VARIETIES OF RELIGIOUS INTOLERANCE

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> There is a much greater distance between religious and secular ethics than is usually recognized . . . the old habits do serious moral harm. For instance, look at all the fuss that's made about research on human embryos . . . [And they allow] us to take far less seriously the horrible cruelty we inflict on our fellow creatures. If the world is not as religions claim it is, there is real harm in acting as though it were.
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> Janet Radcliffe-Richards[1]

This paper is about Christian "Religionists", those whose guiding principles of life are based on a Christian religious belief, and their varying degrees of tolerance towards those of a different religious persuasion. More particularly, it is concerned with the ways in which Religionists seek to control the lives of those who are not of their faith, as well as those who have no faith at all. This is the "religious intolerance" at issue: specifically, this paper considers the ways Religionists wish to inhibit, through legal means, the operations of our society. It is therefore about freedom *from* religion rather than freedom *of* religion. It seeks to establish the discriminatory use of the law for religious purposes.

The point of view adopted here is essentially that of a secular lawyer for whom any belief in supernatural beings is difficult to fathom. The approach is therefore largely Humean and so the idea of a supernatural being is regarded as implausible.[2] Hume wrote, however, with some disdain about those he regarded as the credulous faithful: those who were too willing to dispense with the requirements of proof and observation and to accept uncritically the untested assertions of religious prophets.[3] He tended to characterise them as naïve and unquestioning. That is not the approach here and indeed I would want to acknowledge the integrity, intelligence and seriousness of purpose of many of those who struggle with complex theological and moral issues entailed in religious belief. The critical concern here is with those who commonly impose their systems of belief on the world beyond the confines of their own faith.

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1 Janet Radcliffe-Richards "Darwin, Nature and Habits" in Julian Baggini and Jeremy Stangroom (Eds), *What Philosophers Think* (2003) 31.

2 In his *Dialogues Concerning Natural Religion*, David Hume is famously sceptical of the idea of a supernatural being, one which has never been witnessed by the senses. See also JCA Gaskin, *Hume's Philosophy of Religion* (1978).

3 Hume was particularly scathing about those who believed in miracles.

The attitude of this paper is also "naturalistic". It follows the principles of the natural sciences[4] and is interested in what is good for human beings as natural rather than as sacred beings.[5] Its concerns extend also to the animal kingdom because that kingdom includes beings with desires and interests – a province of concern which tends not to be central to the thinking of the Religionists.[6]

This paper therefore endorses the proposition of Radcliffe-Richards that there is a considerable difference between a sacred and secular ethic and that the sacred ethic can do great harm. The Religionists tend not to tolerate freedom of belief or disbelief in their own credos. They are unwilling to permit freedoms in relation to our treatment of our own bodies, our own lives and deaths. Nor do they wish to foster a free exchange of ideas. The extremists, among them, would positively eliminate the full and free teaching of evolutionary biology to children because this is contrary to their faith.[7]

By Religionists, I do not invoke all Christians, since the Christian Church encompasses moderates, liberals and the truly ecumenical. There are many tolerant Christians who are open to the ideas of others and who do not wish to control their lives. Rather, they wish to engage in open dialogue, and not to impose their faith. Persuasion is their preferred mode of intellectual encounter, not dogmatic assertion.[8] Nor do I wish to disavow the beneficial effects of Christian thinking on law, in particular the demand that there be universal respect for all human beings, whatever their place in life, whatever their physical and mental capacity. This has been a great achievement.[9]

The compass of the paper is necessarily broad and the jurisprudence considered varied. It draws on, and juxtaposes, parts of law that are not

4 The paper endorses what Owen Flanagan has termed "the scientific image" of ourselves, according to which "we are conscious animals living at a certain time in the broad sweep of natural and social history." See his *The Problem of the Soul: Two Visions of Mind and How to Reconcile Them* (2002) 18.

5 An essentially naturalistic approach to human need and human nature can be found in the extensive work of Martha Nussbaum. For an exposition of her human "capabilities" approach, see Martha C Nussbaum, *Women and Human Development* (2000).

6 It is however a matter of central concern to a growing number of lawyers and ethicists who object to the property status of animals and to the poor treatment of animals that status appears to countenance. See especially the extensive writings of Gary Francione and Steven Wise. Gary L Francione, *Animals, Property and the Law* (1995); *Rain Without Thunder: The Ideology of the Animal Rights Movement* (1996); *Introduction to Animal Rights: Your Child or the Dog* (2000). Steven M Wise, *Rattling the Cage: Toward Legal Rights for Animals* (2000); *Drawing the Line: Science and the Case for Animal Rights* (2002). For an excellent recent collection on animal law and animal "rights", which includes works by both authors, see Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004).

7 See Robert T Pennock, "Creationism and Intelligent Design" (2003) 4 *Annual Revue of Genomics and Human Genetics* 143, on the efforts of Creationists to inhibit the teaching of Darwin.

