Safeguarding Rights to Liberty and Security where People with Disability are Subject to Detention and Restraint: A Rights-based Approach (Part One)

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This is the first article in a two-part series that establishes a framework for evaluating law as it affects the rights to liberty and security for people with intellectual and cognitive impairments. Such laws include those which permit the detention and use of restrictive practices for ‘challenging behaviours’ or ‘behaviours of concern’. This article begins by examining the nature of rights and in particular those of liberty and security. Both are recognised not only as human rights but also as common law rights. The article then develops a rights-based approach to law that protects these rights. Taking a ‘thin’ version of the rule of law as the starting point, the approach expands this by adding a requirement to respect not only common law rights but human rights. The rights-based approach then argues for the inclusion of the principle of justice requiring the prioritisation of rights over other policy imperatives and a commitment to equal concern and respect.

Keywords: CRPD; intellectual and cognitive impairments; liberty; rights; role of law.

Introduction

Law is the traditional vehicle through which society permits and regulates detaining people and restraining their freedom of movement. While the focus has been predominantly on regulating the arrest and imprisonment of those accused of committing criminal offences, more recently there has also been a focus on the liberty and security of people with mental illness. This article focuses on the law and the rights to liberty and security of people with disability, in particular people with intellectual and cognitive impairments.¹ It is the first in a two-part series that outlines a rights-based approach to the law, aimed at realising the rights to liberty and security for people

with intellectual and cognitive impairments on an equal basis with others.

When people with intellectual and cognitive impairments are in receipt of care and support in a range of facilities, including aged care facilities, hospitals and other health services and disability support services, they may be subject to a variety of practices that restrict their liberty or involve some type of restraint. These include mechanical restraint, physical restraint, chemical restraint, seclusion and detention, which this paper refers to as ‘restrictive practices’.

There is a growing recognition and concern about the use of restrictive practices in relation to people with intellectual impairment in Australian society. The often

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unregulated use of restrictive practices has been commented upon by the Australian Law Reform Commission (ALRC) in its 2014 Final Report Equality, Capacity and Disability in Commonwealth Laws,² noting that the use of such practices may contravene the Convention on the Rights of Persons with Disability and the Convention Against Torture.³ This issue has also received attention from law reform commissions of various Australian States and Territories.⁴ Further, in the concluding observations on Australia's initial report under the Convention on the Rights of Persons with Disabilities (CPRD), the United Nations Committee on the Rights of Persons with Disabilities recommended that Australia 'take immediate steps to end such practices, including by establishing an independent national preventative mechanism to monitor places of detention'.⁵

These concerns point to the fact that, as French, Chan and Caracher explain, while human rights have always been intended to apply to people with disability on the same basis as others, 'in reality these rights have largely failed to penetrate to the principal sites of human rights violation experienced by persons with disability'.⁶ The largely unregulated use of restrictive practices in aged care facilities, disability services and other health settings is a significant example of this failure and arguably precludes the benefits of the rule of law from being realised by those most vulnerable to abuses of power.

With this in mind, the authors are proposing a framework which we hope will be useful for ensuring the realisation of the rights to liberty and security for people with intellectual and cognitive impairments on an equal basis with others. This is necessary, the authors believe, because while the rights to liberty and security emerged from the general liberal tradition that also gave rise to our system of government and law based on liberalism and the rule of law, this same liberal tradition has often fallen short in developing theories of law to *realise* the equal rights for people with disability.

Our proposal for 'a rights-based approach to the law' is presented in two parts. Part One, in this article, will first present the conceptual basis for the framework, and then articulate a normative or doctrinal basis for the framework. Part Two⁷ will build on this framework to develop a methodology for adjudicating, interpreting and making the law.

Part One is divided into two sections. The first section, the conceptual part of this framework, briefly describes the origin and characteristics of modern human rights, with a focus on the particular rights of security and liberty of the person and how they are grounded in both international human rights and the common law. The second section, the normative part of this framework, outlines the doctrinal approach that will be argued to be necessary to achieve equal recognition and realisation of the rights to liberty and security of people with intellectual impairment in the law.

Conceptual Part: Common Law and Human Rights

The use of restrictive practices such as physical and chemical restraint and detention engage the human rights of people with intellectual and cognitive impairments, in particular the rights to liberty and security. The rights to liberty and security are both fundamental to common law and human rights, with a strong moral force and foundation in our modern system of democratic government and the rule of law. Both rights share a common underlying concern with the separateness and sacredness of the body and the right to be free from arbitrary interference with one's body and one's personal liberty. Collectively, liberty and security reflect core values and principles underlying our modern democratic societies, to be found in both the common law and international human rights law. This part briefly outlines the nature and scope of human rights, in particular the rights to liberty and security which provide the conceptual basis for this normative framework.

Human Rights, their Origin and Nature

While the origins of human rights precede their relatively modern origins, stretching back to ancient times and the idea of a 'natural law',⁸ the concept of rights in this section concerns the liberal rights which emerged from the momentous changes that occurred in the seventeenth and eighteenth centuries alongside the growth of capitalism, the rise of the bourgeoisie and the political ideology of liberalism.

From the late seventeenth century, the language of natural 'rights' emerged, derived from the idea of 'natural law', also coinciding with the new emphasis on the individual and the protection of the liberty and security of the individual *vis a vis* the state. The language of rights coincided with momentous changes in the social and economic fabric of western societies, argues Donnelly, triggered by the development of modern states and modern markets.⁹ This was also the period in western history known as the enlightenment, 'characterised by dramatic revolutions in science, philosophy, society and politics'.¹⁰ Enlightenment philosophers articulated a model of government founded on the political ideals of freedom and equality.¹¹ Locke, a central enlightenment figure, contended, for example, that our basic rights were independent of, and antecedent to, the state which, once established, 'hath no other end but the preservation of these rights, and therefore can never have a right to destroy, enslave or designedly to impoverish the subjects'.¹² The enlightenment was concerned with freedom, in particular personal freedom. As such, this time also saw a growth in the concepts of self-ownership, autonomy and self-determination.¹³

This time, when people began to be perceived as separate individuals, capable of exercising moral judgement,¹⁴ also saw the emergence of the language of the rights of man (as opposed to natural rights). Immanuel Kant, a key enlightenment figure, played a fundamentally important role in this regard. For Kant, the power of reason was determined

and located in the individual, not God.¹⁵ Whereas classic natural law philosophers looked to a form of reason governed by metaphysics, the enlightenment philosophy, led by Kant, situated reason purely within the moral self.¹⁶ It was this Kantian notion of moral worth, inherent in human beings, that was also to have a lasting impact, essentially laying the foundation for the individual right that attaches to the self¹⁷ and later for modern human rights.¹⁸

These new sentiments were reflected in the great eighteenth-century declarations of rights – the American Declaration of Independence (1776) and the Declaration of the Rights of Man and Citizen (1789) – where the claim was not based on traditional rights and privileges, but natural rights and the rights of man.¹⁹ There was also a new conception of the role of Government with a focus on political legitimacy based on respect for the equal and inalienable rights of man:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights Governments are instituted among Men, deriving their just powers from the consent of the governed, – That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.²⁰

The notion of 'human rights', however, really entered popular discourse following the Second World War, with the Universal Declaration of Human Rights (UDHR).²¹ The focus in all these instances, however, even including the twentieth-century UDHR, is (like the idea of natural rights) on rights that pre-exist and are superior to the state, as well as a preoccupation with liberty and security of the individual. Collectively, these

declarations reflect both the long-standing influence of the concept of natural law and natural rights as well as the relatively modern concern with the equal dignity and respect due to human beings and the associated emphasis on liberty and autonomy.

