The Second Annual Belfast Pride Law Lecture,

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"Rainbow Lives, Monochrome Laws

Reflections on law and identity"

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The Queen, in *Alice through the Looking Glass* said that sometimes she had 'believed as many as six impossible things before breakfast'. Today, being neither a monarch and nor, for the most part, a fictional character, I am faced with doing my best to manage a mere *three* impossible things, and to do so before dinner.

The first impossible thing is to live up to the standards of the inaugural lecture last year.

I have the honour to have been asked to come to this great university and to present the second Belfast Pride law lecture knowing that the inaugural speaker, last year, was Lord Kerr, the former Lord Chief Justice of Northern Ireland and a Justice of the Supreme Court. I will fall short of his standards tonight but at least being only the second ever such speaker I am for the moment assured of 'runner-up' status.

The second impossible thing arises from the strict rule – and I quote – that *"it is an absolute requirement that judges do not express views in public about matters of social or political controversy".*

I am tasked today with speaking about the law, and about issues of relevance to the LGBTQ community, and, just for good measure am invited to do so in Northern Ireland at what is self-evidently a time of social change, and legal and political debate on everything from Brexit to same-sex marriage. No doubt again I shall come up short, but not for want of trying to avoid controversy.

As Lord Kerr has observed previously, and I gratefully adopt his way of putting it:

> *"it is not the role of a judge to advocate for social change, but rather to interpret and apply the law. It can, however, fall to us to determine difficult social and moral issues, such as what constitutes a family or whether a difference in treatment is justified. In such cases, we must remain scrupulously impartial, while also responding to broader changes in social mores."*

The third impossible thing relates to the very subject of this lecture and that is of course down to me. The title is *Rainbow Lives, Monochrome Laws, Reflections on law and identity*. That is a big title, and a big subject, and it will be impossible to do it any justice in one short lecture.

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But first I want to start with prejudice.

Literally of course, it is pre-judgment: the application of rules or beliefs without proper or fair consideration. Typically, this takes the form of rigid decision making informed by presumptions or superstitions rather than balanced evidence.

Now, being largely Welsh myself, I am keen to mention an illustrative (and of course wholly *true*) tale from the *Mabinogion*, the great collection of ancient Welsh stories told by my ancestors down the ages. It is the tale of Hen Wen,

the great old white pig. It is my own re-telling, so may my ancestors the bards of Wales forgive me for taking liberties.

Hen Wen was a rather magical pig who lived in Cornwall. She fell pregnant on May eve, a night when tradition dictated that for her to fall pregnant meant disaster for the Island of Britain. It was a bad omen.

Superstition led the people and especially a swineherd called Coll, to chase her pitchfork-style out of Cornwall and over the cliffs into the sea.

Did she give in and drown in the face of hateful prejudice? No, the pregnant pig swam as fast as her trotters and swishing tail would let her, and at length arrived on the shores of Wales.

She gave birth to offspring all over Wales as she travelled gradually north to the great mountains. Among her offspring it is said were various animals such as a wolf and an eagle: she was after all a *magical* and therefore clearly unconventional pig and had an equally unconventional family structure.

It is her last offspring that I want to call to mind for special attention.

When the white pig had at last reached far north Wales there she gave birth to a beautiful small black kitten.

This could be a beautiful case of 'happily ever after' but no: once again prejudice struck.

A swineherd, discovering the helpless and innocent kitten born of a pig, took it, cradled it in his ham-fisted hands and threw it as far as he could out, out, over the cliffs and into the Menai Strait, where the fast flowing water between the Isle of Anglesey and North Wales passes. There he left it to drown, engulfed in the waves and foam of the seas.

I will return to the poor but hated kitten at the end, for as with all good tales it does not end there. For now we will leave the kitten to the mercy of the unforgiving sea bobbing in the waves, and turn to more modern matters.

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The Universal Declaration of Human Rights starts with the statements that:

“...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”

and that the peoples of the United Nations

“reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom”.

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Much of the development of law in the modern era protecting rights and freedoms since the Second World war have stemmed from that Declaration. Yet inherent in the text itself we see ideas which we now appreciate in retrospect not simple.

The Declaration speaks of the human “family” and of equal rights being accorded to both “men” and “women”, the two traditional sexes identified in Western culture and long held in those cultures to be ‘all there is’, until recent times when we began to appreciate that both scientifically and socially the picture is far more nuanced.

