

UNDERSTANDING THE OBJECTIVE: PSYCHOLOGICAL EFFECTS IN ENVIRONMENTAL DECISION-MAKING

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A resource consent application for land use might encounter opposition by respondents who claim that the proposed activity will cause them to suffer psychologically. For example, opponents may fear that a proposed activity risks damaging their health and that they will suffer from unacceptable levels of anxiety if the application is consented to, or an activity may offend their moral sensibilities and as a consequence they feel anger and disgust. Psychological effects are a valid resource management concern but the case law on this issue appears inconsistent. This article considers the seeming contradictions in the way that psychological effects are accounted for in resource management decision-making in New Zealand. It posits that contrary to first impressions a dominant assessment approach is apparent, one that successfully manages the difficulties inherent in the 'problem of other peoples' minds' and addresses land use conflicts in a principled, equitable manner. Further, it cautions that the legislature should be wary of attempting to tinker, as it has done latterly, with this common law approach. To do so not only risks corroding the sound principles formulated by the courts but may create inequities between citizens that are incapable of justification. To render the arguments less amorphous, various scenarios are explored and set within the fictional village of 'Totoimano'.

I. INTRODUCTION

... we know that when the tide of knowledge cannot submerge opinion in its cleansing flow, then those unreachable lands and islands remain part of the Empire of Prejudice ...

— Janet Frame¹

Within the shadow of the Totoimano is a village, populated by 'ordinary' people. If we go there now we will see some of them. There is Ameer, pushing her new baby, and pulling her young son along to school. She calls hello to Tame who is watching the damson shadows on his mountain change to lilac, and he smiles back. But they both ignore Jan passing by, a newcomer from up North accompanied, so the rumours go, by an unsavoury past.

The morning quiet is broken by Mrs Fret, who opens her window, waves the local paper and shouts, "Tame, hoi Tame, they're building a resort-hotel right by the mountain, right by *your* mountain". Mrs Fret is right. A consortium has applied for resource consent to build a golf course-resort and hotel just on the outskirts of the village. The resort will change their village beyond recognition; it will bring tourists and traffic and jobs and money. Some of the villagers are pleased and some are not, but all feel strongly. The primary

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1 *Living in the Maniototo* (The Women's Press, London, 1981) at 144.

school has been told that a new telecommunications mast will be built on the land at the back of the school to provide increased phone coverage and the schoolchildren's parents are anxious. The hotel will be built in the lea of the mountain, where Tame's kaitiaki taniwha² resides and he is fearful for the mana of his place. Of our four 'ordinary' people, only one sees this as an opportunity. "Those lonely men stuck up here for meetings," Jan thinks, "might need some company."

These people are part of this environment and the coming changes will change them. The new developments will affect how the inhabitants *feel* about their home and for some this will be overwhelmingly negative. Is this important? The developments will require regulatory consent and the villagers will be able to participate in the decision-making process but will those deciding whether to allow the resort and mast (and Jan's embryonic business-enterprise) consider the emotional responses of the villagers to these proposals? Within the New Zealand context, yes, they will, but not all psychological effects are equal and, as we shall see, how the catalysts or stimuli for those responses are categorised is critical.

II. PSYCHOLOGICAL EFFECTS IN RESOURCE MANAGEMENT LAW

In our fact scenario we can assume that the developers of the resort will have to apply for resource consents enabling them to carry out the necessary works. The Resource Management Act sets down criteria to be considered by the court³ in making a determination about resource consent applications⁴ and the court must, amongst other things, consider the "actual and potential effects on the environment of allowing the activity". The Act acknowledges people as part of the environment⁵ and case law establishes that *psychological* effects or the emotional responses of people to developments will constitute a valid resource management concern.⁶

Most resource management cases that have addressed psychological effects do so in a rather monotypic fashion. Reference is made to the opponent suffering from "fear" or "anxiety" or the more generic "stress"⁷ and the court attempts, as best it can on the evidence, to gauge the severity and potential

2 Translated as guardian spirit.

3 In most cases a local authority consent authority will hear resource consent applications in the first instance and the Environment Court will hear appeals from that decision de novo, however I refer to "the court" throughout to connote the generic decision-maker for simplicity.

4 Resource Management Act 1991, s 104(1).

5 Resource Management Act 1991, s 2: definition of environment includes "people and communities"; and see *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 (HC) at 708 per Greig J: "[T]he resource management legislation intends that the environment includes the people, and must give them in this particular context predominant significance."

6 See for example: *Meadow Mushrooms Ltd v Paparua County Council* (1977) 6 NZTPA 327 (TCPAB); *Duncan v Thames Coromandel District Council* (1980) 7 NZTPA 65 (HC); *Edgware Service Station v Christchurch City Council* (1984) 10 NZTPA 33 (PT); *Allens Service Station Ltd v Glen Eden Borough Council* (1985) 10 NZTPA 400 (HC); *Department of Corrections v Dunedin City Council* EnvC Dunedin C131/97, 19 December 1997.

7 See for example *Orica Mining Services New Zealand Ltd v Franklin District Council* EnvC Wellington W032/09, 5 May 2009 at [11] and [51].

persistence of the effect. None of the cases enter into any detailed discussion about the difficulties inherent in accounting for psychological effects and, perhaps wisely, there is no attempt to provoke a general understanding of the phenomenon of psychological effects or emotion, a complex, multi-faceted area. Certainly, no single definition could adequately capture the meaning of emotion; a fuller understanding requires insights from psychology, neurology, anthropology and philosophy amongst other disciplines.⁸ Each of those disciplines offer varying approaches to understanding the causes, features and full effects of different emotional states⁹ but there are certain important characteristics of emotions that most scholars now agree on and that are important for legal analysis.¹⁰ Critically, and despite the long-held belief within the law that emotions are unreliable and should be mistrusted as ‘irrational’ responses to stimuli,¹¹ emotional responses are seldom if ever irrational in a true sense. On the contrary, emotions are inseparable from reasoning.¹² Emotional responses will nearly always be *subjectively* rational because they are based on complex cognition; that is, an evaluative judgment of one’s situation. A set of facts, or more accurately, belief about facts will stimulate an emotional response and that response, both in terms of how it will be categorised (as anger, anxiety or fear, etc.) and its severity, duration and effects, will depend upon the appraisal made by the individual and the importance that they place upon the belief. In general terms however, the underlying cognition may be deemed *objectively* irrational for one of two reasons: the reasoning may be flawed in that it cannot be justified logically, for example it is based on mistaken facts, lack of knowledge or erroneous judgement; or, alternatively, it may not be normative (in the sense of reflecting customary behaviour or beliefs) and may be considered counter-majoritarian.¹³

8 See Susan A Bandes (ed) *The Passions of Law* (New York University Press, New York, 1999) at 7–8.

9 See Robert C Solomon (ed) *What is an Emotion? Classic and Contemporary Readings* (2nd ed, Oxford University Press, New York, 2003).

10 Lazarus notes that it is accepted that emotional arousal causes profound physiological changes by secreting hormones from the cortex and medulla of the adrenal glands and that, “... when too much of any hormone is secreted into the bloodstream, or if these hormones remain in the body for too long, they can result in harm to the tissues ...”: see R S Lazarus and B N Lazarus *Passion and Reason: Making Sense of our Emotions* (Oxford University Press, New York, 1994) at 183–184 and further see chapter 12 “Emotions and our health” at 239–261.

11 See Bandes, above n 8, at 1–15.

12 See for example Lazarus, above n 10; anthropologists: R Shweder and R Levine (eds) *Culture Theory: Essays on Mind, Self and Emotion* (Cambridge University Press, Cambridge, 1984); philosophers: Solomon, above n 9; legal philosophers: Martha C Nussbaum *Hiding from Humanity: Disgust Shame and the Law* (Princeton University Press, Princeton, 2004); Bandes, above n 8; William I Miller *The Anatomy of Disgust* (Harvard University Press, Cambridge (Mass), 1997).

