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### Law under the influence of religion: The limiting of birth and death decisions

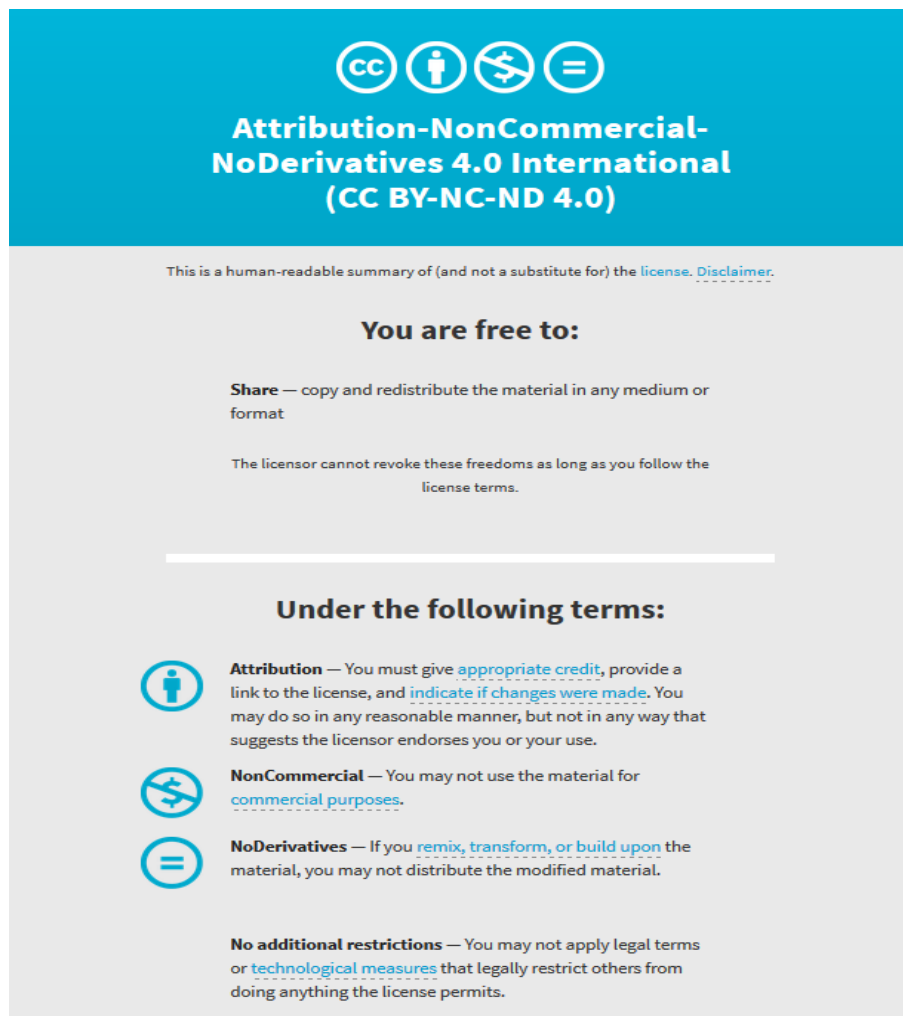
Imagining Law: Essays in Conversation with Judith Gardam, 2016 / Stephens, D., Babie, P. (ed./s), Ch.11, pp.243-260

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Published version <http://dx.doi.org/10.20851/essays-gardam-11>

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23 October 2017

<http://hdl.handle.net/2440/108733>

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## LAW UNDER THE INFLUENCE OF RELIGION: THE LIMITING OF BIRTH AND DEATH DECISIONS

NGAIRE NAFFINE

### PREFACE

This chapter is written in the spirit of Judith's scholarship and style of inquiry. It endeavours to provoke discussion; it is polemical but also indicates the manner in which strong argument might be supported by measured research; it is written in a spirit of rationalism and is against the forces of irrationalism, especially as they undermine the interests of two vulnerable groups: women who wish to terminate a pregnancy and those who are extremely ill and wish to end their lives. Its arguments and concerns have an international reach. It takes on a large subject, which ultimately affects us all. And it employs a slightly experimental approach, as Judith has done in her own work.

In 'An Alien's Encounter with the Law of Armed Conflict', Judith responded creatively to a request to characterise the law of armed conflict in terms of the sex of its subjects.<sup>1</sup> She supplied an account of this body of law from the point of view of an alien, trying to make sense of these regulations as if they were the rules of a ghastly game, but without prior knowledge of their purposes or intended subjects.

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1 In Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (LBC Information Services and Sweet and Maxwell, 1997) 233.

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What would this creature from another world make of the people conjured up by these rules? Judith thus disclosed the presuppositions and biases of humanitarian law, and its understandings of its male and female subjects: the dominant male players, or combatants, with their natural affinity for arms and their peculiar codes of honour, and the preyed-upon female players, beings of natural modesty and weakness.

My chapter borrows from Judith and her exercise with the alien. It creates two distinct viewing points from which to examine afresh another body of law: the medico-legal rules governing basic birth and death decisions. From quite a high perch (though perhaps not from the great heights of the alien),<sup>2</sup> I examine the broad diplomatic and rhetorical moves and strategies of the main protagonists in the legal/religious debates which have shaped these laws. I consider also how these protagonists have themselves manipulated and played with perspective and point of view in order to achieve their ends. I then propose a shift of observational position to allow a close-up scrutiny of the disputants and their specific practical tactics: of the religious, who seek to control these decisions, and of the secular legal liberals, who respond to the religious with laws of compromise.

