Dissent.

Identity

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Dissent
Identity 2011

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Foreword, Editor-in-Chief

How can a national identity be forged from the violence of civil unrest? Who gets to choose when a person is 'black' or 'white'? Shakespeare's Petruchio may identify women as chattels, but should we? These questions and more are what we, the Editorial Board – Alex Cubis, Emma Frean, Rachael Hyde, Eliot Olivier, Nikila Kaushik, Ramya Krishnan and myself – were faced with. It is a thought-provoking experience that will challenge you, the reader, to widen your perspective of the world.

This year's theme, *Identity*, runs throughout the social justice issues of 2011. At the domestic level, the question of the identity we afford asylum seekers has again raised its head in the form of the Gillard government's proposed 'Malaysian solution' and the re-introduction of a legislative bill concerning complementary protection. Other issues, such as same-sex marriage, have been afforded prominence both here and overseas, particularly following New York's milestone legalisation. In the Middle East and North Africa, the self-immolation of Mohamed Bouazizi in Tunisia has been a catalytic firecracker for a wave of civil unrest, as people across the region call with their feet for governments that truly represent the interests of the citizen body.

In choosing the theme, we hoped to make available to students an expansive body of issues and affairs to critique. These same students have answered the call. Sydney University endows its students with a greater awareness of the world. It can be seen by the subjects on offer, such as working with communities in the shadow of the Himalayas or the social justice placement course. It can be seen through SULS, the law student society, which does immense work to give students access to social justice opportunities. Most importantly, it is seen through the students themselves; those engaging, intelligent and interested students, who give up several days a week to volunteer their time at community legal centres, or offer their holidays to work with indigenous communities on the Aurora Project. For these students, *Dissent* provides a forum to voice their concerns on questions of social justice. In editing this publication, it has been a privilege and inspiration to live and learn by these people.

Finally, I would like to thank a number of people for their help in realising this publication: Gilbert + Tobin, who have generously sponsored this journal, and who continue to show themselves true supporters of social justice; SULS and its Vice-President (Social Justice) Alexandra Chappell, who have provided constant support for this publication; and the Editorial Board and Design, with their countless volunteered hours. Also, I cannot forget the students themselves, who breathe life into this journal through their submissions and reading interest.

With that, I present to you Dissent 2011.

Warren Oakes, B.E. (Hons)/LL.B. VI
Editor-in-Chief

Foreword, Professor Peter Cashman

The notion of 'social justice' continues to serve as a focal point for discussion and action within the law school, the wider University community and in the legal profession generally.

Within the law school I have had the privilege of being appointed the inaugural Kim Santow Professor of Social Justice and have the opportunity to work with other academics and students to expand our social justice program. The Dean, Professor Gillian Triggs, has been instrumental in facilitating many social justice initiatives.

The social justice program is presently engaged in or developing a number of projects including:

- clinical legal education options for law students through partnership with legal centres, law firms and other organisations involved in public interest law and the provision of legal services to disadvantaged or vulnerable members of the community;
- a partnership arrangement with the Human Rights Group at law firm Mallesons Stephen Jaques to identify and conduct significant public interest cases on behalf of individuals or organisations that do not otherwise have the resources or expertise to ensure their rights are protected;
- a partnership arrangement with law firm Maurice Blackburn to conduct a significant test case through that firm's pro bono social justice initiative. The current test case (*Cancer Voices Australia v Myriad Genetics Inc*) seeks to challenge the patenting of human genes. The case is fixed for hearing in the Federal Court of Australia in February 2012;
- a proposed joint venture with the Public Interest Advocacy Centre to facilitate mutual involvement in litigation, research, policy work and law reform on matters of substantial public interest;
- the publication of an authoritative legal guide to public interest law;
- the development of a publicly accessible data base of cases and resource materials on public interest law;
- a proposed joint venture with law firm Corrs Chambers Westgarth to develop a publicly accessible data base of cases and resource materials on class actions; and
- a public seminar program, jointly with the law schools at the University of New South Wales and University of Technology, Sydney.

Within the law school many members of the academic staff are engaged in a variety of other social justice projects.

Both within the law school, and within the wider University community, considerable attention is being given at present to means by which we may be able to attract and retain more students from indigenous or disadvantaged backgrounds.

Within the legal profession there is a continuing expansion of pro bono and social justice initiatives.

These developments are to be welcomed and encouraged. However, much remains to be done to bring about a greater measure of social justice within the University and in the community at large.

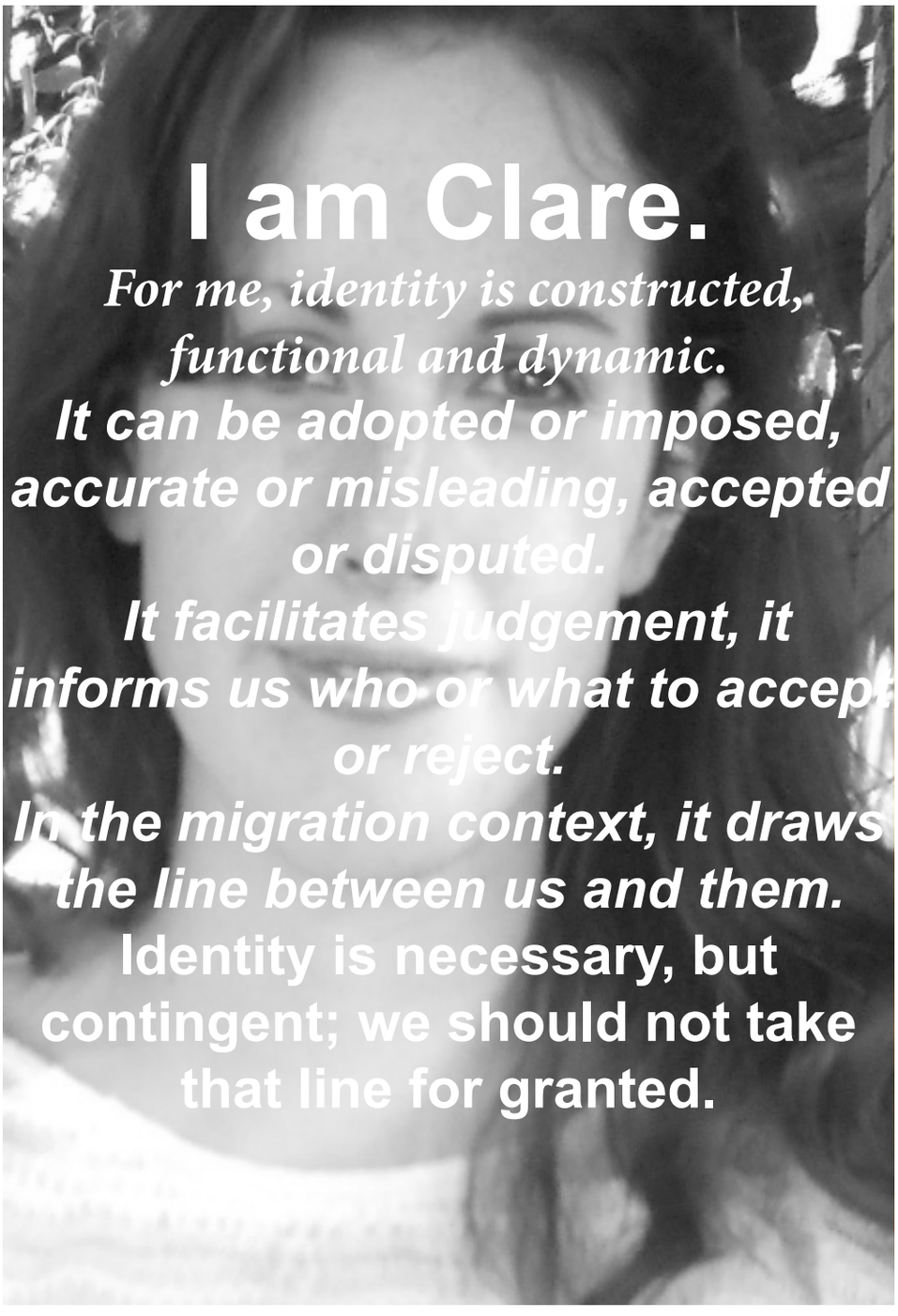
The expansion of such social justice initiatives within the University and the legal profession has been at a time when there continues to be insufficient public funding of universities, a reduction in funding of legal aid and a preoccupation with privatisation in the pursuit of economic rationalism and efficiency. Whilst many corporations have an increasing awareness of their social responsibilities, their activities are not always conducive to improvements in social justice.

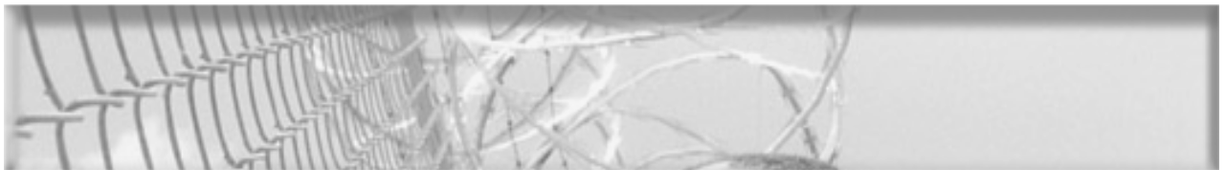
It is to be hoped that our law school graduates will enter the profession and the community with a heightened perception of their responsibility to work towards achieving a greater degree of social justice within their areas of professional and community engagement.

The theme of Dissent this year is *Identity*. This encompasses a wide range of issues including the identity of indigenous or minority groups, national identity and issues relating to the identity we give refugees.

The authors and editors are to be congratulated for producing such an excellent selection of thought provoking and informative articles.

Professor Peter Cashman
Kim Santow Chair in Law and Social Justice, University of Sydney


I am Clare.
For me, identity is constructed, functional and dynamic.
It can be adopted or imposed, accurate or misleading, accepted or disputed.
It facilitates judgement, it informs us who or what to accept or reject.
In the migration context, it draws the line between us and them.
Identity is necessary, but contingent; we should not take that line for granted.



Stopping the Boats

Law as Deterrence

C l a r e L a n g f o r d
B.Int.S/LL.B. IV

Twenty-eleven marks a critical time in the debate on Australia's on-shore refugee policy. For decades this debate has been monopolised by the concept of 'boat people', whose collective identity has been forged by an unrelenting discourse of illegitimacy. Australia's polarised treatment of on- and off-shore refugees reflects and reinforces this identity, while 'stopping the boats' has become the litmus test of governmental performance on refugees. Deterrence of boat people has framed the national debate to the exclusion of broader issues of social justice, becoming so engrained that its ideological foundations seem unassailable and non-examinable. Yet Labor's plan to transfer 800 asylum seekers to Malaysia has the potential to re-open issues of strategy and social justice closed off by decades of deterrence rhetoric. In re-locating Australia's deterrent strategy, Labor risks undermining the boat-person identity in making deterrence politically justifiable.

Deterrence Discourse

Since the late 1980s, Australia's on-shore refugee policy has been characterised by an increasing anxiety over *en masse* maritime arrivals from our poorer neighbours: in 1989, the first immigration detention centres ('IDCs') were established; in 1992 detention became mandatory for 'boat people'; and in 1994 the original 273 day time limit on detention was removed. This final change raised the prospect of indefinite detention for stateless persons whose refugee application had been refused, but who could not return to their home countries.[1] What had previously been considered a humanitarian issue became one of self-preservation, at least for on-shore arrivals. The threat posed by boat people has been matched by the counter-threat of mandatory detention, Temporary Protection Visas ('TPVs') and off-shore processing in an overall policy of deterrence.

On one view, this sits uneasily with Australia's international obligations under the 1951 UN Refugee Convention[2] and the 1967 Protocol.[3] Neither instrument distinguishes between refugees according to their mode of arrival in host countries, or whether they have passed through countries of first asylum. Boat people have no special identity from the perspective of international law. For this reason, the adoption of a deterrent strategy, commonly associated with criminal law, has entailed the criminalisation of its target.[4]

This did not happen overnight. In the 1980s, Labor emphasised that, while it wanted 'barriers to illegals, we must at all times leave some chink

in the armour so that genuine refugees cannot be turned away from our borders'[5] – adopting the language of illegality, but recognising that 'boat people' and 'genuine refugees' were not mutually exclusive identities. By the early 1990s, these identities had become binary, reflecting an increasingly polarised refugee policy:

> What right do illegal refugees arriving in Australia as unauthorised entrants have over refugees from other parts of the world, those who cannot come here by boat? ... Let us show some decent concern for those who want to come to this country and are prepared to stand in the queue... for those who are legitimate refugees.[6]

This quote neatly captures the complexity of deterrence discourse in an issue that, unlike criminal law, might otherwise be dominated by humanitarian concerns. The identity of the boat person permits the denial of compassion to some of the world's most vulnerable, by redirecting that compassion towards 'legitimate' refugees.[7] Moreover, Australia's dualised, zero-sum processing system and the collective 'boat people' identity are mutually reinforcing. For every on-shore application accepted, one place is cut in our off-shore program; the policy constructs the queue-jumper by constructing the queue.

Criminalisation arguably reached its zenith around the time of the arrival of the MV Tampa and the 'children overboard' scandal:

> ...amongst those who have arrived here unlawfully there are also former terrorists; former senior officers in repressive regimes; people suspected of crimes against humanity; people with criminal records; organisers of people smuggling rackets; people who have ignored or abandoned protection already available to them elsewhere; and people who have been refused migrant visas and then attempted to enter Australia unlawfully.[8]

A 2003 study by Klocker and Dunn revealed that 90 per cent of the terms used by the federal government to describe 'boat people' were negative.[9] The tempo of criminalisation has arguably diminished in recent years, and especially since this year's wreck at Christmas Island, the fight against people-smuggling has regained a humanitarian aspect. Yet 'boat people' remain identified with economically-motivated, opportunistic migrants:

> ...there is no nice way to deal with people who are determined to exploit Australians' goodwill... Those who could pay more than a poor villager's lifetime savings to get on a leaky boat to Australia are not bad people. The Coalition has not asserted that they are. Like generations of newcomers to Australia, they want a better life. The difference between them and other migrants is that they are coming without our permission, not with it.[10]

Deterrence entails re-taking control over those factors deemed to rendering Australia a 'soft option', and presumes boat people are primarily motivated by such factors. Thus the identity of the 'boat person' is crucial to the strategy's success. Furthermore, the 'boat person' identity dispels the majority of social justice concerns over deterrence policy. Deterrence elevates the 'boat person' to a strategic actor, guided by cost-benefit analyses within the parameters defined by the deterrent threat itself. Moreover, because the strategy places the trigger for carrying out the threat firmly in the hands of the potential aggressor, deterrence rhetoric underscores that boat people have brought the costs of action on themselves. Pickering

and Lambert note that, '[i]n their 'choice', it is as if the asylum seeker is able to opt for one side of the deviance binary such a vocabulary allows: they can be genuine or bogus, decent or dangerous, parasites or in need.'[11] The constructed identity of the boat person not only makes deterrence possible, but justifiable.

Deterrence in Practice

Mandatory Detention

The binary rhetoric of deterrence has played out in the 'dual pathway for refugees'.[12] Systematically, far-flung locations, prison-like conditions, inadequate facilities, restrictions on movement and routine, and endemic over-crowding have generated considerable human fall-out. Before children were removed from detention, minors suffered shocking rates of emotional disturbance.[13] The centres have seen hunger strikes, mass acts of self-mutilation and other forms of self-harm, riots and damage to buildings. It was also noted that a small number of detention staff had been treating detainees, including children, 'as if they were criminals'.[14] In 2005 the Palmer Inquiry (launched in response to the mistaken detention of a mentally-ill Australian citizen) found a 'culture of denial and self-justification' among the authorities resulting in an 'assumption culture' that 'generally allows matters to go unquestioned when, on any examination, a number of assumptions are flawed.' This culture pervaded right through to senior management, who demonstrated 'deep-seated and attitudinal problems'.[15]

These incidents may have become less common, with the Human Rights and Equal Opportunities Commission finding in 2010 most of the Christmas Island detainees 'expressed positive views about their treatment by most DIAC and Serco staff... [although] many expressed concerns about being referred to by their identification number rather than their name'.[16] The Commission was also pleased to note that, in response to its 2008 and 2009 reports, the separation system restricting movement within compounds was no longer used and electrical fencing was switched off. They also noted that the Government was making the most of infrastructure within constraints. However, these constraints were largely self-imposed by the decision to detain people 'in a location as small and remote as Christmas Island'.[17] Despite the improvements in staff training and conditions, the Commission retained its overarching concerns, finding that 'it is neither necessary nor appropriate to hold asylum seekers in a high security detention centre on Christmas Island.'[18] Detainees still feel like prisoners. As one man in Lilac Compound (Christmas Island) put it, 'I have not committed any crime and still we are confined to a jail [sic].'[19]

The effects of detention on asylum seekers are significant and ongoing. Silove et al note that '[m]ental health professionals found themselves in the paradoxical situation of offering services to compatriot refugees in two diametrically different contexts: in well-resourced torture and trauma services designed to minimise fear and alienation; and in prison-like detention centres, a context that maximised fear and uncertainty.'[20] Testimony by mental health professionals indicates that the experience in detention compounds pre-existing symptoms and highlights the difficulty in 'making therapeutic headway in a setting largely responsible for the persistence of mental distress.'[21]

Pull versus Push

Australia's policy has historically focussed on pull factors, although isolated and limited efforts have been made in countries of first asylum to address factors pushing people to seek asylum in Australia. Silove et al found that 95 per cent of Australian government statements and media releases between 2001 and 2002 failed to give 'any contextualising information explaining the 'push factors' behind asylum seekers leaving their countries of origin.'[22] This is consistent with Pickering and Lambert's findings that 'deterrence is communicated almost entirely

with an internal audience.'[23] The primary goal in asylum seeker policy has been to control those factors that render Australia a 'soft touch' in the eyes of the 'transnational deviant'.[24]

This stance is certainly in line with deterrence discourse, yet by excising broader social justice concerns over the conditions in countries of first asylum the policy risks deterring a straw man. It fails to acknowledge that refugee flows fluctuate most in line with international conflicts rather than changes in domestic migration policy, that most boat people are 'genuine' refugees, and that second-wave migration may be just as forced as the first wave. Those in genuine fear of persecution arrive with the knowledge that, at some point, the deterrence against unauthorised arrival will cease to apply to them. While qualified somewhat by the continued deterrence of TPVs and off-shore processing, protection by Australian authorities remains the pull-factor we cannot do away with.

Up until now, the 'boat person' identity has been tinged with unreality. Certainly an economic migrant may be deterred by mandatory detention coupled with the threat of deportation when their disingenuous claim is rejected. But this is unlikely to motivate refugees, responding to overwhelming push factors and confident in the genuine nature of their claims.

Deterrence by Denial

The Malaysia Deal

This is where the ground-breaking nature of Australia's prospective swap with Malaysia comes in. The Opposition are at pains to portray the 'Malaysian Solution' as a poor man's 'Pacific Solution', one which will be more costly and less humane. Yet the policy is markedly different – it represents a shift away from deterrence by punishment towards deterrence by denial. This means broadening the focus of strategy from governmental action only to considerations of what influences and motivates the other side.

Whereas deterrence is etymologically associated with 'frightening away', denial aims to demonstrate not the costs of action, but the futility.[25] It eliminates the potential benefit of action and/or decreases the probability of benefit. One advantage is the ability to determine the costs of implementing the strategy, whereas it is never wholly clear how much cost an individual is willing to endure before renouncing the benefit in question.[26] For this reason, 'if the logic of denial is pursued then a position of control is reached, while the logic of punishment never reaches control.'[27]

Immigration Minister Chris Bowen has underlined the strategic difference between the deal and the Pacific Solution:

> The point about Nauru is that the whole model was based not on stopping people from making it to Australia, but breaking their will along the way... The majority of people who went to Nauru ended up in Australia, but they went through quite an ordeal before they got here. Malaysia stops people being resettled in Australia and it means they live in the community in Malaysia, not in detention.[28]

In this context, criticism from the Opposition indicates it is still committed to an inward-looking deterrence strategy as well as the presumption 'boat people' are opportunistic and are primarily motivated by those 'pull factors', thus rendering the country vulnerable to exploitation. They accuse Labor of mitigating the deterrent threat through terminating the Pacific Solution and TPVs, incentivising maritime arrival:

> What the government does not understand is that the government are the people smugglers' business model. The government's policies have underwritten the people smugglers' activity for the last

> three years. Those criminals up in Indonesia and around South-East Asia who have been putting people on boats and sending them to Australia for the last three years have been doing so because of the incentive, the conditions and the environment that the government have created through their policies.[29]

Such criticism centres on Labor's failure to adhere to the deterrence 'solution' it inherited, portrayed as the cause of the current influx. Notably, the Opposition has taken pains not to acknowledge the differences between strategies and the sea-change that the Malaysia deal represents. The federal government has seized upon reports that the threat is already undermining people smugglers' business model. Malaysian Home Affairs Minister Datuk Seri Hishammuddin Hussein has claimed a reduction in the number of people seeking protection since the deal's announcement. Others reported clients demanding their money back from people smugglers, although the foundation of these is unclear.[30] What *is* clear is that the deal marks a key change in Australia's deterrence strategy and, if it results in a long-term arrangement, may be much more effective than previous efforts.

<u>*Push Factors*</u>

While mandatory detention relies on increasing costs, the Malaysian solution centres on denying benefits; the *protection* asylum seekers would have gained on reaching Australia. Crucially, the strategy is predicated on return to a country of first asylum, and one many refugees sought to escape. Deterrence would not be as effective if Malaysia were a signatory to international refugee conventions, if it did not have such a chequered history of asylum-seeker treatment, and if asylum-seekers had a recognised status under immigration law. The deal does not entail the elimination of incentives to leave countries of first-asylum per se. Rather, it decreases the benefit of coming *to Australia* by scrambling the likelihood of access and raising the prospect of a return to the conditions motivating departure in the first place.

Yet broadening the strategic focus to such 'push factors' has re-opened conditions in countries of first asylum to public scrutiny. The near-total abdication of control over the protection of the 800 to be transferred has placed the spotlight firmly on Malaysia's treatment of asylum seekers. In doing so, it undermines the constructed identity of the 'boat person' which has so far provided the strategic foundation of, and justification for, deterrence.

Malaysia is not a signatory to the 1951 UN Refugees Convention or 1967 Protocol, or to the UN Convention on Torture.[31] Its refugee policy is ad hoc and discretionary; the product of refugee influxes from Indochina in the 1970s and 1980s. In 2000, Human Rights Watch noted that 'Malaysia's treatment of different groups of refugees, ungoverned by domestic law, has been uncoordinated and variable, ranging from expulsion to full integration.'[32] The treatment of some groups, such as Rohingya from Burma, has been especially lacklustre. Rohingya have frequently been victim to the discretionary powers of search and arrest under Malaysia's 1959 Immigration Act, being subjected to detention without judicial review and physical abuse during arrest. Some Rohingya reported having their United Nations High Commissioner for Refugees ('UNHCR') documents disregarded or destroyed. Vulnerable groups like the Rohingya are an easy target for corrupt police and many only obtain release or avoided arrest by paying police bribes.[33]

Concerns over human rights abuses and mistreatment of refugees persist. As the 2010 Annual Report of the Human Rights Commission of Malaysia acknowledges, 'there are no laws governing asylum seekers and refugees in Malaysia, while the rights

of refugees are very limited. Asylum seekers continue to be arrested, detained and sentenced for immigration offences – even including those who have documents from the United Nations High Commissioner for Refugees'.[34] These conditions undermine the 'boat person' identity by drawing attention to a range of motivating factors that challenge binary portrayals of legitimacy and illegitimacy.

So while the Malaysia deal incorporates more realistic expectations about 'boat people' and what motivates them, it risks debunking the 'boat person' image which makes deterrence justifiable. Whether or not the deal goes ahead, lifting the 'boat person' veil represents a positive development in the debate on refugee policy.

Dissent from Deterrence

Social justice concerns return when it becomes clear what a successful deterrence strategy actually *means*. As discussions continue between Malaysia, Australia and the UNHCR over the details of the swap, there is growing evidence of domestic discontent. The policy of placing conditions in countries of first asylum centre-stage may be the victim of its own success. The human costs of deterrence have become relevant again, especially in light of the precedent this deal could set.

