**Francis Forbes Society for Australian Legal History**

**10th Annual JH Plunkett Lecture**

# HUMAN DIGNITY IN THE TIME OF JOHN HUBERT PLUNKETT

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1. The dignity that is the subject of this paper, and which I will refer to as human dignity, concerns ideas about the inherent value of each and every person. Human dignity in this sense is the dignity that is the subject of, for example, the Universal Declaration of Human Rights which commences with the acknowledgement that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". As it is inherent, this kind of human dignity ought to be meaningful in relation to humankind at all times. And yet, fundamental as it is to our contemporary and presumably shared beliefs about personhood, the attribute of human dignity was not explicitly recognised in law until the 20th century.

2. The life of JH Plunkett (1802-1869), in whose honour this lecture is given, has been extensively researched and is the subject of two biographies, Professor John Molony's *An Architect of*

*Freedom*[1] and Tony Earls' *Plunkett's Legacy*[2] as well as the work of Mark Tedeschi QC, *Murder at Myall Creek*[3]*.* Professor Molony discerns in Plunkett an appreciation of human dignity. By way of example, Professor Molony identifies Plunkett as someone who taught the lesson in Australia that "civilisation ... has to be worked for and paid for, and the price of dignity and freedom is respect and restraint"[4]. In this observation, Professor Molony identifies dignity as a widely and explicitly desired attribute or experience in 19th century New South Wales. Professor Molony continues[5]:

> "To him the common sharing of human dignity and a Christian tradition, overflowing in civic values of decency, honesty and above all respect for the concept of law, was enough to unite all classes and build a mutual framework for the future."

3. Professor Molony clearly suggests that Plunkett recognised a special value, human dignity, common to all persons and, in particular to all persons regardless of class. However, Professor

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1 Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869* (ANU Press, 1973).

2 Earls, *Plunkett's Legacy: An Irishman's Contribution to the Rule of Law in New South Wales* (Australian Scholarly Publishing, 2009).

3 Tedeschi, *Murder at Myall Creek: A Trial That Defined a Nation* (Simon & Schuster, 2016). See also McLaughlin, "John Hubert Plunkett: An Irish Lawyer in Australia" (2021) 50 *Australian Bar Review* 1; McLaughlin, "John Plunkett (1802-1869)" in Lindsay and Hudson (eds), *Australian Jurists and Christianity* (Federation Press, 2021).

4 Molony, above n 1 at 100.

5 Ibid.

Molony does not point to any explicit statement by Plunkett concerning human dignity, and nor does he identify the aspects of Plunkett's values or conduct from which it might be inferred that a recognition of a shared human dignity informed Plunkett's life and work.

4. The questions that gave rise to this paper concerned the foundations of "human dignity" and how the concept of human dignity emerged and came to be incorporated into Australian law. It turns out that the meaning and nature of human dignity are difficult questions. Professor Molony's claim is interesting, given that institutional statements about human dignity mostly seem to post-date the World War II, the horrors of the Holocaust and the development of public international law. Assuming that Plunkett did consider that there was a "common sharing of human dignity", what did that mean to him and would his belief correspond with some or all contemporary ideas that we, as Australians, might have about human dignity? If Plunkett held beliefs about human dignity that would be shared by contemporary Australians, was he atypical: a man ahead of his time? Or can we identify common beliefs about human dignity shared by us and our forebears in the New South Wales colony?

5. The aim of this paper is to place the notion of Plunkett as a man who valued human dignity in historical context. I will start by grappling with the idea of human dignity. Then, I will consider some

of the aspects of Plunkett's formation from which it is possible to speculate about his important beliefs and values. Finally, I will consider some aspects of Plunkett's life in the colony of New South Wales. My conclusion is that Plunkett is fairly likely to have believed in a version of human dignity, and one that may be shared by a segment of the contemporary Australian community. That version is a Catholic conception of human dignity, based on the sanctity of human life and the essential goodness of God's creations. In saying this, it is important to note that the Catholic conception of human dignity has not remained frozen in time, so that it cannot be assumed that Plunkett's beliefs would be shared by all or even many contemporary Catholics. Either way, a problem is readily apparent, albeit a problem for another day. In our present day society, a 19th century Catholic conception of human dignity will be unlikely to command universal support. Is there a version of human dignity that accounts for different views about what makes humans special and so confers upon them the attribute of human dignity? For the purposes of legal history, the important point seems to be that caution is necessary in discerning the meaning of an historian's words, in this case, the words of Professor Molony who, it might be noted, had a degree in canon law and was a Catholic priest before he became a professional historian. Another important point might be that caution is necessary in interpreting the words and actions of an historical figure that might, in a contemporary context, bear a different meaning.

**Human dignity and its recognition**

6. Like other fundamental values, the true nature of human dignity is the subject of philosophical debate. Its origins include ideas about demeanour and status: the use of the term "dignity" in relation to such matters has a long history in English language and law[6].

7. However, human dignity is not a mere matter of personal demeanour, although it may raise important questions affecting behaviour. Such questions include whether a person must or may be permitted to live in a dignified manner (whatever that might mean); whether a person ought to be free to behave in a manner of their choosing (even though that behaviour may be perceived by others as undignified); or whether a person may be subjected to treatment which is humiliating or degrading (and thus causes them to experience a violation or loss of dignity). These are questions about autonomy, a person's freedom to make choices about their own

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6 The Oxford English Dictionary records, from 1667, Milton's Paradise Lost "Grace was in all her steps ... In every gesture dignitie and love. See also *Black's Law Dictionary* (11th ed, 2019) "dignity", which records the attribution of dignity to the Crown by the 13th century. In early Australian colonial case law, see reference to the peace of King George III, "our Sovereign Lord, his Crown and Dignity" (see, eg, *R v Baker* [1788] NSWSupC 8); the peace of Queen Victoria, "our Sovereign Lady the Queen, her Crown and dignity" (see, eg, *R v Hodghen and Paten* [1838] NSWSupC 10; and the dignity of the Court (see, eg, *Admission of Convict Attorneys* [1815] NSWSupC 1; *In re Tyler; R v Rossi and ors* [1829] NSWSupC 25; *Cobcroft v Pringle* [1840] NSWSupC 35).

life[7]. Legal philosopher Joseph Raz has said: "Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future"[8].