13 This is an extreme simplification but suffices for present purposes. Note for example that members of the Critical Legal Studies movement criticise the whole notion of objectivity in law for indeterminacy, claiming that no adjudication can be wholly objective. For an explanation of this argument and other critiques of objectivity in law see Brian Leiter (ed) *Objectivity in Law and Morals* (Cambridge University Press, Cambridge, 2001) and in particular Gerald J Postema “Objectivity Fit for Law” at 99–143. Further see Joan Forret “An Interface Between Science And Law: What is science for members of New Zealand’s Environment Court” (PhD Dissertation, University of Waikato, 2006) and in particular at 48–

Accepting that emotions have an underlying cognitive basis is important in understanding how the courts in New Zealand have approached emotional effects in environmental decision-making and how the law might evolve in this area. A study of case law reveals that the Environment Court implicitly accepts that a cognitive process underlies emotional responses. Evidence as to the psychological effects of a proposal on respondents will be accepted and assessed for its veracity but thereafter it is the underlying cognitive process that is scrutinised. It is at this point in a decision that the objective test enters.¹⁴ The court considers the reasoning process that underlies the emotion and, in considering those underlying thoughts and beliefs, will judge whether they are objectively rational or irrational. Depending on the fact scenario, the court employs one or other of the general reasons in assessing whether the underlying cognition is objectively irrational. If the cognition is deemed irrational, the resulting emotional effects will not attract any weight in the decision-making process. The most interesting scenarios arise where the cognition is normative but incapable of logical justification; or, conversely, objectively rational but not normative. In those circumstances the choice as to the reasoning to employ to test rationality (logic versus normative reasoning) will critically influence the weight given to psychological effects.

This article surveys the approach of the court in different fact scenarios. It posits that the dominant assessment approach is one based on logical assessment and suggests that this approach has particular advantages over the normative in the context of resource management law. Further, it questions whether the logical assessment approach should be applied consistently to *all* cases where opponents claim they will suffer from psychological effects, but, ultimately, concludes that certain exceptions to the logical assessment approach may be justified.

To test how we assess the cognition underlying psychological effects in environmental decision-making, and in those interesting scenarios in particular, we can return to the Totoimano.

III. THE PARENTS

Amee is extremely concerned about the prospect of a telecommunications mast being erected on land next to the primary school. The mast will emit electromagnetic radiation (EMR) and Amee wants to know what the health effects could be for her son and the other children. The School Board arranges a meeting for the parents and invites a respected scientist to attend. The meeting does not go well. Amee asks the scientist what effects have been linked to EMR from masts and is told that some research suggests an increased risk of

⁵⁵ for an explanation of the contested paradigms of objectivity in the context of scientific evidence.

¹⁴ If the cognition underlying the psychological response is objectively rational, then arguably the actual degree of the effects on particular people should be accepted in their entirety. The particular characteristic of the receiving environment, its sensitivity or otherwise, is always relevant in resource management decision-making and likewise, the precise manifestations within individuals should be taken into account. This enables the law to acknowledge the variables in human psychology, and the rich diversity that makes-up humanity in all its 'messy individualism', without sacrificing an underlying consistency and reason.

learning disorders, sleeplessness and incidents of childhood leukemia but, the scientist says, the science is not clear and these risks are likely to be very low. One of the fathers shouts out “Can you tell me that it’s safe and there is no risk to my boy?” “No,” replies the scientist, “we could never say that, but it’s highly unlikely any of the children’s health would suffer.” “Yeah,” shouts the angry father, “you scientists said that about Thalidomide and mad-cow disease too.” Ameer is extremely upset, as are many of the other parents. She cannot stop thinking about the potential harm, a cancer risk even, and because of her love and desire to protect her son from harm, this makes her extremely anxious. Ameer discusses with her husband the prospect of moving her son from the school but, given their isolation, this would mean moving the whole family to a different area and losing their home, family support and her husband’s job. Their choices are extremely limited and this adds to the stress that Ameer experiences. Ameer’s anxiety is deeply felt and genuine and her response to the situation cannot be termed irrational; on the contrary, it is a subjectively rational response and many of the parents feel the same way, and the most effective methods of controlling adverse emotional responses (such as moving away from the threat) will be difficult to utilise when you have limited influence over outcomes and your options are few.

There can be little doubt that the normative response of most parents would be the same and would probably remain unchanged regardless of the expert opinion evidence given and the assessment of risk made by the court. Researchers have explained this phenomenon in various ways¹⁵ but it is inaccurate to classify this unwillingness or inability to accept majority scientific opinion as irrational *per se*; rather it connotes a “conflict over what is the available science and how it should be evaluated”¹⁶ and the degree of risk that should be accepted. It is also a reflection that our approach to risk mirrors values. As Professor Cotgrove wrote in response to Lord Rothschild’s criticism of “eco-nuts”:¹⁷

The acceptability of risk cannot be isolated from values. We take incalculable risks to save the life of a child. To cross the road, presumably even Lord Rothschild seeks zero risk. Where he and the environmentalists differ so passionately is for what goals, and to promote what kind of society, it is worth taking particular risks. Both are from this perspective rational.

Why should parents accept any risk, no matter how small, to their children’s health, where there is little or no direct benefit to their families? And if such risks are imposed upon them, and continue on a daily basis, it is easy to understand the resulting anxiety.

But as the Environment Court explained in *Shirley Primary School v Christchurch City Council*, “such fears can only be given weight if they are

15 See for example D Kahan and others “Fear of Democracy: A Cultural Evaluation of Sunstein on Risk” (2006) 119 *Harvard Law Review* 1071; compare to C Sunstein *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, Cambridge, 2005). Note also *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC) at [233].

16 Elizabeth Fisher *Risk Regulation and Administrative Constitutionalism* (Hart Publishing, Oxford, 2007) at 16.

17 See letter from Professor Cotgrove replying to Lord Rothschild, *The Times* (November 27 1978), quoted in Patrick McAuslan *The Ideologies of Planning Law* (Pergamon Press, Oxford, 1980) at 7.

reasonably based on real risk”.¹⁸ If, for example, the court finds that whilst one cannot rule out a risk,¹⁹ any risk is infinitesimal, particularly compared to risks we take every day with our children (driving them in the car for example), the court will determine that the risk is of an acceptable level. As a result, the court will determine that flawed reasoning produces the adverse emotional response of the parents. In the context of EMR, the court assesses the cognition by considering whether the reasoning is logical or whether, on the other hand, the emotional response is based on an erroneous judgement. The risk assessment conducted by the court is decisive and that assessment is based on rational inquiry and a logical analysis of the scientific evidence.²⁰ If the cognition is objectively irrational, the resulting psychological effects will carry no weight in the final decision-making process.²¹

But what if Amee’s anxiety is to a greater or lesser degree shared by the majority of the community? Or what if *all* the villagers are fearful for the health of their tamariki? Will misguided albeit normative cognition be accepted as validating the emotional response in these circumstances? Although the court has not had to decide such a case, it is unlikely that this would alter the evaluative approach. The Environment Court commented in *Shirley Primary School* that even “sufficient people to be regarded as a community would be unlikely to persuade ... the Court that consent should be refused, because the ... stance is unreasonable.”²²

18 *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC) at [193]. Note that s 3(f) of the Resource Management Act 1991 entitles decision-makers to take into account “any potential effect of low probability that has a high potential impact”. For a full explanation of the meaning of “real risk” in this context see *Shirley* at [11]–[13], [146]–[151] and [175]–[180] and [142] where the court explained: “in the case of any hypothesis about a high impact risk a scintilla of evidence may be all that needs to be established”, and [147]: “[T]o fall within section 3(f) of the Act as a potential effect of low probability and high potential impact an effect must not simply be a hypothesis: there must be some evidence supporting the hypothesis. This evidence may consist of at least one of: (1) consistent sound statistical studies of a human population; or (2) general expert acceptance of a hypothesis; or (3) persuasive animal studies or other bio-mechanistic evidence accompanied by an explanation as to why there is no epidemiological evidence of actual effects in the real world; or (4) (possibly) a very persuasive expert opinion.” For a comprehensive analysis of risk assessment in resource management proceedings prior to 2002 see R J Somerville QC *Risk, Regulation, and the Resource Management Act 1991: The Case of Electricity Generation and Transmission* (PhD Dissertation, University of Otago, August 2001).

