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Dissent

deviance

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Many thanks to everyone who made the production and publication of the 2021 Sydney University Law Society Dissent Journal possible. In particular, we would like to thank the Sydney Law School and the University of Sydney Union for their continued support of SULS and its publications.

The University of Sydney is built upon the stolen land of the Gadigal People of the Eora Nation. Their sovereignty was never ceded. The system of law that we study and participate in has continuously failed First Nations communities. Throughout this nation's history, and to this very day, the law has been manipulated to become a vehicle for dispossession, violence and colonial rule. As students of the law, we acknowledge our solemn obligation to reckon with this legacy and to actively participate in the struggle to redress it. It is our hope that the future sees an end to the corruption of law and its misuse in the subjugation of First Nations communities — that it is finally used to address the continuous wrongs imposed upon them. We are certain that, until this happens, resistance will remain as proud and fierce as ever. This always was, and always will be, Aboriginal Land.

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DEVIANCE

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Editor-In-Chief's Foreword

Max Vishney

Compared to other publications of its kind, Dissent is something of a cart dragging a horse. Where most journals are dedicated to a particular subject of inquiry which each edition might view through a new perspective, Dissent scrutinises a different topic every year through the same critical lens. Many a law student has found this approach to be one of academic catharsis: an escape from classes that have one learn and apply the law, but rarely question it.

This edition of Dissent turns its critical gaze to the concept of deviance. It asks readers to question the relationship between the law as a means of social cohesion and deviance as the subject of society's opprobrium. If laws emerged through the formalisation of punishments and remedies for breaches of custom or taboo, then deviance is the natural subject of law. But not all deviance is illegal, and not all illegal behaviour is deviant. Liberal values demand that we do not conflate the criminal with the despised, and yet public attention has only recently fallen on the many ways by which marginalised groups are, in substance, punished for existing despite being formally equal to the majority.

These tensions go to the question of how the law reifies cultural or political conceptions of deviance by proscribing certain kinds of conduct, however one might question law and deviance in an entirely different way: that is, how the law in a particular jurisdiction is itself deviant as compared to its counterparts elsewhere by reference to standards such as natural law or widely held community standards. While a polity's laws are bound up in the preferences and prejudices of its constituents, students of comparative jurisprudence might look to standards which transcend borders such as the rule of law.

This edition's contributors examine the relationship between law and deviance in five dimensions. First, they consider the nature of rights as the means by which the law protects people whom their peers would not. Genevieve Couvret deconstructs the historical and cultural contingency of human rights to challenge the sentiment that such rights are innate, and Zi Liang Lim examines Rights of Nature legislation as a counter to the anthropocentrism within the legal system.

Second, our contributors examine the relationship between law enforcement and deviance as constituted by perceptions of criminality. Zachary O'Meara considers the famous case of R v Brown to mount a socio-legal analysis of the treatment of sexual deviance in British society. Ariana Haghighi criticises the use of predictive and algorithmic policing and examines the capacity of such law enforcement paradigms to reproduce society's biases under a cloak of statistical neutrality. Lauren Lancaster examines the legal status of protest and its consequences for democracy.

Third, contributors considered deviance in laws operating at the international level. Jules Edwards articulates the humanitarian failure of the international intellectual property regime in obstructing the provision of COVID-19 immunisation and other essential medicines to the global poor. Kiran Gupta investigates the travel ban enforced on Australians returning from India in May 2021 and situates it in structures of Whiteness in Australia. Fourth, April Barton uniquely approaches deviance in the context of professional ethics and its underlying moral framework among lawyers.

Fifth, our contributors reckoned with deviance as it applies to marginalisation on racial grounds. Sundanda Mohan writes about the mediation of public perceptions of deviance in marginalised racial groups through storytelling. Niveditha Sethumadhavan examines the history of racially motivated violence against Asian and Black Americans and the movements consolidated in 2020 following the killing of George Floyd.

These articles offer a timely and incisive account of deviance under the law which comes together to form a purposeful and truly thought-provoking edition of Dissent. I give my thanks and congratulations to all who were involved in the creation of this year's edition: the editors for their discerning oversight; the SULS design team for their tireless and indispensable work, Justin Lai for his guidance as publications director; Ellie Zheng for her powerful art; and, of course, the writers, without whom this journal would not exist.

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PART I

Deviant Rights

THE HUBRIS OF HUMAN RIGHTS

Genevieve Couvret

"Let us look at ourselves, if we can bear to, and see what is becoming of us ... it's not a pretty sight. It was nothing but an ideology of lies, a perfect justification for pillage; its honeyed words, its affection of sensibility were only alibis for our aggressions."[1]

The institutions of international law and human rights resemble the global world order. The term 'human rights' was not handed down by, and makes no appeal to, anything greater than the common man. This man has a language, race and gender. He wears the face of 'progress'. To some, he is the oppressor. Recently, the human rights regime has faced a postcolonial challenge. This essay is focused on outlining the charges of Eurocentrism and imperialism which threaten human rights' purported universality and normative power. I will begin by historicising the context in which the *Universal Declaration of Human Rights,* the starting point of the contemporary human rights project, was created. I will then go on to illustrate how, although the decolonisation of human rights is empowering from a postcolonial perspective, it can also be used by states to circumvent the enforcement mechanism of political pressure from other states. Deviance from human rights norms is thus reframed as a rejection of Western ideology. In order to actualise the abstractions that are freedom from oppression and respect for human dignity - which underlie both the dominant and alternative conceptions of human rights mentioned throughout this essay - we must confront the history of human rights discourse and liberate it from its perceived home in a narrow liberal tradition.

The *Universal Declaration of Human Rights* was born in 1948 as "a war-weary generation's reflection on European nihilism and its consequences".[2] It was "mostly a product of the winners against the losers,"[3] enabling victorious states with similarly bleak records of war crimes to position themselves as leading the world in human rights. Almost two thirds of world countries at the time of signing were under European colonial rule and thereby voiceless – only 48 states actually signed the *Declaration*. The drafting committee was also led by "the Westernised global elite," with the only two non-Westerners on the commission still hailing from Ivy League schools.[4] Moreover, colonialism was not a violation of human rights although human rights were applicable to colonial subjects.[5] Considering how international politics at the time was steeped in racism, this sets the backdrop to the Eurocentric ideology at the heart of the contemporary human rights project.

This project was, of course, a reaction to atrocity.[6] Having originated in this way, "a foundation for human rights [could not be built] on natural human solidarity," and cannot be tied to natural rights.[7] They are a *construction,* built on "the testimony of fear".[8] Human rights in the liberal tradition are framed in the negative – they are only about securing baseline freedoms *from* cruelty. This is consistent with the emphasis on individual liberty at the heart of the liberal tradition.[9] This dominant characterisation of rights is not innate and contrasts to alternative conceptions of human rights outside the Western corpus.

It is useful to briefly outline two alternative human rights discourses to exemplify this point – the Soviet and Islamic conceptions. The semantic and ideological disparity between alternatives and the dominant regime highlights that we normatively attach Western cultural, ideological and political significance to the term "human rights".[10]

In Soviet jurisprudence, the Western rule of law and appeals to natural law are rejected because the state asserts rights *against* the individual, rather than the other way around.[11] Contrary to the Western focus on civil and political rights, the emphasis is on economic rights. Civil rights are circumscribed insofar as individuals are supposed to subordinate their needs to those of the collective.[12] Suppression of dissent is justified by ideological necessity, because the collective is more important than the individual: "If one accepts this ideological premise, certain actions by the Soviet state against political dissidents become logical necessities, rather than reprehensible violations of human rights".[13] The active, parental role of the state directly cuts against the focus on minimal governmental intrusion and freedom at the heart of liberal human rights discourses. This does not advocate for a Soviet conception of human rights. Indeed, the existence of a legal and constitutional framework for human rights in an oppressive, authoritarian state reveals the fallibility of the mere concept of rights. Whether one accepts the ideology or not, this merely serves to illustrate that alternative conceptions of human rights can be ideologically sound and logically consistent – the Western tradition is just one historically situated, theoretical position recast as 'Truth'.[14]

This is echoed in another alternative human rights discourse espoused in the *Cairo Declaration on Human Rights in Islam*. This doctrine is based on the belief that human beings are the vicegerents of God on Earth and is exercised through the framework of Shari'ah. This strikes at one of the central tenets of the normative human rights movement – its secularism. The "deliberate silence at the heart of human rights culture,"[15] illustrated by the absence of appeal to any God in the preamble of the *Universal Declaration*, is tactical.[16] The logic of its drafters was that human rights needs to be secular to make convergence possible between heterogeneous cultures and polities. This imperative to provide for pluralism is informed by concerns of tolerance and cultural relativism. Intercultural dialogue is important for practical reasons, for example "to produce a document that could be adopted by consensus despite political differences,"[17] and to empower individuals to pursue their own idea of the good whilst advocating for one conception of human rights. However, the inherent contradiction between universalism and pluralism in human rights discourse presents a quandary for its intended normativity and again opens itself up to charges of Eurocentrism.

This scope for cultural diversity also incidentally upholds individualism. If human rights attach to the individual, they effectively atomise us. Teson promotes the concept of normative individualism, whereby the primary normative unit is the individual, not the state, and respect for states is derivative only of respect for persons.[18] In this way, human rights attach to us *as individual units*: "rights language cannot be parsed or translated into a non-individualist, communitarian framework".[19] This precludes an understanding of human rights as structural, as sought after with common objects; we use them to leverage our individual equality, rather than upholding our common humanity. Rather than being a merely semantic problem, this can be recast as an inculcation of liberal thought – for example, many African and Asian conceptions of humanity do not isolate the individual as against society but view society's members as integrated through groups or communities.[20] Adherence to human rights norms, even those which foster cultural pluralism, are an exercise in adherence to Western norms.[21]

Claims of universalism are thereby subject to intellectual attack[22] because of the purportedly Eurocentric lens through which human rights were constructed, "in a matrix of historical traditions shared by all major Western countries".[23] When the human rights movement claims universality, this can be perceived as imperialist.[24]This precludes non-Western states and actors from participating in the movement – and even encourages their deviance from 'international' norms. Human rights are "increasingly seen as the language of moral imperialism just as ruthless and just as self-deceived as the colonial hubris of yesteryear".[25] Although Michael Ignatieff suggests that the drafters of *Universal Declaration* likely "knew the knell had sounded on two centuries of Western colonialism,"[26] reflecting on their mistakes by the very act of proclaiming rights, postcolonial thinkers aim to decolonise the regime by highlighting that its structures are nevertheless an exercise in power; a panopticon rather than panacea.

In an effort to decolonise human rights, Saghaye-Biria characterises the human rights regime as "the newest mode of the Eurocentric civilising mission."[27] On this view, it is a kind of Western cultural transfer that diffuses European ideology and masks it as development or modernisation. This institutionalises the normative superiority of Western political ideology and fixes a Foucauldian discourse of power and domination of Western states against the East.[28] This is best realised in the double standard between the enforcement of human rights against the United States or other hegemonic powers and developing countries.

International law relies on sovereign state deference to a regime that the original signatories of the *Declaration* likely did not think would be enforced. This is because it lacks any analogous enforcement mechanism to domestic rights protections. [29] This signals the predominantly political foundations of the human rights project. States must opt into the jurisdiction of the International Court of Justice[30] and signing Conventions, and typically have to ratify them separately in domestic law to actually be bound. The protection of states, rather than the protection of individuals, is the objective of the law.[31] As Merry observes, "The UN, as a collection of sovereign states, has very little power to coerce individual states".[32] Whilst there exist enforcement methods of pressuring and shaming, recalcitrant states such as the United States and China "are relatively impervious to this pressure", as their economic and political power means they are not vulnerable to a coalition of smaller states. Both China[33] and the USA[34] flagrantly ignore decisions of courts; China has justified human rights abuses on the basis of state unity[35] and the USA has created a culture of exceptionalism. Ignatieff concedes that powerful states who are directly challenged by human rights are unlikely to respect universal validity of any meaningful rights, except the "toothless and anodyne ones" that don't conflict with their self-interest.[36] Whilst Ignatieff tenders support for the "enforcement revolution in human rights",[37] it is manifest that the body of international law still overtly submits to powerful states.

The lack of enforcement by some states who most ardently and visibly position themselves at the forefront of human rights, democracy and freedom – such as the United States, Australia and Israel – lends itself to hypocrisy. This is utilised by oppressive nations who, in turn, position themselves directly against the Western world. For example, the North Korean government dismisses international criticism of the country "as a plot to demolish its *Juche*-based socialist system".[38] In her memoir chronicling her escape from North Korea, Yeonmi Park describes that at school, "You learn the principle of *juche,* or national self-determination. And you are taught to hate the enemies of the state with a burning passion."[39] She writes of schoolyard military games, where "nobody ever wanted to be on the American imperialist team".[40] More broadly, Ulferts and Howard analyse how resolutions and legislation made by the UN, US and its allies to improve human rights in North Korea have been ineffective.[41] For example, North Korea has rejected the United Nations Resolution on North Korean Crimes, made annually by the General Assembly since 2003, "labelling it to be fabricated and politically motivated".[42] Legislation such as the United States' *North Korean Human Rights Act* of 2004 "did more to assist President George W. Bush's conservative and aggressive approach towards North Korea due to its nuclear program".[43] Although much of these failures is owed to a contradiction between

the intended purpose of the legislation and actual policies – such as a reduction in humanitarian assistance or international sanctions, which hinder humanitarian activities in the country[44] – this hard-line approach also reflects the political, rather than practical, force of human rights discourse. At the heart of these demands is a bid to conform with the international community, led by the United States. North Korea's unwillingness to do so is supported by the narrative that human rights are Eurocentric. Of course, the atrocities committed by the North Korean government cannot be reduced to or understood as a rejection of Western thought or excused by hypocrisies in the states which sanction it – it is merely apposite to note that ideologies structured in diametric opposition to Western thought like that of North Korea are able to weaponise charges of imperialism to inform their rejection of the dominant world order. Furthermore, despite deviating frequently from international human rights law, the United States invokes rights-based discourse to advance its foreign policy aims.[45] The weaponisation of human rights, particularly against non-hegemonic powers, contributes to the characterisation of human rights as imperialist. The real problem is not that deviance is encouraged or practiced by powerful states but that, for some, compliance signals a tacit adherence to this kind of Western domination. Without accountability on an international plane, upon which powerful states are presently untouchable, the *Universal Declaration* "remain[s] a pious set of clichés more practiced in the breach than in observance",[46] as its original signatories foresaw.

To illustrate this more specifically, the contested doctrine of humanitarian intervention in public international law is often characterised as imperialist weaponry. The use of armed force in the territory of a non-consenting state with the object of protecting human rights is a purported additional exception to the prohibition on the use of force[47] beyond self-defence approved by the United Nations Security Council.[48] This is a prima facie breach of Article 2(4) and contrary to the United Nations *Declaration on Friendly Relations,* which precludes intervention in the affairs of another State "for any reason whatever".[49] Indeed, the ICJ noted that "the use of force could not be the appropriate method to monitor or ensure…respect for human rights."[50] Further, intervention is principally constrained by the notion of state sovereignty in a consent-based system.[51] Yet the pretence of humanitarian intervention has been invoked by a number of states. For example, NATO's 3-month air bombing campaign in Kosovo was claimed necessary to prevent the Yugoslav government's practice of ethnic cleansing and was met with no international condemnation. Similarly, India sent troops to East Pakistan in 1971 to prevent violations of human rights. This invasion was successful in stopping the atrocities in the face of UN impotency. Many countries, including the United Kingdom, asserted their involvement in Iraq or Syria was also on this basis. However, what this also reveals is that states will rarely intervene without corresponding political motivations. Notably, many developing states do not accept humanitarian intervention because this right would be easily open to abuse by aggressor states invoking it as a convenient pretext to send armed forces into the territory of another country. It whispers too loudly of imperialism. It is furthermore contentious whether intervention under the guise of human rights undermines the autonomy of individuals who act freely in ways that are culturally dissimilar or repugnant to Western norms, like female genital mutilation. Perhaps not every intervention is a colonising effort, not every Western norm is a narrative device to liberate the other from savagery or barbarism – to Ignatieff, "relativism is the invariable alibi of tyranny" and often is actually just a defence of political or patriarchal power.[52]

In spite of all this, Lambelet argues that these ideological differences in human rights discourse can be reconciled through fundamental commonalities transcending the liberal tradition, such as a rejection of oppression and arbitrariness through the law.[53] The postcolonial movement and alternative human rights discourses identify these shared premises in a way that can ultimately bolster rights systems and incentivise a more inclusive international order. Achieving such a meaningful, transcendent and alternate human rights regime may nevertheless require deconstruction of Western notions of progress or ideas about the inevitability of modernisation; about 'progress' as a mission led by the West.[54] History clearly subverts the claim that the world is humanised and redeemed through the West – through self-determination and anticolonial struggles in Africa, Asia and Latin America, anti-slavery campaigns and the global struggle for women's suffrage.[55] It is also worth noting that there is far less recognition of the failures of American democracy and capitalism in relation to human rights – such as extreme inequality, poverty, lack of medical care and the inescapable cycle of opportunity – by Western ideologues, compared to societies with alternate rights discourses.[56]

And yet, the dominant conception of human rights is still upheld as "the only universally available vernacular".[57] Human rights have been successful in that they have given language to people seeking to understand and surmount their inequality. They are pervasive perhaps only insofar as they are discursive. Although human rights discourse is rife with contentions, it is invaluable to have a "shared vocabulary from which our arguments can begin".[58] Having this language has not only articulated moral equality, but has empowered and enfranchised bystanders and victims, legitimising their protests against oppression. This has led to a revolution of advocacy, spearheaded by non-government organisations.[59] Much advocacy is done through the act of shaming misbehaving states,[60] because this language has provided a vantage point from which to criticise and revise laws and customs.[61] For example, intuitive claims that all women should be educated out of fairness are weightless in comparison to claims supported by a shared set of criteria denoting what fairness looks like. Despite its shortcomings, the discursive power of the human rights regime is, so far, the closest thing to a universal language.

Deconstructing the tensions between the dominant thread of human rights discourse and alternative perspectives, and understanding who is pulling the strings, reveals that the rights deemed inherent to us are in fact a product of history, politics and law. The fabric of human history is woven with conflict, including conflict in our ideas of what it means to be human and to live in a shared society. The contemporary human rights project must overcome the problem at the heart of human nature – unifying us in spite of our differences. We can only look to, and rewrite, history to discover whether this is truly possible.

FROM "ME" TO TREES: SHIFTING AWAY FROM AN ANTHROPOCENTRIC LEGAL SYSTEM THROUGH RIGHTS OF NATURE

Zi Liang Lim

I INTRODUCTION

Even as the world progresses towards irreversible climate change, the legal system has frustratingly remained an ineffective tool to meet the challenges brought forth by the climate emergency.[62] At the heart of the law's inability to manage climate change is the entrenched influence of anthropocentrism. Instead of recognising nature for its intrinsic value, the law perpetuates the anthropocentric narrative that the value of nature is limited by its instrumental value to humans. Given the necessity for substantive and urgent climate action, I advocate for an epistemic shift in the legal system: from anthropocentrism towards ecocentrism through the conferral of legal personality to nature (hereinafter Rights of Nature).

This essay will proceed in three main parts: first, I will detail the influence of anthropocentrism within the legal system and explain how anthropocentric influences impede the law's ability to manage the challenges brought forth by climate change. Second, I will introduce ecocentrism as an alternative to anthropocentrism and delineate how Rights of Nature can facilitate an epistemic shift towards ecocentrism. Third, I will identify essential characteristics that a Rights of Nature legislation should have to ensure its legal functionality.

II ANTHROPOCENTRISM

A What is Anthropocentrism?

Anthropocentrism is an epistemological approach that posits humans and human-based interests at the centre of the universe.[63] It premises itself on the assumption that humans, being equipped with intrinsic moral worth, are superior to non-human entities, who, unlike humans, have no intrinsic moral worth.[64] Hence, the value of non-human entities extends to their capacity to be exploited for human needs and interests.[65] Of course, the purported superiority of humanity is more of a social construct rather than reflecting reality. The scientific consensus within evolutionary biology has indicated that all biotic life on Earth, including humans, have a common ancestor.[66] This suggests that humans are embedded within a complex web of biological life rather than being superior to other lifeforms.[67] Nevertheless, despite the theoretical weaknesses of anthropocentrism, it remains the predominant influence in many contemporary societies.[68] Whether it is the secular humanists who assert the primacy of the rational human actor or adherents of the Judeo-Christian tradition who purport the sacrosanctity of human life, the centrality of humans is presumed as default in contemporary societies.[69] One only needs to consider morally controversial issues involving human lives, such as abortion or euthanasia. For either debate, the pertinent, if not sole, consideration is always human life on both sides of the spectrum.[70] No thought is given to non-human actors even though such decisions will inevitably affect non-humans.

B Anthropocentrism in Law

The legal system, being an institution of our anthropocentric society, is also inescapably anthropocentric. Due to the anthropocentric influences in the legal system, the law is inept in managing climate matters. This assertion can be substantiated through two observations: first, the law places human interests (typically economic interests) at the forefront, while environmental protection is a mere afterthought. Second, the operation of the law is guided by the human understanding of the world. The persistence of importing the human worldview, often through legal requirements and tests that reflect the human understanding of the world, then stymies the effective management of environmental matters as the interests of nature often cannot be attained through an anthropocentric understanding of the world.

In the current framework of Australian environmental law, an important objective is "ecologically sustainable development"[71] through

balancing "both… economic [and] environmental considerations".[72] The choice to premise environmental protection on a balancing scale between human and environmental interests for "sustainability" reflects an approach that places priority on human interests when protecting the environment; it indicates a willingness to protect the environment only if it does not cause an arbitrarily determined amount of harm to human interests.[73] The focus on "sustainability" also demonstrates that the purpose of environmental protection is to ensure that future humans can continue to exploit the environment rather than protecting the environment because of its inherent moral worth.[74] This results in a whole range of "lawful but awful" acts from escaping the scrutiny of the law.[75]

A fitting illustration of how the "balance" approach reflects the precedence of human interests over environmental interests is the split referral system in S 74A of *EPBCA*.[76] Under s 67 of *EPBCA*, environmentally harmful economic activities are known as "controlled actions".[77] Controlled actions can only be performed with the approval of the Environmental Minister.[78] In practice, the seeking of approval for a project is often split into smaller components (or split referrals) rather than in its entirety for business efficiency.[79] However, split referrals risk undermining the integrity of environmental damage assessments as the overall environmental impacts of a project might be understated if it is assessed in individual components.[80] Theoretically, the Minister can reject split referrals. In practice, however, split referrals are rarely rejected by the Minister, indicating a desire to facilitate business efficacy over environmental protection.[81]

Another manifestation of anthropocentrism in the legal system is the law's importation of human experience to legal matters.When the law seeks to attribute environmental harm to a party who had committed an environmentally harmful act, it applies the rules of causation and remoteness of damage.[82] For tort or contracts cases, it is reasonable for the court to demand that the plaintiff establish causation before a tortious action can be attributed to a defendant because, barring rare and extraordinary cases, causation issues tend to be academic and resolvable with basic human sensibilities.[83] However, for environmental problems like climate change, the consequences of an environmentally harmful act can often only be felt after a few stages away from the original harmful act.[84] That was the problem faced by the applicants in *ACF v Environment Minister*.[85] The applicants sought to challenge the Minister's approval of the Adani coal mines on the grounds of the Minister's failure to discharge his statutory duty under s 136 of *EPBCA* to consider the impact of coal extraction on the Great Barrier Reef.[86] The applicant submitted that the extraction of coal and the subsequent burning of the extracted coal would result in increased carbon emissions, which will exacerbate climate change, which will then cause coral bleaching and damage the Great Barrier Reef.[87]

The Federal Court rejected the applicant's proposition, holding that it is legally impossible to attribute climate change exacerbation and the subsequent coral bleaching to the Adani project because of the remoteness of damage.[88] The legal weaknesses of the applicant's case are further exacerbated by the fact that the Adani project is only one of the many causes of climate change.[89] Ostensibly, the chain of connection proposed by the applicant is scientifically sound.[90] Nevertheless, it failed to receive a favourable outcome because it was contrary to the legal understanding of causation, which is based on the human understanding of causation being determined by spatial proximity and basic human sensibilities. Therefore, so long as the law continues to insist upon the human experience when determining causation, it will remain an ineffective regime in dealing with environmental matters.

Second, as a matter of procedural law, only an individual or entity that is personally "aggrieved" by a legal decision can have standing can pursue judicial review for that decision.[91] For human plaintiffs, this requirement is often formal and rarely imposes legal impediments. However, for non-human plaintiffs that are either physically incapable of attending court (e.g., rivers, trees, or mountains) or non-human plaintiffs that do not have legal personality (e.g., animals), their rights can only be upheld by proxy through a human individual or organisations who were "aggrieved" by the wrongful act of the defendant.[92] Nevertheless, since many environmental lawsuits are brought on by environmental protection organisations or concerned individuals who have no relevance to the litigated matter other than a commitment to environmental protection, the special interest requirement often poses a serious impediment to these plaintiffs.[93]

Even when standing was found, the judicial reasoning to justify a finding of standing is often bizarre or logically dubious. In *Animal Legal Defense Fund v Glickman*,[94] the applicants, an animal protection group, sought judicial review for the US Department of Agriculture's ('USDA') standards for the caging of non-human primates as the USDA's standards permitted the caging of an orangutan in the Washington DC zoo to the extent of visible physical atrophy. The US Court of Appeal held that the applicants had standing; the deterioration of the orangutan affected the "aesthetic interests" of the applicants.[95] While the outcome of the decision was favourable to the applicants, the logic underpinning the decision was undoubtedly logically dubious and morally questionable as it implied that orangutans, despite sharing large percentages of DNA with humans, only deserve to have reasonable living conditions if they harmed the aesthetic pleasures of humans.[96]

As the aforementioned examples have illustrated, the pervasive influence of anthropocentrism in the legal system weakens the law's capabilities to mitigate climate change. Hence, I argue for an alternative approach that places the interests of nature at the heart of environmental protection laws: ecocentrism.

