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LAW & HUMAN DIGNITY

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CONTENTS

ANNA KERR	*CUPS OF TEA, JOYRIDING AND SHAKING HANDS – THE VEXED ISSUE OF CONSENT*	1
ANDREW DYER	*YES! TO COMMUNICATION ABOUT CONSENT; NO! TO AFFIRMATIVE CONSENT: A REPLY TO ANNA KERR*	17
ANNA KERR	*A REPLY TO ANDREW DYER'S RESPONSE*	57
ANDREW DYER	*THE DANGERS OF ABSOLUTES – AND A FEW OTHER MATTERS: A RESPONSE TO ANNA KERR'S REPLY*	64
ERIN LEACH	*'DOING HER TIME': A HUMAN RIGHTS ANALYSIS OF OVERCROWDING IN BRISBANE WOMEN'S CORRECTIONAL CENTRE*	76
JULIAN R MURPHY	*HOMELESSNESS AND PUBLIC SPACE OFFENCES IN AUSTRALIA – A HUMAN RIGHTS CASE FOR NARROW INTERPRETATION*	103
ZEINA ABU-MEITA	*INTERNATIONAL LAW AND ITS DISCONTENTS: STATES, CYBER-WARFARE, AND THE PROACTIVE USE OF TECHNOLOGY IN INTERNATIONAL LAW*	128
BEN WARDLE	*THE REVOLUTIONARY POTENTIAL OF LAW SCHOOL*	147
PETER MCLAREN	*TEACHING AGAINST THE GRAIN: A CONVERSATION BETWEEN EDITORS OF THE GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY AND PETER MCLAREN ON THE IMPORTANCE OF CRITICAL PEDAGOGY IN LAW SCHOOL*	173

CUPS OF TEA, JOYRIDING AND SHAKING HANDS — THE VEXED ISSUE OF CONSENT

ANNA KERR*

This manuscript is the first of a four-piece conversation between Anna Kerr and Andrew Dyer, on the topic of affirmative consent, published in this issue. Our Journal has been invested in the conversation surrounding a shift toward communicated consent, and the 'Yes means yes' movement. As a Board we felt that this reply series would be an important and timely contribution to consent laws in Australia.

CONTENTS

I THE ISSUE? 2
II 'YES MEANS YES' IN OTHER JURISDICTIONS 3
III WHY ANYTHING LESS THAN YES IS NOT ENOUGH 4
IV DO WE HAVE CLEARER BOUNDARIES OVER THE USE OF CARS THAN WOMEN'S BODIES? 6
V GENDERED NATURE OF THE DEBATE 6
VI CONSENT AFTER PERSUASION? SEXUAL COERCION 8
VII OPENING THE FLOODGATES? 9
IX THE IMPORTANCE OF COMMUNITY EDUCATION 10
X CONCLUSION 12

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I THE ISSUE?

The NSW Law Reform Commission is currently conducting a review into consent regarding sexual assault. The review is a response to community outrage over the notorious case *R v Lazarus,*[1] where at retrial Judge Robyn Tupman found Saxon Mullins had not asked Lazarus to stop and 'did not take any physical action to move away'.[2] The NSW District Court Judge found Lazarus had a genuine and honest belief, based on reasonable grounds, that Mullins was consenting to anal sex even though 'in her own mind'[3] she was not. He was acquitted of the crime at retrial.

Currently, the *Crimes Act 1900* (NSW) s 61HE(2) defines consent as free and voluntary agreement to sexual intercourse. The introduction of this statutory definition was intended to promote communication around consent and acceptable standards of sexual behaviour.[4] The current statutory framework imputes knowledge of non-consent if the defendant has no reasonable grounds for believing the other person has consented.[5] To make such a finding, all circumstances of the case must be considered, including any steps taken by the accused person to ascertain whether the other person consents.[6]

Unfortunately, these provisions are insufficient. As the Lazarus case highlights, courts are empowered to find a party has not consented to sexual intercourse, but nonetheless acquit given lack of knowledge or a 'reasonable mistake'.[7] Despite various safeguards contained in the existing legislation, Lazarus was able to overturn his conviction by claiming that he interpreted the complainant's body language as consent.[8] Thus, this paper argues that Section 61HE(2) of the NSW Crimes Act must be strengthened to require positive confirmation of consent.

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[1] [2017] NSWCCA 279 ('*Lazarus*').
[2] Ibid 110.
[3] Ibid 108.
[4] James Monaghan and Gail Mason, 'Reasonable reform: Understanding the knowledge of consent provision in section 61HA of the Crimes Act 1900 (NSW)' (2016) 40(5) *Criminal Law Journal* 246, 249.
[5] *Crimes Act 1900* (NSW) s 61HE(3)(c).
[6] Ibid s 61HE(3)(d).
[7] Kathleen Calderwood, 'Luke Lazarus Case Highlights the Need to Change Our Conversation about Sexual Consent' *ABC News* (online, 8 June 2017) <https://www.abc.net.au/news/2017-05-06/luke-lazarus-case-should-make-us-reconsider-consent/8502144>.
[8] *Lazarus* (n 1).

The use of the defence of 'mistaken belief on reasonable grounds' has the inevitable outcome that 'reasonable grounds' are the behaviours of the alleged victim.[9] Thus effectively placing victims on trial and making their actions, rather than those of the defendant, subject to the closest scrutiny.[10] Following the Lazarus case, it appears necessary to amend s 61HE to require evidence of a positive indication of consent to refute a charge of sexual assault. This would reduce the scope for juror misinterpretation and manipulative defenses based on knowledge of consent, while upholding an important educative role for the community.

The majority of preliminary submissions to the NSW Law Reform Commission's (NSWLRC) review into consent in sexual assault cases support the adoption of an affirmative model of consent. In other words, 'Yes means yes', where anything less is insufficient in defending a charge of sexual assault. This is consistent with the United Nations recommendation that a definition of sexual assault '[r]equires the existence of "unequivocal and voluntary agreement" and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting'.[11] We now await publication of the final submissions and NSWLRC's report.

II 'YES MEANS YES' IN OTHER JURISDICTIONS

Other jurisdictions have already implemented 'Yes means yes'. In Tasmania, a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused did not take reasonable steps to ascertain that the complainant was consenting.[12] Before relying on the defence, the accused will need to demonstrate positive evidence of the reasonable steps taken to ascertain consent.[13] In Victoria, jury directions stipulate

[9] *Crimes Act 1900* (n 5).
[10] See Julia Quilter, 'Re-framing the Rape Trial: Insights from Critical Theory About the Limitations of Legislative Reform' (2011) 35(1) *Australian Feminist Law Journal* 23.
[11] Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women,* UN Doc ST/ESA/329 (July 2009) 26 [3.4.3.1].
[12] *Criminal Code Act 1924* (Tas) s 14A(1)(c).
[13] Helen Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012) 6.

that the fact the alleged victim did not say or do anything indicating free agreement to a sexual act is enough to show that act took place without that person's free agreement.[14]

The Canadian Supreme Court has also limited a mistaken belief to the immediate and affirmative communication of consent.[15] *R v Ewanchuk,*[16] established that

> [F]or the purposes of mens rea, consent is now established based on the accused's perception of the complainant's words or actions and not on the accused's perception as to the complainant's desire for sexual conduct.[17]

The principle adopted in the case is that 'silence, passivity and ambiguity do not connote consent'.[18] This enshrined there that there must be 'an affirmative unequivocal indication of consent to sexual touching'[19] with consent provided through words or conduct. The defence of 'mistaken consent' is still available, but 'only a mistaken belief that the complainant communicated consent will raise a reasonable doubt as to mens rea — not a mistaken belief that the complainant was consenting'.[20]

III WHY ANYTHING LESS THAN YES IS NOT ENOUGH

There must be a positive obligation before engaging in sexual intercourse to take active steps to ascertain consent. In other words, there must be explicit permission to have sex. Where no action is taken to determine the existence of consent, and the complainant has not said or done anything to indicate consent, it should be assumed that there was no consent. Silence should not be construed as consent given 'the variety of reasons women are not necessarily empowered to express dissent'.[21] Equally, consent is not unequivocal, and can be withdrawn at any time.[22] The requirement of an affirmative consent standard

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[14] *Crimes Act 1958* (Vic) s 37.
[15] *Criminal Code,* RSC 1985, s C-46, s 153.1(2).
[16] [1999] 1 SCR 330.
[17] Elaine Craig, 'Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence' (2009) 13(3) *Canadian Criminal Law Review* 247, 251.
[18] Ibid 252.
[19] Ibid 258.
[20] Ibid 251.
[21] Helen Cockburn (n 13) 27, quoting Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* (Harvard University Press, 1998) 272.
[22] *Crimes Act 1900* (NSW) s 61HA(d).

is likely to assist women in asserting their legal right in 'situations where the existence of coercive factors prevents the victim from rejecting or avoiding sex'.[23] Consent given under coercion, duress or peer pressure does not constitute consent.[24] The onus cannot rest on the complainant to debunk the perpetrator's defence that the perceived consent was given.

The current law does not require that consent must have been clearly communicated, which leaves consent open to interpretation by the perpetrator rather than providing a definitive standard protecting victims. The law as it stands tells women that whilst no means no, everything else might mean maybe, or at least be sufficient for the accused to claim they had reasonable grounds for believing there was consent. When 'one in five young people between the ages of 12 and 20 believe it's "normal" for a male to pressure a female into sexual acts',[25] consent should be requested rather than interpreted. A research survey of young people around Australia 'showed that 22 per cent of participants believed it's a female's responsibility to make it very clear when sex isn't wanted'.[26] Rather than continuing to place responsibility on women, those initiating sexual intercourse should be responsible for ensuring consent is communicated positively, eliminating any misinterpretation of behaviour.

The scope for interpretation of behaviour is further complicated by the attitudes of jurors; '[j]urors do not (because they cannot) make objective judgements about consent and guilt based on the facts presented to them in court'.[27] Jurors may be influenced by rape myths and victim blaming narratives and may look for overt signs the complainant was not consenting. If the complainant's resistance was not active, a juror may query

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[23] Helen Cockburn (n 13) 27. See also Moira Carmody, Georgia Ovenden and Amy Hoffman, '"The program really gives you skills for dealing with real life situations": Results from the evaluation of the Sex + Ethics Program with young people from Wellington, New Zealand' (Research Report, Centre for Educational Research, University of Western Sydney, June 2011).

[24] See *Crimes Act 1900* (NSW) s 61HE(5).

[25] Luke Cooper, 'One in Five Young People Think it's OK for a Man to Pressure a Women into Sex' *Huffington Post* (online, 23 February 2017) <https://www.huffingtonpost.com.au/2017/02/22/one-in-five-young-people-think-its-okay-for-a-man-to-pressure-a_a_21719078/>, discussing The Line, *Sex, Love and Gender Roles: Views on 'what's ok' and 'What's not' in sex, dating and relationships* (Research Report, May 2017).

[26] Ibid.

[27] Natalie Taylor, 'Juror attitudes and biases in sexual assault cases' (Research Paper No 344, Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, August 2007) 6.

'how a defendant could reasonably be expected to know that the complainant was not consenting'.[28] An affirmative model of consent may correct these kinds of juror attitudes.

IV DO WE HAVE CLEARER BOUNDARIES OVER THE USE OF CARS THAN WOMEN'S BODIES?

To avoid this outcome in future, one solution is shifting the evidential burden of consent onto the defendant with clarification that acquiescence is insufficient. If someone took your property without your express permission, the onus should not be on you to prove that this is not what you wanted. The existing framework for larceny requires that where the accused asserts a claim of right to the taking of property, they then bear the evidential burden to raise this as a possibility.[29] This does not seem to attract the same outcry in relation to reversing the onus of proof or eroding the element of mens rea as it does in the case of sexual assault.

Indeed, the offence of 'taking a conveyance without consent of owner'[30] does not evoke the same debate over the element of consent. Even if an owner leaves their car unlocked with the keys in the ignition, they are unlikely to be subjected to harrowing cross-examination that places blame upon them. Furthermore, it is accepted that a criminal transgression has occurred even if a vehicle is returned unscathed after a quick joy ride. It would seem society is clearer about its boundaries in relation to the use of someone's car than the use of a woman's body. As with consent in these crimes, it should not be possible for a defendant to escape conviction based purely on the simple defence of 'mistaken belief on reasonable grounds' in circumstances where no positive consent was given.[31]

V GENDERED NATURE OF THE DEBATE

Notably, current support for adopting a positive model of consent is gendered and this is illustrated in the preliminary submissions to the NSWLRC which were made by

[28] Ibid 3.

[29] Elyse Methven and Ian Dobinson, Submission No PC077 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018) 18-19, citing *R v Fuge* (2001) 123 A Crim R 310, 314–315.

[30] *Crimes Act 1900* (NSW) s 154A.

[31] Ibid s 61HE(3)(c).

academics or on behalf of services focused on victim's interests and in most cases were signed by women. In contrast, submissions that either favoured retaining the status quo or explicitly opposed to strengthening the requirement for positive consent almost all contained at least one male signatory, with few exceptions. These submissions also appeared to represent legal establishment interests with a focus on defendant rights.[32] It is impossible to ignore the gendered nature of this debate, with patriarchal interests fighting a strong rear-guard action against the outrage of women working in community services.[33]

Sexual assault continues to be a gendered crime in which the overwhelming majority of perpetrators are male and victims are female,[34] and attempts to shy away from recognising this reality should be resisted. Women are four and a half times as likely to be the victim than men.[35] Sexual assault is gender-based violence about power and control and is an abuse of a woman's human rights. Women remain devalued and subordinated in society and the prevalence of sexual violence ensures that women experience fear throughout their lives. Women are constantly subjected to unwanted sexual behaviour. One in six women in Australia have experienced sexual assault,[36] with young women aged 18-24 the most likely victims.[37] Problems associated with how the justice system deals with sexual assault include 'the extremely low level of the reporting of sexual assault, a high level of attrition of cases following an initial report and a low level

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[32] See, eg, NSW Bar Association, Submission No PCO47 to New South Wales Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018); The Law Society of NSW, Submission No PCO73 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (27 June 2018).

[33] Equitable Briefing Working Group, *Review of the Application in New South Wales of the Equitable Briefing Policy of the Law Council of Australia* (Report August 2015) 2-3; New South Wales Bar Association, Submission to *the National Inquiry into Sexual Harassment* (18 February 2019) 13-15; see generally Jerome Doraisamy, 'Turning targets into quotas may be necessary for equality at the bar', *Lawyers Weekly* (online, 3 October 2018) <https://www.lawyersweekly.com.au/politics/24165-turning-targets-into-quotas-may-be-necessary-for-equality-at-the-bar#!/ccomment-comment=11323>; Grace Ormsby, 'NSW bar stats give insight into female barristers', *Lawyers Weekly* (online, 10 October 2018) <https://www.lawyersweekly.com.au/wig-chamber/24214-nsw-bar-stats-give-insight-into-female-barristers>.

[34] Australia's National Research Organisation for Women's Safety, 'Violence against women: Additional Analysis of the Australian Bureau of Statistics Personal Safety Survey' (Research Report, Horizons, October 2015), 50.

[35] Ibid. 50.

[36] Ibid 48.

[37] Ibid 52.

of conviction following trial'.[38] This indicates a systemic failure to protect women from male violence and an urgent need for not only legislative reform but also community education to address a widespread culture of victim blaming.

VI CONSENT AFTER PERSUASION? SEXUAL COERCION

Sexual violence is a gendered crime and is characterised by inherent power inequalities. In this context, it is essential to consider the question of when 'persuasion' becomes duress or when coercion has eroded consent. In their preliminary submission to the NSW LRC Review, the NSW Bar Association's assertion that 'consent after persuasion is still consent'[39] is reminiscent of comments on the acceptability of 'rougher than usual handling'[40] and leaves ambiguous what constitutes acceptable persuasion. Does this refer to flowers and a massage? Or instead does persuasion consist of financial incentives, veiled threats, bargaining and relentless badgering?

Currently, only threats of physical violence negate consent.[41] However, threats of violence that are not proximate, including within a context of domestic violence, do not currently negate consent.[42] Nor are patterns of coercive control within relationships[43] or economic coercion such as fraud[44] recognised as negating consent. There is a need to take account of power imbalances between the parties, a history of abuse or other coercive elements such as economic duress in assessing whether consent is freely given.

This would capture not only coercive activity in the context of sex work[45] but in the workplace generally and any other circumstances where there is an imbalance in

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[38] Lesley Townsley and Ian Dobinson, 'Sexual assault reform in New South Wales: Issues of consent and objective fault' (2008) 32(3) *Criminal Law Journal* 152, 152, citing Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Report, December 2005) 8-18.

[39] NSW Bar Association (n 32) 2.

[40] Lynne Spender, 'Legal studies: Justice Bollen, community attitudes, the power of judges' (1993) 18(2) *Alternate Law Journal* 90, 90, quoting *R v David Norman Johns* (Supreme Court of South Australia, Bollen J, 26 August 1992).

[41] *Crimes Act 1900* (NSW) s 61HE(5)(c). See also *R v Aiken* [2005] NSWCCA 328.

[42] Rape & Domestic Violence Services Australia, Submission No PCO88 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018) 17.

[43] Australia's National Research Organisation for Women's Safety, Submission No PCO105 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (13 July 2018) 8.

[44] Sex Workers Outreach Program, Submission No PCO103 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (11 July 2018) 11.

[45] Feminist Legal Clinic Inc. supports adoption of the Nordic Modelin relation to the regulation of prostitution.

bargaining power with women vulnerable to the kind of *#MeToo* experiences currently being widely reported.[46] This would ensure 'Yes means yes', except when there is a context of duress or coercion, in which case it means 'Not really'. There is a need not only for an affirmative consent model but also an expanded list of factors that negate consent.

VII OPENING THE FLOODGATES?

If all forms of coercive sex are criminalised, will the legal system be overwhelmed and the prisons bursting with a sizable portion of the male population? As a community, we cannot progress towards ideal standards of behaviour if we forever shy away from articulating these standards for fear of opening the floodgates. Currently less than a fifth of all sexual assaults are reported to the police,[47] and it is likely most low-level assaults, whether sexual or just common assault, will continue to go unreported.

As Germaine Greer points out in her recent musings on the subject, most rapes are 'just lazy, careless and insensitive' and don't involve injury.[48] She distinguishes between violent rapes causing significant injury and banal non-consensual sex that is occurring more widely. Her suggestion is that the latter crime should be punishable by 200 hours community service and perhaps an 'r' tattooed on the perpetrator's hand, arm or cheek.[49]

Some organisations suggest introducing a lesser charge for cases involving mere recklessness in relation to consent, as in the case of intoxicated perpetrators.[50] Certainly many offences would be more readily prosecuted by applying an objective standard of proof rather than insisting on strictly establishing mens rea in relation to consent. Indeed, there is an argument that a conviction for a less serious offence would be preferable to the current situation where most cases of non-consensual sex fail to be reported,[51] let alone result in conviction.

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[46] Christina Pazzanese and Colleen Walsh, 'The women's revolt: Why, now and where to' *The Harvard Gazette* (online, 21 December 2017) <https://news.harvard.edu/gazette/story/2017/12/metoo-surge-could-change-society-in-pivotal-ways-harvard-analysts-say/>.
[47] Australian Bureau of Statistics, *Personal Safety Survey Australia: Reissue* (Catalogue No 4906.0, 21 August 2006).
[48] 'Germaine Greer: "Rape is rarely a violent crime" and four other controversial quotes', *The Week* (online, 31 May 2018) <https://www.theweek.co.uk/93968/germaine-greer-rape-is-rarely-a-violent-crime-and-four-other-controversial-quotes>.
[49] Ibid.
[50] See New South Wales Bar Association (n 39).
[51] Australian Bureau of Statistics (n 47).

Greer suggests that in cases of obviously violent rape, courts should concentrate on the degree of violence rather than having lengthy trials in which women are humiliated for long periods being cross-examined on often uncontentious questions of consent.[52] This is in line with suggestions that we adopt a new offence which eliminates consent as an element and requiring only that harm be established.[53] However, this raises questions about the scope for prosecution of sexual assault which does not include physical violence, and the extent to which emotional harms such as a victim's distress, anger and grief should be incorporated into the definition of harm. If excluded, this clearly sends a problematic message — that there is no crime if there is no physical harm done to the victim.[54]

Removing the element of consent altogether therefore does not constitute the solution. While there is a need not to trivialise more serious violent crimes by grouping them with milder instances of non-consensual sex, it is nevertheless essential that the criminality of both are acknowledged.

VIII THE IMPORTANCE OF COMMUNITY EDUCATION

A video on YouTube 'Consent — It's as simple as Tea' has received over seven million views and provides a simple and amusing explanation of consent which sanctions against making people drink tea against their wishes or when they are unconscious.[55] It concludes: 'Whether it's tea or sex, consent is everything'.[56] This seems like clear advice.

However, the video is from the perspective of the one making the tea rather than the one consenting (or not) to drink it. This conceptualisation is a bit back to front. Watching someone else drink tea is hardly a compelling desire for many people. Drinking the tea is more likely to have a certain element of compulsion. What if the individual was claiming to be parched? It could be more difficult to refuse them tea in these circumstances, even

[52] Marks Brown, 'Germaine Greer Calls for Punishment for Rape to be Reduced', *The Guardian* (online, 31 May 2018) <https://www.theguardian.com/books/2018/may/30/germaine-greer-calls-for-punishment-for-to-be-reduced>.
[53] Peter Rush and Alison Young Submission No PC059 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018).
[54] Conversely it is also flawed in that it would also capture consensual sex that has caused harm, such as through the unwitting transmission of a sexually transmitted disease.
[55] Blue Seat Studios, 'Tea Consent' (YouTube, 13 May 2015) <https://www.youtube.com/watch?v=oQbei5JGiT8>.
[56] Ibid 0:02:39-0:02:45.

if the tea was in your personal water bottle and you harboured significant reservations about the other individual's personal hygiene. Unfortunately, many men conceptualise and portray satisfying their sexual urges as a compelling need equivalent to thirst and feel somewhat entitled to have this need met as though it were a human right. Until we address this narrative of male entitlement, we are not really addressing the issue.

Another video has sprung up in response to the Tea video. This video is entitled 'Tea — A bad idea'.[57] By analogy, this video appears to insinuate that sex is never a good idea because women are inherently untrustworthy and prone to fabrication. In this video, the tea drinker consents freely to the tea but later claims not to have consented as it was actually pretty bad tea. This video is misogynist propaganda, with a strong incel flavour, implying that a woman is likely to claim rape when what she experienced was just unsatisfactory sex.

Disturbingly, this emphasis on performance is a common theme, even in materials focused on educating people about consent. For example, one workshop activity advertised online uses handshakes as a way of teaching students about sexual consent by opening discussion 'about how we ask for our needs to be met'.[58] The workshop focuses on the importance of negotiation and the need to balance fun and spontaneity. This training places a disturbing focus on the mechanics of the handshaking rather than on more basic concerns such as the cleanliness of your hands, are you squeezing too hard and hurting the person, and whether the person really wanted to shake hands in the first place or just felt compelled to do so by social convention. Community education must not entrench a view of sex as an essential need or a performance sport, and is paramount in addressing current sexual assault trends,[59] that must accompany legislative change.

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[57] Cusper Lynn, 'Tea, it's a bad idea' (YouTube, 24 November 2015) <https://www.youtube.com/watch?v=yX6va9glqgA>.
[58] Justin Hancock and Meg John Barker, 'Three Handshakes — An activity for learning how consent feels' *Bishtraining* (online, 25 March 2015) <https://bishtraining.com/three-handshakes-an-activity-for-learning-how-consent-feels/>.
[59] Terry Goldsworthy, 'Yes means yes: moving to a different model of consent for sexual interactions' *The Conversation* (online, 30 January 2018) <https://theconversation.com/yes-means-yes-moving-to-a-different-model-of-consent-for-sexual-interactions-90630>.

IX CONCLUSION

To summarise, victims must no longer be subject to harrowing cross examination in efforts by defence lawyers to establish that they have given consent. Judges and juries must be directed to understand that a lack of physical resistance does not constitute consent. In the absence of explicit permission, a victim's assertion that there was no consent should be accepted and any consent should also be negated in cases where there was any incapacity on the part of the victim or the presence of a coercive element. In cases involving obvious signs of violence or physical injury, the need to establish that sexual activity took place without consent should be dispensed with altogether. Certainly, steps should be taken to eliminate a Lazarus defence of mistaken belief. Finally, more must be done to educate the community not only that 'Yes means yes', but also that a 'Yes' obtained by coercion is not really a yes at all.

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YES! TO COMMUNICATION ABOUT CONSENT; NO! TO AFFIRMATIVE CONSENT: A REPLY TO ANNA KERR

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This is part of a four-piece conversation published in this issue, and a response to Anna Kerr's 'Cups of Tea, Joyriding and Shaking Hands – The Vexed Issue of Consent'.

CONTENTS

I INTRODUCTION 18

II THE PROBLEMS WITH AFFIRMATIVE CONSENT 22

A *The Law Relating to Consent and Knowledge of Non-Consent in NSW* 22

B *Affirmative Consent and Absolute Liability* 26

C *Other Difficulties with Kerr's Argument for Affirmative Consent* 33

III PERSUASION, RELUCTANCE, NON-VIOLENT THREATS AND MISTAKES; AND TWO-OFFENCE PROPOSALS 40

A *Acceptable Persuasion and Unacceptable Pressure — and Mistakes* 40

B *Kerr's Two-Offence Proposal* 46

IV CONCLUSION 48

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I INTRODUCTION

As Anna Kerr notes, the New South Wales Law Reform Commission (NSWLRC) is currently reviewing s 61HE of the *Crimes Act 1900* (NSW).[1] That section deals with both consent and an accused's knowledge of a complainant's non-consent for the purposes of: the sexual assault offences created by ss 61I, 61J and 61JA of that Act; the sexual touching offences provided by ss 61KC and 61KD; and the sexual act offences in 61KE and 61KF.[2] As Kerr also notes, the NSWLRC's review is a response to community outrage following Tupman DCJ's decision[3] to acquit Luke Andrew Lazarus of one count of sexual assault, contrary to s 61I, at his second trial[4] for that offence. The NSW government announced the review the day after the ABC telecast a *Four Corners*[5] episode in which the complainant in the *Lazarus* case, Ms Saxon Mullins, waived her right not to be identified as a complainant in 'prescribed sexual assault proceedings'[6] and claimed that the government should insert an affirmative consent standard in (what is now) s 61HE. 'If you don't have [enthusiastic consent]', Ms Mullins said at the end of the programme, 'you're not good to go'.[7] Indeed, she continued, the person who fails to ask 'do you want to have sex with me?' is — without exception — properly regarded as a criminal if the resulting intercourse is non-consensual.[8] The same is true of the person who *does* ask, but receives no 'enthusiastic yes' in response.[9]

Is this right? Kerr thinks that it is,[10] and many people agree with her.[11] I firmly (though with great respect) believe that it is not. Fewer people seem to agree with me, at least in

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[1] Anna Kerr, 'Cups of Tea, Joyriding and Shaking Hands – the Vexed Issue of Consent' (2019) 7(1) *Griffith Journal of Law & Human Dignity* (in this issue); see also Mark Speakman and Pru Goward, 'Media Release: Sexual Consent Laws to be Reviewed' (Media Release, NSW Government, 8 May 2018).
[2] This has been so since the coming into force of the *Criminal Law Amendment (Child Sexual Abuse) Act 2018* (NSW) on 1 December 2018. Before that date, s 61HA regulated consent and knowledge of non-consent – for the purposes only of the offences created by ss 61I, 61J and 61JA. Section 61HA now deals with the meaning of the term 'sexual intercourse'.
[3] *R v Lazarus* (District Court of NSW, Tupman DCJ, 4 May 2017) ('*Lazarus*').
[4] Judge Tupman heard that trial without a jury because of the attention that the media had given the proceedings: see *Criminal Procedure Act 1986* (NSW) s 132.
[5] Four Corners, 'I am that Girl', *ABC Four Corners* (Transcript, 7 May 2018) <http://www.abc.net.au/4corners/i-am-that-girl/9736126> ('*I am that Girl*').
[6] See *Crimes Act 1900* (NSW) s 578A(2), (4)(b).
[7] '*I am that Girl*' (n 5).
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] See, eg, Rape & Domestic Violence Services Australia, Submission No CO28 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (21

academic circles. That said, many academics do resist affirmative consent proposals.[12] Contrary to what Kerr suggests, many of them are women.[13]

In this reply, I argue that affirmative consent proposals are objectionable, mainly because they are draconian, but also because they perpetuate notions of female passivity. They are draconian because, by rendering nugatory the honest and reasonable mistake of fact 'defence',[14] they effectively convert sexual assault and like offences into crimes of absolute liability. Morally innocent persons are punished to achieve what is seen as a higher good.[15] They perpetuate notions of female passivity because of their — and their supporters' — insistence that it is always for male actors to ask female 'gatekeepers' for their permission to engage in sexual activity. 'Men as active and women as passive in sex … women with no role in shaping events in the world and men with all the responsibility for shaping them,' Janet Halley says.[16] '[H]ave we ever heard those ideas before?'[17] We certainly have. As Halley points out, we have heard them from social conservatives.[18] Affirmative consent is not progressive — it is punitive, authoritarian and, in some ways, unliberated. That is why right-wing parliamentarians, such as the former NSW Minister for the Prevention of Domestic Violence and Sexual Assault, Pru Goward, support it.[19] Those who believe in fairness for accused persons, and a limited state, should not.

February 2019); Tom Dougherty, '*Yes* Means *Yes*: Consent as Communication' (2015) 43(3) *Philosophy and Public Affairs* 224.

[12] See, eg, Aya Gruber, 'Consent Confusion' (2016) 38 *Cardozo Law Review* 415; Kimberly Kessler Ferzan, 'Consent, Culpability, and the Law of Rape' (2016) 13(2) *Ohio State Journal of Criminal Law* 397; Janet Halley, 'The Move to Affirmative Consent' (2016) 42(1) *Signs: Journal of Women in Culture and Society* 257.

[13] See, eg, Ferzan (n 12); Aya Gruber, '*Not* Affirmative Consent' (2016) 47(4) *The University of the Pacific Law Review* 683, 692; Halley (n 12); Arlie Loughnan et al, Submission No CO09 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (1 February 2019).

[14] In NSW, a person will not be guilty of sexual assault if the jury thinks it reasonably possible that, though s/he had non-consensual intercourse with another person, s/he believed on reasonable grounds that the complainant was consenting: *Crimes Act 1900* (NSW) s 61HE(3)(c). In the text, I place the word 'defence' inside inverted commas because as Brennan J pointed out in *He Kaw Teh v The Queen* (1985) 157 CLR 523, 573 ('*He Kaw Teh*'), since *Woolmington v DPP* [1935] AC 462 ('*Woolmington*'), the ultimate onus of negating honest and reasonable mistake of fact – both at common law and in the Code states – has rested on the Crown. See also *CTM v The Queen* (2008) 236 CLR 440, 446 [6] ('*CTM*'); *Youssef v R* (1990) 50 A Crim R 1, 2-4 ('*Youssef*'). The same is true of the s 61HE(3)(c) ground of exculpation.

[15] As is pointed out by Ferzan (n 12) 421.

[16] Halley (n 12) 276.

[17] Ibid.

[18] Ibid 276-8.

[19] See Michaela Whitbourn, ''Enthusiastic yes': NSW announces Review of Sexual Consent Laws', *Sydney Morning Herald* (online, 8 May 2018) <https://www.smh.com.au/national/nsw/enthusiastic-yes-nsw-announces-review-of-sexual-consent-laws-20180508-p4zdyn.html>.

I respectfully disagree with Kerr in two other ways.

First, whether one agrees with everything that the NSW Bar Association said in its preliminary submission to the NSWLRC's review[20] — and I do not[21] — there is nothing problematic about its statement that '[c]onsent obtained after persuasion is still consent'.[22] Provided that the persuaded person has nevertheless made a free and voluntary decision to engage in sexual activity,[23] s/he is consenting. That is the law in NSW.[24] It is reflected in the standard direction that judges give juries in sexual assault cases.[25] Moreover, there is nothing normatively undesirable about this position. Take, for example, the man who is persuaded by his sexual partner to participate in planned, formulaic sexual intercourse as part of fertility treatment that the couple is receiving. His participation in such activity might be reluctant. It might not be 'enthusiastic'. Despite this, however, he has made an autonomous decision to proceed. He is not being raped. It is wrong, with respect, for Kerr to suggest that persuasion of this sort is comparable to an accused's use of 'rougher than usual handling' to procure a person's 'consent'.[26] It is also inaccurate to suggest that the Bar Association was lending its support to the latter kind of behaviour. With that said, however, I do believe Kerr to be right insofar as she suggests that the person who 'consents' because of a non-violent threat has not really consented at all.[27] Certainly, I do not agree the Bar Association's further claim that '[c]rimes of sexual assault should be confined to cases where sexual choice is non-

[20] NSW Bar Association, Submission No PCO47 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018).
[21] See Andrew Dyer, Submission No CO02 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (1 February 2019); Andrew Dyer, 'The Mens Rea for Sexual Assault, Sexual Touching and Sexual Act Offences in New South Wales: Leave it Alone (Although You Could Consider Imposing an Evidential Burden on the Accused)' (2019) 47(4) *Australian Bar Review* (forthcoming) ('*The Mens Rea for Sexual Assault*').
[22] NSW Bar Association (n 20).
[23] *Crimes Act 1900* (NSW) s 61HE(2).
[24] *R v Mueller* (2005) 62 NSWLR 476, 479 [36]-[37].
[25] The Criminal Trials Court Benchbook, *Sexual intercourse without consent,* 'Suggested direction – sexual intercourse without consent (s 61I) where the offence was allegedly committed on or after 1 January 2008' <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/sexual_intercourse_without_consent.html>.
[26] Kerr (n 1).
[27] Ibid.

existent'.[28] I also believe that the list of mistaken beliefs that negate a complainant's apparent consent[29] should be expanded and modified (a topic not addressed by Kerr).

Secondly, there are flaws in Kerr's argument that there should be two sexual assault offences, one with and the other without, non-consent as an element. Kerr apparently supports[30] an offence along the lines of that suggested by Peter Rush and Alison Young in their preliminary submission to the NSWLRC's review.[31] But if it were an offence for a person to engage in sexual intercourse with another person and intentionally or recklessly cause that person (serious) injury,[32] those who engaged in consensual sadomasochistic sex would be guilty of sexual assault.[33] That is a sufficient reason for rejecting any new offence that focusses purely on the harm caused to the complainant and requires no proof of her/his non-consent. Moreover, Kerr is, with respect, wrong to argue that the lesser offence that she is proposing would lead to a higher conviction rate for those who have intercourse with another person without that person's consent.[34] Kerr proposes that the mens rea threshold for such an offence would be 'mere recklessness in relation to consent'[35] or an 'objective standard'.[36] But that would not make things any easier for the Crown than they are currently. Because sexual assault offences are already crimes of 'objective culpability',[37] and because, additionally, both advertent and inadvertent recklessness are sufficient mental states for those offences,[38] Kerr's offence would be just as difficult to prove as the sexual assault offences that are currently on the books.

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[28] NSW Bar Association (n 20).
[29] See *Crimes Act 1900* (NSW) s 61HE(6).
[30] Kerr (n 1).
[31] Peter Rush and Alison Young, Submission No PC059 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018) ('*Preliminary Submission*'); See also Peter Rush and Alison Young, 'A Crime of Consequence and a Failure of Legal Imagination: The Sexual Offences of the Model Criminal Code' (1997) 9(1) *Australian Feminist Law Journal* 100 ('*A Crime of Consequence').*
[32] I place the word 'serious' in brackets for the reasons noted at (n 198).
[33] See the facts of *Brown v DPP* [1994] 1 AC 212 ('*Brown*').
[34] Kerr (n 1).
[35] Ibid.
[36] Ibid.
[37] *Tabbah v R* [2017] NSWCCA 55 (29 March 2017) [139].
[38] *R v Mitton* (2002) 132 A Crim R 123, 139 [28] ('*Mitton*'); See also *Crimes Act 1900* (NSW) s 61HE(3)(b).

II THE PROBLEMS WITH AFFIRMATIVE CONSENT

A *The Law Relating to Consent and Knowledge of Non-Consent in NSW*

Before I discuss the difficulties with Kerr's contention,[39] echoing Pru Goward that '[t]here must be explicit permission to have sex',[40] it is important to set out what the law in NSW says about consent and an accused's knowledge of a complainant's non-consent for the purposes of the offences covered by s 61HE of the *Crimes Act*.

Under s 61HE(2), a person consents to sexual activity if s/he freely and voluntarily agrees to that sexual activity. Section 61HE(5) provides that a person does not consent to such activity if s/he: lacks the capacity to do so because of her/his age or cognitive incapacity;[41] is unconscious or asleep;[42] 'consents' because of threats of force or terror;[43] or because s/he is unlawfully detained.[44] Section 61HE(6) provides that there will, likewise, be no consent if the complainant consented 'under' any of the mistaken beliefs that it specifies. Section 61HE(8) provides that a person *might* not consent — the matter is one for the trier of fact to work out — if s/he 'consents' because of: her/his substantial intoxication;[45] non-violent threats;[46] or the abuse by the accused of a position of authority or trust.[47] And, finally, s 61HE(9) provides that the complainant who offers no physical resistance might, even so, not be consenting.

It is necessary to pause briefly here. With great respect, Kerr is wrong to imply that juries are currently given no direction that 'a lack of physical resistance does not constitute consent'.[48] They *are* given such a direction. They are told that the law — that is, s 61HE(9) — specifically provides that submission is not the same as consent.[49]

A person will have the mens rea for the offences to which s 61HE applies if s/he 'knows' that the complainant was not consenting.[50] In turn, a person will have the requisite

[39] Kerr (n 1).
[40] Whitbourn (n 19).
[41] *Crimes Act 1900* (NSW) s 61HE(5)(a).
[42] Ibid s 61HE(5)(b).
[43] Ibid s 61HE(5)(c).
[44] Ibid s 61HE(5)(d).
[45] Ibid s 61HE(8)(a).
[46] Ibid s 61HE(8)(b).
[47] Ibid s 61HE(8)(c).
[48] Kerr (n 1).
[49] The Criminal Trials Court Benchbook, (n 25).
[50] *Crimes Act 1900* (NSW) ss 61KC, 61KD, 61KE, 61KF, 61I, 61J, 61JA.

knowledge, not merely if s/he actually knows that consent is absent,[51] but also if s/he is reckless as to consent[52] or lacks reasonable grounds for his/her belief that consent is present.[53] When determining whether the accused did have one of the required mental states, the trier of fact must have regard to all of the circumstances of the case[54] — including any 'steps' that the accused took to ascertain whether the complainant was consenting,[55] but excluding the accused's self-induced intoxication (if any).[56]

It is necessary again to pause briefly. In the second *Lazarus* appeal, the NSW Court of Criminal Appeal (NSWCCA) found that Tupman DCJ erred, at the second trial, by failing to consider any 'steps' taken by Mr Lazarus to work out whether Ms Mullins was consenting.[57] Her Honour thought it reasonably possible that, though Ms Mullins was in fact not consenting, Mr Lazarus believed on reasonable grounds that she was.[58] Crucial to that conclusion, as Kerr notes,[59] were her Honour's anterior factual findings that (a) Ms Mullins had not said 'stop' or 'no' at any stage during the relevant encounter; and (b) Mr Lazarus had behaved in neither an 'aggressive' nor an 'intimidatory' way.[60] Concerning this last point, Tupman DCJ said:

> [I]t has never been the complainant's evidence at trial that the accused acted aggressively or roughly, or used any form of physical restraint or force against her, to persuade her to stay. She made that point quite clear in her evidence. So whilst she said she felt scared and that was why she did what she did, that fear was not as a result of any physical force being used by the accused, nor aggressive or forceful tones.[61]

However, s 61HE(4)(a) means what it says when it provides that the trier of fact *must* have regard to any 'steps' taken by the accused to ascertain whether the complainant was

[51] Ibid s 61HE(3)(a).
[52] Ibid s 61HE(3)(b).
[53] Ibid s 61HE(3)(c).
[54] Ibid s 61HE(4).
[55] Ibid s 61HE(4)(a).
[56] Ibid s 61HE(4)(b).
[57] *R v Lazarus* [2017] NSWCCA 279 (27 November 2017) [142]-[149] ('*Lazarus*').
[58] *Lazarus* (n 3).
[59] Kerr (n 1).
[60] *Lazarus* (n 3).
[61] Ibid.

consenting, when it determines whether s/he had the requisite mens rea.[62] Her Honour's failure to do that meant that error was established.

This is relevant to my reply in three ways.

First, with respect, it is not entirely clear that Kerr is right to contend that the provisions that currently appear in the *Crimes Act* are 'insufficient' to deal with a case such as *Lazarus*.[63] If Tupman DCJ had considered that Mr Lazarus took only the 'step' of forming a positive belief that Ms Mullins was consenting, her Honour might have answered the 'reasonable grounds' question differently from how she did. That is, Mr Lazarus's failure to make any 'enquiry of the complainant before or during intercourse as to whether she was willing to have anal intercourse (or intercourse at all)',[64] would have to have been viewed alongside various other matters that should have put him on notice that Ms Mullins might not have been consenting. It was undisputed that, at one stage in the laneway where the intercourse occurred, Ms Mullins announced her intention to go back to her friend.[65] Judge Tupman also found that, when Mr Lazarus pulled the complainant's undergarments down the first time, she promptly pulled them up again.[66] And Mr Lazarus's knowledge of Ms Mullins's virginity might also reasonably have raised some doubt as to whether she was a willing participant.[67] A trier of fact considering all of that might have concluded that Mr Lazarus was negligently incurious about whether Ms Mullins was consenting. And it might have concluded that his failure to ask the relevant question in those circumstances fortified the inference that, despite Ms Mullins's silence and his lack of aggression, he had no reasonable grounds for believing what he did.

