion on Law Reform for the Prevention of Financial Abuse of Older People' (2013) 7 *Elder*

practitioners, in other words professionals with a legal identity that features expectations regarding competence, to confirm as best they can whether the individual does understand what is at stake and is acting voluntarily.[29]

The third aspect, coexisting with the notion of capacity for principals and agents, is that of liability under the law of obligations. That law recognises that some people, through poor understanding attributable to intoxication, a developmental disorder, neurological injury or psychiatric disorder, may be particularly vulnerable to harms or at perceptible risk of harming others. The norm is that people are deemed to have capacity and thus to take responsibility, in other words bear liability for intentional torts.

Implicitly, Australian law expects the woman in the Bondi taxi and her peers to behave in a way that foresees and thus avoids intentional harms. Some people, for example children and those with the abnormality of mind referred to above, have an identity that is exceptional because recognised as different from that norm and accordingly attracting lesser or no liability. As a corollary, some anticipate that they will lose capacity and accordingly, in reasoning ahead, make provision through powers of attorney.[30]

Neoliberalism (a belief system as reductive as that of Marx, MacKinnon or Schmitt) assign markets an agency that under-recognises the scope for action by the state to offset the vulnerabilities of that polity's citizens.[31] In thinking about capacity as a facet of legal identity it is important to acknowledge that not all relationships (or all important relationships) are commercial. Some involve civil rights and responsibilities that are not reducible to contracts and markets. Building on the preceding chapter we can discern capacities – and legal identities – beyond the market. They are capacities that may be contested and have changed over time.

Law Review 1; and Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99.

[29] *Badman v Drake* [2008] NSWSC 1366, [84]; and *Winefield v Clarke* [2008] NSWSC 882.

[30] See for example *Powers Of Attorney Act 2003* (NSW); *Powers of Attorney and Agency Act 1984* (SA); and *Powers Of Attorney Act 2000* (Tas).

[31] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2007) 2, 5 and 53; and Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press, 2009) xvi.

One, for example, is suffrage. Women historically were denied the vote because they were deemed to have a lower capacity for rational thought and a weaker will, being emotional, irrational and susceptible to having their will overborne.[32] Gilligan accordingly decried the 'psychology that has equated male with human in defining human nature and thus has constructed evidence of sex differences as a sign of female deficiency',[33] with Paglia arguing that

> All human beings must wrestle with nature. But Nature's burden falls more heavily on one sex. With luck, this will not limit woman's achievement, that is, her action in male-created social space.[34]

Contrary to Andrea Dworkin, whose work is highlighted in the following chapter, law reform offers considerable opportunities for fostering action in social spaces, important in its own right and for reinforcement of positive social perceptions of the identity of previously disadvantaged groups.

Another example is that of youth. We are currently seeing proposals to extend the vote from 18 to 16 year olds, [35] a continuation of past reductions from 25 or 21 years as the age of voting capacity and from 21 to 18 as the age of majority.[36] That classification is arbitrary,[37] unlike notions of Gillick Competence (that is, legal recognition for autonomous health decisions by minors) that are based on assessments of whether the individual understands the significance of a particular decision.[38] It is

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[32] Audrey Oldfield, *Woman Suffrage in Australia* (Cambridge University Press, 1992) 23; and Mary Wollstonecraft, *A vindication of the rights of woman: with strictures on political and moral subjects* (Unwin, first published 1792, 1891) 120.

[33] Carol Gilligan, 'Reply To Critics' in Mary Larrabee (ed), *An Ethic of Care: Feminist and Interdisciplinary Perspectives* (Psychology Press, 1993) 207, 213.

[34] Camille Paglia, *Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson* (Yale University Press, 1990) vol 1, 9.

[35] George Williams, 'Lowering the voting age to 16 would be good for democracy' *Sydney Morning Herald* (Sydney) 1 June 2015, 17.

[36] See for example *Age of Majority Act 1974* (Qld) s 5(2) and *Minors (Property and Contracts) Act 1970* (NSW) s 9.

[37] A more innovative (and readily subversible) age demarcation is that in the *Public Health Amendment (Tobacco-free Generation) Bill 2014* (Tas) that seeks to establish a 'Tobacco-free Generation' ('a person born on or after 1 January 2000') with people born after 1999 not being able to lawfully purchase tobacco at retail outlets within Tasmania. It would not be an offence to retail tobacco to adults born before 2000. Magnusson comments that

> As time passes, the legislation would create two distinct classes: adults who, by virtue of being born before the year 2000, would be entitled to continue to purchase tobacco during their lives; and adults of the tobacco-free generation, born after 31 December 1999, who would be forever unable to purchase tobacco lawfully in Tasmania.

Roger S Magnusson, 'Time to raise the minimum purchasing age for tobacco in Australia' (2016) 04(6) *Medical Journal of Australia* 220, 220. 'Old Age', in terms of eligibility for the 'Aged Pension' appears to be getting older.

[38] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; adopted in *Department of Health & Community Services v JWB & SMB* ("*Marion's Case*") (1992) 175 CLR 218.

an echo of past temporal markers of capacity, [39] such as manhood in the Roman Empire beginning at the age of 14 and the former female age of discretion at 16.[40] It is also a pragmatic measure, evident in for example an incapacity to gain a driver's licence (which Chapter Eight below identifies as a key identity document) as a child.[41] The woman in the taxi can gain a licence because she is an adult and without particular disabilities, for example is not blind. A diligent twelve year old might have an exemplary understanding of physics, be able to recite chapter and verse of the road rules and overall be a more experienced and safer driver than an adult but the minor is deemed on the basis of age to lack the necessary capacity for authorised use of a vehicle on a public road. Determination of capacity by age is founded on registration of births, and thus individuation, by the state, a matter discussed in the following chapters.

The concluding chapters of this dissertation suggest that neither markets nor states are fully independent. Instead, they are what we make of them, which is one reason why the exercise of the identity as voter and legislator is fundamental. Preceding paragraphs have highlighted capacity as a matter of understanding and will. We both can and should extend our consideration of capacity to the state as a legal identity. Schmitt damned the Weimar liberal democratic state for its indecision – its lack of agreement and hence will. We can read contemporary Australia as a state where there is often consensus (implicitly a will to act on a meliorist basis) and where the state, through large-scale data collection that is often based on population-scale registration and mechanisms such as the census, seeks to identify and thence understand its subjects as the basis for giving effect to programs that potentially foster flourishing by addressing disadvantage.

That flourishing necessitates voters and policy-makers thinking outside a paradigm of citizenship (and aid to non-citizens) as contracted services. Put simply, we should expect the state to be informed, thoughtful and agentic – demonstrating capacity resembling that of human animals and simulacra such as corporations.

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[39] In contemporary Australia see temporal markers in for example *Children & Young People Act 1999* (ACT) ss 7, 8 and 9; *Children, Youth & Families Act 2005* (Vic) s 3; and *Young Offenders Act 1997* (NSW) s 4.
[40] For the superseded age of discretion (14 for males, 16 for females) see *Thomasset v Thomasset* [1894] P 295.
[41] See for example *Road Transport (Driver Licensing) Regulation 2000* (ACT) Reg 16.

'Ideots, Fooles and Lunatics'

Preceding paragraphs have referred to rationality, the mind and behaviour: notions that have changed over the centuries. That is evident in law centred on the supposed agency of metaphysical entities (in terms of causation for example we now blame congenital or acquired neurological problems rather than the influence of demons and witches). More subtly, it is also evident in how society, through its legal system, addresses people with transient and ongoing problems regarding reason and action, those whom Lord Coke in an earlier taxonomy identified as ideots, fooles and lunatics.[42]

Chapters One and Two noted the disquiet of historians regarding the historicity of claims by Foucault and some peers regarding 'the history of madness', in other words the development of institutions for containment of people with non-normative mental states that include severe difficulties in learning and communication, incapacitation through depression or anxiety, and problematic interaction with peers through what would now be classified as psychoses.

Foucault's theorisation, along with that of subsequent scholars such as Rose,[43] has been influential in the social sciences but is highly idealised, has a weak historical base and reductively disregards efforts by clinicians, courts and institutions to care for rather than repress people whose behaviour was outside the norm. Its tacit assimilation of the anti-psychiatry movement of the 1960s – in which diagnosis, treatment and confinement is necessarily repressive – is at odds with the distress experienced by the 'mentally ill', health service providers, families and others in dealing with some disorders of thought and action.[44]

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[42] Neil Howard Cogan, 'Juvenile law, before and after the entrance of Parens Patriae' (1970) 22(2) *South Carolina Law Review* 147, 152.

[43] Michel Foucault, *History of Madness* (Jean Khalfa trans, Routledge, 2006) [trans of *Folie et déraison: Histoire de la folie à l'âge classique* (first published 1961)], which has encountered criticisms such as those identified in the Appendix to this dissertation. For an extension of Foucault's 'biopolitics' see for example Nikolas Rose, *Inventing Our Selves: Psychology, Power, and Personhood* (Cambridge University Press, 1996) and Nikolas Rose, *The Politics of Life Itself: Biomedicine, Power, and Subjectivity in the Twenty-First Century* (Princeton University Press, 2007).

[44] As expressions of 1960s anti-authoritarian and anti-rational theorisation see for example Thomas Szasz, *The Myth of Mental Illness* (Harper & Row, 1961) and *Cruel Compassion: Psychiatric Control of Society's Unwanted* (Syracuse University Press, 1998); R D Laing, *The Divided Self: An Existential Study of Sanity and Madness* (Tavistock, 1960) and *The Politics of Experience/ The Bird of Paradise* (Penguin, 1967); and Nick Crossley, 'R. D. Laing and the British anti-psychiatry movement: a socio-historical analysis' (1998) 47(1) *Social Science & Medicine* 877.

On occasion Australian law, whether to foster the flourishing of the afflicted individual or minimise harms to those they encounter, relies on discrete legal identities that are attributable to capacity and relationships that flow from disability. Law for example establishes an identity of guardian, someone responsible for the well-being of an individual who retains dignity but in part or wholly needs someone else to make decisions that are legally significant (for example disposition of assets rather than a choice of breakfast cereal).[45] That guardian acts, in effect, in what Roman law described as a *loco parentis* role. Someone at serious risk of harm to others or inability to care for themselves without exploitation may be involuntarily confined to an institution or required to undergo treatment, including medication regimes that may have side-effects or erode the patient's sense of selfhood. The word patient is used advisedly, given that the mental state once formally identified brings into being the legal identity of patient (distinct from the normative person in the taxi) and relationships with other people/institutions, such as clinicians and guardianship tribunals,[46] that feature duties and powers alongside expectations about standards of professionalism.

Under Australian law, the criteria for determining capacity are functional, rather than diagnostic.[47] A person may for example have a diagnosed mental illness, yet still retain their decision-making capacity, or their ability to understand fully the consequences of their criminal acts. Conversely, a person without a formal clinical diagnosis may also be held to be lacking capacity, on the basis of an inability to manage specific tasks defined by legislation. A clinical diagnosis may be suggestive of impaired capacity, but is neither determinative nor presumptive, although in the case of an individual whose condition renders them either permanently unconscious or dramatically impairs their ability to make decisions or choices, loss of capacity becomes easier to demonstrate. Personal goods are subjective, with individuals accordingly having differing views about what constitutes the flourishing that is

[45] See for example *Guardianship & Administration Act 1986* (Vic); *Guardianship Amendment Act 1997* (NSW); *Guardianship and Administration Act 1990* (WA); and *Guardianship and Administration Act 1993* (SA). More broadly see Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124) (2014).
[46] Terry Carney, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection and Treatment?* (Themis Press, 2011).
[47] See for example *Mental Health Act 2015* (ACT) s 7.

relevant or important to them. As a society we will on occasion privilege a view of flourishing that is contrary to that held by someone who is deemed to lack capacity regarding consent to medical treatment and on the basis of that legal identity is medicated, against the individual's wishes but consistent with what the legal system considers are that person's best interests.[48]

Crime, conviction and career

Wyndham quotes a 1912 Sydney newspaper article characterising eugenics as a principle that people rejected for themselves while conceding it was 'all right' for 'other people's children'.[49] Law has traditionally sought to identify and incapacitate criminals. Past identity theorists such as Lombroso[50] have attributed deleterious behaviours to races or classes, on occasion with a view that the 'criminal classes' could be tamed or even eliminated through mechanisms such as eugenics[51] and through programs that promoted 'healthy minds in healthy bodies', legally privileging the state above the individual.

We can discern throughout this dissertation, and in much Australian law, what we might label in abstract as the criminal identity, something that results from conviction

[48] See for example *Mental Health Act 2007* (NSW) s 22; and *Mental Health Act 2015* (ACT) s 80.
[49] Diana Wyndham (1996), *Striving for National Fitness: Eugenics in Australia, 1910s to 1930s* (PhD, History, University of Sydney) 229; and Stephen Garton, 'Eugenics in Australia and New Zealand: Laboratories of Racial Science' in Alison Bashford and Philippa Levine (eds), *The Oxford Handbook of the History of Eugenics* (Oxford University Press, 2010) 243.
[50] David Horn, *The criminal body: Lombroso and the anatomy of deviance* (Psychology Press, 2003); Cesare Lombroso, *Criminal Man* (Mary Gibson and Nicole Rafter trans, Duke University Press, 2006) [trans of *L'uomo delinquente studiato in rapporto alla antropologia, alla medicina legale ed alle discipline carcerarie* (first published 1876)]; and Cesare Lombroso and Gugliemo Ferrero, *Criminal Woman, the Prostitute and the Normal Woman* (Nicole Rafter and Mary Gibson trans, Duke University Press, 2004) [trans of *La donna deliquente, la prostituta e la donna normale* (first published 1893)].
[51] For Australia see in particular Ross Jones, 'Removing Some of the Dust from the Wheels of Civilization: William Ernest Jones and the 1928 Commonwealth Survey of Mental Deficiency' (2009) 40(1) *Australian Historical Studies* 63 and 'The master potter and the rejected pots: eugenic legislation in Victoria, 1918-1939' (1999) 30(113) *Australian Historical Studies* 319; and Stephen Garton, 'Sound minds and healthy bodies: Re-considering eugenics in Australia, 1914–1940' (1994) 26(103) *Australian Historical Studies* 163. Context is provided by Daniel Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (University of California Press, 1985); Mark Adam, *The Wellborn Science: Eugenics in Germany, France, Brazil, and Russia* (Oxford University Press, 1990); Robert Proctor, *Racial Hygiene: Medicine Under the Nazis* (Harvard University Press, 1988); Nicole Rafter, *White Trash: The Eugenic Family Studies, 1877-1919* (Northeastern University Press, 1988); Mark Largent, *Breeding Contempt: The History of Coerced Sterilizations in the United States* (Rutgers University Press, 2008); Paul Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (Johns Hopkins University Press, 2008); Wendy Kline, *Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom* (University of California Press, 2005); Rebecca Kluchin, *Fit to Be Tied: Sterilization and Reproductive Rights in America, 1950-1980* (Rutgers University Press, 2009); and William Schneider, *Quality and Quantity: The Quest for Biological Regeneration in Twentieth France* (Cambridge University Press, 2002).

by a court and that has consequences ranging from suspension of the right to drive a vehicle through to incarceration on a fixed or indefinite basis, including incarceration of particular types of offenders under the rubric of preventive detention after the person has served the assigned sentence.[52]

The identity may reflect one-off or ongoing offences, the latter on occasion resulting in judicial characterisation as a 'habitual criminal'.[53] It is distinct from that of people who are deemed to be innocent – the normative identity of Australians in relation to the criminal justice system – and people who are suspects or 'assisting in inquiries',[54] in other words suspected of committing one or more offences but not proven in court to have done so. It reflects expectations that people will manage their anger[55] or affront,[56] in other words exercise self-discipline and act 'rationally' in using law rather than illicit violence to solve disputes or perceived disregard of 'honour'.[57]

In law the criminal identity comes into being on conviction, irrespective of popular belief in the individual's guilt. It is signified through registers, through criminal identity numbers in for example correctional institutions, and through the inclusion of conviction data in a range of public and private sector records,[58] for example as part of working with vulnerable people regimes.[59] The legal identity differs from the social

[52] See for example *Crimes (High Risk Offenders) Act 2006* (NSW). Work on the state/territory regimes includes Tamara Tulich, 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38(2) *UNSW Law Journal* 823; and Patrick Keyzer, Cathy Pereira and Stephen Southwood, 'Pre-emptive imprisonment for dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The constitutional issues' (2004) 11(2) *Psychiatry, psychology and law* 244.
[53] *Nabobbob v The Queen* [2001] NTSC 42; and *Strong v The Queen* (2005) 224 CLR 1; 216 ALR 219.
[54] *Sands v State of South Australia* [2013] SASC 44.
[55] Jeremy Horder, *Excusing Crime* (Oxford University Press, 2004) 73-74.
[56] Graeme Coss, 'God is a righteous judge, strong and patient: and god is provoked every day – A Brief History of the Doctrine of Provocation in England' (1991) 13 *Sydney Law Review* 570. *Tuberville v Savage* [1669] EWHC KB J25, (1669) 1 Mod Rep 3, 86 ER 684; *Lindsay v The Queen* [2015] HCA 16, [23] and [33]; and *Green v The Queen* (1997) 148 ALR 659. In contrast see Thane Rosenbaum, *Payback: The Case For Revenge* (University of Chicago Press, 2013) 48-51. More broadly see pointers to the literature on provocation defences in Chapter Six below.
[57] That self-management will tend to preserve plaintiffs from identification as a vexatious litigant, discussed in Michael Taggart and Jenny Klosser, 'Controlling Persistently Vexatious Litigants' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 272.
[58] For example *Child Sex Offenders Registration Act 2006* (SA) and *Sex Offenders Registration Act 2004* (Vic).
[59] For example *Working With Children Regulations 2006* (Vic); and *Working with Vulnerable People (Background Checking) Act 2011* (ACT). See Lyn Hinds and Kathleen Daly, 'The war on sex offenders: Community notification in perspective' (2001) 34(3) *Australian & New Zealand Journal of Criminology* 256; and James Vess, Brooke Langskaill, Andrew Day, Martine Powell and Joe Graffam, 'A comparative analysis of Australian sex offender legislation for sex offender registries' (2011) 44(3) *Australian & New Zealand Journal of Criminology* 404.

identity, given that law makes provision for spent convictions[60] and that popular culture often appears to confuse prosecution with conviction.

The criminal identity is a disability that is more far-reaching than the civil death inherent in undischarged bankruptcy (discussed below). It may preclude some people from exercising the right to vote that is fundamental in a liberal democratic state; as noted in the following chapter it prevents some incarcerated individuals from fully being political animals. It may preclude people from occupying particular positions or professions, for example because they are not of the 'good character' noted below or because identity as a sexual offender bars the individual from paid and voluntary activity involving vulnerable people.[61]

In terms of flourishing it might most saliently involve deprivation of the individual's liberty[62] and exposure to harms that in respecting human dignity we should regard as abhorrent, preventable and contrary to any notion of rehabilitation.[63] It may also result in financial penalties that signal wrong-doing or in confiscation of property and money involved in offences.[64]

Australian society, diverging from the theorisation of penologists, has often disregarded rehabilitation and instead construed the criminal identity through a lens of punishment – retribution for egregious wrongdoing – rather than as matter of containment. The latter involves the containment of some offenders in institutions and more generally the bounding of risk, the containment of potential problems by exclusion of past wrongdoers from opportunities to engender wrongs in future.

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[60] For example *Spent Convictions Act 1988* (WA) ss 4 and 12; *Spent Convictions Act 2000* (ACT) ss 7 and 12; and *Spent Convictions Act 2009* (SA) s 10. See also Moira Paterson and Bronwyn Naylor, 'Australian spent convictions reform: A contextual analysis' (2011) 34(3) *UNSW Law Journal* 938.

[61] Chapter Eleven, in highlighting contingency in the conceptualisation of offences, notes the salience of law reform to deal with historic convictions of adult males convicted of consensual same-sex activity. The reform enables removal of those individuals from registers that prevent them from paid/voluntary work with vulnerable people.

[62] See *Foster v The Queen* (1993) 67 ALJR 550, 555.

[63] David Heilpern, *Fear or Favour: Sexual Assault of Young Prisoners* (Southern Cross University Press, 1998) 87; and *AW* [2004] WACIC 46. See *R v Fern* (1989) 51 SASR 273, King CJ at 274.

[64] See for example *Proceeds of Crime Act 2002* (Cth); *Criminal Assets Recovery Act 1990* (NSW); *Criminal Property Forfeiture Act 2002* (NT); *Criminal Proceeds Confiscation Act 2002* (Qld); *Criminal Assets Confiscation Act 2005* (SA); *Confiscation Act 1997* (Vic); and *Criminal Property Confiscation Act 2000* (WA).

At a more intuitive social level the criminal identity – a stain on the person's life (and on the person's legibility in relation to the information state through a range of registers and declarations) – is one element of a pervasive legal binary, with people being sortable into those with a criminal conviction and those who are 'clean', in other words who are defined through the absence of a conviction and thus by extension through the absence of the disabilities.

Chapter Ten of this dissertation cautions that law enforcement bureaucracies are inclined to misread that binary and, as part of 'the war on terror', act lawfully in ways that treat all citizens as suspects.

It is axiomatic that the modern liberal democratic state reserves to itself a monopoly of legitimate violence,[65] a monopoly reflected in construction of two positive legal identities (police and armed forces) and the negative identity of 'the criminal' noted above.[66]

Bankruptcy

We reserve a milder form of civil death, another disability, for people who are undischarged or former bankrupts.[67] Bankruptcy *per se* is no longer a crime; we no longer execute or imprison ordinary bankrupts in institutions such as The Fleet in

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[65] AW Brian Simpson, *Reflections on The Concept of Law* (Oxford University Press, 2011) 165. Max Weber, 'Politics as a Vocation', in Hans Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Hans Gerth and C Wright Mills trans, Routledge, 2nd ed, 1991) [trans of 'Politiks als Beruf' (first published 1919)] 77, 78 characterises the state as the community that successfully claims the monopoly of the legitimate use of physical force within a given territory. The exception – killing in self-defence – is noted above. See for example *Crimes Act 1900* (NSW) s 418 and *Zecevic v DPP* (1987) 162 CLR 645.

[66] As with many axioms, the statement should be regarded as indicative rather than definitive. A preceding chapter noted Australian law's recognition of the ending of human life in self-defence. The contemporary state deems as legitimate much of the violence that is apparent in sport, notably boxing, and grapples with the force that may be integral to consensual sadomasochist activity. Points of entry to the literature include Theodore Bennett, 'Sadomasochism under the Human Rights (Sexual Conduct) Act 1994' (2013) 35(3) *Sydney Law Review* 541; Chris White, 'The Spanner Trials and the Changing Law on Sadomasochism in the UK' (2006) 50(2/3) *Journal of Homosexuality* 167; Simon Bronitt, 'The Right to Sexual Privacy, Sado-masochism and the Human Rights (Sexual Conduct) Act 1994 (Cth)' (1995) 2(1) *Australian Journal of Human Rights* 59; Darren Langdridge, 'Voices from the Margins: Sadomasochism and Sexual Citizenship' (2006) 10(4) *Citizenship Studies* 373; George Syrota, 'Consensual Fist Fights and Other Brawls: Are They a Crime?' (1996) 26(1) *University of Western Australia Law Review* 169; Curtis Fogel, 'On Privileged Grounds: Sport, Law, and Agamben's State of Exception' (2014) 7(3) *Journal of Politics and the Law* 74; and John O'Brien, 'What happens on the field stays on the field?: Battery in sport' (2015) 130 *Precedent* 23.

[67] *Bankruptcy Act 1966* (Cth) s 148. See also *Motor Dealers and Repairers Act 2013* (NSW) s 25; *Security and Investigation Agents Act 2002* (Tas) s 8; *Medicines, Poisons and Therapeutic Goods Act 2012* (NT) s 118; *Greyhound Racing Act 2009* (NSW) s 6; and *Renmark Irrigation Trust Act 2009* (SA) s 13. In relation to Commonwealth power see *Australian Constitution* s 51(xvii).

order to punish the person or persuade them to disgorge undisclosed assets.[68] Identity as a bankrupt (or former bankrupt) is socially salient because it typically precludes the individual from borrowing on favourable terms, thereby restricting opportunities for flourishing.

In terms of legal identity the inability to meet obligations to creditors, formally signified through a declaration under the Act, results in a status with a range of consequences. The undischarged bankrupt is for example unable to act as the director of a public company,[69] a barrister or solicitor. The individual is ineligible for election to the Commonwealth and state/territory legislatures and local government councils,[70] with penalties if that person sits as a member of the Commonwealth legislature while bankrupt.[71] The individual may be prohibited from travelling overseas (with the trustee in bankruptcy automatically gaining that person's passport, irrespective of whether an associate pays for the ticket).[72] Failure to disclose when seeking finance, in other words a fraud by the undischarged bankrupt, is a criminal offence.[73]

Character

In one of his more memorable discussions of essence and appearance Rilke commented

> Who knows what a face is, and is our notion thereof not mere prejudice, a limitation of the staggering number of forms that could constitute a face in their inexhaustible combinations? It never occurred to me before how many faces there are. There are multitudes of people, but there are so many more faces, because each person has several of them. There are people who wear the same face for years; naturally it wears out, gets dirty, splits at the seams, stretches like gloves worn during a long journey. They are thrifty, uncomplicated people; they never change it, never even have it cleaned. It's good enough, they say, and who can convince them of the contrary? Of course, since they have several faces, you might wonder what

[68] Emily Kadens, 'The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law' (2010) 59(7) *Duke Law Journal* 1299.
[69] *Corporations Act 2001* (Cth) s 206B. Note s 206F.
[70] See for example *Australian Constitution* s 44; *Constitution Act 1975* (Vic) s 5; *Local Government Act 2009* (Qld) s 156; *Local Government (Elections) Act 1999* (SA) s 17(3); *Local Government Act 1989* (Vic) s 29; and *City of Brisbane Act 2010* (Qld) s 156.
[71] *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth) s 3(1).
[72] *Bankruptcy Act 1966* (Cth) s 77. See also Christopher Symes, 'Bankrupts and Passports: A Call to Repeal Sections 77(1)(a)(ii) and 272(1)(c) of the Bankruptcy Act' (2014) 14(3) *QUT Law Review* 98; and discussion in Chapter Ten below. Under *Corporations Act 2001* (Cth) ss 486A and 486B liquidators have the power to apply for court orders to prevent officers of insolvent corporations from absconding from Australia.
[73] *Bankruptcy Act 1966* (Cth) s 269(1).

> they do with the other ones. They keep them in storage. Their children wear them. But sometimes it also happens that their dogs go out wearing them. And why not? A face is a face.[74]

The psychological attributes known as character – what is 'underneath the mask' and thus might be construed as stable – has been a preoccupation of business, government and law.[75] A salient reason is that character is viewed as a predictor of future action, encapsulated in the claim by *fin-de-siecle* banker JP Morgan that a potential borrower's character and character alone was determinative in whether funds were provided.[76]

A range of what we would now characterise as pseudo-sciences have historically been used to identify character, independent or alongside scrutiny of an individual's history, lineage or other affinities. As a society we no longer believe that aptitudes and character can be accurately ascertained by mapping the bumps on a person's skull (phrenology),[77] handwriting,[78] the shape of earlobes and noses (in other words, physiognomy),[79] skin colour, the lines on a palm, or even gender. Empiricists are cautious about tools such as the polygraph,[80] noted in Chapter Nine below, or in supposedly culturally-neutral tests such as Myers-Briggs. A history of over-reliance on (and over-interpretation of) such character-centred mechanisms for 'preclusion and

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[74] Rainer Maria Rilke, *The Notebooks of Malte Laurids Brigge* (Stephen Mitchell trans, Knopf, 1990) [trans of *Aufzeichungen des Malte Laurids Brigge* (first published 1910)] 6

[75] See *Melbourne v The Queen* (1999) 198 CLR 1, Kirby J at 41-42 on prediction and mutability.

[76] House Of Representatives Subcommittee Of The Committee On Banking & Currency, US Congress (19 December 1912)
at http://www.sechistorical.org/collection/papers/1910/1912_12_19_Morgan_at_Pujo_C_t.pdf

[77] John Thearle, 'The Rise and Fall of Phrenology in Australia' (1993) 27(3) *Australian and New Zealand Journal of Psychiatry* 518; Nicole Rafter, 'The Murderous Dutch Fiddler: Criminology, History and the Problem of Phrenology' (2005) 9(1) *Theoretical Criminology* 65; David de Giustino, 'Reforming the commonwealth of thieves: British phrenologists and Australia' (1972) 15 *Victorian Studies* 439; and Pierre Schlag, 'Commentary: Law and Phrenology' (1997) 110 *Harvard Law Review* 877.

[78] Julie Spohn, 'The Legal Implications of Graphology' (1997) 75(3) *Washington University Law Quarterly* 1307; Roxanne Panchasi, 'Graphology and the Science of Individual Identity in Modern France' (1996) 4(1) *Configurations* 1; Barry Beyerstein and Dale Beyerstein (eds), *The Write Stuff: Evaluations of Graphology - The Study of Handwriting Analysis* (Prometheus, 1992); Russell Driver, Ronald Buckley and Dwight Frink, 'Should We Write Off Graphology?' (1996) 4(2) *International Journal Of Selection And Assessment* 78.

[79] As a point of entry to the literature see Daniel Pick, *Faces of Degeneration: A European Disorder, 1848-1918* (Cambridge University Press, 1993); and Richard Twine, 'Physiognomy, phrenology and the temporality of the body' (2002) 8(1) *Body & Society* 67.

[80] David Lykken, *A Tremor in the Blood: Uses and Abuses of the Lie Detector* (Basic Books, 1998); Ian Freckelton, 'The Closing of the Coffin on Forensic Polygraph Evidence for Australia: Mallard v The Queen [2003] WASCA 296' (2004) 11(2) *Psychiatry, Psychology and Law* 359; John Philipp Baesler, 'From Detection to Surveillance: U.S. Lie Detection Regimes from the Cold War to the War on Terror' (2015) 8(1) *Behemoth: A Journal on Civilisation* 44; Ken Alder, 'A Social History of Untruth: Lie Detection and Trust in Twentieth-Century America' (2002) 80(3) *Representations* 1; and Geoffrey Bunn, *The Truth Machine: A Social History of the Lie Detector* (Johns Hopkins University Press, 2011).

discouragement'[81] might induce caution about current claims regarding 'neurolaw'.[82]

We look instead to a person's past actions, to inferences on the basis of the those with whom they associate, and their honesty (in terms of accuracy and comprehensiveness) in providing information about their past.[83] From the perspective of legal identity – and of flourishing –notions of character are significant. In some circumstances 'character' will determine whether people are admitted to Australia as refugees[84] and visitors, experience cancellation of a visa[85] or are deported as non-citizens who have served time in an Australian correctional institution for criminal offences.[86]

In the professions there is a requirement for potential and current practitioners to be 'fit and proper' persons[87] with attributes of integrity, knowledge and ability[88] (in other words not disabled by a serious disorder of the mind, bankruptcy or a current criminal conviction). That requirement is also evident outside the professions.[89] Indicia of bad character, often viewed through the lens of fame (the person's reputation), may be decisive in rejection of an application for admission to the profession or for continued practice. [90] Character is independent of intellectual acuity, experience or formal qualifications. Case law demonstrates that character is mutable, with courts for example recognising that potential practitioners may acknowledge past wrongdoing, demonstrate insights into why the past action was wrong (analogous to the value of

[81] John Philipp Baesler, 'From Detection to Surveillance: U.S. Lie Detection Regimes from the Cold War to the War on Terror' (2015) 8(1) *Behemoth: A Journal on Civilisation* 44, 49
[82] Adam Kolber, 'Will There Be A Neurolaw Revolution?' (2014) 89 *Indiana Law Journal* 807; Stephen Morse, 'Neuroscience and the Future of Personhood and Responsibility' in Jeffrey Rosen and Benjamin Wittes (eds), *Constitution 3.0: Freedom And Technological Change* (Brookings Institution, 2011) 113; Joshua Greene and Jonathan Cohen, 'For the Law, Neuroscience Changes Nothing and Everything' (2004) 359 *Philosophical Transactions of the Royal Society* 1775.
[83] J R Spencer, *Evidence of Bad Character* (Hart, 2006).
[84] Australian Auditor-General, *Administering the Character Requirements of the Australian Citizenship Act 2007 Performance Audit (Audit Report No. 56, 2010–11)* (2011).
[85] *Demillo and Minister for Immigration and Citizenship* [2012] AATA 805; and *Mehta v Minister for Immigration and Border Protection* [2015] FCA 1096, [1] and [12]. Cancellation is discussed in Chapter Three above.
[86] *Ropiha and Minister for Immigration and Citizenship* [2012] AATA 689.
[87] *Wilks v The Medical Board of South Australia* [2010] SASC 287, Gray J at [30]-[31].
[88] *Hughes and Vale Pty Ltd v New South Wales (No. 2)* [1955] HCA 28; (1955) 93 CLR 127, 156.
[89] See for example *Broadcasting Services Act 1992* (Cth) s 41(3); *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 380; *Re New Broadcasting Ltd and Australian Broadcasting Tribunal* (1987) 12 ALD 1; *Hughes and Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127, 156; *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70, 75; and *Re Mayers and Casino Surveillance Authority* (1993) 29 ALD 585.
[90] See for example *Law Society of NSW v FC* [2008] NSWADT 352; *Re Legal Profession Act 2004, Re OG, a lawyer* [2007] VSC 520; *Law Institute of Victoria v Brott (Legal Practice)* [2007] VCAT 808; *Legal Services Commissioner v PFM (Legal Practice)* [2013] VCAT 827; *Legal Services Commissioner v Spicehandler (Legal Practice)* [2012] VCAT 630; and *Legal Practice Board v Ridah* [2004] WASC 263. Other instances are highlighted in Chapters Eight and Nine below.

understanding in the notion of capacity) and have exhibited spotless behaviour over several years since the initial wrongdoing.[91]

Middleton and Levi comment

> Regulatory structures aim at situational prevention: regulated industries impose 'fit and proper' tests on admission and in the aftermath of public sanctions such as criminal and disciplinary convictions; many professionals who are subject to (or think they are subject to) oversight will be dissuaded from wrongdoing unless they think they can outwit surveillance or are truly desperate.[92]

A consequence is the tendency of both the public and private sectors to seek to 'see like a state', in other words comprehensively and abstractly through compilation and interrogation of public and private databases regarding criminal offences, qualifications and credit history.[93]

Much trust in people whose legal identity is denoted through possession of official signifiers (such as the Aviation Security Identity Card) or who occupy positions of importance is predicated on belief that the documentation is authentic – a matter discussed in Chapters Eight and Nine below – and that the person has undergone an evaluation of worthiness, for example through a vetting that as discussed in Chapter Ten includes a dispassionate consideration of the person's character.

We can extend our thinking about character and identity by considering defamation. Australian jurisprudence refers to character, for example that an individual was of good or bad character (on occasion in the context of disagreement about the admissibility of 'character evidence') but does not expressly identify character *per se* as a discrete legal identity. Tacitly, the default position is that the person in the Bondi taxi is a person of good character, someone whose reputation – fame – is significant for commercial interactions and for the individual's psychological or even physical well-being. The consequences of tarnishing the person's perceived identity as a trustworthy and 'reputable' individual may be significant.

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[91] See for example *Re Application for Admission as a Legal Practitioner* [2004] SASC 426; and *Ex parte Lenehan* (1948) 77 CLR 403.
[92] David Middleton and Michael Levi, 'Let Sleeping Lawyers Lie: Organized Crime, Lawyers and the Regulation Of Legal Services' (2015) 55 *British Journal of Criminology* 647, 658.
[93] *DPP v Hall* [2015] VCC 1338, [12]-[16].

Defamation law provides a cause of action where the person's reputation has been falsely damaged. It is in essence a mechanism for reparation of a legal identity.

Observations

In contemplating the nature of legal identity through the lens of this chapter we can conclude that capacity matters and that not all legal entities, human or otherwise, have capacity in full or in part.

The default position, in terms of legal identity, is that all human animals – a class of entities that the preceding chapter demonstrated is on occasion arbitrarily differentiated from the more sentient nonhuman animals – possess capacity. The species is determinative. Membership of that class, on the basis of capacity, invokes respect, albeit as the following chapters demonstrate different cultures have on occasion strongly discriminated against individuals and groups on the basis of ethnicity, gender and other attributes.

Artificial persons may be perceived to lack dignity, for example through restrictions noted in Chapters Five and Seven on voting in most elections, but they have the ability to buy, sell, sue, be sued, own and occupy real property and other manifestations of capacity.

The legal conceptualisation of capacity is culturally contingent, rather than something that has been stable over the past two millennia. We no longer, for example, regard women as a subclass of legal identities who are distinguished by an intellectual or emotional deficiency and thus requiring a soft 'guardianship' to protect individuals from themselves and others. Markers of adulthood and hence capacity in the sense of autonomous understanding and action, with consequent freedoms and responsibilities, have shifted and as the following chapter suggests are likely to shift.

Our society's embrace of a Lockean respect for possessive individualism[94] means that law implicitly manages risks of financial harm through the identity of bankrupt, an

[94] John Locke, *Locke's Two Treatises of Government: A Critical Edition With An Introduction and Apparatus Criticus by Peter Laslett* (Cambridge University Press, 2nd ed, 1967) 227 and 224.

incapacitation regarding some activities. We similarly address perceptions of physical harm through varieties of what might be dubbed civil death, that is restrictions – which might be life-long – on the capacity of people convicted of crimes to exercise autonomy in terms of choice of domicile, employment, consumption and representation in the legislature. Management of risk involves a preoccupation with character, a predictive function that we take for granted in Australian society but as noted earlier in this dissertation is at odds with the world views – and legal systems – of other societies that attribute responsibility to fate or metaphysical entities rather than individual understandings and actions.

We confine some humans or impose medical treatments for psychiatric conditions, potentially freeing those individuals from the consequences of criminal action on the basis that they lack the rationality (and thus the responsibility) of peers who are deemed not to have the requisite degree of learning or psychiatric disorders. Contrary to Foucault, Rose and other theorists that disrespect of the individual's cognitive difference is not antithetical to the flourishing of the person or community. Construing someone as in need of care, and thence assigning that person with a particular legal identity that results in incapacitation, may be of direct benefit to individuals whose ability to look after themselves is weak or non-existant.

Finally, in thinking about capacity – especially in relation to practices highlighted in Chapters Eight, Nine and Ten below – we can see that legal identity involves information generation and dissemination.

We construct, verify and subvert legal identity using paper and its equivalents. Age as a marker of capacity in contemporary Australia involves reference to public registers of births. Bankruptcy, professional qualifications and status as an incarcerated criminal (and person who has been convicted but is now at liberty) involves reference to other public and private registers. Capacity is separate from the paper; documentation is pertinent in building particular legal identities through law regarding capacity and incapacity.

Chapter Five: The Political Animal

Overview

Preceding chapters have unpacked legal identity through use of the generative questions articulated in Chapter Two, demonstrating that frameworks for legal identity are created by states, feature a range of legal identities and involve a broad taxonomy in which some identities (such as being human or being a citizen) are typically both presupposed by and are more important than others (such as gender, age and character). A normative view of law that emphasises individual flourishing requires consideration of legal identities relating to participation in political processes. From that perspective legal identity is very much a matter of who gets to determine the legal framework for the legal identity of themselves and others.

For Aristotle it was evident that

> the state is a creation of nature, and that man is by nature a political animal. And he who by nature and not by mere accident is without a state, is either a bad man or above humanity; he is like the "Tribeless, lawless, hearthless one" whom Homer denounces – the natural outcast is forthwith a lover of war; he may be compared to an isolated piece at draughts. Now, that man is more of a political animal than bees or any other gregarious animals is evident. Nature, as we often say, makes nothing in vain, and man is the only animal whom she has endowed with the gift of speech.[1]

What are political identities, their consequences and signifiers?

Classical philosophers construed identity in terms of political participation and community membership, with a taxonomy differentiating between the active citizen and those who lacked agency, such as women, slaves and outsiders.[2] Theorists more recently have implied that possession of wealth (or more subtly of the individual's relationship to wealth's means of production) is the salient identity.[3]

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[1] Richard Mulgan, 'Aristotle's Doctrine That Man Is a Political Animal' (1974) 3 *Hermes* 438.
[2] See for example Wolfgang Kullmann, 'Man as a Political Animal in Aristotle' in David Keyt and Fred Miller Jr. (eds), *A Companion to Aristotle's Politics* (Blackwell, 1991) 94; and Malcolm Schofield, *The Stoic Idea of the City* (University of Chicago Press, 2nd ed, 1999) 36. See also Mary Nichols, *Socrates and the Political Community: An Ancient Debate* (SUNY Press, 1987) 181-183; and Bernard Yack, *The Problems of a Political Animal: Community, Justice, and Conflict in Aristotelian Political Thought* (University of California Press, 1993) 62.
[3] Evgeny Pashukanis, *The General Theory of Law and Marxism* (Barbara Einhorn trans, Transaction, 2007) [trans of *Obshchaia teoriia prava i marksizm*, first published 1924] 54.

This chapter considers contemporary Australian law's construction of the political animal, including discussion of voting restrictions, requirements on eligibility for some public office, boundaries on speech, associational autonomy and restrictions through mechanisms such as offender registers and preventative detention on the self-realisation of convicted criminals.[4]

The chapter argues that although contemporary law retains a traditional bias towards real property ownership, in terms of legal identity the respect for wealth is administrative rather than fundamental and we have abolished the identity of 'vagrant' and have sought to alleviate a disadvantage that encompasses shelter, health, policing and other attributes. Membership of the Australian community brings with it entitlements to income and health support – bases for the flourishing of people who are disadvantaged through disability or economic misfortune – that are manifested through a range of social services identities. The chapter also suggests that there are revealing inconsistencies in theorisation or practice regarding legal identity as a manifestation of possessive individualism, for example consensual sado-masochism, body modification or suicide.

The chapter initially considers the identity of Australia's head of state, an entity that has a core function within the Australian polity but has attributes at odds with expectations about merit or representation, telling us something about the history of Australian law and provoking thought about law reform through movement to a republic. The chapter then discusses suffrage and the legislature, mechanisms that both signal the dignity of adult Australians and the achievement of collective flourishing through bounds on executive power. The identity of voter has significant legal consequences.

The chapter discusses valorisation of property, in particular real property, as underpinning legal identity. It then considers the identity of Australia's Indigenous peoples, before discussing tensions in respect for self-possession and noting the shape of civil disabilities such as bankruptcy, that is identities in which a person without

[4] For a perspective on 'the political' see Carl Schmitt, *The Concept of the Political* (George Schwab trans, University of Chicago Press, 1997) [trans of *Der Begriff des Politischen* (first published 1932)] 22 and 25.

cognitive or psychiatric deficits is formally prevented from exercising particular powers.

Embodiment

Yael Tamir, in critiquing Anderson's *Imagined Communities* commented that all communities, particularly the 'nation' discussed in Chapter Three above, are to a large extent imagined.[5] On a day by day basis most people probably look for a manifestation of that imagined entity, something concrete rather than an abstraction. That manifestation is in part a matter of shibboleths: the flags, passports, anthems, oaths of allegiance, public holidays, state insignia and other signifiers. As discussed in Chapter Eight those signifiers serve to individuate one state from another; they are accordingly legally recognised and protected. They foster self-affiliation with the state.[6]

The manifestation is also a matter of performance by what people variously describe as the Crown, the Executive and the government.[7] In thinking about the construction of legal identity we can discern several discrete legal identities that embody functions in law making (abstract) and implementation (practice).

Of those identities the longest-standing and in one sense the most important is that of the monarch, the hereditary head of state who is conflated with the Executive. The monarch's importance is two-fold: directly as the identity whose assent (through embodiment as Governor-General and Governors)[8] is formally required for enactment

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[5] Yael Tamir, 'The Enigma of Nationalism' (1995) 47(3) *World Politics* 418, 421; and Jerry Brotton, *A History of the World in 12 Maps* (Viking, 2012) 335. For Anderson see Chapter Four above.

[6] Anderson comments 'In an age when it is so common for progressive, cosmopolitan intellectuals (particularly in Europe?) to insist on the near-pathological character of nationalism, its roots in fear and hatred of the Other, and its affinities with racism, it is useful to remind ourselves that nations inspire love, and often profoundly self-sacrificing love'. Benedict Anderson, *Imagined Communities* (Verso, 1991) 141.
Contrary to Foucault, Lyotard and Pashukanis we should not necessarily be hostile to or inordinately suspicious of the liberal democratic state or – as argued in Martha Nussbaum (ed), *For Love Of Country?* (Beacon Press, 1996) – our adherence to that state in working towards a Kantian global cosmopolitanism.

[7] Kirby J comments that use of 'the Crown' to describe the Australian polities is constitutionally and historically incorrect. See in particular *Australian Competition & Consumer Commission v Baxter Health Care Pty Ltd* [2007] HCA 38, [87]-[136]; (2007) 232 CLR 1; 237 ALR 512.

[8] Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2009). See also Peter Boyce, *The Queen's Other Realms: The Crown and its legacy in Australia, Canada and New Zealand* (Federation Press, 2008). See also *Governor-General Act 1974* (Cth).

of Bills,[9] indirectly as symbolic of the representative government discussed below and of that government's legitimacy.[10]

The importance is evident but misconstrued in claims by 'sovereign citizens' and other people who believe that all Australian law and government since 1901, 1919, 1973 or another inflection point is void because there had been an invalid transmission of authority from an individual monarch or the British state. The Victorian Supreme Court in 2015 for example noted

> The orders sought by the applicant on this appeal included, but were not limited to, that the position of Queen of Australia is invalid, that no bill of the Victorian Parliament has been made law since 1919, that the current Victorian Parliament be dismissed, and that the Court appoint the applicant as 'the autocratic Head of Government of the State of Victoria to establish the rule of law and a constitution with a majority decision of the Sovereignty of the People of Victoria'.[11]

Australia is a 'crowned republic' or a constitutional monarchy.[12] From the perspective of identity there has been surprisingly little attention to the Australian monarch[13] as an identity that is constructed by law and having a foundational status.

It is surprising given the centrality of the monarchy to the Australian legal system and the symbolic conflation of the Executive arm of government with an individual who is normally resident in another nation,[14] who is head of another nation's established

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[9] Anne Twomey, 'Royal Assent – The Business of Parliament or the Executive?' (2015) 30(2) *Australasian Parliamentary Review* 31. Note also *Australian Constitution* s 59.

[10] Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (Routledge, 1962) 127; and Ernst Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press, new ed, 1981) 5 and 21. Note that although Australia is a constitutional monarchy and the state's legitimacy arguably reflects election of MPs to the Commonwealth legislature, in formal terms the preamble to the Australian Constitution – which as noted in Chapter One above is the *Commonwealth of Australia Constitution Act 1900* (Imp) – refers to establishment of a federal Commonwealth under the crown of the United Kingdom. Section 61 of the Constitution states that the Commonwealth's executive power is 'vested in the Queen and is exercisable as the Queen's representative'; as noted above section 59 provides that the Queen may disallow a law following assent by the Governor-General. Swearing-in of Susan Kiefel as Chief Justice of the High Court in 2017 featured her pledging allegiance to 'the Queen'.

[11] *Jones (a pseudonym) v DPP* [2015] VSCA 272.

[12] Peter Boyce, *The Queen's Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Federation Press, 2008) 248; and Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995).

[13] *Royal Styles and Titles Act 1973* (Cth) s 2.

[14] The High Court in *Sue v Hill* (1999) 163 ALR 648 characterised the United Kingdom as a foreign power for the purposes of s 44(i) of the *Australian Constitution*; see Gleeson CJ, Gummow and Hayne JJ at 665, 675 and Gaudron J at 694–695.

church and who gained her status at the constitutional apex of the Australian state through lineage rather than election and a basic test of religious affiliation.[15]

If legal identity is a matter of consequences, what are the consequences of being the monarch? Greg Craven in an echo of Bagehot's constitutional taxonomy (that is 'dignified' versus 'efficient' or 'functional')[16] claimed that the Australian monarchy as an

> institution possesses no real, as opposed to theoretical functions, under the Australian Constitution, acting quite literally as a posting station for the appointment and dismissal of an indigenous governor-general. Beyond this, the monarchy is, as it should be, nothing more than a dignified symbol.[17]

Symbols however have power in shaping perceptions of the law and of hierarchies of identity in a multicultural society ('all are equal but some are more equal than others'?). It is a legal system that features depictions of the Queen on many coins, an Australian honours regime, continued use of armorial crests[18] and corporate titles such as 'Royal Australasian College of Surgeons',[19] references to 'the Crown' in litigation[20] (and in television depictions of the justice system),[21] references to legislation binding 'the Crown' and to 'Crown Debts',[22] and uncertain understanding among non-specialists about the role of the Monarch, the Governor-General and

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[15] Vernon Bogdanor, *The Monarchy and the Constitution* (Clarendon Press, 1995) 55 and 59. A member of the Roman Catholic church is ineligible to succeed to the throne; insanity is not a disqualification for succession although under the *Regency Act 1937* (1 Edw VII & 1 Geo VI c 16) – which replaced the *Lord Justices Act 1837* (7 Will 4 and 1 Vict c 72) – the power of the mad monarch would be exercised by a regent. Relevant statutes are the *Act of Settlement 1700* (12 and 13 Will 3 c 2), the *Coronation Oath Act 1688* (1 Will and Mary c 6) and *Accession Declaration Act 1910* (10 Edw 7 and 1 Geo 5 c 29). Note the discussion of regency regarding the Queen of Australia in Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 436-432. Questions of capacity are discussed in Chapter Four above. The tests are retained in the *Succession to the Crown Act 2013* (UK). See also the *Succession to the Crown Act 2015* (Cth).

[16] Walter Bagehot, *The English Constitution* (Cambridge University Press, 2001) 5.

[17] Greg Craven, 'A Liberal Federation and a Liberal Constitution' in John Nethercote (ed), *Liberalism and the Australian Federation* (Federation Press, 2001) 67. Craven goes on to comment that 'the effect of our innate constitutional conservatism seems to be that it impels us to the paradoxically radical choice of maintaining a monarchy which we have outgrown through our inability to hit upon agreement as to a form of republic which would appropriately reflect the truths of modern Australia'.

[18] Noel Cox, 'The Law of Arms in New Zealand' (1998) 18 *New Zealand Universities Law Review* 225.

[19] Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 358 and 360.

[20] For example *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 293; and *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14.

[21] For example ABC television series *Crownies* (2011), depicting 'the extraordinary world of the Department of Public Prosecutions and its young eager lawyers' and promoted with statements such as 'Senior Crown Prosecutor, Janet King, is a star and one of the most feared and admired advocates at the bar. Steely and immovable, with an armour-piercing gaze and a tongue that can eviscerate a poor argument, she is a consummate professional.' http://www.abc.net.au/tv/crownies/default.htm, accessed 2 January 2013.

[22] Examples include *Currency Act 1965* (Cth) s 6; *Crown Debts (Priority) Act 1981* (Cth); *Crown Lands Act 1989* (NSW); *Crown Proceedings Act 1988* (NSW); and *Crown Proceedings Act 1980* (Qld).

Governors[23] or adherence to conventions regarding restraint in the exercise of prerogative and reserve powers.[24]

The Governor-General's site in 2013 for example featured Ms Bryce's Oath of Office:

> I, Quentin Alice Louise Bryce, do swear that I will well and truly serve Her Majesty Queen Elizabeth the Second, Her heirs and successors according to law, in the office of Governor-General of the Commonwealth of Australia, and I will do right to all manner of people after the laws and usages of the Commonwealth of Australia, without fear or favour, affection or ill will. So Help Me God![25]

It is sometimes noted that although the Commonwealth Constitution does not refer to the Prime Minister, section 2 of the Constitution states that

> A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.[26]

The state constitutions feature similar provisions.[27] The exercise of powers by the Governor-General and Governors may be circumscribed by convention[28] but in formal terms those positions are more than mere post boxes or posting stations.[29]

In thinking about legal identities we can regard the monarch (or viceroys) as discrete foundational identities. They are foundational as embodiment of the state. The legal identities have consequences. Postbox or otherwise, under current Australian law their

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[23] For an authoritative discussion see Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2009) and Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010).
[24] See for example the discussion in Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 101-144.
[25] Office of the Governor-General, Oath of Office at http://www.gg.gov.au/node/91998, accessed 2 January 2013. The complementary Oath of Allegiance states that 'I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her heirs and successors according to law'. The *Australian Constitution* s 42 requires an oath of allegiance by Senators and Members. See further Enid Campbell, 'Oaths and Affirmations of Public Office' (1999) 25(1) *Monash University Law Review* 132, and 'Oaths and Affirmations of Public Office under English Law: An Historical Retrospect' (2000) 21(3) *Journal of Legal History* 1. For a Canadian perspective see *McAteer v. Canada (Attorney General)* 2014 ONCA 578.
[26] For the current regime see *Royal Powers Act 1953* (Cth) s 2.
[27] *Constitution Act 1902* (NSW) s 9A(2); *Constitution of Queensland 2001* (Qld) ss 29, 34 and 39; *Constitution Act 1889* (WA) s 50; and *Constitution Act 1975* (Vic) s 6.
[28] For changing UK views on convention in relation to Australian practice see Vernon Bogdanor, *The New British Constitution* (Hart, 2009) 26. A provocative analysis is provided in Brian Galligan, *A federal republic: Australia's constitutional system of government* (Cambridge University Press, 1995) 14 and 18.
[29] *Constitution Act 1902* (NSW) ss 8A, 35E and 47; *Constitution of Queensland 2001* (Qld) ss 33, 35 and 36; and *Constitution Act 1975* (Vic) ss 12 and 14.

involvement is required for the passage of legislation and for the formal appointment of people to a range of positions. Their significance is demonstrated by statutory provision for people to act in their stead if the individuals are incapacitated or unavailable.[30]

Given previous reference to legal identity as a matter of consequences and as something discernable through questions, how does the legal identity of the monarch and her Australian avatars arise? How are they signified? As foreshadowed in Chapter Three, should an emphasis on flourishing encourage us to abandon a hereditary head of state – whose occupant holds the position because she meets two immutable legal tests of identity –by establishing a republic, a state in which opportunity would be open to all?[31]

In formal terms the individuals occupying the office of Governor or Governor-General are appointed by Royal letters patent, on advice from the respective Premier or Prime Minister. That appointment is an expression of prerogative power recognised in the constitutions. It is implicit that the occupants will be capable at the time of appointment, a notion discussed in the preceding chapter. In formal terms they hold office at the monarch's pleasure and can thus be relieved of the office's burdens or privileges if they become incapacitated or inconvenient, again on advice from the representative of the elected government.[32] Although the constitutions provide for their residence in Australia there appears to be no formal requirement that they be Australian citizens, demonstrating that the identity is, to a large extent a matter of convention rather than statute.[33] Typically they will be members of what Hennessy dubbed the 'great and the good',[34] and unimpeded by bankruptcy, unexpunged criminal convictions or other disabilities.

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[30] For example *Constitution Act 1902* (NSW) s 9C; *Constitution of Queensland 2001* (Qld) ss 40 and 41; and *Constitution Act 1975* (Vic) ss 6B and 6C.

[31] The tests are that the monarch does not profess Roman Catholicism and is the eldest legitimate child of the preceding monarch (or person with a claim to the throne through lineage in those instances where the previous monarch had no legitimate children). The tests are discussed below.

[32] Note however Jenny Hocking, *The Dismissal Dossier* (Melbourne University Press, 2015) 15 and 25.

[33] Historically the post of colonial or state governor was a sinecure for superannuated British aristocrats, encapsulated in Belloc's Lord Lundy:

> Sir! you have disappointed us! We had intended you to be, The next Prime Minister but three: The stocks were sold; the Press was squared; The Middle Class was quite prepared. But as it is! ... My language fails! Go out and govern New South Wales!

[34] Peter Hennessy, *The great and the good: an inquiry into the British establishment* (Policy Studies Institute, 1986) 11.

Apart from the exercise of powers, which famously include the dismissal of a Prime Minister[35] and a Premier,[36] the identity of occupants of the viceregal position as surrogate heads of state is signified by the receipt and award of honours,[37] access to a viceregal residence and other perquisites that signal membership of what is meant to be seen as a social (and thus political) elite.[38] Legal identity can be expressed by and valorised through a culture of deference, rather than through a certificate, card or identity number.

What of the monarch? Kantorowicz, one inspiration for this dissertation, noted mediaeval efforts to reconcile conflicting social and physical realities, such as the ugly, ailing and corrupt king who was at the same time the 'fount of justice', chief arbiter and person uniquely touched (and authorised) by God.[39] Early jurists accordingly advanced the notion of the king's two bodies: one an earth-bound imperfection, the other an abstraction. In essence they, like contemporary Australian legal thinkers, differentiated between the position and the person who by occupying that position has a specific legal identity. We can see tensions between occupant and abstraction, individual and role or attribute, throughout the following chapters. In practice Australian law addresses the dichotomy by conflating person with identity. Apart from the statutes and indicia noted above, recognition of the monarch is evident as a matter of performativity: red carpet and other ceremonial on royal visits (which like the monarch's birthday were formally marked by public holidays),[40] photographs of the monarch in courts and offices, ceremonial toasts, and official prayers.

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[35] George Winterton, '1975: The Dismissal of the Whitlam Government' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 229; and Jenny Hocking, *The Dismissal Dossier* (Melbourne University Press, 2015) 13, 15 and 25.

[36] Anne Twomey, 'The Dismissal of the Lang Government' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 129.

[37] For a discussion of making marks of distinction leap into being see Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 107-109 and Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 152.

[38] Among accounts see Chris Cunneen, *Kings' Men: Australian Governors-General from Hopetown to Isaacs* (Allen & Unwin, 1983); David Clune and Ken Turner, *The Governors of New South Wales: 1788-2010* (Federation Press, 2009); the more analytical Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2009) and Peter Boyce, *The Queen's Other Realms: The Crown and its legacy in Australia, Canada and New Zealand* (Federation Press, 2008).

[39] Ernst Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton University Press, new ed, 1981).

[40] For example *Public Holidays Act 2010* (NSW) s 4(h); *Dangerous Substances (Explosives) Regulations 2004* (ACT) Reg 28; and *Fisheries Regulations 1998* (Vic) Reg 506.

How did the person who holds the identity of monarch and thus provides constitutional legitimacy to the statute law framing Australian legal identities and to appointments by the executive, come to occupy that foundational position?

As noted in Chapter One, tests for eligibility are essentially exclusionary and appear at odds with a society that espouses principles of equal opportunity, even meritocracy, rather than hereditary privilege. The Queen's service as what Craven dubbed a posting station is dependent on her being the eldest legitimate child of the preceding monarch or direct heir to the throne. Under current law she cannot be the child of a morganatic marriage and cannot be an adherent of Roman Catholicism.[41] She need not be sane and any cognitive deficit is irrelevant. She faces no character test, such as we would expect for admission as a legal practitioner, although a refusal to take the Oath at her coronation – which takes place after accession to the throne rather than bringing the monarch into legal being – would pose conundrums for constitutional lawyers. She is not required to be well-educated, outstandingly sagacious or eloquent. She might indeed occupy the position while in a vegetative state, with her duties being undertaken through a regency;[42] as noted in preceding pages incapacity can be addressed through assisted or substitute decision-making. The Australian monarch appears to be protected through sovereign immunity; in one of her other realms her first-born enjoys exceptional privileges as Duke of Cornwall.[43]

Is she – and her avatars – merely a decorative postbox? If we construe legal identity in Australia through questions we could argue that a test of the monarch's foundational identity is to take her out of the picture. Hypothesise further that all the governors were incapacitated or, in an echo of the threatened 1905 'High Court

[41] Benoit Pelletier, 'The Constitutional Requirements for the Royal Morganatic Marriage' (2005) 50 *McGill Law Journal* 265; and Simon Cretney, 'Royal Marriages: Some Legal and Constitutional Issues' (2008) 124 *Law Review Quarterly* 218. As noted in Chapter One above, the tests are retained in the *Succession to the Crown Act 2013* (UK) and *Succession to the Crown Act 2015* (Cth), with the latter following *Succession to the Crown (Request) Act 2013* (NSW), *Succession to the Crown Act 2013* (Qld), *Succession to the Crown (Request) Act 2014* (SA), *Succession to the Crown (Request) Act 2013* (Tas) and *Succession to the Crown (Request) Act 2013* (Vic).
[42] *Duchy of Lancaster Case* (1561) 1 Plowd 212; 75 ER 325; *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 377h.
[43] John Kirkhope, 'Is the Duchy of Cornwall entitled to Crown Immunity?' (2014) 1 *Plymouth Law and Criminal Justice Review* 41 and 'The Duchy Of Cornwall And The Principle Of Crown Immunity Part II: Is The Duchy Free To Break The Law Without Criminal Sanction?' (2016) 1 *Plymouth Law and Criminal Justice Review* 73. Other exceptional treatment on the basis of identity includes exemption under the *Freedom of Information Act 2000* (UK) for members of the royal family and royal household and closure of royal wills, discussed in Robin Callender Smith, *Celebrity and Royal Privacy, The Media And The Law* (Sweet & Maxwell, 2015) 309.

Strike' refused to do their duty.[44] In formal terms we have problems, because Australian law as it stands presumes that there is a monarch and there are viceroys ready with signs of assent.

Bearing in mind Lloyd George's quip that a duke was more decorative than a Dreadnought but twice as costly to run[45] we could rewrite Australian law so that we are no longer that 'crowned republic', with cost savings going into health care or education that fosters individual and collective flourishing. Rewriting of the Constitution, through a referendum, and of a range of other law would be necessary. At the moment, if you remove the 'regal' component of the state you are left with a formal hole.[46]

Ongoing patriation[47] is evident in reference to the Queen of Australia, with Elizabeth II being both the Australian monarch (one legal identity) and Queen of England, Scotland, Wales and Northern Ireland (a separate legal identity).[48] The legal identity of the monarch informs subordinate identities or notions such as 'officer of the crown' and reference to QCs rather than SCs,[49] that wording on occasion construed as meaning the monarch and her servants are above politics, that is disinterested and not evanescent.[50]

The Queen's legal identity is a survival of premodern times when the monarch *was* the state and law (along with title to real property) flowed from a particular deity via

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[44] Stephen Gageler, 'When The High Court Went On Strike' (2017) 40(3) *Melbourne University Law Review* 1098.
[45] David Lloyd George quoted in Roland Quinault, *British Prime Ministers and Democracy: From Disraeli to Blair* (Bloomsbury, 2011) 80.
[46] If, similarly, you purport to radically restructure identity as part of the UPMART (United People Movement Against Representation Taboo) movement – centred on a 'Right of Redemption' enshrined in 'bible codified common law' – you are left with the incapacity evident in cases cited in Chapter Three above and in this chapter below. See *Freilich v Lambert* [2007] QDC 157 and *Kobylski v Cole* [2006] QDC 308.
[47] As points of reference for patriation see George Winterton, 'The Acquisition of Independence' in Robert French, Russ Vince and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 31; and Anthony Dillon, 'A Turtle by Any Other Name: The Legal Basis of the Australian Constitution' (2001) 29(2) *Federal Law Review* 241.
[48] George Winterton, 'The Evolution of a Separate Australian Crown' (1993) 19(1) *Monash University Law Review* 1; and *Royal Styles and Titles Act 1973* (Cth).
[49] For example Rebecca LaForgia, 'Attorney General, Chief Law Officer of the Crown: But where is the law?' (2003) 28(4) *Alternative Law Journal* 163; *Work Health and Safety Act 2012* (Tas) s 247; *Work Health and Safety Act 2011* (NSW) s 247; *Bell v Cribb* [2012] WASCA 234; and *R v Dalton* [2011] SASCFC 125.
[50] A scholar of legal identity might respond that evanescence has its place: through elections and ineligibility rules we can get rid of politicians who are convicted of crimes or are otherwise embarrassing but lineage means that 'royals' may be chastened by scandal but remain in the line of succession for life. See for example *R v Theophanous* [2003] VSCA 78; *Orkopoulos v R* [2009] NSWCCA 213; and *R v Finnigan (No. 3)* [2015] SADC 166.

the royal hand.[51] It is reflected in the pretensions of Australian pseudo-states and pseudo-monarchs, that is self-appointed/accountable dignitaries who are not recognised as states by other states and who lack the ability to give effect to their wish to be free of Australian road rules, consumer protection and competition law, taxation and other obligations.[52]

Australia is merely one among numerous nations. We can accordingly see embodied national identity being recognised and thence protected in other ways through recognition of identities that are manifestation of other states. Chapter Three referred to the protection of diplomatic personnel, a protection that can see an offender for example evade the consequences of disregarding traffic restrictions.

Recognition is also evident in legal protection for visiting heads of state, a protection that might be effected through courtesies, guards and restrictions on protests but is independent of that performativity.[53]

Suffrage and Legislature

In a liberal democratic state suffrage is critically important, with identity as 'a voter' (and consequentially how that identity is exercised) ultimately influencing who gets to construct and verify other legal identities.

In essence you need an identity to participate in the state's making or unmaking of identities through the legislation process. Identity as a voter is a matter of authority to decide who makes law.

Waldron referred to mythic ideas about the social contract, commenting that

> The citizen really is not much more than a subject. The state is an independently empowered entity that confronts the subject in her abject

[51] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, Brennan [25] and [49]; *Attorney-General v Brown* (1847) 1 Legge 312, 316; and Michael Stuckey, 'Feudalism and Australian Land Law': A Shadowy, Ghostlike Survival'' (1994) 13(1) *University of Tasmania Law Review* 102.
[52] *Commissioner for Fair Trading, Department of Commerce v Hunter* [2008] NSWSC 277. For other pseudo-states/executives see Chapter Three above.
[53] *Foreign State Immunities Act 1985* (Cth). For applications see *Li v Zhou* [2013] NSWSC 12. A point of reference regarding current and former heads of state is provided in Colin Warbrick, Dominic McGoldrick and J. Craig Barker, 'The Future of Former Head of State Immunity after ex Parte Pinochet' (1999) 48(4) *International and Comparative Law Quarterly* 937.

> vulnerability. The subject, far from being a signatory to any social contract, is in fact more or less helpless in shaping its structures and laws. And it may seem that the most we can do is to try to mitigate this helplessness by arranging a modicum of protection for the subject and ceding a microscopic quantum of political power to the subject and calling that "citizenship." And yet, our commitment to the dignity of citizenship connotes a determination not to always see things in the light. Just as in times past we sacralized and dignified kingship even though we all knew kings were really nothing but human animals like any others, so now we create an aura of dignity for the ordinary subject. She is to be saluted, respected, empowered, and answered to, as though this were her society (among others).[54]

It is contestable whether people during much of history 'all knew' that 'kings were really nothing but human animals', given the large body of theory and practice in the past reflecting a legally recognised knowledge – and arguably a legal imperative, given the desirability of stability – that kings were special and had powers not vouchsafed to those un-anointed by god.[55] People live by myths but also by practicalities. Chapter Three suggested that citizenship is a foundational legal identity because it a basis for suffrage, that is the right to elect a representative body that makes statute law and through the Executive gives effect to that law.[56]

Suffrage is important because in a liberal democratic state the representative body (in Australia the parliaments and legislative assemblies) is meant to serve the people and is accountable through elections to the people. The legislature is both bounded by the Constitution and along with the courts serves to bind the Executive, the latter resembling the premodern sovereign and the agents who served the monarch rather than the people. Chapter Eleven of this dissertation offers recommendations about how binding might be made more effective and therefore more fully foster flourishing.

In contemporary Australia, in contrast to past regimes where representation was highly selective (for example restrictions on the basis of nobility, ethno-religious

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[54] Jeremy Waldron, 'Citizenship and Dignity' (New York University School of Law Public Law & Legal Theory Research Paper Series 12-74, 2013) 21.

[55] See for example Marc Bloch, *The Royal Touch: Sacred Monarchy and Scrofula in England and France* (JE Anderson trans, Routledge Kegan Paul, 1973) [trans of *Les rois thaumaturges* (first published 1924)]. Waldron's argument disregards the theorisation of premodern figures such as Aquinas, Francisco Suárez and Jean Gerson.

[56] At the Commonwealth level see for example *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, Mason CJ at 137; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, Brennan J at 46-48 and 50; and *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, Stephen J at 56.

affinity, literacy or wealth),[57] suffrage is notionally universal, without privileges or disabilities on the basis of social class or ethnicity. There is for example no statutory quota for representation by women or Indigenous people, and no hereditary chamber that has a deliberative, advisory or decorative function. There are restrictions on the basis of intellectual disability and, unevenly, on what a later paragraph dubs 'civil death'.[58]

Schmitt conceptualises politics as a matter of decisions about 'us' and them', a matter of collective identities formed through existential conflict and exclusion. Conflict within the state is to be reduced, if not eliminated, through a godlike Executive, one that makes and is thus above the law.[59] He defined the 'enemy' as

> the other, the stranger; and it is sufficient for his nature that he is, in a specifically intense way, existentially something different and alien, so that in the extreme case, conflicts with him are possible. These can neither be decided by a previously determined norm nor by the judgment of a disinterested and therefore neutral third party. ... [T]he inherently objective nature and autonomy of the political becomes evident by virtue of its being able to treat, distinguish, and comprehend the friend-enemy antithesis independently of other antitheses.[60]

Schmitt's claims are specious. Difference is a social and thence legal construction. Physical difference may be inevitable (although note the blurring of the traditional gender binary through surgery) but the valorisation of specific differences is contingent. The sweep of law about the erosion of disadvantageous identities such as slave and woman, suggests that the modernist project has benefits and has been too lightly dismissed

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[57] Consider, for example exclusion from the UK House of Lords on the basis that a person was not noble (addressed through a process of enoblement that prior to life peerages conferred nobility and thus eligibility on the person's descendants) and historic exclusion from the House of Commons on the basis that the candidate was female, an atheist, or an adherent of Judaism or Roman Catholicism.

[58] See in particular *Roach v Electoral Commissioner* [2007] HCA 43; and Jonathon Savery, 'Voting Rights and Intellectual Disability in Australia: An Illegal and Unjustified Denial of Rights' (2014) 37(2) *Sydney Law Review* 289.

[59] Commentators on Schmitt rarely note that the the unbounded exclusive power of Schmitt's executive that is meant to end competition in fact fosters an extreme competition, given that losing power has existential consequences and that that his total state will expand until it collapses. To adapt Pierce's criticism of William James, Schmitt's ideal state is an identity that has the seeds of its own death. See Harvey Cormier, *The Truth Is What Works: William James, Pragmatism, and the Seed of Death* (Rowman & Littlefield, 2000).

[60] Carl Schmitt, *The Concept of the Political* (George Schwab trans, University of Chicago Press, 1997) [trans of *Der Begriff des Politischen* (first published 1932)] 27.

Heller during 1926 contested Schmitt's theological politics[61] – a vision of an all-powerful decision-maker above the law – in commenting that

> Parliamentary democracy rests on the belief in the rational nature of people, who, controlling their passions by reason, settle their political conflicts through public rational parliamentary proceedings, rather than physical force and godlike intervention.[62]

That respect for and presumption of rationality and agency reflects classical theorisation,[63] highlighted by figures such as Nussbaum,[64] about what differentiates human animals from their nonhuman peers.[65] It also reflects the expectations about (and frameworks for) capacity discussed in Chapter Four of this dissertation.

Identity as a voter is signified by a presence on the electoral roll in the relevant jurisdiction,[66] with registration not requiring payment of a processing fee, a property test,[67] a test of ethnicity or religious affiliation (discussed in the following chapter),[68] a preliminary test of the potential voter's understanding or exclusion on the basis of gender. The individual's name, in other words the signifier, used by the individual in

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[61] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, University of Chicago Press, 2005) [trans of *Politische Theologie: Vier Kapitel zur Lehre von der Souveranitat* (first published 1922)]. See in particular the discussion in Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy* (Marcus Brainard trans, University of Chicago Press, rev ed, 2011) [trans of *Die Lehre Carl Schmitts: Vier Kapitel zur Unterscheidung Politischer Theologie und Politischer Philosophie* (first published 2004)] 41, 43 and 187.

[62] Hermann Heller, *Die Politischen Ideenkreise der Gegenwart* [1926] quoted in David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herman Heller in Weimar* (Oxford University Press, 1997) 189. Schmitt, after arguing that the justifications for representative democracy would be equally satisfied by a single representative of rhe people, comments that the democratic legislature is 'the place in which particles of reason that are strewn unequally among human beings gather themselves and bring public power under their control ... a typical rationalist idea'. Carl Schmitt, *The Crisis of Parliamentary Democracy* (Ellen Kennedy trans, MIT Press, 1988) [trans of *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (first published 1923)] 34 and 35 respectively.

[63] Aristotle, *Metaphysics* in Jonathan Barnes (ed), *The Complete Works of Aristotle II* (W D Ross trans, Princeton University Press, 1984) 1552, 1552; and Epictetus, *Discourses* in *Discourses, Fragments, Handbook* (Robin Hard trans, Oxford University Press, 2014) 4, 87-88.

[64] Martha Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton University Press, rev ed, 2009) 324-325; Matthew Boyle, 'Essentially rational animals' in Günter Abel and James Conant (eds), *Rethinking epistemology* (De Gruyter, 2012) 395; and Giles Pearson, 'Aristotle and the Cognitive Component of Emotions' in Brad Inwood (ed), *Oxford Studies in Ancient Philosophy, Volume 46* (Oxford University Press, 2014) 165, 177-179.

[65] In contrast see Carl Schmitt, *Dictatorship* (Michael Hoelzl and Graham Ward trans, Polity Press, 2014) [trans of *Die Diktatur* (first published 1921)] 7 and 12.

[66] See for example *Commonwealth Electoral Act 1918* (Cth) ss 81 and 93; *Electoral Act 1992* (ACT) ss 57 and 72; *Local Government Act 1993* (NSW) ss 301 and 266; *Parliamentary Electorates and Elections Act 1912* (NSW) ss 22 and 26; *Electoral Act 2004* (Tas) ss 30 and 31; and *Local Government Act 1993* (Tas) s 254.

[67] For the English property test of 1711 see Lawrence Klein, 'Property and Politeness in the Early Eighteenth-Century Whig Moralists: The Case of The Spectator' in John Brewer and Susan Staves (eds), *Early Modern Conceptions of Property* (Routledge, 1995) 221, 221.

[68] Luke Beck, 'The Constitutional Prohibition on Religious Tests' (2011) 35(2) *Melbourne University Law Review* 322. See more broadly Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012); and *Crittenden v Anderson* (HCA 1950, unreported) discussed in 'An Unpublished Judgment on s 116 of the Constitution' (1977) 51(4) *Australian Law Journal* 171.

enrolment (and potentially thereafter cited by the person as evidence that the state has recognised a particular name) may however be restricted,[69] something discussed in Chapter Nine below. Being an Australian citizen is a prerequisite, as is capacity[70] and having reached the age of eligibility (that is, 18 years), one of the several markers of adulthood noted in the preceding chapter.[71]

Individuals are not required to provide a 'voter card' or polyvalent official identity card as the definitive identity document. Identity verification at polling places instead involves reference to the person's name (which as noted in Chapter Nine has on occasion been the subject of contestation) and physical address,[72] with documentation such as driver's licences being requested where there is reason to suspect fraud.[73]

Eligibility to vote is consistent with legal identity in the form of eligibility to stand for election to the particular legislature. Voting and candidacy have jurisdictional restrictions; and an individual thus cannot simultaneously be a member of the Commonwealth, Victorian and Tasmanian state legislatures. Eligibility to take a seat in the legislature is again notionally universal, with specific disqualifications such as

[69] *Informal v Chief Electoral Officer* [1992] TASSC 2. Note however *Freemarijuana and Australian Electoral Officer for Queensland* [2001] AATA 917, with the Tribunal finding for Mr Freemarijuana. Pointers to the somewhat ambiguous jurisprudence on nominalism in relation to electoral registration are found in Chapter Nine below. See also *Justice Abolish Child Support and Family Court v State of Victoria (Victoria Police) (Human Rights)* [2015] VCAT 771; and broadly *Nevil Abolish Child Support v Telstra Corporation Limited* [1997] VADT 44.

[70] *Commonwealth Electoral Act 1918* (Cth) 93(8)(a) for example provides for exclusion of a person of 'unsound mind' who is 'incapable of understanding the nature and significance of enrolment or voting'. Removal from the roll on grounds of incapacity through mental illness or disorder is provided under *Electoral Act 1907* (WA) ss 51A. In *Roach v Electoral Commissioner* Gummow, Kirby and Crennan JJ commented that exclusion on the basis of unsound mind 'plainly is valid. It limits the exercise of the franchise, but does so for an end apt to protect the integrity of the electoral process. That end, plainly enough, is consistent and compatible with the maintenance of the system of representative government'. *Roach v Electoral Commissioner* (2007) 233 CLR 162, 200.

[71] See Chapter Four above; and for example *Commonwealth Electoral Act 1918* (Cth) ss 93 and 100; and *Electoral Act 1985* (SA) ss 4 and 29.

[72] See *Commonwealth Electoral Act 1918* (Cth) s 98AA regarding enrolment and *Australian Citizenship Act 2007* (Cth) s 37.

[73] Joint Standing Committee on Electoral Matters, Parliament of Australia, *The 2013 Federal Election: Report on the conduct of the 2013 election and matters related thereto* (2015) 113 and 115.

foreign nationality,[74] undischarged bankruptcy,[75] current imprisonment,[76] holding an 'office for profit' (that is being a government employee)[77] and treason.[78]

What is the significance of legal identity as a voter? In essence, the consequence of that identity is that the individual gets to vote for, and thus potentially elect, a candidate who is standing as an independent or who has been nominated by the entity of a political party (often on the basis of a few hundred votes or less by party members in local branches). Being a voter is both a right and a duty, given the compulsory nature of voting.[79] The significance of election is in the first instance the successful candidate has a voice in deliberations within the legislation and may serve as a minister, directing officials as a member of the Executive, and less directly as enjoying immunity in the form of judicial non-recognition of statements made in the course of the legislature's business that would otherwise be regarded as defamatory.[80] The privileges of members of parliament when viewed through an historical lens have greatly diminished. MPs for example no longer have an immunity from criminal prosecution[81] or life-long subsidised travel after retirement.[82] In contrast, they have obligations, including a requirement for attendance[83] and for disclosure through personal interests regimes.[84]

Rawls noted that some people disagree with decisions by their representatives. A consequence may be to abandon the polity and abandon the associated identity as

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[74] See in particular *Commonwealth Electoral Act 1918* (Cth) s 163(1)(a) reflecting the nationality ('foreign allegiance and dual citizenship') restriction in *Australian Constitution* s 44(i). That restriction is discussed in *Sykes v Cleary* (1992) 176 CLR 77, Brennan J at 109 and 113; and in *Sue v Hill* (1999) 163 ALR 648. See also *Re Wood* (1988) 167 CLR 145 regarding citizenship at the time of nomination as distinct from election. Note also Michael Pryles, 'Nationality Qualifications for Members of Parliament' (1982) 8 *Monash University Law Review* 163.
[75] *Australian Constitution* s 44(iii). See *Nile v Wood* (1988) 167 CLR 133 at 140; *Local Government (Elections) Act 1999* (SA) s 17(3); and the discussion of civil death below.
[76] *Australian Constitution* s 44(ii). See *Nile v Wood* (1988) 167 CLR 133, 139.
[77] *Australian Constitution* s 44(iv). See *Sykes v Cleary* (1992) 176 CLR 77, Mason CJ, Toohey and McHugh JJ at 95, Deane J at 122.
[78] *Australian Constitution* s 44(ii).
[79] For example see *Commonwealth Electoral Act 1918* (Cth) s 245; *Electoral Act 2004* (Tas) ss 34 and 152; and *Electoral Act 1907* (WA) ss 38 and 45.
[80] For example see *Defamation Act 2005* (NSW) s 27(1) and 27(2); *Parliament of Queensland Act 2001* (Qld) s 8; and *Parliamentary Privileges Act 1987* (Cth) s 10. More broadly see the discussion in David Rolph, *Defamation Law* (Thomson Reuters, 2015); and Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003).
[81] Provisions in the *Parliamentary Privileges Act 1987* (Cth) and *Parliament of Queensland Act 2001* (Qld) do not for example exempt members of parliament from civil action and from observance of the road rules or other obligations that are unrelated to service as an MP.
[82] *Members of Parliament (Life Gold Pass) Act 2002* (Cth) s 4A.
[83] See for example *Parliament of Queensland Act 2001* (Qld) s 72.
[84] The *Members of Parliament (Register of Interests) Act 1978* (Vic) and *Members of Parliament (Register of Interests) Act 1983* (SA) are of interest in providing a statutory basis for disclosure, in contrast to disclosure codes used by the chambers in the other legislatures.

responsible citizen. Individuals who are desperate may seek acceptance by another state as a refugee, an identity under international and Australian law.[85] People who are wealthy may go shopping for citizenship, as noted in Chapter Three.[86] Others may simply purport to be immune from Australian law or to have seceded, a secession for which there is no provision in the Constitution and which does not provide the individual with the desired legal identity. The Supreme Court of Western Australia for example recently stated

> Mr Williamson claims to have seceded from the Commonwealth of Australia and that he is not subject to the *Road Traffic Code*. He said today that the UN Covenant has given him this right. With respect to Mr Williamson, this is a misinterpretation of this document.
>
> The only lawful means by which land ceases to become a part of the state is set out in s 123 of the *Commonwealth Constitution*. The procedure described in this section has not been followed. Mr Williamson, or more correctly the land he has some connection with, has not lawfully seceded. Even if some part of the state to which Mr Williamson occupies had seceded, Glen Forest where Mr Williamson's driving occurred, remained part of Western Australia.
>
> Any person whether a citizen of Western Australia or somewhere else is liable to abide by the laws of Western Australia including its road traffic laws. This ground has no merit.[87]

In essence, self-concept as someone who is independent, rather than autonomous, does not equate to legal identity. Self-described 'sovereign citizens',[88] lacking the monarch's advantages, are constitutionally and administratively ineffectual. Given that Australian courts have not embraced the theorisation of postmodern authors such as Deleuze,[89] in the eyes of some observers the claims of such secessionists are likely to be seen as symptomatic of a mental disorder,[90] evident in judicial responses to litigants who assert legal immunity on the basis that the Commonwealth or a state government agency is a Delaware corporation.[91]

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[85] See Chapter Three above.
[86] See Chapter Three above. Note that the Premium Investor Visa (subclass 188) as of 2017 is a fast-tracked permanent residence visa for applicants who make a designated investment of $15 million.
[87] *Williamson v Hodgson* [2010] WASC 95, [37]-[39]. See also *Maxwell (also known as Harley Robert Williamson) v Bruse* [2012] WASC 12, [22]-[24]
[88] Australian and New Zealand examples include *Ulysses & Child Support Registrar* [2007] FamCA 1395, [7]; *McKinnon v R* [2005] NZCA 94, [6]; *Robert Mcjannett v Construction Forestry Mining and Energy Union of Workers* [2012] WAIRComm 1111, [14]; and *Van den Hoorn v Ellis* [2010] QDC 451, [2].
[89] See Chapter Two above.
[90] Jennifer Pytyck and Gary Chaimowitz, 'The Sovereign Citizen Movement and Fitness to Stand Trial' (2013) 12(2) *International Journal of Forensic Mental Health* 149.
[91] *Hedley v Spivey* [2011] WASC 325, [5].

Courts, tribunals and administrative bodies may be more sympathetic to Indigenous activists, such as Murrumu (formerly Jeremy Geia) and the leaders of the Murrawarri Republic, who claim that they have never been covered by 'white man's law' and that the sovereignty of a single Indigenous nation (or nations) is uninterrupted.[92] Those claims have no constitutional traction and actions such as disregard of driver licencing rules[93] or rates[94] will presumably eventually attract sanction.

A property-owning democracy?

From the perspective of legal identity we might more acutely refer to Australia as a property respecting democracy.

