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**HYPERLEXIS AND THE SOURCES OF GOVERNMENT  
AUTHORITY**

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**Abstract**

The genesis of this paper rests in two separate concerns about the role for legislation in New Zealand. Those concerns are, respectively, the idea that government makes “too much law” (“hyperlexis”), and whether government needs positive legal authority for its actions before that action is lawful. Both concerns provide for fascinating debate independently of one another. Both concerns have recently received attention in New Zealand in legal commentary and in the courts. The purpose of this paper is to add to the commentary on both concerns, and to explore their interplay.

**Word length**

The text of this paper, excluding abstract, table of contents, footnotes and bibliography, comprises approximately 9,676 words.

**Subjects and Topics**

Hyperlexis

Intensity of review

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Positive Empowerment theory

Residual freedom

Rule of law

Statute law

Sources of government authority

Third source theory

## *I Introduction and overview*

Sir Geoffrey Palmer argues that New Zealand suffers from hyperlexis in his most recent treatise on lawmaking.<sup>1</sup> Worse, that law is often unnecessary, poor quality, or both. Bad lawmaking undermines the rule of law and public confidence in the law. Certain reforms should therefore be made to reduce the quantity of law and improve the quality of lawmaking. I analyse the hyperlexis allegation in Part II of this paper by investigating the particular harms that the idea of “too much law” is alleged to cause. Closer inspection shows that hyperlexis is a concept with overlapping concerns. Making too much law is one of those concerns, but it is not unequivocally and intrinsically harmful.

The second concern is whether positive law – that is, legislation or the royal prerogative – must authorize all government action. In Part III of this paper I note the support for a “third source” of authority for lawful government action; a so-called “residual freedom” to supplement positive law. Proponents of the third source (primarily Professor Bruce Harris) argue that government has a residual freedom to act in a way that is not otherwise prohibited by law. Without such freedom, government would have to legislate for every inane and innocuous mundanity. Buying paperclips is the most oft-cited example. Opponents to the existence of a third source (primarily Professor Philip Joseph) argue for “positive empowerment”, which is the idea that all government action must be positively authorised by law. Professors Harris and Joseph have been sparring for some years about the appropriateness of the existence of a third source and more recently about positive empowerment. Surprisingly, we still do not know whether government action is only lawful if positive law authorizes it.

The question surfaced in the recent *Quake Outcasts* litigation. The Crown argued that it could lawfully rely on the third source for Cabinet to make decisions to categorize earthquake damaged land in Canterbury into “zones” and to provide offers to purchase “red-zoned” land<sup>2</sup> from their owners. The Court of Appeal<sup>3</sup> agreed, but the Supreme Court<sup>4</sup> disagreed. The latter Court found the government decisions should have been made under the provisions of the relevant statute – the Canterbury Earthquake Recovery Act 2011 – because that statute “covered the field” of earthquake recovery measures, squeezing out any room for a residual freedom for government to act.

*Quake Outcasts* appears to exacerbate the hyperlexans’ fears. The court’s reasoning means prudent counsel would advise the executive to seek ex ante positive law (legislative) empowerment for all executive actions, no matter how innocuous and mundane the action government sought to perform. Conversely, if government is unequivocally recognized to have the freedom at law to do anything that is not otherwise prohibited by law, one would expect a net decrease in the executive demand for legislation and an amelioration of the hyperlexis problem. I

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<sup>1</sup> Geoffrey Palmer “Law-Making in New Zealand: Is There A Better Way?” (2014) 22 Wai L Rev 1.

<sup>2</sup> ‘Red-zoned’ land was severely damaged, with area-wide and infrastructure damage. The Crown land would not be rebuilt on in the short to medium term.

<sup>3</sup> *Minister of Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588, [2014] 2 NZLR 587.

<sup>4</sup> *Quake Outcasts v the Minister for Canterbury Earthquake Recovery* [2015] NZSC 27.

discuss some points of note on the impact of both theories of government authority on the volume of legislation in Part III below.

The third source proponents' mode of reasoning is to first ask if positive law prohibits the government action in question. If the answer is no, then the relevant government action is automatically lawful. I argue the logical extension of this mode of reasoning means that the third source is capable of being much more than a "residual" freedom enjoyed by government: if it were accepted by the courts, it would instead be capable of justifying all government action that is not prohibited by positive law. This extends farther than buying paperclips or any other form of stationery for that matter. It would include politically contentious government action, and action that transgressed the rights and interests of private persons if those rights and interests were not already protected by positive law. In Part III I argue that this extension of the "residual freedom" survives constitutional scrutiny and may bring certain benefits through efficiencies for government and reduced volume of legislation, but would tip our fine constitutional balance too far. It is also more desirable for the legislature to consider and ratify (or reject) executive action in advance of that action being carried out.

I conclude Part III by posing another way of interpreting third source cases: through an intensity of review analysis. The analysis would allow the courts to continue navigating particular disputes about contested government action without the need to base their reasoning in either theoretical camp.

## *II What is wrong with lawlubbing?*

### *A An outline of hyperlexis*

Hyperlexis describes the exponential growth of law in a legal system. Some commentators use the term broadly to describe the growth in sources of law and legal information, including statute law, case law and legal commentaries. Other commentators have taken a narrower approach, referring to the amount of law produced by a state's lawmaking glands – the legislature and the executive. The focus of this paper is on the latter sources of law, and, in particular, whether the volume of law produced by those branches of government is problematic per se.

Accounts of hyperlexis are unflattering. Its proponents conjure language of natural disaster and disease. Sir Geoffrey Palmer has raised concerns about a “flood” of legislation in a recent *Waikato Law Review* article.<sup>5</sup> He argues New Zealanders have an “innocent and misplaced faith” in legislation, echoing Sir Alexander Turner's observation that we believe “there is no human situation so bad but that legislation properly designed will effectively be able to cure it.”<sup>6</sup>

Sir Geoffrey makes a number of propositions about how New Zealand comes to be in a state of hyperlexis throughout his paper, including:

- The question “why is this law necessary” is not asked with due rigor by policymakers, who rely on new legislation to achieve their policy aims.
- Regulatory impact statements are well intentioned but do not stem the flow of new law.
- The amount of legislation on Parliament's order paper and the length of time it has been on the order paper show that Parliament bottlenecks government's modern thirst for lawmaking.
- Parliament's three-year term incentivizes government to push through big-ticket policy items at the expense of quality legislation.
- Once the big statute is in force, frequent amendments are made, causing the statute to lose its principles and coherence.
- The amount of legislation poses rule of law problems for New Zealand.
- Attempts at post-enactment monitoring of whether legislation is doing its job are too sporadic to be effective.

So the public demands it, policymakers rely on it, our legislative processes fail to curb that demand, and the result is hyperlexis – government functioning as a hyperactive lawmaking gland.

Sir Geoffrey's diagnosis is supported on the numbers.<sup>7</sup> At 31 March 2014, the New Zealand statute book was 1,043 statutes and 64,536 pages long, far longer than in 1978 when Sir Kenneth

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<sup>5</sup> Palmer, above n 1.

<sup>6</sup> Sir Alexander Turner, cited in Palmer, above n 1, at 5. Turner, in turn, seems to echo De Tocqueville's observation of America's governing principle: “identify a problem, throw a law at it” cited in Bayless Manning, “Hyperlexis: Our National Disease” (1977) 71 *Nw. U. L. Rev.* 767 at 772.

<sup>7</sup> He provides a lengthy account of the statistics about the size of New Zealand's statute book. See Palmer, above n 1 at 14-17.

Keith raised parallel concerns about overzealous legislating.<sup>8</sup> Comparatively, New Zealand passes four times the number of statutes as the United Kingdom and is considered an outlier in its preference for detail in primary legislation.<sup>9</sup> While Sir Geoffrey notes the modern regulatory welfare state requires extensive amounts of law, and some old law is repealed each year, there is still a long-term net increase in the amount of legislation. MMP has not driven away the rainclouds. The flood is getting worse.

But what are the problems caused by a flood of legislation; is volume per se harmful? I outline three lines of argument raised by commentators below. Those problems relate to the rule of law; public harms and harm to particular affected individuals. These problems are not mutually exclusive, but I will treat them separately for ease of analysis. I aim to show that the harms of hyperlexis are not, per se, volume of law problems. They are instead problems of the presentation of legal rules in legislation.