Such terms as “men” and “women” likely appeared wholly uncontroversial in 1948 at the time of the Declaration of Human Rights but they import the notion that the world is divided into persons of two types only, the man and the woman. The deliberate choice of a gender-binary reference surely reflected the assumed and natural position of the era in which the Declaration was drafted.

That is not to say that the Universal Declaration less than a key and important statement of the commitments and aspirations of humanity, or that it has not been a very important source of discourse about rights of practical protection for all humans to varying extents around the world.

We now know that some people are entirely comfortable and fulfilled members of our human family whilst being non-gender binary. Some people born physically with one anatomy have a different gender identification. Many people do not genetically conform to the now dated scientific notion of the XX

or the XY chromosomal typing for sex. There are far more varieties than that, we now understand.

All of that is overlaid with the reality that whatever one's sex or gender, or non-gender, or chromosomal type, or body type, the objects of our love and affection and our drive to form social and family groups, surely at the core of what wee feel makes us human, are themselves not a simple case of heterosexual norms but of all the possible variations and permutations one can imagine.

It is a complex world and I suggest that the evolutionary progress humanity has made and is making in fields such as technology, medicine and the arts is in part fuelled by the greater participation of people, expressing their true identities, ideas and selves in society, freed more than before from the constraints of previous eras.

The law has at times struggled to keep up with society's gradual appreciation of the complexity of human life.

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Some of the Rights in the Declaration of Human Rights and which today we see embodied in the European Convention in our own domestic law are absolute and unqualified. Whoever you are the right to life for example cannot be subject to derogation. Nor can the right to freedom from torture.

Yet for other key rights we see that they are qualified. They can be limited by law.

Of importance to the LGBT community is Article 8 which provides, as those lawyers among us know very well, that:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

It is Article 8 which has done most for the LGBT community to secure rights to certain core parts of what many would regard of their identity as a distinct human being in society.

It is the right which has served to ensure civil partnerships and in some jurisdictions marriage for same sex partners, and which has secured reforms to laws relating to re-registration of legal gender, to mention just two of many examples.

But it is not an absolute right: as we see from the text of Article 8 the law can derogate to the extent '*necessary in a democratic society'* for a range of reasons including *'the protection of health or morals'.* Those are both phrases capable of a range of interpretations from the narrow to the generous, the conservative to the liberal.

If that were not enough, the principle of what is termed the 'margin of appreciation' means that there is a margin of flexibility in the extent to which rights may be interfered with by the State, reflecting differences in the social and cultural circumstances of the different countries.

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Thus it is that whilst we all have an equal legal right under the law to the exercise of our basic human rights, what that actually means is not absolute and is run through with some more relative, flexible and subjective concepts and socially-defined ideas.

Terms such as 'man' and 'woman', 'health and morals', the notion of 'necessity in a democratic society', and the margin of appreciation all serve to offer up many ways in which society, and in a democracy therefore most typically the *majority* or consensus view, acts to define and delimit the ways in which we may exercise the rights which one most closely associates with 'personal identity'.

Who we may marry, what gender we are, what identity documents we may have or not have, what job security, what rights we or others may have to decline (to us or others) goods and services, what rights we or others have to manifest religion and so on. All those are not seen in law as absolute but as relative to society's norms and values as they evolve down the years. That is self-evidently both a potential threat and opportunity to any minority group.

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Article 7 of the Declaration famously declares that *"All are equal before the law and are entitled without any discrimination to equal protection of the law....*"

I suggest that if the law is the body of rights and obligations in society, it is the legal system, by which I mean the practice of the law and the application of it by the courts and professionals, which is the lifeblood and the immune system by which, gradually, it is possible to rid the body of the disease of prejudice, hatred, and oppression.

I suggest that we gain greatest protection and freedom not from the monochrome text of the law itself but from the way in which the law is *performed* by those participating in it, and from ensuring that the rainbow community which we celebrate at the time of Pride is, especially, fully engaged in performance of the law.

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Since Lord Kerr gave the inaugural lecture here, Stanford University in the United States announced that it had created a computer algorithm which can analyse human faces taken from photographs on a dating website and can detect whether they are gay or heterosexual, with a reliability of upwards of 80% if given a few photos to look at.

Also since the last lecture, we saw the widely discussed example of natural language computer programmes which, when exposed to the internet and all its prejudice, learn to associate words such as 'gay' or 'homosexual' with negative sentiment.

There was also the very short-lived chatbot which was meant to be an experiment in a system which tried converse with people via twitter but quickly started to pick up on using hate-speech. It reflected of course not what its designers intended but the prejudices expressed by people on the internet who got it to parrot back what it was told.

