

*D*issent.

RAGE

SYDNEY UNIVERSITY LAW SOCIETY
SOCIAL JUSTICE JOURNAL
2014



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ISSN 1839-1508

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Editor's Foreword

'Rage' may feel like an inappropriate theme for a legal journal – it seems to waver between being excessively sincere or annoyingly performative. *Dissent* in 2014 embraces the ambiguities of the role of rage in law and law-making. In particular, this edition explores how our experiences as subjects and future practitioners of the law can further social justice causes.

It is this recognition of different personal experiences of the law that has led us to create a unique cover for each copy of *Dissent*. This year's edition also features a number of personal reflections, such as Amy Stanford's account of the difficulty of reconciling activism with the professional expectations of social workers. Rafi Alam recalls feeling both boredom and fear when he faced trial for offensive language and hindering arrest.

Importantly, this issue also addresses how rage can be channelled into legislative reform. James Clifford opens the journal by discussing strategies to reduce gentrification, while Sarah Ienna analyses potential legal responses to sweat-shop labour. Oscar Monaghan and Joshua Krook advocate embedding Indigenous knowledges and legal ethics within law school curricula.

As a counterpoint to instances of productive mobilisation of rage, Andrew Bell and Gemma McHardy warn against emotion replacing justice. Andrew makes the case against the Scottish verdict of 'Not Proven' and Gemma critiques superficial hashtag activism.

I would like to express my gratitude to all the contributors for sharing their thoughts and experienc-

es on law and social justice. We are very grateful to Professor Mary Crock for her insightful words introducing these submissions. Thanks must also go to the entire *Dissent* committee for their work shaping the direction of this year's issue. Finally, I would like to thank SULLS, in particular Erika Nguyen and Greta Ulbrick, for their support in putting together this publication.

This edition's articles, poems and artworks together form a dialogue on the role of emotion, activism, and of course, rage, in creating a socially just legal system. I hope that you enjoy this year's edition of *Dissent*.

Nina Ubaldi
Editor-in-Chief

Maintain Your Rage

Foreward by Professor Mary Crock

Rage is an extreme emotion that is not infrequently linked to youth, passion and enthusiasm. Uncontrolled, it can diminish. In the words of Louis L'Amour:

Anger is a killing thing: it kills the man who angers, for each rage leaves him less than he had been before - it takes something from him.

My personal view is that rage in modern developed societies like Australia is often misdirected – or even manufactured – and too often counter-intuitive to the interests of the enraged. Witness the frenetic opposition generated by America's Tea Party to the idea of universal health care. The public angst around reforms that would help remediate the depredations of human-induced climate change serves as an example closer to home. In other instances, (out)rage is strangely absent, not least in the way our politicians calmly rationalize the brutal and inhuman treatment of refugees and asylum seekers.

Yet, I would agree with Jayne Hardy that rage can be a fire-starter, drawing us to be agents of positive social change. Many of the contributors to this issue use their rage as creative spark. On the one hand, Hardy offers a thematic poem; and Andrew Smart a piece of visual art. On the other, Georges Remi contributes a parable about the transformative power of peaceful commercial protest in the Occupied Palestinian Territories (a phrase that has itself become contested in the new Conservative Australia).

For others the rage theme is put to more didactic use. Gemma McHardy urges us to use caution in assuming that the wildfire generated by social media will always produce real and lasting social change. Deborah White explores the dilemmas surrounding the treatment of the clinically enraged – in particular those suffering the effects of Post-Traumatic Stress Disorder.

Rage as an agent of social change is explored by James Clifford with an essay on structural resistance to gentrification. From the barricades, Rafi Alam contributes a personal reflection on his arrest during a student protest. Natalie Mendes gets hot under the collar about corruption of political structures by all manner of lobbyists and puppet-masters. Sarah Ienna decries our wilful blindness to the sweatshops that produce the clothes we wear and the commodities we consume.

The remaining contributions range across the subjects taught in law schools (Joshua Krook) and approaches to Indigenous inclusion within legal education (Oscar Monaghan); to essays on the Legal Aid defended hearings policy (Richard Schonell) and professionalism within social justice work (Amy Stanford). Gila Segall and Patrick Cort contribute an existential reflection on law as a mechanism of violence that resonates in the insights offered by Manna Mostaghim's chilling tale of rape from the Game of Thrones television series; Sibella Matthews' proposals for preventing child sex abuse; Natalie Czapski's piece on homelessness and domestic violence; and Andrew Bell's discussion of the verdict of 'not proven' in Scottish criminal trials.

This is an issue that is remarkable in the diversity of the subjects covered. It is also a volume that demonstrates the imagination, creativity and sheer depth of talent amongst the young people who it is our privilege to teach at Sydney Law School. Just as Dylan Thomas urged his ageing father not to 'Go Gently into that Good Night', so should we heed the injunction of (Edward) Gough Whitlam: Maintain Your Rage.

Professor Mary Crock

Professor of Public Law, The University of Sydney

Gentrificaton



“at worst it leads to homelessness, at best it impairs a sense of community”
– Peter Marcuse

Beyond 'Die Yuppie Scum': Options for Structural Resistance to Gentrification

James Clifford

Arts / Law V

Capitalism binds thinking to the level of the individual: the consumer. In terms of gentrification processes, this limits resistance to gentrification to 'conscious' consumer choices such as shopping at local businesses and avoiding 'yuppie' entrepreneurship. But what options exist for addressing the structural problems behind the individual gentrifier: large external commercial investment in displacing markets and deliberate urban planning by government? How can legal avenues, such as zoning controls, taxation incentives and affordable housing minimums mitigate or even prevent gentrification processes? How can communities access improved infrastructure without being displaced? This essay will begin by defining gentrification and respond to initial questions regarding the negative impacts of gentrification. Answers and strategies that do not involve a 'gentler eviction', such as legislative protections, neighborhood councils and tenant collectives will be presented and evaluated, while remaining cognizant of the context-contingent nature of these strategies.

What is Gentrification?

Gentrification is a process whereby housing prices in a previously low-income area become unaffordable for existing communities. This leads to those communities being forced to move to more affordable neighbourhoods, often further from the city centre. Such displacement of existing communities may make it '...seem as though neighbourhoods 'improve', when the reality may be that poorer groups are thinned out or re-sorted through the housing system.'¹ This 'improvement' generally includes reduced crime, the provision of infrastructure such as transport options and higher quality residential dwellings. The effects of gentrification vary wildly depending on the social and economic position of those affected. As summarised by the housing policy analyst Peter Marcuse: 'at worst

it leads to homelessness, at best it impairs a sense of community'²

There are several, interconnected forces that displace existing working-class communities and communities of colour. The most pronounced is being 'priced out' of a neighbourhood due to increased rents. Such prices can be, and are paid by educated, professional workers who are attracted to work opportunities and the inner-city lifestyle (the 'cool' factor of which is often connected to the simplification and commodification of those working-class communities and communities of colour; such as 'rustic' aesthetics and 'exotic' food options). Rather than being evicted, Sydney tenants are more likely to be unable to meet rent increases and may opt to pre-emptively move out in anticipation of eviction. These rent increases are not limited to the end of a lease, but often take place during an agreement and in some instances, on a monthly basis.³ Those tenants who elect to stay within the community often face high rates of anxiety due to financial instability. Because of the expanding nature of gentrification, displacement is not limited to a single move but often leads to 'serial displacement', as gentrification processes catch up with those affected as suburbs gentrify further and further from the city centre.

For Sydney, this process has seen working-class and immigrant inner-city neighbourhoods in the 1950s (populated mainly by terraces, pubs and factories) transforming into expensive, exclusive residential and recreational real estate.⁴ Some of this movement can be traced to the movement of factories and manufacturing jobs from the inner-city to suburbs from the 1950s to the 1970s.⁵ However, more recent change has been due to economic displacement, rather than the pursuit of blue-collar work. Current sites of gentrification in Sydney have been identified as Marrickville

and Concord. These are 'working class areas... with disproportionate increases in professional workers, high income households, two earner childless couples, and the well-educated'.⁶ Over a third of the population in these suburbs currently speak a language other than English at home.⁷ Due to the processes identified above, those living in gentrifying areas are being displaced at a rate far beyond non-gentrifying Sydney suburbs.⁸ This includes those with incomes below \$499 (weekly), production, transport and labour workers.⁹

Such a negative impact is not shared evenly across social demographics. This results in wildly varying perceptions of the gentrification process:

Some view gentrification as an opportunity to make money; for others, it's something they know is bad, but are pretty sure means better restaurants; and for many, it means rising rent, hostile retail spaces, and ultimately displacement.¹⁰

These three distinct perceptions of gentrification are clearly tied to one's socio-economic status, and the racial and gendered elements embedded in that status. For those with economic capital who are looking for a cheap, high-yield investment, gentrification represents an economic opportunity. I, and many other middle-class students find themselves in the second position. We know generally about displacement and the way rents rise with demand and force, leading those who cannot keep up out of those properties. But we also want to be near inner-city universities, queer scenes, jobs, cultural opportunities etc. Some of these are closer to needs; others are far closer to wants. And the third group are people who feel the impact of gentrification the most acutely. This group includes Indigenous populations or immigrants who have built communities out of necessity in places considered undesirable at that moment in time (often due to lack of infrastructure, relative distance from the CBD) and who increase the 'undesirability' of that neighbourhood by their presence following the gentrification process. This is tied to racialisation; the way areas such as Redfern are/were perceived of as 'dangerous' by white and middle-class sensibilities due to both the visible non-white, non-English presence and high rates of poverty related crime, such as property offences, larceny and drug use.

In some ways, the first, pro-gentrification perspective echoes the position of governments and informs their urban planning policies. In Australia, relevant government policy avoids the term 'gentrification', preferring to frame the process as one which creates business and employment opportunities. Nonetheless, much academic, activist and community work has viewed gentrification from the perspective of the displaced, and accurately identifies the process as a social justice issue.

Potential Responses

Individual Strategies

Individuals concerned with the effects of gentrification are often ill equipped to respond to this vast, slow and seemingly inevitable process. Neil Smith, the author of *The New Urban Frontier*, identifies the 'Die Yuppie Scum' slogan used in the Lower East Side in New York City (which was being gentrified by young professionals in the 1980s) as such an example. He demonstrates how it 'was an effective slogan for scaring off yuppies and indeed the gentrification of the area stalled until the city evicted homeless people and protestors'.¹¹ Smith goes on to detail how this campaign was limited by its focus on individual consumers, rather than large developers enabling and encouraging this demand. This illustrates how such movements are restricted in their effectiveness when not supported by long-term, targeted community planning and/or legal protections.

The more passive strategy of relying on the benevolence of individual landlords is also insufficient even for those tenants in such a relationship. As highlighted by Australian Housing and Urban Research Institute (AHURI), 'benevolent landlords' who do not increase rents at the market rate (thus creating a 'rent gap' between what could be charged and what is currently being charged) still contribute to financial anxiety and instability as renters experiencing a rent-gap are aware that should their landlord change or merely change their mind, they could face a massive and fatal rent increase.¹² It also diminishes living standards. As highlighted by the Tenant's Union, tenants in a 'rent-gap' property are often loathe to contact landlords regarding necessary repairs or improvements, out of fear of reminding their landlords of their presence, or irritating them into increasing the rent.¹³ Thus, even if



tenants are paying a low rent in a gentrifying neighbourhood, they still suffer unique problems that render their living situation undesirable.

Structural Responses

Long-term structural protections against gentrification must address two concerns: maintaining existing communities at risk of displacement and enabling the provision of better infrastructure to those communities.¹⁴ This infrastructure can include commercial and industrial development, so long as they remain relevant and accessible to existing communities.¹⁵ It is useful to consider the different and sometimes conflicting roles played by governments and communities in combating gentrification. For governments, the main tactics are the inclusion of low-income housing in new developments and taxation tools. These will be evaluated below. For communities, tactics often include lobbying for the above. However they also extend to securing autonomous community control over neighbourhood planning and the development of non-private ownership structures.

Government Led Affordable Housing:

Legislating affordable housing requirements can be effective at offsetting gentrification. Planning requirements can be used to require developers to maintain a proportion of affordable housing, such as the 12% requirement in Los Angeles.¹⁶ This shifts the expense of affordable housing from governments to developers.¹⁷ However this creates a reliance on private developers, who in turn depend on selling units at or above the (rising) market rate to compensate for the reduced income from affordable housing units.¹⁸ Below Market Rate ordinances have similar benefits and disadvantages; they require a certain ratio of affordable housing (such as one in every four units) be provided in

new developments. Although this can create social divides between those paying full price and those in affordable housing units, such methods have seen success, such as in the gentrifying African-American and Latin@ populations in East Palo Alto in the Silicon Valley.¹⁹

In NSW, affordable housing initiatives that are integrated into development proposals are the main form of preventing displacement. However, the State Government permits only certain councils to make enforceable levies with developers which require the incorporation of affordable housing into their development projects. Marrickville Council, for example, is not one of these councils, and the Council is therefore left to negotiate for voluntary agreements by providing incentives to individual developers.²⁰ For a suburb like Marrickville, however, even if enforceable affordable housing agreements were made, their effectiveness would be limited as there are few large-scale developments that could support such a levy. Rather than a single large development, many small and mid-sized developers are gentrifying Marrickville, and the council is unable to impose such levies. Even where such agreements are negotiated or developers seek to provide affordable housing, obstacles such as complaints by gentrifiers (both private households and developers) have led to councils being forced to reconsider social housing plans.

The AHURI has noted specific instances of this occurring in Randwick, where a development proposal for social housing received 254 objections, compared to 'two or three' for similar, purely commercial proposals.²¹ This makes it even more difficult for councils to protect lower income residents who are being overshadowed by the more vocal, new residents who are invested in maintaining their 'improved' neighbourhood. Should this social housing go ahead, social

exclusion will still occur when low-income residents remain in a neighbourhood as a barely tolerated minority.²² Public housing is also very limited due to narrow and changing eligibility requirements. For example, if you are a single parent who has attained public housing because of that status, you may be forced to move once your youngest child turns sixteen. Therefore, public affordable housing is beset by problems, and does not represent a sufficient response to the displacement caused by gentrification.

Taxation Tools

A more effective legislative response to displacement is taxation reforms aimed at discouraging or artificially freezing the effects of gentrification. For example, tax deferral legislation used in Atlanta and Cleveland gives long-time homeowners the ability to defer incremental tax increases that arise because of gentrification induced increases in property value, so long as low-income tenants remain in their properties. This disincentivises home-owners from raising rents.²³ However this still relies on goodwill of landlords, and thus carries the substantial flaws identified above. Sunshine taxes (used in California) are simpler and effective. They involve applying higher tax to 'quick investment sale transactions', where rapid renovations are made in areas of increasing property value. Such a tax discourages landlords from shifting existing residents to ride the wave of increasing property prices. Over time however, the effectiveness of this provision weakens as properties are renovated gradually, thus avoiding the higher tax rate.

Problems with Government Solutions

The problem with government solutions lies in the fact that state and local governments benefit from gentrification, and are therefore more inclined to encourage the process rather than initiate the onerous steps required to prevent it. As per Smith, it is often the ambition of the local state to assist gentrification because it sees particular benefits like increased property tax revenues that stem from these changes.²⁴ Legislative solutions are also limited due to gentrifying areas often having large populations living in cheap, illegal or unregulated boarding houses. For example, as of 2009, 3000 of the 72,000 people living in Marickville lived in such boarding houses, to which tenancy laws do not apply. Therefore, we must look to

solutions led by affected communities working with and apart from governments for more sustainable and customised solutions.

Non-Governmental Strategies

Many of the above strategies have non-government doubles that can be initiated by community organisations. These include negotiating rent increase schedules with landlords, which lock in gradual rent increases should they happen based on negotiation between landlord and tenant. This removes the uncertainty identified as undermining the benevolent landlord model. Eviction controls and agreements that include negotiated terms for when eviction is permitted are another example of non-government, negotiation-based strategies that can create stability in gentrifying neighbourhoods. However these solutions are quite localised, and depend on the good will of individual landlords and the negotiating abilities of tenants/unions/lawyers.

Solutions that are more permanent can be found via targeting local council policies relating to zoning and public land giveaways. Community campaigns that promote inclusionary zoning ordinances, mixed-use development and density provisions can make rezoned land a site of resistance by making it amenable to affordable housing. Even greater stability and control can be created by 'turning some of the high proportion of renters into homeowners' via co-operative ownership. By pooling resources, 'renters' are accountable to themselves and similarly-positioned 'renters', and can manage their housing within a democratic, rather than capitalistic relationship.

Community Land Trusts (CLTs) is a similar model, whereby participating persons pool resources or petition governments, NGOs, unions and private developers to fund a CLT. The CLT then takes land off the speculative market and rents it out to relevant groups vulnerable to gentrification (e.g. community centered businesses, long term residents, low income homeowners and renters). Obviously this presents a great logistical challenge for communities, especially considering the uneven power relationship between developers/landlords/councils and communities. Nonetheless, resources exist (such as the PolicyLink toolkit)²⁵ which attempt to educate and empower communities to negotiate for these protections. Al-

though these may seem utopian at first glance, such organisations are not without precedent. Harlem, for example, has more than 300 housing co-operatives that have mitigated the threat posed by gentrification for decades.²⁶

As evident from the discussion of the causes of gentrification, it is impossible to limit anti-gentrification strategies to housing. Income and asset creation is also essential, often in the form of improved neighbourhood economies. This can be development via governments or through agreements with local commercial entities, and involves the provision of resident services (childcare, transport, 'basic retail sector') and public investment (via local hire and living wage provisions).²⁷ This enables existing communities to be able to support themselves economically and improve their own living standards without necessarily being exposed to greater demand from external buyers.

Tactics such as boycotts and picketing have also been used to combat gentrification. Often exclusionary retail spaces (such as up-market clothing, dining and specialty stores) send signals regarding who is wanted and catered to in a community. For this reason, boycotts are generally not useful as displaced groups are not the target market of these businesses. Rather, activists such as Karen Ward advocate for the picketing of these businesses.²⁸ The problem with such methods, however, is that law enforcement are more than willing to intervene against already over-policed communities who are perceived as holding back an 'up and coming' suburb. Policing from these protests then only leads to further poverty (via fines etc) and may result in incarceration, criminalisation and joblessness.

Nevertheless, such methods are often successful in mobilising media outrage and communities against gentrification processes, and may be able to stall or prevent crucial developments through interference, irritation and loss of popular support. Such an example may be seen with the Redfern Tent Embassy, which is currently blockading construction of a large student housing development on the former site of social housing for Indigenous Australians. As stated by the founder of the embassy, Jenny Munro: "The plan for this land was always to provide affordable housing

for Aboriginals, it was designed to be for low-income housing, The AHC's (Aboriginal Housing Commission)'s current plans have no benefit to the Aboriginal community whatsoever. Student housing problems can be handled by universities, they shouldn't be forced on our community.²⁹ This ongoing campaign epitomises the impact of gentrification and its racialisation which may come to indicate the potential of non-legislative, activist strategies to prevent displacement via gentrification.

Conclusion

Clearly, individual, legislative and community responses to the threat of gentrification face an uphill battle against free market dynamics. Although the strategies identified above have demonstrated varied levels of effectiveness, the global trend in Western OECD major cities toward displacement is unlikely to be reversed. Nonetheless, there have been successes as channeling community rage, anxiety and fear of displacement into context-specific, long-term, community and legislative solutions remains the most valuable way to combat the forces of gentrification. ■



*“I was arrested last year on June 5 on
Carillon Avenue.”*

Will Not Cry in Public: A Personal Essay

Rafi Alam

BA (Hons) (2013)

Whenever I sat in court, I declined to show any emotion. There, before a magistrate of the Local Court, I remained still and limp; blank, like a rag doll propped against a chair. I had trained this front over numerous Court mentions, and ever perfected it until the last moments of my fifth day on trial. But, despite my – hopefully – cool demeanour, I was anxious inside, although little attention was paid to the testimonies of police witnesses. I was worried that I might crack, that my calmness would collapse; that I would ‘make a scene’. The only occurrences of this, however, were small giggles at hearing the word ‘cunt’ in a court of law.

Arrest

I was arrested last year on June 5 on Carillon Avenue. It was the day of a strike, the fourth or fifth of the year. A few students had just been dragged off the ground and placed under arrest. They were sat against a wall awaiting the custody bus that would deliver them to Newtown Police Station. A crowd had just begun to gather around the arrestees when riot police began pushing people onto the road and into the ground. I fell and knocked my head against another student.

In anger, I swore at the police officer: ‘What the fuck are you doing, you piece of shit?’

Almost immediately, a sergeant in the riot police pointed at me. I heard ‘arrest him’ before I was grabbed by the arm and silently taken further up the wall, where I too, was made to sit and wait.

Losing faith: a short history

It’s hard to know exactly when I lost faith in the legal system, but I know when I still had it. In my senior years in high school I did Legal Studies, and I remem-

ber being awed by the principles of justice in Western democracies. Rule of law! Due process! In particular, the rights of the accused really got to me. There was something so noble about a system that imposed on itself such high standards for proof, and that the people they sought to prosecute held such immense protections from the state. It was always the prosecution that was forced to present evidence, not the defendant, and this led to a scrupulous justice system.

But my progressive disenchantment with the legal system continued uninterrupted throughout my young adulthood. There was something disconcerting about the disproportionate rate of Indigenous incarceration. Further scrutiny presented a clear barrier to the oft-revered equality before the law: class and wealth. How could a poor homeless person, charged with public drunkenness and offensive behaviour, challenge the state? (And how could the public service challenge the might of corporate wealth?). Legal Aid exists, and community legal centres do all they can in their capacity, but funding is scarce– and the stretched charity of these services pale in comparison to the inherent inequalities of the adversarial legal system.

