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UNIVERSITY OF MELBOURNE

TRINITY COLLEGE

42<sup>nd</sup> REVEREND DR. BARRY  
MARSHALL MEMORIAL LECTURE  
2012

RELIGION AND SEXUALITY:  
UNCOMFORTABLE BED FELLOWS

The Hon. Michael Kirby AC CMG

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**RELIGION AND SEXUALITY: UNCOMFORTABLE  
BEDFELLOWS\***

THE HON MICHAEL KIRBY AC CMG\*\*

*BARRY MARSHALL REMEMBERED*

The Warden of Trinity College had reminded us of the milestones in the life of Barry Marshall. I cannot abide memorial lectures that ignore the person who is remembered and whose life is celebrated.

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\* Lecture delivered at the University of Melbourne, 22 August 2012.

\*\* One time Justice of the High Court of Australia (1996-2009). Formerly President of the International Commission of Jurists (1995-8). Gruber Justice Prize (2010).

These lectures began in 1971, a year after Barry Marshall's death. It takes a very vivid personality, and enduring themes, to keep a memorial lecture going for more than 40 years. I began this, my first visit to Trinity College, by a call at the chapel where the remains of Barry Marshall are placed. There I said my prayers for him, for my loved ones and myself.

I then inspected the portrait of Barry Marshall held by the College. I did not know him. But having read quite a lot about him, in preparation for this lecture, I peered at his face to try and discern what he would make of the subject that I had chosen to address. He seemed to respond benignly. As a brilliant and intellectual man, I have no doubt that he would have taken it in his stride (as I hope my audience will do), responding to the controversies that need to be unveiled.

The story of Barry Marshall's life is told in short form in the *Australian Dictionary of Biography*.<sup>1</sup> However, from that abbreviated chronicle, the real contours of his life do not really emerge. For personal glimpses, I am indebted to Professor Robin Sharwood, past Warden. Although, as ever, he is prudent and discreet, he adds flesh and bones to the story of the career recorded in the *ADB*.

Professor Sharwood's lecture was delivered in 1982. The immediate pain of Barry Marshall's death for his close friends (of whom Robin Sharwood was clearly one) had passed by that time. But his memory was still vivid enough to illicit powerful reminders. He is described as having been "brilliant", "influential", "controversial", "complex", "disputable" and an attractive man with dark good looks that he had inherited from his mother, whose ethnicity was Spanish.<sup>2</sup>

Even the short account of his life in the *ADB* reveals that he had a personality that was "engaging and elusive"<sup>3</sup>. Yet it also describes a man who made huge demands upon himself that others felt they could not emulate. Robin Sharwood dug just a little deeper to explain why this might have been so. He wanted to understand why Barry Marshall had "girded himself about with a kind of spiritual armour". To answer this

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<sup>1</sup> *Australian Dictionary of Biography* (1940-80) Vol. 15, 307 (J. Morgan).

<sup>2</sup> R. Sharwood, "Barry Marshall and the Armour of Light: A Memoir." (The Barry Marshall Memorial Lecture 1982), Manuscript, 2.

<sup>3</sup> *Ibid*, 307.

question, he looked in the most obvious place: at Barry Marshall's personal life, especially as a boy and young man. And when he did this, he found a lad deeply disturbed by the break-up of his parents' marriage. More importantly, by the discovery that

“His mother did not really care for him. She was indifferent to him. She did not want him. She did not love him. It was as simple, and as cruel, as that”. This, Robin Sharwood explains, was a feature of his life that “cut [him] to the quick and the wound never healed”.

Most terribly, when as a teenager Barry Marshall's mother had come to attempt to hammer out a financial settlement with his father, the endeavour failed. The mother left in a temper and drove off. As Professor Sharwood explains:<sup>4</sup>

“She crashed the car and was killed. Barry always believed that the accident occurred because she was in a temper – driving too fast and not concentrating. So she died, he felt, uselessly, pointlessly, unnecessarily, and above all, unreconciled. Much in Barry's life and ministry can, I believe, be traced, at least in part, to these traumatic and painful experiences of his childhood, which never ceased to trouble him.”

It led him, so Robin Sharwood suggests, to take:<sup>5</sup>

“A very strict view of marriage, insisting on careful preparation for marriage and counselling married people on the maintenance of their relationship. He no more favoured indiscriminate marriage than he did indiscriminate baptism. He did not approve of divorce.”

As I read these and other descriptions of Barry Marshall, inevitably I speculated on whether they might reveal a special interest in the subject of sexuality which I will explore in this lecture. I cannot say for sure. His life is already distant – now long in the past. The times in which he lived were different from those of today. It has been known, of course, that people who are conflicted over their sexuality and religious

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<sup>4</sup> Ibid, 6.

<sup>5</sup> Ibid, 6.

beliefs are sometimes led (often unsuccessfully) to close down the personal side of their lives. To reject the disturbing and threatening attempts of others to pierce the armour and to storm the citadel of their emotions.