Chris Bowen's stated that '[i]f people think that the situation for asylum-seekers in Malaysia is difficult, they should endorse the fact that Australia is taking 4000 out [over] the next four years.'[35] However, this does not allay concerns over mistreatment – not least because the majority is directed towards unprocessed asylum-seekers, rather than those with refugee status already, as the 4,000 arrivals will have. Dr Graham Thom, Refugee Coordinator for Amnesty International, has argued that transferring asylum-seekers off-shore 'runs a high risk of exposing genuine refugees to grave human rights violations.'[36] In addition, the UN High Commissioner for Human Rights has indicated that the deal might be a violation of international law: 'They cannot send individuals to a country that has not ratified the torture convention, the convention on refugees.'[37]

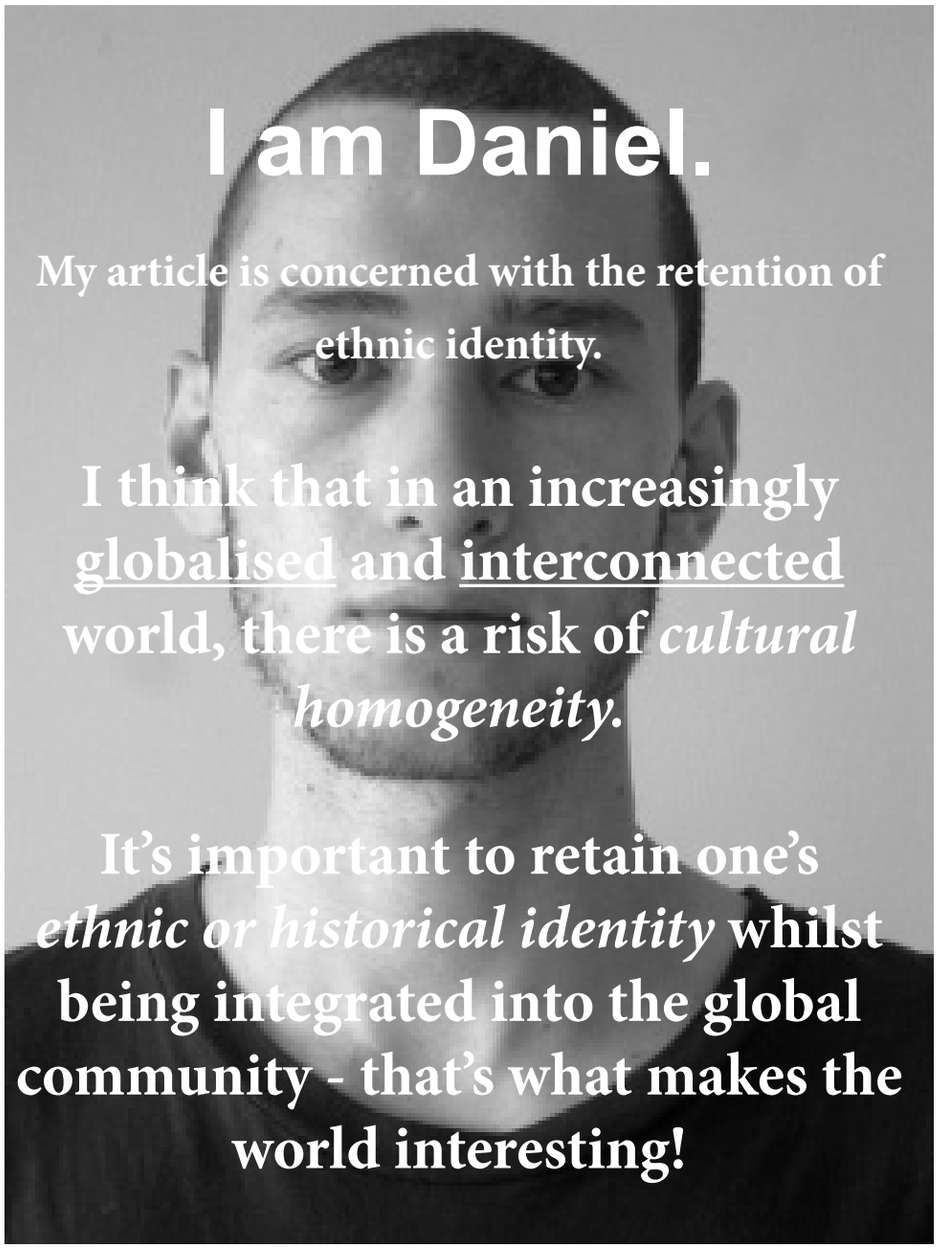
The initial deal was blackballed by the UNHCR, which retracted its criticism once modifications were made to assess the transferral of unaccompanied minors on a case-by-case basis.[38] While the Immigration Minister maintains those returned will not be subject to mistreatment such as caning, and underlines the deal will be concluded to the satisfaction of both the UNHCR and the International Organisation for Migration, the details of what protections will be afforded and how these are to be monitored are unknown at the time of writing.

Former Human Rights Commissioner Sev Ozdowski has called the deal 'much worse' than the Pacific Solution of the Howard era[39] – and this sentiment is widely echoed. Independent MP Andrew Wilkie has called it an 'abomination': 'It may well help to deter asylum seekers from attempting the risky [boat journey] to Australia but it is wrong, so wrong in fact I detest it even more than the so-called Pacific Solution.'[40] As of 17 June, while talks with the UNHCR continue in Geneva, both Houses of Parliament have passed a motion condemning the strategy.[41] Greens MP Adam Bandt, who moved the motion, asserted that 'there are times when enough is enough. The Malaysia deal is wrong.'[42] These developments may indicate the country is less willing to pursue deterrence for deterrence's sake, and represent a small but significant victory for the place of social justice in refugee policy.

Conclusion

Twenty-eleven is a key year in the debate on Australia's on-shore refugee policy. For decades this policy has been monopolised by the aim of deterrence, targeting the 'boat person' whose identity has been constructed as one of deviance and economic opportunism. The policy has entailed considerable human cost,

although social justice concerns have been rendered more or less irrelevant by deterrence and the 'boat person' identity on which it depends. Nevertheless, the Malaysia deal represents a change of course. In adopting a strategy of deterrence by denial, the Australian Government has shifted the focus from pull to push factors, such that conditions in countries of first asylum are squarely within public scrutiny. So while denial *may* be more effective from a strategic standpoint, this shift calls into question the very foundation of the strategy: who 'boat people' are, and what motivates them. Social justice concerns are again relevant. Regardless of whether the Malaysia deal goes ahead, this renewed willingness to question the strategy, and its justification, is to be celebrated.


I am Daniel.
My article is concerned with the retention of ethnic identity.
I think that in an increasingly globalised and interconnected world, there is a risk of *cultural homogeneity.*
It's important to retain one's *ethnic or historical identity* whilst being integrated into the global community - that's what makes the world interesting!

Issues of Ethnic Identity in United States' Allotment Policy and Its Relevance Today

D a n i e l Z w i
B.A./LL.B. III

The United States has at different stages in its history adopted a variety of policies towards its indigenous population in pursuit of changing congressional goals with regard to Native Americans. The policy of Allotment, first employed at the turn of the 20th century and rescinded in 1934, aimed to break up tribal structures and assimilate Native Americans into white society. The policy fractured individual, ethnic and tribal identities within the Native American population. Allotment demonstrates that, first, the retention of indigenous culture is not an impediment to economic equality, as the policy assumes. Secondly, ethnic identity should not be imposed by the state on individuals. Such lessons may also be reflected on when considering Australia's current policies regarding our indigenous population.

History of Allotment

The *General Allotment Act of 1887*[1] radically altered government policy toward Native Americans. Prior to the legislation Native American tribes recognised by Congress lived primarily on allocated land reservations which were owned collectively by members of that tribe. Allotment partitioned those reservations into individually owned plots of land, ending communal ownership and dismantling tribal structures. This attempt at assimilation through the imposition of individual economic agency on Native American people undermined the identities of Native Americans, which are informed by a person's land and tribal culture. While Allotment failed in its attempt to destroy the tribal institution, it had by its official termination confiscated two-thirds of all Native American land in the United States.

The General Allotment Act also enabled the government to decide who was part of a tribe and who was not. Only those Native Americans who could prove membership were eligible to receive a plot of land. The *Burke Act of 1906*,[2] a supplement to the General Allotment Act, furthered this governmental control over identity by attaching different terms of ownership to 'full-blood' and 'mixed-blood' Indians without providing a strict definition of either. This established an arbitrary distinction between Indians of the same tribe, facilitating unilateral decision-making on an individual's identity without regard to their own beliefs or allegiances.

The policy of Allotment was the product of two distinct public concerns. First, there was an increasing pressure on the government to supply white people with land to utilise. Secondly, a paternalistic attitude toward Native Americans

encouraged the genuinely held belief that the partitioning and privatisation of reservations was the way to raise the socio-economic status of Native American population. Under the legislation, each eligible tribal member would receive between 40 and 160 acres of reservation land, with the surplus land to be made available to white settlers. It was thought that private property would encourage Native Americans to cultivate the land; the president of Amherst College, Merrill Gates, claimed in 1885 that 'there is no incentive so strong as the confidence that by long, untiring labor, a man may secure a home for himself and his family.'[3] Where land was owned collectively, however, the prevailing attitude was that 'thrift and enterprise is rendered very improbable, if not impossible.'[4]

Dismantling the Tribal Institution

In the majority of Native American tribal societies, the decision to transfer land rights outside the tribe could only be made by tribal leaders and elders. In removing the power of leaders to permit or prevent the sale of land, the apportioning of land title to individuals shook the very foundations of tribal structure. Moreover, the destabilisation of tribal structures was an overtly held official aim; Gates described Allotment as 'a mighty pulverizing engine for breaking up the tribal mass.'[5]

Allotment, with its focus on individual labour, made it harder to achieve economies of scale, so that many allottees ended up impoverished, landless and bereft of the intra-tribal connection that collectively owned land had provided. Although the legislation stipulated that land apportioned to Indians would be held in trust for 25 years by the United States 'for the Indian allottees' sole use and benefit',[6] during which time it could not be sold, it was common for white settlers to acquire this land before the trust period expired. Legislative amendments in 1906 meant patents could be issued earlier than 25 years at the Secretary of Interior's discretion. Further, there is evidence that land imbued with natural resources was given priority in order to facilitate its sale to white landholders more quickly. Native Americans also lost land either 'through sale (often fraudulent), mortgage followed by default and foreclosure, or confiscation for failure to pay state taxes.'[7] That many Native Americans either had no experience of farming prior to Allotment, or were apportioned land unsuited to agriculture, also encouraged Native Americans to sell any allotted land. Contrary to the views of the proponents of Allotment, the undermining of tribal identity led to economic loss, not prosperity.

Allocating Tribal Membership and the Government Imposition of Ethnic Identity

Manipulation of tribal identity was achieved not only through division and apportionment of land, but also through the decision of who was qualified to receive those portions. Allotment required that the government identify the members of a particular tribe and exclude those deemed non-members from land grants. The task proved to be complex, messy and arbitrary. Katherine Ellinghaus explains that 'the policy makers who dreamed up allotment were seduced by the simplicity of the solution, and had little realisation of how contested Indian identity might become once connected with rights to land.'[8] Initially left to tribal leaders, determination of tribal membership was increasingly regulated by the US government. Faced with a myriad of differing backgrounds and lifestyles – some inter-married, some pure-blooded yet modernised, some living away from the tribe and some still on the reservation – the government allocated tribal identity with little reference to the sentiments of the tribesmen themselves.[9]

In order to differentiate between Indians and non-Indians, the government focused less on culture and more on biology. The use of a 'blood quanta', an artificial estimate of the fraction of Native American blood in an individual, allowed the dismissal of those with

too diluted an Indian genealogy as unworthy of tribal membership. Ellinghaus explains that these biological conceptions of identity were in direct contrast to the understanding of Native Americans themselves, who assigned membership according to cultural connection and lifestyle, and not blood.[10]

By engineering a situation where benefits were attached to a certain ethnic status, Allotment led many Native Americans to ostensibly adjust their tribal identity. Native Americans were excluded from tribal membership by government administrators if their blood was considered too 'mixed'. Furthermore, those mixed blood Indians within the threshold for tribal membership were given different land rights to full blooded Indians: amendments to the Indian Appropriation Acts[11] in 1907 saw Congress remove the 25 year trust period for all land allocated to mixed blood Indians, causing many tribesman to simply call themselves mixed bloods in order to secure control of their land (whereupon it was usually appropriated by lumber or mining companies). Ellinghaus describes the example of how, since the law 'made the issue of being of mixed or full descent so crucial, many Anishinaabeg began proactively claiming the status that most advantaged them.'[12]

In establishing a system of arbitrary classification, Native Americans under the Allotment policy were either told 'who they were' on the basis of blood-quantum, or forced to participate in the arbitrary modification of their own identity in pursuit of self-preservation. The sudden shift in Native American societal structure as part of Allotment removed their ability to use the powerbase of the tribal institution to oppose their subsequent subjection to an economic model of which they had no previous experience. By the policy's conclusion in 1934, Native Americans were left with less than 40 per cent of the land they previously owned; 85 million acres had passed into white ownership.

Relevance of Allotment Today

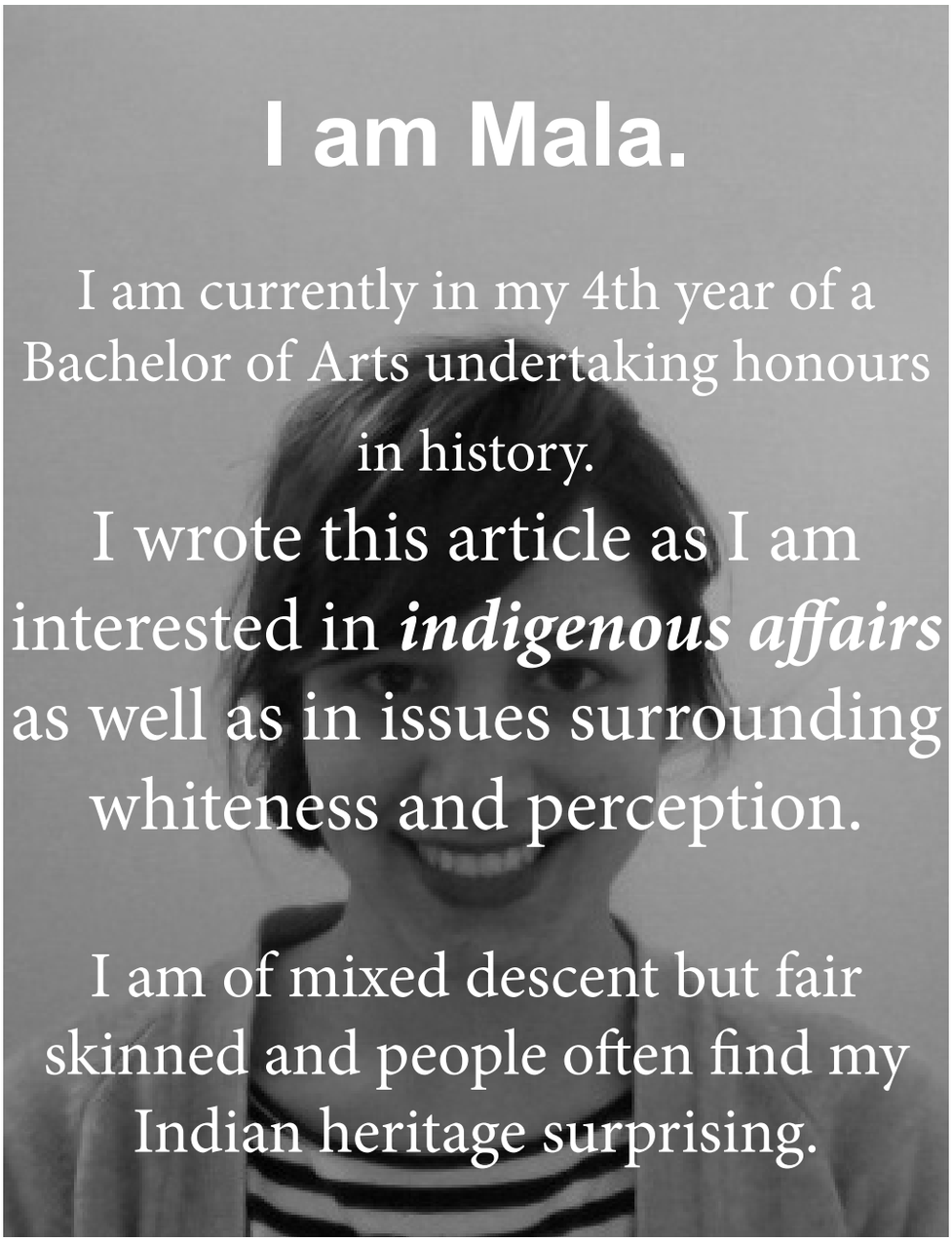
Despite its conclusion over 70 years ago, the policy of Allotment provides us with a number of important lessons in relation to Australia's own indigenous population. Australia should be especially aware of the damage caused by state attempts to manipulate the identity of cultural minorities given the horrific trauma sustained by the Stolen Generations, where 'half-caste' children were removed from their families in order that they become culturally and, eventually, genetically assimilated into White Australia.

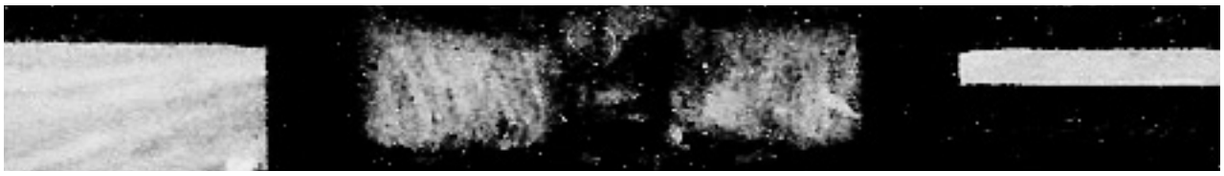
Underlying the policy of Allotment was the implicit message that in order to secure the rights and economic protections afforded to white citizens, Native Americans needed to forego their own cultural identity. The price of socio-economic welfare (notwithstanding that this welfare never materialised) was a conversion to Western-style society in which private ownership and American citizenship was accepted. By perceiving cultural identity as something to be disposed of in order to succeed in the United States the government trivialised traditional cultural identity. To avoid this recurring in the Australian context, Aboriginal civil equality, for example equal access to healthcare and education, should not depend on Aboriginal people leaving rural areas and integrating into urban society.

Furthermore, ethnic identity cannot be defined genealogically. It is a choice made by an individual and the group in question. Allotment, in its use of blood-quanta to determine tribal status, denied the element of personal choice and cultural alignment in ethnicity. The principle of native title, in spite of its dilution by the Howard government and the High Court, is of vital importance because it allocates land on a case-by-case basis founded on continued use of that land and not on the definition of plaintiffs as umbrella entities such as full- or mixed-blood.

Finally, it should be noted that Indigenous Australians were granted neither reservations of land to be owned collectively or individual title until *Mabo*[13] – a consequence of the British defining the continent as *terra nullius*. Allotment vindicated the connection between native land ownership and native identity; the balkanisation and appropriation by whites of Native American land was done in part to fragment tribes. If Australia is serious about preserving the identity of Indigenous Australians while bringing them in line socio-economically with non-Indigenous Australians, it should be more inclined to recognise the title to land of its own indigenous population.

Photographs by Olivia Teh


I am Mala.
I am currently in my 4th year of a Bachelor of Arts undertaking honours in history.
I wrote this article as I am interested in *indigenous affairs* as well as in issues surrounding whiteness and perception.
I am of mixed descent but fair skinned and people often find my Indian heritage surprising.



Andrew Bolt, Whiteness and the Right to Choose Aboriginality

M a l a W a d h e r a
B.A. (Hons) IV

Biological descent as a determinant of who you are today is odious and unacceptable, and Mr Bolt knows that.

- Justice Mordecai Bromberg[1]

Can you define Aboriginal identity based on how you look? Who gets to choose who is or is not Aboriginal? A 2009 *Herald Sun* article by Andrew Bolt raised these questions when he argued that many fair skinned Aboriginals chose to identify as such for 'political' reasons, pointing to the ways in which their choice to identify this way had facilitated their personal careers in public life.[2] Bolt's views caused offence to many in the Aboriginal community, and nine fair-skinned Aboriginals, represented by Ron Merkel, have brought an action against him under the *Racial Discrimination Act 1975* (Cth).[3] At the time of writing, the case is still with the Federal Court.

This article will examine the controversy surrounding Bolt's case and then turn to the current stance of the law on the question of whether Aboriginal identity can be genetically mandated or individually chosen. It will discuss a few issues of importance in this debate: the realities of identity's link to perceptions of embodiment, the legacy of the Stolen Generations, and the question of how important identity really is.

Andrew Bolt's opinion piece, 'White is the New Black', caused controversy by questioning the motivation of many prominent fair-skinned Aboriginals in choosing to identify as Aboriginal rather than European in the cases where individuals had the heritage of both cultures. Although he stated that he saw their reasons for identification as 'heartfelt and honest', he seemed to disagree with these reasons, describing legal academic Larissa Behrendt's identification in particular as 'bizarre' and characterising the situation in general as 'madness'.[4]

The biggest question Bolt provokes is whether Aboriginal identity is a matter of choice or racial inheritance. Bolt poses this implicitly, commenting that 'this self-identification [as Aborigines] strikes me as self-obsessed, and driven more by politics than by any racial reality', which suggests that 'racial reality' has a natural claim to higher authority.[5] This idea of privileging race has been described as harking back to an era where eugenics still influenced policy, and on this basis Merkel has argued Bolt is 'a man living with a mindset frozen in history'.[6]

Legal Definitions

For the law, deciding Aboriginal descent is not a black and white issue. Definitions come from case law, rather than legislation. The most cohesive 'test' of Aboriginality is the tripartite test of Deane J in *Tasmania v Commonwealth*.[7] Under this test, someone identifying as Aboriginal is 'a person of aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aboriginal'.[8]

Despite a general distaste for the idea, race is a key feature of this understanding. This is evident in alternate legal definitions. The definition in the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), set up to determine eligibility for the commission, says only that an Aboriginal is 'a person of the Aboriginal race of Australia'.[9] *Queensland v Wyvill*[10] made clear racial descent, though not sufficient, was necessary. Biology, it seems, is inescapable.

It remains to ask if this is how it ought to be. Deane J's three-part test has been criticised for retaining the importance of biology despite its recognition of self-identification. Loretta de Plevitz and Larry Croft have pointed to how this concept of racial descent is at odds with Aboriginal customary law among their reasons for such criticism. Some Aboriginal custom does not feature a system of linear descent, with Aboriginal culture allowing the concept of individuals to have many mothers and fathers.[11] To some degree, this consideration of custom has been incorporated into the legal definition of Aboriginality. Brennan J in *Mabo v Queensland [No. 2]* used the three part test but also paid attention to identification by customary laws.[12] De Plevitz and Croft prefer the UN's general recommendations, which overwhelmingly favour the self-identification side of the equation: the UN recommends that determining identity for a group be based on self-identification until the point that contrary justification exists.[13]

A racial element to the decision of identity also presents practical difficulties. Scientifically it is extremely difficult to prove race and genetics as genes are practically intangible. They cannot be produced and presented before a court.[14] O'Connor pinpoints what is difficult about genetic definitions, suggesting that the gene is perhaps only a metaphor to replace blood, since speaking in terms of 'bloods' evokes colonial era language that is detestable today.[15] If true, we must acknowledge that race is here to stay as the 'ghost' haunting legal institutions. Although in theory we reject race 'within the dominant philosophies of law' we are unable to banish the concept for good.[16]

Arguably, the solution to all of this lies in the delicate balance of these elements. On this the law can only offer that the balance tips towards subjective factors, particularly with the decreasing importance of genetic descent. As established in *Gibbs v Capewell*, 'the closer to the racial boundary the person's genetic history places him the greater the influence of his conduct'.[17]

Perceptions and Whiteness

Bolt's views suggest that although the law has a clear idea of Aboriginality as a balance between genetic inheritance and self-identification, the 'man on the street's' idea of Aboriginal identity is a different matter. Bolt's views have currency in that there are many in the wider Australian community that would assent to them by instinctively judging the identity of another based on physical appearance. This is because identity is linked to perception and, on the most direct level, perception relates to physical appearance.

Almost surprisingly, the law also recognises the power of physical appearance in determining identity. While Drummond J is careful to say that appearance is not a determining factor by itself, he concedes it has real influence. In *Gibbs v Capewell,*[18] his Honour comments that Aboriginality cannot be denied if, regardless

of his or her own views of their identity, a person is so Aboriginal in appearance that their Aboriginality is obvious. Aboriginality is unavoidable if 'the degree of Aboriginal descent is so substantial that the person possesses what would be regarded by the generality of the Australian community as clear physical characteristics associated with Aboriginals'.[19] This idea is problematic if it is flipped the other way around: it could justify Bolts' remarks that the 'white' physical appearance of the individuals he writes about is the true indicator of their identity, regardless of their personal sense of belonging to a different community. As Karen O'Connell puts it, 'here creeps in embodiment, which has been hovering below the surface, unacknowledged'.[20]

All of this goes some way to explain why and how Bolt holds the views he does. At the root is the fact that by instinct we cannot separate identity from whatever is placed physically before our eyes, tangible and plain to see: physical appearance. Further, it reflects how difficult it is to practically disentangle general society's ingrained association between skin colour and race. These views are of real importance, not just for how society regards Aboriginal persons, but within the legal sphere as well. The common law gives authority to lay ideas of interpretation. First and foremost, the word 'Aboriginal' is to be understood by its natural and everyday usage.[21] The corollary of this is that everyday usage is, by and large, 'white' usage. In these ways the white gaze is ever present in determining Aboriginal identity.

Legacies of History

A silent presence in this debate is the ghost of the Stolen Generations. History, as always, has a role to play. It can be argued that the legacy of the Stolen Generations undermines the rights of non-Aboriginals to attempt to define Aboriginal identity. In the first sense, this is because the situation which causes Bolt such consternation, whereby Aboriginal individuals must choose between two aspects of their identity, is a consequence of the actions of non-Aboriginal people. This idea is limited in an obvious way. The argument is not based on proof that any of the nine individuals involved in the Bolt litigation have ancestors who were directly affected by child removal policies in the mid-twentieth century, as this is so personal as to not be the author's business. Yet in general, it is almost axiomatic to argue that the issue of 'whiteness' and Aboriginality is a consequence of non-Aboriginals' actions: the aim of official policies toward Aboriginals from the first act of colonisation to the last breath of assimilationist policies, including child removal, aimed to 'breed out the colour'.[22] It is acknowledged that this claim about the aim of child removal is contestable and there is not space to do any justice to this debate here. This statement from A. O. Neville, Chief Protector of Aborigines, Western Australia, must suffice for evidence of the interpretation held here, as Neville wrote that his rationale behind child removal policies was to 'eliminate the full-blood and permit the white admixture, and eventually the race will become white'.[23] In light of this, it is understandable that to have a non-Aboriginal comment negatively upon Aboriginal individuals' decision to favour the Aboriginal over the European aspects of their heritage, can be received as deeply offensive by Aboriginal persons. From all this, we can say that a responsibility exists to allow Indigenous people's agency in reconstructing their own ideas of identity. Self-identification must be allowed to matter because colonisation and child removal has traumatised any uncomplicated notions of Aboriginality.