### INTRODUCTION

Why conduct this exercise? Why revisit the great debates between the religious and the secular legal? One of the most pressing national and international concerns of the new century is the strengthening of religion, as a social and political force, and its movement into the public sphere.<sup>3</sup> And yet the institutional effects of this religious flourishing are poorly understood.<sup>4</sup> This is especially true of the institutions of law, which are a major target of religious organisations.<sup>5</sup> Conservative elements of a variety of proselytising Christian Churches in Australia, the United Kingdom and the United States share a pronounced interest in certain basic life and death matters.<sup>6</sup> Their representatives often proclaim in public forums on the morality of contraception and abortion, assisted reproduction, the use of embryos and organs, pregnant women's refusal of medical treatment, the formation of intimate union and

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2 Though Judith breathed life into the alien and so its eyes were really hers on planet Earth.

3 AC Grayling, *Towards the Light: The Story of the Struggles for Liberty and Rights that Made the Modern West* (Bloomsbury, 2007).

4 Marion Maddox, 'An Argument for More, Not Less, Religion in Australian Politics' (2009) 22(3) *Australian Religious Studies Review* 345-67.

5 Peter Cane, Carolyn Evans and Zoe Robinson (eds), *Law and Religion in Theoretical Context* (Cambridge University Press, 2008).

6 Ngaire Naffine 'Varieties of Religious Intolerance' (2006) 8 *University of Technology Sydney Law Review* 103-17; 'Law's Sacred and Secular Subjects' in Peter Cane, Carolyn Evans and Zoe Robinson (eds), *Law and Religion in Theoretical Context* (Cambridge University Press, 2008) 268.

the positive ending of life, especially euthanasia.<sup>7</sup> Such religious interest groups also endeavour to influence directly the content and direction of relevant law, so that it marries with theological doctrine.<sup>8</sup> For example, they may seek leave to intervene in law cases dealing with matters of their concern, or make submissions to relevant government inquiries into law reform.

As and when such religiously sensitive matters are formally translated into legal norms, and so enter the realm of law, the responsible legal officials are likely to be placed under a variety of intellectual, political, social and moral strains. These strains may occur as the law is being developed and formulated or when the resulting doctrine is applied and requires interpretation. There may be pressures to supply both legal and moral justifications; to exercise diplomacy to avoid offence to the religious and the secular, without straying too far from accepted legal principles. The result is a mixed body of law often marked by conceptual tension.<sup>9</sup>

This chapter comes in two parts. The first part ascends to a high perch and endeavours to discern the broad forms and character of the debate between the legal and the religious communities, especially in relation to birth and death decisions, and reflects on the reasons that legal officials have found themselves so vulnerable to the claims of the religious within these debates. This, I suggest, tends to be bad for women and bad for the vulnerable more generally. The second part changes the viewing position: it urges a move to the detailed, the technical and the practical. It proposes a programme of close research into the particular ways law has specifically responded to such religious pressure: when and how it has resisted such pressure and when and how it has succumbed. The avowed purpose of such an inquiry is to improve our legal understanding of the nature and extent of the imprint of religion on law and thus equip law better to resist religion.

### THE CANONICAL DEBATE — HOW THE RELIGIOUS AND THE LEGAL COMMUNITIES TEND TO ENGAGE WITH ONE ANOTHER ON THE BIG ISSUES

The moral, political and legal terrains of abortion and euthanasia are important meeting grounds of the religious and the secular. There are highly public and well-rehearsed

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7 David Marr, *The High Price of Heaven* (Allen and Unwin, 2000); John Portmann, *Sex and Heaven: Catholics in Bed and at Prayer* (Palgrave Macmillan, 2003).

8 D Eisenberg, 'Lessons of the Schiavo Battle: What the Bitter Fight over a Woman's Right to Die Tells Us about Politics, Religion, the Courts and Life Itself' *Time*, 4 April 2005, 21.

9 Jane Weaver, 'Court Ordered Caesarean Sections' in Andrew Bainham, Shelley Day Schlater and Martin Richards (eds), *Body Law and Laws* (Hart Publishing, 2002) 229; Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001); Emily Jackson, Fatemeh Ebtehaj, Martin Richards and Shelley Day Sclater (eds), *Regulating Autonomy: Sex, Reproduction and the Family* (Hart Publishing, 2009).

moral and legal debates between the religious believer and the secular liberal, which tend to be cast in a certain manner: as a struggle between two oppositional principles — the sanctity of human life versus the autonomy of the human individual — and those principles are linked with fundamentally different systems of thought. This canonical debate between the religious and the secular on the appropriate mode of regulating the fundamental life matters of abortion and euthanasia is typically cast as one of 'pro-life' versus 'pro-choice'. By way of this shorthand, the sanctity of the life of the foetus is pitted against the reproductive autonomy of the pregnant woman, and the sanctity of the life of the suffering person is pitted against their preference for their life to end.

The believer advances the principle of the sanctity of human life and argues that it should directly sound in law such that, for example, abortion should be fully criminalised and euthanasia should remain the crime of murder. The foetus and the adult at death's door are said to have ineliminable value; they are sacred and inviolable; nothing and no-one should deliberately harm them or end their life.<sup>10</sup> The secular liberal argues that choice should reside with the rational chooser: with the woman who may or may not wish to reproduce and with the person who wishes to die.<sup>11</sup>

This debate is conventionally portrayed as one of stark oppositional disagreement between those of fundamentally different, even incommensurable, worldviews or mentalities or ways of seeing. Repeatedly, it is stated that the disagreements between the religious 'pro-life' view and the secular liberal 'pro-choice' position are intractable; that they entail fundamentally different comprehensive systems of thought; that controversy and hence regulative difficulty is inevitable. For example, a general review of Australian efforts to decriminalise euthanasia described the 'euthanasia debate' as 'indeterminable and intractable' and as 'a controversial subject on which many people hold strong views'.<sup>12</sup> Similarly, the debate about the regulation of reproduction has been described as one of 'profound moral disagreement about the propriety of human intervention', such that 'there will ... never be consensus about the moral status of