8 Such religious tolerance is particularly evident in the work of liberal Australian Christian ethicist Max Charlesworth. See for example his *Bioethics in a Liberal Society* (1993).

9 It is an achievement rightly acknowledged by Raymond Gaita in *A Common Humanity: Thinking About Love, Truth and Justice* (1999).

often considered together in order to demonstrate the diverse ways religion and religiously informed ideas can inhibit our freedoms. The point is to demonstrate the modern, continuing, undiminished and illiberal operation of religious principles in the legal arena. Some of the ways in which religion controls us are subtle and have become so thoroughly woven into the fabric of legal thought that they can go unnoticed. Indeed a central proposition of this paper is that the very idea of "human sanctity", which is more typically regarded as a preserver of human freedoms and as an unqualified good (indeed as the foundational principle of human rights law),[10] can also operate perversely to restrict and limit our lives and so undermine our self sovereignty.[11]

I consider three varieties of religious intolerance which have considerable practical effects on our freedoms as human beings and on the freedoms and interests of animals. In the first instance, I reflect on a very recent example of intolerance of educational freedom by Fundamentalist Christians and the role of an American court in declaring *this* form of religious intolerance to be unacceptable and unconstitutional. This is a move I applaud, as a liberal rationalist and a naturalist, because it preserves a basic human freedom: to be educated according to the tenets of science and not according to what some regard as supernatural principles masquerading as science. Here is the State, through the courts, promoting intellectual freedom.

The second variety of religious intolerance I consider is one in which the State is, by contrast, fully implicated and in the name of what is typically regarded as a self-evident good: "human sanctity". The suggestion here is that a deeply institutionalised Christian understanding of human life is implicit in a range of laws regulating the treatment of embryos, foetuses, human organs and persons at the end of life. Although we in the Anglo-American-Australasian world notionally have a secular law, and we are supposed to have a secular law,[12] which does not impose a particular credo on others, in truth the laws in these various areas have a strongly Christian underpinning. In the name of the "sacred" human, such laws impose considerable limits on what we can do to and with ourselves.[13]

The third variety of religious intolerance I examine is more pervasive in law and more subtle, to most perhaps invisible. It concerns the essential legal distinction between animals as property (for human use) and humans

10 On the role played by the principle of human sanctity in human rights law see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001). On the concept of "the sacred" generally see Ben Rogers, *Is Nothing Sacred?* (2004).

11 The classic statement on the importance of personal sovereignty to liberty is that of JS Mill expounded in, *On Liberty* (1910) first published 1849.

12 This is because of a constitutionally mandated separation of Church and State. See *Commonwealth of Australia Constitution Act 1900*, s116.

13 Law, lawyers and legal scholars use a variety of terms to denote the "sacred" nature of human beings. Sometimes the reference is to human inviolability, sometimes to intrinsic human dignity. Raimond Gaita has suggested that these are merely (slightly inadequate) synonyms for the more explicitly religious term. Raymond Gaita in *A Common Humanity: Thinking About Love, Truth and Justice* (1999).

as persons: our most fundamental legal division. It may seem odd to think of this as a matter of either religion or of intolerance. Yet the basic Christian conception of our place in nature is built into this bedrock legal division and it offends those religions for whom animals are not merely things for human use but are, instead, ethical beings. As Robert Darnton explains, by way of example, "A Thai identifies with his buffalo . . . He attributes an ethical existence to his buffalo, he will not work it, unlike other animals, on the Buddhist Sabbath. And he will not eat it."[14] A Christian conception of our nature and value in relation to other species necessarily excludes other religious understandings of our relations with animals, especially those of Buddhism.[15] A Buddhist sensibility in relation to animals is alien to modern Australian legal thought.

The view that only humans are ethical and sacred beings is also perturbing to those who can find no dramatic gulf separating reasoning, sentient human and non-human animals.[16] But does this view that only humans are sacred entail a form of religious imposition of belief? Certainly it helps to sanction the routine and lawful cruel treatment of animals (think of battery hens) and so offends those who object to such complacent abuse of other species. But the freedoms and interests which are the true concern here are not so much the personal interests and sensibilities of the secular human; they are really those of the animals themselves. Many Christians do not tolerate the idea that animals are individuals with their own interests. Animals are put on earth for human use; they do not have their own individual interests and purposes.[17]

The Christian idea of human sanctity remains an important way of affirming human value, human dignity and the importance of human rights.[18] It has important symbolic value. But my thesis is that when it is treated as an absolute unwavering fundamental value, especially by Christian Fundamentalists, it can do great harm. Even in a more muted form, in its second variety, it can obstruct vital scientific work (such as embryonic stem cell research), it can cause human suffering (when people

14 Robert Darnton, *The Kiss of Lamourette Reflections in Cultural History* (1990) 340.

15 On the Christian attitude to those of other Eastern faiths who hold more sympathetic views of animals, see Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500–1800* (1983).

