DISSENT

TIME

The Social Justice Journal

Of the Sydney University Law Society

August 2015

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Acknowledgement of Country

We acknowledge the Cadigal people of the Eora Nation, upon whose stolen land the University of Sydney stands. As law students, we acknowledge that the colonisation of this land was legitimated in law by a white supremacist legal system that continues to condone the theft. We acknowledge that the law continues to be deployed as a technology of colonial power, and that the legal regime of this country continues to enact a dispossessing violence that represents a daily threat to the lives and liberties of First Nations peoples.

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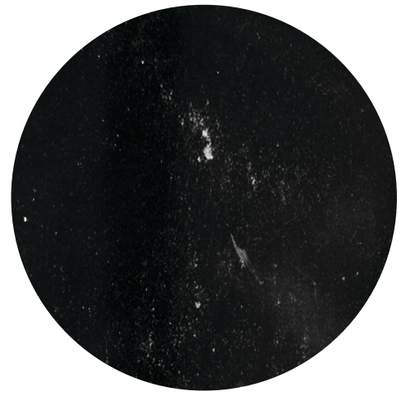

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Editor's Foreword

James Clifford

Time does not only pass in seconds and minutes and hours and years. It jumps forward with events and milestones. Or stays dormant, frozen and unchanging. Like everything else, the law is also at the behest of time. This can been seen by the varying impacts time has had on the law, as evident in the eleven articles collected in this journal.

The articles have been arranged in order to give the reader a sense of various ways time impacts on the law and our different responses to it.

The journal opens with a personal piece by Anonymous in order to ground our reading in the complex, lived experience of the law and its ambivalent relationship with our lives.

The next four articles explore ways time taken can be used as a form of punishment, whether via detainment by private security guards or riot police, or time taken by prisons.

Alison Whitaker's article then analyses the dangers of relying on binary assumptions of permanence and temporality to answer complex questions of capacity, illness and disability.

The following three pieces consider the way time can be used as encouragement or an excuse to forget, and the ways this deliberate forgetfulness can be resisted by individuals, groups and states. This includes the struggle between the Abuelas de Plaza de Mayo and the Argentinean government, the ongoing denial of Armenian genocide and the legacy of nuclear testing in the Marshall Islands.

Bookending the journal are discussions by Oscar Monaghan and Ellen O'Brien of the values lawyers shouldn't buy into, and those they should. This includes the insidiousness of narratives of progress and their manifestations in Queer politics, and the importance of love in our roles as lawyers and our lives.

This is also my opportunity to thank all the people who contributed to the creation of the 2015 edition of Dissent. I thank all of the writers for taking the time out of busy lives to record their thoughts and ideas. I thank Arlie Loughnan for her generous foreword to the journal. I'm very grateful to the Dissent editorial board for their work and assistance. I would also like to thank Remona Zheng and Nina Ubaldi for answering my repeated questions. My thanks also go to Oscar Monaghan, as a writer for the journal and as a co-organiser and advisor in his role as the SULS First Nations Officer. Finally, many, many thanks go to Patricia Arcilla and Nick Gowland for pulling the whole publication together and bringing it out of Word documents and into the world ●

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Academic's Foreword

Arlie Loughnan

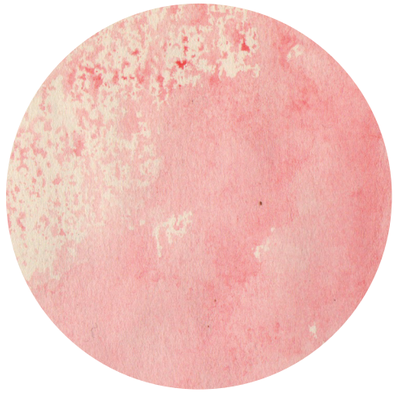
It is my pleasure to write the academic Foreword to this edition of *Dissent*, SULS's social justice journal.

The theme of this issue is *time*. As the articles collected together here suggest, this is a particularly important issue for lawyers interested in social justice to consider seriously. The passage of time might serve social justice ends (by providing scope to address historical wrongs and harms) (Sally Andrews) or deny them (via the ongoing nature of trauma, or the persistent failure to investigate and adjudicate past crimes thoroughly) (Anonymous; Sarah Ienna; Varsha Srinivasan). We forget lessons from the past at our own peril (Justin Pen; Richard Schonell; Christina White), but must be ever wary of the seductive quality of narratives of progress (Oscar Monahan). At the same time, the way in which time is experienced in prison (perhaps in infinitesimally small moments of depravation) (Harry Stitt) or the association between disability and timelessness or permanence in social discourses of difference (Alison Whittaker) demands that we think critically about any universalising or totalising accounts of time, law and its subjects. In all of this, we must remain mindful of the various effects on time on legal practitioners who pursue social justice goals in their professional lives (Ellen O'Brien).

Recognising that the relationship between time and justice is more complex and multi-faceted than straightforward and linear invites reflection on the notions of time structurally embedded in our discipline. While law is a thoroughly time-bound construct, it is perhaps easy to overlook the significance of this. A cardinal feature of the common law is its incremental development over time. Famous, or infamous, for pragmatism rather than logic, the common law seems to wear its 'timefullness' on its sleeve, as, at least since the rise of the Whig political movement in the late modern period in England, this feature of the common law has received strong, positive political loading. But the flip side of this inexorable development is seismic nature of revisions and changes, when they occur. In the Australian legal context, a good illustration of this aspect of time and the common law is the *Mabo* decisions, in which a settled doctrine that had formed the basis of our legal system rested – *terra nullius* – was exposed as false and rejected, ushering in a profound and ongoing re-examination of law in Australia.

As the Editor-in-Chief, James Clifford, writes in the Editor's Foreword to this edition of *Dissent*, time does not proceed evenly but appears to change speed, and jump forward at certain points. As I write this Introduction, I am reminded of my own experience of editing a student journal, *Past Imperfect*, a history students' journal, while I was an undergraduate student at the University of Sydney. While this was a long time ago now, subjectively, it feels much more recent, giving me a sense that time has indeed jumped forward (James Clifford). I remember fondly the process of working with colleagues, marshalling submissions, and deciding on layout. I remain proud of that edition of *Past Imperfect*, although I have now published various other pieces of scholarly work, and now co-edit the *Sydney Law Review*. I hope the editor and the authors of the articles in this edition of *Dissent* will be just as proud of the product of their creative and intellectual endeavours.

Congratulations to James Clifford, the Editorial team and all involved this edition of *Dissent*. It makes for provocative and important reading on social justice ●



01
Journal
Anonymous

Content Note: Memories and reflections on child sex abuse

I won't write with words of the law. I haven't learnt that language. I won't take the stance of the law, that 'objective' posture. I speak as a subject of the law who is considering being subjected to the law. It's funny that this is for a journal – but not a journal in the sense of a personal record of someone's thoughts and experiences - a journal in an academic sense. The product of the latter is not the same at all, yet, not altogether different from the former. In an academic journal, one might take thoughts and experiences (neither necessarily their own) and couch them in a language that affords weight and legitimacy. The product being heavy, layered, referential stories all told in a particular way as if echoes in a chamber or reflections in a mirrored hall. Nonetheless, they remain thoughts and experiences even when codified, principled or with precedent. In the language of the law, the personal is negotiated as a formal dialectic. The content of the personal is parsed out in the law, named and ordered into 'civil' or 'criminal' taxonomies. These abstractions and re-distributions neutralise the force of the personal in the law, they serve to equalise and promote distance. These are surely noble goals. But they leave us in a curious position, wherein, the root, impetus and purpose of law is necessarily the personal despite that, in practice, this is what we're sure the law must not be.

All this as means of saying, what I offer up here might be better placed in a different kind of journal. It does address time, the law and social justice but does so by telling a personal story of my own thoughts and experiences without aiming to employ a strictly 'academic' mode. I am sharing my experiences of sexual abuse; the still-unfolding story of how I have attempted over time to understand and resolve the trauma of persistent childhood sexual abuse through, adjacent to or in opposition with the law in NSW.

It's clear to me that the law is imbued with its own temporality. It's not clear to me that this temporality is synchronous with 'reasonable' expectations of how and when a person might engage with the law. This misalignment is exemplified in the domain of child sexual abuse, wherein, reporting often happens after a substantial delay. That is, if it happens at all. Time is not incidental to these kinds of cases. The passing of time is laden with meaning; it can be a measure of healing or failure in equal measures. In the complex chronology of grieving something that happened in the past, time confers certain legal standing but it might also bring disclosure, doubt, a decision to engage with the law. I know it has brought me all of these things. What I don't know yet is what that's going to look like.

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It would happen in the afternoon. I would go to the house of a family friend to be babysat after school one day every week. Their son, seventeen or eighteen when it started, would tell me we were playing a game and wrest me into a sleeping bag. My brother and his would be playing Nintendo as he bunched up the end of the bag and hauled it (and me) over his shoulder, like a Santa sack, I thought. I started at school not that long before; there was a lot that was new. He took me into his room, lay me down on the bed and as I went to sit up, he held a pillow over my face. I could only feel, not see, what happened after that but it has never left my mind. The game ended with me back in the bag, hauled over his shoulder and marched around the house amidst 'playful' taunts of being taken to the bush and thrown off the cliff. Then he dumped me out on the couch by the TV with the others. I didn't say anything. This happened many more times over the next few years.

-

I found out recently that this person now has a child. A daughter not far off the age I was when it started. I told a friend about my experience of sexual abuse about six years ago. This was the first time I said the words aloud. It happened, somewhat ironically, as a response to being sexually assaulted. In these same six years since, he fathered a daughter, raised her and sent her off to start school. It no longer feels like it is just my time to take.

It's eighteen years since it started. I have been sitting across from the law, an ambiguous enemy, with my eyes down all this time. I am afraid to know it; to look up at it, see it, be seen and to ask for something from it. The currency of sexual abuse is silence; a habit strengthened with time. The irony is that the law is actually more generous to offenders the longer the silence is preserved. The law trades in economies of silence with statutes of limitation on child sexual abuse reporting and sentencing structures that weaken in circumstances of delay. Time no longer feels like my own. The duration of my silence has become a measure of my complicity but my silence has always felt like survival. I don't know if I can speak to the law. I am afraid of what I will hear back. I'm most afraid that there will just be silence ●

02

Social Justice Lawyering and Narratives of Progress

Oscar Monaghan

Introduction

Narrative is central to the practice of law - indeed, some scholars have suggested that law *is* narrative.[1] In this article I am less concerned with the latter question, and more concerned with the narratives we have *about* law and what implications they have for lawyers committed to social justice. Specifically, I am interested in exploring the narratives at play in our social justice lawyering work: what narratives do we have about social justice; how do these narratives position the idea of progress; how is the task of law viewed within this narrative; and what narrative(s) do we have about what the law has progressed away from and what it is moving towards.

In the immediately following section I provide a basic taxonomy of progress narratives, dividing them between broad and specific narratives. Within the latter category, I use Queer politics to unpack the way the broad narrative manifests in specific contexts. In the following section, I go on to discuss the effect of these narratives, highlighting the role of narrative in the production of contemporary politics.

1. Narratives of progress

Charles Baudelaire described the idea of progress as, "grotesque" and a "gigantic absurdity", built on "the rotten ground of the modern self-conceit".[2] Writing in 1855, Baudelaire had no way of knowing how great and powerful a impact the idea of progress would have on Western society. As in all other areas of social life, in the context of law and politics it is a concept that has had deep impact. For instance, the discourse of progress has been deployed in the context of international law to construct the history of its endeavour as one of inevitable progress;[3] some scholars argue that within the discipline of international law, progress has become "a language of authority" – arguments are legitimate or illegitimate depending on their progressive content.[4] If the idea of progress can have so much weight, it is essential that we consider its implications for our work.

Progress beckons us to consider our place in time vis-à-vis some other place in time. Closely linked with the theological notion of salvation,[5] progress concerns the "amelioration or improvement"[6] of a certain thing across time: has the situation of *X* improved, has the suffering of *X* been ameliorated. These are questions that the narrative of progress not only answers in the affirmative, but also *insists* upon into an endless and better future – the situation of *X* is always going to improve, the suffering of *X* will always be ameliorated.

1 Jane B. Baron and Julia Epstein, 'Is Law Narrative?' (1997) 45 *Buffalo Law Review,* 141-187.

2 Charles Baudelaire, *Oeuvres completes vol 2* (Mechel Lévy Frères trans) (1868), 219-20.

3 Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press, 2009). See also: Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2002); David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65 *Nordic Journal of International Law* 385.

4 Skouteris, *The Notion of Progress*, 5.

5 Nathan Rotenstreich, 'The Idea of Historical Progress and Its Assumptions' (1971) 10 *History and Theory* 197.

6 George Rodrigo Bandeira Galindo, 'Review Essay: Progressing in International Law' *Melbourne Journal of International Law* (2010) 11.

For the sake of elucidation, the narratives we have about law and social justice can be divided into two categories: broad and specific. The broad narrative positions us within "the universal march of time - forward and better;"[7] it holds that an endless progression is possible, if not inevitable. This narrative underpins, for instance, expansionist capitalist ideologies that fail to grapple with the finite nature of certain resources and the laws that enable the capitalist practices destined to deplete those resources.

To spell out the narrative structure of this belief, we can easily locate a beginning, middle and end as well as central characters and moments of transition. To begin, we lived in a world that was inequitable and discriminatory: it was racist, sexist, classist, homophobic, and ableist. Laws were similarly discriminatory; slavery was permissible, homosexuality was criminalised, women were property, and there were few protections in place to protect workers from extreme exploitation. Then, at various pivotal moments in recent history, laws and attitudes changed, becoming more *progressive*, less restrictive. Some discriminatory institutions were abolished, some rights were granted, and some protections were put in place. Iconic social movements allow us to pinpoint moments of transition, with recognisable political actors serving as relatable characters.

We know that we do not live at the end of this story, because we can look around and see injustice. However, the end seems to be the logical conclusion from what we understand of our history: things were bad, they got better, and they continue to improve. If they continue to improve, as they always seem to have, a society without racism, sexism, homophobia, classism, ablesim and other structures of domination like colonialism and militarism seems to loom. Within this narrative, we are always part of an incomplete story; the fulfilment of desires resting just on the horizon.[8]

The broad narrative manifests in particular contexts, to produce narratives specific to those contexts. The relationship between this broad narrative of social progress and its specific iterations in specific contexts is co-constitutive. The broad narrative stitches together the social justice histories and victories in different domains (gender, race and so on) to produce a meta narrative. Each domain, in turn, brings this meta narrative to bear on its understanding of its own history.

Within the specific narrative context of contemporary Queer politics, the narrative takes more or less the same overarching structure, although there are obvious moments of divergence. Queer people were disadvantaged due to social stigma and discriminatory laws, but most discriminatory laws have been abolished and any residual social stigma impacting Queer lives is expected to (often quite literally) die out. The work that is left to do involves sorting out a last few inequalities – like marriage and adoption.

2. The effect of a narrative of progress

The narratives described above are not apolitical. When progress is viewed as an inevitability, it is easy to subscribe to the view that incremental concessions from a discriminating state are monumental victories rather than a strategic recalibration on the state's part. It also allows us to view losses as set-backs, rather than defeats worthy of protest. Feeling victorious, and not feeling conquered are no doubt good things; the danger of the progress narrative, however, is that we may lose the ability to scrutinise the importance of a given state of affairs. When progress is inevitable, what are the stakes? You never truly lose if you are on the right side of history. This perspective-altering impact extends beyond the retrospective – it alters both the goals being set, as well as the strategies deployed to reach them. In this section I use contemporary Queer politics to demonstrate the way progress narratives impact the kinds of strategies that get deployed in specific contexts.[9]

Over the course of a few decades, Western Queer politics transformed from a radical, transformative project that called into question the state's role in regulating, policing and producing gendered and sexual norms, whilst claiming "queer public space",[10] into a conservative, assimilationist movement focused on "inclusion in and recognition by" dominant state institutions,[11] like marriage. The centrality of the marriage equality debate is a much-critiqued component of contemporary Queer politics,[12] and this centring of marriage, or the centring of marriage-like goals (those that seek inclusion and recognition, rather than questioning the state's role in producing inequalities) can be explained in many ways – the roles assumed by white, middle class people within the movement and the power and resources they possess by virtue of being white and middle class;[13] the institutionalisation of the movement in the 1980s within a non-profit organisational structure that requires state funding and/or funding from business, or wealthy patrons;[14] or the influence of the equal opportunity

7 Dean Spade and Craig Willsee, 'Sex, Gender, and War in an Age of Multicultural Imperialism' (2014) *QED: A Journal in GLBTQ Worldmaking*, 1, 9.

8 This is the narrative of social progress; there are of course other narratives of progress – perhaps most obviously the narrative of prosperity and economic progress.

9 Within Queer politics, there are always a multiplicity of logics and narratives at play working in concert and conflict. My goal in this section is not to give an account of the exact relationship of all the constituent parts of each domain – rather, my aim here is only to offer a brief and, hopefully, illustrative account of the role of progress narratives in each domain.

10 Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law,* (South End Press, 2011), 60.

11 Ibid.

12 See e.g.: Ryan Conrad (eds), *Against Equality: Queer Revolution, Not Mere Inclusion* (AK Press, 2014).

13 Spade, above n 10.

14 Ibid.

model and its emphasis on formal equality.[15] No doubt it is a confluence of all of these.

Into the mix, I'd like to throw another – the influence of the narrative of progress. A narrative of progress model of social change is content with incremental improvement, because it is read with a lens that places it in on a trajectory of continued improvement and amelioration. The suite of reforms introduced in Australia in 2008 may have secured rights for monogamous queer people, but they did nothing to reduce queer homelessness, ensure transgender people have access to life-saving resources, or prevent violence against queer and trans people. Emphasising progress allows the state to improve the situation of *some* queer lives, ameliorating *some* discrimination, without ever needing to relinquish its own power over the regulation of relationships, and the production of gendered and sexual norms.

Similarly, a politics predicated on progress aims for the low hanging fruit, the easy wins. If we achieve rights and equality for the queer people who can look and behave like everyone else, rights and equality will somehow flow to those that don't – so the narrative goes. This is a model that does nothing to dismantle oppressive systems, and in fact, often does the opposite by legitimating the state's role in regulating our lives. Incremental victories that focus on inclusion are unhelpful in bringing about a Queer world where legitimate gender and sexual formations are not confined to a mostly arbitrary and narrow set of practices and relationship-types. A Queer politics that hopes for more than mere inclusion within an inherently violent and discriminating state must resist the appeal of the narrative of progress, and ask fundamental questions that focus on the most immediate needs in our communities – like housing and access to medical treatment for trans people – rather than the victories that seem the most attainable – like marriage. The attainable victories are more attainable only because they do not threaten the foundations of the existing social and political order.

Conclusion

Ideas of progress are central to the agenda-setting practices of contemporary queer movements; because Queer politics is viewed as being on 'the right side of history', the safety and prosperity of Queer people is taken as an inevitability. As a result, within Queer politics, the dominant narratives of social change tells us something that is fundamentally counter to what we witness in our actual lives. We see rights being granted to the most privileged among us, but rather than the promised flow-on effect, the living situations of most queer people do no change. Queer and trans youth continue to suffer disproportionate homelessness, Queer and trans people, especially trans women of colour, are targeted for violence, and access to life-saving medical treatment is still withheld. We are told that our losses are part of a broader political narrative, and that history is on our side – and yet the wins we see being made seem to progress only the most normative amongst us. We are told that social change is achieved through incremental progress and conservative agenda setting only because conservative, assimilationist changes are the easiest to attain ●

15 Ibid.

03

An Ethical Argument: The Architecture and Institution of the Prison

Harry Stitt

'We do not live in a homogenous and empty space, but on the contrary in a space thoroughly imbued with quantities…[1]*'*

— Michel Foucault

'Inmates do not tend to destroy television sets purchased with inmate welfare funds or paintings made by fellow prisoners.[2]*'*

— Robert Sommer

'Changes in regime and ideology are more powerful than the most radical architecture – a conclusion both alarming and reassuring for the architect.[3]*'*

— Rem Koolhaas

An understanding of space – that abstract continuum in which people move, objects exist, and events take place – that posits a neutral, autonomous medium unshaped by social heterogeneity, is flawed. What happens to an object, as a 'thing amongst other things,'[1] can never be explained solely by the intrinsic properties of the object in question.[2]

Space is a constituted reality. It involves a discourse; a congestion and contestation that seeks to qualitatively embed it with *meaning*. The physical aspects of a space (its shape, material, and form) are overlaid with an abstract fabric specific to the social groupings that use it. Socio-cultural and political arguments inform the physical medium.[3] To take Jones' argument, space, and by association, architecture are 'forms of materially conditioned cultural production that operate within an internally differentiated social field.'[4]

Something Quite 'Other'

Certain sites within this spatial continuum have the curious property of being in relation to all others, in such a way as to 'suspect, neutralise, or invent the set of relations that they happen to designate.'[5] These sites operate within a discursive medium, representing, contesting, and inverting the social and cultural relations that inevitably define them.[6] The prison is one such site: a space of heavy social contest and political control. Its function is defined by variables beyond those initially associated with an enclosure for transgressors of social morality (as codified in state legislation). Indeed, as Rusche and Kirchheimer understand, it is 'necessary to strip from the social institution of punishment its ideological veils and juristic appearance and to describe it in its real relationships.'[7] Accordingly, the function of the prison is a

1 James Donald and Ali Rattansi (eds), *Race, Culture, & Difference* (SAGE Publications, 1992), 220.

2 Loic Wacquant, quoted in Paul Jones, *The Sociology of Architecture: Constructing Identities*, (Liverpool University Press, 2011).

3 Maurice Broady, 'Social Theory in Architectural Design', in Robert Gutman (ed.), *People and Buildings*, (Basic Books, 1972) 170, 185.

4 Paul Jones, *The Sociology of Architecture: Constructing Identities* (Liverpool University Press, 2011).

5 Michel Foucault, 'Of Other Spaces: Utopias and Heterotopias' in *Architecture/Movement/Continuity* (1984) 2.

6 Ibid 3,4. Heterotopias are 'something like counter-sites, a kind of effectively enacted utopia in which the real sites, all other real sites that can be found within the culture, are simultaneously represented, contested, and inverted.'

7 Georg Rusche and Otto Kirchheimer *Punishment and Social Structure* (Institute of Social Research, 1968).

point of concern.[8]

It must certainly, in some way, *deal* with criminals. Social systems are generally understood as homogenous groupings of people with a general aspiration towards cohesion and stability.[9] Mechanisms capable of enforcing such a system must incorporate some manner of dealing with those who fail to conform to its bounds. The response provided by such mechanisms is varied and dependent on the cultural logic of the relevant grouping: retribution, incapacitation, deterrence, or rehabilitation compose most response models.[10] These desires can often be contradictory;[11] the prison exists to enact whatever treatment is considered just.

Beyond a surface function of treating criminals, the prison plays a role in relation to greater society. In confining problematic portions of the population, it acts in social defence and as a symbol of action; quelling public anxiety by demonstrating that *something* is being done about crime.[12]

The prison also acts to legitimise government action with respect to institutionalised systems of control. Foucault understands that the 'government not only has to deal with a territory and with its subjects, but also with a complex and independent reality that has its own laws and mechanisms of reaction, its regulations, as well as its possibilities of disturbance.'[13] The governmental means to control such disturbances must be justified according to the beliefs of the public.[14] Government institutions provide a means to alter public opinion. Policy decisions are taken as a codification of pre-existing social values, and generally force a shift in public opinion.[15] Policy direction associated with prisons influences the social discourse on crime and delinquency, and often colours public opinion in favour of the government's position.

Perverse Instruments of Use[16]

In the late-modern period, the prison and its associated branches of government have been increasingly used in such a manner at the expense of criminal welfare. Bolstered by local media, conservative governments – specifically in America, England, and Australia – have with increasing frequency used 'the criminal problem' as a political platform. Expanded government legislation and enforcement programs[17] combined with a cultural vision of crime shaped by media representation, has resulted in a perceived increase in criminal activity.[18] Subsequently, the public has become emotionally invested in criminal control and are accordingly more supportive of tougher legislation.[19] Fears surrounding criminal activity become an important currency of political power on which strong states capitalise, tending 'away from [their] consensual towards [their] coercive pole, away from [their] social welfare and integrative functions towards an intensification of [their] controlling, disciplinary, and criminalising functions.'[20] The public is recruited to political agendas that pair popular anxiety surrounding crime to social moral codes. Such agendas offer punitive and incapacitating programs to 'treat' and 'deter' criminal activity, classifying the criminal problem as an individual or group pathology (an 'Other') that seeks to maliciously undermine the social majority (the 'Us'), in turn concealing the basis of its force.