The Stolen Generations haunts the debate in one other way. The Stolen Generations and assimilation policies in general were themselves a product of non-Aboriginal attempts to define Aboriginal identity. This claim is relatively less controversial, and acknowledged by the Royal Commission into Aboriginal Deaths in Custody:

> The worst experiences of assimilation policies and the most long term emotional scars of those policies relate directly to non-Aboriginal efforts to define Aboriginality and to deny to those found not fit to be the definitions [Aboriginals of mixed heritage] the nurture of family.[24]

The experience of this attempt by outsiders to redefine Aboriginality is, for many Aboriginal people, not easy to forget. In this way it is important to always take extreme care in discussing Aboriginality. At the very least it ought to be recognised that the practice of non-Aboriginals questioning Aboriginality has a justified potential to be perceived as belying a 'continued aggression' by members of the Aboriginal community who still carry with them the hurt of the Stolen Generations.[25]

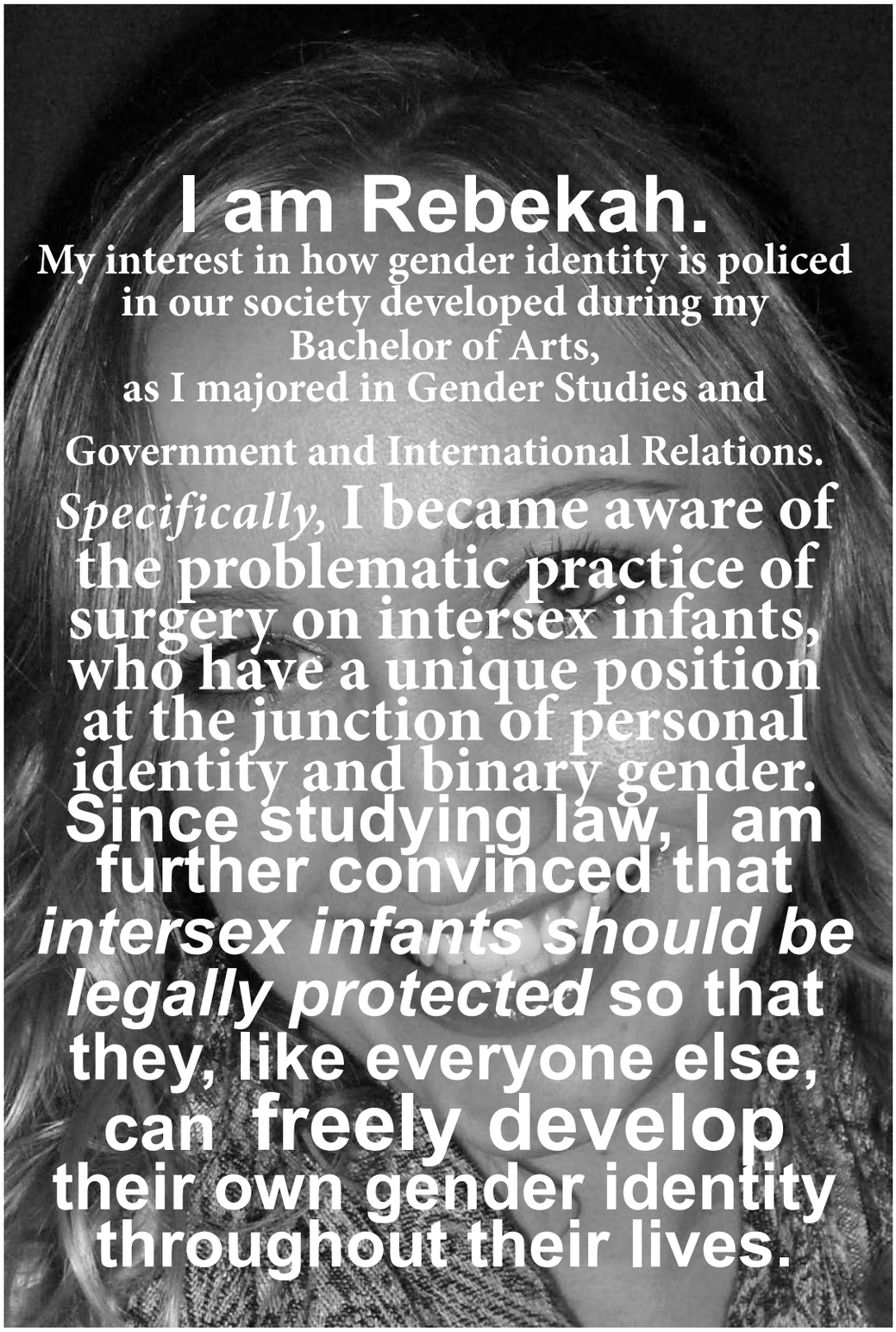
The Importance of Identity

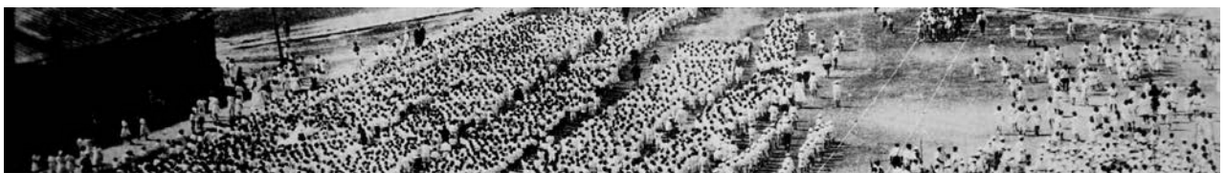
There remains one last point raised in Bolt's articles to comment upon. Bolt concluded his piece with the suggestion that a harmonious society is one where race does not divide us; where people do not elect to be understood in terms of Aboriginality, but merely as people.[26] Though it must assure readers to hear of Bolt's altruistic motives, identity cannot always be rescinded, as it matters more than Bolt understands it to. Identity, for Aboriginal people, is not a mere matter of gaining career advantages. It is something far more profound and individually meaningful than his article seemed to suggest. Identity and existence are intrinsically interdependent concepts. This is true both linguistically and on an individual level, as identity is the reflection of the essence of a sense of self. In this sense Bolt is correct to say the phenomenon of these individuals' self-identification is 'self-obsessed'.[27] Here one can agree, but this ought to be read in a sense profoundly less pejorative than Bolt may have intended. Further, identity is integral to Aboriginality on a collective level. As a community, Indigenous people 'are determined to preserve … their ethnic identity as the basis of their continued existence as people'.[28] Self-identification, though it is an intangible concept, has the power of affirming existence itself.

Conclusion

It seems unlikely that Bolt anticipated his comments to re-engage a debate of such depth. The ensuing debate has revealed how the issue needs to be approached with an appropriate degree of sensitivity in contrast to Bolt's 'trademark belligerence'.[29] In many ways, the issues within this discussion are emblematic of the same concerns that haunt many other aspects of Aboriginality: the white gaze, ghosts of history, and above all the need to preserve a sense of respect, agency and self-determination for Aboriginal peoples.

Artwork by Georgia Forbes-Smith


I am Rebekah.
My interest in how gender identity is policed in our society developed during my Bachelor of Arts, as I majored in Gender Studies and Government and International Relations.
Specifically, I became aware of the problematic practice of surgery on intersex infants, who have a unique position at the junction of personal identity and binary gender.
Since studying law, I am further convinced that *intersex infants should be legally protected* so that they, like everyone else, can freely develop their own gender identity throughout their lives.



‘Is It a Boy or a Girl?’

The Legal Responsibility to Protect Intersex Infants

R e b e k a h H i t c h e n s o n
J.D. I

Gender operates as a regulatory force in our society, which results in unequal treatment for those who do not comply with the strict demands of being male or female. Intersex Australians, whose bodies have been defined as abnormal for either of these classifications, experience this inequality from birth, along with the imposition of unnecessary and irreversible medical ‘treatment’ to resituate them into the culturally constructed binary. Since this typically occurs before the individual is able to legally consent, it relies on the tacit social agreement that medical involvement to assign and maintain a socially acceptable gender identity meets the standard of being in their ‘best interests’, which is the requirement for medical intervention on behalf of a minor. This practice, which is informed by current understandings of gender rather than the infant’s needs, is actually an unjustified and harmful double standard,[1] requiring intervention from the courts or Parliament for the protection of intersex rights.

Intersex Infants

At birth, infants are immediately allocated to one side of a binary gender system due to particular biological traits.[2] This positioning is based on the understanding that sex is a fact of nature, which renders an individual either male or female, and fosters an appropriate gender role within this framework.[3] The category of sex is normative - ‘part of a regulatory practice that produces the bodies it governs.’[4] It views coherent gender as a requirement for personal intelligibility, physicality, and identity.[5] However, in approximately 1 in 1,500 births chromosomal, hormonal or anatomical anomalies produce sexual features that do not conform to gender norms, either because they are considered atypical or because they do not exclusively characterise an individual as one sex.[6] These intersex bodies are typically ‘forcibly resituated into a discrete sex’[7] because their existence provides embodied evidence against the construction of the male/female binary as natural and immutable.[8] This treatment makes it clear that currently, ‘bodies that matter’, or those that legitimately exist socially,[9] cannot occupy an ‘intermediate space in a body politic that insists on a polarity of sex and gender.’[10]

Medical Involvement

In contemporary medical practice the ‘social emergency’[11] of an intersex birth is alleviated by the rapid assignment of a coherent gender identity, which is created and maintained through various technologies such as genital and secondary surgeries and continual hormone monitoring.[12] The social need to

'disambiguate'[13] the infant's gender means that within 48 hours of the birth of an intersex baby physicians have typically begun to erase any form of embodied sex that fails to conform to a male/female, heterosexual pattern.[14] This is ostensibly to eliminate future psychological distress or rejection,[15] but actually functions as part of a system of normalisation, which proclaims that children whose sexual features do not fit within the binary framework require 'corrective' surgery to 'repair' the atypical features.[16] As such, even when intersex infants do not require treatment, surgery is used to make the sexist and heterosexist dimorphic sex schema accommodate their bodies.[17] This disturbing model is the predominant approach to intersex births in Australia today,[18] meaning that most intersex people are 'gendered' by the medical care they receive as infants[19] long before they can personally consent to or question this construction of their identity.

The broad social acceptance of this practice, which has traditionally deterred debates about the need for individual consent, is problematic for two key reasons. First, medical treatment aims to uphold sexist and heterosexist social norms, 'valuing aggressiveness and sexual potency for boys and passiveness and reproductive/sexual-receptive potential for girls' and viewing homosexuality and trans-genderism as 'bad outcomes'.[20] Secondly, it tolerates what would ordinarily constitute sub-standard medical care, violating the axioms of honest disclosure and evidence-based treatment, which often results in irrevocable harm for patients without their understanding or agreement.[21] Essentially, it privileges violent interventions such as surgery on the individual over rethinking our social, political, or psychological understandings of gender identity.[22] This can hardly be seen as in the infant's 'best interests' because arguments supporting genital surgery rely more on popular notions of gender identity than on studies showing good long-term outcomes from medical involvement.[23] In fact, clinical literature has cited poor outcomes for over 30 years.[24] This unconvincing rationale for such highly contentious medical practice cannot stand up to external scrutiny, particularly without the support of the individual concerned.

Consequently, this medical model has been heavily critiqued by activists who argue that the true 'pathology lies in the social system and its strict adherence to gender binarism.'[25] As an intersex support group participant explained: 'the error was not in my body, nor in my sex organs, but in the determination of the culture, carried out by physicians with my parents' permission, to erase my intersexuality.'[26] Though all people embody gender regulation to some extent, 'those with atypical sexual anatomies [have] conspicuous marks of enforcement… literal scars borne by children submitted to surgery.'[27] This medical involvement is seen as the most critical issue to address for intersex equality broadly and for individual rights,[28] and most activist work has focused on challenging physicians to improve their ethics and care.[29] While some argue that significant progress has been made,[30] it is clear that much remains to be done to ensure that intersex people are not subjected to invasive medical procedures without their consent simply because they challenge gender norms. This protection should be enforced by the law rather than entrusted to doctors, who continue to disregard the equal rights of intersex infants.

Legal Responsibility

It is well accepted that the 'law cannot draw the line between different degrees of violence and therefore totally prohibits the first and lowest stage of it',[31] but medical intervention on intersex infants is currently not viewed as an invasion of the right to be inviolate as long as parental consent is given. Australia's Family Court recently published guidelines outlining the circumstances in which court authorisation is required to ensure this standard for medical intervention in children,

which included 'a major medical procedure that may permanently affect [a child's] quality of life', particularly surgeries which are invasive, irreversible, or ethically sensitive.[32] *Marion's Case* decided that the Court alone had the power to determine whether sterilisation for non-therapeutic purposes was in the best interests of a child.[33] Similarly, in *Re A*[34] the Court concluded that consenting to a gender reassignment on a 14-year-old did not fall within the ordinary scope of parental power, 'noting first the significant risk of making the wrong decision about what was in A's best interests and secondly that the consequences of the decision were particularly grave.'[35] As infant gender assignment surgery, and the continuing treatment that generally follows, clearly meets the Court's criteria, it should also fall within the scope of decisions that require court authority.[36]

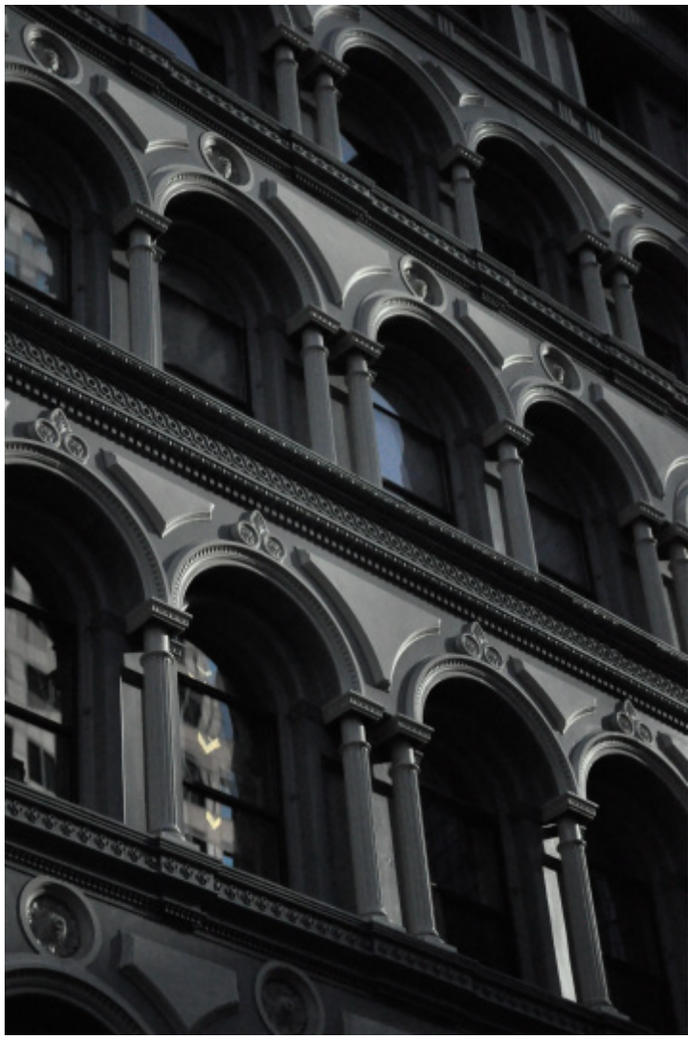
While transferring authority to the courts would clearly be an improvement for the equal rights of intersex people, there could still be difficulties with ensuring that their rights are paramount. Brennan J noted the limited usefulness of the 'best interest' principle as it 'does not assist in identifying the factors which are relevant to the best interest of the child.'[37] Medical opinion combined with parental support could mean that a court would be unlikely to refuse authorisation, as in both *Marion's Case* and *Re A*. However, *Marion's Case* expressed the importance of determining the child's future capacity to consent before the court authorises irreversible treatment.[38] Brennan J stated that the most effective way to deal with such controversial non-therapeutic surgery was to postpone it until such a time that the individual might personally decide,[39] which suggests that the Court would not authorise non-reversible treatment unless it was immediately medically necessary or if the individual would not develop the capacity to decide in the future.[40] This is in line with activist demands that 'clinicians should opt for the least invasive treatment procedures and not conduct any irreversible surgical or hormonal intervention without the patient's direct consent.'[41] Further, as these procedures 'are not simply for the purpose of curing an illness or improving health, but are inextricably associated with the patient's self-identity,' the Court should recognise that the choice is particularly difficult, and the consequences of choosing incorrectly more serious, without direct consent.[42] As such, legal recognition that intersex infants share the same right to be inviolate would represent important progress in the social acceptance of a more inclusive conception of gender identity and would offer protection to intersex individuals from unnecessary medical intervention.

Nonetheless, the delay and cost of adversarial court proceedings means that the Court could in some instances be 'unsuitable for arriving at this kind of decision'.[43] Therefore, further progress would be achieved by federal legislative involvement, 'since a more appropriate process for decision-making can only be introduced in that way.'[44] Parliament would be able to determine and develop the most suitable specialized body to face these decisions. It would have the capacity to consider the complex issues in assigning gender, which extend beyond medical considerations, and should benefit from the input of those who have shared the same experiences.[45] This important step should be taken by the legislature to unfailingly preserve the best interests of those whose 'ambiguous genitalia do not constitute a disease [but] a failure to fit a particular (and, at present, a particularly demanding) definition of normality.'[46]

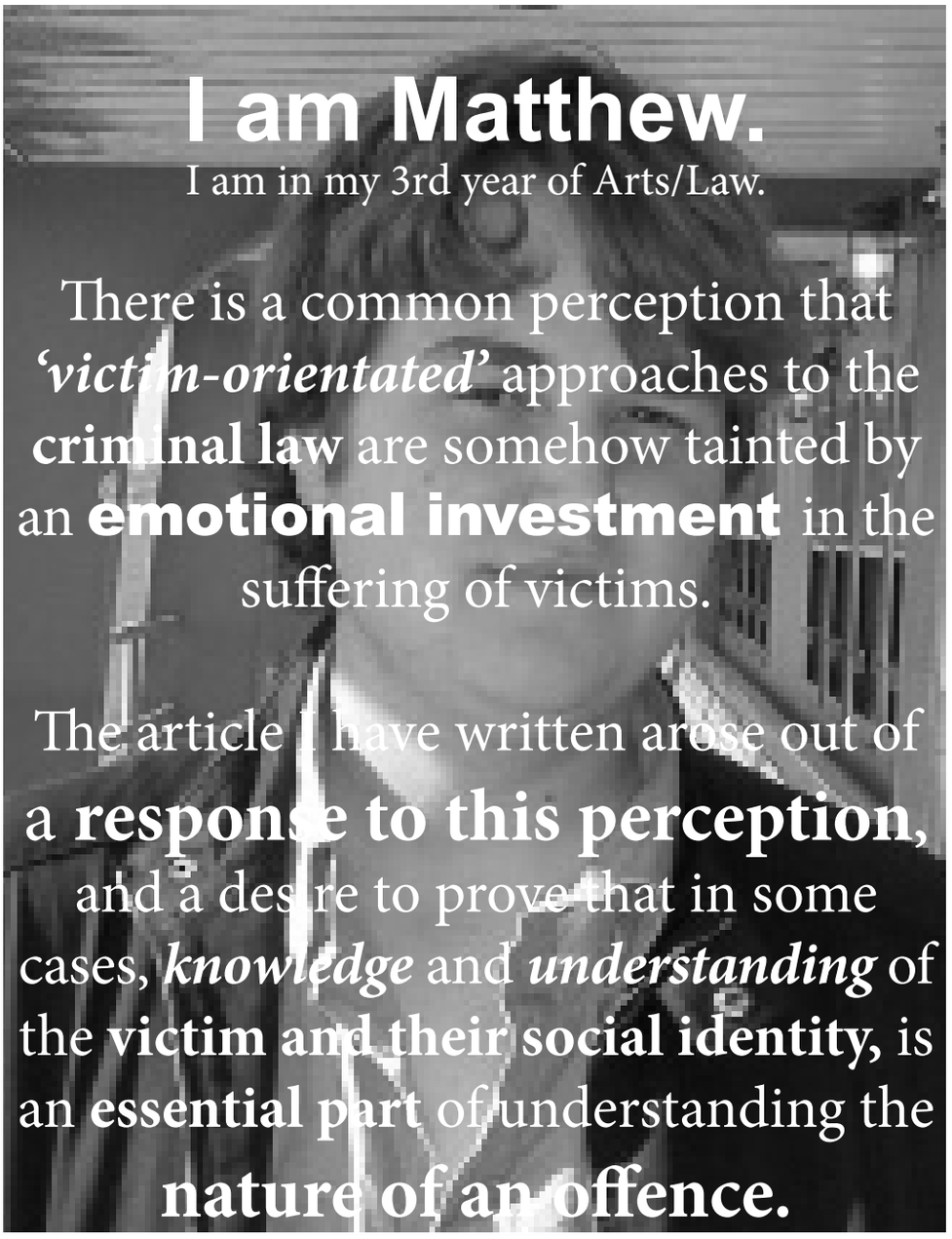
Progress

The medical treatment of intersex people over history has continually 'shown how social beliefs about gender identity are actively imposed on people whose bodies don't fit the simplistic assumptions that gender equals sex and that sex-gender formations come in only two flavours.'[47] While our culture remains

'deeply committed to the idea that there are only two sexes',[48] the interventionist paradigm of medical treatment endures, with clinicians barely acknowledging concerns about this approach.[49] Importantly, they are not solely implicated in the greater 'political process of making 'gender' work'[50] within a sexist and heterosexist social structure, because the law is also failing in its responsibility to protect the equal rights of intersex people. Progress can only be made when the law recognises that the 'decisions concerning gender-related surgery on infants are so important that decisions, at least for non-life threatening conditions, should be made by courts [or other governmental bodies] that are able to take a more objective perspective in determining a child's best interests.'[51] While intersex conditions continue to be 'corrected' not because they are threatening to the infant's life, but because they are threatening to the infant's culture,[52] it is up to the courts or Parliament to (re)define and defend the best interests of the children who are being 'reconstructed to fit into (and thereby reinforce)'[53] specific gender identities.



Photographs by Nick Yap


I am Matthew.
I am in my 3rd year of Arts/Law.
There is a common perception that *'victim-orientated'* approaches to the **criminal law** are somehow tainted by an **emotional investment** in the suffering of victims.
The article I have written arose out of a **response to this perception**, and a desire to prove that in some cases, ***knowledge*** and ***understanding*** of the **victim and their social identity,** is an **essential part** of understanding the **nature of an offence.**

Recognising Culpability
Hate Crimes and the Law

M a t t h e w C l a r k e
B.A./LL.B. III

Over the past three decades, criminologists have recognised a substantial shift in the way society and the legal system at large understand the aims and purposes of criminal punishment. Critics note a paradigm shift away from concepts such as rehabilitation and education towards those of retribution and punishment.[1] Part of this change has manifested in recent legislation increasing penalties for prejudice-related crimes, most commonly referred to as 'hate crimes' or 'bias crimes'. Despite their increasing prevalence of these crimes, many critics have condemned statutes of hate crime as the negative by-product of a growing culture of punitiveness and victim advocacy. However, these crimes are not committed against a specific individual but rather against a wider group that the individual is identified with. On closer inspection it becomes clear that hate crime provisions are not only conceptually valid, but also play an important role in denouncing prejudice and bigotry within the community.

Are Hate Crime Laws Actually Thought Crime Laws?

While there are various formulations of hate crime statutes, hate crime legislation generally serves to increase the punishment of an offender where it can be established that the offence was motivated by prejudice or hate toward a group to which the offender believed their victim to belong. Since first appearing in the 1980s in the United States, hate crime statutes have come under intense scrutiny, with critics citing both philosophical and policy-based objections to their presence in the criminal law. Most notably, opponents argue that such statutes unjustifiably punish people for antisocial or politically unpopular beliefs. As hate crimes involve the same *actus reus* as parallel crimes, the suggestion is that the additional penalty being imposed is merely punishment for the offender's prejudiced thoughts.

In response, critics raise John Stuart Mill's seminal argument that the state should not punish individuals for their beliefs, regardless of how immoral or repugnant the community may find them.[2] Accordingly, it is suggested that hate crime statutes involve an infringement of civil liberties, as they necessarily involve the curtailing of freedom of speech and expression.[3] One of the most vocal supporters of this argument is American lawyer Susan Gellman, who argues that '[t]he only substantive element of most hate crime statutes is that the defendant had a motive for committing the base offense. As motive consists solely of the defendant's thought, the

additional penalty for motive amounts to a thought crime'.[4] This line of reasoning has been echoed by other legal scholars[5] as well as the Wisconsin Supreme Court, which decided in the 1992 case of *State v Mitchell* that '[a] statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights'.[6]

The type of statute Gellman and her supporters are describing is what is commonly referred to as a 'penalty enhancement' model, the form hate crime legislations most commonly used throughout the United States.[7] Under this model, the hate crime statute increases either the minimum or maximum penalty above that imposed for the corresponding parallel crime. Accordingly, proof that the offence was motivated by hatred is incorporated into the definition of the offence, meaning that the offender's motive becomes an essential *mens rea* component of the crime. In contrast, New South Wales has adopted what is described as a 'sentence aggravation model' whereby the maximum penalty for hate crimes and parallel crimes remain the same. Under this model, proof that the offence was motivated by hate or prejudice is not relevant to defining the core offence, but is rather an aggravating factor to be taken into consideration at sentencing. Introduced in 2003, s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) cites as an aggravating factor situations where:

> the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).

The advantage of this model is that while the prejudiced motive has to be taken into consideration, the power of the court to increase sentence is entirely discretionary.[8]

Gellman does not address the validity of this model specifically, but seems to suggest that those statutes which rely upon judicial discretion are less problematic than automatic penalty enhancements (although not entirely free of issue).[9] Other critics are far less equivocal. According to Ralph Brown, '[s]entencing discretion to take account of bigoted motive is more than a loophole; it is a gaping escape-hatch.'[10] For critics such as Brown, increasing an offender's sentence because of their prejudiced motive is a clear violation of freedom of expression, regardless of whether that motive is considered at trial or at sentencing.

While this may be a valid argument, what these critics fail to understand is that questions of motive and purpose are consistently used by the criminal law to determine the appropriate sentence for an offender. Carol Steiker makes the point that 'criminal law frequently makes the definition of criminal offenses and sentencing options turn on some qualitative evaluation of the offender's reasons for acting.'[11] Moreover, in a reversal of the decision of *State v Mitchell*, the Supreme Court of the United States recognised that '[i]n determining what sentence to impose, sentencing judges have traditionally considered a wide variety of factors in addition to evidence bearing on guilt, including a defendant's motive for committing the offense.'[12] For instance, sentencing statutes regularly take into account mitigating factors relating to the defendant's motive or state of mind, such as whether or not the offender was provoked, or whether they were acting under duress.[13] Dan Kahan points out that a similar situation exists for offences such as rape; the reason rape is punished more severely than assault is not because rape invariably causes more physical harm, but rather because of the 'greater contempt it evinces for its victim's agency'.[14] According to Kahan, the reason the law makes distinctions such as this is because there is a need to distinguish the moral culpability of different offenders.[15]

Questions of Moral Culpability

Using this analysis is becomes clear that hate crimes require different punishment to parallel crimes because the offender has a different degree of moral culpability. Those who commit crimes based on hatred towards specific groups demonstrate to the community that they not only enjoy violence and the suffering of their victims, but also the domination and sense of power that is associated with the denigration of someone's identity.[16] Barbara Perry points out that hate crimes involve an attempt 'to re-create simultaneously the threatened (real or imagined) hegemony of the perpetrator's group and the 'appropriate' subordinate identity of the victim's group.'[17] It is this attempt to demean and devalue the identities of their victims that cause hate crimes to accrue an additional level of moral responsibility not present in parallel crimes. It is for this reason that the New South Wales sentencing provisions allow additional punishment where there is evidence the offence was motivated by hatred of a group, but not in cases where the offence was motivated by group stereotyping. For example, in the case of *Aslett v The Queen*,[18] the New South Wales Court of Criminal Appeal found that evidence of actual malice or hatred is a necessary requirement for s 21A(2)(h) to be applied. In *Aslett*, the offenders broke into the home of an Asian family, as they believed that 'Asians tended to keep money and jewellery in their homes.'[19] While reprehensible, this was not deemed an example of a hate crime. That the victim was selected because of their membership to a particular group is certainly a necessary element of a hate crime, but is not sufficient to establish the additional level of moral culpability. What is also required is contempt for the group in question and an attempt to punish their victims for their membership.

