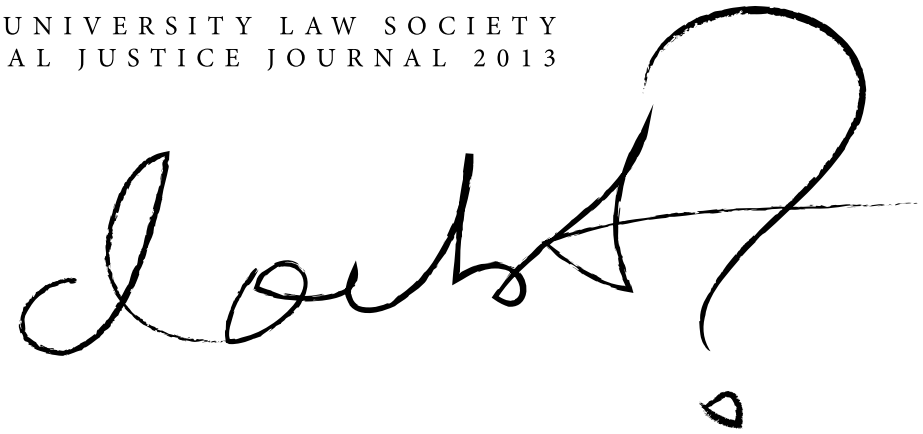
Dissent.

SYDNEY UNIVERSITY LAW SOCIETY
SOCIAL JUSTICE JOURNAL 2013



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Doubt

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Contents

Editor-in-Chief's Foreword

Doubt confronts us at every turn.

From the mundane (*Should I have dyed my hair white blonde? Did I submit a good clerkship application?)* to the more serious (*Do I really love the person who I'm married to? Is there a God?)*, it is that constant feeling of doubt that keeps us questioning, keeps us hungry for self-improvement and betterment.

Unless it overwhelms us absolutely – and this, may I suggest, is all too often a genuine possibility – doubt can be a positive catalyst for change.

This is why the Editorial Board chose 'doubt' as the theme for this year's edition of *Dissent*. The Sydney University Law Society (SULS) social justice portfolio has a rich history of providing students with opportunities to tackle some of the most pressing social justice issues of the day. *Dissent*, the annual social justice journal, is one forum in which to do so. We wanted to provide contributors with a stimulus to think and write critically about the efficacy of social justice works, the darkened crooks and crannies of doubt within the legal system, or how doubt can be cornered and overcome (or alternatively, how it may be impossible to vanquish).

With the submissions this year - ranging from academic articles to opinion pieces, poems, interviews and photographic essays – our desire for a critical analysis of the law, social justice and 'doubt' was met with gutso. The journal is structured in such a way as to lead readers through a progression of different themes, starting with doubt and legal process and continuing on with doubt and the media, communities, and new frontiers. Finally, the journal ends with an exploration of doubt and social justice advocacy, suggesting the value of doubt and doubting in assisting us to improve existing methods and programs within the social justice arena.

Without such doubt – without such a catalyst for change – we are in danger of falling into the trap of complacency.

I would like to thank Gilbert + Tobin, who have sponsored this journal for the last few years, and without whose support this journal would not be possible. I would also like to express my appreciation towards the Dean of Sydney Law School, Joellen Riley, for writing the Dean's foreword and more generally, for demonstrating her ongoing encouragement of student endeavours. From SULS, Vice-President (Social Justice) James Higgins and Design Officer Judy Zhu have worked tirelessly to assist with the creation of the journal this year, as have the contributors themselves and of course, the Editorial Board who have sweated through countless volunteer hours on the lookout for rogue em-dashes *vis-à-vis* hyphens. I am grateful to you all.

And with that I present to you, the reader, this year's edition of *Dissent*.

Melissa Chen
Editor-in-Chief, *Dissent*

Dean's Foreword

For the well-trained lawyer, 'doubt' is an essential professional tool. The legally-trained mind is tuned to question, and to test evidence thoroughly before accepting a conclusion or adopting a position. This edition of *Dissent* is a testimony to the fine skills in critical, lawyerly analysis of many Sydney Law School student authors. All have turned those skills towards examining some aspect of, or role for, doubt in our legal system, and all maintain a commitment to pursuing socially just outcomes.

Some of the pieces examine the institution of doubt in our criminal justice system. In the broader community (among the greater population untrained to doubt as lawyers are) the principle that an accused person is innocent until proven guilty 'beyond reasonable doubt' is by no means intuitive. Media reports on famous crimes frequently provoke snap judgments of guilt: think of the media trial (and retrial) of Lindy Chamberlain. Or the show trial of OJ Simpson. And today, how many people are giving Jimmy Savile, alleged serial paedophile, the benefit of any reasonable doubt? Once the media has demonized an alleged perpetrator, the community can be quick to convict, often on the strength of little more than a headline and a few paragraphs of yet to be proven 'facts'.

How are facts proven? Must law defer to science in this age of high tech forensic analysis? Laura Precip-Pop looks, dubiously, at DNA evidence. Virat Nehru questions the reliability of witness memory in an intriguing examination of 'false memory' cases.

Populist governments often seek to appeal to our natural tendency to assume that any smoke of rumour indicates a fire of guilt, by launching 'law and order' campaigns. These promises of crackdowns on crime may comfort the fearful, but (as Samuel Murray's article examines) they risk infringing civil liberties. People often forget that the innocent can easily be swept up in the nets set to trap the guilty. Even the guilty have a right to due process. Without it, who can distinguish the guilty from the innocent with any confidence, 'beyond reasonable doubt'?

A number of the articles embrace the theme of 'doubt' more broadly, and use it to challenge prevailing views on a range of social justice issues: human genome patenting, social media activism (or 'slacktivism'); indigenous communities' relationships with mining interests. Catherine Dawson provides a fascinatingly skeptical analysis of the experience of the Grameen Bank and microfinance more generally as an attempt to alleviate poverty in the developing world.

In all, this is an intriguing issue. Read it . . . critically. Accept no conclusions until you have tested the authors' evidence thoroughly, and are satisfied yourself, beyond any reasonable doubt.

Joellen Riley
Dean, *Sydney Law School*

Opening submission

Kate Farrell
LL.B. V

Poem

The defendant sits high in the stand,
lowest of all. Waves of doubt wash
slowly into the dock
soaking the public-sector-coloured carpet.

The judge's new shoes are safe.
The bench is dry as droughtbone
ground to dust
by dint of savannah sun.

And counsel charges across the floor
talking and passing papers and parting
the sea, wearing a periwig like a feeble grey
half-mane, lionised.

Yet fluid fear runs faster
in the murky shallows, tided memory
slaps the stand
and the family huddled on the back row dunes.

On another continent
the judge considers
the deepening ocean
the cold squirming fish.

Doubting DNA

Scientific evidence and the adjudgment of guilt or innocence

Laura Precup-Pop
J.D. II

Article

Introduction

When confronted with scientific evidence in the courtroom, jurors often face two competing sources of authority: science and the law. Although research suggests that juries do engage in sound fact-finding, there is doubt as to whether the lay juror can comprehend complex scientific evidence, and much depends upon the way in which the prosecution or defence has presented it. The common perception that DNA allows for a conclusive determination of guilt can taint the fairness of a trial and can ultimately produce life-shattering consequences for the accused. This article utilises the tragic case of *R v Jama*[1] as a lens through which the use of DNA in jury trials may be analysed, and questions whether jurors are capable of properly interpreting scientific evidence in the courtroom.

R v Jama – the facts

On 21 July 2008, Farah Abdulkadir Jama was convicted of rape by the County Court in Melbourne and was sentenced to imprisonment for 6 years with a fixed non-parole period of 4 years.[2] It was alleged that Jama engaged in the penile-vaginal penetration of a 48-year-old woman in a nightclub in Doncaster, Victoria. The woman, identified solely as 'M', was found semiconscious in a toilet cubicle of the nightclub and was taken to a Crisis Care Unit for a physical examination and further tests. M had taken prescription medicine earlier in the day and had been drinking shots of Frangelico prior to arriving at the nightclub. She was unable to account for why she was unconscious, and it occurred to M that she may have been drugged and sexually assaulted. The doctor who was attending M then notified the police, the Northern Centre Against Sexual Assault (NCASA) and a doctor from the Victorian Institute of Forensic Medicine (VIFM).

The doctor conducted a physical examination of M and took vaginal swabs that were sent for analysis to the Victorian Police Services Department (VPFSD).[3] The forensic evidence indicated that DNA attributable to Jama was found on only one of the two swabs taken from M. The amount of DNA on the swab was remarkably small given the fact that it had been obtained in the context of a penile-vaginal rape, with only one intact sperm and fifteen heads being observed. No other traces of Jama's DNA were found either within the high vagina or on the clothing of M. It was on the sole basis of this DNA evidence that the prosecution decided to proceed to trial notwithstanding the numerous inadequacies of the case.

The deficiencies of the prosecution's case were indeed remarkable. First, investigators found no link between Jama and the over-28's nightclub; he was not identified by any of the 800 patrons, M had no recollection of seeing or speaking to 'any black men'[4] that night and he was not spotted by any nightclub security guard. It would be quite extraordinary if a 19-year-old student of Somali origin could have remained unnoticed in a predominately Caucasian club catering exclusively to patrons over 28 years of age.

Secondly, in order to place a drug within her drink, Jama would presumably have been within very close proximity to M at a time when her consciousness was not yet impaired by the administration of a drug. Thirdly, regard must be had to the fact that M had only been in the nightclub for approximately thirty minutes before being found in the toilet cubicle. This means that within a maximum time frame of thirty minutes Jama would have had to have spotted and drugged M, somehow lured her away from the 800 patrons unnoticed, raped her and then abandoned her within a toilet cubicle all the while having sufficient forethought to lock the cubicle from the inside upon leaving. It is also incredible to note that although it took two large security guards to lift M from the nightclub bathroom who 'at times, drag[ged] her across the floor', it was nevertheless put to the jury that a 19-year-old man could have moved a heavy and at least semiconscious woman in her late forties.

Such a highly unlikely series of events seems more appropriate in the context of a poorly scripted daytime soap opera rather than the prosecutorial substance of a rape trial. The prosecution never offered a scenario or theory concerning the exact circumstances of the rape as their case

was entirely based upon the incriminating DNA evidence. Nor did the defence challenge the assertions of the prosecutor regarding the DNA, as they too adopted similar beliefs as to its infallibility.[5] In the end, Jama's guilt was accepted by the jury and trial judge on the basis of what the prosecution referred to as 'rock solid'[6] DNA evidence, which could be relied upon 'safely and beyond a reasonable doubt'.[7]

Jama served 16 months in prison before his sentence was quashed, after it was discovered that the incriminating DNA sample had been contaminated. It is believed that the contamination occurred as a result of poor DNA collection standards. The doctor who examined M had earlier that day obtained samples from another woman with whom Jama had had consensual sexual contact. Contamination is thought to have occurred as a result of environmental factors. The astonishing facts of this case provide an ideal platform to examine the ways in which DNA evidence is presented and perceived by juries and the "mystical infallibility" it can wield within the criminal justice system.

The Vincent Report

The exoneration of Jama prompted Mr FRH Vincent QC to produce a highly critical report to the Victorian Government, the Vincent Report, which put forth a number of recommendations. Although *prima facie* the error that set this case in motion was attributable to the hospital, the Vincent Report identifies highly problematic areas within the criminal justice system. These areas include the perception that DNA evidence is "rock solid", thereby enabling prosecutors to bypass the checks and balances engrained within the criminal justice system and convince a jury beyond a reasonable doubt that the accused committed an offence. In one of the most damning facts of the case, the Report revealed that a police detective 'conscious of the lack of supporting evidence' had expressed reservations about the DNA evidence and had questioned whether the sample had been contaminated. The officer also suggested the drafting of a report on the matter but the police department reassured the officer of the quality of the forensic evidence and no such report was ever prepared.

In the most colourful language, Vincent compares the DNA evidence used in this trial to Ozymandias' broken statue from the poem by Percy Byssche Shelly. He writes, '[L]ike the inscription on the statue's pedestal, everything around it belied the truth of its assertion. The statue, of course, would seem by any reasonably perceptive observer, and viewed in its surroundings, as a shattered monument to an arrogance that now mocked itself.'[8] Precisely how the DNA evidence took on the quality of Ozymandias' statue is best examined through an analysis of the manner in which juries treat scientific evidence.

DNA in the Australian criminal context

DNA can provide powerful evidence establishing either the guilt or innocence of a defendant. It is found in all cells except red blood cells and it is often professed individuals (apart from identical twins) has a unique DNA marker.[9] Nevertheless, there is no conclusive scientific proof of such uniqueness. Australia's first case involving DNA evidence was in 1989 when Desmond Applebee was convicted in the ACT of three counts of sexual assault on the basis of DNA evidence found on the victims' clothing.[10] Following the Applebee case, there has been a dramatic increase in the use of DNA evidence in criminal trials.[11] However, as a result of its potential fallibility, DNA evidence should be used in conjunction with other forms of evidence.

Former Police Minister Paul Whelan expressed hesitation towards sole reliance on DNA evidence upon the introduction of the *Crimes (Forensics Procedures) Act 2000* (NSW), when he stated, 'It is important to note that DNA will be only one tool in the police officer's kit. They will still need to assemble a brief of evidence against the offender; DNA alone will not convict!'[12] Although this point has been made in numerous cases,[13] one wonders exactly what other tools the police and prosecution employed in the Jama case.

In recent years, courts have become more

willing to rely predominately on DNA evidence, as Chief Justice Spigelman noted in *R v Galli*[14] that, 'The courts have approached DNA evidence with caution. However that caution is naturally abating as experience with the use of such evidence has grown.'[15] The question of whether the prosecution can rely solely on forensic evidence has only twice been put to the High Court of Australia, in 1912 (regarding fingerprints) and in 2010 (regarding DNA).[16] By its refusal in both cases to accept special leave, the Court lost a crucial opportunity to provide guidance to lower courts on the way in which to handle such difficult cases.

In an example of extraordinary irony, in the same year as Jama was exonerated, the Deputy Senior Public Defender Andrew Haesler SC prepared a paper for the Judicial Commission of NSW in which he stated, 'A DNA match thus shows that it is *possible* to a very high degree of probability that the defendant is the person responsible for leaving the stain. Despite the power of statistical analysis that accompanies DNA testing I argue this can never be enough to prove a case beyond a reasonable doubt in the absence of other evidence for the DNA to corroborate.'[17] Unfortunately for Mr Jama, the prosecution proceeded with the case despite the absence of additional evidence. This raises significant questions as to why the checks and balances entrenched within the criminal justice system failed and allowed such an astonishing miscarriage of justice.

DNA and juries

Archival studies reveal that the presence of incriminating DNA evidence significantly increases conviction rates. Juries convict 23 times more frequently in homicide cases and 33 times more frequently in sexual assault cases where the prosecution leads DNA evidence.[18] This finding highlights how essential it is to the proper administration of criminal justice that juries be capable of interpreting and comprehending forensic evidence.

In light of jurors' propensity to convict when presented with DNA evidence, recent trends are worrying. A study based on post-trial juror interviews in NSW reveals that regardless of any admitted difficulties in understanding DNA evidence, jurors proceed to convict.[19] This suggests a perception amongst jurors that DNA is infallible. Jurors appear to be 'overawed by the scientific grab in which the evidence is presented and attach greater weight to it than is capable of bearing'.[20] This finding certainly aligns with the Jama case. Alongside comprehension difficulties, many scholars have also raised the possibility of the "CSI Effect" in jury trials.

The "CSI Effect"

In 2007, with 84 million viewers globally, CSI was the most popular television program worldwide.[21] The show glamourizes the work of forensic scientists and omits the more mundane, less dramatic features of police work. Through an unrealistic portrayal of the speed and accuracy of forensic science, viewers can be left falsely believing in the irrefutability of forensic evidence. At worst, this can breed a perception that DNA evidence will always leads to a correct conviction. Numerous studies and surveys have been conducted to analyse the effect that CSI exposure has on jurors.[22] The results of these studies indicate that although CSI viewers expected more scientific evidence for criminal cases, this did not correlate with a higher than average conviction rate.[23] Although most "CSI Effect" studies originate in the United States, in 2010 researchers conducted the first Australian investigation regarding the influences of CSI viewing on legal-decision making.[24]

The mock-trial study led by the Australian Institute of Criminology (AIC) concluded that CSI viewing affects jurors in three key areas: perception of evidence, motivation to serve as juror and victim sympathy.[25] The participants in the study were predominately residents of NSW in the greater Sydney area, ranged in age from 18 to 65 years, and had varying educational backgrounds.[26] Approximately half of the mock jurors (51.5 per cent) were frequent viewers of CSI shows, while a further 31.7 per cent were infrequent viewers and 16.8 per cent had never watched the show.[27]

In general, the perceived trustworthiness of DNA evidence was very high. The mean conviction rate among mock jurors who were exposed to DNA expert evidence (58.6 per cent) far exceeded that of unexposed mock jurors (22.5 per cent). The mock jurors who were most likely to convict were those who were not only exposed to DNA expert evidence, but who had concurrently found the information easy to follow, and perceived it to be useful. In terms of relative education, the mock jurors with less formal education tended to rate DNA evidence as more useful. Notwithstanding, one's level of education was not generally a strong determinant in influencing a verdict. Increased victim sympathy on the part of CSI viewers is likely explained by the compassionate light in which the show portrays victims. Juror sympathy for the victim may help explain why Jama was convicted of raping M on the basis of the extremely weak case put forth by the prosecution. However, the potential for juror error and misconception can be mitigated through the presentation of DNA evidence within a cognitively-sequenced expert tutorial.

Avenues for reform - multimedia learning

Traditional court procedures present jurors with instructions, information and evidence in a verbal manner. Proponents of multimedia learning argue that the vast majority of people learn better and more accurately when presented with information both visually and verbally.[28] The AIC Study exposed jurors to an 18-minute cognitively-sequenced expert tutorial on DNA evidence. These tutorials improved jurors' understanding with an average knowledge gain of 37 precent. Of particular relevance to the Jama case, the study indicated that an exposure to multimedia learning led to an increase in a mock juror's sensitivity to the fallibility of DNA, and lowered the conviction rate.[29] The exposure to multimedia was especially effective for those mock jurors with a lower level of formal education as it reduced susceptibility to 'white coat syndrome' (a term used to describe situations where respect for the scientist or doctor veils the interpretation of a witness' testimony).[30] In light of these results, we might question whether Jama would have been convicted had the jury in that case been exposed to multimedia learning.

The consequences for NSW

Although the Jama case occurred in Victoria, it is reasonably conceivable that a similar tragedy could occur in NSW. There is nothing to suggest that NSW jurors would differ from their Victorian counterparts in the possibility of falling victim to "rock solid" DNA, as reflected by recent jury studies. The NSW Bureau of Crime Statistics and Research (BOSCAR) conducted a jury study across 112 criminal trials in NSW between July 2007 and February 2008.[31] Of the 1,225 jurors who participated in the survey, 57.5 per cent said they understood everything, 27.9 per cent claimed to understand nearly everything, and 14.4 per cent responded that they understood most things.[32] This study should be approached cautiously as participants may falsely purport to understand everything put before them. However, these findings, when taken in conjunction with those of the AIC, demonstrate the continuing need to ensure juror comprehension.

Findlay Report

Leading Australian criminologist and professor, Mark Findlay, reviewed the regulation of DNA and forensic evidence for the NSW Government in his report, *Review of the Crimes (Forensic Procedure) Act NSW*.[33] Findlay recommended tighter regulation of DNA and forensic evidence in the criminal justice system. The absence of uniform regulation is demonstrated by the fact that there is no national standard laid down for doctors when conducting forensic examinations of females and the collection of samples for additional testing.[34] This is significantly worrying given the potential for DNA contamination and the extraordinary weight an unchecked error can wield within a criminal trial.

After extensive study, Findlay found that even '[i]f the defence challenges the way these samples were taken, judges fairly regularly will let it in because they believe its probative value outweighs any prejudice to the accused'. Thus, proper directions from judges to juries, alongside multimedia learning, would aid in reducing juror

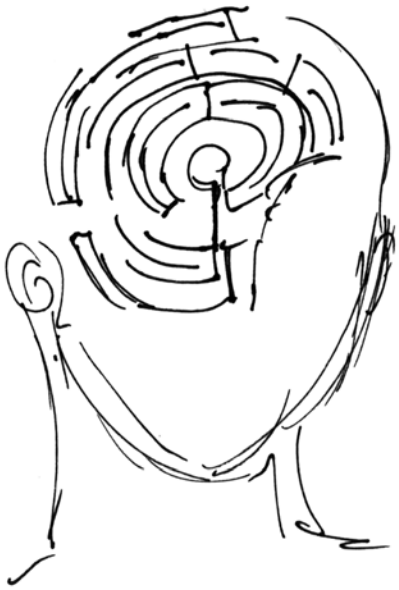
misconceptions. Findlay's calls for reform have fallen on seemingly deaf ears. In a 2010 interview with The Australian, he lamented that '[n]othing of substance has happened – certainly nothing in terms of legislation.'[35] I met with Findlay earlier this June; he confirmed that no significant changes have since been implemented.

The reality that these misconceptions regarding DNA and improper management of forensic evidence predominantly benefits the prosecution may offer one possible reason why the government has yet to implement significant changes. One can only hypothesize whether the government would be more eager to introduce new policies regarding DNA evidence if the current regime disproportionately benefited the defence and resulted in more acquittals.

Concluding remarks

The injustice and deficiencies within the Jama case are best illustrated by the stark and disturbing contrast between the statements of the prosecutor, trial judge and the Victorian Court of Appeal. In closing submissions, the prosecutor in the Jama case submitted, 'There was no suggestion in this case of any lapse or error including contamination type error about which the laboratory has got techniques that reveal such a thing if it happens…'[36] However, on 7 December when the Court of Appeal quashed the conviction, the Court held that it 'was likely that the rape had never even occurred'.[37] This statement can be juxtaposed with that of the trial judge who during sentencing jarringly referred to Jama as 'offensive, repugnant and intolerable in this society' and shamed him by stating, '[i]-nstead of assisting her and making sure of her safety, you raped her for your own immediate and short-lived sexual gratification. The jury cannot have viewed the facts in any other way'.[38]

Although the Victorian Government awarded Jama an *ex gratia* payment of $525,000 following his acquittal, could any monetary award ever truly compensate a person for such a miscarriage of justice? The extraordinary injustice of the Jama case should be used as a stimulus for reform. When a single piece of DNA evidence can be used by the prosecution to establish both the commission of a crime and the identity of the accused, it is remarkable that the report recommendations of Vincent and Findlay have not yet been implemented more comprehensively.



Navigating the Memory Labyrinth

False memories and the rights of the accused in a criminal trial

Virat Nehru
LL.B. III

Article

Introduction

Is it possible to recall events that never actually happened? Can one *genuinely* believe that an event occurred in one's life, even though it never did? How easy is it to implant 'false' memories? In a world where sexual abuse cases are regularly coming to light, and psychologists and psychiatrists are increasingly being called upon to give evidence regarding the mental state of the alleged victim or the accused, the concept of what can be considered truthful in terms of memory requires close scrutiny. 'False memory' cases, a phrase coined by Peter Freyd, the founder of the False Memory Syndrome Foundation, occur when a person believes in memories which are factually incorrect. Such cases prove to be exceptionally difficult when judging what can be termed 'reliable' inside the courtroom. This article explores the phenomena of false memories, drawing on an interview with Charles Waterstreet, a Sydney-based criminal law barrister experienced with false memory cases.

The unreliability of memory

The only reliable aspect regarding memory is that it is unreliable. You can be at your wits' end, trying to remember where you put your car keys and yet, when you desperately want to forget the times you spent with your ex and move on with your life, the memories seem to haunt you forever. Charles Waterstreet defines memory as something subsequent to our first experience of an event.

> Memory is not the act of remembering an event; it is the act of remembering your first memory of it.[1]

This formulation might appear hard to grasp at first instance, but becomes clearer when applied to identification cases. There is overwhelming empirical evidence to suggest that when witnesses are called upon to identify someone from a police line-up, they are more inclined to recall the description that they first gave to the police, rather than recalling the person from the event when it actually happened.[2] Contemporary memory theorists agree that as human beings, we only retain approximately one-fourth of a day's information that we receive. The rest is either forgotten, or is absorbed into the subconscious and may prove to be extremely unreliable when 'recalled'. The new information that we receive is then stored in our brains as 'fresh' information. Unfortunately, to make space for this 'fresh' information, older memories become recalibrated.[3] This is the reason why we remember less and less about specific events of past days. The *Judicial Commission of New South Wales* contains specific guidelines with regards to the reliability of memory in its 'Sexual Assault Handbook'. It makes five key points:

First, memories are only records of people's experiences of events and should not be considered a record of events themselves. Therefore, they do not offer absolute truth and should not be mistaken for a holistic version of events.

Secondly, as a general rule, memory is more reliable when it is regarding an overall perspective and less reliable when it is of specific experienced events.

Thirdly, memory is a constantly constructive process. As a consequence, memory is prone to error and is easily influenced by the environment of recall, including police interviews and cross-examination in court.

Fourthly, memories for experienced events are always incomplete. Memories are time-compressed fragmentary records of experience. Any account of a memory will contain forgotten details and gaps.

And finally, most saliently, people can remember events that they have not experienced in reality. This does not necessarily entail deliberate deception. For example, an event that was imagined, which may be a blend of a number of different events or may make personal sense for some other reason, can come to be genuinely experienced as a memory. These are often referred to as 'confabulations'.[4]

Instances of confabulation or 'false memory' are quite common and even more so in cases

involving sexual abuse, because of the reliance on witnesses and victims to recall specific, traumatic events.

The historical development of 'false memory' cases

The concept of 'false memory' came to the fore in the early 1980s and 1990s in the United States of America. During that period, the concept of 'compartmentalised memory' was widely accepted and promoted by many psychologists. This theory was formed on the basis that the mind could form internal compartments and one could repress memory of traumatic events in these compartments and not remember them entirely. This was just an extension of Freudian repression, that, the mind suppresses that which hurts it.[5] Freudian psychoanalysis has since grown increasingly irrelevant, and though the concept of 'repressed memory' has survived, it invites heated debate. Compartmentalised memory theory has been acutely scrutinised and is now viewed with significant scepticism.[6]

Waterstreet sums up the attitudes of the 1980s and 1990s:

> In the 80s and 90s there was a rash of finger pointing at family members and the clergy by middle aged men and women, who've come to a realisation that their life is washed up, they are alcoholics, they are drug addicts and they've got to find out reasons why they are like that and they rack their memories and they are fanned by psychologists and they come up with - abuse.[7]

Dr. Elizabeth Loftus, a forensic psychologist, conducted the 'lost in the mall' experiment to show how easy it was to manipulate memory.[8] The test subjects were all told of an event that never happened – how they got lost in a mall when they were younger, along with four other true events of their lives. After a few days, the participants were informed that one of the events that were relayed to them was false and they were called upon to relay which one they thought was false. Some truly believed that the false incident was true and instead claimed that one of the events that had actually happen was false.

Cases involving 'false memory' are common. The New South Wales 'Skaf' gang rape trials that occurred in 2000 are a prime example.[9] Waterstreet recounted the testimony that was the point of contention, without revealing the names of the parties involved:

> The girl couldn't remember anything, she had a gang rape scenario, and two days later, had a nightmare and remembered everything in detail. Unfortunately, she didn't tell the police that what she recalled was a nightmare, not her memory. Her first statement named three, her second statement named about fifteen in graphic detail, which is a lot of people. But ironically, there was not one bruise, one hair out of place, one bit of physical or medical evidence that would indicate rape by fifteen guys.[10]

The question is not whether what she recounted *really* happened or not; rather, the question is about upholding the rule of law and having a fair trial, wherein the rights of the accused are not infringed.

