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CONTEMPORARY ADVOCACY: VALUE-FREE?*

JOHN McCARTHY QC**

What conclusions should be drawn about the nature of law and its relationship to morality from consideration of Australian cases since the High Court became Australia's ultimate appellate authority?

This article argues that the connection between law and morality in Australia is not contingent. It is of the essence of law and that Australian law draws its validity from its moral purposes. Moral concepts form a major part of common law discourse which is a continuing and living tradition of application and reflection.

INTRODUCTION

Advocacy, in the common law tradition, is simply the pleading of a cause before a court of justice. It is invariably undertaken by a designated group of professional advocates. The law reports record the judgments and arguments of the leading cases, either directly or by reference. Being a record of the contemporary legal enterprise, the law reports are also a fair representation of the manner in which judges and advocates think about the nature of their role and the content and purpose of the

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* This article was originally published in the AUSTRALIAN BAR REVIEW, 14 AUSTL. B. REV. 97 (1996). Minor technical revisions have been made in order to more closely approximate the citation and formatting style of THE CATHOLIC LAWYER. Reprinted with permission of the AUSTRALIAN BAR REVIEW.

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This article is based on a presentation made by the author at a Continuing Legal Education seminar conducted by the New South Wales Bar Association in association with the St. Thomas More Society and the Australian Lawyers Christian Fellowship.
rules and laws they apply. What conclusions should be drawn about the nature of law, and its relationship to morality, from considering Australian cases since the High Court became our ultimate authority for both the general law and constitutional law? It is submitted that the only reasonable conclusion is that the connection between law and morality in Australia is not contingent. It is the essence of law and that Australian law draws its validity from its moral purposes.

Take out any volume of the Commonwealth Law Reports during the last 10 years and peruse its pages at random. It is an illuminating exercise. Any report perused will be full of such terms as “natural justice,” “unconscionable conduct,” “fundamental principles of law,” “corrupt conduct,” “basis fairness,” “a fair and reasonable man,” “reasonable expectations,” “reasonable reliance,” “protection of legitimate interests,” “unfair detriment,” “unjust enrichment,” “misleading and deceptive conduct,” “murder,” “fraud,” “duty of care,” “fundamental principles of the common law.” Professor P.D. Finn, as he then was, characterises such language this way: “The evocative, and morally judgmental, adjective is with us.”

These concepts provide the very stuff of advocacy by members of the Australian bar. They are a part of the forensic armory of our profession. Such discourse has met with considerable success. In fact, it is more difficult to give instances where morally neutral or value-free submissions have essentially succeeded.

**MORAL PURPOSES AND THE COMMON LAW TRADITION**

Clearly, moral concepts are a major part of common law discourse about justice and right order in society. Here, they have force and potency because they are not disembodied but are a part of a continuing tradition of application and reflection. In fact, the common law, its principles and practices, is a notable example of what a leading contemporary moral philosopher, Alasdair McIntyre, would describe as a living tradition; being one that is “historically extended” and “socially embodied.” As he so rightly stated, “moral concepts are embodied in and par-

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CONTEMPORARY ADVOCACY

When recently analyzing creativity and renewal in the common law, the influential Harvard Law Professor Mary Anne Glendon commented:

[Common law is an evolving body of principles built by accretion from countless decisions in individual law suits. Because it emerges from practice rather than theory, its principles are highly fact-sensitive, and not too general. Continental law, by contrast, had, as they say, the smell of the lamp—it was developed by scholars, and was further rationalized and systematized by comprehensive legislative codifications.

What needs to be emphasized here are two remarkable features of the common law tradition. First, its continuity. Over centuries that saw the rise and fall of feudalism, the expansion of commerce and the transition to constitutional monarchy, the common law of England adapted to each new circumstance without abrupt change or any root and branch reorganization of the sort represented by the European codifications.

The second feature of the common law that must be stressed is its distinctive methodology that enabled it to adapt and grow while maintaining its continuity. To try to describe that method is a bit like trying to describe swimming or bicycle riding, for it consists of a set of habits and practices that are only acquired by doing. But the conventional understanding goes something like this: the common law judge is supposed to be a virtuoso of practical reason, weaving back and forth between facts and law, striving not only for a fair disposition of the dispute at hand, but to decide each case with reference to a principle that transcends the facts of that case, all with a view toward maintaining continuity with past decisions, deciding like cases alike, and providing guidance for parties similarly situated in the future. It was those sorts of operations that Lord Coke had in mind in the seventeenth century when he famously said: "Reason is the life of the law; nay, the common law itself is nothing else but reason." To Coke, "reason" did not mean deductive reason (as it did for Descartes), nor self-interested calculation (as it did for Hobbes). It was, rather, an extended process of collaboration over time. Or, as he put it himself, it was a kind of group achievement, "gotten by long study, observation, and experience, ... fined and refined over centuries by generations of grave and learned men.