Secondly, as I have argued elsewhere,[68] there is a difficulty with the NSWCCA's reasoning regarding the meaning of 'steps' in s 61HE(4)(a). For the NSWCCA, a person can take a

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[62] *R v XHR* [2012] NSWCCA 247 (23 November 2012) [51], [61]-[65]; *Lazarus* (n 57).
[63] Kerr (n 1).
[64] *Lazarus* (n 57).
[65] *Lazarus* (n 3).
[66] Ibid.
[67] Gail Mason and James Monaghan, 'Autonomy and Responsibility in Sexual Assault Law in NSW: The *Lazarus* cases' (2019) 31(1) *Current Issues in Criminal Justice* 24, 33.
[68] Andrew Dyer, 'Sexual Assault Law Reform in New South Wales: Why the *Lazarus* Litigation Demonstrates no Need for Section 61HE of the *Crimes Act* to be Changed' (2019) 43(2) *Criminal Law Journal* 78, 97-9. Other commentators have criticised this reasoning on the same basis. See, eg, Mason and Monaghan (n 67) 33; Rape & Domestic Violence Services Australia, Submission No PC088 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018); Luke McNamara et al, Submission No C013 to NSW Law Reform Commission, *Review of*

'step' within the meaning of that provision simply by considering the events in front of him/her and concluding that the complainant is consenting.[69] The problem with this is that it appears to run contrary to the legislative intention, namely, to require juries to consider whether the accused took *active* measures to ensure that the complainant was consenting, when those juries determine whether the accused had the mens rea for sexual assault. It is for this reason that I have proposed[70] this change to the text of s 61HE(4)(a):

> For the purpose of making any such finding [i.e. that the accused 'knew' that the complainant was not consenting], the trier of fact must have regard to all the circumstances of the case:
>
> (a) including any **physical or verbal** steps taken by the person to ascertain whether the other person consents to the sexual intercourse …

Under such a reform, judges would be required to tell juries that they must take into account the accused's failure to ask the complainant whether s/he was consenting (or to take similar measures), when those juries assess whether the accused's belief in consent was held on reasonable grounds.

Thirdly, however, a provision of this kind differs from an affirmative consent provision of the sort that Kerr favours, in this crucial way. Under my proposed provision, the trier of fact would have to *take into account* the accused's failure to say or do anything to obtain unambiguous consent, when it decides the mens rea question. People would thereby be *encouraged* to communicate about consent. For Kerr, on the other hand, an accused's failure to seek 'permission' is not merely something to be taken into account. Rather, in her opinion, in all cases where the accused has omitted to gain express permission, s/he should be convicted of the relevant sexual offence if the complainant was in fact not consenting.[71] People would thereby not only be *forced* to communicate about consent, but also to receive an unequivocal statement from the complainant that s/he was

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Consent and Knowledge of Consent in relation to Sexual Assault Offences (1 February 2019). I thank Gail Mason for bringing this point to my attention originally.

[69] *Lazarus* (n 57) [147].

[70] Dyer (n 68) 99; Andrew Dyer, Submission No PC050 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018).

[71] Kerr (n 1).

consenting. The problem with such a proposal is that, however well-intentioned it is, it is draconian. Certainly, Kerr is right to argue that the law of sexual assault must take account of the human rights of complainants.[72] But the law must balance such rights against the rights of the accused. By effectively favouring absolute liability for sexual assault, and by seemingly supporting a reversal of the onus of proof in sexual assault cases (a separate issue dealt with below)[73] Kerr's proposal, with respect, does not achieve any such balance.

B *Affirmative Consent and Absolute Liability*

In *Wampfler v R*,[74] Street CJ noted the difference between subjective mens rea offences, strict liability offences and absolute liability offences. In the case of subjective mens rea offences, the Crown must prove that the accused actually knew of the existence, or the possible or probable existence, of the guilty circumstance.[75] In the case of the strict liability offences, the accused will be guilty of the crime unless it is reasonably possible that s/he had an honest and reasonable but mistaken belief in the existence of a state of affairs that, if it had existed, would have rendered his/her conduct non-criminal.[76] In the case of absolute liability offences, the accused will be guilty upon proof merely that s/he performed the actus reus of the crime.

It follows that, currently, the offences to which s 61HE applies closely resemble strict liability offences. As noted above, an accused will be acquitted of sexual assault, for example, if, leaving the onus of proof to one side, s/he believed on reasonable grounds that the complainant was consenting.[77] It is true that there are seemingly two other circumstances where an accused will lack the mens rea for sexual assault and like offences. If the accused did not consider the matter of consent at all, in circumstances where the risk of non-consent would not have been obvious to a person of his/her mental capacity if s/he had turned his/her mind to the relevant question, s/he will be acquitted.[78] The same is true, apparently, if s/he realised merely that there was a negligible, rather

[72] Ibid.
[73] See text accompanying nn 130-141.
[74] (1987) 11 NSWLR 541, 546.
[75] Or, in the case of result-crimes, intended or foresaw as possible or probable the forbidden consequence: see *Macpherson v Brown* [1975] 12 SASR 184, 188.
[76] *CTM* (2007) 236 CLR 440, 447 [8] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).
[77] *Crimes Act 1900* (NSW) s 61HE(3)(c).
[78] *Tolmie v R* (1995) 37 NSWLR 660, 672 (Kirby P, with whom Barr AJ agreed) ('*Tolmie*'); *Mitton* (n 38).

than a real risk that the complainant was not consenting.[79] But these mental states are rarely encountered. Generally, if a person who has engaged in non-consensual sexual activity with a complainant, is nevertheless to be exonerated, this will be because of honest and reasonable mistake.

In my view, if it were enacted, an affirmative consent provision of the sort that Kerr supports would turn the offences to which s 61HE applies into absolute liability offences. No one who performed the actus reus of sexual assault would be acquitted. This is because, while the statutory honest and reasonable mistake 'defence' for which s 61HE(3)(c) provides would continue to exist in form, no accused could satisfy its requirements. And nor could any accused have either of the other two innocent states of mind just noted.

Now, at a recent conference, I encountered some resistance to this idea.[80] However, with respect, nobody said anything that cast any doubt on the correctness of the following argument:

1. A person accused of an offence to which s 61HE applies can only successfully raise honest and reasonable mistake if s/he has made a reasonable mistake about whether the complainant was consenting.
2. A person can only make a reasonable mistake about whether the complainant is consenting if s/he has failed to obtain an unambiguous indication from him/her that she *is* consenting. This is because, as soon as s/he has received such an indication, s/he cannot reasonably be under any illusions as to whether the complainant is a willing participant.
3. The effect of 'affirmative consent' provisions is that any person who *has* failed to gain such an unambiguous — or 'unequivocal'[81] — indication, has the mens rea for the relevant sexual offence (that is, lacks an honest and reasonable but mistaken belief in consent).

[79] *Banditt v R* (2004) 151 A Crim R 215, 232 [92] ('*Banditt*').
[80] Cf though others think that I am right: Loughnan et al (n 13).
[81] See, eg, Rape & Domestic Violence Services Australia (n 11). According to that organisation, the point of affirmative consent provisions is to require the accused to 'resolve any ambiguity in communication' about consent.

4. It follows that, if an affirmative consent provision were enacted, it would be impossible for an accused successfully to raise honest and reasonable mistake of fact.

Until someone can show me what is wrong with this argument, I will adhere to the view that affirmative consent makes the honest and reasonable mistake 'defence' redundant.[82] Indeed, Kerr seems happily to concede that this is so. The aim of a provision that requires people to obtain 'explicit permission to have sex', she says, is to 'eliminat[e] … any misinterpretation of behaviour'.[83] Because honest and reasonable mistake of fact can only successfully be pleaded if there is such misinterpretation — that is, because it requires the accused to have made a mistake — it could never succeed if Kerr were to have her way.

Nor, it seems, could an accused be acquitted if s/he had one of the other states of mind that will currently exculpate a person who has performed the actus reus of an offence covered by s 61HE. Because a non-consenting person cannot give a clear indication that s/he *is* consenting, and because only the accused who obtains such a clear indication would be acquitted under affirmative consent proposals, no acts of non-consensual intercourse would result in acquittal.

Now, to her credit, Kerr seems to be more forthright about the effects of her proposal than some others who advocate affirmative consent. As just noted, she seems to accept with equanimity the idea of convicting all those who perform the actus reus of sexual assault.[84] Nevertheless, with respect, some of those effects are nothing to be proud of. Three examples should suffice to make my point.

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[82] What if a person obtains an unambiguous communication of consent, but his/her partner then withdraws consent — without saying anything — during the resulting encounter? Might not honest and reasonable mistake of fact be capable of operating in such a scenario? Maybe, but I am not willing to concede the point. This is because, under an affirmative consent standard, according to Rape & Domestic Violence Australia, 'where ambiguity arises, there is a … burden on the person … to resolve any ambiguity in communication': Ibid 14 [52]. In the scenario just described, ambiguity would seem to have arisen as soon as the person revoked her/his consent. For, how can a person who is not consenting unambiguously communicate to another that s/he is? But even if affirmative consent does not entirely oust honest and reasonable mistake of fact, it very nearly does and the real point is that this allows non-culpable actors to be convicted of very serious crimes: see text accompanying nn 85-93.

[83] Kerr (n 1).

[84] An affirmative consent provision would be even more problematic when applied to the other offences covered by s 61HE. Should the person who 'tests the waters' by touching a woman's breasts, or a person's bottom, while kissing her/him, be guilty of sexual touching simply because the other person gave him/her no unambiguous indication that s/he was consenting to this? That said, even without an affirmative

First, take the accused with an intellectual disability,[85] or with Asperger's Syndrome,[86] who has non-consensual intercourse with another person, in circumstances where that person was silent because s/he was scared and the accused has not deliberately caused such fright — but also has failed to 'find out'[87] whether the other person is consenting. Should such an accused be convicted of sexual assault? If an affirmative consent provision were in force, s/he would be. S/he has not asked explicitly for permission to have sex. S/he has obtained no unambiguous indication from the complainant that s/he is consenting. Because of such an accused's disability, however, it might not occur to him/her that there is a risk that the complainant is not consenting — or that there is any need to ask whether s/he is. It might be quite reasonable *for him/her* to believe that consent has been granted.[88] Should we convict a person of a serious crime because s/he fell short of a standard that s/he was quite unable to reach? In my view, the answer is a clear 'no'.

Secondly, consider the accused who has no such disability but who nevertheless genuinely, but mistakenly, believes that s/he has received an unambiguous indication from the complainant that s/he is consenting to sexual activity. If we alter the facts of *Lazarus*, imagine that Mr Lazarus and Ms Mullins had gone together to the laneway after dancing with each other for a sustained period. Imagine further that, after kissing each other passionately at that location, Ms Mullins had never announced her intention to

consent provision, this conduct seems to be caught by the new sexual touching offence: *Crimes Act 1900* (NSW) s 61KC. In such a case, there has been sexual touching without consent, knowing that the complainant might not be consenting; and that is enough for liability to attach. The old indecent assault offence under *Crimes Act 1900* (NSW) s 61L, repealed by the *Criminal Law Amendment (Child Sexual Abuse) Act 2018* (NSW), additionally required the Crown to prove that the touching was contrary to the standards of morality of right-minded members of the community: *Harkin v R* (1989) 38 A Crim R 296, 299-301. But this is no longer the case. I have been critical of this change elsewhere: Dyer, 'The Mens Rea for Sexual Assault' (n 21).

[85] See, eg, the facts of *R v Mrzljak* [2005] 1 Qd R 308 ('*Mrzljak*') and *Butler v The State of Western Australia* [2013] WASCA 242 (18 October 2013) ('*Butler*').

[86] In *R v B(MA)* [2013] 1 Cr App R 36 [41], the Court of Appeal of England and Wales accepted that an accused's 'demonstrated inability to recognise behavioural cues' might be able to be taken into account when determining whether his/her belief in consent was reasonable.

[87] New South Wales Law Reform Commission, *Consent in relation to Sexual Offences* (Consultation Paper 21, October 2018) 36 [3.37].

[88] Note that the question under s 61HE(3)(c) is not whether a reasonable person would have realised that consent was absent. Rather, it is whether it was reasonable for the *accused* — presumably taking into account any disabilities that s/he has — to believe that consent was present: *Lazarus* (n 57) [156]; *O'Sullivan v R* (2012) 233 A Crim R 449, 473-4 [124]-[126] (Davies and Garling JJ). Likewise, in Queensland and Western Australia, it is clear that, in a rape case where the defendant has an intellectual disability, the relevant question is whether it was reasonable *for a person of the accused's intelligence* to believe that the complainant was consenting: *Mrzljak* (n 85); *Aubertin v Western Australia* (2006) 33 WAR 87, 96 [43].

leave and that, when Mr Lazarus had tried to pull Ms Mullins's undergarments down the first time, she had not resisted this, but instead had kept on kissing him. Finally, imagine that Ms Mullins had never disclosed to Mr Lazarus that she was a virgin. If, in those circumstances, she and Mr Lazarus had then had sexual intercourse, should he inevitably have been convicted of sexual assault if Ms Mullins's 'subjective internal state of mind towards the [intercourse], at the time that it occurred'[89] was other than what he thought it was?[90] Again, in my view, the answer must be 'no'. The accused in this case seems to have believed on reasonable grounds that the complainant was consenting (at least as a reasonable possibility). Indeed, there is nothing in the circumstances known to him to call into question his belief that she actually communicated such consent to him. But because this belief was wrong and because he failed to ask, 'do you want to have sex with me?', Kerr would support his conviction. She suggests that the punishment of such morally innocent actors is justified by its tendency to promote 'ideal standards of behaviour'.[91] The counterargument is that, however much authoritarian regimes might use the innocent to achieve some 'higher good', liberal democracies should not utilise such tactics.

Thirdly, consider the accused who, due to *non*-self-induced intoxication, is prevented from forming criminal intent. At present, such a person would seemingly not be guilty of sexual assault if s/he had non-consensual intercourse while in such a state: evidence of his/her intoxication could be taken into account when assessing whether s/he had the requisite mens rea.[92] Under Kerr's affirmative consent proposal, however, such a person would apparently be convicted. That person is of course totally blameless. But because, for Kerr, *all* those who fail to ask permission are rapists, such an accused would no longer avoid criminal responsibility.

Because affirmative consent provisions lead to unfairness, and are untenable, I would be surprised if the NSWLRC were to recommend the introduction of such a provision into the *Crimes Act*. Even if it does, I would be very surprised if the NSW Government were to

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[89] *The Queen v Ewanchuk* [1999] 1 SCR 330, 348 [26] (Major J, writing for himself, Lamer CJ and Iacobucci, Bastarache and Binnie JJ) ('*Ewanchuk*').
[90] Note the similar examples provided by Elaine Craig, 'Ten Years After Ewanchuk The Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence' (2009) 13(3) *Canadian Criminal Law Review* 247, 252; Halley (n 12) 266.
[91] Kerr (n 1).
[92] *Crimes Act 1900* (NSW) s 428D(b). Such a person has no intent to have sexual intercourse, and the Crown must prove such intent before a guilty verdict is returned: see *R v Brown* [1975] 10 SASR 139, 141.

adopt such a recommendation. Kerr seems not to be unduly concerned about the prospect of 'prisons bursting with a sizable proportion of the male population'.[93] But we *should* be concerned about the conviction of non-culpable actors simply because they have not received unambiguous consent — even though they might have thought that they did.

This brings me to another point. As Halley notes, affirmative consent has a reputation for being progressive.[94] As Halley also notes, that reputation is ill-deserved.[95] Indeed, the identity of some of the entities that support affirmative consent puts us on notice that this idea is likely to be a conservative, illiberal one. So, for example, the Police Association of NSW informs us, in its preliminary submission to the NSWLRC's review, that:

> A person should actively seek the consent of their [sic] prospective sexual partner, and only act in accordance with a consent which is wilfully and enthusiastically given. … The Police Association does not think that this is an unwarranted standard of behaviour; if a person has not clearly and enthusiastically consented to sexual activity, don't do it. No longer does the community accept that possible ambiguity or awkwardness about obtaining consent is a sufficient justification for ignoring the tens and thousands of people in NSW who suffer unwanted sexual contact every year. [96]

And, as we have seen, members of the right-wing NSW Liberal Party, such as Pru Goward, have expressed exactly the same views.

It takes only a brief examination of a couple of the other proposals that have been supported by the Police Association and/or the Liberal Party's more conservative elements, to realise that these people are not civil libertarians. Mandatory penalties for certain offenders convicted of one-punch killings.[97] A mandatory life without parole sentence for most of those who have been convicted of murdering a police officer.[98] Both of these are authoritarian, punitive proposals. And under each of them, crucially, an

[93] Kerr (n 1).
[94] Halley (n 12) 278.
[95] Ibid 278.
[96] Police Association of NSW, Submission No PC084 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018).
[97] *Crimes Act 1900* (NSW) s 25B(1).
[98] Ibid s 19B.

absolute rule is stated: 'if you do X, Y will happen to you, whatever were the circumstances'. It is the same with affirmative consent: 'if you do *not* gain an unequivocal permission, you are guilty of sexual assault, whether or not you have an intellectual disability, and whether or not there is some other valid reason why you did not seek permission to have sex'.

Affirmative consent is socially conservative for another reason. Not only is it indiscriminately punitive; it is also essentialist. As Halley points out, it:

> [E]ncourages its intended constituency, women, to relinquish rather than exercise the social powers that they *do* have in sexual encounters with men. … This is protective legislation and will have the classic and predictable social consequence of protective legislation: it will entrench the protected group in its weakness.[99]

In other words, people like Pru Goward appear to view (heterosexual) sex as being something that men request from women and women give to men. They appear to like the idea of the woman who is too meek and passive to speak up and say 'no' and of the masterful gentleman who takes control of the situation. Now, depressingly enough, in heterosexual relations, women and men do seem *often* to take on such roles. That is to say, it is often men who initiate sexual activity and women who accept or decline such advances.[100] It is partly as a concession to this reality that I believe that the law should require juries to consider whether the accused — usually a man — took 'physical or verbal steps' to ascertain whether his sexual partner — usually a woman — was consenting.[101] But is this the sort of behaviour that the law should positively encourage? It seems to me that, by perpetuating notions of male agency and female submissiveness, affirmative consent sends a very questionable message to the community. Women are not encouraged to speak up or to assert themselves. All of the onus to do that is on male agents. Of course, there are times when people — female and male — freeze in response to fear.[102] The law must acknowledge this. But if it were to go one step further and compel men to seek permission to have intercourse, it would merely be lending its endorsement

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[99] Halley (n 12) 277.
[100] Gruber (n 12) 443.
[101] See text accompanying nn 68-70.
[102] See New South Wales Law Reform Commission (n 87) [2.95].

to traditional gender roles. It would be doing nothing to liberate women from the oppression created by such roles, or the rigid thinking of those who promote them.

C *Other Difficulties with Kerr's Argument for Affirmative Consent*

There are several other problems with Kerr's argument in favour of affirmative consent.

Kerr argues that affirmative consent is required in Tasmania, Victoria and Canada.[103] But she is, with respect, wrong about Victoria; and she might well be wrong about Tasmania and Canada, too. And even if she were right, the presence in other jurisdictions of a particular rule is not really an argument in favour of its adoption in a new jurisdiction. The merits of that rule must first be considered.

Of Victoria, Kerr says:

> [J]ury directions stipulate that the fact that the alleged victim did not say or do anything indicating free agreement to a sexual act is enough to show that that act took place without that person's free agreement.[104]

Though she cites s 37 of the *Crimes Act 1958* (Vic), Kerr seems to be referring to s 36(2)(l), which provides that a person does not consent to an act 'if the person does not say or do anything to indicate consent to an act'. As I have argued elsewhere,[105] s 36(2)(l) does not create an affirmative consent standard. It does not require people to ask for permission to have sex. It does not require defendants to receive unambiguous consent if they are to escape sexual assault liability. Instead, it requires triers of facts to examine conduct of the complainant around the time of the relevant events, to determine whether s/he performed that conduct *to* indicate that s/he was consenting. So, if, for example, a case with the same facts as *Lazarus* were to arise in Victoria, the trier of fact would be required to consider whether the complainant pointed her buttocks towards the accused,[106] or got down on her hands and knees and arched her back,[107] or moved backwards and forwards during intercourse,[108] *for the purpose* of demonstrating that she was a willing participant.

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[103] Kerr (n 1).
[104] Ibid.
[105] Dyer (n 68) 86-8.
[106] *Lazarus* (n 57) [43].
[107] *Lazarus* (n 3); *Lazarus* (n 57) [46].
[108] *Lazarus* (n 3).

If the trier of fact found that she did not do these things for that reason, the accused might still escape conviction. S/he would do so if the accused might reasonably have believed that the complainant was consenting.[109] In attempting to prove the contrary, the Crown would not be able to rely on any provision that stated that a person has a reasonable belief in consent only if s/he has obtained clear permission. That is because no such provision exists.

Moving now to Tasmania, s 2A(2)(a) of the *Criminal Code Act 1924* (Tas) is in very similar terms to s 36(2)(l); but Kerr does not refer to it. Rather, she refers to s 14A(1)(c), which provides that:

> [A] mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused … did not take reasonable steps, in the circumstances known to him/her at the time of the offence, to ascertain that the complainant was consenting to the act.

Kerr does not support her argument that s 14A(1)(c) is an affirmative consent provision with any references to Tasmanian case law. Rather, she refers to Helen Cockburn's statement, in her PhD thesis, that the effect of ss 2A(2)(a) and 14A(1)(c) is that '[p]ositive evidence of consent is now required to refute claims of non-consensual sex'.[110] One point to note here is that 'positive evidence of consent' is not the same thing as an unambiguous assurance by one party to another that s/he is consenting. For example, a person's *apparently* willing participation in sexual activity is 'positive evidence' that s/he is consenting to that activity. But if her/his willingness *is* merely apparent, s/he has in fact given no clear indication of her/his willingness.

This brings me to the real point. While, like Kerr, I have been unable to find any case law concerning the meaning of s 14A(1)(c),[111] it would seem that, in a particular case, a person could take '*reasonable* steps, *in the circumstances known to him/her*' to ascertain whether consent had been granted, without explicitly asking for permission to have intercourse. For, as the Canadian Supreme Court has recently noted, when interpreting a

[109] *Crimes Act 1958* (Vic) s 40(1)(c).
[110] Helen Cockburn, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012) 6.
[111] But see *SG v Tasmania* [2017] TASCCA 12 (8 August 2017) [7]-[8], [11].

similarly worded provision in the Canadian *Criminal Code*,[112] 'reasonable steps' need not be active[113] and may extend to 'observing conduct or behaviour suggesting that' the relevant circumstance existed.[114] This is reminiscent of Bellew J's reasoning in *Lazarus* that a 'step' is a 'measure', and that a person takes a 'measure' when s/he observes the complainant's conduct and forms a positive belief that s/he is consenting.[115] Of course, in the above text, I have criticised that reasoning.[116] But I am not sure that I would be so critical of a Tasmanian court that employed it. When it comes to statutory interpretation, the idea is to work out the intent of Parliament.[117] It is hard to believe that the Tasmanian Parliament's intent, when it passed s 14A(1)(c), was to allow for the conviction of people — including those with intellectual disabilities, for example[118] — simply because they were not in fact (even though they might have thought that they had been) given clear permission to have sex, and despite their having reasonably believed that the complainant was consenting.

It follows from what I have said about the Canadian Supreme Court's approach to the meaning of the term 'reasonable steps' that, in that jurisdiction, too, it is unclear whether affirmative consent is required.[119] That depends on whether a person can take 'reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting',[120] without obtaining an unambiguous assurance. The majority's insistence in *Morrison v The Queen* that 'the reasonable steps requirement is highly contextual',[121] taken together with its findings — just noted — that a person might take 'reasonable steps' while remaining passive and merely observing conduct, indicates

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[112] The provision at issue was *Criminal Code*, R.S.C. 1985, c. C-46, s 172.1(4), which provides that, if the accused believed that the complainant was over a certain age, that is 'not a defence' to child luring offences created by s 172.1(1)(a),(b) and (c) 'unless the accused took reasonable steps to ascertain the age of the person'. This provision does not contain the words 'in the circumstances known to him/her': cf *Criminal Code Act 1924* (Tas) s 14A(1)(c). Nevertheless, in the opinion of seven Canadian Supreme Court Justices, 'the "reasonable steps" that the accused is required to take under subs. (4) are steps that a reasonable person *in the circumstances known to the accused at the time*, would have taken': *The Queen v Morrison* [2019] SCC 15 (24 March 2019) [105] ('*Morrison*') (emphasis added).
[113] Ibid [109].
[114] Ibid [112].
[115] *Lazarus* (n 57) [146]-[147].
[116] See text accompanying nn 68-70.
[117] Of course, this is an objective question; there is no search for what Parliament — or individual parliamentarians — *subjectively* intended: see *CTM* (2008) 236 CLR 440, 498 [203] (Heydon J).
[118] See text accompanying nn 85-8.
[119] See *Morrison* (n 112) [105]-[112].
[120] *Criminal Code*, R.S.C. 1985, c. C-46, s 273.2(b).
[121] *Morrison* (n 112) [105]; see also [110].

that s/he *can*.[122] For her part, Kerr thinks[123] that the Canadian Supreme Court's decision in *Ewanchuk v The Queen*[124] creates an affirmative consent standard. With respect, it does not. As Elaine Craig makes clear, in an article that Kerr extensively cites: '*Ewanchuk* does not require that the complainant communicated consent in order to allow the defence of honest but mistaken belief in consent'.[125]

It requires the accused merely to have believed, however wrongly, that the complainant had given such a communication.[126] In a 'truly ambiguous situation' — that is, in a situation where the accused mistakenly thought that a non-consenting complainant had communicated her/his consent in some way — *Ewanchuk* does not allow for a conviction.[127]

A further difficulty with Kerr's affirmative consent argument relates to her apparent contention that the accused bears the onus of proof in a case where s/he is charged with 'taking a conveyance without the consent of the owner',[128] and larceny,[129] and that the same should be true in a sexual assault case.[130] This, with respect, is misconceived. The onus of proof is *not* on the defendant in cases of car theft. Rather, in cases of this kind, it is for *the Crown* to prove that the owner was not consenting. Nor is it correct to argue, as Kerr does,[131] that the onus of proof is reversed in larceny cases where an accused person tries to set up a claim of right 'defence'.[132] Certainly, the accused must discharge an

[122] But see that since I wrote the above, the Canadian Supreme Court has delivered judgment in *R v Barton* [2019] SCC 33. In that case, the Court considered *Criminal Code*, R.S.C. 1985, c. C-46, s 273.2(b), which provides that an accused will have the mens rea for various sexual assault offences if s/he 'did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting'. As seven Justices did in *Morrison*, four Justices observed that 'the reasonable steps requirement is highly contextual': [108]; see also [106]. It is true that their Lordships also held that 'an accused cannot point to his reliance on the complainant's silence, passivity, or ambiguous conduct as a reasonable step': [107]; see also [109]. But because *the complainant's* silence, passivity or ambiguous conduct could never be a step that *the accused* took, the real meaning of this statement seems to be that the accused who views passivity, silence or other conduct that s/he *knows* to be ambiguous, fails to discharge his/her s 273.2(b) duty. On the other hand, the accused who mistakenly thinks that s/he has received an unambiguous communication seems liable to be acquitted.
[123] Kerr (n 1).
[124] *Ewanchuk* (n 89).
[125] Craig (n 90) 254.
[126] *Ewanchuk* (n 89) 354-5 [45].
[127] Craig (n 90) 254.
[128] But see *Crimes Act 1900* (NSW) s 154A.
[129] Kerr (n 1).
[130] Ibid.
[131] Ibid.
[132] Again, I place the word 'defence' inside inverted commas because claim of right is not a true defence. Once the accused raises this issue, it is for the Crown to disprove it: *Fuge v R* (2001) 123 A Crim R 310, 315 ('*Fuge*'). Concerning 'defences' and defences, see generally *Youssef* (n 14).

evidential burden if s/he wants the jury to consider such a claim.[133] But this is only because it is reasonable to presume that this matter is not in issue. It is rare for an accused to argue that, while s/he did steal, s/he only did so because s/he believed that s/he was legally entitled to the relevant property. Accordingly, it is only fair to require her/him to produce, or point to, *some* evidence — it may be 'slender'[134] or 'very slight'[135] — before the matter is left with the trier of fact.[136] Once s/he has done so, *the prosecution* must disprove the accused's claim.[137] In other words, contrary to what Kerr suggests, the law does not provide for different, more stringent rules of proof where sexual offences are concerned. The whole point of *Woolmington v DPP*[138] is that, *whatever the crime*, the Crown must prove the accused's guilt beyond reasonable doubt unless the relevant statute provides otherwise.[139] In the case of car stealing and larceny, the statute does not provide otherwise.[140]

There is another aspect of Kerr's argument about car theft that strikes me, with respect, as wrongheaded. Like Kerr, I do not approve of 'harrowing cross-examination placing blame on [the complainant]' in sexual assault trials.[141] But I cannot agree with her apparent suggestion that the defendant in such a case, through his/her counsel, should have no right to challenge a complainant's evidence regarding consent. The offence of car stealing, Kerr observes, 'does not evoke the same debate over the element of consent'.[142] 'Even if an owner leaves [his/her] … car unlocked with the keys in the ignition', she continues, s/he is unlikely to be asked any questions about whether s/he consented to the alleged theft.[143] In like vein, Germaine Greer has recently said:

> If a man punches you in the eye, you are not expected to have pleaded with him not to for the crime to be accepted as an assault. If you are

[133] *Fuge* (n 132) 315.
[134] *The Queen v Khazaal* (2012) 246 CLR 601, 624 [74] (Gummow, Crennan and Bell JJ).
[135] *Clarke v R* (1995) 78 A Crim R 226, 231.
[136] For more discussion of evidential burdens, how they operate, and why they do not breach *Woolmington* (n 14); see generally Andrew Dyer, 'The Mens Rea for Sexual Assault' (n 21).
[137] *Fuge* (n 132) 315.
[138] *Woolmington* (n 14).
[139] Viscount Sankey also required the Crown to prove the defence of insanity, now known in NSW as the mental illness defence: Ibid 481.
[140] See *Crimes Act 1900* (NSW) ss 117 and 154A.
[141] Kerr (n 1).
[142] Ibid.
[143] Ibid.

> sitting at your cash register and someone demands the cash in it, you will not be accused of consent if you simply hand it over.[144]

The reason why consent is almost never an issue in cases of assault or car stealing, however, is because it is unusual for a person to consent to be struck, or to allow a perfect stranger to break into his/her car and then go on a 'joyride' (usually with the assistance of a piece of wire). On the other hand, people consent to sex all the time. Accordingly, when an accused claims that a complainant was consenting, there is, in many cases — though by no means all — nothing inherently implausible about what s/he is saying. What s/he is saying might not be true. No doubt, there are many trials where the accused perjures him/herself by alleging that a non-consenting complainant was consenting. But fairness to the accused demands that s/he be entitled to dispute the complainant's account. A person should not serve a lengthy prison sentence after a trial at which s/he was not given the opportunity of presenting his/her version of events. Indeed, I do not understand Greer to be saying anything different. She observes that it is the 'savagery of the [maximum] sentence' for sexual assault 'that pushes juries towards extending the benefit of the doubt'.[145] She does *not* say that the approach of such juries is wrong, or that the onus of proof should be reversed in sexual assault cases, or that defendants should be unable to dispute the complainant's evidence, or that juries should be told that they must accept what the complainant has alleged.

Indeed, instead of comparing sexual assault with certain offences of dishonesty, Kerr might have compared it with the offence of murder. As Kimberly Kessler Ferzan has pointed out, no one in her/his right mind would argue that the person who kills another person without displaying either subjective or objective fault, should be convicted of murder.[146] So why should the person who believes on reasonable grounds that his/her sexual partner is consenting, when in fact s/he is not, be convicted of any of the very

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[144] Germaine Greer, *On Rape* (Melbourne University Press, 2018) 41.
[145] Ibid 65.
[146] Ferzan (n 12) 422. Having said that, the constructive murder rule, provided for by *Crimes Act 1900* (NSW) s 18(1)(a), might be capable of facilitating a conviction for murder of a person who displays no fault — subjective or objective — in respect of the death that s/he has caused. Generally speaking, however, even the person convicted of murder in this way will have displayed objective culpability. The person who kills during an armed robbery, for example, will often have performed an act causing the relevant death that it was reasonable for him/her to have realised was dangerous to life. In any case, I have criticised the constructive murder rule elsewhere: Andrew Dyer, 'The Australian Position Concerning Criminal Complicity: Principle, Policy or Politics' (2018) 40(2) *Sydney Law Review* 291, 308-9.

serious sexual offences to which s 61HE now applies? As noted above, Kerr clearly thinks that such a person should be convicted. She thinks that: '[I]t should not be possible for a defendant to escape conviction based purely on a simple defence of mistaken belief on reasonable grounds in circumstances where no positive consent was given.' [147]

At the risk of repetition, the problem with this is that it would not only be in cases where 'no positive consent was given' that the honest and reasonable mistake of fact 'defence' would fail to operate. That 'defence' would fail to operate at all. Because honest and reasonable mistake can only succeed when the accused has made a reasonable mistake, and because only a person who has not received a clear permission can make a reasonable mistake, honest and reasonable mistake would always fail.

Finally, Kerr's argument that the debate about affirmative consent is gendered[148] is *ad hominem* and in some respects misleading; and, with respect, it adds nothing. Kerr essentially says that most of those who supported affirmative consent in their preliminary submissions to the NSWLRC's review were women, while most of those who opposed it were men.[149] (She also makes the far from startling observation that those from 'services focused on victims' interests' were much more inclined to support affirmative consent than those who supported defendants' rights).[150] This argument is *ad hominem* because it suggests that the arguments of those men who resist affirmative consent are flawed simply because of the gender identity of those who make them. It is misleading because, as already noted, many women — including many feminists — oppose affirmative consent.[151] Some women said so in their submissions to the NSWLRC's review.[152] It adds nothing because it is *ad hominem* and inaccurate. Those who are critical of commentators who resist affirmative consent must engage with such commentators' *reasoning*. A person's arguments are not invalid just because that person is a man (or a woman).

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[147] Kerr (n 1).
[148] Ibid.
[149] Ibid.
[150] Ibid. But see that the NSW DPP does not favour affirmative consent: Office of the Director of Public Prosecutions Submission No CO14 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (1 February 2019).
[151] Ferzan (n 12) 692; Gruber (n 12) 440-458; Halley (n 12).
[152] See Loughnan et al (n 13).

III PERSUASION, RELUCTANCE, NON-VIOLENT THREATS AND MISTAKES; AND TWO-OFFENCE PROPOSALS

A *Acceptable Persuasion and Unacceptable Pressure — and Mistakes*

As noted above, in her comments on the *Four Corners* show about the *Lazarus* litigation, Ms Saxon Mullins said that, 'if it's not enthusiastic yes, then it's not enough'.[153] Of course, it is understandable that she would say this. But is it right? Or can valid consent sometimes be given reluctantly? Kerr seems to be in no doubt about the answer to this question. Indeed, she seems to come close to saying that consent after *persuasion* can never amount to a real consent.[154] But, again, is this right?

In truth, consent given without enthusiasm and/or after persuasion *can* still be a valid consent. On the weekend, for example, I drove to my parents' house in heavy rain. The rain was so heavy, and the roads were so waterlogged, that at one stage I decided to abort the trip. My wife persuaded me to continue driving. I complied with her wishes reluctantly; but my consent was nevertheless a valid one. To use the words of Edelman J in *STZAL v Minister of Immigration*,[155] while I did not 'emotionally want' to keep driving, I 'volitionally ch[ose]' to do so. Consent to sex, too, can be reluctant without being invalid — as the above example of the couple undergoing fertility treatment shows.[156] Certainly, the same is true of many consents given after persuasion. People often change their minds after becoming aware of new facts. Indeed, a person who was initially opposed to the idea of having sexual intercourse might end up participating *enthusiastically* in such activity.

Having said all of this, I do agree with Kerr that this cannot be taken too far. Gentle persuasion is one thing. As she says, 'veiled threats' and 'relentless badgering' are quite another.[157] The difficulty, however, is in knowing where the boundary lies between the complainant who 'volitionally chooses' and the complainant who makes no such free choice. As noted above, the Bar Association of NSW thinks that it is only in those cases where 'sexual choice is non-existent'[158] that a person should be held not to have made a

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[153] '*I am that Girl*' (n 5).
[154] Kerr (n 1).
[155] *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936, 956 [97].
[156] See further (n 26).
[157] Kerr (n 1).
[158] NSW Bar Association (n 20).

free and voluntary[159] (that is, autonomous) decision to have intercourse. For it, then, the person who has intercourse only because of a non-violent threat has consented. *To an extent*, this approach accords with s 61HE. As noted above, while s 61HE(5)(c) provides that the complainant who 'consents' because of a threat of force, has not in fact consented, the same is not necessarily true of the person who has sex because of a threat that 'does not involve a threat of force'.[160] It is also to an extent consistent with an argument presented by Jennifer Temkin some years ago. For that commentator:

> The defendant who threatens his victim with violence denies her the choice of whether to have intercourse with him or not. He means to have intercourse with her in any event. Her choice lies between intercourse with violence or intercourse without it. … On the other hand, where the threat is to terminate a woman's employment, she is left with a choice, albeit an unpalatable one, as to whether to have intercourse with the defendant or not. In cases such as this where sexual choice remains but is unacceptably limited or confined, liability for an offence which is less serious than rape is appropriate.[161]

Is this right? Is the woman who is threatened with the loss of her job really consenting? My intuition is that she is not, and I have said so in my final submission to the NSWLRC.[162] Certainly, such a person's choice is constrained rather than non-existent. But is it not *so* constrained as, in fact, to be no real choice at all?

On the other hand, what is the precise difference between this person and the person who reluctantly participates in fertility treatment sex? Why is one of these acts autonomous while the other is not? To be sure, the person who issues the threat is much more culpable than the person who persuades his/her spouse to engage in planned and uninspiring medical sex. But that does not seem to matter. It is the pressure that is brought to bear on an *individual*, and not the blameworthiness of the actor who brings it to bear on him/her, that makes his/her conduct less than autonomous.[163] *Does* the threatened person have

[159] See *Crimes Act 1900* (NSW) s 61HE(2).
[160] Ibid s 61HE(8)(b).
[161] Jennifer Temkin, 'Towards a Modern Law of Rape' (1982) 45(4) *Modern Law Review* 399, 406-7.
[162] Dyer, 'The Mens Rea for Sexual Assault' (n 21).
[163] The High Court made a similar point to this in *Papadimitropoulos v The Queen* (1957) 98 CLR 249, 260 ('*Papadimitropoulos*').

more pressure on him/her than the fertility treatment spouse? Maybe it could be said that s/he does. The consequence with which s/he has been threatened is virtually certain to occur if s/he does not comply with the threatener's demand. By contrast, even if s/he does not go ahead with a particular act of intercourse, the spouse might still get a baby. And maybe, too, it is relevant that the spouse has more control over her/his situation than does the person who participates in sexual activity because of a threat emanating from an unscrupulous third party:[164] because the pressure on him/her is self-imposed, s/he can (theoretically, at least) liberate her/himself from it at any time. Whatever the true explanation is, however, it does seem unpalatable to treat the person who has intercourse only because of a threat to terminate her/his employment, or to 'tell her fiancé that she had been a prostitute',[165] or to 'report her to the Tax Office for tax evasion',[166] as having 'freely and voluntarily agreed to the sexual activity'.[167]

It follows that I respectfully agree with Kerr when she argues that there is 'a need … for … an expanded list of factors [in s 61HE] that negate consent'.[168] Though I do have some doubts about the argument that I have just presented, my present thinking is that Parliament should amend the section to provide that a 'consent' given because of threats or intimidation of *any* kind is no consent at all. Certainly, the danger of an absolute rule like this is that, as Gleeson CJ put it in *Tame v New South Wales,* 'sooner or later a case is bound to arise that will expose the dangers of inflexibility'. [169] But *is* that bound to happen here? To put the matter differently, are there really any circumstances in which we are willing to say that a person has validly consented though s/he has only engaged in the relevant activity because of a threat?

I also think that the list of mistaken beliefs that vitiate a complainant's apparent consent, in s 61HE(6), should be expanded and modified. But because Kerr does not deal with this matter, I will deal with it only briefly here.[170] Currently, the only mistaken beliefs that certainly negate consent to sexual activity are mistaken beliefs: as to the other person's

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[164] I thank Gail Mason for the suggestion.
[165] *R v Olugboja* [1982] 1 QB 320, 328.
[166] George Syrota, 'Rape: When Does Fraud Vitiate Consent?' (1995) 25(2) *Western Australian Law Review* 334, 344.
[167] *Crimes Act 1900* (NSW) s 61HE(2).
[168] Kerr (n 1).
[169] (2002) 211 CLR 317, 337 [35].
[170] See generally, Andrew Dyer, 'Mistakes that Negate Apparent Consent' (2019) 43 *Criminal Law Journal* 159.

identity;[171] that the complainant is married to the other person;[172] that the sexual activity is for health or hygienic purposes;[173] and about the nature of the activity, where that belief has been induced by fraudulent means.[174] Accordingly, the NSWLRC has asked the question: should s 61HE(6) explicitly provide for other mistakes?[175] It is particularly interested in those cases where a complainant has had intercourse with the accused only because of a mistaken belief that he would wear a, non-sabotaged,[176] condom during intercourse. But it also refers to scenarios where an accused fails to disclose, or deceives the complainant about, the fact that s/he has a 'grievous bodily disease'[177] such as HIV/AIDS. It appears that it is common enough for these mistakes to be made;[178] so too, there are cases where the complainant has only consented to engage in sexual activity because s/he believes that s/he will be paid for it.[179]

It is possible that all of these scenarios are currently covered by s 61HE, despite their not appearing on the s 61HE(6) list. Courts in other jurisdictions have held that intercourse is non-consensual when the complainant only engages in it because of her/his mistake about the accused's condom-use,[180] or the accused's HIV positive status,[181] or the fact that the complainant will be paid.[182] Perhaps a NSW court would likewise find that the complainant has not 'freely and voluntarily agree[d]'[183] to sexual activity in these situations. Further, it might hold that a complainant who has made a mistake about condom-use has made a 'mistake about the nature of the activity' within the meaning of s 61HE(6)(d). Whether or not this is so, in my view, this matter should be put beyond doubt. That is, s 61HE(6) should be amended to state:

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[171] *Crimes Act 1900* (NSW) s 61HE(6)(a). See also *Dee v R* (1884) 15 Cox CC 579; *Pryor v R* (2001) 124 A Crim R 22.
[172] *Crimes Act 1900* (NSW) s 61HE(6)(b). See also *Papadimitropoulos* (n 163).
[173] Ibid s 61HE(6)(c). See also *R v Mobilio* [1991] 1 VR 339.
[174] Ibid s 61HE(6)(d).
[175] New South Wales Law Reform Commission (n 87) 60-1 [4.65]-[4.67], 61-2 [4.70]-[4.74].
[176] Note the facts of *Hutchinson v The Queen* [2014] 1 SCR 346 ('*Hutchinson*').
[177] See *Crimes Act 1900* (NSW) s 4.
[178] See, eg, *Aubrey v The Queen* (2017) 260 CLR 305; *Zaburoni v The Queen* (2016) 256 CLR 482; *Neal v R* (2011) 32 VR 454; *R v Reid* [2007] 1 Qd R 64; *R v Dica* [2004] QB 1257; *R v Konzani* [2005] 2 Cr App R 14; *Cuerrier v The Queen* [1998] 2 SCR 371 ('*Cuerrier*'); *Mabior v The Queen* [2012] 2 SCR 584 ('*Mabior*').
[179] See, eg, *R v Linekar* [1995] QB 252; *Livas v The Queen* [2015] ACTCA 54 (13 August 2015) ('*Livas*'); *R v Rajakaruna* (2004) 8 VR 340, 343 [5] (Chernov JA), 350-1 [37]-[40] (Eames JA); *R v Winchester* [2014] 1 Qd R 44.
[180] *Hutchinson* (n 176); *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) [86].
[181] *Cuerrier* (n 178); *Mabior* (n 178).
[182] *Livas* (n 179).
[183] *Crimes Act 1900* (NSW) s 61HE(2).

