2017 Sir Maurice Byers Lecture

The law as an expression of the whole personality[1]

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I have taken the title of this evening's lecture from a short, but powerful, article on the advocate's view of the judiciary, given by Sir Maurice Byers in 1987, in which he wrote: [2]

> The law is an expression of the whole personality and should reflect the values that sustain human societies. The extent to which those values influence the formulation of the law varies according to the nature of the particular legal rule in question.

What did Sir Maurice mean by the phrase 'law as an expression of the whole personality'? We cannot ask him now, but we can look around and discern the shape and fabric of an answer: an answer that reflects his subtlety, complexity and humanity. Subtlety and complexity are not matters of choice. They are how life is. They are features of the human, as a whole.

A personality is a human attribute, an outward expression of the character of the whole. It is incapable of definition. It can be described, though not fully. It is neither understood nor described by breaking it down into separate component parts (if they be separate at all), though the parts may help one understand the whole. It can be illuminated by many things – art, poetry, music, metaphor, dance. It can be appreciated by experience. It is full of contradiction. It is made up of the explicit and the implicit, the contradictory and the ambiguous. It lives relationally, as part of human exchange and experience.

Subtlety and complexity are not matters of choice. They are how life is. They are features of the human, as a whole.

Where is the place of logic, of abstracted idea, and of taxonomy in a personality? Taxonomy is an abstraction of the mind. It is the disembodiment of the whole into its parts into an organised logical structure. It can be seen as a depersonalised abstraction; but it can also be seen as a human feature – as part of the human search for order. It is a way of thinking abstractly, in particular about parts and their ordering, as opposed to thinking about the whole and its character including its implicitness – about its whole personality.

How do these features of personality have relevance for the law? How do these different features and perspectives of the personality affect legal thinking, judicial technique and legal doctrine? There is something to be said, in thinking about the law, of the relationship between abstraction and theoretical taxonomical ordering of the parts, on the one hand, and a feeling of the human, the relationally experiential and the contextual, on the other. It is this that I wish to explore from Sir Maurice's phrase.

One dimension of the meaning and content of the phrase, 'the law is an expression of the whole personality,' can be implied from its place in the paper. It followed shortly after the citation of a passage from Sir Anthony Mason's 1987 Wilfred Fullagar Lecture entitled 'Future Directions in Australian Law'.[3] Sir Anthony referred to the evolving concept of the democratic process moving beyond an exclusive emphasis on parliamentary supremacy and majority will, and to the respect for the fundamental rights and dignity of the individual. In this respect, Sir Anthony said: '[t]he proper function of the courts is to protect and safeguard this vision of the democratic process'.[4]

The phrase used by Sir Maurice links the law to the individual, not as a political abstraction, but as a human in his or her living character. It is the human, with all his or her frailties, strengths and limitations, who is entitled to dignity, not the atomised and abstracted element of society.

The phrase (expression of the whole personality) implies the necessary wholeness of the law. It also implies the humanity of the law, as something constructed of more than (but including) organised abstractions and rules. It must be more than this if it is to express a personality. The phrase denies the exclusive authority of the abstracted rule as the essence or nature of law.

To say that law is an expression of the whole personality is not to deny the central place of articulation of rule, of clarity, of precision, of logic, of abstracted ideas, and, where helpful, of the giving of coherent taxonomical form to necessary abstractions of rules. But it is to deny the complete dominion or hegemony of such. That denial is necessary for doctrine to be shaped in a fully human form, and for the application of law to control power in human society. At times, this requires the recognition of the limits of text and expression. Sometimes striving to define in order to reach greater precision and clarity is counterproductive; it brings lack of clarity and false distinctions when the subject does not yield meaning beyond a general expression. The 'unacceptable risk' of sexual abuse of a child to justify an order denying a parent custody of the child is an example.[5] Unacceptable risk is not to be further defined. This is so – because of the human and experientially founded nature of the subject: the test is left at the appropriate degree of generality, to be judged against the facts.

Taxonomy's relationship with the messiness of reality is important for law. Taxonomy too simplistically arrived at will see the complex and subtle made falsely simple. Taxonomy too elaborately structured will see the simple made complex, and the complex made incomprehensible, with false distinctions and dichotomies, definitions and distinctions without difference, making the meaning of the whole obscure.

The world may be ruled by words, but it is understood by the implicit.

Something may also be drawn from the balance of Sir Maurice's sentence in which the phrase appears – that the law should reflect the values that sustain human societies. This directs one to the relationship between rules and values. The derivation of rules from values, and the importance of values to the law which I have elsewhere explored[6], can perhaps be explained and illuminated by today's discussion – by focussing on the way life and experience, as much as abstracted theory, shape the law.

Too detailed an explanation of Sir Maurice's phrase, pregnant as it is with meaning and implicit metaphor and nuance, may deaden its meaning by the flat weight of prose. The better approach may be to look at some examples of the formation and application of legal doctrine and rules to contemplate the force and power of the phrase.

I propose to discuss a number of topics of private and public law, civil and criminal, in order to suggest the depth of Sir Maurice's statement, and in order to illustrate what I am searching for in exploring the phrase, in particular its suggested element of the humanity of the law. This is not an exercise in seeking to show the gentleness or goodness of law, rather to show its structure, fluidity, simplicity, complexity, intellectual abstraction and experiential blunt reality.

The relationship between rules and values to which I just referred reflects, to a degree, an abstracted dialectic in this enquiry, in that both are conceptions. Though the critical values that inform the law, the dignity of the individual and the rejection of unfairness, are conceptions, they are derived from emotion, sentiment, the human condition and social experience. These values come from life and experience. As important as the contrasting of rules and values is the relationship between the abstract (in its different forms) and the experiential (in its countless manifestations). It is from the experiential that the abstracted human values that sustain societies manifest themselves in concrete situations, in law and in society. It is the human and the experiential that give the proper context for the derivation and expression of rules, principles and law. From that derivation, rules, principles and law become infused with values.