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8 A. McIntyre, A SHORT HISTORY OF ETHICS (Routledge, United Kingdom 1989).
Professor Glendon concluded:

To be a traditionalist in such a tradition seems pretty clearly not to be frozen in the past or mired in the status quo but rather to participate as McIntyre puts it, in a community of intense discourse about what it is that gives the tradition in question its point and purpose.  

Recently, when commenting on the Mason High Court, Professor Leslie Zines remarked that “[t]he changes that have occurred in the reasoning of the court must inevitably lead to changes in the style of advocacy. Arguments as to ‘policy’ and ‘values’, once disguised under more legalistic forms, must now be openly confronted.”

Given that context, it becomes unexceptional to suggest that the dialectical processes involved in common law advocacy have been overlooked by Professor Zines. The changes he referred to, especially where he proposes that submissions about policies and values should be undisguised, had already happened.

It is not as if, in any of these cases, counsel’s submissions had not suggested where justice might lie and how the law should evolve. The decisions of the High Court in recent years have given such submissions the legitimacy of success. After all there is more than an echo of the exchange between the bench and bar in the court’s finely honed reasoning about values and policies in our law. Those exchanges are critical to common law judgments avoiding, to use Professor Glendon’s words, “the smell of the lamp.” Moreover, those cases did not commence in the High Court, which, in any event, is not the initiator of the causes before it, except in the sense of its control of the special leave procedure.

**LAW AND MORAL PURPOSES: LORD ATKIN**

Two of the most influential statements in the common law tradition this century are meditations on law as a reflection of moral and social responsibility. Firstly, of course, Lord Atkin in

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5 *Id.*  
6 Leslie Zines, *Most Significant Case of the Mason High Court*, AUSTL. LAW. 18, 21 (June 1995).  
7 Glendon, *supra* note 2, at 14.
Donoghue v. Stevenson\textsuperscript{8} and to the best known passage in all twentieth century English law:

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as a species of “culpa”, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyers question “Who is my neighbour?” receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.\textsuperscript{9}

The second statement, also by Lord Atkin, in Liversidge v. Anderson,\textsuperscript{10} was a similar reasoned appeal to the moral imagination of common lawyers. The vast expansion, indeed revolution, in administrative law since World War II had part of its genesis, in this statement. Lord Atkin proclaimed:

In this country, amid the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King’s Bench in the time of Charles I.

I protest, even if I do it alone, against a strained construction

\textsuperscript{8} (1932) AC 562.
\textsuperscript{9} Id. at 580.
\textsuperscript{10} (1942) AC 206.
put on words with the effect of giving an uncontrolled power of imprisonment to the minister. To recapitulate: The words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them....

I know of only one authority which might justify the suggested method of construction: "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."' (Through the Looking Glass, c vi) After all this long discussion the question is whether the words "If a man has" can mean "If a man thinks he has." I am of opinion that they cannot, and that the case should be decided accordingly."

This Australian-born Law Lord is, perhaps, the most revered figure of this century amongst the Anglo-Commonwealth legal profession. *Donoghue v. Stevenson* has probably been the most influential statement of the common law and of its fundamental principles. Succeeding generations of lawyers have debated, criticised, sought to apply, limit or refine Lord Atkin's statement. The late Professor Julius Stone might have effectively shown that some of the reasoning of Lord Atkin or Lord McMillan ("The categories of negligence are never closed.") were, in some ways, categories of illusory reference. However, what Professor Stone would never deny is that Lord Atkin captured and distilled a vision of common law obligation. A vision which has excited and inspired the imagination of lawyers in our tradition ever since. It also steadied lawyers as to the purposes of law and signposted what Professor Ronald Dworkin would later call "Law's Empire."

It is fair to say that for many at the bar or on the bench, Lord Atkin's famous statements have become almost a vocational charter. Lord Atkin's statements have become embedded in the collective imagination and memory of the legal profession. It is significant that Lord Atkin's biographer observes, "[h]e had thus come to see the field of civil wrongs and legal liability for care-
lessness as depending on moral obligation.”

LAW AND MORALITY: SIR GERARD BRENNAN

The connection between law and morality has also been expressed forcefully by our new Chief Justice, Sir Gerard Brennan:

In many areas, law and morality work in a symbiotic relationship. This is especially true of the general criminal law, which would hardly be enforceable if the common moral values of the community were at odds with the law’s prescriptions. In tort also, a close relationship of law and morality can be perceived...it is desirable that the dichotomy between law and morals be steadily borne in mind in determining the content of each. Law which is the subject of our professional concern does not mirror all the tenets of morality. Nor should it try to do so. The coercive power of the State must be reserved to the enforcement of those moral principles which, by a broad community consensus, enjoy recognition and acceptance and which need to be expressed as universal binding rules in order to facilitate a peaceful, ordered, just but free society.