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10 See, for example, the extensive writings of John Finnis on this subject, especially 'The Legal Status of the Unborn Baby' (1992) 43 *Catholic Medical Quarterly* 5-11; 'Bland: Crossing the Rubicon?' (1993) 109 *Law Quarterly Review* 329-37; 'A Philosophical Case against Euthanasia' in John Keown (ed), *Euthanasia: Ethical, Legal and Clinical Perspectives* (Cambridge University Press, 1995) 32; 'Euthanasia, Morality, and Law' (1996) 31 *Loy. LA Law Review* 1123, 1143; 'Public Reason, Abortion and Cloning' (1998) *Valparaiso University Law Review* 32; 'Abortion, Natural Law and Public Reason' in Robert P George and Christopher Wolfe (eds), *Natural Law and Public Reason* (Georgetown University Press, 2000) 71-105.

11 The most prominent liberal in this area is Ronald Dworkin; see especially his *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins, 1993) 82-3; and 'Tyranny at the Two Edges of Life: A Liberal View' (Winter 1994) *New Perspectives Quarterly* 16, 19.

12 Lorana Bartels and Margaret Otlowski, 'A Right to Die? Euthanasia and the Law in Australia' (2010) 17 *Journal of Law and Medicine* 532, 550.

the foetus'.<sup>13</sup> '[T]he predominant construction of the issue of abortion regulation' has also been described 'as an irresolvable conflict between a foetal right to life and a maternal right to privacy or bodily autonomy'.<sup>14</sup>

Because of this seemingly dug-in oppositional stance, it is often said that legal development, legal reasoning and analysis in this field are inherently hard work, legal principles strained and compromised, and consensual law making impossible.<sup>15</sup> To Emily Jackson, for example, 'in working out how to regulate abortion, pursuit of a compromise that reaches even a minimal level of universal acceptability is almost certainly futile'.<sup>16</sup> This canonical debate is, in essence, a particular (Christian) religious view pitted against a secular liberal view, and — incidentally and importantly — it is the preferred orthodox Roman Catholic method of framing the debate, as opposed to that of religious liberals.<sup>17</sup>

Why and how does the debate continue to be cast and recast in these stark terms?<sup>18</sup> What work is being done by this casting or framing of the debate, and what does it leave in place, uninspected and unresolved? And most importantly, perhaps, what are its utilities and its disutilities — especially for pregnant women and the dying? Here my intention is to observe, from a high perch, the large moves of the protagonists and their manipulation and negotiation of perspective.

### Declaring Incommensurable Visions: The Duck/Rabbit

Something that is exceedingly confusing about the big debates on abortion and euthanasia is that, starkly drawn as they are (typically said to be) in their canonical forms, both debates seem to entail an assertion of incommensurable ways of seeing the relevant subjects and their regulation and even the source of law; and such incommensurability would seem to suggest that conversation or negotiation is impossible. It is said repeatedly that the conflicts are irresolvable, but, as we know, conversation does occur. After all, it is a debate — one of the biggest and best known.

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13 Emily Jackson, *Regulating Reproduction* (Hart Publishing, 2001) 1.

14 Charlotte Lesslie, 'The Psychiatric Masquerade' (2010) 18 *Feminist Legal Studies* 1, 3.

15 See Ngairé Naffine, 'How Religion Constrains Choice' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012).

16 Emily Jackson, *Regulating Reproduction* (Hart Publishing, 2001) 1.

17 Of course, the Christian Church also encompasses moderates, liberals and the truly ecumenical. There are many tolerant liberal Christians who do not cast the debate in such stark oppositional terms. Such religious tolerance is particularly evident in the work of liberal Australian Christian ethicist Max Charlesworth. See, for example, his *Bioethics in a Liberal Society* (Cambridge University Press, 1993).

18 Even by feminists, such as Jackson and Lesslie.

Though the form in which this debate is cast, between the religious and the secular, is one of complete conflict, it contains paradoxical elements of agreement and bipartisanship. These elements of agreement have important utilities for those on both side of the divide, but they are particularly beneficial to the religious, as they entail such large concessions. The form, I suggest, in which the debate is cast is very like that of the duck/rabbit made famous by Wittgenstein. The duck/rabbit is a perceptual puzzle which enables two fundamentally and incommensurable ways of seeing the one object, both of which cannot exist at the same time. Wittgenstein employed the duck/rabbit to demonstrate that we see the one object (here the one human being) 'according to an interpretation', and that we can see it as entirely different objects.<sup>19</sup> If we employ the idea of the duck/rabbit here, one way of seeing is religious — call it the rabbit; the other way of seeing is that of the secular liberal — call this the duck. The two visions, the rabbit (the religious view) and the duck (the secular liberal view) are irreconcilable: they are two utterly different views or systems of thought which result in entirely different ways of seeing what is there. In a sense, the seeing produces a completely different object or subject.

If and while you see it one way, you cannot see it the other way. Thus when it comes to seeing the pregnant woman, a strong religious 'rabbit' way of seeing her (from the moment of the fertilisation of her egg) is as the bearer of her own and another's soul, a sacred innocent being of unalloyed value who must be protected from intentional killing at all costs. Now she is not one, but two, and now she may represent the greatest threat to the embryonic soul. There is a Divine Supernatural source of the value of both. By contrast, a strong secular liberal 'duck' way of seeing the pregnant woman is as one being: one rational human individual who is the woman and the only responsible chooser. Now human value derives from human reason and there is no such thing as the Divine. These are incommensurable ways of seeing the same human being.