8. A related concept, liberty, was of great political importance by the late 18th century, as evidenced by the claim in the American Declaration of Independence in 1776, of the "self-evident truth" that all men are created equal and endowed with unalienable rights, including liberty. In 1789, the French Declaration of the Rights of Man and the Citizen asserted that human beings are born and remain free and equal in rights. The right of liberty was said to consist of doing anything which does not harm others.

9. Human dignity is also not simply a matter of status. To the contrary, it is intrinsic to the idea of human dignity that it is an aspect of all human kind, which has been imagined as a "gold coin" or an "inner, transcendental kernel" that each person receives at birth, and retains for their lifetime.

10. The incorporation of a universalised dignity in Australian law is much more recent. The earliest Commonwealth statute to refer to

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7 Riley, "Human Dignity and the Rule of Law" (2015) 11(2) *Utrecht Law Review* 91 at 101.

8 Raz, "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) at 221.

human dignity is the *Charter of the United Nations Act 1945* (Cth). The Act approved the Charter, which provided for the establishment of the United Nations. The Charter commences by stating the determination of "[w]e the peoples of the United Nations" to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

11. There are now numerous statutes in force across Australia, both Commonwealth and State, which refer to the value of dignity. In 2019, the High Court of Australia considered such a Victorian statute[9], in a case concerning the implied freedom of political communication[10]. The plurality (Kiefel CJ, Bell and Keane JJ) cited the following statement of Professor Aharon Barak about the centrality of dignity in human rights law[11]:

> "Most central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole. ... Human dignity regards a human being as an end, not as a means to achieve the ends of others."

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9 *Charter of Human Rights and Responsibilities 2006* (Vic).

10 *Clubb v Edwards* (2019) 267 CLR 171.

11 *Clubb v Edwards* (2019) 267 CLR 171 at 196 [50], citing Aharon Barak, *The Judge in a Democracy* (2006) at 85. See also *Monis v The Queen* (2013) 249 CLR 92 at 182-183 [247] per Heydon J.

12. Professor Barak's statement invokes the language of Immanuel Kant (1724-1804), whose role in the development of philosophical thought about human dignity is both important and contested. In *Groundwork of the Metaphysics of Morals* (1785), Kant stated his second categorial imperative, namely[12]:

> "So act that you use humanity, whether in your own person or in the person of any other, but always at the same time as an end, never merely as a means."

13. More cryptically and, arguably, contentiously, Kant also said that "morality, and humanity insofar as it is capable of morality, is that which alone has dignity"[13]. This suggests that dignity would be denied to a "person" incapable of morality.

14. Equal value and equal treatment are now widely accepted as minimum requirements for recognition of human dignity. In a case decided in 2004, Baroness Hale of Richmond stated[14]:

> "Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others ... violates his or her dignity as a human being."

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12 Kant, *Groundwork of the Metaphysics of Morals*, Mary Gregor (tr and ed) (Cambridge University Press, 1997) at 38.

13 Kant, above n 12 at 42.

14 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [132].

15. Again, the value of equality was well recognised by the late 18th century, as I have already noted in relation to the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen. Of course, the value of equal justice in the common law is of even longer standing.

16. However, more than freedom and equality, the contemporary idea of human dignity implies that all people are worthy of respect, tolerance and understanding[15]. In this regard, the concept of justice has much to say about the proper treatment of others: obvious examples are procedural fairness, the writ of *habeas corpus* and trial by jury. Tony Earls' biography, *Plunkett's Legacy*, quotes, albeit with some irony, the Attorney-General of Ireland, John Davies, in 1613[16]:

> "For, there is no Nation of people under the sun, that doth love equal and indifferent Justice better than the Irish; or will rest better satisfied with the execution thereof, although it be against themselves; so as they may have the protection and benefit of the Law, when, upon just cause they do desire it."

17. Professor Michael Rosen claims that the idea of human dignity was very much a part of discourse in the late 18th and early 19th centuries[17]. He concludes that by 1839, when Schopenhauer

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15 See Office of the United Nations High Commissioner for Human Rights: https://www.ohchr.org/EN/pages/home.aspx.

16 Earls, above n 2 at 1.

17 Rosen, *Dignity: Its History and Meaning* (Harvard University Press, 2012).

criticised the expression "dignity of man" as a shibboleth, various strands of "human dignity" had become "fused into a cliché of pious humanitarianism"[18]. However, so far as I have been able to establish, the first references to human dignity in institutional discourse were made by Pope Leo XIII in the last decade of the 19th century. In 1890, in an encyclical "On Slavery in the Missions"[19], Pope Leo XIII stated:

> "Wherever Christian customs and laws are in force, wherever religion establishes that men serve justice and honor human dignity, wherever the spirit of brotherly love taught by Christ spreads itself, there neither slavery nor savage barbarism can exist. Rather, mildness of character and civilized Christian liberty flourish there."

