A Philosophical Critique of the Best Interests Test as a Criterion for Decision Making in Law and Clinical Practice

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2007

A thesis submitted to Auckland University of Technology in fulfilment of the degree of Doctor of Philosophy

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Attestation of Authorship

"I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where explicitly defined in the acknowledgements) nor material which to a substantial extent has been accepted for the award of any other degree or diploma of a university or other institution of higher learning."

Signed ***Date***

Acknowledgements

With sincere thanks (in no particular order) to:

David Anderson-Ford – who introduced me to, and inspired me to think about, law, ethics and best interest determinations.

David Seedhouse – for his philosophy, expertise, supervision and for good faith.

Kate Diesfeld – for her wisdom, knowledge and guidance.

The PhD group – for their clarity, their challenges and their constant interest in my thesis.

Murray and Norman – for their unfailing patience and support.

Mum and Dad – for their enthusiasm, encouragement and understanding.

Dedication

To all the people who have had, and for those in the future who will have, treatment and non-treatment decisions made on their behalf.

Abstract

The best interest test is the legal mechanism which governs decision making on behalf of adults who lack the capacity to make their own health care treatment decisions. The test has attracted considerable criticism from health professionals, academics, judges and lawyers for being ill-defined and non-specific.

The question of what is meant by 'best interests' remains largely unanswered. As a consequence, the test gives medical and legal decision makers considerable discretion to apply their personal value judgements within supposedly value-free philosophical frameworks - unreasoned and opaque decision making processes are the inevitable result.

Because of the dominance of supposedly value-free philosophical frameworks, the place of values in decision making is not always fully understood. Reasoning is not possible without values, which stem from our emotions and passions, our upbringing, our religion, our cultures, our processes of socialisation and from our life experiences. Values help us make sense of our daily lives.

I argue that law – like any other social institution - is essentially a human, values based construct. I put forward a theory of values-based law which argues for the recognition that laws, rules and conventions are based on, and contain, individual values.

Currently, medical and legal decision makers justify grave decisions on behalf of society's most vulnerable citizens without revealing, or even acknowledging the values which drive and inform their decisions. Any opportunities to scrutinise or debate the values driving decisions are lost. Ultimately, values-based law argues that values underlying best interest determinations *must* be exposed to facilitate honest, transparent and fulsome decision making on behalf of adults who lack capacity. By applying the theory of values-based law, supposedly value-free decision making processes are exposed as insufficient to facilitate fulsome, honest and transparent legal reasoning.

Introduction

This thesis is a philosophical critique of the best interest test, the legal mechanism for health care decision making on behalf of adults who lack capacity in England and New Zealand. My thesis is that the current use of the best interest test ignores an integral part of decision making – the role of values.

The existing process claims to use science-based, value free philosophies, which are supposed to underpin clinical practice and legal reasoning in best interest determinations. But there is an inevitable interrelationship between facts and values in the process of decision making on behalf of adults who lack capacity and in processes and systems of law and medicine. This is not acknowledged.

The fundamental choices which lie behind best interests' determinations are masked from scrutiny. This is to the detriment of the adults on whose behalf decisions are made, the decision makers themselves (the judiciary and health professionals) and society. I argue that the integral place of values in decision making can, and must be, revealed to improve transparency, honesty and credibility, and inform decision making.

The best interests test as a decision making mechanism

For competent adult patients the law is clear; an individual's autonomy and right to self-determination in accepting or declining medical treatment are absolute. "A person is completely at liberty to decline to undergo treatment, even if the result of his doing so will be that he will die" (Lord Keith, *Airedale NHS Trust v Bland* [1993] (England) at 859). However, for the incompetent adult, the law in England and New Zealand is reliant on the best interests test.

The test has been widely used as a legal principle to justify health care treatment and non-treatment decisions on behalf of incapacitated adults since it was first applied, along with the common law principle of necessity, to justify medical treatment for an adult who lacked capacity to consent to treatment in *Re F* [1990] (England). This case concerned a woman with an intellectual disability who lacked capacity to consent to

sterilisation. She was in an active sexual relationship, and her family and carers believed it was not in her best interests for her to go through pregnancy or to give birth to a child. The common law principle of necessity has for some time been the recognised principle under which health professionals may initiate emergency treatment without the express consent of the patient (Lord Goff, *Re F* [1990] at 75). The Lords established that the link between necessity and administering non-consensual treatment for incapacitated adults is whether the clinician was acting in the best interest of the person concerned. The Lords found that, when treating an incompetent adult, as long as doctors act in good faith and reasonably in the best interests of their patients and in accordance with a responsible body of medical opinion, they would not be liable in battery (Lord Brandon, at 68).

The test has since been applied in a variety of circumstances to justify medical treatment for incompetent adults who lack capacity to accept or decline medical treatment. The following list is representative.

- Sterilisation of women with learning disabilities: *Re F* [1990] (UK); *Re HG* [1993] (UK); *Re W* [1993] (UK); *P v P* [1994] (Australia); *Re X* [1998] (UK).

- Hysterectomy for women with learning disabilities: *Re X* [1991] (NZ); *Re Marion (No 2)* [1992] (Australia); *Re Z* [2000] (UK).

- Removal of human tissue for transplant from adults with learning disabilities: *Re Y* [1997] (UK); *Northern Sydney and Central Coast Area Health Service v CT by his Tutor ET* [2005] (Australia).

- Withdrawal of life sustaining health care:
    - Withdrawal of food and nutrition from adults in persistent vegetative state: *Airedale NHS Trust v Bland* [1993] (UK); *Re G* [1997] (NZ); *Re H* [1998] (NZ); *NHS Trust A v M; NHS Trust B v H* [2001].
    - Renal replacement therapy: *Shortland v Northland Health Ltd* [1998] (NZ).
    - Mechanical ventilatory support: *Auckland Area Health Board v A-G* [1993] (NZ); *Auckland Healthcare Services Ltd v L* [1998] (NZ).

- Detention of an adult with autism for treatment: *R v Bournewood Community and Mental Health NHS Trust, Ex parte L* [1998].

- Use of experimental drugs to treat Variant Creutzfeldt Jakob Disease: *Simms v Simms and another; A v A and another* [2003] (UK).

- Enforced caesarean section against a pregnant woman's wishes: *Re MB* [1997] (UK).

The best interests test has been applied together with the 'Bolam test'. In *Bolam v Friern Hospital Management Committee* [1957] (England), it was established that a doctor, or other health professional, is not liable in negligence if she has acted according to a responsible body of medical opinion.

The combination of *Bolam* and the best interest test perpetuates the notion that the best interests of incapacitated adults are limited only to medical interests. For example, in the New Zealand case of *Shortland v Northland Health Ltd* [1997], a patient who lacked capacity to consent or refuse treatment was denied renal replacement therapy. It was held that the doctors making the decision to discontinue his treatment acted in good faith and in their patient's best interests. Furthermore, the doctors' decision conformed with "prevailing medical standards and with practices, procedures, and traditions commanding general approval within the medical profession" (Salmon J, p. 131). The judgement was not influenced by other considerations, for example, that the patient himself had expressed a wish to continue treatment and his family strongly supported the continuation of treatment. Neither cultural, familial or other factors impacted on the decision and the suggestion that Mr Williams' situation be assessed by an ethical review board were rejected. This judgement reflects a body of international case law which supports the view that an incapacitated person's best interests may be decided exclusively by health professionals caring for the patient, as long as they are acting in good faith, and in accordance with a responsible body of medical opinion.

The philosophical problem

Making a decision to withdraw or withhold treatment on behalf of another person is essentially a value judgement. Veatch explains the influence of values in best interest determinations.

> *The value choices that go into a judgement about what is best for another are so complex and subtle…. unconscious value distortions will not only influence the clinician's judgement about what is best, but even influence the very interpretation of the scientific data.*
>
> Veatch, 1995, p. 11

Values are the expression of the subjective, human self. They stem from our experiences, our upbringing, the people around us, our education, our religions, our cultures, our societies and our emotions. Values are instrumental in guiding ongoing activities, resolving conflicts and making decisions (Rescher, 1982)

There is a common misperception, however, which claims that personal value judgements can, and should be, removed from human reasoning and good science (Loughlin, 1998). This view is influential in medicine and law, resulting in the mistaken belief that objective value free reasoning is possible and even preferable. This results in a fundamental philosophical incongruity when best interest determinations are made using a combination of medical fact centred approaches and positivist legal process. Best interest determinations which raise complex ethical questions are reduced to medical facts and clinical judgement, and *portrayed* as objective and value-free. Consider the following case.

Re Y **[1997] (England)**

Y was a 25 year old woman who was severely mentally and physically handicapped. Y's sister (the plaintiff) suffered from a bone marrow disorder. For a number of years, Y's sister had undergone extensive chemotherapy. There had been a recent deterioration in her sister's condition and there was a strong likelihood that her situation would progress to leukaemia in the next 3 months. The only realistic prospect of recovery for the plaintiff was a bone marrow transplant operation from a healthy

compatible donor. Y appeared to be a suitable donor. However, Y did not have the capacity to give her consent to the bone marrow donation. Y's sister sought a declaration that bone marrow could lawfully be taken from Y, even though she could not give her consent for the procedure.

Employing the best interest test, the judge found that the benefit to Y's sister of the bone marrow harvest would also bring positive affects for Y. It was said that if anything happened to Y, that Y's mother would be detrimentally affected and that might undermine the relationship that Y had with her mother.

> *It was to the emotional, psychological and social benefit of the defendant to act as done to her sister because in this way her positive relationship with her mother was most likely to be prolonged. The disadvantages to the defendant of the harvesting procedure were very small. The bone marrow donated by the defendant would cause her no loss and she would suffer no real long-term risk…*
>
> *Harvesting of bone marrow from the defendant who is incapable of giving informed consent would amount to assaults upon the defendant and would therefore be illegal unless shown to be in the best interests of the defendant and therefore lawful.*
>
> *Re Y* [1997] (England)

A question about whether it is ever justifiable to proceed with a non-consensual invasive medical procedure which appears to have no direct therapeutic benefit for that person raises questions of ethical and social concern. For example, is it acceptable to use people who have no understanding of a procedure as a resource of medical benefit for others? Does someone who is intellectually disabled have the right not to be subjected to invasive medical procedures for the benefit of someone else? And if they do have those rights, should the law uphold them over all other considerations? If Y were not intellectually disabled, she would be able to make her own decision. Is it possible to assume that people with capacity in Y's situation would want to help their very ill sister?

In order to invoke the best interests test in *Re Y* [1997], the judge had to demonstrate that the procedure would be of some benefit to Y. The link was made between the potential consequences of Y not donating her bone marrow (the death of her sister) and

the detrimental affect of this potential outcome on Y. The judge referred to a case from the United States which concerned the donation bone marrow from twin brothers. In that case it was said that a psychological benefit could be realistically found to exist if there was an existing relationship between the healthy child and the sibling (*Curran v Bosze* [1990]). However, in Y, such a relationship did not exist. The judge said "that it was not possible accurately to describe the relationship between the plaintiff and the defendant as particularly strong" (Connell J, p. 4). Y's sister did not visit regularly and their relationship largely consisted of Y's sister sending Y cards, presents and photographs. So the judge looked to the relationship that Y had with her mother to justify the procedure.

To establish that there would be detrimental affects if Y's sister died as a result of not having the bone marrow transplant from Y, the judge turned to the evidence of experts. A consultant in the psychiatry of learning disability gave evidence that Y may well have had some recollection of the early years of living in the family home with her sisters. It was said that Y would be negatively affected if her mother was upset by her sister's death. The judge asked the question: "Why subject the defendant to the process of bone marrow extraction?" The answer was found in the medical evidence: "It is to her emotional, psychological and social benefit. This is the expert opinion of Dr Berney [the consultant psychiatrist] who is very experienced in these matters" (p. 8).

In considering the detrimental effects to Y of the actual bone marrow harvesting procedure, the judge also turned to medical evidence. Experts said that the risk of complications from the anaesthetic that would be required to complete the procedure was very low "i.e. less than one per 10,000" (p. 8). The judge was reassured by the evidence that Y had undergone several general anaesthetics, one of which was for a hysterectomy, with no adverse effects.

By couching the decision largely in terms of the clinical judgement, the difficult value judgements and the inherent subjective nature of the decisions were portrayed in terms of medical facts and expert evidence. At no point did the court ask what the disadvantages to Y were regarding the violation of her bodily integrity beyond the medical risks of the procedure. Nor did the court consider whether it is right or wrong to proceed with the bone marrow donation solely based on what appear to be utilitarian

grounds. The value judgements which underpin the decision to allow the non-consensual bone marrow extraction remained implicit.

Responses to the best interests test

The best interest test has attracted considerable attention from lawyers, health professionals and ethicists. The literature highlights some of the difficulties with using the best interest principle as a mechanism for making decisions on behalf of incapacitated adults. For example, there is no consensus about the test's meaning or interpretation. Despite this, some writers assume that there is common understanding about the intended meaning and application of the test. Conversely, others express frustration at the indeterminacy of the principle and lack of practical guidance provided. Despite calls for, and many attempts made to achieve specificity, none have yet provided a definitive solution.

It has been asserted that the best interest principle is clearly patient-centred and focuses exclusively on the patient's good (Buchanan & Brock, 1986, p. 73; Edwards, 2002, p. 149). Edwards considered which interests should be factored into the determination and concluded: "All types of interests that are relevant to the situation" (2002, p. 149). But how do we know what interests are relevant to a situation when making fundamental treatment decisions? The argument becomes circular. In making a best interest determination, there will be many relevant considerations. Those which take priority and are given weight, is not so readily solved by simply saying that 'relevant' interests should be taken into account. What is perceived as relevant by one person, may be irrelevant to another.

Harris provides a similarly problematic argument. Harris suggests that the best interest test is linked with the principle to do no harm (2003, p. 11). In making decisions on behalf of patients who lack capacity, Harris asserts that clinicians can justify treatment by simply doing the right thing for patients "and it is right precisely *because* it is in his or her best interests" (2003, p. 11). Again, the argument is circular. What is right and what is best? Such an assessment comes down to the individual values of decision makers.

On a very practical level, Bailey provides the clinician's perspective of trying to apply the principle on a daily basis in an intensive care environment (2001). Bailey argued that the test does not provide an ethically defensible means of determining whether treatment should be administered or withheld. Furthermore, she highlighted the direct link between best interest determinations in the intensive care environment and quality of life judgements. In the intensive care context, Bailey found that the guidelines offered to help clinicians make determinations were vague, unstructured and lacking any conceptual framework (Bailey, 2001, p. 162). Bailey further observed that best interest determinations are based on unquestioned assumptions about doctors being able to judge quality of life, to weigh up risks and benefits, and to decide on a fair distribution of resources.

Critique of the best interest test in particular cases

In England and New Zealand, critique of the best interest principle exists primarily in response to specific cases which have sparked interest in the use of the best interest principle. The case of Tony Bland considered the removal of food and fluids from a young man in a persistent vegetative state which resulted from horrific injuries he sustained at the Hillsborough football disaster in England in 1989. The House of Lords found that it was in Tony Bland's best interests to discontinue artificial nutrition and hydration. The case prompted a great deal of attention, in particular the House of Lords denial that the case was about euthanasia. For example, Mason and McCall Smith called for a more honest approach, challenging the courts to admit that the deliberate removal of sustenance from vegetative patients is indistinguishable from euthanasia (1999, p. 407). In response to *Bland*, Laurie and Mason described the language and justifications employed in best interest determinations as "arguably hypocritical, dishonest, misleading, illogical and, as a result questionable in moral and ethical terms" (2000, p. 177).

Diesfeld (2000) critiqued the House of Lord's response in *R v Bournewood Community and Mental Health NHS Trust, Ex parte L* [1998] (England) which employed the best interest test to justify the informal detention of an autistic man outside the protections of mental health legislation. Diesfeld argued that in doing so, the House of Lords failed to provide optimum protection for vulnerable members of society (2000, p. 281).

Cases concerning sterilisation of women with learning disabilities have also attracted considerable critique (Kennedy, 1991; Keywood, 1998; Keywood, 1995; Montgomery, 1989). For example, Kennedy robustly critiqued the use of the principle in legal proceedings to allow the sterilisation of a seventeen year old with learning disability (1991). Kennedy highlights unreasoned justifications for decision making by the courts in the name of best interests and asserts that if any reasoning has taken place, it is prior to concluding that a particular course of action is in a person's best interests (1991, p. 90). In his analysis, Kennedy highlights many of the on-going issues with the test.

> *The best interests formula may be beloved of family lawyers but a moment's reflection will indicate that although it is said to be a test, indeed the legal test for deciding matters relating to children, it is not really a test at all. Instead, it is a somewhat crude conclusion of social policy. It allows lawyers and courts to persuade themselves and others that theirs is a principled approach to law. Meanwhile, they engage in what to others is clearly a form of 'ad hocery'. The best interest approach of family law allows the courts to atomise the law, to claim that each case depends on its own facts. The court can then respond intuitively to each case while seeking to legitimate its conclusion by asserting that it is derived from the general principle contained in the best interests formula. In fact, of course, there is no general principle other than the empty rhetoric of best interests: or rather, there is some principle (or principles) but the court is not telling. Obviously, the court must be following some principles, otherwise a toss of a coin could decide cases. But these principles, which serve as pointers to what amounts to the best interests, are not articulated by the court. Only the conclusion is set out. The opportunity for reasoned analysis and scrutiny is lost.*
>
> Kennedy, 1991, p. 90-91

Kennedy suggests that by employing the test, the court fails to call to account professionals proposing to carry out medical intervention without express consent. Furthermore, he argues that the best interest test is nothing other than the view of experts (1991, p. 90).

Critique of the best interest test in North America

Researchers have examined the use of the best interest test as a mechanism for making decisions on behalf of others in different legal contexts. Research from North America provides a number of salient observations which resonate with the use of the principle on behalf of adults who lack capacity in England and New Zealand.

Mnookin has given considerable attention to the principle as the mechanism for making child welfare and custody decisions in the United States (1975; 1985). As a result of his research, Mnookin argued that "deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself" (1975, p. 260). Mnookin's ultimate goal was to expose the indeterminacy of the principle (1975, p. 255).

Mnookin found that a decision about what is best or least detrimental for a child was usually indeterminate and speculative. The flexibility and discretion required did nothing to require the courts to face up to hard questions about child welfare in a systematic way (p. 277). For example, should the judge be primarily concerned with the child's happiness, spiritual and religious training, or their potential economic productivity? (1975, p. 260). Because of the indeterminacy, Mnookin argued that the same cases presented to different judges could result in different decisions. The scope of judicial discretion created a risk that decisions may be made on the basis of values not widely shared among society, even among judges (1975, p. 263). Mnookin concluded that "while the indeterminate best interests standard may not be good, there is no available alternative which is plainly less detrimental" (1975, p. 282).

Artis researched the use of the best interest principle in child custody determinations in the U.S. and found that the wide judicial discretion required by the best interest principle introduced value judgments. Applying a feminist lens, Artis demonstrated that societal ideas about gender roles in families are both reflected and reproduced by the legal system (1999, p. 239).

Mercer (1997) was concerned by the judicial discretion inherent in employing the best interests standard and also examined child custody determinations in the U.S. From her

research, Mercer identified the biases of judges which the test introduced, for example, a mother's sexual conduct and instances of adultery were a leading predictor that custody with the father was in the best interest of the child. In conclusion, Mercer conceded that there would never be a perfect formula for best interest determinations and suggested that families should stop going to court about child custody decisions where imperfect systems were unlikely to be able to solve family issues which the family could better resolve for themselves (1997, p. 293).

Other North American researchers have investigated the best interest test in discrete areas of health care treatment decision making on behalf of others. Their research suggests that different approaches to the use of the principle should be taken in different health care settings. Cranley-Glass (1992) examined Canadian law and the best interest test in relation to elderly persons and decision making within a medical context. The conclusion that Cranley-Glass reached was that family members are, on the whole, best suited to make health care decisions serving the needs of incompetent elderly persons (1992, p. 424).

Myser (1994) conducted a philosophical critique of the best interest test as a criterion for decision making about medical interventions for very disabled neonates and infants, comparing decision making in India, Sweden and the U.S. No guidance was found in any of these countries about how the relevant interests in a decision to discontinue treatment for neonates should be weighed (Myser 1994, p. 266). Concluding her research, Myser called for the development of theoretical structures to bridge the gaps which she found existed when balancing the interests of infants and family members (1994, p. 267).

Responses to indeterminacy

Much of the critique in the literature is levelled at the test's indeterminacy and resulting failings as a criterion for making decisions on behalf of others (Kennedy, 1991; Keywood, 1995; 1998; Mnookin, 1975, 1985; Myser, 1994; Spiers, 1997). Calls for greater specificity have come from academics (Mnookin, 1975; Myser; 1994, Worthington, 2002), clinicians (Bailey, 2001; Edwards, 2002), and the judiciary (Brennan J, *P v P* [1994], p. 13; La Forest in *Re Eve* [1986], p. 112; Thorpe LJ, *Re A*

[2000], p. 13). Responses to this criticism have resulted in numerous attempts to define and provide guidelines for the tests' application in both medical and legal contexts.

Tick lists representing a list of criteria to be taken into account in best interests determinations have proven popular. Such lists have been compiled in case law and by professional advisory bodies (British Medical Association, 2003). For example, in a case that found hysterectomy for menstrual management and sterilisation to be in the best interests of a female with intellectually disabilities, the judge identified seventeen specific factors for consideration to ensure a measure of uniformity in best interest determinations in similar circumstances (*Re X* [1991] (NZ)).

However, despite what may appear to be comprehensive accounts of necessary considerations, lists can never be exhaustive. For every consideration which is listed for one circumstance, considerations may be different in another circumstance. For example, if a hysterectomy is proposed for a woman with intellectual disabilities because she becomes hysterical at the sight of blood, this may be weighed in the decision to allow a hysterectomy. But if this factor is not included on the list, is it to be excluded by the court as a consideration? Even though this solution attempts to provide greater specificity, check lists can never take into account every possible consideration particular to the individual adult and the context in which a best interest determination is taking place.

A cost benefit analysis has been suggested as the proper method of making best interests determinations (Beauchamp & Childress, 2001; Buchanan & Brock, 1986; Edwards, 2002; *Re A* [2000], Thorpe LJ). Applying this interpretation, the surrogate decision maker is required to identify the highest net benefit from among the available options. To do this, different weights must be assigned to each option, discounting or subtracting perceived risks or costs. A comparative assessment then locates the highest net benefit (Beauchamp & Childress, 2001). In *Re A* [2000] (p. 13) Thorpe, LJ suggested that a balance sheet should be drawn up. Any factors of actual benefit should be one side. On the other, any counterbalancing disbenefits to the applicant. The judge should then identify potential gains and losses, making some estimate of overall gains or losses that might accrue. At the end, only if the account is in significant credit will

the judge conclude that the application is likely to advance the best interests of the claimant (*Re A* [2000], Thorpe LJ, p. 13). This interpretation raises questions about what is meant by the good of the individual, demanding a weighing of the benefits arising from possible courses of action (Bailey, 2001). Which evidence is placed on the gains side of the balance sheet and which to losses is a value judgement and entirely dependent on the preferences of the decision maker.

Another alternative which has been mooted is the reasonable person standard. This involves selecting the course of action according to what most reasonable persons would choose (Docker, 2001) or what patients under similar conditions but competent have tended to choose (Pellegrino & Thomasma, 1988). Reasonable patient approaches are akin to the substituted judgment test which has been favoured over the best interest test in some cases in the United States (*Re Lucille Boyd* [1979] (U.S) cited Kennedy & Grubb, 2000, p. 835). This approach is no less problematic. As Lord Mustill observed in *Bland*:

> *To postulate a patient who is in such condition that he cannot know that there is a choice to be made, or indeed know anything at all, and then ask whether he would have chosen to terminate his life because that condition made it no longer worth living is surely meaningless…. The idea is simply fiction.*

The best interest test has been described as a welfare appraisal and this interpretation has been used more recently in two sterilisation cases in the U.K. (*Re A* [2000], *Re S* [2001]). The welfare appraisal finds its origins in family law and focuses on the patient's contemporaneous needs, operating with the singular focus of the present welfare of the patient (Griffith, cited Myers, 1994). However, the welfare appraisal is also ill defined, and goes no further than acknowledging that a best interests determination should not comprise solely of considering the medical best interests of the adult concerned.

The existing critique of the best interest test reflects decision makers grappling to make complex, value judgements within frameworks which do not acknowledge the necessary and integral role of values. Attempts to achieve a particular formula for making ethically complex best interest determinations using value-free decision making

frameworks are bound to fail. It is not surprising that research from the United States has demonstrated that employment of more sharply defined legal standards is ineffective in solving the difficulties with the best interests test (Artis, 1999; Mercer, 1997).

Artis' (1999) research into child custody cases indicates that attempts to achieve greater specificity for best interests standards have a limited effect on reducing the concerns associated with indeterminacy. Her findings demonstrate that even though guidelines and lists were enacted to restrict judges' discretion and reduce bias, it was not clear that they did. Judicial decisions remained a function of a variety of factors, including age, gender, race, and marital status (Artis, 1999, p. 6). Mercer (1997) examined the use of the 'primary caretaker standard' adopted in West Virginia as an alternative to the best interests test. This standard provided a ten point list of factors for determining appropriate outcomes in child custody cases, but despite implementation of the more specific primary care taker standard, judicial decision making increasingly reverted back to using the best interest standard (Mercer, 1997).

While the subjectivity of best interest determinations has been acknowledged (Biegler, 2002, p. 360) the view that reasoning can somehow be separated from values when making decisions on behalf of incapacitated adults persists (Edwards, 2002; Savulescu, 1995). This view reflects the dominance of objective, value-free philosophies which underpin legal and medical decision making and which do not acknowledge that best interest determinations are primarily value driven.

The aim of my thesis is not to create a theory, or to provide a definitive solution, on how to make best interest determinations. This is simply not possible. What is required is a new philosophical approach which challenges traditional objectivist approaches to law and legal reasoning and recognises the ethically complex, value dependent nature of best interest determinations. Then the necessary role of values can be revealed so that *all* components of reasoning which go into making decisions on behalf of others can be revealed: not just the legal "facts" and medical "evidence".

Chapter 1 - The objectivist myth

The objectivist myth has developed from traditional philosophical methods which exclude values from reasoning. Because of the dominance of these approaches, the place of values in decision making is not always fully understood. Reasoning is not possible without values, which stem from our emotions and passions, our upbringing, our religion, our cultures, our processes of socialisation and from our life experiences.

This first phase of my thesis aims to show how values make sense of, guide and inform our decisions in *all* aspects of our lives – including legal and medical contexts within which best interest determinations are made.

Fact / value distinction

There is a classic distinction between rationality and empiricism in philosophy which rests on the question: ultimately should we rely on reason or experience to justify our beliefs? (Radcliffe, 2000) Empiricists argue that knowledge is obtained through experience by the data we receive through our senses. The rationalist says that reality can be properly understood only from what appears as necessary to the reasoning mind (Loughlin, 1998, p. 25). Both the empiricist and the rationalist have one thing in common: they require the suspension of individual values in forming and guiding logic (Hutcheon, 1972).

There is a commonly held view that objective reasoning is superior to subjective reasoning and that only value-neutral science can provide true knowledge (Hutcheon, 1972; Loughlin, 1998). A dualistic concept of reality comprises a fact realm, where knowledge is attained through reason and sensory experience, and a realm of value whereby an individual's "natural knowing and valuing equipment" is suspended. Hutcheon (1972, p. 5) suggests that prevailing cultural climates have been influential. In particular, a world view based on Christianity that insists the source of values are spiritual, therefore beyond the possibility of analysis by human kind. If values and values systems are governed by some higher spiritual authority, objective reasoning is left to man, resulting in a segmentation between a scientific world of fact and a theological world of value. This view was firmly entrenched by the end of the

nineteenth century, influenced by major scientific discoveries, such as Darwin's theory of evolution (Hutcheon, 1972, p. 6).

Value-free approaches to law and medicine

This segmentation has repeatedly been attributed to the influence of Descartes (Loughlin, 1998). Loughlin (p. 26) explains that acceptance of value-free philosophies stems largely from the Cartesian conviction that the world to be studied is an objective, impersonal mechanism which we can only hope to understand by impartially viewing the "cold, hard facts". Kennedy (1981) sees Descartes' influence in the way modern medicine views the body as a machine and illness as a mechanical failure. Through this paradigm, the doctor approaches disease as a mechanic approaches an engine. This results in a reductionist approach to illness which isolates disease to the malfunction of a body part rather than seeing the person as a whole.

The objective, scientific approach depicts man as an automaton, devoid of feelings, emotions, life experience and removed from his social or cultural environments. It influences not only the treatment of disease, but also the perception that medical decision making can be value-free.

The medical science approach and the premise that value-free empirical knowledge is preferable remains highly influential in modern day health care systems. Evidence-based medicine takes it for granted that the scientific method is the governing method in advancing the field of medicine (Mayer, 2004). Evidence-based medicine urges health professionals to base their care on empirical studies, rather than simply on "opinion" (Meulen & Dickenson, 2002). Empirical methods in medicine have even spawned a new approach to bioethics called "evidence-based ethics" which claims to "delineate popular attitudes" relating to issues such as abortion, stem cell research and euthanasia (Goldenberg, 2005, p. 2). Evidence-based medicine may be a sensible approach to health care delivery, offering providers and consumers accountability and a firm knowledge base from which to plan treatment provision. However, purely evidence-based approaches promote the perception that medical decision making is

purely empirically and scientifically based – the acknowledgement of the subjective human experience and human relationships is missing (Little, 2003, p. 181).

The underpinning philosophy of modern legal systems is also based on a positivist approach which assumes that law is identifiable from factual sources and is explainable without recourse to values (Finnis, 1995, p. 477). Legal positivism is most closely associated with Hobbes' view that the sovereign declares to their subjects what they may and ought to do (Goldsmith, 1996, p. 3). Central to legal positivism is the perception that law is a set of human commands which form a closed and coherent framework for making legal decisions. Positivism denies that laws need to be just, right, moral or good in order to be laws (Goldsmith, 1996, p. 4). Rather, the duty of judges is viewed solely to determine the correct elements of the legal framework and apply them without recourse to moral judgements (Campbell, 1996). Accordingly, modes of reasoning and procedure are established which seek to establish facts (Smith, 2000, p. 286).

Essential to the positivist position is the value-free neutrality of legal rules; a position aligned and perfectly compatible with a scientific model of legal reasoning. The emergence of legal science paralleled the growth of medical and biological discourses in the eighteenth century and is primarily concerned with classification and division of concepts, the analysis and synthesis of rules and reasoning methods of induction and deduction (Adelman & Foster, 1992, p. 41).

The idea of legal science is most closely associated with the legal theorist John Austin. Legal science is embedded in methods of legal process and reasoning whereby "judicial decision-making becomes an experimental procedure in which hypotheses of abstract rules are proposed, evidence is found and tested, and conclusions are drawn by logical deduction" (Adelman & Foster, 1992, p. 41).

Legal positivism – the basic problem

The problem with these approaches is that they do not acknowledge that values *are* a necessary and integral component of any decision making process. To ignore this is not only a misperception of decision making, but also – and in several ways – potentially

damaging. For example, Loughlin sees value-free approaches as destructive; negatively affecting individual consciousness and society at every level. She believes that objective approaches are alienating, they set us apart in a destructive way from the world we know, causing us to ignore or devalue those subjective capacities which could enrich our awareness of the world (1998, p. 1). Even to consider that solely objective reasoning might be a possibility is to depict man as an automaton, devoid of feelings, emotions, life experience and removed from his social or cultural environments.

These are the value-free philosophical underpinnings of modern legal and health care systems which guide treatment and non-treatment decisions on behalf of adults who lack capacity. In reality, scientific and rationalist paradigms do not eliminate values from decision making. Instead, denying the relevance of values results in best interest determinations according to the decision maker's own unspecified values.

Values and reasoning

Contemporary theorists have attempted to re-dress the balance, particularly in relation to health care decision making. Fulford (2004) has developed what he describes as the counterpart to evidence-based medicine. Values-based medicine (VBM) "is the theory and practice of effective health-care decision making for situations in which legitimately different (and hence potentially conflicting) value perspectives are in play" (2004, p. 205). He argues that in values-based medicine, awareness, knowledge and ethical reasoning are combined with communication skills to effect action (2004, p. 223). Central to Fulford's theory is a fact + values model of reasoning. Fulford argues that values and evidence are "the two feet on which all decisions in health (and any other context) stand" (p. 209).

Seedhouse's theory of values-based decision-making is similarly concerned with the decision making process and exposing the values which drive and inform decision making. Values-based decision-making is based on the philosophical tenet that decision making is necessarily a combination of values and evidence. "Obviously all decisions are a balance of evidence and values. Obviously we should regard values as at least equally important as evidence. And yet we don't" (Seedhouse, 2005, p. 23). My theory

of values-based law is based on the same philosophical foundations and aims to redress the balance in legal decision making.

Values + evidence

Values and evidence are both necessary and integral components in the dynamic reasoning process. Consider Adam's decision about whether to buy a diamond. I have broken down his decision making process to identify facts and values.

This is a diamond. Fact.
Adam perceives this is a beautiful diamond. Value.
This diamond is priced at $5000. Fact.
Adam believes this diamond is worth $5000. Value.
Adam has $5000 in the bank. Fact.
Adam wishes to spend $5000 on the diamond. Value.
Adam buys the diamond for $5000. Fact.
Adam is very happy with the diamond he has bought for $5000. Value.
And so on.

For the reasoning process to take place at all, it is simply not possible to remove the evaluative component. The decision whether to buy the diamond is a complex mix of fact and values, whether the decision maker acknowledges this or not. Consider the same decision with the removal of values.

This is a diamond. Fact.
This diamond is priced at $5000. Fact.
Adam has $5000 in the bank. Fact.
Adam has bought the diamond for $5000. Fact.

This description of the process is purely an account of what has happened. But it gives no insight into the reasons why Adam bought the diamond or the full process of reasoning that led to the decision. Adam may not have bought the diamond because it was beautiful. He may have bought it because his employer told him to, and because Adam valued his job he bought the diamond. Alternatively, Adam may have been

aware that the value of the diamond on the open market is only $1000. But this diamond belonged to Adam's great grandmother and because of sentimental attachment, Adam valued the diamond more highly than other diamonds. An evaluative component is always necessary in order to reach a decision.

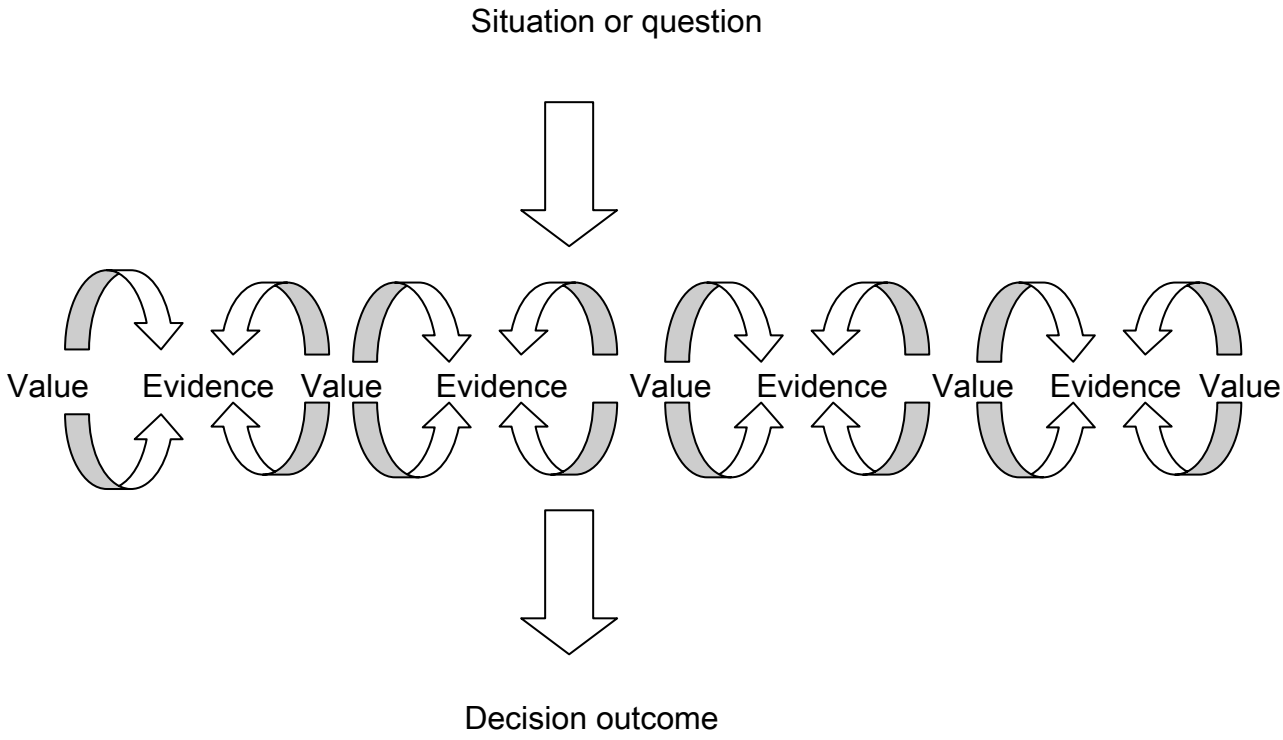


Figure 1. The value + evidence model of reasoning.

As this visual representation demonstrates, human reasoning is a complex combination of values and evidence.

What is the fact / value distinction?

So how is the distinction made between what is fact and what is value? For example, how do I know that 'this is a diamond'? This question has been the concern of philosophers for centuries. For this thesis, I take what might be termed a common sense view of evidence. This is a table, this is a computer and this is a desk. The sun will rise tomorrow morning. This is evidence which exists independently of my human engagement. Williams (cited O'Grady, 2002) couches the answer in terms of

knowledge, and suggests that if knowledge is what it claims to be, then it is knowledge of *reality* which exists independently of that knowledge; "knowledge is of what is there anyway." The diamond is there, independent of whether Adam has any knowledge of it. The cost of the diamond is $5000 regardless of whether Adam is aware of it or not.

Another way of understanding the distinction is the 'just is' evidence (Seedhouse, 2005, p. 57). This is a tree. Water boils at 100^0 C. Seedhouse describes this as evidence which exists "whether we human beings like it or not. The evidence is those things just are and which we cannot change" (2005, p. 57). A diamond just is, regardless of the label it has been given, and independent of human evaluation. The price of the diamond 'just is' $5000. The pricing of the diamond has already taken place, perhaps by the jeweller, and therefore, for the purpose of Adam's decision, the price 'just is'. Adam then has to evaluate whether it is worth $5000 to him. It 'just is' that Adam has $5000 in the bank. Whether Adam decides to spend that money on the diamond is a value judgement. The value component is a subjective, human interpretation of evidence.

This distinction relates directly to an important philosophical question within value theory. Does the object or principle of value possess value independent of human engagement? Or is the value conferred on it by human engagement? Traditional objectivist theories of value maintain that certain objects possess properties that give them their value based on impersonally specifiable criteria whose satisfaction can be determined by some objective examination akin to the scientific investigation of things (Rescher, 1982). Subjectivist theories, in contrast, assign value solely on the basis of the observer enjoying or valuing an object (Baumgartner & Pasquerella, 2004).

Evaluation is a human activity, representing the engagement of the person or persons with the object. Therefore, it is in the realm of subjective experience. Let us return to the diamond example. How do I know this diamond is beautiful? The objectivist may say that the diamond has certain characteristics which define it as beautiful, such as its clarity, the way it sparkles, and its number of carats. However, this evidence is 'just is' evidence, which is insufficient itself to define the diamond as beautiful. When describing the diamond as beautiful, you may use these characteristics to articulate why you think it is beautiful. But ultimately the subject has to engage with the diamond and form an evaluation of whether it is beautiful. The valuing of a concept is similarly a

human subjective endeavour, occurring in the same way as the valuing of an object. Perry (1954) uses the example of peace to demonstrate; the valuableness of peace being the characteristic conferred by the interest which is taken in it, for what it is, or for any of its attributes, effects or implications.

What is a value?

A survey of attempts to define values confirms human preference as central to most theories and definitions of value.

> *Traditionally, all attempts to develop an exact formal theory of evaluation have concentrated on the concept of preference.*
>
> Rescher, 1982, p. 73

- A value is a belief upon which a man acts by preference. (Allport, 1961, p. 454)

- A value is a conception of something which is personally or socially preferable. (Rokeach, 1973, p. 10)

- The term values has been used variously to refer to interests, pleasures, likes, preferences, duties, moral obligations, desires, wants, goals, needs, aversions and attractions, and many other kinds of selective orientations. To avoid such excessive looseness, we have insisted that the core phenomenon is the presence of criteria or standards of preference. (Rokeach, 1979, p. 16)

- A value is a human preference for a thing, state or a process. A value judgement is a decision based upon one or more values. (Seedhouse, 2005, p. xxiii)

- A man's "values" may refer to all his attitudes for-or-against anything. His values include his preferences and avoidances, his desire-objects and aversion-objects, his pleasure and pain tendencies, his goals, ideals, interests and disinterests, what he takes to be right and wrong, good and evil, beautiful and ugly, useful and useless, his approvals and disapprovals, his criteria of taste and standards of judgement. (Edel, 1953, p. 198)

Aren't some values fundamental?

At first glance, particularly in relation to ethical and social values, defining values as preferences may feel instinctively insufficient to describe the weight and high regard in which they are held. For example, democracy, freedom of speech, sanctity of life, truth, justice. This may be due in some part to the heritage in Western philosophy and cultures for regarding the source of values as religion; the perception that some higher authority has handed them down to us. It may also be due to the significance we accord some values, not just individually, but collectively, within societies.

The definition that "values are preferences" was offered to a group of health promotion students. Their reaction was one of collective horror. They felt that their values reflect their character and their culture and said something significant about the kind of people they were. For example, if trust or truthfulness were highly valued, the students thought that this suggested integrity and even indicated suitability for a career in a caring profession. Values may be perceived as ideals or highly prized ethical principles and describing values as preferences may at first appear to be an over simplification. Certainly, likening your preference of an apple over a pear to your preference about freedom of speech over government censorship, or sanctity of life over quality of life, can be discomforting. But this is dependant on your perception of value and evaluation.

Rescher (1982) suggests that "values are founded upon a vision of how life ought to be lived", and has expressed objections with defining a value as a preference. Rescher (1982) argues that values are instrumentalities for reasoning about alternatives and that there is an essential relationship of values with benefits which bestows stability and solidity. This is opposed to preferences which can be fleeting and fly in the face of consciously reckoned benefits (Rescher, 1982). What is a benefit, however, is a matter of preference, of value, and the distinction between whether values are expressions of preferences, or whether values guide preferences, is an artificial one. The complex nature of human reasoning ensures that however stable and solid our values, the values we employ are not fixed, but vary according to context. For example, I do not eat meat because I value the life of living creatures. However, if my house becomes infested with rats, I will call in the rat catcher to kill the rats. This does not mean that I no longer value the life of all living creatures. It simply means in that situation I value the welfare

of my family over the lives of the rats. I *prefer* to have my house rat-free than to compromise the safety of loved ones.

The argument that defining a value as a preference is too simplistic does not hold up to scrutiny. Ultimately, however strongly held the value, and how seemingly significant and highly regarded it is, it is still an expression of preference. I value world peace; I *prefer* that all people in the world lived in harmony and without war. Conversely, what may appear as a matter of simple preference may be an expression of significant and deeply held values. I am going to buy the apple instead of the pear. I prefer the taste of the apple, but I also know that the apple has been grown organically in my home town. I prefer to buy the apple because I value locally grown organic produce and the support this gives to the local economy.

Perry (1954) was also concerned with finding an all encompassing definition of value. Perry recognised and emphasised that the realm of values and valuing constituted "what may properly be given the name of 'civilization', that total human adventure whose rising and declining fortunes give significance to human life upon this planet" (p. 14). He argued for an understanding of values primarily in terms of interest. "A thing - anything - has value or is valuable, in the original and generic sense, when it is the object of interest - any interest. Of whatever is object of interest is ipso facto valuable." (Perry, 1954). Given the many different potential applications and meanings of the word 'interest', however, this definition may increase confusion rather than clarify. For example, interest may refer to your leisure pursuits, your bank balance, your level of curiosity, what you think is advantageous to you or others. Perry's use of the word 'interest' conveys much the same meaning as when other theorists have used the word 'preference'. Perry used the word 'interest' to point to attitudes or having the characteristic of "being for or against something." (p. 6-7), and categorised acts such as "liking – disliking" and "desiring – avoiding" as interests. These acts are essentially expressions of preference.

A considerable advantage of defining values as expressions of preference is that it transcends all potential applications of values and value theory. For a theory to be accepted and endure it must be commonly understandable and applicable. Values and value theory has expressly informed a variety of fields such as aesthetics, ethics,

economics and sociology. A different understanding of a concept across disciplines potentially causes confusion and incorrectly creates the impression that values and valuation have different roles in different spheres of life. The role of values is not confined to questions of right and wrong, or of what is good and bad, or of aesthetics. Values and valuing are integral to all areas of human reasoning. As Rokeach explains:

> *Persons are not detached or indifferent to the world; they do not stop with a sheerly factual view of their experience. Explicitly or implicitly they are continually regarding things as good or bad, pleasant or unpleasant, beautiful or ugly, appropriate or inappropriate, true or false, virtues or vices.*
>
> Rokeach, 1979, p. 16.

Where do values come from?

There have been a number of theories regarding the origin of values. Values have been attributed to human feelings and emotions (Brentano, cited Jacquette, 2004; Damasio, 1994; Seedhouse, 2005; Stevenson, 1944, cited Edel, 1953), desire (Ehrenfels, cited Rescher, 1982), society and culture (Kohlberg, 1975; Raz, 2003; Rokeach, 1979) and life experience (Hutcheon, 1972). Some theorists acknowledge a complex mix of a variety of sources (Hutcheon, 1972; Magendanz, 2003; Rokeach, 1979).

Brentano saw the basis of valuation in emotions, in particular the contrast between favourable emotions (such as loving and liking) and negative emotions (such as hating and disliking) (cited Rescher, 1982, p. 51). As human beings, we all experience times when our emotions overtly influence the decisions we make, for example, in the form of sentimental attachment. It is easy to justify keeping an item which is effectively worthless, but for the sentimental, emotional attachment which reminds us of a happy time, or a loved one. The box of items in the loft which have no monetary value and serve no purpose (and are rarely even looked at) are not disposed of because of the emotional and sentimental value. Brentano, however, located value judgements in the objective realm, and thereby argued that value judgements could be assessed as being either correct or incorrect. To borrow the example from Baumgartner & Pasquerella (2004), two friends examine a striking piece of art work. One friend finds the painting breathtakingly beautiful. The other disagrees and experiences displeasure at viewing the

painting. For Brentano, emotions directed toward an object in this way will be either correct or incorrect, and judgement that the painting is either beautiful or not beautiful cannot both be correct (Baumgartner & Pasquerella, 2004).

If a value derives from an emotion or feeling, is it really possible that it can be described as correct or incorrect? Can one of the friends perspectives on the painting be right and the other wrong? The aesthetic evaluation of the painting is a subjective, evaluative judgement. The majority of people may agree with the first friend, achieving some consensus on whether the painting is beautiful, but this does not make the second friend wrong. It simply means he has made a different evaluation of the painting than others. Consider the feeling of sadness that may be invoked on a very happy occasion, such as a wedding or a christening. This feeling is not a matter for debate and even though it may seem inappropriate for the occasion, cannot be described as intrinsically right or wrong. The event may have sparked memories of a loved one who has died, or other unhappy memories. Emotion is an individual, subjective, human experience.

Seedhouse (2005) also argues that value-judgements stem from human feelings: “I like this”, “I am drawn toward this”, “this makes me feel sick”, “I am afraid of this”, “I find this beautiful” (Seedhouse, 2005, p. xxiii). Seedhouse draws on the work of Antonio Damasio (1994) to establish the link between rationality and emotion.

