
# Law Review

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## ABOUT THIS PUBLICATION

The USQ Law Society Law Review is a forum for debate for scholars and professionals, it provides a modern approach to a student run, peer-reviewed journal published biannually. Presenting current industry research, trends, points of law and legislative critique.

## ABOUT THE USQ LAW SOCIETY

The University of Southern Queensland Law Society (USQLS) is a non-profit, volunteer organisation that aims to enhance student experience in all aspects of their personal, social, academic, and professional development. The core functions of the USQLS are:

1. To advocate our Members interests and concerns;
2. To support our Members with the appropriate guidance and opportunities; and
3. To mentor our Members while creating and nurturing strong relationships.

Established in 2008, the USQLS is comprised of law students from Toowoomba, Ipswich, and the external cohort. The USQLS is passionate about law and justice as well as strengthening our relationships the wider legal community. The USQLS organises, hosts, and promotes networking events, social events, competitions, education, and career development sessions.


A special thanks to the following for contributing to the USQLS Law Review

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## Acknowledgement of Country:

*The USQLS Law Review Board acknowledges the traditional custodians of the land and pay our respect to the Elders both past, present, and emerging. We extend that respect to all Aboriginal and Torres Strait Islander peoples throughout Australia.*

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# LAW REVIEW VICE PRESIDENT'S ADDRESS

Welcome to the summer edition of the 2022 USQ Law Review. This is the second edition of the law journal for this year, and I hope every reader carefully considers and thoroughly reads the ideas reflected and discussed in every article within this edition.

This edition will touch on a variety of ideas within the legal sphere. We will start in the realms of law and its complex relationship with music and consider how gender has been deployed to reclaim murder ballads while discussing the songs and lyrics of one of my favourite artists of all time, Taylor Swift. The law review will then move onto some historical topics, featuring women and their rights in divorce then moving on to discussing the different legal theories of positivism and liberalism. The law review will then find itself considering the court system and its impact on the law and how they have developed in sentencing indigenous defendants and the application of evidence. Finally, the law review will touch on how law classrooms across the nation are changing and the development of flipped lectures.

I would like to thank the 2022 Editorial board and my editor-in-chief, Hamida Nazari whose passion and impressive attention to detail helped create the high edition to the standard that it is today. I would also like to extend my gratitude to the whole 2022 USQ Law Society executive board and the University of Southern Queensland's Law School for their ongoing support of the law review. Without all of your help, this edition of the paper would not be possible. I welcome incoming Vice-President Yoon Kim and wish him all the best with the continuation of the publication. Yoon was a dedicated editor as a part of the 2022 board and I know that he will continue the impressive legacy of this law journal.

I now invite you, the reader to once again indulge in reading the knowledgeable articles found within the pages of this paper, thoughtfully consider the contrasting ideas and ideals found within the contents of the law review and enjoy reading them thoroughly. I wish you well on your reading journey.

Yours faithfully,

Jaidyn Paroz
Vice President - Law Review
USQ Law Society Law Review

# EDITOR-IN-CHIEF'S ADDRESS

Dear Authors and Readers,

Welcome to the 2022 Summer Edition of the USQLS Law Review.

The law is an all-encompassing force that impacts and embodies every aspect of society and by extension, the human experience. This edition yet again portrays that. It carefully presents the diversity that is inherent within the law addressing overtly: international law, the law of evidence, constitutional law, jurisprudence and covertly: amongst others, music, divorce, and ingeniously even, a classroom setting. It is this ingenuity of the law that has drawn me to the field, and through this edition of the USQLS Law Review, I hope it intrigues you as much as it fascinates me.

To the USQLS Law Review Editorial Board,

This edition is what it is today owing to the astute guidance of the USQLS Law Review Vice President, Jaidyn Paroz, and the continuous efforts of the editorial board members Rasha Abdulhassan, Yoon Kim, and Mai Marie Voet.

To the authors, your contribution to this edition has been tremendous. As evident as it is, I would like to remind you that this edition would not be possible without your valuable contributions.

Finally, it has been a privilege to serve as the Editor-in-Chief of this edition. I am proud of the quality of this edition and look forward to the direction the USQLS Law Review is headed to.

I hope you have an exciting, intriguing, and enriching reading experience.