16 Philosophers Peter Singer and James Rachels have both questioned this distinction between humans and animals. Both argue that species is not a morally significant distinction. For their recent thoughts on this, see Peter Singer, "Ethics Beyond Species and Beyond Instinct" in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) and James Rachels "Drawing Lines" in Cass R Sunstein and Martha C Nussbaum (eds) *Animal Rights: Current Debates and New Directions* (2004).

17 The bioethicist who has most successfully campaigned for the treatment of animals as sentient individuals with their own individual interests, rather than as things for human use, is Peter Singer. His seminal work on animal interests is *Animal Liberation*, first published in 1975. See also Peter Singer (ed), *In Defense of Animals: The Second Wave* (2006).

18 Again this point is well made by Raymond Gaita in *A Common Humanity: Thinking About Love, Truth and Justice* (1999).

in great pain are not allowed help to end their life as this is thought not to be God's way) and, in its third variety, it can countenance cruelty to non-humans. Dead humans are sometimes accorded far more moral consideration than intelligent living animals.

In the body of this paper I draw, therefore, on three modern instances of religious intolerance: the first extreme and obvious and ultimately rejected by the courts; the second pervasive but less conspicuous; the third foundational but almost invisible.

The First Variety: Suppressing Science

In October 2004, the Dover Area School Board of Directors in the American State of Pennsylvania resolved that "Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design".[19] In November, the Board announced to the press that, from January of 2005, ninth-grade biology teachers at Dover High School would be required to read to their students a statement to the effect that "Darwin's Theory of Evolution" must be taught, and would be examinable. But "Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist." Further that "Intelligent Design is an explanation of the origin of life that differs from Darwin's view" and that "students are encouraged to keep an open mind."[20] Students were then directed to read *Of Pandas and People* written by acknowledged Creationists[21] and published by a religious publisher.

Tammy Kitzmiller, the mother of a ninth-grade student, together with a number of other concerned plaintiff parents, sued the Dover Area School Board and the School District, "challenging the constitutional validity of a Board policy that required presentation of the concept of intelligent design in ninth grade biology classes, claiming that it constituted an establishment of religion prohibited by the First Amendment."[22]

The Dover School Board was not alone in its approach to the teaching of Darwin. A commentary in *The New Yorker* published only months before

19 *Tammy Kitzmiller v Dover Area School District* 400F Supp 2d 707; 2005 US Dist Lexis 33647, 3.

20 Ibid, 4.

21 Creationists believe that the world was created by God at a particular date. There are "old" and "new" creationists who invoke different dates. The Biblical date of creation can be calculated from the genealogy recorded in *Genesis* and throughout the Bible. If one calculates the total ancestry of Jesus back to David, and then from David back to Adam, creation occurs 4004 years before the birth of Christ and 1656 years before the Flood. (See *The Holy Bible Containing the Old and New Testaments Translated out of the Original Tongues and with the Former Translations diligently compared known as the Authorised (King James) Version Issued in 1611.* (John Reid, Edinburgh, Bailie Fyfe's Close, 1766.) I thank David Watts for his assistance here.

22 From Case summary: Procedural Posture. The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment then applies the establishment clause to the States.

the *Dover* decision observed that "proposals hostile to evolution are being considered in more than twenty states."[23] What was distinctive about the Dover Board is that it publicised its policies possibly in anticipation of setting up a highly-public test case on the constitutionality of teaching Intelligent Design as science.

In brief, the theory of Intelligent Design is distinct from Creationism, although Creationists have put their support behind the theory of Intelligent Design.[24] It does not entail a literal reading of the Bible and its proponents tend not to assert that the universe was created in six days. Nor do advocates of Intelligent Design necessarily eschew evolutionary biology *in toto*. However those who support Intelligent Design maintain that life was somehow created, though they tend not to explore the question of the identity of the creator. "The movement's main positive claim," as Orr succinctly states it, "is that there are things in the world, most notably life, that cannot be accounted for by known natural causes and show features that, in any other context, we would attribute to intelligence."[25] It is the sheer complexity of living organs (such as the eye or brain) and organisms (especially the human being) which defies explanation by mindless natural causes, according to the exponents of Intelligent Design. For such complexity of design, there must be an "intelligent designer". Random mutation and adaptation cannot rank as sufficient explanations for such "irreducible complexity".[26]

In December 2005, the United States District Court for the Middle District of Pennsylvania in essence agreed with the plaintiffs. The Court decided that the Dover Board's policy on the teaching of Intelligent Design did indeed offend the religious establishment clause of the American Constitution. In the course of the judgment, the District Court undertook a survey of what it termed "the jurisprudential landscape". It traced the long legal history of what it called "Fundamentalist" challenges to Darwinism, the endeavour to oust its teaching from public schools, and to replace it with a religiously-informed pedagogy about the origins of life. The Fundamentalists had experienced some success until 1968, when the US Supreme Court "struck down Arkansas's statutory prohibition against teaching evolution".[27] There followed periodic attempts to introduce biblical views of creation into science classes in American state schools and periodic challenges to such introduction. Each time the Court declared that the teaching of Creationism as science was unconstitutional.