These ideas and this perspective, are not just important to the content of substantive legal doctrine, but they are also important for how we think about the law and how we express ourselves. For that reason, I wish to say something a little later about statutes and their expression.

Let me begin with a simple example. No one now would deny the objective theory of contract. The formation and meaning of the contract is to be judged by notions of objective reasonableness.[7] Within that framework, the place of the plea of *non est factum* sits awkwardly. It is grounded on the lack of subjective consent. But, as Lord Wilberforce put it in *Gallie v Lee*,[8] the doctrine is necessary as an instrument of justice. The cases recognise the difficulty in theoretical expression in identifying the boundary (if there truly be one) between *non est factum* and lack of capacity (with the differences in remedial consequences) but coherence is maintained by the experientially derived expression of principle and its application to concrete facts. This is an example of one rule qualifying another for the necessary response of the law to human considerations in the control of power, and the place of the law in protecting the vulnerable, by reliance on rule or principle expressed generally by reference to human experience.

Certainty is sometimes best created not by drawing a black line, but by creating a recognisable space.

Let me turn to a creature of law and equity – the doctrine of penalties in obligations. I propose to spend a little time on the subject because it displays with some clarity how the abstract and the experiential interrelate in the formation of legal doctrine. The setting aside or reforming of private contractual arrangements because of the presence of a penal provision has a long history. It was recently described by Lord Neuberger and Lord Sumption as 'an ancient, haphazardly constructed edifice which has not weathered well'.[9] It might be thought, however, that if a doctrine has developed and changed over 700 years, and still maintains a contemporary relevance, it is hardly surprising, in a legal system built on the literal expression of rules, that there have been twists, turns and inconsistencies and that the doctrine is a little weather-beaten. When one looks to the history of the doctrine,[10] one is struck by the feature that different judges saw different priorities and different rationales for the interference with freely-entered bargains. But the principal problem has been the attempts by judges to define the limits of a concept which is to a degree indefinable, to express abstract rules as a **comprehensive** representation of human standards which are experientially and relationally founded and recognised in circumstance, not logically or theoretically derived. One aspect of this is the limits of language. Clarity of expression is vital, but only up to, not further than, the end point of its utility. Recognising that point is not necessarily easy or self-evident. But a recognition that there is or may be such a point is of some importance. The world may be ruled by words, but it is understood by the implicit. From the earliest examples of the Chancellor's interference with the enforcement of defeasible conditional penal bonds (the origins of the doctrine of penalties[11]), the concern of the courts was the control of private power. The human imperatives that generated that exercise of state authority were not capable of definition, but were capable of description and recognition from an examination of circumstances and by reference to experience. Thus, the notions (all concepts of value, degree and indeterminacy) of exorbitance, unconscionability and extravagance were enunciated as the core of the doctrine. The values that underlay these notions were decency and fairness in the relational arrangements of commerce; derived not from definitions, but through lived experience.

As the doctrine developed through the 18th century, cases were decided, rules emerged, and surrounding private law developed.[12] The separate doctrinal and precedential growth of the common law and equity, together with the intervention of Parliament[13] revealed a body of law tolerably coherent which saw provisions acting as security for the performance of conditions (promissory in the view of the United Kingdom Supreme Court but not so restricted according to the High Court[14]) limited in their effect to what was just and appropriate given their fundamental purpose to act as security for the primary performance condition.

The 19th century saw the development of a more rigidly structured approach and a change in focus. This coincided with, and grew out of, the development of the modern law of contract. There came to be an emphasis on the intentions of the parties in a society increasingly influenced by *laissez faire* philosophy which saw debates framed in terms of rules and precedents, not in terms of experientially and relationally derived norms of conduct applied to circumstance. The doctrine became fixed around the distinction between the penalty and the genuine pre-estimate of damage, albeit expressed in terms of extravagance and unconscionability. In the first fourteen years of the 20th century, three powerful courts in a Scottish appeal in the House of Lords (from a jurisdiction without a separate stream of equity),[15] a Privy Council appeal from the Supreme Court of the Cape of Good Hope,[16] and an English appeal in the House of Lords,[17] sought to reconcile the abstracted rules and the experientially and relationally derived human values.

In the third of those cases, *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*,[18] Lord Dunedin provided a remarkably lucid compromise that became the orthodox penalties model for the 20th century. Its stability came from its form as a rule-based construct to solve the enigma to positivists of the setting aside of freely entered bargains by reference to values. *Dunlop*, you will recall, concerned a contract for the supply of trademarked 'Dunlop' tyres, tubes and associated products to a garage. As was permitted at that time, the contract contained a resale price maintenance clause with a provision for the payment of £5 by way of 'liquidated damages' for every article sold in breach of the agreement. The garage sold the tyres for a lower price, thus breaching the agreement. The court held that the clause providing for the £5 payments was a valid liquidated damages clause.[19] The four tests of Lord Dunedin were summarised by Lord Neuberger and Lord Sumption in *Cavendish* as follows:[20]

> (a) that the provision would be penal if 'the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach'; (b) that the provision would be penal if the breach consisted only in the non-payment of money and it provided for the payment of a larger sum; (c) that there was a 'presumption (but no more)' that it would be penal if it was payable in a number of events of varying gravity; and (d) that it would not be treated as penal by reason only of the impossibility of precisely pre-estimating the true loss.