> Without limiting the circumstances in which a person's mistake about, or ignorance as to, a matter, means that he or she does not consent to a sexual activity, a person does not consent to a sexual activity if she participates in it because of:
>
> (a) a mistaken belief as to the identity of the other person;
>
> (b) a mistaken belief that the other person is married to the person;
>
> (c) a mistaken belief that the sexual activity is for health or hygienic purposes;
>
> (d) a mistaken belief that the other person will wear a condom, or will wear a condom that has not been sabotaged, during the sexual activity (provided that that sexual activity is sexual intercourse);
>
> (e) a mistaken belief that the other person will pay the person for participating with him/her in the sexual activity; or
>
> (f) a mistaken belief that the other person does not have a grievous bodily disease, or his/her ignorance of the fact that the other person has such a disease, in circumstances where there is a real risk that the person will contract the disease as a result of the sexual activity.
>
> But there is to be no conviction for an offence to which this sub-section applies where: a person participates in a sexual activity because of a mistaken belief about, or his/her ignorance of, some matter not expressly referred to in this sub-section; but his/her interest in sexual autonomy is outweighed by (a) a privacy or other interest of the defendant, and/or (b) a compelling concern, or compelling concerns of public policy.

Some commentators have resisted the idea that it is sexual assault not to pay a sex worker for the services that s/he has provided.[184] Other commentators think that, if we convict of sexual assault those who fail to disclose their HIV positive status, people who suspect

[184] See, eg, Syrota (n 166) 341; Neil Morgan, 'Oppression, Fraud and Consent in Sexual Offences' (1996) 26(1) *Western Australian Law Review* 223, 226, 233-4; AP Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 6th ed, 2016) 475; Joel Feinberg, 'The Case of Fraudulently Procured Consent' (1986) 96(2) *Ethics* 330, 336-7.

they have the virus will be deterred from undergoing testing for it.[185] Still, others think that mistakes as to condom-use do not render a complainant's participation in sexual activity other than autonomous.[186]

It is submitted that all of these arguments are misconceived. There is no difference in principle between such cases and those that are already covered by s 61HE(6). In each of them, the complainant's will stands opposed to that which in fact occurs. In each of them, the accused gets around this 'problem' by deceiving the complainant, or not informing her/him of a matter that is material to her/his decision to engage in intercourse. In other words, if there is no consent where a person has intercourse because s/he wrongly thinks that s/he is doing so with her/his regular sexual partner (for example), then there must logically be no consent wherever else a person makes a 'but for' mistake.[187] Of course, there are situations where, despite this, no sexual assault conviction should be returned (thus the final paragraph in my proposed provision). A classic case of this nature seems to be the case of the transgender person who fails to disclose her/his gender history to her/his sexual partner.[188] This person's privacy interest seems to trump the sexual autonomy interest of the complainant (strong though that interest is). But it is not at all convincing to argue that a similar concession should be made to the HIV positive person because of the pragmatic concern that, if his/her conduct is criminalised, s/he might be deterred from participating in STD-testing. It is unlikely that people consult the *Crimes Act* before they engage in such testing. Even if they were to do so, they would find that the law already criminalises the person who recklessly or intentionally transmits HIV to another.[189] It is hard to believe that, if those laws do not deter people from engaging in testing, an amendment of the type that I suggest here *would*. With that said, however, if

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[185] See generally Rape & Domestic Violence Services Australia (n 11).
[186] Jonathan Rogers, 'The Effect of "Deception" in the Sexual Offences Act 2003' (2013) 4 *Archbold Review* 7, 8.
[187] As noted by many commentators. See, eg, Tom Dougherty, 'Sex, Lies, and Consent' (2013) 123(4) *Ethics* 717, 728; Tom Dougherty, 'No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception"' (2013) 123 *Yale Law Journal Online* 321, 322; Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale Law Journal* 1372, 1376, 1400; Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 8th ed, 2016) 357-8, 360.
[188] Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' [2014] *Criminal Law Review* 207, 218-222.
[189] See *Crimes Act 1900* (NSW) ss 33(1), 35(1)-(2), s 4. In 2007, s 4 was amended to make it clear that a person who caused a person to contract a grievous bodily disease had inflicted grievous bodily harm on him/her for the purposes of ss 33 and 35: *Crimes Amendment Act 2007* (NSW) sch 1 [1]. But, according to a majority of the High Court in *Aubrey* (2017) 260 CLR 305, even before 2007, a person 'inflict[ed] grievous bodily harm' upon a person, within the meaning of ss 33 and 35, if s/he transmitted a serious sexual disease such as HIV to her/him.

the accused poses no 'real risk' of transmitting the disease, I accept that his/her privacy interest does seem to take precedence over the complainant's autonomy interest.[190]

B *Kerr's Two-Offence Proposal*

This brings me to my final point. In her article, Kerr says this:

> In cases involving violence or injury the need to establish that sexual activity was without consent should be dispensed with altogether. There should be an alternative offence created with lower penalties and an objective test of consent, enabling easier prosecution and eliminating a Lazarus defence of mistaken fact.[191]

With respect, both of these proposals are misconceived.

The first proposal is much along the lines of Peter Rush and Alison Young's recommendation that, in a sexual assault case, it should no longer be necessary for the Crown to prove that the complainant was not consenting to the sexual intercourse that took place.[192] Rather, they think, 'what must be prohibited by the legal characterisation of the offence is the *causing of sexual harm* by an accused'.[193] 'A serious offence of sexual assault', in their opinion, should be defined as follows:

> A person who:
>
> (a) engages in sexual intercourse with another person, and
> (b) causes serious injury to that other person,
> (c) with the intention of causing injury or with recklessness as to causing injury
>
> is guilty of the offence of sexual assault.[194]

The most glaring problem with this model provision is that it treats as sexual assault, conduct that, because it is consensual, should not be characterised in this way. The

[190] That is, I agree with the balance that the Canadian Supreme Court struck in *R v Mabior* [2012] 2 SCR 584.
[191] Kerr (n 1).
[192] Rush and Young, *Preliminary Submission* (n 31).
[193] Ibid.
[194] Ibid.

appellants in the well-known case of *Brown v DPP*,[195] for instance, engaged in sexual intercourse with their 'victims' (I imagine[196]) and intentionally or recklessly caused them injury.[197] It is of course highly debatable whether they should have been convicted of any assault or wounding offences. It is even more questionable whether such persons ought to be convicted of sexual assault. The same point can be further exemplified if we again alter the facts of *Lazarus*. The complainant in that case was not consenting. But what if she had been? In such a scenario, there would have been sexual intercourse within the meaning of s 61HA of the *Crimes Act*, and Mr Lazarus would recklessly have caused the complainant injury. A person who has anal intercourse with a person whom they know to be a virgin, must foresee the possibility that s/he will cause her/him injuries of the type that Ms Mullins in fact sustained.[198] If the injured person willingly participated in the intercourse that occurred, however, why should it be possible to convict of sexual assault the person who inflicted such injuries?[199]

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[195] *Brown* (n 33).

[196] Having said that, no acts of sexual intercourse are described in the Court of Appeal's judgment in that case (see *R v Brown* [1992] 1 QB 491, 495-7 ('*Brown*')). It is true that Lord Lane CJ tells us, for example, that Jaggard considered it to be necessary to push 'a piece of wire and later his finger down the urethra in Laskey's penis' (at 597); but, in NSW, the penetration of male genitalia does not amount to sexual intercourse: *Crimes Act 1900* (NSW) s 61HA. But even if there was no sexual intercourse in *Brown*, there could easily have been; and in those circumstances, sexual assault convictions would seem a singularly inappropriate response.

[197] I use the term 'injury' here, rather than 'serious injury', because Rush and Young are not always clear about whether the latter should be necessary or, alternatively, whether the former should suffice. In their preliminary submission, for example, they say that '[t]he physical element [of the proposed offence] simply requires proof of *injury* and the accused's causative relation to the occurrence of the injury. … Such injury can be defined in a number of ways: we would not limit it to physical injury, but also extend it to injury to mental well-being, whether permanent or temporary. There may also be [a] need … to include adverse economic consequences': Rush and Young, *Preliminary Submission* (n 31) (Emphasis added). Moreover, in their 2002 submission to the Victorian Law Reform Commission, Rush and Young supported the enactment of an offence that required proof that the accused: (a) sexually penetrated the complainant; and (b) caused *injury* to her/him, with the intention of causing harm or with recklessness as to causing injury: Peter Rush and Alison Young, Submission No 5 to Victorian Law Reform Commission, *Reference on Sexual Offences: Law and Procedure*, (10 January 2002)' (Emphasis added). Cf Rush and Young, *A Crime of Consequence* (n 31) 107-8. In any case, it seems that at least some of the activities in which the appellants in *Brown* engaged, resulted in serious injury (even though there was no evidence that any of the 'victims' sought medical attention): see *Brown* (n 196). Indeed, the scarring of the complainant A, as a result of Laskey's act of branding his initials on him (see 495) would presumably amount to the 'permanent … disfiguring of … [his] person', and thus to grievous bodily harm: *Crimes Act 1900* (NSW) s 4.

[198] The doctor who examined Ms Mullins reported that 'she had a number of painful grazes around the entrance to the anus. She was in pain, and it was extremely difficult for me to examine her because it was very painful': '*I am that Girl*' (n 5).

[199] Rush and Young have expressly stated elsewhere that 'where the acts of sexual penetration provide the setting in which the other acts are alleged to be the cause of the serious injury … whether or not the victim consented *to sex* would be totally irrelevant to the determination of guilt or innocence'**:** Rush and Young, *A Crime of Consequence* (n 31) 111 (emphasis in original).

The problem with the second proposal is that it would not make prosecution easier. It would merely reduce the maximum penalty that applied in cases where the accused had a genuine but unreasonable belief that the complainant was consenting. By 'objective test for consent', Kerr seems to mean 'an objective mental element for consent'. This is because, as noted above, she refers to the requisite mens rea for the proposed offence as involving 'mere recklessness in relation to consent'[200] and 'an objective standard'.[201] The problem is that this type of mens rea threshold is no lower than that which applies to the sexual assault offences for which the *Crimes Act* currently provides. As noted above, a person has the mens rea for those offences if s/he either is (advertently or inadvertently) reckless as to consent,[202] or lacks an honest and reasonable but mistaken belief that consent has been granted.[203]

To be clear, I am not necessarily opposed to the idea of having two sexual assault offences, one focussing on violence *and* lack of consent, and the other focussing merely on lack of consent.[204] But any such solution would have to be carefully considered and, for the reasons just given, I am opposed to the different solution that Kerr proposes.

IV CONCLUSION

The United States commentator Aya Gruber makes some very good points about affirmative consent. 'Critics' of such provisions, she says, 'often [nevertheless] … agree that best sexual practices involve clear communication'.[205] I am one such critic. Though I cannot accept that conviction for a serious offence should follow every time a person engages in non-consensual sexual activity with another without first obtaining that person's clear permission, I accept that people should be encouraged to communicate about consent to sexual activity. Certainly, there are situations where such communication is probably unnecessary and impracticable. Does a person really have to ask for permission to touch the buttocks of a person whom s/he is kissing? Moreover, there are situations where a person who fails to gain clear permission is not morally culpable. The cases that spring to mind here are those involving an accused with an

[200] Kerr (n 1).
[201] Ibid.
[202] *Crimes Act 1900* (NSW) s 61HE(3)(b); *Mitton* (n 38).
[203] Ibid s 61HE(3)(c).
[204] See, in this regard, the offences noted in Feinberg (n 184) 338.
[205] Gruber (n 12) 445.

intellectual disability, or an accused who thinks, wrongly but reasonably, that consent has been clearly communicated. Nevertheless, it is usually the case that, if ambiguity arises about whether a person is consenting, his/her sexual partner should check with him/her that s/he *is*.

Gruber also notes, however, that '[o]ne should … be wary of the "punitive impulse" to embrace criminalization as a preferred tool of social change'.[206] Apart from anything else, she continues, 'shoves may produce backlash'.[207] Again, I agree. As I have argued here, it is not morally permissible for the state to punish non-culpable actors as a means of achieving social change. The arguments that I have used to support this view are principled arguments; Gruber's backlash argument is, on the other hand, a pragmatic one. But it is a good argument even so. The more unfair and draconian a law is, the less likely it is to hold the respect of those whom it governs.

I am not opposed to sexual assault law reform in NSW. As noted above, I believe in allowing juries to be told that they must consider any physical or verbal steps that the accused took to ascertain whether consent has been granted when those juries determine whether s/he had the mens rea for the offences to which s 61HE applies. I believe that the list of vitiating mistakes in s 61HE(6) should be expanded. And I think that I believe that consent should be negated in any case where it is given only because of a threat — whether violent or non-violent. But I do not believe in provisions that make rapists of all those who fail to ask for permission to have intercourse. As explained above, under such a provision, there is apparently no scope for a person to perform the actus reus of sexual assault — non-consensual sexual intercourse — and be acquitted. Sexual assault would therefore effectively become an absolute liability offence. Even if this is wrong, and the 'defence' of honest and reasonable mistake of fact could very occasionally still succeed, that 'defence' would have a very limited scope of operation indeed. Undeserving people would be convicted of sexual assault. The state should not use such means in an attempt to improve sexual behaviour.

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[206] Ibid 446.
[207] Ibid.

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A REPLY TO ANDREW DYER'S RESPONSE

ANNA KERR*

This paper is not subject to peer-review and is the third instalment of this Right to Reply series, published in this issue.

Dyer is concerned that an affirmative consent model would turn sexual assault into a crime of absolute liability and result in the wrongful conviction of morally innocent men who have simply made a mistake.[1] But are men who have non-consensual sex with women ever morally innocent? Could such a mistake ever be reasonable? At worst, they actually knew there was no consent but pretend otherwise and are willing to lie and trash a woman's reputation to protect their own. At best, they have inflicted harm on a woman through a shocking lack of sensitivity and empathy.

Men, like Lazarus,[2] who claim they simply made a mistake are not morally innocent. They are culpable for inflicting harm upon a woman through their negligent failure to ascertain her true feelings and for a complete lack of concern for the impact of their actions on a woman's physical and psychological well-being. In a society where young men are increasingly receiving their sexual education from violent pornography, it is essential that women are protected from male misapprehensions about what women seek from a sexual encounter.

Dyer seems to think that having an intellectual disability or even Asperger's syndrome should enable an individual to rape women with impunity.[3] He seems to accept with

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[1] Andrew Dyer, 'Yes! To Communication about Consent; No! to Affirmative Consent: A Reply to Anna Kerr' (2019) 7(1) *Griffith Journal of Law & Human Dignity* (in this issue).

[2] *R v Lazarus* [2017] NSWCCA 279 ('*Lazarus*').

[3] Dyer (n 1).

equanimity, the idea that individuals of limited ability to discern the feelings of others should be free to commit sexual assault without consequence. The rights of victims basically do not feature in this reasoning. He also seems unaware that in practice, a person suffering a mental condition (whether intellectual disability or mental illness) would be dealt with under mental health provisions and be committed to a psychiatric facility if they pose a risk to the safety of others. In relation to the somewhat unconvincing hypothetical of an accused who is suffering from 'non-self-induced intoxication', we would suggest that if a man is so paralytic that he is unable to form criminal intent, he is also equally unlikely to be able to carry out a substantive sexual assault.

Dyer also claims an affirmative consent model perpetuates notions of female passivity. But if we want to encourage women to take control of their sexuality, we must first provide them with recourse should they be sexually assaulted, instead of endlessly providing men with excuses and ways to avoid the consequences of their morally reprehensible behaviour. If a man has sex with a woman, he needs to be completely certain that she is freely and voluntarily consenting or otherwise accept the risk of prosecution. The focus here should not be on women needing to be more sexually assertive but on men learning to be more cautious and considerate of women's feelings in intimate encounters.

Particularly in the scenario of sadomasochistic sex in which an individual is causing physical injury to another, there must be very clear communication of consent and even then, a sadistic lover should be prepared to accept the real risk of conviction should the other individual at any point change their mind about the wisdom of the activity. Dyer questions '*If the injured person willingly participated in the intercourse that took place… why should it be possible to convict of sexual assault the person who inflicted such injuries?*'[4] It is strange that Dyer must ask this question at a time when euthanasia is still banned in most Australian jurisdictions. The major difficulty is that men inevitably claim there was consent in circumstances in which even major injuries have been inflicted, thus making it difficult to prosecute even serious cases.

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[4] Dyer (n 1) 32.

This is exemplified by the recent notorious case in the United Kingdom, where a man escaped a prosecution for murder by running a defence citing *Fifty Shades of Grey* and claiming that he had been engaged in consensual rough sex with his partner.[5] It is clearly not in the public interest to accept a defence of this nature. Women's safety and well-being is currently being put at risk by a narrative that women enjoy being hurt, without due consideration for the social context in which many women are under extreme pressure to satisfy increasingly violent male sexual demands, fuelled by unregulated pornographic content. Men who wish to hurt women to satisfy their sexual proclivities must be willing to assume the risk of prosecution. There is no public interest in exempting men from liability for injuries to women.

For Dyer, the balancing of the rights of complainants against the rights of the accused is one in which the scales are firmly rigged in the accused's favour. He is very concerned by the potential for an accused to be falsely convicted but gives no thought to the social cost where masses of women are unable to achieve justice for heinous crimes due to a misogynistically calibrated legal system. Dyer fears that an affirmative consent model would be draconian and authoritarian. However, he does not seem to consider that the existing patriarchal legal system that empowers men to rape and injure women with impunity is exactly why women are unable to resist male violence in their daily lives.

Men routinely escape conviction on the basis that the offence boils down to her word against his. In most cases, the matter does not even result in a charge because police are familiar with the difficulty of prosecuting these crimes and regularly advise women that their account is insufficient evidence upon which to proceed. In cases where the matter does proceed to trial, there are too many legal loopholes through which men can currently escape conviction. For example, as Dyer has identified, Section 61HE(9)[6] does provide that submission is not the same as consent, but Judge Tupman nevertheless failed to give a direction to the jury to this effect in the Lazarus case. Furthermore, due to the use of the

[5] Sophie Wilkinson, '"Rough Sex" Doesn't Kill, Domestic Violence Does', *Grazia* (online, 18 December 2018) <https://graziadaily.co.uk/life/real-life/domestic-violence-natalie-connolly-john-broadhurst-sentence-harriet-harman-attorney-general/>.
[6] *Crimes Act 1900* (NSW).

word 'may', section 61HE(8) fails to provide that substantial intoxication automatically negates consent as should have been the case in the Lazarus matter.

Dyer could be regarded as trivialising the issue by comparing a woman coerced into having sex with his being persuaded to drive his wife in the heavy rain. He also compares it with a man reluctantly participating in planned, formulaic sexual intercourse as part of fertility treatment. The factor missing in Dyer's analysis is the complete lack of recognition of the power imbalance and physical disparities that typically exist between men and women. Is the man persuaded by his wife to participate in planned formulaic sexual intercourse acting under threat of violence or even withdrawal of much needed financial support? Is this taking place in a context of a relationship characterised by coercion and control? What will be the consequences of not consenting? Indeed, if the man does not share his partners enthusiasm for conceiving a child or even the mechanics to achieve this outcome, it is a good question why he is consenting? Are the social pressures to reproduce so intense that he feels compelled to comply, despite his own lack of interest? If so, perhaps this individual should indeed be seeking counselling and support to leave what is clearly a very oppressive situation.

Certainly, it is hazardous to draw comparisons, even between the different types of sexual assault. For example, it is difficult to say which is more injurious, a random violent attack by a stranger or years of non-consensual marital sex? Or to speculate what is more damaging, short term physical injury or long term psychological damage? Certainly, some scenarios may prove easier to prosecute but it is like comparing an acute and a chronic illness which is ultimately counterproductive. What is clear is that both are serious, and the legislation should be adequate to ensure that perpetrators of all forms of sexual violence can be successfully prosecuted.

Comparisons with other crimes are also fraught with difficulty, but nevertheless we maintain that society has clearer boundaries in relation to the use of someone's car than the use of a woman's body. Dyer argues that it is 'unusual for a person to consent to be struck or to allow a perfect stranger to break into his or her car and then go on a "joyride"'.[7]

[7] Dyer (n 1) 22.

But in fact, there are many scenarios in which people consent to being struck, such as martial arts, other contact sports, medical procedures, games with children etc. Is giving a stranger access to your car less likely than consenting to violent anal penetration? I think most women would much rather hand over their car keys. So why is consent specifically an issue in relation to sexual offences but not in relation to larceny? Clearly this is because of misogynistic suggestions that women are motivated to falsely claim sexual assault. Any legislative definition of consent should relate to the range of criminality and not just to sexual offences.

The scales of justice are misogynistically calibrated with the sexual and privacy rights of males outweighing women's rights to safety and wellbeing. For example, failing to disclose HIV status or to use a condom may place a sexual partner's life at risk and should be considered a crime. However, in Dyer 's view, the right to privacy can trump a woman's right to informed consent or at least when it comes to disclosing sexual or gender history. Ultimately, this position seems to reflect a male perspective which prioritises sex as a fundamental need that eclipses women's rights to safety and autonomy. There is a complete failure to acknowledge that *informed* consent should be required in sexual matters and to recognise that only permission granted in full knowledge of all relevant facts should suffice.[8]

Rather than endlessly expand the list of circumstances and mistaken beliefs that can negate consent and further complicate the existing prolix provisions, it is instead suggested that the legislation be amended to read:

> *A person consents if they freely and voluntarily* ***communicate*** *their agreement to an activity or action in relation to which they have not been deceived or misled in any significant regard.*
>
> *A person shall not be considered to have provided consent if:*

[8] See Abbey Ellin, 'Is Sex by Deception Rape?', *New York Times* (online, 23 April 2019) <https://www.nytimes.com/2019/04/23/well/mind/is-sex-by-deception-a-form-of-rape.html>.

> *i. they did not have capacity to do so, because of factors such as age, cognitive incapacity, substantial intoxication or because they were unconscious or asleep;*
> *ii. they were threatened, coerced, intimidated or acting under duress, including financial duress;*
> *iii. they were misled or not informed of relevant facts before providing their consent.*

The offence of sexual assault in section 61I of the NSW Crimes Act should be amended to read:

> *Any person who has sexual intercourse with another person**, intentionally** without the consent of the other person, is liable to imprisonment for 14 years.*

In addition, it is suggested that an offence of negligent rape should be added:

> *Any person who has sexual intercourse with another person, and is negligent in obtaining their consent, is liable to imprisonment for 10 years.*

Negligence is commonly defined as failing to take proper care over something and certainly this would at least have seen Mr Lazarus convicted if it had been available as a backup charge.

Much of the opposition to a positive consent test has been from those representing the legal establishment and is therefore primarily focused on the defendant's interests. They are influential and clearly may impede reform in this area. I agree with Dyer that the presence of a rule in another jurisdiction is not necessarily an argument in favour of it and defer to his deeper knowledge of the legislation and case law on this point. Nevertheless, I think this is a situation in which it is in everyone's interests to see the legislation simplified and clarified. This would ensure men understand their obligations during intimate encounters and are not able to escape justice when they have willfully or negligently ignored a woman's feelings in their rush to satisfy their sexual urges.

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THE DANGERS OF ABSOLUTES — AND A FEW OTHER MATTERS: A RESPONSE TO ANNA KERR'S REPLY

ANDREW DYER*

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CONTENTS

I INTRODUCTION 65

II KERR'S ABSOLUTES 65

III SOME OTHER PROBLEMS WITH KERR'S ANALYSIS 70

IV CONCLUSION 72

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I INTRODUCTION

I am not sure that a lawyer should never say 'never', but s/he would be unwise to say it as often as Anna Kerr does in her latest piece of writing. The accused who has non-consensual intercourse, Kerr maintains, should never be acquitted of sexual assault.[1] A substantially intoxicated person, she continues, has never consented to sexual activity.[2] And, for Kerr, a person should never escape conviction if his/her sexual partner has participated in sexual intercourse with him/her because of a mistake as to, or his/her ignorance about, some fact.[3] In this reply, I argue that the law should adopt none of the absolute rules that Kerr favours.

II KERR'S ABSOLUTES

Kerr continues to believe that sexual assault should be an absolute liability offence.[4] This distinguishes her from some other supporters of 'affirmative consent', who seem loath to face up to the draconian nature of their proposals.[5] For example, Rape & Domestic Violence Australia (R&DVSA) has accused certain commentators of 'conflat[ing] the affirmative model with a model of strict or absolute liability'.[6] 'In fact', it continues:[7]

> [T]he affirmative model of consent does not require any shift to the legal burden of proof. Rather, an affirmative model may still require the prosecution to prove all elements of the offence beyond reasonable doubt, including the mental element.

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[1] Anna Kerr, 'Reply to Andrew Dyer's Response' (2019) 7(1) *Griffith Journal of Law & Human Dignity* (in this issue).
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Though some commentators openly advocate absolute liability: Jonathan Crowe and Bri Lee, 'Reform', *Consent Law in Queensland* (Web Page, 2 May 2019) <https://www.consentlawqld.com/reform>. Others have noted without disapproval, suggestions that sexual assault be made an absolute liability offence: Wendy Larcombe et al, ''I Think it's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social & Legal Studies* 611, 623. Strangely, such commentators appear to believe that such a reform would be 'progressive': at 624.
[6] Rape & Domestic Violence Services Australia, Submission No CO28 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (21 February 2019).
[7] Ibid.

Leaving aside R&DVSA's apparent ignorance of the distinction between strict and absolute liability,[8] its claim is misconceived. No one is arguing that, under an 'affirmative consent' standard, the burden of proof would be altered. Rather, if we were to convict of sexual assault all those who had non-consensual intercourse with another, without first having received a clear indication from that person that s/he was consenting, no one who performed the actus reus of that offence would be acquitted. Only if a person obtained such a clear indication would s/he avoid conviction, but all those who obtain such an indication have had *consensual* intercourse (that is, have *not* performed the actus reus of sexual assault).

In any case, Kerr is wrong to argue that it is never reasonable for a man mistakenly to believe that a woman is consenting.[9] 'Dyer seems to think that having an intellectual disability or even Asperger's syndrome should enable an individual to rape women with impunity,'[10] she announces. I think nothing of the sort. My argument instead is that, when determining whether a person with such a disability *has* committed rape,[11] the trier of fact should take his/her disability into account. If it was unreasonable *for him/her* to believe that the complainant was consenting, a conviction should follow. If, however, his/her belief in consent was reasonable for someone with his/her disability, s/he should be acquitted. Kerr does not substantiate her claim that this latter accused is at all morally culpable. Indeed, any such claim would be impossible to defend. The person who, because of some disability, has had no 'fair opportunity to act otherwise'[12] should not be convicted of a serious offence.

Moreover, Kerr is wrong to state that, 'in practice a person suffering a mental disability (whether an intellectual disability or mental illness) would be dealt with under mental health provisions'.[13] There are many cases where an accused with an intellectual

[8] As to which, see *Wampfler v R* (1987) 11 NSWLR 541, 546, and my discussion of that case in Andrew Dyer, 'No! to Affirmative Consent: A Reply to Anna Kerr' (2019) 7(1) *Griffith Journal of Law & Human Dignity* (in this issue).
[9] Kerr (n 1). Though Kerr refers only to heterosexual relations here, presumably she would extend no more latitude to gay men or lesbians.
[10] Ibid.
[11] Or 'sexual assault', to use the terminology favoured in NSW: see C*rimes Act 1900* (NSW) s 61I.
[12] H.L.A. Hart, 'Negligence, *Mens Rea* and Criminal Responsibility' in *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008) 153.
[13] Kerr (n 1).

disability,[14] or a mental illness,[15] has been tried for rape. I cited three of them in the article to which Kerr was responding.[16]

Turning now to Kerr's remarks about the accused who performs the actus reus of sexual assault while in a state of non-self-induced intoxication, this, she thinks, is a 'somewhat unconvincing hypothetical'.[17] It could not actually arise. Really? In *R v Kingston*[18] it was open to the jury to find that the respondent only 'indulged in gross sexual acts' with an unconscious 15 year-old boy because his co-accused had 'secretly administered drugs not only to the boy but also to the respondent'.[19] Such scenarios are rare; however, when legislating, we must keep in mind all cases that might arise. Moreover, Kerr makes no attempt to support her claim that the accused who fails to form criminal intent due to non-self-induced intoxication is anything other than morally innocent. She merely states that, 'if a man is so paralytic that he is unable to form criminal intent, he is also equally unlikely to be able to carry out a … sexual assault'.[20] However, many people have performed prohibited conduct though seemingly prevented by their intoxication from forming criminal intent.[21] Any law that allows for the conviction of such a person, whose intoxication is involuntary, is patently unjust.[22]

We can now consider Kerr's remarks about a *complainant's* self-induced intoxication, and about situations where a complainant has consented to sexual activity because of some factual mistake that s/he has made. For Kerr, a complainant's consent to sexual activity should 'automatically' be negated whenever the complainant gave that consent while

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[14] See, eg, *R v Mrzljak* [2005] 1 Qd R 308; *Butler v The State of Western Australia* [2013] WASCA 242 (18 October 2013).
[15] See, eg, *R v B(MA)* [2013] 1 Cr App R 36; *R v Dunrobin* [2008] QCA 116.
[16] Dyer (n 8).
[17] Kerr (n 1).
[18] [1995] 2 AC 355.
[19] Ibid 360. Such a claim is of course a claim of disinhibition; it is not a claim that the accused was prevented from forming intent. But the defence also made a claim of the latter kind at trial in *Kingston*, and it is far from clear that such a claim is never capable of succeeding in practice.
[20] Kerr (n 1).
[21] See, eg, *R v O'Connor* (1980) 146 CLR 64; *DPP v Majewski* [1977] AC 43. Contrary to what Kerr suggests, the question in a case of this sort is not whether the accused was *incapable* of forming intent; it is whether s/he did not *in fact* form such intent: *R v Makisi* (2004) 151 A Crim R 245, 250-1 [12]-[13].
[22] It is true that *Crimes Act 1900* (NSW) s 428D might currently prevent the conviction of such an accused. After all, s/he has not had intercourse intentionally, and s 428D provides that an accused's non-self-induced intoxication may be taken into account when determining whether an accused had the mens rea for 'an offence other than an offence of specific intent' (such as sexual assault). But Kerr would seem to believe that the law *should* state that the accused who fails to ask permission to have sex — for whatever reason — must be convicted of sexual assault if his/her partner is not consenting.

s/he was substantially intoxicated.[23] This claim is unsustainable. A person consents to an activity — whether it be driving to his/her parents' house,[24] or sex, or something else — if s/he makes an autonomous decision to proceed.[25] In *Burns v The Queen*,[26] five High Court Justices held that a person's decision can be truly autonomous even though s/he was substantially intoxicated when s/he made it. This is obviously right. Take, for example, the man who has ten beers before having intercourse with his long-term sexual partner. He is clearly consenting to that intercourse.[27]

It appears that Kerr argues what she does because of *Lazarus*. Saxon Mullins was substantially intoxicated. Therefore, says Kerr, she was not consenting.[28] But Luke Lazarus had consumed a fair quantity of alcohol, too. Indeed, Tupman DCJ thought that, if he had been sober, he might not have engaged in the relevant activity.[29] Presumably, however, Kerr would not accept that, assuming that Mr Lazarus was 'substantially intoxicated' within the meaning of s 61HE(8)(b) of the *Crimes Act 1900* (NSW),[30] he too was not consenting to the penile-anal intercourse. Further, Kerr seems to be confused about what Tupman DCJ actually found at the second *Lazarus* trial. She seemingly implies that, if Tupman DCJ had been satisfied that the Crown had proved that Ms Mullins was not consenting, she would have convicted Mr Lazarus. However, Kerr appears to suggest, Tupman DCJ did not make this finding — even though Ms Mullins was intoxicated at the time of the intercourse. In fact, Tupman DCJ *did* find that Ms Mullins was not consenting.[31] The prosecution foundered on the Crown's inability to prove that, additionally, Mr Lazarus lacked an honest and reasonable but mistaken belief that Ms Mullins was consenting.[32]

Concerning mistakes, Kerr agrees with me that the person who has sexual intercourse with another because of her/his mistaken belief that the other person is not HIV positive

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[23] Kerr (n 1).
[24] A topic to which I will return.
[25] See, eg, Simon Gardner, 'Appreciating *Olugboga*' (1996) 16(3) *Legal Studies* 275, 281-282; Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2013) 122 *Yale Law Journal* 1372, 1392-1394.
[26] (2012) 236 CLR 334, 364 [87] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[27] Unless, of course, there is something besides his intoxication that renders his conduct other than free and voluntary.
[28] Kerr (n 1).
[29] *R v Lazarus* (District Court of NSW, Tupman DCJ, 4 May 2017) ('*Lazarus*').
[30] The relevant provision at the time was *Crimes Act 1900* (NSW) s 61HA(6)(a).
[31] *Lazarus* (n 29). As I thought I had made clear in my earlier piece: Dyer (n 8).
[32] *Lazarus* (n 29).

or will wear a (non-sabotaged) condom during the intercourse, has not really consented.[33] But:

> [I]n Dyer's view the right to privacy can trump a woman's right to informed consent, or at least when it comes to disclosing sexual or gender history. Ultimately this would seem to reflect a male perspective which prioritises sex as a fundamental need that eclipses women's right to safety and autonomy.[34]

Again, Kerr's position is unsustainable. Certainly, Herring has argued that the law should state that:

> If at the time of the sexual activity a person:
>
> (a) is mistaken as to a fact; and
>
> (b) had s/he known the truth about that fact would not have consented to it
>
> then she did not consent to the sexual activity. If the defendant knows (or ought to know) that s/he did not consent (in the sense just described) then s/he is guilty of an offence.[35]

But, as Horder has observed, this would make a rapist of the person who continued with conjugal relations though s/he was having an affair, or the man who continued having intercourse with his wife despite having fallen in love with another man.[36] My belief that liability should not arise in such circumstances has nothing whatsoever to do with the privileging of a 'male perspective'. For, a rule of the type just proposed does not just make criminals of men. It makes criminals of *anyone* who has intercourse with a person who only participates in the relevant activity because of his/her mistake about (or, for Kerr, his/her ignorance of)[37] some fact. Often, such people *should* be convicted of sexual

[33] Kerr (n 1). I provide a full defence of my proposal concerning complainants' mistakes in Andrew Dyer, 'Mistakes that Negate Apparent Consent' (2019) 43 *Criminal Law Journal* 159.
[34] Kerr (n 8).
[35] Jonathan Herring, 'Mistaken Sex' (Legal Research Paper Series, Oxford Criminal Law Review, Oxford, 2005) 511, 517.
[36] Jeremy Horder, *Ashworth's Principles of Criminal Law*, (Oxford University Press, 8th ed, 2016) 360.
[37] Kerr (n 1).

assault. But not where the accused's interest in privacy — and/or a compelling public policy concern — outweighs the complainant's right to sexual autonomy.

Returning to the gender history example, Sharpe has noted that there are good reasons why a transgender woman, say, might not wish to disclose that s/he was once considered by society to be a man.[38] 'In addition to the not inconsiderable physical risks', she says, 'we need to recognise the psychological and emotional impact [on her]'.[39] However, it is not just the accused's privacy interest that is engaged. There are also public policy concerns that point decisively against the view that such a woman should be convicted of sexual assault if she proceeds to have intercourse with a man, say, who is unaware that she is transgender. If the man later finds out about this fact and expresses outrage, is he not being distinctly transphobic? Surely the courts should not lend their endorsement to such attitudes?

III SOME OTHER PROBLEMS WITH KERR'S ANALYSIS

There are several other difficulties with Kerr's argument.

Firstly, regarding sado-masochistic sexual activity,[40] nothing that she says alters my view that defendants in cases such as *Brown v DPP*[41] should be innocent of sexual assault. Because the 'victims' consented, sexual assault liability would have been even more bizarre than the activities in which they engaged.[42]

Secondly, Kerr thinks that I 'could be regarded' as 'trivialising the issue by comparing a woman coerced into having sex with [my] … being persuaded to drive [my] … wife in the heavy rain'.[43] I made no such comparison. I simply argued that, contrary to Kerr's position, a person *can* consent to intercourse even though s/he has been persuaded to engage in it or has engaged in it reluctantly. The person who engages in boring fertility treatment sex is a good example of this.[44] It is not to trivialise rape to use a non-sexual example to show that a person can reluctantly make an autonomous decision. By

[38] Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' (Legal Research Paper Series, Oxford Criminal Law Review, Oxford, 2014) 207, 220.
[39] Ibid.
[40] Kerr (n 1).
[41] [1994] 1 AC 212.
[42] As to which, see *R v Brown* [1992] 1 QB 491, 495-7.
[43] Kerr (n 1).
[44] Dyer (n 8).

suggesting the contrary, Kerr could be regarded as not being sufficiently attuned to the relevant concepts.

Thirdly, nothing that Kerr says in her reply changes my view that her remarks about joyriding in her original article were misconceived. It is only in 'atypical' sexual assault cases where the complainant sustains 'injury beyond unwanted penetration'.[45] This is why consent is 'specifically an issue'[46] more often in such matters than in larceny prosecutions. It is common for people to consent to intercourse that does not result in physical injury. It is uncommon for a person to allow another to 'hotwire' his/her car for the purposes of going on a joyride. Accordingly, in the many sexual assault cases where the complainant has sustained no physical injuries, the accused's claim that there was consent will often be plausible. Of course, it might be a total lie, but we would be entering dangerous territory if we were to prevent the accused from putting forward his/her version of events.[47]

Fourthly, Kerr's reform proposal is problematic.[48] For example, a person would be guilty of her lesser offence if s/he had 'sexual intercourse with another person' and was 'negligent in obtaining their (sic) consent'.[49] Such a provision would seem to criminalise the person who had *consensual* sex with another, but failed to take reasonable steps to ensure that consent had been granted. If a negligent sexual assault offence is to be introduced in NSW,[50] non-consent should be an element of that offence.

[45] Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *British Journal of Criminology* 296, 300.
[46] Kerr (n 1).
[47] It is no answer to this to say, as Kerr does, that 'there are many scenarios in which people consent to be struck': ibid. Her apparent point is that, given that people sometimes consent to such contact, and given that consent is nevertheless rarely an issue at an assault trial, why should consent so often be in issue in a sexual assault trial? The answer to this is that where a footballer, for example, claims that s/he was not consenting to violence that the accused inflicted on him/her in the course of the game consent *is* in issue: See *Giumelli v Johnston* (1991) Aust Torts Reports 81-805. This is because, as with sexual activity, in many cases of bodily contact on a football field, the footballers have consented to the relevant contact.
[48] Kerr (n 1).
[49] Ibid.
[50] And I do not agree that it should be: See Andrew Dyer, Submission No CO02 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (1 February 2019).

IV CONCLUSION

While I support sexual assault law reform in NSW, any reforms must be cautious and carefully considered. Though Anna Kerr is undoubtedly well-intentioned, her suggested reforms satisfy neither of these criteria.

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'DOING HER TIME': A HUMAN RIGHTS ANALYSIS OF OVERCROWDING IN BRISBANE WOMEN'S CORRECTIONAL CENTRE

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At the end of 2016, the Queensland Ombudsman released his report 'Overcrowding at Brisbane Women's Correctional Centre'. This investigation, alongside reports from the Anti-Discrimination Commission Queensland and Crime and Corruption Commission Queensland reveal that, despite the best efforts of Queensland Correctives Services, there are a number of potential human rights violations that have arisen within Brisbane Women's Correctional Centre as a result of ongoing overcrowding. As of 27 February 2019, Queensland has become the third Australian state or territory to pass a human rights Act, 14 years after the Australian Capital Territory introduced the Human Rights Act 2004, and 12 years after Victoria introduced the Charter of Human Rights and Responsibilities Act 2006. In 2019, Australia remains to be the only Western democracy that is yet to introduce a national Act or bill of human rights. This article will consider the potential violations of female prisoners' human rights inside Queensland's largest female correctional facility, drawing on case law from Canada, Scotland, and the ECtHR to discuss their potential for recourse under Queensland's new Human Rights Act 2019.

CONTENTS

I THE SCOPE OF CURRENT HUMAN RIGHTS PROTECTIONS IN QUEENSLAND, AUSTRALIA 77

II OVERCROWDING IN BRISBANE WOMEN'S CORRECTIONAL CENTRE 81

A *Doubling Up* 83

B Lockdown 86

C Overflowing Sewage 87

III A HUMAN RIGHTS ANALYSIS OF OVERCROWDING 87

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A *Canadian Caselaw* ... 89

B *Scottish Position* ... 91

C *Influence of the ECtHR* ... 94

IV QUEENSLAND'S POSITION UNDER THE 2019 ACT ... 95

V CONCLUSION ... 97

I THE SCOPE OF CURRENT HUMAN RIGHTS PROTECTIONS IN QUEENSLAND, AUSTRALIA

Prior to 2004, neither the federal state, nor any of the six Australian states had introduced a human rights Act or Charter. This meant that Australia fell outside the modern international tradition of express legal protection for human rights,[1] placing faith instead in a historical reliance on the doctrine of government responsibility.[2] This position changed in 2004 when the Australian Capital Territory ('ACT') introduced its own *Human Rights Act 2004* ('2004 Act'), followed by Victoria in 2006 with the *Charter of Human Rights and Responsibilities Act 2006* ('the Victorian Charter'). Though each are key historical developments towards giving human rights legal protection at the domestic level in Australia, both in their original forms showed inherent weaknesses.

The 2004 Act broke 'the political deadlock' that had precipitated the development of human rights law in Australia,[3] marking a growing awareness that common law no longer stood as an 'invincible safeguard' for breaches of fundamental rights.[4] Initially, however, the 2004 Act did not provide a platform for individuals to bring a human rights claim against the government, meaning that there were no direct remedies available for human rights violations. This has since been resolved with *The Human Rights Amendment Act 2008*,[5] which introduced a new basis for claims to be brought against a public

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[1] Jeremy Gans, 'The Charter's Irremediable Remedies Provision' (2009) 33(1) *Melbourne University Law Review* 105, 106 ('Gans').

[2] George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) *Melbourne University Law Review* 881 ('Williams'); see also Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 2.