A naturalised conception of 'the criminal' is apparent in this form of sequestered moral debate. Criminals are portrayed as morally deviant people who willfully seek to disrupt social stability. As Drake notes, there remains a fundamental belief that 'those who commit crime are different from those who do not.'[21] This model divests the social majority of blame and responsibility. The reality is that 'criminal nature' as an individual or group pathology is a social construction.

8 Thomas Mathiesen, *Prison on Trial* (Waterside Press, 2006). Some functions of the prison do not have penological purpose and do not accord with the social expected purpose of the prison.

9 Megan Moore and Meghan Brenna Morris, 'Political Science Theories of Crime and Delinquency' (2011) 21(3) *Journal of Human Behaviour in the Social Environment*, 284.

10 Terance Miethe and Hong Lu, 'Punishment Philosophies and Types of Sanctions' in Terance Miethe and Hong Lu (eds.) *Punishment: A Comparative Historical Analysis* (Cambridge University Press, 2004) 15-49.

11 A social system that simultaneously seeks social vengeance and reduced recidivism rates will have difficulty formulating an adequate response. Punitive measures (which allow retribution) are a great stimulus for further offence, but rehabilitative measures in no way ensure the criminal 'gets what they deserve.'

12 Discussion regarding the 'action function' of the prison to be found in Deborah Drake, *Prisons, Punishment, and the Pursuit of Security* (Palgrave MacMillan, 2012).

13 Michel Foucault, 'Space, Knowledge, and Power' (transcript of interview conducted with Paul Rainbow) in Neil Leach (eds.) *Rethinking Architecture* (Routledge, 1997) 367-381.

14 David Beetham, *The Legitimation of Power* (Macmillan, 1991).

15 James Stoutenborough, Donald Haider-Markel, and Mahalley Allen 'Reassessing the Impact of Supreme Court Decisions of Public Opinion' (2006) 59 *Political Research Quarterly* 419-433. Stoutenborough et al. contend government institutions (in their case the judicial system) affect public opinion as decisions of relevant institutions are seen as codifying pre-existing social values. The public opinion shifts towards policy position.

16 Term originally used by Bernard Tschumi, 'Violence of Architecture' in Bernard Tschumi (ed), *Architecture and Disjunction*, (MIT Press, 1994) 121-141.

17 Examples include the 'War on Crime', the 'War on Drugs', the 'War on Terror', and the 'Safe Streets Program.' Elizabeth Hinton, 'Why We Should Reconsider the War on Crime', *The Time* (online) 20th March 2015 <http://time.com/3746059/war-on-crime-history/>.

18 Cultural visions of crime are a product of media attention and the cultural and political economies. Gregg Barak, 'Media, Society, and Criminology' in Gregg Barak (ed.) *Media, Process, and the Social Construction of Crime* (Garland Publishing, 1994), 3-49.

19 David Garland, *The Culture of Control* (Oxford, 2001).

20 Robert van Krieken, 'Crime and Social Theory' in Thalia Anthony and Chris Cunneen (eds.) *The Critical Criminology Companion* (Hawkins Press, 2008).

21 Deborah Drake, *Prisons, Punishment, and the Pursuit of Security* (Palgrave MacMillan, 2012).

Crime tends to be associated with maladjustment to socially prescribed principles[22] when the approved norms that regulate resource distribution produce systemic inequality. As evidenced in the work of Zembroski, social systems 'hold the same goals for all people without giving the same people the equal means to achieve them.'[23] Criminals are those who respond to such systems by seizing socially illegitimate opportunities to achieve a degree of wealth and social status. Generally, criminals possess insufficient power to force any revision of the socio-economic mechanisms responsible for resource distribution, and are thus largely unable to abide by cultural norms with respect to wealth and lifestyle.[24]

Naturalising crime allows strong political agendas to gain power. Conservative elements whose support is implicated by the public's concern with crime hardly seek to eradicate it. Indeed, as Nietzsche wrote, 'every part sees that its interest in self-preservation is best served if its opposite number does not lose its powers.'[25] Within this socio-political matrix, the prison acts to punish, incapacitate, and stigmatise criminals. Social vengeance is practiced through punitive prison conditions, such that criminals 'get what they deserve,'[26] whilst longer sentences (implicitly exclusionary policies) reduce the capacity of criminals to reoffend. No concern is given to reducing recidivism despite the continued reference to late-modern prisons as 'rehabilitation' or 'correctional' centers: a case study in governmental doublethink.[27]

Such prisons are, understandably, 'cold, ugly, and impersonal buildings.'[28] Prisons that seek to punish are uncomfortable and physically restrictive. This is especially notable in medium to maximum-security facilities. A complex set of enclosures starting from the perimeter fence proceeds through internal subdivisions to the enclosure of the cell,[29] typically non-facing concrete volumes with minimum amenity. The cells circumscribe shared interactive spaces, policed in majority through passive surveillance systems.[30] These uniform cell units are embedded deep within the prison structure. The social aspects of such prisons offer no relief to the monotony of the architecture. Guards are inadequately trained, especially in people management, serving only as a 'turn key,' and contact with other prisoners is restricted, apart from in shared dormitories where privacy is not possible. Little recreational, vocational, or educational activity takes place. Instead, prisoners are 'maintained in an artificial setting the dynamics of which are very different from real life'.[31] Such conditions serve no penological purpose, and do not aid in reducing recidivism (which might be seen as the prison's defining statistic).[32] Indeed, several groups of prisoners have brought proceedings against American state prisons on the grounds of having experienced 'cruel and unusual punishment' whilst imprisoned.[33]

Prisoners subjected to the foregoing conditions tend only to suffer and misadjust. When confined in restrictive environments with minimal rehabilitative activity, prisoners typically respond through maladaptive behaviour.[34] Punishment, especially that which involves force, is a powerful stimulus for violence. The treatment of prisoners informs their understanding of the system of authority and the power relations that require legitimation for social accordance.[35] The fundamental inequality present in the majority of prisons in America, England, and Australia does not aid social integration or adjustment; the prison system fails those confined within it. Prisoners deviate further from social norms, acting out the scripts written for them.

The action of the prison as a 'classifying device'[36] serves as a Foucaultian 'program of rationality,'[37] a 'system of regulation of the general conduct of individuals whereby everything is controlled to the point of self-sustenance.'[38] It might be likened to the *habitus* of Bourdieu, which posits

22 Social prescriptions are codified as state-made and -imposed laws. Crime is a violation of such laws.

23 David Zembroski, 'Sociological Theories of Crime and Delinquency' (2011) 21(3) *Journal of Human Behaviour in the Social Environment* 209, 240-254.

24 'Because cultural norms always exist and are dependent upon sanctions for their adherence, certain people and therefore groups must have more power than others to enforce such norms. The basic unit of society involves dominance-subjugation relationships.' Ralf Dahrendorf in Zembroski, above n 26, 240-254.

25 Friedrich Nietzsche, 'Morality as Anti-Nature' in *Twilight of the Idols* (Oxford University Press, 2008) (Trans. Duncan Large).

26 Miethe and Lu, above n 13.

27 Term first used by George Orwell in *1984* (Secker and Warburg, 1949).

28 Robert Sommer *Tight Spaces: Hard Architecture and How to Humanise It* (Prentice-Hall, 1974).

29 Kim Dovey, *Framing Places: Mediating Power in Built Form* (Routledge, 1999).

30 This description refers to the layout of 'third generation' prisons, which are currently the most widely used prisons in America. Elizabeth Grant and Yvonne Jewkes, 'Finally Fit For Purpose' (2015) 95 *The Prison Journal* 223.

31 Giuseppe di Gennaro and Sergio Lenci, 'Architecture and Prisons' in Giuseppe di Gennaro (ed.) *Prison Architecture* (United Nations Social Defence Research Institute, 1975), (Published by The Architectural Press, 1975). Also see the 'basic traits of the prison render it an unnatural institution, removed from the social context.' Peter Dickens and Sean McConville, 'Design for Containment' in Peter Dickens, Sean McConville, and Leslie Fairweather (eds.) *Penal Policy and Prison Architecture: Selected papers from a symposium held at the University of Sussex in July 1977* (Barry Rose Publishers, 1978), 61-80.

32 Paul Gendrau, 'Treatment in Corrections' (1981) 22 *Canadian Psychology* 332.

33 Examples include *Ashker v. Brown*, No. 09-05796 CW. (N.D. Cal. Mar 28, 2011), *Griffin v. Gomez*, 741 F.3d 10 (9th Cir. 2014), *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

34 This is known as the 'deprivation perspective.' See Robert Morris and John Worrall, 'Prison Architecture and Inmate Misconduct: A Multilevel Assessment', (2014) 60 *Crime and Delinquency* 1083.

35 Richard Sparks and Anthony Bottoms, 'Legitimacy and Order in Prisons' (1995) 46 *The British Journal of Sociology* 45.

36 Thomas Markus, *Buildings and Power: Freedom and Control in the Origin of Modern Building Types* (Psychology Press, 1993).

37 Foucault, above n 16.

38 Ibid.

that dominant social agents are able to legitimise themselves by concealing the basis of their force.[39] This conception of the prison, as a political vehicle, is, quite explicitly, ethically flawed. It involves an 'implicit denial that the interest of the inmate and the interest of the community are common to one another.'[40] The very moment the offender returns to the community they are 'as much a part of the community as any other person';[41] if their incarceration has not been of a nature conducive to success in the broader community, the community interest has not been served at all and the system has clearly failed. It is worth quoting Gilbert at length here: 'if prisoners are moved from activity to activity in chains or restraints, if their actions are constantly monitored by figures of authority, if their movement is impeded by multiple electronic gates, made from case-hardened steel and opened remotely from a central control unit, how will they move in society?'[42]

A Study in Antitheses

The question must be asked: do prisoners go to prison *as* punishment or *for* punishment? Perhaps the ethical contention is that the loss of liberty explicit in a prison sentence is punishment enough, and the period of confinement should aid in the rehabilitation of the prisoner. Certainly, the first requisite of the prison must be that it renders the prisoner no worse than their condition upon entry.[43] Prisons should normalise their environment to the greatest extent compatible with safe custody, such that prisoners are able to feel and act as equals within the institutional setting. They should incorporate treatment programs to assist in resolving interpersonal, educational, and vocational problems,[44] and hire staff with adequate training and interpersonal skills that constructively integrate themselves in the lives of the prisoners.[45] The architecture itself might be planned akin to a university campus (discrete spaces with clear programmatic functions), allowing for differentiated spatial experience. Various facilities and amenities should be provided: sporting fields, libraries, and medical centres amongst others. Vocational programs that are challenging and provide valid rewards should be offered. Cells should not be denoted as such, and should at the very least be no worse than those offered in state housing. Living spaces should embrace and reflect human presence. There is a threshold quality of life guaranteed to prisoners by the political body that incarcerates them, and this must be respected.

If architecture is to reflect institutional form,[46] one must be critical of its mechanisms of use. Criminals go to prison *as* punishment, not *for* punishment, and certainly not to aid the political circus in its discourse of deviancy. The prison, as a temporally informed architecture, offers a chance to aid those maladjusted to cultural norms and any ethically inclined society must capitalise on this opportunity, both for the welfare of the criminal and the community ●

39 'The ruling ideas, in every age, are the ideas of the ruling class, and the ruling ideas themselves reinforce the rule of that class, and they do so by establishing themselves as legitimate.' Pierre Bourdieu and Jean-Claude Passerson, 'Foundation of a Theory of Symbolic Violence', in *Reproduction: In Education, Society, and Culture* (SAGE publications, 1977), 31-54, translated from the French by Richard Nice. Also 'power is tolerable only on condition that it masks a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms.' Michel Foucault quoted in Kim Dovey, *Framing Places: Mediating Power in Built Form* (Routledge, 1999).

40 Alfred Gilbert, 'Observations About Recent Correctional Architecture' in United States Department of Justice (1972) *New Environments for the Incarcerated*, 7-15.

41 Ibid.

42 Gilbert, above n 43, 7-15.

43 Robert Sommer, The Social Psychology of the Cell Environment (1971) 51 *The Prison Journal* 15-21. Sommer's follows from Florence Nightingale's contention that the minimum standard of the hospital should be that it makes the patient no worse.

44 Gendrau, above n 35.

45 Prison guards in Norway study for a year before qualifying to work. Wim Wenders, *Cathedrals of Culture* (Neue Road, 2013).

46 Kenneth Frampton, 'Reflections on the Autonomy of Architecture: A Critique of Contemporary Production' in D. Ghirardo (ed.) *Out of Site: A Social Criticism of Architecture*, (Seattle Bay Press, 1991). Also Bernard Tschumi, 'Architecture and Transgression' in Bernard Tschumi (ed), *Architecture and Disjunction*,(MIT Press, 1994) 65, 78.

04

Private Security in Australia: Present Lessons from Recent History

Justin Pen

The so-called 'quiet revolution' of private policing has long passed in Australia.[1] In 2006, the number of private security personnel (52,768) surpassed public police (44,898).[2] The Australian Institute of Criminology (AIC) concedes this is a conservative estimate: the Australian Bureau of Statistics (being the source of the AIC's data) only registers a person's 'main occupation', meaning the findings exclude those who work part-time work within the sector.[3] The slow burn of the industry into public life has rendered the regulatory frameworks that govern it ill-defined and unclear. This article attempts to address this knowledge gap: Part I examines the patchwork and inchoate legislative regimes that govern entry to the private security industry. Part II observes what limits are placed on operatives, with respect to citizens' arrest and use of force. Finally, Part III considers the management of offshore detention centres and the prospective *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015* ("the Good Order bill") as a case study on the themes raised in this essay.

1 Philip Stenning and Clifford Shearing, 'The Quiet Revolution: The nature, development and general legal implications of private security in Canada' (1979) 22 *Criminal Law Quarterly* 220; Philip Stenning and Clifford Shearing, 'Private Security: Implications for Social Control', 30(5) *Social Problems* 493.

2 Tim Prenzler, Karen Earle and Rick Sarre, 'Private security in Australia: trends and key characteristics' (2009) No. 374 *Trends & issues in crime and criminal justice*, Australian Institute of Criminology.

3 Ibid.

1. Letting the right ones in: licensing regulation and reform

The private security industry conjures a diversity of job roles: private detectives, security guards, debt collectors, prison and detention centre personnel. However, the chief legislative response to the rise and diversification of the sector has been restricted to licensing regimes: the regulation of persons who operate within the industry and the imposition of exclusion criteria on those who wish to enter it.[4] In practice, the 'default modern position' has been to license security personnel in terms of competency (minimum training requirements) and character (certification of integrity, reference checks and so on).[5] As there is currently no national operating code to govern the licensing of private security personnel, the responsibility of regulation falls to the states and territories.[6] This section examines the arc of regulation and reform in Australia and its shortcomings.

1980s

The Victorian Government spearheaded the

4 Tim Prenzler and Rick Sarre, 'A Survey of Security Legislation and Regulatory Strategies in Australia' (1999) 12(3) *Security Journal* 7.

5 Mark Button, 'Optimizing security through effective regulation: Lessons from around the globe' in Tim Prenzler (eds), *Policing and Security in Practice* (Palgrave Macmillan, 2012) 204.

6 Tim Prenzler and Rick Sarre, 'The Evolution of Security Industry Regulation in Australia: A Critique' (2012) 1(1) *International Journal for Crime and Justice* 38, 39.

first tranche of licensing reform in response to the mounting allegations of assaults perpetrated by crowd controllers at nightclubs and other licensed venues. The release of the *Inquiry into Violence and Around Licensed Premises*, in 1990, exposed the magnitude of private security misconduct. It revealed that more than 800 of all reported serious assaults were connected with licensed values, totalling approximately 20 per cent of all such assaults in the state.[7] 37 per cent of patrons surveyed who had witnessed an altercation at a licensed venue alleged that private security personnel had perpetrated violence.[8] In response to these findings, the Victorian Parliament passed the *Private Agents (Amendment) Act 1990* (altering the *Private Agents Act 1966*) and introduced specific training and licensing requirements for private security personnel working at licensed venues. The Victorian response quickly became the model Act for other jurisdictions.[9] Legislation passed over this period generally had the effect of establishing licensing requirements for contract guards and security firms; mandating pre-employment training and introducing disqualifying offences relating to violence, theft and fraud.[10] The absence of a national framework has left private security personnel subject to 'highly variable' licensing regimes.[11] Furthermore, the slate of reforms spread state regulatory bodies across police, consumer affairs, and justice departments, meaning that education and training requirements and enforcement agencies differ between jurisdictions.[12] This patchwork regime, buffeted by fresh storms of scandal in the noughties, was revisited two decades later.

2000s

The first wave of industry reform, conducted across the 1990s, did little to ameliorate the negative press attention the private security sector had attracted, nor address its recurrent issues with violence and personnel misconduct. Throughout 2004, Adelaide's *The Advertiser* published a series of reports critical of the private security industry, which covered lawsuits and assaults concerning private security personnel.[13] In the same year, the Australian Competition and Consumer Commission (ACCC) fined Chubb, Australia's largest private security firm, $1.5 million for misrepresenting its ability to fulfil conditions in mobile patrol contracts made in NSW, Canberra and Tasmania.[14] In 2005, the *Sydney Morning Herald* reported that 56 firearms had been stolen from security guards and security firm premises over a three-month period.[15] In 2009, the NSW Independent Commission Against Corruption (ICAC) found that Registered Training Organisations, employed by the private security sector, had falsified records of attendance, provided answers to students in certification examinations and allowed students to graduate 'without requiring them to attend any classes or undertake the relevant course.'[16] The ICAC estimated about 9,000 certificates issued within the industry had been tainted by fraud.[17]

Despite the myriad scandals, state and territory governments again declined to impose stricter and more comprehensive industry regulation. Across jurisdictions, licensing requirements were merely expanded to cover all areas of security work; the powers of regulators were enhanced to suspend or reject licenses on competency and character grounds; and ongoing review and disclosure obligations were placed on private security firms.[18] However, this reform agenda has been derided by legal academics as insufficient, albeit consistent with the history of milquetoast international and domestic reform.[19] Researchers have instead proposed a national approach to monitor and conduct further inquiry into the industry, with a role to be developed based in the federal Attorney-General's department.[20] Indeed, root and branch reform is needed in the areas of licenses, education and training, performance measures, and complaints and prosecutions to effect serious industry change.[21]

7 Victorian Community Council Against Violence, *Inquiry into Violence in and around Licenced Premises* (1990).
8 Ibid.
9 See, for example: Queensland Department of Justice, *Discussion Paper. Brisbane: Legal and Executive Services* (1993); *Commercial and Inquiry Agents Act 1974* (Tas); *Security Providers Act 1993* (QLD); *Security and Investigation Agents Act 1995* (SA); *Private Security Act 1995* (NT); *Security and Related Activities (Control) Act 1996* (WA); *Security Industry Act 1997* (NSW).
10 Tim Prenzler and Rick Sarre, above n 6, 42.
11 Ibid.
12 Ibid.
13 See, for example: Nigel Hunt, 'Death of a champion, two years – and 87 bouncers charged', *The Advertiser* (Adelaide) 22 January 2004, 4; Michael Owen-Brown, 'Heaven guards accused of assault 80 times in a year', *The Advertiser*, 17 February 2004, 4.
14 Natasha Wallace, 'Chubb fined $1.5m over phantom security patrols', *Sydney Morning Herald*, 31 December 2004, 3.
15 Eamon Duff, 'Calls to disarm guards as gun thefts rise' *Sun Herald*, 24 April 2005, 25.
16 Independent Commission Against Corruption, *Report on Corruption in the Provision and Certification of Security Industry Training* (2009).
17 Ibid.
18 Tim Prenzler and Rick Sarre, above n 6, 45.
19 See, for example: Mark Button, above n 5; Tim Prenzler and Rick Sarre 'Developing a risk profile and model regulatory system for the security industry' (2008) 21(4) *Security Journal* 264; Philip Stenning 'Powers and accountability of private police' (2000) 8 *European Journal on Criminal Policy and Research*, 325.
20 Tim Prenzler and Rick Sarre, above n 6, 48.

2. The law and its disorder: use of force and citizens' arrest

The slipshod development of jurisdictional licensing regimes is only outdone by the legislative inaction concerning the regulation of the powers exercised by private security personnel. There is no uniform code or Act in place that maps out the prohibitions or limitations on these powers.[22] Instead, checks on power are haphazardly drawn from criminal law, property law, contract law and employment law (themselves derived from an imbroglio of general law, common law and state and territory legislation).[23] The effects of this uneven legislative action can further be seen in the diverse regulation of use of force and citizen's arrest powers. Generally, private security personnel possess the same powers given to the ordinary citizen when it comes to the lawful use of force and citizens' arrest, unless specific legislation is in force. However, the powers retained by ordinary citizens remain 'considerable' and may be delegated from employers (for example, landowners) to employees (for example, security guards).[24]

a. Use of force

Criminal law limitations on the lawful use of force vary between jurisdictions. In South Australia (SA), for example, a substantially subjective test is used to determine whether the use of force has been lawful:[25] if the accused had reason to believe their life was in danger when acting in a defensive matter, the accused will be able to establish a full defence to their use of force.[26] The *Criminal Law Consolidation Act 1935* (SA) does not expressly state its effect on employees of private citizens (that is, private security personnel). Meanwhile, section 419 of the *Crimes Act* (NSW), which establishes the statutory defence of 'self-defence', also requires the use of force to be 'reasonable' in the circumstances. Like the SA position, however, this section remains silent on its application to the agents of private citizens.[27] The *Criminal Code 1899* (QLD) clearly states the statutory defence of 'self-defence' is available to the agents of private citizens, but fails to impose a higher standard on security agents.[28] In contrast, the *Crimes Act 1900* (ACT) provides no 'self-defence' provision relating to the 'defence of property'.[29]

These laws contrast against the positions of Western Australia (WA) and the Northern Territory (NT). In WA and the NT, statutory codes expressly state that agents of landowners are subject to a different, higher standard when it comes to the use of force in defence of persons and property. The *Criminal Code 1913* (WA) and *Criminal Code* (NT) provides that agents of landowners cannot use force that results in bodily harm on the other party ('grievous harm' in the case of the NT).[30] Researchers have favoured the approaches of Western Australia and the Northern Territory and recommend that all other jurisdictions should follow suit and distinguish in law the 'latitude' given to landowners as opposed to their agents in the use of force in defence of property.[31]

b. Citizens' arrest

As with the use of force, the power of arrest and detention available to private citizens and security personnel varies from to jurisdiction to jurisdiction. The High Court weighed in on the seriousness of arrest in *Williams v The Queen* (1986) 162 CLR 278. Although the case concerned police officers, the court's remarks readily apply to general powers of arrest: 'it is not for the courts to erode the common law's protection of personal liberty in order to enhance the armoury of law enforcement'.[32] For the most part, parliaments too have declined to expand the arrest and detention powers of private citizens.

In Victoria, New South Wales and South Australia, private citizens can only make an arrest on another party to prevent the other party from committing, continuing or completing an 'indictable' or serious offence.[33] This requires private citizens, including security personnel, to recognise the immediate difference between indictable and non-indictable offences. As discussed earlier in this essay,

21 Tim Prenzler and Rick Sarre, above n 6, 47-48.
22 Rick Sarre, 'The legal powers of private security personnel: some policy considerations and legislative options', (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 301, 303.
23 Ibid.
24 Ibid, 305.
25 Rick Sarre, 'Private security in Australia: some legal musings' (2010) 1 Journal of the Australasian Law Teachers Association 45, 47.
26 *Criminal Law Consolidation Act 1935* (SA) s 15A.
27 *Crimes Act 1900* (NSW) s 418-420.
28 *Criminal Code 1988* (QLD) s 277(2).
29 Rick Sarre, above n 25, 49.
30 *Criminal Code Act 1913* (WA) s 254(3); *Criminal Code* (NT) s 27(k).
31 Rick Sarre, above n 25, 50.
32 *Williams v The Queen* (1986) 161 CLR 278, 296 (Mason and Brennan JJ).
33 *Crimes Act 1957* (Vic) s 462A; *Criminal Law Consolidation Act 1935* (SA), s 271; *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) s 100.

the insufficient and inadequate education and training that security personnel receive is likely to render making this distinction an ongoing problem for the private security industry.