The Right to Liberty and Security

This brief examination of the emergence of human rights from the idea of 'natural rights' provides an important background for the examination of the particular rights that are the focus of these articles: liberty and security. The recognition of each right as part of the common law is followed by consideration of liberty and security as human rights.

Security of the Person as a Common Law Right

The protection of the security of the person in common law is reflected in the modern tort of trespass, including the need for consent to medical treatment.²² The common law tort of trespass originally developed in order to give an alternative to the custom of blood feud through the law of vengeance (family feud known as 'faida').²³ The objective behind the original writ issued by the Chancery in 1252, *vi et armis et contra pacem Domini Regis*, was the punishment of offenders against the royal peace.²⁴ With the development of the notion of personal freedom and the rights of the individual developed in the seventeenth and eighteenth centuries, the tort of trespass came to be about protecting personal security and personal liberty. In the second part of the eighteenth century, William Blackstone wrote that 'the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner'.²⁵

The requirement for patient consent to medical treatment also reflects the modern emphasis on the separateness and sacredness

of the body as well as the freedom of the individual and the right to self-determination. Developed principally in the United States, the requirement for patient consent to medical treatment also emerged at the beginning of the twentieth century at a time when the American Courts were still highly influenced by natural law jurisprudence,²⁶ reflected, for example, in this statement by Justice Miller in the United States Supreme Court in 1875 in *Loan Ass'n v Topeka*:

There are ... rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is after all but a despotism.

...

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.²⁷

This notion of the 'free citizen's rights' under a 'free government' was to resonate in the medical battery cases of the very early twentieth century,²⁸ ultimately expressed as the right to self-determination in *Schloendorff v Society of New York Hospital*,²⁹ from which the following often-quoted words of Cardozo J about self-determination are derived: 'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages'.³⁰

Key medical treatment cases in the English courts continue to cite these early statements about the natural right to bodily inviolability and the importance of the principles of self-determination and autonomy reflected in the judgements of the American Courts in the early twentieth century. Many

of these were helpfully summarised by Dame Elizabeth Butler-Sloss in her review of the English authorities in *Re B (Adult: Refusal of Medical Treatment)*:

‘In 1972 Lord Reid in *S v McC: W v W* [1972] AC 25 said, at page 43

“English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d’état but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions”.

In re F (Mental Patient: Sterilisation) [1990] 2 AC 1, Lord Goff of Chieveley said at page 72

“I start with the fundamental principle, now long established, that every person’s body is inviolate”.

Lord Donaldson of Lymington, MR said in *re T (Adult: Refusal of Treatment)* [1993] Fam. 95, at page 113

“the patient’s right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent”.

In *re T (Adult: Refusal of Treatment)*, I cited Robins JA in *Malette v Shulman* 67 DLR (4th) 321 at 336, and said at page 116–117

“The right to determine what shall be done with one’s own body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based. Free individual choice in matters affecting this right should, in my opinion, be accorded very high priority.”³¹

Therefore, as every person has a right to determine what shall be done with his or her body, the common law provides that any touching of the body without consent (unless authorised, justified or excused by law) constitutes trespass.³² The corollary of the need for consent to medical treatment is also the right of a person (with capacity) to refuse medical treatment.³³

Personal Liberty as a Common Law Right

Personal liberty is also a foundational value of the common law and our constitutional arrangements.³⁴ It has often been viewed as one of the most integral values, and its contravention one of the most serious, as reflected by Blackstone in his *Commentaries*:

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper ... there would soon be an end of all other rights and immunities.³⁵

Isaacs J in *ex parte Walsh and Johnson; In re Yeats*, acknowledged that although this principle cannot be found in any ‘written constitution of Australia’,³⁶ the right to personal liberty is enshrined in the Magna Carta³⁷ and other ancient Imperial statutes,³⁸ which has been recognised as forming part of our ‘constitutional heritage and express fundamental principles and values which continue to influence the application and development of the common law’.³⁹ Isaacs J summarised the principles recognised by clause 39 of the Magna Carta and other justice and liberty provisions:

- (1) Primarily every free man has an inherent right to his life, liberty, property and citizenship;
- (2) His individual rights must always yield to the necessities of the general welfare at the will of the state;
- (3) The law of the land is the only mode by which the state can so declare its will.⁴⁰

Effectively this means that the underlying principle in our common law is that no one can be deprived of their liberty except in accordance with the law. The infringement of this principle is something that, as Brennan J said in *Re Bolton; Ex parte Beane* ‘the law of this country is very jealous of’.⁴¹ Even the most ‘minor’ of infringements are viewed seriously.⁴²

The right to personal liberty underlies the tort of false imprisonment⁴³ and the availability of judicial review of the legality of detention (the writ of *habeas corpus*).⁴⁴

Liberty and Security as Human Rights

The human rights of liberty and security share many similarities with the concepts of liberty and security recognised by the common law. This is not surprising given their common liberal heritage, as discussed above. Yet, as acknowledged by Bingham, as human rights, liberty and security may provide a broader range of remedies and redress and have a broader application than as common law rights. In the United Kingdom, Bingham has argued, the Human Rights Act 1998 (UK) has ‘empowered the courts to identify and make public declarations concerning infringements of liberty for which, without the Act, they could have given no redress at all’.⁴⁵

Article 9 of the International Covenant on Civil and Political Rights (ICCPR), recognises the right to liberty and security of the person.⁴⁶ Liberty, in this context, refers to physical liberty, or the freedom from physical confinement rather than a general freedom of action.⁴⁷ The protection of liberty, it has been acknowledged by the ICCPR Committee however, is not confined to imprisonment or police custody, but includes a wide range of circumstances in which a person may be deprived of their liberty,⁴⁸ including, for example, placement of people in psychiatric facilities, nursing homes, support services and homes for vagrants.⁴⁹

The European Court of Human Rights (ECHR) in interpreting article 5 of the European Convention on Human Rights, which incorporates the right to liberty and security, has also found that the ECHR is not bound by the conclusions of domestic legal authorities on what amounts to a deprivation of liberty.⁵⁰ The question of what amounts to deprivation of liberty is determined by the person’s ‘concrete situation and account must be taken of a whole range of criteria such as type,

duration, effects and manner of implementation of measure in question’.⁵¹

The right to liberty in article 9 of the ICCPR is not an absolute right; it requires that any detention of the person be both lawful and free from arbitrariness.⁵² With respect to lawfulness, the ECHR has held that this ‘refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law’.⁵³ However, it also goes further than this and requires that detention must not be arbitrary, that is, it must not include ‘elements of inappropriateness, injustice, lack of predictability, and due process of the law’.⁵⁴ The ECHR has held that this means, regardless of whether domestic law may authorise the detention, the detention authorised under law must satisfy these other elements.⁵⁵

The right to security of the person is independent from the right to liberty and refers to ‘freedom from bodily injury, including fatal injury’.⁵⁶ In this sense, it is not directly equivalent with the right to security of the person, or bodily integrity at common law, which is the foundation for the tort of trespass and the need to consent or lawful authorisation for medical treatment. The right to security in article 9 of the ICCPR is aimed at protecting individuals from intentional infliction of bodily or mental injury.⁵⁷ The right to freedom from torture and cruel, inhuman or degrading treatment or punishment in article 7 of the ICCPR also overlaps with the right to liberty and security.⁵⁸ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) also protects the right to liberty and security, importantly imposing an absolute prohibition on torture.⁵⁹

Of significance for this article is that there is also specific recognition of these human rights for people with disabilities. Article 14 of the CRPD recognises the right of people with disabilities to liberty and security of their person.⁶⁰ Article 15 also prohibits torture and cruel, inhuman or degrading treatment or punishment. These rights are directly

relevant to the use of restrictive practices on people with intellectual impairment. The CPRD Committee in its concluding observations on Australia has commented that it is concerned that persons with intellectual impairment are subjected to 'unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraints and seclusion, in various environments, including schools, mental health facilities and hospitals'.⁶¹

In summary, the above discussion provides a very brief description of the social, material and political foundations for the birth of modern rights, in particular the right to liberty and security as we understand them today and that are integral to political liberalism.