The fascination with denominations

As a society, we are increasingly concerned with denominations. Whenever the media covers a court case, the audience is quickly made aware of who the 'victim' is and who the 'perpetrator' is. This binary is then exaggerated by human-interest stories that personalise the ordeal of the 'victims', thus making them appear even more sympathetic to the public. However, Waterstreet is quick to note that the perspective differs quite distinctly when you are inside the courtroom.

> No one is usually a hundred percent innocent or a hundred percent guilty. There are all shades of grey, even more than fifty. No one has ever said: 'I'm guilty of this'. You may create a defence out of what they've told you but very rarely, if ever, they say I'm guilty of this. They may say I'm guilty of these facts but I did not intend that outcome.[11]

Perhaps the world has become too cynical. Perhaps the lines between the victim and the perpetrator aren't really that clear, as Waterstreet reminds us. This propensity to judge the accused based on the charges laid exists mainly because of the huge disconnect between events inside

the courtroom and those beyond. Most trials that involve minors and sexual abuse occur behind closed doors and the stigma that comes attached even the alleged label of a 'paedophile' is immense. The instances of trial by social media have increased by leaps and bounds as vitriol is spewed on alleged sexual abusers on platforms like Facebook and Twitter. The presumption of innocence appears nothing more than mere words, especially in cases where sexual abuse is involved.

How then to solve this problem of 'false memory'? The natural answer would be to give more opportunities for barristers to thoroughly examine witnesses so that the truth comes to the fore at the earliest. But how exactly does one accomplish this? After all, in sexual abuse cases, victims have the choice to give testimony via closed-circuit television cameras. Where, children are concerned, CCTV cameras are almost always used. Waterstreet fleshes out the core conflict in the issue:

> If you're a victim, you get enormous amounts of sympathy from the system in NSW, in Australia. It encourages you to go into this bubble. As soon as you walk into the police station, you make an allegation, you're put into this bubble, I call it the 'culture of the complainant'. You are nursed into the witness box; you don't get cross examined till the trial. You don't even get into the courtroom; you are beamed in there by television. So, it's an artificial enterprise. The jury doesn't even get to see whether you've got legs or a body, all they see is a television screen and defence barristers are forbidden to cross examine about a lot of things. And it becomes really unfair.[12]

In our efforts to protect the rights of the victim, we have invariably neglected the rights of the accused. The accused has become a form of 'deviance' that is beyond reproach. At least in terms of sexual abuse cases, the criminal justice system seems to be moving towards a system of retribution, instead of rehabilitation. This is a serious cause for concern.

Canada is one of the first nations that has taken a firm step in the fight to retain 'reliability' inside the courtroom. After being used for almost thirty years, the Supreme Court of Canada imposed a blanket ban on 1st February 2007, on witness testimonies that were obtained under hypnosis, ruling that it was not scientifically reliable enough to have a place in the court of law.[13] Canada has certainly moved in the right direction, by being the first country with an English criminal law tradition to place a prohibition on post-hypnotic evidence.[14] 'This technique and its impact on human memory are not understood well enough to be sufficiently reliable to be used in a court of law. Although hypnosis has been the subject of numerous studies, these studies are either inconclusive or draw attention to the fact that hypnosis can, in certain circumstances, result in the distortion of memory,' held Deschamps J, whilst ruling for the majority in *R v Trochym* [2007].[15]

The advent of 'false memory' cases has posed a serious dilemma for the law. It has highlighted the glaring imbalance and discrepancy between the rights of the victim and the rights of the accused. It remains to be seen whether the law can react in time to restore some sort of balance.

Think you remember the details?

Think again.

As Waterstreet puts it, 'you've got to distil the smoke from the mirrors'.[1]

Broken Promises

Waging war on the legally vulnerable in New South Wales

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Article

Introduction

The Westminster tradition of democratic governance holds that the entrenchment of legal rights and protections within constitutional documents is unnecessary. Rather, we trust that convention and adherence to the values that such protections stem from will mean that governments will not fundamentally alter our legal rights. Unfortunately, this approach in the state of New South Wales has been fundamentally unsuccessful. Parliament has proved inadequate to the task of upholding the rights of the legally vulnerable, instead opting to trade these rights for votes in a game of electoral chess. This article will explain how the NSW state parliament has in recent years systematically undermined long-held legal traditions and rights of citizens caught in the criminal law system - not due to any attempt to be more effective in crime prevention and detection but rather, as part of a cynical 'law and order' auction. In particular, this article will focus on the reforms to NSW's anti-consorting legislation and the qualifying of the right to silence as being emblematic of this troubling trend.

The context

First, it is necessary to unpack the political context behind the making of such policy decisions. Fundamentally it is about a balance of what gains parties the most votes. Standard democratic theory suggests that if parliament adopts a motion that will please some people but alienate more (for instance, by taking away their fundamental rights), then most political parties will not pursue such measures. This theory fails when it comes to reform of the criminal justice system. As the perceived 'victims' of such legislation are easily vilified and characterised as being criminals, part of organised gangs, and violent offenders, there is no perceived cost to targeting them as a marginal group of society. Such groups lack well funded and coordinated lobby groups to stand for them, and are inherently difficult for the average voter to sympathise with. Hence, political parties of any persuasion have an electoral incentive to be seen as being tough on crime – a political strategy with virtually no cost. Conversely, there are very few votes to be gained by appearing to be 'soft' on crime, for example, by focusing on restorative justice and rehabilitative sentencing. Consequently, in recent decades there has been a 'law and order' auction with respect to legal criminal rights, as both parties attempt to outdo each other when it comes to appearing in favour of law enforcement at the expense of citizens' liberties.[1] Unfortunately, the Australian sense of 'fairness' doesn't seem to extend to widespread outrage about the systematic dismantling of legal rights, and so political parties have been able to do as they please, with criticism predominately only from legal professionals, academics and activist groups. Whilst this article will mostly focus on reforms adopted in the past few years by the Liberal government of Barry O'Farrell it is important to recognise that both political parties are complicit in this political point scoring, and the lack of any meaningful opposition to such policies by Labor means that the government in this regard at least, is able to act without being held to account.

What is particularly disturbing is that the current crop of state politicians involved in the process are fully aware of their actions. Greg Smith, the former shadow Attorney General made his opinions on the 'law and order' auction clear. He recognised the existence of this complication in the political system and lamented its negative effect on the development of criminal justice in the state. He went on record multiple times whilst in opposition to both declaim Labor's giving into it, and promising that the Coalition would avoid such policies.[2] This was in character with Greg Smith's former profession as Deputy Director of Public Prosecutions, experienced in the operation of the criminal law in a way that few other politicians could claim. Consequently, his reverence for the legal traditions and protections for NSW citizens was credible. This makes it all the more baffling why, when Greg Smith became NSW Attorney General, he has been leading the charge in reforming the criminal justice system in particularly problematic ways. Whilst some of his proposed reforms are commendable (for instance trying to simplify the over-complicated bail laws, and a renewed focus on rehabilitative

sentencing)[3] others have been in direct contradiction of his own sentiments. At best, this is disappointing - at worst it is the highest hypocrisy for a former barrister, Queens Council and Deputy Director of Public Prosecutions to engage in behaviour that he himself knows to be perniciously destructive of individuals rights, for the sole purpose of achieving electoral success.

NSW anti-consorting laws

One of the Attorney General's first troubling forays into reforming criminal justice was with the strengthening of NSW's anti-consorting laws. Such laws were historically created and used for dealing with the organised 'razor' gangs of the 1920s and 1930s, and have been successively strengthened ever since.[4] They are used by police to target and pressure potentially innocent or potentially guilty people who 'consort' with those formally found guilty of serious offences. These laws have always been extraordinarily broad: High Court decisions reveal the absurdity of these provisions. *Johanson v Dixon* held the word 'consort' is a value neutral term,[5] not necessarily requiring illegitimacy or illegality, or specifying a length of time. *Brearly v Buckley* determined that two or more meetings are enough for consorting to be defined as 'habitual'.[6] It effectively means that anyone who interacts with those convicted on a regular basis is committing an offence. Due to the broad scope of this law and the enormous quantity of possible defendants, it is obviously up to police discretion in deciding whom to charge with the offence. This means that the law is, in practice, less an offence to be pursued, and more a tool for police power in combating criminal gangs; that being the reason it was instituted in the first place during the 1930s.

The latest raft of changes occurred in response to escalating violence between motorcycle gangs in 2011. The current incarnation can be found section 93X of the *Crimes Act 1900* (NSW). It reads "A person who: habitually consorts with convicted offenders, and consorts with those convicted offenders after having been given an 'official warning' in relation to each of those convicted offenders, is guilty of an offence" punishable by a maximum three year custodial sentence.[7]

To the current government's credit, they did institute a number of (necessary) defences to the offence. These include seeing family, work commitments, education, health services and legal aid. [8] Interestingly, the addition of these new exemptions to the law was opposed by NSW Labor, who claimed it watered down the law too much.[9] However, other changes (which Labor did agree with) proved more troubling. Notable amendments include the raised maximum sentence from six months to three years, converting the previously summary offence to an indictable one and expanding the definition of 'consort' to include digital means - thus empowering wiretaps and the monitoring of text and email messages.[10]

The fundamental problem is that anti-consorting laws have always been troubling in theory and disturbing in practice, and any increased expansion of their scope is enormously problematic. For starters, the law is ridiculous in theory; a politician could be sentenced to three years in gaol for being consistently interviewed by journalists who were convicted of perjury.[11] The sheer scope means the law must be applied selectively by police.[12] This is a fundamental breach of a key principle of the rule of law which emphasises that the law should be applied equally – not according to individual discretion. It is clear there is scope for police to abuse such a law: the inherent discretion involved means that police can selectively target certain populations or social groups unfairly. It also becomes a means for police to legitimately hassle and threaten potential information sources, this being one of the reasons the police were greatly in support of the amended legislation.[13]

Moreover, the law is based on the principle of guilt by association, which is contradictory to the community belief in the principle of freedom of association. Even worse, the law is functionally unnecessary. There exists non-association court orders which police can apply for, but which have appropriate safeguards.[14] Hence the provisions are redundant, except where extraordinary abuse of the system is required.

Even more perversely, the provisions undercut the theory that someone who has committed a crime can restart his or her life after prison. It is further punishment of a person who has already been punished by the system. This serves to potentially alienate convicts from the rest of society, for the rest of their life. It essentially classes ex-convicts as permanent criminals diminishing prospects of reintegration, potentially increasing rates of recidivism.

The latest proposals only make these problems worse by expanding the severity of the law and it scope, and hence widening the potential for abuse. Ironically (yet somehow not surprisingly), the first person charged under the new and improved laws was not a hardened member of a biker gang, but a disabled pensioner.[15] Charlie Foster, 21, who was born with an intellectual disability and cannot read or write, was sentenced to between nine and twelve months' jail last year for a series of shopping trips and walks with three friends who had prior convictions. If there was ever an incident that revealed the sheer scope of the law for both laughable absurdity and yet serious minded abuse, it was this.

Abrogating the right to silence

A case of legal reform far more subversive to fundamental legal rights was the qualification of the right to silence earlier this year. These reforms were first proposed in late August 2012, once again in response to a police outcry demanding more powers to be able to target organised criminal groups. Their argument is that under the status quo, it is too easy for hardened criminals to stay quiet, and then call upon a manufactured alibi later.

The relevant legislation was introduced to parliament in October, shelved for a few months, and then passed in March in an amended form (as the previous draft was so poorly constructed that it accidentally required the government to completely overhaul legal aid resources to be effective). Naturally, the fact that such an overwhelming change to the basic rules of evidence and principles criminal justice was given less than three months for discussion and debate between the proposal and the first draft of legislation (resulting in the aforementioned poor drafting) was in and of itself immensely contentious.

What no one expected, however, was that the resultant legislation would be absolutely abysmal in its consequences, and yet totally meaningless in what it was designed to do. Consequently, looking over the March Bill is a terrifying glance at the future legal rights of all NSW citizens.

The *Evidence Amendment (Evidence of Silence) Act 2013* (NSW) that passed the house in March, added section 89A to the *Evidence Act 1995* (NSW). Specifically, this section allows for an unfavourable inference to be drawn (for instance about consciousness of guilt or the credibility of a defendant), if a defendant fails to mention a fact during 'official questioning' that is later relied upon by the defendant in trial, for instance an alibi. In order to mitigate the massive potential for harm this can have on the legally illiterate but innocent, under the March Bill, this inference can only be drawn if a caution was given to the defendant during official questioning about a failure to mention such relevant facts AND if a lawyer was present in the room during the questioning.[16]

These safeguards are, supposedly, sufficient to deal with the conventionally raised arguments in favour of the right to silence; that innocents could accidentally incriminate themselves for other activities, that innocents might initially make mistakes in their statement that cause the police to distrust them and persecute them and that innocents might remain silent for an abundance of legitimate reasons (mental capacity, intoxication, age, stress, loss of recall, misunderstanding of the question, ignorance of rights and duties, and fear of consequences). The government's argument is that with a lawyer in the room hopefully all these potentially disastrous consequences for suspects can be avoided.

Basically the logic of the proposal is that a person who is arrested, is cautioned about remaining silent (for instance about his alibi), is advised

by his lawyer on the harms of remaining silent about his alibi, proceeds to remain silent anyway, and magically finds an alibi before the trial, can have a negative inference drawn about his refusal to mention his alibi.

Let's ignore the aforementioned conventional harms of undermining the right to silence, and more philosophical harms (for instance, how it undermines the 'golden thread' of criminal justice, by effectively reversing the burden of proof with respect to evidence not initially mentioned). There is, however, a fundamental problem with the requirement for a lawyer to be present to provide the absolutely necessary advice on what facts should and shouldn't be revealed to police during official questioning: there will be virtually no circumstances in which lawyers will be in a position to provide adequate and detailed advice on such matters to defendants in the short time before and during the official questioning. Considering the limited time they have to interview their client, and the fact that police are rarely cooperative as to providing defense lawyers with detailed charge sheets and what evidence they intend to use (considering any potential trial is months away), the amount of information that defense lawyers have to work with is impossibly small.[17] This in turn opens up massive potential for claims against lawyers for professional negligence if they provide inadequate advice.

There are of course other practical problems with the legislation; there are no allowances made for the intoxicated being questioned,[18] there is no clear definition of what 'official questioning' actually means so theoretically it could encompass the questioning of witnesses who do not yet know they are suspects,[19] the required caution is not required to be in a standardised form as in Britain, such a caution requires extraordinarily competent language translators to be on hand 24/7 to ensure that suspects understand the caution as even a minor mistake in translation could be fatal,[20] and detention times are massively increased to allow for legal advice to be given before 'official questioning'.[21] All of these reek of legal reforms which sound good to politicians, but to any lawyer who even considers how the bill will be practically implemented, the legislation reveals itself as being a hollow shell of pretensions of being tough on crime. Most importantly, it fundamentally fails in its entire purpose, to crack down on organised crime. This is because the qualification only applies if a lawyer is in the room. Therefore there is no reason why a 'hardened' criminal couldn't just tell his lawyer to leave the room, and then stay quiet, thus rendering the entire law meaningless. In an online conversation, even the NSW Government Whip, Peter Phelps, conceded that there was nothing preventing such tactics from taking place, that the law was functionally useless, and in fact deterred lawyers from appearing at police stations to represent clients.[22] Therefore, the change has virtually no impact on those who apparently have experience in gaming the system, and disproportionately affects those without much experience in the nature of criminal procedure, exactly the sort of people the right to silence is designed to protect. Unsurprisingly, this legislation was strenuously opposed by the NSW Law Society.[23]

Conclusion

If nothing else, the past and current experience of the current NSW government raft of legal reforms reveals the problems of relying purely on the democratic process to protect the rights of the legally vulnerable in society. Instead, we see how the democratic process, by focusing on balancing electoral gains and losses, creates a perverse incentive to ignore solid policy advice and normative principles of criminal law. It is difficult to see a silver-lining amongst such radical restructuring of the basic legal rights and processes that for so long have safeguarded procedural fairness, other than the reminder that the state should always be questioned and held to account for its actions; and that just because reform of a complex system is sought doesn't mean that the reformer has everyone's best interests at heart.

"That Secret Court Took My Kids Away"

A critique of child protection proceedings in New South Wales Children's Courts and suggestions for reform

Anonymous

Article

Introduction

The rate of child removal in NSW is reportedly one of the highest in the Western world.[1] Given the significant powers of child welfare authorities, and the enormous impact of child removal upon both children and families,[2] one would expect rigorous processes of judicial oversight to have been put in place. However, the operation of the Children's Courts in such proceedings conflicts with many of the fundamental principles of Australia's justice system: courts are closed to the public and the rules of evidence do not apply.[3]

The relaxation of these principles is intended to create an informal environment, which invests primacy in the protection of children's privacy and welfare. This paper casts doubt on the necessity for such measures, and argues that it is necessary to re-evaluate the conduct of child protection proceedings, in light of mounting reports of misconduct on the part of child protection authorities. It will be revealed that proceedings are highly adversarial, with parents being confronted by significant barriers to challenging orders sought by the authorities. Finally, it will be questioned whether significant changes can occur without addressing entrenched attitudes among caseworkers and their legal representatives. Interspersed throughout are excerpts of an interview with Jane,[4] a mother whose daughter was the subject of child protection proceedings.

The Children's Court of NSW: brief overview of proceedings

The conduct of care proceedings in the Children's Court is governed by the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ('the Act'). Under the Act, magistrates in the Children's Court may make various orders upon application by Family and Community Services ('FACS', formerly the Department of Community Services ('DoCS') [5] including for the removal of children[6] and/or allocation of aspects of parental responsibility.[7] In reaching decisions, the paramount concern for the Court is protection of the child/young person from harm, and promoting the child or young person's development.[8] Typically, cases involve removal on grounds of abuse or neglect, though the Court also authorises medical treatment of children in cases of parental objection.[9] In 2011, 11,813 children in NSW were living in out-of-home care following court-ordered removal from their families.[10]

Jane's story

Jane's daughter Zoe[11] had a happy, healthy childhood and, by the age of 14, excelled at sport, drama and her studies. At the start of the school year, Zoe began to feel slightly unwell and went to see a doctor who prescribed her some medication. Within a week of starting the medication, Zoe was so sick that she couldn't attend school and, within a month, she was in hospital. No one could explain what had caused the sudden onset of such severe symptoms. She became progressively worse as the dosage of the medication was increased and, over the course of the next year, was frequently in intensive care. Jane was greatly distressed by Zoe's sudden severe illness and began researching the symptoms on the internet. She found that there was considerable controversy surrounding the medication that Zoe had been prescribed, with warnings about side effects in teenagers that mirrored Zoe's.

Jane asked Zoe's treating team to consider reducing the medication, or trying Zoe on alternative medication to determine if it was the cause of her symptoms. Instead, they increased it. Zoe got worse. Jane asked repeatedly for them to try something different. Well over a year had passed since Zoe was first admitted to the hospital and she had never been so unwell. Frustrated, Jane wrote a letter advising the hospital that she was withdrawing her consent for the medication. Soon afterwards, Jane was called to a meeting with a number of people who introduced themselves as DoCS caseworkers. She was told that if she didn't sign a form giving consent to the treatment, they would take Zoe's parental rights from her. Jane refused to sign, believing Zoe wouldn't survive the treatment. The caseworkers said they would see Jane in court the next day.

DoCS were successful in obtaining the orders they sought; in Jane's words, she 'didn't stand a chance in the Children's Court'. For more than a year, DoCS provided the requisite consent for Jane to be medicated in hospital. Finally, under a different treating team more than three years after Zoe's first visit to the doctor, she was allowed to stop taking the medication. The symptoms disappeared and, within weeks, Zoe was healthy enough to return to school.

A closed court with publication prohibitions

Care proceedings in the Children's Court are closed to the general public,[12] and there is a prohibition on publishing names and identifying information about children involved in court proceedings.[13] This is justified by the perceived need to protect the identity of children, due to the stigma associated with being the subject of care and protection proceedings in which it is often assumed that parents have been 'neglectful or deliberately abusive of their child'.[14]

However, 'openness [of courts] is seen as an essential attribute of the judicial process and fundamental to accountability'[15] and is now considered 'a basic norm of international human rights law'.[16] Indeed, in *Russell v Russell,*[17] the High Court struck down a provision in the *Family Law Act 1975* (Cth) requiring Family Court proceedings to be heard in closed court on the basis that it changed the essential nature of the State Courts as articulated in s 77 (iii) of the *Australian Constitution*. Referring to the rule requiring open administration of justice, Gibbs J stated: 'this rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected'.[18] Equally important was the need to maintain public confidence 'in the integrity and independence of the courts', which was deemed to be improved through the 'public administration of justice'.[19]

Indeed, it would appear that the closed nature of children's court proceedings has led to 'disturbing'[20] practices in the Children's Court. In *Wilson v Department of Human Services – Re Anna*[21] Palmer J expressed concern about a failure to ensure procedural fairness, stating:

> [a]s a result of what appeared to be a rather quick and *"in club"* discussion between the Bench and Bar Table, an interim care order was made. The most important person in the courtroom at that time – the mother [who was unrepresented and] whose child had been taken from her at birth two days ago – was ignored.[22]

Furthermore, he observed that solicitors who appear regularly in the Children's Court could be perceived as 'enjoy[ing] a relationship with the Judge which [i]s something more than merely professional'.[23]

The aforementioned reference to a so-called 'in club' alludes to concerns about the limited pool of legal representatives that appear regularly in the Children's Court. According to Jane, 'it's like a game of musical chairs: [they] all seem to take turns representing the Department and the child. It's hard to believe that solicitors representing the child would challenge anything sought by the Department, given they are regularly instructed by the same DoCS officers'. Another parent whose children were taken on medical grounds was told to engage her own lawyers because 'local lawyers all sucked from the same government teat, all lunched together and rarely did a good job'.[24] These observations are echoed in the case law. For example, in two separate cases involving parental objection to a similar treatment regime in a particular hospital, the same solicitor acted for the child in one case, and for the Department in the other.[25]

Jane continues:

> They all seemed very chummy. During a fire drill in the middle of the hearing, the magistrate chatted casually with Zoe's doctor outside. It worried me that they were so familiar and I was sure the magistrate wouldn't give me a fair hearing…. when my lawyer [who had never worked in the Children's Court before] was speaking in court, the DoCS lawyers would roll their eyes and snigger...My lawyer said she'd never seen anything like it.

The closed nature of care proceedings is compounded by a failure to publish the vast

majority of Children's Court decisions in any forum accessible by the public, ensuring decisions cannot be subject to public or academic scrutiny. Furthermore, it has been reported that of the 600 submissions made to the 2008 Inquiry into Child Protection Services in NSW ('Wood Inquiry'), many of them critical of FACS, only 47 were made public,[26] supposedly in the interests of ensuring the protection of the identities of children in out-of-home care.[27] The non-publication provisions have been described as 'shackl[ing]…innocent parents whose children have been removed from their care…[who] could not speak out and take their cases to the court of public opinion.'[28] The cumulative effect of this is to potentially corrode public confidence in the fairness of proceedings. In approaching these concerns, it is pertinent to acknowledge Brereton J's comments in relation to an application for the Supreme Court to be closed in the exercise of its parens patriae jurisdiction:[29]

> In my view, great caution is required before determining that proceedings, even of this type, should be conducted in closed court… The issues which typically arise in this type of case…are generally of significant public interest, not merely out of curiosity but because all parents and the community as a whole have deep and abiding interest in the welfare of children. Proceedings such as these have a significant informative and educative function. It is important that what the Court does in this field be open to public knowledge, information and scrutiny… There may no doubt be some cases in which that course is appropriate, but ordinarily sufficient protection of the child will be achieved by a non-publication order of the type to which I have referred.[30]

It is thus arguable that Children's Court proceedings should be opened to the public as a general rule, with the necessary safeguards of non-publication orders. There should be greater publication of decisions to enable examination of judicial decisions and efforts should be made to facilitate public disclosure of FACS complaints, even if this involves the onerous task of removing identifying information. These measures would satisfy the need to protect the identities of children, whilst opening up court processes to public scrutiny, and could prevent abuse of court processes.

Non-application of the rules of evidence

Another striking feature of the care jurisdiction is that the Children's Court is not bound by the rules of evidence, unless the Court determines that those rules are to apply to particular proceedings or parts of proceedings.[31] Dispensing with the rules of evidence is purportedly justified by the concern that magistrates have recourse to all relevant material for the purpose of determining the 'safety, welfare and wellbeing of the child or young person'.[32] Furthermore, it has been suggested that 'the procedural formality of court processes can have an alienating effect on children, young people and their families'.[33]

However, rules of evidence serve an important function in marshalling the quality of information presented in court. The consequences of the non-application of these rules were highlighted in the Wood Inquiry which makes reference to an observation that '…information provided to the court on behalf of the Director-General… may include anonymous, and sometimes unreliable and occasionally malicious and/or quite incredible reports'.[34] This is supported by other reports that material put forward by child protection caseworkers is 'all too often biased, inaccurate, and frequently includes assertions and conclusions that are not supported in fact'.[35] Indeed, it has been noted that 'it is not unusual to see words attributed to very young children which are well beyond the child's vocabulary'.[36] There may be instances in which evidence that would otherwise be excluded should be admitted in the interests of the welfare of child. However, the tendency for FACS to rely upon questionable evidence is likely, at least partly, to be influenced by the highly adversarial nature of proceedings, which are reported as involving 'combative, hostile and point scoring behaviour.[37]

This kind of behaviour is demonstrated in reports of instances in which FACS 'selectively put[s] material before the court that's prejudicial to the parents'.[38] For example, in *Re Liam*,[39] McDougall J identified a paragraph in a FACS affidavit where information was taken out of context. In the course of the Children's Court proceedings, the FACS caseworker had provided an affidavit to the

court, arguing there should be no further contact sessions between a child in care and his mother. The caseworker included a quote from an access report[40] in her affidavit: '[the mother]…tried to cuddle him but he seemed more interested in the toys in the room. [The mother] was recorded as being upset that [Liam] didn't seem to need her. She was worried he had forgotten her…'.[41] Any person reading such a description would understand that the visit had displayed a tenuous connection between mother and son.

This observation, however, should have been put in context. The Access Report from which this observation was quoted went on to say:

> …After about ½ an hr [Liam] started to laugh and play hide and seek with his mother. [Liam] kept hiding behind a chair and popping his head [sic] and laughing at [the mother]. She gave him a cuddle and a kiss, he lay in her arms. He seemed relaxed and to enjoy it…[Liam] had a texta, [the mother] draw [sic] a heart on his hand and hers and told [Liam] she loved him... The visit ended well [the mother] gave [Liam] a kiss and left the interview room.[42]

McDougall J expressed particular concern that DoCS' legal representative had also used this paragraph out of context in his evidence in chief,[43] in breach of the duty of frankness with the court.[44] He went on to emphasise that when 'employees of DoCS summarise or extract from documents…they [should] do so accurately, fairly and impartially'.[45]

Case law reveals numerous instances in which FACS caseworkers have put forward unsubstantiated allegations. For example, when an 11-year-old was taken to the local hospital, 'in pain with a swollen belly':

> The doctor said she was pregnant and notified DoCS. The parents didn't believe it for a moment and Sarah was subsequently diagnosed with cancer. The family doctor told the social worker that the family belonged to a religious group that frowned upon modern medicine. They did not. They were non-denominational Christians and held no such views, but the profile stuck… Everybody involved with the case was told about the family's weirdo religious beliefs. Nobody bothered to check if it was true…[46]

Unsupported allegations were also made by FACS in *Re Georgia and Luke (No 2)*.[47] In this case, the Children's Court had accepted evidence put forward about a couple's 'history of mental health issues' and 'domestic violence' and made an order placing children in out of home care. However, in a Supreme Court decision, Palmer J ordered the immediate return of the children, stating:

> There is not the slightest evidence before this Court of a "history of mental health issues", whatever that vague phrase is intended to mean… children are not to be taken from their parents on the basis of vague and prejudicial "evidence" such as this.[48]

This judgment suggests that the quality of evidence routinely accepted in the Children's Court may be considered grossly inadequate in other jurisdictions. Given the weight afforded to FACS' allegations in Children's Court proceedings, this is of great concern. For example, in a case involving parental objection to medical treatment:

> Even with…a pile of glowing references and long letters from 10 doctors including specialists from Australia and the US – people who'd treated tens of thousands of similar patients between them and published hundreds of peer-reviewed articles on the subject – they still failed to tip the balance against the social workers.[49]

In these circumstances, it is necessary to closely scrutinise the necessity of dispensing with the rules of evidence in care proceedings. In terms of achieving the end of creating an environment that does not alienate parties, it was observed in a review of the legislation that there is no reason that applying the rules of evidence should preclude the 'conduct of matters with an appropriate level of informality'.[50] Furthermore, while it could pose a significant risk to enforce a strict adherence to the rules of evidence when a child's welfare is at stake, it would be preferable for the starting point to be that rules of evidence apply but can, if necessary, be overlooked.

