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A Reply: Broadening Disciplines that Dull as well as Sharpen

JOHN BRAITHWAITE*

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I thank Ziegert, Krygier and Glass for commentaries which begin to round out a discussion advanced on too narrow a front in my article. Klaus Ziegert is right that my contribution is no substitute for "a thorough analysis of ... a much more complex design of modern law to provide a highly differentiated society with both adequate and legitimate legal decision-making".¹ I am not equipped for that kind of thorough analysis. But interdisciplinary scholars such as myself, who are specialists in other things, can make distinctive contributions to a conversation about how to move toward a more complex design for modern law.

This particular contribution is literally just another turn in a conversation that began at an Australian National University Law and Government Workshop. At that event, I queried some senior judges about why they rely on notions like "fundamental community values" having legitimacy in the law, juxtaposed with "superficial opinion" or personal values which should not be granted legitimacy: "Why don't you, I said, rely on a more coherent distinction that is conceptually well developed and empirically fleshed out in the discipline of social psychology — the distinction between values and attitudes?" Participants were interested in this approach and requested something in writing with some citations to work of Valerie Braithwaite that I had shamelessly touted. The conversation continued during and after the conference with some participants sending letters up to six pages in length. Out of the conversation came the rather interesting idea of a Bill of Values and Rights.

Conversations are the most important products of universities, not publications or completed systems of thought. In this reply, I seek to continue the conversation. So the history of this piece does not fit Ziegert's characterisation of readers being lured to witness a sideshow about the jurisprudence of values as a vehicle to put a republican system of thinking about governance on centre-stage. No, I was luring people into reading my wife's research in the hope that this would make her famous.

Ziegert, Krygier, Glass and I share in common the view that the rule of law is something to take seriously, though we have very different views about how to do so. Rather than deferring to community values, they want judges to defer to legal traditions ("accepted legal doctrine" in Ziegert)² to justify the way judges interpret and fill gaps in the law. Where legal "traditions" or "doctrines" can be soundly justified by the laws of a democracy, or the values of its people, I find virtue in their use to interpret the law. There is vice, however, in

* Professor, Law Program, Research School of Social Sciences, Australian National University. My thanks to Peter Drahos and Leslie Zines for helpful comments on this text.

1 Ziegert, K A, "Judicial Decision-Making, Community and Consented Values: Some Remarks on Braithwaite's Republican Model" (1995) 17 *Syd LR* 372 at 383.

2 *Ibid.*

accepting legal traditions or doctrines as sufficient or ultimate justifications for interpretive or gap-filling choices.

While scholars like Krygier are at base optimistic about legal traditions, I am not. Certainly, in the principles, attitudes and mental habits that constitute legal traditions, there is much that is valuable. Yet like most outsiders to the tradition, I find profligate mystique of technique in it that obscures accountability in a troubling way. Indeed, I am inclined to find our legal tradition rotten in some fundamental ways that the law itself is not. It is not the "law in the books" that delivers us a world where major corporate criminals are almost never dealt with while the criminal courts are monopolised by the underclass — a world where even the white-collar criminals who go to jail are disproportionately black!³ It is not the law in the books that all but excludes that same underclass from our various non-criminal courts as complainants. It is not flawed drafting that has transformed Part v of the *Trade Practices Act 1974* (Cth) from the consumer protection statute intended by Lionel Murphy into a weapon in contests between powerful corporations — almost never a tool powerless consumers use as claimants. Responsibility for this injustice system seems, rather substantially, to lie with the way our legal tradition reacts to inequality of power.⁴ Peter Drahos and I are seeking to show in a current project how the traditions of Western intellectual property law are important contributors to a major shift of wealth in the world system, as power in the international economy shifts from the control of capital and labour to the control of abstract objects such as patents.

Let me be more provocative. A principal reason a standard like "beyond reasonable doubt" gets taken seriously in the trial of an OJ Simpson or the Chamberlains, but not in the trial of a Joe or Mary Bloggs, is that practitioners are protective of their tradition's mystique. Part of the tradition is that when the tradition is under the public microscope, change the tradition. There is a need to expose the tradition, and to require its practitioners to give an account of it in terms of laws and values to which the wider community subscribes.