Kind regards,

**Signature**
Hamida Nazari
Editor-in-Chief
USQ Law Society Law Review

# HOW HAS GENDER BEEN DEPLOYED TO RECLAIM 'MURDER BALLADS' FROM THEIR PHALLOCENTRIC LEGACY?

ADELAIDE GREEN[1]

Despite law and literature being recognised as a legitimate and vibrant field of legal scholarship, there is a relative dearth of popular music in legal analysis.[2] As explained by Cardiff University Professor Daniel Newman in his study of law and justice in popular music, "popular music has not been taken seriously, which is in some contrast to works of literature such as novels or plays… popular music could and should be considered in a similar light".[3] The law and literature movement contains two opposing theories; law *as* literature, which has been heavily criticised by notable jurists such as Richard Posner, who believes law as literature scholars take literature too seriously and overvalue the views of legal scholars,[4] and law *in* literature, which uses literature as a means of critiquing the law.[5] Following the former approach allows law and literature scholars to gain insight into the human condition, which is after all what law is "all about".[6] At its core, literature is about narrating shared experiences, it promotes and provokes our understanding of ourselves and each other.[7] By using literature as an insight into the human condition we may further understand how law and society interact.[8]

Music effortlessly operates under the category of "literature" and aligns with its shared purpose of understanding the human condition. As Newman explains, music and literature are "best understood as cultural phenomena, texts to be decoded for the broader message they communicate".[9] The human condition is as present in music as it is in other literary forms. According to respected ethnomusicologist, John Blacking, "music has been studied as a product of societies or of individuals, but rarely as the product of individuals in society".[10] This longstanding misjudgement has wasted the very principle of music, which Blacking asserts, is "to enhance in some way the quality of individual experience and human relationships; its

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[1] This paper was originally submitted as assessment for the subject *ENG3007 Law and Literature*.

[2] Daniel Newman, 'Law and Justice in Popular Music: Murder Ballads' (2018) 24(1) *European Journal of Current Legal Issues* 1, 1.

[3] Ibid.

[4] Richard Posner, 'Law and Literature: A Relation Reargued' (1986) 72(8) *Virginia Law Review* 1351, 1352.

[5] Newman (n 2) 1.

[6] Geoffrey Hazzard, 'Humanities and the Law' (2004) 16(1) *Yale Journal of Law and Humanities* 79, 79.

[7] Daniel Newman, 'Murder Ballads and Death in Song' (2020) 46(1) *Australian Feminist Law Journal* 17, 20.

[8] Ibid 17.

[9] Ibid 21.

[10] John Blacking, *Music, Culture and Experience* (University of Chicago Press 1995) 32.

structures are reflections of patterns of human relations, and the value of a piece of music as music is inseparable from its value as an expression of human experience".[11]

# I MURDER BALLADS

The idea of music as an insight into the human condition shared by the function of the law is not a new one. The Western link between law and music stretches back to ancient Greece, where oral culture, "the oldest cultural expression known to us", was used to establish what was acceptable and expected within society.[12] This ancient oral custom travelled across Europe and eventually evolved into the rich tradition of ballad writing through the British Isles and Scandinavia.[13] As proclaimed by Roy Palmer in his history of English ballads, "Ballads of all kinds were part of the very fibre of English life".[14] The popularity of ballads increased dramatically in the early 15th century, shortly after the introduction of the printing press. Printed on large, single sided pieces of paper, called broadsheets, ballads were extremely cheap to produce (also called 'penny sheets'),[15] and were often written to echo true crime stories of the time, of which crimes involving murder were of particular interest.[16] Beggars selling broadsheet murder ballads utilised public intrigue in the particular crime to garner interest in their wares,[17] and were a regular spectacle seen performing the ballads to catch the attention of potential customers. These performances were made near public execution sites adding to the general 'festivity' that accompanied public executions of the time.[18]

# II THE PHALLOCENTRIC LEGACY

The appearance of the "murder ballad" has transcended time and is dotted throughout modernity, primarily led by men. This possession of casual and satirical violence by men is prevalent throughout multiple mediums. In addition to this, ballads featuring women who killed were written imitating the female voice to force the killer to repent, often displaying that the murder was not worth the suffering endured afterwards.[19] However, these ballads featuring women who killed or those with man-on-man violence, were exceptions to the rule that most traditional murder ballads featured femicide, or the killing of women by men simply because

[11] Ibid 31.

[12] Paola Mittica, 'When the World was Mousike: On the Origins of the Relationship Between Law and Music' (2015) 9(1) *Law and Humanities* 29, 29.

[13] Newman (n 2) 4.