18. Pope Leo XIII again invoked the concept of human dignity in his 1891 encyclical *Rerum Novarum*[20] on the rights and duties of capital and labour[21]. The Pope stated that the duties of the wealthy owner and the employer include "not to look upon their work people as their bondsmen, but to respect in every man his dignity as a

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18 Rosen, above n 17 at 41.

19 Text: https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_20111890_catholicae-ecclesiae.html

20 Text: https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html.

21 See also LaVaque-Manty, "Universalizing Dignity in the Nineteenth Century" in Debes (ed), *Dignity A History* (Oxford University Press, 2017) at 318-319.

person ennobled by Christian character". Pope Leo drew the important distinction between dignity and degradation[22]:

> "if employers laid burdens upon their workmen which were unjust, or degraded them with conditions repugnant to their dignity as human beings ... in such cases, there can be no question but that, within certain limits, it would be right to invoke the aid and authority of the law."

19. While these statements are congruent with an ideal of equal treatment, a wider reading of Pope Leo XIII indicates that he was making no such equation and, indeed, Rosen argues that the Catholic Church of that time used the language of "dignity" as part of a "fiercely anti-egalitarian discourse". For example, Pope Leo XIII explicitly asserted that the relationship between husband and wife was one of the wife's subjection and obedience to her husband. In his 1878 encyclical *Quod apostolici muneris*[23], against socialism, the Pope stated that God had "appointed that there should be various orders in civil society, differing in dignity, rights and power". Underlying this conception of human dignity is the notion that dignity resides in a person occupying their appropriate place within God's creation.

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22 See also Luban, "The Rule of Law and Human Dignity: Reexamining Fuller's Canons" (2010) 2 *Hague Journal on Rule of Law* 29.

23 Text: https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_28121878_quod-apostolici-muneris.html.

20. Current day Jewish and Catholic thought grounds human dignity in the Old Testament Book of Genesis and the creation of man in God's image[24]. However, the relative recency of the argument tells against such an early origin: the writings of important Catholic scholars such as St Augustine and St Thomas Aquinas do not reflect a conception of inherent dignity[25]. Traditional Catholic doctrine which referred to human dignity emphasised the special value of Christians (as opposed to all people) and the frailty of human nature, so that dignity was a state of virtue capable of being lost by the commission of serious sin.

21. Human dignity was first invoked in a national written constitution in 1917[26]. Since then, references to human dignity as a right or a value have become frequent in written State constitutions to the point where, as at 2013, dignity was recognised in over 100 of the world's written constitutions[27]. Dignity is incorporated into written constitutions in different ways, no doubt reflecting the political history of the relevant State[28]. In Australia, the Australian

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24 See Waldron, "The Image of God: Rights, Reason and Order" in Witte and Alexander (eds), *Christianity and Human Rights* (Cambridge University Press, 2010) at 216, 221.

25 See Kent, "In the Image of God" in Debes (ed), above n 21.

26 *Constitution of Mexico* (1917).

27 Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (University of Pennsylvania Press, 2013) at 16.

28 For example, the Constitution of Ireland, enacted in 1937, refers to the desire to "promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity

Capital Territory, Victoria and Queensland have enacted Charters of Human Rights, each of which invokes human dignity as a value[29].

22. In our High Court, the first reference to the modern conception of human dignity appears in 1919. The context was labour law. The case, *Federated Municipal & Shire Council Employees' Union of Australia v City of Melbourne*[30], concerned the scope of the conciliation and arbitration power (and, specifically, the meaning of "industrial disputes") in s 51(xxxv) of the *Constitution*. Isaacs and Rich JJ referred to the "degradation and suffering" that ensued from the industrial revolution of the latter part of the 18th century and the 19th century as a "well known historical fact"[31]. Their Honours noted that "about 1890 and onwards industrial disputes assumed such importance and magnitude both in England and in Australia and New Zealand as to demand special public attention"[32]. Their Honours concluded that[33]:

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and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations".

29 See *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

30 (1919) 26 CLR 508.

31 *Federated Municipal & Shire Council Employees' Union of Australia v City of Melbourne* (1919) 26 CLR 508 at 556.

32 Ibid.

33 *Federated Municipal & Shire Council Employees' Union of Australia v City of Melbourne* (1919) 26 CLR 508 at 560-561.

> "[I]n 1894 it was well understood that 'trade disputes', which at one time had a limited scope of action, had ... so developed as to be recognized better under the name of 'industrial disputes' or 'labour disputes', and to be more and more founded on the practical view that human labour was not a mere asset of capital but was a co-operating agency of equal dignity—a working partner—and entitled to consideration as such."

23. A further conception of human dignity that should be mentioned is proposed by New Zealand legal academic and philosopher Professor Jeremy Waldron, who describes dignity as a "status-concept" referring to the legal standing or the moral presence that a person has in a society and their dealings with others[34]. According to Professor Waldron, dignity is "the idea of a certain status that ought to be accredited to all persons and taken seriously in the way they are ruled". This conception may resonate with the reasoning of Isaacs and Rich JJ in an earlier decision, also concerning the meaning of "industrial dispute"[35]. Their Honours said[36]:

> "Now, whether or not employés are entitled to improved conditions is a matter... beyond the sphere of this discussion; but we should be blind to everyday facts and events, if we failed to observe that the aim of industrial struggles is to raise the personal status and condition of the workers".

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**34** Waldron, "How Law Protects Dignity" (2012) 71 *Cambridge Law Journal* 200 at 201. See also André Dao, "Human Dignity, the Right to be Heard, and Algorithmic Judges" in *British Yearbook of International Law* (2020).

**35** *Australian Tramway Employers Association Claimants; and The Prahran and Malvern Tramway Trust* (1913) 17 CLR 680.

