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LAW & HUMAN DIGNITY

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CONTENTS

WILL POTTER	<i>AG-GAG LAWS: CORPORATE ATTEMPTS TO KEEP CONSUMERS IN THE DARK</i>	1
JOSHUA KROOK	<i>THE REAL SOCRATIC METHOD: AT THE HEART OF LEGAL EDUCATION LIES A FUNDAMENTAL MISUNDERSTANDING OF WHY SOCRATES ASKED SO MANY QUESTIONS</i>	32
BETHNEY BAKER & ANGELA DWYER	<i>UNDERTAKING FORENSIC PROCEDURES WITH, AND DATABASING DNA FROM, YOUNG OFFENDERS: FUTURE DIRECTIONS FOR HUMAN RIGHTS PROTECTIONS</i>	44
MARIE ISKANDER	<i>THE DESERVING AND THE UNDER-SERVED: A COMMENT ON THE OVERSUPPLY OF LAW GRADUATES, DIVERSITY IN THE LEGAL PROFESSION AND ACCESS TO LEGAL REPRESENTATION</i>	66
GREG BARNES & KAYLENE DOWNEY	<i>PARTICIPATION IN SOCIAL MEDIA BY POTENTIAL JURORS</i>	88

AG-GAG LAWS: CORPORATE ATTEMPTS TO KEEP CONSUMERS IN THE DARK

WILL POTTER*

The only way we, as consumers, have begun to see behind the closed doors of factory farms is through the work of whistleblowers and undercover investigators. In recent years, the animal agriculture industry has been rocked by a series of exposés that have revealed the true story of our food. These investigations, led by non-profit animal protection organisations, have used photography and video cameras to document egregious acts of animal cruelty, along with standard industry practices. They have garnered international media coverage, prompted historic prosecutions, and most importantly, created a cultural shift in how consumers understand animal agriculture. Rather than condemn these abuses, change their policies, and respond to consumer demand, the agriculture industry has responded by attempting to shoot the messenger. The industry has labelled whistleblowers as "terrorists" and supported new laws to silence them. 'Ag-gag' laws — 'ag' is for 'agriculture', 'gag' is 'to silence' — are an explicit attempt that began in the United States to outlaw undercover investigations and whistleblowing if they negatively portray the industry. These proposals — introduced in 25 states, passed into law in six, and now spreading internationally, including Australia — eliminate the only meaningful oversight of this massive industry and allow it to continue operating without oversight or accountability. The industry's efforts to restrict information in the United States has become an international model for corporate efforts to keep consumers in the dark.

CONTENTS

I INTRODUCTION..... 2
II CULTURAL SHIFT IN ANIMAL WELFARE..... 6

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III	‘WE DON’T NEED THESE ACTIVISTS TO POLICE US’.....	8
IV	ROOTS OF AG-GAG.....	10
V	AG-GAG	12
VI	GLOBAL SPREAD.....	16
VII	BACKLASH.....	20

I INTRODUCTION

We all know what a farm looks like. It is full of happy cows, happy pigs, and happy chickens. Happy farmers work outside, and little red barns dot the countryside. We all know this, because this is a story we have been told our entire lives.

I grew up in Fort Worth, Texas, and knew this story well. Fort Worth is "Cowtown" — cattle country, and home to the historic Fort Worth Stockyards. I remember my family taking my cousins and me to the brick-covered streets of the former stockyards, now a tourist destination, when we were children. We watched a herd of Longhorns driven through town by cowboys and ran through a maze made from old cow chutes. Growing up, I was surrounded by animal agriculture, and I even had family members who worked on factory farms, yet I had no idea what they looked like in real life.

As children, many of us sang ‘Old MacDonald had a farm’ and played with toy sets full of plastic pink pigs, smiling cows, and shiny green tractors. As adults, most of us have watched commercials with dairy cows mooing in lush green fields, pigs rolling in hay, and hens pecking freely outside of barns; we have seen the same iconic imagery used in product labels and reflected in brand names. This carefully constructed marketing by the agriculture industry taps into a romantic narrative of farming that we have been exposed to repeatedly since before we even knew what “marketing” meant.

The reality of modern farming is much different. The only way we, as consumers, have begun to see behind the closed doors of factory farms is through the work of whistleblowers and undercover investigators. In recent years, the animal agriculture industry has been rocked by a series of exposés that have revealed the true story of our food. These investigations, led by non-profit animal protection organisations, have used photography and video cameras to document egregious acts of animal cruelty, along with standard

industry practices. They have garnered international media coverage, prompted historic prosecutions, and, most importantly, created a cultural shift in how consumers understand animal agriculture.

As the author Jonathan Safran Foer noted: 'Undercover investigations by dedicated non-profit organisations are one of the only meaningful windows the public has into the imperfect day-to-day running of factory farms and industrial slaughterhouses.'¹

In one such investigation in California, the Humane Society of the United States documented cows too sick to even walk — so common that they are called "downers" by the industry — entering the food supply. Workers at the Hallmark/Westland Meat Packing Company were using heavy machinery to push cows into the "kill box" so that they could be slaughtered. Workers were recorded beating and kicking the cows, applying electric shocks, and stabbing them with the blades of a forklift.² The slaughterhouse was the US Department of Agriculture's second-largest supplier, and was named a 'supplier of the year' for 2004–2005.³ These sick animals would have been fed to school children in 36 states as part of the national school lunch program of the United States Department of Agriculture ('USDA').⁴ The exposure of these practices prompted the recall of 143 million pounds of meat,⁵ the largest meat recall in US history.⁶

Other investigations have revealed vicious acts of cruelty. Mercy For Animals has exposed workers throwing pigs across the room and calling it a 'roller coaster ride';⁷ throwing a bowling ball at a pig's head for fun;⁸ and punching cows in the face while another worker

¹ Jonathan Safran Foer, *Eating Animals* (Back Bay Books, 2010) 181.

² Humane Society of the United States, *Rampant Animal Cruelty at California Slaughter Plant* (30 January 2008) <http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html>.

³ Hallmark/Westland Meat Recall: Hearing before a Subcommittee of the Committee on Appropriations United States Senate, Comm. on Appropriations, 110th Cong. 37 (2008) (statement of Sen. Wayne Paccelle, President and CEO of The Humane Society of the United States).

⁴ Joe Roybal, 'California Nightmare', *Beef Magazine* (online), 1 March 2008 <<http://beefmagazine.com/beef-quality/cattle-handling/california-nightmare>>.

⁵ 'USDA recalls 143 million pounds beef', *NBC News* (online), 3 March 2008 <<http://www.nbcnews.com/id/23212514/>>.

⁶ David Brown, 'USDA Orders Largest Meat Recall in US History', *Washington Post* (online), 18 February 2008 <<http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021701530.html>>.

⁷ Mercy For Animals, *Concealed Cruelty – Pork Industry Animal Abuse Exposed* <http://pigabuse.mercyforanimals.org/?_ga=1.214877140.250614545.1480100857>.

⁸ Mercy For Animals, *Undercover Investigations* <<http://www.mercyforanimals.org/investigations>>.

joked about sexually abusing the animals, asking the investigator, '[d]o you want me to fuck her?'⁹ Compassion Over Killing ('COK') has documented workers suffocating birds by standing on their heads,¹⁰ and punching them while they hung in shackles;¹¹ newborn calves, just days old with umbilical cords still hanging from their bodies, being dragged by their necks and slammed on the ground;¹² and workers pushing the herniated intestines of pigs back into their bodies by hand, and then wrapping the open wound with tape.¹³ In one COK investigation, of a Hormel pork supplier, pigs were beaten, shocked, and improperly stunned, all out of view of government inspectors.¹⁴ In another Humane Society investigation, calves were picked up only by their tails, and sprayed with high-pressure water hoses; the plant manager warned workers not to do these things with the US Department of Agriculture inspector present.¹⁵

Undercover investigations have exposed animal abuse so egregious that they have even resulted in criminal prosecutions for animal cruelty against farm animals — a historic legal development. Workers in North Carolina were exposed beating turkeys with metal pipes,¹⁶ and the investigation resulted in the first-ever felony cruelty prosecution related to animals used for food.¹⁷ In Wyoming, workers pleaded guilty to animal cruelty after they were exposed punching piglets and kicking them like soccer balls.¹⁸ Prosecutors have relied on

⁹ YouTube, *Dairy Industry Tries to Cover Up Factory Farm Sex Abuse* (18 February 2014) <<https://www.youtube.com/watch?v=3PlJgBeOmZc>>.

¹⁰ Compassion Over Killing, *Tyson Exposed: A Tradition of Torture* <<http://cok.net/inv/Tyson/>>.

¹¹ Compassion Over Killing, *Ag-Gag Alert: North Carolina Chicken Slaughterhouse Horrors* <<http://cok.net/inv/mountaire/>>.

¹² Compassion Over Killing, *Quannah Cattle Company Animal Cruelty Investigation* <<http://cok.net/inv/quannah/>>.

¹³ Compassion Over Killing, *Iowa Investigation: Hawkeye Sow Centers (Hormel Supplier)* <<http://cok.net/inv/iowa-pigs/>>.

¹⁴ Compassion Over Killing, *Hormel Investigation* <<http://cok.net/inv/hormel/>>.

¹⁵ YouTube, *HSUS Investigation of Catelli Bros. Calf Slaughter Plant* (27 January 2014) <<https://www.youtube.com/watch?v=7suPjXRwVTk&feature=youtu.be>>.

¹⁶ Cindy Galli, 'Butterball Farm Worker Guilty of Animal Cruelty', *ABC News* (online), 28 August 2012 <<http://abcnews.go.com/Blotter/butterball-farm-worker-guilty-animal-cruelty/story?id=17098746>>.

¹⁷ Nathan Runkle, 'Making History: Butterball Case Marks First-Ever Felony Conviction for Cruelty to Factory-Farmed Birds' on *Mercy For Animals*, 29 August 2012 <<http://www.mercyforanimals.org/making-history-butterball-conviction-marks-first-ever-felony-conviction-for-cruelty-to-factory-farme>>.

¹⁸ Snejana Farberov, 'Nine Arrested for Animal Cruelty at Wyoming Pig Farm Where Workers Were Caught on Video Brutally Punching Sows and Flipping Piglets in the Air', *Daily Mail* (online), 27 December 2012 <<http://www.dailymail.co.uk/news/article-2253325/Nine-arrested-animal-cruelty-Wyoming-pig-farm-workers-caught-video-brutally-punching-sows-flipping-piglets-air.html>>; Becky Orr, '9 Cited in Abuse at Wheatland Pig Farm', *Wyoming News* (online), 25 December 2012 <http://www.wyomingnews.com/news/cited-in-abuse-at-wheatland-pig-farm/article_0b5c46de-fff2-53e3-bf23-7fed030b70de.html>.

the detailed footage of undercover investigators to build their legal cases and punish the workers caught on camera.

These whistleblowers have not only exposed horrific, aberrant behaviour, but perhaps most damning of all is that they have also shown the public what the industry considers completely normal and humane, or ‘standard industry practices’¹⁹ — cutting off the tails of piglets, the testicles and horns of bulls, and the beaks of chickens without anaesthesia;²⁰ tossing male chicks into trash cans to be gassed, electrocuted, or ground alive, because the males hold no value for the egg industry;²¹ confining sows in ‘gestation crates’ and ‘sow stalls’ — metal pens that are used to keep female pigs tightly confined during pregnancy, and for most of their adult lives;²² separating baby cows from their mothers after birth, and chaining them in veal crates where they cannot even turn around, so that their flesh remains soft;²³ stacking hens in battery cages — wire cages that are the dominant form of restricting egg-laying hens, internationally — so tightly that each bird is given less space than a standard sheet of paper,²⁴ its neck and wings are immobilised in the corroded cage wire, it is surrounded by mummified corpses, and covered in the faeces of birds stacked above it.²⁵

For the animal agriculture industry, all of this is business as usual.

And the industry has publicly defended all of it. In some cases of extreme cruelty, farm owners have attempted to distance themselves from their own workers, and say they were unaware of their daily abuses. In other cases, some have even claimed the cruelty was only

¹⁹ David J Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals* (1996) Animal Legal & Historical Center <<https://www.animallaw.info/article/beyond-law-agribusiness-and-systemic-abuse-animals>>.

²⁰ Paul Solotaroff, ‘Animal Cruelty is the Price We Pay for Cheap Meat’, *Rolling Stone* (online), 10 December 2013 <<http://www.rollingstone.com/feature/belly-beast-meat-factory-farms-animal-activists>>.

²¹ Maryn McKenna, ‘By 2020, Male Chicks May Avoid Death by Grinder’, *National Geographic* (online), 13 June 2016 <<http://www.nationalgeographic.com/people-and-culture/food/the-plate/2016/06/by-2020-male-chicks-could-avoid-death-by-grinder/>>.

²² National Hog Farmer, *Getting the Right Message on Sow Gestation Stalls* (3 July 2012) <<http://www.nationalhogfarmer.com/animal-well-being/getting-right-message-sow-gestation-stalls>>.

²³ Mercy For Animals, *Ohio Veal Investigation* <<http://veal.mercyforanimals.org/>>.

²⁴ Humane Society of the United States, *Animal Suffering, Filth, and Hen Corpses at Kreider Egg Farms* (12 April 2012) <http://www.humanesociety.org/news/press_releases/2012/04/investigation_kreider_farms_041212.html?credit=web_id158983203>.

²⁵ Compassion Over Killing, above n 13.

possible because of "coaching" and "staging" by animal advocates — claims that have never been proven.²⁶

Overwhelmingly, though, every time a new investigation is released, corporations and industry associations respond by simultaneously defending the practices and proclaiming their love for their animals. In Canada, for example, Mercy For Animals exposed workers at Puratone pig farm holding piglets by their feet and slamming them onto the concrete floor to kill them.²⁷ The Animal Care and Review Panel responded by saying that what investigators exposed are widely accepted practices within the industry.

The headline of *The Vancouver Sun* said it all: 'Body slamming piglets to death humane, pork experts say.'²⁸

II CULTURAL SHIFT IN ANIMAL WELFARE

When consumers are confronted with this disconnect between animal agriculture's fiction and the animals' reality, they are outraged and demand change. In the United States, new legal standards are being developed to eliminate the most restrictive confinement on factory farms. Often these proposals are initiated by consumers gathering thousands of signatures in ballot initiatives so that the issue will be considered for a state-wide vote. In 2008, California passed a sweeping measure to ban veal crates, gestation crates, and battery cages: the proposal passed with a greater margin of approval than any other citizen-led proposal in the state's history.²⁹ To date, five states have banned or restricted battery cages, eight states have banned veal crates, and nine states have agreed to phase out gestation crates.

The latest initiative, in Massachusetts, was a proposal called Question 3 to prohibit the in-state sale of eggs, veal, or pork if they come from farms that use battery cages, veal crates,

²⁶ Scott Logan, Kelsey Anderson and KBOI Web Staff, 'Senator: Video of Cow Abuse Staged, Advocacy Group Considers Lawsuit', *Idaho News* (online), 17 March 2014 <<http://kboi2.com/news/local/senator-video-of-cow-abuse-staged-advocacy-group-considers-lawsuit>>.

²⁷ Mercy For Animals, *Crated Cruelty: Canada's Pork Industry Animal Abuse Exposed* <<http://pigcruelty.mercyforanimals.org/>>.

²⁸ 'Body Slamming Piglets to Death Humane, Pork Experts Say (with Graphic Video)', *Vancouver Sun* (online), 12 December 2012 <<http://web.archive.org/web/20121221235454/http://www.vancouversun.com/business/Body+slamming+piglets+death+humane+pork+experts+with+graphic+video/7677326/story.html>>.

²⁹ Farm Sanctuary, *State Legislation* <<http://www.farmsanctuary.org/get-involved/federal-legislation/state-legislation/>>.

or gestation crates.³⁰ The proposal won the support of a staggering 78 per cent of voters. The overwhelming success of the initiative left the animal agriculture industry deflated. 'I think there are some in the egg industry that have lost the will to fight anything that [the Humane Society] puts forward,' said Ken Klippen, spokesman for the National Association of Egg Farmers.³¹ 'They don't want to fight anymore.'³²

New research has shown that these values are widely shared by voters, and more would like the government to take action and eliminate cruel farming practices. According to a Michigan State University study, if given the opportunity, 70 per cent of voters nationally would support outlawing gestation crates.³³ This type of enormous consumer support has led to some of the biggest corporations changing their own practices, in advance of legislative changes. McDonald's, for example, recently announced a switch to cage-free eggs by 2025.³⁴

In short, we are witnessing a massive shift in legal standards, and the cultural values they reflect, surrounding farm animals. Many factors have contributed to this social change, but the dominant influence of undercover investigations has been undeniable. As the *Journal of Agricultural Economics* explained in the first study of its kind, when animal welfare issues are reported in the news, consumers respond by cutting back on the amount of meat they eat.³⁵ In other words, when people are able to see abuse, they do not want to take part in it.

³⁰ Massachusetts Attorney General, *An Act to Prevent Cruelty to Farm Animals* (29 July 2016) <<https://web.archive.org/web/20170318114110/http://www.mass.gov/ago/docs/government/2015-petitions/15-11.pdf>>.

³¹ Chase Purdy, 'How the Vegan Movement Broke Out of Its Echo Chamber and Finally Started Disrupting Things' on *Quartz* (13 November 2016) <<http://qz.com/829956/how-the-vegan-movement-broke-out-of-its-echo-chamber-and-finally-started-disrupting-things/>>.

³² *Ibid.*

³³ Glynn T Tonsor, Department of Agriculture, Food, and Resource Economics, *Consumer Demand for Animal Welfare Practices: Gestation Crate/Stall Use* (17 December 2008) Michigan State University <https://www.agmanager.info/sites/default/files/2008_MPPC_AnimalWelfareDiscussion.pdf>.

³⁴ Lisa Baertlein, 'Big Food Investors to Meet on Cage-Free Eggs, Humane Sourcing', *Reuters* (online), 24 September 2015 <<http://www.reuters.com/article/us-usa-funds-food-idUSKCN0R012V20150924>>.

³⁵ Glynn T Tonsor, Nicole Olynk and Christopher Wolf, *Media Coverage of Animal Handling and Welfare: Influence on Meat Demand* (July 2009) AgEcon Search: Research in Agricultural & Applied Economics <http://ageconsearch.tind.io/record/49338/files/AAEA_2009_TonsorOlynkWolf_7.15.09_.pdf?version=1>.

III 'WE DON'T NEED THESE ACTIVISTS TO POLICE US'

Rather than condemn these abuses, change their policies, and respond to consumer demand, the agriculture industry has responded by attempting to shoot the messenger. The industry has labelled whistleblowers as "terrorists" and supported new laws to silence them. 'Ag-gag' laws — 'ag' is for 'agriculture', 'gag' is 'to silence' — are an explicit attempt to outlaw undercover investigations and whistleblowing if they negatively portray the industry. These proposals — introduced in 25 states, passed into law in six,³⁶ and now spreading internationally — eliminate the only meaningful oversight of this massive industry and allow it to continue operating without oversight or accountability.

In California, for example, an investigation by Compassion Over Killing of Central Valley Meat Co revealed such extreme cruelty that the government actually shut down the slaughterhouse. This type of intervention by the US Department of Agriculture is extraordinarily rare. The footage was so shocking that McDonald's, Costco, and In-N-Out Burger quickly cut ties with the supplier.³⁷

The animal agriculture industry, not surprisingly, was outraged. The industry pressured members of Congress to take action, and a few days after the plant was shuttered, three US Representatives from California sent a letter to the USDA calling for the immediate reopening of the slaughterhouse.³⁸ US Representatives Devin Nunes, Kevin McCarthy, and Jeff Denham said that its closure was hurting the economy, and the government needed 'to intervene against the onslaught of attacks that are occurring at the behest of radical groups'.³⁹ In a blog post, Representative Nunes compared the non-violent undercover filming to arson and described it as 'economic terrorism'.⁴⁰ As a result, the slaughterhouse reopened.

³⁶ American Society for the Prevention of Cruelty to Animals, *What is Ag-Gag Legislation?* <<https://www.asPCA.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation/ag-gag-bills-state-level>>.

³⁷ Christine Hauser, 'Work at Slaughterhouse Is Halted After Graphic Undercover Videos' on *The Lede, The New York Times* (22 August 2012) <http://thelede.blogs.nytimes.com/2012/08/22/work-at-slaughterhouse-is-halted-after-graphic-undercover-videos/?_r=0>.

³⁸ Letter from Devin Nunes, Kevin McCarthy and Jeff Denham to Thomas J Vilsack, Secretary of the United States Department of Agriculture (23 August 2012) <http://nunes.house.gov/uploadedfiles/usda_letter.pdf>.

³⁹ *Ibid.*

⁴⁰ Devin Nunes, 'Eco-extremists Strike Again' on *Devin Nunes* (23 August 2012) <<http://devinnunes.blogspot.com/2012/08/eco-extremists-strike-again.html>>.

