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CASE NOTE & BOOK REVIEW

MUTILATING WORDS

JEREMY GANS*

R V A2†

Sovereignty, Restraint, & Guidance: Canadian Criminal Law in the 21st Century by Michael Plaxton (Irwin Law, 2019) pages 1–591. Price CAD75.00 (paperback). ISBN 978–1–55221–499–2.

In late 2019, a majority of Australia's High Court ruled that the term 'otherwise mutilates' in New South Wales' female genital mutilation offence extends to nicks or cuts that heal quickly. Earlier that year, Professor Michael Plaxton published a book arguing that courts interpreting Canada's substantive criminal law follow three theses: Parliament makes the criminal law, it usually does not mean to transform society, but it does mean to guide lay people. This combined case note and book review concludes that the Australian decision largely reflects those theses and vice versa, but identifies some problems about how to read the words of criminal offences which require further attention from both the High Court and Professor Plaxton.

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* Professor, Melbourne Law School.

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I Introduction

On Wednesday 29 August 2012, a joint team from the New South Wales ('NSW') health and police services interviewed two children at their primary school.[1] The eldest, aged eight, was asked about 'a type of cutting to the private part'.[2] She said '[it] happened to me' when she was seven and gave a poignant account.[3] Her six-year-old sister was less forthcoming, but replied '[y]es' when told that 'we heard that you had had a cut on your private parts', adding that she felt '[h]urting … [i]n my bottom'.[4] A few hours later, the police secretly recorded their mother when she picked them up from school: 'I told you not to say. Now we are in big trouble because of this.'[5] Over the next fortnight, the police tapped the phones of the girls' parents and other members of the greater Sydney area's Dawoodi Bohra community, listening as some concocted a false story about checking the girls' vulvas for injuries after a trip to Africa.[6] They also recorded the girls' father asking their mother (in a police station waiting room) '[i]n us do they cut skin … or do they cut the whole clitoris' and her reply '[n]o they just do a little bit'.[7] Three years later, a jury found A2[8] (the girls' mother), Shabbir Vaziri (the community's head cleric and spiritual leader) and Kubra Magennis (a registered nurse) guilty of female genital mutilation.[9]

We will never know exactly what happened to the girls' genitals. We know that Magennis touched their vulvas with steel forceps in A2's presence — the defendants admitted that at the trial[10] — and that the jury unanimously found that the girls' clitorises were injured.[11] We also know that the trial that yielded that verdict was flawed — the prosecution conceded that in the High

[1] *A2 v The Queen* [2018] NSWCCA 174, [20] (Hoeben CJ at CL, Ward JA and Adams J) ('*A2 Court of Criminal Appeal*').

[2] Ibid [21], [24].

[3] Ibid [24]–[35].

[4] Ibid [36], [40]–[42].

[5] Ibid [48].

[6] Ibid [51], [59], [66], [78], [82], [85], [92], [94], [124], [128], [139], [149], [162], [630], [632].

[7] Ibid [72]. The Court described this exchange as the 'high point' of the telephone intercept and listening device recording evidence: at [630].

[8] The various courts used 'A1' and 'A2' in their judgments to refer to the girls' parents: see, eg, ibid [1], [10].

[9] Ibid. A2 and Magennis were convicted of two counts under s 45(1)(a) of the *Crimes Act 1900* (NSW), while Vaziri was convicted of two counts under s 45(1)(b): *A2 Court of Criminal Appeal* (n 1) [1], [361].

[10] *A2 Court of Criminal Appeal* (n 1) [15].

[11] *R v A2 [No 23]* (2016) 258 A Crim R 32, 36 [21] (Johnson J).

Court[12] — because the younger child swore an oath she was not competent to make;[13] a prosecution expert on the Dawoodi Bohra community went beyond her expertise;[14] the jury was given irrelevant information about a local education program;[15] and a fresh examination disproved trial evidence suggesting that the tips of the girls' clitorises were gone.[16] More recently, we learnt that the NSW Court of Criminal Appeal's view that the verdict was unsafe was itself unsafe — the defence has since abandoned that ground of appeal[17] — because the appeal court misinterpreted the offence provision.[18] Although a retrial would have been possible — the Court of Criminal Appeal ordered one[19] — we know that it will not occur, because the prosecution has chosen not to proceed for 'discretionary reasons'.[20]

However, the case has lasting legal significance. The High Court resolved a key question about the meaning of NSW's 25-year-old female genital mutilation offence:

> 45 Prohibition of female genital mutilation
>
> (1) A person who:
>
> (a) excises, infibulates or *otherwise mutilates* the whole or any part of the labia majora or labia minora or clitoris of another person, or
>
> (b) aids, abets, counsels or procures a person to perform any of those acts on another person,

[12] *R v A2* (2019) 373 ALR 214, 231–2 [71]–[75] (Kiefel CJ and Keane J) ('*A2 High Court of Australia*').

[13] *A2 Court of Criminal Appeal* (n 1) [851]–[881].

[14] Ibid [709]–[714], [724]–[725].

[15] Ibid [1078]–[1090].

[16] Ibid [358]–[359].

[17] *A2 v The Queen* [2020] NSWCCA 7, [3] (Hoeben CJ at CL, Ward JA and Adams J) ('*A2 Court of Criminal Appeal Remittal*').

[18] *A2 High Court of Australia* (n 12) 231 [71] (Kiefel CJ and Keane J), 250 [150]–[151] (Nettle and Gordon JJ), 257 [174] (Edelman J).

[19] *A2 Court of Criminal Appeal Remittal* (n 17) [21].

[20] Perry Duffin, 'Charges Dropped in Historic Female Genital Mutilation Saga', *The Daily Telegraph* (online, 6 March 2020) archived at <https://perma.cc/653K-DBTS>. See *A2 High Court of Australia* (n 12) 234 [85] (Kiefel CJ and Keane J); *A2 Court of Criminal Appeal Remittal* (n 17) [17], noting the impact of any retrial on the (now teenage) complainants, among other issues.

> is liable to imprisonment for 7 years.[21]

The majority endorsed the trial judge's instruction that 'otherwise mutilates' means 'to injure to any extent' and rejected the NSW Court of Criminal Appeal's view that it requires 'injury or damage that is more than superficial and which renders the body part in question imperfect or irreparably damaged in some fashion'.[22] The High Court's ruling is important to similar prosecutions in the future and may affect the legality of other things done to women's genitals, such as waxing, cosmetic surgery and extreme body modifications.

Questions such as these — about the meaning of words in criminal offence provisions — are the subject of a recent book by the University of Saskatchewan's Professor Michael Plaxton titled *Sovereignty, Restraint, & Guidance: Canadian Criminal Law in the 21st Century* ('*Sovereignty, Restraint, & Guidance*').[23] The title refers to three theses — Parliament makes the criminal law, it usually does not mean to transform society, but it does mean to guide lay people[24] — that Plaxton argues explain most features of the substantive criminal law and, in particular, determine how to work out the meanings of the words in offence provisions. In his book, Plaxton seeks to present 'a plausible account of what the law *is*',[25] drawing on hundreds of Canadian court decisions about the meaning of criminal offences. Naturally — but especially given Plaxton's past vigorous criticisms of a number of Canadian decisions[26] — his aim is both to devise 'an internally coherent set of principles' behind these decisions and to identify where courts have gone 'astray'.[27] The latter concern is not idle. Such courts, Plaxton argues,

> risk undermining the democratic values that animate our constitutional system, and the public's sense that the substantive criminal law is roughly responsive to their own moral priorities, sensibilities, and voices. They risk sending the

[21] *Crimes Act 1900* (NSW) s 45(1) (emphasis added), as at 5 July 2012. The maximum penalty was changed to 21 years' imprisonment on 20 May 2014: *Crimes Amendment (Female Genital Mutilation) Act 2014* (NSW) sch 1 item 2.

[22] *A2 High Court of Australia* (n 12) 229 [59] (Kiefel CJ and Keane J), 252 [159] (Nettle and Gordon JJ), 257 [174] (Edelman J). But see Bell and Gageler JJ in dissent: at 249 [145]. See also *A2 Court of Criminal Appeal* (n 1) [521]–[522].

[23] Michael Plaxton, *Sovereignty, Restraint, & Guidance: Canadian Criminal Law in the 21st Century* (Irwin Law, 2019) ('*Sovereignty, Restraint, & Guidance*').

[24] Ibid 1–2.

[25] Ibid 2 (emphasis in original).

[26] See, eg, Michael Plaxton, 'What *Butler* Did' (2012) 57(1) *Supreme Court Law Review (2d)* 317, 319, criticising *R v Butler* [1992] 1 SCR 452 ('*Butler*') and *R v Labaye* [2005] 3 SCR 728 ('*Labaye*').

[27] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 3–4.

> message — to both citizens and legislators — that elected officials need not make hard decisions about how it is inappropriate for members of the public to act, since the courts will sand away any injustices in the name of 'interpretation'.[28]

While Australians are familiar with concerns about democratic deficits when it comes to rulings on constitutional law,[29] Plaxton's attention is directed to the less discussed terrain of how courts read the words of criminal statutes.

My own goal in this combined case note and book review is to apply Plaxton's theses on the substantive criminal law to the High Court of Australia's decision on female genital mutilation, to try to test both Plaxton's approach and the High Court's. I use the word 'try' mainly because, as its subtitle makes clear, Plaxton's book is 'emphatically a work about *Canadian* law at *this* moment in history — and not the law of the United States, the United Kingdom, or Narnia'.[30] Or Australia. That means that my goal of measuring the Australian case and Canadian book against each other could sputter in multiple ways: the High Court's judgment could be an outlier or oddity, or Plaxton's theses could have a relevant gap or flaw, or Australia and Canada's legal systems may differ in some pertinent way. But that is fine because those would all be interesting failures. Plaxton states that, while his book's aim is 'to unsettle opinion and provoke debate on what are the fundamental ground rules and techniques of substantive criminal law', merely 'forcing a rethink on a number of smaller, more discrete issues … is good enough for [him]'.[31] So too this note/review.

With my case note hat on, I should point out that the female genital mutilation prosecution that reached the High Court is one I have tracked for years. I have set the case as an exam question for my students several times and my criminal law text's latest edition features the original trial as a running example of criminal justice discretions and defences, including passing criticisms of the trial judge's (now High Court's) interpretation of 'mutilates'.[32] With my book review hat on, I must point out that my own writing and teaching on criminal law reflects Plaxton's view that the process of interpreting criminal offence provisions largely accounts for how the substantive criminal law works.[33] Indeed,

[28] Ibid 561.

[29] See, eg, Gregory Craven, 'Beyond the Constitution: The High Court's Democratic Deficit' (1997) 13(3) *Policy: A Journal of Public Policy and Ideas* 7.

[30] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 3 (emphasis in original).

[31] Ibid 39.

[32] Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2nd ed, 2017) 82–5, 244–7, 403–5 ('*Modern Criminal Law*').

[33] Ibid 49, 92–4; Jeremy Gans, 'Teaching Criminal Law as Statutory Interpretation' in Kris Gledhill and Ben Livings (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017) 93, 93.

Plaxton and I have other shared academic interests, including sexual assault law[34] and the work of apex courts,[35] though we do not always agree.[36]

Plaxton's book, running to over 500 pages, is too large and detailed to fully cover here. The High Court judgment is also complex, with four separate (and different) judgments. This combined note/review will focus on the parts that intersect.[37] It will work through Plaxton's three theses in order. For each, it will first present Plaxton's approach and explain how it ties to the questions about female genital mutilation that were before the High Court, and then it will present the High Court's approach and examine how it measures up against Plaxton's. Part II(B) will focus on the two principal judgments in *R v A2*, Kiefel CJ and Keane J, for the majority, and Bell and Gageler JJ, for the minority. I will shift my attention to the concurrences of Nettle and Gordon JJ and Edelman J in Parts III(B) and IV(B), respectively.