23 H Allan Orr, "Devolution: Why Intelligent Design Isn't" May 30 (2005) *The New Yorker* 40.

24 William Paley is responsible for the classic statement of the case for design. See William Paley, *Natural Theology* 1802.

25 H Allan Orr, above n 23.

26 The argument of irreducible complexity has been advanced by the biochemist Michael Behe (who gave evidence in the *Dover* case) and specifically in relation to biomolecular structure. For a critical account of Behe's argument see Robert T Pennock, above n 7.

27 It did this in *Epperson v Arkansas* 393 US 97.

In 1987, the US Supreme Court held that the teaching of "Creation science" alongside evolution in public schools was unconstitutional.[28] In effect the Court instituted a national prohibition against teaching creation science. The *Dover* case was prompted by yet another attempt to introduce Creationism into schools under a different guise, that of Intelligent Design. In *Dover*, the Court concluded that: "The religious nature of ID would be readily apparent to an objective observer, adult or child";[29] "The overwhelming evidence at trial established that ID is a religious view, a mere re-labelling of creationism, and not a scientific theory";[30] ID was not science as it purported to be;[31] it was ineradicably religious and the advocates of ID, who clearly formed a majority on the Dover School Board, had thereby sought to change "the ground rules of science which require testable hypotheses based upon natural explanations".[32]

While the Court conceded that proponents of Intelligent Design might "occasionally suggest that the designer could be a space alien or a time-travelling cell biologist, no serious alternative to God as the designer has been proposed by members" of the ID movement.[33] Moreover, the statement of the Dover Board "singles out the theory of evolution for special treatment, misrepresents its statement in the scientific community, causes students to doubt its validity without scientific justification, presents students with a religious alternative masquerading as a scientific theory, directs them to consult a creationist text as though it were a science resource, and instructs students to forego scientific inquiry in the public school class room and instead to seek out religious instruction elsewhere."[34] In effect, the students were being taught to make a choice between a "God-friendly" science or an atheistic science. The school's policy therefore created "an excessive entanglement of the government with religion".[35]

Dover stands, among other things, for the proposition that Darwin's theory of evolution is accepted science and that Intelligent Design has no

28 *Edwards v Aguillard*, 482 US 578, 107 S.Ct. 2573, 96 L Ed 2d 510 (1987).

29 From Overview: *Tammy Kitzmiller v Dover Area School District* 400F Supp 2d 707; 2005 US Dist Lexis 33647.

30 *Tammy Kitzmiller v Dover Area School District* 400F Supp 2d 707; 2005 US Dist Lexis 33647 at 55.

31 Intelligent Design was not science because it "violates the centuries-old ground rules of science by invoking and permitting supernatural causation" and "ID's negative attacks on evolution have been refuted by the scientific community." Moreover "ID has failed to gain acceptance in the scientific community, it has not generated peer-reviewed publications, nor has it been the subject of testing and research." (82)

32 *Tammy Kitzmiller v Dover Area School District* 400F Supp 2d 707; 2005 US Dist Lexis 33647 at 29. Further the Court said that "ID is reliant upon forces acting outside of the natural world, forces that we cannot see, replicate, control or test...such forces...are simply not testable by scientific means and therefore cannot qualify as part of the scientific process or as a scientific inquiry". (104)

33 *Tammy Kitzmiller v Dover Area School District* 400F Supp 2d 707; 2005 US Dist Lexis 33647 at 34.

34 *Tammy Kitzmiller v Dover Area School District* 400F Supp 2d 707; 2005 US Dist Lexis 33647 at 64.

35 *Tammy Kitzmiller v Dover Area School District* 400F Supp 2d 707; 2005 US Dist Lexis 33647 at 115.

place in biology classes in state schools. To require the teaching of Intelligent Design in science classes, as a plausible alternative theory to evolution, is to offend the constitutionally-mandated division or separation between Church and State. And second, the case confirms a division between the religious and the scientific and seeks to preserve the scientific from religious encroachment, from religious intolerance—and this despite a sustained campaign by Fundamentalists to manipulate the teaching of science.

The Fundamentalists did not prevail. The Court identified the threat they represented to the very teaching of science. It appreciated that the defendants in *Dover* were intolerant of the free, uncensored teaching of the scientific principles entailed in evolutionary biology. And yet in other ways, as we will see, a profound Christian ethic continues to be endorsed by the judiciary and the Parliament, it runs through common law and limits our freedoms. It interferes with important human projects. This brings me to my second variety of religious intolerance which entails the idea of human sanctity.

The Second Variety: Human Sanctity in Three Guises

THE SANCTITY OF EMBRYOS

In 2002, the *Research Involving Human Embryos Act* (Cth) became law, together with the *Prohibition of Human Cloning Act* (Cth). This Commonwealth legislation introduced a strict regulatory scheme for research employing embryos and criminalised human cloning as well as the creation of embryos for research purposes. Underpinning both laws was the idea that human embryos were not to be treated in a morally-neutral manner, as a mere cluster of cells, but as somehow morally special, indeed sacred.