III ECOCENTRISM

Ecocentrism is premised on the view that humanity is interconnected and dependent on nature instead of being separate from nature.[97] Ecocentrists purport that nature and humans possess equal value and moral worth, which logically flows that humanity is morally obliged to minimise or even prevent harm to other parts of nature.[98] Hence, while ecocentrism recognises that humans have the power to carry out acts that could drastically alter the environment, it posits that such power confers responsibilities to protect nature rather than bestow the right to exploit nature.[99] This then begs the question: how can the law begin its epistemic shift towards ecocentrism? I propose that the law's journey towards ecocentrism can be kickstarted by introducing Rights of Nature into the legal system.

IV OPERATIONALISING ECOCENTRISM: RIGHTS OF NATURE

Broadly speaking, Rights of Nature involves granting legal personality to nature, thus allowing nature to both hold legal rights and protect these legal rights in a court of law.[100] The conceptual justification of Rights of Nature draws influence from the foundational tenets of ecocentrism; if one recognises that nature has equal moral worth as humans, it logically flows that there is a moral imperative for nature to be afforded many of the same legal rights that humans enjoy.[101] Hence, the implementation of Rights of Nature into the legal system facilitates an epistemic shift towards ecocentrism as it tantamount to a legal acceptance of some of the core tenets of ecocentrism. Additionally, because the law has the capacity to influence the ethical and moral standards of society, the implementation of Rights of Nature (and by extension, elements of ecocentrism) can provide a platform for ecocentrism to undermine the epistemic entrenchment of anthropocentrism in society.[102]

It should be noted that Rights of Nature itself is not the end goal of ecocentrists. Indeed, a forceful argument against Rights of Nature is that because legal rights are a fiction that exists only in the contemplation of the human mind rather than materially existing, the concept of legal rights will inevitably be anthropocentric.[103] Thus, even if one were to ascribe legal rights to nature, the centrality of humans in the legal system will remain untouched.[104] As such, Rights of Nature can only be described as "soft" ecocentrism. While the force of this argument should be acknowledged, I posit that it is this purported "weakness" of Rights of Nature that makes it suitable for implementation. As discussed in the previous sections, anthropocentrism is firmly entrenched in our societal structures. Considering the epistemic entrenchment of anthropocentrism, radical actions that attempt to displace anthropocentrism in its entirety will face significant public resistance, which could in turn, perpetuate the status quo.[105] In the context of climate emergency, every second lost is a second too many. By contrast, Rights of Nature acts as an entry point to ecocentrism as it does not seek to completely upend anthropocentrism since it continues to recognise the intrinsic moral values of humans.[106] At the same time, it facilitates an epistemic shift towards ecocentrism by encouraging the public also to recognise the intrinsic moral worth of nature. Thus, Rights of Nature should be viewed as a starting point to ecocentrism rather than its end goal.

A History of Rights of Nature

Rights of Nature is by no means an unprecedented historical novelty. The concept was introduced into the legal academic discourse by Professor Christopher Stone in his seminal paper, *Should Trees Have Standing?,* in 1972.[107] Subsequently, Ecuador amended its Constitution in 2008 to recognise the Rights of Nature.[108] Bolivia then implemented national legislation giving legal personality to "Mother Earth" in 2010,[109] followed by the *Te Awa Tupua Act* ('*TATA*') in New Zealand in 2017, which granted legal personality to the Whanganui River.[110] Rights of Nature also has a history of mixed success in judicial decisions; it first received judicial endorsement by the dissenting judgment of Justice Douglas of the US Supreme Court in *Sierra Club v Morton*.[111] It was only until 2017 where Rights of Nature had its first judicial success, when the High Court of Uttarakhand, India, conferred legal personality to the Ganges and Yamuna Rivers.[112] Although the Supreme Court of India eventually issued a stay of the High Court's order, the publicity from the case arguably encouraged legal action across the globe.[113] Most notably, in 2019, the High Court of Bangladesh recognised the legal personality of all rivers within Bangladesh.[114] Turning to Australian jurisdictions, although the attempt to integrate Rights of Nature into Western Australian law through the Rights of Nature and Future Generations Bill 2019 was unsuccessful,[115] the Blue Mountains City Council became the first Australian government entity to integrate Rights of Nature into its planning and operation.[116] These collective examples serve as a precedent to the implementation of Rights of Nature.

B Is Rights of Nature Anti-human and Radical?

To the unacquainted, Rights of Nature might appear radical and controversial. Nevertheless, when considered in history, Rights of Nature is arguably analogous to the law's historical experiments with expanding legal personality to non-human entities. Although the legal personality of corporations is an undisputed fact in our modern legal system, one only needs to look at the 19th century to see that the notion that corporations could be legal persons was viewed with suspicion and disbelief.[117] Such suspicion was crystalised in the obiter dictum of Chief Justice Marshall of the US Supreme Court in *Trustees of Darmouth College v Woodward,* who pondered if corporations should enjoy legal personality as they "exist[ed] only in contemplation of law".[118] Furthermore, even though the law has progressed to a stage where corporations are undisputedly legal persons, the concept of corporate legal personhood is still viewed with confusion to the lay public; it is unlikely to make sense to a layperson walking past Hungry Jacks that they are walking past a person.[119] The fact that society might view the conferral of legal personality to nature as confusing is no excuse to deny such conferral; even the conferral of legal personality to human groups such as slaves, women, and Indigenous persons was met with ridicule and suspicion at some point of history.[120]

Some opponents of Rights of Nature have then argued: what if, for example, a river floods and causes damages? Can the river be held liable through a civil claim, and if so, on whom should the judgment be executed on?[121] The flaw in such arguments is that it presumes Rights of Nature must confer a completely identical set of rights and obligations that humans hold to nature. Just as the precise boundary of corporate legal personality is subject to debate, the extent of Rights of Nature would also depend on the specific operational needs of each context. Nevertheless, regardless of specific structure, by reviewing the history of Rights of Nature and addressing some common counter arguments to Rights of Nature, this essay illustrates that the introduction of Rights of Nature to the legal system will neither be radical nor impractical.

V ESSENTIAL CHARACTERISTICS OF RIGHTS OF NATURE

While it is beyond the scope of this paper to propose a draft of Rights of Nature legislation, I intend to recommend several essential characteristics that a Rights of Nature legislation should have to ensure its operability. First, an individual, organisation or government entity should be legally empowered to uphold the Rights of Nature.[122] Second, the person or entity empowered must have sufficient resources to defend the rights of nature.[123] Third, the person or entity must be independent and insulated from political influence to ensure that actions can be taken in politically controversial cases.[124]

A Legal Empowerment

The first characteristic should not be controversial. As mentioned above, a major issue with our current legal framework is the difficulty for nature to seek legal recourse for harmful acts through proxies. The existence of a legally empowered individual or entity ensures that any rights accorded to nature can be defended in practice. There are two existing frameworks within the legal system that Rights of Nature could depend on for operationalisation. The first framework is the current framework of legal guardianship.[125] Relevant authorities could decide to appoint individuals or entities to act as legal guardians to nature and empower them to commence proceedings on behalf of nature should the interests of nature be harmed. A precedent that policymakers can consider emulating is the Victorian Environmental Water Holder ('VEWH'). Established by s 33DB of the *Water Act 1989* (Vic), the VEWH is a body corporate with full corporate legal personality that has assumed the position as guardian of the water reserves in Victoria.[126] The VEWH is helmed by three appointed commissioners who can make economic decisions for water usage in Victorian water reserves so long as they fulfil the VEWH's objectives of "improving the environmental values and health of water ecosystems".[127]

Alternatively, a trust fund could be created by an NGO or government entity acting as a settlor, managed by an independent trustee. The beneficiary (the natural entity in question) could then utilise any trust income for the reparation and maintenance of its ecosystem. This was the format preferred by the New Zealand Parliament when affording legal personality to the Whanganui River.[128] The trust fund in question, Te Korotete, is managed by a board of commissioners appointed through consultation with relevant stakeholders, including the Maori people who have an interest in the Whanganui River.[129]

B Access to Adequate Resources

The second characteristic is the adequacy of resources accessible by the guardian/trustee. Litigations are a costly affair. Considering that the defence of nature's interests will likely run contrary to the business interests of giant corporations in the extractive industries, the guardian/trustee must be equipped with sufficient financial resources and legal expertise to ensure their capabilities to defend the rights of nature. For instance, despite successfully having Ecuadorian and Bolivian courts recognise the legal rights of nature, stakeholders have found it challenging to translate legal decisions to practical outcomes as they lack the financial means to enforce these court decisions.[130]

A similar problem is the disparity in legal expertise between Ecuadorian proponents of Rights of Nature and financially endowed corporations in the extractive industries. Although several legal decisions were held in favour of Rights of Nature in Ecuador, none of these decisions was against the extractive industry.[131] Instead, Ecuadorian Rights of Nature proponents are often hesitant to bring on cases against these corporations as they fear the imbalance in legal expertise might create unfavourable legal precedent.[132]

C Political Independence

The third characteristic is the political independence of the guardian/trustee. Matters revolving around the exploitation of nature for resources are often politically charged. If the appointed guardian is not politically independent, it might face conflicts of interests which could affect its capacity to act in the best interest of nature.[133] Consider the orders in the abovementioned case of *Salim v State of Uttarakhand*. In that case, the court designated the five state bureaucrats to serve as the guardian of the Ganges river. The state and its officials, which often rely on the exploitation of the Ganges river for economic and political benefit, is thus unlikely able to simultaneously perform their duty in *locus parentis* to the Ganges river while at the same time serving their duties as state officeholders.[134] Hence, the guardian/trustee must be politically independent to prevent any potential conflict of interests that might undermine the guardian/trustee's capabilities to act in the best interests of nature, especially under political pressure.

VI CONCLUSION

Prior to obtaining the technological means to irreversibly damage the climate and the environment, the cost humanity had to pay for ecocentrism was at most a moral failing. Through centuries of technological advancements, the current cost of anthropocentrism is the potential destruction of human livelihood and communities through irreversible climate change. As an instrument of social change, the law should lead the charge in the epistemic shift away from anthropocentrism and towards ecocentrism. The introduction of Rights of Nature into the legal system should serve as a suitable entry point for the shift towards ecocentrism. However, much more work still needs to be done. Although this essay suggests three essential characteristics to ensure the operability of Rights of Nature, it does not recommend a precise legislative format for Rights of Nature, nor does it furnish further details such as the exact extent of rights and obligations nature should hold. Despite its limitations, this essay contributes to the increasingly rich literature on the advocacy of Rights of Nature. It also serves as a timely reminder that the boundaries of legal personality were never based on any objective criteria of merit, but rather the furthest imagination of the power-wielding groups. As the current most powerful group on Earth, it is time for us to concede some of that power and acknowledge an ontological truth: we are but a mere speck in a giant web of nature and life.

PART II

Punishing Deviance

SADOMASOCHISM, HOMOSEXUALITY AND BRITISH MORALITY: A SOCIO-LEGAL EXAMINATION OF R v BROWN AND SEXUAL DEVIANCY IN THE UNITED KINGDOM

Zachary O'Meara

I INTRODUCTION

The Judeo-Christian-inspired ideals of sexual restraint, austerity, and non-indulgence have influenced British morality dating back to the Victorian Era.[135] In the 19th and 20th centuries, there was zero-tolerance of immorality, sexual promiscuity, or even acknowledgment of the existence of non-heteronormative sexual activity.[136] Those who embodied conservative values were recognisable as people of high moral esteem in British society.[137] In the 1990s, moral condemnation of homosexuality was deep-rooted in the UK. It highlighted the pre-existing social attitudes towards same-sex relations, previously deemed offensive to British morality and Judeo-Christian-inspired ideals.

R v Brown (*Brown*) is a 20th century judgment that exposes these embedded prejudicial attitudes.[138] The criminalisation of homosexual sadomasochism in the case defined these sexual acts as deviant. The judgment's reasoning implicitly deemed these acts as *malum in se* – an offence that is evil or wrong from its nature irrespective of the statute.[139] This characterisation inherently created the moral duty to safeguard society against these risks.[140] According to the House of Lords, homosexual sadomasochism was unpredictably dangerous, morally injurious to the participants, and harmful to British morality.[141] *Brown* is a notable legal example of moralistic and heteronormative evaluations of same-sex relations and the sexual 'Other'. The fact that the sadists' acts were *homosexual* is also imperative to understand the judicial response and social utility for denouncing them.[142] 27 years on, *Brown* remains a controversial case and an example of moral evaluations of criminality and sexual deviance.

This article begins by setting out the societal view of homosexuality in the UK during the early 1990s. Against this backdrop, it examines how the *ratio decidendi* in *Brown* directly correlated with societal expectations and stemmed from the moral condemnation of the sexual 'Other' instead of from common law principles. Whilst the judiciary represents a microcosm of broader societal thinking, *Brown's* judgment was particularly problematic as it employed blatant homophobic reasoning to justify criminalisation. In hindsight, the judicial reasoning highlighted how associations of sexual deviancy have persisted in contemporary society as abominable and flawed legal jurisprudence. This article concludes that despite societal views having changed, *Brown* has paved the way for enduring homophobia. As such, moral offences can have a profound multigenerational impact on cultural beliefs, even lasting long after liberalisation across broader society.

II CASE STUDY: R V BROWN

A Societal View of Homosexuality at the Time of Brown

Despite homosexuality being partially decriminalised in the 1960s, homophobic attitudes towards homosexuality remained widespread in the UK over the subsequent decades.[143] The 1967 decriminalisation of homosexuality only applied to private sexual activity, and harsh penalties still existed for same-sex relations in public.[144] In the 1980s, pre-existing social attitudes towards homosexuality and media sensationalism associated mortality rates fuelled the social hysteria around the HIV pandemic.[145] The media represented HIV as a transmittable disease that only affected homosexual men who were not 'innocent' victims.[146] This public sentiment deprived homosexual men of traditional victimhood. Instead, portraying them as deviants who were a risk to public health. In effect, homosexuality was not a crime *per se*, but the media perpetuated it as a moral offence that jeopardised public safety.

In 1967, the partial decriminalisation of homosexuality did not end the persecution and fear associated with homosexuality. The

sexual deviancy associated with some acts, such as same-sex kissing, was deeply rooted in UK society. Police officers continued to exploit gross indecency offences to criminalise and prosecute homosexual men performing these acts.[147] This misuse of criminal law led to the police prosecuting more than 2,000 men for the offence in 1989.[148] In 1993, fearing the spread of homosexuality, the British government outlawed the promotion of acceptance towards same-sex relations through teaching or published material.[149] In 1994, the British government lowered the homosexual consent age from 21 to 18, despite being 16 for their heterosexual counterparts.[150] Only in 2001 were the ages of consent equalised in the UK.[151] In 2003, new legislation significantly reformed sexual offences under the English criminal law, introducing a new range of offences relating to underage and non-consensual sexual activity, focusing on the act itself rather than the sex, gender, or sexual orientation of those committing it.[152] These legal and policy double standards were emblematic of a government fearful of spreading homosexuality among the community. The 1967 decriminalisation did not absolve homosexuality of its moral offensiveness and danger to British morality.

The public response to *Brown* was an accurate representation of the social norms towards homosexuality at the time. The public held similar prejudicial attitudes. In 1993, the British Social Attitudes survey recorded that 64% of respondents believed same-sex relations were "always or mostly wrong".[153] Of all available options in the survey, this response was the most critical and disapproving.[154] Comparatively, prejudicial attitudes peaked in 1987, with 75% of the respondents expressing disapproving views. Despite homosexuality not being a criminal offence at the time, it remained a moral, but not criminal, offence in British society. The fact that they were *homosexual* sadomasochistic acts in *Brown* is crucial in understanding the rationale for criminalisation. In 1993, embedded prejudicial attitudes and fear of same-sex relations were still prevalent.[155]

B Legal Background

Brown demonstrates the tension between criminalisation, the scope of the defence of consent, and individual autonomy. In effect, criminal laws are accepted by the public as boundaries for acceptable behaviour, discouraging citizens from engaging in that activity and resulting in the internalisation of legal and illegal distinctions as norms.[156] The criminal law distinguishes between legal and illegal activity involving sexuality and assault, deeming any unacceptable behaviour to warrant punishment as it is to be dangerous to the dominant social order.[157] Although assault laws exist to prevent violence, not sexual deviation, *Brown* criminalises these sexually deviant acts of same-sex relations and sadomasochism.

In the British legal system, consent is a fundamental legal principle to the offence of assault. The law's separation is primarily conferenced with the criterion of consent and intent and force. Whether expressly or implied communicated, consent involves an agreement to undergo a particular interaction with another person. Any non-consensual physical touching is considered unlawful and a violation of the individual's bodily integrity, with a strong emphasis on the victim of the offending.[158] In effect, the consent of participants prevents an accused from incurring liability for their actions.

In tort law, there are circumstances where consent can be granted for the assault of another person. The common law position is that if assault results in occasioning bodily harm or more severe, consent will not relieve liability unless the actions fall within lawfully recognised exemptions, including activities associated with sporting activity, medical treatment, and body modification (e.g., tattooing and piercing).[159] The common law doctrine of *volenti non injuria,* more commonly known as voluntary assumption of risk. It exists as a defence to exempt a person from liability to the consented commission of an act, if that willing person suffers a harm from such act.[160] However, this doctrine's application varies significantly between tort and criminal law.

In criminal cases, the question of whether consent acts as a defence to the application of force is a question of degree of harm, not voluntariness. For example, a person can consent to common assault where no actual bodily harm was inflicted. However, the common law approach regarding intentionally inflicting bodily harm varies based on the circumstances. For example, in *Brown*, the House of Lords exercised its judicial discretion not to permit consent as a defence to sadomasochism, intruding into the private sexual relations of UK citizens.

C Material Facts and Judgment

In *Brown*, the police charged a large group of homosexual men engaged in consensual sadomasochistic acts, including genital torture, branding, and bloodletting, with crimes of assault, aiding and abetting, and unlawful wounding.[161] These acts took place in private, causing no permanent injury, and none of the participants ever complained, but police found a videotape of their activities while raiding one of the participant's homes for an unrelated purpose.[162] Of the large group, the police identified, charged, and convicted eight men of lawful wounding and assault occasioning actual bodily harm.[163] In 1993, five defendants appealed their convictions to the House of Lords, contesting that these acts were committed voluntarily with the consent of all participants.[164] However, the court dismissed this appeal, citing public policy concerns as reasoning for rejecting the arguments.[165] The appeal judgment deemed that participants consent was not available as a defence where the harm reached the actual harm threshold.[166] Ultimately, the majority applied a moralistic evaluation to rationalise the criminalisation of the defendants. They believed the House of Lords, as a court of last resort in the UK, was entitled to protect society against a "cult of violence" which contained the danger of "proselytisation", "corrupting young men", and the potential for infliction of serious injury.[167]

D Judicial Reasoning

1 The moralism of homosexuality and sadomasochism

Deviating from traditional legal principles, *Brown's* House of Lords' reasoning revealed moralistic and seemingly prejudicial assessments. The language of evilness and cruelty highlights the House of Lords' underlying moralistic evaluations, seemingly motivated by personal standards of British morality. Due to the perceived sexualisation of cruelty, the House of Lords' majority held they had the civic duty to criminalise the sadists.[168] In this case, they deemed the acts to involve unacceptable levels of violence and degradation of victims.[169] In dismissing the defence of consent, Lord Templeman distinguished incidental violence from that inflicted for the "indulgence of cruelty" – holding these acts to be unlawful, "uncivilised", and "evil".[170]

In the majority's judgment, they employed 'common' morality in the assessment of criminal conduct. As such, sadomasochist acts fell below that standard, deemed as carrying a significant risk of causing physical and moral harm among the public. Even after acknowledging that Parliament was better suited to handle the issue, the majority instead chose to criminalise sadomasochism.[171] In legitimising his own bias and paternalistic interference, Lord Templeman stated that "society was entitled and bound to protect itself against a cult of violence."[172] These extracts demonstrate the moralistic language used to rationalise the criminalisation of homosexual sadomasochism. The sexual deviancy associated with these acts was significant enough to justify State invasion of bodily autonomy and liberty, representing attempts to govern these sexual practices in public and private spheres of society.[173]

2 The Public Threat to British Society

Explicit prejudicial attitudes towards homosexuality featured prominently in *Brown*. They highlighted the House of Lords' underlying bias against same-sex relations and the predetermined reasoning for criminalising institutional perceptions of morally offensive behaviour. Examples include, *inter alia,* the consideration that same-sex relations were a 'comfort' for a 'victim' who had not settled into a *normal* heterosexual relationship and who were non-conducive to the "enhancement or enjoyment of family life or… the welfare of society."[174] The judicial reasoning reinforced notions of heteronormativity and the moral obligation to safeguard society from sexual immorality and corruption.[175] The majority's judgment also emphasised the *homosexual* nature of the sadomasochistic acts five separate times.[176] In distinguishing between heteronormative as normal and sexual deviances, such as homosexual sadomasochism, as the abnormal, the majority in *Brown* exercised its discretion to criminalise the latter.

III SOCIOLOGICAL CRITIQUE: DIRT, POLLUTION, AND SADOMASOCHISM

The way a society views offensive activity is crucial in understanding their social and cultural norms. The internationally acclaimed British social anthropologist, Mary Douglas, developed her social theories understanding the significance of danger and taboos in society.[177] According to Douglas' prominent book, *Purity and Danger*, prohibitions in society are not inherent in the nature of the thing but dependent on the system they exist.[178] Douglas' 'pollution and taboo' theory proposed that nothing is objectively dangerous.[179] Douglas argues that humans identify the world around them by dividing it into binary categories, such as love and violence.[180] The understanding of these binary terms is dependent upon their cultural context.[181] Any matter that falls outside these social boundaries is 'dirt' – a matter believed to be 'out of place'.[182] In these contexts, 'dirt' is polluting and dangerous to a society's moral standards.[183] These pollution beliefs are universal, and criminal law is a mechanism used by the State to exterminate 'dirt' that does not fit into pre-existing social systems and order.[184] In this sense, the risks associated with homosexual sadomasochism are dependent on British social and cultural constructs.

Brown perceived and affirmed that both sadomasochism and homosexuality were 'dirty', polluting, and socially disapproved.[185] Even though not criminalised at the time, the retrospective criminalisation of the sadists identified in *Brown* judged them to be deviants for mixing sexual pleasure and violence. In *Brown*'s view, the mixture of these activities falls outside of the traditional categories of British morality. For the House of Lords, sadistic acts equated symbolically to 'dirt', pollution in society, and warranted criminalisation to discourage future behaviour of this kind. No matter the context, these acts were considered 'dirt' and dangerous to British morality. The House of Lords deemed these risks too significant to be lawful within their social and cultural context. The high percentage of social disapproval towards homosexuality even committed voluntarily by consenting adults, supports the proposition that it continued to exist as sexually deviant behaviour in British society.[186]

In sanctioning homosexual sadomasochistic practices, the House of Lords portrayed those acts as objectively dangerous, threatening public health and safety. They gave particular significance to the evidence of bloodletting – the withdrawal of a person's blood.[187] In doing so, the House emphasised specific risks, such as those associated with HIV. As the sadists performed bloodletting, the House of Lords judged those participants as infectious deviants of a cult who voluntarily put themselves at risk.[188] Furthermore, as HIV is transmittable through exchanging bodily fluids, the sadists' acts posed significant levels of risk and harm to public safety, particularly during the peak of the pandemic. This perception stigmatised the stereotypic carriers of the virus, homosexual men.[189] Accordingly, the sadists could never indeed truly be innocent of these dangerous acts – where they voluntarily incited harm against the public.[190]

A Social Reaction

From a sociological perspective, when society criminalises an act, it denounces it as immoral. The French social scientist, Emile Durkheim, developed his functionalist theories of how crime and deviance overlapped in society.[191] Durkheim theorised that crime is a healthy part of any society because it reaffirms moral boundaries and community social standards.[192] Defining *something* as an offence distinguishes members of society by who obeys and disobeys these rules and order. [193] In effect, the functionality of criminalisation has the intention of creating immoral activity.[194] In *Brown*, the defendants did not crime any offences *per se*, but the House of Lords punished them as they violated their collective interpretation of British morality. The judgment was a blatant condemnation of homosexual sadomasochism and its social, health and moral risks. The House of Lords saw themselves as guardians of sexual morality and protectors of British society against this particular manifestation of dangerousness. For the House of Lords majority, sadomasochism was unpredictable, unknowable, uncontrollable, and ungovernable, so the usual penal strategies were not applicable. In their minds, judicial paternalism was the only appropriate sentence.

Since *Brown*, there have been no legislative or policy developments overturning its common-law decision. The judgment implicitly reinforced common conceptions of British morality and reflected the social consensus of moral offence in the 1960s about homosexual sadomasochism. It symbolically portrayed homosexual sadomasochism as an attack on public core beliefs, and as a result, the State punished those participants by addressing and repressing the sexual activity.[195] The lack of public protests in response to the *Brown* judgment revealed the UK's embedded moral condemnation of sexual deviancy.

IV RISKY OR RISQUÉ SOCIETY: THE SHIFTING AND EMBEDDED PERCEPTIONS OF CRIME

A Sadomasochism

Since *Brown*, social attitudes towards sadomasochism have shifted significantly. Mainstream worldwide acceptance of portrayals of sadomasochism in popular culture, including films, music videos, and fiction books, reflect this shift.[196] In particular, the bestselling book and film adaptation, *Fifty Shades of Grey*, led to the widespread social awareness of bondage, discipline, sadism, and masochism (**BDSM**) worldwide.[197] Released in 2011, the film promoted discourse about healthy BDSM practices and the perception of these sexual taboos in society.[198] Commentators criticised how explicit consent is employed in the movie, moving away from an affirmative consent model.[199] For the people in the BDSM community, consent is the starting point, not the finish line, of their sexual activities, which is portrayed poorly in the film.[200] For all the work that has established BDSM as a normative human erotic interest and not a pathological illness, Fifty Shades poorly portrayed the communication and importance of consent in BDSM sexual practices. In 2015, results from a *YouGov* survey demonstrated the film's surprising popularity among British respondents.[201] The book and film's international success prompted debate about the legality of sadomasochism in the UK. There was a significant public outcry from UK domestic violence campaigners and religious groups, condemning the film's "non-natural" and abusive sexual content.[202] However, the success of the film hinted at an underlying trend in British culture.