Inquiries in NSW and other states have examined the viability of alternative courtroom models for Children's Court proceedings.[51] Suggestions include adopting the 'Less Adversarial Trial Model', which is used in child-related proceedings in the Family Court and which enables the judge to take a more inquisitorial role.[52] A transition away from the highly adversarial system may reduce the likelihood of FACS presenting biased or unsupported evidence, and hence these models should be given serious consideration.

Barriers to challenging Children's Court decisions

The issues raised above are particularly concerning in light of the difficulties faced by parents in challenging the actions of child protection authorities. Parents are required to engage in 'combative processes and proceedings "against" a well-resourced, legalistic, emotionally detached government department with a vested interest in having its decisions vindicated. This is extremely difficult for families that are already significantly distressed and terrified'.[53]

Avenues for review of Children's Court decisions are limited. While final orders can be appealed to the District Court,[54] there are often delays of a length that can 'irretrievably damage relationships between parents, and sever maternal bonds'.[55] Further, FACS is known to argue that for children who have been 'away from their parents so long it [is] no longer in their best interests to be reunited with them'.[56] Parents face even greater obstacles in challenging interim care orders,[57] which can only be reviewed by the Supreme Court in its parens patriae jurisdiction.[58] The Supreme Court will only hear applications in 'extraordinary circumstances'[59] and thus will not intervene in the vast majority of cases. This is troublesome as it would appear that at a final hearing of a care application in the Children's Court, parents may be precluded from contesting the findings upon which an interim order is granted.[60]

Furthermore, parents face enormous costs in challenging Children's Court determinations. This was highlighted in one case by the award of costs in excess of $50,000 to parents who successfully fought the unjustifiable removal of their children in the Supreme Court.[61] In another case, in which children were removed on medical grounds, parents reported spending '$110,000 in legal fees.[62] Given the paucity of Legal Aid funding available for child protection matters,[63] and the fact parents in such proceedings are overwhelmingly from backgrounds of socio-economic disadvantage,[64] financial considerations pose a significant barrier to challenging the actions of FACS. As Jane laments:

> I wasn't eligible for Legal Aid and had trouble finding a solicitor to act for me. I had lots of trouble finding anyone who would appear in the Children's Court and once I did, I ended up paying her around $12,000 for 3 brief appearances. I took out a second mortgage to help pay for it. I eventually found some lawyers who would act for me pro bono and they ended up appearing for me more than 20 times. DoCS keeps going until families run out of money and assets to sell…

Costs could be reduced if the Court moves towards a less adversarial system, which may obviate or reduce the need for parents to engage lawyers.[65] In addition, the increased use of Alternative Dispute Resolution may also reduce the costs associated with lengthy proceedings.[66] Finally, commentators have called for community service providers to be provided with legal training to enable them to take on advocacy roles when lawyers are unavailable or too expensive.[67]

Ultimately, however, if the Court system continues to function as it does presently, the engagement of lawyers is necessary to offset power imbalances and guard against abuses of process. Indeed, the European Court of Human Rights found the lack of legal representation for a mother in child protection proceedings to constitute a breach of her right to a fair trial.[68] Greater Legal Aid funding may be necessary to ensure parents are adequately represented. As noted by some commentators, 'these are cases which are serious matters, they involve the welfare and future of children, and for that reason no expense should be spared'.[69]

An attitudinal issue

This essay has highlighted procedural aspects of the Children's Court that create opportunities for questionable practices in care proceedings. However, it is the FACS staff involved in these proceedings that appear to be exploiting these opportunities to disempower vulnerable parties and press their case.

As Jane says:

> DoCS made things impossible. The notifications for attending court were given the night before. They would tell me about meetings only 15 minutes in advance in the full knowledge that I couldn't get from my workplace to the venue in that time, and then use my absence against me. It was as if they were deliberately creating situations so they could say I was a bad mother. At one stage, DoCS were saying we were too close, at other times they said we weren't close enough. They were throwing every theory they could at me, but with no consistency. Anything I said or did would be twisted against me.[70] They were ruthless in criticising my parenting my skills, even though the real issue was the appropriate treatment for Zoe. It was a course of treatment upon which reasonable medical minds differed. My parenting skills needn't have come into it, but this was how DoCS conducted things.[71]

Palmer J's scathing judgment in *Re Georgia and Luke (No 2)*[72] identified 'a serious abuse by certain DOCS officers of the Department's power to take children into custody under the Act'[73] and 'an intransigent refusal to acknowledge a mistake, regardless of the consequences to the children'.[74] Relevantly, the conduct of FACS' legal representative in these proceedings was described as 'cavilling'.[75] Similarly, the Senior Chief Magistrate has drawn attention to inappropriate and unprofessional behaviour on the part of FACS and the 'occasional need for the Court…to…warn and cajole DoCS to lift its game'.[76]

It would appear that FACS consistently fails to exhibit these traits, leading the Wood Inquiry to conclude that FACS' conduct falls below the standards of conduct required of it as a government department.[77] This is particularly concerning in light of Magistrate Ellis' observation that 'the [Children's] Court, while representing a check and balance can only do so in a limited way and therefore it is extremely important when exercising such power that there be candour, frankness and a willingness to assist the Court in reaching the correct decision'.[78]

While stresses associated with working in child welfare[79] may give rise to occasional lapses of judgment, the widespread nature of concerning conduct has led to claims there is an 'endemic problem' with the approach of FACS.[80] The issue may relate to FACS' extensive powers.[81] Of these powers in the context of medical treatment, one journalist wrote:

> [FACS'] powers can be used to nullify the rights of families where the lines aren't so clearly drawn and where one doctor's opinion can differ sharply from that of others. On those occasions, the right to informed consent appears to be no right at all - merely a whim of doctors and social workers with extreme powers and a sometimes Orwellian propensity to use them.[82]

Children's Court processes must be designed to prevent abuses of power by FACS. The reforms suggested above could go some way in achieving this.

Conclusion

Care proceedings in NSW Children's Courts are conducted in a closed court, which is not bound by the rules of evidence. The confluence of these factors, along with the highly adversarial nature of proceedings, can give rise to abuses of procedural fairness and reliance on questionable evidence. This is particularly concerning given the relative power of FACS, and the barriers faced by parents in challenging decisions. This essay has put forward suggestions to reduce the potential for abuse of court processes, without jeopardising the paramount concern of protecting children from harm. However, it has been emphasised that there must be an attitudinal shift among FACS representatives in order for there to be any meaningful change to the conduct of care proceedings in NSW Children's Courts. Such change is essential to preventing instances of

wrongful child removal and associated lifelong trauma for those involved.

It is poignant to acknowledge the promise made in March of this year in the National Apology for Forced Adoptions:

> …To you, the mothers who were betrayed by a system that…subjected you to manipulation, mistreatment and malpractice…the mothers who were denied knowledge of your rights… For the loss, the grief, the disempowerment, the stigmatisation and the guilt, we are sorry… We resolve, as a nation, to do all in our power to make sure these practices are never repeated. In facing future challenges, we will remember the lessons of family separation. Our focus will be on protecting the fundamental rights of children and on the importance of the child's right to know and be cared for by his or her parents.[83]

Doubting Adoption Legislation

A view from an adoptee

Dr Catherine Lynch
J.D. III

1972 adoption, St Margaret's Hospital, Sydney

Opinion piece

Imagine an experiment: take a large cross-section of society, remove a whole lot of babies at birth, watch them as they grow and then, when they are adults, make a study of whether their post-birth removal had any significant effect on them. Such an experiment would never be approved by an ethics committee. And yet – it has already happened.

Here we are: adoptee adults.

Separation from our mothers at birth is a trauma that lays in the unconscious of all adoptees. It manifests itself in recurring dreams of loss, childhood bedwetting or nightmares and excessive thumb sucking, in attachments driven by anxiety and the fear of further abandonment. Hyper-vigilance, where babies don't sleep properly, can be carried into adulthood. The phrase "adoption fog" is now common in adoption lexicon because so many adoptees recognise a kind of dissociative experience in childhood that some adoptees never seem to emerge from: a childhood experienced as something lived outside of, as if in observation of the child self from a point outside oneself. Knowing on a profound level that something is terribly wrong but having to get on in a world that shows little sign of what that may be, constructed as it is by the denial of adoptive families and the broader community. In a sense, always waiting to go "home". Never really smiling in a genuine spontaneous joyful out-burst but never knowing why: if there is one way an adoptee might recognise another adoptee it is in this restraint that persists into adulthood reflecting adoptee truth: that losing your mother at birth is interminably sad.

Babies cry when they lose their mothers – and cry until they come to the understanding that the loss is forever. This is infant suffering.

Today, however, the actual subjects of adoption have grown up and now have a voice. They can remind the public of what they must already know: no baby wants to be abandoned to the adoption system, no infant wants to be adopted because that entails the loss of their mother, and every baby wants its mother. A denial of infant rights to remain with their mothers should only ever be done in specific circumstances: when a child is in real physical, emotional or psychological danger.

So what is the big problem with listening to what adoptees have to say about adoption? The answer to this is easy. The procurement of children as a presumption of entitlement is the insidious long-term effect of adoption legislation. Where once people had to be encouraged to adopt because they gave such value to blood ties and the biological relationships of family, today the public face of the "modern family" is heard saying "I can always adopt," or that they even have "a right to adopt" as if adoption is a one-stop solution to supply their lives with a baby. People, and especially governments, enculturated into the strict formulae of the nuclear family ideal, talk about "completing your family" as if a family was a finite and fixed state of affairs.

These events and assumptions are offensive to many adoptees.

Adoptees now have a voice and are insisting that their story is told the way it really is *to them* and not as the "pro-adoption brigade" tells it. And it is the duty, the moral obligation of society to listen to their critique of adoption. They cannot be merely dismissed as an "anti-adoption brigade" because they are telling a story that does not conform to what society, with its penchant for the reconsignment of children, wants to hear: that you don't have a "right" to another person's child if you can't have your own; that babies suffer terribly when taken form their mothers at birth; that no baby wants to be abandoned to the adoption system; that *every baby wants – and has a human right – to remain with their mother,* that no person ever truly "forgets" the loss of their mother at birth.

Infamy

The need for due process in allegations of child sex offending

Jo Seto
LL.B. IV

Angelica McCall
LL.B. V

Article

Introduction

Within the last six months reports of child sex abuse have permeated media coverage. Allegations of approximately 400 child sex abuse claims against TV personality Jimmy Savile have led to a national inquiry in the UK known as Operation Yewtree.[1] A slew of high profile individuals have been further implicated: Rolf Harris,[2] Stuart Hall,[3] Garry Glitter[4] and Freddie Starr.[5] In Australia, Cardinal George Pell, acting on behalf of the Catholic Church, is soon to face the Victorian Parliamentary Inquiry into child sex abuse.[6] Politicians and commentators have characterised the global campaign against child sex offenders as a propitious occasion. Former Prime Minister Julia Gillard described the launch of the Royal Commission into Child Sexual Abuse as an 'important moral moment for our nation'.[7] Across the Atlantic, journalists emphasise that the 'dazzling cloak of fame' no longer conceals 'scary child-catching creatures' who seek sanction in their celebrity status.[8]

Adequately responding to crimes of child sexual abuse presents a legal quandary for democratic nations. The sense of moral panic and public hysteria surrounding such crimes demands a quick-fix panacea. While paedophilic crimes should be properly investigated and justice thereby realised for victims, should this be achieved at the cost of implementing laws that compromise due process and fair procedure? Even individuals who allegedly commit the most morally reprehensible or inexcusable crimes should be afforded the fundamental procedural norms that form the basis of our criminal justice system. This essay considers how adequate legal responses to crimes of child sex abuse can be compromised by popularised perceptions of such offenders, and further complicated by the broader moral discussion which surrounds such crimes.

Folk devils and moral panic

Stanley Cohen first developed the theory of 'moral panic' after observing the highly publicised clashes that occurred between various youth subcultures on British beaches in the mid-1960s.[9] Cohen theorised that there are discernible trends in the ways societies experience episodes of panic and anxiety.[10] Societal responses tend to be 'exaggerated' and 'misdirect public concern, anxiety, fear or anger' into reactive laws and public policy that the mass media have called for.[11] During the early 1980s, moral panic over child sexual abuse in Northern America spread to other English-speaking countries. In Australia, the state of NSW prioritised combating paedophilic crimes in 1984, amid media reports of paedophile rings that practiced 'satanic ritual abuse' on children.[12] In the notorious 'Mr Bubbles Case' in 1988, the owners of a kindergarten in Mona Vale were arrested, along with two other assistants on charges relating to the sexual and ritual abuse of seventeen children.[13] Despite a lack of evidence, police passed on unverified information to the media concerning the existence of confiscated pornographic videos and materials relating to satanic rituals. Without a strong evidentiary basis, the State proceeded to prosecute, resulting in a debacle that Justice Wood would later describe as a case that had 'left a number of persons severely traumatised… and questioning the justice system.'[14]

After six weeks at the committal hearing, the charges were dismissed. Experts had tendered evidence that the children's testimonies were likely contaminated by repetitive, suggestive and coercive police questioning.[15] The failure to secure a prosecution provoked public outrage – in NSW Parliament, Labor MP Deirdre Grusovin noted that over 4,000 letters had been sent by residents of the Northern Beaches to the Premier. Minister Marie Bignold, a former solicitor, further remarked that, 'whether the charges are true or false, the fact that there is even a slight suggestion of anything like that [abuse] should be sufficient for that person to be refused a [childcare] licence'.[16] The Mr Bubbles Case provides an apt example of how widespread social panic can detrimentally influence proper criminal procedures. As due process was denied in this instance and the case never revisited, it is unclear whether the claims were in fact genuine. For the children involved and their families, the case was never satisfactorily resolved; whereas for the alleged perpetrators, their names, if

innocent, were denied the opportunity of being cleared.[17] If anything, this case demonstrates that undermining fair processes and transparency can result in miscarriages of substantive justice, for both perpetrators and victims. Notwithstanding this, in 1997 the issue of ritual child abuse was again considered by the NSW Wood Royal Commission into Police Corruption, which found that though this phenomenon was rare, it should nevertheless not be 'ruled out'.[18]

As child sexual abuse presents a grave social harm and carries heavy consequences for those associated with such crimes, we need to carefully evaluate how such crimes are investigated and prosecuted. One of the dangers associated with media coverage of paedophilic offences is that the emphasis on the abhorrent nature of such crimes can thwart due procedure at an early stage. Often it is the media emphasis on 'law and order' justice that obscures a fair trial and outcome for the alleged perpetrator and victim. In the 2008 case of Dennis Ferguson the intensity of prejudicial pre-trial publicity led the trial judge to conclude that it was not possible to empanel an impartial jury.[19] Providing just one example of the highly sensationalised media coverage at the time, *Sunrise* and *The Today Show* broadcast clips of angry mobs protesting against Ferguson's relocation into their community. Rousing public fears and outrage, the saturation of media attention made it impossible for Ferguson to receive a fair trial by jury. Commenting on the media's detrimental impact on the case, the trial judge noted 'my own impression is that in recent times, the extent of publicity [on the Ferguson trial] has declined. Notwithstanding that there is likely to be available on the internet everything which has ever been available there.'

Thus, even in cases where media reporting has decreased, such material may still be openly available to jury members, effectively thwarting the chance of a fair trial.

Responses to the issue of child sex abuse

Any attempt to combat the issue of child sexual abuse must be carried out within the confines of proper legal procedures. If any current criminal justice issue were to tempt the legislature from abandoning or compromising due process, it would be pedophilic offences. The treatment of child sexual abuse as a form of 'risk' has led to increasing social control over both alleged and convicted offenders, precluding any real reform in the area of rehabilitation, education or prevention.[20] Politicians tend to adopt reactive approaches in order to assuage public fears. The *Crimes (Serious Sexual Offenders) Act 2006 (NSW)* ('*CSSOA*') provides one example of the law and order approach adopted in relation to this issue. Under the Act, sexual offenders can be subject to a continuing detention order if the court is satisfied there is a 'high degree of *probability* that the offender is *likely* to commit a further serious sex offence if he or she is not kept under supervision'.[21] Onerous conditions can also be attached to such orders, including extended supervision, satellite tracking, electric monitoring and the implementation of curfews. Commenting on the bill in parliament discussion, Liberal Minister Andrew Humpherson even urged the Government to consider 'chemical castration', a measure that has been adopted in Europe and North America.[22]

The de-humanisation of child sex offenders has transformed these individuals into some of the most vulnerable persons in the criminal justice system. The *CSSOA* imposes civil proceedings, which fail to apply the stricter procedural norms required for a criminal trial. Judges are expected to predict the level of future 'dangerousness' an offender poses to the community. Considering this an arbitrary and 'inherently problematic' test, the NSW Bar Association and Human Rights Committee have both criticised the Act, arguing that continued detention amounts in substance to a 'fresh term of imprisonment', effectively based on assessments of prospective action and not actual conviction.[23]

More recently, the Royal Commission Amendment Bill 2013 (Cth) – which will potentially provide the legislative framework for the Inquiry into Institutional Responses to Child Sexual Abuse – also weakens procedural standards in relation to the investigation of paedophilic crimes. Implementing 'private

sessions', Commissioners could have the option to hear alleged victims in settings that are private and less formal. These individuals can also remain anonymous are not required to give their evidence under oath, and any information that could be used to identify them will not be recorded. While adequate weight must be given to victims' rights, this must be balanced with other considerations – namely, that being publicly accused or convicted of paedophilia carries significant social stigma, which can detrimentally affect a person's livelihood, reputation and even safety. One only has to consider the effect of the false accusations directed at Justice Michael Kirby in 2002 or the mistaken implication of British politician Baron Robert Alistair McAlpine in the North Wales Abuse Scandal in 2012 to realise that the taint of paedophilic crime swiftly transforms an individual's public reputation, regardless of their former status or perceived character. Yet despite the repercussions of being connected with such crimes, the procedures established for dealing with claims of child sexual abuse are some of the most diluted standards in comparison to other criminal offences.

A close examination of the UK's Operation Yewtree Report provides further cause for alarm. Investigating claims of abuse against Jimmy Savile, the report estimates that approximately 450 females and males from the ages of 8 to 47 were victims of the TV personality's abuse between 1965 and 2006.[24] At the outset of the report, its authors remark on the 'unusual' and 'complex' nature of the inquiry: here, certain claims occurred decades ago and the subject of these complaints is now deceased. What is perhaps most alarming is that the report collates these various complaints into substantial proof of Savile's guilt. The authors note, 'taken together [these] accounts paint a compelling picture of widespread sexual abuse by a predatory sex offender. Therefore we are referring to them as victims rather than complainants and *are not presenting the evidence they have provided as unproven allegations*'.[25] As no criminal proceedings could be brought against Savile, the report considered that 'justice for victims' entailed releasing this information into the public domain.[26] Undoubtedly, investigations into systemic child sexual abuse should be conducted and performed thoroughly; however, the Savile case presents new issues. Should investigations into alleged paedophilic crimes constitute highly publicised affairs, where numerous allegations are collated into concrete proof of an individual's guilt? Do such claims merit different treatment, when the livelihood and reputation of high-profile individuals are involved? Should such procedures be varied, when an alleged offender such as Savile is deceased, and unable to proffer a defence? These are not simple questions to answer but they form important considerations which require further discussion and examination. The current climate, however, does not favour such reflection. Instead contemplation of these issues is often interpreted as an apologist response that undermines victims' rights and interests.

As the Royal Commission into Institutional Responses to Child Sexual Abuse is carried out in Australia, an opportune moment for renewed discussion of these issues is presented.[27] In contrast to the Savile Inquiry, which was conducted by the police force, the Australian Royal Commission's six-member panel of Commissioners consists of both legal and non-legal professionals with relevant credentials, including a child and adolescent psychiatrist.[28] The inquiry will conduct a thorough investigation into any institution, 'private, public and/or non-governmental that is, or was in the past, involved with children including government agencies, schools, sporting clubs, orphanages, foster care and religious organisations'.[29] There is much to be applauded in the establishment of the current inquiry. Most significantly, it recognises that child abuse permeates societal structures, contrary to the common misconception that most offenders operate on the outskirts of society. While the Savile investigation failed to articulate clear aims and focused on victims' allegations, the Royal Commission has assumed a clear goal: to make recommendations that prompt change in policies and practices that effectively respond to allegations of abuse. Adopting a more balanced approach, the Royal Commission will also hear submissions from all interested bodies and stakeholders.

However, the Royal Commission has not yet established a formal process to weigh the various submissions it will receive.[30] The Inquiry's website notes that these guidelines are subject to vary from time to time.[31] Further, the Royal Commission intends to adopt 'private sessions' in which alleged victims can give evidence in informal settings but has provided no criteria as to when such sessions will be considered appropriate. Finally, one of the Royal Commission's important functions is to determine the relevant issues, as a matter that it believes has been adequately dealt with will not be investigated. Again, such decisions should be supported by clear criteria or guidance, as choosing not to pursue further investigations is to an extent predicated on forming predetermined judgments about the issue.[32] Given that the Commission is still at a preliminary stage, only time will tell as to whether these procedural issues will be clarified. At the time of writing this article, there is great anticipation to see the extent to which public opinion will continue to shape these considerations, although the interim report is currently not forecast for release until 30 June 2014.[33]

Conclusion

Following Operation Yewtree and the Royal Commission into Institutional Responses to Child Abuse, this may be a significant 'moral moment' or turning point for the investigation and prosecution of paedophilic crimes. Significantly, these inquiries emphasise that all individuals, regardless of their status, wealth, age or position, must answer to such crimes, or be held responsible for concealing victims' allegations. Finally, after years of suppression, victims are being given a voice. However, any response to the issue of child sexual abuse must be formulated within the boundaries of proper legal procedure. These fundamental principles sustain confidence in the criminal justice system and must not be comprised in place of highly politicised, quick-fix solutions.

Trial by Media

An analysis of the impact of the free press on criminal trials

Isabella Kang
LL.B. IV

Article

'The media's the most powerful entity on earth. They have the power to make the innocent guilty and to make the guilty innocent, and that's power because they control the minds of the masses.'

Malcolm X

Introduction

The right to a fair trial is a cornerstone of the Australian legal system. Due to the influence of the media exemplified in Edmund Burke's idea of the 'Fourth Estate', this article will examine the delicate balance between the role of the press and the impact the media has on accused people in criminal trials. This balance is explored through an analysis of the Lindy Chamberlain case and the presumption of innocence that was compromised. As a form of comparison, the OJ Simpson case is important for the media coverage containing racial connotations. The common thread that joins these two cases together is the undeniable sensationalisation by the media.

The Chamberlain case

In Australia, the word dingo is synonymous with the phrase "the dingo's got my baby", words uttered by mother Lindy Chamberlain when baby Azaria was taken from her tent in 1980. Charged with the murder of her infant, Chamberlain's protestations of innocence were played out in the media and eventually, in the courtroom, where she was found guilty by a jury. Despite Chamberlain and her then-husband being exonerated in 1986, after three years of serving time in prison, the damaging press coverage cost Chamberlain her reputation, which has taken years to be restored, and which, arguably, has been so damaged that nothing could ever compensate for her suffering.

The Chamberlain case exemplifies the delicate balance between the freedom of the press and a fair trial. This balance is often jeopardised by the media's selective coverage of issues - the subconscious influence the media exercises over all forms, print, television and now social networking sites, raising doubt as to whether an accused can truly be tried fairly by a jury. Edmund Burke recognized the sheer power the media possesses, and referred to the Reporters' Gallery in the British House of Commons as the "Fourth Estate" whom he regarded was more 'important' than the other Three Estates of Parliament.[1]

The right to a fair trial that is inherent to Australia's legal system is protected through several mechanisms. The presumption of innocence is upheld symbolically in a courtroom, as an accused is unchained from handcuffs during the process of a trial. The presumption of innocence is also contained in Article 14(2) of the *International Covenant on Civil and Political Rights*,[2] to which Australia is a signatory.

Moreover, the jury system is designed to be as fair as possible, by selecting twelve random members of the community who are required to determine an accused's innocence beyond reasonable doubt for criminal trials. However, whether or not the jury can be fully impartial is questionable, as the jury is made up of human beings who have their prejudices, biases and preconceptions before coming into the courtroom. Although jurors who serve in a high-profile case may be sequestered, this is rare, even though it is a valid process to prevent interference with juror objectivity.

Indeed, it may be that the power the media wields negatively impacts an accused's right to a fair trial. The press coverage given to an accused is critical to a fair criminal trial, as it contributes to the public perception of the accused, with the public, not necessarily the jury, condemning a person to a guilty verdict. Due to the media's monopoly in being able to disseminate mass information and report selectively on incidents or evidence, this can meddle with the administration of justice. Journalists have the ability to craft formulaic news narratives[3]: in the Lindy Chamberlain case, the purported facts and incriminating evidence that led to Chamberlain's guilty verdict became tabloid fodder.

It did not matter that there were inadequacies in the Crown's case such as the lack of motive, no confession, no body, and no witnesses to the alleged murder.[4] The factual gaps that existed

in determining guilt did not act as a bar to the widespread rumours and gossip circulating amongst the broader Australian public. It did not matter that forensic pathologist Joy Kuhl's evidence that there was foetal blood in the boot of Chamberlain's car was later found to be inaccurate[5]. In the 1980s many Australians formed their own judgments of Lindy Chamberlain[6] through the prism of what Nicole Goc construes as the 'Medea news frame', which she argues allows for the creation of news discourses that are prejudicial to particular mothers.[7] Likened to Medea, a figure of ancient Greek literature who murdered her children, Chamberlain was condemned for being "too hard" because she controlled her emotions in front of the camera and refused to cry.[8] The focus of the case appeared not to be one of evidence and sound prosecutorial judgment, but one criticizing Chamberlain's fitness to be a mother.

The media narrative developed well beyond that of the prosecution. Themes emerged from media reporting concerning matricide, religious sects, the role of mothering and the dressing of children in black.[9] The Chamberlains' Seventh-Day Adventist faith saw various rumors circulate. These included the false myth that the name Azaria meant 'sacrifice in the wilderness' and that adherents to Seventh-Day Adventism sacrificed babies as part of a ritual in the desert - rumors which Chamberlain has subsequently addressed and refuted on her own website.[10]

Furthermore, the Crown Prosecutors alleged that Chamberlain had murdered her daughter by slitting Azaria's throat in the front seat of the family car. These allegations were later turned into a 1983 Australian TV movie, entitled 'Who Killed Baby Azaria?' which portrayed the scene the prosecution had acted out in the courtroom. Though the film is no longer available in Australia due to its libelous content[11], the production of such a movie in the first place suggests Chamberlain was tried not just in a court of law, but also by the press.

New evidence emerged on 2 February 1986, which led to Chamberlain's guilt being questioned, when an item of clothing was found near Uluru adjacent to a dingo lair. The clothing was held to be Azaria's missing jacket and was the crucial piece of evidence that exonerated Chamberlain from wrongdoing. A 2012 coronial inquest finally ruled that a dingo had taken and killed baby Azaria. This small victory, however, was 30 years overdue.[12] It is unlikely that Chamberlain will ever be properly compensated for the miscarriage of justice that she suffered as a victim of trial by media.