Custody

As I was taken into custody, I suspected the penalties not to be severe, although at this point I didn’t have any idea what my charges were. We were graced with the presence of one of Sydney University’s security officers before our lawyers arrived. He entered our cells with dubious permission from the police to hand us our bail notices. Some of us, students – the majority in fact – were given one-day bans from campus. Others were given permanent bans. Just like that, signed off by campus security. I heard a dispute happening in the cell to my right, before a detective swore at the

occupant, calling him – I believe – ‘a fucking child’. I peeked my head around the corner through the now open door to see what was happening until I was yelled at – reminded that this wasn’t a hotel.

One by one, each person was given their charge. Everyone before me received a traffic offence and a fine. When I was called up, I expected the same. But I was told I was being charged with offensive language and hindering arrest. This was the first I’d heard of it. Suspiciously, every person who came into custody after me – the second round of arrests – was charged with the same. We were all facing trial together now.

After the usual procedures – the fingerprints, the mug shot, acknowledging that the police had told me my rights – the SRC lawyer was finally allowed to talk to us. She wasn’t allowed into the cell, so we spoke through its doors. When we realised it’d be best to talk alone and asked for a private room, the police sighed and claimed that would be difficult to do. I wasn’t happy about this. I knew I had rights, and I knew talking to my lawyer in confidence was one of those. But I didn’t want to make my stay there any more difficult, and I was to be let out soon – four hours, maximum (another right). The mood became sombre; shifting from a cheery mood in spite of imprisonment to the quiet anguish of having to sit in a cell, bored. I kept looking at the time, wondering when the four hours were up. Little things amused me – the police debating simple maths, or dropping everything in my bag and having to pick it all up – but generally it was utter boredom.

When the fourth hour arrived, I asked my lawyer about it. Freedom, at last – for now, at least. She went to the custody manager to remind her of this. I was told however, that they could keep me for longer, because the first couple of hours were a ‘cooling off period’, arguably implying that I had been intoxicated or violent and that until I had ‘cooled off’, the period of custody hadn’t officially started. I thought back a few hours before, wondering what could give them this impression, but surely sitting fatigued, staring indifferently into a wall was no grounds for claiming violent or intoxicated behaviour. It was here that my heart sank, because there was no time frame anymore, there was no end point, just tedium and anxious an-

icipation for when I’d be released, if at all, or made to stay the night.

I could protest my treatment, argue that I was being treated unfairly, but what good would it do? My only contact with the outside was my lawyer, and my conversations with her were monitored and restricted. I had no power; the rights granted to me by the state were meaningless. My time was in the hands of the police that had arrested me in the first place. Being angry would only make things worse – if my hours of silence required cooling off, what would a ranting, rabid activist achieve? I continued sitting there, mulling over my rage but showing nothing, the tedium broken only by a Maccas run, our provided meal of the day. The only thing worse than the slow tick of the clock would be to give the police satisfaction that they were affecting me, so three hours later, after seven hours in custody, after those arrested with me had left much earlier but those charged after remained inside, I walked away silently into the crowd that had formed outside in solidarity.

Trial

The case for my innocence was clear. With a barrister and ‘beyond reasonable doubt’ behind me, no magistrate could find me guilty. The trial would last a day. No longer was I dealing with the malice and/or incompetence of the NSW Police Force but an impartial court. I had seen the briefing, and not only were all events exaggerated – claiming that I was kicking and screaming and yelling ‘fuck you cunts!’ in excess of a dozen times, with no mention, funnily, of the actual only time I had sworn – but they were contradictory. And not only were the statements contradictory, also, of each other, but with police records that gave me a clear alibi: in custody. I had to endure six months of monthly mentions, getting to Newtown Court by 9 am to see a magistrate for a few minutes, before I could finally have my day in court – but it would be a sweet day of victory.

But it didn’t occur that way. The police, headed by a police prosecutor as opposed to the independent Director of Public Prosecutions, had five witnesses on call, including an inspector and the sergeant who called my arrest – although he claimed someone

else had. I had two witnesses with video footage. The first trial day started hours late, and barely scratched the surface. Then the next court date was later that week. The next was months later. It was almost done, we were so close, but it continued on. The next court date was, again, months later, but when I arrived, the police prosecutor had just called in sick, and so we were delayed again. My final court date was on June the 2nd, almost a year after my arrest. The experience was frustrating. Police are paid to be witnesses. I had to take time off for the entire day, even if my trial wouldn't start until the afternoon. I had to rely on the good nature of my witnesses to cut work to come to court, often having to sit outside, and often not being needed that day. It was a frustrating experience, and I was felt deeply apologetic to my friends and witnesses who came to support me each time.

In court, however, it was like I was back in custody. I could never show how angry I was at the constant delays of my trial, at the pedantic and useless questioning of the prosecutor, who often provoked the magistrate into exasperatedly forcing him to make a point. I could never show my deep discomfort and rage when police, as witnesses, would attack my character and make false allegations about my conduct on the day. I know what happens to people who make a scene in court, and I didn't want to go down that path, because the only goal was having the case dismissed.

Amidst all this, I would forget that the prosecution required evidence beyond reasonable doubt. Every day in court I felt like my chances were diminishing as more evidence was fabricated and more stories spun about what occurred, including a hastily contrived story about my arrest occurring twice and a long session misidentified as someone else in video footage. It felt as though my rights and protections were slipping through my fingers like water, ungraspable. There they were, either in suits or police blue, protecting and serving, testifying under oath that I was a violent degenerate criminal, an obstacle to police in their noble duties. I knew that I was relatively privileged, with an educated background and an ability to speak fluently under questioning. But still, in that courtroom, appearances were all, and in the performance of adversarial justice, I was just an 'Indian male', 'the accused', who said 'cunt' a lot. I was just another defendant who

wanted to violently profess my anguished innocence against a barrage of inane and misleading questions, like Proctor in *The Crucible*.

Aftermath

When I was ultimately found not guilty, unceremoniously dismissed without even realising, all I really wanted to do was celebrate in front of my prosecutors. But my lawyer warned me not to. There was no point riling up the police. This is what I took from the experience.

Before my arrest, I would joke at police, sometimes making fun of their uniforms. I was once even threatened with arrest after an officer said he heard me say that I wanted to 'bash him', when I said nothing at all. But I thought they wouldn't go to all that trouble just to be vindictive. Now, though, I know that things aren't like that. I am now more uncomfortable around police than I was before, questioning whether I'm doing anything wrong lest I be picked up for vague reasons. The police have all the power, despite the protections we allegedly have. Police can get away with not showing you their badge. They can get away with asking you to move from a public place without explanation. They can get away with perjury. Hell, they've gotten away with deaths in custody. They're untouchable, undeterred by laws stating otherwise; we are always vulnerable to abuse. It's unsurprising how many people are driven to plead guilty for crimes they never committed, either due to financial constraints or the emotional stress of the an imbalanced legal system weighing on their shoulders.

The justice system is not designed for real humans, but for a bureaucratic ideal of the perfect human. A person that is ever-rational in the face of adversity, with the means to speak up for themselves. A person that, in custody, knows their rights and can afford access to a lawyer. I attempted to embody that ideal, nonplussed by a denial of justice, unfazed by the accusations. But I still wanted to break down and scream every time my trial continued and I was still suspected of criminal behaviour, incensed by the malice of the police. ■



“...it is difficult to make sense of recent developments that put more women at risk.”

Going Home, Staying Home...

Natalie Czapski

LLB IV

Jane Citizen is 24 years old. She lives in South-Western Sydney, has two children, is from a middle-class, migrant, background, and in most respects, is an entirely ordinary member of society. And she is about to be homeless.

This, you would think, is not the typical profile of someone at risk of homelessness. But when you add Jane's abusive partner into the mix, the scenario becomes all too common. In Australia, over 100,000 people will be homeless on any given night – the single largest cause of this is domestic and family violence.¹ Over half of the women staying in homeless assistance services are escaping such violence, in fact, domestic and family violence is by far the biggest cause of homelessness amongst women and children.² A harsh reality – just as harsh as the reality that Jane's abuse is not an anomaly but a commonality, with nearly one in five Australians having experienced violence from a current or former partner across a lifetime.³

Jane cannot take the violence any longer – she decides to flee her home, taking her infant children with her. But as many as one in two women who approach specialist domestic violence services will be turned away due to lack of accommodation or resources.⁴ The shortage of crisis accommodation in Australia is acute, even more so for those living in regional areas, and for refugee and migrant communities who often lack culturally appropriate services.⁵ This combines with a shortage of affordable long-term accommodation in both private and public sectors to leave many victims of domestic violence with a total lack of agency.⁶ It is a monumental issue, and one that policymakers are far from adequately dealing with.

A National Survey on Community Attitudes to violence undertaken in 2009 indicated a *decline* since

1995 in understandings of why women stayed in violent relationships. 8 in 10 general community respondents said it was hard to understand why women stayed in violent relationships, and around half of those surveyed believed that 'a woman could leave a violent relationship if she really wanted to.'⁷ This is upsetting – we should know that a complexity of factors influence whether a woman leaves the relationship – financial, cultural, emotional, based on fear of harm from the abuser, the presence of children, lack of options or support away from the home.⁸ We should know that the process of leaving is never easy – that many women cycle in and out of refuges, return to their partners multiple times, seek to leave, only to be stymied by flaws in the system.⁹

Our policymakers should know better – so it is difficult to make sense of recent developments that put more women at risk. The biggest nightmare is the imposition of a new tendering regime for the NSW Government's '*Going Home, Staying Home*' initiative, a major overhaul of the way homelessness services are funded around the State. Under the scheme, 336 individual homelessness services in NSW have now been consolidated into 149 packages, operated by a more limited range of non-government organisations.¹⁰ Whilst the government increased funding for homelessness services, the tendering was set up in a way which largely excluded specific funding for women's specialist homelessness services, focusing on local partnerships, and pitting some women's organisations against each other. The results were appalling: 27 women's refuges lost their direct funding. Some of these will shortly close - others will be taken over by larger organisations with successful tendering packages. In many cases, these are the big religious charities - Mission Australia, St Vincent de Paul, Wesley Mission, and the Salvation Army.¹¹

At a time where crisis accommodation is already limited, the outrage is palpable. It is not just the closures that are an issue. Many are concerned that larger charitable organisations will be unable to provide the level of specialised care that previous refuges were able to provide, not just for victims of domestic violence, but for women who are victims of sexual assault, grappling with serious mental illness, or battling drug or alcohol addiction. After all, these specialist services provide not only a safe place to sleep, but tailored health, legal, financial and counselling services. As transitions to new providers take place, there are fears that refuges will lose staff with decades of expertise in dealing with the complex needs of their clients, to say nothing of organisations with years of proven success now closing their doors.¹² Many of the smaller specialised services have built up strong ties within the local community and to other services, connections that have been thrown into disarray by the funding changes.

For Jane, one of the 31 per cent of NSW residents who comes from a Culturally and Linguistically Diverse (CALD) background,¹³ the situation is especially bleak. Under the funding allocations, not a single organisation was awarded a women's refuge or multicultural package in South Western Sydney - one of the most diverse regions in the state. The NSW government recently back-flipped on a decision which would have seen millions cut to inner city services - services accessed by many from the outer-suburbs precisely because of their safety, security, and distance from those communities.¹⁴ The desire to consolidate services and cut funding has already devastated other important avenues for victims of domestic violence - cuts to local court funding initiated at the end of last year have severely reduced options for women

seeking apprehended violence orders against abusive partners, closing some courts and seeing sitting days cut in others.¹⁵

Budget cuts at the Federal level may also worsen the situation for women fleeing abusive relationships. In particular, in the latest budget the Federal Government abolished the National Rental Affordability Scheme, a scheme aimed at increasing low rent options by providing incentives to developers who agree to charge rent at 20 per cent below market price.¹⁶ The only silver lining here is a recent one - on the 27th of June, the Abbott government pledged \$100 million as part of a plan to tackle domestic violence, including funding to develop and test a new national domestic violence protection order scheme.¹⁷ Currently, a woman fleeing interstate to build a life away from her abuser must also prove to a new court system why a protection order is necessary - yet another hurdle faced by victims of domestic violence.

But even if we were to dramatically increase the provision of specialist services for women and children escaping domestic violence, if there were enough refuges to cater for every cross-section of the population, and enough low-cost, long-term accommodation to go around, we absolutely would not have solved the problem. The harsh reality is that we, as a society, continue to accept and normalise violence in our homes. There are 370 instances of domestic violence in New South Wales *every single day*.¹⁸ That is an outrage. A quarter of all women who are killed in this state die at the hands of their partner.¹⁹

Yet we continue to ask women why they do not simply leave their abusers, even as women continue to be killed by ex-partners in the process of leaving, or

even long after separation. We continue to ask women why they do not leave their abusers, even as estranged partners murder their children in the limited window of custody granted by the courts.²⁰ The 2005 ABS *Personal Violence Survey* found that 2.1 per cent of women and 0.9 per cent of men over 15 had experienced violence from a current partner during their lives. 15 per cent of women and 4.9 per cent of men had experienced violence from a former partner. Another study demonstrated that the level and severity of violence carried out by former partners was *higher* than that experienced from current partners.²¹ This is upsetting, but hardly surprising - in leaving an abusive relationship, a woman finally regains some control - and in doing so, often triggers the wrath of a partner. Simon Gittany, a man who threw his partner, Lisa Harum, off a high-rise when she finally mustered the courage to leave him, is only one highly publicised example amongst dozens of other intimate-partner homicides that go unnoticed, every single year. Apprehended domestic violence orders (ADVOs) are important preventative measures - but an ADVO didn't protect Julie Grant when she was murdered by her ex-partner, already, upsettingly, on bail for having previously assaulted her.²² Law and support services can only go so far - the problem is a deeper, societal issue that we must be prepared to tackle.

If Jane is lucky, she will find a place to stay. It may even be within a refuge, secured, monitored, deliberately hidden from a vindictive ex-partner, and not in a motel room or caravan park, where women have been directed so many times when refuge accommodation is sparse.²³ But fear for Jane if she is unlucky. Fear for our women, fear for our society, if Jane is murdered - if she joins the list of women killed by current or ex-partners - one woman - every single week.²⁴

There is no one solution to the violent epidemic that plagues our state, and our country. Yes, we must increase funding to specialist services, and keep our refuges open. We must give women safe and affordable places to stay, short-term and long-term - no matter where they live, what their background is, how many children they have - so women do not live in fear in their own homes, or flee, at risk of homelessness. But more than that, we must find a way to change our society, so violence in our homes is never, ever acceptable. Jane Citizen should not represent every single woman our society is failing. We should know better than to ask, '*why didn't she leave?*' ■



“There exists an opportunity to change the paradigm of child sexual abuse from one that is solely focused on criminal law, to that of a broader public health problem.”

Preventing Child Sexual Abuse

Sibella Matthews

LLB (2013)

In its Interim Report published July 2014, the Royal Commission into Institutional Responses to Child Sexual Abuse reported that the impact of child sexual abuse can be devastating and last a lifetime, leaving a traumatic legacy for the victim's family and for future generations.¹ With up to 30 per cent of children in Australia experiencing sexual abuse,² there can be no doubt that such an insidious epidemic demands a coordinated and comprehensive societal response.³

Public health problems of this magnitude are usually met with a suite of preventative programs that consider all possible risk factors that may lead to offending. 'Early intervention' and 'diversionary mechanisms' are concepts that are now integral to crime prevention discourse. Currently, preventative tools for child sexual abuse include pre-employment screening through working with children checks, the disincentive of criminal sanctions for those who choose not to report, regulations to ensure that schools and child-care centres implement child-safe policies, identifying risk factors and vulnerabilities in potential victim groups, incarceration to prevent recidivism, and education programs for children. And yet there is one glaring omission from this complement – the intervention and diversion of individuals at-risk of offending.

Arguably, one reason why criminal prevention programs have not focused on potential offenders is because it is nearly impossible to profile a child sex offender before the act. As McCartan notes, child sex offender tendencies are not simply defined by a single aetiology, gender, age, IQ, background, career, social skills or contact offence, making treatment difficult and ultimately offender-centric.⁴ Despite these difficulties with profiling, there are some common non-determinative risk factors that may increase an individual's likelihood of offending. These include poor attachment and dysfunction in their family, high sex drive and preoccupation with sex, more tolerant

attitudes to adult-child sex and attitudes that minimise perpetrator culpability.⁵

One further risk factor that is said to be present in 20 per cent of sexual abusers is the disorder of paedophilia.⁶ Defined in the Diagnostic and Statistical Manual of Mental Disorders, known as DSM-V, 'paedophilic disorder' has the following diagnostic criteria:

Over a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges or behaviours involving sexual activity with a prepubescent child or children (generally aged thirteen years or younger).

The fantasies, sexual urges or behaviours cause clinically significant distress or impairment in social, occupational or other important areas of functioning.

The person is at least sixteen years and at least five years older than the child or children in criteria A.

Importantly, commission of an offence is absent from these criteria. Thus, paedophilia, on its own, is first and foremost a medical condition that can and should be managed with treatment. Confusingly, common usage of the term paedophile has taken on a socio-legal meaning as a person who has had sexual contact with a child.⁷ This is misleading, as not all people with paedophilic disorder will commit a child sexual abuse offence, and not all people who commit a child sexual abuse offence will be paedophiles. Furthermore, neurological similarities between people with paedophilic disorder strongly suggests that it is a sexual interest that exists in individuals from birth.

If we accept that that some people are born with paedophilia, a disorder which is a clear risk factor for child sexual abuse offending, why are we not using the proven remedies of diversion and intervention

to assist self-identifying paedophiles manage their behaviour? Somewhat understandably, there will always be controversy associated with diverting funds towards the treatment of potential offenders where it could be used to support victims and incarcerate perpetrators.⁸ Unfortunately however, the demand for longer terms of incarceration as a solution does little to prevent the potential offenders in the community, many of whom are likely to be looking for help and not finding it. The description provided by one self-identifying paedophile of the difficulty in coming to terms with his sexual interest in children captures this cavernous gap in the existing framework for intervention and support:

I sort of had strange feelings for children when I hit puberty, around 13 or 14. I was attracted to younger children than I was, when most of my classmates were interested in girls our own age. I was about 13 [and] I was looking at 12 year olds to 10. It sort of just stuck there. I started to fantasise about taking off their clothes and doing things in a sexual nature. I was bothered by it straight away... I didn't really know what - to have a label for it - but I knew it was wrong... It wouldn't be the right thing to do, yet you still wanted to do it, because you still wanted to fulfill your fantasies and stuff. It's pretty hard to battle with those thoughts. You get very depressed... and self-loathing. A lot of suicidal thoughts. You think the only place you're going to end up is in jail. That's the only place you deserve to be. This is what I'm going to be labelled as. This is what I am.⁹

A need to intervene and support individuals suffering this torment was recognised in 1999 by an existing treatment centre for rehabilitating convicted offenders. Approximately 10 years after its establishment in the late 1980s, *SafeCare* extended its counselling services from convicted offenders to anyone who thought about offending children. This Western Australian service provided a successful treatment model until 2008 when its government funding was cut due to public pressure.¹⁰

Funding will continue to be a battle for any treatment model aimed at potential offenders, as the research regarding the effectiveness of treatments is still largely inconclusive. Justifying funding for potential offenders is even more difficult where all of the research regarding treatment is solely focused on convicted offenders who are seeking rehabilitation. Studies of child sex offenders that have paedophilic disorder have suggested that the most effective treatments are those that attempt to suppress the psychological and physiological aspects of paedophilia, and encourage

victim empathy and understanding.¹¹ Popular treatment programs for incarcerated offenders include Cognitive Behaviour Therapy (CBT), forcing the individual to confront and rectify their distorted thinking patterns,¹² designed to decrease the urge to commit the sexual acts to a manageable level.¹³ Drug treatment is also used to suppress sexual desire through reducing testosterone levels, including Estrogens, Narcoleptics, Antoadrogens, Meproxyprogesterone Acetate and Specific Serotonin Reuptake Inhibitors.¹⁴ Some of these modern treatment techniques have shown significant success, with some studies claiming a long-term recidivism rate of 6 per cent, compared with the 35 per cent in untreated control groups.¹⁵

If we accept, as the research suggests we should, that paedophilic disorder is a sexual interest inherent to someone's make-up, there will always be limits to these medical treatments, and possibly no cure. One study demonstrated that treated individuals still showed sexual interest in children even after a year of combined CBT and drug treatment, however the individuals' self-reported frequency of urges and masturbation had decreased, suggesting that urges and arousal can be managed but the innate attraction cannot be changed.¹⁶

It would appear then, that the solution lies in assisting individuals who seek support in managing their urges by providing safe and supportive avenues to do so. As one self-identifying and non-offending paedophile stated, 'It doesn't protect children to have a stigmatised group of outcasts living on the fringe of society'.¹⁷ It comes as no surprise then, that one area that is seeing definitive results in prevention is community-based treatment. *Circles of Support and Accountability* is a rehabilitative community support group in the US, Canada and UK where volunteers aid offenders released into the community as a means of restorative justice, discouraging offenders from social isolation and re-offending.¹⁸ In Canada, *Circles* has seen re-offending rates reduced by 70% amongst participants.¹⁹ In considering these possible prevention alternatives, Mullins draws an analogy with the success of the heroin injecting room run by *Uniting-Care* in Sydney's Kings Cross as an effective component in the effort to tackle drug abuse.²⁰ The success of this program is the understanding that drug abuse is both an illness and a crime, and requires an empathetic approach.

The research also supports the need for an empathetic approach in preventing at-risk individuals from offending. Studies have shown that with no avenues for honesty and discussion of their problematic sexual interest, paedophiles are likely to suffer low feelings of



self-efficacy.²¹ Problematically, social and emotional problems are important risk factors for sexual offending behaviour, and it is therefore important that individuals troubled by these thoughts seek community help and support, rather than act on their urges as a result of their isolation. Denial of this need to help potential offenders stymies any chance of dialogue, and forces those with deviant sexual desires to become more secretive and elaborate in concealing their condition. In the UK, Europe and US, community-based programs once reserved for rehabilitating convicted offenders, are now recognising the need to extend their services to potential offenders.