Common Law Rights and Human Rights for People with Disabilities

Even though people with disabilities were theoretically included in the coverage of human rights instruments such as the UDHR and the ICCPR, there was a general recognition that they were insufficiently protected by these general human rights conventions. Related to this, while theories of justice and equality may have claimed that people with disabilities have a right to formal equality, in reality, realising their social, economic and political rights has been problematic. Many disability theorists have argued⁶² that one of the key reasons why people with disabilities, in particular people with intellectual impairment, have been excluded from or marginalised in theories of justice and human rights, is that historically classical liberal approaches have grounded such entitlements in the actual possession of *rationality*⁶³ and the idea of the 'free, equal and independent'⁶⁴ human being.

Rationality, Reason and Rights

Understanding the reasons for the limited application of theories of rights and justice for people with disability, it is argued, is

central to understanding what type of normative framework is needed to address this limitation.

As emerged in the discussion of the emergence of the modern rights to liberty and security above, these rights depended on the new emphasis on the individual and the Kantian notion of moral worth inherent in human beings. As Carlson and Kittay have pointed out, the ability to reason is generally taken to be the foundation for human dignity and the special moral status that we accord human beings.⁶⁵ Dignity is also a foundational value of modern human rights with article 1 of the UDHR, reflecting the Kantian belief in the inherent moral worth of human beings, declaring that: '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.⁶⁶ Hence, argues Finegan, 'human rights inhere in human nature, a nature which is characterised by reason and conscience'.⁶⁷

This raises the question: what of people who are not attributed with reason or rationality? People with intellectual and cognitive impairments, including those with mild impairments, may be seen at best to have a diminished capacity for rational deliberation, argue Carlson and Kittay.⁶⁸ This, they argue, raises philosophical questions about the grounds for our society's moral obligations to people with intellectual and cognitive impairments.⁶⁹ In fact, ideas of 'personhood' and who is a 'person' can be, and has been, used to exclude certain groups from possessing natural or human rights, including women, slaves and people with disabilities and mental illness.⁷⁰

Not surprisingly, as Fennell notes, people with mental disabilities posed a particular problem for liberal democratic theories with the new enlightenment emphasis on reason and rationality.⁷¹ Accompanying the significant changes that occurred from around the seventeenth century with respect to the confinement and segregation of people with

mental illness and intellectual impairment⁷² were changing attitudes to reason and rationality. Irrationality became associated with the animality in human beings, the lowest point of humanity.⁷³ The inability to reason became a basis for species differentiation for classical liberal theorists such as Locke, who held that 'Ideots' and 'Lunatics' could not be due justice, as they were incapable of knowing the law due to a lack of reason.⁷⁴ While they may lay claims to charity, 'to keep him from extreme want'⁷⁵ they have no claim to just treatment.

Fennell has observed that 'there is a special set of legal relations which has been developed specifically for the mentally disordered'.⁷⁶ In so far as an individual is insane, or lacks mental capacity, 'though in the state', Fennell points out, they 'are not of the state'.⁷⁷ In practical terms this means that individuals with mental or intellectual impairment have been denied the same rights, including to liberty and security, that people without mental intellectual impairment have been entitled to. This lack of entitlement to protections that justice offers, Carson and Kittay argue, leaves people with disability 'at the mercy of another's charity' and, as such, more likely to 'suffer poverty, neglect, and abuse'.⁷⁸ At best, people with mental and intellectual impairment have been subject to a 'soft law' or welfare approach with most of the early developments in realising the rights of people with disability, argues Kayess and French,⁷⁹ still tending towards a medical/welfare model as reflected in security and welfare legislation, health law or guardianship.⁸⁰

Even in the common law, there was a focus on the 'competent' as rights holders. This was expressed by Cardozo J in the foundational medical battery case of *Schloendorff v Society of New York Hospital*, who attached the right to bodily integrity to 'every human being of adult years and sound mind'.⁸¹ Therefore only 'competent' people may provide a valid consent or refusal to medical treatment.

The question that arises for this article, therefore, is what type of normative

framework is needed to ensure the rights to liberty and security are realisable by all and are not denied on an unequal basis to people with intellectual and cognitive disabilities. This raises particular challenges for a normative framework that is, as it will be discussed, grounded in the same liberal political foundations that has historically excluded and marginalised people with disability.

It will be argued that a rights-based approach to the law, as outlined below, and in the Part Two article that follows,⁸² can help to ensure the equal realisation of rights for people with intellectual and cognitive impairment.

Doctrinal Approach: A 'Substantive' Version of the Rule of Law

The foundation of the rights-based approach to the law in our proposed doctrinal approach is the concept of the rule of law. As a formal or procedural concept, the rule of law is important in ensuring fair and equal treatment, procedural due process and checks and balances on arbitrary exercises of power, and this makes it particularly important for those vulnerable to abuses of power. However, we argue that a formal or procedural conception of the rule of law is not sufficient for guaranteeing the equal protection of the rights to liberty and security for people with intellectual impairment.

A rights-based approach to the law is needed, and such an approach incorporates a number of extra requirements. First, it incorporates a further *content requirement*. It adds human rights, alongside common law rights, as both a necessary content requirement and part of the sub-stratum supporting the theory of law. Next, a rights-based approach to the law adds a further *normative requirement*: the *principle of justice*. This principle (as developed for this doctrinal approach) has two imperatives. First it *prioritises the protection of the rights* to liberty and security over other policy imperatives. Second, it is committed to *equal concern and respect*.

Importantly, however, this doctrinal approach also adopts a rights-based approach to equality that is reflected in the CPRD. This approach to equality not only imposes obligations on the state to ensure that people with disability can realise their human rights, it also challenges the distinctions between mental and legal capacity, holding people with intellectual and cognitive impairments out as rights bearers on the same basis as others. In this way it assists in transcending some of the limitations of classical liberal theories of justice.

