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Journal of Military and Strategic Studies, 2022; 21(2):77-106

Journal of Military and Strategic Studies

VOLUME 21, ISSUE 2

Colouring In The Grey Zone: Lawfare As A Lever Of National Power

Samuel White*

> As Themistocles sailed along the coasts, wherever he saw places at which the enemy must necessarily put in for shelter and supplies, he inscribed conspicuous writings on stones, some of which he found to his hand there by chance, and some he himself caused to be set near the inviting anchorages and watering-places. In these writings he solemnly enjoyed upon the Ionians, if it were possible, to come over to the side of the Athenians who were risking all in behalf of their freedom; but if they could not do this, to damage the Barbarian cause in battle, and bring confusion among them.
>
> **Plutarch,**
>
> *Life of Themistocles*[1]

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[1] Plutarch, *The Lives of Noble Grecians and Romans* tr W. Dryden (Encyclopaedia Britannica, 1st ed, 1952), p. 98.

ISSN : 1488-559X

> [I]t turns out that one can penetrate a state's information networks in the simplest way through Internet channels in addition to the traditional channels of radio, television and mass media.
>
> **Vladimir Slipchenko & Mahkmut Gareev**,
>
> *Future Wars*[2]

Introduction

Foreign state and non-state actors attempting to interfere in the domestic affairs of others is not a new phenomenon; nor, too, is the use of information as a resource, environment and weapon in warfare.[3] However, historically there have been some buffer zones. Themistocles, in bringing war along the Ionian coast and attempting to foster insurrections amongst the Hellenes living under Persian control, understood the demoralising effect his writings on stone could have upon his enemies. Yet he was restricted to choosing locations which he knew to be popular, to endeavour upon populations in general terms, limited to a single language – and most importantly, reliant upon some literate members of the target population.

This has all changed. Now, rather than simply writing a message on stone at popular watering holes, foreign interference operations (IOs) can leverage the ubiquity of the Internet in order to deliver personally tailored, micro-targeted messages to individuals in their homes.[4] These operations are not theoretical. This is the real threat that the digital age has brought: not the death and disruption that for nearly 25 years

[2] Vladimir Slipchenko & Mahkmut Gareev, *Future War* (Polit.ru OGI, 2004), p. 7.
[3] John Keegan, *Intelligence in War* (Hutchinson Press, 2003).
[4] Foreign interference operations are 'covert, coercive or corrupt activities' against a State for the purpose of advancing the actor's interests – see Attorney-General's Department 2019, *Foreign Influence Transparency Scheme: Factsheet 2*, Australian Government. Accessed on 10 October 20 at https://www.ag.gov.au/sites/default/files/2020-03/influence-versus-interference.pdf.

has been hypothesised,[5] but the ability to connect to individuals, insidiously, at any time of the day.[6]

The changing nature of warfare has led, formally and informally, to practitioners of the Profession of Arms to claim that grey zone operations unfairly exploit the gaps between peace and war, exploiting the vulnerabilities of Western democracy – free speech – in an unacceptable manner. This paper looks to explore this notion and advocates for a change in discussions within Australia. By continuing public discussions that grey zone operations are somehow 'unacceptable' is both naïve and dangerous. This paper holds that such rhetoric fails to grapple with the basic concept of armed conflict and competition – to win.

In order to demonstrate this point, it is first necessary to canvass what is meant by the concept of *grey zone*. To do so requires, axiomatically, covering traditional legal frameworks of peace and war and exploring how this binary distinction has shaped legal thinking since Rome. It will then look to unpack the underlying logic in identifying something as being *acceptable* and *unacceptable* exploitations in war, demonstrating that even through the Eurocentric lens of chivalry – a high watermark in the idea of unacceptable exploitation – the exploitation of traditional legal thresholds was more than acceptable.

Finding that it thus unsafe to maintain a moralistic stance to security threats and that the current strategic framework is inappropriate, it then addresses what domestic remedies are available for the Australian Government to take, under the Australian *Constitution.* Such a discussion, although through the case study of Australia, is not limited to this pacific island. The updating of defence laws, thereby countering vulnerabilities, is important for all countries. It is applicable across the Global North more generally, blinkered by history and culture to the ultimate aim of conflict.

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[5] Alvin Toffler, *The Third Wave* (William Morrow, 1980); Edward Waltz, *Information Warfare - Principles and Operations* (Artech House, 1st ed, 1998).

[6] The use of information as resource, environment and weapon within the 21st century is an emergent capability still seeking both language and concepts to become normative for discussions of warfare. See generally Edward Morgan and Marcus Thompson, "Information Warfare - An Emergent Australian Defence Force Capability,'" (Discussion Paper No 3, Centre for Strategic & International Studies, October 2018), p. 6.

Traditional Frameworks and the Grey Zone Between

There is no common definition of *grey zone* activities and operations, for it is a relative term. Its relativity, in turn, is to the legal frameworks of the day. At best, a definition of *grey zone* is one of a range of terms used to describe activities designed to coerce countries, in ways that seek to avoid military conflict.[7] Military conflict, in turn, is triggered when certain thresholds of international law are met.

These thresholds are set rather high and find their origins in Roman legal frameworks. Specifically, Roman jurisprudence recognised a binary state of affairs: peace and war. Augustus Caesar exemplified this when, during his reign, he boasted to have closed the doors of the Temple of Janus.[8] The temple, reflecting Janus' two faces, acted as a conspicuous sign of conflict. When the doors were open, there was war. When closed, there was peace.[9] It is a construct that has continued in Western political and military thinking, best epitomised by Oppenheim's (and Tolstoy's) eponymous works.[10]

War, in the Roman and later European concept, relates to "the contention between two or more states, through their armed forces, for the purpose of overpowering each other, and imposing such conditions of peace as the victor pleases."[11] It required violence and an armed force, which still colours many strategic writings and legal interpretations.[12] Although the classification of belligerency is an often highly critiqued field (reliance on casualty rates, or length of the conflict) it is still influenced by European and Roman notions of war. Importantly, international law views force as **physical**. Accordingly, economic or informational pressure does not and cannot meet these thresholds.[13]

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[7] "Defence Strategic Update," *Department of Defence*, 1 July 2020, pp. 1.4; 1.5.
[8] Suetonius, *The Life of Augustus* (Loeb Classical Library, 1913), p. 22.
[9] Livy, *The History of Rome* (Hackett Publishing Co, 2006) Book 1, para 19.
[10] LFL Oppenheim, *International Law* (Oxford University Press, 9th ed, 2008), *Volumes 1 and 2*.
[11] Ibid., Volume 2, p. 115.
[12] Tom Ruys, "The meaning of 'Force' and the boundaries of *jus ad bellum*: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?" *The American Journal of International Law* 108, 2 (2014): p. 159 ("The meaning of 'Force' and the boundaries of *jus ad bellum*: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?').
[13] Dale Stephens, "Influence Operations & International Law," *Journal of Information Warfare* 19, 4 (2020). ('Influence Operations & International Law').