19 Note the court will never be able to determine that no risk at all exists; science cannot prove a negative.

20 In terms of assessing technological risk, the Environment Court has always adopted an approach based on scientific or expert opinion evidence as opposed to ensuring the “political legitimacy of technical decisions in the public domain ... by referring them to the widest democratic processes” (see H Collins and R Evans “The Third Wave of Science Studies: Studies of Expertise and Experience” (2002) 32 *Social Studies of Science* 235 at 235). For the difficulties inherent in each approach see for example Collins and Evans, *ibid*, at 236.

21 Note a similar analysis occurs under the Hazardous Substance and New Organisms Act 1996: see Nicola R Wheen “Genetic Modification, Risk Assessment, and Maori Belief under New Zealand’s Hazardous Substances and New Organisms Act 1996” (2004) 8 *APJEL* 141.

22 *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC) at [190]. Note the obiter comments to the contrary of the Planning Tribunal in *Liquigas v Manukau City Council* (1983) 9 NZTPA 193 (PT) at [218], a case decided under the Town and Country Planning Act 1977. But see *Contact Energy v Waikato Regional Council* (2000) 6 *ELRNZ* 1 (EnvC) at [250]–[255] where the court stated: “the appeal should not be conducted as a political process where the extent to which parties have mobilised public opinion might

Why have the courts adopted this approach? Firstly, there are valid *policy* arguments as to why we do not adopt the normative approach in assessing the underlying cognition of psychological effects in the EMR situation. Specifically, to hold technological developments hostage to the suspicions of the masses will stifle invention and development. For the fears of the majority to prove determinative, when those fears flow from misunderstanding, would reverse progress in many areas of life. But from a wider perspective, and putting aside the EMR fact scenario, there is a clear danger in regulators accepting the irrational normative because it legitimises suspicions and ignorance. When a regulatory regime has particular relevance in influencing social conditions and the operation of communities, as resource management regulation does, this difficulty can become acute. The irrational normative engenders prejudice against others (and their activities) who may not be ‘harmful’, but may be considered ‘different’. Such prejudice may be positive (all Welsh people are good singers) or it may be negative (the Scots are not generous with money); it may be subjectively rational (all the Welsh ‘X’ knows are good singers; his family believe the same; all Welsh legends have a tuneful bard) but it is not the truth and to accept it as such will create problems (if, based on my Welsh heritage, you asked me to sing it would be an unpleasant experience for all). In fact, the normative, as Foucault wrote, is inherently value-laden:²³

... normalisation becomes one of the great instruments of power at the end of the classical age. For the marks that once indicated status, privilege and affiliation were increasingly replaced – or at least supplemented – by a whole range of degrees of normality indicating membership of a homogenous social body but also playing a part in classification, hierarchization and the distribution of rank.

From the perspective of social equity, just blindly accepting the preferences of the dominant group reinforces the advantages of the already privileged and preserves their mores and it is a trite argument that such an approach would not protect minorities. On the contrary, it would stifle diversity and in the context of community planning some theorists argue this would lead to unappealing homogeneity, ghettos and the ultimate decay of communities.²⁴

Secondly, there are *causation* difficulties with the psychological effects in the EMR scenario.²⁵ What is causing the anxiety in the parents? Strictly-

influence the outcome”; and *Morgan v Marlborough District Council* EnvC Christchurch W62/2000, 4 October 2000 at [133]–[134] endorsing these comments.

- 23 M Foucault *Discipline and Punish: The Birth of the Prison* (translated by Alan Sheridan, Vintage Books, New York, 1979) at 184, quoted in Mayo Moran *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, Oxford, 2003) at 146; see also: Moran, *ibid.*, at 131–163; Lord Hoffmann “Anthropomorphic Justice: The Reasonable Man and his Friends” (1995) 29 *Law Teacher* 127.
- 24 See for example Jane Jacobs *The Death and Life of Great American Cities* (Random House, New York, 1961); Elenore Kofman and Elizabeth Lebas (eds) *Writing on Cities: Henri Lefebvre; selected, translated and introduced by Elenore Kofman and Elizabeth Lebas* (Blackwell Publishers, Cambridge (Mass), 1996); Michael Warner *The Trouble with Normal: Sex Politics and the Ethics of Queer Life* (The Free Press, New York, 1999) at 149–194.
- 25 A causal link is required not just as a factor of logic but in terms of legal principles because a philosophical underpinning of resource management law is that regulators should not restrict property rights in land unless they are used in a manner that cause adverse environmental effects. This rationale is the basis for s 9 of the Resource Management Act 1991: see Hon

speaking it is the *belief* that their children's health may be damaged. What is causing this belief? In the EMR case, the court made an assessment that there is no 'real risk' of any emanations from the telecommunications mast causing harm. In terms of causation therefore we must accept that it cannot be the applicant's activities that provide a basis for the psychological effects.²⁶ Rather the emotional response is caused by unfounded suspicion, ignorance and perhaps Luddite prejudices on the part of the parents. Critically, therefore, the causal link has been broken; the parents' fears cannot be used to prevent the applicant carrying out its activity because that activity is not the cause of these adverse effects. And whilst for present purposes we have used an EMR fact scenario to illustrate the point, this approach accords with all other cases where the fears or other psychological effects are based upon the risk of an unwelcome *emanation* from the land, whether that concerns a technological risk or encompasses, for example, anti-social activities. Neighbours might be deeply concerned, for example, that a half-way house for probationers is to be sited in their midst, but only if they can demonstrate a real risk of increased crime in the area caused by the establishment of the home will their fears be given due weight in the planning decision.²⁷

Thirdly, we do not adopt a pure 'might is right' approach in any decision-making under the Resource Management Act and if we were meant to, the Act would be drafted in a wholly different manner. Certainly, there would be practical problems in operating a democratic decision making process within the framework of the present statute. Whilst the Act mandates that decision-makers must manage natural and physical resources in a way that enables "people and communities" to provide for their well-being, it is extremely hard to delimitate who or what the community might be in any given situation. The

Simon Upton, Third Reading of the Resource Management Bill (4 July 1991) 516 NZPD 3018–3021.

26 The court is speculating as to what might happen in the future; to describe this as definite or as fact-finding is inaccurate and would be a fiction. And this is where the complexities (and arguments as to the correct approach to determining acceptable risk) manifest: why should the parents accept this speculation? But this is not so very different from traditional findings of fact – they too are a legal fiction but such findings are a necessary evil of litigation; we can do our best to refine the process, improve evidence and decision-making to try and improve accuracy but we can never do away with this inherent flaw completely. A major difference between risk assessment and fact-finding is that at some point in the future the Environment Court will be proven right or wrong and this can never happen in a traditional fact-finding exercise (hence the increasing use of adaptive management techniques in resource management). Nevertheless, if the court were not able to make an assessment or that assessment was not respected as a basis for the ultimate decision in the case then resource management as a discipline would fall into paralysis. And in fact if absolute truth were the standard, all litigation would be rendered impotent. So we have to accept this difficulty – and legal fiction – if we want to permit the court to decide between competing interests and competing visions of sustainability in resource management cases.