O.J. Simpson

Without a doubt, the Chamberlain trial has been one of the most followed and publicized in Australian legal history. Comparisons can be drawn between Chamberlain and the O.J. Simpson case in the United States, which concerned a professional footballer on trial for the murder of his wife. Although Simpson was acquitted at first instance, unlike Chamberlain, the media frenzy surrounding his case resulted in prejudiced public opinion.

In June 1994, *TIME Magazine* published a cover story on the O.J. Simpson criminal trial with a mugshot of the accused on the cover.[13] The image was darker than the original, and it emerged that *TIME Magazine* had used photo manipulation to darken the photo, with the apparent objective of making Simpson appear more 'menacing' to the *TIME* readership.[14] The racial editorializing inevitably skewed public perception towards implying Simpson was predatory, menacing and potentially guilty of murdering his wife. Although Simpson was acquitted of the murder of his wife, the *TIME Magazine* cover is an example of the media's ability to skew or subconsciously influence public perception of an accused.

Society thrives off intrigue, and as revealed by both the Lindy Chamberlain and O.J. Simpson case, media reporting often contributes to the mystery or speculation surrounding murder cases. Accurate reporting and journalism can encourage informed debate and discussion concerning social issues. If the media is factually accurate in its reporting, then a defamation claim is unlikely to succeed.

Free press, free speech

The question of whether unfettered media freedom preserves or constrains the pursuit of free speech is then raised. Media freedom is vital for open justice. Yet Gavin Phillipson asserts that the freedom of press can often directly undermine the values underlying the right to free speech itself. Indeed, giving the press a mandate of absolute freedom has the potential to threaten human dignity, the state's duty to secure equal respect for the basic rights of all, and the rule of law, a vital aspect of which is the right to a fair trial.[15] As such, the right to free speech must be tempered by defamation laws that deter the media from making comments damaging an accused's right to an objective and impartial trial. The right to a fair trial is paramount to the administration of justice, and the challenges faced in attaining this ideal have only been exacerbated by the rise of social media.

More recent sensational criminal cases have seen judicial attempts to restrain and moderate social media forces. For example, in the preliminary criminal procedures surrounding the rape and murder of Jill Meagher, Victorian Police and Jill's husband Thomas Meagher issued a statement warning people to exercise caution when posting comments.[16] Evidently, the accessibility of social media has become a double-edged sword in the administration of justice. On the one hand, social media can be an efficient mechanism for raising awareness and generating public conversation. Conversely, however, University of Canberra academic Julie Posetti warns of the risk social media poses to a fair trial, in that a community can take it upon itself to reconstruct an alleged perpetrator's history by posting about an accused.[17] Such posts can lead to false information being spread, and hearsay might ultimately jeopardise the selection of future jurors capable of remaining impartial in spite of the damaging information that has circulated.

High profile cases undoubtedly captivate public interest in both the proceedings and outcomes of the trial. However, the responsibility of accurate and objective reporting by media outlets is critical to preserving the foundations of a fair trial that is owed to any accused in the common law legal system.

As a victim of a "trial by media", Lindy Chamberlain's observations that 'the media is a powerful institution, and can be used to make society better, or, if society demands it, to feed their cravings for sensation'[18] are poignant. As the Fourth Estate, the media yields significant power and influence. It is imperative that such power is exercised with caution.

Trust Me, I'm a Journo

Journalism and the public interest

David Blight
J.D. I

Interview

I used to love watching *The Pelican Brief* as a child. Forget that the combination of Denzel Washington and Julia Roberts is a match made in heaven. Forget that I was likely too young to really understand what was going on. What drew me to the film was the idealised vision of the newspaper reporter, which Hollywood seems to fawn over. Secret documents? Check. A conspiracy that goes all the way to the White House? Check. And, above all, a dogged journalist willing to risk life and limb for the story: all in the name of the public interest.

It's a good yarn. But unfortunately, that's all it is.

Journalists may strive to be impartial and personify the "Fourth Estate". However, the public interest is only one force, and with every story written there exist commercial, political, cultural and personal pressures that can pull the tale in different directions. They are forced to wear multiple hats, stuck in a constant state of journalistic schizophrenia. Which force wins out? It depends on the journalist, the story they are writing and the organisation for which they are reporting: but it exists everywhere. From the writer who holds a grudge against a source and blasts out a negative story as a form of misguided retribution, to the reporter who is forced to spike a great story because it risks offending a valued advertiser.

Disruptions are currently tearing through the media landscape at an alarming rate: consumers are shifting in droves from the printed paper to less profitable digital platforms; share prices of entrenched media firms are nose-diving; thousands of journalism positions are facing the guillotine; scandals such as *News of the World* are putting the profession into deep disrepute; media consumption is fragmenting at a staggering rate that is practically impossible to track. Quasi-journalists writing out of garden sheds have become the norm; story deadlines have contracted from days and weeks to minutes and hours; giants like Google are storming the scene and becoming the new kings of content; competition for the readers' attention has reached dizzying heights; and the GFC has served a superb middle finger from the universe. This all has an impact on today's journalists and the stories they write, as the public interest is often forced to take a back seat to a host of contending pressures.

Together Robert and Beatrix* have over 30 years experience working as print and online journalists; they have worked for national publishers and might be classed as traditional news journalists due to their focus on breaking news rather than writing features and reviews. Each experiences the journalistic schizophrenia referred to above on a daily basis.

According to Robert, any notion that journalism has ever been all about the public interest is 'complete bullshit'. Despite his own best efforts to achieve the ideal, he admits he succumbs to competing pressures on a daily basis. 'There is an attempt to do it,' Robert says. 'Whether on a commercial basis with a publisher, or an attempt to be impartial with your own political and philosophical positions, but they always come through. There's plenty who claim the fourth estate but it's just bullshit. Working on major metro daily newspapers I've seen it first hand.'

Robert talks with frustration about having to pull or temper stories because they did not fit with the political agenda of the man at the top or because they were negatively geared towards a major advertiser or commercial partner. He has worked at a number of major publishers, and while the 'commercial and political agenda is followed more rigorously' at some organisations, he suggests the problem is endemic. Robert told me about a work colleague Eddie* , a freelance journalist, who wrote a well-researched, long-form piece about government funding of the local digital industry. It was an optimistic story and painted the government in a positive light, so the major national publisher he submitted it to, which wasn't feeling very pro-government at the time, subjected the piece to an 'editorial re-engineering'. The story which came out the other end, after the editor of the newspaper put his red pen to it, was a glowing picture of the newspaper's agenda: anti-government and negative.

There was one particular newsroom that Robert

worked in, where the political indoctrination of staff was pervasive. It may not have been as overt as an email from the boss dictating editorial policy, but instead, often revolved around cultural subversion. 'It's partly self-censorship, and partly you get censored if you don't write the way they want,' Robert says.

> I've written things for the paper that, in my grand attempt to be impartial, were not favourable to their way of thinking and I was told flat out to rewrite it. Sometimes you try to be feral and uphold the fourth estate mantra, but I'm a little bit crazy. But when you are working in this environment, you see how you are meant to be writing. You see it in the columns, you see it coming from the editorial leaders in the news room, you see what gets pushed up to the front page, and if every piece on the front page is drama, drama, drama, you sit there and you read the signals.
>
> The journalists write first and foremost to their peers and their editors. If you're writing what you expect your colleagues and editors want to see, this is often very different to what your readers actually want. You're writing to your circle first, to your editors and colleagues, then readers second. And on the news floor, there's the 'in' crowd. I remember having positions that were very different, but if you dared question the baseline position, you knew that you would be on the outer, so I would shut up. These guys love having a go at cults and religion and all that in their articles, but this fucking myopia, you don't dare cross the chasm of what is acceptable and what is not. There are influencers in every sub segment of every publisher, and you must play to those influencers and to what is allowable. You can be a leper on the editorial floor if you are not taking the positions of the majority on the floor.

From a commercial perspective, Robert argues that 'since the birth of newspapers' there have been tales about journalists who have been forced to temper stories at the whim of publishing proprietors who don't want to put commercial advertisers offside. However, he maintains that in the past the separation between media sales and editorial was more sacrosanct, a division between 'church and state', he says. 'When there was a meeting between editorial and advertising, it was very cool for a journo to say "fuck them". The editorial floor culture was very pro being anti-commercial.'

But with increased financial pressures crippling the publishing industry, and rounds of redundancies becoming the norm, Robert has noticed a considerable shift in the journalistic mindset.

> It's no longer as sustainable to be as intensely anti the commercial agenda. The market is changing, and the reality is that the ad market is dead, dying, changing, and on top of that it's going online, so there's less money coming into publishers from advertisers, so the walls between editorial and sales are coming down, journalists have to be more aware of the commercial agenda. For the journo on the floor, it's all Darwinian; it's all about personal survival. In the past journos could have this anti-commercial stance, because the revenue had been there to justify it, but that's changing. Of course, that's not to say that everything in news media is going to be influenced by advertisers.

Of course, it's not always some external force that will intrude. Often the journalist's own agenda will come into play. Beatrix, recounts a time she nearly published a major story that was clearly in the public interest, but pulled back because of her own sense of 'morality and humanity'. She explains:

> This was a story about energy trading, energy brokering, where a small trader wanted to be a whistleblower against a bigger firm engaging in data theft and using that to win customers. It would have been a huge story, it would have been a public interest story, for me I would have dined out on it, it would have put my name out there, and it would have caused major ripples. But the problem was it could have only come from one source, my source, and it would have destroyed his business, and it would have had severe financial consequences for him and his family, and I don't think he realised the consequences of what he had told me and the data he had shown me. After much thought, I decided not to do it.
>
> As a pure and true journalist, maybe you should not let an emotional judgment get in the way, but as a person, then I guess you have to think of the consequences for your source. The definition of news is that which somebody somewhere doesn't want you to know or wants to suppress.

> That was the definition of this story. But it's a question of how you view morality. Should one man be crushed for the sake of many? [Also] this was about an energy firm breaking the rules at the expense of its competitors, not child abuse at the clergy. There is room for judgement calls and suppression if it means protecting your source because there are other ways of effecting change.

Robert adds that he makes decisions not to run stories on a daily basis, even if they might be in the public interest. He argues this is part of 'the game', suggesting that journalism is really about negotiation and horse-trading, in which a reporter must weigh up how a story will affect their rapport with contacts and what impact this will have on future stories.

'There wouldn't be a journo on the planet that hasn't done that and if they said they haven't, then they're liars,' Robert contends.

> It's a game. The game is about access, relationships, trade-offs and compromise, and I do it all the time. There's more stuff I haven't written than I have. If you know someone and that person engages you and feeds you or helps you or gives you tips or inside information, then of course it can affect what you do or don't write about them, and it's the same if you're in a feud. There's always horse-trading. Sometimes I still feel bad about it because I know I'm sitting on something the market would like to know, but that would be the end of a relationship and you have to play the long game. It's a challenging juggle but every journo worth his salt does it.

Meanwhile, changing market forces are also having a major impact on a journalist's ability to produce high-quality, in-depth content. Well-researched investigative pieces are increasingly replaced with stories that have been bashed together from a press release or a couple of superficial interviews, as consumers demand more and more content, and as journalists face continuous deadlines in an always-on digital world.

Beatrix laments this noticeable change across the industry. 'There's a shift away from good and proper journalism because journos don't have time anymore, it's all compressed,' she says.

> What used to be days and weeks of research is now compressed into minutes and hours, at best. With the move to online you're on continual deadline, so there's no such thing as a down period for research, and you can't do justice to your stories in terms of quality. You have to draw readers in, and there's so many competitors vying for them from just about every source, from social media to brands, everyone is a media channel these days. So you don't have time, and if take your time you're already dead.
>
> Do you need jazzy headlines and snappy intros? You have to lure the readers in. Is it moving away from good, solid, traditional journalism? Yes. Broadly, everyone is quoting some Joe Blogs on Twitter because that's all they've got time to do. If you get half an hour unbroken to concentrate on a story you are very lucky.

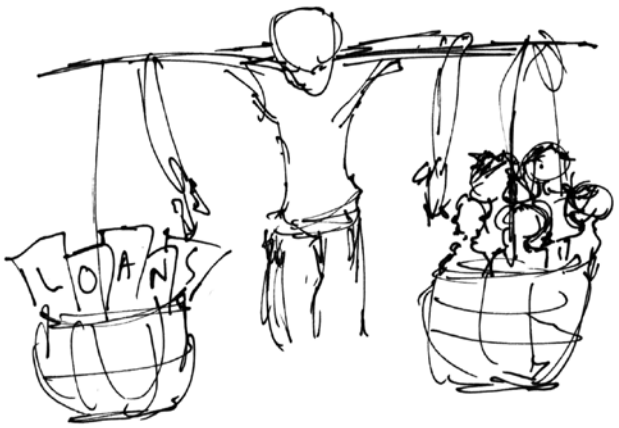
In such an environment, it's much easier for a journalist to repurpose a press release than to engage in the time-consuming process of calling sources, teasing out new angles and sniffing out the next big story. Beatrix explains that many reporters are 'inherently lazy', and complains that she will often see a story in a newspaper which is actually a 'press release masquerading under someone's byline'. 'It's just more bollocks,' she says. 'The market is drowning in a sea of shite.'

But let's not get too doom and gloom about the situation. Despite their lamentations, neither Robert nor Beatrix thinks the world of journalism is going to implode. Instead, it will recalibrate. While a sexy headline might generally guarantee a certain number of eyeballs, an increase in this 'sea of shite' content means that more consumers are hungry for quality, and if you can be one of those rare gems who can generate quality, in-depth journalism, then you've stumbled onto a winning formula. The difficulty is finding the time. According to Robert, 'The flip side is when you actually get some depth, and get your head around a subject, you can get great traction. If it's on-song it'll get read and it'll get good numbers. But doing that, you spend a lot of time to get to that point.'

So where does that leave the public interest and journalism? Well, if the idealised reporter played by Denzel Washington in *The Pelican Brief* was

transported into a modern newsroom, he might be hunched over a computer writing ten stories at once and regurgitating press releases. But let's keep things in perspective. It's highly doubtful this ideal reporter has ever existed. The nature of journalism has always been schizophrenic, with multiple forces at play, pulling in different directions. The changing market simply adds a new influence or at least exacerbates the old ones. Despite all the competing forces which come into play, it is this concept of the public interest in journalism, idealistic as it may be, which serves as the golden standard for almost all Australian newsrooms. Above all, this aspiration could be seen as one of the motivating factors which instills ambitions in the budding journalist to unearth the next Watergate, or at least the next Gai Waterhouse racing scandal.

**Not their real names.*



Future or fad?

The rise and fall of the microfinance empire

Catherine Dawson
J.D. I

Article

The "Golden Age"

'Microfinance stands as one of the most promising and cost-effective tools in the fight against global poverty'

Jonathan Morduch, Chair, UN Expert Group on Poverty Statistics, 20 September 2005

When Muhammad Yunus opened the Grameen Bank in 1976, the modern concept of microfinance quickly transformed into a silver bullet for poverty alleviation. Over the course of its so-called "Golden Age", the Grameen Bank dispersed more than US$4 billion in microloans, claiming that 5 per cent of its clients exited poverty each year.[1] Microfinance reached its apotheosis in 2005, which the United Nations dubbed 'The International Year of Microcredit'- 55,000 staff days and US$30 million were spent on some 120 microfinance conferences, many of which celebrated microfinance as a universally accepted tool to eliminate poverty.[2] By the time Yunus and the Grameen Bank had been jointly awarded the Nobel Peace Prize in 2006, there were over 3000 microcredit institutions in operation, providing loans to more than 100 million clients.[3]

Microfinance is a term used to describe myriad combinations of financial services, including credit, microsavings and insurance.[4] These services are, ideally, provided to the poorest citizens of developing nations, who have little access to capital, or who are otherwise subject to extremely unfavourable terms and interest rates. More recently, microfinance institutions (MFIs) have begun to pair the provision of financial services with access to vital education and health services. For the sake of simplicity, this article will adopt Yunus' definition of microfinance; that is, 'lending money to the poorest… for income generating activity, without collateral'.[5]

Initially, this was provided through a joint-liability lending scheme.[6] At the time of the 1974 famine in Bangladesh, Yunus recognised that the existing credit market, provided by 'loan sharks', was exploiting the poor.[7] The traditional banking structure was unsuitable for the poor, as traditional banks were unable to offer collateral. Additionally the transaction costs of reaching those in rural areas were far too large to prove sustainable (or profitable), without an elevated interest rate.[8] Within this group, women suffered the greatest discrimination, as their de-facto ownership of assets and largely unpaid domestic employment were not recognised.[9] The lower echelons of society were, therefore, forced to rely on loaners who imposed punishingly high interest rates. This inevitably led to loanee indebtedness and the forced sale of assets as repayment.[10]

In 1976, Yunus established the Grameen Bank, with a target market of the rural poor, the landless and those possessing minimal assets.[11] To overcome a lack of collateral, joint-liability schemes were set in place. These methods persist to this day. Groups of five are formed by members, ideally joining those from similar social and economic backgrounds whom they can trust.[12] Loans are disbursed, by approval from the group and the Bank, to two members at a time.[13] Repayments are made at compulsory weekly meetings. If a member is unable to repay their loan, all future loans to the group are suspended.[14] In the majority of such joint-liability schemes, the remaining members of the group are required to repay the loan.[15] This group mechanism effectively relocates the risk of defaulting from the Bank to the members, encouraging individuals to screen other potential members, so as to restrict membership to those perceived as trustworthy.[16] It also places considerable social pressure on members of the group to meet their repayments. The transferring of certain tasks, such as screening and enforcement, to clients, has provided a solution to information asymmetries (especially for the asset-less) that were prevalent in the credit market.[17]

More recently, there has been a shift to individual-liability loans. This shift was borne from several key shortcomings inherent in the joint-liability system. Firstly, social peer-pressure to enforce repayment resulted in significant tension within small, interdependent communities.[18] This precipitated voluntary drop-outs and

community-based shaming, ultimately damaging the social capital of the village.[19] In rural areas, where support from neighbours provides a vital safety-net for the poor, the destruction of social bonds can engender disastrous consequences. An issue of freeriding also arises. Since the establishment of numerous joint-liability MFIs, the average size of a group has increased to at least fifteen members.[20] Although members are familiar with a subset of the group, they often do not have personal contact with every member. This erodes the potential for members to 'screen' trustworthy (ie low-risk) neighbours as potential members. Higher-risk clients are able to free-ride the system by deliberately not repaying the loan under the assumption that other low-risk members of the group will cover them.[21] This has caused default rates to rise for both the high and low-risk members of the group. Finally, the demand for credit is rarely homogeneous. Conflicts within groups occur where clients, who borrow minimal amounts, are reluctant to guarantee larger loans for other members.[22] Such deficiencies lead to an increase in demand (and supply) of individual-liability loans. Additionally, some MFIs, including the Grameen Bank, have begun to offer a hybrid type of loan which includes group lending but excludes group-liability.[23]

The microfinance movement enjoyed a thirty-year honeymoon period. Through the Microfinance Summit Campaign, the annual cash turnover within the thousands of MFIs topped US$2.5 billion[24]. The leader of the modern microfinance movement, the Grameen Bank, boasted a 95 per cent repayment rate, attesting to the credit-worthiness of the poor.[25] A study commissioned by the World Bank marked the climax of the microfinance crusade, where research authored by Pitt and Khandker confirmed that existing microfinance programs had a strong impact on poverty alleviation.[26] The microfinance movement seemed invincible.

The fall from grace

'It's quite extraordinary… the world's biggest loan shark has just got the Nobel Prize'

Ali, a Grameen customer, Bangladesh[27]

The beginning of the twenty-first century saw a dramatic fall from grace for both Yunus and the thousands of MFIs operating across the globe. The first hiccup was, arguably, the 2007 Initial Public Offering of Compartamos, a MFI based in Mexico.[28] The auditing process publicly aired previously undisclosed account transactions. Rather than evidencing poverty reduction, the audit exposed widespread corruption and 'Wall Street-style levels of private enrichment'[29] for senior management. Further investigations revealed that such financial benefits were financed via a 195 per cent interest rate on the microloans taken by clients of Compartamos.[30]

Growing scepticism of microfinance coalesced into unprecedented challenges to evidence of its effectiveness. Randomised Control Trials were introduced to address the potential issue that those who were already members of a MFI are innately more entrepreneurial.[31] A more comprehensive critique of MFIs as an economic development tool followed.[32] This prompted re-examination of the World Bank's initial research, which had been used as proof of the success of microfinance in alleviating poverty – a re-examination which uncovered serious errors in the original analysis.[33] Subsequent research papers concurred that the impact of microfinance was minimal, or non-existent.[34] In 2011, the United Kingdom funded a review of all existing evidence of the benefits of microfinance: it found that the majority of positive impact studies on microfinance were funded by the MFIs and were tainted by serious issues of bias and inadequate data.[35]

Adding fuel to the fire were the lingering effects of 'microfinance meltdowns' in developing nations.[36] Between 1999 and 2000, Bolivia's microfinance market crashed. Over the course of this collapse, it was revealed that the poorest borrowers were most likely to resort to desperate

survival tactics, such as cutting consumption, increasing loans and selling off remaining assets.[37] Although this event was excused as a one-off predicament predicated on unique factors, similar crises followed in Morocco, Nicaragu, Pakistan and Bosnia [38] These events were characterised by massive client defaults, debt spirals, large-scale withdrawals from MFIs and increasingly severe tactics to ensure repayment.[39] In Andhra Pradesh in India's southeast, a strategy of applying for additional microloans to pay existing debts oversaw the metamorphosis of the microfinance system into something comparable to a Ponzi scheme.[40] Finally, in 2010, Yunus was accused of fraudulently removing Norwegian-donated funds from the Grameen Bank.[41] By May 2011, he had been removed from the board of the Grameen Bank.

Fatal flaws

Devoted supporters of microfinance have argued that external factors and crises have placed insurmountable pressure on MFIs, leading to their collapse. Such factors may have played a role. However, this article argues that the existence of three fatal flaws within the microfinance system rendered such crises unavoidable. The unsound scaffold upon which the empire of microfinance was built led to its inevitable demise.

The providers of microfinance

The majority of MFIs can be categorised as operating For-Profit, or by Non-Government Organisations (NGOs). For-Profit MFIs have increasingly become the most prevalent type of provider, with commentators arguing that continued dependence on subsidies is unnecessary.[42] Their mission is both commercial and developmental: they aim to cultivate efficient financial markets that allow the poor to access credit at competitive rates.[43] Subsidies and donations are therefore only used to cover the start-up costs, or to aid the immediate expansion of a MFI. In contrast, NGO-based providers are completely dependent on funds from international donor programmes to subsidise low interest rates.[44] Expanding their services to include health and education provisions, NGO-based providers maximise outreach to the poor.[45]

For-Profit MFIs have the benefit of independence from international aid, allowing them to minimise transaction costs associated with applying for donations and complying with attached conditions.[46] The developed world in particular favours this type of MFI as it has the potential to sustainably alleviate poverty without large subsidies. Many NGO institutions have undergone a process of 'neoliberalising' in an attempt to become financially self-sustaining. In addition, multinational financial institutions, such as Citigroup and Morgan Stanley, have created credit lines or purchased equity in For-Profit microfinance providers[47].

Commercially-driven microfinance presents a conflict of interest. Driven by a 'double bottom line',[48] these MFIs attempt to alleviate poverty through granting financial assistance to the poor at a low interest rate. Additionally, they must remain profitable by setting an interest rate that covers their transaction costs and the risk associated with their clients. As the poor, lacking assets for collateral, represent an extremely high risk, For-Profit agencies are forced to decide which bottom-line to prioritise: do they risk their own financial sustainability to grant high-risk individuals with low-interest loans? To overcome this issue, many MFIs have reshaped their target market so as to privilege small and medium enterprises, which are lower risk and require larger loans.[49] They have also shifted their financial services from microinsurance and savings - which are in the greatest demand by the poor - to large loan portfolios.[50] Although this does assist overall profit, it has minimal impact in alleviating poverty.

NGOs are able to focus solely on providing low-interest loans to the extremely poor, often in conjunction with education programmes. However, NGOs have largely proved unable to have a large-scale impact.[51] Due to their dependency on international aid, they are often unable to cover the hefty transaction costs associated with reaching the poorest in remote areas. Therefore, although their services may be potentially beneficial, such services are

unavailable to those who need it most. For-Profit organisations struggle to satisfy two masters; yet, NGOs are financially barred from reaching the rural poor. Ultimately, microfinance is structurally incapable of mass poverty alleviation.

The ignored influence of tradition and culture

The experience of microfinance has highlighted considerable cultural barriers to development. Although microfinance has certainly increased access to capital, this does not necessarily lead to economic development. As Jonathon Morduch, an advocate of microfinance, stated: 'the microfinance movement rests largely on one basic assertion: that poor households have high economic returns to capital'.[52] This assumption highlights the overwhelming failure of MFIs to consider poverty in its cultural context.

Thomas Dichter found that a substantial number of loans are used for 'consumption smoothing'; that is, to sustain or increase basic consumption.[53] Although this can improve the welfare of the poor in the short term, there is a continuing trend for the poor to take out microloans as a substitute for a lack of income. In Andhra Pradesh, for example, the poorest households were found to have resorted to the local loan sharks to pay off their loans granted by MFIs; this directly conflicts with Yunus' rationale for microfinance.[54] Additionally, research into MFI-member households in Korai, India discovered that over 1 in 5 clients of MFIs used their loans to finance their daughter's dowries.[55] Experience in MFI-saturated nations shows that, contrary to having high economic returns to capital, a large percentage of microloans have absolutely no impact on income.

Microenterprises to cure poverty

Yunus famously declared 'all human beings are entrepreneurs'.[56] A lack of access to capital provides one of the largest barriers to the poverty-stricken from living on profits of their potential business. A stereotypical example of a microenterprise is formed by providing a woman with the funds to buy a sewing machine. In comparison to hand-sewing, the woman experiences a dramatic increase in her efficiency. She is then able to start a tailoring business and earn enough income to repay her loan. Ideally, she is able to provide for her family through the profits of this enterprise. By allowing this woman to purchase a small piece of capital, she is able to generate income and, ideally, lift herself out of poverty.

Unfortunately, while this may be the short-term effect of providing a microloan, the long-term result tends to be less favourable. Due to lack of education, the poor are generally restricted to establishing microenterprises based on simple, low-cost products and services.[57] To continue with the aforementioned example, the success of a woman's tailoring business prompts myriad other women in the community to seek loans to purchase sewing machines. Say's Law, that supply creates its own demand, was largely discredited by economists in the last century.[58] More recently, studies have found that local demand for simple products is finite.[59] Therefore, as the market for sewing services (or any provision of simple goods and services) becomes inundated by extra competition, the income for each microentrepreneur decreases. In Bosnia and Herzegovina, the World Bank found that half of all microenterprises were insolvent within twelve months.[60] In order to maintain their repayments, clients often have to increase their labour hours (effectively creating their own sweat-shop) or sell their remaining assets to repay their loan.[61] The premise that human kind is inherently entrepreneurial may be true; however, as the majority of the poor in developing nations remain uneducated and illiterate, their business-making potential is confined to a small, infant, and already saturated market. Every successfully established microenterprise has almost certainly displaced an already existing one.[62] This renders the net impact on poverty alleviation negligible.

Doubt

'How would you like a new kind of bank account? ... You will be responsible for repaying other group members' loans if they default. If you decide to close the account you will only get back your

savings, without interest. The interest rate on any loans you take will be two to three times the usual commercial rate in your country. Are you interested?'

Malcom Harper[63]

It is assumed that the developed world would be highly sceptical of the offer described above. An institution offering such loans and savings provisions would, almost immediately, sink into insolvency. And yet, Malcom Harper's description aptly fits a typical microfinance loan. Billions of dollars in aid, thousands of celebratory conferences and a Nobel Peace Prize has been dedicated to a concept that would be shunned by Western countries.