In the United States, *B4U-ACT* seeks to create a safe space for “minor-attracted people” to engage with mental health professionals. The organisation began in 2002 when a clinical social worker, Russell Dick, and a convicted sex offender, Michael Melsheimer, sought to address the scarcity of mental health services available to paedophiles.²² Another US program is *Virtuous Paedophiles*, a website created in 2012, which states ‘our highest priority is to help paedophiles never abuse children.’²³ On its homepage, *Virtuous Paedophiles* explains that more paedophiles could lead productive, happy and law-abiding lives if they were able to open up to people, and not be treated as monsters, but as human beings with an unfortunate burden to bear.

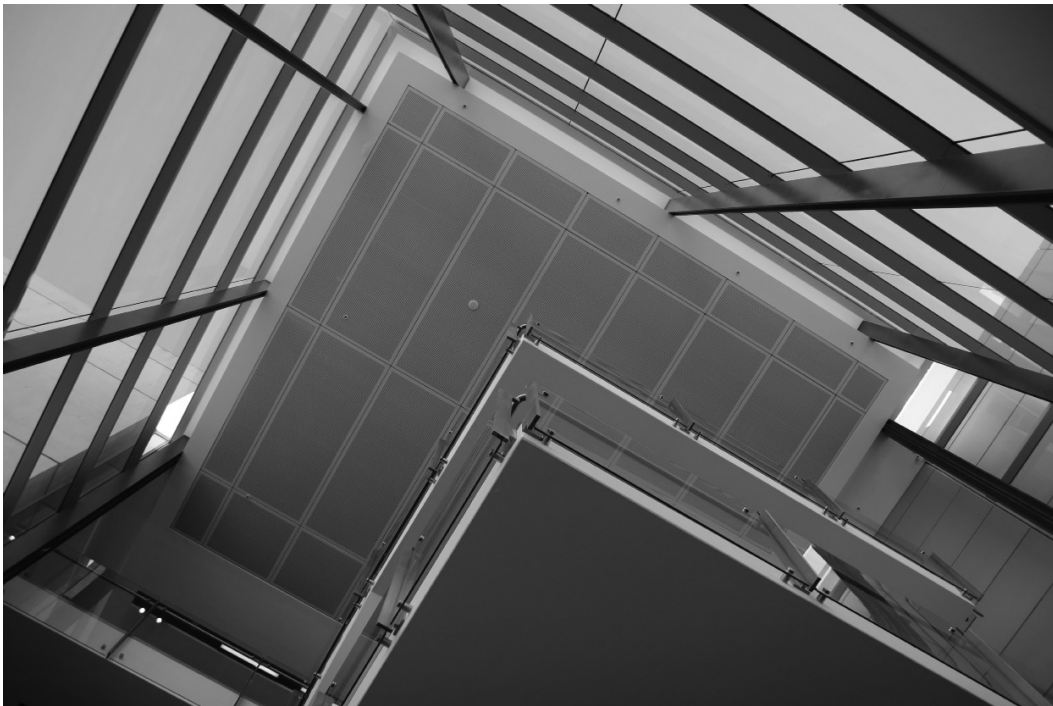
Launched in Germany in 2005, *Prevention Project Dunkelfeld* provides free confidential treatment to individuals who are attracted to children and are seeking therapeutic help.²⁴ The project was developed in response to the large number of child sexual abuse cases not reported to the authorities, known as the ‘dunkelfeld’ or ‘dark field’ in German. The project is advertised in print media, billboards and television, using slogans such as ‘You are not guilty because of your sexual desire, but you are responsible for your sexual behaviour’ and ‘Do you like children in ways you shouldn’t? Don’t offend. There is help – free of charge and confidential.’²⁵ Similarly, *Stop it Now! UK and Ireland* was launched in 2002, and aims to prevent child sexual abuse through raising adults’ awareness, encouraging adults worried about their own behaviour or the behaviour of others to seek help, and helping adults challenge or change behaviour.²⁶

In 2012 to 2013, 48 per cent of callers to the *Stop it Now! UK Helpline* had committed a sexual offence, whereas 8 per cent were potential offenders.²⁷

By offering treatment and counselling to self-identifying paedophiles, these programs are not condoning sexual abuse; they are recognising that individuals with paedophilic disorder are capable of controlling their sexual desires and deserve help and support. By failing to offer support, society risks the further stigmatisation of this disorder and drives potential offenders further underground.²⁸ The reluctance of governments and policy-makers to fund research and preventative programs for self-identifying paedophiles is thwarting what could arguably be the most powerful preventative mechanism for child sexual abuse. Would it not be far more productive to help those individuals who present themselves for treatment outside the criminal justice system rather than wait for the criminal justice system to oblige those same individuals to seek it after an offence is committed?²⁹

With inquiries such as the Royal Commission into Institutional Response to the Child Sexual Abuse, the Victorian Government Parliamentary Inquiry into the Handling of Child Abuse by Religious Organisations, and the Special Commission of Inquiry into Child Sexual Abuse Allegations in the Catholic Diocese of Maitland-Newcastle exposing the cruel ways in which child sex offenders can insidiously cripple the most vulnerable members of our society,³⁰ there is increased public awareness and interest in how policy can prevent past atrocities of child sexual abuse from occurring again. There exists an opportunity to change the paradigm of child sexual abuse from one that is solely focused on criminal law, to that of a broader public health problem. In doing so, we must simultaneously accept that the exploitation of children is wrong and worthy of criminal sanction, whilst still facilitating the preventative benefits of treatment and community-based counselling for those that seek it. The immeasurable harm caused by child sexual abuse demands no less. ■

“...don't ever, ever, equate legal ethics with morality.”



...They are almost always mutually exclusive.”

What Law Students Need to Know about Legal Ethics Won't be Taught to Them in Law School

Joshua Krook

LLB IV

It's 2004 and *Boston Legal* defence lawyer Alan Shore rises to his feet to deliver a blistering defence of personal misconduct, immorality and criminal negligence. He tells the court that 'every first year law student is taught: don't ever, ever equate legal ethics with morality. They're almost always mutually exclusive.'

Eight years later, I sit in a first year lecture at Sydney Law School and I am told the exact same thing. Our first year lecturer, smiling at the irony of the statement, tells us that law and morality are distinctly separate concepts. Even if they do sometimes overlap, he says, it is naïve to presume that they always will, or must, do so.

In saying as much, my lecturer mirrors the sentiments of the Austrian philosopher Hans Kelsen, who once proclaimed that law is hopelessly contaminated by the baggage of moral philosophy and social science, and that both should be tossed aside in favour of studying 'pure law'. 'Pure law' can be taught without reference to morality at all, Kelsen argued, for law does not derive from morality but merely prior legal norms:

It is called 'pure' [law] ... because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: its aim is to free the science of law from alien elements, [including] psychology, sociology, ethics and political philosophy.¹

Law need not be considered in its political or social context, but rather as an abstract, scientific entity unto itself. Judges need not refer to basic principles in every judgment; they need only refer to past precedent. This line of thinking is the hallmark of legal positivism, a branch of legal theory that now dominates legal education in most Commonwealth countries. Australian law schools have increasingly begun teach-

ing law through legal positivism alone, ignoring critical thinking, ethical engagement and moral considerations regarding the merits of the law:²

When a choice has to be made [by law schools], the social is deemed dispensable because its inclusion is not specified by the admitting authorities. Separating law from its socio-political context [however] reifies the positivistic myth that law is autonomous and disconnected from the social forces that animate it.³

Legal positivism in Australia has been entrenched by the 'Priestley Eleven', a set of compulsory law subjects established by committee in 1992: administrative law; civil procedure; company law; contracts; criminal law; equity (and trusts); ethics and professional responsibility; evidence; federal and state constitutional law; property; and torts. Taught by every law school, the majority of these subjects focus on 'black letter law': content that promotes the study of what Kelsen defined as 'pure law', over the conceptual and moral critique of legal authorities. Aside from Ethics itself, a diminutive subject where students are taught the 'rules' of legal ethics instead of the philosophy of what makes them 'ethical', most of the 'Priestley Eleven' focus on the learning and application of case law and legislation to facts; ethical behaviour and critique is sidelined. Indeed, in 2000, the *Australian Law Reform Commission* critiqued the 'Priestley Eleven' for precisely this reason, stating that the list tends to constitute 'what lawyers need to know', rather than 'what lawyers ought to do'.⁴ University of Queensland Associate Professor Tamara Walsh phrased a similar concern, in the following terms:

As long as the traditional law subjects of torts, contracts, property, equity, trusts, corporate law and evidence dominate the curriculum, the ex-

pense will be a deep appreciation of ethical standards and professional responsibility.⁵

Instead of being taught how to think in a critical manner, questioning how, why and if the law is correct, students are taught to substantiate their thinking using prior legal authority alone. Such is the logic behind 'legal problem questions', a uniformly accepted testing method where students are asked to apply cold legal principles to a set of hard facts, at the expense of considering the psychological, emotional and ethical dilemmas inherent in the problem.

In an event where students are asked to defend someone who has prima facie committed murder, students are encouraged to sideline the myriad ways in which the accused can be condemned (aside from proscribed punishments), and defences that can be raised (aside from proscribed defences). Facts are fitted to precedent, so that the puzzle of conviction is never questioned, no matter how puzzling a conviction becomes. It is almost never pertinent for a law student to ask for more facts to uncover contextual information, unless that information is directly relevant to a legal point in order. The very human element that makes an individual 'flawed' enough to commit a crime in the first place is overlooked in the strict application of legal positivism. An overemphasis is placed on legal education being reactive, furthering the continuance of the current system, rather than being proactive, and considering that the solution lies in social policy and critical analysis rather than the simple application of laws.

In negligence and tort law, where blame is dispensed like candy, students are never asked to question why we blame people, how we blame people or whether that particular type of blame is 'sufficient, adequate or necessary'. Rather, assigning blame becomes an issue of causation - a rigorous legal test that can be applied

to almost any situation, without ever having to think beyond the boundaries that the test imposes upon itself.

Instead of a critically engaged experience, problem questions become a case of assigning pre-defined repercussions, ruling out irrelevant laws and hunting for possible 'loopholes' in systematic structures. Law becomes a game that is possible to 'win', and thereby receive a high mark. High marks get you a 'good' career. Rarely along the way are the social and moral ramifications of practicing law discussed; these are irrelevant to admission.

In 2013, I raised these and other concerns with the Sydney Law School, petitioning the Faculty to change the Law School's 100 per cent examination policy in a few core Priestley Eleven subjects. I hoped that by advocating essays, speeches, group work and other formative assessment tasks, I could help reorientate the general student mentality at Sydney Law School beyond a simplistic understanding of law as 'pure law', into a more sophisticated discussion of law in practice.

Rebuffing my suggestions, I was told that a law degree is a vocational degree, and that examinations teach the appropriate 'graduate skills' required of those entering the legal profession. These skills include requiring students to demonstrate a thorough understanding of principles and an ability to apply that understanding to solve problem questions. The response was, in essence, that law school is about applying law to a set of facts.

The Law School, in its response, tends to ignore the fundamental inadequacy of black letter law courses. By advocating a clinical, detached, dehumanised version of 'pure' law through 'rigorous' black letter study, its approach tends to dehumanise a student's response



to a highly emotional set of circumstances by making emotion and human compassion an irrelevant afterthought. I recall a similar approach in a third year Criminal Law class, in which the tutor stated, 'The content of this class on sexual assault may be troubling to you, but remember that you just need to apply the law to the facts.'

Some law schools have adopted a variety of measures to rectify this situation. The University of New South Wales adopts the clinical simulation approach, where students take on real cases with real people in a legal office located on campus. Participants in the 2012 program spoke of how interesting it was to see clients firsthand and deal directly with their issues in criminal and family law. The clinical approach presents a direct emotional connection to clients, rather than a hypothetical client in examinations. Seeing and speaking to real people renders them much harder to dehumanise.

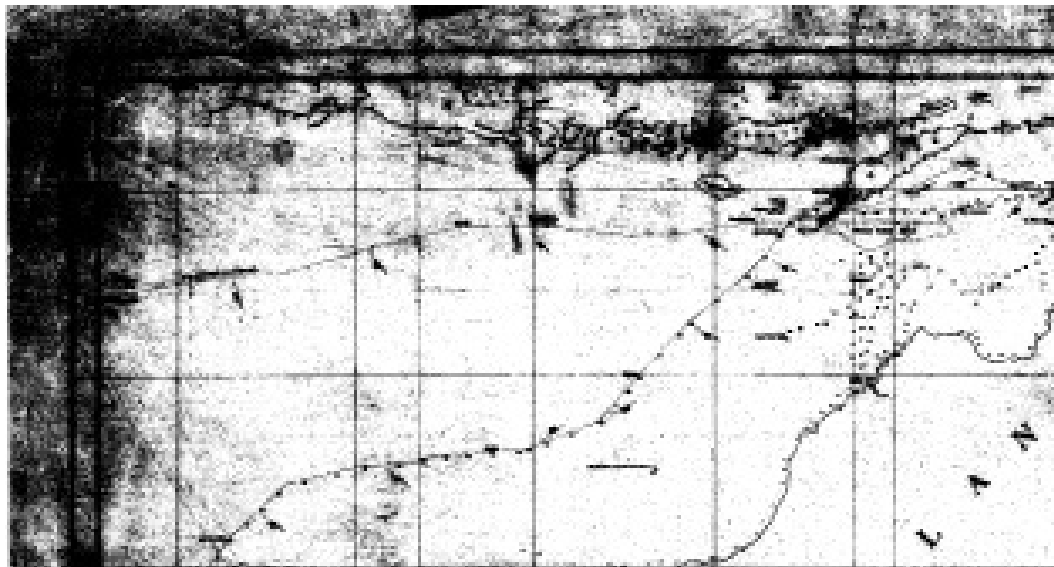
Other universities have remained stagnant in adopting new and innovative measures to ethical teaching. Many still abide by what Justice Kirby called 'a few lectures thrown in at the end of a [law] degree.'⁶ Students at Sydney University have become so frustrated with the status quo that they have taken matters into their own hands, establishing a Critical Legal Students Network. The Network goes beyond discussions of 'what is the law?' to ask 'why is law the way it is?' Although still in its infancy, the group has been expanding over time and has received attention from students outside of Sydney Law. Its discussions of the oppressive nature of legal institutions, prisons, identity in the law and other unique issues arrive at a critical time where law schools are absent of such teachings until fifth year electives.

In conclusion, a framework that questions 'why' is an effective way of questioning the law beyond a strict

positivist framework. Law schools might adopt this model as a central component behind the majority of compulsory courses, rejecting a simplistic application of law to facts and adopting a well-rounded testing method.

Regardless of what measures are adopted, it is clear that ethical education in Australian law schools requires a major shake-up. Critiques and criticisms, now over a decade old, need to be considered afresh by institutions that are traditionally glacial in introducing reform. ■

“Decolonising the law school requires the embedding of Indigenous knowleges within the curriculum and the creation of a space that legitimises the politicisation of law in the academic arena”



Legal Education in the Australian Settler Colonial Context: Decolonising the Law School

Oscar Monaghan

BA / LLB IV

Much has been written about Indigenous engagement in legal education.¹ Since at least the 1970s, many Australian law schools have been grappling with how to increase Indigenous enrolment, retention and graduation rates - to varying degrees of success.² In this paper, I contribute to this ongoing dialogue by drawing on settler colonial studies to trouble the dominant approaches employed by law schools around the country. I argue that present approaches fail to situate both the law and the law school within their colonial context, and that this failure not only contributes to the sense of 'cultural exclusion,'³ isolation and alienation reported by many Indigenous law students,⁴ but they also reify the colonial project to which they are enmeshed. I begin with a brief and general overview of approaches to Indigenous inclusion within legal education, before going on to look at why such approaches continue to fail by illustrating the inherent tension between settler law and Indigenous peoples. I conclude with suggestions for the future.

In this paper I am not interested in focusing on the particular strategies employed by specific law schools. Given that the strategies that the top law schools employ (or are thinking about employing) greatly resemble each other, it will suffice to speak in generalist terms - except where the specifics are remarkable or otherwise serve to highlight a material point. This paper is grounded in the knowledge of low Indigenous entry and graduation rates; for example in 2009, of the 92 commencing Indigenous law students nationwide, only 45 percent (41) completed their law degree.⁵

Past and Present Attempts

Since the 1970s, law schools have attempted to increase Indigenous graduation rates through the provision of alternative entry routes.⁶ The 1980s saw the introduction of pre-law and bridging programs, directed at

up-skilling Indigenous students to better enable their participation in legal education.⁷ With only a few exceptions, typically universities and law schools have struggled to render ongoing support once students are enrolled,⁸ though in some law schools, there have been moves to establishing mentoring schemes to foster relationships between staff and students. Some law schools, like the Sydney Law School, have proposed to undergo a curriculum review in response to student feedback about the lack of Indigenous content.⁹ Most law schools also recognise the importance of employing Indigenous staff and nourishing Indigenous legal researchers - though some schools have struggled to entice suitable candidates.

Lastly, law schools are increasingly drawing on the notion of 'cultural competency,' which has been gaining traction in education over the past five to ten years. While there is no single definition or pedagogical model of cultural competency, broadly with respect to Indigenous peoples, it combines cultural awareness and critical self-reflection of one's own cultural position, to achieve proficiency to 'engage and work effectively in Indigenous contexts congruent to the expectations of Indigenous Australians.'¹⁰ It remains to be seen how law schools propose to draw on this framework within their pedagogies.

Why law schools are failing students

Though undoubtedly well-intentioned, the approaches outlined above fail to locate the law as a site and tool of Indigenous dispossession. 'Settler colonialism' is the term used to describe the form of colonialism that emerges when the 'settlers come with the intention of making a new home on the land, a homemaking that insists on settler sovereignty over all things in their new domain.'¹¹ Settler colonialism contains two complementary imperatives: (1) to

have and maintain control over the 'land/water/air/subterranean earth' for the purposes of homemaking and securing capital,¹² and (2) the disavowal of Indigenous claims to land/water/air/subterranean earth.¹³ The law has been, and continues to be, used to legitimate settler claims to land, and to protect the interests of the settlers at the expense of Indigenous peoples. The law continues to deprive Indigenous peoples of their lands, their resources, and frequently, of their communities - the overrepresentation of Indigenous peoples in prison makes perfect sense against this backdrop of colonial domination, as does the data around Indigenous life expectancy and the disproportionate rates of Indigenous poverty.

Narratives of Australian nationhood rarely confront the reality of theft and, rarer still, of ongoing illegitimacy. The truth is that there is no actual or constructive disjuncture between the legal regime that established the colonies, that sanctioned the heinous genocidal practices of the settler state, and the legal regime that operates today. The law can only be read as an ongoing exertion of colonial power that remains deeply invested in shoring up its own legitimacy through Indigenous dispossession and disappearance: the Australian legal regime is inescapably a colonial system of discipline and control. As scholars such as Eve Tuck, K. Wayne Yang, Patrick Wolfe and Lorenzo Veracini have emphasised, the violence of settler colonialism is 'not temporarily contained in the arrival of the settler, but is reasserted each day of occupation.'¹⁴ Wolfe, in particular, argues that settler colonialism cannot be viewed as an *event*, but ought rather be regarded as a *structure* that *shapes* everything occurring within - including schooling and educational research.¹⁵

The approaches outlined in the above section are *necessary* steps, but alone, they are insufficient to address the deeper, structural issues surrounding poor Indigenous graduation rates. Moreover, they represent a misunderstanding of why Indigenous students might find law school such a distasteful and/or inhospitable environment: the very field of law is operating to marginalise Indigenous voices - particularly when those voices are highlighting the complicity of contemporary institutions.¹⁶ This is unsurprising, given that law schools are conservative institutions, mostly uninterested in providing students with a critical academic experience. Proposals that come out of the top law schools (and indeed, most law schools) are suggestions for reform work, so mild, that it does little to restructure the socio-political order. The training

one receives at law school thus normalises the principles that underlie our racist and genocidal legal system and produces lawyers who view legal systems as disinterested, apolitical tools and neutral frameworks.

Law schools continually fail to fully confront the irrevocable harm caused by the legal system, that system's role in establishing and maintaining the settler nation state of Australia, and the fundamental role the law continues to play in the ongoing dispossession and structuring of colonial relations in this country. *Terra nullius* is exposed as fiction, but the legal framework that rendered those two words powerful somehow remains un-interrogated. At the level of the law school, these failures help to explain why law schools continue to be alienating places for many Indigenous students, as the black-letter approach to legal education - almost universally favoured by the top law schools - attempts to divorce the law from its socio-political context and subsequently from students' lived experiences.

Suggestions for the future

The title of this essay should be disquieting: decolonisation is a framework directed towards changing the 'order of the world.'¹⁷ A decolonised law school ought to look nothing like the law schools of today. Many of the approaches outlined in section one are necessary prerequisites to a decolonised law school, but absent a deeper commitment to truly interrogating the colonial nature of the law, they will remain tokenistic attempts at including a select few 'natives' into the folds of colonial power.

Decolonising the law school requires the embedding of Indigenous knowledges within the curriculum and the creation of a space that legitimises the politicisation of law in the academic arena.¹⁸ The success of any attempt to decolonise legal education will first require non-Indigenous people in the decision-making process to 're-examine their positions and the control they exert over curriculum decision-making and reform';¹⁹ to become advocates for Indigenous knowledges; and to explore what decolonising methodologies can contribute to their own work. Academics should be encouraged to reconsider the '*a priori* of Western knowledges in universities'²⁰ - not merely as an ethical demand upon those interested in building sustainable and productive Indigenous-settler relations, but as part of a broader recognition that such critical reflection produces a more robust scholarship.