[14] Roy Palmer, *A Ballad History of England* (Anchor Press, 1979) 6.

[15] Alyssa Hubbard, 'Murder She Sang: How Contemporary Murder Ballads Alleviate Blame' (Honours College Thesis, Murray State University, December 2021) 7.

[16] 'American Murder Ballads', *Knoji* (Web Page, 15 June 2010) https://knoji.com/article/american-murder-ballads/.

[17] Hubbard (n 15) 8.

[18] Ibid 7.

[19] Ibid 1.

they are women.[20] In these songs women were heavily objectified, painted as vessels created exclusively for the use of men. For example, the 1954 ballad, *I'm Gonna Murder My Baby* by Pat Hare, features a man pre-emptively addressing a court justifying the murder of his partner. In this ballad the narrator insists that he has been wronged by his partner as she has done "nothing but cheat and lie", however, the only evidence for this claim is that she has been leaving the house early in the morning and not returning until late at night.[21] Clearly, the message of this song is that a woman's sole purpose is to serve men, and should they live outside of this purpose they are justifiably killed by their apparently wronged partner as they have broken their promise to "treat [him] right".[22]

The anatomy of this conventional legacy consisted of the manly hero performing violent acts without losing his status or being chastised. Whereas, if a woman performed these acts she would be categorised as an oversexualised mistress or tyrannical witch. Themes of femicide have persisted and can be found wrought throughout the modern music industry. Current popular music artists such as Eminem have released a catalogue of songs which feature the killing of women. For example, his 2010 song *Love the Way You Lie* details how if his partner tries to leave him, he will tie her to the bed and set the house on fire.[23] The song was widely popular at the time of its release, receiving numerous accolades, including the 2011 Billboard Music Award for Top Rap Song.[24] Despite releasing this and much more graphic tales of femicide, Eminem continues to be revered as one of the most successful songwriters in the music industry and was inducted into the rock and roll hall of fame in early 2022.[25]

As pointed out by Newman, male norms lead in music and "attention must be given to the gendered aspect that dominates the narratives." *The Madwoman in the Attic* by Gilbert and Gubar illustrates how women are idealised as "angels in the house", or pure, chaste, silent, and obedient objects of men's affection. Any shortcomings of this impossible standard leads to their demonisation as corrupt and unnatural.[26] In this way, a woman must "kill" both the "angel" and its antithesis the "monster" in the house if she wishes to write from beyond the aesthetic ideals that have been placed on her.[27] Newman uses Andrea Dworkin's analysis of fairy tales to build on Gilbert and Gubar's identification of the "angel" and "monster". Here it is pinpointed that fairy tales represent the gender roles that "children learn and adults never

[20] Diana Russell, 'Femicide: The Murder of Wives' in Diana Russell (ed) *Rape in Marriage* (Macmillan 1982) 282.

[21] Hare, Pat, 'I'm Gonna Murder My Baby' https://www.youtube.com/watch?v=E6GJPaEokOI.

[22] Ibid.

[23] Mathers, Marshall, 'Love the Way You Lie' https://www.youtube.com/watch?v=uelHwf8o7_U.

[24] 'Billboard Music Award for Top Rap Song', *Awards and Winners* (Web Page, 2022) http://awardsandwinners.com/category/billboard-music-award/billboard-music-award-for-top-rap-song/.

[25] '2022 Inductees', *Rock & Roll Hall of Fame* (Web Page, 2022) https://www.rockhall.com/2022inductees.

[26] Sarah Gilbert and Susan Gubar, *The Madwoman in the Attic: The Woman Writer and The Nineteenth-Century Literary Imagination* (Yale University Press, 1979) 17.

[27] Newman (n 7) 22.

overcome".[28] These fairy tales perpetrate that there are only two types of women: good women, like Snow White or Sleeping Beauty, who are passive, helpless, innocent, and asleep; and bad women, like the Evil Queen or Wicked Stepmother, who are powerful, devouring, and awake.[29] In stark contrast, men in fairy tales are generally portrayed as heroes irrespective of their actions, for example, Aladdin and the Beast both possess questionable moral compasses – thievery and holding a hostage - but are not defined by these qualities. Their characters continue to maintain their hero status regardless of their flaws because they harbour the privileged ability of being allowed to be a whole and complex character. This tells us that while women must stay confined to their beauty, passivity, and victimhood, whatever a man does is good because a man has done it.[30]

Such an extreme dichotomy restricts women especially when acting outside the norm results in alienation and demonisation.[31] Women in these roles as killers are often portrayed as "scorned" women who have been driven mad by the actions of their partners. Traditionally, the actions of the unfaithful man reflected badly only on the scorned woman, who was belittled for occupying this character, while the man faced no retribution for his actions. Women ballad writers today have reclaimed this title and embrace this character by making their narrators a normal woman/hero who has been scorned. In this way "scorned" ceases to be an identifier and instead is simply another aspect of a more complicated woman character.