Robin Sharwood vividly describes the way Barry Marshall “put on armour”, so that he would never again ... allow himself to be so vulnerable.” He describes how he was said to be “not at ease with women”. And was “less successful in counselling and ministering to women”. But Dr Sharwood denies that he was a misogynist and doubts that his attitude had a “predominately sexual base”. He attributes Barry Marshall’s special reserve with women to a “special edge” that he traces to his mother’s attitude to him. Certainly, our honorand found it difficult to share emotions with ordinary people who came to him for comfort. He knew that this hurt people. It distressed him.<sup>6</sup>

At this remove it is impossible, especially for a stranger, to dig more deeply and to speculate at greater length on the explanations for such conduct and attitudes that were so distinctive. But whether, contrary to Robin Sharwood’s opinion, they had a sexual basis or not, they were the type of response that one certainly sees in people who are deeply conflicted over their sexual feelings. Their predicament is a distressing sight. Anyone of compassion would so conclude. All of us should harken to the Psalmist’s injunction: “Harden not your hearts”<sup>7</sup>. The pain and distress that Barry Marshall felt in his lifetime, for whatever reason, constitutes a very sad story of pain and inner loneliness.

The grace of the message that our religion brings to the world is designed to heal and comfort those who might otherwise be driven to close down their basic human emotions. Any person who is driven to that state of affairs is left only half a human being. And that is not, by any means, the objective of Christian beliefs and the loving message that lies at their heart.

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<sup>6</sup> Ibid, 10.

<sup>7</sup> *Psalm 95*, verse 8. Cf. *Book of Common Prayer* 46 (*Venite, Exultemus Domino*) (Morning Prayer).

## *A PROTESTANT PERSPECTIVE*

I feel that I need to explain, at the outset of this lecture, that I hold the perspective of a member of the Anglican denomination of Christianity, adhering to the Protestant tradition within Anglicanism.

This may come as a slightly disturbing, and possibly unpleasant, discovery for some who may hear and read this lecture. Every person raised in the Protestant tradition of the Sydney Diocese of the Anglican Church of Australia soon finds, on venturing north, south, west and even east to New Zealand and the Pacific, that there are other perspectives within Anglicanism. The viewpoint of the Sydney Diocese in by no means universal. Indeed, within Australia it represents a minority. Yet, within the world, there are still many who observe the same evangelical and strongly Bible-based traditions.

I am not unaware that, even here in Melbourne, there are differences between the traditions that live and flourish at Trinity College and those that exist, say, at Ridley College, the other centre in Melbourne that offers training for Anglican priests. At school in Sydney, my Scripture (special religion) classes were presented by the Reverend Stuart Barton Babbage. He was then the Dean of Sydney. He later came to Melbourne to be Dean of Melbourne and the principal of Ridley College. He was a follower of the evangelical traditions of Sydney, though it must be said in a mild form. It was he who presented me for confirmation to another mild Sydney Anglican, Bishop Hilliard.

My local church was St Andrew's Anglican Church, on the corner of Parramatta Road and Concord Road in the western suburbs of Sydney. The minister was the Reverend Cecil Dillon. He had been a padre in the Second World War. He wore the breast ribbons on his surplice to show his service in that conflict. Above the altar were the Union Jack and the Australian flag, although I believe that the former was in the place of honour. These were the final days of the British Empire and the Church of England in Australia. That church claimed adherents amongst 40% of the

Australian population. It was far the largest Christian denomination in this nation and thus the most numerous religious affiliations. Because of history and section 116 of the *Australian Constitution*, it was not (as in Britain) established. It had to compete with other denominations of Christianity and other religions (or unbelief). Gradually, as the years wore on, it lost out in that competition, most especially to the Roman Catholic Church.

If one is raised in the Sydney Diocese of Anglicanism, one becomes comfortable with the Protestant tradition:

- \* There is no genuflection and no kissing of priestly rings;
- \* There is no manual sign of the cross;
- \* There is no use of incense;
- \* There are no ceremonial bells;
- \* There is no ceremony of *Angelus*;
- \* There is no wearing of elaborate or “heathen” vestments;
- \* There are no statues or crucifixes showing Christ dead on the cross;
- \* The altar is bare and extremely simple;
- \* The order of service is plain and modest;
- \* The singing of hymns and participation of the laity are important;
- \* The sermon is extremely important; and
- \* The Bible is at the very centre of the Faith.

Remember that one of the causes of the Protestant Reformation was the objection of the reformers to the notion that Church authority and tradition could sustain Christian beliefs and practices. The Protestant reformers taught that the Faith rested on a much more secure and objective foundation. The most secure foundation was the Scriptures, accepted as conveying the authentic word of God and a trustworthy instruction concerning the new Covenant, brought by God’s son, Jesus.

If one reflected on the relatively simple, modest, understated traditions of Sydney Anglicanism, one felt that one was being more faithful to the essential simplicities of the life and works of Jesus Himself. Thus, the Protestant tradition of Anglicanism

sees itself as a reflection of Jesus of the manger. Jesus the *tekton* (carpenter) – a person of a lower social strata, impoverished<sup>8</sup>. Jesus on the donkey. Jesus the common prisoner on the Cross. These simplicities are seen as being in stark contrast to the ornate displays of Roman and Orthodox Christianity. These opulent ways are commonly regarded as having lost their bearings and forgotten the simple, central messages that Jesus brought to the world. I shall return later to this concept of context.

As a boy, I was raised in this serious and Bible-based version of Christianity. I must confess that this is still the place in religion where I feel most comfortable. I mean no disrespect to those who have followed other traditions. This is mine. I adhere to it. And I will not be shifted from it. This is a very Protestant view of Christianity. Like Martin Luther, I hope without self righteousness, I say: *Ich kann Nichts anders!* I know no other approach.