[3] The Australian National University, *The Human Rights Act 2004 (ACT): The First Five Years of Operation*, (Final Report, May 2009) 6.

[4] Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16(1) *Federal Law Review* 1, 12.

[5] *The Human Rights Amendment Act 2008* (ACT).

authority for breach of human rights.[6] Despite this, in its first five years of operation, only 91 cases were heard, with most judgements playing 'spectator to the HRA dialogue'[7] and failing to grasp and develop the apparatus at hand. In the Victorian Charter, section 39(1)[8] was described as 'the last in a series of built-in obstacles'[9] to applying any of the Charter's operative provisions, and has been interpreted as 'a conditional prohibition',[10] meaning in effect that the section blocks some of the remedies that would have otherwise been available where a breach of the Charter was established. George Williams, Chair of the Human Rights Consultation Committee, which recommended the Charter, comments that the ambiguity in the Charter 'reflects the need for the [Charter] to give rise to remedies as well as the preference expressed by the Government… [that it] does not wish to create new individual causes of action based on human rights breaches.'[11]

A decade on, and with the ratification of Optional Protocol to the Convention Against Torture ('OPCAT') in 2017, the Victorian Charter has enjoyed some successes. In 2017, Victoria's higher courts heard more than 40 cases,[12] including the protection of children's rights in detention in *Certain Children v Minister for Families and Children & Ors (No 2)*,[13] and the protection of the right to fair trial for those with learning disabilities self-representing in court in *Matsoukatidou v Yarra Ranges Council.*[14] Undoubtedly, the strides made by the 2004 Act and The Victorian Charter were significant, yet simultaneously ACT and Victoria failed to foster a strong culture of human rights in which the true potential of their respective Acts could be utilised.

At the federal level in Australia, human rights proceedings may be brought where the claim falls under the umbrella of one of the four discrimination statutes.[15] Ordinarily, the

[6] Australian National University: College of Law, 'ACT Human Rights Act Portal' *Australian National University* (Web Page, 2 October 2014) <http://acthra.anu.edu.au/faq.php#faq6>.
[7] 'HRA 2004' (n 4) 7.
[8] Which provides for the process where a breach of section 38(1) occurs, namely, that a public authority has acted in a way that is incompatible with human rights.
[9] Gans (n 1) 106.
[10] Ibid 115.
[11] Williams (n 3).
[12] Victorian Equal Opportunity & Human Rights Commission, *2017 Report on the Operation of the Charter of Human Rights and Responsibilities: Human Rights in Courts and Tribunals* (Report, August 2018) 35.
[13] [2017] VSC 251.
[14] [2017] VSC 61.
[15] *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Age Discrimination Act 2004* (Cth).

case will be brought first to the Australian Human Rights Commission ('AHRC')[16] before proceeding to the Federal Court of Australia.[17] In the event that the claim is successful, the applicant may be financially compensated, or else receive a remedy requiring the respondent to stop the discrimination. Where human rights claims fall outside the four discrimination Acts, the legal protection of human rights in Australia is very limited, as admitted by the AHRC itself in 2015.[18] At present citizens of New South Wales ('NSW'), South Australia ('SA'), Tasmania, and Western Australia ('WA') are without domestic legal protection of human rights.

Where domestic remedies fall short, international human rights mechanisms may be utilised to establish specified breaches of Convention obligations. Despite the fact that Australia has ratified many of the core human rights treaties, including the International Covenant on Civil and Political Rights ('ICCPR'),[19] the Convention on the Rights of the Child (CRC),[20] the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ('CAT'),[21] and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'),[22] the legal backing of the human rights protections is limited until incorporated into national legislation, either by way of an Act which makes reference to international human rights law, such as the *Human Rights Act 1998* in the UK or by establishing its own bill of rights, such as the United States *Bill of Rights*. *Collins v State of South Australia*[23] ('*Collins*') is a sobering illustration of the prospects for cases within Australian States that do not have recourse to an Act of human rights. In *Collins*, the applicant claimed that the doubling up conditions at the Adelaide Remand Centre

[16] *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 1.
[17] Ibid s 46.
[18] Australian Human Rights Commission, 'About a Human Rights Act for Australia' (Web Page, 2015) <https://www.humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_questions.pdf>.
[19] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').
[20] *Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[21] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Optional Protocol of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc A/RES/57/199 (22 June 2006, adopted 18 December 2002).
[22] *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 28 (entered into force 3 January 1976).
[23] [1999] SASC 257.

breached Article 10(1) of the ICCPR.[24] The judge was satisfied on the evidence that there was indeed a breach, however, he was forced to conclude that as the ICCPR is not incorporated into legislation at the domestic level, he was not able to provide a legal remedy.[25]

For each of the core international human rights treaties there exists a treaty body or committee which acts as a monitoring system to ensure Member State compliance. In order for Australian citizens to bring complaints to the committees, Australia must have accepted the Committee's competence, doing so by either ratifying the convention, plus the optional protocol of the relevant treaty, or by making a declaration to be bound to that effect.[26] In the absence of robust domestic human rights Acts, the only course of action for human rights claims that fall outside the discrimination Acts is to bring an individual communication before the relevant human rights treaty body (where there is provision to do so) or make a complaint to the Special Procedures of the Human Rights Council. As of 27 February 2019,[27] this position has now changed for Queensland.

The introduction of the *Human Rights Act 2019* ('HRA') marks a historic change in Australia. This new piece of legislation sets out 23 human rights protected by law in Queensland, largely derived from the ICCPR and the ICESCR. Although it does not make international law part of domestic legislation,[28] these statutory rights can be utilised to breathe the life of international treaties into domestic legislation, offering protection to some of the most marginalised members of our society. Notably, it is not a magic wand, one wave of which will end current rights violations throughout Queensland. If Queensland is to move past the progress of the 2004 Act and The Victorian Charter, the introduction of the HRA requires a willingness to tackle the hurdles that will come with

[24] ICCPR (n 20) art 10(1): 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'
[25] Ibid [53].
[26] 'Human Rights Bodies — Complaints Procedures', *Office of the High Commissioner for Human Rights* (Web Page) <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx.>.
[27] The date on which The Human Rights Bill 2018 was passed in Parliament. Please see e.g. 'Media Statements', The Queensland Cabinet and Ministerial Directory (Web Page, 2019) <http://statements.qld.gov.au/Statement/2019/2/27/historic-day-for-queenslanders-as-human-rights-bill-passes>. As of the 1 July 2019, the ADCQ became the Queensland Human Rights Commission, marking the realisation of the first stage of the Human Rights Act 2019. As of the 1 January 2020 the Commission will begin accepting complaints.
[28] 'Human Rights Law', *Queensland Human Rights Commission* (Web Page) <https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0009/19908/QHRC_factsheet_QueenslandHumanRightsAct.pdf>.

applying it to complex, socially entrenched problem areas. One such issue is overcrowding in women's prisons. At the outset of 2017, the Anti-Discrimination Commission Queensland ('ADCQ'), now the new Human Rights Commission Queensland ('HRCQ'), began their 10 year review of women in prison. The ensuing report, '*Women in Prison 2019: A Human Rights Consultation Report*' (2019 Report) details a number of human rights concerns which prior to 2019 had not been dealt with in law in Australia. As such, this article has used Brisbane Women's Correctional Centre ('BWCC') as its focal point, drawing from legislation in Scotland and Canada, and jurisprudence from the European Court of Human Rights (ECtHR) in order to illuminate how the Queensland Courts may interpret the HRA and maximise its potential to protect the 23 rights now enshrined in Queensland law in regard to prisoners' rights.

II OVERCROWDING IN BRISBANE WOMEN'S CORRECTIONAL CENTRE

The State of Queensland is the second largest contributor to the national prisoner population in Australia, accounting for 21% (8,905 persons) of the 43,018 full-time prisoners held in Australian correctional centres, as of September 2018.[29] The Australian Bureau of Statistics ('ABS') reports that from 2017 to 2018 the national imprisonment rate rose by 3% from 216 to 221 prisoners per 100,000 adult population.[30] There has been a 10% (326 persons) increase in female prisoners over the last year, outpacing the statistics recorded for men in prison: 4% (1,430 persons).[31] Over the last decade, females in custody have increased by 66%[32] and as of September 2018, 773 women were detained in Queensland.[33] At the end of 2016, the Queensland Ombudsman, Phil Clarke, named BWCC the most overcrowded facility of the 13 operational correctional centres in Queensland,[34] and said that this had been the case for a period of three years since his first investigation in 2013.[35] As of September 2018, the Crime and Corruption

[29] Australian Bureau of Statistics, *Corrective Services Australia, June Quarter 2019* (Catalogue No 4512.0, 12 September 2019) ('Corrective Service Australia: Report'): only New South Wales has more prisoners.
[30] Australian Bureau of Statistics, *Prisoners in Australia, 2018* (Catalogue No 4517.0, 2018).
[31] *Corrective Services Australia: Report* (n 30).
[32] Anti-Discrimination Commission Queensland, *Women in Prison 2019: A Human Rights Consultation Report* (ADCQ 2019) 52.
[33] Queensland Corrective Services, *Queensland Corrective Services Report 2017–2018* (Annual Report, 2018) 116.
[34] Queensland Ombudsman, *Overcrowding at Brisbane Women's Correctional Centre: An Investigation into the Action Taken by Queensland Corrective Services in Response to Overcrowding at Brisbane Women's Correctional Centre* (Report, September 2016) 11 ('Queensland Ombudsman').
[35] Ibid 20.

Commission Queensland ('CCC') reported that Queensland's Correctional Centres were running at 128% capacity.[36] The rise in numbers has been referred to as 'a symptom of a system under pressure',[37] and at the end of 2018 the Queensland Corrective Services ('QCS') Commissioner named overcrowding as the 'most pressing operational issue' currently facing the QCS.[38]

'Overcrowding' is defined as the circumstance where the number of persons in prison exceeds the official capacity for a prison.[39] At its core, overcrowding overburdens the infrastructure of the prison itself: it interferes with the processes that are designed to keep persons in prison and staff safe and with the procedures in place to ensure the smooth running of the facility and all of its programs. Overcrowding was identified by the ADCQ as one of the most pressing concerns in their 2019 Report,[40] and similarly, by prisoners in Victoria when then Victorian Ombudsman, Bronwyn Naylor, consulted prisoners as to the realities of their detention and the respect of rights in the prison environment.[41] At the end of 2018 the CCC produced *'Taskforce Flaxton – An Examination of Corruption Risks and Corruption in Queensland Prisons,'*[42] (2018 Report) which details a number of consequences that flow from overcrowding in Queensland's correctional centres, including the:

(1) difficulty in classification of and separation of persons in prison;[43]
(2) difficulty in the provision of efficient and effective health care;[44]
(3) strain on infrastructure including provisions for water, sewage, sanitation, heating and cooling;

[36] Ibid 57 (see Table A3.1 in Appendix 3).
[37] Walter Sofronoff QC, *Queensland Parole System Review: Final Report November 2016* (Report, 30 November 2016) 58 ('Sofronoff').
[38] Crime and Corruption Commission Queensland, *Taskforce Flaxton: An Examination of Corruption Risks and Corruption in Queensland Prisons* (Report, December 2018) 64 ('CCCQ').
[39] United Nations Office on Drugs and Crime and the International Committee of the Red Cross, *Handbook on Strategies to Reduce Overcrowding in Prisons* (2013) 8:.'Official capacity or design capacity of a prison: The total number of prisoners a prison can accommodate while respecting minimum requirements, specified beforehand, in terms of floor space per prisoner or group of prisoners including the accommodation space. The official capacity is generally determined at the time the prison is constructed.'
[40] Anti-Discrimination Commission Queensland, *Women in Prison 2019: A Human Rights Consultation Report* (Report, 2019) 10 ('ADCQ').
[41] Bronwyn Naylor, 'Human Rights and Respect in Prisons: The Prisoners' Perspective' (2014) 31 *Law in Context* 94.
[42] CCCQ (n 39).
[43] As is the case for Townsville Women's Correctional Centre, as provided by ADCQ (n 41) 61.
[44] Corroborated by Anti-Discrimination Commission Queensland, *Women in Prison* (Report, March 2006) 89-105.

(4) further restricted access to kitchen space and telephones;
(5) diminished capacity for constructive days and participation in programs;
(6) increased anger and frustration which leads to higher risk of conflict;
(7) less time out of cell; and
(8) an increase in the risk of corrupt conduct occurring.[45]

A number of human rights issues are called into question here, ranging from the right to be free from torture and cruel, inhuman, or degrading treatment — which is included in section 17 of the HRA — and the right of an accused person in detention to be segregated from convicted persons — included in section 30 of the HRA — among others. Overcrowding has a domino effect and an increase in persons in prison causes the first block to fall: adequate staffing. Without the correct number of guards on duty, QCS is hard pressed to maintain the regular routine of the centre. Low staffing leads to escalated security concerns, which in turn may amount to excessive 'lockdown' periods. As the Ombudsman comments, restrictive periods of lockdown, alongside the 'doubling up' of inmates can lead to conditions that have a deleterious effect on prisoners.[46] Notwithstanding the severity of the other consequences that flow from overcrowding, this article will focus on the particularly confronting conditions of 'doubling up,' 'lockdown', and the issue of overflowing sewage. These conditions will first be identified in BWCC and then discussed in the context of Canadian, Scottish, and ECtHR case law which provides a well-established and progressive line of jurisprudence on the respective issues.

A *Doubling Up*

Prior to the opening of Southern Queensland Correctional Centre (SQCC) in August 2018, women at BWCC experienced what is described as 'doubling up' as a result of overcrowding, whereby two inmates are placed in a cell designed for one person.[47] At the time of his 2015 investigation, the Ombudsman reported that BWCC was over capacity by 47.7%.[48] In the 2016 report, the Ombudsman wrote that doubling up in BWCC

[45] CCCQ (n 39) 5–6.
[46] *Trang v Alberta (Edmonton Remand Centre)* 2010 ABQB 6 [164] ('*Trang*').
[47] *Queensland Ombudsman* (n 35) iv.
[48] Sofronoff (n 38) 59.

involved placing an extra mattress on the floor, with the second prisoner required to sleep with their head close to an exposed toilet and shower, as pictured in *Figure 1* below. The 2016 report concluded that as a result of, and in an effort to manage overcrowding, BWCC made 'extensive use of doubling-up',[49] with prisoners sharing cells in both secure and residential units.[50] The ADCQ reported that this was still the case during their investigations in 2017,[51] and cautioned that if the rate of imprisonment continues, women's prisons in Queensland are likely to be at full capacity again as early as 2020.[52]

BWCC's standard secure cells are 8.5 m^2 with facilities for one person, including one bed, one desk with a fixed seat, shelving for personal items, one toilet, a wash basin, and a shower. At the time of writing, the Queensland Ombudsman noted that while 30 cells had had bunk beds introduced, the majority of doubled-up cells just had one bed. To accommodate an extra person, a mattress would be wedged against the desk and wall on the floor. For checks to be carried out during the night, QCS required that this person sleep with their head at the end closest to the exposed toilet. The Ombudsman identified this layout as problematic, particularly in instances where the first person needed to use the bathroom during the night and must navigate her way, over the second person, to the toilet in the dark.[53]

Figure 1: A doubled-up single secure cell at BWCC, taken during the Queensland Ombudsman's 2013 investigation.[54]

[49] *Queensland Ombudsman* (n 35) vii.
[50] Ibid 13.
[51] *ADCQ* (n 40) 108.
[52] Ibid 109.
[53] *Queensland Ombudsman* (n 34) 13.
[54] Ibid 14.

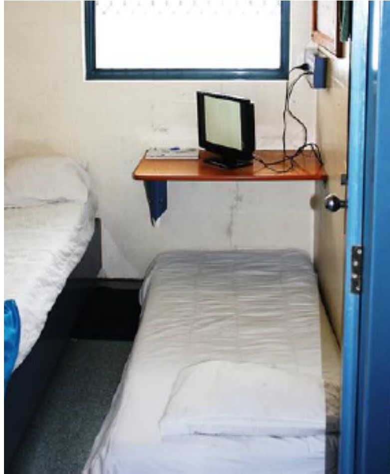

Figure 2: A doubled-up single residential cell at BWCC, taken during the Queensland Ombudsman's 2013 investigation. At the time of their 2015 investigations there had been no changes to the fixtures since that time.[55]

The conditions were different for those doubled-up in residential cells, where bathrooms are located outside cells and in communal areas. These cells are designed to accommodate six persons, each with their own cell, sharing a communal kitchen, living/dining area, and bathrooms. As pictured in *Figure 2* above, the extra mattress in these cells took up almost all of the floor space.[56] As stated in Rule 9(1) of the Standard Minimum Rules, though placing two inmates in one cell is not prohibited in instances such as temporary overcrowding, 'it is not desirable to have two prisoners in a cell or room'.[57] It is also anticipated as a temporary measure, and where it fails to be such, concern as to the effect of persons living in these conditions increases. As the Ombudsman reported, such a layout creates 'concerns about privacy, dignity, and hygiene'.[58] Privacy concerns, for example, orientate around the use of the toilet in the presence of another. Rule 15 of the Mandela Rules provides that each prisoner should be able to 'comply with the needs of nature when necessary and in a clean and decent manner'.[59] In the 2016 Report the Ombudsman noted that issues of privacy 'remain largely unaddressed' with QCS stating that it is not feasible to introduce temporary privacy screens.[60] It is particularly alarming that pregnant prisoners were not identified as unsuitable to occupy spaces on the floor. The Ombudsman reports that on one occasion a pregnant woman sleeping on the floor

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[55] Ibid 15.
[56] Ibid 15.
[57] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015).
[58] *Queensland Ombudsman* (n 35) i.
[59] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/C.3/70/L.3 (29 September 2015) (Note by the Secretariat).
[60] *Queensland Ombudsman* (n 35) 17.

suffered a miscarriage, and after returning from hospital was again made to sleep on the floor.[61]

B Lockdown

'Lockdown'[62] for women living in secure accommodation,[63] refers to the period when women are confined to their cells without access to their central common area or yards. For women in residential accommodation,[64] lockdown refers to the period of time when women are locked in their units with access to their communal living area.[65] The 2019 Report found that from October 2018, a standard day at BWCC for women in secure accommodation consisted of being locked down in their cells for 13 hours in a regular day, and for women in residential up to 17.5 hours a day,[66] concurrent with the Ombudsman's findings that women in prison were spending at least 14 hours every day on lockdown in 2015.[67] According to QCS's own 'Healthy Prisons Handbook' 2007, prisoners should have 'access to a minimum of 10 hours out of their cells except in exceptional circumstances'[68] and be actively encouraged to engage in out of cell activities with provision for structured days.[69] Despite this, the 2016 Report found in one case that two prisoners were locked together in one cell in excess of 80 hours, having been denied the minimum statutory requirement of two hours out of cell over the course of three days.[70] The 2019 Report revealed that 'women advised us that there were many disruptions to the usual routine, and they were frequently locked down for much longer periods'.[71] Not only does lockdown give rise to human rights concerns, as identified in the

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[61] Ibid 16.
[62] The term 'lockdown' refers first and foremost to the practice of keeping prisoners locked in their cell, usually without access to their communal areas or yards. During this time, it is common for all resources to be restricted from the prisoner, e.g. access to telephones or daily programmes. Defining the term by way of reference to a particular allotment of time is particularly problematic as it could refer to anything from 30 minutes up to 80 hours in exceptional cases in Queensland and will vary across different jurisdictions. The ambiguity of the timeframe is what makes the practice all the more confronting as prisoners lose all control over their daily schedules.
[63] *ADCQ* (n 41) 106.
[64] Ibid 107.
[65] Ibid 108.
[66] Ibid.
[67] *Queensland Ombudsman* (n 35) 14.
[68] State of Queensland, 'Healthy Prisons Handbook' *Queensland Corrective Services* (Report Handbook, November, 2007) 65 [20.1].
[69] Ibid [20.2].
[70] *Corrective Services Regulation 2017* (Qld) s 4(d); *Queensland Ombudsman* (n 35) 16.
[71] *ADCQ* (n 41) 108.

cases of *Ogiamien v Ontario* and *Trang v Alberta* below,[72] CCC established in their 2018 report that less time-out-of-cell was associated with an increase in allegations related to QCS staff made to the CCC.[73]

C Overflowing Sewage

The conditions of doubling up and lockdown are particularly problematic given the recurring problems with drainage at BWCC. In its 2017 investigations, the ADCQ found that overcrowding was straining the prison's plumbing system and as such blockages were frequent, overflows were common (up to three or four times per week) and bad sewage odours occasional.[74] Overflowing sewage is even more so concerning in light of mattresses being placed on the floor next to the exposed toilets and where there is a requirement of having the prisoners head at the end of the exposed toilet to allow for checks to be carried out at night.[75] The 2019 Report revealed that mattresses on the floor could become wet with toilet water,[76] giving rise to a justified concern as to the standards of hygiene and dignity experienced by some women at BWCC. Blocked toilets also give rise to issues of accessibility and humiliation: the 2019 Report revealed that one woman had resorted to using another 'receptacle' to relieve herself due to the toilet being blocked.[77]

III A HUMAN RIGHTS ANALYSIS OF OVERCROWDING

The conditions identified above encroach upon prisoners' rights to be treated with humanity and respect for human dignity;[78] their right to be free from torture, inhuman, or degrading treatment;[79] their right to privacy;[80] the right for accused persons to be separated from convicted persons; [81] and their right to the highest attainable standard of physical and mental health.[82] As summarised by the United Nations Office on Drugs and

[72] 2016 ONSC 3080 ('*Ogiamien*'); *Trang* (n 47).
[73] *CCCQ* (n 39) 6.
[74] *ADCQ* (n 41) 110.
[75] *Queensland Ombudsman* (n 35) 17.
[76] *ADCQ* (n 41) 110.
[77] Ibid.
[78] See ICCPR (n 20) 10(1).
[79] Ibid 7.
[80] Ibid 17.
[81] Ibid 10(2).
[82] See Article 12(1) of *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

Crime ('UNODC'): '… overcrowding is the root cause of a range of challenges and human rights violations in prison systems worldwide, threatening, at best, the social reintegration prospects, and at worst, the life of prisoners'.[83]

Due to the inherent weaknesses as pertaining to the enforceability of the 2004 Act and the Victorian Charter, and the resulting lack of developments, this article has sought to shed light on the potential of the HRA 2019 by comparing it to a number of other jurisdictions, outside of Australia. At the time of conception of the Victorian Charter the government instructed that they were particularly interested in the UK's Human Rights Act 1998 model,[84] and paid particular attention to the impact of the Act in Scotland which had a similar population size to Victoria.[85] Alike Victoria, Queensland follows a system of law and government similar to the UK and at present, Queensland and Scotland each boast a modest population of just over five million. As such, this article has chosen Scotland as a primary comparator to Queensland's HRA 2019, followed by Canada, who equally derives her laws from England. Further comparison will be made to jurisprudence flowing from the ECtHR which offers a wide breadth of knowledge and development of understanding of the European Convention on Human Rights (ECHR). Having been established in 1959, it has delivered over 21,600 judgements by the end of 2018, interpreting issues in relation to our fundamental rights and finding Convention violations in 84% of its judgements.[86] ECtHR case law offers an example of a well-established judiciary, actively interpreting the Convention in an effort to ensure our fundamental rights are protected. Though the case-load will certainly differ between each jurisdiction, the potential for the Queensland Courts to learn from the progress of other jurisdictions and foster a strong human rights culture has been handed to them with the HRA 2019.

[83] *UNODC* (n 40) 14.
[84] Williams (n 3) 887.
[85] Ibid 894.
[86] European Court of Human Rights: Public Relations Unit, *Overview ECHR 1959 — 2018* (Report, March 2019).

A *Canadian Caselaw*

Correctional Service Canada ('CSC') maintains 43 institutions across North America, responsible for the care and order of 40,147 prisoners in 2015-16.[87] In 2017, females accounted for 25% of criminal incidents in Canada, with their rates of offending falling by 15% between 2009 and 2017. A 22% decrease for male offenders was recorded over the same period.[88] The rate to which Aboriginal females were accused as opposed to non-Aboriginal females was 27 times higher in 2017. For Aboriginal males the rate was 12 times higher.[89]

In the case of *Ogiamien v Ontario*,[90] the Superior Court of Justice held that the rights of Jamil Ogiamien and Huy Nguyen were violated under section 12 of the Canadian Charter of Rights and Freedoms,[91] which prohibits cruel and unusual punishment, due to the conditions of their detention, specifically arising out of intensive periods of lockdown.[92] The daily schedule for inmates at Maplehurst Correctional Complex was:

a) 0800 – 0930 – Inmates locked down in cells for meal service – breakfast;
b) 0930 – 1130 – day room access;
c) 1130 – 1330 – inmates locked down in cells for meal service – lunch;
d) 1330 – 1530 – day room access;
e) 1530 – 1730 – inmates locked down in cells for meal service – supper;
f) 1730 – 1930 – day room access;
g) 1930 – 0800 – inmates locked down in cells overnight.[93]

Despite a well-intentioned schedule, statistics revealed that due to a variety of reasons such as staff absences; a number of prisoners requiring hospital escorts; mandatory staff training; emergency situations or searches,[94] Maplehurst was placed on lockdown for

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[87] Correctional Service Canada, 'CSC Statistics — Key Facts and Figures' *CSC* (Web Page, 1 August 2017) < https://www.csc-scc.gc.ca/publications/005007-3024-en.shtml>.
[88] Laura Savage, *Female Offenders in Canada, 2017* (Catalogue No 85-002-X, 10 January 2019) <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00001-eng.pdf?st=5UKB_mYX>.
[89] Ibid.
[90] *Ogiamien* (n 73).
[91] *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'), s 12 ('CCRF'): 'Everyone has the right not to be subjected to any cruel and unusual treatment or punishment'.
[92] *Ogiamien* (n 73) [245]-[270].
[93] Ibid [17].
[94] Ibid [33].

167 days of the year, or 46% of the total days in 2014,[95] and 199 days or 55% of the total days in 2015.[96] A study showed that during a period of seven months in 2015 Ogiamien and Nguyen were locked down for 74 days, out of which 68 days were caused by staff shortages.[97] During this time prisoners lost access to programs,[98] and were contained within their doubled-up cell for 24 hours per day.[99] Judge Gray remarks that in some ways, lockdowns are worse than the experience of segregation or solitary confinement.[100] The Deputy Superintendent of Administration and Staff Relations at Maplehurst, Mr Marchegiano, gave evidence that there is generally an adverse reaction by prisoners to lockdowns.[101] He also acknowledged that there would likely be a delay in providing cells with cleaning supplies, or allowing them to have access to laundry.[102] Time to make phone calls or access showers is largely restricted.[103] Judge Gray also pays attention to the violation of two international standards — that non-convicted criminals are being housed with convicted criminals and are subjected to double-bunking.[104]

The case of *Ogiamien* illustrates Canada's willingness to consider international guidelines, subject to a Canadian perspective.[105] Judge Gray states that '…non-observance of an international standard does not, standing alone, mean that [s 12] of the *Charter* has been violated. However, it is a starting point.'[106]

In the case of *Trang v Alberta,*[107] the applicants submitted that overcrowding was the root cause of their oppressive conditions and that taken in combination they amounted to a violation of section 12 of the Canadian Charter.[108] In assessing whether the conditions of overcrowding may amount to a violation of human rights, *Trang* stated that factors such as lockdown 'cannot be applied in a vacuum'.[109] Justice Marceau concluded that the evidence showed that the cells were all double-bunked, without enough room for two

[95] Ibid [39].
[96] Ibid [40].
[97] Ibid [42].
[98] Ibid [46].
[99] Ibid [47].
[100] Ibid [252].
[101] Ibid [50].
[102] Ibid [52].
[103] Ibid [247].
[104] Ibid [250].
[105] Ibid [221].
[106] Ibid [251].
[107] *Trang* (n 47).
[108] CCRF (n 92).
[109] *Trang* (n 47) [1018].

roommates to move around freely at the same time, with only enough room for one person to sit at the table at a time. There was no privacy with regards to using the toilet and inmates would spend up to 13 hours in which they were awake on lockdown in their cell.[110] Further, they had restricted access to recreation, both inside and outside their cell.[111]

Trang applied the case of *R v Smith* (1987),[112] which identified nine factors to consider before concluding a section 12 breach of the Canadian Charter. Among these factors were whether there are any adequate alternatives, whether the conditions would shock the general conscience or be regarded as intolerable as a matter of fundamental fairness, and whether the regime is unusually severe and hence degrading to human dignity and worth.[113] Justice Marceau concluded that where prisoners are on lockdown for 18-21 hours a day and doubled up, with limited access to recreation, alongside limited access to activities within their cell, and endure these conditions over a delayed period of time, the conditions collectively 'shock the conscience and are "grossly disproportionate"'.[114]

B *Scottish Position*

> 'If I had to sum up the last 40 years of women in prison… who knew you could travel so far to stay still?' (Mitch Egan CB, a former prison governor).[115]

In January 2019, Scotland was exposed as having the highest imprisonment rate in western Europe, with around 144 per 100,000 people incarcerated.[116] Scotland's prison population boasts 7,982 persons, with 387 women in custody.[117] Liam McArthur MSP raised the issue of overcrowding in Scottish Parliament at the beginning of 2019.[118] In a subsequent letter, Cabinet Secretary for Justice, Mr Humza Yousaf MSP, revealed that nine

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[110] Ibid [1013].
[111] Ibid [1014]-[15].
[112] [1987] 1 SCR 1045.
[113] Ibid [1063].
[114] *Trang* (n 47) [1016].
[115] Helen Pankhurst CBE, *Deeds Not Words: The Story of Women's Rights Then and Now* (Sceptre, 8 February 2018) 198.
[116] Scottish Parliament, *Meeting of the Parliament 'Official Report*' (Report, 15 January 2019) 3; World Prison Brief, 'United Kingdom: Scotland' (Web Page) <http://www.prisonstudies.org/country/united-kingdom-scotland>.
[117] 'SPS Prison Population' Scottish Prison Service (Web Page, 2019) <http://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>.
[118] Scottish Parliament, *Meeting of the Parliament 'Official Report'* (Report, 15 January 2019) 3 ('*Scottish Parliament*').

out of 15 of Scotland's prisons were 'at or above capacity' as of December 2018, with its largest prison, HMP Barlinnie, operating at 139% capacity and HMP Inverness at 137%.[119] In his parliamentary speech, Mr Yousaf MSP details a number of consequences regarding the harm that overcrowding causes, including its effect on rehabilitation and on the overall morale of the prison. He explained that overcrowding affects the amount of time prisoners spend out of their cell, which in turn increases frustration levels, and triggers issues for staff safety.[120] At present, Scotland is working to introduce the presumption against short sentences and speaks of introducing 'radical solutions'[121] to tackle their issue of overcrowding.

In a line of Scottish cases, dubbed as the 'slopping out saga',[122] conditions of detention as potentially constituting breaches of Article 3,[123] and Article 8,[124] of the ECHR were considered. Article 3, namely the prohibition on torture, inhuman or degrading treatment or punishment, requires treatment to attain one of the three thresholds of suffering in order to qualify as a breach of the right. The ECtHR has gone some lengths to identifying the particularities of each threshold. In the case of *Docherty v Scottish Ministers,*[125] it was held that Stuart Docherty could competently bring an action for damages against the Scottish Ministers for a breach of his rights under Article 3 of the ECHR, given that he experienced periods where he was forced to resort to using chamber pots or similar structures to perform bodily functions whilst in the presence of another as a consequence of being doubled up.[126]

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[119] 'Scottish Prisoners Forced to Double-up in Cells', *BBC News* (online, 17 February 2019) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-47264322>.
[120] *Scottish Parliament* (n 117) 6.
[121] Ibid*.*
[122] Chris Himsworth, 'At the Interface of Public and Private: Docherty v Scottish Ministers' (2012) 16(1) *Edinburgh Law Review* 92.
[123] The *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953): Prohibition on Torture: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'
[124] Right to respect for private and family life: '1. Everyone has the right to respect for his private and family life, his home and his correspondence; 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'
[125] [2011] CSIH 58.
[126] Ibid; *Docherty v Scottish Ministers* 2012 SC 150.

This case was preceded by *Napier v The Scottish Ministers*,[127] in which Lord Bonomy found that the conditions of detention experienced by Robert Napier, combined with a consideration of all of the circumstances of his detention, were capable of attaining the minimum level of severity necessary to constitute degrading treatment, thus breaching Article 3 of the ECHR.[128] Counsel for Mr Napier described such conditions as the 'triple vices' of overcrowding, slopping out, and impoverished regime'[129] and Lord Bonomy placed emphasis on examining Mr Napier's experience of his conditions through the 'context of the triple vices'[130] and not in isolation.[131] The process of slopping out was described by Lord Bonomy as a two-part practice of: (1) using a bottle to urinate and a chamber pot to defecate whilst in the cell; and (2) emptying these containers at the same time as other prisoners, up to four times a day in a communal area.[132] The Court held that the petitioner was, in an assessment of his conditions *taken together,* being exposed to conditions that diminished his human dignity and brought forth feelings of anxiety, anguish, inferiority, and humiliation — which met the standard for degrading treatment. In reaching his conclusion, Lord Bonomy placed importance on the following features of Mr Napier's detention: the size and condition of the cell,[133] including the poor levels of illumination and ventilation;[134] overcrowding and the doubling up of inmates;[135] inaccessibility to toilets overnight;[136] the slopping out process,[137] poor daily regime and access to out of cell activities;[138] confinement to a small holding unit during court appointments;[139] and the overall negative effect of the conditions on his physical health, particularly the outbreak of serious eczema, and on his mental state.[140]

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[127] [2005] CSIH 16.
[128] Ibid [75].
[129] Ibid [6].
[130] Ibid.
[131] Ibid.
[132] Ibid [19].
[133] Ibid [8-12].
[134] Ibid [13]-[15],[16]-[18].
[135] Ibid [7].
[136] Ibid [75].
[137] Ibid [19]-[27].
[138] Ibid [28].
[139] Ibid [75].
[140] Ibid [34]-[48].

C *Influence of the ECtHR*

The ECtHR has also handed down a number of instructive judgements which may be used in an evaluation of potential human rights violations arising out of conditions associated with overcrowding. With regards to assessing a prisoner's lack of personal space in an attempt to establish a breach of Article 3, the case of *Ananyev v Russia*[141] sets out a three-fold test, in which the absence of *any* of these requirements creates a strong presumption that the conditions experienced amount to degrading treatment:

(a) each detainee must have an individual sleeping place in the cell;

(b) each detainee must have at his or her disposal at least three-square metres of floor space; and

(c) the overall surface of the cell must be such as to allow the detainees to move freely between the furniture items.[142]

This test was most recently upheld in the case of *Mursic v Croatia*,[143] which found that 3 m^2 of floor surface per detainee was the relevant minimum standard to be applied under Article 3 of the ECHR. The ruling did, however, introduce a caveat to this test. The evaluation of whether there has been a breach of Article 3 of the ECHR must take into account the 'cumulative effects' and the duration to which the prisoner was subjected to these conditions. The presumption outlined above could be 'rebutted' by the cumulative effects of all of the conditions of detention.[144] In this particular instance, the applicant had enjoyed: (1) 'sufficient freedom of movement inside the prison';[145] (2) 'various out-of-cell activities…';[146] (3) 'unobstructed access to natural light and air, as well as drinking water';[147] and (4) 'an otherwise appropriate facility'.[148] It was held that the restriction of his personal space was not so severe as to violate Article 3, except during the time he was subjected to 3 m^2 surface space continuously for a period of 27 days.[149] In the case of

[141] (2012) 55 EHRR 18.
[142] Ibid [148].
[143] 65 EHRR 1.
[144] Ibid [76].
[145] Ibid [78]; Ibid [77].
[146] Ibid.
[147] Ibid.
[148] Ibid [78].
[149] Ibid [H3].

Apostu v Romania,[150] the ECtHR noted the additional considerations of: (5) 'heating arrangements'; (6) access to 'basic sanitary requirements'; and (7) 'the possibility of using the toilet in private'.[151]

In *Szafrański v Poland*,[152] where the ECtHR found that the minimum level of severity, namely degrading treatment, had not been met for a breach of Article 3,[153] a violation of Article 8 was recognised on the basis that the applicant was deprived of 'a basic level of privacy in his everyday life' each time he had to use the toilet in the presence of other inmates with only a fibreboard partition and no doors to offer privacy.[154] Notably, this prison did not suffer from overcrowding.[155] In finding a breach of Article 8, the court gave weight to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT),[156] which has ruled that partially concealed toilets are not acceptable in circumstances where a cell is occupied by more than one prisoner.[157] The case of *Szafrański* held that domestic authorities are under a positive obligation to ensure that the minimum level of privacy is reached for prisoners under their care.[158]

IV QUEENSLAND'S POSITION UNDER THE 2019 ACT

Case law from around the world has emphasised the special status of the prohibition on torture, inhuman or degrading treatment or punishment. There is a minimum level of severity which ill treatment must reach before it will fall under the parameter of Article

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[150] (2017) 65 EHRR 8.
[151] Ibid [79].
[152] 64 EHRR 23.
[153] Ibid [29].
[154] Ibid [39].
[155] Ibid [16].
[156] The CPT was set up under the Council of Europe's 'European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment', which came into force in 1989. The CPT is responsible for organising visits to places of detention in order to evaluate treatment of those in detention, whether they be in prisons, police stations, holding centres for immigration detainees, or so on. While it is not an investigative body, and as such does not produce findings which are binding, it provides non-judicial preventive mechanisms which complement the work of the ECtHR. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'About the CPT' Council of Europe Portal (Web Page) <https://www.coe.int/en/web/cpt/about-the-cpt>.
[157] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT's Activities* (Report, 1992) s 49.
[158] *Szafrański v Poland* (2017) 64 EHRR 23 [40].

3 of the ECHR or Article 7 of the ICCPR. Case law from Scotland, Canada, and the ECtHR suggests that consideration must be given to all of the circumstances of the case.

Section 17 of the HRA 2019 provides for protection from torture and cruel, inhuman or degrading treatment, stating: 'a person must not be (a) subjected to torture; or (b) treated or punished in a cruel, inhuman, or degrading way…'.[159] Protections of privacy are less robust, with section 25 providing: 'A person has the right (a) not to have the person's privacy, family, home, or correspondence unlawfully or arbitrarily interfered with'.[160] Protection of this particular group is seemingly strengthened by section 30(1) which provides that '[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person'.[161] This again is strengthened by section 5, which provides that the Act binds all persons, 'including the State', the courts and tribunals, Parliament, and public entities that have functions under Part 3 and Division 4 of the Act. A corrective services facility is identified as a function of a public nature under section 10(3)(a),[162] and the conduct of such public entities is regulated by section 58, which provides: '(1) It is unlawful for a public entity: (a) to act or make a decision in a way that is not compatible with human rights; or (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.'[163] It would seem that the 2019 Act has set up a well defended statute of rights, intended to offer and secure fundamental protections.

Yet, we begin to walk through muddier waters as we approach section 13, which provides that human rights may be limited. Section 13(2) provides a list of relevant factors that may be considered in an evaluation of whether a human right is reasonably and justifiably limited.[164] Section 13 is followed by section 14 which reassures us that '[n]othing in this Act gives any person or other entity a right to limit *to a greater extent than is provided for under this Act*, or destroy, a human right of any person.'[165] As human rights organisations such as Amnesty International have already contended,[166] these sections markedly

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[159] *Human Rights Act 2019* (Qld) s 17 ('*HRA*').
[160] Ibid s 25.
[161] Ibid s 30(1).
[162] Ibid s 10(3)(a).
[163] Ibid s 58.
[164] Ibid s 13(2).
[165] Ibid.
[166] Amnesty International, Submission No 069 to the Legal Affairs and Community Safety Committee, *Inquiry into Human Rights Bill 2018 Queensland* (26 November 2018).

change the force of these fundamental and hard fought for protections. They are further confounded by section 43 which permits Parliament to override '1 or more human rights… despite anything else in this Act.'[167] Worse still, in the context of prison overcrowding, section 126(2) amends the Corrective Services Act 2006:

> To remove any doubt, it is declared that the chief executive or officer does not contravene the Human Rights Act 2019 s 58(1) only because the chief executive's or officer's consideration takes into account:
>
> (a) The security and good management of corrective services facilities; or
> (b) The safe custody and welfare of all prisoners.[168]

It is thus for the Queensland Courts to determine whether the human rights consequences of overcrowding in BWCC, which drastically impact on the human rights of inmates, can be justified by security considerations.

V CONCLUSION

The introduction of the HRA to Queensland marks a significant step forward in the state's commitment to human rights and should be praised. While it does not offer an immediate solution to the various human rights debates that exist, it is an important new tool to attack the harmful consequences that follow from political neglect and reluctance to make funds available for prison reform, as well as from the impact of severe sentencing policies. The interpretation of the HRA should draw on existing case law from comparable countries as a guide. Where it utilises this potential, the Act offers a real remedy for prisoners currently subject to the miseries of overcrowding.

[167] HRA (n 160) s 43.
[168] Ibid s 126(2).

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HOMELESSNESS AND PUBLIC SPACE OFFENCES IN AUSTRALIA — A HUMAN RIGHTS CASE FOR NARROW INTERPRETATION

JULIAN R MURPHY *

Laws criminalising 'vagrancy' are sometimes studied as an historical phenomenon. However, contemporary Australian laws, particularly 'public space offences', continue to have the effect of criminalising homelessness. Public space offences are laws that criminalise otherwise lawful activity – such as sleeping, drinking or hanging about – on the basis that it is done in a public place. Unsurprisingly, homeless people are particularly vulnerable to prosecution under these laws. This article argues that the indiscriminate and expansive application of public space offences would be contrary to international human rights law. That being so, this article suggests that public space offence legislative provisions ought to be construed narrowly so as not to criminalise conduct that is incidental to homelessness. This 'solution' is characterised as a process of rights-orientated statutory interpretation. Not only would this give effect to the assumed legislative intention of complying with Australia's international obligations, but it would also be consistent with the international law orientation of the state and territory Bills of Rights. Most importantly, a narrow interpretation of public space offences so as to exclude conduct incidental to homelessness would protect vulnerable individuals from what many in the international community, and in Australia, consider to be gross human rights violations.

CONTENTS

I INTRODUCTION 104

* Criminal Appeals Manager, North Australian Aboriginal Justice Agency; PhD student, University of Melbourne, School of law. Part of this article was written while I was the beneficiary of a Human Rights Fellowship at Columbia Law School, New York. Thanks to Maria Foscarinis for introducing me to issues at the intersection of law and homelessness. Thanks also to the anonymous referees for their helpful comments.