Consequently, contemporary murder ballads have been reclaimed by women songwriters as a tool for repossessing their power by justifying the actions of women who have acted outside the bounds of the strict fairy tale dichotomy. Specifically, two examples of songs from the perspective of mistreated and potentially "scorned" women include "Goodbye Earl" by the Chicks,[32] and "No Body, No Crime" by Taylor Swift.[33] Each of these songs feature a narrative where the actions of women killers are justified through the nature of the victim.

## III THE CHICKS: SHUT UP AND SING

Originally known as the Dixie Chicks, sisters Martie Maguire and Emily Strayer founded the Chicks in Texas in 1989. The group began with a traditional instrument heavy bluegrass sound and today the sisters are regarded as some of the best musicians in country music. However, their major success did not begin until after 1995 when they brought Natalie Maines on as lead singer. Maines broadened the musical focus of the band with her powerful voice and pop/rock influences. The subsequent 1998 album *Wide Open Spaces* sold more CDs in that year than all

[28] Andrea Dworkin, *Woman Hating* (Plume, 1974).

[29] Newman (n 7 22.

[30] Ibid.

[31] Hubbard (n 15) 2.

[32] The Chicks, 'Goodbye Earl', https://www.youtube.com/watch?v=Gw7gNf_9njs.

[33] Swift, Taylor, 'No Body, No Crime', https://www.youtube.com/watch?v=IEPomqor2A8.

other country music groups combined.[34] This success continued into the groups next two albums, *Fly* and *Home.* However, controversy struck in 2003 when the group became an example of what the music industry would do to women should they push back against the binary imposed upon them. In March of 2003, eight days before George W Bush declared war on Iraq, Maines made a comment at a live show in London that the band was "ashamed the President of the United States [was] from Texas".[35] This single misstep saw the band's reputation instantly shift from angel to monster. The repercussions of this shift saw the group martyred and made an example of. An example for whom though? Certainly not men, especially when male country music artist Willie Nelson was praised, or at least respected by those that disagreed with him, for making similar anti-war statements during the Vietnam War.[36] The Chicks were not allowed the same respect and instead were portrayed as either actively malicious or too dumb, young, and naïve to understand the complexity of the political situation. The resulting backlash lead to their music being boycotted by radio stations, public demonstrations where their work was destroyed, and them being bashed in the media, with many publications referring to them as "the Dixie Sluts". In 2006, once it was clear that apologising would not mitigate the situation, the band released "Not Ready to Make Nice" in which they addressed the backlash and the "shut up and sing" order that had been placed on them. Despite "Not Ready to Make Nice" achieving the most success out of any of their singles, the Chicks' 2006 album *Taking the Long Way* was a commercial let down in comparison to the success of their previous three albums.[37] The band virtually disappeared for the succeeding 14 years, until in 2020 they discarded the "Dixie" from their name and released their most current album *Gaslighter*.[38] Despite the Chicks still being considered a pariah among the country music industry, the album signified a strong comeback, debuting at number one in America.[39]

Notwithstanding their notorious comeback, the Chicks remain a strong example of what will happen to a female artist should she fail to "shut up and sing". Artist Taylor Swift revealed in her 2019 documentary *Miss Americana* that her early reluctancy to speak out politically was an effort to avoid ending up like the Chicks.[40]

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[34] Roger Burns, 'The Chicks: Biography', *IMDb* (Web Page) https://www.imdb.com/name/nm1202271/ bio.

[35] Ibid.

[36] Hubbard (n 15) 23.

[37] Andrew Leahey, 'The Chicks: Biography', *All Music* (Web Page) https://www.allmusic.com/artist/the-chicks-mn0000162487/biography.

[38] Laura Snapes, 'The Chicks: "We were used and abused by everybody who wanted to make money off us"', *The Guardian* (online, 18 July 2020) https://www.theguardian.com/music/2020/jul/18/dixie-chicks-used-and-abused-by-everybody-who-wanted-to-make-money-off-us.