Because of the substantially separate streaming of Roman Catholic education in Australia, I did not really meet Roman Catholics until I reached university. There I formed a good friendship with Murray Gleeson, an *alumnus* of St Joseph's Roman Catholic College in Sydney. He introduced me to his religious teachers and priests. They seemed very nice people, in their black outfits. However, I was impervious to his books about the Vatican and his attempts to make me see the truth of the 'eternal Church'. For me, the Anglican Church was the true Catholick Church of England, and therefore of Australia. For me, others had been seduced by opulence into possibly heretical opinions, such as the elevation of Mary to what sometimes appeared to approach a kind of goddess. The belief in the 'bodily assumption' of Mary to Heaven, a doctrine unsustained by scripture. The notion that the wafer and wine, used 'in remembrance of me', were the *actual* body and blood of Jesus (a cannibalistic idea to many minds). And the dangerous pretention that the Pope, a fallible human being, could make declarations *ex cathedra* that were "infallible", when the whole world knew the history of papal fallibility (including recently). I tried to convert Murray Gleeson to Protestant truth. But I was no more successful with

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<sup>8</sup> Robert Crotty, *Three Revolutions – Drastic Changes In Interpreting the Bible*, ATF, Hindmarsh, SA, 2012, 201.

him than he with me. In the end, we accepted a polite stand-off. So it was also in our society at large. Gradually, unpleasant sectarian prejudice came to be reduced.

Then, when I served with Murray Gleeson in the Supreme Court of New South Wales, he would occasionally be absent from the State. I would be sworn by the Governor for the duration, to be Acting Chief Justice of New South Wales. Whenever this happened, the rector of the Anglican Christ Church St Lawrence in Sydney, Father Austin Day, would pounce. He would organise a special Service of Thanksgiving. Sometimes it would be accompanied by a musical performance, say *Haydn's Nelson Mass*. He would ask me to come and “grace” the church with my presence as Acting Chief Justice. He had no chance of securing the attendance of Murray Gleeson. Politely, he would drop a hint that I might attend in the Chief Justice’s limousine, accompanied by a police motorcycle escort. On a couple of occasions, I humoured him in these respects.

Christ Church St Lawrence in Sydney follows the High Church tradition of Anglicanism. At its door, as Acting Chief Justice, I was welcomed by Bishops wearing unfamiliar headdress, derived from Roman times and traditions. They processed under a canopy. The Church was filled with incense that was almost choking. The whole performance was theatrical, even “over the top”. But then the familiar liturgy of the *Book of Common Prayer* could be heard. I was back again in the beautiful Shakespearean language of Thomas Cranmer. And at the end of the Service, I knew I had been privileged to participate in a spiritual experience. It was not exactly my tradition. Yet plainly the participants were devout and sincere. I was told that the Anglican Archbishop of Sydney, Donald Robinson, would attend a Service in the Church at least once a year, despite his evangelical inclinations. If it was good enough for the Archbishop, I thought, it would be good enough for me.

Father Austin Day was a saintly man. He was a dear friend of Stuart Barton Babbage. I would meet him at gatherings of Anglicans at Stuart’s home. I was struck by the capacity of all participants, whatever their backgrounds, to share in Christian love for one another. This brought home to me a particular feature of the less authoritarian tradition of Anglicanism that I cherished. I explained this to an

address to the Prayer Book Society at the Church of St Mary, Waverley in Sydney in 1998:<sup>9</sup>

“I have always seen it as a strength of the Anglican Church that it is a place of many mansions. There is somewhere in the Church for everyone; and that is how it should be ... [T]he Anglican Church is struggling with the issues of whether women can be ordained to the priesthood; and whether the Church should not, in the light of greater knowledge, review the received tradition on homosexuality ... It is here that we see at work the wonderful mixture of tradition and continuity (on the one hand) and reform and renewal (on the other).”

This was just another way of restating the well known passage that appears at the start of the Preface to the *Book of Common Prayer*<sup>10</sup>:

“It hath been the wisdom of the Church of England, ever since the first compiling of her public Liturgy, to keep the mean between the two extremes, of too much stiffness in refusing, and of too much easiness in admitting, any variation from it.”

Still, as befitted the teachings of the Protestant martyrs, who helped to establish the modern Church of England, and gave the politics of its creation a strong intellectual foundation, the *Thirty Nine Articles of Religion* included one, the Sixth, which insisted on the primacy of Scripture:<sup>11</sup>

“Holy scripture contains all things necessary to salvation: so that whatsoever is not read therein, nor maybe proved thereby, is not to be required of any man, that it should be believed as an article of the Faith, or be thought requisite or necessary to salvation.”

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<sup>9</sup> Speech to the Prayer Book Society, Waverley, Sydney, 1998, cited A.J. Brown *Michael Kirby: Paradox/Principles* (Federation, 2011), 300.

<sup>10</sup> Preface to the *Book of Common Prayer*, London, Eyre and Spottiswoode Ltd. (1662 version).

<sup>11</sup> *Articles of Religion, Book of Common Prayer, Ibid*, 682 at 686 (Article VI).

This Article is ‘fairly minimalist’<sup>12</sup>. It is talking about what is *not* essential; not about what is. It is addressing extraneous teachings, not how to construe the written texts that we call Scripture. It is an affirmation of primacy; but not a guide to interpretation.