WA has a slightly broader position on citizens' arrest, which empowers private individuals to arrest any other person who has committed or is committing an 'arrestable offence'.[34] Queensland and the NT have adopted similar approaches, but require the arresting party to believe 'on reasonable grounds' that the other person is committing an offence.[35] In doing so, the parliaments of WA, Queensland and the NT have salved the potential confusion regarding indictable and non-indictable offences that vexes private security personnel operating in Victoria, SA and NSW. Still, the lack of uniform clarity between jurisdictions can generate headaches for industry operators, personnel and those tangled up in private security misconduct and misdemeanours.

c. Reform

In the short-term, academics have recommended the improvement of training standards to address issues arising the exercise of force and arrest powers by private security personnel.[36] However, long-term solutions rest with parliaments and the enactment of comprehensive and uniform industry legislation – particularly in wake of the rise and diversification of the industry within Australia. Currently, the cost of legislative ambiguity is borne by those who have been aggrieved by private security forces: plaintiffs forced to 'negotiate more and litigate less' in the face of the legal imbroglio of citizen's arrest and use of force – notwithstanding other potential causes of action relating to trespass, search and seizure, covert surveillance and breach of privacy claims.[37]

3. Case Study: Immigration Detention Guards and the 'Good Order' Bill

This essay has largely dealt with private security personnel in the abstract, focussing on legislative and literature analysis. This section will now apply the issues already raised to the conduct of offshore detention centre personnel. The author acknowledges the activities and experiences of detention centre personnel may represent an 'outlier' in terms of industry behaviour. However, the field remains a live area of parliamentary and public debate given the current deliberation over the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (the 'Good Order' Bill), a federal parliamentary attempt to clarify the powers of immigration detention personnel. This section unpacks the Bill and offers critical perspectives on the powers it grants to private security personnel.

a. The 'Good Order' Bill: A critical evaluation

The 'Good Order' Bill is a manifestation of the Coalition Government's continued commitment to muscular border security.[38] If passed, the Bill would expressly establish a legislative framework that provides a clear authority for the use of reasonable force in immigration detention in Australia'.[39]

The centrepiece of the Bill would empower an 'authorised officer' (defined as an officer that satisfies the training and qualification requirements as determined by the Minister)[40] to use 'reasonable force against any person or thing' so long as the authorised officer believes it is 'necessary to protect the life health or safety or any person' or 'maintain the good order, peace or security of an immigration detention facility'.[41] Thus, the proposed statutory test applied to immigration detention personnel is a subjective one: whether the use of force has been lawful or unlawful is to be determined by the officer's personal assessment of the situation.[42] This is in contrast to the common law test, which applies the metric of what is *objectively* reasonable in the circumstances.[43] The amending legislation provides an open list of circumstances in which an authorised officer may elect to use force.[44]

Significantly, the Bill would provide private security personnel immunity from civil proceedings with respect to any exercise of reasonable force, so long it was done in 'good faith'.[45] The courts have described the term 'good faith' as 'protean', one that has 'longstanding usage in a variety of statutory and, for that matter, common law contexts'.[46] With respect to the Bill, the Senate Scrutiny of Bills Committee noted that 'bad faith' is a 'very difficult allegation' to prove. 'It is doubtful that showing that use of force was disproportionate (even grossly disproportionate) would amount to bad faith,' the Committee said.[47] Accordingly, the Committee requested 'further justification' from parliament pertaining to the inclusion of the immunity.[48]

A third area of concern is the Bill's mechanism for handling complaints, which provides the secretary with a discretion to investigate complaints concerning the use of force by an authorised officer.[49] An investigation may be declined where the complainant has previously made the same or 'substantially similar' complaints to the secretary;[50] the complaint is 'frivolous, vexatious, misconceived, lacking in substance or is not made in good faith';[51] the complainant lacks sufficient interest in the subject matter of the complaint;[52] or where the investigation is 'not justified in all the circumstances'.[53]

It is here worth noting that the Commonwealth owes a non-delegable duty of care to immigration detainees.[54] Indeed, the federal government can and has been successfully sued for breaching its duty of care to detainees held in immigration detention centres.[55]

Several human rights organisations have expressed disapproval at the Bill's conferral of wide powers conferred on private security personnel. Some common themes arise from the submissions to the inquiry into the Good Order Bill.

Though it generally conceded that it is necessary to clarify the scope of power given to private security personnel working in immigration detention facilities, the Australian Human Rights Commission (AHRC) recommends the threshold for the use of force 'should be based on objective criteria of necessity and reasonableness' and that limitations should be expressed in the statute and not merely in policies and procedures.[56] The AHRC also recommended that in cases where private detention personnel use excessive force, both contractors and the Commonwealth should be liable to civil proceedings.[57]

In a submission from Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, UNSW, it was alleged that the powers conferred in the Bill could justify the killing of a person by an authorised officer.[58] The organisation also submitted that the Bill could adversely affect detainees' rights to peaceful assembly and bar the likelihood of an effective remedy for any aggrieved detainee.[59]

The lack of scrutiny targeted at the training and preparation of private security personnel was another sore point. The Refugee Council of Australia expressed concern at the training and education required of authorised officers, noting that it failed to meet the standards required of police and prison personnel.[60]

Conclusion

The private security industry requires deep and urgent reform. The federal government's increased reliance on private security personnel to manage immigration detention facilities further underscores the need for stricter regulation on industry training and education. During a recent Senate Inquiry, Transfield Services, the multinational infrastructure services

34 *Criminal Investigations Act 2006* (WA) s 25(2).
35 *Criminal Code Act 1899* (QLD) s 546; *Criminal Code* (NT) s 441(2).
36 Rick Sarre, above n 25, 54.
37 Rick Sarre, above n 22, 351.
38 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 February 2015, 1201 (Peter Dutton).
39 Ibid.
40 Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 s 197BA(6), (7).
41 Ibid s 197BA(1).
42 Explanatory Memorandum, Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015, 6.
43 Ibid.
44 Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 s 197BA(2)
45 Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 s 197BF.
46 *Secretary, Department of Education, Employment, Training and Youth Affairs v Barry Prince* [1997] FCA 1565, 129.
47 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert* Digest, No 3 of 2015, 18 March 2015, 27–28.
48 Ibid.
49 Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 s 197BD.
50 Ibid s 197BD(1)(a).
51 Ibid s 197BD(1)(b).
52 Ibid s 197BD(1)(c).
53 Ibid s 197BD(1)(d).
54 *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs and Another* [2005] FCA 549.
55 Azadeh Dastyari, 'Out of sight, out of right? Who can be held accountable for immigration detainees harmed on Nauru?' in Linda Briskman and Alpherhan Babacan (eds), *Asylum Seekers: International Perspectives on Interdiction and Deterrence* (Cambridge Scholars Publishing, 2008) 82.
56 Australian Human Rights Commission, Submission No 25 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, 7 April 2015, 3.
57 Ibid.
58 Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, UNSW, Submission No 8 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, 1 April 2015, 6.
59 Andrew & Renata Kaldor Centre for International Refugee Law and Gilbert + Tobin Centre of Public Law, UNSW, Submission No 8 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, 1 April 2015, 8.
60 Refugee Council of Australia, Submission No 27 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015*, 7 April 2015, 3.

company contracted to run the detention centre at Nauru, admitted to receiving 33 sexual assault and rape allegations from immigration detainees; 15 of which were made against staff.[61] Wilson Security, the private security firm subcontracted and charged with the responsibility to 'maintain a safe and secure environment' for detainees, revealed they were forced to terminate staff over allegations that personnel had used excessive force against, or inappropriately touched, child asylum seekers.[62] These revelations follow reports that Wilson Security guards had allegedly paid immigration detainees for sex and taped these sexual encounters.[63]

The recently proposed Good Order Bill does little to address growing concerns of immigration facility mismanagement and private security misconduct. Accordingly, human rights groups have castigated the Bill for its wide-reaching conferral of powers and dearth of accountability measures. To address the immediate crises at Nauru, and to ease these recurrent issues within the industry, national and rigorous training and education standards must be imposed on private security personnel. Indeed, to fix the industry's long-term problems, the 'third' wave of private security regulation and reform must consider and avoid the shortcomings of the state and territory governments during the first and second waves of the 1990s and 2000s ●

61 Nicole Hasham, 'Child asylum seeker alleges rape in shower and 253 Nauru detainees attempt self-harm, Senate inquiry hears', *Sydney Morning Herald,* 17 July 2015.
62 Ibid.
63 Paul Farrell, 'Guards at Nauru paid for and taped sex with refugees – former case manager', *Guardian Australia,* 20 June 2015.

05

Policing a Decade of Protest: Repositioning Police Power at the Centre of Governmentality in NSW

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*I should be marching down the street, anybody should be able to do that. But... I might get the f*** out of there, because this is police state stuff.*[1]

— Dan Jones, 2007
APEC Excluded Person

Introduction

In February this year, university students were pepper sprayed whilst protesting against Christopher Pyne[2] and anti-government protests faced the aggressive presence of the NSW Public Order and Riot Squad ('PORS').[3] PORS was established in 2006 to deal with the levels of violence seen at the 2004 Redfern and the 2005 Macquarie Fields riots. It was announced for use in response to an 'outbreak of public disorder',[4] but the full-time force is now regularly deployed to police non-violent events. It is sent to peaceful protests,[5] sporting games,[6] nightlife areas,[7] and even the removal of a fig tree.[8] Despite coming up to its ten-year anniversary, there is yet to be a detailed scholarly study of the full-time force. Moreover, there is little public information about PORS available and no statement of its guidelines.

This paper focuses on the policing of protests, where free speech sits in tension with maintaining public order. The paramilitary nature of PORS alters the power dynamic between the state and protesters. I will build on Markus Dubber's concept of police power as a model of governance. This framework addresses an issue often ignored by liberal jurisprudence and criminology: that the state does not just govern through law, but *manages* its subjects through policing.[9] I will analyse the NSW Police,

1 Mark Davis, 'Reining in the Parade', *SBS Dateline* (5 September 2007) http://www.sbs.com.au/news/dateline/story/reining-parade
2 Rebecca Barrett, 'Students Pepper Strayed At Christopher Pyne Protest In Sydney', *ABC News* (13 February 2015) http://www.abc.net.au/news/2015-02-13/students-pepper-sprayed-at-pyne-protest-in-sydney/6090986
3 Taylor Auerbrach, 'Boiling Point: Riot Police Battle To Take Control After Thousands Of Student Protesters Shut Down Sydney, Melbourne And Brisbane In Mass Demonstration Over Education Budget Cuts', *Daily Mail Australia* (21 May 2014) http://www.dailymail.co.uk/news/article-2634772/Startling-scenes-student-protesters-Australian-cities-massive-demonstration-against-Tony-Abbotts-education-budget-changes.html
4 'Minister for Police', *Budget Estimates 2006-7*, NSW Treasury' [16-6] http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0011/4151/bp3_16police_n.pdf
5 For example, Hannah Ryan, 'Police Clash With Protesters At USYD Strike', *Honi Soit* (15 May 2013) http://honisoit.com/2013/05/police-clash-with-protesters/; Marion Ives, 'Mother of Thomas 'TJ' Hickey Calls For Peaceful March After Protesters Clash With Police', *SBS News* (14 February 2015) http://www.sbs.com.au/news/article/2015/02/14/mother-thomas-tj-hickey-calls-peaceful-march-after-protesters-clash-police
6 Josh Massoud, 'Riot Squad Footy Alert – Specialist APEC Team To Control The Fans', *The Daily Telegraph* (3 August 2007) accessed via Factiva.
7 Michael Gormley, 'Police blitz a well-behaved Kings Cross' *Alt Media* (17 December 2009) http://www.altmedia.net.au/police-blitz-a-well-behaved-kings-cross/14467
8 Australian Associated Press, 'Riot Squad Move in for Fig Tree Removal', *The Australian* (31 January 2012) <http://www.theaustralian.com.au/news/latest-news/riot-squad-move-in-for-fig-tree-removal/story-fn3dxity-1226258129114>
9 Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press, 2005); Lindsay Farmer, 'The Jurisprudence of Security' in Markus D. Dubber and Mariana Valverde, eds., *The New Police Science: The Police Power in Domestic and International Governance* (Stanford University Press, 2006)

including PORS, as a manifestation of this residual, elusive, and amorphous power. In so doing, I seek to demonstrate how the NSW government manages political speech without recourse to the legalism of the criminal law.

Methodology

I embrace a version of criminal scholarship that is deeply rooted in empirical and historical analysis.[10] Rather than making a normative claim that police are too violent, I seek to study the way in which the state has used force and criminal law over the past ten years in order to elucidate a greater understanding of the relationship between law and the police.

This study foregrounds police practice; which is often pushed to the margins in criminal theory. It applies Dubber's differentiation between 'police' and 'law' as two different modes of governance.[11] Rather than assuming police are just agents of the criminal law, this distinction allows us to recognise the different options that police have when exercising their duties: they can exert force and intimidation (police power) or they can elect to charge persons with a variety of offences (criminal law). I focus on four case studies: the 2007 Asia Pacific Economic Cooperation ('APEC') meetings; the anti-coal seam gas ('CSG') protests in Northern NSW; the 2013 University of Sydney ('USYD') staff strikes, and; the 2015 TJ Hickey memorial rally. At each of these protests, PORS officers have been deployed alongside other police officers. I will discuss the practices of both kinds of officers together, whilst noting distinctions where possible. Given PORS was highly visible and active at each event, the relationship between protesters and all police is affected by their paramilitary presence.[12]

Since Foucault, criminological work has focused on specific modes of exercising power and the rationalities that justify them.[13] Drawing on this literature, I analyse the impact of police exerting control through violence and arrests.

After canvassing the paramilitary deployment of PORS at protests, I seek historical explanations for why such a force was established and show how PORS embodies a state that is insecure in its own sovereignty. Next, I will explore the way police use the criminal law arbitrarily, which shows that police power derives not from the criminal law but from outside it. Finally, I will evaluate the statutory framework for authorising protests, which also focuses on minimising risk and depoliticises dissent. The arbitrary power of PORS is therefore not necessarily unique; it is just an embodiment of a system designed to resist disruptions.

Stifling Dissent With The 'Iron Fist'

PORS is a paramilitary force. Each member of PORS has $8,500 worth of gear. They wear a bulletproof vest, ballistic goggles, and flameproof overalls. They carry X26 Taser electric stun guns, capsicum spray, and batons.[14] They receive military training and have a water gun in reserve.[15] However, recognising PORS as a paramilitary force challenges orthodox literature on policing in Australia. That literature claims community-based styles of policing to be dominant.[16] As noted by several academics, paramilitary policing and community policing are actually complementary strategies. In Jude McCulloch's words, conciliatory rhetoric is the 'velvet glove' that covers an 'iron fist' of paramilitary force.[17] American literature supports this view; where the use of police paramilitary units has become normalised across the country. Kraska and Kappeler described the 'two parallel developments' as a well-publicised movement towards community accountability and a backstage shift toward militarisation.[18] The American trend was the model for PORS. One month after PORS was formed, its head, Superintendent Cullen, toured the United States. He remarked that 'The US had the best public order response in the world' and that 'it was important to review it to see which aspects might fit in Australia'.[19]

There were moments during these protests where police showed flagrant disregard for legalism and exercised the brute force of their paramilitary apparatus. The 2013 staff strikes at the University of Sydney (USYD) gave rise to multiple claims of brutality. Picket lines blocked roads into the university. On multiple occasions when a vehicle wished to enter, riot police pushed the protesters out of the way, often dragging them or throwing them to the ground.[20] One protester's leg was broken, and a PORS officer strangled another. A witness of the strangulation commented that 'his whole face went purple and his body was completely limp'.[21] A student body wrote to the Vice-Chancellor; 'The riot police have been so violent that we are terrified that one of our friends will be killed.'[22] This violence is not isolated. Images of police brutality continue to emerge and PORS' heavy-handedness was alleged at the anti-CSG protests.[23] In both situations, violence was used to move protesters out of the way of vehicles. Normally, this would be done by issuing a 'move on' order,[24] but police are barred from using such directions at industrial disputes and genuine protests.[25] Accordingly, employing brutality to allow traffic through can be seen as a way to get around this statutory protection of protesters. PORS' reputation for violence is its very purpose. Cullen has proudly proclaimed their 'zero tolerance' approach, telling *Sixty Minutes* that riot police have an 'absolute right to do anything' so if people 'want to stay there and engage us, then unfortunately we will accommodate.'[26]

The amorphous power of police is also exercised through intimidation. The NSW police, beefed up with PORS, revealed the extent of this capacity in the lead up to APEC. One commentator called the government's efforts 'a psychological war' waged against dissent.[27] Sydneysiders were told how intimidating the water canon was[28] and that there would be snipers on the rooftops in the city.[29] A blacklist of excluded persons was made[30] and footage of police pushing a photographer to the ground was circulated.[31] Socialist and anarchist political groups were targeted by PORS in dawn raids; one morning, over fifty officers were deployed to arrest five men across Sydney. One was told 'If you guys turn up to APEC, we'll smash you.'[32] That afternoon one anti-Iraq protester was approached by police and told to stop attending rallies. 'They said they had a file… on me, and to watch out.'[33] This climate of intimidation was cited as the reason for the low turnout at the main demonstration.

Such threats of police saturation are not confined to national security risks. In 2014, anti-CSG protesters at Bentley were told to brace for the arrival of hundreds of riot police. Aided by the government, rumours flew.[34] The Premier refused to confirm or deny that 800 police from across the state, including over 200 riot squad officers, would be sent to break up the protest.[35] Police never came, but for weeks 'an ugly and possibly violent confrontation appeared inevitable.'[36] These patterns of intimidation serve to discourage demonstrators and weaken their resolve. Moreover, they speak to the vagueness of unaccountable

145-167.

10 Nicola Lacey, 'What Constitutes Criminal Law' in Antony Duff et al, eds., *The Constitution of Criminal Law* (Oxford University Press, 2013), 28; Luke McNamara, 'Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform' in Thomas Crofts and Arlie Loughnan, eds., *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 34, 43; Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72(6) *Modern Law Review* 936

11 Peter Ramsay, 'Vulnerability, Sovereignty, and Police Power in the ASBO' in Markus D. Dubber and Mariana Valverde, eds., *Police and the Liberal State* (Stanford University Press, 2008), 158.

12 Jude McCulloch, *Blue Army: Paramilitary policing in Australia* (Melbourne University Press, 2001), 1-2

13 Michel Foucault, *Discipline and Punish* (Vintage Books, 1977); Mariana Valverde, 'Police, Sovereignty, and Law: Foucaultian Reflections' in *Police and the Liberal State* (Stanford: Stanford University Press, 2008) 15-32; Jock Young, *The Exclusive Society* (Safe Publications, 1999).

14 Eamonn Duff, 'Robo Cop: Brawlers Beware', *Sydney Morning Herald* (3 August 2008) http://www.smh.com.au/news/national/robo-cop-brawlers-beware/2008/08/02/1217097606149.html; 'Minister for Police', *Budget Estimates 2006-7*, NSW Treasury [16-6] http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0011/4151/bp3_16police_n.pdf

15 Andrew Clennell, 'Wet v wild: riot squad shows off its $700,000 weapon', *Sydney Morning Herald* (21 August 2007) accessed via Factiva; 'Full-time riot squad in training', *The Daily Telegraph* (1 September 2005) accessed via Factiva.

16 David Baker 'Police Confirmation of Use of Force in Australia: "To Be or Not to Be?" 52(2) *Crime, Law and Social Change* 139; Judy Putt, ed., 'Community policing in Australia', Research and Public Policy Series (Australian Institute of Criminology Reports, 2010).

17 McCulloch, *Blue Army,* 4; Chris Cunneen, *Aboriginal–Police Relations in Redfern: With Special Reference to the 'Police Raid' of 8 February 1990*, Report Commissioned by the National Inquiry into Racist Violence (Sydney: Human Rights & Equal Opportunity Commission, 1990), 26; Tony Jefferson, *The Case Against Paramilitary Policing* (Open University Press, 1990) 41.

18 Peter B. Kraska and Victor E. Kappeler, 'Militarizing American Police: The Rise and Normalization of Paramilitary Units' (1997) 44 *Social Problems* 1, 12-13.

19 Rhett Watson and Kara Lawrence, 'Riot boss in fresh attack – lack of help labeled "a disgrace"', *The Daily Telegraph* (25 January 2006) accessed via Factiva.

20 Helen Davidson, 'Riot police arrest eleven at Sydney University protest' *The Guardian* (5 June 2013) http://www.theguardian.com/world/2013/jun/05/sydney-university-strike-arrests-protest; 'Multiple arrests as protesters clash with riot police at Sydney University', *ABC News* (5 June 2013) http://www.abc.net.au/news/2013-06-05/university-students-arrested-during-protest/4734550; 'Protestors arrested during strike at Sydney Uni', *ABC News* (26 March 2013) http://www.abc.net.au/news/2013-03-26/48-hour-strike-goes-ahead-at-sydney-university/4594208

21 Hannah Ryan, 'Police clash with protesters at USYD strike', *Honi Soit* (15 May 2013) http://honisoit.com/2013/05/police-clash-with-protesters/

22 85th SRC Executive, 'Open letter to Michael Spence', *Honi Soit* (15 May 2013) http://honisoit.com/2013/05/open-letter-to-michael-spence/

23 'Protesters blast 'rogue' riot squad members', *The Northern Star* (9 January 2013) http://www.northernstar.com.au/news/protesters-blast-rogue-riot-squad-members/1710479/;

24 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 197-199.

25 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 200.

26 Michael Usher, 'Brute Force', *Sixty Minutes* (17 April 2009) http://sixtyminutes.ninemsn.com.au/stories/802711/brute-force

27 Elisabeth Wynhausen, 'The aura of a police state', *The Australian* (15 September 2007) accessed via Factiva.

28 Andrew Clennell, 'Wet v wild: riot squad shows off its $700,000 weapon', *Sydney Morning Herald* (21 August 2007)

29 Elisabeth Wynhausen, 'The aura of a police state', *The Australian* (15 September 2007)

30 Liz Snell, 'Protest, Protection, Policing: The Expansion of Police Powers and the Impact on Human Rights in NSW – The policing of APEC 2007 as a case study' (Combined Community Legal Centres Group (NSW) and Kingsford Legal Centre, 2008) 25; *Padraic Gibson & Ors v Commissioner of Police & Ors* [2007] NSWCA 251 [10]; David Campbell, 'APEC Meeting (Police Powers) Bill 2007 Agreement in Principle,' NSW Legislative Assembly Hansard and Papers, 19 June 2007, 1241 http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LA20070619/$File/541LA012.pdf; Sylvia Hale, 'APEC Meeting (Police Powers) Bill 2007, Third Reading, In Committee,' NSW Legislative Council Hansard and Papers, 26 June 2007, 1676 http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/; Clover Moore, 'APEC Meeting (Police Powers) Bill 2007 Agreement in Principle,' NSW Legislative Assembly Hansard and Papers, 19 June 2007, 1240 http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LA20070619/$File/541LA012.pdf

31 Elisabeth Wynhausen, 'The aura of a police state', *The Australian* (15 September 2007)

32 David Marr, 'Faith in the demo marching out the door', *The Age* (2 June 2007) http://www.theage.com.au/news/in-depth/faith-in-the-demo-marching-out-the-door/2007/06/01/1180205502591.html

33 David Marr, 'His Master's Voice: The Corruption of Public Debate under Howard' (2007) 26 *Quarterly Essay*, 36-7.

34 Rodney Stevens, 'Rumours rife anti-CSG protest camp will be met with 800 cops', *The Northern Star* (10 May 2014) http://www.northernstar.com.au/news/rumours-rife-anti-csg-protest-camp-will-be-met-wit/2254125/

35 Ibid.

36 Mungo MacCallum, 'Sometimes, the Good Guys Really Do Win', *The Monthly* (20 May 2014)

police power.

Stories of police brutality and intimidation disturb liberal sensitivities. They demonstrate a flagrant disregard for the principles of justice and legalism that we expect from a liberal criminal justice system and its agents.[37] The police complaints procedure is opaque, run internally, and from the outside there is no guarantee rules are being followed.[38] The pertinent question is how can this aggressive police power persist within our constitutional state?