The contemporary significance of *Dunlop* was that it was an attempt to draw together centuries of cases in equity and at common law and the differing approaches of judges with different philosophical views into a stable structure that yet provided for flexibility. The framework laid down by Lord Dunedin had two central features. The first was the identification of the relevant legal technique – he called it 'this task of construction'.[21] This can be seen, if only in language, to be a doctrinal recognition in the compromise of those judges (such as Lord Eldon[22] and Sir George Jessel[23]) who had given primacy to the intention of the parties in describing the clause as a genuine pre-estimate of damage, which was, by then, the reflex of the penalty. But, Lord Dunedin did not mean construction in the strictly textual and interpretive sense. He meant characterisation of all the circumstances including (but not bound by) the language of the parties: 'upon the terms and inherent circumstances of each particular contract'.[24] Characterisation goes beyond ascription of meaning and is not a process of definition; it is the evaluative formation of a conclusion from given circumstances applying explicit or implicit norms, values and assumptions. It is a process and legal technique that pervades the law and legal thinking that sometimes goes ignored, and often goes unrecognised or unremarked.[25]

The second feature of Lord Dunedin's framework was the expression of tests or rules that had a significant degree of certainty, but which sought to embody the value-based heart of the doctrine: a money stipulation that is extravagant and unconscionable in amount compared with the greatest loss that conceivably could be proved to have followed from the breach. Around these two features moved 'propositions' that too often were taken as rules. We see in Lord Dunedin's structure a search for clarity by structure, yet a vindication of human relational standards.

A more simply expressed expression of the test came from the speech of Lord Atkinson (which has become central in the recent cases). Lord Atkinson saw the broad justification for the impugned provision by reference to the legitimate interests of the obligee.[26]

The core of the matter was extravagance and unconscionability of compensation by reference to something. The 'greatest possible loss' was the phrase most often used, being rooted in the doctrine's history concerned with securing performance and the remedial consequences thereof. The greatest possible loss has an obvious and direct relationship with the protection of the legitimate interests of the party to whom performance is owed, but it does not necessarily define those interests comprehensively. One can (as the cases from the 19th century did) seek to concretise the law to give certainty. This is what dominated the analysis in the 19th century: what could be taken as a genuine pre-estimate of damages was not a penalty. One could, perhaps in the search for certainty, make this assessment by going to more rules about recovery of damages under *Hadley v Baxendale*[27] and such cases against which to compare the amount in the clause. Or, one could make the evaluation by reference to a broader conception closer to human experience, expressed more generally, involving the protection of the legitimate interests of the obligee. The former tended to be the approach taken until recently; the latter has now commended itself to both the United Kingdom Supreme Court and the High Court of Australia.

In *Cavendish* Lord Neuberger and Lord Sumption recognised the vice of rule-making in this area. They spoke of the doctrine of penalties having become: [28]

> the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent.

They recognised that:[29]

> These distinctions originate in an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field. … All definition is treacherous as applied to such a protean concept.

The concept is protean (and so changeable, polymorphic and variable) because it is human and experientially based, and to be recognised as such, by reference more to value than to rule.

Although disagreeing in an important respect about the relevance of a breach of contract to engage the doctrine, the Supreme Court in *Cavendish*[30] and *ParkingEye*[31] and the High Court in *Andrews*[32] and *Paciocco*[33] have moved away from a rule-based structure to one based on the evaluation of interests. In *Andrews*, drawing on the broader formulation of the obligee's interests as articulated by Lord Atkinson in *Dunlop*, the High Court said it would look to 'whether the sum agreed was commensurate with the interest protected by the bargain'.[34] This idea of legitimate interest was adopted (variously expressed) by the members of the court in *Paciocco*.[35] The members of the Supreme Court expressed the matter not dissimilarly.[36]

That the doctrine is experientially and relationally based, not logically founded on abstracted rules, is a powerful reinforcement of the true nature of the doctrine and of its role in the control of the exercise of private power, but in a way that does not undermine central legal values of party autonomy, freedom of contract and faithfulness to the bargain. This proper balance is not achieved by rules that give a false sense of certainty, but which in fact undermine freedom of contract by ignoring business relational reality in the particular circumstances of the case. Rather, the balance is achieved by experientially founded evaluation of the genuineness of interests in real life. Certainty is sometimes best created not by drawing a black line, but by creating a recognisable space. Business people understand conceptions rooted in business experience. Thus, one buttresses freedom of contract by the textually less precise, but experientially more certain principle because of its closeness to commercial reality without the need to follow precise rules of potentially arbitrary application. The buttressing of freedom of contract can be seen in the results of *Paciocco*, *Cavendish* and *ParkingEye* where the interests recognised as legitimate went beyond a mechanical approach involving comparison with damages calculated in the usual way.

The recognition of the importance of legitimate interests of the obligee, and the balance with freedom of contract was perhaps no better said than in 1986 by Mason and Wilson JJ in *AMEV-UDC*,[37] in a passage that has been recently recognised by Lord Hope for its importance.[38] Together with the recent formulations of the Supreme Court and the High Court, this passage contains experientially founded principles that balance two fundamentals of commercial law – freedom of contract and the control of unconscionable exercise of power through the recognition of the relevance of inequality of bargaining power.[39]

Let me now turn to restitution. There have been tensions and contrasts in the recent development of the law in England and Australia, and over more than three centuries between judges of different generations. This can be seen in the different importance given to abstracted rules on the one hand, and to relational conceptions based on experience and values, on the other.

Certainty and predictable coherence is a basal feature of a mature and civilised legal system.

In 1760, in *Moses v Macferlan*[40] Lord Mansfield sought to replace an unstructured and historically-based body of rules and causes of action with a principle: 'the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money.'[41] By the early 20th century, the rules and precedential analysis thrown up by 19th century positivism, saw English courts retreat into more (barely logical) rules excluding, and sometimes with condescension describing, the place of conscience and equity in this field. In 1913 in *Baylis v Bishop of London*,[42] Hamilton LJ (later Lord Sumner) described *Moses v Macferlan* as 'vague jurisprudence'. In 1914 in *Sinclair v Brougham* the House of Lords (including Lord Sumner) equated restitutionary recovery to the availability of, and rules concerning, implied contract.[43] In 1923 in *Holt v Markham*,[44] Scrutton LJ referred condescendingly to Mansfield's 'well-meaning sloppiness of thought'.