Damasio is a neurobiologist who, through examples of case studies, clinical experience and examination of the function of the human brain, has concluded that emotions, feelings and biological responses all play an indispensable role in human reasoning. As the title of his book, *Descartes’ Error* suggests, Damasio’s research refutes the view of rationality that human reasoning can take place independently from emotions and feelings.

> *Feelings point us in the proper direction, take us to the appropriate place in a decision-making space, where we may put the instruments of logic to good use…. Emotion and feeling, along with the covert physiological machinery underlying them, assist us with the daunting task of predicting an uncertain future and planning our actions accordingly.*
>
> Damasio, 1994, p. xiii

Some of Damasio's everyday examples demonstrating the link between emotion and rationality have resonance with any thinking, feeling human being. For example, the "gut feeling". This can be a literal sensation of unpleasantness or tension which manifests physically in response to a bad outcome, either anticipated or experienced; or the emotional experience of meeting an old friend who you have not seen for a long time. Your body state changes: your heart may race, your skin may flush, the muscles in your face change around the mouth and eyes to design a happy expression (Damasio, 1994).

Recent research into the physical reaction of the brain to witnessing another person in pain supports Damasio's findings. Jackson, Meltzoff and Decety (2005) asked, "to what extent do we share feelings with others?" They asked subjects to assess the level of pain experienced by another person photographed in a painful situation, and recorded their response using neuro-imaging techniques. Jackson et al (2005) found significant activity in the brain usually associated with the processing of pain, and a commonality in brain activity between perceiving pain in others and experiencing it oneself. This research affirms the link between our emotional reactions (in this case, compassion) and a physiological manifestation of those emotions (in the witnessed brain activity).

Attributing values to feelings and emotions may account in some part for the rejection of values in traditional perceptions of human reasoning. As Seedhouse (2005) explains; "We worry about our passions… We think they are wild, instinctive and thoughtless, programmed by biology - we suppose they cloud our judgement." But is the origin of our values purely emotional? Is it possible that the source of our values may also be the societies we live in, the cultures with which we identify, or work environments and professional socialisation processes?

Socialisation as the source of values

It has been suggested that societies and cultures are the source of values. Rokeach argued that values are standards which to a large extent are derived, learned, and internalised from society and its institutions (1979). We all have our own experiences from growing up in which parents, teachers, ministers, extended family members, and

others attempted to instill certain values in us; do not lie, do not steal, be kind to your friends and siblings. Kohlberg worked with prisoners and discovered that harsh backgrounds had affected their moral values. Many had never lived in a co-operative, helpful environment and many of them did not know that such a situation could exist (Kohlberg, Scharf & Hickey, 1973)[1].

Raz has developed the 'special dependence thesis' which claims that some values exist only if there are social practices sustaining them (Raz, 2003, p. 19). One example Raz uses to demonstrate his thesis is valuing opera. He identifies attendance at operas, music school, listening to compact discs and reading and writing about them as examples of sustaining practices. Raz's theory has some exceptions; sensual and perceptual pleasure, aesthetic values of natural phenomena, such as the beauty of sunsets, and values whose good is in facilitating other values, such as freedom which acts to allow individuals to pursue choices (Raz, 2003).

An example given by Ball-Rokeach and Tallman (1979) of the transient value change which resulted from the American civil rights movement to some extent supports Raz's theory. In that example, mechanisms were employed by the civil rights movement to appeal to social conscience and change people's values. For instance, saturation of the media, labelling racist groups as 'bad' and methods of moral confrontation challenged the then existing standards of morality. However, with the onset of the Vietnam war, the black civil rights movement lost its momentum and whilst equalisation of economic and social conditions were affected in part, the changes were not as radical as the movement had hoped (Ball-Rokeach & Tallman, 1979). The social practices targeted by the civil rights movement to reduce racist values were only partially effective following their original campaign in the short term because their efforts could not be sustained.

But is it really possible that a person's values *only* exist under certain social conditions? Consider the individual who is isolated in a culture or society alien to the one in which his values developed. Will his values therefore adjust according to the society in which he is living? Will the opera lover cease to value hearing an aria because he can no

[1] I consider Kohlberg's theory in greater depth in the next section on values instrumentality.

longer do so? Or because he has no-one to share his appreciation with? It might be more plausible to say that values which derive from social or cultural sources may be *less likely to endure* if they have no social practices to sustain them. I value democracy. But if my home country is taken over by a fascist dictator for the remainder of my life, I will not cease to value it. Indeed, it is probable that I will value democracy even more in these circumstances. Similarly, if an individual has never experienced democracy, this does not preclude him from valuing it.

The intricacy of individual values, their mechanisms and influences is so complex that the source of values may not always be identifiable. For some, religion may be seen as a source of values. For others, life's experiences, the societies in which they live and work and the cultures with which they identify may all be the source of our values. I prefer a conception of values which acknowledges and encompasses a variety of possible sources for people's values. Values are an integral component of individual character, essential to the human condition, a culmination of a person's passions, emotions, and lived experience, guiding responses to all we encounter in our day to day lives.

Values instrumentality

To support his theory of values-based medicine, Fulford draws on the work of Hare (1952) who highlights the prescriptive or action-guiding property of values. Fulford uses this action guiding property to explain that values are one of two feet on which all decisions stand (fact being the other). The sociological value theorists have also considered the function of values, in so far as recognising their role in supporting and guiding human reasoning, giving expression to human needs, rationalising action, resolving conflicts and making decisions (Rescher, 1982, p. 12; Rokeach, 1979, p. 48). But how do values work instrumentally to guide and influence us?

The Scottish Eighteenth century enlightenment philosopher David Hume considered the place of passion in human reasoning in his work *A Treatise of Human Nature* (Hume, 1969). Hume famously made the distinction between 'is' and 'ought' to explain the place of values in human reasoning. Hume explained that no factual statements by themselves support a conclusion about value, about what ought to be done. An 'ought'

conclusion must always have a statement of value (Radcliffe, 2000). If I say, “Annie lied to you about where she was last night”, I am making a statement about the way that Annie *has* behaved. If instead I say, “Annie should not lie”, I am making a value judgement. I have made my subjective evaluation about how Annie *ought* to behave and making a statement expressing my assessment of the situation. Consider again Adam’s decision to buy a diamond. The price of the diamond is $5000. Now Adam thinks the diamond *ought* to be priced at $4000. Adam is making a statement about the value he has placed on the diamond. The *is* statement describes the objective evidence. The *ought* statement is a subjective statement of value.

Hume was also concerned with the motivation for actions. He argued that reason alone can never be a motive for action, and that reason can never oppose passion over the direction of action (Radcliffe, 2000). Hume explains his argument in *A Treatise of Human Nature.*

> *Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.*
>
> Hume, 1969, p. 462

According to Hume, the impetus for action always originates with the passions. Hume makes the distinction between direct and indirect passions. The direct passions either follow immediately from pleasure or pain, or else they are instinctive propensities which produce pleasure or pain (Radcliffe, 2000). For example, in the first instance, if I decide to go and watch a movie, my motive for action is driven by the pleasure which I will gain from seeing the film. In the second instance, my choosing to eat is driven by the instinctive propensity to relieve my hunger. The relief of hunger is pleasurable, as is the experience of eating my favourite meal. Conversely, the indirect passions are those which are caused in us by reflection on pleasure and pain in cooperation with other perceptions (Radcliffe, 2000). Hume identifies amongst these, love, hatred, envy, pity, malice and generosity (Hume, 1969, p. 328). In making the distinction between direct and indirect passions, Hume always refers to the direct passions when discussing motives for actions (Radcliffe, 2000).

Hume's psychology of the passions informs in part the instrumental role of values. However, to attribute the impetus for all human action to either pain or pleasure is surely too restricting and simplistic a view of human decision making. Of course, it is possible to link most, or even all, emotional experiences with pleasure or pain depending on how broad your perception of either passion. But to limit impetus for action to pain and pleasure denies the instrumentality of other values. Radcliffe (2000) uses fear to demonstrate that not all of our actions are motivated by pain or pleasure. For example, if I witness a girl running onto a busy street, I am motivated by fear for the girl's safety to do what I can to minimise the risk of her being hit by a car. But I am also acting from compassion originating from my lived experience when at a similar age I was hit by a car and was severely injured.

Biological instrumentality of values

Whilst Hume provides us with a philosophical explanation of the instrumental role of values, Damasio (1994, p. 173) provides us with a biological one. Damasio's "somatic marker hypothesis" directly links the emotional response of the individual with the physiological response, and is concerned with decision outcomes. Damasio claims that a "somatic marker" is a physiological reaction that works to alert you to any negative outcomes to which action may lead. This in turn drastically reduces the number of options and signals you to reject negative courses of action from alternatives. Damasio claims that the physiological signal produced, such as an unpleasant gut feeling, alerts the decision maker of danger ahead and precedes any subsequent process of reasoning.

Hume's and Damasio's theories are complementary. Consider again the example of the child running out into the road. The reaction I have is not limited to an emotion of fear for the girl's safety. I also experience a physiological reaction. My heart starts racing, my palms sweat and I have a gut feeling which tells me I have to remove the child to safety or she may be injured or even killed. According to the "somatic marker hypothesis", the many options I have in that situation are narrowed down by my biological reactions. In this instance, what will bring the child to immediate safety. Physiological reactions are not confined to situations of danger. Recall moments of acute embarrassment when you feel hot and red-faced, perhaps when you have said or

done something you regret. In such a situation, the feeling and physiological reaction will guide decisions for action. You may be driven to remove yourself from the situation, or do something to divert attention onto something or somebody else. According to Damasio, somatic markers may not be fully sufficient for a normal decision making process, but they can increase accuracy and efficiency of reasoning.

The role of cultural and societal values in decision making

How do values originating from cultures and society function? Rokeach argues that we employ values as standards across objects and situations in various ways.

> *To guide action, to guide us to the positions we take on social, ideological, political and religious issues… to evaluate and judge ourselves and others by… to decide what is worth and not worth arguing about, worth and not worth persuading and influencing others to believe in and to do… to guide processes of conscious and unconscious justification and rationalisation of action, thought and judgement.*
>
> Rokeach, 1979, p. 48

The values which come from society and the cultures in which we live, function to guide and influence decision making. I have considered the "special dependence thesis" developed by Raz (2003) and challenged his claim that some values exist only if there are social practices sustaining them. I suggested instead that values which derive from social or cultural sources may be *less likely to endure* if they have no social practices to sustain them. But how does this apply to values derived from cultures or societies in decision making? Does the *context* within which we make decisions influence which values guide our decisions? And are values more likely to be influential if used within the *social or cultural* context from which they derived? Or do values transcend contexts?

Kohlberg has constructed a theory based on movement through six stages of moral development (Kohlberg, 1981; 1984). This theory was developed following investigation of the moral development of children and prisoners (Kohlberg, Kauffman, Scharf & Hickey, 1975). The perception that children's morality is formed by adults in

authority is refuted by Kohlberg's research. Kohlberg et al (1975) found that parents, teachers, and church leaders are only partly influential, with peers at least as important as adults in influencing moral development. Their research also demonstrates that children who belong to families and other groups where there was moral discussion and dialogue, took responsibility for decisions and were more advanced in their moral development (Kohlberg et al, 1975). These findings suggest that the role of moral values in decision making may be influenced by complex social and cultural systems which impart, support and sustain their use. For example, if a child is taught to always play fair at home and at school, then the value of fairness may be more likely to be instrumental in the child's decision making both in her home and school environment. Conversely, if the child's school environment does not support and teach fairness, that value is less likely to be instrumental at school.

Context appears to be influential on the function and instrumentality of values. Kohlberg's work with prisoners supports this view. Kohlberg, Scharf and Hickey (1973) found that the moral values that prisoners used to solve dilemmas in prison was of a standard much lower than that used for non-prison dilemmas. Perceptions about what should be done inside the prison were different and of a "lower moral order" than what should be done outside of the prison (Kohlberg et al, 1973). Their research also found that exploitative peer culture and the prison authority system encouraged judgment more consistent with primitive reasoning in decision making about action. The social environment of the prison was directly influential on the values employed by prisoners in their decision making in that context.

Professional and institutional values

The societies and cultures that we grow up in and are part of can impart, support and sustain our values. The environments in which we work, and the professions we occupy, must also then be influential on the role and instrumentality of our values. For example, Paul (2000) proposes that there is a clear distinction between internal and external morality in health care. Internal morality arises from within a community of practitioners based on how one should behave in one's daily work, which are shared and learnt from one another. External morality, conversely, is the view from the outside, reflecting the ethos of wider society (Paul, 2000). The idea of internal and

external morality suggests a clear link between the values imparted in a professional context and their influence within that environment.

There is evidence which supports this thesis. Andre (1992) suggests that during medical training student doctors reconstruct their view of the world so that patients become merely bodies. Andre refers to research demonstrating that students become conditioned to leave behind emotional responses to suffering and pain, and grow more cynical, less humanitarian, and more contemptuous of patients (1992, p. 148). The values that medical culture and education imparts to students are influential in their medical practice. Research also demonstrates that medical and institutional cultures may be influential on decision making. For example, physicians are more likely to withdraw therapy from supporting organs which have failed through natural rather than iatrogenic reasons (Christakis & Asch, 1993). Or put another way, if you have sustained some kind of disease or injury as a result of care or treatment given to you for treatment of your original medical complaint, you are more likely to be actively treated than if you presented with the same complaint from natural causes. Escher, Perneger and Chevrolet (2004) established that doctors' decisions to admit patients to intensive care may be influenced by patients' personalities or the availability of hospital beds. These examples demonstrate how values imparted from medical culture and health care institutions influence treatment decisions.

The complete picture

So far in this chapter I have considered a variety of potential mechanisms influencing the instrumentality of values in decision making; the passions, biological responses, cultures, society, and professional contexts. To consider any one of these explanations for the instrumentality of values in isolation is insufficient. Return to the very basic visual representation of decision making depicted in the introductory chapter.

The depiction of reasoning developed earlier in this chapter has now established a far more complex picture of the instrumentality of values in decision making. When all of the explanations are integrated, a multi-layered representation of decision processes is constructed. Consider the following more thorough representation.

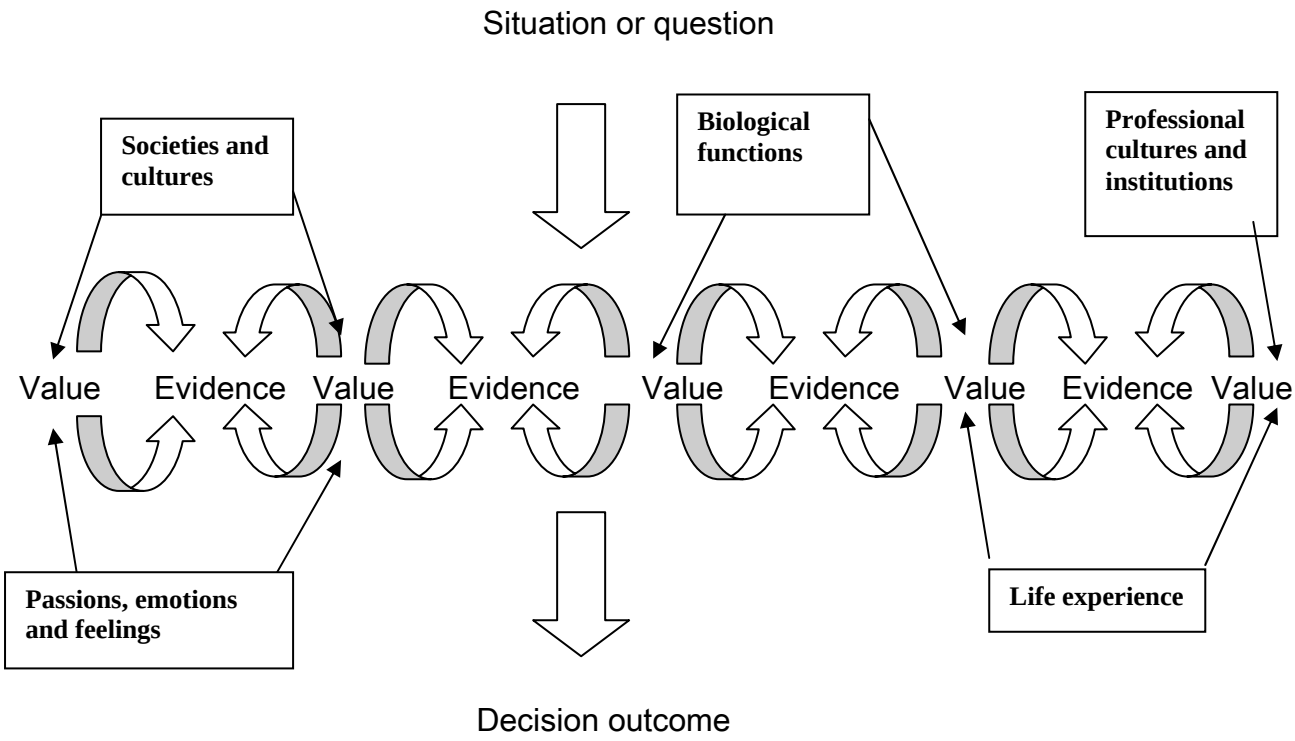


Figure 2. The complex values + evidence model of reasoning

Of course, a visual representation of decision making can never fully represent the intricacy and complexity of human reasoning. At any one moment our senses are bombarded with evidence, our mind processes the evidence and our values work to guide and inform our reasoning. But what is demonstrated is the integral and multifaceted role of values in decision making.

Values-based law and the myth of legal reasoning

The values + evidence model of decision making applies to all areas of human decision making. However, the positivist legal science approach does not acknowledge this. In a system which does not account for values, mechanisms have developed which aim to eliminate or objectify them. What has resulted is what Kairys has described as the myth of legal reasoning (1992, p. 12-13).

> *The problem is not that the courts deviate from legal reasoning. There is no legal reasoning in the sense of a legal methodology for reaching particular, correct results. There is a distinctly legal and quite elaborate system of discourse and body of knowledge, replete with its own language and conventions of argumentation, logic and even manners. In some ways these aspects of the law are so distinct and all-embracing as to amount to a separate culture, and for many lawyers the courthouse, the law firm, the language, the style, become a way of life.*
>
> *But in terms of a method or process for decision making – for determining correct rules, facts or results – the law provides only a wide and conflicting variety of stylised rationalisation from which courts pick and choose. Social and political judgements about the substance, parties and context of a case guide such choices, even when they are not the explicit or conscious basis of decisions.*

For example, many introductory legal texts refer to traditional value-free methods as governing judicial decision making; deductive reasoning, inductive reasoning and reasoning by analogy (Holland & Webb, 1991; McDowell & Webb, 2002; Slapper & Kelly, 1999). Deductive reasoning involves reasoning from the general to the particular; commonly used in law in the application of clear rules to fact (McDowell & Webb, 2002, p. 391). For example, John deliberately took Fred's car to give to Jim. Theft is removing an item of someone's property with the intent of permanently depriving them of it. John is therefore guilty of theft (adapted from an example given by Holland & Webb, 1991, p. 195). Inductive reasoning is arguing from the particular to the general: Kevin is lying dead with a bullet in his head. Lee is standing over Kevin with a smoking gun in his hand. Lee therefore shot Kevin (adapted from an example used by Slapper & Kelly, 1999, p. 132). Reasoning by analogy is concerned with reasoning by example. The legal concept of 'stare decisis' refers to the adjudication of

cases by means of precedent; “by trying to show an analogy with previously decided cases” (Heiner, 1986, p. 228).

Law as a system of rules

Part of the problem with positivist methods is the perception that law is simply a system of rules which can be objectively applied to any situation to establish an outcome. There are plain case examples when this is possible, such as, the indisputable violation of a speed limit accurately measured by sophisticated technology. The rules can simply be applied to the situation to reach a clear conclusion. Was the car travelling at 80 km / hour? Yes. Was this person driving the car? Yes. The speed limit was 50 kms / hour. The speed limit has therefore been broken. This is a simple example of deductive reasoning.

However, the use of technology is limited to areas in which the evidence and the law requires little or no interpretation, such as the dispensing of speeding tickets, or driving through red traffic lights. But even in such apparently clear cut situations, the conclusion may not be so straight forward. What if the driver was rushing a heart attack victim in a life-threatening condition to hospital? Does the rule of law still apply? The intention of speed limits is surely not to prevent benevolent citizens from aiding the plight of a critically sick man. In reality, someone must interpret and apply the law, and have the authority to resolve conflicts over its meaning and interpretation (Zuckert, 1995, p. 66). And any requirement for human judgement signals the introduction of values as integral to the administration and application of the law.

As Holland and Webb rightly point out, there are clear limitations to relying on value-free logical processes. The ‘truth’ in court is not found by discovering objective, empirical truths; it is established by arriving at an agreed view of events (Holland & Webb, 1991, p. 207). And this is dependent on the values of decision makers. Consider the following example which at first glance appears to be a simple example of deductive reasoning.

Kevin is lying dead with a bullet in his head. Evidence.
Lee is standing over Kevin with a smoking gun in his hand. Evidence.
Lee is therefore guilty of murder. Evaluation.

This, of course, is a simplistic representation, with many assumptions and unknowns rendering this mode of reasoning completely inadequate. The process is not simply about employing rules to evidence. How do we know it was Lee standing by the body? And how do we know he was holding a smoking gun in his hand? And just because Lee had the gun in his hand does not mean that he killed Kevin. This is not 'just is' evidence in the same way that water boils at 100^0 C. The legal agent (i.e. the jurors or judge) must engage with the evidence, assess it, then make a decision, guided and informed by their values.

Experience demonstrates the extent and influence of values in assessing the evidence. The quality of observation by witnesses is notoriously variable, and may be value laden (Holland & Webb, 1991, p. 206). Studies have shown witnesses to be inaccurate and suggestible and their reports distorted by stress and prior expectations (Pickel, 1993, p. 569). Judges are not immune from value judgements. When confronted with two conflicting stories and little else, the judge may base their decision "mainly if not entirely, on his impression of the witnesses" (Devlin, 1979, p. 3).

In the same way, when experts are called upon to establish evidence in a case, the process is evaluative.

> *The selection of experts to assist in gathering and presenting relevant information during a dispute is rather like choosing players for a sports team. Everyone knows the rules but particular players are better in some positions than in others. Further, during the course of the game, it may be advantageous tactically to replace one player with another. Sound case strategy dictates not merely the areas selected for expert involvement; it also points attention to drawing distinctions among experts within the one area on the basis of their comparative abilities to be up-to-date with the latest developments, their report-writing skills, and their presentation in the witness box.*
>
> Freckleton and Selby, 2002, p. 3–4

The portrayal of expert witnesses as participating in a game highlights the evaluative nature of the evidence of experts. For example, Sir Roy Meadow is an eminent paediatrician knighted for his services to paediatrics, with a renowned reputation

throughout the world. Sir Meadow acted as an expert witness in the trial of three mothers accused of murdering their babies and his evidence contributed to their conviction. In each case, he referred to his now disputed "Meadow's law" on cot deaths; "one in a family is tragedy, two is suspicious and three is murder" (Lister, 2005, p. 2). In each trial, the juries were persuaded by evidence given by Sir Meadow which the General Medical Council has since found has limited statistical significance which was not sufficiently explained to the jury (Dyer, 2005, p. 177). The convictions of the 3 women have since been quashed, and Sir Meadow was struck off the medical register (Lister, 2005, p. 2). He has since been re-instated by a high court judge who found that he had made "an honest mistake" in giving misleading evidence (Lister, 2006, p. 2). Even though the evidence was questioned, Sir Meadow's eminence and authority was sufficiently powerful that jurors convicted innocent mothers of murdering their babies (Dyer, 2005, p. 177).

The necessary role of values in legal process

It has been suggested that the technical, objective and scientific approach to law is the idealised model, thought to lend neutrality and legitimacy to the process (Kairys, 1992, p. 13). The striving for objectivity is so influential that computer programmes have been developed which claim to be able to determine legal facts (Dewitz, cited Bankowski, 1996, p. 34). However, values are not only an unavoidable component in law and legal process, they are also very necessary.

The requirement for interpretation in legal rules is explained by the "open texture thesis" (Hart, 1994). Hart's thesis refers to the need for interpretation in instances outside of the plain case example where the rules are clearly and unambiguously stated, and can be applied accordingly (1994, p. 127). According to Hart, there will always be a situation for which the law is in question and indeterminate. It is at this point that there is open texture. Central to the Hart's thesis is concern with the limitations of rules, specifically the inability of rules to anticipate every possible scenario which it will be required to govern (Hart, 1994, p. 128). Hart's thesis explains the necessity for interpretation in legal reasoning. As the rules become less able to anticipate the circumstances which they govern, so the law becomes less specific and more

interpretive. At the most open textured end of the spectrum are the development of judge made law and application of legal principle.

Legal principle

Lord Donaldson explains the role of principle in legal process:

> *This process of using the common law to fill gaps is one of the most important duties of the judges. It is not a legislative function or process – that is an alternative solution the initiation of which is the sole prerogative of Parliament. It is an essentially judicial process and, as such, it has to be undertaken in accordance with principle.*
>
> Lord Donaldson, *Re F* [1990] p. 13

Eckhoff (1976) describes legal principle – in contrast with legal rules – as vague and general, "serving as grounds for interpreting or changing laws and as ground for action in cases not covered by rules of law… They serve as a kind of 'normative raw material' out of which new law is made" (Eckhoff, 1976, p. 211). The best interest test is an example of a legal principle.

In the introductory chapter I referred to *Re F* [1990], the case of a 36 year old woman with learning disability for whom non-therapeutic sterilisation was proposed. The English courts were asked to intervene. The common law respects the autonomous right of any person to consent or refuse medical treatment. However, F lacked the capacity to consent to the sterilisation procedure. In the absence of any other legal mechanism for medical treatment and non-treatment decisions, the House of Lords adopted the best interest principle. The best interest test finds its origins in family law, specifically child welfare and custody cases (Henaghan, 2002; Mnookin, 1975; 1985; Myser, 1994). The principle developed from the courts' assertion that when a proxy makes a decision on behalf of a child, they must act out of concern for the child's welfare (Kennedy & Grubb, 2000, p. 778).

In line with Hart's open texture thesis, the vague and interpretive best interest test developed for making health care treatment decisions on behalf of adults who lack capacity. But how is the standard to be interpreted and applied? Within the current

paradigm, legal methods are employed to fill the open texture which attempt to achieve neutrality and objectivity. However, representing a broadly positivist position, Hart does not acknowledge that despite these efforts, the values of decision makers become increasingly necessary and influential the greater the indeterminacy of the law.

This is why, within a system of law which is built on positivist, scientific and technical rational foundations, two appellate courts can consider the same evidence and the same set of rules and reach utterly opposing decisions. *R v Bournewood Community and Mental Health NHS Trust, Ex parte L* [1998] concerned a 48 year old autistic man. He was unable to speak, with a severely impaired level of understanding and requiring 24-hour supervision. He sometimes injured himself, had no concept of danger and did not have the ability to consent to or refuse treatment. Mr L resided at Bournewood Hospital for over 30 years, and then went to live with his foster carers. On 22 July 1997, Mr L became agitated, banged his head against the wall and hit himself with his fists at the day centre he routinely attended. A local doctor administered a sedative and a social worker arranged for him to be transferred to the emergency department of the local hospital where a psychiatrist determined that Mr L required admission, based on his behaviour. Mr L was not detained under the Mental Health Act 1983 because he did not resist admission and was compliant (Diesfeld, 2000, p. 277). It was, however, reported that if Mr L attempted to leave, those in charge of him would not have permitted him to do so (Lord Nolan, p. 1). The law regarding the hospitalisation of adults who lack capacity to consent (either within or without the protections of legislation) was unclear. The Court of Appeal found that Mr L had been wrongfully hospitalised without his consent.

The result of the Court of Appeal's decision was a law change which would have affected large numbers of 'informal' mental patients who did not qualify for compulsorily detention. Thereafter they would have to have been detained under the Mental Health Act 1983. The benefits of this law change were that informally hospitalised patients would be given the protections provided for patients formally detained under the Act. These provisions include access to the Mental Health Review Tribunal which reviews the criteria for discharge; access to a formal complaints mechanism; the right to a second opinion and after care services (Diesfeld, 2000). However, the law change affected by the Court of Appeal's decision left the legal

position of many other informally admitted patients in need of review, with significant resource repercussions. The case went to the House of Lords who reversed the decision of the Court of Appeal. They employed the best interest test and the principle of 'necessity' to justify Mr L's hospitalisation and treatment, despite his inability to consent, and without the protective mental health legislation.

From the outset, the House of Lords' judgement appears to have been primarily concerned with resource allocation and the judgements reflect this interpretation. The case report begins with a summary of the "grave concern" caused by the Court of Appeal's decision among "those involved in the care and treatment of mentally disordered persons" (Lord Goff, p. 3). A written submission from the Mental Health Act Commission detailing the resource implications of the decision was referred to by the House of Lords. The submission offered evidence suggesting that an additional 22,000 detained patients, plus 48,000 admissions per year would be affected by the law change with a resulting "substantial impact on the available resources… the resource implications were likely to be considerable" (Lord Goff, p. 4). The influence of the resource implications over the best interests of Mr L (and other informally admitted mental health patients) was made clear by Lord Steyn:

> *If considerations of financial resources are put to one side, there can be no justification for not giving to compliant incapacitated patients the same quality and degree of protection as is given to patients admitted under the Act of 1983…I would have wished to uphold the judgement of the Court of Appeal if that were possible… on a contextual interpretation of the Act of 1983, this course was not open to the House.*
>
> Lord Steyn, *R v Bournewood Community and Mental Health NHS Trust, Ex parte L* [1998] p. 4

Even though the agreed evidence was that Mr L would be prevented from leaving if he attempted to do so, the Lords disagreed that he had been wrongfully hospitalised without his consent. The focus between each court was quite different and the subsequent interpretation and application resulted in an entirely different process and outcome.

Precedent

It has been argued that while there is an element of discretion in judicial decision making, that discretion is constrained by previous cases (Cohen, 1933, cited Yablon, 1987). However, the boundaries of reasoning by analogy become quickly blurred when the evidence and facts of comparative cases are inexact and when the rules governing precedent are imprecise. The rules of precedent establish the hierarchy of authority of judicial decisions within the court system (Cane, 2002). Lower courts are bound by the decisions of higher courts.

The paradox in common law is that judges are required to look to previous cases to establish the rules which guide precedent. However, the rules which govern this search are themselves uncertain. The key terms governing precedent, such as ratio decendi, material facts, and interpretation, all "have their own penumbra of uncertainty" (Hart, 1994, p. 134). For example, the concept of 'ratio decendi' translates literally as 'the reason for deciding', and is a central concept to the doctrine of precedent for establishing the ratio of a particular decision which is binding upon subsequent courts (Mulholland, 2001, p. 190). The ratio may be the principle of law which is used to determine a case, it may concern whether the facts of the present case apply to previous cases, or it may concern a principle which a judge lays down in a particular case to arrive at a conclusion. However, there is no single method of determining the rule for which a given authoritative precedent is an authority (Hart, 1994, p. 134). Ratio decendi is subjectively determined by individual judges, it cannot be learned, and there is no clear definition of what it means (Mulholland, 2001, p. 190). It has been described as a concept which "does not glow in the dark", but "must be assimilated over time" (Mulholland, 2001, p. 190).

This rather enigmatic description appears to reflect the entire process surrounding the use of precedent. Aldridge examined literature surround precedent and found that faulty reasoning has resulted in a view that rules of precedent are rules not of law but of practice (Aldridge, 1984, p. 187). Whilst rules have been developed, the method is imperfect and legal reasoning remains open to considerable interpretation. For example, in 1966 the House of Lords, freed itself from the obligation that it was bound to follow its own previous decisions (Cane, 2002 p. 21). Lord Denning issued a practice direction

stating that “the Court of Appeal would be free, having regard to requirements of certainty in law, to depart from a covering decision of its own” (Denning [1966] cited Aldridge, 1984, p. 188). Since then, the House of Lords and the Court of Appeal are no longer bound by their own rules of precedent and may depart from previous decisions “when it is considered right to do so”.

These observations indicate some of the ambiguities and inconsistencies surrounding precedent. However, what emerges from this brief examination is that legal analogy, as with all processes of reasoning, is necessarily dependent on values. Firstly, the judge is required to decide whether to be bound by the laws of precedent, or whether they are simply rules of practice. Secondly, they must evaluate the facts and details of one case and decide whether it is applicable to the case at hand. Thirdly, the judge must evaluate to what extent the rules or principles in the previous case are binding. And fourthly, if members of the House of Lords, they must evaluate whether it is ‘right’ to follow previous precedent. As Aldridge suggests, rules of precedent owe their binding nature to judges’ attitudes to “their own dealings and those of their brethren” (1984, p. 200).

The judge

Crucial to value-free legal method is not only the employment of rational and scientific method, but the perception of the neutrality of the judge. The common view that law is a system of rules goes hand in hand with the role of judges to neutrally and objectively apply the law. It is precisely because judges are not robots or machines that the necessary interpretation and application in anything but the most straight forward case is possible. Despite the development of mechanisms which aim to objectify judicial interpretation, there remains considerable judicial discretion particularly where the law is unclear and open textured.

Lord Devlin describes his perception of this component of his role as a Lord of Appeal in the highest court of the English legal system. Lord Devlin paints a picture of the judge as the epitome of an English gentleman; a “spokesman for the ordinary citizen” (p. 22) whose role is an extension of a jury and his judgement an “elaboration of a jury’s verdict” (p. 27). In relation to the ordinary man, Lord Devlin talks of judges

reading the same newspapers and watching the same television programmes, with the court affording unique opportunities

> *of seeing the ordinary man in action, not in a general way, but in connection with such of his affairs as the law impinges upon… They would be blockheads if they did not absorb from what is so constantly acted out before them a sense of the ordinary man's attitudes in the situations with which the law has to deal.*
>
> Devlin, 1979, p. 23

Lord Devlin suggests that within the combination of the judge as an ordinary man with expert skills in law and full legal training, is embedded the idea of open justice. Within this portrayal positivist ideals are entrenched: the judge is an impartial legal specialist whose authority is given by mandate from the crown and whose role is to apply the law of the land (p. 87). However, Lord Devlin acknowledges the role and discretion of the judiciary in developing law (p. 178) and the necessary role of judicial values when at times a judge will have no other guide than his own sense of justice (p. 181). While Lord Devlin denies that judicial discretion allows the modification of law so that justice can prevail, using the analogy of a road map, he concedes that "the judge is put on a looser rein and in certain parts of the country left to find his own way" (p. 101). Within this positivist legal idyll, "impartiality and the *appearance of it* are the supreme judicial virtues" (p. 4; emphasis added).

The literature also refers to the use of intuition, instinct or hunch in judicial decision making (Dworkin, 1986, p.10; Eckhoff, 1976, p. 241; Mnookin, 1975, p. 274). The following statement captures the essence of the perceived role of instinct or hunch by legal decision makers themselves.

> *They [judges and lawyers] say that law is instinct rather than explicit doctrine, that it can be identified only by special techniques best described impressionistically, even mysteriously. They say that judging is an art not a science, that the good judge blends analogy, craft, political wisdom, and a sense of his role into an intuitive decision, that he "sees" law better than he can explain it, so his written opinion, however carefully reasoned, never captures his full insight.*
>
> Dworkin, 1986, p. 10

Employing instinct or hunch has also been described as a product of subconscious or unconscious weighing processes concerned with the desirability of the outcome of a case, with the need to find convincing justification amongst the categories and concepts of law which will support the desired result (Hutcheson, 1929, cited Eckhoff, 1976, p. 215). This is the unprincipled approach which is anathema to Dworkin, a legal theorist who has called for a more structured and theoretical approach (1986, p. 10).

Dworkin and interpretation

Dworkin has been credited with highlighting the essential role of interpretation, particularly in the use of legal principles which are "separate sorts of standards, different from legal rules… which seem most energetically at work, carrying most weight, in difficult lawsuits" (1970, p. 41). The reality of employing legal principles is that they are dependent on the interpretation of the decision maker; primarily to decide whether to use them, how to interpret them, and then how to apply them.

According to Dworkin (1994), interpretation and discovery of law is reliant on the theoretical underpinnings of the legal actors charged with establishing what the law is. For example, the legal positivist will look to history to discover historical acts that make law and looking to what has been said by the legislature about a given situation to find the answer (1994, p. 466). This is of particular concern to Dworkin because he suggests there is no consensus on the theoretical underpinnings of law between lawyers and judges and no plausible theory regarding this disagreement (1986, p. 5).

The plethora of views about the origin, purpose and administration of law in legal philosophy is testament to the disagreements which exist. For example, lawyers and judges who subscribe to the school of therapeutic jurisprudence perceive the purpose of the law as a therapeutic agent (Wexler, 2000, p. 1). This raises the possibility that when considering the same case, a judge who perceives therapeutic outcomes as the law's purpose may reach a different outcome from a judge who believes that law should be applied literally, regardless of any possible therapeutic outcome.

Dworkin's response appears to be an attempt to theorise what, in positivist legal systems, is the unrecognised evaluative component of judicial interpretation. However, while acknowledging that the theoretical perspective of actors is influential on their interpretation of law, and recognising the relative nature of judicial discretion (1970, p. 45), Dworkin denies any subjective component (1994, p. 474). Instead, Dworkin argues that whether legal interpretation is subjective or objective "depends on the underlying claims about the purpose of the enterprise" (p. 474). For example, if we think there is a possible right answer to questions of justice, then we will also think that there are right answers to questions of law (p. 475).

Dworkin fervently defends his position on ethical objectivism (1986, p. 45–86; 1994, p. 475). In doing so, he follows in a long history of rationalist theoretical traditions which support his objectivist position. He employs philosophical argument to discount the sceptical view that there can be no moral absolutes. For example, Dworkin argues that matters of right and wrong about slavery are linked to belief rather than opinion. He argues that moral beliefs can be objective: that they are not simply matters of opinion as, say, your favourite ice cream flavour. Dworkin demonstrates his position by examining whether abortion can be described as right or wrong, or whether it is just a matter of opinion.

> *It is certainly logically possible to take up a fully sceptical position about abortion, or any other matter of political or social justice. But then you have to give up your own opinion. And most people confronted with that choice will give up bad philosophy rather than intensely held convictions.*
>
> Dworkin, 1994, p. 475

Unfortunately, what Dworkin and others hold as good philosophy does not reflect reality. Influential theoretical perspectives of law have an inescapable basis in ethics (Knowles, 2001, p. 2). For example, according to Mill, the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others (Mill, 1972, p. 78). As such, they are based in values. This philosophical distinction is crucial to my thesis. If the theories which guide and inform what Dworkin calls the "underlying legal enterprise" are viewed as objective, the result is not value-free decision making process. Instead, values of

decision makers are implicit. In order to defend my position and challenge Dworkin, who represents the objectivist view, I must return to the arguments developed at the start of this chapter and magnify my analysis of the relationship between ethics, rationalism and values.

Ethics

At the start of this chapter I established that:

- Values are preferences.
- A decision making process is necessarily a combination of values and evidence.
- Values may originate from a variety of sources including our emotions, our social environments and our professional cultures.
- Values work instrumentally to guide and inform our reasoning.

Right and wrong, good and bad, are expressions of preference in the same way as enjoying opera, or disliking a work of art. And when it comes to values, there may be no uniquely right view (Fulford, 2004). If I make an ethical judgement, I can argue my case, present my rationale and try to convince you of my argument. I may be totally sure I am right about the issue. But I cannot categorically say that my conclusion is right or wrong.

We have a strong desire to be able to state absolutely that some actions, for example paedophilia, are wrong. And we use our values to guide and justify our reasoning. The values we use to reach our decision may be universally agreed and held, and our reasoning processes may be perfectly acceptable and rational to likeminded individuals. However, this does not alter that value judgements about right and wrong are subjective.

As Seedhouse (2005, p. 54) explains:

> *We can say that we do not approve of behaviours and values that repel us, and we can point out reasons why other people should not approve of them either. Even though we cannot appeal to objective morality we can be passionately opposed to wanton cruelty. We can try to explain*

> *that the behaviour has detrimental consequences for all of us, or that it will ultimately be bad for its perpetrators, or that it is inconsistent with other behaviours and desires favoured by the perpetrators (like being kind to their own family or tribe, for example). We can also explain alternatives, but still we cannot prove that these alternatives are right per se.*

Few people would disagree with the assertion that paedophilia is wrong. However, it is not possible to prove objectively, in the same way, for example, that we can prove that water boils at 100^{O}C. How then do we *know* that paedophilia is wrong?

We *feel* that paedophilia is wrong. The contemplation of the action induces emotional responses, for example, revulsion, anger and disgust for the perpetrator, and compassion and sadness for the victim. We may also experience a physiological response: feelings of nausea, or a 'gut feeling', sweaty palms, or a shiver down the spine. The society and cultures that we have grown up with tell us paedophilia is wrong; our religious teachings, our schools, families and peers. We may know of someone who has been a victim, or who has worked professionally with perpetrators or victims who tell of the awful effects. Policy and professional practice guidelines and the laws in our society proclaim paedophilia as wrong. Our experience also tells us that children are vulnerable and innocent members of society and social convention endorses sex only between consenting adults. Our feelings, our cultures, our upbringings, our lived experiences all culminate to tell us that paedophilia is wrong. It is in this way that our values work instrumentally to guide our ethical judgement.

Ethical objectivism

As values have such an integral and essential role in ethical decision making, how does the belief persist that there are moral absolutes and that ethical judgements can be made without values? Ethical objectivism proposes that there can be objective moral truths that can be established through pure reason or which exist externally and independently of human assessment (Berggren, 1998).

James Rachels is a contemporary American philosopher who agrees with the objectivist view of ethical decision making. Rachels (2003, p. 43) argues that we can support our

ethical judgements with good reasons, and we can provide explanations of why those reasons matter. Rachels suggests that when proof for ethical judgements is called for, people are looking for the same evidence which can be supplied, for example, by observation and evidence in science. He argues that just because ethical reasoning differs from reasoning in science, does not make it deficient. Furthermore, that in ethics, rational thinking consists in giving reasons, analysing arguments, and setting out and justifying principles (2003, p. 43).

Of course Rachels is right about ethics. Setting out arguments, giving reasoned justifications and employing principles is exactly what ethical decision making is about. But giving reasons is not possible without a subjective response to evidence. The reasons that we provide are founded on our evaluative response. This has been demonstrated using the paedophilia example. We know paedophilia is wrong because, for example, children are innocent and vulnerable and adults should not abuse their position of power to exploit children for their own sexual enjoyment. How do we reach this conclusion? Our values have guided and informed our reasoning. When we provide reasons, that is just what we are doing – providing reasons. We are not 'proving' that paedophilia is wrong, nor are we objectifying the value judgement that paedophilia is wrong because of the reasoned and well-argued justification that we provide. We are giving our reasons based on our subjective evaluation of the evidence. In addition, the realisation and acceptance of the subjective, evaluative nature of ethical decision making does not make our reasoning deficient; it simply provides an honest, accurate and fulsome account.

Rachels is not alone in asserting that judgements can achieve objectivity through reasoning process. According to Raz, it is the *way* that we reason which determines whether our arguments can be objective. Consider his explanation regarding the epistemic objective / subjective distinction:

> *People are objective about certain matters if they are, in forming or holding opinions, judgments and the like, about these matters, properly sensitive to factors which are epistemically relevant to the truth or correctness of their opinions or judgments, that is, if they respond to these factors as they should. Their views or beliefs may be wrong or mistaken, but there are no emotionally induced distortions in the way they are reached, or the conditions under which they are held. That*

> *means, for example, that people are objective in this sense if they form their opinions and judgements on the basis of the relevant evidence available to them, mindful of whether or not they were in circumstances which might affect the reliability of their perceptions or thought processes, and when their selection of information as relevant and their evaluation of it are sensible, and are not affected by such emotional or other psychological distortions. Opinions and beliefs are said to be objective if they are reached or held in an objective manner.*
>
> Raz, 2001, p. 119

Close analysis of Raz's explanation reveals the issues with attempting to objectify subjective values and valuation. Firstly, this account is very close to the value-free Cartesian logic which was challenged in the first section of this chapter. Statements such as "emotionally induced" or "psychological distortions" imply that emotions adversely alter an individual's ability to reason. Other words and phrases negatively portray the evaluative component of human reasoning. "Unreliable", "relevant" and "correctness" all cast a shadow of doubt over the legitimacy of the role of emotions in reasoning. Such portrayals sustain and perpetuate the misconception that value-free reasoning is possible and even preferable, and that there is a right and a wrong way to reason in any given situation.

Secondly, the paradox of Raz's objectivist theory is that whilst suggesting that value-free reasoning is possible (and by implication, preferable), this account, as with any account of human reasoning, necessarily incorporates value judgements. For example, who decides what is relevant, and what is sensible? These are subjective value judgements. Any account of human reasoning, including an attempt to portray a purely objective explanation of valuation, must incorporate value judgements. And value judgements cannot be described as either right or wrong. We can agree with another person's evaluation and we can respect or attempt to understand another's preferences, even if we do not agree with them. The view that opinions and beliefs are said to be objective if they are reached or held in an objective manner does not hold up to scrutiny. Objectivity cannot be achieved simply by reasoning in a way that is deemed correct; that you have considered all the relevant evidence, excluded all the irrelevancies and been mindful of circumstances and other influences which "might affect the reliability of perception or thought processes". If ethical objectivism is reliant

on measures such as sensibility, relevance and sensitivity, it must after all, therefore, be based on matters of subjective evaluation.

Along with Raz and Rachels, many influential thinkers have propounded the view that ethical rationalism is possible and preferable, establishing moral theories based on this premise. Perhaps two of the best known are Kant's deontology and Bentham and Mill's utilitarianism.

Kant

Kant has been credited with first challenging the notion that moral reasoning consists of the discovery of external norms, such as the will of God, or objective perfections (Guyer, 1992, p. 3). Kant's rationalist account of ethical reasoning has been influential, along with the perception that an account of moral judgement that admits a subjective response is somehow deficient. As Norton explains:

> *The rationalist understanding of human nature has a strong hold on the common understanding of our choices. We pride ourselves on the supposed fact that we are able sometimes to choose courses of action that override our passions and desires in the light of a greater good. We pride ourselves on the supposed fact that when we do this, we exercise the power to be free from the influences and temptations that would otherwise condemn us to what Kant called heteronomy. And we particularly pride ourselves on the supposed fact that we are able to pursue the austere demands of duty and so, by putting inclination aside, function as pillars of society.*
>
> Norton, 1993, p. 125

According to Kant, to call an action morally right is to describe the nature of the initiating or original impulse that causes the action, and it is this original doing, or the willing of the action, which can be called morally good (Thomson, 2003, p. 64). Kant's moral philosophy is in the rationalist tradition that moral laws can be found "not in the nature of man, nor in the circumstances in which he is placed, but solely *a priori* [sic] in the concepts of pure reason" (Kant, 2002, p. 21). However, while values are a necessary and integral part of any process of reasoning, Kantian theory does not account for values.

Kant's philosophy is uncompromising, proposing that the moral law specifies simply what must be done, not what must be done to achieve an objective (Dickerson, 2004, p. 66). Kant was concerned with moral duty, not with the consequences of actions, and gave the example of lying to demonstrate his theory (2002, p. 68). "I ought not to lie if I want to maintain my reputation". This formulation is what Kant calls a hypothetical imperative. The action is guided not by the establishment of a moral duty not to lie. Instead, the motivation for action lay in the consequence of action rather than in the duty to follow the moral law *per se*. Kant argued against a hypothetical imperative in which the motivation for action lay in its consequence. He argued instead for the categorical imperative. According to the categorical imperative, the moral agent should not be concerned with lying in order to achieve an objective. They should simply be concerned with the maxim; "I ought not to lie".

Autonomy and freedom of will are central to Kant's moral philosophy (2002, p. 67 and p. 74). Kant argued that normal adults are capable of being self-governing in moral matters, and that through reason, we impose moral laws on ourselves which give rise to obligations and the necessity to act in certain ways (Schneewind, 1992, p. 310). Kant thought that an action done for the sake of duty, which is caused by a good will, cannot be done out of desire or natural inclination (Thomson, 2003, p. 64). The duty is prescribed by reason.