The stimulus which moral values provide in the development of legal principle is hard to overstate, though the importance of the moral matrix to the development of judge-made law is seldom acknowledged. Sometimes the impact of the moral matrix is obvious, as when notions of unconscionability determine a case. More often the influence of common moral values goes unremarked. But whence does the law derive its concepts of reasonable care, of a duty to speak, of the scope of constructive trusts—to name a few examples—save from moral values translated into legal precepts? How often do we see the construction of a statute turn on an intention of the legislature imputed by reference to a moral value?  

Brennan C.J. has also stated:

As legal transactions become more complex, the input of morality—or policy, for in this context the terms are interchangeable—will increase inevitably, for morality furnishes the reference points of legal development.

....

Whether the development of law is in a direction of new rules or

the broadening or loosening of existing rules, morality has a part to play.

Before morality can be employed by judges to inform legal principle, the particular moral imperative must exhibit certain characteristics. I have already mentioned one characteristic: a broad consensus for recognition and acceptance. Such an imperative is easily translated into a legal precept for it represents a common community value. Law, the binding cement of society, simply adds the coercive powers of the State to the value which the community has accepted. And thus the crimes which stir the community to moral outrage become the more heinous crimes in the calendar. At the discretionary level, we may note that the heaviest penalties are imposed where the moral sense of the community is most deeply offended.\textsuperscript{17}

His Honour further stated:

The second characteristic of moral imperatives which inform the law is that they relate—for the most part—to personal morality. By that I mean the kind of ethical standards by which people live in their personal, as distinct from their public, lives. These are familiar standards. We do not deliberately set out to inflict physical harm on our neighbour or to damage his land or his possessions; when we foresee that harm or damage might happen, we take care to avoid causing it; we do not try to deceive or defraud people with whom we deal; we do not engage in calumny or detraction of another. These ethical standards are the stuff of the law of torts. Equally with the criminal law: murder, rape, offences against the person, larceny. There are few crimes which have what might be called the public element in them...By referring to standards of personal morality, I do not mean to imply that personal morality is, or ought to be seen as, private morality in which the public can have no interest. Perhaps there is no area of morality more personal than that which effects consensual sexual relations, yet the public interest and the health consequences of sexual activity is manifest. In one sense, I suppose all morality is a matter of profound public interest for the strength of a nation cannot survive the moral decadence of its people. But the point of present relevance is that public interest is seldom an element in the immediate circumstances which give rise to the moral standards which are translated into law.

The moral standards of personal life apply, generally speaking,\textsuperscript{17} \textit{Id.} at 101-02.
to situations where the consequences of their non-observance are immediate or clearly foreseeable by the person who engages in the forbidden conduct. This is reflected in judge made law.\textsuperscript{18}

His Honour continued:
In the general law which is informed by moral imperatives these imperatives can be identified: general recognition and acceptance, applicability of the standard to one’s own conduct in personal living and immediacy or foreseeability of the consequences of non-observance. These three characteristics facilitate the translation of a moral imperative into a legal precept.\textsuperscript{19}

**LAWYERS: THE LEGAL OBLIGATION TO ADVISE ON THE MORAL PURPOSES OF LAW**

However, the moral purposes behind the commercial law are not always self-evident. This factor has important consequences for the legal profession in the practice of commercial law. Sir Gerard Brennan said:

\[\text{Although the complexity of much commercial law hides the underlying moral purpose so that that purpose is not immediately revealed by reference to the community’s general set of personal moral values, the commercial lawyer must search for the moral purpose by ascertaining the operation of the law he or she practises.} \]

It is not a light burden.\textsuperscript{20}

His Honour also stated:

The hidden morality of much of the commercial law and the traditional role of the lawyer as the advisor on law alone, raises peculiar difficulties for the commercial lawyer.

Because the moral purpose of much commercial law is known to or ascertainable by commercial lawyers alone, the commercial lawyer becomes by default the moral as well as the legal advisor to the client. There is nobody else to be the moral advisor. The role sits somewhat uneasily on a lawyer’s shoulders. Yet it must be accepted if professional advice is to avoid the reproach of being the solvent of the client’s moral responsibility. How often does one hear the financial journalist who, seeking to embarrass a captain of commerce, is met with the disarming response: “We took the best advice and what we did is entirely

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\textsuperscript{18} Id. at 102-03.  \\
\textsuperscript{19} Id. at 103.  \\
\textsuperscript{20} Id. at 104.
\end{flushright}
Yet legality and morality are not interchangeable terms and both are appropriate fields for advice by the well furnished commercial lawyer... If the client is merely advised that such a transaction is legally valid, he may fail to consider whether it is morally objectionable.