**36** *Australian Tramway Employers Association Claimants; and The Prahran and Malvern Tramway Trust* (1913) 17 CLR 680 at 703.

24. Pulling these strands together, and without attempting to be exhaustive, human dignity is or may be concerned with ways in which human lives are constrained or facilitated; with a recognition of the inherent value of each person, acknowledged as an equal value so that each person is accorded equal treatment and equal justice; with the manner in which persons are treated; with the prevailing sanctity of human life; and with the legal standing or moral presence of each person in society and in relation to others.

25. How might Plunkett's recognition or denial of human dignity be identified? Most evidently, in his treatment of others, especially those of low status within the New South Wales colony. Importantly, in his efforts to improve or equalise the conditions of the disadvantaged, or to secure privileges, freedoms or rights for members of the colony (including Aboriginal peoples). However, in order to determine the character of a sense of human dignity that actuated Plunkett, it would be necessary to understand something of his underlying beliefs and motives.

**Plunkett's formation**

26. We are likely to become conscious of dignity when we observe its violation or non-recognition. If we experience our own degradation or humiliation, or observe the degradation or humiliation of others whom we consider to be worthy, we are likely to become interested in questions about our rights and the possibility of

different and better treatment. If this is true, Plunkett was well placed to develop a sense of human dignity ahead of his time.

27. He was born in Ireland in 1802, shortly following the *Union with Ireland Act 1800* (UK)[37] ("the *Act of Union*"), by which the Irish Parliament was abolished, in response to the 1798 Irish rebellion seeking the creation of an independent Irish republic.

28. Plunkett grew up in a Catholic family, whose lands had been restored to them following the repeal of Catholic penal laws in the late 18th century. The visceral anger of the Irish Catholics about the penal laws had been expressed most vividly by Edmund Burke, the cousin of Governor Richard Bourke, with whom Plunkett later formed a close bond. Burke's language evokes a sense of violation of dignity[38]:

> "[The Penal Laws] was a machine of wise and elaborate contrivance, and as well fitted for the oppression, impoverishment, and degradation of a people, and the debasement, in them, of human nature itself, as very proceeded from the perverted ingenuity of man."

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[37] 39 & 40 Geo III c 67.

[38] Burke, "A Letter to Sir Hercules Langrishe, Bart, MP, on the subject of the Roman Catholics of Ireland, the propriety of admitting them to the elective franchise, consistently with the principles of the Constitution, as established at the Revolution (1792)" in Nimmo (ed), *The Works of the Right Honourable Edmund Burke: Volume IV* (1887) at 305 (text available through the Gutenberg Project: https://www.gutenberg.org/files/15700/15700-h/15700-h.htm#SIR_HERCULES_LANGRISHE).

29. While Plunkett was born into a degree of privilege, he was still part of a community that was affected by significant religious discrimination. As a young law student, he was aware that, by virtue of his Catholic faith, he was ineligible to sit in the United Kingdom Parliament or to hold the vast majority of senior government offices in the United Kingdom. He was also aware that Ireland had suffered a significant loss of autonomy through the *Act of Union*.

30. Plunkett was an early member of the Catholic Association, created in 1823 by Daniel O'Connell to campaign for Catholic emancipation. He was called to the Bar in Ireland in 1826. Within three years, the *Roman Catholic Relief Act 1829* (UK)[39] was passed following O'Connell's election for the seat of Clare, which had created the embarrassing prospect that O'Connell would arrive at Westminster to represent his seat but would be denied entry. By virtue of the 1829 Act, Plunkett became eligible for his appointment as Solicitor-General of New South Wales in 1831. As Earls put it, "Catholic Emancipation was the single most significant event in Plunkett's life"[40].

31. Professor Molony summarised Plunkett's attitude when leaving Ireland in 1831 as follows[41]:

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39 10 Geo IV c 7.

40 Earls, above n 2 at 43.

41 Molony, above n 1 at 8.

> "In him there was human compassion for the downtrodden, a quick and eager resentment at whatever smacked of injustice, a desire to grant to every man his due in human dignity and worth. But, above all, he was moulded by his concept of the law."

32. The precise sources of this appraisal are unclear but may have been based on Plunkett's membership of the Catholic Association, and his subsequent involvement in the effort to secure seats at Westminster for Irishmen, or perhaps Plunkett's strong connections with O'Connell. According to Earls, Plunkett's appointment as Solicitor-General was the result of lobbying by O'Connell. Once O'Connell achieved Catholic emancipation, he went on to campaign for the repeal of the *Act of Union*. The relationship between Plunkett and O'Connell speaks strongly to Plunkett's Irish Catholic political sensibilities.

33. Professor Molony does not explain what Plunkett would have considered was every man's "due in human dignity and worth". It seems to connote a vision of a society in which human dignity would be universally respected, as opposed to merely a life in which Plunkett personally would honour the dignity of others. But Professor Molony does not explain the substance of Plunkett's vision or whether a man could lose their claim to human dignity (and so be due nothing).