It is evident from the *Groundwork of the Metaphysics of Morals* that Kant viewed pure reason as solely deductive, excluding all sensory and empirical knowledge to establish a right action.

> *Every one must admit that a law has to carry with it absolute necessity if it is to be valid morally – valid, that is, as a ground of obligation; that the command 'Thou shalt not lie' could not hold merely for men, other rational beings having no obligation to abide by it – and similarly with all other genuine moral laws; that here consequently the ground of obligation must be looked for, not in the nature of man nor in the circumstances of the world in which he is placed, but solely a priori in the concepts of pure reason.*
>
> Kant, 2002, p. 21

In his earlier work, Kant explained individual motivation to act morally in terms of a struggle between various feelings (Pasternack, 2002, p. 7). However, strongly influenced by the work of Rousseau, Kant made the link between morality, reason and the intellect (Guyer, p. 315). Kant was also influenced by the work of Newton and thought that moral law could have *a priori* status akin to Newton's gravitational laws (Guyer, p. 316). Kant developed the idea that people could use 'pure reasoning' and established the categorical imperative as the rule for rational deduction of moral obligations: "Act only on that maxim through which you can at the same time will that it should become a universal law" (Kant, 2002, p. 50).

Not surprisingly, Kant's moral philosophy has been subject to considerable criticism (De Luca, 2003, p. 69; Seedhouse, 1998, p. 123). For example, is it really possible to deduce a moral duty without taking any account of its consequences? And is Kant's theory simply too demanding for individuals to apply in every day life? Unfortunately, this thesis does not allow for a full critique of Kant's moral philosophy. What is of direct concern is that Kant's theory takes no account of values. Is this possible?

Consider Kant's response to the famous case of the inquiring murderer (taken from MacIntyre, 1998, p. 188). A prospective murderer asks me the whereabouts of his intended victim. I know the answer, but lie to conceal the victim's whereabouts because I am aware of the murderer's intentions. The murderer follows my directions, but, unbeknownst to me, the victim has since moved to the place where I have directed the murderer. The murderer finds and kills their victim. According to Kant, the victim's death is a direct consequence of my lie. I am therefore responsible. Kant reasoned that in this situation, my duty was not to lie. As long as I fulfilled my duty to follow the categorical imperative not to lie, I would not be responsible, whatever the outcome.

But if we actually found ourselves in this situation, is it realistic to expect that we would simply act on this maxim that we must not lie? Imagine, for example, that the person the killer is searching for is also a murderer and has killed hundreds of innocent people. Or that the murderer is threatening to kill your son if you do not reveal the victim's whereabouts. Your values become operative, and in deciding whether to lie or not, you will be guided by your emotional and physiological response, the social environment and your life experiences. Your response will be very different than if you

know the victim is your son. Kant's formulation of the categorical imperative over-simplifies the decision making process and denies that, in reality, values have a fundamental role in the application of the theory.

Kant's theory assumes that we can remove individual preferences and deduce our moral duty from pure reason. But this is not possible. If reason actually worked this way, then there would be no ethical dilemmas; each person, using reason, would be able to deduce and act on the categorical imperative in any given situation. And presumably, employing pure reason, all individuals would deduce the same moral obligation. In reality, however, the morality of action reached is dependent on the individual evaluation of the evidence within the context in which the decision is made. Through reason we can establish our moral duty, but not without values to guide and inform our decisions.

Utilitarianism

Utilitarianism is a consequentialist theory most closely associated with the English philosophers Jeremy Bentham and John Stuart Mill. Utilitarians argue that the rightness or wrongness of actions can be judged by the amount of happiness promoted by an action. This theory is in direct contrast to Kant's. Where deontology is concerned only with moral duty and the rightness of an action itself, utilitarianism is concerned only with the outcomes of actions and how much pleasure or happiness is produced by the action.

> *The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.*
>
> Mill, 1972, p. 7

The utilitarian formula, however, raises two fundamental considerations. Firstly, should maximisation of happiness be the ultimate consideration in deciding the right or wrongness of actions? Secondly, if we are primarily concerned with maximising pleasure and minimising pain, how are these to be calculated?

The maximisation of pleasure and the minimising of pain appear at first blush to be noble goals. Mill attempts to persuade us that the utilitarian method is the ultimate ethical formula for establishing the rightness or wrongness of actions (Mill, 1972, p. 18). However, happiness may not always be the most appropriate ultimate consequence to guide actions. For example, the deontologist's argument that duty should guide action may be perceived as more important in some circumstances. If I am contemplating the rightness or wrongness of euthanasia, say, am I purely concerned with the resulting pleasure or pain of the action? As a health professional, I am certainly concerned with a utilitarian ethic of minimising pain and am very likely to consider this a motivating factor for my actions. But does this go as far as actively killing a terminally ill patient? I may instead prefer a Kantian approach which forces me to consider the sanctity of human life and my duty as both a human and a health professional not to take life. Whether maximisation of happiness or duty should be the primary goal for our actions is dependent on our individual evaluation of the situation at hand. The problems with focusing on maximisation of good are illuminated by the following dilemma which the utilitarian ethicist Peter Singer faced recently.

Singer is a controversial Australian ethicist who has espoused utilitarian ethics to such a degree that he lives by its rules and promotes what have been seen as extreme views about euthanasia, animal rights and infanticide of disabled babies. For example, based on his interpretation of utilitarianism, Singer has argued that parents should be allowed to kill a disabled infant, or even one with a treatable disease such as haemophilia, if it allows them to have an able bodied child with a greater chance of happiness (Singer, 2001, p. 324). However, when his mother got Alzheimer's disease, Singer could not implement his own utilitarian ethic. According to his rules, he should have killed her and given the cost of her upkeep to the starving. Instead, he paid for her nursing care until she died. He admitted that while he believes in euthanasia, he could not carry it through (Macdonald, 2001).

Singer's actions demonstrate that rigid subscription to an ethical theory which takes no account of individual values is problematic in the decision making of our day to day lives. In the final analysis, it appears that Singer was primarily motivated by what he perceived to be duty to his mother rather than achieving the greatest good for the

greatest number. Faced with the very real situation of having to make an ethical decision about how to manage the end of life care for his mother, Singer was, like any thinking, feeling human being, guided by his emotion and feelings. Our values prescribe whether we are primarily concerned with the greatest good for the greatest number in situations we encounter, not a rigid subscription to a particular ethical theory.

Calculating happiness

The second major consideration in relation to utilitarianism and values is that the utilitarian ethic insists that we maximize happiness. But how do we calculate what is essentially a value judgement? Mill suggests that a satisfied life equates to a happy life, made up of an existence "of few and anticipatory pains" and not expecting "more from life than it is capable of bestowing" (p. 13). Mill describes the constituents of a dissatisfied life as selfishness, want of a cultivated mind, indigence, disease, unkindness, worthlessness, premature loss of objects of affection, and so on (p. 14–15). But are these the correct constituents of a dissatisfied life? In Mill's evaluation, perhaps. But attempting to define happiness is, of course, a matter of value. To achieve a satisfied, happy life, I may not value a cultivated mind, but instead value friendship and family. I may have no choice but to live with disease or disability, but this does not necessarily preclude me from living a fulfilled and happy life.

At the outset of Mill's essay on utilitarianism, the assessment of pleasure and happiness is attributed to feelings. This challenges the possibility of an objective measure of good in relation to happiness. "No reason can be given why the general happiness is desirable, except that each person, so far as he believes it to be attainable, desires his own happiness" (Mill, 1972, p. 36). By the end of the essay, however, Mill suggests that happiness is calculable via a mathematic formula (p. 65). So which is it? Mill was influenced by the utilitarian theory developed by Jeremy Bentham who thought that different sources of pleasure can be measured and compared in respect of the intensity and duration of the sensation derived from them and the certainty or otherwise of having the sensation. In choosing between alternatives, Bentham perceived quantity of pleasure as the criterion (MacIntyre, 1998, p. 226). If it were possible to measure

happiness objectively, then it would seem possible that a mathematical formula could be conceived for its calculation.

The growing mass of instruments developed to measure quality of life for people with disease, disability or following health interventions is testament to the rationalist perception that this is possible. (A brief search on Medline database for quality of life instruments returned 146 journal articles in the five years from July 2000 – July 2005.) Instruments claim to measure quality of life for people with a wide variety of different diseases and undergoing various medical procedures[2]. If a quality of life calculation which captured all determinants of happiness in life were possible, it would be unnecessary to develop such an array of different instruments.

Similarly, numerical scores have been developed to assist health professionals to better manage the pain of patients in a variety of different health care settings. Unsurprisingly, research has found that numerical scores are inadequate for fully capturing patients' pain experiences in a number of settings. See, for example, the findings of a study investigating pain assessment in the post-operative context (Manias, Bucknall & Botti, 2004); research on pain assessment in the emergency department (Guru & Dubrinsky, 2000) and evidence concerning the assessment of patients in chronic pain (McHugh & Thoms, 2001). Patients do not share the same meaning of numerical pain instruments as health professionals, and scores may reflect what health professionals expect instead of the patient's story (Manias et al, 2004). Attempts to quantitatively measure subjective human experience is problematic. Anyone who has ever tried quantifying patients' post-operative pain using a numerical scale will be able to relate to the difficulty of the task.

Thus, with Kant's categorical imperative, so too with utilitarianism. When practically applied, the fundamental philosophical difficulties of using a model which does not account for matters of value remain. The subject *must* apply the theory. In doing so, each person will necessarily employ values in their reasoning. Application of theory to

[2] For example Le, et al (2005) used the 'Functional assessment of cancer therapy ovarian module version 4' for quality of life assessment during chemotherapy for advance stage ovarian cancer. Smeritschnig, et al (2005) used the 'St George's respiratory questionnaire', a lung specific health status instrument to measure the quality of life of patients post lung transplant; And Wolffsohn et al (2000) tested the 'low vision quality of life questionnaire' for measuring the quality of life of the visually impaired.

real life decisions is impossible without the use of values to inform and guide decision making.

Values and law

The aim of this focused analysis of ethical objectivism and rationalist theories has been to both demonstrate and challenge the profound and far reaching influence of value-free philosophies. Dworkin's theory demonstrated the common perception that even when the law is subject to considerable interpretation, for example in the use of legal principle like the best interest test, it is possible to rely on rational theoretical perspectives to objectify the necessarily open textured aspects of law.

The preceding analysis of existing processes resulting from the positivist approaches to law also discounts any claims that legal reasoning *is* scientific, or can be solely reliant on methods of pure logic. Those introduced to law for the first time are rightly shocked that something as obviously basic to legal reasoning as interpretation is not well worked out by judges and scholars (Moore, 1985, p. 285). These processes have developed as a result of underlying ideologies which do not recognise the place of values in reasoning. As Heiner explains, the law is not comprised of uniform doctrines and procedures:

> *It must continually deal with influences about the particular features of successive cases and the motivations and beliefs of those persons called on to adjudicate them, be they plaintiffs, defendants, lawyers or judges. A great challenge for the law is thus how to discipline the multifaceted effect of these influences.*
>
> Heiner, 1986, p. 257

Summary

Ultimately, we know that the values of lawyers and judges, which originate in part from their social background, the professional cultures, and supporting institutions within which they are educated and work, are highly influential in judicial decision making (Artis, 1999; Kairys, 1992; Kennedy, 1992; Mnookin, 1975 & 1985). Kairys, a critical legal theorist, summarises the impact on legal process:

> *Judges are not robots that are – or need to be – mysteriously or conspiratorially controlled. Rather, they, like the rest of us, form values and prioritise conflicting considerations based on their experience, socialisation, political perspective, self-perceptions, hopes, fears and a variety of other factors. The results are not, however, random. Their particular backgrounds, socialisation and experiences – in which law schools and the practice of largely commercial firms of law play an important role – result in a patterning, a consistency, in the ways they categorise, approach and resolve social and political conflicts.*
>
> Kairys, 1992, p. 15

However, while the values which influence legal decision making have been recognised, legal positivist and scientific paradigms remain entrenched in centuries of objective philosophical tradition. This has resulted in the use of legal method, and portrayal of law and decision making, as disconnected from subjective evaluation. To illuminate the necessary, but unacknowledged, role of values in best interest determinations, what is required is a theoretical response which establishes the foundations of law as value-based and reconnects law and legal decision making with conscious human action.

Chapter 2 – Values-based Law

There is a widely held but mistaken view that law and legal process exist independent of human opinion (the *objectivist myth*). In this chapter, I advance a theory of values-based law which shows that legal decisions cannot possibly be entirely based on facts. I call my theory 'values-based law' because I propose that law is a response to and a product of subjective, human values – law is based on values.

This chapter is in three parts. In the first part, I argue that while laws may exist as part of the governing framework of life in modern society, they do not work *just because* they exist. Rather they work because we value them. When enough of us value the rules, we exist in societies with stable social order.

Laws, rules and conventions are part of the external reality of our social world. But it is how we engage subjectively with a situation which influences whether we choose to follow the rules currently objectified in our societies.

The *objectivist myth* creates the impression that we live in stable, predictable societies in which laws are detached from subjective human evaluation. In the second part of this chapter, I demonstrate exactly why this perception is illusory. To do this I adapt a popular philosophical thought experiment – what would life be like in the 'state of nature' - drawing on the work of Golding (1954), seventeenth century philosophers and contemporary examples. It quickly becomes clear that in an environment without rules, our behaviours are governed by our individual desires and preferences. It is then equally apparent that law cannot exist without evaluation by at least some members of society and social structures (designed by people) to uphold and maintain it.

Value judgements about the way we *ought* to behave are objectified – in the form of laws, rules and conventions - as a result of our socialisation and societal institutions. This process is the concern of the third part of this chapter.

Thomas Kuhn recognised that values have a significant role in scientific revolution. I make use of his theory to demonstrate how values become objectified in law.

Something happens, maybe a sudden catastrophic event, or a growing sense that something is wrong with our institutions and this alters the way we view the world. Normal social rules become destabilised – members of society question or cease to value the laws imposed on them sufficiently to constrain their behaviours in accord with them. What results is a metaphorical state of nature in which the values of the community emerge. This state may be macro – and relate to entire social rule, or micro – relating to discrete areas of law. With enough support, a new paradigm emerges – its values fixed either through a process of social normalisation or in law itself. This process applies equally to the rule of law generally and to discrete areas of governance.

Lord of the Flies

Throughout this chapter I draw from Golding's novel, *Lord of the Flies.* It is the story of British schoolboys marooned on a desert island following a plane crash. Their struggle for survival starts well. Amid the initial exciting realisation that there are no grown-ups on the island, the boys establish a system of self rule which governs the search for food and shelter. These 'self rules' also legislate for the operation of a smoking fire to alert passers-by of their presence and desire for rescue. As time passes, the system of rules established from social conventions and a context far removed from the desert island begins to destabilise as fear and power dominate the quest for survival. Through the medium of the novel, Golding communicates his insights into the nature of human behaviour and provides a rich tableau of human response to society without normal rules, laws and conventions.

Part One – Law, Values and Reasoning

Objectivity

Values-based law is based on the premise that laws, rules and conventions work within our individual processes of logic to contain and constrain our individual preferences. But the power of rules, laws and conventions to maintain social order is not solely in their objective existence. It is in the way they function in our individual reasoning; the way we use them as we make sense of our social environments and to make decisions about our actions. For example, there is a common perception that law is a system of

rules which is decisive on every issue that might come before the courts (Dworkin, 1986, p. 8). Laws exist within society as objective reality. But what use is a set of laws written in the statute books unless they influence peoples' decisions?

Berger and Luckmann argue that human conduct is controlled by social institutions (for example, law) that set up predefined patterns of conduct which channel behaviours in one direction as opposed to the many other directions that are theoretically possible (1966, p. 72). Berger and Luckmann suggest that this happens through a process of objectivication. This is a process "by which the externalized products of human activity attain the character of objectivity" that may be achieved through institutionalisation (p. 78). For example, the law provides an institution for the objectivication of value judgements. The subjective judgement that you *should* drive safely through suburban areas becomes objectified by laws which state you *must* adhere to traffic laws that ensure safety in suburban areas (stopping at red traffic lights, adhering to speed limits and stopping at zebra crossings). The law governing traffic safety thereby becomes presented to citizens as fact. The law changes a value judgement – what ought to be done – into a matter of fact – what must be done. Berger and Luckmann further argue that this process results in institutions which must and do claim authority over the individual, "independently of the subjective meanings he may attach to any particular situation… the more conduct is institutionalised, the more predictable and thus controlled he [the individual] becomes" (1966, p. 80).

I do not dispute this process of objectification. That rules and laws are the objective statement of value judgements is an important component of this thesis. However, I do dispute that predefined patterns of conduct can channel our behaviours *independently of the subjective meanings we attach to particular situations*.

It is our individual evaluative response within internal reasoning processes to a law or rule which contains and constrains our individual preferences. If social institutions could control all behaviours by setting up predefined patterns of conduct, then why would (or could) anyone ever break the law? No amount of rule writing or law making will ever control the behaviour of every member of society. For example, many people break the laws which control traffic speed; some routinely. We do this even though we know that speed restrictions are there for the safety of the community. We may reason

that the risk of getting a speeding ticket, and of exceeding the limit by a few kilometres per hour given the traffic conditions are outweighed by the reduced time we have travelling. We include traffic rules and laws in our reasoning about how fast we drive. But just because the governance of our driving behaviours are objectified by law, they do not become the absolute consideration in any given situation. They form part of the complex reasoning processes which guide our interaction with our social worlds and which cannot be disconnected from the context.

Consider the following example which occurred in my local supermarket. A young man (I will call James) serving at the supermarket counter had a small stud through his chin. On questioning by a female colleague why he did not have a ring through the stud, as was the norm for teenagers, James replied that he was not allowed to wear the ring for work, and that he did not want to lose his job. It simply was not acceptable within the supermarket environment. James' colleague observed that perhaps he should go and work at the supermarket in another suburb where they did not care what their employees looked like as long as they did their job properly and were nice to the customers. James replied that he preferred this supermarket and that he got better paid there. James had three options: to avoid the rule and apply for another job elsewhere; to wear the ring and risk losing his job; or to conform to the supermarket rules. He valued the pay and conditions of his current job and therefore preferred to conform to the rules. James' preference to wear a ring through his chin was constrained by the influence the supermarket rules had *within* his process of logic. James did not simply conform to the rules because they existed. It was through a process of internalisation and complex consideration of the options that he chose to abide by the rules rather than risk losing his job or seek alternative employment.

Socialisation and internalisation

We are not simply machines who can be programmed to adhere to a set of rules or laws provided by the institutions of society. Of course there will be reasons, many of them, why the majority of us choose to conform to the rules and laws of our society. But people have different priorities in different contexts. When we make decisions within our daily lives, they comprise a part of our reasoning in our continuous interaction with

the social world that we live in. Consider the following incident from Lord of the Flies in which one of the boys began to throw stones at one of the younger boys.

> *Roger gathered a handful of stones and began to throw them. Yet there was a space round Henry, perhaps six yards in diameter, into which he dare not throw. Here, invisible yet strong, was the taboo of the old life. Round the squatting child the protection of parents and school and policemen and the law. Roger's arm was conditioned by a civilisation that knew nothing of him and was in ruins.*
>
> Golding, 1954, p. 61

Golding demonstrates how the influence of the society in which Roger was growing up remained deeply embedded in the values guiding his actions, despite his removal from that context. It was not simply rules or the law which constrained his actions. In that moment, Roger was evaluating his own behaviour guided and informed by his parents, his life experience, schooling and the policeman – a symbol of fear and retribution. He was "conditioned" by the entire complex social fabric and his experience within it – the "civilisation" in which he had grown up and previously lived, of which the law was but a part. Roger's split second reflection on his behaviour through the lens of his previous social experience constrained his desire to throw the stone at Henry. The majority of the other boys ceased to value the previous social rules and conventions. They had disregarded the framework which constrained their individual values. The social order disintegrated and a state of nature ensued.

But why, in a new environment, hundreds of miles from the social norms within which he was brought up, was Roger still influenced by his social conditioning? Berger and Luckmann (1966, p. 66) explain the process of social conditioning; that the way we relate to the world around us is due in large part to our socialisation.

> *The developing human being not only interrelates with a particular natural environment, but with a specific cultural and social order, which is mediated to him by the significant others who have charge of him. Not only is the survival of the human infant dependant on certain social arrangements, the direction of his organismic development is socially determined. From the moment of birth, man's organismic development and indeed a large part of this biological being as such, are subjected to continuing socially determined interference.*

Berger and Luckmann emphasise the role of society in shaping individuals. This includes the way we know, how we behave and how we establish and identify roles in society. The social conditioning which Roger had been subject to had left an indelible impression and continued to influence his decision making despite the absence of the societal structures to reinforce them. Roger's significant others, his parents and his schooling, the policeman and his awareness of the law all influenced his behaviour within that moment. But, the rule of law, as such, did not exist on the desert island. Roger's significant others were not actually present to tell him not to throw the stones, or to punish him. The influences were not external to Roger. They were internal. The sum of Roger's life experience including the people, social structures, rules, laws and norms constrained his behaviour *within* his decision making process that ultimately constrained his desire to throw the stones at the other boy.

In Golding's story, social convention proved as powerful at inhibiting Roger's desire to throw the stones at Henry as any laws or rules. A social convention is a "general agreement on, or acceptance of certain practices or attitudes" (dictionary.reference.com). There was no rule or law which said that he must not throw stones at younger boys. But there was the taboo of the old life "invisible yet strong" which protected the child via the strong, inhibiting influence it still had on Roger. It becomes impossible to disentangle the conventions embedded in us during our socialisation processes from our values. Whilst social conventions exist externally to us, we internalise them. They provide the source for and form some of our individual preferences that guide and inform our subjective reasoning. The conventions entrenched in Roger during his socialisation had, in part, formed his value system that informed and guided the subjective component of his reasoning. These values informed his decision not to throw the stone at Henry, by acting *within* his process of logic. As such, Roger's values were as effective as a physical restraint at prohibiting him from following his desires.

Emotion and feelings

Whilst socialisation clearly has an important role in the influence of laws, rules and conventions, alone it does not fully explain how they function in our reasoning processes to constrain our individual desires.

Consider another incident in *Lord of the Flies* when one of the boys kicked sand in one of the younger boy's eyes. In response to his own behaviour:

> *Maurice hurried away. In his other life Maurice had received chastisement for filling a younger eye with sand. Now, though there was no parent to let fall a heavy hand, Maurice still felt the unease of wrong-doing.*
>
> Golding, 1954, p. 59

Even though he had behaved in a way which was not necessarily unacceptable or prohibitive in his new environment, Maurice still knew he had done something wrong. He not only knew it, he *felt* that he had done something wrong. Thus Golding demonstrates the complex entangled influence of our emotions, our physiological reactions, as well as our socialisation on the decisions we make about our actions. It was not simply the social convention which told Maurice his behaviour was wrong. His conditioning combined with his emotions so that he *felt* it was wrong. His emotions, life experience, social conditioning all combined in one moment to inhibit his desire to kick any more sand into the younger boy's face.

External influences

Thus far I have grouped laws, rules and conventions together and drawn on examples of each interchangeably. This has been intentional. What I have tried to demonstrate is that it is not the rule, the law or the convention itself that constrains our individual preferences. It is how they influence our individual decision making which is significant.

The context within which we make decisions is crucial. I have intentionally chosen extreme examples to demonstrate this important point. Am I, for example, more likely to blow my nose on my shirt sleeve than end a person's life? Social convention governs one behaviour and law prohibits the other. My answer will depend on the context of my decision. I am less likely to blow my nose on my shirt sleeve at a crowded dinner party than I am to administer pain-killing medication to a terminally ill patient which may have the secondary effect of reducing their respiratory capability in my role as a nurse. Given a different context, however, and my behaviour will be guided quite differently.

If I am cycling along the road and my nose is running uncontrollably, and my handkerchief is lost, I will, (of course) be far more likely to blow my nose on my shirt sleeve than to end the life of an innocent person. As we engage with the social world that we live in, so the conventions, laws and rules which govern our actions will influence our decisions according to the situations we find ourselves in.

There are elements to laws, rules and conventions which increase the possibility that individuals will adhere to them. If I asked why you abide by the law, you may give any one of a number of answers. You may agree with the substance of a particular rule of law (say, do not kill, do not steal). You may abide by the law simply because it is the law. But you may also fear the punishment or the social embarrassment if you break the law. A criminal record might not only tarnish your reputation, but threaten your employment or registration with a professional body. You may value the law as a necessary social institution and the benefits it brings to society as a whole. Even if you disagree with a law, you may well abide by it for one or more of these, or many other reasons.

For example, I dislike being forced by New Zealand law to where a cycle helmet. But I do wear it, because I can see the safety benefits for myself and others and I respect the law as a necessary social institution. I also prefer to avoid the legal consequences of not wearing the cycle helmet (a fine), and the social embarrassment of breaking the law. Thus, the law which forces me to wear a cycle helmet contains and constrains my values about freedom of choice, personal responsibility and unnecessary restriction of individual liberty. The inconvenience of wearing the helmet is minor in comparison to the potential negative consequences of not wearing it. I therefore abide by the law even if I do not agree with it.

These elements are effective because they render us *more likely* to evaluate the law as important in the decisions we make about our every day lives. For example, Hobbes' response to life without law (which I consider further in the next section) worked on the assumption that people would accept the creation of a sovereign whose command or will is law, who establishes order through fear, because they would prefer peace and conformity with the rules over the potential chaos of life without them (Levine, 2002, p.

35). However, as I have tried to show, the reasons that people value laws, rules and conventions in decisions they make about their daily lives is far more complex.

In the same way that we are not robots who can be pre-programmed to adhere to a set of institutional orders intended to control our behaviours, so threat of punishment may not provide sufficient reason for us to conform. We also want to know *why* we should follow the rules before we value them sufficiently to follow them. For example, a new rule is put in place by the management in the outpatient department that all nurses must wear big pink and white striped hats. Will I conform? If I am simply told I must adhere to the rule, this is not reason enough. However, if I am told that wearing the hat is intended to attract out-patients to participate in a new health promotion initiative then I will be happy to follow the rule. I value any opportunity to be involved in health promotion and fully understand and agree with the intentions of the rule. The greater we value a law, rule or convention in any given situation (for whatever reason – be it fear of the consequences, because we agree with the rationale behind it or because we value social order), the more likely we are to conform to it.

If, as I have suggested, the controlling power of the orders of societal institutions is in the way they influence our individual decision making in our daily lives, how then does this translate to the governance and maintenance of social order in entire societies?

Individual values and social order – how does one lead to the other?

Because of what we have in common, in every day life, we each value rules, laws and social conventions sufficiently (for whatever reason) for them to influence our decisions about our every day lives. The total, collective effect is that individual preferences are enveloped and constrained by the rules which govern whole societies. This translates to the large scale societal containment of individual desires and preferences; if enough individuals are simultaneously valuing institutional orders sufficiently, collective large scale containment of individual desires and preferences is achieved.

At the end of *Lord of the Flies*, Golding captures this common understanding and collective valuing of social rule. As the story reaches its final crescendo, Ralph, the boy

who was voted leader at the outset of the story and who tries desperately to maintain the rules and the social order, is being hunted down by the boys who ceased to value his leadership and the old system.

> *He [Ralph] stumbled over a root and the cry that pursued him rose even higher. He saw a shelter burst into flames and the fire flapped at his right shoulder and there was the glitter of water. Then he was down, rolling over and over in the warm sand, crouching with arm up to ward off, trying to cry for mercy.*
>
> *He staggered to his feet, tensed for more terrors, and looked up at a huge peaked cap. It was a white-topped cap, and above the green shade of the peak was a crown, an anchor, gold foliage. He saw white drill, epaulettes, a revolver, a row of gilt buttons down the front of a uniform.*
>
> Golding, 1954, p. 213

In his description of the naval officer, Golding recognises his readers' collective understanding of what the uniform symbolises; the power and authority of the laws, rules and conventions of British society. The description of the officer is sufficient to communicate that his arrival signals the re-instatement of social order. He encompasses in this description the influence of our social conditioning and collective understanding of why we value the laws, rules and conventions sufficiently for the maintenance of social order.

Whilst rules are a part of our objective realities, it is our individual subjective response to them which renders them effective. This translates to the collective valuation by enough members of society sufficiently to maintain stable social order. If we cease to value society's rules sufficiently as individuals, we break them. If some members of society cease to value societal controls sufficiently, pockets of civil unrest result. If collectively we do not value law sufficiently, the break down of social order ensues. These are the concerns of part two of this chapter.

Part Two – The State of Nature

The state of nature has proven to be a useful philosophical device: an element in a thought experiment in which we imagine what life would be like in the absence of political arrangements (Levine, 2002, p. 18). Contemplation of this hypothetical state refutes any suggestion that law is separate from subjective, human judgement. I use Golding's depiction of the state of nature, which results from the stranding of a group of school boys on a desert island, to demonstrate that there is no such thing as objective law. In the absence of normal social rules and conventions, the thin veneer of order and stability disintegrates and behaviours are guided by individual preferences and desires. I also draw on the theoretical responses of Hobbes, Locke and Rousseau to show how laws stem from, and are a response to, the unconstrained expression of individual values.

Golding, reflecting on his aims when writing *Lord of the Flies*, wrote:

> *The theme of the book is an attempt to trace the defects of Society back to the defects of human nature. The moral is that the shape of a society must depend on the ethical nature of the individual and not on any political system however apparently logical or respectable.*
>
> Golding, cited www.brothersjudd.com

However robustly objective and detached the rule of law appears to be, it is totally dependent on the valuation of individual members of society and its institutions to uphold and maintain it.

Unpeeling the layers

It is war-time in Britain and a group of school boys are evacuated by air from their homes. During the journey, the plane crashes and the pilot is killed. Only the school boys survive. In the early stages of the novel the island is depicted as a tropical paradise; "a good island… It's wizard. There's food and drink… flowers… like in a book" (Golding, 1954, p. 32). The boys are excited by the prospect of having fun on the island free of adults. Even the realisation that they need to establish rules to ensure their

survival is greeted with delight (p. 30). Like playing a game, the group establish between them the requirement, substance and system of rules.

From the beginning of the story, the boys recognise the need for rules and they embrace the luxury of adult-free self-governance. One of their first considerations is the need for a chief. The book's main protagonists are instated in the ensuing "toy of voting" (p. 18). There is Jack – the arrogant leader of the choristers and head boy at school – whose confidence and experience mark him out as the most obvious leader. Then there is Piggy – an almost blind fat boy with asthma – whose glasses become essential for the groups survival to light fires. Piggy's intelligence and insights are invaluable to Ralph, the boy actually voted as leader. Ralph's size and attractive appearance mark him out, and at the time of the vote he holds the conch. The shell is quickly established as the symbol of power; when blown, it emits a commanding sound which effectively calls the boys to order.

The values of the boys are pivotal in establishing the rules which initially stem from their recognition of the need for food and shelter and their desire to be rescued. The norms and conventions from the society the boys come, govern their initial creation. As Jack explains: "We've got to have rules and obey them. After all, we're not savages. We're English; and the English are best at everything. So we've got to do the right things" (p. 41).

But even in the early stages, perceptions of what is *right* differ. Ralph values rescue and the maintenance of fire and smoke to optimise their chances of rescue. For Jack, hunting for pigs and eating meat is paramount. This clash in values runs like a deepening fissure all through the novel, rawly exposed at key moments in the story. Ralph's faith in, and consistent appeal to the established rules and social order, contrasts with Jack's increasing disregard for them.

As time passes, the distance from normal social rules and conventions grows and the differing values of the chiefs become more apparent and influential. At the beginning it is a vague source of irritation that Jack would rather be hunting for pigs than maintaining the fire or building shelter. However, a turning point comes when Jack leads a hunt for pig, taking with him the boys who were allocated the job of

maintaining the fire. The fire goes out whilst the boys are away hunting. During that time, Ralph sights a ship passing by the island. Desperately, he climbs the island's mountain to light the fire, but the quest is pointless as the ship drifts out of sight and hopes for rescue are extinguished. Because the majority of boys valued the hunt over maintaining the fire, what results is the awful realisation that they could have been rescued. "The two boys faced each other. There was the brilliant world of hunting, tactics, fierce exhilaration, skill; and there was the world of longing and baffled common-sense" (p. 71). The consequence of this irreconcilable disparity in the values of the dominant characters is the disintegration of the established, but fragile, social order which ultimately proves fatal.

Contributing to this collapse is the increasingly pervasive fear of the beast. This at first appears to be the result of the overactive imagination of the smallest boys reacting to their new alien adult-free world. However, the sight of a dead man who arrived via a parachute onto the island transforms the imagined beast into something real and tangible. The boys' reaction is a kind of primal fear. The resulting instinctual savagery is more compatible with Jack's disregard for the conventions of their previous life and preference to hunt and kill than Ralph's insistence on maintaining the fire and adhering to the rules.

Jack, using this fear, attracts and coerces most of the boys into his new tribe. Simon (a boy who has extraordinary insight into their predicament and their reaction to it), having discovered that the source of their fear (the beast) is actually a dead man, releases him to float off the island in the parachute which brought him and comes to relay this tale to the others. However, as Simon arrives to dispel their fears, the others are so absorbed in their primeval dance celebrating the hunt, that he becomes the victim and is killed in their ritual.

The penultimate moment comes when Ralph, who has not joined Jack's followers, is being hunted by all the other boys. To hunt Ralph down, they light a fire which ignites the whole island. Ironically, in the quest to hunt and kill Ralph they employ his methods and successfully achieve his primary goal; to be rescued. The smoke from the fire attracts a passing ship. The arrival on the island of a man in "white drill, epaulettes, a revolver, a row of gilt buttons down the front of a uniform" (p. 213) brings the

immediate reinstatement of familiar social conventions, dispelling the savagery and starkly contrasting with the primeval depravity and evil which emerged in its absence. With it comes an overwhelming sense of relief, not only for Ralph, but also for the reader, at the instant restoration of the old social order.

The novel demonstrates that when the normal rules and social conventions are stripped away, what remains are individual values. These stem from the boys' upbringing, life experience, their passions, emotions, and the societies they have left behind.

Ralph's consistent insistence on the maintenance of fire stems from his unwavering desire to be rescued and longing to return to his previous life. (Ralph is the only character for whom the reader is given a portrayal of a yearning for an idyllic former life in rural south west England. He wears his grey school shirt until the end of the story). Ralph's fear of dying on the island without rescue guides all rules, expected behaviours and actions he initiates as chief. The reader shares in Ralph's incredulity and frustration as the other boys value the hunt over fire and rescue and the growing realisation "that understandable and lawful world, was slipping away" (p. 92).

For Jack the pride and humiliation at not being voted chief (along with his failure to kill a pig when first presented with the opportunity) seem intolerable in contrast to his place as prefect and head chorister in the previous social order. These passions drive Jack's desire to claim his rightful position as chief which he achieves by exploiting the fear of the other boys, luring them with the thrill of the hunt and gaining their respect by killing the pigs to provide meat for them to eat.

In the other boys we are given glimpses of perceptions of right and wrong. Significantly, each occurrence is linked to the conventions of home. But as the boys become further separated from the old order, so these instances disappear. As time distances them further and further from their familiar home environments, so emotions, passions and instincts emerge and increasingly dominate the boys' decisions and actions. The values from their upbringing and social environments recede along with the remnants reminding them of civilised society. This shift in values influences how they portray themselves, what they do with their time, and how they behave towards each other. For example, as the hunt becomes increasingly valued by more and more of

the boys, they discard their identities from their old world, like the tattered remnants of their uniforms. They become transformed into savages by the use of war paint and performance of killing and dancing rituals.

The boys, driven by fear and the excitement of the hunt, no longer constrained by societal conventions join Jack's new tribe. Along with Jack's growing status is his increasing contempt for the fragility of the established rules: "Bollocks to the rules! We're strong – we hunt!" (p. 93). As the tenuous social order disintegrates and the authority and legitimacy of the rules are doubted, they are exposed for what they are – inventions, fabricated from fear, longing and another world.

Golding's novel represents a state of nature where all but the last remnants of law and social order dissipate, and the rules based on a desire for rescue and known life in a vastly different context destabilise and disintegrate in an alien environment. Along with this collapse, individual values are fully exposed which in turn drive the establishment of the new rule of law and social order. Golding's novel is a shocking and raw depiction of the behaviour of boys without the usual rules to constrain their behaviours. Is his portrayal in accordance with how other thinkers have envisaged life in societies without rules and laws?

Developing the model - Hobbes, Locke and Rousseau

In the seventeenth century, philosophers began to reflect on the grounds of their allegiance and the legitimacy of the constitutions of particular states, deciding that the best way to consider this was to hypothesise a state of nature before the rule of law came into being and in which their was no sovereign power (Knowles, 2001, p. 6). Hobbes, Locke and Rousseau construct their political philosophy using the state of nature as their starting point. They were concerned with formulating a solution for the management of individual values exposed in the state of nature.

Parallels have been drawn between Hobbes' and Golding's depiction of the state of nature (Peabody n.d.). Hobbes' portrayal is a miserable state of war of all against all (Wolff, 1996, p. 35). It is an image of the rule of private will resulting in conflict, war and the endangerment of all that human beings hold dear (Zuckert, 1995, p. 68).

Everyone is suspicious of everyone else. With an ever increasing spiral of violence, people attack each other for gain, safety, glory or reputation. Life is truly miserable, wracked by fear and lacking material comforts and sources of well–being (Wolff, 1996, p. 18). There is no justice or injustice, no right or wrong and moral notions have no application. Equality is about the mental and physical capabilities of people.

> *In [the state of nature] there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation; nor use of the commodities that may be imported by Sea; no commodious building; no Instruments of moving, and removing of things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continual feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short.*
>
> Hobbes, 1996, p. 84

Hobbes' solution to this alarming portrayal is the creation of a sovereign whose command or will is law, who establishes order through fear, causing everyone to prefer conformity to the rules and the resulting peace over the state of nature (Levine, 2002, p. 35). People exchange some of their rights for protection, with the lives of people preserved and enhanced by government protection of every citizen from external enemies and each other (Martinich, 2005, p. viii). This monopoly of power quells individual passions and creates an environment in which people can better preserve peace, recognise obligations to one another, enforce agreements and move beyond mere individual enforcement of the right to self preservation (Peabody, n.d. p. 4).

Locke had a quite different perception of the state of nature. According to Locke, a state of nature is a place of perfect freedom, a state of equality bound by a law of nature.

> *The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health liberty or possessions: for men being the servants of one sovereign Master: sent into the world by his order, and about his business.*

Accordingly, natural laws are attainable both through reason and God, and liberty is what the law of nature allows (Wolff, 1996, p. 20). Locke does not adopt the idea of a sovereign. Instead, central to Locke's theory is that even in a state of nature, morality is effective and enforceable by a natural right to punish wrongdoers.

Within Locke's state of nature, every man has the right to punish the offender and be executioner of the law of nature (Locke, 2002, p. 4). Law-abiding citizens, outraged by an offence, will unite with the victim, and together, having the necessary power, will bring the villain to justice (Wolff, 1996, p. 23). Morality is effective and enforceable by a natural right to punishment and citizens become responsible for maintaining order and for judging the behaviours of others. The systems and institutions required to accommodate this response are the exercise of publicly justifiable power and the application of moral standards to legislative power (Zuckert, 1995, p. 64).

Rousseau also justifies the need for a sovereign power based on the need to contain individual values. His state of nature is concerned with the advancement of humans from savages to members of civilised societies. In contrast with Hobbes, Rousseau considers the human capacity for compassion, claiming that we generally avoid harming others. This is because we have a "natural repugnance at seeing any other sensible being, and particularly any of our own species, suffer pain or death" (Rousseau, 1993, p. 47). However, with the development of man from savages to civilised society come negative elements, such as pride, shame and envy, resulting from wealth and the ability to compare our own talents with those of others (Rousseau, 1993, p. 90). The "cries of natural compassion" and justice are suppressed and people are filled instead with "avarice, ambition and vice" (Rousseau, 1993, p. 97).

Even though Rousseau believed in natural innocence, he ultimately thought that life without government in a civilised society would be intolerable (Wolff, 1996, p. 32). He argued that in regard to social relations, there could be a general, collective will of society to become fundamental laws "obligatory on all the members of the State without exception". Rousseau affirmed Hobbes' assertion that a superior power capable to ensure compliance is required (1993, p. 106-7).

While each theorist has a slightly different perception of the state of nature, they agree that some kind of rule of law *is* necessary for the containment of individuals' values and the maintenance of stable social order. And their responses are inextricably linked to their values and the context within which they were writing. Locke's theory assumes agreement that natural law and morality is established by God (2003, p. 102). He wrote his response from a Christian theological perspective. Rousseau admired what was the moderate democracy of the Republic of Geneva which he found conducive to simple, plain existences; a quiet life which he hankered after and thought best suited human nature (Ryan, 1973, p. xxix). Hobbes' political philosophy was strongly influenced by the context of revolutionary upheaval and civil unrest endemic in seventeenth century England, and his anti-revolutionary political orientation (Levine, 2002, p. 15).

The responses of seventeenth century philosophers have developed this model in two crucial ways. Firstly, their portrayals have affirmed that of Golding's fictional depiction of life without governance. In societies in which there are no constraints on individual behaviours, what exists is a state of nature. Secondly, they have demonstrated that our responses to this potential chaos also stem from conscious human action; from values – our life experiences, beliefs, social and historical contexts, and so on. By combining the responses of Hobbes, Locke and Rousseau with the *Lord of the Flies* I have created a visual framework illustrating the four main elements of values-based law.

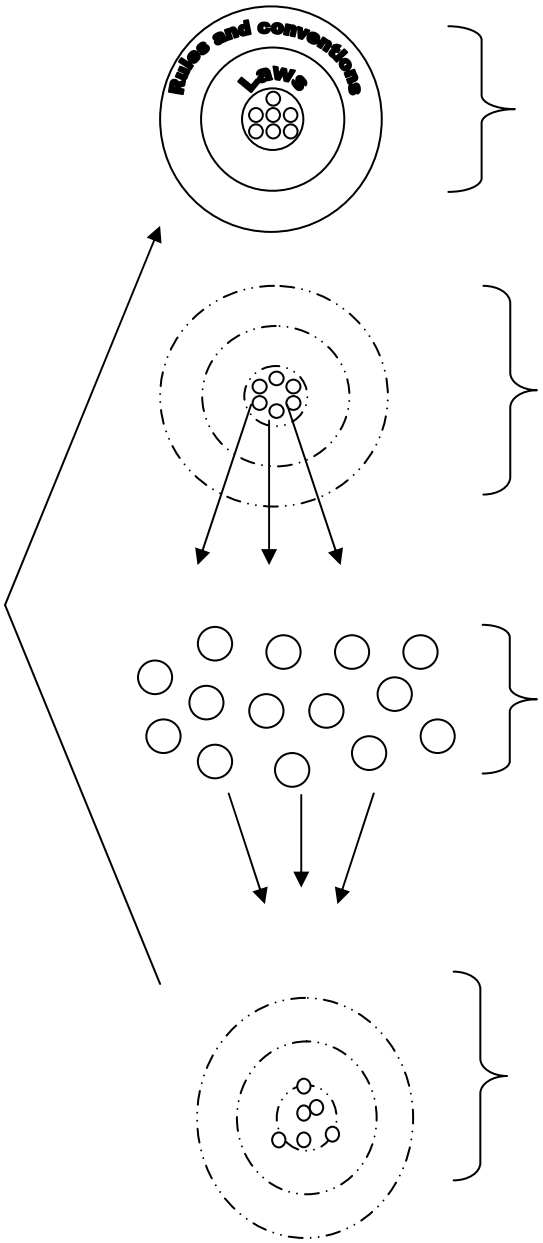
What follows is a brief overview of each stage to explain the nascent model. The next section of this chapter is concerned with a theoretical development of each stage and application of the model to discrete areas of governance.

Stage one illustrates times of normal social order, for example, the situation for Golding's school boys in their home environments before they were evacuated. The inner circles represent the values of individuals within society which are contained and constrained by laws, rules and conventions. These are represented by the outer circles.

Stage two represents the destabilisation of normal social order. This may be in response to a change of environment, an event or a new world view. Individuals' values emerge as the normal social rules contain and constrain them less and less.

Stage three is the state of nature. Normal rules and conventions either do not exist (as in the state of nature considered by Hobbes, Locke and Rousseau) or they are no longer valued sufficiently by enough people for the maintenance of social order.

Stage four shows how individuals' values begin to be contained again as new or existing social rules are re-established and sufficient numbers of people value them. In time, the situation re-stabilises and enough people value them sufficiently for a return to normal social order depicted at stage one.



1. Rules and laws envelope and contain individual values in 'normal society'. Enough members of society value the law sufficiently for it to constrain individual behaviours and collectively to maintain social order. This is the situation for Golding's school boys in their home environments.

2. In response to an event, a change in environment, new evidence or changing values, 'normal' rules and laws destabilise and individual values are exposed.

3. The state of nature: 'normal' rules and laws do not exist. Behaviours are governed by individuals' values. I have considered the following are the interpretations of the values that emerge in the state of nature:

- **Hobbes**: Gain, safety, glory or reputation ⇒ WAR
- **Rousseau**: Pride, shame and envy ⇒ WAR
- **Locke**: Perfect freedom, a state of equality ⇒ Natural laws attainable both through reason and God
- **Golding:** Pride, shame, envy, gain, safety ⇒ WAR-LIKE STATE

4. Theoretical responses for managing the state of nature. Rules and laws established by:

- Sovereign (Hobbes)
- Sovereign and general will (Rousseau)
- Natural law (Locke)

Figure 3. Values-based law.

So far, I have employed a novel and seventeenth century philosophy to identify the significant components of this theory. However, any numbers of examples are found in history, philosophy and literature which support my theory. Times of war provide perhaps the most obvious example.

War was only one of three situations in which Hobbes thought that a state of nature actually exists. (The other two were among people too primitive to have government and between sovereign nations (Hobbes, 1996, p. 85).) The normal social rules and conventions which govern peace time destabilise under the fear and threat of attack. As the normal rules destabilise, so altered values in the new environment (to preserve life and maintain national security) are exposed. Laws are re-established which are a response to, and reflect the shift in values. For example, the conditions under which killing becomes acceptable within the new war time environment are broadened and actions are made lawful which would be unacceptable in the normal social ordering of peace time. A recent example is provided by the international response to the terrorist attacks in New York on September 11th 2001. The terrorist attacks destabilised normal social rules and conventions and exposed fear and anger in the populations of Western nations. New laws were enacted as governments responded to the media, public outcry and politicians' anxiety to be viewed as resolving the crisis (Thomas, 2002).

A contemporary application of the state of nature is provided by Peabody (n.d.). Through the lens of political theory, Peabody employed *Lord of the Flies* to draw lessons for the problems surrounding governance and self rule in Iraq in 2004 following the removal of Saddam Hussein. Peabody found many parallels between Golding's and Hobbes' depictions of the instability of social life and likened their portrayals to the social discord and civil unrest in the absence of governance in Iraq. Peabody suggests that Hobbes' and Golding's portrayals show discord to be the natural state, and that while necessary, the state is artificially imposed. Peabody relates the struggle of Piggy and Ralph on Golding's desert island to maintain their tenuous grip on social order with the new government in Iraq which was struggling to prevent civil unrest. In doing so, he emphasises the illusory and fragile nature of stable government and social order, using the analogy of the emperor's new clothes which "can fall away in a moment" (p. 5).

Describing the background to his novel, Golding explained that his experiences of the Second World War were deeply affecting. They influenced his portrayal of the boys' responses to the absence of societal ordering. Golding witnessed the destabilisation of normal social rules and conventions in war time and the emergence of changed values that guided behaviours which had been accepted within the new environment of conflict.