In a case where the underlying moral purpose of the law on which advice is given is not and perhaps cannot be perceived by the client unless the lawyer tells him, the commercial lawyer's duty cannot be restricted to legal advice, for then the moral decision—what ought to be done as distinct from what can lawfully be done—will not be addressed. If the lawyer alone knows the moral dimension of the decision to be made, it is morally unacceptable for him to be silent. If he perceives it is within the client's legal power to impair the rights of a third party whom the legislature has ineffectually tried to protect or to exercise that legal power in a way that is unjust, surely the moral dimension must be pointed out.  

As Sir Gerard then pointedly asks: "[s]hould a lawyer do for a client what he would not do as a person?"

The ethical issues for any lawyer required to tender such advice therefore can also raise questions about the participation with a client in any such activity. Brennan C.J. moreover raises an issue about the provision of extra-legal services in such circumstances. In all these ways, this seems to be a far cry from advising on the law in some value-free context. Legal professional responsibilities entail moral responsibilities. In our time, to be a lawyer of integrity requires that a practitioner be a moral agent and a teacher of moral conduct. Not only must a lawyer follow the first precept of practical reason, do good and avoid evil, but clients, and colleagues, must be warned to do likewise if the moral purposes of the law are to be fulfilled.

**MORAL PURPOSE AND THE JUDICIAL OATH OF OFFICE**

These duties are also consistent with the fact that the very constitution of our courts manifests an immediate moral dimension. A person cannot become a judge without making, either by oath or affirmation, two avowals to the community. One is a pledge of allegiance and the other is a promise as to conduct. This is the promise "to do right to all manner of people according

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21 *Id.* at 104-5.
22 *Id.* at 105.
to law without fear or favour, affection or ill will." So the judicial promise is to do right. The opposite of right is wrong. These are moral categories. So the carrying out of moral duties does not cease when a lawyer is appointed to the bench, even if the judicial oath to do right is structured by an explicit standard: according to law. Surely it is morally wrong for instance, for a judge to be partisan, partial and susceptible to improper influences when deciding a cause. These moral failings may have legal consequences; the judgment may be set aside.

**IS AN UNJUST LAW, LAW?**

The judicial oath attempts to secure for our community the rule of law; but it has a corollary which Sir Gerard Brennan underlined at his swearing in as Chief Justice, when he said, "[i]f right is to be done according to law, right will be done only if the law be just."

Where the source of the perceived injustice is the common law, Brennan J., as he then was, in *Mabo v. Queensland (No. 2)* held:

The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.

More recently, in *Dietrich v. R*, his Honour stated:

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21 *Id.* at 30.
22 (1992) 177 CLR 292.
Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this Court will modify the rule provided no injustice is done thereby. And, in those exceptional cases where a rule of the common law produces a manifest injustice, this Court will change the rule so as to avoid perpetuating the injustice.

The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community. 27

In his swearing-in speech, the Chief Justice further reflected on some of the principles involved in the judicial development of law:

Judicial method is not concerned with the ephemeral opinions of the community. The law is most needed when it stands against popular attitudes, sometimes engendered by those with power—and when it protects the unpopular against the clamor of the multitude. But judicial method is concerned with the equal dignity of every person, his or her capacity to participate in the life of the community, to contribute to society and to share in its benefits; it is concerned with the powers entrusted to governments and the manner in which those powers are exercised. Judicial method starts with an understanding of the existing rules; it seeks to perceive the principle that underlies them and, at a deeper level, the values that underlie the principle. At the appellate level, analogy and experience, as well as logic, have a part to play. Judgments must be principled, reasoned and objective, as Sir Anthony Mason said yesterday. And, most significantly, each step in the reasoning must be exposed to public examination and criticism. 28

The remarks of the new Chief Justice of Australia serve to confirm that, ultimately, in our courts, the validity of any legal rule will be sought in terms of its purposes and consequences. If the justification for any given principle or rule of law is inadequate, then that rule may be subject to alteration by an appellate

27 Id. at 319.
28 69 ALJ at 680-81. Brennan C.J., considered that issues about the justice of a law are more significant in appellate courts: "In the trial courts of this country, the rules of law prevail. And so they must, for it would do no justice to give judgment according to an abstract notion of what is right in the knowledge that the judgment would be overruled on appeal." Id. at 680.
court. In other words, it is the validity as well as the application of any existing principle which is subject to the judicial method. It is not a process whereby the existing law may be taken for granted, in some sovereign sense, and simply applied regardless of its consequences. As the content of any existing rule may be the subject of refinement or alteration, the purpose or moral object of that rule or principle must be always an important ingredient in its continued validity.

As Mr. Justice Young of the New South Wales Supreme Court has said about the Brennan C.J.'s remarks:

Gone are the days when one could merely construe words used in an Act of Parliament according to their semantic significance or merely apply a principle of equity or the common law simply because it was there in the textbook. One now looks to the principles behind the words. One looks to the legal history and evolution of the rules of equity and the common law. One looks to the purpose of the statute often found in the Second Reading Speech of the Minister who introduced the relevant Bill into Parliament.