3 For an article which takes seriously the possibility that such data show that blacks in the United States really are more likely to commit white-collar crime than whites, see Hirschi, T and Gottfredson, M, "Causes of White-Collar Crime" (1987) 25 *Criminology* 957. The most important weakness of our legal tradition relevant to this problem is its reactivity. There is no prospect of equality before the law under a tradition that reacts equally to those with unequal power, and that responds equally only to those who are equally able to pay. Brent Fisse and I have outlined some major, yet we think practical, shifts in our legal tradition that are required to make corporate criminal law something other than the vilification of junior scapegoats. It involves both lawyers in regulatory agencies and judges rejecting reactive case processing in favour of an activist harnessing of civil society to explore the responsibility (including non-criminal responsibility) of all who are responsible. See Fisse, B and Braithwaite, J, *Corporations, Crime and Accountability* (1993).

4 In the 1990s, the Trade Practices Commission itself has shown some leadership in using public enforcement to make the *Trade Practices Act 1974* (Cth) available for the first time as a remedy for Aboriginal communities, for example. Creative extra-judicial "class actions" through negotiated settlements by the Trade Practices Commission have attracted fire from legal traditionalists. For a discussion of why Fisse, Ayres and I see this as precisely the sort of break we need to make with our legal traditions, see Fisse and Braithwaite, *id* ch 7 and Ayres, I and Braithwaite, J, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

One reason for seeking an alternative to judicial justification in terms of the legal traditions valued by Ziegert, Krygier, and Glass is that in these traditions "so much that is most important is assumed and implicit."⁵ The assumed and implicit that is good, and there is much of that, can and should be defended, it seems to me, in terms of the standards in the law and in community values. The assumed and implicit that is wrong, and there is much of that, should be exposed and evaluated against shared community values by critics both internal and external to the tradition.

A virtue of community values, conceived in the Rokeach tradition of social psychological research, is that they can be exhaustively and explicitly listed in a couple of pages. If Ziegert wants to characterise them as doxic, they are listed there for him to go after. Anyone who wants to characterise our legal tradition as doxic deals with a target that is assumed, implicit, or immanent. Moreover, I suspect there is a causal connection between the mystique of our legal tradition that prevents outsiders from getting it in their sights (its transparency-accountability problem) and the kinds of corruptions of the tradition I have illustrated above. That is one reason I find appeal in the notion of requiring legal decisions to be justified ultimately in terms of the laws of a democracy and community values.

My job is not to attack the alternatives proposed by the critics, however. That would require a much longer response. Rather, my job is to defend a jurisprudence of Australian community values against the critics. First, I must clear up some misunderstandings. I am not very interested in the "bad question" of "whether judges apply or make law".⁶ I have never written on it. In the present piece, judges making law is something I assume happens. It is a premise I do not examine or support.⁷

Second, I agree with Krygier and Glass that it is necessary to bring into judicial inquiry "from the start" matters that are extrinsic to the law in the books. In the first sentence of my article, I meant to be interpreted as agreeing with Mason when he said: "It is unrealistic to interpret any instrument, whether it be a constitution, a statute, or a contract, by reference to words alone, without any regard to fundamental values".⁸ Human actors cannot interpret without values. It would be a considerable stupidity to subscribe to a view that values could, or should, only come into play after some sort of value-free interpretation has failed, and thereby left gaps in the law. Yet I do confess to my communication not being clear enough on this point. What I *do* mean to propose is a kind of "lexicographic ordering" of the law and values extrinsic to the law. When philosophers use the term lexicographic ordering, they mean normative ordering as in a dictionary, which is not necessarily temporal. In a dictionary one can look at the "B"s before the "A"s and then use