[39] Philip Trapp, 'The Chicks' Gaslighter Soars to the top of the Country Albums Chart', *Taste of Country* (Web Page, 27 July 2020) https://tasteofcountry.com/the-chicks-gaslighter-tops-country-albums-chart/#main-content.

[40] *Miss Americana* (Tremolo Productions, 2020).

# IV TAYLOR SWIFT: YOU NEED TO CALM DOWN

Despite Taylor Swift's efforts to remain unproblematic and "shut up and sing" she is a prime example of the scrutiny and judgment placed on female artists in the music industry. Swift rose to fame with her debut self-titled album in 2006 at just 16 years old. Because of her age she upheld a "good girl" persona where any anger or "monster-like" characteristics in her music could be written off as a result of her immaturity. This didn't stop the media from sexualising her and overanalysing her relationships. By 2014 when her fifth studio album, *1989,* was released, Swift had been burdened with a reputation of burning through men. She addressed this narrative in her song "Blank Space" in which she parodies the character created for her by singing from the perspective of a crazed serial dater who finds joy in ruining the lives of men. In 2016, Swift was a victim of cancel culture over a feud with rapper Kanye West. Following this scandal, Swift retreated significantly from public life by deleting her social media presence and avoiding being seen by the public for an entire year. She returned in November of 2017 with her sixth album, *Reputation,* which featured songs along the same vein as the Chicks' "Not Ready to Make Nice", including "Look What You Made Me Do", and "This Is Why We Can't Have Nice Things". Swift faced additional contention when her masters were sold out from underneath her by her record company, Big Machine Records. As part of this contract she has been allowed to begin rerecording her old music in order to once again own the rights to it. Swift's latest albums, *Lover*, *Folklore*, and *Evermore*, have explored themes of healing and happiness, aiming to move forward from the confrontational narrative. "No Body, No Crime" is Swift's only murder ballad, but is one of many songs in which she has reclaimed her voice following her scandal and the stealing of her masters (see "The Man", "Mad Woman", and "The Last Great American Dynasty"). Today she is a fierce advocate for artists to own their own work.

# V "GOODBYE EARL": MARY ANNE AND WANDA WERE THE BEST OF FRIENDS

The campy murder ballad from the Chicks' 1999 album *Fly, "*Goodbye Earl", centres around domestic violence with a "side-eyeing humour and wit".[41] The song features two female protagonists, Mary Anne and Wanda, who are introduced as recent high school graduates, thereby encouraging the listener to associate their youth with naivety and innocents.[42] In contrast, Earl first appears abusing Wanda. This abuse is detailed through Wanda's efforts to hide its evidence by putting on "dark glasses or long sleeve blouses /Or make-up to cover a bruise." Thus decentralising the tyrannical man from the narrative and cementing the women as the main characters of the narrative. Wanda is further pitied by the listener when she tries to do the apparent right thing and leave Earl but is unsuccessful as Earl "walked right through that restraining order /And put her in intensive care." This line situates the ballad as directly

[41] Jason Scott, 'Behind the Songs: Dixie Chicks, "Goodbye Earl"', *American Songwriter* (Web Page, 2020) https://americansongwriter.com/dixie-chicks-goodbye-earl-behind-the-song/.

[42] Hubbard (n 15) 31.

useful for law in literature scholarship as it can easily be understood as a commentary on the shortcomings of the law regarding the protection of women against domestic violence. Here the law has failed Wanda, and so, both her and Mary Anne take justice into their own hands. By this stage the listener is positioned to effortlessly agree with the girls' decision that Earl must die. From here the upbeat and satirical mood of the song leads the listener to feel that they are privy to an elaborate and hilarious prank the girls are playing intended to teach Earl a lesson. Each step of the murder is comically narrated to Earl with the girls ironically asking him if he's feeling weak and suggesting that he "lay down and sleep". The murder of Earl is further vindicated when the police fail to suspect that any foul play occurred and Earl is deemed a "missing person who nobody missed at all." The story closes with the reassurance that the girls "don't lose any sleep at night" because "Earl had to die". "Goodbye Earl" is a clear example of a shift away from traditional murder ballads which rely heavily on teaching women to repent for their crimes and instead features the justification of a murder committed by two female killers who suffer no negative consequences for their actions, as the nature of the victim excuses the crime committed.