The Concept of the Rule of Law

The foundation for the rights-based approach to the law is the rule of law. While it has ancient origins (with Aristotle espousing that the rule of law was preferable to that of any individual),⁸³ the concept of the rule of law has a particular meaning in modern western liberal democracies derived from the common law, international conventions and academic jurisprudence.⁸⁴ For Tamanaha, the concept of the rule of law is focused on political liberty (the requirement for the democratic basis for the creations of laws); legal liberty (requiring that laws are declared in advance and that government officials also abide by pre-existing laws); personal liberty (requiring a minimal degree of personal autonomy or civil rights retained by individuals after they consent to live under laws); and institutional liberty (requiring the separation of the legislative, executive and judicial arms of government).⁸⁵

In modern liberal democracies, the dominant idea of the rule of law is about formal legality,⁸⁶ that is, it emphasises 'a rule-bound order established and maintained by government'.⁸⁷ Overall the emphasis is on predictability and certainty. This is reinforced by the following statement about the requirements of the rule of law by FA Hayek, who championed a conservative liberalism:

Stripped of all its technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand –

rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.⁸⁸

While this concept of the rule of law is consistent with the classical liberal tradition (characterised as an individualist political theory that champions liberty and the protection of rights, specifically contract and property rights),⁸⁹ it is also vitally important to those vulnerable to abuses of power. The rule of law, as Allan argues, ensures equality 'in the fundamental sense' in that it requires 'the consistent application of the ordinary law to every person'⁹⁰ and because it means political rulers 'cannot single out particular persons for special treatment'. In so far as the rule of law safeguards and promotes justice for the vulnerable, Bingham argues, it is essential. He points out that laws and legal processes are most needed for 'minorities, particularly unpopular minorities'.⁹¹ With the particularly important role it plays with respect to protecting against arbitrary deprivations of liberty, it provides a good foundation for a rights-based approach to the law that is concerned with the equal protection of the rights to liberty and security for people with intellectual and cognitive impairments.

There are, however, a number of alternative formulations of the rule of law, as described by Tamanaha, running from the formal (thin) to the substantive (thick) versions, with each formulation incorporating the requirements of the preceding one, making them progressively accumulative.⁹² The preceding discussion outlined what can be characterised as a thin or procedural version of the rule of law. Its focus was on a consistent application of law and procedures and process.

Yet, it is also a somewhat limited version of the rule of law. First, under this formal or thin version of the rule of law there are no content requirements for the law, as epitomised by this famous statement by Joseph Raz that '[a] non-democratic legal system, based

on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law'.⁹³ Second, this formal or procedural version of the rule of law does not aim for distributive justice or substantive equality. That is, it is not concerned about underlying structural inequalities and disadvantage. The rights-based approach to the law that will be outlined below adds further requirements to the formal or procedural version of the rule of law. Eventually, this approach arrives at what Tamanaha would call a thick or substantive approach to the rule of law.

Adding Human Rights to the Rule of Law

The first addition to the formal or procedural notion of the rule of law is the content requirement of human rights alongside common law rights.

Community of Principle/Constitutional Framework for the Law

The justification for adding fundamental human rights to common law rights as needing protection by the rule of law is that fundamental human rights form part of what Donnelly describes as an 'overlapping consensus' or a 'hegemonic political discourse' on the limits of political legitimacy in a contemporary world.⁹⁴ That is, they form part of the principles that are 'widely accepted as authoritative within the society of states',⁹⁵ or, as Dworkin would express it, they form part of the 'community of principle' underlying our system of law and government.⁹⁶

Internationally, political legitimacy of any given state is increasingly judged, Donnelly suggests, in terms of human rights.⁹⁷ Substantive rule of law theorists, such as Bingham, argue that a state can only claim adherence to the rule of law if it also protects those rights and freedoms that are regarded in most countries as 'fundamental'.⁹⁸ This is also reflected in the preamble to the UDHR which states, 'it is essential, if man is not to

be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.⁹⁹

While, as Bingham acknowledges, there is perhaps not a standard of human rights universally agreed upon,¹⁰⁰ nevertheless, he argues, 'within a given state there will ordinarily be a measure of agreement on where the lines are to be drawn' and that '[t]he rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental'.¹⁰¹

The rights to liberty and security can be understood as fundamental human rights. As discussed above, both as human rights and common law rights, liberty and security represent the modern liberal concern with the recognition of the 'separateness and sacredness of human bodies'¹⁰² and the right to self-determination. As both common law and human rights, the rights to liberty and security are integral to our modern system of government and law.

Benefits of Human Rights Jurisprudence

There are a number of benefits to adding human rights, alongside common law rights, for protection by the rule of law, in particular for people with intellectual and cognitive impairments. First, human rights jurisprudence places a significant emphasis on the inherent dignity and moral worth of all human beings and as such their equal and inalienable rights.¹⁰³ This is important for people with intellectual and cognitive impairments, who (along with many others) have been denied their personhood, and as such, their equal right to common law rights and to justice more broadly.

Further, human rights jurisprudence, particularly in the last two decades, has really made great strides in concretising what it means for a person with intellectual or cognitive impairment to be deprived of their liberty. Cases such as *HL v United Kingdom*¹⁰⁴ and *Cheshire West and Chester Council v*

P,¹⁰⁵ for example, have illustrated what deprivation of liberty looks like for people with disability, in the places that many people with intellectual and cognitive impairment live: supported accommodation, group homes and health facilities.

Justice: The Priority of Rights and Substantive Equality

This rights-based approach to the law adopts not only a content requirement of human rights (alongside common law rights) as demanding protection by the rule of law, but also the principle of justice. In this doctrinal approach, the principle of justice has two related requirements. First, justice means *prioritising the need to secure rights over other policy imperatives*. Second, it requires *equal concern and respect*. This approach has roots in a particular type of liberalism reflected in the eighteenth-century theorists such as Locke, Paine and Rousseau.¹⁰⁶ It is in contrast to classic liberalism, which emphasises individual liberty, but where there is little focus on distributive justice. This latter approach is exemplified in the theories of Hayek and Bentham, whose work also reflects an imperative to produce overall good social consequences, essentially the idea also underlying utilitarianism, ‘a good-based theory, that makes human rights a second order or derivative political principle’.¹⁰⁷ This doctrinal approach will draw on (parts of) the theories of two contemporary examples of this more substantive liberal tradition – Ronald Dworkin and John Rawls.¹⁰⁸ As will be illustrated below, the interconnected requirements of prioritisation of rights and equal concern and respect play an important role in counteracting the influence of prejudice and discrimination in the law, an important requirement for people with intellectual and cognitive impairments.

Rawls, Dworkin and the Priority of Rights

In *A Theory of Justice*, Rawls describes a conception of social justice, that is, ‘the way in

which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation’.¹⁰⁹ The first (and most important) principle of justice to which Rawls is committed is the first principle,¹¹⁰ that is, that ‘each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all’.¹¹¹ Ryan describes Rawls’ prioritisation of this principle of justice as the ‘priority of liberty’ or ‘the emphasis on the need to secure each individual against any temptation to sacrifice him or her for the general good’.¹¹² In this way, as Ryan points out, Rawls’ theory is opposed to utilitarianism, that is, the idea that the only way society should be run is by maximising the total welfare of all inhabitants.¹¹³ This means, argues Ryan, that before we think about economic matters, we must first think of civil liberties, and ‘[e]ven if we could make the worst-off person better off by curtailing civil liberties ... we must not do so, for doing so would violate the personal integrity that it is the whole point of this theory to protect’.¹¹⁴

Like Rawls, Dworkin also prioritises rights over other social policy imperatives and challenged utilitarianism, the idea that ‘an act is right if the general acceptance of a rule requiring that act would improve the average welfare of members of the community’,¹¹⁵ as well as other teleological theories. As such, Dworkin would disallow the pursuit of community goals that override the rights of individuals.¹¹⁶ In *Law’s Empire*, Dworkin expanded this idea to a hostility to pragmatism, or the idea that ‘judges should follow whichever method of deciding cases will produce what they believe to be the best community for the future’.¹¹⁷ Importantly, legal pragmatism ‘does not take legal rights seriously’, a requirement of Dworkin’s early work.¹¹⁸

Dworkin uses the metaphor of individuals holding a ‘trump card’. That is, rights are trumps when considered alongside other concerns. In contrast, as Letsas points out, under

a utilitarian calculation, rights are entered on the same par as other concerns (that is, they are not accorded a special weight). Further, they would only be protected if doing so would provide the maximum amount of benefit overall.¹¹⁹

Importantly, as both Waldron and Letsas point out,¹²⁰ Dworkin's theory does not provide that individual rights must never be limited in response to other policy interests, but rather that there are certain policy reasons that must never be used to justify their limitation. Waldron argues that Dworkin is explicit that the point of rights is to 'counteract the ineliminable presence of "external preferences"'.¹²¹ External preferences are those that do not value equal concern and respect, but 'value the assignment of goods or opportunities to some and not to others'.¹²² That is, external preferences tend to be based on prejudice and judgements about a person's moral worth.