But what for actions that fall below this threshold of war? Grey zone operations aim to exploit this gap in traditional binary frameworks and state, sub-s and non-state actors have done so for millennia. In the past century, however, with the crystallisation of international law and the increase of costs (financial, political, and social) for breaching international law, grey zone operations have logically increased. The reason for doing so is best highlighted by a speech by American diplomat George Keenan in 1948. He opined:

> Political warfare [i.e. grey zone operations] is the logical application of Clausewitz's doctrine in time of peace. In broadest definition, political warfare is the employment of all the means at a nation's command, short of war, to achieve its national objectives. Such operations are both overt and covert. They range from such overt actions as political alliances, economic measures (as ERP—the Marshall Plan), and "white" propaganda to such covert operations as clandestine support of "friendly" foreign elements, "black" psychological warfare and even encouragement of underground resistance in hostile states.[14]

Keenan's white/black/grey *troika* relates to the lack of clear attribution, a primary method by which operations remain in the grey zone. International law and international legal thresholds and responses revolve around a key critical vulnerability – clear attribution. Grey zone activities deliberately aim to reduce visibility on attribution, utilising the ubiquity of digital connections and the ability for actors to be anonymous, in many instances for valid reasons, anonymous. Even in instances where a state is able to attribute the conduct, it might be weeks, months, or years after the initial operation, or separately and distinctly, its discovery. Finally, for states that are economically, politically, or socially intertwined with their attacker, even if they are able to technically and legally attribute the actions to state or sub-state proxies, they may not wish to politically call out the action (this is using the tryptic Dutch approach to attribution).[15] In short, grey zone operations are not new; and they are operations designed to exploit the gaps. These gaps, in contemporary international relations, are the thresholds and triggers of *war* and *peace*.

[14] "The Inauguration of Political warfare" (Wilson Centre, Digital Archive), 30 April 1948.
[15] Department of Home Affairs, *Australian Cyber Security Strategy 2020,* p. 24 [42].

This is a vulnerability unique to the Anglo-Saxon cultures; and that these notions are Western is important, for they are often not shared outside of European strategic thinking. In work conducted elsewhere, research has begun to demonstrate just how isolated the concepts of peace and war really are. Indigenous Australians – the oldest continual culture in the world – engaged in a spectrum of conflict which is only now being referenced.[16] Ancient Indian texts discuss held three forms of conflict, without judgment: open, covert, and silent.[17] The Mexica people (conventionally called Aztecs) utilised merchants to engage in subversion campaigns prior to more kinetic warfare.[18] The Mongols, with incredibly limited number of troops due to the sparsely populated steppes, relied upon spies to plant rumours of their "huge numbers, stupidity and ferocity among enemy populations to lower morale and frighten the enemy before an attack."[19] Indeed, even the late medieval period (the high watermark for the laws of chivalry) advocated for various forms of public and private conflict outside of declared war.[20]

The risks that interference operations posed in conflict was the subject of fascination and anxiety in the late 19th century. Gustave Le Bon, a well-known French social psychologist, published in 1895, a landmark study titled *The Crowd: A Study of the Popular Mind*.[21] The work encouraged the view that ordinary, rational people could lose their reason when caught in crowds; and influenced the view that the populations could be manipulated.[22] This view in turn dominated the thinking of the Great Powers during the First World War, concerned as it was with the first total, national mobilisation. Modern technologies combined with broadcast media, such as film, were believed to

[16] Samuel White & Ray Kerkhove, "Indigenous Australian Laws of War: Makaratta, milwerangle & junkarti" *International Review of the Red Cross,* 102 (2020): pp. 956-978.
[17] Zuzana Spicova, "Laws of War in Ancient India," in *The Laws of Yesterday's Wars: Volume II, ed.* Samuel White (Brill, 2022) (forthcoming).
[18] Samuel White & Ray Kerkhove, "Aztec Laws of War," in *The Laws of Yesterday's Wars: Volume II, ed.;* Samuel White (Brill, 2021), pp. 69 – 101.
[19] Paul M.A. Linebarger, *Psychological Warfare* (New York: Duell, Sloan & Pearce, 2nd ed 1948,), p. 15
[20] Samuel White, "The Late Medieval Ages," in *The Laws of Yesterday's Wars,* ed. Samuel White (Brill, 2021), pp. 101 – 127.
[21]Gustave Le Bon, *The Crowd: A Study of the Popular Mind* (New York: The Macmillan Co, 1896)
[22] IS Bloch, *Is War Now Impossible? Being an Abridgement of The War of the Future and in Its Technical Economic and Political Relations* (Grant Richard, 1899).

offer a "hypodermic needle" or "magic bullet" to the masses which they were unable to resist.[23] This could be used in both an offensive, and defensive, manner.[24]

The combination of non-European strategy and modern technology came to the fore for Vladimir Ilyaich Ulyanov, also known by his *nomme de guere,* Lenin. Lenin created the practice of "active measures."[25] Specifically, Lenin wrote:

> The more powerful enemy can be vanquished only by exerting the utmost effort, and by the most thorough, careful, attentive, skilful and obligatory use of any, even the smallest, rift between enemies, any conflict of interests among the bourgeoisie of the various countries and among the various groups or types of bourgeoisie within the various countries, and also by taking advantage of any, even the smallest, opportunity of winning a mass ally, even though this ally is temporary, vacillating, unstable, unreliable and conditional.[26]

It was a, therefore, "a war which is a hundred times more difficult, protracted and complicated than the most stubborn of ordinary wars between states."[27] Its initiation by Soviet Russia as a formidable method of warfare, however, demonstrated to many states the benefits that could be gained by exacerbating "the existing tensions and contradictions within the adversary's body politic, by leveraging facts, fakes and ideally a disorienting mix of both."[28]

Any discussion of Russian modern strategic thinking requires reference to Chief of the Russian General Staff, Valery Gerasimov, who claimed in 2013 that:

> The very rules of war have changed. The role of non-military means of achieving political and strategic goals has grown, and in many cases, they have exceeded the power of force of weapons in their effectiveness… In

[23] Nicholas Reeves, "Battle of the Somme" (1997) *Historical Journal of Film*; Sandra J Ball-Rokeach, *Media, Audiences and Social Structure* (Beverly Hills, 1986).
[24] Brock Millman, "HMG and the Battle of Dissent," *Journal of Contemporary History* 40, 3 (2005): pp. 413 – 440.
[25] Keenan, "Aztec Laws of War."
[26] Vladimir Ivanov, "Left-Wing Communist, an Infantile Disorder," in *Collected Works* (trans. Ronald Vroon, Progress Publishers, 1972), pp. 70-71.
[27] Vladimir Ivanov, "What Is To Be Done?" in *Collected Works*, p. 108.
[28] Thomas Rid, *Active Measures – The Secret History of Disinformation and Political Warfare* (London: Profile Books, 2020), p. 4

> North Africa, we witnessed the use of technologies for influencing state structures and the population with the help of information networks.[29]

Thus, by avoiding traditional kinetic warfare as defined in international law, states are able to avoid the laws of armed conflict which would otherwise define, dictate and limit their activities, obligations, and rights.

Ross Babbage, in *10 Assumptions for Future War in the Indo-Pacific* expertly canvasses this.[30] His first observation is to highlight that Chinese and European strategic thinking is not the same. In 1999, two Chinese Colonels recognised that a critical vulnerability of Western civilisation was its binary constructs of peace and warfare. Shaped by the strategic thinking of Lenin, Stalin, and Mao, these two military officers advocated offensive political warfare and subversive instruments (grey zone activities) to exploit the vulnerability.[31] Indeed, modern interference operations can trace their history back to Soviet active measures.[32]

There are strong reasons to try to avoid these stated, known thresholds of international law. The controls and limits placed on states after World War Two with the creation of the collective security apparatus of the United Nations, and particularly the United Nations Security Council, brought with it the threat and fear of third-party intervention in what was usually protected, sovereign affairs – *if* certain thresholds were met.[33] Just as many states have avoided the onerous duties and requirements instilled under the Geneva Conventions, so too do states navigate to less costly operations. This is particularly so for those states whose cultural practices and understandings of conflict are not blinkered by declared war.