In one of the Collects (that for the joyous Second Sunday in Advent), there is further guidance on the way in which we do well to read Scripture: reflectively, patiently and not with the false pride that attributes to ourselves, mere humans, an immediate capacity to comprehend all of its divine messages. Whilst Protestantism was founded in the belief that ordinary people should have access to Scripture in their own vernacular languages, the need for caution is emphasised. This is not a territory for experts alone. But neither is it one apt to an attitude of *hubris*:<sup>13</sup>

“Blessed Lord, who hast caused all holy Scriptures to be written for our learning;  
Grant that we may in such wise hear them, read, mark, learn and inwardly digest them, that by patience and comfort of thy holy Word, we may embrace and ever hold fast the blessed hope of everlasting life, which thou hast given us in our Saviour Jesus Christ. Amen”

Sadly, there are those today, including amongst Protestant Christians and others who should know better, who read Scripture with arrogance. Who believe that, doing so, they can entirely defy the evidence of the natural world and science, now available to us. In a sense, they are making the same error as those who fought and resisted the Reformation. They want to adhere to comfortable old ways of understanding. They resist those who bring a new message of truth and insight. As someone raised in a Protestant tradition of Anglicanism, a mere layman, I have to remind these pretended evangelists of the core of the Protestant approach to Christianity. It is a humble and simple core, based upon open mindedness, free inter-congregational dialogue, a search for truth and a connection to the real world beyond tradition, power and superstitious ignorance.

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<sup>12</sup> Peta Sherlock, “Reading Romans as Anglicans: Romans 1:26-27” in N. Wright (ed.) *Five Uneasy Pieces – Essays on Scripture and Sexuality* (ATF Theology), Adelaide, 2012, 31.

<sup>13</sup> *Book of Common Prayer*, Collect for the Second Sunday in Advent. *Ibid*, 92.

In the battles that are now being waged concerning Scripture and sexuality, it is not surprising to see some in the line-up of power-brokers clinging to old beliefs. But it is astonishing, and distressing for me, to see them joined by those who claim to be faithful to the Protestant tradition of Scripture-based Christianity. And this is a nice thing about Protestant Anglicans. They believe in the virtue of a bracing cold shower from time to time. In the matter of religion and sexuality, this is what realism and truth require today.

### *THEOLOGICAL AND LEGAL INTERPRETATION*

Self evidently, I have not spent my life in the profession of religion. Nor in the world of hermeneutics and scriptural interpretation. It might have been different. At the primary school that I attended in the 1940s, I answered a question as to my future by modestly declaring that I hoped to become a judge or a bishop. Clearly, I already had an unhealthy desire for vestments.

When, occasionally I read books on theology, I see immediately the strong connections between the world with which I am familiar, (legal interpretation), and the analogous activity within theology, (scriptural interpretation). In each case, the fundamental task is similar. It is to give meaning in a written text. The law also sometimes deals with ancient texts. Occasionally, it has to deal with a text that has been translated into the ambiguous English language from other languages. For a very long time, in medieval years, the business of the law of England was substantially conducted in a foreign language, namely Norman French. And until recently, it was common to see phrases, and sometimes extended passages, in legal texts expressed in Latin.

Whilst many words that must be given meaning are expressed in contemporary statutes, or private and more informal documents, a good part of the function of the Supreme Court of the United States is to interpret the text of a national constitution written between 1776-1790. Likewise, an important part of the work of the High Court of Australia lies in interpreting the Australian Constitution. This was adopted in 1900, when it was enacted by the Imperial Parliament. But it was based on drafts

that emerged from the Australian people during the 1890s. The antiquity may not be as great as Biblical language. But, generically, the problem is much the same. It is finding meaning from words: these distinctive sounds that emanate from one person's brain to another, by way of language, writing and now digital images.

When I began my journey in the law, the conventional approach to interpretation, adopted by the English (and therefore Australian) judges, was highly literal. This was the so called 'plain meaning' interpretation of legal language. In the interpretation of the Constitution and statutory language, this literal interpretation was adopted, in part, for political or policy reasons. Such texts were commonly viewed as an unpleasant intrusion into the liberty expressed by the judges in the form of the common law. To achieve such interference the written text had to be abundantly plain. This approach to legal interpretation often had the result of causing statutes to misfire. Judges, their eyes filled with crocodile tears, would lament that, once again, the fairly obvious purpose of Parliament had not been achieved because of defects in the drafting.

Over the past 40 years, first in England and then in Australia, judges began to rebel against this narrow and destructive approach to interpretation. They did so, in part, because Parliament enacted provisions in the *Acts Interpretation Acts* urging decision-makers to give effect to the language of the legislature, so as to achieve, and not frustrate, its *purpose*<sup>14</sup>. Repeatedly, legislatures, national and sub-national refined these instructions<sup>15</sup>. In part, the judges were themselves moving in the same direction, in order to discourage legislative retaliation in the form of ever longer written texts. Most significantly, the law moved in this direction because it came to understand that this was the way that human beings grapple with the meaning of written words. They do not see those words in isolation. They seek to understand the essential purpose and objective to which the writing appears to be directing their minds.

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<sup>14</sup> See e.g. *Acts Interpretation Act 1901* (Cth), s 15AA.

<sup>15</sup> See *Acts Interpretation Act Amendment Act 2011* (Cth). Cf M.D. Kirby, "The Never Ending Challenge of Drafting and Interpreting Statutes – A Meditation on the Career of John Finemore Q.C." (2012) 36 *Melbourne University Law Review*, 1 at 24.