> *Before the second World War I believed in the perfectibility of social man; that a correct structure of society produced goodwill; and that therefore you could remove all social ills by a reorganisation of society. It is possible that I believe something of the same again; but after the war I did not because I was unable to. I had discovered what one man could do to another. I'm not talking of one man killing another with a gun, or dropping a bomb on him… I am thinking of the vileness beyond all word that went on, year after year, in the totalitarian states… They were done, skilfully, coldly, by educated men, doctors, lawyers, by men with a tradition of civilisation behind them, to beings of their own kind. I must say that anyone who moved through those years without understanding that man produces evil as a bee produces honey, must have been blind or wrong in the head.*
>
> Golding, 1966, p. 85

The depictions of chaos, war and evil painted in contemplation of life without behavioural constraints are certainly shocking, but contemporary examples demonstrate how fragile and vulnerable social order is. The framework of societal rules which we have erected to constrain individuals' preferences creates the perception that we are civilised, predictable and ordered. But like the emperor's new clothes, if something happens to destabilise the social order, society's rules fall away, individuals' values emerge and the illusion of objectivity is shattered.

Part three - Kuhn's theory of scientific revolutions

In this part, I use Kuhn's theory of scientific revolutions to develop the model, expanding values-based law to apply to discrete areas of governance. He emphasises the role of values in the process of scientific revolution and is therefore directly applicable to values-based law. Kuhn's theory of normalisation and Berger and Luckmann's notion of objectivication demonstrate how, through processes of socialisation, we objectify acceptable behaviours in the form of laws, rules and conventions. However, what is produced cannot be likened to the objectivity say, that this is a tree, this is a cat, water boils at 100^{O}C. Crucially, both methods are dependent on values to uphold and sustain them. I draw from a variety of contemporary examples as well as Golding's novel to clarify and test my arguments.

The Structure of Scientific Revolutions

Thomas Kuhn was a philosopher and scientist concerned with, in the first instance, physics. Kuhn's interest shifted to the history of science as a result of some philosophical concerns he encountered in his scientific training and a long-standing interest in the philosophy of science. The result was *The Structure of Scientific Revolutions*. Kuhn's theory, established primarily through an examination of the history of science, proposed that:

> *Science is not the steady, cumulative acquisition of knowledge that is portrayed in the textbooks. Rather, it is a series of peaceful interludes punctuated by intellectually violent revolutions… in each of which one conceptual world view is replaced by another.*
>
> Ward, 1977, p. 144

Kuhn has been credited with popularising the notion of paradigms which are central to his thesis. He took paradigms to be "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners" (1996, p. x). A scientific paradigm provides a framework within a period of science which influences what is observed and how it is interpreted. Kuhn argued that there are brief periods of revolution in which paradigms are formed, set against a background of

longer calmer periods – which he called “normal science” (1996, p. 10). Since Kuhn developed the notion of paradigms, the concept has been more broadly defined.

> *A set of assumptions, concepts, values, and practices that constitutes a way of viewing reality for the community that shares them, especially in an intellectual discipline.*
>
> dictionary.reference.com

In science, a paradigm helps scientists to create avenues of inquiry, formulate questions, select methods with which to examine questions, define areas of relevance and to establish or create meaning (Kuhn, 1996, p. 10). So a societal paradigm exists at any given time and in an historical context within which enough of us value laws, rules and conventions sufficiently for the maintenance of stable social order. But what happens if the paradigm changes and enough of us cease to value the behavioural controls established and upheld by society’s institutions? And what might cause a paradigm change?

Kuhn’s theory and Stage 2 of values-based law

Stage two represents the destabilisation of the normal social rules and conventions which govern behaviours. As people value the rules less and less, the outer rings which were solid at stage one begin to lose their ability to constrain individuals’ values. This may be in response to a change of environment, an event or a new world view.

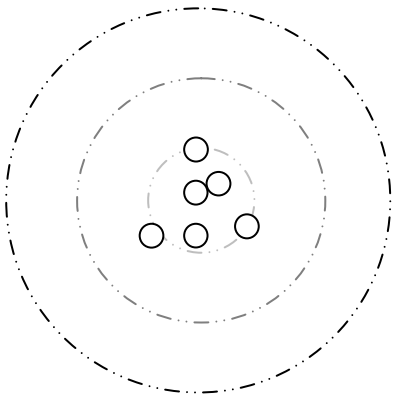


Figure 4. Stage 2 of Values-based law.

Any number of factors may act as a catalyst for the destabilisation of stable social order. But crucially, it is not the event itself. The destabilisation occurs because of the altered way we view the world following the event. This paradigm change affects how we individually and collectively value the societal constraints on our behaviour.

Kuhn draws on the process of political revolution to elucidate his theory of scientific revolution. Kuhn argues that political revolutions are begun by "a growing sense" that societies institutions are failing to meet the problems posed by an environment they have in part created.

> *Political revolutions are inaugurated by a growing sense, often restricted to a segment of the political community, that existing institutions have ceased adequately to meet the problems posed by an environment that they have in part created. In much the same way, scientific revolutions are inaugurated by a growing sense, again often restricted to a narrow subdivision of the community that an existing paradigm has ceased to function adequately in the exploration or an aspect of nature to which that paradigm itself had previously led the way.*
>
> Kuhn, 1996, p. 92

The "growing sense" which Kuhn refers to is a paradigm change which initiates the destabilisation process; a collective feeling that institutions are no longer effective for their purpose. In an environment where society's institutions are questioned, this allows for the individual expression of preferences about the political rule. The "growing sense" becomes a cumulative and collective rejection of the current political regime. In their engagement with their political environment individuals cease to value the way the institutions are functioning.

The catalyst which initiates the paradigm change could be anything; political revolution, hurricanes, terrorist attacks. But whether this is a "growing sense" or a sudden catastrophic change in the environment, the result is the same. Something happens to alter the way people see their social world. Through this new world view, individuals may not value the pre-existing laws, rules and conventions sufficiently to constrain their preferences. If enough people cease to value the behavioural constraints sufficiently, destabilisation occurs and the state of nature ensues.

In *Lord of the Flies* the paradigm change was initiated by the dramatic change in the boys' known environment to the desert island with no adults and only their individual values (including their experience of their previous social order) to guide their actions.

As time distanced the boys from their previous world, so their valuing for its rules diminished, individual passions and emotions were exposed which became increasingly influential. At the outset, there was only one boy – Jack who did not value the old system of rule. Initially Jack conformed to the established system. But as he became more and more caught up with the hunt and the desire to eat meat, so he conformed less and less to the system established by the majority. As the other boys saw what Jack was doing, so increasing numbers of them wanted to hunt. The existing social order disintegrated. The act of removing the boys to the island initiated a paradigm change, which resulted in the destabilisation of the old system of law and order.

The civil unrest which followed hurricane Katrina in New Orleans in 2005 provides a recent example of a dramatic change in environment initiating the destabilisation process. Scenes of complete lawlessness followed the hurricane-devastated city and police were stopping anyone they saw on the street and warning them that they were not safe from attack or rape. News bulletins described the deployment of the military with a shoot to kill policy attempting to regain civil order (cnn.com, 2005). As the rule of law destabilised the emotions and passions of individuals emerged. What resulted was not unlike Hobbes' depiction of the state of nature where life was truly miserable and wracked by fear of attack and death. The city's infrastructure was devastated and the population feared for their lives. People's need for food overrode the usual collective adherence to the rules, and people stole and looted shops. The pre-hurricane structure and substance of social order ceased to be congruent with the values of the people remaining in the flood-ravaged city. The institutions to uphold and police the law were absent, and the fear of punishment was overridden by survival instincts. The devastation wrought by the hurricane and subsequent absence of infrastructure initiated the paradigm change which destabilised the normal social order.

Paradigm conflict

Kuhn's theory identifies what I have described as a state of nature as the period of conflict between an old and a new paradigm. In science, when revolution happens and a new paradigm is created, there is a process whereby sufficient numbers of the scientific community must commit to the new paradigm. This, Kuhn argues, is because "the normal scientific tradition that emerges from a scientific revolution is not only

incompatible, but often actually incommensurable with that which has gone before" (1996, p. 103). In political revolution, as the growing sense develops that existing institutions have ceased adequately to meet the problems posed by the environment, the new way of perceiving political institutions becomes incompatible with the old paradigm. As with the new scientific paradigm, so with political revolution; a choice has to be made between the new and the old world view. And the choice between competing paradigms is "a choice between incompatible modes of life" (Kuhn, 1996, p. 94).

What results from this incompatibility is the formation of competing camps; one seeking to defend the old institutional order and others seeking to institute new political order. So it was with the boys on Golding's desert island. Ralph wanted to maintain the old social order and ensure the establishment and maintenance of a lit fire visible enough to attract any ships passing the island for rescue. Jack wanted to lead the hunt and eat meat. The competing camps were incommensurable. This was dramatically illustrated by the incident in the middle of the novel when all the boys, including those that were assigned to maintain the fire, decide to go with Jack hunting for pigs. It simply was not possible for all the boys to be hunting and for the fire to remain lit. The desperate realisation that they could have been rescued, had smoke been visible, begins the process of fracturing the two camps.

In the unstable period where a new paradigm is in conflict with an old one, opportunity arises for the expression of individual values. In this period what results is what I refer to as a state of nature. For example, in relation to political revolution, Kuhn argues that in the period of conflict there is no political framework within the society. In this state, people become increasingly "estranged from public life" and behave more and more "eccentrically within it" (1996, p. 93). In short, in the absence of the usual societal restraints on behaviours, there is opportunity for the expression of individual values which are no longer constrained within the political institutional frameworks. It is during the period of destabilisation and conflict between the old and new political paradigms that individuals' values emerge.

In response to the new paradigm, the normal rules represented by the outer circles destabilise. In the period of conflict between the old and new world views, the previously contained values emerge, resulting in a metaphorical state of nature. This process may apply to entire social orders or to discrete areas of law.

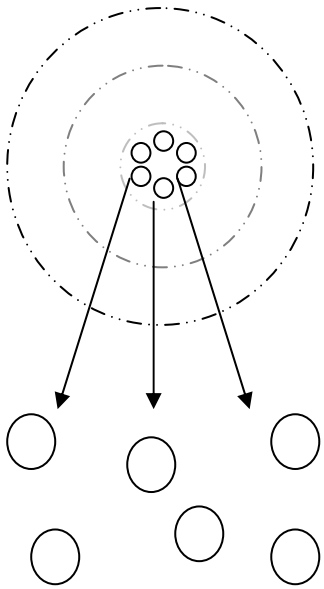


Figure 5.

Stage 3 of Values-based law.

Applying the model to discrete areas of law - micro and macro states of nature

So far I have considered the effect of destabilisation on entire social orders. But it is possible to apply the model to discrete areas of governance. The laws, rules and conventions which govern a particular area of life may become destabilised by a new paradigm relating *specifically* to one discrete aspect of how we live.

What I refer to as the state of nature which follows in response to destabilisation in specific areas of law is not to be compared with the state of nature portrayed by Golding or Hobbes. Their portrayals and the recent events in New Orleans, are examples of what I shall call *macro* states of nature. The rule of law is no longer valued sufficiently by enough individuals for stable social order to be maintained. In the macro state of nature, the entire social order is significantly destabilised, rawly exposing the passions and emotions of individuals in many areas of governance. In specific, discrete areas of law the same process is initiated and individual values pertaining to that specific area of governance become exposed. What results in the period of conflict between an old and new paradigm is what I shall describe as a *micro* state of nature. The entire social order is not destabilised in the same dramatic way.

Consider again Kuhn's theory of scientific revolutions. He argues that paradigms exist within discrete areas of intellectual inquiry and may specifically relate to very

particular areas of scientific expertise. In this case, only those scientists working within *that* particular area of inquiry are affected by a revolution. Kuhn uses the example of astronomers and the discovery of X-rays to demonstrate. The paradigm change relating the emergence of X-Rays was very important to scientists working in the field of radiation theory or cathode ray tubes. The "emergence of X-rays necessarily violated one paradigm as it created another" (Kuhn, 1996, p. 93). However, to an astronomer X-rays are perceived as an addition of knowledge, but they remain otherwise unaffected by this new discovery. So it is with discrete areas of societal governance. The following example illustrates.

In 2003 the New Zealand government enacted legislation enforcing a complete ban of smoking in public places including work places, restaurants and bars. Prior to its ban, smoking in public places was accepted as a social norm. However, growing scientific evidence reinforced the detrimental affects of smoking on health, most recently research confirming the link between lung cancer and passive smoking. This, coupled with the government's desire to promote healthy work places, provoked the move against smoking in public places (Bell, 2003). The normal social rules and conventions of the old paradigm were no longer compatible with the new paradigm and a period of destabilisation ensued. As the conflict arose between the two paradigms a micro state of nature relating specifically to smoking in public places followed.

Kuhn refers to the period of conflict between paradigms in scientific revolution as debate. When a new and old paradigm conflict, the two different sides discuss the relative merits of their respective paradigms. As no two paradigms leave the same problems unsolved, so the debate asks which problems are more significant to solve (Emory, n.d. p. 13). The debate provides the opportunity for scientists to discuss why either the new or the old paradigm should be followed, during which their values are revealed.

So the micro state of nature which occurs between a new and an old paradigm in discrete areas of governance can occur within public debate. Society has formal and informal mechanisms to facilitate this debate, such as the media, group action, and parliament's debating chamber and, in relation to the best interest test, common law.

The public debate facilitates the expression of individuals' valuation of the new paradigm.

In the micro state of nature which resulted from the emergence of the new paradigm about smoking, public debate followed. This provided the opportunity for the expression of people's values about whether smoking in all public places should be banned. With the emergence of more scientific evidence, so smoking in public places became increasingly unacceptable. Smoking was banned in many areas, such as hospitals, school grounds, and some restaurants and bars. Those who supported the old paradigm argued that the legislation was unnecessarily restricting to people's individual freedom to smoke where they chose. Some bar owners argued that they would lose significant income from people who wanted to enjoy a drink and smoke at the same time. In support of the new paradigm, people argued that the harm done both to non-smokers by passive smoking and the hope that banning smoking in public places may encourage people to give up an unhealthy and increasingly unsociable habit justified the restriction of individual liberty.

Stage 3 to 4 of values-based law – success of the new paradigm.

Ultimately, it is the outcome of the conflict between old and new paradigms that determines which succeeds. But how does a new paradigm succeed and what fixes it?

Kuhn argued that a new paradigm is fixed by the assent of the relevant community (1996, p. 94). For instance, a new *scientific* paradigm is fixed by the assent of the *scientific* community. A new *political* paradigm is fixed by the assent of the *political* community. Thus, the normal laws, rules and conventions which exist to maintain social order are fixed by the assent of society. In short, the new paradigm must be sufficiently valued by enough members of the relevant community for it to successfully replace the old paradigm.

In political revolution, Kuhn acknowledges that mass persuasion and even force may be necessary to encourage people to adopt the new paradigm (1996, p. 93). The majority of the community – scientific or political – must be convinced to value the new paradigm sufficiently (for whatever reason) for it to succeed.

Let us return again to the example of banning smoking in public places. The old paradigm accepted smoking in public places as part of normal social behaviour. The new paradigm gradually emerged from scientific research about the detrimental health effects of smoking. The two paradigms were incompatible. When the new scientific evidence accumulated, people started to view smoking in public places in a new light. A member of the community might say, for example, "I used to think that people should have the freedom to smoke in public places. But now I accept the evidence that smoking is harmful to both smokers and non-smokers and so I support a complete ban on smoking in public places". In the micro state of nature, public debate followed and sufficient assent was indicated from the community that smoking was sufficiently harmful to be no longer acceptable in public places. The new paradigm succeeded. The New Zealand government responded by fixing the new paradigm, enacting laws to prohibit smoking in public (Smoke-free Environments Amendment Act 2003).

However, the new paradigm will not always be successful. For example, Hurricane Katrina caused the people of New Orleans to have a new world view; those left in the flood ravaged city were concerned for their very survival. But the new world view was temporary. The parts of the infrastructure were quickly re-established which provided people with sufficient basic necessities for survival. The people no longer had to loot shops to get food and water, and the military employed force to persuade people to value the rule of law sufficiently to adhere to it. The new paradigm created by the hurricane dissipated and the return to the old rule of law was given the assent of the community.

Absence of a state of nature

If there is no state of nature between an old paradigm and a new paradigm, or if new institutional orders are enforced without the assent of the community, the expression of individual values are not heard. How then can support from the relevant community for the conflicting world views be gauged? Without a state of nature, a new world view may be fixed which has not received assent from the community and which may not be compatible with the prevailing values of society.

Consider the enactment of English poll tax laws in the late 1980s. The poll tax was introduced by a Conservative government determined to transform the method of funding for local government. The old paradigm taxed people according to their assets (their house) or their income, in short, their ability to pay. The new paradigm taxed all people equally, and all home owners paid the same regardless of their means.

The poll tax was anathema to many people in English society – they simply did not agree with the new world view that people should be taxed without reference to their ability to pay. The Conservative party had a massive majority in parliament at that time which enabled them to enact legislation without considering the values of the community about the collection of taxes. No mechanism gauged the assent of the community. The demonstration marches which followed the implementation of the new system indicated the strength of feeling against it. One of the demonstrations turned into one of the largest riots ever seen in central London. The poll tax has been credited with the downfall of the then Conservative leader, Margaret Thatcher, and as a direct result of this public expression of feeling, the poll tax was revoked (bbc.co.uk, n.d). The law did not receive the assent of the community. It was in direct conflict with prevailing societal values and therefore failed.

Fixing the paradigm

Once assent from the community has been received, the new paradigm becomes fixed. So what happens to facilitate this process? How do we move from having support for the new world view to, for example, laws, rules and conventions that become part of our objective reality? This happens through processes of objectification.

This figure illustrates the re-containment of values from the micro or macro state of nature. As support for the new paradigm is established and rules are set which are in accordance with the new world view, so individuals' values will begin to be effectively constrained.

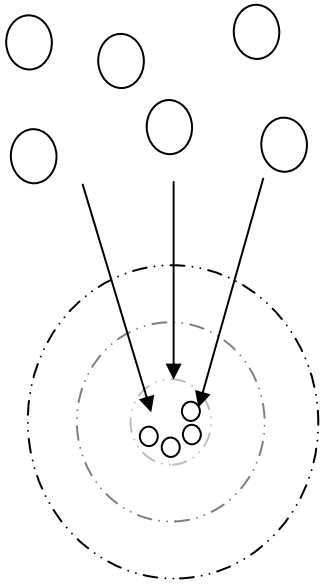


Figure 6. Stage 3 to stage 4 of values-based law.

Kuhn's process of normalisation

In reference to scientific revolutions, Kuhn suggests that paradigms are fixed not only by the assent of the community, but by a commitment to the new paradigm. When the new paradigm is accepted, the community sees things in a different light. A scientist must have faith in the new paradigm. This is often based on values – or what Kuhn describes as personal and inarticulate aesthetic considerations. For instance, the new paradigm may be neater, more suitable, simpler or more elegant (Kuhn, 1996, p. 155).

Assuming that assent and then commitment to the new paradigm is achieved, the scientific revolution proceeds to a period of normal science within its field of enquiry. Kuhn explains this in relation to the process of socialisation which new scientists receive from the scientific community. Normalisation occurs through the education of new scientists, the re-education of old scientists, the use of the new paradigm to solve problems, and the fixing of the paradigm within the contemporary literature (Kuhn, 1996, Ch. XI).

Thus, the new paradigm becomes not only normalised, but objectified. The objective reality of the scientist working in a particular field is presented via her education, the text books she learns from and the teaching of her peers who are fixed in the new paradigm. This *is* the way we conduct experiments to find out about X, Y or Z. These *are* the laws of gravity. The sun rotates around the earth. The earth rotates around the

sun. And so on. We do not say, at this time, on this day, science tells us that the earth rotates around the sun. The world view is accepted that the earth revolves around the sun. This is normalised, through our education and socialisation processes and therefore makes up part of our objective reality.

In this way the new paradigm becomes the normal objective reality within the scientific community. This process may not be fully complete until the new generation of scientists has totally succeeded the old generation (Emory n.d., p. 16). The man who continues to resist after his whole profession has been converted has *ipso facto* ceased to be a scientist (Kuhn, 1996, p. 159).

Berger and Luckmann's process of objectivication

Earlier, I briefly considered the process proposed by Berger and Luckmann which they call objectivication. Kuhn's process of normalisation and Berger and Luckmann's process of objectivication have startling similarities, and their theory explains how our socialisation processes fix value judgements about how we should behave. Their theory compliments and supports Kuhn's theory of socialisation.

Berger and Luckmann describe objectivication as the process "by which the externalized products of human activity attain the character of objectivity" (1966, p. 78). Berger and Luckmann argue that the achievement of objectivity may be through institutionalisation (p. 80). They also suggest that objectivication may be achieved through a process of socialisation and the internalisation of the roles and attitudes of significant others into general rules about how to behave (p. 152–153). They use the example of a boy who learns that it is not generally acceptable behaviour to spill soup.

Firstly, the mother expresses negativity and anger towards her son for spilling soup. The boy internalises this command and first thinks it is only his mother who is negative towards soup spilling. He then goes through a process of generalisation whereby he realises that it is not just his mother who is against soup spilling. The boy recognises that everybody is against soup spilling. The social norm is generalised and the boy learns that "one does not spill soup – one being himself as part of a generality that includes, in principle, all of society in so far as it is significant to the child" (p. 153).

The process of objectification is complete; the rule not to spill soup becomes part of the boy's objective reality.

Berger and Luckmann's process of objectivication parallels Kuhn's theory of normalisation. When the boy realises it is not *normally* acceptable to spill soup within the community that he lives, this is the point when objectivication occurs. Similarly, as the new scientific paradigm goes through the process of normalisation, it becomes the accepted objective reality for scientists working in the relevant field.

Objectification of laws, rules and conventions

Conventions are objectified via Berger and Luckmann's socialisation process. Laws and rules are objectified both through convention which teaches us we must follow the law, and also through formal institutional processes to which society has given the power and authority, such as through parliament and judges at common law. In much the same way that Kuhn's scientific paradigms achieve objectivity through text books, education and use of the current paradigm for solving problems, so the values of the relevant community become objectified in legislation, codes of conduct, institutional rules and so on.

We are immersed in societies in which socialisation and institutional orders are objectified by systems and processes which we accept as legitimate for the purpose. Of course, we have little choice about the societies or the systems of government we are born into. However, in democratic societies we do have the opportunity to express our preference for who governs us and we (mostly) accept the systems of government which exist to enact, police and adjudicate the law. According to Hart, the true foundations of a legal system involve the majority who habitually obey a sovereign, and comply with social conventions that represent the community's acceptance of rules empowering certain people or groups to create law (1994, p. 100). Accordingly we have houses of representatives which propose, debate and enact laws and in common law jurisdictions we accept a system whereby judges change and develop the law according to their perception of prevailing societal values.

Theoretical methods for fixing laws

Philosophers have proposed many different theoretical methods to guide the fixing of laws. For example, the utilitarians, Jeremy Bentham and John Stuart Mill, envisaged the maximisation of good as the ultimate guide for social policy and legislation (Williams, 1973). These perspectives are useful in that they justify and support the framing of laws in particular ways. However, employing theoretical methods for objectifying behavioural constraints does not alter the fact that laws and rules stem directly from the values of the relevant community. Consider the example of the legalisation of homosexuality in England in the 1950s.

In 1957, a report from the Wolfenden Committee, a group of men and women appointed by the Home Office recommended that homosexual practices between consenting adults in private should no longer be a crime in England (cited Hart, 1963, p. 13). The Committee deemed offence to the moral standard of the day insufficient harm to restrict by law the individual and private liberty of consenting adults to engage in their preferred sexual activity (Hart, 1963, p. 13). The justification for this position rested largely on Mill's famous dictum that power can only be rightfully exercised over any member of a civilised community against his will if it is to prevent harm to others (Mill, 1972, p. 78). But whatever the theoretical justification, the debate was sparked by the emergence of a new world view about homosexuality. In the period of conflict between the new and the old paradigm, the law's role for enforcing common standards of morality became the subject of intense theoretical debate. Hart (1963) represented the legal positivists who insisted that the relationship is separate and Devlin (1961) represented those that disagreed. Ultimately, however, the rights of consenting adults to do as they please in private prevailed and the new paradigm was fixed in legislation.

Moving from stage 4 and returning to stage 1 of values-based law

The final stage of values-based law concerns the fixing of the new social paradigm to the point where it becomes completely normalised. Part of the objectification process is in the transition phase between stages 4 and 1. This process may take place across generations.

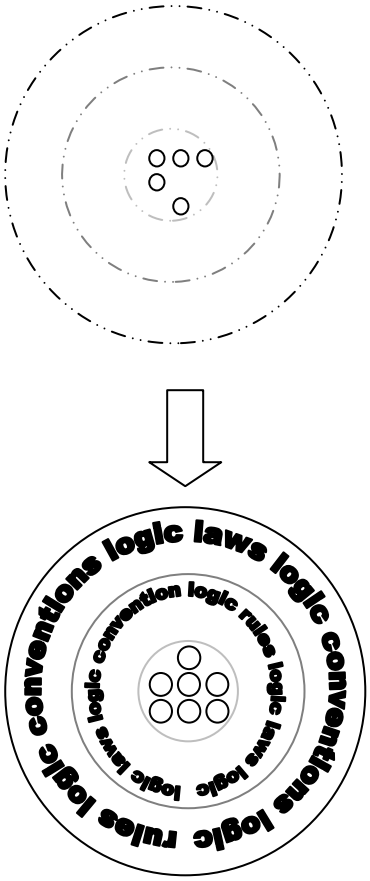


Figure 7. The transition from stage 4 returning to stage 1 may take many years and even across generations.

At stage four there remains a period of instability. The new world view is not fully normalised and objectified. For example, we accept same sex civil unions and the freedom of individuals to live their preferred sexual lives. But it is still not established social convention (except for certain social contexts) for gay couples to display their affections publicly, say by holding hands or kissing in public in the same way that heterosexual couples do. Our societies remain in a period of instability where the new paradigm which accepts same sex unions has not become fully normalised in every aspect of social life.

Similarly, with specific laws there may be a period of instability before they become completely normalised. This period allows for the continuing expression of individual preferences within the framework of the new world view. In the state of nature between two paradigms not everyone will have agreed with the new world view. There is a settling period as people adjust and the new paradigm is sufficiently normalised for it to become a fixed part of our objective reality.

Consider the recent enactment of the Hunting Act 2004 banning fox hunting with dogs in England. For hundreds of years foxes have been hunted in rural Britain, but changing social values destabilised the normal social rules and conventions surrounding the sport. Fox hunting was increasingly viewed as an activity of the upper classes; a rural tradition which involved cruelty to animals no longer congruent with prevailing societal values. (See for example the website of the UK's Royal Society for the Protection of Cruelty to Animals dedicated to the banning of fox hunting: banhunting.rspca.org.uk/). Individual values began to emerge as fox hunting became less socially acceptable and the normal conventions began to destabilise. For example, activists disrupted hunts and raised the profile of their cause. A Labour government sympathetic to anti-hunt sentiment was elected, and they mooted legislation. The new paradigm which viewed fox hunting with dogs as cruel was utterly incompatible with the old paradigm which accepted fox hunting as a normal social activity. A micro state of nature in the form of public debate ensued. Once support for the new world view was established, it was fixed in legislation.

A period of instability followed and this was accepted as a normal course of the legislative process (bbc.co.uk, 2005a.). One news bulletin explained that the League Against Cruel Sports, which monitors hunts, found up to 40% of people fox hunting were still breaking the law six weeks following its enactment (bbc.co.uk, 2005b.). It may take several generations before the new world view is completely normalised.

Summary

In this chapter I have developed a theory of values-based law which argues for the recognition that laws, rules and conventions are based on, contain, and for them to be effective, are dependant on individual values. In a state of nature, there are no constraints on individuals' behaviour and values are clearly exposed. This state may be macro – and relate to entire social rule, or micro – relating to discrete areas of law. The state of nature follows the destabilisation of normal social conventions, rules and laws resulting from people ceasing to value them sufficiently. The destabilisation is the result of a paradigm change; a new world view which is incompatible with the old world view. It is in the period of conflict between the two that individuals' values emerge and support is given to either the new or the old paradigm. Whichever has the

most support will succeed. These values provide the source for, and become objectified in processes which create new laws, rules and conventions.

This chapter has demonstrated the irrefutable relationship between law and values. So why is law and legal decision making portrayed as value-free, even when this position is clearly unsustainable? And why do we continually seek to objectify values and then detach the subjective, human component from the process? These are the concerns of the next theoretical stage of values-based law.

Chapter 3 – Bad Faith

Values-based law challenges the myth that society's laws, rules and conventions are anything other than essentially human, values-based constructs. In order to show this and to develop my theory of values-based law I have made use of seventeenth century philosophers' rather bleak portraits of human nature in the absence of law, rules or conventions; Golding's equally depressing portrayal of English school boys without the normal social constraints; and several contemporary illustrations of the same tendency. I have also drawn on the theoretical perspectives of Kuhn, and Berger and Luckmann, to demonstrate that we objectify values through normalisation and socialisation processes in response to the state of nature. However, a deep puzzle remains: why is it that we do not always recognise that we use methods of objectification?

> *Man is capable of producing a world that he then experiences as something other than a human product.*
>
> Berger and Luckman 1966, p. 78

This chapter makes use of the philosophy of Sartre and the psychological experiments of Stanley Milgram to explore this puzzle.

Sartre, existentialism and bad faith – a brief introduction

Jean-Paul Sartre was a twentieth century existentialist French philosopher. Existentialism takes as its point of departure the concrete individual struggling to makes sense out of his or her life (Kamber, 2000, p. 5). Sartre provides important clues about how and why we employ methods of objectification. These ideas, and in particular his notion of bad faith, are central to this thesis. However, some of Sartre's ideas which support the notion of bad faith are unrealistic and logically flawed.

It would be impossible to deal with the intricacies of Sartre's philosophy within the confines of this thesis. Instead, I distil some of Sartre's key ideas and show how they inform and guide my understanding of values-based law.

Mary Warnock provides a practical and common sense perspective on Sartre's philosophy. I draw from her critique to isolate the significant elements of bad faith in order to create a grounded and applicable framework through which to critically examine best interest decisions. The psychological experiments of Stanley Milgram provide empirical behavioural evidence which supports, explains and clarifies Sartre's notion of bad faith.

Sartre's bad faith

With typical inscrutability, Sartre identified an existentialist as "one who holds that existence precedes essence" (Warnock, 1978, p. 109): fundamentally a person simply exists - what they are or what they become depends on what they choose to do. Sartre uses a pen knife to illustrate his point. A pen knife is a pen knife, to be used for cutting and gouging for example. That is its purpose and essence. But, according to Sartre, a person is born without purpose or essence. As such, we are free to make choices and make ourselves what we are.

The idea that nothingness is the unique characteristic of the conscious being is central to Sartre's philosophy (Warnock, 1978, p. 112). When we are faced with the reality of this freedom and nothingness, we become frightened. It dawns on us that we inhabit a chaotic and irrational world, and somehow we must cope (Seedhouse, 1998, p. 135). We long to be able to bring order to disorder, to classify things, and to organise and separate objects. Yet we find ourselves in a state of nausea when we contemplate this chaos, and anguish at the realisation of freedom with nothing but ourselves to determine our choices.

Sartre develops these ideas in the novel *Nausea* (1962). Sartre tells the story of a man (Antoine) struggling to make sense of his subjective self within the objective reality of his daily life. As Antoine goes about his usual activities, his days are punctuated by periods in which he seems completely overwhelmed by his external reality, his perception of it, and place within it. In response, Antoine experiences a physical reaction of nausea.

In *Being and Nothingness* Sartre introduces the idea of bad faith - Sartre's term to describe the protections we assume as individuals in response to nausea and anguish (Warnock, 1978, p. 121). Sartre demonstrates what he means by bad faith using an example of a man 'objectifying himself' by adopting the role of waiter (1958, p. 83). The waiter becomes not objective in the sense that an inkwell is an inkwell. Rather he takes on the characteristics and represents to the world the identity and behaviours associated with the role of being a waiter. In this way he becomes the objective reality of a waiter to himself and others. The waiter has to get up at 5 a.m., sweep the floors and knows the rights and performs the duties associated with being a waiter. By taking on this role he fills the void of nothingness and obscures the reality of his essentially disordered situation; that he is free to choose to be whatever he wants to be and do whatever he wants to do. By assuming the role of waiter "I am in the mode of being what I am not" (Sartre, 1958, p. 83).

Existentialism and bad faith – critique and application

Some of Sartre's existential positions immediately challenge us. For example, is the world really as chaotic and our freedom to make choice within it as debilitating as Sartre portrays? As Warnock points out, this is a necessary device which Sartre commonly uses to emphasise particular points within his descriptive method of philosophy (p. 122). From these seemingly extreme positions, it is possible to isolate the essence of Sartre's arguments to establish a basis from which to develop a theoretical perspective applicable to our everyday experiences. But is it really necessary to accept Sartre's perception of the nature of human existence in order to accept the notion of bad faith?

The problem with nothingness

Sartre's idea that the essence of human existence is freedom and nothingness is unsustainable because the ideas of freedom and nothingness are incompatible. If we are free to act, we must have a will, an intention to act, and the capacity to recognise and make choices. To portray our existence as nothingness denies the reality of all aspects of our external world and our intrinsic human abilities to process and respond to it. Freedom cannot *stem* from nothingness because there is no nothingness.

Consider again an example I gave in chapter one. I witness a child running out onto a busy road. I have a number of choices about the way I can react. And I have at least some freedom to choose how to react. My reason processes a number of possible responses. As I evaluate the situation I also experience physiological and emotional reactions to the unfolding events. Should I run out onto the road and save the child? Should I look around and ask someone else to respond? Should I call to the child and shout "stop"? I then opt for a course of action, say, to run out onto the road and save the child from an approaching lorry. This response comes from a complex array of values and evidence. It does not stem from nothingness. Only nothingness can stem from nothingness.

Sartre's own portrayal of our response to nothingness – anguish and nausea – indicates that there cannot be nothingness. As with Sartre's perception of human existence, his perception that we respond with nausea and anguish represents an extreme position. If all of us responded to the external world like Antoine in *Nausea* the world would be a strange and anxious place. Of course we sometimes respond to the situations we meet in daily life with anxiety. But for the majority of us that anxiety is not utterly debilitating. Indeed, anxiety may be useful for guiding decisions about our actions in the situations that we meet.

I propose that the notion of bad faith does not have to be accepted *solely* as a response to a state of nothingness. Sartre's idea can be accepted without having to adopt his concept of nothingness. Warnock suggests that we should think of Sartre's portrayal of consciousness as a gap or emptiness which we are always trying to fill either by thinking or acting (p. 112). Similarly, the nausea and anguish that Sartre portrays can be related to the anxiety that we feel when we are required to make difficult choices and take responsibility for them. In summary, when we employ mechanisms to objectify ourselves and our world we are not responding to nothingness, we are making sense of and using our freedom and choice to respond to what is happening in our daily lives and environments.

What makes bad faith bad?

If we perceive someone as a waiter, we know what to expect from him. We know they are going to perform certain actions. Their behaviour will be to a certain extent predictable in that we know the role that a waiter has. We therefore know how to engage with the waiter. The identity the waiter has and the role he plays helps us to make sense of that reality. "There is nothing there to surprise us" (Sartre, 1958, p. 82). I enter a café and wish to order a cup of coffee. I recognise the waiter instantly because he is carrying a small order book and wearing an apron. Immediately I know how to behave in this situation. I take a seat at the table and wait for the waiter to come to the table to take my order. Objectifying that person as a waiter has helped me make sense of my reality in the café environment. So what makes bad faith *bad*?

Employing mechanisms to manage our subjective selves within our external reality is not bad *per se*. We do it all the time as part of our individual engagement with our objective and social worlds. Perceiving the waiter has helped me to make sense of my reality in the café rather than seeing him instead as John from Bay View with a cat and a sick elderly mother. But this mode of objectification is not bad. Indeed, it is a helpful tool which I employ to make sense of different situations.

When I am working as a nurse I objectify myself in the same way that Sartre's waiter objectifies himself. I employ this as a coping mechanism particularly in high stress situations intentionally to disengage my emotions so that I can deal practically and effectively with the circumstances at hand. For example, say a patient is exsanguinating from a bleeding vein in his oesophagus, I adopt my objective role as a nurse equipped with the skills to effectively manage the situation for the best patient outcome. If I had not objectified my role in that scenario and engaged purely on a subjective level, the full horror of the situation would be debilitating to the extent that it would have negatively influenced my ability to function, less still to achieve a positive outcome. (Even now, in describing a situation which I regularly confronted in practice many years ago, I find myself using language which objectifies my behaviour in that context.)

In each of these situations, employing a mechanism of objectification does not appear to be problematic. However, central to Sartre's bad faith is that we use processes of

objectification to deceive ourselves, to deny our subjectivity and thus our values. Sartre uses the example of lying to demonstrate bad faith. The essence of the lie implies that the liar is in complete possession of the truth. The liar intends to deceive and does not seek to hide this intention from himself. But what changes the liar into a state of bad faith is that "it is from myself that I am hiding the truth" (p. 72). It is when the liar attempts to deceive himself about the lie that bad faith ensues. The two necessary aspects of the state of bad faith are therefore deception and intention. If I *intend* to *deceive* myself about the lie I am going to tell, instead of being honest, authentic and sincere by acknowledging that I am going to tell a lie, then I am in bad faith.

Do we deceive ourselves?

Sartre's waiter is in a state of bad faith because he *intentionally* adopts the role of waiter and *denies* that he does this to fill the void of nothingness and obscures the reality of his situation; that he is free to choose to be whatever he wants to be and do whatever he wants to do. So was I acting in bad faith when I *intentionally* adopted the objective role of nurse to avoid the stark reality that I was responsible for preventing a young man from bleeding to death? I do know that it was an extremely useful mechanism to manage a difficult and emotionally challenging situation. But I was not *intentionally deceiving* myself about the role I adopted. Does this mean that I was not, therefore, acting in bad faith? It seems that bad faith is inextricably linked to whether we use modes of objectification and *intentionally deceive* ourselves to deny our subjectivity within the reality of our external world.

Conscious intention and self-deception

According to Sartre, when we act in bad faith we *knowingly* employ methods of coping with our freedoms which deny the reality of subjectivity. Conscious intention is necessarily a pre-requisite of bad faith. We are free to choose whether to employ mechanisms of objectification which deny the reality of this freedom and choice. But when we adopt bad faith we deceive ourselves that this is how and why we behave in this way. However, the uneasy and apparently contradictory relationship between intention and deception raises fundamental logical and practical considerations which appear to be insoluble. Consider Sartre's account of self-deception and bad faith.

> *How can we believe by bad faith in the concepts which we forge expressly to persuade ourselves? We must note in fact that the project of bad faith must be itself in bad faith. I am not only in bad faith at the end of my effort when I have constructed my two-faced concepts and when I have persuaded myself. In truth, I have not persuaded myself; to the extent that I could be so persuaded, I have always been so. And at the very moment when I was disposed to put myself in bad faith, I of necessity was in bad faith with respect to this same disposition. For me to have represented it to myself as bad faith would have been cynicism; to believe it sincerely innocent would have been in good faith. The decision to be in bad faith does not dare to speak its name; it believes itself and does not believe itself in bad faith; it believed itself and does not believe itself in good faith.*
>
> Sartre, 1958, p. 91

Sartre's description places us in a spiral of self-deception. We deceive ourselves about our subjective reality which leads to deceptions about the mechanisms we use to avoid that reality which also then become part of the deception. Thus we not only perform actions in bad faith to avoid the reality of our existence, but we exist in a state of bad faith where we deny that we are in bad faith. We are complicit in our own self-deception.

But how far does the deception go? According to Sartre, bad faith is an entire way of being, of perceiving reality.

> *With bad faith a truth appears, a method of thinking, a type of being which is like that of objects; the ontological characteristic of the world of bad faith with which the subject suddenly surrounds himself is this: that here being is what is not, and is not what it is.*
>
> Sartre, 1958, p. 91

However, to take Sartre's argument to the conclusion towards which he appears to be rapidly heading reduces the idea of bad faith and self-deception to absurdity. Is it possible that we can become so consumed by the need for objectification, and deceive ourselves so effectively that we cease to be aware of or have the conscious intention to act in bad faith? For there to be bad faith, logically there must be conscious intention. For example, Sartre may have interpreted my challenge to his notion that consciousness

is nothingness as evidence of bad faith. Have I deceived myself so effectively that I am no longer aware of what Sartre perceives is the reality of existence? But if I am so deceived about my need to objectify myself, so utterly immersed in my state of bad faith that I am not even conscious of my intent, then how can I be in bad faith? And is this complete immersion in a state of bad faith, which according to Sartre is clearly undesirable, even possible?

To achieve any state of bad faith there must logically be a *conscious intention*. Ultimately, bad faith is the adoption of mechanisms which deny the free, subjective self. If I *deny* my subjective self and try to objectify myself and everything within my reality then I am *intentionally* deceiving myself. I do not just find myself acting in bad faith. I do so for a reason. I consciously intend to use mechanisms to manage the reality of my subjective self within an objective reality. And if I intend to act in a certain way to avoid my reality, I must be conscious of the reality I am trying to avoid. Logically then, it appears that there must be a limit on the extent of self-deception for us to be in bad faith. Otherwise the entire foundation on which the notion of bad faith rests is undermined.

However, while the logic of Sartre's argument appears flawed, in reality we *do* seem to be able to deceive ourselves that objectification and denial of the subjective self is possible. For example, a complete state of bad faith logically ends with total self-objectification. What would this state look like? The person would be a machine who had completely denied his subjectivity, an automaton devoid of any emotion, any life experience or sociological influence. In short, they would be a robot. Sartre's waiter attempts to achieve this status by mechanising his actions: "His gesture and even his voice seem to be mechanisms" (p. 82). But as I have argued throughout this thesis, it is not possible to attain this state. We cannot simply switch our emotions on and off. Indeed, what Sartre's waiter is trying to achieve is quite recognisable. "He is playing, he is amusing himself… We need not watch long before we can explain it… the waiter in the café plays with his condition before he can realise it." We cannot remove our values from our selves or the decisions we make in our everyday lives. But the longevity of rational and empirical philosophies and the on-going reliance on a fact-centred model of medical decision making and legal positivist approaches are testament to the reality that we can, and do, deceive ourselves that this is possible.

Good faith

A further implication of taking Sartre's bad faith argument to its logical conclusion is that any possibility of acting in good faith is negated. It follows from Sartre's portrayal of bad faith that if I am conscious of my subjective self, and make decisions fully cognisant that I am free to make decisions, that I am not acting in bad faith. However, if immersion in a state of bad faith is complete and the deception so total that I cease to have conscious intention, good faith ceases to be a possibility. It becomes a situation where I am either in total bad faith, or I am not. And if I am totally in bad faith, then there is no possibility to be in good faith. As Sartre explains: "At the very moment when I was disposed to put myself in bad faith, I of necessity was in bad faith with respect to this same disposition" (1958, p. 91).

If I am in a state of bad faith with no possibility for good faith, then the state of bad faith becomes simply a descriptive statement of my existence. It is neither good nor bad. It is simply the way I am. Logically, there *must* be conscious intention in order for us to at least consider the opportunity to choose a good faith or bad faith option. Otherwise any appeal to authenticity, to our subjective selves, is not possible. In order for us to employ mechanisms to deny our subjectivity, we must be *conscious* of it and have the *intention* to avoid it. And if both of these conditions are present, there must *always* be the possibility for us to consciously intend to act in good faith. To be conscious is to have choice. And to act in good faith is to consciously exercise and take responsibility for that choice.

Let us return to one of Sartre's examples. The waiter became the identity, the role of the waiter. He adopted this role to limit his choices and manage his subjective self. But what if a waiter chooses to become a waiter without the intention of protecting himself from this anguish? Under these circumstances, the waiter must be acting in good faith. He takes on the identity of the waiter to earn money and because he enjoys the interaction with the customers. He does not become a waiter to protect himself from anguish. He does so in full knowledge that he chooses to get up at 5 a.m., and chooses to sweep the floor. He could have taken any job, any identity. He is fully aware of his subjective self and has exercised his freedom by choosing to be a waiter. His *intention* is not to objectify himself in an attempt to manage his anguish. Indeed, he does not feel

anguish, but instead embraces and rejoices in his subjectivity and freedom to choose. His *intention* is to do a job which he enjoys and for which he is rewarded with money, job satisfaction and interaction with the customers.

If bad faith is about self-deception and denying our subjectivity, then good faith must be about honesty, recognising our subjective selves, exercising our freedom to choose and taking responsibility for our choices. Whether we act in good faith or not depends on how we reason individually and make decisions about our actions.

Consider again James from chapter two, who worked in the supermarket and was considering whether to follow the rule which stopped him from wearing a ring through his chin. In the same way that the supermarket building or the uniform he wore was part of his objective reality, so too were the rules. But James did not simply find refuge in the rules which governed his situation, or the identity he had adopted as a supermarket worker. James was not denying the reality of his subjective self to make a decision in that situation. The rules prompted him to think about his action of wearing the ring both inside and outside of the supermarket environment and thus to make sense of his actions within different contexts. James did not make his decision in bad faith. He was not simply following the orders issued by the supermarket. He contemplated all his options and *chose* to follow the rules and not wear the ring through his chin.

Was Sartre really saying that self-deception can be so complete that good faith ceases to be a possibility? His thesis again takes us to a seemingly illogical position, yet which conveys an important aspect of how we behave in relation to bad faith. This is because logic can never fully capture the complexity of human existence. There does seem to be situations where we are so immersed in bad faith that we may not recognise what we are doing. Warnock explains this in terms of levels of bad faith (p. 117). At the superficial level, for example, we use self-deception to justify an extravagance which we do not really need on the grounds that it is in a sale, or that it will be more expensive next year.

At another level, people do not appear to be knowingly trying to be something they are not. “But nevertheless one feels about these people that they are always seeing themselves as such and such – a member of some social group, an intellectual, a

mother." (Warnock, 1978, p. 117). This equally applies to professionals. Consider the health manager who denies that values have any role in his decisions about resource allocation, or the judge who perceives herself as an impartial, objective instrument of the law. Does that mean that they can never achieve a position of good faith?

In real life situations the action of bad faith exists within a complex moment of human existence incorporating entire life experiences, surrounded by people, books, media, literature all of which may prompt us into realising that we are in bad faith. And most importantly, we have the ability to recognise and acknowledge the values which guide and inform our decisions. The judge who perceives herself an objective instrument of the law when she is fulfilling her role does not exist as a judge for the entirety of her life. In the same way that there are levels of bad faith, the adoption of bad faith is fluid in different contexts. The judge is unlikely to deny her values and subjectivity, say, in her home and family environment. We may be able to deceive ourselves that we employ methods of objectification in certain contexts. But our movement through different roles and a variety of contexts in the course of our everyday lives provides opportunities for us to recognise that we are in bad faith. Whilst we are conscious beings, there is always the *possibility* of good faith, not only by recognising and acknowledging our own values, but from cues and prompts from people, society and the environment which make up our shared external reality.

Summary of the central aspects of Sartre's bad faith

Sartre provides us with the central thesis that in response to our freedom and choice in a seemingly chaotic and disorganised world we adopt mechanisms of objectification which deny the free, subjective self. In summary:

- The idea that nothingness is the unique characteristic of the conscious being is central to Sartre's philosophy.
- Sartre argues that all humans have ultimate freedom and choice.
- Bad faith is a response to nothingness and freedom.
- We use methods of objectification to help us cope with a chaotic and disorganised external reality.

- Objectification of self becomes bad when we ***intentionally deceive*** ourselves that we are adopting modes of objectification.
- There are instruments of bad faith including objectification of self and the assumption of roles.