This is of course no new principle, most judges have been applying this principle over the last 20 years. It is good to see the Chief Justice of Australia enunciating the thought so clearly at this important moment in his distinguished career. 29

MORAL PURPOSES IN THE DEVELOPMENT OF AUSTRALIAN LAW

What have been the effects for Australian law of drawing purpose from morality? As Professor Finn so admirably summarised:

Contract law is in evolution, if not (to some) in revolution. The unconscionable dealings doctrine is resurgent; consideration is under siege; privity has taken a mortal blow; the mistake rules are being revitalised with their limits as yet unsettled. The implication and interpretation of contractual terms seem set fair for some reappraisal; relief against forfeiture is in a state of expansive uncertainty; and the last word has not yet been said on penalties. The doctrine of “good faith” in contract performance is now squarely upon contract’s agenda; and we have the impact, direct and indirect, of the Trade Practices Act 1974 (Cth) and its State equivalents with which to contend.

Equity, the sometimes moral policeman of the law, has been one significant force in this re-shaping of contract. But in its renaissance in Australia it has gone well beyond contract. Equitable estoppel has been transformed; the unconscionability principle (as distinct merely from the specific unconscionable dealings doctrine) is becoming as imperialistic in equity as the neighbourhood principle is in tort law; breach of confidence has won unequivocal acceptance; the fiduciary principle is resurgent, albeit measuredly in some instances; the constructive trust is being liberated from its historical shackles; and the inherent jurisdiction to award damages prospers again. One could go on.

In yet another sphere we are witnessing the likely emergence of a law of unjust enrichment (or restitution). Whether it will prove to be the Siamese twin of the unconscionability principle remains to be seen. It heralds, for example, a change of position defence in the law. And quantum meruit for its part has been openly acknowledged to be a restitutionary remedy.

30 Finn, supra note 1, at 88-89. The cases and articles referred in footnotes by Professor Finn are as follows:


Professor Finn then commented on the new directions in Australian common law:

[T]here is an evident change in the standards of conduct which the law is exacting from persons in their voluntary or consensual dealings with others. Putting the matter in a very general way for the moment, I suggest it can rightly be said that we are witnessing a partial shift (though of marked consequence) in the ideology which is forming much legal doctrine. Associated with this is an emerging tendency to formulate some range of doctrines, not in terms of distinct, limited and discrete rules of behaviour, but as generalised standards of conduct which in a controlled way are instance-specific in their application.  

Professor Finn justified this from the historical perspective of the late nineteenth century when individualism and self-reliance were the endorsed virtues of the common law.

For the nineteenth century and much of this century, Professor Finn concluded:

Importantly, in all of this, the law would not mend hard bargains save in the most gross of cases. Superior knowledge and superior power were advantages which could be exploited. In this environment, caveat emptor could flourish. As Blackburn J. was to observe in *Smith v. Hughes* “whatever may be the case in a court of morals, there is no legal obligation on [a] vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.” In this environment, the now brutal-sounding view of Wills J. is that “any right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean, the motive may be which determines the enforcement of the right.”

As to our contemporary scene, Professor Finn observed:

Today though not all willingly, we are marching to a different drum. As Sir Robin Cooke (President of the New Zealand Court of Appeal) has observed. Legal obligation is being asked to match ‘the now pervasive concepts of duty to a neighbour and the linking of power with obligation’. Individualism has to accommodate itself to a new concern: the idea of “neighbourhood” - a moral idea of positive and not merely negative requisition - is abroad.

The legal genesis of one's duty to a neighbour was, of course, in

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31 Finn, *supra* note 1, at 90.
32 *Id.* at 91.
tort law in Lord Atkin's judgment in *Donoghue v. Stevenson*. It was there acknowledged that though the requirements of a practical world restricted its scope, it was "based on a general public sentiment of moral wrongdoing". Powerful in its effect upon the legal imagination, the idea it encapsulates permeates our law. In its imperative that in society we must be responsible to or for others, it seems to be leading us inexorably to some commitment to the view that we must demonstrate, "good faith and fair dealin" [sic] in our relationships with others.