5 Krygier, M, "Thinking Like a Lawyer" in Sadurski, W (ed), *Ethical Dimensions of Legal Theory* (1991) at 71.

6 Krygier, M and Glass, A, "Shaky Premises: Values, Attitudes and the Law" 17 *Syd LR* 385 at 385.

7 Braithwaite, J, "Community Values and Australian Jurisprudence" (1995) 17 *Syd LR*. 351 at 353: "[T]he article begins from the premise that judge-made law is inevitable and desirable"

8 *Id* at 351.

knowledge from looking up a "B" to help interpret an "A", yet that does not change the fact that the "B"s come lower down in the lexicographic order. My clarification is to contend that laws enacted by the parliament have a normatively higher status in a lexicographic order than community values that are extrinsic to the law. Judges often have reason to believe that the application of a community value to a case will commend X, while the application of a statute will commend not-X.⁹ According to this lexicographic theory, in this circumstance, the judge should decide not-X. This normative ordering of law and community values is one reading of what the rule of law means.

Krygier and Glass say that I "seem[] aware of immanent institutional values",¹⁰ though of course most of the belief-sets that legal traditionalists view as immanent values will be conceived in the psychological tradition of value scholarship as attitudes rather than values. I hope that I am not only aware of them, but that I can persuade Krygier and Glass that I subscribe to many of them and want to encourage their use in judicial reasoning. What I wish is for their use to become more transparent, for them to be subjected to justification in terms of shared community values (where the law itself provides no warrant for them), and for their use to be abandoned if they cannot be so justified. I am not an advocate of ransacking our legal tradition, merely of subjecting it to major renovation in a way that is responsive to the people's values rather than the lawyers' attitudes. This is because I see lawyers' attitudes as a threat to liberty in a way that I do not see consensus community values as a threat. I will illustrate later with lawyerly attitudes to contempt of court. Krygier, Glass and I agree on the need "to link legal judgment to a form of public reason which works to restrict the role of private judgment".¹¹ We disagree on how to ground this public reason.

It is important in a democracy that the attitudes, as well as the values, of citizens are taken seriously. For a republican, sound institutional design means a separation of powers, and a very different view of responsiveness to community attitudes in the political sphere than in the judicial. The primary function of political democracy is to protect against the domination of the many by the few, while the judicial institution has a special responsibility to protect against the domination of the few by the many. Direct responsiveness to community attitudes by politicians serves the first of these functions well. Direct responsiveness of judges to community attitudes puts at risk their special responsibility to guard against the tyranny of the majority. Consensus community values, in contrast, are not tyrannical, or at least they have not been so in Australia since research in the values paradigm began. The values/attitudes immanent in our legal tradition have an intermediate status here: direct responsiveness to them threatens less tyranny than direct responsiveness to community attitudes, yet direct responsiveness to legal attitudes has allowed

9 Even under circumstances where a Bill of Values and Rights had become law, I would have thought that while the rights should be regarded as constraints that can trump statutes, the values should still be no more than legally sanctioned interpretive standards with a normatively subordinate status to statutes. In other words, the values in the Bill of Values and Rights would stand in the same relation to statutes as the values immanent in the common law stand in relation to statutes. However, the values immanent in the common law, whatever they are, would be supplanted by the values in a Bill of Values and Rights.

10 Above n6 at 392 fn 24.

11 *Id.* at 393 fn 28.

many legal tyrannies to flourish because of the domination of legal traditions by the interests of lawyers (and because of sheer closed-mindedness — the dulling of creativity by tradition).

But this is not the end of the story of democratic responsiveness. What I advocated was a willingness of judges to listen to a wide plurality of community attitudes, which would include, of course, the attitudes of lawyers. Moreover, judges should act on those attitudes, but only when they can provide a justification for doing so in terms of the law and/or community values (that can be judged a coherent justification by higher courts). In short, neither community attitudes nor legal tradition should count as a justification. Both, however, may contain wisdom. The role of the judge, on this theory, is to find whether this is a wisdom that can be justified in terms of laws that the parliament has enacted (or declined to overrule in the case of the common law) or values the people share. There is a major place for preserving the kind of public reason that Krygier and Glass cherish in our legal tradition, but subordinated to a more democratically grounded public reason.

