Australian Academy of Law Tenth Annual Patron's Address

"Thinking About Law: The importance of how we attend and of context"

21 October 2021

The title of the address tonight as advertised contained a small compromise. Given what I propose to discuss, that is appropriate. I had entitled it: *Thinking about Law: The importance of how we attend and of context*. Alan Robertson rang me and asked for clarification. He was troubled by the word "attend": What did I mean? So the clarification, by adding "*to the matter at hand"* after the word *"attend",* was made to the title. I prefer my first title, because it directs the subject to the brain and its working.

I used the word "attend" in the sense used by neuroscientists:[1] vigilance, sustained attention, alertness, focused attention, and divided attention.[2] I did so because I wish to discuss a remarkable book written by a neuroscientist, psychiatrist, polymath, former Oxford English literature don, and thrice-elected fellow of All Souls College: Iain McGilchrist. The book is entitled *The Master and his Emissary: The Divided Brain and the Making of the Western World*.[3] I wish to discuss its relevance to how we think about law and approach legal problems.

Leaving to one side any spiritual question, no one book has the key to all things. McGilchrist is not the hedgehog (who knows one big thing) in contradistinction to the fox (who knows

[1] And also in the sense used by philosophers and psychologists. See, in this regard, the illuminating explanation expounded by William James in 1890 in *The Principles of Psychology* (Dover, 1950) Chapter XI, especially 402–404:

> *My experience is what I agree to attend to*. Only those items which I *notice* shape my mind – without selective interest, experience is an utter chaos. Interest alone gives accent and emphasis, light and shade, background and foreground – intelligible perspective, in a word. …
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> Every one knows what attention is. It is the taking of possession by the mind, in clear and vivid form, of one out of what seem several simultaneously possible objects or trains of thought. Focalization, concentration, of consciousness are of its essence. It implies withdrawal from some things in order to deal effectively with others, and is a condition which has a real opposite in the confused, dazed, scatter-brained state which in French is called *distraction*, and *Zerstreutheit* in German.

[2] See Iain McGilchrist, *The Master and his Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, 2009) 43–58 ('***ME***'); and Iain McGilchrist *Ways of Attending: How Our Divided Brain Constructs the World* (Routledge 2019*);* and also see: Neville Moray, *Attention: Selective Processes in Vision and Hearing* (Routledge, 2017) 1–9, especially 6, 28–38; Raymond M Klein and Michael A Lawrence, 'On the Modes and Domains of Attention' in Michael I Posner (ed), *Cognitive Neuroscience of Attention* (Guilford Publications, 2nd ed, 2011) 11–24. On divided attention, see Harold Pashler, *The Psychology of Attention* (Massachusetts Institute of Technology, 1998) 101–166.

[3] (Yale University Press, 2009).

many things).[4] But the fundamental working of the brain should be of interest to lawyers if it assists them in understanding the execution of their task.

The work was published in 2009 after having been 20 years in the making. It contains a discussion of the brain, of the centrality of the physical division of it into left and right hemispheres, of the asymmetry of the two hemispheres, and of the influence of how the two hemispheres work – upon human life and culture, including such aspects as language, music, dance, poetry, philosophy, art; indeed, upon all aspects of life. The second half of the book is a history of western civilisation and culture drawn from insight and conclusions about life, thought and creativity by reference to the ways of attending and ways of constructing the world by the left and right hemispheres. For this evening, it is the essential thematic ideas dealt with in the first half of the book that are of importance.

There is not one word in the book about the law. Nevertheless, as I read it for the first time in 2015 and 2016, I saw illumination about aspects of legal thinking that had been present to me since law school.

I undertake this task with diffidence. I am ill-equipped to debate any points of contention of neuroscience, but the relevance of the discussion to legal thinking of a practical everyday nature is within my remit of competence, and I think worthy of discussion.

May I express my thanks to four people: first to Iain McGilchrist himself for his illuminating work, for the opportunity to discuss with him his ideas, and for his friendship; secondly to Kevin Connor SC for giving me the book and for the countless hours of enthusiastic and deeply thoughtful discussion of this topic, and for his comments in the preparation of this address; thirdly to my associate, Ms Georgia Reid, for her insightful comments and erudition; and fourthly to the Hon Stephen Gageler AC, for our discussions on the topic and for encouraging me to deliver this lecture on the topic.

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[4] See Isaiah Berlin in *The Hedgehog and the Fox: An Essay on Tolstoy's View of History* (Phoenix paperback, 1992) made famous the reference by the Greek poet Archilochus to the two animals: 'The fox knows many things, but the hedgehog knows one big thing'. Berlin said (at 3): "…taken figuratively, the words can be made to yield a sense in which they mark one of the deepest differences which divide writers and thinkers, and, it may be, human beings in general." Berlin, then, appreciates the distinction between attending to the detail, that is to immediate experience, and to the abstract whole. Berlin goes on to address Tolstoy's genius, remarking (at 41):

> Tolstoy perceived reality in its multiplicity, as a collection of separate entities round and into which he saw with a clarity and penetration scarcely ever equalled, but he believed only in one vast, unitary whole. No author who has ever lived has shown such powers of insight into the variety of life – the differences, the contrasts, the collisions of persons and things and situations, each apprehended in its absolute uniqueness and conveyed with a degree of directness and a precision of concrete imagery to be found in no other writer.

Rather than begin with McGilchrist, let me start with some general observations about law.

Law can be seen as a system of rules and principles by which human society controls and mediates behaviour of the whole, of the part, and of the individual.[5] Law is also situated *within* human society and human experience: within, to paraphrase Isaiah Berlin, the cacophony and chaos of colliding liberties, colliding rights and duties, colliding understandings of fairness, of desert, of right and of wrong.[6] Within this cacophony, law mediates and controls, through rule and principle, relationships and exercises of power.

The Judiciary, as an independent branch of government, protects the whole, the part, and the individual by control of power:[7] public and private power, by declaring and enforcing rights and duties, and compensating for and restraining wrongs. Law and judicial power are, to a significant degree, built on abstractions, but they are necessarily human in character.