The national fascination with *Fifty Shades of Grey* highlighted shifting societal attitudes and acceptance of sadomasochistic practices to a certain degree. In 2015, a substantial minority of British respondents to a *YouGov* survey admitted to engaging in BDSM practices.[203] This data revealed that 12% of the respondents had taken part in BDSM at least once.[204] These numbers increased to 19% among respondents aged between 18 to 39, demonstrating how younger generations in the UK adopt more liberal attitudes towards once 'deviant' sexual practices.[205] Furthermore, only 15% of respondents discouraged these sexual practices, and 71% believed that people who freely consented to BDSM should not be held criminally liable.[206] The once embedded fears of sadomasochistic crimes seem to have shifted, or even dissipated, in British society. Despite the change in social attitudes, consensual sadomasochistic sexual activity that inflicts physical harm remains a criminal offence in the UK.[207] However, it seems a considerable portion of the population privately practices it. Both the commercialisation and supporting survey data suggest that sadomasochism have seemingly become socially acceptable in British society. Time has transformed its once threatening and polluting impact on British morality into ordinary and everyday practices for some Britons.

B Homosexuality

Prejudicial attitudes towards homosexuality have gradually diminished with each successive generation since *Brown*.[208] The British government has repealed discriminatory laws, enacted equal ages of consent regardless of sexual orientation, and legislated for same-sex marriage.[209] Since the British Social Attitude survey commenced in 1983, there has been a significant liberalisation of attitudes towards sex, sexuality, and the public disproval attached to each of them.[210] This social shift is attributable to the fact that religious generations are dying out and religious institutions are holding more liberal views of sex and sexuality.[211] As a result, each generation has more liberal views than the previous one.[212]

Despite legislative reforms reflecting more liberal attitudes, the 2013 British Social Attitudes survey indicates that 28% of British respondents still hold prejudicial attitudes towards same-sex relations.[213] Even 40 years after partial decriminalisation, a substantial minority still perceive homosexuality to be morally wrong. This evidence suggests that same-sex relations remain embedded in British culture as sexual deviant behaviour, existing long after liberalisation attempts. Unlike sadomasochism, attitudes to homosexuality have been less susceptible to social and cultural change. In 2013, morality is still the defining criterion of how over a quarter of the British population perceive threats and dangers within their community.

V CONCLUSION

Brown is a seminal example of how sexual deviancies are viewed and judged in society. Expressed at the judicial level, *Brown* was a creature of its culture. This judgment exhibited culturally entrenched attitudes among the upper class of British society, represented in the House of Lords, towards same-sex relations in a socially disapproving society. Sadistic homosexual acts were threats to British morality. Consequentially, their criminalisation was socially accepted. It echoed throughout the common law world, becoming a controversial example of judicial activism and manipulating current laws to justify a predetermined moralistic outcome.

This paper's socio-legal analysis revealed how moralism rationalised and justified judicial paternalism. In these circumstances, public interest was paramount, overriding traditional criminal law principles, such as autonomy and consent. In doing so, the House of Lords imposed their notions of morality in safeguarding society against the sexual 'Other', revealing underlying homophobic biases. Despite the acts being consensual and private, there was a public trial held in the criminal justice system and court of public opinion. *Brown's* cultural and social circumstances highlight how homosexual sadomasochistic acts, particularly bloodletting, were deemed 'dirty', polluting and significantly dangerous to British public health and safety. *Brown* demonstrates how judicial condemnation can achieve social utility through criminalisation.

Despite society being more accepting of sexual diversity since *Brown*, even with its recent cinematic and cultural commercialisation, the embedded prejudicial attitudes towards homosexuality highlight the moralising effects of criminalisation. Long after decriminalisation, specific acts are still not accepted in society – demonstrating the enduring sexual deviancy associated with historic offences. Society has moved on from the understanding of sadomasochism in the 1990s and become more socially accepting of sexual diversity. British society and the courts have also changed significantly since *Brown*. However, it remains a British common law precedent and an example of how over a quarter of the British population perceive deviants and sexual dangers within their community. Legislative reform is needed to expunge the longstanding stigmas and taboos perpetuated by *Brown*'s outdated, prejudicial, and homophobic reasoning.

PREDICTING DEVIANT BEHAVIOUR: TARGETING DATA OUTLIERS TO POLICE NEIGHBOURHOODS

Ariana Haghighi

I INTRODUCTION

Predictive policing is an emerging policing strategy that employs analytical algorithms to anticipate crimes before they occur based on the calculation of risk-factors.[214] This approach has captivated the interest of lawmakers for decades due to its promise of efficiency given the focus on crime prevention.[215] Police officers laud the possibility of proactively assessing areas and people at risk, claiming it could create a safer society where risks are minimised before materialising into crimes.[216]

However, policing databases are ostensibly biased, and since "predictions are only as good as the underlying data", suspects targeted by predictive policing algorithms are frequently found to be innocent or highly stereotyped.[217] Historical proactive approaches to law enforcement have also suffered from biases, an example being the 'stop-and-frisk' policy in the United States where police physically search suspects without warrant.[218] Predictive policing takes an even more sinister form and exacerbates many of the injustices endemic to the law when departments use actuarial and technological methods to portend future crimes and suspects..[219]

II HISTORICAL ROOTS OF PREDICTIVE POLICING: CHARTING CRIME BEFORE IT HAPPENS

The concept of predictive policing has a dark history. Before police departments forecasted crime with computer analytics, they employed analogue methods to predict suspects that often relied on racist and ableist proclivities.[220] The commonplace American practice of 'stop-and-frisk,' formalised in *Terry v Ohio Supreme Court* [1968] where police officer McFadden searched three suspicious individuals who had pistols on their person, allowed police to apprehend potential suspects for search or detainment.[221] Though stop-and-frisk requires the policing officer to reasonably suspect questionable behaviour, the use of discretion by police officers can be poor due to time constraints and is often reliant on racist and classist narratives surrounding the 'presentation' of a criminal.[222] Beginning in 1965, there has been significant debate pertaining to whether this predictive practice could be applied "equally [and] fairly" as claimed by Detroit Police Department's Commissioner Girardin.[223] Detroit's future Mayor Coleman A. Young argued that stop-and-frisk would compound over-policing of Black neighbourhoods, "waging war against the constitutional rights of law-abiding citizens."[224] This sparked city-wide controversy, and white families voiced their support for stop-and-frisk, demonstrating their subscription to stereotypes surrounding African-Americans and gun violence. Their sentiment was clear in letters that read, "Who is supposed to protect us from all these criminals roaming the streets?"[225] and "bring back law and order".[226] Individuals were to be approached only in cases of "reasonable suspicion" and not "hunches."[227] Nevertheless, these guidelines were thwarted and continue to be today; since 2002, Black and Latino individuals have been the major target of stop-and-frisks.[228] Data from New York City surveying the 685,000 individuals apprehended in the district in 2011 reveals that nine of ten suspects subjected to privacy invasion and often brutality are subsequently deemed innocent.[229] This highlights that police discretion is often either inaccurate or limited, given that officers were implicitly encouraged to use the tactic superfluously during this time.

The discretion of police officers regarding future criminals also historically manifested in the unjust practice of 'investigative arrests'. This was a practice where individuals were detained without reasonable cause or warrant, owing to police suspicion.[230] Harold Norris, writing for the non-profit litigation organisation American Liberties Civil Union, stated that "thousands of citizens [spent] thousands of days in jail illegally ... what makes this deprivation of civil liberties so insidious is that it seems to have no basis in law."[231] This quote demonstrates that police

practices infringed upon individual freedoms for all citizens, disempowering individuals. This practice also primarily targeted African American individuals, often delivered with stinging racial epithets. In a National Association for the Advancement of Colored People (NAACP) report, it is noted that after physical brutality, the complaints surround "common use of profanity and slurs" and "reference to the complainant's race in a derogatory manner."[232] Robert F. Mitchell, an innocent man without a criminal record, was pursued and attacked by police in 1957; his testimony to the Trial Board epitomises these complaints. He recalls, "They called me smart. They also called me a son of a b**** and a n*****"; despite Mitchell's vivid testimony, his appeal was dismissed, symptomatic of prejudiced attitudes.[233] The NAACP report also published over 100 complaints of police members accosting black women on the street under the racially-justified suspicion of prostitution.[234] This highlights how the notion of race served as a strong basis for criminal suspicion, and was exploited to instil fear in suspects.

These practices were ruled unconstitutional, but racial bias underpinning international legal systems remains pervasive. Previous Head of the Law Council of Australia Fiona McLeod claims there is undeniable "direct evidence of institutional racism in Australia's criminal justice system", due to the over-criminalisation of petty offences and over-policing of areas with Indigenous inhabitants.[235] She argues law itself is conducive to racial discrimination as it is bereft of focus on the improvement of environments to deter crimes committed out of necessity.[236] The continuation of race being considered an aggravating factor for criminal suspicion is thus a vestige of a dark history.

Though criticised by many for thwarting the rule of law's key principles of procedural fairness and stipulating proof beyond reasonable doubt,[237] this policing method is justified by its proponents who cite criminological theories such as 'broken windows'. This proposes that visible civil disorder begets crime, known to target lower socio-economic communities.[238] This theory is used as rationale for aggressive predictive policing strategies as proponents suggest reformed and proactive strategies will decrease neighbourhood disorder and promote a feeling of social control.[239] Hence, some police officers are taught to suspect all individuals in certain areas and attempt a total crackdown on crime, rendered more efficient through proactive means.[240] Proponents also criticise law enforcement as purely reactive in nature as officers wait for crime to occur rather than making active efforts to predict its occurrence, thus only responding to crime rather than preventing it.[241] Overall, these police practices formed a foundation for the modern-day justification of proactive and predictive praxis.

III ONE STEP AHEAD: TECHNOLOGICAL ALGORITHMS

Harnessing the power of databases and sophisticated algorithms, there is a trend in modern-day law enforcement towards utilising technology to incriminate potential suspects.[242] Predictive policing adopts an even more sinister form when combined with technological surveillance, leading to policing algorithms that are both inaccurate and biased.[243] Although companies that produce algorithms for commercial gain are often reticent to reveal the detailed mechanics behind their algorithms, one such algorithm, Predpol, reveals its criteria. This algorithm follows crime patterns with regard to three main aspects of offender behaviour: 'repeat victimisation', the assumption that a criminal will strike again at the same location, 'near-repeat victimisation', the presumption that the criminal will offend in circumstances very similar to those before in which they were successful, and the extent of a 'local search', estimating that the same offender's crimes will cluster geographically.[244] According to jurisprudential scholar Leslie Gordon, the criteria mirror those used for a seismologist's earthquake predictions.[245] Predpol sparked criticism in 2012 over the conspicuous racial bias peddled by its predictions.[246] It is not entirely the fault of the algorithm itself – predictive policing systems utilise pre-existing crime databases wherein racial minorities are overrepresented due to over-policing of lower socio-economic areas and police officers' disproportionate targeting of Black and Indigenous crime.[247] Additionally, since the humans who coded the algorithms held biases, these were replicated in the data, and amplified due to computational powers.[248] As Predpol relied on data such as the location of crimes, over-policing was exacerbated as squads were sent in droves to crowd areas already enduring disproportionate mistreatment.[249]

The unjust outcomes of predictive algorithms are often transferred into the policing matrices that brand individuals themselves as potential suspects before they have even committed any deviant behaviour. This trend emerged in the United States and has been similarly adopted by the United Kingdom and Australia.[250] Algorithm COMPAS was trialled in 2014 where surveillance was allotted to each potential suspect, commensurate with their risk category.[251] Though researchers found that low-risk suspects with lesser surveillance were less likely to commit a crime, individuals labelled 'high-risk' were administered a suffocating dose of surveillance, to the extent that they were four times more likely to commit a violent crime compared to before the implementation of the model.[252] Researcher Marc Faddoul from UC Berkeley, has also debunked predictive policing algorithms as grossly inaccurate and atrociously biased.[253] Algorithms run a 97% risk of a false positive in terms of categorising suspects, due to their overestimation of risk level.[254] Additionally, the computational power of algorithms re-inscribe the biases of the humans that created them, and indeed exacerbate them due to complex sociotechnical systems, worsening structural violence.[255] Furthermore, algorithms are inherently reductive in that they disregard the context behind a crime, further dehumanising offenders and entrenching the separation between police and communities.[256] Though often inaccurate, the outcomes of predictive algorithms could constitute a basis for "reasonable suspicion" in criminal procedure; as consolidated in *R v Rondo*, 'the belief needs to be more than a possibility but need not amount to a reasonable belief'.[257] This demonstrates how police officers may avoid judicial sanction for seemingly unlawful persecution of suspects on matrices.

IV EARMARKED: NSW'S SUSPECT TARGET MANAGEMENT PLAN

In New South Wales, the recent introduction of the Suspect Target Management Plan (STMP) has garnered significant controversy due to the use of a categorative algorithm to define at-risk individuals.[258] This intelligence tool with opaque criteria labels people police believe could commit a future crime. Unsurprisingly, a large portion of these forecasted individuals are young people and racial minorities.[259] Children as young as ten have been listed on the database as potential suspects, contravening the *doli incapax* presumption that children aged 10-14 are too young to bear criminal responsibility.[260] The implications for targeted individuals included on this database include superfluous surveillance and infringed rights. A Youth Justice Coalition investigation into this controversial practice found that the STMP program emboldens police members to employ unlawful search methods; considering the algorithm itself falls victim to inaccuracies, this greatly undermines legal ethical principles.[261]

A 16 year old boy with minor offences of graffiti and a caution for cannabis use was stopped and searched by police 23 times in a year under the STMP program. In the police record, reasonable grounds for suspicion included, "he was wearing Nautica clothing", and "he boarded the last train carriage"; both cited as factors congruent with crime patterns.[262] A 15 year old Aboriginal boy with prior petty theft convictions was stalked by police, with their cars congregating outside his house until his family was in-effect evicted.[263]

A 13 year old Indigenous boy recalls police teasing him, calling him "a thieving little dog".[264] The common thread sewing these atrocious stories together is reprehensible police conduct. Although the STMP is merely a precaution with no guaranteed accuracy, police officers treat it as a certain fact, emboldening them to new heights of abuse and mistreatment.[265]

In 2015, the Minister for the Prevention of Domestic Violence and Sexual Assault Pru Goward announced that the STMP's use would be extended to capture 'recidivist domestic violence offenders' (DV-STMP); contemporary NSW Premier Mike Baird claimed that this would decrease domestic and family violence reoffending by five per cent within twelve months.[266]

When evaluating the STMP system, one must consider whether or not there has been a significant reduction in crime associated with the new predictive approach. Within NSW's BOCSAR, researchers analysed crime statistics and rates before and after the implementation of the STMP.[267] They conclude that the program has decreased recidivist behaviours, likely due to deterrence rather than incapacitation.[268] However, determining a causal relationship between STMP and an apparent reduction in court appearances and violent crime is fraught with confounding variables; thus researchers deem it near impossible to claim with certainty that STMP has successfully reduced crime.[269] In evaluating the success of the DV-STMP program, it appears any effective crime reduction is concealing something more sinister – as the offender is notified that they are on STMP watch for DV offence, it is more likely they will isolate the victim, lowering rates of reporting.[270] Thus, any statistic identified as a mechanism of success could be reflective of a deeper entrenchment of the problem.

More perniciously, the STMP sees less success with the vulnerable groups it overwhelmingly targets: there is more significant 'crime reduction' for non-Indigenous individuals rather than Indigenous.[271] Looking at the STMP data, there are clear biases in the areas in which it operates; Redfern was the most targeted suburb in 2015.[272] 60% of the individuals flagged within this area were Aboriginal, highlighting the algorithm's clear adherence to stigma and a perverse policing mindset.[273] The Youth Justice Coalition's Report also reveals how placing youth at-risk increases their disillusionment with police and does not serve to rehabilitate them for prior offences, only deter them with fear.[274] Ultimately NSW's STMP program is more harmful than helpful, posing no clear benefit other than to enable police to pursue racially-based crusades against juvenile offenders. The program could be reformed, but this must involve transparency with its criteria and database, better communication with lawyers and their suspect clients and a restraint on police authority. The STMP is an intelligence tool requiring further development, not an accurate criminal forecast.

V DEFINING A 'GANG MEMBER': LONDON'S GANG MATRIX

Formed after riots in 2011, London Police's 'Gang Matrix' aims to survey and proactively restrain gang activity.[275] Similarly to STMP, it is composed of a large database of individuals thought to be at-risk of gang involvement, and algorithms that interact with this data to formulate predictions.[276] The database itself is blatantly racist, as 78% of individuals listed are Black, and lacks transparency.[277] Martin Griffiths, an Advocate for Violence Reduction asserts, "The matrix [is]... distorted to fit a narrative: all knife crime is committed by black men in gangs".[278] Under the guise of targeted gang crime reduction, the police use the Matrix to continue to justify overpolicing.[279]

Due to its predictive nature, often suspect status is predicated on nothing more than vague patterns; Amnesty reveals that at least 40% of individuals listed on the Matrix have never had any serious criminal involvement.[280] The inaccuracy of the system manifests in harrowing anecdotes, such as when the police sent an eviction notice to a residence as they believed a suspect lived there, only for the suspect's mother to respond that her son had been dead for over a year.[281] Regardless of the low accuracy rates, suspects are subjected to augmented police surveillance, and their personal information is shared without their consent to third parties, such as their prospective employers and education institutions.[282] Amnesty reports that police monitoring can go as far as officers creating a fake social media account to stalk their targets.[283] Their rights are clearly impinged upon with no justification other than their conformity with some elements of a 'gang member' stereotype. The corollary of this privacy infringement is evident, as it could affect employment and educational outcomes. In many ways, the unfounded Matrix condemns its targets by perpetuating a positive feedback loop: feeding on racially disproportionate data, its use further exacerbates the overrepresentation of racial minorities in prison.[284]

London research group Stopwatch conducted research in the form of interviews with 15 people of colour listed on the Gangs Matrix to gauge their past and current relationship with the police force and criminal proceedings.[285] These interviews firstly shone light on the fact that, contrary to stereotypes, these people of colour did not grow up with feelings of hostility towards police. One participant described looking up to policemen as "heroes", "I thought they saved you in a way", he said.[286] Respondents focused on their positive and helpful experiences with law enforcement officers, rather than subscribing to the narrative of a tense relationship.[287] However, due to the police's abhorrent misconduct towards them and members of their community, disillusionment soon seeped in as they aged. For many, the catalyst of an onslaught of negative police experiences was their first memory of the invasive stop-and-search, highlighting the need for discretion in employing such a traumatic practice.[288] Gary, who was first charged for theft by finding at 14, was most irate at the public humiliation: "You feel like shit because there's no courtesy of where they're doing it and who's watching".[289] Subjection to trauma exacerbates tensions, as respondents reported a higher likelihood of carrying their own weapon if they mistrusted the police.[290] Respondents also spoke to the pernicious impact of non-consensual data sharing, as they felt their relationships, accommodation and employment had been irredeemably impacted.[291] Ultimately, the tangible and emotional corollary of the Matrix clearly outweighs any benefit, especially considering it has not directly led to any specific reduction in gang crime.

VI CONCLUSION

Despite promises of efficiency, accuracy and fairness, predictive policing procedures\ have failed to deliver beneficial outcomes for victims, communities or even law enforcement officers. Instead, these procedures have opened the gateway harmful practices, exacerbating dangers for society's most vulnerable. In reforming police practices and ensuring officers facilitate a healthy relationship with communities, we should not look too far into the future, but reflect on the present. The current systems are inadequate and if they continue on this trajectory, they will undermine the evidentiary foundations of the common law system. We must pay attention to this trend due to its inerasable impacts on individuals' lives. Where deviance is suspected, an approach encompassing human intuition, rather than computational bias, is required to ensure the most just outcome.

THE GOOD (ACTIVIST) UNIVERSITY: HOW STUDENT PROTEST MAKES OUR DEMOCRACY STRONGER

Lauren Lancaster

I INTRODUCTION

In liberal systems of democratic government, protests are important means of contestation that manifest keen social tensions in the public domain. People take to the streets in impassioned demonstrations of collective will for justice, freedom, environmental action and workers' power. Far from isolated acts of deviance, protest is the primary mechanism by which this means of political expression can be protected. It would be facile to suggest that mere access to, or communication with, local members or the availability of free information and press are sufficient to keep checks on the state's power and catalyse processes of justice and change. That is why it is important that protest is both sanctified and protected in legitimate democracies.

As Frank Brennan states in *Law, Liberty and Australian Democracy: "*There are some political issues that prompt feelings of moral outrage in the citizenry. [Constitutional democracies] must include means for communication of such outrage. The most usual means for such communication are the public procession and assembly… In society, a public gathering of persons is the most powerful means of expression of solidarity to the group and witness to those outside the group."[292] The book argues the crucial role of law in protecting a wide range of civil and political rights, and specifically how it's the law's duty to protect the right to protest and criticise the state and the limits on liberty imposed by the state.

II THE GOOD (ACTIVIST) UNIVERSITY

Being a university student is singular in terms of the diverse and vital political development one can experience. It has been noted that student life is a life stage highly conducive to 'acting collectively in a public sphere' to express ideas, make demands on some authority, and hold that authority accountable[293]. History offers many examples of students forming an influential oppositional force to university administrations, corporations and governments. This is because the unique solidarity required to sustain radical and progressive social movements is arguably developed, at least partly, through education. As students, we are encouraged to look beyond our own experiences and interrogate injustices and social hierarchies in the wider community. We are given theoretical and practical tools to deepen and strengthen this interrogation, and opportunities to come together with those who align with our views through activist projects and collaboration. It is thus no wonder that the universities of Australia have long been hotspots of radical political organising.

The 1965 Freedom Rides, led by University of Sydney student Charles Perkins, became a defining moment in Australian activism - drawing international attention to the plight of Indigenous peoples and endemic racism across urban, regional and rural Australia. The first Indigenous person to be admitted to a university in Australia, Perkins was awarded the Order of Australia in 1987 for his dedication to pursuing equality. For two weeks in February 1965, he and other USYD student activists drove a school bus around rural NSW to expose the blatant racism of Australian towns and communities and colonial violence perpetrated against First Nations peoples, from disallowing entry to public swimming pools, to corruption scandals in local government aimed at disempowering and alienating prominent Indigenous spokespeople. Dr. Charles Nelson Perrurle Perkins, a civil rights activist who dedicated his life to achieving justice for Aboriginal and Torres Strait Islander people, described the Freedom Ride as "the greatest and most exciting event [he had] ever been involved with in Aboriginal affairs".[294] Anti-apartheid, anti-conscription, women's liberation and anti-war movements have attracted swathes of passionate students, demonstrating for a better future. More recently, climate action, Indigenous deaths in custody and education austerity have dominated the student agenda in NSW.

Governments and university administrations are aware of the political potency of student interest groups on the national level. The latter half of the 20th century saw the beginning of protracted student resistance to global neo-liberal economic reforms that precipitated the privatisation and financialisation of the tertiary education sector. Increased corporate governance sought to centralise power in the hands of appointed administrators. At the same time, a gutting of public funding to universities under conservative economic policymakers limited the democratic power of student unions to form and organise effectively[295].

Where the outright prohibition of student organising cannot occur, governments in purported democracies tend to opt for a pluralist approach: deploying multiple arms of the state to deter possible mass collective action through a strategy best described as '*divide et impera*'.

Most broadly, one can understand the repression of student activism through four main mechanisms: policy, non-violent police action, police violence and legal action. Policies justify and enable police action, setting the legal basis for repression of free speech and assembly. NSW statute creates a strange precedent for police and protesters interactions seemingly pursuant of collaboration and concession. At the same time, COVID-19 health orders and their application to student protests have complicated questions of movement and association. Non-violent police action includes surveillance of students, harassment, arbitrary fining and warnings. Violent policing methods have grown increasingly common, used when other measures cannot curtail political expression. Legal action is used to sanction students for protest activity and usually follows police actions. However, in some cases, it precedes it as seen in the sensational appellant overturning the NSW Supreme Court decision prohibiting a Black Lives Matter protest in June 2020.[296]The Court of Appeal looked to the *Summary Offences Act 1988* (NSW),[297] to solve the fairly narrow issue of statutory interpretation in *Bassi*. Declared as an 'authorized public assembly',[298] the Black Lives Matter protest last year is a prime example of protests in Australian history that have continued a legacy of public dissent for fundamental and radical social change.

III AUSTRALIAN POLICY

In NSW, Part 4 of the *Summary Offences Act 1988* facilitates the exercise of the common law right to assembly. Yet, Part 4 is silent as to the actual existence of that right. This is in contrast to s 5 of the *Peaceful Assemblies Act 1992* (Qld),[299] which expressly provides a statutory right to assembly. NSW is singular in its obfuscation of such a right, particularly when one considers multiple international legal provisions that exist to confirm a human right to peaceful assembly and association,[300] bounded by contingencies of national security, public health and order.

It is strange then to consider that public assembly and political procession are not 'accorded recognised places in the constitutional machinery' in Australia. However, Australian courts have expressly recognised the common law right to assembly, including the High Court of Australia and the Supreme Court of NSW. The Australian Constitution further protects it under the implied freedom of political communication. The scope of the protection afforded to the common law right to assembly by the implied freedom of political communication is considered in light of the High Court authority of *Lange*.[301] David McGlone summarises this effectively in *The Right to Protest*:

> "The basic principle espoused in Lange is that there exists a freedom of political communication implied in systems of representative government provided by the Constitution. This freedom involves a two-limbed test. First, to be found unlawful or to be read down in light of the freedom, a law must infringe the freedom. Second, the law in question must not be 'reasonably appropriate and adapted to' a legitimate end compatible with the system of representative government provided."[302]

Further discussion of the *Lange* principles in *Coleman v Power* found it did not guarantee a right to protest in a substantial or practical sense. In *Mulholland v AEC,*[303] the Court emphasized that the implied freedom recognised in *Lange* is a freedom from interference with **pre-existing rights** but that it did not, in itself, create new positive rights.