In the first instance we can see that Australian law recognises private ownership of real and other property,[95] in contrast to utopian regimes where land, chattels and other goods were held collectively.[96] Reference to 'the Commonwealth' does not signify common ownership of real or intangible property; instead the national Constitution reflects a Lockean philosophy[97] founded on what Macfarlane characterised as English Individualism[98] and for example provides for just compensation where property is compulsorily acquired by the Commonwealth.[99] The state as a legal identity has some regard for the possessions of its subjects, implicitly recognising their justiciable identity as property owners and through criminal law protecting the exclusive rights of those owners. A theme evident throughout this dissertation is that the exercise of

[92] For example *R v Buzzacott* [2004] ACTSC 89, [3]-[6]; and *Buzzacott v R* [2005] ACTCA 7, [11]. See also Jane Raffan, 'The Crux of the Matter: Manipulating Cultural Property in Aboriginal Rights Debates' (2010) 232 *Art Monthly Australia* 51.
[93] For Geia see Saffron Howden, 'Murrumu Walubara Yidindji renounces citizenship to reclaim Australia' *Sydney Morning Herald* (Sydney) 2 November 2015, 5; Paul Daley, 'The man who renounced Australia', *The Guardian Online* 26 August 2014; and Miranda Johnson, *The Land Is Our History: Indigeneity, Law, and the Settler State* (Oxford University Press, 2016) 162-163.
[94] *Ngurampaa Ltd v Balonne Shire Council & Anor* [2014] QSC 146, [4] and [12]-[21].
[95] That recognition is evident in diverse ways, from for example s 51(xxxi) of the *Australian Constitution*, registration of real property under the Torrens Title system, registration of intangible property under the Patents, Trade Marks, Plant Breeders Rights and Designs statutes to registration of vehicle and firearm ownership under the state/territory roads and firearms statutes. That registration serves as a signifier of ownership, discussed in Chapter Eight below.
[96] Christopher Knaus, 'Trespass case dismissed against Indigenous man who declared property was embassy' *Canberra Times* (Canberra) 9 November 2015, 3; and Joshua Robertson, 'Murrumu charged after driving with licence issued by his Indigenous nation' (2015) 27 May *The Guardian* at http://www.theguardian.com/australia-news/2015/may/27/murrumu-charged-after-driving-with-licence-issued-by-his-indigenous-nation.
[97] John Locke, *Locke's Two Treatises of Government: A Critical Edition With An Introduction and Apparatus Criticus by Peter Laslett* (Cambridge University Press, 2nd ed, 1967) 227 and 224.
[98] Alan Macfarlane, *The Origins of English Individualism: The Family, Property and Social Transition* (Blackwell, 1978).
[99] *Australian Constitution* s 51(xxxi).

particular legal identities has financial value and that as a consequence we will see instances of the identity crime discussed in Chapter Nine where an offender misuses an identity.

In contrast to some past regimes, there are no restrictions on real property ownership by citizens on the basis of ethnicity, religion, marital status or gender. The state is indifferent – and from a Rawlsian perspective correctly indifferent – to those attributes. It reserves its restrictions for people who are non-citizens (essentially a matter of notification and authorisation under the Foreign Investment Review regime)[100] and people who are undischarged bankrupts.[101] It has belatedly come to recognise native title,[102] with collective ownership of traditional lands by Indigenous peoples. It seeks to claw back the proceeds of crime,[103] which might take the form of real property or otherwise, but legal identity as someone incarcerated in a correctional institution or as someone who has 'served time' does not preclude that person from continuing to hold assets.[104] In contrast to Roman law there is no confiscation of the wealth of an offender and that person's family.[105]

Australian law, consistent with its English origins, has tacitly sought to encourage property ownership and the accumulation of wealth that is at the disposal of institutions and individuals, for example through wills, trusts and favourable treatment of residential property ownership under the taxation system. Kelley comments

> For Blackstone anyone who violated the sanctity of property and possession was "guilty of a transgression against the law of society, which is a kind of secondary law of nature." Eventually, divested of feudal trappings and expressed in the still more naturalistic terms of Lockean political theory, what might be called the property fetish of common law helped to prepare the way for modern liberal ideology [106]

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[100] *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 3. Complementary sector-specific legislation addressing potential concerns regarding the legal identity of foreign investor includes *Banking Act 1959* (Cth); *Financial Sector (Shareholdings) Act 1998* (Cth); *Qantas Sale Act 1992* (Cth) s 7; *Airports Act 1996* (Cth) s 40; and *Telstra Corporation Act 1991* (Cth) s 8BG.
[101] *Bankruptcy Act 1966* (Cth) ss 5.
[102] Nonie Sharp, *No Ordinary Judgment: Mabo, the Murray Islanders' Land Case* (Aboriginal Studies Press, 1996); David Ritter, *The Native Title Market* (University of Western Australia Press, 2009); and Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo* (Aboriginal Studies Press, 2nd ed, 2009).
[103] For example *Proceeds of Crime Act 1987* (Cth); and *Criminal Proceeds Confiscation Act 2002* (Qld).
[104] *Cable* v. *Sinclair* [1788] NSWKR 7; [1788] NSWSupC 7.
[105] Edward Champlin, *Final Judgments: Duty and Emotion in Roman Wills* (University of California Press, 1991) 18.
[106] Donald Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard University Press, 1990) 171.

From the perspective of flourishing it is salient to note that law has come to valorise the enjoyment of private property as a non-public space, that is a sphere into which the state and others cannot intrude except by invitation or with an accountable and proportionate process.[107] Implicitly, if an Englishman's home is his castle, residence is a socially and legally meaningful identity rather than merely a wealth preservation mechanism.[108]

Western law traditionally discriminated against people who did not own residential property (or who were not renting property) and were thus variously described as 'of no fixed address', 'transients' or 'vagrant'.[109] It is no longer a crime to be homeless and thus susceptible to incarceration in a workhouse or branding, in other words signification through an indelibly legible body.[110] We do not rely on internal passports or other documents such as China's *Hukou* that restrict opportunities for flourishing by restricting people to a particular region within a state.[111] We have broadly moved on from 'social sweeping' such as clearing the homeless from parks and public squares,[112] and it is possible – albeit with difficulty – to register as a voter and welfare recipient while not having a conventional 'fixed' address.[113] (It is likely that some homeless people are using false addresses or post office boxes to gain some of the signifiers discussed in Chapter Eight below.) Some anomalies remain in relation to

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[107] *Entick v Carrington* [1765] EWHC KB J98.

[108] More broadly there is protection for 'quiet enjoyment' of rented accommodation through for example *Residential Tenancies Act 1997* (Vic) s 67; *Residential Tenancies Act 2010* (NSW) s 50; *Residential Tenancies Act 1997* (ACT) s 71(1)(c), sch 1 cl 52; *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 183; *Residential Tenancies Act 1999* (NT) s 65; *Residential Tenancies Act 1987* (WA) ss 44(2)(a)-(c), 59E(1); *Residential Tenancies Act 1995* (SA) s 65(1)(a)-(b); *Residential Tenancy Act 1997* (Tas) s 55.

[109] For discussion of problems relating to having the wrong address in recent China under the internal passport (hukou) regime in which the Beijing, in seeing like a state, determined where subjects would live, see Fei-Ling Wang, *Organizing through division and exclusion: China's Hukou system* (Stanford University Press, 2005); and Kam Wing Chan, 'The Chinese Hukou System at 50' (2009) 50(1) *Eurasian Geography and Economics* 197. See also Lily Saint, 'Reading subjects: passbooks, literature and apartheid' (2012) 38(1) *Social Dynamics: A journal of African Studies* 117; Michael Savage, 'The Imposition of Pass Laws on the African Population in South Africa 1916-1984' (1986) 85(339) *African Affairs* 181; and Peter Alexander and Anita Chan, 'Does China have an apartheid pass system?'(2004) 30(4) *Journal of Ethnic and Migration Studies* 609.

[110] Miriam Eliav-Feldon, *Renaissance Imposters and Proofs of Identity* (Palgrave Macmillan, 2012) 144.

[111] The freedoms of mobility and association that we take for granted are politically significant in terms of scope for the individual to maximise that person's value in the workforce and live in a well-serviced congenial location (drivers for rural depopulation in Australia post-1950) or in the most extreme circumstances where 'voice' is denied to engage in 'exit' from the particular jurisdiction.

[112] Tamara Walsh, *Homelessness and the Law* (Federation Press, 2011). *DPP v Mann* [2015] VCC 1081; *Regina v Gregory Christopher White* [2006] NSWDC 201; and *Re Hill; Application for Bail* [2014] VSC 288.

[113] For example *Commonwealth Electoral Act 1918* (Cth) s 96; *Dent v Australian Electoral Commissioner* [2008] FCAFC 211; and Joint Standing Committee on Electoral Matters, Parliament of Australia, *The 2013 Federal Election: Report on the conduct of the 2013 election and matters related thereto* (2015) 80.

identity regarding local government. The *Hobart Corporation Act 1947* (Tas) referred anachronistically to citizens of that city, indicating that the

> owner or occupier of any land or building shall be a citizen of the city, and except as aforesaid no person shall be such citizen.[114]

'Urban citizenship' in the past has often had a direct real property ownership requirement, entrenching a particular elite. People who were sound of mind, stout of heart, law-abiding, British citizens and had several hundred thousand acres of freehold land elsewhere in Australia were thus potentially ineligible to vote in local government elections in a location where they were longtime residents.

Anatole France commented 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread'.[115] That epithet foreshadowed Berlin's differentiation between positive and negative liberty.[116] Over the past century the Australian community, through statements by advocacy groups and individuals, and through enactments of the different legislatures, has recognised that disadvantage inhibits flourishing and undermines 'social citizenship'.[117] Margaret Thornton recently commented that neoliberalism as 'the favoured political philosophy all over the world' denotes 'adulation of the market, the privileging of freedom, the private accumulation of wealth, small government and promotion of the self'.[118] In Australia there is however a long-standing consensus, which has not disappeared with the demise of the 'Australian Settlement',[119] that the state both can and should act to alleviate disadvantage. The dominant disagreement in politics concerns the extent of and specific mechanisms for that alleviation, given respect for individual autonomy.[120]

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[114] *Hobart Corporation Act 1947* (Tas) s 7. See *Local Government Act 1993* (NSW) s 266.
[115] Anatole France, *The Red Lily* (Winifred Stephens trans, Bodley Head, 3rd edition, 1927) [trans of *Le Lys Rouge* (first published 1894)] 95.
[116] Isaiah Berlin, 'Two Concepts of Liberty' in Berlin, *Four Essays On Liberty* (Oxford University Press, 1969) 118, 121. See also Quentin Skinner, 'A third concept of liberty' (2002) 117 *Proceedings of the British Academy* 237.
[117] Peter Dwyer, *Welfare rights and responsibilities: Contesting social citizenship* (Policy, 2000); and Alexander Hicks, *Social democracy and welfare capitalism: a century of income security politics* (Cornell University Press, 1999).
[118] Margaret Thornton, 'Neoliberal Governmentality and the Retreat from Gender Equality' in Ashleigh Barnes (ed), *Feminisms of Discontent: Global Contestations* (Oxford University Press, 2015) 71, 71.
[119] Geoffrey Stokes, 'The "Australian Settlement" and Australian Political Thought' (2007) 39(1) *Australian Journal of Political Science* 5; Humphrey McQueen, *Temper Democratic: How Exceptional Is Australia?* (Wakefield Press, 1998) 19; and George Megalonis, *Australia's Second Chance* (Penguin, 2016) 166. See however Paul Kelly, *End of Certainty: The Story of the 1980s* (Allen & Unwin, 1994) 1.
[120] Philip Mendes, *Australia's Welfare Wars Revisited*: *The Players, the Politics and the Ideologies* (UNSW Press, 2008); John Murphy, Suellen Murray, Jenny Chalmers, Sonia Martin and Greg Marston, *Half A Citizen: Life On*

GA Cohen stated 'an overwhelmingly obvious truth' that 'lack of money, poverty, carries with it a lack of freedom'.[121] We do not have a formal legal identity of people who in exercising freedoms choose to sleep under bridges, in drains or in parks. We are however aware that some people have no choice, on the basis of disadvantage. As a result there has been a cascade of legislation and administrative programs over the past century that in reflecting the national Constitution[122] give Australian citizens entitlements for income support that relates to disability (for example a physical, cognitive or psychiatric deficit), unemployment, status as a parent of young children or carer for an older person,[123] military service[124] or old age. That legislation both fosters individual flourishing and community harmony (collective flourishing). It sits alongside state-provided or subsidised health services that although contested we assume are entitlements as citizens and that implicitly differentiate Australia from regimes such as the United States.[125]

The legislation establishes a range of legal identities as recipients for benefits that include subsidisation of utilities and travel on public transport, the 'aged pension', 'the dole', 'the family allowance' and Abstudy.

Those identities are meaningful because they may directly foster the individual's flourishing (in some instances on an existential basis, with people accordingly not needing to starve to death, forgo education or beg in the streets).

Formally they are meaningful because they are articulated in statute and are justiciable, with disputes about eligibility for example being addressed in the Administrative Appeals Tribunal and other fora. They are a focus of official and

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Welfare in Australia (Allen & Unwin, 2011); and Sheila Shaver, 'Australian Welfare Reform: From Citizenship to Supervision' (2002) 36(4) *Social Policy and Administration* 331.

[121] G A Cohen, 'Freedom and Money' in Michael Otsuka (ed), *On The Currency of Egalitarian Justice and Other Essays in Political Philosophy* (Princeton University Press, 2011) 166, 166-167. As Fineman notes in several works, poverty also results in and exacerbates vulnerability and thence inequality. See for example Martha Fineman, 'The Vulnerable Subject: Anchoring equality in the human condition' (2008) 20 *Yale Journal of Law & Feminism* 8.

[122] *Australian Constitution* s 51(xxii) and (xxiiA).

[123] For identity as a carer, beyond the Commonwealth social welfare regime and statutes such as the *National Disability Insurance Scheme Act 2013* (Cth), see for example *Carer Recognition Act 2012* (Vic).

[124] *Veterans' Entitlements Act 1986* (Cth).

[125] Anne Crichton, *Slowly Taking Control? Australian Governments and Health Care Provision, 1788–1988* (Allen & Unwin, 1990); Anne-marie Boxall and James Gillespie, *Making Medicare: The Politics Of Universal Health Care In Australia* (New South Publishing, 2013).

public anxiety about 'welfare fraud'[126] or other 'identity crime', discussed in Chapter Nine and often exploiting the state's reliance on signifiers of identity – individuation and authority – explored in Chapter Eight.

That anxiety coexists with self-concept regarding entitlement and stigma. In thinking about identity and the political we can draw several conclusions.

The first is that the foundational identity as a citizen posited in Chapter Three is the basis of specific entitlement identities. The second is that the community broadly construes the state as a legal identity in terms of supporting its members and thence as an income redistribution mechanism drawing on registration fees and taxation obligations that are given effect through discrete legal identities, for example that of a taxpayer or registered driver. That observation may seem trite but we should remember that states over the past millennium have often *not* supported Waldron's subjects (and his apparent faith in human rationality),[127] whether because of administrative incapacity, because subjects were deemed to be self-sufficient or because those people were deemed unworthy and accordingly deserving correction rather than assistance. The third conclusion is that the legal identity as voter noted above is consequential because it affects who decides law's construction of identity as a recipient.

'Citizens minus'?

Chapter Four of this dissertation argued that disability is a pervasive and often unremarked aspect of law regarding identity. In historic and contemporary Australia we can see groups of people who have not been convicted of a crime but whose members were either subjects (rather than citizens) or whose legal identity is so

[126] Janet Mosher and Joe Hermer, 'Welfare Fraud: The Constitution of Social Assistance as Crime' in Janet Mosher and Joan Brockman (eds), *Constructing Crime: Contemporary Processes of Criminalisation* (UBC Press, 2010) 17; and Dean Wilson, 'The Politics of Australia's Access Card' in Colin Bennett and David Lyon (eds), *Playing the identity card: surveillance, security and identification in global perspective* (Routledge, 2008) 180, 187.
[127] Jeremy Waldron, 'Between Rights and Bills of Rights' in Jeremy Waldron, *Law and Disagreemen*t (Clarendon Press, 1999) 211, 223.

restricted as to mean that they are 'citizens minus', in other words recognised as citizens but hampered in the exercise of their rights.[128]

Most readers, especially those who are familiar with the Critical Race Theory highlighted in Chapter Two,[129] will recognise that for much of Australia's history what we now characterise as an Indigenous or Torres Strait Islander person was a deleterious identity, one marked by a disrespect that served to erode the individual's self-concept and by a denial of rights on the basis of ethnicity. The reference to the 'now' is deliberate, given that some activists argue that at and after colonisation several hundred discrete sovereign nations – often with a small population but discrete indicia of national identity such as language and territory – are discernible.[130] The contemporary characterisation is one of ethnicity or disadvantage.

Those people over a period of more than 100 years were typically denied citizenship and enjoyment of particular rights,[131] with denial of the vote,[132] restrictions on movement or on habitation of a particular location and restrictions on marriage under miscegenation rules,[133] disruption of families,[134] problematical treatment in criminal law[135] and underpayment.[136] Accompanying that legal identity was categorisation in

[128] A perspective is provided by Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (University of British Columbia Press, 2000).
[129] More specifically see Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 75 and Aileen Moreton-Robinson, 'Witnessing Whiteness in the Wake of Wik' (1998) 17(2) *Social Alternatives* 11, expressions of a racial essentialism that potentially serves to perpetuate disadvantage. There is a more nuanced analysis in Patrick Anderson, *The Cultivation of Whiteness: Science, Health and Racial Destiny in Australia* (Basic Books, 2003).
[130] See Geoffrey Stokes, 'Citizenship and Aboriginality: Two conceptions of identity in Aboriginal political thought' in Geoffrey Stokes (ed), *The Politics of Identity in Australia* (Cambridge University Press, 1997) 158.
[131] John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997).
[132] Bain Attwood and Andrew Markus, *The 1967 Referendum, Or When Aborigines Didn't Get the Vote* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997). See also Pat Stretton and Christine Finnimore, 'Black fellow citizens: Aborigines and the Commonwealth Franchise' (1993) 25(101) *Australian Historical Studies* 521; and Chapter One above.
[133] John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997) 144; Katherine Ellinghaus, 'Absorbing the "Aboriginal problem": controlling interracial marriage in Australia in the Late 19th and Early 20th centuries' (2003) 27 *Aboriginal history* 183; Mitchell Rolls, 'The changing politics of miscegenation' (2005) 29 *Aboriginal History* 64; and Patricia Jacobs, 'Science and Veiled Assumptions: Miscegenation in Western Australia 1930-37' (1987) II *Australian Aboriginal Studies* 15.
[134] For example *Trevorrow v State of South Australia (No 5)* [2007] SASC 285; and *Cubillo v Commonwealth* [2000] FCA 1084. See also Peter Read, 'The Stolen Generations, the historian and the court room' (2002) 26 *Aboriginal History* 51; and Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Australian Institute of Aboriginal & Torres Strait Islander Studies Research Paper) (Australian Institute of Aboriginal & Torres Strait Islander Studies, 2004).
[135] Stanley Yeo, 'The Recognition of Aboriginality by Australian Criminal Law', in Greta Bird, Gary Martin and Jennifer Nielsen (eds), *Majah - Indigenous Peoples and the Law* (Federation Press, 1996) 228; and Australian Law

official data collections and other state ways of seeing, which embodied categories such as 'Aboriginal' or 'Native'.[137]

That identity was perceived as something indelible, often with reference to belief that the Indigenous population would die out or that through a progressive admixture of blood and a long period of tutelage by special institutions might shed stigmatised attributes and thus become 'white',.[138] In 1937 the Western Australian Protector of Natives thus asked

> Are we to have 1,000,000 blacks in the Commonwealth or are we going to merge them into our white community and eventually forget that there were any Aborigines in Australia. ... I see no objection to the ultimate absorption into our own race of the whole of the Australian native race.[139]

That question foresaw an erasure of legal identity. More directly, the identity taxonomy at that time provided for full and halfcaste Indigenous people,[140] that is a legal identity on the basis of ethnicity and within the race power[141] of the Australian Constitution.[142] In essence a quantum of 'blood' (what we might now phrase as a deleterious genetic endowment) was seen as determinative of the individual's character, capabilities and destiny.

Quantum still matters, in a era where discrimination on the basis of 'race' remains evident. Substantive disadvantage has been alleviated through Commonwealth, state and territory social welfare and advancement programs but – as a succession of

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Reform Commission, *The Recognition of Aboriginal Customary Laws (Report No. 31)* (Australian Law Reform Commission, 1986).

[136] Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006).

[137] Ellen Kraly and John McQuilton, 'The 'Protection' of Aborigines in Colonial and Early Federation Australia: The Role of Population Data Systems' (2005) 11(4) *Population, Space and Place* 225.

[138] Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law – A Case Study' (2001) 10(1) *Griffith Law Review* 139.

[139] Tony Austin, 'Cecil Cook, Scientific Thought and "Half-Castes" in the Northern Territory 1927- 1939' (1990) 14(1) *Aboriginal History* 104, 113.

[140] Ibid.

[141] Robert French, 'The Race Power: A Constitutional Chimera' in H.P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180; George Williams, 'Removing racism from Australia's constitutional DNA' (2012) 37(3) *Alternative Law Journal* 151; and Melissa Castan, 'Constitutional Deficiencies In The Protection Of Indigenous Rights: Reforming The 'Races Power'' (2011) 7(25) *Indigenous Law Bulletin* 12. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 and *Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1.

[142] *Australian Constitution* s 51(xxvi).

reports about incarceration, educational achievement and living conditions all demonstrate – has not been eliminated.[143]

Contemporary law enshrines an Indigenous identity and a Torres Strait Islander identity. The consequences of the legal identity extend beyond statute law centred on deterrence of racial discrimination in the provision of goods and services or ethnic vilification.[144] The identity is for example evident in advancement mechanisms such as the former Abstudy scheme and in the 'enjoyment of culture' provisions in the Family Law Act,[145] which specifically valorises the Indigenous child's right to enjoy 'their culture', including exploration and development with peers of an appreciation of that culture. Judgments under the same enactment have emphasised indigeneity in determination of custody disputes.[146]

Given that 'race' is now recognised as a cultural construct, a valorisation of particular attributes, we might ask what is the test of the Indigenous identity. Blood and belief are crucial.[147] In law an Indigenous person is an individual who self-identifies as Indigenous, has indigenous ancestry (as noted in Chapter Six, lineage is still important in the construction of identity) and is accepted by an Indigenous community as an Indigenous person.[148] Identity is thus not a matter of verification through an anthropologist's calipers or of an observer scrutinising facial architecture and skin tone. That has discomforted some writers, such as Andrew Bolt, who in rhetoric about particular individuals accused them of being inauthentic, in other words of perpetrating an identity crime in claiming to be Indigenous when in Bolt's eyes they were clearly not.[149] The dispute in *Eatock* is a demonstration that identities matter; they are for example a marker in 'culture wars' or political debate.[150] It is also

[143] See for example Rowse, Tim, 'The Royal Commission, ATSIC and self-determination: a review of the Royal Commission into Aboriginal Deaths in Custody' (1992) 27(3) *Australian Journal of Social Issues* 153
[144] For example *Racial Discrimination Act 1974* (Cth).
[145] *Family Law Act 1975* (Cth) s 60B(2)(e) and 60B(3).
[146] See for example *Sheldon & Weir (No. 3)* [2010] FamCA 1138; and *Hort & Verran* [2009] FamCAFC 214.
[147] Loretta De Plevitz and Larry Croft, 'Aboriginality Under The Microscope: The Biological Descent Test In Australian Law' (2003) 3(1) *QUT Law and Justice Journal*, 105.
[148] See for example *Aboriginal Lands Act 1995* (Tas) s 3A.
[149] *Eatock v Bolt* [2011] FCA 1103. See also Adrienne Stone, 'The Ironic Aftermath of Eatock v Bolt' (2015) 38(3) *Melbourne University Law Review* 926; and Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Federation Press, 2002)
[150] Stuart Macintyre and Anna Clark, *The History Wars* (Melbourne University Press, rev ed, 2004) 4, 47 and 153; Bain Attwood, *Telling the Truth about Aboriginal History* (Allen & Unwin, 2004) 5 and 20; Raymond Evans, 'The Country Has Another Past: Queensland and the History Wars' in Frances Peters-Little, Anne Curthoys and John Docker (eds), *Passionate Histories: Myth, Memory and Indigenous Australia* (ANU e-Press, 2010) 9, 10.

an illustration that identities are contested or appropriated, with adoption of an Indigenous persona evident in work by Durack, Carmen and Morgan,[151] and that disadvantage might be offset through defamation or anti-vilification law.[152]

A preceding paragraph in this chapter argued that Indigenous separatism (and suggestions that only Indigenous people can perform in 'Indigenous roles')[153] is unlikely to gain substantial traction in Australia. From a legal pragmatism perspective one response might be to look at law on the ground, acknowledge past and present injustices, seek to address those injustices but take as a given that the settler state's legal system is in place, will remain in place and is legitimate. The same perspective would encourage a limited legal pluralism,[154] with for example some recognition of that customary law[155] which is consistent with Rawls' universalist test for flourishing.[156]

Can we discern other groups with a citizen minus identity? Brand comments

> By reason of the requirements of command the organisation of an army, as a community, is vastly and fundamentally different from the organisation of a civil community. The civil community is ordinarily conceived of as existing for the benefit of the individuals that compose it, and its organisation and standards of conduct prescribed by its laws and customs are designed primarily to promote the happiness and well-being of its individual members. In an army, on the other hand, individuals exist for the benefit of, and as a part of, the organised fighting group.[157]

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[151] See for example Maggie Nolan, 'In His Own Sweet Time: Carmen's Coming Out' (2004) 21(4) *Australian Literary Studies* 134; Philip Morrissey, 'Stalking Aboriginal culture: the Wanda Koolmatrie Affair' (2003) 18(42) *Australian Feminist Studies* 299; Ian McLean, *White Aborigines: Identity Politics in Australia Art* (Cambridge University Press, 1998); and Cath Ellis, 'Helping Yourself: Marlo Morgan and the Fabrication of Indigenous Wisdom' (2004) 21(4) *Australian Literary Studies* 149. Appropriation is further discussed in Chapters Eight and Nine below.

[152] See for example *Racial Discrimination Act 1975* (Cth) s 18C and *Racial and Religious Toleration Act 2001* (Vic) s 7. Wendy Bonython, 'Power failure? The distracting effect of legislation on common law torts' in Kit Barker, Karin Fairweather and Ross Grantham (eds), *Private law in the 21st century* (Hart, 2017) offers the persuasive suggestion that the plaintiffs in Eatock would have had a stronger remedy if they had relied on defamation rather than the *Racial Discrimination Act* given that the sting of his claim was that they had dishonestly pretended to be what they were not.

[153] Jane Harrison, *Who can play Aboriginal Roles?* (Currency House, 2012). See also Rosemary Coombe, 'Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy' (1993) 6 *Canadian Journal of Law & Jurisprudence* 249. Would we restrict 'Jewish roles' or 'male roles', 'Islamic roles' or 'straight roles' to performers with the corresponding ethno-religious, gender or other attributes?

[154] See Bede Harris, 'Legal Pluralism and a Bill of Rights: The South African Experience' (2006) 10(1) *Australian Indigenous Law Reporter* 1 and the discussion in Bede Harris, *A New Constitution For Australia* (Cavendish, 2002) 184 and 186.

[155] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, *ALRC Report No 31* (Australian Law Reform Commission, 1986).

[156] John Rawls, *A Theory of Justice* (Harvard University Press, 1st ed, 1971) 136.

[157] Clarence Brand, *Roman Military Law* (University of Texas Press, 1968) xi.

A consequence in Roman law was a fundamental demarcation between military law and civil law, with a member of the armed forces forgoing the rights and importantly the judicial protection of his civilian peers, evident at its most visceral through exemplary extra-judicial decimation of troops *pour encourager les autres*.[158]

In Australia we have a different view of ends and means than the Romans, accordingly not disciplining agents of the state in that way. We do however regard members of the armed forces as having a special legal identity. We frame the activity of our troops within military law, a special regime centred on obedience and featuring discrete courts.[159]

The Federal Court in recent consideration of a dispute by a reservist[160] who had engaged in vilification thus commented

> Membership of the ADF, while on service in one form or another, undoubtedly carries with it obligations of obedience to lawful commands, and all the rigour and restrictions of military service but it does not seem to me that it extinguishes either freedom of belief or, while free from military discipline, freedom of expression. It may be the case that members of a full time regular service are rarely (if ever) free to publicly express opinions against the policies of the ADF or the decisions of their superiors but the same cannot always be said about members of Reserves. Such persons are often not on duty. They are private citizens, in substance, when not on duty and not in uniform. Military discipline under the *Defence Discipline Act* does not apply to them. In my view, their freedom of political communication cannot be burdened at those times.[161]

That judgment is notable both for its acknowledgement that political freedoms are a foundation of liberal democracy and that in specific circumstances those freedoms are legitimately restricted on a proportionate basis,[162] implicitly a pragmatic philosophy that accommodates different circumstances such as the voluntary nature of military enlistment.

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[158] Fred Drogula, *Commanders and Command in the Roman Republic and Early Empire* (University of North Carolina Press, 2015) 49 and 83.
[159] *Defence Force Discipline Act 1982* (Cth); *Re Tracey; Ex parte Ryan* (1991) 172 CLR 460; *Re Nolan; Ex parte Young* (1989) 166 CLR 518; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; and *White v Director of Military Prosecutions* (2007) 231 CLR 570. Note Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System* (2005); and *Lane v Morrison* [2009] HCA 29.
[160] *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370.
[161] *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370, [287].
[162] *Rowe v Electoral Commissioner* (2010) 243 CLR 1, Kiefel J at [459] discusses tests of proportionality in terms of three key criteria: suitability, necessity and appropriateness.

Autonomous bodies

A salient feature of identity in Australian law is autonomy, with the expectation that in most contexts individuals will exercise their freedom – for example to drive a car, enter a contractual relationship, use a signifier of identity – and accept responsibility for that exercise. One test of identity in a legal system is what law allows people to do with their bodies.

Are individuals, for example, regarded as holding their bodies on trust for the state or the 'national community'? Does the system instead embody values of possessive individualism, with individuals having substantial autonomy and thus able to engage in practices that their peers might regard as inconsistent with social norms, decency and the particular individual's health except where those practices harm others?[163]

Mill commented that

> the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant … The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[164]

Mill offers an ideal position. as noted immediately above the state on occasion limits or disregards that sovereignty and thus does not regard self-possession as the paramount legal identity. Instead, we can see the state, through law, creating deleterious legal identities that among other functions signal to the community that particular actions and affinities are improper and accordingly criminalised, irrespective of the self-possessed individual's needs and tastes. Few people live in

[163] Ngaire Naffine, 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25 *Journal of Law and Society* 193. See more broadly C B Macpherson, *Political Theory of Possessive Individualism: Hobbes to Locke* (Clarendon Press, 1962); Etienne Balibar, ''Possessive Individualism' Reversed: From Locke to Derrida' (2002) 9(3) *Constellations* 299; and Lewis Hinchman, 'Virtue or Autonomy: Alasdair MacIntyre's Critique of Liberal Individualism' (1989) 21(4) *Polity* 635.

[164] John Stuart Mill, 'On Liberty', in J M Robson (ed), *Essays on Politics & Society (Collected Works, Vol XVIII* (University of Toronto Press, 1977) 223.

splendid isolation as Robinson Crusoe on his island.[165] Identity as membership of the Australian polity in essence brings into being restrictions on self-possession, restrictions that as Hobbes and others have implied are inevitable in any society. The specific restrictions, which we potentially read as discrete legal identities, are culturally culturally and temporally contingent. They are diverse.

We can see for example the historic identity of inebriate,[166] someone whose appetites were deemed to justify the restriction of capacity through incarceration, through non-recognition of ostensible consent in wills and contracts and even through prohibition of travel from a colonial jurisdiction.[167] We can also see restrictions on the autonomy of female bodies, through for example past criminalisation of abortion[168] and advice about abortion, along with restrictions on the promotion and sale of other contraceptive methods.[169] There are limitations on the commercialisation of sexual services,[170] sometimes strongly endorsed or opposed by feminist and other theorists of identity,[171] along with historic restrictions on the production, sale and possession of erotica that did not feature children or animals.[172] In retrospect we can see anxieties, legitimised through statute law and policing practice, about 'gender crime' such as cross-dressing.[173]

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[165] Wolfram Schmidgen, *Eighteenth-Century Fiction and the Law of Property* (Cambridge University Press, 2002) 62 and 66; and Nancy Armstrong, *How Novels Think: The Limits of Individualism from 1719-1900* (Columbia University Press, 2006) 32.
[166] *Inebriates Act 1912* (NSW) s 2.
[167] *Inebriates Act 1900* (NSW) s 8, reflected in the *Inebriates Act 1912* (NSW) s 22.
[168] Gideon Haigh, *The Racket: How Abortion Became Legal in Australia* (Melbourne University Press, 2009). See more broadly Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (Knopf, 1993). For recent statutory provisions see for example *Abortion Law Reform Act 2008* (Vic) s 1; *Acts Amendment (Abortion) Act 1998* (WA); and *Health (Patient Privacy) Amendment Act 2015* (ACT).
[169] Paula Treichler, 'How To Use A Condom: Bedtime Stories for the Transcendent Signifier', in Cary Nelson and Dilip Gaonkar (eds), *Disciplinarity & Dissent in Cultural Studies* (Routledge, 1996) 359; and Götz Aly and Michael Sontheimer, *Fromm's: How Julius Fromm's Condom Empire Fell to the Nazis* (Other Press, 2009) 109.
[170] For example *Summary Offences Act 1953* (SA) s 28; *Police Offences Act 1935* (Tas) s 8(1)(c); and *Sex Work Act 1994* (Vic) s 13.
[171] Andrea Dworkin, 'Against the male flood: Censorship, pornography, and equality' (1985) 8 *Harvard Women's Law Journal* 1. See also the discussion in Julia Long, *Anti-Porn: The Resurgence of Anti-Pornography Feminism* (Zed Books, 2012) 68-80.
[172] Nadine Strossen, *Defending Pornography: Free Speech, Sex and the fight for Women's Rights* (New York University Press, 2000); and Ronald Dworkin, 'Women and Pornography' (1993) 40(17) *New York Review of Books* 36.
[173] Marjorie Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety* (Routledge, 1992); I Bennett Capers, 'Cross Dressing and the Criminal' (2008) 20(1) *Yale Journal of Law and the Humanities* 1; Charles Upchurch, 'Forgetting the Unthinkable: Cross-Dressers and British Society in the Case of the Queen vs Boulton and Others' (2000) 12(1) *Gender & History* 127; and Derek Dalton, 'Genealogy of the Australian Homocriminal Subject: A study of two explanatory models of deviance' (2007) 16(1) *Griffith Law Review* 83, 98-99. See more broadly Ruthann Robson, *Dressing Constitutionally: Hierarchy, Sexuality, and Democracy From Our Hairstyles to Our Shoes* (Cambridge University Press, 2013).

Some people in pursuit of personal goods such as affection give effect to a same-sex affinity through acts that over the past five centuries were often addressed as a capital crime,[174] irrespective of that action taking place in the private sphere noted above and without coercion, and on occasion as the performance of a discrete legal identity.[175] Perceptions of that affinity remained a barrier in employment during much of last century.[176]

Action by an individual to end that person's life was often regarded as so abhorrent as to require capital punishment or public humiliation of the cadaver,[177] rather than respect for the person's considered choice to dissolve a social contract[178] or development of a therapeutic regime to address ills such as depression or schizophrenia.[179] Assisted suicide remains legally and ethically contentious.[180] We have at times similarly criminalised the expression of consensual sado-masochism,[181] construed as a deviant activity indicative of deviant legal identities.[182] Given the

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[174] The last execution in Australia for the charge of sodomy took place in Tasmania in 1863; consensual same-sex activity was decriminalised in South Australia in 1975 and in Tasmania as late as 1997 following *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4 and the consequent *Croome v Tasmania* [1997] HCA 5; 191 CLR 119. See Barbara Baird, 'Sexual citizenship in Tasmania: Stories of gay law reform' (2003) 17(1) *Continuum: Journal of Media & Cultural Studies* 3; Alan Berman, 'The Repeal of Sodomy Laws in Tasmania in 1997' in Shirleene Robinson (ed), *Homophobia: An Australian History* (Federation Press, 2008) 236; Frank Bongiorno, *The Sex Lives of Australians: A History* (Black Inc, 2012) 276-277; and the discussion in Chapters Six and Eleven below.

[175] Walter Fogarty, '"Certain Habits": The Development of a Concept of the Male Homosexual in New South Wales Law, 1788–1900' in Robert Aldrich and Gary Wotherspoon (eds), *Gay Perspectives: Essays in Australian Gay Culture* (Sydney University, 1999) 59.

[176] Graham Willett, 'The Darkest Decade: Homophobia in 1950s Australia' (1997) 27(109) *Australian Historical Studies* 120; and Daniel Robinson and David Kimmel, 'The Queer Career of Homosexual Security Vetting in Cold War Canada' (1994) 75(3) *Canadian Historical Review* 319.

[177] Lieven Vandekerckhove, *On Punishment: The Confrontation of Suicide in Old-Europe* (Leuven University Press, 2000) 70 and 43.

[178] Barbara Gates, *Victorian Suicide: Mad Crimes and Sad Histories* (Princeton University Press, 1988) 22.

[179] Jeffrey Watt (ed), *From Sin to Insanity: Suicide in Early Modern Europe* (Cornell University Press, 2004).

[180] Note for example Commonwealth action under the Territory's Power to override the Northern Territory legislature's intention in the *Rights of the Terminally Ill Act 1995* (NT). See further Jerry Wilson, *Death by Decision: The Medical, Moral, and Legal Dilemmas of Euthanasia* (Westminster Press, 1975) 17; Margaret Otlowski, *Voluntary Euthanasia and the Common Law* (Oxford University Press, 1997) 1; Glanville Williams, 'Euthanasia Legislation: A Rejoinder to the Non-Religious Objections' in Arthur Downing and Barbara Smoker (eds), *Voluntary Euthanasia: Experts Debate the Right to Die* (Peter Owen, 1986) 156; and Roger Magnusson, 'The Sanctity of Life and the Right to Die: Social and Jurisprudential Aspects of the Euthanasia Debate in Australia and the United States' (1997) 6 *Pacific Rim Law & Policy Journal* 9.

[181] Andrea Beckman, ''Sexual Rights' and 'Sexual Responsibilities' within Consensual 'S/M' Practice', in Mark Cowling and Paul Reynolds (eds), *Making Sense of Sexual Consent* (Ashgate, 2004) 195; Darren Langdridge, 'Voices from the Margins: Sadomasochism and Sexual Citizenship' (2006) 10(4) *Citizenship Studies* 373; Chris White, 'The Spanner Trials and the Changing Law on Sadomasochism in the UK' (2006) 50(2/3) *Journal of Homosexuality* 167; Simon Bronitt, 'The Right to Sexual Privacy, Sado-masochism and the Human Rights (Sexual Conduct) Act 1994 (Cth)' (1995) 2(1) *Australian Journal of Human Rights* 59. See also *R v McIntosh* [1999] VSC 358 [11].

[182] *R v Brown & Ors* [1994] 1 AC 212; *Laskey, Jaggard & Brown v UK* (1997) 24 EHRR 39; *Wilson* [1996] 2 Cr App R 241; *R v Slingsby* [1995] Crim LR 570; and *R v Boyea* [1992] Crim LR 574 (CA). More broadly see Paul Lehane, 'Assault, Consent & Body Art: A review of the law relating to assault and consent in the UK and the practice of body art' (2005) 4(1) *Journal of Environmental Health Research* 41; Bernardo Attias, 'Police Free Gay Slaves: Consent, Sexuality, and the Law' (2004) 10(1) *Left History* 55; and the discussion in *R v S* [2016] NZHC 1185, [24]-[26] regarding an exploitative domestic relationship.

absence of consent, fundamental to self-possession, Australia has criminalised the practice of female genital mutilation[183] but – in respecting the self-concept of members of particular ethno-religious communities – has not criminalised circumcision,[184] with some sense that the body modification may be culturally in the best interests of the particular child – a value discussed in the following chapter.[185] On grounds of equity in personal relationships and broader utility regarding charities we in practice restrict how the self-possessed property-owning individual can dispose of assets. [186] Given an ideology of heroic amateurism in sport we have stigmatised unacknowledged performance enhancement,[187] in other words what might be characterised as passing off or identity crime, and have begun to both enshrine 'athlete' as a legal identity – with a specific definition in at least one statute – and verify that the performance of that identity has not been chemically or otherwise enhanced.[188]

Civil Deaths

Given that 'liveness' of the human animal is fundamental to identity, there are requirements for registration of births and deaths, in other words a formal acknowledgement by the state that can be accompanied by a birth or death certificate that as discussed in Chapter Eight is useful for gaining other identity signifiers such as passports, exercising an entitlement to social welfare benefits[189] or for settling an estate. Death ends the person's legal existence, with survivors thereafter acting in the deceased individual's stead.[190]

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[183] *Criminal Code Act 1899* (Qld) s 323A, *Criminal Code Act 1924* (Tas) sch 1 s 178A,
[184] Tasmanian Law Reform Institute, *Non-Therapeutic Male Circumcision* (Issues Paper 14) (Tasmanian Law Reform Institute, 2009).
[185] Les Haberfield, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23(1) *Monash University Law Review* 94.
[186] Peter Young, Clyde Croft and Megan Smith, *On Equity* (Lawbook Co, 2009) 917-918; and John de Groot and Bruce Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 4th ed, 2012) 7. Among statutes see *Family Provision Act 1969* (ACT); *Succession Act 2006* (NSW); *Family Provision Act 1970* (NT); *Succession Act 1981* (Qld), *Inheritance (Family Provision) Act 1972* (SA); *Testator's Family Maintenance Act 1912* (Tas); *Administration and Probate Act 1958* (Vic); and *Inheritance (Family and Dependants Provision) Act 1972* (WA).
[187] Paul Horvath, 'Anti-Doping and Human Rights in Sport: The Case of the AFL and the WADA Code' (2006) 32(2) *Monash University Law Review* 357; *Sports Drug Testing Act 2000* (SA); *Sports Drug Testing Act 1995* (NSW); and *Australian Sports Anti-Doping Authority Act 2006* (Cth). See also Vanessa McDermott, *The War on Drugs in Sport: Moral Panics and Organizational Legitimacy* (Routledge, 2015).
[188] *Australian Sports Anti-Doping Authority Act 2006* (Cth) s 4 for example provides a definition of athlete and associated extensive powers regarding testing, including notification of an individual's whereabouts.
[189] For the requirement to provide a birth certificate to Centrelink see *Social Security (Administration) Act 1999* (Cth) ss 64(1), 64(2), 64(3), 64(4) and 80(1). For an application see *Carter and Secretary, Department of Family and Community Services* [2004] AATA 1011.
[190] George P Smith, 'The iceperson cometh: cryonics, law and medicine' (1983) 1(2) *Health Matrix* 23.

Societies have sometimes demonstrated their disapproval of a person's actions or associations through 'social death', an expression of disregard through exclusion from private social gatherings and through the performativity in public spaces that we dub 'cutting someone dead'. The shunned person, however, retains a physical existence and legal identity.

For the purposes of this dissertation a legally more meaningful concept is 'civil death' (*civiliter mortuus* or what Agamben dubbed 'bare life'),[191] a term used to indicate that the individual as a consequence of a criminal conviction has a deleterious identity that excludes them from participation in political and other activity[192] but as Michael Kirby indicated does not strip them of their identity as human animals or equality before the law.[193]

That exclusion might be physical, with 'crime' or 'criminal' construed by many Australians in terms of incarceration in a correctional institution, in other words denial of freedom of movement, restriction and scrutiny of communications,[194] and lawful practices such as confiscation of chattels or cavity searches that deny the autonomy of the convict's body.[195]

The individual's status as someone with a conviction is marked by inclusion in registers, for example lifelong state-operated sex-offender registers,[196] that coexist with spent conviction schemes (indicating the therapeutic state's appreciation of the

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[191] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, Stanford University Press, 1998) [trans of *Homo sacer. Il potere sovrano e la nuda vita* (first published 1990)].
[192] Michael Mulkay and John Ernst 'The changing profile of social death' (1991) 32(1) *European Journal of Sociology* 172; Harry Saunders, 'Civil death - A new look at an ancient doctrine' (1969) 11(4) *William & Mary Law Review* 988-1003; Liam Williams, 'Civil death and penal populism in New Zealand' (2012) 20 *Waikato Law Review* 111; and Helen Sweeting and Mary Gilhooly, 'Doctor, Am I Dead? A Review of Social Death in Modern Societies' (1991) 24(4) *Omega: A Journal of Death and Dying* 251.
[193] *Muir v The Queen* (2004) 78 ALJR 780, Kirby J at 784.
[194] *Corrective Services Act 2006* (Qld) s 45; *Corrections Act 1997* (Tas) s 22; and *Prisons Act 1991* (WA) s 41.
[195] *Corrective Services Act 2006* (Qld) s 39. Note scope for physical and electronic searching of people who have not been convicted, notably at borders under the *Customs Amendment (Serious Drugs Detection) Act 2011* (Cth).
[196] See for example *Sex Offenders Registration Act 2004* (Vic); and *Child Sex Offenders Registration Act 2006* (SA). Registration regimes are critiqued in Eric Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006); Stephen Robertson, 'What's Law Got to Do with It? Legal Records and Sexual Histories' (2005) 14(1/2) *Journal of the History of Sexuality* 161; Carol Ronken and Robyn Lincoln, 'Deborah's Law: The Effects of Naming and Shaming on Sex Offenders in Australia' (2001) 34(3) *Australian and New Zealand Journal of Criminology* 235; James Jacobs, *The Eternal Criminal Record* (Harvard University Press, 2015); and Terry Thomas, *The Registration and Monitoring of Sex Offenders: A Comparative Study* (Routledge, 2012).

scope for reinvention)[197] and that are underpinned by requirements for notification that a person's name has changed.[198] In extreme instances it might involve preventative detention regimes, with people remaining in custody after completion of a sentence.[199]

It might more subtly involve denial of the franchise[200] and of exclusion from the legislature, the bench or other positions that as indicated above the state regards as politically important. Historically it has featured prohibitions on the civilly dead holding or transferring property; in some instances it was an offence to feed, shelter or otherwise assist the person.

Banishment of offenders from the polity now takes the form of deporting people who have committed serious offences but are not Australian citizens – as indicated in Chapter Three citizenship is a foundational identity – even though some deportees have spent most of their lives in Australia and do not speak the language and have connections in the jurisdiction to which they are reported.

We can discern a civil death, one that is gentler than incarceration but perhaps fosters identity offences through misreporting of a legal identity, in the form of bankruptcy (noted in Chapter Four).[201] In a property-respecting democracy we find social stigma

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[197] For the state see James Nolan Jr, *The Therapeutic State: Justifying Government at Century's End* (New York University Press, 1998); and the more negative but insightful Andrew Polsky, *The Rise of the Therapeutic State* (Princeton University Press, 1991). Spent convictions statutes include the *Spent Convictions Act 1988* (WA); *Spent Convictions Act 2009* (SA); and *Spent Convictions Act 2000* (ACT). See also Moira Paterson, and Bronwyn Naylor, 'Australian spent convictions reform: A contextual analysis' (2011) 34(3) *UNSW Law Journal* 938; Lyn Hinds and Kathleen Daly, 'The war on sex offenders: Community notification in perspective' (2001) 34(3) *Australian & New Zealand Journal of Criminology* 256; and James Vess, Brooke Langskaill, Andrew Day, Martine Powell and Joe Graffam, 'A comparative analysis of Australian sex offender legislation for sex offender registries' (2011) 44(3) *Australian & New Zealand Journal of Criminology* 404.

[198] See for example *Births, Deaths & Marriages Registration Act 1995* (NSW) s 27A.

[199] See also Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, policy and practice* (Federation Press, 2009); Patrick Keyzer, Cathy Pereira and Stephen Southwood, 'Pre-emptive imprisonment for dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The constitutional issues' (2004) 11(2) *Psychiatry, psychology and law* 244; Bernadette McSherry, 'Sex, Drugs and Evil Souls: The Growing Reliance on Preventive Detention Regimes' (2006) 32(2) *Monash University Law Review* 237; and Tamara Tulich, 'Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38(2) *UNSW Law Journal* 823.

[200] There is a useful historical overview of inconsistencies in the Australian regimes in Jerome Davidson, 'Inside Outcasts: Prisoners and the Right to Vote in Australia' (Australian Parliament House, Current Issues Brief 12, 2003-4) (2004).

[201] *Bankruptcy Act 1966* (Cth) ss 5 and 58. For non-reporting and false reporting see *Official Trustee in Bankruptcy v Alvaro, Guiseppe & Ors* [1996] FCA 483; *R v Neil Gordon Camm; R v Harold Charles Cary; R v Brendan Matthew Godfrey* [2008] NSWDC 162, [4] and other instances noted in Chapters Nine and Ten below. See also Paul Ali, Lucinda O'Brien and Ian Ramsay, '"Short a Few Quid": Bankruptcy Stigma in Contemporary Australia' (2015) 38(4) *University of New South Wales Law Journal* 1575.

about the financial failure that is signalled through bankruptcy.[202] In terms of legal identity we see the law characterising the undischarged bankrupt, an identity widely enshrined in statute,[203] as having disabilities regarding service in various positions such as a corporate directorship and holding assets at the expense of creditors. Bankrupts are not denied the vote and bankruptcy *per se* is not a criminal offence, so we might regard the identity as a form of 'civil death lite'.

Observations

In drawing together analysis in Chapters One, Three and Four we can conclude that politics matters because it is a discourse about identities, in particular the valorisation of identities discussed in the following two chapters. It also matters because it is about the political system that reflects – and should foster, as Nussbaum and Rawls note – that discourse.

The system, which we can construe as both the constitutional structure of the particular state and the broader way that people conceptualise rights, obligations and civility (the habitus that we take for granted in dealing with Jenkins' sub-aquatic nature of law on a day by day basis)[204] provides sustained mechanisms for making and breaking legal identities, thence often determining the flourishing of people who are members of a particular state or who come into contact with that state. In terms of legal identity – and more broadly law – the political is in essence concerned with what matters.

Cicero in *De Republic* argued that

> a people is not any coming together of human beings, herded together for any reason whatsoever, but a coming together of many, united by

[202] Nicola Howell and Rosalind Mason, 'Reinforcing Stigma or Delivering a Fresh Start: Bankruptcy and Future Engagement in the Workforce' (2015) 38(4) *University of New South Wales Law Journal* 1529. As a point of comparison see Scott Sandage, *Born Losers: A History of Failure in America* (Harvard University Press, 2005); and David Skeel Jr, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton University Press, 2001).

[203] See for example *Bankruptcy Act 1966* (Cth) s 148; *Constitution Act 1975* (Vic) s 5; *Motor Dealers and Repairers Act 2013* (NSW) s 25; *Local Government Act 1989* (Vic) s 29; *City of Brisbane Act 2010* (Qld) s 156; *Medicines, Poisons and Therapeutic Goods Act 2012* (NT) s 118; *Greyhound Racing Act 2009* (NSW) s 6; *Renmark Irrigation Trust Act 2009* (SA) s 13; *Local Government Act 2009* (Qld) s 156; *Local Government (Elections) Act 1999* (SA) s 17(3); and *Security and Investigation Agents Act 2002* (Tas) s 8.

[204] See Chapter Two above.

> consensual commitment to a particular normative order and common utility.[205]

That political community had to aspire to justice, something that was more than merely the pursuit of what was advantageous. The emphasis on justice construed in relation to flourishing rather than merely consistent procedure (formalism) or utility differentiates the theorising of Rawls, Nussbaum, Heller and Gewirth from that of the decisionism valorised by Schmitt and figures such as Mouffe or the hereditary privilege valorised by de Maistre. It reflects their respect for diversity, something that Schmitt envisaged would be erased if his millennial state came into being and pending that eschatological event should be minimised through an abandonment of the disagreements inherent in a liberal democratic state.

More subtly it is at odds with the anxieties of contemporary cultural critics such as eminent legal philosopher John Finnis, who in 2009 echoed Oswald Spengler in commenting that

> European states in the early twenty-first century move ever more clearly out of the social and political conditions of the 1960s into a trajectory of demographic and cultural decay; circumscription of political, religious and educational speech and associated freedoms; pervasive untruthfulness about equality and diversity; population transfer and replacement by a kind of reverse colonization; and resultant internal fissiparation foreshadowing, it seems, ethnic and religious inter-communal miseries of hatred, bloodshed and political paralysis reminiscent of late twentieth century Yugoslavia's or the Levant's.[206]

If identity construction is political, as contended in this dissertation, it is incumbent on citizens through their participation in law making to provide identities that are imbued with Rawlsian fairness rather than merely formal equality, and not assume that matters are appropriately left to bureaucrats or other vested interests.

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[205] Cicero, *The Republic* in Cicero, *The Republic and The Laws* (Clinton Keyes trans, Harvard University Press, 1928) [trans of *De Re Publica*] 13, 65.
[206] John Finnis, 'H.L.A. Hart: A Twentieth-Century Oxford Political Philosopher' (Oxford Legal Studies Research Paper 30/2009) 15.

Chapter Six: Affinities

Overview

The methodology articulated in Chapter Two of this dissertation argued that we can discern the nature of legal identity by asking a set of questions. One question is 'What is the function of the identity – what legal purpose does it serve?'. A subsequent question is 'Who or what is eligible – is it dependent on prerequisites or preconditions?'. Chapter Three argued that if we are using a pragmatic approach we can differentiate between foundational and derivative legal identities, with the latter presupposing that a particular entity has a foundational identity and can be located within a broad taxonomy in which some identities are functionally more significant than others. This chapter considers a collection of derivative identities. They involve attributes that may be of profound importance for the ways that individuals view themselves and their place within the world. Those attributes are however not valorised by everyone and are not prerequisites for flourishing. They are facilitative for flourishing rather than determinative. This chapter accordingly analyses the functioning, creation, signification and other aspects of selected derivative identities. Those identities have been chosen because they are representative of legal identity in terms of affinity, that is shared systems of belief, social and financial relationships. The chapter demonstrates the cultural contingency of ethnicity and other affinities as a basis of legal identity.

The preceding chapter referred to the archetypal entrepreneur, individualist and sovereign known as Robinson Crusoe in noting that by choice few people are islands. We are social animals, creatures who do not exist in isolation but instead are shaped – and in law are often identified – by our affinities.

Chapters One and Three argued that people have a cluster of legal identities, some more important for the specific individual's self-concept than for other people, some more highly valorised by specific communities within Australia or other jurisdictions, some only significant in specific situations. Being a child of a parent (two legal identities) may – because of ties of affection – be far more important in that parent's

eyes than whether the child is bankrupt,[1] mentally handicapped,[2] a convicted murderer[3] or sitting in judgment on the bench of the High Court[4] (all legal identities, although not simultaneously evident in the one person, given that some identities are exclusive of each other). Being a bankrupt does not disqualify an individual from buying a carton of milk or taking a taxi but as noted in the preceding chapter does exclude that person from some legal identities (for example becoming a company director, member of parliament or official) and may lead the state to restrict opportunities through for example the surrender or cancellation of a passport.[5] Identity as a parent involves responsibilities. Identity as a child or as a partner involves rights.

Those rights and responsibilities have social, economic and legal dimensions.

Many of the derivative identities within the cluster are identities of affinity, in other words attributable to social relationships or adherences such as family and faith that are both recognised and expressly or tacitly encouraged by law. They are identities of community, including groupings that may experience discrimination and from which individuals may wish to dissociate on the basis that particular cultures are restrictive (for example adherence to ultra-orthodox Judaism precludes overt expression of some forms of sexual affinity)[6] or result in an objectification by other groups that flourishing the dignity inherent in recognition as an individual rather than a social type or exemplar ('I am a person, not a skin colour that you negatively or positively valorise').

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[1] *Bankruptcy Act 1966* (Cth) s 5(1).
[2] See for example *Property (Relationships) Act 1984* (NSW) s 27; *Australian Human Rights Commission Act 1986* (Cth) sch 5; *Disability Act 2006* (Vic) s 3; *Re A Teenager* [1988] FamCA 17, [3]; *R v Hickman* [2013] NSWDC 143, [52]; *PH v R* [2009] NSWCCA 161, [17]; and *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).
[3] *Zecevic v DPP (Vic)* (1987) 162 CLR 645, Wilson, Dawson and Toohey JJ at 661. In statute law see for example *Criminal Code* (Tas) s 157; *Crimes Act 1900* (ACT) s 12; and *Criminal Code* (Qld) s 302.
[4] *High Court of Australia Act 1979* (Cth) ss 4 and 7. See Chapter Eleven below regarding an independent judicial commission for recruitment to the High Court.
[5] *Council of the Law Society of NSW v Xu* [2009] NSWADT 67; *Talacko v Talacko* [2010] FCA 239; *Oates v Minister for Foreign Affairs* [1999] FCA 1825; *Murphy and Minister for Foreign Affairs & Trade* [2007] AATA 1272; and *Republic of Croatia v Snedden* [2010] HCA 14.
[6] Randal Schnoor, 'Being gay and Jewish: Negotiating intersecting identities' (2006) 67(1) *Sociology of Religion* 43; and Yaakov Ariel, 'Gay, orthodox, and trembling: The rise of Jewish orthodox gay consciousness, 1970s-2000s' (2007) 52(3/4) *Journal of Homosexuality* 91.

This chapter addresses some affinity-based identities that are socially and politically contested, and that demonstrate the contingency of identity construction.

It initially looks at ethnicities, suggesting that they are social constructs rather than biological facts: we positively or negatively valorise differences that biologists would regard as trivial.[7] It focuses on identities in relation to discrimination law, building on the discussion in Chapters Three and Five of Indigenous people within Australian law.

It goes on to discuss marriage as a legal institution, one that involves the legal identity of married person. That identity has a symbolic value, one reason that it is the subject of calls for law reform to remove the civil disability experienced by gay and lesbian people. It also has substantial financial and other consequences. It reflects a valorisation that is not apparent in some other cultures, with for example non-recognition in Australia of polygamy and encouragement of amicable dissolution of companionate marriage, which on occasion now does not last 'until death do us part'.

The chapter next looks at 'lineage', that is the relationship between children, parents ('biological' or adopted) and other members of extended families. It looks at the bounding of fertility, touched on in the preceding chapter's comments regarding possessive individualism.

After a discussion of sexual affinity in terms of discrimination, theory and law reform the chapter then considers faiths. That consideration notes the shift away from religious identity as a key aspect of civil society, the protection of clergy and the functioning of discrimination law.

The chapter then discusses employment, a relationship that results in meaningful legal identities of employer and employee (and has resulted in the identity of the trade

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[7] Ernest Renan, 'What is a Nation?' in Homi Bhabha (ed), *Nation and Narration* (Routledge, 1990) [trans of Renan, 'Qu'est-ce qu'une nation?' (first published 1882)] 8, 15 comments

> Human history is essentially different from zoology, and race is not everything, as it is among the rodents and felines, and one does not have the right to go through the world fingering people's skulls and taking them by the throat saying "You are of our blood; you belong to us!".

union as a form of association, in other words one of the categories of 'artificial person', discussed in Chapter Seven), alongside the identity of contractor.

Ethnicities

Political scientists have disagreed about the conceptualisation of ethnicity, although it is often held to encompass a collective name, a sense of solidarity, a shared history and culture, an association with a specific territory, and even a myth of innate capabilities attributable to what people often characterised as race.

Ethnicity is valorised in the leading international human rights agreements,[8] which have some traction in Australian law.[9] It may be important for a positive or negative self-concept[10] and, because it involves difference, as a focus of disadvantage that ranges from characterisation as 'unAustralian'[11] and the vilification addressed by some Australian hate-speech law[12] through to ongoing economic subservience,[13] intra-community violence[14] and 'interventions' that on occasion unsuccessfully seek to respect dignity in ways that minimise harms without overriding the autonomy of Indigenous individuals and communities.[15]

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[8] In particular International Convention on the Elimination of All Forms of Racial Discrimination.

[9] *Racial Discrimination Act 1975* (Cth) s 7. Section 9(1) makes it illegal for a person to

> do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

[10] Eugenia Kaw, 'Medicalization of racial features: Asian American Women and Cosmetic Surgery' (1993) 7(1) *Medical Anthropology Quarterly* 74; Ruth Holliday and Joanna Elfving-Hwang, 'Gender, globalization and aesthetic surgery in South Korea' (2012) 18(2) *Body & Society* 58; Sander L Gilman, *Making The Body Beautiful: A Cultural History of Aesthetic Surgery* (Princeton University Press, 1999) 99-109; and Xiaoxiang Deng, 'Patenting Ethnic Appearances: The Problem of Patents Involving Biotechnologies That Alter Ethnic Traits' (2013) 5(2) *Georgetown Journal of Law & Modern Critical Race Perspective*s 159. See more broadly Sander L Gilman, *Creating Beauty To Cure the Soul: Race and Psychology in the Shaping of Aesthetic Surgery* (Duke University Press, 1998); and Margaret Hunter, *Race, Gender and the Politics of Skin Tone* (Routledge, 2013).

[11] Philip Smith and Tim Phillips, 'Popular understandings of 'UnAustralian': an investigation of the un-national' (2001) 37(4) *Journal of Sociology* 323.

[12] See for example *Racial Discrimination Act 1975* (Cth); *Racial and Religious Tolerance Act 2001* (Vic); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1998* (Tas); and *Anti-Discrimination Amendment Act 2001* (Qld). See further Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Federation Press, 2002); and Katherine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (Federation Press, 2007).

[13] That subservience is most salient in past slavery regimes such as the pre-Civil War United States, where ethnicity was central to the legal identity of slave and by extension to the identity of slave owner, that is the the person who was typically white and who had property rights in another human being. It is less obvious but persistent in informal but systemic discrimination in contemporary regimes such as Japan (the *Burukamin*) and India (*Dalits*): underclasses whose status is based on perceived ethnicity.

[14] Joy Wundersitz, Indigenous perpetrators of violence: Prevalence and risk factors for offending (Research and public policy series no. 105) (Australian Institute of Criminology, 2010) iii, 20 and 26.

[15] See in particular Peter Sutton, *The Politics Of Suffering: Indigenous Australia and the End of the Liberal Consensus* (Melbourne University Press, 2011) 17 and 87; Mark Moran, 'The More Things Change' in Mark

Is ethnicity a – or indeed *the* – legal identity in Australia? Critical Race Theorists such as Bell and Moreton-Robinson have implied that ethnicity is all: foundational as an identity and something, that once recognised by the scholar and political activist, provides a powerful conceptual tool for a comprehensive deconstruction of a law of 'whiteness'[16] (racist, patriarchal, rational, instrumental, property-centric, formal, adversarial and often punitive) that perpetuates an oppressive 'white privilege'. US writer Ta-Nehisi Coates looked to history in another assertion of essentialism, claiming that

> The terrible truth is that we cannot will ourselves to an escape on our own … You have been cast into a race in which the wind is always at your face and the hounds are always at your heels … The plunder of black life was drilled into this country in its infancy and reinforced across its history, so that plunder has become an heirloom, an intelligence, a sentience, a default setting to which, likely to the end of our days, we must invariably return.[17]

Preceding pages have highlighted that Indigenous Australians have experienced fundamental harms as legal subjects in colonial and federated Australia.[18] As Posner noted, however, it is potentially antithetical to self-agency and broader law reform to regard race in the abstract – or a particular ethnicity – as wholly or primarily determinative.[19]

Moran (ed), *Serious Whitefella Stuff: When solutions became the problem in Indigenous affairs* (Melbourne University Press, 2016) 1, 8; Bill Hunter, 'Conspicuous consumption and wicked problems: the Howard Government's national emergency in Indigenous affairs' 2007 14(3) *Agenda* 35; Fiona Arney, Kate McGuinness and Gary Robinson, 'In the best interests of the child? Determining the effects of the Emergency Intervention on child safety and wellbeing' in Peter Billings (ed), *Indigenous Australians and the Commonwealth Intervention* (Federation Press, 2010) 42; and more broadly Sarah Maddison, *Black Politics: Inside the complexity of Aboriginal political culture* (Allen and Unwin, 2009).

[16] See for example Aileen Moreton-Robinson, 'Witnessing Whiteness in the Wake of Wik' (1998) 17(2) *Social Alternatives* 11; Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law: A Case Study' (2001) 10(1) *Griffith Law Review* 139; Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 75; and Livy Visano 'The Impact of Whiteness on the Culture of Law: From Theory to Practice' in Cynthia Levine-Rasky (ed), *Working Through Whiteness: International Perspectives* (State University of New York Press, 2002) 209.

[17] Ta-Nehisi Coates, *Between the World and Me* (Text, 2015) 72. See the caution about self-chosen 'therapeutic alienation' in Mary Lefkowitz, *History Lesson: A Race Odyssey* (Yale University Press, 2008) 152.

[18] As noted above dignitarian harms on the basis of the deleterious legal identity as a 'native' included denial of suffrage, a miscegenation regime, forced relocation of families and denial of land rights, suppression of traditional languages, removal of minors deemed at risk, supersession of traditional justice systems, post-mortem collection of human remains, discriminatory policing, retention of wages and objectification as one or more special categories in statistical and other reports.

[19] See more broadly Peter Sutton, *The Politics Of Suffering: Indigenous Australia and the End of the Liberal Consensus* (Melbourne University Press, 2011).

Ethnicity is a feature of contemporary Australian law, evident for example in anti-discrimination[20] and racial vilification statutes,[21] but it is *not* the only feature or primary feature. Reference to an ethnicity in terms of an 'other' may be a constant in legal systems but the values that law assign to what is construed as race are mutable, with law shaping social perceptions and thus for example rectifying disadvantage. More broadly, we should beware of construing racial essentialism through a lens of genetic determinism that denies responsibility to individuals who are deemed to be members of particular ethnicities.[22]

The contingency of valorisation means that we can see an abandonment of notions, evident in policing and political discourse regarding for example migration restrictions or national loyalty,[23] that the 'Irish' are 'black' (innately violent, dishonest, lazy and emotionally labile).[24] The same attributions were evident in law relating to what were perceived as other ethnicities, for example through migration restrictions during the White Australia period encapsulated in Arthur Calwell's politically resonant quip that 'two wongs don't make a white'.[25]

The reference to ethnicities is deliberate, given the history of conflating place of origin (and/or religious affinity or language) with ethnicity, a taxonomic category that was often interchangeable with race. Schmitt valorised ethnicity and force as the two foundations of the Nazi racial state, boasting that under Hitler

> Our conception of constitutional principles is again German. German blood and German honour have become the basic principles of German law, while the state has become an expression of racial strength and unity.[26]

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[20] For example *Anti-Discrimination Act 1977* (NSW); and *Racial Discrimination Act 1974* (Cth).
[21] For example *Racial and Religious Toleration Act 2001* (Vic); and *Racial Vilification Act 1996* (SA).
[22] Stephan Palmié, 'Genomics, divination, "racecraft"' (2007) 34(2) *American Ethnologist* 205.
[23] See for example George Megalonis, *Australia's Second Chance* (Penguin, 2016) 170 and 175-176 on 'Anglo' anxieties about Roman Catholic 'Celts'.
[24] Noel Ignatiev, *How the Irish Became White* (Routledge, 2008); and David R. Roediger, *Working Toward Whiteness: How America's Immigrants Became White: The Strange Journey from Ellis Island to the Suburbs* (Basic Books, 2006). In contrast see Michael Keevak, *Becoming Yellow: A Short History of Racial Thinking* (Princeton University Press, 2011).
[25] 1948 statement by Migration Minister Arthur Calwell MP quoted in Gwenda Tavan, 'Leadership: Arthur Calwell and the Post-War Immigration Program' (2012) 58(2) *Australian Journal of Politics and History* 203, 215. See also Suvendrini Perera, 'White shores of longing: 'Impossible subjects' and the frontiers of citizenship' (2009) 23(5) *Continuum: Journal of Media & Cultural Studies* 647, 653; and *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277.
[26] Carl Schmitt quoted in Yvonne Sherratt, *Hitler's Philosophers* (Yale University Press, 2013) 101. For a more extreme expression see Carl Schmitt, *On the Three Types of Juristic Thought* (Joseph Bendersky trans, Praeger, 2004) [trans of *Über die Drei Arten des Rechtswisserschaflichten Denken* (first published 1934] 82-83.

Scientists over the past fifty years, unlike many researchers and clinicians in Schmitt's race-centred Germany, have acknowledged variations in skin tone and other appearance but questioned the value we place on dissimilarities and inferences we draw regarding capabilities. Geneticist Jonathan Marks for example noted genetic commonalities across the human species, other animal species and the plant kingdom, commenting that

> Somehow, to aver that we are over one-quarter genetically banana sounds more inane than profound; but it does illustrate the cultural assumptions behind 'natural' similarities[27]

Ethnicity on a year-by-year and instance-by-instance basis may be significant but it is malleable. It is not dependent on place of origin or the shared belief of a group of arrivals to Australia.

If we construe ethnicity in terms of discrimination we might more usefully follow Rawls and, in thinking about flourishing, ask whether we should be concerned with disadvantage (something that is not innate to ethnicity) and with difference.[28] Such a concern for example raises questions about notions of 'fat rights', in other word respect for people who are stigmatised for being irresponsible burdens on the public health system as a consequence of a lifestyle choice. As of 2017 that is not a legal identity.

Given the preceding chapters in understanding legal identity we can usefully ask what is ethnicity, who decides and why does law recognise some ethnicities not others?

Law privileges ethnicities through recognition. Those that are not recognised are legally invisible, an invisibility that potentially excludes individuals and groups from discrimination law. Nonrecognition tells us something about power relationships within the liberal democratic polity, including the extent to which advocacy groups have gained acceptance for their exceptional identity – in other words an identity that is discernably different from the norm of 'no identity' in terms of ethnicity – as one

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[27] Jonathan Marks, 'Contemporary Bio-Anthropology: Where the Trailing Edge of Anthropology Meets the Leading Edge of Bioethics' (2002) 18(4) *Anthropology Today* 3, 4

[28] For questions about fairness and the role of the state in positively offsetting vulnerability see Martha Fineman, 'Beyond Identities: The Limits of an Antidiscrimination Approach to Equality' (2012) 92(6) *Boston University Law Review* (2012) 1713.

that is politically and thence legally legitimate. Ethnicity potentially implies respectability, even desirability (consider notions of 'ethnic chic', the cultural appropriation noted in Chapter One and practices such as 'passing'),[29] whereas recognition of disability implies a deficit relative to a norm.

Recognition goes to the heart of what is ethnicity, given that in contemporary Australian law we selectively recognise ethnicity as a result of disadvantage (in particular Australia's Indigenous and Torres Strait Islander peoples, what in an echo of Herder we formerly legally classified as Aborigines or Natives) or advocacy by particular identitarian groups, in essence those who are sufficiently organised to have persuaded politicians that they are a discrete constituency.[30] Modood argues that

> Liberal citizenship is not interested in group identities and shuns identitarian politics; its interest in 'race' is confined to anti-discrimination simply as an aspect of the legal equality of citizens. Strictly speaking, race is of interest to liberal citizenship only because no one can choose their race; it is either a biological fact about them or, more accurately, is a way of being categorized by the society around them by reference to some real or perceived biological features, and so one should not be discriminated against on something over which one has no control.[31]

Ethnicity becomes legible through statistical reporting, such as questions in population surveys or requests that individuals indicate if they choose to identify as being of a particular group (for example Australian tertiary student registration with an option to identify as person of Aboriginal/Torres Strait Origin but not Croat, Serb, Scot, Maltese, Hausa or Inuit). In seeing like a state we are interested in some rather than all ethnicities, with the Commonwealth taking a narrow view of the Race Power in the Australian Constitution.[32]

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[29] Among discussions of 'passing', impersonation and appropriation see Elizabeth Smith-Pryor, *Property Rites: The Rhinelander Trial, Passing and the Projection of Whiteness* (University of North Carolina Press, 2009); Lovat Dickson, *Wilderness Man: The Strange Story of Grey Owl* (Macmillan, 1974); and Laura Browder, *Slippery Characters: Ethnic Impersonators and American Identities* (University of North Carolina Press, 2000). Literary and other impostures are noted in Chapters Eight and Nine below.

[30] Lory Britt and David Heise, 'From Shame to Pride in Identity Politics', in Sheldon Stryker, Timothy Owens and Robert White (eds), *Self, Identity, and Social Movements* (University of Minnesota Press, 2000) 252; and Tyler Sutton, 'The Emergence of a Male Global Gay Identity: A Contentious and Contemporary Movement' (2007) 15(1) *Totem: The University of Western Ontario Journal of Anthropology* 51.

[31] Tariq Modood, 'Multicultural Citizenship And Muslim Identity Politics' (2010) 12(2) *Interventions: International Journal of Postcolonial Studies* 157, 162.

[32] See Robert French, 'The Race Power: A Constitutional Chimera' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 180; and Melissa Castan, 'Constitutional Deficiencies In The Protection Of Indigenous Rights: Reforming The 'Races Power'' (2011) 7(25) *Indigenous Law Bulletin* 12.

Ethnicity becomes legible through tests and in terms of entitlements or disadvantages. The contemporary the three-part test for recognition as an Aboriginal person for example characterises an Aboriginal person as a person who is of Aboriginal ancestry and self-identifies as an Aboriginal person and has communal recognition by members of the Aboriginal community. (The onus of proving that a person satisfies all three requirements lies on that person.) Entitlements for someone who satisfies the test include potential educational assistance, small business assistance and land council entitlements.[33] Tacit disadvantages may include restrictions on access to alcohol and other goods in 'Intervention' areas on the basis of inferred Indigeneity.[34]

Perhaps most saliently ethnicity as a legal identity becomes legible through litigation under Commonwealth and state/territory legislation that prohibits discrimination on the basis of ethno-religious affinity or that precludes people who are deemed to lack the relevant ethnicity from claiming particular rights. [35]

We do not provide legibility through an ethnic signifier in basic identity documents, such as drivers' licences and passports discussed in Chapter Eight, practice a *numerus clausus*, reserve part of the legislature for a particular ethnicity or formally exclude people on the basis of ethnicity from the professions and other opportunities for individual/community flourishing. In that sense Australian law is indifferent: other than the ethnicity of exception (in particular Australia's First Peoples) it is generally blind to ethnicity.

Marriage

What of marriage, in contemporary Australia the formal and exclusive bond agreed by two people with capacity, [36] a bond that provides the legal identity of married person? It results in an identity desired by some gay/lesbian people and rejected by others.

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[33] For example *Aboriginal Lands Act 1995* (Tas) s 3A.
[34] *Northern Territory National Emergency Response Act 2007* (Cth). See also Castan Centre for Human Rights Law (Monash University), The Northern Territory Intervention: An evaluation (2015); Thalia Anthony, 'The Return to the Legal and Citizenship Void: Indigenous Welfare Quarantining in the Northern Territory and Cape York' (2009) *10 Balayi: Culture Law and Colonialism* 29; and Fiona Arney, Kate McGuinness and Gary Robinson, 'In the best interests of the child? Determining the effects of the Emergency Intervention on child safety and wellbeing' in Peter Billings (ed), *Indigenous Australians and the Commonwealth Intervention* (Federation Press, 2010) 42.
[35] *Rose on behalf of the Kurnai Clans v State of Victoria* [2010] FCA 460.
[36] *Marriage Act 1961* (Cth) s 5. For common law see *Hyde v Hyde and Woodmansee* (1866) LR 1 PD 130.

That aspiration in part reflects a perception that although marriage is increasingly indistinguishable from civil partnership[37] – productive of legal identities that may be enjoyed by same and different sex couples alike – the denial of gay marriage is a civil disability that symbolises and legitimises traditional discrimination on the basis of the sexual affinity discussed below. In part it reflects more abstract concerns, with Kenneth Karst for example commenting

> it is the choice to form and maintain an intimate association that permits full realization of the associational values we cherish most .... companionship, caring, commitment, intimacy and self-realisation.[38]

Marriage is a matter of Commonwealth law, reflecting an express power in the Australian Constitution[39] that is given effect through the national marriage statute[40] and a formal ceremony[41] – which brings the identity into being. It is documented in state/territory official registers under the registration statutes of those jurisdictions[42] and thence in assertions of identity, for example claims under the veteran's regime for entitlements as a serviceman's widow.

It involves an exclusive relationship between people of different gender, with bigamy being criminalised under several statutes[43] and the subject of recent prosecutions.[44]

What is the function of the legal identity that we know as marriage? Is it a mechanism for smoothing the transmission of assets across generations? A state encouragement of the personal and social well-being associated with a stable companionate relationship – which might be fostered through a civil partnership and restrictions on

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[37] See for example *Family Law Act 1975* (Cth) s 79; *Civil Unions Act 2012* (ACT); *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic); and *De Facto Relationships Act 1984* (NSW). For a perspective on the incremental development of civil partnerships as resulting, religious endorsement aside, in what amounts to marriage by another name see Jens Rydström, *Odd Couples: A History of Gay Marriage in Scandinavia* (Amsterdam University Press, 2011); and Law Commission of Canada, *Beyond Conjugality: Recognising and Supporting Close Personal Adult Relationships* (2001).

[38] Kenneth Karst, 'The Freedom of Intimate Association' (1980) 89(4) *Yale Law Journal* 624, 637.

[39] *Australian Constitution* s 51(xxi).

[40] *Marriage Act 1961* (Cth).

[41] Under *Marriage Act 1961* (Cth) ss xx and 41 the ceremony must be 'celebrated' by a recognised religious or civil marriage celebrant (s 5(1)), the celebrant having a discrete legal identity, obligations and presence in a register (for example ss 27, 33, 39G and 39B). The ceremony must be in a particular form, under s 45 of that Act, and under s 44 must be witnessed by at least two qualified people

[42] For example *Births, Deaths & Marriages Registration Act 1995* (NSW); *Births, Deaths & Marriages Registration Act 1997* (ACT); and *Births, Deaths & Marriages Registration Act 1999* (Tas).

[43] Examples include *Marriage Act 1961* (Cth) s 94, with a penalty of imprisonment for five years; *Defence Force Discipline Act 1982* (Cth) s 104; *Crimes Act 1958* (Vic) s 64; and *Crimes Act 1900* (NSW) ss 92 and 93.

[44] *Amarnath & Kandar* [2015] FamCA 1138, [10]; *Hills & Killen* [2015] FamCA 536, [15]; *Chhibber & Kudva* [2014] FamCA 499, [1]; *Re Patricia Baron and Director-General of Social Service*s [1982] AATA 242; *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279; and *Sasani & King (No 3)* [2014] FamCA 910.

domestic violence[45] – rather than a legal device to administer procreation, given that reproduction is not a legal prerequisite for continuation of marriage and 'sterility' is not a legal impediment?[46] Embodying 'complete trust and mutual loyalty' as a basis for confidentiality?[47] Something that has reached its use-by date in a supposed era of universal social welfare systems?[48] Ordained by the deity whose blessings are invoked in a range of legal statements such as the Constitution and whose clerical representatives formerly made the identity 'spring into being'? (That historical mechanism through which clergy of a particular faith brought a legal identity into being was an Austinian speech act involving a declaration that the individuals were now 'man and wife' till death made them part.) Is marriage a civil contract, the value of which was formerly evident in damages for breach of promise and alienation of affection? Something that should be independent of the state?[49]

One response is that marriage as a social practice and legal institution results in identities that are formally recognised in the Commonwealth Marriage Act[50] and Family Law Act,[51] in registration statutes, and in a range of other legislation that includes crimes,[52] welfare and other statutes. [53] Almost fifty years ago Sackville and Howard commented that

> Marriage and divorce in themselves are no more than ceremonies performed for their evidentiary value. They acquire their true importance from their relevance to the social unit of the family: from their effect in creating, or disturbing, as the case may be, family relationships. The family unit created around a monogamous marriage is one of the most

[45] Demarcation between 'domestic' and other violence tells us something about values, relationships and identities. Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39(2) *Melbourne University Law Review* 434.
[46] Martha Fineman, 'Why Marriage?' (2001) 9 *Virginia Journal of Social Policy and the Law* 239 and Dorian Solot and Marshall Miller, 'Taking Government Out of the Marriage Business', in Anita Bernstein (ed), *Marriage Proposals: Questioning A Legal Status* (New York University Press, 2006) 70.
[47] *Argyll v Argyll* [1967] Ch 302, 318. For a broader discussion of confidentiality see Mark Warby, Adam Speker and David Hirst, 'Breach of Confidence' in Mark Warby, Nicole Moreham and Iain Christie (eds), *Tugendhat & Christie: The Law of Privacy and the Media* (Oxford University Press, 2011) 163-222; and Tanya Aplin, Lionel Bently, Phillip Johnson and Simon Malynicz, *Gurry On Breach Of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd ed, 2012) 241-308.
[48] Carol Weisbrod, *Grounding Security: Family, Insurance and the State* (Ashgate, 2006) 25.
[49] Tamara Metz, *Untying the Knot: Marriage, the State and the Case for Their Divorce* (Princeton University Press, 2010).
[50] *Marriage Act 1961* (Cth).
[51] *Family Law Act 1975* (Cth).
[52] Examples include *Crimes Act 1958* (Vic) s 64; *Crimes Act 1900* (NSW) s 2; and *Criminal Law Consolidation Act 1935* (SA) s 78.
[53] See for example the *Defence Force Discipline Act 1982* (Cth) s 104.

> widespread and influential of all human social institutions. It is certainly fundamental to Australian social organisation. [54]

It involves expectations about cohabitation,[55] in other words that people will share their lives although not necessarily their beds. Expectations about mutual support mean that a choice to live apart raises questions about whether the identity is invalid on the basis that the 'marriage' is a sham.[56] The identity gives partners rights to assets accumulated in the course of the marriage, with an abandonment of expectations that a woman's property passed to the male with marriage. Law similarly no longer disregards the wife's consent for intimate activity, in other words the notion of rape in marriage is now well accepted in law.[57] Notions of balance in the assessment of public goods mean that spousal privilege is no longer absolute.[58]

An emphasis on the procreative function of marriage represents an ideology of fertility that potentially disrespects married 'straight' people who cannot (or choose not to) have children. It is at odds with gay people who bring a child to a marriage, adopt or use some form of assisted fertility. More subtly, it reinforces traditional valorisation implicit in descriptors such as 'old maid', in other words women who have 'failed at life' or shirked their natalist duty by 'failing to catch a man' and breed more servants of the state.[59]

How does marriage end? Traditionally it was regarding in law as an identity for life, one ended by God through death (extramarital relations being regarded as a crime by

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[54] Ronald Sackville and Colin Howard, 'The Constitutional Power of the Commonwealth to Regulate Family Relationships' (1970) 4(1) *Federal Law Review* 30, 32.
[55] Rebecca Probert, *The Changing Legal Regulation of Cohabitation: From Fornicators to Family, 1600-2010* (Cambridge University Press, 2012). For a US perspective on changing spousal identities see Hendrik Hartog, *Man and Wife in America: A History* (Harvard University Press, 2000).
[56] *Medicare Levy Act 1986* (Cth) s 3.
[57] *PGA v The Queen* [2012] HCA 21.
[58] *Australian Crime and Corruption Commission v Stoddart* (2011) 282 ALR 620; discussed in Edward Fearis, 'Australian Crime Commission v Stoddart: The End of Common Law Spousal Privilege' (2012) 12(2) *QUT Law Review* 97. Note also *Cattanach v Melchior* [2013] HCA 38; (2003) 215 CLR 1, 30. *R v Byast* [1999] 2 Qd R 384, 385 considers the position in common law that a husband and wife cannot conspire together. For a perspective see Edward Stein, 'Spousal Secrets: Same-Sex Couples and the Functional Approach to Spousal Evidentiary Privileges' in Austin Sarat, Lawrence Douglas and Martha Umphrey (eds), *The Secrets of Law* (Stanford University Press, 2012) 77.
[59] Elspeth Browne, *The empty cradle: fertility control in Australia* (UNSW Press, 1979); and Neville Hicks, *This Sin and Scandal: The Population Debate in Australia 1891-1911* (Australian National University Press, 1976). For other perspectives see Cornelie Usborne, 'Pregnancy is the Woman's Active Service: Pronatalism in Germany during the First World War', in Richard Wall and Jay Winter (eds), *The Upheaval of War: Family, Work and Welfare in Europe, 1914-1918* (Cambridge University Press, 2005) 389; Michelle Mouton, *From Nurturing the Nation to Purifying the Volk* (Cambridge University Press, 2007) 107; and the masterly Paul Ginsborg, *Family Politics: Domestic Life, Devastation and Survival 1900-1950* (Yale University Press, 2014).

the name of adultery). Individuals can shed their ethnicity in terms of legal identity, for example by simply not ticking boxes in the sort of questionnaire noted in Chapter Three (choosing not to identify as an Aboriginal or Torres Strait Islander Person) or not asserting an ethnic identity in relation to pertinent statutes. Can people similarly shed the legal identity of married person, perhaps in an effort to escape from loveless relationships contrary to their view of personal goods or to escape encumbrances such as an obligation to provide financial support for children?[60] The answer is yes, with scope for ending the relationship but not obligations regarding offspring.