II Sovereignty and Females

A *Plaxton's Statutory Interpretation Thesis*

I will start with a provocative question: who decides what can and cannot be done to women's bodies? This question seems either rhetorical or outrageous, but — in both Australia and Canada — there is at least one answer that is neither: Parliaments decide, as they can with nearly all things.

Hence, in 1994, NSW's Parliament chose to impose a heavy criminal penalty on anyone who does certain things ('excises, infibulates or otherwise mutilates') to certain parts ('labia majora or labia minora or clitoris') of women's bodies (subject to some medical exceptions).[38] Three years later, Canada's Parliament did the same, expressly including those same acts (with different exceptions)

[34] See Jeremy Gans, 'Rape and the Golden Thread' (PhD thesis, The University of New South Wales, 1998); Michael Plaxton, *Implied Consent and Sexual Assault: Intimate Relationships, Autonomy, and Voice* (McGill-Queen's University Press, 2015).

[35] See Katy Barnett and Jeremy Gans (eds), *Opinions on High* (Blog) <http://blogs.unimelb.edu.au/opinionsonhigh>, archived at <https://perma.cc/A2AW-2265>; Carissima Mathen and Michael Plaxton, *The Tenth Justice: Judicial Appointments, Marc Nadon, and the Supreme Court Act Reference* (UBC Press, 2020).

[36] See Jeremy Gans, 'The W (D) Direction' (Pt 1) (2000) 43(2) *Criminal Law Quarterly* 212; Jeremy Gans, 'The W (D) Direction' (Pt 2) (2000) 43(3) *Criminal Law Quarterly* 345; Michael Plaxton, 'The Credibility of the W (D) Direction: A Response to Professor Gans' (2000) 43(4) *Criminal Law Quarterly* 443, 443.

[37] The case note will not discuss an important procedural issue addressed by some justices about what orders must be made if a criminal appeal is allowed: see *A2 High Court of Australia* (n 12) 232–3 [76]–[83] (Kiefel CJ and Keane J), 257–63 [175]–[192] (Edelman J).

[38] *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW) s 3.

within its existing aggravated assault offence.[39] Both Parliaments' criminalisation decisions followed an earlier one taken by the United Kingdom's ('UK') Parliament in the form of the *Prohibition of Female Circumcision Act 1985* (UK).[40]

To Plaxton, identifying *who* made these rules — legislatures — is crucial to understanding, applying and criticising the substantive criminal law. The simplest reason is that doing so identifies who *isn't* making these rules, namely everyone else, and notably judges: 'What the courts do is undeniably important, but there is no question that parliamentary intent lies at the heart of the criminal law enterprise.'[41] In Australia, this idea (albeit with some exceptions to be noted below) is so uncontroversial that it is almost never expressed. In Plaxton's Canada, by contrast, it was briefly controversial 70 years ago in another case about the rules surrounding women's bodies.

In 1949, British Columbia's top court, which needed to determine whether or not being a 'peeping tom' was a crime, boldly declared that '[c]riminal responsibility at common law is primarily not a matter of precedent, but of application of generic principle to the differing facts of each case'.[42] In the case before it, the 'generic offence' was 'necessarily as wide as the vagaries and frailties of men', and certainly wide enough to cover someone who entered private property to watch 'a woman preparing for bed'.[43] These pronouncements' lasting legacy came a year later when Canada's Supreme Court firmly and unanimously rejected them, yielding a judgment that kicks off Canadian law students' study of the criminal law:

> [T]his power has not been held and should not be held to exist in Canada. I think it safer to hold that no one shall be convicted of a crime unless the offence with which [they are] charged is recognized as such in the provisions of the *Criminal Code*, or can be established by the authority of some reported case as an offence known to the law. I think that if any course of conduct is now to be declared

[39] *An Act to Amend the Criminal Code (Child Prostitution, Child Sex Tourism, Criminal Harassment and Female Genital Mutilation)*, SC 1997, c 16, s 5. See also *Criminal Code*, RSC 1985, c C-46, s 268(3) ('*Canadian Criminal Code*').

[40] *Prohibition of Female Circumcision Act 1985* (UK) s 1 ('*UK Female Circumcision Act*'). This is now found in the *Female Genital Mutilation Act 2003* (UK) s 1.

[41] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 12.

[42] *Frey v Fedoruk* (1949) 95 CCC 206, 214 (O'Halloran JA, Sidney Smith JA agreeing at 240).

[43] Ibid 212, 214.

> criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts.[44]

This statement and its later endorsement in Canada's 1954 *Criminal Code*[45] are a constant reference point of Plaxton's book.[46]

Plaxton's 'statutory interpretation thesis' holds that the question of who makes laws profoundly affects how those laws are read, because it determines whose policies and values enter into such readings:

> Criminal law is closely related to moral philosophy, both in what it seeks to achieve and in the value-laden terminology it uses. But the two fields are not the same. Criminal law is moral reasoning refracted through the prism of legislative *authority*.[47]

When Parliament makes criminal laws (as is nearly always the case), the only sense of morality that counts when a criminal law is being interpreted is Parliament's sense, expressed when the law was made. For example, while everyone has (doubtless very strong) views on whether it should be a crime for someone to injure another's clitoris 'to any extent' for non-medical reasons, those views do not matter at all to the question of whether or not that was a crime in 2012. Rather, the only view that matters is the NSW Parliament's, specifically the view it expressed 18 years earlier when it criminalised female genital mutilation.

Again, although this idea is uncontroversial to the point of banality in Australia (with respect to statutory offences), there is an especially vivid illustration in Canada, in a very recent case about what can be done to women's bodies. In 2016, the Supreme Court considered whether or not anyone who caused a dog to lick a girl's vulva is guilty of 'bestiality'.[48] It is difficult to imagine actions that are more likely to attract moral outrage from everyone today, including senior judges. And yet, six members of the apex national court found for the defendant, because the only moral stances on 'bestiality' that mattered were ones held by Parliaments of earlier eras.[49] They ruled that, in the relevant eras, the loaded

[44] *Frey v Fedoruk* [1950] SCR 517, 530 (Cartwright J for Rinfret CJ, Taschereau, Rand, Kellock, Locke and Cartwright JJ) ('*Frey Supreme Court of Canada*').

[45] *Criminal Code*, SC 1953–4, c 51, s 8(a). This is now found in the *Canadian Criminal Code* (n 39) s 9(a).

[46] See, eg, Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 8, 41–2, 141, 145, 154.

[47] Ibid 11 (emphasis in original).

[48] *R v DLW* [2016] 1 SCR 402, 415–16 [6]–[7] (Cromwell J for McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Côté and Brown JJ) ('*DLW*').

[49] Ibid 414 [3].

term 'bestiality' was exclusively used to express repugnance towards acts involving a penis, so that was all the term covered in 2016.[50]

Before moving to the specifics of what Plaxton's thesis means for reading NSW's female genital mutilation offence, I must note some exceptions, albeit ones that ultimately prove Plaxton's rule that it is the views of the makers of criminal offences, not those of their interpreters, that matter to their interpretation. The first — not relevant in code jurisdictions like Canada or much of Australia — is the continuing survival of some common law offences in non-code jurisdictions such as NSW. Clearly, legislative intentions do not (generally) affect questions about the scope of such offences, something illustrated a decade ago when a divided High Court ruled that rape in marriage has long been criminal under Australia's common law.[51] However, even in that decision, every Justice saw the question before them as one about understanding *past* views — of judges and jurists — about rape, approximating to the views of the *makers* of the common law offence of rape.[52] Indeed, the majority's ruling has attracted sharp feminist criticism, not (of course) because anyone today thinks that rape in marriage should be legal, but because the majority's take on past views paints the past as rosier than it was.[53]

A second, more difficult exception is well illustrated by perhaps the most famous judicial decision about what can and cannot be done with genitals — men's, this time — when a divided House of Lords ruled that consensually wounding penises and scrotums for sexual ends is criminal.[54] While the question before the Law Lords could have been resolved by contemplating the UK Parliament's past views on the criminality of sadomasochism, it was not. Rather, both the majority and minority expressed their role as determining whether or not consensual sadomasochism is or is not in the 'public interest', a question that they clearly resolved by applying their own views on policy and values.[55]

[50] Ibid 420 [19], 456 [123].

[51] *PGA v The Queen* (2012) 245 CLR 355, 384 [64]–[65] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[52] Ibid 384 [64]–[65] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), 396 [112], 415 [162] (Heydon J dissenting), 443 [242], 437–8 [224]–[226] (Bell J dissenting).

[53] See, eg, Ngaire Naffine, 'Admitting Legal Wrongs: *PGA v R*' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 257, 257–8, 261; Wendy Larcombe and Mary Heath, '*PGA v R* [2012] HCA 21: Judgment' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 262, 270–1; Jill Hunter, 'Rape Law, Past Wrongs and Legal Fictions: Telling Law's Story with Integrity' in Jill Hunter et al (eds), *The Integrity of Criminal Process: From Theory to Practice* (Hart Publishing, 2016) 327, 327–8.

[54] *R v Brown* [1994] 1 AC 212.

[55] Ibid 234–5 (Lord Templeman), 246 (Lord Jauncey), 255–6 (Lord Lowry), 272–5 (Lord Mustill), 282–3 (Lord Slynn).

And this is just the best known of a slew of such pronouncements on the public interest (and hence criminality) of doing consensual things to people's bodies, be it vasectomies,[56] branding,[57] or tongue splitting.[58] Plaxton is all too aware of such decisions, as Canada's Supreme Court took the same approach to determining the criminality of a bar fight, a decision he sharply criticises.[59]

But none of this contradicts Plaxton's thesis — his statutory interpretation one, anyway — because the judges' decisions to define these offences according to their own moral views can still be sheeted home to the views of legislatures. For instance, the House of Lords' resort to a public interest test to determine the criminality of sadomasochism is attributable to the century-old decision of the drafters of England's statute on offences against the person to sprinkle those offences with tautological exceptions for 'lawful' behaviour.[60] The Supreme Court of Canada's decision to let judges 'decide that the acts proved constituted a crime or otherwise … according to his individual view'[61] when it comes to bar fights is similarly attributable to a decision of the *Criminal Code*'s drafters to adopt the apex court's 'made by Parliament and not by the Courts'[62] mantra only for criminal offences, while continuing the common law for 'defences'[63] (arguably including consent).[64]

Plaxton's focus on Canada means that he misses what I think is the best example of how legislatures can tell judges to apply their own views when determining the scope of criminal offences. In *Taikato v The Queen* ('*Taikato*'), yet another decision on women's bodies, the High Court of Australia had to rule on whether a statutory ban on carrying something that can discharge an irritant absent 'a reasonable excuse for possessing it' allowed a woman to carry a can of formaldehyde for self-defence.[65] The majority agonised over whether it should look for a general rule about when the legislature 'envisaged such a defence

[56] See *Bravery v Bravery* [1954] 1 WLR 1169, 1180–1 (Denning LJ) ('*Bravery*').

[57] See *R v Wilson* [1997] QB 47, 50 (Russell LJ for the Court) ('*Wilson*').

[58] See *R v M (B)* [2019] QB 1, 13 (Lord Burnett CJ for the Court) (Court of Appeal) ('*M (B)*').

[59] *R v Jobidon* [1991] 2 SCR 714, 762–6 (Gonthier J for La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ). See Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 137–45.

[60] See, eg, the *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100, which provides: 'Whosoever shall *unlawfully* and maliciously wound or inflict any grievous bodily harm upon any other person … shall be guilty of a misdemeanor': at s 20 (emphasis added).