Equal Concern and Respect

The prioritisation of rights and the role it plays in counteracting the influence of external preferences (or prejudice and discrimination) links to the second requirement of justice: equal concern and respect. At a foundational level, equality demands the recognition of all people as 'moral and political equals'.¹²³

While Rawls' first principle of justice was the prioritisation of liberty, the second was the principle of equality, that is, that 'social and economic equalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage; and (b) attached to positions and offices open to all'.¹²⁴

Similarly, in Dworkin's view, it is 'the right of each man to be treated equally without regard to his person or character or tastes'. This is enforced, he argues, 'by the fact that no one else can secure a better position by virtue of being different in any such respect'.¹²⁵ Dworkin, like Rawls, was also committed to political equality, as well as a

'morally acceptable distribution of material resources and protection of civil liberties'.¹²⁶ Dworkin's idea is that the state is required to treat every person with equal concern and respect,¹²⁷ and further that '[i]t must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern'.¹²⁸ The imperative to treat people as equals is central to Dworkin's idea of justice, and in *Taking Rights Seriously*, he states that:

We may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice.¹²⁹

In this sense, Dworkin's approach also echoes the Kantian belief in the dignity of human beings inherent in each and every person, simply because they are human beings, and that 'every man has a legitimate claim to respect from his fellow men and is in turn bound to respect every other'.¹³⁰ Therefore the principle of equality, including the equality recognition of the right to liberty and security as common law and human rights, in this normative framework is founded upon the notion of human dignity and the intrinsic worth of human beings.

For both Rawls and Dworkin, equal concern and respect is also central to their prioritisation of liberties (or rights). In this way, as Waldron states, the function of rights is to 'preclude governmental actions motivated by reasons that denigrate or express contempt for certain members or sections of the community'.¹³¹ That is, as discussed above, rights are better understood not as absolute guaranteed interests, but constraints on the kind of reasons that government may legitimately act on.¹³² Both Letsas and Waldron also emphasise that in this sense rights have an 'anti-majoritarian dimension',¹³³ and that they are 'trumps' over utilitarian majoritarian

arguments, based on other people's dislikes and prejudices, which must never be a basis for legal distinctions made between individuals.¹³⁴

Therefore the prioritisation of rights, underpinned by the principle of equal concern and respect, forms a very good foundation for countering majoritarian or populist arguments about the moral worth and status of individuals. This is particularly relevant for people with intellectual or cognitive impairments who historically have been subject to extreme prejudice and discrimination, or what Cynkar has termed 'transient psychological, sociological and economic theories' about people with disability.¹³⁵

Rights-based Approach to Equality: A Role for the CRPD

But to truly challenge the discriminatory attribution of rights to people with intellectual and cognitive impairments requires more than formal equality. One of the critiques of equality before the law, for example, is that, even once equality has been established, disadvantage persists and further, that 'this disadvantage tends to be concentrated in groups with a particular status, such as women, people with disabilities, ethnic minorities and others'.¹³⁶

The principle that like should be treated as like is one of the most common expressions of equality and is the foundation for the approach to non-discrimination known as formal equality.¹³⁷ Like the procedural or formal approach to the rule of law, formal equality is an important starting point. However, this approach fails to address the underlying disadvantage of those for whom equal treatment may in fact result in their disadvantage being entrenched.¹³⁸ It also fails to recognise that unequal treatment may be needed to achieve genuine equality.¹³⁹

What is needed is an approach to equality of rights that is not dependent on a certain physical, intellectual or cognitive status; that acknowledges that people with disability are

holders of rights, not subjects of welfare or protectionist approach; that recognises that people start from certain points of structural disadvantage; and that recognises that the primary responsibility on ensuring people with disability realise their human rights rests on the state. This is something that a rights-based approach to equality can offer.

A rights-based approach to equality is necessary if this normative framework is to transcend some of the issues identified in the first part of this article about the exclusion of people with disability from theories of rights and justice and the difficulties that have been encountered in practice in realising rights for people with disability. A rights-based approach to equality goes beyond ideas of formal equality and equal treatment, and instead emphasises the need for structural adjustments, including positive obligations on the state to ensure people with disability can realise their human rights on an equal basis with others. This approach is reflected in the CRPD.¹⁴⁰

While originating from the same liberal origins as other modern human rights instruments, the CRPD represents a significant paradigm change,¹⁴¹ one that must be integrated into any liberal theory of justice aimed at ensuring equality for people with disability.

First, the CRPD challenges the medical idea of disability, that is, that disability is defined by a person's impairment, including mental impairment, and is based on what is known as the social model of disability. The social model of disability locates a person's disadvantage or discrimination in the social environment, rather than the person's impairment.¹⁴² The definition of disability in article 1 of the CRPD emphasises interaction between impairment and social and structural barriers to equality.¹⁴³

Importantly, the CRPD also has foundations in a human rights model that recognises the inherent and intrinsic dignity of human beings, regardless of differences, including impairments. Article 3 refers to 'respect for the inherent dignity of persons' alongside the

‘respect for difference and respect of human diversity and humanity’.¹⁴⁴ Quinn and Degener comment that the recognition of human dignity for people with disability ‘serves as a powerful reminder that people with disabilities have a stake in and a claim on society that must be honoured quite apart from any considerations of social or economic utility’.¹⁴⁵

The CPRD also introduces a new definition of discrimination. Article 2 defines discrimination on the basis of disability that not only encompasses direct and indirect discrimination, but also the denial of ‘reasonable accommodations’.¹⁴⁶ ‘Reasonable accommodation’ is defined as:

[N]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.¹⁴⁷

That is, obligations are placed on state parties to ensure human rights of people with disabilities are respected, protected and fulfilled.¹⁴⁸ Degener argues that it goes beyond a substantive model of equality, providing a more comprehensive road map for change, it ‘thrives to overcome structural, institutional, as well as direct and indirect discrimination by introducing positive duties to transform society’.¹⁴⁹

This approach can be consistent with the principles of justice described above. It emphasises that human rights belong to people with disability because of their humanity, dignity and moral worth, common to all human beings. Like Dworkin’s metaphor of the ‘trump card’, it also ensures that their fundamental rights and liberties cannot be curtailed on a basis that is related to impairment or difference. If rights are to be curtailed, it must be on the same basis as others. As Harnacke articulates, ultimately the CPRD also ‘turns its back on a disability policy as a social welfare response and recognises that a

disability policy needs to be based on human rights’.¹⁵⁰

But, perhaps most significantly for this normative framework, this recognition of people with disability as bearers of human rights, not objects of welfare, also extends to people with intellectual and cognitive impairments. This, in a large part, arises from article 12: Equal rights before the law. Article 12(2) makes a distinction between legal capacity and mental capacity. It recognises that legal capacity (and thus the rights and duties that accompany it) is an inherent right and belongs to the person with disability, including a person with intellectual impairment (or a lack of mental capacity). Article 12(3) then goes even further by placing an obligation on state parties to support people with disability to exercise their legal capacity.