The message of animal agriculture trade groups has been, '[w]e don't need these activists to police us. We can do it ourselves.'⁴¹ Animal advocates should not be allowed to document animal welfare abuses, they say. That should be left to the government and law enforcement. Most Americans would be shocked to learn, though, that in the United States not one single law protects farm animals during their lives. Not one.

The *Animal Welfare Act*, the nation's flagship legislation to prosecute animal cruelty, does not apply to food.⁴² There are some laws that protect farm animals at the point of slaughter, such as the *Humane Methods of Slaughter Act*,⁴³ but even those only apply at the time of death. They also specifically exempt poultry, which constitute about 90–95 per cent of the animals killed. On top of all this, about 25 states have exemptions for whatever the animal agriculture industry decides are 'customary practices'. If the industry decides it is 'customary' to keep pigs in gestation crates, cut off pieces of them without anaesthesia, and stack them on top of each other in battery cages, then, by definition under the law, it cannot be considered cruelty.

Simply put, between 8 and 9 billion animals are raised and killed for food every year in the United States by an industry that is not effectively monitored by any level of government. As Mark Bittman wrote for *The New York Times*, '[v]ideotaping at factory farms wouldn't be necessary if the industry were properly regulated. But it isn't.'⁴⁴ With ag-gag laws, the animal agriculture industry is fighting to keep it that way. The industry's efforts to restrict information in the United States has become an international model for corporate efforts to keep consumers in the dark.

⁴¹ Emily Meredith, 'Who "Ag Gag" Laws Truly Protect — Part III' on *Meatingplace* (2 December 2013) <<http://www.meatingplace.com/Industry/Blogs/Details/39779>>.

⁴² *Animal Welfare Act of 1966*, 7 USC § 2131 (1966); Animal and Plant Health Inspection Service, United States Department of Agriculture, *Animal Welfare Act* (14 June 2017) <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_program_information/>.

⁴³ *Humane Slaughter Act of 1958*, 7 USC § 1901 (1958).

⁴⁴ Mark Bittman, 'Who Protects the Animals?', on *Opinionator*, *The New York Times* (26 April 2011) <<http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/>>.

IV ROOTS OF AG-GAG

To truly understand this modern legislation, we need to step back and examine its historical roots and the current political climate after the September 11 terrorist attacks. Ag-gag and the war on whistleblowers has been building for decades.

The rhetoric of 'eco-terrorism' — a word created by industry groups in 1985 — took new meaning after 9/11.⁴⁵ What began as a public relations campaign against activist groups worked its way into the top levels of government. Animal rights and environmental activists became the FBI's 'number one domestic terrorism threat'.⁴⁶ Even in the most militant activist tactics, such as breaking into laboratories or fur farms, or setting logging equipment on fire, no one has been injured. Yet an animal rights activist has even been listed on the FBI's website, alongside Osama bin Laden.⁴⁷

Meanwhile, right-wing groups who have a history of bloodshed are repeatedly left out of FBI and Homeland Security listings and not labelled as "terrorists".⁴⁸ According to the FBI, in the three years after the September 11 terrorist attacks, every act of domestic terrorism except for one was the work of animal rights and environmental activists.⁴⁹ Those incidents physically harmed no one. Yet in that same time period, there were 283 injuries and 71 deaths by right-wing groups, primarily targeting people because of their ethnicity or sexual orientation.⁵⁰

The FBI's disparate treatment of these groups sends a clear message to the public. If you occupy government land with high-powered weapons, you will get a slap on the wrist; if you protest corporations non-violently for animal protection or environmental reasons, you are a terrorist. As a Congressional report warned in 2012, 'the crimes committed

⁴⁵ For a detailed history, see Will Potter, *Green is the New Red: An Insider's Account of a Social Movement Under Siege* (City Lights Books, 2011).

⁴⁶ Henry Schuster, 'Domestic Terror: Who's Dost dangerous?', *CNN* (online), 24 August 2005 <<http://www.cnn.com/2005/US/08/24/schuster.column/>>.

⁴⁷ Vivian Ho, 'Daniel Andreas San Diego Listed on FBI's Most Wanted' on *SFGATE* (13 December 2013) <<http://www.sfgate.com/crime/article/Daniel-Andreas-San-Diego-listed-on-FBI-s-most-5062632.php>>.

⁴⁸ Justin Rood, CQ Homeland Security, *Animal Rights groups and Ecology Militants Make DHS Terrorist List, Right-Wing Vigilantes Omitted* (25 March 2005) <http://www.cq.com/public/20050325_homeland.html>.

⁴⁹ Federal Bureau of Investigation, US Department of Justice, *Terrorism* (2002–2005).

⁵⁰ Arie Perliger, *Challengers from the Sidelines: Understanding America's Violent Far-Right* (November 2012) Combating Terrorism Center at West Point <<https://www.ctc.usma.edu/wp-content/uploads/2013/01/ChallengersFromtheSidelines.pdf>>.

by animal rights extremists and eco-terrorists cannot be compared to clearly violent attacks...'.⁵¹

New FBI agents are being trained to follow these misplaced priorities. In documents obtained through the *Freedom of Information Act* — the US open records law — the FBI's training materials on 'eco-terrorism' are not about violence.⁵² The FBI lists lawful First Amendment activity and low-level criminal activity (such as nonviolent civil disobedience) as examples of domestic terrorism by animal advocates. The FBI is particularly focused on information gathering and distribution by these groups, including the use of open records requests and the use of media in a 'public relations war'.⁵³

Prior to ag-gag, corporations attempted a variety of tactics to criminalise the animal protection movement. They attempted to use the *Racketeer Influenced Corruption Organization Act* ('RICO') — the law was intended to be used for the mafia — against the animal rights movement.⁵⁴ They have sought restraining orders and injunctions to stop protests, and they have introduced a variety of state and federal legislation to target their opposition. By far the most significant development in this effort was the passage of federal legislation that created the crime of 'animal enterprise terrorism'.

The *Animal Enterprise Protection Act* is a federal law passed in 1992,⁵⁵ at the request of animal industries, in order to crack down on illegal, underground actions by groups like the Animal Liberation Front. Years later, the law was used to prosecute the SHAC 7,⁵⁶ who were members of an international campaign to stop the notorious animal testing lab, Huntingdon Life Sciences, which had been exposed multiple times by undercover investigators. The SHAC 7 were never accused of participating in underground activity, though. They spoke and wrote about it and published news of both legal and illegal protest activity on their website. According to prosecutors, this web publishing created a political climate that

⁵¹ Will Potter, 'Congressional Report on Domestic Terrorism Addresses the "Green Scare," Cites Green Is the New Red' on *Green Is the New Red* (2 October 2012) <<http://www.greenisthenewred.com/blog/domestic-terrorist-threat-congressional-report/6418/>>.

⁵² Freedom of Information Act, 5 USC § 552 (1967).

⁵³ Will Potter, 'Newly Released FBI "Domestic Terrorism" Training on Anarchists, Environmentalists, Show COINTELPRO Tactics' on *Green Is the New Red* (29 May 2012) <<http://www.greenisthenewred.com/blog/fbi-domestic-terrorism-training-anarchists-eco/6199/>>.

⁵⁴ Racketeer Influenced and Corrupt Organizations Act, 18 USC §§ 1961–1968 (1970) ('RICO').

⁵⁵ Animal Enterprise Protection Act of 1992, 18 USC § 43 (1992).

⁵⁶ 'SHAC 7' on *Green is the New Red* <<http://www.greenisthenewred.com/blog/tag/shac-7/>>.

encouraged illegal acts and amounted to a conspiracy to commit animal enterprise terrorism. They were sentenced to between one and six years in prison.

The *Animal Enterprise Terrorism Act* ('AETA'),⁵⁷ passed in 2006, expanded that law even further. There are three ways to be prosecuted under the AETA: damaging or causing the loss of any property (which is later defined as including the loss of profits), instilling a reasonable fear, and conspiracy. This vague, overly broad language is especially troubling in light of the political climate I have described. How can we possibly describe 'reasonable fear' when industries are campaigning to make the unreasonable reasonable?

When I testified before Congress against the AETA in 2006, the primary concerns I raised were that the law would have a chilling effect on lawful protest activity and that the vague language of the law could be used to wrap up non-violent undercover investigators and whistleblowers. Members of Congress angrily dismissed these concerns, saying the law was tailored to illegal, underground groups. Whistleblowers and lawful protesters would never be affected. They said the law would only be used against people who do things like burn buildings.

It turns out that these statements were completely untrue. The FBI Joint Terrorism Task Force has kept files on activists who expose animal welfare abuses on factory farms and recommended prosecuting them as terrorists, according to a document uncovered through the *Freedom of Information Act*.⁵⁸ The 2003 FBI file details the work of several animal rights activists who used undercover investigations to document repeated animal welfare violations. The FBI special agent who authored the report said they 'illegally entered buildings owned by [redacted] Farm ... and videotaped conditions of animals'.⁵⁹

V AG-GAG

When I began reporting on the criminalisation of dissent 15 years ago, I never thought this latest development would have been possible. At that time, legislative efforts by corporations were focused on labelling underground groups such as the Animal Liberation

⁵⁷ Animal Enterprise Terrorism Act of 1992, 18 USC § 34 (1992) ('AETA').

⁵⁸ Will Potter, 'FBI Says Activists Who Investigate Factory Farms Can Be Prosecuted as Terrorists' on *Green Is the New Red* (20 December 2011) <<http://www.greenisthenewred.com/blog/fbi-undercover-investigators-animal-enterprise-terrorism-act/5440/>>; *Freedom of Information Act*, 5 USC § 552 (1967).

⁵⁹ Potter, above n 56.

Front as terrorists and also criminalising their above-ground supporters. The possibility of legislation to explicitly target anyone who lawfully photographs or videotapes factory farms seemed politically untenable.

Laws with provisions similar to ag-gag have existed since the early 1990s. In Montana, North Dakota, and Kansas, 'agricultural interference' laws include outright bans on photography and video recording. Each includes similar language against those who '[e]nter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment'.⁶⁰ These laws remained on the books and set a legal precedent, but they were not enforced. Undercover investigations were simply not as common as they are today.

This first wave of legislation passed in a very different cultural and technological climate. Undercover investigations and whistleblowing were quite different: costly, and their distribution was limited to either physically mailing video tapes or relying on media outlets to air the investigation. Today, the availability of inexpensive pinhole cameras, intuitive video editing programs, cheap web hosting, and free social media tools allows global distribution. An organisation can carry out an investigation for very little money, post it on YouTube for free, and distribute the video primarily through social media channels such as Facebook, and quickly reach millions of people.

This democratisation of technology has made the tactic of undercover investigation accessible to more organisations and the products of those investigations accessible to countless more consumers. The rise of anti-whistleblower laws needs to be understood in this social context. The threat of sunlight has been amplified exponentially.

There is a clearly-seen correlation between the increasing frequency and media attention paid to factory farm whistleblowing and the introduction of ag-gag legislation. In Idaho, for instance, Mercy For Animals exposed workers punching and kicking cows and sexually abusing them at Bettencourt Dairies.⁶¹ In response, the state's billion-dollar dairy industry

⁶⁰ Mont Code Ann § 81-30-103; ND Cent Code § 12.1-21.1; Kan Stat Ann § 47-18-27.

⁶¹ Paresh Dave, 'Graphic Cow Abuse Video Released as Idaho Advances 'Ag-Gag' Bill', *Los Angeles Times* (online), 18 February 2014 <<http://articles.latimes.com/2014/feb/18/nation/la-na-nn-cow-abuse-video-idaho-ag-gag-bill-20140218>>.

drafted SB1337, which prohibits 'audio or video recording' on an agricultural facility.⁶² It also makes it illegal to 'obtain records' without the farm owner's consent.⁶³ Similarly, in Kentucky, the Humane Society exposed horrific abuse against pigs at Iron Maiden Hog Farm. National media described so-called "piglet smoothies",⁶⁴ in which sick and dead piglets were ground up and fed back to their living mothers. The next month, ag-gag language criminalising photography was included in what was previously a piece of animal welfare legislation.⁶⁵

There are three main types of modern ag-gag laws that have been debated in the United States. The first incarnation of ag-gag explicitly criminalised photography and video.⁶⁶ Proposals included language against anyone who 'records an image or sound' from a factory farm and also anyone who 'uploads, downloads, transfers or otherwise sends recorded images of, or sound from, the agricultural operations over the internet in any medium.'⁶⁷ This did not sit well with the public. Just as banning books piques the curiosity of readers, attempting to ban photography has backfired by prompting consumers to wonder what, exactly, is being hidden.

In response to that growing opposition, the industry tried a new tactic. The second iteration of ag-gag bills criminalised those who misrepresent themselves on job applications in order to carry out an investigation. Iowa's ag-gag law, for example, describes 'agriculture production facility fraud' as making a false representation in order to obtain employment and 'commit an act not authorised by the owner' (read: filming animal abuse).⁶⁸ Some of this language is so broad that if someone applies for a job at a farm and is also a member of an animal protection group, that could be a criminal offence.

The third type of ag-gag law is the most innovative. These 'mandatory reporting' bills require investigators to turn over any footage of animal abuse to police within 24 or 48 hours. It is a particularly savvy, and deceptive, proposal. Publicly, the industry says that

⁶² SB, 1337, 62 Legislature, 2nd Sess (Idaho, 2014).

⁶³ Ibid.

⁶⁴ Eliza Barclay, 'Piglet Smoothie' Fed to Sows to Prevent Disease; Activists Outraged' on *NPR* (20 February 2014) <<http://www.npr.org/blogs/thesalt/2014/02/20/280183550/piglet-smoothie-fed-to-sows-to-prevent-disease-activists-outraged>>.

⁶⁵ Ky Stat Rev Ann § 258.505, 258.119.

⁶⁶ Matthew Shea, 'Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws' (2015) 48 *Columbia Journal of Law and Social Problems* 337.

⁶⁷ SB 16, 89th Gen Assemb, Reg Sess (Ark 2013); HB, 683, Gen Assemb, (Pa 2013).

⁶⁸ HB 589, 84th Gen Assemb (Iowa, 2012).

they had no idea extreme cruelty was taking place on their farms and that they want to stop it. Using the "see something, say something" mantra of the domestic 'War on Terrorism', they say that investigators should be required to notify police immediately — and that they should not be allowed to send the footage to journalists.

The true intention of this proposal is to stop investigators from documenting patterns of abuse. In any investigation of criminal activity, whether it is organised crime or drug cartels, investigators never stop with just one example. They continue investigating in order to build a case that demonstrates repeat offences and systems of behaviour. With this style of ag-gag law, the agriculture industry is attempting to shift the blame on to individual workers, rather than allow whistleblowers to reveal cruel practices used regularly within the entire industry.

It is troubling enough that these proposals criminalise whistleblowers and their sources, but we also need to remember the identity of typical factory farm workers. These are already among the most disenfranchised populations in the country. The people who work on factory farms are not there because of a passion for the job. They work there because they do not have other options. They are predominantly immigrants and non-native English speakers. In many cases they are undocumented and also do not have easy access to (or money for) attorneys. To tell these workers, whose livelihood and family depend on their job on the farm, that they have to turn over all evidence of abuse to their employer so quickly is a disproportionate burden on an already-marginalised community.

In my research comparing all of these proposals, I have found that some contain identical language. For example, Iowa's HB 589 and Minnesota's HB HF 1369 both include the exact same wording against anyone who 'obtains access to an agricultural production facility by false pretences', or 'makes a false statement or misrepresentation as part of an application for employment at an agricultural production facility'.⁶⁹ Either politicians are just equally brilliant in understanding how legislation should be phrased, or they are working secretly, behind closed doors to share their information nationally, even copying and pasting the text verbatim.

⁶⁹ HB 589, 84th Gen Assemb (Iowa, 2012); HR 1369, 87th Sess (Minn, 2011).

The most recent ag-gag law, passed in early 2016 in North Carolina, marked a sweeping expansion of the scope of this legislation. The bill was introduced on the same day that a fifth Butterball employee pled guilty to criminal cruelty to animals — charges that would not be possible without the undercover investigations that bills like this aim to criminalise.⁷⁰ North Carolina's SB 648,⁷¹ the '*Commerce Protection Act*', does not include any "terrorism" language, as others have in the past, and it does not mention animal agriculture at all.

Instead, it says: 'It is unlawful for any person to willfully make false statements or representations or to fail to disclose requested information as part of an employment application' if the purpose is 'to create or produce a record that reproduces an image or sound occurring within the employer's facility, including a photographic, video, or audio' or 'to capture or remove data, paper, records, or any other documents ...'⁷² It goes on to say that '[a]ny recording... shall be turned over to local law enforcement within 24 hours.'⁷³

As *The New York Times* noted in an editorial against the measure: "The law originally singled out factory-farm exposés, but after it twice failed to pass in the face of resistance from animal-rights activists, lawmakers succeeded in pushing through a version that covered everyone equally."⁷⁴

VI GLOBAL SPREAD

Social movements have no national boundaries. They never have, but online tools have facilitated much more collaboration internationally, including the sharing of strategies being developed by social movements in other countries. In Australia, for example, the animal protection movement has been a global influence. People like Patty Mark pioneered a tactic called 'open rescues', where activists enter the sites of animal abuse, document their findings through photography and video, and then rescue some of the animals who are in dire need of care.⁷⁵ They do all of this without covering their faces or attempting to conceal

⁷⁰ Vandhana Bala, 'Breaking News: Yet Another Butterball Turkey Employee Convicted of Cruelty to Animals' on *Mercy For Animals* (4 April 2013) <<http://www.mercyforanimals.org/breaking-news-yet-another-butterball-turkey-employee-convicted-of-cruelty-to-animals>>.

⁷¹ HR 648, Gen Assemb (N.C, 2013).

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Editorial, 'No More Exposés in North Carolina', *The New York Times* (New York), 1 February 2016.

⁷⁵ YouTube, *Patty Mark – President of Animal Liberation Victoria* (21 June 2010) <<https://www.youtube.com/watch?v=49G4luRsOmo>>.

their identities. As Mark and Animal Liberation Victoria gained international attention, they shaped how American groups thought about their own tactics.⁷⁶ Open rescues began appearing in the United States in the late 1990s and early 2000s,⁷⁷ and those rescues evolved into long-term undercover investigations.

Ideas may not be confined by borders, but neither are corporations. As animal advocacy efforts have spread internationally, so too has the backlash against them. Under neoliberalism and global capitalism, corporations traverse borders freely in pursuit of profits, and with them they bring repressive tactics, frequently backed by governments, to silence those who threaten those profits. After ag-gag took root in the United States, it grew into a model for the animal agriculture industry to silence animal advocates globally.

In 2011, at about the same time modern ag-gag laws emerged in the United States, undercover investigations of animal abuse started being classified as “terrorism” throughout Europe. EUROPOL, the European police agency, published a report on terrorism threats meant as a warning for law enforcement agencies. The report included the 2005 bombing of the London subway, for example, and the 2004 bombing of the Madrid train system. The report also included a section on animal rights activists and a warning about activists with cameras. ‘ARE (animal rights extremists) activists also use disinformation methods in order to discredit their targets and weaken their public acceptance,’ the report says.⁷⁸ ‘Images of sick and abused animals are embedded in video footage and made public’.⁷⁹

In Finland, an animal rights group called Oikeutta eläimille (Justice for Animals) did exactly that and faced harsh penalties. The group published photographs and video footage from 30 pig factory farms.⁸⁰ The two-month investigation documented injured and dying pigs and led to a national outcry by the public and members of Parliament. Instead of

⁷⁶ ‘Opening Doors and Eyes to Animal Suffering’ on *Satya* (March 2004) <<http://www.satyamag.com/mar04/mark.html>>.

⁷⁷ Mark Hawthorne, ‘Inside an Open Rescue: Putting a Human Face on Animal Liberation’ on *Satya* (June/July 2005) <<http://www.satyamag.com/jun05/hawthorne.html>>.

⁷⁸ Europol, *TE-SAT 2011 EU Terrorism Situation and Trend Report* (2011) <https://www.europol.europa.eu/sites/default/files/publications/te-sat2011_0.pdf>.

⁷⁹ *Ibid.*

⁸⁰ Sikatehaat, *Sikalat 2009* (2009) <<https://www.sikatehaat.fi/sikalat-2009>>.

prosecuting those responsible for the animal abuse, law enforcement prosecuted the whistleblowers.⁸¹

In Austria, activist Martin Balluch and his group VGT, the Association Against Animal Factories, has criticised the Austrian People's Party for fighting against animal welfare legislation. Balluch says it is because 26 per cent of the party has ties to animal agriculture,⁸² (much like in the United States, where the sponsors of 'ag-gag' bills have close ties to the industry as well). To prove the point, VGT created a web page with a list of politicians. When visitors click on a name of a politician, they are shown photographs of animals at the farms they own.⁸³ In response, the Austrian Farmers' Association or the ÖVP, created an advertising campaign with a figure dressed in black with a ski mask covering his face. Much like advertisements that have long been used in the United States, it warned of 'farm families terrorised'.