34. It seems that Plunkett was a devout Catholic. The parable of the Good Samaritan, found in the Gospel of St Luke[42], would have been known to Plunkett and every educated Christian of the time, as later famously demonstrated by Lord Atkins' allusion to the "the lawyer's question, Who is my neighbour?" in *Donoghue v Stevenson*[43]. This parable reflects a value of universal compassion and mercy towards all people. The priest and the Levite who passed by the wounded man were of high status and were acting in accordance with the customs of the time, while Samaritans were regarded by the Jewish community as social outcasts. There are other passages in the Gospel of St Luke depicting Jesus showing compassion to the marginalised (including tax collectors and

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**42** *King James Version Bible* (1611), Luke 10: 25-37. A lawyer sought to test Jesus by asking "Who is my neighbour?" in the teaching "Love your neighbour as yourself". Jesus answered:

> "A certain man went down from Jerusalem to Jericho, and fell among thieves, which stripped him of his raiment, and wounded him, and departed, leaving him half dead. And by chance there came down a certain priest that way: and when he saw him, he passed by on the other side. And likewise a Levite, when he was at the place, came and looked on him, and passed by on the other side. But a certain Samaritan, as he journeyed, came where he was: and when he saw him, he had compassion on him, And went to him, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him. And on the morrow when he departed, he took out two pence, and gave them to the host, and said unto him, Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee. Which now of these three, thinkest thou, was neighbour unto him that fell among the thieves? And he said, He that shewed mercy on him. Then said Jesus unto him, Go, and do thou likewise."

**43** [1932] AC 562.

prostitutes), which Plunkett would almost certainly have heard. In the Epistle to the Galatians, St Paul the Apostle gave the following ostensibly egalitarian message[44]: "There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus." Plunkett's attitudes concerning the appropriate treatment of others were undoubtedly informed by Catholic teachings such as these. However, it would be possible to adopt an attitude of universal compassion and mercy, while also advocating harsh or degrading punishment. The two positions could be reconciled by a belief that human dignity is capable of being forfeited by serious sin.

35. If Plunkett's religious formation may not have promoted the idea of human dignity as a universal and inherent status, it seems reasonable to consider the likely effect of his situation as an Irish Catholic in early 19th century. Professor Molony emphasised Plunkett's aristocratic heritage, "tempered and honed by his education in secular, or at least non-Catholic institutions"[45]. By reason of his family's relative privilege, Plunkett was well positioned to take advantage of the opportunities that arose from the recent Catholic emancipation, such as entry into university and, of course, his appointment as Solicitor-General of New South Wales.

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[44] Galatians 3:28.

[45] Molony, above n 1 at 8.

36. However, Earls records Plunkett's account of his admission to the legal profession including the "notorious change of demeanour" of the Chief Judge when Plunkett stood forward and asked to take the form of oath provided for the relief of Catholics[46].

37. Plunkett arrived in New South Wales in June 1832, to take up his appointment as Solicitor-General. At least one factor in his decision to accept the appointment must surely have been a concern about his prospects of advancement in England or Ireland, having regard to prejudice against Irish Catholics within those communities. Even in the colony, he would have expected to be treated as an outsider to some extent by reason of his Catholicity. These are ample reasons to have harboured a bitterness, a sense of humiliation or more positively, a desire to vindicate a personal sense of dignity coupled with a desire to improve the lot of others. There is certainly evidence that Plunkett harboured such desires. Earls records that, on his arrival in New South Wales, Plunkett is said to have been "a slashing Irishman ... full of the wildest opinions of what were the rights of people"[47].

38. Later, when responsible government was established in New South Wales in 1856[48], Plunkett campaigned for election to the

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46 Earls, above n 2 at 24.

47 Earls, above n 2 at 55.

48 The *New South Wales Constitution Act 1855* (UK) (18 & 19 Vict c 54) established a bicameral parliament where the

Legislative Council. In his campaign speech, Plunkett asserted that "he had ever been the friend and champion of civil and religious liberty"[49].

**Human dignity in the colony of New South Wales**

*Plunkett and autonomy*

39. At the outset, it is relevant to note the basic premise of the common law: "everybody is free do anything, subject only to the provisions of the law"[50]. As Sir Victor Windeyer has explained, the laws of England came to Australia with the First Fleet[51].

40. Plunkett's campaigning claim that "he had ever been the friend and champion of civil and religious liberty" acknowledged the popularity of liberty as a human right. However, precisely what that liberty entailed may be open to question. For example, there is no

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Legislative Assembly was popularly elected (albeit only men who owned property could vote at the time) and in 1856 the New South Wales Parliament opened and sat for the first time.

49 *Sydney Morning Herald*, 13 March 1856.

50 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564, citing *Attorney-General v Guardian Newspapers [No 2]* [1990] 1 AC 109 at 283.

51 Windeyer, "'A birthright and inheritance': The Establishment of the Rule of Law in Australia", in Debelle (ed), *Victor Windeyer's Legacy: Legacy and Military Papers* (Federation Press, 2019). See also Clark, "The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law" [2000] *Melbourne University Law Review 866* at 872

reason to think that Plunkett would have endorsed a version of freedom that permitted each individual to plan their future according to a secular vision. And, consistent with the substantial invisibility of women in public life at the time, I have discovered nothing of significance about Plunkett's views of women, let alone what he might have envisaged as civil liberties for that segment of the population.

41. As to religious liberty, it has been said that Plunkett considered the *Church Building Act 1836* (NSW) to be the most significant achievement of his public career[52]. That legislation placed Catholics, Anglicans, Presbyterians (and later Methodists) on an equal basis by funding the employment of members of the clergy and the construction of places of worship. Plunkett and Governor Bourke drafted the original bill to include Methodists, Jews and other dissenting Protestants, but those aspects were defeated[53]. As Tedeschi has explained, the initiative effectively displaced the position of the Church of England and arguably set the scene for the separation between Church and State which Australians generally take for granted. Tedeschi suggests that the legislation can be

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**52** Molony, above n 1 at 23; Suttor, "John Hubert Plunkett" in *Australian Dictionary of Biography: Volume 2* (1967).

**53** Earls, above n 2 at 80-81.

understood as an "early version of the philosophy behind our present day anti-discrimination laws"[54].