But *Moses v Macferlan* today, certainly in Australia, provides the principled foundation

and the unifying concept of the law of restitution. In a series of cases,[45] the High Court has been largely faithful to what might be said to be the development of doctrine from the experiential – by recognising a unifying concept of unjust enrichment drawn from human intuitive response, recognising its application in particular known factual circumstances, and using legal reasoning (inductive and deductive) to consider the concept's application to human circumstances. This was the force of what was said by Deane J in 1987 in *Pavey & Matthews Pty Ltd v Paul*, when he said:[46]

> [unjust enrichment is a] unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation to make fair and just restitution … and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.

The recognition of restitution resting on unjust enrichment took place in England in 1991 and 1996 in *Lipkin Gorman v Karpnale Ltd*[47] and in *Westdeutsche*.[48] But English law has been substantially informed by the work of the great English scholar of restitution, Professor Peter Birks. He embarked upon the great task of seeking to divine an overall structure or taxonomy for the law of restitution. Birks' contribution was of immense significance; it demonstrates the benefits (but also perhaps risks) that flow from structured and analytical thinking about the law. Birks contended that a case should be analysed[49] according to a framework of whether a defendant has been enriched, whether the enrichment was at the plaintiff's expense, whether there was a vitiating factor present that made the enrichment unjust, and whether any relevant defences were open on the facts. These elements, drawn, to a significant degree, from abstracted deductive reasoning, then led to a conclusion as to whether a defendant has been unjustly enriched.[50] Evaluative judgment or discretion of what is said to be unconscionable was to be eschewed.[51]

Language is not merely the vehicle of meaning, it is a source of law, because it has the capacity to excite meaning and understanding through feeling.

Birks' framework, as taken up in English law, presents an analysis with an abstracted structure and which could be considered as dividing unjust enrichment into distinct elements that come to approach constituents of an unjust enrichment cause of action.[52] There are, however, signs that the Supreme Court is softening this somewhat strict taxonomical approach.[53]

That the two approaches can lead to very different results can be seen in the case of *Ford*.[54] The decision of the trial judge that the recipient of funds received an incontrovertible benefit making him liable to repay it to the lender, in circumstances where he was vulnerable and simple-minded and duped by his son to part with the money, have the hallmarks of a legitimate and structurally sound application of the Birksian rule of enrichment by incontrovertible benefit by receipt of money. The Court of Appeal evaluated the justice of the case where the simple and vulnerable man had signed documentation in circumstances plainly bespeaking his weakness to the mortgage originator and which enlivened the doctrine of *non est factum*.[55] A taxonomy of a cause of action based on incontrovertible enrichment would have led to a gross injustice by any human standard. The appeal was allowed.

The law as to criminal responsibility should be as certain as possible, with as little place for value judgment as is reasonably possible.

Let me say a little more about certainty in commercial law. Certainty and predictable coherence is a basal feature of a mature and civilised legal system. The less certainty, the more risk; the more risk, the higher the cost.

But certainty is not gained by the written word alone. It is derived and felt from an understanding of a stable and known position. That comes as much from a known demand for trust, honesty and a lack of sharp practice as from clarity of expression. That is why, in most civilised legal systems, there is a concept of good faith in the law of bargains; not as a particular or specific implied term upon which to seek damages, but as a pervading norm that helps supply the blood and oxygen to honest common sense in the process of implication and construction of contracts.

Litigation lawyers in particular (by which phrase I include judges) sometimes resist these ideas in the name of certainty. That resistance can sometimes partly be traced to the fact that many gained their 'commercial' experience from 'commercial' litigation. The difficulty with that is they see commerce at the failure end, at the place of unravelling of relationships, where parties sometimes seem to compete with each other to be more unreasonable, dishonourable, greedier or meaner than the other. Litigation is often a place of little trust, and less good faith. The trouble is that the common law is forged in such a place. That is unfortunate because the other 99 per cent of commercial parties who do not need to go to court to engage in mutually profitable arrangements have their rules made there.

Certainty is made by strong, clear, reasoned principles based on trust, honesty, reason, common sense and good faith. These are human values and qualities not definable, but regularly displayed and recognised by commercial people, which lower the transactional costs of business.

New York is, and was in the early 20th century, a world commercial centre. It was then, and no doubt still is, home to judges of great commercial acumen. In the 1920s and 1930s, these judges included the great Cardozo. Not only was he a great lawyer and judge, but also he wrote with a style and grace that exemplified the importance of language to law. Language is not merely the vehicle of meaning, it is a source of law, because it has the capacity to excite meaning and understanding through feeling. The implicit strength of an idea gives the idea a quality that distinguishes it. Thus, to understand the nature of the requirement of fiduciary trust, one can read text book after text book, case after case, Corporations Act provision after Corporations Act provision, but one will never obtain a better sense, feeling or sentiment of fiduciary trust than by reflecting upon Cardozo's famous dictum in *Meinhard v Salmon*:[56]

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

And common law is no different to equity. In dealing with a building contract in 1921, Cardozo was faced in *Jacobs & Young v Kent*[57] with a problem of substantial performance and dependent promises. A builder had been required to install a particular brand of piping. A subcontractor had installed a different brand, but one which was qualitatively substantially equivalent. The owner refused to pay the balance of the contract sum until the whole piping was replaced with piping of the brand requested – an onerous and expensive task. There is much in Cardozo's language that illuminates the process of characterisation of terms, and the commercial values which underpin the law. Speaking of the process of characterisation of terms as dependent or independent, he said:[58]

> Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or another … Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If

> something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

He then went on to say something of symmetry and logic, saying:[59]

> Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favour of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be weightier …Where the line is to be drawn between the important and the trivial cannot be settled by a formula.