A preoccupation of law in England and Australia over the 570 years has been circumstances and mechanisms for releasing people from the bonds of marriage, that is giving the married people a new identity as individuals who are free to marry someone else or remain single or even remarry each other. One instance was the effort by Henry VIII to secure a legitimate male heir, a matter central to the stability of the state, so central that a consequence of the legal identity of spouse was judicial murder. Another was the legal differential evident for several centuries afterwards, in which only the elite could with great difficulty gain a divorce through a statute that privileged a specific individual.[61]

A theme running throughout this dissertation is state registration of identities, typically accompanied by a card, certificate or other identifier that signifies the status of both the registered person/s and the state as entity assigning or recognising the identity. Thomas Cromwell, whom we might regard as a progenitor of the contemporary Australian information state, initiated formal registration of marriages through registers in parish churches.[62] That system reflected state incapacity: the Tudor bureaucracy was unable to track marriage through a central civil registry and instead pragmatically relied on the institution found in almost every local community, in other words the parish church whose clergyman was endowed with state authority. In contemporary Australia the Commonwealth has pragmatically continued the

[60] *Child Support (Registration and Collection) Act 1988* (Cth).
[61] Lawrence Stone, *Road to Divorce: England 1530-1987* (Oxford University Press, 1990).
[62] Edward Higgs, *Identifying the English: a History of Personal Identification 1500 to the Present* (Continuum, 2011) 75.

registration system found in the colonies, relying on state/territory BDM registers and registrars.[63]

One reason that marriage is important is because it potentially involves lineage, at its most visceral the transmission of entitlements on the basis of parentage, what one writer characterised as the 'dynastic uncanny'.[64]

Lineage

Lineage matters. Chapter Five suggested that the Australian head of state occupies that position through inheritance rather than through exceptional skill, ruthlessness, beauty, intellect or campaigners.[65] Abbe Sieyes, at the end of the *ancien* legal regime, commented that 'It is an absolute fact that the privileged class look upon themselves as another species of beings', membership of a species initially founded on descent and later on purchase.[66] He anticipated Carl Schmitt in attacking aristocratic exceptionalism – such as exemption from the *corvee* and *taille* – with the argument that anyone claiming exemption from the law covering most French people could not be part of the nation, the aristocratic and clerical orders accordingly having no political rights.[67]

That exceptionalism was founded on lineage – lines of patrimonial descent that provided status, opportunities for flourishing and often assets through what we might now characterise as an accident of birth or fortune in parentage. Crouch noted that it was axiomatic that the *ancien regime* peasant – someone of the wrong lineage – must

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[63] *Births, Deaths & Marriages Registration Act 1997* (ACT); *Births, Deaths & Marriages Registration Act 1995* (NSW); *Births, Deaths & Marriages Registration Act* (NT); *Births, Deaths & Marriages Registration Act 2003* (Qld); *Births, Deaths & Marriages Registration Act 1996* (SA); *Births, Deaths & Marriages Registration Act 1999* (Tas); *Births, Deaths & Marriages Registration Act 1996* (Vic); and *Births, Deaths & Marriages Registration Act 1998* (WA).

[64] George Marcus, 'The Deep Legacies of Dynastic Subjectivity: The resonances of famous family identity in private and public spheres' in João de Pina-Cabral and Antónia Pedroso de Lima (eds), *Elites: Choice, Leadership & Succession* (Berg, 2000), 14 and 18.

[65] In contrast the scholarly literature attributes the success of Australian ministers and their parties to mechanisms such as qualitative surveys, voter databases and expertise of the part of professional campaign managers. Elizabeth II gained the status of monarch through an accident of birth, not polling and marketing. See Stephen Mills, *The Professionals: Strategy, Money and the Rise of the Political Campaigner in Australia* (Black Inc, 2016).

[66] Sieyes quoted in William Doyle, *Aristocracy and its Enemies in the Age of Revolution* (Oxford University Press, 2009) 174.

[67] William Doyle, *Aristocracy and its Enemies in the Age of Revolution* (Oxford University Press, 2009) 179.

be filthy and corrupt, cunning but stupid, immune and even allergic, to the higher things in life.[68]

As a legal system we no longer perpetuate a class identity that rewards 'bluebloods' and punishes the 'filthy' on the basis of parentage. We no longer have a strong natalism regime that criminalises fertility control and provides honours or substantial rewards for large families, although we still refuse marriage within 'prohibited degrees'.[69] Public discourse more broadly includes reference to notions of social mobility and the reinvention discussed in Chapter Ten below.

Law does however recognise and seek to foster the family as an institution through collective economic measures (for example grants and concessions under 'family benefits' programs) and through respect for cross-generational relationships (for example parent and child, grandparent and child). That respect often centres on the subjective notion of what is in the best interests of the child,[70] a conceptualisation that underpinned past interventions in the lives of Indigenous people through initiatives reported by the Stolen Generations inquiries[71] and refusal of custody on the basis of sexual affinity.[72]

Being a minor is now a more salient identity than in the period in which the family, according to Aristotle, was 'the association established by nature for the supply of man's everyday wants', wants that encompasses affection rather than merely shelter and sustenance.[73] Respect for the minor child, whose relationship with the parent might be through blood or adoption, involves legal expectations that the child will be

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[68] David Crouch, *The Image of Aristocracy In Britain, 1000-1300* (Routledge, 1992) 19.
[69] *Marriage Act 1961* (Cth) s 23B(2).
[70] *Convention on the Rights of the Child Art* 3(1) gives paramount importance to 'the best interests of the child', ahead of that of related adults or of administrative convenience, and thereby estabishing children as a special class of human animals. There is a useful discussion in Paula Gerber, 'The Best Interests of Children in Same-sex Families' in Paula Gerber and Adiva Sifris (eds), *Current Trends in the Regulation of Same-Sex Relationships* (Federation Press, 2010) 28, 29-32.
[71] For example Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999) and Senate Standing Committee on Community Affairs, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012). Those reports should be placed alongside the Forgotten Generations inquiries, that is investigation of intervention in nonIndigenous families, which suggests that administrators were not necessarily motivated by concern regarding race or attempting a form of ethnic cleansing.
[72] See Carlos Ball, *The Right To Be Parents* (New York University Press, 2012); and Paula Gerber, 'The Best Interests of Children in Same-sex Families' in Paula Gerber and Adiva Sifris (eds), *Current Trends in the Regulation of Same-Sex Relationships* (Federation Press, 2010) 28.
[73] Aristotle, *Politics* in Jonathan Barnes (ed), *The Complete Works of Aristotle II* (B Jowett trans, Princeton University Press, 1984) 1986, 1987.

properly fed, clothed, educated, housed and protected from harms. As that child matures the respect encompasses greater regard for the individual's autonomy, for example legal recognition of decision making through the notion of Gillick Competence highlighted in Chapter Four. Over a longer span it is evident in legal expectations regarding personal advancement through intergenerational wealth transfers.[74]

In discussing Vattel's taxonomy, noted in Chapter One of this dissertation, Domingo comments

> Roman jurists did not elaborate a legal theory based on personality or personhood, nor did they deal with human rights concepts as they are understood today. The person (*persona*) included all human beings, whether free or slave, regardless of whether he or she was considered a subject of rights and duties, and regardless of whether or not he or she had legal capacity. The legal unit par excellence in the Roman world was the family, governed by the *pater familias*. All its members, even if they were Roman citizens, were subject to his paternal authority (*patria potestas*). In fact, Roman law was primarily shaped as a law between families governed by a *pater*. This scheme of things, at least in part, passed into modern international law during the Ancien Régime as the law which governed relations between nations ruled by monarchs. Moral or legal persons were not considered persons in the strict sense.[75]

The identities of parent and child are ones that have consequences, in particular obligations and powers (for example to put a toddler to bed, 'ground' an older sibling or engage in mild physical chastisement). As with the Romans those consequences are specific to the family members or to entities acting in the family's stead. Powers and responsibilities (or, sadly, the expression of a self-concept in which one parent seeks to be 'the winner') are central to much of the family law, with parents and on occasion other members of an extended family going to court in disputes about who 'gets the children' and who influences their tastes, behaviour and association.

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[74] John de Groot and Bruce Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 4th ed, 2012). See more broadly Hendrik Hartog, *Someday All This Will Be Yours: A History of Inheritance and Old Age* (Harvard University Press, 2012); and George Marcus, 'The Deep Legacies of Dynastic Subjectivity: The resonances of famous family identity in private and public spheres', in João de Pina-Cabral and Antónia Pedroso de Lima (eds), *Elites: Choice, Leadership & Succession* (Berg, 2000) 9, 12.

[75] Rafael Domingo, 'Gaius, Vattel, and the New Global Law Paradigm' (2011) 22(3) *The European Journal of International Law* 627, 630.

The emphasis on obligations, alongside social valorisation of fatherhood, means that lineage may be disputed. We see for example reference to biometrics (DNA testing)[76] in claims about paternity fraud,[77] with for example a father refusing to support a child and mother on the basis that the child was actually the offspring of another man[78] or claiming damages for 'intentional infliction of emotional distress'. Thompson endorses Janet Dolgin's suggestion that US contested parentage litigation shifts conceptualisation of parentage from

> something that is socially fixed and biologically natural toward something that is more voluntaristic and enforceable through contracts expressing procreational intent'.[79]

Readers will recall a more subtle concern in relation to legal identity. Lineage (through blood or adoption of a minor) brings into being citizenship – a foundational identity – for the children of Australian parents.

How is lineage signified? From a formal perspective the determinative signifier is data in birth and adoption registers, which can for example be expressed through the birth certificates characterised in Chapter Eight below as fundamental documents of legal identity and which feature in contemporary debate about a mooted right for an adopted or assisted fertility child to know that person's biological parents.[80]

More subtly lineage is indicated through surnames (patronymics and matronymics) and, in a more social sense, through the choice of given name,[81] with individuals on

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[76] Lyn Turney, 'Paternity testing and the biological determination of fatherhood' (2006) 12(1) *Journal of Family Studies* 73; Michael Gilding, Entrepreneurs and legitimacy: a case study of the paternity testing industry in Australia' (2006) TASA 2006 Conference Proceedings; and An Ravelingien and Guido Pennings, 'The right to know your genetic parents: From open-identity gamete donation to routine paternity testing' (2013) 13(5) *The American Journal of Bioethics* 33.

[77] Michael Gilding, 'Rampant misattributed paternity: the creation of an urban myth' (2005) 13(2) *People and Place* 1; and Mark Bellis, Karen Hughes, Sara Hughes and John Ashton, 'Measuring paternal discrepancy and its public health consequences' (2005) 59 *Journal of Epidemiology & Community Health* 749.

[78] *Magill v Magill* [2006] HCA 51; and Lisa Young, 'Sex, lies and money: the High Court considers deceit and paternity fraud in Magill v Magill' (2007) 15(1) *Torts Law Journal* 1; and Lyn Turney, 'Paternity Secrets: Why Women Don't Tell' (2005) 11(2) *Journal of Family Studies* 227. In the UK see *A v B* [2007] 3 FCR 861. More broadly see Nick Wikeley and Lisa Young. 'Secrets and lies: no deceit down under for paternity fraud' (2008) 20(1) *Child and Family Law Quarterly* 81; Heather Draper, 'Paternity fraud and compensation for misattributed paternity' (2007) 33(8) *Journal of Medical Ethics* 475; and Joanna Fletcher and Samantha Horsfield, 'The tort of deceit and misrepresentations of paternity' (2007) 81(1/2) *Law Institute Journal* 42.

[79] Charis Thompson, *Making Parents: The Ontological Choreography of Reproductive Technologies* (MIT Press, 2007) 146.

[80] J David Velleman, 'Family History' (2005) 34(3) *Philosophical Papers* 357, 363 regarding gamete donation and for example Law Reform Committee, Victorian Parliament, *Inquiry into Access by Donor-Conceived People to Information about Donors* (2012).

[81] Beverly Seng, 'Like Father, Like Child: The Rights of Parents in their Children's Surnames' (1984) 70(6) *Virginia Law Review* 1303; Roderick Munday, 'The girl they named Manhattan: the law of forenames in France

occasion signalling a rejection or realignment of lineage through a change of name. Naming is discussed in Chapter Eight below.

Sexuality

Chapter Three noted notions of a non-majoritarian 'sexual citizenship' (in other words that all citizens enjoy equal rights, irrespective of sexual affinity)[82] that is for example inclusive of people with the identity of 'homosexual'[83] in contrast to the legally heteronormative or 'straight state'.[84]

That state is one in which individuals are legally identified and disadvantaged – a disadvantage that potentially includes imprisonment and capital punishment[85] – on the basis of sexual expression or sexual desire, in other words identity on the basis of what those people did in bed or who was in the bed (or other locations)[86] rather than necessarily in terms of the self-concept of those actors.[87]

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and England' (1985) 5(3) *Legal Studies* 331; James Scott, John Tehranian and Jeremy Mathias, 'The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname' (2002) 44(1) *Comparative Studies in Society & History* 4; and Yasuhide Kawashima, 'Marriage and Name Change in Japanese Family Law' (1992) 26 *University of British Columbia Law Review* 87.

[82] For a critique of that citizenship as mere consumerism see Eileen Richardson and Bryan Turner, 'Bodies as Property: From Slavery to DNA Maps', in Andrew Bainham, Shelley Sclater and Martin Richards (eds), *Body Lore and Laws* (Hart, 2002) 29, 37. See also Diane Richardson, 'Constructing Sexual Citizenship: Theorizing Sexual Rights' (2002) 20(1) *Critical Social Policy* 105; and Jeffrey Weeks, 'Live and Let Love? Reflections on the unfinished sexual revolution of our times' in Rosalind Edwards and Judith Glover (eds), *Risk & Citizenship: Key Issues in Welfare* (Routledge) 48, 60.

[83] For example *Renouf, Ray v Australian Broadcasting Commission and Gary Gibson* [2001] NTADComm 3: 'The complainant in this matter is a homosexual'.

[84] Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton University Press, 2009).

[85] Sharia law regimes such as those in Afghanistan, Iran, Saudi Arabia, Yemen and Iraq have attracted criticism from human rights advocates over execution of people who have expressed a same-sex affinity. Historically see criminal penalties in Australia and the United Kingdom through statutes such as *Offences Against the Person (England) Act 1828* (UK) s 15.

[86] Paul Flowers, Claire Marriott, and Graham Hart, ''The bars, the bogs, and the bushes': The impact of locale on sexual cultures' (2000) 2(1) *Culture, Health & Sexuality* 69; Paul Johnson, 'Ordinary folk and cottaging: law, morality, and public sex' (2007) 34(4) *Journal of Law and Society* 520; Derek Dalton, 'Policing outlawed desire: 'Homocriminality' in beat spaces in Australia' (2007) 18(3) *Law and Critique* 375; Derek Dalton, 'Gay Male Resistance in Beat Spaces in Australia: A Study of Outlaw Desire' (2008) 28 *Australian Feminist Law Journal* 97; Stewart Kirby and Iain Hay, '(Hetero) sexing space: gay men and "straight" space in Adelaide, South Australia' (1997) 49(3) *The Professional Geographer* 295; and Clive Moore, '"Poofs in the Park": Documenting Gay "Beats" in Queensland, Australia' (1995) 2 *GLQ* 319.

[87] The potential differentiation between self-concept, social perceptions of actors or action, and the legal identity is significant given that historically some men appear to have considered that they were what would now be termed 'straight' on the basis that they were the penetrative rather than receptive partner, that some activities – as illustrated in Sean Fewster, 'Father John Fleming defamation trial: court told he said sex acts 'just blokes mucking around'' *Adelaide Advertiser* (Adelaide) 14 October 2014, 3; and *Fleming v Advertiser-News Weekend Publishing Co P/L & Anor (No 2)* [2016] SASC 26, [111] – were conceptualised as just 'blokes mucking around', or that a wedding ring at a beat signified (if only to the wearer) that the person was not 'gay'.

The locus of identity in what Higgins dubbed the 'heterosexual dictatorship'[88] (centred on policing and criminalisation of actions outside the deemed norm, with that criminalisation resulting in and reinforcing discrete social and legal identities) was for many people a matter of public space. That space was a locus of identity because they had been arrested for sexual activity at those locations, attacked or blackmailed at those locations, or lived their lives in fear that they or people with whom they associated would encounter the state in relation to their sexual affinity[89] and be legally stigmatised on that basis,[90] a stigma reflected in for example the former 'homosexual panic defence'.[91]

That stigma might involve a criminal penalty or involve the denial of dignity and reduction of flourishing through exclusion from opportunities (such as military service),[92] migration,[93] employment as an official[94] and education.[95] The same identity was a preoccupation of the state and criminologists in the past, with followers

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[88] Patrick Higgins, *Heterosexual dictatorship: male homosexuality in postwar Britain* (Fourth Estate, 1996). For questions about autonomy and the choice of a gender or sexual identity (which might change over a person's lifetime) see Thomas Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford University Press, 2001) 162-177.

[89] Leslie Moran, 'The changing landscape of policing male sexualities: a minor revolution?' in Paul Johnson and Derek Dalton, *Policing Sex* (Routledge, 2012) 11.

[90] Todd Pettys, 'Sodom's Shadow: The Uncertain Line Between Public and Private Morality' (2010) 61(5) *Hastings Law Journal* 1161.

[91] *Lindsay v The Queen* [2015] HCA 16, [23] and [33]; and *Green v The Queen* (1997) 148 ALR 659. Among discussion regarding law reform, provocation and affinity see Kellie Toole, 'Law reform: South Australia and the defence of provocation' (2013) 38(4) *Alternative Law Journal* 270; Kent Blore, 'The Homosexual Advance Defence and the Campaign to Abolish it in Queensland: The Activist's Dilemma and the Politician's Paradox' (2012) 12(2) *QUT Law & Justice Journal* 38; Adrian Howe, 'Green v The Queen - The Provocation Defence: Finally Provoking Its Own Demise?' (1998) 22(2) *Melbourne University Law Review* 466; Sarah Oliver, 'Provocation and Non-violent Homosexual Advances' (1999) 63(6) *Journal of Criminal Law* 586; Santo de Pasquale, 'Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy' (2002) 26(1) *Melbourne University Law Review* 110; and Jeff Sewell, '"I Just Bashed Somebody Up. Don't Worry About it Mum, He's Only a Poof": The "Homosexual Advance Defence" and Discursive Constructions of the "Gay" Victim' (2001) 5 *Southern Cross University Law Review* 45.

[92] Demetrios Simopoulos and Lawrence Murphy, *Perverts by official order: The campaign against homosexuals by the United States Navy* (Routledge, 1988). Note however the scope for subversion by 'passing', evident in Randy Shilts, *Conduct Unbecoming: Gay and Lesbians in the U.S. Military: Vietnam to the Persian Gulf* (St Martin's Press, 1993); Garry Wotherspoon, 'Comrades-in-Arms: World War II and Male Homosexuality in Australia', in Joy Damousi and Marilyn Lake (eds), *Gender and War: Australians at War in the Twentieth Century* (Melbourne University Press, 1995) 205; and Allan Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War II* (Free Press, 1990). Among works on DADT see Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997) 105.

[93] Shannon Minter, 'Sodomy and public morality offenses under US immigration law: Penalizing lesbian and gay identity' (1993) 26(3) *Cornell International Law Journal* 771. In contrast see Kristen Walker, 'Sexuality and refugee status in Australia' (2000) 12(2) *International Journal of Refugee Law* 175.

[94] David Johnson, *The lavender scare: The cold war persecution of gays and lesbians in the federal government* (University of Chicago Press, 2004); David Kelly, *Hoover's War on Gays* (University of Kansas Press, 2015); Daniel Robinson and David Kimmel, 'The Queer Career of Homosexual Security Vetting in Cold War Canada' (1994) 75(3) *Canadian Historical Review* 319; Garry Wotherspoon, 'The Greatest Menace Facing Australia: Homosexuality and the State in NSW During the Cold War' (1989) 56 *Labour History* 15; and Graham Willett, 'The darkest decade: Homophobia in 1950s Australia' (1997) 27(109) *Australian Historical Studies* 120.

[95] William Wright, *Harvard's Secret Court: The Savage 1920 Purge of Campus Homosexuals* (St. Martin's Press, 2005).

of Lombroso in Australia and other jurisdictions worrying that people with a same sex affinity were innately criminal (for example could not be trusted with money)[96] and hoping for techniques that would allow reliable detection of 'deviants'.[97]

Such techniques were desired because people with a deleterious legal identity on the basis of their sexual affinity typically looked like their 'normal' peers[98] and thus were not necessarily legible. Given an awareness of the legal consequences of different sexual affinity many people historically subverted expectations about the identity by not disclosing their preferences or history. Some expressed their identity in private. Some engaged in what theorists have described as 'passing' (appearing to be straight)[99] or more recently in 'covering' ('acting gay looking straight'), with Yoshino for example commenting that

> In the new generation, discrimination directs itself not against the entire group, but against the subset of the group that fails to assimilate to mainstream norms. This new form of discrimination targets minority cultures rather than minority persons. Outsiders are included, but only if we behave like insiders - that is, only if we cover.[100]

Australian human rights legislation, alongside decriminalisation of same sex activity – and hence that affinity – (which Chapter Five noted occurred as late as 1997 in Tasmania)[101] has reflected and reinforced social acceptance of sexual diversity in the form of a 'gay' self-concept and community.[102] We can expect to see ongoing

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[96] Derek Dalton, 'Genealogy of the Australian Homocriminal Subject: A study of two explanatory models of deviance' (2007) 16(1) *Griffith Law Review* 83; and Walter Fogarty, '"Certain Habits": The Development of a Concept of the Male Homosexual in New South Wales Law, 1788–1900', in Robert Aldrich and Gary Wotherspoon (eds), *Gay Perspectives: Essays in Australian Gay Culture* (University of Sydney, 1992).
[97] Matt Cook, *London and the Culture of Homosexuality, 1885-1914* (Cambridge University Press, 2003).
[98] Editor, 'Straight men may be confused for gay men: ACL' SkyNews 16 February 2016, www.skynews.com.au/news/national/nsw/2016/02/16/straight-men-may-be-confused-for-gay-men--acl.html in which Australian Christian Lobby spokesperson Lyle Shelton expresses concern that if Australia legalises same-sex marriage people could assume heterosexual men such as himself are gay.
[99] Derek McGhee, *Homosexuality, Law and Resistance* (Routledge, 2001) 40.
[100] Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House, 2006) 22.
[101] See Chapter Five above; and Clare Parker, and Paul Sendziuk, 'It's Time: The Duncan Case and the Decriminalisation of Homosexual Acts in South Australia' in Yorick Smaal and Graham Willett, *Out Here: Gay and Lesbian Perspectives* (Monash University Publishing, 2011) 17, highlighting consequences of criminalisation and the scope for law reform.
[102] Pierre Bourdieu, 'The Social Space and the Genesis of Groups' (1985) 14(6), *Theory and Society* 723. For discussions of community formation and activism around a deleterious identity see Dennis Altman, 'The Emergence of Gay Identity in the USA and Australia', in Christine Jennet and Stewart Randal (eds), *Politics of the Future: The Role of Social Movements* (Macmillan, 1989) 30; Dennis Altman, *Power and Community: Organizational and Cultural Responses to AIDS* (Routledge, 1994); Tyler H Sutton, 'The Emergence of a Male Global Gay Identity: A Contentious and Contemporary Movement' (2007) 15(1) *Totem: The University of Western Ontario Journal of Anthropology* 51; and John Ballard, 'The Constitution of AIDS in Australia: Taking Government at a Distance Seriously' in Mitchell Dean and Barry Hindess (eds), *Governing Australia: Studies in Contemporary Rationalities of Government* (Cambridge University Press, 1998) 125, 134.

discourse about particular expressions, for example sadomasochistic practice,[103] and about associated matters such as censorship of erotica. From a dignitarian perspective that celebrates autonomy we might look askance at the essentialist view of gender and sexuality inherent in Dworkin's claim that 'Pornography exists because men despise women and men despise women in part because pornography exists',[104] an assertion at odds with the existence of gay erotica but consistent with her explanation that

> intercourse is the pure, sterile, formal expression of men's contempt for women; but that contempt can turn gothic and express itself in many sexual and sadistic practices that eschew intercourse per se.[105]

In practice a same-sex affinity remains a legal identity marked by civil disability, a 'citizenship lite' identity through for example the current restriction on gay marriage. Reference to 'current' restriction is deliberate, given that comparable jurisdictions such as the United Kingdom and Canada have made statutory provision for the marriage (and divorce) of same sex partners.

The change demonstrates that the values associated with and fostered by legal identities are contingent, and that as noted in Chapter Eleven we should be alert to opportunities to foster flourishing through law reform. We no longer encounter police commissioners warning that a same sex affinity is the 'greatest social menace' facing Australia;[106] menaces are culturally contingent and commissioners are now preoccupied with the terrorists, outlaw motorcycle gangs and 'identity thieves' discussed in Chapter Nine and Ten below.

Law reform is relevant, given that particular institutions foster social stigma relating to sexual affinity and that although Australia has human rights legislation at the national and state/territory levels that is respectful of sexual diversity there has been a

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[103] *R v Brown* [1993] 2 All ER 75; and Chris White, 'The Spanner Trials and the Changing Law on Sadomasochism in the UK' (2006) 50(2/3) *Journal of Homosexuality* 167.
[104] Andrea Dworkin, 'Pornography and Grief', in her *Letters From A War Zone: Writings 1976-1989* (Dutton, 1989) 23. For similar essentialising views see Christopher N Kendall, 'Gay Male Pornography and the Sexualization of Masculine Identity' in Laura Lederer and Richard Delgado (eds), *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* (Hill & Wang, 1995) 102; and Christopher N Kendall, *Gay Male Pornography: An Issue Of Sex Discrimination* (UBC Press, 2004).
[105] Andrea Dworkin, *Intercourse* (Basic Books, 2nd ed, 2006) 175.
[106] NSW Commissioner Colin Delaney quoted in Frank Bongiorno, *The Sex Lives of Australians: A History* (Black Inc, 2012) 217. See also reference at 260 to a 1968 survey in which 80% of respondents endorsed criminalisation of consensual acts in private.

history of governments passing responsibilities for social services to offshoots of those institutions and funding their delivery of services delivery.[107]

In recognising the importance of symbolism in shaping perceptions – law as something that provides signals rather than is necessarily punitive – we should be aware of how identities are perceived. We would not endorse a religious organisation's refusal to employ people on basis of ethnicity. Some entities such as the Roman Catholic Church and Church of the Latter Day Saints however restrict opportunities for flourishing by continuing to restrict their highest positions to males, a permitted restriction that tells us about something about the ambivalence of the liberal democratic state regarding identity construction, identity remediation and private sphere. Should the state endorse organisations that discriminate on the basis of sexual affinity?

More broadly, should the Australian state as an embodiment of liberal democratic values adopt a robust stance in response to anxieties about the international extension of human rights, implicitly the protection of legal identities that are deemed to be 'western' and are dissonant with the values of authoritarian states such as Iran, China and Saudi Arabia.[108] Those states enshrine public and private violence against people who breach heteronormative conventions that are valorised as an expression of national integrity or demanded by law founded on religious dictates.[109] Should we more fully respect sexual affinity in claims for refugee status?

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[107] Note Australian Human Rights Commission, *Addressing Sexual Orientation and Sex And/or Gender Identity Discrimination: Consultation Report* (2011); the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth); and Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013).

[108] Discourse theorists may note rhetoric in which references to a globalising liberal democratic Homintern or homonationalism replaces anxieties about the Comintern. See for example Joseph Massad, *Desiring Arabs* (University of Chicago Press, 2007) and Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007). Massad's 'Re-Orienting Desire: The Gay International and the Arab World' (2002) 14(2) *Public Culture* 361 offers an Occidentalist critique of human rights advocacy featuring claims that 'the Gay International' is engaged in a global campaign directed at 'the Muslim world' by the secular/Christian West. Massad's view is at odds with historical studies such as Khaled El-Rouayheb, *Before Homosexuality in the Arab-Islamic World, 1500-1800* (University of Chicago Press, 2005).

[109] One reason for the human rights advocacy decried by Massad (and by peers in for example Uganda and Kenya) is a recognition that 'dissonant' identities in much of the Middle East and Africa potentially involve penalties such as public hanging or stoning. See for example Darius Rejali, 'Studying a practice: an inquiry into lapidation' (2001) 10(18) *Middle East Critique* 67; Abdel Sidahmed, 'Problems in Contemporary Applications of Islamic Criminal Sanctions: The Penalty for Adultery in Relation to Women' (2001) 28(2) *British Journal of Middle Eastern Studies* 187; Brian Whitaker, *Unspeakable Love: Gay and Lesbian Life in the Middle East* (University of California Press, 2006) 123 and 192; and Daniel Englander, 'Protecting the Human Rights of LGBT People in Uganda in the Wake of Uganda's' 'Anti Homosexuality Bill 2009'' (2011) 25(3) *Emory International Law Review* 1263.

Dworkin, alongside the more eloquent MacKinnon, sought greater policing of sexual activity, at odds with the permissiveness inconsistently advocated by Foucault and less prominent identity theorists such as Lyotard who were noted in Chapter Two. In thinking about contingency it is useful to recognise continuities.

We have moved on from the preoccupation with prohibited degrees (for example marriage of cousins) that engaged law reformers in Victorian and Edwardian England[110] but continue to criminalise tabu activity[111] such as incest,[112] in other words consensual or other sexual activity with biological children, step-children and siblings.[113] Abhorrence of activity with nonhuman animals[114] is evident in early colonial law and its precursors (for example death for buggering the ship's pig,[115] a calf[116] or dog,[117] two years hard labour for intent to bugger a calf, and ritual hanging or burning of the unfortunate animals in earlier times).[118] Bestiality continues to be a crime (with contemporary prosecutions for possession of images[119] and engagement in the 'crime against nature'),[120] perhaps because there are few people whose practice matches that identity.[121]

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[110] Adam Kuper, *Incest and Influence: The Private Life of Bourgeois England* (Harvard University Press, 2009); and Nancy Anderson, 'The 'Marriage with a Deceased Wife's Sister Bill' Controversy: Incest Anxiety and the Defense of Family Purity in Victorian England' (1982) 21(2) *The Journal of British Studies* 67. Restriction regarding the prohited degrees, which extends beyond the bloodline, features in *Marriage Act 1961* (Cth) s 23B(2).

[111] Elizabeth Archibald, *Incest and the medieval imagination* (Oxford University Press, 2001) 10, 21, 26 and 30; and Roy Wagner, 'Incest and identity: a critique and theory on the subject of exogamy and incest prohibition' (1972) 7(4) *Man* 601.

[112] Vikki Bell, *Interrogating incest: Feminism, Foucault and the law* (Routledge, 1993) 40 and 92. Among recent convictions see *Sanders (a Pseudonym) v The Queen* [2016] VSCA 6, [1]; *Ryder v The Queen* [2016] VSCA 3, [1]; *DPP v Tanner (a pseudonym)* [2015] VCC 1915, [14]; *Weston (a pseudonym) v The Queen* [2015] VSCA 354, [2]; *DPP v Clay* [2013] VCC 501, [9]-[10]; *Stark v The Queen* [2013] VSCA 34, [10]; *M A v The Queen* [2013] VSCA 20, [9]-[12]; *R v RAI* [2011] QCA 64, [6]-[7]; *DPP v Donaldson, Stephen Michael (a pseudonym)* [2010] VCC 1708, [1]-[5]; *R v CC* [2016] ACTSC 41, [1]; and *R v Madden* [2015] QDC 340, [25].

[113] For example *Crimes Act 1958* (Vic) s 44; *Crimes Act 1900* (NSW) s 78; *Criminal Law Consolidation Act 1935* (SA) s 72; *R v G Scc* [1989] ACTSC 53; *R v G* [1993] TASSC 70; *R v D H* [2003] VSCA 220; *R v Bellerby* [2009] VSCA 59; *R v Dales* [1995] QCA 329; and *R v PLK* [1999] VSCA 194.

[114] Piers Beirne, 'Rethinking Bestiality: Towards a Concept of Interspecies Sexual Assault' (1997) 1(3) *Theoretical Criminology* 317. For another view of law reform see Jens Rydström, *Sinners and Citizens: Bestiality and Homosexuality in Sweden, 1880-1950* (Amsterdam University Press, 2003).

[115] *R v Jones* [1833] TASSupC 6.

[116] Samuel Morison (ed), *William Bradford Of Plymouth Plantation, 1620-1647* (Knopf, 1952) 320-321.

[117] *R v Smith (No 3)* [1834] NSWSupC 125.

[118] *R v Wells* [1833] TASSupC 3.

[119] *Bounds v R* [2006] HCA 39; (2006) 228 ALR 190; *Sun v Evans* [2009] WASC 91; *Badcock v White* [2004] TASSC 59; *Furber v R* [2008] WASCA 233; and *Foster v Filz* [2002] TASSC 23.

[120] *R v CAP* [2009] QCA 174.

[121] See for example *Crimes Act 1900* (NSW) ss 79 and 80; *Criminal Code Act* (NT) s 138; *Criminal Code 1899* (Qld) s 211; *Criminal Law Consolidation Act 1935* (SA) s 69; *Criminal Code* (Tas) s 122 and *Crimes Act 1958* (Vic) s 59 and *Criminal Code* (WA) s 181. Engagement in or commissioning of bestiality for a publication is prohibited, for example, by the *Classification (Publications, Films & Computer Games) Enforcement Act 1995* (Tas) s 72, with possession of such a publication being an offence under s 74 of that Act. For an example of contemporary production see *Nicholas v Hibble* [2007] TASSC 26.

Faiths

For most of human history a faith-centred affinity has been determinative, with religious institutions and authority figures enjoying privileges and heterodoxy being criminalised. With secularisation religion in recent authoritarian states has been superseded by another faith-centred affinity, that is adherence to the doctrines and authority structures of the dominant (if not exclusive) political party.

How we view nature, other species and the appropriateness of relations between humans has often been determined by religious doctrine and enforcement by or on behalf of religious institutions. Religion is a system of belief involving faith in metaphysical entities such as deities, demons and angels, some of which are indifferent to humanity and others negatively or positively agentic on a day-by-day basis (curing cancer through invocation in prayer but inexplicably not regenerating severed limbs). It is a way of knowing, something that along with law allows us to understand our 'lifeworld' and provide norms for behavior. In Australia freedom of religion has been characterised as a fundamental 'because of the value of religion to a person whose faith is a central tenet of their identity'.[122]

Adherence to a particular belief system is not a foundational identity. Australian law does not require people to belong to a specific church or be an adherent of any faith, religious or otherwise, consistent with conceptualisation freedom of religion as 'of the essence of a free society' and the 'paradigm freedom of conscience'.[123] The state regards religious institutions as productive of social goods[124] and accordingly offers them favourable taxation treatment and other dispensations such as lower local government fees/charges.[125] In Australia however it does not automatically transfer

[122] *Christian Youth Camps Limited v Cobaw Community Health Services Limited* (2014) 308 ALR 615, Redlich JA at [560].
[123] *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, Mason CJ and Brennan J at 130. For indications of diversity see Gary Bouma, *Australian Soul: Religion and Spirituality in the Twenty-First Century* (Cambridge University Press, 2006) 58-65.
[124] G E Dal Pont, *The Law of Charity* (LexisNexis Butterworths, 2010) 213; and Kerry O'Halloran, *Religion, Charity and Human Rights* (Cambridge University Press, 2014).
[125] *Australian Charities and Not-for-Profits Commission Act 2012* (Cth). For a criticism see Max Wallace, *The Purple Economy: Supernatural Charities, Tax and the State* (Australian National Secular Association, 2007) 114 and 173. Those concessions might be a reflection of the substantive/perceived political power of specific institutions such as Hillsong, for which see Amanda Lohrey, *Voting for Jesus: Christianity and Politics in*

wealth from individual adherents to each person's specified church via the taxation system,[126] a transfer determined by the individual's legal identity as for example a Lutheran.[127] Recognition as a religious denomination has statutory basis,[128] with associations being required to incorporate if they wish to legally bring marriages into being rather than merely bless the particular relationship. (As discussed in the following chapter there is no requirement for the faith *per se* to incorporate and what people often misconstrue as a unitary legal identity is instead a cluster of discrete bodies united through a shared system of belief and broad adherence to one or more figures of authority.)

Secularisation[129] and recognition of the multicultural nature of Australian society[130] means that faith – in particular adherence to the doctrines of and formal membership of a particular religious sect – is no longer a fundamental legal identity.[131] Neither apostasy nor heterodoxy are crimes; as noted in preceding chapters we refrain from burning witches, beheading supposed sorcerers or lapidation of heretics.[132] Those legal identities are no longer salient in Australia. There is no registration of individual

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Australia (Black Inc, 2006) and Marion Maddox, *God Under Howard: The Rise of the Religious Right in Australia* (Allen & Unwin, 2005), or of adherents collectively.

[126] Heinrich de Wall, 'Church Tax, Subsidies and State Aid–Church Funding in Germany' in Francis Messner (ed), *Public Funding of Religions in Europe* (Ashgate, 2015) 109, 110; David Durisotto, 'Financing of Churches in Italy' (2010) 165 *Law & Justice – The Christian Law Review* 159, 162; and Vincenzo Pacillo, 'Public Funding of Religious Groups in Italy' in *Public Funding of Religions in Europe* in Francis Messner (ed), *Public Funding of Religions in Europe* (Ashgate, 2015) 149, 164.

[127] That transfer allows the state to sidestep direct funding of religious entities, significant because the liberal democratic state is meant to be neutral in relation to the choice of religion. See the broader discussion in Kerry O'Halloran, *Religion, Charity and Human Rights* (Cambridge University Press, 2014).

[128] For example through proclamation under the *Marriage Act 1961* (Cth) s 26

[129] As one indicator see Bertelsmann Stiftung: 28% of the population see themselves as not at all religious, with religious practices and beliefs barely featuring in their lives. 25% classify themselves as 'deeply religious', 44% report that they consider themselves 'religious' but that religion does 'not play a central role in their lives'. 48% 'do not partake in personal prayer'; 52% never or very seldom visit a church, mosque, synagogue or temple for religious reasons. 31% report that they did not believe in 'God or a divine power or in life after death'. 50% consider religion 'the least important' relative to family, partners, work, leisure time and politics. Bertelsmann Stiftung, 'Australia is not 'God's own country'' (International Religion Monitor) (Bertelsmann Stiftung, 2008) 5.

[130] Australian Bureau of Statistics, *Year Book 2015*.

[131] The concern in this chapter is with faith as a legal attribute. Formal religious affiliation or expression of belief in a 'higher' or other force may be fundamental to an individual's self-conceptualisation and may be politically significant but, with the exception of members of the clergy, typically does not construct a legal identity. Belief in an afterlife or one of the smorgasbord of divinities on offer in 2011 may determine a person's adherence to legal rules and perceptions of justice but does not endow that believer with a particular legal status. For perspectives on religious affiliation see James Jupp (ed), *The Encyclopedia of Religion in Australia* (Cambridge University Press, 2009). Insights regarding the political status of religion are provided in Amanda Lohrey, *Voting for Jesus: Christianity and Politics in Australia* (Black Inc, 2006); David Marr, 'The Spires of St Mary's', in *The High Price of Heaven* (Allen & Unwin, 1999) 215; and Marion Maddox, *God Under Howard: The Rise of the Religious Right in Australia* (Allen & Unwin, 2005).

[132] That is not necessarily the case elsewhere. See for example Perry S Smith, 'Speak No Evil: Apostasy, Blasphemy and Heresy in Malaysian Syariah Law' (2003) 10 *UC Davis Journal of International Law & Policy* 357; and David Forte, 'Apostasy and Blasphemy in Pakistan' (1994) 10 *Connecticut Journal of International Law* 27.

belief and sociologists have on occasion used the analogy of a smorgasbord to describe the avidity with which some believers have sampled a succession of faiths.[133]

Despite John Downer's 1890s expectations about federation building a 'Christian Commonwealth', Australian law has been interpreted as representing a separation of church and state.[134] That was not the case in the past, with orthodoxy being a prerequisite for full participation in civil society (for example through formal religious tests for property ownership, voting and standing as a witness).[135] That non-establishment of a state church predates the recent statement in the UK High Court by Lord Justice Laws that British law could not be used to protect one religion above another. Laws indicated that Christianity deserves no protection in law above other faiths: to privilege one metaphysical system would be 'irrational, divisive, capricious and arbitrary'.[136] Exclusive protection of one faith

> however long its tradition, however rich its culture, is deeply unprincipled and would give legal force to a subjective opinion, leading to a "theocracy".[137]

As the High Court noted in the 'Scientology Case', 'religious conviction is not a solvent of legal obligation'.[138] Adherence to a particular faith or to conventions associated with that faith, for example the veiling of women, does not override legal requirements regarding individuation. Muslim women for example can be required to 'uncover' and there is no faith-based exemption from photo IDs.[139]

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[133] Markus Davidsen, 'Jediism: A Convergence of Star Wars Fan Culture and Salad Bar Spirituality' (2011) 51 *Die Filosoof* 24.

[134] At a national level note the 'non-establishment clause' in the Australian Constitution s 116, considered in *Adelaide Company of Jehovah's Witnesses Inc. v The Commonwealth* [1943] HCA 12; (1943) 67 CLR 116. The Constitution is discussed in Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18(2) *Monash University Law Review* 208; Joshua Puls, 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26(1) *Federal Law Review* 139; and more broadly in Tom Frame, *Church and State: Australia's imaginary wall* (UNSW Press, 2006).

[135] Reconstruction of religiously heterodox identities in the UK through for example the *Jewish Disabilities Act 1858* (c.49 21 and 22 Vict), *Universities Tests Act 1871* (c.26 34 and 35 Vict) and *Catholic Emancipation Act 1829* (c.7 10 Geo IV) is highlighted in David Cesarani, 'British Jews', in Rainer Liedtke and Stephan Wendehorst (eds), *The Emancipation of Catholics, Jews & Protestants: Minorities and the Nation State in Nineteenth Century Europe* (Manchester University Press, 1999) 33; and Ian Machin, 'British Catholics' at 11 in the same volume. As noted above, the UK monarch – and, it appears, implicitly the Queen of Australia – is currently subject to a religious test.

[136] *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1.

[137] *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1.

[138] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40; (1983) 154 CLR 120. Case law such as *R v White* [1996] QCA 104; *R v Fletcher* [2005] NSWCCA 338; *Alan Arthur Farrell v R* [1996] TASSC 58; *R v Robinson* [1999] NSWCCA 172; *R v Pritchard* [1999] NSWCCA 182; *Ryan v R* [2001] HCA 21; 206 CLR 267 and *R v Coswello* [2009] VSCA 300 demonstrates that individuals who profess a strong commitments to particular theological tenets and are perceived to be of 'unblemished character' have on occasion been guilty of egregious sexual abuses and other offences.

[139] *Emanuel and Anor v State of Queensland* [2011] QCAT 731.

In contemporary Australia there is an inferred identity through categorisation in the national census,[140] which features a broad categorisation of faiths (subversive self-identification as a Jedi or Pastafarian, which falls outside the Australian Standard Classification of Religious Groups, is for example accommodated under the 'other' category).[141]

That identity does not have direct consequences. It is instead noteworthy as an illustration of the governmentality discussed by Foucault and Rose, with some Australians presumably parsing their peers into worthy 'believers' and unworthy 'others'. The identity is consistent with law's weak recognition of a deity. That recognition is expressed through the option of oaths in judicial proceedings[142] and associated exegesis by courts prior to development of uniform evidence law,[143] at a more rarified level through measures such as the title of the monarch since 1973 ('by the Grace of God Queen of Australia')[144] and public prayer in legislatures,[145] and through recognition of particular holy days through proclamation and licensing or

[140] The 'Religion' question in the Census of Population & Housing is the only non-compulsory question in that Census. As far as could be determined for this dissertation there have been no prosecutions in relation to that question under the *Census & Statistics Act 1905* (Cth).

[141] Australian Bureau of Statistics, *The 2001 Census, Religion and the Jedi* (2001); Adam Possamai, Yoda Goes To The Vatican: Youth Spirituality and Popular Culture (2007 Charles Strong Lecture); and Jennifer Porter, 'I Am A Jedi: Star Wars Fandom, Religious Belief and the 2001 Census', in Matthew Kapell and John Lawrence (eds), *Finding the force in the Star Wars Franchise* (Peter Lang, 2006) 95.

[142] See for example *Oaths Act 1867* (Qld) s 21 ('so help you God'); *Oaths Act 1900* (NSW) s 11A ('I swear by Almighty God as I shall answer to God at the Great Day of Judgment…'); *Oaths, Affidavits & Statutory Declarations Act 2005* (WA) s 4; and *Evidence Act 1995* (Cth) s 24. Note that the statutes now typically do not require use of a religious text or belief, for example s 4(2) of the WA *Oaths Act* states that 'The fact that at the time of taking an oath a person has no religious belief does not affect the validity of the oath'. The *Evidence Act 1995* (NSW) s 24(2) and *Oaths Act 1900* (NSW) s 11A(6)(c) indicate that the oath is effective even if religious belief or comprehension is absent. The *Evidence Act 2001* (Tas) s 24(2) provides that the oath is effective even if the person 'did not have a religious belief or did not have a religious belief of a particular kind or did not understand the nature and consequences of the oath'. See also Michael Gordon, 'The Invention of a Common Law Crime: Perjury and the Elizabethan Courts' (1980) 24(2) *American Journal of Legal History* 145; and John Spurr, 'A profane history of early modern oaths' (2001) 6(11) *Transactions of the Royal Historical Society* 37.

[143] The statutory provisions in the preceding note supersede more stringent requirements voiced by past courts, illustrating that law's formal construction of witness capability has changed radically over the past thirty years. In *Cheers v Porter* [1931] HCA 51; (1931) 46 CLR 521 for example the High Court drew on *R v White* (1786) 1 Leach 430, 168 ER 317 in requiring the person's understanding of an oath as 'a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of heaven, if he do not speak the truth; and therefore a person who has no idea of the sanction which this appeal to heaven creates, ought not to be sworn as a witness in any Court of Justice'. That expectation was discernable as late as *R v Brown* (1977) Qld R 220, with the dictum that the 'qualification of a witness to take an oath is that the witness has a belief in God and an expectation that God will reward or punish in this world or the next', and *Attorney-General's Reference* [1994] TASSC 79; (1994) 4 Tas R 26. A broader shift in law's use of oath-taking is highlighted in Richard Willen, 'Rationalization of Anglo-legal culture: the Testimonial Oath' (1983) 34(1) *British Journal of Sociology* 126.

[144] *Royal Style and Titles Act 1973* (Cth) s 2. The *Royal Style and Titles Act 1953* (Cth), reflecting its UK counterpart, had referred to the monarch as 'by the Grace of God' and as 'Defender of the Faith'.

[145] Gonzalo Puig and Steven Tudor, 'To the Advancement of Thy Glory? A Constitutional and Policy Critique of Parliamentary Prayers' (2009) 20(1) *Public Law Review* 56.

industrial relations statutes.[146] The current Preamble to the national Constitution refers to the people of the colonies 'humbly relying on the blessing of Almighty God'; proposals in 1999 for a stronger reference or alternative references to 'spiritual wealth' were unsuccessful.[147]

Courts have been wary about perceived favouritism of one faith in public institutions,[148] with adherence to a specific faith in education or other services being accommodated through state support for faith-centred institutions, most notably the introduction of national government funding of sectarian primary and secondary schools – a pragmatic solution under Menzies. Those institutions can and do exclude students and patients on the basis of faith.[149] Given that a basis of adherence is a claim of exclusive truth it is unsurprising that advocates of particular faiths have derided rival faiths, whose adherents on occasion have resorted to anti-discrimination law after for example statements regarding self-styled witches,[150] satanism[151] and Islam[152] or unavailingly relied on archaic law regarding blasphemy.[153] That law protected a specific faith, in other words only the established Church of England.

Law enshrines particular tests and values. Belief in a deity and in the deity's agency is no longer a prerequisite in the provision of evidence and other indicia of a commitment to truth telling, with people for example being able to affirm rather than take an oath relating to their particular faith. That flexibility is a reflection of both

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[146] For protection of Good Friday (along with Anzac Day) see for example *Liquor Act 1992* (Qld) s 12; *Holidays Act 1983* (Qld) s 2; *Liquor Control Act 1988* (WA) s 98E; *Sunday Entertainments Act 1979* (WA) s 3; and *Door-to-Door Trading Act 1991* (ACT) s 9. Production of a hegemony through recognition of Good Friday as a 'temporal marker' is reflected in for example *Constitution Act 1934* (SA) s 28 and *Evidence Act 1958* (Vic) s 58J.

[147] George Williams, Mark McKenna and Amelia Simpson, 'With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (2001) 24(2) *University of New South Wales Law Journal* 401; and Marion Maddox, 'With Hope in God: Religion, the Preamble Debate and Public Values in Australia' in Brian Howe and Alan Nichols (eds), *Spirit of Australia: Religion and National Life* (Australian Theological Forum, 2001) 150. Maddox quotes Archbishop (later Governor-General) Peter Hollingsworth's reference to the preamble to the Irish Constitution: 'In the name of the most Holy Trinity, from whom all power is derived and to whom all acts of men are ultimately referable'.

[148] *A obo V and A v Department of School Education* [1999] NSWADT 120, [29]-[30].

[149] Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30(1) *Adelaide Law Review* 31.

[150] *Fletcher v Salvation Army Australia (Anti Discrimination)* [2005] VCAT 1523.

[151] *Ordo Templi Orientis v Legg (Anti Discrimination)* [2007] VCAT 1484.

[152] *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284. See also Nicholas Aroney, 'The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34(2) *Federal Law Review* 287.

[153] Bede Harris, 'Pell v. Council of Trustees of the National Gallery of Victoria - Should Blasphemy Be a Crime - The Piss Christ Case and Freedom of Expression' (1998) 22(1) *Melbourne University Law Review* 217. Note George Pell, 'Religion, Christianity and Social Capital' in Scott Mason and Daniel Wood (eds), *Future Proofing Australia: The Right Answers For Our Future* (Melbourne University Press, 2013) 20, 26 and 25 regarding tolerance in the face of the 'soft despotism' of secularism.

secularisation (the devalorisation of faith) and the pragmatic nature of Australian law, with the court in *Damon v R* for example commenting that

> In the apparently primitive, the curse on the perjurer is to take effect in this world, but as nations became more observant, experience must have shown that bears and tigers were as apt to kill truth tellers as perjurers and that even lightning would strike without moral discrimination." … by the 16th century it was well recognised that the theory of the oath was a subjective one being, "a method of reminding the witness strongly of divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to speak only the truth as he saw it".[154]

Employment and its others

The preceding chapter suggested that freedom of movement and of association – facets of possessive individualism – was a basis for flourishing, reflected in contemporary Australia's recognition of legal identities of employer, employee, contractor and trade union. The expectation is that people will be free to pursue their own interests through choices about where they work and for whom they work or whom they employ, in contrast for example to geographical restrictions using 'internal passports' or other residency regimes and egregious denials of agency in the form of slavery and serfdom that tied the labourer to a superior and restricted that labourer's opportunities to acquire new skills.

The assumption in Australian law is that each employee will faithfully serve the employer (an entity that might be a natural person or one of the artificial persons discussed in Chapter Seven).[155] In return the employer (a legal person who engages a person to work under a contract of employment and exercises some control over how that work is performed)[156] will reward the employee (someone who works under a contract of employment rather than under another contract) and take some care to

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[154] *Damon v R* [1985] TASSC 6, Underwood J at [38].

[155] The employee's traditional duty of fidelity and good faith can be regarded as part of the broader mutual duty of trust and confidence; may be reinforced through express loyalty obligations and coexist with a status-based fiduciary duty to the employer discussed in for example *Helmet Integrated Systems Ltd v Tunnard* [2007] IRLR 126. The fidelity and good faith duty is analogous in the statutory and common law expectation that the director of a company, a legal identity discussed in Chapter Seven below, will put that company's interests ahead of her own if those interests are in conflict. See for example *Corporations Act 2001* (Cth) ss 181(1); *ASIC v Adler* [2003] NSWCA 131; and *R v Byrnes* (1995) 13 ACL 1488.

[156] See for example *Income Tax Assessment Act 1936* (Cth) s 221A(1); *Stevens v Brodribb Sawmilling Pty Ltd* (1986) 160 CLR 16; and *Hollis v Vabu* (1986) 160 CLR 16, 40.

protect the latter from harms in the workplace,[157] with protection being reinforced by arms of the state (particularly occupational health & safety agencies)[158] and employee collective bodies that also advocate for higher rewards.[159] Those collective bodies are typically characterised as unions;[160] they have discrete legal identities that come into being through registration and are bounded by statute.

The traditional 'master and servant' model of employment, which centres on two discrete legal identities, is discernable from at least 1349 and criminalised 'disloyalty' by the servant.[161] Contrary to views that contemporary identity questions are unique that epoch was one of economic disruption similar to our own, although attributable to mass death and consequent wage rises following pandemics rather than irrational exuberance in the boardrooms and the demise of blue/white-collar jobs through automation and offshoring. [162]

Labour market statutes enshrined obligations to serve, provisions for punishment and forced labour for those who refused to serve (in other words identities that we would now characterise as unemployment benefit recipients), and notional price controls.[163] Subsequent Master and Servant statutes established the identity of employer and employed; they were in force in most Australian states until the 1970s.[164] The pragmatic nature of legal development in Australia meant that despite their mediaeval origins and increasingly anachronistic language they were enforced into the twentieth

[157] See for example *Occupational Health & Safety Act 1989* (ACT) s 5; *Workplace Privacy Act 2010* (ACT) s 10; and *Work Health & Safety Act 2012* (Tas) s 8.
[158] For example Work Safe NSW under the *Work Health & Safety Act 2011* (NSW) and *Explosives Act 2003* (NSW); and WorkSafe ACT under the *Work Health & Safety Act 2011* (ACT).
[159] For industrial action see in particular *International Covenant on Economic, Social and Cultural Rights* Art 8(1), discussed in Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010).
[160] We typically do not regard the professional bodies, such as the state/territory Law Societies, the Australian Medical Association, the Royal Australian Institute of Architects and the specialist medical colleges, as trade unions but they have a similar function to the blue collar bodies and in practice have greater traction with policymakers.
[161] Including the *Statute of Labourers Act (1351)* (UK) 25 Edw III c 1 that was introduced to suppress wages, discussed in Cohn, Samuel, 'After the Black Death: Labour Legislation and Attitudes Towards Labour in Late-Medieval Western Europe' (2007) 60(3) *Economic History Review* 457.
[162] Adrian Merritt, 'The Historical Role of Law in the Regulation of Employment: Abstentionist or Interventionist' (1982) 1(1) *Australian Journal of Law and Society* 56; Otto Kahn-Freund, 'Blackstone's Neglected Child: The Contract of Employment' (1977) 93(4) *Law Quarterly Review* 508; Simon Deakin, 'The contract of employment: a study in legal evolution' (2001) 11 *Historical Studies in Industrial Relations* 1; Mary Gardiner, 'His Master's Voice - Work Choices as a Return to Master and Servant Concepts' (2009) 31(1) *Sydney Law Review* 53; and Douglas Hay and Paul Craven (ed), *Masters, Servants, and Magistrates in Britain and the Empire*, 1562-1955 (University of North Carolina Press, 2004).
[163] Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 19.
[164] For example the *Masters and Servants Act 1902* (NSW) was not repealed until 1980.

century, sometimes on a punitive basis.[165] They came to coexist with law that recognised greater autonomy for the professions,[166] identities in perceived less need of industrial or domestic discipline and typically providing services as independent contractors on an incident- or project-specific basis.

Although the legislation and language has changed the identities remain, with employees now potentially in a weaker position because of practices such as casualisation. This traditional master/servant relationship embodies the potential power imbalance between employers and employees, particularly when obligations flowing from each party are assessed. Employers have typically had greater freedom and power than actual/potential employees, with a position of dependence historically reflected in language such as 'servitude' and in judicial emphasis on the loyalty of servants to their employers. That emphasis was a reflection of the duties of subjects to the sovereign. It was also a reflection of the principle that employees represented or otherwise acted for the master, evident in the jurisprudence regarding vicarious liability.[167] Employers are now required to comply with regulations that stipulate minimum standards for employees,[168] but on occasion will use mechanisms such as sham contracting that realign risk by purportedly transferring powers and obligations to an independent entity.[169]

Marxian theorists such as Callinicos and Thornton would presumably see identity in Australia as being determined by capital, in contrast to the ethnicity that Bell and Moreton-Robinson view as determinative. If we construe identity through lenses of disadvantage and difference we can see other identities outside the employment relationship.

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[165] Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 18-19.

[166] See for example Harold Perkin, *The Rise of Professional Society: England Since 1880* (Routledge, 1989); Richard Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford University Press, 2003); and Ian Freckelton and Belinda Bennett, 'Regulating Professional Practice' in Yann Joly and Bartha Maria Knoppers (eds), *Routledge Handbook of Medical Law and Ethics* (Routledge, 2014) 139. Recognition of the special status of the professions – which are differentiated from trades/occupations by substantial self-regulation – is evident in discrete statutes such as the *Legal Profession Act 2006* (ACT), *Legal Profession Act 2004* (NSW) and *Veterinary Surgeons Act 2015* (ACT).

[167] See for example *Bugge v Brown* (1919) 26 CLR 110.

[168] Under the *Fair Work Act 2009* (Cth) there are three sources of rights for employees: the National Employment Standards (NES), modern awards and enterprise agreements.

[169] *Fair Work Act 2009* (Cth) ss 357-359. See also Douglas Brodie, 'How Relational Is the Employment Contract?' (2011) 40(3) *Industrial Law Journal* 232, 233; and Andrew Stewart, *Stewart's Guide to Employment* Law (Federation Press, 3rd ed, 2011) 50, 56. In sham contracting the employer misrepresents an employment relationship as an independent contracting arrangement, avoiding liability for superannuation, leave and other entitlements.

One is identity as an unemployed person, that is an individual who is entitled to income support because disability or market vicissitudes mean a job is unavailable.[170] Chapter Nine below notes the preoccupation of the state and mass media with policing those people who receive support,[171] with for example instances of 'welfare fraud' as a form of 'identity crime',[172] and characterisations such as 'dole bludgers'. From the perspective of flourishing we might instead regard support for people experiencing unemployment (or unemployment) in terms of social citizenship,[173] a proper function of the state as a political identity and a mechanism for social solidarity. Chapters Three and Five suggested that the liberal democratic state is what we make it, in other words that being a citizen rather than subject involves agency (and duties) in influencing public policy.

Unemployment as an identity coexists with two significant but legally underrecognised social entities.

One is the unwaged care-giver, often a parent but potentially a partner or child supporting a family member who is working or who is unable to work because of youth or disability. That status is economically significant but only weakly recognised as an identity through mechanisms such as the National Disability Insurance Scheme.[174]

It also coexists with the legal identity of volunteer, the civic-minded person whom in a past era we would have described as a good samaritan and who in law is more neutrally characterised as someone who acts without any legal obligation to do so.

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[170] Philip Mendes, *Australia's Welfare Wars Revisited*: *The Players, the Politics and the Ideologies* (UNSW Press, 2008); and Alexander Hicks, *Social democracy and welfare capitalism: a century of income security politics* (Cornell University Press, 1999).
[171] Sheila Shaver, 'Australian Welfare Reform: From Citizenship to Supervision' (2002) 36(4) *Social Policy and Administration* 331; and Paul Henman and Greg Marston, 'The social division of welfare surveillance' (2008) 37(2) *Journal of Social Policy* 187.
[172] Janet Mosher and Joe Hermer, 'Welfare Fraud: The Constitution of Social Assistance as Crime' in Janet Mosher and Joan Brockman (eds), *Constructing Crime: Contemporary Processes of Criminalisation* (UBC Press, 2010) 17.
[173] Peter Dwyer, *Welfare rights and responsibilities: Contesting social citizenship* (Policy, 2000); and John Murphy, Suellen Murray, Jenny Chalmers, Sonia Martin and Greg Marston, *Half A Citizen: Life On Welfare in Australia* (Allen & Unwin, 2011).
[174] *National Disability Insurance Scheme Act 2013* (Cth).

Laws of sociability?

In building on the preceding chapters we can make several inferences.

The first is that Australian law presupposes that humans are social animals, a presumption that means much rulemaking about legal identity is concerned with identities that are based on relationships.

The second is that the affinities noted in this chapter are derivative rather than foundational. You are for example a human first, and an Australian citizen within the ambit of Australian law, before legal identities relating to your belief system and intimates come into play. We might posit, along with Murrumu, that the legal system that valorises Australian citizenship is illegitimate and invalid but in the absence of true Indigenous sovereignty (or sovereignties) the ethnicity of Indigenous people will not be definitive.

A corollary, unlikely to be welcomed by Murrumu or Moreton, is that the essentialism espoused by figures such as Nehisi-Coates is an escape into theory and anger. The latter is understandable but self-defeating. Rather than essentialism we might in fostering flourishing more usefully heed the words of Ralph Ellison, who asked 'Need my skin blind me to all other values?'.[175] From a Rawlsian perspective the answer is no.

Eve Kosofsky Sedgwick astutely commented that

> An understanding of virtually any aspect of modern western culture must be not merely incomplete but damaged in its central substance to the degree that it does not incorporate a critical analysis of modern homo/heterosexual definition.[176]

Field similarly commented

> The right-minded teaching that "race has nothing to do with biology, but is merely a social construction" is true but misleading. For one thing there is nothing "mere" about a social construct … For another, discovering the independence from biology of what Americans call race

[175] Ralph Ellison, 'The World and the Jug' in John Callahan (ed), *The Collected Essays of Ralph Ellison* (Modern Library, 1995) 155, 165.
[176] Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, 2nd ed, 2007) 1.

> opens the way to investigating social construction itself, as thought and action.[177]

A final and disquieting inference is that law respects some affinities and disrespects others. As an expression of social values it defines through exclusion. Law reform on occasion is a matter of devalorising stigma, thereby removing a deleterious and thus contested[178] identity from the legal lexicon and bringing the excluded into the broader community.

Observations

In understanding legal identity by considering different aspects on the basis of the six questions in the methodology we can draw several conclusions from this chapter.

Consistent with the preceding discussion, we can see that legal identities are constructions. They represent values that are not timeless. The valorisation of physical attributes such as skin colour and skull shape, belief systems and adherence to cosmological doctrine, mechanisms for mutual comfort and economic support (notably the family), and choice of sexual partner or practice is culturally contingent and has changed over time. Law articulates and reifies particular values, sometimes in great detail and through bureaucratic mechanisms that involve registers and ceremonies. Some reification is on occasion contrary to the flourishing of individuals and to that of a society in which justice is founded on fairness.

The temporal instability of legal identities does however have a positive aspect, with law reform as noted in this chapter signalling that social values appropriately have changed, in part by fostering agency on the part of people with a hitherto stigmatised identity. What is often characterised as human rights law in Australia has for example allowed both individuals and the state (on behalf of the wider community) to act against discrimination regarding ethnicity, faith, gender, political adherence or sexuality. Over time some, if not all, of those affinities are likely to fade into

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[177] Barbara Fields and Karen Fields, 'Witchcraft and Racecraft: Invisible Ontology in Its Sensible Manifestations' in George Bond and Diane Ciekawy (eds), *Witchcraft Dialogs: Anthropological and Philosophical Exchanges* (Ohio University Press, 2001) 283, 283

[178] See for example Robert McRuer, 'We Were Never Identified: Feminism, Queer Theory, and a Disabled World' (2006) 94 *Radical History Review Winter* 148, 152.

insignificance as legal identities, in the same way that Roman Catholicism remains important for the self-concept of many people but unlike the United Kingdom of George II is not legally determinative.

We should also recognise that people may subvert both social expectations regarding the expression of affinity or choose not to self-identify. In contemporary Australia, for example, an individual may choose to identify as Aboriginal as a legal identity but is not required to do so. The nature of legal identity in 2017 often features considerable autonomy, discussed more broadly in Chapters Eight and Nine.

Chapter Seven: Unnatural Identities

Overview

The dissertation question asks 'What is the nature of legal identity?'. One answer is that legal identity is not restricted to natural persons, that is live human animals. Chapter Three for example noted the significance of states as entities that are themselves legal identities and that, through the provision of legal frameworks, result in legal identities that potentially extend from humans to rivers or forests and to corporate bodies, commonly known as artificial persons.

This chapter considers those artificial persons, both as legal identities *per se* and as points of reference (in terms of similarities and differences) for understanding the nature of humans as legal identities. It addresses several of the methodological questions in Chapter Two, for example 'What is the function of legal identity?', 'Where does it come from?' and 'Who or what is eligible to have that identity?'.

A contention throughout this dissertation is that the conceptualisation of legal identity tells us something useful, if only for prediction, about what a particular society values and what mechanisms it has adopted to deal with risk, time and agency. Chapter Six of this dissertation suggested that in law the pre-industrial family can be construed as a mechanism for individual comfort, social solidarity and facilitation of flourishing over the long-term through the transmission of property. Contemporary Australian law recognises and tacitly encourages the existence of artificial persons, legal fictions such as the company, that have discrete legal identities.

Those fictions are culturally contingent; it is not a given, for example, that large/small scale enterprises and educational institutions should take the form of corporations or that governments should rely on autonomous entities in the form of statutory authorities. In the neoliberal epoch of privatisation and respect for market forces the latter are out of fashion.

When asking what is a legal identity we can see the corporation, in particular incorporated commercial enterprises, as a risk management and time machine – a mechanism that insulates corporate members from adverse consequences and facilitate the intergenerational transfer of assets. Noncommercial corporations, such as universities, also have a time-spanning value as an identity. Local government is another identity that may exist beyond the lifespan of any human.

This chapter accordingly looks at artificial persons as a perspective on the identities discussed in the preceding chapters. Those artificial persons, along with local governments, are the bloodless 'undead'. We engage with them every day. They have many but not all of the characteristics of human animals as legal identities. Unlike animals they potentially last forever, although the pace of administrative and corporate change means that few exist for more than three generations. They exhibit an agency that mirrors the agentic attributes of their human peers and of the individuals who direct their operations. They may be confused with entities that have a social but not legal authority, such as 'the church', discussed at the conclusion of this chapter.

The chapter initially considers companies as legal identities, discerning their existence by asking how they come about, what they can do (and cannot do), how they are signified and how their legal existence ends. The chapter next considers local government, an identity that takes differing forms and affects all Australians. The chapter goes on to discuss institutions such as universities and statutorily-established hospitals before building on examination in preceding chapters of religious faith as an identity, that is looking at legal identities that are misconstrued by many people as 'the church'.

Companies

Social, political and economic life in Australia is shaped by three types of legal persons whom most people encounter at least once each week. Those persons are our fellow human animals, governments (at the national, state/territory and local government levels) and corporations. As consumers and readers of law we typically construe corporations as commercial enterprises, although as the following

paragraphs indicate, status as a corporate entity encompasses a wide range of for-profit, quasi-commercial, governmental and other bodies that have a discrete legal identity.

Identity as a corporation is analogous to legal identity as a natural person (in other words as a human animal),[1] with Cave J commenting 'a corporation is a legal persona just as much as an individual'.[2] It is a legal fiction, something that is administratively convenient and a respected mechanism for managing risk.[3] The legal entity is able to acquire, hold and dispose of assets – attributes of the property-centric personhood discussed in Chapter Five. In some instances the assets held and revenue enjoyed by incorporated enterprises operating within/across jurisdictions dwarf the revenue of nation states,[4] a revenue that fosters corporate endeavours to reshape or even escape from regulatory cages through use of tax havens,[5] regulatory arbitrage[6] or simply the exercise of influence in public policy-making.[7] The entity can undertake work for reward, borrow, employ people, be subject to tax and charges, enter into contracts,

[1] For judicial recognition of corporations as discrete legal persons see *Foss v Harbottle* (1843) 2 Hare 461; *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL); *Willers v The Queen* (1995) 125 FLR 221; *Sydney Catchment Authority v Bailey* (2006) 164 A Crim R 263; *Houghton v Arms* (2006) 225 CLR 553; and *Hamilton v Whitehead* (1988) 166 CLR 121.

[2] *Re Sheffield and South Yorkshire Permanent Building Society* (1889) 22 QBD 470, Cave J at 476. Note that the Court did not say a corporation is identical with a natural person; corporations as discussed below can for example be fined but not imprisoned.

[3] We can think of that risk in terms of liability on the part of shareholders and assumptions reasonably made by people who deal with the corporation, for which see *Corporations Act 2001* (Cth) ss 128 and 129. See generally Robert Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 15th ed, 2012); Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Ashgate, 2009); and Michael Whincop, *An Economic and Jurisprudential Genealogy of Corporate Law* (Ashgate, 2001).

[4] John McClintock, *The Uniting of Nations: An Essay on Global Governance* (Peter Lang, 2010) 57.

[5] Nicholas Shaxson, *Treasure Islands: Tax Havens and the Men who Stole the World* (Random House, 2011); Tax Justice Network Australia, *Who Pays for Our Common Wealth?* (2014); Chris Sanchirico, 'As American as Apple Inc.: International tax and ownership nationality' (2014) 68(1) *Tax Law Review* 207; and Senate Economics References Committee, Parliament of Australia, *Corporate Tax Avoidance: Interim Report* (2015) 27 and 57.

[6] Lutgart van den Berghe, *Corporate Governance in a Globalising World: Convergence or Divergence?: A European Perspective* (Springer, 2007) 104; and Franklin Gevurtz, 'An Essay on Teaching International Economic Law from a Corporate Perspective' in Colin Picker, Isabella Bunn and Douglas Arner (eds), *International Economic Law: The State and Future of the Discipline* (Hart, 2008) 171, 174; and Stephen Loomis, 'The Double Irish Sandwich: Reforming Overseas Tax Havens' (2012) 43(4) *St Mary's Law Journal* 825.

[7] Mark Sheehan and Peter Sekuless (eds), *The Influence Seekers: Political Lobbying in Australia* (Australian Scholarly Press, 2012); Martin Gilens, 'Preference Gaps and Inequality in Representation' (2009) 42(2) *PS: Political Science and Politics* 335; John Warhurst and Peter Strangio, *Behind Closed Doors: Politics, Scandals and the Lobbying Industry* (UNSW Press, 2007); John Hogan, Raj Chari and Gary Murphy, 'Regulating Australia's lobbyists: coming full circle to promote democracy?' (2011) 11(1) *Journal of Public Affairs* 35; Finance and Public Administration References Committee, Parliament of Australia, *The Operation of the Lobbying Code of Conduct and the Lobbyist Register* (2012); Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Knock, knock … who's there?: The Lobbying Code of Conduct* (2008); and NSW Independent Commission Against Corruption, *Investigation into Corruption Risks Involved in Lobbying* (2010).

sue and be sued, and otherwise have many of the same rights and responsibilities as a human.

It is however distinguishable from humans in several ways, which offer a perspective on both human identity and legal identity *per se*.

Humans – collectively or individually – can own a corporation; a corporation in contrast cannot own a human[8] or the human genome.[9] Australian companies are ineligible for election to the legislatures[10] and cannot vote in the national and state/territory legislatures (although as real property owners and thus rate payers have a vote through nominees in some local government elections).[11] They cannot be members of the judicature or in vice-regal positions. They may be penalised or fined (typically larger than the fines imposed on individuals),[12] deregistered[13] or abolished by statute but cannot be imprisoned.[14] Like humans they may break the law; unlike humans they lack the capacity defences noted in Chapter Four.

Unlike animals – for a pragmatist finitude is a defining aspect of life – they can exist in perpetuity, subject to compliance with regulatory requirements and continuation of the legal system in which their existence is recognised. They are broadly deemed to lack human rights.[15] Lord Thurlow highlighted questions about their cognition in

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[8] That non-ownership is consistent with the prohibition on slavery noted in Chapter Three. Patent law in several jurisdictions permits exclusive rights in genetic material that meets tests of novelty but does not enable ownership of the overall human genome or of an individual living human body as a whole. For an introduction to the literature on genomic data and body parts see Wendy Bonython and Bruce Baer Arnold, 'Privacy, Personhood, and Property in the Age of Genomics' (2015) 4 *Laws* 377; and Muireann Quigley, 'Propertisation and Commercialisation: On Controlling the Uses of Human Biomaterials' (2014) 77 *Modern Law Review* 677.

[9] *D'Arcy v Myriad Genetics Inc* [2015] HCA 35. See further Claire Gregg, 'The Myriad Dichotomy: A tale of two jurisdictions' (2014) 99 *Intellectual Property Forum: Journal of the Intellectual and Industrial Property Society of Australia and New Zealand* 21; and Brad Sherman, 'Before The High Court: D'Arcy v Myriad Genetics Inc.: Patenting Genes in Australia' (2015) 37(1) *Sydney Law Review* 135.

[10] The *Commonwealth Electoral Act 1918* (Cth) for example refers to the Australian Constitution in dealing with electors as 'people'. Among arguments for recognising corporations as persons entitled to the vote see Peter French, 'The Corporation as a Moral Person' (1979) 16(3) *American Philosophical Quarterly* 207; and Philip Pettit, 'Responsibility Incorporated' (2007) 117 *Ethics* 171.

[11] See for example *City of Melbourne Act 2001* (Vic) s 9C; *Local Government Act 1993* (Tas) s 255; and *Local Government Act 1989* (Vic) s 16.

[12] For example AUD$18 million in *Australian Competition and Consumer Commission v Visa Inc* [2015] FCA 1020; and AUD$520,000 in *Australian Competition and Consumer Commission v Actrol Parts Pty Ltd* [2015] FCA 312.

[13] *Corporations Act 2001* (Cth) s 601AD.

[14] For example *Gas Industry Act 2001* (Vic) s 238

[15] See in particular Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press, 2006); Anna Grear, 'Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights' (2007) 7(3) *Human Rights Law Review* 511; Lyman Johnson, 'Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood' (2012) 35 *Seattle University Law Review* 1135; Anat Scolnicov, 'Lifelike and Lifeless in Law: Do Corporations Have Human

commenting 'Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?'. [16] Their will is an embodiment of the humans for whom they exist, whether as members or the boards/councils and executives who ostensibly act on behalf of those members.[17]

Corporations may come into being through royal charter or through statute, the mechanism used for the government bodies that we characterise as statutory authorities (discussed below) and traditionally for non-commercial entities with a special 'public purpose' status.[18] Most contemporary Australian corporations are commercial enterprises. Those entities owe their existence to the *Corporations Act 2001* (Cth), coming into being on registration[19] with the Australian Securities and Investments Commission – a national agency that reflects the emergence of a coherent and uniform Australian body of corporate law.[20] Overall their capability is bounded by that statute, by the *Australian Securities and Investments Commission Act 2001* (Cth) and by the constitution for the specific corporation.[21] Their identity may be bounded by the Australian Stock Exchange (ASX) listing regime (a co-regulatory scheme that for example deals with rules regarding transparency and the raising of capital) and other legislation specific to particular industries.[22]

It is important to recognise that the corporation has a discrete legal identity independent of its members,[23] an insulation that is perhaps the foundational *raison*

Rights?' (University of Cambridge Faculty of Law Research Paper No. 13/2013); Alan Meese and and Nathan Oman, 'Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons' (2014) 127 *Harvard Law Review Forum* 273; and Adam Winkler, 'Corporate Personhood and the Rights of Corporate Speech' (2007) 30 *Seattle University Law Review* 863.

[16] Attributed to Lord Chancellor Thurlow. Quoted in for example John Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386, 386. See also *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, Lord Reid at 170.

[17] Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Harcourt, Brace & World, 1932) highlighted concerns regarding the unaccountability of managers to small investors and more generally to society at large. See also Brian Cheffins and Steven Bank, 'Is Berle and Means Really A Myth' (2009) 83(3) *Business History Review* 443; and Mark Mizruchi, 'Berle and Means revisited: The governance and power of large US corporations' (2004) 33(5) *Theory and Society* 579.

[18] See the discussion below under 'Institutions'.

[19] *Corporations Act 2001* (Cth) s 119.

[20] For the Commission see *Australian Securities and Investments Commission Act 2001* (Cth) and *Corporations Act 2001* (Cth) s 5B. The national regime reflects the Commonwealth's powers under ss 51(xxxvii) and 122 of the *Australian Constitution* and the referral of powers from the states. See *Corporations Act 2001* (Cth) s 3.

[21] *Corporations Act 2001* (Cth) ss 136 and 140.

[22] See for example *Telecommunications Act 1997* (Cth) ss 56 and 58; *Broadcasting Services Act 1992* (Cth) ss 37, 41 and 53; and *Foreign Acquisitions And Takeovers Act 1975* (Cth) s 3.

[23] Its members, often referred to as shareholders, gain a legal identity as member when the corporation comes into existence. The identity is transferrable and is in essence a property right.

d'etre of most incorporated entities.[24] As a legal fiction it does not however exist in a vacuum; in particular it is potentially subject to regulation (and more broadly law) in any jurisdiction in which it operates, irrespective of whether it claims domicile in one jurisdiction or several jurisdictions. Although a fiction it 'is a reality for legal purposes'[25] and 'must be treated like any other independent person with its rights and liabilities appropriate to itself'.[26] The corporation has manifestations such as directors and bank accounts. Those manifestations mean that it – like a natural person – *can* be kicked, albeit Bond,[27] Maxwell,[28] HIH,[29] James Hardie,[30] Enron[31] and other regulatory failures suggest that the kicking may be incommensurate with a prior harm to shareholders, employees and the society at large.

On a pragmatic basis to minimise risks to society at large a corporation's directing mind/s – the governance and executive personnel noted above that collectively serve as surrogates of an individual conscience – can thus be held responsible[32] for breaches of the law regarding the corporation, for example putting their own interests ahead of shareholders, trading while insolvent or directing subordinates to disregard restrictions on exports to rogue states.[33] Courts in Australia and elsewhere will on occasion construe a corporation as an individual's alter ego.[34] The Act further excludes some civilly disabled people from managing or directing corporations, thereby reinforcing a deleterious legal identity attributable to undischarged bankruptcy or conviction for corporate offences.[35]

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[24] *Salomon v Salomon & Co Ltd* [1896] UKHL 1; [1897] AC 22.
[25] *The Case of Sutton's Hospital* (1612) 10 Rep 32b.
[26] *Salomon v Salomon & Co Ltd* [1897] AC 22, Lord Halsbury LC at 29.
[27] Paul Barry, *Going For Broke: How Bond Got Away With It* (Bantam, 2000).
[28] UK Department of Trade and Industry, *Mirror Group Newspapers PLC: Investigations under Sections 432(2) and 442 of the Companies Act 1985* (1995); Philip Stiles and Bernard Taylor, 'Maxwell – The failure of corporate governance' (1993) 1(1) *Corporate Governance: An International Review* 34; Tom Bower, *Maxwell: The Final Verdict* (London, 1996); and Roy Greenslade, *Maxwell's Fall* (Simon and Schuster, 1992).
[29] Royal Commission into the Failure of HIH Insurance, *Report of the Royal Commission into the Failure of HIH Insurance* (2003).
[30] D.F. Jackson QC, *Report Of The Special Commission Of Inquiry Into The Medical Research & Compensation Foundation* (2004)
[31] Robert Bryce, *Pipe Dreams: Greed, Ego, Jealousy and the death of Enron* (Public Affairs, 2002); and Sherron Watkins and Mimi Swartz, *Power Failure: The Inside Story of the Collapse of Enron* (Doubleday, 2003).
[32] Helén Anderson, *Directors' Personal Liability for Corporate Fault: A Comparative Analysis* (Kluwer Law International, 2008).
[33] *Defence Trade Controls Act 2012* (Cth)
[34] See for example *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [110]; *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734, [26]; *Cook v Deeks* [1916] AC 544, 565; and *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, [243].
[35] See for example *Corporations Act 2001* (Cth) ss 206A and 206B.

That bounding gives effect to Solum's conceptualisation of identity as a matter of being appropriately made the subject of a set of legal rights and duties.[36] Contrary to Thurlow's exasperated comment, corporations *do* have a conscience: that conscience is provided by the requirement for directors and executives to operate within the law relating to the particular corporation. One conclusion is that if we want enterprises (and indeed any legal person) to behave more ethically (otherwise more socially and legally responsibly) and thereby foster collective flourishing we, through the legislature, should articulate and actively implement legislation that determines the behaviour of corporations. Active implementation is salient, given concerns regarding the regulatory incapacity highlighted by a succession of royal commissions and parliamentary committees.[37]

How do we know a corporation? An abstract response, discussed in the final two chapters of this dissertation, is that we understand the particular entity in relation to the law that relates to its operation. Many law academics with 'commercial' rather than 'criminal' subdiscipline would for example accordingly construe 'identity' in terms of company law or financial law, rather than human rights.

A more direct response is that we relate to the corporation through its name[38] (which is often accompanied with signifiers such as logos, brands and trade marks)[39] and other manifestations such as billboards, call centres, shopfronts, business cards and manufacturing or retail facilities. Linfox, for most readers, is probably the signage on trucks operated by subcontractors working for a large private company.

We also relate to it through reports to members, auditors and regulators, potentially including access on request by members and regulators to governance deliberations in the form of board minutes. That legibility is a salient aspect of public companies, in contrast to humans who as Chapter Ten notes are required at times to engage with the state (for example in paying tax, gaining/using a driver's licence or complying with census obligations) but otherwise can often enjoy anonymity. Regulators and others

[36] Lawrence Solum, 'Legal Personhood for Artificial Intelligences' (1991-1992) 70 *North Carolina Law Review* 1231, 1239.
[37] Royal Commission into the Failure of HIH Insurance, *Report of the Royal Commission into the Failure of HIH Insurance* (2003).
[38] *Corporations Act 2001* (Cth) ss 148, 153 and 157.
[39] Trade marks are independent of the corporation; see *Trade Marks Act 1995* (Cth).

discern companies through a registered address[40] – its nexus with the jurisdiction – and with registration numbers granted by the state. Public and private observers may rely on profiling founded on that identifiability in for example providing commercial loans or ensuring that insurance is in place.

A particular enterprise may have a presence in several jurisdictions. That is different to local government, another class of legal identities that provokes thought about the nature of human identity.

Local governments

It is fact, often recognised and often deplored, that Australia has three levels of government, of which the most subordinate is the type of legal identity that we collectively describe as 'local government'[41] (in other words municipal/urban/city and district/shire governments).[42]

Subordination and the absence of enshrinement in the Australian Constitution may lead some readers to disregard local government as a discrete class of legal identity.[43] Given the conceptualisation of legal identity in the preceding chapters, however, we can see that local governments have an identity. Their recognition in law brings with it powers, responsibilities and disabilities. They have agency, their action potentially affects many people and they often have a considerable revenue and workforce.[44]

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[40] *Corporations Act 2001* (Cth) ss 142 and 146A.
[41] Chris Aulich, 'From convergence to divergence: reforming Australian local government' (1999) 58(3) *Australian Journal of Public Administration* 12; Martin Mowbray, 'Intellectuals and the Local State' (1997) 15(4) *Urban Policy and Research* 247; Brian Dollery, Lin Crase and Andrew Johnson, *Australian Local Government Economics* (UNSW Press, 2006) ix; and Alexander Brown, 'Subsidiarity or subterfuge? Resolving the future of local government in the Australian federal system' (2002) 61(4) *Australian Journal of Public Administration* 24.
[42] See for example *Local Government Act 1989* (Vic) s 4; *Local Government Act 1993* (NSW) sch 7; and *Local Government Act 2009* (Qld) s 8.
[43] For recognition in the state constitutions see *Constitution Act 1902* (NSW) s 51; *Constitution of Queensland* (Qld) ss 70 to 78; *Constitution Act 1934* (SA) s 64A; *Constitution Act 1934* (Tas) s 45A; *Constitution Act 1975* (Vic) s 74A; and *Constitution Act 1889* (WA) s 52. More broadly, Ed Wensing, 'The process of local government reform: Legislative change in the states' in Brian Dollery and Neil Marshall (eds), *Australian local government reform and renewal* (Macmillan, 1997) 89.
[44] Brisbane City Council, for example, rivals the State of Tasmania in terms of direct revenue, spending and employees.

Using the tests provided in Chapter Two, how do those entities come into existence? What function/s do they perform? What are their powers and disabilities? How are they recognised?