[61] *Frey Supreme Court of Canada* (n 44) 530 (Cartwright J for Rinfret CJ, Taschereau, Rand, Kellock, Locke and Cartwright JJ).

[62] Ibid.

[63] *Canadian Criminal Code* (n 39) s 8(3).

[64] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 137–9.

[65] (1996) 186 CLR 454, 456 (Brennan CJ, Toohey, McHugh and Gummow JJ) ('*Taikato*'). See also *Crimes Act 1900* (NSW) s 545E(2), as at 26 March 1992.

being available' or whether it should assess the reasonableness of any excuse on a case-by-case basis, where 'the courts will have to make what are effectively political judgments'.[66] Crucially, the majority Justices decided that Parliament itself wanted the courts to do the latter:

> [T]he reality is that when legislatures enact defences such as 'reasonable excuse' they effectively give, and *intend* to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes its decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence. That being so, the courts must give effect to *the will of Parliament* and give effect to their own ideas of what is a 'reasonable excuse' in cases coming within s 545E even when it requires the courts to make judgments that are probably better left to the representatives of the people in Parliament to make.[67]

In *Taikato*, the Court's Justices had an unusual, albeit legally irrelevant, comfort: the people's representatives had already tipped their hand. NSW's Parliament responded to Taikato's original conviction by amending the offence to guide courts in future on how to deal with the question her case raised, clearly opting for the case-by-case approach the High Court eventually endorsed.[68] Twenty-three years later, the Justices hearing the Director of Public Prosecution's appeal against A2, Magennis and Vaziri's acquittals were less fortunate. The same Parliament's sole response to the State's first contested female genital mutilation prosecution was to triple the offence's maximum penalty from seven to 21 years.[69]

B *The High Court's Statutory Interpretation*

When Cromwell J wrote the Supreme Court of Canada's majority judgment on the meaning of bestiality in 2016, his Honour expressly disclaimed the significance of his own views on what sorts of bestiality should be criminal:

> My point is not to take sides in the policy debate. The point, as I see it, is that these are important points of penal and social policy. And they are matters for Parliament to consider, if it so chooses. Parliament may wish to consider whether

[66] *Taikato* (n 65) 465.

[67] Ibid 466 (emphasis added).

[68] *Crimes Legislation (Dangerous Articles) Amendment Act 1994* (NSW) s 3. See *Taikato* (n 65) 466–7.

[69] *Crimes Act 1900* (NSW) s 45(1), as amended by *Crimes Amendment (Female Genital Mutilation) Act 2014* (NSW) sch 1 item 2.

> the present provisions adequately protect children and animals. But it is for Parliament, not the courts, to expand the scope of criminal liability for this ancient offence.[70]

There is no similar disclaimer in the High Court's judgment in *R v A2* on a much less ancient offence, but that is almost certainly because none of the Justices thought it necessary. None so much as hinted at their own policy views when it comes to female genital mutilation, either generally (for example expressing revulsion at the practice) or on the specific question of the criminalisation of cutting someone's clitoris to any extent. Rather, the High Court's judgment — like the NSW Court of Criminal Appeal's and the trial judge's — reads as a technical exercise in determining the meaning of statutory words, just as Plaxton says it should.

But the exercise was not straightforward. The essential problem is that the NSW Parliament opted to use a word — 'mutilates' — that was coined to meet particular advocacy goals. As the World Health Organization later explained:

> The terminology used for this procedure has undergone various changes. During the first years in which the practice was discussed outside practising groups, it was generally referred to as 'female circumcision'. This term, however, draws a parallel with male circumcision and, as a result, creates confusion between these two distinct practices.
>
> The expression 'female genital mutilation' gained growing support from the late 1970s. The word mutilation establishes a clear linguistic distinction from male circumcision, and emphasizes the gravity and harm of the act. Use of the word 'mutilation' reinforces the fact that the practice is a violation of girls' and women's rights, and thereby helps to promote national and international advocacy for its abandonment.[71]

The shift can be seen in both the UK and United States offences. The former, from 1985, was titled 'female circumcision' but its text was about mutilation.[72] The latter, from 1993, was titled 'female genital mutilation', but its text was about circumcision.[73] NSW's offence was one of the first to use 'mutilation' in both title and text, saving the need for the High Court to puzzle over what a cultural or medical term, 'circumcision', means, exactly.

[70] *DLW* (n 48) 438 [70].

[71] World Health Organization, *Eliminating Female Genital Mutilation: An Interagency Statement* (Report, 2008) 22 ('*Eliminating FGM*').

[72] *UK Female Circumcision Act* (n 40) s 1.

[73] 18 USC § 116 (2012).

But that left the need to puzzle over what an advocacy term, 'mutilates', means, exactly. Indeed, a few years later, stakeholders adopted more precise language that eschewed both culture and advocacy:

> From the late 1990s the terms 'female genital cutting' and 'female genital mutilation/cutting' were increasingly used, both in research and by some agencies. The preference for this term was partly due to dissatisfaction with the negative association attached to the term 'mutilation', and some evidence that the use of that word was estranging practising communities and perhaps hindering the process of social change for the elimination of female genital mutilation. To capture the significance of the term 'mutilation' at the policy level and, at the same time, to use less judgemental terminology for practising communities, the expression 'female genital mutilation/cutting' is used by [the United Nations Children's Fund and United Nations Population Fund].[74]

Had NSW's Parliament used this 'less judgemental terminology', there would have been little or no need for the High Court to become involved in the prosecution of A2, Magennis and Vaziri.

By opting to use a term coined for advocacy purposes without clarifying qualifiers, NSW's Parliament put Australia's High Court in the same position that Canada's Parliament put its Supreme Court when it came to interpreting the historical word 'bestiality'. Justice Abella's lone dissent in the Supreme Court case began:

> This case is about statutory interpretation, a fertile field where deductions are routinely harvested from words and intentions planted by legislatures. But when, as in this case, the roots are old, deep, and gnarled, it is much harder to know what was planted.[75]

In the High Court case, the roots were not so old or deep, but were perhaps even gnarlier, because discourse about female genital mutilation was especially fluid in the year that the offence was enacted in NSW. In January 1994, the Director-General of the World Health Organization reported that '[f]emale genital mutilation is a collective name given to a series of traditional surgical operations … [N]one of the procedures are reversible. In all types of female circumcision part or the whole of the clitoris is removed.'[76] But by 1996, the body's

[74] *Eliminating FGM* (n 71) 22.

[75] *DLW* (n 48) 456 [125].

[76] Hiroshi Nakajima, *Executive Board: Ninety-Third Session Resolutions and Decisions*, WHO Doc EB93/1994/REC/1 (12 January 1994) annex 5 ('*Maternal and Child Health and Family*

technical group described the term as 'now generally accepted for the traditional practices that entail removal of part or all of *or injury to* the external genitalia' and decided

> that, in addition to the three main forms of female genital mutilation (clitoridectomy, excision of the clitoris and labia, and infibulation), other practices involving the stretching, pricking, piercing, cauterization, scraping or cutting of any part of the external genitalia or the insertion of herbs or any other substances into the vagina for the purpose of tightening should also be included in the classification.[77]

The uncertainty in May 1994 is showcased by Robert Webster's second reading speech, on behalf of Attorney-General John Hannaford, for the Bill that introduced the NSW offence:

> Female genital mutilation, or FGM, is the term used to describe a number of practices involving the mutilation of female genitals for traditional or ritual reasons. The practice involves the *excision or removal* of parts or all of the external female genitalia. … The *three forms* of FGM in order of severity are infibulation, clitoridectomy and sunna. The bill seeks to prohibit all of *these* various methods of FGM.[78]

But his speech also mentioned that a recent report to the Australian government 'recommended the introduction of legislation to make clear that FGM

Planning: Current Needs and Future Orientation') 207. See also World Health Organization, *Female Genital Mutilation: An Overview* (Report, 1998) 4 ('*FGM Overview*'), citing a 'much-quoted classification' for a further procedure in AA Shandall, 'Circumcision and Infibulation of Females: A General Consideration of the Problem and a Clinical Study of the Complications in Sudanese Women' (1967) 5(4) *Sudan Medical Journal* 178: 'Type 4: Introcision. This is the cutting into the vagina or splitting of the perineum, either digitally or by means of a sharp instrument, and is the severest form of circumcision.' The World Health Organization comments that '[t]here is no evidence of this practice outside Australia, either in Sudan or other African countries that practice female genital mutilation. A recent inquiry to the Australian government revealed that there are no known reports of the practi[s]e currently among the [I]ndigenous population', citing an 'unpublished communication': *FGM Overview* (n 76) 5.

77 World Health Organization, *Female Genital Mutilation: Report of a WHO Technical Working Group*, WHO Doc WHO/FRH/WHD/96.10 (1996) 4–5 (emphasis added). The definition was later adopted in World Health Organization, *Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement* (Report, 1997) 3 ('*FGM Joint Statement*').

78 New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1859–60 (RJ Webster) (emphasis added). On 'sunna', see *A2 High Court of Australia* (n 12) 221 [22] (Kiefel CJ and Keane J): 'The second form is "clitoral circumcision" or "sunna". It involves the removal of the clitoral prepuce — the outer layer of skin over the clitoris, which is sometimes called the "hood".'

constitutes a criminal act'.[79] That report, actually dated a month after the speech, said that the term 'female genital mutilation' is 'meant to embrace all types of the practice where tissue damage results; for example, damage manifested by bruising, contusion or incision'.[80] Its list of those types included 'ritualised circumcision' — both conduct that 'causes bleeding and may result in little mutilation or long-term damage' and 'wholly ritualised' acts such as 'cleaning'[81] — and called for female genital mutilation to be criminalised 'in all of its forms'.[82]

What is a court to do when a Parliament's words and intentions are both fuzzy? Plaxton's answer is clear: interpret!

> [J]udges faced with hard cases turning on tricky interpretive questions will have a measure — perhaps a healthy dollop — of discretion. To acknowledge the significance of discretion, though, is not to say that judges are free to do whatever they want. A judge, faced with two plausible interpretations of a statutory provision, would not be entitled to resolve the matter with a coin toss. [They] would be expected, and would expect [themselves], to resolve the issue on the basis of reasons that draw their force from Canadian norms of statutory interpretation.[83]

And that is what the High Court's Justices proceeded to do with Australia's norms.

The lead majority Justices, Kiefel CJ and Keane J, decided that mutilation's 'literal' meaning should be rejected in favour of one that captures the 'mischief' of female genital mutilation 'in its various forms',[84] noting that

> A purposive approach of this kind does not suggest that the language of a statutory provision is to be ignored. It is rather that a broader meaning of the language is to be preferred over its ordinary or grammatical meaning. It is necessary to do so to give effect to the provision's purpose. That purpose is evident from the use of the term 'female genital mutilation' in the heading and extrinsic materials. The word 'mutilates' is to be understood as a term of condemnation of any of the practices referred to in the *FLC Report* injurious to a female child …[85]

[79] New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1859 (RJ Webster).

[80] Family Law Council, *Female Genital Mutilation: A Report to the Attorney-General Prepared by the Family Law Council* (Report, June 1994) 6 [2.02] ('*Family Law Council Report*'), quoted in *R v A2 [No 2]* (2015) 253 A Crim R 534, 554 [182] (Johnson J) ('*A2 [No 2]*').

[81] *Family Law Council Report* (n 80) 6 [2.03].

[82] Ibid 57 [6.80(a)], quoted in *A2 [No 2]* (n 80) 556 [186].

[83] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 18–19.

[84] *A2 High Court of Australia* (n 12) 224–5 [37], [41].

[85] Ibid 228–9 [58].