[29] Valery Gerasimov, "The Value of Science in Prediction," *Military-Industrial Kurier*, 27 February 2013.
[30] Ross Babbage, "Ten questionable assumptions about future war in the Indo-Pacific," *Australian Journal of Defence and Strategic Studies* 2, 1 (2020).
[31] Ibid., p. 29.
[32] Rid, *Active Measures*, p. 33.
[33] It is for this reason that Mary Kaldor suggested that, with state borders frozen and the ability for nations to expand their territory now neutered, war would transform from *old war* to *new war*; see Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Polity Press, 2012).

Unacceptable Exploitation?

The above has discussed what grey zone operations are. The below will now grapple with the idea of whether or not grey zone activities and operations *unacceptably* exploit these vulnerabilities.

Exploitation of vulnerabilities is the key concept of warfare, recognised in the canonical works of Sun Tzu and Carl von Clausewitz. Sun Tzu advocated action consistent with today's understanding of grey zone operations. Particularly, he held that the best way to settle a dispute was through negotiations and gift-giving; the second best was grey zone activities including assassination, bribes and the use of "dead spies."[34] It was only if these operations could not be pursued that one should resort to war.[35] Sun Tzu highlights that in war, all courses of action should be considered viable, limited only by the norms and customs of the time.

Carl von Clausewitz equally holds that warfare should be fought within the accepted restrictions but to the fullest ability possible. Clausewitz is best known for his enduring definition of war – the continuation of "political intercourse" (*des politischen Verkehrs*) through the intermixing of other means (*mit Einmischung anderer Mittel*).[36] These means are not limited to strictly military levers of power but can be any range of national power including diplomatic, information, and economic. But he also concurred with Sun Tzu's premise on exploiting grey zones. Specifically, on international law, he stated that "self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of international law, accompany (war) without essentially impairing its power."[37] This statement is multifaceted but includes within it an implication that war – whatever its manifestation – will inevitably find a home in the gaps of laws.

Further, von Clausewitz equally does maintain a division between *acceptable* and *unacceptable* exploitations. Whilst he condemns irregular tactics such as Cossack hit-and-run,[38] he accepts that they are an acceptable method of war, by targeting an enemy's

[34] Sun Tzu, *The Art of War* tr Rupert Smith (1st ed, 2007) vol Folio Society, p. 82.
[35] Ibid.
[36] Carl von Clausewitz, *On War*, tr J.J. Graham (Wordsworth Classics 1976), p. 75.
[37] Ibid., p. 1.
[38] Ibid., p. 82.

centre of gravity and its critical vulnerabilities.[39] In this way, under a total war construct, even the morale of the enemy population could be targeted. This is exactly what Keenan advocated in his comments on political warfare.

So where does this concept of *unacceptable exploitation* arise from? One answer, hinted at in Clausewitz's condemnation of Cossack tactics, is from European strategic thinking, particularly in the notions of chivalry. Chivalry relates to a set of codes and norms that regulated the conduct of warfare for a very specific class of persons in Medieval Europe.[40] The codes of chivalry – the *ius militarie* – are perhaps most commonly thought of as prohibiting surprise tactics (ambushes and breaches of oath, etc) and a preference for fighting pitched battles, between equals, resulting in ransoms. This position is, however, hard to maintain in the face of the facts.[41] Surprise attacks, ambushes, and ruses of warfare were not only acceptable within the chivalric codes, but lauded in certain circumstances. Siege warfare is perhaps the greatest example of this. Siege warfare was, until the advent and utilisation of gunpowder, rather archaic. It occurred via two methods – by assault (escalade or ambush) or by treaty. Assault by escalade required the besieging party to either breach the walls through the use of siege weapons or to starve the inhabitants out.[42] Assault by ambush required the use of internal dissidents to open the gates.[43] Neither was viewed as superior to the other; nor was either form prohibited. Exploiting a critical vulnerability within an enemy fortification, or enemy disposition, was not unacceptable, but simply good tactics.[44]

But to maintain that these operations did not exploit known legal thresholds is a fallacy. In the maritime domain, commercial warfare featured recurrently from the mid-sixteenth century into the seventeenth, reflecting the mercantilist approach of the period.[45] Through deniable, third-party actors (privateers) middle powers, such as

[39] Ibid.
[40] Maurice Keen, *Laws of Medieval War* (Routledge, 1965).
[41] Yuval Noah Harari, *Special Operations in the Age of Chivalry: 1100-1550* (Boydell Press, 2009).
[42] Keen, *Laws of Medieval War*, p. 129.
[43] Clifford J. Rogers (ed) *The Wards of Edward III: Sources and Interpretation* (Boydell Press, 1999), p. 67.
[44] White, "The Late Medieval Ages," pp. 101 – 127.
[45] D.C. Peifer, "Maritime Commerce Warfare: The Coercive Response of the Weak?" *Naval War College Review* 66, 2 (2013): pp. 83, 87.

Elizabethan England, could profit financially without the associated costs of declared war.[46]

Private actions supported by letters of marque or reprisal, contrasted with blatant acts of piracy, attracted less individual and sovereign risk.[47] With difficult attribution, the use of non-state actors was expedient for such purposes,[48] as political reactions to them were usually relatively more sustainable compared to instances of outright state-directed belligerency. As Peter Lehr opines, when Elizabeth dispatched men like Sir Francis Drake on missions which were "very thinly disguised pirate raids," the Crown could be confident that responses would fall short of open war and would be limited to local armed resistance in the targeted regions and diplomatic demarches in London.[49]

The Elizabethan exploitation of legal frameworks was not viewed as unacceptable, but a valid method for middle-powers to operate against large powers. While prominent naval theorist Alfred Thayer Mahan dismissed commerce warfare as an indecisive strategy of the weak,[50] immediate naval decisiveness nor the achievement of a rival's overthrow or surrender were the objects of Elizabethan grey zone activities.[51] Rather the *limited war* aim was, as Douglas Peifer outlines, to use force and coercion to tilt the distribution of power and resources.[52] Further, the attributable and non-attributable use of private actors, devoid of the costs associated with conventional methods, enabled England to preserve its defence at a point when it was not otherwise conventionally capable of this. There was nothing unacceptable with this and decrying grey zone operations within the Anglo-Saxon cultures is, bluntly, hypocritical.

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[46] Andrew Read, "Elizabethan Pirates and Privateers," in *The Laws of Yesterday's Wars* ed. Samuel White (Brill, 2021), pp. 171–187; MG Hanna, *Pirate Nests and the Rise of the British Empire, 1570-1740* (Omohundro Institute of Early American History, 2015), p. 40

[47] H Hillmann and C Gathmann, "Overseas Trade and the Decline of Privateering," *The Journal of Economic History* 71, No. 3 (2011): pp. 730-731.

[48] Ibid.

[49] Peter Lehr, *Pirates: A New History, from Vikings to Somali Raiders* (Yale University Press, 2019), p. 88.

[50] DC Peifer, "Maritime Commerce Warfare: The Coercive Response of the Weak?" *Naval War College Review* 66, No. 2 (2013): p. 83.