Sartre has given us clues about how and why we employ bad faith and Warnock's interpretation draws broad themes with which to make sense of his thesis. For example, good faith seems to be about authenticity, sincerity, responsibility and being true to the subjective self. Conversely, bad faith is about insincerity and deceiving oneself about using mechanisms to avoid subjectivity. However, I have challenged the following aspects of Sartre's thesis:

- Nothingness is not the unique characteristic of the conscious being. Bad faith can be accepted instead as the use of mechanisms to objectify ourselves and our world. We are not responding to nothingness, we are making sense of and using our freedom and choice to respond to what is happening in our daily lives and environments.
- Deception is a necessary component of bad faith. Complete self-deception is logically not possible. So how far does the self-deception go and does the deception extend to intentionally deceiving others?
- Whilst a person has conscious awareness, logically there must always be a possibility of both good and bad faith.
- Bad faith may be context dependent and subject to external influences.

Whilst I have addressed some aspects of Sartre's bad faith, the analysis so far leaves many questions unanswered. For example, do people have the level of freedom and choice which Sartre proposes? Are we susceptible to external influences when we employ bad faith which have not yet been considered? Is bad faith a transient state which is adopted in certain contexts? And logic tells us that the notion of self-deception and bad faith is problematic. Is this resolvable? I now turn to Milgram's research which furthers our understanding of people's behaviours directly in relation to objectification processes and bad faith. His work supports, explains and clarifies aspects of Sartre's thesis.

The Milgram experiments and bad faith

The Milgram experiments were a series of now famous scientific experiments conducted by the psychologist Stanley Milgram in the United States in the 1960s. The intention of the experiments was to measure the willingness of a participant to obey an authority who instructs the participant to do something that may conflict with their personal conscience. Milgram devised his experiments in response to the German holocaust in World War II in which he questioned whether the accomplices to the holocaust could credibly offer the defence that they were simply following orders (Milgram, 1974, p. 12). Milgram summed up his research and findings as follows.

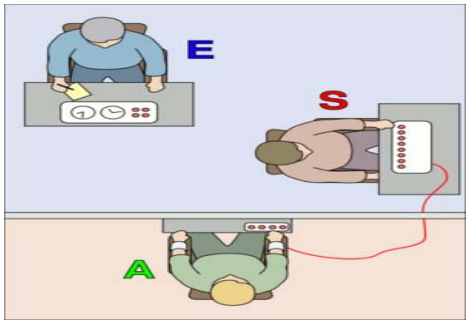
> *The legal and philosophic aspects of obedience are of enormous import, but they say very little about how most people behave in concrete situations. I set up a simple experiment at Yale University to test how much pain an ordinary citizen would inflict on another person simply because he was ordered to by an experimental scientist. Stark authority was pitted against the subjects' [participants'] strongest moral imperatives against hurting others, and, with the subjects' [participants'] ears ringing with the screams of the victims, authority won more often than not. The extreme willingness of adults to go to almost any lengths on the command of an authority constitutes the chief finding of the study and the fact most urgently demanding explanation.*
>
> Milgram, 1974a, p. 1

Milgram's research was based on his concept of obedience which causes people to behave in a way which has striking similarities with Sartre's idea of bad faith and self-objectification. According to Milgram, the essence of obedience lies in the way a person comes to view themselves as an instrument for carrying out another person's wishes. This adjustment of thought frees the person to engage in behaviour, including cruelty to others, without having to accept responsibility for that behaviour (Milgram, 1974, p. 12). In this way, the obedient person knowingly allows themselves to become the objective instrument of someone else's subjective wishes, whilst denying their own freedom to choose. Rather than make our own decisions about our behaviours, many of us prefer to avoid our intrinsic subjective freedom and become an objective instrument of instruction, even if our actions inflict considerable pain and discomfort on another human being.

Milgram came to these conclusions after a series of experiments which were variations on one basic theme. Subjects were invited to participate in what they were told was a study of memory. The subjects were given the task of reading out pairs with word associations to a learner who was then punished if they failed to give the correct answer. The punishment – a series of ever increasing electric shocks – was administered by the subject. The subject was not informed that the learner was in fact an actor and the electric shocks the subject administered as punishment, were not actually real.

The experiments

The actor - learner responded as if the electric shocks were real, for example by crying out in pain and verbally objecting to the shocks. During the experiment, a researcher was in the room with the subject and encouraged them to continue with the electric shock punishment even if the subject had doubts about whether to do so.



The experimenter (E) persuades the participant (S) to give what the participant believes are painful electric shocks to another participant (A), who is actually an actor.

Figure 9. The Milgram Experiments
From wikipedia.org (n.d.)

Milgram found "time and again" that many of the subjects obeyed the experimenter "no matter how vehement the pleading of the person being shocked, no matter how painful the shocks seem to be, and no matter how much the victim pleads to be let out" (1974, p. 23). In one experiment, as many as 26 out of 40 subjects obeyed the orders of the experimenter and continued to administer electric shock punishment up to 450 volts – an amount of electricity which would deliver a considerable shock if it really were administered. By this stage, many of the subjects were in an agitated state; one subject even laughed nervously when they heard the screams of agony coming from the actor rather than cease delivering the electric shocks (Milgram, 1974, p. 70).

The agentic state

From his findings in these experiments, Milgram developed the theory of the "agentic state" (Milgram, 1974, p. 151). The agentic state is the condition a person is in when he sees himself as an agent for carrying out another person's wishes (p. 151). In the agentic state a person is open to regulation by a person of higher status. In this state, an individual is in a condition of hierarchical control and "the mechanism which ordinarily regulates individual impulses is suppressed and ceded to the higher-level component" (p. 149). This is what happened to the majority of Milgram's subjects. Even when experiencing extreme anxiety at the actions they were carrying out, the subjects continued to inflict pain on the learner – actor because of the instructions received from what they perceived to be the higher authority of the researcher. The individual ceased to function autonomously, assuming the instrumental role of the researcher and ceding control to the higher level decision maker.

The subjects' coping mechanisms were similar to the process of role adoption and objectification of the self by Sartre's waiter. In that instance, the objectification occurred by an individual taking on the role and identity of "waiter". But for Milgram's subjects, the objectification process occurred when they perceived themselves as an instrument of someone else's control. This allowed the subjects to rescind responsibility for any decision making and convince themselves that they were simply carrying out the orders of a higher authority, even if those orders clashed with their values. Becoming an instrument of the researcher's wishes provided a way for the subjects to manage the reality of their situation rather than employing the intrinsic freedom they had to make their own choices. Or to put it another way, they were employing bad faith.

A spectrum of bad faith

Milgram's research provides us with shocking evidence about the preference of individuals to assume an agentic state and follow the instructions of a higher authority rather than be disobedient and act on their own values. However, whilst many of the research subjects assumed the agentic state for the entirety of the experiment, not all of them did. Some disobeyed the researcher and acted on their own values very early in the experiment when they realised they were inflicting (what they thought was)

increasingly severe electric shocks. Others disobeyed the researcher at different stages up to the point where the researcher discontinued the experiment. This evidence refutes the absolute position that either a person is or is not in a situation of bad faith which Sartre's philosophical argument logically led to. Instead, what emerges is a spectrum of bad faith. At one end are those who obeyed instruction to deliver harmful electric shocks right up to the discontinuation of the experiment by the researcher. At the other are the subjects who asserted their values and disobeyed the experimenter as soon as they realised the electric shocks were potentially harmful. The remaining subjects disobeyed at different points along the continuum.

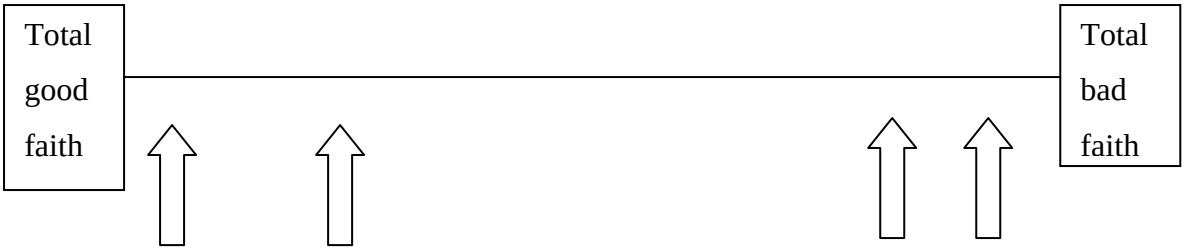


Figure 8. Levels of bad faith.

For example, Milgram describes the experiment conducted with a man who disobeys the researcher early on in the experiment (p. 64–66). The man questions whether the ethics of the experiment had been considered. He does not accept the authority of the researcher and declines to follow his instruction, exercising his choice and asserting his evaluation of the need to discontinue the experiment. At the other end of the spectrum, the actions of a man who continues to administer shocks until the researcher discontinues the experiment are described (p. 66–67). In the follow-up interview, the man explains his behaviour by saying that he was merely "following orders… I was told to go on. And I did not get a cue to stop." This man had followed the objectification process through to the agentic state. He rescinded all responsibility for delivering the electric shocks and surrendered his subjective self to the authority of the researcher.

Self-deception

For Sartre, self-deception was a necessary component of bad faith. Milgram's findings strongly support this aspect of Sartre's thesis. But logically, there is an irreconcilable difficulty between self-deception and bad faith. We employ methods of objectification to deceive ourselves about the reality of our freedom and choice. However, that self-deception can never be total. To be in bad faith there must be intention. For there to be intention, there cannot be *total* self-deception. Milgram's experiments suggest a possible solution to this logical impasse and builds on Warnock's interpretation that while self-deception is a necessary component of bad faith there may be different *levels* of deception and bad faith.

Consider again the response of the different responses of Milgram's subjects. The man positioned at the far end of the bad faith spectrum used the defence that he was only following the researcher's orders. During the experiment, the man totally adopted the agentic state. In the follow-up interview, he is "enmeshed in the formulation, [that he was following the orders of the researchers] which he repeats several times" (p. 67). The man continues to employ mechanisms to reinforce his denial of his part in the experiments and thus maintains his self-deception long after the real formulation for the experiment was revealed to him. In contrast, another subject obeyed the researcher and continued to deliver shocks up to 255 volts. His level of self-deception was effective up to the point in the experiment when he could no longer ignore the cries of agony from the learner – actor. When asked who was accountable for shocking the learner against his will, he said "I would put it on myself entirely" (p. 68). For this man, the agentic state was only partial, existing only within the context of the experiment up to a certain point and completely dissipating on later reflection. A few did not adopt the agentic state at all. Instead, in good faith they declined to take any further part in the experiment when they realised that they were being asked to harm someone simply because they were failing to answer some questions correctly.

These different responses demonstrate how there are different levels of bad faith depending on the level of self-deception achieved. Like the thin social veneer of laws, rules and conventions which when removed led to the state of nature on Golding's desert island, individually we employ methods of objectification which create a veneer,

such as taking on roles and identities, to cope with the reality and events of our external worlds. The more we deceive ourselves and others about what we are doing the thicker the veneer becomes and the further distance we create from our subjective self. When the veneers are stripped away our subjective, authentic self is revealed. Context seems to be important. Can the level of objectification and self-deception be influenced by forces external to us?

External influences

Whether we act in bad faith to deny our subjective selves relates to the freedom and choice which is an integral part of Sartre's concept of bad faith. But how much freedom and choice did Milgram's subjects have to act according to their values? The situation in which the subjects were placed was completely contrived and the experiment was set up intentionally to limit the choices of the subjects. As Milgram observed:

> *Control the manner in which a man interprets his world, and you have gone a long way to controlling his behaviour…*
> *Every situation itself possesses a kind of ideology, which we call the 'definition of the situation', and which is the interpretation of the meaning of a social occasion. An act viewed in one perspective may seem heinous; the same act viewed in another perspective seems fully warranted. There is a propensity of people to accept definitions of action provided by legitimate authority. That is, although the subject performs the action, he allows authority to define its meaning.*
>
> Milgram, 1974, p. 162

Milgram had intentionally incorporated components into his experiments to test the obedience of the subjects. These manipulations influenced the level of conscious intention and self-deception which the subjects were able to employ to achieve the agentic state. For example, many of the subjects, despite indicating that they did not wish to continue punishing the learner with ever increasing and potentially damaging electric shocks, were told by the researcher that they must continue and that they did not have a choice. (See the transcript of an experiment on page 68 of Milgram's *Obedience to Authority,* 1974*).* This provided the subject with support for their self-deception. If they were already deceiving themselves that they were simply an instrument of the researcher, the authority informing them that they had no choice but

to continue to follow the orders of the researcher affirmed the denial of subjective choice.

Conversely, Milgram manipulated experimental conditions which decreased support for the subjects' self-deception. For instance, Milgram adjusted the proximity of the subject with the learner – actor on whom the subjects were required to deliver the electric shock punishment. Milgram found that the closer the subject was to the victim, both physically and visually, the less likely they were to continue to be obedient and deliver the punishment up to the maximum potentially injurious 450 volt shock (p. 53). If, as in one of the experiments, the subject actually had to physically force the victim's hand onto a metal plate before administering the shock, 70% of the subjects defied the experimenter in comparison to 37.5% when the subjects could only hear and not see the reaction of their victim. It was easier for the subjects to deceive themselves that they had no direct role in the pain and suffering inflicted in the experiments the further removed both physically and visually they were from the victim[3]. This in turn led to a decreased likelihood of them adopting the agentic state to the completion of the experiment.

These external conditions directly relate to the context of the experiment. Is it also possible that there may be external influences prior to the experiment which affect the likelihood of employing bad faith? For example, was the response to the experimental conditions in part provoked by behaviours objectified via the socialisation process described by Berger and Luckmann? The socialisation process normalises certain behaviours which become an objective reality for the individual. Whilst internalisation of the behaviour is required for the objectification process to be complete, the convention itself is *external* to the individual. For instance, the objectification of obedience to authority through normalisation processes is a method of control employed by armed services to ensure the compliance of their forces.

I am not suggesting that a person's socialisation process or the context within which they make a decision to act absolves them from moral responsibility. But Milgram's

[3] These findings are congruent with the experiments considered in chapter 1 suggesting the link between compassion and witnessing another's pain, and Damasio's work demonstrating the link between physiological responses, emotions and decision making.

experiments have demonstrated that whilst people do adopt mechanisms of objectification to deny their subjective selves, there are external factors; societies, socialisation processes, the situations which we are in, which appear to influence whether and how we assert our values.

Perhaps the most obvious example of someone who has been objectified by an external process is a soldier in the army. The military employ a host of devices to transfer the individual to an agentic state as far as possible. These include taking an oath of allegiance, systems of reward and punishment, defining actions in terms of larger societal purpose rather than individual goals, dehumanising the enemy, maintenance of discipline portrayed as important for own and others' survival and the cause for killing and war is represented as just (Milgram, 1974, p. 197-198). Each of these devices is aimed at making the soldier the instrument of the command of the higher authority.

Self-deception and conscious intention

Sartre proposes that the use of bad faith is totally up to the individual. But it seems as though there may be circumstances when do not always have complete freedom and choice to make decisions which assert our conscience, our values. Can external conditions ever fully subsume the conscious intention of an individual? Logic provides us with two answers. Either yes, the agentic state can be total in which case bad faith ceases to be bad faith because the subject no longer has conscious intention. Or no, the agentic state can never be totally objectified and while the conscious intention remains, a person retains a choice of whether to be in bad faith or good faith. However, once again the limits of logic fail to capture the complexity of the individual human condition. The extent to which we respond to external influences vary as much as our unique experiences, socialisation processes, and personalities.

Milgram's subjects have demonstrated how different people adopt different levels of the agentic state. For some in the military the external objectification process will be effective. Yet, for others, transformation to the agentic state is only partial, and human values break through (Milgram, 1974, p. 199). This seeming ambiguity is reflected in societies' response to the classic defence of a soldier to war crimes; that they were only obeying orders. On one hand, the military system employs methods to create an agentic

state in which soldiers become instruments of the state and obey the orders of their superiors. On the other, we expect them to differentiate between circumstances in which they should disobey and assert their own values.

Ultimately, however, the reason we cannot accept this defence is because we recognise that the conscious intention of an individual can never be fully subsumed by an external objectification process. Our response acknowledges that the total adoption of the agentic state, or complete objectification and elimination of the subjective self is not possible. Reflection on Milgram's experiments and military methods demonstrate that external influences cannot be ignored. They may be complicit in, and even encourage our self-deception. As Seedhouse explains:

> *Sartre's idea is as naïve as it is penetrating. It takes no account of genetics, for instance, and fails to appreciate that no one has infinite potential. Nor does it recognise how greatly people can be constrained by external circumstances and events.*
>
> Seedhouse, 1998, p. 136

There exists different levels of self-deception; between individuals, within individuals in different contexts and which may be influenced by external factors. But the deception, however great the influence, can never be total.

Milgram's research demonstrates that there are different levels of bad faith which we build like a shell around our conscious, free-thinking selves. The more we deceive ourselves, the thicker the shell becomes. Like the mass of laws, rules and conventions that we employ collectively as society to constrain our values, individually, we employ modes of objectification to deny our subjective selves; our values. As Sartre suggests, eventually we may become so entrenched in this way of thinking that bad faith becomes a way of life. However, the veneer we build remains just that; a veneer. We know that beneath the surface our conscious awareness can never be fully subsumed by objectification however effective the self-deception. While we live and think there is always a conscious awareness. And while we have conscious awareness, we have a choice whether to opt for good faith and authenticity, or whether to be in bad faith,

denying our values and intentionally distancing our subjective selves from our external worlds.

Milgram's research was the subject of a great deal of criticism concerning the ethics of experimenting on human subjects in this way (See Blass, 2002, p. 70; Milgram, 1974, Appendix 1). However, in follow-up interviews and questionnaires, many of the subjects responded positively to the experiment, thankful that the research had highlighted their willingness to obedience, particularly in light of the atrocities in Nazi Germany. One subject was so impressed with the insights into his own behaviour that he asked whether he could join the research team (Milgram, 1974, p. 69). In response to the critique, Milgram asked; "Is not the criticism based as much on the unanticipated findings as on the method? The findings were that some subjects performed in what appeared to be a shockingly immoral way" (p. 213).

In truth, we feel uncomfortable with Milgram's findings in the same way we are uncomfortable with Golding's portrayal of the boys' behaviour on the desert island, Hobbes nightmarish portrayal of the state of nature, and war criminals who justify horrific atrocities on the grounds that they were simply obeying orders. As Sartre suggests, we find refuge from our subjective selves through objectification; of ourselves, our behaviours, our environments, the people we interact with and in the justification we give for the decisions we make.

Working towards a framework

Thus far I have drawn from the existential philosophy of Sartre and the psychological experiments of Milgram to establish why people seem compelled to objectify their values. Sartre's thesis is that in response to our freedom and choice in a seemingly chaotic and disorganised world we adopt mechanisms of objectification to deny the free, subjective self. He couches our response to this in terms of bad faith; we intentionally deceive ourselves and deny our subjectivity to cope with the reality of our existence.

Milgram's experiments have affirmed, explained and clarified many aspects of bad faith. However, this is a long way from a structured, workable theory. Many questions

remain unanswered and important aspects of bad faith have not yet been considered. For instance, I have not yet considered instruments of bad faith other than Sartre's role adoption and Milgram's agentic state. Are there other instruments of bad faith? If so what are they? And is bad faith always active, or can it also be passive?

I now adapt and develop Sartre's notion of bad faith to create a thorough, robust framework with which to examine best interest determinations. I start by suggesting key components of a workable theory and propose a working definition of bad faith. I test and develop the theory using four examples.

Values-based law interpretation of bad faith

Sartre starts from the position that we all have complete freedom and choice and that consciousness is nothingness. Our reaction to this freedom and nothingness is nausea and anguish which we respond to with bad faith. My interpretation starts from the basic premise that we employ bad faith as a mechanism to cope with the reality and the complexity of different situations that confront us daily.

Every minute of every day we employ our values to guide and inform our decisions. But sometimes, particularly if a situation is especially foreign or difficult, we do not always know how to respond. So we employ mechanisms to help us cope. One of these mechanisms is objectification. We objectify ourselves, the people round us, the laws, rules and conventions that govern our behaviours and so on. This creates a perceived distance between our subjective selves and the situation we are dealing with. We then feel better able to cope. If we do this with the intention of deceiving ourselves about the reality of our situation or to deny our subjectivity then we are in bad faith.

Promoting the use of objectification is the common perception that values somehow cloud our judgement. In chapter one, I considered how Cartesian duality separates the mind from the body and empirical and rational epistemologies portray value-free reasoning as not only possible, but preferable. These philosophical traditions propagate the deception that we can make decisions independently of our subjective self. As a result, we not only use bad faith existentially to deal with the situations we meet in our day to day lives. Using methods of objectification with the express intention of denying

our values conforms to the prevailing epistemological paradigms which underpin many aspects of life in Western societies. Within these paradigms we aim to deceive not only ourselves, but also others, that we can separate our subjective selves from our responses to the situations we meet and the decisions we make.

Definition and key components

I have distilled the following definition and key components of bad faith from the preceding analysis. This definition incorporates the *necessary* key components of the values-based law interpretation of bad faith; objectification, intention and deception. The remainder explain and expand on specific considerations in relation to the use of bad faith.

> *Bad faith refers to the employment of modes of objectification with the express intention of distancing the subjective self from a situation or decision and aiming to deceive self and / or others of intent.*

Objectification.

A mode of objectification is employed to objectify subjective self in response to a situation.

Intention

Objectification is intentionally chosen as a method to cope with an external reality.

Deception

The person attempts to deceive themselves or others that they are using objectification to deny their subjectivity.

Levels of bad faith

There is no absolute line between either being in bad faith or not. There is a spectrum which acknowledges differing levels of bad faith which create a veneer around the subjective self. Depending on the extent of the objectification and deception, the veneer will be thicker and less penetrable.

Conscious awareness

However successful the deception, there always remains a level of conscious awareness. Conscious awareness is an integral part of any thinking, feeling human being. Complete objectification and elimination of conscious awareness is a robot-like state which is not possible.

Good faith

While conscious awareness remains there exists a choice between adopting good or bad faith.

Instruments of bad faith

An instrument of bad faith refers to any mechanism of objectification employed with the express intention of distancing the subjective self and aiming to deceive self or others of intent. Thus far I have considered Sartre's role adoption and Milgram's agentic state. Many modes of objectification exist, including Berger and Luckmann's socialisation process and Kuhn's paradigm normalisation process which I considered in relation to the fixing of values in laws, rules and conventions. I consider others in the course of the case analysis.

Transience

Bad faith is not a permanent state of existence. Bad faith may permeate many aspects of the way a person copes with the reality of the situations they meet in their lives, even becoming a way of life. But it is transient; people do not simply remain in one state of bad faith in all aspects of their lives.

Context dependent

People adopt different modes and levels of bad faith in different situations.

External influences

External factors may be influential. But they can never totally subsume the conscious intention of an individual.

Active or passive

Not only do people actively employ bad faith. They may also passively accept objectification processes in their social world with the same intent of separating themselves and their response from their external reality.

The values-based law definition and identified key components of bad faith provide a basic framework with which to analyse decision making and behaviours. Is the framework sufficiently robust? I now apply it to four case studies to test, develop and clarify my interpretation of bad faith.

Case study 1 – the American soldier in Iraq

The Age reports the story of Private Lynndie England who said that she was only following orders when she posed for the notorious photographs with Iraqi prisoners leashed and naked at Abu Ghraib jail.

> *Her lawyer said she was unable to identify who gave the orders.*
> *"She said there were several people, they were telling her to stand here or hold the leash or smile at the camera. Somebody even said, 'Say cheese'," her lawyer, Rosemary Zapor told The Age.*
> *Pictures of Private England holding a leash attached to a naked male Iraqi prisoner and pointing at the genitals of male prisoners were splashed around the world. She has been charged with assaulting detainees and conspiring to mistreat them.*
> *But her lawyer claims that all the photographs were shot on one occasion when an off-duty Private England visited the restricted-security cell block. According to Major-General Antonio Taguba's report, the abuses at the prison began in October and continued at least until December 2003.*
> *In a television interview on Tuesday, Private England claimed publicly for the first time, "I was instructed by persons in higher ranks to stand there and hold this leash" and that people, "in the higher chain of command" knew about it.*
> *She did not apologise. "We didn't feel like we were doing things we weren't supposed to do," she said.*
> *Her lawyer agreed with General Taguba's finding that there was no written order requesting the abuses as part of the jail's interrogation techniques.*
>
> Wilkinson, 2004a.

Objectification.

Lynndie England was a soldier in the United States army. She had adopted Milgram's agentic state.

Intention

Ms England intentionally adopted the agentic state, both during the time of the incident and thereafter.

Deception

Ms England rescinded decision making to a higher authority and denied any responsibility for the torture of Iraqi detainees.

Levels of bad faith

Ms England's adoption of the agentic state appears to have led to a high level of self-deception, claiming that she did not realise what she was doing was wrong.

Conscious awareness

Even though Ms England denies that she knew what she was doing was wrong, the attainment of complete objectification and self-deception is not possible. Ms England had her life experiences prior to being in the military to draw on. Ms England also had a period of reflection after the incident. In this time she could have taken responsibility for her actions rather than continue to deny her own involvement. Ms England was likely to have been aware that there was no written order and the abuse was not part of the jail's usual interrogation techniques.

Good faith

Ms England, in good faith, could have declined to be involved in the abuse which was outside usual military procedure. Additionally, if she had felt compelled at the time to follow the military order, she could have admitted in good faith to her part in assaulting and mistreating detainees at the prison afterwards.

Instruments of bad faith

The agentic state.

Transience

Ms England opted to occupy a position of bad faith both at the time of events at the jail and thereafter.

Context

Whilst I can never capture the context within which the abuse took place, there are factors which may have influenced Ms England's choice to adopt bad faith at the time of the incident. For instance, Ms England was in a situation in which she had to choose whether to follow orders or cede decision making to the higher authority. There would have been consequences had she failed to follow the instruction of a superior officer. Even afterwards Ms England appeared to be fearful; she was reluctant to reveal the name of the officer who gave the order to abuse the prisoners.

Additionally, a culture of abuse at Abu Ghraib jail has since been revealed. (See for example, Wilkinson, 2004b) Even though the abuse fell outside of the usual accepted treatment of prisoners, the orders that Ms England were given may have been perfectly normal within the culture of the jail.

External influences

The law – accepting responsibility for any part in the prisoners' treatment would have meant that Ms England would have been found guilty with assaulting detainees and conspiring to mistreat them.

Military training - Ms England would have undergone military training designed to foster obedience to authority and follow without question the orders of her superiors.

Lynndie England acted in bad faith both at the time of the abuse and following the incident with the prisoners. She employed the agentic state with the express intention of distancing her subjective self from a situation or decision and aimed to deceive herself and / or others of her intent.

Case study 2 – the American soldier in Vietnam

Milgram reports an interview in the New York Times in 1969 with a soldier who followed military orders to shoot and kill civilian men, women, children and babies in the Vietnam war (1974, p. 202).

When asked why he did it the soldier replied:

> *Because I felt like I was ordered to do it, and it seemed like that, at the time I felt like I was doing the right thing, because, like I said, I lost buddies. I lost a damn good buddy… and it was on my conscience. So after I done it, I felt good, but later on that day, it was getting to me.*

The soldier's response reflects the complex response of a person attempting to reconcile his behaviour with his conscience and the agentic state imposed by the military in a very difficult situation. In justifying his behaviour, the soldier not only appealed to the orders he was given, but rationalised his actions in terms of his feelings, recent events, a life's experience and the context of war which all culminated in a decision which led him to take the actions that he did.

Objectification.

This was a soldier in the United States army. He partially adopted Milgram's agentic state.

Intention

The soldier intentionally followed the orders of his superiors. However, the soldier admitted afterwards that at the time he also had his own justification for killing the innocent civilians. The soldier, therefore, did not demonstrate complete intention to distance himself from the events.

Deception

The soldier partially rescinded decision making to a higher authority. But on later reflection he did not attempt to deceive himself or others of his part in the killings.

Levels of bad faith

The soldier appears to have adopted a low level form of the agentic state. He partially attributed his actions to the military orders he was given and took the remaining responsibility as his own.

Conscious awareness

This soldier's description of events demonstrates that even though he had been through a full military training programme aimed at maximising obedience to authority, he retained conscious awareness.

Good faith

Whilst the soldier partially attributed responsibility for his actions onto the military order, he also had his own personal justifications. The soldier admitted that he had his own justifications for thinking that killing the Vietnamese people was the right thing to do at the time.

Instruments of bad faith

The agentic state.

Transience and context dependence

This case study demonstrates both the transient and context dependent nature of bad faith. The soldier was partially in a state of bad faith at the time of the incident and was able to reflect on that some time afterwards and outside of the context of war.

External influences

The law – this soldier was not under the threat of legal action unlike Lynndie England.

Military training – this soldier would also have undergone military training designed to foster obedience to authority and follow without question the orders of superiors.

This case is significant because it demonstrates the complex response of a person faced with an alien and, to the majority of people who have never been exposed to anything

of this kind, unfathomable situation. Whilst the soldier partially attributed the decision to gun down innocent citizens to his superior, he also acknowledged and took responsibility for his part in the killing. Although the soldier may have behaved partially in bad faith at the time of the incident, he did not deny his own justifications which motivated him to kill.

Case study 3 – objectifying people with a learning disability

Gillman, Swain and Heyman (1997) report on the tendency of people, systems and institutions to objectify people with learning disabilities. They provide a Foucauldian analysis of the experience of the learning disabled who, through professional attention and theorising, become objectified as cases and problems by, for instance, the use of IQ measurements and medical diagnosis. Gillman et al found that background information giving the life stories of learning disabled people are often lost or unavailable. This means there is no account of the person other than their position within the professional paradigm – which dehumanises people with learning disability and implies that their life experiences are not important (p. 6). Is this an example of bad faith?

Objectification

The mode of objectification used is in contrast with Sartre's role adoption and Milgram's agentic state. Professionals and care workers objectify not themselves, but the people with learning disabilities. This process of dehumanisation allows professionals to psychologically distance themselves from their clients (Gillman et al, p. 13). (This tendency has also been observed in nurses (Taylor, 1993) and doctors (Andre, 1992).)

Intention

The researchers say they are not suggesting that professional or care workers intentionally objectify people with learning disabilities (p. 686). However, this *is* what the workers appear to be doing. And if it is not in itself bad enough, to objectify a person with learning disability, they appear to be doing so in bad faith. Objectification which denies the subjectivity of the person with learning disability is intentionally employed to distance

professionals from the client and to conform to the prevailing fact-centred model of care.

Deception

Care workers and professionals may argue that they are not intentionally employing paradigms which objectify the learning disabled. They are simply working within it. But this argument is similar to the defence of Milgram's research subjects or Lynndie England and is part of the deception. Workers and professionals deceive themselves and others when they actively employ, or passively accept the institutional and theoretical frameworks which foster processes of objectification with an intention of imposing a professional value-free paradigm and / or distancing themselves from their clients.

Levels of bad faith

Objectifying people with learning disability represents a high level of bad faith. Such is the extent of the entrenchment of the value-free paradigm that the personnel, institutions and processes, promote the objectification of people with learning disability.

Conscious awareness

This research demonstrates that although the institutions and processes uphold and promote the objectifying paradigm, key workers do have an awareness of the effects of the process. For example, a key worker noted some institutions' propensity to dehumanise clients using numerical categorisations representing the level of care they required. People with learning disabilities have themselves given voice to their objections to this objectification process (People First, n.d.). There is also a significant body of literature, including this research, which expresses concerns about objectifying people with learning disabilities (see for example, Bray, 2003).

Good faith

Gillman's research demonstrates that key workers exhibit a level of conscious awareness of the issues. (See above). While there is conscious awareness there is always the opportunity for good faith.

Instruments of bad faith

Objectification of another person.

External influences

Fact-centred theoretical models**.**

A limitation of the theory

Whilst bad faith has provided a theoretical framework for the examination of case studies, it has so far failed to account directly for the effects of bad faith. In each case study, the effects of bad faith have been profound. For the soldiers, following the orders of their superiors has resulted in the torture and humiliation of prisoners of war and the violent killing of civilians, including women, children and babies. For the learning disabled, objectification strips people of their life story, replaced with a professional paradigm which directly affects their management and care. For example, people who don't conform to institutional routines are often labelled as having challenging behaviours which may be pathologised rather than seen as a product of current and past experience, and life events (Gillman et al, p. 685). For this reason, I include an additional final component to the framework; the effects of bad faith.

Case study 4 – Shortland v Northland Health (No 2)

I have chosen the case of *Shortland* from best interest case law as a preliminary to the next chapter. The case introduces some of the specific issues relating to best interest determinations and bad faith.

Rau Williams was a 63 year old man with a long history of late onset diabetes. He had two significant complications of this type of diabetes: kidney failure and brain damage. By June 1997, Mr Williams had reached end stage renal failure with irreversible non-

functioning kidneys. The only treatment is transplant for which there is up to a seven year wait. In the mean time people are treated with dialysis – a process which mechanically fulfils the role of the kidney to cleanse the blood. A spokesman for the local health authority, Northland Health, wrote to Mr Shortland (spokesperson for Mr Williams and his family) to say that he had not been accepted onto the renal replacement programme and that dialysis would discontinue in September 1997. Mr Shortland applied for judicial review of this decision on the grounds that Northland Health was in breach of its duty to provide treatment required by good medical practice and section 8 of the New Zealand Bill of Rights Act 1996 which states that no-one shall be deprived of life except on grounds established by law and consistent with the principles of fundamental justice. The court found no grounds for procedural error establishing instead that the decisions at issue were made in the best interests of Mr Williams and according to prevailing medical standards.

Objectification

Shortland primarily concerned the rationing of scarce renal replacement therapy. As Seddon observes (1999) any decision about resource allocation that involves public funds and the denial of services is concerned with distributive theories of justice. As such, value judgements are a necessary part of the decision. However, the court employed a number of methods objectifying the values intrinsic to the decision whether to offer Mr Williams renal replacement therapy.

In reaching its decision, the court relied largely on the evidence of national practice guidelines and the evidence of medical experts. The guidelines are an example of what Fulford describes as “quasi-legal” bioethical rules and regulations that seek to establish what he describes as “moral facts” (Fulford, 2004). The renal replacement guidelines in *Shortland* were written chiefly to assist with the rationing of scarce renal replacement therapy resources (Feek et al, 1999). They provided a guide for clinicians to determine when it is appropriate to offer life-prolonging therapy and decide priorities for therapy on the basis of greatest probable benefit (*Shortland* p. 126).

The guidelines objectify the value judgements – about people’s quality of life, ability to cope, whether this is a good use of scare health resources – by reframing

the question at hand. The question ceases to be *should* renal replacement therapy be offered to a 63 year old man in the early stages of Alzheimer's disease? It becomes instead, does the guideline allow renal replacement therapy to be offered in this situation? Mr Williams was said to be suffering from moderate dementia which placed him in a category in which the guidelines stated that renal dialysis should not be offered. The value judgements about allocating scarce health resources to a man with the early stages of dementia are avoided and the clinicians and the judge are distanced from the final decision. The written document is seen to be the final arbiter and the values of the decision makers are portrayed as absent from the process.

Intention

From the outset, the judge in the Court of Appeal expressed his views about the role of the Court and his intention not to question the clinical decision making of doctors. Salmon J (p. 125) said he thought it was totally inappropriate for the Court to direct clinicians as to what treatment should be given. Further, he suggested that Northland Health was not refusing to treat the patient. Instead, professional judgement was being exercised about the appropriate treatment to adopt.

Deception

By couching the best interest determination purely in the objective terms of "clinical judgement" and "clinical guidelines," the subjectivity inherent in the judgement was not acknowledged. In the case report, there are a number of occasions in which the judge either accepts evidence, or denies that the case is related to resource allocation (p. 129; p. 133).

The case report also denies any ethical component to a decision that withheld renal replacement therapy from a diabetic man in the early stages of dementia. The judge perceived instead that "the issues arising were essentially ones of clinical judgement, not ethics" (p. 132).

Levels of bad faith

This decision demonstrates a high level of bad faith. Different methods of objectification were employed which accompanied denials about the evaluative nature of the decision.

Conscious awareness

Relying on objective guidelines may distance clinicians and judges from the immediate responsibility of making difficult decisions about the allocation of scarce resources. However, they are often rigid and inflexible and leave no latitude for the consideration of individual cases (Seddon, 1999). In this way, it is not only the decision makers who are distanced from the process, but also the patient, who is thought of in terms of an age and a diagnosis. Whilst it made up only a small part of the case report, the evidence from Mr Shortland was sufficient to raise conscious awareness and reconnect the proceedings with the person – Mr Williams – with an entire life story and a desire to live. It was said that Mr Williams enjoyed seeing his family and had expressed a wish to live as recently as five days before the Court of Appeal hearing. Mr Williams' general practitioner who had known him for a number of years maintained that dialysis would improve his quality of life and might improve his longevity.

Precedent also prompted the judges to consider *Shortland* from a wider perspective, beyond professional judgement and clinical guidelines. According to the criteria set down in *Auckland Area Health Board v AG* [1993], consultation with a recognised ethical body is critical in cases about withholding life sustaining medical treatment. However, this recommendation was rejected. The judge stated that it was a matter of assessing the appropriateness of the suggested criteria in a different situation and found that the case was about clinical and not ethical judgement (p. 131-2).

Good faith

The best interest test allows for considerable judicial discretion. The judges therefore had freedom to be honest about the decision and the grounds for withholding renal dialysis. It is not clear why the judges seemed so adamant to deny that the decision was primarily about the allocation of scarce resources. By being open and transparent about the basis for the best interest determination,

opportunities for discussion and debate about the values guiding distribution of scarce renal replacement therapy would have been afforded. For example, should age and dementia be determining factors about access to renal dialysis? Is it appropriate to use strict guidelines which absolve clinicians from resource allocation decisions but are inflexible and do not consider individual cases? These questions are the concern not only of clinicians, but society.

Instruments of bad faith

The guidelines were the primary methods of objectification, but other methods were also employed by the court.

Clinical judgement. The Court was asked whether there had been a deficiency in "an administrative decision-making process" (*Shortland* [1998], p. 125). The judgement of the process was couched in terms of clinical decision making. This meant that the decision not to provide renal dialysis to Mr Williams required conformity with prevailing medical standards. The judge found that the process met this criteria. Doctors consulted from around New Zealand were unanimously of the view that Mr Williams was "unsuitable" for long term dialysis (p. 132). But what exactly did they mean by unsuitable? Had they deemed anyone with the early stages of dementia not to be worth the cost of expensive dialysis? Portraying these value judgements as "clinical" eliminated the subjectivity from the decision – which was said to be "made in good faith in the belief that they were in the best interests of Mr Williams" (p. 122).

The Court. In the case report there are occasions when the judge attributes his comments and opinion to "the Court". For example, in the words of the first appellate judge, "it is totally inappropriate for the Court to attempt to direct a doctor as to what treatment should be given to a patient" (p. 125). At the end of the case the judge states that, "in any event it is not for the Courts to be arbiters of the merits in cases of this kind" (p. 134). In this way, the judge distances his subjective self from the process and places responsibility for the decision with the objective authority of the Court.

The effects of bad faith

> Rau Williams died from renal failure on October 10th 1997. A subsequent investigation by New Zealand's Health and Disability Commissioner found that "Northland Health made its decision without fully recognising the importance of the process for Mr Williams and his whanau, without giving sufficient weight to the fact that the clinical decision was a life decision, and without sufficient support and recognition to cultural and spiritual needs" (Opinion 97HDC8872).

This case analysis demonstrates that making an evaluative best interest determination within positivist legal frameworks may result in the use of methods which objectify value-judgements intentionally to dissociate subjective human judgement from the process. This response to problematic ethical questions where there is no definitive right or wrong answer is an example of bad faith. Rather than confront the difficult and uncertain issue of how best to allocate limited renal dialysis and admit that responses are primarily subjective value-judgements, decision makers seem to prefer to distance themselves behind the objective façade of best interests, the Court, professional judgement and clinical guidelines.

This case also raises the broader question of whether bad faith is the inevitable result when best interest determinations are made within systems which deny the role of values and consist of processes which promote their objectification. These are the concerns of the next chapter which applies the complete model of values-based law to the evolution and application of the best interest test as a mechanism to make grave decisions on behalf of society's most vulnerable citizens.

Summary

Sometimes we use objectification (in many different forms) as a mechanism to respond to the situations we meet and the decisions we make in our everyday life. For example, as I write this summary, I objectify you as "the reader" of this thesis. I do this intentionally as a method to help me express what I want to say as clearly as possible. But I do not do this with the intention of deceiving myself about the difficulty of my task, or to deny your subjectivity. It is when we use objectification to dissociate our subjective selves from the choices we have and the decisions we make about the

situations we meet in our every day lives, *and* that we attempt to deceive ourselves and others about why we do this, that we are in bad faith. Whilst we have conscious awareness, good faith is always possible. We have the option to confront and use our ability and freedom to make choices: to establish – subjectively – right from wrong, good from bad, and then to take responsibility for our decisions.

Chapter 4 - Values and best interest determinations

We are in the midst of a revolution. It is a revolution about decision making and an increasingly influential world view which rejects the objectivist myth in law and medicine. The best interest test is both a symptom and a gauge of the conflict between a new paradigm, which calls for values transparency, and an old paradigm, which continues to rely on traditional value-free methods.

There is a fundamental philosophical incompatibility between each approach. This has led to a paradox. We are no longer content to accept medical decision making which fails to capture the complexity and intrinsic subjectivity of decisions about, for example, withdrawing life sustaining treatment from insensate patients and sterilising women with intellectual disability. But we also seek certainty. So we have turned to the law to find the answers.

However, both law and medicine are entrenched in objectivist approaches which simply have no mechanisms to account for values. The combined methods of medical science and positivist legal process can no longer be convincingly portrayed as the sole bases for justifying fundamental ethical questions. The indeterminacy of the best interest test implicitly acknowledges that the decisions are enormously complex and cannot be made by reference to an objective guideline or check list. This lack of specificity is also forcing the values which guide and drive decisions into the open. From case law it appears that decision makers are grappling with what are inescapably value judgements in frameworks which are not equipped for the new paradigm.

I begin this chapter by returning to Kuhn's theory of scientific revolution. I propose that we are currently in a micro state of nature between two conflicting paradigms concerning medical decision making. I suggest that this period of conflict has placed us in a position of uncertainty about how best to make decisions on behalf of incapacitated adults. I draw on the existential framework developed in chapter three to explain our response to this uncertainty.

I contend that because we seek certainty, we have called on the courts to adjudicate the decisions. However, legal decision makers (like others) cannot establish a definitive answer to the fundamental human questions raised. Judges working within positivist frameworks also seek certainty, which they have found largely by deferring back to medical solutions. I use best interest case law to support and develop my arguments. I conclude by suggesting that the only way to break the philosophical impasse is by recognising, accepting and revealing the values which inform and guide best interest determinations.

The process of revolution

In chapter two I drew parallels with Kuhn's process of scientific revolution to demonstrate how values become objectified in law. To briefly re-cap, when a new paradigm is created in science, it must be valued by sufficient numbers of the relevant community for it to be successful. Because the new paradigm is incompatible with the old paradigm, there is a period of conflict. In the period of conflict, there is debate, during which the opportunity arises for the expression of values about the competing paradigms. The relevant communities make their choices and the new world view succeeds if there is sufficient support. The revolution is complete once the new paradigm is completely normalised within the scientific community. This process may take many years and even across generations.

The new paradigm

A new paradigm is emerging in medical decision making. Traditionally, health care treatment decisions for incapacitated adults were left to the discretion of health professionals. Social conventions promoting a paternalistic "doctor knows best" approach flourished in an environment in which medical professionals were accorded God-like status (Brazier, 1992). Under these conditions, treatment decisions were the domain of doctors, with an assumption that the ethical principle of beneficence underpinned their intentions (Eastman & Peay, 1999, p. 28). Medicine was seen by some as a new religion, doctors were seen as magicians and there was increasing medicalisation of the events of our everyday lives (Kennedy, 1981). In this

environment, it seemed obvious that health professionals knew the best interests of their patients and would always act to promote them.

A number of high profile incidents have undermined the unwavering confidence of the public in health professionals. For example, the Cartwright report (1988) was a damning indictment of research into cervical cancer at National Women's Hospital in Auckland, New Zealand. More recently in England the Bristol Inquiry investigated poor paediatric cardiac surgical practices (Kennedy, 2001). Along with these incidents have been growing consumerist and rights based societies questioning the assumptions which uphold the traditional medical decision making model.

The new paradigm questions the validity of the value-free medical model in the decision making of health professionals (See Fulford, 2004; Kennedy, 1981, p. 78; Little, 2003; Seedhouse, 2005; Spiers, 1997, p. 54; Veatch, 1995, p. 4). Growing evidence paints a more realistic picture of the values which guide clinical decisions. For example, Holloway, Benesch, Burgin and Zentner (2005) found research demonstrating that physicians' personal characteristics, including age, race, religion, time in clinical practice, religion, gender and degree of burnout, are influential in decisions about whether to continue or withdraw life sustaining treatment for patients following severe stroke. As Bieglar observed "being good at medicine does not necessarily translate into moral expertise at moral judgment for others" (2002, p. 61).

The conflict between the new and the old paradigm

The new paradigm is in direct conflict with the old paradigm. The call for the recognition and transparency of values in health care is simply incompatible with the dominant philosophical approach. In accordance with Kuhn's theory of scientific revolution, this has created tension between the people supporting the new paradigm and those in the old camp. In the new camp people are no longer prepared to accept without question the clinical judgement of health professionals, particularly concerning grave treatment decisions. In the old camp, health professionals recognise their vulnerability in the new environment where their decisions are no longer accepted without question. What has resulted in this period of conflict is uncertainty about the decisions made on behalf of incapacitated adults and how they are made.

For years, health professionals have provided certainty, basing their decisions on medical science and 'clinical judgement'. Questions about, for example, who should be given renal replacement therapy is couched in medical terms such as prognosis, clinical benefit and scientific evidence. However, the period of uncertainty between the old paradigm and the new paradigm has resulted in the destabilisation of traditional social conventions and revealed the certainty of clinical judgement as a façade.

Consider again Sartre's portrayal of our human response to the realisation of our freedom and choice to make decisions about the situations that confront us in daily life. Through his fictional character Antoinne, Sartre portrayed our response to this freedom and choice as anguish and nausea (Sartre, 1962). Antoinne's response seemed both extreme and ridiculous in the context of ordinary events in our daily lives, like ordering a drink in a café or observing an oak tree in a park.

Imagine instead that you have to make a decision whether to permanently remove the reproductive capacity of a young woman with learning disability, or to end the life of young man in a persistent vegetative state by discontinuing food and hydration. Sartre's representation comes to life. The enormity and finality of the decision and the absence of complete certainty about whether your decision is right or wrong renders a response of almost dizzying anxiety completely understandable.

This leaves us on shaky ground. We know this. We also know that when we make choices, we have to take responsibility for them. So we attempt to create certainty. As Sartre suggests, in an attempt to achieve certainty, we may use methods of objectification. And if we then detach our own subjective judgement from the process what results is bad faith. This tendency has been observed in health professionals.

Research tells us that doctors shroud value judgements in technical justifications (Spiers, 1997). This in itself is not bad faith. But what if the objectification is used to avoid the complexity of the decisions or to remove their subjective selves from the process? Sayers and Perera (2002) examined end of life treatment decisions by general practitioners and geriatricians in response to case studies. Each case study concerned whether to initiate acute, routine medical treatment for elderly people with terminal illnesses without which they would die. For instance, the doctors were asked whether a

patient with terminal prostate cancer with a urinary tract infection should be treated with antibiotics. They found that doctors gave medical reasons for not admitting patients to hospital, and that in this way they avoided having to justify in ethical terms the death of the patient. Sayers and Perera suggest that this may be a form of deception or self-deception used as a coping mechanism to reduce anxiety about decisions which inevitably hastened the death of some patients (2002, p. 352).

Like the emperor's new clothes, as the traditions governing medical decision making fall away, the illusion of objectivity and certainty is shattered. The stark reality that decisions made on behalf of others are value judgements is revealed. There are no definitive right or wrong answers about who should receive scarce health resources or whether bone marrow should be harvested from an intellectually disabled person for the benefit of a sibling. This is counter-intuitive to the certainty that we seek, particularly when grave irreversible decisions are being made. And so, in this period of uncertainty and tension, we have sought certainty from the law.