Local governments as legal identities are creatures of state legislation,[45] attributable to two types of enactment that have their origins in the development of representative government during the colonial period. The first type is a statute that establishes a specific municipal government, for example the *City of Sydney Act 1988* (NSW), *City of Adelaide Act 1998* (SA), *City of Greater Geelong Act 1993* (Vic) and *City of Brisbane Act 2010* (Qld). That statute coexists with a broader enactment within the state, such as the *Local Government Act 1993* (NSW),[46] which provides a framework for the establishment, powers and governance of other local governments – entities that typically have a much smaller population.[47] Local governments have a specific geographical coverage;[48] the tendency across Australia over the past century has been to amalgamate local governments for supposed enhanced efficiency.[49]

They thus come into being with the enactment of state legislation and typically cease through a ministerial decision under the statute or through amendment of the statute.[50] The elected council – the representative governance aspect of the particular entity, whose members change over time – can similarly be dismissed through a ministerial or vice-regal decision under the statute or through a dismissal-specific statute.[51]

The functions of local government are threefold. They provide public goods in the form of local roads, water/sewerage, parks, libraries, and other local infrastructure.

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[45] *Constitution of Queensland 2001* (Qld) s 70; *Constitution Act 1902* (NSW) s 51; *Constitution Act 1934* (SA) s 64A; *Constitution Act 1934* (Tas) s 45A, *Constitution Act 1975* (Vic) s 74A; and *Constitution Act 1989* (WA) s 52.
[46] *Local Government Act 1993* (NSW); *Local Government Act* (NT); *Local Government Act 2009* (Qld); *Local Government Act 1934* (SA) and *Local Government Act 1999* (SA); *Local Government Act 1993* (Tas); *Local Government Act 1989* (Vic); and *Local Government Act 1995* (WA).
[47] Brian Dollery, Lin Crase and Andrew Johnson, *Australian Local Government Economics* (UNSW Press, 2006) 17 and 19.
[48] *Local Government (City of Sydney Boundaries) Act 1967* (NSW) s 12.
[49] Brian Dollery and Euan Fleming, 'A conceptual note on scale economies, size economies and scope economies in Australian local government' (2006) 24(2) *Urban Policy and Research* 271; Brian Dollery and Lin Crase, 'Is bigger local government better? An evaluation of the case for Australian municipal amalgamation programs' (2004) 22(3) *Urban Policy and Research* 265.
[50] See for example *Constitution of Queensland* (Qld) s 75; *Local Government Act 1999* (SA) s 9; and *Local Government Act 1993* (NSW) sch 9.
[51] See for example *Local Government (Brimbank City Council) Act 2009* (Vic) s 5; *Local Government (City of Wangaratta) Act 2013* (Vic) s 5; *Local Government Act 1993* (Tas) ss 226 and 226A; and *Local Government (City of Sydney Boundaries) Act 1967* (NSW) s 10.

They further provide services and local regulation (for example regarding waste management, traffic control and location-specific licensing) and have a role in planning the management of the natural and physical environment.[52] A rezoning or development approval decision under the latter can for example change the market value of land by several million dollars and means that decisions by council members and officers are the subject of attention by anti-corruption bodies.[53] They have the authority to restrict activity in public places. That restriction has been criticised as contrary to the implied freedom of political communication that is an important aspect of citizenship in Australia as a liberal democratic state.[54] The third function is one of representation, in other words those entities that have the requisite legal identity (typically that of a ratepayer) through local government elections have scope for influencing decisions about matters at the local community level.

Local governments have disabilities. For example the NSW Local Government statute expressly prevents each council from delegating functions such as the making of a rate or the fixing of fees and charges, the voting of money for expenditure, or compulsory acquisition of land. They lack the authority to assume the responsibilities of their parent governments and thus cannot, for example, set up their prisons and own army, unilaterally absorb a neighbour within their own or another state, or appoint a replacement senator to the national legislature.

Although the legal powers of a local government are formally vested in an elected body, in practice de facto authority is enjoyed by the council's employees, primarily the chief executive officer, with the elected representatives often construing their role as governance (policy-making and broad oversight) rather than administration. That demarcation resembles the structure of corporations that was of concern to Berle and Means nearly a century ago. Membership of the council has requirements analogous

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[52] *Educang Limited v Brisbane City Council* [2002] QSC 374; *Anthony John Jarrett and Katherine Mary Jarrett v Manly Municipal Council* [1997] NSWLEC 143; *Rumble v Liverpool Plains Shire Council* [2015] NSWCA 125; and *Forgall Pty Ltd v Greater Taree City Council* [2015] NSWCA 340. More broadly, Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Role of Local Government as Regulator* (2012).
[53] Aquinas John Purcell, 'Corruption and misconduct in local government in Australia: What we know, but have trouble understanding and explaining' (2012) 1 *IIA Australia Journal* 35; and Joel Byrnes and Brian Dollery, 'Local government failure in Australia? An empirical analysis of New South Wales' (2002) 61(3) *Australian Journal of Public Administration* 54.
[54] *Muldoon v Melbourne City Council* [2013] FCA 994; *Kerrison v Melbourne City Council* [2014] FCAFC 130; *Bickle & Ors v Corporation of the City of Adelaide* [2013] SASC 115; and *Attorney-General (SA) v Corporation of the City of Adelaide & Ors* [2013] HCA 3; (2013) 87 ALJR 289.

to those of the state/territory and Commonwealth legislatures, with provision for example regarding ineligibility for office[55] or election[56] and suspension as a consequence of wrong-doing.[57]

As with the companies noted above, local governments can borrow (typically only for long-term capital works and within guidelines from the state government),[58] invest, accumulate or sell assets, lease real property,[59] enter into contracts, employ staff,[60] sue other legal entities,[61] and be held responsible in tort law for acts or omissions.[62] Conceptually they are distinct from those corporations: they are not established under the *Corporations Act 2001* (Cth), do not have shareholders, their governing body is popularly elected and they are restricted to a specific geographical area.

As legal identities they are recognisable. They have discrete names and seals that provide for individuation and signal authority. Some have crests from the English College of Heralds and indicia such as a Lord Mayor (analogous to the head of state identifying a nation), a traditional and now only marginally effective form of soft power in a pluralist society that arguably places a greater emphasis on celebrity than on the deference traditionally associated with ancient lineage.[63] They are identified either through a specific statute or through a schedule or regulations to a general 'local government' statute. Their officers, equipment such as trucks, and communications are badged – one of the significations discussed in the following chapter.

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[55] For example *Local Government Act 1993* (NSW) s 275; and *Local Government Act 1989* (Vic) ss 29 and 28A.
[56] For example *Local Government Act 1993* (NSW) s 276; *Local Government Act 1989* (Vic) s 28; and *Local Government (Elections) Act 1999* (SA) s 17(3).
[57] See for example *Office of Local Government v Salim Mehajer* [2016] NSWCATOD 10; *Office of Local Government v Councillor Genevieve Campbell of Murray Shire Council* [2016] NSWCATOD 8; *Fidge v Councillor Conduct Panel (Review and Regulation)* [2014] VCAT 1477; *Johnston v Brisbane City Council & Ors* [2014] QSC 268; and *Office of Local Government v Petty* [2015] NSWCATOD 46.
[58] *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028; *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200; *Muswellbrook Shire Council v Royal Bank of Scotland NV* [2013] FCA 616; *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC; and Productivity Commission, *Assessing Local Government Revenue Raising Capacity* (2008).
[59] *Brickworks Markets P/L v The Corporation Of The Town Of Thebarton* (1996) 67 SASR 180.
[60] *Latrobe City Council* [2015] FWCA 7477; *Lake Macquarie City Council Enterprise Agreement 2014* [2015] NSWIRComm 32; and *Ali Ali v Rockdale City Council* [2015] NSWSC 1481; and *Hegarty v Townsville City Council* [2015] QIRC 165.
[61] For example *Sydney City Council v Griffin Corporation P/L* [2003] NSWSC 26; and *Launceston City Council v Tasmanian Water and Sewerage Corporation Pty Ltd (No 2)* [2015] TASSC 29.
[62] *Byrnes v Hawkesbury City Council* [2015] NSWCA 173; *Pyrenees Shire Council v Day* [1998] HCA 3; 192 CLR 330; *Shire of Gingin v Coombe* [2009] WASCA 92; *Wyong Shire Council v Vairy; Mulligan v Coffs Harbour City Council* [2004] NSWCA 247; *Leyden v Caboolture Shire Council* [2007] QCA 134; and *Wyong Shire Council v Shirt* [1980] HCA 12.
[63] For example *City of Melbourne Act 2001* (Vic) ss 6 and 20.

Institutions and Authorities

A further perspective on social and legal identities is provided by considering what might be informally and collectively characterised as institutions, a characterisation that reflects the capaciousness or imprecision of legal identity taxonomies.

They are entities that are corporate in nature, that are often intended to exist in perpetuity (and typically outlast public/private companies), may have substantial revenue but are not determined by maximisation of shareholder value and are not listed on the ASX. They may be specifically established by or recognised in statute law, with varying degrees of autonomy from the particular state/territory government. They are not directly referred to in the Australian Constitution. They have the attributes that preceding chapters demonstrated as forming a legal identity.

At first glance we can readily identify a range of such institutions, for example Australian universities. Some predate Federation. They are echoes of early modern philanthropic bodies and colleges, some of which are the oldest surviving institutions in England and through passage of time have accumulated substantial assets. The universities have a discernable presence, a governing body, real property and investments, employees, authority to enter into contracts and liability to be sued. On the model of nations or monarchs they have traditional signifiers such as armorial crests, flags, seals and robes of office. As part of the national tertiary education regime they have provider numbers, analogous to the provider number of a health practitioner.[64] Apart from authority to contract in undertaking their corporate mission, which is articulated in each institution's statute and associated rules, they have the authority to award education qualifications, which go to the credentialism noted in Chapter Ten below.

Those institutions coexist with statutory authorities, sometimes characterised as public authorities, which are Commonwealth and state/territory government entities that are established and abolished by statute, that are formally autonomous (in

[64] See the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) Number under the *Education Services for Overseas Students Act 2000* (Cth) s 14A.

contrast to departments and non-statutory agencies under direct control by a minister)[65] and that undertake marketing, regulatory or other activities specified in that statute. Lewis comments that

> Statutory authorities are commonly formed out of a belief that certain objectives of government are better pursued free from direct political interference and accordingly are usually invested with a greater or lesser degree of autonomy.[66]

Those authorities can sue and be sued, acquire and dispose of property, employ staff and otherwise act as discrete legal persons. They are discernible through occupation of a physical address and use of a name. Governance is typically provided by a board or council whose members are appointed by the relevant minister, with further legibility provided through publication of reports with financial and other data. In terms of this dissertation the salient aspect of a statutory authority is that it has a legal identity that is separate to the Commonwealth or other jurisdiction that established the authority. A consequence is that in law the authority, rather than the state, is held responsible for its wrongdoing.

We can contrast corporations as legal identities with unincorporated associations, entities that ordinarily are not recognised as having a legal personality apart from the individual members of the particular association. That absence of identity means the association is incapable in its own name of acquiring and holding property, entering into enforceable contracts, or suing and being sued. One response is that social groupings, such as people who accept particular religious doctrines and the authority of those who articulate the doctrines, have relied on the use of trustees and incorporation.

In essence a trust involves the holding of assets by the trustee as legal owner for the benefit of other persons (the beneficiaries) or for a recognised purpose (usually a charitable purpose).[67] That differentiation between legal ownership and beneficial enjoyment is reinforced through equitable duties imposed on the trustee, including the obligation to act honestly and in good faith to further the purpose of the trust or for

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[65] Christos Mantziaris, 'Interpreting Ministerial Directions to Statutory Corporations: What Does a Theory of Responsible Government Deliver?' (1998) 26(2) *Federal Law Review* 309.
[66] David Lewis, 'Statutory Authorities and Constitutional Conventions - The Case of the Reserve Bank of Australia' (1987) 16(2) *Melbourne University Law Review* 348.
[67] J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 2006).

the benefit of the beneficiaries.[68] An earlier paragraph referred to the corporation as a time machine.[69] Although assets cannot ordinarily remain subject to a trust in perpetuity, that restriction does not apply to charitable trusts, which in certain circumstances are capable of enduring indefinitely. Such trusts must be for recognised charitable purposes.

Faith made manifest

What of the identity of faiths and the entities that expound doctrine or otherwise guide adherents, an institutional identity distinguishable from the affinity of individual believers noted in the preceding chapter?

We can discern confusion in the mass media and public at large about the legal identity of churches, with for example a misapprehension that it is possible to sue 'the Roman Catholic Church' or 'the Church of England in Australia' for harms attributable to acts by individual clergy and disregard by the institution to whom the clergy belonged. Torts action and reports by the Commonwealth and Queensland child abuse royal commissions[70] have demonstrated that what people mistakenly consider to be a discrete, monolithic and timeless institution with a clear chain of command is instead a cluster of separate legal identities that espouse a shared doctrine but do not have common assets and liabilities. Their assets are typically held by trustees,[71] with the trust relationship creating a discrete legal identity in which the trustee has obligations to the beneficiary on whose behalf the assets are held. Under for example the *Roman Catholic Church Trust Property Act 1936* (NSW) and *Roman Catholic Archdiocese of Adelaide Charitable Trust Act 1981* (SA) the trustees hold real property in the form of diocesan schools and places of worship, along with chattels, shares and other investments.

[68] Peter Young, Clyde Croft and Megan Smith, *On Equity* (Lawbook Co, 2009) 484, 487 and 492.
[69] Lynn Stout, 'The Corporation As Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form' (2015) 38 *Seattle Law Review* 685.
[70] Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (1999); and Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse, *Report on Redress and Civil Litigation* (2015).
[71] *Trustees of Roman Catholic Church for Diocese of Bathurst v Dickinson* [2016] NSWSC 101.

From the perspective of flourishing that structure is problematical, given the preparedness of particular religious groups to deny liability for wrongdoing by clergy or other people whom a non-specialist would consider to be representatives of the group. That denial of vicarious liability on the part of trustees potentially means that victims of sexual or other abuse have no effective basis for compensation. The salient example in Australia is that of *Trustees of the Roman Catholic Church v Ellis* [2007] NSWCA 117, in which the Court accepted the argument that the Church was not a *corporation sole*, that the trustees did not employ priests, that the current archbishop or bishop were not responsible for those clergy and that the Church as an unincorporated association was too amorphous to be sued under traditional actions against such associations.[72] Australia's non-recognition of the vicarious liability of trustees of religious groups is at odds with other common law jurisdictions, notably the United Kingdom, which have treated dioceses as corporations sole and have attributed liability to trustees for egregious harms attributable to the personnel of religious institutions.[73] As a later paragraph notes, there is accordingly scope for reworking the identity of faiths to produce outcomes that are more just.

If we look beyond *Ellis* we can see that some religious entities have specific statutes.[74] Some have substantial assets;[75] others are poor.[76]

There is similar recognition for other interests.[77] That recognition does not indicate a constitutionally privileged position (for example that adherence to the particular doctrine or belief system is a prerequisite for election to the legislature or appointment to an official position). It is instead an accident of history that reflects both the power

[72] See also *PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors* [2011] NSWSC 1216; *Clark v Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* [1998] 1 Qd R 26; and *Archbishop of Perth v "AA" to "JC" inclusive; DJ & Ors v Trustees of the Christian Brothers & Ors* (1995) 18 ACSR 333.
[73] See in particular see *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256; *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB); and *The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents)* [2012] UKSC 56.
[74] For example *Anglican Church Of Australia Act 1976* (NSW); *Wesleyan Methodists, Independents, and Baptists Churches Act 1838* (Qld); *Lutheran Church Of Australia Victorian District Incorporation Act 1971* (Vic), *Presbyterian Church Of Australia Act 1900* (Qld), *Hobart Hebrew Corporation Act 1958* (Tas), *Queensland Congregational Union Act 1967* (Qld) and *Churches Of Christ, Scientist Incorporation Act 1958* (Vic).
[75] *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117
[76] *Mond & Mond v Berger* [2004] VSC 45
[77] For example *United Grand Lodge of Antient Free and Accepted Masons of Queensland Trustees Act 1942* (Qld), *Returned & Services League of Australia (Queensland Branch) Act 1956* (Qld) and *Queensland Temperance League Lands Act 1985* (Qld).

of adherents at a particular time and in the words of a Queensland Law Reform Commission report 'to facilitate the vesting or management of the organisation's property, or to provide for the governance structure of the organisation'.[78] We do not see discrete statutes for new Christian congregations and for sects of other belief systems (including accommodation of 'charlatanism' as 'a necessary price of religious freedom'),[79] which are instead recognised less specifically through registration for favourable taxation treatment as faiths[80] and for the celebration of marriage.[81] Typically, the Acts declare the relevant office-holders or persons to be a corporation with perpetual succession, a common seal, and the capability in its corporate name to sue and be sued and to hold property. This reflects the powers incidental to corporations under the common law, outlined above.

Although the leaders of a 'church' may see the world *sub specie aeternitatis* the entities over which they may or not have formal control are likely to have a life that is distinctly contingent, potentially including exhaustion of all the particular identity's assets and – as demonstrated in *Ellis* – no legal obligation on part of associated entities to provide compensation for a wrong such as the sexual abuse of vulnerable people.[82]

More broadly, litigation has indicated that people acting in clerical roles have a special status and are not formally employees of the particular institution,[83] although they may in practice be treated as such.

A pragmatic response is that Australian law, through amendment of statutes such as the *Roman Catholic Church Trust Property Act 1936* (NSW), should make trustees liable for the misdeeds of clergy and people in parochial institutions. That amendment

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[78] Queensland Law Reform Commission, *A Review of Religious and Certain Other Community Organisation Acts* (2013) i and 12-14.
[79] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40, [26]; (1983) 154 CLR 120.
[80] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40, Mason ACJ and Brennan J at [17], and Wilson and Deane JJ at [18]. See also *Adelaide Company of Jehovah's Witnesses Inc. v The Commonwealth* [1943] HCA 12; (1943) 67 CLR 116.
[81] *Marriage Act 1961* (Cth) s 26.
[82] *Anglican Development Fund Diocese of Bathurst in its own capacity and in its capacity as trustee of the Anglican Development Fund Diocese of Bathurst (receivers and managers appointed) v The Right Reverend Ian Palmer, Bishop of The Diocese of Bathurst; Commonwealth Bank of Australia v The Right Reverend Ian Palmer, Bishop of The Diocese of Bathurst* [2015] NSWSC 1856, [1] - [7].
[83] *Sturt and Anor v the Right Reverend Dr Brian Farran, Bishop of Newcastle and Ors* [2012] NSWSC 400. See also *Macqueen v Frackelton* [1909] HCA 28; (1909) 8 CLR 673; *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95; and *Scandrett v Dowling* (1992) 27 NSWLR 483.

would be a measure of fairness, on the basis that taxation and other advantages enjoyed by religious entities should be accompanied by responsibilities.

Observations

In understanding the nature of legal identity through this chapter and reference to earlier discussion of natural persons one conclusion should stand out.

That conclusion is that *all* legal identities are in essence 'unnatural' and fictions, albeit fictions that are administratively convenient and socially so taken for granted as to be often unrecognised.

Our notion of the natural person reflects historic conceptualisation of 'man' as an entity with a special relationship with the divine, with attributes (including a conscience) distinctively different from those of nonhuman animals, and with special rights and responsibilities within the cosmos. In contemporary law we no longer construe women in terms of deficits, for example as overgrown children. We increasingly recognise our commonality with nonhuman animals. We should recognise that society's assignment of powers and disabilities is a construct, something that is malleable (and accordingly subject to law reform) rather than an eternal verity.

A consciousness of the legal system's flexibility in constructing and protecting the legal identities of natural persons should prompt us to think about the nature of the legal identity of the 'undead' artificial person, an identity that in the form of the company has been popular for less than three hundred years. In terms of flourishing we should resist a US-style jurisprudence that encourages voting by corporations and allows them to discriminate on the basis that the artificial person has human rights.[84] Such discrimination is contrary to recognition of the artificial person as a mechanism for collective flourishing and the body of law holding that corporations lack 'feelings'; corporations are a tool for flourishing rather than an outcome and a

[84] Alan Meese and Nathan Oman, 'Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons' (2014) 127 *Harvard Law Review Forum* 273; and Alex Luchenister, 'A New Era of Inequality: Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws' (2015) 9(1) *Harvard Law & Policy Review* 63.

corollary of their recognition as legal identities is that they must on occasion face criticism.[85]

Chapters One and Two noted that legal pragmatism seeks to identify 'what works'. History suggests that the artificial person is an administratively useful mechanism for risk management, inter-generational activity and the aggregation of capital that permits social goods. Put simply, the artificial person 'works'. From a normative perspective the class of legal identities that this dissertation has classified as artificial persons could work *better.* The flourishing of Australian society could be fostered through, for example, the strengthening of state capacity to identify/address misbehaviour by the conscienceless corporation. It could also be fostered through law reform that – without restricting freedom of religious belief – reduces the scope for faith-based institutions to evade responsibility for the actions of their representatives. Such reform involves public discussion of why we have legal identities and what we want them to achieve.

A further conclusion is that the legal identities of artificial persons, just like their human peers, are constructed and reinforced (and on occasion subverted) through paper and other signification mechanisms highlighted in the following chapter. Legal identity is a matter of signs, rather than merely a matter of blood.

[85] See for example *McGrath v Dawkins* [2012] Info TLR 72, [81]; *Lonrho plc v Fayed (No 5)* [1993] 1 WLR 1489, 1505; and *Jameel v Wall Street Journal Sprl* [2007] 1 AC 359, [95].

Chapter Eight: Signifiers and Subversions

Overview

Chapters One and Two, in responding to the question 'What is the nature of legal identity?', indicated that legal identity as matter of consequences – crudely, abilities and disabilities – will on occasion be subverted as entities purport to have a status to which they are not entitled. That subversion is both inhibited and fostered by identification of legal identities through signifiers. Put simply, a signifier is an indication that an entity has a particular legal identity and an individuation differentiating the specific entity from others with the same status.

This chapter draws on contemporary and historic law and social practice in arguing that signifiers provide a lens for understanding the nature of legal identity. It centres on three of the methodological questions in Chapter Two: 'How is legal identity signified?', 'How does it come into being?' (through for example registration) and 'How is it validated or verified when contested?'.

Law is made by signs and how we read/misread them, subvert them and protect them.

It is axiomatic in this dissertation that legal identity – the status that brings with it legal consequences, including opportunities and disabilities – is culturally contingent. It is also axiomatic that what preceding chapters have characterised as signifiers of legal identity, such as identity cards, robes of office, testamurs, a clerical collar, licence papers, laptop dongles, curricula vitae and house or car keys, are both independent of the identity and contingent. The meaning, form and implications of those signifiers has varied over time.

The 'sign' is not identical with the legal identity it denotes. Although we refer to a privileged child being 'born with a silver spoon' in her mouth,[1] an image that has

[1] Stephen McNamee and Robert Miller Jr., *The Meritocracy Myth* (Rowman & Littlefield, 3rd ed, 2013) 49.

superseded tropes about being 'born in the purple'[2] or 'to the manor born', no one comes into the world clutching a name or a passport,[3] entry to Harvard[4] or a driver's licence. They are equal until the Rawlsian veil is lifted and it becomes apparent, for example, that some have inherited restricted opportunities for flourishing by being born of refugees in an internment facility at Nauru rather than being the legitimate offspring of the heir to the Australian throne.[5] Geoffrey Rush may have worn a crown while starring in the Sydney Theatre Company's 2015 performance of *King Lear*; the pasteboard and tinsel did not give him the authority of the Australian head of state.[6] The Australian monarch similarly remains Queen, irrespective of whether she 'sits in state' with the official regalia – symbols of her legal identity – or removes her crown after a ceremonial event. The signifier is indicative rather than determinative; it may be misread or disrespected, as with the official signification of one recent head of state –

> His Excellency President for Life Field Marshal Al Hadji Dr Idi Amin, VC, DSO, MC, Member of the Excellent Order of the Source of the Nile, Lord of All the Beasts of the Earth and Fishes of the Sea and Conqueror of the British Empire in Africa in General and Uganda in Particular.[7]

If we construe legal identity as a matter of consequences, a matter of disadvantages and advantages determined by law, we can infer that there is an incentive for people to subvert the signifiers. Indeed, to return to the example of the yellow star noted in Chapters One and Seven of this dissertation, there may be an existential imperative to subvert the signifier. Such subversion through removal of the star – a signifier required by law, enforced by representatives of the state and recognised by the population at large – would potentially allow the bearer of that sign to escape a

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[2] 'Porphyrogennetos' in *The Oxford Dictionary of Byzantium* (Oxford University Press, 1991) 1701; and Charlene Elliott, 'Purple pasts: color codification in the ancient world' (2008) 33(1) *Law & Social Inquiry* 173.
[3] See for example *R v Clark* (1818) Russ & Ry 358; 168 ER 844: 'Until named in a ceremony appropriate under what might be called the *lex loci natus* to confer a name, the child has no name'.
[4] In a contemporary liberal democratic state class is indicative rather than definitively predictive of destiny. For perspectives see Jerome Karabel, *The Chosen* (Houghton Mifflin, 2005); Lauren Rivera, *Pedigree: How Elite Students Get Elite Jobs* (Princeton University Press, 2015); Nicholas Leman, *The Big Test: The Secret History of the American Meritocracy* (Farrar Straus Giroux, 2000); Suzanne Keller, *Beyond The Ruling Class: Strategic Elites in Modern Society* (Transaction, 1991); and Michael Young, *The Rise of the Meritocracy, 1870–2033* (Thames & Hudson, 1958). Contemporary concentration of wealth, and by extension opportunity, appropriately addressable by the liberal democratic state is highlighted in Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press, 2014).
[5] Note for example Bill Shorten, 'Closing The Justice Gap' (Melbourne Law School, 2015): '... half of the young people in juvenile detention are Aboriginal and Torres Strait Islander people… two per cent of our population makes up more than a quarter of our prison population… an Aboriginal man leaving school is more likely to go to jail than university.'
[6] See Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2009).
[7] David Benatar, 'A First Name Basis?' (2011) 10(29) *Think* 51.

deleterious legal identity whose salient consequence was the abuse and death we would now characterise as a crime against humanity.

That characterisation would not resonate with Schmitt, given his view of the state and the state's law as fundamentally at odds with liberal democratic notions of a transcendent respect for dignity (and hence difference), a respect for process and flourishing that – as Kirchheimer noted in 1933 and Heller noted in 1934 – is not obfuscated by claims that democracies are inappropriately pluralist and insufficiently decisive.[8] It would also not resonate with many premodern jurists, for whom the death and spoliation of 'others' identified as heathen or heretics was permissible, if indeed not imperative because divinely sanctioned.[9]

In law, signs matter. This chapter deals with the mechanisms that law uses to signify legal identity, mechanisms that by many people are misread as the identity. It highlights particular signifiers, chosen because they illustrate conceptual challenges and changing social or administrative practice. It considers the dialectical relationship between law's reliance on signifiers and their subversion, with valorisation of particular attributes and of particular mechanisms fostering subversion and in turn driving both legal responses and use of verification mechanisms.

In contemporary Australia for example we can discern a shift to use of the body as a signifier, with law regarding networked biometrics providing for a legible body indelibly marked through physical attributes such as retina patterns, a verification mechanism that coexists with and replaces signifiers in the form of documents provided by the state, pre-industrial mechanisms such as cropping of ears and scarification of faces to denote criminality, or scrutiny of superfluous teats and other anatomical features that demonstrate an individual is a witch. The discussion includes reference to privacy and critiques problematical mechanisms, such as the Aviation

[8] Otto Kirchheimer, 'Remarks on Carl Schmitt's Legality and Legitimacy' in William Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer* (University of California Press, 1996) 64, 66; and Hermann Heller, 'The Nature and Structure of the State' (1996) 18(3) *Cardozo Law Review* 1139, 1147 and 1152.

[9] For instances of the interaction between personal/corporate self-interest, principle and law see Carol Lansing, *Power & Purity: Cathar Heresy in medieval Italy* (Oxford University Press, 1998) 30 and 46; Jonathan Sumption, *The Albigensian Crusade* (Faber, 2011) 3; Henry Kamen, 'Confiscations in the Economy of the Spanish Inquisition' (1965) 18(3) *The Economic History Review* 511, 512; and Kathleen Parrow, 'Neither Treason nor Heresy: Use of Defense Arguments to Avoid Forfeiture during the French Wars of Religion' (1991) 22(4) *The Sixteenth Century Journal* 705, 705.

Security Identity Card, that ostensibly determine particular legal identities but are readily subverted when read in isolation.

The chapter initially differentiates between social markers (those of no legal significance) and legal markers, that is indicia of legal identity. It explains the role of signs in individuation (differentiating one member of a class from another) and signification (that is indicating that the entity has a specific legal identity or identities). It discusses verificationism – the testing of indicia of legal identity (and thens claims to identity) – and the role of appearance. The chapter then explains naming, a facet of legal identity that most people take for granted and that is bounded by law. The chapter considers biometrics and signatures as indicators of identity before exploring subversion of identifiers (for example forgery of identity documents) and law's response to that subversion, notably criminalisation of document tampering and mechanisms for verification of identity through large-scale data-matching.

Social markers and legal markers

In reading this chapter it is important to remember that identifiers are symbolic rather than discrete legal identities. You may well borrow an authentic Lord Mayor's robes and chain of office or a police sergeant's uniform but merely wearing that clothing does not give you the legal authority of the mayor or law enforcement officer, even though someone might mistakenly believe that you legitimately have that authority and by speech or other means – the performativity noted in the preceding chapter – you might foster that belief in order to gain an illicit benefit.[10]

Some signifiers function as markers of social status or affinity, accurately or otherwise, rather as markers of a legal identity. Driving a 'top of the line' BMW might for example be read as indicating that the driver is wealthy[11] and thus not a person of 'no fixed address' susceptible to being 'moved on' by police as part of

[10] For example in relation to personation see *Australian Federal Police Act 1979* (Cth) ss 63 and 63A; *Great Barrier Reef Marine Park Act 1975* (Cth) s 50; *Wild Dog Destruction Act 1921* (NSW) s 29; and the broader *Criminal Code* (Qld) s 514.
[11] Laura Heymann, 'The Law of Reputation and the Interest of the Audience' (2011) 52(4) *Boston College Law Review* 1341, 1362.

social sweeping from parks and streets.[12] It might instead reflect that the person is a BMW salesman, or the mechanic testing that vehicle, someone guilty of racially-profiled 'driving while brown',[13] or a drug dealer,[14] or that the person has not yet been apprehended for stealing the vehicle.[15]

Social signifiers might involve tone and language in speech ('speaking with authority', 'elevated diction' or 'being to the manner born', the latter a performativity fostered through a private school education), physical bearing (the 'appearance of command', direct gaze' or 'comfort in their own skin' and 'lack of shiftiness' in those 'accustomed to rule') or self-possession (aplomb, equanimity, confidence, perhaps even a hint of aggression).

Those signifiers might be founded on the presence or absence of legal identity, for example status as a police officer or judge rather than a refugee or escapee from a correctional institution. They are independent of identity cards and badges, testamurs, uniforms and other physical signifiers that formally signal a legal identity.

They can be misread by individuals and institutions, something that is both a basis of identity offences and a basis of the soft power enjoyed by individuals in positions of authority. Law enforcement personnel for example do not necessarily need to use physical force; a uniform, gruff voice and physical closeness may be sufficient for people to believe that the officer is authorised and willing to use that force. That is

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[12] Tamara Walsh, *Homelessness and the Law* (Federation Press, 2011). *DPP v Mann* [2015] VCC 1081; *Regina v Gregory Christopher White* [2006] NSWDC 201; and *Re Hill; Application for Bail* [2014] VSC 288. More broadly see *Dent v Australian Electoral Commissioner* [2008] FCAFC 211 and the discussion in Chapter Six above.

[13] Stephane Shepherd, 'Why diversity may not mend adversity: an Australian commentary on multicultural affirmative action strategies in law enforcement' (2014) 26(2) *Current Issues Criminal Justice* 241, 242; Atemthii Dau, 'Bayesian Analysis of the Sudanese Immigrant Youth Crime Rates and the "Likelihood" of Committing Violent Offence than an Australian-Born' (2015) 4 *International Journal of Criminology and Sociology* 82; Peter Run, 'Unnecessary encounters: South Sudanese refugees' experiences of racial profiling in Melbourne' (2013) 32(3) *Social Alternatives* 20; and Daniel Haile-Michael and Maki Issa, '"The more things change, the more they stay the same" – report of the FKCLC Peer Advocacy Outreach Project on racial profiling across Melbourne' (Flemington & Kensington Community Legal Centre, 2015). More broadly see Jeffrey Reiman, 'Is Racial Profiling Just? Making Criminal Justice Policy in the Original Position' (2011) 15(3) *Journal of Ethics* 3; and Mathias Risse and Richard Zeckhauser 'Racial Profiling' (2004) 32(2) *Philosophy and Public Affairs* 131. Adrian Beck and Kate Broadhurst, 'National identity cards: The impact on the relationship between the police and ethnic minority groups' (1998) 8(4) *Policing and Society* 401 highlights perceptions of social sorting by identity card, discussed below.

[14] *R v Ferguson; R v Sadler; R v Cox* [2009] VSCA 198.

[15] *Baghdadi v Regina* [2011] NSWCCA 234; and *BMW Prestige Pty Limited (t/as Alto BMW) v A1 Perfect Plumbing Pty Limited* [2006] FCA 1434.

particularly the case if the people reading those signs are unused to resistance and have a self-concept of 'the law abiding citizen who respects law enforcement'.[16]

As Chapter Seven noted in referring to the axiom that mayoral robes and other clothes 'maketh the man', social signifiers can be appropriated or simulated for the purposes of an identity offence, a performativity that might be supported by bogus documents but does not necessarily require those props.

The misreading of social signifiers and the potential confusion between social and legal signifiers is significant, as will be discussed below and in the final two chapters of this dissertation.

Individuation and Signification

Research for this dissertation has not identified a coherent and comprehensive study of the semiotics of legal identity,[17] in other words a semiology of how people create, recognise and – more importantly – interpret signs that indicate a particular legal rather than broader social identity.

It is probable that such a study does not exist, although there are suggestive publications by economists,[18] social scientists,[19] art historians[20] and philosophers,[21]

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[16] *Symes v Mahon* [1922] SASR 447; and *R v Armstrong* [2001] NSWCCA 33, [6].

[17] Jack Balkin, 'The Hohfeldian Approach to Law and Semiotics' (1990) 44 *University of Miami Law Review* 1119, 1121; and Jeremy Paul, 'The Politics of Legal Semiotics' (1991) 69 *Texas Law Review* 1779. From the perspective of this dissertation the value of much of the writing by Derrida, Barthes and Deleuze regarding semiotics rests in its injunction to contemplate the processes of communication, processes that are less obscurely unpacked by figures such as J L Austin, the pragmatist C S Pierce or Michael Halliday in for example the latter's *Language as social semiotic: The social interpretation of language and meaning* (Edward Arnold, 1978). Disagreement about utility and mis/interpretation of Austin is evident in Jacques Derrida, 'Signature Event Context' (1977) 1 *Glyph* 172; John Searle, 'Reiterating the Differences: A Reply to Derrida' (1977) 1 *Glyph* 198; and Jacques Derrida, 'Limited Inc.' (1977) 2 *Glyph* 162.

[18] See for example George Akerlof and Rachel Kranton, *Identity Economics: How our identities shape our work, wages and well-being* (Princeton University Press, 2010) 39-41; and Stanley Lieberson, *A Matter of Taste: How Names, Fashions, and Culture Change* (Yale University Press, 2000).

[19] Connie Ulasewicz, 'Girls' Juvenile Justice Uniforms: A Semiotic Analysis of Their Meaning' (2007) 2(2) *Feminist Criminology* 137; Nicolas Cambridge, 'Cherry-Picking Sartorial Identities in Cherry-Blossom Land: Uniforms and Uniformity in Japan' (2011) 24(2) *Journal of Design History* 171; Kieran Tranter, 'The Car as Avatar in Australian Social Security Decisions' (2014) 27(4) *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique* 713; and Monica Owyong, 'Clothing semiotics and the social construction of power relations' (2009) 19(2) *Social Semiotics* 191.

[20] Anne Hollander, *Seeing Through Clothes* (University of California Press, 1993) and *Sex and Suits* (Knopf, 1994); Roland Barthes, *The Fashion System* (Matthew Ward and Richard Howard trans, Hill & Wang, 1983) [trans of *Systeme de la Mode* (first published 1967)]; Brigitte Bedos-Rezak, 'In Search of a Semiotic Paradigm: The Matter of Sealing in Medieval Thought and Praxis (1050–1400)' in Noël Adams, John Cherry and James

political scientists,[22] cultural critics such as Fussell[23] or legal historians on the identification of specific groups and roles.[24] Literature in the field of legal semiotics centres on texts (such as statutes, contracts and judgments) rather than on attributes that serve either to indicate rights/responsibilities or to individuate entities that have the same rights/responsibilities.[25] This dissertation thus has some originality.

A contention in this dissertation is that all indicators of legal identity latently or directly provide information regarding that identity.

The information might be latent in the sense that it is not used or called into question until after an event has occurred. In contemporary Australia for example we assume that everyone driving a car has a driver's licence.[26] Typically there is no checking of that licence before the driver starts the car but it may be examined if the driver is pulled over for a breath test,[27] for speeding or driving dangerously,[28] or because a police officer considers that the vehicle is defective.[29] The indicator might instead directly provide information, for example unrestricted passage through the security gate at an Australian international airport is typically dependent on the incoming

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Robinson (eds), *Good Impressions: Image and Authority in Medieval Seals* (British Museum, 2008) 1, 2; and Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Cambridge University Press, 1990).
[21] Giorgio Agamben, *The Signature of Things* (Luca D'Isanto trans, Zone Books, 2009) [trans of *Signatura Rerum: Sul Metodo* (first published 2008)] 41, 61-62 and 79.
[22] Fei-Ling Wang, *Organizing through division and exclusion: China's Hukou system* (Stanford University Press, 2005). For Laclou and Mouffe see Albert Bergesen, 'The Rise of Semiotic Marxism' (1993) 36(1) *Sociological Perspectives* 1; and Tomasz Szkudlarek, 'Semiotics of Identity: Politics and Education' (2011) 30 *Studies in Philosophy & Education* 113.
[23] Paul Fussell, *Uniforms: Why We Are What We Wear* (Houghton Mifflin, 2002).
[24] See for example Steve Hindle, 'Dependency, Shame and Belonging: Badging the Deserving Poor, c. 1550-1750' (2004) 1 *Cultural and Social History* 6, 29; Charlene Elliott, 'Purple Pasts: Color Codification in the Ancient World' (2008) 33 *Law & Social Inquiry* 173; and Ramya Kasturi, 'Stolen Valor: A Historical Perspective on the Regulation of Military Uniform and Decorations' (2012) 29 *Yale Journal on Regulation*, 419; Charles Yablon, 'Judicial Drag: An Essay on Wigs, Robes and Legal Change' (1995) 5 *Wisconsin Law Review* 1129; James McLaren, 'A brief history of wigs in the legal profession' (1999) 6(2) *International Journal of the Legal Profession* 241; Rob McQueen, 'Of wigs and gowns: a short history of legal and judicial dress in Australia' in Rob McQueen and Wesley Pue (eds), *Misplaced Traditions: British Lawyers, Colonial Peoples* (Federation Press, 1999) 31; William Hargreaves-Mawdsley, *A History of Legal Dress in Europe Until the End of the 18th Century* (Clarendon Press, 1963); Mireille Lee, *Body*, *Dress*, and *Identity* in *Ancient Greece* (Cambridge University Press, 2015); and Bruce Christianson, 'Doctors' greens' (2006) 6 *Transactions of the Burgon Society* (2006) 44.
[25] See for example Bernard Jackson, *Semiotics and Legal Theory* (Routledge, 1985); Roberta Kevelson, *The Law as a System of Signs* (Plenum 1988); Jack Balkin, 'The Promise of Legal Semiotics' (1991) 69 *Texas Law Review* 1831; and Jan Broekman and Larry Catá Backer (eds), *Signs In Law - A Source Book* (Springer, 2015). See also Anne Wagner and Jan Broekman (eds), *The Promise of Legal Semiotics* (Springer, 2010); Peter Goodrich, 'Law and Language' (1984) 11(2) *Journal of Law and Society* 173, 181-183; and Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2013) 89-90.
[26] See for example *Road Transport (Driver Licensing) Act 1999* (ACT) ss 31 and 32.
[27] *Police v Hall* [2006] SASC 281; *Road Transport (Alcohol and Drugs) Act 1977* (ACT) s 13A. See also *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105, [26]-[28].
[28] *R v Grabovica* [2012] QCA 180.
[29] *Pick v Police* [2013] SASC 184.

passenger providing a valid passport or visa for scrutiny by a Commonwealth official. (Heads of state and other exceptional people may be ushered through the gate without provision of a passport in an instance of signification by association.)

The contention that signifiers of legal identity provide information regarding the identity is, in essence, commonplace and will not surprise legal scholars or other readers who have encountered figures such as de Saussure,[30] Austin, Barthes and Derrida or have received a business card.[31] A more substantive contention in this dissertation is that indicators of legal identity perform two functions, which may coexist but are discrete and depending on context are not necessarily in effect at the same time.

The first function is that of signification or representation, in other words indicating that the entity that bears (or can access) the sign has a particular legal identity. Entry on a Supreme Court's roll and being issued with a practising certificate signifies that an individual has the formal identity of a legal practitioner, an identity that has consequences in terms of privileges and obligations. An Australian passport signifies that the person identified in that travel document is an Australian citizen, someone who as noted in Chapter Three of this dissertation is free to enter the country and by extension has the obligations of a citizen, obligations that might be reflected in restrictions on leaving the country. Appearance on the Diplomatic List[32] in Australia indicates that particular people are recognised by the Australian state, consistent with the Vienna Convention,[33] as being the representatives of other states and thus having a particular identity under Australian and international law.[34] The List does not bring the identity into being.

Many people have a particular legal identity, given that although some identities are unique most legal identities are generic. In April 2017 there is for example only one

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[30] See for example Paul Thibault, *Re-reading Saussure: The dynamics of signs in social life* (Routledge, 1997).
[31] See for example *Slaveski v State of Victoria & Ors* [2010] VSC 441, [868]; and *Forkserve Pty Limited v Jack and 1 Ors* [2000] NSWSC 1064.
[32] Department of Foreign Affairs & Trade, *The Diplomatic List and List of Representatives of International Organisations* (2015), http://protocol.dfat.gov.au/Default/view.rails
[33] *Vienna Convention on Diplomatic Relations 1961*, Done at Vienna on 18 April 1961. Entered into force on 24 April 1964. United Nations, Treaty Series, vol. 500, 95.
[34] *Diplomatic Privileges and Immunities Act 1967* (Cth) ss 7 and 11. Judicial interpretation of that statute's characterisation of identity in *Naoum (Consul General for Lebanon in Sydney) v Dannawi* [2011] NSWSC 23 was noted in Chapter Three above.

Queen of Australia – someone who as noted in Chapters Three and Five does not reside in Australia – but over twenty million Australian citizens, over five million women, several thousand legal practitioners (and even more law graduates) in Australia, numerous members of the various Australian legislatures and judicature, over 15 thousand members of the armed forces and a large number of people in correctional institutions.[35]

The second function of indicators is accordingly that of individuation, or what might be characterised as disambiguation. The signs enable differentiation between entities that have the same legal status. Human animals have come to rely on personal names, in other words a nominalism involving 'given' and surnames,[36] supplemented by indicators such as birth dates and entitlement/obligation identifiers such as tax file numbers,[37] health practitioner numbers,[38] police service numbers,[39] uniform consumer health numbers,[40] registration numbers for other professionals[41] and in the United States the Social Security Number.[42] Corporate entities are identified by names and similar numbers, such as the Australian Company Number, noted in the preceding chapter.[43]

Individuation may be at a high or low degree of specificity, with definitive identification of an individual sometimes involving tacit or express reference to two or more signifiers. There are for example numerous men named John Smith; individuation between those people could involve a passport, driver licence, tax file number, face scan, DNA sample, fingerprint, reference to residential address and parentage or other signifiers.

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[35] Australian Bureau of Statistics, *Yearbook of Australia* (2015).
[36] Contemporary reference to 'given' rather than 'Christian' names reflects bureaucratic recognition of pluralism, that is an acknowledgement that many people are not adherents of Christianity and implicitly that Australia does not have a state religion. See *Business Names Act 1962* (Vic) s 4(1); *Magistrates Court (Amendment) Act 1996* (ACT) s 103(2); and Explanatory Note to *Statute Law Amendment Act (No 2) 2005* (ACT) sch 3.
[37] *Taxation Laws Amendment (Tax File Numbers) Act 1988* (Cth). See also Kathryn Cole, 'Just Tell Me Your Name, Bank and Tax File Number' (1992) 17 *Alternative Law Journal* 52.
[38] See for example *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic) Sch 2 s 225; and *Veterinary Surgeons Act 2015* (ACT) s 34.
[39] See for example *Road Transport (Offences) Regulation 2005* (ACT) s 4D(a).
[40] *Healthcare Identifiers Act 2010* (Cth) s 9; *National Health Act 1953* (Cth) s 84(1).
[41] *Architects Regulations 2015* (Vic) Reg 17(c).
[42] For concerns regarding the SSN as a mechanism fostering identity offences see Jonathan Darrow and Stephen Lichtenstein, ''Do You Really Need My Social Security Number?' Data Collection Practices in the Digital Age' (2008) 10(1) *North Carolina Journal of Law and Technology* 1.
[43] *Corporations Act 2001* (Cth) s 601BD. See also ss 148 and 153.

In practice individuation rather than signification is a preoccupation of criminal lawyers and central to case law interpreting the evidence statutes.[44]

Verificationism

Many social interactions do not involve a formal or detailed recognition and thence verification of an individual's legal identity as a prerequisite for initiating a commercial transaction or other activity. Given both administrative convenience and perceptions of risk or trust, which are discussed in the final chapter of this dissertation, people often do not need to display signifiers and in the absence of a dispute there is no forensic examination of the sign/s (and of the identity) on a retrospective basis.

If I am using cash in purchasing a coffee at the university cafe, for example, I do not need to show my university staff card or passport or a testamur or other identity document. If I was paying with a transaction card and payment did not proceed I might be required to confirm my identity. Similarly, if I am seeking or exercising an entitlement in the public sector (often in the context of officials safeguarding 'public money' through distribution to only those recipients who are properly entitled) I may be required to initially gain signifiers such as social welfare and Medicare cards/numbers and thereafter provide those signifiers when seeking a 'benefit' on an instance by instance basis. Use of the word 'benefit' tells us something about shifting perceptions of the relationship between the recipient and the state discussed in Chapter Five above, with officials and politicians on occasion implying that people are receiving an undeserved gift rather than an entitlement as a member of the liberal democratic state or as a mechanism that will offset disadvantage.[45] Verification may

[44] *Evidence Act 1995* (Cth); *Evidence Act 1971* (ACT); *Evidence Act 1995* (NSW); *Evidence Act* (NT); *Evidence Act 1977* (Qld); *Evidence Act 1929* (SA); *Evidence Act 1995* (Tas); *Evidence Act 1958* (Vic); and *Evidence Act 1906* (WA).

[45] In that respect see Philip Mendes, *Australia's Welfare Wars Revisited*: *The Players, the Politics and the Ideologies* (UNSW Press, 2008) 43, 55 and 113; Peter Dwyer, *Welfare rights and responsibilities: Contesting social citizenship* (Policy, 2000); Sheila Shaver, 'Australian Welfare Reform: From Citizenship to Supervision' (2002) 36(4) *Social Policy and Administration* 331; and John Murphy, Suellen Murray, Jenny Chalmers, Sonia Martin and Greg Marston, *Half A Citizen: Life On Welfare in Australia* (Allen & Unwin, 2011). As a point of reference see the indications of financial ingenuity at https://data.gov.au/dataset/corporate-transparency, a listing of large corporations paying little or no tax in Australia despite substantial revenue and dividends.

accordingly remind the recipient that the individual has a stigmatised legal identity, for example as someone 'on the dole'.[46]

Verification may be a form of soft power, a discreet way of reminding individuals and the community that they are subject to the law. As Chapter Ten notes, in Australia people are not required to carry identity papers when taking the dog for a stroll or riding a bicycle. They are however expected, as a condition of driving a motor vehicle, to both be registered as a driver (in other words to have been granted a legal identity) and while driving to bear the official signifier that is popularly known as 'the licence', 'driver ID' or 'card'. Refusal to provide that signifier is an offence,[47] as is fraudulent use of a signifier (for example through a 'photoshopped ID').[48] Irrespective of whether I am a citizen, a permanent resident or otherwise, I can be required to verify my identity through provision of 'personal identifiers'.[49]

On occasion the legitimacy of a signifier of legal identity is questioned, a process that might be cursory or intensive. If we construe identity signifiers as 'truth statements', in other words as assertions of authority or representations of a fact, we can consider that questioning as an exercise in verification.[50]

Verificationism, to adopt the wording used by pragmatists such as William James and linguistic philosophers such as Austin last century, might be restricted to scrutiny – often by someone who lacks expertise, time or a strong interest in whether the particular signifier/use is true or false – of the document or other signifier.[51] That disinterest may be recalled by readers who have had to present an official card, utility statement or other proof of identity to a bored junior employee at a front counter

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[46] J L Austin, 'A Plea For Excuses' in Austin, *Philosophical Papers* (Oxford University Press, 3rd ed, 1979) 175, 182 notes the need for recognising how signs are used and thence their meaning rather than merely their formal content.
[47] See for example *Road Transport (General) Act 1999* (ACT) s 58(2); and *Road Transport Act 2013* (NSW) s 176.
[48] *Wignall and Commissioner of Police* [2006] WASAT 206, [135]; *Chime v R* [2014] NSWCCA 304; *Mortada v R* [2014] NSWCCA 36.
[49] *Migration Act 1958* (Cth) ss 188.
[50] Susan Haack, 'The pragmatist theory of truth' (1976) 27(3) *British Journal for the Philosophy of Science* 231, 233.
[51] 'Verification' as a concept and formal process is addressed in for example the *Financial Transaction Reports Regulations 1990* (Cth), notably Regs 2 and 3. It is apparent in other statutes, for example *Marriage Act 1961* (Cth) s 39M.

during a peak period.[52] It is one reason why public and private sector organisations have embraced biometric technologies, with an expectation that information technology systems are less likely than junior employees to experience attention deficits.[53]

Some verification however involves matching the signifier and/or the asserted identity to a register or other external data. The rationale for that matching is to confirm the identity (or the authenticity of the signifier, which as discussed below is not necessarily identical with the identity), to trigger further examination or to deepen the interaction. The latter, for example, is evident in Australian policing practice which sees traffic police in patrol vehicles checking vehicle registration and driver licence details against automated 'wanted' lists.

An unspoken but noteworthy rationale for such verification is that the scrutinised people are reminded that police and other officials as representatives of the state have a legal status that allows them to gather data and interrogate signifiers (for example by requiring a licence holder to provide a specimen signature for comparison purposes),[54] along with questioning of the bearers of those signifiers.

Verification is also evident in the private sector, with the Court in *R v Huang* for example noting

> a loan application in the amount of $780,000 was submitted to a financial institution, in the same name as that used in the false documents, and accompanied by false documents. It attracted the suspicion of the financial institution employee who dealt with it, who sought legal advice, referred the matter to police, and contacted the person whose identity had been used to create the false documentation.[55]

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[52] See for example *Chandra and Anor v Perpetual Trustees Victoria Ltd and Ors* [2007] NSWSC 694; *R v Harry Ghamraoui* [2008] NSWDC 31.
[53] Biometric technologies are discussed in more detail below. For introductions see Benjamin Muller, *Security, Risk and the Biometric State: Governing Borders and Bodies* (Routledge, 2010); and Anne Trimmer, 'Identity management and the application of biometric technology' (2005) 62 *Computers and Law (Journal for the Australian and NZ Societies for Computers and the Law)* 13, 13.
[54] *Road Transport (General) Regulation 2000* (ACT) Reg 9C, reflecting *Road Transport (General) Act 1999* (ACT) s 59(2).
[55] *R v Huang* [2010] NSWCCA 68, [15]. See also *Murphy v Police* [2015] SASC 193, [5]-[6].

Identity verification (and the collection of information that would assist verification) has become something of a preoccupation in security practice and the associated literature, often centred on mechanisms for excluding unauthorised people at portals such as gates to precincts and doors in buildings or access points to electronic networks.[56] Contemporary authors have suggested a three element taxonomy for identity verification.[57] That taxonomy involves determining identity on the basis of what the individual 'has' (such as a key, card or dongle issued by authority), what the individual 'knows' (such as a password, a secret handshake imparted by authority) or what the individual 'is' (such as a fingerprint or retina scan that is innate to the individual and prospectively/retrospectively recognisable).

That categorisation is useful as a conceptual tool but is inadequate.

At a superficial level it fails to recognise identity signification on the basis of association, in other words who the individual is with or who vouches for the individual. Invitations appear, doors open and opportunities arise for example on the basis that I am accompanied by *x* or vouched for by *y* or have merely been seen with *z* and am therefore trustworthy on the basis of social proximity. The doors might close and opportunities evaporate on the same basis. Signification by association potentially conflates upbringing or other social networks with character (discussed in Chapter Four) and merit.

At a more challenging level signification involves consideration of documents and other signifiers that are 'genuine' but were illicitly obtained, for example a passport that has been improperly issued by a corrupt official rather than being 'faked' by the bearer or a birth certificate that has been issued in good faith by a registry official to an individual who is appropriating the identity of a dead child, something noted in the following chapter.

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[56] See for example papers collected in Emilio Mordini and Manfred Green (eds), *Identity, Security and Democracy: The Wider Social and Ethical Implications of Automated Systems for Human Identification* (IOS, 2009); and Bruce Schneier, *Beyond Fear: Thinking Sensibly About Security in an Uncertain World* (Copernicus, 2003) 181.

[57] Theodor Richardson and Charles Thies, *Secure Software Design* (Jones & Bartlett, 2012) 78.

Australian law has come to require some verification of many signifiers and assertions of identity. That verification might involve scrutiny of a sign in an effort to detect whether the signifier is authentic (for example legitimately issued/acquired and unaltered), has not expired and is otherwise accurate. Verification might instead involve a requirement that the individual asserting an identity (for example assertion in the form of seeking to open a bank account, an expression of performativity) provide sufficient proof of identity to meet bureaucratic requirements and thereby satisfy an enactment's allocation of risk.[58]

Reference to risk is pertinent, because contemporary law tacitly seeks to manage rather than eliminate the incidence and severity of harms. The cost of much identity crime is for example typically spread across all payment system card holders rather than being borne by the individual consumer whose payment authorisation (and thus legal identity) has been appropriated by the offender.[59] It is also borne by individual actors who, consistent with the respect for autonomy inherent in the liberal democratic state, are expected to exercise their freedom in a responsible way.[60] We might well be able to substantially reduce some of the identity crimes discussed in the following chapters but we choose not to do so because the transaction costs, such as delays in checking of information, deployment of verification personnel and general unfriendliness 'at the front counter', are commercially and socially deemed to be inappropriate. Few consumers would presumably like using payment systems that are both insecure (in other words where there is pervasive and severe identity appropriation) and the victims are consistently left out of pocket.

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[58] In particular see the '100 points of identity' requirement under the Regulations for the *Financial Transaction Reports Act 1988* (Cth) and the Rules under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). Adoption elsewhere includes *Working With Children Regulations 2006* (Vic) Sch 2; *Marine Safety Regulations 2012* (Vic) Reg 114; *Pawnbrokers and Second-hand Dealers Regulations 1996* (WA) Reg 13; and *Sale Of Motor Vehicles (Amendment) Act 1995* (ACT) s 12.

[59] For a critique of risk-bearing in the US see Lydia Segal, Benjamin Ngugi, and Jafar Mana, 'Credit card fraud: a new perspective on tackling an intransigent problem' (2011) 16(4) *Fordham Journal of Corporate & Financial Law* 743.

[60] See Anthony White, 'The Recognition of a Negligence Cause of Action for Victims of Identity Theft: Someone Stole My Identity, Now Who Is Going to Pay for It' (2004) 88(4) *Marquette Law Review* 847. A persuasive expression of scepticism about 'hyped' corporate costs and losses is provided in Manuel Maroto Calatayud, ''The world is open for business: The card is key' 'identity theft' in the marketplace of criminal policy' (2009) 36 *Cahiers de défense sociale: bulletin de la Societé International de Défense Sociale pour une Politique Criminelle Humaniste* 33, 41-42. Scepticism about the benefits of welfare fraud reduction through universal government service cards is apparent in Dean Wilson, 'The Politics of Australia's Access Card' in Colin Bennett and David Lyon (eds), *Playing the identity card: surveillance, security and identification in global perspective* (Routledge, 2008) 180, 187 and 191.

The routinisation of verification fosters both subversion and a tendency to disregard dignity by confusing the identity with the person and thus treating the person as an abstraction (for example a file number or statistic) rather than as an individual.

Dicey implied that documents, and by extension signifiers (whether in the form of documents such as passports or otherwise), tell a story.[61] Law determines who decides what is meaningful in that storytelling and what form the story should take. In considering signifiers it is worth recalling the fundamental contention in this dissertation that a legal identity is what *law* regards as an identity, irrespective of an individual's self-concept or beliefs of a small group of people contrary to the law.

From that perspective identity is what is subject to validation in court when contested. As a corollary a signifier of legal identity is what is recognisable by a court for the purposes of identity, whether through reference to a specific statute (for example one dealing with an identity number, card, register or passport) or through principles evident in common and statute law regarding deception and an improper advantage.

Appearances and Affordances

Literature about cognition, design and other disciplines has come to embrace the notion of affordance, in other words the qualities or properties of an object that define its possible uses or that make clear how it can or should be used.[62]

In terms of legal identity the affordances of some signifiers are quite limited. A key for example can only be used to unlock a door or other entity, thereby serving as a weak but often sufficient indicator of someone's authority. A proximity or magnetic strip card without human-readable data (such as the authorised bearer's name, position and date of birth) is a similar weak identifier. A passport or other photo identity document might in contrast have much wider affordances and provide a stronger signification of identity, one for example that enables a readier verification of

[61] A V Dicey, *The Law of the Constitution* (Oxford University Press, 2013) vol 1, 126.
[62] For initial use of the term see James Gibson, 'The Theory of Affordances' in Robert Shaw and John Bransford (eds), *Perceiving, Acting, and Knowing* (Lawrence Erlbaum, 1979) 127. Insights are offered in Max Taylor, 'Terrorism and Affordance: An Introduction' in Taylor and PM Currie (eds), *Terrorism and Affordance* (Continuum, 2012) 1, 5-6; Donald Norman, 'Affordance, conventions, and design' (1999) 6(3) *Interactions* 38 and 'The Way I See It: Signifiers, not affordances' (2008) 15(6) *Interactions* 18.

the bearer, is imbued with another entity's authority (in particular, the expectation that the state issuing the passport will stand behind its recipient, as noted in Chapter Three above) and perhaps most importantly will serve as a 'breeder document' that allows the recipient to accumulate other proofs of legal identity under '100 Points of Identity' and similar schemes.[63]

Documents and electronic signifiers such as the Tax File Number or Student Number are important in the construction and subversion of legal identity. They are so frequently encountered that in Australia most people probably take them for granted and other than in exceptional circumstances do not recognise their significance. In taking a Geertzian deep view of identity it is however useful to recognise that throughout history people have often relied on construing identity through reference to physical appearance.

Preceding chapters of this dissertation have suggested that in practice we are unconscious about our reading of some signifiers of legal identity, with many – perhaps most – people on a day by day basis assuming that gender – itself a recent term – is binary. Put crudely, popular culture and law has often been predicated on a sense that 'true' identity comprises male humans and female humans (with the latter sometimes ascribed a lower value and capacity because of that gender), alongside what have variously been described as freaks, sports, curiosities, degenerates, hermaphrodites and conundrums.[64] Identity in that sense has been a matter of what you wear, what you look like and which gendered sign you obey. The significance of identity theorists such as Garber,[65] Paglia and Butler[66] may be that they have both highlighted the performativity of gender and drawn attention to the historical

[63] For 'breeding' see *DPP v Hall* [2015] VCC 1338, [15]-[22]; and *Clarkson v Regina* [2007] NSWCCA 70, [9]-[19] and [44].
[64] Alice Dreger, *Hermaphrodites and the Medical Invention of Sex* (Harvard University Press, 1998); Julie Greenberg, *Intersexuality and the Law: Why Sex Matters* (New York University Press, 2012); Sue-Ellen Jacobs, 'Is the ''North American berdache'' merely a phantom in the imagination of western social scientists' in Jacobs, Wesley Thomas and Sabine Long (eds), *Two spirit people: native American gender identity, sexuality, and spirituality* (University of Illinois Press, 1997) 21; Elizabeth Reis, *Bodies in Doubt: An American History of Intersex* (Baltimore: Johns Hopkins University Press, 2012). See also Gary Edmond, 'The law-set: The legal-scientific production of medical propriety' (2001) 26(2) *Science, Technology & Human Values* 191; and Sara Benson, 'Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed' (2005) 12 *Cardozo Journal of Law and Gender* 31.
[65] Marjorie Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety* (Routledge, 1992).
[66] Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40(4) *Theatre Journal* 519.

literature about indeterminacy or subversion in relation to sexual and other roles (signification by behaviour) and practice such as cross-dressing.[67]

We unconsciously make judgments about age (and capacity) on the basis of height, skin tone, body proportions and facial endowment. Our heuristic for identity tells us that the tall bearded person should not be entering the female toilet, other than for purposes such as cleaning and first aid. Unsurprisingly the court in *Re Kevin* noted

> Kevin's male secondary sexual characteristics were such that he would have been subject to ridicule if he had attempted to appear in public dressed as a woman; he could not have entered a women's toilet".[68]

In considering assumptions about the correlation between appearances and identity it is useful to recall that in previous centuries the most important signifier of legal identity for many people was what we would now characterise as skin colour, hair colour and facial architecture and other phenotypical attributes, for example the shapes of noses and the 'Asian' epicanthic eye fold.[69] In some regimes, such as Saudi Arabia, legal and social signification involves a gendered face-covering, which as noted in Chapter Six above has attracted attention in Australia regarding evidence[70] and populist discontent as part of 'veil politics'.[71]

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[67] See the discussion in Chapters Four and Five above and in works such as I Bennett Capers, 'Cross Dressing and the Criminal' (2008) 20(1) *Yale Journal of Law and the Humanities* 1; Charles Upchurch, 'Forgetting the Unthinkable: Cross-Dressers and British Society in the Case of the Queen vs. Boulton and Others' (2000) 12(1) *Gender & History* 127; Michelle Carriger, '"The Unnatural History and Petticoat Mystery of Boulton and Park": A Victorian Sex Scandal and the Theatre Defense' (2013) 57(4) *The Drama Review* 135; Neil McKenna, *Fanny and Stella: The Young Men Who Shocked Victorian England* (Faber, 2013); Gary Kates, *Monsieur d'Eon is a woman: a tale of political intrigue and sexual masquerade* (Johns Hopkins University Press, 2001); Patricia Bonomi, *The Lord Cornbury Scandal: The Politics of Reputation in British America* (University of North Carolina Press, 2000); Michel Foucault, *Herculine Barbin: being the recently discovered memoirs of a nineteenth-century French hermaphrodite* (Richard McDougall trans, Pantheon Books, 1980) [trans of *Herculine Barbin dite Alexina B* (first published 1978)]; and Mark Tedeschi, *Eugenia: A True Story of Adversity, Tragedy, Crime and Courage* (Simon & Schuster, 2012).

[68] *In Re Kevin (Validity of Marriage of Transsexual)* [2001] FamCA 1074. If challenged after alighting from our Bondi taxi and entering a female toilet without a signifier such as mop and bucket Kevin would presumably have had to provide medical documentation regarding gender reassignment or even undergo a physical examination.

[69] Joseph Pugliese, ''Demonstrative Evidence': A Genealogy of the Racial Iconography of Forensic Art and Illustration' (2004) 15(3) *Law and Critique* 287; Otto MacLin and Roy Malpass, 'Racial categorization of faces: The ambiguous race face effect' (2001) 7(1) *Psychology, Public Policy, and Law* 98; William Darity Jr, Jason Dietrich and Darrick Hamilton, 'Bleach in the rainbow: Latin ethnicity and preference for whiteness' (2005) 13(2) *Transforming Anthropology* 103; Ginetta Candelario, *Black behind the ears: Dominican racial identity from museums to beauty shops* (Duke University Press, 2007) 199; Antonio Guimarães, 'The Brazilian system of racial classification' (2012) 35(7) *Ethnic and Racial Studies* 1157.

[70] See for example *Oaths Regulation 2011* (NSW) Regs 4 and 7; *Road Transport (General) Act 1999* (ACT) s 58B; *Criminal Investigation (Identifying People) Amendment Act 2013* (WA) s 10; *Crimes (Administration of Sentences) Regulation 2014* (NSW) Reg 93; and *Court Security Act 2005* (NSW) s 13A. See also *Aydemir v Redegalli* [2011] NSWADT 198; *R v S (N)* (2012) 290 CCC (3d) 404; *R v Carnita Matthews* (unreported, Local Court of Campbelltown, 19 November 2010), and *R v Anwar Sayed* (unreported, District Court of WA, August 2010).

[71] *Summary Offences Amendment (Full-Face Coverings Prohibition) Bill 2010* (NSW); Steve Lunn, 'Facing up to questions of identity' *The Australian* (Sydney) 6 July 2011, 13; NSW Ombudsman, *Issues Paper - Law Enforcement (Powers & Responsibilities) Act 2002 - Part 3, Division 4: Removal of face coverings for*

In legal cultures where there was formal coding of legal identity on the basis of ethnicity the 'appearance' might result in exclusion from (or only exceptional admission to a jurisdiction), for example exclusion of 'Asians' from entry to Australia, Canada and the USA at particular times.[72] In the same epoch it might instead have resulted in ascription as an Australian 'Aboriginal', with appearance being a foundation for the legal identity that featured being subject to guardianship, miscegenation rules,[73] denial of the franchise and other disadvantages that eroded opportunities by the individual and peers for flourishing. Appearance in the form of skull shape, ear and nose ratios, hair colour, eye colour, circumcision and other indicia were referents for determination of a hierarchy of 'nonGerman' (and thus disadvantaged) identities under the Third Reich.[74]

Nominalism

A preceding paragraph referred to nominalism, in other words the 'naming' that identifies individual human animals (and by extension their families, Australia's primary social grouping as discussed in Chapter Six) and that along with gender is perhaps central to the self-concept rather than merely the legal identity of most Australian citizens. It is central to the perceived commercial value and legitimacy of private and public sector corporate entities.

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identification purposes (2012) 2 and 6; NSW Ombudsman, *Review of Division 4, Part 3 of the Law Enforcement (Powers & Responsibilities) Act 2002: face coverings and identification* (2013) 6. See more broadly Anthony Gray, 'Section 116 of the Australian Constitution and Dress Restrictions' (2011) 16(2) *Deakin Law Review* 293; Anne Hewitt and Cornelia Koch, 'Can and should burqas be banned? The legality and desirability of bans of the full veil in Europe and Australia' (2011) 36(1) *Alternative Law Journal* 16; Joan Wallach Scott, *The Politics of the Veil* (Princeton University Press, 2010); and Ajume Wingo, *Veil politics in liberal democratic states* (Cambridge University Press, 2003).

[72] Charles Price, *The Great White Walls are Built: Restrictive Immigration to North America and Australasia 1836-1888* (ANU Press, 1974); Christopher Anderson, *Canadian Liberalism and the Politics of Border Control, 1867-1967* (University of British Columbia Press, 2012) 75-82 and 112-113.

[73] Katherine Ellinghaus, 'Absorbing the "Aboriginal problem": controlling interracial marriage in Australia in the Late 19th and Early 20th centuries' (2003) 27 *Aboriginal history* 183; Patricia Jacobs, 'Science and Veiled Assumptions: Miscegenation in Western Australia 1930-37' (1987) II *Australian Aboriginal Studies* 15; and Mitchell Rolls, 'The changing politics of miscegenation' (2005) 29 *Aboriginal History* 64.

[74] Alan Steinweis, *Studying the Jew: Scholarly Antisemitism in Nazi Germany* (Harvard University Press, 2006) 52-56; Richard Gray, *About Face: German Physiognomic Thought from Lavater to Auschwitz* (Wayne State University Press, 2004) 367; and Thomas Miller, 'Seeing Eyes, Reading Bodies: Visuality, Race and Color Perception or a Threshold in the History of Human Sciences' (2004) 56(1) *Amsterdamer Beiträge zur neueren Germanistik* 123. Circumcision remains a significant cultural signifier for Australia's Jewish and Muslim communities. For the foreskin, or its absence, as an aid to legibility see Sander L Gilman, *Making The Body Beautiful: A Cultural History of Aesthetic Surgery* (Princeton University Press, 1999) 137 and 142-144.

Names provide bureaucratic legibility, an imperative for the modern liberal democratic state given the importance of rationally identifying entities that have entitlements and obligations. That imperative is discussed in Chapter Eleven below. It should therefore be unsurprising that states make rules about what human and corporate names can be used and how names are assigned.[75] The process for assignment tells us something meaningful about law and identity.[76]

Having a name has been a requirement for several centuries, through for example the mediaeval *Statute of Additions*.[77] In Australia the assignment of human names is a process that involves the parent/s (or guardian in their absence), with recognition by the state through registration of the chosen names in official registers under the births, deaths and marriages regime noted earlier in this dissertation. That regime is a matter of state/territory law,[78] reflected in Commonwealth statutes that deal for example with passports.[79] Names are not allocated by the state and parents have a wide latitude about what names they bestow on their offspring. That is in contrast with other regimes, for example that of Imperial Germany where people escaping the Tsarist Pale of Settlement (in essence restrictions on the basis of ethno-religious affinity)[80] were assigned stigmatic surnames such as Urinfuss,[81] Nazi Germany where as a precursor of introducing the yellow star people where required to adopt a handful of given names such as Israel or Sarah to signal their legal identity as Jews[82] or in France

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[75] James Scott, John Tehranian and Jeremy Mathias, 'The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname' (2002) 44(1) *Comparative Studies in Society & History* 4; Aeyal Gross, 'Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names' (1996) 9 *Harvard Human Rights Journal* 269; and Beverly Seng, 'Like Father, Like Child: The Rights of Parents in their Children's Surnames' (1984) 70(6) *Virginia Law Review* 1303.

[76] There is a cogent analysis in Thomas Franck, *The Empowered Self: Law and Society in the Age of Individualism* (Oxford University Press, 2001) 151-162.

[77] *Statute of Additions* (1 H 5, c 5).

[78] *Births, Deaths & Marriages Registration Act 1997* (ACT) s 12; *Births, Deaths & Marriages Registration Act 1995* (NSW) s 21; *Births, Deaths & Marriages Registration Act* (NT) s 20; *Births, Deaths & Marriages Registration Act 2003* (Qld) s 12; *Births, Deaths & Marriages Registration Act 1996* (SA) s 21; *Births, Deaths & Marriages Registration Act 1999* (Tas) s 20; *Births, Deaths & Marriages Registration Act 1996* (Vic) s 22; *Births, Deaths & Marriages Registration Act 1998* (WA) s 22.

[79] *Australian Passports Act 2005* (Cth); Robert Lancy, 'The evolution of Australian Passport Law' (1982) 13(3) *Melbourne University Law Review* 428; and Jane Doulman and David Lee, *Every Assistance and Protection: A History of the Australian Passport* (Federation Press, 2008).

[80] Benjamin Nathans, *Beyond the Pale: The Jewish Encounter with Late Imperial Russia* (University of California Press, 2002) 37; and Albert Lindeman, *Esau's Tears: Modern Anti-Semitism and the Rise of the Jews* (Cambridge University Press, 1997) 61-64.

[81] Rodney Livingstone, 'Some Aspects of German-Jewish Names' (2005) 58(2) *German Life and Letters* 164, 179. See more broadly Dietz Bering, *The Stigma of Names: Antisemitism in German Daily Life, 1812-1933* (University of Michigan Press, 1991).

[82] Robert Rennick, 'The Nazi Name Decrees of the Nineteen Thirties' (1970) 18 *Names* 65. See also Jane Caplan, 'Registering the Volksgemeinschaft: Civil Status in Nazi Germany, 1933-1939' in Martina Steber and Bernhard Gotto (eds), *Visions of Community in Nazi Germany: Social Engineering and Private Lives* (Oxford University Press, 2014) 116, 124-126.

where the state for over a century required parents to choose given names from an official list of 'French' names.[83] Restrictions under the Australian regime in essence address concerns regarding offensiveness (for example names that 'contain expletives or racial and/or ethnic slurs or implications'),[84] impracticality or harm to a minor.[85]

A feature of what has been viewed as the patriarchal nature of law[86] has been the requirement (now only a cultural expectation in Australia but still a requirement in some other jurisdictions)[87] that women use the male partner's surname on marriage, a name change recognised through the marriage registration. Surnames can be changed as part of adoption,[88] noted in Chapter Six, or through a decision by the individual to change that person's surname/given name on the basis of self-concept, good luck,[89] fashion,[90] to escape domestic violence[91] or as a political gesture.[92] The change may instead be an attempt to avoid stigma (for example evident in clergy and others convicted of sex offences)[93] and restrictions under bankruptcy or other law.[94]

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[83] Roderick Munday, 'The girl they named Manhattan: the law of forenames in France and England' (1985) 5(3) *Legal Studies* 331. See also Roderick Munday, 'The French law of surnames: a study in rights of property, personality and privacy' (1986) 6(1) *Legal Studies* 79; and K Sharma, 'What's in a Name?: Law, Religion, and Islamic Names' (1998) 26(2) *Denver Journal Of International Law and Policy* 151.

[84] *Abolish Child Support & Family Court and Minister for Foreign Affairs and Trade* [2001] AATA 159, [9].

[85] *Births, Deaths & Marriages Registration Act 1998* (WA) s 4 thus authorises the prohibition of names that in the opinion of the Registrar are obscene or offensive; could not practicably be established by repute or usage; are too long; consist of or include symbols without phonetic significance; or for some other reason; or are contrary to the public interest for some other reason. See also Law Reform Commission of NSW, *Names: Registration and Certification of Births and Deaths (Report No. 61)* (1988). Salient case law includes *Prime Minister John Piss the Family Court & Legal Aid v Minister for Foreign Affairs and Trade (No. 1)* [2003] FMCA 90; *Informal v Chief Electoral Officer* [1992] TASSC 2; and *Abolish Child Support & Family Court and Minister for Foreign Affairs & Trade* [2001] AATA 159.

[86] Elizabeth Emens, 'Changing Name Changing: Framing Rules and the Future of Marital Names' (2007) 74(3) *University of Chicago Law Review* 761; and Omi Leissner, 'Jewish Women's Family Names: A Feminist Legal Analysis' (2000) 34(4) *Israel Law Review* 560.

[87] For mandatory change in Japan see Yasuhide Kawashima, 'Marriage and Name Change in Japanese Family Law' (1992) 26 *University of British Columbia Law Review* 87; Ichiro Numazaki, 'To Change or Not to Change Surname Upon Marriage: An Analysis of the Fufu Betsusei Controversy' (1997) 2 *Japanese Society* 20.

[88] See for example *Adoption Act 2000* (NSW) s 101; and *Adoption Act 2009* (Qld) s 215.

[89] *Horwood and Minister for Immigration and Multicultural and Indigenous Affairs* [2004] AATA 250, [8]; *Shea and Minister for Immigration and Citizenship* [2010] AATA 378, [21].

[90] Stanley Lieberson, *A Matter of Taste: How Names, Fashions, and Culture Change* (Yale University Press, 2000) 16 and 23-28 for a discussion of why in 2017 given names such as Algernon, Ethelred, Dorabella, Ealdred, Tancred, Adolphus, Ruby and Cora are less likely to be bestowed than Kanye, Rihannon and Brittney. A point of reference is provided by Gregory Clark, *The Son Also Rises: Surnames and the History of Social Mobility* (Princeton University Press, 2014).

[91] *Kozarova v DEEWR & Anor* [2009] FMCA 888, [7]; *P v Commonwealth Agency* [2009] PrivCmrA 19.

[92] *Nevil Abolish Child Support v Telstra Corporation Limited* [1997] VADT 44. See also *Freemarijuana and Australian Electoral Officer for Queensland* [2001] AATA 917.

[93] *DPP v Bales (formerly known as Edward Vernon Dowlan)* [2015] VCC 377; *Taylor v Victorian Institute of Teaching (Human Rights)* [2013] VCAT 1290 after offences under the name of Laragy; and *R v Cowan* [2013] QSC 337, [22]. *Births, Deaths & Marriages Registration Act* (NT) s 27A and *Births, Deaths & Marriages Registration Act 1995* (NSW) ss 31E-31F provide for restrictions on name changes by serious sex offenders. See also *Commissioner for Fair Trading, Department of Commerce v Hunter* [2008] NSWSC 277, [90].

[94] *R v Neil Gordon Camm; R v Harold Charles Cary; R v Brendan Matthew Godfrey* [2008] NSWDC 162, [4]. Note *Bankruptcy Act 1966* (Cth) s 8.

Increasing bureaucratic consciousness of identity crime, addressed in the following chapter, has meant that people who wish to change their names are encouraged to do so through a formal process[95] rather than merely use, ensuring that a changed name comes to official attention.

For the purposes of legal identity an individual may only have one name at a particular time (that is cannot interchangeably use two or more surnames at the same time)[96] and, it would appear, cannot have a combined given and surname.[97] The person may face restrictions on the frequency with which a name is changed, ensuring that the signifier has some stability and thus is administratively useful rather than merely inhibiting fraud.[98]

A legal identity is not contested or perceived as relevant in every social interaction. As a consequence there is considerable scope in day by day life for the anonymity and pseudonymity discussed in Chapter Ten, or for institutions out of administrative convenience to accept anomalous names in addressing correspondence.[99] However, an individual's registered name must be used in a range of circumstances, with use of a 'false name' accordingly being an offence. Examples include provision of false names

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[95] *Births, Deaths & Marriages Registration Act 1997* (ACT) s 17; *Births, Deaths & Marriages Registration Act 1995* (NSW) s 26; *Births, Deaths & Marriages Registration Act* (NT) s 22; *Births, Deaths & Marriages Registration Act 2003* (Qld) s 15; *Births, Deaths & Marriages Registration Act 1996* (SA) s 23; *Births, Deaths & Marriages Registration Act 1999* (Tas) s 22; *Births, Deaths & Marriages Registration Act 1996* (Vic) s 24; *Births, Deaths & Marriages Registration Act 1998* (WA) s 22.

[96] *Avery v Registrar of Births, Deaths & Marriages; Avery v State of New South Wales (Attorney General's Department)* [2010] NSWSCA 72.

[97] *Informal v Chief Electoral Officer* [1992] TASSC 2. Refusal to register a combined given and surname would appear to be a discretionary power under the state/territory births, deaths and marriages statutes, guided by each registrar's manuals. As such it demonstrates that law regarding identity is sometimes given meaning 'at the front counter' rather than expressly in the statute or the judgment.

[98] *Births, Deaths & Marriages Registration Act 2003* (Qld) s 21. See also *Mellini v Registrar Registry of Births Deaths & Marriages* [2012] NSWADT 215; *Ezekiel v Registrar of Births, Deaths and Marriages* [2011] NSWADT 137.

[99] See for example *Abolish Child Support and Family Court and Minister for Foreign Affairs and Trade* [2001] AATA 159, [17]:

> a vast amount of evidence before us showing that institutions and organisations such as the Supreme Court, Office of the Deputy Sheriff, banks, local government departments, RACV, CES, Catholic Superannuation Fund, Equal Opportunity Commission, NRMA and the Swinburne University of Technology, amongst others, have recognised the applicant's name

and *Freemarijuana and Australian Electoral Officer for Queensland* [2001] AATA 917, [9]:

> authorities and organisations including the Australian Electoral Commission, Queensland Government, Centrelink, National Australia Bank, Griffith University, Brisbane City Council, University of Queensland Union, National Security Training Academy, Blockbuster Video, Queensland Tertiary Admissions Centre Ltd, Foxtel and others dealt with the applicant by using his adopted name after the name change.

We might conclude that junior administrators in such organisations may snicker or raise their eyebrows but, in the absence of clear authority and an institutional imperative to challenge the name, will accept what is provided if the name is substantiated through sufficient documentation. They may also be concerned about the potential for discrimination claims, evident in *Justice Abolish Child Support and Family Court v State of Victoria (Victoria Police) (Human Rights)* [2015] VCAT 771. See also *Informal v Chief Electoral Officer* [1992] TASSC 2, [30].

to the police,[100] operating accounts in false names,[101] acquiring mobile phones using false names,[102] claiming social security benefits with a false name,[103] entry/departure from Australia using a false name[104] and other identity offences discussed in Chapter Nine.

Given that the use of names (and by extension of documents such as birth certificates and driver licences) is bounded by the state, individuals who are acting for the state in policing or national security operations on an assumed identity basis can however use what would otherwise be a false name contrary to law.[105] The new identity of a person in witness protection[106] can be withdrawn.[107]

We do not have state registers of animal names, consistent with conceptualisation of nonhuman animals as property, in other words entities without rights or obligations, objects of affection or assets or anxiety[108] rather than legal persons. Registration as companion animals has the same status as registration of a gun, car or skiff: it does not make the family pet or the car into a legal person.[109] Data in private sector studbooks and other animal registers may be referred to in litigation regarding animals as having particular attributes but does not signify that animals are persons.[110]

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[100] *Prothonotary of the Supreme Court of New South Wales v Montenegro* [2015] NSWCA 409; *Naik v Morgan* [2013] WASC 336; and *Harries v Commissioner for Fair Trading, NSW Office of Fair Trading* [2006] NSWADT 203.
[101] *Van Haltren v R* [2008] NSWCCA 274; *Studman v Commonwealth Director Of Public Prosecutions* [2007] NSWCA 285; *Muhammad Jehangir Khan v R* [2012] NSWCCA 132; and *Official Trustee in Bankruptcy v Alvaro, Guiseppe & ors* [1996] FCA 483.
[102] *Elomar v R; Hasan v R; Cheikho v R; Cheikho v R; Jamal v R* [2014] NSWCCA 303.
[103] *R v Lovel* [2007] QCA 281.
[104] *Leung v R* [2003] NSWCCA 51; and *Setiawan and Minister for Immigration & Border Protection* [2014] AATA 682, [5].
[105] For example *Crimes Act 1914* (Cth) s 15KP; *Police (Special Investigative And Other Powers) Act 2015* (NT) ss 40 and 57; *Law Enforcement and National Security (Assumed Identities) Act 1998* (NSW); *Crimes (Assumed Identities) Act 2004* (Vic); and *Police Powers (Assumed Identities) Act 2006* (Tas). Note *Hopley v The State of Western Australia* [2014] WASCA 30. More broadly see Gary Marx, *Undercover: Police Surveillance in America* (University of California Press, 1988); Simon Bronitt, 'The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe' (2004) 33(1) *Common Law World Review* 35; Bruce Hay, Sting Operations, Undercover Agents, And Entrapment (Harvard John M. Olin Center For Law, Economics and Business Discussion Paper No. 441) (2003); and the UK Inquiry into Undercover Policing (Pitchford Inquiry) at www.ucpi.org.uk.
[106] For example *Witness Protection Act 1991* (Vic); *Witness Protection Act 1994* (Cth); *Witness Protection Act 1996* (ACT); *Witness Protection (Western Australia) Act 1996* (WA); and *Witness Protection Act 2000* (Qld).
[107] *Re a former protected witness* [2006] VSC 291. See also *Woods v Scipione* [2014] NSWSC 1100.
[108] For example evident in the *Domestic Animals Amendment (Dangerous Dogs) Act 2010* (Vic) and *Dog Control (Dangerous Breeds) Amendment Act 1993* (SA). There has been slow movement towards uniform number-based identity registers under for example *Animal Management (Cats And Dogs) Act 2008* (Qld) ss 45(2), 47 and 23.
[109] See *Dog Regulations 2013* (WA) Reg 16; and *Domestic Animals Act 2000* (ACT) ss 6, 14 and 84A.
[110] *Bull v The Australian Quarter Horse Association* [2014] NSWSC 1665; *Gray v Brimbank City Council* [2013] VSC 281; *Conners v Plozza & Traralgon Veterinary Centre P/L* [1998] VSC 26; *Gubbins v Wyndham City Council* [2004] VSC 238; *Wade v Leroy* [2010] FCA 178; *Sally Ann McKay v Australian Alpaca Association* (1997) 69 SASR 218; and *Ferguson v Fennamore* [2015] NSWSC 1965.