Law, in its form, has constituent constructed materials – statutes, interpretations of their meaning, judicial rule-making, including principles of application, learned writing, *la doctrine*: and so is made the general law and informing principle. These imperfectly segregated types of material are drawn from history, custom, values, social mores and expectations.

The expression of law is through language: the work of Parliament in statutes; regulations promulgated by the executive; and the articulation of legal rules and principles in judgments. Careful and disciplined textual analysis is a critical aspect of legal method in our legal system.

But our law is more than texts, and rules. Words are not immutable forms or material elements; they are symbols within which is found, indeed sometimes buried, *meaning*, anchored in a particular context.

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[5] See, for such perspective, HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 79–99. See further Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford University Press, 1980) 122–165, 168–171; Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999) 150–177.

[6] Isaiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin, *Liberty* (Oxford University Press, 2002) 192 at 207–215.

[7] This understanding of the function of the judiciary, as an independent branch of government, as a bulwark against the usurpation or abuse of power dates back to Aristotle: Aristotle, *The Politics of Aristotle*, tr Benjamin Jowett (Clarendon, 1885) Vol I, Book IV [1298a]. See further John Locke, *Second Treatise of Government* (Mark Goldie, ed, Everyman, 1993) 189 [143]–[144]; Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of Laws,* tr Thomas Nugent (Batoche Books, 2001) especially Book XI, Chapter 6; Jean-Jacques Rousseau, *The Social Contract*, tr Donald Cress (Hackett, 1987) Book III, Chapter XVI; James Madison, 'No. 47', James Madison, 'No. 48' and James Madison, 'No. 51' in James Madison, John Jay and Alexander Hamilton, *The Federalist* (Liberty Fund, 2001).

How these materials combine, coalesce, inter-relate, disengage, change and apply to complex factual circumstances are both legal and *social* questions. This must be so, as law is a binding agent, part of the structural form and tissue, of human society: its form, content and application being determined or shaped by its social, and its human, character.

A society which values freedom, the individual as well as the group, the happiness and the dignity of the individual, order and appropriate certainty, and which eschews unfairness and embraces mercy,[8] cannot exist without law that reflects these evanescently subtle and related qualities. In turn, these qualities demand that social and legal structures and their form and content rest on broad consent, respect, trust and confidence. This involves a broad democratic consent to power,[9] its sources and its modes of application. Our social and legal structures and their form and content, being human, and concerned with or manifesting human relationships, reflect human values, practicalities and felt necessities. The democratic consent to power is predicated upon an independent judiciary which (by its part in the democratic compact to ensure legality, but to do no more) protects those human relationships, values, and vulnerabilities.

Our tripartite division of governmental power was born of our political and legal traditions,[10] from the separation of church and state in the 11th century and following, and the emergence of the recognition of the equality of the soul before God – rich or poor, high or low, irrespective of gender.[11] The tripartite division of power rests on a practically-learnt and intuitive mistrust of power, and the sense of the need to diffuse it, drawn especially from the bitter, and sometimes bloody, struggles in the 17th and 18th centuries. We consent to some power, then, because we distrust other power and those who are unrestrained in wielding it.

So, trust emerges from mistrust: the first of our antinomies, of our antitheses, and of our reconciliations or adjustments, through synthesis and practical human judgement and the compromise of apparent irreconcilables.

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[8] See, for example, John Rawls, *A Theory of Justice* (Belknap Press, 1971) 1–6, 453–462.
[9] See generally Rousseau, *The Social Contract* (n 7); John Locke, *Second Treatise of Government* (n 7) Chapter 8 and 9, especially 163–4 [95], 180 [129]; TM Scanlon, *What We Owe to Each Other* (Harvard University Press, 1998); Michael Huemer, 'The State' in John Shand (ed) *Central Issues in Philosophy* (Blackwell, 2009) 257–271.
[10] See above (n 4).
[11] Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Allen Lane, 2014) especially Chapters 4 and 5.

As Cardozo described most clearly in the third book of his great trilogy,[12] *The Paradoxes of Legal Science,* we (as lawyers) daily meet and adjust, synthesise and compromise such opposites, antinomies, antitheses and apparent irreconcilables. That is because such is the stuff of daily legal and judicial work, situated within the cacophony of human experience: especially those incommensurable concepts of certainty and uncertainty; rule, principle and exception with which we must grapple and reconcile; the endemic impossibility of definition, despite the essentiality of the requisite degree of definition, of taxonomical structure, and of the expression of abstract concepts, all in the face of implicit wholeness of human relational ideas drawn from thought, feeling and emotion; and, importantly, notwithstanding the importance of words and text, the limits of explicit expression. These unending, but immediate, reconciliations make up much of our task as judges and lawyers to express and apply the law for individuals who come before us in court and in offices. As Cardozo posited: The enduring conflict is between stability and progress, mediated by a philosophy of change informed or supplied by a principle of growth.[13]

Let me turn to McGilchrist.

McGilchrist begins with realities and modes of experience: Humans have two fundamentally opposed realities, two different modes of experience, two ways of attending.[14] Each is important in its separate operation and both are important in their integration. Their differences are rooted in the bi-hemispheric physical structure of the brain.[15] The co-operation of the two hemispheres is vital; but conflict between them or the dominance of one over the other can explain aspects of life and culture, contemporary or past – for us tonight, law and legal thinking.

Both hemispheres deal with almost everything we do. The important difference is not *what* each does but how, *the manner in which*, each does what it does.[16]

Even at this introductory point, the importance for law and legal thinking can be glimpsed. The *manner* in which we approach legal problems and their solution will be critical in determining the outcome and the expression of principle. One only has to reflect upon the well-known remarks of Dixon CJ and McTiernan and Kitto JJ in *Jenyns v Public Curator*[17] as to the

[12] *The Nature of the Judicial Process* (Yale University Press, 1921), *The Growth of the Law* (Yale University Press, 1924) and *The Paradoxes of Legal Science* (Columbia University Press, 1928).
[13] Cardozo, *The Growth of the Law* (n 12) at 1.
[14] ME Ch 4, especially 133–141.
[15] ME Ch 2, 32–93.
[16] ME 33.
[17] [1953] HCA 2; 90 CLR 113 at 118–119.

different judicial techniques of the common law (at least with its procedures dominated by the jury) and equity to appreciate the importance of manner of approach – the way of attending:

> [Cases such as undue influence that affect the conscience] do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord *Stowell's* generalisation concerning the administration of equity: "A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case".