Insofar as such case law emphasises the uncertainty of the right to protest, this raises further questions with respect to the implied freedom of political communication and its effect upon the right to protest. Indeed the discussion in *Coleman* demonstrated 'deep seated differences of opinion on the High Court'[304]. Justice Callinan doubted the validity of *Lange*, while Gleeson CJ and Heydon J offered only lukewarm support. Justices Gummow and Hayne 'seemed to reduce it to a 'canon of statutory construction"[305] .

IV ON THE STREETS

Arguably, even the most liberal construction of the law problematizes the existence of rights to protest, or assemble or communicate. Further, how such construction is applied to activists varies widely. Indeed, the relationship between the police - those who enforce law relating to the aforementioned rights - and protests at large is framed in statute as one that is, by all accounts, supposed to be collaborative and mutually beneficial - ie. protestors make concessions on protest routes, content, size, duration or location in return for assurances of no violence on the part of the police.

Removing this from the abstract, one can see how collaborating with police and making concessions in the court of a protest could be construed as principally inconsistent. It would appear that the encouragement of collusion between police and protestors forces activists to engage in actions often antithetical to the very means and ends by which they pursue justice and change. To require, for example, anti-police brutality protest organisers to make significant concessions to the police as the only means of avoiding heavy handed reprisal seems decidedly ironic. Closer to campus, many universities maintain policies requiring administrative approval for flyers, posters, and other materials; or as at USYD, frequently ban or remove political material from display around campus.

This is not an isolated issue in Australia, nor a particularly contemporaneous one. The US-based Foundation for Individual Rights in Education (FIRE) published a comprehensive report in 2011 titled *Spotlight on Speech Codes 2011,* analysing the state of free speech at over 300 American universities. The report found that more than two-thirds of universities had policies that restricted or violated free speech as it is laid out in the US Constitution. This ranged from policy adjustments to financial coercion. Instances of administrations broadening definitions of 'inciting language' (i.e. language used to incite violence/action) within internal policy documents to include that which was deemed 'offensive' or 'provocative' were common. Some administrations also attempted to charge student organisations for their own security costs if a controversial speaker or event were hosted on campus. This operated in contravention of the US Supreme Court ruling in *Forsyth County v Nationalist Movement*[306] that found the imposition of charges to be unnecessarily adjudicative of the content of speech and could thus be unacceptably used as a censoring mechanism.

While inference is a blunt instrument indeed, growing censorship and suppression of protest on university campuses occur as global unrest trends upward, according to a news report by the Center of Strategic and International Studies (CSIS), a Washington-based think-tank. Using data from the Global Database of Events, Language, and Tone, researchers found that the number of mass protests globally has increased

by 11.5% per year, on average, since 2009[307]. It is more pertinent to consider how, if protests are occurring more frequently, whether changing institutional responses implicate or weaken basic political rights.

V NON-VIOLENT POLICE TACTICS: SURVEILLANCE AND HARASSMENT

The student movement has never been friends of the police. It is no surprise that where students find power in political belligerence and civic disobedience, police respond with force many would deem utterly disproportionate. Further, one finds police powers confirmed and oft-expanded by legislation and collusion with university management that undermines the afore-mentioned spirit of collaboration purportedly encouraged by protest law in this state. Non-violent tactics, ranging from surveillance to in-person harassment and excessive fining, are used by many university administrations and police forces to curtail free speech and political assembly on campuses.

An example of such is the conduct of NSW Police and USyd management last year during education protests against the Higher Education Support Amendment Bill 2020. The release of documents under the Government Information (Public Access) Act 2009 revealed police using surveillance networks to monitor student organisers. Plainclothes officers were deployed to "initiate engagement" with student activists and coordinated police operations with university management to shut down protests and radical organising events.[308] Further, released documents revealed the use of Dataminr, CIA-associated AI technology, to monitor digital activity and profiles of known student activists in the lead up to September 2020 student actions.

These efforts mirror historical practises used by security and police on university campuses across the world. They form part of a broader trend of "community policing" as part of the administrative reaction and management of student uprisings since the 1960s. In 2010, the American Civil Liberties Union released a report titled *Policing Free Speech* detailing seventeen cases of surveillance and harassment from campuses across the US. These cases included military monitoring of counter-recruitment anti-war activity, undercover officers attending events on veganism, the interception and dissemination of private emails, [and] pre-emptive arrest of protestors[309].

Free speech and the extent and success of political action by students is limited by surveillance, harassment and pre-emptive arrest. In turn, the selective weaponization of legislation to demand collaboration with police, the historic foe of the student movement, creates a sense of confusion and apprehension amongst those looking to demonstrate against injustice, particularly when the substantive content of that protest would be critical of police and university administrations.

VI POLICE VIOLENCE

While there is an inconclusive statutory foundation to support an unequivocal right to protest in Australia, it would be reasonable to expect that the state's respect for and wish to allow democratic contestation is confirmed through legislation that errs in favour of freedom of expression and assembly. However, this is not the case.

Police invariably oppress dissent expressed by student protestors through violence in the name of public order. This is also arguably in derision of their statutory obligations in NSW that err towards collaboration. It is thus legitimate to characterise the police as an arm of the state that is patently uncommitted to the very collaboration they purport to encourage. Police violence here serves two purposes. First, it physically and emotionally attacks and demoralises activists. Second, it is used to criminalise dissent. Administrations and governments support acts of police violence by claiming they are a justified response to out of control activists. These claims are undermined when one considers the global trend of violent policing in relation to specifically left-wing activism.

Data produced by the US Crisis Centre and Armed Conflict Location and Event Data project (ACLED) following the mass mobilisation of protestors for Black Lives Matter in 2018 and 2019, police in the United States are three times more likely to use force against left-wing protesters than right-wing protesters, and more than twice as likely to make arrests at left-wing protests. Despite partisan rhetoric asserting the violence of BLM protests, rates of non-peaceful protest were similar across the political spectrum.

During 2020, while emergency health order restrictions on public gatherings persisted, thousands of sports fans filled football stadiums. Yet at Sydney university campuses, riot police were deployed to disperse student protestors[310] who had detailed COVID-19 contingency plans and gathered in groups of no more than 20[311]. In response, more than 100 University of Sydney staff signed an open letter expressing their concern about a "large and overbearing police presence", reflecting that "students [were] told that they were allowed to congregate in groups if they were eating lunch, but not if they were protesting,". The staff letter concluded that "this unambiguously constitutes political censorship."

Little has been offered by NSW Police in response to more than 18 months of demand by politicians, community leaders and students against the transparently political deployment of police to suppress left-wing protest. There is an uncomfortable tension between allowing high-capacity sports games to continue and deploying riot squad units on small groups of young people protesting for education justice. This marrs claims that police actions simply constitute the indiscriminate enforcement of emergency health orders. Instead, it confirms what Turk identifies as the irrefutable role of the police as keepers of a traditional and conservative public code of conduct. 'All policing is political in that the ultimate rationale and purpose of policing is to preserve against radical changes those cultural and social structures which are congruent with some historically specific polity'[312].

VII CONCLUSION

Ultimately, the unstable status of our right to protest fails to protect dissenters in a liberal democracy from the violence the state can perpetuate against them. Despite some permutations of free speech, association and communication being affirmed at common law, the original uncertainty of those rights both dissuade action in the first instance and makes it difficult for those who do attempt to protest to access justice after the fact. The comparative certainty of policing laws, and the far greater quantity of substantial common law that clarify latent confusions there exacerbate tensions between police and protestors. At a time of large mobilizations across the world, attempts by governments to deter and impose criminal penalties on peaceful protesters should be stopped. International human rights law protects the right of peaceful assembly and requires authorities at all levels to facilitate such assemblies and avoid unnecessary or disproportionate restrictions on them.[322] It is specifically necessary that Australia re-examines the legal mechanisms used to protect our democracy, and that when the state fails to do so, we can confidently take to the streets to make our voices heard.

PART III

Deviance Between States

INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS OR HUMAN RIGHTS OF THE GLOBAL POOR? THE FAILURE OF THE TRIPS AGREEMENT TO PROTECT PEOPLE FOR PATENTS

Jules Edwards

I INTRODUCTION

The current trajectory of the vaccine rollout has systematically failed to protect the global poor, engendering a humanitarian crisis where developed states are able to return to a sense of normalcy while developing states are left 99% unvaccinated.[313] Much of this trajectory derives from the international protections currently afforded to the intellectual property rights of pharmaceutical companies, through a structural functionalist theory of deviance,[314] the failure to protect developing nations from formation, development, and practice is palpable. Through the TRIPS Agreement, global intellectual property rights will once again preference the profit incentives of pharmaceutical corporations and wealthy states over the wellbeing of the global poor - unless this agreement undergoes major change.

This essay will argue that there are serious problems embedded in the current international IP protections for the global poor. It will canvass how a temporary waiver from the TRIPS agreement would create a striking model of deviance by convalescing the global poor, improving vaccination rates, and innovating how intellectual property protections can further alleviate this cycle of systemic inequity. It will first consider what the TRIPS Agreement currently looks like, including its historical development and past failures. It will then adopt a normative lens to examine why the agreement denies poor countries equitable access to the COVID-19 vaccine, before practically juxtaposing the policy choices afforded to Australia, a developed state, and Bangladesh, a developing state. Finally, it will examine what the TRIPS waiver would look like and evaluate its effectiveness in deviating from the problematic trajectory of preferencing intellectual property rights over human rights during health crises.

II WHAT IS THE TRIPS AGREEMENT?

The Agreement on Trade-Related Aspects of Intellectual Property Rights, known as TRIPS, is the most prominent global standard for private intellectual property protection, born out of the rise in conflict over international trade without tariff barriers.[315] The benefits of TRIPS purportedly derive from having temporary monopolies, since limits on counterfeit and piracy allow for the discovery and encouragement of new and creative innovations by way of protection and remuneration.[316] Intellectual property rights and the innovative competition created can extend to the international scale, meaning that both foreign direct investment and the creative integrity of technology and other products can be enhanced.[317] Thus, TRIPS putatively endorses trade and innovation between states.

More specific benefits of the TRIPS agreement also exist. First, there is some protection of developing states in lieu of their ability to ensure compliance per the 'transitional arrangements' section. Developing states were granted four further years to achieve compliance, and per Article 66.1, a further ten years from the 2001 Doha Declaration to comply with IP arrangements for pharmaceuticals.[318] Moreover, Article 66.2 encourages technology transfer from developed states to developing to ensure a viable technological base, and Article 67 mandates the assistance of developed states to uphold the TRIPS agreement.[319] Second, TRIPS affords flexibility within its own operation, meaning that member states can both exclude innovations from patentability (Article 27.3) and grant compulsory licenses to combat 'national emergencies' (Article 31).[320] Third, TRIPS has also enabled numerous dispute resolution mechanisms which can enable punitive trade sanctions to guarantee compliance – cases have been made successfully by both developed and developing states in this space.[321]

However, the benefits of scaling intellectual property rights internationally are conditional on equating encouragement of innovation through protecting the private nature of ownership with actual access to the benefits of that innovation as a public good through shared knowledge and improved welfare. Unfortunately, the way that the TRIPS agreement has historically been applied has seen preference fall to private intellectual property rights rather than publicly accessing the benefits of innovation. In the 1970's, American corporate lobbyists and government policy-makers actively pursued security in international intellectual property rights due to concerns about the lack of competitiveness and national trade deficit. This allowed the United States to internationally push for IP legislation, sustaining their comparative advantage technologically.[322]

As developed states have more intellectual property rights-holders due to infrastructure and technology, the increased protection granted by TRIPS has meant that wealth is much more likely to flow from technology-importers to exporters, thereby benefitting only a few states like the United States. Although developing states could eventually benefit by merely accessing the, the benefits of the TRIPS Agreement flow disproportionately to the most developed states.[323] More importantly, the short-term harms can be disastrous, particularly with respect to international health crises, as this essay will subsequently focus on. This is because the trade secrets and technological access required to manufacture vaccines and other pharmaceutical products have meant that pharmaceutical corporations can monopolise these spaces and set prices at unaffordable rates. TRIPS has a history of failing to protect public welfare at the cost of private gain, as manifested in the HIV-AIDS epidemic: in 2001, 39 pharmaceutical companies sued the South African government for passing legislation that would allow for compulsory licensing of generics (which was only dropped due to severe public pressure).[324] Even though the Doha Declaration attempted some reformation, this essay will now turn to the legal problems within the TRIPS Agreement which prevent developing states from being adequately protected despite that reformation.

III HOW DOES THE TRIPS AGREEMENT FAIL THE GLOBAL POOR?

The first issue with the TRIPS Agreement and the COVID-19 vaccination roll-out is that the prima facie protections of developing states are in fact restrictive and inadequate. The first reason for this is that the differences, or separations, outlined by TRIPS for developing states are temporally bound, meaning that once the time given to developing states has lapsed, these states are then bound to the same expectations for intellectual property rights as developed states, regardless of their socio-political conditions.[325] This means that, despite events like the COVID-19 pandemic, developing states are expected to uphold their obligations to intellectual property even if this may threaten the capacity to get their states vaccinated quicker. The second reason is that, as a result of those tight boundaries, there is a significant reduction in the autonomy for states, especially developing states, to create policy domestically which allow for development.[326] This is importantly problematic as these policies are often the mechanisms which allow developed states to ensure that they are protected in events such as global pandemics, due to the capacity to benefit from innovation made from their own infrastructure. The third reason is that the flexibility provided within the agreement has, in practice, only been given to developed states. This is because it strictly mandates the obligations which developing states ought to uphold with respect to intellectual property rights (the rights customarily held by developed states) but does little to enforce provisions such as Articles 66.2, which clearly requires technology transfer to developing states, especially in times like a global pandemic.[327]

The second issue, which is more direct to public health emergencies, is that protections granted to intellectual property holders are so great that monopolised prices set are often so far outside the scope of what developing nations can afford to pay. Individual states are afforded the power and discretion to make choices concerning the patenting and licensing of vaccines according to international intellectual property law. When an individual state approves a patent, that state (per the TRIPS Agreement concluded by all WTO members) retains the right to make that product accessible in instances of emergency through granting "compulsory licenses and the freedom to determine the grounds upon which such licenses are granted" through payment to the patent owner.[328] However, Article 31 of TRIPS propagates two difficulties for developing states. First, this licensing system requires consultation with the patent owner which is both time-consuming and conditional on pharmaceutical firms with monopolised power to agree on a "reasonable" price despite the expenditure on research and trials for these firms to actually create the vaccine.[329] This is especially problematic as these pharmaceutical companies are seldom willing to give up their own profit incentives – extortionate prices, tax evasion, toxic marketing strategies, corporate crime, and public distrust have plagued the actions of these corporations, meaning that it seems almost credulous to expect change.[330] Secondly, many countries do not have the resources to produce the vaccine, or the compulsory licensing is too expensive, meaning they must rely on importation. The problem here is that Article 31 prevents the use of compulsory licensing for exportation, meaning that states who support waiving the TRIPS limitations are unable to export vaccines to the global poor anyway, which leaves donated vaccines after wealthy states have vaccinated their populations as the only alternative for numerous states.[331]

This essay will now compare the domestic policy decisions of two states – Australia and Bangladesh – and illustrate the ways in which responses to the vaccination roll-out are conditional on the protections and freedoms granted by the inequity of the TRIPS agreement.

IV HOW DOES THE TRIPS AGREEMENT DIFFER IN APPLICATION FOR DEVELOPED AND DEVELOPING STATES?

A Australia

According to Dr Ben Bramble, Australia has been able to contract enough vaccines to inoculate the population three times over.[332] Currently, two vaccines are available: the Pfizer-BioNTech vaccines are being imported, and the Oxford-AstraZeneca vaccine is being manufactured in CSL-Seqirus in Melbourne after paying for the intellectual property rights to produce.[333] However, it is the flexibility in inoculation from having access to the intellectual property of the vaccine, alongside the comparatively limited threat that the virus has posed for people in Australia, which has meant that many vaccinations (one in five,[334] in fact) have gone wasted and unused – many Australians are now presenting hesitancy over getting AstraZeneca, despite it being the most used vaccine in the world, over blood clots and efficacy compared to Pfizer.[335]

B Bangladesh

Bangladesh, on the other hand, has relied on donated vaccines through the COVAX initiative, as it has struggled to strike any deals for production domestically. Incepta, a Bangladeshi pharmaceutical company, is capable of manufacturing bulk antigen for coronavirus vaccines, and would easily be capable of producing the same protein subunit as in Pfizer-BioNTech[336] – however, because the vast majority of Pfizer is manufactured in its own facilities, it is able to maintain prices at a rate too extensive for the Bangladeshi government to pay to import it and thus refuses to hand over the intellectual property rights.[337] Similarly, the Bangladeshi

government requested access to the patent for the AstraZeneca vaccine, which was declined on the grounds that both Bangladeshi facilities to create the vaccines need to be upgraded to meet global standards and, according to the AstraZeneca CEO, would be too difficult to 'train these people to manufacture the vaccine because [their] engineers are flat-out working with [their] existing partners'.[338]

V WHAT IS THE SOLUTION?

A temporary waiver of the TRIPS agreement within the context of COVID-19 vaccines and other health technologies would both allow developing nations the autonomy to produce those technologies without the fear of contravening their duty to respect intellectual property rights and promote equitable access to vaccination through a mechanism which is morally, economically, and politically advantageous for all states.

For the TRIPS waiver to be effective, it ought to waive the IP rights on both patents and trade secrets associated with COVID-19 technologies. This duopoly essentially covers the majority of information required to manufacture the technologies: patents are in place for products which are easy to reverse engineer or reproduce; trade secrets cover the more complex and unidentifiable production measures.[339] For example, Moderna stated that they would not enforce their patents during the pandemic – unfortunately, most of their technology is premised on trade secrets, which thus reveal the empty promise made and the necessity of waiving rights to both.[340] In terms of implementation, Article 73 of TRIPS allows for the suspension of duties in times of national emergencies according to consensus;[341] this could work hand in hand with domestic legislation such as the *US Defence Production Act*, for example, which provides a legal basis for sharing trade secrets – similar legislation could be constructed to facilitate the distribution of technology data between foreign medical authorities.[342]

Unfortunately, this TRIPS waiver has been opposed by both Australia and numerous European states for mistaken and misguided reasons, including but not limited to the fact that many pharmaceutical companies heavily lobby these governments. This essay will now consider reasons why this opposition is erroneous.

Firstly, the idea that temporarily waiving IP rights would disincentivise vaccine innovation is both morally troubling and practically mistaken. On a moral level, the argument that pharmaceutical companies would not innovate because of waivers acts directly in contrast to the purpose of innovating, which is to create products which enhance our lives. On a practical level, the vast majority of investment into vaccine production for pharmaceutical companies comes not from the competition in development but from government and philanthropic funding, which constituted 97.1% - 99% of Oxford-AstraZeneca funding.[343] Moreover, it is unclear as to why, considering this waiver is existent for only the pandemic, pharmaceutical companies would not have an incentive to innovate considering the sizable profit margins that will again exist outside the context of COVID-19.

Secondly, the argument that it is not infringement upon IP rights but instead an incapacity to produce vaccines in developing states is also unsound. As evinced in Bangladesh (although also true for Denmark, Canada and Israel), many manufacturers across the world exist ready to start producing the vaccine;[344] it is simply not true that it is the manufacturing capacity which is holding back global production, but rather the transnational claims to intellectual property which prevent producers from entering the market. Similarly, many current producers argue that even if this manufacturing capacity exists, it could lower the quality of vaccine standard. However, this argument fails on the account that firstly, the WHO has committed to aiding manufacturers to ensure quality, and secondly, a slightly less quality vaccine would be far more effective still in states like Bangladesh who face the potential of people instead being simply unvaccinated.

Thirdly, the COVAX strategy will not be enough to protect the global poor from contracting COVID-19. Even though states like Australia have promised to donate 20 million doses to the COVAX system,[345] multiple problems exist within this donation system. The first is that COVAX's current goal only aims to attain vaccination for 20% of necessary populations[346] – a goal which is far from representative of what is needed for actual protection against the pandemic. Second, COVAX is not reaching the supply necessary to even fulfil its goal – it has only been able to deliver 100 million doses as of 6 July 2021, a goal that was set for the end of March.[347] This is because states like Australia, as aforementioned, are both wasting vaccination usage and are also vaccinating at slower rates.

VI CONCLUSION

The waiver of the TRIPS agreement is an imperative step for deviating from the currently disastrous trajectory of humanitarian failure in protection against COVID-19 for the global poor. This essay has attempted to underline what the problems are within the agreement that prevent equitable distribution of the vaccination, as well as more general problems for protection of developing states outside the scope of global health crises. Then, it considered how different states have been able to respond to the COVID-19 pandemic as a result of the flexibilities afforded to them by the TRIPS agreement. Finally, it proposed the mechanism for deviating from the problematic trajectory caused by the TRIPS agreement – a waiver – as well as reasons for why it would be effective in protecting the global poor, as well as future intellectual property rights.

THE INDIA TRAVEL BAN - A PROTECTIVE PUBLIC HEALTH MEASURE OR PUNISHMENT FOR DEVIANCE?

Kiran Gupta

ABSTRACT

"I hate people playing the race card. But even I must now say I am ashamed of Australia, which is making it a crime for Indian Australians to come back home. To me, it stinks of racism… What's more, I fear that more than 600,000 Australians of Indian ancestry will now conclude that they can never been real citizens of this country. That they are outsiders. Not "real" Australians. And so our tribalism deepens."

These are the words of Australian conservative commentator Andrew Bolt.[348] Those familiar with Bolt would be aware that if he describes something as "racist" then the subject warrants serious attention. On 1st May 2021, the Australian Government imposed a travel ban on all citizens returning from India due to the spread of COVID-19.[349] Under s 477 of the *Biosecurity Act 2015,* any Australian who attempted to return from India to Australia faced penalties of up to $100,000 or 5 years imprisonment.[350] Criticism came from many sectors of society, with lawyers, doctors, constitutionalists, politicians and citizens all rising in protest. This essay will formally investigate the travel ban, whilst placing it into the wider historical and racial context of Australian society and within a framework of "deviance."

I INTRODUCTION AND BACKGROUND

The travel ban, introduced on 1st May 2021 and which concluded on 14th May 2021, raised "serious human rights concerns" and set a dangerous precedent for Australia.[351] As new variants of COVID-19 emerged all around the world, the Morrison government stood firm in their infection management policies and maintained its highly successful and stringent hotel quarantine system.[352] However, when the Morrison government announced a travel ban from India, locking out thousands of Indian-Australians, both progressive and conservative media were quick to identify the ban as "racist."

In order to fully understand the factors behind the travel ban, we need to pay attention to structures of hegemonic Whiteness in Australia, as well as the social and epidemiological hypocrisy of the ban. Comprehension of these structures, in conjunction with an analysis of the principles of criminalisation, lead to a singular conclusion: that punishment under the *Biosecurity Act 2015* is not solely to manage "biosecurity risks" as described in the Act, but rather, it also serves to punish deviance from the dominant structures of hegemonic Whiteness in Australia.

II STRUCTURES OF HEGEMONIC WHITENESS IN AUSTRALIA

Australia is a settler-colonial nation. As a result, historical stereotypes have been perpetuated in the media to reinforce hegemonic structures of Whiteness since the birth of the nation.[353] Often, these stereotypes are used to position an "Other" as "dirty", "unclean" and "carriers of disease" which reflect a settler-colonial mindset that people of minority background are less "civilised."[354] This has been painfully evident in the discourse surrounding the Indian travel ban and more broadly, in the discourse surrounding all Asian-Australians since the initial outbreak of COVID-19.

The settler-colonial mindset essentially positions those of non-White background as the "Other", an "Other" who deviates from the hegemonic structures of Whiteness in Western society.[355] Waleed Aly has noted in the past that "Australia is generally a very tolerant society until its minorities demonstrate that they don't know their place… the minute someone in a minority position acts as though they're not a mere supplicant, we lose our minds."[356] This suggests that one must be a supplicant to hegemonic structures of Whiteness in order to be supported in contemporary political discourse and when one deviates from those structures, they are "Othered."

In this case, the deviance from the hegemonic structures of Whiteness took the form of a perceived "threat" in the form of COVID-19 from India (as distinct from COVID-19 from anywhere else). Consequently, this resulted in a legal and political form of "Othering", literally through exclusion. Whilst this is not an exhaustive examination of structures of Whiteness in Australia, this merely seeks to provide a brief prelude which places the travel ban in context.

III HYPOCRISY OF THE TRAVEL BAN

To contextualise the hypocrisy of the travel ban, it is necessary to examine the political trends of the pandemic. Restrictions quickly became mobilised in a way that many perceived to be racialised. At the start of the outbreak, Chinese-Australians were placed on Christmas Island to prevent the spread of COVID-19 to Australia.[357] Whilst this may have seemed like a reasonable measure at the time, when the restrictions were not equally applied to countries such as Italy and the United States, it was suggested that the reasons were not solely epidemiological.

At the time of the travel ban, epidemiologists revealed that India had fewer coronavirus cases per capita than either the United States or the United Kingdom during their respective COVID-19 peaks and was largely based on a "fear factor."[358] In retrospect, it is likely that this fear factor was based on a perceived deviant "Other" rather than clear epidemiological grounds.

IV CONSTITUTIONAL CHALLENGES TO THE TRAVEL BAN

Whilst the India travel ban was objectionable from most moral and ethical standpoints, no constitutional challenge to the ban was successful and there likely remains no constitutional remedy to challenge the travel ban.

Travel bans are likely protected under the *nationhood principle* which means there are likely no constitutional grounds to challenge them. The nationhood power allows "the executive to engage in enterprises and activities peculiarly adapted to the powers of the nation which cannot otherwise be carried out for the benefit of the nation."[359] In this case, it should be noted that the established categories for the nationhood power are not closed and can be reasonably extended to the particular context.[360] It is arguable (and indeed, likely) that the nationhood power extends to protecting the nation in times of national crisis such as war or a pandemic.[361] Consequently, it is arguable that the threat of coronavirus (and especially of a new variant) is a sufficient threat to the protection of the nation in a time of national crisis, allowing the nationhood power to be mobilised and giving the travel ban constitutional protection.