II CRIMINALISING HOMELESSNESS IN AUSTRALIA – AN INTRODUCTION TO THE PROBLEM 106

A *Definition and Data: 'Homelessness'.* 106

B *Public Space Offences* 107

C *The Impact of Public Space Offences on Homeless People* 108

II A Solution? – International Human Rights Law 111

A *Protections and Rights of Homeless People under International Law* 111

B *Australia's Public Space Offences judged against International Law* 114

C *Mechanisms for Enforcing International Law in Australia* 115

III 'Domesticating' International Law through Statutory Interpretation 116

A *Common Law Interpretative Methods* 117

B *Statutory 'Bills of Rights'* 118

IV Conclusion 120

I INTRODUCTION

> The majestic quality of the law forbids the rich as well as the poor to sleep under bridges.[1]

Anatole France's words retain their acerbic power even now, over a century after they were written. The legal systems of liberal, developed democracies have come a long way since 1910 but not so far as to have abandoned the practice of criminalising homelessness. Australia, for one, continues to enforce laws that have the effect of criminalising homelessness, even in the face of sharp rebukes from the United Nations.[2]

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[1] Anatole France, *Le Lys Rouge* (1910) 3.

[2] The UN Special Rapporteur Leilani Farha said of a proposed Victorian measure: 'The criminalization of homelessness is deeply concerning and violates international human rights law. It's bad enough that homeless people are being swept off the streets by city officials. The proposed law goes further and is discriminatory – stopping people from engaging in life sustaining activities, and penalizing them because they are poor and have no place to live': 'Proposed "Homeless Ban" in Australia cause for concern – UN Expert', United Nations Human Rights: Officer of the High Commissioner (Media Release, 13 March 2017) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21357&LangID=E>. See also Committee on Economic, Social and Cultural Rights, Concluding Observations, E/C.12/AUS/CO/5 (July 11, 2017) [41c] – [42c]: 'The Committee is concerned about the … [p]roposed amendments to a local law in Melbourne that have the effect of criminalizing homelessness. … The Committee also recommends

One category of such laws can be described as 'public space offences'. These laws criminalise what would otherwise be lawful activity — such as sleeping, drinking or 'hanging about'[3] — on the basis that it is done in a public place.[4] Unsurprisingly, homeless people living in public spaces are particularly vulnerable to prosecution under these laws. In this article I argue that, when understood against the backdrop of international human rights law, public space offences in Australia should be construed narrowly so as *not* to criminalise conduct that is incidental to homelessness. On this approach, a 'sleeping under bridges' offence would not apply to a person who is only sleeping under a bridge because they are homeless.[5]

This article will proceed in three parts. Part I is concerned with describing the contours of homelessness in Australia particularly, the criminalisation of homelessness through public space offences. In Part II, I put forward a potential 'solution', namely, the protections offered by international human rights law. Closer analysis, however, will reveal that these protections are incapable of being *directly* enforced in domestic Australian law, for example, to provide a defence for homeless people charged with public space offences. Accordingly, Part III proposes a means by which the protections of international human rights law can be *indirectly* applied in Australian courts, through a process of rights-orientated statutory interpretation. On this approach, international human rights law would serve as an interpretative guide requiring courts to narrow the operation of Australia's public space offences so as to exclude their application to conduct incidental to homelessness.[6]

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that the State party … [r]eview existing and draft legislation in states and territories that have the effect of criminalizing homelessness.'

[3] 'Hanging about' is one judicial synonym for the offence of loitering. See *Samuels v Stokes* (1973) 130 CLR 490, 498 (Menzies J).

[4] Tamara Walsh, *Homelessness and the Law (*Federation Press, 2011) 71.

[5] While I am not the first to have made such an argument, I am the first to have framed it as a question of statutory interpretation. Cf Philip Lynch, 'Begging for Change: Homelessness and the Law' (2002) 26 *Melbourne University Law Review* 690, 699.

[6] To be clear, my argument is that conduct that is incidental to homelessness should not attract any criminal liability. It is not sufficient, in my eyes, that such conduct may, post facto, be eligible for a fine waiver. See *Infringements Act 2006* (Vic) s 3(1) (definition of 'special circumstances'); *Infringements Regulations 2016* (Vic) reg 7.

II CRIMINALISING HOMELESSNESS IN AUSTRALIA – AN INTRODUCTION TO THE PROBLEM

A *Definition and Data: 'Homelessness'*

The task of defining 'homelessness' is not easy. Scholars,[7] governmental agencies,[8] and international bodies all proffer differing definitions.[9] Of particular complexity is the task of defining homelessness as it affects Indigenous Australians, some of whom have different relations to land and place as compared to non-Indigenous Australians.[10] These definitional issues, while troubling as a matter of public policy formulation, present no obstacle for this article. I am focused on a particular experience of homelessness that is likely to be encompassed within *all* definitions, namely, the experience of residing in streets, parks, public buildings, or other public places not designated or designed for accommodation.

The most recent census data (2016) shows that 8,200 people per night experience this

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[7] See, eg, Chris Chamberlain & David MacKenzie, 'Understanding Contemporary Homelessness: Issues of Definition and Meaning' (1992) 27 *Australian Journal of Social Issues* 274: a proposed three-tiered definition that includes individuals sleeping in public or in improvised shelters, individuals sleeping with friends or relatives, or in homeless shelters, and individuals living in short or long-term insecure housing, including boarding houses or caravan parks). Chamberlain & MacKenzie's definition has been referred to in various government and non-governmental reports. See, eg, Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home: A National Approach to Reducing Homelessness* (Report, 2008) 3; Andrew Bevitt, Journeys Home Research Report No. 6: Complete Findings from Waves 1 to 6 (Report, May 2015) 1; Law Council of Australia, *The Justice Project – Homeless Persons Consultation Paper* (Paper, 2017) 5.

[8] See, eg, Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness 2016 – Key Findings* (Catalogue No 2049.0, 29 March 2018): 'a person is homeless if they do not have suitable accommodation alternatives and their current living arrangement: is in a dwelling that is inadequate; has no tenure, or if their initial tenure is short and not extendable; or does not allow them to have control of, and access to space for social relations'. See also Australian Bureau of Statistics, *Information Paper: A Statistical Definition of Homelessness 2012; Factsheet: Homelessness in concept and in some measurement contexts* (Catalogue No 4922.0, 4 September 2012): explaining the rationale behind the ABS definition of homelessness and acknowledging its cultural bias.

[9] See, eg, Committee on Economic, Social and Cultural Rights, Gen*eral Comment No 4: The Right to Adequate Housing*, 6th sess, UN Doc E/1992/23 (13 December 1991) at [7] suggesting that a person is homeless if they have anything short of adequate housing allowing them to live in security, peace and dignity.

[10] See, eg, Suzie Forell, Emily MacCarron & Louis Shetzer, *No Home, No Justice? The Legal needs of homeless people in NSW*: Access to Justice and Legal Needs (Report, Volume 2, July 2005) 5 (discussing the Indigenous experience of 'spiritual homelessness' that can arise as a result of geographic isolation from traditional land or family and kinship networks). See also Committee on Economic, Social and Cultural Rights, *Concluding Observations,* E/C.12/AUS/CO/5 (July 11, 2017) [41d]: 'The Committee is concerned about the … [o]vercrowding and severe shortage of housing for indigenous peoples living in remote areas'. See also Committee on the Elimination of Racial Discrimination, *Concluding Observations*, 2496-2597th sess, CERD/C/AUS/CO/18-20, (26 December 2017) para [23].

type of homelessness.[11] This represents a 20 per cent increase since the previous census in 2011.[12] A significant portion (27 per cent) of these people were Indigenous, despite the fact that Indigenous people only make up 20 per cent of the total homeless population, and a mere 3 per cent of the general population.[13]

B *Public Space Offences*

Homelessness is rarely, if ever, criminalised explicitly. Instead, laws will often prohibit a person from engaging in certain conduct in a public place, where that behaviour would otherwise be lawful in private. These can conveniently be labelled 'public space offences'. Every jurisdiction in Australia has public space offences written into statute.[14] To understand how public space offences effectively criminalise homelessness we can look at three examples: laws criminalising sleeping, drinking, and loitering in public.

An example of a law criminalising sleeping in public can be seen in the controversial by-laws proposed by the Melbourne City Council in 2017. These laws would have made it an offence to sleep in public in the central business district of Melbourne.[15] The laws were not directed at late night travellers who might stop for a nap on a park bench. Rather, they targeted people experiencing homelessness.[16] Nor were these laws particularly novel, they were just the latest in a long line of similar council prohibitions around Australia.[17]

The second example can be seen in the Northern Territory's public drinking offences,[18]

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[11] To be exact, this figure described the number of people on census night who were 'living in improvised dwellings, tents or sleeping out'.
[12] Australian Bureau of Statistics, Census of Population and Housing: Estimating Homelessness 2016 – Key Findings (Catalogue No 2049.0, 29 March 2018).
[13] Ibid. In reality, the data is likely to underestimate Indigenous homelessness because, as the ABS acknowledges, some Indigenous people report their usual address as a town or locality, which leaves the ABS unable to confirm the housing status of such people.
[14] See, eg, Vagrancy Act 1966 (Vic) s 6(1)(d); Vagrants, Gaming and Other Offences Act 1931 (Qld) s 4(1)(k), Summary Offences Act 1953 (SA) s 12 (1)(a); Police Act 1892 (WA) s 65(3); Police Offences Act 1935 (Tas) s 8(1)(a); Summary Offences Act 1923 (NT) s 47A(1).
[15] See Committee on Economic, Social and Cultural Rights (n 10): 'The Committee is concerned about the … [p]roposed amendments to a local law in Melbourne that have the effect of criminalizing homelessness'.
[16] Josh Butler, 'Melbourne's Laws Outlawing Homelessness, and the Campaign to Reverse Them', *Huffington Post* (online, 6 April 2017) <https://www.huffingtonpost.com.au/2017/04/06/melbournes-laws-outlawing-homelessness-and-the-campaign-to-rev_a_22027975/>.
[17] James Farrell, 'Councils are Criminalising Homelessness' *ABC News* (online, 8 February 2011) <http://www.abc.net.au/news/2011-02-08/how_councils_are_criminalising_homelessness/43734>.
[18] See, eg, *Liquor Act 1978* (NT), s 101U(1). See also, s101T (defines regulated place as public place).

which turn dual public health problems (homelessness and alcoholism) into a singular 'law and order' issue. The sometimes-tragic operation of such laws can be seen in a 2015 decision of the Northern Territory Coroners Court.[19] There, a homeless Aboriginal man was drinking at a public park in the Darwin region. He was arrested for drinking alcohol in a prohibited place.[20] The maximum penalty for that offence was a $74 fine, however the police arrested the man and took him to the police station. He died in custody a few hours later as a result of his pre-existing heart condition. In an impassioned decision, the Coroner highlighted the 'differential treatment' resulting from laws criminalising public drinking. The effect, the Coroner said, was to allow a large portion of the public to drink freely in licenced establishments on the main entertainment strip in Darwin, while one street away homeless people were being detained, and treated like criminals for drinking in a public park.[21]

Finally, the paradigmatic public space offence is that of loitering, an example of which reads:

> Loitering – General Offence
>
> (1) A person loitering in any public place who does not give a satisfactory account of himself when requested so to do by a member of the Police Force shall, on request by a member of the Police Force to cease loitering, cease so to loiter.
>
> Penalty: $2,000 or imprisonment for 6 months, or both.[22]

It is hard not to intuit, even from the bare text, that it presents a danger of being disproportionately applied to homeless persons. Particularly those residing in public spaces. Unsurprisingly, this intuition is confirmed by the limited available data, which is discussed in the following section.

C *The Impact of Public Space Offences on Homeless People*

Currently no quantitative data is publically available, on the rates at which homeless people are charged with public space offences in Australia. This is because, when

[19] Inquest into the death of Perry Jabanangka Langdon [2015] NTMC 016.
[20] *Liquor Act 1978* (NT) s 101U(1).
[21] Inquest into the death of Perry Jabanangka Langdon [2015] NTMC 016 at [79].
[22] Summary Offences Act 1923 (NT) s 47A(1).

charging people for public space offences, police departments do not request or record their housing status. There are, however, a number of published studies describing this phenomenon in particular locations, which provide some idea of the scope of the problem.

In Queensland, the most informative empirical data relates to the use of police 'move-on' powers. These powers allow police to direct a person to leave a particular public area;[23] if the person fails to leave, the police may charge the person with an offence.[24] While state-wide data does not measure the use of move-on powers against homeless people,[25] there are small-scale studies that provide some insight. For example, one survey of 132 homeless people in Brisbane found that 77 per cent of respondents had been 'moved on' by police in the last 6 months.[26] In addition, at least one reported case reached the Queensland Court of Appeal in which a homeless person was 'moved on' unlawfully.[27]

Similar to Queensland, New South Wales provides no-state wide dataset describing the rates at which homeless persons are charged with public space offences. There is, however, a wealth of anecdotal accounts and qualitative survey data suggesting that homeless persons in New South Wales are disproportionately charged with public space offences. As early as 1999, the New South Wales Ombudsman observed that police were using move-on powers to regulate behaviour associated with homelessness, such as begging and sleeping on the street.[28] More recently, researchers came to the following conclusions after interviewing a number of homeless people that '[b]ecause homeless people … spend much of their time in the public space, they are highly visible to police. Homeless participants, particularly those who sleep rough in parks, bus stops, and other

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[23] *Police Powers and Responsibilities Act 2000* (Qld) s 39. See also *Rowe v Kemper* (2009) 1 Qd R 247, 254 [6]: describing the power as a 'move on' power.
[24] Police Powers and Responsibilities Act 2000 (Qld) s 445.
[25] See, *Summary Offences Act 1923* (NT) s 6 and s 18: 'Lack of data ... means that we are unable to answer a key question about whether move-on powers have a disproportionate impact on homeless people' and 'because of the nature of the data provided by the [police], we were unable to determine the impact of the move-on powers on homeless people. Police do not specifically record "homelessness" as a category. Police may record a person's address as "no fixed address" but this does not necessarily mean that person would regard themselves as homeless'.
[26] Tamara Walsh and Monica Taylor, '"You're Not Welcome Here": Police move-on powers and anti-discrimination law' (2007) 30(1) *University of New South Wales Law Journal* 151, 160.
[27] *Rowe v Kemper* [2009] 1 Qd R 247.
[28] Irene Moss, *Policing Public Safety* (Report, New South Wales Ombudsman, 1999) 258–259.

public spaces, commonly report being asked to "move on" by police.'[29] The same researchers reviewed data and interviewed legal services in respect to substantive public space offences. The authors concluded that public space offences 'were a major problem for many homeless people who, because of their lack of private housing and economic disadvantage, were more likely to be publicly visible.'[30]

That observation was confirmed by focus groups and interviews of people experiencing homelessness in Victoria. It was reported that 'homeless people are more likely to attract attention from law enforcement officers … [and] more likely to be fined or charged in relation to their behaviour in public spaces'.[31] One Victorian homeless person's story deserves recounting in some detail because it powerfully exposes the need for change to Australia's current approach to public space offences:

> Andy … used to sleep rough … He suffers from an acquired brain injury and an intellectual disability. He also suffers from chronic alcoholism, a legacy of trying to cope with life on the street. Between 1996 and 2001, Andy received more than $100 000 in fines for offences such as drinking in a public place, swearing, urinating, and littering. Most of the fines were issued around Flinders Street railway station — the location of his community, his support network, and his 'home'. Non-payment of such fines can result in imprisonment for up to one day per $100.[32]

Similar examples are available from other states and territories.[33] Notwithstanding the absence of comprehensive data, the evidence outlined in the preceding paragraphs establishes that public space offences are disproportionately applied to homeless people *as a result of their homelessness*. This is unacceptable; it effectively creates 'status offences' contrary to the central tenet of our legal system that criminal liability ought to be determined according to what someone has *done*, not who they *are*.[34] The remainder

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[29] Suzie Forell, Emily MacCarron & Louis Shetzer, No Home, No Justice? The Legal needs of homeless people in NSW: Access to Justice and Legal Needs (Report, Vol 2, July 2005) 109.
[30] Ibid 105 ('The criminal law issues … [that homeless people] face reflect their living situation: … street offences are a result of them being particularly visible to police and other enforcement officers responsible for regulating the use of public space').
[31] Beth Midgley, 'Achieving Just Outcomes for Homeless People through Court Process' (2005) 15 *Journal of Judicial Administration* 82, 86.
[32] Philip Lynch, 'Begging for Change: Homelessness and the Law' (2002) 26 *Melbourne University Law Review* 690, 697.
[33] See Priscilla Lavery, 'Homelessness and Public Spaces Issues in Darwin' (2014) 27 *Parity* 14, 14–15.
[34] See Department of Attorney-General and Justice, *Final Report: Review of the Summary Offences Act,* (Report, August 2013) 13–14, discussing contemporary objections to 'status offences' relating to

of this article suggests a route to reforming Australia's current approach to public space offences so as to avoid criminalising homelessness.

III A SOLUTION? – INTERNATIONAL HUMAN RIGHTS LAW

International law protects homeless people and affords them positive rights in a number of ways. In what follows, I map the sources of international law's protections for homeless people. I then suggest that Australian laws criminalising homelessness, including indiscriminate public space offences, are inconsistent with international law. Finally, I explain the difficulty of enforcing international law in Australia.

A *Protections and Rights of Homeless People under International Law*

The *Universal Declaration of Human Rights* ('UDHR'), under Article 25, provides for a minimum standard of housing, stating that '[e]veryone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, *housing* and medical care and necessary social services …'.[35] While the UDHR is not a treaty, it is recognised as customary international law.[36] A number of United Nations (UN) appointed experts have recognised the criminalisation of homelessness as a potential infringement of basic human rights.[37]

The preamble of the *International Convention on Civil and Political Rights* (the 'ICCPR') states the following: 'the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and

homelessness; Stephen Gray and Jenny Blokland, *Criminal Laws Northern Territory* (Federation Press, 2nd ed, 2012) 274.

[35] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), at 71 [art 25] (emphasis added).

[36] See Hilary Charlesworth, 'The Universal Declaration of Human Rights', in Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008) [16]: outlining the conflicting literature on whether or not the norms contained in the UDHR have the status of customary international law; Maria Foscarinis et al., 'The Human Right to Housing: Making the Case in the US' (2004) *Clearinghouse Review Journal of Poverty Law and Policy* 97, 110–111; Maria Foscarinis, 'Homelessness, Litigation and Law Reform Strategies: A United States Perspective' (2004) 10 *Australian Journal of Human Rights* 105, 122: 'The Universal Declaration of Human Rights is a declaration, not a treaty, and thus not by its terms binding, though some argue that it has achieved the status of customary international law and therefore is binding'.

[37] United Nations Human Rights, 'Moving away from the criminalization of homelessness, a step in the right direction', *Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation* (Press Release, 23 April 2012) <http://sr-watersanitation.ohchr.org/en/Pressrelease_usa_2.html>.

cultural rights'.[38] This covering statement is given context by the enumeration of various rights in the body of the Convention, including the following:

- Article 7 protects against 'cruel, inhuman or degrading treatment or punishment'. The UN Human Rights Committee has suggested that this prohibition is implicated by public space offences, such as those criminalising eating, sleeping, or sitting in particular public areas.[39]
- Article 9 guarantees, amongst other things, that 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention'. The UN Human Rights Committee has referred to this provision when raising concerns about public space offences.[40]
- Article 12 protects the 'right to liberty of movement and the freedom to choose [one's] residence'. This provision has plausibly been argued to have a bearing on homelessness, and specifically domestic laws that criminalise incidents of homelessness.[41]
- Article 17 states: '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, *home* or correspondence, nor to unlawful attacks on his honour and reputation'. (emphasis added) This provision was cited by the UN Human Rights Committee when the Committee recently expressed concern about US public space offences.[42]
- Finally, Article 26 of ICCPR's catch-all discrimination prohibition, might be argued to protect homeless persons from discrimination on account of their status as homeless. [43] Some scholars and litigators have argued that domestic laws

[38] *International Covenant on Economic, Social and Cultural Rights,* opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[39] See Human Rights Committee, *Concluding Observations*, 110th sess, CCPR/C/USA/CO/4, (23 April 2014) [19]: '[t]he Committee is concerned about reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular areas, etc. The Committee notes that such criminalization raises concerns of … cruel, inhuman or degrading treatment'.
[40] See Ibid, discussing US laws criminalising homelessness and referring to Article 9.
[41] Maria Foscarinis et al., 'The Human Right to Housing: Making the Case in the US' (2004) *Clearinghouse Review Journal of Poverty Law and Policy* 97, 110: describing Article 12 as 'relevant to challenges to laws criminalizing homelessness'.
[42] See Human Rights Committee (n 39), discussing US laws criminalising homelessness and referring to Article 17.
[43] Article 26 protects against discrimination based 'on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, *property, birth, or other status'* (emphasis added).

criminalising homelessness violate this provision.[44] This view appears to be shared by the UN Human Rights Committee, which has cited Article 26 discrimination concerns in relation to laws criminalising homelessness.[45]

Other than the UDHR and the ICCPR, there are a number of other potential international law instruments protecting homeless people. The *International Covenant on Economic, Social and Cultural Rights* establishes, in Article 11, a multifaceted right to housing but only imposes an obligation on the state to achieve 'progressive realisation' by the allocation of 'maximum available resources'.[46] The *International Convention on the Elimination of Racial Discrimination* explicitly prohibits racial discrimination in the context of housing.[47] This provision was referred to by the UN Committee on the Elimination of Racial Discrimination when it was presented with evidence of US laws criminalising homelessness.[48] The UN Committee on Economic, Social and Cultural Rights has recognised a further six[49] international instruments protecting the right to adequate housing.[50] Further, it is arguable that the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* is relevant for the same reasons as

[44] Philip Lynch & Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as Human Rights Violation' (2003) 4 *Melbourne Journal of International* Law 139, 149; Maria Foscarinis et al., 'The Human Right to Housing: Making the Case in the US' (2004) *Clearinghouse Review Journal of Poverty Law and Policy* 97, 108 ('[the] use of criminal law to punish homeless people for conduct inherent in their status constitutes discrimination based on "property, birth or other status" in contravention of the International Covenant on Civil and Political Rights').

[45] Human Rights Committee (n 39): 'the Committee is concerned about reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular areas, etc. The Committee notes that such criminalization raises concerns of discrimination'.

[46] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See Committee on Economic, Social and Cultural Rights, General Comment No 4: The Right to Adequate Housing, 6th sess, UN Doc E/1992/23 (13 December 1991)

[47] *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

[48] Committee on the Elimination of Racial Discrimination, *Concluding Observations*, 2299-2300th sess, CERD C/USA/CO/7-9 (28 September 2014) [12]: 'the Committee is concerned … at the criminalization of homelessness through laws that prohibit activities such as loitering, camping, begging, and lying in public spaces'.

[49] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 14(2); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 27; *Declaration on Social Progress and Development,* GA Res 2542(24) UN Doc A/RES/24/2542 (11 December 1969), art 10; *Vancouver Declaration on Human Settlements* Sales No. E.76.IV.7 and Corr. 1, taken from UN General Assembly, *Habitat: United Nations Conference on Human Settlements,* 31st sess, A/RES/31/109, (16 December 1976) section III (8); *Declaration on the Right to Development,* GA Res 128(41) UN Doc A/RES/41/128 (4 December 1986) art 8(1); International Labour Organisation, *ILO Recommendation Concerning Workers' Housing No. 115*, 45th sess, (28 June 1961).

[50] Committee on Economic, Social and Cultural Rights, G*eneral Comment No 4: The Right to Adequate Housing*, 6th sess, UN Doc E/1992/23 (13 December 1991) [3] nn 3.

Article 7 of the ICCPR (both of which prohibit cruel, inhuman, or degrading treatment or punishment).[51] Finally, the *UN Declaration on the Rights of Indigenous Peoples* protects the connection of Indigenous people to their traditional land.[52] This protection could conceivably be implicated by domestic laws criminalising certain uses of public space where that space is traditional Indigenous land.

B *Australia's Public Space Offences judged against International Law*

With the benefit of the above survey of international law, it must be concluded that many Australian public space offences contravene international law. At least insofar as they criminalise conduct incidental to homelessness. Three examples suffice to justify that conclusion.

Australian laws that make it illegal to drink alcohol in public places have the potential to infringe international human rights when applied to homeless persons,[53] especially where those persons are effectively foreclosed from drinking in licenced establishments by virtue of their poverty. The Northern Territory's public drinking laws can be seen to have such an operation. As was adverted to above, such laws are disproportionately applied to homeless people (often Indigenous) who are drinking in public due to their homelessness and their inability to meet the dress codes of licenced establishments.[54] Where a person is arrested for such behaviour, that arrest is likely to contravene the ICCPR's protection, in Article 9, against arbitrary arrest and detention.[55]

An example of the offence of loitering has already been quoted above. Essentially, it creates a criminal offence for a person spending time in a public space who is not able to give an adequate reason for being there.[56] Under existing Australian law, it appears that such offence provisions are applied, or threatened to be applied, to homeless people. One homeless person in Darwin described being 'moved on', apparently under the loitering laws, while sleeping under a tree in a park.[57] This appears to infringe Article 7 of the

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[51] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85, art 16.
[52] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc. A/RES/61/295 (2 October 2007, adopted September 2007).
[53] See, eg, *Liquor Act 1978* (NT) s 101U(1).
[54] Inquest into the death of Perry Jabanangka Langdon [2015] NTMC 016 at [78].
[55] See Human Rights Committee (n 39).
[56] See, eg, *Summary Offences Act 1923* (NT) s 47A(1).
[57] Priscilla Lavery, 'Homelessness and Public Spaces Issues in Darwin' (2014) 27 *Parity* 14, 15.

ICCPR (prohibiting cruel, inhuman, and degrading treatment),[58] and likely many other international law protections described above in Part IIA.

Finally, one offence that is likely to be more heavily enforced in the new terrorism-alert era is the offence of leaving personal belongings unattended. While not particularly common in Australia at present, it was proposed by the City of Melbourne Council as an amendment to the *Activities Local Law 2009* (Vic). The aim of the proposed law was to allow the Council more powers to disband homeless 'camps' and remove items left there.[59] If such a law had been passed and enforced, it would likely infringe Article 17 of the ICCPR, which relevantly protects against arbitrary interference with a person's privacy and home.[60] The United Nations Special Rapporteur has also suggested that such laws would discriminate on the basis of a person's status as homeless,[61] and thus offend Article 26, the anti-discrimination provision of the ICCPR.[62]

Having concluded that a number of Australia's current and proposed public space offences contravene international human rights law, the pressing question for homeless persons and their advocates is: *how can international human rights law be enforced in Australia?* As will be seen in the next section, the answer to that question is somewhat dispiriting.

C *Mechanisms for Enforcing International Law in Australia*

The question of how to enforce international human rights law within Australia is a vexing one. Currently, ratification of an international agreement does not necessarily make that agreement part of domestic Australian law.[63] Nor do we have any enforceable constitutional right — such as the US 'substantive due process' or 'privileges and

[58] See Human Rights Committee (n 39): 'the Committee is concerned about reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular areas, etc. The Committee notes that such criminalization raises concerns of … cruel, inhuman or degrading treatment'.
[59] See Law Council of Australia, The Justice Project – Homeless Persons Consultation Paper (Paper, 2017), 27–28.
[60] See Human Rights Committee (n 39) discussing US public space offences and referring to Article 17.
[61] Leilani Farha, quoted in 'Proposed "Homeless Ban" in Australia cause for concern – UN Expert' *United Nations Human Rights: Officer of the High Commissioner* (Media Release, 13 March 2017) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21357&LangID=E>.
[62] Article 26 protects against discrimination based 'on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, *property, birth, or other status'* (emphasis added).
[63] Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 286–287.

immunities' doctrines — through which we can channel international law protections.[64] The provisions of a ratified treaty only form part of Australian law once they have been enacted in legislation.[65] Instruments like the ICCPR do not create rights and obligations directly enforceable in Australian law.[66] Unless and until the Australian parliament make laws implementing international protections,[67] such protections remain largely unenforceable in domestic Australian law.

While not *enforceable*, international law rights can be *influential* in Australian law in other ways. Firstly, international law arguments can have persuasive power in law reform debates.[68] Recently, international law arguments were powerfully deployed by opponents to the City of Melbourne's proposal to criminalise homeless camps in the central business district.[69] Secondly, successful complaints to the UN Human Rights Committee can result in international pressure on the Australian government to change laws infringing human rights.[70] Finally, and most relevantly to the present discussion, international law can offer guidance as to the proper interpretation of domestic statutes, including public space offences.

III 'DOMESTICATING' INTERNATIONAL LAW THROUGH STATUTORY INTERPRETATION

Statutory interpretation presents as the most effective mechanism for 'domesticating' international human rights. That is, giving these rights legal recognition in Australian

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[64] See Maria Foscarinis, 'Homelessness, Litigation and Law Reform Strategies: A United States perspective' (2004) 10 *Australian Journal of Human Rights* 105, 123 (Discussing ways in which 'a right to housing' might be located in the US Constitution.).
[65] *Victoria v Commonwealth* (1996) 187 CLR 416, 481–482.
[66] Minogue v Human Rights and Equal Opportunity Commission (1999) 84 FCR 438, 447.
[67] With respect to the federal government's constitutional power to make laws giving effect to Australia's international law obligations, see *Commonwealth v Tasmania* (1983) 158 CLR 1: discussing the external affairs power in s 51(xxix) of the Australian Constitution.
[68] See generally Philip Lynch & Jacqueline Cole, 'Homelessness and Human Rights: Regarding and Responding to Homelessness as Human Rights Violation' (2003) 4 *Melbourne Journal of International Law* 139, 165–166: discussing the persuasive power of framing policy issues in the language of international human rights.
[69] See, eg, Josh Butler, 'Melbourne's Laws Outlawing Homelessness, and the Campaign to Reverse Them' *Huffington Post* (online, 6 April 2017) <https://www.huffingtonpost.com.au/2017/04/06/melbournes-laws-outlawing-homelessness-and-the-campaign-to-rev_a_22027975/>. See also, with respect to the removal of homeless camps in Sydney: Cristy Clark, 'Clearing Homeless Camps Compounds the Violation of Human Rights and Entrenches the Problem' *The Conversation* (10 August 2017) <http://theconversation.com/clearing-homeless-camps-compounds-the-violation-of-human-rights-and-entrenches-the-problem-82253>.
[70] Ronald Sackville, 'Homelessness, Human Rights and the Law' (2004) 10 *Australian Journal of Human Rights* 11, 16–17.

courts. There are two particular interpretative methods that might advance this project. First, there is a common law rule (now enshrined in statute) that legislation should be interpreted consistently with Australia's international law obligations if such an interpretation is possible. Secondly, there are more powerful state and territory 'Bills of Rights'. These require, as far as possible, that legislation be interpreted so as to be compatible with certain enumerated human rights.

A *Common Law Interpretative Methods*

In the case of *Minister for Immigration and Ethnic Affairs v Teoh*, the High Court recognised a common law interpretative rule that, where statutory language is ambiguous or would lead to an unreasonable result, courts may look to Australia's international obligations to inform the interpretation of the particular statutory provision.[71] This rule has subsequently been legislated in each of the state and territory Interpretation Acts.[72] At first, one might think that this rule would allow Australian courts to use international law sources to compel a narrow interpretation of public space offences so that they do not cover conduct incidental to homelessness. Unfortunately, two limitations to the common law rule suggest that it may not have quite this much interpretative suasion.

First, this rule arguably only permits reference to international treaties entered into *prior* to the enactment of the statute being interpreted (the rationale for this view is that Parliament may only be presumed to legislate against the background of *existing*, not future, treaty obligations.).[73] This presents a problem for lawyers trying to invoke international law to argue for narrow interpretations of public space offences as applied to homeless people. Most public space offences were enacted many decades *before* Australia's entry into the ICCPR and the other international instruments surveyed above in Part II A.

The second limitation of such an interpretative argument is that it is only available in circumstances where a court finds the statutory language to be 'ambiguous',

[71] Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 286–287.
[72] Legislation Act 2001 (ACT) ss 141-143; Interpretation Act 1987 (NSW) s 34; Interpretation Act 1987 (NT) s 62B; Acts Interpretation Act 1954 (Qld) s 14B; Acts Interpretation Act 1931 (Tas) s 8B; Interpretation of Legislation Act 1984 (Vic) s 35(b); Interpretation Act 1984 (WA) s 19.
[73] Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 287.

'unreasonable' or 'manifestly absurd'.[74] These preconditions may be difficult to satisfy, especially given what appears to be a history of public space offences being interpreted to apply to conduct incidental to homelessness. So, for example, if an Australian court were faced with the 'sleeping under bridges' offence at the opening of this article, the court would likely find the provision to be unambiguous and thus would refuse to consider international law materials. Accordingly, a more effective way to translate the concerns of international law into the language of domestic Australian law is to use the state and territory 'Bills of Rights'.

B *Statutory 'Bills of Rights'*

Three Australian jurisdictions — the Australian Capital Territory ('ACT'), Victoria, and Queensland — have enacted statutory Bills of Rights.[75] These statutes require courts, 'so far as it is possible', to interpret State and Territory legislation in a manner that is 'consistent' or 'compatible' with certain enumerated human rights.[76] Importantly, the drafters of these Bills of Rights replicated verbatim the language of various international treaties to which Australia is a party — such as the ICCPR. The High Court has explained that when this occurs, Australian courts may look to international law for assistance in interpreting the domestic statute.[77]

In Victoria's Bill of Rights, there are a number of freedoms and protections that might pose interpretative limits on the application of public space offences to homeless people. These include: the protection from cruel, inhuman, or degrading treatment;[78] the right to

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[74] See, eg, Interpretation Act 1984 (WA) s 19.
[75] See Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2019 (Qld).
[76] See *Human Rights Act 2004* (ACT) s 30(1): 'So far as it is possible to do so consistently with the its purpose, a Territory law must be interpreted in a way that is consistent with human rights'; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1): 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'; *Human Rights Act 2019* (Qld) s 48(1): 'All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights'.
[77] See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-231 ('If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty.'). See also DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) [2.20] 54: 'Where legislation gives effect to an international convention or treaty or portion thereof by adopting the words of the convention or treaty, in the interests of certainty and uniformity it has been recognised that those provisions should be interpreted using the interpretative principles which are applied to the convention or treaty'.
[78] Charter of Human Rights and Responsibilities Act 2006 (Vic) s 10(b).

free movement;[79] the right not to have one's privacy or home arbitrarily interfered with;[80] the right to be free from arbitrary arrest or detention,[81] and the right of Indigenous people to maintain their relationship with land to which they have a traditional connection.[82] In both Queensland[83] and the ACT,[84] the protections are the same, but with one addition: the ACT statute contains a right to be treated equally and without '[d]iscrimination because of … property … or other status.'[85] Acknowledging this suite of rights, it is necessary to consider how such rights might be utilised to protect homeless people from public space prosecutions in Victoria, Queensland, and the ACT.

Consider, for example, a situation in which Victoria had passed its laws against sleeping in the central business district of Melbourne. If a homeless person was charged with an offence under this law, they would have a strong argument in their defence that, in order to be 'compatible' with rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*,[86] the statute should be interpreted to exclude conduct incidental to homelessness. The particular rights that could be argued to compel such a narrowing interpretation are the right to freedom of movement,[87] and the right to be free from cruel, inhuman, or degrading treatment.[88] The plausibility of these arguments is confirmed by reference to international case law. In the United States, advocates for homeless people successfully challenged similar laws. The court hearing the case held

[79] Ibid s 12.
[80] Ibid s 13.
[81] Ibid s 21(2).
[82] Ibid s 19(2)(d). The language of this provision is derived from Articles 25 and 31 of the *United Nations Declaration of the Rights of Indigenous Peoples.*
[83] See *Human Rights Act 2019* (Qld) s 17(b) (protection from cruel, inhuman or degrading treatment); s 19 (right to free movement); s 25(a) (right not to have privacy interfered with arbitrarily); s 28(2)(d) (right of Indigenous people to maintain and strengthen their distinct connection to the land); s 29(2) (right to be free from arbitrary arrest or detention).
[84] See *Human Rights Act 2004* (ACT) s 10(1)(b) (protection from cruel, inhuman or degrading treatment); s 12(a) (right not to have privacy interfered with arbitrarily); s 13 (right to free movement); s 18(1) (right to be free from arbitrary arrest or detention); s 27(2)(b) (right of Indigenous people to the recognition and value of their traditional connection to land).
[85] See *Human Rights Act 2004* (ACT) s 8(3): entitlement to equal protection of the law without discrimination); s 8: 'Examples of discrimination' (making clear that 'discrimination' includes 'discrimination because of … property … or other status').
[86] The compatibility imperative is contained in s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[87] Charter of Human Rights and Responsibilities Act 2006 (Vic) s 12.
[88] Ibid s 10(b).

that laws prohibiting sleeping in public violated a homeless person's right to freedom of movement and their right to be free from cruel and unusual punishment.[89]

A further argument might be engaged if the person prosecuted under the Victorian laws was a local Indigenous homeless person. In such a case, that person might be able to claim that sleeping on their traditional land was part of their way of maintaining their connection to the land. If that argument were accepted, the law would likely be read so narrowly as to exclude such persons, and would thus be compatible with s 92(2)(d) of the Victorian *Charter of Human Rights and Responsibilities* (which protects an Indigenous person's right to maintain connection to their traditional land).

IV CONCLUSION

Homelessness is rarely, if ever, a choice.[90] Instead, it is better understood as a personal circumstance that is primarily linked to economic status but is also significantly influenced by social factors, including age, gender, Indigeneity, substance dependence, and mental health.[91] We do not normally punish people for social circumstances beyond their control. However, as the previous analysis ought to have made clear, many of our criminal laws punish conduct incidental to homelessness. How might we remedy this situation?

This article proposes that we take a human rights orientated approach to limiting the application of public space offences to homeless people. This approach is admittedly modest, even conservative, in two respects. First, to invoke international human rights law is, to some extent, to engage the very same international power structures of globalised, neo-liberal democracies which have allowed the homelessness epidemic to occur in the first place. Second, to propose a 'solution' at the level of statutory interpretation is to address the problem too late. By the time an issue has made its way to court — the primary forum for statutory interpretation — many opportunities for

[89] *Pottinger v City of Miami* 76 F3d 1154 (11th Cir 1996). While this case was decided on US constitutional grounds, the reasoning process is analogous to that which would be available in Victoria with reference to the rights under the *Charter of Human Rights and Responsibilities 2006* (Vic).

[90] Cf Cameron Parsell and Mitch Parsell, 'Homelessness as a Choice' (2012) 29 *Housing, Theory and Society* 420.

[91] Philip Lynch, 'From "cause" to "solution": Using the law to respond to homelessness' (2003) 28 *Alternative Law Journal* 127, 127.

change have been missed. Other theories of change might focus on changes to legislation, police practices, and prosecutorial charging decisions.

Notwithstanding these limitations, there remains considerable value in addressing the criminalisation of homelessness in the field of statutory interpretation. That value is threefold. Firstly, such an approach is capable of being applied immediately and with very real positive consequences for individuals prosecuted under existing public space offences. For example, a person prosecuted tomorrow for a public space offence could advance a statutory interpretation argument of the type proposed here and, if successful, would avoid conviction. Secondly, methods and practices of statutory interpretation carry significant symbolic value — they are indicative of the shared assumptions from legislative and judicial branches of government.[92] Finally, the successful development and implementation of a rights-orientated approach to interpreting public space offences would further entrench the Australian practice of rights-orientated statutory interpretation, which could then be applied to human rights causes beyond homelessness.

My purpose in this article has not been to argue that a homeless person could never be properly convicted of a public space offence under Australian law. What I have contended is that, by taking appropriate interpretative guidance from international law sources, Australian courts should narrowly construe public space offences so that they do not cover acts incidental to homelessness. Not only would this give effect to the assumed legislative intention of complying with Australia's international obligations, but it would also be consistent with the international law orientation of the state and territory Bills of Rights. Most importantly, a narrow interpretation of public space offences so as to exclude conduct incidental to homelessness would protect vulnerable individuals from what many in the international community, and in Australia, consider to be gross human rights violations.

[92] *Zheng v Cai* (2009) 239 CLR 446 at [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ): 'Judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws'.

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INTERNATIONAL LAW AND ITS DISCONTENTS: STATES, CYBER-WARFARE, AND THE PROACTIVE USE OF TECHNOLOGY IN INTERNATIONAL LAW

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Technology enables trans-jurisdictional activity, both legal and illegal, by people, organisations, and governments. Technology is advancing much faster than the international laws that must cope with such progression. Blockchain technology is examined as an opportunity for the law to catch up with technological advancements rather than fall further behind them. Governments and corporations have made several disconnected attempts to harness the unique properties of blockchain technology to promote electronic voting and asset registration. The benefits of incorporating blockchain technologies may have the potential to alleviate some of international law's current discontents.

CONTENTS

I INTRODUCTION 129

II BLOCKCHAIN TECHNOLOGY AND INTERNATIONAL LAW 132

A *Voting, Smart Contracts, And Global Intellectual Property* 135

B *Land Titles* 136

C *People and Citizenship* 137

III TAKING ADVANTAGE OF TECHNOLOGY 138

IV WHO IS ULTIMATELY HELD RESPONSIBLE? 141

V CONCLUSION 142

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I INTRODUCTION

Technology typically advances ahead of the law's ability to deal with its implications; the term 'law lag' describes this phenomenon.[1] The issue of technology outpacing the law has been identified in cases dating back to early problems with Copyright law in the 1800's.[2] Since then, the pace at which technology has advanced has accelerated exponentially, and technology in the late 20th and early 21st centuries has developed far quicker than law has been able to. Technology's global reach means that it must be dealt at an international law level and, as a result, trans-jurisdictional complexity arises. The distinction between public and private international law adds yet another layer of difficulty to the issue of law catching up with global technological advancements.

Civil war, regional conflict, and international disputes create complications that public international law must react to. The transnational character of internet-based technologies has unavoidable implications for public international law. In 'traditional' warfare, there is large-scale mobilisation of local physical forces tying the instigating state to a local action. However, cyberwarfare is characterised by intangible actions, untraceable or obfuscated responsibility, and unexpectedly widespread consequences.

Similarly, disputes between legal entities in different legal jurisdictions create complications that private international law must deal with. These disputes are often commercial and/or contractual in nature.

One emerging internet-based technology, known as blockchain technology, poses unique three-fold benefits to international law. Its rapid uptake in the international finance industry will need to be dealt with under private international law. Blockchain technology has potential for espionage and cyberwarfare meaning it will need to be dealt with under public international law. The ability to code for non-repudiable 'smart contracts', as discussed later, provides a new medium in which contractually binding agreements can be written, actioned, and enforced; blockchain technology will directly impact the operations of basic contract law internationally.