In Australia, this globalised model of resistance and repression is illustrated full-circle: open rescue tactics began here and then expanded to the United States where they evolved into undercover investigations; the investigations were effective, and the industry responded by introducing laws to criminalise them; now, ag-gag laws have been exported back to Australia.

Ag-gag supporters in Australia have copied the entire playbook of the US agriculture industry. The Victoria Farmer's Federation says existing laws have not been able to stop activists from covertly filming farms and sometimes rescuing animals in need of medical treatment. Katrina Hodgkinson, the former New South Wales Primary Industries Minister, said those filmmakers are 'akin to terrorists'.⁸⁴ Farmers even offered a AUD10 000 reward to anyone who could help convict an animal activist.⁸⁵ The pig industry

⁸¹ Mikko Alane, 'No Justice for Animals', *Huffington Post* (online), 22 November 2011

<http://www.huffingtonpost.com/mikko-alanne/pig-animal-justice_b_972672.html>.

⁸² Martin Balluch, 'Tierindustrielobby Innerhalb Der Övp: Tierfabriken Hoher Övp-Funktionärinnen Aufgedeckt' on *Martin Balluch Blog* (24 September 2013) <<http://www.martinballuch.com/?p=3174>>.

⁸³ VGT, *Tierquälerische Tierfabriken hoher ÖVP-FunktionärInnen* (19 September 2013)

<<http://www.vgt.at/filme/fotos/recherchen/20130919OeVP-Tierhaltung/index.php>>.

⁸⁴ 'Animal Rights Activists 'Akin to Terrorists', Says NSW Minister Katrina Hodgkinson', *ABC News* (online), 18 July 2013 <<http://www.abc.net.au/news/2013-07-18/animal-rights-activists-27terrorists272c-says-nsw-minister/4828556>>.

⁸⁵ Simon Thomsen, 'Australian Farmers Have a \$10,000 Bounty Out on Animal Rights Activists over Farm Raids', *Business Insider* (online), 11 December 2013 <<http://www.businessinsider.com.au/australian-farmers-have-a-10000-bounty-out-on-animal-rights-activists-over-farm-raids-2013-12>>.

has paid for television advertisements that say animal activists with cameras ‘terrorise pigs at night’.⁸⁶

The industry in Australia is openly, explicitly modelling Australian proposals after US legislation. They are promoting similar ag-gag laws in hopes of obtaining the same protections that US corporations now have. A Western Australian Senator named Chris Back has been formulating ag-gag legislation to stop websites like AussiePigs.com that publicise undercover footage.⁸⁷ Western Australian Labor Senator Glenn Sterle has called for legislation with mandatory reporting provisions, identical to US ag-gag laws.

These efforts have not been successful in Australia, in large part because of media campaigns and public education efforts by groups like Voiceless, the Animal Protection Institute. Politicians have been wary of embracing legislation that explicitly criminalises truthful information and are exploring other options to arrive at the same result. The federal and New South Wales governments held private meetings with animal industry groups to discuss ways of discrediting animal protection groups, such as changing the laws surrounding evidence gathering so that it is easier to prosecute those who document animal abuse.⁸⁸ Rather than address the cruelty that animal rights activists have consistently exposed, politicians are using tax dollars to discuss how these groups might be stripped of their charitable status.

Animal protection groups in Australia, just like those in the United States and globally, say they will not be deterred. ‘What we witness inside animal agriculture is beyond comprehension,’ says Patty Mark of Animal Liberation Victoria.⁸⁹ ‘The public would not believe us, if we were not able to bring out the video and photographs of the extreme torture, humiliation, deprivation, terror and pain the animals suffer endlessly in their incarceration ... Ag-gag laws won’t stop us.’⁹⁰

⁸⁶ John Stewart, ‘Animal Rights Battle’, *ABC News* (online), 5 November 2013
<<http://www.abc.net.au/news/2013-11-05/animal-rights-battle/5072026>>.

⁸⁷ See, eg, Australian Pig Farming: The Inside Story <aussiepigs.com>.

⁸⁸ Voiceless, *Joyce, NSW Gov Plan to Challenge Animal Charities Revealed* (8 December 2016)
<<https://www.voiceless.org.au/content/joyce-nsw-gov-plan-challenge-animal-charities-revealed>>.

⁸⁹ Will Potter, ‘Attack on Factory Farm Whistleblowers Goes Global’ on *The Dodo* (16 February 2014)
<<https://www.thedodo.com/attack-on-factory-farm-whistle-432282967.html>>.

⁹⁰ *Ibid.*

VII BACKLASH

These attempts to keep consumers in the dark have resulted in a massive public backlash. Every time one of these bills is introduced, it has allowed for an opportunity to discuss what the industry is trying to hide.

The first use of an ag-gag law, much like the first use of the Animal Enterprise Terrorism Act, was for clearly constitutionally-protected activity. In Utah, a young woman named Amy Meyer saw a sick cow being pushed by a bulldozer outside of Dale Smith Meatpacking Company. She did what any of us would in the age of iPhones and YouTube: she filmed it. She was standing on a public street. I found out about the case, and broke the story on my website. Within 24 hours it had created such an uproar that prosecutors dropped all charges.⁹¹

In another case, a young woman named Taylor Radig worked at Quanah Cattle Co in Kersey, Colorado, and covertly filmed calves — some so young they still had umbilical cords attached — being kicked, thrown, and slammed onto trucks. Video footage was released by Compassion Over Killing, and two days later criminal charges were filed against three men shown abusing the animals. Later, Radig was asked to visit the sheriff's office to provide a formal statement. After she confirmed that she had witnessed and recorded the abuse, she was told by police that she, the whistleblower, was being charged with animal cruelty.⁹² Much like Amy Meyer's case, as the public was so outraged that someone who tried to stop animal cruelty was being charged with cruelty herself, prosecutors later dropped the charges.⁹³

The most significant impact of ag-gag laws is that they have brought together a wide range of groups that typically do not engage in dialogue. It has helped build multi-issue coalitions that never existed before — groups including Amnesty International, People for the Ethical

⁹¹ Will Potter, 'First "Ag-Gag" Prosecution: Utah Woman Filmed a Slaughterhouse from the Public Street' on *Green Is the New Red* (29 April 2013) <<http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer/6948/>>.

⁹² John B Cooke, 'Press Release: Animal Abuse Investigation; Quanah Cattle Company' on *Green Is the New Red* (22 November 2013) <<http://www.greenisthenewred.com/blog/wp-content/Images/2013.11.22-quanah-press-release-prosecution.pdf>>.

⁹³ Will Potter, 'BREAKING: Charges Dropped Against Investigator Who Filmed Animal Cruelty' on *Green Is the New Red* (11 January 2014) <<http://www.greenisthenewred.com/blog/taylor-radig-charges-dropped/7492/>>.

Treatment of Animals, labour unions, the American Civil Liberties Union, the Sierra Club, Human Rights Watch, and many others. In ag-gag, they see a common enemy.

The message of this coalition has been that if we allow this to take place, if we allow factory farms to silence their critics, other whistleblowers will be next. It does not matter what you think about animal rights activists or if you are a vegetarian. If we allow this industry to gag their critics, other corporations will follow their lead.

Amnesty International said in a statement: ‘What at first might appear to be exclusively an animal abuse issue is, on closer inspection, clearly also a freedom of expression issue, a workers’ rights issue, an environmental issue and a public health issue’.⁹⁴ As Amnesty International put it, ‘... sunshine — in our case, the proverbial candle — really is the best disinfectant. We have no hope of stopping abuses if we can’t even bring them to light.’⁹⁵

At least one US court has agreed and struck down an ag-gag law as unconstitutional in a historic ruling. I was a plaintiff in the first legal challenges filed against these laws. In Idaho, the Animal Legal Defense Fund led the legal effort, arguing that ag-gag is an unconstitutional attempt by the agriculture industry to silence journalists, animal advocates, and whistleblowers who expose cruel farming practices. A wide-range of organisations supported the lawsuit by filing amicus briefs. The basis of the constitutional challenge was that ag-gag laws single out one group of people based on what they believe. Video footage that is favourable to the industry would not be subject to prosecution: it is only critical reporting that is at risk.

A US District Court agreed, and struck down the law. Judge Lynn Winmill said in the ruling that ag-gag ‘gives agricultural facility owners veto power, allowing owners to decide what can and cannot be recorded, effectively turning them into state-backed censors able to silence unfavourable speech about their facilities’.⁹⁶

In addition to violating the First Amendment, by criminalising newsgathering and distribution, ag-gag is also a violation of the Equal Protection Clause of the US Constitution

⁹⁴ Vienna Colucci, ‘Amnesty Makes It 60’ on *Amnesty International USA* (24 May 2013) <<http://blog.amnestyusa.org/us/amnesty-makes-it-60/>>.

⁹⁵ *Ibid.*

⁹⁶ *Animal Legal Defense Fund, et al v C L Butch Otter and Lawrence Wasden*, 44 F Supp 3d 1009 (D Idaho, 2014).

as Winmill said 'because it was motivated in substantial part by animus towards animal welfare groups'.⁹⁷ Also, '[m]any legislators made their intent crystal clear by comparing animal rights activists to terrorists ...'⁹⁸

The ruling is a strongly-worded defence of the First Amendment and investigators, and a harsh attack on attempts by corporations to carve out special protections under the law, solely to protect their profits. It is a landmark victory that spells trouble for the agriculture industry's attempts in other states, such as Utah where the Animal Legal Defense Fund is challenging the ag-gag law.

There are plenty of legal battles to come, but consumers and the courts have weighed in against ag-gag, and the industry has taken notice. The widespread backlash against ag-gag has been so strong that even the industry itself is starting to question the wisdom of this legislation. A survey by Pork Network News of its readership found that 73 per cent of industry respondents said ag-gag laws are not helping them.⁹⁹

All of this is a testament to the power of public education. The animal agriculture industry is threatened by consumers seeing what happens behind closed doors, and law enforcement and lobbyists are threatened by the public seeing these repressive measures. In both cases, when people find out about what is happening, they are outraged and demand change.

Animal cruelty cannot withstand public scrutiny, and neither can the attempts to silence those who expose it.

⁹⁷ Ibid

⁹⁸ Ibid.

⁹⁹ Angela Bowman, 'Can "Ag Gag" Laws Stop Undercover Activists?' on *Cattle Network* (22 March 2013) <<http://www.cattlenetwork.com/news/industry/can-%E2%80%9Cag-gag%E2%80%9D-laws-stop-undercover-activists>>.

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THE REAL SOCRATIC METHOD: AT THE HEART OF LEGAL EDUCATION LIES A FUNDAMENTAL MISUNDERSTANDING OF WHY SOCRATES ASKED SO MANY QUESTIONS

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In a true Socratic law school, I suggest, students would be instructed to ask questions of those in authority instead of answering them. Nothing and no one would be beyond a student's questioning, especially by virtue of claims to authority or expertise alone. Students would be empowered to question the wisdom of professors, judges, politicians, and the law itself, unpacking the hidden values, ideological motivations, and philosophical foundations of legal principles. By questioning the origins of law, students would learn to refine their critical thinking and analytical skills to judge whether or not a law, in itself, is just.

CONTENTS

I	INTRODUCTION.....	32
II	LANGDELL'S SOCRATIC METHOD.....	33
III	TOWARD A NEW SOCRATIC METHOD.....	36
IV	THE ALTERNATIVE LEGAL EDUCATION METHODS.....	38
V	CONCLUSION.....	41

I INTRODUCTION

A stern, almost cruel-looking professor stands at the front of a law class and picks on a student at random.

'Mr Hart' the professor says, 'What are the facts of the case?'¹

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¹ *The Paper Chase* (Directed by James Bridges, Thompson-Paul Productions, 1973).

The student stands.

‘I haven’t read the case’, the student says quietly.²

The professor grumbles in frustration, mentioning that the assignment has been stuck on a wall in Langdell Hall for over a week.

‘I will give you the facts of the case myself, Mr. Hart’ the professor says, to the student’s visible relief.³

The above scene from the 1973 film *The Paper Chase* is a classic example of what is now called the Socratic Method – a system of asking questions to a student about a particular case of law. Invented by the law professor Christopher Langdell in 1870, the Socratic Method bears little resemblance to the actual ideas of Socratic wisdom in *Meaieutics* and the *Apology*. In this paper, I intend to challenge Langdell’s interpretation of Socrates and ask whether his method reinforces authoritative structures of law as opposed to granting students the ability to test their critical thinking skills.

In a true Socratic law school, I suggest, students would be instructed to ask questions to those in authority instead of answering them. Nothing and no one would be beyond a student’s questioning, especially by virtue of claims to authority or expertise alone. Students would be empowered to question the wisdom of professors, judges, politicians, and the law itself, unpacking the hidden values, ideological motivations, and the philosophical foundations of legal principles. By questioning the origins of law, students would learn to refine their critical thinking and analytical skills in a manner that Langdell himself intended to teach, but which he never truly managed to achieve. Finally, students would be able to examine the interests of the state in enforcing a particular law, and whether that law abided by certain principles of justice, fairness, and equity.

II LANGDELL’S SOCRATIC METHOD

As Dean of Harvard Law from 1870 to 1895, Professor Christopher Langdell systematically laid out the foundation of legal education in most common-law countries, including

² Ibid.

³ Ibid.

America, the UK, and Australia.⁴ His two primary inventions were the case method of instruction and the Socratic method. Langdell taught on the basis of 'a settled conviction that law could only be taught or learned effectively by means of cases'.⁵ He taught these cases by asking students a series of questions about the 'principles and doctrines' contained therein.⁶ Students were expected to understand the facts of a case, the legal principles of a case, and understand how those legal principles could be applied in a new set of factual circumstances.⁷ Although some law schools have recently adopted a less interrogative approach, the case method and to a lesser extent the Socratic method, remain the benchmarks of modern legal education.⁸

Langdell's Socratic method was inspired by a similar method outlined by Socrates in *Maieutics*.⁹ The ancient philosopher outlines a method of interrogating young Greek men by asking them a series of questions to draw out fallacious reasoning in their logic.¹⁰ Socrates boasted of an 'ability to apply every conceivable test to see whether [the] young man's mental offspring [was] illusory and false'.¹¹ This bears some resemblance to Langdell's technique of interrogation. By forcing students to justify illusory or false understandings of case law, Langdell was applying his own version of Socrates' technique.

Under his Socratic method, Langdell encouraged students to come to a different opinion on the ratio decidendi of a case. However, his method lacked any sustained debate on the origins of those legal decisions or the method by which they were reached by judges. A student could distinguish a particular case from a new set of facts — suggesting that the old legal principle may not apply in a new circumstance — but where a judge provides an opinion, it was not the student's place to disagree with the judge on first principles or the philosophical foundations of that opinion. Indeed, philosophy is not a part of the method at all, which is ironic, given that the method is named after one of the most famous

⁴ Harvard Law School, *The Case Study Teaching Method* <<http://casestudies.law.harvard.edu/the-case-study-teaching-method/>>.

⁵ Christopher Columbus Langdell quoted in William Schofield, 'Christopher Columbus Langdell' (1907) 55(5) *The American Law Register* 273, 278.

⁶ Harold Anthony Lloyd, 'Raising the Bar, Razing Langdell' (2016) 51 *Wake Forest Law Review* 231, 231.

⁷ Todd D Rakoff and Martha Minow, 'A Case for Another Case Method' (2007) 60 *Vanderbilt Law Review* 597, 599.

⁸ Christopher M Ford, *The Socratic Method in the 21st Century* (Masters Thesis, United States Military Academy, 2008) 3 <http://www.usma.edu/cfe/literature/ford_08.pdf>.

⁹ Plato, 'Maieutics' in *Plato: Theatetus* (R Waterfield trans, Penguin, 1987) 25–29.

¹⁰ *Ibid.*

¹¹ *Ibid.*

philosophers of all time. If a student does question a judge, they must do so by reference to another case, and another judge — ie they must question authority by reference to prior authority alone, rather than questioning authority itself. In this sense, the current Socratic method is used to pacify students and prevent them from questioning what they are being taught. This works in a similar manner to the ways in which ideologies discourage lateral thinking by discouraging followers from questioning the basic foundations of their ideological principles. As Yuval Harari suggests: ‘How do you cause people to believe in an imagined order[?] First, you never admit that the order is imagined’.¹²

Langdell himself questioned legal authority on occasion but only if an ‘opinion did not square with the original [cases themselves]’.¹³ He ‘cultivated the intellectual autonomy of students’ but only in so far as they had a different, judicial opinion on how a case should be read and understood.¹⁴ If a student uncovered a new ratio decidendi in a case, Langdell was the first to reconsider his opinion on the case in question.¹⁵ He did so three times in a week, on one particular case.¹⁶ However, Langdell consistently failed to interrogate the origin of those ratios, the philosophy behind those decisions, or whether the decisions themselves were just or fair. Langdell taught the law, but his method failed to question where the law came from. What mattered to Langdell was the outcome itself.

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer.¹⁷

In the above reasoning of law as a “science [of] principles” Langdell closely mirrors the German legal philosopher Hans Kelsen. Kelsen argued for a study of law as “pure law” suggesting that law should be rid of the “baggage” of the social sciences and studied in its own right as law alone.¹⁸ By advocating “pure law” Kelsen meant that no justification for a

¹² Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Harper, 2014).

¹³ Schofield, above n 5.

¹⁴ Bruce A Kimball, ‘Christopher Langdell: The Case of an ‘Abomination’ in Teaching Practice’ (2004) *The NEA Higher Education Journal* 30.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Christopher Columbus Langdell, ‘Preface’ in *A Selection of Cases on the Law of Contracts* (Brown & Little, 2nd ed, 1879) 82–83.

¹⁸ Andrei Marmor, ‘The Pure Theory of Law’ in *Stanford Encyclopedia of Philosophy* (Stanford University, 2016); Hans Kelsen, *Pure Theory of Law* (University of California Press, 2007).

law was ever necessary as law derives its authority from prior law alone, and in his view, the highest piece of law can presuppose its own validity as in the case of a country's constitution.¹⁹ Once students learn that a law is self-justified, they begin to implicitly learn to 'draw boundaries between the spheres of legal, moral, and political consideration'.²⁰ By focusing solely on the reasoning of judges, students are taught that a decision is always justified by reference to another prior decision.²¹ Never is the 'end point' or the original conception of law, in terms of its derivation from politics, society, morality, social values and so on, allowed to be questioned.²²

The final flaw in Langdell's Socratic method is its tendency to promote an inequitable power dynamic by allowing those in a position of power — the teacher, the judge, the law, and so on — to interrogate those in a position of weakness: the student. As the American founding father Benjamin Franklin elucidated: 'I found this [Socratic] method the safest for myself and very embarrassing to those against whom I used it.'²³ Orin Kerr calls the method 'cruel and psychologically abusive' because it creates a strange power dynamic between teacher and student.²⁴ It is this kind of power dynamic — which Socrates himself sought to redress in his actual use of the Socratic method in Ancient Greece — discussed below.

III TOWARD A NEW SOCRATIC METHOD

Although Langdell correctly identifies a Socratic form of questioning in *Maieutics*, he fails to understand that the method used by Socrates in his own time was primarily used on figures of authority, rather than students. This is revealed in a wider reading of Socrates — particularly his discussions in the *Apology*.

At the heart of the *Apology* is Socrates' trial for the corruption of the youth of Athens.²⁵ Socrates is charged with corrupting the youth by questioning their wisdom, but also by questioning the social and political institutions of Athenian high society. His "curious"

¹⁹ Ibid.

²⁰ Vanessa E Munro, 'Legal Education at the Intersection of the Judicial and the Disciplinary' (2003) 2 *Journal of Commonwealth Law & Legal Education* 1, 39; Gonzalo Vitalta Puig, 'Legal Ethics in Australian Law Schools' (2008) 42(1) *The Law Teacher* 34.

²¹ Edward J Phelps, 'Methods of Legal Education' in Steve Sheppard (ed) *The History of Legal Education in the United States: Commentaries* (Salem Press, 1999) 529, 532.

²² John D Whyte, 'Finding Reality in Legal Education' (2013) 76 *Saskatchewan Law Review* 99.

²³ Benjamin Franklin, *Benjamin Franklin: His Autobiography* (Harpers & Collins, 1849) 26.

²⁴ Ford, above n 8.

²⁵ Plato, *Apology* (Benjamin Jowett trans) <<http://classics.mit.edu/Plato/apology.html>>.

nature is what condemns him in the eyes of his Greek accusers.²⁶ At the trial, Socrates lays out a vision of what it means to be wise, including a Socratic method of analysing the state. Before one can look to his own private 'interests', Socrates says, in the trial, one must 'look to himself, and seek virtue and wisdom'.²⁷ Before one can look to the interests of the state, Socrates says, one must 'look to the state'.²⁸

By 'look' Socrates here means examine, in the sense that one must examine the state before blindly following its dictates. One must 'look' to himself, in the same manner in which the '[unexamined life] is not worth living'.²⁹ Here we might extend the idea of the state's 'interests' to the enforcement of the law. The law is, after all a state's primary interest, its existential interest — for a state can only exist on the basis that the people follow the law — foremost of which is the constitutional basis of the state's authority. A lawyer who does not examine the law they learn, or what the state wishes them to do, or the states 'interests' in enforcing said law is not virtuous or wise in Socrates' phrasing. They are not 'looking' to the state, before enforcing its interest. A study of law which neglects to mention that the state has *any* interests in applying one particular law over another, one particular case over another, or one particular agenda over another, is not a Socratic study of law at all.