The dissenting Justices, Bell and Gageler JJ, agreed that the literal meaning should give way to a contrary parliamentary intent but disagreed that there was such an intent.[86] They considered that the offence's title 'says nothing as to the conduct that the legislature is to be taken to have intended to fall within the scope of the prohibition'[87] and that the second reading speech's dual aspects leave it 'unclear that it was the legislative intention that ritualised practices were to fall within the proscription'.[88]

With one possible caveat, that is good enough for Plaxton. The caveat involves one of Kiefel CJ and Keane J's reasons for not reading the NSW offence as limited to the three more serious forms listed in Webster's speech:

> The problem with that approach is that it is inexplicable and improbable. It is inexplicable given the obvious acceptance of the recommendation of the *FLC Report* to prohibit all four forms of female genital mutilation there expressly identified. It is improbable because there is nothing to suggest that a lesser form of injury to a child was considered to be acceptable or, at the least, not warranting condemnation.[89]

Plaxton approves of 'look[ing] to the absurdity of a given interpretation, as a basis for preferring another', but only in 'narrow circumstances': where the absurdity 'would defeat Parliament's own purposes'.[90] He is troubled by a 1993 decision where Cory J read a prohibition on possessing guns 'capable' of automatic fire as extending to weapons that can be readily modified to become automatic, because the wider 'prohibition ensures a safer society':[91]

> [H]e seems to start with *his* impression of automatic weapons … and then quickly proceeds to assume that Parliament's intentions must have reflected those background beliefs. Perhaps they did. The point of techniques of statutory interpretation, however, is to ensure that *they*, rather than judges' own policy preferences, drive the inquiry.[92]

Plaxton would be less troubled by Kiefel CJ and Keane J's analysis, which is clearly expressed to be about what 'may have been *intended*' or what 'may be taken as *intended*'.[93] Likewise, the opposing conclusion of Bell and Gageler JJ,

[86] Ibid 249 [145].

[87] Ibid 243 [126].

[88] Ibid 247 [140].

[89] Ibid 226 [46].

[90] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 120 (emphasis omitted).

[91] *R v Hasselwander* [1993] 2 SCR 398, 414 [114].

[92] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) [124] (emphasis in original).

[93] *A2 High Court of Australia* (n 12) 226 [47]–[48] (emphasis added).

who saw the creation of a 'serious, indictable criminal offence' as telling against an 'objective legislative *intention*' to prohibit 'conduct occasioning no more than transient injury'.[94]

But I'm troubled. There surely comes a point when Parliament's words and preferences are so unclear that *any* reading is tantamount to a coin toss. If criminal law is 'moral reasoning refracted through the prism of legislative authority',[95] what do you do if the prism scatters the beam? Plaxton's statutory interpretation thesis warns against too readily discarding the prism, and hence Parliament's views. But I see a similar danger in twisting the legislative prism until the light points one way — say, by reading a particular government report as crucial and the other approach in earlier reports as absurd — at least where a different twist would point the light elsewhere. Plaxton's thesis is clear on what courts should *try* to do, but is less clear on when they should give up and switch to a different rule.

The different rule is, of course, strict construction of penal provisions, which Australians and Canadians alike give short shrift. Plaxton writes that '[t]he Supreme Court has frequently treated it' as a 'last resort'.[96] Australia's High Court has said the same, expressly.[97] Chief Justice Kiefel and Keane J set out the rule in their Honours' judgment, making it clear that there are two aspects to it. One opposes stretching language:

> The old rule, that statutes creating offences should be strictly construed, has lost much of its importance. It is nevertheless accepted that offence provisions may have serious consequences. This suggests the need for caution in accepting any 'loose' construction of an offence provision. The language of a penal provision should not be unduly stretched or extended[98]

and the other mandates how to choose between some readings:

> Any real ambiguity as to meaning is to be resolved in favour of an accused. An ambiguity which calls for such resolution is, however, one which persists after the application of the ordinary rules of construction.[99]

94 Ibid 249 [145] (emphasis added).

95 Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 11 (emphasis omitted).

96 Ibid 116.

97 *Waugh v Kippen* (1986) 160 CLR 156, 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ), quoting *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J).

98 *A2 High Court of Australia* (n 12) 227 [52] (citations omitted).

99 Ibid (citations omitted).

In his book, Plaxton endorses the first aspect as a check on judicial overreach into the legislature's realm,[100] but dismisses the second, limiting it to 'irreducibly ambiguous' statutes: 'In the vast majority of cases, the rule of strict construction is a needless distraction.'[101] But this frequency-based assertion of irrelevance depends on unexplored or debatable assumptions about the legislature's ability to communicate without irreducible ambiguity, judges' ability to judge when such ambiguity is irreducible, and the harms criminal defendants face if legislators and judges *both* fail their respective tasks. Even if correct, it leaves Plaxton's statutory interpretation thesis incomplete for at least some crimes, possibly including NSW's female genital mutilation offence.

III Restraint and Genitals

A *Plaxton's Restraint Thesis*

The second thesis of *Sovereignty, Restraint, & Guidance* is that when Parliaments enact criminal offences, they usually do not intend radical changes:

> In construing offence provisions, judges and courts should and do proceed on the basis that the offence in question was not intended to give rise to radical transformation or abolition of customs, practices, traditions, or institutions that are (rightly or not) widely regarded as benign or positive, or at least not so wrongful as to warrant serious condemnation.[102]

This restraint thesis is subject to (and indeed an application of) Plaxton's statutory interpretation one:

> [W]hen we proceed on the basis that restraint is merely an interpretative presumption, rather than a free-standing principle, we can see that there is nothing logically inconsistent between it and the idea that Parliament is, for the most part, constitutionally free to criminalize what it wants.[103]

Accordingly, the restraint thesis suggests a way for judges to proceed when an offence's words and intentions falter in one particular way — specifically, the words are open to be read as radically transformative or not, and there is no clear intention to be radical — which is a partial answer to my concern above about the limits of the statutory interpretation thesis. But restraint differs from strict construction in both its purpose — protecting society's norms, not

[100] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 115–16.

[101] Ibid 117.

[102] Ibid 20.

[103] Ibid 20–1.

defendants' liberty — and its operation, applying even (indeed, especially) when the easiest reading is the radical one.

Plaxton's key example is the word 'consent' that appears throughout Canada's *Criminal Code* and in particular determines the legality of most bodily interactions in that country.[104] He notes that a narrow definition of consent can limit autonomy, while a broad one can license exploitation:

> One can easily imagine arguments that certain popular social practices should be abolished or transformed for the sake of protecting vulnerable and exploited members of the public. Many forms of cosmetic surgery, such as breast-enhancement, could be regarded as symptoms of a broader culture of sexual objectification. Taking that as a starting-point, it might be argued that women who notionally consent to such practices have simply adapted to a political and social climate shot through with demeaning and degrading gender norms — in much the same way that women in some cultures consent to female genital mutilation.[105]

But those are matters for the legislature, not the courts. Plaxton argues that 'the safest course for the judiciary, given separation-of-powers concerns, is to adopt the broad construction of "consent"', but with a crucial caveat: 'the absence of evidence that Parliament in fact intended to transform or abolish certain practices and institutions'.[106]

Plaxton lists myriad examples of Canadian judges' restraint, including refusing to read: an obstructing offence as barring window-shopping, proselytising or begging;[107] a prohibition on officials receiving unsanctioned benefits as covering being bought a coffee or offered a lift;[108] or a provision that sexual consent is vitiated by fraud as criminalising 'commonplace tactics in sexual seduction'.[109] The latter issue arises more sharply in Victoria, which in 2016 replaced its offence of sexual penetration by fraudulent means with one covering

[104] *Canadian Criminal Code* (n 39) ss 50(1), 78(1), 121(1)(b)–(c), 153.1(1), 162.1(1), 184(2), 193(1), 193.1(1), 265(1)(a), 270.1(1), 335(1), 338(1), 339(1)–(3), 390(b), 406(a), 410, 432(1)–(2). See especially at s 265(1)(a) (emphasis added): 'A person commits an assault when … without the *consent* of another person, he applies force intentionally to that other person, directly or indirectly.'

[105] Ibid 241–2.

[106] Ibid 242.

[107] Ibid 179, discussing *R v Munroe* (1983) 148 DLR (3d) 166, 173 (Cory JA for the Court).

[108] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 178, discussing *R v Hinchey* [1996] 3 SCR 1128, 1179 [95] (Cory J for Sopinka, Cory and Iacobucci JJ).

[109] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 178, discussing *R v Cuerrier* [1998] 2 SCR 371, 434–5 [135] (Cory J for Cory, Major, Bastarache and Binnie JJ).

a 'false or misleading representation' that results in a sexual act.[110] Asked by a parliamentary committee — one I advise — whether this would criminalise commonplace lies such as 'I love you', 'this means nothing' or 'I'm single',[111] Victoria's Attorney-General responded:

> This element will capture a misleading or fraudulent representation intended to lead another person to engage in a sexual act that they would not otherwise engage in, not 'white lies' or 'half truths' that may be told in a social context.[112]

This leaves the replacement offence's scope cryptic, but — so long as a court accepts this response as determinative of Parliament's intentions[113] — it makes one thing clear enough: no radical change to social norms was intended. This would be enough to trigger Plaxton's presumption of restraint, which would require courts to try to avoid reading the offence provision in a way that criminalises those norms, regardless of what anyone — including future social influencers, government officials or the judges themselves — thinks of them.[114]

However, it is only the judiciary and the executive that is being restrained:

> [T]he presumption of restraint may function as a safeguard against courts and prosecutors hijacking criminal offences, using them to effect radical social change contrary to the wishes of Parliament.[115]

Legislatures, on the other hand, can alter social norms whenever they want, subject only to democratic and constitutional constraints. Plaxton cites a 2011

[110] *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 15, inserting *Crimes Act 1958* (Vic) s 45. Cf *Crimes Act 1958* (Vic) s 57, as at 1 December 2015.

[111] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 9 of 2016, 21 June 2016) 11.

[112] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 10 of 2016, 16 August 2016) 22 ('*Scrutiny of Acts Digest No 10*').

[113] See *Interpretation of Legislation Act 1984* (Vic) s 35(b): 'consideration may be given to any matter or document that is relevant', including 'documents laid before or otherwise presented to any House of the Parliament' and 'reports of … Parliamentary Committees'.

[114] On whether an Australian court will be able to read an offence provision consistently with such an intention, see generally *Michael v Western Australia* (2008) 183 A Crim R 348 ('*Michael*'), discussing *Criminal Code Act Compilation Act 1913* (WA) app B s 319(2)(a), providing that 'consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, *deceit*, or any fraudulent means' (emphasis added). President Steytler declined to 'read down' the offence and instead called for legislative reform: *Michael* (n 114) 371 [88]–[89]. Compare the approach of EM Heenan AJA in dissent, who read down the offence, observing that because broader sexual deceit has been common and not regarded as seriously criminal, 'it would be surprising indeed if … Parliament had intended to effect such a far-reaching change': at 432–3 [373]–[376]. The third judge, Miller JA, found that Parliament did intend such a change: at 384 [160]–[161]. I am grateful to a reviewer for pointing out this case.