The question then arises as to whether there is a specific constitutional impediment to a travel ban from a *specific* country. Unfortunately, there is no authority to suggest that a travel ban which bars citizens from returning to Australia from one particular country raises any constitutional impediment under the nationhood power. It is likely that this idea is well beyond the original purview of the nationhood power.

More relevantly, it could be argued that there is an implied constitutional right to be able to return to one's own country. If it were to be held that there was an implied right for citizens to enter Australia in the constitution, then this would override the *Biosecurity Act* in a way that a common law right of entry would not. However, as the travel ban was lifted prior to the full hearing in *Newman*, this was not adjudicated.[362] In practice, this represents a significant challenge for constitutional determinations, as cases require a plaintiff to go forward, which is often lacking. At other times, they are resolved before a constitutional challenge can be brought, which means that constitutional law remains largely unchanged. In addition, even if it was held that there was an implied right to entry for Australian citizens, it would likely be mitigated by a test of proportionality, which would balance the right with practical concerns like COVID-19 spread, ultimately reducing the decision to a policy decision. [363]

Further, the challenge to the Western Australian border closure suggests that the Court would take a conservative approach to overturning any travel ban on Constitutional grounds. In *Palmer v Western Australia*, Kiefel CJ ruled that border closures do not reason any Constitutional concerns.[364] Although domestic border closures are distinct from international border closures, under the same principle, it is likely that the same approach would be taken.

V OTHER LEGAL CHALLENGES TO THE TRAVEL BAN

Other legal challenges to the travel ban were rejected in *Newman* by Thawley J. [365]

The first challenge involved s 477(1)(4) of the *Biosecurity Act 2015*, which states that the following provisions must be satisfied to implement a travel ban: [366]

> "The minister must be satisfied before determining a requirement that:
>
> (a) that the requirement is likely to be effective in, or to contribute to, achieving the purpose for which it is to be determined;
> (b) that the requirement is *appropriate and adapted to achieve the purpose* for which it is to be determined;
> (c) that the requirement is *no more restrictive or intrusive than is required* in the circumstances;
> (d) that the manner in which the requirement is to be applied is no more restrictive or intrusive than is required in the circumstances;
> (e) that the period during which the requirement is to apply is only as long as is necessary."

(Emphasis added).

Whilst there are significant questions over whether the travel ban was "appropriate and adapted to achieve [its] purpose" and that the ban is "no more restrictive or intrusive than is required," Thawley J held that it was not at issue in this case. As the Act stipulates that the "minister must be satisfied", these five criteria essentially constituted a policy decision that allows for very little judicial oversight, even if the Minister is perceived to have erred in the eyes of the public.[367] Therefore, there was little Thawley J could do under the guidance of the Act.

The second ground argued that there was a common law right for an Australian citizen to enter Australia. Whilst this was accepted by representatives of the Commonwealth government and Thawley J, it was held that such a common law right could be abrogated by legislation if it had "irresistible clearness."[368] In this case, Thawley J held that it was clear that the legislation intended to limit the right of Australian citizens to enter Australia and therefore, that there were no grounds for legal relief in this case.[369] Thawley J further held that the Act was deliberately broad in order to circumvent any issues.[370]

Finally, although it has been suggested by the Australian Lawyers for Human Rights that the travel ban is in breach of the International Covenant on Civil and Political Rights (ICCPR), this is a largely unproductive argument. They argue that Australia is in breach of Article 12 which states:

"Everyone shall be free to leave any country, including his own. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. No one shall be arbitrarily deprived of the right to enter his own country."[371]

However, although Australia is a signatory to the Covenant and ratified it in 1980, the Covenant has not been adopted into Australian law.[372] This means that the ban can not be legally adjudicated in Australia and is difficult to enforce at an international law level and reduces the likelihood of any successful legal challenge to a travel ban.

VI PRINCIPLES OF CRIMINALISATION IN THE BIOSECURITY ACT

Given that the *Biosecurity Act* criminalises the act of returning from India to Australia, it is necessary to examine the principles of criminalisation.[373] In order to potentially criminalise conduct, Ashworth and Horder argue that the behaviour must be harmful, wrongful and of public concern. [374]

Harmful conduct must directly or indirectly cause a setback to one's interests.[375] Prima facie, returning from India in the time of a global pandemic is harmful to the interests of Australians and therefore satisfies this principle. However, it could also be argued that this harm is mitigated by current quarantine arrangements which are in place for returning travellers from all countries and therefore, the criminalisation of the conduct becomes punitive to travellers returning from India. This is then in breach of the principles of criminalisation.

Wrongful conduct requires a mental state of intent and knowledge of the harm that may be inflicted.[376] This is difficult to prove in this case as it is arguable that the return to Australia does not correspond with the intent to cause harm (by infecting Australians) but merely corresponds with the intent to return home. It is therefore difficult to argue that the act of returning, before any discussion of intent to quarantine or similar, cannot constitute wrongful conduct under the principles of criminalisation.

By the same logic, it can also be suggested that the mere act of returning from India is not necessarily of public concern. Given the stringent structures of hotel quarantine established by the government, it could be argued that the return does not concern the public as the infection risk is minimised. Public concern could become relevant if parties refused to quarantine, however, given that this determination of criminalisation occurs before quarantine, this can be ignored. [377]

Ashworth and Horder also argue for a minimalist approach to criminalisation and a right not to be unnecessarily punished by the state.[378] It is certainly arguable that the penalty of five years' imprisonment for returning to one's own country constitutes unnecessary punishment, given that there are other avenues such as quarantine to manage the infection risk. There is also an argument that criminalisation was selectively applied to citizens who returned from India, suggesting a form of racial bias, which should not be present in criminal law. Given this, it could be argued that the state has no right to intervene punitively.

VII CONCLUSION

The India travel ban remains an unprecedented step in Australia's COVID-19 response. Analysis of legality, principles of criminalisation and hegemony all bring us to the same conclusion. This isn't about law, this isn't about criminalisation and it's arguably not about risk mitigation. This is about deviance and more to the point, this is about punishing deviance. To quote Andrew Bolt, sadly, "our tribalism deepens."

PART IV

Deviance In Morality

THE RIGHT, THE WRONG AND THE RATIONAL?

April Barton

"Ironically, lawyers' self-conception as advocates for the client, as neutral, non-judgmental facilitators of transactions, or as professionally trained to make 'arguments' on either side of an issue, can allow a high degree of rationalization of their complicity in conduct that is ultimately not in their corporate client's interest, certainly not in the public interest and often immoral if not illegal."[379]

I INTRODUCTION

When we envisage the *ideal* lawyer we visualise independence and neutrality - an advocate who unhesitatingly serves the best interests of their client. We see the blurred silhouette of an advocate standing before an objective bench - an arena ripe with opportunity to persuade. It is the effortless reciprocity between advocate and judge which is somewhat performative: a fluid exchange of legal erudition and psychological persuasion. Lawyers as custodians of the law, employ their expertise and talents to serve their client as beneficiary. A relationship which shapes the contours of fiduciary duty. As professional advocates, lawyers obtain a particular aptitude to rationalise behaviour as operating within the peripheries of what is 'legal' or client-centric. Legal training has fostered an acumen in advocacy, issue identification, and creative compliance with our system of precedent. This process of 'rationalisation' is underpinned by 'narrative psychology,'[380] which can chart the relationship between a lawyer's aptitude to justify and a rise in professional deviance or ethical misconduct. Narrative psychology provides a unique voice in recent scholarship, challenging the fixed reciprocity between legal adversarialism and ethics. It is within these realms that what may be argued as *right* and *wrong* becomes subsumed by what may be considered '*rational*.' As rationalisation becomes so deeply ingrained in the profession, how will young lawyers militate against the force of their own self-advocacy?

In the Australian legal profession, the increased incidence of unethical behaviour or '*deviance*' by lawyers has not gone unnoticed. Between 2005 and 2015, a 2020 study revealed 22,251 complaints against Victorian lawyers alone, 96.7% arising from experienced practitioners.[381] According to the Tang et al 2020 study, the data is insightful for several reasons. Firstly, it reveals that senior lawyers are far more prone to misconduct, with only 3.3% of all complaints being issued against new lawyers.[382] Further, low rates of established misconduct amongst young lawyers, may in turn confirm prevailing beliefs that there is a low probability of ethical sanction.[383] These statistics fit somewhat seamlessly with narrative psychology, or more specifically a cognitive bias known as probability neglect[384] – aptly articulated by the belief that "*this is unlikely to ever happen to me*". The report also raises concern that these low rates of misconduct outcomes may set an 'inappropriately high internalised standard for what constitutes unethical behaviour.'[385] This begs a psychological re-analysis of how ethicality is cultivated in the legal workplace. It is apparent that an extensive body of case law regarding lawyer misconduct,[386] a mandated ethics course within the legal curriculum and extensive professional regulations and codes of conduct all serve to acknowledge an appetite for ethical parameters.[387]

II 'RE-RIGHTING' THE NARRATIVE

The study undertaken by Tang et al in 2020, revealed that a majority of young legal professionals currently view the culture of their law firm as unethical.[388] As young law graduates enter into the legal profession, how do we resist against our own psychological predisposition to rationalise?[389] In law, where rationalisation is endemic, it may be difficult to locate

mechanisms of resistance. The issue then posed at young lawyers is a revaluation of our ability to dissent against these inherent psychological limitations. To do so, we must grow cognisant of the vulnerabilities of our own psychology. A variety of studies have accentuated the notion that lawyers find it notoriously difficult to predict future behaviour. Lawyers tend to emphasise the 'idealistic self - the self that places principles and values above practical considerations.'[390] However, studies have suggested that when the moment arises, lawyers act according to their 'pragmatic self – the self that is primarily guided by practical concerns.'[391] In the process of this misconception, rationalisation surfaces, where the benefit of hindsight enables a lawyer to embellish their reasons for adopting a course of conduct. It has been argued that once unethical conduct occurs, 'not only do we justify our behaviour, but we may also change our beliefs about ethics and moral rules to match our behaviour.'[392] In this sense, ethics are endogenous; they will wax and wane according to what can be rationalised. Psychologists have noted that while decision-making tends to hinge on intuitive judgments, moral reasoning usually occurs subsequent to the fact.[393] Once lawyers have exercised their decision-making, they are 'able to mobilise reasons to bolster that decision.'[394] In this context, rationalisation becomes employed as a somewhat dangerous instrument of legitimacy – it shapes and is shaped by its own reasoning process.

This article intends to understand the reciprocity between the psychology of rationalisation and deviance in the legal profession, particularly amidst the backdrop of increasing commercialisation. An evaluation of the prefixed discriminatory notions of what constitutes deviance, reveals the bias impregnated in our definition of wrong and right. As rationalisation becomes institutionalised, remnants of racism and inequality filter through the professional psyche. The final arbiter of deviance can be recognised as increasingly arbitrary and homogenous. Narrative analysis allows us to acknowledge that 'narrative plays a strong role in how we make sense of our lives.'[395] Accordingly, narrative enables discrimination to be constantly reproduced within the system. The flexibility of narrative to suit varying perspectives is highly attractive to its operation as an instrument of rationalisation. Narrative 'allows us to filter ideas and experiences, and create a consistent and positive story about ourselves.'[396] Contemporary psychologists such as Murray, Polkinghorne and Sarbin[397] have gone further to suggest that 'in providing accounts of our everyday lives we speak in narrative form.' Once we adopt the vernacular of rationality, it can become difficult to recognise our own shortcomings. The concept of *moral architecture* may provide a framework to reconceptualise legal practice towards better ethical outcomes. As moral architects, we must constantly seek to strengthen the structures of our ethical conscience.

III DEFENDING DEVIANCE?

In 2019, former Enron CFO Andrew Fastow left the courtroom, stating, "*you can follow all the rules and still commit fraud*." Enron was one of the largest energy companies on Wall Street. Fastow was convicted of security fraud and served five years in prison for strategically using off-balance sheet instruments which triggered the largest collapse in US corporate history.[398] Upon conviction, Fastow admitted that "". . . our financial statements were intentionally misleading. But did I think that was wrong? No. I was just following the rules." Legal firms, like other major commercial organisations, can at times provide an apt example of rationalisation at an institutional level. Institutionalised rationalisation has been defined as 'the process by which corrupt practices are enacted as a matter of routine, often without conscious thought about their propriety.'[399] As early as 1979, it was noted that 'far more persons are killed through corporate criminal activities than by individual criminal homicides.'[400] The use of self-narrative by white collar criminals is evident when upon conviction individuals such as Fastow refuse to accept their guilt. The convicted 'resist incorporating a pejorative identity into their self-definition,'[401] preferring to rationalise their conduct as a mere part of the tapestry of corporate culture. This reveals the significance of a firm's professional ethos; whereby corrupt practice may be internalised by organisational members and in turn, form part of normative work practice. As the law straddles diverse and increasingly competitive incentives, it arguably becomes easier for a lawyer to adopt a narrative which is consistent with their (un)ethical standpoint. In the corporate sector, where a modern lawyer has assumed an interdisciplinary role, the content of what can be rationalised becomes infinitely broader.

Further, the adversarialism of the legal profession is particularly conducive to adopting narrative as a means of rationalisation. It has been noted that approaching a conflict from a competitive perspective tends to increase unethical behaviour.[402] If a lawyer speaks within the vernacular of *winning, beating or competing*, their ethical obligations may begin to lose sustenance. In the legal landscape, where specificity of language is paramount, the vocabulary employed can often mask the ethical contours of an act or decision. The vernacular of 'collateral damage, downsizing, strategic misrepresentation [or] creative timekeeping'[403] can deprive decision-making of its ethical content. Further, psychologists have found that individuals tend to perceive behaviour as being more ethical when it is responsive or reactive to the unethical behaviour of another.[404] Accordingly, the structured dynamic of plaintiff and defendant sets the groundwork for ethical duties to become subsumed within the greater pursuit of victory. This may in turn lead lawyers to sacrifice principles for pragmatism, which can be easily rationalised when acting in the best interests of the client.[405] Lawyers may be reluctant to reveal elements which would be considered disadvantageous to their case, US Professor Mark Sargent noting:

'seeing evil is costly. Because it is costly, people tend to avoid seeing evil. If they see it, they convince themselves they did not see it, or at least pretend they did not. If they cannot pretend, they begin the process of rationalisation, for which human beings have an almost infinite capacity.'[406]

As such, lawyers as professional problem-solvers may engage in *creative compliance*, whereby the blurred lines between legality and ethics are accentuated. As this process gains increasing momentum, the ethics of the legal profession become vulnerable to corrosion.

The difficulty arises where entrenched rationalisations facilitate mindless obedience. This invites individuals to opt out of the independent ethical decision-making process and instead, rely on organisational precedent. It has been argued that in the process of institutionalised rationalisation, 'personal behaviours become impersonal norms, emergent practices become tacit understandings and idiosyncratic acts become shared procedures.'[407] In a landscape of entrenched misconduct, unethical behaviour is easily inherited by junior lawyers or graduates who seek to be validated by the dominant narratives which provide a means of social discipline. An array of psychological studies have revealed the interdependence between social context and behaviour.[408] Research suggests that the effect of peer conduct is accentuated when the peer is considered a member of or identifies as being part of a similar group.[409] In this sense, unethical conduct in a hierarchical legal workplace spreads infectiously and such behaviour becomes contagious. Further, psychologists have noted the tendency of individuals who act unethically to proceed to judge similar behaviour less harshly,[410] or perceive normative social behaviour as aligned with their unethical conduct.[411] Accordingly, within the organisational structure individuals are more likely to claim that their behaviour was rationalised as '*everyone was doing it*' or that '*it was the norm*.' It is within this process of justification, a lawyer may shift the moral onus or blame from the individual to the organisational, thereby alleviating themselves from independent or personal, ethical accountability.

IV WHO DEFINES DEVIANCE?

The definition of deviance may be understood as an antonym to the '*fit and proper person*' admission threshold imposed upon Australian legal graduates. The fit and proper test is based on a character assessment of the applicant.[412] The admissibility requirements provide another erudite example of institutionalized rationalism. The difficulty here, is again an absence of recognition for the process of rationalisation in cultivating, or rather encouraging these standards. The vulnerability of the process to discrimination was recognised by Justice Black of the United States Supreme Court, in stating that the good character test: '*can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes … of the definer [and hence] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law*.' [413] An applicant who applies for admission has a duty of disclosure, as to 'what a reasonable applicant' would consider the Board might consider unfavourable.[414] The disclosure test is imbued with a subjective understanding of what actually constitutes *reasonableness*. As articulated in *Frugtniet v Board of Examiners,* the requirements for admission prescribe that 'the applicant must have the personal qualities of character which are necessary to discharge the important and grave responsibilities' of the legal profession.[415] The danger here is that what may be considered reasonable echoes remnants of discriminatory practice which overtime has formed an innate part of legal rationales.

A Mental health

In Australia, there has been an ongoing issue regarding mental illness as indicia of unsuitability for admission to practice. The character test is admittedly 'not value neutral and so will accommodate shifts in interest or emphasis.'[416] The growing incidence of mental illness within the legal profession mandates a reconsideration of mental illness as ancillary to questions of ethical character. A conflation of 'questions of character (ethical) and capacity (technical ability) is confusing and potentially unjust,'[417] which arguably grants discretionary power to the Admissions Board to disentitle individuals of their ability to practice based on misguided mental health stigma and understandings of deviant behaviour. In *Murtough v NSW Bar Association (No 3),*[418] the applicant failed to establish a contravention of the *Anti-Discrimination Act 1977* (NSW) for a refusal to grant a practising certificate due to mental illness. This decision was upheld by the NSW Administrative Appeals Decisions Tribunal despite the Bar Association citing mental illness as a significant reason for denying certification, and evidence from treating doctors recommending certification with conditions[419] The amalgamation of the question of character and capacity reveals the complexities of applying a strict approach to admissibility, which hinges on character assessment. The absence of guiding principles to delineate these considerations, arguably facilitates the potential for arbitrary reasoning in this process.

B Race

The adoption of a Euro-centric rationality has arguably enabled the law to speak in a single voice. The ongoing complexity of recognising Indigenous connection to country, is just one of the many ways in which the Australian legal system may act arbitrarily in what it chooses to value. This allows 'White people [to] set standards of humanity by which they are bound to succeed and others bound to fail.'[420] Accordingly, institutionalised rationalism becomes a refuge for pre-existing bias and prejudice. It may therefore be argued that 'raced people will never be in a position to impose their own values and beliefs on White people,' who simply assume a position of moral superiority. Lawyers, who are considered 'themselves instruments by which the law operates,'[421] in turn become the voice for a prejudiced system. The communication barriers between white lawyers and Indigenous clients was aptly illustrated in *R v Kina*.[422] The inability to reconcile language difficulties led to an inability for Ms Kina to testify, the inadmissibility of her affidavits into the brief of evidence and a failure to admit evidence of probative value. Further, discrimination is arguably embedded in the internal walls of the profession itself. In Australia, only 519 of the 76,000 practising solicitors identify as Aboriginal or Torres Strait Islander.[423] Indigenous voices represent 0.7% of the legal profession despite forming 2.8% of the Australian population.[424] As Australian legal practitioners 'embody how the law speaks and operates in everyday life,'[425] this reveals an imbalance in who constitutes the rational, and therefore the right.

C Gender

Analogously, these issues traverse into the ongoing complexity of gender inequality in law. Despite the increasing numbers of women entering the legal profession, 'it is well-documented in Australia and internationally that women are still grossly underrepresented at the top levels of the profession.'[426] In a profession that is still predominantly male-centric, this inherently leads to values that are identifiably 'male.'[427] The absence of women in differing aspects of the legal landscape enables a certain voice to define what legally constitutes 'deviance.' Nowhere is this more evident than in prosecutorial difficulty in proving allegations of sexual assault 'beyond reasonable doubt.'[428] Case law such as *Phillips v The Queen* elucidates the evidential difficulties faced by female complainants of sexual assault.[429]. In the case, the High Court quashed a conviction despite six women claiming a lack of consent during sexual activity with the defendant. The majority of Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ reasoned that the issue of consent related 'much more to her mental state than his.'[430] To posit that six women who felt forced to have non-consensual sex had no causal relevance to the state of the mind of the defendant, arguably reinforces deviance as informed by the male perspective. The mere shifting of onus from the defendant elucidates the primacy of some voices over others. Accordingly, caveating our rationality with statute or case law may be conducive to ongoing discrimination, as we continue to justify what is normatively 'right' within the parameters of pre-existing bias.

V A WAY FORWARD

Once lawyers become cognisant of the symbiosis between their potential to rationalise and unethical decision-making, they must find avenues of resistance. How can dissent be rearticulated within the vernacular of the law, or better yet envisioned as a structural part of legal practice? The legal profession is fertile ground for unpacking the nuances of behavioural ethics whereby partisan dealings are embellished with problem-solving, monetary incentive and a longstanding fidelity to professionalism. As the legal landscape progresses into a more commercial, technological and intangible space, the fallibility of legal ethics proves particularly cogent. Legal psychology reveals that many of the profession's ethical failures are unconscious reflexes rather than intentional acts of misconduct. It is therefore significant that lawyers are trained to recognise their own psychological limitations and bias. Lawyers 'who understand the nature of the slippery ethics slope can seek to resist the pull of each step.'[431] Legal practitioners should have faith in their own moral compass, while critiquing the production of reasons which substantiate their behaviour. This self-reflexivity should occur at all stages of the decision-making and advisory work of legal practice. Accordingly, 'if we are reminded of morality at the moment we are tempted, then we are much more likely to be honest.'[432] As such, lawyers not only need to be reminded of the cogence of ethics, but also require formulated indicia to keep their own exercise of morality accountable.

Scholars such as Robbennolt have conceptualised the notion of lawyers as '*moral architects*.'[433] Moral architecture is a concept which

embodies someone who 'can involve modest organisational changes ... to more complex ones (like implementing an ethical checklist for all important decisions).'[434] A moral architect seeks to facilitate ethics as a salient part of the infrastructure of the legal profession. This may be envisaged by an in-house ethical advisory panel to form part of the legal firm, to provide third-party advice or operate as a mechanism of accountability. As the legal profession adopts the efficiencies of artificial intelligence, the architecture of a law firm will be reformed into an intangible, digital space. This has been recognised by many leading commercial law firms in Australia, with Ashurst declaring that 'it is radically transforming our work, our society and the way that we do business,'[435] and firms such as Gilbert + Tobin integrating innovation into a Digital Hub, or facilitating a dedicated practice area to Technology + Digital. In turn, this may allow the profession to become increasingly expedient, and our current practices mimicked into the digital mapping of technology. Arguably this presents a potentially far greater threat in increasing the rate at which unethical behaviour or misconduct may occur through technology. Notwithstanding, technology simultaneously provides a unique opportunity for reform and tighter control of ethical standards. If technology can limit the potential for human error in the areas of document production or coding for privilege, then why not also for ethical duties?

Another significant location of organisational rationalisation is within the nuances of firm culture. The moral genealogy of a firm will be an inherent determinant of the independent ethics of each lawyer who forms part of that entity. A focus on behaviour from an organisational standpoint is self-fulfilling, whereby once a group norm is established it will be mimicked by its observers.[436] However, purely to advocate for an acknowledgement of ethical behaviour may prove insufficient. Psychology has elucidated the fact that ethical climates grounded in not getting caught, self-interest, or individual advancement tend to equate to higher levels of unethical behaviour.[437] It is therefore significant that ethics remains within the vernacular of social justice, benevolence and wellbeing. The ethical vocabulary should become employed as part of everyday legal language, to serve as a reminder of its salience and solidify its normativity. It has been noted that openly discussing ethics has positive impacts on 'employee commitment, the perception that it is acceptable to deliver bad news, [and] the belief that employees would report an ethics violation.'[438] Accordingly, the routine exercise of ethics in quotidian legal practice should serve as a visible part of firm culture. This can be achieved by senior legal practitioners modelling ethical behaviour and fostering a climate whereby this behaviour is revered. Thus, young lawyers as moral architects should accept their limitations whilst seeking to openly endorse practices which can provide a powerful source of dissent.

PART V

Racialised Percpetions of Deviance

THE PERCEIVED DEVIANCE OF MINORITY GROUPS AND THE POWER OF STORYTELLING

Sunanda Mohan

I INTRODUCTION

Media and the news stories we consume shape our understanding of 'deviance'. A straightforward way to characterise the word 'deviance' would be breaking the rules and laws that govern our society. Stories of individuals breaking the law and being deviant from social ethics are a recurring theme of the media stories we consume. However, it is essential to consider whether these stories perpetuate negative stereotypes about the inherent criminality of minority groups. The perceived deviance of minority groups assumes that racial and ethnic minorities in a society are more likely to commit crimes and not behave in a manner consistent with social norms. Through the media and news stories we consume, this specific prejudicial idea is reinforced. This piece will explore how stories shape the meaning humans make of the world, why this is significant, and provide real-life examples of how public perceptions can be strongly shaped by how stories are told about minority groups. I will also argue that the many racial minorities supposedly involved in 'deviant practices' are not how they are described in this story. Still, minorities are depicted that way to justify deeply held prejudices.

II WHY STORYTELLING IS IMPORTANT

Storytelling has a function beyond amusement and entertainment. It is one of the oldest forms of communication among humans and has been the basis of the way we understand the world.[436] This means that storytelling has an impact on the social norms we believe in. The elements of a story are structure, characterization and setting.[437] Stories are also not a mere aspect of the media we consume. The chapter in the book *Exploring Positive Psychology* states "Humans are literally wired for stories" because humans draw their conclusions and meaning of the world based on the stories they consume.[438] However, mainstream stories circulated through influential media, such as news broadcasts, perpetuate a problematic narrative that affects how minorities are portrayed on a public landscape.