# VI "NO BODY, NO CRIME": I THINK I'M GONNA CALL HIM OUT

"No Body, No Crime", Swift's poised murder ballad debut, also displays a clear change in attitude towards female killers. The ballad is unique in structure as it shifts from an outside perspective of an affair to an outside perspective of a murder to an inside perspective of a murder all without changing narrator.[43] The story follows the narrator and her best friend, Este, who believes that her husband has been acting strangely and "smells like infidelity". Este does not plan on killing her husband, instead she simply says, "I think I'm gonna call him out". However, after this proclamation, Este goes missing. The narrator suspects that her confrontation with her husband was unsuccessful and that Este has been murdered. The narrator lists several clues to support this suspicion including that his truck has brand new tires, and his mistress has moved in and sleeps in Este's bed. She further convinces the listener of the husband's guilt by claiming that "there ain't no doubt/ Somebody's gotta catch him out". While the husband's guilt of the heinous crime is apparently absolute, there is no way to legitimately bring him to justice as there is no way to substantially prove it, hence, no body, no crime. Once again, the law has failed the woman and the woman is forced to take justice into her own hands. In contrast to the Chicks vivid depiction of Earl's murder, the narrator in Swift's ballad does not explicitly state that she has killed the husband. Instead she implies it by providing a list of connected facts; she has a boating license, she is good enough at cleaning houses to "know how to cover up a scene", Este's sister will provide an alibi, and it's a "good thing his mistress took out a big life insurance policy". These facts together encourage the listener to assume that the narrator avenged Este by killing her husband, dumped his body off a boat, and cleaned the crime scene of evidence. This endeavour is further supported by the fact that the narrator has a strong alibi from Este's sister and the police are likely to turn to the mistress when identifying

[43] Hubbard (n 15) 34.

a suspect as, considering the life insurance policy, she has the most to gain from the murder. In this way, justice is served not just to Este's husband but to the complicit mistress also.

Interestingly, the murder of Este's husband mirrors the murder of the titular character in Daphne Du Maurier's 1938 novel, *Rebecca*. In this narrative, Rebecca is murdered by her husband Maxim for being unfaithful to him. After shooting Rebecca through the heart, Maxim disposes of her body by sinking her sailboat with her corpse aboard and cleans the blood from the scene of the shooting to divert suspicion away from himself.[44] Swift revealed in an interview with Apple Music that she was heavily influenced by Du Maurier's novel when writing another song from the same album as "No Body, No Crime".[45] It is reasonable to assume that the influence of this infamous murder story may have also made its way into her take on a contemporary murder ballad. In altering this original narrative of femicide by changing the gender dynamics to feature a female killer avenging the death of the murdered wife, Swift has reclaimed this murder and deployed it against the archetypical, tyrannical man.

Swift's murder ballad can also be interpreted as an allegory for injustice in the music industry. Currently, Swift is notoriously undertaking the ambitious task of rerecording her six original albums so that she may reclaim the rights to her masters after they were bought out from underneath her. This ballad could represent the taking of the masters (Este's death) and Swift's rerecording, or rather, destroying the value of her original work and therefore the investment of the man who stole them from her (the narrator killing Este's husband). Using this interpretation, Swift has reclaimed the genre of murder ballads from their phallocentric legacy by creating a narrative where women are avenged by the justifiable killing of a tyrannical man. This interpretation aligns with Swift's activism surrounding the rights of artists, especially young women who are particularly susceptible to exploitation in the music industry, to own their own work from the very beginning, instead of having to fight as she has done with record companies and large investors for this right.

# VII CONCLUSION

From this analysis of two contemporary murder ballads by female artists, it is clear that gender has successfully been deployed to reclaim murder ballads from their phallocentric legacy. Traditionally, these ballads were used as tools for maintaining social order and to warn women of the consequences should they step out of the carefully crafted persona expected of them. Traditional narratives featured the demonisation of women who existed outside the expected "angel" persona and were drenched in themes of femicide, or the killing of women by men simply because they are women. From their misogynistic beginnings, the contemporary murder ballad has been reclaimed by female artists today to push against the "angel" persona, by speaking out against perceived injustices, and drawing attention to the mistreatment of women in both the music industry and society more generally. In this way contemporary murder

[44] Daphne Du Maurier, *Rebecca* (Harper Collins Publishers, 1938) 279-281.