In that search, *context* is obviously critically important. No one in ordinary human communication, would try to understand a word expressed in isolation. In this way the repeated and unanimous approach of our courts in recent times has effectively been encapsulated in the convenient *dictum*: ‘text, context and purpose: but the greatest of these is text’<sup>16</sup>.

A common interpretive debate, that arising particularly in giving meaning to an old text such as a national constitution, concerns whether the interpreter should search for the ‘original intent’ of the authors of the text. Or whether the interpreter should acknowledge the function and purpose of the document as being to speak to succeeding generations in evolving societies, treating the text as a kind of ‘living tree’, necessarily with an organic life of its own.

Doubtless, analogous quandaries arise in the interpretation of a Biblical text, given that the original authors were historical personages, who set down so long ago, their understandings of the authentic words of God, of Jesus and ancient prophets and disciples, followers and others.

Although some current High Court Justices occasionally flirt with ‘originalism’, most appear to embrace the ‘living tree’ approach, in one of its manifestations. Certainly, that was the approach that I adopted. I did so for functional reasons.

A homely illustration indicates the reasons for adopting this approach. Section 80 of the *Australian Constitution* contains a provision requiring that the trial of indictable federal offences should be had by *jury*. But what does that word “jury” mean, taken in isolation or in context? At the time the Constitution was written, the word would undoubtedly have meant a body of 12 men of property who stayed together, locked in the courthouse during a trial, to deliver a unanimous verdict on the accusation brought by the Crown. In Australia, the word “jury” in Section 80 is no longer confined to male citizens<sup>17</sup>. Nor do jurors have to qualify for service by having

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<sup>16</sup> With a nod to 1 *Corinthians* 13:13. See M.D. Kirby, John Finemore essay (2012) 36 *Melbourne University Law Review*, 1 at 23.

<sup>17</sup> *Cheatle v the Queen* (1993) 177 *Commonwealth Law Reports* 541 at 560.

property holdings<sup>18</sup>. Nor do they need to be segregated throughout trials which now typically last much longer than in earlier decades<sup>19</sup>. A trial now does not need to be abandoned if a juror dies or is discharged<sup>20</sup>. Nowadays, it is not every serious offence against federal law resulting in imprisonment that attracts a jury trial<sup>21</sup>. Various other modifications, unthinkable in 1900, have been adopted, such as letting jurors go home to their families during a trial.

True, a small number of essential features of a 'jury' must be maintained, such as the requirement of a unanimous verdict<sup>22</sup>. The jurors must be randomly and impartially selected, not chosen by the prosecutor or the state<sup>23</sup>. Whereas in ancient times jurors were chosen precisely because they were from the neighbourhood, knew the accused and witnesses and had information about the event, nowadays these characteristics are seen as disqualifications. So the word has changed its meaning. The context and purpose of jury trials give the clue as to what the continuing requirements are, as laid down by the Constitution<sup>24</sup>.

The task of legal interpretation is thus neither mechanical; nor simply intuitive. Sometimes intuition and immediate impressions have to give way to a deeper reflection that will yield the correct meaning. My thesis is that much the same can be said of theological interpretation of Scripture. Bullying tactics designed to frighten or shame those who propound differing interpretations of the Bible, can have no place in any sincere search for the meaning of written passages. Nor, as the history of the meaning of words in the law demonstrates, can past authority, even of long standing, necessarily oblige the ultimate decision-maker to accept older approaches when later insights demonstrate to conscience that the earlier approaches must be wrong.

I am sure that you will discern in this attitude, still further evidence of my Protestant upbringing. Whilst respect and deference must be paid to the past and to the institutions of authority that exist in society – legal and religious - in the end, the

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<sup>18</sup> Ibid.

<sup>19</sup> *Brownlee v the Queen* (2001) 207 *Commonwealth Law Reports* 278 to 90 [27], 342 [147].

<sup>20</sup> Ibid at 288 [20], 303-4 [71], 331 [149], 341 [183].

<sup>21</sup> *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 397 [24]; cf at 427 [105].

<sup>22</sup> *Cheatle v The Queen* (1993) 177 *Commonwealth Law Reports* 541 at 548.

<sup>23</sup> Ibid at 560; *Katsuno v The Queen* (1999) 199 *Commonwealth Law Reports* 40 at 64.

<sup>24</sup> M.D. Kirby, John Finemore, *op cit*, pp 14-15.

lonely conscience of the individual does not bow to authority, even if sometimes the law, life or expedient necessity temporarily overwhelm conscience. How much clearer are these rules of interpretation when the subject of the analysis is Scripture, not the mere laws of human beings?

### *FIVE UNEASY PIECES*

This brings me to the recent publication, edited by Father Nigel Wright, *Five Uneasy Pieces – Essays on Scripture and Sexuality* (ATF Adelaide, 2012). The book contains five chapters, each written by an Anglican theologian. It addresses passages of Scripture which are said to be evidence of divine disapproval of homosexuality and homosexual acts. These are *Genesis* 19 (the story of Lot and Sodom); *Leviticus*, 20 (the Holiness Code); *Romans* 1:20 (Paul's castigation of 'shameless acts' of men and women); 1 *Corinthians* 6 and 1 *Timothy* 1-8 (lists of morally reprehensible classifications: including *arsenokoites* (Gr.), variously translated as 'effeminates', 'sodomites' or 'homosexuals').