With the sick or dying person who positively wishes to hasten death, the religious view is that the only relevant will is the perceived will of God. The religious view invokes a higher law than human law. For the secular liberal, the relevant will is that of the dying person whose life it is. With the debate thus starkly drawn, entailing utterly different visions, we seem to be at an impasse.

The duck/rabbit is the extreme and yet common cast of the debate. This is how the debate is typically described: as entailing incommensurable ways of seeing the problem which cannot be held simultaneously. This necessarily means that, at any given moment, either the rabbit or the duck must trump — we cannot have both, or a mix of the two. It can only be the rabbit (say, the soul/life of the foetus, which is

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19 Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell, 1953) 200.

infinitely precious and must not be intentionally killed) or the duck (say, the woman as human chooser, as sovereign controller of her body). Binocular vision cannot be achieved. Resolution is impossible. The religious faithful will see only the twin souls of the pregnant woman, and the secular rationalist will see no soul at all: only a single human rational chooser. Thus cast, we have non-negotiability of position and so intransigence.

However, this cast of the debate, which I suggest is the received one, also has a number of important paradoxical implications and effects. The duck/rabbit cast of the debate entails a basic concession by rationalists to those on the other side of the debate — that is, the rationalists concede that the religious adherents genuinely, absolutely see the matter differently, for reasons which must be respected. It can also connote that the image or meaning is in the eye of the beholder and that neither the duck nor the rabbit are right or wrong:<sup>20</sup> it is a matter of perception.<sup>21</sup>

Secular rationalists may thus concede too much from the outset. They concede the supposed difficulty of the subject matter — after all, it is a duck/rabbit. They concede that it is useless to argue in duck terms to the rabbit people. They may further agree not to argue the nature of the problem because the two understandings are fundamentally incompatible.

The secular rationalist will speak of the importance of the choice of the individual but also, in a spirit of compromise, of the inherent value of the individual, regardless of the individual's ability to make rational choices. Legal liberals are unlikely to challenge directly what are taken by the religious to be supernatural truths. There may even be a judicial or scholarly recognition that what once had a Biblical justification (say, the principle of the sanctity of life) now has a secular justification (humanism). But judges and law makers and even legal scholars are reluctant to go further and say, in true atheistic humanistic spirit, that there is no basis for belief in God and that its tenets can be positively harmful. Direct, and one could say intellectually honest, confrontation is avoided. Respect and restraint and even solicitude may be displayed. Deep and true differences are veiled.

Indeed, as one skeptical commentator has observed, 'religious tolerance is largely a creature of secular humanism, and in its spirit the majority of critics manqué

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20 The rabbit people will not concede this among themselves because, after all, they see a rabbit and take the rabbit to be the position.

21 It is not the essential or true nature of the object or human being which is being seen and described by the duck people or the rabbit people (whatever that may be), but an interpretation of that object or being; however, that interpretation is so compelling and critical to the particular worldview that it is experienced as a true and accurate perception of the nature of the object and it is neither negotiable nor subject to change.



have simply declined to fire'.<sup>22</sup> Thus secular rationalists, in liberal spirit, out of respect for the religious, often decline to criticise the contents of religious belief; and, indeed, some have treated such belief as intellectually respectable and have been willing to draw upon it when the need is thought to arise.

### Concession that Legal Resolution Will Be Hard or even Impossible

The duck/rabbit casting of the debate can also entail a declaration by law makers and lawyers that in these areas of legal life there can be no real resolution; those of belief will simply not see it the same way as the secular; these differences of seeing necessarily put the matters in the 'hard basket'; they are inherently difficult or tricky matters, which will inevitably produce hard cases for law. They must be bracketed from the mainstream of good, sound, principled law. Law cannot make them different. They will remain legally difficult and probably unsatisfactory, but that is just how things are. These are the matters that will be non-standard, exceptional, at the penumbra of legal meaning. And thus they will not threaten the core of legal meaning or represent a test of it. Strategically, the duck/rabbit is important. It says that what might appear to be a legal or political compromise or failure actually resides in the different ways of seeing the problem, which will not and cannot change.

### Parcelling Out the Problem

This cast of the debate can entail the further implication that the religious-rabbit cast of the debate might be right in some circumstances (entailing a concession to religious moral authority) while the secular-duck cast might be right in others. This is what Stephen Jay Gould has referred to as 'non-overlapping and thus non-competing magisteria, where a magisterium is "a domain where one form of teaching holds the tools for meaningful discourse and resolution"'.<sup>23</sup> This can conduce to a parcelling and division of the problem, so that the religious get some bits of law while the secular get others. If we look very briefly at the resultant law, one could conclude that euthanasia has been given over to the religious, while the formally criminal, but practically liberal, law of abortion remains somewhere between magisteria; neither rabbit nor duck; neither fish nor fowl.<sup>24</sup>

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22 Tamas Pataki, *Against Religion* (Scribe Short Books, Melbourne, 2007) 11.

23 Owen Flanagan, *The Problem of the Soul* (Basic Books, 2002), quoting Jay Gould in *Rock of Ages: Science and Religion in the Fullness of Life* (Ballantine Books, 1999) 47.

24 In those Australian jurisdictions (such as Victoria) where early-term abortion has been decriminalised, it would seem that the secular-duck position has prevailed.

The duck/rabbit cast of the debate draws attention away from the compromises of secular liberalism, where it is willing for autonomy not to be fully applied, despite the presence of a rational chooser: where liberals begin to exceptionalise and even move towards mysticism and begin to concede the special mysterious nature of that which must be regulated.