Nonhuman animals are sentient. They are to some degree agentic. Their names may be meaningful to the humans with which they live or work, expressions of bonds of affection, but in the eyes of Australian courts those names have less traction than the signs used to identify non-agentic non-sentient goods and services, in other words trade marks.[111]

Names as such are not purpose-specific and provide weak disambiguation (for example, in isolation do not differentiate between the numerous people named Smith or Ng). Public and private bureaucracies over the past century have accordingly sought to supplement or replace those signs with discrete alphanumeric nominals such as the Tax File Number[112] or VET Student Number[113] or Medicare Number,[114] typically derived from a register and often featured on a card or other document. The identification is in principle independent of the document on which it features, meaning that some popular anxiety about proposals for a universal service card such as the 1980s Australia Card was misplaced.[115] For administrative purposes there is no need for a single master database because data with a uniform person-specific identifier or identifiers can be generated by different public sector agencies, processed by those agencies and readily shared/matched by them.

An individual will typically be identifiable through reference to multiple signifiers at a specific time and over that person's lifetime. Statute and common law dealing with allocation and use of the identifier might feature identifier-specific or general offences that are categorised in Chapter Nine as identity crime. Importantly, statute law sometimes provides for official restrictions on the inter-agency sharing and processing of those identifiers, data processing that is potentially productive of fuller

[111] *Trade Marks Act 1995* (Cth) ss 17 and 6.
[112] *Taxation Laws Amendment (Tax File Numbers) Act 1988* (Cth)
[113] *Student Identifiers Act 2014* (Cth). See also Bruce Baer Arnold, 'National Student Identification (But not quite yet)?' (2013) 9(7) *Privacy Law Bulletin* 111.
[114] *National Health Act 1953* (Cth) ss 84, 86C and 99.
[115] Ewart Smith, *The Australia Card: The Story of Its Defeat* (Sun Books, 1989); Graham Greenleaf, 'The Deceptive History of the 'Australia Card' (1986) 58(4) *Australian Quarterly* 407; Margaret Jackson and Julian Ligertwood, 'Identity Management: Is an Identity Card the Solution for Australia?' (2006) 24(4) *Prometheus* 379; Peter Graham, *Bureaucratic Politics and Technology: Computers & the Australia Card* (Centre for Australian Public Sector Management, Griffith University, 1990); and Joseph Eaton, *Card-Carrying Americans - Privacy, Security & the National ID Card Debate* (Rowman & Littlefield, 1996). For recent developments see Dean Wilson, 'The Politics of Australia's Access Card' in Colin Bennett and David Lyon (eds), *Playing the identity card: surveillance, security and identification in global perspective* (Routledge, 2008) 180, 185.

pictures of the individual's relationship with the state and thus of improper receipt of benefits or evasion of obligations.[116]

German historian Götz Aly, influenced by Foucault, questioned identification of people through numbers in asking

> Is not the simple abstraction of humans into numbers a fundamental assault on their dignity? By profiling individuals, does the temptation not arise to regulate and, as statisticians like to put it, clean them up?[117]

As discussed in the final chapter of this dissertation, there are two responses to that question.

The first is that a large-scale and consistent provision of services (and enforcement of obligations) is enabled by abstracting human subjects in a way that is ostensibly fair because bureaucratically indifferent, in other words where decisions by administrators are determined by rules rather than personal relationships or tears at the front counter. If you want a redistributionist welfare state as a basis for individual and collective flourishing you need both identity numbers and, as importantly, protocols for how bureaucracies and their information systems use the data to frame identity.

The second response is that accountability in a liberal democratic state and the associated emphasis on the agency of civil society means that abstraction is not comprehensive, with the legislature and courts on occasion heeding public expressions of concern and restraining official use of the data. A corollary is that such constraint would be facilitated by constitutional recognition of dignity through a justiciable Bill of Rights, one of the recommendations at the end of this dissertation.

In thinking of how signifiers of legal identity operate on a day by day basis we might also consider nominal prefixes and suffixes, the 'Ms', 'Mr', Miss', 'Mrs', 'Dr', 'Sir' and other indicators associated with names. They are indicia of gender or affinity that

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[116] The salient statute is the *Data-matching Program (Assistance and Tax) Act 1990* (Cth).

[117] Götz Aly and Karl Roth, *The Nazi Census: Identification and Control in the Third Reich* (Edwin Black trans, Temple University Press, 2004) [trans of *Die restlose Erfassung*: *Volkszählen, Identifizieren, Aussondern im Nationalsozialismus* (first published 2000)] 7. There is a less polemical account in Adam Tooze, *Statistics and the German State 1900-1945* (Cambridge University Press, 2001) 36 and 285; contextualised by Jason Hansen, *Mapping the Germans: Statistical Science, Cartography, and the Visualization of the German Nation, 1848-1914* (Oxford University Press, 2015).

enable administrative sorting by public and private sector entities. They are representative of a differentiation that in terms of legal identity is not inevitable, with regimes at particular times seeking to shape behaviour (or merely expectations) through an emphasis on uniform descriptors.

Revolutionary France thus sought to erode the class distinctions of the *ancien regime* and build social solidarity by encouraging the members of the national community (from which the 'Whites' had been excluded) to refer to each other as citizen rather than by indicators of a social status that had formerly been legally significant, for example because members of clergy and the aristocracy enjoyed a range of non-trivial legal immunities. Citizen Robespierre for example was nominally equal to Citizen Capet, the man who had lost his legal identity as France's divinely sanctioned absolute monarch and was shortly to lose his head as a consequence of that deleterious former identity, followed by Robespierre once the sea green incorruptible had been extrajudicially identified by his own foes as having the legal identity of an outlaw, someone outside the law who could thus be summarily executed as an enemy of the people.[118] In the French Revolution de Maistre construed social flourishing – conceptualised as peace, prosperity and the comfort attributable to people knowing their proper place within the social fabric – as an outcome of strict adherence to an hereditary monarchy. His vision was inegalitarian, one in which many people would have fundamentally limited opportunities for self-fulfilment and others would flourish because of their lineage[119]. Constitutional theorist Abbé Sieyès had more optimistically (and for the purposes of flourishing, more usefully) construed legal identity as people being uniformly subject to and equal before the law. He wrote

> I picture the law as being in the centre of a huge globe; all citizens, without exception, stand equidistant from it on the surface and occupy equal positions there; all are equally dependent on the law, all present it with their liberty and their property to be protected, and this is what I call the common rights of citizens, the rights in respect of which they are all alike.[120]

[118] Peter McPhee, *Robespierre: A Revolutionary Life* (Yale University Press, 2012) 219-220.
[119] Joseph de Maistre, *Maistre: Considerations on France* (Richard A Lebrun trans, Cambridge University Press, 1994) [trans of *Considerations sur la France* (first published 1797)] 90. Isaiah Berlin, 'Joseph de Maistre and the Origins of Fascism' in Henry Hardy (ed), *The Crooked Timber of Humanity* (Princeton University Press, 2nd ed, 2013) 95. For a more positive view see Carolina Armenteros and Richard Lebrun (eds), *Joseph de Maistre and his European readers: from Friedrich von Gentz to Isaiah Berlin* (Brill, 2011).
[120] Sieyès quoted in Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1992) 39. See also Raymond Kubben, 'L'Abbé de Sieyès, Champion of National Representation, Father of

The early Soviet Union similarly encouraged its members to refer to each other as comrade or citizen in a world where all people (other than enemies) were ostensibly equal but some, such as Stalin, were substantively more equal than others.[121]

What of state names? In *Through The Looking Glass* Lewis Carroll touched on nominalism, writing

> "When I use a word", Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less".
> "The question is", said Alice, "whether you can make words mean so many different things".
> "The question is", said Humpty Dumpty, "which is to be master— that's all".[122]

Given the contention in Chapter Three of this dissertation that states both provide rules for the legal identity of their subjects and themselves are discrete legal identities it is worth pausing momentarily to consider their self-naming, alongside other signifiers.

State nominalism can be read as an example of Dumpty indicating that words mean whatever the speaker wants them to mean. Contrary to Deleuze, who in places seems to consider that meaning is entirely open, not all speakers are equal and the meaning of state names is framed by what the speaker in authority considers is important. Returning to Renan's characterisation in Chapter Three above of nations as a community of meaning we might read state names as collective expressions of aspiration, irony or merely historical circumstance. Australia for example identifies itself as the Commonwealth of Australia (rather than the Kingdom or United Kingdom of Australia).[123] 'Ireland' refers to both the island of Ireland (a micro-continent) and the state of the Republic of Ireland (also known as Eire), a state that

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Constitutions' in Denis Galligan (ed), *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham* (Oxford University Press, 2014) 290, 303.

[121] Jeffrey Brooks, *Thank You, Comrade Stalin! Soviet Public Culture from Revolution to Cold War* (Princeton University Press, 2000) 89 and 91. For a perspective see Friederike Braun, *Terms of Address: Problems of Patterns and Usage in Various Languages and Cultures* (Mouton de Gruyter, 1988) 261-265; and Sheila Fitzpatrick, *Everyday Stalinism: Ordinary Life in Extraordinary Times: Soviet Russia in the 1930s* (Oxford University Press, 1999) 83-84.

[122] Lewis Carroll, 'Through The Looking Glass' in Martin Gardner (ed), *The Annotated Alice* (Penguin, 1970) 269.

[123] Reference in the *Royal Style and Titles Act 1973* (Cth) Sch to 'Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth' identifies the monarch but not the state and does not in Australian law signify that the Commonwealth's continued existence is dependent on pleasing a specific deity. A handful of states, such as Saudi Arabia, claim divine sanction for their executive, a ruler typically read in domestic law as synonymous with the state.

under Article 2 of its Constitution claims sovereignty over the entire island. That claim encompasses the nine counties of Ulster, of which six – in the law of the United Kingdom characterised as Northern Ireland – are part of that kingdom.[124] Britain is currently the United Kingdom of Great Britain (in other words England, Scotland and Wales) and Northern Ireland.[125] Viewed through a Rawlsian lens self-identification of the former Deutsche Demokratische Republik (an entity that as Brecht implied in his 1953 poem about the 'ruling party sacking the people' was German, formally republican but decidedly not democratic)[126] and the current Democratic People's Republic of North Korea give a new meaning to terms such as socialist, democratic and people. Under the Kim Il Sung dynasty the only people whose identity matters in North Korean law are the dynasts and their close associates.[127]

Shakespeare deconstructed naive understandings of nominalism when, in answering 'What's in a name?', he commented 'That which we call a rose. By any other name would smell as sweet'.[128] In so doing he highlighted that there is no inherent relationship between names *per se* and the entities signified by those names. When thinking of legal identity as extending beyond human animals it is useful to recognise that people draw inferences about corporate entities and their manifestations (in other words goods and services that are designated by brand names and taken by consumers to be representative of the entity) on the basis of names.

The preceding chapter highlighted questions about the naming of commercial entities and corporations, noting that companies can for example be identified using what non-specialists would consider to be a personal name, especially one associated with the persona of the corporation's founder, or through words that through habituation have come to be recognised as identifying the entity. Corporate names can consist of numbers – embodying the Australian Company Number, a unique identifier allocated

[124] See J D B Oliver, 'What's in a name' in John Tiley (ed), *Studies In The History of Tax Law* (Hart, 2001) 177, 184.
[125] *Royal and Parliamentary Titles Act 1927* (17 & 18 Geo V c 4).
[126] Bertolt Brecht, 'The Solution' in *Poems, 1913-1956* (John Willett and Ralph Mannheim trans, Methuen, 1987) [trans of 'Die Lösung' (first published 1953)] 440.
[127] Michael Kirby and Sandeep Gopalan, ''Recalcitrant' States and International Law: The Role of the UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of North Korea' (2015) 37(1) *University of Pennsylvania Journal of International Law* 229, 232 and 252-260.
[128] William Shakespeare, 'Romeo and Juliet' in Richard Proudfoot, Ann Thompson and David Kastan (eds), *The Arden Shakespeare* (Bloomsbury, 2013) 1007, 1017.

by the state – rather than one or more words,[129] words that in retrospect might be ironic (as in Chaste Corporation or Advanced Medical Institute)[130] or otherwise. Names can be changed and, as noted in the preceding chapter, corporations can change their domicile.[131]

The choice of signifiers in corporate naming is limited in Australian law by restrictions on words that would be deemed to be generally misleading, offensive or conveying an association with the executive or other authority. In signifying identity through an entity's name there are accordingly restrictions under the Corporations Act[132] on names that incorporate words relating to financial activity,[133] universities, associations with the executive and other aspects of the state, particular individuals (Mary McKillop and Donald Bradman) and other entities.[134] Those restrictions are reflected in the Trade Marks Regulations.[135] There are similar restrictions – consistent with consumer protection and respect for what is deemed to be legitimate authority – under the business names regime. In *Djamirze* for example the registrar's rejection of 'HRH Prince Alan Djamirze' was upheld on the basis that the applicant had failed to prove his connection with a royal family, in this instance the supposed Circassian Royal House of Dja Mirze.[136]

The Legible Body

Despite enthusiasm for a range of biometrics (discussed below) that proponents argue will authoritatively enable public/private sector entities to identify individuals and

[129] *Corporations Act 2001* (Cth) ss 148. See also s 118.
[130] *Australian Competition & Consumer Commission v Chaste Corporation Pty Ltd (in liq) (ACN 089 837 329)* [2002] FCA 1183; and *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Limited (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 368.
[131] *Corporations Act 2001* (Cth) ss 177.
[132] *Corporations Act 2001* (Cth) ss 147(1)(c) and 601DC(1)(c).
[133] Authorisation by the Australian Prudential Regulation Authority is required under Part 5 of Schedule 6 of the *Corporations Regulations 2001* (Cth) for use in a name of the words ADI, Building Society, Authorised Deposit-Taking Institution, Bank, Credit Union, Friendly Society, Credit Society, Banker and Banking.
[134] Treasury Department authorisation is required for corporate names that feature the words or abbreviations RSL, Aboriginal Corporation, Aboriginal Council or Torres Strait Islander Corporation, Chamber of Commerce or Chamber of Manufactures, Chartered, Commonwealth and Federal, Consumer, Co-operative, Executor, Guarantee, Friendly Society, GST, Incorporated, Made in Australia, Police and policing, Starr Bowkett, Stock Exchange, Trust or Trustee; that suggest a connection with the Crown, certain Governments, municipal or other local authority or a Commonwealth, State or Territory department, authority or instrumentality; that suggest an organisation is one of totally or partially incapacitated war veterans if this is not the case, or a connection with an ex-servicemen's organisation if that connection does not exist; or suggest a connection with a member of the Royal Family or the receipt of Royal patronage.
[135] *Trade Marks Regulations 1995* (Cth) Reg 4.15.
[136] *Djamirze v Director General, Department of Services Technology & Administration* [2012] NSWADT 17.

thereby establish or maintain perimeters of authority, we are all familiar with legal identity on the basis of reading the legible body. Put simply, we are so habituated to discerning attributes of identity and making sense of that identity that we are rarely conscious of identification as process. In contemporary Australia the salient examples are gender, disability and age. Those identities, which are legally recognised and have legal consequences, are generally evident in viewing or hearing by a non-specialist observer.

In the absence of assertion (in other words an express statement by a transgender individual)[137] we assume that people are male or female on the basis of physical appearance, which is not solely a matter of costume, and behaviour such as choice in using gendered facilities such as female change-rooms. We discern age through markers such as gait, vigour, skin quality (reflected in the popular characterisation of the aged as 'wrinklies'), sparseness of hair and even costume choice. A disability[138] may be signalled by use of a prosthetic, by absence of a limb or other body part, difficulty in communication, unconventional behaviour or merely exercise of a right such as use of a 'disabled parking' spot.[139] The pluralism evident in a liberal democratic state means that those people are socially and potentially legally perceived as different, perhaps disadvantaged, but not denied full personhood.

We identify (or mis-identify) people on the basis of what they wear, with clothing providing cues about social and legal status that inform both the observer and the wearer. Chapter Two for example pointed to work by Hunt, Raffield, Phillips and others[140] on sumptuary regimes, with for example female sex-workers in the past

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[137] See *R v McNally* [2013] EWCA Crim 1051; and the discussion in Penelope Childs, ''Gender Fraud': Where Do We Go From Here? (2016) 1 *Plymouth Law and Criminal Justice Review* 109. See also Jocelynne Scutt, 'Fraudulent Impersonation and Consent in Rape' (1975) 9(1) *University of Queensland Law Journal* 59.

[138] See for example *Disability Discrimination Act 1992* (Cth) s 4; *Handicapped Persons Assistance Act 1974* (Cth) s 3; *Disability Inclusion Act 2014* (NSW) s 7; and *Disability Services Act 2006* (Qld) s 11.

[139] *Local Government (Parking For Disabled Persons) Regulations 1988* (WA) Reg 4; *Conveyancing & Law Of Property Amendment (Parking Easements) Act 1998* (Tas) s 7; *Congestion Levy Act 2005* (Vic) s 21. See also *McVeigh v Johnston* [2013] ACTSC 135, [1]-[5]; *Farage v Sydney West Area Health Service* [2009] NSWADT 53, [2]; and *Morris v Transport Accident Commission* [2014] VCC 158, [42].

[140] Alan Hunt, *Governance of the Consuming Passions* (St Martins, 1996); Paul Raffield, 'Reformation, Regulation and the Image: Sumptuary Legislation and the Subject of Law' (2002) 13(2) *Law and Critique* 127; Kim Phillips, 'Masculinities and the Mediaeval English Sumptuary Laws' (2007) 19(1) *Gender and History* 22; Maria Hayward, *Rich Apparel: Clothing and the Law in Henry VIII's England* (Ashgate, 2009); Valentin Groebner, *Who Are You? Identification, Deception & Surveillance in Early Modern Europe* (Mark Kyzburz and John Peck trans, Zone, 2007) [trans of *Der Schein der Person: Steckbrief, Ausweis und Kontrolle im Mittelalter* (first published 2004)]; Claire Sponsler, 'Narrating the Social Order' (1992) 21(3) *Clio* 265; and Ruthann Robson, 'Beyond Sumptuary: Constitutionalism, Clothes and Bodies in Anglo-American Law, 1215-1789' (2013) 2(2) *British Journal of American Legal Studies* 477.

being required by law to wear distinctive clothing, beggars to wear badges to signify their indigence,[141] other pariahs to wear distinctive dress[142] and an early-modern Scottish statute specifying 'it be lawful for no women to wear above their estate except whores'.[143] Both historically and currently we do not need to rely on text for indicators of identity and questions about capacity. Art for example may give us representations of past signifiers. In discussing the Warren Cup, Clarke suggested that

> It was easy to know the status of people in Roman times because of their dress: a freeborn boy or *ingenuus*, who was off-limits for sex, wore a golden amulet, or *bulla*, around his neck, and a special toga, the *toga praetexta*.[144]

Those signifiers tell us something about indicia and about identities, implicitly a deleterious identity for a young male who was property and thus lacked the *bulla*. In contemporary Australia, as noted above, representatives of the state often wear uniforms while acting in an official capacity.[145] Most law enforcement personnel wear uniforms to build *esprit de corps* and signify their authority,[146] uniforms that are emulated by entities such as Victoria's Protective Services Officers (state transport personnel with quasi-policing powers)[147] and the militarised Australian Border Force.[148] Adherents of Islam may wear a *niqab*, something that renders legible the individual's religious identity and self-concept but, as noted above, in obfuscating individuation conflicts with passport, driver licensing and other regimes.

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[141] Steve Hindle, 'Dependency, Shame and Belonging: Badging the Deserving Poor, c. 1550-1750' (2004) 1 *Cultural and Social History* 6. Jonathan Swift's 1737 *A Proposal for Giving Badges to the Beggars in All the Parishes of Dublin* suggested a mix of public and private violence for fake indigents, with the badge indicating the authorised beggar's connection with a specific parish. See Leo Damrosch, *Jonathan Swift: His Life and His World* (Yale University Press, 2013) 420-421.

[142] Miriam Eliav-Feldon, *Renaissance Imposters and Proofs of Identity* (Palgrave Macmillan, 2012) 171-175.

[143] Ruthann Robson, 'Beyond Sumptuary: Constitutionalism, Clothes and Bodies in Anglo-American Law, 1215-1789' (2013) 2(2) *British Journal of American Legal Studies* 477, 478.

[144] John Clarke, 'The Warren Cup and the Contexts for Representations of Male-to-Male Lovemaking in Augustan and Early Julio-Claudian Art' (1993) 75(2) *The Art Bulletin* 275, 290. The poor relied on signifiers with a lower value; Braund for example refers to the knot in a leather strap as a surrogate amulet. Susanna Braund (ed), *Juvenal and Persius* (trans Susanna Braund, Harvard University Press, 2004) 229. John Pollini, 'The Warren Cup: Homoerotic Love and Symposial Rhetoric in Silver' (1999) 81(1) *The Art Bulletin* 21, 38 comments 'Although this amulet had apotropaic properties to ward off evil from the still-defenseless freeborn boy, it was also a way of distinguishing between a slave boy and a freeborn boy. As noted by Plutarch in Moralia, *Quaestiones Romanae* 288A, it helped protect against unwanted sexual advances, especially if a boy were unclothed.' See also Amy Richlin, 'Not before Homosexuality: The Materiality of the Cinaedus and the Roman Law against Love between Men' (1993) 4 *Journal of the History Of Sexuality* 523.

[145] A concise and irreverent introduction is provided by Paul Fussell, *Uniforms: Why We Are What We Wear* (Houghton Mifflin, 2002).

[146] See for example *Police Act 2013* (Vic) s 62. See also Mariana Valverde, *Law and Order: Images, Meanings, Myths* (Routledge, 2013) 20-21 and 43.

[147] *Justice Legislation Amendment (Protective Services Officers) Act 2011* (Vic).

[148] *Australian Border Force Act 2015* (Cth). See also Khanh Hoang, 'Migration law: Of secrecy and enforcement: Australian Border Force Act' (2015) 2(7) *LSJ: Law Society of NSW Journal* 78; and Andrew Hamilton, 'Australian border force cuts through the fence of law and due process' (2015) 25(17) *Eureka Street* 41-43.

Sumptuary regimes are readily subverted. US slaves and Tudor beggars could for example presumably throw off the badges and travel to a location where their identity as a vagrant was not known and the future appeared brighter,[149] police uniforms and badges can be stolen or borrowed or rented from costume shops,[150] and people can illicitly wear stolen or purchased indicia of heroism[151] or of military service[152] in the hope that their appropriation of honour[153] is undetected by the Department of Veterans Affairs and identity regime activists such as Australian and New Zealand Military Impostors group.[154]

In making bodies legible as identities states have accordingly sought more stable signifiers, with criminals for example being branded or tattooed with a marker indicating a specific crime[155] or other status (for example branding an 'A' on the thumb as a signifier of abjuration).[156] The punitive nature of signification is highlighted by past practice such as cropping ears, lips and noses,[157] a legibility mechanism that both had a particular power in cultures where those body parts had a symbolic value and that reflected the state's incapacity regarding effective policing

[149] For slave badging see David Lyon, 'Identification practices: state formation, crime control, colonialism and war' in Katja Franko Aas, Helene Oppen Gundhus and Heidi Mork Lomell (eds), *Technologies of inSecurity: the surveillance of everyday life* (Routledge, 2008) 42, 48.
[150] *DOHS v Mr O & Ms B* [2009] VChC 2; *Milane v R* [2006] NSWCCA 281; and *In the matter of an application for bail by Eiginson* [2014] ACTSC 234, [42].
[151] Ramya Kasturi, 'Stolen Valor: A Historical Perspective on the Regulation of Military Uniform and Decorations' (2012) 29 *Yale Journal on Regulation* 419; R George Wright, ''What is that Honor?': Re-Thinking Free Speech in the 'Stolen Valor' Case' (2013) 60(4) *Cleveland State Law Review* 847; and Beth Lloyd-Jones, 'The Stolen Valor Conundrum: How to Honor the Military While Protecting Free Speech' (2012) 38 *New England Journal on Crime & Civil Confinement* 153.
[152] *Defence Act 1903* (Cth) ss 80A and 80B; *Discharged Servicemen's Badges Act 1964* (NSW) s 3; *Returned Servicemen's Act 1956* (Qld) ss 3 and 4; *Returned Services Badges Act 1952* (SA) s 3; *Returned Servicemen's Badges Act 1956* (Vic) s 2; and *Returned Servicemen's Badges Act 1953* (WA) s 3. Note also *Veterans' Entitlements Act 1986* (Cth) s 102.
[153] Trent Dalton, 'How military imposters fool the ANZAC Day crowds and themselves', *The Australian* (Sydney) 31 August 2013, 5; Tom Hyland, 'The ANZAC heroes who weren't', *The Age* (Melbourne) 27 April 2001, 3; Russell Robinson, 'Diggers declare war on ANZAC imposters', *Herald Sun* (Melbourne) 2 April 2005, 9; Viva Goldner, 'Lowest rank of fraud: Court told 'colonel' was all self-promotion', *Daily Telegraph* (Sydney) 22 March 2007, 7; Christine Flatley and Steve Gray, 'POW imposter gets jail term $464,000 welfare scam exposed' *Hobart Mercury* (Hobart) 22 December 2010, 21; and Russell Robinson, 'For 20 years at services he mourned his Vietnam mates, now he admits ... I'm an Anzac fake', *Herald Sun* (Melbourne) 22 April 2010, 3. The only reported cases appear to be *Dunn v Simon Blackwood (Workers' Compensation Regulator)* [2014] QIRC 9 and *Hines v Commissioner of Police* [2016] QCA 3.
[154] Australian and New Zealand Military Impostors group (www.anzmi.net).
[155] Peter Becker, 'The Standardized Gaze' in Jane Caplan and John Torpey (eds), *Documenting Individual Identity* (Princeton University Press, 2001) 139, 155.
[156] Krista Kesselring, 'Abjuration and its demise: The changing face of royal justice in the Tudor period' (1999) 34(3) *Canadian Journal of History* 345, 352; and Tom Gerety, 'Sanctuary: A comment on the ironic relation between law and morality' in David Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Springer Netherlands, 1988) 159, 161.
[157] Miriam Eliav-Feldon, *Renaissance Imposters and Proofs of Identity* (Palgrave Macmillan, 2012) 137, 141 and 144.

through verification of paper identity documents.[158] In a liberal democratic state we eschew such punitive action as contrary to national and international expectations regarding torture[159] and in conflict with belief that the justice system is meant to foster rehabilitation.

The past 150 years in advanced economies have instead seen growing interest in biometrics as a mechanism for making bodies legible.[160] The mechanism has included anthropometric and photographic bertillonage[161] and fingerprints[162] in the period before digital imaging systems and networks. It now includes palm, face, iris, retina, voice and other 'prints', along with DNA-based tools,[163] all of which seek to identify the individual through stable, unique and readily discernable physical attributes. In endorsing Bertillonage the director of the French prison system enthused about its ability 'to fix the human personality, to give to each human being an individuality, that is certain, lasting, unchangeable, always recognisable and easily demonstrable'.[164] That was an overstatement, given that biometrics do not capture character. Fingerprints for example do not reveal whether the person is generous, fearless, greedy, pious or sociable. Other than signs of wear and tear, they also do not indicate an individual's history and legal capacity.

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[158] Jeremy Bentham commented that social practice regarding naming stood 'upon such an unsatisfactory footing' that it would be desirable and 'quite practical' to establish a 'new nomenclature of such a character that every individual in the whole nation should have a proper name, borne only by himself', and that 'Everything which tends to improve the expedients for the Identification and Discovery of men engaged in crime adds to the general security'. He accordingly proposed that names be tattooed on wrists. Charles Atkinson (ed), *Principles of the Penal Code* (Humphrey Milford, 1914) 258 and 269 respectively. Dreams of universal legibility through body modification have been replaced by visions of legibility through pervasive networks of imaging devices using face-recognition and other biometric technologies.

[159] See for example *Crimes (Torture) Act 1988* (Cth); United Nations 1975 *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10.

[160] Els Kindt, *Privacy and Data Protection Issues of Biometric Applications: A Comparative Legal Analysis* (Springer, 2013) 15; Ruud Bolle, Jonathan Connell, Sharath Pakanti, Nalini Ratha and Andrew Senior, *Guide to Biometrics* (Springer, 2004); Richard Hopkins, 'An introduction to biometrics and large scale civilian identification' (1999) 13(3) *International Review of Law, Computers & Technology* 337; and Michelle Frye, *The Body As Password: Considerations, Uses and Concerns of Biometric Technologies* (MA, Communication and Technology, Georgetown University, 2001).

[161] Martine Kaluszynski, 'Republican Identity: Bertillonage as Government Technique' in Jane Caplan and John Torpey (eds), *Documenting Individual Identity* (Princeton University Press, 2001) 123.

[162] Simon Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (Harvard University Press, 2001); and Simon Cole, 'Fingerprint Identification and the Criminal Justice System: Historical Lessons for the DNA Debate', in David Lazer (ed), *DNA and the Criminal Justice System* (MIT Press, 2004) 63.

[163] Michael Lynch, Simon Cole, Ruth McNally and Kathleen Jordan, *Truth Machine: The Contentious History of DNA Fingerprinting* (University of Chicago Press, 2009).

[164] Louis Herbette quoted in Claire Valier, *Crime and Punishment in Contemporary Culture* (Routledge, 2005) 30.

Biometric data in isolation does not endow an individual or a cohort of individuals with a specific legal identity. It potentially provides individuation, rather than a standalone and tamper-proof signifier of status. It is meaningful only through reference to other data, for example through matching with a fingerprint collected at a crime scene on a forensic basis (or held in a register of people convicted/investigated for crimes) or through matching of a scan made as someone moves through a portal with a scan held in an electronic register and in a passport. It may be useful to answer 'Am I who I say I am?' (verification through a one-to-one match) or 'Who am I?' (identification through a one-to-many match involving for example a search of records of fingerprints of all people with a criminal conviction in Australia).[165]

The immutability of the physical attributes captured through most biometric systems along with the ease of data collection, dissemination and processing mean that public and private sector entities appear to be moving towards identity verification regimes founded on those systems, often promoted as providing a reliable and humane electronic border that will exclude terrorists[166] or a tool for quickly discerning shoplifters, terrorists, poor credit risks, people who have broken the speed limit and other offenders. Embrace of those systems is also a reflection of scientism, in other words a faith in advanced technologies as providing administrators and social policy makers with definitive answers to meaningful social questions.[167]

That faith provides an impetus for the explicit or tacit establishment of population-scale biometric registers that may be formally established under specific legislation[168]

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[165] See for example *Yeonata v R* [2012] NSWCCA 211, [6] and [14]-[18].

[166] Benjamin Muller, *Security, Risk and the Biometric State: Governing Borders and Bodies* (Routledge, 2010); and Gerrit Hornung, 'The European regulation on biometric passports: legislative procedures, political interactions, legal framework and technical safeguards' (2007) 4(3) *SCRIPT-ed: A Journal of Law, Technology and Society* 246. See also European Commission Joint Research Centre, *Biometrics at the Frontiers: Assessing the Impact on Society for the European Parliament Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (LIBE)* (2004).

[167] Peter Atkins, 'Science As Truth' (1995) 8(2) *History of the Human Sciences* 97; Carole McCartney, *Forensic Identification and Criminal Justice* (Routledge, 2013) xiv and 212; Tom Sorell, *Scientism: Philosophy and the infatuation with science* (Routledge, 2013); and Robert Putnam, 'Elite Transformation in Advanced Industrial Societies: An Empirical Assessment of the Theory of Technocracy' (1977) 10(3) *Comparative Political Studies* 383, 383. For a legal theory and methodology perspective see George Priest, 'The New Scientism in Legal Scholarship: A Comment on Clark and Posner' (1981) 90(5) *Yale Law Journal* 1284, 1292; and Nancy Levit, 'Listening to Tribal Legends: An Essay on Law and the Scientific Method' (1989) 58(3) *Fordham Law Review* 263, 268.

[168] See for example *Migration Amendment (Strengthening Biometrics Integrity) Act 2015* (Cth); *Crimes (Administration Of Sentences) Regulation 2014* (NSW) Reg 320; *Auscheck Act 2007* (Cth); *Mental Health Act 2013* (Tas) s 100; *Motor Vehicles Variation Regulations 2012* (SA) Reg 4; and *Prisons (General) Amendment (Biometric Identification System) Regulation 1997* (NSW).

and may involve networked sharing by governments,[169] for example Australia's national biometrics hub that is meant to facilitate identity document verification and complement the exchange of biometric data about people with criminal convictions.[170] Biometric data has significant value for law enforcement in the prospective and retrospective identification of individuals, thus underpinning legal identity regimes at borders and other locations. However, the indelible nature of the data and bureaucratic faith in biometric systems potentially fosters abuses[171] and raises questions about privacy in a world where, as noted in Chapter Ten, databases are often insecure.[172]

Given this dissertation's emphasis on respect for the dignity of offenders, suspected offenders and the innocent alike, the increasingly pervasive collection and weakly constrained use of biometric data raises questions about the non-financial costs of legal identity verification in the liberal democratic state. We have not seen an express whole of population DNA or other biometric registration program for the purposes of identity verification; proposals for example to exploit DNA inherent in Guthrie Cards (that is records from newborn infants)[173] have been resisted and mass-fingerprinting in pre-1950 Argentina has not been emulated.[174] We should be conscious however that governments are building very large fingerprint and other biometric databases through what have come to be seen as unexceptional mechanisms such as passports, visas, government security vetting, drivers' licences, and criminal conviction

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[169] Dean Wilson, 'Australian biometrics and global surveillance' (2007) 17(3) *International Criminal Justice Review* 207; and Carole McCartney, 'Forensic data exchange: ensuring integrity' (2015 47(1) *Australian Journal of Forensic Sciences* 36.

[170] *Australian Crime Commission Amendment (National Policing Information) Act 2015* (Cth) and for example *Police Powers And Responsibilities Act 2000* (Qld) s 493. See also Bruce Baer Arnold, 'A National Identity Hub? The Privacy Impact Assessment for the National Facial Biometric Matching Scheme' (2016) 13(3) *Privacy Law Bulletin* 50; and Roger Clarke, 'Privacy impact assessments as a control mechanism for Australian counter-terrorism initiatives' (2016) 32(3) *Computer Law & Security Review* 403.

[171] Ruha Benjamin, 'The Emperor's New Genes: Science, Public Policy, and the Allure of Objectivity' (2015) 661 *Annals of the American Academy of Political and Social Science* 131; Dean Wilson, 'Biometrics, Borders and the Ideal Suspect' in Sharon Pickering and Leanne Weber (eds), *Borders, Mobility and Technologies of Control* (Springer, 2006) 87; David Kay, 'Who Needs Special Needs? On The Constitutionality Of Collecting DNA and Other Biometric Data From Detainees' (2006) 34 *Journal of Law, Medicine and Ethics* 188; and Rhian Beynon, 'The compulsory biometric registration of foreign nationals in the UK: policy justifications and potential breaches of human rights' (2007) 21(4) *Journal of Immigration, Asylum and Nationality Law* 324.

[172] As noted above, you can change nominals, credit cards and other identifiers but cannot change your DNA or fingerprints. The attributes collected through some biometric systems appear to be less immutable, with potential for example for obfuscation through plastic surgery or subversions noted below.

[173] Graeme Laurie, Kathryn Hunter and Sarah Cunningham-Burley, *Storage, Use And Access To The Scottish Guthrie Card Collection: Ethical, Legal And Social Issues* (University of Edinburgh, 2013) 49.

[174] Kristin Ruggiero, 'Fingerprinting and the Argentine plan for universal identification in the late nineteenth and early twentieth centuries' in Jane Caplan and John Torpey (eds), *Documenting Individual Identity* (Princeton University Press, 2001) 184.

records.[175] Biometrics are thus a key and expanding signifier of a range of legal identities.

In practice much identification and verification involves reference to faces, that is assembly of photographic records of people's faces and the presentation of those images in 'photo IDs' such as driver's licences and proof of age cards or in the 'mug shots' and 'wanted' posters.[176] An implication is that being imaged is often, in practice, compulsory – you cannot for example obtain a driver's licence, a passport or many public/private sector corporate identity passes without being photographed. One explanation was provided in 2011, when a representative of the state testified that

> the Queensland driver licence is more than an authority to drive. Not only does it enable police to identify quickly a driver in relation to a relevant matter, but it has become a primary form of identification, used by holders when proof of identity is required, for example when opening a bank account, taking out a loan, proving age to purchase liquor, et cetera.
>
> In turn, ... following the Administrative Guidelines, the Department has, and accepts that it has, a duty to ensure that a driver licence is only issued where the licence can reliably identify its holder to any law enforcement agency, government agency, commercial entity, or community group. He expresses the view that reliable identification cannot occur in the absence of a photograph, and that a driver licence does not compare to other identity documents such as a birth certificate or a passport, because it is more functional and durable, can easily be carried on a person, and is one of the only photographic identity documents to include a person's address.[177]

Signatures

DNA, retina scans and other digital biometrics have attracted attention because they are new and have something of the 'CSI Effect'.[178] In contrast we have become habituated to handwritten signatures on documents as signifiers of legal identity and

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[175] Margaret Betzel, 'Recent Changes in the Law of Biometrics' (2005) 1 *I/S: A Journal of Law and Policy for the Information Society* 517.
[176] Jonathan Finn, *Capturing the Criminal Image: From Mug Shot to Surveillance Society* (University of Minnesota Press, 2009). For an instance of misuse see the discussion in James Jacobs, *The Eternal Criminal Record* (Harvard University Press, 2015) 81-86.
[177] *Emanuel and Anor v State of Queensland* [2011] QCAT 731, [56]-[57].
[178] Tom Tyler, 'Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction' (2006) 115 *Yale Law Journal* 1050; and Donald Shelton, 'The 'CSI Effect': Does it Really Exist?' (2008) 259 *National Institute of Justice Journal* 1.

are increasingly unfamiliar with seals (wax or ink imprints) as a more traditional signifier.[179]

Readers of this dissertation will recognise from the preceding comments that a signature or a seal (or the tool such as a Malayan or Chinese chop,[180] the Japanese *hanko*[181] or signet[182] used to make that seal) is a contestable representation of legal identity rather than the identity *per se*. In essence, it provides a sign that a statement has been knowingly made by the legal entity authorised to make that statement, for example an uncoerced statement in the form of a contract or deed by someone with the requisite understanding.[183] The sign might be contested in a legal forum. Much case law (and a larger body of popular fiction) has concerned claims of forgery, in other words that a signature was inauthentic and therefore the authority of the supposed legal identity cannot be invoked for example in a will, contract or in valuation of an artwork that features a signature made by someone other than the ostensible creator.[184]

A contention throughout this dissertation is that identities, signifiers and mechanisms for their recognition/verification are culturally (and by extension often technologically contingent). They are sometimes subject to a mystique, with ritual serving as a soft form of power – a hegemony – to reinforce legal authority.[185] We can see that with use of seals in the pre-modern period, signatures (often superseding seals as literacy increased and the cost of paper plummeted) in the modern period and law about 'digital signatures' in contemporary Australia where people are more likely to own a

[179] For the handwritten signifier see *Goodman v J Eban Ltd* [1954] QB 550, 557 and 563. Note however signature by print or stamp: *Re a debtor (No 2021 of 1995)* [1996] 2 All ER 345, 349 and *Goodman v J Eban Ltd* [1954] 1 QB 550, 555. Statutory references include *Evidence Act 1995* (Cth) ss 150(3) and 140; *Acts Interpretation Act 1954* (Qld) s 27A(3); *Biosecurity Act 2015* (Cth) s 494; *Director of Public Prosecutions Regulation 2015* (NSW) Reg 5; and *Crimes Act 1958* (Vic) s 464K(3)(b).
[180] Annabel Teh Gallop, 'One Seal Good, Two Seals Better, Three Seals Best? Multiple Impressions Of Malay Seals' (2006) 34(100) *Indonesia and the Malay World* 407.
[181] Yin-Miao Liu, Visually Sealed and Digitally Signed Electronic Documents: Building on Asian Tradition (Master of Information Technology) (Queensland University of Technology, 2004) 22-24 and 34-53.
[182] Edward Higgs, *Identifying the English: a History of Personal Identification 1500 to the Present* (Continuum, 2011) 60.
[183] For knowledge and coercion see Chapter Four above. Further, see *Crago v McIntyre* [1976] 1 NSWLR 729; and *Gibbons v Wright* (1954) 91 CLR 423.
[184] See for example Brad Epps, 'The Blankness of Dali, or Forging Catalonia' in Judith Ryan and Alfred Thomas (eds), *Cultures of Forgery: Making Nations, Making Selves* (Routledge, 2001) 79, 85; and Ronald Spencer, *The Expert versus the Object: Judging Fakes and False Attributions in the Visual Arts* (Oxford University Press, 2004) 93.
[185] A point of reference is Brigitte Miriam Bedos-Rezak, 'Seals and stars: Law, magic, and the bureaucratic process (12th-13th centuries)' in Phillipp Schofield (ed), *Seals and their Context in the Middle Ages* (Oxbow, 2015) 89.

smartphone or personal computer than a fountain pen and to use electronic funds transfer rather than a cheque.[186]

Horowitz comments that in pre-modern England

> One weak point in a written obligation was the means to identify its authenticity should an action at law ensue. Seals became the final proof of a written agreement in England and northern France, while on much of the Continent the notary validated a document. .... In an action at law, loss or defacement of a seal led to the suspension of an action on a written obligation. This stance remained firm throughout the late-medieval period, summed up by a case before King's Bench in 1527, which concluded that if a seal fell off a written obligation it could render it valueless. A stolen or lost seal – much like identity theft today – could also prove to be financially hazardous. Henry de Perpoint came to chancery at Lincoln in 1280 and said he had lost his seal, and therefore any instrument found stamped with it after the present date was to be void and of no effect.[187]

Seals as indicators of legal identity are still in use, primarily in the form of ink stamp and embossing by corporations and public sector agencies.[188] The presumption in law, simplified since the time of Henry VIII and Elizabeth I, is twofold. The first is that the document was duly sealed by the office holder acting in that person's official capacity. The second is that the office holder held the relevant office when the document was sealed.[189] It is important to note that the seal, as a signifier of the entity, must be safeguarded and only used with authority.[190]

Until the advent of the internet many Australians manually signed documents throughout their lives, ranging from cheques, bank deposit/withdrawal slips and routine personal/business correspondence through to wills, contracts, affidavits,

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[186] Clare Sullivan, *Digital Identity: An Emerging Legal Concept* (University of Adelaide Press, 2011).
[187] Mark Horowitz, 'A country under contract: Early-tudor England and the growth of a credit culture' (2011) XXIX *Essays in Economic & Business History* 75, 78.
[188] As examples see *Corporations Act 2001* (Cth) ss 123 and 1.5.7; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) Reg 28.04; *University of Sydney Act 1989* (NSW) s 35; *Customs Act 1901* (Cth) s 13; *Administrative Appeals Tribunal Regulation 2015* (Cth) Reg 6; *Infrastructure Victoria Act 2015* (Vic) s 6; *Associations Incorporation Reform Act 2012* (Vic) ss 29 and 37; *Royal Melbourne Institute of Technology Act 2010* (Vic) s 7; *St. Shenouda Coptic Orthodox Monastery (NSW) Property Trust Act 2014* (NSW) s 20; and *Mental Health Act 2014* (Vic) s 328.
[189] For example *Evidence Act 1995* (NSW) s 150(2)(b) and 150(2)(c). See also *Evidence Act 1995* (Cth) s 150; and *Evidence Act 1995* (Tas) s 150.
[190] See in particular the discussion in *Northside Developments Pty Ltd v Registrar-General* [1990] HCA 32; (1990) 170 CLR 146, with reference to *The Royal British Bank v. Turquand* (1856) 6 El. and Bl. 327 [1856] EngR 470; (119 ER 886); *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd* (1964) 2 QB 480; and *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd* [1975] HCA 49; (1975) 133 CLR 72.

marriage certificates and other government forms. Much of that documentation has moved online, with institutions and individuals relying on electronic mail and web forms, with use of the latter increasingly being encouraged by governments, businesses and educational institutions or other bodies in an effort to reduce administrative costs.[191] As the following chapter notes, the 'virtualisation' of the autograph signature has raised concerns about 'identity theft', sometimes on the basis that much signing of documentation in the past involved one or more witnesses and was often accompanied by presentation of signifiers such as birth certificates and utilities notices that would formally allow verification of the signatory's identity. Those concerns coexist with anxieties about the attribution of artefacts, with for example suggestions that much Indigenous art may have desirable aesthetic qualities but has an inappropriate high commercial value because the particular piece has been misleadingly ascribed to someone other than the creator, that is not to the true legal identity.[192]

In terms of legal identity and its signification two aspects of traditional and digital signatures are notable, although rarely remarked.

The first is that although mechanisms for generating and verifying signatures are interesting the salient concern should be whether the particular signature serves as a meaningful indicator of legal identity rather than the specific format of the signature or the nature of forensic tools. As background to recommendations in the final chapter of this dissertation we should accordingly look beyond the literature on the forensics of the particular pigment and brushstroke on a canvas, ingenious (albeit often impractical) proposals for digital keys[193] and document 'watermarking' that both

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[191] Sören Preibusch, Kat Krol and Alistair Beresford, 'The Privacy Economics of Voluntary Over-Disclosure in Web Forms' in Rainer Böhme (ed), *The Economics of Information Security and Privacy* (Springer, 2013) 183, 184.

[192] Christine Alder, Challenges to Authenticity in the Aboriginal Art Market (Paper presented at the Art Crime: Protecting Art, Protecting Artists and Protecting Consumers Conference, Sydney, 2-3 December 1999); Christine Alder, Duncan Chappell and Kenneth Polk, 'Frauds and fakes in the Australian aboriginal art market' (2011) 56(2) *Crime, law and social change* 189; Duncan Chappell and Kenneth Polk, 'Fakers and Forgers, Deception and Dishonesty: An Exploration of the Murky World of Art Fraud' (2009) 20(3) *Current Issues in Criminal Justice* 393, 397 and 398; Sally McCausland, 'Adelaide Art Dealer Charged over Clifford Possum Paintings' (1999) 4(24) *Indigenous Law Bulletin* 19; Sally McCausland, 'R v O'Loughlin: latest art controversy goes to court' (1999) 4 *Art and Law* 9 and *DPP v O'Loughlin* (2000) (NSW District Court, Penrith, unreported).

[193] Sharon Christensen, William Duncan and Rouhshi Low, 'The Statute of Frauds in the Digital Age - Maintaining the Integrity of Signatures' (2003) 10(4) *Murdoch University Electronic Journal of Law* np; and Anthony Balloon, 'From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and a New Model for Consumer Protection in Internet Transactions' (2001) 50 *Emory Law Journal* 905.

associates a document with a particular legal identity and indicates whether the document has been corrupted,[194] uniform national identifier codes for public/private web forms, or secure private gateways for communicating high-value contracts.

Meaningful, in relation to that question, is in essence a matter of pragmatism and proportionality. Does the signature sufficiently indicate the legal identity that it represents within a legal or administrative framework that provides sufficient recourse if there has been fraud? Such frameworks might for example involve both Australian law founded on the Statute of Frauds and action by financial institutions to distribute the costs of fraud across all customers so that consumers have the necessary trust in electronic transactions. Is the cost of the signature regime proportionate in balancing harms to the individual, intermediaries and society? We accept that a personal identifier number (the PIN) is a sufficient signature when used in conjunction with a magnetic strip or chip on a transaction card, without a need for witnesses (discussed below) or provision and verification of biometric information that would involve costs for financial institutions and ultimately consumers at large.

The second aspect is that although all signatures are representations of a legal identity the context in which those representations are made, the use to which they are put and the mechanisms for verification are diverse. We cannot, for example, ask Rembrandt van der Rijn,[195] Glykon and Euphronios[196] or Andy Warhol's mother[197] to confirm that an artwork bearing the artist's signature was solely or primarily by the artist, and accordingly may need to rely on a dealer's opinion in buying that work. We typically *can* rely on witnesses (for example that signing was undertaking in the presence of people who had ascertained the identity of the signatory) or on contextual information (for example that a signature matches previous instances of that signature that had initially been substantiated through an institution's scrutiny of documentation such as

[194] Ingemar Cox, Matthew Miller, Jeffrey Bloom, Jessica Fridrich and Ton Kalker, *Digital Watermarking and Steganography* (Morgan Kaufmann, 2nd ed, 2008).
[195] Ernst van de Wetering, *Rembrandt: The Painter at Work* (Amsterdam University Press, 1997) 164 and 349.
[196] Jeffrey Hurwit, *Artists and Signatures in Ancient Greece* (Cambridge University Press, 2015) 23 and 155.
[197] Martha Buskirk, *The Contingent Object of Contemporary Art* (MIT Press, 2005) 73; and Richard Meyer, *Outlaw representation: censorship & homosexuality in twentieth-century American art* (Oxford University Press, 2002) 113. For Dali, an egregious example of signature fakery (including the artist's signature of blank paper), see Meryl Secrest, *Shoot the Widow: Adventures of a Biographer in Search of Her Subject* (Knopf, 2007) 107 and Lee Catterall, *The great Dali art fraud and other deceptions* (Barricade Books, 1992).

birth certificates and utility statements that substantiated the identity of the individual asserting the identity).

Paper Empires

Chapter Four of this dissertation referred to historic practice of providing testimonials by employers and associates regarding a person's character, expertise and affinities. Such testimonials, which are sometimes characterised as letters of reference and whose veracity is encouraged through defences in defamation law,[198] are still in use. Along with business cards, which can be read as representations of authority[199] rather than merely as valuable contact details,[200] they are signifiers of identity. People more commonly conceptualise signifiers in terms of the plethora of public/private sector documentation indicating both that the bearer is the body that the person implicitly claims to be (in other words, individuation) and has one or more of the requisite legal identities. That documentation is typically founded on public/private sector registers, such as the birth and marriage registers noted in Chapters Five and Six above or private databases of the customers of a specific bank or driver support company. The state often requires that the register have a specific structure and that customer data be accessible by government agencies as a matter of course, thus co-opting the private sector.[201]

In the absence of a whole-of-population 'national identity card' or 'universal service card' the de facto national signifier is for example the driver's licence, a state-issued identity document that features a photographic image of the individual alongside name and other identifying data.[202] The card is a representation of the state's authorisation of the person to drive a motor vehicle. It is not the identity *per se*. Its meaning is attributable in a formal sense to an authorisation recorded in a register (the

[198] The qualified privilege is provided in for example *Defamation Act 2005* (NSW) s 30.
[199] For questions about 'holding out' and mis/reading see for example *Amended Prospect Industries v Anscor Pty Ltd & Ors* [2003] QSC 296, [73]-[75]; *Beuth v Blums* [2005] ACTSC 44, [50]-[51]; *Law Institute of Victoria v Brott (Legal Practice)* [2007] VCAT 808, [199]-[208]; *Commissioner for Fair Trading v Holz & Anor* [2006] WASC 202, [3]-[4]; *Taylor v Gould & Ors* [2011] QSC 203, [16]-[18]; and *Burnard v R, R v Burnard* [2009] NSWCCA 5 [10].
[200] *Forkserve Pty Limited v Jack and 1 Ors* [2000] NSWSC 1064.
[201] Financial institutions are for example required to provide customer identity data under the *Income Tax Assessment Act 1936* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth); and *Taxation Administration Act 1953* (Cth).
[202] Individual states have introduced jurisdiction-specific photo identity cards; see for example *Western Australia Photo Card Act 2014* (WA) and *Adult Proof of Age Card Act 2008* (Qld).

identity does not evaporate if the card is destroyed)[203] and in a deeper sense to how it is read by officials (for example the standard request by traffic police for roadside presentation of the card when a driver is pulled over for speeding or random breath testing) and how it is read by other people for purposes independent of authorised use of a vehicle. The card is the proof of identity expected in a range of transactions, for example to support opening a bank or mobile phone account or confirm identity when renting a video or a rotary hoe.

There has been no comprehensive study of how Australians construe their identity in terms of identity documents and by extension of identity registers. As the preceding chapters have indicated, we can discern a range of such documents, some of which have a general use (and what might thus be characterised as polyvalent) and others that are specific.

A birth certificate, in essence a confirmation of data held on the particular state's birth register, serves as a breeder document and is often a prerequisite for gaining other fundamental documents such as a passport. The card issued to a New South Wales apiary inspector has a more limited use; it indicates to the reader that the bearer is authorised to undertake activity in that state under the *Apiaries Act 1985* (NSW) and accordingly does not signal that the inspector has a legal identity that allows dispensing of psychotropic medications, removal of at-risk minors from an abusive family or cavity searches of someone in a correctional institution. The aviation, national health security and maritime security identity cards provide a proof of identity for authorised passage through perimeters and work within particular precincts.[204] The academic testamur provided to a graduate of a law degree is a physical representation of data in the university's register. It is an instance of the credentialism discussed in Chapters Four and Ten. The paper can be replaced if it is damaged or destroyed; the replacement does not bring a new legal identity (that of graduate) into being. Graduation is a prerequisite but insufficient for admission as a

[203] For suspicions regarding supposed destruction of passports in a washing machine see *Idaayen v Minister for Foreign Affairs* [2007] AATA 1676, [14]. Those suspicions resulted in refusal of replacement passports but did not erase the citizenship of Saad and Idaayen.

[204] *Aviation Transport Security Act 2004* (Cth); *National Health Security Act 2007* (Cth); and *Maritime Transport & Offshore Facilities Security Act 2003* (Cth). National security background checking for the three Cards is noted in Chapter Ten below; involving verification of individuation and assessment of an individual's criminal history, security status, citizenship and residency status or entitlement to work in Australia.

legal practitioner, which is a separate legal identity to 'graduate'. The practitioner's identity is signalled by the practicing certificate, a manifestation of data in the roll of practitioners. Readers of this dissertation will typically have other identifiers that have specific or general use, in particular financial transaction cards that signify the individual's authority in dealing with institutions to make payments, transfer money and deposit funds into personal/corporate accounts.

In understanding how identity cards operate in signifying legal identities we can discern five aspects worthy of comment.

The first is that at an abstract level there is no clear differentiation between transaction documents (such as bank passbooks and transaction cards), authority cards (such as apiary inspector card), affiliation cards such as tertiary student ID cards,[205] and the plethora of state-issued identity documents such as driver licences, passports and proof of age cards[206] that might be complemented or replaced by a uniform government entitlements regime such as the Australia Card noted above. All function as indicators of legal identity.

The second aspect is that there is often an expectation in law that a card will be physically withdrawn, 'deregistered' or electronically invalidated if the legal identity no longer exists[207] or if the card has been compromised.[208]

The third aspect is that law seeks to prohibit misuse of the card or other document, in other words to criminalise subversion of the legal identity that is signified by that document.

The fourth aspect is an expectation in law that identity documents will be provided for administrative purposes (with for example a requirement to provide the birth certificate for payment of social welfare entitlements).[209]

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[205] *Dawn-Manuel v The Queen* [2015] VSCA 212, [22].
[206] In 2015 the NSW government for example indicated that it 'currently issues more than 23 million licences each year, covering 769 different licence types'. Dominic Perrottet MP, Minister for Finance, Services and Property, 'Media Release: First Digital Licences Ready For Download Mid 2016' (2015 25 November).
[207] For example *T Wright v Australian Customs Service - PR9318565* [2003] AIRC 545, [12]-[21]; and *Sale of Motor Vehicles Act 1977* (ACT) s 5C.
[208] For example *Road Transport (Driver Licensing) Regulation 2000* (ACT) Reg 75.
[209] *Carter and Secretary, Department of Family and Community Services* [2004] AATA 1011.

As a corollary, and importantly, there is an expectation that cards issued to officials will be borne by those people and presented for scrutiny.[210] That requirement reflects the assumption that in a liberal democratic state representatives of the state (in the private and public sectors) will be identifiable, so that the state and its embodiments on an instance by instance basis will be accountable.

A preceding paragraph characterised the driver's licence as the de facto national identity document, one that has a higher profile (arguably because it has a photographic image) than other identifiers such as the Medicare card or the Tax File Number. Australia has not established a formal national identity card, whether for national security purposes or as a universal service card embodying data about a range of welfare entitlements that may currently be represented through multiple cards and identity numbers.[211] Such a comprehensive whole-of-population identifier has been advocated in the past, is in use in some liberal democratic states[212] and has attracted states with a weak rule of law.[213]

In that respect it is worth noting Lord Goddard's 1951 comment on continuation of the wartime UK identity card regime, founded on comprehensive registration of the adult population in the face of an existential threat to the British state. The statute required all adults to provide a uniform identity card on request. Goddard considered that the threat had passed with the demise in 1945 of the Schmitt's exterminationist state and that bureaucratic convenience – a feature of contemporary Australian regimes – did not trump the dignity of ordinary citizens. He accordingly commented

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[210] See for example *Road Management Act 2004* (Vic) s 73; *Public Health and Welfare Act 2008* (Vic) s 166; *Burial and Cremation Act 2013* (SA) s 58(5); *Competition and Consumer Regulations 2010* (Cth) Reg 76; and *Medicines and Poisons Act 2014* (WA) s 99.

[211] For example a health care card issued under the *Social Security Act 1991* (Cth); pensioner concession card issued under the *Social Security Act 1991* (Cth); and a repatriation card issued in relation to a pension under the *Veterans' Entitlements Act 1986* (Cth) or the *Military Rehabilitation and Compensation Act 2004* (Cth).

[212] Torsten Noack and Herbert Kubicek, 'The introduction of online authentication as part of the new electronic national identity card in Germany' (2010) 3(1) *Identity in the Information Society* 87; Teemu Rissanen, 'Electronic identity in Finland: ID cards vs. bank IDs' (2010) 3(1) *Identity in the Information Society* 175; and Simone Van der Hof, Bert-Jaap Koops and Ronald Leenes, 'Anonymity and the Law in the Netherlands' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons From The Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 503. For a perspective see Fabrice Mattatia, 'An Overview of some Electronic Identification Use Cases in Europe' in Saïd Assar, Imed Boughzala and Isabelle Boydens (eds), *Practical Studies in E-Government: Best Practices from Around the World* (Springer, 2010) 71.

[213] For example Alejandro Vélez, 'Insecure Identities: The Approval of a Biometric ID Card in Mexico' (2012) 10(1) *Surveillance & Society* 42; and Ursula Rao and Graham Greenleaf, 'Subverting ID from Above and Below: The Uncertain Shaping of India's New Instrument of E-Governance' (2013) 11(3) *Surveillance and Society* 287.

> This Act was passed for security purposes, and not for the purposes for which, apparently, it is now sought to be used. To use Acts of Parliament, passed for particular purposes during war, in times when the war is past, except that technically a state of war exists, tends to turn law-abiding subjects into lawbreakers, which is a most undesirable state of affairs. Further, in this country we have always prided ourselves on the good feeling that exists between the police and the public and such action tends to make the people resentful of the acts of the police and inclines them to obstruct the police instead of to assist them.[214]

Goddard's criticism has been echoed in Australia and elsewhere.[215] Froomkin argued that

> U.S. hostility to ID cards is based on a romantic vision of free movement … the English view is tied to a related concept of "the rights of Englishmen." I then suggest that these views distract from the real issues raised by contemporary national ID plans in the common and civil-law worlds. Today's issues, I suggest, involve a complex set of data protection issues that have little to do with romantic stories of cowboys and motorists talking back to policemen, and a great deal to do with data storage and access.[216]

In considering the state, legal identity and its discontents two more subtle responses are pertinent. The first is that in a liberal democracy the 'power' of a ubiquitous official card that is routinely scrutinised by representatives of the state is symbolic. It reinforces perceptions across the population that, to use Foucault's phrase, all people are subject to panopticism and by extension all people are data subjects rather than individuals whose dignity is respected. That perception is explored in Chapter Eleven.

The second response is that mechanisms such 'big data' analysis permissible under national security data-matching frameworks,[217] ongoing rollout of CCTV networks with a biometric and automated number plate recognition (ANPR) capability,[218] and data retention/reporting schemes relating to money-laundering and counter-terrorism

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[214] *Willcock v Muckle* (1951) 49 LGR 584.
[215] Richard Sobel, 'The Demeaning of Identity and Personhood in National Identification Systems' (2001) 15(2) *Harvard Journal of Law and Technology* 319; Wendy Grossman, 'Identifying Risks: National Identity Cards' (2005) 2(1) *SCRIPTed* 4; Adrian Beck and Kate Broadhurst, 'Compulsion by stealth: Lesson from the European Union on the use of national identity cards' (1998) 76(4) *Public Administration* 779.
[216] Michael Froomkin, 'Identity Cards and Identity Romanticism', in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons From The Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 245.
[217] Roger Clarke, 'Big data, big risks' (2016) 26(1) *Information Systems Journal* 77.
[218] Ian Warren, Randy Lippert, Kevin Walby and Darren Palmer, 'When the profile becomes the population: examining privacy governance and road traffic surveillance in Canada and Australia' (2013) 25(2) *Current Issues in Criminal Justice* 565; and Roger Clarke and Marcus Wigan, 'You are where you've been: the privacy implications of location and tracking technologies' (2011) 5(3/4) *Journal of Location Based Services* 138.

(AML/CTF)[219] and to telecommunications metadata,[220] mean that in the absence of the strong justiciable rights recommended in Chapter Eleven the state can in practice draw on multiple data resources in ways that are potentially contrary to respect for dignity. In essence, in the 'age of Big Data' it does not need a single card or single identifier.

Supercession

Signifiers, along with the legal identities that they represent, come and go.

The contingency highlighted throughout this dissertation means that the form of signs, how they are read and how they are verified has changed over time and across cultures. Chapters One and Three differentiated contemporary Australian law from its early-modern and pre-modern predecessors. In law we do not for example think of deities as being agentic and of monarchs as individuals imbued with sacred powers. We thus do not recognise divinity by signs such as turning water into wine or royalty through signs such as a magical touch that heals scrofula.[221] We are likely to regard rituals such as coronations and installations (which in the past had a quasi-sacral value that softly underpinned indicia of identity such as crowns, orbs, sceptres, tabards, robes and chains of office) as entertainments or the undeserved indulgences of an elite rather than a performativity that manifested divine approval. The demise of the legal identity of witch (in other words an entity that attracted the same fear, hostility and exclusion as today's terrorists) means that signifiers such as superfluous teats or other 'witch marks' on a legible satanic body are no longer recognised in either law or popular culture.[222] A tonsure, cope or literacy will not indicate that the individual can successfully claim 'benefit of clergy', although those signifiers were at one time of

[219] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).
[220] *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth). See also the very broad warrantless 'assistance' provision in *Telecommunications Act 1997* (Cth) s 313 and discussion in Konrad Lachmayer and Normann Witzleb, 'The Challenge to Privacy from Ever Increasing State Surveillance: A Comparative Perspective' (2014) 37(2) *University of New South Wales Law Journal* 748; and House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *Balancing Freedom and Protection (Inquiry into the use of subsection 313(3) of the Telecommunications Act 1997 by government agencies to disrupt the operation of illegal online services)* (2015) 2-3.
[221] Marc Bloch, *The Royal Touch: Sacred Monarchy and Scrofula in England and France* (J E Anderson trans, Routledge, 1973) [trans of Les *Rois thaumaturges* (first published 1924)].
[222] Stuart W McDonald, 'The Devil's mark and the witch-prickers of Scotland' (1997) 90(9) *Journal of the Royal Society of Medicine* 507, 507; and Oma Darr, *Marks of an Absolute Witch: Evidentary Dilemmas in Early Modern England* (Ashgate, 2011).

particular value.[223] Coats of arms,[224] recognised by the College of Arms or granted by the autocephalous Cardinal and Prince of Avram,[225] are no longer a meaningful signifier of suffrage or entitlement to trial by combat. We no longer assess the status of male minors on the basis of whether their neck features a piece of string, locket or leather strap.

We can conclude that signifiers of legal identity are culturally and temporally contingent, a conclusion that should provoke thought about how we read signs of identity, what such signs might comprise in future and what signifiers are fading as the identities that they represent become less legally and socially important. Are the enactments regarding RSL badges, for example, a cultural artefact that is increasingly less relevant?

Subversions

A contention throughout this dissertation is that legal identity can be construed in terms of consequences. Put simply, it matters. A corollary is that signifiers matter and will accordingly be subverted. In other words there is an incentive, on occasion an imperative, to create or erase an identity by illicitly manufacturing, altering, using or removing a signifier.

A salient example in this dissertation is the removal of the Nazi yellow star. It has been chosen because of its elegance – identity subversion through a moment using

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[223] Franz Bäuml, 'Varieties and Consequences of Medieval Literacy and Illiteracy' (1980) 55(2) *Speculum* 237, 238; Connie Kendall, 'Nooses and neck verses: The life and death consequences of literacy testing' in Patricia Bizzell (ed), *Rhetorical agendas: Political, ethical, spiritual* (Lawrence Erlbaum, 2006) 97, 98; J M Beattie, *Crime and the Courts in England 1660-1800* (Clarendon Press, 1986) 141-145; and Lesley Skousen, *Redefining Benefit Of Clergy During The English Reformation: Royal Prerogative, Mercy, And The State* (Masters thesis, University of Wisconsin, 2008). For that the 'benefit' was progressively devalued see John Langbein, 'Albion's Fatal Flaws' (1993) 98 *Past And Present* 96, 117.

[224] Noel Cox, 'The law of arms in New Zealand' (1998) 18(2) *New Zealand Universities Law Review* 225; and the persuasive rebuttal by Gregor Macaulay, 'The Law of Arms in New Zealand: A Response' (2001) 10(1) *Otago Law Review* 113, 114 and 117. See also Noel Cox, 'The intellectual property laws and the protection of armorial bearings' (2001) 12(1) *Australian Intellectual Property Journal* 143. The identity of the Royal Family, the Commonwealth, the states, local government and representatives of other nations is protected under for example the *Armorial Bearings Act 1979* (WA) s 3, *Emblems of Queensland Act 2005* (Qld) s 4, *Consular Privileges and Immunities Act 1972* (Cth) Sch, and *Designs Regulation 2004* (Cth) Reg 4.06. There is no specific statutory protection of other coats of arms; in practice Australians can concoct their own arms (bear vilené rampant on bed of lettuce?) and pseudo-heraldic titles – not a legally meaningful signifier - or apply to the College of Arms in London for insignia that provide individuation and an expression of self-concept but not justiciable indicia of legal authority.

[225] Mark Dapin, *Strange Country* (Pan, 2008) 8-9. See Chapter Three above.

scissors in an expression of bravery, risk assessment and desperation – and because breaking the law in that instance potentially had existential consequences. Readers of the contemporary law reports and mass media are probably more familiar with subversions that are commercial or more elaborate, involving paper or simply data.

We can see, for example, people buying passports or what appear to be passports and other travel documents,[226] using counterfeit passports[227] or passports with false data,[228] using false birth certificates as breeder documents in commercial frauds,[229] illicitly using credit risk databases to build fake consumer profiles,[230] exploiting counterfeit academic transcripts[231] and trades certificates,[232] forging a will[233] or the signature on a cheque,[234] gaining access to drugs or cash through forged signatures,[235] using false police identity documents,[236] providing CVs that were 'economical with the 'truth',[237] using a false name while 'on the run'[238] or to evade financial reporting rules,[239] defrauding the state through use of false Medicare signifiers,[240] gaining an advantage through false references,[241] and using fake driver licences[242] or credit cards.[243]

[226] *N97/16986* [2001] RRTA 297; *SZACX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 97, [18]; *WZANC v Minister for Immigration & Anor* (No. 2) [2012] FMCA 504, [20]; *0803478* [2008] RRTA 435; and *N97/20449* [1999] RRTA 960.
[227] *Stevens v R* [2009] NSWCCA 260; and *Tomov v The Queen* [2011] WASCA 189.
[228] *Mayhew v United States of America* [2004] FCA 1197; *Foster v Minister for Customs* [2000] HCA 38; 200 CLR 442; and *Grahame v Singh* [2010] SASC 306.
[229] *Clarkson v Regina* [2007] NSWCCA 70.
[230] *DPP v Hall* [2015] VCC 1338, [12]-[16].
[231] *Victorian Legal Services Board v Swies (Legal Practice)* [2015] VCAT 1903.
[232] *Strik and Director-General, Department of Services, Technology & Administration* [2011] AATA 177.
[233] *Nicholas v R* [1988] TASSC 36.
[234] *R v Selvakulalingam* [2015] SASCFC 41; and *Stevens v R* [2009] NSWCCA 260.
[235] *Dahlstrom v R* [2000] TASSC 53; and *Murphy v Police* [2015] SASC 193.
[236] *Devaney v R* [2012] NSWCCA 285.
[237] *Barnes v Hatch Associates Pty Ltd* [2015] FCCA 3375, [167]; *Medical Board of Australia v Patel* [2015] QCAT 133; and *R v Morehu-Barlow* [2014] QCA 4.
[238] *R v Schmidt* [2013] ACTSC 295, [109].
[239] *Maxwell Alfred Kippe and Australian Securities Commission* [1997] AATA 580; *Studman v Commonwealth Director of Public Prosecutions* [2007] NSWCA 285, [11]; *Yeonata v R* [2012] NSWCCA 211, [6]-[18]; *Ihemeje v R* [2012] NSWCCA 269, [9] and [13]; and *R v Guo; R v Qian* [2010] NSWCCA 170, [63].
[240] *DPP v Hall* [2015] VCC 1338; *Anjoul v R* [2014] NSWCCA 234; *Yeonata v R* [2012] NSWCCA 211; and *Hancock v R* [2012] NSWCCA 200.
[241] *DPP v Zotos* [2014] VCC 1963; and *Mansell v The State of Western Australia (No 6)* [2013] WASCA 120.
[242] *Lowe v The Queen* [2015] VSCA 327; *DPP v Yip* [2015] VCC 1709, *DPP v Hall* [2015] VCC 1338; *Chime v R* [2014] NSWCCA 304; *Chen v R* [2011] NSWCCA 145; *Mortada v R* [2014] NSWCCA 36; *Leung v R* [2003] NSWCCA 51, [18]; *Mansell v The State of Western Australia (No 6)* [2013] WASCA 120; *Gim Eng Moh v Shaun Pine* [2010] ACTSC 27; *Yeonata v R* [2012] NSWCCA 211; *R v Verrall* [2012] QCA 310; *Hancock v R* [2012] NSWCCA 200; *JOD v Regina* [2009] NSWCCA 205; and *R v Tapatu* [2005] VSCA 256.
[243] *Anjoul v R* [2014] NSWCCA 234; *DPP v Neoh* [2014] VCC 229; *DPP v Lee* [2013] VCC 1353; *Hancock v R* [2012] NSWCCA 200; and *R v El-Azar & Anor* [2007] VSC 487.

In essence, if something is valuable it is worth subverting. If it is worth subverting it will be. A legal identity is valuable and the signifiers of that identity are accordingly on occasion subverted. Law and administrative practice will respond to and to some extent anticipate subversions, implicitly on the basis that if something is worth subverting it is worth protecting.

Subversion reflects the lack of familiarity or lack of expertise in document forensics, often alongside what courts have characterised as laziness in checking documentation or other signifiers.[244] It reflects the trust that we expect in a liberal democratic state, where people assume that their peers are honest or that there is substantive protection from harms attributable to dishonesty and that truth is taken seriously through for example perjury provisions.[245] It reflects the suspension of disbelief when people are invited to share in a narrative that retrospectively is seen to be too good to be true, for example gifting by 'Polynesian Prince' Morehu-Barlow.[246]

Perhaps more fundamentally it reflects both a conflation of the signifier with the legal identity (if the signifiers appear authentic then the identity must be authentic) and risk allocation.

As noted above that allocation sees the cost of financial offences involving large institutions being spread across consumers on a retrospective basis rather than as processing delays and other costs attributable to comprehensive verification of identity assertions on an instance by instance basis. In the public sector it sees an emphasis on enforcement of welfare entitlements law that potentially involves greater compliance costs than the amount of fraud detected and improper payments recovered.[247]

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[244] *Tax Practitioners Board v Su* [2014] FCA 731, [16]; *Graham v Hall* [2006] NSWCA 208; and *Ginelle Finance Pty Ltd v Diakakis* [2007] NSWSC 60.
[245] For example *Crimes Act 1914* (Cth) s 35 and *Criminal Code Act 1995* (Cth) s 6.1; *Crimes Act 1900* (NSW) s 327; and *Criminal Code* (Tas) s 94.
[246] Sarah Elks, 'Fake prince Joel Morehu-Barlow sentenced to 14 years for theft of $16m from Queensland Health' *The Australian* (Sydney) 19 March 2013, 5; and Queensland Crime & Misconduct Commission, *Queensland public sector: An examination of how a $16.69 million fraud was committed on Queensland Health* (2013). See also George Akerlof and Robert Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (Princeton University Press, 2015) 45.
[247] Greg Marston and Tamara Walsh, 'A Case of Misrepresentation: Social Security Fraud and the Criminal Justice System in Australia' (2008) 17(1) *Griffith Law Review* 285; and Russell Smith, 'Electronic Medicare Fraud: Current & Future Risks' (Australian Institute of Criminology, 1999).

Legal Reflexivity

It is axiomatic that if identity is a thread running through the carpet that we call law, the state – through both law and administrative practice such as encouragement of delation[248] – will respond to subversion of that entity.

The literature does not appear to provide a comprehensive typology of that response, with authors instead discussing particular periods, categories of subversions and specific responses. Two examples are the literature on pretenders and on sumptuary regimes. Another is the literature on forgery, such as writing by cultural and legal historians on a succession of highly punitive anti-forgery statutes in Hanoverian Britain.[249] Those enactments in retrospect have aspects of a moral panic that resembles contemporary statements about a supposedly pervasive and very pernicious 'epidemic' of 'identity theft' discussed in the following chapter.

Historically law has embodied several responses to subversion, including a progressive transition from capital punishment and severe disfiguration through to benign mechanisms such as fugitive paper intended to inhibit forgery, routine audits by bodies such as Austrac[250] and authorisation to refuse provision of official documentation in the absence of 'full and further particulars'.[251] Particular responses have often coexisted, reflecting administrative incapacity, the availability of technological solutions, political opportunism and social expectations.

The first response is punitive, with for example statutes historically providing capital penalties for forgery of documents[252] and counterfeiting, alongside indelible markers

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[248] See for example reference to 'tip offs' in *Beven and Centrelink* [2008] AATA 144; *R v Grice* [2006] QCA 326; *Identity of provider of public information not protected* [1997] PrivCmrA 1; *Forbutt and Centrelink* [2005] AATA 814; *Pennington v McLean* [2008] TASSC 4; *Arber and Centrelink* [2008] AATA 366; *Field and Secretary, Department of Families, Community Services and Indigenous Affairs* [2006] AATA 747.

[249] Paul Baines, *The House of Forgery in 18th-century Britain* (Ashgate, 1999); Douglas Hay, 'Property, authority and the criminal law' in Douglas Hay, Peter Linebaugh, John Rule, E P Thompson and Cal Winslow (eds), *Albion's fatal tree: Crime and society in Eighteenth-century England* (Pantheon, 1976) 17; and Randall McGowen, 'From pillory to gallows: the punishment of forgery in the age of the financial revolution' (1999) 165 *Past and Present* 107. There is a persuasive criticism of Hay in John Langbein, 'Albion's Fatal Flaws' (1993) 98 *Past And Present* 96, 117-118.

[250] *Ihemeje v R* [2012] NSWCCA 269, [10].

[251] *Road Transport (Driver Licensing) Act 1999* (ACT) s 40.

[252] Randall McGowen, 'Making the 'bloody code'? Forgery legislation in eighteenth-century England' in Norma Landau (ed), *Law, Crime & English Society, 1660-1830* (Cambridge University Press, 2002) 117; and Phil Handler, 'Forgery and the end of the 'Bloody Code' in Early Nineteenth-Century England' (2005) 48(3) *The Historical Journal* 683.

such as ear-cropping that have both an administrative and symbolic value.[253] Contemporary enactments criminalise a wide range of signifier-related activities such as making false statements regarding names[254] or providing false information to obtain signifiers,[255] failure to notify a change of name in relation to certain identities,[256] failure to replace defective driver licences,[257] dealing in identity documentation[258] and in data intended for identity offences, possessing and/or false documentation,[259] illicitly possessing genuine identity documentation,[260] and impersonation.[261]

More broadly, law casts a wide net by taking a consequentialist approach to people who have benefited or sought to benefit from misuse of signifiers, with for example *Hancock v R* [2012] referring to conspiracy to make false instruments, having custody of false instruments and dishonestly obtaining or dealing in personal financial information.[262]

A corollary is non-recognition of illicit signifiers and exclusion of those who use them, alongside wariness about people who appear to be engaging in fraud through for example recurrent loss of a passport,[263] and scope for seizure/destruction of 'bogus' documents.[264] If a visa offers a magic carpet that can transport an individual from subservience and misery to a life of comfort, Australian law excludes people who have sought a ride on the carpet through visa fraud.[265]

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[253] Pamela Graves, 'From an archaeology of iconoclasm to an anthropology of the body: images, punishment and personhood in England, 1500-1660' (2008) 49(1) *Current Anthropology* 35, 40.
[254] *Shero v Hinton* [2010] ACTSC 73, [16].
[255] *Road Transport (Driver Licensing) Act 1999* (ACT) s 29.
[256] *Bankruptcy Act 1966* (Cth) s 8.
[257] *Road Transport (Driver Licensing) Regulation 2000* (ACT) Reg 75.
[258] *Hancock v R* [2012] NSWCCA 200.
[259] *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) ss 21(4) and 21(2).
[260] *Road Transport (Driver Licensing) Act 1999* (ACT) s 30.
[261] *Opacic v R* [2013] NSWCCA 294; *DOHS v Mr O & Ms B* [2009] VChC 2; *Poniris v R* [2014] NSWCCA 100; *Vaccaro and Anor v Flammia* [2008] NSWSC 1322, [77]; *Milane v R* [2006] NSWCCA 281; *R v Raad* [2002] NSWCCA 75; *R v Armstrong* [2001] NSWCCA 33, [6]; *DPP v Cuccia* [2013] VCC 1506; *DPP v Moore* [2014] VCC 1770; and *Barton v R* [2009] NSWCCA 285.
[262] *Hancock v R* [2012] NSWCCA 200.
[263] *Morales and Minister for Foreign Affairs and Trade* [2007] AATA 1077; and *Idaayen and Minister for Foreign Affairs* [2007] AATA 1676; *Saad v Minister for Foreign Affairs* [2007] AATA 1675; and *Saad and Minister for Foreign Affairs* [2009] AATA 920, [9]-[10].
[264] For example *Migration Act 1958* (Cth) ss 487ZI to 487ZL, inserted through *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).
[265] *Sekhon and Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 639, [11]-[13].

Another response, reflecting changing perceptions of capacity discussed in Chapter Four of this work, is endorsement. In essence, there has been a recognition that apart from exceptional circumstances it is insufficient for testators to merely sign a will; the absence of coercion must be signified by a witness whose endorsement of the document reflects that witness's own legal identity. [266] That witnessing, unlike witness parades and other mechanisms authorised under the evidence statutes,[267] is as much a matter of capacity verification as it is of individuation. A corollary is provision in some statutes for registration of documents, in particular wills.[268]

If we follow the comment by Oliver Wendell Holmes Jr noted in Chapter One and regard law as something that is lived rather than merely expressed in statutes we can see a more subtle reflexivity. Law regarding identity is reified through signs of authority: the symbolism (through insignia, impressive buildings and rituals) that serve as a form of soft power in indicating that particular institutions such as courts or the monarchy and the overall legal system matter. That reflexivity provides an explanation for offences in some jurisdictions such as flag burning and in Australia on specific protection for members of the royal family in for example signifier statutes such as the Trade Marks Act and Corporations Act.

Unpersoning

Early modern, modern and contemporary states alike are founded on registers and written signifiers of identity. If power is a matter of legal identity and legal identity is constructed using paper, one implication is that identity can be erased through changes to the signifiers.

Historical scholarship over the past fifty years has explored the 'airbrushing' of notables in totalitarian states from public memory, for example through 'correction' of inconvenient photographs,[269] the excision of pages from encyclopaedias and other reference works, the removal of bodies from places of honour such as the Kremlin

[266] See *Nicholas v R* [1988] TASSC 36; and *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275.
[267] For example *Evidence Act 1995* (NSW) s 114; *Evidence Act 1929* (SA) s 34AB and the discussion in Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 10th ed, 2012) 618-620.
[268] For example *Wills Act 1968* (ACT) s 32; and *Succession Act 2001* (NSW) s 51.
[269] David King, *The Commissar Vanishes* (Metropolitan Books, 1997).

Wall and Lenin's Mausoleum, and the renaming of cities such as Stalingrad and Kuibyshev.[270] That practice has a long history, evident in the Roman *damnatio memoriae* or *abolitio memoriae* (defacement of inscriptions, destruction of public statues and ancestral portrait masks, criminalisation of spoken references to those deemed guilty of *lese majeste* or parricide)[271] and in the defacement of inscriptions in Pharaonic Egypt or Mesopotamia in the expectation that expunging the written word would injure (in the afterlife) or physically harm a living human being whose name or image had been so defaced.[272] In contemporary Australia, where we have a different view of legal identity and of agency, death is deemed to end legal personhood as far as reputation is concerned. [273]

In the preclassical period a representation of a person's identity in the form of seal used to signify authorisation of a document was on occasion defaced, action that potentially both destroyed the seal as a tool for conveying authority via documents and caused the seal's owner to wither and die. More recently James II of England, an individual who lost his crown in part because of his legal identity as a recalcitrant Roman Catholic – exacerbated by supposedly seeking to pass off a bogus heir via the famous warming pan – confused signifier and person in attempting to disrupt the British government by throwing the Great Seal into the river as he fled to the Continent.[274]

There has been less attention to the attempted erosion of cultural identity through the contemporary destruction of libraries and museums and the erosion of legal identity through a mass 'unpersoning' in the course of civil wars through the destruction of official archives and population registries,[275] a destruction that we might read more

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[270] Irina Yanushkevich, 'Semiotics of social memory in urban space: The case of volgograd (stalingrad)' (2014) 2(1) *International Journal of Cognitive Research in Science, Engineering and Education* 43; and Pavel Ilyin, 'Renaming of Soviet cities after exceptional people: A historical perspective on toponymy' (1993) 34(10) *Post-Soviet Geography* 631.

[271] Charles Hedrick, *History and Silence: Purge and Rehabilitation of Memory in Late Antiquity* (University of Texas Press, 2000); and Eric Varner, *Monumenta Graeca et Romana: Mutilation and transformation: damnatio memoriae and Roman imperial portraiture* (Brill, 2004).

[272] Lara Weiss, 'Perpetuated Action' in Rubina Raja and Joerg Ruepke (eds), *A Companion to the Archaeology of Religion in the Ancient World* (Wiley Blackwell, 2015) 60, 62.

[273] *Defamation Act 2005* (NSW) s 10; *Defamation Act 2005* (Vic) s 10; and *Defamation Act 2005* (WA) s 10.

[274] Hilary Jenkinson, 'What happened to the Great Seal of James II?' (1943) 23 *The Antiquaries Journal* 1; and Evelyn de Beer, 'The Great Seal of James II: A Reply to Sir Hilary Jenkinson' (1962) 42 *The Antiquaries Journal* 81.

[275] Patricia Nugent, 'Battlefields, Tools, and Targets: Archives and Armed Conflict' (2005) 23(1) *Provenance* 39, 45; András Riedlmayer, 'Crimes of War, Crimes of Peace: Destruction of Libraries during and after the Balkan Wars of the 1990s' (2007) 56(1) *Library Trends* 107, 119; Helen Walasek, 'Destruction of the Cultural Heritage

broadly as both an expression of cultural genocide[276] and denationalisation contrary to international law.[277] Panich notes instances of state incapacity in the early days of the French Revolution, where peasants reworked the identity of the state, themselves and their betters by destroying manorial and other records.

> Much like attacks on other symbols of oppression—defacement of churches, coats of arms, statues, and carriages, for example, and even the strangling of game birds on seigneurial manors—this mutilation and destruction of records can best be construed as a metonymic assault against the nobility and the seigneurial system, an act of displaced retribution which might in some cases have even had practical consequences for the peasants whose debts and obligations had just gone up in flames. [278]

That action would constitute an identity crime, the subject of the following chapter.

Observations

Readers can draw four salient conclusions about the nature of legal identity from this chapter.

The first is differentiation between the legal identity (a matter of rights and responsibilities, powers and disabilities) and the signifier of that identity. The Australian legal system recognises and relies on a wide range of signifiers but distinguishes between the legal identity and the signification of that identity.