If we pause and reflect upon considerations of *text*, we will immediately notice, both in the *Old Testament* and *New Testament* passages, the social context in which the identified words were expressed. This is a context in which some things that today are regarded as horrible, immoral and unacceptable, are recounted as the norm. Such as concubinage; slavery; human sacrifice; theocratic government; capital punishment for religious and social offences; collective punishment; ethnic cleansing; unbridled patriarchy; deep gender discrimination; highly particular gender dress codes and hair styles; systemic exclusion of women; treatment of mental illness as demonic possession; understanding misfortune as an act of divine retribution; complex social systems including ritual purity codes; use of honour and shame in the public values system; celibacy preferred over marriage; sex viewed as being for procreation only; prohibitions upon receiving interest upon funds held on deposit or on loan to others; and minimal support for the poor and marginalised.

Add to this list the *context* of the New Testament, with its powerful and simplified message obliging us to love one another and to love God. In such a *context*,

particularly of the words attributed to Jesus in the *Gospels*, the idea that the conduct natural to a certain proportion of human beings, denounced as ‘effeminate’ or ‘sodomites’, is alien to God’s love can readily be seen as suspect. Unlikely. Questionable. Once modern scientific research on sexual orientation and gender identity demonstrated their fairly stable features in human society and in the unchosen characteristics of millions of individuals, the idea that such human beings are evil and are to be denied physical expressions of love can be seen for what it is. Either it is an overbroad judgment, not intended for those whose sexual orientation or identity is part of their nature, but for others who recklessly, wilfully and unkindly acted to humiliate other persons, particularly guests. Or it needs to be treated as inessential, directory not mandatory or affected by ancient cultural norms, no longer relevant to contemporary society, like slavery or possession by demons.

The danger of slipping a modern word such as “homosexuals” into contemporary Biblical lists of wrongdoers is particularly obvious. That word was not coined until the late 19<sup>th</sup> Century in Germany. It carries a great deal of baggage. To introduce it into a Biblical text, 2000 years old or thereabouts, is simply an historical error. The inclusion of ‘effeminate’ (in the King James version of the Bible) probably comes closest to the original Greek word. And why, pray, would ‘effeminate’ be listed so readily with the ungodly and unrighteous? Why throw them in with ‘fornicators, idolaters, adulterers’ and others who are ‘abusers of themselves with mankind: ‘thieves, covetous, drunkards, revilers, extortioners’ and so forth. Poor old effeminate. What bad company they are keeping.<sup>25</sup>

It would be ridiculous, if it were not so serious, that these lists and comparatively brief passages denouncing listed ‘abominations’, have caused (and continue to cause) so much misery, pain, death, humiliation, stigma and sheer hatred amongst human beings.

In the face of science, any intelligent reader of such texts would naturally struggle to do what judges do all the time in the courts. Read the text down. Read it in context. Read it as containing non-binding portions – what we lawyers used to call ‘directory’

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<sup>25</sup> Another translation was ‘musicians’, a euphemism for homosexuals. See S. Hough, “An Equal Music” in Ben Summerskill (ed.), *The Way We Are Now* (May 2012).

not 'mandatory'. Read it as poetical, a metaphor, speaking from earlier lack of knowledge and ignorance of modern science. Above all, read it with the kindly light of Christian love that sits so uncomfortably (in its Gospel sense at least) with classification of stereotypes rather than searching for the soul of each precious individual.

This is what the authors of *Five Uneasy Pieces* have attempted to do. It is not my purpose to recount their analysis. Rather, it is to draw their book to attention and to encourage people to read it, followed by serious reflection on the part of readers who have not lost their spiritual bearings. They should rediscover their sense of proportion and reality about the loving religion that Jesus taught. There have been altogether too many burnings and birchings over religion. And even in this day and age, there is too much violence, cruelty and hostility, relevantly targeted at a cohort of human beings who do not choose their sexual orientation or gender identity and who cannot change it. Nor should they be forced to try to do so, simply to fit in with a mistaken understanding of Scripture, written in ignorance of today's scientific knowledge. Above all, modern Christians have no excuse for continuing the hostility that might have been understandable in olden times, before the writings of Jeremy Bentham, Richard Krafft-Ebing, Havelock Ellis, Alfred Kinsey, Evelyn Hooker and all the modern scientists of sexuality.

What is the answer that the major denominations of Christianity give to the quandary presented to them by the apparent clash between their past understandings of the Biblical texts and modern science? Essentially, it is the same answer that was given to Martin Luther and the Protestant martyrs. Stick to the authoritarian pronouncement of bishops. Stay with the old beliefs. Adhere to the authority of the church and its leaders. Do not re-examine the Scriptures or read them differently, as written in a time before the modern enlightenment.

This is the current instruction of the Roman Catholic Church and of the Greek and other Orthodox churches on this issue. There is no particular surprise in that for a person of my denominational background. At least within the Anglican Church, we are having a dialogue on this and parallel controversies. The most obvious of these

parallels is the controversy concerning the role of women in the church: to be priests, bishops and other leaders.

The Anglican Church, it is true, is divided at this time both on the questions of gender and sexuality. However, at least it is engaged in an exploration, as befits a global Communion, faithful to the central messages of Christianity. In the face of hostility, the conversation continues. In fact, Anglicans have become a kind of stalking horse for Roman Catholics. Anyone in doubt of this should familiarise themselves with the website of [eurekastreet.com.au](http://eurekastreet.com.au)<sup>26</sup>. Collected there are many contributions by thoughtful Roman Catholics and Anglicans who realise that the current position of their Church, on gender and sexuality, is unstable, untenable and will ultimately give way to a more rational response.