The legislation was passed by a conscience vote because of the "complex moral and ethical judgements" apparently entailed, according to the Prime Minister. Mr Howard expressly consulted Christian Church leaders—the Catholic and Anglican Archbishops of Sydney in particular—who were publicly opposed to the use of embryos in research. He also consulted prominent scientists. Ultimately he supported the use of embryos in research, but affirmed that "the special character of the embryo warrant[ed] a strict regulatory regime for research involving excess IVF embryos". He further expressed his "very strong belief that human embryos should not be created for any purpose other than IVF treatment".[36] These moral views were to be embodied in the new law.

36 Second Reading Speech. These views have been sustained. At the time of writing, Federal Cabinet had just expressed its opposition to the findings of the Lockhart Committee (Report tabled in both Houses of Parliament in December 2005), and in particular to the recommendation that it should be permissible to create embryos for research and therapeutic purposes. Loane Skene, the Chair of the Lockhhart Committee, has described "government opposition to the research" as "a kind of fundamentalism". She has further argued that "those who spoke against [embryonic stem cell therapy] for reasons of religion or philosophy had a heavy duty of persuading that it should not be allowed." *The Australian* (Sydney) 23 June 2006.

A further effect of the legislation was the imposition of a ban on the use of excess embryos created by artificial reproductive technology (ART) after 5 April 2002, for research purposes, regardless of the wishes of those responsible for the embryos. These embryos were created by ART but because they were excess to the requirements of reproduction, they were likely to be discarded anyway. This particular impediment to scientific research had the strong public support of the Prime Minister. In January 2005, he wrote to all Premiers asking that the ban be continued for another year. He did not obtain their agreement and so the ban was lifted in April of 2005; it therefore lasted for three years.

In general, the Prime Minister has been strongly committed to biomedical research. Indeed funding for the National Medical and Research Council, the main source of government funding for biomedical research in the country, "has doubled since 1999, as part of a sustained effort by the Government to position Australia at the fore of global medical research".[37] However this commitment has been muted in the case of research on excess embryos because of their assumed moral significance. Influential opposition to the free exercise of science in this area has come from prominent members of the Christian Church who have been animated by a religiously-informed belief that the embryo has a particular metaphysical status demanding strong protection.[38]

We still have laws in place, nationally, to ensure that embryos cannot be treated as property, as things, that they cannot be used as the source of profit. Thus the *Prohibition of Human Cloning Act 2002* (s23) states that "A person commits an offence if the person intentionally gives or offers valuable consideration to another person for the supply of a human egg, human sperm or a human embryo." It is "an offence if the person intentionally receives . . . valuable consideration from another person for the supply of a human egg, human sperm or a human embryo." And of course research on embryos is now heavily regulated.

In deliberately provocative terms, Radcliffe Richards suggests that a Christian religious ethic is responsible for "all the fuss that's made about research on human embryos".[39] She prompts us also to reflect on the worrying secular proposition that "if the world is not as religions claim it is, there is great harm in acting as though it were."[40] If we are persuaded by her logic and accept that the embryo is not sacred, that it does not have

37 Steve Lewis and Joseph Kerr, "Medical Research Funding in Crisis" *The Weekend Australian* (Sydney) March 18–19 2006, 9.

38 Explicit statements to the effect that the embryo is sacred from the moment of conception and so demands basic human rights are to be found in the writings of natural law scholar John Finnis. See for example John Finnis "'The Thing I Am': Personal Identity in Acquinas and Shakespeare" in Ellen Frankel Paul, Fred D Miller Jr and Jeffrey Paul (eds), *Personal Identity* (2005) 250. The Australian Prime Minister has been more cautious in his characterisation of the embryo though the religious influence seems clear.

39 Janet Radcliffe-Richards, above n 1.

40 Ibid.

a special moral status, then it could be said that the legal constraints on biomedical science are for no good reason.

THE SANCTITY OF CORPSES AND ORGANS

The human body has had a remarkable legal history because of its assumed sacred nature. At common law, bodies and their parts have generally *not* been regarded in law as a type of property. The well-known common law rule is that there is no property in a corpse.[41] Corpses and organs of the dead therefore could not be bought, sold, or stolen. This generated problems for the teaching of anatomy in medical schools, notably in the supply of bodies to dissect for the purposes of education.[42]

With the no-property rule in place, British students and teachers of anatomy were unable to purchase cadavers. Nor could they rely on the community to donate their dead bodies to the medical schools, as some do today, though still not enough. For there was once a wide-spread religious belief in whole-body resurrection, in the need for the entire sacred body to ascend to Heaven. Consequently people chose not to donate their bodies to medicine for fear of not achieving Salvation.[43]

Some of the medical schools, most infamously in Edinburgh, relied on the "body-snatchers" for a regular supply of illicit corpses to examine. The no-property-in-a-corpse rule, however, meant that the body snatchers were immune from prosecution for the felony of larceny. This gave them licence to take bodies. They could only be charged with such lesser offences as interference with a grave or perhaps theft of the winding sheets.[44]