The obligation to make reasonable accommodations is specifically incorporated into article 14 of the CPRD dealing with the rights of liberty and security. Envisaging how this will look in practice will mean challenging the idea of divisibility of rights, and the distinction between civil and political rights on one hand and economic, social and cultural rights on the other.¹⁵¹ It may be, for example, that realising the rights to liberty and security involves making accommodations to ensure people with intellectual and cognitive impairments live in the community, with choices equal to others,¹⁵² and have access to habilitation and programs of support to attain and maintain maximum independence¹⁵³ as required under the CPRD.

Conclusion

The rights-based approach to the law in this doctrinal approach was built upon a commitment to the rule of law, that is, a commitment to the equal application of the law to everyone, equal protection under the law and protection from the arbitrary exercise of power. Yet, this is not sufficient, it was argued, for realising the rights of people with intellectual and cognitive impairments. First, this is

because they have been subject to underlying structural disadvantages, and, as such, equal treatment will not guarantee equal outcomes. Further, because of the linking in liberal theory of rights and justice to rationality and reason, people with intellectual and cognitive impairments have been viewed not as rights bearers, but objects of charity and protection. Finally, people with intellectual and cognitive impairments have been subject to significant prejudice – including paternalism, but also much worse.

Therefore this rights-based approach to the law added the further *content requirement* of the protection of human rights alongside common law rights, as central to the rule of law, and the *normative requirement*, the principle of justice. The principle of justice incorporated both a commitment to the *prioritisation of rights* over other policy imperatives as well as a commitment to *equal concern and respect*. As such, this approach to the rule of law is derived from a more substantive type of political liberalism, drawing in particular on contemporary liberal theories of law in the work of Rawls and Dworkin.

Responding to the challenge articulated at the outset of this article, namely the failings of many liberal theories of rights and justice to ensure people with disability can realise fundamental rights and liberties on an equal basis with others, a *rights-based approach to equality* was also proposed. This essentially adopted the paradigm underlying the CPRD. The CPRD repositions people with disability, including people with intellectual and cognitive impairments, as rights bearers, and deserving of rights and justice by virtue of their humanity, not their rationality, reason or cognitive capacity. Introducing new concepts of discrimination, the CPRD also imposes positive obligations on the state to ensure people with disability can realise their rights.

By adopting the rights-based approach to equality underpinning the CPRD, the normative framework arrives at its destination – that is, what Tamanaha would classify as the ‘thickest’ conception of the rule of law.¹⁵⁴

While this approach may be criticised¹⁵⁵ and characterised more as a ‘social welfare’ approach to the rule of law,¹⁵⁶ it is argued here that, without such an approach, certain groups in society, such as people with intellectual and cognitive impairments, are restricted in realising the benefits that the formal rule of law offers.

The formal idea of the rule of law essentially adopts the classic liberal approach of negative freedom, an approach that only places limits on the government, or as Isaiah Berlin expresses it, how a person ‘is or should be left to do or be what he is able to do or be, without interference by other persons’.¹⁵⁷ This is of little assistance to people with intellectual and cognitive impairments, many of whom have great difficulties in exercising appropriate remedies, for example when their right to liberty or security have been curtailed.

Krygier asks us to remember the purpose of the rule of law when considering what institutions, legal or otherwise, are required to guarantee the outcomes sought.¹⁵⁸ The test of whether the rule of law is successful is perhaps not in the ‘precision of legal rules’ he argues,¹⁵⁹ but in ‘the myriad law-affected everyday interactions of individuals and groups, which go nowhere near lawyers or officials, but where law in a rule-of-law society does its most important work’.¹⁶⁰

Therefore, the real test of the rule of law in our society with respect to people with intellectual and cognitive impairments may be in the everyday interactions in the places that they live – in aged care facilities, disability group homes, or health facilities. It may be in the examination of the extent to which they are exposed to the unregulated and/or arbitrary use of physical restraints, the use of psychotropic medication to control their behaviour or to detention in facilities which they cannot leave.

The next article, Part Two, seeks to translate this normative framework to how laws are interpreted and made. It will discuss how the rights-based approach to the law can be

applied to the adjudication of common law rights, the interpretation of statute and the making of laws to ensure the rule of law penetrates to the everyday lives of people with intellectual and cognitive impairments.

Notes

1. *Intellectual and cognitive impairment* is a broad term used in this article to include both intellectual disability and a range of cognitive impairments. Broadly, the term cognitive impairment refers to a loss of brain function resulting in decreased ability to process, learn and remember information, manifested in a variety of conditions including dementia, autism and autism spectrum disorders and acquired brain injury. While this article may at times discuss people with mental illness, this is not the focus.
2. Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, Report No 124 (2014).
3. Australian Law Reform Commission (n 2) 247.
4. Victorian Law Reform Commission, Guardianship Final Report, Report No 24 (2012) 318; Queensland Law Reform Commission, A Review of Queensland's Guardianship Laws, Report No 67 (2010) Vol 3.
5. Committee on the Rights of Persons with Disability, Concluding Observations on the Initial Report of Australia, Adopted by the Committee at its 10th Session (2–13 September 2013), UN Doc CRPD/C/AUS/CO/1 (21 October 2013) 5, quoted in Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, Issues Paper 44 (November 2013) 79.
6. Phillip French, Jeffrey Chan and Rod Carracher, 'Realizing Human Rights in Clinical Practice and Service Delivery to Persons with Cognitive Impairment who Engage in Behaviours of Concern' (2010) 17(2) *Psychiatry, Psychology and Law* 245, 245.
7. Kim Chandler, Ben White and Lindy Willmott, 'Safeguarding Rights to Liberty and Security where People with Disability are Subject to Detention and Restraint: A Practical Approach to the Adjudication, Interpretation and Making of Law (Part Two)' (2018) *Psychiatry, Psychology and Law* (forthcoming).
8. James Spigelman J, 'The Common Law Bill of Rights: Statutory Interpretation and

Human Rights' (Speech delivered at the McPherson Lectures, University of Queensland, 10 March 2008) in *Statutory Interpretation and Human Rights* (University of Queensland Press 2008).