42. The *Sydney Morning Herald* reported Plunkett's claim that "all men of unbiased feelings acknowledged that the Act was the Magna Carta of religious liberty in the land"[55], while Earls plausibly contends that the *Church Building Act* was the product of a personal mission shared by Bourke and Plunkett "that Australia would be spared the resentment and oppression on religious grounds which had plagued Ireland"[56]. Such a mission can readily be understood as reflecting a modern concern for liberty, with an aim of according equal treatment to members of all religious faiths. Tedeschi implies that Plunkett advocated for equality under the law for people of non-Christian religions apart from Judaism[57]. I have not been able to verify this. Plunkett's expressed views about Chinese immigration to the colony were, as Tedeschi put it[58], "at ... variance" with a view that all persons of whatever race ought to receive equal treatment.

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54 See Tedeschi, above n 3 at 218.

55 Earls, above n 2 at 86.

56 Earls, above n 2 at 70.

57 Tedeschi, above n 3 at 233.

58 Ibid.

*Fair treatment before the law*

43. Professor Waldron has argued that human dignity has obvious connections with the very idea of law and, more specifically with fundamental legal ideas about hearings, due process and standing to sue[59]. At its most basic, Professor Waldron argues, the imposition of just legal rules and standards entails an acceptance that people are capable of understanding and following laws and responsible for conduct which departs from the law. Where self-application of the rules is not possible or desirable, courts provide an orderly proceeding in which "the evidence is made available to be examined and confronted by the other party in open court ... both sides are treated respectfully, and above all listened to by a tribunal which is bound in some manner to attend to the evidence presented"[60].

44. Plunkett's most remembered effort to pursue justice concerns the two trials of the perpetrators of what we now recognise as the Myall Creek massacre, in which a group of over 20 Aboriginal men, women and children were brutally killed. It is not possible to be specific about the number of deaths because of the treatment of the bodies after death. The detail of the trials is recounted by Tedeschi. The trials were held in 1838 in the face of widespread opposition, which laid bare opposing views about the justice of the case. One view within the community was that equal treatment under the law

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59 Waldron, above n 34 at 203.

60 Waldron, above n 34 at 210.

would mean that there should be no trial because murders allegedly committed by Aboriginal people were not being brought before the courts.

45. Plunkett's conduct of the trials demonstrated his firm view that equal treatment under the law required, as he told the first jury, that every person be "as amenable for his evil acts" as any other and, accordingly "as much entitled to protection by the laws"[61]. The first trial judge, Dowling CJ, expressed a similar view in his summing up to the jury, namely, that the life of an Aboriginal person "is as precious and valuable in the eyes of the law as that of the highest noble in the land"[62]. The second trial judge, Burton J, reminded the jury that the Aboriginal deceased were "equally under the protection of God and the law" and "equally liable to the protection of the law"[63]. These repeated admonitions impress upon us what both judges and Plunkett felt unable to take for granted: that the jury would afford equal treatment to the accused.

46. Another notable feature of the trials is the repeated and explicit religious references, particularly by Burton J. In his Honour's sentencing remarks, Burton J noted that "[t]he crime was ... committed in the sight of God and the blood of the victims cries for

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[61] Tedeschi, above n 3 at 137.

[62] Tedeschi, above n 3 at 144.

[63] Tedeschi, above n 3 at 174, 175.

vengeance"[64]. Burton J noted that the murderers' crime occurred on a Sunday "thus doubly offending their God by selecting His holy day for the commission of their unheard-of barbarity"[65]. In reporting the sentence, the *Sydney Gazette* reported that the effect of the remarks was to show that the Aboriginal deceased "has a soul to be saved"[66]. If the trials were intended to demonstrate respect for the inherent human dignity of the accused or the victims (which we might now conceive of as an element of a jury trial), that was far from the main goal.

47. At the time of the Myall Creek massacre trials, the sentence for murder was death, and execution was inflicted publicly. The use of capital punishment decreased from about 1833 as the United Kingdom reduced the range of offences for which the penalty might be imposed, however, it was not until the 1940s that the last person was executed in New South Wales[67].

48. In 1845, Plunkett unsuccessfully proposed the abolition of the death penalty for embezzlement[68]. In 1853, Plunkett strongly

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64 Tedeschi, above n 3 at 179.

65 Tedeschi, above n 3 at 180.

66 Ibid.

67 Lennan and Williams, "Death Penalty in Australian Law" (2012) 34 *Sydney Law Review* 659 at 679.

68 Tedeschi, above n 3 at 236.

supported the abolition of public hangings[69] (which he called "extremely demoralising"[70]), and this was achieved in 1856, some 13 years before a similar reform in Britain. It might be argued that capital punishment is the ultimate violation of human dignity. After all, it denies the condemned person the capacity to make any choice for their future. The issue is debated in countries that retain the death penalty[71], and arguments are put that execution can be administered in a manner consistent with maintaining the dignity of the prisoner. The grounds for Plunkett's opposition to the death penalty are not entirely clear. In 1867, he argued that [t]he sooner the NSW parliament adopted his abolition bill, the better for the country; and the more honourable to us as Christian men"[72]. His opposition to public execution seems to have been more about discouraging prurience or other misconduct associated with public attendance at hangings than any concern about the degradation of the prisoner.

49. The Myall Creek massacre trials raised the important issue of evidence from Aboriginal persons, another issue relating to religion. At that time, evidence was required to be given by oath upon the

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69 See *Act to Regulate the Execution of Criminals 1853* (NSW).