Why?

Two possible answers seem to arise. First, because those living in developing nations are poor, and a loan on such terms is better than nothing. Initially, high interest rates for MFIs were expected to cover the start-up costs. However, it was assumed that competition would decrease interest rates to be on par with the average commercial rate for that nation. This has not occurred. Interest rates across MFIs range from 30-100 per cent, with evidence that rates have been used to cover multi-million dollar financial benefit packages for senior employees.[64]

Another possible reason for microfinance's unwavering popularity is that those aiding and praising MFIs are ignorant of the conditions attached to such loans. This excuse raises noteworthy concerns, and doubt, about current development strategies. The speed with which so many countries supported a simple formula to 'cure' poverty is alarming. Both developed and developing nations dedicated significant funds and time to a concept predicted on mere anecdotal evidence of success. Furthermore, as quantitative research began to emerge, its findings were accepted without critical examination of its methodology or data. MFI-funded impact evaluations, which simply compared MFI members to a pseudo-counterfactual 'no-assistance' group, rather than its best alternative, were relied upon without critique.[65] Microfinance enjoyed unquestioned loyalty.

Lessons

Lessons to be learnt from the world's experience with microfinance are threefold. First, a renewed focus on critical and unbiased evaluation of development strategies - before universal adoption - is needed. The billions of misallocated funds wasted in failing MFIs is proof that poverty alleviation is not as straightforward as claimed.

Secondly, neoliberalistic ideas are not easily transferable to a developing market. A key advantage proclaimed at the Microfinance Summit Campaign was that the poor are 'bankable' and MFIs can prove financially sustainable.[66] However, the idea of full-cost recovery has come at the expense of crippling interest rates, with the focus devastatingly shifting from development to loan repayment. Rather than allowing self-help notions of welfare improvement, there is a continued necessity for international aid and public expenditure to stimulate development.

Finally, although microfinance was never considered to be the sole tool for poverty alleviation, it was championed as the one of the most effective way to promote development, and immediately accepted as such by capitalist nations.[67] However, it should be clear that further attention needs to be placed on the social, political and cultural barriers to progress. While improvement of economic conditions is desirable, it is by no means the key determinant of well-being.

Photographic Essay

Raihana Haidary
B.A. (*Hons*) IV

Of example, from God,
For their crime:
And God is Exalted in Power.

But if the thief repent
After his crime,
And amend his conduct,
God turneth to him
In forgiveness; for God
Is Oft-forgiving, Most Merciful.

Justice must always question itself, just as society can exist only by means of the work it does on itself and on its institutions. - MICHEL FOUCAULT

Rigorous law is often rigorous injustice.

- PUBLIUS TERENTIUS AFER

An unjust law is no law at all.

- SAINT AUGUSTINE

The Plentiful Paradox

Native title and possibilities for Aboriginal economic progress in the mining industry

Connie Ye
LL.B. IV

Article

Warning – the following piece contains names and stories of members of Aboriginal and Torres Strait Islander communities who may be deceased.

To the honourable speaker and members of the House of Representatives in Parliament assembled.

The Humble Petition of the Undersigned aboriginal people of Yirrkala being members of the Balamumum, Narrkala, Gapiny, Miliwurrwurr people and Djapu, Mangalili, Madarrpa, Magarrwanalinirri, Djambarrpuynu, Gumaitj, Marrakulu, Galpu, Dhaluangu, Wangurri, Warramirri, Naymil, Rirritjingu tribes respectfully showeth.

1. That nearly 500 people of the above tribes are residents of the land excised from the Aboriginal Reserve in Arnhem Land.
2. That the procedures of the excision of this land and the rate of the people on it were never explained to them beforehand, and were kept secret from them.
3. That when Welfare Officers and Government officials came to inform them of decisions taken without them and against them, they did not undertake to convey to the Government in Canberra the views and feelings of the Yirrkala aboriginal people.
4. That the land in question has been hunting and food gathering land for the Yirrkala tribes from time immemorial; we were all born here.
5. That places sacred to the Yirrkala people, as well as vital to their livelihood are in the excised land, especially Melville Bay.
6. That the people of this area fear that their needs and interests will be completely ignored as they have been ignored in the past, and they fear that the fate which has overtaken the Larrakeah tribe will overtake them.

And they humbly pray that the Honourable the House Of Representatives will appoint a Committee, accompanied by competent interpreters, to hear the views of the people of Yirrkala before permitting the excision of this land.

They humbly pray that no arrangements be entered into with any company which will destroy the livelihood and independence of the Yirrkala people.

And your petitioners as in duty bound will ever pray God to help you and us. [1]

The 1963 Yirrkala bark petition to Parliament by the Yolgnu peoples of northeast Arnhem Land is a vast understatement. Yet, it represented the final straw in their opposition to Nabalco's mining operations on their traditional lands. At the time, the absence of government consultation of local Aboriginal interests was unremarkable in a decade that had already sanctioned tacit apartheid and the abduction of Aboriginal children.[2] Since then, landmark native title recognition has occurred – one need only consider *Mabo v Queensland (No 2) ('Mabo')*[3] and the *Native Title Act*.[4] Yet, this article contends that not enough has changed.

Recent Australian mining industry investment has reached a record high, with some suggestions that the boom has already peaked.[5] Any adverse implications such a mining bust would have for the country's economic future pale in comparison to the present (and foreseeably ongoing) plight of Aboriginal economic progress in remote areas, communities upon whose land the mining industry has reaped its riches. The ready abundance of iron, copper, nickel, diamonds and bauxite in some of the most undeveloped regions of this country have set two great disparities on a collision course. Indeed, 60 per cent of all mining operations in the country are adjacent to Indigenous communities.[6] Starkly oppositional situations cleave faultlines between these reluctant bedfellows. There is, on one hand, the unprecedented wealth generated by the mining and resources industry, a factor largely responsible for steering the Australian economy through the 2007 recession.[7] On the other hand exists a group of ostensibly land-rich, but cash and skill-poor, Aboriginal communities, struggling to fully capitalise on their rights as native title holders after centuries of historic discrimination, legal marginalisation and government paternalism. As these communities slowly come to better terms with their corporate neighbours, the manner in which negotiations over land rights are conducted must be rethought, lest the paradox of plenty replicated throughout the world continue to endure in the "lucky country".

But before the bulldozers and hard hats are brought in, there are legislative and administrative barriers to Aboriginal peoples' claiming equality

of position at the bargaining table over native title claims. This essay will consider how these difficulties translate into the uneasy governance of agreements between mining companies and the local communities. Within a broader pragmatic framework, it is argued that the disadvantages under these barriers must be compensated through considering Aboriginal economic progress as necessarily integrated with corporate Australia's interests. As such, does employment in mining operations offer a viable and gainful means of employment for Aboriginal communities under corporate economic initiatives?

The "inherent vulnerability" of native title

Native title rights in Australia have taken a hard-won but incomplete road to legislative recognition since *Mabo* and the *Native Title Act* (NTA).[8] If anything, the recent trends of High Court decisions and statutory amendments to the NTA have down-scaled veto and compensation rights whilst increasing the hurdles in the land claims process, rendering the interaction between Aboriginal tradition and Western common law fraught with uncertainty.

Empirical research on specific mining operations on land formerly under traditional Aboriginal custodianship in Western Australia, Queensland and the Northern Territory has revealed pessimistic outcomes for retaining Indigenous control over the negotiation process with prospective mining companies.[9] Western Australia, the jurisdiction historically most vocal and demonstrative of pro-mining interests, is, somewhat tellingly, the only state not to have land rights law.[10] Native title case law in the intervening years since *Mabo* has been consistently referred to as 'compromised jurisprudence',[11] on the basis that, although the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) and NTA were introduced with the intention of facilitating claims of Aboriginal native title holders,[12] the resulting trend of court and tribunal decisions and dispute settlements has remained inequitably tipped in favour of commercial interests. As such, the weakness of veto rights and land claims mechanisms have produced great difficulty and inequity for claimants in the negotiating process with mining companies.

The idea of an inherent vulnerability of native title was first suggested in the 1998 High Court decision *Fejo v Northern Territory*,[13] which held that a grant of freehold estate would extinguish native title with no option for revival of that interest. The lowly position that native title occupies in the hierarchy of interests has been established by the High Court's progressive attachment of common law characteristics to native title, despite the clear acknowledgement that native title derives its legitimacy from a recognition of traditional Aboriginal law that is separate and external to common law.[14] In *Western Australia v Ward*,[15] the High Court essentially found that historic mining leases have the capacity to extinguish native title. The High Court has also ruled unfavourably against Aboriginal interests in determining that native title, as an integral 'bundle' of rights, could be extinguished by the exercise of rights in Crown land, overruling the exclusivity of native title and leaving behind specific rights only, such as the mere right to engage in particular activities.[16]

The first step in proving native title requires overturning an absent recognition of native title. This process requires positive proof that property rights are held under traditional laws and customs, that those rights were held before contact with British settlement, and have, furthermore, continuity through to the present day.[17] This rigorous standard imposes a highly restrictive burden of proof on Aboriginal claimants[18] and a presumption in favour of native title claimants has yet to be recognised, despite the pragmatic difficulty of demonstrating continuity in traditional laws and customs. In *Members of the Yorta Yorta Aboriginal Community v Victoria,*[19] a High Court majority found that the meaning of 'traditional' as required under the NTA[20] required more than transmitting law or custom from generation to generation, by word of mouth or common practice.[21] For claimants living in the more settled areas of Australia, the forced removal of whole communities from their land under various twentieth-century

government policies has made this task nigh impossible. It is unsurprising, therefore, that the average claimant in a native title contest will wait over six years before a decision is reached.[22]

The strongest native title rights under existing legislation are the rights of consent provisions under the ALRA, which establish Land Councils as representative bodies for the relevant Aboriginal native title claimants and grant them the right to approve applications for exploration license grants.[23] Unsurprisingly, these provisions were watered down by subsequent amendments made in 1987. At present, while exploration leases to Aboriginal land cannot be granted without the consent of the Minister and the appropriate Land Council on behalf of the traditional custodians, in reality the preservation of 'prior commercial interests' has allowed the amendments to remove the power of traditional Aboriginal custodians to exercise the right to veto mining after exploration leases had been approved, leaving only the right to veto exploration itself.[24]

Under the NTA, the Howard government's 1998 amendments subjugated native title claimants' rights in favour of pastoral and mining developers' interests, under the guise of 'return[ing] the pendulum to the centre'.[25] In the administrative arena, the NTA also forged the National Native Title Tribunal (NNTT), which provides services for facilitating agreements for future acts on lands that may impact on native title, such as exploration leases or other proposed operations and developments.[26] The anticipated reformative outcomes of the NNTT and various Native Title Representative Bodies (NTRBs) around the country have not been as effective as imagined, again due in no small part to the loaded and complex statute-governed claims process.

The track record of the NNTT has not made itself amenable to Aboriginal interests; in over 40 cases since 1993, there has been only one instance where a claim against native title was refused: in 2009, where Holocene Pty Ltd was initially prevented from developing Lake Disappointment, in favour of the Western Deserts Land Aboriginal Corporation.[27] Since then however, Holocene and its parent company, Reward Minerals Ltd, were granted subsequent mining licenses allowing development to resume.[28]

In regards to the avenues of recompense post-negotiation, the common law presumption that applies to all other title holders in respect of receiving compensation upon extinguishment of property rights does not apply to native title holders.[29] Under the NTA's right to negotiate,[30] there is a distinct lack of clarity over the entitlement to compensation for future acts in regards to proposed uses of land under Indigenous Land Use Agreements (ILUAs). There are significant disadvantages for native title parties in so far as the inability to revive native title as a remedy for breach, and the absence of any requirement that parties to ILUAs recognise the existence of native title.[31] Given that ILUAs are binding not only upon the parties to the agreement but also all subsequent persons holding native title over the land referred to therein,[32] and that only a minority of ILUAs propose fixed terms of agreement, some of which themselves last up to 99 years or for the 'life of the project',[33] native title parties to ILUAS can face further intergenerational difficulties in renegotiation.

Such limited access to compensation has been expedited by attempts to reduce time frames for negotiation. Despite the introduction of mediation guidelines requiring parties to act in good faith, the guidelines do not constitute compulsory reference when considering whether parties have acted in good faith, suggesting their role is largely cosmetic.[34] Relatively short time frames of six months built into the negotiation process places pressure on the developers and native title holders to come to an agreement, as opposed to deferring to third party representatives such as the National Native Title Tribunal or the courts, although an extension of time frames has been proposed.[35] The onus on claimants to provide a sum of compensation they should be awarded exacerbates the difficulty of determining an appropriate figure in any case; looking to payouts from previous agreement for comparison defies the unique circumstances faced by each community.[36]

It has also been pointed out that there exists a lack of flexibility for communities to terminate the agreements in the case of adverse long-term social or environmental impacts.[37] In light of this, the recently proposed draft legislation that creates the possibility to amend ILUAs after registration without reapplying to the NNTT would be welcome.[38]

When the rescission of the Jabiluka Agreement was celebrated as a landmark victory, it was a marker of how rarely the claims process works in favour of Aboriginal interests. Jabiluka has, to date, been the only occasion in native title history where an existing agreement was retracted after development had already been undertaken, but only under enormous political and international pressure, and through returning to the fundamental understanding that Jabiluka would not be mined without the consent of its traditional owners.[39] Even so, the future of Jabiluka remains precipitous, with its owners, Rio Tinto, suggesting mining developments could reopen once the Ranger Uranium Mine is exhausted.[40]

Mining agreements and employment opportunities

The increasingly interwoven relationship between large-scale private mining interests with Aboriginal economic affairs is undeniable. An estimated 80 to 85 per cent of mineral production in Australia is conducted by multinational corporations, with some of the largest, such as Rio Tinto, taking tentative steps towards greater engagement with the indigenous workforce.[41] Under the spirit of 'practical reconciliation',[42] the once actively hostile mining sector has increasingly tried to assert itself as a champion of Aboriginal economic welfare.

The rising corporate involvement in indigenous affairs was exemplified by the 2008 launch of the Aboriginal Employment Covenant, a joint initiative between Andrew "Twiggy" Forrest, CEO of Fortescue Metals Group, and the Commonwealth Government under then Prime Minister Kevin Rudd. At the height of the mining boom during 2009-2012, over 120,000 jobs were created in in the mining sector alone.[43] Anticipating that wave, the AEC scheme proposed the creation of 50,000 new jobs within two years for Aboriginal Australians.[44] In its ideal capacity, the AEC incentivises training for Aboriginal job-seekers and operates as a referral system for those job-seekers, now suitably equipped to take on the jobs guaranteed for them. While it remains too early yet to judge the success of the covenant, the apparent enthusiasm from corporate interests should nevertheless be taken as a step in the right direction.

A greater cause for concern is that the new leadership of the mining sector has led to a perception on behalf of federal and state governments that the provision of basic services and infrastructure can be scaled back without consequence. The mere allocation and provision of mining-related jobs for Aboriginal people will not present a successful solution to engaging Aboriginal workers in employment, without addressing the continued underlying need for socioeconomic and physical infrastructure to support an environment where those opportunities can be meaningful and long term.[45] Moreover, in spite of the positive incremental steps taken by the mining industry, it remains an immense understatement to claim that Aboriginal communities are more likely than not to be adversely affected by large-scale long-term extractive mines on land formerly held under native title.[46] The question is whether their close proximity to these mines has the potential to increase the number of meaningful economic opportunities, and thereby create positive flow-on effects for social participation and living standards.

This section will look at the economic welfare of certain Aboriginal communities through the specific lens of employment in the mining industry and the possibilities for successful integration of increasing indigenous participation with the mining economy, from which Aboriginal people have historically been excluded.

Century Mine

The Century Mine Agreement was sparked

by the 1990 discovery of a significant zinc deposit on Lawn Hill station, in the south of Queensland's Gulf of Carpentaria. A proposal for development was brought by Century Zinc Ltd (CZL) to build what was estimated to be one of the largest zinc mines in the world. The mine was to be located on a substantial area of land traversing the boundaries of two predominantly Aboriginal towns with native title interests and multiple broader Aboriginal communities within the region. After a protracted seven-year dispute, the Gulf Communities Agreement (GCA), was finally signed between the Queensland government, CZL and the Waanyi, Mingginda, Gkuthaarn and Kukatj peoples.[47] Most of these communities, having minimal prior exposure to dealing with commercial interests, were forced to rely on technical experts such as lawyers, resource specialists and economists,[48] and moreover, were negotiating in the absence of any established common body representing indigenous interests. An obvious disparity of bargaining strength was evident, notwithstanding potential reliance on the NTA. Despite the fact that the proposal to grant a mining license overrode the right to veto, the Act vested ultimate discretion in the Queensland minister who had the power in any case to overturn any arbitral appeals.[49]

While the GCA was, ultimately, recognised under the 'future act' provision of the NTA, a total of eight separate native title claims were lodged during the negotiations, with no positive determination of native title being returned.[50] What constituted suitable compensation also remained unanswered, given the inherent difficulties of the local communities' reaching an adequate evaluation of what was essentially a compromise of their land rights against a lack of comparable benchmarks. However, one positive impact of the leverage provided under the NTA right to negotiate, as opposed to pre-NTA bargaining positions, was the increase in cash offers, from $70,000 to a sum of eight figure digits. Overall, the total expenditure of $30 million from the Queensland government and $60 million from CZL in a package encompassing employment and training for Aboriginal people remained set against criticisms that those amounts would have been spent, regardless, as part of ordinary operation expenditure.[51]

Comparing the proposals for Aboriginal advancement under the GCA with their outcomes after over two decades has shown mixed success. On paper, the communities' interests and the promises of the GCA appear aligned on issues such as training, employment and business opportunities, as well as protection of sacred sites and access to pastoral leases.[52] The GCA also holds the Queensland Department of Education and Training to commit to supporting education and training programs to facilitate those employment opportunities.[53] However, half-hearted delivery of these programmes has been met with disappointment.

The retention of Aboriginal employees in long-term meaningful employment has shown itself to be a significant challenge to economic progress. The GCA established the Aboriginal Development Benefits Trust (ADBT) with the design of promoting regional Aboriginal business initiatives, which was accused of channelling funds away from development programs for the organisation's own purposes, and granting loans to non-viable businesses.[54] Additionally, the mine employs trainees from the Work Ready, Job Ready scheme provided by the Aboriginal training enterprise Myuma Group, founded by the Indjalandji-Dhidhanu people. Over five semesters from 2007 to 2009, the Myuma pre-vocational training program accepted 122 trainees into the program, with 105 graduating. However, only 69 subsequently secured employment and only 24 were employed continuously for at least 6 months.[55] The nature of the employment has also proved problematic, with the majority of Aboriginal employees populating entry-level jobs and few progressing beyond, partly due to the low number of formal qualifications held.[56]

Despite these hurdles, the Century Mine operation has been considered a success, holding one of the highest Aboriginal employment and retention rates in the country. As of 2008 18 per cent of the Century Mine's 1100 plus employees were Indigenous.[57] While part of this is due to the provisions under the GCA, other factors include

the high concentration of Aboriginal populations in the area.[58] The average employment rate of between 15 and 20 per cent since the mine's inception has far exceeded the national average of 4 to 5 per cent Aboriginal employment in the mining sector.[59]

Future prospects: in bed with the "corporate devil"

The integration of Aboriginal and corporate interests is not as paradoxical as it may appear. An alignment of interests under the banner of "corporatising the Aboriginal landscape" may provide disaffected Aboriginal communities with one of the best opportunities for economic self-sufficiency. Corporate mining's self-interests in preserving a social license, under which companies can operate with a degree of acceptance in predominantly Indigenous regions, have tentatively shown themselves to be mutually beneficial, as companies will inevitably seek to consolidate the flow of resources towards Aboriginal interests so as to ensure continuity of licence.[60] Factoring in potential public backlash, as well as practical impediments to accessing project lands, the assumption is now for mining companies to demonstrate engagement with affected communities, a change in tack which Rio Tinto has helped to initiate.[61] In the mid-nineties, former Rio Tinto CEO Leon Davis brought new leadership to the industry by suggesting commercial interests could work within the NTA framework, thereby defying its historically adversarial stance.[62] His personal view, that companies could deliver social benefit,[63] was reflected in Rio Tinto's behavioural shift in the operation of the Argyle Diamond mine in Western Australia's lucrative Kimberley region. From the initial Good Neighbour Agreement under which funds were controlled according to non-Aboriginal criteria, Rio Tinto resigned the Argyle Participation Agreement in 2004, which redirected prior funds into community-held trusts.[64]

Enabling greater Aboriginal economic agency in this way does however, require both corporate and Aboriginal leadership. Once the injection of revenue from mines and supporting businesses is brought under the control of Aboriginal interests, implementing targeted, relevant training programmes and services are the next step. Utilising established bodies representative of local Aboriginal interests with control and discretion over the exercise of funds is an indispensable corollary to the industry's priority of extracting resources from the land and maximising its profits, without which the relationship between Aboriginal and corporate mining interests will ultimately remain a catch-22. Holding economic leverage through achieving sustainable employment represents one of the best means for improving Aboriginal agency in respective communities' economic affairs. Such leverage serves to level out the built-in disadvantages at the bargaining table with mining companies, but coming away with a just outcome from those agreements is itself half the battle in attaining that leverage.

Law reform by way of realigning the native title applicant process, and allowing flexibility for post-agreement renegotiation, will prove fundamental to the successful removal of the existing conundrum. Until then, so long as the federal and state governments fail to recognise that their interests transcend rapacious commercial growth, and with the economic welfare and strong economic potential of its remote Aboriginal communities, it will be difficult to foresee any eradication of the inherent inequity of the paradox of plenty.

The Ghost that Keeps on Giving

The Chinese Communist Party and the rule of law

Lewis Hamilton
J.D. II

Article

'Stability overrides everything else'

Deng Xiaoping

In the wake of Sanlu

In 2008 the Chinese State Administration for Quality Supervision, Inspection and Quarantine made a devastating discovery that sent shockwaves across China and the world. Melamine, a chemical commonly found in plastics and garden fertilizers, was discovered in baby milk formulas primarily produced and distributed by the State-Owned Enterprise (SOE) and dairy product company Sanlu Group. By the end of the year, there were reports of over 300,000 victims, 54,000 hospitalisations and six deaths.[1] It was the greatest breach of corporate social responsibility in the nation's history.

Nearly 100 well-trained lawyers offered pro bono service to victims in the wake of the atrocity. A class action was in the making. The Communist Party of China (CPC) throughout this time believed that a failure to respond in a socially responsible way would greatly undermine the legitimacy of the party. As Sanlu was a SOE, the company enjoyed resources from the State and in return was directly accountable to the Party.[2] The breach of commercial ethics by one of its SOE's posed a threat to the very foundation of the CPC.

The response by the party struck a balance between the need to maintain political and social stability, and the imperative of achieving the perception of justice in the eyes of the public. The party initially released a national compensation plan, which provided victims of the outbreak with direct access to medical treatment. Despite the compensation, some parents attempted to file proceedings against Sanlu but they were prevented without legal justification from doing so.[3] After 95 per cent of the victims had received compensation, the Supreme People's Court then opened the way for civil cases to commence.[4] The timing of the decision by government authorities to release compensation has been considered suspicious, with suggestions that it had been timed to reduce the role of the courts and to shorten the political fallout of the crisis.[5] Furthermore, the courts were reluctant to allow joint litigants, preferring each victim to issue an individual claim.[6] This decision greatly reduced the chances of victims receiving legal closure. The party also exercised control over the crisis in less obvious ways. Key legal associations under the direct control of the party reportedly organised meetings with lawyers to discourage them from filing lawsuits against the company.[7] They were told: 'act together, and help maintain stability'.[8]

At no time was there a clear opportunity for the families of the victims to freely pursue their interests through the law. The calculated interference by the CPC was successful in stemming the outbreak of any mass of litigation while at the same time appeasing the milk formula victims. Yet Sanlu was just one test of the Chinese legal system. There is a bigger picture: a system of law in China where individual rights come second to political considerations. At the centre of that system is the CPC and its relationship with the legal organs of the State.

The ghost: the Communist Party and the law

The law in China has evolved to reflect a broad paradox in the country's rapid development. While the economic institutions of the nation have expanded in a new wave of capitalism and entrepreneurship since Deng Xiaoping opened the nation up to the world in 1978, Chinese institutions have maintained the same fundamental objective of maintaining stability. The law in areas such as property rights and contractual relations has grown exponentially over the past three decades to promote this growth of enterprise, yet individual rights continue to be side-lined by the courts, whose first responsibility remains the maintenance of national stability. This paradox is broadly responsible for the many institutional problems in the Chinese legal system today. There is a wide disparity in the effectiveness of legal systems between regions that are economic centres and those that are far away from the pockets of development. Regions that are not the central focus of corporate China have been neglected to the point where they see low levels of judicial competence, and under-developed enforcement

mechanisms.[9] The obvious consequence is that citizen justice in under-developed areas of the nation is harmed by a lack of coherent legal framework to govern social interactions. Most importantly, however, this paradox has significantly shaped the relationship between the CPC and the legal system.

In most areas of Chinese society – including the legal system – the CPC endeavors to play a coordinating role. The party reaches in when threats awaken, but it otherwise remains on the outskirts of legal affairs until politically sensitive issues arise. At the heart of the CPC's coordination effort is the Central Politics and Law Commission, the party body dedicated to strategic interference with the Chinese legal system. The Commission is responsible for ensuring party control over the internal security apparatus of the state: enforcement authorities, the Supreme People's Procuratorate (the equivalent of a chief prosecutor), and the various legal ministries. All of these fall under the jurisdiction of the Commission. It has broad, discretionary powers of intervention that empower it to dictate the law when the regime feels threatened.[10] The Commission can intervene directly in court operations and issue guidance to judges on verdicts and sentencing in particular cases.[11] Membership of the Commission remains unpublished by the CPC, but known members have included the President of the Supreme People's Court, the Procurator-General, and the Ministers for State Security, Public Security, and Justice.[12] The head of the Commission sits on the Politburo, the central group of 25 who make key decisions about the party. Importantly, its leadership has few if any professionally-trained lawyers, despite it being responsible for substantive legal reform and the use of broad powers of intrusion into the legal system.[13]

The legal profession as a whole has been a victim of the CPC's control efforts. Lawyers in China are first and foremost public servants. Significant proportions are members of the party. Though many remain critics of the party, the CPC has developed stringent methods of ensuring that the legal profession does not become a pocket of resistance against the ruling regime.[14] Recent changes by the CPC to legal practicing requirements have meant that all new lawyers must pledge to 'uphold the leadership of the Chinese Communist Party and the socialist system' before being granted a license to practice.[15] The Ministry of Justice stated that the aim of this pledge was to 'improve the quality of lawyer's political ideology'.[16] Of course, oaths taken by lawyers to protect the cause of justice are not uncommon across most of the developed world, but rarely would you find a professional oath pledging to uphold the leadership of a ruling political party. The extent of party involvement in the legal profession is not limited to their influence over individual practitioners. They also maintain strong party networks throughout legal professional associations and law firms in the country. All legal associations are required to maintain party cells – networks of party members – that can provide correspondence to the party when a politically sensitive issue arises.[17] As recently as last year, the Chinese government published stricter requirements for law firms to establish party cell networks.[18]

The All-China Lawyers' Association (ACLA) provides an apt example. ACLA has served as a stepping-stone for the CPC to influence the legal system for many years. During the Sanlu Crisis it was alleged that ACLA put pressure on pro bono lawyers to drop their case against the company.[19] This has not been the only sensitive issue where ACLA has played a role. After Falun Gong was outlawed in 1999, the CPC used ACLA to issue guiding opinions to all practicing lawyers, placing restrictions on their capacity to defend those practicing the spiritual discipline.[20] Although ACLA is meant to be a non-government organization, it does not meet any reasonable standard of independence. Its entire executive is made up of members of the CPC.[21] Not only that, the leaders of ACLA have concurrently held positions across the Ministry of Justice, a deeply political department whose head bureaucrat, Wu Aiying, previously sat on the all-powerful CPC Central Committee.[22] There is no simple division between the politics of the nation, the Ministry of Justice, and ACLA. All are entwined to benefit the ruling regime.