27 See, for example, applications for 'mongrel mob' headquarters (*AA Knight v Wairoa District Council* PT Wellington W37/90, 19 July 1990); psychiatric units (*A'a v Manukau City Council* EnvC Auckland A115/98, 24 September 1998; *Hawkes Bay Hospital Board v Napier City Council* (1986) 11 NZTPA 404 (PT)); and probation centres (*Department of Corrections v Dunedin City Council* EnvC Christchurch C131/97, 19 December 1997; *Ammon v New Plymouth District Council* EnvC Wellington W27/97, 2 April 1997; *Department of Corrections v Gisborne District Council* EnvC Auckland A57/99, 24 May 1999). For an interesting case from the United States, see *City of Cleburne, Texas v Cleburne Living Centre* 473 US 432 (5th Cir 1985).

Act is not concerned only with property owners or those living in the immediate area, nor is it concerned solely with the present generation and so, as theorists have explained, there are “problems of extension”.²⁸ Even if you could determine the finite extent of the relevant community, it would be difficult to ascertain an accurate majority opinion because you cannot force participation. Only the predilections of those who made submissions could be accurately ascertained. The Act also establishes clear duties and responsibilities for decision-making; it is local authorities and the Environment Court that have been given the statutory responsibility to promote sustainable management and to simply make decisions based on the majority view of submitters would be an abrogation of those responsibilities. Whilst, for example, district plan making is heavily influenced by community preferences, legally plan-makers still have an independent responsibility to ensure that the purpose of the Act is met.²⁹ And whilst those deciding resource consent applications can receive the results of surveys or polls to illustrate community preferences,³⁰ again these are not determinative because the court has the statutory duty to promote the purpose of the Act. Sustainable management of a resource is more complex than simply ascertaining community preferences as a consideration of the list of values in Part 2 to be addressed illustrates.³¹ It may well be that one can argue that the Resource Management Act is too discretionary and doesn’t constitute the real rule of law but majority opinion doesn’t determine results and the courts have sanctioned against ‘judgement-by-numbers’ on many occasions.

So, whilst in our given scenario there are genuine and understandable psychological effects that may well be normative, and that cannot be placated by court findings, they will to all intents and purposes be disregarded. If deemed irrational, deleterious emotional effects on the mother, or indeed on all the parents, just will not matter in the final analysis.³² They will not carry any

28 See Collins and Evans, above n 20.

29 Resource Management Act 1991, ss 56, 59, 63(1), 72, 32.

30 See *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647 (HC); *Commerce Commission v Griffins Foods Ltd* [1997] DCR 797 at 806. Although note that the court has warned about the risks inherent with survey evidence and suggested following the test laid down in *Imperial Group plc v William Morris Ltd* [1984] RPC 293 (ChD) at 294; see *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC) at [138].

31 Resource Management Act 1991 Part 2 contains the purpose of the Act that is “sustainable management of natural and physical resources”. Sustainable management is described in s 5(2) to mean “managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing for their health and safety while (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of air, water, soil and eco-systems; and (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.” Sections 6 to 8 add to the list of values decision-makers are to be cognisant of.

32 At first sight, the Resource Management Act does not permit the objective assessment of effects. Whilst the Act expressly requires the court to conduct an objective assessment of effects in certain applications (for example s 314 enforcement orders) this is not the case with the initial fact-finding exercise to be conducted in respect of resource consent applications. Section 104 simply requires the court to have regards to “any actual and potential effects”. But it is important to appreciate that these words cannot be read in isolation. Rather they are

weight in deciding whether to grant the applications and, as explained, there are good reasons for this.

IV. TANGATA WHENUA

At the other end of the scale are psychological effects that may, from a secular perspective, be based on illogical thoughts but nevertheless as a society we have decided to accept as relevant to decision making.

In the *Totoimano*, Tame has firm beliefs that the development will anger the *taniwha*, the *kaitiaki*, that protects his *hapu* and who resides in the land marked for development. Although Tame's beliefs are based on Māori legends and lore, they are important to his very identity: his beliefs provide a guide as to how he lives his life and, he believes, only to the extent that people live by them do spiritual beliefs continue to have force.³³ Blatantly disrespecting those beliefs would belittle Tame, his culture, ancestors and spirituality and an unsurprising response would be anger, eventually replaced by sadness and feelings of worthlessness. To allow the development would be tantamount to the society he lives in disparaging Tame's beliefs and he is anxious for the *mana* of his people and their *mauri*. Tame's cultural identity and spiritual beliefs – what is important to him – have been shaped by his experiences in life, the orderings of the society he has grown in, social gatherings, teachings and rituals, and so we can see how this response is subjectively rational and will be a response normative to his people.³⁴

As a statutory imperative, the relationship of Māori with their *taonga*, including their spiritual beliefs,³⁵ must be taken into account by decision-makers in resource management proceedings.³⁶ The High Court in *Bleakley v Environmental Risk Management Authority* acknowledged that the express

“subject to Part 2” of the Act and specifically the aim of the Act that natural and physical resources be managed in a way that (amongst other things), “enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety”, values that do not always coincide in any given case. So, whilst the court will make findings as to all actual and potential effects, it is common for different effects to create a conflict. In the EMR case, for example, there will be negative effects flowing from the proposal (the adverse psychological effect on the parents – a health effect) but also positive effects (the increased telecommunications coverage in the area – a social and economic effect). In determining how best to promote sustainable management of the land in question, invariably the court will have to declare a preference (on this see J G Fogarty “Giving Effect to Values in Statutes” in J Finn and S Todd (eds) *Law, Liberty and Legislation: Essays in Honour of John Burrows QC* (LexisNexis, Wellington, 2008)). Assessing whether psychological effects are irrational assists in this process by enabling the court to attach little if any weight to them.

33 See R Shweder and R Levine (eds) *Culture Theory: Essays on Mind, Self and Emotion* (Cambridge University Press, Cambridge, 1984) at 193.

34 Whilst cultural influence is “not monolithic” it is considered substantial in stimulating an emotional response: see Lazarus, above n 10, at 195.

35 *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) at 233.

36 Resource Management Act 1991, ss 5(2), 6(e), 7(a) and 8. The main difficulty for Māori is how much weight these effects will be given in the final decision-making process if there are conflicting values; see IH Williams “The Minister's Prison and the Cultural Prison: Lessons from the Northland Prison Litigation” (2003) 20 NZULR 320.

statutory reference to taonga requires cognisance of beliefs central to Māori culture, including intangible spiritual beliefs, and commented:³⁷

The Resource Management Act does for the most part deal with physical objects, although on occasion needing to consider Maori cultural and spiritual beliefs associated with those physical objects. It is not an area where intangible cultural and spiritual beliefs often fall for consideration in their own right.

Māori cultural and spiritual beliefs are considered to have particular relevance to environmental management and other people's use of natural objects (whereas, for instance, Christian beliefs are not³⁸) because of the animist features of Māori spirituality and the concept of whakapapa. The meaning of 'Maori relationship with their taonga'³⁹ constitutes a number of facets (including kaitiakitanga) but will also include the right to hold beliefs and to know that they are respected. Such beliefs certainly cannot garner any scientific support or clear documented evidence to show that they are true but as Schweder explains, rather than deeming them irrational, these spiritual beliefs are better described as non-rational thoughts, that is: "ideas that fall beyond the scope of scientific evaluation".⁴⁰ Non-rational thinking suggests that there is "something more to thinking than reason and evidence – culture, the arbitrary, the symbolic, the expressive, the semiotic – that many of our ideas and practices are beyond logic and experience".⁴¹ This contrasts with the type of irrational thinking that we saw in the EMR scenario, described by Shweder as "cases of genuinely degraded performance".⁴² In the EMR-type cases, either "the informant has *failed to apply* a standard that he himself recognizes as authoritative and correct ... or the informant has *failed to acquire* the proper standard for reasoning, judgement or choice".⁴³

For the court to take into account these psychological effects, Māori opponents must of course still show that the beliefs allegedly being transgressed are genuinely held and demonstrate the adverse effects that flow. Assuming that this evidential hurdle is passed, however, the court cannot render the resulting psychological effects weightless by looking at the rationality of the underlying cognition. The courts do not investigate the historical proof of whether, for example, the mountain actually *was* the home

37 *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) at 234.

