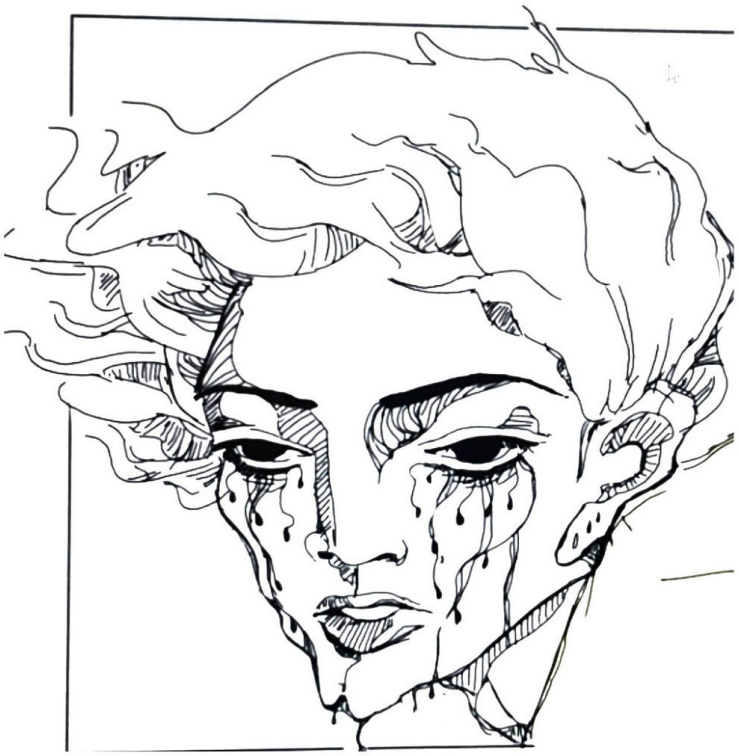
Dissent



Reform and Resistance

Social Justice Journal
Sydney University Law Society

2020

Acknowledgement of Country

The University of Sydney is built upon the stolen land of the Gadigal People of the Eora Nation. Their sovereignty was never ceded. The system of law that we study and participate in has continuously failed First Nations communities. Throughout this nation's history, and to this very day, the law has been manipulated to become a vehicle for dispossession, violence and colonial rule. The notion of 'reform' in a legal context is not foreign to the First Nations Community. It has long been a deceptive concept, used by politicians and jurists alike to drown out voices that have resonated across these lands for time immemorial. It is our hope that the future sees an end to the corruption of law and the concept of 'reform' — that it is finally used to address the continuous wrongs imposed upon First Nations Communities. We are certain that, until this happens, resistance will remain as proud and fierce as ever. This always was, and always will be, Aboriginal Land.

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Editor-in-Chief's Foreword

Pranay Jha

It is a common belief now that the events which have unfolded around the world this year have caused many of us, particularly in law, to open our eyes. The year began with the most visceral manifestations of the climate emergency witnessed in our lifetime. That was followed by the onset of a historic pandemic that has exposed the inadequacies of health care and social welfare across the world. And, in the middle of the COVID-19 crisis, the Black Lives Matter Protests have reignited, causing many in the West to re-examine our attitudes towards the police and, more broadly, the state's monopoly on force.

But perhaps, it is misleading to suggest that our eyes have only just opened. The astute activist reading this journal would be quick to point out that many of the phenomena listed above are not novel creations of 2020 — they have been festering for decades, if not centuries. Accordingly, it may be more accurate to suggest, in Malcolm X's words, that we are finally beginning to see that which, before, we were merely looking at. Problematically, lifting the voyeuristic veil through which many law students previously observed the world removes the barrier between us, and a rather vexing reality. There are a plethora of social issues before us, and only a limited number of resources through which they can be addressed. Given that, the question of reform, resistance or something in between has become increasingly relevant.

The diversity in social issues addressed by authors in this year's Dissent, is reflective of the aforementioned reality. The existential anxiety of the climate emergency has led many to discuss resistance and reform in the context of environmental policy. Others have tapped into the trend of mental health awareness, to question the adequacy of mental health legislation in Australia. The issues covered by our authors have not been limited to Australia, or even the West. Global protest movements have been placed under the microscope, challenging the compatibility of resistance with reform.

It is my belief that these articles have captured the historical context in which they have been written. We have all experienced weeks where decades have occurred. I hope that when future versions of ourselves look back at the 2020 edition of *Dissent*, answers have been found to the questions we have raised.

I should conclude my foreword by thanking Dr Coel Kirkby for providing his profound thoughts in the Academic's foreword this year. I would also like to thank all the contributors and my fellow editors, who have come together to produce a journal of which we can be proud.

Academic's Foreword

Dr Coel Kirkby

I am honoured to write the foreword to this year's *Dissent* on 'Resistance and Reform'. We are now in the middle (or start, or end) of a global pandemic after a summer of great fires that burned through most of our continent's forests. At times like these even a powerful word like 'dissent' seems not enough to express our desire for a better world. But each article in this issue shows different ways we can bring about the world we want through critique and action.

Dissent is ever-present in critical thinking about law. As the pandemic closed down the University of Sydney earlier this year, my history of legal thought class took consolation in philosophy by looking at how a pandemic threatened classical Athens and its laws.

In the year 430 BCE the plague came to Athens. Her citizens were all crowded within their high stone walls as the Spartan army pillaged outside. Thucydides, the exiled general turned historian, recounted the horrors of the plague—an uninvited guest accompanying overcrowding and hunger in the besieged city-state.

The plague was truly democratic: it did not discriminate by age or health or sex or wealth. All were equally vulnerable and all suffered equally. The plague's greatest harm was to the laws of Athens. 'For the catastrophe was so overwhelming,' wrote Thucydides, 'that men, not knowing what would happen next to them, became indifferent to every rule of religion or of law.'

This began a period of what he describes as 'a state of unprecedented lawlessness.' People did not know their fate since they might die at any moment or someone else might die and leave them a great fortune. So people acted according to their desires without any concern for honour or the future.

No fear of god or law of man had a restraining influence. As for the gods, it seemed to be the same thing whether one worshipped them or not, when one saw the good and the bad dying indiscriminately. As for offences against human law, no one expected to live long enough to be brought to trial and punished: instead everyone felt that already a far heavier sentence had been passed on him and was hanging over him, and that before the time for its execution arrived it was only natural to get some pleasure out of life.

Our pandemic has not degenerated into this cruel spectacle. In fact it is remarkable how orderly the mass lockdowns have been with almost everyone taking care for each other before any laws were passed to enforce social distancing. This makes the recent police breakup of student protests on campus all the more egregious—a brutal response to careful and caring citizens and scholars.

Many authors in this issue of Dissent take up the theme of dissent as resistance to unjust government acts and laws. Rebekah Oliver writes about online resistance against citizens who aim to resist unjust governments, while Jasmine Crittenden explores press freedom in Australia without any such constitutional right. Deaundre Espejo takes us through the harrowing protests against climate change like Greg Rolles' self-suspension over a coal railway. Rolles would advance an old defence—the extraordinary emergency defence—in a new form to argue that such protest is necessary because of the government's failure to act on climate change.

Moving across the seas, Aanya Das retells the failure of criminal law reforms in Indian to deal with sexual violence against women. In spite of this failure, women continue to lead popular protests to find some measure of justice for survivors beyond the courts. Zachary O'Meara recounts the history of the Hong Kong protests as a great success that provoked harsh new laws to silence a nascent democratic movement. We also hear from Jenny Chiu about migrant workers in Singapore whose precarious legal life is exacerbated by Covid-19 restrictions. More broadly Jeffrey Khoo questions the use of the rule of law in economic development. While it seems to promise progress, its actual use seems consistent with constituted domination of developing states who are denied development on their own terms.

As the charred bush slowly greens with spring rains, several authors return to the question of climate change and our precarious environment. Nicholas Betts tells us about the emerging right to nature found in Bolivia, New Zealand and India. He argues for an Australian right as a form of legal guardianship to 'advance both climate and racial justice.' At a more philosophical level Khanh Tran Nguyen talks about theological approaches as a prelude to a broader political coalition to act effectively on climate change. Our relationship to land is also central to Tom Dews' critical study of strategic litigation on Aboriginal land rights. The land rights movement won some major victories, but in most places its business remains unfinished and ensnared in an increasingly complex and contested statutory regime.

The last group of articles take up how Australian criminal law and social regulations might help us create the society we desire. Murray Gatt tells us about how New South Wales and other states regulate infant male circumcision. While women's sexual lives have long been heavily regulated, men are only now experiencing new rules that also create new challenges for intersex people. In the aftermath of the High Court's decision regarding Cardinal George Pell, Gabbie Lynch writes about how law can help heal survivors of child sex abuse within a criminal justice system focused on the accused. Genevieve Couvret tells us about the construction of mental illness and its consequences in criminal law, while Thomas Foutiou concludes with an article on homelessness as a myth of individual failing rather than political choice.

Taken as a whole these remarkable articles set out the challenges facing Australians who desire a better world at home and abroad. The authors give us hope that dissent is not simply a refusal to obey (though it is that), but also a practice to generate new possibilities for action in our troubled world.

Part I

"YOU TAUGHT ME PEACEFUL PROTESTING WAS FUTILE": AN EXAMINATION OF THE HISTORY OF PROTESTS AND HUMAN RIGHTS IN HONG KONG

Zachary O'Meara[1]

I Introduction

On 1 July 2019, protesters invaded the National Parliament of Hong Kong.[2] In doing so, they broke into the Legislative Council, removing Chinese national flags and spray-painting over any references to the People's Republic of China. In particular, protesters graffitied the quote, "you taught me peaceful protesting was futile",[3] throughout the building.[4] On the 22nd anniversary of the changeover of governments between Britain and China, this event symbolised one of the highpoints of political tension among Hong Kong dissidents. It remains one of the most radical acts of protest and defiance in the city's history.[5] For political activists, all previous attempts at achieving democratic reform had been unsuccessful. Protesters currently face unprecedented levels of persecution and imprisonment for dissenting than ever before.[6] In a symbolic standoff between the power of the people and the government, Hong Kong protests highlight the struggles for human rights in the face of an authoritarian regime.

This paper begins by setting out the legal framework for the right to protest in Hong Kong. In this light, it examines the most significant protests in the city's history, highlighting the perennial contest between pro-democracy and human rights activism, and Chinese authoritarianism. Throughout this history, a trend of escalation emerges. As the magnitude and number of protests increases, so too does the level of legal restriction and new criminal sanctions for political dissenters. Despite the threat of criminal prosecution, protesters continue to hold public demonstrations and mobilise in unprecedented numbers. As the international community continues to watch on in anticipation of the Chinese Central Government ('CCG') response to the events in Hong Kong, this paper focuses on the role of human rights in the history of the Hong Kong protest movement. For the people of Hong Kong, protesting has become the *modus operandi* for demanding reform and resisting the encroachment of an undemocratic and authoritarian government. However, as dissidents face greater persecution than ever before, there is significant uncertainty as to the legal safeguards and future for protests in the city.

1 Juris Doctor III, The University of Sydney. The views expressed in this paper are those of the author. They do not purport to reflect the opinions or views of the Sydney University Law Society. The author appreciates the comments from Associate Professor Bob Breen OAM and Richen Mojica, who provided thoughtful feedback and advice on this piece.

2 Shibani Mahtani and Anna Fifield (2019), 'For China, a growing conundrum: What to do with Hong Kong?' In *Washington Post* (July 2, 2019), <https://www.washingtonpost.com/world/asia_pacific/for-china-a-growing-conundrum-what-to-do-with-hong-kong/2019/07/02/ff761682-9c37-11e9-83e3-45fded8e8d2e_story.html>; Joshua Wong (2019), "Standing up for Hong Kong is standing up for human rights", In *The Telegraph Online* (2019, July 5).

3 Twitter (2019) '@Sanzhao4' (July 1, 2019, 7:24 pm), <https://twitter.com/sanzhao4/status/1145881009507848192>.

4 Mahtani and Fifield (n 2).

5 Brendan Clift (2019), 'Hong Kong: The Canary in the Coal Mine', In *Pursuit*, The University of Melbourne (20 August 2019), <https://pursuit.unimelb.edu.au/articles/hong-kong-the-canary-in-the-coal-mine>.

6 Ibid.

II The Right to Protest and the Importance of Human Rights

The right to protest encompasses several distinctive human rights. It includes the freedoms of assembly, association, and expression, all of which are fundamental to the political discourse between civil society and government.[7] For the people of Hong Kong, this mechanism is crucial in communicating issues of social, cultural, and political significance.[8] Inherent in the right to protest is the concept of universality: the quality of being shared by all people.[9] However, the national context shapes the degree of permissibility, frequency, and scale of protests.[10] In 1991, the Hong Kong Government enacted laws that protected the right to protest in the region.[11] As a result, this universal right has a longstanding tradition in Hong Kong society. However, in mainland China, the CCG notoriously suppresses all forms of dissent and public criticisms, resulting in a history of human rights violations.[12] Not least of which is the right to protest.

Under its municipal law, Hong Kong has an obligation to uphold international human rights. In 1991, the Hong Kong Government passed the *Bill of Rights Ordinance*,[13] which specified, though did not require, that all future laws be consistent with the *International Covenant on Civil and Political Rights* ('ICCPR').[14] This legislation recognised human rights as a legal bedrock to society and the basis for universal suffrage. Over the next three decades, the CCG attempted to derogate from this legal framework by redefining these rights through the introduction of new legislation. However, Hong Kong dissidents responded each time to these challenges with grassroots-organised protests. To best understand this ideological tug -of-war requires an examination of Hong Kong's modern political climate.

III 'One Country, Two Systems': The Context of Hong Kong's Political Climate

1 July 1997 is a historic day for Hong Kong. It became known as 'Establishment Day' and celebrates the exchange of sovereignty between Britain and China which formally established the Hong Kong Special Administrative Region ('HKSAR').[15] Under the Sino-British Joint Declaration, the policy of 'one country, two systems' pledged that Hong Kong could operate as an autonomous region until 2047.[16] It was also later enshrined in the *Basic Law* (the territory's post-handover mini-constitution).[17] Within this agreement, the CCG promised Hong Kong a high degree of autonomy and civil liberties, such as the rights of a free press, freedom of assembly and democratic elections.[18] Twenty-three years later, these promises remain aspirational but incomplete.[19] Despite the classification as an 'autonomous region of China', HKSAR has minimal self-governance over their institutions and engagement with

7 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into on 25 September 1991), Article 21, 22, 19(2).

8 Ewelina Ochab (2019). "Standing With the People of Hong Kong for Human Rights and Democracy, in *Forbes* (9 September 2019, 5:50 pm), <https://www.forbes.com/sites/ewelinaochab/2019/09/09/standing-with-the-people-of-hong-kong-for-human-rights-and-democracy/#3b29680e6471>.

9 Philip Alston and Ryan Goodman (2013). International Human Rights: The Successor to International Human Rights in Context (OUP), 157; Oxford Languages, 'Universality' (Oxford University Press: 2020).

10 "The Historic Right to Peaceful Protest" (2006). In *YourRights.org.uk*, <https://web.archive.org/web/20080430160441/http://www.yourrights.org.uk/your-rights/chapters/the-right-of-peaceful-protest/the-historic-right-of-peaceful-protest/the-historic-right-of-peaceful-protest.shtml>.

11 *Hong Kong Bill of Rights Ordinance*, Cap. 383, 8 June 1991, Legislative Council of Hong Kong.

12 Edward Gargan (1997), 'Right to Protest In Hong Kong To Be Cut Back', In *New York Times (1923-Current File)*. (1997, April 10); Human Rights Watch (2019), "China: Events of 2018". In *World Report*, <https://www.hrw.org/world-report/2019/country-chapters/china-and-tibet>; Hualing Fu (2014). "Human Rights Lawyering in Chinese Courtrooms", In *The Chinese Journal of Comparative Law*, *2*(2), 270–288 <https://doi.org/10.1093/cjcl/cxu014>; Yanfei Ren (2008). "When Chinese Criminal Defense Lawyers Become the Criminals", In *Fordham International Law Journal*, Vol. 32, 988-1042, <https://pdfs.semantic scholar.org/699f/f521f4fd2fc2555a8b1fdc0a421d8dd01c7d.pdf>.

13 *Hong Kong Bill of Rights Ordinance*, Cap. 383, 8 June 1991, Legislative Council of Hong Kong.

14 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into on 25 September 1991); Human Rights Watch (n 12); Gargan (n 12).

15 Public Holidays Global, 'HKSAR Establishment Day' (29 July 2020), <https://publicholidays.hk/special-administrative-region-establishment-day/>.

16 Constitutional and Mainland Affairs Bureau, 'The Joint Declaration' (1 July 2007) The Government of Hong Kong Special Administrative Region, <https://www.cmab.gov.hk/en/issues/jd2.htm>.

17 China (1991), *The basic law of the Hong Kong Special Administrative Region of the People's Republic of China*. Hong Kong: Joint Pub. (H.K.) Co (' *The Basic Law*').

18 Clift (n 5); Heiler Cheung and Roland Hughes (2019). "Why are there protests in Hong Kong? All the context you need", in *BBC News* (4 September 2019), < https://www.bbc.com/news/world-asia-china-48607723>.

19 Mahtani and Liang (n 2).

the mainland. Nonetheless, Establishment Day endured as an essential date in the Hong Kong calendar. Protesters marched annually to call for universal suffrage and other fundamental freedoms and rally against CCG influence in the HKSAR Government.[20]

In mainland China, the political climate is radically different. Since the Tiananmen Square Massacre of 1989, the CCG has proactively suppressed all historical, political, and public criticism of the Chinese Communist Party and their leaders.[21] Overall, dissent is outright banned.[22] If found guilty of crimes against the State, such as treason, subversion, secession, and sedition, an accused can receive lengthy terms of imprisonment.[23] These offences overlap with the prohibitions on association, free expression, and mass assembly, all of which are prerequisites to protesting, even peacefully, against the CCG.[24] An individual charged with these offences faces a draconian legal process, often deprived of open justice and the fundamental right of a fair trial.[25] The divergent histories of protest in China and Hong Kong exemplify the profoundly different statuses which human rights occupy in each of their political systems.

IV Hong Kong's History of Protesting and the Pushback Against Chinese Authoritarianism

In the years leading up to China resuming sovereign control over Hong Kong, human rights flourished. In 1989, an estimated 1.5 million people marched in Hong Kong to protest the use of force against Chinese students at Tiananmen Square.[26] At the time, the scale of public demonstrations in Hong Kong was unprecedented, galvanising the wider public's opposition to authoritarianism. In the following years, human rights thrived under British rule and received protection under domestic law.[27] In 1995, in an attempt to promote democratic elections post-changeover, the British Government lifted the previous restrictions on the right to protest.[28] The legislation also removed the requirement for protesters to obtain permission from the police to organise political protests.[29] At the time, this reform was heavily scrutinised by the CCG and the Chinese mainstream media, as both disapproved of the expansion of Western notions of human rights in Hong Kong.[30] However, the legislation reinforced the function of assembly, association and free expression in the social fabric of the city. As a result, the people of Hong Kong and mainland China developed divergent notions of the right to protest.

In 1997, human rights development in the region came to a standstill. The change of governments brought significant legislative changes for protesting, such as the imposition of former restrictions. For example, the HKSAR Government, orchestrated by Beijing, reintroduced the restrictive laws regarding political activity and mass assembly.[31] Again, the law required all political organisations to register with law enforcement for public demonstrations, limiting the maximum number of protesters.[32] The HKSAR Government, under the guise of 'national security', also enabled the State to ban political organisations altogether.[33] Much to the surprise of the CCG, the reintroduction of these laws caused the opposite effect. In defiance, the people of Hong Kong responded with grassroots-organised street protests.[34] Due to its symbolic significance, protests were organised each year on Establishment Day to demand, *inter alia*, the legal protection of human rights.[35]

Establishment Day has become an essential date for human rights in the Hong Kong calendar. In 2003, over 500,000 people protested on the day in response to the HKSAR Government's attempt to pass the infamous Article 23 of the *Basic Law*.[36] Pro-democracy supporters and the public fiercely opposed these new laws, which included the *National Security Bill*, fearing it would infringe on civil liberties and human rights.[37] As adopted in mainland China, Article

20 Public Holidays Global (n 15).
21 Human Rights Watch (n 12).
22 Gargan (n 12).
23 Human Rights Watch (n 12).
24 Ochab (n 8).
25 Ibid.
26 Gargan (n 12); Conrad Duncan, 'Hong Kong protests: More than one million people join rally against Chinese extradition bill, organisers day' (2019) *Independent* <https://www.independent.co.uk/news/world/asia/hong-kong-protests-extradition-bill-china-carrie-lam-million-a8951136.html>.
27 *Hong Kong Bill of Rights Ordinance*, Cap. 383, 8 June 1991, Legislative Council of Hong Kong.
28 Gargan (n 12).
29 Ibid.
30 Ibid.
31 Ibid.
32 Ibid.
33 Ibid.
34 Clift (n 5).
35 Public Holidays Global (n 15).
36 Mahtani and Liang (n 2); Clift (n 5); *Basic Law* (n 17).
37 China Studies Centre, 'National Security Law of Hong Kong : Legal and Social Implications' (YouTube, 28 July 2020) <https://www.youtube.com/watch?v=XCV4Nt-

23 criminalised acts of treason, subversion, secession, and sedition.[38] As a result of the public backlash, the HKSAR Government recognised passing the Bill would be a political impossibility, subsequently abandoning it.[39] It also established a new precedent for street protests and the symbolism of Establishment Day. In the future, whenever the CCG encroached or interfered with HKSAR affairs, the people would rally on 1 July. As such, it remoulded the significance of the day around independence from both colonial and authoritarian powers.

In Hong Kong's political history, student-organised protests feature prominently. In 2010, the local government proposed a national education syllabus for schools which praised Chinese Communism and denounced Western freedoms.[40] The following year, an organisation of Hong Kong students, 'Scholarism,' called for the removal of Chinese propaganda from the region's school curriculum.[41] After months of organised protests, the students succeeded.[42] Following the 2003 precedent, this solidified the people's awareness that in numbers and exercising their right to protest, they could push back the 'red tide' of Chinese authoritarianism and force the CCG to back down. In 2014, *Scholarism* again organised a protest for Hong Kong suffrage.[43] This protest would snowball into what would become known as the Umbrella Movement.[44] After a decade of successfully pushing back Chinese authoritarian rule, the people of Hong Kong understood protesting as the mechanism to peacefully oppose the CCG political interference in domestic affairs.[45]

V0lkY>; *The Basic Law*, Article 23.

38 Hong Kong Special Administrative Region of the People's Republic of China, *National Security (Legislative Provisions) Bill*, (30 June 2006) <https://www.basiclaw23.gov.hk/english/pamphlet/pamphlet3_2.htm#1>.

39 Gargan (n 12).

40 Mahtani and Liang (n 2).

41 Malcom Moore (2014). "Portrait of Hong Kong's 18-year-old protest leader", In *The Telegraph* (11 December 2014), <https://www.telegraph.co.uk/news/worldnews/asia/hongkong/11139904/Portrait-of-Hong-Kongs-17-year-old-protest-leader.html>.

42 Clift (n 5).

43 Clare Baldwin and James Pomfret (2014), "Hong Kong students to boycott class to protest China on curbs on democracy", Thomas Reuters (21 September 2014, <https://www.reuters.com/article/us-hongkong-china/hong-kong-students-to-boycott-class-to-protest-china-curbs-on-democracy-idUSKBN0HF0MR20140920>.

44 M. Lee (2010). "Hong Kong pro-democracy activist arrested on suspicion of attacking police", In *The Canadian Press* (2010, January 9).

45 Clift (n 5).

A THE CAUSE AND EFFECTS OF THE UMBRELLA MOVEMENT

Civil disobedience and political tensions climaxed in 2014. The Umbrella Movement, known for its symbolic use of umbrellas in peaceful protests, emerged. According to organisers, over one million people participated in public demonstrations during this period.[46] The citizens' frustrations and anxieties culminated in a persistent city-wide protest, consisting of 79 days of civil disobedience.[47] The movement demanded democratic elections for the appointment of the Chief Executive of Hong Kong and members of the legislature. This innovative form of protesting constituted a powerful message of defiance against the CCG, who undemocratically appoints the Chief Executive.[48] In response, the HKSAR Government cracked down on dissidents, imprisoning protest leaders, disqualifying opposition legislative members, and banning nonconformist political parties.[49]

Since the changeover of governments, Hong Kong had not experienced these levels of oppression and authoritarian rule. It resoundingly silenced the calls for universal suffrage. At the time, commentators stated this repression had a chilling effect upon the political momentum of democratic reform in Hong Kong.[50] It single-handedly suppressed civil society and political parties. It discouraged association among protest leaders, mass assembly, and any public criticism of the CCG.[51] The protest movement in Hong Kong was silent until a series of events in 2019, when, in response to proposed extradition laws, the city witnessed the largest protests in its history. It also experienced an escalation of law enforcement and use of force to subdue these public demonstrations. The city-wide protests lasted for days on end, and subsequently, led to property destruction, police brutality, and the mobilisation of the Chinese military. The escalation of political dissent, showcased by these events, was unprecedented.

46 Alessio Perrone, 'Umbrella Movement: Hong Kong jails eight leaders from pro-democracy protest', *The Independent* (24 April 2019) <https://www.independent.co.uk/news/world/asia/umbrella-movement-hong-kong-protests-court-trial-china-a8883841.html>.

47 Clift (n 5).

48 Lee (n 44).

49 Clift (n 5).

50 Mahtani and Fifield (n 2).

51 Lee (n 44).

B THE 'EXTRADITION BILL': UNPRECEDENTED ESCALATION OF POLITICAL DISSIDENTS AND PROTESTS

On 9 June 2019, protesters marched to oppose the Extradition Bill,[52] which proposed that HKSAR nationals accused of a crime in China were liable for detention, extradition and prosecution in the Chinese legal system.[53] An estimated two million people, over a quarter of Hong Kong's population, participated in a city-wide protest.[54] Along with the 1989 Tiananmen Square protest, these two demonstrations are the most substantial displays of political dissent in the city's history.[55] Despite threats of use of force by HKSAR law enforcement and Chinese military, the protesters marched in defiance of CCG encroachment on the city's judicial independence and civil liberties.[56]

In the aftermath of the 2019 protests, Hong Kong plunged into chaos. In response to the increased use of force by law enforcement, protests became more radicalised. Several protesters have reportedly committed suicide to demonstrate their conviction to a "revolution" in Hong Kong.[57] The four who died have become fixtures in protest art and treated as heroes of the cause.[58] The deaths only add intensity to the protests. For some, it highlights the seriousness of a life-and-death situation and commitment to the pro-democracy cause.[59] However, the HKSAR Government refuses to give-in to the pro-democracy protesters, resulting in a permanent standoff.[60] What started as an anti-extradition protest snowballed into a fervent expression of a much deeper public outrage with their non-elected leadership and implicit transition to an autocratic system of governance in Hong Kong.

Defiance of the CCG had enthralled the city. In response to the chaos, protest leaders made five demands of the government: the formal withdrawal of the extradition laws, an amnesty for arrested protesters, an end to the description of protesters as rioters, an independent inquiry into the police abuse of power, and fully democratic elections.[61] On 4 September 2019, in a breakthrough for the pro-democracy protesters, the Chief Executive of Hong Kong announced the withdrawal of the Extradition Bill.[62] After months of city-wide marches, resulting in a reported 1,183 arrests,[63] the protesters had managed to maintain the status quo. Hong Kong endured more than six months of civil unrest to achieve this goal. However, this success was short-lived.

C THE ENACTMENT OF 'NATIONAL SECURITY' LAWS: ESCALATION OF CHINESE AUTHORITARIANISM IN THE CITY

On 30 June 2020, the CCG unanimously passed 'national security' laws in HKSAR.[64] Without notifying the public or local authorities, these laws criminalised acts of secession, subversion, terrorism, and collusion with foreign forces that interfered in Hong Kong affairs.[65] In doing so, Chinese legislators aim to safeguard national security and interests within the region.[66] For

52 Joshua Rosenzweig, 'Year of repression: How Hong Kong's leaders twisted the protest narrative to strangle a movement', *Amnesty International* (9 June 2020) <https://hongkongfp.com/2020/06/09/year-of-repression-how-hong-kongs-leaders-twisted-the-protest-narrative-to-strangle-a-movement/>; ABC's Asia Pacific Newsroom and Story Lab, 'Inside the city caught between a British past and Chinese future, ABC (19 November 2019) <https://www.abc.net.au/news/2019-09-13/hong-kong-protests-british-history-chinese-future-interactive/11469290?nw=0>.

53 Amnesty International, "Protect the Rights of People in Hong Kong, <https://www.amnesty.org/en/get-involved/take-action/stop-the-hong-kong-extradition-bill/>; Kirsty Needham, (2019) , 'Hong Kong leader formally withdraws extradition bill in major backdown', In *Sydney Morning Herald* (4 September 2019), <https://www.smh.com.au/world/asia/hong-kong-leader-prepares-for-major-backdown-20190904-p52o02.html?fbclid=IwAR01sBs9UR8cfJhn6zSWbPoha2De9fhiZD-dQN-nrhwwY91mj_ZU68wKx>.

54 Clift (n 5).

55 Ibid.

56 Elizabeth Barber (2014) "79 Days That Shook Hong Kong", in *Time* (15 December 2014), <https://time.com/3632739/hong-kong-umbrella-revolution-photos/>.

57 Wong (n 2); Julia Hollingsworth, Jo Shelley, and Anna Coren (2019) "How four deaths turn Hong Kong's protes movement dark", *CNN* (July 22 2019), <https://edition.cnn.com/2019/07/21/asia/hong-kong-deaths-suicide-dark-intl-hnk/index.html>; Rosie Perper (2019) "Protesters in Hong Kong are killing thmeslves in a disturbing turn in their high-profile struggle against China", in *Business Insider: Australia* (July 6 2019), <https://www.businessinsider.com.au/suicide-notes-hong-kong-protesters-reference-protests-2019-7?r=US&IR=T>.

58 Perper (n 57).

59 Hollingsworth, Shelley, and Coren (n 57).

60 Amnesty International (n 53).

61 States News Service, THOUSANDS FORM HUMAN PROTEST CHAIN AMID CALLS TO "FREE HONG KONG!", In *States News Service*, (2019, August 23); Needham (n 53).

62 Ochab (n 8).

63 Needham (n 53).

64 ABC News, China releases details of controversial new national security law for Hong Kong, (21 June 2020) <https://www.abc.net.au/news/2020-06-21/china-releases-details-of-security-law-for-hong-kong/12377562>.

65 Ibid.

66 Baker McKenzie, 'National Security Laws in Hong Kong' (July 2020) <https://www.bakermckenzie.com/en/insight/publications/2020/07/national-securi-

example, according to Article 29, it is a criminal offence to collude with a foreign country or with external elements to endanger Chinese interests.[67] Despite the 2019 mass protests, the CCG bypassed the HKSAR legislator to implement these new laws, including extradition to mainland China.[68]

The new laws brought significant procedural reform as well. The new offences carry maximum terms of imprisonment varying from three years to a lifetime.[69] Hong Kong's Chief Executive gained the discretionary power to appoint specific judges to hear the trials for these new offences.[70] The Justice Secretary gained the discretionary powers of determining whether court proceedings, arising from these offences, are held as either a jury trial, closed court, or heard in the Chinese, rather than the HKSAR, legal system.[71] The latter quashes the promises made as a result of the 2019 Extradition Bill protests. These procedural reforms constitute a significant departure from HKSAR's judicial independence enshrined in Article 19 of the *Basic Law*.[72] For those charged, it provides a pathway for potential human rights violations through arbitrary detention and malicious prosecution while trialled in mainland China.[73] In effect, these laws violate Hong Kong's Constitution and ICCPR obligations.

The recent legislative reform challenges the very existence of dissent in Hong Kong. For example, the new offences criminalise all statements that call for independence from China, including Hong Kong, Tibet, and even Taiwan.[74] The CCG recently established a new security office, with Chinese law enforcement, in the city.[75] In a controversial move, this new police force is not accountable to HKSAR authorities, only to the national interests of China.[76] Given the CCG's history of using broad legislative powers to suppress political dissent, these laws signify the virtual end for lawful protests in Hong Kong. In reality, these legislative reforms provide unchecked discretionary powers to both HKSAR and Chinese law enforcement to disband mass assembly.[77]

Despite these new laws and a police ban on protests across the city, the will of the people persists. On Establishment Day 2020, pro-democracy protesters marched the streets to hold public demonstrations. These events saw over 370 arrests, 10 of whom charged with offences under the new 'national security' laws.[78] In a clear message to the pro-democracy and human rights protesters, the CCG asserted its supremacy over the will of political dissidents and their intentions to protest in future.[79] In light of these events, pro-democracy political parties and activists have fled the city.[80] Several pro-democracy organisations that support Hong Kong autonomy have disbanded.[81] The impact of the new laws on civil society has become immediately visible and experienced by the people of Hong Kong.

V Looking to the Future: What Role Do Protests Play in Hong Kong?

In the modern history of Hong Kong, there is a legacy of activism. Over the past three decades, the right to protest has empowered the citizens of Hong Kong and emerged as a

ty-law-in-hong-kong>.

67 Thomas So and Evan Zhou, 'HKSAR National Security Laws Explained', *Mayer Brown* (2 July 2020) <https://www.mayerbrown.com/en/perspectives-events/publications/2020/07/hksar-national-security-law>

68 Carol Anne Goodwin Jones, 'Hong Kong: how China's new national security laws subvert the territory's cherished rule of law', In *The Conversation* (30 May 2020), <https://theconversation.com/hong-kong-how-chinas-new-national-security-law-subverts-the-territorys-cherished-rule-of-law-139683>.

69 ABC News, 'China reveals new national security law for Hong Kong to stop 'terrorism' amid international condemnation' (1 July 2020) <https://www.abc.net.au/news/2020-06-30/china-passes-new-national-security-law-for-hong kong/12406178?utm_source=abc_news&utm_medium=content_shared&utm_content=link&utm_campaign=abc_news>.

70 *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*, Article 44; ABC News (n 64); Baker McKenzie (n 66).

71 *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*, Article 46; ABC News (n 62); Baker McKenzie (n 63).

72 *The Basic Law*, Article 19.

73 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into on 25 September 1991); *Basic Law* (n 16); Carol Anne Goodwin Jones (n 66).

74 ABC News (n 69).

75 ABC News (n 64); Baker McKenzie (n 66).

76 Ibid.

77 Rosenzweig (n 52).

78 Brendan Clift, 'Hong Kong activists now face a choice: stay silent, or flee the city. The world must give them a path to safety', in *The Conversation* (3 July 2020), <https://theconversation.com/hong-kong-activists-now-face-a-choice-stay-silent-or-flee-the-city-the-world-must-give-them-a-path-to-safety-141880>.

79 ABC News (n 69).

80 Ibid.

81 China Studies Centre (n 37).

vehicle for discourse between civil society and the governing political class. The evolution of protests in Hong Kong demonstrates the will of the people and their aspirations for democracy and universal human rights. In response to the CCG encroachment on these rights, protests have been the sole mechanism used to defend them. A historical examination of these protests demonstrates a pattern of escalating conflict and corresponding authoritarian responses, resulting in extreme reactionary means by CCG to suppress all forms of political dissent. In light of the recent events, the CCG has succeeded in undermining and criminalising protests in Hong Kong. In effect, it has diluted, if not dissolved, the utility and political influence of protesting as a form of activism.

In 2020, the escalating trend of authoritarianism in Hong Kong reached a new crescendo: the legal intervention and strongarm response by the CCG. As the number of offences and prospects of extradition to mainland China increase for protesters, they face more significant levels of criminalisation, persecution and human rights violations than ever before. As a result, the 'national security' laws have subdued the whole city, and the plight for democracy has died. In effect, these laws undermine the *Basic Law*, contradict the Sino-British Joint Declaration and fundamentally challenge the 'one country, two systems' model. The 2019 political and civil unrest provided the impetus to China for enacting this legislation and legitimising the punishment of pro-democracy and human rights activists. However, it is merely the latest escalation in a sustained attack on human rights in Hong Kong over the past 30 years.

Since the changeover of sovereign control between China and Britain, HKSAR laws were weaponised against the right to protest. Beijing-enacted and orchestrated laws have continually derogated from universal human rights standards in Hong Kong. The most recent example, the draconian 'national security' laws, aim to silence political dissent and suppress protests. First introduced in 2003, under the guise of Article 23, these laws override any resemblances of self-governance over political activism in the city. Seventeen years on, the CCG succeeded in implementing their suppressive extradition laws.[82] In effect, it has clamped down on Hong Kong's vibrant civil society, destroying its pro-democracy and independent spirit.