Historicising The Establishment Of PORS

Understanding the historical context of PORS reveals it to be an embodiment of a state insecure in its own sovereignty. PORS was announced in September 2005 after police had been widely criticised for 'bungling' the Macquarie Fields riots.[39] An internal police report blamed numerous tactical errors[40] and Opposition Leader John Brogden led the criticism across mainstream media, saying the police 'should have crushed this riot on night one with hard and brutal force.'[41] This perception of police weakness built on the idea that they 'hadn't learnt their lesson' from the Redfern riots in 2004.[42] Police Commissioner Ken Moroney confirmed that the police's 'failure' at those two riots prompted the creation of PORS.[43] It was in the context of these exceptional points of violence that a full-time riot squad was approved and justified to the public.

The second important dynamic shaping the creation of PORS was 9/11 and global counter-terrorism efforts. State police had tangible links to national security since the 1970s when counter-terrorist units were first established in Australia.[44] Since 9/11 and the Bali Bombings, there has been a significant overlap between national security work and domestic policing.[45] In the organisational hierarchy, PORS sits underneath the Counter-Terrorism command.[46] PORS officers undergo military training exercises involving searching for bombs and dealing with the fallout of a terrorist attack.[47] These routine exercises can breed latent militarism, a zeal for absolute security at all costs, and propensity to use force.[48] Accordingly, PORS was founded as – and still is – a paramilitary force designed to quash violent uprisings or terrorist risks as quickly as possible. Importantly, studies of other specialist groups have found organisational culture and practices had flow-on effects to the entire force.[49]

We must remember that PORS is not an inevitable reflection of twenty-first century technology, but an active policy choice that sheds light on the way our state is governed. PORS is a similar body to NSW's Tactical Response Group ('TRG'), which was shut down in the early 1990s after a series of fatal shootings.[50] The National Inquiry into Racist Violence found the TRG had consistently perpetrated excessive force against Aboriginal Australians.[51] In 2008, with no reference to the problems of the TRG, Cullen proudly boasted that PORS' equipment was much more 'extreme' than that worn by the TRG.[52] PORS was founded with no plan to prevent the problems that lead to the TRG's termination, and no recognition of scholars' findings that the 'structure and ethos' of the TRG encouraged a 'tendency towards routine reliance on the force.'[53]

The use of a specialist paramilitary squad impliedly admits the failure of relations between the normal policing agencies and the public. The spokesperson for CSG Free Northern Rivers said their group had a 'good working relationship' with local police who understand their movement, unlike PORS who use 'heavy-handed tactics.'[54] The use of PORS indicates that local police do not trust any negotiations that took place and they do not feel capable of diffusing a potential situation.[55] PORS is a centralist force, isolated from the community and not designed to develop local relationships. In this way, PORS miscarries many of the Peelian principles of ethical policing which promote 'policing by consent'[56] – the supposed 'hallmark of Australian policing for the past 200 years.'[57] PORS can actually undermine the steps toward community policing. For example, at the Glenugie blockade a PORS officer arrested one of the appointed police liaisons when they passed a bottle of water to another protester.[58] These liaison officers work with the local area command to oversee the protest. Local officers would have known this protester was sympathetic to police efforts and likely to help them during the event, and thus less likely to exercise their discretion to arrest.

The discretion to arrest protesters speaks to the continuing elusiveness of modern police power and its vague relationship with the rule of law.[59] In the next section, I will explore how protests are often effectively and coercively policed without any recourse to the criminal law.

Choosing Not To Use The Criminal Law

PORS and other police officers employ the criminal justice system arbitrarily at protests, which discloses the indefinability of police power.[60] Police act as a hinge between the future-oriented governance of dangers and the past-oriented punishment of wrongdoing.[61] At protests they do so arbitrarily.

One of the most striking features of protests is the large number of people who are arrested, but never charged. At APEC, five of the seventeen were arraigned, but free to go at the end of the protest.[62] It is also common for protesters to be arrested for trivial charges that are later dropped because they were incorrect or had little chance of successful prosecution. At APEC, a 37-year-old man was charged with assault after squirting a pro-Bush sign with tomato sauce.[63] The majority of arrestees from USYD had their charges dropped without ever attending court.[64] After the arrests at Glenugie, the police were unsure of how to proceed so they ran a trial case against two of the protesters. The magistrate threw the case out of court, accusing NSW police of running an 'absurd' and 'vexatious' case. The magistrate declared the police were wasting the court's time by bringing an 'innocuous minor traffic matter worthy of a $67 fine.'[65] It should be noted that most offences that protesters were charged with – obstructing driver/pedestrian, resisting arrest, offensive language[66] – do not even satisfy the first level of Duff's tripartite criteria for legitimate criminalisation,[67] the conduct being 'morally wrong'.[68] These minor offences are only part of a broader system of control.

Even in situations where an offence was clearly committed, police and prosecutors still have discretion to drop charges. The wide scope of discretion was most prominently demonstrated by the Chaser incident at APEC.[69] The state's flexibility as to how it proceeds reverberates with the sound of an arbitrary form of governmentality. It allows police to denounce behaviour and coerce groups when convenient without calling them to account through a rationale of criminal responsibility.[70] As Stuntz has observed, discretion can be so endemic that 'it is not law at all.'[71]

Recognising that the criminal law often goes unused allows us to comprehend what is actually going on, the strategic value of performative arrests. At the protests studied, police used arrests tactically to remind the crowd of the state's power and coerce others to moderate their behaviour. At USYD, one officer was seen carrying a hand-written list of perceived 'ringleaders' – many of whom were arrested by the end of the day.[72] Judicial commentary has

37 Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1964), 1-2; Dubber, *The Police Power,* xv.

38 Andrew Goldsmith, 'Complaints against the Police: A "Community Policing" Perspective' in Julia Vernon and Sandra McKillop, eds., *The Police and the Community in the 1990s* (Australian Institute of Criminology, 1992) 207.

39 'Slow riot squad response 'farcical': expert', *The Daily Telegraph* (3 March 2005) accessed via Factiva.

40 Les Kennedy et al, 'Police bungle fuelled four days of riots', *Sydney Morning Herald* (30 June 2005) http://www.smh.com.au/news/national/police-bungle-fuelled-four-days-of-riots/2005/06/29/1119724699861.html

41 Edmond Roy, 'NSW Oppon attacks Govt over Macquarie Fields riot responsibility' *ABC PM* (29 June 2005) http://www.abc.net.au/pm/content/2005/s1403434.htm

42 'Fifty police injured in Redfern riot', *ABC News* (16 February 2004) http://www.abc.net.au/news/2004-02-16/fifty-police-injured-in-redfern-riot/136268

43 'Full-time riot squad in training', *The Daily Telegraph* (1 September 2005) accesed via Factiva.

44 Jenny Hocking, *Beyond Terrorism: the development of the Australian security state* (Allen & Unwin, 1993) 141-59; McCulloch, *Blue Army*, 1

45 *Terrorism (Police Powers) Act 2002* (NSW); Jenny Hocking & Colleen Lewis, 'Counter-terrorism and the rise of security policing' in Jenny Hocking and Colleen Lewis, eds., *Counter-terrorism and the Post-democratic State* (Edward Elgar, 2007) 147-8; Sharon Pickering and Jude McCulloch, 'The Haneef Case and Counter-Terrorism Policing in Australia' (2010) 20 *Policing and Society* 21

46 John Kidman, 'Frontline anti-terror role for riot squad', *Sun Herald* (13 November 2005) accessed via Factiva.

47 Gemma Jones, 'Riot trucks to combat street mob' *The Daily Telegraph* (6 November 2006) accessed via Factiva.

48 McCulloch, *Blue Army*, 15-31, 83-85, 90, 213.

49 Ibid, 1-2.

50 Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the* Police (Allen & Unwin, 2001) 98-99.

51 Cunneen, *Conflict, Politics and Crime*, 101; Chris Cunneen, 'Law, Policing and Public Order: The Aftermath of Cronulla' (Social Science Research Network, 2011), 188.

52 Eamonn Duff, 'Robo Cop: Brawlers Beware', *Sydney Morning Herald* (3 August 2008) http://www.smh.com.au/news/national/robo-cop-brawlers-beware/2008/08/02/1217097606149.html

53 Russell Hogg, 'NSW Tactical Response Group' (1982) 7 *Legal Services Bulletin* 75

54 'Protesters blast 'rogue' riot squad members', *The Northern Star* (9 January 2013) http://www.northernstar.com.au/news/protesters-blast-rogue-riot-squad-members/1710479/

55 Chris Cunneen et al, *Dynamics of Collective Conflict: Riots at the Bathurst Bike Races* (Law Book Company, 1989), 121

56 Susan A. Lentz and Robert H. Chaires,'The Invention of Peel's Principles: A Study of Policing 'textbook' History' (2007) 35 *Journal of Criminal Justice* 69

57 Judy Putt, ed., 'Community policing in Australia', Research and Public Policy Series (Australian Institute of Criminology Reports, 2010) 3, 17.

58 'Anti-CSG mob fills the court', *The Northern Star* (9 January 2013) http://www.northernstar.com.au/news/anti-csg-mob-fills-the-court/1710477/

59 David Alan Sklansky, 'Work and Authority in Policing' in Markus D. Dubber and Mariana Valverde, eds., *Police and the Liberal State* (Stanford University Press, 2008) 129-130.

60 Dubber, *The Police Power,* 44, 82, 94, 195, 198

61 Dubber and Valverde, 'Introduction', 4

62 Elisabeth Wynhausen, 'The aura of a police state', *The Australian* (15 September 2007) accessed via Factiva.

63 David Braithwaite et al, 'Cheeky protest an arresting sight', *The Sydney Morning Herald* (8 September 2007) accessed via Factiva.

64 Ed McMahon, 'From picket to court', *Honi Soit* (2 March 2014) http://honisoit.com/2014/03/from-picket-to-court/

65 David Mark, 'Magistrate throws out vexatious police case against CSG protesters', *ABC PM* (4 November 2013) http://www.abc.net.au/pm/content/2013/s3883682.htm

66 'LIVE: Police at Glenugie blockade as drill rig moves in', *The Daily Examiner* (7 January 2013) http://www.dailyexaminer.com.au/news/police-at-glenugie-blockade-as-drill-rig-moves-in/1707693/; Ed McMahon, 'From picket to court', *Honi Soit* (2 March 2014) http://honisoit.com/2014/03/from-picket-to-court/

67 Luke McNamara, 'Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform' in Thomas Crofts and Arlie Loughnan, eds., *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 45

68 Antony Duff, 'Towards a Modest Legal Moralism' (2014) 8 *Criminal Law and Responsibility* 217

69 Australian Associated Press, 'Chaser's APEC stunt goes to court', *Sydney Morning Herald* (12 March 2008) http://www.smh.com.au/news/national/chasers-face-apec-trial/2008/03/12/1205125962824.htmll; 'Chaser case dropped', *ABC News* (28 April 2008) http://www.abc.net.au/news/2008-04-28/chaser-case-dropped/2417690

70 Cf principles of criminal responsibility for when people should be called to account with contested philosophical and political foundations. Nicola Lacey, 'Response to Norrie and Tadros' (2007) 1(3) *Criminal Law and Philosophy* 267, 268

71 William J. Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100(3) *Michigan law Review* 505.

72 Felix Donovan, 'I didn't believe them either', *Honi Soit* (14 June 2013) http://honisoit.com/archive/website/2013/2013/06/i-didnt-believe-them-either/

recognised that arrests are political. In throwing out the vexatious police case from Glenugie, the magistrate said there was 'realistic suspicion of political interference' in how these arrests had been handled.[73]

Arrests are not strictly punitive, but they are coercive. They are known to be violent,[74] which PORS' presence can only be expected to exacerbate, and arrestees can be detained for up to four hours without charge.[75] The process of an arrest is intimidating and likely to deter other protesters from taking risks. Furthermore, an arrest is a 'control signal'[76] that labels protesters as deviants. Sociological literature has emphasised the importance of disciplinary categorisation at the crux of power in control systems.[77] An arrest immediately declares them a risk to the state, even before any crime is committed, and indicates that the full force of PORS can be marshalled against them.

When that force is used against protesters, it carries with it a physical message of condemnation. The USYD protester who was strangled described how he internalised responsibility for the violence. 'I have always been firm in my support of civil disobedience, but today I doubted myself,' he wrote. 'Traumatised, wanting to disappear, I thought that maybe it actually is all my fault.'[78] Interactions like this, which operate outside the criminal law, are highly effective at discouraging protest.

This signalling power of policing is crucial to understanding protest and governmentality in NSW. Police practices generate powerful social meanings about whether an individual's voice is to be heard or whether they belong in the political community.[79] When police use arrests in an effort to quell protests or intervene to protect certain interests (be those of the employer in an industrial strike, the gas company seeking to drill, or the supposedly communal interest of 'public safety') they act to protect the status quo and denigrate dissent. By doing so, their rationalities authorise 'absolutist exercises of state power'[80] to facilitate sovereignty in favour of the status quo. This power is conflated with law because police exercise it in the name and uniform of law, but to properly understand the way our state is managed we must recognise it is not bound by law.

Protecting The 'Safety' Of The Status Quo

In this final section, I will show how the policing of protests prioritises efficiency in ways that dehumanise and depoliticise dissent. Dubber posited that 'The job of the officer is to classify everyone and everything properly, and to treat each object according to its classification.'[81] In NSW, it is not just police officers who engage in this classification task, but also judges when they are called upon to authorise proposed protests under Part 4 of the *Summary Offences Act*.[82] Classifying protesters based on their potential risks shows all the hallmarks of the 'pre-crime' paradigm.[83] However, as I have shown, the criminal law does not exhaustively cover the power exercised at protests, so there must be something more shaping control. I will show how applying the logic of the 'risk society'[84] to situations of protest exposes the ultimate purpose of amorphous police power: to fight efforts to constrain the sovereign's discretion.[85]

The process for authorising protests imports these public safety risks into individual responsibility. A protest can be authorised by the Police Commissioner or the court,[86] which gives protesters immunity from a range of public order offences.[87] Whilst the statutory scheme's purpose is to encourage protest and provide protection for worthy causes, case law shows that the courts prioritise the elimination of any and all risks that could arise. This was demonstrated earlier this year, when the court rejected the TJ Hickey memorial rally's plan to march up George Street. The court considered the spike in traffic from Saturday morning sport, the fact it was Valentine's Day, and that a cruise ship's scheduled departure from Circular Quay at 4pm as reasons why the protest should not be approved.[88] Similarly, the court rejected the APEC demonstration's preferred route on the basis that there was risk of crowd crush.[89]

73 Magistrate David Heilpern quoted in David Mark, 'Magistrate throws out vexatious police case against CSG protesters', *ABC PM* (4 November 2013) http://www.abc.net.au/pm/content/2013/s3883682.htm

74 Megan Levy, 'Police accused of brutality in Potts Point arrest filmed and posted on Facebook', *Sydney Morning Herald* (4 December 2014) http://www.smh.com.au/nsw/police-accused-of-brutality-in-potts-point-arrest-filmed-and-posted-on-facebook-20141204-11zug3.html; Hayden Cooper, 'Sydney mother to take legal action against NSW Police for daughter Melissa Dunn's wrongful arrest', *ABC News* (24 March 2015) http://www.abc.net.au/news/2015-03-24/sydney-mother-launches-legal-action-against-nsw-police/6345392

75 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 115

76 Ian Loader, 'Policing, Recognition, and Belonging' (2006) 605 *Annals of the American Academy of Political Science* 202, 206; Martin Innes, 'Reinventing Tradition?: Reassurance, Neighborhood Security and Policing' (2004) 4(2) *Criminology & Criminal Justice* 151, 162.

77 Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Cambridge: Polity, 1985)

78 Tom Raue, 'My wonderful day', *Honi Soit* (15 May 2013) http://honisoit.com/2013/05/my-wonderful-day/

79 Loader, 'Policing, Recognition, and Belonging', 204, 206.

80 Valverde, 'Police, Sovereignty, and Law', 26.

81 Dubber, *The Police Power*, 180.

82 *Summary Offences Act 1988* (NSW) ss 22-27.

83 Lucia Zedner, 'Pre-Crime and Post-Criminology?' (2007) 11(2) *Theoretical Criminology* 261

84 Barbara Hudson, *Justice in the Risk Society: Challenging and Re-affirming 'Justice' in Late Modernity* (Sage Publications, 2003), 43.

85 Dubber and Valverde, 'Introduction', 4; Markus D. Dubber, *The Police Power,* 195-198

86 *Summary Offences Act 1988* (NSW) ss 23, 26.

87 *Summary Offences Act 1988* (NSW) s 24.

88 *Commissioner of Police v Jackson* [2015] NSWSC 96 [74]-[75] (Schmidt J)

89 *Commissioner of Police v Bainbridge* [2007] NSWSC 1015 [19] (Adams J)

Moreover, political participation and dissent itself is judged through a reductive lens of safety. This year's TJ Hickey rally sought maximum publicity to promote 'the pursuit of justice for TJ Hickey and… [others] who have died in custody.' Schmidt J called their desire 'understandable', but considered it to be one 'likely to attract the participation of those marchers who had caused considerable problems' during previous marches.[90] Transgressions at the prior year's rally, including that protesters stopped 'at agreed locations for excessive times', 'used offensive language', and did not 'provide identified marshals to assist police' were considered factors tending toward prohibition this year.[91] In the eyes of the court, the fact that people were fervent in political campaigns was precisely the reason why they should not be approved. These administrative law cases demonstrate how security is prioritised above political speech as the government aims to remove all forms of risk.[92]

Whilst a protest can still go ahead if the proposal is rejected, the protesters open themselves up to liability.[93] This decision has further consequences; dicta suggest that if approval is rejected the organiser might not be able to participate.[94] Court approval is seen to have a legitimising effect; it gives the organisers credibility and police are likely to be less confrontational. In this way, the courts and police act to discourage dissent if it interrupts the ordinary processes of life no matter how trivial. They prioritise activities such as the entry of a truck carrying beverages[95] or the traffic from Saturday morning sport[96] over the political message being communicated.

Two points must be noted. Firstly, 'risk' here is understood broadly. It goes beyond causing actual injury or damage to merely interrupting the status quo. At the Glenugie blockade, the police spokesperson considered physical safety amongst other practical considerations of the modern industrious routine. They said arrests were justified when a protest 'obstructs traffic, interferes with people's safety, and hinders their work.'[97] The Supreme Court of NSW held that protests must not cause 'injury to persons or property' or 'interfere with the undertaking by other citizens of lawful conduct.'[98] Secondly, the status quo is taken as the ideal situation and any lawful conduct is therefore deemed worthy of protection. The Saturday morning traffic is presumed to be not just harmless, but inherently valuable. Police and courts alike consider any sort of interruption to it as a harm that militates against the approval of a protest, or justifies police intervention on the day.

Considering the 'harm principle',[99] I contend that its current formulation in this context fails to grapple with the complexity of harm that protests try to raise. The reductive risk analysis carried out by courts does consider the subject matter of the protest, but crucially, only evaluates the amount of support there might be for the issue in the local community.[100] It does not consider the *level of harm* that is identified in the status quo and being protested against. Courts do not include the harm and risk associated with the Iraq War or coal seam gas in their risk assessment. These harms are considered too remote, temporally or geographically, and impossible to quantify. Therefore, decision makers do not consider potential benefits that could flow from a protest occurring.

Even if they tried, it would be difficult to measure the damage of an unjust law or power in the status quo; for their harms 'tend to be done in bits and pieces, extended over space and time, and parcelled out among numerous agents whose connection with one another are austerely institutional or bureaucratic.'[101] A protester standing on the road and blocking traffic is less harmful than many acts of violence carried out by the state, but much easier to identify, categorise, and stop. Nor do they seem to consider the harms of deploying a full paramilitary force to peaceful protests; police embody sovereignty, so they are seen as neutral arbiters of 'public safety'. In this way, the courts endorse an amorphous police power to minimise any and all risk. This protects the status quo and restricts the ways that protesters can challenge perceived injustices. Ultimately, it protects the current form of governmentality.

Conclusion

The way protest is policed exposes a police power that sits above the law. Its power is aggressive and highly discretionary. The criminal law is just one of its many tools to discourage disruption in the status quo. It is both arbitrary and calculative, democratic and despotic. The way it privileges certain interests over dissent rebuts orthodox ideas about community-minded policing by consent. The state can still govern through older, illiberal constructions of police power. Recognising that police power sits outside

90 *Commissioner of Police v Jackson* [2015] NSWSC 96 [70] (Schmidt J)

91 *Commissioner of Police v Jackson* [2015] NSWSC 96 [43] (Schmidt J)

92 Hudson, *Justice in the Risk Society*, 43.

93 *Summary Offences Act 1988* (NSW) s 25.

94 *Commissioner of Police v Bainbridge* [2007] NSWSC 1015 [17] (Adams J)

95 Nour Dados, 'Violence on the Picket Line', *New Matilda* (2 April 2013) https://newmatilda.com/2013/04/02/violence-picket-line

96 *Commissioner of Police v Jackson* [2015] NSWSC 96 [74] (Schmidt J)

97 'LIVE: Police at Glenugie blockade as drill rig moves in', *The Daily Examiner* (7 January 2013) http://www.dailyexaminer.com.au/news/police-at-glenugie-blockade-as-drill-rig-moves-in/1707693/

98 *New South Wales Commissioner of Police v Bainbridge* [2007] NSWSC 101 [16] (Adams J)

99 Douglas Husak, 'Paternalism and Autonomy' (1981) 10 *Philosophy & Public Affairs* 27

100 *Commissioner of Police v Bainbridge* [2007] NSWSC 1015 [1], [3] (Adams J)

101 Austin Sarat and Thomas R. Kearns 'A Journey Through Forgetting: Toward a Jurisprudence of Violence' in Austin Sarat and Thomas R. Kearns, eds., *The Fate of Law* (University of Michigan Press, 1991) 212

the criminal law has important ramifications for how we should think about reform. If police power is unconstrained by the laws of the criminal justice system, for example, then legislation is likely to be be impotent in the face of this residual executive power.

In the eighteenth century Blackstone wrote, 'individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.'[102] Orthodox ideas about modern policing would reject that 'industriousness' has any role in the criminal justice system. However, the past decade of policing protest shows how the industriousness of the status quo is privileged above the need to voice dissent. As a paramilitary force deployed to intimidate dissenters, PORS is ensuring that Blackstone's statement still rings true today ●

102 William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon, 1769) 163

06

Consorting: A Warning from History

Richard Schonell

The *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW), which made habitually consorting with individuals convicted of an indictable offence punishable by up to three years in gaol, was swiftly criticised by concerned members of the legal community and the commentariat. The common thread shared by these arguments was that the legislation offended the basic principle that conduct, and not identity or association, is the only legitimate basis for assigning criminal liability.

Given the nature and extent of this backlash, you could be forgiven for thinking that the 2012 amendment represented a dark new turn in the evolution of the criminal law. However, unlike a number of other express attempts to stymie the perceived and largely confected threat posed by bikies and drive-by shootings, there was nothing novel about the (re)emergence of consorting. In fact, for close to two hundred years now, and arguably for many more, successive governments have repackaged and reformulated the offence to suit a variety of essentially interchangeable tough on crime campaigns.

With the notable exception of Chris Berg's July 2012 article in *The Drum*, this inconvenient but significant fact was lost in the rush to condemn, with the offence's rich history reduced to a passing sentence or buried footnote.[1] Instead, the bulk of the commentary focused narrowly, but quite understandably, on the legislation's obvious deficiencies.

This article aims to correct the record by reacquainting the reader with consorting's colourful and didactic past. From the high tower of history we can see that consorting has repeatedly been invoked to punitively and unfairly criminalise historically contingent groups for the sake of political gain and the placation of misplaced public anxiety. The fact that we can now look back and agree that these past injustices were a mistake sheds light on the undesirable state of the contemporary laws, and begs the question: what distinguishes the laws of 1835 from the laws of 2012?

The inescapable conclusion: very little.