Of equal illumination on this point of the importance of the manner of legal approach is the judgment of Kitto J in *Livingston's Case*[18] in dealing with the proper *characterisation* of the rights of a residuary legatee in an unadministered estate for probate duty purposes.[19] His penetrating analysis begins with the rejection, as a helpful starting point, of an *a priori* definition (for all purposes) of the nature of rights in equity as *in personam* or *in rem* and arbitrary abstracted defined categorisation such analysis produces. Yet, a debate built on that very foundation had been carried on in the late 19th and early 20th centuries by some of the finest scholars in the Anglo-American legal world: Pound, Scott, Hohfeld, Maitland, Ames, Langdell, Pomeroy, Austin and others.[20] The misconceived and deeply misleading search for universal definition in equity is nowhere better challenged than by the authors of *Meagher, Gummow and Lehane* in the luminous chapter on equitable estates and interests.[21]

McGilchrist identifies a durable generalisation about the two hemispheres: The left (that is, the hemisphere that controls the right side of the body and there the *grasping* right hand) has a

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[18] [1960] HCA 94; 107 CLR 411 at 448–454.

[19] Notably, the following remarks of his Honour:

> At 448: I venture to think that for the purpose of solving a concrete legal problem with respect to such a set of rights, more hindrance than help is likely to come from an attempt to classify them according to Austinian terminology as rights *in personam* or rights *in rem.*
>
> At 450: If a question arises as to whether a particular asset "belongs" to the residuary legatee within the meaning of some statute or other instrument, the answer cannot be reached without consideration of the precise rights of which the residuary interest consists. Similarly, if the question is where should the interest be considered in law as locally situate, the rights which it comprehends must be clearly understood before an answer can be given.

[20] See Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) *Harvard Law Review* 383; AW Scott, 'The Nature of the Rights of the "Cestui Que Trust"' (1917) 17(4) *Columbia Law Review* 269; Wesley Newcomb Hohfeld, 'The Relations Between Equity and Law' (1913) 11 *Michigan Law Review* 537; Wesley Newcomb Hohfeld, 'The Conflict of Equity and Law' (1917) 26 *Yale Law Journal* 767; AH Chaytor and WJ Whittaker, *Equity: A Course of Lectures* (Cambridge University Press, 2011); JB Ames 'The History of Assumpsit- Implied Assumpsit' (1888) 2 *Harvard Law Review* 53; CC Langdell, 'A Brief Survey of Equity Jurisdiction' (1887) 1 *Harvard Law Review* 55; John Norton Pomeroy and John C Mann, *A Treatise on the Specific Performance of Contracts* (Banks & Co, 2nd ed, 1926); John Austin, *Lectures on Jurisprudence* (John Murray, 5th ed, 1885).

[21] JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 5th ed, 2015) ch 4 esp [4-010]

tendency to deal with pieces of information in isolation; whereas the right hemisphere has a tendency to deal with the whole of the subject.[22] McGilchrist says that the importance of the distinction cannot be over-stated, because the difference in approach goes to the core of how we understand the world and ourselves.

This observation is worthy of deep contemplation. Are we not familiar with, indeed do we not daily experience, and express ourselves using, deconstructed taxonomically-arranged, abstracted and defined parts of a whole (generally a relational) idea or concept? Do we not constantly seek to define reality with words? Do we not see words used to arrange abstracted parts into the expression (or re-creation) of a whole idea, often in the grasping or reaching for certainty, and thereby seeking to define exhaustively, rather than to describe the context illustratively; all in order, hopefully, to simplify, almost it seems sometimes to commodify, ideas for future (often mechanical) use?

McGilchrist emphasises that things (that is, ideas, emotions, objects, subjects) change according to the stance we take or adopt towards them: to the type of *attention* we give to them and to the world.[23] A feature of the human condition is the ability to stand back and rise up from immediate experience – to plan, and to think inventively.[24] This power of abstraction comes from the frontal lobes. But such detached abstraction must combine with the experience from which it derives.[25] To live only in experience is to be a mere creature or animal. To stand back and distance oneself entirely and constantly is not to live or experience at all, but to become abstracted or divorced from human reality. McGilchrist sees an optimal degree of separation: the necessary distance for the frontal lobes to perceive the world and other people in experience, to turn us into social beings, and to provide, through conceptualising and feeling, a sense of the spiritual.[26] This is the human necessity of experience, and of removal and distance from experience, working together.

For law and lawyers this relationship between experiential reality and abstracted conceptualisation derived from distance is at the heart of our way of thinking. It is what we do. The abstract is essential to form, definition and taxonomical structure, but experience is at

[22] ME 25–28, 191.
[23] ME 28. On this point, see further the philosophy of Iris Murdoch, notably 'The Idea of Perfection' in *The Sovereignty of Good* (Routledge, 2014) 1–44; William James, *The Principles of Psychology* (Dover, 1918) Vol 1 ch XI; and William James, *Pragmatism* (Longmans, 1911) Lecture 1.
[24] ME 21. See also, for example: Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Random House, 2014) especially Part 1 Ch 1.
[25] ME 49–51.
[26] ME 22.

the heart of the human whole in what is ultimately a social science – the regulation of human life and society. Experience, context and the implicit are fundamental to our conceptions of, and our ability to perceive and attain, meaning and justice.