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[1] Lyria Bennett Moses, 'Recurring Dilemmas: The Law's Race to Keep up with Technological Change' (2007) 2007(2) *University of Illinois Journal of Law, Technology & Policy* 239.
[2] L R Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press, 1968) 214.

The current international law literature on blockchain technology tends to reflect the mindset of how it should be *dealt* with on an international level. It treats blockchain technology like any other new technology, as something separate from the operations of the law, to be dealt with reactively after its legal implications become apparent. This paper proposes that international law should actively *incorporate* the use of blockchain technology — that it should proactively utilise emerging technology with direct applications to legal processes, in order to future-proof itself from whatever new technological or geo-political situation should arise. For example, when discussing the evolution of law globally and whether the internet is eroding state sovereignty specifically, Schultz argues in the negative, using the example of the Dutch revolt in the Thirty Years War in Westphalia.[3] He explains that the resulting treaties and principles of sovereignty, along with the equality of states which emerged, have led to a natural fragmentation of internet law today. However, one thing missing from this analysis is the impact of the technology from this time and its effect on the law. Modern law graduates would think no more of composing new laws or treaties in a real-time collaborative cloud-based document, than the authors of the Westphalian treaty thought of using the leading-edge calligraphy techniques of the time. The construction medium is inevitably a part of the message. However, the ramifications of instant global availability, collaboration and feedback, online translation services, social media, and the possibility of near-instant global counteraction, cannot be ignored.

The nature of any current international treaty cannot stand if it reflects the territoriality and technology of a pre-internet world, much less a 17th century one. As put eloquently by Svantesson: 'whatever the status of territoriality principle *de lege lata*, it is unsustainable as the jurisprudential core of our thinking on jurisdiction *de lege ferenda*'.[4] The international community needs to find ways to use these technologies as part of the mechanism of international law so that they can govern the world as it is today and tomorrow, otherwise global users of leading-edge technologies will always have an edge over outdated territorial laws and processes.

[3] Thomas Schultz, 'Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface' (2008) 19(4) *European Journal of International Law* 799.
[4] Dan Jerker B Svantesson, *Private International law and the Internet* (Wolters Kluwer, 3rd ed, 2016).

It is the applicability of blockchain technology to legal processes that hints at the possible compatibility with international laws' existing structure, rather than simply being yet another technology that must be dealt with. As an illustrative example, with the continuing refugee crisis in Europe, blockchain technology may aid and streamline the implementation of different facets of international law, while creating development of legal structures for those technological advances — just as Africa has done to lead the world in mobile electronic payments.[5] Africa leads precisely due to their lack of access to the payments infrastructure incumbent in Western countries, which forced them to innovate. In the same way, blockchain technology promises to provide the means which allows refugee populations to leapfrog Western countries in digital identity, electronic legal infrastructure, electronic property rights, and universal financial access.[6] With blockchain technology, international law can co-evolve alongside technology, rather than waiting passively while technology takes other directions and then trying to reactively regulate against their uses. International law will no longer be seen as ineffective due to its slow process, but rather will be at the active forefront of development.

For the purpose of this paper, international law is broadly defined as a body of protocols or rules, established by customs or treaties, and recognized by nations as binding in relation to their dealings with each other.[7] Some issues surrounding cyber-warfare and international law may cross into private international law, which is observed in this paper as a body of rules used to resolve legal disputes between private individuals who cross international boundaries. However, the specific focus here will primarily be on public international law — the laws, rules, and principles that deal with the conduct of nation states (and some international organisations) among themselves.

This paper will begin with an overview of the issue on technological advancements outpacing legal developments. Firstly, it will describe the unique properties of blockchain technology which can bridge this gap, and provides specific examples to highlight these properties. This is followed by a brief overview of governments trialing legal blockchain

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[5] 'Massive Drop in Number of Unbanked, says New Report', *The World Bank* (Web Page, 15 April 2015) <http://www.worldbank.org/en/news/press-release/2015/04/15/massive-drop-in-number-of-unbanked-says-new-report>.

[6] Zeina Abu-Meita and Nick Inglis, 'Financial Equality, the Ignored Human Right: How e-Currencies Can Level the Playing Field' (2019) *Griffith Journal of Law & Human Dignity, Special Issue: Law and Human Dignity in the Technological Age* 105.

[7] *Macquarie Dictionary* (7th ed, 2017) 'international law'.

technology and a discussion of where the responsibility for future updated developments of this technology lies in international law.

II BLOCKCHAIN TECHNOLOGY AND INTERNATIONAL LAW

Blockchains are electronic, distributed ledgers of asset ownership and asset transfers whose records cannot be modified once recorded.[8] Blockchain technology was developed for crypto-currencies; digital currencies that use encrypted tokens as money, the most famous of which is Bitcoin. Being purely electronic, they exist only as computer files. When distributed, these files exist on multiple internet-connected computers anywhere in the world at once. As they are transaction ledgers, the only modifications allowed to them are the appending of new transactions — they are otherwise immutable. The prevention of any deletion or modification of existing transaction records is built into the blockchain design.

Blockchains can be privately distributed within some (potentially trans-national) organisations, or publicly distributed outside of any organisation. Both public and private blockchains can be global and trans-jurisdictional, making them suitable subjects for potential regulation in public and private international law. However, forward-thinking legal experts have recently argued that this technology can also be incorporated into the infrastructure of various aspects of international law itself, specifically including international warehouse receipts,[9] data flows,[10] security holdings and transactions,[11] international arbitration,[12] as well as the issues discussed later regarding land titles, electronic voting, intellectual property, and citizenship.

While some could argue that a single hegemonic power is preferable over a distributed system for establishing and maintaining order and stability in a commercial, or legal system, there are three counterpoints worth considering. Firstly, a hegemony is the

[8] Caitlin Moon, 'Blockchain 101 for Lawyers: Part 1', *Law Technology Today* (Web Page, 10 January 2017) <http://www.lawtechnologytoday.org/2017/01/blockchain-101-for-lawyers-part-1/>.
[9] Marek Dubovec and Elias Adalberto, 'A Proposal for UNCITRAL to Develop a Model Law On Warehouse Receipts' (2017) 22(4) *Uniform Law Review* 716.
[10] Stan Sater, 'Blockchain and the European Union's General Data Protection Regulation: A Chance to Harmonize International Data Flows' (2017) *SSRN Electronic Journal* 612.
[11] Philipp Paech, 'Securities, Intermediation and the Blockchain — An Inevitable Choice between Liquidity and Legal Certainty?' (2016) 21(4) *Uniform Law Review* 612.
[12] Ibrahim Shehata, 'Smart Contracts & International Arbitration' (2018) *Social Science Research Network* 1-25.

centralisation and monopolisation of power, and economists from Adam Smith onwards have long associated monopolisation with lack of growth, lack of diversity, and economic inefficiency.[13] Secondly, the internet itself is a living example of an open, decentralised system which is now vital to so many aspects of life and business and which could only have taken the form it has without centralised control. Thirdly, the nature of international law is itself decentralised, with sovereign countries seeking to interoperate rather than cede legal control to some higher transnational entity. A distributed, trans-jurisdictional, and immutable ledger of transactions with non-repudiable smart contracts thus lends itself to applications in both private and public international law.

Technically, Casey and Vigna describe a blockchain as a 'distributed, append-only ledger of provably signed, sequentially linked, and cryptographically secured transactions which is replicated across a network of computer nodes, with ongoing updates determined by software-driven consensus'.[14] Briefly, a blockchain can be broken down into five things:

1. A transaction ledger that logs the transaction of digital tokens. The digital tokens can represent many things including but not limited to:

- Money: such as Bitcoin, a crypto-currency.[15]
- Debt instruments: such as digital commercial paper being implemented by Monax.[16]
- Equity instruments: including shares of companies, being implemented by Funderbeam — an online primary stock market based out of Estonia.[17]
- A vote: entities such as the NASDAQ (National Association of Securities Dealers Automated Quotations — an American stock exchange) are using the voting aspect for shareholders of firms.[18]

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[13] Adam Smith, *Wealth of Nations an Inquiry into the Nature and Causes of the Wealth of Nations,* Mobi Classics (MobileReference, 2010) 83.
[14] M J Casey and P Vigna, *The Truth Machine: The Blockchain and the Future of Everything* (HarperCollins Publishers, 2018) ('*Casey and Vigna'*).
[15] Jerry Brito and Andrea Castillo, *Bitcoin: A Primer for Policymakers* (Mercatus Center, 2013) ('*Brito and Castillo*').
[16] Nina Kilbride, 'Monax Commercial Paper Bundles: Toolkit for Financial Engineering Monax' (Webpage, 2016) <https://monax.io/2016/03/31/commercial-paper-intro/>.
[17] 'Discover, Invest In, and Trade Growth Companies', *Funderbeam* (Web Page, 2019) <https://markets.funderbeam.com>.
[18] Richard DeMarinis, 'Is Blockchain the Answer to e-Voting*? NASDAQ Believes So*' NASDAQ (Web Page, 23 January 2017) <http://business.nasdaq.com/marketinsite/2017/Is-Blockchain-the-Answer-to-E-voting-Nasdaq-Believes-So.html>.

- Or the registration of an electronically notarised document: such as a property record or a birth certificate. Estonia uses the Blockchain for their e-Notary system.[19]

2. A distributed transaction ledger is not owned by or controlled by any bank, exchange, corporation, or government, and existing on any number of public or private machines which all participate in copying and updating the ledger.[20] This is important because corporations are unable to exclude low-income earners from having access, and governments cannot exclude or discriminate against vulnerable groups, minorities, or any other group that is at risk of being marginalised.

3. A validated transaction ledger. Being distributed, there is no single entity which everyone must trust to validate transactions. Blockchain technology relies on the participating machines to perform cryptographic validation of incoming transactions and to achieve peer to peer consensus on the results, ensuring no one machine, or minority of machines, can append invalid transactions onto the blockchain.[21] Participation in this scheme is encouraged via game-theoretic economic incentives — essentially the awarding of tokens in that blockchain's native electronic currency for fair and efficient transaction validation.[22] While the details of the various schemes for this — notably 'proof of work' and 'proof of stake' — are out of scope for the current paper, the information is readily available.[23]

4. An unalterable transaction ledger. As the ledger is replicated on any number of uncontrolled public machines, the consensus mechanism between these machines also ensures that no alteration to existing transaction records made on a minority of machines can be propagated to the rest.[24] Anyone who tries to alter a transaction record on one machine finds their change 'voted down' by the rest. Existing transaction and ownership

[19] 'Estonia E-Residency Program & Bitnation Dao Public Notary Partnership', *Bitnation* (Web Page, 2019) <https://bitnation.co/blog/pressrelease-estonia-bitnation-public-notary-partnership/>.
[20] *Brito and Castillo* (n 15).
[21] Ibid; Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System', *Bitcoin* (Web Page, 2008) <https://bitcoin.org/bitcoin.pdf> ('*Nakamoto*').
[22] See generally Brian Curran, 'What is Game Theory? And How Does It Relate To Cryptocurrency?' *Blockonomi* (Web Page, 21 March 2019) <https://blockonomi.com/game-theory/>. See, eg, Amir Haleem et al, 'Helium: A Decentralized Wireless Network' (2018) *Helium Systems Inc*.
[23] *Casey and Vigna* (n 14) gives a good overview. For the original technical source documents, see Leslie Lamport, Robert Shostak and Marshall Pease, 'The Byzantine Generals Problem' (1982) 4(3) *ACM Transactions on Programming Languages and Systems* ('*Lamport, Shostak and Pease*') and *Nakamoto* (n 21).
[24] *Nakamoto* (n 21) 8.

records, therefore, are highly 'tamper proof' or 'hacker resistant', resulting in immutability and reliable non-repudiation.

5. A transaction ledger that is either opaque or transparent. A private blockchain's transactions are visible to all participants, and a public blockchain's transactions are visible to all. The identities of the parties involved are either private and encrypted as they are in Bitcoin or are publicly verified and readily identifiable as they are with the NASDAQ / Estonian consortium. NASDAQ wants shareholders of its listed firms to be able to participate in company voting electronically and are using the ID technology developed by the Estonian government, and Blockchain, to do it.[25]

A *Voting, Smart Contracts, And Global Intellectual Property*

Electronic 'opinion polls' and social feedback buttons have become a standard when interacting with web-based systems. However, NASDAQ's proposal for blockchain-based electronic voting for shareholders[26] — where the results of voting will affect company-level strategies to which boards will be held accountable, takes this technology to the level of a binding contract. In blockchain, these purely electronic contracts are known as 'smart contracts.[27] Blockchain rules around ownership, transfer, and voting rights which apply to the digital tokens easily transfer to use in smart contracts. A smart contract is a contract in digital form whereby promises are digitally coded and, therefore, able to be digitally enacted and enforced. Raskin purports that smart contracts relate to contract law arguing that they should be treated as, essentially, a new form of contract but also reviews more speculative proposals — such as, the use of smart contracts for Distributed Autonomous Organizations, taxation, property rights, and the encoding of constitutional principles into smart weapons. [28] This can revolutionise the current issues in international investment law by creating a globalised and uniform system that is, at current, fraud proof and transparent.

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[25] DeMarinis, Richard, 'Is Blockchain the Answer to e-Voting*? NASDAQ Believes So*' NASDAQ (Web Page, 23 January 2017) <http://business.nasdaq.com/marketinsite/2017/Is-Blockchain-the-Answer-to-E-voting-Nasdaq-Believes-So.html>.
[26] Ibid.
[27] Caitlin Moon, 'Blockchain 101 for Lawyers: Part 2', *Law Technology Today* (Web Page, 31 January 2017) <http://www.lawtechnologytoday.org/2017/01/blockchain-lawyers-101-part-2/>.
[28] Max Raskin, 'The Law and Legality of Smart Contracts' (2017) 1(2) *Georgetown Law Technology Review* 304 (*'Raskin'*).

B *Land Titles*

The Republic of Georgia has partnered with a company using Blockchain technology to register land titles for the National Agency of Public Registry (NAPR), an office of the Georgian Ministry of Justice.[29] State sovereignty in international law is paramount when matters of international conflict and legality of war are being contemplated and debated at the United Nations. The blockchain technology's ledger in Georgia's case, creates a space for tracking and registering land titles that can be used as evidence of state boundaries in state sovereignty cases. Raskin argues that property rights rely on trust, and while this may not be such an issue in the 'developed' world, it certainly is an issue for the majority of the world.[30] This is particularly evident in regions currently under sovereignty or border disputes. Crimea, Kashmir, Western Sahara, West Papua, and Palestine would be able to establish 'facts on the ground' using 'facts in the cloud' to assert their boundaries in international negotiations regarding state boundaries and state sovereignty over specified areas of land. One key feature of blockchain technology is that it does not require ongoing central involvement — a necessary feature when attempting to counteract colonisation. A second key feature of blockchain technology is that the system itself is resilient against colonisation. Blockchain technology would allow property ledgers to be transparent enough for it to be accessible to view, and opaque enough for ledgers to be unalterable by colonising or outside forces. International law is still mired by problems as a result of colonisation and decolonisation efforts. A blockchain-based property system would put little or no cost on a potentially non-existent public purse and excel where the central evidence of legally binding title is being hidden, obfuscated, altered, or destroyed, with the only remaining evidence existing in the personal records of displaced people. This use of blockchain put power and control back into the hands of the states and citizens affected by the colonialist past. Average citizens could also use blockchain technology to register their personal properties in conflict zones where becoming a refugee may render them unable to access such documents later. This would provide refugees, and states that temporarily home

[29] Stan Higgins, 'Republic of Georgia to Develop Blockchain Land Registry', *Coindesk* (Web Page, 22 April 2016) <https://www.coindesk.com/bitfury-working-with-georgian-government-on-blockchain-land-registry/>; Laura Shin, 'Republic Of Georgia To Pilot Land Titling On Blockchain With Economist Hernando De Soto, BitFury', *Forbes* (Web Page, 21 April 2016) <https://www.forbes.com/sites/laurashin/2016/04/21/republic-of-georgia-to-pilot-land-titling-on-blockchain-with-economist-hernando-de-soto-bitfury/#622d1f6044da>.
[30] *Raskin* (n 28).

refugees, a ledger of properties that could be used for reparations and repatriations. Additionally, Griggs points out that even in developed countries, while the use of blockchain-based property systems might only prevent 50% of the kinds of fraud that occur, this is still a significant improvement.[31] Similar to Raskin, Griggs highlights that it is the 'new players' who are most likely to benefit, in contrast to established developed countries who are likely to offer the most resistance.[32]

C *People and Citizenship*

In an ever-globalised world, human beings can be logged onto a blockchain for a universal birth certificate, which would alleviate issues of statelessness and refugees lacking identity documents. Just as Nansen passports were used to identify stateless refugees between 1922 and 1938,[33] the European 'refugee crisis' could be streamlined with electronic documentation for people who are forced to flee at a moment's notice without official documentation. An electronic blockchain–technology–based version of the Nansen Passport, an 'e-Nansen', could be used for this purpose. It would also prevent fraudulent refugee claims, and enable the collection of valuable population data that is otherwise difficult to obtain or verify.

Never before have Palestinians been counted as a single national group because of the diasporic nature of their population. The benefit of using blockchain technology here is that it is trans-jurisdictional and international in the same sense of the law and would encapsulate these populations. Moreover, Nomadic tribes in the Western Sahara could use blockchain technology to map out land usage and no longer be confined by the global northern and western definitions of permanent residence in a specific physical area. The land on which they roam can be mapped out and claimed. No longer will *Sahrawis* be restricted in their quest for statehood because of their traditional semi-permanent nomadic lifestyle.

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[31] Lynden Griggs et al, 'Blockchains, Trust and Land Administration — The Return of Historical Provenance' (2017) 6 *Property Law Review* 180.
[32] Ibid.
[33] Otto Hieronymi, 'The Nansen Passport: A Tool of Freedom of Movement and of Protection' (2003) 22(1) *Refugee Survey Quarterly* 36.

III TAKING ADVANTAGE OF TECHNOLOGY

Blockchain technology was developed for the Bitcoin crypto-currency, which quickly gained notoriety as a tool utilised by the criminal world for illegal purchases,[34] and money laundering.[35] Thus, criminals were using technology before it was being used and understood by the law, lawyers, and law enforcement; a situation that is only now being addressed with blockchain's uptake in the finance industry as previously mentioned with NASDAQ. As well as its use in global finance, global property, and global IP, another reason why the law and legal profession must come to terms with, and embrace, blockchain technology is the potential to be used in the military — in both cyber and traditional warfare. The Blockchain algorithm itself came about as a solution to the 'Byzantine Generals' problem. The 'Byzantine Generals' problem explained in computer science as a military scenario, where a group of commanders must coordinate an attack solely through a messenger, while defending their coordination efforts against traitors.[36] As such, the blockchain algorithm is almost purpose-built for coordinating cyber and drone attacks (which may violate international law) by hackers. As with Bitcoin, any such violations of international law will go unaddressed so long as violators are using technology that is ahead of the current law.

Blockchain's attributes of openness, inalterability, and non-repudiation make it as suitable for legal purposes as it is for financial and military purposes. As mentioned earlier, there are potential counterarguments arguing that a closed, centrally controlled system is more suitable for international law on the grounds that a distributed system is not viable, possible, or suitable. These arguments are nullified by the economic arguments against monopolies, the counter-examples of the Internet and the World Wide Web, and the fact that international law is already by nature a decentralised system of interoperating, autonomous parties. Blockchain technology does of course have plenty of detractors. A recent review of blockchain security found several examples of various

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[34] A good account of Silk Road's drug business can be found in: Eileen Ormsby, 'Dealer's Chance: The Dark Web, Bitcoin and the Fall of Silk Road' (2019) 64(1) *Griffith Review* 184.

[35] For a review of literature and analysis on Bitcoin for money laundering see generally Rolf van Wegberg, Jan-Jaap Oerlemans and Oskar Van Deventer, 'Bitcoin Money Laundering: Mixed Results? An Explorative Study On Money Laundering of Cybercrime Proceeds Using Bitcoin' (2018) 25(2) *Journal of Financial Crime* 419.

[36] *Lamport, Shostak and Pease* (n 23).

blockchain security breaches.[37] However, as computer worms, such as Stuxnet, and spyware, such as Pegasus, demonstrate, critical government and commercial computer systems that run traditional, non-distributed, commercial, and 'secure' software, are already vulnerable and security issues are hardly a unique characteristic of blockchain systems. Given that security is a leading design aspect of blockchain technology, rather than a non-functional desirable feature added on later, the likely outcome is that the designs will improve with time, as will security. Taking a different approach, Forbes gave a negative opinion on blockchain, questioning its core purpose.[38] However, each of its eight reasons are lacking justification. For instance, reason 2, 'End users don't want to use blockchain'[39] is a straw man. End users of traditional software don't want to use relational databases either, but they do. End users of either systems use apps. Further, reason 6, 'performance issues' is simply a problem inherent in many software systems, which can and should be fixed.[40] And reason 7, 'immutability isn't always a good thing',[41] is an excellent case for not using blockchain technology for everything, but there is no case for not using it, particularly for financial and evidential issues where immutability is paramount.

Given this, it would serve the legal field well to foster and stay abreast of the many currently disparate attempts being made to use blockchain technology to solve legal problems. The hope is that these attempts will culminate to enable international law to address the 'law lag', to stay in pace with, or even surpass technology's military uses. As will be described in the next example and next section below, the goal should be for international law and blockchain technology to be used and developed simultaneously.

For example, in 2007 many of Estonia's government institutions were shut down for three weeks due to a massive cyber-attack (allegedly by the Russian government). In the wake of the attack, NATO developed the Tallinn Manual on the international law

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[37] Mike Orcutt, 'How Secure is Blockchain Really?', *MIT Technology Review* (Web Page, 25 April 2018) <https://www.technologyreview.com/s/610836/how-secure-is-blockchain-really/>.
[38] Jason Bloomberg, 'Eight Reasons to Be Skeptical About Blockchain', *Forbes* (Web Page, 31 May 2017) <https://www.forbes.com/sites/jasonbloomberg/2017/05/31/eight-reasons-to-be-skeptical-about-blockchain/#1793d3c85eb1>.
[39] Ibid.
[40] Ibid.
[41] Ibid.

applicable to Cyber Warfare,[42] named after Estonia's capital: Tallinn. Shortly after the announcement of the launch of NATO's second version of this document,[43] Microsoft's Chief Legal Officer called for the creation of a 'digital Geneva Convention'[44] to help provide parameters on offensive cyber operations and address a rapidly growing area of concern. An independent review of the legal and technical requirement was shortly followed by the identification of Blockchain as a highly applicable technology for implementing the digital Geneva Convention.[45] This convention would be designed to protect civilians' electronic rights in cyberspace from nation-state attacks. Similar to the original Geneva Convention, the digital proposal would require participating states to sign-on to the network and digitally sign their cyber-attacks or run the risk of being held responsible for violating the convention, should any unsigned attacks be traced back to them. However, this idea is highly problematic. Given the 'arms race' already being waged between cyber attackers and defenders, it is possible that such an agreement would actually encourage attackers to find new ways to attack undetectably, untraceably, or to make 'false flag' attacks. In other words, a convention of this form relies completely on inter-party trust (the antithesis of what the blockchain is actually for).

A better convention might involve countries committing to two ideas: firstly, putting people's information — for example, their identity and property information — onto a blockchain-based 'self-sovereign' system described by Bert et al,[46] making attacks such as denial of service or identity and asset theft more difficult. Secondly, putting the log files of critical network infrastructure onto blockchains, making attacks more traceable. These two measures rely on mutual distrust which follows the design of blockchain technology and would see nations applying money and effort to cyber-defence ahead of cyber-attack.

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[42] Kristy Raidma, 'Tallinn Manual — The International Law in Cyberspace', *Estonian World* (Web Page, 15 July 2013) <http://estonianworld.com/security/tallinn-manual-the-international-law-in-cyberspace/>.
[43] CCDCOE, *Tallinn Manual 2.0 On the International Law Applicable to Cyber Operations* (2nd ed)
[44] Brad Smith, 'The Need for a Digital Geneva Convention' *Microsoft* (Web Page, 14 February 2017) <https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention/#sm.001hyuheo1049czppep2qitwbu5q3>.
[45] Jovan Kurbalija, 'Digital Geneva Convention: Multilateral Treaty, Multistakeholder Implementation', *Diplo* (Web Page, 23 February 2017) <https://www.diplomacy.edu/blog/digital-geneva-convention>; Luke McNamara, 'Blockchain's Potential Role in Constraining Future Cyber Conflict' *The Cipher Brief* (Web Page, 11 May 2017) <https://www.thecipherbrief.com/blockchains-potential-role-in-constraining-future-cyber-conflict-2>.
[46] Alistair Berg et al, 'The Institutional Economics of Identity', (2018) *Social Science Research Network* 1-20.

IV WHO IS ULTIMATELY HELD RESPONSIBLE?

Historically, the law has always lagged behind technological advances. Inventors create technologies for their own purposes. Others than using this technology to commit fraud or violence, and if technology uses the internet, they are able to commit these acts across international borders as easily as within them. Only afterwards are international laws developed prescribing fair use and users of this technology. Further, as the speed of technological innovation accelerates, the complexity of the legal issues increases. There are three problems here: firstly, as long as international law lags behind what is technologically possible, there is the potential for people to operate outside the law until the law catches up months or, more often, years later. Secondly, as long as the law, particularly international law, is technologically reactive rather than proactive, the gap between what technology enables and what the law handles will only widen. Thirdly, by the time the law catches up with technology, technology has moved on. The potential exists for people, corporations, or governments to continue to operate outside international law by remaining at the cutting edge of technology.

The question of responsibility comes in two parts. The first looks at questions of who is responsible for violations of international law could be more readily answered by the existence of extra-governmental, extra-corporate, blockchain-based ledgers of property and asset ownership, refugee status, select transaction records etc., acting as a kind of international 'electronic notary'. The nonrepudiation inherent in such a system would make issues of ownership and transaction participation transparent and undeniable, assisting in the legal determination of violations of international law and human rights.

The second question of who is responsible for creating this extra-governmental, extra-corporate electronic notary, must be addressed. The rate of technological change makes it impractical to hold governments, states, or international legal bodies responsible for its implementation. Similarly, the amount of vested interest in current ledgers makes it impractical to assume that the task should be left to profit-driven financial institutions. Rather, a) this endeavour must start within academia, through a collaboration between legal and computer science researchers providing thoroughly developed legal and technical foundations, and taking the form of an academically moderated 'open source' movement. Further, b) it must propagate via grassroots adoption by those people who

stand to benefit most from its existence, with the ability to incorporate or interoperate with existing legal/technical frameworks. Finally, c) it must gain acceptance through legal precedent via its use in legal actions, assisted by suitably accredited expert witnesses. The system needs to resemble the internet itself, with its value coming from, going to, and growing with its number of users. Governments, states, and corporations who are keen to appear progressive will then see the value and follow in adoption and regulation.

V CONCLUSION

The creators of international law cannot wait for technology to be created, have ramifications, and then adapt international law to the consequences. This method has proven to be recurringly inadequate. The law should develop a proactive and symbiotic relationship with technology, so that they develop alongside each other. Thus, blockchain's properties provide an unprecedented opportunity for the law to, for once, be 'ahead of the game' rather than behind it.

At its core, properly implemented blockchain solutions can offer the capability to openly verify secure transactions of any kind, which can be the great equaliser in international law across many fields. Just as social media gave a voice to those who did not have access to audiences, Facebook and Twitter became the great equaliser of their voices. No longer are people relying on the media to cover a story, instead it has become easier to open Facebook and livestream the event to the world. Hashtags have brought about real change. Blockchain too may equalise voices of states that lack power or influence on an international law front. Decolonising states has been a slow and difficult process. Embracing technology in international law will not only create a system for international law to flourish and grow, it will force technology to take the law into account, which may be the key to completing decolonisation.

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THE REVOLUTIONARY POTENTIAL OF LAW SCHOOL

BEN WARDLE*

This paper highlights the experiences at law school that transformed a self-interested consumerist with dreams of becoming a corporate lawyer into a critical legal theorist concerned with social justice, sustainability, and Indigenous sovereignty. Tracing the author's personal experiences at law school, this paper highlights the common barriers to critical thought presented by conventional legal education. More importantly, this paper offers broader insights into the teaching methods and course content changes that could bring about radical shifts in consciousness for the next generation of law students.

CONTENTS

I INTRODUCTION 148
II MY FORMATIVE YEARS 148
III GRIFFITH LAW SCHOOL 153
IV REFLECTION 163
V CONCLUSION 168

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I INTRODUCTION

The spark for this article came from a brief conversation I had with an academic at the National Workshop on Indigenous Cultural Competency in Law held in the Monash Law Chambers. Many of the speakers at the workshop were Indigenous law academics who shared similarly shameful stories of the alienation and racism they experienced during law school at the hands of both academics and students supposedly studying a degree concerned with justice. As the Melbourne wind whipped down Lonsdale Street, an Indigenous academic and I chatted about our experiences at law school. I told her about how I began studying wanting to be a wealthy corporate lawyer, and left law school a critical legal theorist with the desire to do all I can to understand the relationships between law and inequality and, hopefully, contribute to the latter's demise. The academic listened intently as I explained the key moments that led to this metamorphosis. After telling me how her studies lacked deep critique, the academic said that I should write a paper to tell my story. This is that paper. To fully appreciate the dramatic impact law school had on me, I think it necessary to first outline what my values were at the time I enrolled in a double degree of law and business at Griffith University in 2004, and where I believe these values stemmed from.[1]

II MY FORMATIVE YEARS

I grew up in the sprawling suburbs of Logan, South of Brisbane. In my teens the highlights on my cultural calendar included aimless walks through the local cathedral to capitalism – the Hyperdome Shopping Centre; seeing the latest Hollywood blockbuster; listening to scratched Silverchair CDs on my discman and attending house parties where copious amounts of alcohol entered and then often exited the same orifice of anxious teenage bodies. No one spoke of politics or art or ideas; we spoke only of people, and only of people we knew. I attended the local Catholic primary and secondary schools. For reasons I still don't quite understand my mother, who is a public-school teacher and raised my sister and I on her own, thought we would be better off in a private school. Looking back, I think she was probably wrong. The gross concentration of resources privy to many inner-city

[1] I have made every attempt to ensure the accuracy of my memories, but, as they have likely been moulded and distorted over time, I make no claim to absolute objectivity. Moreover, it must be noted that memories have been selected to tell a specific story and so what follows should not be viewed as a total encapsulation of my experiences.

private schools had not found their way to the Catholic schools of the suburbs of Logan that had only recently been cut out of the bush. While the school had new buildings, it had no new ideas. But for a couple of diamonds, my teachers seemed to rarely draw on experience or passion or expertise in designing their lessons; they drew overwhelmingly on the single stuffy textbook upon which entire subjects rested. Countless lessons involved no more than silently reading the text book or working through its exercises. We were tested not on our understanding, or our creativity, or our compassion — we were tested on our memory. Critical thinking was completely absent from the curriculum. Authority was not something to question and critique; it was to be observed and obeyed. Above all else, we were taught to sit still and silent.

Australian history was covered purely through a colonial gaze.[2] I recall learning the minute details of what was aboard each of the ships of the First Fleet; having to sing 'We're heading for Botany Bay'; being taught to admire the early explorers who boldly 'discovered' new lands; and how we owe our current lifestyles to the pastoralists who built Australia's economic wealth on the backs of sheep. Being Australian was something to be proud of. We were, in the words ritualistically sung at each school assembly, 'young and free', something quite absurd given the true history of this country. When Aboriginal culture did enter the school's brick buildings, it was tokenistic and regulated. Occasionally, Aboriginal people would perform ceremonial dances at assembly, though they never spoke. We once painted a rainbow serpent, though never learnt what it meant. We knew that Aboriginal people were here before 'settlement', though we never learnt what happened to them.

I cannot recall a single lesson in my 12 years of schooling that addressed inequality, though it was all around us. The school bus took me home past the upper middle-class gated estates near my school; snaked around the bottom of the only mountain in town and the handful of mansions perched around its peak; then rambled through the mass of run down houses of the lower-middle and working classes around the public school. Some of the parties I went to were relatively regulated affairs hosted by private school kids

[2] For an overview of how the frontier wars and Indigenous dispossession became left out of books on Australian history in the nineteenth century, and the debates around the 'black arm band version' of history that occurred in Australia in the 1990s, see Henry Reynolds, *Why Weren't We Told?* (Penguin Books, 2000) chs 10-12.

whose parents were away for the weekend. Others held closer to the public school were rank and raucous, and often descended into violence. Sometimes cars were stolen, sometimes they were trashed, one time a Holden VN was set on fire. I'm not saying that private school teenagers weren't capable of destruction and violence — on my first day at high school I saw a kid pummelled into the lockers outside my PC room. But violence seemed to stalk working class people in a way foreign to those without the grit of drug addiction and poverty, a major difference being that our violence and destruction was overwhelmingly invisible to police and so we were rarely tangled up in the law. While on the surface these wild nights brought together teenagers from differing social backgrounds; social groups rarely mixed just like in the Hollywood films we watched. We largely stood together in self-organised rings ranked first by class, then by culture, then by appearance.[3]

Hierarchy was everywhere at school. The staff were ranked (principal, deputy principal, heads of departments, senior teachers, and just 'teachers'), the students ranked themselves largely by popularity and appearance, and the staff ranked the students using a grossly narrow definition of intelligence. Each year an awards night would walk so-called achievers one after another with certificates in hand for hours on end in front of those who did not demonstrate the requisite 'intelligence'. It seems to me now that the students forced to sit still and watch their friends getting certificates were being taught that they do not deserve the salaries of university graduates. They were being taught that their lower academic status justifies their place in a lower economic class. There are few more dishonest and destructive lessons that could be taught to such impressionable minds. In this and a myriad of other ways, social hierarchy became viewed by most as natural, inevitable, and justifiable.

More than anything, I found school boring. Before my father unexpectedly died of a heart attack in our backyard when I was five, I was raised by two teachers and so was equipped with all the skills necessary to be an academic achiever. Although it's something the teenage me would have scoffed at, it is clear to me now that any academic success I have had stems from these first five years of my life. While I remember very little before my

[3] For an overview of everyday experiences of inequality like this and how they reinforce oppressive class relations, see Michael Kraus, Jun Won Park and Jacinth Tan, 'Signs of Social Class: The Experience of Economic Inequality in Everyday Life' (2017) 12(3) *Perspectives on Psychological Science* 422.

father's death, I know my mother resigned from her job to have me and did not go back to work until his death forced it upon her. For my first five years, I therefore had a privilege not many children get — an attentive and affectionate mother who was an expert in teaching children, and a professional father who was also an excellent teacher.

With this foundation, I found the tasks set for me by teachers to be largely pedestrian and uninspiring. I could read, remember and regurgitate like a well-oiled machine, and as that was really all that was asked of me, I achieved high grades. Frequently I would want to know more about something than that covered in our textbooks, and frequently my questions went unanswered. Over time I realised, perhaps only implicitly, that most of my teachers often didn't know what they were talking about, and so slowly but surely, I developed a distain for authority. This was also fuelled by the fact that those students who most clearly saw through the charade and so made fun of it with exquisitely sharp humour, felt all the force a teacher could muster. The students who provided the only colour in our grey classrooms found themselves in detention, then suspension, and then expulsion. Looking back now, it seems to me that it was often the students who showed the most individuality, creativity, and critical thinking who spent their lunchtimes writing lines, while hair-flicking sheep like myself excelled.

Outside of school and social life, my understanding of the world was shaped largely by popular culture. Under the spell of films like *American Pie,* I saw women as incomprehensible creatures whose value was purely physical. Sex was not a means to connect, but to conquer. This was an age pre-*Queer Eye for the Straight Guy*,[4] and while *Will & Grace* was carving into hetero-normativity, it was a show I never watched and so television for me only reinforced that to be 'normal' was to be 'straight'. In film and on TV it was always men who drove the stories and saved the day while women provided emotional support, or romance, or were the ones being saved. Apart from Ernie Dingo and Cathy Freeman, I can't recall seeing an Indigenous face on my television. In short, it was very rare to see a film or a TV show that told stories from any other perspective than that of a white, privileged, heterosexual, able-bodied male.

[4] I'm not implying that *Queer Eye* was a beacon of progressive thinking, but it certainly brought being gay into the mainstream, even if it did permeate problematic gay stereotypes.

When I was in year 10 I had the task of selecting what subjects to take in my final years of high school. At a year-level meeting a hundred or so nervous 15-year-olds were told that this decision was one of the most important they would ever make. It was explained to us in a serious and forceful tone that many university degrees would not accept students without certain marks in certain subjects, and that this should be the primary consideration in making our decisions. We were not told to choose subjects we were interested in, or even subjects we excelled at. Our education was purely a means to a job.

During my final years of school I took subjects that should have opened my eyes to the rich culture of Aboriginal and Torres Strait Islander peoples, yet this remained strangely absent. In ancient history we looked to Greece and Rome, but not in our own backyards. I recall learning about the diverse types of Egyptian pottery, yet the local bora rings that were likely older than the pyramids, never got a mention. We studied the genocide of Jewish people, but not a single massacre of the First Australians was spoken of. In the subject called *Study of Religion* we learnt about Buddhism and Islam, but never discussed Indigenous spirituality. I could say 'hello' in Japanese and German, but could not speak a word of a local Indigenous language.

If I could summarise my values entering law school, I would say I adopted many of the dominant social norms of suburban Australia. I believed that Australia was the lucky country and had no serious problems concerning poverty, sexism, or racism. I thought that an individual's economic status stemmed only from their individual abilities, and that therefore those who were wealthy deserved to be so. I had no understanding of the prevalence and causes of systemic inequality. All my heroes were male, and my definition of what constituted a 'hero' relied entirely on stories told from a male perspective that emphasised male characteristics.[5] If my education had ceased at this point, there was every chance that none of these values would have altered much in the subsequent 15 years. It was these beliefs that led me to enrol in a law/business double degree, majoring in finance at Griffith University. My aim was to be a wealthy, corporate lawyer who could manage his own lucrative share portfolio. This decision was clearly motivated by self-interest, individualism, and the belief that there was no pressing reason to study

[5] By this, I mean characteristics that are taught to children as 'masculine', e.g. individualism, autonomy, aggression, risk-taking etc., as opposed to 'feminine' values such as empathy, putting others ahead of yourself, kindness, gentleness, etc. I make no claim that values are gendered, in fact I doubt that is true.

something that could assist in correcting serious flaws in Australia's political, economic or education systems, or even culture. Little did I know that my beliefs were about to be seriously shook.

III GRIFFITH LAW SCHOOL

The academics at Griffith Law School did not wait long to expose students to the political nature of law and the ways by which Indigenous Australians have been systemically oppressed by law.[6] I remember like it was yesterday; the panic that ran through my bones, when an hour before my first *Law and the Modern State* tutorial I discovered that there were questions I was supposed to have prepared for, realised there was a required reading for the tutorial, and then saw it was a judgement from the *Yorta Yorta* decision.[7] Frantically, I read my first High Court decision. While little made sense, this was the first time I had read anything about how 'colonisation' impacted Indigenous communities. The case outlined how the Yorta Yorta community suffered due to disease, violent conflict, the loss of food sources, the forcible removal of children from their families and country, policies of segregation, and how Indigenous customs and the speaking of Indigenous languages were illegal for a significant period. Looking back now, I still find it disconcerting how this history was largely new information to my 19 year old self. The ability of Australia's education system and culture to deny this truth was quite extraordinary, though I am aware from my younger law students that things are changing for the better. I'd like to say that learning this history broke my racist shackles and launched me into social activism, but I had a well-oiled system that repressed anything that threatened my identity as a member of the 'lucky country' where 'everyone gets a fair go'. However, my cultural armour shielding me from the truth took its first serious knock in my first law tutorial.

On top of the in-class tutorials, *Law and the Modern State* required students to submit an online response to some of the tutorial questions and attached 10% of our grades to this task. We were assigned small groups of about five students who could see each other's responses and, if we wanted, engage in discussions. As luck had it, my small group

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[6] In this paper, I use the word 'political' in the legal realist sense, meaning not neutral or objective but an instrument of power.

[7] *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

included a highly engaged critical thinker who frequently challenged my submissions and the cultural hegemony which underpinned them. While the other three members of our group would usually make their single required submission and be done with it, my learned colleague and I would often engage in long debates about the merits of liberalism, contentious Howard government policies, or the nature of inequality in Australia. This was quite a formative experience for me for several reasons: it gave me a chance to formulate my own views on given political/legal topics in a non–assessable, informal environment with no time pressures; have those views subject to criticism by a peer in a non–threatening way; and gave me a chance to respond after some thought. This process allowed me to realise how many of my political and social views could not stand the test of proper scrutiny and, while I might not have completely realised this at the time, how many of my views were simply regurgitations of what I had heard on television or read in the newspaper. Importantly, this scrutiny came not from an academic but from someone just like me who had read more broadly and formed her views drawing on experience and experts rather than opinion and adverts. That was inspirational.

During my second semester I was given my first taste of philosophy in the course *Introduction to Legal Theory*. The first significant lesson was giving a name to our current political and economic system. I can't recall anyone saying the word 'capitalism' before this course — the word was never mentioned in my entire business degree, nor had I thought that such a thing as a political system existed. That is the power of dominant ideas: they are believed to be all encompassing, natural and eternal so it becomes impossible to imagine an alternative. It was a revelation to learn that the individualism, self-centeredness, and consumerist driven values that I thought of as normal and natural were only necessary for the survival of a particular form of political and economic system, and that there were alternatives. Now I am getting ahead of myself here — I could never have formulated the previous sentence while at law school. But by simply naming 'liberalism' and 'capitalism' it became possible to imagine alternative ways of organising society.

Earlier in the semester, *Introduction to Legal Theory* included Duncan Kennedy's 'Legal Education and the Reproduction of Hierarchy' as a required reading.[8] While much of the

[8] Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32(4) *Journal of Legal Education* 591 ('*Hierarchy*').

reading was above my intellect, and some of it seemed only relevant to Ivy League law schools in the United States, it was something of a revelation to read such a detailed critique of law school while in my first year at law school. Much of what Kennedy wrote rung true for me, such as the focus in law school on rules and not the values that underpin them or their impact on people; the celebration of the odd judge that attempts to make the rules marginally more humane (e.g. Kirby in dissent[9]); the hierarchy created between student and lecturer and the students themselves fuelled primarily by assessment results; and the emphasis on legalism in discussing cases rather than how the outcome of cases seemed obviously unjust. I had never considered that law school was a means to ensure the continuation of social hierarchy and generate hearts and minds in service of the corporate sector and corporate agendas. Given that I had chosen to study law to be a wealthy corporate lawyer this paper seemed to speak directly to me. It began my understanding of the connections between corporate law and inequality.