The Offence

In March 2012, the O'Farrell Government revived consorting as part of its emotively marketed 'war on shootings.'[2] The *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW) makes it an offence under section 93X of the Act to habitually consort with two or more convicted offenders after being warned by a police officer that they are convicted offenders, and that consorting constitutes an offence.[3] This amendment also broadened the punitive scope of the pre-existing offence, increasing the maximum prison term from six months to three years, and the maximum fine from $440 to $16,500.[4] In addition to formally criminalising unlawful associations, section 93X also functions as a broad discretionary police power used officially for deterrence and intelligence gathering purposes, and, as Alex

1 Chirs Berg, 'Freedom of association lost in the moral panic', *The Drum* (online), 11 July 2012 <http://www.abc.net.au/news/2012-07-11/berg-consorting-laws/4121592>

2 The Hon Barry O'Farrell MP, *Media release: New laws to tackle drive-by shootings*, 13 February 2012.

3 *Crimes Act 1900* (NSW) s 93X.

4 Ibid.

Steel establishes in his critique, unofficially to harass the vulnerable.[5]

The ostensible purpose of this legislation was to curb drive-by shootings. Media attention in the lead up to the amendment focused sharply on these crimes, with, for the most part, bikies being blamed for their occurrence. In that period, daily tabloids were typically emblazoned with dramatic headlines accompanied by full page (and full colour) breakdowns of what occurred, who was responsible and what needed to be done.[6] This reportage fed into and encouraged the growing fear that a 'shooting war' between bikies, Middle Eastern crime gangs and other organised criminal elements had broken out, and that the police had lost control of Sydney's streets.[7] On the basis of this widely held belief, the imperative for an urgent government response formed.

Predictably, this anxiety was out of all proportion to the actual threat posed to the public. As is now commonly acknowledged, bikie related crimes constitute only one per cent of all crimes committed nationally.[8] Momentarily suspending the hysteria in favour of statistical analysis similarly debunks the notional threat of drive-by shootings. While the rate of offending had increased markedly over the preceding ten year period, the incidence of these crimes had in fact declined since peaking at the end of 2008.[9] Indeed, crime rates for all major categories of offence except sexual assaults were down and had been for close to twenty years when the O'Farrell Government introduced the impugned bill.[10]

It is therefore necessary to understand the way this perception was encouraged, refracted and reproduced in order to fully account for the O'Farrell government's legislative response. On reflection, 2012's revival of consorting spoke more loudly of the conflation of shock jock agitation, the law and order auction encouraged by the Labor Opposition, sensationalised media reporting, the semiotic construction of the bikie in popular culture and fear in the suburbs, than a relatively significant but factually negligible increase in drive-by shootings in Western Sydney.

An Inglorious History

In short, the *Crimes Amendment (Consorting and Organised Crimes) Act 2012* was not a product of considered research and reflection; rather, it was part of a hastily prepared populist response to the moral panic engendered by a largely contrived criminal threat. What is perhaps most striking about this pattern is the extent to which it mirrored the emergence and evolution of earlier permutations of the offence.

While it has been contended that consorting has medieval origins,[11] the enactment of the *Vagrancy Act of 1835* (NSW) represents the most tangible foundation on which to begin a discussion of the evolution of the offence.[12] Among other things, the *Vagrancy Ac*t made it an offence for 'rogues, vagabonds and incorrigible rouges' to associate with Indigenous Australians and/or be found in a house occupied by an individual with an unascertained means of income. Like the modern law, this legislation attacked the socially undesirable by targeting the company they keep. It was also precipitated by a similarly dubious moral panic. As a penal colony, the question of maintaining order amongst the purportedly biologically predisposed 'criminal class' and guarding against the inchoate criminality of ticket of leave holders was given added impetus by the growing number of free settlers who demanded the legal protection of their property and person. This challenge was regarded by lawmakers as uniquely Australasian, and it is unsurprising that the offence, even to this day, has only ever emerged in the ex-penal colonies of Australia and New Zealand.[13]

This early version of the offence was eventually modernised by the *Vagrancy Act 1902*, which was amended in 1929 to make it an offence to 'habitually consort with reputed criminals, known prostitutes or persons who have been convicted of having no visible means of support.'[14] This amendment provides a particularly vivid insight into interwar Sydney; a time and place that was hit hard by the Great Depression and First World War, and is now synonymous with inner-city crime, the famous rift between mesdames Kate Leigh and Tilly Devine and the city's notorious 'Razor Gangs.'

The *Vagrancy (Amendment) Act 1929* was aimed squarely at dismantling these gangs. By imposing severe penalties for carrying concealed firearms, the *Pistol Licensing Act 1927* (NSW) unintentionally drove criminals to appropriate the otherwise innocuous cutthroat razor as their weapon of choice.[15] It is estimated that between 1927 and 1930, over five hundred razor attacks occurred in the course of battle for control of the city's cocaine, prostitution and illegal gambling racquets, a figure which captured the public's imagination due to the high numbers of victims and the skin-crawling, uniquely primal fear the cutthroat razor inspired.[16]

With characteristic timelessness, the media inflated the actual threat posed by the Razor Gangs, which ensued an urgent law and order response. All of the major tabloids were implicated in this sensationalism, but none more so than the *Truth*. As Steel points out, the weekly rag stoked public consternation by running a series of successively alarmist jeremiads under headlines such as 'The Razor Gang: Terrorists of Darlinghurst Underworld: Slashed and Disfigured Victims', 'Wipe Out Gang Terrorism' and 'Sweep the Gangsters from Sydney's Streets.'[17] Just as before, and as a presage to what was to come, the government kowtowed to this pressure, and legislation that cast an indiscriminately wide net of criminal liability was passed.

Forty years later, consorting was again modified by the *Summary Offences Act 1970* (NSW), which established conviction as the basis of assigning criminal liability by association. Despite the outwardly neutral construction of the offence, this legislation similarly targeted a specific criminal threat.[18] By the beginning of the 1970s, fear of the heroin glut had infiltrated the middle class.[19] Once again the government responded to this fear by launching a crackdown on drug users, with consorting updated as a tranche in Australia's war on drugs.

Unintended Consequences?

The most important thing to be gained from this discussion is that consorting has a serious and troubled form. Time and time again, and for close to two hundred years now, the offence has been modified by successive governments to give off the impression that it is responsive to community concerns, despite, or in spite of, flimsy foundations and unintended consequences. This history is inherently patterned, and defined by the ageless translation of middle class concern into public policy via populist and largely unprincipled democratic politics.

Consorting could be rendered more palatable if construed narrowly. Problematically though, the High Court has continuously rejected a purposive construction of the offence, which means that many individuals who were not considered in the drafting of the legislation have fallen foul of its strict application.[20]

This is because each successive offence has failed to furnish sufficient judicial discretion to mitigate its harshness or contain the categories of defendant it can be used against. In the 1933 case *Auld v Purdy*, for instance, Street J convicted a woman with no association with Razor Gangs on the basis that she had consorted with a 'known prostitute' – her housemate.[21] In 2012 the intellectually disabled 21 year old Charlie Foster, who can neither read nor write and has no connection to any outlaw motorcycle gangs, was charged with consorting while shopping with his housemates far from the Western suburbs of Sydney in Inverell.[22] In relation to the same version of the offence, the homeless defendant in *R v B* was convicted after consorting with other homeless individuals in an 'area where homeless people hang out.'[23] In its review of the use of consorting laws between 2012 and 2013, the NSW Ombudsman alarmingly found that of the 1,260 individuals issued with official warnings by police in the relevant period, forty per cent were of Indigenous background, the majority of which lived in rural and regional areas, and twenty-five per cent had not been convicted of an indictable offence in the preceding fifteen years.[24]

The concern with the attachment of criminal liability to association therefore appears justified. It is demonstrably the case that many otherwise innocent defendants have been convicted of the offence because of identity or circumstance. On this basis, as King CJ queried in *Jan v Fingleton*, the offence lacks both wisdom and justice.[25]

Conclusions

It is often pithily observed that the criminal law is a reflection of the society it governs. Consorting is an offence that neatly encapsulates this point; at various points in time, the offence has been modernised to reflect the concerns and anxieties of the day. Fortunately, the assumptions and suppositions that supported the establishment of the offence in 1835 retired long ago. We no longer fear the 'born criminal' and the 'criminal class', and we no longer condone, at least in principle, legislation that tramples on civil rights

5 Alex Steel, (2003) 'Consorting in New South Wales: Substantive Offence or Police Power?' 26(3) *University of New South Wales Law Journal* 597.

6 See for instance, Kara Lawrence, 'Bikie War', *The Daily Telegraph* (online) 23 March 2009 <http://www.dailytelegraph.com.au/sydney-bikie-war-victim-named/story-e6freuy9-1225698321089>

7 Nicholas Cowdery, (2012) 'Criminal Justice in New South Wales under the new State Government' 23(3) *Current Issues in Criminal Justice* 447.

8 Australian Crime Commission, Outlaw Motorcycle Gangs Crime Profile Fact Sheet, <www.crimecommission.gov.au/publications/intelligence-products/crime-profile-fact-sheets/outlaw-motorcylce-gangs>

9 NSWPD, (Hansard), Legislative Council, 8 March 2012. Full transcript available at: http://davidshoebridge.org.au/2012/03/08/crimes-amendment-consorting-and-organised-crime-bill-2012/

10 Derek Goh & Stephanie Ramsey, *An update of long-term trends in property and violent crime in New South Wales: 1990-2014*, Bureau of Crime Research and Statistics, Issue paper no.104, April 2015.

11 Andrew McLeod, (2013) 'On the origins of consorting Laws' 37(1) *Melbourne University Law Review* 103.

12 *Vagrancy Act of 1835* (NSW).

13 David Brown, David Farrier, Luke McNamara, Alex Steel, Michael Grewcock, Julia Quilter & Melanie Schwartz, *Criminal Laws: Material and Commentary on the Criminal Law and Processes of NSW* (Federation Press, 6th ed, 2015)

14 *Vagrancy (Amendment) Act 1929* (NSW).

15 *Pistol Licensing Act 1927* (NSW).

16 Larry Writer, *Razor: A true story of slashers, gangsters, prostitutes and sly grog*, (Pan Macmillan, 2001).

17 Ibid, Steel, p. 582-3.

18 *Summary Offences Act 1970* (NSW).

19 Ibid; Steel, above n, 576.

20 See *Johanson v Dixon* [1979] HCA 23*; Jan v Fingleton* (1983) 9 A Crim 9 293*; Taijour v NSW; Hawthorne v NSW; Forster v NSW* [2014] HCA 35.

21 *Auld v Purdy* (1933) 50 WN (NSW).

22 Sean Rubinsztein-Dunlop, 'Disabled man's jailing angers consorting law critics', *ABC News* (online), 12 November 2012 <http://www.abc.net.au/news/2012-07-12/disabled-mans-jailing-angers-consorting-law-critics/4127194>

23 *R v John O'Brien* (unreported, Manly Local Court, Magistrate Brydon, 7 November 2012).

24 NSW Ombudsman, *Consorting Issues Paper - Review of the use of the consorting provisions by the NSW Police Force*, November 2013.

25 Jan v Fingleton (1983) 32 SASR 379 (1983) 9 A Crim 9 293 at 380.

and discriminates against individuals on the basis of the life they were born into. However, what does remain is the ageless fear of crime and powerful voices willing to exploit it. If we are to avoid the mistakes of the past, it is incumbent upon us to exercise caution in determining how we respond to new criminal threats. Anything less constitutes a failure to learn from history, which is the refrain of the intellectually retrograde.

It is unfortunate that this point was mostly lost in the commentary surrounding the recent revival of the offence. A brief introduction to consorting's history provides a number of compelling reasons to not only avoid modernising the offence, but repeal it altogether.

Charlie Foster, the previously mentioned intellectually disabled individual convicted under the recent legislation, eventually became one of the defendants in the unsuccessful 2014 High Court appeal in *Taijour v NSW* against section 93X.[26] In that appeal, the main argument employed was that the offence impinges the implied freedom of political communication. By seven to one, the High Court held that consorting was appropriate and adapted to serve a legitimate purpose, and consequentially that the law was valid. *Taijour* therefore built on earlier precedent to clarify that consorting will not be defeated as a matter of legal principle; rather, as Stephen J put it in *Johanson v Dixon*, 'it is for Parliament to decide whether that change should be made.'[27]

If the history of consorting reveals anything thing, it is that this decision is unlikely to be made any time soon, and that the knee-jerk nostrums of the elected will continue to criminalise, suppress and unfairly harm the marginalised and vulnerable ●

26 NSW Ombudsman, *Consorting Issues Paper - Review of the use of the consorting provisions by the NSW Police Force*, November 2013; *Taijour v NSW*.

27 Ibid, *Johanson v Dixon*.

07

Disability, Illness and the Aspirational Autonomous Legal Subject

Interrogating Permanence, temporality and discretion in NSW incapacity interventions

Alison Whittaker

Distinctions between the incapacities arising from disability and illness rely on critical divisions in conceptual and legal time. The supposition of illness as temporal, and conversely, of disability as permanent, impact the assessment of ill and disabled legal subjects and their capacity at law. Such assumptions have significant consequence for these legal subjects when their capacity is intervened upon by a general category of legislation, including the *Guardianship Act 1987* (NSW) ("GA") and the *Mental Health Act 2007* (NSW) ("MHA"), described here as *incapacity interventions*. Similarly reflecting upon disordered incapacity and normative incapacity, provides a comparative framework through understanding a generic legal person which, though temporarily incapable, acts as an intermediary between current binary and future-focused understandings of capacity.

Permanence of some interventions, and long-term fluctuating interventions, are applied by unhelpfully broad, and functionally-limited, legislative assessments of capacity, which arise from illness and disability, rather than any assessment of time- and context-specific decision-making. This legislative focus has been narrowed by assessing capacity in terms of decision-making processes, rather than in disabled or ill status, or undesirable or unreasonable outcomes of decisions.

Could this be a symptom of the continual push through the law towards liberal autonomy, and a push to recover the liberal subject's capacity where possible (for instance, in illness), or to mitigate visibility and impact of decisions made by disabled persons it imagines to be permanently incapable? Could it instead be an artefact of the reference back to the average or aspirational reasonable legal subject, and reflect a legal reluctance to properly consider non-autonomous, or partially-incapable subjects?

Illness and disability

Comparisons between illness and disability are complicated by illness' conceptual vagueness. Whilst the World Health Organisation has provided definitions of disability, howsoever clinical and granting only small concessions to social understandings of disability, little such clarity has been given to the definition of illness. In the absence of a sturdy clinical framework, medical ethics and medico-philosophical schools provide some insight into socio-medical models of illness. Similar to the impairment/disability relationship put forward by disability studies, Jennings[1] posits that illness is the "experience [of] suffering[2]," related to, but distinguished from, a state of the mind and body, or disease.

Emson instead hints that illness becomes disease only when a physical process is detected. This definition is undermined by psychiatric or mental illnesses with no detectable organic cause. Few would have difficulty asserting that such illnesses had a cause that could not be described as a physical disease in absolutely every instance, be it social or neurological in origin. Fewer still would have difficulty

1 D Jennings, 'The confusion between disease and illness in clinical medicine' (1986) 135(1) *Canadian Medical Association Journal* 865

2 D Jennings, 'The confusion between disease and illness in clinical medicine' (1986) 135(1) Canadian Medical Association Journal 865, 866.

asserting that a mental illness is an "experiencing" that is dependent on different external and psychosocial factors. It is similarly undermined by mental illnesses that cause, rather than are caused by, debilitating and detectable physical suffering[3].

This is a question which cannot be answered in this short space, but flavours the definitions of mental illness, where it is tempting to ignore the body, but where embodied and psychological experiences of time are critical to understanding distinctions in incapacity interventions.

For the sake of this article, Jennings' distinction will be assumed, where disease and illness are distinguished by "experienced suffering", but where disease does not necessarily have an organic or physical origin. "One can be seriously diseased without being ill…[and] be seriously ill without being diseased."[4]

Whilst physical/mental and disability/illness dichotomies are unhelpfully and artificially distinguished, for the sake of limiting the scope of this article, only mental illness, intellectual disabilities and their conceptual relative, disorder, will be considered as comparative grounds for decision-making incapacities.

Whether disability and illness are related by their impact, or by the relationship of disease/illness to impairment/disability, is for some contestation. Contemporary bodies of thought have suggested contemplating illness as part of the broader discourse of social disablement. The distinction of disease and illness by "experienced suffering" is critical in distinguishing illness from disability, which has generally rejected the equivalence of disability to suffering.

Despite their compelling similarity, it is clear in the law's current application, that illness and disability are distinct with regards to decision-making interventions.

Time: an experiential conduit for illness, disability and the imagined able subject

This distinction is clarified by an analysis of the socialisation of time around disability and illness. Illness is treated as temporal (regardless of biomedical status); an event which imposes upon the body in reference to a past or able self, rather than the body itself. Disability, however, is conceptualised as a permanently corrupted body,[5] with scant reference to a past self, except when disability is acquired by injury. Distinctions made by time between illness and disability rely on reference to past and future manifestations of self and the body, and with reference to an imagined able subject, regardless of whether that subject was present.

The relationship of time to illness refers back to "experienced suffering", in which "[t]ime is the medium through which illness is experienced…in order to understand the progression of the illness, the **permanency** of chronic illness or the **terminal** nature of the condition."[6] Illness is a process of becoming, distinguishing current physical or mental states from those preceding.

Time's integral relationship to mental illness and capacity was briefly explored by White J in *Re J*[7]. J had been prone to episodes of mania, and had recently become terminally ill and received pay-outs as a result totalling $700,000. These circumstances provoked questions regarding the relationship of J's mental illness to his financial incapacity. Despite making no binding assessment of J's capacity (the decision to release J was based on whether 'serious harm' could include serious financial harm), White J stated that J's reckless spending was characteristic of typical behaviour in the circumstances. Many would exhibit such lack of financial restraint when endowed such a volume of money, and the knowledge of a terminal illness.

Terminal limitation of physical illness prompts the normalisation of behaviour which would otherwise typically have prompted intervention or rendered the subject legally incapable. Exploring the suffering of illness through the framework of terminality, prompts a more time-specific, sensitive and subject-oriented outcome, which, intersecting with J's mental illness, seems to distinguish legal perceptions of illness (conceptualised socially as a fluctuating or temporal incapacity) from disorder (irrational incapacity prompted by circumstance).

Critically, disability, related to day-to-day enduring disruptions in a process of "re-embedding time into corporeal practices",[8] diverges from the broader relationship illness has with time, which is concerned with long and medium-term progression from "health" and toward "recovery."

This is evidenced in guardianship and involuntary admission law, where long-term guardianship for persons with mental illnesses is demonstrably infrequent,[9] but management and recovery intervention mechanisms which affect legal capacity and decision-making are plentiful,[10] and frequently utilised.[11] Applications on grounds of mental illness to the NSW Guardianship Tribunal in 2012/2013 comprised only 9.3% of all cases,[12] ranking just above applications on grounds of stroke.[13] However, applications on grounds where mental illness co-existed with intellectual disability in a person comprised 18.9%.[14]

This may be explained by the variety of non-guardian legal interventions available to be exercised over persons with mental illnesses.

Guardianship, a comparatively enduring intervention, is exercised when its subject's incapacity is viewed as worthy of day-to-day management, with the purpose of "re-embedding time into corporeal practice." Whilst the GA provides temporary guardianship measures, these are not as frequently applied and are often renewed continually so to effectively be enduring guardianship orders. Promisingly, most guardianship orders undergo variation after a statutory or tribunal-ordered review.[15]

These modifications, however, are framed as limitations or expansions on the exercise of the guardian's decision-making with regards to the disabled subject in the *GA*, rather than the comparative recognition of the ill or disordered subject's capacity which may be available through community treatment orders ("CTO") in the *MHA*.[16]

Assessing Capacity

Legislative design may read enduring incapacity into subjects who have partial capacity, fluctuating capacity or only time- and decision-specific incapacities. Assessment may be only triggered by events occurring when a person is at their least capable, and the assessment made at that point may be inaccurate and leave room for minimal procedural engagement.

Illness and disability arise in "incapacity" by three branches of incapacity assessments:

1. **Status:** through being disabled or ill;
2. **Process:** through discreet, ongoing or fluctuating limitations to participate in decision-making processes;
3. **Outcome:** making atypical, uncharacteristic or reckless decisions.

These reflect three different relationships between incapacity and time respectively:

1. Permanence or long-term decline from a past capacity;
2. Incapacity in the immediate and contained present;
3. Past and future orientation, normativity and incapacity to intellectualise or plan for the future.

Interventions in the MHA are available through a higher assessment of risk of harm,[17] rather than the GA's requirement of the existence of some category of disability, and restriction…to the extent that [supervision] is required.[18]

The GA relies on assessments of **status**, whereas the MHA relies on an assessment of **outcome**, or *risk* of harmful outcome. Both result in the legal loss of capacity. Importantly, neither require an explicit assessment of capacity.

Process assessments of capacity are not unheard of throughout Australian law, but are of universal application and design, and are not generally applied in capacity intervention laws.

Process-Orientation: Able Incapacity

In this essay, 'normative incapacity' refers to incapacities which are not based in illness, disability or disorder. Whilst all incapacity arguably falls outside of the range of the norm of the liberal legal subject, 'normative incapacity' receives restorative and generally non-interventionary treatment before the law.

Normative incapacity is not beyond legal imagining or application; it is scattered throughout Australian common law. These interventions are heavily oriented towards remedies for abuses of normative incapacities, and similarly position a questionably capable legal subject in a litigative framework, rather than as the subject of inquiry.[19]

Normative and temporary fluctuations in capacity are mediated by reactive areas of law. Areas such as contract law permit considerations of reduced or entirely limited capacity, such as intoxication, undue influence, duress and age. These focuses allow for recovery or voiding of contracts, and provide potential remedy, rather than projected restriction of substituted decision-making.

Most importantly, normative incapacity grounds

3 C Wakefield "The concept of mental disorder: on the boundary between biological facts and social values." (1992) 47(3) American Psychologist 373.
4 D Jennings, 'The confusion between disease and illness in clinical medicine' (1986) 135(1) *Canadian Medical Association Journal* 865, 869.
5 W Kennedy, 'Permanent Disability: The Legacy of Tort Litigation' (1997) 336(1) *Clinical Orthopaedics and Related Research,* 67.
6 W Seymour, 'Time and the Body: Re-embodying Time in Disability ' (2002) 9(3) *Journal of Occupational Science* 132, 137.
7 *(No 2)* [2011] NSWSC 1224.
8 J Roth, *Timetables: structuring the passage of time in hospital treatment and other careers* (Bobbs Merrill, 1963)
9 T Carney, 'Australian Mental Health Tribunals - "Space" for rights, protection, treatment and governance?' (2012) 35(1)
10 M Allen , 'Why Specific Legislation for the Mentally Ill?' (2005) 30(3) *Alternative Law Journal* 103
11 D Howard, 'Mental Health Review Tribunal Annual Report' (Annual Report 2012/2013, NSW Mental Health Review Tribunal, October 2013), Table 1.
12 M Schyvens, '24 Years – Empowering and Protecting' (Annual Report 2012/2013, Guardianship Tribunal, 14 October 2013) Graph 4.
13 Ibid.
14 Ibid.
15 Ibid, Table 6.
16 *Mental Health Act 2007* (NSW) s51.
17 *Mental Health Act 2007* (NSW), s14(1).
18 *Guardianship Act 1987* (NSW) s3(2).
19 E Bant, 'Incapacity, Non Est Factum and Unjust Enrichment' (2009) 33 *Melbourne University Law Review* 368.

decision-making at the time of its execution, and examines the **process** by which decision-making occurred,[20] bad faith exploitation of incapacity, and capacity to understand the nature and intricacies of the immediate context. As recoverable actions, they are less reflectively oriented towards assessments of past, capable decision-making than they are oriented towards assessments of exploitative awareness of a person's decision-making capability.

In many ways, the deliberate links between context, the legal person and incapacity made in normative incapacity are a simpler assessment than those afforded to incapacity interventions. In a purely conceptual sense, these incapacities appear more extensively debilitating, where a subject may not even understand the act of signing a contract.

Despite this seeming debilitation, normative incapacities which, for instance, may render contracts voidable, attract no binding and continuing interventions from courts, unless subsequently and separately referred to a Tribunal under disabled, ill or disordered incapacity.

Two arguments may be offered in reaction this; that the capacity to sign contracts while intoxicated is significantly different to the capacity to sign contracts while manic or intellectually impaired, and; that the circumstantial incapacity of contract-signers is contained within that instance, and therefore restrictive preventative interventions are unjustifiable.