There are some who would argue that the additional punishment for hate crimes could be justified solely by the harm they cause to their victims and to the community. For instance, the primary quality of a hate crime victim is his or her fungibility, meaning that their individual identity is irrelevant to the offender. All that is required is that the victim be a member of the group to which the offender harbours his or her hatred.[20] Accordingly, some would make the argument that hate crimes are committed not just against individuals, but against all people who identify as a part of that group. As such, it has been suggested that hate crimes cause a greater degree of harm than other crimes because the psychological impact spreads beyond the immediate victim and affects the community at large.[21]

While it is certainly true that hate crimes cause harm beyond the immediate victim, it is a matter of contention as to whether or not they invariably cause greater harm than other crimes.[22] It is not necessary, however, to rely upon this argument. It is enough to call upon the expressive or symbolic function of criminal punishment to justify increasing penalties for crimes motivated by prejudice. In increasing the severity of punishment for these crimes, we are not necessarily suggesting that they invariably cause greater harm than others. Rather, we are recognising the special kind of affront to the victim's agency – that is to say, we recognise that the crime is not only an attack upon the victim's body or their property, but also upon their identity. Hate crime statutes therefore operate in consonance with the overall purposes of sentencing: not only do they ensure adequate punishment, but also demonstrate society's rejection of the conduct and recognise the harm caused to the victim and the community.[23]

Hatred of a Group versus Hatred of an Individual

In response, opponents of hate crime legislation suggest that, in terms of moral culpability, hatred of a group is not necessarily worse than hatred of an individual.[24] American social commentator Andrew Sullivan has argued fervently against hate crime laws because 'the distinction between a crime filled with

personal hate and crime filled with group hate is an essentially arbitrary one.'[25] Sullivan argues that when we increase the sentence for hate crimes, we are suggesting that the moral culpability of an offender who attacks his victim because of hatred of a group is always greater than the culpability of someone who attacks their victim because of personal hatred. While this argument may hold some weight in a debate about penalty enhancement statutes, it is not nearly as convincing when considering sentence aggravation provisions. For example, the New South Wales provision does not imply that crimes motivated by hatred toward a group invariably involve a greater degree of moral culpability than other crimes. Rather, the provision recognises that there is an additional element of culpability to be considered. Whether or not the overall culpability of the offender is greater or less than a similar crime motivated by personal hatred will ultimately be a matter of judicial discretion as the court balances the aggravating and mitigating factors listed in the statute.

Defining Protected Groups

Even if one were to accept the additional element of culpability, it is still argued that hate crime legislation should be repealed for policy reasons. Most importantly, it is argued that there is no moral justification for protecting some groups and not others. However, it is further argued that if we were to create a more expansive definition of those groups protected by the legislation, then this would open up the possibility for almost any offence to be considered a hate crime. Andrew Sullivan has argued that 'if we include the white straight male in the litany of potential victims, then we have effectively abolished the notion of a hate crime altogether.'[26] In some ways, Sullivan is clearly mistaken. Hate crime legislation has developed in such a manner that statutes are no longer about protecting only minorities – they are about protecting and affirming the identity of victims, regardless of whether or not that identity is associated with a minority or majority group. While in the past hate crime legislation sought to protect only marginalised and particularly vulnerable groups, it is now widely recognised that neutral definitions of protected groups are necessary for the legislation to achieve its goals.[27]

Despite this, Sullivan does raise a salient issue. A plain reading of the New South Wales provision seems to cast an undesirably wide net when determining which groups should be covered by the subsection. For instance, the New South Wales Court of Criminal Appeal recently decided in *R v Dunn*[28] that paedophiles could be considered a protected group under s 21A(2)(h). In coming to this decision Hoeben J held that:

> [t]he offence was motivated by a hatred or prejudice against Mr Arja solely because the applicant believed him to be a member of a particular group, i.e. paedophiles. The examples given in parentheses [in s 21A(2)(h)]… do not comprise an exhaustive list of the groups envisaged by the subsection.[29]

Gail Mason makes the point that this type of interpretation of the provision refuses to recognise that the groups mentioned in the subsection have anything in common. Mason suggests that unless the courts are willing to recognise that a particular genus is implied in the categories listed in the statute, then the provision could apply to crimes motivated by hatred towards almost any group.[30] Therefore, the courts must recognise that there are some groups which should be included in the meaning of the provision, and some groups which should not.

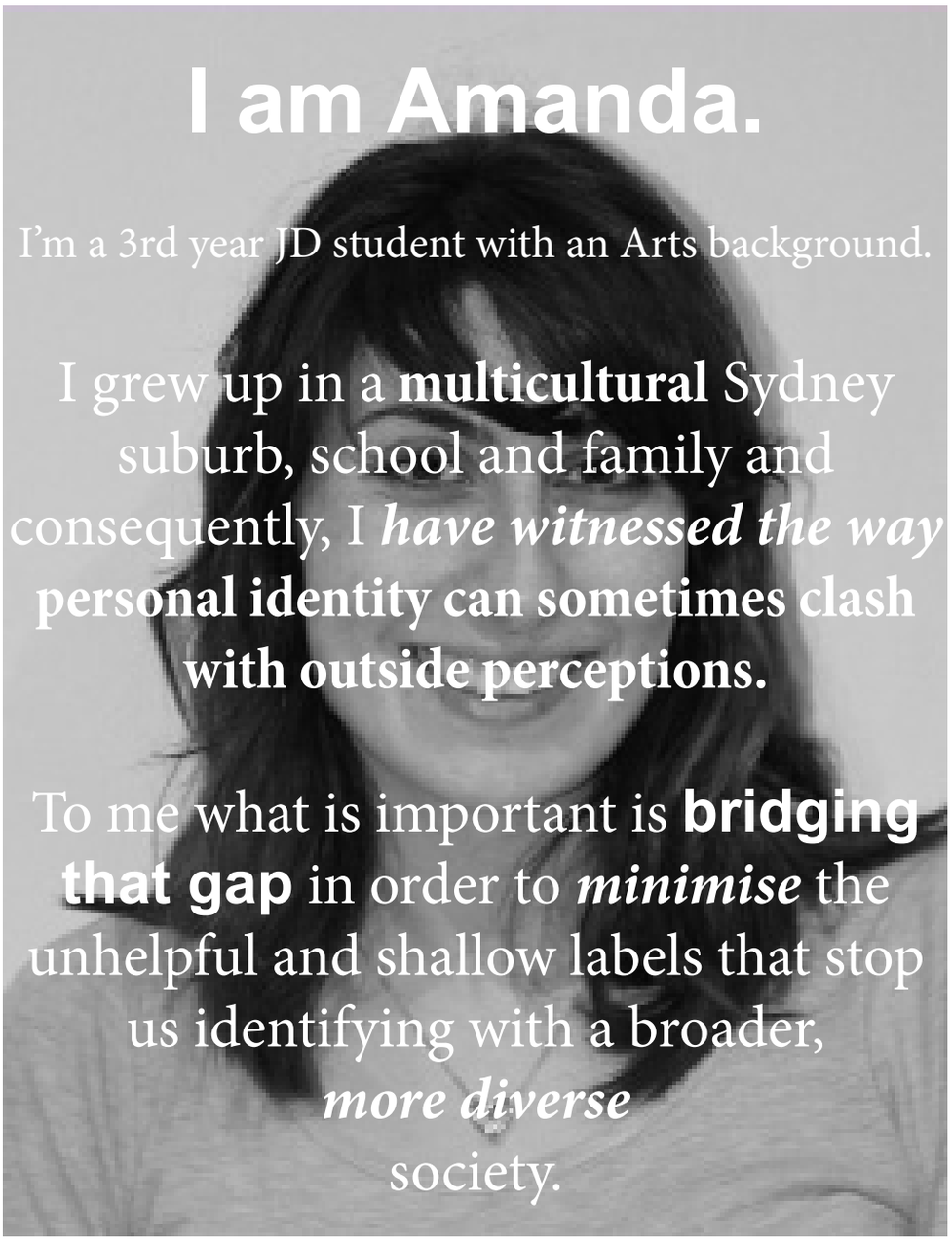
Frederick Lawrence argues that in order to determine whether or not a group should be protected by a hate crime statute, one must ask: 'Is there some self-consciousness of these collections of individuals as a group?'[31] This is

a useful starting point as it eliminates trivial categories which in reality are not groups, but rather 'random collections of people.'[32] But it quickly becomes clear that this is not enough; paedophiles, for instance, could, and some would argue do, identify as a group, and yet intuitively there is a problem with considering them as part of those groups protected by the provision. A second requirement should therefore be added: that the group does not cause harm to others. In pursuing the actualisation of their identity, paedophiles necessarily cause harm to individuals and to the community, and therefore their inclusion in the statute runs contrary to the fundamental goals of a hate crime provision – to protect and encourage the open expression of one's identity. Finally, judges need to consider whether or not the group in question could reasonably be called an 'identity group'[33] as termed by Michael Blake. What this means is that for its members, their belonging to that group is 'essential for how they understand their place in the social world.'[34] Imposing such a requirement would limit the groups covered by the subsection to those where membership contributes to one's core identity or sense of self.

Some would argue that limiting the definition of the subsection in this way would not necessarily be a positive outcome. Jo Morgan has argued that 'stigmatised and victimised groups which are deficient in moral status claims, have inadequate foundations for organising 'identity"[35] and are therefore unlikely to receive protection under most hate crime provisions. Groups which are commonly cited in support of this argument include groups such as sex-workers, the homeless, or those who work in abortion clinics. Yet there are a number of potential problems with including groups such as these. On the face of it, these look more like 'random collections of people' than actual groups, and it is questionable to what extent membership within them informs the identities of their members. Moreover, identity groups have traditionally been interpreted to refer to those groups, membership of which is determined based on one's innate or immutable qualities. Of course this inevitably raises questions of volition associated with factors such as occupation, social status and political beliefs. However, while this presents a challenge of interpretation, this difficulty is not so great as to discredit the validity of the subsection altogether. Rather, these borderline groups should be dealt with on a case by case basis, keeping in mind the purpose of the subsection, and the common features of the groups already listed in the provision.

Conclusion

While many have criticised hate crime legislation, few of those same critics oppose the sentiments or motivations behind such laws. All critics and commentators agree that prejudice and bigotry should be condemned by the community. The point of difference, however, lies in to what extent the law should be involved in communicating this message. Opponents of hate crime legislation argue that 'we will not cure bigotry by being intolerant',[36] that 'hate is only foiled not when then the haters are punished but when the hated are immune to the bigot's power.'[37] For others, however, this is not enough. While we are all free to hold our beliefs, no matter how immoral, we are not free to act on them. Those who do act on their prejudice or bigotry deserve condemnation, not just for attacking their victims or their property, but also for attacking their victim's identity. Criminal sanction is never solely about deterrence or retribution; it is also 'a statement of collective morality.'[38] While we may not have the capacity to eradicate hate, we do have an ability to reject it. As such, the law has an obligation to denounce the manifestations of hate, and to punish those responsible accordingly.


I am Amanda.
I'm a 3rd year JD student with an Arts background.
I grew up in a **multicultural** Sydney suburb, school and family and consequently, I ***have witnessed the way*** **personal identity can sometimes clash with outside perceptions.**
To me what is important is **bridging that gap** in order to ***minimise*** the unhelpful and shallow labels that stop us identifying with a broader, ***more diverse*** society.

Complementary Protection in Australia

A m a n d a A l a m
J.D. III

Complementary protection is the legal obligation to provide protection to asylum seekers who do not fit into the narrow definition of 'refugee' under the 1951 UN Refugee Convention.[1] It has been recognised by many Western states including the European nations, the US, New Zealand and Canada. Despite being a signatory to the treaties from which complementary protection is commonly accepted to arise, Australia does not yet have a codified system of complementary protection. Although in both 2009 and 2011 bills to include complementary protection in the *Migration Act 1958* (Cth) ('the Migration Act') were introduced into the House of Representatives, no changes have yet been made.[2] However, creating a complementary protection scheme under the Migration Act is necessary to ensure that human rights standards do not shift between identities based on technical categorisations.

Asylum Seekers' Identity

The attitude towards refugees and asylum seekers in Australian society is one of ambivalence. This is reflected in the different identities attributed to asylum seekers by our politicians and mainstream media. Often the language used to report on asylum seekers encourages the formation of negative stereotypes. For example, Greg Sheridan of *The Australian* asserts that in order to protect Australia from jihad and anti-social behaviour, 'the inflow of illegal immigrants by boat in the north, almost all Muslim, mostly unskilled, should be stopped.'[3] This accompanies a tendency to define 'refugee' restrictively, which allows labelling those who do not fall within that category as somehow morally culpable or less deserving. Although Immigration Minister Chris Bowen defends multiculturalism against the language of commentators such as Sheridan,[4] he joins Prime Minister Julia Gillard, and John Howard before her, in labelling asylum seekers arriving by boat as 'queue jumpers', a term which has no basis in fact and invites a false moralism by defining 'boat people' in opposition to 'genuine refugees'.[5]

An example of this misleading label is even inherent in the 1951 Refugee Convention.[6] Article 1A(2) defines refugees restrictively, allowing claims based on the fear of persecution for only one of five specific reasons: race, religion, nationality, membership of a particular social group or political opinion.[7] Many have attributed the specificity of the 1951 Refugee Convention to the individual refugee crises that it was created to solve following the Second World War. Although the

1951 Refugee Convention is the foundation of modern refugee law and of state responsibility towards refugees, it contains a threshold that discriminates against those people who are facing a 'refugee-like predicament' but whose persecution does not fit the restricted definition.[8] *Non-refoulement* is the principle that asylum seekers should not be returned to places where they fear persecution. Since 1951, human rights conventions have broadened the concepts of *non-refoulement* and state protection far beyond that of art 1A(2) through other human rights conventions. They include the 1966 International Covenant on Civil and Political Rights,[9] 1984 Convention against Torture[10] and the 1989 Convention on the Rights of the Child.[11] States now have obligations not to deport asylum seekers where they may face torture, cruel, inhuman or degrading treatment or punishment or the arbitrary deprival of life. These legal obligations have been termed 'complementary protection' in the sense that they provide a basis for legal protection in addition to the 1951 Refugee Convention.

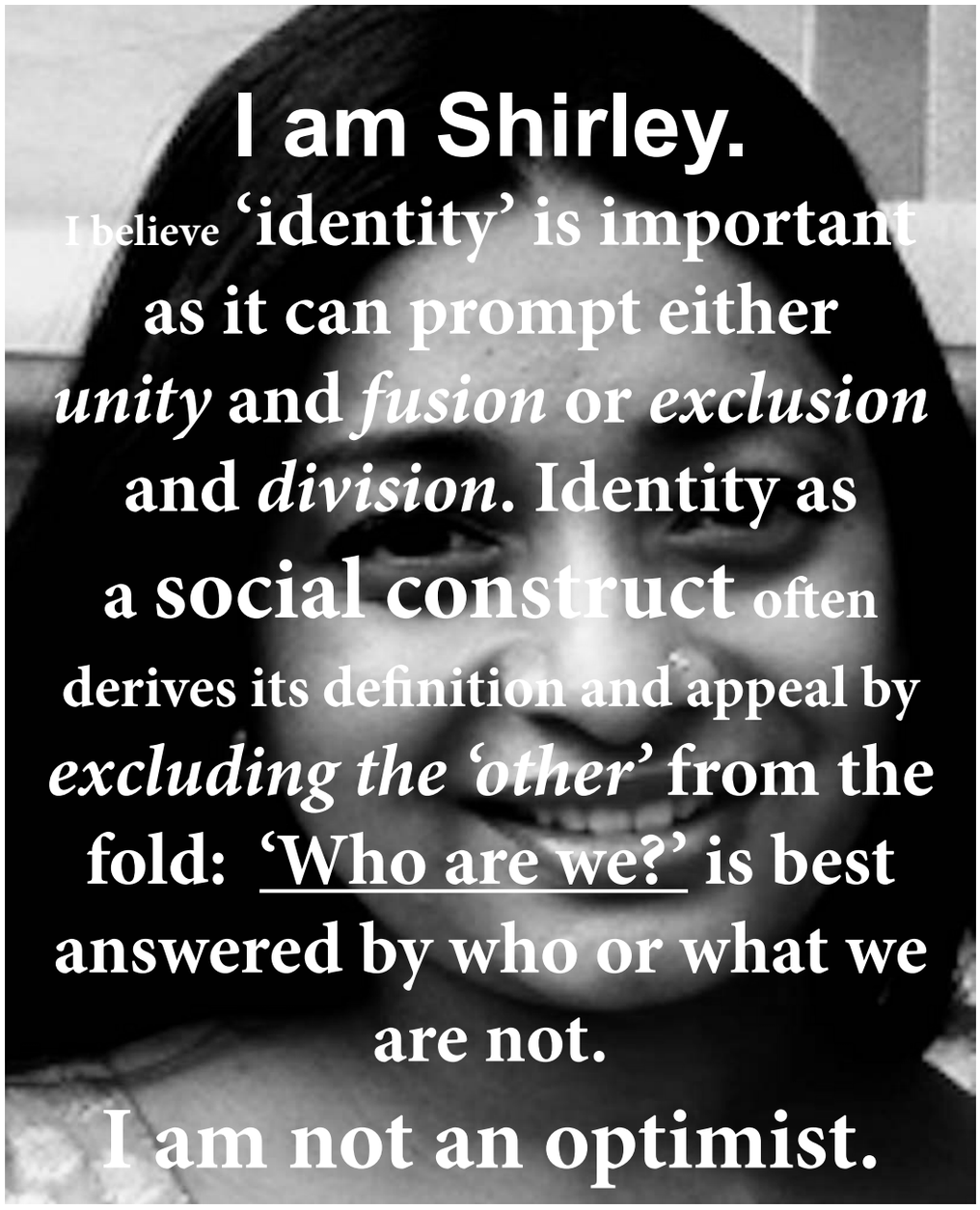
Asylum Seekers' Protection

Under the Migration Act, the only form of onshore protection visa is based on the 1951 Refugee Convention's definition of refugee. There is no system of complementary protection in Australia.[12] A person who fails to meet the Convention criteria will be refused a protection visa by the Migration Department unless a Minister personally intervenes on their behalf. This creates a de facto complementary protection system in which the Minister has discretion to intervene where it is in the public interest to do so.[13] The Liberal Minority Report on the 2009 Complementary Protection Bill argued that the current system was fair and effective and that an amendment was unnecessary.[14] However, ministerial intervention is an inappropriate method of providing adequate protection for those seeking asylum.[15] Although it allows for broader protection than under the 1951 Refugee Convention's refugee definition, it is discretionary, non-reviewable and based on 'public interest' - a concept at odds with *non-refoulement* which guarantees the interests of the individual. As the Minister has no duty to exercise his discretion,[16] this disables any transparency or consistency in the system of protection. Instead, it curtails protection by restricting the rights of those individuals in the gap between 'refugee' and 'other'.

Australia's system of refugee protection discriminates between refugees as defined under the convention and those who, despite similar fears of persecution, are not. Jane McAdam argues that there should be no difference in status between refugees under the 1951 Refugee Convention and those provided protection under other legal obligations.[17] This is because complementary protection itself is defined by an extension of the threshold requirement in the convention. The idea of *non-refoulement* has matured into what we now recognise as a responsibility not to return asylum seekers to possible torture or to inhuman or degrading treatment or punishment. Yet the 1951 Refugee Convention is still the foundation of modern refugee law as it provides a package of rights that attach to the status of 'refugee'. The Australian system undermines the principle of complementary protection as it is based on the presumption that those applicants seeking ministerial intervention are seeking extraordinary protection.

The lack of a complementary protection system in Australia exposes those who are not classified as refugees to persecution if they are returned home. In 2000, for example, the Senate noted the case of a Chinese woman who suffered a forced abortion of an 8.5 month pregnancy after two protection applications were refused and she was deported to China.[18] The Australian Human Rights Commission describes cases of asylum seekers who are deported despite being at risk of domestic violence without protection from authorities, witnesses of crimes by criminal elements operating with

impunity. These are circumstance where a complementary protection system would protect these individuals.[19] Parliament needs to move away from laws that rely on an anachronistic definition of refugee. Without a codified system of complementary protection, Australia is at risk of breaching its obligations to the international community and exposing those who, despite not being labelled as refugees in Australia, face the same threat of persecution.


I am Shirley.
I believe 'identity' is important as it can prompt either *unity* and *fusion* or *exclusion* and *division*. Identity as a social construct often derives its definition and appeal by *excluding the 'other'* from the fold: 'Who are we?' is best answered by who or what we are not.
I am not an optimist.

Wither *Ibadat*

The Regulation of Mosques in Secular India

S h i r l e y M a n i
J.D. III

On 9 May 2011, the Supreme Court of India rejected a lower court ruling that called for the country's most disputed religious site – the Babri Mosque – to be divided between Muslims and Hindus.[1] Although the Court is yet to announce its own resolution, the case highlights a long-standing dilemma in the separation of religion from the state: 'how should governments protect religious sites that are holy or sacred to faith adherents?'[2] In a context where religion plays an instrumental role in creating, defining and sometimes destroying national identity, the repercussions are significant. Islam itself is based on five pillars – belief, prayer and *ibadat* (worship), zakhir, Ramadan and Hajj. The mosque is important in facilitating prayer whilst being a symbol of religious identity. Should the mosque be controlled and subject to the state? Should it be protected? And to whom does it belong? This article begins by examining the role of the mosque in Islam, addressing issues of title and protection of mosques. The second part examines the interpretation of secularism in India in three key state instruments: the Constitution, legislation and the judiciary. The final part looks at the practical effect of these instruments on religion-based violence, as highlighted in the Babri Mosque controversy. In so doing, this article concludes that state intervention into religious matters should not be undertaken lightly, particularly as undue intervention can result in factionalism and fuel the divide between religious and national identity in a secular state.

The Mosque in Islam

The mosque is a public and communitarian symbol of unity. Its critical function in the religious and socio-political sense is summarised by 13th century jurist Ibn Taymiyah as 'a place of fathering where prayer was celebrated and when public affairs were conducted.'[3] The Prophet's instructions to hold prayers in groups made Muslims come to the mosque five times a day and worship Allah in orderly lines.[4] Such congregations were imperative in closing the socio-economic divides between Muslims and resulted in the formation of a 'co-ordinated, united and powerful Muslim society.'[5]

The mosque continues to play a central role in contemporary society as the public place where communal prayer is performed and *khutba* (public sermon) is delivered to the assembly of worshippers.[6] However, its political and judicial role has been subject to external restraints, particularly in non-Islamic states. British colonial rule in India led to the confinement

of the Shariah law to the personal sphere. This led to an increased role for the *ulama* (Islamic scholars) in guiding ordinary Muslims,[7] particularly through mechanisms such as Friday prayers and the issuance of fatwas.[8] However, any sense of a common Muslim community was also accompanied by fear of persecution.[9] Tension between secular notions of property and religious identity manifests in state incursions on communitarian and religious symbols such as the mosque.

Legal Title to Mosques

The purpose of every mosque is to facilitate community worship.[10] All interests, rights and title pertaining to it are therefore vested in God. This proposition is supported in Islamic law by the practice of *wakf* (endowment). *Wakf* refers to the freezing of rights of ownership over a property, and utilising its revenues for charity and general Islamic welfare.[11] The custom of *wakf* is strongly encouraged by Islamic governments and endowed properties are strictly protected from state control.[12]

As the Hanafi movement is the dominant Islamic school in India,[13] it is important to consider its *wakf* rules. First, the founder must expressly or impliedly declare their intention to dedicate a property for the purpose of a mosque.[14] Secondly, the founder must divest himself completely of ownership of the mosque. Divestment can be in the form of actual delivery of possession to the Mutawalli or an Imam of the mosque, or implied from the fact that public prayers are said at the mosque.[15] A place may be dedicated as a mosque or masjid without there being any building or having the appearance of a mosque.[16] Further, a complete dedication to the mosque as a place of public worship means that any reservations or conditions imposed by the founder are deemed void. Essentially, the dedication passes property title from the owner to God, and the question of 'private property' becomes redundant.[17] So, once the founder dedicates a property for the purpose of a public mosque, no Muslim can be denied the right to offer prayers in it. Any adjuncts to the mosque, which also serve a religious purpose, are considered part of the mosque.[18] Once dedicated to God, all title, interest and property rights of the founder are completely extinguished and vested in God.[19] How then does the mosque's inextricable link to *ibadat* and God fit within secular India?

Secular India

Secularism has been instrumental (in principle, if not in application) in the development of postcolonial, post-partition India. While Western notions of secularism are associated with an 'impassable wall between Church and State,'[20] the Indian Constitution reflects Gandhian principles of secularism that advocate equality for all religions within the State, which has no religion itself.[21] Therefore, Indian secularism cannot accurately be described as 'anti-religious'.[22] However, the notion that political institutions operate without reference to religion undermines the raison d'etre of Islam, namely oneness with and complete submission to the will of God.

In examining the role and title of mosques in secular India, the next section analyses three state instruments – the Constitution of India, legislative instruments and the common law – highlighting the tension between religious freedoms and state incursions into the right to form and protect one's religious identity.

Constitution

Religious Freedoms: Articles 25 & 26

There is no specific reference to Islam or Muslims in the Indian Constitution. Religious freedom in the constitutional sense is both an individual as well as collective right. Pursuant to art 25(1), the Indian Constitution protects 'the right freely to profess, practise and propagate religion.'[23] Article 25 does not contain any reference to property. Judicial authority suggests that the right to practise, profess and propagate religion does not necessarily include the right to acquire, own or possess property.[24]

Further, religious freedom is not an absolute right, and has been qualified by interests of public order, morality and health, as well as the Indian Government's 'economic and political attempts to accelerate the social integration of disadvantaged groups.'[25]

Under art 26, the Constitution gives all religious denominations the right to establish and maintain institutions for religious and charitable purposes, manage their own affairs, and own and acquire movable and immovable property in accordance with law.[26] The predominant judicial position is that protection under the article only extends to the essential and integral elements of religious practices.[27]

Acquisition of Property – Article 31

In *Suryapal Singh v U.P.*,[28] the Supreme Court held that art 25 was subject to Part III of the Constitution, which includes the State's right to acquire property under art 31. The Court held that the acquisition of *wakf* property by the state is unrelated to the freedom to practice, profess and propagate religion. The constitutional provisions pertaining to religious freedoms do not remove the right of the State to acquire property belonging to religious denominations.[29] Although there is some authority to suggest that compulsory acquisition can be negatived if the action were to *completely extinguish* a religious domination's right to acquire property,[30] the general consensus is that art 26 does not interfere with the State's right to acquire property.[31] This proposition demonstrates the tension between law and religion in Islam. The notion that title to a mosque built and consecrated by public worship is vested in God is difficult to reconcile with the proposition in art 31 that the State – an unrecognised entity in Islamic law – may have better title.