82 Carol Anne Goodwin Jones (n 68).

ACTIVISTS UNDER SURVEILLANCE:
THE NEED FOR DIGITAL RESISTANCE IN AUSTRALIA

Rebekah Oliver

I Introduction

Technology has never been so crucial as in this COVID-19 age; whether it is apps like Zoom enabling isolated families to connect, or the COVID-Safe App allowing the government to track contacts. However, technology is also being employed as a tool of government repression. China's use of a social credit system and strong surveillance state is well documented;[1] including their recent cyberattacks against Telegram and installation of surveillance towers to target protesters in Hong Kong. While Australia and the US are quick to denigrate China for their authoritarian practices;[2] very similar instruments of surveillance are being built into their own systems. This is clearly evident with the recent response of the US government and Australian governments to the Black Lives Matter protests. The US government has used drones to capture footage and subsequently identify protesters at 15 different rallies.[3] Further, private technology corporations including Facebook and Twitter have allowed start-ups like Dataminr to track users' locations to sell them on to government agencies.[4] Police have been creating fake accounts to infiltrate online protestor groups in order to obtain the details of participants.[5] While this is not an isolated phenomenon,[6] different countries have implemented varying levels of protection against government intrusion. This paper contends that the present moment requires fundamental changes to the nature of dissent and government resistance particularly in Australia in order to effectively challenge the acquisition of government power through surveillance technology. First, it will examine the accumulation of surveillance power to the Australian government and the absence of remedies to ameliorate the dangers. Second, it will analyse the ways in which resistance needs to prioritise the digital.

II Surveillance As Power

A *What is Surveillance?*

Surveillance is a form of power in two ways: it gives the government more information by which to coerce dissidents, and it can cause those who are subject to surveillance to self-discipline in the knowledge that they are being watched.[7] As technology advances particularly the internet of things, individuals inevitably leave a larger data trail which allows the state to increase the scope and depth of its surveillance.[8] This section will examine how the legislative framework in Australia enables mass

1 Fan, L., Das, V., Kostyuk, N., & Hussain, M. "Constructing a Data-Driven Society: China's Social Credit System as a State Surveillance Infrastructure." *Policy and Internet*, (2018) 10(4), 415–453.

2 Walden, M. "Australia joins UK, Japan in expressing concern over China's treatment of Uyghurs, Hong Kong" *ABC* (July 1, 2020) https://www.abc.net.au/news/2020-07-01/australia-statement-condemn-china-over-hong-kong-uyghur abuses/12409268?utm_source=abc_news&utm_medium=content_shared&utm_content=link&utm_campaign=abc_news

3 Kanno-Youngs, Z. "U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance" *New York Times* (New York, June 19, 2020) https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html

4 Biddle, S. "Police Surveilled George Floyd Protests with Help from Twitter-Affiliated Startup Dataminr." *The Intercept* (July 10, 2020) https://theintercept.com/2020/07/09/twitter-dataminr-police-spy-surveillance-black-lives-matter-protests/

5 Funk, A. "How Domestic Spying Tools Undermine Racial Justice Protests" *Freedom House* (June 22, 2020) https://freedomhouse.org/article/how-domestic-spying-tools-undermine-racial-justice-protests

6 Smyth, S. *Biometrics, Surveillance and the Law: Societies of Restricted Access, Discipline and Control* (New York: Routledge, 2019), 12.

7 Jamie Susskind, *Future Politics: Living Together in a World Transformed by Tech* (Oxford University Press, 2018), 125-126.

8 Ibid 136.

surveillance by equipping the government with greater power to access dissidents' data and failing to provide any protection for protestors.

B *INCREASING GOVERNMENT POWERS*

In 2015, the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015* required all providers to store the metadata of all of their users for a period of two years.[9] This metadata includes the source and destination of each communication, the date, time and duration of any communication, the location of equipment and the times which a device joins a network.[10] Importantly, law enforcement agencies are able to access this metadata without a warrant.[11] Although data is mostly accessed for serious offences there is no prohibition to prevent access for more minor offences.[12] In 2016-2017, 15% of authorisations were for "lesser offences" including public disorder offences which protesters have been charged with in the past.[13] Moreover, the Australian Federal Police (AFP) has admitted that it had accessed the metadata of journalists over 60 times between 2016 and 2017, and had done so once without a warrant.[14] These suggest that protestors are vulnerable to such a regime, and given the trend of government towards anti-protest rhetoric,[15] it is not unlikely that this technology will be used against dissidents in the future. While the Parliamentary Joint Committees and the Ombudsman possess powers of review, these are retrospective and cannot prevent breaches.[16] In the case of *Tele2 Sverige and Watson*, in which the European Court of Justice confirmed Digital Rights Ireland, it was held that any legislative regime retaining metadata must limit the categories of data to be retained, the persons concerned, and the retention period adopted; otherwise the legislation is disproportionate and amounts to mass surveillance.[17] In January 2018 the UK Court of Appeal held that the *Data Retention and Investigatory Powers Act*, which was a model for the Australian retention scheme, was unlawful.[18] These developments suggest that indiscriminate retention schemes as in Australia are incompatible with the international human right to privacy, to which Australia also subscribes.[19]

At the end of October 2017, the *Intergovernmental Agreement on Identity Matching Services* was signed, allowing identification data stored by different agencies to be compiled and made accessible through a National Facial Biometric Matching Capability.[20] One of the most concerning aspects of the Capability is its Face Identification Service which matches photos of an unknown individual against existing identification photos within government systems.[21] They can also be caught from any optical device including police body cameras, social media, CCTV or drones.[22] These images

9 Negative reaction by Parliamentary Joint Committee

10 Meares, M. "Mass Surveillance and Data Retention in Australia: Balancing Rights and Freedoms" *Journal of Internet Law* (2018) 21(10) 3, 4.

11 *Telecommunications (Interception and Access) Act 1979* (Cth), s 178-180.

12 Ibid s 180F.

13 Australian Human Rights Commission, Submission No. 8 to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia Legislative Assembly, *Review of the Mandatory Data Retention Regime,* 14; For a recent example of protestors charged with public disorder offences see: Stewart, S. "Extinction Rebellion rallies marred by arrests as protesters block roads, chain themselves to water tank" *ABC* (online, 7 October 2019), abc.net.au/news/2019-10-07/sydney-protests-extinction-rebellion-marred-by-arrests/11580058.

14 Meares (n 10), 3; Department of Home Affairs, Submission No. 21 to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia Legislative Assembly, *Review of the Mandatory Data Retention Regime,* 27.

15 See: Boseley, Hurst and Visontay. "Sydney Black Lives Matter rally: NSW court rules protest is illegal" *The Guardian* (online, 5 June 2020) https://www.theguardian.com/australia-news/2020/jun/05/sydney-black-lives-matter-rally-nsw-police-go-to-court-to-have-protest-declared-illegal; Young, E. "Scott Morrison shoots down ideas of stripping benefits from Black Lives Matter protesters" *SBS News* (online, 12 June 2020), https://www.sbs.com.au/news/scott-morrison-shoots-down-ideas-of-stripping-benefits-from-black-lives-matter-protesters; Remeikis, A. "Peter Dutton accused of sounding 'like a dictator' after urging welfare cuts for protesters" *The Guardian* (online, 3 October 2019), https://www.theguardian.com/australia-news/2019/oct/03/peter-dutton-accused-dictator-urging-welfare-cuts-protesters.

16 *Telecommunications (Interception and Access) Act 1979* (Cth), Chapter 4A.

17 *Tele2 Sverige AB v. Post-och telestyrelsen; Secretary of State for the Home Department v. Watson and others (Judgemwent)* (European Court of Justice (Grand Chamber), C-203/15 and C-698/15, 21 December 2016), [108].

18 *Secretary of State for the Home Department v Watson & Others* [2018] EWCA Civ 70

19 See: *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg UN Doc A/810 (10 December 1948) (' UDHR'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 171 (entered into force 3 November 1976) ('IPPCR').

20 Council of Australian Government, *Intergovernmental Agreement on Identity Matching Services* (Intergovernmental Agreement, 5 October 2017).

21 Department of Home Affairs, "Fact Sheet: Face Matching Services" (2017), 1.

22 Mann, M., Smith, M. "Automated Facial Recognition Technology: Recent Developments and Approaches to Oversight" *University of New South Wales Law Journal* (2017) 40(1) 121, 125.

are collected, checked and shared without consent being sought from the affected individual.[23] What is particularly problematic about the technology is that it has no parameters for its use; it is not limited to a sub-category of the population and does not require a minimum threshold of seriousness, making it disproportionate to any potential threat it is attempting to counteract.[24] While supposedly smart facial recognition CCTV would not be possible under the Capability, it has already been used on a State level, for example at the 2018 Commonwealth Games at the Gold Coast and by Victorian Police at Melbourne train stations.[25] Moreover, leaked evidence revealed that the AFP and several state police bodies were customers of the company ClearviewAI which uses facial recognition for images on online platforms.[26]

The issue with facial recognition technologies is that they have a higher rate of error and bias for people of colour, and especially women of colour.[27] In Michigan, smart facial recognition technology was responsible for the wrongful arrests of African-American man Robert Julian-Borchak Williams and Indigenous-American woman Irene Joseph who were falsely accused of shoplifting.[28] Particularly in the context of the Black Lives Matter protests, this means that protesters are particularly at risk of false identification and perhaps wrongful arrests if facial recognition was used. There is some evidence suggesting that police departments in states such as Minnesota have been using facial recognition technologies such as ClearviewAI to track protestors online.[29] Although relevant data is not yet available, the use of facial recognition could change the activist landscape forever.[30]

C PROTECTIONS

Data privacy is primarily governed by the *Australian Privacy Act*.[31] The fundamental problem with the Australian regime is that it provides exceptions for where data is collected by a law enforcement body and "is reasonably necessary for, [...] the entity's functions or activities."[32] Non-law enforcement agencies may also disclose individuals' information where it "is reasonably necessary for one or more enforcement related activities."[33] This renders the entire regime powerless to address the overly broad powers of law enforcement. When compared to other jurisdictions Australia's protections are inadequate. The EU currently has the *General Data Protection Regulations*;[34] as well as a specific directive that applies to data collected by law enforcement agencies.[35] It applies to all personal data including: the name, location data and online identifiers such as an IP address, cookies or an RFID tag in addition to any biometric material.[36] The Act mandates six principles which require all processing to be: authorised by the law; specified, explicit, and not incompatible with the purpose for which it was collected; relevant; appropriately time-limited; and must ensure appropriate security.[37] Individuals also have specific rights to their data including the right to: be informed, access their data, rectification, erasure and to not be subject to automated decision making.[38] This is not merely superior to the protections of Australian law but is almost the very antithesis of the Australian approach, as it prioritises the rights of the individual over those of law enforcement agencies.

23 Ibid 126.
24 Garvie, C. *The Perpetual Line-up: Unregulated Police Face Recognition in America* (Georgetown Law, Center on Privacy & Technology, 2016), 16.
25 Russell Marks, "All Watched Over" *The Monthly* (online, March 2020).
26 Goldfein, J. "Australian police are using the Clearview AI facial recognition system with no accountability" *The Conversations* (online, 4 March 2020), https://theconversation.com/australian-police-are-using-the-clearview-ai-facial-recognition-system-with-no-accountability-132667.
27 Klare, B. "Face recognition performance: Role of demographic information." *IEEE Transactions on Information Forensics and Security* (2012) 7(6), 1789-1801;
28 Knight, E. "Facial recognition technology is one of the most racist weapons in the police arsenal" *Open Media* (online, 14 July 2020) https://openmedia.org/article/item/facial-recognition-technology-is-one-of-the-most-racist-weapons-in-the-police-arsenal.
29 Ibid.
30 Fowler, G. "Black Lives Matter could change facial recognition forever — if Big Tech doesn't stand in the way" *The Washington Post* (online, 13 June 2020), https://www.washingtonpost.com/technology/2020/06/12/facial-recognition-ban/.
31 *Privacy Act 1988* (Cth). Other privacy legislation includes: *Competition and Consumer Act 2010 (Cth),* Part IVD; *Information Privacy Act 2014 (Act), Privacy and Personal Information Protection Act 1998 (NSW), Information Privacy Act 2009 (Qld), Personal Information and Protection Act 2004 (Tas), Privacy and Data Protection Act 2014 (Vic).*
32 *Privacy Act 1988* (Cth), sch 1 cl 3.
33 Ibid sch 1, cl 6.2(e).
34 European Parliament and the Council of the European Union, *Regulation (EU) 2016/679 (General Data Protection Regulation)* (4 May 2016).
35 European Parliament and the Council of the European Union, *Directive (EU) 2016/680* (27 April 2016).
36 Ibid art 3(1)
37 European Parliament and the Council of the European Union (n 35) art 4.
38 European Parliament and the Council of the European Union (n 35) art 12-18.

Moreover, Australia lacks any alternative private remedies. While the High Court held that there was no obstacle to the recognition of a legal cause of action to protect individuals from the invasion of privacy; no such action has ever been recognised.[39] Australia also lacks the explicit constitutional protections of personal data which are enshrined in many other countries such as Kenya, Greece, Sweden, the Netherlands,[40] and across Europe.[41] Even in the US, the Fourth Amendment provides some limited protection against unreasonable searches and seizures by the government, and in *Carpenter v United States* it was held that obtaining location data was a Fourth Amendment search.[42] Other countries in Latin America have developed a writ of habeas data which allows individuals to seek data held about them and demand its rectification, suppression, or destruction.[43] This comparison contradicts the rhetoric often used by Australian politicians that there is no need for any entrenched Bill of Rights in Australia because the legislation will respond to any specific needs. It is evident that the legislature has grossly failed to legislate in this area, and has only taken action to increase executive power at the expense of individual rights.[44] Overall, comparative to other jurisdictions there is a uniquely severe asymmetry in Australia between the legal power of the state and individuals in areas of digital data and surveillance. This next section argues that digital resistance has a salient role to reverse this asymmetry.

III Digital Resistance

The notion of digital activism has existed for quite some time. Back in 1996, the Critical Arts Ensemble wrote their essay on "*Electronic Civil Disobedience*" which advocated for the shift of activism to move from the streets into the digital space.[45] That was when only 1% of the world's population had access to the internet.[46] Now in 2020 it is estimated 59% of the world has access to the internet.[47] However, it is more than sheer number of potential protesters that justify why resistance in this present era should occur on the digital frontier. First, the very essence of protest is about demonstrating the sovereignty of the body. As feminist theorist McClaren writes:

> What besides bodies can resist? It is my body that marches in demonstrations, my body that goes to the polls, my body that attends rallies, my body that boycotts, my body that strikes, my body that participates in work slowdowns, my body that engages in civil disobedience. Individual bodies are requisite for collective political action.[48]

However, in this case the violated body is the digital body of data.[49] In order to effectively draw the relationship between power, the body and digital technologies, the agency and importance of the digital body must be recognised.[50] This can best occur by performing the resistance on the same platform as the repression; in the online space. In this way, these issues of technology and surveillance can be differentiated from other issues occurring in the physical world, which can be better addressed on that physical plane. Secondly, governments, especially Australia, are slow to regulate or legislate around new technologies, demonstrated by the lack of protection of individual data.[51] This means that the law surrounding the legality of some forms of digital protesting is a grey area and hence there is scope to be disruptive before experiencing legislative limitations.[52] Thirdly, digital activism facilitates collective action in the absence of physical presence; lowering the costs of participation for many people.[53] With the COVID-19 pandemic, many traditional forms of protest have been banned

39 *ABC v Lenah Game Meats Pty Ltd* (2002) 208 CLR 199
40 De Hert, P., and Papakonstantinou, V. 'Three Scenarios for International Governance of Data Privacy: Towards an International Data Privacy Organization, Preferably a UN Agency?' (2013) 9(2) *Journal of Law and Policy for the Information Society* 270, 289.
41 Charter of Fundamental Rights of the European Union, Article 8; Treaty of the Functioning of the European Union, art 16.
42 *Carpenter v United States* 585 US 1 (2018)
43 A Gregory, *The Power of Habeas Corpus in America: From the King's Prerogative to the War on Terror* (Cambridge: Cambridge University Press, 2013).
44 Michael Kirby, 'Privacy Today: Something Old, Something New, Something Borrowed, Something Blue' (2017) 25(1) Journal of Law, Information & Science 1, 17-8.
45 Sauter, M. *The coming swarm DDoS actions, hacktivism, and civil disobedience on the Internet.* (New York: Bloomsbury Academic, 2014), 41.
46 Vlavo, F. *Performing digital activism: new aesthetics and discourses of resistance.* (New York: Routledge, 2016), 92.
47 Clement., J. "Internet penetration rate worldwide 2020, by region." *Statista.* (Website) <https://www.statista.com/statistics/269329/penetration-rate-of-the-internet-by-region/>.
48 McLaren, M. *Feminism, Foucault and Embodied Subjectivity*. (Albany: Suny, 2002), 116.
49 Vlavo (n 46) 42.
50 Ibid 60.
51 Productivity Commission, *Regulation in the Digital Age* (Supporting Paper No. 13, August 2017), 2.
52 However, it should be noted some cybercrimes such as unauthorised access to restricted material are still capable of prosecution under ss 477-478 of the *Criminal Code Act 1995* (Cth).
53 Bennett, W.L. Segerberg, A. *The Logic of Connective Action: Digital Media and the Personalization of Contentious Politics*. (Cambridge, UK: Cambridge University Press, 2013).

by governments or have occurred in a more limited form. Many supporters are divided over whether to physically protest, or perhaps due to their health do not even have that choice. Digital resistance allows for action even under these circumstances.

Digital resistance needs to transcend the slacktivism which is often associated with millenials.[54] There is no shortage of effective digital disruption. For example, groups like Anonymous have used Distributed Denial of Service attacks which create bottlenecks, disrupt and block access to a digital space by overloading the server. This simulates physical sit-ins in the digital sphere.[55] A similar activity is a DNS Zone transfer, which can redirect users who are trying to access one website to another.[56] A more extreme form of digital resistance could involve hacktivism and the leaking of confidential documents.[57] Another technique, "Zoombombing",[58] has been previously utilised to propagate racist or obscene images,[59] but there is no reason why protestors could not use it to disrupt government activity. Zoombombing was used to interrupt a House Oversight Committee in the US on women's rights in Afghanistan, although few details were released on the matter.[60] Moreover, in the recent UK and US elections there was extensive use of bots across a number of social media platforms to boost the ratings of political candidates and to conduct smear campaigns.[61] These kinds of bots could easily be repurposed as a tool of government resistance. However, digital activism does not have to involve high technical skills. The planned Trump rally at Tulsa in June 2020 was underattended due to K-Pop fans using the social media platform TikTok to reserve mass amounts of tickets; ultimately undermining the success of the Trump campaign.[62] K-Pop fans also bombarded the TikTok hashtag #whitelivesmatter with GIFs and K-Pop videos, causing the thread to be classified as a K-pop rather than a political trend.[63]The opportunities are there and are waiting to be seized.

IV Conclusion

Rosa Luxemburg wrote that "history has the fine habit of always producing along with any real social need the means to its satisfaction, along with the task simultaneously the solution."[64] The growth of the surveillance state is real. The dangers to political dissent are presently experienced by many. But this explosion in technology also provides unique opportunities to invigorate government resistance and dissent not only to protect our digital sovereignty but to spur action against some of the biggest injustices of our time.

54 Dennis, J. "#stopslacktivism: Why Clicks, Likes, and Shares Matter" in Dennis J. (ed.) *Beyond Slacktivism Political Participation on Social Media.* (Springer International Publishing) 25-69.

55 Bessant, J. "Democracy denied, youth participation and criminalizing digital dissent" (2016) 19(7), *Journal of Youth Studies*, 921, 924.

56 Ibid 930.

57 Note distinctions between hacking (illegal) and other forms of digital protest. See: Meikle, Graham 'Electronic Civil Disobedience and Symbolic Power' in Karatzogianni, A. (ed.) *Cyber-conflict and Global Politics.* (London: Routledge, 2008) pp. 177–187.

58 Where uninvited participants join a private Zoom meeting.

59 Elmer, Glyn Burton, Neville, "Zoom-bombings disrupt online events with racist and misogynist attacks" *The Conversation* (June 10, 2020) https://theconversation.com/zoom-bombings-disrupt-online-events-with-racist-and-misogynist-attacks-138389

60 Eversden, A. "A House Oversight Committee meeting was 'Zoom-bombed' *Fifth Domain* (online, 10 April 2020) https://www.fifthdomain.com/congress/capitol-hill/2020/04/10/a-house-oversight-committee-meeting-was-zoom-bombed/

61 Philip Howard, "How Political Campaigns Weaponize Social Media Bots" *IEEE Spectrum* (Oxford, 18 October 2018) https://spectrum.ieee.org/computing/software/how-political-campaigns-weaponize-social-media-bots

62 Anjana Susaria, "TikTok teens and the Trump campaign: How social media amplifies political activism and threatens election integrity" *The Conversation* (Michigan, July 1, 2020) https://theconversation.com/tiktok-teens-and-the-trump-campaign-how-social-media-amplifies-political-activism-and-threatens-election-integrity-141266

63 Ibid.

64 Rosa Luxemburg, "The Russian Revolution", (1918), ch. 6, translated by Bertram Wolfe (New York: Workers Age Publishers, 1940) *Marxists* https://marxists.org/archive/luxemburg/1918/russian-revolution/ch06.htm

THE EXTRAORDINARY EMERGENCY DEFENCE: PROMOTING PROGRESSIVE CLIMATE POLICY IN THE COURTS

Deaundre Espejo

I Introduction

In the early morning of 21 November 2018, 37-year old geography teacher Greg Rolles mounted a tripod that blocked Aurizon's coal railway in North Queensland. The railway line is used to feed coal into the Adani-owned Abbot Point Terminal, and is part of a greater network that moves more than 700,000 tonnes of coal, iron ore and other minerals across Australia.[1] Rolles suspended himself in a harness over the tracks, halting activity as six police officers watched on. "I have no other way to defend myself against companies profiting from global warming," he said. After three hours, a cherry-picker was brought to the site and Rolles stood down before the situation escalated. He was subsequently arrested and charged with three offences: trespassing on a railway, interfering with a railway, and failing to follow police orders. This is not the first instance of anti-coal protesters being charged, however Rolles took an unprecedented step in his trial; he pleaded the extraordinary emergency defence, arguing that he was compelled to act due to the governments' failure to respond to the ongoing climate crisis.

The legal basis for Rolles' defence was Section 25 of *Queensland's Criminal Code Act*,[2] which states that a person is not criminally responsible for an act that was done under the circumstances of a "sudden or extraordinary emergency", provided that it would be the "reasonable response" of an "ordinary person [with] ordinary power of self-control". During his trial, Rolles presented scientific evidence that climate inaction would lead to extreme and harmful impacts, pointing to increased CO2 emissions that are pushing global warming above the 1.5C threshold.[3] In his witness statement, climate scientist Professor Mackey stated that climate change "is an unprecedented, exceptional and urgent matter requiring immediate action on the part of governments, business and civil society."[4] Evidence was also presented on how litigious avenues against Adani had been exhausted, leaving Rolles with no choice but to protest.[5] However, Rolles was unsauccessful in arguing his defence. According to the magistrate, the scientific data "does not in any way require this court to accept that climate change would amount to an extraordinary emergency",[6] and that Rolles' moral obligation to take action on climate change was both subjective and self-indulgent.[7] He also added that reasonable, lawful options were available to Rolles, including a lawful and peaceful protest or direct contact with Members of Parliament.[8]

II Climate Litigation: A Higher Evidentiary Burden

The courts have long been reticent to appreciate evidence on climate change, often reducing the phenomenon to nothing more than a speculative or remote issue.[9] In *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy*,[10] the Federal

1 Aurizon, 'Moura West Upgrade', *Wiggins Island Rail Project* (online, June 2019) <https://www.aurizon.com.au/-/media/project/aurizon/files/what-we-do/projects/wiggins-island/fact-sheets/aur0052---moura-west-upgrade-fact-sheet-110614.pdf>.
2 *1899* (Qld).
3 *Police v Rolles* (Bowen Magistrates Court, Magistrate Muirhead, 28 May 2019) 2.
4 Ibid 2.
5 Ibid 5.
6 Ibid 2.
7 Ibid 5.
8 Ibid 5.
9 Laura Schuijers, 'Climate Change in Court', *Pursuit* (online, 3 March 2019) <https://pursuit.unimelb.edu.au/articles/climate-change-in-court>.
10 [2017] FCAFC 134.

Court of Australia dismissed a challenge against the Environment Minister's approval of Adani's Carmichael Coal Mine project in the Galilee Basin. Despite evidence presented on combustion emissions and warming levels in the Great Barrier Reef, the court held that the Minister's decision was legitimate. In his judgement, Griffiths J stated that climate change was subject to a range of variables; to quantify the harm caused by the coal mine would have been speculative and hence there was 'no relevant impact' that the Minister was required to consider for the purposes of the *EPBC Act*.[11] He also made it clear that he did not think it was possible to draw "robust conclusions" from the evidence provided by the applicants.[12] This reluctance, which has been reflected in the courts more broadly, has meant that the majority of climate litigation claims in recent years have been unsuccessful.[13]

Additionally, the argument that civil disobedience is a reasonable response to perceived emergencies has been viewed with disfavour. In *R v Webb*,[14] Reeves J of the Northern Territory Supreme Court stated that it was not a reasonable response for activists to enter a prohibited area at the Joint Defence Facility Pine Gap in protest of the military use of drones. His view was that "no response was required… beyond continuing to pursue their longstanding and lawful protest activities."[15] Legal scholars such as Mary Wood argue that judges and juries today must rethink what may be considered reasonable in light of the climate crisis, pointing out that "as scientists urge immediate action to slash carbon emissions, many drawn-out political and legal processes that may have been 'reasonable' to pursue two decades ago now exceed the short window of time left to act".[16] However, this may prove difficult. As Lance N. Long and Ted Hamilton observe, judges continue to have a particular discomfort with issues of climate change in the courtroom, and "activist defendants are faced with a higher evidentiary burden".[17]

11 Ibid [60].
12 Ibid [60].
13 Gerard Timbs and Lucy Kaiser, 'Climate change litigation and the Human Rights Act 2019', *Holding Redlich* (online, 1 July 2020) <https://www.lexology.com/library/detail.aspx?g=9d4ee4ae-68c8-440c-bf02-aa4963b5dcb4>.
14 (2017) 326 FLR 413.
15 Ibid [25].
16 Julia Carrie Wongm 'A crime justified by climate change? Activists caught in legal showdown', *The Guardian* (online, 15 January 2016) <https://www.theguardian.com/environment/2016/jan/14/climate-change-activists-trial-washington>.
17 Lance N Long and Ted Hamilton, 'The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases' (2018) 38(57) *Stanford Environmental Law Journal*, 57, 80.

III Debate on the Necessity Defence

When it comes to the use of the necessity defence to justify civil disobedience, there is even greater judicial intolerance as it involves questions of not only how but *whether* the law should be applied. Though it is well-established in Australian common law, there has been much anxiety about the consequences of necessity as a legal doctrine. In *Southwark London Borough Council v Williams*,[18] Lord Denning stated 'necessity would open a door which no man could shut. It would not only be those in extreme need who would enter.'[19] He refers to the concern that widespread use of the necessity defence could nullify the application of criminal laws, describing this as a state of 'lawlessness.'[20] In the US, judges have voiced concerns that activists may attempt to 'extend the necessity doctrine beyond its strict and logical limits, and to transform it into a principle that results in legalising criminal activity in the pursuit of political ends.'[21] But such slippery slope arguments are fallacious, ignoring the relevant differences between situations in which the defence may or may not be available.[22]

If the courts were to accept that climate change was an extraordinary emergency for the purposes of Section 25, the 'reasonable response' requirement would remain an important qualifier. Tom Hastings, an Assistant Professor at Portland State University, proposes a threshold for proving reasonableness: the Court should be satisfied that the executive and legislative branches of government have failed to address the emergency, and that the defendant had 'tried or observed others trying' all other remedies available within the system.[23] This signifies that the act of civil disobedience was the only remedy left, and 'situates the defendant as working within the system more than defying it.'[24] Under this framework, Rolles would have likely succeeded for three reasons: the Australian government

18 [1971] Ch 2 All ER 175.
19 Ibid 179.
20 Ibid.
21 *Wilson v State*, 777 S.W.2d 823, 825 (Tex. App, 1989).
22 Trudy Govier, 'What's Wrong with Slippery Slope Arguments?' (1982) 12(2) *Canadian Journal of Philosophy*, 303.
23 Tom Hastings, 'Necessity Defense and the Climate Crisis: Can a Good Law Be Broken for a Good Reason?', *International Center for Nonviolent Conflict* (online, 11 February 2020) <https://www.nonviolent-conflict.org/blog_post/necessity-defense-and-the-climate-crisis-can-a-good-law-be-broken-for-a-good-reason/>.
24 Ibid.

continued to subsidise fossil fuels despite years of protest action; that litigious and political avenues in the past had not led to appropriate policy responses; and that Rolles' actions were non-violent. If, for example, the government announced a large-scale divestment plan at the time, or there had been a history of successful climate litigation in Australia, he would have likely failed in the defence.

Further, some arguments focus on protesters' state of mind as a requirement for the defence. In the decision of *Massachusetts v West Roxbury Protesters*,[25] pipeline protesters had their charges reduced due to 'heartfelt expressions of the defendants,' who 'believe[d] they were entitled to invoke the necessity defence.' Additionally, Hastings suggests that it is necessary to show that 'the defendant acted in an utterly altruistic fashion, not for personal aggrandizement in any way.'[26] Therefore, some bona fide belief that the necessity of defence was available to the defendants, or that their actions were for the greater good of society, may also be necessary to prove. Regardless of how the courts interpret the reasonable response requirement, it will serve to limit the defence to only the most serious or urgent cases. Therefore, if the defence of necessity is accepted, it does not follow that civil disobedience becomes legal or devoid of any legal repercussions. There will always be a prima facie violation of the law, and activists relying on necessity must still demonstrate that their actions were justified.

In fact, the rationale for accepting the defence is not to legalise or absolve criminal wrongdoing at all. Henry David Thoreau wrote that the very purpose of civil disobedience is to be a 'counter-friction' to the state, and this is only possible where there is refusal to be governed by law.[27] Instead, the defence is primarily a means by which activists can scrutinise policymakers and draw attention to climate injustice in a public forum. As the Climate Disobedience Centre states, 'by presenting a necessity defence - that is, describing the dangers of climate change, the lack of effective legal remedies, and the importance of individual action - activists put the government on trial.'[28] Indeed, this is a powerful political tool, as the courts are an institution where the individual citizen or community group can obtain a hearing on equal terms with actors that hold significant power.[29] And if the activist succeeds, it would give authority to their cause and the need for political change.

IV Exceeding Judicial Powers?

This leads to perhaps the most controversial issue with necessity defence: the over-politicisation of the judiciary. Since the rise of climate litigation, scholars have warned that the balance between the branches of democratic government are threatened when judges increasingly 'interfere' with the political issues of climate change.[30] In the context of climate activism, the necessity defense asserts that breaking the law is justified in order to avert greater harm that would occur as a result of government policy. When a court is permitted to entertain the necessity defence in a civil disobedience case, they would essentially be deliberating on policy issues, which is outside of the Courts' judicial role. John Alan Cohan states that "[In these cases], the jury is asked to decide whether actors were justified in seeking to avert an unwise policy." In effect, this turns the jury into a quasi-legislative or executive body, allowing it to prescribe which policy out of various permissible policies the government should choose, and in essentially "veto duly promulgated policies."[31] The result of this would be to undermine public confidence in the courts and the administration of justice, which, according to the Hon Sir Anthony Mason, largely depends on public perceptions of independence and impartiality.[32]

However, Lord Radcliffe argues that this is a 'fiction of formal legalism'; the courts have long played a direct role in deliberating on and prescribing policy.[33] During the late 19th and early 20th century, US Federal Courts granted injunctions from employers to ban strikes and organising activities by unions.[34] Unionists

25 (Mass Dist Ct, 27 March 2018).
26 Hastings (n 23).
27 Henry David Thoreau, '*Resistance to Civil Government*' (1849), in Wendell Glick (ed), The Writings of Henry D Thoreau: Reform Papers (Princeton University Press, 1973) 63-76, 86-90.
28 Climate Disobedience Centre, 'The Climate Necessity Defense: A Legal Tool for Climate Activists' (online, 2017) <http://www.climatedisobedience.org/necessitydefense>.
29 Brain J Preston, 'The Contribution of the Courts in Tackling Climate Change' (2016) 28(1) *Journal of Environmental Law*, 11.
30 Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) *Transnational Environmental Law*, 55.
31 John Alan Cohen, 'Civil Disobedience and the Necessity Defence' (2007) 6(1), *The University of New Hampshire Law Review*, 110, 122.
32 Hon Sir Anthony Mason, 'The courts and public opinion' (Speech, National INstitute of Government and Law, 20 March 2002) 31.
33 Quoted in Brian Galligan and Peter Russell, 'The Politicisation of the Judiciary in Australia and Canada' (1995) 67(2) *The Australian Quarterly*, 85, 99.
34 Wm G Peterkin, 'Government by Injunction' (1897) 3(8) *The Virginia Law Register*, 549.

at the time labelled this as 'government by injunction,' arguing that it was "a new and highly dangerous form of oppression by which federal judges, in contempt of the laws of the States and rights of citizens become at once legislators, judges and executioners."[35] Today, injunctions remain widely used in order to compel or block certain policy decisions. In Australia, the Federal Court ordered the Australian Government to remove refugee children from Nauru in 2018, granting a mandatory interlocutory injunction to ensure compliance with their duty of care.[36] In 2019, the Federal Court granted an injunction for Metro Trains Melbourne to block unionised workers from taking industrial action.[37] And more recently, the Supreme Court prohibited Black Lives Matter protests in Sydney due to public health risks amidst the COVID-19 pandemic.[38] While these cases concern distinct questions of law, they nonetheless result in what is essentially judicial interference in policy. And thus far, this amount of politicisation has not appeared to undermine the legitimacy of courts or the authority of the judges.[39]

V Conclusion: The Court's Role in Climate Policy

In light of this, Brian J Preston argues that the courts can no longer sit idly under the guise of formal legalism, and should play a more active role in assisting the progressive and principled development of climate change policy.[40] Allowing the necessity defence for climate disobedience would provide much needed opportunities for government scrutiny, 'forcing the executive, legislature and private sector to take climate change seriously.'[41] The use of the defence in the UK demonstrates what can be achieved through this avenue. In 2007, six Greenpeace activists were acquitted by reason of "lawful excuse", after scaling a chimney of the Kingsnorth power station and painting the Prime Minister's name on it. During the trial, the jury was told that Kingsnorth emitted the same amount of carbon dioxide as the 30 least polluting countries in the world combined, and that '[s]omebody needs to step forward and say there has to be a moratorium, draw a line in the sand and say no more coal-fired power stations.'[42] And five years after the trial, the power station shut down after failing to meet emissions targets.

Cases in the US also demonstrate what can be achieved through the defence, regardless of whether defendants are acquitted. In 2011, activist Tim DeChristopher attempted to use the necessity defence after infiltrating a Bureau of Land Management auction and placing fake bids on oil and gas leases.[43] At his trial, he intended to present evidence on the government's illegal leasing practices and the amount of carbon dioxide that would be released should drilling continue. While the judge rejected this evidence and DeChristopher was sentenced to 2 years in prison, his case garnered international attention and inspired similar protests, ultimately resulting in the cancellation of the leases.

But for Australia, the extraordinary emergency defence is still being tested, and its application to acts of civil disobedience remains uncertain. As of the writing of this article, only 4 activists have set out to use the defence in ongoing trials. While Rolles faces bankruptcy and there have been deterrent consequences for climate activists, the importance of his trial cannot be understated: it was the first time in a Queensland courtroom that the scientific argument for climate change as an emergency was presented. With the rise of climate litigation and recent uses of the extraordinary emergency defence, the court must begin to recognise the role it has long played in climate policy. If an activist succeeds in using the defense at trial, it will become a powerful precedent for future defendants to justify their lawbreaking, and even more powerful incentive for the government and the private sector to act on climate change.

35 'The Democratic Platform and the Federal Judiciary', *The Placer Herald* (Rocklin, 5 September 1896)
36 *FRX17 as litigation representative for FRM17 v Minister for Immigration and Border Protection* [2018] FCA 63; *AYX18 v Minister for Home Affairs* [2018] FCA 283.
37 Liz Main, 'Metro wins injunction against union but braces for strike', *The Australian Financial Review* (online, 10 August 2019) <https://www.afr.com/companies/transport/metro-wins-injunction-against-union-but-braces-for-strike-20190809-p52fgb>.
38 Jamie McKinnell, Lily Mayers and Emma Elsworthy, 'NSW Supreme Court bans Sydney Black Lives Matter protest', *ABC News* (online, 5 June 2020) <https://www.abc.net.au/news/2020-06-05/court-rules-sydney-black-lives-protest-unsafe-due-to-coronavirus/12324186>.
39 Galligan (n 33) 100.
40 Preston (n 29).
41 Ibid 11.
42 James Randerson, 'Q&A: Kingsnorth power station', *The Guardian* (online, 8 October 2009) <https://www.theguardian.com/global/2009/oct/08/kingsnorth-climate-change-protests>.
43 Suzanne Goldenberg, 'US eco-activist jailed for two years', *The Guardian* (online, 27 July 2011) <https://www.theguardian.com/world/2011/jul/27/tim-dechristopher-jailed-two-years>.