The second is that signifiers exist in diverse forms, some of which are readily subverted or misconstrued, including cards, registers and oral statements. Signification *per se* is timeless: it is discernable (as demonstrated in the preceding pages) since at least ancient Rome. Specific signifiers are contingent, reflecting

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in Bosnia-Herzogovina' in Walasek (ed), *Bosnia and the Destruction of Cultural Heritage* (Ashgate, 2015) 23, 46; Gezim Krasniqi, 'The Challenge of Building an Independent Citizenship Regime in a Partially Recognised State: The Case of Kosovo' (CITSEE Working Paper 2010/04) 10 and 21; and Gerard Toal and Carl Dahlman, *Bosnia Remade: Ethnic Cleansing and Its Reversal* (Oxford University Press, 2010) 244-245.

[276] Donna-Lee Frieze, 'The Destruction of Sarajevo's Vijecnica: A Case of Genocidal Cultural Destruction?' in Adam Jones (ed), *New Directions in Genocide Research* (Routledge, 2012) 57, 58.

[277] For critiques see Chapter Three above.

[278] Judith Panitch, 'Liberty, Equality, Posterity?: Some Archival Lessons from the Case of the French Revolution' (1996) 59(1) *American Archivist* 30, 33-34. See also Gerard Noiriel, 'The Identification of the Citizen: The Birth of Republican Civil Status in France' in Jane Caplan and John Torpey (eds), *Documenting Individual Identity: The Development of State Practices in the Modern World* (Princeton University Press, 2001) 28; Katherine Ly Cox, *Ideology, Practicality, And Fiscal Necessity: The Creation Of The Archives Nationales And The Triage Of Feudal Titles By The Agence Temporaire Des Titres, 1789-1801* (MA Thesis, Florida State University, 2007). Rodney Hilton, *Bond men made free: medieval peasant movements and the English rising of 1381* (Temple Smith, 1973) 156 and 227 highlights peasant agency in an earlier era.

changes in technology and administrative or other needs. History demonstrates that subversion, through for example the illicit appropriation of genuine signifiers or through forgery, is timeless. Subversion is unsurprising, given that legal identity is a matter of consequences: if legal identity was without consequences there would be no reason for subversion. That statement tells us something salient about identity.

The third is that signifiers typically serve two functions: they serve to individuate the legal person from other entities with the same legal identity and they represent the identity.

The fourth is that the assignment and verification of legal identity has time and other costs, meaning that the performance of identity is inextricable from notions of risk. Put simply, we cannot and importantly need not check every identity in every instance. Law instead emphasises protection of selected identities and as a corollary the associated signifiers. Some identities are more important than others in the functioning of the legal system; they may accordingly receive stronger protection – in terms of formal penalties and in terms of alertness by administrators for potential subversion – than others.

Chapter Nine: Identity Crime

Overview

This dissertation has argued that legal identity is a matter of consequences. It is axiomatic that some entities will seek to illicitly evade, ameliorate or improve those consequences through for example erasing a disability or improperly gaining an advantage through appropriation of a legal identity to which the entity is not entitled. That activity constitutes what has come to be dubbed identity crime. It provides a lens for understanding the nature of legal identity. It relates to several of the methodology questions articulated in Chapter Two, for example 'What is the function of legal identity?' (by implication why would someone illicitly use an identity), 'Who or what is eligible?' (with the identity criminal subverting the rules and tests regarding eligibility) and 'How is it validated or verified when contested?' (building on the discussion in Chapter Eight of identity as something signified through tokens of identity and registers). In essence, the chapter argues that we can gain insights about the nature of legal identity by looking at why and how the legal framework gets broken and why and how the framework responds.

Given legal identity as a matter of consequences many individuals and public/private sector bureaucracies construe identity through a lens of 'identity crime'. In a 2015 report the Australian Government stated that

> Identity crime is a generic term that describes a range of activities in which evidence of identity and other personal information is fabricated, manipulated, stolen or assumed, in order to facilitate the commission of a crime. Identity crime is rarely an end in itself, but is an important element in a wide range of criminal activities. These include credit card, superannuation and other financial frauds against individuals; welfare, tax and other fraud against government agencies; money laundering and financing of terrorism; gaining unauthorised access to sensitive information or facilities for unlawful purposes; and concealing other activities such as drug trafficking or the production and distribution of child exploitation material. Misuse of identity has also been present in connection with the commission of terrorist acts.[1]

[1] Attorney-General's Department, *Identity Crime and Misuse, 2013-2014 (National Identity Security Strategy)* (Attorney-General's Department, 2015) 17. See also Peter Millett, *On Villainy* (Queensland University Press, 2007).

Spigelman CJ in a 2009 judgment had referred to an earlier report in commenting that

> The ease with which identity crimes can be committed has expanded well beyond the traditional means of stealing mail or eavesdropping to obtain personal data. The new techniques are multifarious and have a facility of execution which is, of itself, such as to require that sentencing for such offences gives considerable weight to general deterrence.[2]

The Australian Federal Police characterised identity crime as

> a generic term to describe activities/offences in which a perpetrator uses a fabricated identity; a manipulated identity; or a stolen/assumed identity to facilitate the commission of a crime(s)

before going on to refer to identity theft, identity manipulation and identity fabrication.[3]

Other sources have referred to identity fraud (or more simply to fraud) or relied on terms such as impersonation, financial information offences, credit card skimming, fictitious identity, benefit fraud, credit card fraud, obtaining property by deception, forgery, obtaining a financial advantage by deception, counterfeiting, production and use of a false document, possession of a false document and possession of a device for making false documents.[4] At a more abstract level, some have relied on broad conceptualisations such as theft, deception or villainy.[5]

There is no agreed and definitive international taxonomy. There is no longstanding Australian statute that has specifically referred to 'identity crime' or 'identity theft' over several decades; the term 'identity crime' was introduced into some of the criminal codes within the past 15 years.[6] As earlier chapters have implied, identity offences cannot be comprehensively subsumed under a new category of 'cybercrime', given for example that not all legal identities involve digital networks.[7] The frequency

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[2] *Stevens v R* [2009] NSWCCA 260, Spigelman CJ at [6]. The reference is to the Model Criminal Law Officers Committee *Final Report: Identity Crime* (2008).
[3] Australian Federal Police, 'Identity Crime', ww.afp.gov.au/policing/fraud/identity-crime.
[4] See for example Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Identity Crime* (2007) 2; Australian Centre for Policing Research, Discussion Paper: Standardisation of Definitions of Identity Crime Terms (2004); and Rodger Jamieson, Lesley Pek Wee Lan, Donald Winchester, Greg Stephens, Alex Steel, Alana Maurushat and Rick Sarre, 'Addressing identity crime in crime management information systems: Definitions, classification, and empirics' (2012) 28(4) *Computer Law & Security Review* 381, 383 and 385.
[5] Peter Millett, *On Villainy, Money Loops and Identity Theft* (University of Queensland Press, 2008).
[6] Recent amendments include *Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Act 2011* (Cth) and *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (Cth).
[7] See *Law and Justice Legislation Amendment (Identity Crimes And Other Measures) Act 2011* (Cth) Sch 1.

with which politicians and law enforcement personnel refer to identity crime is not reflective of established jurisprudential terminology. There are for example only a handful of references specific to 'identity crime' and 'identity theft' (all from the past twenty years) in the law reports.[8]

The imprecision of the terminology is unsurprising, given the history of what might be generically or otherwise neutrally referred to as identity 'misuses'.[9] It is also unsurprising because of the nature of Anglo-Saxon law-making, which has been pragmatic (the responsiveness, experimental and practical qualities noted by Posner, as referred to in Chapter One) rather than involving a single overarching 'identity theft' or a 'crimes' statute of the sort advocated by Bentham.

Alan Milward quipped that 'All history is change'.[10] In thinking about identity and identity offences we can however discern substantial continuities along with the cultural and temporal contingency that has been highlighted in the preceding chapters of this dissertation. In essence, as long as there has been legal identity there have been instances of individuals appropriating, inventing or editing legal identities – and associated signifiers – for purposes that range from greed or a desire to escape a humdrum present (the desire for a flourishing through reinvention or second act that Fitzgerald unpersuasively denied in *The Last Tycoon*)[11] through to national security and existential imperatives involving removal of telltale yellow stars. As a corollary we can discern both formal law and public/private sector administrative mechanisms that have sought to criminalise identity misuses and foster trust in day by day social interactions across the public/private sectors.[12]

This chapter suggests that we can discern an uneven but in practice serviceable range of Commonwealth and state/territory statutes that provide such criminalisation and

[8] Note that in making that statement, which is accurate as of April 2017, it is conceivable that courts are making extensive use of the specific wording in unreported judgments, although that is unlikely. Most identity offences are addressed in the law reports using different wording.
[9] For neutrality see Emily Sherwin, 'Legal Taxonomy' (2009) 15(1) *Legal Theory* 25, 34.
[10] Alan Milward, *The European Rescue of the Nation-State* (Routledge, 1992) 437.
[11] F Scott Fitzgerald and Edmund Wilson, *The Last Tycoon, an Unfinished Novel, Together with The Great Gatsby* (Scribner & Sons, 1941) 163. Fitzgerald a decade earlier in *The Great Gatsby* had noted James Gatz' heroic reinvention, springing from 'his Platonic conception of himself'. For reinvention see in particular Anthony Elliot, *Concepts of the Self* (Polity Press, 3rd ed, 2014) 170 and the discussion of spent convictions in Chapters Four and Five above.
[12] See *Ali v R* [2008] NSWCCA 60, Adams J at [3]; and *Stevens v R* [2009] NSWCCA 260, McClellan CJ at [79] regarding trust.

that coexist with common law, some of which is more flexible and thus effective than statutory provisions that have a narrow focus or are over-reaching.[13] The chapter notes that activity that is currently categorised as 'identity crime' has a long history and predates digital payment systems or large-scale social welfare databases, despite the rhetoric noted by Calatayud that has determined how many people construe identity.[14] It argues that if we construe legal identity in terms of consequences and flourishing we should look beyond conceptualisation of offences in terms of payment systems and 'identity theft'. Could we, for example, construe defamation, ethno-religious vilification and counterfeiting as identity offences?

The chapter initially looks at continuities and change in the practice and legal characterisation of identity offences, for example illustrating a shift from frauds involving costume to those involving bogus documentation. It contextualises identity offences and then asks whether law regarding identity crime is an example of statutory incoherence. The chapter argues that identity crime is in essence a matter of improperly 'doing things with words' and that in conceptualising offences we should look beyond financial loss or improper benefit. We should also recognise that the state on occasion engages in what would otherwise be regarded as identity crime, for example in undercover action as part of law enforcement.

Continuities and Contingency

It is fashionable for law enforcement personnel, politicians, journalists and people in the private sector to speak of 'identity crime' as the crime of the millennium, of the new millennium, or as a global crime. Some construe it as a category of offences that are uniquely/particularly associated with the 'information age', the 'computer age' or a 'digital environment' in which there is an unprecedented lack of face to face contact regarding electronic commerce and social service entitlements.[15]

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[13] For a critique of over-reaching regarding 'possession' offences see Alex Steel, 'The True Identity of Australian Identity Theft Offences: A Measured Response or an Unjustified Status Offence' (2010) 33(2) *UNSW Law Journal* 503.

[14] Manuel Maroto Calatayud, ''The world is open for business: The card is key' 'identity theft' in the marketplace of criminal policy' (2009) 36 *Cahiers de défense sociale: bulletin de la Societé International de Défense Sociale pour une Politique Criminelle Humaniste* 33. See also Rebecca Mercuri, 'Scoping identity theft' (2006) 49(5) *Communications of the ACM* 17; and Nicole Piquero, Mark Cohen and Alex Piquero, 'How much is the public willing to pay to be protected from identity theft?' (2011) 28(3) *Justice Quarterly* 437.

[15] Sean Hoar, 'Identity Theft: The Crime of the New Millennium' (2001) 80 *Oregon Law Review* 1423; John Newman, *Identity Theft: The Cybercrime of the Millennium* (Loompanics, 1999); Stephanie Jones, 'Identity theft:

From a scholarly perspective those references are problematical. Identity misuses are evident from the beginning of recorded history. Eliav-Feldon for example refers to the Renaissance as 'an age of imposters'.[16] Higgs point to Tudor anxieties about the ability to 'steal someone's legal identity through forgery'.[17] Ecclesiastical fraudster Paulus Tigrinus successfully persuaded Pope Boniface IX and Antipope Clement VII into colluding in his assertion that he was the wandering Patriarch of Constantinople.[18] It is worth remembering that assumption of authority in the above instances came at a time when the church was experiencing difficulty in establishing its authority and true doctrine, articulated by a true identity, was a matter of salvation rather merely academic dispute. The shape of authority has changed over the past millennium but it, and other identities, remain important.

As noted in the preceding chapter's reference to the Hanoverian Black Acts – statutes that had an exemplary value in addressing popular anxieties about intangibles in a new economy – misuses of legal identity have mattered very much to authorities, writers, vendors and consumers.[19] So too did the reconstruction of identity by revolting *ancien regime* peasants in France, Germany and China through theft, arson and other offences involving erasure of records that were foundations of their deleterious legal identities. That reconstruction was an identity crime until regime change was effected.

A salient example of pre-digital identity crime appears in one of the West's

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A 'catch phrase for the new millennium' (2007) March *Insurance Journal* 6*;* Steve Weisman, *50 Ways to Protect Your Identity in a Digital Age: New Financial Threats You Need to Know and How to Avoid Them* (FT Press, 2nd ed, 2012); Kurt Saunders and Bruce Zucker, 'Counteracting identity fraud in the information age: The Identity Theft and Assumption Deterrence Act' (1999) 13(2) *International Review of Law, Computers & Technology* 183; Bob Sullivan, *Your evil twin: Behind the identity theft epidemic* (John Wiley, 2004); Kenneth Siegel, 'Protecting the Most Valuable Corporate Asset: Electronic Data, Identity Theft, Personal Information, and the Role of Data Security in the Information Age (2006) 111(3) *Pennsylvania State Law Review* 779; Daniel Solove, 'Identity theft, privacy, and the architecture of vulnerability' (2003) 54 *Hastings Law Journal* 1227; Peter Grabosky, Russell Smith and George Demsey, *Electronic Theft: Unlawful Acquisition in Cyberspace* (Cambridge University Press, 2011); and Erin Kenneally and Jon Stanley, 'Beyond Whiffle-Ball Bats: Addressing Identity Crime in an Information Economy' (2008) 26(47) *John Marshall Journal of Computer & Information Law* 3. See also Michael Levi, 'Suite Revenge? The Shaping of Folk Devils and Moral Panics about White-Collar Crimes' (2009) 49(1) *British Journal of Criminology* 48.

[16] Miriam Eliav-Feldon, *Renaissance Imposters and Proofs of Identity* (Palgrave Macmillan, 2012) 13.

[17] Edward Higgs, *Identifying the English: a History of Personal Identification 1500 to the Present* (Continuum, 2011) 69.

[18] Miriam Eliav-Feldon, *Renaissance Imposters and Proofs of Identity* (Palgrave Macmillan, 2012) 84.

[19] John Langbein, 'Albion's Fatal Flaws' (1993) 98 *Past And Present* 96, 117-118 highlights the policy incoherence and imperative for Governments to 'do something' that we might discern in contemporary statute-making about identity crimes.

foundational texts. The Book of Genesis for example records the identity fraud – a matter of performativity and misread signifiers – perpetrated by Jacob and Rebekah at the expense of Jacob's hirsute brother Esau.

> And Isaac said unto Jacob, Come near, I pray thee, that I may feel thee, my son, whether thou be my very son Esau or not. And Jacob went near unto Isaac his father; and he felt him, and said, The voice is Jacob's voice, but the hands are the hands of Esau.
>
> And he discerned him not, because his hands were hairy, as his brother Esau's hands: so he blessed him. And he said, Art thou my very son Esau? And he said, I am.[20]

We have recurrently seen face to face impersonation since that time, evident for example in the succession of pretenders who claimed to be the rightful head of state (discussed below), in the history of conmen that has fascinated US novelists and literary scholars,[21] or in contemporary incidents where an offender falsely claimed to be a law enforcement officer.[22] We have seen people who falsely claimed to be disabled and thus exploited pity (or fear of hellfire) in mediaeval and early modern Europe.[23] Others, along with people in our own time, created or promoted literary and legal texts that were supposedly authentic and had a cultural,[24] political[25] or financial

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[20] *Genesis* (King James Translation) 27: 11-24.

[21] See for example Karen Halttunen, *Confidence Men and Painted Women: A Study of Middle-Class Culture in America, 1830-1870* (Yale University Press, 1986); James Cook, *The Arts of Deception: Playing with Fraud in the Age of Barnum* (Harvard University Press, 2001); and Timothy Spears, *100 Years on the Road: The Traveling Salesman in American Culture* (Yale University Press, 1995). For a later period see Joseph Weil, *Con Man: A Master Swindler's Own Story* (Broadway, 2004); Floyd Miller, *The Man Who Sold the Eiffel Tower* (Doubleday, 1961); John Crosbie, *The Incredible Mrs Chadwick: The Most Notorious Woman of Her Age* (McGraw-Hill, 1975); Richard Ryner, *Drake's Fortune: The Fabulous True Story of the World's Greatest Confidence Artist* (Doubleday, 2002); and Robert Crichton, *The Great Imposter: the Amazing Careers of Ferdinand Waldo Demara* (Random House, 1959). Elsewhere see Paul Jankowski, *Stavisky: A Confidence Man in the Republic of Virtue* (Cornell University Press, 2002); Hilary Spurling, *La Grande Therese: The Greatest Scandal of the Century* (HarperCollins, 2000); Sheila Fitzpatrick, 'The World of Ostap Bender: Soviet Confidence Men in the Stalin Period' (2002) 61(3) *Slavic Review* 535; Freda Nicholls, *The Amazing Mrs Livesey* (Allen & Unwin, 2016); and Golfo Alexopoulos, 'Portrait of a Con Artist as a Soviet Man' (1998) 57(4) *Slavic Review* 774.

[22] *Devaney v R* [2012] NSWCCA 285. For precursors see Jennine Hurl-Eamon, 'The Westminster impostors: Impersonating law enforcement in early eighteenth-century London' (2005) 38(3) *Eighteenth-century Studies* 461; and Robert Gellately, 'Crime, identity and power: Stories of police imposters in Nazi Germany' (2000) 4(2) *Crime, Histoire & Sociétés/Crime, History & Societies* 5. For a satiric impersonation by the 'Tranny Cops', resulting in charges of impersonating NSW Police officers in 2007, see David Marr, 'Crossing a Line Drawn on a Map', *Sydney Morning Herald* (Sydney) 4 September 2007, 10 and 'More Operetta than Operation Cheney', *Sydney Morning Herald* (Sydney) 11 July 2007, 6.

[23] Steve Hindle, 'Dependency, Shame and Belonging: Badging the Deserving Poor, c. 1550-1750' (2004) 1 *Cultural and Social History* 6; Iain Cameron, *Crime and Repression in the Auvergne and the Guyenne, 1720-1790* (Cambridge University Press, 1981) 110; Paul Keenan, *St Petersburg and the Russian Court, 1703-1761* (Palgrave Macmillan, 2013) 42; and Lindsey Dawn Row-Heyveld, Dissembling Disability: Performances of the Non-Standard Body in Early Modern England, PhD dissertation, University of Iowa, 2011.

[24] Thomas Curley, *Samuel Johnson, the Ossian fraud, and the Celtic revival in Great Britain and Ireland* (Cambridge University Press, 2009); and Ian Haywood, *The Making of History: A Study of the Literary Forgeries of James Macpherson & Thomas Chatterton in Relation to Eighteenth-Century Ideals of History and Fiction* (Associated Universities Press, 1986). See also Anthony Grafton, *Forgers & Critics: Creativity and Duplicity in Western Scholarship* (Princeton University Press, 1990).

significance,[26] or 'enhanced' an artwork with a bogus signature and a false description.[27]

In our own time, where there is an expectation that the liberal democratic state will foster flourishing through income support for the disabled,[28] we encounter people who falsely claim a disability as the basis of a state allowance[29] or in a workers' compensation scam.[30] Some engage in a 'mischief' by falsely claiming to be a victim of crime.[31] We also encounter instances where people have engaged in 'survivor fraud', in other words gaining both sympathy and money through false representations about their health[32] or avoidance of athletic performance enhancers,[33] about abusive childhoods[34] or endurance of events such as the 9/11 attack,[35] a

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[25] Johannes Fried, *The Donation of Constantine and Constitutum Constantini: The Misinterpretation of a Fiction and Its Original Meaning* (de Gruyter, 2007); and Riccardo Fubini, 'Humanism and Truth: Valla Writes against the Donation of Constantine' (1996) 57(1) *Journal of the History of Ideas* 79.

[26] For recent incidents see Robert Harris, *Selling Hitler* (Faber, 1987); James Phelan and Lewis Chester, *The Money: The Battle for Howard Hughes's Billions* (Random House, 1997); Stephen Fay, Lewis Chester and Magnus Linklater, *Hoax: The Inside Story of the Howard Hughes-Clifford Irving Affair* (Andre Deutsch, 1972); Clifford Irving, *What Really Happened: The Untold Story of the Hughes Affair* (Grove Press, 1972); and Simon Worrall, *The Poet and the Murderer: A True Story of Literary Crime and the Art of Forgery* (4th Estate, 2003).

[27] *McBride v Christie's Australia Pty Limited* [2014] NSWSC 1729, [24]-[25]; *Blackman & Ors v Gant & Anor* [2010] VSC 229, [1]; and *Siddique v DPP* [2015] VSC 99, [4]. More broadly see Thierry Lenain, *Art Forgery: The History of a Modern Obsession* (Reaktion, 2011); Sandor Radnsti, *The Fake: Forgery & Its Place In Art* (Rowman & Littlefield, 1999); Eric Hebborn, *Drawn to Trouble: Confessions of a Master Forger* (Random House, 1993); Jonathan Lopez, *The Man Who Made Vermeers: Unvarnishing the Legend of Master Forger Hans van Meegeren* (Harcourt, 2008); Frank Wynne, *I Was Vermeer: The Legend of the Forger Who Swindled The Nazis* (Bloomsbury, 2006); and Aviva Briefel, *The Deceivers: Art Forgery And Identity in the Nineteenth Century* (Cornell University Press, 2006).

[28] See for example *Disability Services Act 1986* (Cth) s 3; and Deborah Stone, *The Disabled State* (Temple University Press, 1984).

[29] *Miodrag Tanaskovic v David Bateman* [1998] ACTSC 279, [14]-[15]

[30] *WorkCover Queensland v Brennan* [2007] QMC 3, [1]; *Workcover Corp of SA v Musolino* [2007] SASC 249, [7]-[10]; *Pharmacy Board of Australia v Coghill* [2015] QCAT 27, [4]; and *Rumbelow v Magistrates' Court of Victoria* [2004] VSC 265, [7].

[31] See for example *Crimes Act 1900* (NSW) s 547B; *Crimes Act 1900* (ACT) s 396; and *Criminal Code Act 1924* (Tas) Sch 1; *In the matter of an application for bail by Jones* [2014] ACTSC 248, [4]; and *State of New South Wales v Brookes* [2008] NSWSC 473, [69].

[32] Recent instances in Australia include health guru Belle Gibson and mother Elle Edmonds, for which see Rebekah Cavanagh, 'Pressure grows on cancer charlatan', *The Advertiser* (Adelaide) 3 November 2015, 10; ''Cancer' blogger grilled', *Geelong Advertiser* (Geelong) 11 July 2015, 26; Ben McClellan and Richard Noone, 'Mother-of-six faked terminal cancer', *The Advertiser* (Adelaide) 4 November 2014, 4; and Damon Cronshaw, 'Did She Fake Cancer For Cash', *Newcastle Herald* (Newcastle) 4 June 2015, 1.

[33] Juliet Macur, *Cycle of Lies: The Fall of Lance Armstrong* (HarperCollins, 2014); and David Walsh, *Seven Deadly Sins: My Pursuit of Lance Armstrong* (Simon & Schuster, 2012). Armstrong and his publishers have faced class actions regarding deception in his books; he is reported to have reached a US$10m settlement with a sponsor. See John Fortunato, 'Sponsorship Implications of the Lance Armstrong v. USPS Lawsuit' (2014) 3(1) *Berkeley Journal of Entertainment & Sports Law* 72; and Anna Haslinsky, 'Lance Armstrong Wins Again by Surviving a Lawsuit for Misrepresentations and Fraud Without So Much as a "SLAPP" on the Wrist' (2015) 22(1) *Jeffrey S. Moorad Sports Law Journal* 109.

[34] Gillian Whitlock, 'Tainted Testimony: The Khouri Affair' (2004) 21(4) *Australian Literary Studies* 165; Simon Caterson, 'The Norma Khouri Affair' (2005) 49(12) *Quadrant* 63; and Maggie Nolan and Carrie Dawson, 'Who's Who? Mapping Hoaxes and Imposture in Australian Literary History' (2004) 21(4) *Australian Literary Studies* v.

[35] Robin Fisher and Angelo Guglielmo, *The Woman Who Wasn't There: The True Story of an Incredible Deception* (Simon & Schuster, 2012).

tsunami[36] or the Holocaust.[37] That reliance on sympathy and heroism reflects a shift in perceptions of worthiness, with for example few people now claiming support on the basis of newly-discovered royal blood[38] and bogus royals such as Morehu-Barlow instead using the supposed lineage as an explanation for how they can live like a prince on a Queensland public servant's salary.[39]

Some non-aristocrats appear to have sought to fund a more aristocratic lifestyle by concurrently seeking welfare entitlements using multiple identities.[40] A Marxist theorist such as Hobsbawm might construe that social security fraud as an expression of 'primitive rebels' unsuccessfully taking from the rich and giving to the poor,[41] or note the entrepreneurial ethic evident in the following judgment, where Cogswell DCJ stated

> Almost everyone has had to go to some trouble to obtain a credit card. They fill in forms and have their credit rating assessed by a financial institution. It becomes easier once a person already has one or two cards.
>
> For most people, buying high end designer goods is an expensive luxury. It might be a gift or an indulgence and they might take some time to pay off the purchase with interest if they use a credit card. Others of course can afford such goods regularly because they earn more money from their occupation.
>
> Financial institutions have made it easier for us to afford such purchases. We can buy the goods immediately, the retailer is paid, the financial institution bears the risk of waiting for us to pay for the goods but we agree to pay interest for the advance of the funds. These arrangements underpin a vast number of transactions by individuals. They promote commerce and personal convenience.

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[36] *DPP v Dawn-Manuel* [2014] VCC 1810, [29]. See also *Dawn-Manuel v The Queen* [2015] VSCA 212. For much of last century rich North Americans and Australians sought to enhance their social capital by marrying their daughters to impoverished aristocrats. Some parents were accordingly assiduous readers of works such as *Burke's Peerage* and the *Almanach de Gotha* in order to discern whether claims of noble linesage were substantive. For a recent imposture incident see Lorenzo Montesini, *My Life and Other Misdemeanours* (Viking, 1999); and Damien Murphy, 'All dressed up but nowhere left to go', *The Sydney Morning Herald* (Sydney) 11 January 2012, 4.

[37] Blake Eskin, *A Life in Pieces: the Making and Unmaking of Binjamin Wilkomirski* (Norton, 2002); and Stefan Maechler, *The Wilkomirski Affair: A Study in Biographical Truth* (Schocken, 2001). See also Anne Rothe, *Popular Trauma Culture: Selling the Pain of Others in the Mass Media* (Rutgers University Press, 2011).

[38] See for example the career of Mary Carleton, discussed in Mary Kietzman, *The self-fashioning of an early modern Englishwoman: Mary Carleton's Lives* (Ashgate, 2004); and Janet Todd, 'The German princess: criminalities of gender and class', in Rosamaria Locatelli and Robert De Romanis (eds), *Narrating Transgression: Representations of the criminal in early modern England* (Peter Lang, 1999) 103–112; or Princess Caraboo in John Wells, *Princess Caraboo: Her True Story* (Pan, 1994). For an imposter closer to home see Kirsten McKenzie, *A Swindler's Progress: Nobles and Convicts in the Age of Liberty* (University of New South Wales Press, 2009).

[39] Queensland Crime & Misconduct Commission, *Queensland public sector: An examination of how a $16.69 million fraud was committed on Queensland Health* (2013).

[40] *Natasha Jade Thomas v R (Commonwealth)* [2006] NSWCCA 313; and *Thomson v R* [2014] NSWCCA 88.

[41] Eric Hobsbawm, *Primitive Rebels*: *Studies in Archaic Forms of Social Movement in the 19th and 20th Centuries* (Norton, 1965).

> Bin Li, whom I am sentencing today, aggressively abused the processes and understandings which underlie these arrangements which benefit so many. He went about fraudulently manufacturing his own credit cards. These cards were used to buy high end luxury goods which he then arranged to on-sell for cash. He had a virtual factory set up at his home for producing hundreds and hundreds of false but effective credit cards. He had a person out shopping with these cards. If one card did not work, another was tried. His operation was extensive, well organised and was backed by sophisticated plant and equipment.
>
> In addition Bin Li had equipment to manufacture cards – other than credit cards, such as driver licences – which could be used for identification purposes. Therefore the system we are all familiar with of producing a form of identification was being deliberately undermined by Bin Li's criminal activity.[42]

Given the contention in this dissertation that if a legal identity has consequences it is worth subverting, we can also discern a wide range of activities in which people have edited their persona and thus for example sought to gain an undeserved advantage or escape the consequences of past offences.

People for example 'massage' their CVs to omit deleterious information such as bankruptcies, criminal convictions or merely false starts in building a career.[43] They similarly add academic qualifications or other markers of achievement to reflect Australia's embrace of credentialism, in which the paper is a token of both expertise and identity as a prerequisite for career advancement.[44]

In Australia for example Glen Oakley rose from mortician's assistant to become Director-General of the NSW Department of Business & Regional Development, partly on the strength of his academic background. Unfortunately his degrees, including a BSc (Hons) and Grad Dip in Education from the University of Newcastle,

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[42] *R v Bin Li and Kun Wang* [2013] NSWDC 211, [1]-[5]. For conceptualisation of cards as both property and tools for flourishing see *Police v Singh* [2010] SASC 104, [10]

[43] *Barnes v Hatch Associates Pty Ltd* [2015] FCCA 3375, [167]; *Medical Board of Australia v Patel* [2015] QCAT 133; and *R v Morehu-Barlow* [2014] QCA 4.

[44] *Victorian Legal Services Board v Swies (Legal Practice)* [2015] VCAT 1903; *Legal Services Commissioner v Ge* [2016] NSWCATOD 25; *Legal Services Commissioner v Grosser (Legal Practice)* [2014] VCAT 1533, [12]; *Legal Services Commissioner v Spicehandler (Legal Practice)* [2012] VCAT 630, [2]; *Legal Services Commissioner v PFM (Legal Practice)* [2013] VCAT 827, [8]-[11]; and *Strik and Director-General, Department of Services, Technology & Administration* [2011] AATA 177. See more broadly George Brown, 'Degrees of doubt: legitimate, real and fake qualifications in a global market' (2006) 28(1) *Journal of Higher Education Policy and Management* 71; and Russell Smith, 'Criminal Use of Identity in Higher Education' (2006) 2(9) *Privacy Law Bulletin* 124.

MBA from UNSW and a PhD, were all fake.[45]

There is a long history of people who have profited from tall tales about their travels (for example Psalmanazar,[46] Essad Bey[47] and de Rougemont,[48] who wowed European audiences with descriptions of nocturnal flying wombats), about their embodiment of traditional wisdom (for example Grey Owl,[49] Buffalo Long Lance,[50] Little Tree and Morgan)[51] or about their divine relationships (for example Sabbatai Zevi[52] and Hóng Xiùquán).[53]

People may hold themselves out as having a legal identity, for example what a non-specialist would regard as the authority of a legal practitioner[54] or medical practitioner,[55] that they do not possess. As preceding chapters have noted, some people omit to provide information about legal identities, for example bankruptcy, when applying for finance.[56] Some attempt to obfuscate their status by altering their names as part of the application to the lender, or forge documents to support a loan

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[45] Independent Commission Against Corruption, *Report on investigation into Mr Glen Oakley's use of false academic qualifications* (2003) 8. Similarly egregious failures of vetting are evident in recruitment of NZ Chief Defence Scientist Stephen Wilce, Maori Television Service CEO John Davy, and Telstra senior executives Chris Tyler and Bruno Sorrentino. See for example Chief of Defence Force NZ, *Report of the Court of Inquiry into the appointment of Mr Stephen Wilce to the position of Director of the Defence Technology Agency in July 2005* (2010); Neil Walter, *Report on the inquiry into the granting of a security clearance for Stephen Wilce on appointment to the Defence Technology Agency in 2005* (2010); State Services Commission, *Findings in relation to the New Zealand Security Intelligence Service's management of the security clearance vetting of Stephen Wilce* (2010); Ruth Berry, 'Conman Davy urged MTV to destroy his fake CV' *Southland Time*s (Auckland) 5 April 2003, 2; and Roger Horrocks and Nick Perry, *Television in New Zealand: Programming the Nation* (Oxford University Press, 2004) 38. Vetting is further discussed in Chapter Ten below.

[46] John Shufelt, 'The trickster as an instrument of enlightenment: George Psalmanazar and the writings of Jonathan Swift' (2005) 31(2) *History of European Ideas* 147; and Michael Keevak, *The Pretended Asian: George Psalmanazar's Eighteenth-century Formosan Hoax* (Wayne State University Press, 2004).

[47] Tom Reiss, *The Orientalist: Solving the Mystery of a Strange & Dangerous Life* (Random House, 2005).

[48] Ron Howard, *The Fabulist: The Incredible Story of Louis de Rougemont* (Random House, 2006).

[49] Lovat Dickson, *Wilderness Man: The Strange Story of Grey Owl* (Macmillan, 1974); and Armand Ruffo, *Grey Owl: the mystery of Archie Belaney* (Coteau, 1996).

[50] Donald Smith, *Chief Buffalo Child Long Lance: The Glorious Impostor* (Red Deer Press, 1999); and Laura Browder, *Slippery Characters: Ethnic Impersonators and American Identities* (University of North Carolina Press, 2000).

[51] Cath Ellis, 'Helping Yourself: Marlo Morgan and the Fabrication of Indigenous Wisdom' (2004) 21(4) *Australian Literary Studies* 149. See also Angela Pulley Hudson, *Real Native Genius: How an Ex-Slave and a White Mormon Became Famous Indians* (University of North Carolina Press, 2015).

[52] Gershom Scholem, *Sabbatai Zevi: The Mystical Messiah, 1626-76* (Princeton University Press, 1976); and David Halperin (ed), *Sabbatai Zevi: Testimonies to a Fallen Messiah* (Littman Library of Jewish Civilization, 2007).

[53] Jonathan Spence, *God's Chinese Son: The Taiping Heavenly Kingdom of Hong Xiuquan* (Norton, 1996).

[54] *Legal Practice Board v Ridah* [2004] WASC 263.

[55] For example *Zepinic v Psychologists Registration Board of NSW* [2010] NSWPST 6, [10]; *Psychology Board of Australia v Milosevic (Occupational and Business Regulation)* [2013] VCAT 12, [3]. See also Adrian Lowe, 'Fake psychologist's $1m TAC, WorkSafe haul', *The Age* (Melbourne) 29 September 2011, 8.

[56] *R v Neil Gordon Camm; R v Harold Charles Cary; R v Brendan Matthew Godfrey* [2008] NSWDC 162, [4]; *R v Issaac* [2005] NSWCCA 86, [5]-[7]; and *Re Charles Graham Willis Ex Parte: the Official Trustee In Bankruptcy* [1985] FCA 390. Note *Bankruptcy Act 1966* (Cth) s 8.

application.[57] Impersonation allows offenders to recurrently avoid having to pay for mobile phone bills or motorbikes.[58]

Some use an entirely fictitious identity,[59] on occasion to escape the consequences of murder.[60] Some are anxious about 'migration fraud'[61] or 'paternity fraud',[62] given that parentage has legal consequences under for example the current child support regime.[63] Some rely on a 'ring-in' for IELTS and other tests.[64] Some sell document 'templates'[65] or 'novelty' passports, driver's licences and other signifiers in the expectation that the consumer will fraudulently use the *faux* signifier.[66]

Others have attracted the attention of the state, journalists and the mass media through appropriation of a real person's identity[67] in the course of using payment systems, for

[57] *Perpetual Trustees Victoria Ltd v Xiao & Anor* [2015] VSC 21; *R v Andre di Cioccio* [2012] VSC 28; *RHG Mortgage Corporation Ltd v Baira; RHG Mortgage Corporation Ltd v Ianni* [2014] NSWSC 849; *JOD v Regina* [2009] NSWCCA 205; *Fast Funds Pty Limited v Coppola; Coppola v Hall* [2010] NSWSC 470; *Australian Regional Credit v Mula; Australian Regional Credit v Raphael* [2009] NSWSC 325; *Victorian Legal Services Board v Swies (Legal Practice)* [2015] VCAT 1903; *Haddad v Lyon* [2003] FCA 1623; *The Queen v Munt* [2015] VSC 132, [33]; *The Queen v Linacre* [2014] VSC 615, [11]-[15]; and *DPP v McKenzie* [2013] VCC 1310.
[58] *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105, [31]-[35] and [37]-38].
[59] *R v Schmidt* [2013] ACTSC 295, [109].
[60] Mark Seal, *The Man in the Rockefeller Suit: The Astonishing Rise and Spectacular Fall of a Serial Imposter* (Viking, 2011); and Walter Kirn, *Blood Will Out*: *The True Story of a Murder, a Mystery, and a Masquerade* (Liveright, 2014).
[61] Russell Skelton, 'Gatekeepers in Disarray: Identity fraud is rife and the Department of Immigration is failing to crack down', *The Age* (Melbourne) 7 January 2013, 9. A perspective is provided in Leslie Levin, 'Immigration Lawyers and the Lying Client' in Leslie Levin and Lynn Mather (eds), *Lawyers in Practice: Ethics & Decisionmaking in Context* (University of Chicago Press, 2012) 87, 104-105 regarding complicity in some offences.
[62] Lyn Turney, 'Paternity testing and the biological determination of fatherhood' (2006) 12(1) *Journal of Family Studies* 73; Nick Wikeley and Lisa Young, 'Secrets and lies: no deceit down under for paternity fraud' (2008) 20(1) *Child and Family Law Quarterly* 81; and Heather Draper, 'Paternity fraud and compensation for misattributed paternity' (2007) 33(8) *Journal of Medical Ethics* 475. See also Michael Gilding, 'Rampant misattributed paternity: the creation of an urban myth' (2005) 13(2) *People and Place* 1.
[63] *Child Support (Registration and Collection) Act 1988* (Cth) ss 3 and 3A.
[64] *Patel v Minister for Immigration & Anor* [2015] FCCA 2142, [13]; *Dhindsa & Ors v Minister for Immigration & Anor* [2015] FCCA 3202, [3]; *Kumar v Minister for Immigration & Anor* [2015] FCCA 3377, [2]; *Singh v Minister for Immigration & Anor* [2013] FCCA 1421, [25]; *1212070* [2014] MRTA 1601, [10]; and *1408859* [2015] MRTA 749, [18].
[65] Christopher Murray, 'Fake IDs: Can bar owners sue if they get fooled' (2005) 89 *Marquette Law Review* 437, 439. See also Senate Committee on Government Affairs, US Congress, *Phony IDs and Credentials Via the Internet – An Emerging Problem: Hearing Before the Permanent Subcommittee on Investigations*, 106th Congress 2nd Session 19 May 2000. Sites as of April 2016 included replaceyourdocs.com; onlinenoveltydocs.co.uk; and banknovelties.com.
[66] That marketing is a more egregious form of the sharp practice evident in sale of manorial lordships, which enable the purchaser to claim that the correct form of address is 'Lord of the Manor', but since enactment of the *Law Of Property Act 1925* (UK) provide no title to real property or other rights.
[67] Instances of impersonation include *Opacic v R* [2013] NSWCCA 294; *DOHS v Mr O & Ms B* [2009] VChC 2; *Poniris v R* [2014] NSWCCA 100; *Vaccaro and Anor v Flammia* [2008] NSWSC 1322, [77]; *Milane v R* [2006] NSWCCA 281; *R v Raad* [2002] NSWCCA 75; *R v Armstrong* [2001] NSWCCA 33, [6]; *DPP v Cuccia* [2013] VCC 1506; *DPP v Moore* [2014] VCC 1770; and *Barton v R* [2009] NSWCCA 285.

example credit cards.[68] In such instances the offender gains a financial benefit and the individual whose identity – in essence authority to enter into the transaction – bears the cost, if only in terms of dealing with retailers and financial institutions to rectify that appropriation. It is an extension of activity involving documents from at least the time of the Tudors, for example including the forgery of signatures,[69] wills,[70] letters of credit,[71] and practitioner registration certificates.[72]. Some people supposedly return from the dead,[73] seeking to step into someone else's shoes,[74] or – as with – John Stonehouse MP[75] or recent UK canoeist John Darwin, fake their own deaths in order to escape inconvenient relationships (or a police investigation) and collect the insurance money.

In the contemporary registration state, discussed in Chapter Eleven, people have disregarded rules about identity signifiers in order to illicitly become members of the Australian community, to facilitate unencumbered movement,[76] to evade restrictions aimed at ensuring the integrity of the taxation system or anti-money laundering and counter-terrorism regimes,[77] or simply to enable the breeding of identity documentation that if taken at face value facilitates other offences such as drug trafficking. Membership of the Australian community has a value; people will accordingly seek to reinvent their identities through lies in visa or refugee

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[68] *R v Li* [2012] NSWSC 477. See also *Anjoul v R* [2014] NSWCCA 234; *DPP v Neoh* [2014] VCC 229; *DPP v Lee* [2013] VCC 1353; *Hancock v R* [2012] NSWCCA 200; *R v El-Azar & Anor* [2007] VSC 487; *R v Kheng* [2001] NSWCCA 85, [3]-[5]; and *R v Harry Ghamraoui* [2008] NSWDC 31.

[69] *Jeans v Cleary* [2006] NSWSC 647; *Campbell v DPP (Cth)* [1995] 2 VR 654, 663; *Fast Funds Pty Limited v Coppola; Coppola v Hall* [2010] NSWSC 470; *Creswick & Ors v Creswick* [2010] QSC 339; *Gutta v Ierino* [2010] WASC 402; *Elfar v Registrar General of New South Wales* [2010] NSWSC 539; *Deangrove Pty Ltd v Commonwealth Bank of Australia* [2003] FCA 268; *Parke & Parke* [2015] FCCA 1692, [92]-[97]; *R v Reid* [1999] VSCA 98; *Mahoney and Commissioner of Police* [2003] NSWIRComm 67; *Montclare v Metlife Insurance Ltd* [2015] VSC 306, [187]-[190]; and *Permanent Custodians Limited v Geagea (No 2)* [2014] NSWSC 562.

[70] *Nicholas v R* [1988] TASSC 36.

[71] Nicholas Booth, *The Thieves of Threadneedle Street: The Victorian Fraudsters Who Almost Broke the Bank of England* (History Press, 2014).

[72] *Bahramy v Medical Council of New South Wales* [2015] NSWCA 384, [11].

[73] Partha Chatterjee, *A Princely Impostor? The Strange and Universal History of the Kumar of Bhawal* (Princeton University Press, 2002).

[74] Carrie Dawson, ''The Slaughterman of Wagga Wagga': Imposture, National Identity, and the Tichborne Affair' (2004) 21(4) *Australian Literary Studies* 1; Rohan McWilliam, *The Tichborne Claimant* (Continuum, 2007); Robyn Annear, *The Man who Lost Himself: The Unbelievable Story of the Tichborne Claimant* (Text, 2011); Christopher Kent, 'Victorian Self-Making, or Self-Unmaking? The Tichborne Claimant Revisited' (1991) 17(1) *Victorian Review* 18; and Sara Murphy, ''No Two Men Were Ever Alike Within': The Tichborne Trial, The Lord Chief Justice, and The Narration of Identity' (2013) *Law, Culture and the Humanities* 1.

[75] *DPP v Stonehouse* [1978] AC 55; and G R Sullivan, 'Crossing The Rubicon In Miami' (1978) 41(2) *Modern Law Review* 215. See the self-exculpatory John Stonehouse, *Death of an Idealist* (WH Allen, 1975).

[76] *Re Stephen John Caulton and Jennifer Ann Caulton v the Minister of Immigration and Ethnic Affairs* [1987] FCA 264, [8]; *Bouffiere and Tax Agents' Board of NSW* [2007] AATA 1978, [8] and [12]-[13].

[77] *Re Taxation Appeals* [1992] AATA 277, [31]-[37]; *Tomov v The Queen* [2011] WASCA 189; *DPP (Cth) v Cheng* [2015] NSWDC 326, [5]; and *Setiawan and Minister for Immigration and Border Protection* [2014] AATA 682.

applications[78] or through passport frauds.[79] For many people participation in the community is predicated, more subtly, on the freedom of movement associated with a driver's licence,[80] which in other words provides autonomy on a day by day basis rather than merely the signifier commonly used as proof of identity (as individuation) in seeking other identity documents.

Framing identity offences

Deception through commission or omission is part of human nature, a function of one party's willingness to lie and the other party's willingness to be deceived or poor assessment of risk. As Ibsen indicated in *The Wild Duck*, much social interaction (and perhaps healthy self-concept) would be difficult if we were expected to be absolutely truthful on all occasions.[81] Wiley explained that

> In all relationships private and public, lies are used to protect or promote one's self or others. There are institutional lies to sell, to protect turf, to improve competition, to motivate staff, and so forth. There are lies in politics, advertising, and education. There are even lies in medicine: doctors to patients and patients to their doctors. Deception is plentiful – it is there all the time; we just do not like to look at it.[82]

Not all deception or mistatement about legal identity is illegal.

What can we discern about the structure of law regarding identity offences? One response is that it is easier to describe what offenders have been doing and report their motivations[83] than it is to identify an internally consistent structure of the law, something that is evident in much writing under the rubric of cybercrime or white-

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[78] *Bourakov and Minister for Immigration and Citizenship* [2007] AATA 1093; *Hobbins and Minister for Immigration and Multicultural Affairs* [2006] AATA 279; and *Grace Pushpa Wati v Minister for Immigration & Ethnic Affairs & Anor* [1996] FCA 1043.
[79] *Tomov v The Queen* [2011] WASCA 189.
[80] *Lowe v The Queen* [2015] VSCA 327; *DPP v Yip* [2015] VCC 1709, *DPP v Hall* [2015] VCC 1338; *Chime v R* [2014] NSWCCA 304; *Mortada v R* [2014] NSWCCA 36; *Mansell v The State of Western Australia (No 6)* [2013] WASCA 120; *Gim Eng Moh v Shaun Pine* [2010] ACTSC 27; *JOD v Regina* [2009] NSWCCA 205; *Yeonata v R* [2012] NSWCCA 211; *R v Verrall* [2012] QCA 310; *Hancock v R* [2012] NSWCCA 200; *Markovic v The Queen; Pantelic v The Queen* [2010] VSCA 105, [26]-[28]; and *Chen v R* [2011] NSWCCA 145.
[81] Henrik Ibsen, 'The Wild Duck' in *Ibsen Plays: One* (Michael Meyer trans, Methuen, 1980) [trans of *Vildanden* (first published 1884)] 117. See also *R v Clarence* (1888) 22 QBD 23, Stephen J at 43.
[82] Susan Wiley, 'Deception and Detection in Psychiatric Diagnosis' (2005) 21(4) *Psychiatric Clinics of North America* 869, 869.
[83] Woody Guthrie, 'The Ballad of Pretty Boy Floyd' in *American Folksong* (DISC Company of America, 1947) 27. See further Bruce Baer Arnold and Wendy Bonython, 'Villains, Victims and Bystanders in Financial Crime' in David Weisstub, Michel Dion and Jean-Loup Richet (eds), *Financial Crimes* (Springer, 2016); and Heith Copes and Lynne Vieraitis, 'Understanding Identity Theft: Offenders' Accounts of Their Lives and Crimes' (2009) 34(3) *Criminal Justice Review* 329.

collar crime, the activity that Guthrie dubbed being mugged with a fountain pen or keyboard rather than a blue-collar cosh.[84] There is accordingly substantial literature on social engineering such as phishing by email, websites and other mechanisms.

For the purposes of this dissertation a more useful response is that in contemporary Australia four categories of law are evident in the Commonwealth and state/territory jurisdictions. As Sherwin commented in her discussion of legal taxonomies, such a typology may be of value in supporting a critical evaluation of law rather than guiding decision-making by legal adjudicators.[85]

The first category is common law, broadly pitched in terms of dishonesty or deception, in other words that people will not seek/gain an improper benefit through untruth.[86] It is substantially bounded and overtaken by statute, with the Commonwealth, states and territories having codified particular offences.[87] We see a continued expectation that people will act in good faith in seeking or enjoying legal identities, for example as employees in what Chapter Five noted was traditionally characterised as a master-servant relationship.[88] They will for example not engage in omission when providing CVs to potential employers, with dishonesty in the provision of applications being a basis for dismissal from employment.

The second category comprises the general crime statutes that address actions of dishonesty, particularly where the actor receives or seeks to receive a benefit.[89] Those statutes address the activity of both individual actors and their associates, through for example provisions regarding conspiracy, and in scrutinising the jurisprudence noted in Chapter Nine it is evident that offenders have sometimes been charged under

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[84] Rodger Jamieson, Lesley Pek Wee Lan, Donald Winchester, Greg Stephens, Alex Steel, Alana Maurushat and Rick Sarre, 'Addressing identity crime in crime management information systems: Definitions, classification, and empirics' (2012) 28(4) *Computer Law & Security Review* 381 provides a useful overview of confusion in identity crime terminology.

[85] Emily Sherwin, 'Legal Taxonomy' (2009) 15(1) *Legal Theory* 25, 39 and 41.

[86] See the discussion by Toohey and Gaudron JJ in *Peters v The Queen* (1998) 192 CLR 493, 509; *R v Glenister* [1980] 2 NSWLR 597, 604; and *Spies v The Queen* (2000) 201 CLR 603, 630.

[87] Gleeson CJ in *Lipohar v R* [1999] HCA 65, [3]; 200 CLR 485; 168 ALR 8; 74 ALJR 282 for example noted that in South Australia for example conspiracy to cheat or defraud is a common law offence, with the penalty identified in *Criminal Law Consolidation Act 1935* (SA) s 270(2).

[88] See Simon Deakin, 'The Contract Of Employment: A Study In Legal Evolution' (2001) 11 *Historical Studies in Industrial Relations* 1; and Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) 18-19. See more broadly Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire*, 1562-1955 (University of North Carolina Press, 2004).

[89] Examples are *Criminal Code Act 1995* (Cth) Sch 1, *Crimes Act 1900* (NSW), *Criminal Code Act 1924* (Tas), and *Crimes Act 1958* (Vic).

several sections of a crimes statute.

In practice that recognition of multiple discrete identity offences, which are principle-based rather than being tied to a particular signifier or identity, has a pragmatic value in providing precedent for prosecution of people whose offences have a narrower scope and in casting a wide net, in other words embodying the understanding that a prosecutor using several charges will get a conviction without having to rely on devices such as the 'prosecutor's darling'.[90]

A salient example is *Hancock v R* [2012] NSWCCA 200, where the offender faced charges relating to conspiracy to make false instruments, conspiracy to cheat and defraud, conspiracy to deal with proceeds of crime, knowingly dealing with the proceeds of crime; having custody of false instruments; and dealing in credit card data intended to become an instrument of crime. In *JOD v Regina* [2009] NSWCCA 205 the offender faced charges under s 145.1(5) of the *Criminal Code Act 1995* (use forged Commonwealth document), two offences contrary to *Criminal Code* (Cth) s 480.4 (dishonestly obtain or deal in personal financial information), 26 offences contrary to *Crimes Act 1900* (NSW) s 178BA (obtain money by deception), 22 offences contrary to s 300(2) of the *Crimes Act 1900* (NSW) s 300(2) (use false instrument with intent), a single offence contrary to *Crimes Act 1900* (NSW) s 178BB (obtain benefit by false statement), and seven offences contrary to *Financial Transaction Reports Act 1988* (Cth) s 24(1) (open account in false name).

As that listing indicates, the general crime statutes as a third category criminalise possession of identity signifiers or of tools for the production of those signifiers, as distinct from actual use of those signifiers.

That criminalisation is at an abstract or generic level, in other words is not restricted to a specific signifier and thus differs from the fourth category. It is often accompanied by provisions regarding computer offences such as computer 'hacking', for example unauthorised access to a database and 'theft' of data.[91]

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[90] *R v Saik* [2007] 1 AC 18, Lord Brown at 62.
[91] *Crimes Act 1914* (Cth) ss 3C, 3L, 3M and 3N. Corresponding state/territory provisions include *Crimes Act 1958* (Vic) ss 247A through 247I; *Criminal Code* (WA) s 440A; and *Criminal Code* (ACT) s s 412 through 421.

The fourth category comprises provisions that are specific to a particular signifier (for example criminalising unauthorised amendment or use of a driver licence or passport) or a particular legal identity (for example an offence against a diplomat).[92] Prosecutions often relate only to a specific misuse. They may however encompass category two and category three identity offences.[93]

Preceding chapters of this dissertation have noted offences relating to performativity involving badges;[94] obtaining a driver's licence by false statements;[95] destroying or damaging a passport or visa;[96] forging a medical prescription;[97] failing to return an identity card;[98] impersonating an inspector;[99] using a false name in opening an account;[100] unlawfully possessing the driver's licence;[101] gaining a welfare payment through impersonation;[102] forging, defacing or damaging the driver's licence;[103] acting as a beekeeper without authorisation;[104] impersonating a harbour master;[105] non-disclosure in relation to bankruptcy;[106] providing misleading information in relation to identity verification;[107] assuming another person's identity for jury service;[108] or practitioners engaging in 'medifraud'.[109]

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[92] See for example *Crimes (Internationally Protected Persons) Act 1976* (Cth) s 8.
[93] In *Tomov v The Queen* [2011] WASCA 189 the offender thus used a foreign passport that had not been issued to him, contrary to s 21(2) of the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth); uttered counterfeit money, contrary to s 7(a) of the *Crimes (Currency) Act 1981* (Cth); produced a false passport to a reporting entity, contrary to s 137(1) of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth); received currency exchange using a false name, contrary to s 140(1) of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth), attempted to utter counterfeit money, contrary to s 7(a) of the *Crimes (Currency) Act 1981* (Cth) and s 11.1 of the *Criminal Code* (Cth); dealt with money that was the proceeds of crime, contrary to s 400.7(1) of that *Code*; possessed a false passport, contrary to s 21(4) of the *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth); and possessed 'counterfeit' money, contrary to s 9(1)(a) of the *Crimes (Currency) Act 1981* (Cth).
[94] For example *Discharged Servicemen's Badges Act 1964* (NSW) s 3; *Australian Federal Police Act 1979* (Cth) s 63; and *Returned Servicemen's Badges Act 1953* (WA) s 3.
[95] *Road Transport (Driver Licensing) Act 1999* (ACT) s 29.
[96] *Australian Passports Act 2005* (Cth) s 34.
[97] *Poisons and Therapeutic Goods Act 1966* (NSW) s 16.
[98] *Financial Transactions Reports Act 1988* (Cth) s 27B(2).
[99] *Apiaries Act 1985* (NSW) s 41; *Fertilisers Act 1985* (NSW) s 28; *Fisheries Act 1994* (Qld) s 193; *Liquor Act 1992* (Qld) s 231B; *Electricity Act 1994* (Qld) s 237 and *Electricity Act 2001* (Qld) s 145A.
[100] *Financial Transaction Reports Act 1988* (Cth) s 24.
[101] *Road Transport (Driver Licensing) Act 1999* (ACT) s 30(1).
[102] *Social Security (Administration) Act 1999* (Cth) s 216; *Veterans' Entitlements Act 1986* (Cth) s 208; *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) s 176; and *National Health Act 1953* (Cth) s 103.
[103] *Road Transport (Driver Licensing) Act 1999* (ACT) s 30(2) and 30(4).
[104] *Apiaries Act 1985* (NSW) s 6.
[105] *Transport Operations (Marine Safety) Act 1994* (Qld) s 84.
[106] *Bankruptcy Act 1966* (Cth) s 269(1).
[107] *Financial Transactions Reports Act 1988* (Cth) s 29(4).
[108] *Juries Act 2003* (Tas) s 62; and *Jury Act 1995* (Qld) s 66.
[109] *Health Insurance Act 1973* (Cth) s 129; and *R v White* [1979] Qd R 248, Staple SPJ at 254.

Statutory Incoherence?

Chapter One of this dissertation noted that there are several hundred current Australian statutes and regulations that specifically refer to identity and/or identity signifiers. Governments continue to add new statutes and provisions.[110] Anti-pragmatist Jeremy Bentham, a grand systematiser, criticised the proliferation, incoherence, undue specificity and redundancy of British crimes statutes. He commented

> The country squire who has his turnips stolen, goes to work and gets a bloody law against stealing turnips. It exceeds the utmost stretch of his comprehension to conceive that the next year the same catastrophe may happen to his potatoes. For the two general rules ... in modern British legislation are: never to move a finger till your passions are inflamed, nor ever to look further than your nose.[111]

We might speculate whether law in an ideal world, one without the drafting problems and political tensions noted by Langbein in criticising Hay's work on the Bloody Act,[112] could tersely and effectively address contemporary identity offences through a handful of general statutes – or indeed a single criminal code – that criminalised forgery, impersonation, misrepresentation or otherwise acting outside the bounds of the identities discussed earlier in this dissertation.

Statute-making in contemporary Australia reflects perceptions in the minds of ministers, ministerial advisors and senior bureaucrats about what is required and what is feasible, perceptions that are conditioned by expedience and institutional imperatives. No single minister is responsible for statutory drafting; ministers often have a short term in office and perhaps a shorter attention span for matters that have not grabbed the attention of the media or key stakeholders.

In thinking about identity crime we can usefully draw several conclusions from the perspective of legal pragmatism, rather than being puzzled by incoherence.

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[110] For example the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic); *Criminal Code Amendment (Identity Crime) Act 2014* (NT); *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009* (NSW); and *Law and Justice Amendment (Identity Crimes and Other Measures) Act 2011* (Cth).
[111] Bentham quoted in Gerald Postema, *Bentham and the Common Law Tradition* (Clarendon Press, 1986) 264.
[112] John Langbein, 'Albion's Fatal Flaws' (1993) 98 *Past And Present* 96, 117.

The first is that the identification of offences tells us something about what the society, or more persuasive actors within the society, consider to be important in terms of identity. At one stage, for example, the identity of the returned serviceman – consistent with mythologies about ANZAC and the 'Australian Character' – was important or, through legislation, was what an interest group had decided society at large was meant to regard as important.[113]

We can construe the construction of much legal identity as a matter of recognising the identity as an abstraction, referring to that entity in statute, giving administrative and statutory recognition of the identity through signifiers such as registration numbers or identity cards, and as corollary protecting that identity regime through the enactment and prosecution of offences relating to the identity *per se* or its signifiers.

Another conclusion is that although the importance of particular identities diminish, the identity and reference to identity-specific offences remains in the statute books until there is a clean-up, a reweaving of the legal carpet on the basis of administrative housekeeping or advocacy.

A further conclusion is that most identity offences relate to exploitation of what might be dubbed 'positive' or 'advantageous' legal identities, in other words those that provide the individual with powers or entitlements. People such as Mark 'Chopper' Read[114] may well gain kudos and consequent remuneration by exaggerating their crimes but law has traditionally punished people who dishonestly enhanced rather than tarnished their persona. Examples noted above refer to people who have given themselves an advantage through illegal removal of a disability (such as non-disclosure of identity as an undischarged bankrupt or use of a false name in particular transactions as an undischarged bankrupt) or through impersonation (signature forgery and other misuse of signifiers as false representations of the victim's authority) to gain a financial benefit. At an abstract level, identity offences are about the prohibited advantage rather than what ethicists would regard as dishonesty *per se*.

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[113] James Brown, *Anzac's Long Shadow: The Cost of Our National Obsession* (Black Inc, 2014).
[114] Patrick Carlyon, 'Natural Born Killer' *The Bulletin* (Sydney) 4 June 2002, 32 on Mr Read's veracity and the 'Chopper' myth.

A fifth conclusion is that the articulation of identity offences reflects institutional imperatives and drafting processes, which tells us something about the nature of law. There is no whole-of-jurisdiction polyvalent identity card for officials (and for private sector entities exercising power or undertaking work on behalf of the state in the particular jurisdiction). Apart from concerns regarding privacy highlighted in the following chapter, a pan-government card would foster identity offences unless its use was protected through real-time networked verification.

As a corollary there is no single jurisdiction-specific or multi-jurisdiction agency that makes policy and administers the implementation of signifier regimes and identity offences. Instead, we can discern assertions of authority by key law and justice policy agencies such as the national Attorney-General's department; weak coordination through intergovernmental bodies such as the former Standing Committee of Attorneys-General; and discrete statutes, signifiers and identities specific to particular tasks that are the responsibility of specific ministers, departments and agencies.

Registration as a beekeeper, along with issue of an inspector's card and supervision of the use of that signifier of the inspector's authority under the *Apiaries Act 1985* (NSW) is for example a matter of concern for the NSW Primary Industries department but only peripherally of concern for NSW finance agencies (given the association of registration with fees and hence public revenue opportunities) and likely to be of no concern to other NSW agencies that are independently enshrining separate identities in 'their' legislation, establishing their own signifier systems and reflexively addressing identity offences that relate to their own bailiwick.

A final conclusion is that law seeks to preserve the authority of the state and, implicitly of law. That preservation is existential but in Australia, as distinct from Schmitt's godlike state, is bounded by law. One indication of a failed state is the particular entity's inability to effectively discipline those who express the state's will or who seek to appropriate the state's identity, something discussed below.

Australian law preserves the authority of public administration in two modes.

The first is through criminalisation of people who step outside their roles as

officials,[115] including instances where they have colluded with a welfare recipient who is fraudulently seeking to gain a benefit. In essence, lack of diligence or incompetence might be stigmatised and might foster identity offences but is not a criminal offence. Collusion, on the other hand, is an offence.

The second mode is criminalisation of impersonation of officials and the state's private sector delegates, including unauthorised use of authentic signifiers of authority, such as the police badge noted in Chapter Eight, or the simulation of such signifiers.[116]

That activity might be a matter of performativity, with some statutes for example specifically referring to any representation that an individual is a police officer, rather than merely presentation of genuine/counterfeit police badges and cards. It might be as simple as presentation of a fake business card[117] rather than display of uniforms, guns, badges and what appears to be a police vehicle.[118] It might be accompanied by a finding that a person who engages in impersonation is not a 'fit and proper person', discussed in Chapter Four above.[119]

From a cultural rather than narrowly legal perspective we might also conclude, on the basis of the extensive popular literature about offenders past and present, that non-specialists are fascinated by identity crime.[120] Similar to the market for work about serial killers it allows readers to live vicariously and engage with boundaries, in this instance what is skim and full cream, what is acceptable edited or obfuscated and what is normatively abhorrent.

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[115] In the Commonwealth see *Public Governance, Performance And Accountability Act 2013* (Cth) ss 26, 27, 28 and 66; and *Criminal Code* (Cth) s 141.1. See also *Public Service Act 1999* (Cth) s 15.
[116] For example *Criminal Code 2002* (ACT) s 360; *Sheriff Act 2005* (NSW) s 9; *Police Integrity Commission Act 1996* (NSW) s 115; and *Gas Act 2000* (Tas) s 126.
[117] *Workcover Authority of New South Wales By Its Officer Kenneth John Shearing v Darryl Wesley Waller* [2003] NSWCIMC 57.
[118] Contemporary use of unmarked and divergently marked vehicles in diverse models from different manufacturers, in contrast to earlier periods where there was greater standardisation, means that people may be genuinely confused about whether the vehicle and its driver is authentic.
[119] See for example *Re Mayers and Casino Surveillance Authority* (1993) 29 ALD 585.
[120] See for example accounts such as Frank Abagnale and Stan Redding, *Catch Me if You Can* (Broadway, 2000); Frank Abagnale, *The Art of the Steal* (Broadway, 2001); Eric Hebborn, *Drawn to Trouble: Confessions of a Master Forger* (Random House, 1993); Peter Kurth, *Anastasia: The Riddle of Anna Anderson* (Little Brown, 1985); Stephanie Newell, *The Forger's Tale: The Search for Odeziaku* (Ohio University Press, 2006); Natalie Zemon Davis, *The Return of Martin Guerre* (Harvard University Press, 1983); Bernard Haykel, 'Dissembling Descent, or How the Barber Lost His Turban: Identity and Evidence in Eighteenth-Century Zaydī Yemen' (2002) 9(2) *Islamic Law and Society* 194; and Matt Houlbrook, *Prince of Tricksters: The Incredible True Story of Netley Lucas, Gentleman Crook* (University of Chicago Press, 2016).

Doing things with words

Analytical philosopher J L Austin explained meaning in terms of 'doing things with words'.[121] If we stand back from the particularities of specific judgments and statutes (and from outrage or admiration regarding individual incidents) we can see that identity crime as commonly conceptualised is a matter of 'doing things with legal identity' – doing what the state considers to be wrong things.

Much of that 'doing' involves words and symbols: illicitly building, blurring or demolishing identities through a prohibited use of signifiers in ways that benefit the offender and for the purposes of this dissertation offer insights into law's construction of legal identity.

In standing back we can also see that criminologists, politicians, journalists and the drafters of enactments are also doing things with words: characterising activities in ways that resonate in popular culture and that seek to offer an administratively viable taxonomy for operation of the criminal justice system. That 'doing' is essentially pragmatic, something discussed in Chapter Eleven and reflective of the realities of policing in a society that is sufficiently large not to have a single adjudicator, in other words where multiple institutions and hence differing perspectives, priorities and language.

Propriety and Disciplinarity

Much of the popular discourse about identity crime, and indeed about identity *per se*, features rhetoric about property. It is evident in language about epidemic 'identity theft', often in terms of someone's identity being 'stolen', and in mass media accounts that centre on financial harms, particularly in the United States where impersonations and a weak real property registration regime have notoriously led to victims losing ownership of their residences.[122] When contextualised with the chapters in this

[121] J L Austin, *How To Do Things With Words* (Harvard University Press, 1962).
[122] In contrast see Lynden Griggs and Rouhshi Low, 'Identity fraud and land registration systems: An Australian perspective' (2011) 4 *The Conveyancer and Property Lawyer* 285.

dissertation, however, identity crime should *not* be construed solely in terms of an illicit gain (in some instances addressable as unjust enrichment), permanent deprivation of property or exclusive ownership of a signifier.

'Identity theft', for example does not mean that the individual who expresses a particular legal identity through authorised use of an intangible signifier such as a credit card number or tangible signifiers such as a driver's licence card and passport cannot use the name, number or paper if those signifiers are appropriated or simulated by an offender. The offence may result in individuation and other verification problems for the legitimate user but a stolen passport, for example, can be replaced and the individual remains a citizen.

Chapter Eight and the above paragraphs indicate that much identity crime has a financial impact on the immediate victims, on financial or other institutions, and on the wider community as consumers at large share the burden of credit card, cheque and other payment system abuses. (In context, those costs[123] may be smaller than the burden of bailing out imprudently managed and under-regulated financial institutions after the Global Financial Crisis, a benchmark that should tell us something about perceptions of risk and about the ability of financial institutions to achieve autonomy in what Thornton described as the neoliberal state).[124] However, if we are thinking of legal identity through a legal pragmatism lens as in essence a matter of consequences we can discern aspects apart from property that are relevant for conceptualising identity crime and thence better understanding the construction of legal identity.

The first aspect is that legal identity is in part a matter of authority, in other words what a particular entity can do in the eyes of the law and whether that entity is recognised by the law. The amounts identified in some of the cases noted above are

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[123] Australian Attorney-General's Department, *Identity Crime and Misuse, 2013-2014 (National Identity Security Strategy)* (2015) 51-62; and Russell G Smith, Penny Jorna, Josh Sweeney and Georgina Fuller 'Counting the costs of crime in Australia: A 2011 estimate' (Australian Institute of Criminology Research in Policy and Practice No. 129) (2014). For estimates of the Global Financial Crisis in the range of US$4 to 11 trillion see Daniel Drezner and Kathleen McNamara, 'International political economy, global financial orders and the 2008 financial crisis' (2013) 11(1) *Perspectives on Politics* 155; and Roger Wettenhall, 'Global financial crisis: The Australian experience in international perspective' (2011) 11 *Public Organization Review* 77. A caution is provided in Chris Hoofnagle, 'Identity theft: Making the known unknowns known' (2007) 21(1) *Harvard Journal of Law and Technology* 98, 104-108.

[124] Margaret Thornton, 'Neoliberal Governmentality and the Retreat from Gender Equality' in Ashleigh Barnes (ed), *Feminisms of Discontent: Global Contestations* (Oxford University Press, 2015) 71, 71.

large, with in some instances millions of dollars being illicitly obtained, transferred or otherwise handled as a consequence of false names and non-reported signifiers. In other instances the amounts were small, and were outweighed by the cost of investigation and prosecution. Contrary to claims about pervasive and high social security fraud, actual losses of public money are incommensurate with the spending on the offshore detention system or the defence procurement program. We can read the offences at an abstract level in terms of misuse of identity, for example an individual claiming disability support entitlements while actively working or by appropriating someone else's authority inherent in the signature used to withdraw money from a bank or a credit card used to pay for items that the other person will never see.

Authority is relevant because some of the identity offences have no immediate financial cost. Some of the activity that *is* criminalised for example involves documentation intended to provide the bearer with an access to Australia that would otherwise be denied or significantly restricted. More broadly, should we regard non-disclosure of an infectious disease to a sexual partner – something that might have existential consequences – as an identity crime.[125] The non-disclosure is criminalised[126] but given that there is no illicit exploitation of credit cards or official badges (and that we do not regard health as 'property' in the same class as a stolen gold watch, Woody Guthrie's fountain pen or other chattels) it is likely that most Australian Federal Police officers and journalists would regard the offender's obfuscation of consent as abhorrent but *not* 'identity crime'.[127]

The emphasis on property means that we do not conceptualise some activity as

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[125] Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission* (Routledge, 2007)
[126] *Public Health Regulation 2000* (ACT) Reg 21; *Public Health Act 2010* (NSW) s 79; *Public Health Act 2005* (Qld) s 143; *Public and Environmental Health Act 1987* (SA) s 37; *HIV/AIDS Preventive Measures Act 1993* (Tas) s 20; *Public Health Act 1997* (Tas) s 51; *Public Health and Wellbeing Act 2008* (Vic) s 111; and *Health Act 1911* (WA) s 264. See also Stephen Tomsen, 'Victimhood, 'Sexual Deceit' and the Social Origins of the Criminalisation of HIV Transmission', *3rd Australian and New Zealand Critical Criminology Conference: Conference Proceedings,* (2009) 266; Annette Houlihan, 'Risky (legal) business: HIV and criminal culpability in Victoria' (2011) 4(4) *International Journal of Liability and Scientific Enquiry* 305 and her 'Offences against the (Moral) Person: HIV Transmission Offences in Australia' *ANZCCC: The Australian and New Zealand Critical Criminology Conference 2010* (2011).
[127] *Neal v The Queen* [2011] VSCA 172, [14]; and *Harvey & 1 Ors v PD* [2004] NSWCA 97, [13]. See also *R v Cuerrier* [1998] 2 SCR 371; Jocelynne Scutt, 'Fraudulent Impersonation and Consent in Rape' (1975) 9(1) *University of Queensland Law Journal* 59; and Michael Hurley and Samantha Croy, 'The Neal Case: HIV Infection, Gay Men, the Media and the Law', in Sally Cameron and John Rule (eds), *The Criminalisation of HIV Transmission in Australia; Legality, Morality and Reality* (NAPWA, 2009) 108.

identity crime, a heuristic that should provoke thought about both social values and the subdisciplinarity of legal study noted in Chapter Two. It is clear for example that celebrities such as Mortenson,[128] Yasuda,[129] LeRoy,[130] Hanna[131] and Armstrong[132] have been egregiously untruthful in recounting their lives in interviews, memoirs and on the lecture circuit. That dishonesty has often had a clear financial reward. We do not however regard it as 'identity crime' and litigation to compensate audiences for the deception is very nascent, in part because it is construed in terms of consumer protection and trade practices regimes rather than as crime.[133]

We similarly do not regard ethno-religious or other vilification as an identity crime,[134] although as noted in Chapter Six hatespeech is founded on questions of identity, seeks to deny the personal and social flourishing that is a rationale for recognition of legal identity, and can be construed as a nontrivial crime. With rare exceptions we pragmatically address defamation as a tort rather than a crime, although false representations about another person's identity (for example the individual's identity as a professional, worthy of trust, of unblemished character and without a criminal record) potentially result in the distress, financial loss, anxiety and other outcomes that analysts have attributed to credit card fraud.

State Crime

We are accustomed to conceptualising identity crime as victimisation of individuals and corporations. If however we accept the contention that the state has a legal identity, an identity with fundamental consequences for the flourishing of citizens and non-citizens alike, we might conclude that states are potentially victims of identity

[128] Jon Krakauer, *Three Cups of Deceit: How Greg Mortenson, Humanitarian Hero, Lost His Way* (Anchor, 2011). See also Ken Stern, 'The Charity Swindle' *New York Times* (New York) 26 November 2013, A25.
[129] Emily Nussbaum, 'Turning Japanese: The Hiroshima Poetry Hoax' (1996) 6(7) *Lingua Franca* 82-84; and Marjorie Perloff, 'In Search of the Authentic Other: The Araki Yasusada 'Hoax' and What It Reveals about the Politics of Poetic Identity' (1997) 22(2) *Boston Review* 26.
[130] Sue Vice, *Textual Deceptions: False Memoirs and Literary Hoaxes in the Contemporary Era* (Edinburgh University Press, 2014) 49-54.
[131] Thérèse Taylor, 'Memoirs of Deception' (2007) 54(1) *Jewish Quarterly* 47.
[132] For Armstrong see footnote 38 in this chapter.
[133] Jessica Lewis, 'Truthiness: Law, Literature & the Problem with Memoirs' (2007) 31 *Rutgers Law Record* 1; Samantha Katze, 'A Million Little Maybes: The James Frey Scandal and Statements on a Book Cover or Jacket as Commercial Speech' (2006) 17 *Fordham Intellectual Property, Media & Entertainment Law Journal* 206; and Jason Kessler, 'First Amendment Protection for False Commercial Speech by a Publisher Regarding the Truthfulness of Its Publication: A Response to Litigation Arising over James Frey's A Million Little Pieces' (2006) 24(3) *Cardozo Arts & Entertainment Law Journal* 1219.
[134] See Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 171-194.

crime and on occasion offenders.[135] That conclusion should provoke thought about the nature of crime, law and identity.

Preceding chapters have referred to the body of the sovereign and signifiers of the state. Simulating that body through the appropriation of signifiers and false representations (coinage, insignia, coronations, appointments) destabilises both the state and the meaning of law, particularly in premodern states where the person of the sovereign was the conduit from god to the people and divinely sanctioned deviser of law.

That destabilisation is evident in the history of imposters and pretenders, particularly those who – unlike imposters John of Powerham,[136] Perkin Warbeck,[137] Giannino di Guccio,[138] Lambert Simnel[139] and Marco Tullio Catizone[140] – both managed to persuade people of their legitimacy and to implement a regime that had some stability.[141] If god was on their side the pretenders established a new regime, one deemed to be lawful because sufficiently recognised by subjects and other states; if not their pretensions typically resulted in an exemplary punishment for what we could now construe as identity crime, in other words for impersonating the rightful ruler and thus overturning the law and the chains of obedience binding served to servers.

A preceding chapter suggested that one marker of the contemporary liberal democratic state is that the polity reserves to itself both the legitimate exercise of violence and the authority to determine what is legitimate. A corollary is that the state is jealous of its own identity, criminalising entrepreneurs who assume its exclusive

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[135] For a discussion of 'state crime' see Sharon Pickering, *Refugees and State Crime* (Federation Press, 2005) 8-11.
[136] Wendy Childs, 'Welcome, My Brother': Edward II, John of Powderham, and the Chronicles, 1318' in Ian Wood (ed), *Church & Chronicle in the Middle Ages: Essays presented to John Taylor* (Hambledon, 1991) 149.
[137] Anne Wroe, *The perfect prince: the mystery of Perkin Warbeck and his quest for the throne of England* (Random House, 2003); and Edward Higgs, *Identifying the English: a History of Personal Identification 1500 to the Present* (Continuum, 2011) 20-24.
[138] Tommaso di Carpegna Falconieri, *The Man Who Believed He Was King of France: A True Medieval Tale* (University of Chicago Press, 2008).
[139] Michael Bennett, *Lambert Simnel & the Battle of Stoke* (Alan Sutton, 1987).
[140] H. Eric Olsen, *The Calabrian Charlatan, 1598–1603: Messianic Nationalism in Early Modern Europe* (Palgrave Macmillan, 2003).
[141] See Paul Gallivan, 'The False Neros: A Re-Examination' (1973) 22 *Historia* 364; Maud Gleason, 'Identity Theft: Doubles and Masquerades in Cassius Dio's Contemporary History' (2011) 30(1) *Classical Antiquity* 33; Philip Longworth, 'The Pretender Phenomenon in Eighteenth-Century Russia' (1975) 66(1) *Past & Present* 61; and Maureen Perrie, *Pretenders and Popular Monarchism in Early Modern Russia: The False Tsars of the Time of Troubles* (Cambridge University Press, 2nd ed, 2002); and Miriam Eliav-Feldon, *Renaissance Imposters and Proofs of Identity* (Palgrave Macmillan, 2012) 68-96. For a more recent period see Wendy Slater, *The Many Deaths of Nicholas II: Relics, Remains and the Romanovs* (Routledge, 2007) 81.

authority by counterfeiting currency[142] and stamps.[143] That criminalisation is typically attributed to concerns regarding loss of revenue, erosion of trust in currency, inconvenience in administration of the postal system, illicit benefits for criminals and other reasons that are salient in regimes where neither the state nor its authority are in doubt. In the abstract we might however regard such offences as a matter of identity crime, occurring in the same conceptual domain as the *lèse majesté* that preoccupies the authorities in contemporary Thailand,[144] the flag burning that outrages some figures in the United States[145] and Australia,[146] and the Australian prohibition on defacing or melting down service medals.[147]

Recall references in preceding chapters to denationalisation (in other words the removal of citizenship) as a mechanism for ethnic cleansing or deterrence of terrorism. Such action by the state was described by US Chief Justice Warren as

> the total destruction of the individual's status in organized society ... It destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. ... It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated.[148]

Do we hold the state as an identity maker and breaker responsible for crimes against groups on the basis of their identities? Preceding chapters have argued that we can discern instances of persecution by the state on the basis of ethnicity, sexual affinity or other attribute. That identity-based action was lawful at the time but is now

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[142] *R v Institoris* [2002] NSWCCA 8; *Tomov v The Queen* [2011] WASCA 189; *Bellas v The Queen* [2006] NTCCA 8; and *Truman v Commonwealth Director of Public Prosecutions* [2007] SASC 432.
[143] *Crimes Act 1914* (Cth) s 85G.
[144] David Streckfuss, 'Kings in the age of nations: the paradox of lèse-majesté as political crime in Thailand' (1995) 37(3) *Comparative studies in society and history* 445; and David Engel, 'Rights as Wrongs: Legality and Sacrality in Thailand' (2015) 39(1) *Asian Studies Review* 38.
[145] Michael Welch, *Flag Burning: Moral Panic & the Criminalization of Protest* (Aldine de Gruyter, 2000); Carolyn Marvin and David Ingle, *Blood Sacrifice and the Nation: Totem Rituals & the American Flag* (Cambridge University Press, 1999); and Robert Goldstein, *Burning the Flag: The Great 1989-1990 American Flag Desecration Controversy* (Kent State University Press, 1998).
[146] Katharine Gelber, 'Political Culture, Flag Use and Freedom of Speech' (2012) 60(1) *Political Studies* 163; Dan Meagher, 'The Status of Flag Desecration in Australian Law' (2008) 34(1) *The University of Western Australia Law Review* 73; and Nigel Stobbs, 'I Love A Sunburnt Country, But I Prefer 'My' Flag Intact: Is Burning the Australian Flag Illegal, Can they make it Illegal?' (2006) 6(17) *Indigenous Law Bulletin* 20. See *Flags Act 1953* (Cth) and *Flags, Emblems & Names Protection Act 1981* (NZ) s 11(b).
[147] *Defence Act 1903* (Cth) s 80B(5). The Section does not appear to have been used in the past 50 years and medals, once awarded, can be sold or gifted by the recipient.
[148] *Trop v Dulles* 356 US 86 (1958) Warren CJ at 101.

regarded as repellent because contrary to dignity, potentially a matter for national apology and reparation (discussed in the following chapter). It is something addressable under international human rights frameworks, in which the notion of ‘crimes against humanity’ is for example predicated on a particular conceptualisation of identity, in other words that all human animals – irrespective of gender, religion, class, ethnicity or nationality – should be treated as people rather than as manifestations of a deleterious identity.

Observations

We can draw several conclusions about legal identity from this chapter.

The first is that ‘identity crime’, however expressed, is neither new or likely to be comprehensively prevented in future. It occurs because legal identity is a matter of consequences: rational actors are likely to seek benefits or escape disadvantages by adopting an identity to which they are unentitled. The second is that their action is conceptualised in law through a range of terms and offences. The third is that the crime is in essence a matter of identity rather than the signifiers of identity – the rights and responsibilities rather than the forged signature, bogus document, appropriated badge or misleading oral statement. The fourth is that crime is not restricted to ‘the criminal classes’; in construing the nature of identity we should recognise crimes by states against individuals and communities in relation to the identies of those humans.

Chapter Ten: Identity and its Discontents

Overview

The preceding chapters have suggested that legal identities matter: whether in terms of self-concept, of legally-recognised (and hence significant) relationships and capabilities, and of the trust or distrust that shapes day by day social, commercial and political interactions.

It is clear that some people find their legal identities to be inopportune and accordingly adopt new identities, lawfully or otherwise, for reasons that range from avoidance of stigma to perpetration of frauds that will enable the identity criminal to avoid obligations or accrue benefits. That action is not a uniquely modern or post-industrial phenomenon. Instead it is to be expected simply because identity matters and because obfuscation, erasure, appropriation and invention are achievable.

It is also clear that legal systems will seek to minimise instances of individuals and groups arbitrarily reweaving patterns in the legal carpet, irrespective of whether that reweaving has an existential basis and fosters the flourishing that we might characterise as 'the good life'.[1] That response to subversion encompasses deterrence: we can, in essence, ascertain whether something is legally significant by looking at penalties and their implementation through prosecution. It also encompasses technical measures such as registration and verification of identity documents that provide signification of authority and individuation. Those measures, as discussed in Chapters Eight and Nine above, however serve to both foster and inhibit identity offences.

This chapter builds on the earlier discussion by considering six aspects that have been referred to throughout the dissertation but not explored in depth. Those aspects address methodological questions articulated in Chapter Two, such as 'How is legal identity signified?' (implicitly, must it be signified through a card or other token and can it be signified through association with another individual?) and 'How is it

[1] See for example Dewey's emphasis on the liberation of individuals for self-realisation, highlighted in Chapter One above, and the discussion in Matthew Festenstein, *Pragmatism and Political Theory* (Polity Press, 1997) 66-71.

verified or validated when contested?' (with a conclusion that identity will on occasion only come into question and be significant in particular circumstances).

The six aspects are criminalisation of association, anonymity as an expression of autonomy, exploitation of persona as the obverse of anonymity, alleviation of risk through official surveillance that leverages identity, accreditation that involves vetting and credentialism, and personal reinvention. Together they offer insights about legal identity and its discontents, the discontents that Freud perceived as inherent in civilisation[2] and that Weber saw as inextricable with a bureaucratised rational economy, a disenchanted regime of reason rather than charismatic decisionism.[3]

Discontents as the price of legal identity

Discontents are the price we pay for legal identity, for the contemporary state and for the digital economy.

Organisations for example seek to profile individuals and communities in order to foster public safety, engage in business or merely legitimate the corporate existence that is discussed in the following chapter of this dissertation. Those individuals and communities, reflexively or otherwise, may seek to avoid being continuously legible to the state, particular enterprises or people in general. That avoidance is consistent with fundamental values in liberal democracy, in other words a demarcation between the public and private spheres, and with historic practice that reflects transaction costs, for example being able to use public transport and other facilities without consistent individuation. Practices are however changing and values are contested, with for example indications of a consensus within Australia that anonymity should be reduced in order to inhibit terrorism and other social ills.

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[2] Sigmund Freud, *Civilisation and its Discontents* (James Strachey trans, Hogarth Press, 1961) [trans of *Das Unbehagen in der Kulture* (first published 1929)].