## ***B The problems voluminous laws may cause***

### *1 For the rule of law*

Sir Geoffrey defines his central concern as “an unmanageable quantity of statute law resulting in attendant danger for the rule of law norm.”<sup>10</sup> Sir Geoffrey relies on Lord Bingham’s conception of the rule of law in making this argument: law must be accessible and so far as possible intelligible, clear and predictable on this conception.<sup>11</sup>

Lord Bingham gave three reasons why law must meet these criteria to be rule of law compliant. The first and second reasons are about knowledge of criminal and civil laws respectively. Citizens must know the law so that they may conduct themselves appropriately, especially if the state lends its weight to those laws by creating sanctions for breach. The third reason is that business values certainty, even more than the content of the law. It does not matter whether a legal rule is more or less favorable to a business as it does that the rule is predictable (or better – certain). The need for law to meet these criteria is heightened because ignorance of the law is no excuse.

But the rule of law critique has three noteworthy limitations.

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<sup>8</sup> Kenneth Keith “A Lawyer Looks At Parliament” in John Marshall (ed) *The Reform of Parliament: Contributions by Dr Alan Robinson and Papers Presented in His Memory Concerning the New Zealand Parliament* (New Zealand Institute of Public Administration, Wellington, 1978).

<sup>9</sup> The New Zealand Productivity Commission, *Regulatory Institutions and Practices* (30 June 2014) at 230, available at <http://www.productivity.govt.nz/sites/default/files/regulatory-institutions-and-practices-final-report.pdf>, last accessed 29 September 2015. However, the difference in figures appears to be a difference in preferences for expression of legal rules. New Zealand’s ratio of primary to secondary legislation is 1:2 and the United Kingdom’s is 1:70.

<sup>10</sup> Palmer, above n 1, at 35. Palmer also states another problem: “rapid increases over time in the cumulative bulk of statutes,” however, this problem stands alone and does not outline any problems caused by the rapid increase over time in the cumulative bulk of statutes; it does not advance our conversation about why volume is per se problematic.

<sup>11</sup> Lord Bingham “What is the Law” (2009) 40 VUWLR 597 at 600, as cited in Palmer, above n 1, at 2.

First, hyperlexis does not appear to pose rule of law problems in practice in New Zealand when compared to other jurisdictions. New Zealand ranks first out of 15 nations in the Asia Pacific region and sixth out of 102 nations globally in the Rule of Law Index.<sup>12</sup> New Zealand also ranks second out of 189 economies globally in the World Bank's ease of doing business rankings.<sup>13</sup> Complex and voluminous legislation and executive regulations would impact the indicators that both indices use to determine their rankings. For example, the World Bank's ease of doing business rankings involve assessments of ease of starting a business, dealing with construction permits, registering property, protecting minority investors, paying taxes, enforcing contracts, and so on.

That is not to say that New Zealand should not strive to better its legislative process; it is simply to note that an accurate problem definition requires further investigation about whether the status quo is actually rather than theoretically harming the accessibility, intelligibility, clarity and predictability of legislation. Both Lord Bingham and William Araiza provide partial empirical answers, which I will return to shortly.<sup>14</sup>

Second, the argument does not explain how, exactly, the quantity of statute law impedes the accessibility, intelligibility, clarity and predictability of law. In Sir Geoffrey's critique of lawmaking in New Zealand he describes the volume of statute law and the rule of law norm, but he does not explain how the former impacts the latter.

There are two possible answers we could derive from the critique. First, big statutes like the Resource Management Act 1991 and the Social Security Act 1964 lose their coherence and quality through frequent amendment.<sup>15</sup> Second, New Zealand's legislation is ordered by the statute in which it was passed. This contrasted with United States jurisdictions, which arrange legislation into codes by subject area.<sup>16</sup>

However, both of these possible answers relate to the way legislation is presented and not to the amount of legislation brought into force or that sits on the statute book. A statute may be amended; added to; chopped and changed in ways that make distilling the relevant legal principle(s) more difficult. Other statutes may be enacted in separate areas of law with legal rules that have an osmotic effect to cloud the clear intent of the original statute. But I would argue these problems concern the presentation of legal rules, and not of the volume of legal rules per se.

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<sup>12</sup> The Index is an independent measure created by the World Justice Project which collects and analyses data in across 102 countries worldwide. The data uses 44 indicators across eight categories. New Zealand ranks behind Denmark, Norway, Sweden, Finland, and Netherlands on the global index. World Justice Project, "Rule of Law Index 2015" (26 September 2015) <<http://data.worldjusticeproject.org/>>.

<sup>13</sup> World Bank Group, "Doing Business: Measuring Business Regulations" (26 September 2015) Economy Rankings <<http://www.doingbusiness.org/rankings>>.

<sup>14</sup> See subpart B.3. "for affected individuals", at pages 10-12 below.

<sup>15</sup> Palmer notes the Resource Management Act was originally 382 pages and is now 827 pages, and has been amended 36 times since September 2007 alone. See Palmer, above n 1, at 4.

<sup>16</sup> Palmer, above n 1, at 19.



Lord Bingham provides a case to illustrate the harm caused by inaccessibility of legislation. I will return to this case below, but for present purposes I note again that a link between volume of legislation and damage to the rule of law is not drawn by the rule of law argument.

Third, Lord Bingham's conception of rule of law does not explain whom, precisely, the law must be accessible (*et cetera*) to, or, relatedly, how accessible (*et cetera*) it must be. Is the relevant benchmark a legal professional, or must the law be accessible, intelligible, clear and predictable for members of the general public?

This inquiry is akin to those about the length of pieces of string, but it is an important inquiry for accurate problem identification and for understanding when the accessibility (*et cetera*) of law has become problematic and needs addressing. I expect Lord Bingham would argue the latter, given his concern about private individuals and businesses knowing and understanding the law in order to comply with it. But law is a system that, like most fields of human endeavor, gets more complex as it evolves.<sup>17</sup> With complexity comes specialization and the need for expert analysis to help laymen interpret and understand the relevant field of knowledge, which would otherwise be incomprehensible. We recognize this idea in our common law already. The law of tort imposes higher duties of care on professionals and specialists in professional fields, who are held to a higher standard of care than your ordinary "reasonable person". It is arguable that law should be treated no differently from these other bodies of expert knowledge.

What this third point means for a hyperlexis critique based on the rule of law is that Lord Bingham's accessibility requirements would not be relevant to primary sources of law. Legislation and case law would be left to lawyers to interpret and explain to the public through legal commentaries, legal advice, and other source of legal information. Our laws are beginning to recognize that the public cannot always know and understand primary sources of law.<sup>18</sup> Resolving this issue is outside the scope of this paper. Suffice to note that if rule of law requires primary rather than secondary sources of law to be accessible (*et cetera*), then different (higher) standards of accessibility (*et cetera*) will need to be set. However, primary sources of law may even pose problems for legal professionals, as Lord Bingham and William Araiza explain shortly.

## 2 *For the public*

Bayless Manning, who originally described hyperlexis (and coined the term) in 1977 during an account of United States law, provides another answer to our inquiry about whether legislative volume is problematic.<sup>19</sup> Manning argued hyperlexis would create a "legal blizzard" to confound and harm the public in many ways, including:

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<sup>17</sup> "The legal system as a whole exhibits a marked tendency to become more complex, a feature that it appears to share with other systems, physical and social" from Peter H. Schuck "Legal complexity: some causes, consequences, and cures" (1992) 42 *Duke L.J.* 1 at 9.

<sup>18</sup> For example, New Zealand, the United Kingdom and Australia have all passed laws prohibiting "unfair contract terms" in standard form consumer contracts. These laws move away from traditional common law contract principles by acknowledging that consumers do not read and understand the contracts they routinely enter into. See for example sections 25A and 46H-46M of the Fair Trading Act 1986, which were inserted by the Fair Trading Amendment Act 2013.

<sup>19</sup> Manning, above n 6.

- The costs of operating a legal system will increase as government, parliament, the courts and private lawyers handle larger workloads. Stress would be placed on the already tight budgets and limited resources of publicly funded law enforcement, including regulators and the courts.
- Public respect for the law would decrease, not just because of increases in complexity of the law and the resultant decline in law's accessibility, but also because of the need for law enforcers to make discretionary choices about which conduct to take enforcement action against.
- Individuals and companies with more resources will be able to hire compliance and legal staff; entrenching a class divide in the citizenry between those who have the means to pay and those who do not.
- Lower courts may be unable to adhere strictly to the doctrine of precedent and stare decisis under the weight of modern law, simply because it is difficult to find and know the law with so much legal information about.