DISSENT, PRESS FREEDOM AND THE LAW IN AUSTRALIA:
IN THE WAKE OF THE AFP'S RAIDS ON THE ABC AND NEWS CORP

Jasmine Crittenden

I Introduction

The press has long been a catalyst for popular resistance to governments, from photographer Nick Ut's '*Napalm Girl*', which intensified anti-Vietnam War protests in 1972,[1] to citizen journalist Darnella Frazier's video of the death of George Floyd, which drove up to 26 million Americans to take to the streets against racist police brutality in 2020.[2] By exposing misconduct and incompetence that might otherwise escape the public's view, the press travels beyond a government's reporting on its own activities, providing citizens with a variety of evidence to which to respond, be that taking to the streets with placards or voting out a party at the following election.

Opposition, and the free press that inspires it, are vital to democracy. After all, the essence of democracy is the citizens' right to decide the government that rules them, and, for this vote to be meaningful, the public must know of a government's activities, where those activities are in the public interest. Further, a free press provides a forum for discussion, debate and analysis.[3]

However, despite being a representative democracy with a history of public protest, Australia does not, in its legal system, explicitly protect press freedom.[4] As a result, laws introduced for other purposes, such as national security, may impact journalists' ability to report legally on the government's activities. Having long been a source of angst for the press, this potential hit headlines around the world in June 2019 when the Australian Federal Police (AFP), within a week, raided the offices of the Australian Broadcasting Corporation and the home of News Corp's national political editor in relation to separate stories, both critical of the government's activities. More than a year later, this essay will examine the state of the law concerning press freedom in Australia.

II A Tangle Of Complex, Contradictory Legislation

Given that the Australian press cannot count on definite legal protection of its freedom at a national level, journalists must keep their eye on a tangle of legislation.[5] This legislation—mainly made to protect national security, official secrets and government agencies—is complex, contradictory and scattered across many Acts.[6] While some laws come with clear exemptions for journalists who report in the public interest, others provide some exemptions for some journalists in some areas—and others, still, provide no exemptions at all. Between them, the laws may interfere with many aspects of a journalist's work, including obtaining, receiving, handling and publishing information pertaining to the government's activities, as well as maintaining the anonymity of sources.[7] Some have been

1 Associated Press, 'AP "Naplam Girl" Photo from Vietnam War Turns 40' *Associated Press* (online, 1 June 2012) <https://www.ap.org/ap-in-the-news/2012/ap-na-palm-girl-photo-from-vietnam-war-turns-40>.

2 Larry Buchanan et al, 'Black Lives Matter May Be the Largest Movement in U.S. History', *New York Times* (online, 3 July 2020) <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

3 T. P. O'Mahony, 'The Press and Democracy' (1974) 63(249) *An Irish Quarterly Review* 47, 47.

4 Keiran Hardy, 'Press Freedom in Australia Needs Much More Than Piecemeal Protection', *The Interpreter* (online, 16 August 2019) <https://www.lowyinstitute.org/the-interpreter/press-freedom-australia-needs-much-more-than-piecemeal-protection>.

5 Rebecca Ananian-Welsh, 'Australia Needs a Media Freedom Act: Here's How it Could Work' *The Conversation* (online, 22 October 2019) <https://theconversation.com/australia-needs-a-media-freedom-act-heres-how-it-could-work-125315>.

6 Ibid.

7 Richard Ackland, 'Suppression and Secrecy: How Australia's Government Put a Boot on Journalism's

around for decades and, since 9/11, the number has increased significantly in responwwse to the perceived threat of terrorism. As of 2007, more than 365 state and federal laws contain secrecy clauses.[8]

A comprehensive summary of every Australian law that may impact press freedom is beyond the scope of this paper. However, an overview of a few of the most restrictive laws paints a good impression of the legislative picture. For example, journalists are limited in their ability to report on the Australian Security Intelligence Organisation (ASIO) under the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*'). The *ASIO Act* makes it an offence, punishable by up to five years imprisonment, to disclose information that relates to ASIO's operations if that disclosure 'will endanger the health of safety of any person' or 'prejudice the effective conduct of a special intelligence operation'.[9] These limits on reporting extend to the Australian Secret Intelligence Service (ASIS), the Australian Geospatial-Intelligence Organisation, and the Australian Signals Directorate (ASD) under the Intelligence Services Act 2001, which makes it an offence, punishable by up to ten years' imprisonment, to communicate information that relates to the agencies' performance of their functions.[10] Further, some of the activities of the Department of Home Affairs are kept secret under the *Australian Border Force Bill 2016*, [11] which prevents Immigration and Border Protection workers from recording or disclosing protected information unless there is a serious threat to someone's health or life.

Journalists' ability to protect the anonymity of sources, which is an ethical obligation under the *Journalist Code of Ethics*,[12] has been particularly affected in the past five years by the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) ('*Data Retention Act*') and the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) ('*Assistance and Access Act*'). The *Data Retention Act* empowers more than 22 government agencies to request a Journalist Information Warrant, which provides access to a journalist's and their employer's telecommunications metadata, including the location, time, source and recipient of calls, text messages and emails from the previous two years, for up to six months.[13] The warrant functions in secret, which means the journalist does not know the warrant has been issued, nor how much or which of their data has been accessed, and anyone who discovers the warrant and reports on it may be imprisoned for up to two years.[14] The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth), [15] introduced to help the pursuit of terrorists, child sex offenders and organised criminals, empowers agencies to go further by accessing not only metadata, but also the content of text messages and emails, as long as the agency is pursuing a law with a penalty of at least three years' imprisonment or is working to 'safeguard national security'. There is no exemption for journalists.

III Warrants, Raids, Fear And Intimidation

The AFP's June 2019 raids of the offices of the Australian Broadcasting Commission's (ABC) in Sydney and of the home of Annika Smethurst, News Corp national political editor, made headlines all over the world.[16] The warrant for the ABC was on the grounds that the 2017 publication of '*The Afghan Files*', a series of stories by journalists Dan Oakes and Sam Clark that revealed the unlawful killing of unarmed men and children by Australian soldiers,[17] raised reasonable suspicion that the ABC had received information pertaining to 'military operations', which is an offence under 73A(2) of the *Defence Act 1903* (Cth).[18] The warrant for the Smethurst raid followed the April 2018 publication of a story that revealed the ASD's intention to propose legislation that would allow the ASD to spy, without a warrant, on Australian citizens' data, including email, text messages, financial transactions and health records.[19] This, according to the warrant, indicated that a person had 'communicated a document or article to a person, that was not

Throat' *The Guardian* (online, 1 September 2019) <https://www.theguardian.com/commentisfree/2019/sep/01/suppression-and-secrecy-how-australias-government-put-a-boot-on-journalisms-throat>.

8 'Report Warns of Culture of Secrecy' *Sydney Morning Herald* (online, 9 November 2007) <https://www.smh.com.au/national/report-warns-of-culture-of-secrecy-20071109-gdrjyw.html>.

9 *Australian Security Intelligence Organisation Act 1979* (Cth) s 35P(2).

10 *Intelligence Services Act 2001* (Cth) ss 39–40.

11 *Australian Border Force Bill 2016* (Cth) s 42.

12 Media Entertainment and Arts Alliance, 'MEAA Journalist Code of Ethics' (2020) <https://www.meaa.org/meaa-media/code-of-ethics/>.

13 *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) s 180N.

14 Ibid s 182A.

15 *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) s 317A.

16 Patricia Drum, 'Raids, Outrage and Reform: What Now for Press Freedom?' (2019) 59 (September) *Law Society Journal* 36, 39.

17 Dan Oakes and Sam Clark, 'The Afghan Files' *ABC* (online, 11 July 2017) <https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?nw=0>.

18 *Defence Act 1903* (Cth) s 73(A)(2).

19 Annika Smethurst, 'Spying Shock: Raids of Big Brother as Cyber-Security Vision Comes to Light', *The Sunday Telegraph* (online, 29 April 2018) <https://www.dailytelegraph.com.au/news/nsw/spying-shock-shades-of-big-brother-as-cybersecurity-vision-comes-to-light/news-story/bc02f35f23fa104b139160906f2ae709>.

in the interest of the Commonwealth, and permitted that person to have access to the document, contrary to the [since repealed] section 79(3) of the *Crimes Act 1914*, Official Secrets.'[20]

Although the raids drew global attention to the lack of protections for press freedom in Australia because of the high profile nature of the media organisations, they were not lone acts but an intensification of the willingness of the AFP and the Federal Government to target journalists and their sources.[21] Several investigations and warrants preceded them. For example, in the 2018-19 financial year, the AFP obtained six Journalist Information Warrants and accessed journalists' metadata 20 times;[22] in 2014, at least eight journalists were referred to the AFP after writing stories about asylum seekers;[23] and, in 2004, the AFP raided the National Indigenous Times, following the newspaper's reporting of the details of leaked documents concerning the Federal Government's controversial Indigenous welfare strategy.[24]

The Australian press may not assume that its freedom will be protected because of convention or by political discretion, nor rely on the hope of constitutional protection, as legal challenges by the ABC and Smethurst demonstrated. In *Australian Broadcasting Corporation v Kane (No 2)*,[25] the Federal Court held that the AFP's warrant was valid, rejecting the ABC's arguments that the authorised seizure of material could not provide evidence of unlawful behaviour by Oakes and that the warrant was legally unreasonable.[26] In *Smethurst v Commissioner of Police*,[27] the High Court held that the AFP's warrant was invalid, but on a technicality—because the warrant incorrectly described the offence under investigation. Both litigants' hopes that the cases might establish that journalists could find protection in the right to freedom of political communication implied in sections 4 and 7 of the Constitution were dashed. The ABC initially posited, but then dropped, this argument,[28] while Smethurst pursued it, but was not offered a resolution by the High Court.[29]

Even if neither Oakes and Clarke, nor Smethurst, are charged, editors nonetheless fear the chilling effect of the raids on journalists and their sources. In September 2019, Gaven Morris, Director of News, Analysis and Investigations at the ABC, told the Law Society Journal that editorial managers had reported sources withdrawing from investigations, out of fear.[30] More broadly, such fear has disturbing implications for Australian democracy. If citizens cannot gain access to information about the government's activities where that information is in the public interest, then their votes may be informed solely by the government's official line.

IV Conclusion: Possibilities For Law Reform

At best, the legislative landscape surrounding press freedom in Australia is extremely murky, placing journalists in a mire of legal uncertainty. At worst, it is a platform for intimidation and, perhaps, prosecution—simply because journalists dare to report on misconduct by, and incompetence of, government agencies and departments. The raids proved that piecemeal reform is insufficient. Consequently, there is an urgent need for law reform at the very least, to ensure that journalists may work in a well-defined legal environment and, at best, to protect their freedom. This may be achieved by a Media Freedom Act, as called for by the Alliance for Journalists' Freedom, which would ensure the safeguarding of both journalists and their sources at federal level,[31] or, in the longer term, an amendment to the Australia Constitution,[32] or the creation of a bill of rights.

20 *Smethurst v Commissioner of Police* (2020) 376 ALR 575, 579 [8].
21 Bianca Hall, 'Press Freedom Is An Important and Necessary Part of Democracy' *Sydney Morning Herald* (online, 26 October 2019) <https://www.smh.com.au/politics/federal/press-freedom-is-a-necessary-and-important-part-of-a-democracy-20191025-p5347p.html>.
22 Josh Taylor, 'Australian Federal Police Obtained Six Warrants to Hunt Down Journalists' Sources in 2018-19' *The Guardian* (online, 29 January 2020) <https://www.theguardian.com/australia-news/2020/jan/29/afp-obtained-six-warrants-to-hunt-down-journalists-sources-in-2018-19>.
23 Mike Dobbie, 'The War on Journalism: The MEAA Report into the State of Press Freedom in Australia in 2020' *Media Entertainment and Arts Alliance Website* (online, 3 May 2020) <https://www.meaa.org/mediaroom/the-war-on-journalism-the-meaa-report-into-the-state-of-press-freedom-in-australia-in-2020/>.
24 'Outrage After Police Raid Newspaper' *The Age* (online 13 November 2004) <https://www.theage.com.au/national/outrage-after-police-raid-newspaper-20041113-gdyzj6.html>.
25 *Australian Broadcasting Corporation v Kane (No 2)* (2020) 377 ALR 711.
26 *Australian Broadcasting Corporation* (n 25) 786 [362-372].
27 *Smethurst* (n 20) 585 [33].
28 *Australian Broadcasting Corporation* (n 25) 719 [32].
29 Smethurst (n 20) 651.
30 Drum (n 16) 39.
31 Drum (n 16) 38.
32 'An Australian "First Amendement"—Centre Alliance to Push For Constitutional Protection For Freedom of the Press and Freedom of Speech', *Centre Alliance Website* (Media Release, 6 June 2019) <https://centrealliance.org.au/media/media/an-australian-first-amendment-centre-alliance-to-push-for-constitutional-protection-for-freedom-of-the-press-and-freedom-of-speech/>.

PATIENT ADVOCACY AND THE NSW MENTAL HEALTH ACT

Maxim Shanahan

I Introduction

The New South Wales Mental Health Review Tribunal ('MHRT') sits at the juncture of medicine and the law. It exercises some of the State's most extensive powers - from indefinite detention to involuntary medication - yet conceals identities, facts and reasons, eschewing the principles of open justice in the name of patient protection and clinical necessity. For advocacy groups, this presents unique challenges. Without access to facts, identities or reasons and lacking in psychiatric expertise, it is both practically difficult and potentially irresponsible to publicly advocate for patients treated under the *Mental Health Act* ("*MHA*"). This article will examine the present state of advocacy under the *Mental Health Act* and question whether a reasonable balance is being reached between patient confidentiality, clinical requirements and open justice. Prohibitions on identity disclosure and the MHRT's reticence to publish reasons will be used as case studies.

II The Act and the Tribunal

The Mental Health Review Tribunal (MHRT) is a 'quasi-judicial'[1] body established under the *Mental Health Act*. Its powers include the ability to make 'mental health inquiries'[2] to determine whether a person is mentally ill for the purposes of the Act.[3] Such a ruling may permit the ongoing detention of a person in a mental health facility.[4] The Tribunal periodically reviews the detention of patients[5] and may make orders for patients to receive involuntary treatment under Community Treatment Orders.[6] The Tribunal also hears initial appeals from patients against various orders made,[7] which may then be elevated to the Supreme Court.[8]

In NSW, Tribunals hearings are, unlike in most other jurisdictions,[9] open to the public[10] unless otherwise specified. However, the names of patients may not be published or broadcast publicly except with the express permission of the Tribunal.[11] The strict application and enforcement of this provision against the wishes of patients has caused difficulty for advocates in bringing public attention to potential injustices in the mental health system. In contrast to most other Australian and international jurisdictions,[12] the NSW Mental Health Act is silent as to when reasons for decisions or reports of proceedings should be published. The MHRT has developed an ad-hoc practice direction which contemplates the publication of reports in cases of legal significance or where systemic issues with the treatment of patients have been dealt with.[13] In practice, very few reports are published.

Finally, the object of the Act itself provides an insight into the difficult balance the Act and the MHRT seeks to strike between open justice and therapeutics: "while protecting the civil rights of [patients], to....provide for their own protection or the protection of others."[14]

1 *Mental Health Review Tribunal* (web page) <https://www.mhrt.nsw.gov.au/the-tribunal/>.
2 *Mental Health Act 2007* (NSW) s 34.
3 Ibid s 153.
4 Ibid s 27.
5 Ibid s 37.
6 Ibid s 51.
7 Ibid ss 44, 67.
8 Ibid s 163.
9 In the ACT, Vic, NT Qld and WA, hearings are closed to the public. Only NSW specifically requires hearings to be open.
10 *Mental Health Act 2007* (NSW) s 151(3).
11 Ibid s 162(1).
12 Section 198 of the *Mental Health Act 2014* (Vic) provides that patients must be provided with reasons upon request. Schedule 1, cl 8 of the *Mental Health (Compulsory Assessment and Treatment) Act 1992* (NZ) permits publication of a report when it is relevant to legal and health professionals.
13 Mental Health Review Tribunal, *Publication of Official Reports of the Tribunal's Proceedings*, 19 June 2013.
14 *Mental Health Act 2007* (NSW) s 3(d).

III Identity disclosure

Section 162(1) of the *Mental Health Act*, which restrains public identification of patients, provides an example of the tension between public interest advocacy, open justice and clinical necessity which often restrains activism on injustices in the psychiatric system. Morton and Pearson characterise this as "a clash between the government's responsibility to act in the best interests of vulnerable individuals in their care and the public interest in ensuring that processes are open to scrutiny."[15]

The matter of Saeed Dezfouli is a useful case study. After setting fire to the Ethnic Affairs Commission in Sydney in 2000, killing one person, Mr Dezfouli was found not guilty of manslaughter by reason of mental illness and has since been detained in a psychiatric facility. He has repeatedly made allegations of mistreatment in the psychiatric system and has been supported by prisoner advocacy group Justice Action. In 2010 Dezfouli, along with Justice Action, sought an exemption to s 162(1) to permit his identification in news articles and social media posts about his accusations regarding the psychiatric justice system.

In the original MHRT hearing, quoted in a subsequent Supreme Court appeal, the Tribunal President characterised the issue not as one of open justice or public interest, but as one of 'capacity' and whether the desire to run public campaigns was symptomatic of Mr Dezfouli's mental illness. The President, on psychiatric advice, found that public activism "would produce a situation not to his benefit, but adverse to him."[16] The MHRT has characterised itself as being concerned primarily with "public health, rather than the adjustment of rights and liabilities between the State and its citizens"[17] This is supported by the stated object of the *Mental Health Act* as being to "provide for the care and treatment of, and to promote the recovery of, persons who are mentally ill..."[18] The clinical purpose of the MHRT should be kept in mind by advocates when campaigning for mentally ill patients. Advocacy groups have a duty to ensure that their activism is in the best interests of the patient rather than the activists, and not detrimental to their mental health.

This is of course a difficult decision to make, and may be coloured by competing psychiatric and personal opinions. Ultimately, it is the MHRT, with its balance of psychiatric and legal professionals, rather than advocacy groups, which is best placed to make such a judgment. Tribunal members include both lawyers and psychiatrists who have access to confidential medical and factual information unavailable to advocates. The composition of the Tribunal allows detailed and informed weighing of medical opinion and sober application of legal issues when considering s 162(1) issues.

However, the prioritisation of patient welfare should not give the MHRT carte blanche to restrict the identification of patients in advocacy scenarios. Mr Dezfouli's case is peculiar in that public campaigning was seen to be a peculiar manifestation of his illness[19] and generally counterproductive to his health. Zealous enforcement of s 162(1) without such grounds is counterproductive to the object of the *Mental Health Act* and can reduce public confidence in its processes. Writing about the UK Court of Protection, Taylor observed that strict enforcement of suppression orders against public advocates "too often...feels like local authorities and primary care trusts are trying to shield their own - often controversial - decisions from public scrutiny."[20]

Justice Action's support of Kerry-Anne O'Malley, who was subject to compulsory medication under a Community Treatment Order, attracted demands from the MHRT to remove articles and social media posts identifying Ms O'Malley. This was despite Justice Action having previously obtained a s 162(1) exemption to identify Ms O'Malley in past campaigns. The President of the MHRT defined the purpose of s 162(1) as "to preserve patients from the effect of the stigma that might otherwise be associated with suggestions that they may have mental health problems."[21] If a patient has demonstrated a continuing capacity to consent to public identification and is aware of its social consequences, then

15 Tom Morton and Mark Pearson, 'Zones of Silence: Forensic Patients, Radio Documentary, and a Mindful Approach to Journalism Ethics' (2015) 21(1) *Pacific Journalism Review* 11, 13.
16 *A v Mental Health Review Tribunal* [2012] NSWSC 293, 20.
17 [2019] NSWMHRT 3, 12.
18 *Mental Health Act 2007* (NSW) s 3(a).
19 *A v Mental Health Review Tribunal* [2012] NSWSC 293, 20, 33.
20 Taylor et al, 'Opening Closed Doors of Justice' (2012) 23(4) *British Journalism Review* 42, 44.
21 *A v Mental Health Review Tribunal* [2012] NSWSC 293, 25.

there should be no reason to enforce s 162(1) against patients and advocacy groups. This is concomitant with a duty for advocates to act responsibly, to not identify other patients and to give publicity only to relevant public interest matters. It is in the interests of the public, patients and the mental health system that injustices and abuses can be brought to light and that the suspicions associated with carte blanche secrecy are avoided.

IV Giving of Reasons

Another aspect of the MHRT which has drawn criticism from advocacy groups is the failure of the Tribunal to regularly provide public reasons for its decisions. The MHRT exercises extensive powers over personal liberty but the bases for their decisions are rarely made public. Unlike other jurisdictions, where reasons are available on request[22] or when significant to relevant professions,[23] the *NSW Mental Health Act* does not prescribe a reasons regime, merely contemplating at s 162(2) that the s 162(1) identification prohibition does not prevent the publication of 'Official Reports' of Tribunal proceedings. The Tribunal has developed its own Practice Directions for the publication of such reports, providing that "from time to time" a report may be issued where questions of legal or systemic significance are considered.[24] These reports "need not include the whole of the Tribunal's reasons."[25] In 2018-19, the Tribunal heard 18,688 matters, yet only published four Official Reports.

The vast majority of MHRT proceedings, for reasons of resources and relevance, do not require public reasons to be given. However, the present level of opacity is neither in the public interest, nor in the interest of the Tribunal in maintaining public confidence in its processes. The benefit of providing more reasons can be seen in the Supreme Court judgment of *A v MHRT*,[26] in which Adams J extensively quoted the Tribunal President from the original unpublished hearing discussing the purpose and legislative rationale of s 162(1). This reasoning, which is enlightening to patients, advocates and the public, was only revealed because the case progressed to the Supreme Court. As Smith and Caple write, "it is difficult for society to monitor whether the interests of patients are being upheld when there is limited public access to the tribunals...A total failure to provide reasons goes beyond what is necessary and appropriate to achieve the therapeutic and protective objective of mental health legislation."[27]

The imperative to protect patients can be satisfied by the production of redacted and anonymised reasons. In New Zealand, where the New Zealand Mental Health Review Tribunal does publish reasons, publication has enabled acknowledgment and affirmation of the therapeutic intention of the Tribunal within academic circles. This access to information has enabled legal studies to be produced which examine, among other things, the inclusion of patient perspectives and the interaction between legal and psychiatric members of the Tribunal.[28] Academic and subsequent media access to anonymised and redacted reasons permits some public understanding of Tribunal procedure and aims, while enabling academic interrogation and debate which can, in turn, better the procedures of the Tribunal. Driesfeld and McKenna write that "written decisions do not, and arguably cannot, fully document the nature and content of review body hearings. However...the documents are the only current method to examine whether, and how, the tribunal's goals are being achieved."[29] Currently, in NSW, advocates and academics are deprived of even this limited source of information, and the MHRT itself consequently remains largely immune from public critique and constructive academic criticism. The present statutory regime, with its default tendency towards secrecy, needs to change. The *Mental Health Act* should be amended to specifically prescribe the instances in which reasons should be published rather relying on the present ad-hoc formulation. The comparative opacity of the NSW MHRT only contributes to the stigma surrounding mental illness by sequestering the

22 *Mental Health Act 2013* (Tas) Sch 4, Pt 6, cl 1; *Mental Health Act 2014* (Vic) s 198; *Mental Health Act 1996* (WA) Sch 2, cl 15; *Mental Health Act 2000* (Qld) s 192.
23 *Mental Health (Compulsory Assessment and Treatment) Act 1992* Sch 1, cl 8.
24 Mental Health Review Tribunal, *Publication of Official Reports of the Tribunal's Proceedings,* 19 June 2013.
25 Ibid.
26 [2012] NSWSC 293.
27 Alison Smith and Andrew Caple, 'Transparency in mental health: Why mental health tribunals should be required to publish reasons' (2014) 21 JLM 942, 950.
28 Kate Diesfeld and Brian McKenna, 'The unintended impact of the therapeutic intentions of the New Zealand Mental Health Review Tribunal? Therapeutic jurisprudence perspectives' (2007) 14 JLM 566; Kate Diesfeld and Brian McKenna, 'The therapeutic intent of the New Zealand Mental Health Review Tribunal' (2006) 13(1) PPL 100.
29 Kate Diesfeld and Brian McKenna, 'The therapeutic intent of the New Zealand Mental Health Review Tribunal' (2006) 13(1) PPL 100, 107.

psychiatric justice system away from the view of advocacy groups and academics who can bring abuses to light and promote the improvement of MHRT processes. Greater access to redacted and anonymised reasons would allow necessary public scrutiny of NSW's mental health system while preserving the anonymity of patients and their circumstances.

V Conclusion

Public advocacy in mental health settings is a difficult task. Delicate clinical matters demand caution from activists, a retreat from established methods of public advocacy and a willingness to defer to psychiatric expertise. However, the clinical focus of the *Mental Health Act* and the MHRT does not justify the present level of secrecy which surrounds NSW's mental health system. A greater willingness to make exceptions to the s 162(1) identity disclosure provision, and more readily given reasons can allow effective public advocacy for the rights of psychiatric patients and thorough academic examination of the MHRT while maintaining clinical outcomes as the prime focus of the Act and the Tribunal. To make changes would not be a radical move - domestic and international jurisdictions are well ahead of New South Wales in their commitment to transparency in mental health systems.

Part II

A DEFENCE FOR THE JOKER?

REFORMING THE INSANITY DEFENCE AND OUR INTUITION REGARDING MENTAL ILLNESS AND CRIMINAL RESPONSIBILITY

Genevieve Couvret

"What do you get when you cross a mentally ill loner with a society that abandons him and treats him like trash?

*You get what you f***ing deserve."*

- *Joker* (2019), dir. Todd Phillips[1]

I Introduction

One need not look any further than the Academy Award winning film *Joker*[2] to realise that popular discourse often conflates mental illness and criminality. In the film, which grossed over one billion dollars at the box office, the Joker's criminal behaviour is explained (and arguably excused) through the convenient, reductive prism of mental illness. Given its success, it is likely that many a legislator, juror or member of the judiciary has seen Joker.[3] That the law does not exist in a vacuum is a platitude the truth of which has been mired by its province in cliché. Yet it is imperative to recognise how cultural conceptions of mental illness pervade policy and legal outcomes in the criminal law.

The insanity defence, which in NSW is found under s 38 of the *Mental Health (Forensic Provisions) Act*[4] ('the *MHFPA*') is currently outdated, unnecessarily complex and legally incoherent. It confuses and obscures criminal liability for those who, unlike the Joker, should not be held legally responsible. In this paper, I will argue that the present operation of the defence does not protect mentally ill offenders because of three key problems: not enough weight is placed on expert medical evidence, there is no definition of 'mental illness' in the *MHFPA*, and it is currently a legal, rather than medical, question whether an offender is mentally ill and whether this affected their offending. Because media portrayals of mental illness shape community attitudes towards mental health and criminal responsibility, I will first outline how the infiltration of these attitudes illustrates and exacerbates these flaws in the defence. I will thus identify three key areas of reform: increased weight given to medical evidence, insertion of a psychiatric definition of 'mental illness' and a simplification of the defence that foregrounds diagnosis rather than applying complex legal tests of wrongfulness.

II Background

A *Popular Portrayals of Violent Crime*

From *Psycho*[5] to *The Silence of the Lambs*,[6] filmmakers have been fascinated by the concept of the psychopath since the mid-20th century. More recently, horror and comic book films have similarly constructed their villains but have attempted to imbue them with depth by portraying their violent criminality as a result of non-descript mental illness. This conflation

1 *Joker* (Warner Bros. Pictures, 2019) ('*Joker*').
2 Ibid.
3 Ibid.
4 *Mental Health (Forensic Provisions) Act* 1900 (NSW) ('*MHFPA*').
5 *Psycho* (Paramount Pictures, 1960).
6 *The Silence of the Lambs* (Orion Pictures, 1991).

of mental illness and criminality on the screen greatly contributes to the stigmatisation of mental illness in the real world and has profound implications for a criminal justice system that relies on the reasonable, ordinary minds of jurors.

The incentives for these portrayals are commercial.[7] Media outlets, driven by the pursuit of profit, often turn to crime as a reliably attention-grabbing topic.[8] This was exactly the case in the 1990s in the United States, where mainstream news networks increased crime coverage despite falling crime rates.[9] This media coverage plays a significant role in shaping public opinion and, in turn, criminal justice policy. Agenda setting, priming and framing enable the media to direct public attention towards crime and affect the criteria by which viewers judge public policies.[10] The mechanism is thus: an emphasis on crime makes it more salient and causes the public to perceive it as more severe, which increases public support for harsher punishments, fear of crime and moral panics.[11] Accordingly, violent crime is not represented with the nuance and depth of cycles of illness, opportunity or circumstance from which it often stems.

When crime and violence are commodified for popular consumption,[12] public perception and policy mandates begin to reflect popular narratives and we project familiar characters onto our offenders. This lack of nuance in popular depictions of crime obscures the ways in which judicial officers, jurors, and policy makers perceive the effects of mental illness on offending. There is ease in believing either that violent criminality is synonymous with illness or, because psychotic mental illness is often misunderstood, it is deemed immaterial and not factored in adequately. This is manifest in the courtroom where the commission of offences that align with a stereotypical narrative are less likely to be perceived as a result of mental illness, and more likely to be contrived as an act of active criminality.[13] Tropes of acrimonious relationships or stealing to procure drugs[14] reflect popular narratives of scorned lovers or hardened street criminals digested and regurgitated by fictional and commercialised news media. The tropes, metaphors[15] and popular opinions that inform the criminal law render the application of the insanity defence subject to this kind of subjective lay view of a judge or juror. This founds determination of the defence on fallacious sociocultural judgement rather than medical judgements, which ought to be at the forefront of conversations around mental illness, particularly in the formalistic context of the court.

B POLITICISATION AND INSTINCTIVE RESPONSE TO VIOLENT CRIME

The outdated M'Naghten[16] rules from the 1840s are the foundations of the modern common law of insanity. To qualify for the defence an offender must be suffering from a defect of reason or disease of the mind such that they did not know the nature and quality of the act or did not know it was wrong. Daniel M'Naghten was acquitted of the murder of the Prime Minister's Secretary under the defence of insanity. M'Naghten had mistaken the Secretary for someone else whilst under the delusion that the Tory party was persecuting him. Despite the testimony of medical specialists that the defence was available to M'Naghten, the political nature of the crime generated such furore in the wake of acquittal that the Queen asked the House of Lords to review the decision. Such public and political responses infiltrating the judicial system can be linked to a perceived lack of legitimacy in the insanity defence and the desire to create accountability for violence in society.

Politicisation thereby obscures the rule of law when it comes to vulnerable defendants or particularly heinous or salacious crimes. The erosion of the defence due to discourse surrounding it – such as the invocation of the insanity plea as a form of 'getting away with it' and not facing real punishment – means our instinctive response to violent crime becomes the operative factor in attaching culpability to offenders. The abolition of the defence of defensive homicide in Victoria because it was purportedly allowing violent men to get away with murder exemplifies that policy makers do not adequately consider the impacts on vulnerable groups, such as women or mentally

7 Sara Sun Beale, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48(2) *William & Mary Law Review* 397.
8 Ibid 424.
9 Ibid 422.
10 Ibid 442.
11 Ibid 446, 453.
12 Ibid 429.
13 Christina White, 'Separating the Inseparable? An Empirical Study of Australia's Approach to Comorbidity and Criminal Responsibility' (2017) 41 *Criminal Law Journal* 312, 334.
14 See *R v Farrow* (No 2)[2014] NSWSC 109; Cf. *R v Daniels* [2005] NSWSC 745, [65]; *R v Derbin* [2000] NSWCCA 361, [75].
15 Steven T Yannoulidis, 'Mental Illness, Rationality and Criminal Responsibility' (2003) 25 *Sydney Law Review* 189, 190.
16 *M'Naghten's Case* 1843 10 C & F 200 ('*M'Naghten*').

impaired offenders. For example, many who are not captured within the defence of mental illness kill with the genuine, yet unreasonable, belief they were acting in self-defence.[17]

Criminal liability should not be attributed to character, choice or external imperatives to be tough on crime, but to legally wrongful action.[18] The criminal law, as it is constructed both in its black letter and by the media, feeds off dichotomies of good and evil: the 'use of the word "evil" in popular media is commonplace… when describing criminal behaviour'.[19] A countervailing mental illness disrupts the convenience of this fiction. In other kinds of law, most saliently in negligence, accountability does not stem from deliberate choice: the 'concept of evil is anathema to legal discourse'[20] because it is an emotional, rather than factual, notion. Yet the adversarial nature of the courtroom employs pathos to play with people's intuitive responses to crime and violence. Rhetorical devices of oral argument can often affect how the insanity defence operates.[21] In 85% of reported cases where evidence that an offender suffers from psychopathy is admitted, it is led by the prosecution rather than the defence because it supports the idea of an antisocial, immoral individual and invokes tropes of evil.[22] Ultimately, structural issues and community support are sidelined when rhetorical devices of the courtroom are at play: 'gaols become holding pens for the mentally ill while assistance for such persons is limited to glib advertising campaigns directing people to a telephone number if they have a problem'.[23]

III Reform

To mitigate the aforementioned structural issues, I propose three key areas of reform. First, greater weight should be placed on expert medical evidence in court. Juries and judicial officers should not have the final say on whether an offender is in fact mentally ill. Secondly, mental illness should be defined in the *MHFPA* by reference to a psychiatric, rather than legal, standard. Thirdly, the defence can altogether be simplified as a causal inquiry rather than one that entertains subjective and irrelevant concepts of wrongfulness, rationality and voluntariness.

A *Expert Medical Evidence*

Where mental illness is at issue, it is clear that for a fair trial[24] medical evidence should be called.[25] Section 38 of the *MHFPA* allows a jury to return a special verdict of not guilty by reason of mental illness. Whether or not a particular mental condition impairs the capacity for liability and can be taken to the jury for such a verdict is ultimately a matter of law.[26] Hence, the current position is that the fact-finder has the final say on whether or not an offender is mentally ill for the purposes of whether the defence operates to preclude criminal responsibility.[27] This is highly problematic, as judges and jurors ultimately apply a "lay filter" to medical evidence: as non-experts, they often "reject opinions that lack intuitive resonance".[28] As above, these intuitions are dangerous and reductive. In *Da-Pra*,[29] Emmett JA held that juries are not bound to accept and act upon expert medical evidence. In fact, it is open to them to reject unanimous medical evidence where other evidence casts doubt on it. Further, in *Goodridge*,[30] Adamson J rejected expert evidence of two psychiatrists who indicated the partial defence of substantial impairment by abnormality of mind ('SIAM') (which reduces murder to manslaughter) was available. Upon appeal, it was held that it was well open to Adamson J to reach a different conclusion to that of the medical evidence. Although there is a limitation on when unanimous medical evidence can be rejected[31] and juries are instructed to accept it unless there is a "good reason to reject it,"[32] that good reason is likely to be far more subjective than a medical diagnosis, which operates as a circuit breaker to the ordinary person's intuitions. This issue is manifest in judges' express reference to the role of "common sense" in their decision-making.[33] The importation of common sense

17 See Madeleine Ulbrick, Asher Flynn and Danielle Tyson, 'The Abolition of Defensive Homicide: A Step Towards Populist Punitivism at the Expense of Mentally Impaired Offenders' (2016) 40 *Melbourne University Law Review* 324.
18 Yannoulidis (n 15) 213.
19 Janet Ruffles, 'Diagnosing Evil in Australian Courts: Psychopathy and Antisocial Personality Disorder as Legal Synonyms of Evil' (2011) 11(1) *Psychology, Psychiatry and the Law* 113.
20 Ibid 114.
21 White (n 13) 333.
22 Nic Damnjanovic, 'Criminal Responsibility and Psychopathy in Western Australia' (2011) 35 *UWA Law Review* 265.
23 Robert Cavanaugh, 'Mental Illness Defences and the criminal law' (2018) 145 *Precedent* 34.
24 *Dietrich v The Queen* 177 CLR 292.
25 See *R v Dashwood* [1943] KB 1.
26 *R v Kemp* [1957] 1 QB 399, 406; *R v Falconer* (1990) 171 CLR 30, 48-49.
27 *R v Falconer* (1990) 171 CLR 30; see *R v Porter* (1933) 55 CLR 182, 188; *R v Bromage* [1991] 1 Qd R, 6.
28 White (n 13) 326.
29 *Da-Pra v R* [2014] NSWCCA 211.
30 *Goodridge v The Queen* [2014] NSWCCA 37.
31 *Taylor v The Queen* (1978) 45 FLR 343, 355.
32 *R v Cunningham* [2017] NSWSC 1176, [16].
33 White (n 13) 326.

principles leads to severe discrepancies in how judges deal with medical opinions, because the legitimacy of expert evidence should not necessarily align with one's lay view.