These words reveal the importance of the human and the just as well as of the word in commercial law. That is because law is to be felt as well as read to be understood. Commercial people do that for a living in their own relational activity.

Let me turn to the criminal law. There, most clearly, one can see the places of the rule and the value, and the abstracted expression and the experiential.

The need to define, with clarity, the limits and content of criminal liability is clear, indeed perhaps self-evident. The law as to criminal responsibility should be as certain as possible, with as little place for value judgment as is reasonably possible.[60] This is so even though the criminal law is regulating human relationships and experience. That is not to say, however, that the content of the rules of liability must not be derived from a human experiential and relational sense of justice. If the rules of criminal responsibility do not conform to, and are not expressed by reference to and in language conformable with, the relationally human and the experiential, they will lose community consent and respect. Sometimes, however, the evaluative assessment is a central part of an offence. The offence of wilful misconduct in public office includes as elements of the offence 'wilful misconduct, by wilfully neglecting or failing to perform his duty in a way that merits criminal punishment'.[61]

The duty of the judge is to reflect the human, experiential and relationally whole response of society; not as a person, but as the embodiment of just state power.

Further, to recognise the central place of the expression of the rule in criminal liability does not detract from the force of something I said earlier about the limits of text. Rules are necessary to make clear the line past which the citizen becomes criminal and becomes subject to punishment. But the conception of wrongdoing is relational and experiential and at some point in the expression of the rule clarity is best achieved by ceasing to define, or clarity is impeded by continuing to define. Such considerations no doubt have been important to the general expression of the offence of misconduct in public office. The criminal cartel provisions of the *Competition and Consumer Act 2010* (Cth)[62] when read with the Commonwealth *Criminal Code*[63] and the definition-ridden insider trading provisions of the *Corporations Act 2001* (Cth)[64] are perhaps examples of more text leading to less clarity.

...the subject is power: who is authorised to wield it, how should it be exercised and what are its limits?

Upon conviction, the criminal must be sentenced to punishment. From the universe of liability where rule is central to legitimacy, one moves to a universe where rule is part, but only part, of an exercise that is experientially intuitive at heart. Rule plays a part because sentencing must be undertaken in accordance with relevant legislation. But it is the human response which dominates.

That sentencing must be undertaken according to statute directs one towards, not away from, the ultimately intuitive response to the offending by the offender. The duty of the sentencing judge is, as the High Court said in *Elias*, 'to balance often incommensurable factors and to arrive at a sentence that is just in all of the circumstances'.[65] The instinctive synthesis[66] is the human, and not mechanical or mathematical, response to the circumstances and the often conflicting factors and considerations. There are no quantitative boundaries or rules of literal application in sentencing. It is a process fixed upon individualised justice in the context of the offender's relationship with society. It is the evaluation of the human context of the offender that marks the process, eschewing any structured approach, or mechanical application of any abstracted rule. These themes have dominated the jurisprudence of the High Court since *Wong*.[67] The experiential, the implicit and the importance of feeling to the human circumstance allows the court as an institution, with its experience and knowledge, to express its response as the manifestation of just state power to the inherently human, infinitely varied, often tragic and violent situations before it. One cannot reason out in logic, or even describe, except by conclusions evoked from human feeling, why the sentence imposed on the step-father in *Dalgliesh*[68] – who had committed incest with his step-daughter under 14 – was manifestly inadequate. A universe of factors can be expressed, but the conclusion can only be reached intuitively by contemplation and elucidation. The comprehensive expression of the precise weight and importance of each factor is impossible because the task is the assessment of the whole by reference to a human judgment of appropriateness and justice, based on experience and instinct. The plurality judgments in *Wong* and *Markarian* are clear in their expression of these concepts. The concurring judgment of McHugh J in *Markarian* illuminates them with literary power in a piece of writing of devastating force. His Honour cited[69] the gritty blunt expression of the depression years of Sir Frederick Jordan in *Geddes*[70] that evokes in the mind the human circumstance, reality and tragedy of Mr Geddes' crime – the drunken beating to death of his physically more powerful rival after the taunts of his estranged partner – an intended 'thrashing' that ended a life. It is from the articulation of the reality that the justice of the response, so long ago, is still felt. This is law and justice, because it is not all abstracted rule. This is why McHugh J was so correct, if that expression be permitted, when he stressed in *Markarian*[71] the importance of the transparent articulation of the instinctive synthesis. I would only respectfully add that the articulation requires the direct language of life; and also that there exist limits, and a likely ultimate inadequacy, of that articulation, because of the nature of the conclusion as, at least partly, an implicit human response of feeling to the circumstances of life and the human condition. It is the feeling from which, at least in part, the law springs.

Within sentencing lies complexity, humanity (sometimes with its contradictions), rule of statute and general law, values and societal response and will to the always unique circumstances of an individual's life and relationship with society. The duty of the judge is to reflect the human, experiential and relationally whole response of society, not as a person, but as the embodiment of just state power. Thus, in a modern judicial reflection of the medieval theory of kingship of the King's Two Bodies[72], the societal response is administered by a human, but one necessarily abstracted; an abstracted representation of human society. The contradictions, the requisite balance, and the inability to draw workable and legitimate conclusions only from the application of abstracted rules in this field can be seen and understood in Chief Judge Haynsworth's expression of the purpose of the criminal law and its character in *US v Chandler*[73] cited by Gleeson CJ in *Fardon*[74], and in the human tragedies dealt with in the judgments in *Veen (No 1)* and *(No 2)*[75].

These are not new concepts. They are often found in, indeed they pervade, the law. The vain search for definition or explanation of a subject beyond that which the subject will admit can be seen in a wide variety of contexts, from the impossibility of defining constitutional conceptions beyond such phrases as 'direct', 'remote' and 'pith and substance'[76] to the protection of the child from 'unacceptable risk' in family law, to intuitive synthesis in sentencing in criminal law, to the characterisation of the seriousness of breach in contract law, to the central notion of causation in all fields of the law – to wherever one is dealing with a subject which in part is indefinable because of its relationally human or experiential character.