I agree with Krygier and Glass that practical reason is impoverished unless it is abductive, shuttling backwards and forwards between the deductive and the inductive. Judges get the data for induction from engaging with specific fact situations and with people's attitudes about those situations. My article made some specific suggestions about how to enrich the inductive end of the enterprise.¹² Equally, we can improve the deductive side by insisting on premises that can be listed on a piece of paper, defended as true and democratic.

Now, of course, it might have turned out that the latter two are in dire tension. I do not think it does turn out that way. I have moments when I want to be seduced away from democratic foundations for the deductive side of the judicial enterprise by the Michael Smith view (really a Dworkinian view) articulated in my article.¹³ Scholars like me, who believe there is moral falsehood (and that judicial opinion should avoid such falsehood), have to worry about foisting upon courts community values which are morally false. So I am tempted to commend, with Smith, that courts use data from the values paradigm simply as another piece of evidence of the likelihood of moral truth, leaving the courts free to ignore community values selectively. In the end, I turn away from this temptation because I do think democratic grounding of the reasoning in all branches of government is critical to a democracy; because I do not trust the legal traditions of judges to select values in a public-regarding rather than a lawyer-regarding way; and because I look at the specific values in Table 1¹⁴ delivered up by research in the values paradigm and I do not worry about substantial falsehood, at least for this period of history in our country.

While there is much that can be done to improve the methodology of values research, and while the data in Table 1 falls far short of what one would want to guide the drafters of a Bill of Values and Rights, Ziegert's characterisation of the data in Table 1 as doxic and that in his Figure 1¹⁵ as non-

12 Above n7 at 369ff.

13 *Id.* at 369, see text accompanying fn 62.

14 *Id.* at 357-9.

15 Above n1 at 380.

doxic¹⁶ does not evince a balanced appreciation of the literature. Of course, when citizens are asked to rank a list of values, it is a matter of logic (rather than absence of acquiescence bias) that no two values can score more than 50 per cent on a highest priority ranking. The literature shows reliabilities in the same range for ranked, versus rated values; it shows similar results for the two methods in terms of which values attract most community support, though some differences in the structure of factor analyses.¹⁷ Finally, it must be remembered that the list of values in Table 1 is the end product of a history of research with more qualitative and contextual methods designed to generate an exhaustive list of the values that citizens care about.

Like Ziegert, I do worry about how to make sense of the values in Table 1. Ziegert is right that citizens do not share the same conceptions of what these values mean. Nor, of course, do judges share the same conceptions of what "accepted legal doctrines" (Ziegert's preferred grounding) means. There are a large number of studies showing low correlations between values and attitudes, attitudes and behaviour, and values and behaviour, starting with La Piere's classic study in the early 1930s.¹⁸

We need no more empirical evidence that "not only are the same values operated differently by different respondents, but that ... value-patterns are interpreted and acted upon differently from group to group",¹⁹ and sometimes these differences are systematic. Of two citizens who claim to strongly accept the value of "A WORLD AT PEACE", one can advocate the laying down of arms in the face of a specific threat, while the other advocates the most brutal deterrence "for the sake of preserving the peace". Yet the fact that they exhibit diametrically opposed attitudes and behaviour does not detract from the fact that they really do agree that peace is what they want. If values, attitudes and behaviour were all perfectly correlated, there would be little point in preserving distinctions among them in psychological research. My argument in Section 4 of the article is that values are different from attitudes in a way that renders them more likely to be morally right. It is problematic to resolve whether the person who has confrontationalist attitudes toward the Bosnian conflict or the person who has pacifist attitudes is right, but it is less problematic to agree