Such discrepancies are worsened when medical professionals have to adapt their opinions into the legal context – opinions about whether the M'Naghten rules are satisfied transpose medical opinions into a hybrid key.[34] In particular, the cautionary statement in the *Diagnostic and Statistical Manual of Mental Disorders*,[35] or *DSM-5*, the primary diagnostic tool for psychiatrists should be noted: it clearly states that the criteria used by clinicians in assessment will not necessarily meet forensic legal needs.[36] Yet written reports for the court have to be framed around the requirements of the defence, employ legal terms and essentially reconstruct and reproduce empirical findings within a fictional framework to accommodate legal norms. This is worsened when empiricism itself is often contentious due to a distrust of clinical opinion within the courts, and more broadly in society. But the concern that diagnoses are mere value judgements 'no more scientifically based than drawing the inference that an offender is evil'[37] ignores the comparative world in which medical evidence is displaced by the opinion of those far less qualified.

It is important to consider these two primary concerns regarding deference to medicine within the law: that individual psychiatrists differ in diagnoses or over-diagnose, and broad scientific uncertainty. At the heart of these concerns is not that psychiatry is an imperfect discipline. Although it may grate against our intuition, 'if the knowledge and the insights contributed by psychiatry are discomforting, it is pointless to protest that the realities of that science should change.'[38] Rather, the true problem lies in the leveraging of equivocality in the legal context as a means of delegitimising these medical opinions.[39] Lawyers seize upon the acknowledgement of a difficulty or slight difference in diagnoses as a reason to give less weight to a medical view. By levelling medical opinions against other evidence, they are found more or less persuasive based on their unambiguousness or the extent to which they match a defendant's account. Manipulating and challenging medical findings within an adversarial context thereby invalidates clinical opinion amongst jurors, incentivises procurement of greater bias in medical assessments and undermines the operation of the defence. Therefore, because medical evidence can currently be entirely undermined by the mere opinion of fact finders, which often leads to highly discrepant outcomes, more weight and legitimacy should be placed on pure diagnostic classifications and medical expertise. This should be both consciously undertaken by judges and juries and clearly established in the statute.

B *DEFINING MENTAL ILLNESS AND PSYCHOPATHY*

The *MHFPA* currently does not define mental illness: the legal, rather than psychiatric test, is founded on the M'Naghten[40] rules and refined in subsequent cases. Making mental illness a legal question poses difficulty because the law is constructed flexibly to incorporate policy concerns.[41] The application of legal principles to indicia of mental illness provided by health professionals can create confusion – for both psychiatrists performing assessments and fact-finders.[42] Instead, I propose that 'mental illness' should be defined in the *MHFPA*. Its definition should be determined by psychiatrists rather than being subject to a fact-specific legal test applied by reference to the opinion of 'ordinary sensible people'.[43] Although mental illness is neither straightforward nor entirely empirical, a definition produced by medical professionals will be comparatively more consistent, reliable and compassionate than a jury's intuition or a medical opinion mired by legal language.

Differences in the nature of the enquiry between law and medicine create conceptual confusion inherent in the insanity defence when it lacks a clear definition: legal insanity is not itself a diagnosis, but an excuse for wrongdoing.[44] Law and psychiatry approach mental illness from different angles: the law seeks to identify symptoms to substantiate a causal nexus and focuses on effects of illness

34 Ibid, 327.
35 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013).
36 American Psychiatric Association (n 35) 13; Geert Philip Stevens, 'A Mother's Love? Postpartum Disorders, the DSM-5 and Criminal Responsibility' (2013) 25(2) *Psychology, Psychiatry and the Law* 186.
37 Ruffles (n 19) 118.
38 C R Williams 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case,' *Monash University Law Review* (1990) 16(2) 161,182.
39 White (n 13) 328.
40 *M'Naghten* (n 16).
41 White (n 13) 315.
42 Cavanaugh (n 23) 35.
43 See *Cozens v Brutus* [1973] AC 854 which held that ordinary words of the English language should be interpreted in the way ordinary sensible people would construe them; Williams (n 38) 173.
44 Yannoulidis (n 15) 190, 202.

rather than identifying an illness itself.[45] But defendants should be diagnosed and recognised as living with a condition, as it affects their whole life, rather than reconstructed by the court as an irrational agent suffering from an amalgamation of symptoms that fused to engender involuntary actions at a particular moment in time. Otherwise, the enquiry does not seek to protect offenders, but rather seeks to qualify irrational thought patterns through a rational, legal framework as interpreted by 'ordinary sensible people',[46] whose perceptions of mental illness and irrationality are largely informed by external influences and intuitions.

For example, comorbid defendants pose a diagnostic challenge because it is often difficult to delineate between mental illness and intoxication.[47] In *R v Doolan*,[48] one psychiatrist gave evidence that the underlying chemical disturbance to the brain is the same for psychosis caused by schizophrenia and drug-induced psychosis. This reveals the incoherence within the law, where defendants both intoxicated and mentally ill 'straddle two theoretically distinct doctrines'.[49] The tendency of judges, experts and counsel to focus on and isolate what caused the offence[50] does not protect mentally ill offenders where the test only considers what caused the distinct conduct rather than the overall mental state of the offender. Ultimately, this defence is a status defence wherein the defendant's mental state should be 'analysed with conceptual priority,'[51] rather than meted out as another mere factor within a causal chain.

Furthermore, the medical distinction between mental illness and personality disorders or psychopathy has not been translated into the law in NSW because of this lack of definition. At trial in *Byrne*,[52] evidence of SIAM was withdrawn from the jury because psychopathy did not fall within the statutory definition of abnormality of mind. On appeal, the English Court of Appeal disagreed and held that it did. Arguments that psychopaths suffer similar defects such that they should be exempted from criminal responsibility is not consistent with medical opinion.[53] Yet, many cases have seemed to accept antisocial personality disorder or personality disorders more broadly as mental illnesses or impairments.[54] Despite scholarly suggestions to the contrary, and most notably the Law Reform Commission of Victoria's recommendation that mental illness include personality disorders,[55] it ought be maintained that 'being evil is not the same as being mad'.[56] That psychopaths cannot speak the language of morality does not mean they do not know the law. A large proportion of criminals have Antisocial Personality Disorder or are psychopaths, and whilst they occupy a different moral framework, 'evil should not be its own excuse'.[57]

A general refusal by the court to characterise psychopathy as a mental illness,[58] which would be corroborated if a psychiatric distinction was inserted, instils a vital distinction between personality disorders and mental illness: the former means people function differently and possess certain traits, the latter denotes a disturbance of cognitive functioning. Although psychopaths suffer from cognitive and emotional deficits insofar as their reasoning about morality is impaired and they cannot distinguish between moral rights and wrongs, they are typically in control of their actions and aware of their illegality.[59] They are thereby not impaired in the same relevant way as the mentally ill because they know the nature of their actions, in the sense that they are cognisant of a legal transgression even if morality is intellectually inaccessible.[60]

Psychopathy thus reveals the fault line between morality and the law inherent in the criminal justice system. In *Stapleton*,[61] the High Court made it clear that the capacity to know an act was wrong refers to the capacity to know the act was legally wrong. The absence of emotional appreciation at the time of performing an

45 Stevens (n 36) 188.
46 Williams (n 38) 173.
47 White (n 13); see *R v Derbin* [2000] NSWCCA 361; *R v Kinloch* [2004] NSWSC 998 [27][45]; *R v Cunningham* [2017] NSWSC 1176 [145]; *R v Brewer* (No 2) [2015] NSWSC 1547; *R v Barker* (2014) 242 A Crim R 339.
48 *R v Doolan* [2010] NSWSC 147, [40].
49 White (n 13) 312.
50 See *R v Sevi* [2010] NSWSC 387 at [37]; *R v Fang* (No 3) [2017] NSWSC 28, [33], [34].
51 White (n 13) 325.
52 *R v Byrne* [1960] 2 QB 396.
53 See Damnjanovic (n 22) 265.
54 See *Stapleton v The Queen* (1952) 86 CLR 358; *Willgoss v R* (1960) 105 CLR 295: *Jeffrey v The Queen* (1982) 7 A Crim R 55; *AG(SA) v Brown* [1960] AC 432. For cases involve diagnoses of ASPD or psychopathy, *see R v Hore* [2002] NSWSC 749; *R v Sievers* [2002] NSWSC 1257; *R v Glen* [1999] NSWSC 1018; *R v Harrison* (Unreported, New South Wales Court of Criminal Appeal, 20 February 1997); *R v Bowhay* [1998] NSWSC 782.
55 See the final recommendations contained in Law Reform Commission of Victoria, *The Concept of Mental Illness in the Mental Health Act 1986* (Report No 31, April 1990).
56 Ruffles (n 19) 115.
57 Damnjanovic (n 22) 267.
58 Ruffles (n 19) 116.
59 Damnjanovic (n 22) 266.
60 Ibid 273.
61 *Stapleton v The Queen* (1952) 86 CLR 358, 360-7.

immoral act merely illustrates a moral failing, rather than a lack of responsibility.[62] Note that as a matter of justice and law enforcement, there is no dilemma regarding punishment of those who lack moral responsibility for their crimes but who are nevertheless legally responsible. Absolute or strict liability crimes, which do not necessarily require a moral failing on the part of the offender, support the notion that legal punishment does not always require moral wrongdoing.[63] This is nevertheless balanced within the law, wherein protection of the community cannot justify preventive detention where this is disproportionate.[64] Where the law is necessarily a coercive system of social control, precluding the availability of the defence for psychopaths in violation of legal reason, despite a defect in their moral reasoning, is consistent. Therefore, to resolve this academic contention between morality and law, personality and psychosis, mental illness should be clearly defined within the *MHFPA*. This should be by reference to psychiatric standards, which neatly excludes psychopaths from escaping liability and increases clarity overall.

C *REFORMULATING AND SIMPLIFYING THE DEFENCE*

Thus far, I have explained why greater deference to medical opinion and a psychiatric definition of mental illness will greatly improve the operation of the defence. However, the peripheral legal concepts of wrongfulness, rationality, involuntariness and causation still complicate the question of insanity. Finally, I propose a reformulation of the defence that focalises a medical diagnosis of mental illness and simplifies the role of the fact finder. I propose a restatement of the defence as follows: 'A person is not criminally responsible if at the time of the commission of the offence they had a mental illness (as defined in the Act) which included in its symptoms a loss of competent cognitive apprehension of the law necessary to refrain from commission of the offence.'

The current requirement that an offender did not know that an act was wrong implies that the requisite mental impairment is based on a lack of epistzemological or moral justification for one's actions rather than the presence and influence of a countervailing, chemical illness, which should be paramount. In 'wrongfulness' lies an ambiguity;[65] wrong can be interpreted as against the standards of reasonable people, as perceived by the offender, in the moral sense or in the legal sense. As per Dixon J, wrongfulness has been conceived of as a lack of rationality or humanity, 'where the destruction of life is no more than breaking a twig or destroying an inanimate object'.[66] But the distinction between a normal and abnormal mind, a rational and irrational actor, is a legal fiction. Rationality is a normative trope that is informed by and interdependent with societal and culturally relative beliefs. Even the scientific concept focuses merely on cognitive processes rather than the existence of an illness. A temporary, involuntary cognitive failing 'denies clinical reality'.[67] What it means to be insane is intuitively and characteristically irrationality, but these intuitions are counterproductive because 'a belief in an objectively ascertainable view of rationality is illusory'.[68]

I thus contend that a causal link between mental illness and the offending should be sufficient and will lead to a simpler, more consistent decision-making process. Consistently with the exclusion of psychopathy from the defence, knowledge of wrongfulness or the presence of a rational mind should be replaced with competency for understanding the imperatives of legal compliance.[69]

III Conclusion

In conclusion, epistemic findings regarding whether the insanity defence should be available should not depend on a legal construct of mental illness or the intuitions of the ordinary person; it should be a medical enquiry. Whether Arthur Fleck from *Joker*[70] would be entitled to this defence should not depend on revenge, social disenfranchisement, the shallow invocation of some form of disorder or his position within a superficial class discourse. It should be based entirely on whether, at the time of the commission of each offence, he had a recognised psychiatric illness that impaired his facility to apprehend a legal transgression. To an extent, the criminal law lacks the capacity for nuance. But the legitimisation of mental illness as precluding criminal responsibility, rather than antagonising it, is a shift which the law – as a normative institution – should pursue.

62 *Willgoss v R* (1960) 105 CLR 295; Damnjanovic (n 22) 277.
63 Damnjanovic (n 22) 280; Williams (n 38) 168.
64 See *Veen v R (No 1)* (1979) 143 CLR 458; *Veen v R (No 2)* (1988) 164 CLR 465.
65 Yannoulidis (n 15) 194.
66 *R v Porter* (1933) 55 CLR 182, 190 (Dixon J); approved in *Stapleton v The Queen* (1952) 86 CLR 358.
67 Yannoulidis (n 15) 212.
68 Ibid.
69 Ibid 219.
70 *Joker* (n 1).

LAW AS AN AGENT OF HEALING: TOWARDS A BENEVOLENT CRIMINAL JUSTICE SYSTEM FOR VICTIMS OF CHILD SEXUAL ABUSE

Gabbie Lynch

When one of the most extraordinary verdicts in the High Court's history was delivered by Chief Justice Susan Kiefel in April this year, it fell on deaf ears. As Australians grappled with the early stages of a seemingly endless COVID-19 lockdown and braced for cover in their homes, George Pell, the most senior clergyman of the Catholic Church to be convicted of child sex offences, won his appeal in the High Court on a legal technicality and walked away a free man.[1] From the grandeur of the courtroom, journalists reported an eerie silence: no cries, no cheers, not even a handshake; nothing but the tapping sounds of the journalists translating the news into their phones and sending it out to the world. The predicted but tragic defeat was instead shared in the privacy of isolating homes across the nation. Just as Witness J, the victim in the Pell trial, held the secret of his abuse for decades, so too did the decision from the High Court find itself settling upon a silent courtroom.

For all that was extraordinary about the George Pell case, the crimes for which he was first convicted in the Victorian County Court, sexual offences against minors, are frighteningly common.[2] Between 2003 and 2016, there were 63,0008 child sexual assault and indecent assault incidents reported to NSW police. Indigenous people were overrepresented, making up 8.6% of complainants but only 3.4% of the population in NSW.[3] The vast number of cases courts hear involving child sexual abuse indicates that it is not alarmist to call it a hidden epidemic.[4] Moreover, the statistics do not account for the many victims who never report their abuse, for myriad reasons. Whether incapacitated by fear, wanting to protect an abuser who is known to the victim, facing cultural barriers or cognitive or physical disability, it is to be assumed that the numbers are indeed much higher than what is currently known. As journalist Jane Gilmore writes, 'there were about 5.7 million children in Australia in 2016. It's difficult to know for sure how many children were sexually abused, but best estimates put it at roughly 8 percent of boys and 20 percent of girls. Put all those numbers together and you could fill the MCG eight times over with children living in Australia right now who have been or will be sexually abused.'[5] Perhaps more harrowing still is that the High Court's decision to quash the convictions against Pell remains on trend with a substantial body of research highlighting the low rates of convictions for sexual offences against children in comparison to other types of crimes.[6] Earlier in 2020, an Australian study into trends of the criminal justice response to child sex offences estimated that only 12% of offences reported to police resulted in a conviction over a fourteen year period.[7] The

1 *Pell v The Queen* (2020) 94 ALJR 394.
2 *Director of Public Prosecutions (VIC) v Pell* [2019] VCC 260.
3 Judith Cashmore, Alan Taylor and Patrick Parkinson, 'Fourteen-Year Trends in the Criminal Justice Response to Child Sexual Abuse Reports in New South Wales' (2019) 25(1) *Child Maltreatment* 88.
4 Nicholas Cowdery, 'Current Issues in the Prosecution of Sexual Assault' (2005) 28(1) *UNSW Law Journal* 246.
5 Jane Gilmore, 'Domestic Violence Half-Yearly Update: The Numbers We Need to Know' *The Sydney Morning Herald* (online, 5 July 2017) <https://www.smh.com.au/lifestyle/domestic-violence-halfyearly-update-the-numbers-we-need-to-know-20170704-gx4dsv.html>.
6 Kelly Richards, 'Child Complainants and the court process in Australia' (2009) 380 (1) *Trends and Issues in Crimes and Criminal Justice* 1.
7 Judith Cashmore, Alan Taylor and Patrick Parkinson, 'Fourteen-Year Trends in the Criminal Justice Response to Child Sexual Abuse Reports in New South Wales'

statistics should elicit outrage. In many ways, however, the Pell case revealed to the greater public what many child complainants, police, prosecutors, judges and health workers already knew: convictions in the legal system for victims of child sexual abuse are an elusive promise of justice. If there is a conviction, the path to get there was a harrowing expedition in providing evidence, of re-telling trauma, facing perpetrators and potential appeals that the endpoint, with or without a conviction, may be worse for the victim than if they had not pursued their own 'justice' to begin with.

While silence has been the predominant response to the hidden epidemic of child sexual abuse, at the other end of the spectrum lies the coercive and militaristic tactics of the Northern Territory Emergency Response by the Howard Government, following the release of the *Little Children Are Sacred* Report in late June 2007. 'The Intervention', as it is now commonly known, has become a prime example of a reactionary, oppressive and racialised response to the complex issue of wide-spread child sexual abuse and neglect in Aboriginal communities in the Northern Territory.[8] In preparing its final report, the Board of Inquiry adopted a therapeutic approach to the crisis by consulting directly with the affected communities. Their recommendations were underpinned by a recognition of the importance of a self-determinative and collaborative approach to the problem of child sex abuse.[9] In so doing, the Report foregrounded a non-adversarial and community driven response. Instead, in a mere few days of its release, the Commonwealth Government had deployed a brigade of social services, federal police and uniformed members of the Australian Defence Force, now practically unhindered in the exercise of authority, without notice to or consultation with the affected communities. The *Northern Territory National Emergency Response Act 2007* and associate Acts effectively suspended the operation of the *Racial Discrimination Act 1975* ('*RDA*') in the NT by labelling the Intervention provisions as 'special measures' to the benefit of those individuals and communities affected.[10] The NTER legislation also diverted a range of Territory matters to Federal jurisdiction and imposed a suite of controls on Indigenous communities, quarantining welfare payments and establishing an 'income management regime',[11] abandoned the consideration of customary laws in bail applications and sentencing,[12] and compulsory acquisition by the Commonwealth of 65 Indigenous communities.[13] In tactfully framing the intervention as a race to save neglected and vulnerable children, the Government's approach faced little opposition. The Senate Committee Inquiry into the legislation found 'overwhelming support' from all sides of Parliament for the need to respond to the crisis as a matter of national emergency, resulting in the adoption of seven minor recommendations relating to the operation of the legislation over time and providing additional drug and rehabilitation services.[14] The ALP offered several proposals relating to the need for 'dialogue and genuine consultation' with affected Indigenous communities, a review of some provisions relating to land rights and welfare reform, and opposing the *RDA* exemption.[15] The Bills passed both Houses without substantial amendment.[16]

As a nation, we have continually failed victims of child sexual abuse. When we could not dig our heads in the sand to its reality, we poured gas on the flames and wondered why the fire bellowed. When we gave child complainants a place to speak, our criminal justice system repeatedly told them the law was not in their corner. For communities particularly vulnerable to both the occurrence and long-lasting effects of child sexual abuse, our governments introduced laws that muted their stories entirely, stripping them of their own tool for healing and placing it within the perpetrators' hands. However, crimes of child sex abuse, particularly within institutional settings, have cast a heavy and permanent shadow across our national identity. When former prime minister Julia Gillard announced a Royal Commission into

(2019) 25(1) *Child Maltreatment* 85.

8 Michael S King and Rob Guthrie, 'Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response' (2008) 89 *Precedent* 40.

9 Michael S King, 'Therapeutic Jurisprudence, Child Complainants, and the Concept of a Fair Trial' 2008 32 (5) *Criminal Law Journal* 303.

10 *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER Act*') pt VIII, ss 132-133; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), ss 4-5; *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4-6.

11 *NTNER Act* (n 10) pt VII.

12 Ibid pt VI.

13 Ibid pt IV.

14 Senate Standing Committee on Legal and Constitutional Affairs, *Report on Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 and Four Related Bills Concerning the Northern Territory National Emergency Response* (Report, 13 August 2007).

15 Ibid 37.

16 Australian Human Rights Commission, *Social Justice Report* 2007 (Report, 2007) 215.

Institutional Responses to Child Sexual Abuse in 2012, the reality of this hidden pandemic rattled our national conscience. Over 8,000 survivors and people directly impacted by child sexual abuse in institutions shared their stories in private session at the Royal Commission.[17] In jurisdictions across the nation, judges, prosecutors and juries faced a labyrinthine task of trialling cases of child sexual abuses. It required a delicate balancing act of supporting victims while preserving the underlying fundamental rights of an accused, particularly the presumption of innocence. The adversarial framework applied in criminal courts placed a heavy burden on vulnerable complainants to prove beyond reasonable doubt that the accused was guilty of a crime that occurred decades earlier. As NSW Crown Prosecutor Kara Shead writes, 'the criminal justice system struggles to accommodate prosecutions that provide either a satisfactory environment for victims or adequate assistance to juries to properly evaluate the evidence and complainant credibility.'[18] Even when a prosecution is successful at securing a conviction, we must ask of our system, 'at what cost'?

Reimagining the legal proceedings for cases involving crimes of child sexual abuse requires a shift in thinking around the deliverance of justice. Traditionally, 'justice' has been synonymous with conviction. Courts have become battlegrounds, of wars fought on the back of legal technicalities by judges, lawyers and juries who are driven by the infectious desire to deliver a conviction, no matter the process, blinded to the effects such proceedings take upon already wounded victims. Many child victims have reported harrowing experiences with legal proceedings, leading to re-traumatization.[19] One sixteen-year-old victim reported to researchers at the Australian Institute of Criminology that the court process was highly traumatic and invalidating: 'It makes me feel like it is no good going to court … It is just a waste of time … They don't look after you. They couldn't care less. They are not interested … It is the hardest thing and it ruins your life. You never forget it.'[20]

Since the Royal Commission into Institutional Responses into Child Sexual Abuse, numerous reforms have been made to assist prosecutors and improve the process for both child and adult victims involved in historical cases of child sexual abuse. Beginning in March 2016, the Child Sexual Offence Evidence Program Pilot was trialled in two locations, Newcastle District Court and Sydney District Court. With the aim of reducing traumatisation for child complaints, the program introduced a witness intermediary who, as an impartial and independent participant, assesses the needs of the child and the prosecution's witnesses and will inform the judge, ODPP, and the defence of the most effective ways of communicating with a complainant or witness giving evidence. The program also expanded the use of pre-recorded hearings, which allowed the complainant and witnesses to pre-record all evidence before the trial.[21] Overall, the program has been well-regarded, particularly in its response to minimising the effects of the legal process on vulnerable victims.[22] In April 2019, the pilot transitioned into a permanent program funded by the NSW government until 2022. The focus, however, remains on providing justice by means of conviction, relying strongly upon the adversarial system.

Further, in June this year, the NSW government successfully passed a bill to amend the *Evidence Act 1995* (NSW) ('the Act') in response to several recommendations from the Royal Commission about the scope of evidence which can be adduced against a defendant in trials involving child sex offences.[23] Most notably, the amendments allow prosecutors to introduce evidence of the defendant's past crimes and admit evidence if it simply 'outweighs' the danger of unfair prejudice. This is a much lower threshold than the previous test requiring evidence to 'substantially outweigh' such a danger.[24] Essentially, the newly amended Act targets the specific challenges in trialling crimes which occur in private spaces, in which there are unlikely to be witnesses and which go unreported for years after they were committed, all of which

17 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) vol 1.
18 Kara Shead, 'Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions' (2014) 26(1) *Current Issues in Criminal Justice* 57.
19 Christine Eastwood, 'The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System' (2009) 250 *Trends and Issues in Crime and Criminal Justice* 2.
20 Ibid.
21 NSW Department of Justice, 'Information Sheet: Child Sexual Offence Evidence Program', *Victims Services* (Web Page, 2019) <https://www.victimsservices.justice.nsw.gov.au/Documents/wi_program-odpp.pdf>.
22 Judy Cashmore and Rita Shackel, *Evaluation of the Child Sexual Offence Evidence Pilot* (Final Outcome Evaluation Report, August 2018) 7.
23 *Evidence Act 1995* (NSW) s 97A.
24 Stephen Odgers, 'Criminal Law: New tendency and coincidence laws edge closer in NSW' (2020) 65 *Law Society of NSW Journal* 74.

are characteristic to child sexual abuse, by its nature. Without a significant period of time in practice however, it is difficult to evaluate how the reforms will impact upon on trials of child sexual abuse. There is cause for concern that admitting evidence of the defendant's previous crimes will undercut the fundamental right to a presumption of innocence. Moreover, just as the Child Sexual Offence Evidence program continued to rely upon an adversarial system of trial, legislative reforms to evidence and procedural law exist as only minor twinges to a legal system that remains a 'poor fit' for cases of child sex abuse.[25] Even when a conviction occurs in child sex abuse matters, appeals are common and often successful.[26] The very nature of child sexual abuse is unlike any other types of crime for a myriad of complex reasons; namely that the crime often happens in private by someone known and respected by the child and is not reported for years after it occurred. The current criminal justice system does not adequately accommodate such circumstances. Beyond increasing the chance of a conviction and reducing the likelihood of further traumatisation, procedural and legislative reforms in cases of child sexual abuse are simply the tape and glue desperately trying to hold together the traditional adversarial law system in cases where it is not suited. Standing in the shadow of the recent appeal of George Pell, the question must be asked of our justice system, is conviction the only form of justice?

At its core, law shapes the foundations of our societies. From our systems of governments to our moral perceptions of right and wrong, the law underpins the way in which we govern our own lives amongst the lives of those around us. With such long reaching effects, it is plausible to imagine that the law might play a role in the psychological well-being of those who directly interact with it. This was the thought process behind therapeutic jurisprudence, a concept that originated in the United States by visionary mental health law experts David Wexler and Bruce Winick in the late 1980s.[27] Wexler and Winnick revolutionised the way in which the law could be studied as a 'therapeutic agent of healing'[28] in both a theoretical and practical approach. Since its beginnings, the principles of therapeutic jurisprudence have been applied in courts both in the United States and internationally. In Australia, family courts and drug courts have welcomed collaborative practices and individual self-determination processes informed by the principles of therapeutic jurisprudence. Chief Justice Diana Byrant and Deputy Chief Justice John Faulks note that the family courts, dealing with both delicate matters and parties, present a 'fertile area' for the application of therapeutic jurisprudence practices.[29] The Children Cases Program ('CCP') developed in 2002–2003 aimed to address the psychological and social needs of the parties involved in disputes with a particular focus on the wellbeing of the child. With a resolution-based focus, the CCP aimed to divert the need for an adversarial approach of a traditional trial, recognising the damaging effect such practices take upon those involved. Meditation was to be initiated before a trial, hearsay evidence could not be admitted, and the Judge had an active role in conducting the hearing, deciding upon the issues to be determined and the way in which evidence was called and received. In a report commissioned by the Family Court to evaluate the CCP, 45 adults who had taken part in the CCP and 34 adults who had taken part in 'mainstream' family court litigation were interviewed about their experiences. Those involved in the CCP reported greater satisfaction with the court system; 35% of CCP parents said the process had a positive experience upon them, compared with only 3% of those in the traditional family court system.[30] Most notably, the CCP group recognised a greater emotional stability in their children after court, reporting less anxiety, fear and unhappiness in comparison to those in the mainstream group.[31] Whilst the CCP was tailored specifically for family court matters, the child-centred, collaborative approach signalled the importance of incorporating therapeutic practices in procedural matters involving children.

The malicious nature of the alleged acts against children and the potential for penalties which deprive the accused of their liberty, for example, preclude the introduction of a program similar to the CCP. Yet the idea that the law may serve as a healing, restorative, and ultimately therapeutic agent could be better adopted in

25 Shead (n 18) 56.
26 Graham Hazlitt, Patrizia Poletti and Hugh Donnelly, *Sentencing Offenders Convicted of Child Sexual Assault,* (Monograph Series No 25, September 2004).
27 David B Wexler and Bruce J Winick, *Essays in Therapeutic Jurisprudence,* (Carolina Academic Press, 1991).
28 Ibid xvii.
29 Diana Bryant and John Faulks, 'The Helping Court Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia' (2007) 17(2) *Journal of Judicial Administration* 95.
30 Jennifer E McIntosh, 'The Children's Cases Pilot Project: An Exploratory Study of Impacts on Parenting Capacity and Child Wellbeing'' (2006) *Final Report to the Family Court of Australia*, 21.
31 Ibid 28.

criminal jurisdictions. In the criminal justice system, this requires a dramatic shift in thinking about the way a therapeutic approach may contest with traditionally upheld principles of law. Establishing a safe space to accommodate the psychological impacts associated with trauma need not stand at odds with the traditional principles of a fair trial.[32] Rather, just as in the family courts, the therapeutic goal—the healing of families and children—can be reconciled with the requirements of justice.

How a therapeutic approach would manifest in cases dealing with crimes of child sexual abuse remains unclear. While the NT Intervention proved to be the antithesis of a therapeutic based approach to child sex abuse, the underlying report, *Little Children Are Sacred*,[33] foregrounded a self-determinative and collaborative response to child sex abuse and neglect.[34] Crucially, the inquiry created spaces for members of the community to share their stories, experiences and malaise. Unlike in a traditional courtroom scenario, witnesses spoke of their experiences in non-hierarchical settings, without the interruption of cross-examination or the pressures of forming a bulletproof testimony. Improving convictions rates was not recognised as being synonymous with justice. Effective healing and prevention relied upon empowering the very people's lives it affected. The recommendations which eventuated stressed the importance of a collaborative approach between government agents, service providers and Indigenous communities themselves.[35] Though the final report acknowledged 'there is nothing new or extraordinary in the allegations of sexual abuse of Aboriginal children in the Northern Territory,' the process of the inquiry itself was a new and extraordinary approach that was overlooked in the paternalistic government response which eventuated.[36] The landscape of child welfare in Indigenous communities in the Northern Territory may have been profoundly different today had the recommendations from the report been followed. The indictment on our nation is not only that our response to the Report perpetuated the harms of a long history of colonial oppression of First Nations people, but that we missed an opportunity to explore an entirely new approach to providing justice of child sex abuse.

When Witness J heard the outcome of Pell's appeal, he made a plea to victims of child sex abuse: 'I would hate to think that one outcome of this case is that people are discouraged from reporting to the police. I would like to reassure child sex abuse survivors that most people recognise the truth when they hear it.'[37]

In the wake of the Pell decision, the choice with which we are confronted is inescapably clear. On the one hand, we may commit to the current adversarial methods of fact-finding in criminal trials for child sex abuse, positioning victims against alleged perpetrators who are structurally advantaged in the inquiry of criminal guilt. On the other, we could recognise the failures of traditional methods in delivering justice or rehabilitation in these cases. We might also observe that victims of child sex abuse are disproportionately Indigenous, have a disability or come from lower socio-economic backgrounds. As was evident in both the Royal Commission into Institutional Responses to Child Sexual Abuse and the *Little Children Are Sacred* report, the desire to vocalise truth and have it recognised is a key commonality for survivors. Whether or not increasing rates of conviction is an end to its means, justice in cases of child sexual abuse demands that the evidentiary burden in these proceedings is oriented on victims who are first assured: 'you are believed.'

32 Michael S King, 'Therapeutic Jurisprudence, child complainants, and the concept of a fair trial' 2008 32 (5) *Criminal Law Journal,* 303.

33 Northern Territory Government, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred": Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Report, April 2007) ('*Little Children Are Sacred*').

34 Michael S King and Rob Guthrie, 'Therapeutic Jurisprudence, Human Rights and the Northern Territory Emergency Response' (2008) 89 (November/December) *Precedent* 39.

35 *Little Children Are Sacred* (n 33) 205.

36 Ibid 5.

37 ABC News, 'Witness J, former choirboy who accused George Pell, says case does not define me' *ABC News* (online, 9 April 2020) <https://www.abc.net.au/news/2020-04-08/george-pell-accuser-witness-j-reacts-to-high-court-judgment/12130684>.

'NIRBHAYA': INDIA'S FAILURE TO PROTECT WOMEN AGAINST SEXUAL VIOLENCE

Aanya Das

I Introduction

On the 21st March 2013, the *Criminal Law (Amendment) Act 2013* ('*Amendment Act*') was passed with the purpose of revolutionising the laws governing sexual violence against women in India. The Amendment Act initially encouraged more women to come forward with reports of sexual violence, as the police disclosed a spike of 26% in reported rape cases in 2013.[1] However, the long-term results are troubling. Official government crime data revealed that the number of rape cases has doubled in India between 2001 and 2017[2] and a rape is reported every 15 minutes.[3] In 2019, mass protests were held in New Delhi, Hyderabad, and Mumbai, after a 27-year-old woman was gang-raped and murdered. In addition to the disturbing increase in cases, convictions remain dangerously low, with only 27% of reported cases leading to convictions in 2018.[4]

This paper will argue that the *Amendment Act* has had minimal long-lasting effects on the reformation of sexual violence against women in India. Firstly, it will consider the failures of the *Amendment Act* by demonstrating that it facilitates two major causes of sexual violence in India: sexist perceptions of women and the stigmatisation of sex. Following this, the paper will argue that The *Amendment Act* has also had limited results due to ineffective implementation. In doing so, it will examine the inaction of India's police force and the delays in the court system. Finally, it will outline that women's rights activists continue to strive for changes that may address the sources of sexual violence in India.

II Background to the Criminal Law (Amendment) Act 2013

On the 16th December 2012, a 23-year-old woman was gang-raped and murdered by six men on a bus in New Delhi. The brutality of the attack triggered protests throughout India that were labelled the Nirbhaya movement; Nirbhaya meaning 'Fearless', as Indian law prevents a rape victim's name from being released to the media.[5] The victim's name has since been leaked to the public as Jyoti Singh and her parents proudly support this, stating 'Why should we hide our daughter's name? My daughter was not at fault. And, by hiding crimes, we only allow more crimes to take place.'[6] India's battle with sexual violence against women was well established before this incident, but Jyoti's death was a pivotal moment in this battle. Following the media's reporting of the incident, protests began in New Delhi that soon spread to Bangalore and Kolkata. After Jyoti's death, these protests intensified

1 Sujan Bandyopadhyay, 'A Closer Look at Statistics on Sexual Violence in India', *The Wire* (Online, 8th May 2018) <https://thewire.in/society/a-closer-look-at-statistics-on-sexual-violence-in-india>.

2 Sudarshan Varadhan, 'One woman reports a rape every 15 minutes in India', *Thomson Reuters* (Online, 10th January 2020) <https://www.reuters.com/article/us-india-crime-women/one-woman-reports-a-rape-every-15-minutes-in-india-idUSKBN1Z821W>.

3 Dipu Rai, 'Sexual violence pandemic in India: Rape cases doubled in last 17 years', *India Today* (Online, 13th December 2019) <https://www.indiatoday.in/diu/story/sexual-violence-pandemic-india-rape-cases-doubled-seventeen-years-1628143-2019-12-13#:~:text=According%20to%20the%20NCRB%20data,had%20been%20raped%20every%20hour>.

4 'Crime in India 2018 Statistics Volume I', *National Crime Records Bureau Ministry of Home Affairs*, (Web Page, 23rd December 2019), xv <https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf>.

5 *Indian Penal Code 1860* (India) s 228A(1).

6 Michael Safi, 'Delhi rape victim's parents call for her real name to be used to end stigma', *The Guardian*, (Online, 16th February 2017) <https://www.theguardian.com/world/2017/feb/16/jyoti-singh-parents-call-for-honorary-museum-nirbhaya-to-use-her-real-name>.

and were staged throughout India in Chennai, Mumbai, and Hyderabad, before becoming global, as marches and rallies were held in Nepal, Sri Lanka, Pakistan, and Bangladesh. The cries for justice and reform from ordinary people, horrified at the inhumane treatment of women in India, became impossible to ignore. In response, the Union Government appointed a judicial committee, spearheaded by the former Chief Justice of India, to create a report with recommendations of amendments to the laws on sexual violence. *The Report of the Committee on Amendments to Criminal Law* ('*The Report*') was published 30 days later and The Amendment Act was passed soon after.

III The Failures of the Criminal Law (Amendment) Act 2013

The *Amendment Act* was passed to reshape the laws on sexual violence and provide greater protection for Indian women. However, its execution perpetuates sexist perceptions of women and stigmatises sex in a way that exacerbates the patriarchal attitudes underpinning rape culture in India. One failure of the *Amendment Act* was retaining a clause in the Indian Penal Code that explicitly allows a man to rape his wife, as long as the wife is not under 15 years old.[7] This clause was passed contrary to *The Report*, which explicitly recommended the removal of the exception.[8] *The Report* also recommended specifying that a marital or other relationship between the victim and their attacker is not a defence against rape, it is not relevant to the issue of consent, and it is not a mitigating factor in sentencing.[9] In *Independent Thought v Union of India*, the Indian Supreme Court read down the marital rape exemption to only apply to cases where the woman is over 18 years old.[10] However, this still leaves married women over the age of 18 unprotected. The exclusion of marital rape from the Indian Penal Code reflects the archaic belief that married women are property of their husbands and do not have agency over their own bodies, thus precluding married women from revoking the alleged consent that they gave following their wedding.[11] The marital exemption reinforces the patriarchal attitudes that drive rape culture by encouraging the Indian public to perceive women as submissive and ultimately belonging to men. This attitude is demonstrated through the haunting words of one of Jyoti's attackers, three years after death: 'When being raped, she shouldn't fight back. She should just be silent and allow the rape.'[12] In 2015, an NGO called RIT Foundation brought a petition to the High Court, challenging the constitutional validity of the marital rape exemption.[13] The Union Government defended the exemption on the grounds that it might 'destabilise the institution of marriage apart from being an easy tool for harassing the husbands'.[14] The Union Government's decision to prioritise men and the sanctity of marriage over women's bodily autonomy speaks volumes of women's place in India's societal hierarchies. It is unlikely that the statistics of sexual violence will improve until their outlook changes, as they guide the public's perception of women.