Thus the duck/rabbit is an extreme cast of the debate which is widely accepted and has a number of practical and strategic implications and utilities. It licenses ongoing negotiations about who is going to control meaning (and the law). Finally, and perhaps most importantly, the duck/rabbit cast of the debate deflects attention away from the terms, concepts and meanings that the two sides share. There is a great deal of bipartisan thinking which tends not to be openly discussed, evaluated or criticised.

### The Common Measure: The Content of the Agreement

I now want to consider more closely just what the two sides have in common. First, the inevitability of a two-sex system as a basic ordering category of social and legal thought is fundamentally agreed.<sup>25</sup> The distinction between man and woman is utterly assumed and shared, even though there are differences in the conception of each. Both sides share a history in which the personification of women is qualified. Certainly, the problems in conceiving of women as sovereign individuals whose symbolic meaning does not derive from man are shared. Both sides assume some sort of reciprocity of the sexes.<sup>26</sup> For both, men (understood in a certain manner) remain the true unproblematic individuals.<sup>27</sup>

Second, both accept a bodily form in which this individual value is uncompromised (the non-pregnant healthy individual). Both have a sense of

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25 For a sustained analysis of the two-sex system in law, see Katherine O'Donovan, *Sexual Divisions of Law* (Weidenfeld and Nicolson, 1985). See also Margaret Davies, 'Taking the Inside Out: Sex and Gender in the Legal Subject' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (Sweet and Maxwell, 1997).

26 According to the Catholic Catechism: 'God himself is the author of marriage' and marriage is to be between one man and one woman. Here the guiding idea is that the sexes have a correlative nature. Rather than functioning as distinct choosing individuals, forming intimate associations unrelated to our sex, we are expected to form intimate relations only across the sexes and then, ideally, to reproduce naturally and so produce a family. In other words, there is a wholesome honourable God-given form to the heterosexual family. It is paradoxically both the natural and required unit of being: the man, his woman and their offspring. Catechism of the Catholic Church (Society of St Paul, 1994), par 1603.

27 On the difficulties of accounting for women as true legal individuals, see Ngaire Naffine, 'Our Legal Lives as Men, Women and Persons' (2004) 24 *Legal Studies* 621.

'physical completeness'.<sup>28</sup> The problematic or marginal status of the pregnant woman is common to each ordering system: the pregnant woman poses a fundamental categorical problem to both religion and law.<sup>29</sup> However, the system of thought is not shaken by this problem of ordering.<sup>30</sup>

The very sick and the dying person are also problematic to both. Both the religious and the secular rationalist question the autonomy rights of the dying person, though on different grounds. The secular rationalist, with their idea of a competent autonomous bounded individual, divines the loss of these qualities in the dying and begins to question their ability to function as choosing individuals; the religious person looks to God's will for the appropriate source of decision making.

There are agreements between Christian theology and Liberal philosophy on principle and conceptual division, and there are bipartisan agreements about how power should be shared in law. When a person unproblematically satisfies the requirements of the liberal individual, as an autonomous discrete rational chooser, there is no quarrel with the religious: the person is governed by the autonomy principle, and law supports their choices without interference from religion. When a person is pregnant or dying and religion acquires an interest, liberal philosophy tends to retreat and begins to cede authority to the Church. The preconditions of liberal individualism are no longer clearly satisfied; religion acquires a stake and is positively permitted to do so.

It can often appear that law is striving valiantly to reach a regulative compromise, to find points of common agreement within a pluralistic society<sup>31</sup> comprising groups with very different worldviews (and doing so badly, according to cogent feminist critiques): 'to reconcile the inevitable conflicts inherent in pluralism and liberal democracy'.<sup>32</sup> But I suggest that law is not a sort of neutral external

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28 Mary Douglas, *Purity and Danger* (Routledge and Kegan Paul, 1966) 64. See also the extensive feminist literature on the 'bounded' nature of the human body in law, especially the work of Jennifer Nedelsky.

29 See Mary Ford, 'A Property Model of Pregnancy' (2005) 1 *International Journal of Law in Context* 261; and 'Evans v United Kingdom: What Implications for the Jurisprudence of Pregnancy?' (2008) 8(1) *Human Rights Law Review* 171.

30 Rather, the problem is found to lie with that which does not fit the order — with the pregnant woman herself.

31 As Peter Cane expounds this view of law: 'Law can underwrite value-pluralism. If disagreements about values become so serious that they threaten social stability and harmony, the law may be able to maintain social cohesion by laying down a norm that people are prepared to accept'. Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 *The Journal of Ethics* 21, 49.

32 This was how the Lockhart Committee inquiry into the regulation of human cloning conceived its task. Loane Skene et al, 'The Lockhart Committee: Developing Policy through Commitment to Moral Values, Community and Democratic Processes' (2008) 16 *Journal of Law and Medicine* 132, 134.

umpire arbitrating fundamental differences across comprehensive systems of belief. Law does not stand outside these two ways of seeing, impartially parcelling out competing claims. Rather, law is deeply implicated in both ways of thinking, and thus plays an important role in shoring up both positions. What we have is a law of compromise: both the competing views find their way into law, thereby setting up tensions within law as well as silent agreements about terms, principles and divisions — the uninspected. Law is fully implicated.

The conceptual divisions I have identified are reflected in law. The conceptual machinery that is already in place in law, particularly its basic divisions, has been developed in a certain religious climate by people of influence within that culture according to their understandings. Religion and then political liberalism have been strong twin conditioning influences on the development and hence the nature of those divisions. One can say that these twin influences have helped to establish basic conceptual legal divisions imbued with particular metaphysical understandings which work poorly for reproducing women and for the weak and dying.