Instead of using the Socratic method on inexperienced students, the *Apology* seems to suggest that the Socratic method should be used on figures of authority. In the middle of the trial, Socrates recounts the story of the Oracle of Delphi declaring him the wisest of all men.³⁰ To disprove this claim, Socrates seeks out figures of authority and wisdom whom he suspects are wiser than he. He begins to interrogate them using his Socratic method, and this is what gets him in trouble with the Greek authorities.³¹ The Socratic method is here shown to be used as a tool to interrogate those who hold themselves out to be wise; to test whether they are in fact wise at all.

To undergo such a test, the figure must have authority — which is why it is strange to use the technique on a student. Socrates himself suggests that he primarily used the method on

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

three particular individuals: a politician who claimed himself wise, an artist who did the same, and a poet whose wisdom was self-evident in his poetry.³² In each of these cases, Socrates questioned the figure of authority on the subject matter of their authority. In the case of the politician, Socrates was literally 'looking' to the state in the manner expressed above, before following the state's interests.³³

The above examination of the Socratic method, as used in the *Apology*, reveals three distinct claims. One, the method should be used to question the interests of the state. Two, the method should be used to question those in authority. Three, the method should be used to question those who hold themselves out to be wise. A modern version of the Socratic method would therefore encompass all three.

The law, being an interest of the state, a source of authority, and an often self-proclaiming source of wisdom, would be an ideal target for the modern Socratic method. The student, being a subject of the state, a subordinate, and a self-proclaimed amateur in their field of training, would *not* be an ideal target for the Socratic method. It is this foundational mistake which Langdell made in his formulation, and which should be corrected to adjust the method for the use of students.

IV THE ALTERNATIVE LEGAL EDUCATION METHODS

Various attempts have been made in the past to create a more "critical" approach to teaching in law schools. In almost all cases however, ideology has trumped Socratic principles when criticism has been put to the test. Instead of critiquing the ideology inherent in law, many of the modern "critical" movements have advanced their own ideological perspective, seeking to change the legal order to represent a new hidden agenda, to replace the old hidden agenda.

Critical Legal Studies (CLS) was one such attempt, so-called because it aimed to critique the political, moral, and social impacts of law on society.³⁴ The CLS movement, however, frequently referred to law's interaction with Marxist understandings of class, hierarchy,

³² Ibid.

³³ Ibid.

³⁴ Guyora Binder, 'Critical Legal Studies' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2nd ed, 2010) 267.

gender, race, and sexuality.³⁵ CLS writers tended to argue that the law was biased towards certain groups over others, but did so from a politically ideological perspective, rather than a higher, Socratic method of critique.³⁶

In challenging the 'law's ideological neutrality', Duncan Kennedy, Karl E Klare, and other CLS scholars of the 1980s were arguing against a status quo that all law was apolitical.³⁷ They explicitly rejected this idea, critiquing the law for its "hidden" ideological agenda.³⁸ In reality, the core subjects of law school, they said, hid an unseen agenda of re-enforcing hierarchy, status, and class. They pointed to the facts that: 'property rights are understood to confer power... contractual bargaining is never truly equal' and so on.³⁹ The curriculum itself, said Karl Klare, 'is emblematic of the notion that the core of ... capitalism is rational' and that transactional law is somehow inherently justified on its face, and should never be questioned.⁴⁰

Although CLS writers aimed to critique the ideology of law through questions, in a similar vein to Socrates, they fell into the trap of advancing their own ideology as a replacement. Instead of critiquing whether a law was just or fair in some quantitative sense, a law was only seen as just or fair if it comported with the ideology of Marxism.⁴¹ Rather than simply 'looking to the interests of the state', they aimed to supplant the state completely with their own vision — something far beyond a Socratic critical analysis.⁴²

The CLS movement was revealed as such when it found a home in Macquarie Law School in the mid-1970s.⁴³ In a largely Marxist faculty, CLS was seen as a way of critiquing the 'traditional norms' of law from a new, radical Marxist perspective.⁴⁴

³⁵ Ibid.

³⁶ Sally E Hadden and Alfred L Brophy (eds), *A Companion to American Legal History* (Wiley-Blackwell, 2013) 172.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Binder, above n 34.

⁴⁰ Karl E Klare, 'The Law School Curriculum in the 1980s: What's Left?' (1982) 32 *Legal Education* 339.

⁴¹ Binder, above n 34, 267.

⁴² Ibid.

⁴³ Margaret Thornton, *Privatizing the Public University* (Taylor and Francis, 2011) 62.

⁴⁴ Drew Fraser and Patrick Kavanagh 'Readings in the History and Philosophy of Law' (1995) *Macquarie University School of Law* 2.

Macquarie's experiment with CLS teaching did not last very long however, due to the aforementioned problems of ideological bias. In 1977, the dean of the law school, P E Nygh, began firing staff.⁴⁵ In a letter to staff, Nygh wrote that as dean he was 'given a mandate ... to create a course of professional training' for students, rather than ideological training.⁴⁶ He feared that training students in a Marxist framework could lead to violence as students became 'defeatist about their legal training' and that some could 'come to the conclusion that the only answer to the problems of our society is to throw bombs around'.⁴⁷ Here Nygh recognized that the replacement of one ideology for another was not a "cure" for the symptoms of law. By 1987, the Australian-Government-commissioned Pearce Report recommended the closure of Macquarie Law School due to a lack of 'solid legal substance' in its curriculum.⁴⁸ Although the law school did not close, the CLS teaching style was abandoned, explicitly due to its ideological nature.⁴⁹

There is a danger in Macquarie Law School's example, in categorising "critical thinking" as left wing or Marxist, rather than Socratic. Historically, critical thinking was advocated by thinkers on both sides of the political divide. The Christian philosopher, Thomas Aquinas, was arguably the greatest critical thinker of the middle ages. In more recent times, the Jesuits perform what amounts to a classical training in critical thought: questioning what they are taught and who they are taught by. It is a relatively recent phenomenon to frame progressives as "sceptics" and "critical thinkers" and conservatives as "market-centric". This framing does not serve the purposes of an objective study of Socratic critical thought.

A second, more recent movement, feminist legal scholarship, suffers from a different kind of drawback: this time the analysis is too narrow, in only critiquing one aspect of law's influence. It would be useful, however, to pair feminist legal scholarship with broader scholarships in an attempt to critique the law in various ways, for various purposes. Feminist scholar Carrie Menkel-Meadow explains that feminist legal theory aims to understand the many ways women are 'oppressed, dominated, and devalued' by a legal system purportedly created to serve society equally.⁵⁰ Instead, a male-dominated system

⁴⁵ P E Nygh, 'Memorandum to: Law School Staff' (1988) 5 *Australian Journal of Law & Society* 57.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Thornton, above n 42, 57.

⁴⁹ *Ibid.*

⁵⁰ Carrie Menkel-Meadow, 'Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"' (1988) 38 *Journal of Legal Education* 61, 61-65.

prevails, one which decontextualizes the voices of women in a hierarchical legal structure.⁵¹ This is true in many respects, and is a worthwhile line of enquiry. However, for the purposes of a reformulated Socratic method, feminist legal scholarship will not suffice on its own in every subject. A broader philosophical critique is required as an ancillary to more targeted, specialist critiques.

V CONCLUSION

While Langdell's Socratic method was an improvement on prior forms of legal education, a new formulation is necessary to accommodate the actual wisdom and virtue of Socrates' critical views. It is time for a second Socratic method, one that equalises the power dynamics between professor and student and empowers the student to critically examine legal principles, without ideological biases.

I propose that a new Socratic method would allow students, not lecturers, to ask the questions in a classroom on the law, legal authority, and the interests of the state. Once students are empowered to admit that they do not, in fact, have all the answers to law waiting for them in a dusty old casebook somewhere but must reason through the law for themselves by asking questions to those in authority, they will grow to understand that the foundation of knowledge is ignorance as Socrates suggests, and that wisdom comes from challenging authority rather than blindly following it.

The resultant graduate lawyers will have a greater ability to determine whether or not a law is just, fair, or principled on the basis of an independent analysis, exceeding that which is possible in a legal class today. Society, by extension, will benefit from a new generation of critically engaged lawyers.

⁵¹ Ibid.

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UNDERTAKING FORENSIC PROCEDURES WITH, AND DATABASING DNA FROM, YOUNG OFFENDERS: FUTURE DIRECTIONS FOR HUMAN RIGHTS PROTECTIONS

BETHNEY BAKER* AND ANGELA DWYER**

Forensic procedures and DNA profiling are commonly used policing techniques employed to solve crimes and prosecute offenders. In more recent times, there has been a focus on the implications of these processes with alleged young offenders. This paper discusses the broader human rights issues for young offenders around these procedures and processes in relation to a specific case study: legislative frameworks in Queensland, Australia. First, the paper overviews what forensic procedures and DNA databases are, generally, and the types of information that can be gleaned from DNA collected through forensic procedures and subsequently databased. Second, the paper analyses Queensland legislative frameworks in terms of human rights issues raised by conducting forensic procedures and DNA databasing with alleged young offenders. The paper concludes by considering possible future directions around forensic procedures and DNA databasing with alleged young offenders, with reference to existing legislative frameworks.

CONTENTS

I	INTRODUCTION.....	45
II	WHAT ARE FORENSIC PROCEDURES AND DNA SAMPLING, ANALYSIS, AND DATABASING, AND WHAT INFORMATION DOES IT MAKE IT POSSIBLE TO EXTRAPOLATE?	48

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III	ELABORATING THE ISSUES THROUGH A CASE STUDY: FORENSIC PRACTICES, DNA DATABASING, YOUNG OFFENDERS AND THE <i>POLICE POWERS AND RESPONSIBILITIES ACT 2000</i> (QLD).....	50
	A <i>What Issues are Raised Around Forensic Procedures with Young People?</i>	50
	B <i>What Issues are Raised Around DNA Databasing with Young People?</i>	55
IV	FUTURE DIRECTIONS.....	57

I INTRODUCTION

The nexus between forensic science and policing — particularly in regard to forensic procedures, DNA collection and analysis, and DNA profile retention — continues to be characterised by controversy. The establishment of DNA databases alone has proliferated worldwide, including in Australia.¹ Western nations are leading the development of the nexus between these practices in policing and criminal processing systems. For example, as early as 2009, the United States saw the implementation of pre-conviction DNA collection.² This means that those who have not even been convicted of crimes are subject to these measures. They now have the largest DNA database in the world with the FBI's Combined DNA Index System (CODIS). This situation could only be outdone by recent moves in the United Kingdom — the country that initially lead the international field by creating the world's largest DNA database — where a recent government White Paper proposed 'the creation of a universal "BioBank" of genetic profiles, taken at birth.'³

Forensic procedures, DNA profiling, and DNA databasing all involve a complex skein of assumptions and ethical ideas, with many competing viewpoints about the value of these practices. For instance, DNA databasing has been lauded as a useful resource because such databases provide "cold hits" — unexpected matching between a crime scene DNA profile

¹ Angela Lavoipierre, 'NSW Police take DNA from Hundreds of Ex-Offenders to Build Crime-Solving Database', *ABC News* (online), 24 August 2015 <<http://www.abc.net.au/news/2014-09-29/nsw-police-take-dna-from-hundreds-of-ex-criminals/5775990>>.

² Sarah B Berson, 'Debating DNA Collection' (2009) *National Institute of Justice (NIJ) Journal* 264, November <<http://www.nij.gov/journals/264/pages/debating-DNA.aspx>>.

³ Carole McCartney, 'Forensic DNA Sampling and the England and Wales National DNA Database: A Sceptical Approach' (2004) 12(2) *Critical Criminology* 157, 157.

already stored on the database — to introduce a new suspect into the investigation.⁴ Further, forensic procedures, DNA profiling, and DNA database searches have assisted with the exoneration of those falsely convicted and imprisoned, such as young people of colour in the United States convicted of crimes they did not commit.⁵ There is no doubt that these outcomes are benefitting the community by controlling crime, prosecuting offenders, and ensuring innocent people are exonerated. In contrast to these perspectives, others have argued that forensic procedures, DNA profiling, and DNA databases all impinge on the human rights of offenders and can be used in unethical ways by policing services. Chief amongst the concerns about breaching individual human rights through DNA databasing is privacy, which has its genesis in the law, with commentators arguing that retention of DNA profiles is an ‘unjustifiable infringement on an individual’s privacy.’⁶

While all these issues impact on a range of people of all different ages, backgrounds, and capacities that have been charged or convicted of crimes, our focus in this paper is young people under the age of 18. Depending on their circumstances, most adults will have more capacity than young people to understand the processes involved in fully consenting to a forensic procedure, and subsequent DNA profiling and databasing processes, in terms of fully comprehending how the material will be used and the implications of this process. This is not always possible for young people as a category of vulnerable person,⁷ particularly those young people considered marginalised or whom are experiencing significant and often multifarious disadvantages. Forensic procedures alone raise important questions about the extent to which a young person may be fully capable of consenting to these processes. For instance, specific to young people, “trawling” processes employed by police organisations using DNA databases raise significant concerns about “net-widening”, with some commentators arguing the mere existence of an individual DNA profile on a database ‘is to treat them as a suspect for any future crime.’⁸ Other concerns raised include the potential to harass, stigmatise, socially exclude, and discriminate against

⁴ Helen Wallace, ‘The UK National DNA Database’ (2006) 7 *European Molecular Biology Organization Reports* 26, 27.

⁵ Edwin Grimsley, *Lessons about Black Youth and Wrongful Convictions: Three Things You Should Know* (1 May 2015) Innocence Project <<https://www.innocenceproject.org/lessons-about-black-youth-and-wrongful-convictions-three-things-you-should-know/>>.

⁶ Beverley Steventon, ‘Creating a DNA Database’ (1995) 59(4) *Journal of Criminal Law* 411, 417.

⁷ Nicole L Asquith and Isabelle Bartkowiak-Theron, ‘Vulnerability and Diversity in Policing’ in Isabelle Bartkowiak-Theron and Nicole L. Asquith (eds), *Policing Vulnerability* (Federation Press, 2012) 3.

⁸ Wallace, above n 4, 27.

young offenders.⁹ Some have even argued storing DNA samples is ethically contentious because the samples are being used for genetic research,¹⁰ including the possible identification of a ‘criminal gene’.¹¹ All these concerns have the capacity to impact on the lives of young offenders long-term.

This paper examines the human rights issues raised for young people around forensic procedures, DNA retention, and databasing. For the purpose of this paper, human rights are defined as those ‘[r]ights inherent in every individual on the basis of humanity’ and are underpinned by the recognition of the universal eligibility to be treated with both dignity and equality.¹² To further explore these issues, this article briefly analyses aspects of the *Police Powers and Responsibilities Act 2000* (Qld) (“PPRA QLD”),¹³ and the *Juvenile Justice Act 1992* (Qld),¹⁴ and draws on other associated legislation, to discuss the issues pertaining to these processes and practices with young people (such as privacy, age, informed consent, and capacity). The analysis is informed by understandings of human rights as outlined by the *Convention on the Rights of the Child* (CRC) (UN 1989),¹⁵ and the *Standard Minimum Rules for Administration of Juvenile Justice (Beijing Rules)* (UN 1985),¹⁶ as benchmarks for appropriate treatment of young offenders. Arguments related to forensic procedures and DNA sampling, analysis, and retention raise complex issues and competing factors, and we suggest more research is needed to examine in detail the implications of these issues for the lives of young offenders in particular. To do this, the paper begins by defining forensic procedures (used for collecting DNA samples) and subsequent DNA profiling databasing, including a discussion of the types of information that can be extrapolated from these procedures. Following this, the paper analyses pertinent sections of the PPRA QLD to demonstrate the key human rights concerns that require further investigation. The paper

⁹ Andrei Semikjodskii, *Dealing with DNA Evidence: A Legal Guide* (Routledge, 2007); Helen Wallace, ‘Prejudice, Stigma and DNA Databases’ (2008) 21(3–4) *GeneWatch* 14.
<<http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=60&archive=yes>>.

¹⁰ Wallace, above n 4, 27.

¹¹ Andrew Haesler, ‘DNA and Policing’ (2001) 79 *Australian Law Reform Commission - Reform Journal* 27, 30.

¹² Peter Butt (ed), *Butterworth’s Concise Australian Legal Dictionary* (Lexis Nexis, 3rd ed, 2004) 205.

¹³ *Police Powers and Responsibilities Act 2000* (Qld).

¹⁴ *Juvenile Justice Act 1992* (Qld).

¹⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁶ United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

concludes with the consideration of future directions regarding the use of DNA databases and the importance of balancing all the issues and competing factors.

Queensland, Australia, has been chosen as the context for this discussion as it represents a uniquely conservative political climate. For instance, with the election of the Liberal National Party in 2013, a range of amendments were passed in relation to youth justice legislation to produce a more punitive criminal processing system for young people aged 10 to 16 years. This included the removal of detention as a last resort; opening the proceedings of the Children's Court; facilitation of moving 17-year-old offenders to adult prisons; and the introduction of new bail offences and mandatory boot camp orders.¹⁷ Beginning on 11 November 2016, the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* received royal assent and will commence by proclamation, which is expected to occur within 12 months of its passing. This will align Queensland with the other states in treating 17-year-olds as young people, rather than as adults.

II WHAT ARE FORENSIC PROCEDURES AND DNA SAMPLING, ANALYSIS, AND DATABASING, AND WHAT INFORMATION DOES IT MAKE IT POSSIBLE TO EXTRAPOLATE?

To more fully understand the issues, it is important to define the key concepts. For this purpose, we draw on definitions from the PPRA QLD and generic definitions where required. Forensic procedures collect physical samples from the human body in the form of bodily fluids and tissues, including 'blood, semen, saliva, hair roots and scalp detritus, flesh, skin, vaginal fluids, and nasal secretions'.¹⁸ The PPRA QLD defines a forensic procedure as: (a) an intimate forensic procedure; or (b) a non-intimate forensic procedure.¹⁹ Surprisingly, this definition fails to describe precisely what a forensic procedure is other than to distinguish between intimate and non-intimate. In defining a non-intimate forensic procedure, we learn that it is 'a procedure performed on a person'.²⁰ These samples collected through forensic procedures carry deoxyribonucleic acid (DNA); 'the genetic material of living organisms that determines every individual's hereditary

¹⁷ Terry Hutchinson, '“A Slap on the Wrist”? The Conservative Agenda in Queensland, Australia' (2015) 15(2) *Youth Justice* 134.

¹⁸ Robin Williams, 'DNA Profiling' (2008), in Tim Newburn and Peter Neyroud (eds) *Dictionary of Policing* (Willan, 2008) 86, 86.

¹⁹ *Police Powers and Responsibilities Act 2000* (Qld) sch 6.

²⁰ *Ibid.*

characteristics, and exact copies of this material are found in every living cell' of the human body.²¹

The forensic material taken in the samples collected through these procedures can be analysed through a process of DNA profiling, typing, or fingerprinting. The Australian and New Zealand Policing Advisory Agency, on their website discussing forensic sciences, defines DNA profiling or typing as the process used 'to distinguish between individuals based on differences in their DNA'.²² This involves a scientific process whereby the "fingerprint-like" structure of the DNA of a person can be mapped — 'the chemical structure of an individual's DNA encodes information about that individual's inherited characteristics.'²³ This typing process does not allow police officers to "see" the precise characteristics of a person whose DNA has been located and sampled at a crime scene — they cannot know if they are looking for someone with brown eyes as opposed to blue eyes. Rather, DNA profiling enables police to make comparisons between other DNA profiles found at a crime scene (for instance, discerning between DNA from the victim and suspects) and between DNA profiles they have retained because DNA in a person's body 'is identical throughout a human body but variable between any two humans, making it a natural alternative to artificial human identifiers, such as names or tax-file numbers.'²⁴ This means that DNA profiling has 'become the "gold standard for identification"',²⁵ and is now a routine part of police criminal investigation work. While people who are biologically related share elements of their DNA structure with other biological relatives, a DNA structure is unique in every human being with the exception of 'identical twins, who develop from a single fertilised cell and hence have identical nuclear DNA.'²⁶ When such fluids and tissues are found at a crime scene, an individual's DNA profile is collected and analysed in addition to a range of other evidence to determine suspects involved in an offence.

²¹ Williams, above n 18, 86.

²² Australia and New Zealand Policing Advisory Agency 'Laboratory Sciences' <<http://www.anzpaa.org.au/forensic-science/forensic-sciences/forensic-science-disciplines/laboratory-sciences>>.