Thus, Sir Victor Windeyer, a great lawyer of clear logic and definition, who had experienced life in its most brutal form in war in North Africa and New Guinea, could encapsulate the essence of law in its humanity in speaking of mandatory sentencing and the intention of Parliament: "It is that a capacity in special circumstances to avoid the rigidity of inexorable law is the very essence of justice."[27] In so expressing himself, he echoed what Aristotle said[28] that the nature of equity was the correction of the universality of the law.

McGilchrist sees the asymmetry of the hemispheres (that is, their bi-hemispheric opposed natures) as fundamental to the essence of humans and animals alike.[29] As explained by the need in life to focus wilfully on the immediate with precision and narrowness, upon the task being undertaken and upon self, and at the same time, upon the whole context around one and one's place therein.[30] The bird focusing on obtaining food on the ground must observe the world around so as not to become prey itself. For humans, the needs of self must be understood, but so too must the place of self in relation to others. These are two quite different types of *attention* to be kept distinct and separate from each other if each is to be effective, but both to operate at the same time. The success of the creature comes from the effective lateralisation of both ways of *attending*. A division of the brain is a result of the need to bring to bear two incompatible types of attention to the world *at the same time*.

These different ways of attending reflect the right hemisphere seeing things as a whole; and the left seeing things abstracted from context, broken into parts, looked at narrowly, from which it re-constructs or re-presents what is taken to be a whole (by organising it into taxonomy) which, inevitably, is different to the reality itself.

The above appreciation is important for law and legal thinking. If the whole is, as it almost always will be, a human relational conception, at least to some degree, how we view it (as a whole) yet analyse it, abstract, particularise, (re-)organise and (re-)present it will depend on the work of the two hemispheres.

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[27] *Cobiac v Liddy* [1969] HCA 26; 119 CLR 257 at 269.
[28] *Nicomachean Ethics*, tr Terence Irwin (Penguin, 1999) Book V ch 10.
[29] ME 26.
[30] ME 22.

The role of definition and the search for exhaustive textual certainty may, depending upon the nature of the whole subject, be apt to create a misleading self-referential default version of "reality". This may be so (depending on the subject) if the right hemisphere's feelings of empathy, emotional understanding, intuition and relational context are disregarded and discarded in, and by a reliance only upon, abstracted deconstruction into parts and reconstruction into a taxonomically arranged default "whole", which lacks a human reality.

Take sentencing. The High Court since at least *Wong*[31] has rejected rules of literal application and abstracted reasoning in sentencing for crime. The necessary instinctive synthesis is essentially the *human* response to the often conflicting circumstances before the court. The experiential, the implicit and the importance of feeling to the human circumstance allows the court, as an institution with its experience and knowledge, to express its response as the manifestation of just state power to the inherently human, infinitely varied, often tragic and violent situations before it. One cannot reason out the imposition of sentences in logical form.[32] Rather, the task involves the articulation of conclusions drawn from or evoked by human feeling shaped by legal rules and statutory factors. But the process is one heavily influenced by the whole human reality, rather than the deconstructed parts of any taxonomical structure.[33] Hence the rejection of rigid grid sentencing, and the demand for the focus on the individual: that the individual and his or her place in society be attended to.

McGilchrist thus sees the nature of *attention* – the different ways of *attending* – as fundamentally important. The type of attention we give (left hemisphere dominance for local narrowly focused attention and right hemisphere dominance for broad, global and flexible attention) is vital to our perception and processing of experience.[34] We have to *experience* the world, but to come to *know* it we need to process the experience. So we come to re-cognize the experience.[35] This enables recognition and categorisation of experience through abstracted thoughts. This can become automatic and familiar. Too familiar and too automatic, and we cease to experience, or recall our experience, of the world, and begin to experience our re-

[31] *Wong v The Queen* [2001] HCA 64; 207 CLR 584; *Markarian v The Queen* [2005] HCA 25; 228 CLR 357; *Hili v The Queen* [2010] HCA 45; 242 CLR 520; *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120; *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571; *Elias v The Queen* [2013] HCA 31; 248 CLR 483*; Kentwell v The Queen* [2014] HCA 37; 252 CLR 601*; CMB v Attorney General (NSW)* [2015] HCA 9; 256 CLR 346*; Director of Public Prosecutions v Dagliesh (a pseudonym)* [2017] HCA 41; 262 CLR 428.

[32] Attempts to do so have, however, been made: see for example, *State v Loomis* 881 N.W.2d 749 (Wis. 2016) concerning the use of algorithmic assessments of recidivism risk used to determine sentences in the United States.

[33] See, for example, David Hodgson, *Rationality + Consciousness = Free Will* (Oxford University Press, 2012) Chapters 5 and 6.

[34] ME 28–29.

[35] ME 206.

presentation of it. This is the right hemisphere experiencing and the left hemisphere processing and categorising.

The relevance of this to law has become increasingly apparent to me, though, in a sense, is perfectly clear. Human experience is abstracted, deconstructed into particular parts, and categorised and so re-presented for use in the setting of rules and principles to help regulate and control social behaviour. So much is, in a sense, straightforward, and perhaps obvious. But it is necessary to recall that re-presented categories are only a re-constructed reality, and may not accord with experience itself, in particular in human application as the law.

McGilchrist's work provides valuable insight for the manner of setting rules and principles and the manner of thinking about them. McGilchrist sees the hemispheric differences as important in the hierarchy of attention: in seeing the whole or the part, in seeing integration or division, in contextualising or abstracting, in individualising or in categorising, in personalising or in impersonalising, in reason or in rationality, in the express or in the implicit, in recognising the importance, but the limits, of express words and the importance, but the place, of the implicit, the ambiguous and the uncertain in appreciating the whole.[36]

All these antinomies are vital for the search (as a lawyer) for the unachievable and the indefinable. The unachievable (but vital) is certainty. The indefinable comprises the moral values that underpin and inform our sense of justice.