The former is a question of causation; the latter is a question of compartmentalising time in relation to incapacity, and capacity's dichotomous legal design.

These questions link to divisions through time relating to the "external" (contextual) and the "internal" (subject-based).

The externalisation of brief or normative losses of capacity, as one of circumstance or context, is a distinct treatment to the status, outcome or internalization assumed of ill or disabled incapacities.

The experiencing of illness or embodying of disability are viewed to be more permanent, or more distinguished from the healthy self or average, so as to be more extensively corrupted by incapacity. Normative incapacity is generally intervened upon retrospectively as a restorative measure, whereas disabled or ill incapacity is intervened upon as preventative measures balanced by reliance and risk.

Causation: linking time and body to intervention

20 *Imperial Loan Co. v. Stone* [1892] 1 QB 599

Where legislative interventions on ill or disabled incapacities apply, they are subject to the requirement of some causative link. This is not a damage-based causative link as with civil or criminal law, but a status- or process-based link which connects incapacity to a ill, disordered or disabled state.

For instance, the *GA* reads;

"person in need of a guardian" means a person who, **because of a disability**, is totally or partially incapable of managing his or her person.[21]

And;

"(2) …a person who has a disability is…a person:

(a) who is intellectually, physically, psychologically or sensorily disabled…

(c) who is a mentally ill person within the meaning of the *[MHA]*…

and who, **by virtue of that fact**, is restricted…to such an extent that he or she requires supervision or social habilitation."[22]

The *MHA* reads;

"(1) A person is a mentally ill person if the person is suffering from mental illness and, **owing to that illness**, there are reasonable grounds for believing that care, treatment or control of the person is necessary:

(a) for the person's own protection from serious harm, or

(b) for the protection of others from serious harm.

(2) In considering [above] the **continuing** condition of the person, including any likely **deterioration** in the person's condition…[is] to be taken into account."[23]

And;

"A person…is a mentally disordered person if the person's behaviour **for the time being** is so irrational as to justify… **temporary** care, treatment or control of the person…:

(a) for the person's own protection from serious **physical** harm, or

(b) for the protection of others from serious **physical** harm."[24]

21 *Guardianship Act 1987* (NSW), s3(1).
22 *Guardianship Act 1987*(NSW) s3(2)
23 *Mental Health Act 2007* (NSW) s14.
24 *Mental Health Act 2007* (NSW) s15.

The discussion returns to Re J. In a contemporary questioning of the intersection between the GA, and s14 and s15 of the MHA, White J critically examined J's reactions to the circumstances and suggested, that in the face of terminal illness, and with such substantial funds to spend in such a limited time, that J's reaction seemed similar to that of a capable person.

If this formed the issue of the case, such a finding of the cause of the "risk of serious harm" through spontaneous, self-oriented spending to be not arising in a mental illness, but in confrontation with the inevitability of death, could be sufficient to sever the link connecting J's illness to the reasonable grounds for his detainment, and from an outcome of legal incapacity.

What of guardianship or disordered interventions? Whilst J's behaviour instead could be understood to be a mental disorder, the scope of s15 extends only to *physical harm*. J's terminality conceptually foreclosed the requirement of his long-term ability to manage finance;[25] there was no long term of which to speak.

This is telling of incapacity interventions' legislative and judicial reflection on impermanence, where causal links may theoretically be severed through recognising temporality or urgent, time-sensitive policy restrictions to interventions upon ill or disabled decision-making, where such incapacity is closely relational in terms of its outcome to the decision of a reasonable, capable legal subject.[26]

Queensland is the only Australian jurisdiction to remove such a causal link.[27] In its final report on guardianship, the Victorian Law Reform Commission recommended against severing the causal link, asserting that it prevents guardianship laws being utilised against persons with "behavioural problems" (closely equivalent to NSW's 'mental-disorder' category).[28]

In recommending the continuation of this link, the VLRC comments on some friction between the legal construct of capacity and any broadly-accepted medical or psychiatric reality.

> "Capacity is a legal construct ultimately determined by [non-objective] professional judgement…[So] that findings of incapacity are not made because of the subjective views about the quality of particular decisions…part of the assessment process [must] rely upon objective, verifiable grounds. This would occur if a link between 'disability [and illness]' and 'incapacity' was maintained."[29]

It is likely that differing institutional structures provide some context to Victoria and Queensland's positions on causation, particularly given significant expansions in Supreme Court specialist listings in Queensland during the past decade, which allow for specialised judicial hearings, assisted by clinicians and community members.[30] This structure allows for specialist input on professional judgment without the need for "verifiable" and clinical "grounds."

Whilst the causal link does provide some clarity to decision-makers, particularly where decisions-makers include lawyers, community members and clinicians, it is difficult to assert that, because of subjectivity in their judgment, decision-makers should instead refer to 'objective' clinical judgment as verifiable grounds. This objectivity is questionable in three ways. Firstly, by refuting the perspectivelessness of clinicians in making assessments of disability or illness itself, particularly given the tendency of clinicians to attribute more suffering and powerlessness to disabled persons than the person themselves may.[31]

Secondly, the artificiality of legally-constructed capacity provides difficulty for clinicians to provide evidence within a legal framework which has little in common with requisite biomedical frameworks.

Thirdly, and pertaining particularly to NSW, the arbiter of mentally-ill status under the GA,[32] is the Mental Health Review Tribunal,[33] whose assessment is fraught with the same professional decision-making concerns as the Guardianship division of NCAT.

Citing concerns about overbearance of guardianship law onto all persons, Victoria Legal Aid expressed support for the causal connection. "It would mean that, regardless of the cause of a person's inability to make reasonable judgements, if they lacked capacity an administrator or guardian could be appointed…a far more liberal [application] than Parliament intended."[34]

Disability and mental illness peak bodies, contrarily, have called for universal design of capacity frameworks, not only to prevent the assessment of capacity based on assumptions of "status" in comparison to a past or imagined

25 *Re GHI (A protected person)* [2005] NSWSC 581, *EB v Guardianship Tribunal* [2011] NSWSC 767.
26 I Freckleton, 'Civil Commitment: Due Process, Procedural Fairness and the Quality of Decision-Making' (2001) 8(1) *Psychiatry, Psychology and the Law* 105.
27 *Guardianship and Administration Act 2000* (Queensland), sch 4.
28 Victorian Law Reform Commission, *Chapter 7: Capacity and Incapacity*, Guardianship Final Report No 24 (2010), recommendation 22.
29 Ibid, p. 114.
30 Mental Health Act 2000 (Qld), s63.
31 M Shildrick., 'Deciding on Death: Conventions and Contestations in the Context of Disability' (2008) 5(2) *Journal of Bioethical Inquiry* 209.
32 *Guardianship Act 1987* (NSW), s3(2)(c).
33 *Mental Health Act 2007* (NSW), s35.
34 Victoria Legal Aid, *Victorian Law Reform Commission Guardianship Final Report 24*, Submission No CP 73 (2010), 118.

able or sane subject,[35] but to permit the expansion of guardianship law to those who are laid vulnerable by fluctuating capacity which is not the result of illness or disability,[36] but of their "external" decision-making circumstances.

Normative, disordered, ill and disabled safeguards: institutional temporality and mediated permanence

The limited-application view expressed by Victorian Legal Aid is shared by incapacity interventions of most states. The extent to which the *MHA* seeks to exclude application to persons who are not disabled, mentally ill or disordered is demonstrated in legislative protections from assumptions of need or risk "merely"[37] based on:

- Sexual practice
- Political or religious belief
- Drug use
- Anti-social, illegal or immoral behaviour.

These provisions serve a worthy purpose of limiting the application of interventions brought in questions of public opinion rather than public interest. Their relationship to time and permanence is worth interrogating, particularly with relation to drug use.

The MHA states: "Nothing [in the above list] prevents…the **serious** or **permanent** physiological, biochemical or psychological effects of drug taking from being regarded as an indication that a person is suffering from mental illness or other condition of disability of mind."[38]

Such causal re-positioning of drug use as an account of assessing incapacity with regards to mental illness is concerned with the mediation of illness and the prevention of disability.[39] Though hospitalisation and protective custody are interventions available for physical protection in terms of short-term and non-disabling drug use,[40] these are not concerned exclusively with continuing protection or intervention, and offer no legal limitation of capacity.

Whilst mentally ill and mentally disordered persons are subject to arguably higher-impact interventions, including reduction of legal capacity through involuntary admission and treatment,[41] these interventions are subject to more rigorous accountability mechanisms enforcing their temporariness.

There are institutional measures to ensure gradual transition from mental illness and disorder towards legal capacity,[42] whilst restricting the ability to refuse treatment and move freely. The *GA* typically applies to those mentally-ill persons on CTOs,[43] as a lower threshold of non-detained management that is not focused on the risk of harm.

The legal distinction of disorder is significant here, as one that is more closely aligned to normative incapacity through its conceptualisation as an incidental incapacity.

Continuing emphasis on the temporary nature of care, and the higher standard of "serious physical harm" highlights the more rigorous assessment afforded to the temporal incapacity experienced by persons who are not presently ill or disabled. Interestingly, the equivalent section providing scope for assessment of mentally-ill persons allows the inclusion of assessments of future deterioration.[44] No such allowance for considering future risk or deterioration is permitted for assessment of a mentally disordered person. Mentally-disordered patients under the MHA may only be detained for three days,[45] unless such a patient can be reclassified as mentally ill. Section 15 is better described as a protective measure for individual and community safety, rather than any purposeful removal of legal capacity.

Problematising (in)capacity

Where incapacity is not explicitly assessed as a criterion in the MHA or GA, incapacity is a legal outcome of, rather than a trigger for justifying, legal interventions. In this way, it can be viewed as a prompter, rather than an intermediary, of legal incapacity, where assessments tangentially related to decision-making, such as risk and requirement of care, expose ill or disabled persons to unnecessarily broad interventions.[46]

This casts some further focus onto the reflectiveness and restorativity enjoyed by incapacity in civil litigation. These laws contrast with the future orientation of guardianship and admission laws, which are of a projected nature, and concerned with estimates of possible vulnerabilities, and potentially cast exposure of the subject to a new foray of vulnerabilities in intervention.

Interrogating the application of perceptions of illness, disability and time to incapacity interventions reveals an oppositional nature of the legal design of incapacity. Despite apparent intention to limit interventions where incapacity is viewed to be fluctuating or temporary and non-remitting,[47] these provisions cast assumptions relating to the supposed permanence of incapacity arising from disability, and similarly, remove legal capacity for a broad period in which it is assumed the capacity of the subject does not exist, or must be mediated with risk.

The alternative is to adopt decision and time-specific interventions which are subject to frequent review. These allow for explicit findings of and subsequent interventions on incapacity in specific circumstances.[48] Another alternative is to universally design incapacity so as to also permit decision- and time-specific interventions in situations where disabled, ill, disordered or normative incapacity is experienced.[49]

It is difficult, however, to imagine a legislative design which would commit to assessments so nuanced, rigorous and time-consuming, particularly where, even with comparatively slackened decision-making processes where reviews occur at three, six and twelve month intervals, the tribunals concerned report themselves as overburdened.

The value placed on temporariness of guardianship speaks of the same relationship to time which underpins the distinction between illness and disability, driven by anxieties of permanence and discursive narratives of "recovery". The continued emphasis of autonomy which enforces looser assessments and applications of binding guardianship, admission or treatment orders, may be as harmful to ill persons through its emphasis on independence as it is to disabled legal subjects through their inability to access similarly time- and context-centred assessments of capacity and care.[50] One may speculate that the immediate anxiety of relevant legislators is to prevent ill subjects' enduring dependence on guardianship, treatment or admission, lest the narrative of temporality proves false in that instance and becomes instead perpetuity, permanence and disability.

The relationship between time and capacity is not purely of legal design. Time itself is integral to understanding disability and illness, as an experiential and adaptive social conduit for experiencing the body and the mind. Its intersection with the law is complex and ought to be the point of further investigation.

Interventions which are designed around simplified discourses on time and incapacity, illness and disability are clumsy. This clumsiness is only amplified by the relationship of time to assessments of capacity itself, where the status of the subject is suspended in past comparisons to an imagined capable self, and heavy onus is placed on future prospects of "recovery" or "management" along the lines of illness and disability respectively.[51] Such clumsiness fails to acknowledge the vulnerability of all legal subjects to incapacity, and the time- and context-specific nature of legal incapacity ●

35 C Henderson, 'Substitute Decision-Making: Time for Reform' (Submission to the *NSW Legislative Council's Inquiry into Substitute Decision-Making for People Lacking Capacity*, People with Disabilities Australia and NSW Mental Health Coordination Council, 2009).
36 *IF v IG* [2004] NSWADTAP 3.
37 *Mental Health Act 2007* (NSW), s16(1).
38 *Mental Health Act 2007* (NSW), s16(2).
39 L Li, 'An exploratory study of violence, substance abuse, disability and gender.' (2004) 28(1) *Social Behaviour and Personality: an international journal* 61.
40 *Mental Health Act 2007* (NSW) s18.
41 *Mental Health Act 2007* (NSW), s103(1).
42 *Mental Health Act 2007* (NSW), s38.
43 G Richardson, 'Autonomy, guardianship and mental disorder: one problem, two solutions' (2008) 65(5) *The Modern Law Review* 702
44 *Mental Health Act 2007* (NSW), s14(2).
45 *Mental Health Act 2007* (NSW), s31.
46 A Roychowdhury, 'Mental Capacity Assessments in Care: an unnecessary complication?' (2009) 33(1) *Psychiatric Bulletin* 461
47 New South Wales, Parliamentary Debates, Legislative Assembly Hansard, 9 May 2007, 373 (Paul Lynch, Minister Assisting the Minister for Health (Mental Health)).
48 Victorian Law Reform Commission, *Chapter 7: Capacity and Incapacity*, Guardianship Final Report No 24 (2010), Recommendation 27.
49 S Zavotka, 'Aging, Disability, and Frailty: Implications for Universal Design' (Pt 25) (2006) 1 *Journal of Physiological Anthropology* 113
50 FK Campbell, 'Tentative Disability - Mitigation and Its Discontents' in FK. Campbell (ed), *Contours of Ableism; The Production of Disability and Abledness* (Macmillan, 2009)
51 M Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010).

08

Stolen Moments: The Abuelas de Plaza de Mayo and the search for the children of the disappeared

Sarah Ienna

From 1976 to 1983, Argentina was ruled by a military dictatorship. Initially some Argentines believed that the military would quell leftist insurgencies and establish the rule of law.[1] Instead, the military embarked on a 'campaign of terror'.[2] One of its tactics of repression was to 'disappear' members of leftist guerrilla terror groups and many others who were merely suspected of holding values contrary to the regime.[3] Those targeted included priests, unionists, teachers, lawyers, activists, journalists and students, and become known as *los desaparecidos* (the disappeared).[4] They were taken from homes, workplaces and even from the streets, and brought to secret detention centres where they were tortured and often killed. In total, an estimated 30,000 people were disappeared by the military over the period that became known as Argentina's 'Dirty War'.[5]

Approximately three per cent of the disappeared were pregnant women.[6] These women were kept alive long enough for their babies to be born in detention centres; giving birth whilst handcuffed.[7] It was sometimes only a matter of hours before these young mothers were separated from their newborns. These babies and other young children of the disappeared were then given to supporters of the military regime, who falsified documents and raised the children as their own.[8] This was part of a policy devised by the 'warped' Catholic military generals and influenced by military sympathisers in the Catholic Church who thought it 'unchristian' to kill children but not their leftist parents.[9] The military also believed in giving the babies to 'good' military families; a new generation of 'authentic Argentines' would be created, raised to espouse military values.[10] This disturbing policy has enduring repercussions for families directly affected, many of whom are still looking for lost children. As the policy aimed to damage the social fabric of Argentina, this continuing search has played a prominent role in Argentine society more broadly. However the passage of time has complicated efforts to recover these children of the disappeared, and repair the damage wreaked by the military's repression.

The Abuelas and the search for identity

In the words of Elsa Pavon de Aguilar, whose daughter disappeared and granddaughter was kidnapped, the military expected that the families of those disappeared 'would stay in our houses and cry'.[11] To the contrary, from 1977 a group known as the Madres de Plaza de Mayo (Madres) organised marches outside the Argentine President's residence in an effort to find their disappeared children.[12] The Abuelas de Plaza de Mayo (Abuelas) was established from this group. In its embryonic stages, the organisation consisted of twelve grandmothers looking for their young grandchildren. The Abuelas met in cafés, seemingly to celebrate a birthday or play cards. They spoke in code language, derived from their common trade as seamstresses, whilst passing written testimonies, writs of habeas corpus and other documents under the table.[13] These measures were necessary due to the continuing repression of the military regime. The first president of the Madres, Azucena Villaflor, became a victim of disappearance herself. Whilst many Argentines were too frightened to speak out against the dictatorship, the Abuelas placed notices in newspapers, visited jails and orphanages, wrote to the Pope and to the United Nations and even posed as maids in houses where they suspected that a child of the disappeared was living.[14] In 1980, the Abuelas had their first successes; they located two children who had been stolen from their biological parents and been given to a military family.[15]

When civilian government was re-established, the Abuelas started lobbying for governmental assistance. The Abuelas also worked with Mary-Claire King, an American geneticist, to develop DNA testing procedures that would help them find their grandchildren.[16] In 1987, the National Genetic Data Bank was established by the Argentinian Congress, partly in response to the Abuelas' lobbying.[17] This unique database allows relatives of those who had disappeared, and those who suspect that they are children of the disappeared, to deposit their DNA in the bank and find possible matches.[18] It is an indispensible tool used by the Abuelas to establish a person's identity in court cases. As Professor Laura Oren observes, the Argentine government's support in establishing the database also constituted an important acknowledgement of 'the truth of the secret kidnappings and disappearances in society as a whole'.[19] In response to pressure from the Abuelas, in 1992 the Argentine government also set up a National Commission for the Right to Identity. This Commission searches for children who have lost their identity, both through state terrorism and through other means such as trafficking.[20] To date, 116 grandchildren have been found. As the first president of the Abuelas, Chicha de Mariani described, finding these grandchildren always made the Abuelas 'feel more or less as happy as if we'd found our own'.[21]

'An older child is already formed'

For the children of the disappeared who have been recovered, the realisation that their 'parents' have been lying to them is difficult to come to terms with. The Abuelas have always recognised this, and have engaged psychologists and social workers to help with the process of being restored to their biological families, which the Abuelas term restitution.[22] Further, some children were intimidated by the 'parents' who appropriated them. A recovered child, Carla, recounts that her adoptive father described her biological grandmother as an 'old witch [who] wants to suck your blood'.[23] Such indoctrination was easier to overcome when the children were younger. It was also easier to demonstrate that appropriators' arguments against restitution were only 'superficially' grounded on the needs of the child, [24]as they ignored the damage to the children's psyche resulting from their kidnapping. [25]

However, restitution becomes more difficult over time, as 'an older child is already formed'.[26] Ignacio Montoya Carlotto was 36 years old when he discovered that he was the grandson of Estela Carlotto, current president of the Abeulas. Ignacio later stated that on first finding out the truth:

> 'I was scared of it devouring my whole life. Things were really great for me, damn it. I was recording records with musicians I respected… I had my wife and we were thinking of starting a family. And before that I had a healthy childhood on the farm, with lots of love.'[27]

This is reflective of the experiences of many older 'children' of the disappeared who have strong ties with their adoptive parents, and have established lives for themselves. Moreover, when these children reach adulthood they no longer lack legal capacity to make choices that could only be made

1 Jose Sebastian Elias, 'Constitutional Changes, Transitional Justice and Legitimacy: The Life and Death of Argentina's 'Amnesty' Laws' (2008) 31 *Hasting International and Comparative Law Review* 587 quoted in Elizabeth B. Ludwin King, 'A Conflict of Interests: Privacy, Truth, and Compulsory DNA Testing for Argentina's Children of the Disappeared' (2011) 44 *Cornell International Law Journal* 435, 540.
2 Ludwin King, above n 1, 541.
3 Francisco Goldman, 'Children of the Dirty War Argentina's stolen orphans', *The New Yorker* (online), March 19 2012 < http://www.newyorker.com/magazine/2012/03/19/children-of-the-dirty-war>.
4 Terrence S. Coonan, 'Rescuing History: Legal and Theological Reflections on the Task of Making former Torturers Accountable' (1996) 20 Fordham International Law Journal 512, 517. See also Paola Gianturco, *Grandmother Power: A Global Phenomenon* (powerHouse Books, 2012), 145.
5 King, above n 1, 541; Goldman, above n 3.
6 Goldman above n 3.
7 Uki Goñi, 'A grandmother's 36-year hunt for the child stolen by the Argentinian junta', *The Guardian* (online), 7 June 2015 <http://www.theguardian.com/world/2015/jun/07/grandmothers-of-plaza-de-mayo-36-year-hunt-for-stolen-child>.
8 Ludwin King, above n 1, 542.
9 Goldman, above n 3.
10 Julia Kumari Drapkin, 'Torn between identities in Argentina', *GlobalPost* (online), November 11 2010 < http://www.globalpost.com/dispatch/argentina/101103/dna-clarin- dirty-war>.
11 Gianturco, above n 4,145.
12 Ludwin King, above n 1, 542.
13 *Botín de Guerra* (Directed by David Blaustein, Zafra Difusión S.A, 2000).
14 Gianturco, above n 4,145; *Botín de Guerra* (Directed by David Blaustein, Zafra Difusión S.A, 2000).
15 Laura Oren, 'Righting Child Custody Wrongs: The Children of the 'Disappeared' in Argentina' (2001) 14 *Harvard Human Rights Journal* 123,129; King, above n 1, 543.
16 Drapkin, above n 4, 1.
17 Oren, above n 15, 191; Louise Mallinder, The Ongoing Quest for Truth and Justice: Enacting and Annulling Argentina's Amnesty Laws' (Working Paper No 5, Beyond Legalism and the Institute of Criminology and Criminal Justice Queen's University Belfast, May 2009) 40.
18 Ludwin King, above n 1, 543.
19 Oren, above n 15, 191.
20 Rita Arditti, *Searching for Life: The Grandmothers of the Plaza de Mayo and the Disappeared Children of Argentina* (University of California Press, 1999).
21 Goldman, above n 3.
22 Arditti, above n 20; Gianturco, above n 6,146.
23 *Botín de Guerra* (Directed by David Blaustein, Zafra Difusión S.A, 2000).
24 Arditti, above n 20, 105.
25 Oren, above n 15, 188.
26 Maria Jose Lavalle quoted in Arditti, above n 20, 112.
27 Goñi, above n 7.

by their 'legitimate' parents.[28] Some children of the disappeared who have been recovered as adults have chosen to keep their appropriated name.[29] For example, Ignacio Montoya Carlotto has chosen to keep the first name his adoptive parents gave him, whilst taking on the surnames of his biological parents.[30] Another recovered 'child' of the disappeared, Hilario Bacca, has explained the reasons for his decision to keep the first name and surname given to him by his 'adoptive' parents; 'I am an adult and I am uncomfortable with this schizophrenic idea that I have to kill Hilario Bacca to give birth to somebody I am not.'.[31] For the Abuelas, their grandchildren's choice to keep their appropriated names may be difficult to accept. Estela had been searching for 'Guido' for thirty-six years before she found Ignacio.

However, the Abuelas also understand their grandchildren's situation. The process of reconstructing an identity is complicated, particularly as an adult. The Abuelas aim to equip their grandchildren with information about their origins so they can 'walk free' with their identity.[32] For example, Claudia Poblete was 22 years old when she finally complied with orders to take genetic tests. She discovered that she was the daughter of Pepe Poblete, a disability rights advocate who disappeared with his wife and Claudia when she was only eight months old. Claudia has since adopted her biological name, and says that her own baby daughter will grow up knowing her biological grandparents' story. Yet Claudia still maintains a relationship with the military couple that raised her. As she explains:

> 'Who I am is everything that has happened to me….It's the 21 years that I've lived as Mercedes and the 10 years I've been living as Claudia. And the eight months that I had with my parents when I was first born.'[33]

Despite the complexity of her situation, Claudia has been able to make fully informed choices about her family relationships and how she shapes her own identity. This is a continuing process. Other recovered 'children' of the disappeared have also described the ongoing process of reconstructing their lives with their biological families. Claudio, who was reunited with his brother after twenty years of separation, explains that 'I always keep something, an image or a gesture or something he says. I suppose they're keepsakes for all the moments I've missed.'[34]

28 Oren, above n 15, 177.
29 Uki Goñi, 'Child of Argentina's 'disappeared' fights for right to keep adoptive name', *The Guardian* (online) 24 September 2011 <http://www.theguardian.com/world/2011/sep/23/child-argentina-disappeared-adoptive-name>.
30 Goñi, above n 7.
31 Ibid.
32 *Botín de Guerra* (Directed by David Blaustein, Zafra Difusión S.A, 2000).
33 Drapkin, above n 4, 3.
34 *Botín de Guerra* (Directed by David Blaustein, Zafra Difusión S.A, 2000).