Another failure of the *Amendment Act* was raising the age of consent from 16 to 18[15] to coordinate the Indian Penal Code with the *Protection of Children from Sexual Offences Act 2012*.[16] This was in contravention of *The Report*'s recommendation that the age of consent should revert to 16.[17] Whilst the *Amendment Act* acknowledges that children below a certain age are unable to give meaningful consent, this change harmonised the age of consent with the legal marriageable age to discourage premarital sex.[18] The criminalisation of consensual

7 *Criminal Law (Amendment) Act 2013* (India) ('The Amendment Act') s 375 exception 2.
8 Committee on Amendments to Criminal Law, '*Report of the Committee on Amendments to Criminal Law*' (Report, 23rd January 2013), 117 ('*Report of the Committee on Amendments to Criminal Law*').
9 Ibid.
10 *Independent Thought v. Union of India* [2017] 10 SCC 800.
11 Dr. Bhavish Gupta1 & Dr. Meenu Gupta, 'Marital Rape: - Current Legal Framework in India and the Need for Change' (2013), *Galgotias Journal of Legal Studies* Vol. 1 No. 1, 31.
12 'Delhi rapist says victim shouldn't have fought back' *BBC News* (online, 3rd March 2015) <https://www.bbc.com/news/magazine-31698154>.
13 'Written submissions on behalf of the petitioners in the matter of RIT Foundation v Union of India', *Lawyers Weekly* (Webpage), <http://www.lawyerscollective.org/wp-content/uploads/2018/01/Constitutionality-Marital-Rape.26Aug2017.Written-Submissions-2.pdf>.
14 Saptarshi Mandal, 'What do Judges in India Think About Marital Sex' (30 Dec 2017), *Economic and Political Weekly* Vol. 52, Issue No. 52.
15 *Criminal Law (Amendment) Act* (n 7) s 375 sixthly.
16 *Protection of Children from Sexual Offences Act 2012* (India).
17 *Report of the Committee on Amendments to Criminal Law* (n 8) 443.
18 Amit Chaturvedi, 'Finally, anti-rape law in Parliament today; age of consent is 18 now', *NDTV* (Online, 19th March 2013) <https://www.ndtv.com/india-news/finally-anti-rape-law-in-parliament-today-age-of-consent-is-18-now-516647>.

relationships between adolescents ignores the reality of teenage sexuality and evolving social mores, which allow young adults to make responsible decisions about engaging in sexual conduct for themselves.[19] Instead, it strengthens the stigma affiliated with sex by characterising it as a transgression, thereby deterring teenagers from safely exploring their sexuality. Furthermore, comprehensive sex education schemes, which can guide young adults on navigating their sexuality and provide information to fill the gaps of actual experiences, are still considered taboo. In 2018, the Union Government camouflaged sex education in schools by combining it with other health issues, such as yoga, nutrition, and meditation under a national health protection scheme to appease Rashtriya Swayamsevak Sangh (RSS), the right-wing, Hindu Nationalist organisation with close ties to India's BJP Government.[20] The RSS' disapproval of sex education is demonstrated through Shiksha Sanskriti Utthan Nya, an RSS-affiliated educational organisation, who argued that there is 'no need for sex education in schools'[21] and strongly objected to the use of the word 'sex'.[22] Whilst including sex education is a step forward, obscuring the scheme amongst other health issues downplays its importance and minimises its effectiveness in cautioning teenagers on safe sex. This, in combination with raising the age of consent, risks creating sexually repressed and uninformed young adults, thereby maintaining the distorted perceptions of consent that are a significant factor in perpetuating rape culture in India.

IV The Failures of Implementation

Despite its principled failures, the *Amendment Act* made some positive changes to the Indian Penal Code by including some of the recommendations of *The Report*. It expanded the definition of rape to include acts in addition to vaginal penetration[23] and clarified that a woman who does not physically resist shall not be regarded as giving her consent.[24] It also introduced new offences for stalking,[25] voyeurism,[26] and acid attacks,[27] and criminalised the police's failure to register complaints as a First Information Report (FIR).[28]

However, the long-term impact of these stringent laws has been minimal, as effective implementation has been hindered by insufficient police involvement. In 2017, a Human Rights Watch report interviewed victims of sexual violence who found that the police failed to follow their legal obligations.[29] Despite a punishment of up to two years imprisonment,[30] the police either delayed reporting sexual violence in a FIR, did not report it at all, or pressured the women to settle the cases through emotional and physical abuse; especially when the offender was from a prominent, wealthy family.[31] Even in the cases where the FIR was filed, women found that the police breached their obligation to investigate the case without 'unnecessary delay'[32] by failing to take any action following the report.[33] The extent of police inaction made headlines in 2018 when a 16-year-old girl tried to set herself on fire in protest against the police's refusal to report that a member of the BJP had sexually assaulted her.[34] Her father was subsequently taken into custody and beaten to death.[35] The absence of police action or police committing crimes themselves has created a large gap between the 2013 law reform and its successful implementation, thus inhibiting the positive

19 Human Rights Watch, *'India: Reject New Sexual Violence Ordinance'* (Web Page, 11th February 2013) <https://www.hrw.org/news/2013/02/11/india-reject-new-sexual-violence-ordinance>.
20 Autur Nehru, 'Delhi: cautious sex education initiative', *Education World* (Online, March 2020) <https://www.educationworld.in/delhi-cautious-sex-education-initiative/>.
21 'No need for sex education in schools': RSS affiliate', *Hindustan Times,* (Online, 28th August 2019) <https://www.hindustantimes.com/india-news/no-need-for-sex-education-in-schools-rss-affiliate/story-SaRnJqwI0X-J7hYPD6LYSFO.html>.
22 Ibid.
23 *Criminal Law (Amendment) Act* (n 7), s 375 (a)-(d).
24 Ibid s 375 explanation 2.
25 Ibid s 364D.
26 Ibid s 354C.
27 Ibid s 326A-s 326B.
28 Ibid s 166A.
29 Human Rights Watch, '"*Everyone Blames Me" Barriers to Justice and Support Services for Sexual Assault Survivors in India*' (Report, 8th November 2017) ('"*Everyone Blames Me" Barriers to Justice and Support Services for Sexual Assault Survivors in India*') <https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors#_ftn161>.
30 *Criminal Law (Amendment) Act* (n 7), s 166A.
31 "*Everyone Blames Me" Barriers to Justice and Support Services for Sexual Assault Survivors in India* (n 29).
32 *Code of Criminal Procedure 1973* (India), s 173(1).
33 "*Everyone Blames Me" Barriers to Justice and Support Services for Sexual Assault Survivors in India* (n 29).
34 Agence France-Presse, 'Indian political charged with rape of girl who tried to set herself alight', *The Guardian* (Online, 12th July 2018) <https://www.theguardian.com/world/2018/jul/11/indian-politician-charged-with-teenagers>.
35 Ibid.

amendments from having any substantial effects on limiting sexual violence against women.

Even in cases where the police investigation has been completed, the prospects of conviction continue to be low due to the severe delays in the Indian court system. Whilst the law requires that rape cases are handled within two months 'as far as possible',[36] the infrastructure of India's court system is completely inadequate to deal with a population of 1.3 billion and it is estimated that there is an average of only 19 judges per 1 million people.[37] Criminal trials often last for months or years because there can be frequent adjournments and court sessions are held intermittently.[38] Following Jyoti's death, the government set up six fast-track courts to hear sexual violence cases. Whilst the outcome of these courts is unclear, government statistics reveal that 133,000 sexual violence cases were pending in 2019.[39] This strongly suggests that these courts have had limited success in providing any justice for victims. Whilst the inefficiency of India's court system affects everyone, the pain is felt most strongly by survivors of sexual violence who may be forced to revisit the trauma of their experience months or years later. Therefore, poor implementation has deprived The Amendment Act from affording any real justice and change for the victims of sexual violence.

V Conclusion

The *Amendment Act* was enacted in recognition of the desperate need for change and it made some positive amendments to the Indian Penal Code. However, the long-term effects of this reform have been minimal, as any potential for substantial improvements were negated by the *Amendment Act's* preservation of sexist perceptions of women and the stigmatisation of sex. Its effectiveness was further hindered by insufficient implementation due to police inaction and the slow court system. Whilst it is unknown whether there will be justice for previous victims of sexual violence, the limited effects of the *Amendment Act* have made it clear to women's rights activists that the future lies in changes that may address the origins of sexual violence in India.[40] This includes altering perceptions of women's roles in society and existing attitudes towards sex and female bodies.[41] Although it is undeniable that these are ambitious aims, women's voices in India are growing louder and the movement preceding the *Amendment Act* is tangible evidence that resistance can trigger some form of change. Nonetheless, this change has not succeeded in providing the protection that Indian women deserve, and we must recognise that India has a long way to go in the fight against sexual violence.

36 *Code of Criminal Procedure (Amendment) Act 2008* (India), s. 309 (a)(1).
37 Puja Changoiwala, 'How India Fails Its Rape Survivors', *World Politics Review* (Online, 24th September 2019) <https://www.worldpoliticsreview.com/articles/28213/seven-years-after-nirbhaya-case-india-rape-victims-still-face-obstacles-to-justice>.
38 *"Everyone Blames Me" Barriers to Justice and Support Services for Sexual Assault Survivors in India* (n 29).
39 Rachel Bunyan and Sanya Mansoor, 'Nothing Has Changed: 7 Years After a Gang Rape That Shocked a Nation, Brutal Attacks Against Women Continue', *The Times,* (online, 23rd December 2019) <https://time.com/5754565/india-rape-new-delhi-bus-attack/>.
40 Ibid.
41 Ibid.

THE RIGHT TO BODILY AUTONOMY: REGULATION OF THE BODY THROUGH INFANT MALE CIRCUMCISION

Murray Gatt

'...an ethical framework for evaluating such alterations that is based upon considerations of bodily autonomy and informed consent, rather than sex or gender'.[1]

I Introduction

Our bodies are subject to different sources of influence and control. Notable silence surrounds the ongoing prevalence of infant male circumcision. Given that the ability to agitate for socio-legal reform is an act of resistance inaccessible to children, we must consider whether or not continued justification exists for infant male circumcision. This article agitates for our legal system to adequately protect the child's best interests by moving towards a model of informed consent alongside the criminalisation of infant male circumcision where it is medically unnecessary. The term 'infant male circumcision' is being utilised throughout to encompass the practice of surgically removing the foreskin of an infant male's penis, where there exists no medical indication of necessity nor the patient's informed consent. When medically indicated as necessary, circumcision should occur to ensure the child's wellbeing, as well as being accessible to those who elect to consent and undergo surgery.

This article will traverse the socio-legal issues arising from infant male circumcision in Australia and identify divergent contemporary resistance to the procedure, with some advocating reform while others are defending circumcision's right to remain. The social and statistical relevance of the procedure will be outlined, proceeded by the contention surrounding continued public funding of infant male circumcision. Contemporary opinions presented will contrast against the socio-legal approaches to analogous procedures. In particular, that despite the criminalisation of female genital mutilation (FGM), infant male circumcision remains implicitly legal in New South Wales (NSW) amongst all other Australian jurisdictions. This legal framework will be canvassed, including exploration of the case law surrounding consent to medical treatment and interrogation of consent as it is currently understood within our legal system, in particular, whether there is potential to incorporate retrospective consent. Importantly, demands for reform exist in tandem with other contemporary socio-legal issues. As such, this piece seeks to expose the gendered and sexual significance of the procedure, occurring within a legal system of greater familiarity with regulating the female body and shortcoming in its protection of intersex people.

II Circumcision in Australia

The statistical prevalence of circumcision in Australia, obtained through the Medicare Benefits Schedule's (MBS) data on infant male circumcision shows that in the 2008 calendar year, 23,064 circumcisions occurred.[2] In 2018

1 Brian D Earp, 'Female Genital Mutilation and Male Circumcision: Toward an Autonomy-Based Ethical Framework' (2015) 5 *Medicolegal and Bioethics* 89.

2 Services Australia, *Medicare Item Reports: Medicare Item 30653 processed from January 2008 to December 2008* (Report, July 2020); Services Australia, *Medicare Item Reports: Medicare Item 30656 processed from January 2008 to December 2008* (Report, July 2020); Services Australia, *Medicare Item Reports: Medicare Item 30659 processed from January 2008 to December 2008* (Report, July 2020); Services Australia, Medicare Item Reports: *Medicare*

this figure was 15,741.[3] This represents a decrease of 31.8% over ten years, suggesting approximately 9.7% of the 161,985 males born in 2018 were circumcised.[4] Such figures are limited as they capture circumcisions performed only until the age of 4, including a minority performed with a medical indication of necessity. They also exclude circumcisions that do not attract a Medicare benefit, such as when executed by community operators. Regardless, estimates suggest that MBS data is accurate, capturing 94% of total circumcisions.[5] Overall, there has been a constant decline in popularity since the 1960s when the majority of Australian male infants underwent circumcision, to today where less than 10% of boys today are circumcised.[6]

Irrespective of the progress of law reform in this area, taxpayers should not be funding infant male circumcision as a matter of public policy. Inadequate justification exists for the payment of Medicare rebates to parents performing circumcision on their child for cultural or religious purposes, given that it is medically unreasonable or unnecessary. Infant male circumcision is one procedure under MBS perceived as 'incentivising less appropriate care, through the systematic provision of clinically unnecessary services'.[7] The Medicare Benefits Schedule Review Taskforce determined that the public regularly cited infant male circumcision as 'unnecessary surgical intervention' calling into question its suitability for public funding.[8]

III Social, Religious And Medical Criterion

Infant male circumcision continues to occur in Australia for an array of familial, cultural and religious dimensions—the amalgamation of these factors creating resistance to law reform. Firstly, the procedure is performed for religious reasons, in particular amongst the Jewish and Islamic faiths.[9] It also occurs throughout various Indigenous Australian communities also practice circumcision rituals. However, these communities are unique, with circumcision constituting a 'coming-of-age' ceremony and performed at a later age when the child is likely of sufficient age to provide consent.[10] Interestingly, concerns of whether or not a child will appear like their father persist as both a primary or adjunct consideration for parents, despite the majority of males now being uncircumcised.[11] Alternative gendered and sexual explanations for circumcision also exist, such as that of Richters, who argues that as circumcision is a culturally embedded practice, this causes medical justification to emerge post hoc despite purported health benefits being of 'varying seriousness and rarity'.[12] Should there be medical benefits of circumcision, scepticism remains as to whether this is the primary motivation of advocates.[13] Perhaps institutions of law and medicine are reluctant to reflect upon their own culturally assumed truths and in turn, contribute to the continuation of the practice due to socio-cultural rather than medico-legal motivations. Whether or not one accepts such a hypothesis, in contemporary non-religious contexts, infant male circumcision continues to occur with minimal reasoning.

Though Australia is an increasingly secular nation with circumcision often conducted for non-religious reasons, religious tradition is one of the domains where resistance to socio-legal change is most pronounced. While acknowledging the culturally relative and personal nature of this subject matter, religious freedom is vital for both parents and their children. Earp writes:

> *R*itual circumcision is a pre-Enlightenment tribal tradition. [Both the Jewish and Islamic versions require] males [to sacrifice] functional erogenous tissue to an excruciating surgery done years before they are old enough to give [meaningful] consent... Both versions

Item 30663 processed from January 2008 to December 2008 (Report, July 2020).

3 Services Australia, *Medicare Item Reports: Medicare Item 30654 processed from January 2018 to December 2018* (Report, July 2020); Services Australia, *Medicare Item Reports: Medicare Item 30658 processed from January 2018 to December 2018* (Report, July 2020).

4 Australian Bureau of Statistics, *Births, Australia,* 2018 (Catalogue No 3301.0, 11 December 2019).

5 'Incidence and Prevalence of Circumcision in Australia', *Circumcision Information Australia,* (Web Page, January 2013) <https://www.circinfo.org/statistics.html>.

6 Les Haberfield, 'The Law and Male Circumcision in Australia: Medical, Legal and Cultural Issues' (1997) 23(1) *Monash University Law Review* 92, 96.

7 Minister for Health, Parliament of Australia, *Medicare Benefits Schedule Review Taskforce* (Interim Report, 4 October 2016) 15.

8 Ibid 12.

9 Geoff Hinchley, 'Is Infant Male Circumcision an Abuse of the Rights of the Child?' (2007) 335 *BMJ* 1180, 1180.

10 Royal Australasian College of Physicians, 'Circumcision of Infant Males' (Policy Statement, September 2010) 6.

11 Haberfield (n 6) 100.

12 Juliet Richters, 'Circumcision and the Socially Imagined Sexual Body' (2006) 15(3) *Health Sociology Review* 248, 250.

13 Ibid.

> are consistent with the norms of [patriarchy]; both elevate the concerns of the community over the freedom of the individual to make decisions about his own body in his own time; and both brand a child with a permanent mark of religious belonging despite the significant possibility that he may one day fail to embrace the belief system and/or cultural practices of his parents.[14]

While infant male circumcision raises concerns of religious freedom, particularly for religious minorities, there exists a conflict between impinging upon the religious freedoms of parents and protecting the rights of the child. The irreversible nature of infant male circumcision should prompt consideration of its diminishing impact upon a child's right to religious freedom. Nevertheless, reform is already occurring at the individual and community levels within the Islamic and Jewish faiths.[15] For instance, the increased performance of the 'brit shalom' by Jewish rabbis, which is a naming ceremony for newborn boys which does not involve circumcision.[16]

The medical conversation surrounding circumcision is beyond the socio-legal focus of this article; however, a brief abridgment will follow. The policy of the Royal Australasian College of Practitioners (RACP) is that the benefits of circumcision 'do not warrant routine infant circumcision in Australia and New Zealand'.[17] The RACP, while supporting the rights of parents to weigh up the risks and benefits of circumcision, encourages delaying the procedure until children are of an age to decide on their own accord.[18] Like any medical procedure, there is a range of potential complications, and the RACP notes that benefits are attainable at a later age.[19]

The medical benefits of circumcision are most pronounced in at-risk populations. Proponents of circumcision point towards its ability to reduce the transmission of sexually transmitted infections and HIV, as well as urinary tract infections; however, medical opinion indicates it is no longer advantageous for such purposes in developed countries.[20] Similarly, although some evidence points to lower rates of sexually transmitted infections amongst circumcised men, many studies have failed to consider the relationship between circumcision and socio-economic status, straining results.[21] Importantly, such infections are treatable through conservative measures such as antibiotics without subjecting a child to 'surgical circumcision and its associated risks'.[22]

Disagreement surrounds whether or not circumcision impacts the experience of sexual pleasure; however, the foreskin is one of the most sensitive parts of the penis.[23] Circumcision causes pain for newborns during and following the procedure. Other, less frequent risks include permanent damage to the penis due to excessive removal of the foreskin and severe infection.[24] Death has occurred in multiple instances alongside complications of greater severity.[25] There exists a counterargument that when circumcision occurs during adulthood, it entails a more significant risk than during infancy.[26] However, in considering the social acceptability of adult male circumcision, studies also demonstrate a narrow preference for men in Western nations to undergo circumcision as adults. For example, a study in the USA found that only 13% of 'uncircumcised heterosexual men' would be willing to undergo circumcision in order to lower their risk of acquiring HIV. [27] Another study identified that circumcision later in life 'may evoke a fear of pain, penile damage or reduced sexual pleasure'.[28] It is troubling to consider that this reality, where people may not elect the procedure during adulthood out of fear, could propel the performance of infant male circumcision before the development of capacity for informed consent.

IV Current Legal Frameworks

The legal framework of NSW amongst other Australian jurisdictions is that infant male circumcision is implicitly legal alongside the provision of parental consent. Circumcision emerges in NSW and international case law, for instance, the matter *Re J*, where parents

14 Brian D Earp, 'The Ethics of Infant Male Circumcision' (2013) 39(7) *Journal of Medical Ethics* 418.
15 Ibid 418, 419.
16 Ibid.
17 Royal Australasian College of Physicians (n 10) 5.
18 Rebecca Jenkins, 'Let Boys Decide on their Circumcision', *Australian Doctor* (Chatswood, 11 September 2009).
19 Royal Australasian College of Physicians (n 10) 14.
20 Royal Australasian College of Physicians (n 10) 6.
21 Haberfield (n 6) 100.
22 Ibid.
23 Richters (n 12) 101.
24 Haberfield (n 6) 101.
25 Ibid.
26 Brian J Morris et al, 'A 'Snip' in Time: What is the Best Age to Circumcise?', (2012) 12(20) *BMC Pediatrics* 1, 2.
27 Ibid 1, 6.
28 Ibid 1.

disagreed regarding circumcising their child.[29] Courts will not authorise the procedure without the consent of both parents.[30] In *Marion's Case*, the court considered the extent of parental power in consenting to the sterilisation of a child with a severe disability.[31] The High Court upheld the notion from *Gillick* that parental power to consent to medical treatment will gradually diminish as the child's capacity increases, with a minor 'capable of giving informed consent' once they have 'sufficient understanding and intelligence'.[32] Such a person who has achieved *Gillick* competency is known as a mature minor in NSW.[33] They noted that although a distinction exists between 'therapeutic' and 'non-therapeutic' procedures, there are circumstances where a parent can provide consent to non-therapeutic procedures.[34] For instance, 'plastic surgery to correct serious disfigurement', going on to accept that infant male circumcision on hygienic or religious grounds was another permissible circumstance.[35]

While Deane J upheld the proposition that parental authority exists only to authorise procedures for the 'purpose of 'advancing the welfare of the child', significant medical and social change has occurred since 1992.[36] Some academics have concluded that the consequence of Marion's case upon involuntary infant male circumcision is that the procedure constitutes criminal assault occasioning grievous bodily harm.[37] Despite permissibility under municipal legislation, circumcision may also breach Australia's international obligations under the *Convention on the Rights of the Child*.[38] Article 24(3) requires the enactment of 'all effective and appropriate measures' toward 'abolishing traditional practices prejudicial to the health of children'.[39] Given the diminishment of hygiene arguments for circumcision and the RACP stance that risks outweigh benefits, it is plausible that had *Marion's Cas*e come before the High Court in 2020 it would have adopted a different position.[40]

Given those varying degrees of cultural pressure occur vis-à-vis the decision surrounding circumcision, examining whether performing circumcision at a later age could evoke duress which would vitiate consent is a significant concern. In a legislative scenario requiring informed consent, mainly when performed during adolescence, this would rest upon pre-existing processes within the health system, ensuring consent to medical treatment without duress.[41]

Various theoretical explanations exist for why our system of criminal law regards consent so highly. These primarily focus upon the superior understanding possessed by an individual as to their interest; one's inherent right to autonomy; and, its importance for our wellbeing.[42] In narrow circumstances, consent may be considered non-contemporaneous, occurring either prospectively or retrospective, testing the applicability of these theoretical justifications. Witmer-Rich reasons that a sound and functional understanding of consent within the criminal law is one which presupposes 'being autonomous [as] a constituent element of the good life'.[43] Courts have had to consider in what circumstances a person's factual non-contemporaneous consent will satisfy the requirements of legally valid consent.[44] For instance, historically, marital rape formed an exemption where there was a presumption of prospective consent to sexual intercourse provided by a wife to her husband at the time of marriage.[45] Although the recent appeal of *PGA v The Queen* held there was 'no presumption of consent to sexual intercourse operative as at 1963', law reform in South Australia during 1976 was still one of the first instances in the world where a jurisdiction statutorily removed this immunity offered to husbands.[46]

29 *Re J* [1992] 4 All ER 614.
30 Ibid.
31 *Department of Health and Community Services (NT) v JWB and SMB (Marion's Case)* (1992) 175 CLR 295.
32 *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402; *Department of Health and Community Services (NT) v JWB and SMB (Marion's Case)* (1992) 175 CLR 219.
33 NSW Ministry of Health, *Consent to Medical and Healthcare Treatment* (Manual, February 2020) 43.
34 *Department of Health and Community Services (NT) v JWB and SMB (Marion's Case) (1992) 175 CLR 297.*
35 Ibid.
36 Ibid 295.
37 Gregory J Boyle et al, 'Circumcision of Healthy Boys' (2000) 7 *Journal of Law and Medicine* 301, 302.
38 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
39 Ibid art 24(3).
40 Royal Australasian College of Physicians (n 10); *Department of Health and Community Services (NT) v JWB and SMB (Marion's Case)* (1992) 175 CLR 219.
41 NSW Ministry of Health, *Consent to Medical and Healthcare Treatment* (Manual, February 2020).
42 Jonathan Witmer-Rich, 'It's Good to be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law' (2011) 5 *Criminal Law and Philosophy* 377.
43 Ibid 377, 378.
44 Ibid 382.
45 Ibid 387.
46 *PGA v The Queen* (2012) 245 CLR 355; Kos Lesses, 'PGA v The Queen: Marital Rape in Australia' (2014) 27(3)

Infant male circumcision is one instance where arguments for retrospective consent can emerge. The reasoning which has already identified where circumcision is advantageous when performed at a younger age include the more significant associated risks should the procedure be performed during adulthood and where it is necessary on religious grounds. Therefore, in this scenario retrospective consent may be of utility to individuals whose parents provide consent when they are infants, and then they retroactively consent as adults. It seems there exists a minimal likelihood of applying retroactive consent to infant male circumcision in a fair and judicially determinable manner. While many individuals may look back at the fact they were circumcised positively, this 'hardly counts as a giving of permission or a relinquishing of a right'.[47] Circumcision should not create an exception where the criminal law begins to accept a defence of retrospective consent.[48] Such a proposition would fail through many exceptions where it is unable to protect the rights of children to bodily autonomy.

This article does not seek to equate infant male circumcision with FGM; however, there is a need for gender neutrality in the opposition towards unnecessary procedures performed upon children's genitals. The operation of current legal frameworks 'discriminate[s] between the sexes' through prohibiting 'custom or ritual' acted upon female but not male genitals.[49] While significant distinction exists between the two procedures, from a harm-based perspective, infant male circumcision can cause more significant harm than the more minor forms of FGM recognised by the World Health Organisation.[50] Divergent dialogues adjoin the practices; however, academics such as Earp argue that both male and female genital alterations exist on broad spectrums, both warranting problematisation.[51] The treatment of infant male circumcision should align with the contemporary progressive zeitgeist, towards the protection of bodily autonomy and discouraging gendered regulation of the body.

Section 45 of the *Crimes Act 1900* (NSW) criminalises all forms of FGM.[52] The recent case of *A2 v R*[53] identified that 'legislative amendment is necessary' to fully encompass the fourth category of FGM in the *Crimes Act 1900* (NSW). However, on appeal, the High Court held that the trial judge 'did not err when directing the jury that 'mutilate'... means to 'injure to any extent', ensuring that the broad NSW legislation criminalises all forms of FGM.[54] The legislation affords protection to individual liability where a medical practitioner performs the procedure, and it is necessary for health reasons, performed during labour, or as part of a sexual reassignment procedure.[55]

The alignment of statutory approaches towards FGM and infant male circumcision is of pressing necessity. In a recent matter before the England and Wales Family Court, the judgement of Sir Munby explored the present distinction, stating that 'if FGM Type IV amounts to significant harm, as in my judgment it does, then the same must be so of male circumcision.'[56]The case exposed a socio-legal scenario like that of the Australian context, where the law 'is still prepared to tolerate non-therapeutic male circumcision performed for religious or even for purely cultural or conventional reasons, while no longer being willing to tolerate FGM in any of its forms'.[57]

Such reform would be consistent with the plight of feminist and queer movements. The permissibility of infant male circumcision is out of keeping with the criminalisation of FGM and reflective of the different approaches towards bodily regulation depending upon sex and gender. As previously discussed, the presumption of consent within marital rape in the Australian legal system is a historical example of unjust and disproportionate regulation of the female body.[58] More recently, within reproductive rights, NSW only de-criminalised abortion to cease the outdated imposition of the criminal law upon the female body in 2019 through the *Abortion Law Reform Act 2019* (NSW).[59] Also, the continued public funding of medically unnecessary infant male circumcision is inconsistent with the inability of transgender people to access essential gender affirmation surgeries under the MBS excluded

Melbourne University Law Review 786, 787.
47 Witmer-Rich (n 42) 377, 392.
48 Ibid.
49 Hinchley (n 9) 1180.
50 Earp (n 1) 89, 90.
51 Ibid 94.
52 *Crimes Act 1900* (NSW) s 45(1).
53 *A2 v R* [2018] NSWCCA 174 (10 August 2018) 523.
54 *R v A2* (2019) 373 ALR 214, 216; *Crimes Act 1900* (NSW) s 45.
55 Ibid s 45(3).
56 *Re B and G (Children) (Care Proceedings)* [2015] EWFC 3, 69.
57 Ibid 64.
58 *PGA v The Queen* (2012) 245 CLR 355; Kos Lesses, 'PGA v The Queen: Marital Rape in Australia' (2014) 27(3) *Melbourne University Law Review* 786, 787.
59 *Abortion Law Reform Act 2019* (NSW).

due to categorisation as cosmetic.[60] These may be the ongoing effects of the Australian legal system's Judeo-Christian origins, contributing to resistance through opposition to reform which prioritises bodily autonomy regardless of gendered or sexual identity.

Given the attention which the reform of criminalising infant male circumcision would bring to concerns of bodily autonomy, there has potential for positive ripple-on effects for the intersex community. Motivated by 'binary conceptions of sex', an array of lawful surgeries occur on intersex children despite lacking medical necessity, which can be highly invasive and cause serious long-term harm.[61] Intersex Human Rights Australia [IHRA] has already called for the 'immediate prohibition as a criminal act of deferrable medical interventions, including surgical and hormonal interventions that alter the sex characteristics of infants and children without personal consent'.[62] Their policy demands 'freely-given and fully informed consent by individuals, with individuals and families having mandatory independent access to funded counselling and peer support'.[63] The criminalisation of medically unnecessary infant male circumcision aligns with this movement towards deferring unnecessary medical intervention upon the genitals of children.

V Proposal And Conclusion

An alternative model requiring the criminalisation of medically unnecessary infant male circumcision and informed consent for elective instances of the procedure is most capable of protecting children's rights to bodily autonomy. The most logical method to achieve such reform is through an amendment to the *Crimes Act 1900* (NSW) which criminalises medically unnecessary infant male circumcision alongside FGM.[64] Such reform will likely bring the practice of infant male circumcision to an immediate halt alongside enforcement of the rights of infant males to bodily autonomy.[65] Similar legislative protection to that which exists for FGM should exist for patients and medical practitioners in circumstances where infant male circumcision is medically necessary, as well as where there is informed consent.[66] Drawing upon the ratio decidenci of *Marion's Case*, the notion of *Gillick* competency is transferrable to circumcision.[67] Where no medical indication exists, deferment of the procedure should occur until one is a mature minor capable of providing informed consent.

There does exist concerns that we are not ready for such a drastic manoeuvre. Prohibition before a shift in cultural attitudes could create 'troubling side effects', such as the emergence of an unregulated circumcision market.[68] However it is observable that such cultural change is already occurring, and irrespective of risks, the greater problematisation of infant male circumcision prompts increased public awareness of the diminished or non-existent ability for infants to consent to this procedure.

After analysis of contemporary academic, medical and public debate opinions, the decreasing occurrence of infant male circumcision does not alleviate from its human rights violations and need for reform. The proposed domestic reform would prioritise the right of all individual to self-determination and bodily autonomy, ensuring informed consent presupposes this elective surgery. FGM and intersex surgeries upon infants present potentially analogous procedures within the same socio-legal landscape. This extension of the prohibition on deferrable surgeries not only in the context of FGM but also for infant male circumcision and intersex infants contributes to the rights of all people regardless of their body, sex or gender to make decisions as to their medical treatment.

60 Department of Health, Victorian Government, *Transgender and Gender Diverse Health and Wellbeing* (Background Paper, 2014) 10.
61 Skye O'Dwyer, '"Treatment" of Intersex Children as a Special Medical Procedure' (2017) 24 *Journal of Law and Medicine* 870.
62 The Darlington Statement', *Intersex Human Rights Australia* (Web Page, 20 March 2017) <https://ihra.org.au/darlington-statement/>.
63 Ibid.
64 *Crimes Act 1900* (NSW).
65 Ibid.
66 *Crimes Act 1900* (NSW) s 45(3).
67 *Department of Health and Community Services (NT) v JWB and SMB (Marion's Case)* (1992) 175 CLR 219; *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.
68 Earp (n 14) 418, 419.

PARENTAL RESPONSIBILITY FOR PRECONCEPTION CARRIER SCREENING: A DISABILITY RIGHTS, REPRODUCTIVE AUTONOMY AND DISTRIBUTIVE JUSTICE CRITIQUE

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I Introduction

Van der Hout, Dondorp and de Wert's ('the authors') overall project is to show that the aims of preconception carrier screening (PCS) should include preventing the procreation of children with severe genetic conditions.[1] PCS is a genetic test undertaken prior to conception to determine whether one is a carrier of genetic variants that will significantly increase the probability of procreating a child with a genetic condition.[2]

They argue for the following conclusion:

> Some prospective parents (i.e. people who intend to conceive in the foreseeable future) have a prima facie moral duty to take steps, starting from the preconception period, to avoid procreating a child with a severe genetic condition.
>
> These steps are: (1) find out if one is a carrier of such a condition through preconception screening, and (2) if one is a carrier, use gamete donation, pre-implantation genetic testing or prenatal testing and abortion, to avoid procreating a child with a severe genetic condition.

The authors refer to this moral duty in various ways, such as the 'prevention paradigm', the 'prevention view' and the 'prevention-aimed approach'. For consistency, I refer to it as 'the preventive moral duty'.

In this commentary, I set out the authors' argument for the preventive moral duty in two parts. The first part is their explication of three ways that the duties of non-maleficence and beneficence might apply to the preconception context (see section 1). The second part is the authors' argument for choosing a duty of non-maleficence, and rejecting a duty of beneficence, as the basis for the preventive moral duty (see section 2). My analysis focuses on the second part of their argument (see section 3). I point out weaknesses in the authors' reasons for grounding the preventive moral duty in a duty of non-maleficence instead of a duty of beneficence. I also observe that the reasons rely on a distinction between severe genetic conditions that cause lives worse than non-existence, and milder genetic condition that do not. Instead of attempting to find reasons to prefer a duty of non-maleficence to a duty of beneficence, I suggest that the authors could instead justify the preventive moral duty by appealing directly to the plausible intuition that

1 Sanne van der Hout, Wybo Dondorp and Guido de Wert, 'The aims of expanded universal carrier screening: Autonomy, prevention and responsible parenthood' (2019) 33 *Bioethics* 568-576.

2 Pieter Bonte, Guido Pennings and Sigrid Sterckx, 'Is there a moral obligation to conceive children under the best possible conditions? A preliminary framework for identifying the preconception responsibilities of potential parents' (2014) 15(5) *BMC Medical Ethics*, 8.

it is morally wrong to procreate a child whose life is expected to be worse than non-existence. I conclude by pointing out difficulties with drawing this distinction.

II Duties of Non-Maleficence and Benficience in the Preconception context

In this section I set out the first part of the authors' argument for the preventive moral duty. This is an explication of three ways that general duties of procreative non-maleficence and procreative beneficence could ground a moral duty for prospective parents to undertake PCS.

I begin by explaining two key terms of the authors' argument – the duty of procreative non-maleficence (PNM) and the duty of procreative beneficence (PB). On the duty of PNM, the authors say that 'according to PNM, it is morally wrong to bring children into the world when there is good reason to think that their quality of life will fall below an acceptable threshold'.[3] They go on to define the relevant threshold as 'life worse than non-existence'.[4] On the duty of PB, the authors say that 'couples have a moral duty to avoid the conception of children not only in cases dealing with unbearable suffering, but in all situations in which they can choose between a 'less' and a 'more' advantaged child'.[5] To sum this up, I take the authors to understand PNM and PB as follows:

PNM: A prospective parent has a prima facie duty not to procreate a child whose quality of life will be worse than non-existence.

PB: A prospective parent has a prima facie duty not to procreate a child whose quality of life will be worse than their other possible children.