Lord Bingham provides empirical support for Manning's final concern. He refers to a case from the United Kingdom where the defendant was nearly ordered to pay £66,120 by the Court of Appeals for England and Wales following the defendant's conviction for smuggling, only for the court to discover at the eleventh hour that the regulation in question had been repealed seven years prior.<sup>20</sup> The judges lamented the lack of a comprehensive statute law database in the United Kingdom by which all of the relevant legislation on a particular topic can be searched. New Zealand is fortunate enough to have such a database, though Sir Geoffrey recommends further development to make the law more accessible by indexing all of the relevant legislation on a particular legal subject under codes, as is the practice in the United States. But this example is, fundamentally, another concern about the presentation of legal rules rather than the volume of laws. Voluminous inaccessible legal rules conflate the fundamental problem – inaccessible legal rules – but it is not the cause of inaccessibility.

However, Manning's cost and resource-oriented critique of the volume of laws is strong. More law to create and administer requires more human resources. More law inherently costs an economy more money. While not directly a volume issue, the complexities in presentation of law outlined earlier in this paper by Sir Geoffrey exacerbate the problem as they create inefficiencies in knowing and understand the law, costing both the private and public sector more. Needing more resources to access and know the law creates difficulties for those that have less resources than others. Hyperlexis is the cause of legitimate cost and resource harms in this regard.

### *3 For affected individuals*

William Araiza takes a narrative approach to outlining the problems caused by hyperlexis. He argues that if particular cases can be identified, those cases should be sufficient to prove that hyperlexis is "profoundly corrosive" of our legal system. Lord Bingham's example outlined above is typical of a narrative approach. Araiza provides another example from the United

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<sup>20</sup> *R v Chambers* [2008] EWCA Crim 2467, as cited in Bingham, above n 11, at 603.

States.<sup>21</sup> The Sacketts, regular Idaho homeowners, sought to build on their land, which looked the same as the rest in the subdivision they had purchased in. They obtained the relevant local consents and proceeded to build, until the federal Environmental Protection Agency intervened by pointing out that the Sacketts were building on protected wetland, in contravention of the Clean Water Act. The Sacketts sought judicial review of the Agency's decision, but were told by the courts that judicial review was not available until the Agency prosecuted the Sacketts. The case made it to the United States Supreme Court, where counsel successfully argued the Agency's decision was reviewable, and that the Sacketts had been unwittingly ensnared in the regulatory net when performing ordinary everyday activities and were caught out by complex legal rules that are not apparent to the everyday citizen.<sup>22</sup>

In making a narrative case, Araiza argues the hyperlexis critique should not be that there is "too much law", but rather that law can sometimes trip up the innocuous conduct of everyday law-abiding citizens.<sup>23</sup> This inductive approach taken from particular cases will allow specific problems in our body of legislation to be targeted.

While it remains difficult to outline problems worthy of system-wide remedy using inductive reasoning, the narrative approach gains significant traction in political and public debate. New Zealand's current government established a Rules Reduction Taskforce to investigate loopy rules and cut "red tape" – a reference to excessive bureaucracy and, in particular, costly, cumbersome and inexplicable legal rules.<sup>24</sup> The New Zealand Initiative has produced a similar stock-take of areas where government could reduce regulatory costs. Both the Taskforce and the Initiative hunted specific examples of red tape to consign to the scrapheap. The Taskforce identified the Resource Management Act 1991 as one of the major sources of complaint about red tape; the Initiative cites more granular examples: the Holidays Act 2003 allows a person to take a year's extended parental leave and yet still accrue annual and sick leave entitlements for that year.<sup>25</sup>

The structure of the argument is no less compelling as a driver of change despite its inductive limits. It evinces a public or social need for the clarity of legal rules in general and legislation and regulation in particular. But, again, the pleas for cutting red tape are not the pleas of those drowning in a sea of law; they are pleas for greater logic, accessibility and comprehensibility of our laws.

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<sup>21</sup> *Sackett v EPA* 132 S. Ct. 1367 (2012), as cited in William D. Araiza "Apoplectic About Hyperlexis" (2012) 80 Fordham L. Rev. 69.

<sup>22</sup> Araiza, above n 21, at 71.

<sup>23</sup> Though I am sure the Environmental Protection Agency would not characterise the situation in this way. A legislature has created legal rules for the Agency to enforce. By nature, being created through democratic institutions, society has deemed the Sackett's conduct important enough to regulate.

<sup>24</sup> The Rules Reduction Taskforce website is available at <<http://www.dia.govt.nz/RR-Taskforce>>. See Rules Reduction Taskforce, *The Loopy Rules Report: New Zealanders Tell Their Stories* (August 2015) <[http://www.dia.govt.nz/vwluResources/Rules-Reduction-Report/\\$file/Rules-Reduction-Report.pdf](http://www.dia.govt.nz/vwluResources/Rules-Reduction-Report/$file/Rules-Reduction-Report.pdf)>.

<sup>25</sup> The New Zealand Initiative, *Reducing Unnecessary Regulatory Costs: Responding to the Prime Minister's Challenge* (29 September 2015) <<http://nzinitiative.org.nz/site/nzinitiative/files/Regulations%20PM%20Challenge%20final.pdf>>.

### *C Scepticism about hyperlexis*

Mila Sohoni provides a compelling critique of the hyperlexis critique. She argues there are serious conceptual problems in measuring and remediating hyperlexis that undermine the broad charge that there is “too much law”.<sup>26</sup> I will set out the particular arguments Sohoni makes that are relevant to the problems caused by volume of law.

First, it is difficult to measure aggregate increases in law. New legislation often repeals old legislation, codifies numerous decided cases, or reconciles seemingly inconsistent legal rules. The length of the statute book goes up with the advent of new legislation, but that could mean a reduction in the aggregate volume of law. Further, common law jurisprudence is often lengthy and more inaccessible than legal rules set out in legislation, so the increase of legislative volume to codify common law may well have a significant downwards effect on the aggregate volume of law.

A pertinent footnote to the statistics provided above regarding New Zealand’s thirst for legislation compared with the United Kingdom, it is worth noting that New Zealand’s ratio of primary to secondary legislation is 1:2, whereas the United Kingdom’s is 1:70.<sup>27</sup> It is not possible to definitively say whether a bulky statute book is “worse” than a bulky book of subordinate legislation. The numbers evince more of a cultural difference in preferences for going about the business of legislating.

Second, it is difficult to pinpoint and argue for how much law there would be in an ideal legal system. It may be zero law; or it may be a series of high-level principles – although these could lead to indeterminate outcomes in particular cases. Point being, it is difficult to make a normative argument about how much law there should be in a legal system, and to aspire towards that amount of law. It would again be akin to inquiring about the length of a piece of string.

The weakness of Sohoni’s argument on this point is that we may also not be able to argue for a particular degree of liberty that should be enjoyed by a modern liberal democracy, but we should still strive towards enhancing our concept of liberty and refining what we mean when we talk about liberty. By analogy, a presumption in favour of “less legislation” or “less law” may be a beneficial normative aspiration for a jurisdiction, especially given Manning’s cost concerns outlined above.

Third, “numerosity alone does not make out a prima facie case for illegitimacy”<sup>28</sup> meaning one’s focus should not be on the quantity of law alone, but on the content of that law. Proliferation of laws may simply reflect the democratic demands of the modern regulatory and welfare state – a point Sir Geoffrey acknowledges.<sup>29</sup>

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<sup>26</sup> Mila Sohoni, “The Idea of Too Much Law” (2012) 80 Fordham L. Rev. 1585.

<sup>27</sup> See Productivity Commission, above n 9.

<sup>28</sup> Sohoni, above n 26, at 1607.

<sup>29</sup> Palmer, above n 1, at 4.