Introduction to Legal Theory had a lecture and tutorial dedicated to the major strands of critical theory — Marxism, feminism, critical legal theory, critical race theory, and queer theory. As law curriculums are becoming increasingly devoid of theory, this may raise some academic eyebrows. Each theory told a similar story from a different angle: namely, that law reflects and privileges the values of the cultural group that has overwhelmingly created it (white, wealthy, heterosexual men). As such, the application of the same laws to all people does not ensure equality but systemically privileges some, while persecuting others. Moreover, the claims by judges and commentators that law is objective and neutral mask the value judgements, cultural assumptions, and political underpinnings of legal principles, legislation, and the common law. Each theory also highlighted the deep inequality prevalent in contemporary Australia and how law is implicated in this inequality, be it based on class, or gender, or race, or sexual orientation.

Given I would now call myself a critical legal theorist, one might think that all this theory would have been a joy. It wasn't. I really struggled with this course. I was not engaged by the lectures or tutorials, the readings were dense and difficult, and we were required to watch several films that were claimed to reveal some of the theoretical principles

[9] See Chris Merritt, 'It's Unanimous: Kirby still the Great Dissenter', *The Australian* (online, 15 February 2007) <https://www.theaustralian.com.au/news/inquirer/its-unanimous-kirby-still-the-great-dissenter/news-story/eee34fa0d8d711bde613a0e783c86a83>.

discussed in the course, but I struggled to see the connections. I also fell into the trap of thinking that unless I was studying a case or legislation, I was not studying law — a likely hangover from high school where education was viewed only as a means to a job and not for personal development or to benefit the community. Nonetheless, hearing about the role law plays in maintaining systemic inequality from the perspectives of class, gender, race, and sexuality surely had an impact, even if that impact wasn't completely realised until later in life.

Had *Introduction to Legal Theory* been the only subject that drew on theory to highlight the relationships between law and inequality I might be in a large law firm serving corporate clients right now rather than writing a paper on the revolutionary potential of law school. My rose-tinted cultural glasses that prevented me from seeing the obvious inequality all around me and the privileges I obtained from the status quo remaining in place were finally shattered in *Property Law 1*. The course began by outlining some philosophical perspectives that supported private property (Locke and Hegel), and then provided a critique of these perspectives (Marx, Foucault, feminism, critical race theory). This was effective as it presented both sides of the argument as to whether private property ensured individual freedom and autonomy, or created oppression and exploitation. To me, the critique seemed more reasonable and supported by empirical evidence.

Before this course, I never considered whether private property, particularly the ownership of businesses, had positive or negative impacts on society. Private property to me was something as natural and unchallengeable as the spherical shape of the earth. But I could not fault Marx's way of explaining the divide between rich and poor. In short, it was explained to us that most people are forced to sell their labour and are paid an hourly rate of pay or a wage. Those who sell their labour are paid less than the value they produce, and the difference is pocketed by business owners and executives, allowing them to become richer and richer while everyone else remains stuck in a stagnant class position.[10] We looked at graph after graph that showed the level of inequality globally and in Australia, which seemed to line up perfectly with Marx's analysis. It seemed that Marx

[10] This argument can be explored in more detail in Karl Marx, *Capital*: *A Critique of Political Economy* (Marxists.org, 2002) ch 7, 23.

had understood the mechanism for vast and unjustified inequality 150 years ago and that little had changed since he put it to paper.

In my first year, I think I rejected Marxism outright due to my cultural biases against it. Communism in my mind was linked to fascism, dictatorships, and tyranny. Even one of my favourite shows growing up, *Get Smart*, called the Americans 'Control' and the Soviets 'Kaos'. Now of course, there is no denying the horrors that occurred under the totalitarian dictatorships that called themselves 'Communist' in places like Russia and China, and I still wonder whether Marx's writings provide a useful blueprint for a way to organise production. However, his explanation of inequality based on class due to the division of labour still rings true to me today. Now in our time, the level of inequality is beyond even Marx's imagination given the growth of multinational corporations that employ and exploit at times tens of thousands of people and siphon surplus value into the coffers of CEOs who often make more than a million dollars a week, all under the protection of law.[11]

The connections between inequality and private property became unavoidable when listening to an Indigenous guest lecturer address the *Property Law 1* cohort. This was the first time in my life I heard an Indigenous person speak at length and it is something I will never forget. With fire in his voice the guest lecturer spoke about the frontier wars, massacres, and the never ceasing resistance to colonisation. He forcefully explained to us how the wealth of Australians is tied primarily to the ownership of land, and that Indigenous Australians have been largely denied this basic right since their forcible removal from country following European invasion.[12] We were told that those of us who are the descendants of wealthy European families, who have owned land and passed title through generations, enjoy the wealth and security that comes with land ownership. As land increases in value so too does the concentration of wealth in the descendants of those responsible for taking land from Indigenous Australians. On the other hand, due to the

[11] For example, the CEO-average employee salary pay gap in the United States has grown from 42-to-1 in 1980, to 107-to-1 in 1990, to 411-to-1 in 2005: Sarah Anderson and John Cavanagh, *Executive Excess* (Institute for Policy Studies, 2006) 30. In 2018 the CEOs of the top 350 companies in the United States earned on average 312 times more than their average employee salary: Dominic Rushe 'US bosses now earn 312 times the average worker's wage, figures show' *The Guardian* (online, 16 August 2018) <https://www.theguardian.com/business/2018/aug/16/ceo-versus-worker-wage-american-companies-pay-gap-study-2018>.

[12] For an overview of the violent dispossession of Indigenous Australians and the role played by the state and law, see Henry Reynolds (n 2).

denial of property rights,[13] slavery and stolen wages,[14] it has been near impossible for Indigenous Australians to obtain the capital to own land until very recently, and so Indigenous Australians are systemically disadvantaged for this reason. It is not that Indigenous Australians don't work as hard as other Australians, or aren't smart enough to obtain professional jobs, or have personality defects preventing them from high paid work that explains the widespread poverty in Indigenous communities — it is the reverberations of a history of dispossession, exploitation, and oppression. Likewise, the wealth and privilege of many Australian families stems directly from this history, meaning much wealth is not derived from individual characteristics and work ethic but from the systemic exploitation of Aboriginal labour and the labour of poorer Australians.[15]

After the lecture many of my peers expressed an outrage and discontent unmatched at any stage of our studies. Small groups of red-faced students accumulated outside the lecture theatre. Likeminded white, young law students exchanged comments reinforcing each other's perceived disconnection from the accusations of the lecture. They used any trick they could to avoid dealing with the substance of what was said and instead focussed on the personal traits of the guest lecturer in vicious attacks. Like me, this was the first time anyone had implicated them in the disadvantages suffered by Indigenous Australians. We were used to thinking that these problems persisted only in the past. This allowed us to pursue power and privilege unabashed. Now we had to face the fact that to do so meant standing on the shoulders of our violent and tyrannising ancestors, and the First Peoples whose land they took and labour they exploited.[16] For many of my peers, this was too much to take and so they took the easy road of attacking the messenger to avoid the message. Given the absence of this type of discourse in any other aspect of my education, or theirs I assume, this is perhaps understandable, albeit wrong. While I also found it difficult to be spoken to so forcefully, I felt that what was said was true, and this lecture still affects me to this day.

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[13] Alexander Reilly, 'From past to present' (2001) 26(3) *Alternative Law Journal* 143; Peter Seidel, 'Native Title: The struggle for justice for the Yorta Yorta Nation' (2004) 29(2) *Alternative Law Journal* 70.
[14] Stephen Gray, 'Holding the Government to Account: The "Stolen Wages" Issue, Fiduciary Duty and Trust Law' (2008) 32(1) *Melbourne University Law Review* 115; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished business: Indigenous stolen wages* (7 December 2006).
[15] For an overview of the economic exploitation of Indigenous Australians in Western Australia, see John Host and Jill Milroy, 'Towards an Aboriginal Labour History' (2001) 22 *Studies in Western Australian History* 3.
[16] Ibid.

Why I was able to face this history and accept my place in it while many other law students could not is worth reflecting on for a moment. I was quite nationalistic at this time and had even considered getting a southern cross or 'Made in Australia' logo tattooed on my bicep. It would have been very easy for me to dismiss this history as out of my control, making me not responsible for taking any actions to remedy it in the present. As a lecturer who now teaches this material, a very common response is: 'this happened in the past so we should forget about it and move on'. Clearly the nationalistic education in Australian schools with its white-washed history and absence of critique fuels these attitudes. As does popular culture, being almost entirely devoid of Indigenous voices and perspectives. However, my learned colleagues had been in the same tutorials as me on *Yorta Yorta,*[17] *Mabo*,[18] Marx,[19] and Critical Race Theory.[20] Why did so many not see the connections? This is a subject worthy of a PhD rather than a paragraph,[21] but let me give you some of my perspectives.

In my view,[22] the uncertainties and horrors of life are too big a burden to bear and so we create identities to give us a semblance of permanence, predictability, and objectivity. These identities, whether they be nationalistic, or religious, or cultural, or personal, provide us with immense enjoyment. Theorists have used many terms to describe this, such as 'hegemony,' or 'ideology,' or 'fantasy'.[23] Regardless of the term used the outcome is the same — anything that threatens the sense of stability and certainty that our identities generate is viewed with hostility and often repressed to retain the enjoyment we gain from our identities. It seems to me that the enjoyment obtained by many of my peers from their nationalistic identities was too great to take on board the true history of this country. As such, many forms of defence mechanisms were engaged. The most

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[17] Discussed in *Property Law 1*; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
[18] Discussed in *Law and the Modern State*, and *Property Law 1*; *Mabo v Queensland* (1992) 175 CLR 1.
[19] Discussed in *Introduction to Legal Theory* and *Property Law 1*; Karl Marx and Frederick Engels, *The Communist Manifesto and Its Relevance For Today* (Resistance Books, 1998).
[20] Discussed in *Introduction to Legal Theory* and *Property Law 1*; Richard Delgado, *Critical Race Theory: The Cutting Edge,* Richard Delgardo (ed) (Temple University Press, 1995).
[21] In a way, this *is* the subject of my PhD, entitled 'The Four Axes of Legal Ideology' (PhD thesis, Griffith University, 2016). The question I wanted to answer was how can people fail to see the inequality all around them, and what role does law play in this process?
[22] My views are influenced primarily by the following texts: Slavoj Zizek, *The Sublime Object of Ideology* (Verso, 2002); Karl Marx and Friedrich Engels, *The German Ideology* (marxists.org, 2000); Slavoj Zizek, *How to Read Lacan* (Grata Books, 2006); Slavoj Zizek, *The Plague of Fantasies* (Verso, 1997).
[23] For a more detailed overview of this theory, see Ben Wardle, 'You Complete Me: The Lacanian Subject and Three Forms of Ideological Fantasy' (2016) 21(3) *Journal of Political Ideologies* 302.

common I saw then and still see today is attacking the messenger; arguing that it is a waste of time to be learning about Indigenous dispossession in a law degree; accusations of bias at lecturers or course co-ordinators; and relegating dispossession to the past to avoid confronting the privileges non-Indigenous Australians possess in the present which directly stem from this history.

So, why did my defence mechanisms fail me? Well, in my view, identities are never complete and are in a constant state of development. If this were not true we would never change our minds about anything. There was a myriad of forces at work in the shifting of my perspectives and, ultimately, my identity. One force outlined above was my scepticism of the widely held view that academic achievement is a primary measure of success, given its narrowness and inability to encapsulate so many admirable characteristics. Another force leading to me changing my perspective was meeting many uninspiring lawyers at law school events. This made me uncomfortable with the prospect of becoming a lawyer and allowed a critique of Australia's legal system to not necessarily be a critique of my future profession. I also likely obtained enjoyment from seeing through the facades of authority and the myths necessary to maintain it. All of these forces, and likely many more, alongside the critical material embedded throughout my law degree, worked to reshape a new identity. While it took years for me to finally let go of my nationalism and instead form an identity around alternative and radical politics, the seeds were sown. I'm very glad I didn't get that Southern Cross tattoo.

It was only after I studied the major strands of critical theory for the second time in *Property Law 1* that they began to make sense. Legal theory is unnecessarily dense and obscure in my opinion and it takes an excellent teacher to condense and simplify thorny ideas into something palatable that resonates with students. My *Property Law 1* lecturer had that ability in spades and was clearly concerned with social justice by teaching us the skills of being able to identify and understand some sources of systemic inequality. I began to see that many of the traits I was implicitly taught to value through popular culture and my schooling — such as self-interest, individualism, and the valuing of economics over other more important concerns such as community and country — were actually the values necessary to maintain social hierarchies in contemporary capitalist democracies. And these values were central to law. If every Australian saw themselves as connected to everyone else, as part of nature rather than separate from it, and were motivated by

empathy, collectivism, and love rather than individualistic consumerism, then our capitalist, patriarchal system that allows for gross inequities and environmental destruction could not survive. Moreover, if truly egalitarian values were central to our legal system it would prevent such horrors from existing. I learnt that each generation must be taught the values necessary for systemic inequality to persist and remain unchallenged, and the critical legal theorists covered in *Property Law 1* pointed out that law is a primary means by which these values gain authority and the perception of being universal, neutral, and consequently unchangeable.

From what I have outlined so far it may seem that my time at Griffith Law School was filled with life changing critique, but that is not true. Many law subjects only covered doctrine without considering the cultural and social norms that underpin the legal principles, and how these principles affect socio-economic and cultural groups in different ways. In *Criminal Law*, for example, it was noted that Indigenous Australians are highly incarcerated,[24] but we spent no time analysing why this is the case. We learnt nothing about the connections between poverty and crime, or culture and crime, or how policies on crime are frequently used as political tools to gain votes with no consideration of what causes these crimes in the first place (e.g. tough on crime approaches to drug offences). *Evidence* did not consider how strange a concept like hearsay must be to cultures that rely on the oral passing of knowledge and law, or the difficulties Indigenous peoples face in meeting the evidential burden given their cultural preference to oral dialogues over written ones. We also did not learn how the rules of evidence were used to exclude the evidence of Indigenous Australians because of their lack of a requisite religious belief to guarantee the truth of their statements under oath, and that this occurred as late as 1958.[25] *Corporations Law* spent no time critically assessing the dominance corporations

[24] In 2018, the Law Council of Australia reported that Indigenous Australians are 12.5 times more likely to be imprisoned than non-Indigenous Australians; that Indigenous women are more than 20 times more likely to be imprisoned than non-Indigenous women; and that juvenile Indigenous peoples are 25 times more likely to be detained than non-Indigenous juveniles: Law Council of Australia, *Aboriginal and Torres Strait Islander People*, (Justice Report, 2018) 5.

[25] The Supreme Court of the Northern Territory excluded the evidence of an Aboriginal man due to his lack of Christian belief in *Wadderwarri* [1958] NTSC 516 [548] (Kriewaldt J): 'If the accused had been a white person, and if the deceased had been a white person, it is almost certain that the evidence which Mr. Ryan proposed to tender of what the deceased had said when he was about to die would have been admitted, but because I have to apply the same rule to aborigines and whites I did not admit that evidence on the basis that the reason for admitting the evidence in the case of a white person is that he has a belief that God will punish him if he tells a lie as he is about to die. So far as aborigines are concerned, we know

have over legal resources resulting in so many lawyers pursuing corporate interests over the public interest.[26] We learnt nothing of the law's failure to protect vulnerable and impoverished wage labourers against exploitation by multinational corporations operating in Australia.[27] Nor did we learn about the capacity of well-financed corporations to ensure legislation reflects their interests through lobbying, political advertising, and political donations.[28]

These subjects that only taught doctrine gave the impression that law operated in a vacuum, and that to be an effective lawyer one only had to understand and apply abstract legal principles. Law was implicitly taught as objective and predictable, making it possible for there to always be a correct answer to a given hypothetical question. At times, we spent a few minutes discussing how certain historic cases had been overruled, but we never analysed why this occurred and what this meant about the nature of law.

Even though I am now critical of law courses that concern themselves only with doctrine, I must say that at the time I enjoyed the predictability of these courses. While some legal principles and cases were perplexing and puzzling, one needed only to spend enough time reading and re-reading to eventually get a handle on them. As luck would have it, the hypothetical client in our exams always seemed to have the same problems as the parties of important High Court cases. These courses were at times challenging on an intellectual level, but required no critical self-reflection, posed no threat to my identity or desire to be wealthy, and in effect, reinforced the cultural values of our time. So long as the lecturer was remotely engaged, and the assessment was close enough to what was discussed in tutorials and wasn't marked too harshly, few students had a problem with these courses. These courses were markedly like those I studied in high school, where largely all that

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that they have not that type of belief in the hereafter and therefore, applying the same rule to aborigines as I do to whites, I excluded any statement the deceased might have made shortly before his death.'

[26] For a seminal overview of how capitalism ensures that an unjustified amount of legal resources is utilised to advance corporate interests over the public interest, see Richard Abel, *American Lawyers* (Oxford University Press, 1991).

[27] For example, CEOs of Australia's largest 100 companies in 2017 earned on average $4.75 million, being 78 times more than the average Australian worker, and CEO earnings rose 46% faster than the average Australian salary between 2016 and 2017: Matt Liddy, Ben Spraggon and Nathan Hoad, 'CEOs Now Earn 78 times More Than Aussie Workers,' *ABC News* (online, 6 December 2017) <https://www.abc.net.au/news/2017-12-06/ceo-salaries-78-times-average-australian/9216156>.

[28] Consider, for example, the abandonment of the Super Profits Tax on the mining industry following relentless political advertising, the removal of the price on carbon, and the abandonment of dollar limits on poker machines following political advertisement in key electorates. An article that provides a useful overview of this process in relation to climate policy in Australia is Anna Krien, 'The Long Goodbye: Coal, Coral and Australia's Climate Deadlock' (2017) 66 *Quarterly Essay* 1.

was required to be successful was remembering and regurgitating. There was little room or requirement for critical thought, creativity, or conscience.

IV REFLECTION

If I can briefly summarise the content of my courses: on the one hand were the handful of courses that deeply challenged us and covered content outside of formulaic legal analysis, and the other were the majority of courses which contained no critique and treated the practice of law as an objective, predictable, apolitical science. As some courses had no political content while others did, many of my peers thought that the political courses were such due to the personal biases of the course convenor. Moreover, concern with sociology, sustainability, philosophy, equality, and culture was criticised for being irrelevant to the skills needed to be a successful lawyer. Now that I am a course convenor with some expertise in critical theory, I feel I can shed some light on these popular perceptions.

No course is value neutral or objective. Law courses that avoid critique and give no context to law are as political as those that do, only the political nature of these courses is concealed. If a course only concerns itself with legal doctrine, it is implicitly endorsing the cultural values imbued in the doctrines it teaches and makes the injustices stemming from an area of law seem non-existent or unworthy of attention. If, for example, *Corporations Law* says nothing on the unjust and unsustainable practices of many large corporations, then this seems unimportant and not in need of greater regulation.[29] If *Contract Law* is silent on the asymmetrical power between employer and employee that makes employment contracts not the result of 'freedom of contract' but largely forced on employees who are frequently exploited by them, then these practices are stealthily justified. If *Constitutional Law* makes no mention of how the *Constitution* was forged only by white, wealthy, male voices, and how the basis of British/Australian sovereignty depends on the unjustified suppression of Indigenous sovereignty that has never been ceded, the course implicitly devalues these pressing issues and justifies the status quo. If *Equity and Trusts* does not critically evaluate why it is only employees who owe fiduciary duties to their employers, and simply explains that employers are excluded from acting in

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[29] See eg Hannah Aulby and Mark Ogge, *Greasing the Wheel: The Systemic Weaknesses that allow Undue Influence by Mining Companies on Government* (The Australia Institute, 2016).

the interests of their employees, then the unfair distribution of power in favour of employers and the legal support for the financial exploitation of employees is subtly reinforced. In these ways it can be seen that subjects which appear apolitical are never so and can actually provide support for some of the most troublesome cultural and legal values of our time.

As a law student, I had no idea about the inequities present in the subjects I just outlined as I was not taught this. I gained this knowledge through self-education during my PhD research. Without this understanding as a student I had no capacity to see the political nature of the courses that failed to address the obvious injustices perpetuated by the principles of their courses. Instead these courses seemed devoid of political content, making the courses that did engage in critique and their convenors seem like biased outliers. Fuelled by this misconception, many of my peers took to attacking the course convenors who engaged in critique. I think this highlights the importance of embedding critical thinking across the curriculum as without this course convenors can be subject to unjustified and misguided personal attacks.

The final formative moment in my law studies that still shapes how I view the world occurred during my honours thesis. To obtain honours we were required to spend a semester researching a legal issue of our choosing, leading to a 6000 word thesis. My supervisor left the topic completely up to me and gave me the time and space to develop my own ideas. At the time, Dennis Ferguson's face was plastered across the front page of every newspaper and flickered on the advertisements of tabloid TV programs. It was the height of paedophile paranoia that swept across Australia in 2009. Ferguson was convicted of kidnapping and sexually assaulting three children in 1988 and served a 14 year sentence, and in 2005 was arrested again and charged with two counts of indecent dealing with children. The media campaign against Ferguson was so fierce, and the evidence against him so weak, that a permanent stay of proceedings was ordered.[30] He was released in 2008 under 24-hour police watch and was greeted by a concerted media campaign calling for his arrest which whipped up community anger and protests to such an extent that he was forced to move several times.[31] Ferguson looked like a cartoon

[30] *R v Ferguson* [2008] QDC 136.
[31] For an overview, see Allan Ardill and Ben Wardle, 'Firebombs and Ferguson: A Review of Hate Crime Laws as applied to Child Sex Offenders' (2009) 34(4) *Alternative Law Journal* 257; 'Media Hunt a Monster', *Media Watch* (Australian Broadcasting Corporation, 2008).

villain and the media campaign vilifying him was so fierce that it was unavoidable. I was caught up in the frenzy and the tough on crime sentiment of the coverage and thought that I could help by writing a thesis on how the relevant laws could be strengthened to better protect the community. My thought going into the research project was that mandatory sentencing could offer a solution to deal with paedophiles like Ferguson who preyed on young children in public spaces.

After a month of reading peer-reviewed journal articles on child sex offenders it became apparent that the reality of these crimes and their context was a far cry from the fear mongering in the media. I learnt that paedophilia is a sexual attraction to pre-pubescent children, and was surprised to find out that most child sex offenders do not have paedophilia. It was a shock to learn that the majority of offenders know the children they abuse and are most commonly family members, and the recidivism rate of child sex offenders is far lower than the average recidivism rate of male prisoners.[32] I learnt that only a minority of child sex offenders had been abused themselves as children, that most do not have a diagnosed mental illness, and that sex offender treatment programs are far more effective in the community than those operating in prisons.[33]

My research also led me to the fact that Queensland already had legislation aimed at protecting the community against offenders like Dennis Ferguson, called the *Dangerous Prisoners (Sexual Offenders) Act 2003*. Under the act, if a person convicted of a violent sexual offence or a sexual offence against a child has served their sentence, and is within six months of being released, the attorney-general can apply for an order to prevent their release and, in effect, detain the prisoner indefinitely.[34] A judge must be convinced by two psychiatric reports that the prisoner poses a serious danger to the community.[35] My research on this process led to many articles by criminologists pointing out that the psychiatric reports are very limited in their capacity to predict future behaviour; one expert I interviewed said that 'you'd have just as much chance predicting the future by rolling dice'.[36]

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[32] Interview with Dr Stephen Smallbone (Ben Wardle, Griffith University, 2008).
[33] See eg Stephen Smallbone and Richard Wortley, *Child sexual abuse in Queensland: Offender Characteristics and Modus Operandi* (Australian Key Centre for Ethics, Law, Justice & Governance, 2000).
[34] *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 5, 8, 13(5).
[35] Ibid s 9, s 13.
[36] Interview with Dr Stephen Smallbone (Ben Wardle, Griffith University, 2008).

After months of research my thoughts on child sex offending changed dramatically, and I moved from a desire for tougher laws fuelled by media stereotyping and fearmongering to writing a critique of the *Dangerous Prisoner (Sexual Offenders) Act 2003*. I concluded that the act breaches proportionality in sentencing and double jeopardy. I came to the view that my own outrage regarding paedophilia and that of the community was fuelled by media reporting that perpetuated stereotypes and misinformation regarding the risks of offending. Rather than redressing the causes of offending, or being concerned with the best means of rehabilitating offenders, the concern of the media, politicians and the public was with punishment, and no punishment seemed tough enough. It seemed that the research on child sex offenders had been overwhelmingly ignored by policy makers and the media.

The process of writing my honours paper made me acutely aware of how my beliefs had been shaped by mass media misreporting, and how the road of research can lead one from sheepish opinion to informed knowledge. The process made me deeply sceptical of the media's representation of criminal justice issues and the tough on crime rhetoric of politicians. It showed how our beliefs and legal responses can be shaped by fear rather than fact. There is every reason to be critical of child sex offenders, but demonising and dehumanising will not reduce offences and protect the vulnerable. The honours thesis process gave me the chance to think deeply about these issues, and the time and space to make up my own mind based on peer-reviewed research. This was such a rewarding process that I ended up becoming a researcher and still relish in the opportunity to engage in self-directed, critically reflective, in-depth research.

To summarise, let me draw together what I think can be learnt from my story that may help turn more young minds from the pursuit of profit and power to the desire to redress systemic inequality. Firstly, let me outline the barriers that stood in front of my own capacity to engage in critical thinking that likely face many others. The most significant barrier to me was my attitude towards education. Because I thought university existed to provide me with a piece of paper so I could practice law, legal education in my mind should have only taught legal doctrine and practical skills.[37] Without combatting attitudes

[37] For an explanation of the prominence and preference of vocationalism in Australian Law Schools, see Nickolas James, 'Why Has Vocationalism Propagated So Successfully within Australian Law Schools?' (2004) 6 *University of Notre Dame Australia Law Review* 41; Margaret Thornton, *Privatising the Public*

like this, course convenors that embed critical thinking and Indigenous perspectives in their courses will face an uphill battle. The first tutorial of a course provides a good opportunity to have students share their reasons for studying law, their expectations as to what studying the course will involve, and encourage critical self-reflection regarding their attitudes towards education.[38]

The second significant barrier for me was my belief that Australia had no substantial problems regarding inequality, racism, or sexism. As many students are likely to reject critique and Indigenous perspectives outright, I think it is essential that this material is embedded across the curriculum.[39] It is very unlikely that a single course dedicated to the task of revealing the relationships between law, inequality, and oppression could win the hearts and minds of those who have enrolled in law for self-interested reasons. I know from my own experience that this would not have worked for me. While some law courses are better suited to deep critique and putting law in context than others, it seems to me that critique must be embodied across multiple, if not all courses, to be effective in turning cold hearts and minds like mine, with a vocational approach to education stemming from pure self-interest, to being concerned with social justice and seeing education as a means to better oneself, one's community, and one's country.

Giving less experienced students the opportunity to learn from those who have perspectives and knowledge that provide them with a more critical outlook is an important pedagogical tool.[40] Critique from a course convenor alone will only go so far,

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University: The Case of Law (Routledge, 2012); Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2008) 17 *Legal Education Review* 1.

[38] On the importance of critical self-reflection in law school, see, eg, Kelley Burton and Judith McNamara, 'Assessing Reflection Skills in Law Using Criterion-referenced Assessment' (2009) 19 *Legal Education Review* 171; Alice Thomas, 'Laying the Foundation for Better Student Learning in the Twenty-First Century: Incorporating an Integrated Theory of Legal Education into Doctrinal Pedagogy' (2000) 6 *Widener Law Review* 49; Kathy Mack et al, 'Developing Student Self-Reflection Skills through Interviewing and Negotiation Exercises in Legal Education' (2002) 13 *Legal Education Review* 221.

[39] I am not alone in this conclusion. See Allan Ardill, 'Critique in Legal Education: Another Journey' (2016) 26(1) *Legal Education Review* 137, 137. Unfortunately, critique is becoming increasingly marginalised in legal education. See, eg, Thornton (n 37) 26; Nickolas James, 'The Marginalisation of Radical Discourses in Australian Legal Education' (2006) 16 *Legal Education Review* 55; Gabrielle Appleby, Peter Burdon and Alexander Reilly, 'Critical Thinking in Legal Education: Our Journey' (2013) 23 *Legal Education Review* 345.

[40] On the importance of peer-to-peer learning, see, eg, Dominic Fitzsimmons, Simon Kozlina and Prue Vines, 'Optimising the First Year Experience in Law: The Law Peer Tutor Program at the University of New South Wales' (2006) 16 *Legal Education Review* 100; Frances McGlone, 'Student Peer Mentors: A Teaching and Learning Strategy Designed to Promote Cooperative Approaches to Learning and the Development of

but if students hear this from other students it is more difficult for them to reject it as bias or irrelevant to themselves or their studies. As such, opportunities for peer-to-peer learning should be looked, for when setting up tutorials, lecture activities and assessments. Guest lecturers can also be effective, especially Indigenous guest lecturers who can speak directly to the myriad of ways that law has and continues to systemically privilege non-Indigenous values and culture, and are powerful additions to any law course. Their presence and poise alone can burst the stereotypes that many law students hold about Indigenous peoples. If law schools take on board these suggestions it is likely that many more impressionable minds will understand some root causes of systemic inequality and be armed with the skills and motivation to make part of their professional lives aimed at eliminating them.

V CONCLUSION

I entered law school with the desire to be a rich corporate lawyer with no understanding of how law has and continues to oppress Indigenous peoples, and left a critical legal theorist who advocates for Indigenous sovereignty. Such is the potential of law school. Having taught at three universities across eleven courses, I also know that law school can reinforce stereotypes, whitewash the deep social problems facing this country, and give the perception that law operates in an apolitical vacuum. Law school, as Duncan Kennedy points out, can train minds to serve corporate agendas and ensure the continuation of social hierarchies.[41] However, by reframing the purpose of education from a means to a job to a means to a more egalitarian and inclusive community, by allowing students to learn from each other and from Indigenous people, and by embedding critique and context across the curriculum, law school has the potential to radically alter the perspectives of privileged, self-interested law students like myself. Law school has the potential to be revolutionary.

Lifelong Learning Skills' (1996) 12 *Queensland University of Technology Law Journal* 201; Stephen Brookfield, *Discussion as a Way of Teaching* (Jossey-Bass, 2005); Appleby, Burdon and Reilly (n 39).

[41] '*Hierarchy'* (n 8).

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TEACHING AGAINST THE GRAIN: A CONVERSATION BETWEEN EDITORS* OF THE *GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY* AND PETER MCLAREN ON THE IMPORTANCE OF CRITICAL PEDAGOGY IN LAW SCHOOL

PETER MCLAREN+

This article is a dialogue between the Editors of the Griffith Journal of Law & Human Dignity and leading scholar Peter McLaren, speaking to the importance of critical pedagogy within education and law. This conversation was not subject to peer review.

CONTENTS

I THE RELEVANCE OF CRITICAL PEDAGOGY FOR UNIVERSITY STUDENTS 174

II REVOLUTIONARY PEDAGOGY AND CREATIVE SKILLS 177

III 'HISTORICITY' AND CRITICAL PEDAGOGY 181

IV CONCRETE UTOPIAS 189

V THE MARXIST EDUCATIONAL LEFT 191

VI CAPITALISM AND PEDAGOGICAL TRENDS 192

VII LAW SCHOOL AND CRITICAL PEDAGOGY 194

VIII DESPONDENCY AND EPISTEMOLOGICAL CHALLENGES OF STUDENTS 196

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IX CAPITALISM AND ECONOMIC INEQUALITY 197

X CONCLUSION........ 199

I THE RELEVANCE OF CRITICAL PEDAGOGY FOR UNIVERSITY STUDENTS

Lisa: What is the relevance of critical pedagogy for university students?

Peter: Critical pedagogy offers students various languages of critique and possibility through which they can understand in a more nuanced and granular way the relationship between their individual subjectivity and the larger society. Put another way, these 'languages' or 'discourses' potentially serve as dialectical relays through which students can 'read the world' against the act of 'reading the word' — by that I mean reading one's lived experiences, as those experiences are reflected in or refracted through various critical theories, such as various feminist theories, theories that connect gender, race and political economy, theories that offer explanatory frameworks that can help students make sense of their own experiences. The idea is to create conditions of critical consciousness or critical self-reflexivity among students. The idea is to help students understand how various ideologies drive social life, to help students discern how systems of intelligibility or systems of mediation within the wider society (nature, the economic system, the state, the social system, cultural system, jurisprudence, schools, religion, etc.) are mutually constitutive with the self.

So, when we talk about liberation, we are referring to self-and-social transformation, that is, to a dialectical relationship. So, we need not refer to the self and social relations as though they were mutually exclusive categories, antiseptically distant from each other. They are not steel cast terms but rather bleed into each other. Again, it's a dialectical relationship. It is at this point that we arrive at the notion of praxis, the bringing together of theory and practice. Of course, we demonstrate that praxis begins with personal agency in and on the world. We begin, in other words, with practice and then enter into dialogue with others reflecting on our practice. This reflection on our practice, then informs subsequent practice — and we call this process or mode of experiential learning praxis, or self-reflective purposeful behaviour, that is exploring with others the relevance of philosophical ideas to the fault lines of everyday life and the necessity to transcend them.

Praxis is a way to realise freedom by transforming society's social structures, systems of intelligibility, of ideological mediation.

However, it's important to remember that being critically conscious is not a precondition for social justice action but critical consciousness is an outcome of acting justly. We act in and on the world and then reflect on our actions in an attempt to effect a deeper, more critical change in our society. We make society, as society makes us. What takes priority in all of this is ethics — the purpose of creating a more just society absent of needless suffering. Liberation theologians refer to this as a preferential option for the poor and oppressed. I take this a little further and call it a preferential obligation for the poor and those who are suffering. So, critical pedagogy is a means to challenge the ideological hegemony of neoliberal capitalism.

There is no secret cabal sitting in the damp cellars of the deep state compelling society to engage in self-censorship. It doesn't take the esoteric and arcane aspects of an Easter Mass in a Gothic cathedral to enable civilians towards self-censorship. There is no grand design in place across the United States (US) for a fascist state that would require penal battalions in which to place those who choose wilful ignorance over critical discernment. As Chomsky has explained it, we have the media at our disposal to manufacture our consent to the dictates of the surveillance state. Capitalism has made it easy to accommodate progressives. The appearance of their political positions can easily be mistaken for the essence of a viable socialist alternative to capitalism. But liberal progressivism is hardly socialism. In fact, most liberal democrats keep their distance from the idea of socialism. They make no bones about accepting capitalism as inevitable, as something carved in the runes of civilisation, while at the same time they desire to make capitalism more 'humane' by redistributing wealth from capital to labour. Capitalism has not suddenly unleashed blitzkrieg on an unsuspecting world but has succeeded through the logic of attrition, of the cold inevitability of 'there is no alternative', and fortunately those social justice warriors who have held strong against the blinding indifference to equality, civil rights and human dignity are with us still in the work being carried on by groups such as Black Lives Matter and Idle No More.

While the academic left has managed so far to create tactical defence zones, such as CRT, Lat Crit, queer theory, revolutionary critical pedagogy, ecosocialism, ecopedagogy, barely enough from keeping a disastrous situation turning catastrophic, the academic left is still

flailing about in the shadows of the new beacons of the hard right. Unlike during the fall of the Soviet Union (a totalitarian regime cloaked in Marxist terminology and driven by an unyielding loyalty to the Party apparatus and its state capitalist mode of production), when educational adherents of militant Stalinist Marxism were left clinging to grim shards of ideological rubble, Western Marxists had had time to reappreciate Marx's writings outside the anaemic and disingenuous ideological parameters that served as an opportunistic means of thought control practiced and enforced by both Western democracies or communist parties, as those who became students of what Marx actually wrote — post-Marx Marxists — learned to engage in the humanism in Marx's work without discarding it as simply the refuse of the thinking of the 'Young Marx' as opposed to the more scientific 'Mature Marx'. And yet the left's attempt to navigate its current syncretic orbit has wandered off course. It hasn't yet discovered the means of challenging today's highly divisive public sphere, which is currently infected with a renascent ultra-nationalism and phony isolationism, a justification of irredentist claims to lost territory (metaphorically the loss of the Anglo-American Christian ethno-state through an historical demographic winter with its falling birthrate for whites) and a dangerous doctrine of natural domination cultivated in the geopolitical imaginary that justifies the existence of an ethno-religious statehood, echoing the catechism of National Socialism's resettlement doctrine.

Just think of Steve Bannon who appears to be in psychic communion with the Thule Society, and the multipolar, anti-globalist worldview promoted by Russia as an antidote to US imperial domination. Trump supporters in my mind share Trump's white supremacy, and it's clear that they have yet to be disintoxicated from the hatred of the first black president of the United States. The fear of a future white minority race is driving much of today's politics. Many are fearful of 'birth dearth' and today's nativist 'dearthers', alarmed by the declining Caucasian population in the United States, are blaming gays and lesbians, environmentalists, population control advocates, supporters of birth control, common law couples who refuse to be legally married and even married heterosexual couples who fail to have sufficiently larger numbers of white children for what they see as the demise of the white race — including what they perceive as their racially defined experiences of dispossession as white people who have been passed over by the politically correct multiculturalists in Washington — all of which they understand to be contributing to the impending death of Western Civilisation.

We who advocate a critical pedagogy, have inherited the acrimony and derision they continue to direct at us. Clearly, critical pedagogy is grievously incompatible with the shared prejudices of Trump supporters such as support for authoritarian populism and for nativism, for the excessive enforcement of the rule of law, the demonisation of and a deep horrific anger towards women, people of colour, immigrants and Muslims, the LGBTQ community, support for evangelical Christian beliefs, and a fanatical defence of the white race so lurid it could have had been hatched in the inner sanctum of Himmler's castle at Wewelsburg. The left in the US has yet to cohere around a viable alternative to capitalism under today's threat of overproduction. This threat has been dramatically underlined by the election of Donald Trump, thanks to the Kremlin playbook and its mobilisation of fascist *engagees* as well as the dangerous metapolitics of red-brown alliances (militant left and far-right).

Critical pedagogy is not opposed to traditional conservatism per se, but stands opposed to the ideas that soil the brainpans of the alt-right, that despicable praetorian guard of the militant right who are loathe to give any credence to ideas spawned by moderate political voices of various stripe (such as traditional conservative ideas or liberal values) believing that they breed ignoble instincts and are inhospitable to the racial hygiene of those who would defend a white ethno-state. This group refuses to be dis-intoxicated from the hatred of the first black president of the United States, and operates under threats of immiseration and the fear of a white minority race. The latter is a phenomenon that many right-wing movements refer to as 'demographic winter', a white supremacist interpretation of 'birth dearth'.

II REVOLUTIONARY PEDAGOGY AND CREATIVE SKILLS

Lisa: Does revolutionary pedagogy involve creativity skills as well as critical and analytical disciplinary skills?

Peter: As someone who holds strong political beliefs but who holds them strategically enough to survive in the academy, I would want to emphasise that critical pedagogy is not a methodology, per se, sequestered in schools of education. It's not simply or mainly a set of pedagogical procedures or analytical steps as one might typically envision. In this sense it's different from the field known as Critical Thinking. It is more

about problem-posing than solution-giving. Of course, it does seek to resolve contradictions through dialectical reasoning, through the negation of the negation — through challenging the disciplinary modalities of domination within capitalist societies, but that's a whole discussion in itself.

It includes but goes beyond helping students graduate. Successful graduation rates among students will not necessarily alter the material positions of those suffering within neoliberal capitalist societies. To date, public and private education has not helped to build a social order where equality, democracy, inclusivity and criticality prevail. Mass schooling has socially reproduced class and racial hierarchies which give greater purchase to the cultural capital of white students and the rich and middle class who are reconfiguring the society using their power, privilege and wealth to amass more power and privilege and to create the conditions of possibility for acquiring greater fortunes for themselves. This is clearly repugnant in the face of massive income and social inequality in the United States and especially egregious in light of the increasing segregation of residential neighbourhoods and schools.

So, if we exercise creativity in our classes it would mean, for instance, resisting the ruthless foisting of market fundamentalism, market discipline on all aspects of life in the US, including the workplace, places of worship, the school-to-prison pipeline, healthcare, schooling, the environment. Almost every aspect of public life is becoming privatised, leading the formation of consumer citizenship and ethical race to the bottom line. Critical pedagogy is about the creation of critical citizenship, of breaking of the bunker mentality that you 'cannot negotiate with authority' and as a result you remain ensepulchered in the crucible of consumer citizenship, in the thrall of the trend towards the businessification of education, from K-12 right through to university education, including the baleful expansion of for-profit charter schools. So, creativity in the sense of practicing critical pedagogy requires that we ask the question, 'creativity for whom?', 'who benefits?' and creativity 'for what purpose?'.

We ask these questions in a dialogical space — this could be a K-12 classroom, a law school seminar room, or a church basement, or a community centre. The purpose of the dialogue is to make the strange familiar and the familiar strange — it is a form of de-acculturation, of de-acclamation, of de-socialisation, of questioning what we take for granted. But this is an existential, phenomenological process that doesn't follow

prescribed steps. The intent is to build a psychosocial moratorium where the educator and the students abandon the hierarchy and the educator is willing to be educated by the students, and when this works it creates a liminal space, a 'subjunctive moment' of 'what if'. What if the world was like THIS and not like THAT? What if it were a place of joy, love, hope and solidarity, and not a place of precarity, fear, hatred and division? What has society made of me? What do I like about that, and what do I want to change? How do we go about re-socialising ourselves so we can build a world where, for instance, capital does not flow from the labouring classes to the rich? How can we remake ourselves; how can we create spaces where we negotiate what we find meaningful in life? All aspects of life have a pedagogical dimension. All communication is pedagogical. When we see the American flag in a classroom, that is a pedagogy, part of the official catechism of patriotism. So, we negotiate and co-construct the curriculum with the students.

I work as a Chair Professor in China for part of the summer and when I ask students to form groups, and I start asking them questions about their lives and history and what they want to get out of the class, they initially think I am crazy. You are the teacher, we are graduate students who have made it into doctoral programs by absorbing the knowledge of our professors, so why are you wasting time asking us about what we think, how we feel? But by the end of the course, many of the students begin to understand that critical pedagogy is not listening to the expert sitting at the podium but standing with the professor with one foot in the classroom and one foot outside the classroom — in the space of the double negative. The world is not necessarily this and not that but both this and that. What do I mean when I make such a claim? Well, when I stand under the arch of the classroom doorway with half my body in the classroom and half my body outside the classroom, I am not in the classroom but I am not not in the classroom. Likewise, I am not in the hallway, but I am also not not in the hallway. I am both in the hallway and outside of it. This illustrates the idea of 'both-and' dialectical thinking rather than 'either-or' classical logic. This is the space of liminality, or betwixt and between, of 'what if?' This is why portals in sacred buildings have been so revered in religious communities over the centuries. Students understand that the way we normally name the world is hidebound and more malleable than it need be.