The CPC is a ghost within the Chinese legal system. The Party does not submit to legal constraints: it treats regulations, laws and the constitution lightly.[23] As a political party it is not officially part of the government or state apparatus.[24] In reality, the CPC plays an immense role across most government organs. At the same time, the Party remains exempt from administrative law restrictions that enable individuals to challenge state power. Judicial authorities are prohibited from investigating members of the CPC without the express consent of the party. Instead, the party favours its own internal investigation mechanisms.[25] Its influence is not codified in any legal sense, but a delicate system of guidelines, incentives and indirect threats serve as successful methods of control. The CPC is both the law, and yet beyond the law. When the moment calls, it exercises its control over justice with a swift and decisive hand.

The Giving: State justice over legal justice

As was seen in Sanlu, when major political issues arise that are a threat to the regime, the CPC is quite content in taking legal control of the situation. However, conceptions of the CPC as a brutal, unforgiving dictator of the law are misplaced. Their control over the law is subject to self-constraints. A response that is publicly and internationally viewed as unjust poses just as much a threat to the regime as no response at all. The behaviour of the CPC validates this theory. During the Sanlu Crisis the CPC was generous with its compensation plans and uncompromising with its punishment of the senior management responsible. The diverse reaction served to appease the public outcry and protect the long-term reputation of the Party.

It was not a legal justice that the CPC gave; it was a State justice. The regime took responsibility for the acts of its SOE and saw it as its duty to settle public anxiety. While the Party's actions are seen as sinister and authoritarian in light of the Western concept of separation of powers, they nevertheless served a particular justice to the victims of the scandal.

State justice differs from legal justice. For one, state justice does not adhere to a strict code of due process. During the Sanlu Crisis, procedural due process was put on hold and a more 'flexible' approach to court procedure was taken.[26] Nor is state justice free from political considerations. The victims of the Sanlu Crisis were lucky in the sense that their plight generated public sympathy, both in China and overseas. Where the CPC influences the legal system, individuals are faced with an intersection of the political and legal arenas that creates a type of justice that is not immediately predictable or consistent - the interplay of political considerations adds a new dimension to the outcome, one that would otherwise not exist if the crisis was managed in absolute by an independent judiciary.

Overcoming doubt

Though it is said that political power grows from the barrel of a gun, political power in China is maintained through tight control over the political and legal apparatus of the state. The CPC is above and beyond the law, yet it exercises its power diligently and strategically in pursuit of the key political objective of national stability. This fundamental facet of the Chinese legal system means that all aspects of the law remain inaccessible to individuals who feel wronged.

For the individual citizen, the question of doubt is more than apparent. It cannot be guaranteed that a fair hearing will take place, especially when the legal issue concerned borders on the politically sensitive. The prospect of accountability through administrative law remains weak: partly as a result of a weak judiciary, but also because the CPC's decisions can only be challenged through obscure internal party mechanisms. Where law reform occurs, it occurs through Party-controlled committees and associations, whose deliberators may be more concerned with the interests of the party than the interests of the citizen. Where state interests are in contest with individual grievances, the individual inevitably remains subservient to the whim of the Party.

Yet, in a world that is quickly shrinking, where ideas flow between states faster than ever before, the belief that the Chinese legal system

will forever remain enclosed in a capsule of its own making is far-fetched. While China's legal system may maintain its Chinese characteristics, it will continue to be subject to international and domestic pressures to change. The task begins with the legal profession. A recent article by Jiang Bixin, the Vice President of the Supreme People's Court, unusually broke the Party line and called on the Party to move towards the rule of law. He criticized the party leadership for treating the rule of law as a 'second or third tier consideration'.[27] Gestures such as this from important figures in the profession may not lead to immediate change, but they challenge the dominant views within the party and have a place in the reform task.

Overcoming the doubt that surrounds CPC influence on Chinese legal institutions is a long-term project. The question, ultimately, is whether a legal system that promotes individual justice can be reconciled with a political system built on the primacy of the state.

It is a question that remains unanswered.

Social Diversity and Social Justice

From Indonesia to Australia and beyond

Ellen O'Brien
LL.B. IV

Article

Introduction

The effectiveness of social justice movements is often criticised when those movements are conducted by outsiders. Grassroots organisations, equipped with an understanding of the issues affecting their community, are positioned to have more success than parties removed from the situation. But there is doubt amongst these organisations as to the best approach to take when elements of their communities clash with one another. The relationship between those providing assistance and those being assisted can often become strained as differing religious, cultural and humanitarian concerns conflict.

In Indonesia, the relationship between the dominant Muslim population and other religious groups, as well as with groups pushing Western notions of human rights, is trying. This presents a challenge for social justice outfits attempting to forge relationships with a variety of religious and cultural groups, especially as the majority of people living in poverty and requiring assistance in Indonesia are Muslim.

This paper will explore the interplay between religion, culture and human rights in Indonesia before examining the techniques used by organisations, specifically Samsara and Tzu Chi, in addressing these concerns in the pursuit of social justice objectives. Their approach will then be compared to the methods used in Australian social justice movements so as to determine the most effective approach to social justice in a diverse society.

Religion, culture, and human rights in Indonesia

Indonesia is not an Islamic state, despite its majority Muslim population,[1] and it is also home to large groups of followers of Christianity, Hinduism and Buddhism.[2] As such, the Indonesian Islamic community is diverse within itself, with Islamic doctrines mixed with those from various other belief systems.[3] Ideas of "rights" and "obligations" vary greatly from person to person, as do the acceptance of interpretations of the Islamic texts.

Although Islam is not the religion of the State, it has been highly influential in the political and legal realms. Not only have Islamic doctrines influenced many national laws,[4] but sharia law has been implemented by way of regional by-laws (*perda syariah*). While some Indonesians believe that Islam has no place in public life,[5] others argue that it is a necessary step forward for Indonesia in the wake of the tyrannical New Order regime.

But the Indonesian government has also expressed its desire to be recognised as an active promoter of human rights, ratifying numerous international conventions, [6] and implementing these conventions into national law, both in the Constitution[7] and Law No. 39 of 1999 on Basic Human Rights.[8] However, the relationship between human rights and Islam is hostile: loyalty is owed to sharia over conflicting obligations, especially those propagated by lay people who have no right in replacing established doctrines of Islam based on the work of Islamic scholars.[9]

This leaves Indonesian organisations working within the social justice sector in a bind. In order to mount an effective challenge to the social structures that perpetuate inequality and discrimination, most organisations promote basic human rights they believe all people deserve to have recognised. In doing so, however, they must also be sensitive to the beliefs of all members of Indonesian society, especially those whose beliefs conflict with the notion of secular universal human rights. Striking a balance can be incredibly difficult, especially for organisations with limited time and resources. Nonetheless, organisations that want to make significant progress in both raising awareness of and challenging the injustices in society must do so through avenues respectful of diverse local customs and beliefs.

The approach of Indonesian organisations

Samsara

Samsara is a non-government organisation helping women access healthcare and safe abortion. For the men and women running the

organisation the clash of culture, religion, and human rights is an ever-prevalent issue. Abortion has been illegal in Indonesia since 1918, with the laws heavily influenced by Islamic groups,[10] and sexual health is rarely discussed, especially amongst women. Samsara conducts workshops on sexuality and sexual health for both men and women. The organisation also runs a counselling hotline for women with unplanned pregnancies, often helping them access illegal, but safe, abortions.

Although Samsara's work violates abortion laws, Inna Hudaya, one of the organisation's founders, feels that Samsara is not contrary to Indonesian culture. Abortion is something that has always happened, albeit covertly:

> [A]bortion has happened in all history, it's not something new. It happened before religion and nationalism. People just do it in different ways…[W]hat I do is against the hypocrisy, not the culture. I'm flowing with it, just being more outspoken and public about it.[11]

Hudaya is a former Muslim. She believes that the laws on abortion are legally defunct, as their very existence leads to women dying across the archipelago[12] - deaths that could easily be avoided if the laws were amended to reflect the reality of the number of abortions administered annually.

> When the policy is not "pro" to people, then it means that the state has cheated on the people, and that's how I see this regulation… How can they let these people die because of unsafe abortion? It's more than about nationality, it's about people, **it can cross the borders of nationality**.[13] [emphasis added]

For Samsara, the fact that this debate is occurring in the Muslim-dominated country of Indonesia is not relevant except insofar as the law is influenced by vocal Islamic groups. Access to safe abortion is seen as an issue that transgresses the boundaries of culture and religion, a basic human right, that in their view should be acknowledged and afforded by the Indonesian government.

Despite her contempt for the Islamic-influenced law, Hudaya is adamant that Samsara conducts itself in a courteous and mindful manner. She instructs the other workers at Samsara to 'think about strategies, how we talk with people, our approach'.[14] One such approach is to conduct workshops and information sessions on reproductive health, rather than abortion. Women are shown how to conduct breast and cervical self-examinations within the privacy of their own homes. This allows Samsara to 'create relationships with the community and talk about issues without aggravating anyone or their beliefs'.[15] Samsara operates in a way that is not dismissive of the imbalance of power between the organisations and the women they help. By providing information and access to services, Samsara aims to give women the choices denied to them by law; but the organisation remains aware that people will not always be receptive of their ideas:

> We're not trying to go against what people believe…Let them have their beliefs, we'll just offer something new. If they like it, take it. If they don't like it, that's fine…If they think what they believe is best for them, then that's okay.[16]

Samsara's employee base reflects the diverse cultural and religious makeup of Indonesia; Hudaya has constructed an organisation made up of individuals from different parts of the nation who hold contrasting religious and cultural beliefs. Although the cultural clashes can sometimes lead to tense situations in the office, it is the all-encompassing nature of Samsara that places it in good stead to not only provide advice and assistance to all Indonesians, but to also promote collaboration within the community. Hudaya believes the leader of an organisation like Samsara 'should think of how to collaborate [the employees], use the best parts'[17] so as to create a culture of equality and inclusivity which can then be put into practice in the wider community.

The diverse nature of Samsara and the views of their leader Hudaya have enabled the group to establish firm ties both with women's groups throughout the island of Java and across the world through their involvement with international networks. By focusing on what communities have in common and facilitating programs towards their shared beliefs, Samsara successfully

engages the community in discussions about sexual health.

Tzu Chi

Tzu Chi, a Buddhist organisation originally established in Taiwan, has been active in Indonesia since 1994. Its approach to social justice demonstrates how effective faith-based organisations can be, even when working within communities dominated by other religious groups. The organisation has provided aid during natural disasters, established free medical clinics, and assisted in rebuilding the Angke River, as well as providing general financial and emotional support to those living in poverty. [18] Tzu Chi works on being direct and respectful in providing services to the community, hoping to spread 'great love [that] transcends all borders and compassion [that] has no barriers'. [19]

Most importantly Tzu Chi's approach to social justice centres on a general sense of concern for humanity. An emphasis on universal love and compassion, rather than an approach intrinsically tied to Buddhism, has seen Tzu Chi be far more successful than other faith-based organisations working in the same areas. It remains true to the precepts of its faith, but does not use its actions to propagate faith-based messages. [20] Consequently, Tzu Chi has been received more readily than Christian groups like Gereja Kristen Indonesia, who has been treated cautiously by Muslim Indonesians suspicious of the re-emergence of Christian missionaries. [21]

Despite differing religious and cultural backgrounds, Tzu Chi has struck up a sincere and mutually respectful relationship with Muslim Indonesians, the majority of whom have been sincerely grateful to be assisted by the Buddhist organisation. [22] Their success proves that even faith-based organisations can break through religious and cultural barriers if such issues are dealt with sensitively.

The approach of Australian organisations

For Australians, cultural and religious diversity is not anything particularly new. "Multiculturalism" has, at least for the last two decades, been a buzzword bandied around by politicians. But the steadily increasing influx of migrants from countries all over the world has put Australian social justice groups in the difficult position of formulating new approaches that take into account the variety of needs and beliefs of all Australians.

Australia is one of the most ethnically diverse countries in the world, more so than New Zealand, Germany or the United States,[23] with 45 per cent of Australians born overseas or having at least one parent born overseas.[24] Australia prides itself on being a culturally inclusive country. However, not all Australians are equal participants in society, and certain cultural and religious traditions, such as those based in the Christian faith, remain more highly valued than others.[25]

The Australian approach to cultural diversity in social justice differs significantly from the path followed by Indonesian social justice groups. In Australia, long-standing social services are being altered so as to be more accessible for those who come from culturally and linguistically diverse communities. In Indonesia, social justice groups are attempting to radically alter the system that exists, but in doing so, they must try not to offend the majority of Indonesians' core beliefs. This is a much more difficult line to tread, with severe consequences if the line is crossed.

In saying that, there are many similarities in the way that Australian and Indonesian organisations conduct themselves. From the top down, Australian groups have aimed to deliver services 'in a way that is sensitive to the language and cultural needs of all Australians',[26] an approach supported by national, state and local governments.[27] It is further acknowledged that only programs and organisations capable of providing information and services in a culturally sensitive way should be encouraged.[28] In theory, the Australian social justice sector is wholly committed to achieving equality for Australians from every ethnic, racial and religious background.

In practice, however, there have been numerous difficulties in cross-cultural communications, both between different organisations themselves, and between those organisations and the community. The relationship between Muslim and non-Muslim NGOs, whilst usually highly amicable, can sometimes be hampered by cultural and religious insensitivity.[29] Muslim NGOs have reported difficulties in engaging with other NGOs that either remain uneducated about Muslim people or that give the impression of an unwillingness to respect Islamic beliefs.[30] One particular anecdote highlights the lack of sensitivity Muslim organisations face when engaging in cross-cultural exercises:

> We invited someone from a women's service organisation to talk about sexual health. We wanted them to talk about contraception but they started to talk about female circumcision with a group of African women and it just was not good. The women got very upset. No one is saying you can't talk to them about this issue but it's very sensitive especially for that ethnic group. So we haven't invited them back. [31]

Although in the majority of cases the relationship between non-Muslim organisations, their counterparts, and the wider community is positive, negative experiences recorded have damaged the already delicate bonds between the groups. It is important, then, that organisations are mindful of the views of the communities with which they deal. Neglecting to do so exacerbates existing unequal social structures and creates significant barriers to achieving justice and equality for all.

Conclusion

When it comes to finding a balance between culture, religion and human rights demands in the field of social justice, it is obvious that there is no single correct approach that should be followed. Instead, organisations should respond to the individual needs and beliefs of the community they aim to assist. There are however, general points to take from the work of groups like Samsara and Tzu Chi, which have successfully administered social justice programs within communities where religious and cultural relationships are fraught.

Both Samsara and Tzu Chi's attitudes to social justice can be summarised as being respectful of and sensitive to the beliefs and ideas of those whom they are trying to assist, so that the natural power imbalance between the organisation and the community is not exacerbated. By doing this, both groups have established productive relationships with Indonesians of all religious and cultural backgrounds, relationships that are necessary in advancing their individual causes.

The methods of Indonesian social justice groups have been, and should continue to be, adopted in Australia, especially as Australian society becomes increasingly diverse. Although religious and cultural tensions perhaps do not appear on the surface to be as divisive as in Indonesia, it is important that every social justice organisation keeps the specific needs of individual communities in mind. Otherwise, ignorance and insensitivity towards minority groups may provide insurmountable barriers to change.

The Privatisation of the Human Genome

A comparison of the recent *Myriad Genetics* court cases in Australia and the United States

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Article

Introduction

'In 1955 Jonas Salk, who led the team that developed the polio vaccine, was asked who owned the patent and he replied, "The people, I would say. There is no patent. Could you patent the sun?"'[1]

Understanding the human genome has allowed us to link genetic mutations to specific diseases, improve diagnostic testing and discover life-saving treatments. Jurisdictions are divided over whether or not these discoveries merit patent claims, which give the patent holder exclusive right to use the knowledge of the specific gene that they discovered. In February this year the Federal Court of Australia held that genes are patentable,[2] though more recently in June the Supreme Court of the United States addressed exactly the same patent claim by Myriad Genetics and held that genes are *not* patentable.[3]

Myriad Genetics discovered the precise location and sequence of two human genes called BRCA1 and BRCA2, mutations of which can substantially increase the risks of breast and ovarian cancer. Both cases dealt with Myriad's patent claims to these genes in the form of isolated DNA molecules that correspond to natural, albeit mutated, sequences of nucleotides.[4] The average woman has a 12 to 13 per cent risk of developing breast cancer, but women with the genetic mutation have a 50 to 80 per cent chance of developing breast cancer, and a 20 to 50 per cent likelihood of ovarian cancer.[5] If valid, the patent would give Myriad an exclusive right to perform genetic tests on those genes, allowing them to stop other laboratories performing the test and thus being able to charge steeply. Such a monopoly reduces access to an important diagnostic test, and impedes individuals' right to healthcare. Moreover, there is no obligation for the patent holder to grant researchers the right to use the gene. They usually charge licensing fees, and the threat of a patent infringement suit acts to create legal hurdles that obstruct scientific progress.

Despite the overwhelming need for human genetic information to be public research, the Federal Court of Australia applied an anachronistic view of patent law. The court's decision turned on whether or not the claim involved a "manner of manufacture" and treated genes like any ordinary chemical compound, ignoring the unique aspect of genetic information. The Supreme Court's decision is more in line with recommendations from scientific institutions, holding that a gene is not patentable because it is a "product of nature". This article will compare the two decisions and argue that the Supreme Court's approach is preferable for the good of scientific progress as well as social justice. As scientists discover more about the human genome, we need to make sure that those benefits are reaped by everyone, for the greater good.

Applying patent laws to scientific frontiers

Ostensibly, patent laws do not allow patent claims over parts of nature that are merely discovered. However with the advancement of science delving into the complexities of natural products like the human genome, there is increased difficulty demarcating how close a patent can get to a product of nature. Both Australian and American case law distinguish between the discovery of something natural, and the application of something natural to a new and useful purpose. Only the latter is patentable.

Both countries have similar statutory bases for patent requirements. In Australia the *Patents Act 1990* (Cth) stipulates that an invention is only patentable if it is a 'manner of manufacture' that is 'novel', includes an 'inventive step', and is 'useful'.[6] In the United States the *Patent Act* states that a patent can only be issued where someone 'invents or discovers any new and useful … composition of matter'[7]. The courts in each country have taken opposite directions in their interpretation of the statute. Australia has focused on the degree of human intervention and the method used, whilst America has focused on the nature of the finished product.

The Australian Federal Court interpreted the 'manner of manufacture' requirement very broadly, saying that it is a concept with a 'broad sweep' intended to encourage developments that are by their nature often unpredictable.[8] Nicholas

J applied principles from the 1959 High Court decision of *National Research Development Corporation v Commissioner of Patents* (*'NRDC')*[9] and concluded that any product that consists of an artificially created state of affairs with economic significance will constitute a 'manner of manufacture'.[10] This means that something need not be actually manufactured, in the sense of physically being a new creation, in order to be patentable. Rather it just needs to be an 'artificial state of affairs' that requires human intervention to be brought about.[11] This shifts the focus onto the method used and amount of effort expended by the patent holder, and explains why complicated 'discoveries' are patentable under Australian law. Nicholas J saw Myriad's 'immense research and intellectual effort' as an indicator that the isolated product could only exist in such a state with a high level of human intervention,[12] and thus contributing evidence that it was an 'artificial state of affairs'.

Conversely, the United States Supreme Court explicitly rejected this focus on methodology, holding that 'groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry'.[13] Rather than focusing on the level of human intervention, American jurisprudence compares how similar the product is to naturally occurring substances. The Supreme Court has interpreted 'new composition of matter' narrowly, holding that it must have 'markedly different characteristics from anything found in nature'.[14]

What is a "product of nature"?

American case law has an explicit exception for 'products of nature', coming from the Supreme Court's decision in *Mayo*[15] which held that 'laws of nature, natural phenomena, and abstract ideas' are not patentable because they 'are the basic tools of scientific and technological work'. Applied to gene patents, the functional portion of the DNA is the nucleotide sequence, which is a natural product. Following this line of principles, it is obvious that genes are not patentable because they contain this natural information.

Australian courts have explicitly rejected the American approach of excluding products of nature from patent claims. In the *Myriad* case, Nicholas J stated that '*NRDC* does not require the Court to ask whether a composition of matter is a "product of nature" for the purpose of deciding whether or not it constitutes patentable subject matter'[16] because the phrases like "work of nature" and "laws of nature" are 'vague and malleable terms infected with too much ambiguity and equivocation',[17] which apparently makes them too hard to use.

This approach lacks sufficient reasoning. The only two justifications for shying away from discussing the laws of nature are that it 'only confuses the issue'[18] and they 'could fairly be employed to challenge almost any patent'.[19] It is the responsibility of the court to clearly demarcate the distinction between what is an invention and what is a discovery, and refusing to engage with the natural end of that spectrum leads to an inadequate conclusion. As shown by Nicholas J's analysis, refusing to discuss the natural element of genetic information leads to a distorted characterisation of isolated DNA. It completely ignores the fact that the functional component of DNA is natural genetic information, which is identical inside and outside the cell. The Supreme Court decision is more logically robust, as it recognises that even though the chemical environment of isolated DNA is an artificial state of affairs, the genetic information is a *natural* state of affairs.[20]

Monopolies are not "progress"

Supporters of strict patent law argue that the public actually benefits from patents because they encourage innovation. However the public cannot benefit if monopoly pricing has made the innovation inaccessible to anyone but the most wealthy. Patent laws preserve a monopoly enforced by the government. The patentee gets the exclusive right to use and profit from their invention by excluding others from making any use of it for a certain period of time.

The discovery of a gene is impossible to 'invent around'.[21] Genetic sequences are finite and fixed in the laws of nature.[22] Since the isolation of

DNA is necessary to conduct genetic testing, if the company that first discovers a gene can claim a valid patent over it, then they have a monopoly on all testing for mutations of that gene.[23] This means that any sort of access to a patented gene like BRCA1 - whether that be for further research, a genetic test, or the development of medical treatments - will run into the patent holder's monopoly. Companies are notorious for charging excessive licensing fees which other laboratories must pay to avoid a patent infringement suit.[24] Tests are therefore more expensive, harder to access, and the quality is unchecked by normal competitive forces.

Myriad enforced their monopoly stringently in the United States, where other entities were previously conducting similar tests. They filed patent infringement suits that forced other testing facilities to cease all similar genetic tests.[25] Clinical laboratories that were already conducing genetic tests for research were forced to mask the results on BRCA1 and BRCA2 in the cancer-risk gene panel, as well as direct patients who wanted those genes tested to Myriad. This caused unnecessary double testing and a waste of resources for patients who had to pay thousands of dollars for a test from Myriad when the original clinic already performed the simple diagnostic test. In just the few weeks after the Supreme Court's decision, multiple laboratories that have had the capacity to perform the genetic test for years announced they will provide it for a significantly lower price than Myriad was offering.

It is not just Myriad that has used their patent to enforce artificially high barriers to people seeking genetic testing. Another example is Bio-Rad Laboratories which currently holds the patent on the hereditary haemocromatosis gene, and demands up front payments of US$25,000 per laboratory and a per test fee of around US$20.[26] This steep pricing is disproportionate to the actual cost of a simple diagnostic test, and discourages new laboratories from performing the test. Most notably, it shows how patents allow private companies' profit motive to dictate price when unrestrained by competition.

The victims are healthcare and autonomy

Allowing patents on our genes is a new low point for capitalism. Patents give property rights over genetic information to companies, who are motivated by profit. This seriously undermines access to healthcare and other fundamental human rights like autonomy and even reproductive rights. [27] The pharmaceutical industry is a clear demonstration of where the aim to help people comes second to the profit incentive. Drug companies continue to set the price of drugs exorbitantly higher than the cost of actually producing the product and use their patents to stop new pharmaceutical industries from developing in other countries.[28] The industry's complete unwillingness to provide HIV/AIDS antiretrovirals at the cost of production shows how patents empower private companies to act in their own interest rather than the public good.

Cost is not the only part of healthcare that is undermined: there can be some impact on the quality and reliability of the product itself. Individuals are prevented from getting a second opinion on genetic tests when one company has a monopoly. If only one company can perform the test to discover a woman's predisposition to breast cancer, then thousands of women are making the life altering decision to have a double mastectomy based on the results of one test.[29] The impact goes further than just genetic testing for cancer. Many new products like vaccines and drugs for common diseases are based on genetic research, as is the way that they are prescribed to individuals.[30] Treatments can be far more effective if doctors are aware of genetic predispositions, but patents often prevent doctors from accessing that information.

Healthcare should be freely accessible to the public, and distributed according to need rather than the ability to pay. Gene patents risk a situation where only the wealthy have access to important genetic testing and therapies. Europe prevented this injustice over a decade ago, when the European Patent Office revoked Myriad's patent over the BRCA1 gene. Since then many European laboratories perform their

own genetic testing, using more cost effective tests than Myriad. Some samples are still sent to Myriad because they offer faster analysis,[31] though the European model demonstrates that accessible genetic testing does not automatically mean there is no incentive for innovation or investment in research.

Are we furthering scientific progress?

Some argue that gene patents are socially acceptable monopolies because they are essential for scientific progress. The main argument for strong intellectual property laws is that they are necessary to encourage inventors to take risks and invest in creating a new product or innovation, otherwise they will not anticipate sufficient benefits to justify investing in their invention or creation.[32] On this logic, even if most of the public cannot access expensive genetic testing, it is still better to have some of that innovation than none at all.

This utilitarian foundation of patent law is no justification for gene patents because doing so conflates "input knowledge" with "outcome invention". Gene patents as upheld in Australia are so broad that they encompass knowledge of the gene itself, not an application of that knowledge. The sequence of nucleotides on a gene is a basic input into scientific research because it is a fact of nature.[33] The patent holder does not just have a monopoly on testing that gene, but also any research that involves using knowledge of its sequence of nucleotides.[34] This forces scientists to negotiate licensing fees, material transfer contracts and database access agreements before they can touch the patented gene.[35] The current patent regime is not furthering scientific progress because it is hindering further genetic research after the patent is granted.

The 'outcome invention' is an application of the genetic sequence, such as cDNA. cDNA is an artificially created series of exon-only molecules which never occurs naturally. Myriad also has a patent claim on this which was held to be valid by the US Supreme Court because the scientist 'unquestionably creates something new when introns are removed from a DNA sequence to make cDNA'.[36] This means that even following the Supreme Court's decision in the United States, there are still profit incentives for applying that knowledge in innovative ways. Thus the patenting of engineered "non-natural" genetic constructs is likely to continue unhindered.

Essentially, patents on genes themselves allow knowledge itself to be privatised, which is illogical and counterproductive. Michael Heller and Rebecca Eisenberg have called it the 'tragedy of the anticommons'.[37] For example, Myriad has run over a million BRCA tests since 1996,[38] but the enormous amount of data on BRCA mutations have not been contributed to a pool of accessible knowledge for all researchers to access and use. When only a select number of scientists and laboratory technicians have access to the data, then the possibility of break through innovation is drastically lower.

There is no justification for the privatisation of knowledge about nature. Ideas should be public goods; once they exist they should be there for everyone to enjoy and derive benefit. Unlike tangible resources, the use of an idea by one person does not result in there being less of that idea left for anyone else to use.[39] The knowledge does not diminish in value, it just levels the playing field for other innovators to try to use it to the best of their ability.

Finally, overreaching patent laws are not necessary to incentivize genetic research. Humans will always desire to understand their environment and their own bodies. Research is often funded by governments, showing it will continue even if it operates at a net economic loss. Moreover, patents do not always go to the company that invests the most. Genetic research is conducted simultaneously by many organizations. The Human Genome Project was the result of an international collaborative effort. Myriad was indeed the first company to clone BRCA1, but in Europe Sangar Institute sequenced the BRCA2 gene before Myriad. Multiple laboratories and research institutions are capable of accessing the BRCA1 and BRCA2 genes, the patent just goes to the company that labeled it first. Sangar Institute immediately announced that it would

allow public laboratories throughout Europe to use its patent on BRCA2 for free,[40] which shows the arbitrariness of patenting in the context of rapidly advancing genetic research.