70 Tedeschi, above n 3 at 236.

71 See, eg, Nagelsen and Huckelbury "The Death Penalty and Human Dignity: An Existential Fallacy" (2016) 5(2) *Laws* 25.

72 See Tedeschi, above 3 at 237.

Bible. The problem, identified by at least 1805[73], was that Aboriginal people were considered to be incompetent to take an oath by reason of their lack of Christian faith. In 1824, Forbes CJ had presided over a trial where the accused was charged with murder and the evidence of an Aboriginal man, had it been admissible, would have shown the killing was by accident. The accused was found guilty of murder by the jury and sentenced to death. The Governor,
Sir Thomas Brisbane, refused to exercise his prerogative of mercy. Afterwards Forbes CJ lamented[74]:

> "Why is not competency confined to interest, and credibility left in all cases to the jury? Truth is a natural institute of mankind -it is founded in moral feeling -and providence has so guarded it, that perhaps it is next to impossible so to cover falsehood as to prevent its discovery, if sufficient care and means be used to expose it."

50. In 1839, Colonial Secretary Lord Russell, in a communication to Governor Gipps, urged him "to hasten the creation of special provisions to allow Aborigines to testify unsworn because the present system, based on the principle of equality before the law,

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73 See, for example, Atkins, "Opinion on Treatment to be Adopted Towards the Natives" in *Historical Records of Australia*, 20 July 1805, series 1, vol 5 at 502.

74 *R v Fitzpatrick and Colville* [1924] NSWSupC 3, note 2 citing Forbes CJ's letter to Wilmot Horton on 14 August 1824.

was producing obvious injustice"[75]. In this observation, equality required every witness to take an oath upon the Bible.

51. While in England, Plunkett lobbied for the passage of the *(Colonies) Evidence Act 1843* (UK)[76], which enabled individual colonies to pass legislation permitting Aboriginal people to give unsworn evidence. On his return to New South Wales, Plunkett argued unsuccessfully for the colony to adopt legislation in accordance with the United Kingdom Act. His arguments are interesting. Plunkett focussed on improved justice by permitting the courts to hear evidence from Aboriginal witnesses in relation to crimes, regardless of the racial identity of the perpetrator or victim. Nothing that he said suggested any commitment to improving the status of Aboriginal people in relation to the rest of the community, or any concern about exclusion of Aboriginal people from giving evidence in court. Further, Plunkett's proposal did not contemplate that Aboriginal evidence would have the same standing as evidence given on oath: it would not have any weight unless corroborated. Even so, it seems that public outrage at the execution of the Myall Creek murderers was so intense that it was not until 1876 that witnesses were permitted to give a declaration in place of swearing

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[75] Smadych, "Contemplating the Testimony of 'Others': James Stephen, The Colonial Office, and the Fate of the Australian Aboriginal Evidence Acts, Circa 1839-1849" (2004) 8(2) *Australian Journal of Legal History* 237 at 243.

[76] 6 & 7 Vict c 22.

an oath[77]. William Charles Wentworth, referred to the executions as "legal murder"[78].

52. It has been said that Plunkett was responsible for the experimental extension of jury rights to emancipists[79]. In 1856, Plunkett claimed that he was "alone, or next to it" when he "first sought to obtain for the colony the glorious privilege of trial by jury"[80]. He also claimed that, after initially failing, he later "succeeded in obtaining for the colony trial by jury as it was in England and abolishing what was called the military jury"[81].

53. I am doubtful about these claims. Arguments in favour of trial by jury in all cases were made in the colony as early as 1791. The issue was under discussion during the Governorships of King, Bligh and Macquarie, with Macquarie adopting the case for including convicts of "long standing emancipation" on the jury list. For some

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77 *Evidence Further Amendment Act 1876* (NSW). See also Lyndon, "'No moral doubt...': Aboriginal Evidence and the Kangaroo poisoning, 1847-1849" (1996) 20 *Aboriginal History* 151 at 159-161.

78 Tedeschi, above n 3 at 207.

79 Suttor, above n 52. The steps by which trial by civilian jury was secured in the colony are detailed in Bennett, "The Establishment of Jury Trial in New South Wales" (1961) 3 *Sydney Law Review* 463. See also New South Wales Law Reform Commission, "Report 117: Jury Selection" (2007) at [2.3]-[2.11].

80 *Sydney Morning Herald*, 13 March 1856.

81 Ibid.

time, the case was opposed on the basis of another claim to equality: that a man (particularly as free settler) ought to be tried by a jury of his peers, who did not include emancipists. In an opposite appeal to equal treatment, Deputy Judge Advocate John Wylde argued (in about 1821) that, as convicts were accepted as witnesses in litigation touching "the most serious, intimate and confidential concerns of the free inhabitants", emancipated convicts should be admitted as jurors[82].

54. Emancipists were, subject to limitations, eligible for jury service from about 1832[83], but in most cases the accused was entitled to elect between a military and a civilian jury. In 1839, military juries were abolished and trial by a civil jury of twelve was established for criminal trials[84]. By 1847, trial by jury was available in both criminal and civil cases. Those eligible for jury service comprised all men over the age of 21, subject to exemptions and disqualifications, resident in the colony and satisfying an annual income threshold. Women became eligible for jury service in 1947[85].

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82 Bennett, above n 79 at 467-468.

83 *Jury Trials Act 1832* (NSW) (2 Will IV c 3). See also Bennett, above n 79 at 473-474.

84 *Jury Trials Act 1839* (NSW) (3 Vict c 11). See also Molony, above n 1 at 103.

85 *Jury (Amendment) Act 1947* (NSW). See also, *Administration of Justice Act 1968* (NSW) which made it obligatory for women to be included on the jury roll.