38 Although see *Grunke v Otago Regional Council* PT Christchurch C8/96, 11 March 1996, an application for an interim enforcement order wherein Judge Skelton did not dismiss out of hand Sister Grunke's objection to the use of pesticides near rivers on the basis of spiritual concerns. The Roman Catholic nun regarded "water as a symbol of baptism and therefore life, and for her polluting it turns it into a symbol of death" (at 3). Although the Judge stated, "[a]s for Sister Grunke's spiritual beliefs, while I accept them as genuine from her point of view, I cannot accept on an objective basis that they should carry the weight that again would be necessary to enable either application to succeed" (at 8). The author was unable to discover any similar cases where non-Māori spiritual beliefs were accepted as relevant, in opposing an application by another party to use the environment in a particular way.

39 Resource Management Act 1991, s 6(e).

40 See Shweder, above n 33, at 165.

41 Shweder, above n 33, at 38.

42 Shweder, above n 33, at 37.

43 Shweder, above n 33, at 37.

of a mythical ancestor or taniwha or whether the taniwha will be angered by the location of the development. In fact the court, following some initial confusion about this, has expressly accepted that such issues are “simply not justiciable”.⁴⁴ Rather the courts, following the statutory mandate, are relativist and pluralistic, appreciating the diversity in peoples and seeking to respect spiritual beliefs. The basis for the belief, if that belief is genuinely held, is not scrutinised.

Why do we give special protection to and ring-fence this non-rational thinking? Certainly, it is an approach that has attracted criticism,⁴⁵ particularly because only Māori cultural and spiritual concerns are expressly protected in this way, and no doubt this will continue to be a contentious issue. But there are specific legal and policy reasons that can be used to provide a justification for this approach. The Treaty of Waitangi and the jurisprudence that has developed around the compact between sovereign and Māori provides a legal justification by establishing quasi-constitutional rights.⁴⁶ But in terms of policy, adopting this approach is seen to have a valuable social utility, not just from the perspective of Māori but for all New Zealanders. It says something about what we stand for, what our values are as a society. It acknowledges the importance, to all of us, of preserving the cultural heritage of our first peoples, a goal that will contribute to the depth and richness of our society. Our entire economic and legal system is premised on and imbued with British values and making express provisions for Māori is an acknowledgement that we have to make a conscious effort to guard against the all-pervading suffocation that colonisation engenders, the smothering of minority indigenous cultures, spirituality, language, knowledge and traditions. In noting that “the aspirations of the Resource Management Act for the recognition of Māori values are expressed emphatically”, Baragwanath J reminds the courts that:⁴⁷

... the importance of due recognition of those values, clearly expressed by Parliament, requires an ungrudging response from the Courts. Because Maori history and traditions are less familiar to many judges than those of England, we need constantly to recall Cardozo’s advice:

Deep below consciousness are ... the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge ... The great tides and currents which engulf the rest of men do not turn aside and pass the judges by ... The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties. *The Nature of the Judicial Process* Yale 1921 pp 167-8 and 174-5.

44 *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 401 (HC) at [39]. Note: Wheen argues that in the context of the Hazardous Substance and New Organisms Act 1996 ERMA has attempted to rationally assess Māori spiritual beliefs, see Wheen, above n 21.

45 See R Ahdar “Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments” (2003) 23 *Oxford Journal of Legal Studies* 611; D Round “Here Be Dragons” (2005) 11 *Otago Law Review* 31; compare to Williams, above n 36.

46 See in particular Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008).

47 *Helmbright v Environment Court* [2005] NZRMA 118 (HC) at [25]–[28].

Such self-appraisal will continue to be needed so long as the importance of the Globe Theatre is more natural than an appreciation of the Maori tradition which is a vital component of our country's history. That will be of increasing value to future generations, whatever the demographics.

It is a small enough thing in resource development to take Parliament at its word and give substantial effect to Maori history... It has been the experience of each colonial society that indigenous interests have been overwhelmed by the claims of the colonists. That experience has been seen in both Americas, Africa and throughout the Pacific including Australasia. It is a problem inherent in the process of the Westminster system, seen in its starkest form in the apartheid regime of South Africa. Those in public office must examine their conduct in the way that Cardozo, himself of a minority, expressed so clearly.

The protection of the indigenous people of New Zealand, now a minority, is at the forefront of the argument.⁴⁸ Fundamentally, a case can be made that giving special protection to this 'non-rational' cognition contributes positively to society and making this exception has a valuable social utility. The courts do not subject emotions, based on Māori spiritual beliefs, to an objective, rational assessment; they do not investigate the logic of the underlying cognition⁴⁹ and nor should they. In essence, we have agreed as a society to value and respect those spiritual beliefs; thus psychological effects flowing from these beliefs have been singled out as a specific exception and protected from the requirement that the underlying cognition be objectively rational.

V. THE PROSTITUTE

Now consider the case of the sex-worker. Jan is delighted at the proposal for a resort. Unbeknown to (most of) the villagers she has secretly been working as a prostitute from her home and the prospect of a steady flow of tourists and conference attendees has increased her potential work. She contacts another sex-worker she knows from Auckland, who agrees to come and work with Jan from her home. Following the decriminalisation of prostitution in 2003,⁵⁰ the District Plan was amended to manage 'prostitution related activities' and to operate within the confines of the Plan, Jan needs to obtain a resource consent. She wouldn't bother but as she wants to advertise to the tourists, she'll need to be legitimate. Her application for resource consent is publicly notified and Mrs Fret is horrified, as are a number of Jan's other neighbours. Mrs Fret's response is voluble and oft repeated: "It's disgusting," she says. "The thought of it going on here in our village makes me feel sick."

In fact, the majority of the neighbours are opposed to resource consent being granted. Their opposition is twofold. They describe their primary opposition as a strong moral response, but it can also be categorised as emotion-based. The opponents hold certain beliefs that prostitution is wrong. Ignoring those beliefs, and allowing behaviour that is anathema to those

48 Note also the general legislative provision for the protection of minorities, their cultural practices and beliefs in the Human Rights Act 1993, s 21 and the Bill of Rights Act 1990, ss 19–20.

49 Although compare to Wheen, above n 21, arguing the opposite in the context of the Environmental Risk Management Authority.

50 Prostitution Reform Act 2003.

beliefs, causes an adverse emotional response: disgust and revulsion at the very thought of prostitution. The neighbours' secondary opposition reflects concern at more concrete nuisance effects such as the potential for noise, late night operating hours, traffic, unsavoury rubbish, attracting a criminal element and the prospects of their property suffering from 'environmental blight' and a loss in value. This anxiety certainly looks to be based on rational cognition that may be testable in evidence⁵¹ and this would be the same with the establishment of any other business. But what of the primary opposition? How will objections categorised as 'moral' be regarded? To answer this question, it is necessary to know a little about the law reform concerning prostitution, particularly because the Prostitution Reform Act 2003 seemingly crafted the way that we are to think about opposition to brothels based on psychological effects.