16 Id at 380, fn 13.

17 See Rankin, W and Gruge, J W, "A Comparison of Ranking and Rating Procedures for Value System Measurement" (1980) 10 *European J Soc Psych* 233 at 233 ("both the ranked and rated versions were of equal reliability and validity"); Feather, N T, "The Measurement of Values: Effects of Different Assessment Procedures" (1973) 25 *AJ Psych* 221 at 221 ("Results indicated that assessment procedure per se had little effect on the average value systems that were obtained"); Alwin, D F and Krosnick, J A, "The Measurement of Values in Surveys: A Comparison of Ratings and Rankings" (1985) 49 *Public Opinion Q* 535 at 548-49 ("ratings and rankings produced similar results in terms of ordering the relative importance of value choices in the aggregate but are dissimilar with regard to latent structure.... It seems worthwhile to ask, in part because of our results using ratings, whether the ranking approach may in fact create artificial contrasts among the latent content of the measures").

18 La Piere, R T, "Attitudes and Action" (1934) 13 *Social Forces* 230. La Piere found that hotel and restaurant managers with racist values and attitudes that required them to refuse service to Chinese were observed to be non-discriminatory, even polite, to a Chinese couple.

19 Above n1 at 382.

that they are both right when they say that their attitudes should be evaluated against the yardstick of the value of securing peace.²⁰

Decades of psychological research demonstrate that values do behave in systematically different ways from attitudes. Neither critique really engages with the difference between attitudes and values as articulated by the psychological research tradition. That tradition does not make the distinction on the basis of values being deep and attitudes superficial;²¹ on the contrary, it is in the legal tradition of talking about values that distinctions between fundamental values and more transient cognitions²² have been rife. My enterprise in this article was to try to get lawyers to move beyond this, to see the distinction from the perspective of a different tradition. The fact that these critics fail to consider the reconceptualisation of the value/attitude distinction in the tradition of Rokeach and his inheritors, that they misconstrue it as the deep/superficial distinction, may say something about how commitments to traditions prevent learning.²³ Ziegert simply proceeds to define a competing phalanx of Luhmannesque concepts to represent norms, institutions, values and the like. I will not go into why I do not think these alternative conceptualisations are attractive beyond saying that Luhmannesque "closure" of communication does indeed have the operative consequence of reducing complexity. Obviously, I am more interested in the virtuous side of complexity and in how it can be savoured and managed by courts. In the legal tradition, the closure that has occurred has too often been troubling in nature; a closure to women and minorities; even closure to dialogue itself by judges locked away in their chambers, shielded even from the slings and arrows of brother judges who have been exposed to external non-systems of thought as they write in solitude their all too "autopoietic" judgments.

Let me return to the question of how we interpret the meaning of values. The fact that there is dissensus over the meaning of values like liberty, equality and the environment in the abstract does not mean that they have no use in the abstract as ideals about which a democracy should argue. Take liberty as a value. Some will argue for a negative conception of liberty, others for a positive conception.²⁴ The same interpretive debates occur when the word liberty appears in existing laws. This interpretive work is important in the abstract, and in motivating large abstract commitments such as to the resistance of totalitarian regimes. But of course it acquires a sharper edge when implemented in a particular context. Philip Pettit and I favour a republican conception of liberty, which I will not defend here. Yet I will illustrate how we have argued

20 Peter Drahos, in commenting on this article, looked at it this way: "Talcott Parsons argues that in modern societies value generalisation is a mechanism that functions to promote stability by allowing fundamental values to accommodate different subcultures within those societies. The fact that fundamental values become generalised does not mean that they cannot be identified. Nor does the fact that they are 'operationalised' differently or have different 'socialisation paths' mean that they are not the relevant entities to focus on within first order moral debate". Personal communication, 3 July 1995.

21 See above n7 at 354-5.

22 See id at 351-2.

23 Or perhaps it just says something about my poor written communication. Perhaps a bit of both.

24 Berlin, I, "Two Concepts of Liberty" in *Four Essays on Liberty* (1969) at 118.

for the implementation of that particular conception of liberty in a particular context with the example of the law of contempt of court.