[115] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 21.

ruling by Canada's apex court that a provision stating that 'no consent is obtained [for sexual offences] if … the complainant is incapable of consenting'[116] means that a sexual act done to an unconscious person with their advance consent is criminal.[117] Chief Justice McLachlin, writing for the majority, responded to an argument that this would criminalise even minor sexual acts like kissing a sleeping person (eg a spouse) as follows:

> Parliament has defined sexual assault as sexual touching without consent. It has dealt with consent in a way that makes it clear that ongoing, conscious and present consent to 'the sexual activity in question' is required. This concept of consent produces just results in the vast majority of cases. … In some situations, the concept of consent Parliament has adopted may seem unrealistic. However, it is inappropriate for this Court to carve out exceptions when they undermine Parliament's choice.[118]

The same surely follows in Victoria, where Parliament has specified that, for sexual offences, there can be no 'consent to an act' by a person who 'is asleep or unconscious'.[119]

While Plaxton argues that his restraint thesis supports some general principles of substantive criminal law — rebuttable ones aimed at avoiding radical social change, such as limitations on omissions, attempt liability and causation[120] — he sharply distinguishes those from others that purport to limit Parliament's will. His key example of such a 'false doctrine' is *de minimis non curat lex* (the law is not concerned with trifles), which he argues — and Australia's High Court has held[121] — is no rule at all but instead depends entirely on the terms of particular statutory offences.[122] Plaxton's stance that all criminal law doctrines are a function of Parliament's words and aims ensures the centrality of statutory interpretation in the criminal law, albeit, he concedes, at the price of greater complexity in reading particular offences:

> There may, however, be some difficulty in articulating the elements of the offence in such a way that they don't catch an implausibly wide range of conduct *and*

116 *Canadian Criminal Code* (n 39) s 273.1(2).

117 Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 250–2, discussing *R v JA* [2011] 2 SCR 440 ('*JA*').

118 *JA* (n 117) 464 [65] (McLachlin CJ for McLachlin CJ, Deschamps, Abella, Charron, Rothstein and Cromwell JJ).

119 *Crimes Act 1958* (Vic) s 36(2)(d).

120 Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 198–234.

121 *Williams v The Queen* (1978) 140 CLR 591, 599–600 (Gibbs and Mason JJ, Jacobs J agreeing at 601).

122 Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 182–94.

> they target the conduct that Parliament intended to condemn. In such cases, the interpreting court is in a tough spot.[123]

Consider, for instance, another 2016 Victorian sexual offence reform, this time to a minor offence. Parliament amended the existing offence of publicly behaving in an 'indecent offensive or insulting' manner by specifying that such behaviour includes 'a person exposing (to any extent) the person's anal or genital region'.[124] Asked to explain the term 'anal or genital region', the Attorney-General said it described the genitals and buttocks, adding that the new provision's purpose was to ensure that non-sexual conduct such as mooning and streaking was criminalised.[125] This makes it clear that Parliament's plan was to stop what is arguably (rightly or not) an Australian custom, which would rebut Plaxton's presumption of restraint. However, he added that the term 'to any extent' was intended to prohibit someone from exposing the tip of his penis (not an Australian custom) and was not intended to prohibit low-slung trousers or revealing swimming clothes (both Australian customs).[126] How does one apply the restraint thesis to achieve the latter intent, without undermining the former one? As will be seen, a variation on this problem troubles NSW's female genital mutilation offence.

B *The High Court's Restraint*

Justices Nettle and Gordon's judgment is a short one, agreeing 'generally' with Kiefel CJ and Keane J's reasons.[127] Their concurrence's apparent purpose is to make a further argument why the offence prohibits *de minimis* clitoral injuries:

> [I]t is significant that, relevantly, the offence is 'otherwise mutilates … *any part* of the … clitoris' (emphasis added). It directs attention to the clitoris, a sensitive organ — the mutilation of *any part of which* is forbidden. It is a vanishingly subtle distinction between the removal of a 'lentil' sized amount from the clitoris, which the Court of Criminal Appeal would categorise as an 'excision', and a 'cut' or a 'nick' to the clitoris. There is no meaningful textual basis to conclude that while the former kind of conduct would be caught by the word 'excises' in s 45(1)(a), a

[123] Ibid 197 (emphasis in original).

[124] *Summary Offences Act 1966* (Vic) s 17(1A), as inserted by *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 24.

[125] *Scrutiny of Acts Digest No 10* (n 112) 22.

[126] Ibid.

[127] *A2 High Court of Australia* (n 12) 249 [148].

> cut or nick, absent permanent damage, would not be caught by the phrase 'otherwise mutilates'.[128]

Their Honours add that the Court of Criminal Appeal's reading of the offence 'would deprive the words "otherwise mutilates" and "any part" of any meaningful work to do'.[129] Justices Nettle and Gordon are the only judges, in the High Court or below, to discuss the words 'any part'.

This means that the remaining judges centred on the offence's murkiest word — 'mutilates' — and therefore on Parliament's intentions,[130] making their judgments an exemplar of Plaxton's approach to the substantive criminal law. Indeed, Kiefel CJ and Keane J cited a Canadian decision in support of their broad reading of the NSW offence:

> A broad construction of an offence provision may be warranted in a particular case. This may be when its purpose is protective. In *R v Sharpe*, McLachlin CJ of the Supreme Court of Canada construed offence provisions relating to child pornography broadly in a number of respects. Her Honour interpreted the provisions in accordance with Parliament's main purpose in creating those offences: to prevent harm to children through sexual abuse.[131]

In *R v Sharpe* ('*Sharpe*'), the Supreme Court of Canada read words defining child pornography in Canada — 'shows a *person* who is or is depicted as being under the age of eighteen years'[132] — as covering the broadest possible meaning of 'person', including imaginary people and even the accused (if she is or looks under 18).[133] The Chief Justice cited 'evidence suggest[ing] that explicit sexual materials can be harmful whether or not they depict actual children' to explain why her Honour was not deterred that her reading 'extends the reach of the law to material beyond the ordinary conception of child pornography'.[134]

Even though it exemplifies the operation of his restraint thesis, Plaxton only discusses *Sharpe* in passing and largely critically,[135] because of what McLachlin CJ added next: '[T]he private and creative nature of this expression,

[128] Ibid 250–1 [153] (emphasis in original).

[129] Ibid 251 [154].

[130] Ibid 218–20 [13]–[18] (Kiefel CJ and Keane J), 244–7 [128]–[140] (Bell and Gageler JJ), 253–4 [161]–[166] (Edelman J).

[131] Ibid 228 [55].

[132] *Canadian Criminal Code* (n 39) s 163.1(1)(a)(i) (emphasis added).

[133] [2001] 1 SCR 45, 77–8 [37]–[41] (McLachlin CJ for McLachlin CJ, Iacobucci, Major, Binnie, Arbour and LeBel JJ) ('*Sharpe*').

[134] Ibid 77 [38], 78 [41].

[135] See, eg, Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 13, 53, 115, 341.

combined with the unlikelihood of its causing harm to children, creates problems for the law's constitutionality'.[136] Constitutional law, especially the bills of rights that are common in most non-Australian countries, is clearly another exception to Plaxton's statutory interpretation thesis, although he convincingly argues that Canada's constitution — including its *Charter of Rights and Freedoms* ('*Charter*')[137] — only rarely shapes Canada's substantive criminal law.[138] Rather, Plaxton's problem is with the *Sharpe* majority's remedy for the law's constitutional overreach — reading in new exceptions for '[s]elf-created expressive material' and '[p]rivate recordings of lawful sexual activity'[139] — which he argues 'intrude[s] upon the legislative role'.[140] In this respect, Australia exceeds Canada in its fidelity to Plaxton's statutory interpretation thesis, because of Australia's relative lack of both constitutional constraints and a remedy of 'reading in' exceptions to statutory provisions.[141]

But the lack of constitutional constraints and their associated remedies also makes the problem with Plaxton's restraint thesis, discussed above, especially sharp. This problem — that courts are sometimes forced to choose between either falling short of Parliament's intentions (eg by excluding potentially harmful imaginative material from the definition of child pornography) or going too far (eg by prohibiting largely harmless private expression) — is especially visible in the judgment of Kiefel CJ and Keane J. After their Honours' survey of *Sharpe* and two Australian cases that read protective offences broadly,[142] the Justices conclude:

> A purposive approach of this kind does not suggest that the language of a statutory provision is to be ignored. It is rather that a broader meaning of the language is to be preferred over its ordinary or grammatical meaning. It is necessary to do so to give effect to the provision's purpose. That purpose is evident from the use of the term 'female genital mutilation' in the heading and extrinsic materials. The word 'mutilates' is to be understood as a term of condemnation of any of the practices referred to in the *FLC Report* injurious to a female *child*. It follows that

136 *Sharpe* (n 133) 77–8 [39].

137 *Canada Act 1982* (UK) c 11, sch B pt I.

138 Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 44–83.

139 *Sharpe* (n 133) 111 [15].

140 Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 53. On *Sharpe* (n 133) in particular, see Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 53 n 58.

141 '[T]he Court cannot make a new law from the constitutionally unobjectionable parts of the old': *Brown v Tasmania* (2017) 261 CLR 328, 426 [297] (Nettle J), citing *Tajjour v New South Wales* (2014) 254 CLR 508, 586 [170] (Gageler J), quoting *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 372 (Dixon J), discussing *Banking Act 1947* (Cth) s 6(a).

142 See *Clarkson v The Queen* (2011) 32 VR 361; *R v Tang* (2008) 237 CLR 1.

> an injury such as cutting or nicking the clitoris of a female *child* cannot be said to be de minimis.[143]

Their Honours' reasoning follows Plaxton's in rejecting a *de minimis* rule, but what is notable is that the express rejection is only partial. Even though nearly all Australian domestic female genital mutilation offences, including NSW's, apply equally to both adults and children,[144] Kiefel CJ and Keane J's rejection of *de minimis* is only about *children*. Their judgment does not expressly resolve a problem that Magennis' counsel posed to the High Court: that, if 'otherwise mutilates' captures minor injuries, 'the offence would capture a bruise or graze even if it was occasioned with an *adult* woman's consent'.[145]

As noted earlier, English judges have dealt with vexed questions of adults consensually harming each other's genitals by judging the public interest for themselves, albeit with putative legislative backing.[146] Australian courts can deal with at least some consensual injuries to adult vulvas in the same way. All Australian female genital mutilation statutes exempt some 'surgical operation[s] … performed by a medical practitioner': relief from birth or labour, sex reassignment and any operation 'which is … necessary for the health', a catch-all that may cover some instances of cosmetic genital surgery.[147] As well, under a federal statute passed the same year as NSW's offence, '[s]exual conduct involving only consenting adults acting in private' is exempt from all state and territory laws so long as a court finds those laws are an 'arbitrary interference

[143] *A2 High Court of Australia* (n 12) 228–9 [58] (emphasis added).

[144] *Crimes Act 1900* (ACT) s 74; *Criminal Code Act 1983* (NT) sch 1 s 186B; *Criminal Code Act 1899* (Qld) sch 1 s 323A; *Criminal Law Consolidation Act 1935* (SA) ss 33–33A; *Criminal Code Act 1924* (Tas) sch 1 s 178A; *Criminal Code Act Compilation Act 1913* (WA) app B ss 306(1)–(2). The exception is *Crimes Act 1958* (Vic) s 32, which has separate offences for female genital mutilation of 'a child' (sub-s (1)) and 'a person other than a child' (sub-s (2), which does not include 'the removal of the clitoral hood'). All jurisdictions also separately provide for an offence of removing a person (usually limited to a child) to another jurisdiction to perform female genital mutilation: *Crimes Act 1900* (ACT) s 75; *Criminal Code Act 1983* (NT) sch 1 s 186C; *Criminal Code Act 1899* (Qld) sch 1 s 323B; *Criminal Law Consolidation Act 1935* (SA) s 33B; *Criminal Code Act 1924* (Tas) sch 1 s 178B; *Crimes Act 1958* (Vic) s 33; *Criminal Code Act Compilation Act 1913* (WA) app B s 306(4).).

[145] Kubra Magennis, 'Respondent's Submissions', Submission in *R v A2*, S44/2019, 3 May 2019, 6 [20] (emphasis added).