[51] Ibid., p. 84.

[52] Ibid.

But there is more risk than mere historical inaccuracies. In the modern area of global politics, one risk is that whilst one group of states act as norm entrepreneurs and attempt to shape and stifle certain grey zone tactics, techniques, or procedures, another group of states will simply not opt in to the new rules. There appears little appetite to reform international agreements, such as rewriting the thresholds of use of force to include economic sanctions.[53] So too can the categorical failure of the 2017 United Nations Group of Governmental Experts' (UN GGE) to reach any consensus be used as evidence. The end result of a watered-down, malleable rules for cyberspace,[54] adopted by all 193 UN member states in the subsequent Open-Ended Working Group on Cyber and also the 2021 GGE only incentivised grey zone activities.

Particular emphasis thus must be placed on domestic legal remedies, rather than international law, for the reasons outlined above. This position has been emphasised and advocated by the UN in responding to historic active measures.[55] Here lies the real danger of categorising interference operations as unacceptable, implicitly restricted by cultural approaches to regulation.

Colouring in the Grey Zone

In 2017, the former Director-General of Security for Australia Mr. Duncan Lewis stated that 'foreign powers are clandestinely seeking to shape the opinions of members of the Australian public, of our media organisations and our government officials in order to advance their country's own political objectives'[56] on a scale and intensity that

[53] See Alexandra Hofer, "The Developed/Developing Divide on Unilateral Coercive Measures: Legistimate Enforcement or Illegitimate Intervention," *Chinese Journal of International Law* 16, 2 (2017): pp. 175-214.

[54] Arun Sukumar, "The UN GGE Failed. Is International Law in Cyberspace Doomed as Well?" *Lawfare* 4 July 2017, accessible from https://www.lawfareblog.com/un-gge-failed-international-law-cyberspace-doomed-well; in 2021 the UN GGE adopted by consensus the 2015 framework, which whilst prescribing elements for attribution noted it is "a complex undertaking and that a broad range of facts should be considered…. (including)_averting 'misunderstanding and escalation of tensions between States."; see *Report of the Group of Governmental Experts on Advancing responsible State behaviour in cyberspace in the context of international security,* 28 May 2021 (advanced copy 6 [22]).

[55] *Concerning Friendly Relations and Co-Operation Amongst States in Accordance with the Charter of the United Nations*, UN Doc A/RES/2625 (XXIV) (24 October 1970) ('*Friendly Relations Declaration*');

[56] Evidence to the *Senate Legal and Constitutional Affairs Legislation Committee*, Parliament of Australia,

"exceeds any similar operations launched against the country during the Cold War, or in any other period."[57]

Two years later, in late 2019, Mr Lewis declared that foreign interference pose an "existential threat to Australia" and was "by far the most serious issue going forward" for Australian security.[58] From this, and other concerns on foreign interference, a trifecta of legislation was introduced: the *Foreign Influence Transparency Scheme Act 2018* (Cth), the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform Act 2018* (Cth); and the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).

In a speech introducing the *National Security Legislation Amendment (Espionage and Foreign Interference Bill) 2017*, then-Prime Minister Malcolm Turnbull noted that at the core of Australia's anti-interference policy was the concept of "sunlight" – a "disinformation disinfectant" that aims "to ensure activities are exposed."[59] This strategic framework mirrors that of the United States in the late 1930s and can be titled *illumination*.[60] The importance of illumination as a central tenant of countering IOs was reinforced a year later with the Australian Counter Foreign Interference Strategy, operationalised by the National Counter Foreign Interference Coordinator within the Department of Home Affairs.[61] The strategy, in acknowledging the need for "convincing foreign interference actors that their actions will have costs"[62] clarified that

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Canberra, 24 October 2017, p. 128. (Duncan Lewis)
<https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/420421b5-6149-431f-96e2-06a8423423cf/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2017_10_24_5667_Official.pdf;fileType=application/pdf#search=%22estimate>.

[57] Ibid.

[58] Duncan Lewis, 'Foreign Interference in the Digital Age' Lowy Institute, 4 September 2019).

[59] Mr Turnbull, *Second Reading Speech of the National Security legislation Amendment (Espionage and Foreign Interference) Bill 2017*, 7 December 2017, Hansard 13145.

[60] The use of this metaphor derives from an essay written by Louis D. Brandeis, "What Publicity Can Do,"*Harper's Weekly*, 20 December 1913, p. 10; see also Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (Frederick A. Stokes Publishing, 1932), p. 92. The metaphor was adopted by the Committee on the Judiciary of the House of Representatives of the United States in explaining the *Foreign Agents Registration Act 1938* (US); see HR Rep No 1381, 75th Congress, 1st Session (1937), p. 2.

[61] Department of Foreign Affairs and Trade, Submission No 10 to Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, (13 March 2020), p. 3

[62] Ibid.

this would occur through "showing foreign interference actors that their actions can and will be revealed."[63]

Such a policy approach would appear underpinned by doctrine of the Anglo-Saxon *marketplace of ideas*. This concept denotes a philosophical rationale for freedom of expression, using the analogy of the economic concept of a free market, where ideas can be traded and accepted. The marketplace of ideas, and thus illumination, is premised on a rational audience and free and open societies. John Milton, in arguing against British censorship laws, perhaps best summarised the point in 1644:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?[64]

It is the underlying concept of Australia's implied freedom of political communication. [65] As a model, it is "undeniably elegant and compelling, an Enlightenment-era cocktail of Bayesian opinion formation, free speech, and capitalism. Unfortunately, its most foundational premise is false."[66] This is compounded by the fact that even rational people – as Gustave Le Bon suggested – can be misled when exposed to an overwhelming amount of conflicting information.

The maintenance of this foundational premise, when it is concurrently accepted as the critical vulnerability in Australian society, is a prime example of cognitive dissonance. Unlike other Anglo-Saxon nations (such as the United States of America), Australian citizens have no right to free speech. Indeed, Australians have very few constitutional rights at all, and those that do exist are often watered down by the

[63] Ibid.
[64] John Milton, "Areopagitica," in *John Stuart Mill On Liberty: In Focus,* eds. John Gray and G. W. Smith (London: Routledge, 1991), p. 40.
[65] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoted in *McCloy v New South Wales* (2015) 257 CLR 178, 193–4 [2], 206 [42] (French CJ, Kiefel, Bell and Keane JJ); *Libertyworks v Commonwealth of Australia* [2021] HCA 18.
[66] Trevor Thrall and Andrew Armstrong, "Bear Market? The American Marketplace of Idea,"' in Information warfare in the age of cyber conflict, eds., Christopher Whyte, A. Trevor Thrall, Brian M. Mazanec (London: Routledge, 2020), pp. 73, 78.

judiciary or interpreted with massive exceptions.[67] There is thus no constitutional bar to instilling legislation that limits and closes this vulnerability – as is expanded upon below. It would appear implicit from the recent legislative reactions to foreign interference operations that the Australian government wishes to retain the high ground against unacceptable foreign practices. This is the second main risk to maintaining the shibboleth of chivalric laws – an unacceptably risky limitation of possible responses.