The personal is political

The Abuelas are evidently engaged in a deeply personal struggle to find their grandchildren. As they have stated, they 'owe that to [their] children, to find *their* children and tell them who their parents were…'. [35] However, they are also human rights activists. The Abuelas have played a significant role in drafting Articles 7, 8 and 11 of the Convention on the Rights of the Child, which established a child's right to identity. The articles are now known as the Argentine articles, demonstrating the far-reaching effects of the Abuelas' work, which has helped to shape international human rights law. Further, the Abuelas' search for the children of the disappeared has been 'inextricably intertwined with the politics of impunity in Argentina'.[36] In 1985, the Abuelas first brought a case against former military leaders Jorge Videla and Reynaldo Bignone for overseeing the systematic appropriation of babies of political prisoners.[37] However, in an attempt to quell military unrest following the trials of the former military leaders, in 1986 the law of *punto final* (final point or full stop) was passed. This ended investigations into political violence perpetrated during the Dirty War. In 1987 it was followed by the *obediencia debida* (due obedience) law, which provided that military personnel could not be prosected for crimes committed whilst carrying out the orders from their superiors.[38] Additionally in 1989 and 1990, President Carlos Saúl Menem granted pardons to members of the military, who were then released from prison. Consequently, Argentines were forced to live with the possibility that they could encounter their torturers and repressors in the streets.[39]

The Abuelas and other human rights organisations fiercely opposed these laws. Drawing on the right to identity established in the Convention on the Rights of the Child, the Abuelas argued that the state had an obligation to ensure that disappeared children could recover their identity. They argued that the presidential pardons would compromise this, and 'in effect legitimise the children's captivity, condemning them to ignorance of their real families and to life with their parents' murderers'.[40] In 1998 changes to the law meant that prosecutions could be brought for human rights violations that the courts had not previously heard. Although this prevented most cases from being prosecuted, the Abuelas argued that the former members of the military junta had not been tried for the crime of stealing children. The Abuelas pushed for the prosecution of these crimes.[41]

35 Howard LaFranchi, Relentless Grandmothers: Argentina Seeks Justice for Kidnapped Children, Christian Science Monitor November 3, 1999 at 1.
36 Oren, above n 15, 191.
37 Gianturco, above n 4,147.
38 Goldman, above n 3.
39 Goldman, above n 3.
40 Arditti, above n 20.
41 Francesca Lessa and Leigh A Payne*, Amnesty in the age of human rights accountability: comparative and international perspectives* (Cambridge University Press, 2006), 112; Juan Forero 'Argentine grandmothers running out of time in search for missing', *The Washington Post* (online), June 4 2012 <https://www.washingtonpost.com/world/argentine-grandmothers-running-out-of-time-in-search-for-missing/2012/06/03/gJQAqzr6CV_story.html>.
42 Lessa and Payne above n 39, quoting Poder Judicial de la Nación, Roberto José Marquevich, Juez Federal: Videla, Jorge Rafael y otros, July 13, 1998. See also Human Rights Watch, 'Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators' (Report Vol. 13 No. 5(B), Human Rights Watch, December 2001).
43 Eilís O'Neill, 'Children of Argentine 'disappeared' confront past', *DW* (online), 1 October 2010 < http://www.dw.com/en/children-of-argentine-disappeared-confront-past/a-16276344?maca=en-rss-en-all-1573-rdf>.
44 Elizabeth Jelin, 'Public Memorialization in Perspective: Truth, Justice and Memory of Past Repression in the Southern Cone of South America' (2007) 1(1) *The International Journal of Transitional Justice* 138, 156.
45 Ludwin King, above n 1, 537 quoting Law No. 26.549, Nov. 26, 2009.
46 Ibid.

They were vindicated on the 9th[th] of June 1998, when Federal Judge Roberto Marquevich ordered preventative prison for ex-president General Rafael Videla for the 'theft' of babies born in detention centres.[42] Judge Marquevich concluded that the crimes had a 'wider and deeper purpose' then merely impacting the family group. Rather it was a 'systematic practice' and 'one more tool using terror as part of a system of social control imposed by an illegitimate de facto regime with hegemonic pretensions'. However Videla was only brought to trial in 2011, and finally convicted in 2012. Further, it was not until 2003 that the amnesty laws were repealed , and they were declared unconstitutional in 2006. These long delays were frustrating for many, including the Abuelas, who seek accountability for the abuses for the past to ensure that such atrocities were not repeated. Therefore, the Abuelas' personal struggles to find their grandchildren 'form a parallel to attempts the country as a whole has made to confront its recent history'.[43]

As part of these attempts to confront its history, Argentine society has 'the right to recover the truth of what took place under a repressive regime'.[44] DNA testing is a crucial means of finding the children of the disappeared. In 2009, amendments were made to the Argentine criminal procedure code allowing courts to order mandatory DNA testing of anyone suspected of being a child of the disappeared.[45] As Ludwin King observes, this was seen to be an 'important victory' for the Abuelas, and a consequence of the legislation is that many of those responsible for illegally appropriating children are now facing charges.[46] By removing the pressures of guilt and parent intimidation, the mandatory testing may also be a relief for some suspected children of the disappeared. These children are otherwise faced with the impossible decision to undergo voluntary testing, which may result in a betrayal and even in criminal charges against those who raised them. This is exemplified by Catalina de Sanctis' experience. When Catalina's mother confessed that she was a child of the disappeared, Catalina felt 'paralysed'; if she was tested, her adoptive parents would be imprisoned. Catalina fled to Uruguay when she became aware that the Abuelas had opened an investigation into her origins. When the police eventually found her and raided her house to confiscate items for DNA testing, she cried. However she now admits that 'it was also a relief.' Catalina continues to describe the restoration of her ties with her biological family as the best thing that happened to her. [47]

However, the current Argentinian legislation can be 'read expansively', creating the danger that it may be used as a political tool.[48] This is demonstrated by the case of Marcela and Felipe Noble Herrera, the adopted children of Ernestina Herrera de Noble. Ernestina is the owner of an Argentine media Empire, Clarín, which has been critical of the incumbent Kirchner government. In 2009 investigations commenced regarding whether Marcela and Felipe were children of the disappeared. Marcela and Felipe refused to co-operate with the investigation, stating that they did not want to discover their biological origins. The result was a protracted and dramatic legal battle, during which Marcela and Felipe were pursued by police, who entered their home and forcibly collected their DNA. [49] It has been claimed that the evidence was not as strong as in other cases, and that the investigation was largely a fishing expedition.[50] There has consequently been widespread criticism that this relentless and invasive investigation was the result of Kirchner government's political vendetta against Ernestina Herrara de Noble. The Argentine government has also been accused of passing the mandatory DNA testing laws in 2009 in order to compel Marcela and Felipe to undergo testing.[51] Ultimately, the samples were found to be negative, and investigations have been discontinued. However this was only after Marcela and Felipe had been subject to great emotional strain and a very public invasion of privacy.

Writing for *The New Yorker*, Francisco Goldman suggests that the Abuelas' continued involvement in the investigation of Marcela and Felipe despite the surrounding political controversy may be because their desperate wish to find their grandchildren becomes more urgent as they age.[52] The case has also undermined the legitimacy of mandatory DNA testing as a tool in the search for identity. This is unfortunate, as arguably mandatory DNA testing is an important tool in continuing to uncover the truth, particularly as time passes. As the potential children of the disappeared grow older, they are less likely to be willing to 'betray' those people they have known as parents their entire life. Therefore, mandatory DNA testing may provide the only means of uncovering their biological origins. Admittedly, if these adults do not want to discover their identity, mandatory DNA testing interferes with their

47 Goldman, above n 3.
48 Ludwin King, above n 1, 545.
49 Goldman, above n 3.
50 Drapkin, above n 4, 2.
51 Drapkin, above n 4, 2.
52 Goldman, above n 3.

personal rights to privacy and removes their freedom to construct their identity as they choose.[53] However, as the experiences of Catalina de Sanctis demonstrate, mandatory DNA testing can provide a relief for many adults unwilling or unable to voluntarily 'betray' the parents who adopted them. Further, alternatives that have been suggested to mandatory DNA testing are inadequate to effectively continue the search for truth. For example, Ludwin King advocates for a solution where appropriators are offered amnesty in exchange for confessing. However, the passage of time has made offers of amnesty less effective. Some of those guilty of appropriation have either died or are now elderly and frail, with deteriorating memories. An amnesty would be of little use in these circumstances. Therefore, mandatory DNA testing may be the best hope of discovering the truth. However it is a fine balancing act between the desperation of the Abuelas and the rights of Argentine society to uncover the truth, and respect for the privacy and free will of suspected children of the disappeared. It is a tool that must be used with great circumspection, both by the Abuelas and by the Argentine judiciary. Precautions must be taken to protect privacy where possible, and it should only be used where there is substantial evidence that the person is a child of the disappeared, preventing its use as a tool to achieve political purposes.

Stolen moments: the continuing search for the children of the disappeared

Estela Carlotto recounts how 'When I turned 80, I begged God not to let me die before I found my grandson.'[54] Estela has lived to find her grandson, after 36 long years of searching. However, an estimated 384 grandchildren are yet to be found, and for those grandparents still searching 'the years are ticking by ever faster'.[55] This may explain why the Abuelas have more recently supported politically controversial methods to find their missing grandchildren, such as mandatory DNA testing. The continuing passage of time is an obstacle of which the Abuelas, many of them now in their 90s, are painfully aware. The organisation's DNA bank includes samples of the grandparents' DNA to ensure that anyone who suspects they are a 'missing grandchild' can step forward and discover their identity even after their grandparents have passed away. However, the Abuelas' work has also made an invaluable contribution to Argentina's efforts come to terms with the atrocities of the past. To aid with this continuing endeavour, mandatory DNA testing may provide the best means of uncovering the truth.

Out of the hundreds of other children who have not yet been found some may prefer to remain ignorant of their biological origins unless required by mandatory DNA laws. For others, discovering their identity may provide the missing puzzle piece to explain those little moments of childhood. Claudia Poblete states that after discovering her identity she now knows why she named her first doll Pepe (the name of her biological father) and why she often checked that her parents were still breathing at night.[56] Despite the more recent political controversies, the Abuelas' untiring work has left their lost grandchildren with the tools they need to discover the past. They are also training a team of young lawyers, psychologists and clerks to continue their quest.[57] Nothing can restore the moments of joy in watching their grandchildren grow that have been stolen from the Abuelas. Sadly, some of the Abuelas have not lived to meet their now adult grandchildren and rekindle the family ties that were forcibly ripped apart.[58] But even if their grandchildren discover their identity after their grandparents have passed on, the Abuelas have left behind a rich message of love, determination and hope. And they will continue their search for as long as it takes.

> 'I'm alone in the world…I was always expecting to find Clara Anahí. Every morning I wake and think, I don't want to, I don't want to go on. After a while, I think, but if I don't move, what will happen? And I get up and go out to search for her. Who will look for her when I'm gone?'
>
> — Chicha Mariani, 91 years old ● [59]

53 Ludwin King above n 1.
54 Goñi, above n 7.
55 Goñi, above n 7.
56 Drapkin, above n 4, 1.
57 Forero, above n 41.
58 Ibid.
59 Goldman, above n 3.

09

On trial: The Armenian massacres and the international legal definition of genocide

Varsha Srinivasan

'Genocide begins with the killing of one man- not for what he has done, but because of who he is.'

— Kofi Annan, Secretary-General of the United Nations, 2001.

2015 marks a hundred years since the Armenian massacres and twenty years since Srebrenica. Separated by two generations, the atrocities committed against Armenians and Bosniaks share a recurring theme: the continued belligerence of the perpetrators in refusing to fully acknowledge the sorrow and suffering of generations of victims. But denial by those who have committed crimes is nothing new. It is the failure of international law in effectively prosecuting genocide, or offering recognition and support by labeling it as such, which needs to be reflected upon. More precisely, the utility of the current legal definition of genocide must be questioned: when does mass murder become systematic? Is systematic mass murder of a group always genocidal? In the context of Turkey's steadfast refusal to acknowledge the Armenian genocide, this essay explores the international legal definition of genocide and its origins, and questions its purpose.

The massacre of Armenians

The mass killings of Armenians began with the slow disintegration of the Ottoman Empire during World War I. In 1914, the Ottomans were fighting against Russian forces in the Caucuses, and facing revolts by Christian minorities in the North. Armenians were seized upon as threats to the state, and the first round of killings began with the execution of several hundred Armenian intellectuals by the Young Turks on April 24, 1915.[1]

Armenians traditionally refer to what followed as 'Medz Yaghern', or the 'Great Crime', and it bears remarkable similarities to genocide of the Jewish people perpetrated in Nazi Germany twenty years later. Armenians were forced to give up their weapons and had their property confiscated. Those who survived beatings and rapes were marched to concentration camps. Between 1914 and 1922, it is estimated that some 1.5 million Armenians were killed.[2]

Turkey's position

Modern day Turkey, under President Erdogan's decade-long conservative AKP rule, very much sees itself as having risen from the ashes of the Ottoman Empire. This is certainly not a universal view - secular Turkish elements see the Empire as the very antithesis of Attaturk's Republic - but it is an official one.[3] The Turkish government, so as to preserve the legacy of the Ottomans, has consistently held the position that while atrocities against Armenians occurred, they were not pre-meditated in the sense that constitutes genocide.[4] Turkish politicians also point to the death of thousands of Turkish Muslims in the chaos of the Ottoman

1 John Kifner, 'Armenian Genocide of 1915: An Overview', *The New York Times* (online), <http://www.nytimes.com/ref/timestopics/topics_armeniangenocide.html>
2 Ibid.
3 Cinar Kiper, 'Sultan Erdogan: Turkey's rebranding into the New, Old Ottoman Empire', *The Atlantic* (online), 5 April 2013 < http://www.theatlantic.com/international/archive/2013/04/sultan-erdogan-turkeys-rebranding-into-the-new-old-ottoman-empire/274724/>
4 Kifner, above n 1.

collapse.[5] Further, publicly expressing an opinion about the Armenian genocide has attracted criminal penalties for 'denigrating the Turkish nation' under Article 301 of the Turkish penal code, amended in 2008.[6] Turkey also withdrew its ambassador to the Vatican earlier this year after the Pope referred to the massacres as 'the first genocide of the twentieth century',[7] and did the same to its US ambassador after the House Foreign Affairs Committee approved a resolution referring to the massacres as a genocide.[8]

The legal definition of genocide

The term 'genocide' was coined in 1943 by Raphael Lemkin, a Jewish-Polish lawyer who lost 49 family members in the Holocaust. Years earlier he witnessed the trial of one of the perpetrators of the Armenian massacres. Lemkin's efforts to criminalise genocide under international law led to the adoption of *The Convention on the Prevention and Punishment of Genocide* in 1948.[9] Citation? The Convention defines genocide as an act causing serious bodily or mental harm (including death) to members of a particular national, ethnic, racial or religious group, committed with the intent to destroy, in whole or in part, that group.[10]

As is the case with the crime of murder in most jurisdictions, the crime of genocide requires two elements to be proven beyond reasonable doubt: the act(s) causing harm, and the requisite intent, which here is to *destroy* the group. The definition does not, however, include a quantitative element, or require that the atrocities were state-sanctioned, although these may be considerations in determining if intent exists.[11] Intent can be proven by the perpetrator's words and acts, and can be 'inferred from the relevant facts and circumstances'.[12]

Reconciling the legal and the real

The *mens rea* element, or *dolus specialis*, of genocide under the Convention has been criticised as problematic in its application due to the difficulty of establishing specific genocidal intent beyond reasonable doubt. The threshold, as laid down in *Bosnia v Serbia*, remains extraordinarily high.[13] In that case, the International Court of Justice (ICJ) was satisfied that Bosnian Muslims in concentration camps were 'systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm', but was not prepared to make a finding of specific intent to destroy a group for lack of evidence.[14]

The treatment of genocide under international law as a crime like any other, and its prosecution following standard criminal procedure, presents a number of problems.[15] The evidentiary burden on the prosecution requires an enormous amount of resources to gather information on the individual atrocities that amount to a potential genocide. In a case like that of the Armenians, evidence gathering would be further complicated by Turkey's firm hold over the narrative surrounding the events, and the time that has elapsed since the purported acts of genocide. In a domestic criminal context, such difficulty would typically result in a plea deal in the defendant's favour.[16]

The high threshold and substantial evidentiary burden is, of course, necessary to protect defendants against unfair prosecution and punishment. With genocide, however, we must ask the question: should the central purpose of the law be only to punish and deter, as set out in the Convention? In *Bosnia v Serbia*, Serbian leaders were found guilty of crimes against humanity and war crimes, alternatives to the more difficult finding of genocide. Genocide may be 'the crime of crimes' in public perception,[17] but if findings of crimes against humanity, which do not require intent to destroy, already impose the highest penalties, then the crime of genocide arguably exists to deliver justice to its victims.

For many Armenians, it is here that the legal content of genocide diverges from their reality. To those who have survived the horror of concentration camps, and to their children, it is inconceivable that those experiences are not deserving of the most serious label. However, it is more than a validation of suffering. Findings of genocide also allow these horrific events to enter collective memory, to give hope to victims that their experiences will be remembered outside of their communities, as the Holocaust has been. It is for these reasons that Armenians, a century after the massacres, continue to fight for recognition.[18]

Moving beyond the law

As a legal instrument conferring jurisdiction on the ICJ to try and punish genocide, and providing recourse to nations wishing to intervene when such a finding is made, the *Convention* should remain significant. Moreover, the law, however grave the circumstances, is not merely a conduit for imposing the justified wishes of victims. In saying that, the international criminal trial as the *only* mechanism for victims of genocide to gain recognition needs to be re-examined.

In the unlikely event that the ICJ tries a case on the Armenian massacres, the stringent elements under the Convention would presumably result in a negative finding: in essence, an acquittal of the perpetrators of the crime of genocide.

As Mark Drumbl notes, 'Justice for atrocity is not synonymous with international criminal trials. It entails much, much more.'[19] A viable approach would thus be separating genocide-at-law, and its attached sanctions, from a process of defining genocide that is able to find and reflect broader truths of the situation. To ask that international law use the same piece of legislation to adequately address the purposes of punishment, deterrence and justice for victims is asking too much, especially where all three are of supreme importance.[20] In practice, the separation of these purposes may require the U.N to establish fact-finding missions that are able to independently and holistically analyse the grievances of victims, without the burden of undue criminal sanctions ●

5 Ibid.
6 'Q&A: Armenian Genocide Dispute', *BBC* (online), 13 April 2015 <http://www.bbc.com/news/world-europe-16352745>.
7 "Turkey recalls Vatican envoy over Pope genocide comment", *Reuters,* 12 April 2015 <http://www.aljazeera.com/news/2015/04/turkey-demands-explanation-pope-genocide-remark-150412122124015.html>
8 "Turkey withdraws ambassador over genocide resolution", CNN, 12 October 2007 <http://edition.cnn.com/2007/POLITICS/10/11/us.turkey.armenians/>
9 "Lemkin, Raphael", UNHCR. <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b7255121c&query=genocide%20convention>
10 Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 2. ('*The Convention*')
11 International Criminal Court, *Elements of* Crimes, Doc No ICC-ASP/1/3 (adopted September 2002) art 6(a)(3).
12 Ibid.
13 Marianne L Wade, 'Criminal Law between Truth and Justice' (2009) 19 *International Criminal Justice Review* 2, 152-153.
14 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement)* [2007] ICJ Rep 18.
15 Wade, above n 10.
16 Ibid.
17 Ibid.
18 Ibid.
19 Mark A Drumbl, *Atrocity, punishment, and international law* (Cambridge University Press, 2007) 205.
20 Wade, above n 10.

10
Marshall Islands v The World: Fallout from the International Court of Justice Nuclear Non-Proliferation Treaty Cases

Sally Andrews

Introduction

On the 24th April 2014, the Republic of the Marshall Islands initiated a series of dramatic proceedings in the International Court of Justice. Submitting claims against the five established weapon states, the United States of America, the United Kingdom, China, Russia and France, and also against Israel, North Korea, India and Pakistan, the Marshall Islands contends that each state's possession of nuclear arsenals breaches the *Nuclear Non-Proliferation Treaty* (NPT).

This essay will examine the strength of the Marshall Islands' case. Whether the obligations to pursue nuclear disarmament under the NPT have crystallised into customary international law will hinge, in a large part, upon considerations of time. To this end, analysis of the customary status of the NPT will draw upon the longstanding nature of the treaty, its impact on subsequent international agreements, and prevailing state practice towards its obligations.

These cases hold an unusually personal significance for many Marshall Islanders, and as such this litigation cannot be fully understood without analysing the role of nuclear weapons within Marshallese national consciousness. This essay will therefore be looking at time in the context of the history of American nuclear testing within the Pikinni Atoll region and its ongoing effects.[1] It will be concluded that whilst there is little prospect of a favourable outcome for the Marshall Islands, it would be remiss to dismiss the litigation as entirely futile.

'Guinea Pig' Nation: A History of Nuclear Testing in the Marshall Islands

Equidistant from Australia and Hawaii, the Marshall Islands is an independent country in free association with the United States.[2] Previously a possession of the Spanish, German and Japanese colonial empires, the United States captured the archipelago in 1944 and administered it as a trust territory from 1947 onwards.[3]

From 1946 until 1954 the United States utilised the Marshall Islands as a nuclear testing ground.[4] Fearing that domestic tests would be too hazardous whilst the effects of the new technology remained uncertain, the US Joint Chiefs of Staff selected the Pikinni Atoll of the Marshall Islands as a 'suitable site' posing 'acceptable risk and minimum hazard'.[5]

To this end, the indigenous inhabitants of the Pikinni Atoll, in addition to those on the neighbouring Ronļap, Wōtto and Ānewetak Atolls, were forcibly removed and resettled on outer island chains throughout 1946.[6] As part of a nuclear technology research program entitled Operation Crossroads, two 'Hiroshima-size' atomic tests were carried out, decimating Pikinni and contaminating its water sources. These would be the first of a further 65 nuclear weapon trials within a twelve year period.[7]

Shielded from media access and international attention, the United States was able to carry out this testing with virtually no UN supervision. The experiment wreaked havoc on fragile Pacific ecosystems and, in some cases, changed the basic geography of the Marshall Islands forever. For instance, during the Mike test of November 1952 a bomb 750 times larger than the one dropped over Hiroshima vaporised the entire island of Elugelabl.[8]

1954 saw the biggest test yet, with the Castle Bravo bomb - approximately 1300 times larger than Hiroshima - dropped over Pikinni on 1 March, a date remembered by the Ronļap islanders as the 'day of two suns'.[9] It created a fireball of four miles in diameter, vaporised two islands and created a fallout zone of thick radioactive ash for 7000 square miles.[10]

Such was the magnitude of the Bravo explosion that the fallout spread to the supposedly safe evacuee islands some three hundred miles away, with inhabitants of Rondik and Aelōnin Ae Atoll reporting severe burns, nausea, bleeding from cavities and skin and eye irritation.[11] As Ronļap mayor James Matayoshi later noted, 'that is the day we went from being survivors of the World War to victims of the Cold War'.[12]

As the tests continued, the uprooted Pikinni peoples were facing starvation due to the barren soils in their resettled islands.[13] Such was their bond to their ancestral lands that many islanders insisted on returning to their native atolls within less than three years of testing, and in the case of the Utrōk people, within three months.[14] Too little was known of the long-term effects of fallout, and after some basic attempts at rehabilitation, the islanders returned home.[15]

After spending three years with limited water, insufficient food and secret medical testing on the outer islands, the Ronļap people were returned to their atoll in 1957, with promises that the region was safe.[16] In 1969 even Pikinni was declared safe, with the Atomic Energy Commission reporting that 'there's virtually no radiation left and we can find no discernible effect on either plant or animal life'.[17]

By 1963 the first cases of thyroid tumours, birth deformities and severe growth retardation were diagnosed. By 1975, the US Department of the Interior announced that tests had shown 'higher levels of radioactivity than previously thought', and that Pikinni appeared to be 'hotter' and potentially 'questionable as to safety'.[18] Having only moved Pikinni Islanders back to their atoll in 1972, Pikinni was declared unfit for habitation in 1977.[19] Meanwhile, diagnoses of thyroid tumours on the outlier islands, which appeared to have a longer latency period, began to climb, as did the number of class action suits commenced against the US government.[20]

So great was the contamination that many of the atolls remain uninhabited. The health and environmental impacts are unprecedented in world history. As noted by David Krieger, president of the Nuclear Age Peace Foundation, the magnitude of testing within the 1946-1954 period was the rough equivalent of 1.6 Hiroshima bombs detonating daily for twelve years.[21] To contextualise the scale of the damage, the Chernobyl power plant disaster is estimated to have released an estimated 40-54 million curies of iodine-131, one of the most deadly and highly radioactive fission substances.[22] Over 12 years of testing, the United States released approximately 8 billion curies of iodine-131 over the Marshall Islands.[23]

It is from this tragic history that the Republic of the Marshall Islands has formed a tradition of passionate engagement with the disarmament movement on the international stage. Drawing on first-hand experience of the devastating impacts of nuclear testing, the Marshall Islands asserts that the norms surrounding non-proliferation and disarmament derive their binding nature from the dangers which they present to the life, healthy and security of peoples and nations everywhere, and of their potential to contribute irreversibly to the pollution of the human environment.[24]

1 Whilst this area is perhaps better known under the Anglicised title of 'Bikini' Atoll, this essay will utilise Marshallese renditions of location names.