The perceived strength of this dichotomous casting of the problem — the duck/rabbit — arises because both religion and secular political liberalism reach into, and connect with, law's general principles and its very conceptual foundations. Consequently, law does not stand above these metaphysical debates, as dispassionate arbiter between antagonists; nor does law exist in its own distinctively legal domain, unaffected by the ideas which are promulgated on both sides. Instead, I suggest, law is deeply implicated in both ways of thinking. Thus it helps to sustain the debate: it helps to reproduce it, to give it legal meaning, to give it practical legal work to do, and indeed to generate the tensions and create the very intellectual problems it strives to solve. Because of this deep implication of law in both ways of thinking, law itself is often confusing and confused, and the subject matters come to seem to be hard areas of regulation.

### The Making of Hard Cases (which Serve the Directly Affected Poorly)

A number of things follow from this analysis. The canonical debate between supposed opposites — the religious and the secular liberal — is misleading because in truth it is founded on a broad base of agreement. Because this broad base is agreed, much of it goes uninspected. And yet it is here in the conceptual foundations that some of the most troubling elements of each position reside, notably the problematic status of the protagonists of both debates: pregnant women and the dying. The practical result is that both are the chief subjects of concern and yet both are poorly conceptualised in the prevailing systems of belief. This helps neither subject to get justice through law because law helps to reproduce each position with all its contradictions.

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Another concerning effect of the strong oppositional nature of the received debate is that law making in these areas occurs in its shadow. Indeed, legal officials are often acutely aware of these religious debates and of the religiously sensitive nature of certain legal issues, and so their reasoning is developed with a sly eye to these debates, especially when it seems that they are moving into religious territory. The canonical debate causes law makers and judicial officials to tread carefully. These are the subjects of conscience votes rather than clearly developed public policy, and they result in law which has been heavily criticised for its failure to address fully the concerns of either side. Legal officials may also begin to adopt metaphysical and theological thinking themselves, to stray into the discourse of the other, to the extent that they come to conceive their task as religious in nature and as touching on the very meaning of life.

Indeed, the great debate appears to produce a law of compromise, but not in the best political sense of that term, nor as a law that comports with justice. Abortion laws have typically entailed the use of criminal law — that is, the setting up of a serious criminal offence — and have then supplied what is effectively a medical defence of necessity if the woman can establish the threat that the pregnancy poses to her health. Formally, the choice to terminate resides with the doctor, not with the woman. Only very recently have a few Australian jurisdictions removed abortion from the criminal law. At the end of life, withdrawal of life support in hopeless cases is lawful (effectively making lawful slow death by dehydration) as is the doctrine of double effect, but voluntary euthanasia remains murder. Repeated attempts to make euthanasia lawful have failed. In both cases, the vulnerable person, who is either the pregnant woman or the dying person, is deprived of individual choice, and religious principles are imposed on the secular.

Feminists, for some time now, have noted the exceptionalising and bracketing of normal female conditions in law making and legal analysis. Indeed, this could be said to be the most important proposition of feminists: that women still do not represent the human norm (though feminists have also questioned the very idea of such a norm). Pregnant women, in particular, have been construed as hard cases for both liberal legal individualists and for the religious, who have such an interest in the twin souls they are thought to represent. They have therefore often been treated as hard legal cases calling for exceptional legal treatment.<sup>33</sup>

The pregnant woman is wrenched between belief systems and represents a problematic case for both. As the subject of religious discourse, she finds that she bears a sacred foetus. To the extent that law subscribes to the same way of thinking and invokes the religious-legal principle of the sanctity of life, she will find that she

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33 See, for example, Mary Ford, 'A Property Model of Pregnancy' (2005) 1 *International Journal of Law in Context* 261.

cannot therefore terminate a pregnancy, unless her own wellbeing is threatened. Thus a termination remains a serious criminal offence, but there is a defence of necessity supplied to her doctor.<sup>34</sup> As subject of the secular liberal discourse, the pregnant woman may find that she is effectively not pregnant at all. She is an autonomous individual whose rights as a choice maker are undiminished by her pregnancy. Alternatively, she may find that she is not regarded as eligible for the status of rational choice maker because this implicitly calls for non-pregnant status. In short, she does not qualify as a liberal individual.

The dying are more obviously the subjects of religious thinking. The religious view gives them a soul that is God's, which is something that neither they nor the doctors have the right to destroy. The liberal secular view endows them with choice. Law resolves the difference with the doctrine of double effect and the criminalisation of voluntary euthanasia.

The duck/rabbit cast of the great debates is subtle, confusing and conducive to spin. It enables sophisticated and tactical disagreement and a good deal of unstated and unquestioned agreement. My practical concern, however, is with the people who are caught up in these great debates where there is so much smoke and mirrors, particularly pregnant women and the sick and dying — people at their most vulnerable times — and the laws they get left with and the manner in which their lives are regulated as a consequence. My concern is that religious principles, in particular, are being imposed on the secular in order to limit both reproductive autonomy and the way that we are permitted to die.

### A RESEARCH PROGRAMME

Thus far, I have examined the broad terms and casting of the debate between the religious and the legal from a high perch. But such general observations would gain strength from a sustained and rigorous investigation into the specific and particular ways in which religion has pressed on to law and the ways in which law has differentially responded. This would be the work of a major investigation, which is badly needed in view of the rising forces of religion. Within the brief of this chapter, my task is only to sketch out a programme of research, not to undertake it.

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<sup>34</sup> Feminists have been especially critical of the medicalisation of women in abortion law and the denial of their right to decide what is done with their bodies — a right asserted as fundamental to liberalism in the classic statement by John Stuart Mill in *On Liberty* (1869). If anything, in abortion law, autonomy rights reside with the doctor rather than with the woman. See especially Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto, 1997); Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001); Emily Jackson, *Medical Law: Text, Cases and Materials* (Oxford University Press, 2<sup>nd</sup> ed, 2009) and Jackson, Ebtehaj, Richards and Sclater, above n 9.