If Australia is to be open with its possible courses of action, it is clear that different strategic frameworks is required to counter interference operations. Deterrence theory is concerned with imposing costs on actions, rather than illuminating them.[68] To deter is "to discourage or turn aside or restrain by fear; to frighten from anything; to restrain or keep back from acting or proceeding by any consideration of danger or trouble."[69] Deterrence is a concept that has been practiced throughout history;[70] perhaps best epitomised by the Roman maxim *si vis pacem, para bellum* (if you wish for peace, prepare for war).[71]

As Keenan's predecessors and successors have held, the benefits of grey zone operations are that they are low cost – both politically and financially. They create an international relations environment akin to Hobbes' "state of nature" which society contracted to beat,[72] and where individuals may take unfriendly but not illegal actions against one another with little to no consequences. Increasing costs may help alleviate and mitigate the damage done by interference operations. This requires, however, an acceptance both of the acceptable nature of interference operations and to take ownership of instilling costs on others.

[67] Such as s 92, which holds that interstate commerce shall be absolutely free. The interpretation of absolutely free has implied the question of 'free from what'? The answer is axiomatically prescriptive and protectionist trade practices. See Palmer v Western Australia (2021) 95 ALJR 229.

[68] Department of Defence, *Task Force on Cyber Deterrence* (February 2017).

[69] Oxford English Dictionary.

[70] Thucydides, *History of the Peloponnesian War* (Penguin, 1999) Book 6, Chapter 18.

[71] The Romans advocated the concept of a mere demonstration of military strength and capabilities might lead adversaries to restrain themselves.

[72] Thomas Hobbes, *Leviathan* (Penguin Classics, 1998).

Deterrence theory has been forever changed by the orthodoxy it gained during the Cold War and the advent of nuclear weapons.[73] The difficulty for Australia is therefore to navigate the maze of definitions and theoretical models applicable; for whilst the threat clearly has evolved from state vs state, kinetic effects focused issues the theories surrounding modern deterrence for the most part still rest upon nuclear and conventional forces to avoid escalation of conflict.

Robert Jervis helpfully outlined the three waves of deterrence theory.[74] The first wave (so-called minimalist theory in comparison to the complexity of other waves) includes the first half of the 20th century – from the advent of airpower to the Soviet Union gaining mastery of thermonuclear weapons. It matters little that airpower was overestimated; the theoretical growth and the practical policies made due to the perception of a threat are what is relevant.

Second wave deterrence theory recognised that nuclear war could not be fought, but merely threatened.[75] It accordingly looked to answer the question of the best methods to threaten without resorting to war. It was based around the reasonable state actor and operated within bipolar relationships (in that it was not concerned with the issues associated with multiple audiences.)[76] Second wave deterrence focused primarily on what made threats "credible," which orthodox thinking linked to whether or not any action was "reciprocal" (and thereby proportionate), which in turn required an ability to effectively attribute the attack.[77]

For second-wave theorists, deterrence became synonymous with dissuading by the threat of sanction or promise of reward (stick and carrot), thereby modifying the cost/benefit analysis of the Soviets.[78] But it also saw heavy intellectual investment in the minimalist theory of punishment and denial.

[73] Laurence Freedman, *Deterrence* (Polity Press, 2004).
[74] George Quester, *Deterrence before Hiroshima: The Airpower Background to Modern Strategy* (Wiley, 1966).
[75] Ibid., p. 48.
[76] Ibid., p. 33,
[77] Ibid., p. 72.
[78] Glenn H Snyder, *Deterrence and Defense: Towards a Theory of National Security* (Princeton University Press, 1961), p. 10.

Glenn Snyder in 1958 produced the first known comprehensive study of denial and punishment.[79] In it, he turned his mind to the most effective combinations of denial and punishment and made some powerful observations. In principle, Snyder advocated that denial is more reliable and to be preferred over punishment. There is merit in this argument. Punishment as a limb of deterrence theory requires the target to assess how much it can take; with denial, that choice is removed.[80] Yet, other second-wave deterrence theorists were clear that denial alone was insufficient, and deterrence required a degree of retaliation and punishment.[81]

Second wave deterrence, focused upon punishment for nuclear attacks as a method of deterrence, relied heavily upon the works of Jeremy Benthem, the first to develop a concept that there should be both a degree of clarity and predictability in sentencing. "As a utilitarian, he supposed that criminals, along with everybody else, were rational and self-interested, and could calculate when the costs of punishments would outweigh the potential benefit of the crime."[82] He used a term that was common at the time – determent, which as defined in the *Oxford English Dictionary* means "the action or fact of deterring, a means of deterring; a deterring circumstance." This remains a powerful word, as it describes a "situation in which what was intended has been achieved."[83] Bentham wrote:

> In so far as by the act of punishment exercised on the delinquent, other persons at large are considered as deterred from the commission of acts of the like obnoxious description, and the act of punishment is in consequence considered as endued with the quality of DETERMENT. It is by the impression made on the will of those persons, an impression made in this case not by the act itself, but by the idea of it, accompanied with the eventual expectation of a similar EVIL, as about to be eventually produced in their own instances, that the ultimately intentional result is considered

[79] Ibid., p. 22.
[80] Ibid., p. 23.
[81] Samuel Huntington, "Conventional Deterrence and Conventional Retaliation," *International Security* 8, 3 (1983): pp. 32-56
[82] Freedman, *Deterrence*, p. 8
[83] Ibid.

> produced: and in this case it is also said to be produced by the EXAMPLE, or by the force of EXAMPLE.[84]

Credibility, as advocated under second wave deterrence theory, was underpinned with the logical requirement that the threat be able to be actioned.[85] Critical to credibility, although very often under-discussed in the literature, is the legal basis for action. If grey zone operations are only grey because they exploit historical black and white legal divides, the use of legal thresholds is an important weapon to colour them in. To this end, it is important to understand the legal left and rights of arc of what Australia constitutionally can legislate for and to question the correctness of rhetoric that Australia is bound by these notions of peace and war

The Australian *Constitution* provides that the Commonwealth Parliament (as opposed to state Parliaments) can only legislate on certain specified subject matters. These are referred to as heads of power and have given rise to the enumerated powers doctrine (that anything *not* enumerated is the responsibility of the state or territory).

There are two particularly pertinent constitutional limbs to be explored. The first is the so-called "defence power" under s. 51(vi) of the *Constitution.* The other is Commonwealth executive power, under s. 61. These constitutional provisions are not particularly unique to Australia – most States have either through constitution or convention similar powers. The author, being an Australian constitutional lawyer, will utilise an Australian case study for the benefit of others. It relies upon the reader to draw similarities, comparisons, and lessons to their own legal system.

The Defence Power

One constitutional head of power relevant to grey zone operations is the so called "defence power," which provides that the Commonwealth Parliament may make laws for the peace, order and good government with respect to:

> 51 (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

[84] *The Theory of Punishment* (Penguin, 1982).
[85] Freedman, *Deterrence*, p. 114

Much has been written on the defence power in an age of terrorism.[86] It is clear that the defence power is a purposive power, permitting legislation across an indefinite spectrum of subjects deemed necessary *for the purpose of* defending Australia.[87] Gageler J in the most recent defence power case (*Private R v Cowen*,[88] citing with approval from *Thomas v Mowbray*[89]) summarizes succinctly the nature of the defence power:

> Section 51(vi) [the defence power] of the *Constitution* confers power on the Commonwealth Parliament to make laws with respect to "the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth." The power "is not limited to defence against aggression from a foreign nation," "is not limited to external threats", "is not confined to waging war in a conventional sense of combat between forces of nations" and "is not limited to protection of bodies politic as distinct from the public".[90]

This is a very large scope, that waxes and wanes according to the threat picture. But it is necessary to establish what the requisite test is to be applied when it comes to legislation empowered by the defence power. Part of the question, therefore, is assessing where IOs fall upon the defence power spectrum. There are four states of play currently: peace, preparing in a time of conflict; at conflict; and post-conflict. In *Communist Party Case,* it was held that the applicable test in wartime was that of Issaac J's in *Farey v Burvett,* that: "the measures questioned may be conceivably in such circumstances *even incidentally aid* the effectuation of the power of defence."[91] Williams J in *Communist Party Case* believed the test should change in peacetime – and that the **conceivable** test should change to **reasonable** test.[92] How IOs interrelates with the defence power has not been subject to any academic questioning in Australia.