In the context of storytelling, a 'master narrative' can be described as the entrenched negative perceptions mainstream society has about a minority group because of the media they consume. The 'master narrative' is refined and broadcasted by the powerful media in a culture that reflects mainstream views. This suggests that any prejudices or perceptions are reinforced or challenged by minority groups depending on the meaning drawn from a story about deviance. This can have a powerful impact on the policies that affect minority groups. . One example is collective youth storytelling in Chicago that led to a legislative change that banned schools from having zero-tolerance policies and expelling students for minor disciplinary infractions. Moyer, Warren and King wrote about this campaign in their *Harvard Educational Review* paper.[439] Zero-tolerance policies were stricter punitive measures in American high schools. There were increasing suspension and expulsion rates of students for minor misconduct such as "acting out" or "disrespecting teachers". To challenge the validity of this policy, there was a 2013 campaign by students who were part of Voices of Youth in Chicago Education ('VOYCE') to pressure the Illinois legislature to pass a law that will prohibit schools from expelling students for minor disciplinary infractions. This movement was supposed to be a subversive movement with a specific aim to challenge the master narrative that students from racial minority groups who often broke the rules and skipped classes deserved expulsion. This questioned the prejudiced view that expelled students were often troublemakers who needed to leave school but instead urged policymakers of school rules to consider the severe repercussions expulsion of a student can have. Storytelling was leveraged as a critical strategy of this campaign, as VOYCE youth leaders used their personal experiences framed as a story to push for a legislative prohibition on zero-tolerance policies. For example, one particular story was by an African American youth leader who was

expelled from high school when he was 15 and his subsequent struggle. Pittman was expelled for skipping one class when he was found sitting in the lunchroom and could not find another high school for another two months.[440] Applying the elements of a story, which are structure, characterisation and setting, this story has a persuasive impact. The story's construction begins with expulsion, the description of the student is an innocent 15-year-old who has committed a minor disciplinary infraction, and the setting is a public school, which is supposed to be an empowering and inclusive place. This story shows how the school system has failed this particular student who did not fit the norm of a hardworking student from a nuclear White family instead of reinforcing a tale that students who were inherently deviant and problematic were being rightly removed. Many personal, authentic and compelling stories such as this would have a multiplied impact. In 2015, as a result of this movement, Senate Bill 100 was passed in Illinois, which banned zero–tolerance policies, meaning schools were prohibited from suspending students for minor disciplinary infractions. The 'VOYCE' movement is a perfect example of how humans construct meaning of the world through stories with structure, characterisation, and setting. This can be immensely powerful to the extent that it can create legislative change.

Within Australia, there is a master narrative of the over-incarceration of Indigenous Australians. The paper *Method and Meaning: Storytelling as Decolonial Praxis in the Psychology of Racialized Peoples* emphasised that stories about minority groups have generally been dehumanising and pathological.[441] This phenomenon of a master narrative does not only exist in Australia but in every society in the world, which is bound to have minority groups. For example, the book *Racialized Media: The Design, Delivery and Decoding of Race and Ethnicity* presented research to argue that media stories disproportionately report crimes committed by African Americans to address consumers' subconscious racial voyeurism.[442] This would mean that within a society where there is a minority group affected by systemic over-incarceration, there would be constant reports in mainstream media about their contraventions with the criminal law to feed the prejudice that others have about that particular minority group. Viewing the world through this perspective suggests that a group in any society that is over incarcerated would be subject to a dominant narrative that perpetuates an idea that they are more likely to engage in criminal conduct.

One broad example of this in Australia of a "story" that perpetuates our subconscious voyeurism can be the 2007 Northern Territory Intervention by the Federal Government. This was a government and national response and was justified to the mainstream media as a measure that was required to address violence and alcohol abuse in Indigenous communities in the Northern Territory. The effect of this was declaring a state of emergency, restricting access to alcohol, and introducing compulsory schemes in how welfare payments are used.[443] This paternalistic situation fuels a perception that these communities were so deviant to the extent that they required intense government intervention for their protection. This was framed as an 'emergency intervention' to the public rather than a community justice or support program, which evokes strong ideas of deviance and criminality.

III CRITICAL RACE THEORY: WHY PERSPECTIVE IN STORYTELLING MATTERS

Instead, a 'story that is told from the perspective of the oppressed has the impact of humanising each voice because it shifts the focus away from the dominant themes of marginalisation and deviance. In the context of storytelling, a perfect example of this is prominent in the teachings of Critical Race Theory. While Critical Race Theory is a dynamic concept, it is defined by the American Bar Association as a practice that examines the role of race in society by "critiquing how the social construction of race and institutionalized racism perpetuate a racial caste system that relegates people of colour to the bottom tiers."[444] This definition stitutionalises race as a socially constructed reality and not as an unalterable biological trait. An example of this is shown in *Critical Race Theory: An Introduction*.[445] In this book, Delgado, Stefancic, and Harris note that stereotypes, prejudices and images about a particular minority group evolve. For example, Middle Eastern groups were characterised as 'exotic' more than a hundred years ago in Western media. However, this characterisation changed to terrorism and religious fanaticism in mainstream Western news following the September 2001 terrorist attacks.

An essential aspect of Critical Race Theory is that if the oppressed group was the 'storyteller' rather than the subject of a story, they are less likely to be disempowered by stereotypes about their supposed deviance and criminality. When an oppressed group takes ownership of their own story, it will evoke empathy and reflect on structural rules that need to be reformed to avoid systemic injustice. For example, Amanda Porter's paper *'Decolonizing Policing: Indigenous Patrols Counter – Policing and Safety* incorporates actual anecdotes told by patrol workers from the Bourke Safe Aboriginal Youth Patrol.[446] This provides insight and human perspective as to why Indigenous youths are likely to be over-policed, and provides a meaningful stepping stone to considering how the structural problem of over-policing can be addressed. One such example is, "Sometimes home is a pretty bad place…So often they are out and about with their mates because they are safer out with their mates than being at home…Kids don't want to be at home, there is nothing for them there, and they are safer with their mates roaming the streets".[447] This story shifts the focus away from the dehumanising outcomes of incarceration and punishment and evokes notions of home, safety, innocence and friendship. It points to how teenagers being on the streets in the early morning hours is not a sign of deviance but a reflection of some other form of adversity they are experiencing. Comparing this to the Voices of Youth Chicago and the story of skipping class, it is clear that personal storytelling can challenge prejudices that lead to systemic oppression.

IV HOW STORYTELLING AFFECTED THE 'TAMPA INCIDENT'

Another entrenched prejudice is the inherent deviance and criminality of refugees. The 'Tampa incident' from two decades ago is a clear example of how the shift in perspective can dismantle powerful stereotypes about a minority group's supposed deviance and criminality. The *MV Tampa* was a Norwegian vessel that rescued Iraqi and Afghan refugees en route to Australia from Indonesia in 2001. The media coverage in October 2001 concerned allegations that the adult refugees in the *MV Tampa* threw their children overboard to intimidate the government to provide them asylum. In November 2001, it was revealed to be a false narrative. The impact of the truth was significant. Kate Slattery, in her journal article *Drowning Not Waving: The 'Children Overboard' Event and Australia's Fear of the Other* argued that the sensationalised media stories in October 2001 reinforced the stereotypes of Australian "goodness" and the supposedly inherent deviant and criminal characteristics of refugees.[448] Australian goodness can be understood in this context as familial ties, hard work and compassion, which was supposedly under threat by the inclusion of refugees. Slattery's research explored the different letters and media headlines during that month. One example of a sensational and impactful headline that Slattery mentioned in her article was 'Boat Children Overboard: Howard Hard-Line Becomes Poll Focus'.[449] The allegations of adults throwing their children overboard cemented the perception that the refugees were deviant from the social norms of family, empathy and compassion. Such examples included the then Prime Minister Howard's radio interview where he said, "I don't want in Australia people who would throw their children into the sea".[450] This

ultimately led to the 2001 elections being partly dominated by border security and immigration policy issues, revealing how powerful the impact of stories can be in forming public perceptions. This example provides further insight into the concept of a master narrative and how it can reinforce an image of minority groups being inherently criminal and deviant.

Fifteen years following the incident, the personal stories of the refugees in the *MV Tampa* tell a starkly different story. The News.com feature article contained interviews with individuals who recounted their own experiences from that day and how they are currently contributing to Australian society.[451] One of them had recounted their progress in Australia, runs their own business and stated, "We employ four to five people. We pay taxes. We pay GST and we pay super. I am not taking from the Government; I am giving back to the Government". The shift in the story's perspective provides an entirely different message, and it evokes familiar notions of hard work, community and ethics. The articles from October 2001 emphasised that the refugee families were deviant to the extent that they would throw their own children to the high seas to intimidate the Australian government. On the other hand, the 2016 News.com feature article is in complete contrast to the master narrative of chaos, terror and illegal activities that dominated the public sphere in 2001.

IV CONTRASTING STORIES OF DEVIANCE WITH THOSE IN A POSITION OF POWER

The other side of the coin when considering storytelling about minority group's deviance is how stories are told about people in positions of power and whether they are portrayed in a misleadingly euphemistic light. One example is the reports in early 2021 about Dr Andrew Laming MP's allegations of online abuse against his constituents. One media story reported that he was "ordered into empathy training" by the Prime Minister,[452] and another that questions "why empathy training is unlikely to work".[453] Considering this is a story of an incumbent Member of Parliament, it gives rise to a question if this position has afforded them to not be subject to the same scrutiny as other members of society who may have such allegations of online abuse. The words surrounding the story, such as "empathy", "ordered" "training", and "work" evokes ideas of power and administration and do not reinforce any notions of inherent criminality.

VI CONCLUSION

In conclusion, stories are an essential part of the way humans make meaning of the world. The perceived deviance of minority groups is the prejudice that racial minorities are more likely to be inherently criminal. This can be fuelled through the master narrative in mainstream media. Consuming more stories that shift the perspective from traditional media to a minority group as a storyteller can challenge the norms that some groups are inherently deviant and criminal. This can provide hope for a fairer world.

"IT IS NOT FAIR": INADEQUATE JUSTIVE AND THE CURSORY MIRAGE OF EQUITY FOR ASIAN AND BLACK AMERICANS IN THE UNITED STATES

Niveditha Sethumadhavan

I INTRODUCTION

"It's not fair"

These were the last words uttered by Vincent Chin who was brutally murdered on the night of his bachelor party in Detroit, in 1982.[454]

Trayvon Martin. Tamir Rice. Michael Brown. Rekia Boyd. Eric Garner. Philando Castile. Sandra Bland. Stephon Clark. Layleen Xtravaganza Cubilette-Polanco. Elijah McClain. Ahmaud Arbery. Rayshard Brooks. Breonna Taylor and George Floyd. These names and so many others, will be forever tied to this moment, now movement, of reckoning.[455]

Race, ethnicity and culture share a complexly inter-webbed relationship with the law.[456] With the emergence of new technologies and an increase in the ease of access to information, race relations are being widely, and more critically viewed in their interactions with the state.[457] The efficacy of the legal system is under scrutiny as a consequence of recently witnessed problematic instances relating to race, as the law has often been a vehicle for the oppression of racial groups.[458] While the rule of law exists as a mechanism to construct and maintain a civil society, the world has critically embarked on a journey to come together and question the inconsistencies that have emerged as a result of a legal system that has suppressed and differentiated against the Black, Indigenous and People of Colour (BIPOC) community in America.[459] BIPOC individuals and communities have traditionally faced and continue to face a plethora of obstacles as a result of their identity, with the further personification of these challenges in their interactions with a legal system that fails to protect and preserve their fundamental rights. How do we move our society away from the gathering forces of hatred and extremism that are causing such *deviance*? This paper begins by noting the unique challenges faced by Asian and Black Americans in the United States and, the disturbing prevalence of deviances such as hate crimes and police brutality within these communities. This sets the stage for an examination of the historic inadequacies in the proper distribution of justice within marginalized groups. Asian and Black Americans have lived through painful experiences that have changed the way they experience their lives in and outside of their own home. Moreover, they have been discriminated against in the field of healthcare, education and employment, to name a few, supplemented with the failure of adequate policy development and the imperceptive nature of existing anti-discriminatory laws.[460] A focus is then brought to the Summer of Racial Reckoning in 2020, and the surge in hate crimes against Asian Americans from the onset of the Covid-19 Pandemic, leading to a discussion of the legislative changes enacted by the Government through *The George Floyd Justice in Policing Act of 2020* and the *Hate Crimes Act 2020*. This national uprising over race, has sparked a critical national and global debate, one which has amounted to substantial progress, with still more waiting to be achieved.

II THE KILLING OF VINCENT CHIN

Vincent Chin's brutal murder was a sharp awakening to the Asian American community, one that made it clear that America is not the land of the free for all. On the night of his bachelor party on June 19th, 1982 in Detroit, Vincent Chin was beaten to death with a baseball bat by two auto workers.[461] He was beaten so badly on the head, to the point that he lapsed into a coma and died four days after the incident. He was buried the day after what should have been his wedding day and whispered to his friend right before he lost consciousness – "it's not fair".[462] Anti-Asian American sentiments surged in 1982 when Japanese automobile companies were putting American auto-industry auto workers out of their jobs.[463] Two white autoworkers, Ronald Ebens and his stepson Michael Nitz were responsible for this incident, and pled guilty to manslaughter, and received an imposition of only a three-year probation period and a $3,000 fine.[464] This led to an outrage by the Asian American community

against a crime involving a crime of this magnitude against an Asian American, forming what arguably is known as the start of the Asian American movement.[465] For all the racial exclusion and hate that Asian Americans had endured up until that point in history, no such event had the effect that Vincent Chin's death had, turning "Remember Vincent Chin" into a rallying cry for justice.[466] Vincent Chin's death marked the inception of Asian American movement.

III THE DEATH OF BLACK AMERICANS UNDER POLICE FORCE

Black Americans have long endured irrational use of police force and brutality, many of which could have been easily prevented.[467] Through restraint by the police, Eric Forbs died in the hands of police while managing to slip out, 'I can't breathe'.[468]Very little had seemed to change from the duration between Eric Forbs death to the death of George Floyd in 2020. For 9 minutes and 29 seconds, former Minneapolis police officer Derek Chauvin pressed his knee onto the neck of George Floyd.[469] In the same summer following the death of George Floyd, the world watched in horror, as Breonna Taylor lost her life in the early hours of March 13th 2020, in Louisville when police officers breached Breonna's front door, firing 32 shots into the apartment, striking Breonna five times.[470] Since George Floyd's death, nearly two-thirds of Americans have come to believe that police who have injured or killed civilians are treated too leniently in the criminal justice system.[471] These deadly and unnecessary uses of force on George Floyd and Breonna Taylor, set off a chain of national and global debates, protests and calls for actions to end police brutality and racism.[472] These calls ranged from defunding and abolishing police and police departments, to putting pressure on governments and international organizations to focus on reform, education and serious policy changes.[473] It was a clear sign that greater accountability is required in the protection of Black lives and in the prevention and reform in violent force enacted by the police.

IV ASIAN AND BLACK AMERICANS: A HISTORY OF INADEQUATE JUSTICES

At a starting point, it has been recorded that the first group of Asian origin migrants were from the Philippines dating back to 1587.[474] In 2021, it has been estimated that by 2050, an estimated 43 million Asian Americans will make-up the American demographic. On the other hand, in 2019, 46.8 million people in the United States identified as Black – a number which has indicated a 29% increase over almost two decades.[475] These numbers are indicative of the fact that Asian and Black communities comprise a significant portion of the American population, reinforcing the need for their rights, liberties and freedoms to be protected and respected through the necessary means. Historically, these are the communities susceptible to violence and hate crimes. According to the United States Department of Justice;[476]

> a hate crime involves a "criminal act, including violent crime such as harassment, assault, murder, arson vandalism or threats to commit such crimes a person or his/her property due to their real or perceived race, colour, religion, nationality, country of origin, disability, gender or sexual orientation.

Hate crimes have increased significantly during the Covid-19 Pandemic, especially against Asian Americans. While the world fights to recover from the virus, racist and xenophobic sentiments have been fuelled through the spreading of misinformation, causing racial disparity in the United States to seep indirectly into other areas of life.[477] Alarmingly, present data may largely in fact understate the degree to which discrimination contributes to the poor social and economic outcomes of minority groups.[478] Although progress has been made since the early 1960s, the problem of racial discrimination remains an important factor in shaping contemporary patterns of social and economic inequality.[479] Legislative intervention and criminal justice reform are launchpads for responses the racial injustices endured by individuals such as George Floyd and Breonna Taylor.[480] The prevention and mitigation of hate crimes requires empirically based research and guidance in order to drive effective and sustainable solutions. The Study of Literature on Hate Crime in America by the National Institute of Justice in Washington D.C. outlines two essential pillars to consider in using a data driven approach, the first, regarding the collection of hate crime data, and second, the inconsistencies that exist within the data collected.[481] The existing hate crime data is identified to be highly uneven and possesses gaps between different jurisdictions and under-represent the real presence of hate crime numbers within BIPOC communities.[482] Further, the lag in the existing data makes it challenging for policy reformers to understand the true scope of the problematic presence of increasing trend in hate crimes across the country.[483] While there are efforts and advocacy campaigns being instituted to increase reporting to strengthen official data, the Covid-19 Pandemic remains a significant barrier in achieving greater productivity and reform for these efforts.[484]

V THE SUMMER OF RACIAL RECKONING IN 2020 AND THE SURGE IN HATE CRIMES AGAINST ASIAN AMERICANS

Due to the prevalence of racist and xenophobic attitudes, the United States has birthed civil and political rights movements for decades.[485] These are a reflection not of the ability of the masses to congregate, but rather reflect the failure of governments, law enforcement and those in positions of power to change the way in which marginalized communities are treated. The discrimination of Black and Asian Americans is a human rights violation, and one of such severity that requires accountability and transformation.[486] We must reimagine the justice system. One which makes it clear that BIPOC lives matter, and that there must be a newly crafted relationship between the law and the communities that they serve. Reform has to be deeper and broader in order to achieve safety, equality and respect for Asian and Black lives. The Covid-19 Pandemic has had a deep and lasting impact on several aspects of civil society. It has generated further turbulence in the United States regarding the treatment, protection and of marginalized groups. The series of shootings and killings at unarmed Black Americans has given rise to the questioning the notion of how far society has progressed from overcoming the legacy of slavery, the Civil War and the Jim Crow South.[487] The unfortunate and avoidable deaths of George Floyd, Breonna Taylor and several others sparked enormous and unprecedented protests around the globe[488]. The #JusticeForGeorgeFloyd hashtag # JusticeForGeorgeFloyd trended on Twitter the day after his death, and quickly became the backbone of the broader political and racially significant moment that turned into the Black Lives Matter Movement in the summer of 2020.[489] Simultaneously, Asian Americans have endured an increase in hate crimes especially against women and elders as a result of misinformation through social media.[490] Conflicting discourse and the spread of misinformation on social media websites such as Facebook, Twitter, YouTube and Instagram have generated a significant increase in the xenophobic attitudes of Americans as well.[491] Since the onset of the pandemic, 32% of Asian American adults say that they have feared someone might threaten or physically attack them – a larger share than any other racial or ethnic group.[492] Further, 81% of Asian adults, who constitute a vast majority, have also indicated that violence against them is increasing, far surpassing the share of violence faced by all American adults – 56%.[493] It is crucial to also remember as stated prior, that the data fails to encompass the true depth of this problem.

VI SOLIDARITY IN MOVEMENT ASIAN AND BLACK AMERICANS: THE SIGNIFICANCE OF *THE GEORGE FLOYD POLICING ACT 2020* AND *THE COVID-19 HATE CRIMES ACT*

Public policy represents merely one phase in an ongoing process of defining public problems. Activists and organisations play a key role in promoting, impeding and complying with these public policies.[494] The Black Lives Matter and Stop AAPI (Asian American and Pacific Islander) Hate movement have fostered and developed immensely meaningful and insightful conversations around the world regarding race relations, equity and equality. They have also had the ability to push for necessary legislative and social change, one that has fundamentally bolstered the way in which Asian and Black communities have stood up along with their allies to reinforce the notion they belong in the same America as their white counterparts.[495] With the backdrop of the Covid-19 Pandemic, the Black Lives Matter Movement is believed to be the largest movement in the history of the United States and has been an inflection point in America's fight for civil rights.[496] The Stop AAPI Hate Movement has brought critical attention to the horrendous hate crimes against Asian Americans, targeted especially towards women and elderly Asian community members since the onset of the Covid-19 Pandemic.

The George Floyd Justice in Policing Act of 2020 was passed in order to enable greater accountability within law enforcement in hopes to tackle misconduct, restriction of certain policing practices, effective and transparent data collection and a general umbrella of ensuring best practices in law enforcement's interaction with civilians.[497] Shortly after the passing of *The George Floyd Justice in Policing Act of 2020*, legislation introduced by Rep. Grace Meng, D-N.Y., and Sen. Mazie Hirono, D-Hawaii, named the *Covid-19 Hate Crimes Act*, was enacted in aims "to make the reporting of hate crimes more accessible at the local and state levels by boosting public outreach and ensuring reporting resources are available online in multiple languages".[498] In addition to this, it further directs the Department of Justice to designate a point person to expedite the review of hate crimes related to the pandemic and authorizes grants to state and local governments to conduct crime-reduction programs to prevent and respond to hate crimes".[499] While the enactment of legislation of this nature is a start, it does not begin to encompass the negative and life-threatening discrimination and hatred that minority groups encounter over their lifetimes. Accountability, transparency and trust are key in ensuring that law enforcement and legal systems uphold the eradication of xenophobia and racism as a core value necessary for the sustenance of an inclusive and a thriving society.

VII CONCLUSION

When examining the interactions of technology and the use of social media platforms that have enabled grassroots, advocacy and an array of other organizations to mobilize swiftly and efficiently in order to guide legislative reform and action, there is hope. Advocacy, allyship and the amplification of minority voices have changed civil rights movements forever. It is estimated that almost 15-20 million Americans had taken the streets to protest the injustices faced by Floyd and Taylor.[500] The Black Lives Matter and Stop AAPI Hate Movements in the summer of 2020 have brought a long-overdue introspective and significant attention to the racial disparities that Asian and Black communities have historically faced.[501] In an innate sense, the multicultural, multiracial and multi-generational coming together of people from across America is a manifestation of what the foundation of America is about.[502] Currently, the existing legal framework of the United States fails to encompass the gravity of inequity faced by BIPOC communities. However, in the dynamic and increasingly divided world we live in today, there is hope for the creation of better systems, procedures and practices through education, representation and conversation. Focus must also be drawn on exploring effective responses to justice through a more inclusive and intersectional developmental approach of the rule of law as we know it, by allowing this notion to be challenged and regarded in order to protect the voices of those who are almost never heard. Strides in lawmaking are a result of tedious advocacy efforts from various actors who envision the presence of a society where differences in race, culture and ethnicity are not only accepted, but also celebrated. This is an issue pertinent to not only America, but also to the rest of the world that faces trials and tribulations in defining and allowing for the achievement of equality. The deviance from a system that has not enabled the progress of Asian and Black Americans, to one which honours and respects their rights and freedoms just like every other person is yet to be achieved - and conversations such as this one are integral in moving the needle forward, and towards the ideal. When reflecting on what is to come, it is important to distinguish between where we stand in our relationship with injustice, and where we need to be to create systems and practices that actively disengage from and erode racism, xenophobia and hate.