By the end of the eighteenth century, it is said that "no corpse was safe from disturbance, no matter how eminent the deceased".[45] The passage of the *Anatomy Act* in 1832 did something to alleviate this problem by ensuring that the bodies of paupers in the workhouses, too poor to pay for their funerals, would be made available to the medical schools for dissection. Before that only a tiny supply of bodies was available for dissection. These were the corpses of murderers whose legal punishment included their anatomical dissection.[46] The *Anatomy Act* meant that the workhouse was now to be feared as a place which could claim your corpse and subject it to the sort of treatment once reserved for murderers. Given the continuing uncertainty about the metaphysical status of the body, dissection became a form of punishment now visited on the dead innocent poor.[47]

The past several decades have seen the rejuvenation of the no-property-in-a-corpse rule with the development of transplant surgery. The corpse and

41 Ngaire Naffine, "'But a Lump of Earth'? The Legal Status of the Corpse" in Desmond Manderson (ed), *Courting Death: The Law of Mortality* (199) 9.
42 See Russel Scott, *The Body as Property* (1981).
43 See Ruth Richardson, *Death, Dissection and the Destitute* (1988).
44 See Ngaire Naffine, above n 41.
45 Russel Scott, above n 42.
46 Dissection was a legal punishment for murder. See Ruth Richardson, above n 43.
47 Ruth Richardson is particularly critical of the *Anatomy Act* for this reason. See Richardson, above n 43.

its parts have again become valuable resources. Lawyers and philosophers are now engaged in a vigorous debate about whether the body should be treated as a species of property.[48] The prevailing view seems to be that it is wrong to regard the body as property because it dehumanises the corpse and fails to respect its special, sacred nature. And thus it remains the case today that we do not own our bodies, and nor does anyone else. Our bodies continue to be treated as morally special in law, in effect, as sacred. They are endowed with mystical significance. Here in Australia—as in many other countries—we cannot sell our blood or our tissue or our organs. We can only give them away.[49]

We can indicate our intention to become an organ donor when we die.[50] But we cannot maintain the same control over our organs that we can over our property. We cannot ensure that our kidney will go to a daughter or nephew or friend. In fact we cannot ensure that our organs will go to anyone. Even if we declare that we want to donate our organs, should a surviving relative object, possibly for religious reasons that our body should not be desecrated, then the surgeons will not proceed with the extraction of organs. As a practical consequence, Australians are dying for want of an organ.[51]

Nor can we treat our organs as part of our estate.[52] We cannot profit from our organs and nor can our beneficiaries, because our organs are not our property. They are special; some would say they are sacred.

THE SANCTITY OF THE DYING

The idea of human sanctity is also at the heart of laws prohibiting euthanasia. The English House of Lords has been absolutely clear about this. It is because of human sanctity that we cannot give lawful permission for another to assist us with our own death and that those who assist

48 See for example, Lori Andrews, "My Body My Property" (1986) 16(5) *Hastings Center Report* 28; Roy Hardiman, "Toward the Right of Commerciality: Recognising Property Rights in the Commercial Value of Human Tissue" (1986) 34 *UCLA Law Review* 207; Michelle Bourianoff Bray, "Personalizing Personalty: Toward a Property Right in Human Bodies" (1990) 69 *Texas Law Review* 209; Courtney Campbell, "Body, Self, and the Property Paradigm" (1992) 22(5) *Hastings Center Report* 34; Roger Magnusson, "The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions" (1992) 18 *Melbourne University Law Review* 601; Stephen Munzer, "Kant and Property Rights in Body Parts" (1993) 6 *Canadian Journal of Law and Jurisprudence* 319; Brian Hannemann, "Body Parts and Property Rights: A New Commodity for the 1990s" (1993) 22 *Southwestern University Law Review* 399; Paul Matthews, "The Man of Property" (1995) 3 *Medical Law Review* 251; Danielle Wagner, "Property Rights in the Human Body: The Commercialisation of Organ Transplantation and Biotechnology" (1995) 33 *Duquesne Law Review* 931.

49 Organ donation is regulated by the *Transplantation and Anatomy Act 1978* (ACT), *Human Tissue Transplant Act 2004* (NT), *Transplantation and Anatomy Act 1983* (SA), *Human Tissue Act 1985* (Tas), *Human Tissue and Transplant Act 1982* (WA), *Human Tissue Act 1983* (NSW), *Transplantation and Anatomy Act 1979* (Qld), *Human Tissue Act 1982* (Vic).

50 Australians can now do this on the new Organ Donor Registry. Our registered consent to organ donation, however, does not amount to an enforceable legal instruction.

51 On Australia's organ donation shortage see T Mathew, "The Australian Experience in Organ Donation" (2004) 9, 1 *Ann Transplant* 28.