Conclusion

Privatisation of our genetic information is principally wrong, based on an anachronistic application of patent law, and leads to drastic social injustices. Patents give companies the right to control who accesses our genetic information, and these monopolies operate to the detriment of healthcare and scientific progress. Fortunately the United States Supreme Court has recognised these problems inherent in gene patents, and we can only hope that the High Court of Australia overturns the Federal Court's decision which would require them to overrule the *NRDC* case.

Genetic information is only going to become increasingly important to healthcare as the biotechnology industry advances, and we need to make sure that those benefits are distributed to those in need. The State should ensure that knowledge of the human genome is a public good, rather than enforce unnecessary and counterproductive monopolies.

Privacy as a Human "Premium"

The age of internet identities and big data

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Article

Introduction

The notion of privacy almost appears ludicrously antiquated in the virtual-minded era of Twitter, Youtube, blogs and Facebook: an age where individuals willingly offer up intimate morsels of themselves on a daily basis, chronicling personal details that range from trivial mealtime updates to new relationship statuses. In an internet-oriented age characterised by mass online exhibitionism and voyeurism, privacy appears passé. Humans have increasingly forfeited their private lives, preferring to live publicly in order to 'exist, to be real' and to be noticed and validated by a virtual audience.[1] Privacy now features as a quaint relic of a bygone era - in the digital age, it is merely a tool for personal barter. This widespread nonchalance towards individual privacy has been exploited by enterprising marketeers who have salivated over this 'treasure trove' of once inaccessible information.[2] Status updates, twitter feeds and Google perusals have been recast as insights into individual desires and wants; progressively collated into the treasured commodity of personal data. As such data is recognised as a "product" stimulating rapid economic growth and even designated as the "oil" of the twenty first century, a valid question arises: what is the true price or more significantly, the *worth* of individual privacy?[3]

This work reconfigures privacy as a vital human premium: not a passé object available for barter between online facilitators and marketing scavengers. As fiscal interests in personal data foster a culture that commodifies privacy, it is vital that we reconsider this age-old antiquity and appreciate it as a modern, human necessity. As America's National Security Agency plans to build a mammoth data surveillance centre in the desert of Utah, it is also fitting that we consider how our virtual information is been utilised.[4] At stake in the privacy debate is more than the concealment of trivial human flaws or embarrassing Google searches. Resuscitating a culture that values privacy is also necessary to ensure democratic participation, political freedom and most significantly – individual sanity.

Privacy as a human "premium"

In the fictional state of Oceania, created in George Orwell's *Nineteen Eighty-Four,* citizens are monitored by ubiquitous two-way telescreens. These screens broadcast messages from the 'Ministry of Truth' whilst simultaneously casting a watchful eye over society.[5] Sharing similarities with Orwell's telescreens, computers now function as a two-way digital medium, allowing cyber-users to receive information whilst also accumulating data on their virtual identities through online histories, cookies and ad-tracking software.[6] As digital devices are progressively utilised to monitor human activity, it is worthwhile to again consider the underlying caveat of Orwell's dystopia. As *Nineteen Eighty-Four* duly highlighted, some conceptual minimum of privacy must be maintained in order to preserve civil democracy. Even in the virtual world, privacy must be valued as an absolute human premium. Privacy acts as a necessary social utility by articulating boundaries between citizens' intimate and public lives. On a smaller scale, it is also significant in facilitating human growth and personal sanity by existing as 'a margin of inviolability for our thoughts, feelings, intimacies, reflections, anxieties, our hopes, our nascent plans, and our recoveries from the abrasions of life'.[7]

Undoubtedly, privacy is still a somewhat elusive concept and its precise definition continues to stir polemic debate. As new technologies have evolved and threatened to violate humans' private lives, legal philosophers and social commentators have persistently clamoured to privacy's defence in the recognition that some frontier (however rudimentary) must exist in order to buffer the individual from intrusive scrutiny. Responding to press vulgarity in 1890, Samuel Warren and Louis Brandeis's seminal treatise characterised privacy as a simple 'right to be let alone'.[8] The development of print machinery and the instantaneous photograph had fostered an industry trading in vicious gossip. Newspaper columns had become consumed with lewd details of private sexual relations, all intending of course, to gratify the public's 'prurient taste'.[9] As new technologies threatened to impinge upon

the sanctity of the domestic sphere, Warren and Brandies asserted that certain details whispered in the confidentiality of the 'closet' should not be subject to broad proclamation from the 'housetops'. Instead, the intensity and complexity of civilized existence necessitated that man should be permitted at frequent intervals to 'retreat from the world' at large.[10]

Internet identities

Ensuring that individuals are still able to enjoy a retreat from public life conveys a challenge in a technology-reliant era. The virtual world is currently awash with personal data as each day the global population sends ten billion text messages and makes over one billion posts on either blogs or social network sites – by 2015 it is estimated that one trillion devices will be connected to the Internet.[11] As humans progressively utilise computers and mobiles as conduits to navigate daily life, their virtual footprints become imprinted upon email logs, web histories and cookies embedded in HTML data. Whether it is calculated or mere carelessness, it appears that participants in the Internet age are freely sacrificing their privacy in exchange for the ease and use of online applications. However, cyber partakers should not submit to the delusion that their virtual footprints are cheap, intransient objects to be peddled off carelessly. After all, Facebook's current projected market value of US$100 billion is based upon the coveted data of over 900 million users that it offers to advertisers seeking to exploit the brand's social graph.[12] Increasingly, virtual traces of cyber-users are been reassembled into full-bodied internet profiles, exploited by advertisers to funnel individual desires into specific merchandise and products.

The realisation that Internet identities are being constructed to facilitate virtual advertising has stirred little consternation, perhaps raising a few eyebrows at most. So what if individual cyber-users are bombarded with wedding dress adverts or weight-loss ads after pursuing those untimely Google searches? This is merely a minor irritation in the global march towards a more prosperous, sophisticated epoch built on the lucrative asset of virtual data. A report released by the *World Economic Forum* in May characterised personal data as the most valuable asset of the twenty first century.[13] In any major economy, goods must physically move - the Silk Route, the Roman roads and the English fleet each provided the backbone of thriving civilizations in facilitating trade over vast geographies. Drawing a long-winded parallel, the Forum's report emphasised that personal data must likewise be copied, collated and distributed globally in order to stimulate revenue.[14] Such predictions – however fiscally promising – should be reassessed, as we consider the future effects of such a perilous conception of personal data. Treating virtual footprints as a financial product that can be readily accessed then auctioned, fosters a culture that degrades personal privacy, diminishing it as a mere bulwark on the path towards global prosperity.

Processes that collate cyber-user's virtual traces into full-bodied profiles have further marked a dangerous precedent. Earlier this year, a New York Judge approved a subpoena placed upon the Twitter brand to relinquish all data relating to the account of Malcolm Harris, an Occupy Wall Street protestor.[15] Judge Sciarrino concluded that the Fourth Amendment prohibiting 'unreasonable search and seizure' was not applicable, as there was no *'physical* intrusion' into Harris's account. Sciarrino noted that:

> If you post a tweet, just like you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which are now gifted to the world.[16]

However, it was not the overtly public tweets that Harris's prosecutors were interested in. Rather the subpoena also required Twitter to divulge the date, time and I.P. address that Harris had utilised to log into his account over a three-month period. Prosecutors were attempting to collate this data in order to ascertain whether Harris was present at a particular site during a disorderly protest.[17] Increasingly, virtual data is been collated and organised in ways that cyber users never intended. Francesca Bignami has emphasised that the vast quantity of data generated on the World Wide Web increases

'exponentially the risk of legitimate political searches degenerating into the aimless perusal of our private lives'.[18] As the Harris case illustrates, search warrants once confined to physical property can be broadened into hazardous fishing expeditions, where individual's online accounts are considered free-for-all repositories of juicy information; all of course "gifted to the world" for public use.

In our present age, the internet has also transformed into a repository for individuals' identities. Howard Rheingold has pointed out that cyber-users 'reduce and encode' their personalities upon keyboards and screens: 'the way we use these words, the stories (true and false) we tell about ourselves… is what determines our identities in cyberspace'.[19] As humans surf the internet, traces of their interests, desires and daily activities are left behind and subsequently stored into vast online repositories and histories.[20] Surveillance of an individual's web presence can therefore reveal a great detail of information about their personality, lifestyle, consumer habits, political and social activities.[21]

Yet, the non-corporeal nature of internet interactions has lulled us into a false sense of security. Progressively, we have become willing partakers in the erosion of our own privacy. If we were to adopt a similar attitude in the real world, the consequences of how we interact online may seem more alarming. For instance, suppose an individual were to enter a store where the sales assistant possessed extensive information: every purchase the individual had made at the store; their predilections for particular products; perhaps their credit history and bank account details. Such details would surely place the sales assistant in a superior position to the buyer. Perhaps the individual would even feel uncomfortable having to face a *human* that possessed so much knowledge about their intimate life.

In time, cyber users may discover that their virtual activities are exposed or utilised in a manner they can no longer control. The internet age has transformed virtual storage into an immensely economical mode of remembrance. However, this convenience may also cripple individual privacy by ossifying unwanted identities of cyber users – identities that they might find unpleasant or past identities that they feel their *present* identities no longer resonate with. For instance, a sixty year old Canadian psychotherapist tried to enter the United States earlier this year - he was turned away when a Google search by a border guard uncovered a philosophical journal he had contributed to thirty years prior, revealing his brief foray into L.S.D.[22] Yet another example is the new I-Phone application called "Date Check". This app offers users a 'sleaze detector' in which a user can punch in the name of a future romantic prospect, in order to receive their criminal histories and a summary of their social network profiles. Technology's interaction with our virtual life is progressively distorting our personal data in ways that we never intended it to. On a more fundamental level, it is increasingly eroding our privacy and our ability to evolve, change and grow as individuals over time.

Virtual privacy as a human right

Virtual information has been characterised as a valuable commodity, but it still lacks the necessary trading rules and policy frameworks that exist to regulate the circulation of other physical assets.[23] As personal data is progressively recast as a new asset and the "oil of the twenty-first century", it becomes imperative that nation-states recognise *virtual* privacy as a necessary human right. Further, personal data has been increasingly utilised in ways that impinge other fundamental political rights. Twitter's Transparency Report in 2011 revealed that in one year, it had been subpoenaed by law enforcement organisations to relinquish data relating to 948 accounts: of these requests, the company had consented to 679.[24] Recognising virtual privacy as a human right would assist in combating a culture where online data has been increasingly commodified, exploited and collated in modes that cyber users never intended.

Often the efficacy of human rights is treated with a healthy dose of scepticism. Individual rights are frequently regarded as toothless tigers or hollow aspirations. However, behind the mere

listing of human rights, there lies an important conception of the minimum requirements that such a prerogative entails.[25] One example is the inherent "right to life"'. While it has been criticised for its vague phraseology, its mere existence has sparked a global dialogue over what a 'right to life' entails and what bare prerequisites must be provided in order for an individual to enjoy this human minimum. If a right to virtual privacy were recognised, a global dialogue would likewise be stimulated, fostering a fruitful discussion on the most effective means to encourage online privacy, without hindering commercial progress. In the current age, an international dialogue on virtual privacy is long overdue. While legislative approaches to virtual privacy differ according to geography, the internet remains borderless and transcends sovereign boundaries and statutes.[26] As a poor substitute for global, unified guidelines, the right to privacy is currently protected by ad hoc domestic laws: in the United States, provisions such as the Fourth Amendment are evoked, while in Australia, privacy receives incidental protection under the tort of trespass, nuisance, defamation and equitable breach of confidence.[27]

In the *Lenah Games Meat* case,[28] Chief Justice Gleeson provided a caveat against creating a legal right to privacy. Gleeson duly highlighted that the 'lack of precision' surrounding conceptual notions of privacy could very well exacerbate the 'tension that exists between interests in privacy and interests in free speech'.[29] However, I would argue that limiting a right to privacy (for the present moment) to virtual spaces, could specifically address cyber users' concerns without unnecessarily impinging on free and fair political discussion. If anything, stringent guidelines on online privacy would enhance democratic freedom and participation by equipping individuals with a right to utilise against intrusive interference by powerful government and corporate bodies. It would force governments to re-think certain courses of actions before exploiting twitter feeds for prosecutorial cases; or before installing invasive software programs, such as China's euphemistically titled Green Dam filter.[30] In recognising a right to protect one's personal data, the European Union has shifted responsibility onto public authorities to ensure that they are not gratuitously storing or processing personal data that impinges individual privacy. By establishing a proportionality test, the E.U. have recognised that it is necessary for both commercial progress and human civility for individuals to maintain a private life - even if it is online.[31]

Anti-luddite options

While this work may be accused of semi-ludditism, it would like to end by noting that technology is not necessary the enemy and that creative virtual options can in fact, enhance our online privacy. Amitai Etzioni has remarked that the relationship between technology and privacy is best viewed as an "arms race between advancements that diminish privacy and those that better protect it".[32] In contrast to telephone calls and letters which are easily subject to perusal, technology is able to secure our routine electronic communications through high-powered encryptions. Medical and financial records stored in encrypted databases can be guarded more securely online than in the corporeal world of locked cabinets.[33] However, there needs to be a will to protect such information, if such provisions are to be rendered effective. In rethinking the current approach to private data, online facilitators need to create alternative options for users who wish to opt out of the current free-for-all approach. Sidebars that actively display information being tracked or personal data lockers which allow individuals to securely store data about themselves from multiple sources, are merely two solutions that have been offered.[34] Creative virtual solutions such as these would successfully enhance individual privacy and also foster a beneficial relationship of trust between web facilitators and cyber users.

As individuals, we may also have to reconsider how we use and store our private data. In a work titled, '*Useful Void: The Art of Forgetting in the Age of Ubiquitous Computing*', Viktor Schonberger tendered the novel suggestion that the digital age requires society to 'revive… [its] capacity to

forget'.[35] Schonberger postulated a world in which digital-storage devices would be programmed to erase photos, blog posts or other data that had reached its expiration date.[36] Putting a definite time limit on the lifespan of virtual data would diminish opportunities for third-party groups to utilise personal information in modes that individuals never intended. It would also reduce the likelihood of companies constructing full-bodied internet profiles on cyber users. Finally, on a more intimate note, it would reimburse technology participants with the necessary breathing space to develop, grow and evolve as human beings. In recognition of this need, a new program named *Tiger Text* (inspired by the Tiger Woods saga) allows text message senders to set time limits on the storage of their phone data: when the expiration date occurs, the message is deleted from both their phone and the recipient's.[37] Google has also recently agreed to render all search queries anonymous after a period of nine months.[38] By putting definite expiration dates on virtual data, individuals could come one step closer to securing their own privacy, without fully restricting the commercial development of the data industry.

Regardless of the never-ending Twitter feeds; the continual Facebook updates; the endless blog posts; privacy must continue to be regarded as a vital human necessity. As the lifeblood of any democratic, civilised society, a healthy communal respect for privacy ensures that individuals are able to enjoy an intimate *and* a public life, allowing for a necessary "breathing space" to grow, think and evolve as human beings. Privacy is not passé, nor is it obsolete. In addition to shielding us from detrimental over-scrutiny, it also bolsters our political and civil rights as citizens. By recognising a virtual right to privacy, and ensuring that more opt-out options are available for cyber-users, we can start to combat a culture in which privacy has been downgraded as a "product" and a tradeable asset for economic profit.

Activism or Slacktivism?

Social justice in the age of social media

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Article

Introduction

The rise of the internet and social media has seen an unprecedented increase in our capacity to be connected and raise awareness of important social issues. However, in an emerging digital economy of "likes" and "shares", there is increasing doubt over whether social media can facilitate meaningful advocacy in the digital age. Does the convenience of showing one's support for a social cause through "liking" it or signing an online petition amount to little more than what has been labelled "slacktivism"?

This essay will explore the ongoing debates surrounding social justice in the age of social media. For the purposes of this essay, "social media" will refer primarily to popular services such as Facebook, YouTube and Twitter, although email and mobile phone texting also apply. This essay will first look at the criticisms that have been levelled towards online activism by thinkers such as Malcolm Gladwell and Morozov, using the KONY 2012 campaign as a case study. It will then discuss the arguments raised by proponents of online activism, looking at the work of the Clay Shirky and the importance of social media in the Arab Spring of 2011. Ultimately, it is argued that the true potential of online activism is realised through the synthesis of traditional grassroots activism with the tools of social media, a synthesis explored by looking at the web organisation Avaaz.

"Slacktivism" and the sceptics

Evgeny Morozov, a leading sceptic of online activism, describes "slacktivism" as the 'ideal type of activity for a lazy generation… [a form] of feel-good online activism that has zero political or social impact.'[1] Slacktivism generally involves small online measures for a social cause that are done at very little personal cost. Activities considered "slacktivist" include signing internet petitions, subscribing to an organisation without contributing to their efforts, or simply sharing socially aware links or videos on Facebook or Twitter.

The debate surrounding online activism has garnered fierce critics. They suggest that the damage of slacktivism lies in the belief that the world's problems can be resolved through simply liking, watching or sharing content through social media, without any real personal cost. Ross Monaghan suggests that the danger of slacktivism lies in 'people thinking that just because they watched, for example, the Kony video, that they're actually making some sort of change in the world.'[2]

Morozov observes that the over-saturation of information of social media, coupled its with real-time and 24/7 news cycles, has created a culture of shortened attention spans.[3] For all social media's promise of creating and amplifying online conversations at a rapid rate, these very conversations run the risk of being shallow, or just as quickly replaced by the newest big thing. Morozov also laments that nominal social media gestures such as signing online petitions of Facebook "likes" have the tendency to supplant more traditional, proven forms of activism (such as demonstrations and volunteering).[4] He argues that simple online actions constitute a shallow and fleeting type of participation, which does little in the way of creating a genuine, personal connection between the person and the cause.

Malcolm Gladwell, another prominent critic of the "slacktivist" movement, builds upon Morozov's argument. Gladwell argues that real social change comes about through high-risk meaningful activism. Pointing to examples such as the 1960s sit-ins by black college students in Greensboro, North Carolina and Australia's "Freedom Rides", Gladwell maintains that successful efforts must 'engage participants by convincing them that they have a great personal stake in the consequences.'[5] By contrast, successful social media campaigns have been successful because they do not ask too much from people, and 'don't require you to confront socially entrenched norms and practices.'[6]

Gladwell also argues that traditionally effective activist movements are built upon 'strong-tie' personal connections. These connections enable social justice activists to establish hierarchies and leadership structures, which are central

to reaching consensus on important decisions and maintaining strategic action.[7] Social media platforms are designed for creating networks built on weak personal ties that lack any form of centralised leadership. As Gladwell points out, 'Twitter is a way of following (or being followed by) people you may have never met. Facebook is a tool for efficiently managing your acquaintances, for keeping up with people you would not otherwise be able to stay in touch with.'[8] Networks lack a centralised leadership structure and thus face real difficulty in setting goals and reaching consensus. They are more prone to creating conflict between their members and are incapable of fostering strategic thinking.[9] Other voices of dissent have come from critics such as Natalie Fenton and Veronica Barassi, who note that the proliferation of individual voices on social media can come at the expense of developing a collective message. They observe that the discourse surrounding the democratic potential of social media tends to focus on individual agency, overlooking 'how the self-centred forms of communication that these platforms enable can challenge rather than reinforce the collective creativity of social movements.'[10]

KONY 2012

The KONY 2012 campaign stands as a leading example of the potential pitfalls of 'slacktivism'. Organised by Invisible Children, KONY 2012 sought to raise public awareness of the Ugandan warlord Joesph Kony, his paramilitary group the Lord's Resistance Army, and its use of child soldiers. Central to Invisible Children's efforts was a half hour long documentary film that amassed over 100 million "likes" within a week of being uploaded to YouTube.[11] If we were to gauge the success of KONY 2012 on statistics alone, it would seem like a resounding success. Why then did the campaign fail to galvanise this immense global response during its Cover the Night event only a month later?

KONY 2012 was attacked for oversimplifying the complex socio-political climate of the northern Ugandan conflict surrounding Joseph Kony. The documentary-film was presented from the perspective of a father, Invisible Children co-founder Jason Russell, speaking to his five-year old son. While the narrative has persuasive emotional gravitas, it does so at the expense of factual and academic accuracy.[12] The campaign was also heavily criticised for its paternalistic overtones, and its inability to demonstrate the transformative work already accomplished by the local Ugandan community. The campaign demonstrates the problematic nature of trying simplifying complex problems to broaden their appeal, and creating a dialogue of aid without engaging the very community you are helping to empower.

Supporters of online activism

The social media as social justice debate has also generated its fair share of proponents. These advocates postulate that the potential of social media lies in 'the means through which you achieve something rather than the outcome itself.'[13] Thus, they acknowledge that online activism cannot solve the problems of social justice by small gestures on social media. On the contrary, they argue that social media tools should be used as a means of coordinating real-world action, rather than a replacement of it.

One of these proponents is Clay Shirky, who argues that social media should be understood as a number of long-term tools 'that can strengthen civil society and the public sphere.'[14] Advocating an 'environmental view' of internet freedom, Shirky argues that 'little political change can happen without the dissemination and adoption of ideas and opinions in the public sphere.'[15]

Elihu Katz and Paul Lazarsfeld, two sociologists examining media in the post-war period, observed that in order for mass media to change people's minds, it must satisfy a two-part test.[16] The first part concerns access to information; the second involves how that information is used in conversation and debate.[17] Shirky appropriates this model to discuss the ways in which social media can enhance the efforts of social justice.
My discussion of these two parts will take place through the lens of the Arab Spring movement.

The Arab Spring and the Katz-Lazarsfeld test

December 2010 and the first months of the 2011 saw a massive explosion in pro-democratic movements in the Middle East and Northern Africa. From Tunis to Cairo, Amman and Manama, Damascus to Tripoli, everyday citizens took to the streets as part of massive demonstrations demanding rallying for political change.[18] What is so distinct about the Arab Spring is the crucial role that social media had in its movements. Social media was not the sole cause of the Arab Spring, but the strategic and concerted use of these technologies meant that people could build extensive networks and organise large-scale political action at an unprecedented speed. Through online networks, citizens brought together by their shared dissatisfaction with corrupt regimes took their voices to the streets, and through social media, to the world.

Part 1 - access to information

Social media has opened up the doorway for a number of innovations that have revolutionised the way in which people access information. One such innovation is the making and proliferation of "on the ground" eyewitness accounts, which are captured on mobile phones and uploaded on to platforms such as YouTube. These accounts offer unfiltered access to the stories of people affected by events, in a way that moves reporting beyond traditional journalistic sources.

The reporting of eyewitness accounts on social media has been vital to the Arab Spring. In '*The Role of Digital Media*', Phillip N Howard and Mazammil Hussain discuss how Egyptian citizens in Tahrir Square used their mobile phones to document events, and especially their own participation.[19] During the Syrian uprising, YouTube's usual no-gore policy was waived in order to allow mobile phone footage of Assad's troops shooting at unarmed Syrian civilians to be shared.[20] Protesters from the Arab Spring demonstrate that social media can be, and is, a vital force in times of high-risk, real-life activism. Social media 'expands access to human rights abuses beyond that offered by the mainstream media and non-government organisations (NGOs), and penetrates veils of secrecy thrown up by repressive regimes.'[21]

Social media also amplifies the message of its users, allowing them access to a diverse global audience who can be constantly updated in real time. For example an article by New York Times journalist Anthony Shahdid, concerning a team of twenty Syrian exiles, spread across the globe. Taking to social media, this small group of cyber activists relayed written accounts, video, photos and other information from demonstrators in Syria around the world.[22] Dissidents such as Rami Nakhle were instrumental in ensuring that the world was kept aware of the atrocities committed by the Syrian government against unarmed and generally non-violent protesters.

Part 2 - the communication of information

According to Shirky, 'access to information is far less important, politically, than access to communication.'[23] Social media platforms enable ordinary citizens to share their stories and communicate with people from far corners of the world, from completely different backgrounds and life experiences. The capacity to share information almost instantaneously provides an important medium through which people can communicate ideas and engage in dialogue with each other.

In the context of the Arab Spring, social media was used initially to communicate a public sense of shared grievances - 'cognitive liberation'[24] - and potential for change.[25] An example of this is the Facebook group "We are All Khaled Said". Started by an Egyptian Google executive, Wael Ghonim, the page sought to keep alive the memory of Khaled Said, a 28-year old blogger who was beaten to death by police for exposing their corruption.[26] The Said memorial Facebook page became a source of solidarity and community, where commiseration and frustration became galvanised into collective dissent.

Social media was crucial in coordinating actions in the Arab Spring, empowering everyday citizens to orchestrate large-scale action more

rapidly and on a larger scale than previously thought possible. People used digital media to organise a political response to a local experience of injustice. This unexpected method of organisation created a situation towhich states found difficult to respond. The efforts of governments in countries such as Egypt to shut down the internet are testament to the effect of grassroots activism through social media.

Progress through synthesis

In examining the debate on the impact that social media has had on social justice, one thing that seems to be forgotten is that social media is only in its infancy: 'Facebook launched in 2004, Youtube in 2005 and Twitter in 2006.'[27] The critics of social media raise valid concerns about its capacity to elicit meaningful change, and provide much needed grounding to the hyperbole that often accompanies discussions of social media. However, they often see traditional activism and online activism as an either-or proposition Although acknowledging that barely committed actors cannot click their way to a better world, this view implies that committed actors cannot and do not use social media effectively.[28] There is also an implicit assumption that loose connections made through social media cannot be strengthened over time, and that "slacktivists" cannot themselves become genuine activists engaged in social justice. It would seem remiss to not acknowledge the immense ways that the internet and social media are transforming how we communicate to each other, especially in a human rights context.

The more genuine challenge for online activists is: how can social media be more effectively synthesised with traditional forms of activism to enhance the impact of real-world actions? I will look at attempts that have been made to synthesise social media with more traditional activism through the case study of Avaaz.

Avaaz

The international advocacy organisation Avaaz demonstrates how online activism can be combined with the aims of more traditional advocacy organisations.[29] Founded in 2007, Avaaz aims to 'bring people-powered politics to international decision-making' by articulating global public opinion. Its campaigns aim to 'bridge local concerns with global issues', rapidly responding to pressing social issues by mobilising large numbers of members - close to 22 million as of June 2013 - to sign online petitions or donate small amounts of money to specific local actions. Their campaigns have covered a diverse range of social issues, from climate change and gender rights to more recent events such as the conflict in Syria.

Describing themselves as a "web movement", Avaaz primarily operates as a virtual organisation. Avaaz has a strong international online presence, with its primary tools of communication being an email alert list operating in 14 languages, and a website operating in 15 different languages. It has capitalised on a number of existing networks, such as Facebook, MySpace, YouTube and Flickr.[30] By harnessing spaces usually used for online socialising, Avaaz offers 'entry points to activism for individuals with limited political experience.'[31] With access to all these networks, Avaaz is able to communicate rapidly and efficiently with its members. The speed of internet communication is vital in allowing the organisation to shift its focus to issues that dominate public debate, and take advantage of the momentum that propels big issues or events.[32] By concentrating mobilization efforts to simple online actions, Avaaz has broadened its appeal and enabled members with limited time or resources to contribute to campaigns.