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The programme I propose is one that examines critically just how, why and when legal officials have asserted their disciplinary autonomy, their conceptual authority and competence, over the intimate life matters, and eschewed religious influence; how, when and why they have struck a regulative compromise with the religious; and when and why they have been positively receptive to religious influence and even ceded moral and legal authority to the Church. In short, what makes for a willingness of law's representatives to join forces with religion? And when is disciplinary separation more likely to be asserted, and what sort of laws and law result?

The project would examine the interplay between religion and law, with a particular emphasis on the legal institutional responses: the effects on legal principle, concepts and doctrine and, perhaps most importantly, on how the task and role of the legal official is conceived by that official. This calls for close legal analysis of the complex diplomatic negotiations between religious and legal officials, as representatives of two disciplinary positions in which a law of cross-disciplinary compromise is often achieved.

The potential scope of this inquiry is considerable and so to secure its intellectual boundaries and establish a sensible framework for specific investigation it would take as its focus certain laws and certain forms of law making in particular jurisdictions. The legal world that forms the focus of this project would be that of modern centralised Anglo-American-Australasian state law. The scope of the project would be further delimited by the choice of legal subject matter.

The two major life decisions which could sensibly form the substantive legal subject matter of this project are, first, the decision to start a life (and conversely to stop life starting), and second, the decision to end a life (and conversely to demand its continuation). As I have already observed, birth and death are parts of life, and their associated decisions are subject to legal regulation, over which the Church asserts its particular competence and authority, and with which it is particularly exercised. They relate to important parts of Christian theology. In these parts of life, the religious story is particularly rich.<sup>35</sup> The case and statute law pertaining to these life decisions could therefore supply an excellent source of material about relations between law and religion.

A cluster of laws regulating the start of life attracts the interest of the Church. They include laws governing contraception, abortion, assisted reproduction, the rights of pregnant women in relation to refusal of medical treatment, sterilisation

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35 This has been noted by Ian McEwan in 'End of the World Blues' in Christopher Hitchens (ed), *The Portable Atheist* (Da Capo Press, 2007).

of the disabled, and the uses of embryos produced by assisted reproduction. These religiously sensitive areas of law are particularly marked by their conceptual tensions.

There is another cluster of laws concerning dying and death which attract the interest of the religious and aspects of which seem to reflect religious understandings. The courts have openly endorsed a common law principle of the sanctity of human life (a direct borrowing of religious language): voluntary euthanasia remains murder and assisted suicide a separate serious crime. However, there is also to be found in these areas of law a jurisprudence of compromise which acknowledges the autonomy rights of the individual to issue directives, in advance of their dying, for medical support to be discontinued.

These complex relations between law and religion are conducted within government inquiries into law, in the parliament and its associated processes, in the courts and on the Bench, at the highest judicial levels, and also in legal scholarship in learned journals and monographs. These are the sources upon which this project could rely. There should be a selection of superior court decisions related to these religiously sensitive matters of making and ending life. The point of these case analyses would not be to labour or rehearse the religious nature of these matters. Rather, their point would be to reveal the techniques employed to justify, deflect or deny the recognition of religious arguments and interpretations. There could also be a close study of a selection of reports of government inquiries on religiously sensitive matters which anticipate changes to legislation in the two areas and the means adopted to engage with and bypass moral/religious inquiry.<sup>36</sup> Again, the point would be, first, to show the techniques of engagement with religious representatives and second, to explore the legal mechanisms of compromise.

This inquiry would shed new light on the very nature of law as it absorbs religious pressures and is constitutionally altered in complex ways that are, to date, poorly understood. It would show how law both changes and sustains its very nature, as a discipline, as it assimilates strong pressures from another discipline. It would

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36 The project could consider, for example, Mary Warnock's report of the government inquiry into the regulation of human fertilisation and embryology (Mary Warnock, *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Basil Blackwell, 1985); the Lockhart report on the regulation of human cloning: Loane Skene, Ian Kerridge, Barry Marshall, Pamela McCombe and Peter Schofield, 'The Lockhart Committee: Developing Policy Through Commitment to Moral Values, Community and Democratic Processes' (2008) 16(1) *Journal of Law and Medicine* 132; and the Nuffield Council of Bioethics' Working Party on Human Bodies in Medicine and Research chaired by Marilyn Strathern, published on the Council's site: Nuffield Council on Bioethics, Working Party on Human Bodies in Medicine and Research, *Give and Take? Human Bodies in Medicine and Research: Consultation Paper* (April 2010) <<http://nuffieldbioethics.org/wp-content/uploads/Human-bodies-in-medicine-and-research-consultation-paper.pdf>>. These critical analyses of the reasoning employed in the reports could be supplemented with interviews of Committee consultants and Chairs.



explain the fundamental tensions that are generated within law as it confronts a profoundly different discipline (which is, at least in part, incommensurable with law, due to its reliance on faith rather than reason), and the means by which those tensions are accommodated, resolved, deflected or ignored. Such a study would greatly deepen our understanding of law's intellectual responses to religious pressure, and of the fundamental tensions which ensue within jurisprudence. It might well also show the way to a more coherent, more intelligible more principled and hence more just law governing the decisions which are most basic to our lives.