Fourth, responding to Manning’s argument about the costs created by a hyperlexic legal system, it is difficult to identify a baseline of how much a country should spend on law. Law can increase utility where the benefits created by passing a law outweigh the costs associated with creating and implementing that law. Sohoni argues that critics of hyperlexis often argue about the costs created by making too much law while overlooking the benefits. The shortcoming of an economic analysis of a legal system is that it does not tell us whether we should only pass economically efficient laws. The trick, though, would be to argue that a jurisdiction makes more legislation than is optimal.<sup>30</sup>

Fifth, proliferation of laws may simply be democracy at work. The public often demands government “do something” about certain politically sensitive matters. Government responds by passing a law. We see this frequently in the criminal and quasi-criminal law space. When a regulator tries to prosecute morally repugnant conduct and is unable to do so because the legislation does not respond, the regulator, the media and the public often call for better (more) legislation. Further, legislation is a political badge of honour in Westminster systems of government. Politicians often point to the volume of laws passed as a political key performance indicator when accounting to the public.<sup>31</sup>

#### ***D Observations***

What, then, can be made of the foregoing survey of arguments about hyperlexis in general, the volume of legislation in particular, and the harms that the latter may cause? A number of points can be added to inform debate about hyperlexis:

- Hyperlexis describes overlapping concerns about the volume, coherence and complexity of laws.
- Volume, per se, only poses cost and resource problems for the public in practice. It is inefficient for government to be spending good chunks of its time having to legislate to proceed with its policy agenda, and for the private sector to have to determine how best to comply with the legislation that is produced.
- Coherence and complexity issues relate to the expression and monitoring of law.
- Hyperlexis is not causing practical problems in New Zealand on a comparative basis with other jurisdictions.
- Reducing the volume of legislation by supplanting prescriptive detail with broad high-level principles may simply increase the amount of case law that is needed to explain and supplement that legislation; one would simply be shifting the volume of law from one legal forum (legislation) to another (the courts) which arguably presents legal rules in a less accessible fashion through judgments forming a body of common law, rather than through statute.
- As legal systems evolve they inherently get more complex (and perhaps more voluminous).

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<sup>30</sup> Although equally the jurisdiction could make an amount of legislation that is suboptimal, which I suppose would give rise to articles about “hypolexis”.

<sup>31</sup> While it does not explain that harms caused by reams of legislation, it is helpful to note to outline the motivators for creating those reams.

- The hyperlexis critique in New Zealand is primarily about the ordering, content and expression of legal rules rather than the volume of legislation per se.

To these observations, I would also add:

- Over time, improvements in technology will drive efficiencies that reduce the cost of creating legislation.
- Much modern legislation is regulatory (in the sense that it seeks to modify the behavior of private legal persons). But not all regulatory legislation is relevant to all members of the public. It is arguable that regulatory legislation is only relevant to the regulated person or people. Fishing regulations are only relevant to fisherman; shipping regulations are only relevant to mariners. This makes dissection of a ‘volume of law’ critique more difficult as the dissection needs to be tailored to a greater degree. Such a dissection is beyond the scope of this paper.
- Sir Geoffrey may be right to say that New Zealand legislates more often than it needs to in light of Sohoni’s argument about jurisdictions making more legislation than is “optimal” in an economic sense. Answering this question would require empirical research on the use of other regulatory tools aside of legislation, perhaps, for example, an inquiry into how often the Cabinet Manual provision about law being a last resort is used.<sup>32</sup> Such an inquiry is also beyond the scope of this paper.

We now turn to how jurisprudence on the sources of government authority can impact the volume of legislation the legislature and the executive needs to produce.

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<sup>32</sup> The Cabinet Manual states that “Ministers must ensure that unnecessary new legislation is avoided” Cabinet Office, Cabinet Manual 2008, at [7.20].

### *III Would third source reliance mean less legislation?*

This section outlines the boundaries of government’s residual freedom under the “third source” theory and its alternative, “positive empowerment theory”; extends the theory beyond the point of it being a “residual” freedom and discusses the implications of such an extension, asks what impact both theories can have on the volume of legislation in New Zealand, and concludes by describing judicial decisions about the sources of government authority through an “intensity of review” lens.

#### **A Theories of government authority**

##### *1 Third source theory*

*“Surprisingly, it remains unsettled as to whether the law requires that all central government action be authorized by positive law...”<sup>33</sup>*

Proponents of a third source of government authority argue government is free to do anything that is not prohibited by positive law.<sup>34</sup> The proposition is described as a “residual freedom” which supplements government action under either of the first two sources: statute law and the royal prerogative.

The Court of Appeal in *Quake Outcasts* recently noted that while the existence of the third source is not in question, its rightful scope is. The Court helpfully set out that scope, which I summarise here. Government action under the residual freedom:<sup>35</sup>

- Is subject to constraint by common law or statute.
- Cannot authorize government to act in conflict with the legal rights and liberties of citizens.
- Cannot be used where there is statute law that “covers the field” of that action.
- Can be reviewed by the courts.

With the exception of the Chief Justice, the New Zealand judiciary has shown greater fondness for the arguments in support of a residual freedom than their counterpart in the United Kingdom. To begin with a stock-take of the case law across both jurisdictions, the courts have used third source reasoning to justify the following action by the executive:<sup>36</sup>

<sup>33</sup> Bruce Harris, “The Third Source of Authority for Government Action” (paper presented to NZLS CLE Ltd seminar “Scrutinising the Actions of Government”, September 2014) at page 1.

<sup>34</sup> For clarity, “positive law” refers to statute law or common law when referring to *prohibitions* on government action in this paper. Because of the courts’ role to interpret rather than posit the law, the common law is not regarded as a source of law capable of positively authorising government action (as legislation and the prerogative can), though it can act as a check on it.

<sup>35</sup> *Quake Outcasts*, above n 3, at [75]-[85].

<sup>36</sup> Aside of the following list of judicial decisions, Cohn notes *ex gratia* payments by government, subsidy programmes, public inquiries and government circulars and guidance documents as falling into the same “loose” category of non-statutory actions by the executive: see Margit Cohn “Medieval chains, invisible inks: on non-statutory powers of the executive” (2005) *Oxford Journal of Legal Studies* 1 97 at 101.

- tapping of phone lines,<sup>37</sup>
- car boot searches,<sup>38</sup>
- provision of video evidence to the media before a trial,<sup>39</sup>
- maintenance of a register of people who were deemed unsuitable to work with children,<sup>40</sup>
- authority to give a pension to a widower when a statute only authorized pensions for widows,<sup>41</sup> and
- consultation on a bill before that bill was introduced to parliament.<sup>42</sup>

The courts have also discussed possible limitations on third source reasoning. The original expression of third source reasoning was given in *Malone v Metropolitan Police Commissioner*.<sup>43</sup> Megarry VC stated very broadly:

“if the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful [England being a country where] everything is permitted except that which is expressly forbidden.”<sup>44</sup>

This remains the broadest judicial proposition in support of third source reasoning. In the United Kingdom, *Malone* was toned down by Carnwath and Waller LJ in *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government*<sup>45</sup> by suggesting it should be limited to government actions exercised “for the public benefit” and “for governmental purposes”.<sup>46</sup> Lord Sumption in the United Kingdom Supreme Court noted the residual freedom could be limited by drawing analogy between the Crown and a common law corporation sole with the freedoms enjoyed by a natural person (and subject to restrictions created by positive law).<sup>47</sup> He questioned, however, whether a direct analogy with natural persons was apt, and instead suggested a limit of “purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like.”

It remains to be seen whether these limits discussed in the United Kingdom will crystallize. They have drawn thorough criticism in legal commentary from both supporters and detractors of the residual freedom. Taking perhaps the most diplomatic view, the founding father of third source discourse, Professor Bruce Harris, argues that drawing an analogy between the Crown and a

<sup>37</sup> *Malone v Metropolitan Police Commissioner* [1979] Ch 344 (Ch D).

<sup>38</sup> *R v Ngan* [2008] 2 NZLR 48 (SC) at [93]-[101] per McGrath J.

<sup>39</sup> *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 at [110] per McGrath J.

<sup>40</sup> *R v Secretary of State of Health, ex parte C* [2000] 1 FLR 627 (CA).

<sup>41</sup> *R v Secretary of State for Working Pensions, ex parte Hooper* [2005] 1 WLR 1681 at [47].

<sup>42</sup> *R (Shrewsbury and Atcham Borough Council) v Secretary of State for Communities and Local Government* [2008] EQCA Civ 148, [2008] All ER 548 at [44] per Carnwath LJ.

<sup>43</sup> *Malone*, above n 37.

<sup>44</sup> *Malone*, above n 37, at 638 and 630 respectively.