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[86] See generally Kate Chetty, "A History of the Defence Power: Its Uniqueness, Elasticity and Use in Limiting Rights," *Macquarie Law Journal* 3, 17 (2016).
[87] *Australian Woollen Mills Ltd v Commonwealth* (1944) 69 CLR 476; Edward Santow and George Williams, "Terrorism threat assessments: Problems of constitutional law and government accountability," (2012) 23 *Public Law Review* 33, 40; see further *Stenhouse v Coleman* (1944) 69 CLR 457.
[88] (2020) 383 ALR 1.
[89] (2007) 233 CLR 307
[90] (2020) 383 ALR 1, [92] (Gageler J). References excluded.
[91] (1916) 21 CLR 433, 455.
[92] *The Australian Communist Party & Ors v Commonwealth & Ors* (1951) 83 CLR 1, 223.

One case is particularly relevant to countering grey zone operations. In 1943, the Jehovah's Witnesses of Adelaide began spreading pamphlets that sought to stop potential recruits joining the military for fighting in World War Two. The power of words by internal dissidents clearly fell below the threshold of war as it was viewed at the time. Yet the danger of words was recognised, and the legislation enacted to counter the Jehovah's Witness was found to be in accordance with the defence power. In a flexible judgment, one member of the Court opined:

> The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. The question whether a given opinion is a danger to society is a question of the times and is a question of fact. Society has the right to protect itself by process of law from the dangers of the moment, whatever that right may be.[93]

This threat has been complicated by digital means and the ubiquity of social media. Although pamphlets brought their own security risks, allowing information to spread further, faster and more accurately than mere word of mouth, social media and the interconnectedness of individuals has seen the modern public square now transcend communities and borders.[94] Rich J's judgment is thus particularly useful in recognising the difficulty words can place societies in, and the measures that Australia can legally take in countering them.

In that same case, the ability for the defence power to respond to these matters that fell below the threshold of war was recognised by Chief Justice Latham, who commented:

> No organised State can continue to exist without a law directed against treason. There are, however, subversive activities which fall short of treason (according to the legal definition of that term) but which may be equally fatal to the safety of the people. These activities, whether by way of espionage, or of what is now called fifth column work, may assume various forms… (One example is) propaganda tending to induce members

[93] (1943) 67 CLR 116, quoting at [149] with approval Lord Sumner in *Bowman v Secular Society Ltd* (1917) AC, pp. 406, 466-467.

[94] Niall Ferguson, *The Square and the Tower* (Penguin Publishing, 2018).

> of the armed forces to refuse duty may not only be subject to control but may be suppressed.[95]

Here, the fifth-column work was held to include propaganda asking for armed forces members to not work. Fifth-column work is a historic description for any and all cloak-and-dagger operations/subversive operations, behind enemy lines. It is best understood as a threat from within, and it was a threat known since the earliest defence power cases. Chief Justice Latham continued that:

> the power of the Commonwealth to protect the community against what are now called fifth-column activities, that is, internal activities directed towards the destruction of the people of the Commonwealth, is not so weak as to be limited to legislation for the punishment of the offences after they have been committed. Parliament may, in my opinion, under the defence power seek to prevent such offences happening by preventing the creation of subversive associations or ordering their dissolution.[96]

Clearly then some legislation can be passed in 'peace time' and this may extend to preventing the creation of subversive associations.

This trend continued a decade later, when the Liberal Government of Australia won the election on the basis of crushing the threat of Communism. The *Australian Communist Party v Commonwealth* is a infamous case in Australian constitutional law, particularly for much of its misinterpretation by academics. Often cited as a precedent for the limited ambit of the defence power, a closer reading actually reveals much more nuanced jurisprudence.[97] Although 6 of the 7 judges ended up not supporting the legislation, their reasoning was more because insufficient evidence of the threat of communism had been provided. The actual ability of the defence power to support legislation that criminalised conduct (such as communism) was supported.[98]

The judges were moreover split over how to characterise the state of affairs in Australia at that time. Some judges noted that whilst war could exist outside of Australia, involving Australian forces, that did not necessarily correlate to a state of war

[95] (1943) 67 CLR 116, pp. 132-3.
[96] Ibid., p. 137 (Latham CJ).
[97] Ibid.
[98] *Thomas v Mowbray* (2007) 233 CLR 307.

internally.[99] Other judges held that a binary construct of war and peace was outdated and unsafe. Others yet maintained that there could only be a binary construct. At any rate, a narrow reading of the case still supported a suite of legislation in times of peace. Justice Webb held:

> it is lawful to have a defence establishment and to take steps to protect it against spies, saboteurs, **fifth columnists and the like**. In other words, it is lawful to prepare for war, and the extent to which such preparations should be made is a matter of policy depending upon the judgments of Parliament on the information it has from time to time.[100]

The jurisprudence remained relatively untouched for nearly five decades until a constitutional challenge was lodged as to the validity of Commonwealth control orders. These control orders provided intrusive and coercive powers against suspected terrorists (a defined term in Australia). In *Thomas v Mowbray*[101] the High Court of Australia determined that the legislation was validly enacted under the defence power. Six of the seven judges were convinced that the defence power extended to the protection of the citizens and inhabitants of the Commonwealth and states and their property from terrorist acts and was not limited to external threats posed by foreign states to the body politic. Justice Callinan explicitly addressed the incorrect historic judicial:

> … preoccupation with the events of the recent past, of a declared war, uniformed, readily distinguishable external enemies, generally culturally, ethnically, ideologically and religiously homogenous states, and an incomplete appreciation, despite Hiroshima and Nagasaki, of the potential of weaponry for massive harm…[102]

Accordingly, the real question was:

> …is the Commonwealth or its people in danger, or at risk of danger by *the application of force*, and as to which the Commonwealth military and naval

[99] (1951) 83 CLR 1, 22.
[100] Ibid, 243.
[101] (2007) 233 CLR 307. Thomas was the suspected terrorist, and Mowbray was the Federal Magistrate who granted the control order.
[102] (2007) 233 CLR 307, 503

> forces, either alone or in conjunction with the State and other federal agencies, may better respond, than State police and agencies alone…[103]

The High Court made no explicit reference to the *phases* approach to the defence power, so it cannot be said with certainty whether the Court regarded the state of international affairs as one of ostensible peace or increased international tension. Rather the focus appeared to be the risk of danger to the people of Australia by the application of force. This approach by the High Court has been supported by the Chief of the Australian Defence Force[104] who has concurred with the danger.