If certainty is vital, what is it? It cannot mean the static condition. The only ever-present, and in that (oxymoronic) sense static condition of life is change. The certainty for which we search must be *the requisite degree of certainty* for the context and the question at hand. Abstracted categorisation is essential to this search. The urge to categorise and the search for certainty are human instincts. But the limits and the dangers of the search should be appreciated. In relation to categorisation, the pioneering British psychiatrist Henry Maudsley saw the danger in 1867 when he said the following of "ideational insanity":

> …a sufficiently strong propensity not only to make divisions in knowledge where there are none in nature, and then to impose the divisions on nature, making the reality conformable to the idea, but to go further, and to convert the generalisations made from observation into positive entities, permitting for the future these artificial creations to tyrannise over the understanding.[37]

[36] ME 43–58.
[37] *Psychology and Pathology of the Mind*, (Appleton, 1867) 323–324, referred to at ME 53.

The subject of Maudsley's criticism was the mode of thought of which Kitto J was critical in *Livingston's Case* and which Oliver Wendell Homes called the "delusive exactness" as a "source of fallacy throughout the law".[38]

The late 19th century pragmatist philosopher and psychologist, William James (the brother of Henry and a contemporary and friend of, and an influence on, Holmes,[39] and as a teacher of the next generation, a great influence on Learned Hand[40]) beautifully encapsulated a similar idea:

> Beautiful is the flight of conceptual reason through the upper air of truth. No wonder philosophers are dazzled by it still, and no wonder they look with some disdain at the low earth of feeling from which the goddess launched herself aloft. But woe to her if she return not home to its acquaintance…Every crazy wind will take her, and like a fire-balloon at night, she will go out among the stars.[41]

So, it is to certainty, context, attention, moral sense and values to which we must come, and the place of language, uncertainty, complexity, ambiguity and the implicit, in understanding law.

The left hemisphere employs man-made abstractions to fix them in a certain place with express language by denotation.[42] The right hemisphere understands or appreciates ambiguity born of context and the notion of connotation.[43] The balance and integration of the two is of singular significance and importance for legal thinking.

The rule or principle or maxim must be expressed in words, but may contain a moral value, which cannot be logically or rationally worked out by the left hemisphere. Moral values are, McGilchrist posits,[44] irreducible aspects of the phenomenal world: a form of individual and shared social experience appreciated by the right hemisphere. So, a sense of justice is underpinned by the right hemisphere. The limits and difficulty of expression in text seeking to define conclusively (as opposed to articulate) such values by the abstraction of the left hemisphere are then readily appreciated.

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[38] *Truax v Corrigan* 257 US 312 at 342; see JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 107 [4-010].
[39] G Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, 1993) 92-93, 146-147
[40] Gerald Gunther, *Learned Hand: The Man and the Judge* (Alfred A Knopf, 1994) 35-37
[41] William James, 'On The Function of Cognition' (1885) 10(37) *Mind* 27.
[42] ME 174–175.
[43] ME 178. See further John Stuart Mill, *A System of Logic, Ratiocinative and Inductive* (Longmans, Green & Co, 1898) Chapter 2, especially §5, and Chapter 3.
[44] ME 86.

The use of express text is critical to law in a society built on the written word, as ours is. Other societies are built differently: such as the societies that predate, but which still have the capacity to influence deeply, our modern polity on this continent, in which important conceptions such as meaning, human interaction, law and the bonds of religion and society are transmitted by the spoken word and by storytelling.[45]

Certainty in the context of the written word can be seen as a hallmark of a stable system of rules and principles in a society built on wisdom expressed in writing,[46] but the certainty for which search is worthy, indeed useful, must be the requisite degree of certainty.

The fallacy with which McGilchrist engages is the stubborn view that certainty is or can be achieved *only* through the abstracted taxonomically organised text arranged by the left hemisphere. McGilchrist is not concerned with law. But we are. Certainty, McGilchrist says, is not to be drawn from, or to be equated with, express text *alone*.[47] So to equate the two (that is, to equate certainty with express words) is to ignore the primacy of the implicit and the fact that the roots of explicitness lie in the implicit. The metaphor drawn from the right hemisphere comes before the denotation of the text drawn from the left. For McGilchrist the idea comes from the right hemisphere; its expression, and so its construction, from the left. For McGilchrist, explicitness ties one to what is already known; so explicitness is rooted in the conception of the whole (new) idea and thus cannot be untied from the implicit and the contextual.

Once again the value of this to legal thinking is immense. Depending upon the subject matter, the nature of the problem and context, the search for certainty or clarity can be disrupted, not enhanced, by an over-emphasis on words to define precisely the parts. Whereas the search for certainty or clarity (to the requisite degree) *can* be enhanced by limiting textual expression to seemingly less precise words drawn from sensing or appreciating the appropriate degree of focus: the appropriate focal distance to perceive, contemplate and theorise upon the experiential reality in order to create a workable rule or principle.[48]

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[45] For an insightful account of Indigenous ways of thinking, see Tyson Yunkaporta, *Sand Talk: How Indigenous Thinking Can Save the World* (Text Publishing Company, 2019).

[46] On (un)certainty, see HLA Hart, *The Concept of Law* (n 5) 123–140.

[47] As Holmes said: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it was used": *Towne v Eisner* 245 US 418 at 425 (1918).

[48] On this concept of focal length, the writing of Frederick Schauer may be noted. Schauer rejects an understanding of the law as a collection of rules, reduced into writing in a master rulebook, and rather finds that the most fitting analogy for the common law is the camera: the multiple, sometimes seemingly minute movements to-and-fro

In reflecting upon a successor work by Professor Julius Stone[49] to his magisterial work, *The Province and Function of Law*,[50] the former President of the New South Wales Court of Appeal and High Court judge, Sir Kenneth Jacobs, discussed the judicial process and the reliance on syllogism and logic and the linguistic refinement of concepts by distinctions which (in a logical search for certainty) in fact makes the law arbitrary and uncertain. With great perspicacity, he said:

> The law which seeks certainty in reasoning, which attends to verbal distinction while ignoring or affecting to ignore social reality, becomes truly uncertain in the sense that it becomes increasingly impossible to predict the course which decisions are likely to take.[51]

Certainty is often more easily obtained by a rule based on identifying or describing *a legal space* by reference to a well-understood and familiar whole human concept, than by drawing a line by defining a theoretical abstraction that tends to artificiality and arbitrariness.