The Prostitution Reform Act can be categorised as human rights legislation. The aim of the legislation was to ensure equal labour and human rights for all New Zealanders⁵² and to promote the well-being of sex-workers,⁵³ indeed the very purpose of the Act is:⁵⁴

... to decriminalise prostitution⁵⁵ (whilst not endorsing or morally sanctioning prostitution or its use) and to create a framework that—

- (a) safeguards the human rights of sex workers and protects them from exploitation:
- (b) promotes the welfare and occupational health and safety of sex workers:

But the reform also gave express powers to Local Authorities to regulate the signage for and location of brothels⁵⁶ and in particular, singled out and specifically addressed psychological effects in resource management decision-making. Section 15 of the Prostitution Reform Act amended the Resource Management Act by providing that:

51 General adverse effects (noise, traffic, etc) are possible with all businesses and can be managed by conditions on the consent, a short period granted for consent or a review of the operation of the consent. Effects on property prices constitute valid planning concerns but strong evidence must be adduced of significant effects and the court has warned that "real estate agents' assessments are notoriously variable ... market conditions at the time of sale are unpredictable, but much more likely to be the predominant influence" (*Little Sydney Mining Co v Tasman District Council* [2010] NZEnvC 302 at [93]). The court will look for persuasive evidence rather than mere apocryphal tales and the conclusions of the Prostitution Law Review Committee (Ministry of Justice *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington, 2008)) may be important in helping a court determine this issue.

52 Katherine Rich (National) (19 February 2003) 606 NZPD 3609–3610.

53 Tim Barnett (Labour) (19 February 2003) 606 NZPD 3607–3609.

54 Prostitution Reform Act 2003, s 3.

55 Prostitution Reform Act 2003, s 4(1): Prostitution means the provisions of commercial sexual services.

56 Prostitution Reform Act 2003, ss 12–15, empowering Local Authorities through bylaw provisions to prohibit or otherwise regulate signage and to regulate (but not prohibit) the location of brothels and confirming their powers to regulate location via the District Plan.

15 Resource consents in relation to businesses of prostitution

- (1) When considering an application for a resource consent under the Resource Management Act 1991 for a land use relating to a business of prostitution, a territorial authority must have regard to whether the business of prostitution—
- (a) is likely to cause a nuisance or serious offence to ordinary members of the public using the area in which the land is situated; or
 - (b) is incompatible with the existing character or use of the area in which the land is situated.

So, in determining whether to grant Jan's application, decision-makers must consider whether the thought of prostitution would cause serious offence to ordinary members of the public using the area: these psychological effects can be considered even in the absence of any external manifestations from the business. There is no attempt to explain the meaning of "serious offence" in the statute but within the criminal sphere, case law in Australasia has established that "offensive behaviour" is tested by the psychological effect it creates in the objective perceiver thus providing a useful guide in the present context. Offensive behaviour must be such as to "wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person."⁵⁷ Within Resource Management Act enforcement proceedings, the High Court cited this formula with approval in a case concerning the meaning of the phrase "objectionable and offensive".⁵⁸ So, "offence" stimulates a particular emotional response that we would categorise and describe as "anger, disgust, resentment or outrage". But the criminal law formula also imports the reasonable person test into the equation: an ordinary person, faced with that stimulus, would respond in this particular way. The wording of the Prostitution Reform Act also makes it clear that the court must carry out an objective assessment of that particular psychological response.

In another Resource Management Act case concerning potentially offensive behaviour, the Court of Appeal has explained that in undertaking an objective assessment:⁵⁹

... the Court acts as the representative of the community at large. In that capacity the Court must decide whether the claim of the objector to find the subjectmatter offensive or objectionable is a justified one. ... The Court must weigh all the relevant competing considerations and ultimately make a value judgment on behalf of the community as a whole.

But this is not a very satisfactory answer and the question remains as to how the court assesses whether the emotional response is "justified": is the court still permitted to consider the underlying cognition, and to make an

57 *Ceramulus v Police* (1991) 7 CRNZ 678 (HC) at 682–683.

58 *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 (HC).

59 *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 304–305 per Tipping J. This reflects the test adopted in other regulatory regimes concerning, for example, cases brought under the Food and Drug Act 1969 (*Flint v Hellaby Peach Products* [1974] 1 NZLR 718 (SC)), Hazardous Substances and New Organisms Act 1996 (implicit in *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) at 238–239) as well as the criminal cases of offensive behaviour.

assessment as to whether that emotional response is rational or irrational?⁶⁰ This would certainly accord with the general approach taken by the courts in resource management proceedings. If so, should an assessment be based on logical or normative reasoning?

In trying to answer the questions posed, it may be important to acknowledge the difference between risk-based cases concerning emanations (for example, EMR scenarios) compared to claims of adverse psychological effects caused by the mere knowledge of an activity taking-place. The former may be subject to rigorous scientific analysis, expert evidence as to probability and a decision made as to whether the risk is real. Evidentially, the latter is rather more amorphous. Is it possible to use a logical, rational assessment to test the underlying cognition in cases that are not susceptible to scientific analysis? Fortunately, the courts have dealt with a number of mere knowledge cases where opponents have argued that the activity, even in the event of it functioning properly, will cause them to suffer adverse psychological effects. Most examples include applications for nudist camps and funeral parlours.⁶¹ In the majority of cases (and absent more compelling adverse effects) the court has adopted a robust approach, rejected the opposition and consented to the activities. There are clear policy reasons for this best expressed perhaps by Judge Sheppard in a case concerning an application for a nudist camp:⁶²

It is our understanding that tolerance of a variety of attitudes is evidence of healthy social conditions in a free and democratic society ... [I]f the practice of nudity on the applicant's own private property in circumstances where it is not displayed to

60 Note that the High Court in *Mount Victoria Residents Association Inc v Wellington City Council* HC Wellington CIV-2008-485-1820, 5 March 2009 per Dobson J, found that s 15 of the Prostitution Reform Act 2003 meant an application for resource consent for a brothel *must* be notified to the public to ensure public participation in the decision making process but the Court did not answer how the consent authority was to approach the objective test once it had received any evidence of psychological effects. Note also that the by-law making power under the Prostitution Reform Act 2003 has been the subject of judicial review (see *Conley v Hamilton City Council* [2007] NZCA 543; *Willowford Family Trust v Christchurch City Council* [2006] 1 NZLR 791 (HC); *JB International Ltd v Auckland City Council* HC Auckland CIV-2005-404-2214, 14 March 2006). However none of these cases illuminate the issue at hand.

61 See for example *McQueen v Waikato District Council* PT Auckland A45/94, 20 June 1994; *Tainui Investments v Waimea County Council* (1981) 8 NZTPA 65 (PT); *Cook Islands Community Centre (HB) Inc v Hastings District Council* [1994] NZRMA 375 (PT); *Gateway Funeral Services v Whakatane District Council* EnvC Wellington W005/08, 5 February 2008; *Sanddown Developments Ltd v Rodney County Council* Town and Country Planning Appeal Board 292/76, 300/76, 5 October 1976.

62 *McQueen v Waikato District Council* PT Auckland A45/94, 20 June 1994 at 6. Critically, Judge Sheppard alludes to a major difficulty with mere knowledge cases: causation. If mere knowledge of the activity taking place causes certain sensitive souls to become distressed, whilst other more robust individuals remain unmoved, has the activity caused the effect? This constitutes an interesting discussion that is beyond the scope of this brief paper. Note that Judge Sheppard in *McQueen* also tantalisingly adds: "Nudity as such is not illegal, nor is it generally regarded in this country as immoral ... the fact that some residents of the neighbourhood of an activity find that activity embarrassing, objectionable or unacceptable does not necessarily amount to an effect of the activity on the social or cultural conditions which affect the community..." (at 5-6), but he does not suggest what might be the result if the activity was generally regarded as immoral but not criminal. Could the adverse effects flowing from the mere knowledge that party-pills (presently a legal activity) were to be produced next door be enough to prevent a successful resource consent application?

others is embarrassing or objectionable to residents of the locality, or to others in the vicinity, any adverse social effects of that may be the result of those attitudes, rather than an effect of the nudity.