Because Pettit and I value the contribution to republican liberty as the yardstick against which all other values should be measured in matters of criminal justice, we are willing to countenance criminalising forms of conduct which endanger the system by which liberty is preserved, even if they do not directly threaten liberty. Joel Feinberg calls these derivative crimes.²⁵ Contempt of court is one of these derivative crimes.

The law of contempt is important to protecting the right to a fair trial which is a bulwark of liberty. People who interfere with others getting a fair hearing, who improperly influence a jury, or subject a defendant to adverse publicity during a trial, are in contempt of an institution which guarantees liberty. While Pettit and I think there should be a criminal law of contempt, our legal tradition allows a deal of abuse of that law.

As things stand, however, the law of contempt is often invoked, not just against such activities, but against protests by the defendant, as when they make voluble remarks at the trial or call the judge a fool. This use of the law is not designed to protect the right to a free trial, but to protect the sensibilities of those who inflict punishment and to maintain order in the courtroom. Neither of these goals justifies the application of the criminal law. On the important matter of securing order in the courtroom, we believe that this can be achieved by other, less invasive means than criminalisation; a perfectly adequate remedy would seem to be restraint or removal from the courtroom until the defendant is willing to undertake not to interrupt.²⁶

What this means, in terms of the present article, is that traditional attitudes of lawyers toward contempt are dominated by the self-protective interests of lawyers in a way that renders them morally dubious. Lawyerly traditions are no worse in this respect than those of educators or police. And in all these areas, there are remedies to the professional dominations that threaten liberty. With many colleagues in Australia, I am working on developing community conferences as alternatives to criminal trials in matters where there is an admission of wrongdoing.²⁷ We are finding that there is no need to criminalise contempt of conference or contempt of facilitator, even though occasional conferences are on matters as emotive as armed robbery, rape, or attempted murder. A minor virtue of the reform is that it enables decriminalisation of contempt of the adjudicative process. A major virtue is that it provides a forum for citizens to criticise the police for victimising offenders because they are guilty of "contempt of cop"; conferences increase police accountability to the community in this and other respects. In summary, the contempt doctrine in our criminal justice tradition has been a threat to liberty, particularly for the underclass. A community-based search for institutional alternatives, motivated by a commitment to liberty-equality-fraternity (republican liberty)

25 Feinberg, J, *Harm to Others* (1984) at 19-22.

26 Braithwaite, J and Pettit, P, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990) at 94-5.

27 See, eg, Braithwaite, J and Mugford, S, "Conditions of Successful Reintegration Ceremonies" (1994) 34 *Brit J Criminology* (1994) 139.

external to the legal tradition, may reveal and help solve the dominations to which the tradition is blind. The extent to which this is true or false is a topic for more systematic research that is under way.

The republican way of interpreting a value like liberty is only one way; its prescription for trading off values when they are in conflict in particular situations is only one prescription. My purpose here is not to persuade readers of it, but to illustrate that normative theories exist for guiding judges in how to apply broad community values in specific contexts. Pettit and I have described dozens of contexts of practical, local applications, as well as global ones, and middling ones like contempt of court, in our writing.²⁸ It is the critics who wallow in abstraction when they contend that what many of us do in our daily professional praxis is abstractly impossible. I hang around police stations and regulatory agencies talking about abstractions like community values a lot, and sometimes talk with judges about them.

Engagement between the local and the global, the empirical and the abstract, between legal traditionalists and psychological traditionalists, and among many other traditions, is our best hope for enriching our intellectual life and creating better institutions here in Australia than those we have inherited. But when those traditions inhibit us from fully engaging with local conversations, we will never find a richer intellectual life and superior institutions that build beyond the things we have learned from our Northern inheritance.

28 For a variety of criminal justice applications, see above n26 at 137-55. For applications to trade practices, nursing home and pharmaceuticals regulation, see Braithwaite, J, "Corporate Crime and Republican Criminological Practice" in Pearce, F and Snider, L (eds), *Corporate Crime: Contemporary Debates* (forthcoming).