The thesis of McGilchrist of the complementarity of the left and right hemispheres, of the importance, but limits, of abstraction and of the appropriate distance to raise us above the mere experiential, of the necessity of the experiential to be the roots of and context for the abstract, of the need to reintegrate the analysed abstraction back into the whole,[52] of the significance of the implicit and the ambiguous in this process of reintegration and of the creation of meaning, and of the *requisite degree* of certainty, are all critical for legal thinking.

As both Holmes and Cardozo recognised, law, like life, is replete with messiness, ambiguity and contradictions. Hence the force of Holmes' epigram as to the life of the law being not logic but experience.

Cardozo's great trilogy, *The Nature of the Judicial Process* (1921), *The Growth of the Law* (1924), and *The Paradoxes of Legal Science* (1928) embodies a legal theory built on the law as both a human and social reality, structured by rules and principles, built on clarity of expression, but never being disengaged from the human and social relations it protects and

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necessary to obtain the appropriate focus. This, for Schauer, was an instantiation of Lord Mansfield's dictum that the common law works itself pure: however, it is also an apt analogy for the judicial task and method. If the judiciary strives to achieve the correct focal length at first instance, perhaps there would be less need for the common law to work itself pure: Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009) 112; *Omychund v Barker* (1744) 26 ER 15 at 23.

[49] *Legal System and Lawyers' Reasoning* (Stevens, 1964).

[50] Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control; A Study in Jurisprudence* (Associated General Publications Sydney, 1946).

[51] Kenneth Jacobs, 'Lawyers' Reasonings: Some Extra-Judicial Reflections" (1965) 5 *Sydney Law Review* 425, 428.

[52] ME 206–210.

serves. The antinomies and antitheses expressed by Cardozo in the words to which I referred earlier could have been written by McGilchrist. Cardozo understood that certainty was a basal feature of a mature and civilised legal system, but he also understood that certainty is not reached by words and rules alone. For Cardozo, certainty was to be reached having regard to recognisable concepts (McGilchrist would say, appreciated by the right hemisphere) such as trust, honesty, reasonableness, common sense and good faith built around strong and clearly expressed reason, rules and principles. These concepts are not fully definable, but are experientially recognised as familiar in their appearance, or in their absence, by all people.

The appreciation of the potential for co-operation and conflict between the two hemispheres of the brain in how we think about the law helps us to recognise and give weight to aspects of law's content and demands and how to think of and about it, at least as follows:

- The search for certainty, whilst fundamental, has its limits. Such limits are derived from the nature of the question, from the human reality of the whole subject with which we may be dealing, and from the limits of expressed text.
- It is the requisite degree of certainty that is properly the subject of search, ascertained by the appropriate degree of focus or distance at which to abstract *and* perceive the subject or problem at hand.
- Context and the implicit are fundamental in this search for meaning and certainty, as they influence and help regulate the appropriate focal distance to abstract *and* perceive the subject or problem at hand.
- Definition and taxonomical structure are important, indeed vital, in the search for meaning and certainty, but there are limits to their utility and danger in their over-use. They derive from abstractions of reality, and must be placed back in the context of the whole in a process of reintegration of the particular into the whole. Sometimes articulation of the contextual whole by description creates greater certainty and understanding of the rule than abstracted definition.
- The need to appreciate the place of metaphor as the source of right hemisphere inspiration, but to appreciate the danger of concretising metaphor into a thing or intellectual commodity, as a substitute for both context and any further necessary analysis or reasoning.
- The importance of context, of the whole, and of understanding why the question is being asked.

Clarity, certainty, definition and precise analysis are *protected*, not undermined, by an appreciation of the implicit, the uncertain, the ambiguous, complexity and the limits of text *when those matters cannot be avoided.* Not to appreciate and recognise these matters in thought and expression *when they cannot be avoided* only creates a false and arbitrary so-called-certainty which gives a felt sense of artificiality in textual expression that crumbles against reality.

Almost all important legal concepts are not fully and precisely definable, and have only real meaning in context. All are to be more fully understood by being built around by expression in explicit text, but all are, to a significant degree, experiential, rooted in human emotion or feeling and understood and judged only by an appreciation of the implicit, and in their context.[53] The binding foundational conceptions of honesty, loyalty, fairness, mercy, common sense, human decency and the dignity of the individual that inform legal principle are likewise indefinable exhaustively and fundamentally contextual.

Let me now illustrate the above by reflecting upon some different legal problems.

Let me begin with statute: where words are the tools of Parliament – to express law.

Recently, the Honourable Murray Gleeson AC gave an insight into the drafting of Pt IVA of the *Income Tax Assessment Act 1936* (Cth).[54] He referred to the appreciation by the framers of Pt IVA of the task before them: the use of words to give expression to an idea that was inherently without sense: that there was a rational boundary that could be drawn in words by definition between acceptable tax planning and lawful but unacceptable tax avoidance. In his discussion of the topic he shortly, but customarily lucidly, revealed the emptiness of attempts to define unacceptable tax avoidance, rather than identifying the subject matter of the problem and the context at hand being the "scheme" to avoid tax, if there was said to be one.

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[53] See, for example, Iris Murdoch, *The Sovereignty of Good* (Routledge, 2014) 31–32:

> "Learning takes place when words are used … in the context of particular acts of attention. …Words have both spatio-temporal and conceptual contexts. We learn through attending to contexts, vocabulary develops through close attention to objects, and we can only understand others if we can to some extent share their contexts. (Often we cannot). …
> This dependence of language upon contexts of attention has consequences. … Human beings are obscure to each other, in certain respects which are particularly relevant to morality, unless they are mutual objects of attention …"

[54] Australian Academy of Law, 'Marking 40 years of Part IVA of the *Income Tax Assessment Act 1936*'.