Decolonising Western knowledge and embedding Indigenous knowledges are tandem processes that cannot happen in isolation. Indigenous and non-Indigenous knowledges are already in constant contestation with each other. Although, within Western academia, Indigenous knowledges are subject to Othering discourses,²¹ which 'constitute Indigenous identities as colonised',²² Indigenous knowledges existed prior to colonisation, and therefore 'exist outside of, as well as within, the coloniser/colonised cultural interface'.²³ Much work has been done to reclaim ownership of Indigenous knowledges and to assert the validity of Indigenous epistemologies within the Western university.²⁴ The work of decolonising Western knowledge in the academy requires 'a deep sense of recognition of, and challenge to, colonial forms of knowledge, pedagogical strategies and research methodologies'.²⁵ Though unsettling for many scholars within the academy, this process should be 'regarded as an uncomfortable, power-shifting and transformational necessity for personal and professional practice'.²⁶

Practical measures for the immediate future are not so difficult as the above makes out. Law schools should continue their present attempts at increasing Indigenous enrolment so as to enable the Indigenous legal community to grow in tandem with a genuine review of curricula that seeks to begin the hard task of unsettling the law and embedding Indigenous knowledges. Such reviews must go beyond checking a box to ensure Indigenous 'content' is covered somewhere, because too often that content reproduces the old, tired and Othering colonial gaze. An Indigenous presence in the room should be presumed so as to discourage lecturers from drawing on 'us' and 'them' rhetoric, and to encourage lecturers to view their subjectivity as one among many, rather than universal. Where numbers are sufficient, law schools can encourage an autonomous community of Indigenous

scholars to emerge by providing opportunities for Indigenous students to meet with each other and build networks of personal and professional support. Law schools that struggle to recruit Indigenous staff at the senior, or even postgraduate level should consider recruiting their Indigenous undergraduates to support them both professionally and financially. Ultimately, law schools should initiate processes that enable them to listen to Indigenous staff and students.

Conclusion

I believe in the sincerity of those working within the law and within law schools towards Indigenous inclusion. The approaches employed at present are necessary steps, but are by themselves insufficient to address the sense of exclusion, isolation and alienation many Indigenous students experience at law schools. The field of law itself must be politicised, and the Australian legal system as a whole must be recognised as fundamentally structured to institute and maintain settler colonialism. Absent such recognition, present approaches do little more than train Indigenous (and non-Indigenous) students to participate in Indigenous dispossession – it's no wonder so many Indigenous students leave feeling so dissatisfied. ■

Reintroducing the Self

Amy Stanford

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Introduction

In this paper I examine the emphasis on professionalism within social justice work and the not-for-profit sector. In particular I focus on community lawyers and social workers working within the sector, since this is my experience of ‘professional’ social justice work. Using Foucault’s notions of *governmentality* and *disciplinary power* I explore the ways in which professionals both constitute regimes of power/knowledge and are regulated by these same disciplinary mechanisms. I argue that the effect of this is not only to suppress the rage and radical potential which brought us to social justice work, but also to reinscribe the hierarchies that we seek to dismantle. I further suggest that the need to be seen as ‘legitimate professionals’ has caused social justice work to move away from a holistic approach towards one which privileges objectivity, rationality and psychological distance from the communities we were initially motivated to work with. Finally I draw on the theory of Karl Marx to explain how this process *alienates* us from ourselves, our communities and our social injustice-induced rage.

In this paper I cite from both academic papers and articles published in the online blogosphere since academic literature has historically favoured the voices of people with privilege, particularly class and race privilege. I also want to locate myself in this paper since nobody writes academic papers in a vacuum and the reasons that I want to complicate and challenge professionalism are personal ones. I have recently completed my law degree and throughout my study I’ve worked in the private/corporate, public and community sectors. I’m now studying social work and although I am yet to go on placement I’ve begun to be exposed to some of the discourse around social work practice. As a queer woman I am also passionate about feminism, queer politics and other social justice issues and, strangely, it is here that I’ve encountered a tension in professional social justice work. I quickly learnt that I was more likely to get the support of

my supervisors in assisting potential clients if I made considered arguments about ‘access to justice’ than if I raged about structural racism. People I’ve worked with haven’t known quite what to do when I’ve become visibly angry about the injustices that the system, including the legal system, perpetuates against our clients and I’ve been advised time and time again not to get emotionally invested in the clients I work with. It was this realisation that my social justice-induced rage had no place in professional social justice environments that made me want to explore exactly what it is about professionalism that causes me to need to suppress this rage.

According to Julia Evetts, ‘professions are regarded as essentially the knowledge-based category of service occupations which usually follow a period of tertiary education and vocational training and experience.’¹ They are primarily middle-class occupations sometimes characterised as the service class,² with medicine and law being regarded as the archetypal professions in Anglo-American analyses. Importantly for all professionals, but particularly for those working in the community sector, professionalism is understood in part as ‘[d]isinterested service to other members of society.’³ As such, both lawyers and social workers are required to abide by codes of conduct.⁴ These codes are monitored by professional associations and accordingly autonomy and self-regulation are regarded as a core feature of the professions.

Professionals and disciplinary power

Foucault’s notions of governmentality and disciplinary power outline the ways in which individuals in modern liberal societies are governed not by an all-powerful State but through systems of ‘truth’ which delineate the domain of possibility for action and subjectivity of free-willed subjects.⁵ As such lib-



eralism involves what Valérie Fournier describes as ‘a network of diverse techniques and practices through which the governed are constituted as autonomous subjects and are encouraged to exercise their freedom in appropriate ways.’⁶

Crucial to the construction of ‘appropriate selves’ are experts, who authorise what can be regarded as desirable and undesirable, legitimate and illegitimate, normal and abnormal within a particular culture in what Foucault describes as *disciplinary power*.⁷ According to Foucault: ‘there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.’⁸ Expert knowledge, such as in the areas of psychology, medicine and law, thus serves to produce various ‘truths’ that inform how autonomous individuals construct themselves. These regimes of truth, in which experts are implicated, thus govern individuals at a distance rather than through the direct exercise of domination over oppressed subjects.⁹ The professions are crucial to this process because expertise acquires authority, in part, through professionalisation.¹⁰

However, while professionals constitute and reproduce regimes of power/knowledge, they do not stand outside of them.¹¹ Rather, for Foucault, truth and power are invariably contested, complex and ambiguous such that disciplinary power ‘regards individuals both as *objects* and as *instruments* of its exercise’.¹² Thus while professionals have significant power, that power is never absolute and must be continuously negotiated. According to Fournier, the inclusion of the professions within the mechanism of liberal government is ‘conditional upon the professions conducting themselves in appropriate ways,’ which are ‘recognised as legitimate and worthy’ by the profession itself, by its clients, the state, and the market.¹³

Thus in order to be recognised as legitimate and worthy of the ‘professional label’ there have been increasing efforts to adopt rational, quasi-scientific approaches to practice which are associated with objective analysis, professional boundaries and ‘evidence-based’ practice.¹⁴ This is particularly the case for social workers, who haven’t always been regarded as a profession, but can also apply to lawyers working in a social justice or community legal context. For example, projects operated by community legal centres usually have to prove their effectiveness through evaluation which seeks to isolate the effect of the assistance on a particular legal issue. This undermines the ‘holistic approach’ which the community sector has traditionally favoured by discounting the effect of the project on an individual’s mental health, finances, trust in the system, familial relationships and sense of social connectedness.

This process of establishing the ‘respectability’ and legitimacy of social justice work within currently accepted evidence-based approaches sets up a binary opposition whereby the private/personal sphere is associated with emotions and subjectivity, and the public/professional sphere is associated with the rational and objective. It is worth noting that these binaries are also associated with social divisions whereby those who are white, middle class, educated and male are associated with rationality, and are privileged over those who are black, poor, uneducated and female and associated with emotions.

Thus we see that while professionals are implicated in constituting and reproducing regimes of power and knowledge the notion of ‘professionalism’ also acts as a disciplinary mechanism which controls professionals and potential professionals at a distance through the construction of ‘appropriate’ work identities and



conduct.¹⁵

As Jacob Tobia astutely observes:

Professionalism is a funny term, because it masquerades as neutral despite being loaded with immense oppression. As a concept, professionalism is racist, sexist, homophobic, transphobic, classist, imperialist and so much more – and yet people act like professionalism is non-political.¹⁶

One way in which notions of ‘professionalism’ may be oppressive is by operating to reinforce the ‘gender binary’ or the notion that there are two distinct genders with natural and enduring differences. However people who identify as ‘genderqueer’, for example, may ‘conceptualize gender as a continuum between masculinity and femininity, and define themselves as somewhere between these two poles’ or describe their gender as ‘existing completely outside the male/female dichotomy’.¹⁷ Jacob Tobia, a genderqueer person and queer activist, is typically assumed to be a man, however felt more comfortable going to their¹⁸ new professional job wearing ‘my pants, blouse, heels and pearls’. However notions of a strict gender binary which are tied up in ‘professionalism’ caused Tobia to write:

For years, professionalism has been my enemy, because it requires that my gender identity is constantly and unrepentantly erased. In the workplace, the gender binary can be absolute, unfaltering and infallible. If you dare to step out of line, you risk being mistreated by co-workers, losing promotions or even losing your job.¹⁹

On the other hand, a person who was assigned ‘female’ at birth, who identifies as a woman and feels most comfortable expressing herself in feminine clothing, would not have to give a second thought to

these issues in a professional setting.

As well as reinscribing the gender binary, notions of professionalism also privilege white, Eurocentric modes of expressing oneself and relating to others. LaTisha Hammond observes that what is considered ‘professional’ wasn’t determined with ‘me and my black body in mind’.²⁰ Hammond goes on to write:

I have locs. Outside of wishing I was more creative with hairstyles, having locs is not something I think about often. That is, until I’m preparing for job interviews, or meeting colleagues for the first time, where I am one of the few QPOC around, if not the only one, and I remember all the accounts I have read about how people are turned down from jobs, let go, or told to modify their locs to something more ‘appropriate’ for the workplace.²¹

As such it is clear that professionalism as a disciplinary mechanism erases the identities, experiences and voices of people of colour (POC) by coding particular modes of non-Western expression as ‘unprofessional’.

Professionalism and alienation

Alienation from identity

These oppressive constructions of professionalism are significant in relation to social justice work, not only because they reinscribe the hierarchies which we are trying to dismantle, but also because they exclude from professional social justice work the people from oppressed communities who are in the best position to be doing that work. What’s more, the relatively homogenous nature of these professions has serious implications for the kind of advocacy that will be done, the type of client that is deemed ‘worthy’ of assistance and the ways in which those clients are treated. For those of us who aren’t outright excluded, notions of ‘professionalism’ may alienate us from ourselves and,

in doing so, the communities which motivate us to do that work. Hammond explains:

I am dismayed because what we put on our bodies is an expression of who we are. In many cases, what we wear represents some aspect of ourselves. Sometimes, our clothes create spaces for us to be ourselves and feel at home and at peace in spaces that attempt to silence us and make us invisible... Walking around in dressed-up, 'professional' attire is like walking around in emotionally ill-fitted clothes, ill-fitted to my persona and sense of self.

This kind of identity erasure is not only significant for the individuals it affects – although it is clear that it perpetuates a subtle but enduring violence upon them – but also because it excludes voices which are not able-bodied, cisgender, heterosexual, white, male and middle-class by ensuring that people who do not fit within these normative identities do not apply for professional positions in the first place, are denied when they do, or, if they are employed, feel unable to authentically participate.

Alienation from social justice rage

These notions of professionalism not only alienate us from our identities and communities but also from our emotions and our sense of social justice. As explained previously, professional competence, and therefore legitimacy, is typically measured against the ability to make rational, impersonal decisions which are unfettered by emotions or personal relationships. It therefore becomes necessary for the professional to maintain a distance between themselves and their clients by means of dress, manner and a psychological distance in order to be seen as 'legitimate' and worthy of trust.

I suggest, however, that for community sector professionals social justice issues are often deeply personal and sites of emotion – be that rage, disappointment, compassion or fear. As such I suggest that there is an unresolved tension within professional social justice work. The professional is expected to internalise their profession as part of their identity and as such off-the-clock, underpaid and unpaid labour are the norm. Yet at the same time the rage that brought them to social justice work is denied as 'unprofessional'. This results in an alienation from our emotions and ourselves whereby reason dominates over emotions and professional life over personal – a separation which is maintained through the use of different clothing and

manner.

Finally, drawing briefly on the theory of Karl Marx, it could be argued that the division of social justice labour into smaller skill-related parts causes us to lose sight of the meaning of the activity and the overall goal of our work.²² I suggest that this is especially the case for community lawyers who tend not to work in interdisciplinary teams. In my own personal experience working in a community legal centre I found myself turning away people who experienced multiple intersecting oppressions, knowing that we could do the work in an afternoon and that without our help they would be significantly worse off, on the basis that they did not fit our application criteria. This not only made me genuinely question whether I was acting in accordance with my personal and political values, but also reinscribed a hierarchy whereby I, as a professional had the power to delineate the 'deserving poor' from the 'undeserving poor' and distribute social goods as a result.

For me, there is an inherent tension or contradiction in professional social justice work since professionalism by its very nature is hierarchical and normative and the kind of radical social justice I'm interested in is dedicated to fighting these things. I wrote this paper to figure out whether the anger I feel at the system and my emotional investment in my clients' matters has a place and I don't have an answer – for you or for myself. The reality of the world that we currently live in and the systems that we have to fight against is that they only understand rationality and arguments which speak to objective criteria, so I understand that sometimes we need to speak their language in order to get the best outcomes for our clients. But I also want to want to work to not position myself as an 'expert', to care genuinely about the people I work with and use that to motivate me, to make space for emotions and feelings wherever I can, and to honour and privilege the autonomy of my clients. As to what that looks like in 'professional' practice, I'm still working on it. ■

Reasonable Persons and Sexual Assault: Law, Exclusion and Violence

Gila Segall and Patrick Cort

JD I

The law is a social institution that has been, and continually is, created, accepted, and socially legitimised by influential political and legal actors. These actors are predominantly, (both historically and today), privileged white straight cis-males.¹ This has resulted in the systemic exclusion of a heterogeneous society, including women, persons of colour, trans* and queer people, from fully participating in the development of the principal coercive institution of social control: the law. As a result, male experiences and standards have become the primary point of reference for legal reform, interpretation, and translation.

The process of exclusion, and the institutionalisation of male norms, occurs and functions in four significant ways. To begin with, the structure of the law itself provides a key mechanism by which the exclusion and silencing of others is played out. This mechanism is a process facilitated through the nature of the common law. The doctrine of precedent - the backbone of the common law - requires the courts to build on existing legal structures and principles. The existing legal structures are authoritative sites for the enactment of 'new' law which further strengthens and cements the law in the state that it is in.² Like any power system, the normalisation of certain structures and patterns becomes the means by which the system gains momentum and legitimacy. This process also ensures the law remains a tightly closed system of knowledge.

Secondly, the male perspective has been institutionalised as the norm of the legal system, thereby securing it as a homogenous space. As Findley asserts, 'privileged men have had the power to ignore other perspectives and thus to come to think of their situation as the norm, their reality as reality, and their views as objective'.³ As the male experience is the only one permitted by the law, the law has been able to deny the existence of difference and thus position the male

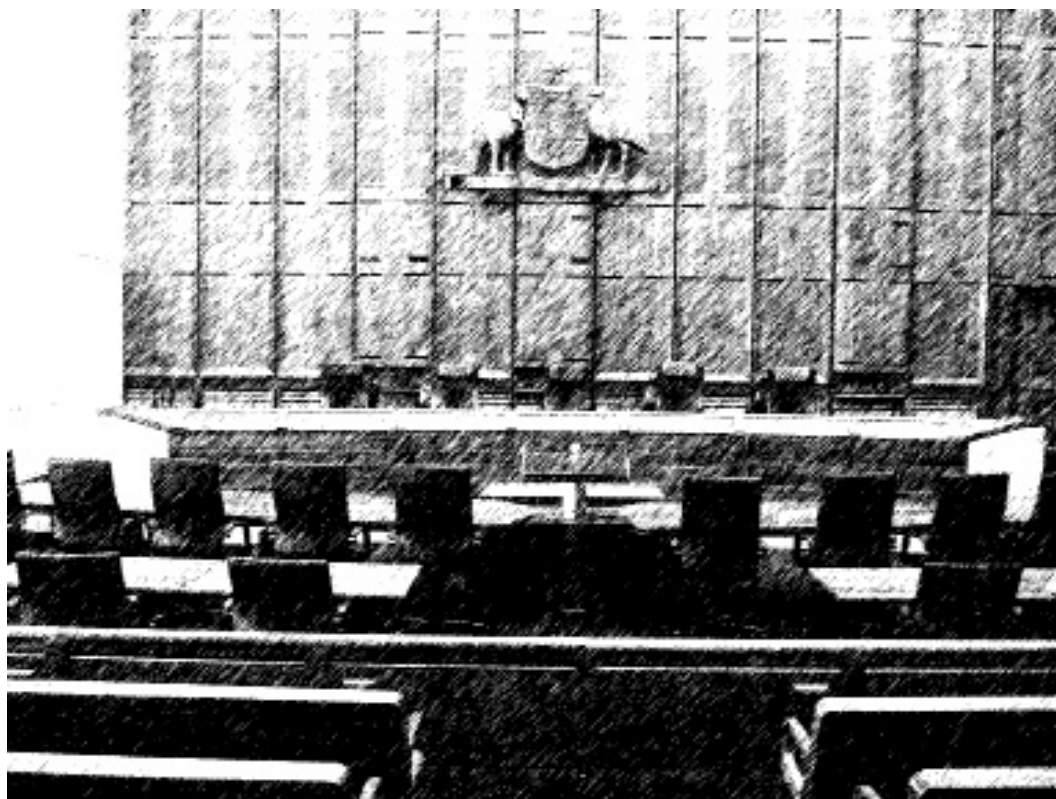
experience as universal. This universality has been subsequently translated to 'neutral', which has meant that the experiences and perspectives of non-minority persons have been 'translated as biased', othered, and thus declared legally invalid.⁴ (Despite common usage, white cis-males are in actuality the minority). Consequently, non-minority persons have 'been forced to abandon their differences in order to be the same as, and therefore equal to, men'.⁵

Thirdly, the assertion of male-centred, male identified, and male dominated norms has become essential in the law's affirmation of its own validity.⁶ Thus it is legally 'unworkable' or incompatible for other perspectives and experiences to be incorporated without undermining the legitimacy of the legal institution itself. The law can therefore be understood as a closed system that is by nature conservative. Due to its necessarily closed nature, it becomes an effective social tool to 'stabilize and reflect the status quo, rather than to reach for radical understandings'.⁷

Finally, it is male understandings of others' lives and experiences that have been 'translated into the law'.⁸ This results in a denial of the actual lived experience of minority groups, and is instead replaced with a misinformed, stereotypical interpretation of non-hegemonic experience. Once embedded within the legal system, this interpretation is often difficult to erase. It also runs the inevitable risk of violent paternalisms. These translations inevitably fail, and have failed again and again, as will be explored in relation to the legal system's approach to sexualised assault.

Legal reasoning is the primary site in which these mechanisms affect the systemic exclusion of heterogeneous experiences, and the adoption of a monolithic world view. The ubiquitous doctrine of reasonableness is a prime example. The notion of reasonableness

“...the assertion of male-centred, male identified, and male dominated norms has become essential in the law’s affirmation of its own validity.”



underlies legal reasoning and is a constituent of the doctrines of objectivity and impartiality. Typically reasonableness, or more often the 'reasonable person test', is used by the court as a means of assessing whether a person's actions should be brought to the attention of the legal system. If behaviour is deemed unreasonable, a person can be held legally responsible and will suffer the (often punitive) consequences. Ostensibly neutral and fair, this test of reasonableness merely reinforces a hegemonic world order, denying the experience of those othered by the legal system. As Parker argues, 'neutral' concepts, such as reasonableness and rationality are 'based on norms that men have claimed as male.'⁹ Problematically, such doctrines give the law its legitimacy. Legitimacy is what enables it to enact forms of violence against its subjects on a regular basis.¹⁰

One area of law where the doctrine of reasonableness is extremely effective at violently asserting male-centered ideas and norms is its application in cases of sexualised assault. Sexualised assault law in Australia, despite its improvement in the past few decades, is still bedevilled with problems that make it incredibly difficult for the law to adequately provide for victims of assault. Both the nature of what constitutes an offence of sexualised assault, the elements that must be proved beyond a reasonable doubt, and the way in which the court construes these elements have resulted in a legal system which affords leniency to perpetrators of sexual violence, while remaining indifferent to female experiences of rape.

In order to successfully prosecute a sexualised assault or rape, a number of elements must be proved beyond a reasonable doubt. Firstly, the sexual act itself must be proved to have occurred.¹¹ Secondly, the absence of consent must be established.¹² Thirdly, and most importantly, the prosecution must prove that the defendant was aware that the complainant was not consenting to the act.¹³ Negotiating what constitutes awareness of non-consent has proved a huge stumbling block in achieving justice for victims of sexualised assault.

Following a period of legislative reform, the *Crimes Act 1900* now provides statutory guidelines to assist the court in determining whether the defendant was aware of the absence of consent, and therefore whether he¹⁴ can be held criminally responsible.¹⁵ Under these guidelines, a defendant has knowledge of non-consent if it can be proved that he knew of the non-consent, was reckless to its existence, or, most

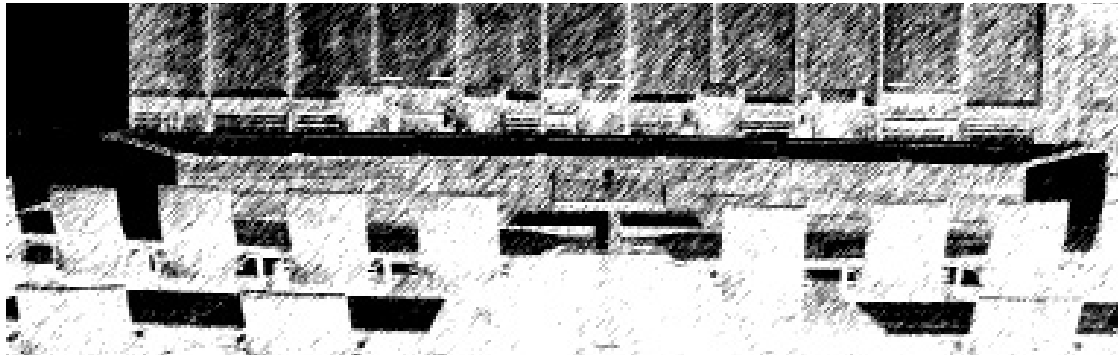
importantly, if he had no reasonable grounds to believe that consent was given.¹⁶ The implication of this third guideline being that where the court construes the defendant's mistaken belief as reasonable, the charges must be dropped.