"Injustice everywhere, is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects us all indirectly"[503]

VIII SUPPORT AND LEARNING RESOURCES

1. Asian Americans Advancing Justice[504]AAPI Women Lead[505]
2. Asian Americans for a more Progressive Georgia[506]
3. Black Lives Matter Global Network[507]
4. Black Visions Collective[508]
5. The Bail Project [509]

References

1. Jean-Paul Sartre, 'Preface' in Frantz Fanon, *The Wretched of the Earth* (Broadway, NY: Grove Weidenfield, 1963) 24.
2. Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 1991) 4.
3. Hakimeh Saghaye-Biria, 'Decolonising the "Universal" Human Rights Regime: Questioning American Exceptionalism and Orientalism' (2018) 4(1) *ReOrient* 59.
4. Ibid 61.
5. Ibid.
6. Ibid 81.
7. Ibid 79-80.
8. See Judith Shklar, 'The Liberalism of Fear' in Stanley Hoffman (ed), *Political Thought and Political Thinkers* (University of Chicago Press, 1998) 3.
9. See John Stuart Mill, *On Liberty* (Yale University Press, 2003) 80.
10. Doriane Lambelet, 'The Contradiction between Soviet and American Human Rights Doctrine: Reconciliation Through Perestroika and Pragmatism' (1989) 7 *Boston University International Law Journal* 61, 62.
11. Ibid 64.
12. Ibid 65-6.
13. Ibid 73.
14. Ibid 63, 77, 81.
15. Ignatieff (n 2) 78.
16. Ibid 64.
17. Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: Chicago University Press, 2006) 46.
18. Fernando R Teson, 'The Kantian Theory of International Law,' (1992) 92(1) *Colombia Law Review* 53.
19. Ignatieff (n 2) 67.
20. Saghaye-Biria (n 3)66.
21. Ibid 67.
22. Ignatieff (n 2) 58.
23. Ibid 91-2.
24. Ibid 58.
25. Ibid 20.
26. Ibid 65.
27. Saghaye-Biria (n 3) 67.
28. Ibid 64-6.
29. Ibid 8.
30. Art 36, *Statute of the International Court of Justice.*
31. Teson (n 18).
32. Merry (n 17) 47.
33. See *Philippines v China(South China Sea Arbitration)* PCA Case No. 2013-19.
34. See *Nicaragua v United States* 1986 ICJ 14; *LaGrand* case (Germany v United States) [1999] ICJ Rep 9.
35. Ignatieff (n 2) 23.
36. Ibid 68.
37. Ibid 12.
38. Gregory Ulferts and Terry L Howard, 'North Korean Human Rights Abuses and Their Consequences' (2017) 13(2) *North Korean Review* 84, 85.
39. Yeonmi Park, *In Order To Live* (Penguin, 2015) 48.
40. Ignatieff (n 2) 47.
41. Lambelet (n 10) 84.
42. Lambelet (n 10) 87.
43. Ibid 89.
44. Ibid.
45. Saghaye-Biria (n 3) 74.
46. Ignatieff (n 2) 6.
47. Art 2(4) *UN Charter*.
48. Ibid Art 51.
49. See, eg, GA Res 2625; GA Res 3314; GA Res 42/22.
50. *Nicaragua* (n 34).
51. Ignatieff (n 2) 74.
52. Ignatieff (n 2) 75-6.
53. Lambelet (n 10) 83.
54. Saghaye-Biria (n 3) 69.
55. Ibid 67.
56. Lambelet (n 1)) 82.
57. Ignatieff (n 2) 68.
58. Ibid 95.
59. Ibid 8.
60. Ibid 7.
61. Ibid 16.
62. Susan Solomon et al, 'Irreversible Climate Change Due to Carbon Dioxide Emissions' (2009) 106(6) *Proceedings of the National Academy of Sciences* 1704.
63. Helen Kopnina et al, 'Anthropocentrism: More than Just a Misunderstood Problem' (2018) 31(1) *Journal of Agricultural and Environmental Ethics* 109, 110.
64. Ibid.
65. Ibid.
66. Madeline C Weiss et al, 'The Physiology and Habitat of the Last Universal Common Ancestor' (2016) 1(9) *Nature Microbiology* 1.
67. Alessandro Pelizzon and Aidan Ricketts, 'Beyond Anthropocentrism and Back Again: From Ontological to Normative Anthropocentrism' (2015) 18(2) *Australasian Journal of Natural Resources Law and Policy* 105.
68. Ben Mylius, 'Towards the Unthinkable: Earth Jurisprudence and an Ecocentric Episteme' (2013) 38 *Australian Journal of Legal Philosophy* 102, 115.
69. Ngaire Naffine, 'Legal Personality and the Natural World: On the Persistence of the Human Measure of Value' (2012) 3(Special Issue) *Journal of Human Rights and the Environment* 68.
70. Ibid, 73; I thank Arwen Yan for bringing to my attention this argument.
71. *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) s 3(1)(b) ('*EPBCA'*).
72. Ibid s 3A(a).
73. Justine Bell-James and Craig Forrest, 'Ecologically Sustainable Development and the Great Barrier Reef – A Delicate Balance of Interests' (2019) 36 *Environmental and Planning Law Journal* 97.
74. John E McDonnell, Helle Abelvik-Lawson and Damien Short, 'A Paradox of "Sustainable Development": A Critique of the Ecological Order of Capitalism' in Jarrett Blaustein et al (eds), *The Emerald Handbook of Crime, Justice and Sustainable Development* (Emerald Publishing Limited, 2020) 439.
75. Avi Brisman and Nigel South, 'Green Criminology and Environmental Crimes and Harms' (2019) 13(1) *Sociology Compass* 1, 2-3.
76. *EPBCA* (n 10) s 74A.
77. Ibid s 67.
78. Ibid s 67A.
79. Timothy Dickson and Katie Woolaston, 'The Balance of Environmental Protection and Economic Development in Federal Decision-Making: An Investigation into Section 74A of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2021) 38(1) *Environmental and Planning Law Journal* 22, 23.
80. Ibid.
81. Ibid, 34.
82. See, eg, *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308 ('*ACF v Environment Minister*').
83. See, eg, *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506.
84. For instance, the emission of nitrous oxide into the atmosphere by commercial farms when they utilise nitrogen-based fertilisers might cause acid rain elsewhere. Acid rain might then cause damage to the flora in national parks elsewhere. But the damage caused to the national parks was one or two stages away from the initial environmentally harmful cat (use of nitrogen-based fertilisers).
85. *ACF v Environment Minister* (n 21)
86. *EPBCA* (n 10) s 136; S 136(1)-(2)(a) of *EPBCA* prescribes that the Minister must consider the principles of ecologically sustainable development when issuing an approval to a controlled act when the controlled act will affect a "matter protected". In s 24B *EPBCA*, the Great Barrier Reef is such a "matter protected".
87. *ACF v Environment Minister* (n 21) [67].
88. Ibid, [58].
89. Ibid.
90. See, eg, Tim Flannery, 'The Great Barrier Reef and the Coal Mine That Could Kill It', *the Guardian* (1 August 2014) <http://www.theguardian.com/environment/2014/aug/01/-sp-great-barrier-reef-and-coal-mine-could-kill-it>.
91. *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 ('*ACF v Cth*'); *Administrative Decisions (Judicial Review) Act* 1977 (Cth) s 5.
92. *ACF v Cth* (n 30)
93. Alexia Staker, 'Should Chimpanzees Have Standing? The Case for Pursuing Legal Personhood for Non-Human Animals' (2017) 6(3) *Transnational Environmental Law* 485.
94. 154 F3d 426 (DC Cir 1998).
95. Ibid.
96. Christopher D Stone, 'Response to Commentators' (2012) 3(Special Issue) *Journal of Human Rights and the Environment* 100.
97. Rob White and Diane Heckenberg, *Green Criminology: An Introduction to the Study of Environmental Harm* (Routledge, 2014).
98. Ibid, 65.
99. Ibid.
100. Gwendolyn J Gordon, 'Environmental Personhood' (2018) 43(1) *Columbia Journal of Environmental Law* 49.
101. This argument relies on Joseph Raz's interests theory- entities that have intrinsic value should enjoy rights by virtue of these

entities having such intrinsic value: Joseph Raz, *The Morality of Freedom* (Oxford University Press, Incorporated, 1988) <http://ebookcentral.proquest.com/lib/usyd/detail.action?docID=3053254>.

102. The law is often described as having the symbolic power to declare the prevailing moral standards of society, thus being able to influence public morality by restating what it ought to be. See, eg, David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon, 1990) 252.
103. Ariel Rawson and Becky Mansfield, 'Producing Juridical Knowledge: "Rights of Nature" or the Naturalization of Rights?' (2018) 1(1–2) *Environment and Planning E: Nature and Space* 99 ('Producing Juridical Knowledge').
104. Ibid.
105. Mylius (n 11).
106. Dickson and Woolaston (n 7) 24.
107. Christopher D Stone, 'Should Trees Have Standing--Toward Legal Rights for Natural Objects' (1972) 45(2) *Southern California Law Review* 450.
108. *2008 Constitution of the Republic of Ecuador* (Ecuador) art 10, 71-4.
109. *Laws of Rights of Mother Earth* (Bolivia).
110. *Te Awa Tupua Act 2017* (NZ) ('*TATA*').
111. 405 US 727, 741 (1972).
112. *Salim v State of Uttarakhand* [2017] (Unreported, High Court of Uttarakhand, India).
113. Laura Spitz and Eduardo M Penalver, 'Nature's Personhood and Property's Virtues' (2021) 45(1) *Harvard Environmental Law Review* 67, 69.
114. Ibid.
115. Rights of Nature and Future Generations Bill 2019 (WA).
116. 'Blue Mountains City Council First in Australia to Adopt "Rights of Nature"' <https://www.bmcc.nsw.gov.au/media-centre/blue-mountains-city-council-first-australia-to-adopt-%E2%80%98rights-of-nature%E2%80%99>.
117. Stone (n 46) 452-3.
118. 17 US (4 Wheat.) 518, 636
119. Gordon (n 39) 70-1.
120. Ruth Barcan, 'The Campaign for Legal Personhood for the Great Barrier Reef: Finding Political and Pedagogical Value in a Spectacular Failure of Care' (2020) 3(3) *Environment & Planning E: Nature & Space* 810, 817-8.
121. Cristy Clark et al, 'Can You Hear the Rivers Sing: Legal Personhood, Ontology, and the Nitty-Gritty of Governance' (2018) 45(4) *Ecology Law Quarterly* 787, 837.
122. Erin O'Donnell and Julia Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 23(1) *Ecology and Society* <https://www.ecologyandsociety.org/vol23/iss1/art7/> .
123. Ibid, 8.
124. Ibid.
125. Stone (n 46).
126. *Water Act 1989* (Vic) s 33DB.
127. Ibid, s 33DC.
128. *TATA* (n 49), s 57.
129. Ibid, s 58.
130. Erin Daly, 'The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature' (2012). 21(1) *Review of European Community & International Environmental Law* 63.
131. Craig M Kauffman and Pamela L Martin, 'Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail' (2017) 92 *World Development* 130).
132. Ibid, 133.
133. O'Donnell and Talbot-Jones (n 61), 12.
134. Palash Srivastav, 'Legal Personality of Ganga and Ecocentrism: A Critical Review' (2019) 4(1) *Cambridge Law Review* 151, 159-60.
135. Victorian Era Organisation, 'Victorian Era Morality Facts: Moral Behaviour, Values, Ideals, Ethics' (Webpage) <http://victorian-era.org/victorian-era-morality.html>; Wendy Boring-Bray, 'An Overview of Victorian Morality' *Better help* (Webpage, 20 March 2020)
136. Wendy Boring-Bray (n 3); Susie Steinbach, 'Victorian Era', *Encyclopedia Britannica* (Webpage) <https://www.britannica.com/event/Victorian-era>.
137. Oxford English Dictionary, 'Victorianism' (Oxford University Press: June 2020).
138. [1994] AC 212.
139. *Merriam-Webster.com* Dictionaries, '*Malium in se*', <https://www.merriam-webster.com/legal/malum%20in%20se>.
140. Murray Lee, *Inventing Fear of Crime* (2007), 77, 203-4 in Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales,* (The Federation Press, 6th ed, 2015) 58 ("*Brown et al*").
141. *R v Brown* [1994] 1 AC 212, 236 (Lord Templeman).
142. A. Park, C. Bryson, E. Clery, J. Curtice. and M. Phillips, (eds.) 'British Social Attitudes: the 30th Report', *NatCen Social Research* (London: 2013), 14 ('*British Social Attitudes: the 30$_{th}$ Report*') 14.
143. *The Sexual Offences Act 1967* (UK), c. 60; *British Social Attitudes: the 30$_{th}$ Report* (n 8) 14
144. United Kingdom Parliament, 'Regulating Sex and Sexuality: 20th Century' (Webpage)
145. <https://www.parliament.uk/about/living-heritage/transformingsociety/privatelives/relationships/overview/sexuality20thcentury/>.
146. *British Social Attitudes: the 30th Report* (n 8) 14.
147. Ibid.
148. *Criminal Law Amendment Act 1885* (UK), s 11; Laura Bruni, 'Legal: Gay Legislation', *Sage Publications* (December 6, 2012), 198.
149. Geraldine Bedell, 'Coming Out of the Dark Ages', *The Guardian* (Webpage, 24 June 2007) <https://www.theguardian.com/society/2007/jun/24/communities.gayrights>.
150. *Local Government Act 1988* (UK), s 28(1).
151. *Criminal Justice and Public Order Act 1994* (UK), ss 145(1), 145(2), 145(3).
152. *Sexual Offences (Amendment) Act 2000* (UK), c. 44, s 1.
153. *Sexual Offences Act 2003* (UK).
154. British Social Attitudes: the 30th Report (n 8) 16.
155. Ibid.
156. British Social Attitudes: the 30th Report (n 8) 16.
157. Stanley Cohen, *Against Criminology* (1988) 256-8 in Brown et al (n 1) 48.
158. Ibid.
159. *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218
160. *Giumelli v Johnston* (1991) Aust Torts Reports 81-85; *Blake v Galloway* [2004] 1 WLR 2844; *Marion's Case*.
161. *Morris v Murray* [1991] 2 QB 6.
162. *R v Brown* [1994] 1 AC 212, 236 (Lord Templeman).
163. *R v Brown* [1994] 1 AC 212, 216.
164. Ibid, 213; Offences Against the Person Act 1861(UK), ss 20, 48.
165. *R v Brown* [1994] 1 AC 212.
166. Ibid.
167. Ibid.
168. *R v Brown* [1994] 1 AC 212, 246 (Lord Templeman).
169. *R v Brown* [1994] 1 AC 212, 237 (Lord Templeman).
170. Ibid, 236 (Lord Templeman).
171. Ibid, 237 (Lord Templeman).
172. *R v Brown* [1994] 1 AC 212, 274 (Lord Mustill).
173. Ibid, 236 (Lord Templeman).
174. Jonathon Simon, 'Governing Through Crime' (2007) 4-5, in *Brown et al*, 127.
175. *R v Brown* [1994] 1 AC 212, 236 (Lord Templeman), 256 (Lord Lowry).
176. Ibid, 256 (Lord Lowry).
177. Ibid, 230 (Lord Templeman), 238, 246, 256 (Lord Jauncey of Tullichettle).
178. Richard Fardon, 'Dame Mary Douglas', *The Guardian*, (Webpage, 18 May 2007), <https://www.theguardian.com/news/2007/may/18/guardianobituaries.obituaries>.
179. Mary Douglas, *Purity and Danger* (London: Routledge, 1996) 4.
180. Douglas (n 36), 98; Paul Richards, 'Mary Douglas', *Oxford Bibliographies* (Webpage, 27 March 2019) <https://www.oxfordbibliographies.com/view/document/obo-9780199766567/obo-9780199766567-0075.xml>.
181. Ibid, 5.
182. Ibid.
183. Douglas (n 36), 5, 6.
184. Ibid, 3, 4.
185. Ibid, 3.
186. Ibid.
187. *British Social Attitudes: the 30th Report* (n 8), 16.
188. Oxford English Dictionary, 'Bloodletting' (Oxford University Press: June 2020).
189. Annette Houlihan, 'When "No" Means "Yes" and "Yes" Means Harm: HIV Risk, Consent and Sadomasochism Case Law', in *Law & Sexuality* (20, 32: 2011), 47. 47 *British Social Attitudes: the 30th Report* (n 8), 3, 14.
190. *British Social Attitudes: the 30th*

Report (n 8), 3, 14.

191. Houlihan (n 46) 44.

192. Ashley Crossman, 'A brief overview of Emile Durkheim and his historic role in sociology', *ThoughtCo* (Webpage, 2 August 2019), <https://www.thoughtco.com/emile-durkheim-3026488>; Karl Thompson, The functionalist perspective on crime and deviance, *Revise Sociology* (Webpage, 3 April 2016) <https://revisesociology.com/2016/04/03/functionalist-explanations-of-deviance/>.

193. Emile Durkheim, *The Divisions of Labour* (1933), 70-3, 74, 77, 79, 80, 81, 102, in *Brown et al*, 110.

194. Richard C. Monk, 'Is Crime Always Functional'*?*, U.S. Department of Justice (Webpage) <https://www.ojp.gov/ncjrs/virtual-library/abstracts/crime-always-functional-taking-sides-clashing-views-controversial>.

195. *Brown et al*, 110.

196. *Brown et al*, 111.

197. See e.g., Robbie Collins, 'Fifty Shades: cinema's kinky side', *The Telegraph* (Webpage, 7 February 2015)

198. <https://www.telegraph.co.uk/culture/film/11394951/Fifty-Shades-cinemas-kinky-side.html>; Charlsie Niemeic, 'What's the Big Deal About Rihanna's S&M?', *Huff Post* (Webpage, 25 May 2011),

199. <https://www.huffpost.com/entry/whats-the-big-deal-about-_b_819878.>; Good Reads Inc, 'BDSM Fiction Books' (2020) <https://www.goodreads.com/shelf/show/bdsm-fiction>.

200. Erika Leonard James, *Fifty Shades of Grey* (Vintage Books: 2011).

201. Emma Green, 'Consent isn't enough: troubling sex of Fifty Shades', *The Atlantic*, (Webpage, 11 February 2015) <https://www.theatlantic.com/culture/archive/2015/02/consent-isnt-enough-in-fifty-shades-of-grey/385267/>.

202. Ibid.

203. Ibid.

204. YouGov, *YouGov Survey Results* (8-9 February 2015), <http://cdn.yougov.com/cumulus_uploads/ document/h38baes6ei/InternalResults_150209_BDSM_Website.pdf> 1 ('*YouGov Survey Results*').

205. Ben Beaumont-Thomas, 'Fifty Shades of Grey protests escalate', *The Guardian* (Webpage, 10 February 2015) <https://www.theguardian.com/film/2015/feb/10/fifty-shades-of-grey-protests-imax>.

206. *YouGov Survey Results*, 1.

207. *YouGov Survey Results*, 1.

208. Ibid.

209. *YouGov Survey Results*, 1.

210. *R v Brown* [1994] 1 AC 212; Samantha Peg,' BDSM: when is sadomasochism an act of domestic violence?', *The Conversation* (Webpage, December 11, 2018) <https://theconversation.com/bdsm-when-is-sadomasochism-an-act-of-domestic-violence108376>.

211. *British Social Attitudes: the 30th Report* (n 8), 17.

212. *Marriage (Same-Sex Couples) Act 2013* (UK), c. 30.

213. J. Curtice. E. Clery, J, Perry, M. Phillips, and N, Rahim (eds.) 'British Social Attitudes: the 36th Report', The *National Centre for Social Research* (London: 2019), 8 ('*British Social Attitudes: the 36th Report*').

214. *British Social Attitudes: the 36th Report* (n 85), 9.

215. *British Social Attitudes: the 30th Report* (n 8), 17.

216. *British Social Attitudes: the 30th Report* (n 8), 17.

217. Walter Perry et al, *Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations* (RAND Corporations, 2013), 116.

218. Sabine Gless, *Being Profiled: Cogitas Ergo Sum* (Amsterdam University Press, 2018), 62.

219. Ibid, 64.

220. Walter Perry et al, *Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations* (RAND Corporations, 2013), 117.

221. Gelman et al, 'An analysis of New York City Police Department's 'Stop and Frisk' Policy in the Contexts of Claims of Racial Bias' (2007) 102 (479) *Journal of the American Statistical Association,* 813.

222. Hurwitz et al, 'Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System' (2005) 67(3) *The Journal of Politics,* 762.

223. Ibid, 764.

224. Terry v Ohio Supreme Court [1968] 392 U.S. 1.

225. Janet Chan, 'Changing Police Culture' (1996) 36(1) *The British Journal of Criminology*, 109.

226. Detroit Police Department, 'Total Enforcement of the Law' (June 21 1966) *Detroit Urban League Papers* 1.

227. Detroit Police Department, 'Press Release' (November 10 1965) *Jerome Cavanagh Papers* 1.

228. Letter from George Scott to Jerome Cavanagh, June 28 1968, 1.

229. Letter from P.S. Tatus to Jerome Cavanagh, July 3 1968, 1.

230. Craig Lerner, 'Reasonable Suspicion and Mere Hunches' (2006) 59(2) *Vanderbilt Law Review*, 407.

231. New York Civil Liberties Union, *Stop-and-Frisk in the de Blasio Era* (Report, 2019), 1.

232. Ibid, 4.

233. Harold Norris, 'Arrests Without Warrant' (1958) *The Crisis*, 1.

234. Ibid, 1.

235. NAACP, 'Police Brutality Complaints Reported to the Detroit Branch' (1958) *The Crisis*, 1.

236. Isaac Jones, '"Struck 50 Times" Mitchell Tells Board' (1957) *The Michigan Chronicle*, 1.

237. NAACP, 'Police Brutality Complaints Reported to the Detroit Branch' (1958) *The Crisis*, 3.

238. NITV, 'Institutional Racism Evident in Australian Justice System' (2018) *SBS*, 1.

239. Ibid, 1.

240. Walter Perry et al, *Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations* (RAND Corporations, 2013), 57.

241. Michael Resig, 'Community and Problem-Oriented Policing' (2010) 39 (1) *Crime and Justice,* 1.

242. Kenneth Novak et al, 'The effects of aggressive policing of disorder on serious crime' (1999) 22 (2) *Policing: An International Journal*, 171.

243. Ibid, 174.

244. Richard Silbergitt et al, *Visions of Law Enforcement Technology in the Period 2024-2034: Report of the Law Enforcement Futuring Workshop* (RAND Corporations, 2015), 21.

245. Ruha Benjamin et al, 'Policing, Race and Technology' (2020) *Democracy & Justice: Collected Writings*, 111.

246. Ibid, 111.

247. 'The Predpol Algorithm', *Predpol* (Web Page) <https://www.predpol.com/technology/>

248. Leslie Gordon, 'A Byte Out of Crime: Predictive Policing may help bag burglars-but it also may be a constitutional problem' (2013) 99 (9) *ABA Journal*, 18-19.

249. Justin Jouvenal, 'Police are using software to predict crime. Is it a 'holy grail' or biased against minorities?' (2016) *The Washington Post*, 1.

250. Ibid, 1.

251. Dom Galeon, 'New Crime-Predicting AI May be Prone to Bias Just Like Humans' (2018) *Futurism*, 1.

252. Justin Jouvenal, 'Police are using software to predict crime. Is it a 'holy grail' or biased against minorities?' (2016) *The Washington Post*, 1.

253. Joshua Scannell, 'PREDICTIVE POLICING AND POPULATION RACISM' (Duke University Press, 2019), 107.

254. Ed Yong, 'A Popular Algorithm Is No Better at Predicting Crimes Than Random People' (2018) *The Atlantic*, 1.

255. Julia Dressel and Harry Farid, 'The accuracy, fairness, and limits of preventing recidivism' (2018) 4(1) *Science Advances*, 1.

256. Marc Faddoul, 'Toward Algorithmic Humility' (O'reilly Media, 2020) *97 Things About Ethics Everyone In Data Science Should Know,* 107.

257. Ibid, 111.

258. Eirini Toutsi et al, 'Bias in data-driven artificial intelligence systems' (2020) 10(3) *WIREs Data Mining and Knowledge Discovery*, 2.

259. Albert Meijer and Martijn Wessels, 'Predictive Policing: Review of Benefits and Drawbacks' (2019) 42(12) *International Journal of Public Administration*, 1031.

260. 2001 NSWCCA 540 , s 53(a).

261. Vicki Sentas and Camilla Pandolfini, *A study of the Suspect Target Management Plan* (Report, 2017), 3.

262. Ibid, 15.

263. Ibid, 13.

264. Ibid, 19.

265. Ibid, 21.

266. Ibid, 35.

267. Ibid, 24.

268. Ibid, 27.

269. Stephen Mudd, 'Suspect Target Management Plans rolled out for repeat

domestic violence offenders' *The Area News* (February 29 2016.).
270. Steven Yeong, *An evaluation of the Suspect Target Management Plan* (Report, 2021), 1.
271. Ibid, 14.
272. Ibid, 16.
273. Ibid, 18.
274. Vicki Sentas and Camilla Pandolfini, *A study of the Suspect Target Management Plan* (Report, 2017), 35.
275. Ibid, 66.
276. Ibid, 67.
277. Ibid, 74.
278. Amnesty International, *Trapped in the Matrix* (Report, 2018), 5.
279. Ibid, 13.
280. Ibid, 2.
281. Ibid, 15.
282. Ibid, 29.
283. Ibid, 3.
284. Ibid, 25.
285. Patrick Williams, *Being Matrixed: The (Over)Policing of Gang Suspects in London* (Report, 2018), 7
286. Amnesty International, *Trapped in the Matrix* (Report, 2018), 27.
287. Patrick Williams, *Being Matrixed: The (Over)Policing of Gang Suspects in London* (Report, 2018), 23.
288. Ibid, 17.
289. Ibid, 13.
290. Ibid, 14.
291. Ibid, 17.
292. Ibid, 20.
293. Ibid, 25.
294. Ibid, 26.
295. Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (Sydney Law Book Company, 1990) 115.
296. Manja Klemenčič, 'Student Power in a Global Perspective and Contemporary Trends in Student Organising' (2014) 39(3) *Studies in Higher Education* 396, 399.
297. The Charlie Perkins Trust for Children and Students 'DR CHARLES NELSON PERRURLE PERKINS AO' (Webpage) <https://www.perkinstrust.com.au/history.html>.
298. Strong, Wesley. "CHAPTER TWO: Repression of Student Activism on College Campuses." *Counterpoints*, vol. 410, 2013, pp. 15–27. *JSTOR*, www.jstor.org/stable/42981731.
299. *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109.
300. *Summary Offences Act 1988* (NSW).
301. *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109
302. [1]-[2].
303. *Peaceful Assemblies Act 1992* (QLD) s 5.
304. *International Covenant on Civil and Political Rights,* Article 21, 22.
305. *Lange v Australian Broadcasting Corporation (1997)* 189 CLR 520, 556-72.
306. Daniel McGlone. "The Right to Protest." Alternative law journal 30.6 (2005): 276.
307. *Mulholland v AEC* (2004) 209 ALR 582.
308. Daniel McGlone. "The Right to Protest." Alternative law journal 30.6 (2005): 277.
309. Daniel McGlone. "The Right to Protest." Alternative law journal 30.6 (2005): 277.
310. *Forsyth County v Nationalist Movement* 505 US 123 (1992).
311. 'Political protests have become more widespread and more frequent', *The Economist* (Web Page, 10 March 2020) <https://www.economist.com/graphic-detail/2020/03/10/political-protests-have-become-more-widespread-and-more-frequent>.
312. 'Documents reveal extensive surveillance of campus activism by university and police', *Honi Soit* (Web Page, 5 May 2021) <http://honisoit.com/2021/05/documents-reveal-extensive-surveillance-of-campus-activism-by-university-and-police/>.
313. ACLU,'POLICINGFREESPEECH:Police Surveillance and Obstruction of First Amendment
314. Protected Activity' *Wired* (Webpage, 2 June 2010)
315. <https://www.wired.com/images_blogs/threatlevel/2010/06/acluspydoc.pdf>.
316. Natassia Chrysanthos, 'Riot squad, mounted police chase protesting Sydney University students' (Webpage, 23 September 2020) *The Sydney Morning Herald*
317.<https://www.smh.com.au/national/nsw/riot-squad-mounted-police-chase-protesting-sydney-university-students-20200923-p55yem.html>
318. As per the Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020.
319. Turk, Austin T. (1982). Political Criminality: The Defiance and Defense of Authority, Sage Publications, Beverly Hills, Calif.
320. Jonathan Pedneault, 'US States Take Aim at Protesters' Rights' (Web Page, 16 February 2021). <https://www.hrw.org/news/2021/02/16/us-states-take-aim-protesters-rights>.
321. Hannah Ritchie et al, 'Coronavirus Pandemic (COVID-19)' (Online Publication, 2020) <https://ourworldindata.org/coronavirus>.
322. Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 25(3) *European Journal of International Law* 645, 675.
323. Ben Willis, 'The Arguments For and Against the TRIPS Agreement' (Research Paper, E-International Relations, December 2013) <https://www.e-ir.info/2013/12/23/the-arguments-for-and-against-the-trips-agreement/>.
324. Ibid.
325. Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPs Agreement* (Routledge, 2002).
326. *Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN (01)/DEC/2 (20 November 2001, adopted on 14 November 2001).
327. Ibid.
328. Ibid.
329. Ben Willis, 'The Arguments For and Against the TRIPS Agreement' (Research Paper, E-International Relations, December 2013) <https://www.e-ir.info/2013/12/23/the-arguments-for-and-against-the-trips-agreement/>.
330. Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPs Agreement* (Routledge, 2002).
331. Phillip McCalman 'Who Enjoys 'Trips' Abroad? An Empirical Analysis of Intellectual Property Rights in the Uruguay Round' (2005) 38(2) *The Canadian Journal of Economics* 574, 603.
332. Rachel Swarns, 'Drug Makers drop South Africa suit over AIDS Medicine', *The New York Times (*April 20, 2001) <https://www.nytimes.com/2001/04/20/world/drug-makers-drop-south-africa-suit-over-aids-medicine.html>.
333. Ben Willis, 'The Arguments For and Against the TRIPS Agreement' (Research Paper, E-International Relations, December 2013) <https://www.e-ir.info/2013/12/23/the-arguments-for-and-against-the-trips-agreement/>.
334. Robert Wade, 'What strategies are viable for developing countries today? The World Trade Organization and the shrinking of 'development space', (2003) 10(4) *Review of International Political Economy* 621-644.
335. Ibid.
336. *Declaration on the TRIPS Agreement and Public Health*, WTO Doc WT/MIN(01)/DEC/2 (20 November 2001, adopted on 14 November 2001).
337. Dilan Thampapillai, 'The controversy to come? Patent Law and a COVID-19 Vaccine' (Research Essay, The Australian National University College of Law, 10 June, 2020) <https://law.anu.edu.au/research/essay/covid-19-and-international-law/controversy-come-patent-law-and-covid-19-vaccine>.
338. Ray Moynihan, 'COVID vaccines offer the pharma industry a once-in-a-generation opportunity to reset its reputation. But it's after decades of big profits and scandals', *The Conversation* (August 4, 2021) <https://theconversation.com/covid-vaccines-offer-the-pharma-industry-a-once-in-a-generation-opportunity-to-reset-its-reputation-but-its-after-decades-of-big-profits-and-scandals-165082>.
339. Dalindyebo Shabalala, 'US support for waiving COVID-19 vaccine patent rights puts pressure on drugmakers – but what would a waiver actually look like?', *The Conversation* (May 10, 2021) <https://theconversation.com/us-support-for-waiving-covid-19-vaccine-patent-rights-puts-pressure-on-drugmakers-but-what-would-a-waiver-actually-look-like-160582>.
340. Ben Bramble and Peter Collignon, 'Let's inoculate at-risk Australians then send Covid vaccines overseas', *The Guardian* (February 8, 2021) <https://www.theguardian.com/commentisfree/2021/feb/08/lets-inoculate-at-risk-australians-then-send-covid-vaccines-overseas>.
341. Catherine Hanrahan, 'Federal government data shows one in five COVID-19 jabs not being used', *ABC News* (July 1, 2021) <https://www.abc.net.au/news/2021-07-01/one-in-five-australian-covid-19-jabs-not-being-used-data-shows/100256096>.