²³ Jeremy Gans and Gregor Urbas, 'DNA Identification in the Criminal Justice System' (Research Paper, No 226, Australian Institute of Criminology, May 2002), 1.

²⁴ Ibid.

²⁵ Williams, above n 18, 86.

²⁶ Gans and Urbas, above n 23, 1.

These processes in police work have now moved beyond simply identifying suspects in a case, as more and more police organisations have the technological capacity 'to construct digital representations of profiles and store them in continuously searchable computerized databases',²⁷ and use those databases for the purposes of police investigative processes.²⁸ This is called a DNA database, and they can be searched by police to find matches between forensic samples they have collected at a crime scene or from a victim, and the DNA they have profiled and retained as digitised DNA profiles.

III ELABORATING THE ISSUES THROUGH A CASE STUDY: FORENSIC PRACTICES, DNA DATABASING, YOUNG OFFENDERS AND THE *POLICE POWERS AND RESPONSIBILITIES ACT 2000* (QLD)

To examine the issues raised through these processes specifically in relation to young people, real world insight can be gained by analysing sections of the PPRA QLD, and other related legislative frameworks. This legislation raises a whole range of ethical and human rights issues when dealing with young people in criminal processing systems.

A What Issues Are Raised Around Forensic Procedures with Young People?

According to the PPRA QLD, there is a difference between intimate and non-intimate forensic procedures. Intimate forensic procedures are defined as:

all or any of the following procedures—

(a) a procedure performed on a person's external genital or anal area, buttocks or, for a female, breasts, that involves—

(i) an external examination of the relevant part of the body; or

(ii) taking a sample from the relevant part of the body, by swab, washing, vacuum suction, scraping, or by lifting by tape; or

(iii) photographing the relevant part of the body; or

(iv) making an impression or cast from the relevant part of the body; or

(v) measuring the relevant part of the body;

²⁷ Williams, above n 18, 86.

²⁸ Robyn Lincoln, 'Human Rights (and Wrongs) of DNA Testing and Evidence' (2001) 7 *The National Legal Eagle* 3; Mairi Levitt and Floris Tomasini, 'Bar-coded children: an exploration of issues around the inclusion of children on the England and Wales national DNA database' (2006) 2(1) *Genomics, Society and Policy* 41; Liz Campbell and Nessa Lynch, 'Competing Paradigms? The Use of DNA Powers in Youth Justice' (2012) 12(1) *Youth Justice* 3.

- (b) a procedure performed on a person that involves—
 - (i) an internal examination of a body cavity; or
 - (ii) taking a sample of the person's hair from—
 - (A) the genital or anal area; or
 - (B) the buttocks; or
 - (C) if the person is a female—the breasts; or
 - (iii) taking a sample, by swab or washing, from a body cavity other than the mouth; or
 - (iv) removing a substance or thing from a body cavity other than the mouth; or
 - (v) taking an X-ray of a part of the person's body; or
 - (vi) taking a dental impression; or
 - (vii) taking a sample of the person's blood or urine.²⁹

There is no doubt that these procedures are intimate and that they would be considered invasive to a person's privacy and to a person's body. Interestingly, the definition of a non-intimate forensic procedure is not hugely different. While these procedures are perhaps less intimate in terms of the areas of the body they focus on, they still require access to intimate parts of the body and invasive procedures to a person's body:

a procedure performed on a person, other than an intimate forensic procedure, that involves all or any of the following—

- (a) an examination of an external part of the person's body, that requires clothing to be removed or contact with the person's body;
- (b) taking a sample from a part of the person's body, by swab, washing, vacuum suction, scraping, or by lifting by tape;
- (c) photographing a part of the person's body;
- (d) making an impression or cast of a part of the person's body;
- (e) taking a DNA sample;
- (f) taking a sample of saliva;

²⁹ *Police Powers and Responsibilities Act 2000* (Qld) sch 6.

(g) taking a sample from, or from under, a fingernail or toenail;

(h) taking identifying particulars.³⁰

Although these definitions raise questions about what it means to be intimate and how invasive these processes are, it is how these procedures relate to privacy and consent that are the primary consideration of this paper.

One of the key concerns we raise about forensic procedures with a young person, and this could be a child of at least 14 years or a child under 14 years, is that of privacy. The PPRA QLD notes there are special requirements for children in Part 2 of Chapter 17 of the Act dealing with Forensic Procedures and obtaining consent for such procedures. Section 450(4) refers to the consideration for privacy that a child must be given, stating, 'if it is reasonably practicable to do so.'³¹ It is reasonable to contend that a part of providing a child with 'special protection' is to also ensure privacy is guaranteed as a part of procedural fairness. Under article 40 of the *Convention on the Rights of the Child* it is stated within section 2(b)(vii) that a child has a right 'to have his or her privacy fully respected at all stages of the proceedings.'³² This position is further supported under the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* that indicate any proceedings be conducted in a manner which allows the young person to express themselves freely.³³ The right to privacy should be in accordance with such rights and absolute. The PPRA QLD seems to fall short of such an inclusion, and the wording of the Act raises questions by noting that the right to privacy needs to be afforded 'if it is reasonably practicable to do so.'³⁴

A further key issue raised with forensic procedures is the securing of informed consent. In order to secure informed consent, it is essential to ensure that the nature and implications of the forensic procedure are clearly communicated to, and understood by, the young person. With further reference to the PPRA QLD, s 453(1) stipulates that the police officer concerned has the discretion to determine what is a 'reasonable time to consider the

³⁰ Ibid.

³¹ *Police Powers and Responsibilities Act 2000* (Qld) s 450(4).

³² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40.

³³ United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

³⁴ *Police Powers and Responsibilities Act 2000* (Qld) s 450(4).

explanation' in relation to seeking permission for a forensic procedure given under s 454.³⁵ It may be reasonable to consider that such discretion is too wide-ranging and that the legislation needs to stipulate a minimum period of time for such consideration to not only apprise the alleged young offender of their rights, but also allow communication with an independent support person. Further, the young person may wish to consider whether they want legal advice and/or parental involvement. In addition, s 455(2) refers to the consent for a forensic procedure to be written and signed by the person giving consent. This clause may need to ensure signing and consent takes into consideration the literacy and comprehension skills of the alleged offender.³⁶

With respect to the alleged offender granting, or not granting, permission to proceed with the forensic procedure, s 458(1) of the PPRA QLD raises an interesting point of contention.³⁷ Ireland highlights the adverse influence from non-consent to the provision of DNA samples by asking: '[d]o they consent and give the sample and have forensic evidence provide valuable support to the prosecution case, or do they refuse to cooperate, and risk the court drawing adverse inference from the refusal to give consent?'³⁸ Sections 458(1) and 488(4)(a)(b),³⁹ it may be asserted, are based on an abrogation of the presumption of innocence, a core principle in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*.⁴⁰ In this instance, within the context of the PPRA QLD, this means that there is no adherence to an integral underlying principle of criminal processing systems. Further, with continuing reference to s 488(7)(b), it is indicated that '[i]t is not a reasonable excuse for the child to contravene the order that complying with it may tend to incriminate the child'.⁴¹ This too may be considered an abrogation of the rights of the child

³⁵ Ibid s 453(1), s 454.

³⁶ Ibid s 455(2).

³⁷ Ibid s 458(1).

³⁸ Steve Ireland, 'What Authority Should Police Have to Detain Suspects to Take Samples?' (Paper presented at the DNA and Criminal Justice conference, Australian Institute of Criminology, 30-31, (30-31 October 1989) <<http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/02.html>>, 81.

³⁹ *Police Powers and Responsibilities Act 2000* (Qld) s 488(4)(a)-(b) governs the taking of DNA evidence from a child.

⁴⁰ United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

⁴¹ *Police Powers and Responsibilities Act 2000* (Qld) s 488(7)(b).

in that it encroaches on the principle of the privilege against self-incrimination as well as the right to silence. As Freckleton states:

Our legal system has insisted upon the primacy of the privilege against self-incrimination and has orchestrated a balance between defense and prosecution with this as its' basis. The prosecution has to prove its case without assistance from the accused person.⁴²

Therefore, again within the Queensland context, the legislation places the alleged young offender at a distinct disadvantage.

Another unclear part of the PPRA QLD is that which deals with the 'capacity' to give consent for forensic procedures under ss 450 to 452.⁴³ Capacity is defined generally as the '[p]ower, ability, competence of a person or body'.⁴⁴ This is well demonstrated in the principle of *doli incapax*, 'a principle dating back to the 14th century which assumes that under a certain age children are incapable of knowing right from wrong and therefore cannot be held criminally responsible for their actions'.⁴⁵ In the PPRA Qld, s 450 refers to a '[s]pecial requirement for a child of at least 14', s 451 refers to a '[s]pecial requirement for a child under 14', and s 452 notes a '[s]pecial requirement for a person with impaired capacity'.⁴⁶ This paper argues there is not necessarily a clear point of delineation between those individuals who fall into each of these sections (by virtue of their age). It contends there are grey areas and regions of overlap with respect to the *capacity* as it relates to the *developmental levels* of alleged child offenders. Levitt and Tomasini have raised this as an issue in relation to the National DNA Database ("NDNAD") in the United Kingdom and how individuals aged 13–20 years' experience '[i]dentity experimentation that they grow out of after being characteristically rebellious and possibly experimenting with minor delinquency'.⁴⁷ Consequently, Levitt and Tomasini conclude '[i]ncluding children on the NDNAD may be inappropriate for developmental reasons... they are in a state of transition, in which their intellectual development is complicated by socio-emotional development. It

⁴² Ian Freckleton, 'DNA Profiling: Forensic Science Under the Microscope', (Paper presented at the DNA and Criminal Justice conference, Australian Institute of Criminology, (30-31 October 1989) <<http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/02.html>>, 31.

⁴³ *Police Powers and Responsibilities Act 2000* (Qld) s 450-452.

⁴⁴ Butt, above n 12, 61.

⁴⁵ John Muncie, *Youth Crime* (Sage Publications, 3rd ed, 2009) 395.

⁴⁶ *Police Powers and Responsibilities Act 2000* (Qld), sch 6.

⁴⁷ Levitt and Tomasini, above n 28, 51.

is controversial to consider them criminally responsible'.⁴⁸ This viewpoint is supported by research demonstrating that young people's brains are still developing the capacity to reason and rationalise as late as 25 years of age.⁴⁹

B What Issues Are Raised Around DNA Databasing with Young People?

Human rights issues are also raised by the storage of DNA profiles. Retaining an individual DNA profile on a database may have the potential to leave the individual vulnerable to being earmarked as a suspect for any future crime. Some argue this creates an avenue for 'individual surveillance',⁵⁰ an exercise of power of the state over the individual whereby those in power gather information on those considered to be subordinates.⁵¹ In the case of DNA databases, the state and governing bodies like police, gather information on arrestees and suspects via DNA profiles, wielding considerable power over the individual. It needs to be considered whether the use of DNA databases by such governing bodies for individual surveillance indicates a lack of restraint with respect to individual human rights, despite the argument of enhancing protection for the broader community.

The first major concern we raise about DNA databasing with young offenders relates to storing the DNA profiles of young people. In Queensland, it has been reported that in a period of less than five years, approximately 1300 DNA samples were collated in a Queensland Police Service database.⁵² This directly opposes the presumption of innocence, which is ordinarily meant to be conferred on all alleged offenders, and which also comes under the ambit of human rights, specifically article 14(2) of the ICCPR.⁵³ This in turn produces a range of implications for young people who are part of these databases and sometimes indefinitely "marked" as criminal and assumed guilty rather than innocent. This is especially the case given that ss 454(1)(g)(i) and (ii) make reference to limiting the

⁴⁸ Ibid 54.

⁴⁹ Charlotte Walsh, 'Youth justice and neuroscience: a dual use dilemma' (2011) 51(1) *British Journal of Criminology* 21.

⁵⁰ Wallace, above n 4, 30.

⁵¹ Nicholas Abercrombie, Stephen Hill and Bryan Turner, *The Penguin Dictionary of Sociology* (Penguin Group Publishing, 5th ed, 2006).

⁵² Sarah Vogler, 'DNA Tag for Kid Crims', *The Sunday Mail* (Australia), 10 January 2010, 1.

⁵³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

'purposes' for which the DNA analysis may be used.⁵⁴ It stipulates that if the person does *not* limit the 'purposes' then the DNA analysis may be included in the Queensland DNA database. Given the gravity of such an inclusion, this clause may need to be explained in a manner that clearly allows adequate comprehension of the intent of the legislation by the alleged young offender, as may the whole of s 454 of the Act.⁵⁵ Kimmelman has argued that storing DNA profiles like this 'injures the trust relationship between a government and its subjects',⁵⁶ because trust comes with being able to act in the absence of surveillance – DNA databasing of the DNA profiles of alleged young offenders amounts to surveillance in this manner, and we suggest therefore this process ultimately erodes trust. It also raises further ethical questions discussed by Kimmelman about how these databases are populated by police actions. Will this mean that more young people will be arrested by police as suspicious in relation to more minor offences because they can get the young person to consent to a forensic procedure, have the DNA analysed and digitised as a profile in a DNA database, and then compare this profile against profiles collected from unsolved crimes in a 'trawling' process,⁵⁷ simply because alleged young offenders do not have an adequate understanding of limiting 'purposes'? Questions like these challenge general principles around how contacts between law enforcement agencies and a young person shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile, and avoid harm to them with due regard to the circumstances of the case.⁵⁸

A second concern we raise with reference to determining who perpetrates crime through the investigation process is the interface existing between the Queensland Police Service DNA database and CrimTrac (the National DNA database executive agency) for the purposes of information sharing and comparison. Section 492(1) of the PPRA QLD entitled notes information to be transmitted from the Queensland Police Service DNA database to its national counterpart.⁵⁹ The concern with this provision is if an alleged young offender does not understand the implications of 'limiting the purposes' of a DNA profile (referred

⁵⁴ *Police Powers and Responsibilities Act 2000* (Qld) s 454(1)(g)(i)-(ii).

⁵⁵ *Ibid* s 454.

⁵⁶ Jonathan Kimmelman, 'Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking' (2000) 28(3) *Journal of Law, Medicine and Ethics* 209, 215.

⁵⁷ David Kaye, 'Trawling DNA Databases for Partial Matches: What is the FBI Afraid Of?' (2009) 19(1) *Journal of Law and Public Policy* 145.

⁵⁸ United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

⁵⁹ *Police Powers and Responsibilities Act 2000* (Qld) s 492(1).

to above), then it may be reasonable to conclude they may also not comprehend the implications of having their DNA profile included in a larger, national database. As Lincoln suggests, there are privacy concerns regarding the information stored on DNA databases in relation to who has access to such information, which may have been provided unwittingly.⁶⁰

A third key point of contention highlighted by the requirements in the PPRA QLD relates to age. Given the gravity and implications of taking a DNA sample by way of a forensic procedure (as part of a police investigation), it is reasonable to suggest the age of the child be confirmed *before* proceeding with the collection of any DNA sample. With respect to the Queensland context, s 451(1) of the PPRA QLD deals with special requirements for children less than 14 years of age and stipulates that the section applies 'if a police officer reasonably suspects the relevant person is a child who is under 14 years.'⁶¹ To suspect or have suspicion of a child's age is not positive confirmation of the child's age. Rule 10.3 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* reaffirms the vulnerability of children with reference to police investigations.⁶² Of particular importance here is how most young people and children processed by youth justice systems around the world are considered a vulnerable group.⁶³ We have ample evidence to suggest that children and young people engaged in offending behaviours often do not have the capacity to fully comprehend policing processes like DNA databasing because they are often marginalised in terms of their literacy levels and other life circumstances which impede their capacity.⁶⁴

IV FUTURE DIRECTIONS

This paper has indicated that there are a number of concerns related to undertaking forensic procedures and DNA databasing with young people, including the lack of regard

⁶⁰ Robyn Lincoln, 'Human Rights (and Wrongs) of DNA Testing and Evidence' (2001) 7 *The National Legal Eagle* 3, 5.

⁶¹ *Police Powers and Responsibilities Act 2000* (Qld) s 451(1).

⁶² United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("*The Beijing Rules*"), GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

⁶³ Asquith and Bartkowiak-Theron, above n 7.

⁶⁴ Chris Cuneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015).

for privacy, the lack of consideration for the variation in individual capacity to provide informed consent, the abrogation of the presumption of innocence, stigmatization from labelling as young offenders, and the potential for unwarranted individual surveillance. As such, with respect to future directions of DNA profiling with young offenders, serious consideration needs to be given to how we reconcile the use of DNA databases in policing whilst at the same time upholding the rights and well-being of young people. Having examined the provisions of the Act relating to undertaking forensic procedures to collect DNA samples, and then retaining these DNA profiles from alleged young offenders, the evidence presented suggests that the well-being and rights of young people are not adequately protected under the Act. Further, it may also be argued that when measured against aspects of the principles of the *Convention on the Rights of the Child*,⁶⁵ and the *Standard Minimum Rules for Administration of Juvenile Justice*,⁶⁶ the PPRA QLD falls short of those principles in some respects. With a view to addressing the issues raised in this paper, it would have great potential benefit to consider the following courses of action.

In reviewing the relevant legislation in Queensland, it may be possible to better safeguard the rights and well-being of young people. Specifically, the examination of Chapter 17 of the *Police Powers and Responsibilities Act* highlighted the need to enhance privacy to fully respect this right under the *Convention on the Rights of the Child*.⁶⁷ Confirming the age of the alleged young offender may better ensure appropriate treatment under the legislation. In considering the issue of informed consent, stipulating a minimum time to consider explanations regarding DNA collection and retention may better safeguard against a young person being unduly pressured into providing consent. Further, throughout the Act, various provisions make reference to the presence of a support person for the alleged offender, but only if that young person agrees. It may prove beneficial to make the attendance of a fully independent support person (themselves fully apprised of the legislation) mandatory, to enhance and safeguard the decision making process. Lastly, the acknowledgement of

⁶⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁶⁶ United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

⁶⁷ *Police Powers and Responsibilities Act 2000* (Qld) ch 17; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

variations in the developmental decision making capacity of individuals needs to be more fully considered.

To justify any further expansion of DNA databases, with regards to those young people dubbed as the '[n]ext generation of criminals',⁶⁸ dedicating resources towards a *cost-benefit analysis* of the Queensland Police Service DNA database may be appropriate,⁶⁹ or at the very least extensive, in-depth research around these concerns like that conducted by McCartney in the United Kingdom.⁷⁰ This may provide greater clarity in the debate as to whether having a DNA profile on such a database is a real deterrent to committing further crime, or whether there should be a refocusing of crime prevention on early interventions, rehabilitation and diversion from the criminal justice system. This latter consideration could be the subject of further exploratory research with the use of, for example, focus groups (parents, young people and criminal justice professionals) to facilitate the collation of feedback as to the perceived usefulness of DNA databases and the best way to deter young people from criminal activity. Further, comparative research across international jurisdictions, and across different Australian state jurisdictions, may also facilitate improvements and continuity with respect to the use of DNA databases.

Given the varying developmental stages of young people, and their varying understanding of processes involved in forensic procedures and DNA databasing, it may be beneficial to have legislation that accommodates or makes provision for a test specifically dealing with the recognition of individual differences with respect to the capacity and maturity of young people, like that in the context of health law termed Gillick competence. Originating from case law in England, Gillick competence addresses the ability of the individual young person to consent to treatment in accordance with their capacity, intelligence, and maturity. The precedent set in the case, *Gillick v West Norfolk and Wisbech Area Health Authority*,⁷¹ has been applied and approved in Australia in *Marion's case*.⁷² In handing down its majority decision, the court held that '[a] minor is capable of giving informed consent when he or

⁶⁸ Vogler, above n 52, 1.

⁶⁹ Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* (September 2007); Freckelton, above n 42.

⁷⁰ Carole McCartney, 'The DNA Expansion Programme and Criminal Investigation' (2006) 46(2) *British Journal of Criminology* 175.

⁷¹ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] All ER 402.

⁷² *Department of Health and Community Services (NT) v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'.⁷³ It is tenable this competence test may also be applied in the context of young people consenting (or not) to forensic procedures such as the collection of DNA. Gillick competence has been challenged in terms of its usefulness. Morss indicates, for instance, that whilst Gillick competence emphasises the acknowledgement of variations for psychosocial development between individuals, it is also incremental in nature and therefore needs to be evaluated on a case by case basis.⁷⁴ As Morss asserts, 'a child's capacity in law depends upon that child's individual circumstances and in spite of increasing capacity, commensurate with age and other factors, major barriers still exist in children exercising their legal rights'.⁷⁵ However, it is also plausible that a Gillick-esque standard or test may be incorporated into relevant aspects of *Police Powers and Responsibilities Act* in the Queensland context to better accommodate variation in psychosocial development between individuals.