In cases where evidence of non-consent is particularly difficult to establish, whether the defendant can be held criminally responsible for his actions hinges on the court's interpretation of what constitutes a 'reasonable ground' for belief. In this act of interpretation, the actions of the complainant, rather than those of the defendant, are subject to intense scrutiny. Despite legislative reform in all jurisdictions in Australia, evidence of a complainant's sexual history and reputation can still be admitted into the court room.¹⁷ For example, although the starting point in New South Wales is that such evidence cannot be allowed into the court room, the court has a degree of discretion to allow such information in.¹⁸

Heenan's study of sexualised assault trials reveals that a complainant's sexual history and reputation has been admitted into the courtroom in situations where an entire defence case is constructed on the grounds that these things could demonstrate the reasonableness of the accused's belief in consent.¹⁹ She notes that in such cases there is a 'mutual understanding' between all actors in the trial that the complainant's sexual reputation is a sure indicator of a reasonable ground for belief.²⁰ In one particular case she notes that a victim's history of having sexual relations with friends of the defendant was construed by the defence as justifying the defendant's mistaken belief that she was consenting to sexual intercourse with him, despite the victim's strong protests otherwise.²¹

If the court interprets the actions of the victim-complainant as giving rise to a reasonable belief, then the defendant cannot be held responsible in the eyes of the law. This process of interpretation is fraught with error. Under the guise of reasonableness, common myths about rape and heteronormative sexual relationships make their way into the courtroom, confirming a view of the world that has little regard for the complexities of consent, and the trauma of sexualised assault.

The implications of the standard of reasonableness that is imported into the sexualised assault trial are multiple. First, as Catharine MacKinnon suggests, focusing on the standard of reasonableness in assessing the defendant's belief in consent privileges a single



world view that is divorced from the reality of the female experience.²² Furthermore, if, under the test of reasonableness the defendant is deemed not to have known of the lack of consent, then the woman's experience of assault is denied. In the eyes of the law 'she is considered to have not been injured at all'.²³

Secondly, because of the particularly gendered nature of the crime of sexualised assault (that is, a majority of sexualised assaults are committed by men against women), the law assesses the woman's behaviour according to a male standard. This inevitably results in a legal system that permits a culture of rape to continue undisturbed. As the male experience is necessarily blind to the pervasiveness of sexualised assault there is no wonder that the tests used for determining what constitutes culpable behaviour will lack the requisite nuance and sensitivity to deal with consent and the trauma of assault.

Finally, these factors result in a trial process that serves as a 'second rape' for victims of sexualised assault.²⁴ In privileging 'a defendant's honest but inaccurate belief in consent . . . above a woman's actual knowledge of her non-consent'²⁵ the legal system perpetuates a culture of violence, subjecting already vulnerable members of society to further shame, humiliation, and injury. There is a blind spot in the legal system that allows a particularly abhorrent experience to, for the majority of cases, go unaccounted for. The flawed attempt at seeking justice for victims of assault is a fraught process that results in a violent end; the explicit denial of experience²⁶ and permission by the court for it to occur again.

Although representation and participation of some minority groups in the legal field is slowly increasing, the problems of these violent structures are situated in the ontology of the system itself. The result is a legal

system that is structurally blind²⁷ - the law claims to be universal and rejects, on the basis of invalidity, other experiences and perspectives. It cannot acknowledge the potential for translation issues, or even that a translation occurred in the first place. The removal or significant alteration of this internalised structure would 'fracture the skeleton' of the legal system and is therefore impossible to attain while the law remains in its current form.²⁸

As summed up by Rifkin: 'in the end, patriarchy as a form of power and social order will not be eliminated unless the male power paradigm of law is challenged and transformed'.²⁹ Transforming the law must go beyond superfluous changes in language and should instead be focused on dismantling the deeply embedded structures within the legal system itself, in an effort to include the expansive array of experiences that are denied validity in the eyes of the law. ■

Legal Aid's undefended hearings policy

Richard Schonell

JD II

With the end of the age of entitlement upon us, fiscal responsibility is increasingly a subject that incites bona fide rage. Over the past twenty years the politics and ideology of laissez-faireism has systematically altered the way governments deliver services to the public. Medicare and tertiary education, which were once sacrosanct, have been re-indexed, taxed, deregulated and cut. Legal aid has also been swept up in this tide. In 2014-15 the Abbott government proposes to build on almost fifteen years of successive cuts by trimming a further \$15 million from its already depleted budget.¹ Like equivalent schemes in other states, Legal Aid NSW has met this challenge by implementing austere cost-saving measures. The purpose of this article is to interrogate one of these measures, namely Legal Aid's new Local Court defended hearing policy. While it is still too early to judge the policy's long-term impact, a number of issues warranting discussion have emerged in its first eight months of operation.

The Policy

In November 2013 Legal Aid NSW introduced a new eligibility precondition that significantly reduces the availability of free legal advice and representation to defendants in the Local Court. It does this by only making grants of legal aid available in defended hearings (where the defendant pleads not guilty) when there is a real possibility of imprisonment on conviction, or if the defendant can demonstrate exceptional circumstances. If these requirements are not met, the defendant must go it alone as an unrepresented litigant. In practice, this means that legal aid will usually not be made available for the defence of less serious summary offences, such as shoplifting, goods in custody, assault, assault police, resist arrest, offensive language and minor drug offences. In making this change, Legal Aid NSW followed the lead of other legal aid schemes, which have enacted similar policies.²

Since the introduction of the policy, Legal Aid NSW has markedly reduced its carriage of defended hear-

ings in the Local Court. While a degree of palatability is lent by the fact that the policy does not exclude those facing gaol terms, it nevertheless threatens the accessibility of justice for a large class of defendant by constructively depriving them of their only viable legal recourse.

In Australia, unlike several other common law countries, there is no right to legal counsel.³ Notwithstanding this, the availability of legal advice and representation is still regarded as an essential element of a fair trial.⁴ It is axiomatic that a layperson typically lacks the experience, training and specialised knowledge required to test the Crown's case. This is especially true in the context of defended criminal trials where defendants come up against the unlimited resources of the state. The defended hearings policy therefore threatens to undermine the fairness of proceedings in cases where it is in the interests of fairness that the accused has legal representation.

The policy also runs the risk of further entrenching social disadvantage and widening the actual and symbolic gap between those who can and cannot afford legal representation. By implementing the policy, Legal Aid NSW has made defended hearings for some matters the almost exclusive reserve of those who can afford private lawyers. It is a sad irony, and alarmingly Kafkaesque, that those who can least afford legal representation only have access to it upon admission of guilt. Beyond the procedural, substantive and social justice implications this has for the accused, the policy also threatens to alienate the disadvantaged and the criminal justice system even further. Experience teaches us that the classic legal aid client is socially and economically disadvantaged, hostile towards the courts and police, and regards the curial process as confusing, unsympathetic and elitist. The policy exacerbates these perceptions by depriving the disadvantaged of the sense that there is 'someone in their corner'.

The policy is also seemingly ignorant of the revol-



“It is a sad irony, and alarmingly Kafkaesque, that those who can least afford legal representation only have access to it upon admission of guilt.”

ing court door that confronts many Legal Aid clients. Anecdotal evidence suggests that some defendants have instructed counsel to enter questionable guilty pleas, whether out of fear of being unrepresented, frustration or apathy, as guilty pleas automatically attract legal representation on a duty basis.⁵ Even more troubling is the long-term impact this can have on an individual's prospect of imprisonment upon future conviction. In sentencing, judges consider a defendant's criminal record and the likelihood of their re-offending, amongst other things. As a consequence, a string of undefended minor convictions can result in a judge imposing a discretionary prison sentence for a subsequent conviction.

Teething Problems

Jane Sanders, the principal solicitor at The Shopfront Youth Legal Centre, says that the policy has experienced 'teething problems' in its first eight months.⁶ Particularly concerning to her is that an undetermined number of defendants who should be eligible for legal aid under the 'exceptional circumstances' provision have been turned away without having the merit of their eligibility adequately assessed.

The Shopfront has kept a record of its interactions with these individuals. Between November 2013 and May 2014 it fielded calls from twelve young people aged between eighteen and twenty-five who were told, or believed that they had been told, that they were ineligible for legal aid because funding for defended hearings in the Local Court was no longer available for their matters. This was despite the fact that their circumstances included various combinations of homelessness, mental illness and drug addiction. It is telling that of these twelve eight defendants met the requirements for pro-bono representation from other free legal service providers, two were eventually granted legal aid after being referred back to the organisation, and one was granted legal aid after successfully appealing to the Legal Aid Review Committee.⁷

Sanders believes that the root of this failing lies in a phenomena commonly observed by social workers; people with exceptional circumstances are typically the least capable of articulating their problems and accessing the services available to them. The reasons for this are varied and complex. They include basic misunderstandings about rights, feelings of shame, communication difficulties and a reluctance to question authority figures.

People with exceptional circumstances therefore re-

quire additional support. A substantial barrier to this is the manner in which defendants access information about legal aid. Most individuals inquire about the organisation over the phone through LawAccess, or via a duty solicitor on the court date. It seems that in some cases telephone operators have inadequately asked about the defendant's circumstances, or neglected to mention or fully explain exceptions to the defended hearings policy.⁸ Likewise, overworked duty solicitors lack the time and resources to fully interrogate a client's circumstances, especially when the client is not forthcoming. Somewhat inevitably then, people with exceptional circumstances have been turned away without being afforded the opportunity to explain why they could be eligible for representation.

On a more positive note, The Shopfront recorded a drop in the number of referrals from defendants who had been refused legal aid in April and May this year, which could be a sign that the policy is starting to work better than before. Nevertheless, until a comprehensive assessment framework that addresses this issue is introduced, it is likely that vulnerable defendants will continue to slip through cracks in the policy.

Another area of concern identified by Sanders relates to the misapplication of the policy by Legal Aid lawyers. This concern was highlighted by a particular case in which a defendant was denied legal aid by a duty solicitor who misunderstood the policy. In this case the defendant was accused of a number of vandalism offences. He instructed the Legal Aid duty solicitor that he wished to plead guilty to some, but not all of the offences. The duty solicitor informed the defendant that he could not enter such a pleading, as Legal Aid NSW policy prevented him from appearing in this particular defended hearing. According to the duty solicitor, the only way that the defendant could have been represented was if he wished to plead guilty to all the offences. This was despite the fact that the defendant was eligible for legal representation on a duty basis.

This deviation quite clearly stemmed from a failure on the part of Legal Aid NSW to fully explain the policy to its lawyers. According to Sanders, Legal Aid NSW has begun addressing this issue, and it appears that lawyers are now applying the policy with greater flexibility in order to accommodate factual scenarios such as the above.

The Future of Legal Aid

Public service has always been at the heart of the legal



aid project. Ever since the Poor Persons Legal Remedies Act of 1918, legal aid schemes in various guises have represented individuals who have been priced out of the legal market. Eligibility for legal aid is always subject to a means test. The defended hearings policy departs from this orthodoxy as it inserts the admission of guilt as a precondition of eligibility for legal aid in the Local Court. Economic need is thus no longer sufficient in itself to attract legal aid.

Brian Sandland, the previous director of Legal Aid NSW's Criminal Law Division, is mindful of the fact that there is no such thing as 'easy cuts to legal aid', but regards the change as 'necessary to preserve the viability of Legal Aid NSW'. His argument is simple: 'our ability to meet budget ensures that we will be able to continue providing legal services to the clients who need us most.'⁹

Sandland's reasoning is logical from an economic and institutional perspective. The effectiveness of legal aid, like all government instrumentalities, is ultimately tied to the resources at its disposal. In the face of budgetary constraints, Legal Aid NSW was compelled to make sacrifices. As stated by Sandland, ninety per cent of criminal matters, many of them trivial, are finalised in the Local Court.¹⁰ Reducing the defence of these hearings was therefore a rational choice.

Ideally though, economic and institutional analysis should not be the basis on which decisions about legal aid are made. This is because cost analysis provides an inadequate assessment of legal aid's true value. It is very difficult, for instance, to calculate the non-material benefits that a fair trial has on the public's perception of the criminal justice system. Furthermore, legal aid is inherently predicated on and constrained by the impecuniosity of its clients. Unlike public utilities or banks, legal aid cannot be galvanised into a profit-generating scheme.

It is therefore deeply perturbing that economic ra-

tionalism has seeped so fundamentally into the way government approaches legal aid funding. As the defended hearings policy demonstrates, an unduly restrictive budget risks nullifying legal aid. Legal Aid NSW's capacity to meet the needs of its clients in the future will remain unpredictable so long as economic priorities, as opposed to other considerations, drive legal aid funding.

Conclusions

It is still too early to judge the long-term impact of Legal Aid NSW's Local Court defended hearings policy. For instance, there is a chance that the policy could dissuade the police from plea-bargaining if it leads them to believe that defendants are generally more likely to plead guilty. Likewise, the burden of the policy on Community Legal Centres and other free legal services that have taken on Legal Aid NSW's shortfall, and the effect of the increased number of unrepresented litigants on the quality of court proceedings, remains to be fully seen. Nevertheless, a number of preliminary conclusions can be made. It is clear that the policy has achieved its intended purpose, but that this has come at a price. The policy has constructively undermined access to justice and the benefits that flow from this for disadvantaged defendants. Disconcertingly, the policy has also experienced a number of serious 'teething problems' that are yet to be fully resolved. The policy also embodies and reflects the long-term threat that economic rationalism poses to legal aid in particular, and social justice more generally. It is becoming increasingly apparent that this doctrine, if left unchecked, could seriously compromise the future of legal aid. ■

One Small Act to Start a War

Georges Remi

LLB

On 13 September 1993, the Prime Minister of Israel, Yitzhak Rabin, and Yasir Arafat, the leader of the Palestine Liberation Organisation, shook hands on the lawn of the White House to mark their commitment to an agreement known as the Oslo Accords. Some believed that this would lead to the eventual establishment of a Palestinian state and a long-awaited peace. With this hope in mind, some Palestinians who had lived overseas for many years moved back to areas of the West Bank where they had grown up and never thought they could return to.¹

'When I think of what happened on the lawn of the White House I am reminded of an entertaining story... a man and a woman, drunk on the eve of Independence Day and finding themselves in the apartment belonging to one of them, go to bed and make love; the morning after they behave with scrupulous politeness, introducing themselves to each other and parting with a handshake but with no exchange of addresses.' – Israeli Deputy Foreign Minister Yossi Beilin (1999).

The ringing of the old telephone disrupted the stillness of the January morning. The sound reverberated off the metal vats of fermenting beer and a dog somewhere nearby started barking. Maryam picked up the phone and was greeted by a timid voice on the other end. A young American student who was vacationing in Israel wanted to come for a beer tasting.

It wasn't uncommon for people to visit the Taybeh Brewery, but nor was it a typical tourist destination. The brewery sat on the outskirts of the obscure town of Taybeh, located, as it has been since biblical times, in the middle of the area now sometimes referred to as the Occupied West Bank; it is now the only fully Christian place left in Palestine.

Maryam looked around the brewery and thought back to when they had first started, the tangible promise of peace so convincing that the owner of the place had left his home in America and returned to Taybeh with his family. Riding on the hope of the Oslo Accords, they had invested back into the region, not only their assets, but themselves. The man who had started the brewery had begun making beer as a hobby when he had lived in the US. He returned to his hometown in Palestine at the first opportunity, deciding to set up a business that nobody would expect. How strange it must have been to relocate his passion to the other side of the world, from the bustling metropolis to a small town perched among arid hills, surrounded by olive trees and conflict.

They thought they were establishing the first brewery of a new country. On that day, however, the wall and checkpoints stood between those who wished to try 'the finest beer in the Middle East.'

He heard the muezzin start the call to prayer as he searched for a taxi. He was standing outside the walls of the old city in East Jerusalem, scanning all the number plates. The different colours indicated which zones the cars were allowed to enter. He concluded that he might have to switch taxis a few times to get to where he wanted to go.

The sun was still out but the morning had lost its freshness. He had never crossed into the West Bank before, and he was feeling slightly apprehensive. He had had a discussion about it the week before with some other students, sitting in a bar in Tel Aviv, sipping arak and lemon. They had been forthcoming with their opinions:

'I wouldn't go if I were you. My Embassy told me I should avoid all travel there...'

'I've heard the food is good, and cheap. Falafels are like a fifth of the price they cost in Jerusalem. But my car insurance won't cover me if I go there ...'

'I think you should go. Take a look at the other side, instead of just reading about it...'

'Don't go. It could be really dangerous, especially for you...'

'Maybe you should buy one of those scarves they all wear?'

He'd been told about Taybeh by someone he had met at the Dead Sea. It wasn't mentioned anywhere in his guide book, and he didn't know how comfortable he was about going alone, on the recommendation of a person he barely knew. Would people there even speak English? Would they be receptive, if he accidentally let slip the few words of Hebrew that he'd picked up?

Bethlehem was the only place in the West Bank that he had heard of tourists traveling to. Every so often, a small group of pilgrims clutching their olive wood crucifixes would board specially organised and vetted tour buses destined for the Church of the Nativity. For Taybeh, however, there would be no guide, no tour – just suspicious glances from soldiers and big signs in red, warning that it was illegal for Israeli citizens to travel there because of the safety risk.

He had always imagined that everyone who lived in the West Bank was Muslim; Muslims on one side of the wall and Jews on the other. But the more time he spent there, the more he realised his mistake. You can't just draw a neat line on a map and separate people into 'teams'; everywhere was sacred to someone. Everyone had their own story about how the conflict had affected them. It wasn't as clear-cut as it had seemed when he had read about it in an American newspaper. Statistics had morphed into real people. Everything and everybody overlapped until it reached a point where sometimes it was best to keep the conversation to the weather, because you were bound to offend someone, or misunderstand something.

As the taxi bumped along the road, he stared out at the dusty hills peppered with white rocks and carved up by walls and fences. Every so often, they would pass an enclave of buildings huddled on their own. They were either Israeli settlements or Arab towns, cut off from each other.

When the taxi stopped, he thought the driver must have misunderstood him and taken him to the wrong place. The streets were deserted and the only sound he could hear was the ringing of a church bell. There was an intense stillness in the hazy air. There were no signs, no groups of tourists holding up maps or taking photos – just a few roads with stone buildings on both sides, and a disproportionate amount of churches for such a small place.

At the brewery, a young woman with an American accent showed him around. She seemed so out of place to him, and the place wasn't as he had expected it to be. It was the normality of it all that struck him. From the accounts he had heard of Palestine, he was expecting something else – some chaos, some danger. Yet there he stood, in the middle of a small brewery with kegs and glasses and beer taps, not too dissimilar from one that he would find back home. There were no flags or banners proclaiming Palestinian independence, or anything else to suggest that he was in the middle of an area that was the stage of a decades-long conflict.

The woman poured three types of beer for him to taste: gold, amber and dark. She spoke throughout, and like the hue of the beer, her story changed to a darker shade. It was one of his most surreal moments, drinking beer and listening attentively to an account of what had taken place...

Two years after the signing of the first Oslo Accords, another agreement known as Oslo II established the Palestinian Authority, a Palestinian body that was given control over certain areas in the West Bank. Concessions were made on both sides: The Palestinian Liberation Organisation for the first time recognised Israel as a state and the Israeli Defence Force eventually pulled their troops out of the Gaza strip. Things seemed like they were improving and people had moved back to Palestine with their families.

But peace proved a snowflake that melted before it could settle. There were factions on both sides who were opposed to it. The Israeli Prime Minister at the time, Rabin, was assassinated by a fellow Israeli citizen, resuming the violence and breaking down the peace process irrevocably. Then came the second intifada.

'Intifada?' he asked.

'It means "uprising". In 2000, there was a string of attacks against Israeli civilian targets. Many were killed, on both sides. There was retribution, retaliation, and security was tightened everywhere. We weren't overrun with visitors during that time.'

'And now?'

'Swings and roundabouts. The situation is always delicate, but things are better. Hopefully something will come out of this new round of peace talks, but you never know. It only takes one small act to start a war.'

He glanced at his half-empty glass. 'It's strange – some people I've met are so angry, so loathe to forgive. And then you talk to the person next to them, and they're filled with calm; they just want it to be over.'

She shrugged. 'A government doesn't always speak for its entire people.'

He pondered that. 'Still, it must be hard to live with... all the stops and security checks. I was checked so many times and interrogated on my way here, as if I were doing something wrong.'

She smiled at him, 'Don't count on getting any sympathy from me. This is just life.'

'How do you deal with it? Do you ever protest?'

'You don't always have to protest with screams and slogans,' she said. 'This brewery is a testament to the fact that in spite of all the road blocks, the check points, the walls and fences, embargoes and economic hardship, we have never given up. When we came back here, we thought we were coming back to the birth of the Palestinian state. We may not have that yet, but we still achieved what we came here to do.'

'People have returned to Palestine. Every year we have a festival at the brewery; people come from overseas, and even Israelis brave the checkpoints to be there. We started with a tiny operation and now we export overseas.' She smiled again, 'You can buy a bottle of Taybeh in Tokyo, you know? So don't feel too sorry for us. If you want to help,' she gestured to the fridge behind her, 'you can buy some beer.'

Maryam's final recommendation had been to visit a church, St George's, and he'd found a young boy who guided him through the town. When they arrived on top of a small hill, the remains of a building stuck out. It was a collection of crumbling stone walls and slabs that looked pink in the light of the setting sun.