These duties are characterised by the authors as 'prima facie', rather than absolute.[6] This means they 'may be trumped by competing moral considerations, including 'the welfare of the [prospective] parents, of existing children, and of others, possible harm to others, and other moral constraints''.[7] The authors give particular focus to various emotional, moral, financial and practical 'burdens of taking preventive measures' on prospective parents, which may trump the duties of PNM and PB.[8] The authors assume the general duties of PNM and PB are plausible, and consider what particular moral duties they imply in the context of preconception carrier screening. The authors argue that PNM can be interpreted in two ways, each of which implies a preconception duty with different duty bearers, but both with the same action. They say that 'the first interpretation of PNM (PNM1)…demands that couples who have 'good reason to assume that [they] belong… to a group with an elevated genetic risk of severely afflicting future offspring under-go PCS, and, if found to be a carrier couple avoid the conception of an affected child'.[9] The authors say that 'the second interpretation of PNM (PNM2)…require[s] that all prospective parents undergo PCS for a limited number of very serious genetic disorders. Proven carrier couples would have a moral obligation to take preventive measures'.[10] To summarise, the authors argue that the PNM could entail the following two moral duties in the PCS context. I refer to each of these as PNM-1_{PCS} and PNM-$2_{PCS,}$ and together as the 'PNM-based duties'.

PNM-1_{PCS}: A prospective parent with a known increased risk of passing on a severe genetic condition (i.e. one that constitutes a life worse than non-existence), should (1) find out if they are a carrier of such a condition through PCS, and (2) if they are a carrier, take steps to avoid procreating a child with a severe genetic condition.

PNM-2_{PCS}: All prospective parents should (1) find out if they are a carrier of a severe genetic condition (i.e. one that constitutes a life worse than non-existence), and (2) if they are a carrier, take steps to avoid procreating a child with a severe genetic condition.

The authors give only one interpretation of PB. They say: PB 'would instruct all [prospective parents], regardless of their individual carrier risk, to test for all genetic traits that might

3 Hout, Dondorp and Wert (n 1) 573.
4 Ibid 573, 574.
5 Ibid 574.
6 Ibid 573-575.
7 Ibid 573.
8 Ibid 572-573.
9 Ibid 574 (citations omitted). The authors say that elevated risk is due to a particular ancestry or family history.
10 Ibid 574 (emphasis in original).

have a negative impact on the well-being on the child'.[11] Further, they say PB 'would instruct them to avoid passing on a genetic defect to their offspring, provided that a child born with it can be expected to have a worse life than the lives of other children [the] couple could have'.[12] To summarise, the authors argue that the PB could entail the following moral duty in the PCS context, which I refer to as PB_{PCS}, or the 'PB-based duty'.

PB_{PCS}: All prospective parents should (1) find out if they are a carrier of any genetic condition that would worsen their child's well-being, and (2) if they are a carrier, take steps to avoid procreating a child with that genetic condition.

For all of these possible duties ($PNM\text{-}1_{PCS}$, $PNM\text{-}2_{PCS}$, PB_{PCS}), the authors consider that the 'steps to avoid procreating a child' with a certain condition include: gamete donation, pre-implantation genetic testing, or prenatal testing and abortion.[13] They say the prospective parent is permitted to use any of these preventive measures, so long as they avoid the procreation of the child with the relevant condition.[14]

III Choosing to Ground the Preventive Moral Duty in PNM, and Not in PB

In this section, I set out the second part of the authors' argument, which is their reasoning that the PNM-based duties ($PNM\text{-}1_{PCS}$ and $PNM\text{-}2_{PCS}$) should be accepted, and PB_{PCS} should be rejected. They remain agnostic as to which of the PNM-based duties is preferable – that is, they remain agnostic as to whether some or all prospective parents are bound by the preventive moral duty.

In my view, all of the authors' reasoning for accepting the PNM-based duties, and rejecting PB_{PCS}, can be drawn out of the following passage:

> Earlier, we argued that parental responsibilities by definition focus on the relation between (prospective) parents and their (future) offspring. As the moral duties implied by... PB are not directly related to what parents are due to their children, we do not see how prospective parents could be expected to act in line with these views.
>
> PNM displays more convincing arguments for holding that prospective parents may have certain moral responsibilities in relation to PCS. Moreover, it provides a more adequate response to the disability right's critique; the prevention view [i.e. the PMD] is not defended in order to serve the 'world' or to create a 'comparatively better outcome', but to spare children the burden of wbeing born with a severe (and often lethal) genetic disease.[15]

I call this the 'extracted passage', and refer to it frequently below. I distil from this passage the authors' three reasons for accepting the PNM-based duties ($PNM\text{-}1_{PCS}$ and $PNM\text{-}2_{PCS}$), and rejecting the PB_{PCS} duty.

The authors' first reason for preferring the PNM-based duties is that they rely on a more preferable metaethical view about wrong action than PB_{PCS}. The key phrase in the extracted passage contrasting these metaethical views is: 'the prevention view [i.e. the PMD] is not defended in order to serve the 'world' or to create a 'comparatively better outcome', but to spare children the burden of being born with a severe (and often lethal) genetic disease'. The first half of this phrase suggests that PB_{PCS} requires the metaethical view that acts can be wrong without making people worse off, for example if they cause an undesirable state of affairs. I call this the 'impersonal view of wrong action'. The second half of the phrase suggests that the PNM-based duties require the metaethical view that acts are wrong only if they make people worse off. I call this the 'person-affecting view of wrong action'. There is an assumption that the person-affecting view of wrong action is preferable to the impersonal view of wrong action, and that this is a reason to accept the PNM-based duties and reject the PB-based duty.

The authors' second reason for preferring the PNM-based duties is that they provide a more adequate response to the expressivist disability rights critique than the PB-based duty. This is evident where the authors say '[PNM] provides a more adequate response the disability right's [sic] critique [than PB]'. While there are many forms of the disability rights critique, here I take the authors to be referring to the expressivist disability critique. This strand of the critique says that selective procreation communicates the morally disrespectful

11 Ibid.
12 Ibid 574.
13 Ibid 572-573.
14 Ibid.
15 Ibid 575.

message that living with the condition selected against is worse than non-existence.[16] I take the authors to be focussing on this strand because earlier they define the disability critique as the view that avoiding the procreation of children with certain genetic conditions 'reflects a discriminatory attitude towards people living with the relevant conditions'.[17]

The authors' third reason for preferring the PNM-based duties is that they are 'directly related' to the welfare of the child, while PB_{PCS} is not. This is evident in the second sentence of the extracted passage: 'as the moral duties implied by…PB are not directly related to what parents are due to their children, we do not see how prospective parents could be expected to act in line with these views'. In the sentence prior, the authors say they have earlier 'argued that parental responsibilities by definition focus on the relation between (prospective) parents and their (future) offspring'. The earlier comments the authors make on this point are not really an argument, but a stipulation of the scope of parental responsibilities they consider:

> Parental responsibility does not involve taking preventive actions for reasons not directly related to the welfare of their children. This means that prevention-aimed carrier screening purely based on public health concerns cannot be justified by referring to parental responsibilities.[18]

This stipulation clarifies that the words 'what parents are due to their children' in the extracted passage refers to ensuring the welfare of children. Though the meaning of the words 'directly related' is not entirely clear, the second sentence in the paragraph just quoted suggests that the authors define parental responsibilities as duties that are not justified purely based on public health concerns; at least one part of the justification of parental responsibilities must be to ensure the welfare of children.

To summarise this section, I have distilled three reasons that the authors give for accepting the PNM-based duties ($PNM\text{-}1_{PCS}$ and $PNM\text{-}2_{PCS}$), and rejecting the PB_{PCS} duty:

> 1. The PNM-based duties require the person-affecting view of wrong action, which is preferable to the impersonal view of wrong action required by the PB_{PCS} duty.
> 2. The PNM-based duties provide a more adequate response to the expressivist disability critique than the PB_{PCS} duty.
> 3. The PNM-based duties are directly related to ensuring the adequate welfare of children, but the PB_{PCS} duty is not.

IV Evaluating the Choice to Ground the Preventative Moral Duty in PNM, and Not PB

In this section, I point out weaknesses and make observations about the authors' three reasons for accepting the PNM-based duties and reject PB_{PCS}.

Recall the authors' first reason for choosing the PNM-based duties:

> The PNM-based duties require the person-affecting view of wrong action, which is preferable to the impersonal view of wrong action required by the PB_{PCS} duty.

The weakness of this claim is that the person-affecting view of wrong action is preferable to the impersonal view of wrong action. This claim is controversial and sometimes rejected,[19] but the authors reasons for supporting it are incomplete, or at least not clear. One interpretation of the extracted passage (see section 2 above) is that the authors think the person-affecting view of wrong action better responds to the disability rights critique than the impersonal view of wrong action. However, the authors need to say more to turn this into a convincing argument. It is not immediately clear that the force of the disability rights critique depends on which metaethical view of wrong action is taken. To help focus attention on other aspects of the authors' reasoning, however, from here on I assume that there are definitive reasons to prefer the person-affecting view of wrongdoing over the impersonal view.

Further, in my view, the PB_{PCS} duty does not always require the impersonal view of wrong action; it sometimes permits both the impersonal view and the person-affecting view of wrong action. Recall that the PB_{PCS} duty

16 Rebecca Kukla and Katherine Wayne, 'Pregnancy, Birth, and Medicine' (2018) *The Stanford Encyclopedia of Philosophy*.
17 Hout, Dondorp and Wert (n) 570.
18 Ibid 572.
19 See for example: M. A. Roberts, 'The Nonidentity Problem' (2019) *The Stanford Encyclopedia of Philosophy*, §3.2.

demands prospective parents to take steps to avoid procreating a child with any genetic condition that would worsen their child's well-being. If the condition is mild (i.e. leads to a life better than non-existence), then the wrongness of breaching the duty cannot be explained by harm to a particular child (the person-affecting view), and is better explained by some other harm, such as creating a less desirable state of affairs (the impersonal view). This is because the child who is born has a life better than non-existence and so does not suffer a net harm. Further, the children with 'better' lives who could have been born had the duty been followed do not suffer any harm because they do not exist. So in cases of mild conditions, the authors are correct that the PB_{PCS} duty requires the impersonal view of wrongdoing, and does not permit the person-affecting view of wrongdoing.

The story is different in cases of severe conditions. If the condition is severe (i.e. leads to a life worse than non-existence), then the wrongness of breaching the PB_{PCS} duty can be explained either by the harm to a particular child (the person-affecting view), or the creation of a less desirable state of affairs (the impersonal view). This is because the child who is born has a life worse than non-existence and so is net harmed, and, adding a life of immense suffering to the world may also create a less desirable state of affairs overall. In contrast, if the PB_{PCS} duty were followed, then no particular child would have been harmed, and a more desirable state of affairs would have been created. So, in cases of severe conditions, the PB_{PCS} duty permits either the impersonal view or the person-affecting view of wrongdoing; it does not require the impersonal view of wrongdoing only.

At this point, recall that the authors accept the PNM-based duties, which require avoiding the procreation of only those children with the most severe genetic conditions (whose lives are worse than non-existence), and not of children with milder genetic conditions (whose lives are better than non-existence). In cases of the most severe conditions, which are the focus of the authors' conclusion, both the PNM-based duties and the PB_{PCS} duty permit the person-affecting view of wrongdoing, which we are now supposing is preferable to the impersonal view of wrongdoing. Thus, the authors' first reason for accepting the PNM-based duties and rejecting the PB_{PCS} duty must actually be that in the milder cases (where the child's life is better than non-existence), the PNM-based duties permit the person-affecting view of wrong-doing, while the PB_{PCS} duty does not.

This observation focuses attention on the fact that the authors' first reason for choosing the PNM-based duties instead of the PB_{PCS} duty, relies on a distinction between severe genetic conditions which cause lives worse than non-existence, and other milder conditions which can be lived with in a way that is better than non-existence. This is because the preferable metaethical view of wrong action only arises in cases of milder conditions. The authors give various characterisations of the severe conditions that cause lives worse than non-existence,[20] which I lack space to reproduce here. They also note that 'only a limited number of recessive conditions fall into this category [of genetic conditions that cause lives worse than non-existence], for instance Tay–Sachs disease and Canavan disease'.[21] While it is beyond the scope of this review to fully evaluate their distinction between mild and severe genetic conditions, I note that the distinction may be difficult to draw because the probabilities of a child developing the genetic condition varies depending on the prospective parents, and there may be variations in the expression of genetic conditions. For the remainder of this review, I argue that even if this distinction can be drawn adequately, the authors' reasons for choosing PNM-based duties and rejecting the PB_{PCS} duty are not convincing.

Next, recall the authors' second reason for choosing the PNM-based duties:

> The PNM-based duties provide a more adequate response to the expressivist disability critique than the PB_{PCS} duty.

To begin with, I note that some deny that selective procreation communicates a morally disrespectful message, or any message at all.[22] Since the authors assume the plausibility of the expressivist disability critique, I will too, so as to respond to them on their own terms.

The weakness with this second reason is that the explanation for why the PNM-based duties

20 Ibid 573.

21 Ibid.

22 Janet Malek, 'Deciding against disability: does the use of reproductive genetic technologies express disvalue for people with disabilities?' (2010) 36(4) *Journal of Medical Ethics* 217-21; James Lindemann Nelson, 'The meaning of the act: reflections on the expressive force of reproductive decision making and policies' in Erik Parens and Adrienne Asch (ed), *Prenatal Testing and Disability Rights* (Georgetown University Press, 2000) 196-213.

provide a 'more adequate response' to the disability rights critique than PB_{PCS} is incomplete or unclear. One possible explanation relates to the first reason concerning metaethical views about wrong action – the semicolon in the last sentence of the extracted passage suggests they are related. The explanation would focus on the idea that the person-affecting view of wrong action required by the PNM-based duties is less disrespectful for people living with a relevant condition than the impersonal view of wrong action required by PB_{PCS}. However, the authors need to say more to make this into a convincing argument. It is not immediately clear why it is any less disrespectful to say that a genetic condition should be selected against because it prevents a harm to a person, than saying the selection should be made because the condition creates a more desirable state of affairs.

In my view, the expressivist disability critique does not apply to cases concerning the most severe genetic conditions, which lead to a life worse than non-existence. Recall that the expressivist disability critique says that selective procreation communicates the morally disrespectful message that living with the condition selected against is worse than non-existence. If it is true that some genetic conditions lead to a life worse than non-existence, then any message communicated by selecting against such conditions is not disrespectful, but is accurate and may in fact be desirable. To bolster this observation, consider the fact that those living with such genetic conditions (for example Tay-Sachs disease) experience extreme suffering and have a short life expectancy of only a few years.[23] Even granting the unlikely claim that these children are capable of experiencing moral disrespect, it is plausible to think that preventing their immense suffering is far more important than avoiding this moral disrespect.

At this point, recall that the PNM-based duties require procreative selection against the most severe genetic conditions that would lead to children's lives being worse than non-existence. If the expressivist disability critique does not apply to cases concerning the most severe genetic conditions, then the critique does not apply to PNM at all. Further, recall that the PB_{PCS} duty requires procreative selection against any genetic condition, from severe to mild, that would worsen their child's well-being. The expressivist disability critique would partially, but not wholly apply to the PB_{PCS} duty. It would not apply to procreative selection against the most severe conditions for the reasons above, but it would apply to procreative selection against other milder conditions (whose presence does not make life worse than non-existence). This is because it would be morally disrespectful to communicate that people living with these milder conditions have lives worse than non-existence.

Earlier I noted that it is unclear why the authors think the PNM-based duties provide a better response to the expressivist disability critique than the PB_{PCS} duty. This remains unclear. However, the above observation suggests that the authors could give a related reason for accepting the PNM-based duties and rejecting the PB_{PCS} duty: that the PNM-based duties need not respond to the disability rights critique at all, while the PB_{PCS} duty does. Again, this reason for accepting the PNM-based duties and rejecting the PB_{PCS} duty relies on a distinction between severe genetic conditions which cause lives worse than non-existence, and other milder conditions which can be lived with in a way that is better than non-existence.

Finally, recall the authors' third reason for choosing the PNM-based duties:

> The PNM-based duties are directly related to ensuring the welfare of children, but the PB_{PCS} duty is not.

The weakness with this reason is that the meaning of the words 'directly related' is unclear, and it is difficult to see how any meaning given to these words would differentiate the PNM-based duties and the PB_{PCS} duty. Let us consider some possible meanings. A first possibility, as noted in section 2, is that the words 'directly related', mean that at least one part of the justification of parental responsibilities must be to ensure the welfare of children. On this interpretation, however, nothing appears to differentiate the PNM-based duties and the PB_{PCS} duty, since both are concerned to some extent with the welfare of children. The PNM-based duties are aimed at preventing lives worse than non-existence, and the PB_{PCS} duty is aimed at preventing lives worse than other possible lives.

A second possibility is that the words 'directly related' mean that the justification of parental responsibilities must entirely consist in ensuring the welfare of children. However, the authors' justification of the prima facie

23 Hout, Dondorp and Wert (n) 573.

nature of both the PNM-based duties and the PB_{PCS} duty includes an appeal to a wide range of moral considerations other than the welfare of children. This is evident in the authors' acknowledgement of the importance of the reproductive autonomy of the parents, and the disability rights critique, as well as their broad description of the competing considerations that may trump the duties: 'the welfare of the [prospective] parents, of existing children, and of others, possible harm to others, and other moral constraints'.[24] Thus on this second interpretation of the words 'directly related', there also seems to be no difference between the PNM-based duties and the PB_{PCS} duty. In sum, as the meaning of the words 'directly related' is unclear, the author's third reason to accept the PNM-based duties and reject the PB_{PCS} duty is not convincing.

V Conclusion

In summary, I have argued that the authors' three reasons for accepting the PNM-based duties and rejecting the PB_{PCS} duty are not convincing. Instead, I have argued that the authors have pointed to the following two weaker reasons for accepting the PNM-based duties and rejecting the PB_{PCS} duty.

> 1. The PNM-based duties always permit the person-affecting view of wrongdoing whereas the PB_{PCS} duty does not always permit it (where this is a persuasive reason only if permitting the person-affecting view of wrongdoing is important).
> 2. The expressivist disability critique does not apply to the PNM-based duties, but it sometimes applies to the PB_{PCS} duty (where this is a persuasive reason only if there is no good response to the expressivist disability critique).

The main observation I made is that these reasons are generated by the fact that the PNM-based duties demand procreative selection only against severe conditions that cause lives worse than non-existence, while he PB_{PCS} duty also demands procreative selection against milder conditions that do not cause lives worse than non-existence.

This in turn relies on a distinction between severe conditions that cause lives worse than non-existence, and milder conditions that do not. While it is beyond the scope of this review to fully assess this distinction, I note that drawing the distinction may be difficult because the probabilities of a child developing the genetic condition caries depending on the prospective parents, and there may be significant variations in the expression of genetic conditions.

As a final dialectical point, I note that if the distinction can be sufficiently well defined and defended, then the authors could justify the preventive moral duty by appealing directly to the intuition that it is morally wrong to procreate children with lives worse than non-existence. The authors could therefore avoid the difficulties I have pointed out in their attempts to ground this duty in PNM instead of PB.

24 Ibid 574.

Part III

THEOLOGICAL APPROACHES TO THE ENVIRONMENT

Khanh Tran Nguyen

Comprising over 2 billion followers, religious subscription in the world is dominated by followers of two Abrahamic faiths: Christianity and Islam. These two traditions both seek to shape, change, and impose their theology onto the rest of humanity because this is their raison d'etre and teleology. The Torah, Tawrat, or Old Testament charge humanity, in Genesis 1:28[1], with the task to: "fill the Earth and subdue it". Subsequently, Abrahamic theologians and political leaders have deployed a literal interpretation of this mission to argue that humanity simultaneously have (1) an entitlement to exploit the environment for material gains necessary for human survival and, (2) an obligation to maintain our social and physical environment in the pursuit of mutually beneficial human coexistence. This dynamic does not merely have theological implications but also exert significant social influence. For instance, Morrison, Duncan and Parton found that Judeo-Christian beliefs were correlated to lower support of climate mitigation policies in comparison with Buddhist and Agnostic/Atheist individuals in the U.S.[2] More than a third of atheist and agnostic respondents reported being concerned about climate change compared to 19% of Christian Literalists, indicating that religious belief materially influenced these individuals' climate change beliefs.[3] Christian and Islamic jurisprudence or theology on the environment must be debated because it comprises a powerful ideological segment in Australian society- with over 20% of public schools being Catholic alone- and the global environmental movement. To this end, this essay will explore the theological-political context behind the two traditions' current environmental philosophy. It will then argue that effective resistance against anti-environmentalism must include strong consensus-building between religious and secular activists by understanding how Abrahamic theology, particularly Christianity and Islam, deals with the environment.

The first Abrahamic tradition to examine is Christianity – namely, Catholicism and Calvinism. In his landmark encyclical, Pope Francis referenced Genesis to argue that care for the environment is an interfaith rather than a Christian mission: "God saw everything that he had made, and behold it was *very good.*"[4] In the document, Francis rejected human exceptionalism and proposed that the Judeo-Christian God saw "Creation" to comprise an equal, interdependent relationship between humanity and their surroundings: "Before I formed you in the womb, I knew you". Thus, canonical Catholicism extrapolates a highly Thomistic, natural law understanding of the world to ground their environmental jurisprudence. For Francis, these passages necessitate an austere interpretation of mankind's mission in *Genesis 1:28*[5]: "subdue it… have dominion over the fish of sea," away from utilitarian exploitation towards a connected ecology in which human existence is contingent on environmental prosperity.[6]

Indeed, Catholicism now holds the former understanding as conducive to idolatry- a grave sin in Christian dogma: "We are not God. The Earth was here before and it was given to us."[7]. Hence, the encyclical elevates excessive

1 1 Genesis 1:28 (King James Version).
2 Mark Morrison, Roderick Duncan and Kevin Parton, 'Religion Does Matter for Climate Change Attitudes and Behaviour' (2019) 10(8) *PLoS ONE* 7.
3 Ibid.
4 Pope Francis, Encyclical letter from Pope Francis, the Holy See, to the World, 'Laudato Si': On Care for our Common Home' (online, 24 May 2015) [19] <http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html>
5 Genesis (n 1) 1:28.
6 Pope Francis, 'Laudato Si' (n4).
7 Ibid 67.

economic exploitation of natural resources as a serious disruption conducive to sin. According to Riordan this represents a significant shift in Catholic environmental thought by moving away from promoting human exceptionalism towards safeguarding collective peremptory human rights.[8] In other words, there is a shift away from economic utilitarianism to demanding a calculation of collectivistic goodness. Riordan and his colleagues[9] in Campion Hall saw this shift as embodying "practical rationality". Furthermore, Kerber[10] argued that *Laudato Si* marked a shift towards liberation theology in the document's call for both personal and structural change favouring the most disadvantaged.[11] Thus, Catholic environmental jurisprudence is remarkably evocative of and borrows from the wider environmentalist movement by framing ecological concerns as a call to orientate economic structures to favour the poor, linking economic exploitation of nature to greed and sinfulness.

Similarly, Reformed denominations- namely, Calvinist thought – were also instrumental in contributing to secular thinking on environmentalism. In his book *Inherit the Holy Mountain,* Stott[12] attributes the rise of the conservationist movement to America's historical legacy of Calvinist-Puritan thought. Following its decline, environmentalism was embedded in the U.S national psyche by prompting individuals to view nature as relational[13]- akin to modern Evangelicals' emphasis on an individual relationship with God. In *Nature,* Emerson urges individuals to contemplate a personal relationship with their physical environment: "The world proceeds from the same spirit as the body of man. It is a remoter and inferior incarnation of God, a projection of God in the unconscious…It is, therefore, to us, the present expositor of the divine mind"[14]. Here, Emerson invoked the Image-of-God imagery in *1 Corinthians 15:49*[15]*:* "And as we have borne the image of the earthly, we shall also bear the image of the heavenly" – albeit, at an individual level rather than the collective. Hence, Emerson's individualist structuring of the human-environment relationship along the imagery of God strongly echoes Calvinism's core premises: namely, that salvation is attained through God's *preordained* mercy rather than through Catholic penitential indulgences. Indeed, Emerson argues that undisturbed nature represents an ideal state of nature from which disruption represented sinfulness: mirroring Aquinas' natural law perspective.

Thus, one can argue that unlike Pope Francis's formulation of environmentalism as a collective social justice problem, 19th and 20th century Calvinist conservationism is more an attempt to preserve an idyllic, deeply ascetical vision of nature where God's grace can be found. Indeed, it is possible to infer Calvinist and Reformed instincts in the proliferation of national parks across the U.S across the 20th century. For instance, Stoll[16] notes that both the artist Thomas Cole and Frederick Olmstead (the architect of New York City's Central Park) were Congregationalists. The environmental romanticism that Cole contributed to as part of the Hudson River artistic tradition and Olmstead's Central Park project- modelled after London's Hyde Park- during an era of enormous capitalist shifts. Thus, although these men were not devout, their groundings in idealistic Calvinist imaginations could be said to have contributed greatly to modern environmentalism. In turn, Christian environmentalism, the Catholic (ie. liberation theology) and Protestant traditions alike, relies strongly on exegetical interpretation in order to support pro-environment legal reforms as opposed to containing a clearly defined jurisprudential structure where precedent can be established and maintain persuasive power – *Laudato Si* owes the vast majority of its authority to Pope Francis' position as the Vatican's head of state[17] whereas Protestant environmental jurisprudence relies significantly on theological imagination as opposed to customary religious laws.

The other Abrahamic tradition in this analysis

8 Patrick Riordan, 'Introducing Connected Ecologies' (2018) 59(6) *The Heythrop Journal* 870.

9 Ibid 965; Nicholas Austin, 'The Virtue of Ecophronesis: An ecological adaptation of practical wisdom' 59 (6) Heythrop Journal (John Wiley & Sons, 2018) 1011.

10 Guillermo Kerber, 'Latin America and Ecumenical insights in *Laudato Si*' 70(8) The Ecumenical Review (John Wiley & Sons, 2019) 629.

11 Patrick Riordan and Emilio Travieso, 'Integral Ecology and Common Goods in Chiapas: The Mission de Bachajon in light of *Laudato Si*' 59(6) The Heythrop Journal (John Wiley & Sons, 2018) 961.

12 Mark Stoll, 'Inherit the Holy Mountains: Religion and the rise of American Environmentalism' (Oxford University Press, 2015) 9.

13 Ibid 6.

14 Ralph Waldo Emerson, 'Nature' (Generic NL Freebook Publisher,1846) 20.

15 1 Corinthians 15:49 (King James Version).

16 Stoll (n 12) 27.

17 Joel Harrison, 'Pope Francis, True Religion and Religious Liberty' (2018) 33(3) Journal of Law and Religion, 459.

is Islam, with its unique theological structures. Through mu'amalat and the broader shariah (or Islamic law) system,Islam attempts to realise the Qu'ran, For context, *Shariah* is the umbrella group of dogmatic rules[18] and laws that permeate every Muslim individuals' lives, ranging from theological convictions (ie. the *shahada*), commercial transactions and moral theology. *Shariah* is comprised of four fundamental precepts[19]: (1) the unerring words of the *Qu'ran*, (2) the *Sunna* (authoritative tradition) that is connected with Hadith, (3) *Ijma* (consensus), and (4) *Itijihad* (application of individual reason). These four interact, through the role performed by imams, to provide the Muslims with a set of practical laws.

Although one approach to support progressive environmentalism is to quote Quranic verses, Sachedina[20] argues that an approach merely focused on Quranic and Hadith quotations were insufficient since these quotations must be balanced with the entire Qu'ran and practical reason. For instance, the Qu'ran's genesis account (2.29[21]) states, in line with Genesis 1:28 in Christianity: "It is He who hath created for you all things that are on Earth; Moreover, His design comprehended the heavens, for He gave order and perfection…he Hath perfect knowledge". This is a verse that is referenced by both[22] Muslim climate activists and sceptics as it is susceptible to being interpreted as either condemning excessive human intervention or endorsing human exceptionalism. Indeed, Mutazilites – a school of Islamic theology which emphasise free will over hard determinism – will tend to reject[23] a pro-environment Islamic theology based solely on the creation narrative. For Mutazilites, since genuine free will exists, humanity is solely responsible for the moral worthiness[24] of their actions. Therefore, Islam's genesis narrative is morally neutral and does not necessitate that human exceptionalism is inherently wrong. Hence, an Islamic eco-theology strictly derived from scriptural revelation will be susceptible to hermeneutical challenges.

This allows one to consider the usefulness of the third source of Islamic *shariah,* namely, *Itijihad* or application of reason, in constructing an Islamic eco-theology that responds appropriately to the challenges posed by climate change and challenging narratives of human exceptionalism. *Qiyas* (analogical reasoning)[25] and *Istislah* (the common good) are held by some as key to developing a consistent Islamic eco-theology. *Qiyas* operates by extending the principles of a limited *hadith* to a seemingly novel situation and thus, broadening a limited allowance or legal prohibition into a general one. For example, Hallaq noted that early Islamic theologians partly inferred a general restriction against the consumption of alcohol derived from grape juice from an analogical prohibition on date-derived alcohol. This is despite some Qu'ranic verses (ie. *Qu'ran* 16:67[26]) praising winemaking activities. It is claimed that early theologians extended the *illa*' (rationale)[27] derived from the limited date-wine prohibition to justify a general restriction since the *hukm* (rule) in the date-wine prohibition was sufficiently analogous to grape-derived alcohols. This is further corroborated by other verses (ie. *Qu'ran* 2:219, 5:90-91) on vices associated with excessive alcohol consumption. On this premise, Abu-Sway[28] have argued that existing edicts against urinating in public waters – the *illa* being public health concerns – could justify a broader *hadith* against offshore waste processing and in turn, stricter environmental protection laws.

However, Llewellyn[29] contends that *Qiyas* alone is insufficient and required consideration of *Istislah* (eschatological common good) for pro-environment theological reforms to hold force. This is because *Qiyas* requires a hadith's *illa*

18 Britannica Encyclopedia of World Religions (2006) Encyclopaedia Britannica Inc, 552.
19 Ibid 552.
20 Abdulaziz Sachedina, 'The Ideal and Real in Islamic Law' in Ravindra Khare (ed), Perspectives on Islamic Law, Justice, and Society (Oxford: Rowman and Littlefield, 1999) 16.
21 Qu'ran, 2.29.
22 Willis Jenkins, 'Islamic Law and Environmental Ethics: How Jurisprudence (usul al-fiqh) mobilizes practical reform' (2005) 9(3) *Worldviews: Global Religion, Culture & Ecology* 344.
23 Kaveh Afrasiabi, 'Toward an Islamic Ecotheology' in Richard Foltz, Frederick Denny and A. Bahruddin (eds), *Islam and Ecology: A Bestowed Trust* (Harvard University Press, 2003) 285.
24 Nomanul Haq, 'Islam and Ecology: Toward Retrieval and Reconstruction' in Richard Foltz, Frederick Denny and Azizan Bahruddin (eds), *Islam and Ecology: A Bestowed Trust* (Harvard University Press, 2003) 129.
25 Britannica Encyclopedia of World Religions (n 14), 1042.
26 Qu'ran 16:67.
27 Wael Hallaq, "Shariah: Theory, Practice, Transformations" (Cambridge University Press, 2012) 228.
28 Mustafa Abu-Sway, 'Towards an Islamic Jurisprudence of the Environment: Fiqh al-Bi-ah fil-Islam' (Speech, Belfast Mosque, February 1998).
29 Othman Llewelyn, "The Basis for a Discipline of Islamic Environmental Law" in Richard Foltz, Frederick Denny and Azizan Bahruddin (eds) *Islam and Ecology: A Bestowed Trust* (Harvard University Press, 2003) 192.

to be applied consistently[30] across the entirety of Islamic law. Such that a hypothetical *hadith* against offshore waste processing due to public health concerns (*illa*) might be invoked by analogy, to severely restrict some sexual activities on public health grounds. Hence, *Istislah* must also be considered against the other pillars of Islamic jurisprudence. It is important to distinguish [31] *Istislah* from secular utilitarianism, unlike the latter, *maslaha* (public good) refers to the common good according to Islamic eschatological objective of salvation. In applying these two concepts- *Qiyas* and *Istislah* - to the environment, Islamic theologians can adapt existing *hadiths* with minimal compromise[32] on the textual consistency of the *Qu'ran* and establish a consistent *illa*. For instance, modern water acidification[33] via industrial processes could be prohibited under existing *hadith* on irrigation/water usage called *harim. Harim*[34] prescribe a protective zone around all real estates surrounding a vulnerable waterway. The *illa* behind this hadith was (1) protection of community access to drinking water, (2) prevention of pollution that may harm such rights to access[35] and (3) fulfilling *istislah* (common good) as adulteration of water was believed to be contrary to divine natural order[36]. Hence, it is possible for Islamic theologians to extend this *hadith* to prohibit toxic industrial processes that harms environmental/marine interests. After all, such a prohibition complies with that *hadith*'s express *illa* of protecting community access to public waterways and fulfills *Istislah* (eschatological common good) as industrial disruption of natural waterways is contrary to divine providence. Thus, existing jurisprudential structures in shariah – *Istislah* and *Qiyas*- equips Islamic theologians with a rationale to pursue pro-environment legal reforms in Islamic law whilst ensuring minimal compromise to the textual integrity of the *Qu'ran* and secular environmentalism's interests in preventing pollution and potentially, even climate change should it be imagined as analogous to pollution.

In conclusion, two Abrahamic traditions, Christianity and Islam, have significant theological structures to support or reject environmental legal reforms. For Christianity, post-Second Vatican Council Catholicism has been increasingly incorporating pro-environmentalism especially through Pope Francis' *Laudato Si* where the tradition rejected narratives of human exceptionalism by framing pro-environment reforms as necessary in addressing economic injustice experienced by disadvantaged populations and demanding consideration of the collective common good in biblical exegesis as opposed to an individualistic philosophy. In contrast, Protestantism, particularly Calvinism, instead the denomination favours reconstructing the environment in the image of God and reason that infringements on the environment is comparable to infringements on one's personal relationship with God. On the other hand, although Islam shares jurisprudential structures with Christianity in having Quranic interpretation as its core, Islamic scholars diverges substantially from their Christian counterparts in acknowledging flaws associated with using textual exegesis to support environmentalism. Some of these flaws include a stalemate where climate sceptics may use religious texts to justify utilitarian exploitation of the environment. In addition to the Qu'ran, Islam also appeal to two other pillars, *Qiyas* (analogical reasoning) and *Istislah* (common good) where *illa* acts akin to the common law's doctrine of precedent to justify pro-environmental legal reforms without major reforms in Qu'ranic interpretation.

30 Ibid 193.
31 Ibid 193.
32 Mustafa Abu-Sway, 'Towards an Islamic Jurisprudence of the Enivironment' (n 26).
33 John Wilkinson, 'Muslim Land and Water Law' (1990) 1(1) *Journal of Islamic Studies* 60.
34 Ibid,60-63.
35 Ibid 63; Willis Jenkins, 'Islamic Law and Environmental Ethics: How Jurisprudence (Usul al-Fiqh) Mobilizes Practical Reform' (n 20), 348.
36 Ibid 72.

RETHINKING 'NATURE':
SHOULD AUSTRALIA LEGISLATE A RIGHT OF NATURE TO PROMOTE ENVIRONMENTAL JUSTICE AND TRANSFORM INDIGENOUS RELATIONS?

Nicholas Betts

I Introduction

The Rights of Nature movement, while still marginal, has fostered profound jurisprudential developments and comprises a normative countertrend worldwide. This article will compare and contrast how legally recognised rights of nature have been constructed in Bolivia, New Zealand and India while suggesting a path of implementation for Australia to promote Indigenous reconciliation and environmental justice. While Bolivia has adopted a broader strategy, enacting a comprehensive statutory scheme in the *Law of the Rights of Mother Earth 2010*[1] ('*Law of Rights*') and the *Framework Law of Mother Earth and Integral Development for Living Well 2012*[2] ('*Framework Law*'), New Zealand and India have advanced a narrower approach, seeking to recognise the legal personality of vital ecosystems and the commensurate standing of indigenous groups in relation to them. While India's experiment failed on appeal to the Supreme Court, the success of New Zealand's narrow approach could provide valuable lessons to Australia. By accepting New Zealand's approach, Australia could advance climate justice and improve race relations, recognising the sanctity of our natural world and the damage colonialism inflicted by disrupting the Indigenous connection to the environment.

II What is a Right of Nature?

A right of nature refers to a heterodox judicial concept that seeks to endow rights upon natural objects – i.e. ecosystems, biomes, etc – and commensurate responsibilities upon humans in relation to them. Philosophically, a right of nature has been grounded in the spiritual connection and interrelationship between humanity and the environment. As we benefit from the earth, so too should we safeguard the earth.