There are common law doctrines which require disclosure in business and related dealings. However, the most potent law now in Australia is Trade Practices Act 1974 (Cth) s 52, and its equivalent in state and territory Fair Trading Acts, of which Professor Finn states that "[i]t promises to be the central force in the expansion of duties 'to speak' in business dealings."\(^{24}\)

The entitlement to insist on one's apparent strict legal rights is undergoing progressive curtailment through the unconscionability principle. Such rights are now being assessed in a context of concern for relational factors, that is the actual conduct of parties in the relationship, the known assumptions upon which one or both of them act, which make it unfair and unjust for one party to act in a particular way notwithstanding the formal right to do so.\(^{35}\) The developments in the doctrine of equitable estoppel in *Commonwealth v. Verwayen*\(^{36}\) and *Waltons Stores (International) Ltd. v. Maher*\(^{37}\) suggests that this is now the case. *Waltons Stores (International) Ltd. v. Maher* provides perhaps the most systematic recognition of imposed obligations of fair dealing arising from the actual circumstances of one's relationship with another. It also reflects closely both the injury averting concern and the moral ethos of the neighbourhood principle in the law of negligence.\(^{38}\)

In sum, clients may be unwittingly committed to legal proceedings if proposed actions or arrangements have not been the subject of legal advice or assessment which includes:

(a) Whether the relationship, in either the public sector or private sector, between the parties creates any vulnerability in

\(^{24}\) *Id.* at 92.

\(^{25}\) *Id.* at 93.

\(^{26}\) *See id.* at 96.

\(^{27}\) (1990) 170 CLR 394.

\(^{28}\) (1988) 164 CLR 387.

\(^{29}\) *See Finn, supra* note 1, at 96.
the other party.

(b) Whether such vulnerability includes disparities in information about the issues, the relative power of the parties so that the other party may be prejudicially affected by the encouragement or silence of the client.

(c) Whether any vulnerability of the other party has been effectively addressed and therefore can be regarded as a legitimate assumption of commercial or personal risk, specifically in arm's length commercial negotiations, so that the client may have the moral entitlement to rely on the basic contractual principle *pacta sunt servanda.*

(d) Whether there are any other factors which may morally disentitle the client from reliance on established legal rights.

**IS AN UNJUST STATUTE, LAW?**

What are the implications for our system of law if the source of a perceived injustice in a case is an Act of parliament? Earlier generations and some contemporary judges would find a simple response in the Austinian-Benthamite theory that law is the command or will of the sovereign: in our system, parliament. Therefore, an Act of parliament, regardless of its content, is to be given effect according to its tenor. As Willes J., once sharply observed, "[a]cts of Parliament ... are the law of this land; we do not sit as a court of appeal from parliament."

During the last 10 years, cases have arisen involving both state and federal legislation in which it was claimed that such legislation, in whole or in part, is invalid as undermining fundamental human rights or common law rights. In 1988, the High Court left the issue seemingly open-ended in the *Union Steamship Co. (Aust.) Pty. Ltd. v. King.*

Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New

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40 *Lee v. Bude and Torrington Junction Railway Co.* (1871) LR 6 CP 576, 582.

41 See, *e.g.*, *Building Construction and Builders' Labourers' Federation of New South Wales v. Minister for Industrial Relations* (1986) 7 NSWLR 372.

South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see *Drivers v. Road Carriers; Fraser v. State Services Commission; Taylor v. New Zealand Poultry Board*), a view which Lord Reid firmly rejected in *Pickin v. British Railways Board*, is another question which we need not explore.  

Since then, for federal legislation, the High Court has shown that it is prepared to make such explorations. A clear majority of the High Court justices have posited implied rights or restrictions on legislative power from the nature of our community as parliamentary democracy with separation of powers and responsible government under the rule of law. Legislation has been invalidated which unduly trenched upon freedom of political discourse implied in the structure of the Australian constitution, although such freedom was not absolute. There has emerged in subsequent cases a wide power to review whether legislation is valid or invalid. In this way, an implied bill of rights may evolve. Subsequent to *Australian Capital Television v. Commonwealth* and *Nationwide News Pty. Ltd. v. Wills*, Toohey J. has stated:

Yet it might be contended that the courts should take the issue a step higher and conclude that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties -- a presumption only rebuttable by express authorisation in the constitutional document.

Just as Parliament must make unambiguous the expression of its legislative will to permit executive infringement of fundamental liberties before the courts will hold that it has done so, it might be considered that the people must make unambiguous the expression of their constitutional will to permit Parliament to enact such laws before the courts will hold that those laws are valid.

If such an approach to constitutional adjudication were adopted,

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43 *Id.* at 10.
the courts would over time articulate the content of the limits on power arising from fundamental common law liberties and it would then be a matter for the Australian people whether they wished to amend their Constitution to modify those limits. In that sense, an implied "bill of rights" might be constructed.\(^{46}\)

As to the present role of the judiciary, Toohey J. concluded:

Some principles are fundamental and it is the role of an independent judiciary to give effect to those principles, within the rule of law, as best it can. Thus, although the relationship in our society between the authority of the legislature and the rule of law fluctuates over the course of time, the rule of law is the dominant factor in the relationship. This explains the efficacy of the rule of law as a means both of protection against the misuse of legislation and executive power and of promotion of fundamental rights and principles.\(^{47}\)

There has been no such development in respect of state parliaments and state appellate courts. In no case has a statute been invalidated, in whole or in part, as a misuse of legislative power and inconsistent with human rights. Such a submission was made in Building Construction Employees and Builders' Labourers' Federation of New South Wales v. Minister for Industrial Relations\(^{48}\) in 1986 and again in 1995 in Kable v. Director of Public Prosecutions,\(^{49}\) proceedings concerning the Community Protection Act 1994 (NSW).