9. Jack Donnelly, *Universal Human Rights: In Theory and Practice* (3rd edn, Cornell University Press 2013) 87.
10. William Bristow, *Enlightenment* (August 2010) Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/enlightenment/>> accessed 28 November 2017.
11. Bristow (n 10).
12. Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, Australia 2013) 31.
13. Danuta Mendelson, 'Historical Evolution and Modern Implications of Concepts of Consent to, and Refusal of Medical Treatment in the Law of Trespass' (1996) 17 *Journal of Legal Medicine* 1, 8.
14. Lynn Hunt, *Inventing Human Rights: A History* (WW Norton & Co 2007) 22.
15. Ian Ward, *Introduction to Critical Legal Theory* (2nd edn, Cavendish Publishing 2004) 29.
16. Zimmermann (n 12) 29.
17. Ward (n 15) 35.
18. Donnelly (n 9) 128.
19. Donnelly (n 9) 89.
20. Declaration of Independence (1776) quoted in Donnelly (n 9) 89.
21. George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) *Oxford Journal of Legal Studies* 705, 714.
22. *Secretary, Department of Health and Community Services (NT) v JWB (Marion's Case)* (1992) 175 CLR 218; *Rogers v Whitaker* (1992) 175 CLR 479.
23. Mendelson (n 13) 5.
24. Mendelson (n 13) 6.
25. Wayne Morrison (ed), *Blackstone's Commentaries on the Law of England* (vol 1, Cavendish 2001) 101.
26. Robert J Cynkar, 'Buck v Bell "Felt Necessities" v Fundamental Values?' (1981) 81 *Columbia Law Review* 1418, 1441.
27. *Loan Ass'n v Topeka* 87 US (20 Wall) 655, 662–63 (1875), quoted in Cynkar (n 26) 1441.
28. The ideas of natural rights, including that to bodily security and personal liberty permeated the early decisions of the state Supreme Courts in the initial medical battery cases including *Mohr v Williams* 95 Minn 261 (1905), *Pratt v Davis* 118 Ill App

- 161 (1905), *Rolater v Strain* 390 Okl 572 (1913) and *Schloendorff v Society of New York Hospital* 105 NE 92 (1914).
29. *Schloendorff v Society of New York Hospital* 105 NE 92 (1914).
30. *Schloendorff* 129–30 (Cardozo J).
31. *Re B (Adult: Refusal of Medical Treatment)* [2002] EWHC 429.
32. Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (2nd edn, Lawbook 2014) 140.
33. *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88; *Brightwater Care Group v Rossiter* (2009) WAR 84.
34. *Antunovic v Dawson* [2010] VSC 377 at [6] (Bell J).
35. Morrison (n 25) 101.
36. *Ex parte Walsh and Johnson; In re Yates* 37 CLR 74, 79 (Isaacs J).
37. Magna Carta 1297 (Imp) cl 39.
38. *Antunovic v Dawson* [2010] VSC 377 at [25]–[28] (Bell J). These statutes identified by Bell J include, for example, the Bill of Rights 1688, 1 William and Mary, s 11, cl 11; Petition of Right 1627, 3 Charles 1, cl 10; and various *Habeas Corpus* Acts which are in force in Australian states and territories by virtue of various application acts and reception acts.
39. *Antunovic v Dawson* [2010] VSC 377 at [25] (Bell J).
40. *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 79 (Isaacs J).
41. *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 (523).
42. *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70 at [88] (Black CJ, Sundberg and Weinberg JJ).
43. *Watson v Marshall & Cade* (1971) 124 CLR 621.
44. *Antunovic v Dawson* (2010) 30 BR 355.
45. Tom Bingham, *The Rule of Law* (Penguin 2010) 72–73.
46. International Covenant on Civil and Political Rights, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969, entered into force in Australia on 28 January 1993) ('ICCPR').
47. Human Rights Committee, International Covenant on Civil and Political Rights, 'General Comment No 35 art 9: Liberty and Security of the Person' 107th session, UN Doc (11–28 March 2013) 2.
48. Human Rights Committee (n 47) 3.
49. *De Wilde, Ooms and Versyp v Belgium* (1970) 1 EHRR 373 concerning applicants who were placed in a home for 'vagrants'; *Nielsen v Denmark* (1988) 11 EHRR 175 concerning the placement of a child in a psychiatric ward; *H M v Switzerland* [2002] 1 MHLR 209 concerning placement in a nursing home; *HL v the United Kingdom* (2005) 40 EHRR 32 concerning placement of an autistic man in a hospital facility; *Storck v Germany* [2005] 1 MHLR 211 concerning placement in a psychiatric institution.
50. *HL v the United Kingdom* (2005) 40 EHRR 32 at [90].
51. *Guzzardi v Italy* [1980] ECHR 5.
52. ICCPR art 9(1).
53. *Del Rio Prada v Spain* (2014) 58 EHRR 37 at [125].
54. Human Rights Committee, 'General Comment No 35 art 9: Liberty and Security of Person' UN Doc CCPR/C/GC/35 (16 December 2014).
55. *Del Rio Prada v Spain* (2014) 58 EHRR 37 at [125].
56. Human Rights Committee (n 47) 2.
57. Human Rights Committee (n 47) 2.
58. Human Rights Committee (n 47) 2.
59. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 2.
60. Convention of the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
61. Committee on the Rights of Persons with Disabilities, Concluding Observations on the initial report of Australia, adopted by the Committee at its 10th session (2–13 September 2013) UN Doc CRPD/C/AUS/CO/1 (21 October 2013) 5.
62. CF Goodey, *A History of Intelligence and 'Intellectual Disability': The Shaping of Modern Psychology in Early Modern Europe* (Routledge 2016) 327; Licia Carlson and Eva Feder Kittay, 'Introduction: Rethinking Philosophical Presumptions in Light of Cognitive Disability' in Licia Carlson and Eva Feder Kittay (eds), *Cognitive Disability and its Challenge to Moral Philosophy* (Wiley-Blackwell 2010) 8; Phil Fennell, 'Law and Psychiatry: The Legal Constitution of the Psychiatric System' (1986) 13(1) *Journal of Law and Society* 35, 36; Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2007) 90.

63. Martha C Nussbaum, 'Capabilities, Entitlements, Rights: Supplementation and Critique' (2011) 12(1) *Journal of Human Development and Capabilities* 23, 29.
64. Nussbaum, *Frontiers of Justice* (n 62) 19; Fennell (n 62) 41.
65. Carlson and Kittay (n 62) 1.
66. Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 1.
67. Thomas Finegan, 'Conceptual Foundations of the Universal Declaration of Human Rights: Human Rights, Human Dignity and Personhood' (2012) 37 *Australian Journal of Legal Philosophy* 182, 186.
68. Carlson and Kittay (n 62) 1.
69. Carlson and Kittay (n 62) 1.
70. Finegan (n 67) 186.
71. Fennell (n 62) 36.
72. Foucault has traced the history of the techniques used to classify, segregate and confine the mentally disordered, including the momentous changes in the legal relations with respect to the mentally disordered from the medieval times to the beginnings of the seventeenth century. While not so long ago, Foucault argued, madness or mental disorder 'had floundered about in broad daylight: in *King Lear*, in *Don Quixote*', it later became subject to confinement, whose object it was to hide away unreason: Michel Foucault, *Madness and Civilisation: A History of Insanity in the Age of Reason* (Richard Howard tr, Routledge 2001) [trans of: *Folie et Dérason: Histoire de la folie à l'âge classique* (first published 1961)].
73. Foucault (n 73) 42; Goodey (n 62) 327.
74. John Locke, *Two Treatises on Government* (London 1824) 2:60, quoted in Carlson and Kittay (n 62) 4.
75. Carlson and Kittay (n 62) 8.
76. Fennell (n 62) 36.
77. Fennell (n 62) 42.
78. Carlson and Kittay (n 62) 8.
79. Rosemary Kayess and Philip French, 'Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8(1) *Human Rights Law Review* 1, 14.
80. Kayess and French (n 79).
81. *Schloendorff v Society of New York Hospital* 105 NE 92 (1914) 129–30 (Cardozo J).
82. Chandler, White and Willmott (n 7).
83. TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993) 22.
84. Geoffrey de Q Walker, 'Rule of Law and the Democratic World Order' in Suri Ratnapala and Gabriel A Moens (eds), *Jurisprudence of Liberty* (2nd ed, LexisNexis Butterworths 2011) 85; Brian Z Tamanaha, *On the Rule of Law: History Politics and Theory* (CUP 2004) 33.
85. Tamanaha (n 84) 34–36.
86. Tamanaha (n 84) 119.
87. Tamanaha (n 84).
88. FA Hayek, *The Road to Serfdom* (Chicago University Press 1944), cited in Tamanaha (n 84) 65.
89. Tamanaha (n 84) 43.
90. Allan (n 83) 23.
91. Bingham (n 45) 4.
92. Tamanaha (n 84) 91; Brian J Preston, 'The Enduring Importance of the Rule of Law in Times of Change' (2010) 86 *Australian Law Journal* 175, 175.
93. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 1979) 211, 222, cited in Bingham (n 45) 66.
94. Donnelly (n 9) 55–58. Donnelly is drawing on Rawls' idea of the distinction between 'comprehensive religious, philosophical, or moral doctrines' like Confucianism and Marxism from 'political conceptions of justice'. Adherents of comprehensive doctrines may still be able to reach an 'overlapping consensus on a political theory of justice' 57.
95. Donnelly (n 9) 55.
96. Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 211.
97. Donnelly (n 9) 55.
98. Bingham (n 45) 68.
99. Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), preamble.
100. Bingham (n 45) 77.
101. Bingham (n 45) 77.
102. Hunt (n 14) 82.
103. See the preamble to the Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
104. *HL v the United Kingdom* (2005) 40 EHRR 32.
105. *Cheshire West and Chester Council v P* [2014] 1 AC 896.
106. Donnelly (n 9) 67.
107. Donnelly (n 9) 67.
108. Both Dworkin's and Rawls' theories are complex and have not been adopted in full here. However, their legal theories are