The period of conflict and best interest determinations.

It is only recently that the courts in England and other common law jurisdictions have been called on to adjudicate in conflicts concerning medical decision making for incapacitated adults. Representing the new paradigm, people opposed to particular treatment decisions have sought clarification from the courts. In defence of the old paradigm, the courts have been asked by health professionals to declare their proposed treatment decisions lawful.

The first sign of the new paradigm impacting on treatment decisions on behalf of incapacitated people came in the case of *In Re D* [1976] (England). It was proposed that an 11 year old girl who was described as being "abnormal and retarded" with "dull to normal intelligence" be sterilised. The mother feared that the girl would be unable to care for a child if she were to become pregnant and also that any child conceived might be disabled. This view was shared by her family doctor. The gynaecologist at the local hospital agreed to perform the sterilisation solely on the recommendations of the family doctor.

The sterilisation was regarded as unnecessary by the headmaster and social worker at the school D attended. They initiated a complaint to the school's medical officer. The judge found that the family doctor was unmovable in his opinions about the benefit of the sterilisation and that "his views were clouded by resentment at what he considered unjustified interference" (p. 4). It was established that D had sufficient intellectual capacity to marry in the future. On those grounds, and with considerable evidence which rejected the sterilisation of 11 year old girls because it was outside the realms of usual practice, the judge declared the procedure unlawful.

Since *Re D* [1976], a number of other cases have been brought to court by people concerned about unfettered clinical decisions made on behalf of people who cannot make their own decisions. For example, in Australia a decision to perform a hysterectomy on a 15 year old intellectually disabled girl was brought to court by an advocacy officer of the New South Wales Council for Intellectual Disability (*Re Elizabeth* [1989], p. 2).

Health professionals responded to the new environment of uncertainty by seeking juridical sanction for their treatment decisions. For example, Tony Bland who was a victim of the Hillsborough football stadium disaster in England in 1989. In the tragedy, Tony Bland's lungs were crushed and the supply of oxygen to his brain was interrupted. As a result, he suffered catastrophic and irreversible damage to the higher centres of his brain resulting in a condition known as persistent vegetative state (PVS). Someone in PVS breathes unaided and digestion continues to function. But, although his eyes are open, he cannot see. He cannot hear. The patient is incapable of voluntary movement and can feel no pain. He cannot taste or smell. He cannot speak or communicate in anyway. He has no cognitive function and can thus feel no emotion, whether pleasure or distress. The space which the brain should occupy is full of watery fluid. With skilled nursing and close medical attention a young and otherwise healthy PVS patient may live for many years. Tony Bland could not swallow, and was fed by means of a tube, through which liquefied food was mechanically pumped into his stomach. (Summary adapted from the appellate judgement of Sir Thomas Bingham MR, *Airedale NHS Trust v Bland*, [1993]).

Four years on from the disaster, Tony Bland's parents and doctor wanted to stop his tube feeding. His doctor sought approval from the local coroner who advised that the doctor could be prosecuted for homicide (Keown, 2002, p. 13). They applied for a declaration of lawfulness that they could stop feeding. The declaration was given by the House of Lords who held that they could lawfully withdraw food and hydration and need not give further medical treatment except "for the sole purpose of enabling AB to end his life peacefully with the greatest dignity and the least of pain, suffering and distress" (*Bland* [1993], p. 3). This case represents health professionals seeking judicial sanction for non-treatment decisions in the new climate.

Legal uncertainty

At stage three of values-based law, I identified a period of conflict and uncertainty between two paradigms as a metaphorical state of nature. Because the normal method of governance has been destabilised, the usual constraints are absent and individual values emerge. In a macro state of nature, for instance, Golding's schoolboys, or New Orleans in the wake of Hurricane Katrina, entire social order breaks down. In the micro state of nature which results from destabilisation of normal social rules in discrete areas of governance, as with scientific revolution, there is a period of debate.

Until recently, the old conventions governed clinical decision making and the courts had been perceived as the arbiters of medical decisions. However, as the traditional conventions destabilised in the period of conflict between the new and old paradigm, it emerged that there was no clear legal mechanism by which others could make decisions to administer or withdraw treatment for adults who lack capacity.

Consider again *Re F* [1990], brought before the House of Lords concerning a young woman with learning disabilities for whom sterilisation was planned. The woman was in an active sexual relationship, and her family and carers believed it was not in her best interests for her to go through pregnancy or give birth to a child. Informed consent is the mechanism which, as well as respecting the autonomy of adults undergoing health care treatment, protects health professionals from charges of assault and battery. However, F lacked the level of capacity required to consent and there was no legal mechanism for the decision to be made on her behalf. In the absence of authorisation

the sterilisation procedure would be unlawful and the health professionals performing the procedure were at risk of criminal and civil charges (*Re F*, Lord Donaldson, at 12–13). The court proceedings were to establish the lawfulness of the sterilisation procedure.

So how can judges find a definitive answer to this very difficult essentially value judgement within positivist systems which strive for objectivism and value-neutrality? There was no rule that provided the definitive answer. To resolve the gap in legal guidance, the House of Lords adopted the best interest principle. The test developed from the courts' assertion that when a proxy makes a decision on behalf of a child, they must act out of concern for the child's welfare (Kennedy & Grubb, 2000, p. 778). In chapter one I considered Hart's open texture thesis which identifies the limitations of legal rules to anticipate every possible scenario which it will be required to govern (Hart, 1994, p. 126). Because of this, new laws employ language which is indeterminate (p. 127). In line with Hart's thesis a vague and indeterminate principle evolved to fill the gap in the legal governance of decision making on behalf of adults who lack capacity.

In *Re F* [1990] the judgement took as the starting point the duty of care that a health professional has to their patient. To establish this, the Lords referred to the established legal standard for medical negligence; the Bolam test. In *Bolam v Friern Hospital Management Committee* [1957] it was found that a health professional could not be found guilty of medical negligence if they acted with reasonable care and skill which conformed to a standard accepted as proper and in keeping with a responsible body of professional opinion. *Bolam* set the standard of reasonableness required of any negligence case to be measured by the medical professional's peers. The Lords agreed that when treating an incompetent adult, as long as doctors act in good faith, in the best interests of their patients, and in accordance with a responsible body of medical opinion, they would not be acting unlawfully (See Lord Brandon, *Re F* [1990] at 67).

Combining the medical framework of *Bolam* with the best interest test achieved certainty and resolved the philosophical incongruence of deciding matters of value within the positivist legal framework. However, the difficult and evaluative nature of a best interest determination does not change simply because it is placed in the hands of

the courts. As Kennedy observes, using the best interest test with Bolam has the effect of transforming what are complex moral and social questions into matters of medical fact (1991, p. 91).

Consider again the case of Tony Bland who was a victim of the Hillsborough football stadium disaster in 1989. The judges found that the food and hydration delivered artificially into Tony Bland's stomach via a pump was not what ordinarily might be described as basic, necessary sustenance. Instead, it was described as medical treatment. In this way, the courts handed the responsibility of deciding when to withdraw the "treatment" back to health professionals and a responsible body of medical opinion (Laurie & Mason, 2000). The experts gave evidence that there was no hope of any improvement or recovery and that the "treatment" was futile. As Laurie and Mason observed, this affirmed a legal ambience which endorsed the value judgements of clinicians as to the quality and worth of the lives of patients with chronic and incurable conditions (2000, p. 160).

Legal process

Other issues within positivist legal systems have rendered the new paradigm questioning best interest determinations as the sole, objective domain of medical professionals less likely to succeed in the courts. The lack of clear legal guidelines relating to decision making on behalf of adults who lack capacity resulted in cases before the courts seeking a declaration of lawfulness to administer or withdraw treatment. Legal process evolved to achieve that purpose. A binary presentation of options is put before the courts. The question is not: "What is in this person's best interests?" But rather: "Is the proposed treatment in the best interests of this person?" For example, in *Re W* [1993] (England), a mother successfully sought a declaration of lawfulness to sterilise her 20 year old mentally handicapped daughter. The evidence was adduced that W was unable to protect herself against unwelcome sexual advances. However, the court was confined to just two options. Either the sterilisation was lawful or it was not. Rather than promoting comprehensive enquiry into the person's best interests, the process has developed to seek legal approval of *a* proposed treatment.

Decision making is further inhibited because one of the two options is already firmly established as preferable by the health professionals involved. Historically the judiciary have proven reluctant to question the clinical decision making of health professionals (Keywood, 1995, p. 128; Sheldon, 1997, p. 75-103). Keywood describes the "rather special relationship" which exists between the medical profession and the courts, with judges inclined to respect their clinical judgement and who have declined to perform close scrutiny, particularly in matters of diagnosis and treatment (1995, p. 127). Case law is littered with examples, but the following is representative.

> *I find it difficult to conceive of a situation where it would be a proper exercise of the jurisdiction to make an order positively requiring a doctor to adopt a particular course of treatment… unless the doctor himself or herself was asking the court to make such an order.*
>
> *Re J* [1993] (England) Balcombe LJ, cited Kennedy & Grubb, 2000, p. 821

Whilst the new paradigm challenging unfettered medical decision making discretion has resulted in cases coming before the courts, the common law doctrine of precedent has promoted and supported traditional approaches. *Re F* [1990] established best interest decisions as primarily medically determined. This ensured that the same approach was followed in the many cases that followed both in England and internationally. For example, one of the first cases in New Zealand to employ the best interest test was *Auckland Area Health Board v Attorney General* [1993]. This case was an application by doctors of the intensive care unit of the Auckland Hospital for a declaration clarifying whether they would be guilty of culpable homicide under the Crimes Act 1961 (NZ) if they withdrew the life support system of a patient with an extreme case of Guillain-Barre syndrome. The test was invoked, and finding the withdrawal of treatment in accordance with a responsible body of medical opinion, the actions of health professionals were declared lawful.

Reverting to the fact-centred medical approach achieves a veneer of certainty and value-neutrality in the form of empirical evidence, clinical judgement and the evidence of experts. But this does not alter the evaluative nature of the decisions, and the values which guide them do not disappear. Instead they are hidden behind the combined illusion of objective legal process and medical science. Is this an example of bad faith?

And is good faith even possible given the persistent use of objectivist methods to reach best interest determinations?

Bad faith and best interest determinations

In chapter three, I used Sartre's philosophy to explore the idea that sometimes we use methods of objectification in order to manage our subjective response to our external realities. This in itself is not bad faith. But when we use modes of objectification intentionally to distance our subjective selves from difficult situations or decisions and aim to deceive ourselves or others of our intent, then we are in bad faith.

I then examined the case of *Shortland* [1998] (NZ) to demonstrate the potential for bad faith in best interest determinations. I argued that difficult value judgements about the allocation of scarce renal dialysis resources were objectified by clinical guidelines, expert evidence and medical judgement. This meant difficult value judgements about how that process was completed were circumvented and the subjectivity of decision makers was portrayed as absent from the process.

In this section I expand my analysis, applying the lens of bad faith to the significant body of international case law which has developed using the best interest test to justify sterilisation or hysterectomy for people with intellectual disability. These surgical procedures have been a response to some of the many difficult problems faced by people with intellectual disabilities and their families, carers and communities in relation to their sexuality and menstrual management.

A decision about whether to proceed with either procedure is complex and value-laden, raising a multitude of ethical concerns including eugenics, sexual exploitation, removal of a person's sexual identity, protection, freedom and human rights. However, it has been argued that the courts have failed to address these issues and that legal process has done little more than rubber stamp medical decision making (Keywood, 1998, p.164). Applying the lens of bad faith, I ask whether, as Kennedy suggests, the best interest test has been used as a device to transform complex moral and social issues into questions of fact (Kennedy, 1991, p. 91). And if so, is this done with the intention of detaching

subjectivity and denying the inescapable value judgements required to reach a decision to permanently sterilise people with learning disability?

Terminology and formatting

People with intellectual disabilities have had a wide variety of labels used to describe them. In the case law, they are described as having learning difficulties, being intellectually handicapped, mentally handicapped and mentally retarded. Because I write this thesis in New Zealand, I adopt the preferred terminology here which is intellectual disability (Bray, 2003, p. v).

In order not to interrupt the flow of my analysis, I cite the relevant cases in footnotes rather than in the main body of the text.

Case selection

I chose this group of cases because of a personal concern about the courts' response and because of the significant body of international case law which has developed. I adopted a two pronged approach to my search. Firstly, I found case citations by consulting medical law texts (Kennedy & Grubb, 2000; Mason & McCall Smith, 1999; Stauch, Wheat and Tingle, 1998), relevant academic literature (Fellowes, 2000; Kennedy, 1991; Keywood, 1998) and case law that references best interests. From the citations, I then located the law reports. I also searched legal databases (LexisNexis, Baillii) using the terms sterilisation, best interests, hysterectomy, learning disability and intellectual disability.

I found 27 cases from England, Australia, New Zealand and Canada. Each jurisdiction has their own unique legal framework and cultural and historical contexts within which decisions are made. However, each has employed the best interest test to make decisions on behalf of incapacitated adults and common themes emerge from the different international contexts.

Fourteen of the cases concerned sterilisation and 13 concerned hysterectomy. Two cases are not included. One was unreported[4] and the other focussed solely on establishing the jurisdiction of the court[5]. The latter case went on to consider whether hysterectomy was in the female's best interest in a separate case which is included in the analysis[6]. In total, of the 14 sterilisation cases, 8 were authorised and six declined. Of the 13 hysterectomy cases 10 were allowed and 3 were declined. 24 of the 25 cases concern women. For a summary of the cases and a brief synopsis of the findings from each, please refer to the appendices.

Approach and emerging themes

Having gathered the cases, I conducted a content analysis of each. Content analysis is a recognised qualitative and quantitative research technique that uses procedures to make valid inferences from texts (Krippendorff, 2004; Weber, 1990). This technique lends itself to the examination of law reports. For example, Artis (1999) and Mercer (1997) both employed this method to examine the influences of judicial decision making in child custody determinations in case reports in the United States. I began by recording some basic information from each of the cases: the year, jurisdiction and whether or not the hysterectomy or sterilisation procedures were allowed. I then examined each case report in depth.

The majority of the cases came to court as a result of anxious parents seeking a declaration of lawfulness for a sterilisation or hysterectomy to resolve a number of practical problems, for example, managing menstruation or sexual maturity in the lives of their adult daughter or son. The reasons given for the applications are varied, ranging from the right to have sexual freedom without the burden of pregnancy, to problems with hormonal fluctuations and aversion to blood. They broadly fall into two categories: firstly, for the prevention of pregnancy and secondly, for menstrual management. Additional themes emerged including eugenics, risk of sexual abuse, human rights, doubt about the ability of people with intellectual disabilities to be parents and the adoption of surgical solutions to resolve problems arising from

[4] *Re H* [1995] (Canada)
[5] Secretary, Department Of Health and Community Services v JMB and SMB [1992] 15 Fam LR 392 (Australia)
[6] *Re Marion (No 2)* [1992] (Australia)

uncertainty about the provision of appropriate levels of support and supervision in community settings.

The prevention of pregnancy

A permanent contraceptive solution was deemed necessary for a variety of different reasons. These include a risk of sexual abuse, an absence of appropriate levels of support and supervision, and that the person concerned could not cope with pregnancy or parenting.

In the cases, there appears to be a recurrent tension between the level of supervision provided for people with an intellectual disability, freedom for them to live their adult lives and a rather more sinister aspect which underpins many of these cases; the risk of sexual exploitation. Parents are clearly anxious about these tensions. The following extract from an English case in which a hysterectomy was proposed for both menstrual management and contraception for a young woman is representative.

> *S is an extremely attractive girl who is at present cared for by her mother who keeps a close watch on her activities and supervises her. If she goes into a local authority home there is a risk that she might move unsupervised in mixed circles and might either form a close attachment or be the victim of sexual assault with the possibility of pregnancy.*
>
> *Re S* [2001], p. 5

Nineteen of the cases were brought to the court by parents[7]. Many of them were specifically concerned about the level of support, care or supervision that would be provided when they left the primary care of the family (usually the mother)[8]. Sterilisation was declared lawful in 7 cases which identified there would be a reduced

[7] *Re S* [2001], *Re A* [2000], Re Z [2000], *Re S* [1998], *Re X* [1998], *JLS v JES* [1996], *P v P* [1994], *Re H* [1993], *Re HG* [1993], *Re L & M* [1993],*Re W* [1993], *Re GF* [1992], *Re Marion (No 2)* [1992], *Re X* [1991], *Re F* [1990], *Re Jane* [1988], *T v T* [1988], *Re Eve* [1986], *Re K* [1985].
[8] *Re S* [2001], *Re A* [2000], *Re S* [1998], *JLS v JES* [1996], *Re HG* [1993], *Re B* [1988], *Re Elizabeth* [1989], *Re M* [1988], *Re a Teenager* [1988], *Re D* [1976].

level of supervision when the person concerned went from the care of their parents to services provided by the community[9].

Concerns about levels of support and sexual exploitation are well founded. Research tells us that people with intellectual disabilities are at a high risk of sexual abuse (Bell & Cameron, 2003, p. 123; Keywood, 1995, p. 132; Keywood, Forvague & Flynn, 1999, p. 36; Sobsey, 1994, cited Mirfin-Veitch, 2003, p. 56). Added to this well established risk is the reality that people with ID are more likely to be sexually assaulted by someone they know, rather than a stranger. For example, male staff sexually exploited people with intellectual disabilities who comply for a variety of reasons including habit, fear, confusion or lack of understanding (McCarthy & Thompson, 2004, p. 231). This raises the possibility that potential exploiters will know that the person has been sterilised. Researchers also point out that sterilisation may lead to neglect and increase the likelihood of sexual abuse. Education and protective measures may be less likely to be implemented because contraception is no longer seen as a concern (Brady & Grover, 1997, p. 22).

In 7 of 8 cases in which a risk of sexual abuse was identified, the sterilisation or hysterectomy was declared lawful[10]. The eighth allowed long term contraception through the use of Depo-Provera[11]. The use of sterilisation as a response to the risk of potential pregnancy from sexual abuse may resolve the consequential issues associated with whether the woman concerned could cope with pregnancy or parenting. However, it does not answer the immediate question about support, safe environments and education for people with intellectual disabilities at risk of abuse. As Brady & Grover (1997) suggest, if a risk of sexual abuse is identified, the most fruitful response is ensuring that environments are made safe and that educational programs are initiated. “Sterilisation is not an appropriate response to sexual abuse” (Brady & Grover, 1997, p. 21).

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[9] *NHS Trust v C* [2000], *Re W* [1993], *Re B* [1988], *Re M* [1988], *T v T* [1988].
[10] *Re Z* [2000], *Re S* [1998], *JLS v JES* [1996], *Re HG* [1993], *Re Marion* (No 2) [1992], *Re Elizabeth* [1989], *Re a Teenager* [1988].
[11] *Re S* [2001]

In 3 instances[12] it was established that the women had a high level of appropriate support and the sterilisation was not declared lawful. In one of those cases the woman concerned had already been indecently assaulted by a member of staff while in a specialist residential home. As a result, she had been moved to new "high quality" accommodation and the local authority had made a commitment for substantial additional finance to fund a "night carer and additional supervisory protection" (Thorpe, J *Re LC* [1997], p. 260). These provisions meant that the risk of sexual abuse was effectively eliminated. In this case, the most obvious, less permanent and less invasive solution to the problem of sexual assault for people with intellectual disability had been found. However, even then the judge admitted that if the application for sterilisation had come prior to the woman's move into the new safe environment, it was "very possible that a different conclusion would have resulted" (Thorpe J, *Re LC* [1997], p. 261).

In just 4[13] of the cases, the judges acknowledged that sterilisation does not protect against sexual assault and in three of those the procedure was not sanctioned. The evidence suggests that in the past the courts have deferred to medical judgement rather than explore the most obvious solutions of initiating educational programmes and increasing provision of safe, protective and supportive environments for people living with intellectual disability in local authority accommodation.

Freedom and independence

Six cases specifically considered the promotion of independence and level of potential freedom facilitated by sterilisation. Each was declared lawful[14]. For example, *Re F* [1990] concerned a 36 year old woman who was known to be having some form of sexual relationship with another resident. In that case, a doctor gave evidence that if she were not sterilised, the only alternative would be to restrict her freedom – the practicalities of which would likely be "extremely detrimental" to her (Lord Donaldson, at 10). What the practicalities of the restrictions would be and how they would be detrimental are not explored. Why does freedom and independence necessarily equate

[12] *Re A* [2000], *Re LC* [1997], *Re L & M* [1993].
[13] *Re A* [2000], *Re LC* [1997], *Re L & M* [1993], *Re Elizabeth* [1989].
[14] *Re Z* [2000], *Re X* [1998], *Re HG* [1993], *Re F* [1990], *Re B* [1988], *Re M* [1988].

with sterilisation? This has echoes of policies from a different era in which the intellectually disabled were allowed to leave institutions as long as they were sterilised (Sabergh and Edgerton, 1962, p. 216). The permanent removal of the reproductive capacity of a woman seems like a high price to pay for an intellectually disabled person to have sexual freedom.

Pregnancy and medicalisation

Once a risk of pregnancy had been identified, the focus of many of the cases turned to giving the reasons why the people concerned must not get pregnant. Included in these was that pregnancy would be detrimental to the women's welfare[15], that the birth process could be traumatic[16] and that the woman could not cope with caring for the baby[17]. The evidence given supporting these assessments was commonly presented as the view of experts and accepted as fact. Consider the following extracts from two of the English case reports.

> *The medical evidence establishes that it is not a viable option to allow F to become pregnant and then consider an abortion. In any event she might become pregnant again after the abortion… Professor Bicknell used the word 'catastrophic' to describe the psychiatric consequences of her having a child. She thought there was a 75 per cent chance of pregnancy, labour and birth putting her progress in recent years back a very long way.*
>
> *Re F* [1990] at 10

Re HG [1993] considered the proposed sterilisation of an 18 year old woman. Similarly, the judge found from "expert evidence" that while the woman concerned was at "risk of sexual relationships", pregnancy would be detrimental to her.

> *There is no dispute but that a pregnancy, if continued to term, as physiologically it probably could be, would be disastrous. There is no conflict on the evidence with the proposition that T has no knowledge of sexual matters, no concept of pregnancy, marriage, contraception,*

[15] *NHS Trust v C* [2000], *Re S* [1998], *Re HG* [1993], *Re W* [1993], *Re F* [1990], *Re M* [1988], *T v T* [1988].
[16] *Re X* [1998], *Re W* [1993], *Re F* [1990], *Re B* [1988], *Re M* [1988], *T v T* [1988], *Re Eve* [1986].
[17] *NHS Trust v C* [2000], *Re X* [1998], *Re B* [1988], *Re D* [1976].

> *childbirth, child-rearing, and that she will never achieve such understanding.*
>
> *Re HG* [1993], p. 4

In both cases, the judges declared the sterilisation lawful. Couching the decision to sterilise in terms of the medical response to the women's ability to cope with pregnancy, child birth or parenting justifies the surgical solution. By asking experts for their opinions, which are then presented as fact, the hearing is in safe, certain territory. The difficult questions about society's response to, for instance, providing safe, supportive environments for people with intellectual disabilities, are circumvented and the onus is on preventing the woman from getting pregnant. Presenting contraception as the primary imperative also evades any questions about the consequences of sterilisation, sexual abuse or the potential for sexually transmitted diseases.

One case considered the potential problem of sexually transmitted diseases[18]. Two cases concerned the sterilisation of women after they had been sexually abused. The question of whether there would be any psychological damage following the abuse appears to have been linked with the perceived level of capacity of the woman. *Re H* [1993] (NZ) was a case about a 38 year old woman with intellectual disabilities who lived in residential care. As a result of sexual abuse, she had become pregnant. The evidence established that carrying a child to term would be detrimental for H and that she would not be able to parent the child. The judge expressed concern for the emotional impact on H of both the pregnancy and enforced sexual intercourse. However, the judge also said that this consideration lost "some of its impact when it is realised that H is mercifully insulated from any such emotional response" (Inglis J, p. 17). An abortion was found to be in her best interests, but the sterilisation was rejected.

A similar picture emerges from *Re LC* [1997] (England) regarding the sterilisation of a woman who had been sexually abused. In that case, it was said that LC could not understand the nature of the sexual attach or sterilisation and therefore, "there would be no emotional or psychological repercussion" (Thorpe J, p. 261). In this way, the judge disregards any potential emotional response to either the sterilisation or the sexual abuse which then ceases to be a consideration.

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[18] *Re A* [2000]

The dismissal of any potential psychological impact from sexual attack or sterilisation has the effect of dehumanising people with intellectual disabilities. This tendency is not uncommon. In chapter three, I referred to research which demonstrated how support workers and medical staff objectify people with intellectual disabilities both to conform with medical models of service provision and to distance themselves from their clients (Gillman et al, 1997). Gillman et al argued that people with intellectual disability often lose their humanity within systems which pathologise, label and thus objectify them (1997, p. 675). In the case reports the degree of disability of the people concerned are often introduced in terms of their perceived mental age[19]. The women were described by ages ranging from 8 months[20] to 9 years old[21]. This has the immediate effect of portraying the women as children and excluding them from any adult experience such as parenting, enjoying a normal sexual relationship, or responding emotionally or psychologically to episodes of abuse or the sterilisation procedure.

The tendency to assume that those with intellectual disability are not even capable of expressing a reaction to sterilisation has been documented in the literature (Sabergh & Edgerton, 1962, p. 221). However, for many years research has demonstrated that there *are* long term damaging effects felt by women with intellectual disabilities following sterilisation.

The effects of sterilisation

In 1962, Sabergh & Edgerton published research in which people with intellectual disabilities spoke about their experiences of sterilisation. Many associated the procedure with punishment and humiliation (p. 220). It was viewed as a symbol of reduced or degraded status. Some women spoke of the intense feeling of deprivation following the procedure. In what the authors suggest is indicative of the importance of the sterilisation in the lives of those sterilised, up to 29 years later, people still had a vivid recollection of the experience (p. 215).

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[19] *Re LC* [1997], *P v P* [1994], *Re W [*1993], *Re Marion (No 2)* [1992], *Re X* [1991], *Re F* [1990], *Re Elizabeth* [1989], *Re S* [1989], *Re Jane* [1988], *Re B* [1988], *Re M* [1988], *Re a Teenager* [1988].*Re K* [1985] *Re D* [1976].
[20] *Re Elizabeth* [1989]
[21] *Re D* [1976]

More recent research supports Sabergh & Edgerton's findings. Dowse & Frohmader (2001) spoke to Australian women with intellectual disabilities about their experiences following sterilisation. The stories of the women are a powerful reminder of the effects of sterilisation. Some of the impacts the women felt included a loss of sexual identity, denial of womanhood, powerlessness and a disrespect of their cultural beliefs. Other damaging effects related to the impact of the sterilisation on their health, the break up of relationships and removal of the woman's choice (Dowse & Frohmader, 2001, p. 34 – 5).

In a unique approach, the judges in *Re Eve* [1986] (Canada) took into account the negative effects of sterilisation on women with intellectual disability. They referred to research concerning both the impact of sterilisation of adults with learning disabilities (including the work of Sabergh & Edgerton, 1962). The judge observed that "there is considerable evidence that non-consensual sterilisation has a significant negative psychological impact on the mentally handicapped" (La Forest J, at 102). Eve's potential parenting abilities were also taken into account. The judge acknowledged the "value-loaded" questions which arise when considering a person's fitness for parenting. He referred to studies which found that "mentally incompetent parents show as much fondness and concern for their children as other people" (at 106). The judge also acknowledged the negative impacts of permanently removing a woman's ability to procreate and observed that there was no evidence that giving birth would be any more difficult for Eve than for any other woman (at 32). The Supreme Court of Canada declared that the sterilisation was not lawful.

Involvement of the people concerned

Another consequence of relying on the medical response to these complex social and moral issues is that the voices of the people are often silent. In just four cases the views of the person concerned about the procedure or the consequences of it were directly referred to[22]. In two of the cases the expressed views of the person concerned were

[22] *Re A* [2000], *Re X* [1998], *Re F* [1990], *Re D* [1976].

taken into account and even in these cases, doubt was cast over the legitimacy of those views.

Re A [2000] (England) considered the only application for male sterilisation. Giving evidence, a consultant psychiatrist said that it was clear that "A had indicated no when asked about the operation". However, that consultant then dismissed the expressed views of A saying that it was not an informed decision because he "could not understand the reason for the operation" (p. 4). The consultant presented this information as fact. However, one of the appeal court judges said that A's view should be taken into account. A had expressed a view that he did not want the operation which "ought not to be ignored even though he was unable to understand its implications" (Butler-Sloss Dame, p. 6). How influential A's rejection of the procedure was in the final outcome is not possible to assess. The judges found that the onus for protection of pregnancy was with the woman with whom A had intercourse and the surgery was not declared lawful.

Re F [1990] was one of five cases that considered whether the woman concerned potentially took any pleasure from being intimate with men[23]. F was said to have regular sexual contact with a fellow resident at the residential home where they both lived. Evidence was given that F found her sexual liaisons "nice" (at 9). One of the appellate judges indicated that it was important for F to have the freedom to enjoy her relationship without having to worry about pregnancy. Lord Donaldson said, "there has been a shift from the paternalistic approach to a much freer approach. Mentally handicapped people have the same needs, feelings and longings as other people, and this is much more frequently acknowledged nowadays than years ago" (Lord Donaldson, p. 9). Again, it is difficult to establish how influential F's views were in the final outcome which declared the sterilisation lawful.

In other cases, the women's views were largely dismissed in the light of medical evidence that they did not understand the connection between sex, pregnancy and having a baby. *NHS Trust v C* [2000] considered evidence of a discussion about the proposed sterilisation procedure between C and a doctor involved in her care. The

[23] *NHS Trust v C* [2000], *Re X* [1998], *Re HG* [1993], *Re F* [1990], *Re Elizabeth* [1989].

doctor reported that C "did understand that the operation was to stop her having babies for always although she did not really understand what that would entail" (p. 7). The doctor went on to conclude that her grasp of what was involved in the sterilisation was limited and that "she could not even discuss the link between sexual intercourse and pregnancy" (p. 7). C had received sex education at school. But how long that was before the question session with the doctor, what the education consisted of, and whether it had been reinforced was not explored. Once the evidence of the doctor had been given and accepted, there was no further direct involvement of C's expressed wishes in the decision to sterilise.

Re X [1998] (England) concerned a 31 year old woman described as being physically able but severely mentally retarded who appeared to "enjoy and desire physical contact with men". X was having a close relationship with one of the male clients at the training centre X attended. X had expressed a wish to have a child. However, a report from a doctor said that if X were to have a child she would be incapable of caring for it and the removal of the child would be "extremely distressing and damaging for her" (p. 3). The judge responded to X's expressed wish to have a child as follows:

> *One matter has, however, caused me to hesitate before granting the declaration [for sterilisation] sought. As I have already indicated, X does, in a very simple and childish way, make a connection between sex and the having of babies. In distinction perhaps to any other reported cases, X herself says when asked, that she would like to have a baby. So the performing of the sterilisation would directly prevent something which she herself wants to be able to do, and might seem, therefore, to be a gross infringement, not only of her right to bodily integrity but her right to reproduce. But in the end however, it seems to me that this takes me back to the very first point. X is quite unable to make any sensible, informed decision for herself, so other people have to make it for her. Even though subjectively she feels she would like to have a baby, it remains objectively completely contrary to her best interests to do so.*
>
> *Re X* [1998] Holman J p. 4

The judge qualifies how this objectivity was achieved, saying that it was fact that X could not bring up a child and fact that the process of pregnancy, birth and inevitable removal of the baby would be "so frightening, bewildering and upsetting to X herself" (p. 4). In this way, the subjective opinions of the judge and the doctors about X's ability

and suitability for parenting are purportedly transformed from value judgement into legal objectivity and medical fact. Having achieved what is expressed as objectivity, the judge then considers himself justified to override what are described as the subjective wishes of the woman.

Parenting

Thirteen of the cases established that the person concerned could not cope with motherhood[24]. Eliminating the choice of parenting for women with intellectual disabilities is well documented in the literature (Johnson, Traustadottir, Harrison, Hillier and Sigurjonsdottir, 2001). Some of the concerns appear to be directly related to widespread perceptions about the ability of intellectually disabled women to parent. Johnson et al explain this as a symptom of the dominant historical discourse which has situated women with intellectual disabilities as "unfit to have children or to be mothers" (2001, p. 207).

The views of the parents of intellectually disabled parents have also been influential. Johnson et al spoke to women with intellectual disabilities and found that parents were concerned that their daughters should not become mothers "because they would not be able to cope, because the child might be disabled or because they might be required to become the primary care givers" (2001, p. 212). This is despite research which tells us that with adequate support and training people with intellectual disabilities can be good parents (Keywood, 1995, p. 137; Mirfin-Veitch, 2003, p. 78-80).

Eugenics

Eugenics has been defined as a science intended to improve the inborn qualities of a race (Bryan, 2000, p. 38). It is a word derived from Greek and literally means "well born" (Hume, 1996, p. 1). In the late nineteenth century, Sir Frances Galton (who is said to have coined the term) promoted eugenics as a science, believing that the human race could be improved by a process of selective breeding. Galton was a cousin of Charles Darwin, and the central theme of the eugenics movement stems from Darwin's

[24] *Re S* [2001], *NHS Trust v C* [2000], *Re X* [1998], *Re H* [1993], *Re HG* [1993], *Re X* [1991], *Re Elizabeth* [1989], *Re S* [1989], *Re B* [1988], *Re M* [1988], *T v T* [1988], *Re Eve* [1986], *Re K* [1985].

assertion that traditional societies allowed natural selection to "weed out" their least fit – using modern medicine and charity not only kept them alive, but upset nature's natural selection process (Bryan, 2000, p. 39).

In the twenty first century, eugenics is linked by many to the policies of war-time Germany under the control of Hitler. However, the practice has not been confined to the concentration camps of Nazi Germany. In some Western countries, eugenic policies existed as recently as 1970s. For example, up until 1976 in what has been described as a "grim social experiment" lasting 40 years, Sweden sterilised up to 63,000 people in a racial purity programme approved by the state (Bates, 1999). Under that programme, people, mostly women, were sterilised for matters including being short-sighted or having "no obvious concept of ethics" (Bates, 1999).

Perhaps the most infamous example of the law's authorisation of sterilisation for eugenic purposes was in the American case of *Buck v Bell* [1927]. In that case the Supreme Court judge proclaimed that "three generations of imbeciles was enough" (at 207). No doubt his judgement was influenced by the view of many social reformers in the early part of the 20th century who advocated sterilisation as a solution to the problems created by society's "misfits" (Forest LJ, *Re Eve* [1986] at 76). In that environment, the view that disabled and "feeble-minded" people were a threat to the welfare of societies was supported by widely accepted research that mental retardation, mental illness, birth defects and social deviance were all inherited (Bryan, 2000).

A total of 12 of the hysterectomy and sterilisation cases refer to the history of eugenic sterilisation in relation to Nazi Germany and the social policies of the early 20th century[25]. In 7 of those cases, the judges explicitly denied that there was any eugenics component to the decision. In each case either the sterilisation[26] or the hysterectomy[27] was declared lawful. 4 of the cases refer directly to the possibility that any baby conceived by the woman would inherit a genetic defect resulting in mental retardation

[25] *Re S* [2001], *NHS Trust v C* [2000], *Re S* [1998], *Re X* [1998], *Re H* [1993], *Re F* [1990], *Re B* [1988], *Re M* [1988], *T v T* [1988], *Re Eve* [1986], *Re D* [1975].
[26] *NHS Trust v C* [2000], *Re X* [1998], *Re F* [1990], *Re B* [1988], *Re M* [1988].
[27] *Re Elizabeth* [1989], *Re a Teenager* [1988].

or intellectual disability[28]. Of those, only the early English case of *Re M* [1988] appears to seriously consider sterilisation specifically on eugenic grounds.

Re M [1988] was an English case concerning a 17 year old girl with Fragile X syndrome. She was described as physically normal but with the mental age of 5 or 6. It was said that she had become sexually aware and that there was a "real danger of sexual intercourse and her becoming pregnant" (Bush J, p. 1). Part of the evidence considered by the court included medical evidence that any child M might have had a 50% chance of inheriting Fragile X syndrome. In response to this evidence, the judge said that people should not be sterilised because they are handicapped, "or likely to give birth to children who might equally be so" (Bush J, p. 2). The judge said he was persuaded that the medical professionals proposing the surgery were not considering M's case from a eugenic point of view. They were simply concerned that if M became pregnant, she would have to be monitored more carefully.

Whilst the decision indicates that the intention of the sterilisation is to prevent M from getting pregnant and giving birth to a disabled child, the judge denies that this intention has any part in the decision (p. 2). The doctors couch the decision in terms of both discomfort to M from the extra testing she would require during pregnancy and what was said to be a real risk of surgical complications from the inevitable recurrent abortions she would require if she were not sterilised (p. 2). The court did not question why M would have to undergo extra testing or why abortion would be the only possible outcome if the foetus was disabled.

In this way, both the judge and the doctors detach their subjective judgements from the decision and the value judgements which guide a decision to terminate a potentially disabled foetus remain implicit. One of the doctors even suggested that the operation should be viewed as contraception and not sterilisation "because of the emotive feelings that the use of the word sterilisation arouses" (p. 1). Medical evidence provided the justification and the sterilisation was approved on the grounds that pregnancy, testing and abortion would be unnecessarily painful experiences.

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[28] *Re H* [1993], *T v T* [1988], *Re M* [1988], *Re D* [1976].

Re M appears to be the only case in which sterilisation is motivated by any eugenic considerations. Certainly, the cases indicate a significant effort to prevent the pregnancy of women with intellectual disabilities. Although it is not explicitly reference, there is no way of telling whether eugenics was a motivating factor in any of the other decisions.

Alternatives to sterilisation

A number of the cases did consider less permanent alternatives, such as the use of the contraceptive pill and depot injections such as Depo-Provera[29]. However, several different objections were raised against these methods, for instance, women having to take the pill everyday for the rest of their lives, contra-indications with other medications and potential side effects of the pill or depot injections. In just one case the depot injection was the preferred option[30].

Education programmes have been promoted and used for a number of years now to help and support the sexual lives of people with intellectual disabilities (Bell & Cameron, 2003, p. 124; Health and Disability Commissioner, 1998, p. 7; Keywood, 1995, p. 137; Mirfin-Veitch, 2003, p. 58). This option was considered in only two of the sterilisation cases. In one case sex education had been given, but was deemed unsuccessful by a doctor involved in the care of the woman named C.

> *She has had sex education lessons at school… She knew that women have babies but she couldn't say how. She told me it was not necessary to have sex to have a child… she could not give me a convincing account of what the act of sexual intercourse entailed.*
>
> *NHS Trust v C* [2000] (England), p. 7

The judge approved the sterilisation of C. The other case had been brought to court by the anxious mother of a man with Down's syndrome. She was concerned that A might have a sexual relationship once he had moved into local authority care, and disapproved

[29] *Re S* [1998], *Re X* [1998], *Re H* [1993], *Re HG* [1993], *Re W* [1993], *Re GF* [1992], *Re X* [1991], *Re F* [1990], *Re B* [1988], *Re M* [1988].
[30] *Re S* [2001].

strongly of a man walking away when responsible for the birth of a child[31]. One of the judges was "not impressed" that specialist counselling which was offered by an expert as a possible alternative to surgery for the Official Solicitor who was acting on behalf of A[32] and preferred a surgical solution on the grounds that it was "more realistic". This option was not further pursued. The judges dismissed the application for the sterilisation on the grounds that if A did enter a relationship, which was hypothetical, the onus for protection from pregnancy would be with the woman.[33]

Menstrual management

A number of the cases proposed hysterectomy in a woman's best interests because of problems with menstruation[34]. Of the 13 cases of this kind I examined, 10 of the applications were allowed[35] and 3 declined[36]. 8 of the applications were in response to problems experienced *after* the onset of menstruation[37]. The remaining 5 concerned problems which were *anticipated,* prior to the onset of menstruation[38]. Of the 5 which anticipated issues arising from future menstruation, four declared the hysterectomy lawful. The issues arising were similar for both the women who were experiencing problems with menstruation and those that anticipated problems. They included very heavy periods[39], problems coping with personal hygiene[40], behavioural problems with hormonal flux[41], negative reaction to pain and blood[42] and increased risk of epilepsy[43].

Consider the English case of *Re Z* [2000]. Z was then 19 years old, with Down's Syndrome. From the age of 12 onwards, she had been suffering from heavy, painful and

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[31] *Re A* [2000] p. 4.
[32] Thorpe LJ (p. 12).
[33] Butler-Sloss, Dame (p. 10).
[34] *Re S* [2001], *Re Z* [2000], *JLS v JES* [1996], *Re L & M* [1993], *Re E* [1992], *Re G F* [1992], *Re Marion (No 2)* [1992], *Re X* [1991], *Re Elizabeth* [1989], *Re S* [1989], *Re Jane* [1988], *Re a Teenager* [1988], *Re K* [1985].
[35] Re *Z* [2000], *JLS v JES* [1996], *Re E* [1992], *Re G F* [1992], *Re Marion (No 2)* [1992], *Re X* [1991], *Re Elizabeth* [1989], *Re S* [1989], *Re Jane* [1988], *Re a Teenager* [1988].
[36] *Re S* [2001], *Re L & M* [1993], *Re K* [1985].
[37] *Re S* [2001], *Re Z* [2000], *JLS v JES* [1996], *Re L & M* [1993], *Re E* [1992], *Re G F* [1992], *Re Marion (No 2)* [1992], *Re Jane* [1988],
[38] *Re X* [1991], *Re Elizabeth* [1989], *Re S* [1989], *Re a Teenager* [1988], *Re K* [1985].
[39] *Re S* [2001], *Re Z* [2000], *Re E* [1992], *Re G F* [1992].
[40] *Re Z* [2000], *Re L & M* [1993], *Re X* [1991], *Re S* [1989].
[41] Re Marion (No 2) [1992].
[42] *Re Z* [2000], *Re Marion (No 2)* [1992], *Re a Teenager* [1988], *Re K* [1985].
[43] *Re L & M* [1993], *Re Elizabeth* [1989].

irregular periods. The mother described in detail the reality of the problems faced by Z when she was menstruating.

> *As a result of her periods being very heavy she should frequently change her sanitary pads. When she is at home I am able to keep an eye on her and help her to stay clean, however when she is at school she is responsible for her own hygiene as the school have indicated they will not invade her privacy; the result of that is that [Z] often arrives home with menstrual blood soaking her leggings and smelling very badly. She is not aware of how unpleasant this is and generally has not sense of basic personal hygiene.*

From the lengthy evidence of the mother, the judge was satisfied that Z had great difficulty coping with her hygiene. Evidence was also given of the distress that Z felt at her periods, perhaps because she did not understand them (p. 5). However, the school policy of not assisting Z with her menstrual hygiene went unquestioned. The hysterectomy was allowed on the grounds of this evidence and also as a permanent contraceptive solution because she had a boyfriend and was showing signs of sexual awareness.

Cases proposing hysterectomy for menstrual problems "have received particular sympathy from the courts" (Keywood, 1998, p. 160). Keywood suggests that this may be more to do with the convenience of carers than for what the courts term as therapeutic reasons. The issue has been bluntly summarised by Brazier.

> *If a 20 year old woman is totally incapable of caring for herself and needs parental care for every bodily function, the issue may ultimately become brutally simple. Is she better off with her uterus but with her family, or with her uterus and in an institution because her parents can no longer cope?*
>
> Brazier, cited Keywood 1998, p. 164

In 2 of the cases it was clearly stated that the proposed hysterectomy would be advantageous for the primary carers of the women concerned[44]. For example, in the Australian case of *Re Marion (No 2)* [1992], the judge stated that "the cessation of

[44] Re Marion (No 2) [1992], Re X [1991]

menstruation will have positive implications for Marion's hygiene and the capacity of her parents to care for her at home." (Nicholson CJ, p. 12).

Of the three cases which rejected hysterectomy as a response to menstrual management problems, each preferred a less invasive solution. It has been argued that if a woman is so disabled that she cannot manage her periods with support and training, she is also likely to require intense help and supervision with other aspects of daily living, for instance, with urinary and faecal incontinence (Women With Disabilities Australia, 1991, p. 13). *Re K* [1985] is a Canadian case which considered whether a proposed hysterectomy was in the best interests of a ten year old described as severely mentally retarded. The medical evidence suggested that the onset of menstruation was imminent. It was proposed that K have the hysterectomy because she had demonstrated a hysterical reaction to blood in the past. However, it was likely that K would always require supervision with all aspects of her toileting for which provision was already made. The judge found that menstrual hygiene could be managed alongside that (at 107). The judge also accepted evidence that a desensitisation programme could be implemented to overcome K's fear of blood (at 110). The judge ordered that the proposed hysterectomy not be performed.

Re *L & M* [1993] is an Australian case that considered whether a hysterectomy for sterilisation and menstrual management purposes was in the best interests of Sarah, a 17 year old physically and intellectually disabled woman. The judgement in *Re L & M* [1993] was unique in that the evidence from an occupational therapist who had conducted research into the use of education programmes for menstruation and fertility of people with learning disabilities was admitted. As with *Re K* [1985], the judge found that there was a high degree of support in place commensurate with Sarah's level of dependence and the provision of care was deemed sufficient to manage Sarah's menstrual hygiene. The application was rejected on these grounds and because the judge viewed a risk of pregnancy in Sarah's circumstances as a failure of care, "and sterilisation is not the remedy for the failure" (Warnick J, *Re L & M* [1993], p. 12).

The third case is more recent and reflects the changing attitudes towards permanent surgical solutions to resolve problems with menstrual management for women with learning disabilities. In *Re S* [2001] (England) considered an application for

hysterectomy for a 29 year old woman with severe learning disabilities as a permanent solution for both menstrual management and contraception. In *Re S* [2001] there was conflicting medical opinion about the best solution. One of the doctors was proposing a partial hysterectomy and the other rejected surgery in favour of a mirena coil; a contraceptive device which also has the benefit of reducing menstrual flow. The surgeon who favoured the coil said of the proposed hysterectomy; "This is a normal woman and we would not dream of doing it [hysterectomy] for a woman just because of socially unacceptable periods" (p. 8).

Best interests + Bolam = bad faith?

I have examined case law which suggests that in response to difficult value judgements about permanently removing the reproductive capacity of women with learning difficulties, judges working within positivist frameworks have largely deferred to medical discretion. This provides a veneer of certainty and objectivity. Beneath this veneer of objective legal process and medical facts, the value judgements of decision makers remain implicit. They are value judgements about, for instance, the ability of intellectually disabled people to parent, about the use of education methods to teach and support intellectually disabled people to lead safer sexual lives and about the value of a woman's physical integrity in relation to the convenience of carers. Without revealing the values which drive these decisions, they cannot be scrutinised or discussed, openly.

Keywood (1998) suggests that the English courts may have been more concerned with ensuring that medical practitioners are not making negligent decisions in relation to their patients (p. 164). It is certainly puzzling that two of society's influential institutions which we turn to for certainty and guidance about fundamental ethical and social issues respond with solutions which seem counter to a common sense view of what is in the person's best interest. For instance, why have decision makers not simply requested that local authorities provide more help and support for vulnerable people? Why not explore alternative approaches for carers who cannot cope with the behavioural problems or the heavy periods that a woman with intellectual disability suffers at times of menstruation? The combination of legal and medical value-free decision making approaches circumvents these issues and promotes methods of objectification which detach the necessary, subjective judgements of decision makers

from the process. Or, to put it another way, the use of the old paradigm does seem to promote bad faith.

The new paradigm which challenges objective, value-free decision making and calls for the recognition and transparency of values which drive best interest determinations is an antidote to bad faith. Opportunities have emerged which promote a more values oriented approach, or at least question the continuing dominance of traditional methods for reaching best interest determinations.