This statute allowed a judge to make a preventive detention order in appropriate circumstances in relation to one person, Mr. Kable. The legislation was attacked as inconsistent with implied human rights on which the Australian constitution and the inherited structure of the government of New South Wales are based. Mahoney J.A., while having significant misgivings about the legislation, nevertheless found:

Such implications do not, of their nature, apply to legislation passed by the New South Wales Parliament. That Parliament is, subject to the Constitution, a sovereign parliament exercising plenary powers. It would in my opinion be wrong, in reliance upon conceptual considerations as to the nature of legislation or

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\(^{47}\) Id. at 33.

\(^{48}\) (1986) 7 NSWLR 372.

the form of parliamentary enactments, to restrict the form of legislation which may be passed by a sovereign parliament. Experience has shown that circumstances may arise in which legislation in a special form will be needed for the public good. It is not, in my opinion, for the courts, upon conceptual or similar bases, to seek to impose restrictions upon what such a parliament may do. Parliamentary power is, in the end, a legal last resort: it is the power which, failing all others, will be available to deal with such special cases as may arise. Compelling reasons indeed would be necessary to justify the assumption by the courts of the power to impose limits to what such a body may do.

In my opinion, such implications are not to be drawn. The power of a State parliament to alter even fundamental aspects of its constitutional structure is well established. Reference was made in argument to the abolition by the Parliament of Queensland of the second House of the Parliament. It was suggested by some judges of this Court that the New South Wales Parliament may possibly not be able to enact legislation inconsistent with certain human rights: see Building Construction Employees and Builders' Labourers Federation of New South Wales v. Minister for Industrial Relations (1986) 7 NSWLR 372 at 378, 385, 406, 407, 411-413, 420 et seq.; and the comments of the High Court in Union Steamship Company of Australia Pty. Ltd. v. King (1988) 166 CLR 1 at 9-10. If there be limits upon what a sovereign State may do in this regard, the present Act does not in my opinion go beyond them: cf. S v. The Queen (Supreme Court of Western Australia, 3 February 1995, unreported).50

Clarke and Sheller J.J.A. agreed with Mahoney J.A., Clarke J.A. stating:

The position in which the court finds itself is relatively straightforward, notwithstanding that the Act presents to me as, prima facie, an unjustified infringement of the appellant's basic human rights. If the Act is valid the court is bound to enforce it. The primary question is whether the law is valid.51

Perhaps in respect of issues concerning the invalidity of a statute trenching on a fundamental principle of the common law or human rights or otherwise, any judicial role may be limited, as yet, to the High Court. The Chief Justice of New South Wales recently cautioned:

50 Id. at 387-88.
51 Id. at 395.
Judges are unelected and, from most points of view, relatively unaccountable. Their independence and unaccountability are appropriate to the judicial role but they are inappropriate to a quasi-legislative role...This is not to assert that there is no room for principled development of the law by appropriate judicial lawmaking. Of course there is. But, as a rule, acceptable judicial lawmaking is incremental, and involves development of established principle. There is a limit to the extent to which a democratic community will accept lawmaking by people who are not obliged to submit to the accountability of the political process.52

Nevertheless, it is apparent that the fundamental rights advocacy of the last 10 years has affected judicial perspectives. The strict Austinian-Diceyian parliamentary supremacy position is in retreat.

Kable's case notwithstanding, there are few in the legal profession who believe that in the present Australian judicial paradigm, Mahoney J.A.'s "compelling circumstances," a 1990s statutory equivalent of the Herodian "all blue-eyed babies shall be killed at dawn" would not be struck down in the courts as an abuse of legislative power.53 Similarly a law, however disguised, which in effect appointed a party as his or her own judge in a particular dispute or category of cases would seem inevitably tending to a similar fate of being declared null and void.

In the future, it will become important to the development of this new constitutional jurisdiction,54 that the independence of

53 Kable v. Director of Public Prosecutions 75 A Crim R 428, 435 at first instance before Spender A.J., where his Honour referred to the BLF Case:
...Priestly J.A. quoted this extract from Dicey, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (9th edition 1939) at p. 81: "If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue eyed babies would be illegal; but legislators must go mad before they can pass such a law, and subjects be idiotic before they could submit to it." Priestly J.A. thought it was at least arguable that such an extraordinary and evil law could never be said to be for the peace, welfare and good government of New South Wales; Kirby P. (at 406) referred to this question: Glass J.A. reserved his position on it. For my part, I would go further: it would seem to me that such a law could not possibly be said to be for the peace, welfare...and good government of New South Wales.
54 In the BLF Case, 7 NSWLR at 387, Street C.J. said:
For my own part, I prefer to look to the constitutional constraints of "peace, welfare, and good government" as the source of power in the courts to exercise an ultimate authority to protect our parliamentary democracy,
the judiciary and the separation of the judiciary from parliament has been given an explicit constitutional framework, with the passage of the recent referendum on judicial offices.\textsuperscript{55} It would be within this now entrenched constitutional framework and with the advantage of High Court reasoning on legislative invasion of fundamental common law rights that New South Wales legislation would be reviewed. It is fair to anticipate that the New South Wales Court of Appeal will contribute to the development of an "implied" bill of rights in Australia.