[3] Max Weber, *Economy and Society* (Günther Roth and Claus Wittich trans, University of California Press, 1968) [trans of *Wirtschaft und Gesellschaft* (first published 1922)]. See more broadly Sung Ho Kim, *Max Weber's Politics of Civil Society* (Cambridge University Press, 2004); and Bernard Silberman, *Cages of Reason: The Rise of the Rational State in France, Japan, the United States and Great Britain* (University of Chicago Press, 1993). Arthur Mitzman, *The Iron Cage: An Historical Interpretation of Max Weber* (Transaction, 1970) offers a perspective on some of this dissertation's critique of Schmitt's romanticism.

We see disagreement about executive measures that criminalise association, an inversion of the sociability highlighted at the end of Chapter Six. We see less disagreement, perhaps because we have been habituated through pervasive practice in the public and private sectors, to systematic profiling of employees, voters and consumers. That profiling leverages and addresses legal identities. It also builds on expectations that formal credentials are a reliable marker of capabilities and character,[4] an expectation that might disquiet law academics who have encountered students with integrity issues or observed professional discipline involving errant clinicians, lawyers and other experts who have been admitted as practitioners and subsequently found to have knowingly breached ethics frameworks and thereby fundamentally affected the flourishing of people to whom they owed a duty of care.[5]

As an expression of soft power, profiling both fosters well-being – notably through the provision of entitlements highlighted in Chapter Five – and potentially inhibits legitimate self-reinvention by people who have some sense of agency and seek to escape digital cages in which they are tagged by age, gender, location, criminal record, purchasing history and other attributes.

Association

In 1941 the German Minister for Popular Enlightenment and Propaganda, Joseph Goebbels, stated in a widely read article that

> If someone is wearing the Jewish star, this means he has been identified as an enemy of the people. Anyone who has private contact with him belongs with him and must be considered and treated as a Jew.[6]

The nature of the star as what was meant to be an indelible signifier of a deleterious legal identity has been discussed in preceding chapters. In reconsidering the signifier

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[4] Burton Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (Norton, 1978); and Richard Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford University Press, 2003).

[5] Harold Perkin, *The Rise of Professional Society: England Since 1880* (Routledge, 1989). See for example *Patel v The Queen* [2012] HCA 29; *Reeves v The Queen* [2013] HCA 57; *R v Dean* [2013] NSWSC 1027; *R v McGrane* [2002] QCA 173; *R v Gassy* [2004] SASC 338; *R v Yeo* [2002] NSWSC 315; and *R v Marsh* [2012] NSWSC 208.

[6] Joseph Goebbels ('Die Juden sind Schuld!', 16 November 1941) quoted in Peter Longerich, *Goebbels: A Biography* (Random House, 2015) 505. See also the detailed discussion of that article in Jeffrey Herf, 'The War and the Jews': Nazi Propaganda and the Second World War' in Jörg Echternkamp (ed), *Germany and the Second World War Volume IX/II: German Wartime Society 1939-1945: Exploitation, Interpretations, Exclusion* (Derry Cook-Radmore trans, Clarendon Press, 2014) [trans of *Das Deutsche Reich und der Zweite Weltkrieg* (first published 2008)] 163, 193-196.

and its functioning in German law two aspects of the Goebbel's statement are however worth considering.

The first is that it embodies the decisionism that is fundamental to Carl Schmitt's vision of law and legal identity. Put simply, the state decided who was a member of the 'national community' (and thus expected to comport themselves in an 'enlightened', in other words racist, way) and who was outside,[7] an outsider status that in Schmitt's eschatological ontology (law and the state as an existential struggle between 'us' and 'them') meant the outsider was an enemy and thus excluded from respect under the law.[8] (Schmitt's conceptualisation of individuals as resources owing their primary duty to the national community is at odds with the dignity that we recognise and value in the liberal democratic state.)

A member of the national community who exercised autonomy in disregarding guidance from the law by choosing to associate with the outsider had decided to alienate themselves from the community through that association and thus decided to become an enemy, a decision that required sanction.

The second aspect is that Australian law in the past and at the present time has sought to dissolve particular collectives and by extension to prohibit endorsement[9] or direct support (for example through funding)[10] of those entities. If we consider law in terms of form rather than substance, the formality discussed by Sherwin[11] and implicit in Hart's legal grammar,[12] we can see resemblances between the Third Reich's

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[7] That decision might be arbitrary and opportunistic, evident in Goering's 'Wer Jude ist, bestimme ich' ['I decide who is a Jew'], adopting the phrasing of *fin de siecle* Vienna mayor Karl Lueger. See Walter Struve, *Elites Against Democracy: Leadership Ideals in Bourgeois Political Thought in Germany, 1890-1933* (Princeton University Press, 1973) 423; and Steven Beller, *Vienna and the Jews, 1867-1938: A Cultural History* (Cambridge University Press, 1990) 195.

[8] Carl Schmitt, *The Concept of the Political* (George Schwab trans, University of Chicago Press, 1997) [trans of *Der Begriff des Politischen* (first published 1932)] 26.

[9] In particular Division 103 of the *Criminal Code Act 1995* (Cth); and *Charter of the United Nations Act 1945* (Cth) Part 4. The statutes make it an offence to be a member of a terrorist organisation; direct the activities of one; recruit for one; train or receive training from (or participate in training with) one; acquire funds for, from or to one; provide support to one; or associate with a listed terrorist organisation.

[10] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) Part 7; and for terrorism financing of the *Criminal Code* (Cth) ss 103.1 and 103.2, *Charter of the United Nations Act 1945* (Cth) and *Charter of the United Nations (Terrorism and Dealing with Assets) Regulations 2008* (Cth). See also Julie Walters, Carolyn Budd, Russell Smith, Kim-Kwang, Raymond Choo, Rob McCusker and David Rees, *Anti-money laundering and counter-terrorism financing across the globe: A comparative study of regulatory action* (Australian Institute of Criminology, 2012).

[11] Emily Sherwin, 'Legal Taxonomy' (2009) 15(1) *Legal Theory* 25, 39.

[12] H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 107. See also AW Brian Simpson, *Reflections on The Concept of Law* (Oxford University Press, 2011) 144; and Mark Burton, 'The Song Remains the Same: The

criminalisation of association and Australia's prejudgment of guilt on the basis of a legal identity that is founded on the individual's association with like-minded others or even family members. Both identities are deleterious. Both involve a weakening of bonds of affinity.

Chapter One commented that social anxieties and legal responses are iterative. Recent efforts to criminalise association with 'outlaw motorcycle gangs' – in essence identity on the basis of 'who you know' – resemble traditional law regarding consorting[13] and, more saliently, action in the 1950s and 1920s about communism and anarchism.[14] The resemblance is pertinent because law enforcement bureaucracies are pragmatic, if only because of continuities in personnel, and adapt or emulate rather than inventing from scratch on the basis of first principles. More broadly, as in earlier times, the efforts are likely to foster oppositional behaviour, given that self-concept means some stigmatised people will welcome being validated through imposition of a criminal identity.[15]

In thinking about affinities as derivative identities we can discern that the contemporary liberal democratic state, resembling its early and late modern precursors, conceptualises individuals as appropriately scrutinised (and potentially prosecuted) on the basis of the people with whom they associate. The notion of 'guilt by association' is administratively convenient but poses dilemmas regarding civil liberties, the same liberties that – as argued in Chapters Five and Eleven – should

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Search for Interpretive Constraint and Rhetoric of Legal Theory in Hart and Hutchinson' (1997) 20(2) *UNSW Law Journal* 407.

[13] See for example *Police Offences Act 1935* (Tas) s 6; *Summary Offences Act 1995* (SA) s 13; *Summary Offences Act 1966* (Vic) s 49F; and *Johanson v Dixon* [1979] HCA 23; (1979) 143 CLR 376; 25 ALR 65.

[14] See for example *Unlawful Associations Act 1916* (Cth), *Communist Party Dissolution Act 1950* (Cth); *Serious and Organised Crime (Control) Act 2008* (SA); *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; *South Australia v Totani* [2010] HCA 39; *Wainohu v New South Wales* [2011] HCA 24. See also Verity Burgman, *Revolutionary Industrial Unionism: The Industrial Workers of the World in Australia* (Cambridge University Press, 1995) and George Williams, 'Communist Party Case' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 122; George Winterton, 'The Communist Party Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108; Roger Douglas, 'Cold War Justice – Judicial Responses to Communists and Communism, 1945-1955' (2007) 29(1) *Sydney Law Review* 43, 56; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136; Aidan Ricketts, 'Freedom of association or guilt by association: Australia's new anti-terrorism laws and the retreat of political liberty' (2002) 6 *Southern Cross University Law Review* 133; and Bridget Dunne, 'Wainohu v New South Wales' (2011) (2011) 30(2) *University of Tasmania Law Review* 144.

[15] David Farrington, 'The Effects of Public Labelling' (1977) 17(2) *British Journal of Criminology* 112; and Laurie Chassin, Barbara Eason and Richard Young, 'Identifying with a Deviant Label: The Validation of a Methodology' (1981) 44(1) *Social Psychology Quarterly* 31.

frame *all* construction of legal identity but are in the absence of a justiciable national Bill of Rights are uncertainly protected.[16]

Autocratic states have traditionally stigmatised particular organisations and criminalised membership of those bodies, whether because the organisations were deemed to have acted illegally (or were perceived as intending to act illegally) in challenging authority or were deemed to have engaged in tax evasion, property offences, unauthorised publication, workplace agitation, sexual misconduct and other offences. Membership signaled that the individual was committed to engaging in the illegality or condoned illegality.

Membership embodied choice, with law embodying an assumption that the right-thinking individual (a person with the capacity highlighted in Chapter Four above) would choose not to be a member of an improper organisation (particularly if realisation was guided by the state and/or church as a moral tutor), would shun members who were acquaintances, would break with or minimise contact with family members (thereby inducing a 'change of heart'), and would actively cooperate with state agencies in the identification of members as the basis of prosecution. In essence, individuals would engage in self-policing and mutual distrust as an aspect of the legal identity of good subject or good citizen, someone worthy of what were deemed by authorities as privileges rather than inalienable rights.

Cooperation with authorities might include denunciation of members, anonymously, confidentially or otherwise.[17] Such an official view of appropriate relations between individual, community and state would foster secrecy and even subversion on the part of members. It would also foster the data collection that is discussed below.

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[16] Bede Harris, *A New Constitution For Australia* (Cavendish, 2002) 8 and 41. See more broadly Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 59, 83 and 122.

[17] Among works on delation see Sheila Fitzpatrick and Robert Gellately (eds), *Accusatory Practices: Denunciation in Modern European History, 1789-1989* (University of Chicago Press, 1997); Timothy Garton Ash, *The File: A Personal History* (HarperCollins, 1997), Anna Funder, *Stasiland* (Granta, 2003); Vandana Joshi, *Gender & Power in the Third Reich: Female Denouncers and the Gestapo, 1933-45* (Palgrave Macmillan, 2003); Roger Austin, 'Surveillance and intelligence under the Vichy regime: The service du controle technique, 1939–45' (1986) 1(1) *Intelligence and National Security* 123; and Graeme Orr, 'Dob in a prostitute: coercing cooperation. Queensland's prostitution laws encourage defendants to incriminate others' (1994) 19(2) *Alternative Law Journal* 58.

States in mediaeval Europe for example held show trials in conjunction with confiscation of assets of the Templars.[18] Tsarist Russia[19] sporadically criminalised membership of Masonic lodges – resulting in a legal identity of freemason – as did various petty states in *ancien regime* Germany, Habsburg Austria and Restoration France. The Soviet Union, Vichy France,[20] Franco's Spain[21] and Nazi Germany[22] prohibited membership of lodges, with the USSR imprisoning individuals whose anti-social nature was demonstrated through membership and the latter imposing civil disabilities regarding public sector employment. Being a member of the Carbonari attracted the death penalty in pre-Garibaldi southern Italian states and imprisonment in *belle epoque* France. It was not, for example necessary to manufacture unauthorised explosives or toss bombs into a theatre or café as an active member of a dynamite gang: support through provision of funds, attendance at meetings or writing statements in support of the organisation or its aims and martyrs was sufficient to attract legal action.[23]

At first sight that action – and the incidents it provoked – seems comfortably antiquarian. Few people for example see the hidden hand of the Masons, Knights of the Southern Cross, Jesuits, Trilateral Commission or Illuminati behind most important events. Within Australia we have however grappled with attempted prohibition of the Communist Party[24] and exclusion of its members from official positions and strategic industries.[25] In earlier decades there was agitation to

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[18] Malcolm Barber, *The Trial of the Templars* (Cambridge University Press, 2nd ed, 2012); and Jochen Burgtorf, Paul Crawford and Helen Nicholson (eds), *The Debate on the Trial of the Templars, 1307–1314* (Ashgate, 2010).
[19] O F Soloviev, 'Freemasonry in Russia' (1996) 34(4) *Russian Studies in History* 27; Douglas Smith, *Working the Rough Stone: Freemasonry and Society in Eighteenth-Century Russia* (Northern Illinois University Press, 1999); and Joseph Bradley, 'Subjects into Citizens: Societies, Civil Society, and Autocracy in Tsarist Russia' (2002) 107(4) *The American Historical Review* 1094.
[20] John Sweets, *Choices in Vichy France: The French Under Nazi Occupation* (Oxford University Press, 1986) 104.
[21] Julius Ruiz, 'Fighting the International Conspiracy: The Francoist Persecution of Freemasonry, 1936–1945' (2011) 12(2) *Politics, Religion & Ideology* 179.
[22] Ralf Melzer, 'In the eye of a hurricane: German Freemasonry in the Weimar Republic and the Third Reich' (2003) 4(2) *Totalitarian Movements & Political Religions* 113.
[23] John Merriman, *The Dynamite Club: How a Bombing in Fin-de-Siecle Paris Ignited the Age of Modern Terror* (Houghton Mifflin Harcourt, 2009).
[24] *Communist Party Dissolution Act 1950* (Cth); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; and 1951 national constitutional referendum on banning the Party. For jurisprudence invalidating the 1950 statute see in particular George Winterton, 'The Communist Party Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Federation Press, 2003) 108; Roger Douglas, 'A Smallish Blow for Liberty? The Significance of the Communist Party Case' (2001) 27(2) *Monash University Law Review* 253; George Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case' (1993) 15(1) *Sydney Law Review* 3; and Hernan Pintos-Lopez and George Williams, 'Enemies Foreign and Domestic – Thomas v Mowbray and the New Scope of the Defence Power' (2008) 27(1) *University of Tasmania Law Review* 83.
[25] *Communist Party Dissolution Act 1950* (Cth) s 10.

criminalise membership of and support for the Fenians[26] and the Wobblies,[27] alongside calls to deport 'foreign' agitators[28] that resembles contemporary anxieties regarding Islamists.[29] Those organisations and the perceived need for extraordinary surveillance measures provided the basis[30] for the contemporary 'national security state' that construes identity in terms of danger, sorting and surveillance,[31] and disregards trust[32] and potentially mistakes omniscience for omnipotence.[33]

In Australia at the moment we can see law regarding associational identity at work in two ways.

The first is the banning of organisations that are proclaimed by the executive to be engaged in or directly supporting terrorism.[34] That proclamation, with consequences such as the freezing of funds,[35] is consistent with international agreements.[36]

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[26] Keith Amos, *The Fenians in Australia, 1865-1880* (UNSW Press, 1988); Geoffrey Bolton, 'The Fenians are coming, the Fenians are coming!' (1981) 4 *Studies in Western Australian History* 62; and Phillip Cowburn, 'The attempted assassination of the Duke of Edinburgh, 1868' (1969) 55(1) *Journal of the Royal Australian Historical Society* 19. The political identity of contemporary Eire enshrines the Fenians as freedom fighters and places the attempted assassination of Queen Victoria's eldest grandson at Clontarf in 1868 – a terrorist incident – in the context of the struggle for national liberation.

[27] Frank Cain, 'The Industrial Workers of the World: Aspects of Its Suppression in Australia 1916-1919' (1982) *Labour History* 54; and Verity Burgmann, *Revolutionary Industrial Unionism: The Industrial Workers of the World in Australia* (Cambridge University Press, 1995).

[28] Kevin Windle, *Undesirable: Captain Zuzenko and the Workers of Australia and the World* (Australian Scholarly Publishing, 2012); Heidi Zogbaum, *Kisch in Australia* (Scribe, 2004); and *R v Wilson; Ex parte Kisch* [1934] HCA 63; (1934) 52 CLR 234.

[29] Department of the Prime Minister and Cabinet, *Review of the Commonwealth's counter terrorism arrangements* (2015) iv and 18. See further Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38(2) *Melbourne University Law Review* 362.

[30] Frank Cain, *The Origins of Political Surveillance in Australia* (Angus & Robertson, 1983); Frank Cain, *Terrorism & Intelligence in Australia: A History of ASIO and National Surveillance* (Australian Scholarly Publishing, 2008); Jenny Hocking, *Beyond Terrorism: The Development of the Australian Security State* (Allen & Unwin, 1993); Fiona Capp, *Writers Defiled: Security Surveillance of Australian Authors and Intellectuals, 1920-1960* (McPhee Gribble, 1993); David McKnight, *Australia's Spies And Their Secrets* (Allen & Unwin, 1994); and David Horner, *The Spy Catchers: The Official History of ASIO, 1949-1963* (Allen & Unwin, 2014). For one response by the Attorney-General see Jenny Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, 1997) 164.

[31] See for example Daniel Baldino (ed), *Spooked: The Truth About Intelligence in Australia* (NewSouth, 2013); and George Williams, Andrew Lynch and Nicola McGarrity, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth Publishing, 2015).

[32] Benjamin Goold, 'Technologies of Surveillance and the Erosion of Institutional Trust' in Katja Franko Aas, Helene Oppen Gundhus and Heidi Mork Lomell (eds), *Technologies of inSecurity: the surveillance of everyday life* (Routledge, 2008) 205, 210.

[33] Tom Engelhardt, *Shadow Government: Surveillance, Secret Wars, and a Global Security State in a Single-Superpower World* (Haymarket, 2014) 43. See also Lucia Zedner, 'The Inescapable Insecurity of Security Technologies' in Katja Franko Aas, Helene Oppen Gundhus and Heidi Mork Lomell (eds), *Technologies of inSecurity: the surveillance of everyday life* (Routledge, 2008) 257.

[34] For example Abu Sayyaf Group, Al-Murabitun, Al-Qa'ida, Al-Shabaab, Boko Haram, Jabhat al-Nusra, Kurdistan Workers' Party and Lashkar-e-Tayyiba as of April 2017.

[35] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) Part 7.

[36] See for example United Nations Security Council Resolutions 1267 and 1373; and International Convention For The Suppression Of The Financing Of Terrorism (Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999; entry into force 10 April 2002). See further Luca Radicati and Mauro

Choosing to belong to an organisation such as ISIS/ISIL is a decision to adopt a stigmatised and implicitly criminal identity – a legal identity – that invites responses by the state that include surveillance both of the individual who exercised capacity in making that choice and of people (such as family members and business associates) who may be committed to behaving legally and have no interest in the prohibited organisation.[37]

That surveillance encompasses covert recording of telecommunications and scrutiny of transactions linked to signifiers such as bank acount names/numbers that, as discussed in Chapter Eight above, are required by law.[38] It can be read as a regrettable but necessary and appropriate measure for dealing with harms, on occasion accompanied by rhetoric that if you have nothing to hide you have nothing to fear (in other words that the good citizen is wholly open to surveillance).[39] It can however be read as an echo of the notions of collective guilt highlighted in Chapter Three, with the individual potentially being punished for his/her unwitting or conscious engagement with people who take substantive action such as attempting to destroy military facilities, fund overseas activists or injure public figures through the 'propaganda of the deed'.

Concerns regarding the potential for misuse of contemporary versions of historic 'consorting law'[40] and 'conspiracy law'[41] also apply outside statutes regarding terrorism. The Australian states have for example created criminal identities through

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Megliani, 'Freezing the Assets of International Terrorist Organizations' in Andrea Bianchi (ed), *Enforcing International Law Norms Against Terrorism* (Hart, 2004) 377.

[37] Note provisions in *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) Sch 1 regarding retrospective ('delayed notification') search warrants, impersonation by authorised officers, access to neighbouring premises, criminalisation of disclosure of a delayed notification warrant and scope for authorised use of force regarding access to neighbouring premises.

[38] See for example the requirements for financial institutions to maintain customer data under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), *Taxation Administration Act 1953* (Cth) and *Income Tax Assessment Act 1936* (Cth).

[39] See for example Senator Fifield (Assistant Minister for Social Services) 12 December 2013 *Senate Hansard* (Australian Parliament) 1620. Such rhetoric is critiqued in Daniel Solove, ''I've got nothing to hide' and other misunderstandings of privacy' (George Washington University Law School Public Law Research Paper No. 288, 2007).

[40] See for example *Summary Offences Act 1953* (SA) s 13; *Police Offences Act 1935* (Tas) s 6; and *Summary Offences Act 1966* (Vic) s 49F. The breadth of coverage is evident in *Johanson v Dixon* (1979) 143 CLR 376, Mason J at 383. See also Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32(2) *University of Tasmania Law Review* 148.

[41] See for example *Crimes Act 1958* (Vic) ss 321 to 321F; *Crimes Act 1900* (ACT) s 133(2); *Criminal Code* (Qld) ss 541 to 543. See also *Ansari v The Queen* [2010] HCA 18; *Vereker v Rodda* (1987) 18 FCR 83; 79 ALR 49; and *R v Saik* [2007] 1 AC 18, Lord Brown at 62. Ansari is discussed in Jackie McArthur, 'Conspiracies, codes and the common law: 'Ansari v The Queen' and 'R v LK'' (2012) 33(1) *The Adelaide Law Review* 271.

contentious 'anti-bikie' or 'criminal organisation disruption' statutes[42] that seek to disrupt what is variously characterised as organised crime (implicitly offences that are not opportunistic, that involve some planning and involve more than the individual offender plus accomplice) or outlaw motorcycle gangs.[43]

Construing participation in or contact with those gangs as a criminal identity is an echo of past moral panics[44] regarding subversive organisations and hooligans or practices such as garotting.[45] Observers apart from legal historians might wonder whether the specific identity is necessary, given that Australia has substantial law criminalising action such as blackmail,[46] non-lethal assault,[47] theft,[48] threatening to kill,[49] murder,[50] possession and distribution of illegal narcotics[51] and possession of unlicensed firearms.[52] Should merely being a family member or acquaintance of an offender be a criminal identity in itself? Should past membership of an organisation,

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[42] *Organised Crime (Control) Act 2008* (SA); *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld); *South Australia v Totani* [2010] HCA 39; *Wainohu v New South Wales* [2011] HCA 24. See also Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of Kable' (2012) 40(1) *Federal Law Review* 1; Nicola McGarrity, 'From terrorism to bikies: control orders in Australia' (2012 37(3) *Alternative Law Journal* 166; Bridget Dunne, 'Case note: Wainohu v New South Wales (2011) 278 ALR 1' (2011) 30(2) *University of Tasmania Law Review* 144; Rick Sarre, 'Combatting serious and organised crime by attacking its associates: will it work?' (2012) 112 *Precedent* 15; Andreas Schloenhardt, 'Banning the bikies: Queensland's Criminal Organisation Act 2009' (2011) 31(2) *Queensland Lawyer* 100; and Anthony Gray, 'Constitutionality of criminal organisation legislation' (2010) 17(4) *Australian Journal of Administrative Law* 213.

[43] *Convention against Transnational Organised Crime* Arts 3 and 5; Australian Crime Commission, *Organised crime in Australia 2015* (2015); Andreas Schloenhardt, 'Mafias and motorbikes: New organised crime offences in Australia' (2007) 19(3) *Current Issues in Criminal Justice* 259; and Michael Bersten, 'Defining organised crime in Australia and the USA' (1990) 23(1) *Australian & New Zealand Journal of Criminology* 39.

[44] Erich Goode and Nachman Ben-Yehuda, 'Moral Panics: Culture, Politics, and Social Construction' (1994) 20 *Annual Review of Sociology* 149; Sheldon Ungar, 'Moral panic versus the risk society: the implications of the changing sites of social anxiety' (2001) 52(2) *British Journal of Sociology* 271; Judith Rowbotham and Kim Stevenson, *Behaving Badly: Social Panic and Moral Outrage – Victorian and Modern Parallels* (Ashgate, 2003); and more broadly Charles Krinsky (ed), *The Ashgate Research Companion to Moral Panics* (Ashgate, 2013).

[45] See for example Rob Sindall, 'The London garotting panics of 1856 and 1862' (1987) 12(3) *Social History* 351; Jennifer Davis, 'The London garotting panic of 1862: A moral panic and the creation of a criminal class in mid-victorian England' in VA Gatrell and Bruce Lenman (eds), *Crime and the law: the social history of crime in Western Europe since 1500* (Europa, 1980) 190; Jeffrey Adler, 'The making of a moral panic in 19th-century America: The Boston garroting hysteria of 1865' (1996) 17(3) *Deviant Behavior* 259; and Geoffrey Pearson, *Hooligan: A History of Respectable Fears* (Macmillan, 1983).

[46] See for example *Criminal Code* (NT) s 228; *Criminal Code* (Tas) ss 216 and 241; *Crimes Act 1958* (Vic) s 87; and *Criminal Code* (WA) ss 396 and 397.

[47] See for example *Crimes Act 1900* (NSW) ss 59 and 61; *Crimes Act 1900* (ACT) ss 24, 26, 26A and 277; *Criminal Code* (WA) s 317; *Criminal Code* (Qld) s 339; and *Criminal Code* (NT) s 187.

[48] For example *Crimes Act 1900* (ACT) s 93; *Crimes Act 1958* (Vic) s 72; and *Crimes Act 1900* (NSW) s 94.

[49] For example *Criminal Code* (Tas) s 162; and *Crimes Act 1900* (NSW) s 31.

[50] For example *Criminal Code* (Tas) s 157; and *Criminal Code* (WA) s 279. See further *Zecevic v DPP (Vic)* (1987) 162 CLR 645, Wilson, Dawson and Toohey JJ at 661.

[51] For example *Drugs, Poisons and Controlled Substances Act 1951* (Vic) s 73; *Misuse of Drugs Act 2001* (Tas) s 23; and *Drug Misuse and Trafficking Act 1985* (NSW) s 10. More broadly, *United Nations Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances* (1988).

[52] For example *Firearms Act 1996* (NSW) ss 7 and 7A; *Firearms Act 1996* (Tas) s 9; and *Firearms Act 2015* (SA) s 9.

construed as being an associate, result in a life-long exclusion from electrical and other trades?[53]

Anonymity as autonomy

Given the preceding comments we might contest Agamben's claim regarding the inescapable desire to be 'recognised by others', a claim that perhaps confuses respect with recognition.[54]

Recognition is important, but as the Stoics and contemporary liberal theorists indicate, the imperative is to be acknowledged as a human: a recognition that involves awareness and respect for difference, a recognition that fosters rather than precludes flourishing. Pending removal of Rawls' veil of uncertainty individuals would, this dissertation contends, want to be recognised as people rather than as subjects with the Schmittian legal identity of 'other' or 'enemy'. Those people would wish to be respected as unique and multi-faceted individuals – possessed of rights and accordingly with the scope for self-realisation – rather than construed solely in terms of a legal identity as Jew, Gypsy, 'race traitor' or another deleterious identity valorised by a god-like decisionist.

In many of our lives we would want and deserve the autonomy that is provided through anonymity, in essence a freedom provided by non-recognition of the individuation discussed in Chapter Eight.[55] It is a foundation of privacy that reflects the liberal democratic respect for the private sphere as a matter of physical[56] and intellectual[57] non-invasion by the state or other entities.[58] That non-invasion was

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[53] The *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Bill 2013* (Qld), which was passed in a modified form as the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld) for example sought to amend the *Electrical Safety Act 2001* (Qld) and *Queensland Building Services Authority Act 1991* (Qld), with the effect that regulators would deny an electrician's, plumber's or builder's licence to anyone deemed to be an associate of a criminal organisation through past membership of the organisation.
[54] Giorgio Agamben, *Nudities* (David Kishik and Stefan Pedatella trans, Stanford University Press, 2011) [trans of *Nuditá* (first published 2009)] 47.
[55] Katja Ziegler, *Human Rights and Private Law: Privacy As Autonomy* (Hart, 2007); George Anastaplo, 'The Public Interest in Privacy: On Becoming and Being Human' (1976-1977) 26 *DePaul Law Review* 767; and Roger Clarke, 'Anonymous, Pseudonymous and Identified Transactions: The Spectrum of Choice', *Proceedings of the IFIP User Identification & Privacy Protection Conference* (Stockholm, 1999).
[56] Anita Allen, *Unpopular Privacy: What Must We Hide?* (Oxford University Press, 2011) 4.
[57] Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford University Press, 2015).

articulated by US jurists Warren and Brandeis more than a century ago,[59] at the dawning of the current information age (a period of mass media,[60] rapid uptake of telecommunications and data processing tools such as the Hollerith machine, and abstraction of individuals through population registration systems). The articulation of the private sphere as a basis for flourishing serves as a point of reference for the anxieties about identity crime in the digital environment that are discussed in Chapters Nine and Ten.

Privacy as a matter of non-interference and respect for the personal sphere is a core value in the Universal Declaration of Human Rights[61] and subsequent human rights conventions,[62] weakly reflected in Australian constitutional law[63] and administrative practice.[64] It is a basis of intimacy and trust in personal relations,[65] comfort in situations where there would otherwise be shame,[66] and the freedom to consider heterodox ideas or affinities[67] – a freedom that underpins our conceptualisation and practice of liberal democracy. It may be particularly important for the self-concept of individuals in communities that have historically been subject to institutionalisation because of a deleterious legal identity.[68]

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[58] See for example *European Convention for the Protection of Human Rights and Fundamental Freedoms* Art 8; and Marie-Bénédicte Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (Cambridge University Press, 2006).
[59] Louis Brandeis and Samuel Warren, 'The Right to Privacy' (1890) IV(5) *Harvard Law Review* 193. See also Samantha Barbas, *Laws of Image: Privacy and Publicity in America* (Stanford University Press, 2015) 38-39.
[60] Paul Starr, *The Creation of the Media: Political Origins of Modern Communications* (Basic Books, 2004).
[61] *Universal Declaration of Human Rights* (1948) Art 12.
[62] See for example *International Covenant on Civil and Political Rights* (1966) Art 17; and *Convention on the Rights of the Child* (1989) Art 16. The 1980 *Guidelines Governing the Protection of Privacy and the Transborder Flows of Personal Data* from the Organisation for Economic Co-operation and Development have influenced development of the *Privacy Act 1988* (Cth). See Graham Greenleaf, *Asian Data Privacy Laws* (Oxford University Press, 2015); and Lee Bygrave, *Data Protection Law: Approaching its Rationale, Logic and Limits* (Kluwer Law, 2002).
[63] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13; and the *Human Rights Act 2004* (ACT) s 12.
[64] Jodie Siganto and Mark Burdon, 'The Privacy Commissioner and Own-Motion Investigations into Serious Data Breaches: A Case of Going Through the Motions?' (2015) 38 (3) *University of New South Wales Law Journal* 1145.
[65] Julie Inness, *Privacy, Intimacy and Isolation* (Oxford University Press, 2002); Jean Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton University Press, 2002); and Hilary Delany and Eoin Carolan, *The Right To Privacy* (Thomson Round Hall, 2008).
[66] Martha Nussbaum, *Hiding From Humanity: Disgust, Shame and the Law* (Princeton University Press, 2006). More broadly see *R v VAB* [2014] QDC 113; *Brown v Palmer* [2008] VSC 335; *R v DR* [2010] ACTSC 152; *R v Cemitis, Andrew (No 2)* [2010] NSWDC 89; *R v GZ* [2007] QCA 225; *Pool v The State of Western Australia* [2013] WASCA 274; *R v MBM* [2011] QCA 100; *R v TY* [2011] QCA 261; *Todd v Police No SCCRM-02-1796* [2003] SASC 62; *R v Hore* [2010] SASFC 60; and *Carger v Police* [2004] SASC 388. Statutory provisions include as *Police Offences Act 1935* (Tas) ss 13A and 14A; and *Crimes Act 1900* (NSW) ss 91K, 91L and 574C.
[67] Neil Richards, *Intellectual Privacy: Rethinking Civil Liberties in the Digital Age* (Oxford University Press, 2015).
[68] Bruce Baer Arnold, 'Dignity, Trust and Identity: Private Spheres and Indigenous Intellectual Property' in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 455.

In thinking about legal identity we can readily acknowledge that much life in Australia features anonymity. As an earlier chapter indicated, you typically are not asked your name, tax file number, sexual affinity, marital status and academic qualifications when you pay cash for a cup of coffee. You can suppress Caller Identity and have a 'silent number' in the phone directory.[69] Some people have accordingly inferred that legal identity is not an issue in much interaction with other individuals and institutions.

Individuation becomes significant and pressure to erode or fully remove anonymity becomes imperative if the person wishes to exercise particular legal identities, for example as a manifestation of law's respect for property.

Anonymity as a *flaneur* wandering through the mall is acceptable. Anonymity in using a credit card is unacceptable, given that the card is a signifier of the individual's desire to make a payment, that the person is authorised to use the card and that the person accepts responsibilities associated with that signifier (for example that the individual will pay the financial service provider). In the absence of the legal identity it is just a small piece of plastic. Voting – one of the indicia of the legal identity known as citizenship, a process that determines who makes statute law and thus constructs identity – involves authority and individuation but, importantly, the individual's decision in the poll or referendum is anonymous. In essence, a scrutineer can discern that someone is listed in the electoral roll, attended the polling place and engaged in individuation by referring to name and street address prior to marking the piece of paper but the scrutineer cannot discern the choice represented by that mark.

Individuals may be required to enable verification of identity that is not otherwise in question. You do need to provide identifiers in gaining a phone number. The directory is not 'silent' to a range of users, and for example can be read for network

[69] Australian Communications & Media Authory, *Inquiry into Silent Numbers* (2013); and Senate Standing Committee on Environment and Communications, Parliament of Australia, *The feasibility of a prohibition on charging fees for an unlisted number service* (2013). The *Telecommunications Act 1997* (Cth) provides consumers with the scope, on payment of a fee, to suppress their details from the publicly accessible national telephone directories. Over 40% of consumers have done so.

maintenance, emergencies and criminal investigation.[70] You do not need to report to a state official that you are intending to drive a friend's car or that you are borrowing that person's bicycle. In that sense you have anonymity. If stopped for a random roadside test, or in connection with an accident, or if you are suspected of stealing the vehicle, you can expect however to be required to demonstrate your authority to use the specific vehicle (one identity) and provide details that individuate you from other members of the broader class of people with the entitlement to drive cars.[71]

It is a specific offence to book and travel on an airline using a false identity, although not apparently on intercity rail and bus services where the requirement is simply that you have a valid ticket. As of late 2015 the New South Wales Government foreshadowed that cyclists will be required to carry identity documents, with that documentation serving as a mechanism of individuation rather than as authority (given that, unlike past regimes, there is no bicycle rider licence or registration of the machine). That requirement has been condemned as a reduction of anonymity and interference with privacy. You are not required to carry a national or state/territory identity card at all times,[72] for example while in the park, but you are expected to assist police investigations by verifying your identity (in other words providing individuation) within a reasonable period.[73]

The earlier discussion of adoption and assisted fertility noted a further aspect of anonymity, in other words the non-individuation that has in the past been promised to mothers who gave up a child for adoption and gamete donors with the expectation (at that time identified in statute and formal agreements) that the identity of the mother/donor would never be revealed. Problematically, in part response to claims that children have an imperative need to 'connect' with the biological parent/s,[74] that

[70] Department of Communications, *Review of the Integrated Public Number Database* (2015) 9 and 22.
[71] *Road Transport (General) Act 1999* (ACT) s 58(1); and *Road Transport Act 2013* (NSW) s 175.
[72] In contrast see Simone Van der Hof and Bert-Jaap Koops, 'Anonymity and the Law in the Netherlands' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons From The Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 503.
[73] *Crimes Act 1958* (Vic) s 456AA.
[74] See for example Andrew Solomon, *Far From the Tree: Parents, Children and the Search for Identity* (Scribner, 2012).

anonymity is being progressively and unsystematically withdrawn by statute in several jurisdictions.[75] That withdrawal restructures the legal identity of those parents.

We might thus conclude that in terms of legal identity anonymity – an absence or imprecision of individuation – is contextual rather than absolute. It concerns individuation, rather than authorisation and disability.

Persona

Greta Garbo famously tired of the cameras, journalists and fans – consequently engaging in a performativity (dark glasses, unlisted numbers, selection of discreet friends) that gave effect to a heartfelt wish to be left alone. As a result she is perhaps now being best known for that reclusiveness, her desire for anonymity. Some people share Garbo's horror at being 'owned' by the public or administrators.[76] Others, including individuals who might be described as hungry for fame or the revenue associated with being a celebrity, seek the limelight.[77] Being a subject of public interest, a subject rather than a person, has a cash value in an attention economy where people will pay to be entertained or enlightened with information about the subject's activities, character and motivations.[78] That value is reflected in Australian law's emulation of overseas models of personality rights, sometimes characterised as publicity rights.[79]

If legal identity is a matter of consequences the persona of celebrities is meaningful because the individual has scope to restrict the unauthorised commercial use of images or attributes, for example graphic or other representations that appear to

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[75] See for example Victorian Department of Health, *Discussion Paper on Proposed changes to donor anonymity* (2015); the *Adoption Amendment Act 2013* (Vic) and the *Assisted Reproductive Treatment Amendment (Access by Donor-Conceived People to Information About Donors) Bill 2013* (Vic).
[76] Janna Malamud Smith, *Private Matters: In Defense of the Personal Life* (Perseus, 1997).
[77] Leo Braudy, *The Frenzy of Renown: Fame and Its History* (Oxford University Press, 1986); James Lull and Stephen Hinerman (eds), *Media Scandals: Morality & Desire in the Popular Culture Marketplace* (Columbia University Press 1998); and Michael Levine, *The Princess & the Package: Exploring the Love-Hate Relationship Between Diana and the Media* (Renaissance, 1998).
[78] Clay Calvert, *Voyeur Nation: Media, Privacy & Peering in Modern Culture* (Westview, 2000); John Thompson, *Political Scandal: Power & Visibility in the Media Age* (Polity, 2000); Jeannette Walls, *Dish: How Gossip Became The News & The News Became Just Another Show* (Perennial, 2000); Gailand Collins, *Scorpion Tongues: Gossip, Celebrity, and American Politics* (Morrow, 1998); and Richard Schickel, *Intimate Strangers: The Culture of Celebrity in America* (Dee, 2000).
[79] Huw Beverley-Smith, *The Commercial Appropriation of Personality* (Cambridge University Press, 2002).

signify the subject's endorsement of goods, services or institutions.[80] Earlier pages noted the exceptional post-mortem protection of St Mary McKillop and Sir Donald Bradman, individuals who feature in popular culture as iconic Australians, two individuals with a unique legal identity conferred through regulations under the Corporations Act.

Australian law's respect for property allows people to 'propertise' their persona, something justified in benefits to the owner of that persona and more broadly to consumers who will be guided through the individual's endorsement of goods and services. In essence, people can choose to commercialise their association with products and organisations. As possessive individuals we are rewarded if we are associated with the correct entities and punished for association with those that are incorrect.

Alleviation

Kelly described the modern state as 'an information-gathering, lexically ordering enterprise of domination'.[81] That domination might be a matter of hegemony – the self-policing highlighted by Gramsci and Elias – or a matter of registration (such as the offender registers noted in the preceding chapter) and surveillance that is substantive or latent.

A contention throughout this dissertation that institutions, in leveraging opportunities presented by contemporary data collection and analysis tools, seek to 'see like a state' – to identify individuals, identify specific interactions and parse data to highlight collective attributes or trends.

Bureaucratic 'knowing' of identities and relationships through 'seeing like a state' (including 'seeing actuarially') is often a matter of risk alleviation rather than merely

[80] *Henderson v Radio Corporation Pty Ltd* (1960) 60 SR (NSW) 576; *Honey v Australian Airlines* (1990) 18 IPR 185; *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1987) 79 ALR 299; *Talmax Pty Ltd v Telstra Corporation Ltd* (1997) 2 Qd R 444; *MK Hutchence t/a INXS v South Sea Bubble Co Pty Ltd t/a Bootleg T-Shirts* (1986) 64 ALR 330.

[81] Duncan Kelly, *The Propriety of Liberty: Persons, Passions and Judgement in Modern Political Thought* (Princeton University Press, 2011) 275. Note however premodern antecedents, for example highlighted in Keith Breckenridge and Simon Szreter (eds), *Registration and Recognition: Documenting the Person in World History* (The British Academy, 2012).

Scott's state (and identity) building.[82] In the public sector it is sometimes an attempt to reduce anonymity and thereby inhibit agency, thus preventing offences or being in a position to successfully prosecute offences. In the process that knowing provides reassurance to the community and justifies the existence of a law enforcement or national security apparatus. In the private sector it embodies expectations that commercial relationships can be fostered by tracking (and hence predicting, even shaping) consumption patterns and requirement by government that particular enterprises 'know your customer', a knowing that involves sharing customer data with a range of agencies.

We can construe substantive surveillance as actively monitoring an individual through for example recording of telephone conversations or the covert placement of listening devices in a residence as the basis of a criminal prosecution. Latent surveillance, on the other hand, involves the possibility of access to public/private sector information about the identity of an individual or cohort, for example on a population scale. That access often does not require a warrant and in practice because of bureaucratic incapacity is weakly regulated. From a legal identity perspective it means that seen through the eyes of law enforcement agencies the population as a whole – for example everyone who has a mobile phone account and thus generates telecommunications metadata – is latently a suspect.[83]

That suspicion is contentious for two reasons. The first, most saliently, reflects the construction of the liberal democratic citizen and community member discussed in Chapters Three and Five above. Legal identity means that reference to dignity and assertion of rights is not vacuous.[84] In Australia it is axiomatic that people are innocent until proven guilty through a process founded on fairness, transparently and

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[82] James Scott, *Seeing Like A State: How Certain Schemes to Improve the Human Condition have Failed* (Yale University Press, 1998). See also Derek Bambauer, 'Privacy versus Security' (2013) 103(3) *Journal of Criminal Law and Criminology* 667; Bernard Harcourt, *Against Prediction. Profiling, Policing, and Punishing in an Actuarial Age* (University of Chicago Press, 2007); Oscar Gandy Jr, *Coming to Terms with Chance: Engaging Rational Discrimination and Cumulative Disadvantage* (Ashgate, 2011) and Oscar Gandy Jr, *The Panoptic Sort: A Political Economy of Personal Information* (Westview, 1993).

[83] Bruce Baer Arnold, 'Data Sharing and Regulatory Creep' (2016) 17(5) *Privacy Law Bulletin* 3

[84] Mirko Bagaric and James Allan, 'The vacuous concept of dignity' (2006) 5(2) *Journal of Human Rights* 257; James Allan, 'The idea of human rights' (2013) 25(1) *Bond Law Review* 1; Andrew Brennan and Yeuk-Sze Lo, 'Two Conceptions of Dignity: Honour and Selfdetermination' in Jeff Malpas and Norelle Lickiss (eds), *Perspectives on Human Dignity* (Springer, 2010) 43; and Ruth Macklin, 'Dignity is a useless concept: It means no more than respect for persons or their autonomy' (2003) 327 *British Medical Journal* 1419. In contrast see Alan Gewirth, 'Why There Are Human Rights' (1985) 11 *Social Theory and Practice* 235.

accountability. Chapter Five referred to notions of proportionality, highlighted in for example *Rowe v Electoral Commissioner,*[85] in *McCloy v New South Wales*[86] and in Lord Atkin's expression of disquiet in *Liversidge v Anderson*.[87]

Proportionality involves consideration of suitability (in other words practically suitable for pursuing a legitimate objective), necessity (is a less restrictive means of achieving the legitimate purpose available and is an alternative approach equally as practicable and likely to succeed?) and appropriateness (a normative balancing exercise weighing the social benefit of the objective being pursued against the importance of the freedom being infringed). That consideration was explored in *McCloy*, where the High Court held that a restriction on the implied freedom of political communication was a legitimate, rational and reasonably practical means of achieving the overarching purpose of a system of representative government.[88]

Irrespective of the burden on citizens as a collective and on individual businesses through the administrative costs associated with pervasive surveillance, it is inappropriate to confuse bureaucratic convenience – data about everyone's identity and activity at your fingertips – with what is necessary and suitable.

The second reason is that a succession of authoritative reports have indicated that pervasive surveillance appears to be ineffective as a mechanism for preventing terrorist incidents.[89] Put simply, exponential growth in the size of data collections does not necessarily result in a greater ability to identify potential offenders and ascertain what they will do. Building larger haystacks may make it easier to find needles after offences have occurred but bureaucratic visions of 'total information awareness' seem misplaced and thus not proportionate in societies where an

[85] *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
[86] *McCloy v New South Wales* [2015] HCA 34.
[87] *Liversidge v Anderson* [1942] AC 206. See Tom Bingham, 'Mr Perlzweig, Mr Liversidge and Lord Atkin' in Tom Bingham, *The Business of Judging: Selected Essays and Speeches: 1985-1999* (Oxford University Press, 2011) 211; and Robert Heuston, 'Liversidge v Anderson in Retrospect' (1970) 86 *Law Quarterly Review* 33.
[88] *McCloy v New South Wales* [2015] HCA 34, [5], [69], [72] and [365].
[89] US Privacy and Civil Liberties Oversight Board, *Report on implementation of the Foreign Intelligence Surveillance Act Amendments Act of 2008* (2014) and *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* (2014).

individual's legal identity as a person is founded on respect for autonomy.[90] Its ineffectiveness is exacerbated by inter-agency conflicts.[91]

One conclusion is that much surveillance in both the public and private sectors is pernicious because it confuses data collection, for example aggregation of data that individuates people, with understanding.

The Information State

Preceding chapters have demonstrated that government agencies and private sector entities, with the authority of or in response to law, construct and verify legal identities through processes of registration, data collection and data analysis.

The salient image of modern government (and of large-scale business) is 'the file'.[92] The information state abstracts people: much activity disregards the variety of life and instead addresses individuals as one or more identity attributes. In that sense an individual is, for example, an identity number and an entitlement to a specific class or classes of income support as part of the state's encouragement of that person's flourishing and in relation to that person's legal identities.

That abstraction, and the scope for population-scale collection, dissemination and analysis of identity data, has three consequences.

The first is what might be characterised as a technocratic imperative: organisations processing data because technology means they can and because that processing is perceived as managerially responsible and ethical.[93] The second consequence is an alienation and at times visceral anxiety about being profiled, with for example

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[90] For a counter view see Mirko Bagaric 'Privacy Is The Last Thing We Need' *The Age* (Melbourne) 22 April 2007, 15; and Mirko Bagaric, 'Rights Must Yield To Community Prosperity: The Fallacy That There Is A Strong Right To Privacy' in Scott Mason and Daniel Wood (eds), *Future Proofing Australia: The Right Answers For Our Future* (Melbourne University Press, 2013) 65. See also James Whitman, 'The Two Western Cultures of Privacy: Dignity v Liberty' (2004) 113 *Yale Law Journal* 1151.

[91] See for example Philip Zelikow, 'The Evolution of Intelligence Reform, 2002-2004' (2012) 56(3) *Studies in Intelligence* 1; and Michael Allen, *Blinking Red: Crisis and Compromise in American Intelligence after 9/11* (University of Nebraska Press, 2013).

[92] Ronald Day, *Indexing It All: The Subject in the Age of Documentation, Information and Data* (MIT Press, 2014) 81.

[93] Michael Quinlan, 'Just Intelligence: Prolegomena to an ethical theory' in Peter Hennessy (ed), *The New Protective State* (Continuum, 2007) 123, 133.

consumers expressing disquiet at a perceived disregard of dignity and privacy activists legitimately opposing bureaucratic overreach that is disproportionate to legitimate needs for the state to 'see' terrorists, tax evaders, drug traffickers and other offenders.[94] The third consequence is less commonly articulated. It is that seeing like a state is a prerequisite for the delivery of services such as schools (location decisions for example leverage population census data),[95] for public health initiatives through notifiable diseases regimes,[96] for risk reduction through 'vulnerable people' regimes,[97] and for the social support entitlements (subsidised prescription pharmaceuticals, the old age pension, income support for the unemployed) that provide a basis for our conceptualisation of ourselves as Australian citizens and of the Australian state.

Those tensions should inform consideration of Sarat's comment that

> When citizens think about law's ways of knowing and about how legal officials gather information, assess factual claims, and judge people and situations, they are often befuddled, confused by the seemingly arcane and constrained quality of the information gathering, fact-evaluating procedures that legal officials employ or impose. Yet law's ways of knowing are as varied as are the institutions and officials who populate any legal system. And relatively few of them are highly ritualised and rule bound. Most of the others are embedded in a distinctive bureaucratic culture or are entirely idiosyncratic and personal. Few are specialised and esoteric; most are rather ordinary.
>
> All of law's ways of knowing are historically specific, evolving in response to developments both internal and external to law itself. In some contexts those procedures seem odd, artificial and divorced from cultural common sense. In others the ways law knows seem all too common, reliant on quotidian assumptions and cultural stereotypes. With respect to the former, we often want law's ways of knowing to be less distant, less artificial and more grounded in the familiar; with respect to the latter, we

[94] For a view that pervasive surveillance results in a 'soft' form of authoritarianism see Christian Parenti, *The Soft Cage: Surveillance in America from Slavery to the War on Terror* (Basic Books, 2003). A caution is provided in David Kilcullen, *Blood Year: The Islamic State and the Failures of the War On Terror* (Black Inc, 2016) 208.
[95] *Census and Statistics Act 1905* (Cth).
[96] *Public Health Act 1997* (ACT) s 102; *Public Health Act 2010* (NSW) s 54; *Notifiable Diseases Act* (NT) ss 8 and 15; *Public Health Act 2005* (Qld) s 70; *Public Health Act 2011* (SA) s 64; *Public Health Act 1997* (Tas) s 46; *Public Health and Wellbeing Act 2008* (Vic) s 127; and *Health Act 1911* (WA) s 276. For a discussion of rationales for such reporting see David Rein, 'Economic and Policy Justification for Public Health Surveillance' in Lisa Lee, Steven Teutsch, Stephen Thacker and Michael St Louis (eds), *Principles and Practice of Public Health Surveillance* (Oxford University Press, 3rd ed, 2010) 32; and Roy Parrish, Sharon McDonnell and Patrick Remington, 'Surveillance for Determinants of Public Health' 275 in the same volume.
[97] For example *Working with Vulnerable People (Background Checking) Act 2011* (ACT).

> worry that law's ways of knowing are insufficiently removed from prevailing assumptions.[98]

Accreditation

In the aftermath of the Third Reich Carl Schmitt lamented that he was 'a white raven that can be found on every blacklist', someone who had not been convicted but was nevertheless excluded from academia because he appeared on a list.[99] Preceding chapters have argued that registration is a basis for the construction of identity and has been since at least the time of the Tudors.[100]

Accreditation is neither unprecedented or exceptional. Academic institutions have long kept lists of graduates. Craft guilds and the professions similarly have entered practitioners 'on the rolls' as a signification of authority to practice. Commerce since at least the 1820s has featured publications identifying individuals and enterprises as credit risks.[101] Individual lenders have often maintained private registers of people and companies who were deemed worthy of trust or potential borrowers to be avoided, the latter constituting blacklists. Private sector employers have used entity-specific or industry-wide lists of unreliable former employees or suspected workplace activists. Both private and public sector organisations rely on official and commercial clearing houses such as Crimtrac and Auscheck,[102] which for example deal with 'police records' (in essence databases of criminal convictions) and tenancy databases.[103] They also rely on agency-specific blacklists, such as listing by ASIC of people disqualified from management of corporations.[104]

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[98] Austin Sarat, Lawrence Douglas, Martha Umphrey and Connor Clark, 'Complexity, Contingency and Change in Law's Knowledge Practices: An Introduction' in Martha Umphrey, Austin Sarat and Lawrence Douglas (eds), *How Law Knows* (Stanford University Press, 2007) 1, 1.

[99] Reinhard Mehring, *Carl Schmitt: A Biography* (Daniel Steuer trans, Polity Press, 2014) [trans of *Carl Schmitt: Aufstieg und Fall* (first published 2009)] xv.

[100] Edward Higgs, *The Information State in England: The Central Collection of Information on Citizens since 1500* (Palgrave Macmillan, 2004); and Simon Szreter, 'Registration of Identities in Early Modern English Parishes and amongst the English Overseas' in Keith Breckenridge and Simon Szreter (eds), *Registration and Recognition: Documenting the Person in World History* (The British Academy, 2012) 67.

[101] James Norris, *R G Dun & Co, 1841-1900: The Development of Credit Reporting in the Nineteenth Century* (Greenwood Press, 1978).

[102] *Auscheck Act 2007* (Cth) s 5. AusCheck is currently a branch within the national Attorney-General's Department providing national security background checking services regarding the Aviation Security Identification Card (ASIC), Maritime Security Identification Card (MSIC), and National Health Security (NHS) check regimes under the *National Health Security Act 2007* (Cth); *Aviation Transport Security Act 2004* (Cth) and *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) noted in Chapter Eight above.

[103] Tim Seelig, 'Tenant Lists, Tenant Risks: Rental Databases And Housing Policy In Australia' (2003) 7 *Flinders Journal of Law Reform* 27; Bruce Baer Arnold, 'Those who won't be missed?: Questions about tenant profiling and privacy' (2011) 7(4) *Privacy Law Bulletin* 50; Rebecca Harrison and David Imber, 'Residential tenancy

That profiling is concerned with legal identities, with profilers for example excluding individuals from opportunities such as finance and employment, on the basis that a person has the identity of an undischarged or former bankrupt, has featured in litigation regarding insurance fraud, has been struck off the roll, has convictions for sexual offences or merely is ineligible because not an Australian citizen. What is often referred to as vetting looks to capabilities and disabilities, with particular institutions displaying a high (albeit sometimes misplaced) aversion to perceived risk. Chapter Six for example noted sporadic 'red' and 'lavender' scares in the public sector and enterprises aligned with the government, including rejection of potential/current employees for a perceived Left or same-sex affinity.[105]

That screening might be ostensibly indifferent because based solely on indicia of merit/achievement such as the individual's possession of academic testamurs, trades qualifications and military/other service honours. It might equally rely on what are construed as objective indicia such as official registers of disabilities such as criminal convictions and bankruptcy or private databases of late/non-payment. Other screening has a subjective element that is more obvious, including exclusion/acceptance on the basis of association (membership of prestigious institutions such as the Melbourne Club typically has a more positive valence than consorting with outlaw motorcycle gangs or what are perceived as environmental radicals), on gender or ethno-religious affiliation (irrelevant in most occupations), age, sexual affinity or merely appearance.

In seeking to discern past/current legal identities and manage risk by forecasting likely future behaviour vetting accordingly seeks to verify that an individual is as claimed (for example that an applicant has not engaged in identity crime by omitting past offences when providing a CV) and that the individual's character is such as to justify being recognised as deserving of authority.

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databases – need for national regulation' (2007) 3(8) *Privacy Law Bulletin* 98; and Paul Henman and Greg Marston, 'The social division of welfare surveillance' (2008) 37(2) *Journal of Social Policy* 187, 190.

[104] *Corporations Act 2001* (Cth) s 1274AA. See also *Corporations Act 2001* (Cth) s 206A.

[105] See for example David Johnson, *The lavender scare: The cold war persecution of gays and lesbians in the federal government* (University of Chicago Press, 2004); Daniel Robinson and David Kimmel, 'The Queer Career of Homosexual Security Vetting in Cold War Canada' (1994) 75(3) *Canadian Historical Review* 319.

Credentialism rewards people who have educational certification or what appears to be that certification but, as noted in Chapter Four and Ten, does not necessarily provide a deep indication of character. Given the search for reliable indications of character – and for the detection of deception – organisations have accordingly relied on inferences on the basis of affinity, on varieties of psychological profiling,[106] or supposedly rational (and empirically verifiable) tools such as the polygraph[107] and graphology.[108]

The latter appears to have as much credibility as a mechanism for looking into the individual's heart as former tools such as phrenology[109] and physiognomy[110] that, as noted in Chapter Four above, were recognised in law and promoted by authoritative theorists such as Lombroso who influenced last century's conceptualisation of 'the criminal' and hence the criminal identity.

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[106] Scott Highhouse, 'Assessing the Candidate as a Whole: A Historical and Critical Analysis of Individual Psychological Assessment for Personnel Decision Making' (2002) 55(2) *Personnel Psychology* 363; Mark Rieke and Stephen Guastello, 'Unresolved issues in honesty and integrity testing' (1995) 50 *American Psychologist* 458; Richard Kocsis and Andrew Hayes, 'Believing Is Seeing? Investigating The Perceived Accuracy Of Criminal Psychological Profiles' (2004) 48(2) *International Journal of Offender Therapy and Comparative Criminology* 149; Deniz Ones, Chockalingam Viswesvaran and Frank Schmidt, 'Comprehensive meta-analysis of integrity test validities: Findings and implications for personnel selection and theories of job performance' (1993) 78 *Journal of Applied Psychology* 679; Brent Snook, Richard Cullen, Craig Bennell, Paul Taylor and Paul Gendreau, 'The Criminal Profiling Illusion What's Behind the Smoke and Mirrors?' (2008) 35(10) *Criminal Justice and Behavior* 1257; Liz Walley and Mike Smith, *Deception in Selection* (Wiley, 1998); Andreas Kapardis and Maria Krambia-Kapardis, 'Enhancing fraud prevention and detection by profiling fraud offenders' (2006) 14(3) *Criminal Behaviour and Mental Health* 189; Paul Sackett and Michael Harris, 'Honesty testing for personnel selection: A review and critique' (1984) 37 *Personnel Psychology* 221; Frederick Morgeson, Michael Campion, Robert Dipboye, John Hollenbeck, Kevin Murphy and Neal Schmitt, 'Are We Getting Fooled Again? Coming To Terms With Limitations In The Use Of Personality Tests For Personnel Selection' (2007) 60(4) *Personnel Psychology* 1029; Robert Tett, Douglas Jackson and Mitchell Rothstein, 'Personality Measures as Predictors of Job Performance: A Meta-Analytic Review' (1991) 44(4) *Personnel Psychology* 703; Ronald Karren and Larry Zacharia, 'Integrity tests: Critical issues' (2007) 17(2) *Human Resource Management Review* 221; and John Rust and Susan Golombok, *Modern Psychometrics: The Science of Psychological Assessment* (Routledge, 1999).

[107] Ian Freckelton, 'The Closing of the Coffin on Forensic Polygraph Evidence for Australia: Mallard v The Queen [2003] WASCA 296' (2004) 11(2) *Psychiatry, Psychology and Law* 359; Geoffrey Bunn, *The Truth Machine: A Social History of the Lie Detector* (Johns Hopkins University Press, 2011); David Lykken, *A Tremor in the Blood: Uses and Abuses of the Lie Detector* (McGraw-Hill, 1981); Ken Alder, 'A Social History of Untruth: Lie Detection and Trust in Twentieth-Century America' (2002) 80 *Representations* 1; and John Philipp Baesler, 'From Detection to Surveillance: U.S. Lie Detection Regimes from the Cold War to the War on Terror' (2015) 8(1) *Behemoth: A Journal on Civilisation* 46.

[108] Richard Klimoski and Anat Rafaeli, 'Inferring personal qualities through handwriting analysis' (1983) 56(3) *Journal of Occupational Psychology* 191; Julie Spohn, 'The Legal Implications of Graphology' (1997) 75(3) *Washington University Law Quarterly* 1307; and Roxanne Panchasi, 'Graphology and the Science of Individual Identity in Modern France' (1996) 4(1) *Configurations* 1.

[109] John Thearle, 'The Rise and Fall of Phrenology in Australia' (1993) 27(3) *Australian and New Zealand Journal of Psychiatry* 518; David de Giustino, 'Reforming the commonwealth of thieves: British phrenologists and Australia' (1972) 15 *Victorian Studies* 439; Nicole Rafter, 'The Murderous Dutch Fiddler: Criminology, History and the Problem of Phrenology' (2005) 9(1) *Theoretical Criminology* 65; and Pierre Schlag, 'Commentary: Law and Phrenology' (1997) 110 *Harvard Law Review* 877.

[110] Daniel Pick, *Faces of Degeneration: A European Disorder, 1848-1918* (Cambridge University Press, 1993); and Sharrona Pearl, *About Faces: Physiognomy in Nineteenth-Century Britain* (Harvard University Press, 2010); David Horn, *The criminal body: Lombroso and the anatomy of deviance* (Psychology Press, 2003); Richard Twine, 'Physiognomy, phrenology and the temporality of the body' (2002) 8(1) *Body & Society* 67; and Dana Seitler, 'Queer physiognomies; or, how many ways can we do the history of sexuality?' (2004) 46(1) *Criticism* 71.

Reinvention

Profiling is on occasion necessary because people wish to escape from their past and a perceived future by reinventing themselves.

Cary Grant, formerly the working class boy known as Archie Leach, explained his reinvention by saying

> I pretended to be somebody I wanted to be and I finally became that person. Or he became me. Or we met at some point.[111]

Eric Blair reinvented himself as George Orwell.[112] Romain Gary less happily inhabited an alter ego, as did the enigmatic B Traven.[113] Other writers have more narrowly relied on pseudonyms.[114] Serial fraudster Ethel Livesey appears to have lost track of her fraudulent reinventions.[115] War hero Marcel Caux engaged in serial reinvention.[116] Paul de Man, one of the leading exponents of deconstruction, was revealed to have reinvented himself mid-Atlantic as a way of evading responsibility for a past that involved bankruptcy, fraud, bigamy, exploitation of friends and family, antisemitism and active support for Nazi Germany in wartime Belgium.[117]

Anthony Elliott comments that

> Society in the twenty-first century propagates a master idea: it is through reinvention that we affirm ourselves and legitimate our experiences. When people in modern society come to think about the conditions and consequences of their lives – of current dilemma as well as future risks, to say nothing of remembered pasts – reinvention seems desirable. In this connection, the lure of reinvention is that it is inextricably interwoven with the dream of 'something else'.[118]

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[111] Grant quoted in Jerome Charyn, *Movieland: Hollywood and the Great American Dream Culture* (New York University Press, 1966) 24.
[112] D J Taylor, *Orwell: The Life* (Henry Holt, 2003) 126.
[113] David Bellos, *Romain Gary: A Tall Story* (Random House, 2010); and Ralph Schoolcraft, *Romain Gary: The Man Who Sold His Shadow* (University of Pennsylvania Press, 2012). See also Romain Gary, *Hocus Bogus* (David Bellos trans, Yale University Press, 2010) [trans of *Pseudo* and *Vie et mort d'Émile Ajar* (first published 1976 and 1981)]. For Traven see Will Wyatt, *The Secret of the Sierra Madre: The Man who was B. Traven* (Harcourt Brace Jovanovich, 1980); and Paul Berman, 'B. *Traven*, I Presume' (1978) 17 *Michigan Quarterly Review* 82.
[114] John Mullan, *Anonymity: A Secret History of English Literature* (Faber, 2007).
[115] Freda Nicholls, *The Amazing Mrs Livesey* (Allen & Unwin, 2016).
[116] Lynette Silver, *Marcel Caux: A Life Unravelled* (Wiley, 2005).
[117] Evelyn Barish, *The Double Life of Paul de Man* (Norton, 2014). See more broadly David Lehman, *Signs of the Times: Deconstruction and the Fall of Paul de Man* (Andre Deutsch, 1991) 191.
[118] Anthony Elliott, *Reinvention* (Routledge, 2013) 6.

Many of the historic legal identities referred to in preceding chapters were fixed. You were born a woman and died one, with at most a small opportunity to engage in what we would now characterise as cross-dressing or stepping outside gendered roles. You could change your religious faith, albeit the consequences of apostasy might be severe. If you were born a serf you were likely to die as a serf. Many slaves did not experience manumission. Much of history has involved caging people in paper or other identities, mimimising their agency and other aspects of dignity.

In contemporary Australia the legal system and social practice offer more leeway for experimentation and personal fulfilment, irrespective of whether that is construed by Finnis as an indication of social crisis attributable to acceptance of 'deviance' in the guise of diversity.

Grant's reinvention is delightful; de Man's less so. In looking back at earlier chapters of this dissertation we can draw four inferences about reinvention, in other words the scope for a new legal identity that reflects opportunities, histories and changing self-concept.

The first is that legal identities are often more plastic than perceived by individuals seeking reinvention and the entities that deal with them. The significations of gender for example can be amended through performativity (perhaps Butler's salient although overstated insight) or through surgery, the latter specifically recognised in Australian statute and case law. People can change their name and, more fundamentally, their citizenship. They can sever relations with a biological or adoptive family; divorce is legally recognised and for many people socially acceptable. Recent generations have reinvented through public articulation of a legal identity as a gay or lesbian person, an avowal that as Chapter Six noted has reflected and reinforced changing social values regarding personhood in terms of sexual affinity.

The second inference is that the legal system acknowledges that character is not indelible, with spent conviction statutes for example indicating that offenders if encouraged by society can acknowledge past wrongdoing and in future live a more virtuous life. That scope for repentance and demonstration of post-offence good

character is evident in acceptance by the professions of people who have erred, since complied with norms regarding behaviour and fully disclosed their past as a token of their changed attitude.

The third is that law accommodates reinvention on a differential basis, reflecting the significance of the change in terms of legal identity. Individuals can for example readily change hair colour, become a vegan, change their religious or political affiliation, choose a new career or undertake tertiary study late in life. Those changes may be fundamental to their self-concept but as implied in earlier chapters of this dissertation do not fundamentally alter legal identity. An individual can change that person's given and/or surname, albeit with restrictions on the volatility of that change and the wording of the new name/s. The individual can similarly change nationality, albeit with restrictions on the frequency with which the mationality is changed.

A final inference is that reinvention is bounded. Some things may be regretted and repented but not expunged. An adult sex offender, for example, will be registered in perpetuity and can expect that identity to be discernable – in future most likely increasingly discernable – through networked offender registers and reporting regimes. Controversy about the supposed 'right to be forgotten' in Europe is misplaced; that regime (which derives from European human rights jurisprudence) does not expunge all commercial misadventures and personal imprudence from the internet but instead provides individuals with a circumscribed right of obscurity in display of data by the major search engines. In adopting such a right in Australia, perhaps as a consequence of the Bill of Rights recommended in the following chapter, we might consider that responsibility precludes people from being able to start with a fully spotless online blank sheet, in other words that legal identity as an adult member of a liberal democratic state involves some self-discipline and awareness of consequences.

Observations

We can draw several conclusions from practice discussed in this chapter.

The first is that there is a tension in relationships between individuals, communities and states. Legal identity potentially liberates and imprisons, associated with public/private goods (such as income support and public health maintenance) and with a surveillance or other restriction that is repressive. In that sense legal identity is more complex and protean than construed by Foucault. A second conclusion is that we have scope to obfuscate or indeed escape from the consequences of undesired identities. That agency, however, is bounded within legal frameworks. In fostering the flourishing of individuals and their society we should take care to ensure that law regarding anonymity, deception or change of legal identities is neither too permissive nor too restrictive.

Chapter Eleven: Conclusion

Overview

Preceding chapters have demonstrated that there are many legal identities in Australia (some new, some ancient) and much law. Law – in terms of formal rules and the understanding of those rules by participants in the Australian legal system, an understanding evident in licit and illicit actions – leverages what an earlier chapter dubbed paper empires, in other words an apparatus of databases, registration requirements and signifiers that serve to individuate one individual from another and to signal that the individual has particular attributes such as citizenship, marriage, physical disability, ethnicity, a law degree but convictions preventing activity as a legal practitioner.[1]

As such contemporary law fosters the aspiration of entities in the Australian public and private sectors to see like a state, an abstract knowing of individuals and communities that is grounded on specific attributes that may be relevant in some contexts but irrelevant in others, that may be given meaning on an actuarial basis[2] and that potentially provides demonstrable goods – such as income support – rather than merely the basis for punitive imposition of disabilities such as incarceration or prohibition on acting as a company director.

In essence, legal identity matters. So does understanding its existence, operation, construction and contestation within the Australian legal system. This dissertation has demonstrated through answers to the five methodological questions in Chapter Two that law's attention to particular identities is not constant. However legal identity as such will continue to be a thread in the legal fabric because identities are relevant, irrespective of whether relationships and actions are digital or face to face.

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[1] See also Jane Caplan, 'Registering the Volksgemeinschaft: Civil Status in Nazi Germany, 1933-1939' in Martina Steber and Bernhard Gotto (eds), *Visions of Community in Nazi Germany: Social Engineering and Private Lives* (Oxford University Press, 2014) 116, 117.

[2] Bernard Harcourt, *Against Prediction. Profiling, Policing, and Punishing in an Actuarial Age* (University of Chicago Press, 2007); Oscar Gandy Jr, *Coming to Terms with Chance: Engaging Rational Discrimination and Cumulative Disadvantage* (Ashgate, 2011); and the critique of Harcourt in Yoav Sapir, 'Against Prevention? A Response to Harcourt's Against Prediction on Actuarial and Clinical Predictions and the Faults of Incapacitation' (2008) 33(1) *Law & Social Inquiry* 253.

If we see how identities have been created, abandoned, subverted, protected and signified we can see patterns in legal structures, in administration and in beliefs. Those patterns are evident in the way that law currently constructs and protects legal identities, and in their subversion. They provide a basis for identifying ongoing use of traditional identity construction mechanisms (for example specification by statute of particular roles and signification of that authority through tokens such as identity cards) and for assessment of the effectiveness of those mechanisms in a digital environment that contrary to enthusiasm on the part of politicians, consultants and journalists is not remarkably novel or requiring a major reweaving of the legal carpet to accommodate relationships in which not all activity takes place face to face.

This dissertation referred to soft power – the assimilation by individuals of rules, the shaping of expectations, the use of paper rather than rubber hoses, fists, guns and prisons – because much legal identity is about self-discipline and because in aggregate we take the system of legal identity (as distinct from contestation of specific identities) as a given. Bourdieu claims to have always been astonished

> by what might be called the paradox of doxa – the fact that the order of the world as we find it, with its one-way streets and its no-entry signs, whether literal or figurative, its obligations and its penalties, is broadly respected, that there are not more transgressions and subversions, contraventions and 'follies' (here you need only think of the extraordinary concordance of thousands of human dispositions - or wills - involved in five minutes of car-driving around the Place de la Bastille or Place de la Concord in Paris) or, still more surprisingly, that the established order, with its relations of domination, its rights and prerogatives, privileges and injustices, ultimately perpetuates itself so easily, apart from a few historical accidents, and that the most intolerable conditions of existence can so often be perceived as acceptable and even natural.[3]

This dissertation has demonstrated that we are habituated to the Australian system's ways of constructing legal identity.

The preceding chapters have for example shown that there is a substantial body of statute law that expressly refers to specific identities and to signification of those identities through mechanisms such as identity cards and registers. Habituation means

[3] Pierre Bourdieu, *Masculine Domination* (Richard Nice trans, Stanford University Press, 2001) [trans of *La domination masculine* (first published 1990)] 1.

that the notion of a legal identity – which this dissertation has argued is a matter of legal consequences such as rights, powers, disabilities – is not considered by courts, the legal profession, public/private administrators, journalists and the public at large to be novel or nonsensical. It is instead a part of the legal system's syntax. Habituation has also been demonstrated in social practice and legal responses to that practice. Chapter Nine for example discussed 'identity crime' as an inevitable consequence of the meaningfulness of legal identity, a social practice that is evident throughout history and that states have sought to inhibit through use of signifiers (analysed in Chapter Eight) and through statutory provisions that criminalise the misuse of signifiers and other subversion of rules regarding identity. The extent of habituation becomes apparent when we consider the emergence of new legal identities, such as New Zealand's recognition of rivers and forests (highlighted in Chapter Three), or the demise of historic legal identities such as Roman Catholic (highlighted in Chapters One and Five). Contestation of specific identities reflects culturally contingent valorisation – being a 'Wiccan' no longer has existential consequences and in contemporary Australian law women are no longer regarded as embodying a fundamental disability – rather than an incomprehension of legal identity *per se*.

We are habituated because those ways of constructing legal identity work. This dissertation has emphasised normative law. In acknowledging Waldron's comment about the 'abject vulnerability' of citizens as subjects (and even greater vulnerability of non-citizens, highlighted in *Plaintiff M68-2015* as potentially risking their lives in search of a jurisdiction that offers greater opportunities for flourishing than totalitarian or war-torn regimes) those ways could be made to work *better*, that is more respectfully and more productive of flourishing.[4] Considered systemically the construction of legal identity is *not* fundamentally challenged by new technologies, although particular interactions may be contested. Neither law nor technology has independent agency; identity is a matter of how individuals and institutions express values through statute and case law, and how they apply (or do not apply) that law. That claim was made in Chapter One and was discussed in Chapters Two through

[4] *Plaintiff M68-2015 v Minister for Immigration and Border Protection* [2016] HCA 1. Note in particular Gordon J at [354]-[355] and [389]. The implications of being a refugee (or deemed to be falsely asserting refugee status) were noted in Chapter Three above.

Seven of this dissertation, which indicated that specific identities have appeared and disappeared as a result of new technologies, economic changes and law reform. Chapter Eight indicated that the shape and pervasiveness of signifiers of legal identity reflects both the growth of state capacity (in particular the emergence of bureaucracies concerned with the assignment of tokens of identity and tools for the registration of legal identity) and changing relationships between the individual and the state.

A salient conclusion from this dissertation is that Australian law's construction of legal identities (in particular through establishment by statute, signification of authority and individuation, online/offline verification) will perpetuate itself in future.

That perpetuation is irrespective of whether we are engaged in electronic commerce, using biometric recognition to pay for bus travel or accepting that ASIO is potentially reading our email. In constructing identities continuities matter. Specific identities, viewed both as matters of rights/disabilities and as manifestations of social values (for example regarding gender, ethnicity and sexual affinity), will appear or drop out of the legal system's vocabulary but identity as a building block for legally-recognised interactions will remain. Chapter Ten thus considered questions about anonymity – an erasure of legal identity – and challenged the utopianism of figures such as John Barlow (highlighted in Chapter Three) who appear to assume that the state and legal identities recognised by states will cease to matter because of digital technology. Mechanisms for the assignment, signification and verification of legal identities are changing but the historical perspective adopted throughout this dissertation should lead readers to conclude that change is neither inherently new or innately threatening.

Grey argues that 'pragmatism is the implicit working theory of most good lawyers'.[5] The preceding chapters have demonstrated that the making of law by Australian legislators and courts about legal identities is pragmatic: empirical, experimental, adaptive, undetermined by a grand theory. That conclusion is consistent with Grey's assessment, echoing Holmes Jr, that

[5] Thomas Grey, 'Hear The Other Side: Wallace Stevens and Pragmatist Legal Theory' (1990) 63 *Southern California Law Review* 1569, 1590.

> Law is more a matter of experience than logic, and experience is tradition interpreted with one eye on coherence and another on policy.[6]

Reference to experience is pertinent because the authority of theorists such as Foucault appears to have often rested on what is misread as deep historical knowledge – verifiable experience – rather than ideology. The historical basis of Foucault's claims is highly idealised. His work, as he acknowledged in places, should – like that of his rival Jacques Derrida – be read as a provocation rather than a conventional text with a strong factual basis. In making sense of identity construction we can draw on Foucault, Marx, Butler, MacKinnon and other theorists for insights on an instance by instance basis and for self-awareness about theory-building/application. We should however accept that their view of relationships and identity is partial; legal identity is not fully described and explained by any one theoretical model.

Contigency and trust

The salient question in this dissertation is what is the nature of legal identity according to Australian law? By extension, are traditional mechanisms for the construction of legal identity viable in the digital environment?

In asking and answering those questions the dissertation has embodied four objectives.

The first was to tell the reader something about the thread known as legal identity, with insights about the basis, significance and protection of what the preceding chapters have analysed in terms of fundamental and derivative identities.

The second objective was to offer a view of Australian law *per se*, highlighting its embodiment of values and interests over the past two centuries. That view has demonstrated continuities and disruptions during the period (and in previous epochs). It has also demonstrated that legal identity is a key element of the legal system, justifying the characterisation of that identity as a thread in the legal carpet – something that is structurally significant.

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[6] Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 814.

The third objective was to provide observations on legal theory, with preceding chapters demonstrating the novel claim that legal identity is a salient aspect of theories that range from work by Aristotle through Locke to Schmitt, MacKinnon and Butler. The dissertation has further demonstrated that the notion of flourishing – a universalist concept – allows us to both critique and build on the work of those theorists.

The final objective was to provide an interpretation that reflects the realities of contemporary Australia and allows an evaluation of whether traditional mechanisms for the construction of legal identity will be viable in 'the digital environment'. The preceding chapters have suggested that legal identity is not fundamentally different in that environment and that tools for the assignment and verification of a range of identities in online spaces are achievable, albeit likely to be implemented in ways that (as highlighted in Chapter Ten) should provoke thought about the erosion of dignity. Neither legal identity nor the state will disappear in the digital environment.

The mechanism for reaching those objectives has been to ask questions about different legal identities, asking what they are, how they become apparent, how they are articulated in law, how identities are functionally signified and individuated, how they are subverted and how they are reflexively protected.

This dissertation has demonstrated the contention in Chapters One and Three that past and contemporary law – along with social, commercial, administrative and political relationships – relies on a range of identities. Some of those identities are fundamental or presupposed because they are fundamental. Others are derivative and of concern only in specific contexts.

Earlier chapters in this dissertation have demonstrated that legal identities reflect and enshrine values. A legal pragmatist asserts that it is useful to recognise that the valorisation of facts (or what are claimed to be facts) as legal identities is culturally and thus temporally contingent. From the perspective of flourishing the valorisation in a liberal democratic state should centre on flourishing, expressed most tautly in Dewey's emphasis (noted in Chapter One) on self-realisation.

This dissertation has demonstrated both that contingency and conceptualisation of legal identity as a matter of consequences by referring to history. Recall for example the identity of Roman Catholic highlighted in Chapters Three and Six. In much of Europe over the past 1,000 years that identity was the norm, 'unremarkable' because differentiated from negative (and at the time fundamental) identities such as Jew, Protestant, Atheist, Heretic or Muslim – all of which involved civil disabilities and on occasion capital punishment. Across the Channel for several centuries the same identity was a matter of crime or civil disability. Contingency means that adherence to Roman Catholicism is now neither rewarded nor punished: changing valorisation has recreated the identity. Changed social perceptions of women means that they are now free of former civil disabilities and, along with changing valorisation of property and suffrage, now have the vote. The consensual expression of same-sex affection may distress some figures but being a 'sodomite', in other words someone whose identity is derived from a specific activity, is no longer a crime addressed through burning at the stake. When a Rawlsian veil is removed in Australia, although alas not in Saudi Arabia and similar theocracies, self-professed witches need not fear for their lives.[7]

This dissertation has demonstrated that 'contingent' is not aleatoric, in other words that it is not random or a matter of chance. The valorisation evident in legal identities (including those of officials) reflects social attitudes and social understandings of nature, markets, risks and behaviours. We can construe law reform in the liberal democratic state as a mechanism in which advocates have sought to ensure that the state, through its legislators and courts, removes disabilities that are no longer seen by most people as legitimate.

That removal is a reconstruction of legal identity. In effect it reflects the community, through action by those advocates, requiring the state to 'see' in a particular way. That reconstruction may be contested, with for example historic resistance to the extension of suffrage to 'the lower orders' (a portmanteau term for people who lacked the legal identity of male property-owning protestant Anglo-Saxon in rotten borough England) and to women, but serves to reinforce public perceptions. From that

[7] Melissa Bruynell, 'The Dangers of Modern Day Belief in the Supernatural: International Persecution of Witches and Albinos' (2012) 35 *Suffolk Transnational Law Review* 393; Dawn Perlmutter, 'The Politics of Muslim Magic' (2013) 20(2) *Middle East Quarterly* 73; and more broadly Silvia Federici, 'Women, Witch-Hunting and Enclosures in Africa Today' (2010) 3 *Sozial.Geschichte* 10.

perspective law is as much about social perceptions as it is about justiciability; perceptions of relevance and fairness reinforce the perceived legitimacy of the legal system and of the institutions enshrined by that system.

The dissertation has also demonstrated that many legal identities embody a function: a public or private sector 'role' or 'activity' that is noteworthy, and thus properly protected through recognition in law, because it has consequences.

We for example specifically enshrine the identity of member of the judiciary or police force because what they do affects an individual's wellbeing, the relationships between that individual and other parts of society (people, rather than Schmitt's noisy 'particles'),[8] and the trust that we can place in institutions and personal relationships. As Chapter Three indicated, citizenship as an identity is foundational because it has fundamental consequences. An earlier chapter suggested that we can test assertions about an identity by removing a factor. Absent Australian citizenship a person seeking the flourishing associated with life in this country is likely to be in an offshore refugee detention after surviving an ordeal at sea. The consequences of being stateless are thus existentially different to other absences, such as the particular commodities for an individual's breakfast. One factor is constitutive of identity and flourishing; the other is not.

Legal identities do not appear and are not administered *ex nihilo*. As the reference to continuities indicated, they reflect a heritage and often leverage existing registration systems. This dissertation has demonstrated that there is little *de novo* conceptualisation: Australian law instead pragmatically reuses models and adapts institutions. We can discern efforts to register populations and certify particular identities from at least the time of the Tudors. Identity registration, identity bureaucracies and seeing like a state (seeing abstractly, seeing across populations, exercising soft power) has a long history. That history will inform both public discourse about signification mechanisms and the development of new administration systems in the public/private sectors. Australians will trust some of those systems because they will not be revolutionary; we will instead be habituated through

[8] Carl Schmitt, *The Crisis of Parliamentary Democracy* (Ellen Kennedy trans, MIT Press, 1988) [trans of *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (first published 1923)] 35.

incremental development that is founded on practices with which we are familiar, for example large-scale enumeration of taxpayers and social service recipients.

A corollary of that comment is that legal identity also reflects a hegemony, in other words how we or authorities construe the world through vocabulary and syntax. One conclusion after reading this dissertation should be the slipperiness of identity language. Officials use 'identity' in different ways, with no uniformity across the statutes, with a tendency to conflate the signifier with the identity, and with a recourse to rhetoric about concerns such as 'identity crime' and terrorism. Popular culture embodies 'identity' as a screen onto which individuals and attitude-shapers such as journalists project hopes, longings and values about for example 'authenticity', 'being Australian', 'reasonableness' and 'responsibility'. Before we dismiss that embodiment as situated on an entirely different plane to law recall its interaction with statute development and judicial decision-making. The construction of legal identity is dynamic, reflecting civil society advocates rather than merely apolitical public policy administrators, the legislature and judiciary.

The Politics of Meaning

This dissertation has recurrently referred to politics because in liberal democracies the people – what Schmitt dubbed the noisy and multicoloured beast – through the legislature and through day-by-day compliance with the law make legal identity.[9] That identity is a construct. It reflects changing values and circumstances rather than being self-evident and transcendent.

In asking where does law about identity come from we can see an international dimension with three facets.

The first, and for most readers perhaps the most obvious, is the recognition by states of other states, in other words acceptance of Australia as a sovereign nation that enacts and administers its own set of laws regarding the identities of its citizens and of

[9] That dismissal reflects his reading of Plato and Hobbes. See for example Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (George Schwab and Erna Hilfstein trans, University of Chicago Press, 2008) [trans of *Leviathan in der Staatslehre des Thomas Hobbes* (first published 1938)] 1.

people within Australian jurisdiction, which Chapter Three suggested were foundational.[10] That recognition is evident in participation in international bodies and in inter-state agreements such as the Vienna Convention. Australia has a legal identity as a state because it is seen by other states to have that identity.

A second facet is that statute and case law about the identity of people in Australia is influenced by commitments under international agreements and under statutes inspired by those agreements, for example Victoria's *Charter*. We thus have some conception of dignity and institutions such as the family.

The third facet is perhaps the least recognised, perhaps because it is seen as an administrative thread in the legal carpet. It is international administrative agreements and law that have an administrative function, such as the Terrorism Funding Convention, international travel document protocols and the Drug Trafficking Convention. They are given effect through bureaucratic practices – for example requirements for enterprises and individuals to provide particular information – and through statutes that mandate verification of identities as part of 'know your customer' regimes.