He stood in the open-air room where the altar was. Atop a large stone sat a collection of half burnt red candles and an icon of the Virgin Mary. A large metal cross was resting against the base. He noticed the red handprints that covered the walls on either side of him, but didn't realise what they were. The boy pointed to them and said something in Arabic that he didn't understand.

He discovered later that the handprints all around him were formed of blood. The old practice of animal sacrifice is still practiced in Taybeh and, every so often, a lamb is led to slaughter, always facing east. Beyond the altar, the wall fell away and offered an expansive view over the whole of the West Bank. He stood there, a stranger in a far away town, and looked out as the sun set behind him. Behind the dusk haze, the hills folded into each other, with no end in sight. ■









*“The veteran accused of a crime should not be the
only one to hear the war’s distant echoes.”*

- Christopher Hawthorne, ‘Bringing the Baghdad into
the Courtroom’¹

From Combat to the Courtroom: the Criminal Responsibility of Combat-Related Post-Traumatic Stress Disorder

Deborah White

LLB V

Introduction

Throughout modern legal history, the criminal justice system has struggled with the attribution of criminal responsibility to war veterans suffering from combat-related Post-Traumatic Stress Disorder (PTSD). In addition to the existing complexities of mental illness in the legal system, the imposition of criminal sanctions against war veterans suffering PTSD is often socially and politically contentious due to heightened public sympathy for war veterans and gratitude for their military service. In light of the increasing crime rates committed by war veterans returning from Iraq and Afghanistan, there has been a proliferation of expert and lay discourse confirming the validity of PTSD as an exculpatory mental disorder. In a recent assault case, Townsville Magistrate Ross Mack cautioned that while 'the country owes all servicemen a debt of gratitude... the more this kind of thing happens the less public generosity exists.'² This illuminates the shifting fault lines within the criminal justice system pertaining to the treatment of mental illness and the extent to which this is informed by prevailing societal attitudes towards war veterans, the psychological impact of war, and the moral culpability for offences committed by servicemen diagnosed with PTSD. Through a socio-historical analysis of the recognition of combat-related PTSD over time and the treatment of war veterans within the criminal justice system, this article asserts that in this case, criminal law is informed by community attitudes towards veterans and the psychological impact of war.

The Socio-Historical Development of Combat-Related PTSD

The popular perception of the psychological impact of modern warfare has evolved throughout the 20th Cen-

tury to reflect dominant views in medical and military discourse. The first modern account of the trauma of battle was 'shell shock' in World War I. Due to political and military objectives to avoid the medicalisation of 'shell shock' as an admissible defence to malingering and desertion, 'shell shock' was often stigmatised as symptomatic of cowardice. Considered a precursor to PTSD, the diagnosis of 'shell shock' was replaced by 'Combat Stress Reaction' in World War II. The change in terminology echoed a shift in understanding that the psychological trauma of war was caused largely by distressing external factors rather than cowardice or a lack of moral character. This is illustrated by the criticism of General George Patton by both members of Congress and army commanders after he controversially slapped two US soldiers admitted to hospital for 'battle fatigue', berating one of them for being 'just a goddamned coward', resulting in General Patton being denied a combat command for eleven months.³ Reflecting the consensus that any soldier could be psychologically affected by combat, the U.S Army officially adopted the slogan '*Every man has his breaking point*'.⁴

It was not until after the Vietnam War that the American Psychiatric Association officially recognised PTSD as a psychological illness in its *Diagnostic and Statistical Manual of Mental Disorders (DSM)*. The prevalence of post-combat PTSD presented a major challenge in the United States with the *National Vietnam Veterans Readjustment Study 1988* revealing that almost half of the 480,000 veterans returning home with PTSD had been arrested or jailed at least once.⁵ As enemy combatants were not clearly identifiable in the guerrilla-style warfare that defined the Vietnam War, many soldiers assumed a hyper-vigilant state of mind constantly anticipating surprise attacks and consequently struggling to reintegrate into civilian life upon return. In response to the relative unpopularity of the Vietnam War, veterans were subsequently treated with

public ‘indifference or derision’ and combat-related PTSD was reluctantly received as a controversial defence in the courtroom.⁶

In contrast, decades later, combat-related PTSD has received a warmer judicial welcome following the wars in Iraq and Afghanistan due to society’s increased understanding of the psychological impact of warfare and broader public sympathy towards war veterans. This is reflected through the broadened definition of PTSD in the recent *DSM-5* and the increased recognition of PTSD as an exculpatory factor in criminal law, most notably through the defences of mental illness and automatism.

The Modern Approach to PTSD: Mental Illness and Criminal Responsibility

Mental incapacity in criminal law necessitates a complex balancing act between state welfare and state punishment, whereby an individual is generally considered to be non-responsible for their actions if they lack the requisite *mens rea* by virtue of their mental illness. Under the *Mental Health (Forensic Provisions) Act (NSW)*, a defendant may be found ‘not guilty by reason of mental illness’ and receive a ‘special verdict’ ordering medical treatment rather than criminal punishment.⁷ As affirmed in *Porter*,⁸ mental illness is defined in accordance with the *M’Naghten Rules* requiring the defendant to suffer a ‘defect of reason from disease of the mind’ such that they did not know the nature and quality of the act or did not know that the act was wrong.⁹ In order to establish mental illness as a defence, expert evidence can be adduced to prove the defendant suffered a mental illness and that the mental illness had a causative effect on the alleged criminal behaviour.

Under the *DSM-5*, currently used in Australia, a person may suffer PTSD if they ‘experienced, witnessed, or was confronted with an event that involved actual death or serious injury, or a threat to the physical integrity of self or others’¹⁰. Dissociation is the most relevant symptom of PTSD for war veterans where the sufferer lapses into a dissociative state reminiscent of a traumatic event and loses cognisance of their environment or action. For combat-related PTSD, a veteran experiencing a dissociative reaction typically enters into “survivor mode” and reverts back to conditioned military skills.¹¹ In a recent assault case against John Brazendale, an Australian soldier returned from Afghanistan, combat-related PTSD was successfully claimed as a defence. It was accepted that Brazendale’s PTSD induced him to assault four other soldiers as the

confrontation triggered an instinctive reaction to his traumatic experience in Afghanistan. Brazendale’s defence barrister claimed:

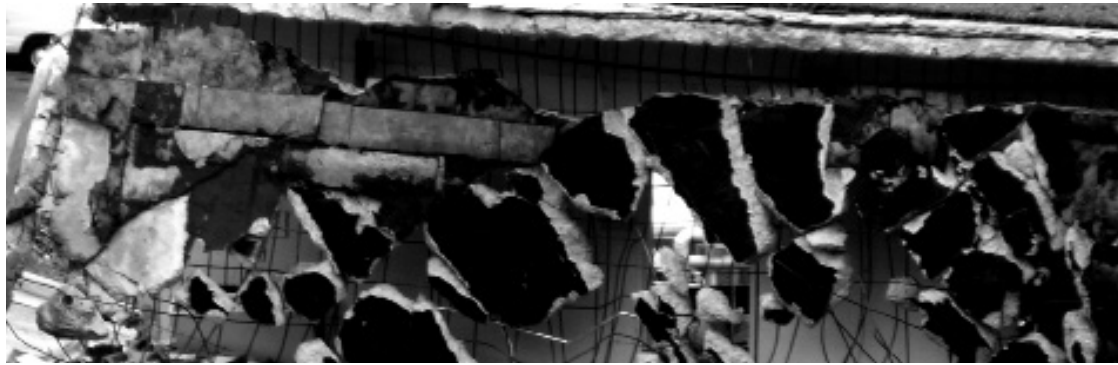
‘While in Afghanistan it was back up your mates, strike first and strike hard... If it was the case where you’re confronted, you don’t pull back. That was the mindset he found himself in that day. He still felt he was in Afghanistan and only thought one thing: protecting his mates.’¹²

While PTSD can involve a plethora of symptoms, dissociation is the most legally cogent as it subverts the defendant’s cognitive understanding of their actions, free will, and appreciation of right – thus striking at the heart of contemporary paradigms of individual responsibility.

Lay Knowledge, Public Gratitude and Criminal Responsibility

Lay knowledge plays a broader role in constructing mental incapacity in criminal law, particularly through the non-expert assessments made by jurors, legal practitioners, and judges. In conjunction with expert medical evidence, the success of a mental illness defence in practice will also depend on its ‘readability’. The ‘readability’ of mental illness in criminal trials is largely contingent on actions and behaviours that are manifestly intelligible to lay observers from which cultural meaning can be derived. Thus in the context of combat-related PTSD, the manifest correlation between mental trauma and fighting in a warzone enhances the readability of combat-related PTSD as an exculpatory criminal defence.

In contrast to other mental illnesses which predominantly depend on the subjective experiences of the defendant as assessed in the courtroom, combat-related PTSD has gained considerable legal currency due to the external factors of PTSD that enable its recognisability to the untrained eye. PTSD has received greater validation as a recognised mental disorder because a pre-requisite to its diagnosis is ‘exposure to an extreme traumatic stressor’¹³. This relatively objective and easily identifiable requirement of an external stressor, such as a warzone, significantly increases the readability of PTSD for jurors and judges. War veterans are more likely to successfully establish a mental illness defence when their criminal conduct mirrors militaristic behaviour reminiscent of their traumatic experience in combat. This was illustrated in *New Jersey v Cocuzza*¹⁴ where a veteran was acquitted for assaulting two police officers with a piece of wood as he believed



the officers were enemy combatants during a dissociative flashback. Evidence indicating he held the piece of wood like a rifle and manoeuvred in accordance with his military training led the Court to find Cocuzza not guilty under the *M'Naghten rules* as he evidently could not appreciate the criminality of his conduct in his dissociative state. Thus, the nature of the external stressor requirement has enhanced the readability of PTSD as lay observers can more easily identify a connection between the illegal conduct of the defendant and their mental illness.

In addition to a heightened understanding of the psychological toll of combat in lay discourses, war veterans have experienced lenient judicial sentencing in recognition of their service. This 'gratitude-based discount' stems from lay discourses surrounding the perception of sacrifice and public contribution military servicemen have made to the community.¹⁵ The lay knowledge shaping criminal law is strongly influenced by popular culture and mass media, from daily news reports of conflict zones to portrayals of glorified soldiers and sympathetic veterans suffering PTSD in Hollywood films such as *The Deer Hunter* and *Rambo: First Blood*. In light of mainstream media's coverage of the emotional fallout of warfare, the public and criminal justice system have become increasingly sympathetic towards Iraq and Afghanistan War veterans. The military is widely regarded as an important institution that is vital for national security and thus it is felt that judicial consideration should be given to war veterans suffering PTSD as a result of their public service. However this begs the question, should the *source* of a defendant's PTSD affect its relevance to criminal responsibility? Fundamental principles of 'equality before the law' and community safety suggest it should not make a legal difference whether the defendant's PTSD developed in the course of a public duty such as military service or while experiencing a morally repugnant act such as armed robbery, provided the defendant proves

their mental incapacity to the requisite *M'Naghten* standard. It is important that the Court avoid the creation of a privileged class of offenders and balance the public gratitude expressed towards war veterans with competing considerations of community safety and the equal application of the law.

Conclusion

Through a socio-historical analysis of the legal significance of combat-related PTSD, it is apparent that mental illness in criminal law is continually evolving to align with socially ratified paradigms of individual responsibility and the dominant social and political interests within a community. From the scepticism of 'shell shock' in WWI to the formal psychiatric recognition of PTSD after the Vietnam War, the treatment of combat-related PTSD in the criminal law is contextually defined by prevailing community attitudes towards war veterans, the psychological effects of war, and the moral culpability for offences committed by veterans diagnosed with PTSD. In comparison to the treatment of other mental illnesses in criminal law, war veterans claiming combat-related PTSD are more openly accepted in Court due to the greater 'readability' of combat-related PTSD with the clear causal connection between mental trauma and warfare as an external stressor, and the judiciary's heightened public gratitude and sympathy towards war veterans. Whilst war veterans should indeed be treated with proper understanding and empathy, as should any criminal defendant claiming mental illness, the Court should avoid the creation of a two-tiered justice system for war veterans with an elevated social status and ensure the uniform application of the law to all citizens in the interests of community safety and equality before the law. ■

The Activist's Flight



Andrew Smart

BA III

The Revolution Should Not Be Instagrammed

Gemma McHardy

BA / LLB V

Public displays of rage have long been an effective way to generate broader awareness of legal and political injustices. Social media platforms have recently been shown to have enormous potential for enabling those without a strong voice to spread information. It is therefore unsurprising that through the so-called democratisation of media, powerful imagery of conflict and protest now form part of the average person's daily news diet. Once the domain of the drab 'World News' lift-out, the struggles of Syrian civilians and abducted Nigerian schoolgirls are now the trends *par excellence* of Twitter feeds and YouTube channels.

This shift in use of media is cause for serious concern. By increasing the accessibility of far-off fury, social media may in some instances result in the frustration or weakening of fights against the abuse of power. The more traction gained by the trend to publicise complex and serious conflicts in these forms, the greater the risk that those conflicts will be normalised, compromising the opportunity for change.

It is not hard to see why rage, as a subject matter, fits the bill of new media so well. Social networking platforms favour form over substance, and the arresting impact of unguarded despair is far greater when presented to consumers as an authentic and immediate experience. The grainy image of the crying woman on a Benghazi street is delivered to you direct by the shaking hands of her neighbour. Cara Delevingne stepped straight off the cover of *Vogue* to invite you to #bringbackourgirls. There's no editorial process, no polishing, it's raw and it *involves* you.

What is less apparent is how, between image, victim and Smartphone-user, a kind of hyperreality is spawned. Jean Baudrillard, the celebrated French philosopher, described hyperreality as existing where reality and its simulation are seamlessly blended.¹ The

Libyan woman's struggles in the physical world, and our recognition of them in the virtual world, are commingled by that eye-catching immediacy, so that our appreciation of reality is dulled.

It bears emphasising that the form in which the message is conveyed shapes, defines and may ultimately overwhelm the message itself. There is something jarring about the Western world discovering the most abhorrent injustices via those most desperately provoked to reveal them, in a form which distinguishes between cats and car bombs based on whichever was more recent.

The kind of engagement achieved by bringing rage into the sphere of social media is at the heart of the problem as I see it. In most cases, however moved or startled we may be by first-hand accounts of injustice, our engagement begins and ends at clicking 'like', retweeting or hashtagging.

A story about 200 schoolgirls abducted from Chibok in Nigeria by Islamist separatists² is appalling by anyone's moral standards, and it would be difficult to argue that it is not newsworthy. However, it is equally difficult to explain what precisely is gained by raising the awareness of the global masses through an avid hashtag campaign entitled "bringbackourgirls" in various social media forms. The nature of those forums means that, beyond entering the deplorable realms of online comment sections, our engagement with the political and legal context surrounding the abduction is strictly limited. The famous faces – Michelle Obama,³ Cara Delevingne⁴ and notably Russian model Irina Shayk who posed topless with her hashtag⁵ – ask no more of their followers than the false accomplishment of reproducing their empty demand. These days, news stories that gain global traction due to the enraged response of the public often mark the

birth of a new hashtag like #YesAllWomen or #OccupyTwitter. By virtue of the norms carved out by social media, the most enraging global injustices are now reduced into an easily digestible formula that values proliferation over education. Again, the form in which the message arrives shapes and defines the response as much as the message itself. The 'purity' of an Instagram photo disguises the complexities which underpin it, and allows us – in our idle browsing on the bus to work – to overlook the fact that the gravity and complexity of these stories merit questioning, criticism and investigation.

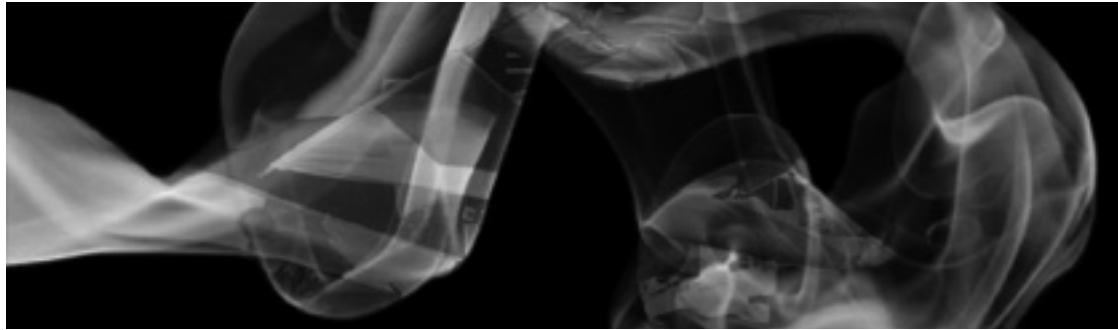
We unconsciously accept that a snippet of rage, filtered and shared, tells us all we need to know. The average (time-poor and largely politically disinterested) person may then propagate an image of themselves as a socially responsible citizen, informing their own social network of their 'pseudo-rage' via the coveted virtual thumbs up. A culture of passivity and detachment ensues, and awareness counts for nothing.

Despite all this, however, the use of social media for calling attention to injustice could still be justified by advantages to those actually being victimised. The 2011 Egyptian uprising provides a good example of the complicated function played by rage where broadcasting becomes central to the successful overthrow of an unjust regime. The logistical benefits of online activism, widely recognised as providing a mobilising force for protesters,⁶ can nonetheless be weighed against the effects of strong media presence *after* the logistical hurdles are overcome. The Tahrir Square protests have been described as constituting a tautological 'demonstration effect'.⁷ As many in the crowd attested⁸, they were there to *show the world* they were there by tweeting and posting videos and Facebook updates. Televisions showing Al Jazeera were set up so the protesters could watch themselves protest.

The popularity of 'citizen journalism' at Tahrir Square meant that the prolonged protest became a 'pseudo-event'⁹ – as it grew so did its hyper-mediation, and its hyper-mediation made it grow. In other words, as protesters' resolve was strengthened by recognition from the West, gained through their own posts and videos, so grew the idea that those posts and videos were the key to the realisation of their goal – a new government. According to a Dubai School of Government survey, 33% of Facebook users believed that the utility of the platform in spreading information to average citizens in the West (not just world leaders and the UN) was *more important* than the much-recognised use for raising awareness and involvement within Egypt¹⁰ – the virtual became more valuable than the physical.

Rage, although undoubtedly real, was in this context a performance designed for a mass audience both powerless to change the future course of events, and interested only to the superficial extent garnered by social media. To use Baudrillard's terms of hyperreality, the broadcast rage of the Tahrir Square protesters served, in the end, to 'launder' the regime, placing power into the freshly validated hands of the military. All parties played their passive parts: Obama warned that the West was watching, Mubarak himself (before stepping down) promised 'a better democracy',¹¹ but after his removal, the discontent of the Egyptian people continued. Momentum towards ending systemic injustice could have been built in a slightly different direction had protesters not had blind faith in consumers of social media. This might not have made a difference, but at least the fight would have been *real*.

A further danger of placing too much reliance on social media in fights against injustice is the ability of the perpetrators to weigh in. President Assad of Syria, for example, has wised up to the power of networking



directly with the masses. Assad's Instagram account, found at @syrianpresidency, features images of he and his wife visiting injured civilians in hospitals, complete with captions of humanitarian sentiment. The ease with which propaganda like this may create false impressions in the minds of users must be emphasised, particularly set against the comparatively arduous task of actively engaging on behalf of the enraged. In these forums, the advantage lies decidedly with those who wish to maintain the status quo.

The broadcasting of rage through the 'shared' virtual world obscures just how different the reality of the enraged and the reality of their audience truly is. This is true to such an extent that its transformative potential should be treated with utmost scepticism. To put these ideas into a domestic context, the recent March in March (and May) demonstrations have, as in other regions, demonstrated the potential for social media to play a role in mobilising action. It is however notable that early criticisms¹² of the movement centred on a lack of focus in its vision – the overriding message conveyed by those who marched was general dissatisfaction with Tony Abbott, rather than a demand for any specific policy alternative. Reportage of the public protests, and indeed the movement's self-promotion,¹³ placed distracting emphasis upon its unofficial, online marshalling. The 'virtual grassroots' story is the preamble, not the main event. Young Australians should be wary to avoid the watering down of a real opportunity for widely accessible activism to become rooted in our culture by giving too much attention to its own mediation. Perhaps more than in other countries, because our government does not subject its citizens to systemic human rights violations, the real value of this new movement might be in igniting the desire of people to educate themselves. In the era of Instagram, this is an opportunity not to be missed.

Mediated rage is powerful, yes, because it is universalising. But things that 'universalise' can also alienate. We are momentarily intrigued, we feel that inexplicable connection that is being sought. However when the implications explode outside the scope of our understanding and experience, we retreat. Social media is fundamentally ill-equipped to bridge that gap between intrigue and understanding. Efforts to connect meaningfully through its forms are, in the overwhelming majority of cases, made in vain. Not everyone can pick their battles, but for those of us who can, it will take more than reproducing somebody else's rage to change anything, and to counter the culture of detachment that social media produces. ■

The Game of Consent: the Sexual Assault of Cersei Lannister

Manna Mostaghim

JD III

Readers are advised that this article discusses a rape scene in detail.

*'Well, it becomes consensual by the end, because anything for them ultimately results in a turn-on, especially a power struggle.'*¹

– Alex Graves, director of the *Game of Thrones* episode, 'Breaker of Chains'

Social processes have imbued ambiguity upon what constitutes consent in sexual engagements. An oft-cited source for the ambiguity imparted upon the definition of consent is the tropes that have emerged in popular culture's depiction of sex.² Post-feminist readings of sex in popular culture have especially signalled the casual use of sexual violence in the narratives that depict heterosexual sexual engagements in television, films and books.³ A recent sex scene between two main characters, Jaime and Cersei Lannister, in the immensely popular HBO series *Game of Thrones* was identified as an exemplar of this trend. The use of sexual violence in *Game of Thrones* is a product of a rape culture that has resulted in the emergence of the television drama trope of the ambiguously framed sex act.⁴ This trope is identifiable by the fact that the sex act is never called a rape; and is characterised instead as being largely consensual but confronting.