**CONCLUSIONS AND CONSEQUENCES FOR ADVOCATES**

Any principle or rule of law draws its validity only from its moral content and purpose and is there by a just law. This should become, for any practitioner, a fundamental professional perspective. It means being alert to the wider ramifications of past actions and proposed future conduct or arrangements by clients. It means being prepared both morally and intellectually to give advice, where appropriate, that a client's proposed course of conduct is at law morally unacceptable and should not be pursued. It may also mean jeopardising a continued relationship with a client. Not being prepared to equivocate and approve proposed conduct especially for large or long-term clients may have financially detrimental consequences. But a value-free approach is simply impossible; giving legal advice will not be the issue or at least not the whole issue.

If government agencies or large corporations or wealthy and powerful individuals are involved, the dilemma for a practitioner may escalate. Professional standards, integrity and conscience become paramount. It is then that other parts of our tradition become important. The most drastic and immortal instance of conscience and integrity is St. Thomas More. His famous words, as he went to the block, condemned to death by Henry VIII after

\footnotesize{\textsuperscript{55} Referendum on Judicial Offices. Constitution (Amendment) Act 1992 (NSW), confirmed by referendum on 25th March, 1995.}
a travesty of a trial, still ring down the centuries for all lawyers
with a conscience and powerful enemies: “I die the King’s good
servant but God’s first.” Let us hope and pray that the stakes
would never be that high: in the words of the Pater Noster: “sed
libera nos a malo.”  

In respect of any cause of action in which counsel is briefed
for advice and evidence, it may well be that within whatever
category of case, for example contracts, torts, trade practices,
administrative law that a case may fall, it might initially be re-
garded as straight forward. However, when all of the factors
concerning validity of a law or rule or its application are consid-
ered as outlined earlier, it may no longer seem to be straight
forward. It may well be that various relevant factors should be
carefully and clearly pointed out to the client, perhaps leading to
negotiations and resolution, in the interests of avoiding being a
test case. Uncertainty in the law, and in its application may still
be avoided by a settlement between the parties. The incentive
for settlement, for one or the other of the parties or both, is cer-
tainly increased when the validity of some or all of the legal
framework in which a dispute arises may become the critical
subject in any litigation.

At trial counsel must ensure that the evidence and submis-
sions highlight any possible injustice of particular principles of
law which may be relevant. Obviously, findings of fact and
statements of law or principle by a primary judge will retain
crucial importance even if, the primary judge, as expected, fol-
lows and does not alter a rule of law that is applicable.

For appellate proceedings, it is important to bear in mind
that this may be the final appeal. It is a bold assumption that
the High Court will necessarily grant special leave. The factors
which Brennan C.J. outlines as pertaining in the High Court in
the judicial assessment as to whether the law is just, are also
matters for state or federal appellate courts. All aspects of a
particular law or rule or legislative enactment may need to be
considered in submissions.

Be prepared for rigorous analysis of any submissions pro-
pounding development of legal principle or statutory invalidity.
Be prepared to meet an argument which reflects these recent
remarks by Gleeson C.J.:  

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56 Sed libera nos a malo: but deliver us from evil.
It is wrong to assume that, running throughout the law, there is some general principle of fairness which will always yield an appropriate result if only the judge can manage to get close enough to the facts of the individual case. Much of the policy behind laws, statutory or judge-made, is based upon other considerations. Some legislation reflects the political influence of a particular interest group in the community which has used its power to obtain a redistribution of wealth at the expense of others who are, at least for the time being, less influential. A principle of law may be just or wise, or convenient, even though it operates harshly in some cases. What is fair in the context of one set of facts may be unfair in the context of another. The law responds to many impulses in addition to the dictates of apparent fairness in individual cases, and these need to be given full weight in any rational development of the law.67

Many counsel have detected a lessening of judicial reliance on older authority for specific applications of principles of law. Recent developments, in other areas of the law where analogous obligations or duties are operative, have become more important. This includes comparable countries such as United Kingdom, United States of America, Canada and New Zealand. As well, international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.68 Failure to take any of these matters into account may lead to counsel being caught short by the bench and/or overwhelmed by the opposition.

67 Gleeson, supra note 52, at 432.