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There are flags here for any lawyers looking to pump the lifeblood of Equality for All Before the Law. If we are all 'Equal Before the Law' then the law and

lawyers will need to keep pace with evolutions in society both human *and* non-human.

If one considers the technological possibility that such online systems could identify people as gay or lesbian, and then link across to targeted decision making, the scope for discrimination is self-evident if such a system was swayed to weight LGBT people as inherently negative or undesirable, for example in job recruitment or access to services.

How does the law address this potential hazard to the rainbow lives of LGBT people and other minorities?

Notably this year the GDPR came into force, the General Data Protection Regulation. It has something to say about cases where automated decisions are made by computer systems.

There is a right under Article 22 of the GDPR not to be subject to a decision made solely on the basis of automated processing if there will be legal effects of the decision affecting that person.

Under Articles 13-15 of a person whose data is being processed must be given information about:

'the existence of automated decision-making, including profiling... and...meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject'.

There is debate academically as to what level of detail and information is required as an explanation for any given automated decision: does the GDPR require a statement of the steps taken to make a specific decision and why, or does it merely require disclosure of a more generic statement of the mechanism used by the system – its logic if you like in the abstract – without the detail of how that applied to the particular person in question?[1]

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[1] S Wachter, B Mittelstadt, and L Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 IDPL 76 cf B Goodman and S Flaxman, 'European Union Regulations on Algorithmic Decision-Making and a "Right to Explanation"' (2016) ICML Workshop on Human Interpretability in Machine Learning, arXiv:1606.08813 (v3); (2017) 38 AI Magazine 50.

Very much as with the brain, machine decision making in the AI field is often underpinned by the use of something I used to play with academically quite a bit in the 1980's before I became a lawyer, namely the so-called neural network. Such systems learn by making *associations* between inputs and desired outputs and then gradually learn to respond to inputs they have not seen before. They are not programmed in the traditional sense of the word. You teach the network on lots of pictures of dogs and cats and if you are lucky you will get a system which can reliably later recognise a dog which it has never seen before, and respond accordingly without mistaking it for a cat.

The fascination but also the potential problem with such AI decision making systems is also their strength: they do not have rules, they have distributed learning and it may well be impossible to explain how such a system makes its decision other than to say '*it made the decision because that was consistent with its experience of the world and what it saw and was told*.'

Which brings us right back to prejudice again.

If an AI system makes a decision based merely on being fed prejudiced information, it may well be just as prejudiced or biased as a human, if it has 'grown up' – and learned all it knows – in that context. Prejudice may therefore be – whether in the case of humans or in the case of machines – an example of *garbage in, garbage out.*

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Lawyers and those interested in the law may well ask how the law can guard against prejudice either of the human kind or, on the technological horizon, the computer kind, and how we (the performers of the law) can promote the objective of equality before law, irrespective of a persons' identity and personal characteristics integral to that identity.

I suggest that a key contribution which the courts and the law and lawyers can make in performing the law is the firm and unwavering protection of principles of *'due process'*. In other words not simply the education of lawyers and judges to be in a general sense fair and nice but a careful and forensic regard to

ensuring that any decision applies rules and laws in a consistent and accountable way based on evidence and not assumption.

That is itself integral to the rule of law. Those principles (due process, consistency and use of evidence not assumption) may appear obvious but it is remarkably easy for any rule maker or indeed a judge to make assumptions or to start from a set of norms or attitudes as if self evident but which are merely learned responses to what society has projected as acceptable or normal in the upbringing and education of that person.

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This brings me to cakes.

The constitutional gag on judges means I cannot say anything about the case of Ashers Bakery which is presently before Lord Kerr and others in the Supreme Court, other than to note that a decision is awaited. If I did speak about it I would of course in any event be speaking in entire ignorance of whatever decision the Supreme Court may make.

But cakes featured, too, in the USA case of the *Masterpiece Cakeshop against the Colorado Civil Rights Commission*, which resulted in a Supreme Court decision in the USA Supreme Court on 4th June this year just 2 months ago.

It is an interesting decision because it signifies the importance which is attached by courts to due process and the avoidance of decision making based on the proverbial 'garbage in' whether by way of evidence or of decision making process. It also highlights the stress placed on applying the law equally and in a balanced way to all people without special preference for one group over another, and highlights how that enures for the benefit of all of us not solely the LGBT community.