A conclusion is that international law and international practice (hard and soft power) serves to construct the identity of the Australian state and to shape the state's construction of the legal identity of Australian natural and artificial persons. Irrespective of developments in international human rights agreements and condemnation of initiatives such as offshore detention of asylum seekers, Australian law about identity will continue to be tacitly determined by the requirements of overseas bureaucracies.

In asking where does law about identity come from and how is it given effect, subverted and protected we can also conclude that from a domestic perspective the construction of legal identity has four facets.

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[10] Charles Tilly commented that states make wars and wars make states. In considering legal identity we should recognise that states make identity and identity makes states. Identity construction, unlike war, is ongoing, and is as much a matter of justice as it is of force. Charles Tilly, *Coercion, Capital, and European States* (Basil Blackwell, 1990) 32.

The first is that actions (agency) can bring into being legal identities. An earlier chapter noted that no-one is born a criminal (although historically people might be born as slaves – identity as a peculiar form of chattel – and in the absence of manumission, revolution or fundamental law reform might retain that deleterious identity throughout their life). You become a criminal, in other words gain that legal identity, by committing the crime. You gain the identity of married person by formally entering into a particular relationship. You can become a citizen through the act of naturalisation; conversely you can lose the Australian component of dual citizenship by acting as a 'foreign fighter' to support one of the terrorist organisations noted in Chapter Ten.

The second facet is that law enshrines what we might describe as administrative roles or official positions. Preceding chapters have highlighted a range of those roles, such as apiaries inspector, police officer, governor, member of parliament and registrar of bankruptcy. Those identities are a matter of consequences: powers and responsibilities. They are typically accompanied by exclusions, for example exclusion of an undischarged bankrupt or person with the identity of a serious sex offender from service in public sector executive positions, irrespective of whether that individual has the requisite technical skills, academic credentials and practical experience. In practice much identity law is a matter of binaries: you gain the identity (or are eligible to gain the identity) because you are not disabled by another identity. You are for example *not* blind, vegetative, incarcerated, bankrupt, a foreign citizen.

The third facet, highlighted in Chapter Three's taxonomy of fundamental and derivative identities, is that much legal identity is additive. Foundational identities are typically prerequisites and on that basis an individual can exercise (and on occasion seek to escape from) a range of other identities during the course of their life.

A corollary is that much of the signification discussed in Chapter Eight and utilised in identities that range from tax-payer and registered driver through to valid holder of a credit card and activity as a tow-truck driver or service as a bee inspector leverages a few basic registers. A consequence of that leverage is that identity offences often concern a subversion of those registers and of salient signifiers such as name and birth date. Subversion is consistent with the observation throughout this dissertation that if

an identity is legally meaningful (in other words involves positive and negative consequences) it is worth subverting.

The final facet is one that is perhaps under-acknowledged by law-enforcement policy-makers and administrators. It is that legal identity is political and should be construed at a high level through reference to both the Australian Constitution and, importantly, to an expansive view of human rights. A preceding paragraph indicated that identity as such is not transcendent: this dissertation has demonstrated that the valorisation of particular attributes and the consequences of those attributes have changed over time, although valorisation *per se* and a range of identities in the abstract are evident in every advanced legal system. We should however regard human dignity as transcendent and inextricable from the flourishing discussed in this dissertation, in other words as something that is inalienable, that is given effect through recognition of human rights and that is independent of the foundational identity of citizenship.

Australian law makes legal identity and responds to the subversion of legal identity. It should do so in a way that fosters flourishing and thus moves beyond Hart's emphasis on law as a coherent system of construable rules, in essence an enforceable language game. An emphasis on flourishing requires normative rather than narrowly positive law.

The Constitution and Identity

On that basis we can conclude that the Australian Constitution, both in its express terms and through implied rights, is important yet inadequate in constituting legal identity.

At the most abstract level it is important because, as noted in Chapter Three, the national and state/territory governments as discrete legal identities have chosen to abide by the framework that it provides for the demarcation and interpretation of public power. That is indicative of the nation as an entity in which public power is bounded rather than indeterminate and unlimited, a bounding that tacitly recognises the dignity of human animals that is the bedrock of the liberal democratic state. It can be contrasted with a vision of the executive as 'a true statesman' who 'holds war and

peace in his hand and communes with God', a utopian erasure of politics (in other words disagreement and difference) and thence of identity.[11]

The Constitution is more pragmatically important because it broadly identifies the powers of the national government and by extension the state/territory governments, powers that underpin legislation that makes legal identities and that will supersede common law regarding legal identities. In terms of human flourishing it is insufficient and as Harris suggested, in need of substantive revision.[12]

A conclusion on the basis of the preceding chapters is that the Constitution, as Australia's *grundnorm*, should articulate the nation's responsibilities – and enshrine Crawford's Rawlsian fairness –rather than merely the executive's powers.[13] The reference to nation rather than executive is deliberate, because the Constitution has a role in shaping society's expectations about the relationship between the individual, the state and other actors. Given concerns noted about stigmatisation of social welfare as a privilege rather than a right, should we for example foster general well-being through articulation of a broad 'right to health'?[14] The 1967 referendum symbolised recognition of Indigenous people as full citizens rather than subjects, a reversal of the exclusion under 1902 Commonwealth Franchise Act.[15] Should we move forward and recognise the historic wrongs to those people – more than a century of deleterious legal identity – through inclusion of a preamble in the revised Constitution?[16]

A further conclusion is that the Constitution and the body of statutes tied to that law is inadequate because it provides at best a patchy protection of human rights. In thinking about legal identity we need to explicitly acknowledge those rights as fundamental for the Australian polity and accordingly enshrine a justiciable bill of rights in the

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[11] Ian Kershaw, *To Hell and Back: Europe 1914-1939* (Allen Lane, 2015) 436.
[12] Bede Harris, *A New Constitution for Australia* (Cavendish, 2002) 1 and 265.
[13] Bede Harris, *A New Constitution for Australia* (Cavendish, 2002) 5-6, 109 and 251.
[14] John Tobin, *The Right To Health In International Law* (Oxford University Press, 2012); and Jennifer Ruger, 'Toward a theory of a right to health: capability and incompletely theorized agreements' (2006) 18(2) *Yale Journal of Law & the Humanities* 273.
[15] Scott Bennett, 'The 1967 referendum' (1985) 2 *Australian Aboriginal Studies* 26; and Bain Attwood and Andrew Markus, '(The) 1967 (referendum) and all that: Narrative and myth, aborigines and Australia' (1998) 29(111) *Australian Historical Studies* 267.
[16] Bede Harris, *A New Constitution for Australia* (Cavendish, 2002) 267. Note George Williams, Mark McKenna and Amelia Simpson, 'With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (2001) 24(2) *University of New South Wales Law Journal* 401. See also Elisa Arcioni, 'Historical Facts and Constitutional Adjudication: The Case of the Australian Constitutional Preamble' (2015) 30 *Giornale di Storia Costituzionale* 107, 119-120 regarding the monarch.

Constitution. Tocqueville differentiated the USA from European monarchies by commenting

> The people reign over the American political world as God reigns over the universe. They are the cause and end of all things; everything proceeds from them and to them everything returns.[17]

As discussed in Chapter Two a justiciable Bill of Rights at the practical level will go some way in ensuring that the republic's executive – what one scholar dubbed the elective dictatorship – does not over-reach and reign god-like.[18] As importantly, the Bill will symbolise that the executive, and the state, exist for the people rather than the other way round.

A corollary of that change is establishment of an independent judicial appointments commission, which would enhance the perceived and substantive autonomy of the judiciary as the third arm of government.[19]

In considering such changes we should ask what we want legal identity in Australia to be, rather than assuming that it is something that just happens or is properly left to staff in ministerial offices. In discussing the emphasis on dignity and social solidarity in the post-1945 German Constitution one writer for example comments on what was seen as

> the moral duty of the post-war nation-state to aid the needy, analogous to the duty of parents to care for their children. Within this moral consensus, the poor, the sick and the uneducated were believed to have a legal right as national citizens to public assistance, to preserve their dignity and self-respect, without needing to show gratitude to their benefactors in some primary bond. In this moral order of a welfare state, charity was perceived as stigmatizing the poor and undermining the self-respect of those who were now *entitled* to receive social care from their sovereign. The provision of social rights to national citizens was, among other things, designed to control the moral problem of humiliation and social exclusion

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[17] Alexis de Tocqueville, *Democracy in America* (Arthur Goldhammer trans, Library of America, 2004) [trans of *De La Démocratie en Amérique* (first published 1835)] 65.

[18] Scott Prasser, John Nethercote and Nicholas Aroney, 'Upper Houses and the Problem of Elective Dictatorship' in Nicholas Aroney, John Nethercote and Scott Prasser (eds), *The Elective Dictatorship: The Upper House Solution* (University of Western Australia Press, 2008) 1, 2.

[19] Bede Harris, 'Appointments to the Bench: The Role of a Judicial Services Commission' (1993) 15(2) *Adelaide Law Review* 191; and Nuno Garoupa and Tom Ginsburg, 'Guarding the guardians: Judicial councils and judicial independence' (2009) 1 *American Journal of Comparative Law* 103. See also Rachel Davis and George Williams, 'Reform of the judicial appointments process: Gender and the bench of the high court of Australia' (2003) 27(3) *Melbourne University Law Review* 910; Kate Malleson, 'Diversity in the judiciary: The case for positive action' (2009) 36(3) *Journal of Law & Society* 376; Simon Evans and John Williams, 'Appointing Australian judges: A new model' (2008) 30(2) *Sydney Law Review* 295; and Bede Harris, *A New Constitution for Australia* (Cavendish, 2002) 87.

> of marginalized groups.[20]

The reference to a public conversation about what we want legal identity to comprise (and implicitly what it means to 'be Australian') is pertinent because as the classical theorists noted the identity of citizen involves responsibilities rather than merely entitlements. That legal identity involves agency, the scope to rationally restructure the cage that was introduced in Chapter One. Colapietro comments that

> Postmodern discourse tends to obscure and even to deny human agency as an enduring form of personal presence in the kaleidoscopic engagements of situated subjects. In contrast, the pragmatic perspective offers the conceptual resources to discern just this aspect of our subjectivity.[21]

He goes on to remark that

> pragmatists take their stand with common sense and refuse to relinquish the self-as-agent, the subject as source of innovation and resistance. Their uncompromising recognition of the historically and institutionally embedded character of human subjectivity does not prompt them to reduce the subject to a screen upon which conflicts and contradictions are projected; rather, their own lived experience prompts them to insist upon seeing human selves as embodied and, thus, embedded agents. In this clear and commonsensical insistence, the American pragmatists differ markedly from the French postmodernists; and here is a difference that truly makes a difference.[22]

That remark is a reminder that theory has its uses and dangers. One is that identity theories risk becoming ideologies – an imperative articulation of transcendent truths that restrict freedoms – rather than tools for analysis as the basis for progressive law reform, a meliorism denied by theorists such as Mouffe, an exponent of an agonistic rather than deliberative democracy.[23] She claims that belief

> in the possibility of a cosmopolitan democracy with cosmopolitan citizens with the same rights and obligations, a constituency that would coincide with 'humanity' is a dangerous illusion. If such a project was ever realized, it could only signify the world hegemony of a dominant power that would have been able to impose its conception of the world on the entire planet and which, identifying its interests with those of humanity, would treat any

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[20] Marinus Ossewaarde, 'Calling Citizens to a Moral Way of Life: A Dutch Example of Moralized Politics' (2010) 4 *Human Affairs* 338, 339. Citations omitted.
[21] Vincent Colapietro, 'The Vanishing Subject of Contemporary Discourse: A Pragmatic Response' (1990) 87(11) *The Journal of Philosophy* 644, 644.
[22] Ibid, 654. See also Benjamin Gregg, 'Jurisprudence in an Indeterminate World: Pragmatist not Postmodern' (1998) 11(4) *Ratio Juris* 382.
[23] Chantal Mouffe, 'Deliberative Democracy or Agonistic Pluralism?' (1999) 66(3) *Social Research* 745, 754.

disagreement as an illegitimate challenge to its 'rational' leadership.[24]

Another danger is that the theories are grossly reductive, denying a range of experience and ignoring attributes that do not fit into the theorisation.

Recommendations

This dissertation embodies what – to adapt Joseph Furphy's description of 'Such Is Life' – is a temper democratic, bias dignitarian.[25] It reflects a concern to respect diversity and foster flourishing.

Like much writing with a theoretical bent it is a work of recovery, in this instance an acknowledgement of writing by figures such as Heller,[26] Pound,[27] Kirchheimer,[28] Aristotle, Rawls,[29] Nussbaum and the Stoics[30] who were wary of easy answers in offering recommendations about improving the human condition.

Given this dissertation's emphasis on practicality, are there any recommendations for public policymakers, managers and individuals? Do the preceding pages, for example, provide the basis for protocols regarding identity offences?

An initial recommendation in considering the construction of identity in Australian law is accordingly that we should be creative and positive in approach[31] but modest in expectations, being prepared to draw on insights from past and contemporary thinkers

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[24] Chantal Mouffe, *On The Political* (Routledge, 2005) 106.
[25] Furphy to J F Archibald, quoted in John Barnes, *The Order of Things: A Life of Joseph Furphy* (Oxford University Press, 1990) 249.
[26] Hermann Heller, 'The Nature and Structure of the State' (1996) 18(3) *Cardozo Law Review* 1139. See also Ellen Kennedy, 'Introduction to Hermann Heller' (1987) 16(1) *Economy and Society* 120; Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of the Weimar Constitution* (Duke University Press, 1997); and David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herman Heller in Weimar* (Oxford University Press, 1997).
[27] Roscoe Pound, *Interpretations of Legal History* (Cambridge University Press, 1923) and *An introduction to the philosophy of law* (Yale University Press, 1922).
[28] Otto Kirchheimer, 'Remarks on Carl Schmitt's Legality and Legitimacy' in William Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer* (University of California Press, 1996) 64.
[29] John Rawls, *A Theory of Justice* (Harvard University Press, rev ed, 2003).
[30] Most saliently Martha Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton University Press, rev ed, 2009).
[31] Note for example Brandeis's comment in *New State Ice Co. v. Liebmann* (1932) 285 US 262, at 311 that in the exercise of power 'we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold'. See further the discussion in Daniel Farber, 'Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century' (1995) *University of Illinois Law Review* 163.

outside the legal academy. We should embrace those that 'work', with criteria for what works reflecting both practicality and a commitment to fostering human flourishing rather than privileging bureaucratic convenience. We should encourage the 'bourgeois virtues' of mutual respect, compassion, temperance, prudence, empathy, imagination and self control espoused by Nussbaum and McCloskey. We should be prepared to learn from overseas and for example to amend statutes regarding the property of religious entities in order to address the liability problem highlighted in Chapter Seven above.

In looking at contemporary and future identity construction we should also beware of enchantment, recognising that ontological discontents are part of life. Heidegger sought to escape from the present, or from an overbearing sense of his own selfhood (a selfhood that he, like his irrationalist peer Schmitt, was happy to deny to people with a 'nonGerman' identity), by a flight into a mythical past where poetry and 'authenticity' on the basis of oneness with soil and a homogenous community somehow obviated the need for law and other 'technology'.[32] That flight is neither necessary or desirable. What some theorists have dubbed the Enlightenment Project both seeks to foster flourishing and frees us from the need for mystification involving an identity that is deemed to be exclusively authentic.

Many of the ills highlighted in the preceding pages are attributable to schemes for the perfection of man or the correction of society, schemes that abstracted people and disregarded autonomy. Seeing like a state does however offer benefits, notably the provision of social support services as rights rather than philanthropy – in other words as manifestations of a particular view of the identity of the liberal democratic state and its citizens.

A further recommendation is that policymakers should eschew grand theory. One conclusion is that Australian courts have already made that choice, given that there are few references to thinkers such as Mouffe and that the emphasis on practical outcomes guided by precedent means that much jurisprudence is a matter of pragmatism. A reader alert to characterisation of legal pragmatism as an 'anti-theory'

[32] See in particular Allan Megill, *Prophets of Extremity: Nietzsche, Heidegger, Foucault, Derrida* (University of California Press, 1987) 122-124, 126 and 135.

might correctly interpret this chapter as an anti-shopping list, in other words as concerned with broad principles rather than as prescriptive dot points or policy tick-boxes.

More substantively, Australia should establish a comprehensive and coherent justiciable Bill of Rights covering all human animals within Australia. Such a Bill might take the form outlined by Harris in *A New Constitution For Australia*,[33] noted in preceding chapters and justified as an effective mechanism for promotion of the flourishing of all Australians rather than merely those in an advantageous position at any one time. A Bill is a pragmatic response to tensions that are inherent in relationships between states, humans and other legal identities.

One reason for a Bill is to restrain the state, an entity that has a legal identity in its own right and that makes/breaks the legal (and thence social) identities of human animals, nonhuman animals and corporate entities within the particular jurisdiction. Legal pragmatism recognises that executives expand until they encounter substantive resistance and that, as demonstrated in the preceding chapters of this dissertation, states will in responding to populist anxieties or institutional opportunism on occasion act in ways that are contrary to the flourishing of citizens and non-citizens alike. A Bill serves to vivify public discourse by signalling that rights are fundamental – and a basis of the state's legitimacy – rather than discretionary.

A second reason is to foster flourishing by restraining groups from action that inhibits the self-realisation of minority groups and individuals and to require the state to give effect to rhetoric about support for that flourishing. The pragmatic tenor of High Court jurisprudence noted in preceding paragraphs suggests that concerns expressed by statutory rights critics are misplaced. That jurisprudence, for example in *Mabo*[34] and the *Communist Party Case*,[35] also suggests that an independent judiciary will on occasion advance the flourishing of the liberal democratic state and communities whose members have been fundamentally disadvantaged through a deleterious legal identity.

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[33] Bede Harris, *A New Constitution for Australia* (Cavendish, 2002).
[34] *Mabo and Others v. Queensland (No. 2)* (1992) 175 CLR 1.
[35] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

From a pragmatic perspective criticisms by figures such as Waldron are misplaced. Waldron for example argues that to entrench a right is to 'adopt a certain attitude towards one's fellow citizens ... best summed up as a combination of self-assurance and mistrust',[36] a mistrust contrary to respect for fellow citizens and embodying a view that

> any alternative conception that might be concocted by elected legislators next year or in tern years' time is so likely to be wrong-headed or ill-motivated that his own formulation is to be elevated immediately beyond the reach of ordinary legislative revision.[37]

The preceding chapters, in discussing both the shape of deleterious legal identities and the flourishing fostered through a rights-based program of law reform, demonstrate that such a mistrust is a matter of realism. It is indeed appropriate to elevate protection of rights beyond the reach of the political passions or opportunism evident at any one time, recognising that rights potentially conflict and that proportionality is accordingly relevant.

Waldron dismisses acceptance of 'lurid images of popular irrationality and majority tyranny'[38] in suggesting that if the desire for constitutional entrenchment of rights

> is motivated by a predatory view of human nature and of what people will do to one another when let loose in the arena of democratic politics, it will be difficult to explain how or why people are to be viewed as essentially bearers of rights ... the attribution of rights to individuals is an act of faith in the agency and capacity for moral thinking of each of those individuals. Rights involve choices; and their exercise requires the agent to select which of a number of options he would like to realize in his life and in his dealings with others.[39]

He accordingly cautions against constitutional enshrinement of a comprehensive and justiciable Bill of Rights, with specific wording taking 'on a life of its own, becoming the obsessive catchphrase for expressing everything one might want to say about the right in question', fostering an inappropriate 'scholasticism' that is at odds with rights 'as principles of deep and pervasive concern'[40] and inhibiting fruitful discussion.[41]

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[36] Jeremy Waldron, 'Between Rights and Bills of Rights' in Jeremy Waldron, *Law and Disagreemen*t (Clarendon Press, 1999) 211, 221.
[37] Ibid, 222.
[38] Ibid, 223.
[39] Ibid, 222.
[40] Ibid, 220.

Entrenchment in his view disables the legislature 'from its normal functions of revision, reform and innovation in the law ... thus indirectly disabling the citizens' represented by that legislature.[42]

This dissertation has demonstrated that to promote flourishing there is a substantive benefit in 'disabling' both the state – as an agent for its citizens and as a generator of foundational legal identities – and individuals from dealing with people in ways that antithetical to those humans who are disadvantaged through for example ethnicity, age, religion, sexuality, nationality, gender or other attributes. Harris highlights both the practicality and need for a justiciable Bill that would embody the timeless nature of human rights and that would contribute to rather than stifling a community discourse about rights, responsibilities and (implicitly) identities, including discourse about the legitimacy and ends of the state as a key Australian legal identity.[43]

Civic virtues include public engagement, whether through express participation in governance at elections or through speech. In thinking about a Bill of Rights and about the self-management of individuals and corporations, for example through the codes of practice used by broadcasters, it would be useful to bear in mind both the principles of proportionality articulated in *McCloy*[44] and the exhortation by Stefan Collini, the historian of England's intellectual aristocracy –

> When engaged in public argument on matters of ethical or cultural importance, do not be so afraid of giving offence that you allow bad arguments to pass as though they were good ones, and do not allow your proper concern for the vulnerable and disadvantaged to exempt their beliefs and actions from that kind of rational scrutiny to which you realise, in principle, your own beliefs and actions must also be subjected.[45]

The justiciability is fundamental, addressing the problem of rights to which Governments merely pay lip-service when dealing with law that establishes deleterious identities, provides for preventive incarceration of offenders who have duly served their time, or under the rubric of averting terrorist and other harms erodes the dignity of citizens through disproportionate pervasive surveillance.

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[41] Ibid, 221.
[42] Ibid, 221.
[43] Bede Harris, *A New Constitution For Australia* (Cavendish, 2002) 7, 8
[44] *McCloy v New South Wales* [2015] HCA 34
[45] Stefan Collini, *That's Offensive: Criticism, Identity, Respect* (Seagull, 2010) 66.

Rights in the abstract are insufficient. We should, as noted above, enhance the autonomy of the third arm of government through appointment of judges by an independent judicial commission. As creatively, bearing in mind Brandeis' reminder to be brave and imaginative, we should ensure the autonomy and effectiveness of executive watchdogs such as the national Privacy Commissioner, the Auditor-General and the Australian Law Reform Commission. Those agencies should actively critique identity-related legislation and practice. They have however been crippled on a bipartisan basis, reflecting what Thornton dubbed the Neoliberal hegemony, through undue budget stringencies over the past 15 years.

We could go further and equip a public interest advocate with both the charter and resources to facilitate private citizens undertaking public interest litigation. This dissertation has noted that some entities are both exceptionally vulnerable and in a disadvantageous position regarding self-representation. In addressing that vulnerability we could send a strong message about the nature of Australia's legal identity – national values, national institutions – by constitutionally enshrining three advocates: those dealing with children, the aged and the environment.[46]

Legal identities in the past have been systemically reconstructed through acts of violence such as beheading and the destruction of archives. That is not necessary in Australia and is contrary to the respect for the dignity of people whose heads end up in baskets. We should however finalise the slow and episodic project of patriation. Given the symbolic and substantive significance of the monarchy for the Australian legal identity it is time to remove the hereditary monarchy that was discussed in Chapters Three and Five, with the new head of state having clearly defined powers and responsibilities.[47]

[46] The advocates would have a more substantive budget and a charter that encompasses litigation, thus differing from the National Children's Commissioner established under the *Australian Human Rights Commission Amendment (National Children's Commissioner) Act 2012* (Cth), an entity on par with the Freedoms Commissioner within the Australian Human Rights Commission. See further Elisa Arcioni and Adrienne Stone, 'Australian Constitutional Culture and the Social Role of the Constitution' (Sydney Law School Research Paper 16/01) (2016).

[47] Michael Crommelin, 'Powers of the Head of State' (2015) 38(3) *Melbourne University Law Review* 1117.

At the same time we should acknowledge our past, a history that contrary to claims by advocates and critics in the 'black armband' discourse,[48] has been of mixed benefit for Indigenous people.[49] As a nation we can articulate historic wrongs; one way of doing that is move on from the Keating and Rudd apologies to particular groups and therefore incorporate reference to Australia's first peoples in the Constitution.

W G Runciman in discussing the *Communist Manifesto* refers to the

> commonplace that there is no master narrative of human history or final goal towards which it is leading but rather a continuous, path-dependent, open-ended sequence of changes which are explicable only in hindsight.[50]

Adoption of a postmodern scepticism about metanarratives does not preclude action.

Acknowledgement of historic wrongs and apology for the historic construction of deleterious legal identities is useful. It is unlikely that there will be strong support for financial reparation for identity-based wrongs committed by the state or with its complaisance.[51] Apology is problematical, given the remoteness of some harms. It is however relevant as an expression by the state of the community's regret for public and private action that involved harm: an acknowledgement that there was a wrong and a point of reference for public discourse to ensure that such wrongs do not occur in future.[52]

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[48] Geoffrey Blainey, 'Drawing up a Balance Sheet of Our History' (1993) 37(7-8) *Quadrant* 10; Mark McKenna, 'The Black Armbandwagon' (1997) 7(7) *Eureka* Street 17; Anna Clark, 'History in black and white: A critical analysis of the black armband debate' (2002) 26(75) *Journal of Australian Studies* 1; and Patrick Brantlinger, '"Black Armband" versus "White Blindfold" History in Australia' (2005) 46(4) *Victorian Studies* 655.

[49] The suffering associated with colonisation is not denied or diminished by an acknowledgement that from a Rawlsian perspective some identities within traditional societies were substantively disadvantaged. We should not valorise 'authenticity' over the violence and subjection experienced by some cohorts; to do so enshrines an essentialist and ahistorical identity of the 'noble savage'.

[50] W G Runciman, *Great Books, Bad Arguments: The Republic, Leviathan and the Communist Manifesto* (Princeton University Press, 2010) 97.

[51] For overseas perspectives see Mari Matsuda, 'Looking to the bottom: Critical legal studies and reparations' (1987) 22(2) *Harvard Civil Rights - Civil Liberties Law Review* 323; Alfred Brophy, 'The Case for Reparations for Slavery in the Caribbean' (2014) 35(1) *Slavery & Abolition* 165; Catherine Iorns Magallanes, 'Reparations for Maori Grievances in Aotearoa New Zealand' in Federico Lenzerini (ed), *Reparations For Indigenous Peoples* (Oxford University Press, 2008) 523; Thomas Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples' (2014) 25(1) *Duke Journal of Comparative & International Law* 1; and David Jobbins, 'Has the Commonwealth a Role to Play in the Row over Reparations for the Slave Trade?' (2014) 103(3) *The Round Table* 343.

[52] John Torpey, *Making Whole What Has Been Smashed: On Reparation Politics* (Harvard University Press, 2006); Mark Gibney (ed), *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, 2008); Jennifer Lind, *Sorry States: Apologies in International Politics* (Cornell University Press, 2010); Melissa Nobles, *The Politics of Official Apologies* (Cambridge University Press, 2008); and Johanna Sköld and Shurlee Swain (eds), *Apologies and the Legacy of Abuse of Children in 'Care': International Perspectives* (Palgrave Macmillan, 2015). More broadly, Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Norton, 2000); Brian Weiner, *Sins Of The Parents: Politics Of National Apologies In The United States* (Temple University Press, 2009); Danielle Celermajer; *The Sins Of The Nation And The Ritual Of Apologies* (Cambridge University Press, 2009); Elazar Barkan and Alexander Karn (eds), *Taking Wrongs Seriously: Apologies and*

A theme running throughout this dissertation and, it is claimed, through the life of all societies that respect individual flourishing and the pursuit of personal goods, is agency. Disadvantages relating to health, education and poverty reduce opportunities for flourishing and thence for the wellbeing of societies as collectives. Contrary to the statement attributed to Margaret Thatcher, there *is* such a thing as society or community, a collective that is made by law through the identity-shaping law discussed in the preceding pages.[53] The liberal democratic state, as an entity that reallocates resources, does have a role to play in facilitating flourishing by fostering opportunity. That role involves provision of income support and services rather than merely formal antidiscrimination legislation and equal opportunity employment (aka affirmative action) programs in the public and private sectors. It gives effect to the notion of justice as fairness rather than formality.

More broadly, as a legal system we should be conscious of the scope for relieving deleterious social identities and for respecting diversity. Law reform may achieve a post-identity society for some people. Recognition of gay marriage, for example, ends a civil disability and is potentially a step towards ending the legal identity of gay person, in other words moving to a 'post-gay society' in which a same-sex affinity is freed from social stigma and legal disability.[54] In 2016 Canadian Prime Minister Justin Trudeau asserted

> There is no core identity, no mainstream in Canada. There are shared values – openness, respect, compassion, willingness to work hard, to be there for each other, to search for equality and justice. Those qualities are what make us the first postnational state.[55]

An earlier paragraph noted Mouffe's scepticism about a Kantian cosmopolitan citizenship and deliberative democracy, which she sees as a facade for capital. One recommendation of this dissertation is that in thinking about legal identity we should

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Reconciliation (Stanford University Press, 2006); and Robert E Goodin, *On Settling* (Princeton University Press, 2012) 23.

[53] Thatcher 1987 interview quoted in Mary Abbott, *Family Affairs: A History of the Family in 20th Century England* (Routledge, 2003) 146.

[54] Among the vexed literature on a 'post-gay' identity – in terms of legal identity a future non-identity – see Eve Ng, 'A "Post-Gay" Era? Media Gaystreaming, Homonormativity, and the Politics of LGBT Integration' (2013) 6(2) *Communication, Culture & Critique* 258; and Ralph Smith, 'Queer theory, gay movements, and political communication' (2003) 45(2-4) *Journal of Homosexuality* 345.

[55] Guy Lawson, 'Trudeau's Canada, Again' *New York Times Sunday Magazine* (New York) 13 December 2015, MM88.

be unafraid to engage with – and to 'own' – the state rather than merely own ourselves. Charles Taylor commented that

> We need patriotism as well as cosmopolitanism because modern democratic states are extremely exigent common enterprises in self-rule.[56]

As a corollary Nussbaum noted that

> The Stoics stress that to be a citizen of the world one does not need to give up local identifications, which can be a source of great richness in life. They suggest that we think of ourselves not as devoid of local affiliations, but as surrounded by a series of concentric circles. The first one encircles the self, the next takes in the immediate family, then follows the extended family, then, in order, neighbours or local groups, fellow city-dwellers, and fellow country-men – and we can easily add to this list groupings based on ethnic, linguistic, historical, professional, gender or sexual identities.[57]

Her reference to relationships and generosity is pertinent in an environment where many people appear to construe relationships and responsibilities in terms of exclusion of people who lack the foundational identity of citizen and thereby disregard our common dignity as human animals.

Law dissertations are typically about what 'others': what other people have got wrong and what other people should do. This dissertation concludes by suggesting that we adopt a somewhat different stance and consider our own identity as people in a privileged position that is attributable to a familiarity with the literature and legal ways of thinking.

We should, consistent with the classical philosophers noted in this dissertation, adopt an ethic of responsibility in our own writing. Schmitt unrepentantly claimed in 1947 that

> The deed for which I am being held responsible ... is essentially the publication of scholarly opinions which have led to many fruitful discussions.[58]

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[56] Charles Taylor, 'Why Democracy Needs Patriotism' in Martha Nussbaum (ed), *For Love Of Country?* (Beacon Press, 1996) 119, 120.
[57] Martha Nussbaum, 'Patriotism and Cosmopolitanism' in Nussbaum (ed), *For Love Of Country?* (Beacon Press, 1996) 3, 9.
[58] Carl Schmitt (interrogation, 1947) quoted in Yvonne Sherratt, *Hitler's Philosophers* (Yale University Press, 2013) 242.

Preceding chapters have suggested that those 'fruitful discussions' resulted in and legitimised the construction of legal identities that we should avoid. The discussions had consequences, one of which was the devastation of much of Europe – a reversion to the horrors of the Thirty Years War – and another of which was genocide on the basis of ethno-religious identities under the rubric of protecting the identity of the German people.

The final recommendation is accordingly that we should write, and act, as if people matter and law is more than an occasion for cleverness in an academic seminar. Richard Rorty condemned some of his contemporaries for writing 'as if there were nothing but texts'[59] and for writing that is 'unconnected from reality'.[60] It behoves us to recognise that words and identities have consequences, to critique Epictetus' injunction to identify illusions and to act accordingly.[61]

This dissertation has been about arguments regarding values, terms and practice. As such it acknowledges Nussbaum's recognition that 'argument shapes – and, eventually, is – a self, and is the self's way of fulfilling its role as a citizen of the universe'.[62]

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[59] Richard Rorty, 'Nineteenth-Century Idealism and Twentieth-Century Textualism' in Rorty, *Consequences of Pragmatism: Essays, 1972-1980* (University of Minnesota Press, 1982) 139, 139. Put simply, given its consequences law is more than a matter of aesthetics.
[60] Ibid, 140.
[61] Epictetus, 'Handbook' in *Discourses, Fragments, Handbook* (Robin Hard trans, Oxford University Press, 2014) 286, 286.
[62] Martha Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton University Press, rev ed, 2009) 354.

Appendix: Critiquing Identity Theory

Our sense of significance is shaped by law's impact on us as individuals, for example whether we are affected by civil disabilities such as restrictions on marriage, enjoy capabilities because we are adult citizens, experience mechanisms such as identity cards as part of pervasive welfare and security systems under contemporary law, or perceive that society – via the law – regards some of us as unworthy.

Perceptions of significance and legitimacy are also affected by legal theorists, some of whose work is contested in the preceding chapters. Keynes famously quipped that 'practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist'.[63] In thinking about identities and the law we might question our preconceptions, for example liberal democratic values of possessive individualism that might not be shared by jurists in past centuries or anti-liberal theorists such as Carl Schmitt and Karl Marx and epigones in our own era.[64] Richard Bernstein for example commented in 2011 that

> 'the so-called Schmitt renaissance' has turned into a virtual tsunami. Schmitt's work is actively and passionately discussed throughout the world. He has been hailed as the most incisive, relevant, and controversial political and legal theorist of the twentieth century – and the enthusiasm for Schmitt is shared by thinkers across the political spectrum from the extreme left to the extreme right.[65]

This dissertation does not embrace that enthusiasm. Schmitt and Marx and epigones such as Pashukanis offered an identity-based and teleological critique of law: one eschatological based on the identity of the working class heading episodically but inevitably to a millennium in which identity would be erased in a global classless

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[63] John Maynard Keynes, Elizabeth Johnson and Donald Moggridge (eds), *The General Theory of Employment, Interest and Money (The Collected Writings of John Maynard Keynes, vol 7)* (Cambridge University Press, 2012) 383.

[64] Heller's and Kirchheimer's 1933 analysis of the Schmitt's misreading of liberal democracy remains of value and is derserving of greater recognition. See Otto Kirchheimer, 'Remarks on Carl Schmitt's Legality and Legitimacy' in William Scheuerman (ed), *The Rule of Law Under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer* (University of California Press, 1996) 64, 66; Hermann Heller, 'The Nature and Structure of the State' (1996) 18(3) *Cardozo Law Review* 1139, 1147; complemented by Clement Fatovic, *Outside the Law: Emergency and Executive Power* (Johns Hopkins University Press, 2009); and Catherine Zuckert and Michael Zuckert, *The Truth About Leo Strauss: Political Philosophy and American Democracy* (University of Chicago Press, 2006) 187-193. A thoughtful defence of Schmitt is provided in Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Duke University Press, 2004).

[65] Richard Bernstein, 'The Aporias of Carl Schmitt' (2011) 18(3) *Constellations* 403, 403.

utopia, the other decisionist based on the *volk* or a theologised view of the state as an entity above law in an existential struggle against anyone who lacks the preferred identity.[66]

Both are quite determinist; both view law as a matter of violence[67] and legitimise violence against 'the other' and disregard of that other's law in achieving a millennium distinguished by the end of politics (and implicitly the end of identity).[68] Later chapters of this dissertation contest Schmitt's vision in particular, given that it contrary to the flourishing of those people who are outside the 'national community' because of ethno-religious affinity, non-citizenship or merely disagreement with authority.

We might also question the legal academy's reception of figures such as Michel Foucault, Slavoj Žižek,[69] Bernard Stiegler, Andrea Dworkin, Derrick Bell, Jacques Lacan and Giorgio Agamben. Is that reception attributable to fashion rather than deep insights?[70] Does it involve a teleology, with what is perceived as 'brilliant, original

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[66] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer trans, Duke University Press, 2008) [trans of *Verfassungslehre* (first published 1928)] 239 and 241. See also Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy* (Marcus Brainard trans, University of Chicago Press, 2nd ed, 2011) [trans of *Die Lehre Carl Schmitts: Vier Kapitel zur Unterscheidung Politischer Theologie und Politischer Philosophie* (first published 1994)] 47; and Hans Kelsen's critique discussed in Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of the Weimar Constitution* (Duke University Press, 1997) 115-116. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, University of Chicago Press, 2005) [trans of *Politische Theologie: Vier Kapitel zur Lehre von der Souveranitat* (first published 1922)] is noted below.

[67] An Australian who is living in public housing and is assaulted or dispossessed by a peer might disagree with Pashukanis's characterisation that 'criminal justice in the bourgeois state is organised class terror, which differs only in degree from the so-called emergency measures taken in civil war' and which justifies mass terror on the part of the revolutionary vanguard. Evgeny Pashukanis, *The General Theory of Law and Marxism* (Barbara Einhorn trans, Transaction, 2007) [trans of *Obshchaia teoriia prava i marksizm* (first published 1924)] 173. See also Dick Howard, *The Specter of Democracy: What Marx and Marxists Haven't Understood and Why* (Columbia University Press, 2012).

[68] Richard Wolin, 'Carl Schmitt: Political Existentialism and the Total State' (1990) 19(4) *Theory and Society* 389. See also Paul Hirst, 'Carl Schmitt – decisionism and politics' (1988) 17(2) *Economy and Society* 272; Joseph Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton University Press, 1983); Reinhard Mehring, *Carl Schmitt: A Biography* (Daniel Steuer trans, Polity Press, 2014) [trans of *Carl Schmitt: Aufstieg und Fall* (first published 2009)]; and Raphael Gross, *Carl Schmitt and the Jews: The 'Jewish Question', the Holocaust and German Legal Theory* (Joel Golb trans, University of Wisconsin Press, 2007) [trans of *Carl Schmitt und die Juden* (first published 2000)]. Schmitt's exclusionary 'us/them' binary is echoed in Chantal Mouffe, *On The Political* (Routledge, 2005) 15.

[69] See for example Todd McGowan, 'Serious Theory' (2007) 1(1) *International Journal of Žižek Studies* 58. Nick Sciullo, 'Žižek/Questions/Failing' (2011) 47(2) *Willamette Law Review* 287 characterises Žižek as 'a valuable contributor to critical theory and deserves a place in the pantheon of legal thinkers' (287) and states that 'Žižek's work is indispensible to legal analysis' (288). A more persuasive view is provided in Geoff Boucher, *The Charmed Circle of Ideology: A Critique of Laclau and Mouffe, Butler and Žižek* (Re-press, 2008); Adam Kirsch, 'The Deadly Jester' *The New Republic* 25 Nov 2008, 24; Mark Lilla, 'A New, Political Saint Paul?' (2008) 55(16) *New York Review of Books* 69; and Alan Johnson, 'Slavoj Žižek's Theory of Revolution: A Critique' (2011) 2(1) *Global Discourse* 135.

[70] Cass Sunstein, 'Forward: On Academic Fads and Fashions' (2001) 99(6) *Michigan Law Review* 1251; François Cusset, *French Theory: How Foucault, Derrida and Co. Transformed the Intellectual Life of the United States*

and relevant' because it is postmodern[71] superseding what are deemed to be Enlightenment concerns such as dignity?[72] From the perspective of legal pragmatism are its insights and provocations, sometimes original, offset by what Ramazanoğlu condemned as 'intellectual elitism and a level of abstraction from experience'.[73]

Such questioning is relevant, from the perspective of pragmatism, because legal theorists – rather than Shelley's philosophers and poets – are on occasion the unacknowledged legislators of the world,[74] authorities who provide languages with which we construe identities and the law.

Kennedy commented that

> In contemporary legal theory, policy is always a potential Trojan horse for ideology … One way to interpret the proliferation, after about 1970, of "schools" of legal theory is as a Weberian phenomenon of sectarianism in the face of the irreducible ethical irrationality of legal judgment. Thus, revived natural law, human rights, law and economics, Habermasian speech act theory, Dworkinian rights theory, libertarian legal theory, feminist legal theory, critical race theory, and, last but by no means least in this list, critical legal studies, would represent responses to the core dilemma, whether it is called "democracy deficit," "countermajoritarian difficulty," "judicial paternalism," "result orientation," "activism," or whatever.[75]

This dissertation is relevant because identity is central to that of a range of contemporary writers, in other words people who either explicitly offer a legal philosophy or whose work has been adopted by legal scholars as the basis for a legal philosophy. The writers may offer a comprehensive view of social and therefore legal relationships or might instead construe what is significant in relationships through a lens of disability.

(University of Minnesota Press, 2008); Marc Redfield, *Theory at Yale: The Strange Case of Deconstruction in America* (Fordham University Press, 2015) 5-6; and Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Duke University Press, 2004) 184-185.

[71] Terry Eagleton, *The Illusions of Postmodernism* (Blackwell, 1996) 43.

[72] Martha Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Harvard University Press, 1997) 77.

[73] Caroline Ramazanoğlu, 'Introduction' in Caroline Ramazanoğlu (ed), *Up against Foucault: explorations of some tensions between Foucault and feminism* (Routledge, 1993) 1, 1.

[74] Percy Bysshe Shelley, TW Rolleston (ed), *A Philosophical View of Reform – Now Printed For The First Time* (Oxford University Press, 1920) 30.

[75] Duncan Kennedy, 'The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought' (2004) 55 *Hastings Law Journal* 1031, 1076.

In thinking about law we can regard those writers as identity theorists. The following chapters engage with that theorisation. They for example highlight the extent to which it is both reductive and on occasion antithetical to the emphasis on flourishing that informs this dissertation, in particular because a deterministic identity hermeneutic potentially results in a self-conceptualisation as a victim and thereby inhibits the personal and collective agency that fosters law reform.

Dogan, in writing about identity and 'the individual' recently commented

> Due to the dualism of the individual's life, namely, the dualism of life within civil society and the life of politics, and more importantly the dualism of private individual life and species-life, the individual is not able to realize what the truth is. The individual is not able to realize themselves neither in their individual life nor in their species-life. The reason is that both life in civil society and political life are unreal and illusory, and therefore the individual is an imaginary and illusory being as well.[76]

Given the emphasis on measures that facilitate flourishing the chapters in this dissertation suggest that engagement with the practice of law is productive and that law academics in particular should be wary about 'retreat into theory' at the expense of substantive action.[77]

Identifying the Identity Theorists

Who are these identity theorists? They are people who typically have not been grouped together on the basis of the centrality of identity to their thinking.

They are all concerned with the relationship of the state to the individual, the individual to the community (or communities), and the excluded to the included or normative. They are concerned with power – soft or hard – and with legitimacy. They reflect a recognition that 'all law is political',[78] along with an often striking

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[76] Sevgi Dogan, 'The Problem of the Individual in the Modern State' (paper presented at Telos in Europe: The L'Aquila Conference, September 2012) at http://www.telospress.com/the-problem-of-the-individual-in-the-modern-state/.

[77] For views from the left on poststructuralism as escapism see Christopher Norris, *What's Wrong With Postmodernism: Critical Theory and the Ends of Philosophy* (Harvester Wheatsheaf, 1990) 25; and Alex Callinicos, *Against Postmodernism: A Marxist Critique* (Polity Press, 1989) 170.

[78] Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 *Southern California Law Review* 1307, 1344; Michael Freeman, 'Putting Law in its Place: An interdisciplinary evaluation of national amnesty laws' in Saladin Meckled-Garçia and Basak Çali (eds), *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routledge, 2006) 45, 48.

disagreement about the ends and means of that law[79] or with a failure to recognise that law offers scope for liberation and is thus not necessarily repressive.[80]

In some instances, such as Guha, Spivak[81] and Bhabha[82] or Butler[83] and MacKinnon,[84] it is difficult not to draw the conclusion that identity is what matters most to them, albeit their conceptualisation of identity and thence of law reform privileges some identities and elides others.[85]

For others law is a process in which power disciplines through disadvantaged identities and knowledge – along with the state – is necessarily repressive (for example Foucault),[86] something from which we should escape because it is a

[79] From the perspective of philosophers such as Nussbaum and Rawls we can condemn some of the theorisation about ends and/or means and substantive legal systems on the basis of firstly inconsistency and secondly the failure to recognise and foster human dignity and individual flourishing, criteria used in the following chapters.
[80] See for example the critique in Leila Brännström, 'How I learned to stop worrying and use the legal argument: A critique of Giorgio Agamben's conception of law' (2008) 5 *No Foundations: An Interdisciplinary Journal of Law & Justice* 22.
[81] Gayatri Chakravorty Spivak, 'Can the Subaltern Speak' in Cary Nelson and Larry Grossberg (eds), *Marxism & the Interpretation of Culture* (University of Illinois Press, 1988) 271. See also Roi Wagner, 'Silence as Resistance before the Subject, or Could the Subaltern Remain Silent?' (2012) 29(6) *Theory, Culture & Society* 99.
[82] Homi Bhabha, *The Location of Culture* (Routledge, 2nd ed, 2004) and 'Liberalism's Sacred Cow', in Joshua Okin, Matthew Howard and Martha Nussbaum (eds), *Is Multiculturalism Bad For Women?* (Princeton University Press, 1999) 79. For a use of Bhabha see Rosemary Coombe, 'Sports Trademarks and Somatic Politics: Locating the Law in Critical Legal Studies' in Lisa Bower and David Goldberg (eds), *Between Law and Culture: Relocating Legal Studies* (University of Minnesota Press, 2001) 22. See also the criticisms in Jeannine Purdy, 'Postcolonialism: the Emperor's New Clothes?' (1996) 5(3) *Social & Legal Studies* 405; and Benita Parry, *Postcolonial Studies: A Materialist Critique* (Routledge, 2004) 26.
[83] Judith Butler, *Undoing Gender* (Routledge, 2004); *Bodies That Matter: On the Discursive Limits of Sex* (Routledge, 1992); *Excitable Speech: Contemporary Scenes of Politics – A Politics of the Performative* (Routledge, 1997); and *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990). Other representative work by Butler features in Judith Butler, Sara Salih (ed), *The Judith Butler Reader* (Blackwell, 2004). Specific works are discussed in more detail in the body of this dissertation. For negative evaluations of Butler see Geoff Boucher, 'The Politics of Performativity: A Critique of Judith Butler' (2006) 1 *Parrhesia* 112 and Martha Nussbaum, 'The Professor of Parody' in Martha Nussbaum, *Philosophical Interventions: Reviews 1986-2011* (Oxford University Press, 2012) 195. There is a defence in Moya Lloyd, *Judith Butler: from norms to politics* (Polity, 2007). For applications of Butler see David Halperin, *How To Be Gay* (Harvard University Press, 2012) 199, critiqued in Adam Mars-Jones, 'Speak For Yourself, Matey' (2012) 34(22) *London Review of Books* 25, and Mary Bunch, 'The unbecoming subject of sex: Performativity, interpellation, and the politics of queer theory' (2013) 14(1) *Feminist Theory* 39.
[84] Catherine MacKinnon, 'Towards Feminist Jurisprudence' (1982) 34 *Stanford Law Review* 703; *Towards a Feminist Theory of the State* (Harvard University Press, 1989) and *Women's Lives, Men's Laws* (Belknap Press, 2005). Among critiques of MacKinnon see Wendy Brown, *States of Injury: Power and Freedom in late Modernity* (Princeton University Press, 1995) 77-95; Kate Phelan, 'Is Feminism Yet a Theory of the Kind That Marxism Is?' (2017) 3(1) *Feminist Philosophy Quarterly* np; and Judith Baer, *Our Lives Before the Law: Constructing a Feminist Jurisprudence* (Princeton University Press, 1999) 59. Feminists Nadine Strossen, *Defending Pornography: Free Speech, Sex and the fight for Women's Rights* (New York University Press, 2000) 111, 196 and 271; and Marilyn Friedman, *Autonomy, Gender, Politics* (Oxford University Press, 2003) 140-162 are particularly critical of Butler's essentialism as denying agency. See also Ronald Dworkin, 'Women and Pornography' (1993) 40(17) *New York Review of Books* 36; Martha Nussbaum, 'Objectification' (1995) 24(4) *Philosophy & Public Affairs* 249; and the polemical Katie Roiphe, *The Morning After: Sex, Fear and Feminism* (Hamish Hamilton, 1993).
[85] See for example Martha Mahoney, 'Whiteness and Women, In Practice and Theory: A Response to Judith Butler' (1993) 5 *Yale Journal of Law and Feminism* 217.
[86] There is a spirited defence of Foucault in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009); see also Richard Rorty, 'Moral Identity and Private Autonomy: The Case of Foucault', in his *Essays on Heidegger*

'technology' and thus inauthentic,[87] or is something that should be negated through a throwing-off of the order that is inherent in stable identities and institutions. Lyotard,[88] for example characterises law as crime,[89] relies on epiphanic events[90] after the end of history[91] and asserts that his vision is outside rationalist critique.[92]

Most of the theorists are preoccupied with 'difference'.[93] Few acknowledge the benefits that might flow from identification in and recognition of the legitimacy of the liberal democratic state, as discussed in Chapter Eleven below.

Some of the theorists conceptualise disability; in essence law is a matter of the institutionalisation of victimisation on the basis of ethnicity, gender, labour, sexual or other affinity. Spivak and other exponents of subaltern theory emphasise the injury done by colonialism, resulting in the 'subaltern who cannot speak'.[94] Spivak's writing illustrates questions about identity theory because as a member of what Gramsci dubbed the New Class she may speak for and about the silent subaltern.[95] Her peer

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and Others (Cambridge University Press, 1991) 193; Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law As Governance* (Pluto Press, 1994); Pascal Engel, 'The decline and fall of French Nietzscheo-structuralism' in Barry Smith (ed), *European philosophy and the american academy* (Hegeler Institute, 1994) 21, 29; and Charles Taylor, 'Foucault on Freedom and Truth' (1984) 12(2) *Political Theory* 152.

[87] For Heidegger see Allan Megill, *Prophets of Extremity: Nietzsche, Heidegger, Foucault, Derrida* (University of California Press, 1987); Panu Minkkinen, 'Right things: On the question of being and law' (2000) 7(1) *Law and Critique* 65; and Ingrid Scheibler, 'Gadamer, Heidegger, and the Social Dimensions of Language' (2000) 76(2) *Chicago-Kent Law Review* 853.

[88] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trans, University of Minnesota Press, 1984) [trans of *La situation postmoderne: rapport sur le savoir* (first published 1983)]. Criticisms of Lyotard's epistemology from inside and outside the legal academy include Robert Nola and Gürol Irzik, 'Incredulity Towards Lyotard: A Critique of a Postmodernist account of Science and Knowledge' (2003) 34(2) *Studies in History & Philosophy of Science* 391; and Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of the Law* (Routledge, 1993). See also Bronwyn Statham, 'Postmodern Jurisprudence: Contesting Genres' (2008) 19(2) *Law & Critique* 139; Gary Browning, 'Lyotard and Hegel: what is wrong with modernity and what is right with the philosophy of right' (2003) 29(2) *History of European Ideas* 223; and Betsy Baker, 'Constructing Justice: Theories of the Subject in Law and Literature' (1990) 75 *Minnesota Law Review* 581.

[89] Jean-François Lyotard, *The Differend: Phrases in Dispute* (George van den Abbeele trans, University of Minnesota Press, 1988) [trans of *Le Differend* (first published 1983)] 8.

[90] Jean-François Lyotard, *The Differend: Phrases in Dispute* (George van den Abbeele trans, University of Minnesota Press, 1988) [trans of *Le Differend* (first published 1983)] 9 and 13.

[91] Jean-François Lyotard, 'Heidegger and 'the jews'' in *Political Writings* (Bill Readings and Kevin Geiman trans, University of Minnesota Press, 1993) [trans of 'Apropos de Heidegger et 'les juifs' (first published 1988)] 135, 141.

[92] Jean-François Lyotard, *The Differend: Phrases in Dispute* (George van den Abbeele trans, University of Minnesota Press, 1988) [trans of *Le Differend* (first published 1983)] 7.

[93] See for example Jean-François Lyotard, *The Differend: Phrases in Dispute* (George van den Abbeele trans, University of Minnesota Press, 1988) [trans of *Le Differend* (first published 1983)]; and Rod Edmond, 'Much Ado about Difference' (1994) 72 *Radical Philosophy* 38.

[94] Among critiques see Vivek Chibber, *Postcolonial Theory and the Specter of Capital* (Verso, 2013); and Nivedit Majumdar, 'Silencing the Subaltern Resistance and Gender in Postcolonial Theory' (2017) 1(1) *Catalyst* np.

[95] Parry condemns Spivak's 'deliberated deafness to the native voice where it is to be heard' and whose 'disparaging of nationalist discourses of resistance is matched by the exorbitation of the role allotted to the postcolonial woman intellectual, for it is she who must plot a story, unravel a narrative and give the subaltern a

Ranajit Guha more problematically appears to believe that *only* the subaltern can legitimately speak about subalternity, a stance that implicitly denies legal agency to the oppressed.[96]

Butler broadly conceptualises people as prisoners of 'performativity', as does Irigaray, identities that are universal and inescapable but susceptible to parody. Nussbaum cogently debunks Butler's quietism, commenting that

> Parodic performance is not so bad when you are powerful tenured academic in a liberal university. But here is where Butler's focus on the symbolic, her proud neglect of the material side of life, becomes a fatal blindness. For women who are hungry, illiterate, disenfranchised, beaten, raped, it is not sexy or liberating to reenact, however parodically, the conditions of hunger, illiteracy, disenfranchisement, beating and rape. Such women prefer food, schools, votes and the integrity of their bodies. … [W]hen a major theorist tells women in desperate conditions that life offers them only bondage, she purveys a cruel lie, and a lie that flatters evil by giving it much more power than it actually has.[97]

MacKinnon, along with Andrea Dworkin,[98] is more reductive, conceptualising law as an embodiment of an oppressive masculinity and at her most polemical offers what the author of this dissertation considers to be a problematical conflation of speech with physical assault. Derrida,[99] Rancière[100] and Lacan[101] invite us to throw off the

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voice in history'. Benita Parry, *Postcolonial Studies: A Materialist Critique* (Routledge, 2004) 23 and 20 respectively.

[96] Among works on authority in representation see Jane Harrison, *Who can play Aboriginal Roles?* (Currency House, 2012). Respect rather than ethnic sorting offers a more persuasive basis for casting.

[97] Martha Nussbaum, 'The Professor of Parody' in Martha Nussbaum, *Philosophical Interventions: Reviews 1986-2011* (Oxford University Press, 2012) 211. Note comments by Spivak, Cornell and others at 216-220 of that volume.

[98] Andrea Dworkin, *Intercourse* (Basic Books, new ed, 2006) and 'Against the male flood: Censorship, pornography, and equality' (1985) 8 *Harvard Women's Law Journal* 1.

[99] Jacques Derrida, 'The Force of Law: The Mystical Foundation of Authority' (1990) 11 *Cardozo Law Review* 920 and *The Beast and the Sovereign: 1* (Geoffrey Bennington trans, University of Chicago Press, 2009) [trans of *Séminaire La bête et le souverain 1* (first published 2008)]. For defences of Derrida see Adam Thurschwell, 'Cutting the Branches for Akiba: Agamben's Critique of Derrida' in Andrew Norris (ed), *Politics, Metaphysics and Death: Essays on Giorgio Agamben's Homo Sacer* (Duke University Press, 2005) 173; Peter Goodrich, 'Introduction: Un Cygne Noir' (2005) 27 *Cardozo Law Review* 534; Jack Balkin, 'Deconstructive Practice and Legal Theory' (1987) 96 *Yale Law Journal* 743; Catherine Zuckert and Michael Zuckert, *The Truth About Leo Strauss: Political Philosophy and American Democracy* (University of Chicago Press, 2006) 102-111; and Drucilla Cornell, 'The Thinker of the Future – Introduction to The Violence of the Masquerade: Law Dressed Up as Justice' (2005) 6(1) *German Law Journal* 125. Criticisms include Jürgen Habermas, 'Excursus on leveling the genre between philosophy and literature' in his *The Philosophical Discourse of Modernity: Twelve Lectures* (Frederick Lawrence trans, Polity Press, 1987) [trans of *Der Philosophische Diskurs der Moderne* (first published 1987)] 185; Mark Lilla, 'The Politics of Jacques Derrida' (1998) 45(11) *New York Review of Books* 36, Alan Sokal and Jean Bricmont, *Intellectual Impostures* (Profile, 1999); and The Editors of Lingua Franca, *The Sokal Hoax: The Sham That Shook The Academy* (University of Nebraska Press, 2000).

[100] Salient works include Jacques Rancière, 'Politics, identification and subjectivization', in John Rajchman (ed), *The Identity in Question* (Routledge, 1995) 63; 'Politics, Identification, and Subjectivization' (1992) 61 *October* 58; and 'Ten Theses on Politics' (2001) 5(3) *Theory & Event* 1. See also Andrew Schaap, 'Enacting the Right to

masks, although their language (particularly in translation)[102] means that it is difficult to discern what those thinkers consider is underneath the mask and how law would operate once people are freed. Their denunciation of a totalising 'metatheory', like that of Lyotard,[103] is at odds with their own grand theory of negation.

Schmitt[104] and Bell[105] emphasise power and ethnicity, with a dialectic between enforced exclusion (legitimised in the case of Schmitt by *dezisionismus,* in other words power)[106] and belonging founded on essentialist ethnic identities. From a liberal democratic perspective much Critical Race Theory resembles a mirror image of racist theories in pre-1945 Japan, France, German and Hungary. Posner commented that

> What is most arresting about critical race theory is that ... it turns its back on the Western tradition of rational inquiry, forswearing analysis for narrative. Rather than marshal logical arguments and empirical data, critical race theorists tell stories — fictional, science-fictional, quasi-fictional, autobiographical, anecdotal — designed to expose the pervasive and debilitating racism of America today. By repudiating reasoned

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have Rights: Jacques Rancière's Critique of Hannah Arendt' (2011) 10(1) *European Journal of Political Theory* 22.

[101] For an application see Jean Schroeder, *The Four Lacanian Discourses, or Turning Law Inside Out* (Routledge, 2010). Critiques include David Caudill, *Lacan and the Subject of Law* (Humanity, 1997); Yannis Stavrakakis, *Lacan and the Political* (Routledge, 1999); Todd McGowan, *The End of Dissatisfaction? Jacques Lacan and the Emerging Society of Enjoyment* (State University of New York Press, 2003); Joan Copjec, *Read My Desire: Lacan Against the Historicists* (MIT Press, 1996); and Drucilla Cornell, 'Rethinking the Beyond of the Real' in Peter Goodrich and David Carlson (eds), *Law and the Postmodern Mind: essays on psychoanalysis and jurisprudence* (University of Michigan Press, 1998) 239.

[102] Foucault's characterisation of Derrida as an exponent of *obscurantisme terroriste* was noted earlier in this dissertation. Readers have on occasion been as unforgiving of infelicities in Foucault's writing, with Andrew Scull, *Social Order/Mental Disorder: Anglo-American Psychiatry in Historical Perspective* (University of California Press, 1989) 252 for example damning 'the idiosyncratic intellectual pyrotechnics of Michel Foucault who attempts a peculiar marriage of history and French structuralism in a style evocative of James Joyce at his most obscure'.

[103] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trans, University of Minnesota Press, 1984) [trans of *La situation postmoderne: rapport sur le savoir* (first published 1983)] xxiv.

[104] Carl Schmitt, *The Concept of the Political* (George Schwab trans, University of Chicago Press, 1997) [trans of *Der Begriff des Politischen* (first published 1932)]. See also the quotations in Mark Lilla, *The Restless Mind: Intellectuals in Politics* (New York Review Books, 2001) 51 and 53. For critiques see Peter Caldwell, 'Controversies over Carl Schmitt: A Review of Recent Literature' (2005) 77 *Journal of Modern History* 357; John McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge University Press, 1997); David Dyzenhaus, 'Introduction: Why Carl Schmitt?' in David Dyzenhaus (ed), *Law As Politics: Carl Schmitt's Critique of Liberalism* (Duke University Press, 1998) 1; Richard Wolin, 'Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror' (1992) 20(3) *Political Theory* 424; and William Scheuerman, *Carl Schmitt: the end of law* (Rowman & Littlefield, 1999).

[105] Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books, 1992) 109-126. See also the essentialist claims in Aileen Moreton-Robinson, *Talkin' Up To The White Woman: Indigenous Women and Feminism* (University of Queensland Press, 2000) and 'Whiteness, Epistemology and Indigenous Representation' in Aileen Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 75; and Nancy Leong, 'Racial Capitalism' (2013) 126 *Harvard Law Review* 2152.

[106] Carl Schmitt, *The Crisis of Parliamentary Democracy* (Ellen Kennedy trans, The MIT Press, 1985) [trans of *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (first published 1923)] 71, 81.

> argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites.[107]

What of the Left? After the demise of the USSR – a regime in which opportunities were often fundamentally determined by class origin (in other words a particular social and legal identity) – Judt commented that Western intellectuals could think of themselves as 'overtaking communism on the left'. By 'rediscovering … a whole new vocabulary' and thus new identities for analysing law

> Marxism becomes a more diffuse language: accessible to students and serviceable for new substitute revolutionary categories – women, gays, students themselves and so on.[108]

Marxists such as Althusser,[109] Badiou[110] and Mouffe[111] emphasise systematic oppression by capital or the state and hegemonic determination of identities by the relationship with the means of production or, in an echo of Gramsci, by language.[112] Foucault and Agamben[113] emphasise institutional power and violence against

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[107] Richard Posner, 'The Skin Trade' (1997) 217(15) *The New Republic* 40.
[108] Tony Judt with Timothy Snyder, *Thinking The Twentieth Century* (Heinemann, 2012) 223-224.
[109] Louis Althusser, 'Ideology interpellates individuals as subjects', in *Lenin and Philosophy and other essays* (Ben Brewster trans, NLB, 1971) [trans of *Lenine et la philosophe* (first published 1969)] 170. See also Jon Elster, 'Marxism and Individualism' in Marcelo Dascal and Ora Gruengard (eds), *Knowledge and Politics* (Westview, 1989) 189; and Erik Wright, Andrew Levine and Eliott Sober, 'Marxism and Methodological Individualism' in Derek Matravers and Jon Pike (eds), *Debates in Contemporary Political Philosophy* (Routledge, 2003) 54.
[110] Alain Badiou, *The Communist Hypothesis* (David Macey and Steve Corcoran trans, Verso, 2010) [trans of *L'hypothese communiste* (first published 2009)]. Badiou's reconceptualisation of communism as a 'strategic hypothesis' towards elimination of the state, of politics (construed as inherently violent) and of differentiation on the basis of identities legitimises violence in the course of political reconstruction and tacitly disregards reduced flourishing of people caught in the crossfire or condemned because of their class identity as we head, apparently inevitably, to the socialist millennium. See also François Laruelle, *Anti-Badiou: On the Introduction of Maoism into Philosophy* (Robin Mackay trans, Bloomsbury, 2013) [trans of *Anti-Badiou: sur l'introduction du maoïsme dans la philosophie* (first published 2011)]; and Peter Osborne, 'Neo-Classic: Alain Badiou's *Being and Event*' (2007) 142 *Radical Philosophy* 19.
[111] Chantal Mouffe, 'Democratic Politics and the Question of Identity' in John Rajchman (ed), *The Identity in Question* (Routledge, 1995) 33; *On The Political* (Routledge, 2005); Chantal Mouffe, 'Carl Schmitt and the Paradox of Liberal Democracy' in Chantal Mouffe (ed), *The Challenge of Carl Schmitt* (Verso, 1999) 38; *Agonistics: Thinking The World Politically* (Verso, 2013); and Chantal Mouffe, 'Critique as Counter-Hegemonic Intervention' (2008) 4 *Transversal*, np. See also Radhika Desai, 'Fetishizing Phantoms: Carl Schmitt, Chantal Mouffe and 'The Political'' in Abbie Barkan and Eleanor MacDonald (eds), *Critical Political Studies: Debates & Dialogues From The Left* (McGill-Queens University Press, 2001) 387; Barbara Epstein, 'Why Poststructuralism Is a Dead End for Progressive Thought' (1996) 95 *Socialist Review* 83, 116; Ellen Meiksins Wood, *The Retreat From Class: A New 'True' Socialism* (Verso, 1998) 54 and 58-63; and Barbara Epstein, 'Postmodernism and the Left' (1997) 6(2) *New Politics* 130.
[112] Albert Bergesen, 'The Rise of Semiotic Marxism' (1993) 36(1) *Sociological Perspectives* 1.
[113] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, Stanford University Press, 1998) [trans of *Homo sacer. Il potere sovrano e la nuda vita* (first published 1990)]; *The State of Exception* (Kevin Attell trans, University of Chicago Press, 2005) [trans of *Stato di Eccezione* (first published 2003)] and *The Coming Community* (Michael Hardt trans, University of Minnesota Press, 1993) [trans of *La Communita che viene* (first published 1990)]. Studies include Justin Clemens, Nicholas Heron and Alex Murray (eds), *The Work of Giorgio Agamben: Law, Literature, Life* (University of Edinburgh Press, 2012) and the more negative Matthew Calarco and Steven DeCaroli (eds), *Giorgio Agamben: Sovereignty and Life* (Stanford University Press, 2007); Aihwa Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty* (Duke University Press, 2006) 22-23 and Leila Brännström, 'How I learned to stop worrying and use the legal argument: A critique of Giorgio Agamben's conception of law' (2008) 5 *No Foundations: An Interdisciplinary Journal of Law & Justice* 22.

minorities, although offering little guidance about how institutions are to be overcome apart from a Khomeini-style cultural change that would presumably result in state-sanctioned violence against exponents of cultural diversity[114] or the anarchy attendant on Foucault's aesthetic decisionism in which individual subjectivity disregards rationality and subjugates social goods to personal gratification.[115]

A reader concerned with the enhancement of opportunities for flourishing might thus endorse Midelfort's cogent criticism of Foucault

> As a mental tone poem Foucault's work has inspired outpourings from enthusiastic readers and baffled groans from empirically minded skeptics. The most charitable and perhaps most illuminating reading of Foucault's history sees it as a great idealist portrait of the age of reason as an age of confinement, a time when the self-proclaimedly moral and reasonable saw fit to lock up those who seemed less hardworking, less moral, and less reasonable. Foucault worked at such a level of symbolic abstraction, however, that empirical criticism never much bothered him or has bothered his disciples. If one finds, for example, that Foucault's image of universal confinement is overdrawn for England, Germany, or even for France, why then one has misunderstood what Foucault was using the image to accomplish. If one finds that Foucault betrayed Romantic tendencies and a complacent acceptance of conventional periodization, one is told that one has naively bought into the project of the Enlightenment, with its belief in progress, or that one has overlooked the radical nihilism of the master. Basic to the Foucaultian perspective is a corrosive suspicion that all historical liberations have actually deployed a subtle exercise of power (often state, economic, or sexual power), and that knowledge itself is a function of power (not that knowledge gives one power, but that power constitutes or constructs "knowledge"). … [F]or historians committed to recapturing the texture of the past, the complexity, variety, and competition of various discursive practices in the past, Foucault's work is a radical and dramatic simplification, a reduction of whole generations, countries, and disciplines to symbolic markers in a moral game whose object is the destabilizing of the present.[116]

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[114] Criticism of Foucault's naivety or embrace of violence-from-the-bottom as authentic is provided in Janet Afary and Kevin Anderson, *Foucault and the Iranian Revolution: Gender and the Seductions of Islamism* (University of Chicago Press, 2005); Rosemarie Scullion, 'Michel Foucault the Orientalist: On Revolutionary Iran and the "Spirit of Islam"' (1995) 12(2) *South Central Review* 16; and Patrick West,'The philosopher as dangerous liar: Michel Foucault taught that might is right, truth is relative, and history just an interesting narrative. Why do we still lionise the French philosopher?' (1996) 133 (4694) *New Statesman* 24. Chantal Mouffe, *Agonistics: Thinking The World Politically* (Verso, 2013) 37 expresses an enthusiasm for sharia law that is somewhat at odds with fundamental restrictions on flourishing evident in sharia regimes such as Saudi Arabia.

[115] Richard Wolin, 'Foucault's Aesthetic Decisionism' (1986) 67 *Telos* 71, 71.

[116] Erik Midelfort, *A History of Madness in Sixteenth Century Germany* (Stanford University Press, 1999) 7. See also Fabienne Brion and Bernard Harcourt, 'The Louvain Lectures in Context' in Michel Foucault, *Wrong-Doing Truth-Telling: The Function of Avowal In Justice* (Stephen Sawyer trans, University of Chicago Press, 2015) [trans of 'Le Pouvoir de la Verité' (first published 2010)] 271, 306 quoting Foucault on 'experience' having a value that is potentially more important than historicity.

Scull similarly commented

> Foucault's isolation from the world of facts and scholarship is evident throughout *History of Madness*. It is as though nearly a century of scholarly work had produced nothing of interest or value for Foucault's project. What interested him, or shielded him, was selectively mined nineteenth-century sources of dubious provenance. Inevitably, this means that elaborate intellectual constructions are built on the shakiest of empirical foundations, and, not surprisingly, many turn out to be wrong.[117]

Roger Scruton argued that Foucault's work comprised

> exuberant exercises in rhetoric, ... full of paradoxes and outrageous historical fabrications, but sweeping the reader along with a kind of facetious indifference to the standards of rational argument or the claims of truth. Instead of argument Foucault saw 'discourse'; and in the place of truth as a guide to human thinking he saw power. In Foucault's view of things all discourse gains acceptance by expressing, fortifying and concealing the power of those who maintain it; and those who, from time to time, perceive this fact are invariably (in bourgeois society) imprisoned as criminals or locked away as mad – a fate that Foucault had unaccountably avoided.[118]

Apart from eliciting the skepticism about grand theory[119] – or merely about its historical bases – noted in Chapter One, what is the significance of those writers?

One reason for identification in this literature review and in engagement in the following chapters is that the views of those theorists – although partial and on occasion self-interested – *do* serve to highlight aspects of legal identity. An attraction of pragmatism, noted by Kloppenberg, is that it is biased towards practicality and is

> a way of thinking open to the critical insights of postmodernism but resistant to cynicism and nihilism because of its conception of experience and its commitment to democracy.[120]

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[117] Andrew Scull, 'Scholarship of Fools: The Frail Foundations of Foucault's Monument' (2007) 5425 *Times Literary Supplement* 3, 3. See also Andrew Scull, 'Michel Foucault's History of Madness' (1990) 3(1) *History of the Human Sciences* 57; and Richard Hamilton, *The Social Misconstruction Of Reality: Validity and verification in the scholarly community* (Yale University Press, 1996) 171 and 184.

[118] Roger Scruton, 'Confessions of a Sceptical Francophile' (2012) 87(4) *Philosophy* 477, 480.

[119] Quentin Skinner, 'Introduction', in *The Return of Grand Theory in the Human Sciences* (Cambridge University Press, 1990) 1; and the more negative responses in Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart, 1998) 172-178 or Gunther Teubner, 'How Law Thinks: Toward A Constructive Epistemology of Law' (1989) 23(5) *Law & Society Review* 727. See also the comments in David Goldman, *Globalisation and the Western Legal Tradition: Recurring patterns of law and authority* (Cambridge University Press, 2007) 10-12.

[120] James Kloppenberg, 'Pragmatism: An Old Name for Some New Ways of Thinking' (1996) 83(1) *The Journal of American History* 100, 131. See also Owen Fiss, 'The Death of the Law?' (1986) 72(1) *Cornell Law Review* 1, 10; and Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (Cambridge University Press, 2009) 101.

Chapters Eight through Ten of this dissertation for example suggest that although Butler's notion of parody has little practical value for day by day law reform her insights about performativity are useful in understanding acceptance of imposters.

Another reason is that their thought – although potentially nihilistic[121] and conservative (offering an escapist 'infinite, negative critique' at odds with the practicalities of political reform)[122] – has been embraced by legal scholars in Australia and elsewhere, although that embrace is not evident in the law reports and arguably has little impact in day by day work by courts, tribunals and legal practitioners.[123] Interest in French psychoanalyst and identity theorist Jacques Lacan for example is strongly evident in the *Griffith Law Review* and gatherings such as the Australia & New Zealand Law & Society Conference,[124] with Foucauldian analysis strongly influencing academic discussion of the justice system as an expression of violence on the bodies of the unprivileged. Recognition of the gendered nature[125] of much Australian law is, fortunately, now a commonplace; it is possible to recognise

[121] For criticism of Foucault see for example Michael Walzer, 'The Politics of Michel Foucault' in David Couzens Hoy (ed), *Foucault: A Critical Reader* (Blackwell, 1986) 58, 61; Nancy Fraser, *Unruly Practices* (University of Minnesota Press, 1989) 32; and Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (Frederick Lawrence trans, The MIT Press, 1990) [trans of *Der Philosophische Diskurs der Moderne* (first published 1987)] 283. A defence is provided in Mario Moussa and Ron Scapp, 'The Practical Theorizing of Michel Foucault: Politics and Counter-Discourse' (1996) 33 *Cultural Critique* 87. Habermas' critique of Heidegger's philosophising as centred on a surrender to an undiscernable fate and 'propositionally contentless speech about Being' is also relevant; see Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (Frederick Lawrence trans, Polity Press, 1990) [trans of *Der Philosophische Diskurs der Moderne* (first published 1987)] 140-141.

[122] Niilo Kauppi, *Radicalism in French Culture: A Sociology of French Theory in the 1960s* (Ashgate, 2010) 90 and 234; and Paul Patton, 'Rancière's Utopian Politics' in Jean-Philippe Deranty and Alison Ross (eds), *Jacques Rancière and the Contemporary Scene* (Continuum, 2012) 129, 133-134. See more broadly François Cusset, *French Theory: How Foucault, Derrida and Co. Transformed the Intellectual Life of the United States* (University of Minnesota Press, 2008).

[123] Larry Catá Backer, 'Measuring The Penetration Of Outsider Scholarship Into The Courts: Indifference, Hostility, Engagement' (2000) 33(4) *U.C. Davis Law Review* 1173. See also Neil Andrews, 'What would Sir Samuel Griffith have said? Postmodernism in the 1990s company law classroom' (1998) 5(2) *Murdoch University Electronic Journal of Law* np.

[124] See for example William MacNeil, 'Taking Rights Symptomatically – Jouissance, Coupure, Objet Petit a' (1999) 8(1) *Griffith Law Review* 134; William MacNeil and Renata Salecl, 'Waxing Lacanian' (2013) 22(1) *Griffith Law Review* 269; Juliet Rogers, 'Beyond the Script of Law: Dildos, Tranny Cops and Protesting Anti-terrorism' (2009) 18(2) *Griffith Law Review* 269; Daniel Hourigan, 'Postmodern anarchy in the modern legal psyche: Law, anarchy and psychoanalytic philosophy' (2012) 21(2) *Griffith Law Review* 330; Zach Meyers, 'Autonomy as a fantasy: Applying psychoanalysis to Australian privacy law' (2013) 22(1) *Griffith Law Review* 122; and Tom Andrews, 'An attachment to separation: Jurisdictional accidents and monstrosity as/in Re A (children)' (2013) 22(1) *Griffith Law Review* 102. In addition to the critiques at footnote 63 in this chapter see Filip Buekens and Maarten Boudry, 'The Dark Side of the Loon. Explaining the Temptations of Obscurantism' (2015) 81(2) *Theoria* 126.

[125] Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002); and Patricia Easteal (ed), *Women and the Law in Australia* (LexisNexis, 2010). For a caution about a new essentialism see Joan Williams, 'Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory' (1991) 2 *Duke Law Journal* 296.

injustice and the 'whiteness'[126] of the law in Australia without embracing notions of an ongoing genocide.

The reception of theory tells us something about law as a body of knowledge that involves academics rather than just legal practitioners.

The fundamental reason for identifying the works is to indicate that although specific insights are acknowledged in later chapters the theorisation overall has been rejected. A 'macrotheoretical turn' is unviable. In testing the contentions outlined in Chapter One the author concludes that there is little value for a realist in an 'essentialist' interpretation based on the notion that identity can be reduced to a small set of attributes such as gender or race and that law is reducible to a system of governance (or governmentality) that is an expression of relationships determined by those attributes.

This dissertation instead envisages legal identity as dynamic, something potentially affected by individual and collective agency, susceptible of subversion and marked by valorisation that has changed over time in ways that reflect (and on occasion drive) social change. To adapt Posner's critique of Critical Race Theory,[127] story telling is a valuable mechanism for explication of the law or the development of a political consciousness but we should aspire to differentiate between narrative and fantasy, advocacy and the contradictions of reality.

This dissertation embodies a disquiet with a literature that both deals with identity and that might be collectively characterised as postmodern,[128] in other words embodies a

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[126] Janet Ransley and Elena Marchetti, 'The Hidden Whiteness of Australian Law - A Case Study' (2001) 10(1) *Griffith Law Review* 139; Aileen Moreton-Robinson, 'Witnessing Whiteness in the Wake of Wik' (1998) 17(2) *Social Alternatives* 11; Jennifer Nielsen, 'Whiteness And Anti-Discrimination Law – It's In The Design' (2008) 4(2) *Australian Critical Race and Whiteness Studies Association e-Journal* 1; and Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Moreton-Robinson (ed), *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 75.

[127] Richard Posner, 'The Skin Trade' (1997) 217(15) *The New Republic* 40.

[128] Richard Rorty, 'Habermas and Lyotard on Post-Modernity' (1984) 1 *PRAXIS International* 32; Peter Schanck, 'Understanding Postmodern Thought And Its Implications For Statutory Interpretation' (1992) 65(6) *Southern California Law Review* 2505; Dennis Patterson, 'From Postmodernism to Law and Truth' (2003) 26 *Harvard Journal of Law and Public Policy* 49; Jay Moran, 'Postmodernism's Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction, and Some Insights from Thomas Pynchon's Fiction' (1997) 6(2) *Southern California Interdisciplinary Law Journal* 155; Alan Hunt, 'The Big Fear: Law Confronts Postmodernism' (1990) 35(3) *McGill Law Journal* 507; Stephen Feldman, 'The Politics of Postmodern Jurisprudence' (1996) 95(1) *Michigan Law Review* 166. Postmodern hermeticism is spoofed in Dennis Arrow, 'Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated' (1997) 96(3) *Michigan Law Review* 461 and '"Rich," "Textured,"

radical scepticism about truths[129] – or about the possibility of truth[130] – and rejects what has elsewhere been dubbed the Enlightenment Project[131] or 'bourgeois virtues'[132] such as temperance, curiosity and empathy that Nussbaum sees articulated in the Stoics. That 'project', growing out of European humanism and the rediscovery of classical authors such as Cicero and Aristotle, emphasised a respect for human dignity and an aspiration for achievement through individual and collective agency of conditions that would foster personal and social flourishing.

The fictions, provocations and questioning of the postmoderns have value in challenging certainties, and on occasion providing a call to arms for minorities.[133] Postmodern theorisation risks, however, a retreat into a private language and nihilism rather than substantive and sustained meliorist reform that enhances the lived experience of ordinary people and that provides a model for future enhancement.

An implication of this dissertation is therefore that there is benefit from engaging with a pragmatist methodology that is informed by a focus on flourishing and thus, in contrast to some critics of legal pragmatism, is more than instrumental or a guise for neoliberalism.

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and "Nuanced": Constitutional "Scholarship" and Constitutional Messianism at the Millennium' (1999) 78(1) *Texas Law Review* 149.

[129] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trans, University of Minnesota Press, 1984) [trans of *La situation postmoderne: rapport sur le savoir* (first published 1983)]; Nancy Fraser and Linda Nicholson, 'Social Criticism without Philosophy: An Encounter Between Feminism and Postmodernism', in Linda Nicholson (ed), *Feminism/Postmodernism*, (Routledge, 1990) 19; Stephen Feldman, 'An Arrow To The Heart: The Love And Death Of Postmodern Legal Scholarship' (2001) 54 *Vanderbilt Law Review* 2351; and Gary Browning, 'Lyotard and Hegel: what is wrong with modernity and what is right with the philosophy of right' (2003) 29(2) *History of European Ideas* 223.

[130] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, (Geoff Bennington and Brian Massumi trans, University of Minnesota Press, 1984) [trans of *La situation postmoderne: rapport sur le savoir* (first published 1983)] xxiv.

[131] Alasdair MacIntyre, *After Virtue* (Bloomsbury, 3rd ed, 2007) 51; Jürgen Habermas, 'Modernity – An Incomplete Project', in Sean Hier (ed), *Contemporary Sociological Thought* (Canadian Scholars Press, 2005) [trans of 'Die Moderne – ein vollendetes Projekt' (first published 1980) 163, 168; and James Schmidt, 'What Enlightenment Project?' (2000) 28(6) *Political Theory* 734. See also Peter Gay, *The Enlightenment: An Interpretation* vols 1 and 2 (Knopf, 1966 and 1969); Ernst Cassirer, *The Philosophy of the Enlightenment* (Fritz Koelln and James Pettegrove trans, Princeton University Press, 1951) [trans of *Die Philosophie die Aufklärung* (first published 1932)]; Jonathan Israel, *Democratic Enlightenment: Philosophy, Revolution, and Human Rights 1750-1790* (Oxford University Press, 2011); and Alfred Cobban, *In search of humanity: the role of the Enlightenment in modern history* (Cape, 1960).

[132] Deidre McCloskey, *The Bourgeois Virtues: Ethics for an Age of Commerce* (University of Chicago Press, 2007).

[133] Justification on the basis that a concept or text, although wrongheaded, provokes thought is not confined to the postmoderns and pre-1900 marxists. See for example Pierre Schlag, 'How To Do Things With Hohfeld' (2015) 78(1/2) *Law and Contemporary Problems* 185, 186.

Another implication, discussed in Chapter Eleven of this dissertation, is that there is value in recovering thinkers whose work has been under-recognised by the academy in recent decades. After the postmodern turn it is perhaps time to return to the classics, an echo of the 1920s exhortation 'Back To Kant',[134] an exhortation that might have been more positive than listening to writers such as Schmitt and Heidegger whose exclusionist conception of identity legitimised genocide.[135] Better 'back' to the dignitarian Kant and his precursor Aristotle than an escape to Heidegger's *urwald* and the notion that 'nothingness is being' or that 'suffering, evil and death are to be accepted, not to be changed'.[136]

What can readers take from this as an academic exercise? When considered in relation to that literature this dissertation has two points of originality. One is that it is the first work to provide a sustained analysis of legal identities and the law from the perspective of legal pragmatism, offering a broad taxonomy that provides insights into legal identity *per se,* into the relationships between specific legal identities and into signifiers of legal identity as systems of meaning and contestation.

The second is that although it draws on writing by figures such as Foucault and MacKinnon, rather disregarding or dismissing them outright, it appears to be the first major Australian study that looks across a range of identities – and times – rather than concentrating on a particular type of relationship, epoch or activity. Legal pragmatism suggests a receptiveness to such claims by encouraging an attentiveness (and wariness about over-commitment) to presuppositions.

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[134] Andrew Chignell, 'Introduction: On Going Back to Kant' (2008) 39(2) *The Philosophical Forum* 109; Peter Gilgen, 'Introduction: On going back to Kant, again' (2010) 41(1) *The Philosophical Forum* 1; Peter Gordon, 'Continental divide: Ernst Cassirer and Martin Heidegger at Davos, 1929' (2004) 1(2) *Modern Intellectual History* 219; and Peter Gay, *The Dilemma of Democratic Socialism: Eduard Bernstein's Challenge to Marx* (Octagon Books, 1983).

[135] Thomas Sheehan, 'What if Heidegger were a Phenomenologist' in Mark Wrathall (ed), *The Cambridge Companion to Heidegger's Being and Time* (Cambridge University Press, 2013) 381, 381; Allan Janik, *Style and Idea in the Later Heidegger: Rhetoric, Politics and Philosophy* (Kluwer, 1989) 2; Hugo Ott, *Martin Heidegger: A Political Life* (Allan Blunden trans, HarperCollins, 1993) [trans of *Martin Heidegger: Unterwegs zu seiner Bibliography* (first published 1988)] 338; Walter Kaufmann, *The Faith of a Heretic* (Doubleday, 1961) 191; and Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of the Weimar Constitution* (Duke University Press, 1997) 115.

[136] Theodor Adorno, *The Jargon of Authenticity* (Knut Taenowski and Frederick Will trans, Routledge, 2003) [trans of *Jargon der Eigenlichkeit: Zur Deutschen Ideologie* (first published 1964)] 49 and 53.

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