*Plunkett and the franchise*

55. In England, a small percentage of the adult male population were entitled to vote in parliamentary elections from 1265. From 1432, the franchise was extended to men who possessed freehold property or lands held directly of the king, of an annual rent of at least forty shillings. In Ireland, the disqualification of Catholics from the franchise was removed in 1793 and, following the *Act of Union,* the position in Ireland was substantially the same as England[86].

56. However, arguments in favour of universal suffrage were developing. In 1789, Jeremy Bentham drafted a "Projet of a Constitutional Code for France" in which he advocated universal adult suffrage, subject to a literacy test[87]. The French National Convention of 1792 was elected on the basis of universal male suffrage. Around this time, groups such as the London Corresponding Society formed to advocate for universal male suffrage.

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**86** The *Parliamentary Elections (Ireland) Act 1829* (UK) (10 Geo IV c 8) increased the freeholder qualification from forty shillings (two pounds) to ten pounds, reducing the county constituencies electorate from around 216,000 to 37,000. This change in electoral law was enacted at the same time as the *Roman Catholic Relief Act 1829* (UK).

**87** Schofield, "Jeremy Bentham, the French Revolution and political radicalism" (2004) 30(4) *History of European Ideas* 381.

57. There was no representative government in the New South Wales colony until 1843, following the passage of the *New South Wales Constitution Act 1842* (UK) which established the partially elected Legislative Council, and granted the franchise to men over the age of 21 who met a property ownership criterion[88]. Plunkett was later to claim that he had secured in the 1842 legislation "a franchise of which was not encumbered by any conditions beyond the ordinary ones".

58. In 1856, under a new constitution, the New South Wales Parliament became bicameral with a fully elected Legislative Assembly and a fully appointed Legislative Council[89]. In 1858, with Plunkett's support[90], the right to vote for the Legislative Assembly was extended to all adult males[91], well before males in the United Kingdom received a similar right in 1918. These achievements can fairly be described as important improvements to the status of a significant segment of the New South Wales community.

59. Aboriginal men in New South Wales were not officially prevented from voting, although I have been unable to determine whether any cast a vote during Plunkett's lifetime. The New South

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88 *New South Wales Constitution Act 1842* (UK) (5 & 6 Vict c 76), s 5.

89 *New South Wales Constitution Act 1855* (UK) (18 & 19 Vict c 54).

90 Suttor, above n 52.

91 *Electoral Act 1858* (NSW).

Wales Parliament records that their exclusion from being counted or included by the Commonwealth *Constitution*, the *Commonwealth Franchise Act 1902* (Cth), together with a range of other factors effectively denied them the vote.

60. In 1902, women in New South Wales were granted the right to vote at both a national and state level[92]. In Britain, women achieved equal suffrage in 1928. In 1949, all Aboriginal people who had served in the military forces or who could vote in state elections were able to vote in Federal elections[93]. In 1962, all Aboriginal Australians gained the right to vote in all states and in Federal elections[94].

61. As a curiosity, I note that the Pitcairn Islands became the first British colony to provide for universal suffrage in 1838, in connection with the annual election of a locally born magistrate "by the free votes of every native born on the island, male or female, who shall have attained the age of eighteen years; or of persons who shall have resided five years on the island"[95].

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92 *Commonwealth Franchise Act 1902* (Cth); *Women's Franchise Act 1902* (NSW).

93 *Commonwealth Electoral Act 1949* (Cth).

94 *Commonwealth Electoral Act 1962* (Cth).

95 The Government of the Pitcairn Islands, "Pitcairn's History", https://www.government.pn/Pitcairnshistory.php.

**Conclusion**

62. The *Sydney Morning Herald* said of Plunkett[96]:

> "He exercised important influence on general legislation, and we believe that every measure tending to equalise the social conditions and promote civil and religious liberty amidst the various, and often hostile, elements of this Colony has either been framed or supported by him."

63. Plunkett's life in the law and in colonial politics reveals a recognition of the moral presence of the people by whom he was surrounded, extending beyond what might have been acknowledged by many of his contemporaries or by the society that he inhabited. Plunkett also repeatedly recognised inequalities and sought to rectify them. Tedeschi explained Plunkett's view of equality as equality "in the eyes of God". In his own words to a jury, Plunkett was concerned to ensure that, before the courts, "a gentleman was no more entitled to respect than a poor man, and he hoped the time would never come when it could be said of [the colony of New South Wales, as had once been said of Ireland] 'there is one law for the rich, and another for the poor'"[97]. He was a strong advocate for religious freedom and for representative government on the basis of universal male suffrage. He actively promoted respect for the Aboriginal and emancipist populations in the court system.

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96 *Sydney Morning Herald*, 10 February 1858.

97 See Tedeschi, above n 3 at 45-46.

64. Even so, the relationship between Plunkett and human dignity remains unclear. Largely, the problem lies in the difficulties of defining or describing human dignity. If it is a conception based upon the sanctity of human life within a framework of Catholic or, perhaps more broadly, Christian ethics, it is relatively easy to conclude that Plunkett probably ascribed to that value, whether explicitly or implicitly. However, the human dignity referred to in the Universal Declaration of Human Rights and in numerous Australian statutes cannot be understood in a purely Catholic way. To the extent that human dignity necessarily respects secular values or even the inherent and equal value of all people, including women, criminals and members of communities foreign to the United Kingdom, such a value was almost certainly foreign to Plunkett.

65. There is good reason to perceive an overall expansionary movement within the colony during Plunkett's lifetime towards broader recognition of the rights and interests of its members. The *Church Building Act* and the relatively early adoption of universal adult male suffrage are particularly significant indicators. The influence of the common law, evolving conceptions of liberty and equality and, no doubt, religion, contributed to the eventual adoption of human dignity as a universal value some 70 years after Plunkett's death.