<sup>45</sup> *Shrewsbury*, above n 42.

<sup>46</sup> *Shrewsbury*, above n 42, at [48].

<sup>47</sup> *R (New London College Ltd) v Secretary of State for the Home Department* [2013] UKSC 51, [2013] 1 WLR 2358 (SC) at [28] per Lord Sumption.



corporation to base the third source in positive legal theory is unimportant.<sup>48</sup> Justification for a third source is properly based in pragmatism; it is a practical necessity of modern government because “it is not practically possible to provide specific authority in positive law for every action needed to be taken by a government performing the role expected of it by the community”<sup>49</sup> Government has vast and multifarious functions, from buying paperclips to entering into lease agreements. If a third source of government authority to act were not recognized, a major flood of new legislation would be needed to fill the lacuna of mundane and innocuous administrative action. Worse, that legislation could only be expressed in general terms, which is undesirable because it would be unlikely that parliament could have directed its collective mind to the full range of government actions, and also because statutory authorization would automatically override any common law rights. Harris also notes that recognition of the third source is necessary because sometimes government must take unforeseeably urgent and necessary action. If this action is not already authorized in positive law, government may be prevented from taking that action, which would be to the detriment of the public interest.

Jeff Simpson takes a firmer challenge to the United Kingdom third source jurisprudence.<sup>50</sup> He argues the judiciary took the wrong approach when examining cases where the lawful source of government authority is in question. This erroneous reasoning led the judges to hunt for a positive law basis for government’s residual freedom, by trying to justify third source action through the prerogative or common law or drawing analogy with the legal personality of a natural person having freedom to act under law. This is unnecessary, argues Simpson, and conceptually flawed.<sup>51</sup> He rights the ship by positing the “third way” of judicial reasoning. The first step of that reasoning asks whether positive law prohibits the government action in question. If the answer to that question is no, then the action is lawful. If the answer is yes, then the onus is on government to prove that the prohibition is overridden by a superior positive law rule.<sup>52</sup>

Harris and the Court of Appeal in *Quake Outcasts* have both subsequently endorsed this method of reasoning. Significantly, it does away with the most frequently levelled critique of the residual freedom; there is simply no need to establish a positive law authority for the government action in question because government does not need to establish a positive law basis for each and every one of its actions. It is not lawful because government has the freedoms of a natural legal person;

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<sup>48</sup> Joseph goes further, arguing the idea is conceptually flawed because government and private individuals are not analogous.

<sup>49</sup> Harris, above n 33, at 3.

<sup>50</sup> Jeff Simpson “The Third Source of Authority for Government Action Misconceived” (2012) 18 Auckland U L Rev 86.

<sup>51</sup> The conceptual flaws come from *ex parte C* and *Shrewsbury*, above n 40 and 42 respectively, where the courts found authority for residual executive freedom in the royal prerogative and by analogy with a natural legal person or corporation sole respectively. The reason the prerogative approach is flawed is that historically legal personality allowed the Crown to do specific actions like contract, rather than permitting a general ability to roam freely unless restricted. The Crown has no heritage of legal rights (*R v Somerset County Council, ex parte Fewings* [1995] 3 All ER 20). The reason the analogy with natural persons is improper is that government has vast coercive powers, and it ignores the specific legal restrictions uniquely applicable to government. Individuals may act lawfully but arbitrarily, inconsistently and in malice. The Crown may not – it must act reasonably and in good faith or be susceptible to judicial review. Professors Harris and Joseph agree.

<sup>52</sup> Conflicting positive law rules will be resolved in the usual way, with specific statute law rules overriding common law rules. An example for disposing with conflicting rules is given by Harris. As in *Entick v Carrington* (1765) 19 St TR 1029 common law trespass would prohibit arbitrary police searches of property, but if a modern day search was brought under the Misuse of Drugs Act 1975, then the government search is lawful.

it is lawful simply because it is *not unlawful*. It only needs to establish a positive law basis for actions that have been proscribed by law: that is, by statute or by the courts. I will return below to whether such a constitutional *modus operandi* is desirable. For now, I simply note that it is lawful for government to rely on a residual freedom in certain circumstances. The courts have acknowledged it is so.<sup>53</sup>

Opponents to the third source residual freedom argue that government may abuse such a freedom at the expense of the liberty and rights of private individuals (or entities), and that such a freedom is contrary to rule of law. Relying on a Diceyan conception of the rule of law, Professor Philip Joseph, the main academic opponent, argues it is “government above the law” or at very least “government without the law”.<sup>54</sup> But third source proponents respond to both of these criticisms – persuasively, in my view. There is no obvious rebuttal to their response. First, government action under the third source is rule of law-compliant because any competing positive law authority will always trump it. If statute law or common law proscribes certain government action, then that action is unlawful. Second, there are other checks in place to ensure government action is suitably constrained. Third source action is already reviewable on illegality grounds, and could also be reviewable for breach of fundamental common law rights, procedural impropriety and irrationality.<sup>55</sup>

## 2 *Positive empowerment theory*

Joseph has recently advanced an alternative conceptual and normative account of government authority. Joseph argues for a “positive empowerment” theory of government authority. It requires all public action to be positively authorized by legislation, the prerogative or the common law.<sup>56</sup> Reliance on a residual freedom is unnecessary because the minutiae of everyday government life are already positively authorized by the “reasonably incidental” doctrine, which permits a public body to do all that is reasonably incidental to, or consequential upon, the exercise of its express powers and achievement of its lawful objectives.<sup>57</sup> Joseph notes the Courts have applied the doctrine liberally by providing examples of the courts construing statutory powers broadly. The doctrine has its origins in 19<sup>th</sup> century case law, however there are more recent examples of the courts reading incidental powers into statutes.<sup>58</sup>

<sup>53</sup> Leaving aside differences between New Zealand and the United Kingdom on limits to the use of the residual freedom for the moment.

<sup>54</sup> Philip Joseph, “Positive Empowerment Theory” (paper presented to NZLS CLE Ltd seminar “Scrutinising the Actions of Government, September 2014).

<sup>55</sup> Harris, above n 34, at 2.

<sup>56</sup> Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (4<sup>th</sup> ed, Brookers Ltd, Wellington, 2014) at 652.

<sup>57</sup> Joseph, above n 56 at 652 and 655-657.

<sup>58</sup> The more recent examples given include findings by the courts that: disciplinary committees have the power to employ secretarial staff (*Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 (SC) at 32; powers to regulate and licence entail powers to charge fees (*Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 (HC) at [117]; and powers to licence public entertainment venues entail powers to create a scheme to register and vet door staff (*R (Barry) v Liverpool City Council* [2001] EWCA Civ 384, noted in *R (New College London Ltd) v Secretary of State for the Home Department* [2013] UKSC 51, [2013] 1 WLR 2358 at [33]).

Though not specifically writing in support of the doctrine, in a dissenting judgment in *Hamed v R*<sup>59</sup>, Elias CJ stated “the common law position in New Zealand and the United Kingdom is that, except in matters within the prerogative or as is purely incidental to the exercise of statutory or prerogative powers, the executive and its servants must point to lawful authority for all actions undertaken”.<sup>60</sup>

Joseph argues his positive empowerment-reasonably incidental analysis is superior to the third source-residual freedom analysis because under positive empowerment theory the Crown, rather than the plaintiff, bears the onus of proving its action was reasonably necessary to achieve the purpose set out in positive law:

“The need for the Crown to establish incidental powers imposes an important public law discipline: it places an onus on the Crown which it does not bear under its residual freedom. The Crown must show that an incidental act was *reasonably necessary* for it to achieve its statutory purpose or to exercise its prerogative power. The Crown bears no comparable onus under the residual freedom doctrine...”<sup>61</sup>

If accepted, the positive empowerment theory-reasonably incidental doctrine rebuts the third source protagonists’ argument that finding positive authority in the law for all government action would require a major flood of new legislation to fill the void that currently exists.