[146] See *Bravery* (n 56) 1180–1 (Denning LJ); *Wilson* (n 57) 50 (Russell LJ for the Court); *M (B)* (n 58) 13 (Lord Burnett CJ for the Court).

[147] *Crimes Act 1958* (Vic) s 34A(1). See also *Crimes Act 1900* (ACT) ss 76–7; *Criminal Code Act 1983* (NT) ss 186B(3)(a)–(b); *Criminal Code Act 1899* (Qld) sch 1 s 323A(3) (definition of 'female genital mutilation' paras (e)–(f)); *Criminal Law Consolidation Act 1935* (SA) s 33(1) (definition of 'female genital mutilation'); *Criminal Code Act 1924* (Tas) sch 1 s 178C; *Criminal Code Act Compilation Act 1913* (WA) app B s 306(1) (definition of 'female genital mutilation' paras (d)–(e)).

with privacy within the meaning of art 17 of the *International Covenant on Civil and Political Rights*'.[148]

However, these provisions do not reach milder things done consensually to contemporary adults' vulvas in non-medical, non-sexual settings, notably waxing and piercing. In particular, the Australian statutes lack the broad exceptions in Canada's female genital mutilation statute where:

> (a) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or *normal sexual appearance or function*; or
>
> (b) *the person is at least eighteen years of age and there is no resulting bodily harm*.[149]

These provisions allow Canadian courts to resolve the continuing legality of cosmetic genital surgery, piercing, waxing or sadomasochism by interpreting pertinent terms such as 'normal' and 'bodily harm'. By contrast, Australian courts have to work with less apt terms. For example, under Nettle and Gordon JJ's approach, these various acts' legality may turn on whether the term 'any part' has a lower limit, excluding (say) the removal of hair follicles.

Chief Justice Kiefel and Keane J were the only High Court Justices to discuss procedures on adults:

> The respondents also contended that if 'otherwise mutilates' has the extended meaning provided by the term 'female genital mutilation', s 45(1) would make it an offence to carry out a cosmetic procedure undertaken by some *adult* women, such as that which involves the piercing of the genitals. The answer to the argument is that no such problem would arise if 'otherwise mutilates' is taken to refer to practices to which female genital mutilation refers.[150]

This discussion clearly treats genital piercing — and a wider, but undefined category of 'a cosmetic procedure undertaken by some adult women' — as falling outside of the offence, but it is at least unclear whether or not the discussion extends beyond *adult* women.

In Plaxton's terms, the defendants' argument about adult women raises the restraint thesis (suggesting that Parliament would not have intended a radical limit on cosmetic procedures on adults' genitals), while the Justices' response

[148] *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4(1). See *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

[149] *Canadian Criminal Code* (n 39) ss 268(3)(a)–(b) (emphasis added).

[150] *A2 High Court of Australia* (n 12) 227 [49] (emphasis added).

applies the statutory interpretation thesis (finding that Parliament's purposes were directed to different practices discussed in various reports from the period when the offence was enacted). However, rather than choosing between the two possible *linguistic* meanings of 'otherwise mutilates' — 'irreparable imperfection' (which insufficiently protects children from some practices) or 'injury to any extent' (which overly restricts adults from other practices) — their Honours instead read those words as precisely congruent with whatever 'practices' Parliament was minded to prohibit in 1994. Parliament's specific intentions in turn explain how an age-agnostic offence prohibits every injury to a child's clitoris or labia[151] but not some injuries to an adult's clitoris or labia.

Chief Justice Kiefel and Keane J's approach shows one solution to the potential conflict between Plaxton's statutory interpretation thesis and his restraint thesis: where Parliament means what it says but has not said what it meant, simply read its words as picking up exactly what it meant to say. This satisfies both the statutory interpretation thesis (especially as Parliament chose to use an advocacy term — 'mutilates' — rather than a more precise prohibition) and the restraint thesis (rebutting the presumption of restraint only to the extent that Parliament intended to rebut it). The harder question is whether and when reading a criminal offence in that way is appropriate.[152] That is something that can be tested in part by reference to Plaxton's final thesis.

[151] But see Nettle and Gordon JJ's view that s 45 'directs attention to the clitoris, a sensitive organ': ibid 250 [153].

[152] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 197–8 (emphasis in original) remarks that a court

> may choose to build express *de minimis* conditions into the offence, recognizing that the offence has limits not apparent from the text alone, and thereby give effect to the presumption of restraint. In taking that approach, though, the court effectively gives judges in subsequent cases a considerable degree of discretion vis-à-vis *application*. Alternatively, the court may articulate bright-line rules — what I describe as 'proxy rules' — setting out the specific circumstances under which a course of action is benign or only trivially wrongful.

Plaxton sees the first of these approaches as 'probably superior as a matter of principle' because of the danger that the 'bright-line rules will simply reflect the interpreting court's *own* values': at 198 (emphasis in original). However, I am unsure which of these approaches, if any, was taken by Kiefel CJ and Keane J. I am also unsure whether my uncertainty is because of ambiguities in Plaxton's text, Kiefel CJ and Keane J's judgment or my own reading of them.

IV Guidance and Mutilations

A *Plaxton's Guidance Thesis*

While Plaxton's first thesis is about who makes the criminal law and his second is about what changes it aims to bring about, his third and final thesis is about whom the law is directed towards:

> [C]riminal offences do not only (or even mainly) 'speak' to police officers, defence lawyers, prosecutors, judges, and juries as they decide whether a *defendant* should be arrested, charged, convicted, and punished. They speak to all of *us*, every hour of every day, whether or not we are ever investigated or prosecuted.[153]

Plaxton here backs Hart's view of the law over Austin's,[154] but his goal is, as always, to describe how courts can and should read offence provisions:

> If Parliament's overarching aim is to guide citizens in certain ways, then the judiciary is powerless … to interpret *Code* provisions, or devise common law regimes, that would undermine that guidance — still less, to send the message, even inadvertently, that citizens do not need to look to statutes for guidance in the first place.[155]

His book's second half uses his guidance thesis to account for both the purpose and scope of various doctrines from the criminal law's 'general part' — voluntariness, fault elements, mistakes of fact and law, defences and capacity — without needing to draw on non-parliamentary regimes, such as Canada's *Charter* or the common law.[156]

Even though Australia's various criminal jurisdictions have quite different sources of general criminal law to Canada — variously in traditional or contemporary statutory codes or reform statutes that set out particular doctrines in detail, or in the continuing (or legislatively adopted) common law of Australia, and with no relevant constitutional limits — Plaxton's guidance thesis is still relevant here. The same core message holds true: whether sourced in codes, statute or common law, general doctrines of Australia's substantive criminal law are not overriding, and can be displaced or modified to achieve Parliament's

[153] Ibid 21–2 (emphasis in original).

[154] Ibid 25. In Plaxton's words: 'For this reason, in *The Concept of Law*, HLA Hart was able to argue at length that John Austin's understanding of law as a system of "orders backed by threats" failed to capture its essence': at 24. See HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 19–20; John Austin, *The Province of Jurisprudence Determined* (John Murray, 1832) 11, 18.

[155] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 30–1.

[156] See, eg, ibid 309–10, 370, 406–7, 452, 463–4, 493.

particular goals for each statutory provision.[157] Indeed, Plaxton's key example of a core doctrine being applied so that individuals are better guided towards the legislature's aims is the High Court's main decision on voluntariness, *Ryan v The Queen* in 1967, where it held that a person who voluntarily points a gun at someone and places their finger on the trigger can be criminally responsible for shooting the gun by reflex.[158] Plaxton sees this ruling as consistent with 'guid[ing] the individual with respect to the second- or higher-order decision to alienate, or take the chance of losing, his own choosing powers at some point in the future'.[159]

The High Court's decision on female genital mutilation did not discuss any doctrines from the general part of the criminal law. Accordingly, the more relevant parts of Plaxton's book for present purposes are where he discusses how courts read a particular offence's words consistently with the guidance thesis. For example, he fetes how Canada's Supreme Court rejected a woman's constitutional challenge to an offence of concealing the body of a child who 'died before … birth'[160] because '[i]ndividuals are nonetheless expected to refrain from conduct that tests the boundaries of criminal law lest they bear the consequences of the risk they have knowingly assumed'.[161] Plaxton adopts this 'thin ice' principle to delineate when an offence statute's complexity or obscurity infringes — or, in this instance, does not infringe — his guidance thesis.[162]

At *Sovereignty, Restraint, & Guidance*'s centre is a chapter titled 'A Complex Piece of Writing', a lengthy analysis of Canada's statutory ban on obscenity.[163] Plaxton tracks the Supreme Court of Canada's attempts to interpret a statutory phrase introduced by Canada's Parliament in 1959 — 'any publication a dominant characteristic of which is the *undue exploitation of sex*'[164] — drawing first

157 Gans, *Modern Criminal Law* (n 32) 49, 92–94.

158 (1967) 121 CLR 205, 245–6 (Windeyer J), quoted in Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 322–3.

159 Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 321.

160 See *Canadian Criminal Code* (n 39) s 243.

161 *R v Levkovic* [2013] 2 SCR 204, 216 [35] (Fish J for the Court).

162 Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 74.

163 Ibid 267–308. The phrase is from *Brodie v The Queen* [1962] SCR 681, 704 (Judson J for Abbott, Martland and Judson JJ) ('*Brodie*'), where it was used to describe the allegedly 'obscene' publication the defendants possessed: DH Lawrence, *Lady Chatterley's Lover* (Tipografia Giuntina, 1928). A narrow majority of the Supreme Court of Canada (including Judson J) ruled that the publication was not obscene: *Brodie* (n 163) 693 (Cartwright J), 705–6 (Judson J for Abbott, Martland and Judson JJ), 710 (Ritchie J).

164 *An Act to Amend the Criminal Code*, SC 1959, c 41, s 11 (emphasis added). See also *Canadian Criminal Code* (n 39) s 163(8); *Brodie* (n 163) 684–5 (Kerwin CJ).

on the previous common law on obscenity[165] (abandoned along with judge-made offences),[166] then, following the Supreme Court of Victoria, 'the standards of the community'[167] (which, Plaxton complains, means Parliament's law would follow, rather than guide, people's actions),[168] then what 'the public has concluded … degrades the human dimensions of life'[169] (a test that bears no 'relation to any model of critical sexual morality that could plausibly have informed Parliament's decision-making in 1959'),[170] before the Court developed a new theory of 'harm … which society *formally recognizes* as incompatible with its proper functioning'[171] (a test that, in full circle, was to be developed '[i]n the tradition of the common law').[172] This last approach, Plaxton concludes, satisfies the guidance thesis, but not the statutory interpretation one.[173]

Chief Justice Kiefel and Keane J's approach to 'otherwise mutilates', outlined above, differs from all of these approaches. It is not based on previous law, the community's views, the judge's own views or formally recognised values, but rather exclusively on Parliament's views (and, specifically, about what Parliament understood the term 'female genital mutilation' to be about in 1994).[174] This certainly satisfies the statutory interpretation thesis, but, as Plaxton would warn, the sheer difficulty of ascertaining the relevant views clearly risks the courts substituting their own. In Canada, this problem arose when courts seeking to ascertain community views of harmfulness shifted to judging what the community ought to view as harmful;[175] in NSW, the risk is that a court will judge what the NSW Parliament ought to have regarded as the practices of female genital mutilation.

As far as the guidance thesis is concerned, though, the sticking point is the 'thin ice' principle. Clearly, anyone who cuts a child's labia or clitoris for a non-medical purpose knows that they are 'testing the boundaries of the criminal

[165] See, eg, Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 269–77, discussing *R v Hicklin* (1868) LR 3 QB 360, 371 (Cockburn CJ).