Ultimately, it is clear that forensic procedures, and subsequent DNA profiling and databasing, require further discussion around how we continue to engage in these practices with alleged young offenders and simultaneously continue to balance this with the human rights concerns raised for these offenders. For instance, what happens in the event that a young person refuses to consent to a forensic procedure, and police then proceed to gain a court order to have this procedure completed? What human rights issues are raised when the young person breaches the order and is criminalised as a result of this? What happens to informed consent with alleged young offenders when their rights are disregarded in these processes? In what ethical space must we move if we consider the infringements on human rights elaborated above as acceptable in light of being able to detect and prevent crime generally, in addition to acquitting those wrongly accused of particular crimes? How do we think through the possibility that having an alleged young offenders' DNA profile entered into a database may be considered as a deterrent for engaging in different types of crime? These are key questions in this debate that we would suggest need to be considered

⁷³ Ibid 237-238.

⁷⁴ John R. Morss, 'But for the Barriers: Significant Extensions to Children's Capacity' (2004) 11(2) *Psychiatry, Psychology and the Law* 319.

⁷⁵ Ibid, 321 quoting B & B and Minister for Immigration and Multicultural & Indigenous Affairs [2003] Fam CA 451, [376].

in light of how we support young people so they fully understand these processes in the future.

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THE DESERVING AND THE UNDER-SERVED: A COMMENT ON THE OVERSUPPLY OF LAW GRADUATES, DIVERSITY IN THE LEGAL PROFESSION AND ACCESS TO LEGAL REPRESENTATION

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Panic about the oversupply of law graduates is not a new phenomenon and has been an ongoing concern for decades, dating back to the 1970s. Despite this, the sizes and numbers of law schools have multiplied in recent years, heightening anxieties about graduate employment prospects. Although the increasing sizes and numbers of law schools has made the law degree more accessible to students from a variety of backgrounds, there continues to be significant unmet need for legal advice and representation for a broad range of Australians from various socio-economic backgrounds. Therefore, while the idea of who is 'deserving' enough to study law has shifted, there remains a significant proportion of our community that is 'under-served'.

CONTENTS

I	INTRODUCTION.....	67
II	HISTORY REPEATING OR RECYCLED RHETORIC? RESPONDING TO THE ONGOING CYCLE OF AN OVERSUPPLY OF LAW GRADUATES.....	69
III	A GENUINE 'CRISIS' OR UNFOUNDED 'PANIC'?.....	72
IV	THE DESERVING: ACCESS TO LEGAL EDUCATION AND THE SHIFTING MAKE-UP OF THE LEGAL PROFESSION.....	74
V	THE UNDER-SERVED: UNMET LEGAL NEEDS OF THE COMMUNITY AND ACCESS TO LEGAL REPRESENTATION.....	79
VI	CONCLUDING REMARKS.....	82

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I INTRODUCTION

Over ten years ago, when I was still in high school, the students in my class were asked to write down a list of university degree preferences alongside the ideal careers we were aspiring towards. Having decided that I wanted to become a lawyer at the ripe age of 11 years' old, without hesitation, I wrote that I wanted to study a law degree at university and become a lawyer. The teacher then went around the classroom, stopping to read each student's answer and then paused at mine, saying: 'Oh darling, you'll need [high marks] to get into law school and you're not going to get that. You should *pick something else*'. Fast forward to over a decade later and I have thankfully achieved my dream of becoming a lawyer in the public sector, but not without being told time and time again during my degree, or in the process of applying for jobs as a graduate to *pick something else*.

Many law students and law graduates have become all-too-familiar with how dismal the graduate employment market has become for aspiring lawyers. This depressing impression has stemmed from the non-stop barrage of news stories which serve as a recurring reminder of how there are not nearly enough employment positions to cater for the oversupply of law graduates. As a result, the idea of using a law degree to *pick something else* by way of a non-legal career has become an increasingly common selling point used by several new and old law schools. Many are now perpetuating the idea that the law degree has become an increasingly generalist degree, with transferable skills to other industries and professions, and that it is no longer inevitable that those who undertake a law degree will become lawyers.¹

During my term as the Vice-President (Education) of the Australian Law Students' Association ('ALSA') in 2015,² we conducted an open survey which found that of the 106 students and graduates surveyed, 69 respondents said that the most pressing concern they

¹ 'Law students and graduates are now being told to broaden their career prospects beyond becoming lawyers. Carolyn Evans, the dean of Melbourne University's law school, said: 'What I would say is that people should be aware when they go into law school, they're going in at a time of rapid change.' "There is structural change in the legal profession and uncertainty in the Australian economy,' Professor Evans said. '[Students] can't assume because they have a law degree, they'll have a job as a lawyer.": Edmund Tadros, 'Law Degree, The New Arts Degree, Students Warned', *The Australian Financial Review* (online), 14 February 2014 <<http://www.afr.com/news/policy/education/law-degree-the-new-arts-degree-students-warned-20140213-jgegs>>.

² The Australian Law Students' Association ('ALSA'), 'National Advocacy Survey', (2015). Results on file with author.

were facing related to gaining employment after law school.³ When asked in a separate question whether respondents believed there was an oversupply of law graduates in the current market, an astounding 88.67 per cent of responses received said ‘yes’, whilst a mere 3.77 per cent said ‘no’.⁴ Thus, despite several law schools’ attempts to comfort prospective law graduates, the marketing rhetoric about *picking something else* has done little to assuage employment concerns.

Although some new law schools have claimed that the degrees they have on offer are more accessible to students from certain regions or backgrounds,⁵ some organisations are sceptical as to whether universities are simply finding new ways to create revenue.⁶ Moreover, despite the overwhelming number of graduates desperate for legal work, recent reports highlight that there continues to be a significant unmet need for legal advice and representation by a broad range of Australians from various socio-economic backgrounds.⁷ Clearly, despite the increasing sizes of law schools around the country, access to justice continues to be a significant issue.

Therefore, by drawing upon survey results received by ALSA — as well as other published pieces — this paper seeks to examine the current oversupply of law graduates, evaluating various areas of concern arising from the current market. The paper also seeks to explore the impact (or lack thereof) that the current oversupply of law graduates may be having on issues pertaining to access to justice and access to legal education. It will also comment on whether the panic around graduate numbers is justified, or if this is just another false alarm brought about by the media.

³ The exact question asked was ‘What do you believe are the most pressing issues facing law students and law graduates today?’ Some responses indicated a number of issues. The most significant issues raised were graduate employment, mental health, tertiary fees and quality of teaching.

⁴ The exact question asked was ‘Do you believe there is a current oversupply of law graduates in the current market?’ Of 106 responses received by ALSA, 94 answered ‘yes’, 4 answered ‘no’ and there were 8 ‘other’ responses which were received.

⁵ See, eg, Felicity Nelson, ‘New Law Schools May Leave Grads Stranded’, *Lawyers Weekly* (online), 29 September 2015 <<http://www.lawyersweekly.com.au/news/17221-new-law-school-may-leave-grads-stranded>>.

⁶ See Lara Bullock, ‘New Law Schools Must Have Right Intentions’, *Lawyers Weekly* (online), 15 August 2016 <<http://www.lawyersweekly.com.au/news/19350-new-law-schools-must-have-right-intentions>>.

⁷ Australian Government Productivity Commission, ‘Access to Justice Arrangements – Volume 1’, Productivity Commission Inquiry Report, No. 72, 5 September 2014 <<http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>> 247.

II HISTORY REPEATING OR RECYCLED RHETORIC? RESPONDING TO THE ONGOING CYCLE OF AN
OVERSUPPLY OF LAW GRADUATES

By the mid-1970s, the number of law graduates had markedly increased and the number of law schools had doubled.⁸ As a result, towards the end of the 1970s and early 1980s, many commentators began to talk about a ‘flood’ or ‘over-supply’ of graduates,⁹ and began to forecast ‘pessimistic’ employment figures for graduates as a result.¹⁰ Almost two decades later, by September 1992, in an article in *The Australian* titled ‘Law Dean Warns of Graduate Glut’, Professor Bob Williams of Monash University foreshadowed that the growing number of law students could become a ‘potential catastrophe’.¹¹ Five months later, Queensland’s Attorney-General stated in the *Courier Mail*, in February 1993, that as a result of the increasing number of law graduates, Australia was set to face the same situation as California ‘where large numbers of lawyers are wandering around ... looking for work’ by ‘ambulance chasing’ or touting.¹² Around this period — namely the early 1990s, before many of today’s undergraduate law students were even born — a ‘panic about law school numbers set in’ and ‘the professional elite worried that supply of law graduates would soon exceed demand’.¹³ Over two decades later, bringing us to recent times, the same ‘panic’

⁸ David Weisbrot summarises:

In 1960, there were six university law schools in Australia – one in each state capital. By mid-1970s the number had doubled, with second law schools established in Victoria and Queensland, three new law schools in New South Wales and another established at the Australian National University in Canberra ... The number of university law students in Australia more than doubled between 1950 and 1965 (to 3039) and then trebled between 1965 and 1980 (to 8981) before funding cuts resulted in a slight dip (of about 200 places) over the course of the 1980s, to 8662 in 1989:

David Weisbrot ‘Recent Statistical Trends in Australian Legal Education’ (1990-1991) 2 *Legal Education Review* 219, 219, 222

⁹ See, eg, Ross Cranston, ‘Law and Society: A Different Approach to Legal Education’ (1978) 5 *Monash University Law Review* 54, 56.

¹⁰ See Weisbrot, above n 8, 226. Weisbrot notes, however, that: ‘Notwithstanding the palpably increased anxiety among law students, recent graduates have a remarkable employment record. The Graduate Careers Council of Australia found that in the years 1983-1987, over 96 per cent of law graduates were in full-time employment within months after graduation’.

¹¹ C Jones, ‘Law Dean Warns of Graduate Glut’, *The Australian*, 9 September 1992 quoted in Christine Parker, ‘An Oversupply of Law Graduates? Putting the Statistics in Context’ (1993) 4 *Legal Education Review* 255, 255.

¹² J Gagliardi, ‘Queensland Faces Jobless Lawyer Glut’, *Courier Mail*, 5 February 1993 quoted in Christine Parker, ‘An Oversupply of Law Graduates? Putting the Statistics in Context’ (1993) 4 *Legal Education Review* 255, 255.

¹³ Christine Parker and Andrew Goldsmith, ‘“Failed Sociologists” in the Market Place: Law Schools in Australia’ (1998) 25(1) *Journal of Law and Society* 33, 37.

arising from the oversupply of law graduates continues, all the while law schools continue to multiply and expand.¹⁴

As a result, some commentators have gone so far as to accuse universities and Australian law deans of closing their eyes to the crisis in the job market and exacerbating it further by enrolling students 'much faster than the overall growth of their respective universities'.¹⁵ Late last year, Dr Frank Carrigan, a senior lecturer at Macquarie University, penned a piece in the *Australian Financial Review* accusing law deans of holding out 'the promise of a legal career, while adding to the unemployment queue'.¹⁶ He continued by stating:

Thousands of students are undertaking a degree that will result in broken dreams. They believe the lie that the magic of the market will (somehow) deliver job opportunities if only they get their foot in the door of the legal academy.¹⁷

The head of the Council of Australian Law Deans, Professor Carolyn Evans, responded to this criticism by reinforcing the standard rhetoric that a law degree is incredibly flexible and it 'teaches a range of transferrable skills' which thereby still makes it a 'good investment for many students'.¹⁸ This idea that a law degree is capable of teaching transferable skills for other professions and industries is not a new one. Writing over 20 years ago, Professor Francis Regan commented 'there are more students currently studying to be lawyers in Australia than there are lawyers practising law',¹⁹ and went on to say that:

Law is increasingly used in much the same way that a BA [Bachelor of Arts] was used 20 years ago. That is, it is used as a basic qualification for interesting and well-paid

¹⁴ 'The total number of law graduates in Australia reached 12,742 in 2012 up from 6149 in 2001. Currently 13 law schools in NSW': Bridget Brennan, 'Law Firm Adlawgroup asking Junior Lawyers to Pay \$22,000 for Job; Fair Work Ombudsman Investigating', *ABC News* (online), 23 June 2015 <<http://www.abc.net.au/news/2015-06-23/junior-lawyers-asked-to-pay-22,000-for-a-job/6568174>>; See also, Nelson, above n 5.

¹⁵ Frank Carrigan, 'Law Schools Sell Graduates Down the River', *Australian Financial Review* (online), 8 August 2016 <<http://www.afr.com/business/legal/the-law-schools-of-rapidly-diminishing-returns-20160808-gqnday>>.

¹⁶ Frank Carrigan, 'Law Deans are Due for a Reality Check', *Australian Financial Review* (online), 18 August 2016 <<http://www.afr.com/business/legal/glaring-omissions-in-claims-of-no-legal-graduate-glut-20160817-gqunu9>>.

¹⁷ *Ibid.*

¹⁸ Carolyn Evans, 'Law School is still the best bet for a graduate job that pays well', *Australian Financial Review* (online), 11 August 2016 <<http://www.afr.com/opinion/law-school-is-still-the-best-bet-for-a-graduate-job-that-pays-well-20160811-gqppz8n>>.

¹⁹ Francis Regan, 'Lawyers, lawyers and more lawyers' (1996) 21 *Alternative Law Journal* 184, 184.

jobs. It is particularly useful for entry into careers in public service or industry where legal skills are valued.²⁰

Notwithstanding this standardised line being fed to us about the law degree being increasingly versatile, or that one can undertake a law degree to pursue a non-legal career, many law students do not appear to be buying it. In ALSA's National Advocacy Survey (2015),²¹ of 106 students and graduates surveyed, almost 80 per cent indicated that they wished to use their law degree to pursue a legal career, whilst only 6.6 per cent answered 'no' to this question.²² Thus, contrary to the marketing ploys being used by law schools to sell the idea about how transferrable their degrees are, many students in their survey responses questioned the value of their law degree.²³ When asked how respondents believed the oversupply of graduates would affect them, one respondent, putting it bluntly, said that '[t]oo many law graduates devalues my degree and creates a too-competitive market'. Another respondent stated that the oversupply of law graduates had forced them 'to consider careers that do not involve specifically legal work' and this has meant that they now 'value [their] degree less'. That same respondent went on to note that: '[a]lready having an Arts degree, I do not feel like I entered the [Juris Doctor] hoping to simply broaden my knowledge base further without actually being prepared for real job prospects'.²⁴

²⁰ Ibid.

²¹ ALSA, 'National Advocacy Survey', above n 2.

²² The exact question asked was 'Do you intend on using your law degree to pursue a legal career?' Of 106 responses received by ALSA, 84 answered 'yes', 7 answered 'no', 5 answered 'maybe' or that it depended on other factors, like actually securing employment first, 6 responded with unsure. There were 3 'other' responses, and 1 respondent left the question blank.

²³ See Stefanie Garber, 'Law Students Question Value of their Degree', *Lawyers Weekly* (online), 4 August 2015 <<http://www.lawyersweekly.com.au/news/16923-law-students-question-the-value-of-degree>>.

²⁴ Other notable responses we received to the question 'How do you believe the current number of law graduates is affecting or will affect you?' include: 'It hugely impacts me. It makes every piece of assessment far more competitive, it adds exponentially to the amount of stress I feel. It greatly affects my work/life/study balance. Ironically, this also impacts on my grades'; 'The job market is so packed with law graduates. I will have to work longer, harder and for less money in order to get ahead of other students. While competition breeds motivation and innovation etc, the high number of law students is putting an unreasonably (sic) burden on graduating law students (even those with good results)'; and:

Yes, [i]t is basically impossible to even be considered for a summer clerkship without having an average mark of 80% or above. I have little hope of obtaining a job as a lawyer, and am instead looking to find a job as a law clerk. I was surprised to find that secretarial roles are now being advertised to law graduates, and I find that extremely dismal. I believe that 6 years at university should have qualified me for more than an entry level job.

Although the law degree undoubtedly teaches an array of skills which may be used in various industries — from critical thinking to practical problem-solving skills — the notion that it has become an increasingly generalist degree not only devalues the degree itself, but also calls into question whether the exorbitant financial, personal, and emotional expense of undertaking a law degree is justified. Regardless of whether it can be used for non-legal careers or not — as is evident by the responses received in ALSA’s survey — it is clear that most students who undertake a law degree do so with the hope of becoming lawyers. With all of that in mind, law schools may need to either adjust how they market their degrees, or how much they charge for them.

III A GENUINE ‘CRISIS’ OR UNFOUNDED ‘PANIC’?

The issue surrounding the oversupply of law graduates reached an all-time high in June 2015, when it was reported that an Adelaide law firm proposed charging law graduates a mandatory fee of \$22 000 for a post-graduate placement in the firm.²⁵ Representatives of the firm made statements to the effect that they were responding to an oversupply of law graduates who were ‘desperate’ for work and believed the company’s supervised positions were an ‘investment’,²⁶ as the fee was said to cover the cost of ‘supervision, mentoring and education programs, leading to an unrestrained practising certificate.’²⁷ Many advocacy groups, such as ALSA,²⁸ and other state-based law societies criticised the scheme as being exploitative. Although the proposal was eventually withdrawn,²⁹ the fact that a scheme like this was even proposed reveals a much deeper-seated issue about the current employment market for law graduates.

The increase in unpaid positions or exploitative business practices, much like that adopted by the aforementioned Adelaide law firm, appears to be a direct response to the oversupply of law graduates. Some graduates are so *desperate* for work experience they are willing to engage in various unpaid positions, even in the private sector. Many respondents to ALSA’s National Advocacy Survey lamented how competitive the employment market has become

²⁵ See Brennan, above n 14.

²⁶ *Ibid.*

²⁷ ‘Adelaide Law Firm Adlawgroup Backs Down on Charging Junior Lawyers \$22 000 in Exchange for Job’, *ABC News* (online), 22 September 2015 <<http://www.abc.net.au/news/2015-09-22/adelaide-law-firm-adlawgroup-backs-down-on-22000-fee-for-interns/6793732>>.

²⁸ Brennan, above n 14.

²⁹ ‘Adelaide Law Firm Adlawgroup Backs Down on Charging Junior Lawyers \$22 000 in Exchange for Job’, above n 27.

as a result of the increasing number of graduates and the pressure on students to undertake extra work and activities while studying — in some cases full time — to remain employable. In particular, when surveyed students and graduates were asked about whether they had engaged in unpaid work experience, 66.03 per cent said they had,³⁰ with 60.37 per cent of respondents indicating in a follow-up question that they had felt pressured to undertake an unpaid position.³¹ One respondent went so far as to say that as a result of the oversupply of graduates, ‘it is near impossible just to get an unpaid clerkship.’³²

While it is not uncommon for students to volunteer in the public sector or with community legal centres, due to their chronic underfunding, the increase in firms or businesses also adopting unpaid opportunities appears to be highly problematic. In ALSA’s submission to the Productivity Commission in 2015, we found that ‘a growing number of larger and mid-sized law firms’ were ‘moving away from remunerating students and graduates in favour of offering unpaid positions’.³³ This trend is problematic for a number of reasons. In particular, the more competitive the market becomes, the more the idea of undertaking unpaid work to remain competitive will become the norm and will create significant issues relating to social mobility and access to the legal profession. In relation to such financial concerns, one respondent to ALSA’s survey stated:

I am not in the financial position to work unpaid (as idont [sic] get Centerlink [sic] or HECS help). This puts me at a severe disadvantage in gaining experience in the legal field where other students who live at home can do volunteer experience.

Such a trend has the potential of creating additional barriers to accessing the legal profession, thereby limiting access to those who can afford to undertake unpaid work experience and thwarting the diversification of the legal profession.

³⁰ The exact question asked was: ‘Have you ever engaged in unpaid work experience?’ Of 106 responses received by ALSA, 70 answered ‘yes’, 34 answered ‘no’, and there were 2 ‘other’ responses, including one which stated: ‘Whilst working in a paid position in a law firm I was often pressured to work unpaid’.

³¹ The exact question asked was: ‘Have you ever felt pressured into undertaking an unpaid position?’ Of 106 responses received by ALSA, 64 answered ‘yes’, 36 answered ‘no’, and there were 6 ‘other’ responses, including one which stated ‘I have been pressured to accept a role for below minimum wages for the sake of experience’.

³² This was a response in relation to the question that asked: ‘What do you believe are the most pressing issues facing law students and law graduates today?’

³³ Australian Law Students’ Association, *Submission to the Productivity Commission: Workplace Relations Framework*, September 2015, <http://www.pc.gov.au/_data/assets/word_doc/0020/193214/subdr0291-workplace-relations.docx>, 5.

Despite growing concerns (and ‘panic’) relating to securing employment in law, commentators have continued to criticise the argument that ‘there are too many law students’, claiming that such an argument is ‘fundamentally flawed because it assumes that all law students become lawyers, without sufficiently defining the term “lawyers”’.³⁴ In particular, Professor Carolyn Evans has continued to argue that law students are ‘better off’ compared to other graduates, stating:

These are difficult times generally for young people seeking to enter the job market across many professions. Digital disruption and the rapid pace of change mean that today’s secure and stable employer may have disappeared within a couple of years while some industries that look as though they are struggling, may reinvent themselves and thrive for decades to come. That is why a flexible degree like law that teaches a range of transferrable skills is still a good investment for many students ... In a complex, difficult world in which graduates will not see the same stability in employment that previous generations have enjoyed, law graduates still have better prospects than most young people.³⁵

Notwithstanding the continued and ongoing rhetoric surrounding the oversupply of law graduates of the last several decades, law schools have continued to expand their intake of new students, and the number of new law schools continues to increase.³⁶ Despite this rise in law graduate numbers, the profession still faces a significant issue by way of diversity in the legal profession as well as access to legal representation.