Legislative Instruments

In addition to the constitutional provisions, there are various legislative instruments that have enabled the regulation of mosques. First, the *Wakf Act 1995* is the central legislative regime for the management of *wakfs*. It is applied uniformly across the whole of India, excepting Jammu and Kashmir. State intervention in *wakfs* has been politically justified on grounds of maladministration. However, the *Wakf Act* has proved unsuccessful in improving the administration of mosques.[32] Further, the central regime is still subject to state laws relating to land-ceiling taxes, revenue control and revenue cessation. These legislative measures vary from state to state and result in inconsistent administrative outcomes across India. A uniform policy by the Central Government that grants exemption to *wakf* properties from all such state laws is yet to be developed. It remains to be seen whether the Central Government will seek to justify an increased role for itself based on the limitations of the current regime.

Secondly, the *Religious Institutions (Prevention of Misuse) Act 1988* makes it an offence to use religious sites to harbour an accused or convicted criminal, or for any political purpose. It was enacted with the view of curbing Sikh insurgency in Punjab following raids at the Golden Temple in Amritsar. Historically, the socio-political purpose of a mosque has been justification for similar state raids. Thirdly, the *Places of Worship (Special Provisions) Act 1991* prohibits the forcible conversion of any religious denomination into that of another. It also requires the preservation of the religious character of all places of worship except the disputed mosque site in Ayodhya. The legislation was a result of the communal riots led by the Bharatiya Janata Party that led to the demolition of the Babri mosque in Ayodhya. Notably, the legislation concerns 'conversion' only, leaving the state right to compulsorily acquire property under art 31 untouched.

Criminal sanctions under ch 15 of the *Indian Penal Code 1860* may also be applicable for offences against religion. Under s 295, a person who destructs or defiles a place or object of

worship with the intention of insulting the religion of any class of persons may be liable for imprisonment for up to two years or pecuniary punishment. It is also a crime to disturb a religious assembly. However, as the dissenting opinion in *Faruqui*[33] and the Babri Mosque suggest, these criminal provisions provide little deterrence or protection to the sanctity of the mosque. In fact, there were 943 instances of violence on religious grounds recorded by the Government in 2008-09,[34] suggesting that the current legal remedies for violations of religious freedom are either ineffective or not enforced rigorously enough.

Problematically, the exclusive jurisdiction for law enforcement and maintenance of order lies with state governments, and federal officials require the permission of the state government to investigate. Historically, intervention has been limited only to exceptional cases where state governments were reluctant or unwilling to intervene themselves.[35] One solution would be to vest the Ministry of Minority Affairs, which is also vested with the authority to manage *wakfs* across India, with the authority to protect sacred sites. The associated risk would be that yet another mandatory imposition would result in de facto state control of religious activities and identity.[36]

Judiciary

An alternative solution to the 'Mosque' question would be to allow courts to step in where legislative or executive arms have been unwilling or unable to protect minority concerns. Courts are not expected to enforce the dictates of any religion in a secular state. However, the Indian secular experiment has involved frequent judicial intervention in minority practices.[37] Specifically, the Supreme Court has developed a doctrine that distinguishes between 'essential' and 'non-essential' matters of religion when examining the state's intervention in religious affairs.[38] The Court only affords constitutional protection to matters construed as essential components of religion, whilst authorising the governmental regulation of those characterised as non-essential.[39]

The essential matters doctrine has enabled extensive state control of religious dominations. In particular, it has permitted intervention in the appointment of personnel, the management of property, and other economic activities.[40] For instance, the Supreme Court has found that cow slaughtering is an 'optional' Muslim practice[41] and that 'a mosque [is] not an essential part of the practice of religion'[42] However, none of these opinions were formed with reference to the primary sources of Islamic law.[43] Such arbitrary application has led to the perception that courts are allowing their own advocacy of a uniform civil code to supersede the protection of religious identity from state control. [44] This further undermines the legitimacy of the judiciary, particularly as its workload impedes its ability to provide quick and efficient solutions. Rather than being the panacea, the essential/non-essential doctrine is thus at risk of being transformed into the malaise that fuels the tension between a secular state and its right to control the formation of religious identities within its boundaries.

Religious Violence - Ayodhya

The repercussions of state *inaction* are also significant. The Ram Janma Bhoomi – Babri Masjid controversy in Ayodhya is one of the most important examples of the usurped place of worship in modern India. Yet religious violence at this site has a historical genesis. The conflict began in the 1850s when Sunni Muslim activists believed that a temple dedicated to the Hindu monkey god Hanuman has been built atop a mosque.[45] The issue then was whether Muslims had a right, independent of the state, to redress the insult to Islam they felt the temple represented.[46] In 1984, the Hindu Right campaigned to build a temple in honour of the God Rama on the site. In 1992, with a pending court case on title to the land, Hindu activists destroyed the mosque, resulting in religious violence across

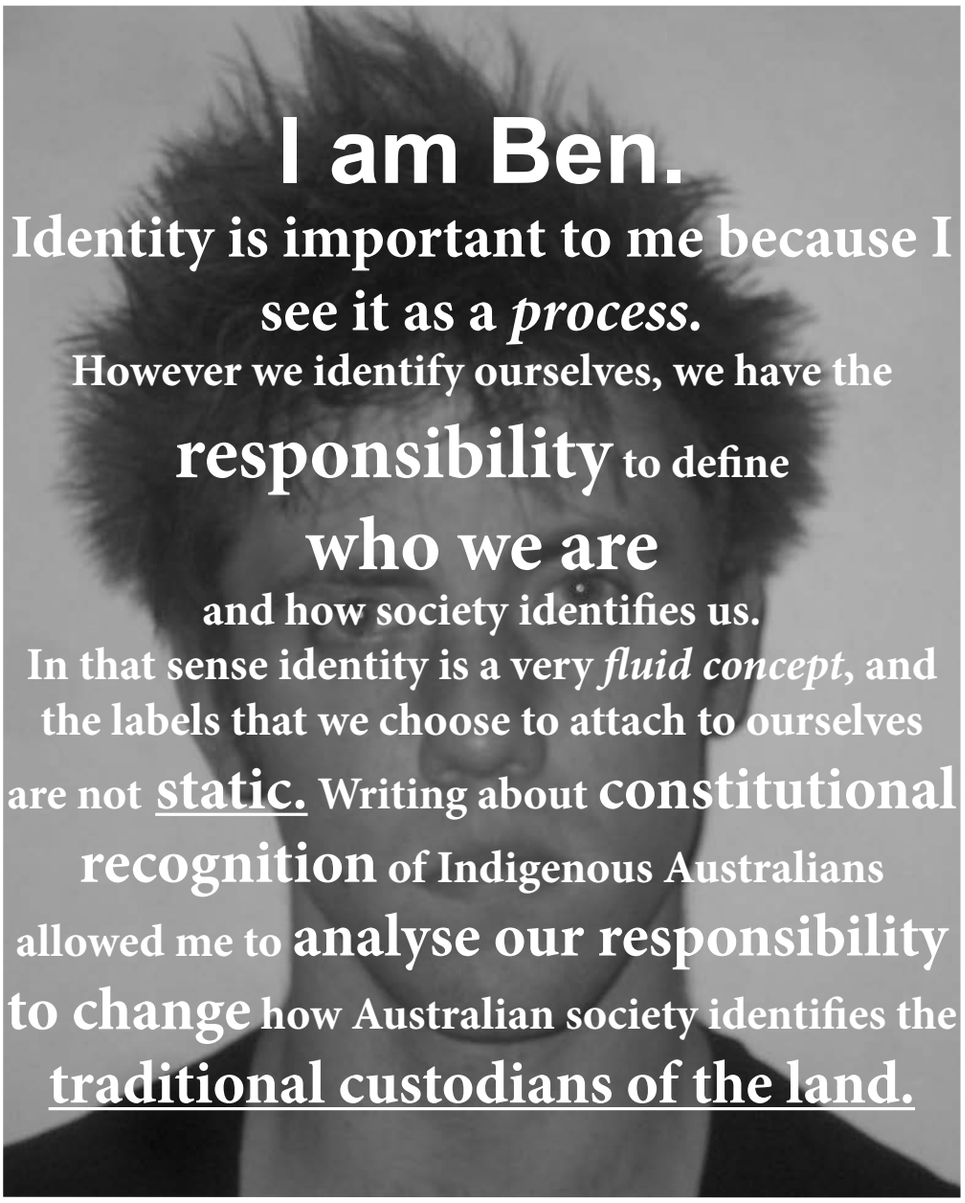
the nation.[47] The dispute culminated into the Gujarat riots,[48] resulting in the 'death of at least two thousand Muslims, with claims of inaction by the state's law enforcement officers and in some cases, instigated by the active support of state officials.'[49]

In *Faruqui,*[50] the issue was whether vesting the property and rights of the mosque in the Central Government through appropriation legislation offended the principle of secularism. A 3:2 majority of the Supreme Court of India held that under the applicable 'Mahomedan law' in India, title to a mosque can be lost by adverse possession. Hence, the mosque – like all other places of worship – is not immune from compulsory acquisition by the State. The majority went further to state that a right to worship does not exist at any place, unless the right to worship at a particular place is itself an integral part of the right to worship. As *namaz* (prayer) by Muslims can be offered anywhere, a mosque is not an essential part of the practice of Islam, and so the State had not contravened any religious freedoms under the Court's 'essential matters' doctrine.

The majority's approach appears grounded in analogical reasoning and the essential/non-essential doctrine rather than examining principles of Islamic law. Given that the pillars of Islam are based on prayer and submission to God, and the mosque is instrumental in facilitating communal prayer, it is equally open on the facts that it is an essential part of the practice of Islam. It is one thing to accept the principles of Islamic law as being applicable in a secular state. It is another to then form an artificial distinction between Islam's essential and non-essential features, particularly when such an analysis is uninformed by the primary sources of Islamic law. The result is mere lip-service to the application of Islamic law, whilst endorsing state incursions into the formation of religious identity.

Conclusion

This article highlights the importance of the mosque as a symbol of unity and worship. The proposition that all interests, rights and title pertaining to mosques are vested in God has garnered support in Islamic law, particularly through the custom of *wakf*. India's experiment with its own brand of secularism has resulted in the regulation of religion through state instruments. However, Islam's proposition that title to mosques consecrated by public worship and vested in God is irreconcilable with the Indian State's powers of compulsory acquisition. Further, the recognition of religious freedoms under the Constitution has accompanied jurisprudence that attempts an artificial distinction between essential and non-essential matters of religion. Finally, the Babri mosque controversy warns how lack of state law enforcement and judicial creativity can undermine just as easily as it can salvage the essence of the constitutionally prescribed religious freedoms. Divesting of religious property without adequate consideration and attacks against communitarian symbols such as mosques will only incite factionalism and sentiments of persecution and isolationism. This in turn can only lead to a fragmented state and national identity, far removed from the vestiges of secularism or *ibadat*.


I am Ben.
Identity is important to me because I see it as a *process*.
However we identify ourselves, we have the
responsibility to define
who we are
and how society identifies us.
In that sense identity is a very *fluid concept*, and the labels that we choose to attach to ourselves are not static. Writing about constitutional recognition of Indigenous Australians allowed me to analyse our responsibility to change how Australian society identifies the traditional custodians of the land.

Upon Whose Land We Sit

The Constitution, Indigenous Identity and Recognition

B e n P a u l l
B.A./LL.B. III

In 2010, the Gillard Government established the Expert Panel on Constitutional Recognition of Indigenous People ('the Panel') comprised of Indigenous and community leaders, constitutional experts, and Parliamentary leaders of both major parties. The Panel was tasked with leading public debate about how constitutional recognition of Indigenous Australians may take place and culminated in a report delivered to the Australian Government in 2011. This presents an historic opportunity to the government to amend the *Australian Constitution* ('the Constitution') in a way that both espouses Indigenous identity and provides a new framework in which Indigenous social justice can be approached. The balancing act that the Panel faces, however, is monumental: it must aim to recognise Indigenous identity in a way that does not give rise to any organised opposition, yet it must be weary of a populist 'lowest common denominator' outcome that would stifle the opportunity to further the cause of Indigenous social justice. This article offers recommendations about how the challenges facing the committee might be overcome.

What Shape Might Recognition Take?

One fundamental prerequisite of any successful referendum is bipartisan support. Australians appear to be united in their support for constitutional recognition of Indigenous people; a 2011 Newspoll survey found 75 per cent of respondents in favour of recognition, with only 16 per cent against,[1] and both the Coalition and the Labor Party support formal constitutional recognition.[2] The shape that recognition should take, however, differs greatly along party lines. The Liberal Party supports recognition in a preamble,[3] whereas Labor has suggested that they either support recognition in the body or the preamble, pending the findings of the Panel.[4] This begs the question of whether recognition should occur in a preamble, or in the body of the Constitution.

Any preambular recognition of Indigenous people would include reference to the history, identity and values of *all* Australians. The preamble is not part of the Constitution; it heads the British *Commonwealth of Australia Constitution Act 1900* (UK)**.** Whether Britain can amend the act remains uncertain, although as a statute it does not require a referendum to be amended. The Panel must also keep in mind that the 1999 proposal for a preamble, including recognition of Indigenous Australians, only received 39 per cent of the 'yes' vote.[5] Consequently, for a preamble of similar effect to achieve majority support, the national resolve

would have to be vastly different to what it was in 1999, which is doubtful. In any event, confining recognition to the preamble is subject to the criticism that it is a tokenistic gesture, devoid of any practical significance. As Helen Irving notes, any piecemeal constitutional modernisation will 'sit awkwardly, like a new wing on an unrenovated building'.[6]

Alternatively, recognition of Indigenous people in the body of the Constitution may markedly improve the relationship between Indigenous identity and the law. The difference between preambular recognition and recognition in the body of the Constitution is that a preamble would not be subjected to judicial interpretation whereas recognition in the body would.[7] There is a risk that recognition may be subject to outcomes at odds with contemporary understanding of the statement's purpose and so the provision must be carefully worded.[8] In any event, it is probable that a statement of recognition would lead to positive outcomes for Indigenous Australians. In *Kruger v The Commonwealth,*[9] the High Court found that there are no 'implied' rights of equality in the Constitution, nor could the courts give any effect to any such 'implied' rights. If the statement is subject to any form of judicial scrutiny, it may have the effect of protecting equality and non-discrimination of Australians. This may ensure that the democratic values within the Australian identity are upheld by the courts.

Identity Politics and the Concept of 'Race'

In the absence of any recognition of Indigenous identity in the Constitution, the Constitution evokes the identity of its authors whose racially supremacist views are arguably inconsistent with the Australian identity of the 21st century.[10] However, the articulation of an Indigenous identity faces the challenge of consultation as well as dealing with the precarious concept of 'race'.

One of the lessons from the 1999 referendum is that deficiencies in the consultation process will stifle the success of any proposal. The preamble proposed in 1999 excluded the reference to Indigenous 'custodianship' despite protests of Indigenous leaders who claimed they had not been adequately consulted on the issue.[11] Incidentally, the Terms of Reference of the Panel state that the Panel will 'seek the views of a wide spectrum of the community'.[12] Exactly how the Panel should go about this has been the subject of disagreement. Noel Pearson, himself a member of the Panel, has demanded that Indigenous Australians should be given the opportunity to vote on the form of constitutional recognition, before it is put to the Australian people in a referendum. Pearson argues that because Indigenous people only constitute three per cent of the Australian populace their voice would be lost amongst the other 97 per cent of votes even though it is the Indigenous population that would benefit the most from recognition.[13] While this reasoning is attractive it neglects the point that the constitution is meant to govern *all* Australians indiscriminately. Pearson is wary of the criticism that this may entrench a sense of racial difference. However, he argues the entire process of recognition is essentially one group recognising another. This type of radical approach may hinder the Indigenous cause and arguably is the sort of racial arsonism that may see any proposal shelved indefinitely.[14]

Moreover, it is questionable whether the concept of 'race' has any lasting relevance in the Constitution. Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner for the Australian Human Rights Commission, notes that 'there's only one race in Australia, and that's us'.[15] Stemming from this is the proposition that identifying an Indigenous 'race' erroneously suggests that Indigenous identity is unified. Further, constitutional experts on the Panel have noted that the South African constitution contains no reference to race, and that it is possible that the concept of 'race' is an outdated concept in the 21st Century.[16] However, selling the idea

to Australians that race is an anachronistic concept may not sit easily with a referendum trying to recognise Aboriginal and Torres Strait Islander people.

In an attempt to rewrite the concept of race in the Constitution, the Panel has identified both ss 25 and 51(xxvi) as in need of either repeal or amendment.[17] Under s 25, the Federal Government will not count the votes of some Australians in the Lower House elections on the basis of their race, if a state law provides that their votes are not counted.[18] The practical significance of repealing s 25 would likely be insignificant: it is yet to be invoked and s 30 has been interpreted as allowing the Commonwealth Parliament the authority to determine its electoral procedures.[19] If the Commonwealth Parliament were to enact racially discriminatory voting laws, the courts may find them to be in contravention of the requirement in ss 7 and 24 that the Federal Senate and House of Representatives are 'directly chosen by the people'.[20] Kim Rubenstein finds that it is unclear whether there is an implied constitutional right to vote, and s 41 might not prevent racially discriminatory laws to this effect.[21] Instead, repeal of this section is needed instead to ensure that such an 'odious and outmoded'[22] provision is deleted so that the Australian value of equality is more accurately reflected within the nation's founding document.

Conversely, the Panel is more divided about the 'race' power in s 51(xxvi). As a head of power, it allows the Commonwealth Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.[23] From a strictly legal perspective, the High Court was divided in its interpretation of 'race' in *Kartinyeri v the Commonwealth*.[24] Malbon's argument that 'race' is a term historically grounded and culturally shaped renders the literalist approach which aims to discern a term's 'natural and ordinary meaning' inadequate.[25] Accordingly, the meaning and scope of the 'race' power is unsettled.

One possibility in amending the 'race' power is to add words ensuring that it can only be used to the 'benefit' of racial groups. The meaning of 'benefit' is, however, inherently subjective. It would be subject to unclear judicial interpretation, and manipulated for political gain by legislators. Alternatively, if the section is repealed, the Commonwealth will lose its ability to make laws for Aboriginal and Torres Strait Islanders under any other heads of power under s 51 that would otherwise genuinely be for the benefit of these groups.

The most favourable outcome would be to include a non-discrimination clause in s 51. Not only would this ensure that the Australian values of non-discrimination are protected, it would, if accompanied by a statement of recognition, improve the relationship between Indigenous identity and the law. The current protections against racial discrimination embodied in the *Racial Discrimination Act 1975* (Cth) do not have the binding power of constitutional amendments. Indeed the Northern Territory National Emergency Response Legislation demonstrates that the *Racial Discrimination Act 1975* (Cth) can be subject to suspension.[26]

How Far Should Recognition Go?

One of the main issues facing the Panel is whether recognition of Indigenous Australians should be rights-neutral or rights-engendered. Considering the opposition that met the National Human Rights Consultation in 2010, any invocation of Indigenous rights would be a bold move.

Should any Indigenous rights be invoked, concerns about new entitlements and causes of action could be met by provisions similar to those found in the New South Wales and Victorian constitutions. They both recognise Indigenous Australians, accompanied by wide-ranging limitation clauses stating that recognition does not give rise to any

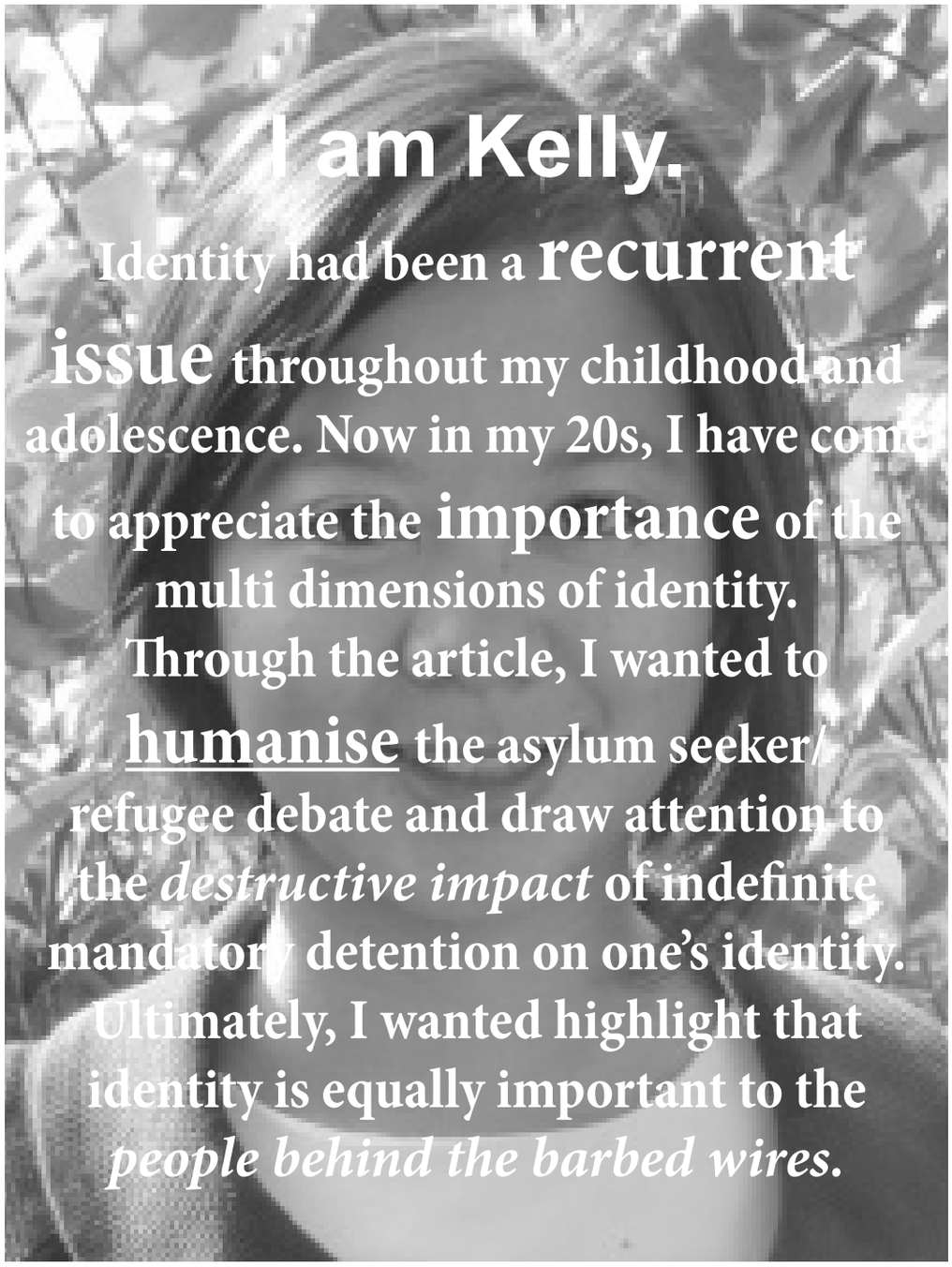
new claims or affect judicial interpretation. Understandably, the purpose of these exclusionary provisions is to avoid uncertainty about future legal actions and to avoid any legal liability for the governments. Taking a Janus-faced approach, however, is illogical: why recognise Indigenous rights while at the same time recognising that those rights have no legal effect within the system of law entrusted to protect them? Accordingly, the Panel should avoid any rights-engendered recognition of Indigenous people, lest it be seen as privileging one group over another within the Constitution and thereby giving rise to opposition within the community.

Conclusion

The continued and systemic discrimination against Indigenous people cannot be justified in a nation that prides itself on a 'fair go' for all. On the date of the National Apology to Australia's Indigenous People, many Australian's declared that they felt truly Australian for the first time.[27] The symbolic weight attached to formal constitutional recognition of Indigenous Australians would go even further. Assuring that our nation is one step closer to being free from discrimination will provide a more effective and inclusive framework of Indigenous identity within the law. This will require bold leadership from the Prime Minister. Her government must go beyond its poll-driven conservatism and ensure that the modern Australian identity and values are entrenched within our nation's founding document in a way that promotes equality and respect for all Australians.

Dusty Traces on Sun
Jimmy Le

The series of photographs is from my travels in South America 2009-10 and from them I was able to explore notions of cultural identity. I found that identity was more than a label we put on ourselves but something we draw out from the small traces of all of our experiences and environments. A pile of rocks, a grumpy old lady and a vast desert valley are all but many nuances that form an identity.


I am Kelly.
Identity had been a recurrent issue throughout my childhood and adolescence. Now in my 20s, I have come to appreciate the importance of the multi dimensions of identity.
Through the article, I wanted to humanise the asylum seeker/ refugee debate and draw attention to the *destructive impact* of indefinite mandatory detention on one's identity.
Ultimately, I wanted highlight that identity is equally important to the *people behind the barbed wires.*

A Multidimensional Identity

More to Him than Meets the Eye

K e l l y X i a o
J.D. II

While it is easy to identify a person by their genetic predispositions, job titles and hobbies, such an approach is superficial and simplistic. Often, it is one's life experience that shapes who they are today.

Mortezza's long ponytail and generous smile could well fool you into thinking he was a rock star. In fact, he is a loving husband, a father, a university student and a businessman. Whilst his many roles reveal Mortezza as a person who successfully juggles life's challenges and wants to all of what life has to offer, the intensity in his eyes reveals an insight into how he developed such driven and unbreakable spirit for life.

This is no ordinary coming of age story. This is the story of many voiceless people misunderstood by many Australians. This story tells of the changes in identity experienced by an ex-detainee and refugee. This is a personal story which illustrates the preciousness and fragility of identity. This is the story of Mortezza Poorvadi, who almost lost his sense of self on many occasions. He was one of the lucky ones. For some, that identity slipped away and never came back.