2 Ian Anderson, 'Potassium could cover up Bikini's radioactivity' (1988) 10 *New Scientist* 17, 17.

3 John Schofield and Wayne Cocroft (eds), *A Fearsome Heritage: Diverse Legacies of the Cold War* (Left Coast Press, 2007) 65.

4 Josh Butler, 'Marshall Islands Nuclear Proliferation Case Thrown Out of US Court', *Inter Press Service* (online) 12 February 2015 <http://www.ipsnews.net/2015/02/marshall-islands-nuclear-proliferation-case-thrown-out-of-u-s-court/>.

5 Jane Dibblin, *Day of Two Suns: US Nuclear Testing and the Pacific Islanders* (New Amsterdam Books, 1988) 20.

6 Jack A. Tobi, *Stories from the Marshall Islands: Bwebwenato Jān Aelōn̄ Kein*, (University of Hawaii Press, 2002) 178.

7 Barbara Rose Johnston and Holly M. Barker, *Consequential damages of nuclear war: the Rongelap report* (Left Coast Press, 2008) 17.

8 International Business Publications USA, *Marshall Islands Country Study Guide* (Global Investment and Business Center, 1996) vol. 1, 217.

9 Dibblin, above n 5, 25.

10 Schofield, above n 3, 51.

11 Dibblin, above n 5, 24.

12 Schofield, above n 3, 51.

13 International Business Publications USA, above n 8, 215.

14 Tobi, above n 6, 91.

15 Tobi, above n 6, 36.

16 Johnston, above n 7, 20.

17 International Business Publications USA, above n 8, 217.

18 Ibid.

19 Schofield, above n 3, 57.

20 International Business Publications USA, above n 8, 217-218.

21 Butler, above n 4.

22 Johnston, above n 7, 19.

23 Ibid.

24 Julian Borger, 'Marshall Islands sues nine nuclear powers over failure to disarm', *The Guardian* (online), 24 April 2014 <http://www.theguardian.com/world/2014/apr/24/marshall-islands-sues-nine-nuclear-powers-failure-disarm>.

Weapon States and the NPT: Prospects for the Marshall Islands' Claims

The Marshall Islands contends that the activities of stockpiling weapons, improving nuclear technology and weaponising nuclear material are violations of legal obligations owed by the nine states to the international community.[25] The Marshall Islands further argues that these norms have crystallised into customary international law, thereby obliging all states to pursue in good faith effective measures to bring about nuclear disarmament.[26]

There are a number of different factors in the cases that combine to present a daunting task to counsel for the Marshall Islands. It should be noted that the United States of America, the United Kingdom, China, Russia and France are the original weapon states. On this basis they have historically been afforded permanent membership of the UN Security Council and formal recognition as a nuclear power within the NPT, in contrast to India, Pakistan, Israel and North Korea.[27]

Signing the treaty in 1968, which entered into force in 1970, the P5 states have committed to observing Article VI of the NPT, under which they are obliged 'to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.'[28]

Failure to observe this commitment is, however, unlikely to amount to a breach of international law. One reason for this is that out of the nine states, only India, Pakistan and the United Kingdom have actually submitted to the compulsory jurisdiction of the ICJ under Article 36(2) of the Court's *Statute.*[29] This means that the other six states must consent by special agreement to the Court's jurisdiction in this particular case in order for the matter to progress, which seems unlikely given the states' vested interests in maintaining their nuclear programs.[30]

Consequently, the likelihood of establishing jurisdiction against the US, France, China or Russia seems relatively remote. Holding just over 7300 nuclear warheads, the United States' weapons program continues to show little sign of winding down, with some $350 billion deployed towards modernising and improving weapons technology over the next decade.[31]

The claim against the US has already been summarily dismissed from US courts on the basis that the US does not recognise the jurisdiction of the ICJ.[32] Washington's animosity towards to the ICJ dates back to the seminal decision in *Nicaragua*, which recognised that in aiding the *Contras* in rebelling against the elected Nicaraguan government the US had breached international customary law.[33]

Similarly, France has been loath to return to the Court in questions relating to its nuclear program since it attracted international condemnation for its nuclear testing in the Mururoa atoll in the *Nuclear Tests* cases of 1974.[34] These cases prompted France to revoke its acceptance of compulsory jurisdiction under Article 36(2).[35] As such, it would seem that the Marshall Islands has little legal recourse with regard to France's 300 warheads.[36]

The need for France to give special consent, in addition to its reservation to the jurisdiction of the Court in relation to matters of national defence, is likely to prove determinative in this case, and similar outcomes can be expected in the cases of China and Russia.[37]

With an arsenal of 215 warheads, the United Kingdom may hold more promise for the Marshall Islands on the basis that the UK has both signed the NPT and accepted compulsory jurisdiction.[38] The case involving the UK is also likely to have flow-on effects for the other eight states.[39]

Whilst signatory states are required to observe obligations under the NPT, the prevailing position in international treaty jurisprudence has been that non-signatory states are exempt from its obligations. Israel, India and Pakistan have never signed the NPT, whilst North Korea withdrew as a signatory in 2003. North Korea refuses to submit to the court's jurisdiction in any way, whilst Israel has such wide reaching reservations to its recognition of jurisdiction that it is extremely unlikely that jurisdiction can be established in any case.[40] Estimates by the Federation of American Scientists in 2015 set Israel at a conservative figure of 80 warheads, with North Korea in possession of between 5 and 10, with potentially no deployment capacity.[41]

Whilst not signatory to the NPT, India and Pakistan have accepted jurisdiction under Article 36(2), although there may still be some jurisdictional barriers on the basis of India's far-reaching national defence reservations.[42] With Pakistan's arsenal recently estimated to contain between 100-120 warheads, and India's program containing between 90-110 weapons, the case against them both is likely to hinge upon the customary status of the NPT.[43] This question, it is suggested, is critical to the success of the nine claims, notwithstanding the jurisdictional difficulties facing the Court across each case.

The customary status of Article VI depends on a variety of factors. The Court must be satisfied that there is 'widespread and representative participation in the Convention', and also that Article VI is of a 'fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.[44] Sufficient *opinio juris* must also be identified; in other words, there must be some evidence pointing towards the existence of widespread subjective belief in the binding nature of the particular norm. Lastly, the Court will examine state practice, which draws upon the length of time for which the norms have stood, and the consistency with which states have observed them.[45]

Whether Article VI can be characterised as bearing a 'fundamentally norm-creating character' may hinge on whether 'in good faith' is a term of sufficient clarity and precision, since the presence of similar ambiguity in the case of *North Sea Continental Shelf* was held to be prohibitive.[46] Treaties do not automatically create custom, and the presence of an opt-out clause in Article 10 of the NPT casts further doubt on whether it can satisfy the 'norm-creating character' test.[47]

Turning to the question of widespread and representative participation, whilst the NPT currently has 190 signatories and broad representation across geographic, political and economic divides,[48] norms usually cannot crystallise into custom unless the practice and *opinio juris* of 'specially interested' states support them.[49] For the purposes of the NPT, 'specially interested' states are likely to be regarded primarily as those which have had the opportunity to engage in the relevant practice; in other words, the weapon states themselves.

The fact that four out of nine states have declined to even sign the NPT, let alone repeated breaches by the signatory states themselves, highlights a fatal flaw in the Marshall Islands' case. Whilst the state practice element does not demand absolute consistency, state conduct ought to be generally consistent. Where evidence of inconsistent conduct is found, the Court must be able to characterise these incidents as 'breaches of that rule, not as indications of the recognition of a new rule'.[50]

In the case of nuclear disarmament, the consistent lack of compliance with Article VI amongst the P5 can hardly be characterised as aberrations within a general rule in favour of disarmament; it entirely fails the test espoused in the *Asylum Case* that a customary norm requires evidence of 'constant and uniform usage'.[51] Rather, these inconsistencies may be regarded as evidence that there is no well-established subjective belief that the norm is binding upon states as a matter of law, and in doing so may fall short of satisfying the requirements of *opinio juris*.

The Marshall Islands argues that the decisions of the General Assembly, pronouncements of the International Atomic Energy Agency, the Court's 1996 *Advisory Opinion,* and the NPT itself point towards the necessary *opinio juris;*[52] it is certainly true that the General Assembly has repeatedly called for the universal acceptance of Article VI. Additionally, India's acceptance of UNGA/RES/68/42 may demonstrate that India itself recognises the universal nature of this obligation.[53]

However, *opinio juris* requires states to have 'adapted their actions and attitudes so as to conform' to the treaty in question. This requirement does not seem to

25 Avner Cohen and Lily Vaccaro, 'The import of the Marshall Islands nuclear lawsuit', *Bulletin of the Atomic Scientists* (online) 5 June 2014 <http://thebulletin.org/import-marshall-islands-nuclear-law-suit7143>.
26 Shashank K. Kumar, 'The Marshall Islands' Case Against India's Nuclear Weapons Program at the ICJ', *Blog of the European Journal of International Law* (online) 27 June 2014 <http://www.ejiltalk.org/the-marshall-islands-case-against-indias-nuclear-weapons-program-at-the-icj/>.
27 Ibid.
28 *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) art 5. ('*NPT*')
29 *Statute of the International Court of Justice* art 36(2).
30 Jerome B. Elkind, *Non-Appearance Before the International Court of Justice: Functional and Comparative Analysis* (Matinus Nijhoff Publishers, 1984) 107.
31 Rediff News, 'US has 7,300 nuclear weapons, do you know India's count?', *Rediff News* (online) 23 June 2014 <http://www.rediff.com/news/slide-show/slide-show-1-defence-news-us-has-7300-nuclear-weapons-do-you-know-indias-count/20140623.htm>.
32 Butler, above n 4.
33 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgement)* [1986] ICJ Rep 14.
34 *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457; *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253.
35 Elkind, above n 30, 89.
36 ICAN, 'Nuclear Arsenals', *International Campaign to Abolish Nuclear Weapons* (online) 17 February 2015 <http://www.icanw.org/the-facts/nuclear-arsenals/>.
37 Elkind, above n 30, 61.
38 Federation of American Scientists, 'Status of World Nuclear Forces', *Federation of American Scientists* (online) 4 June 2015 <https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/>.
39 Butler, above n 4.
40 Stanimir A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* (Martinus Nijhoff Publishers, 1995) 121.
41 ICAN, above n 36.
42 Kumar, above n 26.
43 Federation of American Scientists, above n 38.
44 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark) (Merits)* [1960] ICJ Rep 3, 72.
45 Ibid, 73-74.
46 Ibid, 72.
47 *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT), opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) art X.
48 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark) (Merits)* [1960] ICJ Rep 3.
49 *Anglo Norwegian Fisheries Case (United Kingdom v Norway) (Judgement)* [1951] ICJ Rep 117.
50 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgment)* [1986] ICJ Rep 14.
51 *Asylum Case (Colombia v Peru) (Judgement)* [1950] ICJ Rep 6.
52 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 95.
53 *Follow-up to the advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons*, GA Res 68/42, UN GAOR, 68th sess, 60th plen mtg, Agenda Item 99(k), Supp No 49, UN Doc A/68/411 (5 December 2013).

be satisfied by the evidence of state practice in this case, particularly in examining the behaviour of the 'specially interested' weapons states.

As a matter of construction, counsel for the Marshall Islands will likely encounter further difficulties in countering the argument that the NPT was clearly only intended to extend to signatory parties, given that Articles I, II, III, IV, V, VI, VII and X all limit the operation of the treaty to signatory parties.

This view gains further weight in consideration of Judge Gros' comments in *Nuclear Tests*: '[o]ne need only say that the preparation and drafting of the text, the unequal regime as between the parties for the ratification of amendments, and the system of supervision have enabled the Treaty to be classified as, constructively, a bi-polar statute, accepted by a large number of States but not binding on those remaining outside the Treaty.'[54]

Rather than commanding widespread observance, the NPT is clearly not regarded by the majority of weapon states, including India, as having the binding force necessary to establish customary international law under Article 38(1) of the Court's *Statute*.[55]

Conclusion

As the NPT heads into its 45th anniversary in 2015, the prevailing state practice towards its obligations indicates that the movement towards disarmament has a long way to go. With a total of 15,700 warheads in the world today,[56] it will be some time before it can be said that the obligations contained within Article VI are binding on all states as a matter of customary law.

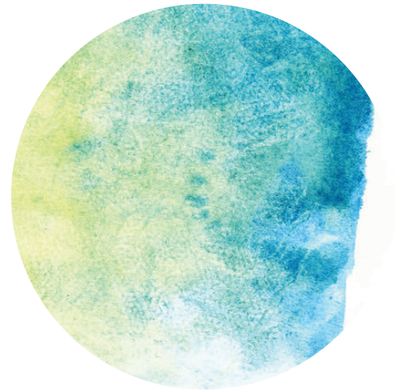
As a tiny Pacific country, the Marshall Islands are clearly outclassed in the ICJ, and are regarded by many as fighting a losing battle. Having examined the multifarious issues involved in the nine cases and international attitudes towards the NPT, the Marshall Islands' customary argument clearly rests more on wishful thinking than evidence of state practice towards disarmament.

In highlighting the numerous flaws applying to each of the nine claims, this lawsuit exemplifies both the strengths and weaknesses of the ICJ. As the majority of the claims fail to meet the basic jurisdictional hurdle imposed by the consent and reservation system, this case is likely to exacerbate a sense of frustration that many have felt with the ICJ throughout the length of its history as an institution.

Nevertheless, the litigation represents an important opportunity for the Marshall Islands to tell their national story, to agitate for renewed commitment from signatory states, and to inject further impetus into the global disarmament movement. The huge power disparity between the Marshall Islands and the respondent states would normally preclude such a small nation from gaining international attention on this issue.

In this way, the claims can be seen to highlight the value of the ICJ as an institution, since it has provided a nominally equal platform through which a small, impoverished Pacific Island state can focus international attention on an issue of deep national and international significance. By enabling the Marshall Islands to move beyond victimhood into agency, these cases merit careful consideration by the international community, particularly with regard to potential developments relating to the customary status of the NPT ●

54 *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457; *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, 305.
55 *Statute of the International Court of Justice* art 38(1).
56 Federation of American Scientists, above n 38.



11
lawyering with love: how to make the most of the time we have

a note for myself, and for those with a revolutionary vision for the law

Ellen O'Brien

I can't quite remember why I initially decided to go to law school. I was seventeen years old when I applied, and now, in my sixth year of university, the motivation behind that initial choice is somewhat blurry. I do know, though, that my commitment to caring for the people around me, to assisting in forging a path towards universal liberation, has given me the strength to continue pursuing a career in law. Reflecting on the privileges that have allowed me to reach the point where I am today, I want to use them for better, not for worse. In my view, being a lawyer has always meant engaging in the pursuit of justice for all people.

It's only been six years, and I'm not yet admitted to practice, but I am already tired of and frustrated by what I have seen of the legal world. This narrative isn't unique – I'm not the first law student inclined towards the vague notion of 'social justice' to be so disillusioned by the sliver of the legal world visible to a student that dropping out (before even really beginning) has become an increasingly favourable option. Having seen advocacy in action, I've witnessed great social justice lawyers working for community legal organisations become disenchanted by the time and resource pressures of their position, and by the fact that being a lawyer does not help achieve true justice but merely upholds a violent colonial legal system.

Being an advocate will always mean different things to different people, but the definition is inevitably shaped by the context of the legal profession. To be a legal advocate means to play by the rules of the game, no matter how supremely unjust they may seem. It means learning to speak the right way – adapting to white masculine cultural norms, acting in a detached and 'rational' manner. Emotion can be shown, so long as it's within the correct scope. This is all in order to present the best possible case for the client within the scope of the existing law – the same law that perpetrates violence, perpetuates inequality and continues to act not as a friend or liberator as I believed when I entered law school, but as an oppressor to those most marginalised within the broader community.

No matter your background, after making it through the rigmarole of law school, you have achieved a level of privilege and have become part of the hierarchy that exists in this society and this legal system. Upon becoming a lawyer, you are inevitably implicated in the system. You have become part of the dynamics of subordination, enforcing laws upon your clients and adapting them to the limitations of the law rather than pursuing true justice and liberation. The uneven power relationships of 'lawyer' and 'client', the formally educated dominating the legally unaware, are reinforced daily, with the real lived experiences of clients interacting with the legal and broader social system often undermined or downplayed as not adhering to the neat legal narrative set by the lawyer (who acts as an extension of the legal system). While learning to adapt to the legal system can be justified as doing what is necessary to achieve solutions in the current context of this system, we must consider that, as was declared by Audre Lorde, 'the master's tools will never dismantle the master's house'.[1]

Lawyers pursuing a more just legal system are also strapped for time, especially lawyers working for under-

1 See Lorde, Audre. 'The Master's Tools Will Never Dismantle the Master's House' in *Sister Outsider: Essays and Speeches* (1984) Ed. Berkeley, CA: Crossing Press, 110-114.

resourced community legal centres or Legal Aid. Not only do lawyers who work for agencies such as these face the challenge of navigating internal and external hierarchies, but they also work in an environment of constant threats to funding, long working hours and a high number of clients, with Legal Aid NSW solicitors seeing as many as thirty clients a day.[2] The combination of these challenges results in solicitors otherwise concerned with 'social justice' only having the time and energy to provide direct services that are disconnected from broader politicised work. In this context, how can legal advocates realistically balance the priorities of assisting people in surviving the current legal system, and radically changing or dismantling the system itself, without inevitably burning out or becoming disillusioned with the legal process?

Perhaps after determining what it means to 'be a lawyer', it is also worth considering whether lawyering is the best use of your skills – whatever that means on a personal level. Will the problems that you wish to see 'solved' be best helped by your practice of law? Or would your time be better spent pursuing justice through other, non-legal avenues. For me, I do still want to be a practicing lawyer, despite my underlying disillusionment, because I want there to be strong and effective advocates in the field. I want to play the game well, but I want to play it differently. I want to radicalise lawyering to the best of my ability to make the most of my time in achieving justice in the short and long terms. I want to be a lawyer acting with love.

Focusing on a love based and community building idea of advocacy is, to me, the most effective way of achieving the two goals of 'radical lawyering' outlined by Arkles, Gehi and Redfield: 'helping our communities survive, and helping our communities organise'.[3] These goals could otherwise be termed as seeking to achieve justice in the short term (within the constraints of the legal system as it stands) and seeking to achieve true justice in the long term (by altering the system as a whole).

I adopt the definition set out by bell hooks, that loving in an active way involves 'care, commitment, trust, responsibility, respect, and knowledge'.[4] Living by a love ethic means that 'while careers and making money remain important agendas, they never take precedence over valuing and nurturing human life and well-being'.[5]

As much as I feel that I've been taught to revile 'love', or any other soft, too-human emotion, in the legal world the practices of love and community building do exist, albeit buried under mountains of elitist behaviours. For example, while the golden bubble of the Bar does not appeal to me at all, the spirit of comradery that exists does (even if it extends only to others in that elite group). What I'm getting at is that the spirit of acting in *love* does exist in the legal world – lawyers are humans, after all. But a concerted effort needs to be made to expand these loving practices beyond the profession, beyond the existing hierarchies, and into the community at large. Of course, there are already practitioners who do their work day in and day out in a loving way, but it needs to happen on a grand scale. We need to have a legal community that supports loving legal practice, a practice where there is care, commitment, trust and respect between all members of the community, not just members of the legal profession, and a legal community that doesn't denounce such behaviour as being 'weak', 'soft', or 'unprofessional'.

It is also important to be surrounded by those, both within and outside the legal world, who share a similar vision; who are actively thinking about restructuring the various systems that perpetuate injustice. They are the ones who will provide support when you are criticised, who will keep you focused when it becomes easy to wander down a less burdensome path. They are the ones that will remind you that learning to be a 'lawyer acting with love' is a lifelong learning process.

The legal system we have will change over time, but the current system is what rules over the lives of all members of our community, who navigate it day in and day out. It is my goal to be a lawyer practicing with love in order to assist people in navigating that system and to achieve the 'end goal' of radically changing and destabilising it.

You don't need to change the world by yourself – in fact, you can't. If you choose to be a lawyer, then recognise the support you can give to others in that capacity. Be humble and acknowledge that, despite your prestigious university degree and years of practical training, you will always have more to learn from those working outside of the legal community, as well as your clients.

For lawyers, the law is the bottom line. You spend five or so years at law school, decades learning the trade, and you become blinded to anything outside of a legal solution, as well as blinded by legal limitations. But solutions to real life problems often come from outside of the law – and larger mass-mobilised social movements can often assist in finding those solutions. Broader solutions also help to radically transform the legal system by making people less reliant on it: they reduce its power and force it to adapt. It is important, as a lawyer, to develop flexible, multi-stemmed approaches to the problems. This is integral to preserving yourself – failure is inevitable, but responding to it with humility and an open mind will ultimately assist the pursuit of real justice.

Legal practitioners and community organisations need to join together and skill share on an even platform. This means that the relationships that are established must be built on mutual respect, support and solidarity, without power politics. If you choose, as a lawyer, to share legal skills with your client and with broader community organisations in order to deprofessionalise legal assistance, then you must do so without reinforcing knowledge hierarchies. This goes back to remembering that you will always have more to learn, and that solutions exist outside the law. By making legal skills more accessible to the wider community, the hierarchies within the legal system will eventually break down. More people will learn the language, be able to access justice, and take the power back into their own hands.

Learning to be a lawyer, no matter what type of lawyer that is, is a life long process. It is important to take time to reflect, both by yourself and with a community that supports you, on what it means to be a radical lawyer, and if the strategies you are adopting currently mean that you are making the most of your time to achieve the goals of radical lawyering. Continue to be patient and to share your thoughts, goals, and fears with your community.

We are dependent on each other. We need to be. Practicing the law with love and building a strong and supportive legal and non-legal community won't dismantle a truly unjust legal system overnight; but it may help us better survive and organise it for the time being. And that, in itself, is a radical thought ●

2 Sydney Morning Herald (Jacobson, Geesche), 'Legal aid lawyers buckle under work stress', September 6, 2011 accessible at <http://www.smh.com.au/nsw/legal-aid-lawyers-buckle-under-work-stress-20110905-1ju9v.html>.

3 Arkles, Gabriel, Pooja Gehi and Elana Redfield, 'The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change' (2010) 8(2) *Seattle Journal for Social Justice* 579, 618.

4 hooks, above n 3, 94.

5 bell hooks, *All About Love: New Visions* (2000) HarperCollins: New York, 88.

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