IV THE DESERVING: ACCESS TO LEGAL EDUCATION AND THE SHIFTING MAKE-UP OF THE LEGAL PROFESSION

An interesting question that is frequently raised every time a new article is written in relation to the oversupply of law graduates is: who deserves to go to law school and who does not? The more we continue to discuss limiting intakes to cut the size of law school numbers the more I query whether that means unfavourably limiting access to legal education by those who may not have fit the ‘typical’ mould of a lawyer just a few decades ago. For instance, writing in the early 1990’s, David Weisbrot commented that the ‘Australian legal profession does not reflect the socio-economic class, ethnicity or gender

³⁴ Parker, above n 11, 256.

³⁵ Evans, above n 18.

³⁶ See, eg, Nelson, above n 5.

composition of the society at large',³⁷ and instead found that 'the social background of young lawyers' is quite 'elite'.³⁸ He went on to say that:

University law students typically come from homes which are significantly more affluent than the norm; most attended selective or elite, private secondary schools, their parents mainly have professional or management backgrounds, and many already have family connections in the legal profession.³⁹

[...]

Law students whose parents were born overseas were less likely to attend elite private schools, and their fathers typically had less formal education and lower occupational status. Migrant lawyers would also tend to lack the family and personal contacts in the profession that so many Australian-born lawyers have and thus miss out on an "important basis of social support role models and easier access to jobs in the profession".⁴⁰

To some degree, the oversupply of law graduates in the market can be linked to the creation of more accessible law degrees and programs, which have attracted the admission of law students from a widely diverse array of socio-economic, geographic, and ethnic backgrounds. Although the creation of such programs and newer more accessible law schools may potentially be contributing to, or exacerbating, the current oversupply of graduates, it has also had the capacity to significantly shift the makeup of the legal profession, making it more diverse than it was just two decades ago. The more we discuss limiting the intake of law students into law schools — and potentially limiting access to a legal education by those from rural areas, lower socio-economic backgrounds or from migrant families (much like mine) — the more I think perhaps we are perpetuating the idea that such students do not "deserve" to have access to a legal education, in the same way that their significantly more affluent counterparts may.

While my high school teacher's scepticism about my ability to obtain the necessary marks to get admitted into law school, may have been harsh, having not attended either a selective or elite private secondary school, or having come from a family of lawyers, I did not have

³⁷ Weisbrot, above n 8, 227.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid 232.

not have access to the same resources or connections in the law that the 'typical' law student Weisbrot refers to may have had access to twenty years ago. Despite my relentless and persistent hard work in high school, I missed the cut-off for a law degree at the University of New South Wales ('UNSW') by a few points, and it was only due to the incredibly accessible 'internal transfer program' that I was eventually able to get admitted into the UNSW Law, and eventually graduate in the top 15 per cent of my cohort. A number of universities have now jumped on board to create a variety of programs which render the law degree incredibly more accessible to those who may have missed the necessary Australian Tertiary Admissions Rank ('ATAR'), or the previous Universities Admissions Index ('UAI'), to get into law school. Some have also created programs which take into account a range of other circumstances, including programs for rural students, Indigenous students,⁴¹ and students from low socio-economic backgrounds.

Despite the creation of all of these programs, some students and graduates remain sceptical about the accessibility of the law degree. For example, when respondents to ALSA's National Advocacy Survey were asked whether they believed a law degree is accessible to students from a variety of backgrounds, only 16.98 per cent of respondents indicated that they believed that the law degree is 'very accessible' to students from a variety of backgrounds. Interestingly enough, 33.96 per cent believed the law degree is *reasonably accessible* and an equal 33.96 per cent believed that the law degree's accessibility is limited; while 13.20 per cent highlighted that they believed the law degree was 'not' accessible to students from a variety of backgrounds.⁴²

⁴¹ Parker and Goldsmith, above n 13, 42-3. Writing in 1998, Christine Parker and Andrew Goldsmith highlighted:

Very modest gains have also been made in increasing the participation of indigenous Australians in legal education. Up to 1990 there had only ever been twenty-one Aboriginal or Islander graduates of Australian law schools. From the mid-1980s a number of universities have introduced discretionary admission and pre-law programs for indigenous Australians that appear to be improving their participation and success rates. In 1997 there are approximately 150 indigenous law students in Australia, but if they were present in numbers proportionate to their representation in the community there would be 666. At the University of New South Wales Law faculty there is extensive support for indigenous students in the form of a preparatory pre-law programme and a full-time tutor for indigenous students throughout the degree. Numbers have grown from 0.81 per cent of the student population in 1984 to 2.09 per cent in 1994, yet even there, only 60 per cent of commencing indigenous students manage to progress through the whole degree. Clearly much still needs to be done to ensure successful access to legal education for indigenous students and others from low socio-economic backgrounds.

⁴² The exact question asked was 'To what extent do you believe a law degree is accessible to students from a variety of backgrounds?' Of 106 responses received by ALSA, 18 believe the law degree is very accessible, 36 believe the law degree is reasonably accessible, 36 believe that the law degree's accessibility to students from a variety of backgrounds is limited, 14 believe the law degree is not accessible. There were

In a follow-up question, respondents were asked whether their law school provides alternative or equitable pathways into law school for students of diverse backgrounds. Sixty respondents said 'yes', with some going on to elaborate upon the types of programs their law schools offered.⁴³ For example, one respondent said: 'Yes through adding ATAR points for people from certain backgrounds, running university courses to replace ATARs and allowing people to easily transfer from lower ATAR entry programs'. Other respondents were sceptical about the value of these alternative or equitable pathways/programs, with one respondent stating:

Yes. There are multiple bonus point schemes and alternative pathways. I feel as though the bonus point schemes are too generous however. I'm noticing that people who have gotten in through this method *are dropping out of law school anyway* (emphasis added).

Some respondents went so far as to say that gaining 'access' to law school is not the problem and that those from diverse backgrounds may 'face discrimination by way of social integration'. That same respondent went on to state:

The culture of law school is elitist. This is evident in the cost of participation in many of its flagship events – you *either need to volunteer for an incredible amount of time* or pay prices of \$100+ to attend some events (emphasis added).

Despite the increasing accessibility of the law degree on one hand, some commentators have noted that fewer law-related jobs — coupled with the increasing fees attached to law degrees (and graduate law degrees, such as the Juris Doctor degree) — mean that law students no longer perceive law school as a 'great opportunity', and are instead exposed to 'terrible risk of both economic loss and personal and professional disappointment'.⁴⁴ For example, in terms of the costs associated with a law degree, a Commonwealth Supported

two 'other' responses, with one of these responses saying: 'Entry to the course is not the barrier, feeling out of place, underprivileged etc is the barrier for people from these backgrounds'.

⁴³ The exact question asked was 'Does your university or law school provide alternative/equitable pathways into law school for students from diverse backgrounds?' Of 106 responses received by ALSA, 60 respondents said 'yes', with some identifying the programs that their universities offer; 2 respondents said 'no'; 26 respondents were not sure of whether there were such programs at their university; 4 respondents had 'other' responses, including one who stated in caps: 'I AM NOT AWARE. HOWEVER, IF YOU ARE FROM A DISADVANTAGED BACKGROUND, AND YOU MANAGE TO GET INTO LAW AND GRADUATE WITH DEBT AND NO JOB WHAT IS THE POINT. YOU'RE WORSE OFF THAN BEFORE!' There were 14 respondents who left their responses blank for this question.

⁴⁴ Carrie Menkel-Meadow, 'Crisis in Legal Education or the Other Things Law Students Should be Learning and Doing' (2013) 45 *McGeorge Law Review* 133, 133.

Place in the combined Bachelor of Arts/Laws program at the University of Sydney is said to cost approximately \$45 180 on its own,⁴⁵ with an additional \$8 820 for the further practical legal training course.⁴⁶ This figure, of course, does not take into account the high costs associated with undertaking a Juris Doctor, which is estimated at \$37 000 *a year* for a full-time domestic student.⁴⁷

Thus, while an increase in the number of law students at law schools, as well as a multiplication of law schools, may have shifted the make-up of students now undertaking a law degree, the oversupply of graduates, the increased competitiveness of the market, and substantial financial investment makes it increasingly difficult for some graduates to enter the market or attain employment. As highlighted in the preceding section, ALSA made submissions to the Productivity Commission in 2015 on the issue of unpaid internships and raised the concern that ‘the current employment market for law graduates and the heightened anxiety around jobs has also created an equity issue for students that cannot afford to work up to 3 or 4 days a week unpaid versus those who can.’⁴⁸ This was raised as a concern due to the fact that getting admitted as a legal practitioner requires students to undertake practical legal training which, in some cases, may involve long hours of unpaid work to satisfy the requisite amount of mandatory days to qualify in the program. Therefore, in some cases, with an increasingly competitive employment market for law graduates, students who are financially stable, live at home, or have connections in the law are much better placed to obtain employment than those who are not. As one respondent highlighted in their survey response, the current oversupply of law graduates makes it ‘difficult to become employed’. That same respondent went on to say:

I have a lot of friends, who have family and friend connections in the law world that receive “side-door” entry into many paralegal, paid and clerkship positions. When you have to compete with that environment already in a cut-throat industry, you really begin to worry about your prospect of employment.

⁴⁵ University of Sydney Law School, ‘Combined Law - The Sydney LLB - Costs and Fees’, *University of Sydney*, last updated 30 September 2015 <<http://sydney.edu.au/law/fstudent/undergrad/fees.shtml>>.

⁴⁶ College of Law, ‘Program Fees’, *College of Law* <<https://www.collaw.edu.au/what-we-offer/law-students-and-graduates/fees-and-payment-options/fees/>>.

⁴⁷ University of Sydney Law School, ‘The Sydney Juris Doctor (JD) – Student Contribution Rates, Costs and Fees’, *University of Sydney*, last updated 6 October 2015 <<http://sydney.edu.au/law/fstudent/jd/fees.shtml>>.

⁴⁸ ALSA, above n 33, 7-8.

In relation to the creation of a new law school last year, Elvira Naiman, managing director at legal recruitment firm Naiman Clarke Legal, suggested that reducing ATAR entry requirements into law schools may not assist some graduates, highlighting that large law firms 'have a "strong bias" towards graduates with degrees from "sandstone" universities'.⁴⁹ She went on to state:

[G]raduates coming out of an absolutely unknown entity with a considerably reduced ATAR - I just don't know where these graduates are going to be getting the right - or any - graduate opportunities, which are already so limited in number.⁵⁰

Thus, with the increasing fees attached to law degrees and the increasing difficulties associated with obtaining employment, some have argued that it makes 'much less economic sense to invest so much time and money in legal education'.⁵¹ While access to legal education has improved due to the increase in accessible and equitable programs, there still remains significant barriers to some students from diverse backgrounds accessing a legal career or obtaining employment as a lawyer.⁵²

V THE UNDER-SERVED: UNMET LEGAL NEEDS OF THE COMMUNITY AND ACCESS TO LEGAL REPRESENTATION

In Samuel Taylor Coleridge's famous poem, 'The Rime of the Ancient Mariner', after finding himself shipwrecked, the sailor famously laments that there is 'water, water every where/nor any drop to drink'. Much like the woeful situation in which the sailor found himself, it appears that this famous quotation aptly reflects the current employment market for graduate lawyers. Although there may be 'lawyers, lawyers everywhere', there are a significant number of vulnerable clients in need of legal assistance or representation, who are unable to access it. The problem, of course, boils down to the issue of funding whereby 'many of the underserved populations are of financial need' and they 'simply cannot afford

⁴⁹ See Bullock, above n 6.

⁵⁰ Ibid.

⁵¹ Brian Tamanaha, *Failing Law Schools* (University of Chicago Press, 2012) 118.

⁵² An exception to this may be specific employment programs which target Indigenous law graduates and students. See, eg, Gilbert and Tobin, *Cadetship Program* <<http://me.gtlaw.com.au/working-with-gt/indigenous-employment/cadetship-key-dates/>>; and Allens Linklaters, *Indigenous Legal Internship* <<http://www.allens.com.au/careers/join/indig.htm>>.

to hire private counsel, and an unemployed lawyer can hardly afford to work for free'.⁵³ The chronic underfunding of important government funded legal services continues to remain a key concern,⁵⁴ as the Productivity Commission found in their recent *Access to Justice Arrangements* (2014) report:

Disadvantaged people face a number of barriers in accessing the civil justice system, which make them both more susceptible to, and less equipped to deal with, legal disputes. If left unresolved, civil problems can have a big impact on the lives of the most disadvantaged ... differences in personal resources and capabilities mean that the most vulnerable Australians may still find the system inaccessible.⁵⁵

Despite the valuable legal representation and advice that organisations such as the Legal Aid Commission or the Aboriginal Legal Service provides, the Productivity Commission found that there still remains 'pressing service gaps' whereby there has been 'a growing "justice gap" for the disadvantaged' namely 'those who would take private legal action to defend their rights, but do not have the resources to do so'.⁵⁶ In particular, the Productivity Commission found that the nature of matters which have fallen into this gap include employment law, tenancy law, and family law matters, including domestic violence, and care and protection of children.⁵⁷ As the Productivity Commission opined in the 'Overview' of their report:

The present means tests used by the LACs [Legal Aid Commissions] are restrictive, reflecting the limited funds available. The income tests are below many established measures of relative poverty. It is not the case that people are 'too wealthy' to be eligible for legal assistance, but rather that they are 'not sufficiently impoverished'.⁵⁸

Although the Australian Federal Government responded to the Commission's report by proposing to provide \$1.6 billion for Legal Aid Commissions and community legal centres,⁵⁹ many organisations were sceptical about this proposal arguing that the government's

⁵³ Angela M Burton, 'Underemployed Attorneys and Underserved Communities: Getting to the Corps of the Problem' (2014-15) 43 *Hofstra Law Review* 157, 162.

⁵⁴ See Australian Government Productivity Commission, above n 7.

⁵⁵ *Ibid* 24.

⁵⁶ *Ibid* 30.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ Australian Government Attorney-General's Department, *Response to the Productivity Commission's Report into Access to Justice Arrangements* 29 April 2016 <<https://www.ag.gov.au/LegalSystem/Pages/response-to-report-into-access-to-justice-arrangements.aspx>>.

response will 'do little to narrow the justice gap facing struggling Australian families'.⁶⁰ Others, at the time, argued that the proposal was 'disingenuous' and that community legal centres were still facing a 30 per cent cut to funding from July 2017, and similar cuts over the following two years, under the National Partnership Agreement for Legal Assistance Services.⁶¹ Thankfully, after significant lobbying by peak bodies, the community legal sector and every state Attorney-General, the Federal Government announced in April 2017 that it would 'restore \$55.7 million to the sector over three years, including \$16.7 million for Aboriginal and Torres Strait Islander legal services'.⁶² While this announcement of course was welcomed, particularly amidst fears in the sector that they would need to significantly reduce their existing services, the sector could still benefit from a significant injection of funds to ensure the legal needs of the most vulnerable members of our community are better met.

It seems rather perverse that in a climate where there is clearly an excess of law graduates willing to work and provide legal advice and representation, there continues to be a significant number of Australians in the community who are unable to access such representation. In addition to ensuring law graduates are appropriately trained to provide competent legal advice and representation, there remains the significant issue that some graduates simply may not be able to afford to take the necessary voluntary roles at community legal centres; for example, to be able to acquire the necessary training to work in the public sector, or for a public interest or not-for-profit organisation. Ultimately, despite the fact that there is plenty of legal work to go around, without adequate government funding and support, it will be very difficult to find a way to meet the legal needs and demands of those who are under-served in the community.

Interestingly, despite issues raised in submissions to the Productivity Commission pertaining to an oversupply of law graduates in the market, the Commission were of the

⁶⁰ Melissa Coade, 'Government's Access to Justice Response Attracts Backlash', *Lawyers Weekly* (online), 3 May 2016 <<http://www.lawyersweekly.com.au/news/18492-government-s-access-to-justice-response-attracts-backlash>>.

⁶¹ Pro Bono Australia, *Government "Disingenuous" Over Community Legal Funding*, 29 April 2016 <<https://probonoaustralia.com.au/news/2016/04/government-fund-community-legal-aid/>>.

⁶² Henry Belot and Louise Yaxley, 'Federal Government to reverse community legal funding cuts in May budget', *ABC News* (online), 24 April 2017 <<http://www.abc.net.au/news/2017-04-24/federal-government-to-reverse-community-legal-funding-cuts/8465420>>.

opinion that they did not see the increasing number of graduates as a justification for ‘any constraint on student numbers for law degrees’. The Commission went further and stated:

The available evidence indicates that this increase in graduates may not equate to an excess supply in the legal market, that law students do not necessarily enter the legal profession and that incomes of starting graduates are relatively unaffected by growth. Indeed, increased entry fosters competition in the profession and therefore improves the responsiveness of firms. *This can improve access to justice* (emphasis added).⁶³

Therefore, while the Productivity Commission remains hopeful that the oversupply of graduates may increase access to justice by those members of the community who are currently ‘under-served’, it remains questionable whether this will indeed be the case. Such a position by the Commission shifts the crisis away from the oversupply of graduates as a problem and highlights the real issue as one relating to resource allocation. This reformulation of the problem was posed by one commentator, writing in relation to the American oversupply issue, who stated: ‘The dilemma is not (just) that we are generating too many lawyers for the jobs available in the market. Rather, we are not sending enough lawyers into the places they are needed most’.⁶⁴

As such, more pressure needs to be exerted on the respective Federal, State and Territory governments to provide adequate funding and resources for legal services to ensure the significant legal needs of the community can be met, while also ensuring a greater proportion of law graduates who are driven by a desire to serve the community will have the means to do so.

VI CONCLUDING REMARKS

With the ongoing concerns associated with the oversupply of law graduates and the saturation of the employment market for lawyers, many question whether we should start talking prospective law students out of attending law schools and cautioning them against incurring all the expenses that come with a law degree — knowing full well how competitive and difficult the job market currently is.⁶⁵ Notwithstanding these concerns, if my high school teacher had told me of all of the associated risks of studying law and the

⁶³ Australian Government Productivity Commission, above n 7, 247.

⁶⁴ Burton, above n 53, 162.

⁶⁵ Ibid 158.

serious difficulties associated with finding employment post-graduation, this *still* would not have deterred me from working as hard as I could to get into law school in the hopes of one day becoming a lawyer. Benjamin H. Barton, speaking in relation to the American job market, echoes these sentiments, stating:

These graduates will have faced a tremendous headwind on their way to law school. Members of their family and their college classmates will have sent them *Wall Street Journal* articles and links to law school scamblogs, all of which begged them not to go to law school. Between their more realistic understanding of the cost of law school, their job prospects, the pain of repaying debt, and what most lawyers actually do and earn, *the students that come to law school will really want to be there. They will be the students that have always wanted to be a lawyer* (emphasis added).⁶⁶

Rather than selling an idea that prospective students should undertake a law degree to pursue a non-legal career, law schools should endeavour to make prospective law students more aware of some of the long-term burdens and risks associated with studying law. Transparency by law schools and universities may help ensure that the students undertaking a law degree 'really want to be there', rather than simply allowing entry to those who are under the false pretence that a law degree will lead to a highly successful and lucrative career at a big law firm. Students, and eventually graduates who will work hard to make their dreams a reality may also be the same future lawyers who will find creative and innovative ways to provide legal services to those who are currently 'under-served', and create new organisations which may collaboratively address some of the systemic issues arising from our current legal system and employment market.⁶⁷

As is made clear in this article, 'panic' about an 'oversupply of law graduates' is not a new phenomenon, nor is it unique to the Australian market. Much like the market has adjusted in the past, there may still be hope that the future of the legal profession, while significantly bigger, will adapt. It may also be far more diverse, inclusive, and considerably more representative of our Australian society than it previously has been. At the end of the day, isn't that an outcome we all deserve?

⁶⁶ Benjamin H. Barton, 'A glass half full look at the changes in the American legal market' (2014) 38 *International Review of Law and Economics* 29, 38.

⁶⁷ See Menkel-Meadow, above n 44, 134.

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PARTICIPATION IN SOCIAL MEDIA BY POTENTIAL JURORS

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This article examines the issue of media publicity in a criminal trial context, given the unprecedented reach of pre-trial commentary on social media platforms such as Facebook and Twitter today. The paper considers how courts have responded to these phenomena, with reference to a particular criminal trial in New South Wales in 2014. In this case, a well-known actor was subjected to an extraordinary level of media attention following his arrest for sexual offences. Relevant to this and other high profile cases is whether jurors can act impartially in the face of relentless pre-trial commentary and publicity, and whether courts should simply rely on selected jurors to remove themselves from participation in the trial if their impartiality is compromised. The question is posed as to whether it is timely to consider allowing the prosecution and defence to investigate juror participation in pre-trial social media commentary during the jury selection process.