The nay-sayers, including within the Anglican Communion, have painted themselves into an impossible corner. They repeatedly tell their congregations (at least in Western countries) that they must not hate homosexuals; or show violence towards them; “for all of us are sinners”. But then they return to their supposed mistranslated Biblical lists and ambiguous stories. They insist that the millions of homosexual people and many others in this world must do nothing physical to fulfil their natures. No genital contact. No loving or sexual embrace. No tender sharing. No deep human love. Just celibate non-sexual friendship. As if the churches have not had sufficient warning of the errors and risks to which this unnatural instruction will lead ordinary human beings.

The obsession in so many religions is about what Archbishop Herft of Perth has aptly described as “the sleeping arrangements” that exist between human beings. It is an obsession about sexual organs. About ‘consummation’. About bodily fluids and the genitals. As if that were all that is involved in the tender, passionate and lifelong affection between humans who love one another. Those in the churches who demand celibacy have to be told in plain and simple language that it is not going to happen. They should start thinking about the real moral questions in our society and in our world. They should lift their thoughts from the human genitals to real

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<sup>26</sup> See e.g. Kristina Keneally “Feminists and Gay Christians who Accept the Church”, *Eureka Street*, June 7, 2012. Compare Bishop G.J. Robinson “Sexual Relationships: Where Does Our “Morality Come From?” (2012)

problems, on which their views may actually be helpful: such as animal welfare; refugees; modern social relationships; the protection of children; the state of the biosphere, global poverty as a kind of modern slavery; climate change; gender equality and over population.

What is happening here is a battle between misguided authority, excessive literalism and a rejection of science (that is itself a product of our God-given rationality). What is needed is the same questioning approach that the early Protestant leaders showed to similar attitudes in the universal church in the 16<sup>th</sup> Century. Given its long history, it is unsurprising that the Anglican Church is increasingly open to this message. But not, alas, to this time in Sydney.

### *PARTING IMAGES*

Let me close with a few images that have come my way in recent days. Some of them are, of course discouraging:

1. One correspondent wrote to me, describing himself as a “concerned senior citizen”. He posted me a large collection of Pentecostal tracts. He called for my repentance. He said:<sup>27</sup>

“I acknowledge your worldly achievements as a forceful, dynamic and dissenting Judge. I note that you have skilfully used your position and articulate presentation to lecture in schools, universities with national media support... Thus guiding young men and women into believing that sodomy and lesbianism is acceptable. **THIS IS ABSOLUTELY INCORRECT** – I enclose a KJ Bible and extracts from it to utterly refute this claim. In the eyes of God sodomy is an **ABOMINATION** and it is an **UNNATURAL ACT**, reprehensible and disgusting.

The writer then turned his anger on others, apparently for supporting new and unacceptable translations of the Bible. One was the “mogul Murdoch” who,

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<sup>27</sup> Letter in the possession of the author.

he said, was “knighted by the Pope for his translations – another triumph for the agent of the Anti-Christ”. So at least I find myself in powerful company.

2. In recent days an Anglican Minister, now preaching in Doncaster, Melbourne, released a video film that repeatedly asserts “God loves homosexuals but he is very clearly against homosexuality”<sup>28</sup>. The Minister denounces their sins and declares that they “go against the natural order”. He reads Paul’s letter to the *Romans*, declaring that homosexuality is the product of a depraved mind and body. These are the words of an ordinary priest, within the Anglican Church, proclaimed to the ever diminishing numbers of the misled faithful. One can only imagine the pain and depression these words cause to sexual minorities and their friends.
  
3. In response to the *Five Uneasy Pieces*, another book has now been released by Anglicans on self-identifying “evangelical perspectives”<sup>29</sup>. They aim to rebut the call for Scriptural reconsideration. An introduction by Rev. Gordon Preece, now serving in an Anglican parish in Melbourne, tells of his disappointment at my contribution to *Five Uneasy Pieces*. There are so many unpersuasive arguments in this book that it is hard to know where to start. The Reverend Preece does not deny that there are homosexuals. But he objects to the idea that sexual orientation is genetic. He seeks to minimise the number of homosexuals by suggesting that they are no more than 2% of the population. This is an unfortunate estimate because the Jews, who were persecuted in Hitler’s Germany, were but 2% of that population. Their persecution also was based on religious views about the “perfidious Jew”. It was founded upon distorted readings of *St Matthew’s Gospel*<sup>30</sup>. Rev’d Preece declares that he is actually being compassionate, in what he says: seeking to save homosexuals from eternal damnation by a call to worldly celibacy<sup>31</sup>. He acknowledges the ‘positive’ examples of long-term relationships “like Justice Kirby and his same-sex partner, and Bob Brown and his and Penny Wong

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<sup>28</sup> [http://www.holytrinitydocaster.org.au/resources/sermons/?sermon\\_id=1172](http://www.holytrinitydocaster.org.au/resources/sermons/?sermon_id=1172)

<sup>29</sup> M. Bird and G. Preece (eds), *Sexegisis – an Evangelical response to Five Uneasy Pieces on Homosexuality* (New Cranmer Lobby, Sydney, 2012).

<sup>30</sup> *St. Matthew 27*, v25.