Capitalism, while taken for granted, is one of many possibilities for organising the world. Socialism is another possibility. How so? Well, the dialogue is initiated through

teachers serving as cultural workers. This space of co-constructing the curriculum with the students adopts some strategies such as the idea of detournement, created by the legendary Letterist International, and later adapted by the Situationist International. It's a way of turning the dominant society against itself, not unlike some forms of contemporary 'culture jamming'. In China I use the video, 'This is America', by Childish Gambino, to counter the perceptions of the US presented politely by my Chinese students. (When I teach in Latin America this is not necessary and I am sure the reason for this needs no explanation). The video incorporates Brecht's famous *Verfremdungseffekt* or 'alienation effect' and works well in certain pedagogical spaces for provoking social-critical reflection on the part of the students.

In Latin America I use a video created by a student at Instituto McLaren de Pedagogia Critica that uses a soundtrack consisting of popular narco-corridos that glorify the drug lords of Mexico. Disturbed by this cultural phenomenon taking place throughout Mexico, my student was able to acquire hundreds of photos of beheaded, shot, machete hacked and acid drenched bodies of victims of the cartels. These images then accompany the popular narco-corridos. I am not permitted to show this video to students at Chapman University, nor would I want to. It is also inappropriate for the Chinese context. The student (who taught public school in Mexicali) who made this video as part of a class assignment in one of my courses in Ensenada is now a doctoral student at Cambridge University.

The problem-posing dialogue generated with the students in the co-construction of the curriculum constitutes a pedagogy of disposition, that enables students to use their lived experiences and their more formal understanding of society to read the world and the word, that is to have a dialectical understanding of their self-and-social formation, their subjectivity, and this disposes them towards a path of liberation, a form of social action for change, a way of constructing themselves and society in a different way, one that respects diversity, equality, the practice of peacemaking, and protecting the biosphere. This is the opposite of what Paulo Freire criticised as the traditional 'banking model' of education where knowledge is deposited into the brainpans of students as a means of socialising them to learn the 'right' way, that is, to learn in a technocratic, quantifiable way that socialises them to accept mainstream values, mores, rules of

behaviour, and the myth of meritocracy (i.e. success comes to those who work hard, study, learn how to interact appropriately with others, and fulfil their duties as citizens).

This is the true meaning of empowerment, a term that has unfortunately been hijacked by corporate culture the way Reagan hijacked the term 'revolution'. Ours is an intervention on behalf on human rights, equality, and social justice in its many incarnations. I must also emphasise that we prioritise anti-fascism and pro-socialism. Well, let me pause to make a qualification. I have developed (with inspiration from the late Professor Paula Allman) a form of critical pedagogy called 'revolutionary critical pedagogy' which is critical of forms of critical pedagogy that has been reduced to domesticated 'feel good' conversations with students. Revolutionary critical pedagogy is underwritten by a Marxist analysis of race and class, and arcs towards a viable socialist alterative to neoliberal immiseration capitalism. In an economy in crisis in which demand for labour declines in relation to developments in technology, real wages are stabilised by capitalist production and wage growth declines relative to the economy's total value creation, leading to a worsening workplace environment. In such an historical juncture, critical pedagogy encourages students to become critical and creative public intellectuals and activist citizens.

III 'HISTORICITY' AND CRITICAL PEDAGOGY

Allan: Paulo Freire spoke of 'historicity' and why it is important for educators and students to be mindful of both hope and the need for 'the insertion of self in the creation of history and culture'. How important is hope and situated knowledge to critical pedagogy and why should students be interested?

Peter: Historicity is an important term in critical pedagogy. Especially at this historical juncture, as we are facing a species of capitalism that has continuously played a role in genocide, ecocide, and epistemicide, the latter referring to the abolition of ecologies of knowing of Indigenous peoples. The rise of the neo-Nazi alt-right in the US suggests that the Aryan visionary Guido von List still haunts the militant Anglo-American right, as does the zoology of Jorg Lanz, ex-Cistercian monk and Biblical scholar, who, inspired by Madame Blavatsky's mystical history of racial evolution, developed an occult religion of race that transmogrified into the Nazi Party. In the infamous Unite the Right torchlit rally in Charlottesville, North Carolina, the Artaman League's cry of 'blood and soil' echoed the

Nazi ideals of a pan European brotherhood of the racially pure, led by the Armanenschaft, whose duty was the extermination of adulterated and debased races and the purification of the Aryan race, the new Templar Knights, the new superman who leads a religion of white supremacist ethno-nationalism. Here the idea of an Aryan historicity was the long cherished dream hatched by the SS Race and resettlement bureau.

It is quite clear that we are facing not simply the prospect of a global police state, but the reality that a global police state has already come into being, even if we find it at times to be somewhat out of focus. I cannot remember in my lifetime when the organised working-class was as weak as it is today, far weaker than many other radical models proposed. It is not that fascism has been significantly absent over the past decades in the United States since World War II, but the pace at which twenty-first-century fascism has come upon us is due to the fact that twenty-first-century capitalism has become a self-fuelling engine whose capacity to travel the globe has intensified dramatically over the last few decades. Hence, for those of us who have chosen a life of self-reference in the midst of historical uncertainty, the birth of new systems of panoptical surveillance weaponised to crush the human will to resist, and a studied inattention to the perils of the marketing strategies designed to depoliticise us, we must continue to reflect upon the need to foreground the forces and relations of production as the medium of our most vital concerns if we are to break free from our shackles of alienation lest we unsuspectingly betray our ontological vocation of becoming more fully human. Our aptitude for and inspiration for becoming social justice educators must not be crushed, even during this world-altering time of ignorance. I can barely detect in today's factories of fear-mongering the faintest adumbration of optimism that is requisite for us to continue to live as moral beings, according to values that elevate and ennoble us rather than ethically impair us.

Trumpism is part of the normal progression of global capitalism, not some feckless aberration. And the same can be said, in my view, about the rise of fascism worldwide. So, the question of hope, of maintaining an 'optimism of the will' in Gramsci's sense is needed now more than at any time. And of course, we cannot divorce the idea of hope from the idea of utopia as Ernst Bloch, Paulo Freire and others have taught us. But we need a concrete utopia, not some abstract utopia disconnected from the daily struggles of the popular majorities. We can't move to the abstract universal except through the concrete, as Marx revealed to us. So, the utopia we forge must be built from the real

struggles faced by the vast numbers of people who are struggling to survive, to put food on the table, to provide shelter and healthcare for their families. For me, the struggle for socialism is an important means for fostering hope.

It thus behoves me to make the claim no less fervently that society is in desperate need of a new paradigm of the public intellectual who refuses to accept the limited situations imposed by the transnational capitalist state, who refuses to deflect attention away from the totalising effects of alienation and immiseration that globalised capitalism has wreaked upon every aspect of contemporary existence dependent upon value augmentation to survive — which covers a heck of a lot of territory.

We are facing the frenetic rise of the white Christian evangelical right who see in the rise of Trump a divine mandate: that born-again Christians must defend Western civilisation from the so-called cultural Marxists, the multiculturalists, the feminists, the environmentalists, the politically correct social justice warriors — and not least from the Freireans, the advocates of critical pedagogy.

Contrary to the argument made by spokespersons on the alt-right, the political corruption of US democratic culture and society did not begin with the discovery of Paulo Freire by radical educators, or by the Frankfurt School, whose members of whom imported pathfinding systems of a dialectical rethinking of Marx, Freud, and other continental philosophers applied to the production of mass ideological control that alerted readers to the potential danger of fascism merging with the market prosperity of Western capitalist countries. Rather the undermining of democracy in modern US. history began with the 'rat lines' created by the OSS (later to become the CIA), Britain's M-16 and the Vatican. For example, Bishop Alois Hudal, a Nazi sympathiser and rector of the Pontificio Istituto Teutonico Santa Maria dell'Anima in Rome coordinated with German 'stay behind' operatives from the SS and the fascist Black Legions in order to help Nazis and fascists to escape from countries liberated by the Allies to Latin America, the US and Canada. Slowly, pro-fascist sentiments were normalised and weaponised in all US-allied countries, as part of a plan to resist a possible invasion of Western Europe by the Soviet Union or to destabilise the possible ascendancy of communist parties in the West. Clearly the OSS/CIA worked closely with German Nazis and Nazis from Nordic countries to create plans for secret operations against communist and trade union organisations in the West.

The alt-right has attacked the importation of US universities' various offerings of critical theory developed by Jewish intellectuals who comprised the Frankfurt School, arguing that these 'cultural Marxists' are to blame for today's crimes of political correctness, multiculturalism, feminism and queer theory, among other progressive developments. This is a favourite alt-right propaganda line. In reality, critical theory remains foundational to critical pedagogy precisely because it was able to reveal the marriage of the US culture industry with fascism.

To the drumbeat of conventional media propaganda which is designed to gaslight the public, to regiment the minds of the citizenry, to gin up preconscious feelings of American exceptionalism, and to buff up the fading historical glint of the Monroe Doctrine, we are marching lock-step through the graveyard of buried memories of past US administrations, knee-deep in a surplus of discontent with facts, etherised in a swamp of disinterred memories of American Empire. Despite the masterful stagecraft of masking its ideological hegemony, the operational signature of US empire is hard to ignore — for instance, US-trained death squads in Chile and El Salvador, the US support for fascist dictatorships in Brazil, Argentina, Guatemala, the funding and training of the Contras of Nicaragua, the shocking silence surrounding current economic sanctions against Venezuela — why are we so quick to forget that sanctions are tantamount to an act of war? — have been responsible for, on balance, millions of deaths of the most vulnerable of the population. US imperialist invasions of Vietnam and Iraq and the undaunted machinations of the CIA have devastated entire countries using chemical warfare, and over the decades have helped to assassinate political leaders — Patrice Lumumba of Congo and Salvador Allende come to mind. The Bush Jr. administration captured and tortured terrorist suspects, whereas Obama made acts of US violence 'cleaner' by sending drones armed with missiles. But we don't deal with these historical events in our schools.

According to the Nuremburg Tribunal, one of the foundations of international law — aggression is the supreme national crime — yet the notion of American exceptionalism helps to codify practices that enable the government to, for instance, imprison and torture American citizens or put citizens on 'no-fly' lists without any explanation. You could look at the stipulations in the International Criminal Code, or the National Defence Authorization Act, which is neither vague nor fleeting and ask yourself if, under the auspices of *American Service-Members Protection Act* of 2002, whether any American

citizen will ever end up in the dock at The Hague. Laws codify practices which become, over time, ensepulchered in the body politic and the citizenry becomes insured to those practices. Look at the disinformation campaign now on Venezuela — Google and Facebook are complicit in a coordinated purge, in working with government agencies and think-tanks like the Atlantic Council that is dedicated to international security and global economic prosperity, in censoring and removing webpages that are sympathetic to the Maduro government. Will the country come to resemble Kansas in the1850s — armed cadaverous pro-slavery gangs brandishing pistols and Bowie knives versus anti-slavery free-soilers? Will we treat immigrants like the Mormons treated emigrants from the North-Western Arkansas region at Mountain Meadows, Utah? Are we raising new generations of William Quantrills? Now to your point about situated knowledge I agree.

I am in agreement with Paula Allman who maintained that there are different levels of truth: meta-transhistorical truths, which appear to hold across the history of humanity but which must always be held to criticism; transhistorical truths, which are susceptible to future revision; truths that are specific to a particular social formation; and in conjunction, specific truths, which are transient but attain validity in the contextual specificity of the developmental processes of which they are a part.[1] While I agree that epistemological viewpoints about the world are value-laden and theory-laden, unlike postmodernists, I do not believe that we can alter the world simply by changing our beliefs about it. Nor would I want to bleed epistemological objectivity into ontological objectivity and claim that because there is no epistemologically objective view of the world there cannot exist an objective world ontologically. When we embrace different worldviews or cosmos-visions, this is not tantamount to inhabiting objectively different worlds. The specific social formation that has attracted the interest of whom we shall call 'the revolutionary intellectual' is capitalism, and the essential gesture of the revolutionary intellectual is to contribute to the formation of a counter-public sphere by making the case for a socialist alternative to capitalism. Students should be interested in knowing that while they cannot have access to the full truth of human history, the world is nevertheless knowable, but our knowledge of the world will always be partial and relational — not relative. We are immersed in fields of knowing, and our engagement is historically

[1] Paula Allman, *Revolutionary Social Transformation: Democratic Hopes, Political Possibilities and Critical Education* (Bergin and Garvey, 1999) 236.

situated. The situated nature of knowledge has led me to develop a position that I call critical patriotism.

As someone who began teaching elementary school from 1974-1979, and then in various universities for over thirty years after that, I have tried to impress upon my students over these years that history is always upon us as a dark shadow we must carry with us even into the light of the present and the dreams of the future. We must never forget the horrors of the Holocaust or ignore the rising tide of anti-Semitism today. We must stand in solidarity with our Jewish brothers and sisters when they come under attack by anti-Semites. Nor should we ignore the sufferings and injustices inflicted upon our own First Nations peoples, upon our African American brothers and sisters, our Latinx and Asian communities and our Muslim brothers and sisters. We stand against all government policies that target innocent and vulnerable groups both in our own country and worldwide, and that permit them to serve as 'collateral damage' in our military operations.

To acknowledge the crimes of those who create and carry out human rights abuses in the US, and in the name of our government, is not tantamount to being anti-American. Crimes against humanity go much further back than the invasions of Vietnam and Iraq and US war crimes committed in those countries, and our logistical support for and training of Latin American military whose death squads slaughtered tens of thousands of men, women and children during the 1970s and 1980s. They are occurring right up to the present.

Once, at a banquet hosted by the Argentine Consulate General in Los Angeles, I was seated next to economist Arnold Harberger, who helped move Chile from a model of socialist transformation under president Allende to a market-driven neoliberal economy under the ruthless dictator, Augusto Pinochet. I was speaking to him approvingly of Lula, then president of Brazil, when Harberger made some comment about the child-like mentality of Brazilians. Slamming my drink on the table in response had all the guests looking my way, so I was forced to hold back my words out of some consideration for decorum, but my point was nevertheless made. Interesting how experiments in socialism are never tolerated by the US. A thriving socialist regime would be considered a national security threat to the US. Look what happened in Nicaragua, during the Sandinista Revolution.

The Reagan administration authorised the CIA to finance, arm and train anti-Sandinista fighters, mainly remnants of the National Guard under the murderous dictator Anastasio 'Tachhito' Somoza Debayle. And under US Lieutenant Colonel Oliver North, the US began covertly selling arms to Iran and channeling the proceeds to the Contras, who were encouraged to attack civilian targets such as schools and hospitals, which they did with savage ferocity, murdering, torturing and raping teachers and students, including children. Not surprisingly, president Reagan lauded the rebels as 'moral equals of our Founding Fathers'. Fawn Hall, North's secretary, confessed to shredding much of the incriminating documents but was granted immunity from prosecution for her testimony during the infamous Iran-Contra proceedings. Interestingly, a friend of Fawn's, a doctoral student studying in Kansas, once introduced me to Fawn, during which time Fawn proclaimed me to be her 'favourite communist', a remark I assumed was made with considerable irony, as she proceeded to photograph me in the living room of my home (at the time I was living off the Sunset Strip in Los Angeles and Fawn, married to Danny Sugerman, manager of The Doors, was living in the nearby Hollywood Hills). Fawn asked if I would give her one of my books to read with her husband.

It was, I think, *Critical Pedagogy and Predatory Culture* — I remember it contained an unflattering description of her former boss.[2] Needless to say, Fawn did not seem pleased that I was working on behalf of Hugo Chavez and the Bolivarian Revolution. Some have argued that leftists overlook the crimes committed by communist regimes, or leftist guerrilla groups. That no doubt has been the case. I would argue that crimes against humanity have been committed by those on the right and on the left. But that doesn't mean we ignore context. Violence of the state often provokes revolutionary violence from below, which provokes reactionary violence from above, which ends in a ceaseless cycle spiral of violence. (Wasn't this one of the teachings of Martin Luther King?) And sometimes revolutions turn into their opposite (as Marxist dialectical reasoning could anticipate via the notion of the negation of the negation). Marx would be correct to argue that the replacement of capitalism with the state ownership of the means of production is only the first negation, which needs to be followed by the negation of the negation, that is, the negation of the very idea that the means of production must be owned rather than equally shared. The failure to engage in the second negation was one of the reasons that I

[2] Peter McLaren, *Critical Pedagogy and Predatory Culture* (Chapman University, 1995).

considered the former Soviet Union to be state capitalist — not communist in Marx's sense of the term.[3]

Over a decade ago while I was visiting comrades in Venezuela, having been invited to a live broadcast of Aló Presidente hosted by President Hugo Chavez, I was seated behind Ernesto Cardenal, a Catholic priest and brilliant poet, who served as Nicaragua's minister of culture from 1979 to 1987. Pope John Paul famously scolded him at the Managua airport for involving himself in politics and forbade him from administering the sacraments (he was rehabilitated by Pope Francis in 2019). Cardenal left the Sandinista Party in 1994, and rightly so in my opinion, as a way of protesting the authoritarian leadership of Daniel Ortega. Cardenal no longer believed the Sandinistas to be a revolutionary leadership. Cardenal joined the Sandinista Renovation Movement, proclaiming, 'Yo creo que sería preferible un auténtico capitalismo, como sería Montealegre, que una falsa revolución' (rough translation, 'I think it would be more desirable to have an authentic capitalism, as Montealegre's would be, than a false Revolution'). At the time, Eduardo Montalegre was the presidential candidate for the Nicaraguan Liberal Alliance. So yes, of course, a liberal capitalist democracy would be preferable than, say, a communist regime that betrayed its principles and turned into a totalitarian police state. But here you are not describing the communism of which Marx so famously wrote.

The issue for me as a dual citizen (Canadian and US), is that we need to look in our own backyards, and address current conditions with the best analytical means we have available and forge networks of solidarity across borders — whether they be neighbourhood, regional, provincial, or nation state. Look at the behaviour of border agents towards political refugees, look at the squalid cages we have built to house the children of these refugees, forcing them to quench their thirst by drinking toilet water. Look at horrifying injustices inflicted upon African Americans by the police — it's become part of the everyday toxicity of American culture, part of a necrotic pageantry we call living the American Dream. To speak out against this culture is to exercise what I have always referred to as critical patriotism. To speak out against inequality is a form of critical patriotism. Revolutionary critical educators do this by analysing why capitalism

[3] See the work of Raya Dunayevskaya on the topic of state capitalism, a theory to which I adhere.

hasn't produced equality, despite a myriad of attempts over the centuries. Marx is the preeminent theorist that can guide us in understanding the current crisis of transnational capitalism. Capitalism can't be fixed — it's time to organise another system. Let's struggle together to find another system that puts the workers in control of the means of production, and with a say in what to do with the profits. Equality doesn't mean everyone will be equally poor. Critics of Marx frequently use that line as a means of obscuring the dynamics of Marxist analysis.

The elements of despotism we see converging all around us is not the result of our being manipulated by a nefarious cabal seeded eons ago by extra-terrestrials that has been pulling humankind's strings from some Atlantean cradleland populated by lizard beings — pace all the occultists who wish to inhale the vitalistic ether of our warrior ancestors with the nasal acuity of Tony Montana snorting a mountain of cocaine spread out on his desk. Rather, it can be best understood by examining the forces and relations of production and how we organise society to fight scarcity, to challenge racism, sexism, homophobia and white supremacy, and to promote a society that continually thirsts for justice rather than succumbs to the temptation of unshackling the forces of proto-fascist authoritarianism.

IV CONCRETE UTOPIAS

Elizabeth: Ideas formed through critical pedagogy, such as revolution, are criticised as being utopian and idealistic which can have the effect of inducing cynicism and causing students to disengage. What guidance can you offer law students who must grapple with this kind of counter-critique throughout their studies?

Peter: There is nothing more important today than utopian thinking. We need it now more than ever. But we need to take advice from Ernst Bloch's *The Principle of Hope*, perhaps the greatest book on hope ever written. I am for concrete utopias against abstract utopias. Concrete utopias constitute our latency of being human and enable us to interrogate capitalist regimes of domination and produce alterative grassroots strategies and tactics. Think of concrete utopian thought as a prefigurative critique of political economy as a challenge to the augmentation of value in capitalist society. We try right now in the raw concreteness of our social life, to create social relationships and ways of

organising our communal life that reflect the future society we seek — socialism, for instance. Abstract utopians detach themselves from a critique of the here and now, they abstract themselves from the latency we possess as revolutionary agents able to challenge the messy web of capitalist social relations of production, far removed from protagonistic agency and struggle 'on the ground'.

To become an agent of history requires utopian thinking in the register of a concrete utopia, able to challenge the swindle of fulfilment of consumer capitalism. We should engage collectively in the struggle to create the not yet realised future — a post-scarcity society, for instance. But the utopian imagination is not the same thing as trying to follow a blueprint. It's more preconceptual, something we strive for and wish to attain.

We are trying to arrive at a particular historical moment, a moment when history really begins. Our struggle is part of our 'prehistory' and when we arrive at socialism, or true democracy, prehistory ends and we begin to live as genuine, authentic human beings. Utopian thinking is the way to disentangle ourselves from ideology, the internalised norms and values of our capitalist society. Ideology is a deformation of everyday life, an unconscious way we move in, through, and alongside everyday life which means following the ideas of the ruling class. Our lived experiences are formed from the ideologically deformed narratives and ideas of the ruling class, and, as Marx pointed out, the ideas of the ruling class are the ruling ideas.

Utopian thinking helps us create history. History here proceeds through negation, as we 'negate' all that which prevents us from fulfilling our ontological vocation, which Paulo Freire maintained was to become more 'fully human'. We generate oppositional concepts to the colonisation of our subjectivity that has been achieved through a marriage of the private sphere and the state. Those oppositional practices happen in the concrete materiality of history which is always open to what Freire called 'untested feasibility', where human potential and the contingencies of hope of human beings — which Bloch referred to as 'daydreaming' — enables us to face daily existential threats conjoined in a dialectical dance of history-making, of creating a radically other world.

This dialectical dance of history is about creating an oppositional public sphere or counter-public sphere, a space of repristinated or re-politicised dialogue, free from domination and oppression, the result of counter-hegemonic practices that open up

spaces of participatory democracy, direct democracy — which can only be realised in a world absent of value augmentation.

Cynicism is understandable since capitalism has hijacked the utopian impulse in our commodity culture. Critical literacy has given way to consumer literacy. Yet cynicism can be transformed into hope through engagement with others in collective struggle. Critical consciousness is not something you acquire through reading critical legal theory and then deciding to open up a storefront office in a working-class neighbourhood. Critical consciousness begins when you open that storefront office and then reflect upon the relationships you build in the process — and critical legal theory can be helpful in that effort. But revolutionary praxis begins with action, then reflection, then more reflective action. Critical consciousness is an outcome of action, not a precondition for acting.

V THE MARXIST EDUCATIONAL LEFT

Allan: In 1998 you wrote: 'The Marxist educational Left has, for the most part, carefully ensconced itself within the educational establishment in an uneasy alliance that has disabled its ability to do much more than engage in radical posturing, while reaping the benefits of scholarly rewards.' [4] Has anything really changed after 20 years?

Peter: Not much has changed, Allan. We still have a gap between academic Marxists, and those that actively live their Marxist politics. I think it must be the same outside academia. All of us live in contradictory ways — some more than others — but I can only speak from my 30 years in the academy. And I find that so much research being done is research directed towards making incremental steps in changing education policy. It's done with the understanding that we need to accept the social relations of capitalist society as more or less a permanent feature of our lives. Here in the US human rights is detached from the idea of economic rights. More research needs to be done on capitalism and possible alternatives to value production (production of monetised wealth). Sure, small steps aimed at the redistribution of wealth are important, but we need to exercise our utopian imagination and begin to address the root causes of educational inequality, an essential component of which is economic inequality — and how this links to racism, patriarchy,

[4] Peter McLaren, 'Revolutionary Pedagogy in Post-Revolutionary Times' (1998) 48 *Educational Theory* 431, 431.

nationalism, etc. We cloak ourselves in our radical garb and debate each other at conferences, and unfortunately end up in the trap of mimetic rivalry, which depotentiates our ability to organise collectively. We end up competing rather than cooperating.

VI Capitalism and Pedagogical Trends

Allan: Why is it unfashionable for academics to teach students about class inequality at a time when inequality is increasing, and it is fashionable to reflect on racism, sexism and homophobia?

Peter: Gender and racial equality are obviously at the centre of the struggle for democracy — this is undeniable just by looking at the impact of the Civil Rights movement, and groups such as Idle No More, and Black Lives Matter, Black Youth Project 100, to name a only a few movements of major importance. Race and racism are integral to the capitalist system but in order to see this clearly we need to go beyond identity politics. The transatlantic slave trade and colonialism helped secure capitalism as a world system of domination, exploitation and alienation, absolutely. Racism is integral to the logic of capital accumulation. But economic relationships are not secondary to racial ones. They are co-constitutive. Races were constructed as part of world capitalism, and racialised social relations help to mask or hide economic relationships.

Nevertheless, I think the Republican Southern Strategy of focusing on issues that divide us culturally, as a way to distract us from the strategic centrality of challenging capitalism, have been all too effective. This includes emphasising initiatives like, for instance, black entrepreneurialism. Affirmative action received too much of a 'whitelash', so the emphasis of government has been on building black small businesses, for example, as a way of reinforcing once more a Horatio Alger, 'pull yourself up by your bootstraps' ideology. I agree that wealth creation in the US has been racist and of course eliminating the racial wealth gap is important. But at the same time as we are trying to make wealth creation inclusive of all groups, let's take a hard look at the heart of the system of value creation that we have — currently, we call it immiseration capitalism, neoliberal capitalism, etc.

In the universities, we are seeing very little critique of capitalism as a set of social, legal, economic and social relationships. At Chapman University, we have posters of individual

students that begin with 'I am Chapman'. Students will follow with a description of how they see themselves — so for instance you see, I am a Latina, I am Catholic, I am vegan, I am Wiccan, I am Christian, I am gay, I am Lebanese-American, etc., but I have yet to see a poster that says, I am a socialist, or I am anti-capitalist. There is a racial wealth gap, and a gender wealth gap — this should be addressed. But why not at least have one required course on Marx, or capitalism. In my 30 years in colleges of education you rarely, if ever, will find such a class, even though it's generally accepted that the best educational reform you could enact would be the abolition of poverty. But the social relations of capitalism are rarely addressed — largely because of the failures of so many communist revolutions and the way that those economic failures have been attributed by the media through establishing a false equivalence between communism and evil empires.

No mention of the fact that the Soviet Union was state capitalist and that Marx would have certainly been critical of any totalitarian state — in fact, Marx was in favour of the dissolution of the state. Hello spirit of Ronald Reagan, are you listening? No recognition that capitalism cannot fix problems engrained in the policies and practices of a racist capitalist state. We desperately need to move beyond a one-sided class-reductionist analysis of society and an equally one-sided identity politics that refuses to recognise class issues and a critique of capitalism. Just look at the vile and horrific resurgence of racism today — look at the way we are treating immigrants and political refugees, putting their children in cages, and look at the way black folks are being gunned down by police. The productivity of labour has been declining — the profits made from real estate and financialisation have not been invested into creating real jobs.

Corporate profits are being reinvested back into capital, not into creating decent jobs with medical coverage and retirement benefits. Profits are going into labour-saving technology. And Trump is using the current crisis of capitalism strategically - to blame the immigrants, blame those coming to the US from Mexico, from Central America, and from 'shithole' countries in Africa! Identity politics becomes a condition of being fixed on one's subjective existence in the face of existential threats while being distracted in the process from grasping and challenging the objective material conditions of exploitation that comes with living and struggling within the oppressive and dehumanising relations within the capitalist state — which include racism, sexism, patriarchy, white supremacy.

VII LAW SCHOOL AND CRITICAL PEDAGOGY

Ana-Catarina: Given critical pedagogy focuses on students questioning, challenging and undermining the current practises and beliefs of the legal system, do you think the current system of teaching adequately prepares law students for their future careers?

Peter: I have never worked within a law faculty, although some of my doctoral students have their Juris Doctor degree, which they obtained before coming into the Ph.D. program in education. I first heard about Critical Legal Studies in the 1980s and read some work by Roberto Unger. And I was intrigued by the idea that legal analysis could become one of the cornerstones of building a more just and humane society. About that time I read the classic work by Sam Bowles and Herb Gintis, two Marxist economists, *Schooling in Capitalist America*. That shifted my interest to economics.

Shortly thereafter I met the great Brazilian educator, Paulo Freire, and I began to focus more on critical theory and praxis philosophy. I cannot speak regarding how legal theory is taught in law schools but I would argue that Freire's development of critical pedagogy would certainly fit well within critical legal studies classrooms. You can't use the 'banking model' of education to teach critical legal studies — you would, I would hope, begin with addressing the lived experiences of your students, with developing critical consciousness through revolutionary praxis, through dialectical reasoning. I would advise adding Freire and Marx to the syllabi of all law courses.

Freire was admitted to the legal bar in 1943, but he chose not to practice law. He opted to become a high school teacher instead. I wonder if there is a lesson in that. Had he been working in the US at the time, perhaps he would have found more opportunities to pursue social justice initiatives by taking on class action suits on behalf of impoverished communities, or he would have become involved in environmental law. I don't want to diminish the contributions of fearless, committed lawyers in creating a just and humane future. As it turned out, Freire was imprisoned by the military dictatorship and afterwards went into self-exile to avoid being assassinated.

Vanessa: What is your view of the trend toward 'intensive' styled university courses? Should they be regarded as equivalent with traditional courses? Why/Why not?

Peter: Knowledge is not information that has been meticulously inked into a three-ringed compendium that sits at the elbow of a reference desk librarian, or that sits in some sacred urn like the armorial ashes of some long-departed king. The term 'intensive' is designed to effect a certain slippage of meaning. Nor does the term stipulate any generalised standards. Such courses in my view are too often part of today's alchemy of propaganda, designed as institutional money-generators that offer the same content as normal courses to be covered in less time. Can courses that are accelerated over a certain time span be taught with sufficient rigor? Likely not. So, the institutions offering such courses need to advertise their intensive courses both as rigorous and accelerated.

And what precisely does this mean — a course stripped to the bones — with all the excess fat removed? Fewer coffee breaks and classroom jokes? The concept of 'intensive' is rarely spelled out. Does 'intensive' mean more rigorous content, or content taught via some kind of streamlined pedagogy. It surely means that content and pedagogy are seen as separate whereas for me the curriculum should be co-constructed between the teacher and students. Knowledge is, after all, a dialogical practice.

So, is an 'intensive course' an academic equivalent of a two-week boot camp workout guaranteed to shed 20 pounds or your money is refunded? Or does it refer to content covered? And if it is the latter, then to what extent can one realise a profound understanding of content at a breakneck speed? So, then, are we talking about covering less content, but in more depth, or more content, but in less depth. None of this is specified in the course advertisements, and the contradictions abound. Can the concept of rigor be applied to the concept of intensive? Or by the term 'intensive' do we mean 'intense'. You certainly can have intense classroom activities in a class that is anything but intensive, if by that we mean both rigorous, in-depth (examining material from multiple perspectives) and comprehensive. Comprehensive is not very often compatible with 'compressed' or 'compact' time frames. These outcomes often work against each other. Knowledge, as my mentor Paulo Freire said, requires reading the word and the world. To what extent can teachers and students have the opportunity to truly engage dialogically with the materials offered in these 'intensive' classes?

VIII Despondency and Epistemological Challenges of Students

Elizabeth: A law student who comes to the classroom with a critical mind and a desire to serve justice as a lawyer might wish to understand how law interacts with society — that is, how it is felt in everyday life. This could include gaining a meaningful understanding of how law reproduces power relations and further generates inequalities. However, the reality of dominant legal pedagogy is that law students will instead leave the classroom feeling desensitised to the exploitive nature of law. Based on your knowledge of law curricula and the epistemological challenges students face, how can students navigate themselves through law school?

Peter: I wish I could provide you with an answer, but all of my 30 years as a Professor has been in colleges of education, and occasional guest teaching in philosophy faculties, and of course invited addresses to groups from many different disciples, such as geography, theology, global studies. I would reason that many of the difficulties faced by law students would be similar to those faced by students in a wide variety of disciplines and professional fields.

I have had doctoral students ask me the following questions over the years: how do I get through this doctoral program without losing my soul? How have you managed to survive in the university as a Marxist? Is it because you are male and white? These are legitimate questions. Students are aware, for instance, that there are hundreds of books written about critical pedagogy, but many of these books have domesticated critical pedagogy, or turned critical pedagogy into a methodology. I would hazard to guess that similar questions are raised by students in faculties of law.

Critical pedagogy is not a methodology in the strict sense of the term. It is a philosophy of praxis applied in everyday life. Rarely are issues debated in education classrooms about the history of educational law (there are exceptions of course). Yes, we read about the *Brown v Board of Education* landmark decision in 1954 (decided in the Supreme Court), but few students are aware of the *Mendez v Westminster* class action lawsuit (decided at the trial and appellate levels in at a federal circuit court in California), which preceded *Brown* by approximately eight years. I've met members of the Mendez family. Thurgood Marshall participated in the Mendez appeal and his work on that case helped him win the *Brown* decision. Few education students have ever heard of *Tape v Hurley,* in which the

California Supreme Court found unlawful the exclusion of a Chinese American student from public school based on her ancestry — this occurred in 1885! Many students of mine have examined the school-to-prison pipeline, have looked at how the legal system in general supports white property owners, and see our educational system — especially one driven by high stakes testing — as reproducing the class and racial hierarchies within the US.

And of course, the issue of privatising education is a big one, and there is a big debate over charter schools, the anti-union practices that come with charters, and the lack of qualified teachers who are conscripted into those charters, and of course the general corporatisation and 'branding' of universities, including colleges of education. So yes, there is a general feeling of malaise within schools of education, a feeling that while you might make a meaningful difference in the lives of students, you won't be able to effect much systemic change, and I assume that such malaise and despondency among students is also expressed in law school seminars.

IX CAPITALISM AND ECONOMIC INEQUALITY

Allan: Before the 2008 GFC you observed, 'One of the central contradictions of the new global economy is that capitalism no longer seems able to sustain maximum profitability by means of commensurate economic growth and seems now to be relying more and more on simply redistributing wealth in favour of the rich, and on increasing inequalities, within and between national economies, with the help of the neoliberal state.'[5] Since the GFC we've seen this play out on the streets of the world with widespread people protests but it appears that political populism and nationalism have benefitted while extreme wealth concentration remains relatively stable. How do you see this?

Peter: The concentration and centralisation of capital after WWII has given us corporate capitalism. There has been a decline in the rate of profits since the 1970s, and the massive debt levels have been accumulated by global capital — which makes it impossible to return to the welfare state or the 'nanny state' that defined progressive liberal states when I was young and starting out as an elementary school teacher in the mid-1970s.

[5] Ibid 432.

'Neoliberalism' or the neoliberal state is not the seedbed of the problem — it is, of course, capitalism! We've had capitalism for hundreds of years whereas we've had neoliberalism only since the 1970s. We now have national-capitalist and transnational capitalist development models which are fuelled by anti-immigrant sentiment, white nationalist ethno-politics, and we are seeing it both in the US and Europe, and in Latin America the pink tide has vanished largely as a result of the crisis of capitalism. The answer is not a revival of Keynesianism (which some view as the antidote to neoliberalism) but the elimination of value production and creating a social universe absent of capital's value form. I hold a Chair Professorship in China during summers and I have been alarmed at the number of peasants displaced from the land and forced into urban areas to seek employment. Instituto McLaren is housed in Mexico and I have noticed a similar situation there, in Oaxaca and Chiapas especially. What will happen when technological innovations in labour productivity replace their jobs?

Relations of exchange have to have a rational basis for their organisation, and this can't be accomplished as long as labour conforms to an abstract average, that is, as long as abstract universal labour time dominates concrete labour. Exchange relations are imposed upon workers, with little or no say among the workers. Long term control over capital is impossible either by capitalists or workers because the logic of capital, its laws of motion (not private property or the market system) assume a form of production relations in which wealth is accumulated in monetary form (we call this value augmentation) and this logic of self-expansion becomes an end in itself.

In order for this to happen, labour has to assume a particular form we call a commodity. Labour in itself is not the source of all value, because value is not determined by the actual amount of time it takes a worker to produce a commodity. The value of a commodity is produced by socially necessary labour time under global conditions — and innovations in technology that increase labour productivity means that this social average is going to fluctuate according to the laws of competition. Since workers have no say in what this social average will be, workers are going to remain controlled by the process of abstract labour. Augmenting the productivity of labour is essential to the survival of capitalism. Affective labour, or labour that doesn't augment value, won't help the workers pay the rent. Affective labour isn't considered as important as productive labour by capitalists. The only way out of this mess is to replace the value form of labour with socialism. A

society of freely associated labour where products do not assume a value form has to occur at a global level.

We can make this happen only in a scenario where we are no longer dominated by generalised commodity production, by socially necessary labour time, by alienated labour and where affective labour is not devalued. Our failure to develop an alternative to capitalism creates a political vacuum that can be seized upon by the likes of Trump, by authoritarian populists, by proto-fascists. We are seeing that all over Europe, in the US. and throughout Latin America. People attack neoliberalism, but not capitalism because to attack capitalism is to open the door to socialism, which has been maligned in the US, especially since the end of World War II. The challenge as I see it is: with what do we replace market anarchy? Planned production doesn't lead to socialism, but merely is transformed into a version of state-capitalism, and we are seeing that in China today, a country that calls itself communist. We need an alternative vision of transcending capitalism that is able to achieve hegemonic ascendency — that achieves the popular support of the masses.

X CONCLUSION

Editors: What would you like to say to conclude this written dialogue?

Peter: I would only wish that we could consider more seriously the way that evangelical fundamentalist Christianity is influencing the current White House administration. We are used to media newspeak spun in the name of truth, from the chalkboard fanaticism of Glenn Beck, the shock jock pathology of Rush Limbaugh, the state media of Fox News, to the 'alternative facts' from the Trump White House, to Jesus stolen from the Bible, his words dropped into a Black Hole only to reappear from its deadly duel with gravity as a Joel Osteen sermon about striving to become a better you. In fact, co-pastor of Joel's church, and his wife, Victoria Osteen, once exclaimed, while twirling her leather skirt and parading her knee-high boots before an enthusiastic crowd at their Lakewood Church, former home of the NBA Houston Rockets: 'God wants everyone to be a superhero…like the ones you see in the movies.' But she didn't specify if she was referring to Superman, Jessica Jones, The Punisher, Ant-Man or some other Marvel figure. But Joel and Victoria are not the worst offenders, bending truth with the insouciance of a circus funhouse mirror — that would have to fall on the sagging shoulders of Franklin Graham, Jerry

Falwell, Jr. and others who have all but sanctified the Trump presidency with vainglorious pronouncements that betray their allegiance to the anti-kingdom.

Seven Mountains dominionism, the New Apostolic Reformation, Project Blitz's stealth attempts to transform American citizenship into Biblical citizenship and stealth tactics by these movements to weaponise the US *Religious Freedom Restoration Act* 1993 in the service of replacing the secular foundations of the nation state with a theocratic state, all amount to a form of Christian imperialism that has found its irreligious champion in Donald Trump.

I would sound a warning against facile analogies between Biblical figures and present-day politicians that are percolating through right-wing evangelical communities. We now see the practice of 'grave sucking', sometimes called grave soaking, that occurs when Charismatic Christians lay on the graves of deceased Christians in order to transport their mantle or anointing into their own body, as if they were receiving a gravesite teleportation with God at the helm of Starship Prosperity. Some believe the election of Trump means that the 'Jezebel curse' (see the words of Christ in Revelation 2:20-29) has been broken; since Trump is the warrior-king Jesu reborn, reincarnated as an American Daddy Warbucks, our capitalist guardian against communists, union leaders, Bohemians and leftist professors, who has cast out Jezebel's idols by 'draining the swamp' of corrupt Washington politicians, moving the US embassy in Israel from Tel Aviv to Jerusalem, and selecting Supreme Court judges at the behest of religious conservatives.

Jezebel was the Phoenician wife of King Ahab of Israel in the ninth century B.C.E. who worshipped Baal and who led the Jewish people into sin and moral deprivation. Some Charismatics see Bill Clinton and Hillary Clinton as present-day analogues of Ahab and Jezebel (see the 'research' of 'doomsday' charade-master and New Jersey preacher and rabbi, Jonathan Cahn, and prepare yourself for a grand, girandola-like eschatological proclamation of this idea). Of course, the Trump administration's egregious attack on feminists, multiculturalists and political correctness also fits in well with this analogy. With all due respect to my Canadian Appalachian kin, and with the risk of chewing my cabbage twice, if this kind of thinking isn't 'si-goggling', I'm not sure what is. Of course, how the evangelical community can have adverse effects on US foreign policy is always a concern. Just think of what the consequences of a Biblical-inspired war under Trump would be like. With the Joint Strategic Operations Command (masters of crowd kill,

signature strikes, targeted assassinations, creating kill lists where all men over 15 and under 70 are fair game and outsourcing these lists to foreign militias) as the paramilitary arm of the Trump (the cosplay president) administration, the worst possible scenarios are at play as Trump's religious base yearns for Armageddon to begin.

To all those holy rollers who wish us to be in thrall of their charismatic swagger, impregnated by tongues of fire and the rushing winds of Pentecost, what you have normalised for us as the protocols of the presidency are the clownish bloviations of a P.T. Barnum who takes his foreign policy and legalist cues from *Fox & Friends*, who panders to foreign autocrats whose tyranny he seeks to emulate, whose ego battens on the anger and hostility of his base. You have managed to divide this nation and then resurrect it into a divine plutocracy. This man-child seeking his own Piazza Venezia balcony in arenas, centres and stadiums across the country from which to jaw jut, gangle and jimmy our brainpans so they remain open to fear, is but a symptom of conditions that are permeating the historical firmament of our social universe. There will be other despots as long as we ignore the root causes associated with value production and the racism that has engulfed our world. The documentary data in the Bible taken from the words ascribed to Jesus unequivocally condemn the accumulation of profit and excoriate the creation of differentiating wealth as tantamount to accumulating 'money of iniquity'. That would be a good place for Churchsplaining fundamentalist Christians to begin in re-setting their moral compass since there exist no exceptions to this Biblical reprobation. But I say this not in order to consider building a socialist theocracy but as a rebuke to right-wing exegesis and the Religious Right's clamorous attempts to merge evangelical Christianity with the lunacy of a president they claim was resplendently appointed by the grace and singular majesty of God to the world's most powerful office.

It's time to join the fray, to collimate our revolutionary line of march towards the future knowing full well that we may never achieve an alternative to capitalism but knowing that not trying will surely doom our planet to obliteration.

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