[166] *Dechow v The Queen* [1978] 1 SCR 951, 961–2 (Laskin CJ for Laskin CJ, Judson, Spence and Dickson JJ).

[167] *Brodie* (n 163) 706 (Judson J for Abbott, Martland and Judson JJ), adopting *R v Close* [1948] VLR 445, 465 (Fullagar J) (Full Court).

[168] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 284–5.

[169] *Towne Cinema Theatres Ltd v The Queen* [1985] 1 SCR 494, 524 (Wilson J).

[170] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 292, discussing *Butler* (n 26).

[171] *Labaye* (n 23) 742–3 [32] (McLachlin CJ for McLachlin CJ, Major, Binnie, Deschamps, Fish, Abella and Charron JJ) (emphasis in original).

[172] Ibid 741 [26].

[173] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 299–303.

[174] *A2 High Court of Australia* (n 12) 225–6 [42]–[44].

[175] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 292–4.

law'. But does the same hold true for someone who engages in purely ritual behaviour (cleaning, the application of herbs or oil, or what the three defendants described as the 'skin' — of the two girls' vulvas — 'sniffing the steel' of the forceps)?[176] And what of acts involving adult genitals that are at the outer edges of current culture, for example tattooing or completely removing someone's labia? The easy answer today is that all of these acts are too rare and weird to fret over. However, much the same may once have been said about cosmetic surgery, or the piercing and waxing of vulvas — acts that have shifted towards the mainstream in the decades since NSW enacted its guidance on what can and cannot be done to women's genitals.

B *The High Court's Guidance*

A subsidiary issue before the High Court in *R v A2* concerned the different ways that lay people and anatomists talk about genitals. In 1993, the High Court ruled that 'vagina', appearing in NSW's 1988 definition of sexual intercourse, is used not in the lay sense (as an overall term for female genitals) but rather the way experts use it ('the membranous passage or channel leading from the uterus to the vulva', a usage that has since shifted towards the mainstream).[177] As part of its 2019 ruling on female genital mutilation, the High Court ruled that 'clitoris', used in NSW's female genital mutilation offence (and the charges laid against A2, Magennis and Vaziri) does not follow the usage of anatomists and histologists (some of whom see a clitoris as distinct from its hood) but rather the usage of lay people (who, everyone agreed, do not).[178] Noting a 1994 Australian government report finding that female genital mutilation practices 'are not generally carried out by surgeons or with any precision', Kiefel CJ and Keane J declined to 'exclude anatomical structures that are *closely interrelated* with the labia majora, labia minora or clitoris'.[179] People who injure vulvas (and perhaps vaginas or pubic mounds) via practices understood as female genital mutilation in 1994 are thus on thin ice, no matter how they understand the terms 'labia' and 'clitoris' and, it seems, no matter how even lay usage of those words evolves.

[176] *A2 Court of Criminal Appeal* (n 1) [5] (Hoeben CJ at CL, Ward JA and Adams J).

[177] *Holland v The Queen* (1993) 67 ALJR 946, 949 (Mason CJ, Brennan, Deane and Toohey JJ). See *Crimes Act 1900* (NSW) s 61A(1)(a), as at 18 December 1988. See also *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 item 4.

[178] *A2 High Court of Australia* (n 12) 230 [67] (Kiefel CJ and Keane J, Nettle and Gordon JJ agreeing at 249 [148], Edelman J agreeing at 257 [175]).

[179] Ibid 230 [67] (emphasis added), citing *Family Law Council Report* (n 80) 6 [2.01]–[2.02], 8 [2.11], 21 [3.02].

However, one High Court Justice thought that post-1994 shifts in terminology would affect the scope of what counts as 'mutilates'. Justice Edelman's judgment follows Kiefel CJ and Keane J in holding that 'otherwise mutilates' means 'otherwise engages in the practice of female genital mutilation'.[180] However, his Honour held that female genital mutilation was *not* limited to whatever acts NSW's Parliament had in mind in 1994:

> The purpose of s 45(1)(a) was to proscribe any forms of that practice. It was not to proscribe only some forms of the practice. Nor was it only to proscribe the particular forms of the practice that were best known in 1994. Indeed, since 1982, the World Health Organization had been advocating for governments to 'adopt clear national policies to abolish the practice of female genital mutilation' and was 'committed to the abolition of all forms of female genital mutilation'. The World Health Organization in 1998 adopted a classification that covered all those forms including a type that it described as '[u]nclassified: includes pricking, piercing … stretching … cauterization by burning … scraping of tissue'.[181]

Notably, the latter report was published four years *after* NSW's female genital mutilation offence was enacted. Nevertheless, Edelman J used that report — together with earlier ones — as follows:

> Against this background, the Minister's remarks in the Second Reading Speech concerning proscribing the practice, which 'has no physical benefits and is associated with a number of health hazards', are remarks that reveal a purpose extending beyond any particular or common forms of the practice to any example of the practice that involves tissue damage to the genitals of female children.[182]

His interpretative approach — defining 'female genital mutilation' by determining 'the contemporary application of its essential meaning that will best give effect to the legislative purpose'[183] — avoids the problems of trying to pin down a term's fast-shifting meaning at a particular moment. But how does it fare against Plaxton's theses?

Given his Honour's finding that the NSW Parliament itself meant for female genital mutilation to be understood at a higher 'level of particularity'[184] than a list of particular acts, Edelman J's approach reflects the statutory interpretation thesis. However, his Honour's finding, drawn from expert reports, that the

[180] *A2 High Court of Australia* (n 12) 253 [162].

[181] Ibid 256 [171] (citations omitted), quoting *FGM Overview* (n 76) 5–6, 59.

[182] *A2 High Court of Australia* (n 12) 257 [173].

[183] Ibid 255 [169].

[184] Ibid 254 [166], 257 [173].

essential meaning of female genital mutilation in 2012 was about 'tissue damage'[185] is open to question. For example, that meaning does not seem to capture two procedures in the 1998 list of '[u]nclassified' procedures: 'stretching of the clitoris and/or labia'; and 'introduction of … herbs into the vagina … for the purposes of tightening or narrowing it'.[186] The three defendants could well ask why Edelman J did not similarly exclude 'pricking' from that same list, which would then have left his Honour with an essential meaning that was similar to the Court of Criminal Appeal's definition of 'otherwise mutilates'. The danger is that, despite Edelman J's claim to be determining the contemporary application of female genital mutilation's 'essential' meaning, his Honour is simply relying on his own sense of what the term means.

What about the restraint thesis? Justice Edelman expressly rejects Kiefel CJ and Keane J's approach of reading 'otherwise mutilates' to capture exactly the practices Parliament was minded to ban in 1994. 'It is not open to courts', his Honour declared, 'to "suppose the law-maker present, and that you have asked [them] this question: Did you intend to comprehend this case?"', a quote from *Riggs v Palmer*, Dworkin's classic example of the limits of Hart's legal positivism.[187] Despite this, Edelman J reached the same conclusion as Kiefel CJ and Keane J on the meaning of 'otherwise mutilates'. Like them, his Honour's 'essential meaning' of female genital mutilation is expressed as limited to 'children', even though the 1998 report describes many procedures done to (and causing considerable harm to) adults.[188] However, his Honour's attention to female genital mutilation's 'contemporary application' seems to contemplate that that term's essential meaning may shift with social norms, perhaps waxing (if, say, genital waxing came to be regarded as a degrading cultural practice) or waning (if, say, tiny 'nicks' administered in doctors' surgeries became a broadly accepted way of protecting potential victims of female genital mutilation from

185 Ibid 257 [173].

186 *FGM Overview* (n 76) 6, citing *FGM Joint Statement* (n 77). See also the still wider classification of 'vaginal practices' in Department of Reproductive Health and Research, World Health Organization, 'A Multi-Country Study on Gender, Sexuality and Vaginal Practices: Implications for Sexual Health' (Policy Brief, WHO Doc WHO/RHR/HRP/12.25, 2012) 2, including 'the "steaming" or "smoking" of the vagina, by sitting above a source of heat (fire, coals, hot rocks) on which water, herbs or oils are placed to create steam or smoke' and either 'associated with maintaining wellness and feminine identity', 'mostly intended to enhance male sexual pleasure by causing vaginal tightening … and drying' or 'as part of innovative beauty treatments' and 'tattoos of the vulva or labia'.

187 *A2 High Court of Australia* (n 12) 254 [164], quoting *Riggs v Palmer*, 22 NE 188, 189 (Earl J) (NY, 1889). See also Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 15–21.

188 *A2 High Court of Australia* (n 12) 257 [174]. Cf *FGM Overview* (n 76) 2, 8, 10, 25, 31.

much more dangerous, amateur acts).[189] Thus, Edelman J's broader logic, if his Honour or other judges follow through with it, future-proofs Plaxton's restraint thesis.

That leaves the guidance thesis. Justice Edelman deprecates the Court of Criminal Appeal's definition of 'mutilates' precisely because it provides inadequate guidance to lay people: 'it confines the proscribed practices by references to criteria that might be difficult to *apply*, including thresholds of "superficial" and "irreparable damage" or "imperfection"'.[190] In a seeming rejoinder to Kiefel CJ and Keane J's approach of looking to what practices Parliament had in mind in 1994, his Honour writes:

> [T]hose understandings of the forms of the practice should not conclusively define the scope of s 45(1)(a), which is not expressly confined to any particular forms of female genital mutilation but appears, instead, by the catch-all 'or otherwise mutilates' to be intended to encompass any type of the practice.
>
> Where legislation does not expressly delimit the scope of its application then its scope is usually to be determined by the contemporary application of its essential meaning that will best give effect to the legislative purpose. This is what is meant by statutes 'always speaking'.[191]

By contrast, Edelman J's own approach of directing potential offenders to a term's 'contemporary application' (which will be most accessible to lay people) of its 'essential meaning' (consistently with the 'thin ice' principle) is guidance par excellence.

But there's a rub. Not only can a term's essential meaning shift over time, but so can the sources of that meaning. In the 1990s, female genital mutilation's meaning was the stuff of expert reports by advocacy groups, who debated its scope and expanded it repeatedly while seeking the enactment of laws

[189] See, eg, Committee on Bioethics, American Academy of Pediatrics, 'Policy Statement: Ritual Genital Cutting of Female Minors' (2010) 125(5) *Pediatrics* 1088, 1092:

> [T]he ritual nick suggested by some pediatricians is not physically harmful and is much less extensive than routine newborn male genital cutting. There is reason to believe that offering such a compromise may build trust between hospitals and immigrant communities, save some girls from undergoing disfiguring and lifethreatening procedures in their native countries, and play a role in the eventual eradication of FGC. It might be more effective if federal and state laws enabled pediatricians to reach out to families by offering a ritual nick as a possible compromise to avoid greater harm.

However, this policy (published online on 26 April 2010) was swiftly 'retired' in May 2010: American Academy of Pediatrics, 'Policy Statement: AAP Publications Reaffirmed and Retired' (2010) 126(1) *Pediatrics* 177, 177.

[190] *A2 High Court of Australia* (n 12) 257 [174] (emphasis added). Justice Edelman may well say the same about Nettle and Gordon JJ's 'any part'.