I Ran For My Life

Many people would remember their adolescent years as scattered with the traces of angst, rebellion and struggle for independence. But growing pains were often overshadowed by the fond memories of epiphanies and increasing maturity in coming to terms with oneself. The specialness of the formative years is a recurrent theme in diverse literature and discourse.

For some teenagers, the growing pains depicted in mainstream media were far removed from reality. Mortezza Poorvadi's adolescence was consumed by experiences that would make the average teenage-hood seem blissful and heavenly. The adversity he experienced and eventually overcame is not easily comprehended by adults, let alone his peers outside the barbed wire fences.

Born in Iran to an Iraqi mother, Poorvadi's family faced constant persecution from the Iranian Mullahs and Saddam Hussein's army.[1] Mortezza was 16 when his family was forced to flee Iran.[2] The situation in his country was such that the family was forced to choose between staying and dying, or fleeing and living. Mortezza's family chose the latter. In so doing, they handed their lives to people smugglers, in order to escape the abject misery of a country to which they no longer belonged.

Boat Person, Queue Jumper

Mortezza boarded a tiny fishing boat which was crammed with 280 other people. Luggage was not permitted and passports and documents were forcibly taken away by the people smugglers.[3] Any sense of identity was rapidly stripped from the refugees, who were powerless to prevent this. In the middle of the ocean, the frail and overcrowded fishing boat sailed for miles in abhorrent conditions until intercepted by Australian officials not far from Christmas Island.

Australians have popularised the usage of the term 'queue-jumper' to describe irregular maritime arrivals who seek asylum in Australia without proper paperwork. This group are often frowned upon by mainstream Australia because they are perceived to have taken advantage of those who wait for the approval of a refugee visa before entering Australia.[4]

However, the 'queue jumper' label is based on fundamentally misguided presumptions. As a party to the 1951 UN Convention Relating to the Status of Refugee,[5] Australia has obligations to protect human rights of all asylum seekers and refugees who arrive in Australia, regardless of the mode of arrival.[6] It is naïve to think that ideal paperwork is always possible to obtain in times of desperation. There is simply no such thing as a queue. 'Jumping the queue' is therefore only a concept conjured up by political parties and media to encourage fear within the Australian public towards this group of asylum seekers.

Detainee Days

The people on Mortezza's boat were taken to mandatory detention. When they arrived at their first Australian destination, they were confronted with endless shades of grey. The grey concrete slabs, the grey blocks of cabins, the grey barbed wire… even the blue sky was tainted by the grey outlines of high wired fences. Startled by the sight of bleakness, his mother could not help but cry. She wept for the hellish days to come and the uncertain future for her teenage son.

It is not an exaggeration to state that the age between 16 and 20 are the golden years of youth. This is the time where one sheds the remnants of childhood and acquires both the ability and the rights to discover one's adult self. Milestones such as reaching the age of sexual consent, the voting age, the drinking age and the end of school are causes worth celebrating on the path to independence. Like other adolescents, Mortezza yearned for the freedom and independence to be his own person during these years. Unlike other adolescents, however, he spent these years behind the barbed fences, inside enclosed walkways and metal grills. Those were the years in which Mortezza was detained at Port Headline, Villawood and Woomera detention centres at the whim of the Australian government.

Mortezza did not commit a grossly repugnant crime. He simply fled for his life. Yet he was locked up like a criminal, sentenced to an indefinite period in detention. It is hardly surprising that this resulted in him questioning his existence, the purpose of his life and his identity, and receiving no meaningful answer:

> There was a point of hopelessness of thinking why am I alive. They took away everything I was living for – friends, education, freedom. This was the time when I was 16 to 20 – the time when your personality develops. I slashed my wrists, drank shampoo, did a 12-day hunger strike, stitched my lips together... [7]

Mortezza became despondent and self-destructive. In light of the outside world's apparent obliviousness to his situation, he attempted suicide seven times during his time in detention.[8]

Sadly, Mortezza's story of self-harm is not

unusual. It demonstrates the destructive impact that indefinite mandatory detention has on detainees. Recently, reports of self-harm across detention centres around Australia have been particularly widespread. Incidents of voluntary starvation, ingestion of detergent and chemicals, wrist-slashing and hanging were among the stories of self-destruction.[9] In the last six months alone at Villawood Immigration Detention Centre there have been 18 reported incidents of actual and attempted self-harm, and five out of six fatalities were the result of suicide.[10] Detention centres have also been plagued by riots and protests.[11] As these facilities exceed operational capacity,[12] issues surrounding delay further contribute to the deteriorating mental health of detainees. One group on Christmas Island told the Australian Human Rights Commission that they could not bear the waiting and uncertainty, and should have died in Sri Lanka or in the ocean.[13] This complete loss of will to live has the danger of reducing asylum seekers' sense of identity to nothingness.

Such troubling accounts have pushed many human rights agencies to urge the Australian government to rethink the system of indefinite mandatory detention currently in place.[14] The Australian Human Rights Commission has repeatedly called for the termination of the system on the basis that it engenders breaches of Australia's international legal obligations.[15] The blanket approach of a mandatory detention policy is inconsistent with the United Nations High Commissioner for Refugees guidelines.[16] The thought that the Australian government's detention policy is instrumental in shaping the deteriorating mental health of many asylum seekers and refugees is an unthinkable and deeply disheartening thought. In order to prosper, this country needs to foster courage and instil hope in people, not to break their spirit and soul by destroying their sense of self and purpose in life.

Freedom: Life as an Ex-Detainee

Fortunately, Mortezza's was a story with a happy ending. His strength and spirit were unbroken by the adversity he experienced, and he was eventually granted refugee status after enduring four years in detention. Mortezza's story provides some hope that despite the obstacle that Australia's indefinite mandatory detention system poses, one's identity can be refound, revived and rebuilt.

After being released from detention, Mortezza married a Burmese woman he met at Villawood and they now have a son. The couple both passed the citizenship test. Mortezza is now a self-employed renovator and is studying civil engineering at UTS.[17] But the days spent inside the detention centres will remain emotionally scarring. Identity is conditioned by the environment one operates in. The replacement of barbed wires with freedom has allowed Mortezza to grow, develop and achieve as a person. Gradually, Mortezza is coming to terms with his lost years of youth, and is embracing the roles of husband, father, businessman and student.

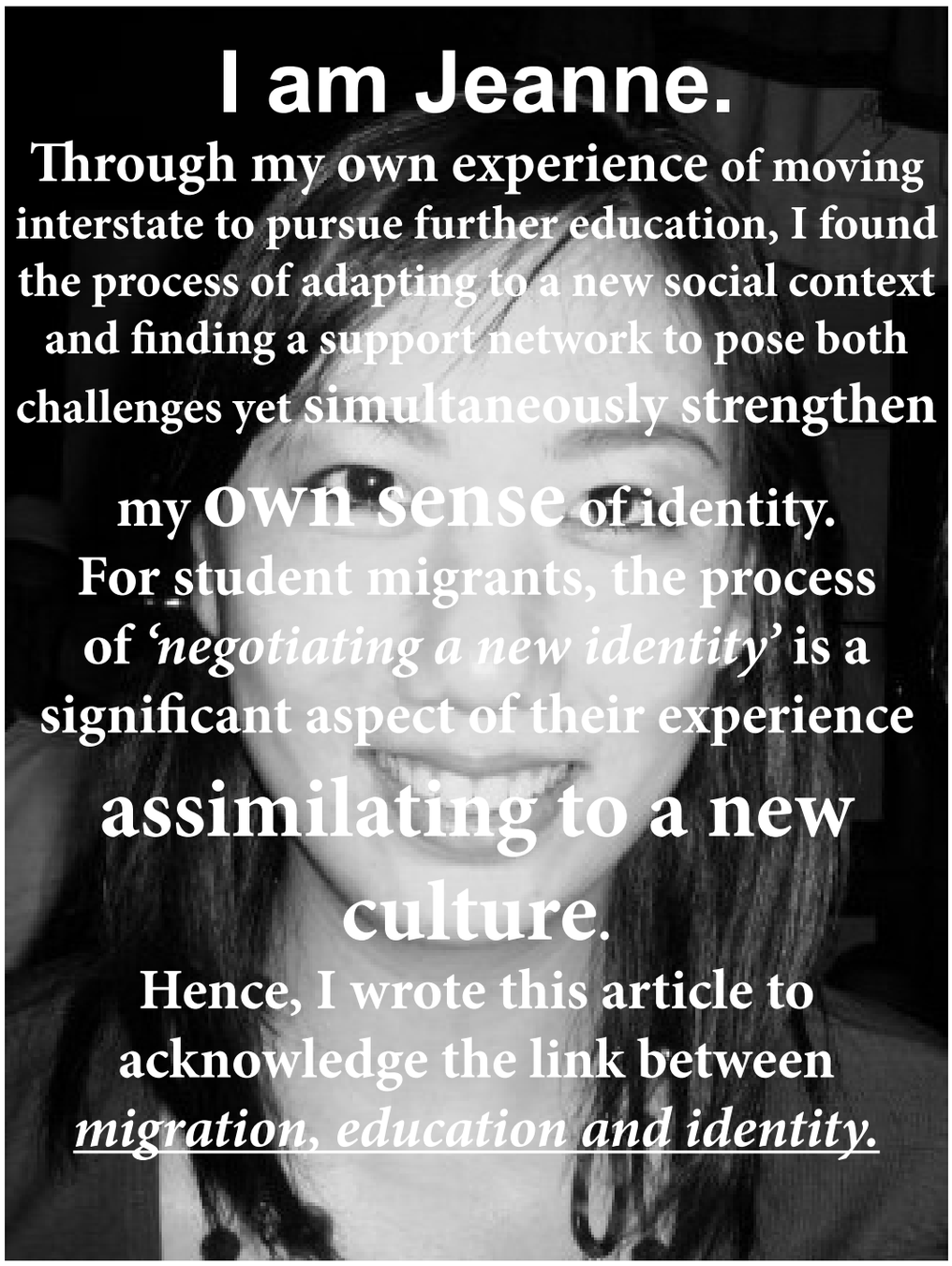
However, Mortezza's story is not echoed universally. Time spent in detention has, for countless ex-detainees, proved irrevocably mentally crippling. Many of Mortezza's friends and acquaintances from his time in detention suffer psychological damage that inhibits their ability to lead normal lives, so that although they have not been in detention for seven years, they are still reliant on a pension.[18] For them, freedom will be forever tainted by the detainee experience.

For others, the hopelessness was too much to bear. They lost any sense of self or purpose, and chose to release themselves from the suffering. By ending their lives, they left their stories untold and their future unfulfilled.

Mortezza's experience serves as a poignant reminder of both the imperative and the

fragility of a sense of identity. Yes, he is now an Australian citizen and a person who leads a fulfilling and happy life personally and professionally. Yet he is more than this. The average Australian is not able to comprehend this fellow citizen's suffering behind the barbed wire fences. Mortezza's experience should open our eyes to the devastating impact of indefinite mandatory detention on a person's identity, and to the urgent need for reform. Australia should be a country that fosters hope and courage in its people, not one that instils fear and breaks spirits.

Photograph by Olivia Teh


I am Jeanne.
Through my own experience of moving interstate to pursue further education, I found the process of adapting to a new social context and finding a support network to pose both challenges yet simultaneously strengthen my own sense of identity.
For student migrants, the process of 'negotiating a new identity' is a significant aspect of their experience assimilating to a new culture.
Hence, I wrote this article to acknowledge the link between migration, education and identity.

The Visa Waiting Game

Identities in Limbo

J e a n n e H u
J.D. II

Jae Hyung Kim came to Australia in 2000 from Seoul, Korea. The first Australian identity he adopted was as a boarder at the Cranbrook school for boys in east Sydney. Over a decade later, Jae has completed two degrees and is now preparing to start his doctoral thesis in Intellectual Property Law.

As one of the most politically informed people I know, it is ironic that Jae's status as a 'pending applicant' for Permanent Residency ('PR') has disrupted nearly every aspect of his life in Australia, including achieving a national identity. Jae first applied for PR in 2008 after graduating from a masters program in International Trade Law. Like tens of thousands of international Australian university graduates, Jae emerged from his course to find that the regulations had changed. As a result, Jae's migration application has been stuck in the visa processing system for the past three years. Jae comments that, 'the decision for a person to move to a new country is probably the biggest decision of their lives, there's a lot of planning involved, to keep changing the rules so frequently like that, well it's just unfair.'

The Relationship between Education and Immigration

Australia is but one of a few countries that supports a substantially intertwined immigration and tertiary education system. Education remains at the forefront of Australian service exportation, and skilled migration exists as a national 'safety blanket' or societal solution to an ageing population. However, from a public policy perspective, education as a pathway to migration has largely remained an unmentionable fact. Since 1998, amendments made to immigration legislation under the Howard Government have allowed international students the option of applying for onshore permanent residency within six months of completing their education program. It was envisioned that the relative familiarity with Australian society, exposure to the English language and skills gained in Australian institutions would make students the ideal fit for skilled migration. Although this process, dubbed 'student switching'[1] did not expressly implement a pathway for migration, such representations implied a relative ease for students to gain residency. This resulted in a new wave of 'student migrants' uncharacteristic of previous immigrant categories. The objective of this article is to provide an overview of the interactions between the individual student and the bureaucratic processes of applying for permanent residency, how these relations impact upon their identity, and social

positioning within a new society.

Current System

The current federal immigration minister Chris Bowen has expressed that the Labor Party's new direction for skilled migration is to be one 'driven by the needs of the economy [...rather than] by the desires of the people who want to come here as skilled migrants.'[2] The migration visa system (begun in 2009) runs according to 'priority processing', which prioritises applicants with urgently needed skills, rather than according to the order in which the applications were lodged. The Department of Immigration and Citizenship ('DIAC') categorises applicants into four categories. For the 38,000 onshore applicants like Jae who are in Category 4, the official DIAC advice is that applications are 'unlikely to be finalised before the end of 2011.'[3]

The concern lies in the uncertainty of such advice and the lack of solid instruction available to applicants. Jae acknowledges that the government has a prerogative to accord preference to skilled migration policy to attract skills that are valuable to the progression of the country. However, he asserts that, 'it is one thing to determine migration and education are to remain two separate fields, it is another issue to not provide any framework for explanation or expectation.' The frequency of regulation changes within the lifetime of an application being lodged places a severe strain on the self-perception and social status of the individual.

Whilst bridging visas allow Category 4 applicants to work and study, this temporary status excludes them from certain job opportunities, international movement and the peace of mind when purchasing property, placing them at odds with their Australian peers. While their lives are in limbo, Category 4 applicants have to undergo a process of 'identity negotiations'[4] in which they search to find a balance between wanting to settle and adapt to the host community and at the same time anticipating the possibility of having to uproot and return to their country of birth. Having spent his teenage and early adult years in Australia, Jae no longer identifies culturally with Korea, and sees his future life in Australia. However, for Jae and thousands of others, the lack of reciprocity is very disheartening. Participating in a constant waiting game with no end in sight prevents the individual from gaining any form of substantial identification with the host country. Jae describes the process as having severe psychological effects: 'as regulations keep changing, the hope of being granted residency fails, you can't really figure out where you really fit in anymore.'

The public portrayal of student migrants can also have a grave effect on the self-perception of the individual. During an interview on the ABC Radio program *National Interest* earlier this year, Mr Bowen described Category 4 applicants as 'a group of people who came to Australia with a view to permanent migration and to study courses which were designed to maximise their chance of residency, courses such as hairdressing and cookery.'[5] Such depictions bring to mind images of shop-front colleges and internet degrees, which devalues the reputation of skilled migrants and the benefits they bring to Australian society. Jae finds this generalisation of Category 4 applicants quite offensive. Such sweeping statements suggest that international students are here to manipulate the migration system to align with their own wishes, thus promoting a derogatory view of international students to the Australian public.

In addition to such negative representations, the series of attacks on Indian students in Melbourne, Sydney and Hobart in 2008-09 raised international concern as to safety of overseas students in Australia.[6] The government response at the time was to send a delegation of high profile representatives to India in order to ease this concern. Both the attacks on students and Mr Bowen's comments detract

from Australia's international reputation as an education service provider. Given the importance of education as an export to the Australian economy, the government needs to be more strategic in maintaining its own image to the international community as well as providing the appropriate level of physical and emotional welfare for international students.

Student Migration Laws

At the core of the problem may be that Australia has to yet to implement migration laws and procedures that are just, clearly expressed and readily comprehensible.[7] Applicants who eventually do emerge successfully from the rocky road to residency have described their experience as 'passing a test or meeting a threshold' rather than a smooth transition into a new life. Jae agrees with such descriptions, arguing that, 'the points system focuses on how much money you have, the English test is not reflective of someone's actually ability to assimilate or communicate fluently.' To Jae, the system is a way of telling people what they should be to get residency.

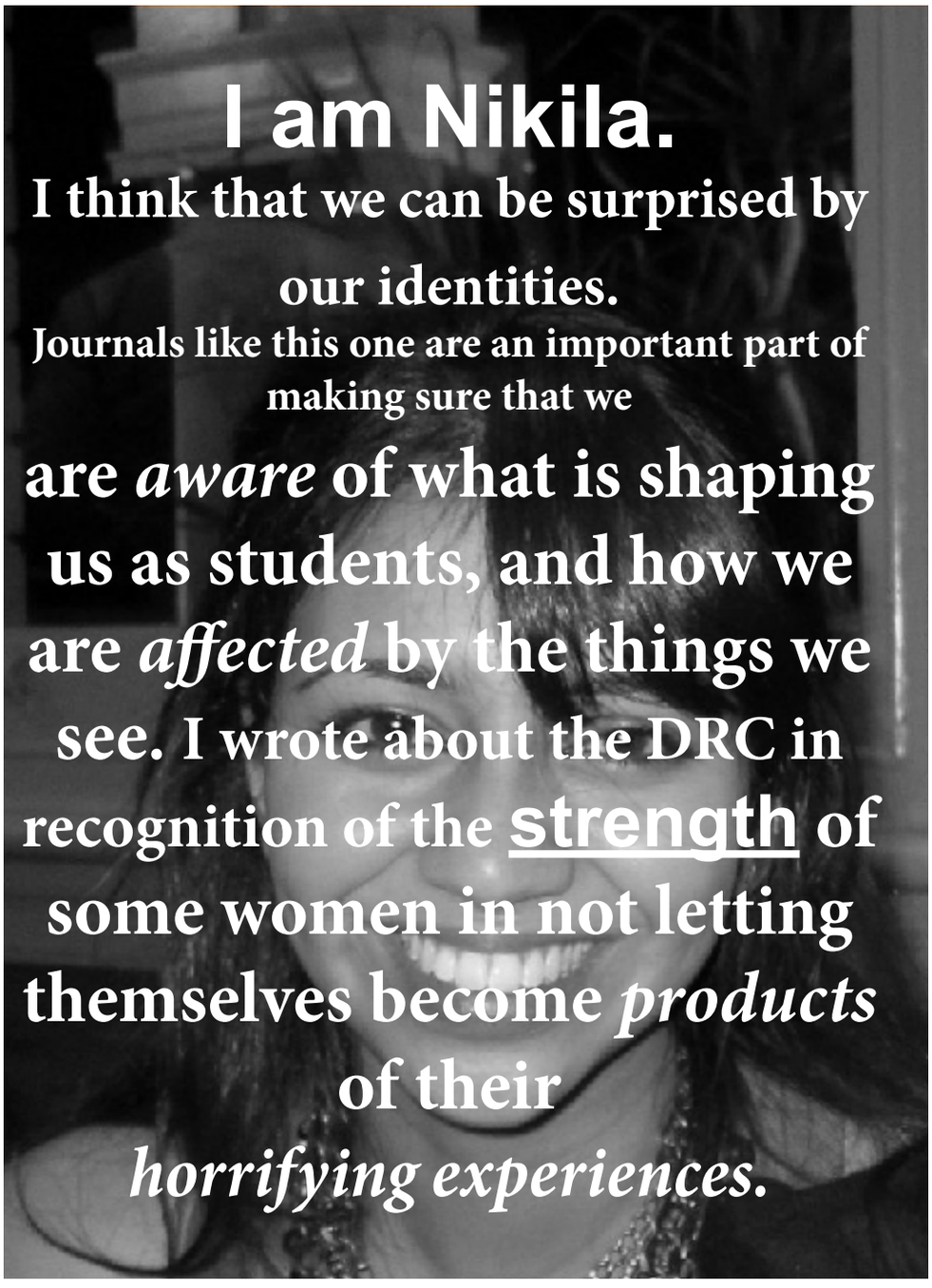
The controversial decision by former immigration minister Chris Evans to cancel and refund the visas of 20,000 prospective migrants raised questions as to whether decisions that impact on so many lives should be left up to the stroke of a pen from the Minister. While this type of action has a drastic effect on people already starting to assimilate and start new lives in Australia, DIAC has the legal powers to cancel student visas through either mandatory or discretional means. Under s 116(1)(fa) of the *Migration Act 1958* (Cth), the Department can cancel applicants' visas if it forms the view that the visa holder is no longer a 'genuine student.'[8] In addition, the supplementary explanatory memorandum to the Migration Legislation Amendment (Overseas Students) Bill 2000 introduced a discretionary cancellation power in response to the Federal Court decision in *Nong v MIMA*.[9] At the end of the day, the current system allows the government to have the final say over who gets to stay and who has to leave. As a general trend, jurisprudence from the lower courts has supported decision-makers' discretion, even when the effects have been harsh.

Alternative Solution

This article provided an overview of the permanent residency process and how it impacts upon the identity of the individual student. Evident from Jae's story, the bureaucratic process of attaining residency has had a dramatic effect on the personal and public perception of the applicant. It should be acknowledged that the subject of migration is one fraught with complexities. While the role of the law should be to provide a bulwark against politics, it is evident under the current system that legislation remains subject to ministerial discretion, which can be exercised arbitrarily.

Whereas there is no solid solution, the alternative is to focus on the foundation of the problem, which is the perceived link between education and immigration. Evidently, meeting the threshold for gaining an education visa is low, whereas meeting the requirements for skilled immigration is relatively high. Hence the first of two formal options is to expressly make clear to applicants that such a relationship of gaining residency through the course of education does not exist.

However, given the significance of education to the Australian economy, I believe the more plausible option may be to refocus on the standard of the education system itself, and raise the threshold of education service to be on par with migration requirements.


I am Nikila.
I think that we can be surprised by our identities.
Journals like this one are an important part of making sure that we
are *aware* of what is shaping us as students, and how we are *affected* by the things we see. I wrote about the DRC in recognition of the strength of some women in not letting themselves become *products* of their
horrifying experiences.

Rape as a Weapon of War in the Democratic Republic of Congo

Mobile Courts and the Social Dimension of Sexual Crimes against Women

N i k i l a K a u s h i k
B.A./LL.B. IV

In post-conflict societies, prosecuting war crimes is critical to the creation of a sustainable peace.[1] In the Democratic Republic of Congo ('DRC') the need to prosecute sexual violence is growing desperate: the failure of the Congolese government to try rapists has implicitly condoned the continuation and proliferation of sexual crime. This has had devastating consequences for the women and girls of the DRC, with approximately 400,000 raped every year.[2] The staggering breadth of the problem has cast a shadow over attempts to look hopefully to the future in rebuilding the DRC, making redress crucial to the DRC's future political strength.

Mobile Courts have become a primary venue for trying soldiers of the Congolese National Army ('FARDC') for sexual crimes. Throughout two civil conflicts in the DRC, from 1996-1997 and 1998-2003, all sides involved were accused of using rape as a weapon of war.[3] Following the end of the second conflict, a transitional government integrated soldiers from remaining rebel groups into the FARDC. The troops of the newly constituted FARDC were insufficiently trained and improperly vetted,[4] with the result that young, undisciplined forces now fill the DRC's jungles and rural territories.[5] Despite the formal end of conflict, these renegade troops continue to inflict systematic sexual violence on civilians.

All women, from the elderly to children as young as two,[6] are targeted by FARDC factions, and the fact that the use of sexual crime developed from the tactics of previous wars has seen many Congolese people become resigned to its continuation.[7] Rape is used as a weapon of war to terrorise women, exert control over them or punish them for perceived collaboration with vaguely identified enemies.[8] The impact on victims is disastrous. Limited access to hospitals and the rapid spread of HIV has resulted in thousands of deaths following sexual violence. The impunity facing perpetrators has left Congolese women feeling as though a war is being fought 'on their bodies'.[9] The brutality of the act is aggravated by practices of thrusting sticks, guns and knives into women, leaving them with severe internal injuries and permanent incontinence.[10] The trauma of rape is escalated by its social consequences - many victims are subsequently met with hostility and rejection by their families and communities. Given that most Congolese girls and women are dependent on men for protection, their rejection leaves them vulnerable to further harm,[11] and tainted by a damning stigma that makes it almost impossible for rape victims to

re-establish their lives.[12]

This paper attempts to explore the potential of Mobile Courts to tackle sexual violence in the DRC. The first section will consider Congolese legal provisions on rape, and the role and effectiveness of Mobile Courts in implementing them. The second section will describe the foundations of the problem in the DRC, and explore the function of Mobile Courts in altering popular attitudes towards rape. Particular focus will be placed on the long-term effects of shifting perceptions of rape, and the framework established for future prosecution.

Laws Addressing Sexual Violence and Barriers to Implementation

DRC law creates an obligation for the state to prevent and punish acts of sexual violence. In 2006, the Congolese Parliament passed new legislation on sexual crime, broadening the scope of offences recognised and criminalising such acts as the insertion of objects into a woman's vagina, sexual mutilation and sexual slavery.[13] It further defines any sexual relation with a minor as statutory rape, with penalties for the various offences ranging from five to 25 years.[14]

Despite the unequivocal legislative provisions surrounding rape, enforcement remains problematic, with those seeking to prosecute sexual crimes facing a long history of impunity. The DRC's dualist judicial system allows both common law courts and traditional community courts (created during the Colonial era to hear actions against Indigenous people)[15] to apply legislative provisions against rape. Yet the enormous size of the DRC, with its weakened administration following years of warfare, has left many citizens unfamiliar with its rule of law.[16] Common law courts have been incapable of hearing the vast majority of grievances, given that most rural communities do not have local courts. Traditional community models and informal reconciliatory bodies have also proved inadequate, as the DRC government has been unable to recruit trained professionals to work in remote jungle territories.[17] Moreover, these bodies are not centrally governed, and where they are operational, are often subject to partisan control and destabilising influences.[18] This leaves the majority of Congolese civilians subject to customary justice administered by local chieftains, or with no avenues of recourse at all.