In this judgment, and in similar cases,⁶³ the irritation of the judge is almost palpable and one can sense echoes of the suspicions expressed by John Stuart Mill with regards to “the good faith of the parties who claim to need protection of their own sensibilities from the self-regarding conduct of others.”⁶⁴

There is one notable exception to this general trend concerning mere knowledge cases, however, which is important for our present discussion. In the case of *Cook Island Community Centre Society (HB) Inc v Hastings District Council*⁶⁵ the Court refused an application in relation to a funeral parlour. The parlour was to be sited directly across the road from a cultural centre for Cook Island people. The popular centre had taken 14 years to complete and was used for a whole range of activities and celebrations, including weddings, sports events and cultural nights. The Cook Islanders argued that their mere knowledge of a body lying in the neighbouring funeral parlour would serve to curtail much of the celebratory activities within the centre. Given that death was unpredictable, a body could unexpectedly be within the funeral parlour at a time when an event planned for many months was scheduled. To all intents and purposes consenting to the funeral parlour would signal the demise of the centre. Implicit in the judgement was an assessment of the cognition underlying the psychological response of the Cook Islanders. The normative assessment approach is clear and evident. The court refused to find the Cook Islanders “hypersensitive” and accepted rather that most civilisations believe it is inappropriate to “behave irreverently close to a place where a deceased person may be if one is aware of the presence of that person.”⁶⁶ But it is not too difficult to supply an argument based on reasoning: we will all become mourners at some point in our lives, a difficult process for most of us, and there is a clear social utility in “revering” the dead and respecting the sensitivities of mourners. Potentially both a normative and a rational assessment approach could be used in this case and certainly the rational argument can be used to underpin a valuable moral code. Clearly, it is possible to undertake rational inquiry to justify a response based on mere knowledge or ‘moral’ belief, although it may not be evidence from the

63 For an example of the court rejecting concerns about the influence in society of an ‘alternative community’ see *Centrepont Community Growth Trust v Takapuna City Council* (1978) 6 NZTPA 503 (PT).

64 Joel Feinberg *The Moral Limits of the Criminal Law: Volume Two Offence to Others* (Oxford University Press, Oxford, 1985) at 63, paraphrasing J S Mill *On Liberty* (Bobbs-Merrill Co, Indianapolis, c1956) chapter 4 at [12].

65 *Cook Islands Community Centre (HB) Inc v Hastings District Council* [1994] NZRMA 375 (PT).

66 *Cook Islands Community Centre (HB) Inc v Hastings District Council* [1994] NZRMA 375 (PT) at 380. It is also important to note that the degree of harm likely to be caused (ie the demise of the centre) was instrumental in the decision to refuse consent but that is not an issue that goes to assessing underlying cognition. Rather it goes to the second stage of assessing psychological effects, ie a consideration of the actual psychological harm caused, its severity and other implications that flow from this; see above n 14.

physical sciences that is adduced but rather socio-political debate from social scientists and philosophers.⁶⁷

Returning to our present case, should the court look for a rational justification? This would bring considerations concerning prostitution into line with how we deal with emanations (and opponents may seek to argue that the corrupting influence of prostitution emanates outwards) but in practice this may well cause difficulties. How would you logically justify the underlying cognition? In her writings on the topic,⁶⁸ Martha Nussbaum carefully and persuasively dismantles the most popular ‘reasons’ for opposition to prostitution. She suggests that the disapprobation of prostitution is propped up by irrational prejudice and a collection of vague, undifferentiated fears, incapable of providing any logical justification. Historically, prostitution was thought immoral because “non-reproductive and extra-marital sex” was considered immoral,⁶⁹ an unpersuasive reason in modern times, and the prejudice against prostitutes (that interestingly is a relatively modern phenomenon, not apparent in antiquity) was intertwined with a general unease about ‘the body’, the prevailing subrogation of women and their sexuality, and a class prejudice against tradespeople. Nussbaum argues that “[t]here’s nothing wrong per se with taking money for the use of one’s body. That’s the way that most of us live”, including Professors of Philosophy, and the work or “service expresses something intimate about the self”⁷⁰ in a myriad of occupations. Many of the major difficulties⁷¹ concerning prostitution are caused by its traditional status as a criminal activity and you can find the same problems with other activities that attract the ‘wrong-sorts’ because of their outlaw-classification. These difficulties are obviated by decriminalisation.⁷² Opponents to prostitution frequently cite religious teachings but relying upon religious dogma that provokes intolerance towards certain classes leads, she warns, into dangerous territory, and as an alternative, feminist arguments as to

67 See below n 75: the court received evidence from philosophers in *Romer v Evans* 517 US 620 (1996).

68 Martha C Nussbaum *Sex and Social Justice* (Oxford University Press, New York, 1999); Martha C Nussbaum *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press, Princeton, 2004); “‘Secret Sewers of Vice’: Disgust, Bodies, and the Law” in Susan A Bandes (ed) *The Passions of Law* (New York University Press, New York, 1999), at 19–62. Compare Nussbaum’s general argument about disgust being an inappropriate driver for regulation with Richard Posner “Emotion versus Emotionalism in the Law” in Susan A Bandes (ed) *The Passions of Law* (New York University Press, New York, 1999) at 309–329, who argues that disgust when normative is a valuable barometer of societal morality, and Dan Kahan “The Progressive Appropriation of Disgust” in Susan A Bandes (ed) *The Passions of Law* (New York University Press, New York, 1999) at 63–79, who writes that this emotional response can positively influence community norms.

69 Martha C Nussbaum *Sex and Social Justice* (Oxford University Press, New York, 1999) at 286.

70 *Ibid.*, at 292.

71 For example, being a conduit for the activities of criminal gangs, drug dealing, violence, trafficking in people, and underage prostitution. See also Joanna Phoenix (ed) *Regulating Sex for Sale Prostitution Policy Reform in the UK* (The Policy Press, Bristol, 2009) arguing that such criminal activities often have an incorrect metonymical association with prostitution (at 6–12).

72 Martha C Nussbaum *Sex and Social Justice* (Oxford University Press, New York, 1999) at 288, 294.

the commodification of women simply don't pass muster.⁷³ Whilst good reasoning upholds valuable moral codes, subjected to the bright spotlight of Nussbaum's scrutiny the so-called moral opposition to prostitution withers, feebly.

Returning to more earthly realms, and our present scenario, opponents to Jan's business may proffer 'concrete' reasons, to suggest that disapprobation has a social utility. Perhaps they would seek to argue that legitimised prostitution in communities causes marriage break-ups, corrupts the innocent minds of our (twenty-first century) children and draws ever more young people into the industry. But if empirical evidence exists to support such claims, it was not unearthed during a five-year governmental review into prostitution post-decriminalisation.⁷⁴ Absent such evidence, it would be hard to justify discrimination on social utility grounds. A good illustration of this point comes from the United States: the State of Colorado encountered horrendous problems in court trying to justify as rational laws that were found to discriminate against homosexuals.⁷⁵ We can assume, and rightly I believe, that it will be a difficult task to shore up the emotional response to prostitution *per se* with logic. But despite the potential difficulties, if the underlying cognition *is* to be assessed this may be the only assessment approach to adopt when the alternative is considered.