52 The American State of Pennsylvania proposed to pay funeral expenses for those who would donate their bodies but this was deemed to be too close to "valuable consideration".

us make themselves vulnerable to a homicide charge.[53] Or as Radcliffe Richards expresses the point, "most anti-euthanasia attitudes can be coherently justified only by a deep assumption that suicide is wrong—probably because life belongs to God."[54]

As a consequence, humans cannot ask for their life to be ended, to be put out of their suffering, when they are dying.[55] It could be said that they are required to suffer on behalf of the beliefs of others. The secular do not require the faithful themselves to die.[56] That would be a matter of personal choice. It is their own dying and death that concerns them. But they are subject to the requirement of the faithful that they live and suffer because life is sacred.

Another corollary of the idea of human sanctity, and the legal treatment of euthanasia as murder, is that when hospitals or the courts decide that it is appropriate to withdraw treatment from the permanently comatose, because they will never think and feel again, because any treatment is futile, the final physical death must occur by dehydration.[57] There can be no positive intervention in the form of administration of a toxin to end life, for this remains murder or assisted suicide.

The person who is permanently comatose has no ability to think or feel. They experience no pain, and so the slow dying from dehydration can have no real personal effect on them. It does mean, however, that family, friends and the treating doctors must witness a dying through dehydration which can take up to two weeks. This is not a dignified ending for those who must bear witness.[58] Nor is it a dignified ending for any of us to anticipate.[59]

Finally, let us consider the treatment of animals.

53 See the decision of the House of Lords in *Pretty v DPP* [2001] UKHL 61, especially the judgment of Lord Steyn in which he refers to "the deeply-rooted sanctity of life principle" in English law (par 65). Mrs Diane Pretty, who suffered from motor neurone disease, sought a declaration from the DPP that if her husband assisted her suicide, he would not be prosecuted under the Suicide Act. She was denied her request.

54 Janet Radcliffe-Richards, above n 1, 28.

55 Only animals can be put down when they are suffering. Conversely humans must be buried respectfully and certainly not eaten, while animals can be subjected to painful experiments in medical laboratories and bred for food using methods which can seem positively cruel. The battery hen is an obvious example. On the cruelty entailed in the farming of animals see Peter Singer, *Animal Liberation* (2001).

56 Although the faithful do tend to reply that voluntary euthanasia is the thin end of the wedge leading to involuntary euthanasia, that is, to the assisted death of those who do not actively seek this assistance. The wedge argument is nicely analysed and criticised in James Rachels, *The Elements of Moral Philosophy* (2003, 4th ed).

57 The House of Lords, in the landmark case on the legality of the withdrawal of nutrition and hydration from a person reduced to a persistent vegetative state, was sensitive to this implication and deeply regretted it. This is the case of Tony Bland who was thus reduced as a consequence of the Hillsborough Soccer Stadium disaster and whose withdrawal of "treatment" was ultimately approved. See *Airedale NHS Trust v Bland* [1993] AC 789.

58 A poignant discussion of this problem is to be found in *R (On the Application of Oliver Leslie Burke) v the General Medical Council* [2004] EWHC 1879 per Munby J.

59 There is of course a voluminous literature on voluntary euthanasia, and the case for and against it. A balanced account of both sets of arguments is to be found in John Keown (ed), *Euthanasia Examined: Ethical, Clinical and Legal Perspectives* (1995).

The Third Variety: The Treatment of Animals

With animals, the powerful and still present impact of the idea of human sanctity on legal thinking is evident in their consistent and continuing property status: those who/which[60] lack souls. According to Western religious tradition, "the world is intended for [our] habitation".[61] All else is intended for our use.[62] This is what American moral philosopher James Rachels describes as:

> the central idea of our moral tradition [which] springs directly from [a] remarkable story. The story embodies a doctrine of the specialness of man and a matching ethical precept. Man is special because he alone is made in the image of God, and above all other creatures he is the object of God's love and attention; the other creatures, which were not made in God's image, were given for man's use . . . The matching moral idea, which following tradition we call "human dignity," is that human life is sacred, and the central concern of our morality must be the protection and care of human beings, whereas we may use the other creatures as we see fit.[63]

Evidence of the presence in law of ideas of human specialness and sanctity, and a correlative deep-seated view that we are not animals, starts foundationally with the Roman legal division between persons and property. In law, all humans, whatever their capacities, are treated as persons. All animals, whatever their capacities, are treated as things. Law operates thus with a fundamental distinction between human and other species. We are persons, which means that we have basic legal rights and interests. Animals are property, which means that their interests only exist to the extent that they are consistent with and advance human interests. Certainly animals do not possess their own individual rights.[64]

As a consequence of this religious thinking, the human embryo, the foetus and the human dead can be said to fare better in law, in many respects, than do animals. There has been a profound legal reluctance to define either embryos or the human deceased as things for use; as property. Embryos cannot be bought or sold. Nor can bodies or their parts. There

60 This grammatical distinction is itself indicative of an attitude towards animals. "Which" is the preferred form for animals and is indicative of their thing-like status.