Legally, a judicial right of nature was first advanced by Christopher D. Stone in his seminal work '*Should Trees Have Standing?*'.[3] Stone argues that legal history has been dominated by supposedly 'unthinkable' extensions of rights to new 'things'. By comparing previous legal thinking on the rights of children, African-Americans, and Chinese individuals in America, Stone demonstrates that standing is a necessary legal fiction.[4] Further, the law has historically expanded rights and standing based on evolving philosophies. Indeed, Stone insightfully points to corporate personality as a rebuttal to the assertion that natural objects 'cannot speak'.[5]

However, the content of such a right is naturally amorphous. Given most societies disagree on implementing and enforcing human rights, ascertaining a precise definition across diverse societies is difficult. Any conception of the rights of nature will be culturally specific. Thus

1 *Law of the Rights of Mother Earth 2010* (Bolivia) ("*Law o Rights*').
2 *Framework Law of Mother Earth and Integral Development for Living Well 2012* (Bolivia) ("*Framework Law*").
3 Christopher D. Stone, 'Should Trees Have Standing?' (1972) 45 *Southern California Law Review*.
4 Ibid 450-455.
5 Ibid 464.

far, the countries addressed in the article have done so based on indigenous socio-cultural heritage or religious philosophy. Guided by the South American notions of *Pachamama* and *Buen Vivir*, the Bolivian Government under Evo Morales embraced a broad statutory right, extending general rights to nature and duties to state and private actors.

III Statute Over Constitution

A *Bolivia*

Before addressing Bolivia's distinct implementations of the right, we must understand their historical context. The rights Bolivia implemented are deeply rooted in Indigenous South American environmental ethics and the nation's traumatic colonial past, from its suffering under Spanish subjugation to eventual independence under Simón Bolívar. This newfound freedom was undermined by the political tumult of the 20th century, wherein Bolivia experienced violent, neoliberal dictatorships, such as Luis García Meza, and periodic instability under successive military dictators between 1964 and 1982. It was against this background that an opening for democracy and a new brand of indigenous-driven, environmentally focused politics emerged.

In Bolivia, the Indigenous socialist politician Evo Morales and his Movement Towards Socialism (MAS) Party promulgated a new constitution, seeking to empower the disenfranchised Indigenous majority. In doing so, Bolivia sought to reject the 'colonial, republican and neo-liberal State';[6] seeking to follow a counter model of ecologically sustainable development (ESD), known as *Vivir Bien* ('live well').[7] The notion of *Vivir Bien* has been advanced in other South American nations – namely through Ecuador's *Sumak Kawsay* – and encompasses an alternative conception of development, focusing on harmonious collective development.[8] 'Living Well' 'seeks balance between humans and nature' with indigenous groups as guardians of sacred nature.[9] This, coupled with the South American concept of *Pachamama* (rather than Mother Nature), reflects the idea of a matriarchal earth which informs the statutory scheme as a whole.[10]

Unlike Ecuador, Bolivia's rights of nature are imposed by statute, rather than entrenched in the Constitution. Contextually, the Constitution of the Plurinational State of Bolivia left open the prospect of a statutory environmental right through Chapter 1's establishment of a 'duty of the state' to pursue ESD and intergenerational equity (Article 342), alongside participatory, public planning.[11] The Constitution promotes environmental integrity by echoing the German notion of the 'eco-constitutional state' (ökologische Verfassungsstaat).[12] The content of the environmental right is expressed broadly through Articles 33 and 34. Article 33 grants 'everyone…the right to a healthy, protective and balanced environment', giving broad environmental scope and reflecting intergenerational equity.[13] Article 34 supports this scope by granting incredibly broad standing to 'any person' seeking to bring an action in defence of environmental rights – notably 'without prejudice' to public institutions' obligation of environmental protection.[14]

Ultimately, however, Bolivia's right of nature derives from two seminal pieces of legislation – the *Law of the Rights* and the *Framework Law*. The former creates a series of broad principles while the second operationalises it. These principles include 'harmony,' that 'human activity…must achieve a dynamic balance with the cycles and processes inherent in Mother Earth';[15] the 'collective good' is to 'prevail in all human activities and any acquired right';[16] and 'no commercialism.'[17] Further, the *Law of Rights* mandates a clear presumption in favour of Mother Earth in conflict of rights, including the right to life, to the diversity of life, to water, to clean air, to equilibrium, to restoration, and to pollution-free living.[18]

6 *Plurinational State of Bolivia's Constitution of 2009* (Bolivia), Preamble ("*Bolivia's Constitution*")
7 Frédérique Weyer, "Implementing '*Vivir Bien*': Results and Lessons from the Biocultura Programme, Bolivia" in *International Pathways to Sustainable Development: Lessons from Latin America,* (Graduate Institute Publications, 2017), 128.
8 Eduardo Gudynas, 'Buen Vivir: Today's Tomorrow' (2011) *Development,* 54(4), 441-447.
9 R. Lalander, 'Ethnic Rights and the Dilemma of Extractive Development in Plurinational Bolivia' (2017) 21(4) *The International Journal of Human Rights*, 129.
10 *Bolivia's Constituion* (n 4) Preamble.
11 Ibid arts 342-347
12 Paola Villavicencio Calzadilla and Louis J. Kotze, "Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia" (2018) 7:3 *Transnational Environmental Law,* 403.
13 *Bolivia's Constitution* (n 6) art 33.
14 Ibid art 34.
15 *Law of Rights* (n 1) art 2(1).
16 Ibid art 2(2).
17 Ibid art 2(5).
18 Ibid art 7.

These rights are practically engaged by the *Framework Law*.[19] Article 1 states that the *Framework Law* establishes the vision, fundamentals and objectives of integral development, in accordance with Mother Earth for *Vivir Bien*.[20] Beyond the standard polluter-pays, precautionary and preventative principles, the *Framework Law* also incorporates the principle of the restoration of Mother Earth.[21] Arguably, the most transformative element of the *Framework Law* is Article 38, which states that any infringement of the rights of Mother Earth constitutes an infringement of the collective – and individual – rights of all peoples.[22]

IV Legal Personhood

In contrast to the broad statutory and constitutional schemes mandated by Bolivia and Ecuador, New Zealand and India have adopted a narrower approach. While charting different paths, both nations adopted a right of nature focused on endowing certain bodies, such as the Whanganui or Ganges and Yamuna Rivers, with legal personality and commensurate responsibilities on state and private actors. Though perhaps not as morally persuasive, this approach arguably has a more specific, and achievable, scope.

A *India – A Failure of Common Law*

India's experiment in adopting a right of nature was initially promising, but stalled after the Supreme Court of India's ruling in July 2017.[23] Both the Ganges and Yamuna rivers are of paramount spiritual and religious significance to the Hindu religion but are overwhelmingly afflicted by pollution and human waste.[24] It was in relation to this affliction, and consistent complaints of failure by the Uttarakhand and Uttar Pradesh Governments to comply with federal government efforts to protect the Ganges, that the High Court of Uttarakhand held the two rivers to be endowed with legal personality.[25] Further, they appointed three officials to act as legal custodians of the rivers and their tributaries and ordered a management board be established within three months.[26] While met with acclaim from global environmental groups, the declaration was overturned by the Supreme Court of India, who acknowledged and agreed with the Uttarakhand Government's argument that the ruling was not practical and would involve complex state jurisdictional issues.[27] Despite this setback, the Indian experiment provides valuable lessons: any right to nature should be implemented by comprehensive legislation, rather than common law, or else it will be vulnerable to revocation.

B *New Zealand – An Evolving Experiment*

Unlike India, New Zealand has seen success attaching legal personality and standing to natural bodies and indigenous groups via legislation. New Zealand was founded on the historically contentious relationship between the indigenous Maori and the colonial regime. Unlike the South American nations and their indigenous populations, New Zealand has a relatively settled relationship with the Maori – embodied in the *Treaty of Waitangi*.[28] While not legally effective, the Treaty has moral force and has shaped New Zealander culture and, subsequently, the rights of ecosystems such as the Whanganui River, Mount Taranaki or the Urewera Forest.[29]

New Zealand's legal approach mirrors Stone's guardianship position approach which endows 'major natural objects as holders of their own rights, raiseable by [a] court-appointed guardian.'[30] In essence, this approach promotes a narrow standing arrangement, whereby the close relationship between the Maori as

19 *Framework Law* (n 2).
20 Ibid, Art. 1.
21 Ibid, Art. 4,5.
22 Ibid, Article 38.
23 BBC News, "India's Ganges and Yamuna Rivers are 'Not Living Entities', *BBC News* (online, 2017) <https://www.bbc.com/news/world-asia-india-40537701>.
24 Raju Gopalakrishnan, "Saving a River: Pollution in India's Holy Ganges Makes it Toxic", *Reuters* (online, 2019) <https://www.reuters.com/article/us-india-ganges/saving-a-river-pollution-in-indias-holy-ganges-makes-it-toxic-idUSKCN1PC0CT>.
25 Michael Safi, "Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings", *The Guardian* (online, 2017) <https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings>.
26 Ibid.
27 Lidia Cano Pecharroman, "Rights of Nature: Rivers That Can Stand in Court" (2018) 7 13 *Resources,* 14.
28 Gregory Pemberton, "Why New Zealand's Maori Got a Treaty, and Australia's Indigenous Peoples Didn't", *The Sydney Morning Herald* (online, 2 June 2017) <https://www.smh.com.au/politics/federal/why-new-zealands-maori-got-a-treaty-and-australias-indigenous-peoples-didnt-20170601-gwhysd.html>.
29 Michelle Maloney, "Changing the legal status of nature: recent developments and future possibilities" (2018) 49, *LSJ – Law Society of NSW Journal*, 79.
30 *Law of Rights* (n 1) 473.

kaitiaki (caretakers, guardians and protectors of nature) and the specific ecosystem provides legal rights and responsibilities.[31]

The best example of New Zealand's right of nature is that of the Whanganui River, whose legal personality was enunciated in the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* ('Whanganui Act').[32] This Act was intended to be a radical realignment of Western law with indigenous concepts through the categorical Crown acknowledgements and apology in Part 3, Subpart 1.[33] In doing so, it acknowledges that, historically, the River was densely populated by the Iwi who continued to assert their connection to the River post-Treaty.[34]

Legal personality is granted under Article 14, which vests the Crown-owned fee simple estate of the riverbed with the Whanganui River managers.[35] Article 14(2) holds the rights, duties and responsibilities vis-à-vis the River are managed by the office of Te Pou Tupua.[36] This is not purely administrative, however. Article 7 defines the health and well-being of the River as having environmental, social, cultural, and economic dimensions.[37] Further, the Te Pou Tupua bears comprehensive duties under Article 19(1): to act and speak for the river, to uphold the river's recognition and values as an indivisible, legal entity, to promote the environmental, social, cultural and economic health and wellbeing of the river, and to take any other action reasonably necessary to achieve its purpose and perform its functions.[38] In doing so, the administration recognises the Maori maxim of *ko au te awa, ko te awa ko au* (I am the river and the river is me).[39]

V An Australian Right of Nature

The implementation of a right of nature in Australia is a politically delicate proposition and activists must be pragmatic. Despite Australia's comprehensive environmental legal scheme, recognition is questionable given our legislature's general unwillingness to promote climate justice.[40] Therefore, despite the moral persuasiveness of Bolivia's approach, it would be wiser to adopt New Zealand's guardianship approach. There are several compelling reasons for this.

The first is the ability to further recognise the pre-existing Aboriginal relationship with the land and further enshrine it into modern law as a continuation of the process undertaken through *Mabo*'s recognition of native title.[41] By granting Indigenous peoples standing, as in Stone's guardianship argument, we simply formalise into Western law the continuous relationship they possess with these sites.[42] From a spiritual perspective, this is a substantive progression towards recognising that native title was a first step that failed to capture the contours of Aboriginal socio-cultural life, mangled by colonialism, and their distinct relationship with the land.[43] By granting this standing, we recognise the Indigenous peoples' connection to these sites and properly integrate them into the democratic project.

From a practical perspective, a guardianship arrangement further incorporates Indigenous peoples into our modern governance structure. As it stands, the traditional Aboriginal owners of Australian natural sites are already key stakeholders in site management. For example, the Uluru-Kata Tjuta National Park has a management board, containing members

31 Aikaterini Argyrou & Harry Hummels, "Legal personality and economic livelihood of the Whanganui River: a call for community entrepreneurship" (2019) 44:6-7 *Water International*, 760.
32 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) (*"Te Awa Tupua"*).
33 Ibid pt 3 sub-pt (1).
34 Toni Collins and Shea Esterling (2019) "Fluid personality: Indigenous rights and the 'Te Awa Tupua (Whanganui River claims settlement) Act 2017'", 20 1, *Melbourne Journal of International Law,* 199.
35 *Te Awa Tupua* (n 35) art 14; Alex Johnston, "Murky Waters: The recognition of Maori rights and interests in freshwater" (2018), 24, *Te Mata Koi: Auckland University Law Review*, 57.
36 *Te Awa Tupua* (n 35) art 14(2).
37 Ibid art 7.
38 Ibid art 19(1).
39 Ibid art 12.

40 Lenore Taylor, "Australia Kills Off Carbon Tax", *The Guardian* (online, 17 June 2014).<https://www.theguardian.com/environment/2014/jul/17/australia-kills-off-carbon-tax>; Marc Hudson, "How Climate Denial Gained a Foothold In The Liberal Party, and Why It Still Won't Go Away", *The Conversation* (online, 6 March 2016), <https://theconversation.com/how-climate-denial-gained-a-foothold-in-the-liberal-party-and-why-it-still-wont-go-away-56013>; Amy Remeikis and Josh Taylor, "'There is No Link': the Climate Doubters Within Scott Morrison's Government", *The Guardian* (online, 16 Jan 2020) <https://www.theguardian.com/australia-news/2020/jan/16/there-is-no-link-the-climate-doubters-within-scott-morrisons-government>
41 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*').
42 *Law of Rights* (n 1).
43 Irene Watson, "Kaldowinyeri", *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2014), 11-24.

approved by the Anangu people of Uluru, whose policies aim to 'maintain Anangu culture and heritage'.[44] The Anangu already receive a portion of revenues from entry fees to the Uluru-Kata Tjuta National Park.[45] Further, they exercised their hereditary rights to ban walks atop Uluru in 2019.[46] While Uluru itself had already been handed back to the Anangu traditional owners in 1985, it demonstrates how guardianship legislation would simply formalise and expand Indigenous rights under modern law.[47] As this would leave us with an arrangement closely resembling New Zealand's legislative scheme over the Whanganui River, Mount Taranaki and Urewera Forest, it could not be construed as a baseless political experiment.

Second, guardianship would enable the tailoring of management requirements to a site's specific needs. As with the establishment of the Te Pou Tupua, legislation would allow the government to mandate inclusion of the traditional owners, possessing standing, alongside scientific and governmental advisors. This may significantly improve outcomes for sites like the Great Barrier Reef by meeting three broad goals: enfranchising the traditional site owners, bringing Indigenous peoples into the governance process, and ensuring scientific considerations are considered. Considering Australia's unique vulnerability to climate change, a guardianship scheme would encourage a holistic, considered approach to site management.

Third, this approach restrains accusations of overreach. Considering Australia's historical ambivalence towards a Bill of Rights – with Victoria and Queensland as notable exceptions – attempting to constitutionally implement rights for nature like Ecuador is inadvisable. Further, given the recent backlash against supposed 'eco-fascism' in the form of agricultural lock-on protests, environmental reformers need to recognise the conservative tendency dominating Australian politics. While this is frustrating for those seeking radical action on climate, narrow, specific legislation could potentially mitigate a conservative, climate-sceptic backlash.

VI Conclusion

In conclusion, by surveying the differing approaches governments have taken in legislating for the rights of nature, we can see that currently the New Zealand guardianship approach is the most effective for our Australian context. While the South American establishment of broad environmental principles entrenched legislatively and constitutionally has moral and persuasive force, the current trend of aversion to environmentally conscious legislation in government means we must confine our focus to the achievable. By implementing a guardianship approach, and following the legacy of *Mabo*, we can increase Aboriginal peoples' stakeholding in the governance of their environmental heritage and, in doing so, advance both climate and racial justice.

44 "Joint Management" (Press Release) <https://parksaustralia.gov.au/uluru/about/joint-management/>.
45 Lorena Allam, "Traditional Owners of Uluru Make A Splash Using Entry Fee Income", *The Guardian* (online, December 2019) <https://www.theguardian.com/australia-news/2019/dec/29/traditional-owners-of-uluru-make-a-splash-using-entry-fee-income>.
46 James Norman, "Why We Are Banning Tourists From Climbing Uluru", *The Conversation* (online, November 2017) <https://theconversation.com/why-we-are-banning-tourists-from-climbing-uluru-86755>.
47 Australian Institute of Aboriginal and Torres Strait Islander Studies, "Journey to Handback" (Report) <https://aiatsis.gov.au/exhibitions/journey-handback>.

FINISHED OR UNFINISHED?
ABORIGINAL LAND RIGHTS AND STRATEGIC LITIGATION IN THE NORTHERN TERRITORY

Tom Dews

I Introduction

With their historical origins in grassroots Indigenous activism, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*ALRA*') and *Native Title Act 1992* (Cth) ('*NTA*') are said to secure land rights and agency in their exercise for traditional Aboriginal groups in the Northern Territory (NT). The Northern Land Council ('NLC') plays a central role in both of these statutory frameworks, both facilitating claims and acting as an intermediary between Aboriginal groups and third parties, including governments and private companies seeking to use Aboriginal land. Yet it has been suggested that the *ALRA* and *NTA* signify the co-optation of the Aboriginal land rights movement, and that as such they are a mere extension of the ongoing neo-colonial relationship between the Australian State and its Indigenous peoples. In light of this, there is much doubt as to the NLC's capacity to maintain an adversarial position against the State. However, strategic litigation is a method that has potential in this regard, providing a vehicle for challenging legal rules, and thereby effecting wider social change in asymmetrical power relations. As one of Australia's most powerful and politicised peak Indigenous bodies, and one that has run high-profile litigation under both the ALRA and the NTA, NLC provides a fitting example for assessment of whether litigation against the State can expand the remit of the seemingly co-opted land rights movement, and thereby increase access to land rights justice.

Using Thomas Mathiesen's 'finished/unfinished' theory, this essay will examine the utility of strategic litigation in contesting the Australian State's co-optation of Aboriginal land rights through analysing significant NLC-led cases under the *ALRA* and *NTA*. It will firstly review the key pillars of Mathiesen's political action theory. Next, by canvassing some of the contemporary critiques levelled at the statutory frameworks, it will reveal the utility of Mathiesen's theory in analysing whether litigation is a viable strategy through which the NLC can maintain an adversarial position against the State. I will then examine select cases which the NLC has run on behalf of Traditional Aboriginal Owners in the NT, including the *Blue Mud Bay case*, *Timber Creek compensation case* and *Wurridjal v The Commonwealth*, in order to reach a conclusion as to whether litigation is a viable strategy by which NLC, and therein the NT land rights movement, can seek to remain 'unfinished'. Finally, I will briefly explore the New South Wales land rights vis-à-vis the NSW Government, thereby demonstrating what it means to be 'finished' in the land rights space in Australia.

II Mathiesen's Political Action Theory and Aboriginal Land Rights

Thomas Mathiesen's 'finished'/'unfinished' framework speculates on the ability of a political movement to maintain a constantly evolving agenda for "boundary-transcending"[1] change

1 Rolf S. De Folter, 'On the methodological foundation of the abolitionist approach to the criminal justice sys-

in the face of repressive State structures,[2] and provides a useful tool for evaluating NLC's role within the contemporary land rights framework in the NT. For Mathiesen, in order for a movement to continue to effect real change it must remain 'unfinished'. Firstly, the movement must not be 'defined in'; that is, completely co-opted by the State's "repression developing systems of ideas".[3] Secondly, the movement must also not be 'defined out' through being "simply set outside society",[4] which may occur through the State's framing of a movement as internally divided or as "continually more irresponsible".[5] Contrastingly, in order to remain 'unfinished', a movement must be in constant contradiction to the State; that is, the movement must retain aspects that, based on its own premises, fundamentally contrast those of the State. Additionally, the movement must be in continual competition with the State, as otherwise it will cease to provide relevant alternatives to the State's repressive system.[6] Thus, to remain 'unfinished' the organisation must remain "in a position of competing contradiction"[7] through its tactics, and therein be neither defined in, nor defined out.

The utility of Mathiesen in assessing the NLC's capacity to successfully contest the State is revealed in light of contemporary debates regarding the effectiveness of the *ALRA* and *NTA* in securing land rights for Indigenous Australians. The present framework has deep historical roots in grassroots resistance to denial of self-determination,[8] and to date has seen considerable success. Indeed, nearly half of the Northern Territory's landmass and 85 percent of its coastline has been returned to Traditional Aboriginal Owners by way of inalienable freehold under the *ALRA*,[9] in addition to 105 successful Native Title claims which play an important role in strengthening connections to Country.[10]

However, many argue that the NT land rights movement has in fact been co-opted through the *ALRA* and *NTA*, and thus can no longer challenge the State as was central to its origins as a political movement. Howard-Wagner resonates with this idea, arguing that despite high aspirations for Aboriginal self-determination through land, government actions such as the NT Intervention indicate that the legislation remains situated within a wider neo-colonial structure, and as such is at the whim of the State.[11] Consequently, questions have been raised about the capacity of land councils such as the NLC, which has statute-mandated roles under both the *ALRA* and *NTA*,[12] to be a combative force for their Aboriginal constituents, as the framework is seen as a mere extension of the State's domination of Indigenous people.[13]

Returning to Mathiesen, it may consequently appear that the NLC has necessarily been defined in as a part of a wider process of State co-optation represented by the *ALRA* and the *NTA*. Indeed, it has a seemingly rigid statutory remit, and as such is considered in many circles to be a mere participant in the decision-making process regarding Aboriginal land rights in the NT. Additionally, the NLC may appear to have been 'defined out' through a combination of intense public scrutiny regarding its operations in the last few years[14] and a wider political environment that is ever-dismissive of calls for Aboriginal self-determination, be it through land rights or otherwise.[15] Yet recent litigation run by the NLC has succeeded in challenging many of the rules of this seemingly co-opted system of land rights governance. Thus, whether the NLC is in fact 'finished' as a combative force warrants further examination, and gives rise to a number of questions in

tem. A comparison of the ideas of Hulsman, Mathiesen and Foucault', (1986) 10 *Contemporary Crises* 39, 48.

2 Ibid 47-52.

3 Ibid 49.

4 Ibid 49.

5 Ibid 49.

6 Ibid 49-50.

7 Simon Rice, 'Are CLCs finished', (2012) 37 *Alternative Law Journal* 17, 18.

8 Graham Neate, 'Land rights, native title and the 'limits' of recognition: getting the balance right?' (2009) 11(2) *Flinders Journal of Law Reform* 1, 9-54.

9 Ibid 138; Northern Land Council, *Our history* (online, 15 December 2020) <https://www.nlc.org.au/about-us/our-history>.

10 Native Title Tribunal, *Search National Native Title Register* (online, 29 April 2015) <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-National-Native-Title-Register.asp>.

11 Deirdre Howard-Wagner, 'Reclaiming the northern territory as a settler-colonial space' (2012) 37/38 *Arena Journal* 220, 230-7.

12 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ss 21, 23; *Native Title Act 1992* (Cth) s 203B.

13 Rachel Lorraine Evans, *Battles for for Indigenous Self-Determination in the Neoliberal Period: a Comparative Study of Bolivian Indigenous and Aboriginal and Torres Strait Islander Peoples' Resistance* [thesis] (2018) University of Sydney, 95; Justin O'Brien, 'Canberra Yellowcake: The Politics of Uranium and How Aboriginal Land Rights Failed the Mirrar People' (2003) 14 *Journal of Northern Territory History* 79.

14 Lorena Allam, 'Federal government asked to investigate Northern Land Council over CEO sacking' *The Guardian* (online, 19 December 2018) <https://www.theguardian.com/australia-news/2018/dec/19/federal-government-asked-to-investigate-northern-land-council-over-ceo-sacking>.

15 Neate (n 8).

terms of this year's theme of 'Reform and Resistance'. Is the NLC truly capable of resisting the State through strategic litigation? Is it possible for Aboriginal land councils to advocate for reform to land rights through the courts, despite their entrenched functions as statutory intermediaries? Or, is it possible that land councils and their empowering statutes are themselves in need of reform in order to do justice to the original land rights movement, to which they owe their very existence? With the recent political imperative to finalise all outstanding land claims in the NT,[16] the role of the NLC going forward will soon be under scrutiny.

III Challenging The Rules: Strategic Litigation And Remaining 'Unfinished'

The NLC has historically turned to litigation as a method of contesting the state's exercise of power over Aboriginal land rights,[17] and as such examining notable casework of the last 15 years provides a useful yardstick by which to measure whether the NLC and the Aboriginal land rights movement in the NT is 'finished' or remains 'unfinished'. Strategic litigation, particularly in superior forums such as the High Court, can be used as a powerful tool for directly changing the wider institutional rules that govern particular social injustices,[18] and therefore can be considered a strategy by which the NLC and its constituents can remain *in contradiction* with the State through seeking to challenge the neo-colonial rules governing land rights under the *ALRA* and *NTA*.

While litigation is inherently adversarial, it is not such a radical tool that it risks the NLC being 'defined out'; rather, it seeks to contest the State within the boundaries of a well-defined and accepted system of rules and procedure. Thus, through litigation NLC can also remain *in competition* with the State by providing legal representation to otherwise marginalised and often remotely located Aboriginal groups. Crucially, in a context of incessant legislative encroachment on land rights progress (most recently during the NT Intervention),[19] the courtroom also provides a more equal playing field by which Aboriginal groups can contest the State and its often unchecked activities, and force a public response. Litigation seeking to expand or alter the rules of the *ALRA* or *NTA* is therefore an important tool through which the NLC and the land rights movement can remain in competing contradiction with the Australian State, and its potential has been demonstrated by prominent contemporary NLC cases.

A *Blue Mud Bay*

Described by many as the most ground-breaking Aboriginal self-determination case in recent Australian history,[20] the *Blue Mud Bay case*[21] and its aftermath demonstrates the NLC's ability to remain in competing contradiction with the State through *ALRA* litigation. In that case, the High Court confirmed that Aboriginal land granted under the *ALRA* extends to the low tide water mark,[22] cementing for Indigenous groups rights to exclusive possession over more than 80% of the NT coastline (a length of 5000 kilometres).[23] Brennan notes that the ruling creates "unprecedented opportunities for Aboriginal participation"[24] in the NT's lucrative fishing industry, despite concerning a particular dispute between the Yolngu people and the NT Government. *Blue Mud Bay* is therefore a textbook example of successful strategic litigation, effecting broader "positive legal, political and social change"[25] surrounding the extent of inalienable freehold title under the *ALRA*.

16 Judy Scatssoon, 'NT takes action to resolve all land claims', *Government News* (online, 17 April 2019) <https://www.governmentnews.com.au/nt-takes-action-to-resolve-all-land-claims/#:~:text=A%20Northern%20Territory%20Aboriginal%20Action,joint%20management%20of%20National%20Parks.&text=The%20Northern%20Territory%20has%20proposed,resolving%20all%20outstanding%20land%20claims>.

17 See, eg, *R v Toohey; Ex parte Northern Land Council* 151 CLR 170.

18 Scott Calnan, 'Planned Litigation: Should It Play a Greater Role in Human Rights Litigation in Australia' (2019) *University of New South Wales Law Journal Forum* 1; Andrea Durbach and Luke McNamara and Simon Rice and Mark Rix, 'Public Interest Litigation: Making the Case in Australia' (2013) 38 *Alternative Law Journal* 219

19 See *ALRA*, endnote 4.

20 Jens Korff, 'Blue Mud Bay High Court Decision', *Creative Spirits* (online, 13 August 2020 <https://www.creativespirits.info/aboriginalculture/land/blue-mud-bay-high-court-decision>); Sean Brennan, 'Wet or Dry, It's Aboriginal Land: The Blue Mud Bay Decision on the Intertidal Zone' (2008) 7(7) *Indigenous Law Bulletin* 6, 9.

21 *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24.

22 *Blue Mud Bay case* (n 21); Brennan (n 20).

23 Lauren Butterly 'A decade on: What happened to the historic Blue Mud Bay case (and why is it in the news again)?', *AUSPUBLAW* (online, 20 June 2017) <https://auspublaw.org/2017/06/what-happened-to-the-historic-blue-mud-bay-case/>.

24 Brennan (n 20) 937.

25 Catherine Corey Barber, 'Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations', (2012) 16(3) *The International Journal of Human Rights* 411, 411.

Moreover, while the ground-breaking effects of the *Blue Mud Bay* litigation had the potential to spark a politically unfavourable response,[26] the NLC's *ALRA*-mandated functions prevented it from being 'defined out' in the aftermath of the decision. In particular, its statutory responsibilities for negotiation of agreements regarding use of and entry onto Aboriginal land has meant that following the decision, the State and the NT fishing industry have been legally obliged to consult te NLC and specific communities regarding continuing use of these areas "on a case by case basis".[27] The *Blue Mud Bay case* therefore exemplifies how *ALRA* litigation is a strategy by which NLC can remain in competing contradiction to the State, and therein continue to enhance land rights justice for their constituents within a wider context of statutory co-optation.

B *TIMBER CREEK*

NLC also represents NT Aboriginal groups in Native Title disputes,[28] and the *Timber Creek compensation case*[29] highlights the NLC's contemporary ability to expand the remit of Native Title rights through strategic litigation. In *Timber Creek*, the High Court considered the compensation provisions of the *NTA* for the first time, examining the principles applicable to the calculation of compensation for "cultural loss" for Crown extinguishment and weakening of Native Title.[30] There, the High Court rejected the NT and Commonwealth's argument that the Full Court of the Federal Court's award of $1.3 million relating to government acts in the town of Timber Creek (south of Darwin) was "excessive",[31] instead upholding the full amount originally awarded.

Timber Creek exemplifies how strategic litigation within the *NTA* can still be a means of holding the State to account for historic injustices on traditional Aboriginal land. While the NLC sought a personal remedy for the Ngaliwurru and Nungali groups, the decision has been lauded as the most significant Native Title case since *Mabo*,[32] and is predicted to have wider ramifications for future *NTA* disputes between governments and Indigenous groups across Australia.[33] Furthermore, in a manner similar to *Blue Mud Bay*, litigious contestation reduced the risk of the NLC being defined out as a result of the decision, with Edgeworth arguing that this is because Native Title is now accepted as a legitimate feature of "Australia's social and legal landscape".[34] While some might argue that this is symbolic of defining in,[35] *Timber Creek* enlarged the remit of the *NTA* in its extension of compensation to rights that were held historically, in turn cementing traditional rights to Country vis-à-vis the power of the State. *Timber Creek* therefore indicates how *NTA* litigation can be utilised by NLC as an effective method for resistance against the State's co-optation of the land rights movement, without risking being defined in.

C *WURRIDJAL'S CASE*

The High Court's decision in *Wurridjal*[36] is of particular significance due to its resistance of aspects of the NT Intervention. In that case, the NLC sought to contest the Federal Government's compulsory imposition of five-year leases over Aboriginal land held under the *ALRA*, which constituted significant incursions on Aboriginal autonomy throughout many remote NT communities.[37] On behalf of plaintiffs from Maningrida (located in northern Arnhem land), NLC argued that the leases amounted to an 'acquisition of property' for the purposes of s 51(xxxi) of the Constitution and therefore required compensation on 'just terms'.[38] The High Court accepted this argument, but costs were awarded against them because absence of just terms could not be factually established.[39] However, Barber distinguishes between the outcomes and impacts of strategic litigation, arguing that a courtroom loss can still be effective in creating change.[40] Such an idea is important to take into account when evaluating *Wurridjal*, especially

26 Jon Altman, 'Understanding the Blue Mud Bay Decision', (2013) *Journal of Indigenous Policy* 49.
27 *ALRA* ss 23(fa), 70; Altman (no 27), 50.
28 Northern Land Council, *Our Governing Laws* (online, 15 December 2017) <https://www.nlc.org.au/about-us/our-governing-laws>; *NTA* s 203B.
29 *Northern Territory v Griffiths (deceased)* [2019] HCA 7 ('*Timber Creek*').
30 *Timber Creek*; Justice Michelle Gordon, 'The Development of Native Title: Opening Our Eyes to Shared History' (2019) 30 *Public Law Review* 314, 326.
31 *Timber Creek*; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Timber Creek Compensation Case* (online, 15 April 2019) <https://aiatsis.gov.au/explore/articles/timber-creek-compensation-case>.
32 Ibid.
33 Brendan Edgeworth, 'Valuable, Invaluable or Unvaluable? The High Court On Native Title Compensation' (2019) 93 *Australian Law Journal* 442, 445.
34 Ibid.
35 Rice (n 7) 19/
36 (2009) 237 CLR 309 ('*Wurridjal*').
37 Ibid; Sean Brennan, 'Wurridjal v Commonwealth: The Northern Territory Intervention and Just Terms for the Acquisition of Property' (2009) 33 *Melbourne University Law Review* 934, 937.
38 Ibid.
39 Brennan (n 37).
40 Barber (n 25).

in the context of what was an overtly colonial and politicised attempt by the State to curb Indigenous self-governance in the Territory. Brennan's work reflects this notion, as he points out that despite its unfavourable result, the case stands for the proposition that *ALRA* property rights are constitutionally protected; an idea which carries serious weight when considered with *Blue Mud Bay.*[41]

Moreover, NLC's decision to litigate had wider normative impacts in its open contestation of the Intervention. Howard-Wagner lauds the case as symbolic of the law's potential to be a "site of resistance"[42] against overtly neo-colonial measures seeking to take control of Indigenous life. *Wurridjal*, she writes, "continues to interrupt and unsettle settler-colonial discourses and practices and represent[s] a different way of viewing the social world".[43] Such an impact cannot be ignored, as the case demonstrates how in addition to encompassing a direct challenge to the legal rules governing asymmetrical power relationship between parties, *ALRA* litigation has the potential to alter wider perceptions of the legitimacy of Aboriginal rights to land, irrespective of the outcome in the case. As such, it is a viable strategy through which the NLC can remain in competing contradiction with the State within a framework of co-optation.

IV Land Rights Litigation in New South Wales: A Brief Explanation

In contrast, litigation has not proven to be a means by which Aboriginal Land Councils in NSW can remain unfinished, as the land rights movement has largely been 'defined in' by the State. Enacted following the grassroots activism that led to the NT *ALRA*,[44] the *Aboriginal Land Rights Act 1983* (NSW) ('the Act'), established 119 Local Aboriginal Land Councils ('LALCs'), which can claim and manage land granted to them. Additionally, the Act established a peak body, NSW Aboriginal Land Council (NSWALC), which can claim on behalf of LALCs or in its own right, as well as lodge appeals if claims are refused by the Crown Lands Minister.[45] Litigation is therefore a central strategy by which Aboriginal Land Councils in NSW seek to challenge the State and secure land rights for their constituents. However, while Norman claims that the scheme "offers a site of power at the local level for Aboriginal people to organise and have their interests represented",[46] it would be difficult to argue that NSWALC or LALCs can truly resist the State within the framework of the Act.

Behrendt notes that delay is one of the most pressing issues with the NSW Act,[47] and inherently prevents NSWALC and LALCs from maintaining an adversarial position against the NSW Government from which substantive change can be effected. In 2015, Bertram reported that 28,000 claims were awaiting determination, despite many having been lodged years or decades ago.[48] Moreover, delays of up to two decades for appeals to be heard are not uncommon, and carry no legal consequences for the Minister. As a result, Behrendt writes "the delay is so great the figures become almost meaningless".[49] The effect of this on land rights justice has been acknowledged by NSWALC in their 2018-19 Annual Report, where they note that out of 3,232 land claims lodged in that period, 519 were refused or partly refused, 182 were granted by the Crown, and only 1 appeal was finalised.[50] Thus, while litigation is presented by the Act as the chief means of contesting State decision-making as it relates to Aboriginal land, it is clear that it is not a viable strategy through which NSWALC or LALCs can remain unfinished, in contrast to the NT context. Rather, the Act largely precludes effective litigation, a move which signifies the 'defining in' of the land rights movement in NSW.

V Conclusion

Litigation under the NSW Act can no longer be considered a viable means by which Land Councils in NSW can remain unfinished, if it ever was. However, while the State has

41 Brennan (n 37) 981.
42 Howard-Wagner (n 11) 238-9.
43 Ibid 239.
44 Heidi Norman, 'What do we want? Land rights!' in *'What do we want?' A Political History of Aboriginal Land Rights in New South Wales* (Canberra; Aboriginal Studies Press, 2015), 203.
45 Jason Behrendt, 'Emerging Issues: Claims to land under the *Aboriginal Land Rights Act 1983* (NSW)' (2011) 34(3) *University of New South Wales Law Journal* 811, 811-814.
46 Norman (n 44) 207.
47 Behrendt (n 45) 820-822.
48 Paul Bertram, 'Amending Act Opens Way for New Negotiations Over Aboriginal Land Agreements' (2015) 15 *Law Society of NSW Journal* 74, 74.
49 Behrendt (n 45) 822.
50 New South Wales Aboriginal Land Council, *Our Land Our Mob Our Future: Annual Report 2018-2019 Part 1 of 2* (2019), 11-14.

purported to co-opt the Aboriginal land rights movement in the NT through statutes such as the *ALRA* and the *NTA*, the NLC retains litigious functions within this framework which indicate that it is capable of contesting encroachments on land rights in contemporary times, and as such can remain in competing contradiction with the State. The *Blue Mud Bay case* and its aftermath reveal NLC's continuing ability to effect expansions to legal rules of the *ALRA* with significant practical consequences for their Aboriginal constituents, while also demonstrating how statutory entrenchment can in fact prevent it from being defined out or in. Similarly, the *Timber Creek compensation case* highlights the ways in which litigation under the NTA can be utilised in order to expand legal *rules* which have a seemingly limited remit. Finally, *Wurridjal's case* is reflective of how losses in the courtroom may nonetheless cement the rights of a marginalised group in the face of overtly colonial exercises of State power, while contributing to a wider social narrative of resistance. Thus, litigation remains a strategy by which NLC can remain unfinished, despite being situated at the heart of the seemingly finished land rights movement in the NT.