The fundamental method of judicial ascription of meaning in the process of statutory construction can now be seen in the High Court as settled: the task begins and ends with the words of the statute in their context.[55] That people disagree about meaning does not mean that they have used different methods to reach their views (one method being right, and the other wrong). It may be that the differences come from different views of the whole, how the words sit in their context, which may not be apt for exhaustive explanation, because it depends on the perception of context, including the implicit. The meaning of words in their context as a whole may strike people differently. Too often rivers of almost meaningless debate follow differences of view as to meaning, when the differences may be explained by different perceptions of the words in their whole context, which perceptions are both open and difficult to explain in words. Such differences will be no less likely (indeed probably more likely) when different people read the same words without, and taken out of, their context.

Let me also say something of statutes which criminalise conduct in an economic or commercial context. The evil the subject of such provisions is generally identifiable. Take insider trading and cartel behaviour for instance. At their foundation, they have recognisably dishonest or sharp practice, by reference to human experience. In one case, insider trading, there is the taking of advantage of special knowledge gained through some position of confidence or some particular function which allows profit to be made secretly at the expense of others before the knowledge becomes widely known.[56] In the other, cartel behaviour, there is rigging or fixing of a market or a transaction to extract a benefit.[57] The sense of what is wrong is a human one based on experience, perception and intuitive response. One can see the wrong if the activity is described; but to define the behaviour by reference to abstractions, in particular exhaustively, has its challenges. If one goes about defining the conduct by exhaustive expression of abstractions two things may follow: first, a lack of clarity through complexity; secondly, and more importantly, the draining of the sense of the human wrong involved. A crime that is confusingly expressed, and in language that makes appreciation of the moral wrong involved difficult, brings challenges to the administration of justice.

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[55] *R v A2* [2019] HCA 35; 277 A Crim R 539 at 522 [33]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at 519 [39]; *Thiess v Collector of Customs* [2014] HCA 12; 250 CLR 664 at 671–672 [22]-[23].
[56] See *Corporations Act 2001* (Cth) Chapter 7, Part 7.10 Division 3.
[57] *Competition and Consumer Act 2010* (Cth) Part IV.

The technique of equity is built not on inflexible rules, but on principles drawn from conscience, adapting itself to complement the common law and statute where context and circumstance require it. In that sense equity is inherently contextual and its spirit is drawn from a sense of right and of conscionability – right hemisphere conceptions drawn from society and context. This can be seen in Cardozo J's summing up of the so-called rule of mutuality in the award of specific performance in *Epstein v Gluckin:*[58]

> If there ever was a rule that mutuality of remedy existing, not merely at the time of the decree, but at the time of the formation of the contract, is a condition of equitable relief, it has been so qualified by exceptions that, viewed as a precept of general validity, it has ceased to be a rule today…What equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or defendant.

In the realm of public law, consider jurisdictional error, or the ground of review for legal unreasonableness. Judicial review on such grounds is fundamentally about the control of power. The concepts involved, and the limits of power, are not susceptible to exhaustive definition. The boundaries of these concepts cannot be precisely defined. What is required is an evaluation of the text, scope and purpose of the relevant statute, the factual context and the underlying values relevant to the exercise of executive or public power. An understanding of this can be seen in the emphasis in *Kirk*[59] that the examples of jurisdictional error provided in *Craig*[60] do not form a "rigid taxonomy of jurisdictional error."[61] Similarly a conclusion that an administrative decision is legally unreasonable is not based on linguistic analysis of different judicial expressions of some defined test. Such comprehensive textual definition is not possible. Rather, whether a decision is legally unreasonable is to be identified by a process that includes evaluative characterisation.

The doctrine of penalties discloses a struggle over the centuries between definition and abstraction of rules on the one hand, and characterisation by reference to an underlying human relational concept based on experience, on the other. This debate has often failed to recognise the crucial difference between *construction* (ascription of meaning and definition) and *characterisation* (a conclusion as to substance by reference to the principles

[58] 233 NY 490 at 493-494 (1922); As to the technique of equity, see ICF Spry, *Equitable Reme*dies (Thomson Reuters, 9th ed, 2014) ch 1; P Young, C Croft and ML Smith, *On Equity* (Lawbook Co, 2009) ch 2; J Story, *Commentaries on Equity Jurisprudence* (Little, Brown and Co, 6th ed, 1853) ch 1.
[59] *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1; 239 CLR 531.
[60] *Craig v South Australia* [1995] HCA 58; 184 CLR 163.
[61] See further *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323.

and values in play rooted in the reality of human experience or existence).[62] The doctrine has, at its heart, a refusal by courts to countenance oppression, private punishment or unconscientious arrangements. This was legal policy built on human experience in life and commerce. The history of the doctrine from the penal bond with conditional defeasance, through the development of the law of contract and damages saw attempts made to identify tests and rules, most notably the four tests of Lord Dunedin in *Dunlop,*[63] and the dichotomy of the genuine pre-estimate of damage or penalty. The modern doctrine, as expressed by the High Court in *Paciocco*[64] and by the United Kingdom Supreme Court in *Cavendish* and *ParkingEye*[65] reflects a rejection of a rule or definition-based approach founded on the (doubtful) dichotomy of genuine pre-estimate of damage or penalty, and the structure of the rules in Lord Dunedin's speech, and the adoption of a more evaluative approach, involving the legitimacy of the parties' commercial and other interests and their protection, inspired by Lord Atkinson's speech in *Dunlop*[66] and that of the Earl of Halsbury LC in *Clydebank.*[67] The notion of proportionality of the contractual provision to the protection of the legitimate interests of the party taking the benefit of the clause was central to the judgments in the two courts.[68] This movement away from Lord Dunedin's four tests and the binary reflex of genuine pre-estimate of damage or penalty has been rejected by the Singapore Court of Appeal,[69] where a rules-based approach has been said to favour certainty. With respect, I have my doubts, at least if the certainty is not to be arbitrary.