In response, Harris does not dispute the courts’ ability to reason from positive law authority by implication, but he argues there are two issues with relying on this method as a source of government authority. First, implied authority is inherently vague. Second, Parliament is unlikely to have turned its mind to the specific context that the implied power is being argued for – otherwise it would have specifically provided for that power and any relevant limitations.<sup>62</sup>

### 3 *Quake Outcasts*

So stood commentary on the sources of government authority going into *Quake Outcasts*, where New Zealand’s Supreme Court, overturning the Court of Appeal, limited room for reliance on the residual freedom. The Crown argued that it had residual freedom to make decisions about land zoning and offers of compensation for red-zoned landowners affected by the Canterbury Earthquakes. The Court of Appeal accepted the Crown lawfully relied on a residual freedom as these decisions did not affect the legal rights of the individuals concerned and did not otherwise contravene the relevant statute, the Canterbury Earthquake Recovery Act 2011 (“the Act”). The Supreme Court disagreed, holding that the Act “covered the field”, meaning there was no room left for residual freedom to operate alongside the Act and authorize “significant earthquake

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<sup>59</sup> *Hamed v R* [2011] NZSC 101.

<sup>60</sup> *Hamed*, above n 59, at [24]. Requiring government action to be “purely incidental” to a statutory or prerogative power is a stricter test than Joseph’s “reasonably incidental” test, but the support for reading incidental powers into a specific positive law authority is noteworthy.

<sup>61</sup> Joseph, above n 56, at 657.

<sup>62</sup> Harris, above n 33, at 3.

recovery measures”.<sup>63</sup> Government decisions about land zoning and compensation should have been made under the Act.

The court cited five central features of the Act to support the view that it was intended to be the exclusive legal vehicle for government decisions relating to the recovery from the Canterbury Earthquakes:<sup>64</sup>

- The title of the statute was the “Canterbury Earthquake Recovery Act”.
- The purposes of the statute were expressed comprehensively.<sup>65</sup>
- The powers and duties of the persons responsible for leading the recovery measures set out in the statute were expressed in detail, and those persons were responsible for producing quarterly and annual reports.
- The statute had provisions for making an overarching Recovery Strategy for the reconstruction, rebuild and recovery of Canterbury.
- There were safeguards built into the powers set out in the statute, and parliament cannot have intended to allow government to circumvent those protections by making decisions under a purported residual authority outside of the statute.

#### 4 *The state of play following Quake Outcasts*

*Quake Outcasts* did not discard the possibility that residual freedom could be used as a source of government authority in future cases. However, the scope for so relying on the freedom has been narrowed significantly for two principal reasons.

First, the Supreme Court’s reasoning for finding the statute “covered the field” in *Quake Outcasts* could equally apply to many other statutes on the statute book. Modern New Zealand statutes are lengthy and comprehensive. Their purpose sections set out high-level principles in broad terms. Their statutory detail can be exhaustive. Where the detail is not exhaustive, delegated authority to the executive is given broadly.

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<sup>63</sup> In so finding, the Court relied on *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508 (HL) which concerned the overlap of prerogative and statutory powers. The Supreme Court cited the following passage of Lord Atkinson’s with approval and held the same principle applies for third source powers “if they exist”: “...it would be useless and meaningless for the Legislature to impose restrictions and limitations on, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown at its pleasure were free to disregard these provisions and by virtue of its prerogative to do the very thing the statutes empowered it to do. One cannot in the constructions of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd.”

<sup>64</sup> *Quake Outcasts*, above n 4, at [112]-[120]. The last reason given is perhaps the most persuasive. Though not specifically noted by the Court in its reasoning, it is noteworthy that the Act was an extraordinary piece of legislation created to give effect to extraordinary measures to assist Canterbury’s recovery from a one in two and a half thousand year earthquake. The Act was specifically created to empower certain government actions to facilitate Canterbury’s recovery.

<sup>65</sup> The purposes of the Act are: (a) to provide appropriate measures to ensure that greater Christchurch and the councils and their communities respond to, and recover from, the impacts of the Canterbury earthquakes; (b) to enable community participation in the planning of the recovery of affected communities without impeding a focused, timely, and expedited recovery; (c) to provide for the Minister and CERA to ensure that recovery; (d) to enable a focused, timely, and expedited recovery; (e) to enable information to be gathered about any land, structure, or infrastructure affected by the Canterbury earthquakes; (f) to facilitate, co-ordinate, and direct the planning, rebuilding, and recovery of affected communities, including the repair and rebuilding of land, infrastructure, and other property; (g) to restore the social, economic, cultural, and environmental well-being of greater Christchurch communities; (h) to provide adequate statutory power for the purposes stated in paragraphs (a) to (g). See section 3 of the Canterbury Earthquake Recovery Act 2011.

Second, prudent counsel would now surely err towards advising the executive that it obtain express legislative authority for as much action that it wishes to carry out as possible. This would incentivise over-legislation, with a resulting upwards effect on the net volume of legislation. Those concerned about hyperlexis may need to reach for their snorkels. I will attempt to provide some comfort by shining light on the problem in the following sections of this paper.

***B How theories of government authority affect the volume of legislation***

Requiring all government action to be founded in positive law authority would not require a “major lacuna” in the law to be filled with legislation, as the third source proponents argue.

One possible explanation is that Joseph’s “reasonably incidental” doctrine could gain traction, though it is too early to tell.<sup>66</sup> Another is that the Crown Entities Act 2004 already authorizes statutory entities (which often act on Crown authority) to do “anything that a natural person of full age and capacity may do”.<sup>67</sup>

Third, a great deal of executive action is uncontentious. There is less incentive to proactively legislate every conceivable uncontentious government action because this action is extremely unlikely to ever be disputed before the courts. Harris and Joseph should agree. Minor differences in expression aside, both would argue that innocuous government actions (like buying paperclips) without specific positive law prescription are nonetheless lawful. Joseph argues the reasonably incidental doctrine would make this action lawful; Harris argues the action is lawful under the residual freedom anyway.

Where Harris’ and Joseph’s theories tangent is in hard cases where a court, without the benefit of specific positive law authority condoning the relevant government action in question, is asked to resolve a particular dispute by balancing the interests of government with the interests of the affected individual(s). These will always be difficult cases to determine, which is precisely why the disputes that come before the courts about sources of government authority concern police searches and property rights, and not stationery. In the next two sections I will advance two reasons why the third source proponents and opponents differ on hard cases. The first is their respective views on whether the legislature should consider and either ratify or reject every executive action before that action is lawful. The second can be explained by an intensity of review-type analysis of the circumstances of particular cases.

To round off the discussion about legislative bulk, maintaining the status quo following *Quake Outcasts* could have a net increase on the size of the statute book. As noted above, Crown counsel would likely advise in favour of ex ante ratification of as much executive action as possible. This can be achieved in two ways: either by creating broad high-level objectives and principles in primary legislation and delegating a large scope of authority to the executive, or by creating

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<sup>66</sup> Curiously, counsel for the Quake Outcasts did not argue for positive empowerment, nor did the appellate courts raise the possibility that it should be considered as a prevailing theory of the lawful sources of government authority.

<sup>67</sup> Section 17 of the Crown Entities Act 2004.

exhaustive, detailed provisions in legislation to articulate at length what the executive may do. Under both approaches, the courts have a similar expository burden. Disputes about conflict between government and private rights will continue to arise, regardless of whether one is working with a system of laws based on indeterminate high-level principles or prescriptive legislation.<sup>68</sup> The more fundamental the individual right encroached, the courts more likely the courts will be to protect the plaintiff concerned. The best safeguard for government to avoid challenge would be through careful stocktake of every conceivable executive action before the fact, and specific legislation to empower that action.

On the other side of the coin, reliance on third source jurisprudence would not significantly reduce the volume of legislation produced in New Zealand, although it may have a net downwards effect on the size of the statute book. The reason its affect would be limited is that most statutory provisions do not authorize executive action. To the contrary, most legislation can broadly be described as “regulatory” as it seeks to modify the behavior of private individuals using the coercive powers of the state. Criminal (including quasi-criminal) and tax laws are obvious examples, and both subjects form significant parts of the statute book. Providing conclusive support for this proposition would require a lengthy stock-take through further empirical study of the statute book, which is outside the scope of this paper. However, I note that only four of the 26 statutes enacted between 1 January and 30 September 2015 gave new authorities for the executive to act.<sup>69</sup> The reason for a net downward effect on the size of the statute book is because, as noted above, the executive would not have as great a demand for prior parliamentary ratification for its action. The caution to sound, though, is that bulk of the reduction in statute book size may simply transfer into non-legislative administrative documentation. For example, if the Ministry of Social Development wanted to alter its scheme of social welfare benefits, to be democratically accountable, transparent and not arbitrary, the executive would need to do what it does now by convention: to release consultation documents, discussion documents, and option papers to develop its position. Once it had determined its policy position, it would still need to formalize and publicise that position through some kind of non-legislative edict. There is no available evidence to determine whether executive edict is more or less efficient a method of distributing societal rules than legislating, though the matter is worth investigating with further research.