<sup>31</sup> G. Preece in *Sexegisis*, *op. cit.*, 23.

and hers”. But he declares that these are ‘rare, especially among men’. Assuming that this is so, is it any wonder that this is the case when priests and other religious teach that homosexuality is an ‘inclination to evil’, the very words of the Roman Catholic catechism? Is in any wonder given the passionate opposition of the churches to each reform that has been sought successively to equalise sexual minorities with their fellow citizens, most recently over marriage. He condemns the ‘appalling Westborough Baptist’ with their ‘God hates gays’ placards<sup>32</sup>. Yet does he ever stop to ask what the uncritical readings of St Paul’s lists, especially as newly translated, must have on young gay listeners? Or the inflammatory effect that they have on impressionable young minds? This is a sad book. It trivialises the fine and brave scientific research of Alfred Kinsey, calling him “that infamous collector of wasps and deviant sexual behaviours from unrepresentative prison and university student populations”<sup>33</sup>.

A conversation must allow for different views. However, I find the science-denying approach of *Sexegisis* discouraging, self satisfied and unrealistic.

As against these discouraging images, there are others that should lift our hearts:

1. Take the words of Bishop John McIntyre to the Diocese of Gippsland in Victoria last month. He too began his address with praise of the diversity of Anglicanism.<sup>34</sup>

“I want to assure you that I am not demanding that you agree with me. One of the beauties of Anglicanism is our capacity to stay together in Christ with strongly held differences. Another is that our idea of authority includes the fact that you do not have to agree with me just because I am a bishop. We can stay together in the unity of Christ with our differences, and in grace we can continue to learn from each other.”

Bishop McIntyre addresses the need for a rethinking of relationships:

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<sup>32</sup> Ibid 24.

<sup>33</sup> Ibid 38.

<sup>34</sup> J. McIntyre, Bishop of Gippsland, address to Diocese of Gippsland, 36<sup>th</sup> Synod, 18 May 2012.

“The Judaeo-Christian view of marriage, based as it is on our Scriptures, has from the beginning been in a state of change and flux. Like any other human institution, even those established under God, marriage is an organic reality and it grows and changes over time. To name one obvious fact, it is clear that in the early days of the institution of marriage in Hebrew life, marriage was not monogamous. The Old Testament stories of the patriarchs and the kings make that very clear... If one outcome of gay and lesbian people being able to marry was that, like many other people in committed sexual relationships they too were held accountable under law for the protection of children in their care, for the good ordering of their sexual relationships within society, and for the rights of those in committed sexual relationships, would that not be a good thing?... [In any case] I do not believe that it is a value consistent with our faith to seek to impose on others what we believe, no matter how strongly we believe it”.

2. The present Warden at Trinity, Associate Professor Andrew McGowan, has disclosed in his online reflections a growing personal appreciation of the need for a shift in the traditional Anglican attitudes to same-sex attraction<sup>35</sup>:

“I believe that the Christian churches must reassess their traditional attitude to same-sex attraction and to forms of committed relationships between people of the same sex. I take the Bible seriously, but I am unconvinced that the (few) negative references to sexual activity between persons of the same sex in Scripture are particularly relevant to what we now understand as homosexuality, or that they provide a basis for making moral judgments about committed relationships between gay or lesbian people. To come closer to home, I think Australian Anglicans must scrutinise the conservative position we have so far maintained in preserving the fragile unity on the issue, and begin asking far more seriously what damage is being done to gay and lesbian members inside our faith communities, and what damage to the Church as far as those outside it are concerned, by prioritising our own real or perceived institutional concerns over theirs.”

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<sup>35</sup> A. McGowan, *Andrew's Version* 14 August 2012, 4.

3. And finally, the internet on this very day brought good news from Canada<sup>36</sup>. The largest Protestant denomination in Canada, the United Church of Canada, elected its first openly homosexual Moderator. This is the first church in the mainstream in Canada to do so. Back in 1988, the General Council of that church declared that all believers in Christ, regardless of their sexuality, were welcome and eligible to be considered for the ministry. Four years later the United Church of Canada ordained the Rev'd Tim Stevenson as its first openly homosexual minister. Now, the church has elected the Rev'd Gary Paterson as its first openly homosexual Moderator. The Rev'd Paterson is married to the Rev'd Stevenson, his partner of 30 years. Under the *Charter of Rights and Freedoms* the law of Canada permits this. The *Charter* promises true equality of citizenship in Canada. It forbids imposing a second class status on citizens because of their sexual orientation. Following his election, the new Moderator publically embraced his partner, to the applause of his Church's Council. He said:<sup>37</sup>

“I've heard from so many individuals that they are worried or that they are feeling a lack of hope. The role of the Moderator is someone who can bring inspiration and hope. We will find our way through. We will be changed and we will be faithful.”

With all respect to those of an older, narrower and a more authoritarian view of such matters, the change in the United Church of Canada is one that I believe is comfortable with the Scriptures; conformable to the central loving tenets of the Christian religion; and consistent with modern scientific knowledge as well as social and individual reality.

I am here to say these things, not despite the fact that I am a Sydney Anglican. But because of that fact. Not despite the words of Scripture. But because those words, read in context and with the light of reason and love provide no impediment. Not despite my upbringing in the Anglican tradition of Christianity. But because of it.

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<sup>36</sup> United Church of Canada Elects First Openly Gay Moderator in Historic Vote, 22 August 2012.

<sup>37</sup> *Loc cit.*