So, what of the normative assessment approach? Should the court look to whether disapprobation of prostitution is majoritarian? But using this as a backstop causes problems: it is saying 'emotional responses to prostitution that can not be rationally or logically justified are acceptable if the majority feel the same' and in respect of prostitution, *context* is critical. In the *context* of human rights reform and legislation – when we have adopted a top-down approach to protecting an unpopular minority – could this ever be a valid approach for a court to take? I would argue not. To interpret the legislation in a way that permitted this approach would result in the state-sponsored stigma of a minority: the complete antithesis to the legislation. Absent tangible nuisance effects, prostitutes, and *only* prostitutes, would face greater restrictions in carrying out their legal business activities compared to any other business, simply because others do not like the thought of what they are doing, consensually, in private, despite those thoughts having no reasonable, logical basis. Permitting this approach says 'prostitutes and their practices are the least desirable members of our community and we will sanction them being prejudiced against even if that prejudice is irrational'. It is setting up, by the use of law, a hierarchy in society and right at the bottom of the heap would be the very people, the marginalised minority, that the Prostitution Reform Act sought to protect. Prostitution is not a criminal activity and I do not believe

73 Ibid, at 291–293.

74 Ministry of Justice *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington 2008).

75 *Romer v Evans* 517 US 620 (1996) and see (1996) 110 Harv L Rev 155 for a note of the case; Martha C Nussbaum *Sex and Social Justice* (Oxford University Press, New York, 1999) at 301–302; Martha C Nussbaum *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press, Princeton, 2004) at 150.

that the state has any role in reinforcing damaging prejudices against non-criminal actors.⁷⁶

Clearly, the above arguments are premised on the basis that a court *would* scrutinise the cognition underpinning the emotional response to prostitution. But an alternative understanding of s 15 of the Prostitution Reform Act is that the court need not consider the cognition at all. The legislation might simply be giving moral objections to prostitution (and, I might add, only prostitution, not any other activity that you or I might find immoral) special standing. To this extent, the disapprobation of prostitution would be accorded the same special protection as Māori spiritual beliefs and, if genuinely felt, just accepted as a valid resource management concern without further scrutiny of the underlying cognition. If this interpretation is correct, s 15 must be read as containing an implicit acknowledgment that prostitution is morally wrong; the legislature is saying, 'If serious offence is taken at the mere thought of prostitution that is perfectly justifiable and we need not examine this response any further.'⁷⁷ Section 15 may simply reflect a political compromise reached in order to secure the passage of the reforming legislation and hence this interpretation was the one intended by parliamentarians, but if this *is* the correct approach it causes difficulties. Perhaps the least of these is an internally inconsistent statute, hoist on opposing policies. The major difficulty however is explained above. If an exception is being made to the general approach taken to psychological effects, this exception is not being made to protect a minority (as in the case of Māori) rather it is serving to undermine and, by the use of law, permit a damaging prejudice to continue against another vulnerable minority. To just accept an emotional response to the mere thought of prostitution (which may, as Nussbaum argues, be based on "irrational prejudice ... vague, undifferentiated fears, incapable of providing any logical justification") without permitting the court to examine the underlying cognition will contribute to stymieing any real reform; irrational prejudice against sex-workers will continue to be considered acceptable and will remain unabated and unchecked.

In summary, psychological effects in the context of prostitution are troubling and the drafting of the statute does not lend itself clearly to one interpretation. Given this lack of clarity, a persuasive argument can be made that a court should scrutinise the cognition underlying the emotional response, and should assess this cognition from the perspective of logic and reasoning. This would result in a consistent legal approach: it would ensure greater consistency to the approach taken to psychological effects in resource

76 For a more detailed discussion of the damage this can cause to sex-workers see A C Warnock and N R Wheen "Prostitution in New Zealand: The Re-importation of Moral Majoritarianism in Regulating a Decriminalised Industry" (forthcoming 2012, copy on file with author). For an exploration of the utility of state-sponsored shaming in the criminal context, see for example Nathan Harris "Shame, Ethical Identity and Conformity: Lessons from Research on the Psychology of Social Influence" in Susanne Karstead and others (eds) *Emotions, Crime and Justice* (Hart Publishing, Oxford, 2011) at 193–209; further see Richard Posner arguing against shaming criminals, "Emotion versus Emotionalism in the Law" in Susan A Bandes (ed) *The Passions of Law* (New York University Press, New York, 1999) at 309, 319–321.

77 Section 3 of the Prostitution Reform Act 2003 may lend weight to this assertion. The section states that "The purpose of this Act is to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use)".

management; and it would ensure an internal consistency within the Prostitution Reform Act. It would require opponents to demonstrate that disapprobation of legalised prostitution has a social utility rather than giving them a ‘free-pass’ to irrationality. But if this is the correct approach, the obvious difficulty is that it would render s 15 meaningless and this in itself would trouble a court charged with interpreting the section. Absent any clear decision on the point,⁷⁸ the position will remain uncertain.

VI. CONCLUSION

At first sight, the approach to psychological effects in resource management decision-making appears inconsistent. If opponents find nudist camps offensive this will be disregarded; if they morally object to prostitution, this may prove determinative. If communities fear that telecommunications masts risk the health of their children, this fear will not carry any weight. The spiritual beliefs of Māori must be taken into account whilst the anxieties of Presbyterians as to the siting of a new religious sect will be irrelevant. But upon closer inspection, a dominant theme emerges. In the vast majority of cases the courts consider the cognition underlying the psychological effect and assess this objectively from the perspective of logic. If the cognition proves rational, the resulting psychological effects will be taken into account; if not, they will be disregarded. This approach enables reason and consistency to be imported into a sphere notoriously characterised by messy individualism and “endless subtleties and variations”.⁷⁹ It results in an equitable approach to managing conflicting interests in land management, and is an approach underpinned by good, reasoned policy objectives. In all cases where statute does not dictate an alternate approach, the courts should be fully transparent as to the assessment they will apply to psychological effects: one that will search for an objectively logical explanation for the underlying cognition. This will assist parties to recognise the applicable tests, enable them to marshal the appropriate arguments and evidence, and it may well have repercussions for case management.

Inursions into this common law approach have been made by the legislature. When such interference complements existing laws and supports a wider social utility, these exceptions appear justified and acceptable. For example, a clear case can be made that exempting the ‘non-rational’ spiritual beliefs of Māori from cognitive scrutiny serves to promote a positive, wider goal. However, when statute law has the potential to overturn the careful and reasoned common law approach and contradicts other laws, difficulties can arise. The case of sex-workers aptly illustrates this point. One interpretation of the Prostitution Reform Act is that logically indefensible objections to the mere thought of prostitution should not only remain unchallenged but will be influential in resource consent decision-making. The effect of this would be to legitimise irrational discrimination against a minority: a minority that the state seemingly determined deserves protection. Arguably, retaining the approach

⁷⁸ See the comments concerning *Mount Victoria Residents Association Inc v Wellington City Council* HC Wellington CIV-2008-485-1820, 5 March 2009.

⁷⁹ Susan A Bandes (ed) *The Passions of Law* (New York University Press, New York, 1999) at 13.

developed by the courts would better manage the inherent conflict of interests that accompanies prostitution. Scrutinising the cognition underpinning the emotional response, looking for logical foundations, will ensure that valuable 'moral' codes are upheld. But irrationality that simply serves to marginalise further a disadvantaged group would, under this court created approach, be disregarded.

As a final observation, the logical assessment approach has interesting ramifications for the relative importance of psychological effects and the wider role of resource management decision-making. In cases concerning the risk of emanations, psychological effects are rendered practically impotent. In such cases, if a real risk were established the resulting psychological effects would be taken into account in the final decision-making process. But as the court in *Shirley Primary School* pointed out, there is a degree of artifice to this because the relevance of those psychological effects would pale into insignificance when compared to the risk to physiological health. The consents would, most likely, be refused because of the actual threat to health, or property in other cases, regardless of the anxieties of those at risk. By comparison, in the mere knowledge cases psychological effects assume critical importance. The proper application of a logical assessment test will serve to delineate between valuable moral codes and prejudice deemed unacceptable in a liberal democracy and thus the role of the court is, as Lefebvre opined, to formulate "the problems of society into questions of space" and to transpose "all that comes from history and consciousness into spatial terms."⁸⁰ As a result, in the context of mere knowledge cases, the Environment Court is required and by necessity must undertake a role far in excess of that originally envisaged for it.

80 Elenore Kofman and Elizabeth Lebas (eds) *Writing on Cities: Henri Lefebvre; selected, translated and introduced by Elenore Kofman and Elizabeth Lebas* (Blackwell Publishers, Cambridge (Mass), 1996) at 99.