Human rights

The human rights argument has been used to critique the use of permanent surgical solutions for contraceptive or menstrual management purposes (see for example, Kennedy, 1991 and Keywood, 1995). The use of a human rights framework to protect and promote the interests of people with intellectual disability has been well documented. (See for example the Declaration on the Rights of Mentally Retarded Persons, United Nations, 1971.) To fully examine the impact of these instruments in relation to people with intellectual disabilities within the confines of this thesis is not possible. However, examination of case law suggests that applying this approach may offer a mechanism for revealing the values underpinning best interest determinations.

Human rights are an expression of values. For example, does someone with an intellectual disability have a right to be a parent? This is a subjective judgement which can only be answered by careful consideration of all the issues and confronting our values which are necessarily instrumental in reaching an answer. Are there concerns about the safety and development of a child brought up by parents with intellectual disabilities? And if we decide that yes, people with intellectual disabilities do have the right to parent, then as a society are we obliged to provide sufficient support to facilitate the optimal environment for both the parents and the child? As a society are we prepared to make those provisions? And are we prepared to accept the consequences if there are detrimental effects for the parents or the child? The process of considering which human rights are relevant when considering sterilisation or hysterectomy therefore has the effect of forcing values into the open.

Three cases adopted a predominantly rights based approach[45]. Of these, each was explicit about the value judgements which drove their decisions, and each declared the procedure to be unlawful. For example, in the Canadian case of Re Eve [1986] the judges considered the proposed sterilisation from a human rights perspective. Eve's rights to inviolability, to have sexual freedom and children were all seen as important. The judge was acutely aware of the enormity of the decision to sterilise and the irreversibility of the procedure. In reaching his decision against sterilisation, he weighed Eve's rights, finding that:

> *The importance of maintaining the physical integrity of a human being ranks high in our scale of values, particularly as it affects the privilege of giving life. I cannot agree that a court can deprive a woman of that privilege for purely social or other non-therapeutic purposes without her consent. The fact that others may suffer inconvenience or hardship from failure to do so cannot be taken into account.*
>
> La Forest J, *Re Eve* [1986] at 115

Kennedy (1991) has supported the human rights approach, arguing that in considering non-consensual sterilisation, the law should begin from "the position that every person has certain rights which it is the job of the law to protect" (p. 103). The Canadian decisions demonstrate that a human rights framework does offer a potential decision making framework which renders the values of decision makers explicit. However, this approach has been largely rejected in the cases that followed. Whether people with intellectual disabilities actually have any rights as regard to procreation or bodily integrity has been contentious.

Nine of the cases did consider the question of human rights[46], but they were not central to the decision making process. Of those, only 5 referred to any kind of statutory human rights instruments[47]. There is a variety of different perspectives in the case reports about exactly what the rights of people with intellectual disabilities are. This reflects

[45] *Re Eve* [1986], *Re K* [1985], *Re S* [1998].
[46] *Re S* [2001], *Re A* [2000], *Re L & M* [1993], *Re Marion (No 2)* [1992], *Re F* [1990], *Re S* [1989], *Re B* [1988], *Re Jane* [1988], *Re a Teenager* [1988].
[47] *Re Jane* [1988], *Re Marion* (No. 2) [1992], *Re a Teenager* [1988], *Re S* [1998], *Re A* [2000].

the multiplicity of values intrinsic to the decisions. As the judge in *Re K* [1985] observed:

> *A decision of this sort involves such a complex balancing of personal, social, professional and ethical views, that one would be alarmed if there was no diversity of opinion over the spectrum of any given social group.*
>
> Wood J, *Re K* [1985] at 65

Some of the rights identified in the case reports supported the non-consensual sterilisation or hysterectomy, for example; the right of people with intellectual disabilities to receive treatment which their condition allows[48] and the right to be protected from pregnancy[49]. Conversely, rights were identified which supported rejection of the procedure, including the right to found a family[50], the right not to have your body interfered with without good reason[51] and the right of a woman to reproduce[52].

In total, 5 of the cases rejected outright any human rights argument against the surgical procedure[53]. Of these, all approved either the sterilisation or hysterectomy. In these cases the judges seemed to take the view that a right, as such, could only be upheld if the holder of the right had the ability to exercise it. The following extract from a judgement in the English case of *Re B* [1988] (also cited in other cases) sums up the essence of the arguments against human rights.

> *To talk of the basic right to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth, the nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child appears to me wholly to part company with reality.*
>
> Lord Hailsham, *Re B* [1988] p. 3

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[48] *Re F* [1990]
[49] *Re Eve* [1986]
[50] *Re A* [2000]
[51] *Re S* [2001]
[52] *Re S* [1998]
[53] *Re a Teenager* [1988], *Re Jane* [1988], *Re B* [1988], *Re S* [1989], *Re F* [1990]

A cluster of cases from Australia from 1988 – 1992 referred their cases to the Australian Human Rights and Equal Opportunities Commission (the Commission). However, the influence of their submissions provides mixed reading for human rights advocates. The case reports suggest that the relevant Australian human rights instruments had only limited influence.

In the first of these, *Re a Teenager* [1988], the Commission submitted a response to the court which took a strong stand against the proposed hysterectomy as a violation of the rights "arising out of the planned operation" (p. 8). However, the judge rejected their submission suggesting that the Commission had not placed enough weight on the rights of the family. Instead the judge found that in the circumstances, the family caring for the person concerned had rights to exercise their obligations and duties which they saw as necessary, which in this case was to consent to the hysterectomy. The judge also took into consideration the rights and interests of a sibling who was advantaged by his sister undergoing the hysterectomy. The judge reasoned that the parents could improve his quality of life and psychological development if they were relieved from the need to implement menstrual management programs which were proposed as an alternative to surgery (p. 24). The judge exercised discretion to override the advice of the Commission and their submission was rejected. The hysterectomy was declared lawful.

In *Re Jane* [1988] the Commission was also invited to make a submission. Again, their submission said that Jane had human rights which would be infringed if the operation took place. The Commission referred to rights laid down in international humanitarian law including the Declaration on the Rights of the Mentally Retarded and the Declaration on the Rights of the Child. However, as in the previous case, the judge rejected their submission. The judge highlighted the courts' discretion to override international rights instruments with Australian domestic law explaining that the primary duty was to establish that the hysterectomy was in the best interests of the child.

In *Re Marion (No 2)* [1992] the Commission was again asked to submit and they took a very different approach. The Commission submitted that if strong medical reasons are established in support of medical opinion, refusal of that operation might constitute discrimination on the grounds of disability if the treatment could be made available

consensually to an adult of normal intellect (p. 10). The judge found their submission to be of assistance and said that a person had a right to medical treatment regardless of their ability to consent and under the conditions of equality, which was in this case the foremost right for consideration. It appears that if the response from the Human Rights Commission was in accordance with the view of the judge and the experts, it was accepted. If not, it was overridden.

The human rights approach does seem to provide a framework which forces the values driving decisions out into the open. However, human rights justifications have largely been rejected in favour of the medical interpretation of best interests.

Indeterminacy and the new paradigm

In the introductory chapter, I observed that one of the most criticised aspects of the best interests test is its indeterminacy. Contrary to the prevailing view, this lack of specificity can be seen as a positive aspect of the best interest test. The indeterminacy implicitly acknowledges the difficulty and complexity of these decisions and gives discretion to decision makers. This means that judges do not *have* to opt for medical judgement as the sole determinant in a treatment decision on behalf of an incapacitated adult.

In chapter one, I considered the rules of precedent and the argument that while there is an element of discretion in judicial decision making, it is constrained by previous cases (Cohen, 1933, cited Yablon, 1987). However, I also argued that whilst rules have developed, the method remains imperfect and legal reasoning remains open to considerable interpretation. A brief overview of the precedent used to guide decisions in the cases I analysed shows that none of the judges employed the same precedent (see the appendices). This reflects both the complexity and unique nature of the decisions put before the courts and indicates a limited level of constraint put on decision makers by precedent. One judge has recently taken advantage of this discretion to reject medical judgement as the sole, overriding consideration in best interest determinations.

In 1997 the English Court of Appeal considered the case of a 23 year old pregnant woman whose baby presented for delivery in the breech position. This normally

requires a ceasarian section delivery. However, the mother had a needle phobia and refused to undergo the surgery. The medical professionals caring for the woman took the case to court, where it was found that the mother lacked competence to make an informed decision because of her phobia. The court allowed the surgery finding that it was in her best interests.

An appeal was brought retrospectively. In the appeal it was found that the clinicians caring for MB were primarily concerned for the welfare of the foetus. English law does not uphold the rights of unborn babies over the competent wishes of the mother. The appellate judge found that simply because the clinicians thought it was in MB's best interests to save the life of her unborn foetus, did not *conclusively* mean that their chosen course of action *was* in her best interests. On appeal, it was established that the proposed treatment was not in MB's best interests, which in this case, were "not limited to medical best interests" (*Re MB* [1997] Butler-Sloss, p. 14).

The same judge re-stated her position in two later cases concerning the sterilisation of adults with learning disabilities (*Re A* [2000]; *Re S* [2001]). A was a 28 year old male with Down's syndrome. When A moved into care, his mother was concerned that he might have a relationship resulting in him fathering a child. His mother disapproved of men walking away from their responsibilities and applied to the court for a declaration that A could lawfully be sterilised because he lacked capacity to consent to the procedure. The appeal was dismissed. The judge found that "best interests are not limited to medical best interests… best interests encompass medical, emotional and all other welfare interests" [Butler-Sloss, p. 8].

S was a 29 year old woman with severe learning difficulties who was distressed by her menstrual periods and had a phobia about hospitals. Evidence was accepted that a pregnancy would be frightening and traumatic for her. S's mother applied to the court for a declaration *that* it was lawful to perform an operation of sterilisation and / or hysterectomy on her daughter. The judge found the less invasive contraceptive coil was in S's best interests. In line with her judgement in *Re A* [2000], Butler-Sloss again rejected *Bolam* as the first and only deciding factor in a best interest determination (p. 14). She said that "it is for the court to decide what is in the best interests of S. The medical advice is, of course, of the greatest importance – but it is that, namely advice."

(*Re S* [2000], p. 7). Furthermore, "the principle of the best interests as applied by the court extends beyond the considerations set out in the Bolam case… The judicial decision will incorporate broader ethical, social, moral and welfare considerations." (Butler-Sloss *Re S* [2000], p. 13). However, even though the less invasive alternative was chosen, a doctor's opinion was still the determining voice. These judgements are encouraging, but given the resistance demonstrated thus far it may be some time before the new paradigm has greater influence in the courts.

Legislation

As well as being a component of common law, the best interest test has been a part of the legislative framework for the provision of health and disability services in New Zealand since 1996. The Code of Health and Disability Services Consumers' Rights (the Code) is said to be at the forefront of consumer focused legislation in New Zealand (Paterson, 1995). The best interest test takes a similar form in the Code of Rights to the common law approach. Right 7 of the Code provides that health and disability services consumers have the right to make an informed choice and give informed consent. But in the absence of capacity, treatment may be given as long as it is deemed to be in the best interests of the consumer, that the wishes of the individual concerned are ascertained whenever possible and consideration is given to the views of people concerned with the welfare of the adult (Right 7, s. 4, ss a, b, and c).

England's Mental Capacity Act 2005 specifies considerations which clinicians must take into account when deciding whether treatment or non-treatment is in a person's best interests (Mental Capacity Act 2005, s. 4). In common with New Zealand's Code of Rights, the Act specifies that health professionals must take into account the person's past and present wishes, the values of the person and the views of anyone caring for the person. In what appears to be a concession to the new paradigm, and an acknowledgement of some of the potential influences which go into medical best interest determinations, the Act also describes what is *not* appropriate to be considered when deciding someone's best interests.

> *(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of-*
> *(a) the person's age or appearance, or*
> *(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*
>
> *(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.*

Section 4, Mental Capacity Act 2005

It has been argued that the Mental Capacity Act has adopted a patient centred approach to determine best interests (Corfield and Granne, 2005, p. 1353). However, the Act has not further defined the meaning of best interests, and its employment in clinical practice remains dependent primarily on the judgement of health professionals.

The persistence of the new paradigm

Even though the best interest test has been subsumed from common law into statute, we remain in a period of conflict. Kuhn suggested that for a paradigm to become fixed, it must receive the assent of the relevant community. Case law demonstrates that the new paradigm which challenges purely objectivist approaches in law and medicine is becoming increasingly influential. This is indicated by the adoption of the human rights approach in some cases and in others by the changing attitudes of judges who have begun to emphasise the need for consideration of *all* aspects of best interest determinations, not just the medical perspective.

Objections to health professionals being the sole and final arbiters of treatment and non-treatment decisions continue to be raised. In 2004 an English man was so concerned about the discretion the best interests test gave to health professionals to withdraw life sustaining treatment, that he took his case to the High Court (*R (Burke v. General Medical Council (Defendant) and Disability Rights Commission (Interested Party) and The Official Solicitor (Intervenor)* [2004]). Oliver Burke was a 44 year old man suffering from a degenerative brain disorder. At the time of the case, the effects of

the disease had rendered him paralysed with some effect on his speech and movement. His mental ability was not effected. Mr Burke knew that there was a time when he would require artificial food and hydration and he sought clarification about the power of clinicians to remove what had been viewed in the courts as life sustaining *medical* treatment.

> *On existing legal principle, if the doctors, in exercise of their clinical judgment, did not consider treatment to be in his best interests, they would be under no duty to give it, and would not risk a homicide charge if they withheld it.*
>
> Wicks, Wyldes & Kilby, 2004, p. 308

Couched in this way, the continuance of the current decision making paradigm is a frightening prospect for patients. Mr Burke sought recognition of his right to insist on artificial hydration and nutrition by an advance directive once his capacity to communicate his wishes had diminished. In a landmark decision, the High Court agreed that his right to self-determination expressed through an advanced directive to continue treatment once he had lost capacity, overrode clinicians' decisions.

However, amid media coverage which included condemnation of the climate of suspicion of health professionals, the General Medical Council appealed the decision. The ruling was described as reflecting a shift in power away from the medical professions and into the hands of patients (Frean, 2004). Doctors felt it was inappropriate to lay down hard and fast rules about end of life treatment and that they felt should be left with their judgement (Hawkes, 2004). It was hoped that the GMC appeal would clarify what were described as ambiguities in the judgement (Dyer, 2005a). The appeal succeeded (Dyer, 2005b) and the medical approach to reaching best interest determinations prevailed.

Although defenders of traditional decision making methods continue to deflect challenges, the new paradigm is not going to go away. It is not that the judgement of doctors or judges is more or less likely to be right or wrong in their decisions than anyone else. What is problematic is that the method of decision making denies that best interest determinations *are* value judgements. Via positivist legal process and

clinical judgement values are objectified and the actual values which guide decision making remain implicit. Giving a blunt appraisal of the implications for medical practice of the original *Burke* decision, Gillon [2004] said in an editorial for the British Medical Journal: "If not overturned, the judgement is likely to tilt the balance of medical practice towards non-beneficial and wasteful provision of life prolonging medical treatment" (p. 810). These are the sorts of value judgements which may underpin best interest determinations and which, while cloaked under the guise of clinical judgement and medical facts continue unseen, unchecked and unscrutinised.

Summary

We are in a period of conflict between an old paradigm, which continues to regard value-free decision making as both possible and preferable, and a new paradigm which challenges those perceptions. We will remain in this period of conflict until we adopt a completely new way of looking at what are essentially value judgements within positivist legal and medical science frameworks.

The old paradigm promotes bad faith. In a bid to achieve certainty and to conform with conventional systems, judges and doctors employ objectivist methods which aim to detach subjectivity from what are essentially value judgements. Through examination of case law, I have demonstrated that despite the veneer of medical evidence and positivist legal process, these are grave and difficult decisions that will *always* require values to guide and inform them. So far, the criticism of the best interest test as a mechanism for making decisions on behalf of incapacitated adults has largely called for greater determinacy. But this is simply not possible. The decisions are so complex and unique, that to reduce best interest determinations to a single formula or check list is never going to resolve the issues.

The new paradigm is an antidote to bad faith. To recognise and reveal the values which guide and inform best interest determinations presents a significant challenge which goes to the very heart of the medical and legal establishments. However, the nature of decisions about, for example, permanently removing the reproductive capacity of women with learning disabilities, or the removal of hydration from a young person in a persistent vegetative state, is not going to change. As the momentum gathers and the

pressure grows, it is the decision making frameworks and the underpinning philosophies which *must* change if we are to move through this period of conflict into an era of openness which recognises and reveals the values which guide and inform best interest determinations. How can this be achieved? This is the concern of the concluding chapter of this thesis.

Conclusion and recommendations

> *An adequate account of practical reasoning must have at its very heart and centre a mechanism for the application of a suitable machinery of valuation.*
>
> Rescher, 1982, p. 29

The inspiration for this thesis came from many years of working as a nurse in tertiary settings. During this time I have witnessed countless decisions being made on behalf of adults who lack capacity. For example, should a teenager in a coma after taking a paracetemol overdose in a bid to end her life be given a liver transplant? Or should the donor organ instead be given to a patient in intensive care with liver failure as a result of alcoholism? Should the pancreas of a woman punctured by a junior surgeon during a routine surgical procedure for a bowel disorder be removed without her express consent? (And then be told that the pancreas was diseased and therefore had to be removed?) Should the family of a man requiring assistance with breathing be told that he has a chance of survival if he is admitted to a high dependency unit, but that there are no beds available in this hospital or any within safe transferable distance? Or should the family be told instead, that nothing further could be done for him?

These examples provide a minute, split second snap shot of the decisions made every day by health professionals on behalf of people who are permanently or temporarily incapacitated. These are extraordinary decisions which become normalised within hospital settings. And each is taken under the guise of 'clinical' or 'professional' judgement. Health professionals work in environments where evidence based practice guides the provision of treatments. When, for instance a surgeon, a physiotherapist, or a nurse, is asked why they have chosen one intervention over another, they are expected to base their rationale on best practice guidelines and empirical research studies. But what about the questions which cannot be answered by recourse to science? What justification is demanded from health professionals about the value judgements which guide and inform decisions about who should be given the liver transplant? Also, whether the woman should be told that her pancreas was diseased and had to be removed?

I felt, instinctively, that there was a fundamental problem with decision making on behalf of others. But I could not say with any certainty what it was. So, like others, I turned to the law. Surely the law has it all worked out? However, in law I found the best interest test: a mechanism which not only allowed, but positioned, health professionals as the final arbiters for treatment and non-treatment decisions on behalf of those who could not express their own wishes. I was unable to reconcile the reliance on the best interest test, which assumes so much in terms of the motivation and ethical decision making ability of health professionals, with the reality of what I had seen in clinical practice. Furthermore, on examination of best interest case law, I observed the same issues which had concerned me in clinical practice. Complex ethical questions were reduced to questions of medical fact and scientific evidence. Why was the law failing to call health professionals to account for the values which were driving their decisions? This was a philosophical problem which went to the heart of law and legal process.

Law and legal process, like medical science, is underpinned by centuries of entrenched and supposedly value-free philosophy. This has contributed to an objectivist myth which has detached the basis and origins of law from values. Within this environment, processes have developed which aim to disconnect the necessary human, subjective component from decision making process. For example, the judge is perceived as an instrument of the law and reasoning is portrayed as based on rational methods (such as induction and deduction) or legal science (using precedent and expert evidence).

Values-based law has established that law is a response to and stems from values. Law is dependent on subjective, human evaluation. Whilst traditional methods are thought to lend objectivity to judicial decision making, this is illusory. What results is not decision making which is value-free, but best interest determinations made according to the unspecified values of health professionals and judges. Not only is there a failure to call medical decision makers to account, but similar value-free approaches in law fail to recognise, and even sometimes deny, that values have any part in the process.

As well as detaching values from decision making process, objectivist approaches fail to acknowledge the intrinsic subjective nature of best interest determinations. Framing ethical and social concerns, such as euthanasia, quality of life versus sanctity of life and

allocation of scarce health resources in terms of clinical judgement and scientific fact, circumvents these fundamental questions. Legal process which continually relies on objective methods ignores the essence and complexity of the decisions and the necessary human evaluative response to them.

The objectivist myth creates certainty. If we justify decisions about withdrawing food and hydration from adults in persistent vegetative state in terms of the results of brain function and scan results, science provides the solution. Thus, the difficult question of whether it is right or wrong to stop artificial food and hydration which will, of course, result in the death of the patient, is avoided. The ultimate responsibility is shifted from the decision makers to the scientific evidence and the veneer of objectivity portrays subjectivity and value judgements as detached from the process.

As with the judge who denies that stopping artificial food and hydration from a person in persistent vegetative state, or the judge who turns to clinical guidelines to provide the solution about the allocation of scarce renal replacement therapy, we want certainty. When I teach ethics to undergraduate health professionals, the students want me to tell them under what circumstances it is acceptable to break someone's privacy and confidentiality. Or at what point a person ceases to have capacity to make their own treatment decisions. When I pose a case study for them, they are anxious to reach the 'correct' solution. But of course this is not possible.

We live in societies which have created the illusion that certainty *is* possible. That there *is* a concept of justice which is not subjective, or that objective solutions to ethical questions are possible if we use accepted methods of reasoning or follow particular rules of logic. Or that right or wrong ways to act in certain situations can be set down in ever increasing rules to guide actions and regulate behaviours. As Fulford has observed, "bioethics has felt constrained to come up with answers, to produce solutions to ethical problems capable of commanding the same degree of consensus as scientific problem" (1998, p. 189).

The perception that objectivity of complex ethical questions can be achieved in medico-legal decision making is a symptom of entrenched Western philosophies which deny the very heart and nature of our human existence. Because of objective frameworks of

rules and laws which contain and constrain values we are able to convince ourselves that we are civilised, tamed human beings. With this philosophical backdrop, "it is almost as if emotions are an embarrassing little secret (… we all do it but we don't really need to talk about it, do we?)" (Seedhouse, 2005, p. 17).

Sartre suggested that we find refuge from our subjective selves through objectification; of ourselves, our behaviours, our environments, the people we interact with and in the justification we give for the decisions we make. If we convince ourselves that we can detach our values from the way we reason and relate to our external worlds, we can reject Golding's frightening portrayal of the boys on his desert island. We can dismiss the response of the subjects in Milgram's research experiments. We can condemn the plea from soldiers who commit terrible war time atrocities on the basis that they were only following orders.

However, by distancing reasoning from our subjective selves we have lost an important part of our humanity. Loughlin explains how influential value-free philosophies have resulted in unrealistic perceptions about the way we engage with the world around us and of how we make decisions:

> *This conception is alienating, meaning that it sets us apart, in a destructive way, from the world we know, and that it does so by causing us to ignore or devalue those subjective capacities which could enrich our awareness of that world. Thus it impoverishes both the rational subject and the world which the subject seeks to comprehend.*
>
> Loughlin, 1998, p. 1

So-called value-free approaches have had a profound effect on decision making on behalf of adults who lack capacity. For example, it has allowed judges to sanction sterilisation in the face of an identified risk of sexual abuse rather than demand the provision of safer environments. It has promulgated the view that ethics have no part in decisions about withholding life prolonging renal replacement therapy. Is this really the best we can do when making grave treatment and non-treatment decisions on behalf of society's most vulnerable citizens?

Values transparency in best interest determinations

We know that values influence legal decision making (Artis, 1999; Eckhoff, 1976; Holland & Webb, 1991; Mnookin, 1975; 1985; Moore, 1985; Worthington, 2002). We also know that philosophy has for centuries promoted the idea that value-free reasoning is possible and that legal process has developed to achieve this end. Is it possible to reconcile these disparate philosophical view points to move towards more honest, open and transparent decision making on behalf of incapacitated adults?

The key to unlocking the conundrum of the best interest test is not greater specificity. It is not a check list of considerations. It is a simple philosophical shift which reconnects decision making on behalf of incapacitated adults with the values which drive and inform best interest determinations.

In chapter one I referred to the work of contemporary theorists, Fulford and David. They have each been concerned with restoring the balance of decision making in health care to account for both evidence *and* values. Both theorists have developed practical solutions to achieve this end. Do their proposals offer tangible solutions to facilitate greater understanding of human reasoning, recognition of the instrumental role of values in legal decision making and mechanisms to achieve values transparency?

> *Instead of reducing values to facts, let alone eliminating values altogether, our efforts should be directed towards making explicit and clarifying the respective contributions of both elements, fact and values, to the conceptual structure of the subject.*
>
> Fulford, 1998, p. 189

Fulford wrote this in the context of his on-going call for the recognition of values in health care, particularly psychiatry. But his argument equally applies to legal process and best interest determinations. The work of the legal theorist Dworkin demonstrated that the dominant positivist view, even when recognising the necessary interpretive component of law and its application, firmly resists and rejects the possibility of subjectivity in legal decision making. The acceptance of a new approach, which offers greater clarity and opportunities for understanding the foundational place of values in law and legal process is required. Values-based law offers just such a framework.

Education

The first of the skills Fulford suggests as necessary for the recognition of values in clinical practice is education. Presently, legal education equips lawyers to reject their subjective responses. Legal reasoning methods are taught and emotional responses to cases are dismissed as incapacitating and isolating (Kennedy, 1992, p. 51). However, the emergence of critical legal theory is beginning to challenge what Lord Devlin (1979, p. 4) described as the supreme judicial virtue – impartiality – as possible.

Critical legal theorists have convincingly applied a variety of theoretical lenses which question the judiciary as impartial instruments of the law, for example, the application of a feminist lens (Conaghan, 1997; Keywood, 1995; Mansell, Meteyard & Thomson, 2004; Sheldon, 1997; 1998). Feminist critique has facilitated debate on the "sterile assertions of judicial partiality towards fuller, freer, debate about the moral values underlying tort law and their desirability" (Conaghan, 1997, p. 131). Conaghan's critique demonstrates the relative absence of women from the cases which comprise tort law, and suggests that entrenched fundamental principles such as the 'reasonable man' taint tort law with gender bias (Conaghan, 1997, p. 125). Likewise, Patel's account of the campaign to free Kiranjit Ahluwalia, a woman who had been the victim of relentless domestic violence, then imprisoned for the murder of her husband, powerfully illuminates a racist and sexist judiciary and legal system unconcerned with years of provocation (Patel, 1997).

This is a start. But if any meaningful understanding and recognition of the influence values in law and legal process is to be achieved, education must start from the bottom up. Common understanding of the philosophical tenets of decision making is required, including improved knowledge of the place of values in reasoning. Simply having this understanding will not, in itself, necessarily lead to more transparent decision making.

Seedhouse has developed a computer software package which aims to turn values into evidence by exposing value-judgements "for scrutiny by all who are making them and all who have an interest in them" (2005, p. 101).

> *What if… judges were able to explain their decisions by openly expressing their values in addition to the traditional factors? Judges repeatedly make value-judgements, why not own up to the fact? Why not make a virtue of it? Why not research and display these values for everyone to see?*
>
> Seedhouse, 2005, p. 133

The system works by presenting a case study to users. For example, in best interest determinations, the facts and evidence of each case would be presented to decision makers. The system administrator puts forward a proposal about the case study. This might read something like 'it is proposed that sterilisation is in F's best interests'. The user then has to respond to the proposal in light of the evidence from the case study. Firstly, decision makers are asked to give an immediate response as to whether they agree or disagree with the proposal. The users then proceed through various screens, each with different tools which facilitate a process whereby the users justify and explain their reasoning.

Crucially, Seedhouse's tools highlight the values which have led to the users' decisions. For example, if the users are more concerned with human rights than the risk of pregnancy, this will be made transparent. If the users are more concerned with their professional integrity, or their emotionally negative reaction to the proposed sterilisation, this will be revealed.

The system offers a tangible mechanism for exposing values. The possibility of a system which promotes values-transparency is an exciting prospect for legal or health professionals who are involved in best interest determinations and anyone who is concerned with achieving open and honest decision making on behalf of incapacitated adults.

Conclusion

My thesis challenges a centuries old objectivist myth from which value-free, opaque legal methods have developed. Certainly, it is ambitious to hope that values-based law might one day be on the curriculum for law students or influence the achievement of more open, values-based, legal decision making. However, I hope that values-based

law, at the very least, will foster debate and contribute to a new era of understanding. Once values are recognised as foundational to law, and necessary and instrumental in legal decision making, the way is paved for a more realistic and transparent approach to best interest determinations.

Epilogue

I write this epilogue in response to points raised during the examination process of my thesis. I would like to gratefully acknowledge the examiners' insights and comments which have provided me with this opportunity to expand, clarify and strengthen my arguments.

The best interest test has been employed for over 3 decades as the legal mechanism for making treatment and non-treatment decisions on behalf of adults who lack capacity. During this time, the test has been subject to considerable attack from health care professionals, judges and academics for being non-specific and ill defined. However, it is not the test *per se* that is at fault. It is obvious that health professionals and legal decision makers should act in the best interests of vulnerable adults who cannot make their own treatment decisions. Instead, the problem lies with conceptual frameworks which fail to take account of the values of decision makers. A new understanding of decision making is required to achieve reasoned, open, honest and transparent best interest determinations.

The basic problem

In 1997 Mr Rau Williams was a 63 year old Maori gentleman who lived in the far North of New Zealand. He had chronic renal failure as a result of a long history of diabetes. Mr Williams was also assessed as having adequate dementia. The only treatment for renal failure is a kidney transplant and in the interim whilst waiting (which in 1997 was up to 7 years) patients are treated with dialysis which artificially performs the function of the kidneys. Mr Williams was declined dialysis treatment by the state public health provider, Northland Health. Mr Williams died the day after the appellate court upheld the decision because it was in accordance with established guidelines and 'made in good faith in the belief that they were in the best interests of Mr Williams' (*Shortland v Northland Health Ltd* [1998], p. 122).

It seems self-evident that to make a decision about withholding life sustaining treatment on the basis of age or a diagnosis of dementia involves some degree of ethical evaluation. However, in the case report there are three occasions where the judge

denied there was any ethical component to this decision. Instead, the decision was described as a 'clinically based' and relied heavily on set guidelines and medical evidence. These denials epitomise the problems with best interest determinations made in medical and legal contexts – entrenched perceptions that they can be made without recourse to values.

To challenge this perception, it is necessary to strip away centuries of positivist legal process and medical, fact centred approaches, and start with a basic understanding of how an ethically complex decision like withdrawing life sustaining treatment is made. Seedhouse's rational fields theory offers a comprehensive and realistic theory of decision making. I use it as the basic theoretical framework with which to advance my argument.

I start by considering perceptions about value-free decision making. I then set out the main points of the rational fields theory, following which I apply the model to best interest determinations. I finish by considering how the additional understanding and clarity provided resolves important philosophical questions and offers practical solutions to enhance decision making.

Existing foundations

> *Obviously evidence and values are intertwined. Obviously all decisions are a balance of evidence and values. Obviously we should regard our values as at least equally important as evidence. And yet we don't.*
>
> *It isn't particularly easy to understand why. We know we value. We know we are passionate creatures. And yet we want more and more evidence and less and less values in our decision-making.*
>
> Seedhouse, 2005, p 23

Best interest determinations take place within legal and medical contexts which are underpinned by philosophical frameworks which aim to achieve neutrality and eliminate the individual values of decision makers. The medical model is traditionally based on scientific method and essentially 'fact-centred'. For example, the current push for evidence based medicine places perspective-free information such as 'meta-analyses

of high quality research' at the top of the 'evidence hierarchy' (Fulford, 2004, p. 215). Additionally, the Cartesian notion of the body as a machine has remained central to medical practice (Kennedy, 1981). Through this paradigm, the doctor approaches disease as a mechanic approaches an engine and illness is perceived as mechanical failure (1981, p. 20-21). This reductionist approach may also have influenced the primacy of value-free methods in health care contexts where scientific evidence is perceived to provide all the solutions.

Similarly, the idealised model of legal decision making is the technical, objective and scientific approach, thought to lend neutrality and legitimacy to legal process (Kairys, 1992, p. 13). To achieve this end, legal mechanisms (such as the elaborate and mystifying rules governing precedent) have developed which aim to eliminate or objectify values. In the positivist environment, the judge is portrayed as a neutral instrument of the law and "impartiality and the *appearance of it* are the supreme judicial virtues" (Devlin, 1979, p. 4; emphasis added). What has resulted is what Kairys has described as 'the myth of legal reasoning' (1992, p. 12-13).

> *The problem is not that the courts deviate from legal reasoning. There is no legal reasoning in the sense of a legal methodology for reaching particular, correct results. There is a distinctly legal and quite elaborate system of discourse and body of knowledge, replete with its own language and conventions of argumentation, logic and even manners. In some ways these aspect of the law are so distinct and all-embracing as to amount to a separate culture, and for many lawyers the courthouse, the law firm, the language, the style, become a way of life.*
>
> *But in terms of a method or process for decision making – for determining correct rules, facts or results – the law provides only a wide and conflicting variety of stylised rationalisation from which courts pick and choose. Social and political judgements about the substance, parties and context of a case guide such choices, even when they are not the explicit or conscious basis of decisions.*

Fact and reasoning methods alone can never be sufficient to guide our decisions, particularly in ethically challenging questions about, for example, withdrawing life sustaining treatment from adults in a persistent vegetative state, or sterilising women with learning disabilities. From a moment's self-reflection we know that values have an integral and necessary role in the decisions we make in our every day lives. There also exists a considerable body of research demonstrating that individual values are

influential in both medical and legal decision making. But this evidence is not in itself sufficient to challenge centuries of entrenched philosophical approaches which aim to exclude subjectivity and achieve neutrality. What is required is a conceptual shift which recognises that 'we need facts to guide our decisions; but we also need values' (Fulford, 2004, p. 209).

What are values and where do they come from?

Clarity about the origins and instrumentality of values is crucial for a comprehensive model of reasoning which exposes their integral and necessary role in decision making. So what are values? And where do they come from? Rescher (1982 p. 73) argued that attempts to develop theories of evaluation focus primarily on the concept of preference, and human preference is central to many definitions of value.

> *A value is a human preference for a thing, state or a process. A value judgement is a decision based upon one or more values.*
>
> Seedhouse, 2005, p. xxiii

Defining a value as a preference may seem ridiculously insufficient to describe some of the values that we hold dear, for example, justice, dignity, democracy, the sanctity of human life and so on. Surely these values cannot be compared with say, choosing your favourite ice cream flavour or picking out your preferred shirt? However, the place of values in reasoning is not confined to questions of morality, of right and wrong, or of what is good and bad. Values and valuing are integral to all areas of human reasoning. As Rokeach explains;

> *Persons are not detached or indifferent to the world; they do not stop with a sheerly factual view of their experience. Explicitly or implicitly they are continually regarding things as good or bad, pleasant or unpleasant, beautiful or ugly, appropriate or inappropriate, true or false, virtues or vices.*
>
> Rokeach, 1979, p. 16.

Visualising our personal values on a scale of importance may be a useful way of responding to concerns about defining values as preferences. Theorists have proposed that our values can be arranged into hierarchies (Rescher, 1982; Rokeach, 1979). No doubt it is true that given a list of values, people could arrange them in order of which they prized most highly. But does it tell us anything else? Rokeach argued that our values hierarchies enable us to choose between alternate goals and actions, and to resolve conflict (Rokeach, 1979 p.49). Is this realistic and does it alter the view that values are essentially expressions of preference?

Consider Jane's predicament. Jane is driving along the local highway when she witnesses an accident. Jane is trained in first aid and has an emergency care kit in her car. Jane has a strong sense of community, helping others whenever she can and trained in first aid to assist in emergency situations. Unfortunately, Jane is late for an appointment with her gynaecologist, and husband, to discuss the possibility of IVF treatment for the longed for baby which they have been unable to conceive after five years. Jane slows her car down, but her mind is racing between helping the victims of the accident and her appointment which she is eagerly anticipating.

How then does a hierarchical list of values help Jane solve her dilemma? Removed from this scenario, Jane would rank helping others highly in her values hierarchy. But given the situation, Jane values the potential baby she and Frank have longed for more highly. Jane reasons that there are many other cars on the road which may stop, and prefers to proceed to her appointment. Given a different scenario, for example, that she was picking her suit up from the drycleaners, she would certainly stop and help the car crash victims. Portraying values as hierarchical systems which we draw from to aid our decision making over-simplifies human reasoning. When the extremely complex, multi-layered reasoning process begins and we are evaluating what course of action to take, which ethical principle to follow, how to weigh the available evidence, we are making choices and essentially expressing our preferences.

Theorists have proposed that values stem from human feelings and emotions, desire, society and culture, and life experience. There is also evidence to suggest that professional cultures and decision contexts are influential and some theorists acknowledge a complex variety of sources. Jane's predicament and potential evaluative

response demonstrates the complexity of decision making and its possible constituents. Imagine that you are Jane and have just witnessed the crash. Your heart is racing, your hands are sweaty, and you are anxious about what you might find when you get to the scene of the accident. The anxiety is, however, tempered when you recall the appointment you have regarding the possibility of having a baby. You process all that is going on around you, the consequences of whether you help or not, whether you value your appointment over helping the car crash victims and so on. Even using this extremely simplified portrayal of Jane's possible response we see how reason, emotion, the context, her life goals and even a physical response all culminate in a split second to guide her decision making.

This example is quite different from the context of the court room or the hospital bedside. However, it serves to demonstrate the complex, multi-dimensional reality of human reasoning which is not accounted for by legal positivist or 'fact centred' medical approaches to decision making. Is it possible, or even desirable, to unravel the multi-layered decision making process to achieve a theoretical, yet realistic model of reasoning?

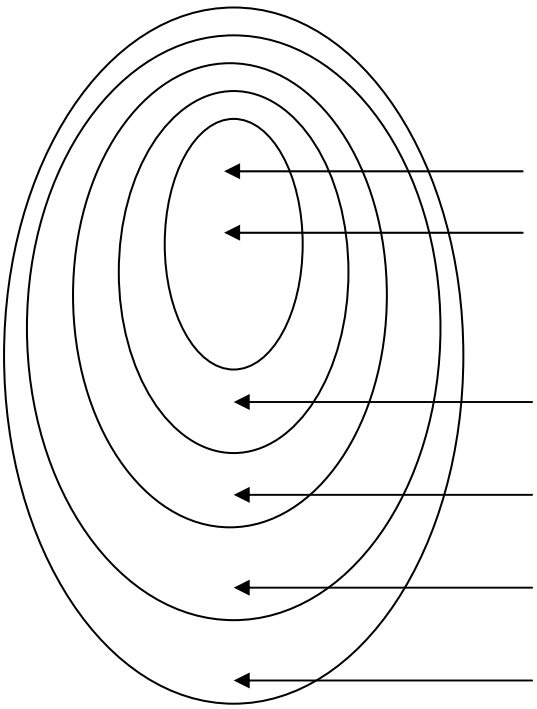
Clearly, comprehensive accounts of best interest determinations (as with any other decision) can only be achieved if *all* the components of decision making are recognised and revealed. However, to accept this fuller conception of reasoning raises some significant philosophical challenges. Specifically, if questions of right and wrong and good and bad are perceived as matters of individual preference, do we fail to respect the gravity and lessen the import of decisions about, for example, whether to withdraw life support from adults in a persistent vegetative state? Furthermore, if we adopt this approach we have to accept that there are no objective moral truths. Is this problematic? And does this inevitably lead to a relativist position which, at its most extreme, suggests that there may be different accounts of the facts in the world and emphasises differences and the non-assimilation of worlds with each other? (Described by O'Grady, 2002, p.11.) Surely it is preferable to tackle these concerns than to use positivist frameworks which only account for a part of the decision making picture. Seedhouse's rational fields theory offers a comprehensive model of decision making which also addresses these important philosophical questions.

Rational fields

Rational fields and their causative influences provide a means of working practically to improve the social world, using evidence and values in their proper balance.

Seedhouse, 2005, p. 63

Essential to an understanding of the rational fields theory is Seedhouse's distinction between what he describes as evidence and non-evidence. Seedhouse provides 6 categories, starting with type 1: the 'just is' evidence, and moving out beyond the evidence in concentric circles to the furthest category, type 6: 'how we value the evidence'. Type 1 and type 2 evidence in the centre circle are 'within-the-evidence'. Type 3 to 6 are described as 'beyond-the-evidence'.



'Within-the-evidence'

Type 1: the 'just is' evidence

Type 2: 'Testable speculations

'Beyond-the-evidence'

Type 3: Speculations that cannot currently be tested by reference to the evidence

Type 4: Speculations that cannot in principle be tested by reference to the evidence

Type 5: Classifications

Type 6: 'How we value the evidence'

Diagram adapted from 'Total Health Promotion': Seedhouse, (2002), p. 70

Type 1: The 'just is' realm – 'Many events and processes just are'.

The 'just is' category is concerned with evidence that is true, regardless of how the recipient values the information and it is unchanging whatever conceptual framework it is viewed through. Seedhouse uses the example of research into breast cancer to illustrate. There is evidence telling us that breast cancer is the second leading cause of cancer among North American women, that the incidence of breast cancer increases with age and that 1 in 8.2 women in North America will have a diagnosis of breast cancer during her life time. This is 'just is' evidence. It is not refutable and it is unchanging regardless of who examines the evidence or which conceptual lens it is considered through.

Type 2: 'Testable speculations.'

This category refers to speculations which can be tested with reference to type 1 evidence. For example, a speculation which is testable in relation to breast cancer is that life stress may be a significant causative factor. The aim of this category of evidence is to expand the 'just is' realm of evidence as far as possible.

The remaining 4 categories are described as 'beyond-the-evidence'. 'The more we find that the evidence will not yield the explanations we require, the closer we move toward the realm beyond the evidence' (Seedhouse, 2005, p. 59).

Type 3: 'Speculations that cannot currently be tested by reference to the evidence.'

Speculations in this category may exist because we do not currently have the techniques or knowledge to test the evidence, or the multi-layered relationship between relevant factors may simply be too complex for us ever to find a definitive answer. An example of a question which would fall into this category is 'what are the causes of breast cancer?'

Type 4: 'Speculations that cannot in principle be tested by reference to the evidence'.

Examples that would fall into this category are speculations that fate or bad karma may have resulted in a woman having breast cancer. These are matters of faith which cannot be tested by reference to the evidence.

Type 5: 'Filing reality – classifying the evidence.'

> *We are surrounded by an endless tangle of undefined processes, events and things – and we are driven to be the world's librarians. We file reality – as diseases, as illnesses, as measurements, as work, as leisure, as dates, as chunks of time, as charity, as right and wrong: we take the evidence, we decide its significance, we make it meaningful.*
>
> Seedhouse, 2005, p. 61

This category is concerned with the way that we file reality. Seedhouse argues that this is an important 'yet undernoticed feature of human life' and proposes that classifications stem both from both 'within-the-evidence' and 'beyond-the-evidence' (Seedhouse, 2005, p. 59-60). For example, our classification of animals stems from the 'just is' evidence that certain types of animals cannot reproduce with each other which we call 'species'. Our classification of intelligence, however, is an example of where we have gone beyond the evidence and produced a classification – of 'what we say it is'. So whilst western culture has classified intelligence in accordance with 'verbal nuance, visual pattern and mathematical relationship', other abilities might equally indicate intelligence – such as musical, artistic or poetic talent. Intelligence is a man made classification which stems from beyond the evidence.

Type 6: 'How we value the evidence'.

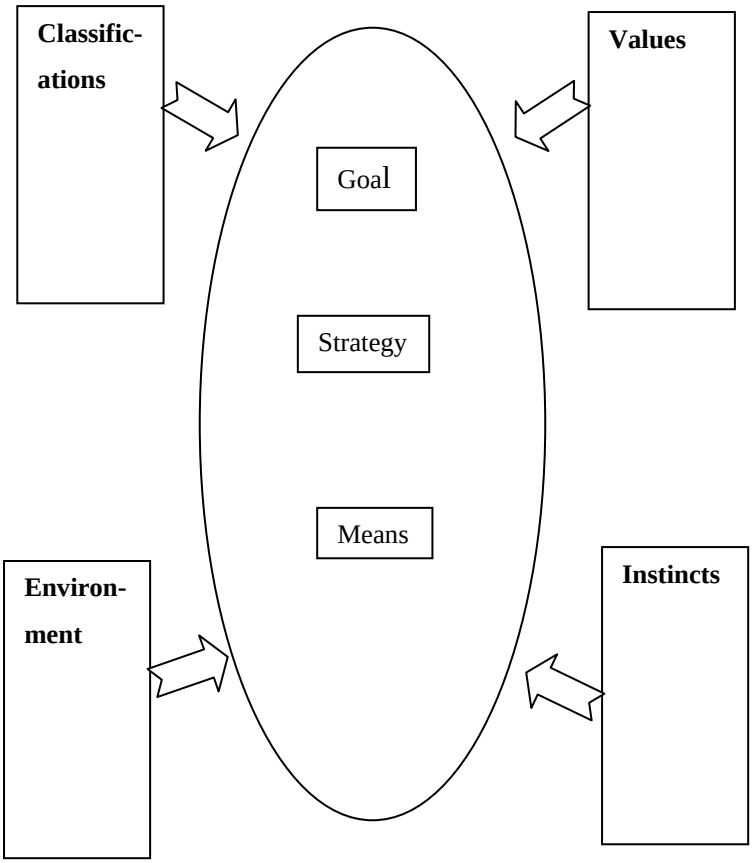
> *We are accustomed to thinking that our decisions take place mostly or entirely within-the-evidence… Yet the reality is that all our decision making extends from beyond-the-evidence.*
>
> Seedhouse, 2005, p. 61

Seedhouse argues that we frequently interpret the evidence according to our moral preferences, whether or not we are aware of it, and how we value evidence is linked to our speculations and classifications. So when we make decisions, effectively we create a frame around the 'just is' (type 1 and type 2) evidence from beyond-the-evidence. This frame is made up of 'human speculations, classifications, drives and instincts, social environment and history, and our personal preferences or values' (2005, p. 62). These components form the filter and create the boundaries of a rational field.

What is a rational field?

> *All rational fields have the same basic structure. They are formed by any kind of problem-solving behaviour, and can therefore be any size… A rational field is usually created either by an instinct or a value-judgement or both (a rational field can also be created by a social, physical or mental pressure). These instincts or judgements generate goals and sub-goals, strategies and sub-strategies, each of which maintain the rational field.*
>
> Seedhouse, 2005, p. 63

The theory proposes that every time we engage in any kind of problem solving or goal oriented behaviour, we manufacture a rational field. The boundary of the rational field is formed and sustained by our values, our instincts, the environment and our classifications of reality. In the centre of the rational field are the goals, sub-goals, strategies and means to achieving that goal.



An example which demonstrates a simple manufactured rational field is a traveller in a foreign land unable to speak the language and needing to find the train station. To succeed, the traveller must set a goal and devise a strategy to achieve it. The perimeter of a rational field is created; perhaps by her preference not to be lost or the value she places on reaching her next destination on time. As she formulates strategies to achieve her goals, such as drawing a picture of a train and showing it to local people, a rational field is created. Once the traveller achieves her goal and finds the station, the rational field dissipates.

Within the rational field is not only the 'just is' evidence, but also methods of technical rationality. Seedhouse explains that for centuries we have wanted to split reason and passion (2005, p. 3). To achieve this end, theorists have developed methods which supposedly eliminate emotion from reason, for example, utilitarian methods, logical analysis and economic calculations (2005, p. 62). However, this split is artificial and incorrectly perpetuates the myth that decisions can be made with reason alone. By placing modes of logic which aim to achieve reasoning unsullied by emotion or subjectivity within the rational field, we can see them in perspective. In the same way we evaluate the 'just is' evidence, so when we use methods of technical rationality, our values, classifications, environment and instincts have an integral and necessary role.

Decisions *cannot* be made on the strength of rationalism or evidence alone. We create a frame drawn from our moral preferences, our emotions, our life experience, our upbringing, our professional cultures, our environments and so on, through and with which we make sense of our social worlds and devise strategies to achieve goals.

Applying the theory to best interest determinations

During the 1990's there were a number of cases in multiple jurisdictions brought before the courts to establish the legality of withdrawing life sustaining food and hydration from patient's with persistent vegetative state. The first, and perhaps most well known and closely scrutinised, was the case of Anthony Bland.