In addition to practical barriers to enforcement, the unstable political situation in the DRC has led authorities to consciously shelve the task of prosecuting rapists.[19] While the transition from dictatorship to democratic government has been heralded a success,[20] this is only in the limited sense that there has been no outright resurgence of conflict since the end of war. Recognition of the fragility of this 'negative'[21] peace has cautioned the government against prosecution, in the interests of maintaining a smooth transition. Jason Stearns, head of the UN Group of Experts on the Congo, observed that 'impunity has been to some extent the glue of the peace process',[22] with the threat of guerrilla attacks a constant and troubling reminder of the possibility of a rapid deterioration into war.

In 2004, in a landmark step, the Congolese government expressed its willingness to cooperate with an International Criminal Court investigation into war crimes.[23] Though a positive measure which resulted in the arrest of notorious rebel leader Thomas Lubanga Dyilo, the large numbers of alleged rapists and war criminals in the DRC make international hearings only a preliminary step.[24] With Congolese women at the mercy of vicious soldiers, the need for effective *domestic* measures is apparent.

The Role of Mobile Courts

Mobile Courts attempt to supply the inadequacy of the DRC judicial system by transporting judges, prosecutors and defence lawyers to remote jungle communities affected by sexual

crimes. Those wishing to bring allegations of sexual violence are heard over a period of weeks or months, before the congregation travels to the next rural site. The Mobile Courts form a part of the Congolese legal system, though elements of traditional procedure are incorporated into their operation.

In recognition of the population's ignorance of the laws criminalising rape, all members of the community are encouraged to attend trials, which are conducted in the centres of villages.[25] Worrying increases in civilian rapes have inspired this structure,[26] and the message that rape is a serious crime is reinforced by the fact that some courts are specifically constituted to hear cases involving sexual violence. Questions remain about the effectiveness of the Mobile Courts in improving the lives of women in the DRC.

Balancing Traditional Practices with Congolese Law in Pursuit of Just Outcomes

The conduct of trials so far suggests that idealistic faith in the capacity of the Courts to bring the rule of law to remote Congolese communities may be misplaced. At the outset, the Mobile Courts appeared to embrace their role as enforcers of the long ignored Congolese law on rape, imposing harsh jail terms (ranging from five to 25 years) on perpetrators.[27] Yet the Courts' stated recognition that 'justice and the law are two different things' has seen some departure from traditional values, potentially undermining community perceptions of the Courts as bodies that impose justice.[28] For example, in situations involving statutory rape, tension between customary values and legalism comes to the fore. In one reported case, a 16-year-old girl sobbed as her intended husband was accused of raping her.[29] Although she and her mother sought to formalise the union in the traditional way, the girl's father brought a claim of statutory rape, contrary to her wishes. The fact that she was under 18 resulted in her boyfriend's conviction, an outcome divorced from community acceptance of girls marrying at a relatively young age.

The need to reconcile justice and the law is again highlighted in cases shaped by an absence of forensic or medical evidence supporting the claims of either party, with conclusions based on the word of one against another.[30] This is particularly problematic where parties are at a power imbalance: in another reported case, a 10-year-old girl testified that a respected member of the national police had attempted to rape her.[31] In such cases, the Courts have relaxed judicial procedures, introducing community standards to replace legal standards. For example, limited civilian participation in trials has meant that throughout proceedings audiences loudly express approval or disapproval of their direction.[32]

The Woodrow Wilson School argues that combining traditional community standards of adjudication with the law undermines the ability of a court to address serious crimes.[33] However, in many cases departures from legal process are unavoidable, particularly in light of the fact that the DRC's record system disintegrated during war, leaving a paucity of credible birth records. In situations of alleged statutory rape where victims did not know their ages, the guilt of the accused rested on guesswork. At several points during trials children were called before courts to make visual comparisons with victims to determine their approximate ages.[34] Such barriers cannot be negotiated without compromising formal standards.

The Mobile Courts are in their early stages of operation, and any conclusion on how these issues will be addressed into the future, and their effect on the prosecution of sexual crimes, would be premature. The development of the unrest and the current frequency of sexual violence will inevitably shape the Courts' direction, validity and efficacy. Hopefully, their work in implementing Congolese law as faithfully as circumstances permit will see

Mobile Courts become an effective means of legally addressing sexual violence.

The Work of Mobile Courts in Shifting Community Attitudes towards Women

The effect of sexual violence on the women of the DRC goes beyond the physical danger posed to them by the prevalence of rape, and the difficulties they face in re-establishing their lives. When asked why the soldiers rape women, Nyangi Kabali, an interim tribal king in Eastern DRC, responded:

> The first reason is that they do not really know what they are doing. They are not informed. They do not know it is against the law.[35]

This statement points to the need for education amongst soldiers and civilians about the law against rape, a daunting prospect in light of DRC's geographical vastness and poor infrastructure. Kabali went on to say:

> The second reason is witchcraft. The men want to possess power. They want to obtain charm… perhaps they need good luck before they set off for the mines and find gold. There are no women near the mines to bring them luck.[36]

Such attitudes are indicative of the depth of the DRC's social problems, which are intertwined with ancient tradition and entrenched in a contemporary culture that fails to protect women. A member of the Mai Mai militia justified his actions in raping 25 women by stating, 'we were just abiding by our magic potion. We had to rape a woman in order to make it work.'[37]

Faida Mwamgilwa, Minister for Women's Affairs in the DRC, has alluded to the underlying problem of Congolese women's social inferiority. She commented:

> Women who are raped are alone. When a woman finds herself the victim of sexual violence… she will flee to the forest to hide. She is ashamed to go home, even to her own family, because her own husband will reject her. Congolese women find themselves in the middle of a battlefield.[38]

With two-thirds of Eastern Congolese women illiterate, many are left with no alternative but prostitution or sexual slavery when rejected by their families and communities as a consequence of rape. As the men who raped them maintain their social status and are reintegrated into the army or pursue political careers, victims of rape are left in hopeless situations, constantly haunted by the prospect of more sexual abuse.

Women's organisations are increasingly articulating the need for respect in the treatment of women. While these groups recognise and appreciate the deterrent effect of legal action, the real achievement of any adjudicatory mechanism will lie in combating the prevailing community stance that rape is acceptable. Activist Christine Karumba states that this requires widespread recognition of the valuable role of women in the community, and awareness that the DRC cannot be rebuilt without their involvement.[39] Movements creating recovery camps and support groups for victims of rape are helping women to voice this message themselves.

The Mobile Courts are lending weight to such attempts to shift Congolese attitudes towards sexual violence, recognising that any remedies to widespread sexual crime must go beyond law enforcement. The place of the Mobile Courts within the legal system is inextricably connected to the continuing violence in the DRC, and their role in educating the public about rape makes them a part of the conflict they are scrutinising. Arguably, this dualistic

role undermines the Courts' authority as mechanisms for justice,[40] as they are incapable of viewing events in the DRC with the objectivity and distance required for effective adjudication. Records of proceedings suggest, however, that compromises on legalism have so far been limited to procedural issues and situations where legal solutions are unavailable.[41] It is inevitable that a legal body interacting with a conflict will prioritise the immediate need for education above strict legal formalities, and reflect the values of the communities it operates within.

Certainly, efforts to ensure that trials are public and enforce community values suggest that the Mobile Courts will not fall subject to the perceived divorcement from society of past prosecutorial and reconciliatory measures:their place within the community might be the key to their long-term efficacy.[42] The Courts are demanded and driven by Congolese people, and will hopefully give rise to the leadership required for permanent social transformation. The domestic foundations of the Mobile Courts also provide answers to perceived harshness and inflexibility in sentencing.[43] As the courts become an entrenched part of the Congolese legal system, such standards are likely to be accepted as reflective of *community* imperatives to stop sexual violence. Further, concern that reparations orders are rarely given effect,[44] due to the fact that perpetrators are usually in a similar state of poverty as victims, is diminished. In a system genuinely grounded within the community, the need for truth must be approached with the broad interests of the community in mind. The Courts have accordingly prioritised fighting acceptance of sexual crime over strictly enforcing the law.

Such a result is inevitable, and ultimately favourable. In concert with the Courts' instructive function, the structure of the Mobile Court system is promising for the future of law enforcement. Once genuine social change is initiated, through the Courts and other measures, the place of Mobile Courts within the Congolese legal system will allow them to effectively enforce the rule of law in remote communities. Until such a shift is established, however, the Courts' legal position must be secondary to their role in promoting widespread change in attitudes towards women.

Conclusion

The beliefs fuelling sexual violence in the DRC are firmly entrenched in the nation's history and culture. The Mobile Courts embrace the social dimensions of the problem, with a view to disentangling socially accepted practices from the need to respect the dignity of Congolese women.

Presently, visions of restoration, peace and reconciliation seem distant, though the manifested drive of the Congolese population to address sexual crimes is hopeful. The firm foundations of Mobile Courts within the DRC's legal system should see them develop into effective, devoted law enforcement bodies. Regardless of the ultimate success of the Mobile Courts, the social change they are conditioning is promising for the future of Congolese women.

I am Ramya.

To me, identity is *fluid*, yet it also gives form. My identity gives me direction and purpose. I am a young person, *a climate activist*, a law student, a traveller and above all a d r e a m e r . The stuff of my dreams - the *sustainable, honest and just plains of the future* - inspires me to work towards it today.

I am Warren.

Every day I see people are **identified by what they do, *how they look,* and who they associate with. The key, however, is that no person can *ever be defined by a single idea.* It is for this reason that there is neither a greater nor more exhilarating challenge than seeing the world from another's perspective.**

Constitutionalism Following the Arab Spring

Creating and Sustaining Democracy

Ramya Krishnan & Warren Oakes
B.A./LL.B. IV B.E. (Hons)/LL.B. VI

An assertive current of democracy has been driving through the Middle East. Dubbed the 'Arab Spring', it has and continues to upset the calcified foundations of many authoritarian governments in the region. Democracy may finally get a foothold in countries such as Egypt, Tunisia and Yemen as citizens in these countries forcefully demand a say in how their countries are governed. The critical challenge is ensuring that the uneasy peace and possibility of democracy is not choked by the region's fraught and frequently violent identity politics.

Forging a constitution that weaves durable democratic institutions and practices into a newly defined national identity is crucial to meeting this challenge. As the highest form of state law, a constitution provides a framework within which far-reaching institutional reform can take effect, and contains both procedural and substantive mechanisms for furthering peace in a post-conflict setting.[1] Procedurally, a constitution provides a structured context for parties to deliberate and reach consensus. Substantively, a constitution can put in place a configuration of institutions that promotes peace and consolidates national identity.

The Middle East is a region notorious for the conflict-prone clash of ethnic and sectarian identities. Furthermore, many of the Arab Spring countries do not have a strong history of civil society and are unfamiliar with the institutions and freedoms that underpin democratic engagement. If emergent constitutions are to effectively act as a vehicle for national dialogue and peace in a post-conflict setting, these local dynamics should colour the process and substance of constitution-making. In light of this, this paper will briefly consider the issue of designing a constitutional review process that is perceived as legitimate. It will then canvas the substantive constitutional concerns about how to navigate the critical issues of majority rule versus minority rights in the context of divisive identity politics and the role of religion in the state.

Procedural Considerations

Ensuring that the constitution-making process is perceived as legitimate is vital to the durability of a constitution and the democracy that it seeks to sustain.[2] It is outside the scope of this article to explore in depth the full gamut of factors relevant to conferring legitimacy on the constitution-making process, but two critical procedural considerations must be mentioned.

First, as many key stakeholders as possible should be involved in the drafting of the

constitution if a constitution is to survive.[3] How stakeholders are identified will depend on the local circumstances, but will be particularly important in cases of multi-ethnic, multi-religious or multi-linguistic societies. This is because it is necessary to recognise the interests of all groups in a document that will define a national identity. At the time of writing, Tunisia looks set to have elections on 24 July 2011 for a constitutional council tasked with drafting a new national constitution, with the elections based on proportional representation by party list.[4] In Libya, in contrast, it may be useful to have an interim agreement assuring all parties a seat at the decision-making table for the purposes of peace settlement. Such an agreement should be short term and ultimately trigger a more democratic process of conflict resolution that is unconstrained by inflexible group guarantees.[5]

Secondly, a balance between wide public participation and ensuring a coherent constitutional design that will sustain democracy should be struck. There is a direct correlation between promoting popular participation in the constitution-making process and the legitimacy of the resultant constitution. Furthermore, popular participation can facilitate the broader social goal of nation-building and developing national identity.[6] For this reason, civic education should be rolled out and citizens encouraged to make submissions on a draft constitution. However, drafting a constitution is a complex matter and a level of public participation without proper deference to experts may come at the expense of a less than coherent constitution. For this reason, representative rather than direct democracy may well be preferable in the absence of a palatable distrust of the regime assigned with the responsibility of making the constitution.[7]

Substantive Considerations

Electoral System Choice

In both Tunisia and Egypt, the secular liberal order that fronted the revolutions has splintered and is ill-organised for early elections. Parliamentary elections in Egypt have been ear-marked for September. While a significant number of political parties have registered, new political players have little or no chance of effectively organising and consolidating a supporter base by that time.[8] Early elections will favour those already organised on the ground - the Islamists and the dregs of the old regime. The Muslim Brotherhood, which originally announced that it would only contest a third of all parliamentary seats, has now said that it will form a new party called 'Freedom and Justice' to contest half of all seats. If the Egyptian electoral system retains its strong majoritarian character, the Brotherhood has a good chance of winning the bulk of seats it contests (conceivably 40 per cent), with nearly all of the rest riddling to local power brokers and players from Mubarak's old party (the National Democratic Party).[9] Tunisia, which has also traditionally used a majority run-off system, faces a similar dilemma, with the well-organised main Islamist party Nahda pushing for elections in late July and the secular liberals who led the 'Jasmine Revolution' divided by their competing ambitions for the presidency.[10]

Given that the political landscape in Egypt and Tunisia may well be occupied by a divided centre and more unified extremes, the constitutions of these countries should move away from a stoutly majoritarian system. These countries should put in place a highly proportional electoral system with a low threshold (perhaps as low as one per cent) to support the secular liberal parties in the centre, the actors most likely to effectuate the compromises necessary for maintaining peace in a post-conflict setting. Such a system would limit the politically strong remnants of the old regime and Islamists to their proportional share of the vote while allowing a great many members of various moderate parties to get their foot in the door of parliament.[11]

While Egypt and Tunisia are reasonably homogeneous in the ethnic and sectarian sense, other Arab Spring countries such as Syria and Libya are more strongly divided along those lines. Such countries will likely be dominated by ethnically-based parties, very high rates of ethnic voting, and electoral results that reinforce group inclusion and exclusion under a democratic system. As such, they too should eschew the American-democratic model of majority rule with strong minority rights. Such a model would exacerbate existing divisions and threaten nascent national identity by virtually ensuring the absence of a minority share of power or the threat of minority power.[12]

Human Rights

An interesting question for constitutional drafters is what a human rights dialogue can add to a newly drafted constitution. Of course, one must first overcome the hurdle of what 'human rights' are; for countries founded on Islamic law this may differ to Western concepts. Moving beyond this, however, it is necessary to ask: what place is there for human rights within a constitution?

Some post-conflict constitutions, such as the South African example, have elected a path where fundamental rights, including civil and political rights as well as social, economic and cultural rights, are incorporated into the constitution. This may be through a bill of rights or as direct articles in the constitution. However, one may question whether such articles are mere rhetoric. For example, the visionary goals in the Interim Constitution of Nepal[13] are qualified by the statement 'as provided by law' and even where goals are not so qualified, discriminatory practices continue across Nepal.[14] Furthermore, the implementation of social and economic rights in particular may depend on the resources at a government's disposal.

In spite of this, the impact of including human rights in a constitution should not be underestimated. Aspirational statements draw attention to human rights issues that a free press and civil society can monitor and pressure the government to act on. In addition, as the United Nations Secretary-General notes, when such statements are based on the norms and standards of the United Nations which have been developed and adopted by countries across the globe they can confer legitimacy on post-conflict constitutions.[15] Critics may point out that this is simply another instance of institutionalising Western norms through the United Nations,[16] yet the reality is that these norms, such as quality of life, equality and representation, are the same rights that the people are asking for. Indeed, violation of such rights was a major cause of the uprisings in the Middle East. Thus, enshrining human rights in a newly drafted constitution can help establish the conditions necessary for stable post-conflict development.

Role of Religion

A critical issue faced by countries caught in the tempest of the 'Arab Spring' is whether their constitutions should make some reference to Islam and to Islamic law. Not all formulations are fatal to the spirit of a secular democracy. For example, a constitutional clause that provides that Islam can be *a* rather than *the* major source of legislation is relatively benign.[17] The real danger is 'transform[ing] the highest judicial body of the state into a guarantor of conformity with Islamic law', that is, conferring on the constitutional umpire the power to undertake 'Islamic judicial review'.[18] Feldman argues that Islamic judicial review could resolve the divisive question of what place Islamic law has in the legal system and who has the power to determine what it means in a particular national milieu.[19] However, the idea that legislative or executive action could be declared unconstitutional because it violates an Islamic norm or because it runs contrary to some Sharia-based argument, notwithstanding that it does not violate some other constitutional provision and was undertaken in the objective

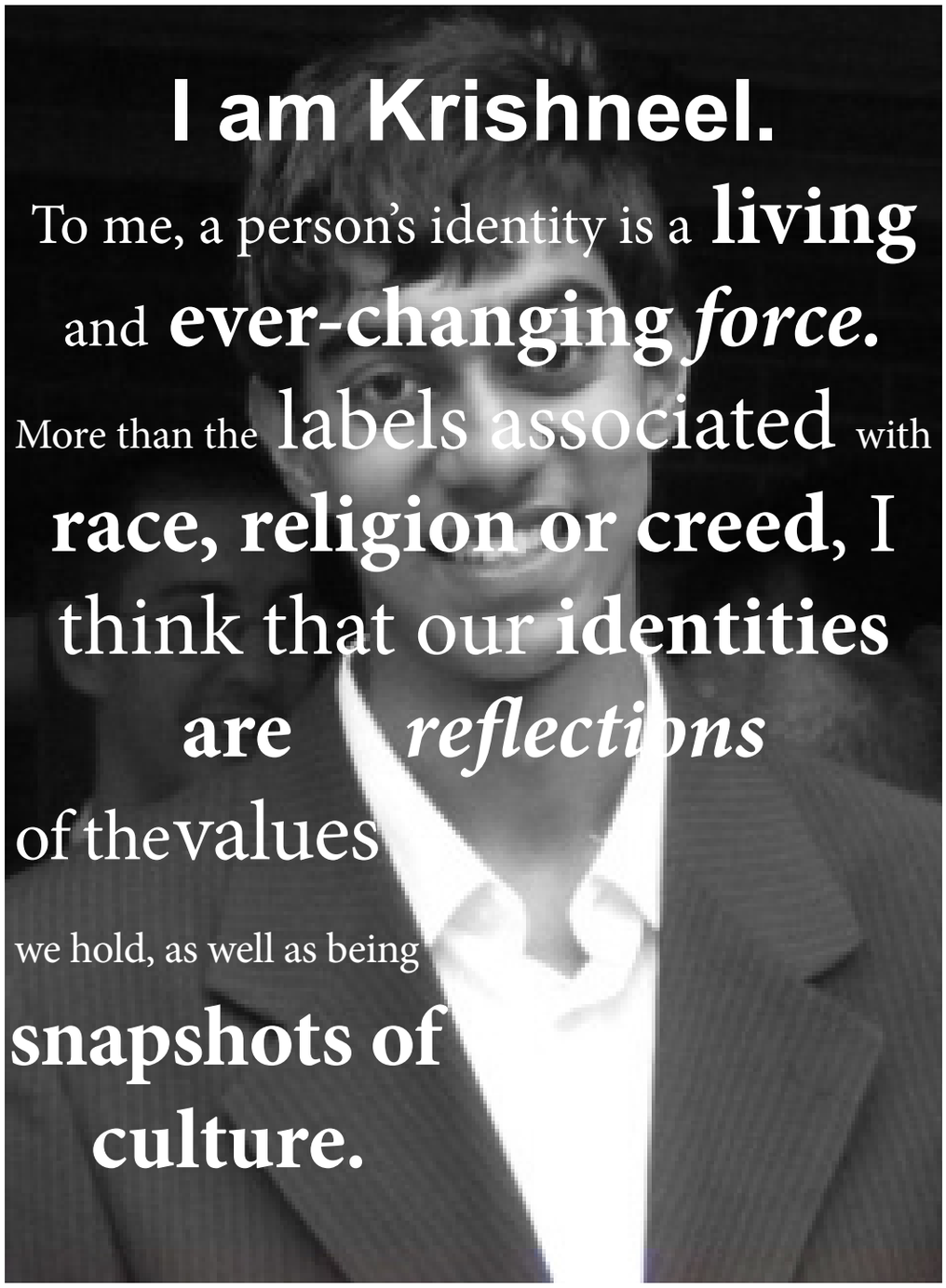
public interest, would imperil the essence of secular democracy. Moreover, it would threaten the subordination of the rights of non-Islamic minorities or at the very least undercut a national identity inclusive of Islamic and non-Islamic citizens alike.

Article 2 of the current Egyptian Constitution is an example for transitioning countries of what to eschew when attempting to reflect the religious sentiments of the majority in the fundamental law of the land. Article 2 provides that 'Islam is the religion of the state; Arabic is the official language; and the principles of the Islamic Sharia are the main source of legislation.'[20] Furthermore, under the Constitution, the Supreme Constitutional Court of Egypt ('SCC') is the sole arbiter of the constitutionality of legislation and regulations. The SCC has taken a rather liberal view of art 2, giving the Parliament ample scope to legislate for the public welfare (*maslaha*) of the country. It has refused to prescribe a specific law-making process regarding Islamic law, instead interpreting the article as a negative requirement. That is, no legislative or executive action may breach rules of Islamic law that are *certain* in their authenticity as well as meaning.[21] Notwithstanding the SCC's narrow interpretation of art 2, whose operation has been confined by jurisprudence to striking down only those laws repugnant to the core rules of Islamic law, the article remains a latent weapon of religious political power. This is because, under the Egyptian Constitution, SCC judges are appointed by the President; thus, the SCC is liable to be used by the Muslim Brotherhood or Islamist parties as a means of enforcing Islamic law as public law. [22]

Conclusion

The potential for a wave of democratisation has swelled in the Middle East. As autocracies in the region are toppled, the question is whether political change will mean peace and democracy. The constitutions that emerge from this historical sea change will play an important role in deciding this question. To successfully found and sustain democracy, transitioning countries must navigate the divisive identity politics of the region to build a new national identity. They should heed Aristotle's advice: one should not commit the mistake of making a constitution for ideal circumstances where less than ideal circumstances exist.[23] Countries must consider their domestic circumstances, and tailor their response accordingly.

Photographs by Nick Yap


I am Krishneel.
To me, a person's identity is a living
and ever-changing force.
More than the labels associated with
race, religion or creed, I
think that our identities
are reflections
of the values
we hold, as well as being
snapshots of
culture.

Fiji: A Troubled Paradise?

K r i s h n e e l K u m a r

B.Ec./LL.B. II

Many are often surprised to hear that Fiji is today at perhaps the greatest pitchfork of its history.

After all, is this not the same Fiji as that in the television commercials? Of endless sandy white beaches, and more coconut cocktails than you could ask for? Perhaps. But when we consider that this tiny pacific nation has suffered four *coup d'états* over the last 20 years,[1] and is regarded as having some of the most racially divisive laws in the world,[2] we soon find that it is not at all surprising that it now faces an epochal choice. To work towards a system of operative democracy, or to else continue with the same systems which have failed it. Time and time again.

History has too shown us that it is often those which lack the power to change ineffective systems of governance that are most harmed by them. And in Fiji's case, many argue that it has been Fijian people of Indian origin.[3] A group as similar, and at the same time, as distinct from their indigenous-Fijian countrymen as their Indian forefathers, they have been described as having borne the brunt of Fiji's historically parochial legal and political system.[4]

A closer inspection of Fijian law however reveals an even deeper truth. That unlike Australia, who has been able to forge itself an identity grounded in its rich multicultural society, Fiji has been unable to have achieved the same successes. And in the process, left the Fiji-Indian people largely uncertain of one.

A Background

Indian people were first brought to Fiji in 1880, to work on its sugar cane plantations.[5] Another part of Britain's increasingly colonialist foreign policy, it has been argued that the circumstances of their arrival foreshadowed that sufficient safeguards would not exist to ensure that they be delivered the same rights as indigenous-Fijians.[6] Prasad here attributes much responsibility to the policies of the first Governor of Fiji, Arthur Gordon. He argues that his decision to outlaw any Fiji-Indian ownership of land acted as the first step in the creation of a 'divide and rule' approach to Fiji's legal system, [7] a legacy which the National Farmers' Union contend has perennially dogged any advances in the creation of a united, multiracial Fiji.[8]

As such, much of the criticism of Fiji's legal system is directed towards its core source of power, the Constitution.[9] Whilst it was abrogated in the 2006 military coup,[10] it is

clear that if Fiji is to become a truly operative democracy, it must abandon many of its now out-dated provisions when designing its successor. Central to this view is the need to allow all its citizens to claim a common identity. This is plainly incompatible with s.51,[11] which legally divided the Fijian people into 'Fijian', 'Indian', and 'other',[12] an idea which fundamentally failed to reflect the need for the legal system to act as the conscience of the people, as a people.

Any question, then, as to how the Fiji Indian identity has been shaped by the Fijian legal and political system invariably demands that we assess the implications that these issues have had upon it. This requires that we look to three areas; land rights, the political system itself, and the response of the global community.