Part IV

THE RULE OF LAW IN ECONOMIC DEVELOPMENT

Jeffrey Khoo

I Introduction

How can reforms to legal systems in developing countries facilitate economic progress and increase living standards? The design of legal institutions is critical for governments and development economists, because core economic concepts, such as capital ownership and labour rights, require regulatory or legislative bases to animate their functioning. However, previous 'law and development' movements in the 1960s and 1990s suffered from Western biases regarding the nature and role of law, and faced strong resistance from people who viewed the implementation of prescriptive reforms as an imposition of foreign legal norms.[1]

This essay introduces economic theories of development and trade to contextualise why certain economic policies were met with resistance from developing countries. It argues that multilateral institutions and developed countries have used mechanisms of development to advance their own interests, and that efforts at legal reform have suffered from an ethnocentric, imperialistic discourse. Finally, it outlines theses that emphasise strong legal institutions and political rights as fundamental to economic development. Importantly, local populations must be involved in establishing legal reforms which recognise cultural nuances and the autonomy of developing nations.

II Neoclassical Economic Theories Of Development And Trade

The origins of international trade theory arose out of a period of contestation, where classical economists such as Adam Smith and David Ricardo advocated against mercantilism (maximising exports, minimising imports and hoarding precious metals to increase a country's wealth). Consequently, trade theory has assumed that more trade is favourable, because countries will specialise in, and therefore export, goods in which they have natural or endowed advantages in production, either in factors such as capital or labour, or technology (how efficiently countries use those factors).[2] It suggests that developing countries often export primary agricultural products, because they are relatively labour-intensive (but which are sold cheaply). Trade theory argues, therefore, that specialisation leads to countries trading at lower prices than they would otherwise, had they produced everything themselves. However, international trade theory and policy remains highly contested, and empirical results have been mixed. Markets are generally assumed to be perfectly competitive, although some models extend the analogy to imperfect competition.

Trade theory favours the elimination of trade barriers like tariffs, quotas and non-tariff measures.[3] It argues that trade liberalisation reduces prices and promotes greater trade volumes, though it somewhat addresses the possibility of protecting 'infant industries'

1 David M. Trubek, 'Law and Development' in Neil J. Smelser and Paul B. Baltes (ed), *International Encyclopedia of the Social and Behavioural Sciences* (Pergamon Press, 2001) 8443.

2 Paul R. Krugman, Maurice Obstfeld and Marc Melitz, *International Economics: Theory and Policy* (Pearson, 11th ed, 2018).

3 Ibid.

from free trade to prevent job losses and allow them to develop.[4] However, it also theorises that setting tariffs can be attractive for large countries which trade heavily, as they can influence world prices of different goods in their favour.

Development economics generally contains less consensus than other branches of economics. Neoclassical development theory champions growth through private enterprise and markets, emphasises expanding microcredit and finance, and speaks about using law, particularly property and contract law, to address 'market failures' (inefficient or non-competitive markets).[5]

Various ideologies in the 1950s-1970s encouraged 'modernisation', from primarily agricultural/rural to industrial/urban economies, through accumulating and effectively using capital, to eliminate cross-country differences in productivity. More progressive paradigms encourage investment in education to create 'human capital' (economically-productive knowledge and skills), advocate for welfare programs and asset transfers to break poverty traps, recognise links between environment, health, work, food and income, and specifically aim to eliminate corruption as a barrier to inclusive development.[6]

III The Washington Consensus And Structural Reform As A Way To Advance External Interests

Neoclassical economic theory informed efforts to reform developing countries' legal systems in the 1990s. The United States, supported by international institutions such as the International Monetary Fund (IMF, which promotes global macroeconomic stability through monitoring and direct assistance) and the World Bank (which provides loans to developing countries), devised a slate of policy reforms in developing countries, termed the 'Washington Consensus'.[7]

Consistent with neoclassical trade theory, reforms included liberalising interest rates, trade and inward foreign direct investment, privatising state industries, and deregulation (insofar as reducing entry and exit barriers in most industries),[8] in order to improve efficiency of markets. The Consensus necessitated removing national barriers to trade and integrating local industries into the global economy,[9] which meant that national authority over economic regulation was somewhat diminished by increasing volumes of transnational economic flows.[10] The Consensus envisioned a small role for the state, insofar as it ran surpluses, set up market infrastructure and designed incentives for enterprise to flourish.

However, the Consensus was widely attacked for espousing a simplistic focus on growth and macroeconomic adjustment, and a prescriptive, formulaic view of development, without adequately considering that country's social, political and economic context. Critics hold the Consensus' program of trade liberalisation and financial deregulation responsible for leaving Argentina particularly vulnerable to global financial crises, leading to Argentina defaulting on its debt in 2001,[11] although it departed somewhat from the Consensus by pursuing fixed exchange rates and larger-than-recommended spending.[12] Argentina faced massive social unrest, much of it directed at the IMF and World Bank, who were seen as externally imposing unfavourable policies on Argentina which did not assist the Argentine government to alleviate poverty or improve living standards.[13]

More saliently, the US Treasury has been criticised as pushing reforms which consolidated their influence over developing countries. In the 1970s and 1980s, the US Treasury viewed its international policies as 'an extension of domestic American economic

4 Ibid.
5 Michael Todaro and Stephen Smith, *Economic Development* (Addison Wesley, 9th ed, 2006).
6 Ibid.
7 John Williamson, 'What Washington Means by Policy Reform' in John Williamson (ed), *Latin American Adjustment: How Much Has Happened?* (Peterson Institute for International Economics, 1990).
8 John Williamson, 'A Short History of the Washington Consensus' (Conference Paper, "From the Washington Consensus towards a new Global Governance," 24-25 September 2004).
9 David Kennedy, 'Law and Development Economics: Toward a New Alliance' in David Kennedy and Joseph Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (Oxford University Press, 2013), 44.
10 Kennedy (n 9) 25.
11 Ruth Felder, 'From Bretton Woods to Neoliberal Reforms: the International Financial Institutions and American Power' in Leo Panitch and Martijn Konings (eds), *American Empire and the Political Economy of Global Finance* (Palgrave Macmillan, 2008).
12 Williamson (n 7).
13 Felder (n 11).

policy'.[14] The Treasury initially supported high interest rates, which increased foreign debt repayments for developing countries, and contributed to rising international discontent amid the 1980s Latin American debt crisis.[15] Throughout the Consensus period, it actively encouraged other states to remove impediments to foreign investment, and pressured developing countries to liberalise their financial systems, which strengthened US structural power.[16]

Critics such as Stiglitz have portrayed the IMF and World Bank as prioritising the interests of creditor countries and the financial community, which leads to international institutions promoting pro-market policies and making financial assistance (through investment, capital inflows or bailouts) contingent on economic liberalisation.[17] For example, the US heavily influences the IMF and World Bank by controlling enough voting shares (proportional to its monetary contributions to those organisations) on key votes, such that, according to Nobel laureate Joseph Stiglitz, 'nothing can be done that the United States is strongly against'.[18]

This approach often proves unpopular with citizens of developing countries, because it undermines their ability to determine their path of development, and locks them into exploitative trade relations and liberalisation programs. As an example of resistance, in the 1997-8 Asian financial crisis, the IMF offered financial assistance to Indonesia, but under strict terms which required broad structural reform and bank closures. The IMF's approach was negatively received by Indonesians and was criticised as applying undue pressure on Indonesia, amounting to a derogation of its sovereignty,[19] leading to instability in Indonesia's financial system, deadly riots and ultimately worse developmental outcomes.[20]

14 David Sarai, 'US Structural Power and the Internationalization of the US Treasury' in Leo Panitch and Martijn Konings (eds), *American Empire and the Political Economy of Global Finance* (Palgrave Macmillan, 2008).
15 Ibid.
16 Ibid.
17 Joseph Stiglitz, 'Challenging the Washington Consensus' (2003) 9(2) *The Brown Journal of World Affairs* 33.
18 Ibid.
19 Ibid.
20 Stephen Vines, 'IMF terms spark riots in Indonesia', *The Independent* (online, 6 May 1998) <https://www.independent.co.uk/news/business/imf-terms-spark-riots-in-indonesia-1161038.html>.

IV The 'Rule Of Law' Movement And Ethnocentric Conceptions Of Law And Development

Along with the Consensus, development agencies in the 1990s invested heavily in projects which championed the 'rule of law' as a goal in itself for developing societies.[21] Informed by neoclassical development economics and its priority of avoiding market failures, these projects emphasised the need for legal order to uphold individual protections, and tended to imitate the policies, institutions and values of Western liberal societies.[22] They therefore encouraged clear, salient and fully-enforced laws to govern commercial and legal interactions, and promoted the courts as a means of enforcing commercial obligations.

However, the 'rule of law' movement has been criticised for being ethnocentric in nature, and, in extreme instances, attempting to ingrain Western structures without modification, leading to accusations of 'legal imperialism'.[23] Calls for reform in developing countries often appeal to the rule of law as a universal concept in international law. However, critics have questioned the accuracy of international law's claim to universality, noting that it has increasingly justified intervention in developing countries and, at times, led to 'violent transformation' of social and legal orders.[24]

In this way, the 'rule of law' movement espoused a naive correlation between successful market economies and 'modern' legal systems,[25] while ignoring existing patterns of legal interactions which reflect that country's historical nuances and the compromises it has reached on legal issues, 'rather than any one recipe for establishing and regulating a market'.[26] Similar to the neoliberal ideology of the Consensus, 'rule of law' projects supported formalistic expressions of law, which 'neglect[ed] the deeper political and cultural environments

21 Kennedy (n 9) 44.
22 Kevin Davis and Michael J. Trebilcock, 'What Role do Legal Institutions Play in Development?' (Draft Paper, International Monetary Fund's Conference on Second Generation Reforms, 8-9 November 1999).
23 Trubek (n 1).
24 Sundhya Pahuja, 'Decolonizing International Law: Development, Economic Growth and the Politics of Universality (PhD Thesis, The University of London, 2009).
25 Trubek (n 1).
26 Kennedy (n 9) 45.

shaping the legal systems',[27] as well as the prevalence of non-legal norms. They did not analyse whether variations in cultural values might affect private sector perceptions of legal systems, and thus whether these reforms would actually stimulate growth or accord with individuals' expectations of the law.[28]

Additionally, institutional legal reform in the 1990s was generally confined to certain parts of society, without building the popular support or understanding that is necessary to consolidate a widespread rule of law. Therefore, these 'supply-side' reforms, 'in the absence of a clear demand from key societal actors and reform strategies that build upon (rather than against) the rooted legal culture of a country,' were always likely to fail.[29] For example, 'rule of law' reforms heavily promoted greater judicial independence, greater access to courts and greater judicial review powers, which hopefully would ease resource constraints on parties seeking dispute resolution and incentivise judges and parties to abide by the law.[30] This would enable the enforcement of contract and property rights, contributing to well-functioning markets. However, this view rests on the assumption that the judiciary is a (perceived or actual) escape from ideology, even when their decisions are necessarily motivated by pro-market ideologies.[31] It also discounts the role of government departments and regulatory bodies in administering and enacting laws to promote development, which may prove to be a more daunting challenge.[32]

In addition, while development agencies pushed for civil protections through fair elections, accessible courts and human rights commissions,[33] not much was done regarding social or economic justice, particularly regarding income and wealth inequality, which potentially hindered reforms from engaging with, and minimising resistance from, local populations. The law was not used to its full redistributive potential (for example, through repealing oppressive land tenure regimes, and constitutionally enshrining basic rights such as shelter, income and freedom from exploitation in employment).[34]

The failure of legal reforms in the 1990s was particularly disappointing given that an earlier 'law and development' movement in the 1960s also failed due to its technocratic, imperialistic approach. Whereas under the Washington Consensus, law would limit the state; in the 1960s, the law, especially public and administrative law, was seen as a tool to strengthen state authority in order to modernise the economy, substitute foreign imports for domestic production, lean into trade specialisations, and undertake massive public expenditure projects.[35] However, this approach involved transplanting legal systems into developing countries, often through educating 'elite' legal actors such as lawyers, judges and government officials.[36] Traditional or customary law was viewed as obstacles to implementing development policy.[37] Despite approaching development from almost opposite political perspectives, both movements suffered from ethnocentric biases and imperialistic tendencies.

V The Role Of Legal Institutions And Political Rights In Economic Development

Recent work in development economics has addressed the need for local populations to take ownership of the development process, and to build legal institutions that support economic mobility and civil rights of vulnerable populations. This involves using law to not only implement economic measures, but to empower individuals and communities to shape and participate in their own version of democracy. In this way, 'development' is not seen as the implementation of a particular set of policies, or the 'modernisation' of societies to fit a certain mould, but the genuine improvement of living standards for the vast majority of people.

27 Trubek (n 1).
28 Amanda J. Perry, 'The Relationship between Legal Systems and Economic Development: Integrating Economic and Cultural Approaches' (2002) 29(2) *Journal of Law and Society* 282.
29 Kathryn Hendley, 'Law and development in Russia: A misguided enterprise?' (Speech, American Society of International Law, Proceedings of the 90th Annual Meeting, 20–27 March 1996).
30 Matthew C. Stephenson, 'Judicial Reform in Developing Economies: Constraints and Opportunities' (Conference Paper, Annual World Bank Conference on Development Economics, 31 January 2007).
31 Kennedy (n 9) 49.
32 Davis and Trebilcock (n 21).
33 Kennedy (n 9) 28.
34 Davis and Trebilcock (n 22).
35 Kennedy (n 9) 44.
36 John H. Merryman, 'Comparative law and social change: On the origins, style, decline and revival of the law and development movement' (1979) 25(3) *American Journal of Comparative Law* 457.
37 Kennedy (n 9) 26.

In Why Nations Fail,[38] Daron Acemoglu and James A. Robinson reject the 'ignorance hypothesis' (the idea that poor countries are simply enacting wrong policies), and stress the need for inclusive institutions, defined as pluralistic institutions where multiple parties have a say in political decision-making (such as democratic elections, representative parliaments and constitutional safeguards). By including vulnerable populations in the political process, and enabling them to advocate for their own interests, inclusive political institutions pave the way for inclusive economic institutions, which distribute wealth widely and enable all individuals to improve their economic position (such as widespread education, contract enforcement, secure property rights and access to credit for individuals and small businesses).[39] Importantly, unlike the Washington Consensus, Acemoglu and Robinson emphasise the need for a strong state to establish a regulatory environment that prevents dominance of, or social and environmental violations by, big business.

Acemoglu and Robinson make a compelling case for centering political and legal rights to empower individuals and communities. One small criticism, however, is that they similarly assume that law and institutions hold the same significance in particular developing countries that they do in the West, and that these institutions automatically lead to prosperity. For that to happen, local communities, not just government bureaucrats and policymakers, must be forefront in tailoring these reforms to local contexts, to avoid resistance to the perception of external actors using developing countries as sites to advance their own interests.

VI Conclusion: Avenues For Reform

The historical approach to legal reform and development neglected the autonomy and institutional contexts of developing countries. The process of development was often enforced by external parties with imperialistic agendas, and did not involve citizens of that country. Promisingly, the UN Development Program seems to recognise these flaws, with a 2013 draft paper recognising the 'multi-faceted, cross-disciplinary and sometimes contested nature of the evidence base' supporting the establishment of the rule of law, and calling for more intricate understanding of the relationship between development and legal reform.[40] It specifically calls for social and economic justice, strengthening accountability and checks on power, and protecting the environment as core goals of future reforms, which are necessary to enable widespread participation and minimise resistance to development.[41]

Beyond these stated objectives, however, legal reforms must account for the cultural nuances of developing countries. Amanda J Perry suggests using Hofstede's model of national cultures,[42] which analyses countries along dimensions of individualism/collectivism, dealing with uncertainty, and attitudes to hierarchy (among others), in developing legal reforms (for example, how formalistic new legal systems need to be).[43] These may be received better by local populations, as they are tailored to local situations, instead of being superimposed on existing, thriving cultures.

38 Daron Acemoglu and James A. Robinson, *Why Nations Fail* (Crown Publishers, 2012).
39 Ibid.
40 Louis-Alexandre Berg and Deval Desai, 'Overview on the Rule of Law and Sustainable Development for the Global Dialogue on Rule of Law and the Post-2015 Development Agenda' (Background Paper, United Nations Development Program, August 2013).
41 Ibid.
42 Geert Hofstede, *Culture's Consequences: International Differences in Work-Related Values* (Sage Publications, 1980).
43 Perry (n 28).

MIGRANT WORKERS IN SINGAPORE

Jenny Chiu

I Introduction

COVID-19 has revived concerns for the welfare of migrant workers in Singapore. There are around 981,000 low-wage migrant workers in Singapore, out of a workforce of 3.7 million.[1] While citizens and permanent residents isolate in the comfort of hotels, migrant workers are crammed into overcrowded dormitories, in rooms with as many as 20 people.[2] They share showers and sleep on bunk-beds that are separated by less than a metre, making physical distancing impossible.[3] Such are the poor living conditions of around 300,000 workers in dormitories during the pandemic.[4]

Migrant workers understandably do not want to voice their complaints, out of fear that they may lose their jobs. Most of them take out massive debts to work in Singapore. For example, Bangladeshi migrant workers pay up to S$17,000 to get their first job in Singapore, to earn an average monthly wage of S$500-700.[5] Out of this wage, migrant workers must also provide for their families back home. They cannot risk speaking out and losing their jobs.
Every country has prioritised the wellbeing of its local population during this pandemic. However, one in four members of Singapore's workforce are migrant workers who are vulnerable to exploitation by employers.[6] Migrant workers have a right to have their health taken as seriously as citizens'.

II Contractual Approach to Migrant Workers

Singapore relies on skilled and low-skilled foreign labour to meet the needs of its economy.[7] Its low-skilled foreign workforce gives it a competitive edge over other economies by allowing corporations to expand quickly, while at the same time creating more and better jobs for citizens.[8] In return, migrant workers gain better economic opportunities in Singapore than they would back home. However, this seemingly mutually beneficial arrangement has often morphed into one-sided exploitation of migrant workers, as their poor living conditions illustrates.

In Singapore, a contractual approach, rather than a rights-based approach, is adopted with respect to migrant workers.[9] The employment of migrant workers is seen solely as a legal agreement, in which the possibility of obtaining citizenship or permanent residency is excluded from the outset.[10] The contractual approach obscures the economic exploitation of migrant workers by framing it as a mutually profitable transaction. The contractual 'revolving door' approach also justifies the minimal rights migrant workers have and extinguishes concerns of human rights, by treating foreign workers as mere economic commodities.[11] After all, the immigration policy is clear on the non-integration of migrant workers into society and the transient nature of their stay in the country.[12] This is part of the pragmatism that characterises Singapore in its relentless pursuit of economic growth.[13] The labour provided

1 Shona Loong, 'The Missing Link in Singapore's COVID-19 Strategy', *The Diplomat* (online, 14 April 2020) <https://thediplomat.com/2020/04/the-missing-link-in-singapores-covid-19-strategy/>.
2 Rebecca Ratcliffe, ''We're in a prison': Singapore's migrant workers suffer as Covid-19 surges back', *The Guardian* (online, 23 April 2020) <https://www.theguardian.com/world/2020/apr/23/singapore-million-migrant-workers-suffer-as-covid-19-surges-back>.
3 Ibid.
4 Loong (n 1).
5 Ibid.
6 Ibid.
7 Eugene Tan, 'Managing Female Foreign Domestic Workers in Singapore: Economic Pragmatism, Coercive Legal Regulation, or Human Rights?' (2010) 43(1) *Israel Law Review* 99, 103.
8 Ibid 104.
9 Ibid 107.
10 Ibid.
11 Ibid 108.
12 Ibid.
13 Wui Ling Cheah, 'Migrant Workers as Citizens within the ASEAN Landscape: International Law and

by a low-skilled foreign workforce has helped to build a glamourous city for citizens, but in the process, migrant workers' welfare has often been sacrificed.

The policy preference in Singapore is not to express migrant workers issues in terms of their rights and protections.[14] Instead, public education emphasises the obligations of migrant workers, their employers and the public.[15] Migrant Workers Centre, an initiative by the National Trades Union Congress and the Singapore National Employers' Federation, aims to educate migrant workers on 'acceptable norms of behaviour in Singapore' and to educate citizens on the importance of migrant workers' contributions and 'how best to live, work and play alongside them'.[16] On the other hand, a rights-based approach that advocates for the implementation of laws that better protect the welfare of migrant workers has continuously been met with resistance from the government, which delegates the responsibility of migrant workers' welfare to employers.[17] As a result, rights discourse is glaringly absent from policy discussion of migrant workers issues.

III Laws and Migrant Workers

The *Employment Act* in Singapore covers both local and foreign employees.[18] Under the *Employment Act*, migrant workers have a right to basic employment entitlements such as salary, rest days, annual leave and sick leave.[19] Migrant workers are additionally covered by the *Employment of Foreign Manpower Act* ('*EFMA*'), which sets out employers' obligations for employing migrant workers, in relation to applications for work permits, medical insurance, cancellation of work permits and repatriation[20]. Employers are responsible for 'the provision of adequate food and medical treatment' and 'bearing the costs of such upkeep and maintenance'.[21] However, as COVID-19 has revealed, not every employer complies with the *EFMA*, and not every employer's legal obligations towards migrant workers have been strictly enforced.[22]

By imposing potential penalties on employers, the government shifts its responsibilities towards the migrant workforce to their employers. Employers pay a binding pledge of S$5,000 as a security bond to the government for every migrant worker they employ.[23] The security bond would be forfeited if the employer breaches the law, such as by not providing for workers' upkeep and maintenance, or if the employer's worker breaches work permit conditions.[24] Consequently, the containment of COVID-19 in migrant workers' non-isolation area dormitories was considered employers' responsibilities. The Ministry of Manpower advised employers to ensure migrant workers are observing physical distancing and warned that it would penalise any public health violations by employers.[25]

This outsourcing of obligations to employers of migrant workers creates an acute power imbalance in the employment relationship, which is further cemented by the work permit system.[26] An employer can revoke their migrant worker's Work Permit unilaterally, which would result in immediate repatriation for the worker.[27]

It may appear that, because employers' legal obligations towards migrant workers slip under the radar unenforced, increasing enforcement of these obligations will improve migrant workers' circumstances.[28] However, it is more likely that allocating this much responsibility to employers in the first place is the root cause of the problem, as it makes workers powerless in the face of exploitation.[29] In addition, making employers entirely responsible for migrant workers' welfare only ensures that when they

the Singapore Experiment' (2009) 8(1) *Chinese Journal of International Law* 205, 219.
14 Tan (n 7) 103.
15 Ibid.
16 Ibid 122.
17 Ibid 103.
18 *Employment Act* (Singapore, cap 91, 2009 rev ed).
19 Ibid.
20 *Employment of Foreign Manpower (Work Passes) Regulations 2012* (Singapore).
21 Ibid Fourth Schedule, Part I.
22 Tamera Fillinger et al, 'Labour protection for the vulnerable: An evaluation of the salary and injury claims system for migrant workers in Singapore' (2017) *Research Collection School of Social Sciences* 3, 55.
23 Ministry of Manpower, *Security bond requirements for foreign worker* (Web Page) <https://www.mom.gov.sg/passes-and-permits/work-permit-for-foreign-worker/sector-specific-rules/security-bond>.
24 Ibid.
25 Ministry of Manpower, *Advisory for employers of workers staying in Factory-Converted Dormitories, Construction Temporary Quarters or Temporary Occupation Licence quarters* (Web Page) <https://www.mom.gov.sg/covid-19/advisory-for-employers-of-workers-in-fcd-ctq-tol>.
26 Fillinger (n 22) 65.
27 Tan (n 7) 110.
28 Shona Loong, *Who is responsible for Singapore's migrant workers, and why does it matter?* (Blog Post, 5 May 2020) <https://www.academia.sg/academic-views/who-is-responsible-for-singapores-migrant-workers-and-why-does-it-matter/>.
29 Terri-Anne Teo, Amirah Amirrudin and Conor Dunne, *Costs of Low-waged Labour Migration: Difficulties, Implications and Recommendations* (Report, 26 November 2018) 33.

struggle financially or logistically to meet their workers' basic needs, they are more likely to take actions that are cost-effective but compromise migrant workers' well-being.[30] The government must take on direct responsibility for workers' basic needs, as well as recognise the important roles of civil society actors such as non-governmental organisations, who have long highlighted the precarious position of migrant workers.[31] Migrant workers' rights groups such as Transient Workers Count Too warned at the start of the pandemic that workers' poor living conditions would breed infectious diseases and endanger their health.[32]

IV Conclusion

From another angle, Singapore is simply a case which shows that globalisation and the mass migration of workers in search for equal economic opportunities, have sometimes given way to economic exploitation instead.[33] This stands in stark contrast with the protections articulated in human rights instruments such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.[34] These instruments do not distinguish between citizens and non-citizens (except for the right to vote and freedom of movement); they require the State to respect the rights of every person in its territory.[35] However, the reality is far from this ideal.

Perhaps COVID-19 presents an opportunity to create more public awareness about migrant workers issues. While migrant workers remain voiceless, their cause can be taken up by civil society actors concerned with their welfare.[36] Such actors can pressure the government and employers to provide better rights and protections for migrant workers. It is possible that civil society actors, through their advocacy, can keep migrant workers issues on the agenda of the authorities and employers and push for change.[37] We can still hope for a day when migrant workers – not only in Singapore but elsewhere – can truly be respected by the countries and people who profit off of their hard labour.

30 Loong (n 28).
31 Ibid.
32 Transient Workers Count Too, *Straits Times Forum: Employers' practices leave foreign workers vulnerable to infection* (Web Page, 23 March 2020) <http://twc2.org.sg/2020/03/23/straits-times-forum-employers-practices-leave-foreign-workers-vulnerable-to-infection/>.
33 Tan (n 7) 124.
34 Cheah (n 13) 212.
35 Ibid.
36 Tan (n 7) 119.
37 Ibid.

THE MYTH OF INDIVIDUALISM
IN HOMELESSNESS POLICY

Thomas Fotiou

On April 2nd, 2020, the United Nations Special Procedures Council released their COVID-19 Guidance Note, '*Protection for those living in Homelessness*'.[1] Written by UN Special Rapporteur Leilani Farha, UN Special Rapporteur, the Guidance Note states that "COVID-19 has exposed the myth of individualism, revealing the ways in which our collective well-being depends not only on our own ability to 'stay home', but the ability of others to do the same."[2]

Isolation has certainly changed the nature of human interactions, resulting in individuals distancing themselves from others within their communities. Households are expected to socially distance and be prudent with their purchasing of essential items, which largely emphasises the responsibility of the individual in overcoming the pandemic.[3] This failure to adopt a collective mindset hasaa seeped into Australian public policy, as there has been no clearly demonstrated political will to act on managing structural issues that are creating conditions for the widespread transmission of the virus.

In particular, the government has failed to appropriately respond to the homelessness crisis.[3] Homelessness has and continues to pervade Australia's legal, political and social landscapes. Nationally, there were 116,427 homeless individuals in the *2016 Census*,[4] an increase of 4.6% since 2011.[5] Although data detailing the change in homelessness rates between 2016-2020 has not been recorded, David Kelly, academic expert in Australian homelessness, observed in July 2020 that "current housing policy settings…have no capacity or potential to meet the needs of those who are currently experiencing homelessness, or who are becoming precariously housed due to the economic downturn."[6]

COVID-19 has only exacerbated the issue, as homeless and low-income individuals are more vulnerable to transmission, which increases the spread of infection. This has been evidenced by the June 2020 lockdown of North Melbourne and Flemington public housing towers, where residents have voiced concerns about the buildings' vulnerabilities, including the risks associated with communal amenities, overcrowding and narrow spaces.[7]

Historically homelessness reform has been unsuccessful in Australia.[8] The creation

1 Leilani Farha (Special Rapporteur), COVID-*19 Guidance Note: Protection for those living in Homelessness*, (2nd April 2020).
2 Ibid.
3 Claire Moodle, 'The coronavirus threat among the homeless is a 'ticking-time bomb' for Australia', *ABC* (online, April 5 2020) <https://www.abc.net.au/news/2020-04-05/coronavirus-threat-to-homeless-posed-by-covid-19/12117700>.
4 Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness 2016* (Catalogue 2049.0, 14th March 2018).
5 Ibid.
6 Prof. Guy Johnson, Dr Meg Elkins, Assoc. Prof. Cameron Duff, Dr David Kelly, 'RMIT experts available for comment on Homelessness Week' (online, July 28 2020) <https://www.rmit.edu.au/news/media-releases-and-expert-comments/2020/jul/homelessness-week>.
7 Alan Weedon, 'Melbourne's tower lockdowns reveal the precarious future of Victorian public housing', *ABC* (online, July 17 2020) <https://www.abc.net.au/news/2020-07-17/melbourne-victoria-public-housing-social-mix-redevelopment/12459870>.; Daniel Pockett, 'Our Lives Matter – Melbourne public housing residents talk about why COVID-19 hits them hard', *The Conversation* (online, July 24 2020) <https://theconversation.com/our-lives-matter-melbourne-public-housing-residents-talk-about-why-covid-19-hits-them-hard-142901>.; Matt Young, 'Coronavirus Australia: Victorian hotel drama after homeless test positive for COVID-19', *News.com.au* (online, July 16 2020) <https://www.news.com.au/national/victoria/news/coronavirus-australia-victorian-hotel-drama-after-homeless-test-positive-for-covid19/news-story/db3411f3650a11364dde09081c2a321a>.
8 Hal Pawson, Cameron Parsell, 'Homelessness:

of the *Supported Accommodation Assistance Act 1994* (Cth) was the first major national legislative attempt outlining a commitment to the statutory protection of homelessness communities.[9] Whilst this Act established corporate partnerships with housing service providers, it did not provide room to create a coherent affordable housing strategy.[10] This was because it did not outline "an approach that acknowledges degrees of homelessness", meaning that it did not provide an array of specific solutions aimed at different types of homeless groups: particularly young homeless people.[11]

To respond to this issue, which continued post-1994, the 2008 Labour Government's *National Affordable Housing Agreement* was established, which aimed to halve national homelessness by 2020. Not only was this objective not met because of the Government's failure to provide "better homelessness services and an expanded supply of affordable housing",[12] it was also found that "the period from 1996 to 2011 saw a real decline in the number of public rental dwellings by 12 000 properties and a relative decline to only 4.06 per cent of the national dwelling stock."[13]

The Australian Government launched their 2018 *National Housing and Homelessness Agreement*.[14] This directly responded to the Labour Gaovernment's prior failures in implementing their National Affordable Housing Agreement. Coming into effect in July 2018, this initiative focused largely on promoting housing affordability over expanding public housing opportunities, which ultimately contributed to its overall failures. This new agreement was criticised for not taking into account how other government policies like those relating to tax, immigration and investment were going to negatively affect the full range of the initiative's impact.

The aforementioned policies demonstrate a belief in the idea of individualism, which Sociologist Peter Callero defines as a "belief system that privileges the individual over the group… it is an ideology based on self-determination, where free actors are assumed to make choices that have direct consequences for their own unique destiny."[15] These policies aimed to address the homelessness problem by isolating it as a contained issue. Rather than changing how society perceives and interacts with homeless communities, these policies advanced a sense of privilege of the individual over the group, reducing the possibility for homeless individuals to truly reap the benefits of these policy measures.

Individualism is a myth because individuals exist within collective social structures,[16] and this has never been more evident than during the COVID-19 pandemic. In order for state governments to improve the effectiveness of their public policy, they must adopt collective ways of thinking. In other words, public policy must not only promote the wellbeing of homeless individuals, but implement practical solutions that allow them to have affordable access to their basic needs for the benefit of the wider community.

We are already seeing this today, as COVID-19 has created some impetus to adopt collective approaches to the homelessness crisis. In June 2020, the NSW Government announced their 'Together Home' Project, a $36m policy package that converts units from the private market into social housing units, and establishes a stronger partnership between community house providers, homelessness services and the NSW Government.[17] This project is adopting what Katherine McKernan, CEO of Homelessness NSW, has termed the

Australia's shameful story of policy complacency and failure continues', *The Conversation* (online, May 15 2018) <https://theconversation.com/homelessness-australias-shameful-story-of-policy-complacency-and-failure-continues-95376>.

9 *Supported Accommodation Assistance Act 1994* (Cth).

10 Ibid.

11 Greg McIntosh, Janet Phillips, 'There's no home-like-place' - Homelessness in Australia' (Parliament of Australia, Parliamentary Library, November 9th 2000) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/homeless>.

12 Hal Pawson, Cameron Parsell, 'Homelessness: Australia's shameful story of policy complacency and failure continues', *The Conversation* (online, May 15 2018) <https://theconversation.com/homelessness-australias-shameful-story-of-policy-complacency-and-failure-continues-95376>.

13 Lucy Groenhart, Terry Burke, Lisa Ralston, 'Thirty years of public housing supply consumption: 1981-2011' (Australian Housing and Urban Research Institute, Swinburne University of Technology, October 2014) 16.

14 *Federal Financial Relations Act 2009* (Cth), Pt 3B Div 2, 15(c).

15 Peter L. Callero, 'The Myth of Individualism: How Social Forces Shape Our Lives', (Lanham" Rowman and Littlefield Publishers, 2018) 17.

16 Paul A.M Van Lange; Bettina Rockenback; Toshio Yamagishi, *Trust in Social Dilemmas (*New York, NY: Oxford University Press, 2017).

17 Michael Koziol, 'NSW launches $36 million program to get rough sleepers into homes', *Sydney Morning Herald* (online, June 8 2020) <https://www.smh.com.au/politics/nsw/nsw-launches-36-million-program-to-get-rough-sleepers-into-homes-20200607-p5507y.html>.

'housing first model', meaning that the central priority of the 'Together Home' Project is to ensure that those in homeless communities are provided with immediate safe housing.[18]

Whether the NSW government is cognisant of this or not, their announcement implicitly acknowledges Farha's demand that the issue of homelessness should be prioritised. Thus, this announcement can serve as an example for other Australian state governments to follow, inspiring them to prioritise public housing in their policies. Kevin Bell, Professor of Human Rights Law at Monash University, suggests that it is the responsibility of "our governments to… resolve" their past inadequate approaches, which requires "positive action to ensure substantive equality." Therefore, the 'Together Home' Project can be viewed as a somewhat promising step moving forward for Australian public policy.[19]

The government must expand this public housing scheme nationally and follow in the footsteps of several countries that have implemented progressive public housing solutions.[20] In Sweden, the implementation of the 'Million Homes Programme' has resulted in 20% of its housing stock prioritising public housing.[21] According to Sveriges Allmännytta, a Swedish organisation accommodating over 300 non-profit municipal and private housing companies, 3 million of the nation's 10 million population live in rental housing, over half of which constitutes public housing.[22]

Similarly, the creation of the 'Name on the Door' development project in Sweden, a funded research-based project aimed at preventing homelessness through adopting the 'Housing First Principle', has had positive ramifications since its inception.[23] According to Juha Kaakinen, the project's first programme leader, "the old system wasn't working", and thus "radical change" was needed.[24] Thus, the programme provided unconditional public housing, creating 3,500 homes and reduced homelessness by over 35%.[25] These programmes in Sweden and Finland do not just focus on homelessness; rather, medical and mental health services are provided so that other outcomes that are not achieved by homeless individuals, like access to adequate healthcare, are provided to them.

By actively preventing individualism from dominating its policies, and learning from successful international models, state governments can ensure that collective well-being remains at its core, allowing for the future of homelessness policy in Australia to have a strong foundation and focus.

18 Ibid.

19 Kevin Bell, Steven Roberts, 'The COVID-19 pandemic opens the door to solving the homelessness problem', *Monash Lens* (online, August 5 2020) <https://lens.monash.edu/@politics-society/2020/08/05/1381002/covid-19-pandemic-opens-the-door-to-solving-homelessness-problem>.

20 Eva Anderson; Päivi Naumanen; Hannuu Ruonavaara & Bengt Turner, 'Housing, Socio-Economic Security and Risks. A Qualitative Comparison of Household Attitudes in Finland and Sweden' (2007) 7(2) *International Journal of Housing Policy* 151, 152.

21 Sveriges Allmännytta, *Public Housing in Sweden* <https://www.sverigesallmannytta.se/in-english/public-housing-in-sweden/>.

22 Ibid.

23 Jon Henley, 'Helsinki's radical solution to homelessness',*The Guardian* (online, June 3 2019) <https://www.theguardian.com/cities/2019/jun/03/its-a-miracle-helsinki-radical-solution-to-homelessness>.

24 Ibid.

25 Ibid.

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