Anthony Bland who was a victim of the Hillsborough football stadium disaster in England in 1989. In the tragedy, Anthony Bland's lungs were crushed and the supply of oxygen to his brain was interrupted. As a result, he suffered catastrophic and irreversible damage to the higher centres of his brain resulting in a condition known as persistent vegetative state (PVS). Someone in PVS breathes unaided and digestion continues to function. But, although his eyes are open, he cannot see. He cannot hear. The patient is incapable of voluntary movement and can feel no pain. He cannot taste or smell. He cannot speak or communicate in anyway. He has no cognitive function and can thus feel no emotion, whether pleasure or distress. The space which the brain should occupy is full of watery fluid. With skilled nursing and close medical attention a young and otherwise healthy PVS patient may live for many years. Anthony Bland

could not swallow, and was fed by means of a tube, through which liquefied food was mechanically pumped into his stomach. (Summary adapted from the appellate judgement of Sir Thomas Bingham MR, *Airedale NHS Trust v Bland*, [1993]).

By using the rational fields theory to examine this decision, new levels of understanding about the integral role of the values of decision makers in best interest determinations are possible. What becomes particularly visible is how positivist processes do not eliminate the individual preferences of decision makers. Instead methods such as the use of precedent or presenting opinion as 'evidence' transform or portray subjective judgements and classifications which stem from 'beyond-the-evidence' into type 1 or type 2 'just is' evidence.

Type 1 - the 'just is' evidence: It 'just was' the case that Anthony Bland was not conscious and lacked the capacity to consent. Evidence from CT scans demonstrated that his brain was significantly damaged, and as a result his functioning was profoundly affected. It 'just was' that he was unable to communicate and had not provided any specific wishes prior to the accident as to what actions he would prefer were he ever to be in this situation.

Type 2 – speculations that could be tested by reference to the 'just is' evidence: Given the 'just is' evidence that Anthony Bland had lived with the same level of disability for 3 ½ years, and the extent of his brain damage, experts speculated that there was no prospect of recovery or functional improvement at all. Although he could breathe unaided, and his digestion continued to function, doctors asserted that given the severity of his brain damage, Anthony Bland could not see, hear, smell, taste, feel pain, or have any awareness of what was going on around him. There was also speculation that with continuing care and treatment he could live for many years.

Both the type 1 and type 2 evidence was not refutable and is unchanging regardless of what conceptual lens it is viewed through. As was noted several times in the case report, 'none of the facts relating to the circumstances and the condition of Anthony Bland are in dispute' (p. 7). But as it stands, this evidence alone tells us nothing about *what* course of action ought to be taken, or even *whether* any action should be initiated. As Hume's famous distinction explains, no factual statements by themselves support a

conclusion about value, about what ought to be done. An 'ought' conclusion must always have a statement of value (Radcliffe, 2000).

Seedhouse suggests that all rational fields are initiated by an instinct or a value judgement (2005, p. 63). This rational field was first generated when the consultant in charge of Anthony Bland's care decided that, given his circumstances, and the evidence that there was no hope of recovery or improvement, 'it would be appropriate to cease further treatment' (*Bland* [1993], p. 1). Anthony Bland's family were in full agreement, and expressed concern for his dignity, his quality of life and their view of what his wishes would have been if he had the capacity to make his own decision (p. 7). However, when the consultant talked to the coroner about his intentions, the coroner warned him that he 'would run the risk of criminal proceedings if he took a course which brought to an end the existence of Anthony Bland' (p. 7).

The Goal, the strategy and the means: The coroner's advice diverted the decision about whether to withdraw enteral nutrition and hydration from Anthony Bland into the legal system. This in turn impacted on the goal, the strategy and the means with which to make the best interest determination.

Goal: The central purpose of bringing this, and other cases, to court is to establish the legality of the actions of health professionals. A binary presentation of options is put before the courts. The question is not: "What is in this person's best interests?" But rather: "Is the proposed treatment in the best interests of this person?". This potentially inhibits full and thorough consideration of ethically complex decisions by moving the focus away from the original goal (to allow Anthony Bland to die in peace and with dignity) to that prescribed by legal process (is this action legal?).

Means: The means with which to make the decision are positivist legal processes. These work on the premise that rules are applied to a situation to reach a conclusion, thus limiting the subjective element of decision making. However, there will always be situations when the law is in question and indeterminate. Anthony Bland's case was the first of its kind in England, and as such there were no clear legal rules relating to the withdrawal of life sustaining treatment from adults who could not decide for themselves. What did exist was precedent establishing that the best interest principle

could be employed to make health care treatment decisions on behalf of adults who lacked capacity (*Re F* [1990]). However, this principle was not further defined and the question of what precisely was meant by 'best interests' was, and continues to be, largely unanswered. Instead, the Lords deferred to the judgement of health professionals. In combination with the *Bolam* test they found that when treating an incompetent adult, as long as doctors acted in good faith in the best interests of their patients, and in accordance with a responsible body of medical opinion, they would not be liable in battery (*Re F* [1990], Lord Brandon, at 68).

This accorded legal and health care decision makers considerable discretion to apply their value judgements within conceptual frameworks which do not recognise their part in the process. As a result, judgements which stem from 'beyond-the-evidence' are portrayed via positivist means as being 'within-the-evidence'.

The rational field frame

When a rational field is created, it is framed by our values, environment, instincts and classifications. This frame acts as a filter, a lens through which we interpret and apply the 'just is' evidence and apply rational methods to achieving our goals.

Environment: While I have positioned positivist legal process as a means to establish the legality of withdrawing food and hydration from insensate patients within the rational field, the entire structure and institution of 'law' has created and sustained an environment underpinned by ideologies that value-free reasoning is not only possible, but preferable. For example, legal education equips lawyers to reject their subjective responses and emotional reactions to cases are dismissed as incapacitating and isolating (Kennedy, 1992, p. 51). A growing body of critical legal theory is beginning to challenge perceptions about judicial impartiality and theorists are exploring ways to take advantage of judicial discretion, for example, to achieve so-called 'therapeutic' outcomes in mental health law. However, the positivist approach remains influential, so as well as providing the process to make best interest determinations, it is an important component of the rational field frame.

A similar picture emerges from the structures and institutions which make up health care environments. For example, it has been suggested that during medical training student doctors reconstruct their view of the world so that patients become merely bodies. Further, that they are conditioned to leave behind emotional responses to suffering and pain and grow more cynical, less humanitarian, and more contemptuous of patients (Andre, 1992, p. 148).

Additional features of the broader social environment may also be influential. For example, the existence of what has been described as a "rather special relationship" between law and medicine (Keywood, 1995, p. 127) has seen the judiciary reluctant to question the judgement of health professionals. Furthermore, although recent events may have eroded the unquestioning faith of the public in health professionals, traditional social conventions have promoted a paternalistic approach which assumes that health professionals know the best interests of their patients and always act to promote them. It is not possible to capture all of the elements of these very complex environments, but in combination, man made social, legal and health care environments which stem from beyond-the-evidence contribute significantly to the frame through which best interest determinations are viewed.

Classifications – the way we file reality: Anthony Bland was classified as lacking capacity to consent to the withdrawal of medical treatment. There was no dispute that Anthony Bland was unable to communicate his wishes and this was unchanging regardless of how decision makers chose to file this evidence. This is an example of a categorisation which stems from 'within-the-evidence'. However, other classifications were not so clear cut and human categorisations which came from 'beyond-the-evidence' were crucial to the outcome.

1. Was the enteral nutrition and hydration which was mechanically delivered through a tube into Anthony Bland's stomach simply food – a basic human requirement? Or was it medical treatment?

2. Was the withdrawal of the food / medical treatment an act or an omission?

1. The judges found that the food and hydration delivered artificially into Tony Bland's stomach via a pump was not what might ordinarily be described as a basic necessity of life. Clearly, this is not an example of 'just is' evidence. How enteral nutrition and hydration are perceived in this context is dependant on individual evaluation; through the frame created by professional, cultural and moral values, your emotional response and so on. Despite contrary opinion, it was classified as medical treatment. The effect of this was to hand the responsibility of the 'treatment' decision back to medical professionals.

2. Whether withdrawing food and hydration constituted an act or an omission was another significant classification which stems from 'beyond-the-evidence'. In English law, performing an act which intentionally ended the life of an individual constitutes the criminal act of murder. The withdrawal of food and hydration was classified not as an intentional act designed to bring about death, but instead as withholding treatment in the patient's best interests. This eliminated the criminal intent and the cause of death was attributable to the original accident and not the actions of health professionals.

Values and instincts: There are difficulties in elucidating a clear distinction between values and instincts (Seedhouse, 2005, p. 70). For example, is compassion an intrinsic human instinct which prompts us to question the benefit of continuing the life of an insensate adult with no prospect of recovery? Or does the value we place on human dignity and the quality of human life evoke compassion for people like Anthony Bland in a persistent vegetative state? It would be impossible and unproductive to unravel their complex interrelationship here, so for this analysis I do not draw a distinction.

I chose to examine *Bland* through the rational fields theory because it illustrates many of the central points of my argument. In comparison to other best interest case law, the judges acknowledge the ethical complexity of the decision and are unusually open and frank about the values which have guided them. Some of the judges also admit the incongruity of making what are, ultimately, individual preferences within rigid positivist frameworks primarily concerned with establishing legality of actions. Their judgements demonstrate how revealing the preferences of decision makers can enhance the credibility of their arguments and provide opportunities for debate.

> *The present appeal raises moral, legal and ethical questions of a profound and fundamental nature, questions literally of life and death.*
>
> *Airedale NHS Trust V Bland* [1993] Sir Thomas Bingham MR, p.14

In being candid about the ethically challenging nature of the case, and confronting the limitations of positivist legal process to guide their decision, the way was paved for more thorough deliberation of relevant issues. Throughout the judgements fundamental ethical principles are considered. Specifically:

- Sanctity of life
- Quality of life
- The right to self-determination
- Human dignity
- Duty to maintain life

These principles provided reference points with which to facilitate exploration of what the judges perceived to be the relevant issues and a mechanism for the expression of values. For example, much of Hoffmann LJ's judgement focuses on reconciling the conflict between respecting the sanctity of life, and maintaining dignity in both life and death. In reaching the conclusion that it was right to allow Anthony Bland to die, Hoffmann LJ argued that while the courts have full respect for the sanctity of life, under the circumstances it could be sacrificed in favour of human dignity (p. 30).

In the discussion, Hoffmann LJ acknowledges that the bases for considerations about, for instance, allowing people a dignified death, or rejecting a positive action to bring about a patient's death while finding withdrawal of treatment acceptable, may stem from feelings rather than reason. One judge went further still, painting a picture of best interest decision making congruent with the rational fields theory.

> *…if the law requires the decision-maker to consider whether a certain course is 'in the best interests' of the patient, the experience of the judge will carry him only so far. They will help him to clear the ground by marshalling the considerations which are said to be relevant, eliminating errors of logic, and so on. but when the intellectual part of the task is complete and the decision-maker has to choose the factors*

> *which he will take into account, attach relevant weights to them and then strike a balance the judge is no better equipped, though no worse, than anyone else. In the end it is a matter of personal choice, dictated by his or her background, upbringing, educations, convictions and temperament. Legal expertise gives no special advantage here.*
>
> *Airedale NHS Trust v Bland* [1993], Lord Mustill, p. 53.

However, while Lord Mustill and others adopted a realistic approach, perceptions about the place of values in reasoning were not consistent. For instance, Butler-Sloss LJ argued that to reach a decision 'we have to rid ourselves of emotional overtones' and referred to reaching an 'objective' best interest determination. And while Lord Browne-Wilkinson argued that a doctor's attitude to the sanctity of life may influence whether he continues or withdraws life sustaining treatment (p. 49), Lord Goff disagreed, arguing that individual doctor's attitudes about sanctity of life were not relevant to the case (p. 43).

These perceptions demonstrate that despite openness about the evaluative nature and content of decisions, entrenched positivist approaches remain influential. In comparison to other best interest case law, *Bland* demonstrates the many advantages of revealing the values of decision makers. However, while value-free legal processes are the only available mechanism for achieving the primary goal, ultimately the fundamental philosophical incompatibilities between ethically complex decisions and positivist means are insoluble. Consistently honest, open and transparent best interest determinations are only possible by shifting to a more realistic framework.

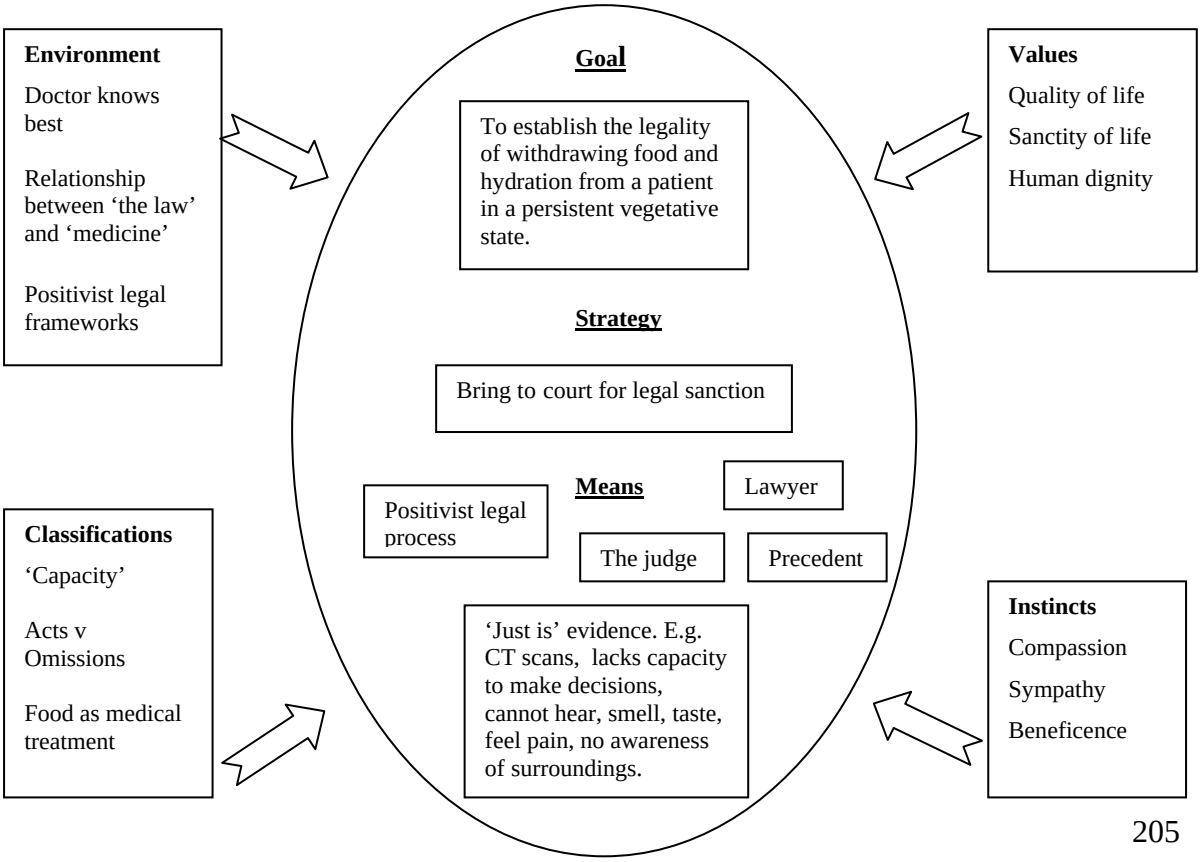
Relativism and ethical objectivism

> *Although it is obviously true that there is no morality independent of human choice, it is exceedingly hard for any of us to admit that our cherished moral outlook is no better than anyone else's.*
>
> Seedhouse, 2005, p. 53

During the journey of *Bland* from family court through to the House of Lords, nine different judges examined the case. They all came to the same conclusion, despite

expressing differing emotional responses, perspectives on the means with which to reach the conclusion and viewpoints on the relevant ethical principles. Of course our moral outlooks will be different. Our individual rational frames through which we view our social worlds are complex and unique. But we will also have similar concerns. For example, the sanctity of human life was of concern both to those in favour of withdrawing treatment and to the lawyers acting on behalf of Anthony Bland who argued against discontinuing feeding. In an argument against withdrawing food and nutrition, it was proposed that the sanctity of life principle placed an obligation on medical professionals to preserve life at all costs. In response, it was argued that having regard to the quality of life both respected, and was complementary with, concern for the sanctity of life because 'the principle of sanctity of life embraces the need for full respect to be accorded to the dignity and memory of the individual human being' (p. 10).

By making the evaluative component of best interest determinations visible, it becomes clear that our outlooks are not completely relative: through consistently exposing the evaluative component of decision making, similarities can be recognised and differences learnt from. This is illustrated using the diagram from the rational fields theory to represent the decision in *Bland.*



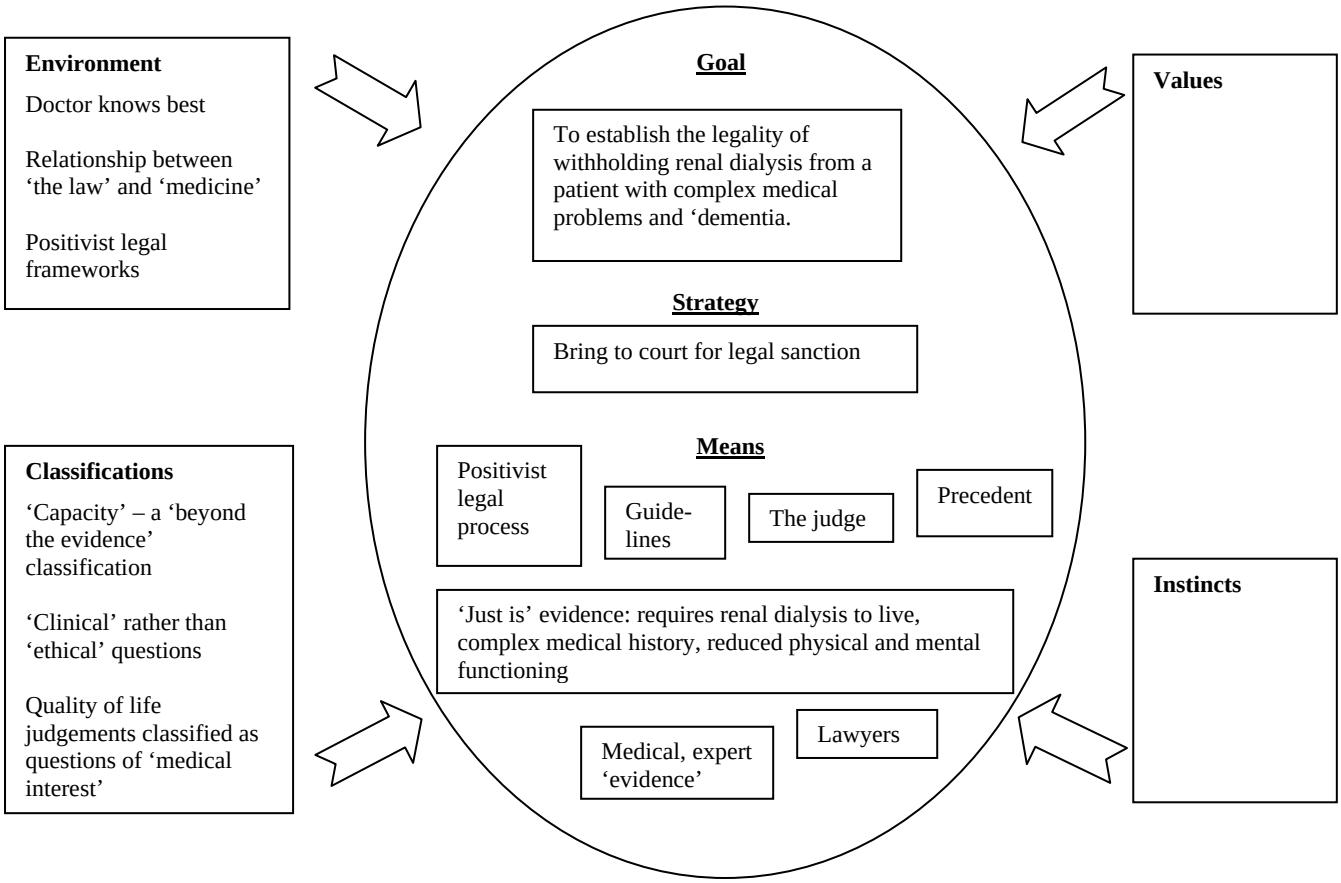
Viewing best interest determinations in this way also exposes the artificial split between reason and the subjective response of decision makers central to legal positivism (and other modes of technical rationality). Each decision maker has their own rational field through and with which to contemplate decisions and employ means to achieve their goals. With this understanding we can both confront the reality that there are no objective moral truths and see the many possibilities to enhance decision making that result from this new vantage point.

In *Bland* decision makers did not claim to have reached the 'right' answer, or to have established an objective moral truth. Their decision was in no way deficient as a result. Quite the opposite; by acknowledging that individual values have an integral and very necessary role in decision making, new levels of openness and honesty were demonstrated. While technical rational and legal positivist methods provide a means with which to examine different aspects of decisions, reason cannot exclusively provide the answers. Claiming right or wrong answers to difficult ethical questions via set formulas which establish 'the truth' potentially blocks a thorough, deliberative process, promotes an elitist approach to ethics, and creates anxieties about reaching the 'right' answer. Conversely, recognising and exploiting the possibilities which stem from a fuller, more realistic approach of reasoning provides opportunities for greater discussion, tolerance, understanding and consideration of diverse perspectives.

These points are starkly illustrated by comparing *Bland* to the case I introduced at the start of this epilogue. *Shortland* represents best interests case law which sits at the most positivist end of the decision making spectrum. The cases were similar, in that they both concerned end of life treatment decisions. However, the perimeter of the rational field through which the case was examined was dominated by positivist approaches.

The means used to reach the decision, specifically, guidelines and 'clinical evidence', blocked the exposure of the individual values of judges and doctors and judgements which stemmed from 'beyond-the-evidence' were portrayed as from 'within-the-evidence'. For example, 'beyond-the-evidence' value judgements from experts that there was no potential for renal dialysis to improve Mr Williams quality of life was accepted as evidence and categorised as a 'clinical judgement' about 'medical interests'

(*Shortland v Northland Health Ltd* [1998], p. 128). This approach had a significant impact on the transparency and openness of the decision making process which becomes obvious by comparing a diagrammatic representation of *Shortland* with *Bland*.



The real values which have guided the decision are invisible and opportunities for debate, learning and scrutiny are lost. The courts have proven notoriously reluctant to intervene in decisions about resource allocation, preferring to confine such decisions to the judgement of clinicians (Whitty, 1998, p. 140). But what if the judges in *Shortland* had decided to adopt an approach similar to *Bland*? Exposing the values which drive very difficult, ethically complex decisions about the allocation of scarce health resources could have prompted full debate about issues which are not the privileged domain of health professionals, but of much wider social concern. For example, is it preferable to withhold renal dialysis on the basis of age or mental capacity as opposed to say, merit or contribution to society? How influential should the wishes of the family to prolong the life of a loved one be? And if there are not enough resources to go round,

is the tax payer happy to carry increasing financial burdens which are inevitably required to increase access to health resources in publicly funded health systems?

By applying the rational fields theory, the sense that there is a large part missing from the *Shortland* decision is graphically confirmed. If the values which drove the judgement had been visible, we may not agree with them, but we would have the opportunity to consider and understand the rationale which underpinned the decision. The stringent use of positivist legal process negatively impacts on the credibility and honesty of the decision process and many questions about the actual evaluative foundations of the *Shortland* decision remain unanswered.

Conclusion

I have proposed what may be seen as a radical and controversial change to the conceptual frameworks which currently underpin best interest determinations. However, to answer the calls for greater definition and specificity of a principle which is employed to find solutions in such profound, diverse and ethically complex situations on behalf of some of society's most vulnerable citizens is simply not possible. Using the rational fields theory, I have compared case law at both ends of the decision making spectrum to demonstrate how the significant advantages of making *all* components of best interest determinations transparent counters any potential philosophical concerns. It is only by moving to a more realistic and comprehensive decision making framework that new levels of credibility, honesty and understanding are achievable when making grave, irreversible decisions on behalf of adults who lack capacity.

Statute

The Code of Health and Disability Services Consumers' Rights (New Zealand)

Crimes Act 1961 (New Zealand)

The Hunting Act 2004 (England)

Mental Capacity Act 2005 (England)

The Smoke-free Environments Amendment Act 2003 (New Zealand)

Case law

Airedale NHS Trust v Bland [1993] 1 ALL ER 821 (HL) (England)

Auckland Area Health Board v Attorney General [1993] 1 NZLR 235 (New Zealand)

Auckland Healthcare Services *Ltd v L* [1998] 5 HRNZ 748 (New Zealand)

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 (England)

Buck v Bell [1927] 274 US 200 (United States)

Curran v Bosze [1990] 566 NE 2d 1319 (United States)

JLS v JES [1996] 20 Fam LR (Australia)

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Appendix A: Table of sterilisation cases (arranged in order of jurisdiction and then chronologically).

Case reference	Case brought by	Facts of Case / age of person	Outcome	Persuading factors in outcome	Special Features	Precedent
Re H [1993] NZFLR LEXIS 76 New Zealand	Mother	*Pregnant* by unknown; seeking abortion and sterilisation. 38	Sterilisation declined; not least restrictive alternative. Abortion; mother given authority to decide under PPPR Act.	'The present case presents circumstances far less extreme.' 'Sterilisation of an intellectually disabled person should not be permitted unless there is no other reasonable alternative.'	Already pregnant from sexual abuse – sought sterilisation and abortion.	*In Re B* [1988] Circumstances for allowing sterilisation must be extreme. *In Re X* [1991] Case with extreme circumstances and sterilisation necessary by product of surgery for a different purpose. *Re Eve* [1986] All arguments against sterilisation accepted. *Re Marion* [1990] examined jurisdiction of the court.
P v P [1994] 120 ALR 545 (Aust H Ct) Australia	Parents	To cease menstruation and permanently prevented from becoming pregnant. 16	Court allowed parents to consent to sterilisation on child's behalf.	Very little facts about the 16 year old. Mainly discussion about law. Persuading factors – precedent. Only reasons given for sterilisation; to preclude pregnancy and prevent menstruation.	Close technical legal examination of Australian statute with regard to allowing parents to consent to sterilisation of adult child.	*Re Marion* [1990] re: scope of the law to allow parents to consent to sterilisation on behalf of 16 year old daughter.
Re Eve [1986] 31 DLR (4^{th})1 (Can SC) Canada	Mother	To prevent pregnancy. 24	Sterilisation declined; described as non-therapeutic.	Court did not have authority to allow sterilisation for solely contraceptive purposes. Used research to establish effects of sterilisation. Human Rights.	Firmly rejected best interests test. Considered child bearing rights. Rejected courts' ability to allow sterilisation for social need.	*Re D* [1976] sterilisation amounts to deprivation of the basic human right to reproduce. *Re P* [1981] authorised abortion in P's BI. *Re K* [1985] (Can) allowed therapeutic hysterectomy. *Buck v Bell* [1927] eugenics.

Re A (medical treatment: male sterilisation) *[2000] 1FLR 549, [2000] 1 FCR 193* England	Mother	Living at home – under mother's supervision. Preparing to go into local authority care. Mother highly anxious about sexual relationships in care home/ day centres. 28	Sterilisation declined; consequences of sex for man less. No enhancement to quality of life by sterilising.	High level of supervision given. Male – 'an application on behalf of a man for sterilisation was not the equivalent of an application in respect of a woman, as there were obvious biological differences. Although refutes this later in script; 'It is not a matter of equality of the sexes but a balancing exercise on a case by case basis.' Sterilisation would not increase the freedom of A.	First case seeking approval of male sterilisation. Contrasting views between psych. stark.	*Re F* [1990] That these cases should come to court, identified lacuna in the law re: adults who lack capacity to consent; application of best interests test in these cases; use of Bolam in combination with BI. *Re MB* [1997] – best interests is not limited to medical interest. *Re Y* [1997] considered interests of third party in BI Test. *Re D* [1976], *Re M* [1988], *Re P* [1989], *Re B* [1988], *Re W* [1993], *Re LC* [1997], *Re X* [1999*] BI principle applied in each of these cases to the individual facts of each case.*
Re X (Adult Sterlisation) [1998] 2 FLR 1124, [1998] Fam Law 737 England	Parents	Risk of pregnancy - Patient's best interests. 31	Sterilisation allowed in X's best interests. Coil less invasive alternative not acceptable due to risk of infections.	'The process of pregnancy, birth, and subsequent inevitable removal .. would be so frightening, bewildering and upsetting to X.' Declined to acknowledge reason for sterilisation, but 'hoped' it would lead to increased level of freedom.	X expressed a desire to have a baby. Appeared to justify decision on grounds of high risk of pregnancy. Prevention of pregnancy in case of real risk.	*In Re F* [1990]. In deciding matter must decide what is in X's overall best interests. *In Re S* [1998] Applications dismissed as no identifiable risk of pregnancy. Opposite therefore swung balance.
A National Health Trust v C (a patient by her friend the Official Solicitor) [2000] Family Division, 8 Feb 2000 England	NHS seeking declaration of lawfulness.	21	Sterilisation allowed. Risk of pregnancy high. Living in residential care. Lots of freedom. Currently taking contraceptive pill – seeking more long term solution.	Greater independence. No need to take the pill daily, greater protection when sterilised than from pill. No need to review need in the future.e Less strain for family. Effect of inevitable removal of baby.	Adopted Thorpe LJ's balance sheet for deciding BI.	*R-B* (a patient) [2000] BI Principle should be applied to the facts of each case. In *Re F* [1990] and R-B (a patient) [2000] considering whether interests of third parties should be taken into account. In *Re X* [1998] sterilisation justifiable if pregnancy, birth and removal of baby frightening, disturbing and psychologically traumatic. *In Re S* [1998] *In Re LC* [1997] for extent of risk of pregnancy.

Re S (Medical Treatment; Adult Sterilisation) [1998] 1 FLR 944, [1998] Fam Law 325, [1999] 1 FCR 277 England	Mother	Her mental and emotional state meant that she was unable to look after herself and she was vulnerable to sexual exploitation. 22	Declined sterilisation.	Identified risk of pregnancy low and speculative only. Weighed risk of pregnancy against risk of invasive sterilisation.	Identified need to maintain consistency between decisions and consequences of allowing sterilisation for social reasons. Re-stated the law and that High Court approval should always be sought.	*Re F* [1990] History of sterilisation, whether procedure medically indicated., social reasons for sterilisation. *Re LC* [1997] likened S's situation to LC and agreed with outcome re: low risk of pregnancy. *Re W* [1993] identified real risk of pregnancy when allowing sterilisation. *Re B* [1988] 'the right to reproduce is of value only if accompanied by the ability to make a choice.'
Re LC Medical Treatment: Sterilisation [1997] 2FLR 258 England	Local authority	Risk of sexual abuse – had previously been indecently assaulted. 21	Declined sterilisation.	LC lived in a residential home where level of supervision was exceptionally high; had been moved from home in which abuse occurred. Therefore sterilisation not required.	Previous assault. Mother concerned about risk of abuse, but moved to new home where risk low.	No precedent referred to.
RE HG (Specific Issue Order: Sterilisation) [1993] 1 FLR 587, [1993] Fam Law 403 England	Father	Lived in a school in circumstances likely risk from sexual relationships leading to pregnancy; would be disastrous, contraceptive pill not suitable because of epilepsy. 18	Sterilisation allowed.	A sufficiently overwhelming case has been established; Pill interfered with epileptic medication. Real risk of pregnancy.	Discussed point of law as to whether the father could apply to the court as next friend to consent to the procedure, and also considered role of Children's Act.	*Re B* [1988]. Satisfied that proceedings in this case met the tests and desirable considerations laid down in Re B. Also used to establish need for high court judgment of need for sterilisation.

RE W (Mental Patient) (Sterilisation) [1993] 1 FLR 381, [1993] Fam Law 208, [1993] 2 FCR 187 England	Mother	Limited understanding about contraception, sterilisation or connection between sexual intercourse, pregnancy and childbirth. Significant risk epilepsy worsening. 20	Sterilisation allowed in W's best interests despite identified low risk of pregnancy.	Low risk of pregnancy. Risk of epilepsy worsening during pregnancy. Alternative forms of contraception unsuitable. Would not be able to cope with pregnancy or childbirth.	Used Bolam test to establish best interests.	*Re F* [1990] 'the test is what is in the best interests of the patient'. *Re F* [1990] Used Bolam test to establish best interests.
In Re F (Mental patient: sterilisation) [1990] 2 AC 1 Appeal Court and House of Lords ruling both analysed. England	Mother	Voluntary in-patient. Sexual relationship with fellow resident. Unable to cope with pregnancy, but staff did not want to curtail her freedom. 36	Sterilisation found to be in F's best interests.	Risk of pregnancy. Having a relationship with fellow resident. Freedom.	House of Lords; Set new precedent allowing use of best interests test for adults who lack capacity to consent or decline medical treatment. Lord Griffiths declared non-therapeutic sterilisation unlawful without the authorisation of the High Court.	*Re B* [1988] 'In Re F is in Re B 4 weeks later' (i.e. B was 4/52 off her 18th B'day) *Re B* [1988] 'The law does recognise a special category on its attitude towards the sterilisation of children.' In *Re D* [1976] 'that the minors own interests may not in all circumstances be best served if the matter is left to the parents and doctors is will illustrated in Re D'. (Judge B) In *Re B* [1988] "I do not myself see how …. could have come to any other possible conclusion applying as they did as their first and paramount consideration the correct criterion of the welfare of the ward." ' There is a striking similarity between the facts in Re B and the facts in the present case. (Judge C) *Re B* "the right to reproduce is of value only if accompanied by the ability to make a choice. (Judge C) *Collins v Wilcock* [1984] 'The fundamental principle, plain and incontestable, is that every person's body is inviolate'.

In re B (A Minor) Wardship: Sterilisation) *[House Of Lords] [1988] AC 199* England	Council; B live in a residential institution.	Beginning to show signs of sexual awareness, could not be placed on effective contraceptive regime. 17	Sterilisation allowed.	No viable contraceptive alternative. Not capable of knowing causal connection between intercourse and childbirth. Panic and require heavy sedation during a normal delivery and in the case of caesarean would be likely to open up the wounds.		*Re Eve*; rejected finding in Eve that courts should never authorise non-therapeutic sterilisation. Rejected *Re D* [1975] as precedent due to 'extreme and quite different facts of the present case'. Judge 5 rejecting Re D [1975] as precedent 'a case very different from the instant case, where… the ward was of an intellectual capacity to marry and would in the future be able to make her own choice.'
Re M (A Minor) (Wardship: Sterilisation) [1988] 2 FLR 497 England	Local Authority	Sexually aware, danger of sexual intercourse becoming pregnant. No understanding of pregnancy or childbirth might harm mental health. 17	Sterilisation allowed.	Accepted evidence that sterilisation is reversible. 50% chance of fragile x syndrome being passed onto baby – would need tests and possible termination which would distress M. Despite above denied eugenics consideration in allowing sterilisation. Would not be able to 'exercise the actual mothering function'.	Eugenics; denied this aspect, but appeared to have clear eugenic component.	*Re B* [1987] proceeded on the basis that sterilisation was irreversible. Evidence given in this case that 50-75% of cases are reversible.
T vT and another [1988] 1 ALL ER 613 England	Mother	Looked after by mother and local authority. Became *pregnant* – requested abortion and sterilisation. 19	Sterilisation and termination allowed.	Termination as T would be unable to be monitored in pregnancy or look after the child when born. Sterilisation to prevent further pregnancies. Possible risk of passing condition to fetus. Other forms of contraception not suitable. Case mainly concerned with finding law to make declaration of lawfulness and to allow the procedures without incurring charges of trespass or battery.	No discussion of pregnancy – who, where, why, how etc.etc.	*Re B* [1987] noted B 17, T 19. Agreed with sterilisation in both cases cited 'I find it difficult to understand how anybody examining the facts humanely, compassionately and objectively could reach any other conclusion.' *Re Eve* [1986] for court's parens patriae jurisdiction. Looks to other cases for precedent to make a declaration of lawfulness.

In re D. (A Minor) (Wardship: Sterilisation) [1976] Fam 185 England	Official Solicitor	The likelihood was that she would have sufficient capacity to marry. Her widowed mother, worried lest D might give birth to a baby which she was incapable of caring for and which might also be abnormal, wanted D to be sterilised. 11	Sterilisation by hysterectomy declined.	Deprivation of basic human right to reproduce not justified in an 11 year old girl with 'dull normal intelligence and epilepsy.' Possibility of relationship and marriage in the future. Majority of medical evidence suggested that sterilisation was not appropriate in this case.	Proposed operation = deprivation of a woman's basic human right to reproduce. to perform an operation for non-therapeutic purposes on a minor not within doctor's sole clinical judgment.	*Wellesley v. Duke of Beaufort* (1827) 2 Russ. 1,20. 'It has always been the principle of this court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done.'

Appendix B: Table of hysterectomy cases (Arranged in order of jurisdiction and then chronologically).

Case reference	Case brought by	Facts of Case / age of person	Outcome	Persuading factors in outcome	Special Features	Precedent
Re X (Sterilisation: Parental Consent) [1991] 2 NZLR 365 New Zealand	Parents	Requesting hysterectomy to prevent menstruation. 15	Allowed parents right to consent under Guardianship Act; it was for X's benefit to have her menstrual periods stopped.	'Reduction in quality of life were she to commence menstruation'. Absolute prevention of onset of menstruation; hygiene and quality of life.	Lays out 10 factors which should be considered in similar cases.	'The situation in NZ is substantially covered by statute law, which of course must be followed rather that oversees jurisdictions however persuasive they might be'. *Re a teenager* [1989]; Welfare principle. *Ward v James* [1966] Judicial discretion. *Re D* [1976] *Re a teenager* [1989] likelihood of increasing capability. *Re F, Re Jane, Re B*; risk of pregnancy. *Re B, Re Jane, Re F, T v T [1988]* Dangers of birth / pregnancy physical or psychological. *Re a teenager, Re Jane, Re B, T v T;* are less drastic options available? *K v Public Trustee, Re a teenager, Re Jane, Re Elizabeth*; sterilise now or in future? *RE Jane & Re a teenager;* - right to reproduce v right to be protected from pregnancy and childbirth. - pain, trauma, psychological or medical problems resulting from menstruation. - unacceptable behavioural or menstrual management problems for care givers. - effect of menstruation.

JLS v JES [1996] 20 Fam LR Australia	Mother	Distressed by menstrual periods and render permanently infertile. 14	Gave consent for hysterectomy.	Side effects from depo-provera and oral pill. No capacity to mother a child. Mother's capacity would be overstretched if baby born. An attractive girl incapable of defending herself against a male abuser – possible risk of pregnancy identified. Risk of abuse when out of mothers care. Improve mothers ability to care for the child. Periods invoke terror and frantic response. Enhanced quality of life.	Acknowledges research Acknowledges that the judiciary are largely composed of men who may not be sufficiently familiar with the significance of sterilising women.	*P v P* [1994] & *Marion's case* [1992]. Both used to establish the courts jurisdiction to authorise the hysterectomy.
Re L and M [1993] 17 Fam LR 357 *Also known as* Re Sarah Australia	Parents	Could not provide a knowing consent to sexual contact. A pregnancy would be a traumatic event. 17	Hysterectomy declined.	Lived in a disabled persons ward at a hospital. Rejects sterilisation as a response to a potential risk of sexual abuse. "To make a decision in this case in favour of sterilisation would virtually equivalent to establishing that all females, with profound disabilities … should be sterilised".	Extensive consideration of meaning of best interests and values in best interest determinations. Girl resides in a hospital ward.	*Re K and Pubic Trustee* [1984] Rights are not undermined just because a person cannot appreciate them. Official Solicitor v K [1963] – rules of precedent. Legal reasoning and deductive logic. *Re Jane* [1988] for list of items to be considered. *Marion's Case* [1992] for significance of partents wishes in interpreting best interests.

Re Marion (No 2) [1992] 17 FamLR Australia *See above. This case deciding whether hysterectomy in Marion's best interests.*	Parents	Purpose of hysterectomy; Preventing pregnancy and menstruation with its psychological and behavioural consequences; ovariectomy proposed to stabilise hormonal fluxes and eliminate consequential stress and behavioural responses. 14	Allowed hysterectomy.	Prevent pregnancy – although identified little risk of sexual abuse. Prevent menstruation and menstrual bleeding with consequent psychological and behavioural problems. To stabilise and prevent hormonal fluxes with consequential stress and behavioural problems. Fitted pre-menstrually. Previously tried oral contraception.	Employed guidelines from Re Jane to determine best interests: Lists relevant factors which determine whether procedure is in the persons best interests, then applies it.	*Re Jane* [1988]; the same judge from Re Jane created the guidelines to be used in such cases.
In Re Elizabeth [1989] 13 Fam LR 47 Australia	Restraining order sought against mother by NSW council officer preventing mother consenting to hysterectomy.	Epileptic – increased risk of epileptic fits; pain, fear, dysmenhorrea and dehydration triggering fits of increasing severity and frequency. 15	Hysterectomy allowed.	Risk of increasing fits during menstruation. Risk also of pain, fear dysmenhorea, dehydration and triggering of fits of increasing severity and frequency. "She shows no fear and will happily go off with any man. She has to be physically restrained from chasing after men in public and throwing her arms around them".		*Re B* [1987]; whether the court can override the parents wishes. *Re Eve* [1986]; consent by the court for medical procedures. *Re Eve* [1986] & *Re F* [1989] to establish the distinction between therapeutic and non-therapeutic hysterectomy or sterilisation. *Re F* [1989]; sterilisation is in a special category of treatment to be considered by the court.
In Re S [1989] 13 Fam LR 660 Australia	Injunction against parents to consent to hysterectomy on S's behalf.	Could not cope with hygiene aspects of menstruation and risk that S would become pregnant. 12	Allowed hysterectomy.	Problematic masturbation. Menstruation not yet commenced. Real risk of pregnancy. Could not cope with they hygiene aspects involved in pregnancy.	Brought by the advocacy officer of the NSW council for Intellectually Disabled, and discusses whether these sorts of groups should be involved. Considered that legislation from NSW allowed parents to consent, and the consent of the court was not also required.	*Re Jane* [1988] the welfare of the child is paramount to the court. *Re F* [1989] *Re a Teenager* [1988] *Re Jane* [1989] *Re Elizabeth* [1989]

In Re Jane [1988] 12 Fam LR 662 Australia	Parents	She would experience great difficulty in coping with menstruation or pregnancy and that she would be unable to cope with motherhood. 17	Allowed hysterectomy.	She would experience great difficulty in coping with menstruation or pregnancy. Any rights infringed by sterilisation she is unable to exercise in a meaningful way and it is necessary to restrict / deny those rights.	Lengthy discussion about human rights instruments and Australian law. *Injunction sought by the Acting Public Advocate to prevent parents from consenting to hysterectomy. (This seemed to be a usual way of obtaining a declaration of lawfulness).*	*Re B* [1987]; the rights of the child cannot override the court's primary duty to regard the welfare of the child as paramount. *Re Eve* [1986], *Re a Teenager* [1988], *Re K* [1985] established the consent of the court is required to perform a procedure if it involves the interference with a basic human right and if its principle purpose is non-therapeutic.
Re a Teenager [1988] 13 Fam LR 85 Australia	Restraining order to prevent parents consenting.	Prevent menstruation which would affect her development and quality of life. 15	Allowed hysterectomy.	She could be the victim of sexual assault. How best to provide protection for future well-being to lead as full a life as her disability allows. Focused on improvement of quality of life. Denied surgery was for convenience of carers, eugenics, public policy, social purpose.	Rejected menstrual management programmes. Invited submission by the human rights commission. Brothers interests considered. Refers to theory of JS Mill..	*Re B* [1987]; how the court dealt pragmatically with the practical issues of the day to day life of B. Rejected *Re K* [1985] and *Re Eve* [1986] as required to consider the facts of the present case.
Re K and Public *Trustee* [1985] 19 DLR (4^{TH})255 Canada	Mother	Hysterectomy to prevent onset of menses. Concerned re: hysterical reaction to blood – childs reaction to blood in the past. 10	Hysterectomy declined.	Rights based – right not to have reproductive capacity removed.	Lengthy discussion of distinction between therapeutic and non-therapeutic.	*J and Another v. C and others,* [1969] & *Re B* [1981] used to establish the jurisdiction of the court to override the parents wishes. *Re D* [1976]; removing someone's child bearing capacity. *Re E* [1979]; making the distinction between therapeutic and non-therapeutic hysterectomy or sterilisation.

Re S (Adult Patient: Sterilisation) [2001] Fam 15 (CA) Lower court reported as: *SL (Adult Patient) (medical treatment)* [2000] 1 FCR 361 England	Mother	Distressed by her menstrual periods and had a phobia about hospitals. 29	Declined hysterectomy. Allowed insertion of mirena coil as least restrictive option	'The less invasive procedure should be adopted first'.	Analysis of link between best interests and bolam tests. Main gynaecologist = female.	*In Re E* [1991] *In Re D* [1976] confirmed right of patient not to be irreversibly interfered with except for good reason *In Re LC* [1997] *In Re ZM & OS* [2000] confirmed that the risk of pregnancy must be real rather than fanciful. *Frenchay* [1994] both reject Bolam test as absolute determinant in deciding patients' best interests. *In Re A* [2000] Best interests encompass medical social and all other welfare issues. *In Re GF* [1992] Requirements set out in GF…. Should be cautiously interpreted and applied.
Re Z (medical treatment: hysterectomy) [2000] 1 FCR 274, [2000] 1 FLR 523, [2000] Fam Law 321 Also reported as; *Re ZM and OS* [2000] 1 FLR England	Mother	Patient suffering extremely heavy and painful menstrual periods - Future risk of pregnancy. 19	Hysterectomy allowed on Z's best interests.	'Periods should cease altogether.' Serve no useful purpose reproductively or emotionally. Severe burden. Bring nothing but misery, pain and discomfort. Quality of life can be improved. Protection from pregnancy.		*Re F* [1990] On BI test can be applied to adults who lack capacity. *Re W* [1993] *Re X* [1999]. Claimed both these cases showed consistent application of BI test for allowing sterilisation since Re F.

Re GF Medical Treatment [1992] 1 FLR 293, 7 BMLR 135 England	Mother	Excessively heavy periods which she was unable to deal with. Incidental effect of sterilisation, object though essentially therapeutic. 29	Allowed hysterectomy for therapeutic reasons.	Heavy periods Unable to take care of menstrual hygiene and sanitary care Dreads having periods and embarrassed and humiliated by experience No practicable less intrusive means Necessary for therapeutic purposes.	Laid out 3 caveats for performing such an operation without seeking courts guidance.	No precedent.
Re E (A Minor) (Medical Treatment) [1991] 2 FLR 585, [1992] Fam Law 15, 7 BMLR 117 England	Official solicitor on behalf of parents.	E suffered from a menstrual condition for which the only effective treatment was a hysterectomy. Required for therapeutic reasons not with aim of sterilisation. 17	Hysterectomy allowed for therapeutic reasons.	Application for heavy periods, not for sterilisation.	Ruled that the consent of the court not required as deemed to be therapeutic.	*Re F* [1990]

Appendix C: Table of sterilisation and hysterectomy cases not analysed.

Cases not analysed	Best interests?	Reason not analysed
Re H (EM)[1995]130 Sask R 281 Canada	Yes Menstruation resulted in seriously disturbed behaviours, 'girl would never understand the process'.	UNREPORTED Publication of judgement restricted. Unknown why. Allowed endometrial ablation on the grounds that it was therapeutic. Declined sterilisation on the grounds that it has no therapeutic purpose.
Secretary, Department Of Health and Community Services v JMB and SMB [1992] 15 Fam LR 392 Appeal in high court following decision; *Re Marion* [1992] 14 Fam LR 427 Australia	No	All cases establishing lawfulness of parents consenting on behalf of Marion and whether court can consent on her behalf – see above for whether hysterectomy in best interests.