That justice cannot be defined is its inherent strength.

Let me say something of administrative law. I use the expression 'administrative law'. The rules and principles concerned with the exercise of public power are better conceptualised as part of constitutional law. It is a branch of the law whose shape and texture are very much affected by what I have been discussing. This is so for a simple reason that lies at the heart of constitutional and public law – the subject is power: who is authorised to wield it, how should it be exercised and what are its limits? Power is a relational concept informed by consent, by compulsion, by a respect for dignity and by the need to eschew unfairness. Contemplation of these concepts reveals that definitional limits and logical constructs will have their limits.

The notion or conception of jurisdictional error is central to the analysis of the exercise of public power involved in its review under s 75(v) of the Constitution and implicitly identically under state law by the doctrine in *Kirk*.[77] Essential to the application of the notion of jurisdictional error is the process of statutory construction in order that the textual limits of power be understood. But the human and relationally experiential judgment involved in legal unreasonableness does not depend on definitional formulae or some precise verbal expression. The concept under consideration is the exercise of power. Over-categorisation and over-definition lead to lack of clarity and confusion. The sufficient defect for the conclusion to be drawn that the power has not been exercised, that the jurisdiction to exercise the power was lacking, has been variously expressed over the years. All the expressions of principle by the courts, by reference to the contemplation of the circumstances in question, seek to express something human about power: the necessity for a discretion to be exercised according to the rules of reason and justice, not private opinion; according to law, and not humour; and within the limits that an honest and competent person would confine himself that is legal and regular, not arbitrary, vague and fanciful;[78] the illegitimacy of a decision that would not be reached by a reasonable or sensible person.[79] Many expressions have been employed[80], but all are centred on how a human would act, or should act when wielding power. Where one cannot find some known kind of error but one is seeking to make an assessment about the legitimacy of the exercise of the power from the result, one's task is evaluative. It is an assessment framed by any relevant statute, by the nature and character of the decision, its legal context and attendant values of the common law. Within the framework of the supervision of legality, one must assess the decision using descriptive and explanatory phrases of the kind just mentioned. This is to translate the human into the legal; not to impose the legal upon the human, as if the former was logically and abstractedly derived.

Let me finish with the central topic of statutes. We live, at least with much Commonwealth legislation, in an age of detailed deconstructionism. The elemental particularisation of modern day legislation – its deconstructionist form, sometimes arranged more like a computer program than a narrative in language to be read from beginning to end, reflects a modern cast of mind intent on particularity, definition and scientific composition and structure that is dismissive of the implicit, of the unknown and of trust in the judgment of instinct. Yet these latter are powerful human forces and influences – not to be left free to run untrammelled as passion, prejudice and bigotry, but to find their place in a framework of rules and principles, to take their place with rational thought to combine to form reason and human value judgments, sometimes which cannot be deconstructed.

I am not intending by saying anything this evening to devalue the central structural place of rules and principles clearly and fully expressed, where possible in an ordered and logical way (whatever the logic may be). Far from it. Rather, I seek to protect their value by recognising that they are threatened by a failure to accord the place of the wholeness of the human context, or to use Sir Maurice's words, to recognise the law as an expression of the whole personality. Sometimes that failure, with the consequent risk to clarity, can be seen in statutory drafting; sometimes it can be seen in the complexity or rigidity of doctrinal expression. If legislation is to be built on complex and interlocking definitions, or if doctrine is to be ordered minutely in the attempt to express exhaustively the minute reach and particular application of the underlying norm, there comes a point where the human character of the narrative fails, where its moral purpose is lost in a thicket of definitions, exceptions and inclusions. The vice is not just lack of clarity; that is bad enough. Worse, it is a loss of human context, a loss of the expression of the human purpose of the law. Language is vital for the expression of the idea in a way that makes its implicit boundaries, context and meaning understandable. To deconstruct into parts and to attempt to express by the exhaustive expression of all the parts may not give an understanding of the whole because it may hide the implicit in the whole: that which emerges only from the whole, from the expression of the personality.

That the law is drawn in part from an indefinable human source – a source of feeling, of emotion, of a sense of wholeness – gives it a protective strength in the service of human society. That source of feeling and emotion includes a sense of, or need for, order, but order in its human place, and not overwhelmed by abstraction and taxonomy. That partly indefinable sense of wholeness of the law allows it to protect and safeguard the vision of democratic process to which Sir Anthony Mason referred. It provides the systemic antidote to logical reductionism that on its own would see the law as the sharp instrument of those who control power. That justice cannot be defined is its inherent strength and permitted such a great lawyer and legal thinker as Sir Victor Windeyer to say that 'a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice'.[81]

I have not discussed the great constitutional ideas that Sir Maurice was responsible for launching and moulding. I have preferred to say something about judicial technique and mode of thought this evening. That, however, leads us back to the Constitution and our struggle, as lawyers, with power. Law, after all, is about power, private and public, and its control. And as Sir Maurice's phrase illuminates, in a few lines, the technique of law must be whole and human – to express a personality aided by coherence and reason, but recognising that the whole and the human are not always definable.

Perhaps one might finish with a question: Whose personality? The answer perhaps lies in the balance of the phrase: the personality informed by the values that sustain human societies, not the characteristics that diminish or destroy.

Sydney, 1 November 2017

ENDNOTES

* Chief Justice, Federal Court of Australia

1 I wish at the outset to express my debt to a number of people whose friendship and intellectual engagement have contributed to my thinking in this paper. Paul Finn, Dr Iain McGilchrist, Stephen Margetts, Tim Game, Julia Roy and Kevin Connor have over different times drawn out for me the importance of the human, the complex and the indefinable. Dr McGilchrist's magisterial work *The Master and his Emissary* is a polymathic exploration of the functioning of the brain and its relevance to history and culture (and so the law).