Sabine Sielke claims that the depiction of sexual violence in popular culture is not an inherent wrong that will result in real life rape.⁵ However, the trope of the ambiguously framed sex scene echoes misconceptions and narratives that excuse male weakness within public consciousness.⁶ This trope's suggestion that consent can be a question of degree allows popular definitions of what constitutes rape to diverge from legal definitions of rape. This perpetuates faulty understandings of rape that impact the prosecution of rape in the court system as well as our understandings of rape victims. Traditionally this kind of narrative mechanism in other TV series was deemed controversial and has caused series creators to issue denials and comments that deny or qualify the exis-

tence of rape in the episode.⁷ But the recent reaction to *Game of Thrones*' presentation of an ambiguously framed act of sexual violence was overwhelming and demonstrated an outright rejection of popular culture's flawed understanding of what constitutes rape.⁸

The Scene

Cersei Lannister is arguably one of the most powerful women in the Seven Kingdoms. She is the only daughter of the wealthiest and most powerful house in Westeros, she was Queen and she is the Queen regent. She has attained a position of privilege unknown to most women in Westeros. But this power and privilege did not make her immune to being raped by her lover/brother, in a Church, next to the body of her dead son. A crime that will most likely go unreported with little legal consequence to her rapist Jaime Lannister.

Game of Thrones is part of the fantasy genre but the rape of Cersei offered a startling insight for many viewers into the real narrative of rape in the real world. HBO's adaption of the sex scene resulted in incredible online anger due to the scene's departure from the source material and the lack of clear consent from Cersei.⁹ However, the show's creators continue to deny the scene was a rape,¹⁰ and instead characterise it as a nuanced exploration of a complicated and flawed relationship.¹¹

The exploration of a complicated relationship through an ambiguously framed act of sexual violence has appeared in many series. These series - like *Buffy: The Vampire Slayer*, *Rescue Me*, and *Louie* - have strong female characters that are flawed and nuanced. But, in terms of the sexual violence committed against them, their flaws are used to justify or help understand why the sexual violence was either consensual or justified. So far, *Game of Thrones* has been the most popular show to repeat this trope. However, the stark contrast between intention and depiction, as well as the pub-



“...sexual violence in Game of Thrones is a product of a rape culture that has resulted in the emergence of the television drama trope of the ambiguously framed sex act.”

lic's response, warrants an examination of the continued permissibility of this trope in television dramas.

Conflicting Narratives and Complicated Relationships

George R.R. Martin, the author of the novels on which the TV series is based, has indicated that the same scene in the book is "disturbing" but it is not a rape.¹² Instead, the scene in the novel serves to physically depict a flawed and complicated dynamic between the sibling lovers. However, in the book the sole narrator of the interaction is Jaime Lannister. Cersei's consent and characterisation of the event can only be filtered through Jaime's perspective of the interaction. The television show, unlike the book, is a format that enables the viewer to act as an objective observer to the proceedings and understand each character's relationship to the event. However, the creators of the episode have publicly declared that they attempted to portray Jaime's characterisation of the event.¹³

Privileging male perspectives in the characterisation of a sexual interaction is not unique in cases of popular culture's portrayal of rape.¹⁴ Rather, it is a universal problem within wider society and the court system's prosecution of cases of sexual violence.¹⁵ Notwithstanding the fact that onus of proof is upon the alleged rapist to prove that the act was consensual,¹⁶ studies have consistently demonstrated that both the judiciary and the jury actively seek to comprehend how the alleged rapist could have construed the interaction as mutually consensual.¹⁷

For example, the creators of the episode attempted to negate the impact of Cersei's protests and buoy Jaime's belief in consent via references to the previously consensual nature of the Lannister twins' sexual relationship within the sex scene. This is because previous consent in sexual relationships qualifies popular understandings of the degree of seriousness in cases of sexual violence.¹⁸ Judicial statistics (in courts in both in the UK and Australia) indicate that a rapist will receive a lesser sentence if the two parties have previously had a sexual relationship.¹⁹ The implication by the court is twofold: that one, granting consent once can be construed as granting consent in future interactions; and that two, the court can afford a qualitative assessment of the lesser seriousness of the crime of rape in a previously consensual relationship.

As if to confirm this, popular culture has persisted in the notion that disturbing emotional dynamics between romantic parties with a shared sexual history

can be physically manifested through rape.²⁰ This is because the previously consensual nature of Cersei and Jaime's relationship is supposed to be understood to offer the peripheral existence of consent, whilst downplaying the severity of the depicted sexual violence. This is often done in order to enable one of the characters, like Jaime, to retain their overall likability, albeit with an acknowledgement of their deeply flawed nature. However, in Klassen's summary of the public anger expressed against Jaime, the sexual violence represented was not an act that could be considered attributable to a sympathetic anti-hero but to a villain.²¹

"Consensual by the end"

In the book, Jaime's perspective of the interaction sees Cersei's consent evolve from cautious to enthusiastic. The HBO series attempted to capture a similar trajectory as the director Alex Graves stated "*it becomes consensual by the end*"²². However, for many viewers the interaction remained non-consensual throughout. Additionally, when Nikolaj Coster-Waldeau the actor who plays Jaime Lannister, was asked whether the interaction was a rape, his answer was "*yes and no*"²³. Both answers acknowledge the overall ambiguity of Cersei's consent and indicate a lack of a qualified understanding of what constitutes consent in cases of sexual violence.

The question of what legally constitutes consent remains difficult to define within the legislation and judicial interpretation.²⁴ As legislative and judicial inquiry continue to contemplate whether consent can be inferred by circumstance or whether it requires a positive confirmation of consent.²⁵ Both Graves and Waldeau indicate that the sex and the consent granted by Cersei was cautious and not did not qualify as enthusiastic. However, neither Graves nor Waldeau indicate a factor that demonstrates that the act ever developed into a consensual act by reference to one of Cersei's actions. Rather, Cersei's eventual acceptance and acquiescence to the situation seemed tantamount to consent by inference.

The question of what form of consent must take place has become increasingly important within Australian law according to the *Australian Institute of Family Studies*.²⁶ A common feature of the changes is that legislative and judicial understandings attempt to remove passive understandings of consent.²⁷ For example, current judicial trends would recognise a lack of active resistance by Cersei as consent. Moreover, in the interaction Cersei's constant assertions that it



'wasn't right' and 'no' were met by Jaime saying "he didn't care". Even if we concede that there was some token act of consent, Jaime's declared indifference to Cersei's wishes in the dialogue shared between the two characters is still tantamount to recklessness to the possibility of consent from the other party.²⁸ Jaime's recklessness against Cersei's physical and emotional integrity means that consent that was issued was coerced – which according to Australian law, is rape.²⁹

The trope often relies on possible consent by inference from the victim of the rape in order to establish that the alleged rapist is a victim of mixed signals. For the creators of the scene, Cersei's unsuccessful resistance or lack of clarity in saying no to Jaime makes her incidentally culpable in the acts of sexual violence committed against her person. It places the responsibility of resisting rape on the victim. Cersei becomes not a victim of her circumstances but of the circumstance she has apparently permitted. The narrative of consent presented by the creators of this scene in the *Game of Thrones* series, thus, miscomprehends the nature of rape and the experiences of victims of rape.

Reporting and Consent

In Westeros society the siblings' relationship is already speculated upon and if acknowledged would result in the devastation of Cersei and her whole family. As the legitimacy of her children and their political status as a source of alliance of the ruling Baratheon family would be void. Cersei's ability to report the crime is then severely restricted, as it would devastate her personally, socially, politically and economically. Cersei then does not report her crime to anyone. Like Cersei, real victims often have to comprehend factors like economic and personal devastation in reporting cases of familial sexual violence – and as a result, often choose not to go to the authorities.³⁰

By not explicitly acknowledging or showing the factors that might demonstrate Cersei's inability to report the crime, viewers may be misled to believe that the ambiguously framed sex scene might be consensual. Under Australian common law a delayed complaint cannot be taken into account on the question of consent.³¹ But the existence of a time lapse between the act and reporting is popularly regarded as evidence of a fabrication of an accusation of rape.³² However, in cases where the victim is related to the defendant, like Jaime and Cersei, there is evidence that there is a longer delay in reporting the crime.³³ The question of consent in the scene is then subject to ambiguity due to Cersei's lack of immediate engagement with the impacts of the sexual violence.

The lack of acknowledgement of the factors that might influence Cersei's hesitance to report the rape condemns the victim and makes her responsible for the lack of justice she is afforded. Even if Cersei and the series creators were to subsequently acknowledge the act as a rape, the delayed nature of the complaint, in popular understandings of rape, unnecessarily attributes ambiguity to the consensual nature of the sex act.

Conclusion

The creators of this *Game of Thrones* episode have not offered compelling reasons as to how the scene was qualified by consent nor have they demonstrated an exploration of Cersei's personal experience of sexual violence. Instead through the direction of the scene they have recycled a trope that perpetuates and confirms popular rape narratives. The rape narratives evinced in the scene are echoed in the prosecutions of rape in our court system, which contribute to the obfuscation of clarity in our legislation and jurisprudence on sexual violence. Hence, the trope of the ambiguously framed act of sexual violence is at best uninspired and at worst insidiously dangerous. ■

“The Not Proven verdict acknowledges that there is insufficient evidence to convict beyond all reasonable doubt but asserts a suspicion or belief of guilt”



The Bastard Verdict

Andrew Bell

Arts / Law III

Adam Morrison was a Scottish lorry driver who killed a middle aged woman by the name of Bettina Adams in January 2011. He was initially convicted of causing death by careless driving,¹ but was acquitted on appeal after the prosecution was found to have made prejudicial remarks during the trial.² The comments encouraged sympathy for the victim's husband, who would be preparing for his first Christmas without his wife.³ He was eventually acquitted with the controversial verdict 'Not Proven.'

Most criminal justice jurisdictions allow for a binary result at trial – an acquittal or conviction. However, Scotland persists in differentiating itself from most other states, by subdividing the former into 'Not Guilty' and 'Not Proven.' The Not Proven verdict acknowledges that there is insufficient evidence to convict beyond all reasonable doubt but asserts a suspicion or belief of guilt.⁴

While it is isolated to the Scottish jurisdiction, it regularly features at the conclusion of Scottish criminal trials, consistently constituting between one fifth and one third of all acquittals.⁵ More than a thousand people are processed as Not Proven every year.⁶ This essay will argue that intuition should have no place in the allocation of criminal guilt. It will consider the conflicting arguments for its abolition and retention in Scotland, as well as arguments for its instatement in the United States and England.

The third verdict gives license to juries to express a speculation about the probability of guilt. It allows juries to impose an implication of guilt that carries some proportion of the stigma of a guilty verdict, yet is only founded on fallible and often prejudicial emotive inferences.

The standard is speculative because it is difficult to index to evidence.⁷ It is based on an inference about the reality of the situation that excuses the fact that there are reasonable doubts to be had about the guilt of the accused. The *Morrison* case illustrates a factual scenario that is susceptible to a Not Proven verdict – a demonised accused and a victim who easily invokes sympathy. The court transcript showed this opinion from the prosecution: 'Personally, I think if you don't think the evidence takes you beyond a reasonable doubt, if you have a reasonable doubt, then you should have the courage to acquit him properly, call it not guilty.'⁸ While the verdict was ultimately unaffected by the prejudicial comments, the circumstances of the trial show a correlation between emotionally intuitive facts and the employment of the Not Proven verdict.

It also raises problems for consistency and accountability in sentencing, where it is much more difficult to delineate what constitutes a suspicion of guilt.⁹ This problem is compounded by the fact that the sentencing option has been primarily developed in the common law rather than through statutory codification.¹⁰ It further obstructs the presumption of innocence,¹¹ implying that the courtroom is *intending* to reach the burden of proof, rather than objectively applying the law to the facts in order to reach a just result.

The use of this verdict is regularly controversial, a reality which is a symptom of its dysfunction. This is because it delivers the frustration of imperfect vindication for both the prosecution and defence, leaving both in limbo between success and failure. The only accessible poll on public perception of the justice system's verdict options found that satisfaction with the Not Proven verdict is extremely low from the perspective of the public and victims.¹² It is seen as beneficial to guilty parties.¹³

The debate is enlivened when trials like Adam Morrison's end in disappointment. The BBC epitomized this debate with its documentary 'That Bastard Verdict',¹⁴ referring to the colloquialism that has long plagued the standard in Scotland. In fact, the standard is associated with a string of undesirable epithets such as 'second class acquittal'¹⁵ and 'that ambiguous and indefensible verdict'.¹⁶

While the verdict is intended to be a clean subdivision of the 'acquittal' option (because both have the same legal consequence, 'equally' indicating an insufficient standard of evidence), a study conducted in Scotland has demonstrated that the proportion between conviction and acquittal changes when the option is introduced.¹⁷ The study considered two factual scenarios – the first was a sexual assault where the defence of consent was raised, and the second an aggravated assault in a bar where the defence argued that there was a case of mistaken identity.

Sexual assault cases are unique in considering the Not Proven verdict. They are particularly difficult to assess in terms of evidence, and are in many cases dependent on the predisposition of jurors to sympathise with either party. Where the national average of Not Proven verdicts is 18% of acquittals, the figure leaps to 25-35% for sexual assault cases. The reasoning for this appears to be two fold: it is easier to cast an intuitive implication of guilt on accused sex offenders, and the evidence in these trials is often difficult to assess between the competing assertions between the parties (especially where the defence of consent is at play).¹⁸

The mere provision of a third option to jurors changes the rate of acquittal. An analogous situation involves prosecutions for murder that pursue numerous classifications (such as first, second and third degree murder) for the same offence. The myriad offers guide the jurors away from the lower end of the spectrum, making acquittal less likely.¹⁹

A similar strategy was employed in the 1970s in America to mediate the unacceptably high success of insanity pleadings. In addition to Guilty, Not Guilty, Not Guilty by Reason of Insanity, the legislature introduced 'Guilty But Mentally Ill' to curb the number of jurors who overplayed the role that mental illness had.²⁰ Surprisingly, it did not change the rate of suc-

cessful mental illness pleas, but instead dropped the rates of successful convictions. Again, this suggests that the jurors who would have convicted without the extra option were implicitly guided towards acquittal by the larger number of options.²¹

In the aforementioned study, cases that relied on evidence of moderate strength had drastically lower conviction rates because jurors felt more comfortable applying a standard that recognised a degree of ambivalence.²² The responses from the test subjects implied that the compromise inherent in Not Proven provided an easier route to a decision. This is picked up in the court transcript of the *Morrison* case: 'juries sometimes feel that Not Proven is sort of a safe option. It's a human nature thing that, when you've had two contrasting versions of events, you conclude that the truth must lie somewhere in the middle'.²³

A further salient problem with the standard is that it is even more difficult to determine than the standard of 'beyond all reasonable doubt'. Empirically it has been found that the Scottish system is more poorly understood than the simple binary,²⁴ which may be partly explained by its absence from popular culture. Juries more regularly ask for clarification of the meaning of the standard.²⁵ There is usually little understanding of the standard prior to entering the courtroom.

The show trial of Casey Anthony, a mother who was accused of murdering her young daughter, generated calls for the verdict to be instated in the United States of America. The public was furious with her acquittal after intense media scrutiny had painted her as a neglectful and unfit mother.²⁶ The sentiment was neatly summarised in the title of the Australian news report, 'Most Hated: Casey Anthony, dubbed the most hated woman in the US, after being found not guilty of murdering her daughter'.²⁷ Marcia Clark, the prosecutor in the OJ Simpson trial suggested that Not Proven was the ideal verdict for the situation: 'It's one way of showing that even if the jury didn't believe the evidence amounted to proof beyond a reasonable doubt, it didn't find the defendant innocent either. There's a difference...If I'd been in that jury room, the vote would have been 11 – 1. Forever'.²⁸

It is these types of trials that generate rage – trials that stoke passions and invite character judgments, where



the evidence is on the margins of the standards and the public interest is high. This is where the standard would allow the jury to give in to their intuition or preconceptions about the guilt of the subject, in the same way that the public had made a character judgment about the inadequacies of Casey Anthony's parenting. This is evidenced by the fact that violent crimes receive starkly higher rates of Not Proven acquittals, which attract the verdict at four times the rate for non-violent offences.²⁹

There are calls to instate the standard in jurisdictions outside Scotland. Bray argues that the entire pool of acquittals is tainted by the certainty that a large number of acquittals are found due solely to insufficient evidence.³⁰ This policy, he argues, would allow us to differentiate unproven cases from 'true' acquittals, fully vindicating those that are found Not Guilty.³¹ This argument appears persuasive, but is premised on the idea that the jury can accurately separate those groups. They cannot, because they are speculating as to potential evidence rather than making a judgment based on the evidence before them.

It is also argued that an increased rate of Not Proven verdicts in sexual assault trials is a benefit for women, allowing victims who secure the verdict to be partially vindicated by the sympathy of the jurors.³² This would increase the number of women who go to trial and soften the fall of the acquittal. Bray notes that the standard here is 'most dangerous yet most needed' because of the 'devilish combination for an acquitted person who is factually innocent, or for a victim whose rapist escapes punishment because of an intermediate verdict.'³³

It is clear why anger follows this verdict. It does not please the victim, who has their grievance confirmed but is denied any remedy. It is worse for the accused, who now bears a quasi-conviction without the corresponding basis in evidence. The justice system should indeed strive for clarity and accuracy, but the Not Proven verdict can only vindicate intuition and personal speculation. ■

Dirty Money: Why the High Court Got it Wrong

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In December 2013 the High Court struck down a key provision of New South Wales Premier Barry O'Farrell's tough anti-corruption campaign finance laws as a burden on freedom of political communication implied in the Commonwealth Constitution. The impugned section banned all political donations from entities that were not from an individual enrolled to vote, in other words, corporations, unions and lobby groups. The Court's reasoning, without recognising any right to free speech for corporations, nevertheless has created a precedent for protecting the participation of corporations and other artificial entities in politics. This participation extends to the donation of money to political parties. Shortly afterwards a fresh suite of damning evidence has pointed to the pervasive influence of corporations and unions on political parties and candidates at both a state and federal level.

The Australian people are understandably concerned about the corrupting influence of money in politics. Within the past six months an ICAC investigation into corrupt conduct concerning Australian Water Holdings Pty Ltd has toppled Premier Barry O'Farrell over the receipt of a \$3000 bottle of Grange, Fairfax media has alleged that Treasurer Joe Hockey has attended meetings with business people and industry lobbyists in exchange for tens of thousands of dollars in donations to the Liberal Party,¹ a \$60,000 discretionary scholarship given to Prime Minister Tony Abbott's daughter has sparked controversy and former High Court Judge Dyson Heydon has been appointed to lead a Royal Commission into Union Corruption. While the issue with many of these allegations is the secrecy surrounding them, thus a lack of transparency and accountability, they also raise questions about how political donations give corporate or industry lobby groups access to the nation's decision makers. A donation to a political party in the age of mass media signifies more than an expression of sup-

port or even the desire to enable a party to promote their platform – because parties depend on these donations it has become a way of making the donor's interests a political priority.

The Election Funding Expenditures and Disclosures Act

The controversial s 96D was one part of a package of reforms brought about between 2010-2012. The *Election Funding Expenditures and Disclosures Act* ('EFED Act') 1981 (NSW) was amended to include a number of provisions aimed at containing the corrupting effect of political donations; for example a cap on the amount of money that can be donated,² a cap on the amount which can be spent on political advertising,³ and a public annual declaration by parties and third-party campaigners of all donations and expenditures.⁴ In addition to this, the Act contains a list of prohibited donors such as tobacco companies, property developers and gambling and alcohol entities,⁵ whose interests are apparently deemed too contrary to the public interest to be allowed to influence political decision making. In 2012 Barry O'Farrell's government introduced an amendment to the *EFED Act* by including s 96D which effectively prevented political donations from any source other than an Australian voter.⁶ Unions NSW, one of the principal targets of the legislation, promptly challenged the constitutionality of this legislation in the High Court in *Unions NSW v NSW* ('Unions NSW'),⁷ arguing that s 96D burdened freedom of political communication.

Freedom of Political Communication

As the Australian constitution contains no express protection of freedom of speech, as is the case in the United States' Bill of Rights, the implied right of freedom of political communication is a judicial creation.

“Therein lies the conundrum; political parties depend on money from unions, corporations and lobby groups, therefore to restrict these donations is likely in the short term to hinder political parties’ ability to advertise...”



Brought about by the Mason Court in *Australian Capital Television v Commonwealth* ('ACTV')⁸ the right of freedom of communication was never expressed as an individual right, but rather a necessary incident arising out of the system of representative government provided for by sections 7 and 24 of the Commonwealth Constitution.⁹ In other words, a system of democratic sovereignty of the people expressed through their elected representatives requires freedom of communication.

This formulation has the advantage of focusing not on individuals but rather frames the freedom as a restriction on legislative power.¹⁰ Rather than individuals and other entities enjoying a bubble of civil liberties upon which the legislative powers of Parliament cannot intrude, the freedom protects only what is necessary for our system of representative government.

The Lange Test

A particular piece of legislation is an unreasonable burden on freedom of political communication, according to the test taken from *Lange v Australian Broadcasting Corporation*¹¹ and modified in *Coleman v Power*¹², if:

The law effectively burdens freedom of communication about political matters in either its terms, operation or effect;

The law is not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

While from the beginning the High Court took care to distinguish the Australian freedom from its stricter United States counterpart, in this case the contro-

versial *Citizens United* decision in the United States Supreme Court was the elephant in the room. In *Citizens United*, the Supreme Court held by a majority of five to four that the first amendment guarantee of the right of free speech extended not only to natural persons but also to corporations.¹³ The reasoning of this case was the basis of the plaintiffs' argument in *Unions NSW*, who argued first that the making of a political donation is itself a form of communication, and secondly, that communications from corporations and other entities should not be treated differently simply because they are not natural persons.¹⁴

The court rejected the plaintiffs' argument because it blurs the distinction between individual rights and a protected system of representative government in which political communication is a guarantee of popular sovereignty.¹⁵ However the Court's application of the *Lange* test does protect the role of corporate entities in politics. The court held that the relevant burden on political communication (as per stage one of the *Lange* test) was not on corporations but on political parties themselves.¹⁶ The plaintiffs led evidence showing that from 1 July 2008 to 30 June 2011 over 98% of donations to the ALP NSW, 75% of donations to the Liberal Party and 90% of donations to the National Party were not from individuals,¹⁷ demonstrating the profound link between corporate donations and the power of political parties to engage in mass media advertising campaigns.