There is a theoretical option available which would almost totally remove the need for the bulk of the statute book. I discuss that option in the next section.

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<sup>68</sup> A good example is the recent litigation culminating in *New Zealand Fire Service Commission v Insurance Brokers Association of New Zealand Incorporated* [2015] NZSC 59. The case concerned how levies funding the fire service are to be calculated under the longstanding and extremely detailed levy provisions of the Fire Services Act 1975.

<sup>69</sup> Those authorisations were for the Accident Compensation Corporation to develop workplace incentives (Accident Compensation Amendment Act 2015), for the Chief Executive of the Ministry for the Environment and the government statistician to produce reports on the environment (Environmental Reporting Act 2015), for authorising a referendum on New Zealand’s flag (New Zealand Flag Referendums Act 2015) and to set out Worksafe’s main objectives (Worksafe New Zealand Amendment Act 2015).

### *C Can the third source be a main course instead of a constitutional condiment?*

#### *1 An argument for third source extension*

Third source proponents universally characterize the third source as a “residual” freedom because it is subject to other forms of positive law. But third source authority should arguably not be described as a “residual freedom”. The “residual” tag is a misnomer. It suggests the freedom is a remnant; a fraction amongst greater quantities of empowering sources of law. I would argue there is nothing in the conception of third source authority advanced by third source proponents that limit it to any degree of “residuality”. Third source authority’s relationship with statute law in a legal system where parliament is sovereign is better described as “subordination” than as “residuality”. The argument advanced – that all government action is lawful unless a positive law authority proscribes it – looks more like a broad and fundamental constitutional tenet whereby the executive has a constitutional blank cheque to act absent proscription, and a reduced incentive to legislate before acting. If the tenet is accepted, there is no logical point at which government’s freedom to act is limited short of positive law prohibition.

Elevation of the third source residual freedom as a constitutional main course has some academic support. Cohn provides a normative argument that all non-statutory powers, including the prerogative, should be codified, with certain restrictions.<sup>70</sup> Further, Cohn argues the current use of these powers, while “constitutionally volatile”, is not unlawful:

“The idea that administrative powers should be declared unlawful simply because they have no statutory basis is essentially foreign to the English legal system, with its rich tradition of common law and its retention of prerogative. English courts have never accepted a purist ideal-type principle of legality, according to which administrative action must be statute-based in order to be lawful, *Entick v Carrington* included.”

I would add five further points to support the argument that the current conception of the residual freedom is capable of being derived from its current state and into a fundamental constitutional principle:

- Simpson’s third way of judicial reasoning logically permits this extension. All executive action is lawful unless there is an existing statutory or common law proscription of that action. The courts’ inquiry ends if there is no positive law prohibition because of the

<sup>70</sup> Cohn, above n 36, at 120. The three restrictions are that residual freedom should not justify action that directly affects human rights and freedoms; a “rule of residuality” should apply, so that existence of a statute “in the same subject matter” excludes reliance on the residual freedom; and the courts should assess any reliance on the residual freedom with a “loose pro-legislation” rule, meaning when the courts are determining issues that could have a long-lasting bearing on society, the courts should generally require statutory backing rather than residual backing. While the analysis is subject to critique for lack of certainty about the boundaries of when a statute is in the same subject matter or how the court should exercise a pro-legislation rule, it would put a positive incentive on government to “cover the field” when proposing legislation for particular policy developments in general subject areas. This kind of ex ante ratification of executive action is described in more detail in the following section of this paper.

- stage one presumption of legality of the third way inquiry. Both Harris and the Court of Appeal in *Quake Outcasts* endorsed this method of reasoning.<sup>71</sup>
- It would be a far more efficient way for government to implement its policy agenda: it is “far more efficient and economical for government departments to rely on residuary authority than to seek positive authorization from Parliament”.<sup>72</sup>
  - It has the potential to reduce the volume of the statute book, as described in the preceding section of this paper.
  - Moving from a conception of parliament as enabler rather than disabler would arguably strengthen the separation of power between the executive and the legislature. Under New Zealand’s Westminster system of government with an executive that is largely comprised of one governing party, parliament is more a facilitator than a curb on executive action.<sup>73</sup> Because the executive would not need to use parliament to facilitate its legislative proposals, parliament would become a forum for legislative proposals that block executive action. Other commentators have noted this disagreement between parliament and the executive can be a “jolly good thing”.<sup>74</sup>
  - The structure of the third way argument is compliant with rule of law. Positive law proscription trumps any reliance on the residual freedom; the freedom is always subject to and subordinate to law. An extension would not, therefore, be “government above the law” or “government without the law” as Joseph describes when he relies on the Diceyan conception of rule of law.<sup>75</sup>

## 2 *A reality check*

However, one must treat rule of law carefully as it escapes definitive iteration and can therefore lie in the eye of the beholder. Third source authority’s compliance with Lord Bingham’s iteration of the rule of law, for example, is unclear. Law is arguably less accessible, intelligible, certain and predictable under reliance on a freedom to do anything not proscribed by law. While the

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<sup>71</sup> The Supreme Court did not set aside the Court of Appeal’s analysis of third source reasoning because of its alternative finding that the statute “covered the field”. The Court of Appeal’s reasoning stands, therefore, as a template and precedent for third source reasoning.

<sup>72</sup> Simpson, above n 50, at 89.

<sup>73</sup> Bertrand Russell, *A History of Western Philosophy* (Reprint, Routledge, London, 2009) at 581. Russell describes the system of government (on which New Zealand is closely modelled) as one where the parliament was established to limit the Crown’s power, but over time the Crown’s ministers – the executive – came to rely so heavily on the parliament that the executive essentially became a committee of the parliament. This reliance, combined with the increasing strictness of political party discipline, diminished the separation of powers in Westminster government. Government became both legislature and executive, with the power only limited by the occasional general election. New Zealand’s MMP electoral system theoretically strengthens the separation between the two branches of government.

<sup>74</sup> Hon Sir Grant Hammond, “The Court and the Executive” (paper presented to the Supreme Court Conference, Auckland, November 2014) at 4. Both Harris and Joseph are referenced at n 10 of that paper.

<sup>75</sup> Joseph may argue that Dicey’s description of the prerogative leaves no room for a residual freedom. Dicey said the prerogative is “the name for the residue of discretionary power” describing “every act which the executive government can lawfully do without the authority of an Act of Parliament is done by virtue of the prerogative” in *The Law of the Constitution* (1915) 8<sup>th</sup> ed at 421. Dicey might have argued since there is no room left for any residue outside of the statute and prerogative, any purported authority outside these sources would be contrary to the rule of law. However, it is arguable that Dicey conceived of the prerogative as far broader than the extremely narrow form it is given today. He certainly did not have the benefit of considering *Malone* or subsequent debate about the sources of government authority in general and the third source residual freedom in particular.



argument can be made both ways<sup>76</sup>, the argument that executive freedom would hinder certainty (et cetera) of law is stronger. Broad scope for executive action would encourage litigation where the rights and interests of individuals were adversely affected. The boundaries of common law proscriptions on lawful third source action would start to look fuzzy if the courts began to search for ways to curb unwieldy executive power. They would do so by extending the literal boundaries of statutory proscriptions, implying proscriptions into statutes, or developing doctrine on fundamental common law rights to protect the individual against executive might. Government action could be sudden and arbitrary and still lawful, which would harm business and trade. Relatedly, uncertainty about the rules by which government must play would undermine Lockean government by social contract: the public cannot consent to a social contract with government if it is ignorant of the terms of that contract.

Uncertainty and arbitrariness of executive action leads to another concern, one of constitutional balance. Commentators note there is already too much power vested in the executive in New Zealand.<sup>77</sup> For this reason alone, it is unlikely that there would be any kind of natural evolution towards greater constitutional significance for the third source. In other words, the courts would be unlikely to adjust the constitutional balance by granting more power to the executive through third way reasoning the way as it is currently posited.