2 Sir Maurice Byers, 'From the Other Side of the Bar Table: An Advocate's View of the Judiciary' (1987) 10 *University of New South*

Wales Law Journal 179 at 182.

3 Geoffrey Lindell (ed), *The Mason Papers* (Federation Press, 2007) at 11-26.

4 Ibid 26.

5 *M v M* [1988] HCA 68;166 CLR 69 at 78.

6 James Allsop, 'Values in Law: How they Influence and Shape Rules and the Application of Law' (Paper delivered at the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong Hochelaga Lecture Series, Hong Kong, 20 October 2016); James Allsop, 'Values in Public Law' (Paper delivered as the 2015 James Spigelman Oration, Sydney, 27 October 2015).

7 See *Taylor v Johnson* at [1983] HCA 5; 151 CLR 422 at 428-432; *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; 209 CLR 95 at 105 [25]; *Pacific Carriers Ltd v BNP Paribas* [2004] HCA 35; 218 CLR 451 at 461-462 [22]; *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52; 219 CLR 165 at 179-182 [40]-[46].

8 [1971] AC 1004 at 1026.

9 *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67; [2016] AC 1172 at 1192 [3] per Lord Neuberger and Lord Sumption.

10 See CJ Rossiter, *Penalties and Forfeiture* (Law Book Company, 1992); AWB Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 *Law Quarterly Review* 392; *Cavendish* [2016] AC 1172; *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30; 247 CLR 205; *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28; 258 CLR 525.

11 See, generally, Simpson, *op cit* and Rossiter, *op cit*.

12 See Rossiter, *op cit*; *Cavendish* [2016] AC at 1193-1194 [6]-[7] per Lord Neuberger and Lord Sumption and *Andrews* 247 CLR at 218 [14].

13 See 8 & 9 Will III, c 11 (1696); 4 & 5 Anne, c 16 (1705).

14 *Cavendish* [2016] AC at 1208 [42] per Lord Neuberger and Lord Sumption and *Andrews* 247 CLR at 225 [39]; 226-227 [42] and 227 [45].

15 *Clydebank Engineering & Shipbuilding Co Ltd v Yzquierdo y Castaneda* [1905] AC 6.

16 *Commissioner of Public Works v Hills* [1906] AC 368.

17 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.

18 Ibid.

19 See discussion of *Dunlop* in *Cavendish* [2016] AC at 1198-1199 [21] per Lord Neuberger and Lord Sumption.

20 Ibid at 1199 [21].

21 *Dunlop* [1915] AC at 87.

22 *Astley v Weldon* (1801) 2 Bos & P 346.

23 *Wallis v Smith* (1882) 21 ChD 243.

24 *Dunlop* [1915] AC at 87 per Lord Dunedin. See also *Cavendish* [2016] AC at 1244 [142] per Lord Mance.

25 James Allsop, 'Characterisation: Its place in Contractual Analysis and Related Enquiries' (Paper delivered at the Contracts in Commercial Law Conference, Sydney, 18-19 December 2015).

26 *Dunlop* [1915] AC at 92-93 per Lord Atkinson.

27 *Hadley v Baxendale* (1854) 9 Ex 341 ; 156 ER 145.

28 *Cavendish* [2016] AC at 1204 [31] per Lord Neuberger and Lord Sumption.

29 Ibid.

30 *Cavendish* [2016] AC 1172.

31 *Parking Eye* [2016] AC 1172.

32 *Andrews* 247 CLR 205.

33 *Paciocco* 258 CLR 525.

34 *Andrews* 247 CLR at 236 [75].

35 Justice Kiefel (with whom French CJ agreed) formulated the test as whether the sum imposed was 'out of all proportion to the interests of the party which it is the purpose of the provision to protect': *Paciocco* 258 CLR at 547 [29]. Justice Keane (in an approach that reflected an important obiter dictum of Mason and Wilson JJ in *AMEV-UDC*) put particular focus on the function of the penalty rule as one that regulated the way in which parties use their bargaining power to impose punishment on other contracting parties. Where the sum was not proportionate or commensurate with legitimate commercial interest, he said, 'the punitive character of the provision stands revealed': *Paciocco* 258 CLR at 607 [256]. Justice Gageler focussed on what smilingly may be described as the yin and the yang of commercial bargains in describing a test where the 'negative incentive to perform' is 'so far out of proportion with the positive interest in performance that the negative incentive amounts to deterrence by threat of punishment': *Paciocco* 258 CLR at 580 [164].

36 In their reasons, Lord Neuberger and Lord Sumption offered the following by way of definition of the 'true test', namely '[W]hether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation': *Cavendish* [2016] AC at 1204 [32]. Lord Hodge (with whom in this respect Lord Toulson agreed) expressed it as 'whether the sum or the remedy stipulated for breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract': *Cavendish* [2016] AC at 1278 [255]. Lord Mance referred to the need to identify any legitimate business interest protected by the provision and whether the provision is extravagant, exorbitant and unconscionable by reference to it: *Cavendish* [2016] AC at 1247 [152]. Lord Clarke agreed with Lord Hodge and Lord Mance: *Cavendish* [2016] AC at 1285 [291].

37 *AMEV-UDC Finance Ltd v Austin* [1986] HCA 63; 162 CLR 170 at 193-194.