Therein lies the conundrum; political parties depend on money from unions, corporations and lobby groups, therefore to restrict these donations is likely in the short term to hinder political parties' ability to advertise, yet it is these donations which give corporate or union agendas leverage over political parties. To look at the short term impact of the legislation misses the point; the provisions are designed to remedy a structural inequality in democratic participa-



tion, and rather than weaning parties off corporate donations, forces them to go cold turkey. While the degree of influence accruing to one corporation may be limited by spending caps, ultimately corporations still have a greater capacity to spare the \$5000 to make a political donation than the average family. An obvious corollary of this is the privileging of interests that are backed by money, over interests that are not.

Given the dependence by parties on corporate or union money, measures to disrupt this relationship should be seen as directed towards the legitimate purpose of enhancing and equalising democratic participation. Yet the court, by reference to the second limb of the *Lange* test, could not find any legitimate anti-corruption purpose to s 96D.¹⁸ The court reasoned that corporations, unions and other entities that are not individuals have a legitimate interest in political matters.¹⁹ If, the court reasoned, the issue was the disjuncture between the interests of the board of a corporation and its shareholders, the law could require the assent of shareholders in order for the corporation to make a political donation.²⁰ Nor, the court adds, are the interests of corporations or unions generally equated with those of prohibited donors, such as tobacco or gambling-related entities.²¹ Thus the court expressly cemented the role of corporate entities in the political landscape. Although finding that the chief burden of s 96D fell on political parties and not corporate entities, the legitimacy of the purpose sought to be achieved by the provision was compromised due to the restriction it placed on corporate entities.

Corporations are by their very nature artificial legal entities usually created for the express purpose of maximising profit. It is this profit which makes it easier for artificial entities rather than individuals to fund political donations, and to thereby promote

their interest in profit creation. It can be argued that charities, human rights lobby groups and unions also fit this description, and collectively they can more effectively promote a legitimate political interest. The separate opinion of Keane J observed the flexibility corporate structures which have been employed by sporting, religious, recreational and charity organisations, all of whom have legitimate interests which deserve political traction, to justify his position that their participation is an important aspect of freedom of political discussion.²² Nevertheless while an incorporated body may be a means to one particular end for some, an end such as making profit, or changing an aspect of education, healthcare or immigration policy, or even promoting human rights, it is ultimately the individuals behind these entities who must live with the decisions that politicians make, and these individuals' interests are cannot be fully or effectively represented by a corporation.

These individuals do not streamline their political interests into one issue – they have children to feed and educate, a job to keep, bills to pay and when they vote they have to make a compromise when deciding which of these interests to prioritise or how they are to be best served.

In a state riven by the corrupting influence of money in politics it is legitimate for the Parliament to separate the two. The participation of corporations, unions and lobby groups in the particular form of making political donations should not be constitutionally protected, even, as it was in this case, in an indirect way. ■



*“If I give them blood, I will learn where my father is,
which body is his.”*

- Haisbul Islam Reaz, aged 10, whose father is presumed to have been killed in the collapse of a factory building in Bangladesh.¹

Slaves to Fashion? The Role of Public Rage in Responding to Sweat-Shop Conditions in Bangladesh

Sarah Ienna

LLB IV

In April 2013, a factory that manufactured clothes for major Western brands in Bangladesh's Rana Plaza collapsed. One thousand, one hundred and thirty-eight people were killed and more than 2000 people were injured, most of them women and some children.² Media coverage of the disaster depicted the grief and rage of those who had lost their loved ones, and presented a confronting reminder of the price of Western consumerism. Although the disaster was shocking in its scale, it was far from an isolated incident. Four hundred people were killed and 5000 people were injured in factory fires in Bangladesh from 1990–2010,³ and a further 1,400 people have been killed in fires and building collapses since 2010.⁴ These tragic incidents resulted from conditions “that no one, including the brands themselves, deny are endemic,”⁵ and have not been prevented by the principles of Corporate Social Responsibility, which emphasise voluntary self-regulation by companies, as many of the companies that sold clothes manufactured in Rana Plaza had voluntarily signed respected ethical codes of conduct.⁶ Moreover, throughout the industry such codes continue to be undermined by superficial audit inspections and aggressive purchasing policies demanding lower costs and faster turnarounds.⁷ This in turn puts pressure on factory owners to cut costs to the detriment of worker health and safety, or results in work being sub-contracted to other factories where conditions are even worse.⁸

One can ask whether or not Australian consumers and companies are complicit in the perpetration of inhumane conditions in these factories, which have been found to include conditions amounting to human rights abuses, such as the use of child labour in conditions likely to harm children's health and safety.⁹ Conditions in Bangladeshi factories are the direct responsibility of the Bangladesh government, and no Australian retailer was involved in the Rana Plaza collapse. Yet Australian consumers *are* to blame for creating demand for low-cost garments and many Australian retailers do source clothing from Bangladesh.¹⁰ Some Australian companies have recognised

this, and in response to public pressure have signed legally binding safety accords and implemented practical measures, such as setting up healthcare services in supplier factories.¹¹ However, other Australian retailers have merely signed a non-binding agreement that was developed without union involvement and has been widely criticised.¹² This unwillingness to take legally binding action demonstrates the need for a legislative response. For other issues, such as concerns about ‘bikie wars’, drive-by shootings or one-punch deaths, governments have been quick to react to public rage and implement reforms, although the efficacy of those reforms has been controversial.¹³ However the sustained, enraged public reaction necessary to create momentum for reform appears to be lacking for this issue. Whilst this remains the status quo, it is the vulnerable workers in overseas factories who suffer from our demands for bargain fashion.

Testing the waters – the case for reform

Attempts at legislative change to address this issue are not unprecedented. The Australian Democrats Party tried to enact the *Corporate Code of Conduct Bill* in 2000 and 2004, but was unsuccessful on both occasions. The Bill, as revised in 2004, would have extended the application of existing Australian statutes such as the *Racial Discrimination Act 1984* (Cth) to corporations operating overseas and also created requirements for Australian corporations to pay all workers a living wage, avoid benefiting from forced or child labour and take reasonable measures to promote employee health and safety.¹⁴ However, the Bill was criticised as being largely “aspirational”, and there were problems with certainty and enforcement.¹⁵ Therefore although the Bill failed, this does not prevent all future legislative reform. Australia is in a unique position to create offences for corporate conduct due to the “progressive” principles of corporate liability enshrined in the *Commonwealth Criminal Code Act 1995* (Cth).¹⁶ Furthermore, as demonstrated by the High Court's decision in *XYZ v the Commonwealth*,¹⁷ the external affairs power granted by s 51(xxix) of the

Constitution allows the Commonwealth Government to make laws regulating the conduct of Australian persons, which arguably includes Australian corporations, in places geographically external to Australia.¹⁸ Therefore, drawing on the suggestions of scholars such as Cooney,¹⁹ appropriately drafted offences should be created to prohibit Australian corporations, that is trading and financial corporations formed in Australia, from continuing to source garments from factories that perpetrate the human rights abuses of child labour, forced labour (slavery) and torture, without taking adequate measures to prevent the abuses. If abuses cannot be prevented, corporations should be punished for continuing to trade with such suppliers.²⁰ This conduct could be attributed to the corporation when a high managerial agent or the board of directors had knowledge, was reckless to, or ought to have known about these abuses, or if it can be proven that there existed a corporate culture that permitted non-compliance with human rights, or that the corporation failed to maintain a culture that required compliance with human rights.²¹ Sanctions for breaches of these offences could focus on fines and remedial measures, so that abuses do not recur.

Although corporate criminal liability is a vexed legal issue, and the offences involve examining the conduct of overseas contractors and subcontractors, obligations to ensure that sub-contractors comply with codes of conduct are not unprecedented and corporations need to ensure that product quality and safety standards are upheld through supply chains.²² Thus, as scholar Vujcich argues, it would 'not be unrealistic for corporations to ensure that human rights...are also observed.'²³ The proposed reforms are also confined to offences 'recognised by the overwhelming majority of states as egregious labour abuses',²⁴ although the *United Nations Convention Against Torture* defines torture as perpetrated by a state or its agent,²⁵ and these offences would apply to non-state actors. Therefore, whilst the reforms may be criticised as a lowest common denominator approach, this largely avoids the difficulties and political complexities inherent in applying Australian labour standards to third countries. Additionally, the criminal law is an appropriate vehicle for deterrence, providing accountability and censuring sweatshop conditions.²⁶ The possibility of criminal prosecution may also create incentives for corporations to engage in internal monitoring, potentially changing corporate cultures and producing long-term results.²⁷

However, the difficulties in obtaining evidence and the lack of corporate prosecutions under the *Commonwealth Criminal Code* demonstrate the need for complementary regulatory provisions to facilitate improvement of poor working conditions falling

below human rights abuses.²⁸ Thus, relying on the corporations power in s 51(xx) of the Constitution,²⁹ the Government could create statutory requirements for trading and financial corporations incorporated in Australia to carry out comprehensive audits of contractors and sub-contractors. Corporations could also be required to report on the use of contractors, the treatment of workers, and policies implemented to address poor working conditions, and be subject to fines if the corporation fails to report or creates a misleading or deceptive report.³⁰ Whilst some corporations have released such information voluntarily in response to consumer pressure, others have continually refused,³¹ demonstrating the need for legislative requirements. The Government could also create incentives for Australian corporations to sign applicable legally binding safety accords, for example by providing subsidies to assist in the implementation of those accords.

Despite these possible solutions, there is little discussion of any law reform on this issue and the Australian Government may be reluctant to act. As Vujcich observes, corporations are 'a powerful constituency to which election-minded lawmakers typically take heed'³² and it is these very companies who have a disincentive to support legislative reform. Moreover, the recognition that the Australian market is only one part of garment factory operations creates less of an impetus for the Government to take the first step. Any potential response may also raise questions of political sensitivities. Garments constitute nearly 78 per cent of Bangladesh's manufacturing export income, and many factory owners wield considerable political influence in Bangladesh.³³ Moreover, even though such reforms would only apply to *Australian* corporations, governments may react adversely to allegations that human rights abuses are being perpetrated on their territory. However by only punishing corporations for the most egregious abuses recognised as such by most nations, the proposed reforms take an approach that avoids treading on political sensitivities.³⁴

Rage: the driver of reform?

Notwithstanding these considerations, public pressure could lead the Government to put legislative reform on the agenda, or take other measures such as entering into diplomatic talks with the Bangladeshi government with the aim of ensuring higher working standards.³⁵ However, unlike other 'law and order' issues that have evoked public rage and led to legislative change, the plight of workers in factories far removed from Australian shores is difficult to expose and easy to forget. A push for reform also seems unlikely judging from a 2007 Brotherhood of St Laurence survey that demonstrated the 'overriding view that most con-



sumers do not care where and how their garments are sourced, or about the labour conditions under which products are manufactured.³⁶ Furthermore, before the Rana Plaza collapse, news sources in America and Australia published images of enraged Bangladeshi workers protesting against abusive, unsafe conditions.³⁷ Yet their anger and desperation failed to elicit a response from Western consumers.³⁸

However, the reaction to the Rana Plaza disaster suggests that attitudes may have changed. Public outcry and labour and human rights groups have led some Australian companies to release information about their suppliers, institute services for workers, and sign the Bangladesh Safety Accord – a legally enforceable agreement that involves local and global unions, mandates independent safety assessments, obliges retailers to pay for repairs, and gives workers the right to stop work if conditions are unsafe.³⁹ This demonstrates that strategic lobbying and public pressure can make an important difference,⁴⁰ and that some Australians *do* care, with some going so far as to protest against the Just Group, which to date has not signed the Bangladesh Safety Accord.⁴¹ However, it took a tragedy of immense scale to spark action. As Cotton On Senior Communications manager Greer McCracken has observed, it was not until the Rana Plaza collapse that there was a ‘turning point ... It’s a sad fact but this was a really big catalyst for change in the industry.’⁴² These observations are supported by the contrast between the 2007 survey, and a 2013 Oxfam Australia survey conducted after the Rana Plaza disaster. The latter survey found that 71 per cent of respondents were concerned about the conditions in clothing factories overseas and 81 per cent believed that Australian clothing companies have a responsibility to ensure that overseas workers are paid a wage sufficient to support their basic needs.⁴³ However, this concern has not translated into a sustained call for a legislative response to ensure that all Australian companies have legally binding obligations. Moreover, according to a worldwide survey conducted in 2013, although 73 per cent of Australian respondents were willing to pay more for ethically made clothes, the majority held local authorities responsible for poor conditions, rather than the consumers who demand cheap products.⁴⁴ In the face of such attitudes, and when the reminders of the tragic cost of consumerism disappear from media headlines, it is important that

the public does not lose sight of the catalyst for rage. If they do, legislative reform seems even more elusive.

Reaching the boiling point

Over one hundred years ago in New York City, 146 garment workers employed by the Triangle Shirtwaist Company were killed when their factory caught fire.⁴⁵ American consumers were made aware of the horrendous conditions under which their clothing was being manufactured and in the wake of public rage, the American government implemented regulations to ensure health and safety.⁴⁶ In contrast, the deaths of over a thousand Bangladeshi factory workers and the horrific and lasting injuries of many more provoked a shocked response from the Australian public. Yet this has not resulted in calls for the Australian Government to enter into diplomatic talks to improve conditions, nor calls for legislative reform to ensure that corporations are legally obliged to undertake audits and reports, and are prohibited for sourcing products from factories that abuse human rights. However, this does not mean that change can never occur. Public reaction and lobbying from human rights groups did lead some Australian companies to sign the legally binding Bangladesh Safety Accord, demonstrating the power that public rage can have in creating change. However, as news about abusive conditions and worker protests disappear from headlines, it becomes all too easy to ignore the three words, ‘made in Bangladesh’, that provide the only clue to the reality of a garment’s creation. The direct responsibility to ensure that overseas workers are protected lies with the Bangladesh government. Yet, if Australians fail to mount a sustained, enraged campaign for change, we will continue to be complicit in the horrendous conditions that workers endure to make the garments that we may be wearing right now. We have the power to push for change, yet because of our apathy and inaction it may never be a reality. *That* is something worth being angry about. ■

Poem

Jayne Hardy

JD III

What might we learn from things unseen?
Things passed by,
By our excuses, our perceptions of time.
“I have no time” is our catch-cry,
But it is time we cried over greater things,
Things unseen, overlooked,
At times illuminated by the faithful and more so,
The faithless.

We might learn a thing or two from the seemingly insignificant
Quietly living near us and across the globe.
In weakness, contemplate the little:
Hadfield’s lichen, a symbol of quiet,
Robust survival over centuries.

We exist in a world created in wonder and grace
But face our own limited worlds with ignorance,
Arrogance: senses for ourselves,
Our own races,
Familiar paces.
It is a paradox of a peculiar kind,
An existence so connected, yet separated – Isolated.
We reach a lacuna of unfulfillment,
Mediocrity. Emptiness.
The black dog growls to be fed,
A dark cloud heavy within us, until We act to evaporate it.

What do we need in our vessels,
In a world full of knowledge, rituals, law?
Knowledge that often falls
Short of wisdom, justice, mercy, forgiveness,
And love.

Illumination takes courage,
Using the tools so generously bestowed upon us,
The armoury fastened to us,
The weapons placed in our hands.

We are able to walk with purpose.
Use words of encouragement,
Those that will illuminate people in our presence,
Starting here, in our neighbourhoods, in our homes.
The same ones who will benefit from our own revelations,
Our support, steadfastness and strength.
Only then can we grow up into a better kind of knowledge
And into a stature of a more glorious, magnificent kind.



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Natalie Czapski

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Legal Education in the Australian Settler Colonial Context: Decolonising the Law School

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Reasonable Persons and Sexual Assault: Law, Exclusion and Violence

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Legal Aid's Undefended Hearings Policy

Richard Schonell

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Deborah White

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The Bastard Verdict

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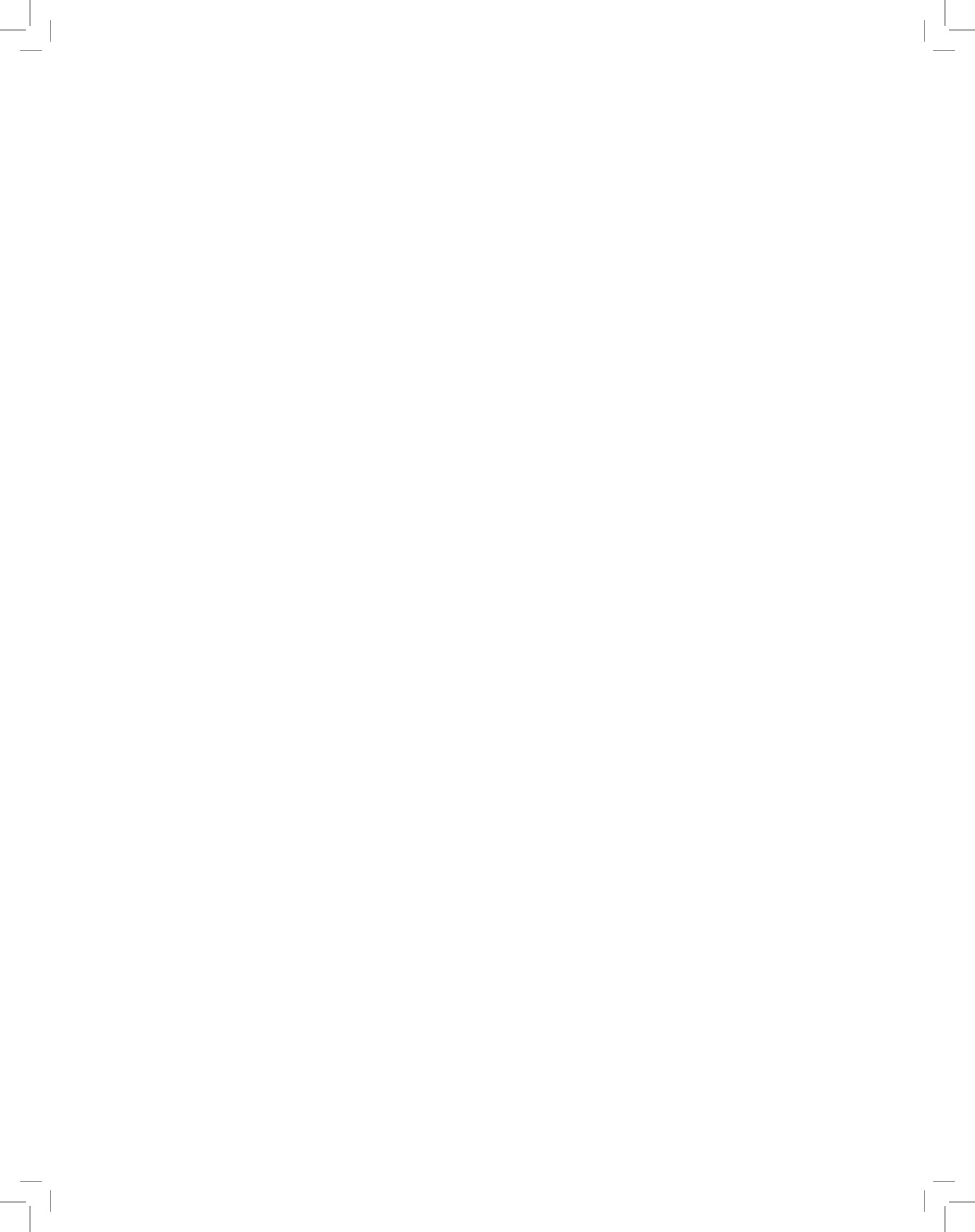
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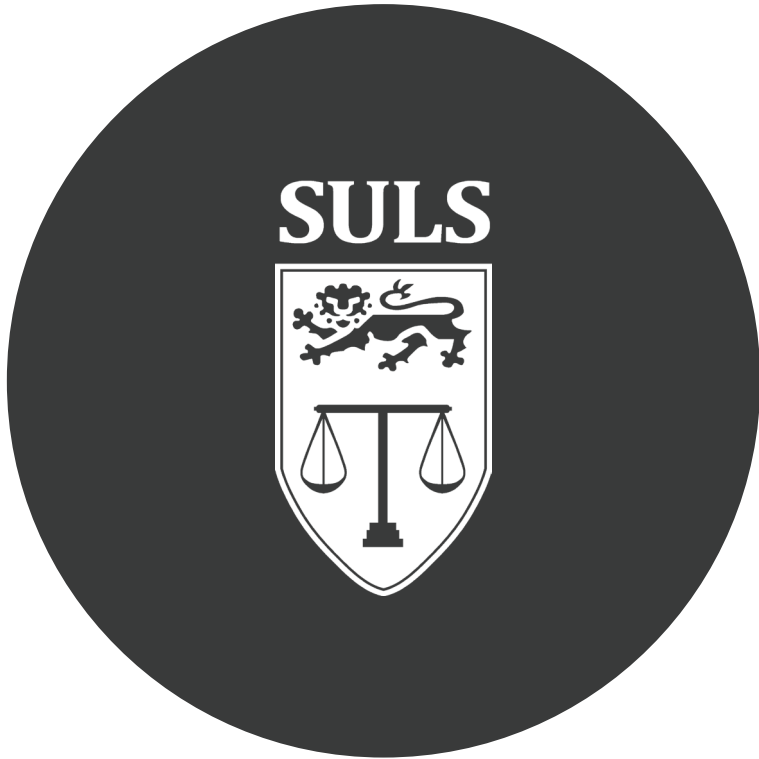
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