- particularly useful for the two requirements of justice for a rights-based approach to the law – the prioritisation of rights and equal concern and respect.
109. John Rawls, *A Theory of Justice* (Harvard University Press 1971) 7. Rawls believes that the principles of justice are those that ‘free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association’. In *A Theory of Justice*, Rawls returns to the social contract theoretical framework of the work of Hobbes, Locke and Rousseau in the seventeenth and eighteenth centuries. Rawls asks the reader to imagine a situation in which we are drawing up a social contract about how the social and economic institutions of the society should be organised, including the principles of justice. We are doing so in the conditions of ‘the veil of ignorance’, that is, we have no knowledge of the talents, attributes, or social and economic position we will occupy in such a society.
 110. Rawls (n 109) 60.
 111. Rawls (n 109) 60.
 112. Alan Ryan, *The Making of Modern Liberalism* (Princeton University Press 2012) 510.
 113. Ryan (n 112).
 114. Ryan (n 112) 512.
 115. Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1991) 95.
 116. Dworkin, *Taking Rights Seriously* (n 115) 185.
 117. Dworkin, *Law’s Empire* (n 96) 160.
 118. Dworkin, *Law’s Empire* (n 96) 160.
 119. Letsas, ‘Two Concepts’ (n 21) 715.
 120. Jeremy Waldron, ‘Pildes on Dworkin’s Theory of Rights’ (2000) 29(1) *Journal of Legal Studies* 301; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007).
 121. Waldron (n 120) 302.
 122. Dworkin, *Taking Rights Seriously* (n 115) 274.
 123. Donnelly (n 9) 62.
 124. Rawls (n 109) 60.
 125. Dworkin, *Taking Rights Seriously* (n 115) 179.
 126. Dworkin, *Taking Rights Seriously* (n 115) 179.
 127. Donnelly (n 9) 62.
 128. Dworkin, *Taking Rights Seriously* (n 115) 272–73.
 129. Dworkin, *Taking Rights Seriously* (n 115) 182.
 130. Immanuel Kant, *The Metaphysics of Morals* (M Gregor tr, CUP 1991) [trans of: *Die Metaphysik der Sitten* (first published 1797)] 462, quoted in Donnelly (n 9) 127.
 131. Waldron (n 120) 301.
 132. Waldron (n 120) 301.
 133. Letsas, *A Theory of Interpretation* (n 120) 119.
 134. Waldron (n 120) 304.
 135. Cynkar (n 26) 1459.
 136. Sandra Fredman, ‘Substantive Equality Revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712, 713, citing Gwen Brodsky and Shelaigh Day, ‘Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty’ (2002) 14 *Canadian Journal of Women and the Law* 185.
 137. Fredman, ‘Substantive Equality Revisited’ (n 136) 716.
 138. Fredman, ‘Substantive Equality Revisited’ (n 136) 718.
 139. Fredman, ‘Substantive Equality Revisited’ (n 136) 712.
 140. Theresia Degener, ‘Disability in a Human Rights Context’ (2016) 5 *Laws* 35.
 141. Kayess and French (n 79). Kayess and French point out that it was Ambassador Mackay, Chairman of the Ad Hoc Committee that developed the Convention on the Rights of Persons with Disabilities that characterised the Convention as embodying a ‘paradigm shift’. Whereas Glen points out that it was Thomas Kuhn who first coined the actual expression ‘paradigm shift’ in his book *The Structure of Scientific Revolution* (1962); Kristen Booth Glen, ‘Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond’ (2012–13) 44 *Columbia Human Rights Law Review* 93, 96.
 142. Kayess and French (n 79) 6.
 143. Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007 [2008] ATS12 (entered into force 3 May 2008) art 1 (‘CRPD’); Sandra Fredman, ‘Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights’ (2016) 16 *Human Rights Law Review* 273, 279.
 144. CRPD art 3.
 145. Gerard Quinn and Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, 2002, HR/PUB/02/1) 14.
 146. CRPD art 2.
 147. CRPD art 2.
 148. Caroline Harnacke, ‘Disability and Capability: Exploring the Usefulness of Martha

- Nussbaum's Capabilities Approach for the UN Disability Rights Convention' (2013) 41 Journal of Law, Medicine and Ethics 768, 774.
149. Degener (n 140) 19.
 150. Harnacke (n 148) 774.
 151. Daniel J Whelan, *Indivisible Rights: A History* (University of Pennsylvania Press 2010) 3. Daniel Whelan explains that stating that human rights are indivisible means that they are interdependent and that the enjoyment of some rights (for example, certain civil and political rights) may mean enjoyment of other rights from a different category (for example, social, economic and political rights).
 152. CRPD art 19.
 153. CRPD art 26.
 154. Tamanaha (n 84) 91–92.
 155. See Hayek, a champion of classic liberalism, who went so far as to say that pursuing the goals of substantive equality and distributive justice is inconsistent with the rule of law; Tamanaha (n 84) 67.
 156. Tamanaha (n 84) 67.
 157. Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty: Incorporating Four Essays on Liberty* (OUP 2002) 168.
 158. Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds), *Re-locating the Rule of Law* (Hart Publishing 2008) 45.
 159. Krygier (n 158) 63.
 160. Krygier (n 158) 64.

Acknowledgements

The authors wish to thank Elizabeth Dallaston for her research assistance.

Ethical standards: Option 1 – Studies with no human participants

Declaration of conflicts of interest

Author A [Kim Chandler] has declared no conflicts of interest

Author B [Ben White] has declared no conflicts of interest

Author C [Lindy Willmott] has declared no conflicts of interest

Ethical approval

This article does not contain any studies with human participants or animals performed by any of the authors.

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