Masterpiece Cakeshop told a same-sex couple that they would not create a cake for their wedding celebration because of religious opposition to same-sex marriages. Colorado did not at that time legally recognize same sex marriage. The shop would sell them other baked goods but not a wedding cake for a same sex wedding.

In Colorado at the relevant time there was provision in State law which permitted providers of services to refuse to create products bearing messages

which they considered offensive. In three cases, the Colorado Civil Rights Commission had upheld the right of a storekeeper to refuse to create cakes which carried messages demeaning gay persons or same-sex marriages. Masterpiece was on the other hand the flip side: a question of the right of a person with religious convictions to refuse to sell an artistic expression of their skill, in what they saw as support of same sex marriage to which they objected.

The same sex couple filed a charge with the Colorado Civil Rights Commission based on law which prohibits discrimination based on sexual orientation in a "*place of business engaged in any sales to the public and any place offering services . . . to the public*." They alleged that the refusal of sale to them of the cake was discriminatory.

A judge ruled in the couple's favour. The judge rejected the baker's First Amendment claim that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. The Colorado Court of Appeals agreed upheld that decision.

At Supreme Court level on further appeal the Supreme Court noted in particular that in considering the Baker's views a Commissioner – without objection from the other commissioners – had among other things said that religious views were a despicable form of rhetoric that people had used in history to hurt others.

The conclusion reached by the Supreme Court was that the process before the Commissioners had not been neutral towards the baker. It had exhibited elements of hostility to the baker which was not consistent with due process of law.
The result therefore was that without deciding the substantive merits of the case the Supreme Court by a majority held that the decision of the Commissioners could not be allowed to stand.

The US Supreme Court stressed that the baker in the Masterpiece case was:

"entitled to a neutral and respectful consideration of his claims in all the circumstances of the case." on the same terms as the bakers who had refused

to inscribe negative messages about gay people and gay marriage on their products.

It is a clear re-statement of the basic principle that when we say that all must be equal before the law, we mean it: we do not merely mean people with views acceptable to government or to certain parts of society including the LGBT community. It is for all of us.

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Coming back to the UK, June this year saw another example, this time in our own Supreme Court, of an approach which once more highlights the recognition by the law that whether straight or gay, the law anticipates that unlawfully discriminatory treatment by the State will be remedied without delay. Rights most often prayed in aid for LGBT groups can just as surely assist those not in the LGBT community.

As with the USA bakery case the, the context was a claim brought by people who are not members of the LGBT community. It is the case of *Steinfeld and Keiden v Sec of State of International Development*[2]

Six weeks ago the UK Supreme Court, with Lord Kerr giving the sole judgment, held in *Steinfeld and Keiden* that in the case of the Civil Partnership Act 2004 the provisions which require people entering into Civil Partnerships to be of the same sex was not compatible with the European Convention on Human Rights.

Once the right to marry had been extended to same-sex partners in England and Wales, so that same sex couples could choose between Civil Partnership and Marriage while heterosexual couples could not, the Government had been aware that the denial of civil partnerships to opposite sex couples was discriminatory. The Government was not entitled to delay in resolving that discrimination.

The judgment of Lord Kerr said this giving the unanimous judgment of the court[3]:

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[2] https://www.supremecourt.uk/cases/uksc-2017-0060.html

"50. I should make it unequivocally clear that the government had to eliminate the inequality of treatment immediately. …"

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52. The interests of the community in denying those different sex couples who have a genuine objection to being married the opportunity to enter a civil partnership are unspecified and not easy to envisage. In contrast, the denial of those rights for an indefinite period may have far-reaching consequences for those who wish to avail of them - and who are entitled to assert them - now. As Briggs LJ observed in the Court of Appeal, some couples in the appellants' position "may suffer serious fiscal disadvantage if, for example, one of them dies before they can form a civil partnership".

The ruling effectively engages indirectly notions of identity in that the basis for the couple's reasons for not wanting a conventional marriage included beliefs that the institutions of marriage and the place of women in marriage were things they could not agree with on conscientious grounds. Mrs Justice Andrews in the first instance decision described them as having

"deep-rooted and genuine ideological objections to the institution of marriage, based upon what they consider to be its historically patriarchal nature. They wish, instead, to enter into a civil partnership, a status which they consider reflects their values and gives due recognition to the equality of their relationship."

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Continuing on the theme of marriage we saw in June that the European Court of Justice, rather than the ECHR, decided in MB v Secretary of State for Work and Pensions[4] that it was directly discriminatory on the grounds of sex to refuse a trans woman a state pension on the same terms afforded to other women, in circumstances where the trans woman had been unable to obtain legal recognition as a woman, under the Gender Recognition Act 2004,

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[3] my emphasis.