Land Rights

Russian-American philosopher Ayn Rand is well known for having asserted that rights cannot exist without the right to translate them into reality. And to therefore 'think, work, and keep the results… the right of property'.[13]

This is one sentiment which is expressed by some with regard to the Native Lands Trust Act[14], which establishes that 87% of Fiji's land cannot be legally owned by Fiji Indians, and can only be leased to them for a maximum of 99 years.[15] One advocate of this view is Brij Lal, Professor of Pacific and Asian History at the Australian National University.[16] He contends that whilst it is necessary to safeguard indigenous-Fijian rights to land, and progress has been made since the policies of Gordon, the current situation is an impractical and unworkable one.[17]

This argument however seems to make much sense. Any modern democracy seems to need to provide its citizens with a legal ability to own land, and moreover, one which is sufficient, so as to allow for a life of stability. And too, the right to call one's land their own, especially in a nation in which 37 per cent of the population has known no other for the last 140 years.[18] It also must be noted that many parcels of that remaining 13 per cent of land are often in remote parts of the country, isolated from basic services, and that most are often forced to enter into leases for more urban properties.[19] But even if one is to disagree, critics such as former coup conspirator George Speight, who have long advocated for a 'Fiji for the Fijians',[20] seem only to be concerned with their own interests. Such is the opinion of Sutherland and Robertson,[21] who contend that in the last 20 years, whilst acres of land have been repossessed from Fiji-Indian tenant farmers, alongside the extortion of rents in excess of those authorised by the Native Lands Act,[22] these lands have in most cases not been reallocated to indigenous people, but instead left to lose its arability.[23] They venture so far as to assert that the motivation behind such a scheme seems to be the Fijian elite, namely a number of powerful Chiefs who backed Speight's 2000 coup, which have 'exploited the disadvantage of the Fijian masses' to ensure that they maintain their say in Fijian politics at any cost.[24]

Of course, Fijian politics is not without its extremists, and the Fijian elite that Sutherland and Robertson[25] speak of may just be a perfect example. Another one however seems to be former Minister for Women, Asenaca Caucau, infamous for describing Fiji-Indian people as 'weeds', 'who merely take up space'.[26] Heralded by some as a representative for the 'protection of the indigeneity of Fijian land',[27] she remains of the view that the status quo sufficiently provides for the land rights of Fiji-Indian people.[28] A number of flaws however seem to exist with this view. The first is raised by Narayan.[29] She establishes that the limited rights of Fiji-Indian people to land affects not only this group, but indeed, all other non-indigenous Fijians, such as those of Chinese or European origin, and that this largely acts to understate the problem.[30] A problem, she adds, which has extensively contributed to the decline of the

Fijian economy by the mass loss of Fiji Indian farmers, which produce 90% of Fiji's sugar.[31] What is of most striking importance, however, is the fact that this discussion must be held in the context of a nation which is a signatory to the United Nations Convention on the Elimination of All Forms of Racial Discrimination.[32] As such, serious question remains as to whether Fiji's laws are not only depriving Fiji Indians of their national identity, but 'impairing the enjoyment or exercise'[33] of their 'human rights and fundamental freedoms'[34] in the process.

Political System

Thomas Jefferson once proclaimed that society's will is not inviolate simply because it is that of the majority. It must also be reasonable, he argued, for it to be rightful, and therefore give rise to equitable laws that recognise the rights of all.[35]

Of course, it seems that this equally applies to the political representation of groups at all levels. Most would accept that an essential part of any working democracy is that it represents, and is therefore accountable to all, including the minority groups which it seeks to govern. The US Country Report however highlights that there is a mass political underrepresentation of Fiji Indian people, who once formed the majority of the population.[36] Narayan attributes much of this to the Constitution, and asserts that if Fiji that it is to return to the same political system as that since independence, one would only ask for the same results, those which, as per ss.185 and 192(4) required that almost half the seats of the senate be allocated upon the election of the indigenous Great Council of Chiefs.[37] A senate, contends Narayan, which is generally partisan, and unelected, and answerable to those which remained in favour of adopting the same systems which have not succeeded in 40 years.[38] It also made it virtually impossible for the formation of a non-indigenous majority government, and when one, or a progressive indigenous government was formed, the National Farmers' Union argue that Fiji's 'coup culture' had effectively already decided only one fate for them.[39]

Such feeling has been expressed by Reverend Akuila Yabaki, an influential indigenous human rights activist.[40] Having long advocated for the removal of Fiji's electoral system, which divides Fiji's constituencies into 'Fijian', 'Indian' and 'other race', he asserts that whilst it is unfair and prejudicial to suggest that a legally majority indigenous government could not amend the status quo, an 'one man, one vote' system is a necessary step to give minority groups a voice.[41] This too would seem to be a far more democratic manner in which governments could be elected, and in which the competency and accountability of a candidate would feature before their race. This matter is however not without its share of controversy. Former Prime Minister Laisenia Qarase has consistently maintained that Fiji is too 'young and inexperienced' to move towards such a system.[42] What seems to be missing from this argument is however any answer as to why sheer youth and inexperience should prevent a nation from having the right to choose those which they want to represent them. And too, why the Fijian public has not once been given the ability to make up its own mind as to this issue by way of a referendum.

The International Response

In Australia, and indeed, many parts of the world, governments have been extremely critical of the path that Fiji has taken since the 2006 coup. Whilst the coup cannot be condoned, the findings of the Lowy Institute however seem to make much sense; namely, that governments would be better to assist Fiji in a path towards operative democracy, than to push it into the same system which has failed itself not thrice, but four times simply in pursuit of a policy of 'tough love'.[43]

Military force is clearly not an ideal instrument of policy. But with the political knowledge and experience that the international community

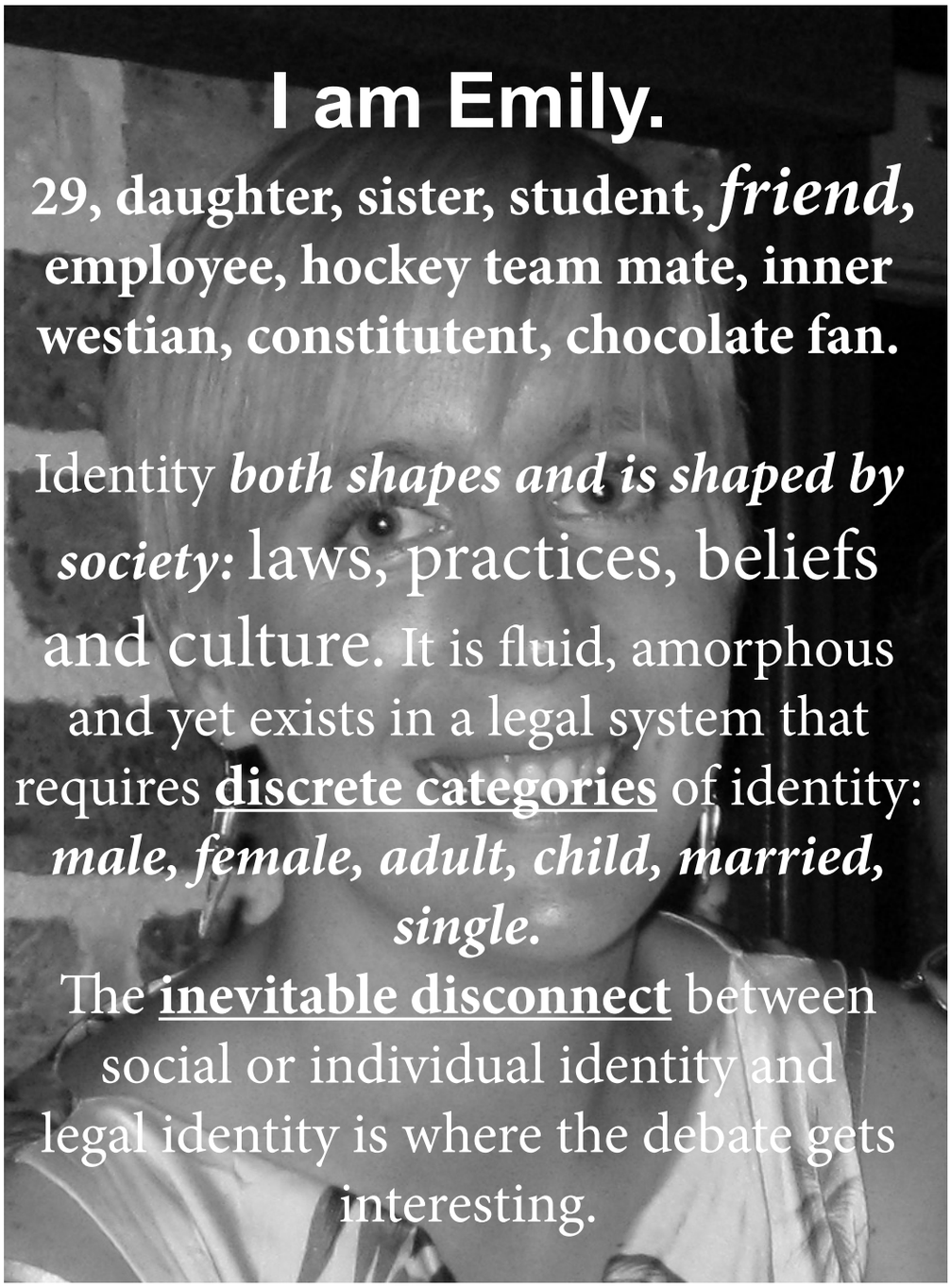
possesses, one does wonder as to why they have not been offered to this nation of less than a million people. One also wonders as to why the same media attention was not given to the fact that the Fijian parliament had at time of the coup been at on verge on passing the Reconciliation, Tolerance and Unity Bill, which would have guaranteed amnesty to those involved in the 2000 coup, and therefore have returned them to the very system they had just crippled.[44]

As always, democracy cannot exist for its own sake, and it must accommodate the society it was designed to. One based, in short, on the fair representation of a nation's people, and one which recognises the identity of all its citizens, regardless of colour, creed, or sexual orientation. This however gives rise to serious query when applied to Fiji. Whilst the international community has demanded the return of democracy in Fiji, we cannot forget that it needs to be first delivered in a form which is sustainable, and workable in the long term. Uncertainty exists as to what purpose the Australian and New Zealand government's mass cuts of foreign aid to Fiji[45] were intended to achieve. Further worsening the issue of poverty in a nation in which a quarter of the population live under the poverty line surely cannot have been it, and it seems to have only strengthened the military government's will to stay on.[46] Nor of assistance seem to be the comments recently made by Brij Lal and expatriate Fiji Indian Karam Ramrakha, that the Fiji Indian people should simply leave the only country they have ever known.[47] No doubt exists that for every person who leaves, another will remain to inherit his or her legacy, much after any quagmire of political correctness has long settled.

This is of course a matter over and above that of mere nostalgia, and the right of the Fiji Indian people to self-determination seems to lies at the epicentre of the protection of their identity. A player which can, however, be of great assistance is our own nation, Australia. A traditional ally and leader in the Asia Pacific region, many argue that it must fulfil its responsibility to constructively assist Fiji to find a long-overdue solution to this problem. Martin Luther King, Jr. once said that 'in the end, we will remember not the words of our enemies, but the silence of our friends',[48] and there can be no doubt that Fiji needs all the help it can get to achieve what many other nations in world have taken hundreds of years to achieve; the rights of all its people to have their identity legally recognised.

Whether or this will occur in Fiji will only truly be answered with the test of time.

Photograph by Jimmy Le


I am Emily.
29, daughter, sister, student, friend, employee, hockey team mate, inner westian, constitutent, chocolate fan.
Identity both shapes and is shaped by society: laws, practices, beliefs and culture. It is fluid, amorphous and yet exists in a legal system that requires discrete categories of identity: male, female, adult, child, married, single.
The inevitable disconnect between social or individual identity and legal identity is where the debate gets interesting.

Women, Violence and the Right to Health

E m i l y C h r i s t i e

LL.B. Graduate 2011

> Petruchio: But for my bonny Kate, she must with me…I will be master of what is mine own. She is my goods, my chattels: she is my house, My household stuff, my field my barn, My horse, my ox, my ass, my anything.
>
> Katherine: Thy husband is thy lord, thy life, thy keeper, thy head, thy sovereign; one that cares for thee…Such duty as the subject owes the prince, Even such a woman oweth her husband.
>
> – Shakespeare, *Taming of the Shrew*[1]

Violence against women occurs across all countries, cultures and classes and can have devastating effects on women's health. Every year, intimate partner violence in the US costs the state $4.1 billion in direct medical and health care services.[2] Traditional gender roles have often relegated women's experiences to the private sphere, as Petruchio states 'household stuff'. Unfortunately, the traditional focus of international law on the public sphere, to the detriment of the private sphere, means that human rights abuses against women are often ignored. Certain types of violence are often the result of cultural ideologies and traditions. As such, attempts to alter these practices can be met with hostility and claims of cultural relativism. A study of domestic violence and female genital mutilation ('FGM') demonstrates the complex interplay between gender identity, violence and health and the shortcomings of traditional approaches of international law in addressing these issues.

Identity, Violence and Health: Joining the Dots

Violence against women is often referred to as gender based violence,[3] indicating the role that a woman's social and cultural identity plays in rendering her vulnerable to violent acts and the lack of state protection. Gender, as opposed to sex, is a social construct; for our purposes it refers to the roles, behaviours, activities and attributes that society considers typical or appropriate for men and women.

Traditional female gender roles are directly linked to relationship inequalities and power imbalance, poverty, economic stress, political and social inequality, lack of institutional support or sanctions and social norms that support traditional gender norms, condone violence or promote models of masculinity based on abuse of power and aggressiveness.[4] The devaluing of women can lead to son preference and female infanticide; treating women as sexual objects and property underlies the practice of FGM; while the restriction of women to the private sphere, the home

and designation as their husband's property may well prevent the state from assuming an obligation to protect women from acts of violence.

This in turn will affect a woman's health and access to services. Son preference can lead to infanticide, neglect and abuse of girls, and prevent daughters obtaining sufficient food and medical treatment, causing an increase in female infant mortality and higher rates of malnutrition and ill health in girl children.[5] FGM can significantly affect a woman's health and can lead to premature death, as detailed below, while women who are physically or sexually abused have higher rates of mental health issues, sexually transmitted diseases (including HIV), unintended pregnancies, abortions and miscarriages than non-abused women and are less likely to seek medical attention.[6]

International Efforts to Date

International Human Rights instruments have recognised a woman's right to health since 1966, primarily through art 12 of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW')[7] and arts 2 and 12 of the International Convention on Economic, Social and Cultural Rights ('ICESCR').[8] The right to health includes, among other things, the right to sexual and reproductive health: the right to decide freely on the number and spacing of children, to the highest attainable standard of reproductive health and the right to make decisions on reproduction free of discrimination, coercion and violence.[9]

By contrast, violence against women was not specifically recognised as a human rights issue until CEDAW released their general recommendation on women and violence in 1992. The recommendation made it clear that parties to the Convention are under an obligation to take all appropriate means to eliminate violence against women [10] including, but not limited to, domestic violence, marital rape, and female genital mutilation.[11] At the Beijing Conference on Women, violence against women was identified as one of 12 critical areas of concern.[12] In 2000, an optional protocol to CEDAW allowed abused women to directly petition CEDAW[13] and since 1994 there has been a Special Rapporteur on Violence against Women.[14] A number of resolutions and treaty body comments have also recognised the strong link between violence and health.[15]

The Effectiveness of International Organisations and State Efforts

Was gender based violence to be viewed in the same guise as health issues such as HIV, the words 'epidemic' and 'global crisis' would not be out of place. For women in the 15-44 year age group, rape and domestic violence were more prevalent and dangerous than cancer, motor vehicle accidents, war and malaria.[16] Despite this, and despite the number of resolutions and declarations, efforts to reduce violence against women do not receive the funding, attention or serious consideration that these other causes of ill health attract.

Traditional practices such as FGM have slightly declined in recent years showing some success in programs aimed at eliminating the practice. Domestic violence has declined less. The reasons for the limited success are closely linked to the nature of international law and its interaction (or lack thereof) with the cultural and social identity of women.

The Public/Private, Male/Female Divide

In Shakespeare's *Taming of the Shrew* Katherine compares her duty to her husband with that of a subject to his or her Prince. The comparison is somewhat optimistic. The sovereign's power over the subject, even in Katherine's time in England, was limited by parliament and now increasingly by international law. The laws of property at private law, however, generally served to protect a man's power over his 'chattels'. Katherine, as wife, is identified with the private sphere, with laws of property, and

with the home. In her time she had no right to refuse intercourse or to claim protection from domestic violence. Short of murder, the state would not intervene.[17]

It is true that Katherine's speech was written in the late 16th century. Domestic and international law are increasingly protecting rights in what is considered the 'private sphere' but it has been slow going. In the early years of human rights discourse, there was little discussion of the specific violation of the human rights of women. Without an explicit focus on the rights of women and the violations that exist, progress was minimal. Feminist analysis has shown that even when a greater focus on women and their experience of violence emerged, the normative structure of international law, arising as it did in a male dominated milieu, had an essentially masculine, public bias. Such a bias contributed to the limitations of human rights and the failure of international law to have a meaningful positive impact on the lives of women. [18]

Take, for example, the inability of the international community and the human rights movement to reduce the prevalence of domestic violence. [19] Domestic violence exists across all cultures, communities and socio-economic backgrounds. Depending on the country, between 20 per cent and 75 per cent of women have experienced one or more emotionally abusive acts, and between 13 per cent and 61 per cent have experienced physical abuse by an intimate partner.[20] One in five women will become a victim of rape or attempted rape in her lifetime, usually by someone she knows.[21]

Traditionally, the law has operated in the public realm and intervention in the private realm has been seen as inappropriate. Domestic violence is, by its very nature, located within the private sphere. It is distinguished from public violence and arguably outside the traditional reach of international law, or even domestic law. The point is made by Hilary Charlesworth, who argues that modern international law replicates the duality of the public and private spheres, with only the public sphere being regarded as the province of international law. This dichotomy is then mirrored on gender differences with the public realm: law politics, economics and war being the purview of men, while the domestic, private world is that of women.[22]

It is such a divide between male and female, public and private that also sees the relegation of social and economic rights to a lower level of importance than civil and political rights. Most forms of oppression of women occur in the economic and social sphere, protected under the ICESCR. Unlike the International Covenant on Civil and Political Rights ('ICCPR'),[23] individual legally enforceable rights are not traditionally created, although this is changing. Rather, the obligation lies with the state to take action towards improving services and legislation in regards to each right. This is in stark contrast to acts of violence that are considered public or politically or racially motivated. For example, the definitions of torture and crimes against humanity have generally focussed on 'public' violence. As Charlesworth notes, severe pain and suffering inflicted within the home 'does not qualify as torture despite its impact on the inherent dignity of the human person'.[24] While rape during war time has been recognised as a crime against humanity,[25] there remains a separation between rape as a weapon of war and marital rape, even when marital rape is sanctioned by the state. The vast majority of violent acts against women do not attract universal jurisdiction. Our increasing preoccupation with the need for international law to be applicable to and effective in so called 'crises' apparently blinds us to the processes that classify certain things as a crises and others as the norm, the status quo and therefore outside the reach of *jus cogens*. [26]

This public-private divide is now a recognised phenomenon and international organisations and states have started taking it into

consideration when approaching the problem of domestic violence. At an international level, part of the mandate of the Special Rapporteur on Violence against Women in terms of domestic violence is to develop an obligation to prevent violence against women by addressing its root causes. In this way the hope is that state obligation will break the public-private dichotomy.[27] At a domestic level, as of 2006 around 89 countries had some kind of legislation prohibiting domestic violence. This, however, is far from universal, with at least 53 countries failing to make marital rape a prosecutable offence and 102 countries have no specific provisions on domestic violence.[28] In countries where there is legislation the violence often continues unabated: legislation is not always followed up by education and enforcement.

The rights of women can also clash with other human rights such as privacy and autonomy. Successful programs are thus those that privilege rights such as health and bodily integrity over the traditionally stronger rights of privacy and autonomy. An overemphasis on the right to privacy can be used to interpret that the law should not intervene in domestic disputes, while the right to autonomy can lead to reluctance to prosecute a perpetrator against a victim's wishes. A number of feminists have interpreted existing manifestations of the right to privacy as nothing more than a right of men to be left alone to oppress women.[29] It may be possible in these situations to suspend or forfeit certain rights such as the right to privacy.[30] Privacy could rather be reformulated not as an argument for non-intervention, but as enabling of each individual to flourish as an individual and to allow for personal choice. Indeed state intervention may be necessary to enable people to live their lives in the manner they wish.[31]

Of course, in addition to prevention programs and legislation, the underlying causes of domestic violence need to be addressed; causes that are often deeply embedded in the patriarchal structures of society and cultural practices of communities.

Cultural Relativism and Harmful Traditional Practices

A major hurdle for a human rights approach to violence against women in many countries is the diversity of cultures, practices and views held in regards to certain human rights. Third World Approaches to International Law ('TWAIL') critics of human rights argue that, in fact, the idea and substance of human rights is west-centric and does not necessarily resonate with or apply to non-western cultures, failing to take into account their own important traditions and beliefs.[32] Feminist theorists, interestingly, often diverge on the issue of cultural relativism, with some arguing that in fact cultural relativism is often just a cover or a shield to hide abuses against women while others emphasise the need to recognise the different experiences and beliefs of women from different cultures and that their priorities may well be very different from those of western women.[33]

What is clear, however, is that it is often the private rights of women that become the subject of cultural relativism. Dominant ideologies regarding female identity, sexuality and her place in society will often perpetuate and even sanction violent practices against women while also keeping it in the private sphere. These same ideologies will also prevent the victims of such violence from seeking medical assistance when needed. Cultural rights and health rights thus clash and a privileging of cultural rights can have a disastrous effect on other rights such as health, education and equality.

The practice of FGM highlights the tension between different views of cultural relativism and the difficulties faced in trying to improve women's rights. The term FGM refers to a number of different forms of traditional cutting operations performed on women and girls, primarily in Africa and the Middle

East, often as part of coming of age rituals. It includes procedures that intentionally alter or injure female genital organs for non-medical reasons and at its most extreme involves the total removal of all external genitalia.[34] FGM can have immediate health consequences including severe pain, shock, haemorrhage and infection, the last two possibly being fatal. Long term, women can suffer cysts, keloid scars, incontinence, sexual dysfunction and difficulties during childbirth.[35] It is estimated that around 130 million women alive today have undergone FGM, with 3 million at risk of the procedure each year.[36] In places such as Sierra Leone and Somalia, more than 90 per cent of women and girls have undergone some form of FGM.[37]

Depending on your point of view, FGM is a traditional practice going back 4000 years that is integral to women's identity, status and survival in the community. Alternatively, it constitutes torture or inhuman and degrading punishment and a gross violation of womens' and girls' rights to health, bodily integrity and freedom from violence.

The recognition of FGM as a human rights issue has led to the development of global eradication strategies and programs and human rights frameworks have addressed the issue from a health and violence perspective. The UN has assisted and pressured governments to stamp out the practice.[38] There is now a specific General Recommendation by CEDAW on the practice of FGM[39] and a UN General Assembly Resolution on Traditional Practices that Harm Women.[40] The Beijing Conference on Women in 1995 also called on Governments to enact and enforce legislation against FGM.[41] In Africa there is also the regional treaty, the Maputo Protocol.[42]

Even where treaties have been signed and legislation is enacted, without implementation and cultural change the practice continues as 'the tension between universal human rights and cultural relativism is played out in the everyday lives of millions of women throughout the globe.'[43] This is particularly the case in parts of North Africa where secret societies flourish and FGM is a prerequisite to become a member.[44] In the past, approaches of international organisations and NGOs to FGM have failed to provide a culturally sensitive approach, generally criticizing the culture within which practices such as FGM exist without first attempting to understand the link between the practice and women's identity; i.e. the role the practice plays in providing a rite of passage or acceptance within the community. Such approaches are often seen as a form of western imperialism and have little success in eradicating the practice.[45] The Special Rapporteur on Violence under CEDAW notes that it is necessary to ensure that the sense of community women feel and sense of belonging is not damaged in trying to assist in preventing violence against women. While health and women's rights are increasingly given precedence over cultural rights, there is recognition of the important role that culture plays in the practice of FGM and successful programmes understand and incorporate these ideologies and beliefs into their programmes for change.

Legislation is thus insufficient on its own and must be accompanied by social measures to combat often deeply ingrained community beliefs. Prosecution of perpetrators alone may only serve to drive the practice underground.[46] It is imperative that the root causes of gender based violence are addressed. So long as these causes continue to exist, programs to eliminate violence will only have limited success.

Conclusion

Despite the prevalence of violence against women, and the serious health consequences that can result, attempts to reduce the prevalence of violence against women and the health effects that stem from them have been limited. Traditional approaches of international

law and human rights are ill equipped to tackle problems traditionally seen as private and female. The Western cultural origins of the human rights discourse also make it difficult to convince non-western cultures of the legitimacy and importance of particular rights and the need to eradicate certain practices. In more recent times there has been an attempt to reassess the role of the state and the ability to intervene in areas of life previously considered private and untouchable. There has also been a realisation that interventions need to take account of cultural needs and identities if harmful practices are to be eradicated in a way that is acceptable and keeps communities and cultures intact. Unfortunately, this is a slow process and there is still a long way to go; legislation is not sufficient, there needs to be an accompanying alteration in culture and community attitudes towards gender, equality and women's rights before meaningful change can be achieved.

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STOPPING THE BOATS - CLARE LANGFORD

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3 *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('1967 Protocol').

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5 Sharon Pickering and Caroline Lambert, 'Deterrence: Australia's Refugee Policy' (2002) 14 *Current Issues in Criminal Justice* 65, 71.

6 Senator Bolkus, *Hansard* (1992) cited in ibid, 72.

7 See generally ibid, 75-6.

8 Campbell, *Hansard* (2001) cited in ibid, 73.

9 N Klocker and K M Dunn, 'Who's Driving the Asylum Debate? Newspaper and Government Representations of Asylum Seekers' (2003) 109 *Media International Australia incorporating Culture and Policy* 71 in Silove et al, above n 1.

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14 Ibid 370.

15 Ibid 370-1.

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18 Ibid.

19 Ibid 30.

20 Silove et al, above n 1, 385.

21 In their 2006 study of 241 Arabic-speaking Sabaean-Mandaean refugees living in Sydney, Silove et al found that, among refugees detained for six months or more, 54% suffered from depression while 49% showed symptoms of post-traumatic stress disorder ('PTSD'). This strongly contrasts with the rates for those held for less than six months: 25% suffering depression and PTSD respectively. Lastly, of those who had not been detained, 23% suffered depression and 11% PTSD: Ibid 382.

22 Ibid 361.

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ISSUES OF ETHNIC IDENTITY IN UNITED STATES' ALLOTMENT POLICY AND ITS RELEVANCE TODAY - DANIEL ZWI

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5 Prucha, above n 3, 342.
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9 Ibid 81.
10 Ibid 86.
11 Refers to several acts passed by the United States Congress under the same name, the most notable of which include the I*ndian Appropriation Act of 1851* and the *Indian Appropriation Act of 1871*.
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13 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

ANDREW BOLT, WHITENESS AND THE RIGHT TO CHOOSE ABORIGINALITY - MALA WADHERA

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RECOGNISING CULPABILITY: HATE CRIMES AND THE LAW - MATTHEW CLARKE

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A MULTIDIMENSIONAL IDENTITY: MORE TO HIM THAN MEETS THE EYE - KELLY XIAO

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Errata: The article by Christine Ernst in *Dissent* 2010 should have been published with the title 'Better than a Bill of Rights?'


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