The defence power could thus, taking into account the nature of modern warfare, be used as a constitutional head of power to deter individuals from conducting interference operations. It might be that the military could be 'called out' alone or in conjunction with the State to respond to instances of foreign interference. The test there would be a political determination that the military *should* be called out. Equally, it might be that the defence power could be used to crimnalise anonymous online behaviour; or the creation of an offence of knowingly publishing disinformation similar to Singapore's *Protection from Online Falsehoods and Manipulation Act 2019*; or Russia's so-called Bloggers Law, which requires individuals with more than 3000 followers to register with the Government.

Commonwealth Executive Power

Under Australia's constitutional and legal frameworks, the authority of the Commonwealth legislature to make laws for Australia's defence (the defence power) is not unlimited. The *Australian Constitution* (the *Constitution*) places limits upon the Commonwealth government's law-making powers, and the defence power waxes and wanes with the international situation, at a nadir in peacetime and rising to a zenith in wartime.

[103] (2007) 233 CLR 307, p. 504. Emphasis added

[104] Angus Campbell, "War in 2025," (Keynote, Australian Strategic Policy Institute, 13 June 2019).

Section 61, by comparison, is a constitutional authority that allows for action to be taken by the Commonwealth. This action can be by any number of organs of the state, including the Australian Defence Force. For some, executive power is elusive for it is 'described but not defined in section 61'[105] of the *Constitution*, which reads as follows:

> [t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this *Constitution*, and of the laws of the Commonwealth.

Constitutional executive power can be divided three-ways: statutory, prerogative, and a power that is neither statutory nor a prerogative – nationhood power. The term "prerogative" is used in a strict, Blackstonian sense of "those rights and capacities which the King enjoys alone, in contradistinction to others, and not those which he enjoys in common with any of his subjects."[106] The last category, which is neither statutory nor a prerogative, is the so called *nationhood power* which is derived from the character and status of the Commonwealth as a national government.[107] The implied nationhood power enables the Commonwealth Executive "to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation."[108]

Of particular relevance to the threat of interference operations is that prerogatives in emergencies short of war have not been authoritatively established[109] and have been described as "remarkably abstruse."[110] There is no definitive list of

[105] *Commonwealth and the Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, p. 440 per Isaacs J; *Davis v Commonwealth* (1988) 166 CLR 79, p. 92 per Mason CJ, Deane and Gaudron JJ; see also *Ruddock v Vadarlis* (2001) 110 FCR 491; see further George Winterton, 'The Limits and Use of Executive Power by the Government' (2003) 31 *Federal Law Review,* p. 421.
[106] *Davis v Commonwealth* (1988) 166 CLR 79 at 108 (Brennan J), *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 133 (Gageler J).
[107] As first posited by Sir Victor in Hope (n 4) Annex 9; for a recent discussion see Nicholas Condylis, "Debating the Nature and Ambit of the Commonwealth's Non-Statutory Executive Power," *Melbourne University Law Review* 39, (2016): p. 385.
[108] *Victoria v Commonwealth* (1975) 134 CLR 338, p. 397 (Mason J).
[109] Samuel White, *Keeping the Peace of the Realm* (LexisNexis, 2021).
[110] Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (7th ed, Penguin, 1994), p. 566.

prerogatives, despite attempts to produce one.[111] For the most part, however, there has been a line of academic and judicial reasoning, from Locke to Berriedale Keith, that there must be an emergency for the Royal prerogative to lawfully allow the military to operate domestically.[112]

This position was, however, overturned in the United Kingdom in 1989. One consequence of the inner-city riots of the early 1980s in the United Kingdom was the establishment, by the Home Office, of a central store of plastic batons and tear gas rounds, to be made available to chief officers of police in situations of serious public disorder. In a Home Officer Circular 40/1986, the Home Secretary announced that the store may be made available to those in need without the approval of the local police authority. This announcement displeased the Northumbria police authority, which applied for a declaration to the effect that that specific part of the circular was *ultra vires*. This application was refused by the Divisional Court and dismissed by the Court of Appeal, [113] holding *inter alia* that the circular could be justified under the royal prerogative.

Relevantly, the Court of Appeal affirmed in *Northumbria* that the Crown has a prerogative power to do what is necessary to Keep the Peace of the Realm, against both actual and threatened disturbances.[114] This arose from a finding that the Crown owes a prerogative duty to keep those under its allegiance safe from physical attack within its dominions.[115] It was also argued through the omission of evidence to the contrary.

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[111] See for example Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Garland, first published 1820, 1978 ed).

[112] See, chronologically, **J**ohn Locke, *The Second Treatise on Government* (J Gough Ed, first published 1689, 3rd ed, 1966), pp. 76, 82; Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Garland, first published 1820, 1978 ed); John Allen in his *Inquiry into the Rise and Growth of the Royal Prerogative* (Longmans, Brown and Green, 1849); Arthur Berriedale Keith in his *The King and the Imperial Crown: The Powers and Duties of His Majesty* (Longmans, Green & Co., 1936), p. 382. Chitty's statement was supported in *Crown of Leon (Owners) v Admirality Commissioners* [1921] 1 KB pp. 590, 604. Leslie Zines, "The Inherent Executive Power of the Commonwealth" (2005) 16 *Public Law Review,* pp. 279, 287 ("The Inherent Executive Power of the Commonwealth"); Gerard Carney, "A Comment on How the Implied Freedom of Political Communication Restricts the Non-Statutory Executive Power,"*University of Western Australia Law Review* 43, 2 (2018): pp. 255, 274 ("A Comment on How the Implied Freedom of Political Communication Restricts the Non-Statutory Executive Power.")

[113] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 Q.B. 26

[114] Ibid.

[115] Ibid., p. 32.

Nourse LJ held that "there is no historical or other basis for denying to the war prerogative a sister prerogative of keeping the peace within the realm."[116] This would imply that the depth of action authorised by the prerogative is identical to the war prerogative, which empowered members of the ADF to apply lethal force and destroy property in the conduct of warlike operations. His Lordship continued that, with the exception of statutory abridgement, the internal security prerogative "has not been surrendered by the Crown in the process of giving its express or implied assent to the modern system of keeping the peace through the agency of independent police forces."[117] Although there is no approval for this case nor its findings so far within Australia, such a position would seem supported by other Commonwealth nations.[118]

Many civil libertarians have taken issue with the finding in *Northumbria.* One issue is the lack of historical justification for the finding that the prerogative exists; Robert Ward, arguing that the sources used to justify their position in the *Northumbria* case should result in "full marks to it for creative thinking" but that the result was erroneous.[119] Yet another British academic has accusing the decision as being "more policy than principle."[120] Further still, the decision has been criticised as failing to mark the limits of the specific prerogative, and that the decision is thus normatively undesirable.[121]

The dismissal of the existence of such a power on grounds of acceptable norms is understandable; generally speaking, executive power is nurtured and bound in anxiety – "anxiety which *fuels* expansive approaches to its content and anxiety *about* expansive

[116] Ibid., p. 58.
[117] Ibid.
[118] See *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 114-115, where Viscount Radcliffe said that the prerogative of protecting public safety was not necessarily confined to the imminence or outbreak of war; see further *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26 at 55 per Purchas LJ. See also the Court of Appeal of Fiji overturned the High Court of Fiji's decision that the *coup d'etat* in Fiji was valid under the reserve powers of the President, on the basis that the Fiji Constitution dealt expressly with reserve powers, which had displaced any relevant prerogative; see *Qarase v Bainimarama* [2009] FJCA 9, [94] (Powell, Lloyd and Douglas JJA). The Australian *Constitution*, by contrast, does not contain such provisions, and would appear to retain the relevant prerogative.
[119] Robert Ward, 'Baton Rounds and Circulars' (1988) *The Cambridge Law Journal,* pp. 155, 157.
[120] Conor Gearty, 'The Courts and Recent Exercises of the Prerogative' (1987) *The Cambridge Law Journal* pp. 372, 374.
[121] Ward (n 174), pp. 155, 156.

approaches to its content."[122] This anxiety is even more pronounced when it comes to non-statutory executive power – some consider the prerogative power to "to be an obscure relic of an undemocratic past, and a potential threat to civil liberties."[123] Yet, it should not be dismissed. It is a flexible power that may evolve to meet new factual circumstances, providing flexibility in situations that may require it. But how far can it evolve, and what is the test (if any) to ascertain whether evolution has occurred?