61 James Rachels, *Created from Animals* (1990) 86.

62 As the Catholic Church proclaimed in 1994, "Animals, like plants and things, are by nature destined for the common good of past, present and future humanity." Quoted in Paul Waldau, "Religion and Animals", in Peter Singer (ed), *In Defense of Animals: The Second Wave* (2006) 69.

63 James Rachels, above n 61, 87.

64 New Zealand's endeavour to endow apes with some basic rights was unsuccessful. At the time of writing, Spanish Socialist MPs are proposing some basic human-like rights for apes. Hugh Warwick (in "Moral Booster", *The Guardian*, 7 June 2006, on-line) reports that "a resolution is going before the parliament which, if passed as expected, will give a set of rights to chimpanzees, bonobos, gorillas and organgatans" which will then be regarded as "legal persons." Opposition to the reform has come from the Archbishop of Pamplona, whose main concern is that "this would undermine the anthropocentric world view and call into question the special status of human beings." For the edited print version see *Guardian Weekly*, June 16–22 2006, 22. See also *BBC News Online*. "Spanish MPS push for apes' rights" 8 June 2006.

is no such reluctance with the legal treatment of animals. Animals are securely within the category of legal property. [65]

British philosopher, Mary Midgley, who has written extensively about human and animal nature, asserts that "We are not just rather like animals; *we are animals*. Our difference from other species may be striking, but comparisons with them have always been, and must be, crucial to our view of ourselves."[66] Further, "our view of man . . . has been built up on a supposed contrast between man and animals."[67] This is certainly true of law. That is to say, our sense of ourselves as moral persons, as fitting subjects of dignifying legal rights, depends on a fundamental distinction between ourselves and other animals. We know that we are inherently valuable, special and sacred because there is a contrasting group of beings who are precisely not of this nature.[68] Darwin said that we are animals but our law tells us that we are not.

Conclusion

I have considered three varieties of religious intolerance. I have observed the formal rejection of religion from the public educational arena and yet the continuing invocation of a strong Christian idea of human sanctity in a broad variety of laws. The value that the concept of human sanctity has given to the idea of fundamental human rights is acknowledged. Because we are sacred, we must be treated with dignity. But the consequences for both humans and animals of a tenacious and unqualified view that we are God's creatures, not our own, can be grim and this has been the point of my paper.

The idea of human sanctity provides the fundamental justification for a number of laws which significantly compromise the interests of human beings and limit human freedoms. Embryos which are destined to be discarded have been treated with such respect that they cannot be used in ways which would benefit living human beings. The sanctity of the embryo and the foetus was, one strongly suspects, at the heart of the recent endeavour to deny Australian women the "abortion pill" even though it was presented as a matter of public health. The dying who are in extreme physical or psychological pain are not permitted to ask for medical assistance to have their life ended. Our animal status as suffering

65 Steven Wise describes the person/property divide as "a thick and impenetrable wall [which] has separated all human from all nonhuman animals. On one side, even the most trivial interests of a single species—ours—are jealously guarded. We have assigned ourselves, alone among the million animal species, the status of 'legal persons'. On the other side of that wall lies the legal refuse of an entire kingdom...They are 'legal things'. Their most basic and fundamental interests...are intentionally ignored, often maliciously trampled, and routinely abused." *Rattling the Cage: Toward Legal Rights for Animals* (2000) 4.

66 Mary Midgley, *Beast and Man: The Roots of Human Nature* (1978) xiii.

67 Ibid, 25.

68 On the way in which animals serve to define human beings see Cora Diamond, "Eating Meat and Eating People", in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 93.

creatures is trumped by a religious idea that that which is sacred should not take its own life or have another assist them to do so. But meanwhile non-human animals can be put out of their misery if suffering but also they can be lawfully treated with utmost cruelty.

Also because our bodies and their parts are not property, we cannot secure their use, according to our intentions, after we die. That is why we cannot bequeath them to our family and friends. And of course the very freedom and dignity of women is constantly threatened by the idea that, when pregnant, a woman carries within her another soul.[69]

Religion hangs over law and society and inhibits rational and humane action. It is rarely exposed as a force for intolerance and injustice. This paper has sought to make visible the pervasive religious assumptions which inhabit some of the most sensitive operations of our entire legal system. It has mounted a modest defence of freedom *from* religion. It is directed at intolerance by the religious or, put another way, it is about the rights of the secular to exercise their freedom not to believe and to do so with conscience.

The Court in *Dover* condemned this sort of religious intolerance when manifested in an extreme and anti-intellectual form. And yet this intolerance is implicitly endorsed by central State law in a more subtle, muted form in the name of "human sanctity". It could be said to set the very limits of our lives: it helps to control and regulate how we may begin our lives and how we may cease to be.

69 There is an extensive legal literature on the relationship between the legal status of the foetus and the rights of pregnant women. Whenever the foetus is regarded as an interest bearer, the rights of women tend to be commensurately reduced. For a balanced account of the legal and ethical debates see Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (2001).