There is already solid preliminary evidence of three broad legal institutional responses to religiously sensitive matters, and these support the formulation of a strong hypothesis that could guide such an investigation.<sup>37</sup> Perhaps the most orthodox institutional response to religion is legalistic in nature, in that the sensitive matter needing regulation is treated as assimilable to, and appropriately governed by, existing conventional legal principles, concepts and reasoning. It entails an assertion of disciplinary autonomy and the invocation of distinctively legal concepts, principles and purposes to preserve that autonomy. This is a jurisprudential assertion of both law's separability and of its actual separation from other bodies of knowledge and thought, and it is likely to entail explicit opposition to religious intervention and a refusal to treat the sensitive matter as exceptional. It entails an assertion of full disciplinary competence and resistance to religious argument and metaphysical speculation. There may also be a tendency to emphasise the abstract, inventive and artificial nature of law. In this mode, law is often turned in on itself, mainly addressed to legal officials, committed to a technical language often not intended for general understanding, relatively autonomous, non-naturalistic, and increasingly statutory.

The second, less influential but still manifest, legal response to religion is effectively its polar opposite: it entails an explicit legal receptivity to religious argument, deference to the authority of the religious and possibly a legal 'exceptionalising' of the religiously sensitive matter, so that it is treated as a special case in need of extra-legal reasoning and principles. This is a jurisprudence which comes close to a variety of religious law. It occurs when legal officials profess that law has exceeded its conceptual competence, that the matter to be regulated is not fully susceptible to legal treatment and hence that there is a ceding of moral and legal authority to the Church and a merging of law with religion. Here, there is a tendency to see law as continuous with a natural or supernatural morality outside of law, and so to import metaphysical understandings into law (such as what is the value and meaning of a life) and also to

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<sup>37</sup> See Ngairé Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009); and 'How Religion Constrains Law and the Idea of Choice' (2009) 30 *Adelaide Law Review* 15.

regard the religious as expert in these areas. In its starkest mode, it entails a surrender of disciplinary autonomy.<sup>38</sup>

The third response seems to entail a pragmatic middle position, an endeavour to juggle legal and religious principles, to defer to and respect both, and even to hold the two in balance. Such reasoning is evident in a good deal of the case law on beginning and end of life decision making. This involves a complex exercise in legal diplomacy in an area where competing views can be strongly articulated and potentially legally destabilising, and where there are high levels of public scrutiny. It entails concessions to the disciplinary authority of the Church, but for certain supposedly metaphysical purposes only, and then not completely so. It invokes a mix of orthodox legal and religious principle.

Here we see legal officials partly engaged in a process of compromise, acknowledging the strain between religious and legal principle, but still asserting the importance or even priority of distinctively legal principles and methods. This response entails a departure from legalism and so a change of law's artificial character, such that the sense of law's abstracting and inventive quality is modified and diminished. This is a law of practical compromise, strategically addressed both to the religious as well as to the legal and broader community.<sup>39</sup>

While preliminary inquiry strongly suggests the presence of these three legal responses to religion, more sustained investigation may well reveal greater complexity of disciplinary response and overlapping positions, and indeed it may identify other disciplinary positions. The full range and complexity of institutional legal responses to religion need to be closely examined and tested for their relative influence, their precise nature, their interplay, and the manner in which they shape legal doctrine. For each legal response, one can anticipate a particular and distinctive understanding of the general nature and role of law, the specific nature of the legal task, the sufficiency of legal concepts, and the suitability of intervention by religious representatives and religious principle in legal matters.

The project should pose a variety of questions designed to probe the nature of the legal response to religious intervention. For example, how does the official construe the nature of the problem or dispute before it? Is the problem cast in an assiduously legal manner, focusing on the specific purposes of the governing laws and the consequent legal rights and duties thus arising, or is it interpreted in a manner which admits metaphysical arguments? Is it treated as a central, standard case for

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38 See, for example, the writings in these areas of Leon Kass, John Keown and John Finnis.

39 For example, there was close public scrutiny of the decisions of the English Court of Appeal in the case of *A Children* [2004] 4 All ER 148 (on the legality of separating conjoined twins, thereby killing one of them), and the Law Lords engaged in extensive highly public justifications of their reasoning, which appealed to a broad variety of positions.

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which there are apposite principles, or as exceptional? Does the official assert full disciplinary competence or concede the relevance of religious argument? Is there a conscious use of legal techniques such as presumptions, fictions and deemings, or abstract rights analysis, to thereby circumvent moral categorisation and metaphysics? Is expressive moral/religious language employed or avoided? The use of the term 'sanctity of life', for example, is highly expressive and bears religious connotations. Is standing granted to religious bodies in the relevant cases? If so, first, on what basis is it granted (why are they seen to have a material interest)? Second, how does the court interpret and respond to their arguments?

The project should examine the ways in which religion influences law making and legal interpretation. The strong guiding hypothesis is that there are three distinct jurisprudential responses to religion: one legalist, another religionist and a third pragmatic. Sources should be investigated and tested for the presence of these responses. However, investigation should remain open to the possibilities of other more complex relationships between law and religion. The anticipated benefit of such a programme of research is a more reflective law, which is either less vulnerable to metaphysics (especially theology) or which employs metaphysics consciously and strategically and in conformity with the needs of justice.

## AFTERWORD

The manipulation of perspective is a useful heuristic technique. As Judith found with her alien's view of humanitarian law, it can offer a new way of seeing something that has become too readily accepted, or that is seen in a standard way, because of excessive familiarity. It can jolt one out of easy assumptions.

With the great religious and legal debates about the making and ending of life, there has been a standard set of arguments and counterarguments; my aim has been to expose and evaluate these practised moral and intellectual manoeuvres. From my high perch, I have observed the large moves of the players within this moral and legal game as it is played over and again. I have then suggested how we might move closer in on the disputants and work out what is going on in greater detail, with a finer focus. But the project proposed is not for the faint-hearted. It is still large in scale and it is riven with contention: the practised players are very likely to want to exert their effects and to press us into all the old moves.