38 Lord David Hope, 'The Law on Penalties –A Wasted Opportunity?' (2016) 33 *Journal of Contract Law* 93.

39 In *AMEV-UDC* Finance 162 CLR at 193-194 Mason and Wilson JJ said: 'The test to be applied in drawing [the distinction between compensation and what is unconscionable and oppressive and penal] is one of degree and will depend on a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term. The courts should not, however, be too ready to find the requisite degree of disproportion least they impinge on the parties' freedom to settle for themselves the rights and liabilities following a breach of contract. The doctrine of penalties answers…..an important aspect of the criticism often levelled against unqualified freedom of contract, namely the possible inequality of bargaining power. In this way the courts strike a balance between the competing interests of freedom of contract and protection of weak contracting parties.'

40 (1760) 2 Burr 1005.

41 Ibid at 1012.

42 [1913] 1 Ch 127 at 140.

43 [1914] AC 398.

44 [1923] 1 KB 504 at 513.

45 See, eg. *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; 162 CLR 221 at 256-257; *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* [1988] HCA 17; 164 CLR 662 at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; 175 CLR 353; *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516 at 543-545 [70]-[74]; *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; 246 CLR 498 at 515-517 [29]-[30]; *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; 253 CLR 560 at 596 [78].

46 [1987 HCA 5; 162 CLR 221 at 256-257.

47 [1991] 2 AC 548.

48 [1996] AC 669.

49 Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, 1989) 20.

50 Ibid.

51 A similar approach has been taken by other English writers including Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th ed, 2011) at [1-09]; Andrew Burrows, *The Law of Restitution* (Oxford University Press, 2011) at 26-27 and in Andrew Burrows, *Restatement of the English Law of Unjust Enrichment* (Oxford University Press, 2012). Birks himself described Lord Mansfield's recourse to equitable considerations as involving 'a dangerously high level of abstraction': Birks, *op cit* at 80. For Birks, the 'unjust' in 'unjust enrichment' meant the vitiating factors recognised by the law as giving rise to restitution and did not describe a 'notion of justice': Birks, *op cit* at 99.

52 Lord Steyn adopted this analysis in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227 (Lord Steyn) and 234 (Lord Hoffmann). Burrows, in fact, describes this academic framework as having been 'expressly approved' by the courts: Burrows, op cit at 27. Later, in *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66; [2016] AC 176 Lord Clarke stated that at 187 [18]: 'In *Benedetti v Sawiris* [2014] AC 938 the Supreme Court recognised that it is now well established that the court must ask itself four questions when faced with a claim for unjust enrichment. They are these: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?'.

53 See James Allsop, 'Rules and Values in Law: Greek Philosophy; The Limits of Text; Restitution; and Neuroscience? – Anything in Common?' (Paper delivered at the Hellenic Australian Lawyers Association – Queensland Chapter Seminar, Brisbane, 29 March 2017) at [27]-[28], discussing *Commissioners for HM Revenue and Customs v Investment Trust Companies (in liq)* [2017] UKSC 29; 2 WLR 1200 at 1214 [41] per Lord Reed and *Lowick Rose LLP (in liq) v Swynson Ltd & Anor* [2017] UKSC 32; 2 WLR 1161 at 1171 [22] per Lord Sumption.

54 *Ford (by his tutor Watkinson) v Perpetual Trustees Victoria Ltd* [2009] NSWCA 186; 75 NSWLR 42.

55 Ibid at 63-64 [85]-[90].

56 249 NY 458 (1928) at 464.

57 230 NY 239 (1921).

58 Ibid at 242.

59 Ibid at 242-243.

60 *Taikato v The Queen* [1996] HCA 28; 186 CLR 454 at 466.

61 *R v Quach* [2010] VSCA 106; 201 A Crim R 522 at 535 [46]; *R v Obeid* (No 2) [2015] NSWSC 1380 at [22] and [111]-[121]; *Obeid v R* [2017] NSWCCA 221 at [60] and [201]-[235].

62 *Competition and Consumer Act 2010* (Cth) Pt IV Div 1 Subdiv B.

63 Ch 2 of the *Criminal Code* is applied by s 6AA of the *Competition and Consumer Act 2010* (Cth) to offences under that Act.

64 *Corporations Act 2001* (Cth) Pt 7.10 Div 3.

65 *Elias v The Queen* [2013] HCA 31; 248 CLR 483 at 494 [27].

66 *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at 377-378 [51]-[52] per McHugh J.

67 *Wong v The Queen* [2001] HCA 64; 207 CLR 584; *Markarian v The Queen* [2005] HCA 25; 228 CLR 357; *Hili v The Queen* [2010] HCA 45; 242 CLR 520; *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120; *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571; *Elias v The Queen* [2013] HCA 31; 248 CLR 483; *Kentwell v The Queen* [2014] HCA 37; 252 CLR 601; *CMB v Attorney General* (NSW) [2015] HCA 9; 256 CLR 346; *Director of Public Prosecutions v Dagliesh (a pseudonym)* [2017] HCA 41.

68 [2017] HCA 41.

69 *Markarian* 228 CLR at 383-384 [65].

70 *R v Geddes* (1936) 36 SR (NSW) 554 at 555-556.

71 228 CLR at 390 [84].

72 Ernst Kantorowicz, *The King's Two Bodies* (Princeton University Press, 1957).

73 393 F 2d 920(1968) at 929.

74 *Fardon v Attorney-General* (Qld) [2004] HCA 46; 223 CLR 575 at 589 [11].

75 *Veen v The Queen* [1979] HCA 7; 143 CLR 458; *Veen v The Queen* [No 2] [1988] HCA 14; 164 CLR 465.

76 *The Commonwealth v Bank of New South Wales* [1949] HCA 47; 79 CLR 497 at 462.

77 *Kirk v Industrial Court* (NSW) [2010] HCA 1; 239 CLR 531.

78 *Sharp v Wakefield* [1891] AC 173, 179; *Shrimpton v Commonwealth* [1945] HCA 4; 69 CLR 613 at 620.

79 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064.

80 *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at 3-4 [5].

81 *Cobiac v Liddy* [1969] HCA 26; 119 CLR 257 at 269.