CONTENTS

I	INTRODUCTION.....	89
II	ISSUES RAISED BY PRE-TRIAL PUBLICITY.....	89
III	APPEAL RE PERMANENT STAY APPLICATION.....	90
IV	APPEAL JUDGEMENT.....	92
V	PUBLIC POLICY AND FAITH IN JURORS.....	94
VI	IS IT TIME TO DEVELOP A PROCESS FOR INQUIRY INTO JUROR PARTIALITY?.....	97
VII	CONCLUSION.....	98

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I INTRODUCTION

In April 2014, Robert Lindsay Hughes, the former actor who had a lead role in the well-known Australian television sitcom *Hey Dad...!* was convicted of sexual offences against four female victims who were all under the age of 16. Hughes was sentenced to jail for 10 years and 9 months, with a non-parole period of six years.¹ The media interest in Hughes' case had been intense throughout the four-year period leading up to the conviction. It began with an article published in the *Woman's Day* in March 2010 which contained allegations of sexual abuse against a young female cast member, Sarah Monahan. Ms Monahan was subsequently interviewed on a nationally broadcasted television program, *A Current Affair*. Days later, further allegations of sexual abuse from other former *Hey Dad...!* cast members were aired.

At the time, Hughes was living in Singapore. His confrontation with the media about the allegations raised against him received widespread coverage in Australia. In August 2012, Hughes was arrested and extradited to Australia following a police investigation whereupon he continued to receive ongoing and widespread media attention until his eventual conviction at trial in 2014.

II ISSUES RAISED BY PRE-TRIAL PUBLICITY

The sensational headlines of a well-known star facing sexual assault allegations created great feasting fodder for the public at large, and no doubt delivered a profitable boon in ratings and revenue for the media outlets. It also raised serious points of contention for the ensuing trial in 2014.

In the pre-trial hearings in the New South Wales District Court, Zahra DCJ outlined some of the vast mainstream (print and electronic) media coverage that had permeated the public domain leading up to the trial, which he described as 'substantial and extensive' and 'intense and widespread'.² He recounted another *A Current Affair* program which aired in 2012 (two years after the story first broke), claiming that the *Hey Dad...!* story was '... one of the biggest scandals in Australian television history'.³ The story continued

¹ *Hughes v The Queen* [2015] NSWCCA 330, [5] ('Hughes').

² *Hughes v The Queen* [2015] NSWCCA 330, [15]-[17].

³ *Ibid.*

to re-surface throughout 2013 when former TV presenter and then Senator for Victoria, Derryn Hinch, invited viewers to sign a petition advocating a published convicted sex-offenders list. During Hinch's commentary, publicity photographs of Sarah Monahan sitting on Hughes' lap were shown. Published ratings for that particular program demonstrated that it was watched by 1.2 million viewers.⁴

Zahra DCJ noted that 'the extensive media reporting led to commentators, including lawyers associations, questioning whether Hughes would obtain a fair trial as the reporting was said to amount to a "trial by media".⁵ His Honour also considered what had been published on social media platforms such as Facebook, Twitter and YouTube and noted that the material on the social media sites was 'not constrained', containing derogatory views and comments from mostly anonymous contributors that vilified the accused.⁶ He cited entries from the Channel 9 News Facebook page posted at the time of Hughes' committal for trial in July 2013, which included comments such as '*Hang the pedo*' and '*Lock him up so he can't ruin any more lives*'. Tracking data showed the website had 228,376 likes. Further data was also tendered that revealed there were between 700,000 to 800,000 views of social media sites containing disparaging mock satirical videos portraying Hughes as a paedophile and sexual predator.⁷ Though no application was made during the trial for takedown orders in relation to prejudicial material, ongoing concerns about media coverage throughout the trial were raised by both the Crown and applicant, which included an order under the *Court Suppression and Non-Publication Orders Act 2010* (NSW) made specifically in relation to what had been published on the website mamamia.com.au.⁸

III APPEAL RE PERMANENT STAY APPLICATION

Following his conviction and sentence, Hughes lodged an appeal on several grounds including 'whether his Honour erred in refusing to permanently stay the indictment due to adverse publicity' against him.⁹ The *NSW Criminal Trial Courts Bench Book* provides

⁴ Ibid [19].

⁵ *R v Hughes* (Unreported, District Court (NSW), Zahra DCJ, 14 February 2014) quoted in *Hughes v The Queen* [2015] NSWCCA 330, [18].

⁶ *Hughes v The Queen* [2015] NSWCCA 330, [20].

⁷ Ibid [21].

⁸ Ibid [27].

⁹ Ibid 4.

that a stay of the prosecution can be granted due to adverse publicity in the media and on the Internet, but will only be granted if the court is unable to take action to overcome any unfairness that may result from the publicity while taking into account the public interest served by the trial proceeding.¹⁰

Hughes applied for a permanent stay in the case, claiming that the extraordinary level of adverse publicity over the preceding four-year period had moved beyond objective reporting and was directed towards the key issue at trial — namely, the accused’s guilt of the charges laid against him — thereby compromising his entitlement to a fair trial. In particular, it was argued that no jury, not even one properly instructed, could remain impartial when prospective jurors had been exposed before the trial to an overwhelming and unrelenting media that were bent on portraying Hughes as a ‘vile, despicable human being’. This exposure was likely to have caused jurors to have pre-judged the outcome. This material continued to be available to jurors throughout the trial via the Internet.¹¹ The stay application contended that the circumstances of Hughes’ case was similar to those discussed by the High Court in *R v Glennon* [1992] in which Deane, Gaudron and McHugh JJ considered that an ‘extreme’ or ‘singular’ case could arise in which a permanent stay might be granted if the effect of a prolonged media campaign of vilification and potential prejudice and prejudgment against an accused might render a conviction a miscarriage of justice.¹²

The stay application was supported by a report from a psychologist, Professor Thomson, who had researched jurors’ capacity to reach a verdict on trial evidence after being exposed to pre-trial publicity,¹³ and found that jurors apply a ‘confirmatory bias’. According to Professor Thomson, confirmatory bias can affect results as jurors will seek out information based on established beliefs and overlook inconsistent information.¹⁴

In an Australian study of 41 high-profile criminal trials conducted in New South Wales between 1997 and 2000, empanelled jurors were interviewed following completion of the

¹⁰ Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2007), [1-450] <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/the_jury.html>.

¹¹ *Hughes v The Queen* [2015] NSWCCA 330, [36]–[40].

¹² *R v Glennon* [1992] HCA 16; 173 CLR 592, 623–4 (Deane, Gaudron and McHugh JJ).

¹³ Jill Hunter, Dorne Boniface and Donald Thomson, ‘What Jurors Search For and What They Don’t Get’ (UNSW Pilot Jury Study, Law & Justice Foundation, Sydney, 2010).

¹⁴ *Hughes v The Queen* [2015] NSWCCA 330, [39].

trial. The authors found that jurors were more likely to recall pre-trial publicity about an accused if that person was independently well-known in the community,¹⁵ and that approximately eight per cent of the verdicts delivered were likely to have been driven by publicity associated with the trial rather than based on evidence adduced.¹⁶

In the *Hughes* case, the Crown opposed Hughes' permanent stay application contending that the circumstances of Hughes' case did not fall into an exceptional class of cases and that the applicant could receive a fair trial if the jury were properly instructed.¹⁷

IV APPEAL JUDGEMENT

The NSW Court of Criminal Appeal (Beazley P; Schmidt and Button JJ) ('Appeal Court') held that his Honour did not err in refusing to grant the stay application. Zahra DCJ had stated that a fair trial could be achieved, despite the pre-trial publicity, by adhering to a number of steps, including:

- providing members of the jury panel with directions to be excused if there was a risk they could not act impartially as result of the pre-trial publicity prior to empanelling; and
- providing the jurors with careful directions during the trial and in summing up to focus their attentions and minds on the evidence led in trial and to ignore any publicity they might have been exposed to.¹⁸

Directions such as these are expressly provided for in the *NSW Criminal Trial Courts Bench Book*,¹⁹ and include a requirement that empanelled jurors be issued with written directions at the opening of a trial.²⁰ The written directions include information explaining that it is a criminal offence for a juror to make enquiries about the accused or any other matters during the course of trial,²¹ which includes conducting any research on the Internet.²²

¹⁵ Michael Chesterman, Janet Chan and Shelley Hampton, 'An empirical study of criminal jury trials in New South Wales' (Research Report, Law and Justice Foundation of New South Wales, February 2001).

¹⁶ *Ibid* 9.

¹⁷ *Hughes v The Queen* [2015] NSWCCA 330, [42].

¹⁸ *Ibid* [55].

¹⁹ Judicial Commission of New South Wales, above n 10, [1-450].

²⁰ *Ibid* [1-480].

²¹ *Jury Act 1977* (NSW) s 68C.

²² Judicial Commission of New South Wales, above n 10, [1-480].

Juror compliance with these directions would, however, require active monitoring and reporting by the courts administrators. In the Australian study mentioned above,²³ jurors revealed that they had discovered pre-trial publicity material *during* the trial, which was later shared with other jurors before or during deliberations.²⁴ This raised concerns for the authors about the accessibility of prejudicial material that resides and endures on the Internet, and may also suggest that judges and counsel underestimate the nature and degree of contact that jurors may have with prejudicial publicity.²⁵

Burd and Horan highlight the emergence and growing recognition amongst some judges and academics of the “Googling Juror” who now has ready access to a wealth of prejudicial information on Internet sites within mere seconds. Unless jurors are sequestered, there is no way of monitoring or restraining jurors from conducting their own research into aspects of the trial from the privacy of their own homes.²⁶ Consequently, the true extent and incidence of the “Googling Juror” is unknown.²⁷

The Appeal Court in the *Hughes* case stated:

For centuries now, courts have had confidence that juries will decide the cases which they are called on to judge, on the basis of the evidence and that they will adhere to the directions which they are given by the presiding trial judges. Experience, including that revealed by this trial, demonstrates that despite fast-moving technological advances which have provided people with enhanced means of communication, jurors still approach their tasks conscientiously.²⁸

They endorsed the steps taken by Zahra DCJ in his communications and directions at all stages before, during, and at the end of trial in summing up. The Appeal Court also highlighted the number of questions raised by the jury throughout the trial and in particular, those questions in relation to publicity during summing up.²⁹ When coupled

²³ See Chesterman et al, above n 15.

²⁴ Chesterman et al, above n 15, 81.

²⁵ Ibid.

²⁶ Roxanne Burd and Jacqueline Horan, ‘Protecting the right to a fair trial in the 21st century — has trial by jury been caught in the world wide web?’ (2012) 36 *Criminal Law Journal* 103, 112–115.

²⁷ Ibid.

²⁸ *Hughes v The Queen* [2015] NSWCCA 330, [70].

²⁹ Ibid, [74]: The jury asked his Honour to clarify his directions about tendency evidence submitted, and whether or not the evidence showed contamination and collusion of the complainants’ witness evidence as a result of the details published in the media in light of earlier directions from his Honour to ignore all media report details as ‘not evidence’ or facts to be judged by the jurors in the trial, at [74].

with the fact that the jury reached its verdicts on the 10 counts in a staged manner, and could not reach a unanimous verdict in relation to one count, the Appeal Court concluded that it was undoubtedly a jury which attended to his Honour's directions and decided the case on the evidence.³⁰

In a majority decision handed down in June 2017, the High Court of Australia dismissed an appeal by Hughes against the decision by the Appeal Court in relation to the issue of tendency evidence.³¹ The issue regarding pre-trial publicity was not raised in argument.

V PUBLIC POLICY AND FAITH IN JURORS

The reasoning of the trial judge and Court of Criminal Appeal in *Hughes* is underpinned by a belief that a permanent stay of proceedings in the context of a criminal trial ought not to be granted except in the most exceptional or extreme of cases.³²

In *Dupas v The Queen*,³³ the High Court noted the imperatives that necessitate such a view being taken of permanent stay applications based on publicity. The Court observed:

There is nothing remarkable or singular about extensive pre-trial publicity, especially in notorious cases, such as those involving heinous acts. That a trial is conducted against such a background does not of itself render a case extreme, in the sense that the unfair consequences of any prejudice thereby created can never be relieved against by the judge during the course of the trial.³⁴

The Court also stated:

[there is] the need to take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial, the "social imperative" as Nettle JA called it, as a permanent stay is tantamount to a continuing immunity from prosecution. Because of this public interest, fairness to the accused is not the only consideration bearing on a court's decision as to whether a trial should proceed.³⁵

³⁰ Ibid [79]–[80].

³¹ *Hughes v The Queen* [2017] HCA 20 (14 June 2017).

³² *Glennon v The Queen* (1992) 173 CLR 592, 605.

³³ [2010] 241 CLR 237 (*Dupas*).

³⁴ Ibid 237 [36].

³⁵ Ibid 237 [37].

As noted above, in the case of Robert Hughes, the New South Wales Court of Criminal Appeal approved the court's position that fairness will not be undermined due to pre-trial publicity, provided that 'members of the jury panel, prior to empanelling, [receive] directions to be excused if ... they could not act impartially as result of the pre-trial publicity'.³⁶ This process is commonly used in criminal trials, and particularly where the subject matter and/or the pre-trial publicity are of such a nature that prospective jurors are highly likely to have prior knowledge of the case. It is incumbent on the potential juror to apply to be excused if he or she, in considering the trial judge's direction, considers him or herself unable to be impartial.³⁷

The opportunity for the defence or prosecution to question members of the jury about impartiality in cases like that of Robert Hughes is severely limited. In *R v Ronen*,³⁸ whilst considering the issue of whether the defence could have access to the names and addresses of jurors, Ipp JA spoke of the possibility of intimidation of jurors as the primary reason for the restrictive right to challenge and stated:

[I]t is self-evident that the institution of trial by jury requires the protection of jury members from threats and intimidation. It would be a disaster for the institution if jurors were to be susceptible to intimidation that could influence their findings. For the jury to remain "the community's guarantee of sound administration of criminal justice", it must be protected from outside intimidatory influences.³⁹

His Honour acknowledged 'a conflict between the need to protect jurors from intimidation and the desire of accused persons to learn the names and occupations of potential jurors for the purposes of exercising their right of challenge',⁴⁰ but said a prohibition on obtaining such information about jurors is necessary to 'protect an essential feature of the jury system, namely, "that the jury should deliberate upon its verdict uninfluenced by an outsider to the trial process"'.⁴¹ These provisions 'protect the very integrity of the system'.⁴²

³⁶ *Hughes v The Queen* [2015] NSWCCA 330, [55].

³⁷ In New South Wales the procedure for excuse is set out in s 38 of the *Jury Act 1977* (NSW).

³⁸ *R v Ronen* [2004] NSWCCA 176 (*'Ronen'*).

³⁹ *Ibid* 176 [95].

⁴⁰ *Ibid* 176 [96].

⁴¹ (2001) 207 CLR 278, 302 [67] (*'Brownlee'*) (Gaudron, Gummow and Hayne JJ)

⁴² *Ronen* 176 [97].

In *Brownlee v The Queen*, Gleeson CJ and McHugh J observed:

One aspect of the jury system that must be capable of changing, and adapting to the circumstances of the time, is the measures that are taken to guard against the danger of jurors being subjected to improper outside influence. That is because the danger itself changes with varying social conditions and methods of communication.⁴³

What has changed in the past two decades in Australia is the capacity for potential jurors to express their views on any topic by way of online media. Online editions of newspapers provide the capacity for readers to comment on stories. More relevantly, Facebook has become a particularly popular forum for individuals to publish their views and opinions on criminal justice matters.⁴⁴

Social media commentary on accused persons can be problematic. As one report puts it:

While it is possible to isolate a particular newspaper article or a specific television or radio program and find that it is prejudicial, the effect of prejudicial publicity on social media is more likely to be cumulative. That is, it will often be the collective effect of commentary on a case that will constitute the prejudice, rather than any individual comment.⁴⁵

There is another aspect of social media which could be utilised to ensure greater transparency of selection of juries: the ability of counsel for the prosecution and defence in a criminal trial to be able to know the names of prospective jurors and search social media to ascertain if prospective jurors have posted comments on the particular case that they may be selected to adjudicate upon. For example, in relation to the case of Robert Hughes, there were numerous comments made on Facebook, news sites, and other online fora expressing views about Mr Hughes and the allegations published against him. Yet in selecting a jury for the trial of Robert Hughes, there was no capacity for the court to know if those selected as jurors had authored any of that commentary.

Is it good enough that the court simply relied on assurances from those selected for the jury in the initial Hughes case, when asked by the trial judge, that they saw no reason to remove themselves from participation in the trial? In other words, should the court have

⁴³ *Brownlee* 278 [27].

⁴⁴ Justice Stephen Estcourt, 'Around the Nation: Tasmania, Social Media and Sentencing' (2017) 91 *Australian Law Journal* 266, 266-7.

⁴⁵ Jane Johnston et al, 'Juries and Social Media: A Report Prepared for the Victorian Department of Justice' (Research Report, Melbourne: Standing Council on Law and Justice, 2013) 6.

complete reliance on the honesty and memory of each juror? Similar types of questions can arise in criminal trials involving allegations of breaches of anti-terror laws. Should a court know if a prospective juror has expressed views on social media about the defendants and their backgrounds or about the application of anti-terror laws on offenders?

VI IS IT TIME TO DEVELOP A PROCESS FOR INQUIRY INTO JUROR PARTIALITY?

The courts consider the right to challenge a juror on the basis of their partiality to be the most appropriate mechanism to deal with a potential juror who might have expressed views about a case, or been influenced by media. Mason CJ and Toohey J in *Murphy v The Queen* said:

It is fundamental that, for an accused to have a fair trial, the jury should reach its verdict by reference only to the evidence admitted at trial and not by reference to facts or alleged facts gathered from the media or some outside source. However, the might of media publicity in “sensational” cases makes such a pristine approach virtually impossible. Recognising this, the courts have used various remedies such as adjournment, change of venue, severance of the trial of one co-accused from that of the others, express directions to the jury to exclude from their minds anything they may have heard outside the courtroom and the machinery of challenge for cause.⁴⁶

Such a procedure has merit in that it provides a greater level of scrutiny in high profile cases, or cases dealing with subject matter such as terrorism or institutional abuse, than a judge simply asking jurors if there is any reason why they cannot judge a case fairly. However, the idea of prospective jurors being subject to the American voir dire process has not found favour with Australian courts. The New South Wales Court of Criminal Appeal in *Murphy* observed:

[i]t is not appropriate for this jurisdiction to adopt the practice followed in some other countries of permitting in effect a fishing expedition with each prospective juror. There must be a sound basis made out on a prima facie footing to anticipate the probability or [sic] prejudice on the part of an individual juror. The fortuitous circumstances that one such juror disclosed a concern on her part in conjunction with the media publicity falls short of carrying the case to the point where it can be said that the judge no longer had

⁴⁶ *Murphy v The Queen* [1989] HCA 28; (1989) 167 CLR 94, 98–99 (Mason CJ and Toohey J) (*‘Murphy’*).

any discretion to exercise in this field and that the only proper decision for him to have made would have been that contended by the appellant [to grant a challenge for cause of each prospective juror].⁴⁷

Dr. Jayant Patel, a doctor accused of serious medical malpractice and incompetence, was the subject of sensational and adverse nation and international publicity prior to his Queensland trial. In this case, the trial judge, Fryberg J, adopted a procedure involving a questionnaire for jurors and some capacity to question jurors on those answers.⁴⁸

VII CONCLUSION

The case of Robert Hughes raised important issues about the impact of extensive pre-trial publicity within traditional and social media on the capacity of jurors to deliberate in accordance with the trial judge's directions. This is not an isolated case. At the time of writing, the laying of criminal charges against Cardinal Archbishop, George Pell, by Victoria Police has again raised these sorts of questions about trial fairness and publicity.⁴⁹

The "game-changing" nature of social media and the traditional media's embrace of its tools allow the comments and attitudes of prospective jurors to be accessed more readily. Given the circumstances, and the importance of an impartial jury as required by the law, it is time for a change. Australian courts may need to be allowed to assess jurors where there has been publicity of any magnitude due to the nature of the alleged crime and the background of the accused. It is one thing for courts to argue that a potential juror can put adverse publicity out of their mind, but quite another to believe they can undertake the same mental exercise if they have actively participated in commentary or publication.

⁴⁷ *Murphy v The Queen* (1987) 37 A Crim R 118, 126.

⁴⁸ *R v Patel* (No 4) [2013] QSC 62.

⁴⁹ See, eg, C Merritt, 'Doubts George Pell can get fair trial due to damaging publicity', *The Australian* (online), 1 July 2017 <<http://www.theaustralian.com.au/news/inquirer/doubts-george-pell-can-get-fair-trial-due-to-damaging-publicity/news-story/84fa3f0e51e12d4d7071808e3be44c5e>>.

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