[4] Case C-451/16 https://curia.europa.eu/jcms/jcms/p1_1159245

because she was married and committed to that marriage. The Gender Recognition Act 2004 requires married spouses to annul their marriage as a condition of obtaining legal recognition in a subsequently changed gender. In a nutshell, unless the claimant annulled her marriage she could not legally be treated as female and she could not qualify for her state pension. Although not the same as a decision that a marriage annulment requirement is per se unlawful, the ruling nonetheless operated at least in the field of protecting State Pension rights – and indeed the claimant's own committed marriage - from such a requirement.

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On 5th June this year, in *Coman v Romania*[5] the European Court of Justice considered the case of a same sex couple who married in Belgium but one of whom was Romanian, the other American. The couple decided they wanted to live in Romania, but the Romanian authorities did not authorise a visa for the husband of the Romanian man, on the ground that same sex marriage is not recognised in Romania and hence he did not qualify as a spouse for the purposes of settlement in Romania. The ECJ decided that EU countries that have not legalised gay marriage must respect the residency rights of same-sex spouses in their state even if their state does not recognise same sex marriages entered into locally. Member states had to recognise the rights of all married couples to free movement, no matter their gender or sexual orientation.

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The rainbow lives of trans people in June this year received news which was experienced by gay and lesbian people quite some years ago but has been a long time coming for the trans community. According to the World Health Organisation there is substantial evidence that the stigma associated with the intersection of transgender status and medical diagnosis contributes to

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[5] Case C-673/16 Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne. See also Directive 2004/38/EC.
http://curia.europa.eu/juris/liste.jsf?num=C-673/16

precarious legal status, human rights violations, and barriers to appropriate health care.[6]

It is therefore of note here that on 4th June 2018 the World Health Organisation document called the International Classification of Diseases finally removed transgender people from categorisation within the scope of mental illness or a form of identity 'disorder'.

Another case, in the end, of emptying the garbage of presumed mental illness in trans people, and reducing the scope for prejudice in the field of LGBT lives and identities.

If we bring the colours of the Rainbow into the law library and the legal profession and the judicial Bench, the greys and blacks of the law take on the brightest and most hopeful shades.

I will quote from Lord Kerr again because I cannot say this better than he did:

"Law, whether enacted or developed through the common law, if it is operating as it should, must be responsive to society's contemporary needs, standards and values. It is a commonplace that these are in a state of constant change. That is an essential part of the human condition and experience. As a deeper understanding of the human psyche and the enlightenment of society increase with the onward march of education, tolerance and forbearance in relation to our fellow citizens develop, the law must march step-by-step with that progress."

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[6] United Nations High Commissioner for Human Rights . Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. New York: United Nations General Assembly, 2011, Council of Europe . Discrimination on grounds of sexual orientation and gender identity in Europe, 2nd ed. Strasbourg: Council of Europe Publishing, 2011, World Health Organization . Sexual health, human rights and the law. Geneva: World Health Organization, 2015. See also https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5032510/#wps20354-bib-0056

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So I come at last back to the black kitten which I started with.

Any scholar will tell you I am using for my own ends, but the Welsh tradition is of oral re-telling and embellishment, so I do not repent too genuinely.

You will recall we left the kitten struggling in the violent currents of the Menai Strait, cast into the waters to drown out of sheer prejudice towards him.

Like his mother, the pig, the kitten swam and swam, struggled for dear life, clung on, on pushed by the sheer sense of injustice and the drive to live his life.

He made it far far across to the Isle of Anglesey, and there found a family who raised him with great kindness.

But for all the kindness he was shown by his new family, he grew and he grew, his claws sharp, his teeth white, his eyes bright.

Still he grew until at last he was enormous.

He was Cath Palug, the great and mighty Scratching Cat of north Wales.

Driven, on my telling of his story at least, by the injustice he felt, he scratched and tormented the people of that region, so much so that he became known as one of the great Welsh plagues of the era. He dispatched to death at least 180 of King Arthur's finest knights. One interpretation of the story even has him slaying King Arthur himself.

Perhaps one day beneath some car park in North Wales his catty bones and catty claws will be found like those of King Richard III and he will be a reminder to us all that prejudice in all its forms is always best *prevented,* in the first place, than remedied afterwards.

Thank you and have a wonderful Pride.

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