Time does not permit full discussion of it this evening, but a consideration of the different paths of development of the principles of restitution in England and Australia in the last 30 years can be seen as a case study in the importance of manner of approach of the hemispheres to legal problems. Much of the doctrine in England was built on the taxonomy

[62] See, eg. James Allsop, 'Characterisation: Its place in Contractual Analysis and Related Enquiries' Contracts in Commercial Law Conference, Sydney, 18–19 December 2015. As to characterisation see *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1940) 63 CLR 209 at 227–228 (Dixon and Evatt JJ) discussed in 1999 by Gummow J in *Change and Continuity: Statute , Equity and Federalism* (OUP 1999) at 18–19.
[63] *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 at 86–88 ('***Dunlop***').
[64] *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28; 258 CLR 525.
[65] *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67; [2016] AC 1172.
[66] *Dunlop* [1915] AC 97 at 90–98.
[67] *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdoy Castarado* [1905] AC 6 at 9–15.
[68] *Paciocco* (2016) 258 CLR 525 at 547 [29] (Kiefel J, with whom French CJ agreed), 580 [164] (Gageler J), 607 [256] (Keane J); *Cavendish* [2016] AC 1172 at 1204 [32] Lord Neuberger and Lord Sumption, 1247 [152] (Lord Mance; with whom Lord Toulson agreed) and 1278 [255] (Lord Hodge; with whom Lord Toulson agreed).
[69] *Denka Advantech Pte Ltd & another v Seaya Energy Pte Ltd & another* [2020] SGCA 119.

and structure conceived by Professor Birks[70] that developed into a cause of action removed from equitable values, in a relentless search for rule-based certainty. Australian law has consistently rejected any adoption of unjust enrichment as a cause of action and any abstracted rule-based taxonomy of the subject. In Australia, unjust enrichment has consistently been described as a unifying concept[71] operating at a higher level of abstraction,[72] and restitution having equitable influences as its basis.[73] Understood in this way, unjust enrichment is a concept relevant to understanding restitutionary claims based on the presence of accepted vitiating factors, drawn from experience and relationships, and to considering the determination of novel cases.[74]

The research and advances in neuroscience discussed by McGilchrist provide a perspective for thinking about the law: that one should not rely on analytical, abstracted and de-contextualised methods of thought as the *totality* of any analysis, critical and important as such approaches always will be. The crucial task is divining the appropriate focal length for perception, and for the necessary level of abstraction: the point past which further expression of abstraction or further definition is counter-productive, in order to facilitate the reintegration of the abstracted proposition or taxonomical structure into the relevant perceived experiential context: to contextualize the abstracted into experience. Law is about people and human existence, their relationships with each other, and the perception and recognition of societal bonds. Law is also about power (public and private) and its control. In its application, law is often non-linear by virtue of the fact that it is necessarily both relational and experiential. Neuroscience tells us that there is the need to balance, and integrate, the explicit and the implicit, the part and the whole. This is how the human brain has evolved.

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[70] I leave aside the deeply sophisticated and nuanced writings of (the later Lord) Goff and Professor Jones in their earlier authored work on restitution: Lord Goff of Chieveley and Gareth Jones, *Goff & Jones' The Law of Restitution* (Sweet & Maxwell, 7th ed, 2009).

[71] See *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* [1988] HCA 17; 164 CLR 662 at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; 175 CLR 353; *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516 at 543–545 [70]-[74]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at 156 [151]; *Lumbers v W Cook Builders* [2008] HCA 27; 232 CLR 635 at 665 [85]; *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; 246 CLR 498 at 515–517 [29]-[30]; cf *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; 253 CLR 560 at 596 [78].

[72] *Equuscorp* (2012) 246 CLR 498 at 517 [30].

[73] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516, 539–555 especially [76]-[89] (Gummow J).

[74] K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis Butterworths, 3rd ed, 2016) 40–44 [135]-[136].

Very often, the point of tension between our left and right hemisphere ways of thinking as lawyers is in the search for certainty. There is often an assumption that certainty can only be achieved by defined rules, and that use of any value-imbued concepts or principles is a detraction from the clarity of defined rule. That assumption is driven by an attending to the world only through the left hemisphere. It is the left arrogating certainty as its own creation and exclusive possession, as something that can only be found in, and expressed by, words, and words *alone*. It is a false and misleading assumption, at least in aid of a proposition of general validity. It fails to appreciate that the most important task for any subject or problem for consideration, especially one of meaning or social organisation (such as law), is the ascertainment of the appropriate focal distance at which to perceive and then abstract and generalise about the circumstances of the subject or problem: to contextualise the abstraction into experience. It is the appreciation of that focal distance and the contextualisation which will enable such certainty as is possible to be perceived and expressed with the requisite degree of certainty, crafted in words. That task will always depend on an appreciation of the nature of the subject or problem, of its context, of the implicit or unknown surrounding it or within which it sits, of the limits of text, and especially, for the expression of a rule, of the need to place the words that are chosen into the operation of the real world. The deep wisdom of Lord Mansfield's expression: "Rules easily learned and easily remembered" epitomises this.

Law is not all about taxonomy, systems, rules and definition. It is not all about short answers to simple questions. If it were, we would not have *Moses v Macferlan*,[75] or *Kable*,[76] or an insistence on individualised justice in sentencing, or the human qualification to such in the principles of sentencing in *Veen (No 2)*,[77] or an insistence on fairness in the exercise of public power, or mercy, or the residual discretion in sentencing, or the law of penalties, or jurisdictional error, or unconscionability as the thematic force of Equity, or the insistence on human decency in relational behavior, or the countless other manifestations of values in the law.

My colleague, Justice O'Callaghan, has a piece of art in his chambers that says in forbidding terms "The world is ruled by language." I suggested to him that the artist had omitted the important qualification: "But understood by context".

[75] (1760) 2 Burr 1005.
[76] *Kable v Director of Public Prosecutions for NSW* [1996] HCA 24; 189 CLR 51.
[77] *Veen v The Queen (No 2)* [1988] HCA 14; 164 CLR 465.

Melbourne (virtually)

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