A key similarity between Avaaz and traditional activist organisations is its centralised leadership. A small team of campaigners are responsible for the coordination of the organisation from the Avaaz headquarters in New York. These campaigners develop the core messages of the organisation with the consultation of expert advisors, and are responsible for defining Avaaz's projects. The organisation taps into the power of social media by conducting opinions polls of its membership base that help to determine its priorities.[33] Furthermore, Avaaz tests ideas for campaigns on random samples

of 10,000 members, only forwarding ideas that have generated strong support to their full membership base. Avaaz demonstrates an innovative synthesis of social media-based interactivity with more traditional, centralised activist leadership. Reflecting an 'ethic of servant leadership',[34] Avaaz treats users as 'co-producers rather than consumers of information' by listening to their concerns and crafting actions accordingly. Members are able to contribute more directly to the agenda of the organisation and feel a greater connection with its causes. [35]

Avaaz is not immune from criticism. Like many forms of online activism, Avaaz demands minimal commitment from its members.[36] This makes it difficult to build a sense of community amongst members. By lowering the bar of participation, members (that is, all subscribers to Avaaz's email alerts) are expected to commit to nominal social media functions, such as donating or signing online petitions. Dave Karpf views this as problematic, with the 'low-barrier-to-entry for organisation membership yielding a large but questionable base of recipients.'[37] Avaaz can thus be criticised as engendering a culture of "slacktivism" amongst its members. However, this overlooks the fact that many loose-tie members of Avaaz may develop greater engagement with the organisation and its causes over time.

Conclusion

The debate surrounding the effectiveness of social media as a tool for social justice has already attracted its fair share of supporters and detractors. Critics like Morozov and Gladwell argue that social media creates weak tie connections between activists and their causes, cautioning that nominal social media activity like signing online petitions are being adopted at the expense of traditional and proven methods of activism. The KONY 2012 campaign provides a clear example of the pitfalls of online activism. Conversely, supporters like Shirky suggest that social media should be considered as tool to coordinate real-life actions, rather than as an outcome in and of itself. The Arab Spring is a pivotal example of how social media strategically can be used in high-risk activism, providing innovative ways to share information and stimulate communication and coordination between activists. Ultimately, social networks can and should be used as tools to achieve political reform. The ongoing challenge for online activists is how to synthesise traditional forms of activism with the tools of social media to enhance the impact of real-life actions.

Social Justice Snobbery

Judging the morality of those who volunteer

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Opinion piece

The social justice battleground is peculiarly cynical. To be propelled by a motivation judged "morally impure" (whether that be to boost one's CV for clerkship applications, or to internally justify the practical benefits of a deferred year, acquiring a profile picture with a miscellaneous emaciated infant along the way) is seen to depress the value of one's time and energy. Why the moral snobbery?

Those who express disapproval of a culture of egocentric enthusiasm for "doing good" often rationalize their unfriendly sentiments with reference to some alleged harm. Self-oriented do-gooders from the developed world reinforce colonizer/colonized power structures; the marketing emphasis of volunteering projects on resume-stacking and sightseeing distracts from the cause, or it encourages band-aid solutions to "structural problems".

None of these complaints are convincing.

Any form of charitable partnership can be framed as reinforcing asymmetrical power relations, by virtue of the fact that givers opt to involve themselves in the struggle into which receivers, without prior consultation, are born. We are constantly finding ways to distract ourselves from the most desperate realities of the world; the phrase "first world problems" allows us to blithely laugh off the gross discrepancy between our own spectrum of discomfort and the routine adversity faced by the majority, and consideration of the number of children who could be vaccinated against TB with unnecessarily spent money does not cross the ordinary person's mind every time they make a superfluous purchase. The diagnosis of "structural problems" captures the fact that the ultimate causes of the world's problems are buried in the layers of a history of oppression; but this should not negate the utility of these "band-aid" projects, as though any modicum of helpfulness in the world is counterproductive to some fantastical global revolution peeping behind the curtains, patiently waiting to be unveiled.

Maybe the real reason we so desperately seek the comfort of moral superiority is an uneasy understanding that our place in the world is ultimately due to luck and that we are therefore burdened to mitigate the unfair consequences of this simple reality. But because we have a choice as to whether to involve ourselves in the struggle for social justice, and making that choice involves personal sacrifice, we must convince ourselves that the motivation for our sacrifice is morally "correct"- for surely this augments the worth of our actions. As with most occasions in life, we do so by comparing ourselves to others.

Criticism of individuals who act upon "lesser" motives usually involves scorn for those who participate in the "voluntourism" industry. Packages are targeted to students from the developed world who might spend their summer working at an orphanage in Kathmandu for two weeks, alongside treks through the Nepalese jungle; all for a usually extortionate fee, most of which contributes to the growth of a profitable third sector organisation. It is not difficult to see why the self-righteous would mock such an expedition; why does one need to be enticed by the prospect of an exotic hinterland in order to "do good"? Should one not "do good" for the sake of doing good, without an ulterior motive? More practically, would that individual not maximize their time and energy if they invested in a project with low administration costs and more sustainable objectives, rather than seeking self-gratification?

Such criticism of ostensibly well-intentioned individuals undertaking projects that do not quite maximize their resources is falsely predicated on this zero-sum analysis. For one individual, the promise of personal gain other than the vague satisfaction of contributing to the betterment of the world may be a requisite of their charity. They are most likely aware of the fact that their resources could go further without the interference of a profit-seeking third party or Himalayan excursions. But dissuaded by the lack of personal tangible benefits, that individual might lose any impetus to give at all.

The existence of grievous inequality drives some to ignorance or indolence, and others to act; and of those who act, complete martyrdom cannot

be expected. Participation in making the world even a marginally better place for a few complete strangers should not require absolute selflessness. That would be unreasonable, for expectations must always be tempered by cognizance of the varieties, complexities and limitations of the human person. Moreover, to have the purest altruistic motivation would essentially require annihilation of the ego. Even the Paul Farmers of the world, those who come as close to martyrdom as one could expect of a human being, cannot be expected to extinguish their own desires, in order to save the world. If we were to apply a zero-sum, utilitarian calculus to the resource allocation of every charitable individual, I doubt we would find satisfactory results.

The task before us is too massive to waste our time and energy proselytizing to people who we imagine to be beneath us. This does not mean that we should shy from engaging in conversation about the most effective way to give, but that the moral snobbery that pervades the social justice world is vain. In a world capable of alleviating the saddest truths, a smidgen of somewhat useful, albeit selfishly motored activity in a tiny corner of the world is better than discouragement and inaction.

Good Intentions

Privileged students, the law and social justice

James Clifford
LL.B. III

Article

Introduction

Doubt is valuable. Thus, one of the most dangerous ways privilege manifests itself is in removing an individual's sense of doubt. It is very easy to avoid questioning one's own skills, the importance of one's thoughts, or one's limits when social and educational structures suggest that there is no need. This danger is particularly pertinent in the field of public interest law: a field in which many high achieving, highly privileged individuals use qualifications largely begot from that privilege to work with oppressed groups. It is too easy to pat oneself on the back for participating in such a field without even considering that legal social justice work necessitates interrogation of the sources of one's own privilege, and how trying to uncritically "help" might in fact further reinforce structures of oppression.

Many students enter law school brimming with Finch-inspired ambitions to create positive social change. Far fewer, however, will stop and consider that good intentions and hard work are not enough. American law professor Dean Spade's excellent essay titled '*For those Considering Law School*'[1] seeks to challenge students to interrogate their subject-position and the intentions that lead them to consider a career in law. Spade attempts to create a conversation that calls into question the 'national narratives we have all been fed that tell us that legal cases are the most effective way to dismantle systems of oppression and change people's lives'.[2] This essay hopes to continue that dialogue by foregrounding the doubt that should sit in the mind of every privileged law student who hopes to use their law degree to social justice ends.

In their roles as lawyers, Gabriel Arkles, Pooja Gehi and Elana Redfield have confronted and engaged with their doubts regarding the role that the law can play in instigating social change. They opened a paper regarding their practice with the admission that:

> The question of how best to use our privilege and skills as lawyers to help improve our clients' health, safety, and life chances without reinforcing systems and structures that hurt and disempower our clients has constantly challenged us.[3]

As a white, middle class, male cisgender law student who hopes to use his education for social justice purposes, I anticipate such a challenge. Practising law, even or perhaps especially within a social justice capacity, carries with it the danger of becoming complacent as one's visions of the potential of change narrow to the confines of a legal system structured to preserve the status quo.[4] Spade identifies this phenomenon, stating that 'Most service provider jobs where lawyers help people navigate violent legal systems (like criminal defender jobs, welfare advocacy, unemployment benefits advocacy, immigration law) are not part of broader social movements, causing many lawyers to end up feeling like they are just cogs in the machine'.[5] When one's legal work is isolated from broader social movements, well-intentioned lawyers end up practicing 'regnant lawyering'.[6] This involves the voice of the lawyer dominating: responses to problems beyond the lawyer's sphere of knowledge are ignored in the process of the lawyer helping the 'subordinate' through legal means and within strict lawyer/client relations.[7] These relations are often disempowering and paternalistic.[8] Regnant lawyers position themselves as funnels through which the demands of a social movement are filtered, refitted and reproduced to conform to the requirements of a legal claim. Such lawyers are often privileged, progressive and hardworking, but cut off from grass-roots autonomous campaigns pushing for broad change for their communities. As a result, they 'undermine the very possibility for re-imagined social arrangements that lies at the heart of any serious attempt to take on the status quo'.[9] In doing so, the 'regnant lawyer' cuts him or herself off from broader social movements and replicates the dominant indifference of the legal system.

In order to avoid this fate, it is important to be aware of how advocacy of the legal system as a means (and perhaps a necessary means[10]) to achieve just outcomes contributes to the reinforcement of oppression. Kennedy argues that Blackstone's '*Commentaries*' legitimised existing social practices by creating legal categories that became assumed as the only means of adjudicating disputes.[11] Although

this refers to systems of law more broadly, it has direct implications for practitioners of law. Arkles, Gehi & Redfield sought to examine 'the ways in which lawyers may intentionally or unintentionally consolidate power in social movements and undermine the potential for systemic change and social justice'[12]. One way that social justice lawyers consolidate entrenched power is by legitimising slow, compromised, top-down avenues of reform: namely landmark High Court decisions and incremental law reform. Spade identifies the faith placed in such means of change as part of a historical forgetfulness that neglects aspects of mass movements that 'exceed the limits of the law'.[13] He focuses on the example of the collective liberal memory of the Civil Rights Movement which 'obscures the roles of mass mobilisation' and 'direct action' and focuses instead on 'charismatic individuals and law changes'.[14] It forgets that much of the Civil Rights Movement's achievements were not accomplished through legal channels but were instead part of a cumulative mass movement that involved direct action, riots, armed struggle and retaliatory violence against police.[15] By forgetting these methods of social change, a privileged law student has little cause to doubt that by working within a system which has so completely benefitted them, they may also be able to extend those benefits to others.

Thus they enter law school, and if they hold on to those visions, they move into the not-for-profit law sector. This sector, in the words of the editors of '*The Revolution Will Not be Funded*' has:

> ...tamed a generation of activists. They've traded in grand visions of social change for salaries and stationery; given up recruiting people to the cause in favour of writing grant proposals and wooing foundations; and ceded control of their movements to business executives in boardrooms.[16]

Such is the danger when privileged individuals hoping to enact change place their faith in help and recognition from those in power, instead of questioning why power should come from the top at all. By placing stock in the methods of change endorsed by the elite, lawyers commit to the legal system '…as a form of utopian idealism or gradualist reform, (with) each apparent gain deceptive or co-optive, and each loss inevitable'.[17] Historical examples of deceptive legal gains can be found broadly, from labour movements[18] to land rights movements[19] and racial justice movements.[20]

Another reason why aspiring lawyers who wish to work in social justice push such doubts out of their minds is the structural imperative to maintain one's own position of power. Once social change through legal means becomes an individual's job and his or her 'qualification', that individual's ability to be critical of its purposes and limitations diminishes. Lorde describes this as a fear by discussing the reluctance of privileged, white feminists to shirk liberal sources of power, as required by intersectional feminism: 'And this fact is only threatening to those women who still define the master's house as their only source of support'.[21] This quote clarifies why the replication of existing power structures is so easy: to question how legal systems inherently contribute to oppression is an easy way to put oneself (or think one's way) out of a job.

The legal system: inherently oppressive?

Due to the historical truth that the common law legal system was and continues to be imposed on this country by white colonialism, its very nature is oppressive. Nonetheless, its destructive functions and effects can be mitigated by social movements and the lawyers who support them. It is important to always remember the history of this legal system, and why 'decreased life chances ... are deeply rooted in and inextricably linked with the legal system as we know it.'[22] These are manifested in many ways. Examples include disproportionate disenfranchisement of Australia's indigenous population as a result of electoral laws pertaining to prison populations[23] and the legal requirement for transgender and intersex people to undergo gender reassignment surgery before their identity documents can be changed.[24] In both these situations, regulation of individuals has come from policies created by individuals outside those groups: partly due to the historical roots of the legal system, and partly because of the way that it continues to operate today.

For this reason, achieving social justice through the prism of existing legal mechanisms is often a paradoxical task that requires lawyers to enforce oppressive laws. Consider how 'many lawyers doing direct services come to feel like their work legitimizes the system, and also hate that their jobs involve enforcing the laws on their clients - telling people to take the plea bargain' and so on.[25] In order to function as a viable practice (either private or government funded not-for-profit), lawyers must only take on cases that have a reasonable prospect of success. This results in the exclusion of the most marginalised individuals who are the most severely affected by the violence of the law. Furthermore, much legal work that is taken on focuses primarily on piecemeal individual fixes and legal strategies that seek to extend existing rights to groups previously excluded from them. While this work is sometimes valuable, it is limited in that it does not address entrenched power inequalities. For even when reforms are made to the law, those reforms are still on the terms of those outside of the affected groups. This is because 'most legal work maintains systems of maldistribution, it does not transform them... there is plenty of evidence that changing law is not as central or as important (to changing lives) as we are made to think'.[26]

It is for this reason that Arkles, Gehi & Redfield operate as lawyers with the recognition that 'significant change for those on the bottom has never been granted by those on the top'[27]. This 'top' includes both the legal system itself and practitioners operating outside of directly affected groups. Instead, they seek to collaborate in a supportive role by following the lead of movements guided by those affected - as stated by Wexler, 'the lawyer who wants to serve poor people must put his skills to the task of helping poor people organise themselves'.[28] This is contrary to the way that many of us, including myself, are taught to conceive of social change. It affronts our egos to think that our skills have necessary and crucial limits; that in social justice work, those directly affected by oppression must lead their *own* movement.

Moving forward – alternative models of lawyering

This article does not wish to suggest there is no role for lawyers in social justice movements. Rather, I want to counter the myth that the law is a neutral system that when participated in with good intentions can produce substantial social justice outcomes. I want privileged law students to be vigilant in how they practice and think about law and social justice. I also want to show that if one embraces one's doubt, and remains vigilant and thoughtful, positive outcomes can be achieved.

Spade writes that 'once you let go of that idea (of law as central to social change), you can start to think about what role lawyers should or could have in social movements and evaluate whether you see yourself in those roles'.[29] These roles involve decentring legal practitioners and refocusing on broad, community based social movements. Villazor discusses the role of 'community lawyering',[30] Quigley 'empowerment lawyering'[31] and Arkles, Gehi & Redfield 'rebellious lawyering'.[32] These concepts aim to empower those affected by the violence of law by embedding lawyers in collaborative, supportive positions within broader social movements. The focus is less on lawyers advocating for others and more on enabling individuals to 'building up the community'.[33] Acting as a community lawyer requires a clear understanding of what community is. As Lorde argues, 'community does not mean a shedding of difference, nor the pathetic pretence that these differences do not exist'.[34] It requires one to embed one's life in the community he or she is working with, as well as a readiness to defer to the voices of those who directly experience the harm being combated.[35]

Community lawyering requires one to engage with the law in a way not encouraged by law school. It requires one to think of non-legal solutions first by '...recognizing the limitations of the legal system, and using our knowledge and expertise to help disenfranchised communities take leadership'[36]. It means 'working with (not just on behalf of)'.[37] If the legal system must be used, community lawyering can help to

share information and demystify the obscurity that both the law and lawyers rely on for both power and income. After all, the 'legal system is maintained by and predicated on arcane knowledge that lacks relevance in most contexts but takes on supreme significance in courts, politics, and regulatory agencies. It is a system intentionally obscure to the uninitiated'.[38] This intentional impenetrability of the law is no doubt familiar to all law students. However, it assumes a far more ominous quality if one's life is placed its violent hands. In being 'initiated' into this knowledge, the lawyer has an opportunity to 'expose the workings of the system to those who seek to destroy it, dismantle it, reconfigure it, and re-envision it'.[39] This can take the form of firstly establishing what rights and protections exist under the law, and secondly in determining how violence in the absence of protections can be ameliorated or stopped either within law or (more probably) outside of it.

It must be remembered that although redirecting legal knowledge is valuable, one must avoid advocating legal solutions as the only or most important means of change. Furthermore, lawyers must be aware that 'people targeted by violent legal systems usually know more about how they actually work'.[40] Such a point speaks to the need to realize the limitations of law, and demonstrates the way that legal education can obfuscate both decision-making and a recognition of how law works in practice. Maintaining awareness of the often superior knowledge of those affected by the law is both necessary and valuable in building a community that uses lawyers without centering them or their knowledge.

In terms of direct services, community lawyers can help communities survive the immediate violence of the law, and in doing so assist them to organise to change or overthrow the law. In terms of maintaining involvement in broader social movements, lawyers can use their skills as legal observers or on-call criminal defence attorneys.[41] While this still maintains the power of the police by engaging with them through their channels, such actions situate the lawyer in the broader social movement. This allows lawyers to utilise their knowledge of the law while contextualising those skills as a *means* by which broader change may be enacted, and not as an end in and of themselves. Quigley also identifies the value of lawyers in providing 'defensive litigation' to aid social movements.[42] Examples outlined by Arkles, Gehi and Refield include managing leases held by organisations and managing bail applications for members of organisations.[43]

In these ways, lawyers can utilise their skills without replicating systems of oppression. This requires vigilance, humility, listening skills and a healthy dose of doubt. It is a challenging task, but so it should be. After all, 'activism is tough; it is not for people interested in building a career'.[44]

Concluding thoughts

Writing this article has widened and affirmed my sense of doubt. There is an obvious irony in the fact that an essay extolling the virtues of foregrounding those voices who are most oppressed is written by someone who hasn't experienced that oppression. I can only say that I have pursued my doubt about social justice work within the legal system to this point. Through reading the words of those affected by these forces, and those who work with and as lawyers to combat them, I hope to have come some way towards understanding the type of lawyer I want to be. By quoting the words of other thinkers, I endeavour to convey how I've conceptualised what role a white, male, middle class, cisgender law student such as myself *should* play in using the law to achieve social justice goals. Obviously these goals are as yet untested, and I still have my doubts. But I hope that in writing this article I've encouraged myself, and perhaps some other law students with social justice career aspirations, to:

> ...reach down into that deep place of knowledge inside... and touch that terror and loathing of any difference that lives there. See whose face it wears. Then the personal as the political can begin to illuminate all our choices.[45]

And after seeing that face, I hope that I can become a lawyer who relies on more than uncritical good intentions.

Closing submission

Kate Farrell
LL.B. V

Poem

Frenzied vultures flew overhead
the sumptuous decision descended
over parched, sandy tongue, through shrunk spinifex lipskeletons
to breathless sea floor.

Watery hell-spared from beak and talon
and air, the defendant's form drifts twisted
in liquorice-black kelp less
than sovereign flood abiding.

Doubt dwells down here where subterranean creatures sprout, gripping upwards
and bodies are trussed in common law's fabulous gloom.
At surface, the herds of day disperse through thinly grassed plains
insoluble questions, still as silt, on silken water's edge.

Later lawful men sup in lawful homes
mourning their beast-fate, their return to drink
the water, worlded sleekly
below.

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NAVIGATING THE MEMORY LABYRINTH
Virat Nehru

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"THAT SECRET COURT TOOK MY KIDS AWAY"
Anonymous

1. 'Bitter Pills', *Sydney Morning Herald* (Sydney), 13 October 2012 <http://www.smh.com.au/lifestyle/bitter-pills-20121008-277yj.html>.
2. Young people leaving care are a highly disadvantaged group in society at greater risk of homelessness, unemployment and involvement in crime and prostitution. This is attributed not only to circumstances prior to removal, but also to the trauma and grief of being removed from their biological families and instances of physical, emotional and sexual abuse whilst in care: see Philip Mendes, 'Young people transitioning from state out-of-home-care: jumping hoops to access employment' (2009) 83 *Family Matters* 32, 32.
3. Rules of evidence do not apply unless the Court determines that those rules are to apply to particular proceedings or parts of proceedings: *Children and Young Persons (Care and Protection) Act* 1998 ss 104B, 93(3).
4. Name changed in accordance with *Children and Young Persons (Care and Protection) Act* 1998 s 105 (1), (4).
5. These acronyms are used interchangeably throughout this essay.
6. This manner in which children are removed is often traumatic: 'child protection officers may be accompanied by police officers, parents may be physically restrained [and] children may be forcibly removed': Tamara Walsh and Heather Douglas, 'Lawyers, Advocacy and Child Protection' (2011) 35 *Melbourne University Law Review* 622, 636.
7. *Children and Young Persons (Care and Protection) Act* 1998 ss 61, 69.
8. Ibid 9(2)(c).
9. Care orders are made in such instances on the grounds that 'the child's or young person's basic physical [or] psychological needs…are not being met, or are likely not to be met, by his or her parents or primary care givers': ibid s 71(1)(d). See, for example, *In the Matter of Elizabeth* [2005] CLN 256; *Re Samantha* [2007] CLN 782; *Re Elizabeth* [2007] NSWSC 729.
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17. (1976) 134 CLR 495.
18. *Russell v Russell* (1976) 134 CLR 495, [520].
19. Ibid.
20. *Wilson v Department of Human Services – Re Anna* [2010] NSWSC 1489 [4].
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23. Ibid [108].
24. Bitter Pills, above n 1.
25. *In the Matter of Elizabeth* [2005] CLN 256, [2], [16]; *Re Samantha* [2007] CLN 782, [1].
26. Caroline Overington, 'Child welfare inquiry turned into farce by official secrecy' *The Australian*, 28 August 2008 < http://www.theaustralian.com.au/news/child-welfare-inquiry-made-into-farce/story-e6frg6o6-1111117321592>.
27. Frank Ainsworth and Patricia Hansen, 'Confidentiality in Child Protection Cases: Who Benefits?' (2010) 35 (3) *Children Australia* 11, 14; James Wood, 'Report of the Special Commission of Inquiry into Child Protection Services in NSW' (November 2008), 6.
28. Heather Stewart, 'Secrecy Rules Surrounding Children May Be Concealing Injustice' *The Australian*, 25 April 2009 < http://www.theaustralian.com.au/news/secrecy-rules-may-conceal-injustice/story-e6frg6no-1225703254855>.
29. The parens patriae jurisdiction is an inherent jurisdiction of the Equity Division of the Supreme Court: *DoCS v Y* [1999] NSWSC 644, [85]-[86]. It enables the Court can make orders with respect to the protection and welfare of children, including orders for medical treatment when there are issues of consent: *DoCS v Y* [1999] NSWSC 644 [98]-[103]. Similar proceedings in relation to medical treatment also occur in the Family Court: see for example, *Department of Health and Community Services v J W B & S M B (Marion's case)* (1992) 175 CLR 218. The differences between these jurisdictions are nuanced and beyond the scope of this essay. However, Brereton J's comments regarding the parens patriae jurisdiction and Family Court are relevant because of the similar nature of issues dealt with in the Children's Court.
30. *Re Jules* [2008] NSWSC 1193, [24]-[25].
31. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 93 (3).
32. Legislation Review Unit, New South Wales Department of Community Services, *Review of the Children (Care and Protection) Act 1987*: *Recommendations for Law Reform* (1997), 62.
33. Ibid 59.
34. Wood, above n 27, 515.
35. Frank Ainsworth and Patricia Hansen, 'Confidentiality in Child Protection Cases: Who Benefits?' (2010) 35 (3) *Children Australia* 11, 13.
36. Ibid, quoting L Hoyano and C Keenan, *Child abuse: Law and policy across boundaries* (Oxford University Press, 2007), 727.
37. Wood, above n 27, 498. This is in spite of a specific legislative direction that proceedings not be conducted in an adversarial manner: see *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 93(1).
38. Ibid 517.
39. [2005] NSWSC 75.
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44. See Law Society of New South Wales, *Revised Professional Conduct and Practice Rules 1995 ('Solicitors' Rules')* (11 December 1995) r A.21-A.31.
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48. Ibid [51], [54].
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51. Queensland Child Protection Commission of Inquiry, *Discussion Paper* (February 2013), 252; Phillip Cummins, Dorothy Scott and Bill Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry: Volume 2* (January 2012), 384; Wood, above n 27, 489.
52. See *Family Law Act 1975* (Cth) s 69ZN.
53. Walsh and Douglas, above n 5, 623.
54. *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 91 (1), (2).
55. *Wilson v Department of Human Services – Re Anna* [2010] NSWSC 1489, [99].
56. Bitter Pills, above n 1.
57. The Children's Court may make interim orders prior to final hearing if it considers the order 'necessary in the interests of the child': *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 62, 69, 70A.
58. *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 91 (1).See, for example, *Department of Human Services – Re Anna* [2010] NSWSC 1489, [14], [18] and *Re Georgia and Luke (No 2)* [2008] NSWSC 1387, [6].
59. *Re Victoria* [2002] NSWSC 647; *Re Elizabeth* [2007] NSWSC 729, [12].
60. See, for example, *Wilson v Department of Human Services – Re Anna* [2010] NSWSC 1489, [8]-[16]. In this case, an interim order was made on the grounds that the mother acknowledged she could not look after her child, although all her solicitor had only conceded was that she was having 'some difficulty'. The order was made by consent and on a no-admissions basis. At final hearing, the mother was not allowed to make submissions on this point and the magistrate proceeded to make orders for the child's adoption.
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62. Bitter Pills, above n 1.
63. Walsh and Douglas, above n 5, 644.
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67. Walsh and Douglas, above n 5, 649-650.
68. *Case of P., C. and S. v The United Kingdom* (European Court of Human Rights, Chamber), Application No 56547/00, 16 July 2002, applying the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), arts 6, 8.
69. Ibid.
70. Jane's experiences are echoed in a comment by a lawyer working in child protection: I've seen two DoCS affidavits last year one of which said…that they went to remove the baby, the mother became angry and emotional and…swore at the departmental workers and threatened them. Then…in another affidavit that arrived across our desk, probably within weeks of that one, the Department was saying the woman showed no particular distress about having the baby removed and so therefore there's no attachment
71. Walsh and Douglas, above n 5, 636.Given this approach to dealing with parents in cases involving consent to medical treatment, it is little wonder that a magistrate wrote in another case: 'So deep is the division between [the parents]…that they could not reasonably be expected to co-operate…': *Re Samantha* [2007] CLN 782, [37].
72. [2008] NSWSC 1387.
73. *Re Georgia and Luke (No 2)* [2008] NSWSC 1387, [23].
74. Ibid [24].
75. Ibid [71].
76. Wood, above n 27, 414.
77. Ibid 498. For this reason, the Inquiry called for the development of guidelines for FACS based on the Code of Conduct for the Office of the Department of Public Prosecutions: ibid, 541.
78. Ellis, above n 46, 2. Given the manner with which FACS conducts proceedings, it is of concern that FACS has successfully applied to the Supreme Court in its parens patriae jurisdiction for the indefinite preventative detention of children in their care in secure residential facilities where they have exhibited violent and anti-social behaviour: see, for example, *Director-General, Department of Community Services; Re Thomas* (2009) 41 Fam LR 220, *Re Helen* [2010] NSWSC 1560, *Re Tracey* (2011) 80 NSWLR 261, *Director General, Department of Family and Community Services; Re Vernon* [2011] NSWSC 1222.
79. Legislation Review Unit, NSW DoCS, above n 33, 412-417.
80. Ibid 517.
81. FACS' powers rival those of the police, with powers to forcibly remove and detain children without court order and enter certain premises without a warrant, require the production of documents and require answers to questions: see *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 43, 158, 235-6, 241.
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THE PRIVATISATION OF THE HUMAN GENOME

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