342. Ibid.
343. Frances Mao, 'Covid vaccine: Why are Australians cancelling AstraZeneca jabs?' *BBC News* (June 22, 2021) <https://www.bbc.com/news/world-australia-57549796>.
344. Ashleigh Furlong, 'Big vaccine makers reject offers to help produce more jabs', *Politico* (May 14, 2021) <https://www.politico.eu/article/vaccine-producers-reject-offers-to-make-more-jabs/>.
345. Ibid.
346. Ibid.
347. Siva Thambisetty et al, 'The TRIPS Intellectual Property Waiver Proposal: Creating the Right Incentives in Patent Law and Politics to end the COVID-19 Pandemic' *LSE Law, Society and Economy Working Papers* (2021) 24.=
348. Zachary Brennan, 'Moderna CEO brushes off US support for IP waiver, eyes more than $19b in covid-19 vaccine sales in 2021', *EndPoints News* (6 May 2021) <https://endpts.com/moderna-ceo-brushes-off-us-support-for-ipwaiver-eyes-more-than-19b-in-covid-19-vaccine-sales-in-2021/>.
349. Siva Thambisetty et al, 'The TRIPS Intellectual Property Waiver Proposal: Creating the Right Incentives in Patent Law and Politics to end the COVID-19 Pandemic' *LSE Law, Society and Economy Working Papers* (2021) 24.
350. *Defense Production Act of 1950*, USC (1950).
351. Samuel Cross et al, 'Who funded the research behind the Oxford-AstraZeneca COVID-19 vaccine? Approximating the funding to the University of Oxford for the research and development of the ChAdOx vaccine technology', (April 10, 2021) *medRxiv* <https://www.medrxiv.org/content/10.1101/2021.04.08.21255103v1>.
352. Human Rights Watch, 'Seven Reasons the EU is Wrong to Oppose the TRIPS Waiver' (News Release, June 3, 2021).
353. David Crowe and Bevan Shields, 'Australia to donate 20 million AstraZeneca doses to billion-vaccine pledge' *Sydney Morning Herald* (June 11, 2021) <https://www.smh.com.au/politics/federal/australia-to-donate-20-million-astrazeneca-doses-to-billion-vaccine-pledge-20210611-p580b5.html>.
354. Human Rights Watch, 'Seven Reasons the EU is Wrong to Oppose the TRIPS Waiver' (News Release, June 3, 2021).
355. Ibid.
356. Andrew Bolt, *Cruel India travel ban driven by fear, ignorance and incompetence.* (News Article, 2 May 2021) < https://www.heraldsun.com.au/news/opinion/andrew-bolt/cruel-india-travel-ban-driven-by-fear-ignorance-and-incompetence/news-story/f54a4628973ef7ba28049b0fd403be1c>.
357. Amy Gunia, *After Australia Banned Its Citizens in India From Coming Home, Many Ask: Who Is Really Australian?* (News Article, 19 May 2021) < https://time.com/6047130/australia-india-covid-travel-ban/>.
358. *Biosecurity Act 2015* (Cth) s 477.
359. Australian Human Rights Commission, *Statement on travel ban and sanctions on Australians travelling from India* (Press Release, 1 May 2021) < https://humanrights.gov.au/about/news/media-releases/statement-travel-ban-and-sanctions-australians-travelling-india>.
360. Samantha Maiden, *Australia could slam borders with UK and South Africa shut.* (News Article, 6 January 2021) < https://www.news.com.au/travel/travel-updates/health-safety/australia-could-slam-borders-with-uk-and-south-africa-shut/news-story/3d4e71732d8d606f4a3c8bc73f73b35a>.
361. Ghassan Hage, 'A Viable Ethics: Journalism and the "Ethnic Question"' in Catharine Lumby and Elspeth Probyn *Remote Control: New Media, New Ethics.* (Cambridge University Press, 2003) 74,77.
362. Osmond Chiu, *COVID-19 racism echoes historical anti-Chinese sentiment.* (News Article, 15 April 2021). < https://www.thechinastory.org/covid-19-racism-echoes-historical-anti-chinese-sentiment/>.
363. Ghassan Hage, *White nation: Fantasies of white supremacy in a multicultural society* (New York: Routledge, 2012), 234.
364. Laura Pond, *How Australia failed Adam Goodes.* (News Article, July 24 2019) <https://www.communitynews.com.au/general/news/the-final-quarter-how-australia-failed-adam-goodes/>
365. Eleanor Ainge Roy and Ben Doherty, *Australian coronavirus evacuees to be quarantined on Christmas Island* (News Article, 29 January 2020) < https://www.theguardian.com/world/2020/jan/29/australian-coronavirus-evacuees-to-be-quarantined-on-christmas-island>.
366. Josh Nicholas and Elias Visontay, *Comparing US and UK Covid case numbers suggests Australia's India flight ban based on 'fear factor'.* (News Article, 29 April 2021) < https://www.theguardian.com/world/2021/apr/29/comparing-us-and-uk-case-numbers-suggests-australias-india-flight-ban-based-on-fear-factor>.
367. *Victoria v Commonwealth* (1975) 134 CLR 338, 397.
368. *Pape v Commissioner of Taxation* (2009) 238 CLR 1.
369. *Burns v Ransley* (1949) 79 CLR 101.
370. *Newman v Minister for Health and Aged Care* [2021] FCA 517.
371. Liz Hicks and Sangeetha Pillai, *Proportionality, rights and Australia's COVID-19 response: Insights from the India travel ban.* (Academic News Article, 16 August 2021) < https://auspublaw.org/2021/08/proportionality-rights-and-australias-covid-19-response-insights-from-the-india-travel-ban/>.
372. *Palmer v Western Australia* (2021) 95 ALJR 229.
373. *Newman v Minister for Health and Aged Care* [2021] FCA 517.
374. *Biosecurity Act 2015* (Cth) s 477.
375. *Newman v Minister for Health and Aged Care* [2021] FCA 517.
376. Ibid.
377. Ibid.
378. Ibid.
379. Australian Lawyers for Human Rights, *Briefing Notes on India Travel Ban* (Briefing Paper, 4 May 2021) < https://alhr.org.au/wp/wp-content/uploads/2021/05/04-05-21-ALHR-Briefing-Note-on-Indian-Travel-Ban-F2.pdf>.
380. Ibid.
381. David Brown, 'Criminalisation and normative theory' (2013) 25(2) *Current Issues in Criminal Justice* 606, 613.
382. Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 40.
383. A.P. Simester, and Andrew von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalization* (Hart Publishing, 2011) 36.
384. Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 35.
385. Ibid 41.
386. Ibid 33.
387. Mark Sargent, 'Lawyers in the Perfect Storm' (2004) 43 *Washburn Law Journal* 1, 32.
388. Michael Murray, 'Narrative Psychology and Narrative Analysis' in P.M Camic et al (eds), *Qualitative Research in Psychology: Expanding Perspectives in Methodology and Design* (American Psychological Association, 2003) 95.
389. Stephen Tang et al, 'Ethical misconduct by new Australian lawyers: prevalence and prevention' (2020) 27(3) *International Journal of the Legal Profession* 245, 249.
390. Ibid.
391. Ibid 250.
392. Cass Sunstein, 'Probability neglect: emotions, worst cases, and law, (2002) 112(1) *Yale Law Journal* 61-107.
393. Stephen Tang et al, 'Ethical misconduct by new Australian lawyers: prevalence and prevention' (2020) 27(3) *International Journal of the Legal Profession* 245, 250.
394. See generally *A Solicitor v The Council of the Law Society of New South Wales* (2004) 216 CLR 253; *Law Society of NSW v Foreman* (1994) 34 NSWLR 408; *Legal Services Commissioner v Ge* [2016] NSWCATOD 25; *R v Apostilides* (1984) 154 CLR 563; *R v Kneebone* (1999) 47 NSWLR 450; *Prothonotary of the Supreme Court of New South Wales v van Es [2014] NSWCA 169.*
395. See generally *Legal Profession Uniform Admission Rules 2015; Legal Profession Uniform Australian Solicitors' Conduct Rules 2015; Legal Profession Uniform Conduct (Barristers) Rules 2015; Legal Professional Uniform Law (NSW).*
396. See generally Stephen Tang et al 'Ethical misconduct by new Australian lawyers: prevalence and prevention' (2020) 27(3) *International Journal of the Legal Profession* 245.
397. Blake Ashforth and Vikas Anand, 'The Normalization of Corruption in Organizations' (2003) 25(1) *Research in Organizational Behavior* 1, 3.
398. Jennifer Robbennolt and Jean Sternlight, 'Behavioral Legal Ethics' (2013) 45 *Arizona State University Law Journal* 1107, 1118.
399. Ibid.

400. Jennifer Robbennolt, 'Behavioral Ethics Meets Legal Ethics' (2015) 11(1) *Annual Review of Law and Social Science* 75, 79.
390. Ibid.
391. Jennifer Robbennolt and Jean Sternlight, 'Behavioral Legal Ethics' (2013) 45 *Arizona State University Law Journal* 1107, 1153.
392. Kath Hall and Vivien Holmes, 'The Power of Rationalisation to Influence Lawyers' Decisions to Act Unethically' (2008) 11(2) *Legal Ethics* 137, 140.
393. Ibid.
394. Theodore Sarbin, *Narrative psychology: the storied nature of human conduct* (New York: Praeger, 1986) 53; Michael Murray, 'A narrative approach to health psychology: background and potential' 1997 (2)(1) *Journal of Health Psychology* 9-20; Donald Polkinghore, *Narrative knowing and the human sciences* (Albany: SUNY Press, 1988).
395. Clifford Coonan, 'Former Enron CFO Andrew Fastow: 'You can follow all the rules and still commit fraud,' *The Irish Times* (Web Page 6 January 2016) < https://www.irishtimes.com/business/companies/former-enron-cfo-andrew-fastow-you-can-follow-all-the-rules-and-still-commit-fraud-1.2485821>.
396. Blake Ashforth and Vikas Anand, 'The Normalization of Corruption in Organizations' (2003) 25(1) *Research in Organizational Behavior* 1, 3.
397. Marshall Clinard, *Illegal Corporate behaviour* (Washington DC: National institute of Law Enforcement and Criminal Justice, 1979) 16.
398. Kath Hall and Vivien Holmes, 'The Power of Rationalisation to Influence Lawyers' Decisions to Act Unethically' (2008) 11(2) *Legal Ethics* 137, 140-141.
399. Jennifer Robbennolt and Jean Sternlight 'Behavioral Legal Ethics' (2013) 45 *Arizona State Law Journal* 1107, 1138.
400. Ibid 1122.
401. Maurice Schweitzer and Donald Gibson, 'Fairness, Feelings, and Ethical Decision-Making: Consequences of Violating Community Standards of Fairness' (2008) 77 *Journal of Business Ethics* 287, 298.
402. *Legal Profession Uniform Australian Solicitors' Conduct Rules 2015* r 12; *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 35.
403. Mark Sargent, 'Lawyers in the Perfect Storm' (2004) 43 *Washburn Law Journal* 1, 33-34.
404. Blake Ashforth and Vikas Anand, 'The Normalization of Corruption in Organizations' (2003) 25(1) *Research in Organizational Behavior* 1, 9.
405. Jennifer Robbennolt, 'Behavioral Ethics Meets Legal Ethics' (2015) 11(1) *Annual Review of Law and Social Science* 75, 80.
406. Ibid 81.
407. See generally Judson Mills, 'Changes in moral attitudes following temptation,' (1958) 26(4) *Journal of Personality* 517.
408. See generally Brian Gunia et al, 'Contemplation and conversation: subtle influences on moral decision making,' (2012) 55(1) *Academy of Management Journal* 13.
409. *Legal Professional Uniform Law (NSW)* s 17; *Legal Profession Uniform Admission Rules 2015* r 10(f).
410. *Konigsberg v State Bar of California* (1957) 353 US 252, 262-3 (Black J).
411. *Legal Profession Uniform Admission Rules 2015* r 17.
412. *Frugtniet v Board of Examiners* [2002] VSC 140, 1 (Pagone J).
413. Gino Dal Pont, 'Ethics: Fit to Practice' (2007) 81 *Law Institute Journal* 76; see also *Legal Profession Uniform Admission Rules 2015* r 17(4).
414. Francesca Bartlett and Linda Haller, 'Disclosing Lawyers: Questioning Law and Process in the Admission of Australian Lawyers' (2013) 41 *Federal Law Review* 227, 248.
415. *Murtough v NSW Bar Association (No 3)* [2012] NSWADT 234.
416. Ibid [9]-[12].
417. Richard Dyer, *White* (Routledge, 1997) 9.
418. Craig Colvin, 'Virtue, Honour and Ethics: Problems with a Deontological Perspective on Ethical Responsibilities of Lawyers' (Paper prepared for the Western Australian Bar Association Spring CPD, 20 October 2020).
419. *The Queen v Kina* [1993] QCA 480.
420. Kate Allman, 'Women lawyers outnumber men; Indigenous numbers lagging' *Law Society Journal* (Web Page, 19 July 2019) < https://lsj.com.au/articles/women-lawyers-outnumber-men-indigenous-numbers-lagging/>.
421. Ibid.
422. Ibid.
423. Trish Mundy and Nan Seuffert, 'Are We There Yet? Best Practices for Diversity and Inclusion in Australia' (2020) 27(1) *International Journal of the Legal Profession* 81, 81.
424. Ibid 83.
425. *Evidence Act 1995* (NSW) s 141(1).
426. *Phillips v The Queen (*2006) 225 CLR 303.
427. Ibid [46].
428. Jennifer Robbennolt and Jean Sternlight, 'Behavioral Legal Ethics' (2013) 45 *Arizona State University Law Journal* 1107, 1157.
429. Ann Tenbrunsel and David Messick, 'Ethical Fading: The Role of Self-Deception in Unethical Behavior' (2004) 17 *Social Justice Research* 223, 234.
430. See generally Jennifer Robbennolt, 'Behavioral Ethics Meets Legal Ethics' (2015) 11(1) *Annual Review of Law and Social Science* 75.
431. Ray Fisman and Adam Galinsky, 'Can you train business school students to be ethical?' *Slate* (Web Page, 4 September 2012) < https://slate.com/business/2012/09/business-school-and-ethics-can-we-train-mbas-to-do-the-right-thing.html>.
432. Ashurst 'Navigating the AI Transformation journey' *Digital Economy AI Guide* (Web Page, 20 November 2020) <https://www.ashurst.com/en/news-and-insights/insights/navigating-the-ai-transformation-journey/>.
433. Gary Weaver et al, '"Somebody I Look Up To:" Ethical Role Models in Organizations' (2005) 34 *Organizational Dynamics* 313, 316-17.
434. Ibid.
435. Linda Treviño et al, 'Managing Ethics and Legal Compliance: What Works and What Hurts' (1999) 41(2) *California Management Review* 131, 131.
436. Lisa Lerman, *'Lying to Clients'* (1990) 138 *University of Pennsylvania Law Review* 659, 681.
437.
438. Margaret Read Macdonald, Jennifer MacDonald Whitman and Nathaniel Forrest Whitman, 'Storytelling Your Way into the Common Core and Beyond' (2014) 42 (3) *Knowledge Quest Chicago* 78, 78.
439. Ibid.
440. Erik M Gregory and Pamela B Rutledge, Exploring Positive Psychology, The Science of Happiness and Wellbeing [(ABC-CLIO LLC, 2016), 155].
441. Jeffrey S Moyer, Mark R Warren, Andrew R King, 'Our Stories are Powerful: The Use of Youth Storytelling in Policy Advocacy to Combat the School to Prison Pipeline' (2020) 90 (2) Harvard Educational Review, 172.
442. Ibid 173.
443. Cara A Samuel, Drexler L Ortiz, 'Storytelling as decolonial praxis in the psychology of racialized peoples' (2020) 62 (8) New Ideas in Psychology, 100868.
444. Matthew W. Hughey, Emma Gonzales – Lesser, Racialized Media: The Design, Delivery and Decoding of Race and Ethnicity'. (New York University Press, 2020).
445. Millicent Churcher, 'Reimagining the Northern Territory Intervention: Institutional and cultural interventions into the Anglo Australian imaginary' (2018) 53 (1) Australian Journal of Social Sciences, 56,56.
446. Janel George, 'A Lesson on Critical Race Theory, (2011) 46 (2) (Web Page) American Bar Association Human Rights Magazine.
447. Richard Delgado, Jean Stefancic and Angela Harris, Critical Race Theory: An Introduction (New York University Press, 2017).
448. Amanda Porter 'Decolonizing Policing: Indigenous Patrols, Counter – Policing and Safety' (2016) 20 (4) Theoretical Criminology, 548.
449. Ibid 553.
450. Kate Slattery, 'Drowning not Waving: The 'Children Overboard' Event and Australia's Fear of the Other' (2003) 109 (1) Media International Australia Incorporating Culture and Policy, 93.
451. Ibid 95 citing 'Howard Hard Line Becomes Poll Focus' The Australian (8 October 2001) 1.
452. Ibid.
453. Cindy Wockner, 'There are the people Australia didn't want – the controversial Tampa refugees reveal life now'. News.Com.au, June 12, 2016 (Web Page) < https://www.news.com.au/national/these-are-the-people-australia-didnt-want--the-controversial-tampa-refugees-reveal-life-now/news-story/fa596f8167daf7e2641694c4b975f6bc>.
454. Mostafa Rachwani and AAP, 'Andrew Laming ordered into empathy training by Scott Morrison after downplaying apology'. (News

Article, 27 March 2021), (Web Page) < https://www.theguardian.com/australia-news/2021/mar/27/andrew-laming-liberal-mps-facebook-page-removed-after-he-downplayed-apology>.
455. Sue Williamson, 'Andrew Laming: Why Empathy training is unlikely to work' (Opinion Piece, March 29, 2021) (Web Page) < https://theconversation.com/andrew-laming-why-empathy-training-is-unlikely-to-work-158050>.
456. Frances Kai-Hwa Wang, 'From a whisper to a rallying cry: commemorating the Vincent Chin Case' (2010) Vol 19 Annual Asian American Policy Review.
457. Jonathan A Greenblatt, 'Fighting Hate in the Era of Coronavirus' (2020) Horizons: Journal of International Relations and Sustainable Development, No, 17, S*pecial Elections Issue: America at Crossroads*, pp. 2018-221.
458. Stephen Spencer, 'Culture, Identity and Representation. Race and Ethnicity' (2006) Routledge, Taylor & Francis e-Library.
459. Kathleen Stansberry, Janna Anderson, Lee Rainie,' Leading concerns about the future of digital life' (2019) Experts Optimistic About the Next 50 Years of Digital Life. *Pew Research Centre*.
460. Valerie P Hans, Ramiro Jr. Martinez, 'Intersections of Race, Ethnicity, and the Law' (1994) *Cornell Law Faculty Publications Paper* 319.
461. Kumi Naidoo, 'The Rule of Law Has Consolidated All the Injustices That Existed Before It' (2014) Interview with Kumi Naidoo, *International Journal on Human Rights*.
462. Michael J. Klarman, 'Brown, Racial Change, and the Civil Rights Movement' (1994) Vol. 80, No. 1 *Virginia Law Review Twentieth-Century Constitutional History* pp. 7-150.
463. Karen Grigsby Bates, 'How Vincent Chin's Death Gave Others A Voice' (2021) *NPR Code Sw!tch*.
464. Ibid.
465. Ibid.
466. Paula C. Johnson, 'The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin', (1996)1 MICH. J. RACE & L. 347.
467. Ibid.
468. Ibid.
469. Rod Jarman, 'Power, politics and policing: How the pandemic has highlighted fractures and fault lines in our society' (2021) *Journal of Global Faultlines,* 8(1), 100-113.
470. Ibid.
471. Lynne Peeples, 'What the data say about police brutality and racial bias – and which reforms might work', Nature https://www.nature.com/articles/d41586-020-01846-z (19 June 2020)
472. Jeff Dean, 'US protestors demand justice a year after Breonna Taylor' (2021) *Al Jazeera*.
473. Kat Stafford, Hannah Fingerhut, ' AP-NORC poll: Sweeping change in US views of police violence' (2020) *AP News*.
474. Ibid.
475. Ibid.
476. Stop AAPI Hate, Timeline (2021).
477. Christine Tamie,' Key Findings About Black America' (2021) Pew Research Centre.
478. 'Learn about Hate Crimes'(2021) *The United States Department of Justice*.
479. Isabella Kwai,'An Outbreak of Racist Sentiment as Coronavirus Reaches Australia' (2021), *The New York Times*.
480. D Pager, Shepherd H, 'The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit and Consumer Markets' (2021) *Princeton University, Department of Sociology*.
481. Ibid.
482. Subramanian et. Al., 'Federal criminal justice reform' (2021) *Brennan Center for Justice Report*.
483. Study of Literature and Legislation on Hate Crime in America' (2005) *National Institute of Justice, Washington D.C.*
484. Ibid.
485. Ibid.
486. Ibid.
487. Angela R Grover et al, 'Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality' (2020) *American journal of criminal justice*: AJCJ, 1-21.
488. 'Dimensions of Racism' (2005) *United Nations*, The Office of the United Nations High Commissioner for Human Rights (OHCHR) in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO), New York and Geneva.
489. Ibid.
490. Michael T, Heaney 'PROTEST AT THE CENTER OF AMERICAN POLITICS' (2020) *Journal of International Affairs*, vol. 73, no. 2 pp. 195–208.
491. Ibid.
492. Neil G. Ruiz, Khadijah Edwards and Mark Hugo Lopez, 'One-third of Asian Americans fear threats, physical attacks and most say violence against them is rising' (2021) *Pew Research Centre*.
493. Ibid.
494. Ibid.
495. Ibid.
496. Rory McVeigh, Michael R. Welch, Thorrudur Bjarnason, 'Hate Crime Reporting as a Successful Social Movement Outcome' (2003) *American Sociological Review*, 68(6), 843-867.
497. Ibid.
498. Buchanan et al., 'Black Lives Matter May be the Largest Movement in U.S. History' (2020) *The New York Times*.
499. *George Floyd Justice in Policing Act of 2020* 116th Congress H.R.7120.
500. Barbara Sprunt, 'Here's what the new hate crimes law aims to do as attacks on Asian Americans' (2021) *NPR Politics*.
501. Ibid.
502. Michael Tesler, 'Support for Black Lives Matter Surged During Protests' (2020) *FiveThirtyEight*.
503. Ibid.
504. Ibid.
505. Martin Luther King Jr., 'Letter from Birmingham Jail' (1963).
506. Asian Americans Advancing Justice (2021).
507. AAPI Women Lead (2021).
508. Asian Americans for a more Progressive Georgia (2021).
509. Black Lives Matter Global Network (2021).
510. Black Visions Collective (2021).
511. The Bail Project (2021).

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