The alternative route for greater third source recognition is through constitutional amendment. For the reasons given in the preceding paragraphs, it would be extremely unlikely for a modern liberal democracy to grant government this kind of constitutional blank cheque. Cohn's option for constitutional recognition of residual powers with appropriate limitations seems more likely.<sup>78</sup>

Indeed, it may be the only acceptable way for a residual freedom to have a future. The reason should be evident from the argument for a third source extension above: on third source reasoning, there is no automatic point at which government's freedom to act is limited, short of positive law prohibition. Government may encroach human rights and freedoms where those rights and freedoms are not already protected by statute or common law.<sup>79</sup> *Malone* remains the best illustration of the point: it may be morally repugnant and politically unacceptable for government to lawfully be able to tap an individual's telephone lines, but under the third source proponents' conception of the freedom enjoyed by government, it is perfectly valid and lawful.

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<sup>76</sup> Proponents of an extension would argue that statutory and common law prohibitions on executive action are known and clear, and that the third way of judicial reasoning is simple and unequivocal: unless one of those clear prohibitions applies, the relevant government action is lawful.

<sup>77</sup> Hammond, above n 74, at 2, citing Geoffrey Palmer, *Unbridled Power* (Oxford University Press, 1987).

<sup>78</sup> Cohn, above n 36.

<sup>79</sup> The Supreme Court in *Ngan*, above n 38, at [97] specifically said the third source analysis is not available to justify government action that conflicts with the legal rights and liberties of citizens. The Court of Appeal in *Quake Outcasts*, cited this with approval above n 3, at [78]. However, this restriction is limited to rights and liberties that are already protected by law, which is no different from saying "there is a positive law proscription" on that executive action, which is consistent with the third source proponents' third way reasoning.

Joseph has distaste for *Malone*, describing it as a “malevolent” exercise of public power,<sup>80</sup> which brings an important point of clarification to light. While he does not explicitly argue the point, Joseph’s positive empowerment theory, and his criticism of residual freedom as not being rule of law compliant, can be distilled into a normative concern that parliament should vet all executive action in advance of that action being either lawful or democratically permissible. The concern is broader than a strict legalistic concern as it includes considerations of constitutionalism, political philosophy, good administration and liberal democratic government. Even Harris states “in an ideal liberal democratic constitution, all government action would be authorized specifically in advance by the democratically elected parliament.”<sup>81</sup> Harris sheds no further light on his reasons for making this statement. His language seems apologetic for having to provide a theory to explain the grout courts have been using to fill the gaps left by legislation.

There are clear aspects of the legislative process that make it a superior mechanism for determining the lawfulness of executive action in advance of that action:<sup>82</sup>

- Proper administrative practice requires democratic participation, clarity and accountability.
- Arbitrariness and covert practices are much more likely to flourish in an informal climate, rendering judicial review and other accountability channels less effective.
- Requiring public action to be subjected to the legislative process promotes participation of interest groups and requires the executive to justify the relevant legal rules it must abide by in carrying that action out.

Arguably, these good administrative practices can be cut-and-pasted into the executive branch of government without bothering the legislature. Modern governmental departments in New Zealand frequently release public discussion documents, option papers and exposure drafts of proposed legislation before introduction into parliament. These consultations are not demanded by our constitution, though it enhances the aspects of good governance bulleted above. Provided there was robust adherence to this convention, democratic government subject to rule of law could survive without ex ante ratification of all executive action by the legislature.

But effective separation of power remains a significant consideration, and is something that the executive acting alone cannot provide. It is a substantial check on power if the executive must seek blessings through the parliamentary process before acting. Having a supreme parliament that considers not just all proposed laws, but all proposed executive actions as well, provides this check. Rules of good governance are often written for the exception to the rule; for governmental actors who either innocently or intentionally take advantage of a lack of constitutional constraint. It is fundamentally important for good modern democratic government to ensure these rules exist to constrain the wayward governmental actors.

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<sup>80</sup> Joseph, above n 54, at 13. Note that malevolence is in the eye of the beholder: it will depend on context and the balancing exercise to be conducted by judges adjudicating and commentators’ subsequent review. This is one of the reasons why an “intensity of review” analysis is appropriate.

<sup>81</sup> Harris, above n 33, at 3 and 10.

<sup>82</sup> See Cohn, above n 36, at 102-103 and 116-117.

What does this mean for third source debate? There are merits to the arguments of both proponents and opponents. Joseph and Harris are right to desire prior ratification of as much executive action as possible before that action is undertaken, to approach empowerment of executive action with a Cohn-type “pro-legislation” rule. But Harris must be right to say it is not possible to think of every action in advance. The courts may continue to find support for government action based on the residual freedom from time to time. It will be more legitimate to use third source reasoning where the government action is relatively innocuous and the individual right affected is relatively weak. In contrast, where the government action is relatively harmful and the individual right affected is more fundamental, the courts will likely say: “parliament should have considered and condoned this, before we agree that it is lawful”.

This approach is similar to the “intensity of review” analysis of judicial review of executive action. While the “intensity” label is controversial, the simple point I make below is that it helps to explain decided third source cases and to predict how arguments about the third source may be decided in future.

#### ***D An intensity of review-type analysis applied to the cases***

With an “intensity of review”-type analysis of the third source cases, there is no need to choose between the competing theories about lawful sources of government authority.

The more fundamental the court views the right or interest affected, the greater the scrutiny the court will apply – a principle which is accepted as much in the United Kingdom now as it is in New Zealand.<sup>83</sup> By analogy, the more fundamental the right or interest affected by executive action that does not have specific support of positive law, the more likely the court is to find that there is no room for the executive to rely on a residual freedom. Conversely, the less fundamental the right or interest affected, or the more innocuous, mundane, or managerial the executive action, the more likely the court is to find room to rely on the freedom.

The Court of Appeal in *Quake Outcasts* confirmed that executive action purportedly taken under third source authority is reviewable.<sup>84</sup>

Justice Wild’s judgment in *Wolf v Minister of Immigration*<sup>85</sup> remains the leading authority in New Zealand on an intensity of review approach to a court’s role in reviewing executive action. Formally speaking, intensity of review falls under an unreasonableness head of judicial review and is available as a rubric to guide the depth of inquiry of the court’s review into substantive executive decision-making. In particular, reviewing courts will ask whether the relevant executive decision can withstand scrutiny on reasonableness grounds. The traditional bar set for executive

<sup>83</sup> Michael Barker, “Legal Unreasonableness: Life after Li” (FCA) [2014] FedJSchol 15. Also see *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 at 531; *R v Ministry of Defence, ex parte Smith* [1996] QB 517 at 554 (“The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable”), as cited in Cohn, above n 36, at 113.

<sup>84</sup> *Quake Outcasts*, above n 3.

<sup>85</sup> *Wolf v Minister of Immigration* [2004] NZAR 414.

action to be unreasonable was for it to be perverse, outrageous or illogical.<sup>86</sup> But this high bar will be diluted in circumstances where the context requires closer scrutiny by the courts. In *Wolf*, Justice Wild held a careful and close examination was required of an executive decision to deport Mr Wolf and thereby break up his New Zealand family unit.

Different commentators describe intensity of review in different ways, especially because the phrase has attracted criticism from the Supreme Court.<sup>87</sup> But academic commentators remain supportive of the rubric, and have adapted with different phraseology to support a context-based, varied intensity of review, including balancing “the competing tensions of vigilance and restraint”<sup>88</sup> and an “inarticulate premise” in the nature of “sniff test” or “instinctual impulse” where the court has identified that something has gone wrong and must translate that wrong into legal language.<sup>89</sup>

Accepting this analysis allows the status quo to be maintained without disrupting the constitutional balance, and helps to explain the trend of cases. It does not provide a particularly robust and objective framework for deciding future cases, but nor is it intended to.

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<sup>86</sup> *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233.

<sup>87</sup> Suggesting that there are degrees of unreasonableness amounts to “dancing around on the heads of pins” and a “perversion of recent years” in *Ye v Minister of Immigration* (NZSC, Transcript, 21-23 April 2009, SC 53/2008) at 181 and *Astrazeneca Ltd v Commerce Commission* (NZSC, Transcript, 8 July 2009, SC 91/2008) at 52 respectively.

<sup>88</sup> Dean R Knight “Judicial review: practical lessons, insights and forecasts” (paper presented to Lawyers in Government conference, Wellington, April 2010).

<sup>89</sup> Joseph, above n 56, at 868-872.

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