Although the prerogative, being part of the common law, necessarily holds the ability to evolve to novel situations, the line between evolution and creation may be a fine one. Equally unclear is the test to apply to determine when a prerogative has evolved, and when it has not. One test to apply is to look at whether or not the *expectation* of the citizens has changed. Winterton's example for this test is the questionable prerogative power of the Crown to open and read postal articles, and its potential evolution as a lawful authority to intercept phones. Both objectives of intercepting letters and intercepting phone calls are the same – 'protecting state security and preventing and detecting crime[124] – yet Winterton opined at the time that the sender's expectations are different. A letter sent can always be intercepted; a phone call is expected to be private.[125] This example, arguably, is one that is no longer relevant with the clear social expectation that data will be collected and mined from online interactions – hence the popularity of encrypted telecommunication applications. But the test is a useful one to apply.

So can the internal security prerogative evolve to the digital domain? Within Australia, the use of the ADF in domestic security operations has been characterised by

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[122] Robert French, "Executive Power in Australia - Nurtured and Bound in Anxiety," *University of Western Australia Law Review* 43, No. 2 (May 2018): pp. 16-41 ("Executive Power in Australia - Nurtured and Bound in Anxiety.")

[123] Benjamin B. Saunders, "Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute," *Federal Law Review* 41 (2013): p. 363 ("Democracy, Liberty and the Prerogative: The Displacement of Inherent Executive Power by Statute."); see further Keith Syrett, "Prerogative Powers: New Labour's Forgotten Constitutional Reform?" *Denning Law Journal* 13 (1998): p. 111; Thomas Poole, "United Kingdom: The Royal Prerogative" *International Journal of Constitutional Law* 8 (2010): pp. 146, 147.

[124] George Winterton, "The Prerogative in Novel Situations,"' *The Law Quarterly Review*, 99 (1983): pp. 407, 409.

[125] Ibid.

'deeply held, even if imperfectly understood, reservations.'[126] This perhaps reflects the isolated nature of the ADF from civilian society, or historical aversion that Anglo-Saxon culture has held towards the military who – prior to the creation of a standing army – were primarily 'the dregs of society… the rogues and vagabonds, the destitute, the condemned felons and the prisoners from the gaols.'[127] It perhaps also reflects the tension in post-settlement Australia between the free settlers supported by the colonial Government and the military, and the convicts.[128] Yet there also remains an expectation that the use of military force can, and will, be applied in situations that demand it.

Accordingly, and applying Winterton's test (noting that it has not been accepted by any Court and indeed is a rather high watermark) it is logical to find that the internal security prerogative can and should be read to have evolved into Keeping the Peace of the iRealm.[129] Citizens expect that their Government is able to take action to counter and neutralise a threat, thereby Keeping the Peace of the Realm. The history outlined above demonstrates that there is an expectation that military force can and will be applied, domestically, outside situations of the riot and insurrection. Indeed, if British courts have accepted that the war prerogative can evolve to encompass new technology and new methods of warfare[130] then there seems no reason to deny that evolution to its 'sister prerogative' to respond to interference operations, which seek to disturb the peace of the realm.[131]

Yet the High Court of Australia has emphasised that 'the ambit of the executive power of the Commonwealth cannot begin from the premise that the ambit of that executive power must be the same as the ambit of British executive power'.[132] Whilst 'consideration of the executive power of the Commonwealth will be assisted by

[126] Margaret White, "The Executive and The Military," *UNSW Law Journal* 28, 2 (2005): pp. 438, 438 ("The Executive and The Military").
[127] Anthony Babington, *Military Intervention in Britain: From the Gordon Riots to the Gibraltar Incident* (Routledge, 1990). p. ix.
[128] Robert Hughes, *The Fatal Shore* (Collins Harvill, 1st ed, 1987).
[129] For an indepth analysis, see Samuel White, "Keeping the Peace of the iRealm," *Adelaide Law Review* 42, 1 (2021): pp. 101–145.
[130] *Attorney-General v De Keyser's Royal Hotel Pty Ltd* [1920] AC 508, 565; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, whilst questioning the viability of the rusty weapon, accepted it could evolve.
[131] *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 Q.B. 26.
[132] *Williams v Commonwealth (No 2)* (2014) 252 CLR 416, 468 at [81] (per French CJ, Hayne, Kiefel, Bell and Keane JJ).

reference to British constitutional history'[133] it must necessarily be interpreted through a lens of federalism. This is a complicated area that requires each grey zone to be analysed and assessed.[134] But it is not an impossible task, and merits so as to colour in the grey zone.

Conclusion

This paper has aimed to demonstrate the danger of dismissing grey zone operations as normatively undesirable. It first addressed the fallacy of maintaining that these forms of operations are somehow *unacceptable*, by implicit reference to European notions of chivalry that are grounded more in fiction than fact. Identifying vulnerabilities and exploiting gaps within the target is the core aim of warfare.

It argued that the failure of international law to shape interference operations validly requires domestic responses to be looked to. There is, of course, risk in the method of response. In maintaining the façade of free and open speech, any heavy-handed response that aims to counter the cheap nature of grey zone operations is particularly pregnant with difficulty. It may be that punishing individuals or states who conduct interference operations would entail actions that are at odds with longstanding notions of liberty and relation of individual to the state. This, of course, in Australia and in many other nations has been demonstrated as more popular understanding than hard constitutional law.

A major complication behind these operations is the collapse over a generation in levels of trust in society. It is sometimes argued by elites that this collapse in trust is a result of foreign efforts – an arguably self-serving notion. Many people do not expect nor trust their governments to protect them and react accordingly. It is necessary therefore to restore trust in institutions, of which the ADF is one of the strongest bulwarks of public confidence. Relying upon the military to shape, deter and respond to grey zone operations (as it has been directed to by Government) is aided by a thorough understanding of the law. Yet it is not just Australia – military responses to diplomatic

[133] Ibid.

[134] As Anne Twomey notes - see "The Prerogative and the Courts in Australia," *Journal of Commonwealth Law* 3 (2021): pp. 55, 83.

or economic coercion are a valid but understudied lever of national power that merit further exploration.

Within Australia, the *Constitution* and its interpretation by the High Court makes clear that the Australian Government can respond to security threats that do not necessarily meet the threshold of war – such as the threat of Communism in the twentieth century,[135] or terrorism in the twenty-first.[136] If we are to move away from illumination, and towards deterrence as a strategic framework for responses (as this paper suggests) then it is necessary to understand the domestic legal left and right of arc the ADF is to operate under. It is only through this process that we can colour in the grey zone.

[135] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.
[136] *Thomas v Mowbray* (2007) 233 CLR 307.