[191] Ibid 255 [168]–[169]. But see at 247–8 [141]–[144] (Bell and Gageler JJ).

prohibiting it.[192] However, by the late 1990s, many advocates switched to a different term, 'female genital cutting',[193] and shifted their focus from lawmakers to communicating directly with particular communities using simple, positive terminology that is specific to each community.[194] That raises a practical question: where exactly does one now find the 'essential meaning' of female genital mutilation? In the most recent expert report? In general dictionaries? In internet usage? In opinion polls? Or in the decisions of courts? That, in turn, raises the type of questions posed in *Sovereignty, Restraint, & Guidance*. Does the present state of the term 'female genital mutilation' still serve the purpose that the NSW Parliament contemplated in 1994? Did Parliament want the term's 'essential meaning in its contemporary application' to reflect or reject shifts in social norms when it comes to women's bodies? And is the term's moral guidance still 'refracted through the prism of legislative authority'?[195]

V Conclusion

On Tuesday 1 May 2018, NSW police arrested an Australian on charges of female genital mutilation, the same charges laid against A2 and Magennis in 2012.[196] In mid-September that year, Victorian police arrested an American for aiding and abetting female genital mutilation, almost exactly six years after Vaziri was arrested for that offence.[197] But the particular acts alleged were very different this time. According to media reporting, the Australian was accused of 'mutilat[ing]' by 'burning the labia majora off the victim' sometime in 2016, while the American was accused of coaching the Australian on how to use a

[192] See, eg, *FGM Overview* (n 76) 5–6, 59; *Family Law Council Report* (n 80) 6 [2.02]–[2.03].

[193] *Eliminating FGM* (n 71) 22.

[194] See, eg, Andrea C Johnson et al, 'Qualitative Evaluation of the Saleema Campaign to Eliminate Female Genital Mutilation and Cutting in Sudan' (2018) 15 *Reproductive Health* 30:1–8, 2: 'The Government developed a national campaign in Sudan, called Saleema, to change social norms discouraging FGM. Saleema translates to being "whole", healthy in body and mind, unharmed, intact, pristine, and untouched, in a God-given condition.'

[195] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 11 (emphasis omitted).

[196] Richard Noone, 'One-Man Brand in Hot Water', *The Daily Telegraph* (Sydney, 16 May 2018) 11.

[197] See Ben Hill, 'Exclusive: Celebrity Body Modifier Known as "Luna Cobra" Who Claims He Invented the World's First Eyeball Tattoo and Boasts of Transforming People "One Dream at Time" Is Charged for "Coaching" Female Genital Mutilation', *The Daily Mail* (online, 19 September 2018) archived at <https://perma.cc/5BG8-QZ4T>; Paul Bibby, 'Sydney Sheikh in Court over "Female Genital Mutilation"', *The Sydney Morning Herald* (online, 13 September 2012) archived at <https://perma.cc/J2VR-KF4K>.

thermal cautery unit for that purpose.[198] The High Court's judgment on the meaning of 'mutilates' fell between the pair's charges and their trials. The American was acquitted in a judge-alone trial in May 2020, after arguing that he had no interest or involvement in female genital procedures, had not coached the Australian and was not present in the room when the complainant's labia were removed.[199] The Australian is due to be tried later in 2021.[200]

Had the NSW Court of Criminal Appeal's interpretation of NSW's female genital mutilation offence been upheld by the High Court, the Australian's alleged conduct would clearly fall within the word 'mutilates' in the offence provision. According to media reports, the informant told the magistrate that the conduct caused 'permanent injury',[201] bringing it within the NSW Court of Criminal Appeal's test that 'the body part in question [be] imperfect or irreparably damaged in some fashion'.[202] However, the only High Court Justices to endorse that definition were Bell and Gageler JJ, who were in dissent.[203] Of the majority judgments, the one that most clearly supports the pair's prosecution is Nettle and Gordon JJ's holding that s 45 applies when a 'procedure was carried out on a person and … the procedure caused physical injury to the whole or any part of the labia majora or labia minora or clitoris of that person'.[204] These four Justices were most concerned with the possible *linguistic* meanings of the word 'mutilates', an orthodox application of Plaxton's statutory interpretation thesis.

By contrast, while the other two judgments are also consistent with that thesis, they each focused on what NSW's Parliament meant by a more complex term, female genital mutilation. Like Nettle and Gordon JJ, Kiefel CJ and Keane J and Edelman J all rejected any requirement of imperfection or irreparable damage, making it easier to prosecute transient injuries like those A2,

198 Sarah McPhee and Mark Russell, 'Body Modifiers "Mutilation" Trial in 2020', *The Newcastle Herald* (online, 26 July 2019) archived at <https://perma.cc/4NNL-49DV>.

199 Perry Duffin and Lucy Hughes Jones, 'Body Modifier Howard Rollins Not Guilty of Helping to Mutilate Woman's Labia with "Branding Iron"', *The Daily Telegraph* (online, 26 May 2020) archived at <https://perma.cc/92LV-HHWN>; Callum Godde, 'Body Modifier "Wouldn't Work on Genitals"', *The Canberra Times* (online, 13 May 2020) archived at <https://perma.cc/DGQ8-LLNU>.

200 Duffin and Hughes Jones (n 199); Gary Hamilton-Irvine, 'Brenan Russell: Body Modifier's Manslaughter Trial Pushed Back', *The Daily Telegraph* (online, 7 September 2020) archived at <https://perma.cc/7NRB-B4KX>.

201 Sam Rigney, 'Body Modifier Brendan Leigh Russell in Court over Alleged Genital Mutilation at Newcastle West', *The Newcastle Herald* (online, 16 May 2018) archived at <https://perma.cc89BX-YYQM>.

202 *A2 Court of Criminal Appeal* (n 1) [521] (Hoeben CJ at CL, Ward JA and Adams J).

203 *A2 High Court of Australia* (n 12) 242 [121].

204 Ibid 252 [158].

Magennis and Vaziri allegedly inflicted on the two girls.[205] But, paradoxically, their judgments may make it harder to prosecute the new case, because all three expressed their views about what the NSW Parliament understood by the practices of female genital mutilation in procedures done on 'children'.[206] In the new case, the alleged victim was 33-years-old when her labia majora were allegedly burnt.[207]

Consistently with Plaxton's restraint thesis, Kiefel CJ and Keane J held that 'otherwise mutilates' reaches all of — and only — 'the *practice* of female genital mutilation in all its forms which are productive of injury', as that term was understood in 1994.[208] However, no-one alleges that the two new defendants were performing or assisting in group cultural practices like the practices A2, Magennis and Vaziri allegedly did. Rather, they offered commercial services in response to unusual individual requests for 'body modifications', such as uncommonly placed tattoos (eg on eyeballs), scarification (eg inserting objects under the skin), and body part removal (eg of nipples).[209] Accordingly, it is arguable that, on Kiefel CJ and Keane J's approach, these practices, whether or not they cause injury — even permanent injury — to women's genitals, fall outside of the term 'otherwise mutilates' because they were not practices that were within the NSW Parliament's contemplation — and hence its meaning — in 1994. Indeed, Kiefel CJ and Keane J expressly specified that their interpretation of 'female genital mutilation' may not cover 'a cosmetic procedure undertaken by some adult women, such as that which involves the piercing of the genitals'.[210] Before his trial, the American's lawyer reportedly told the media that '[t]he legislation was not designed with voluntary genital cosmetic surgery in mind, but rather with cultural practices performed on very young girls'.[211]

These issues play out differently under Edelman J's approach, which is not tied to what Parliament thought in 1994, but rather (and consistently with Plaxton's guidance thesis) looks to what the 'contemporary application' of the term 'female genital mutilation' essentially covers. That very question was arguably

[205] Ibid 228–9 [58] (Kiefel CJ and Keane J), 256 [171] (Edelman J).

[206] Ibid 228 [56] (Kiefel CJ and Keane J), 257 [173] (Edelman J). Note that no member of the High Court addressed the meaning of the term 'excises', which may cover the conduct alleged in the pair's prosecution, regardless of any difficulties with 'otherwise mutilates'.

[207] Noone (n 196) 11.

[208] *A2 High Court of Australia* (n 12) 226 [44] (emphasis added). See also at 228–9 [58].

[209] Hill (n 197).

[210] *A2 High Court of Australia* (n 12) 227 [49].

[211] Sally Rawsthorne, 'Cosmetic Surgery or Female Genital Mutilation? Court to Decide Next Month', *The Sydney Morning Herald* (online, 15 April 2020) archived at <https://perma.cc/9VCP-536N>.

addressed in a report by the federal Attorney-General's Department, published a year after A2, Magennis and Vaziri's arrests and three years before the alleged removal of the new victim's labia:

> While most public discourse distinguishes between female genital cosmetic surgery and female genital mutilation, female genital cosmetic surgery may involve procedures that are technically very similar to those defined in the legislation. The status of these procedures under existing laws is untested. This is a complex issue, which this Report has been unable to fully consider. Further work should be done in close consultation with relevant Commonwealth, State and Territory agencies, communities, experts and other stakeholders to clarify the legal and policy position on female genital cosmetic procedures.[212]

The opening claim raises the possibility that Edelman J would find that female genital mutilation, at least in 2013, did not cover female genital cosmetic surgery, but only if his Honour considers that 'most public discourse' is what now defines that term's essential meaning in its contemporary application. Where extreme body modifications, such as those alleged in the new NSW case, would fit into such a discourse or classification is far from clear.

The aim of this combined book review and case note has been to test the High Court's ruling against Plaxton's thesis and vice versa. That test has not been defeated by Plaxton's focus on Canada. Indeed, the High Court's decision exemplifies all three of Plaxton's theses, albeit in different ways in each judgment and to different degrees in some. Despite the quite different constitutional arrangements in the two countries and the different sources of criminal law in Canada and NSW, the High Court's judgments on female genital mutilation are exemplars of Plaxton's core statutory interpretation thesis. Several judgments also demonstrate Plaxton's restraint and guidance theses and none contradicts them. This remains true even though the Court was divided and even though the majority judges took differing approaches. The difficulty of interpretative tasks like the one the Court faced is precisely why Plaxton stresses the importance of focussing steadily on Parliament's moral views, rather than others', including judges'. That all seven Justices in *R v A2* acted consistently with Plaxton's three theses suggests that his approach is robust across borders and oceans. Despite his modest disclaimer about his book's geographic and temporal reach, *Sovereignty, Restraint, & Guidance* merits attention in Australia and similar jurisdictions, at the very least.

[212] Attorney-General's Department, *Review of Australia's Female Genital Mutilation Legal Framework* (Final Report, 2013) 9.

Nevertheless, the various High Court judgments highlight — and in some instances offer solutions to — some problems in how to apply Plaxton's three theses (and, more generally, to avoid democratic deficits in the substantive criminal law). One, raised by the difficulty of determining the NSW Parliament's precise intentions in 1994, is when courts should abandon determining those intentions in favour of strict construction. A second problem is how to implement the restraint thesis when Parliament's language applies in equal terms to both conduct it intended to prohibit and conduct that is or becomes socially acceptable, for example some contemporary non-medical injuries done to adult women's genitals. The final problem — when does the guidance from Parliament's language cease to be in accordance with Parliament's intentions because that language evolves in ways that Parliament did not anticipate? — is posed by Edelman J's unique approach to defining female genital mutilation according to its contemporary application.

While I would have preferred both Plaxton and the High Court to talk more about these three problems, I should be clear where the main blame for each of them lies. Plaxton concludes his 'A Complex Piece of Writing' chapter as follows:

> Parliament is entitled to use the criminal law to guide citizens in this morally vexed, highly charged arena. If it chooses to do so, however, it must craft real rules that are capable of *settling* disagreements among members of the public concerning how it is appropriate to engage with each other — and pay the political costs of doing so.[213]

These words are apt to describe the continuing failure of the NSW Parliament — and other Australian ones — to do the hard political work of determining the boundary issues of the prohibition of female genital mutilation, be they the (physically) slight harms alleged against A2, Magennis and Vaziri or the (physically) more extreme ones currently before NSW's courts.

[213] Plaxton, *Sovereignty, Restraint, & Guidance* (n 23) 308 (emphasis in original).