[45] Interview with Taylor Swift (Zane Lowe, Apple Music, 16 December 2020) http:youtu.be/CQacWbsLbS4 .

ballads have become a platform for female artists to explore their agency. While broadside ballads served as warnings for women should they step outside the gendered norms expected of them, contemporary murder ballads set a precedent for women to fight back against abuse. Today, murder ballads are an invaluable tool for female artists to push back safely and effectively against prejudice and continue to advocate for equal treatment by challenging the listener's prejudices and speaking out against injustice.

# WOMEN AND DIVORCE IN THE NINETEENTH CENTURY

TIESHA NORFORD[1]

During the nineteenth century in England, the state of marriage was one of 'male dominance' and 'female submission' under the common law. As a result, women were left vulnerable under the common law after marriage, ceasing to exist legally and enduring cruel marital chastisement that sometimes led to death.[2] In addition, women faced societal expectations of being domestic wives and needing to keep the household in order.[3] The law, double standards, patriarchy and misogyny made it difficult for women to pursue a divorce because of wealth, status and social perceptions.[4] In contrast, men were disproportionately advantaged socially, economically and physically by society. However, the literature has highlighted a belief that wifebeaters were primarily poor and of the working class, and divorce was only for the wealthy.[5] This essay examines patriarchal social constructs, perceptions, marriage and divorce reactions during this era, gender, and the nineteenth century's history and explores marital chastisement, divorce law before and after 1857, and the pressures to change. Further, the essay provides insight into how divorce and married laws slowly began to change and reform in the last half of the nineteenth century in hopes that these laws would allow women to escape the tyranny of their husbands.

The law of coverture was a legal doctrine about marriage whereby 'the legal existence of a woman is suspended during the marriage'. [6] Thus, 'the husband and wife [were classes as] one person in law'.[7] Originating from English law, the law of coverture had feudal origins and mandated that a wife was her husband's property; thus, a wife was considered a person without civil liberties with no rights.[8] As such, her husband was solely liable for her actions;

[1] This paper was originally submitted as assessment for the subject *HIS1115 Legal History*.

[2] Elizabeth Foyster 'At the Limits of Liberty: Married Women and Confinement in Eighteenth-Century England' (2002) 17 *Change and Continuity* 39.

[3] Martin J Wiener, *Men of Blood: Violence, Manliness and Criminal Justice in Victorian England* (Cambridge University Press, 2004) 3.

[4] Heather D Cyr, *The Law and the Lady: Consent and Marriage in Nineteenth-Century British Literature* (MA Thesis, Southern Connecticut State University, 2015) 8.

[5] Ibid 1-8; Henry Kha and Warren Swain, 'The Enactment of the *Matrimonial Causes Act 1857*: The Campbell Commission and the Parliamentary Debates' (2016) 37(3) *Journal of Legal History* 307.

[6] Claudia Zaher, 'When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture' (2002) 94(3) *Law Library Journal* 459.

[7] Ibid.

[8] Kha and Swain (n 5) 304.

accordingly, if a wife committed a crime, her husband would be held criminally accountable.[9] Moreover, a husband was responsible for his wife's pre and post-marriage debts, torts and other liabilities.[10] According to Hendrik Hartog, husbands had the right, if not the duty, to 'moderately chastise' their wife.[11] Furthermore, the law of coverture declared that the wife would be an obedient servant to her husband while, in juxtaposition, the husband would be a master to his wife.[12] Consequently, the law of coverture made it socially tolerable and broadly acceptable for a husband to physically abuse his wife.[13] Heather Cyr discusses women agitators fighting for marriage and reform and states that 'at some point a line was crossed and [women] were no longer willing to accept such treatment'.[14] Further, the literature suggests that women in this era fighting for legal change often referred to marriage as slavery.[15] With the comparison of marriage and slavery for women, it is apparent that women were susceptible to violence, which leads to the next point of marital chastisement.

Marital chastisement could be described as 'one of the daily fixtures of married life' for many women tethered to the home.[16] 'Wife-beating' was a form of martial chastisement that could now more commonly be referred to as domestic violence, which was prevalent during the nineteenth century in England.[17] A husband could 'subject his wife to corporal punishment or chastisement so long as [he does not] inflict permanent injury' to his wife under the law of coverture.[18] Social perceptions and reactions to wife-beating during this era were permissible. A large part of that was due to the law of coverture, as men felt their actions were justifiable, and it was the norm for society.[19] Wife-beating was symbolic of gender relations to indicate male dominance.[20] Often husbands were sympathised with for not having obedient wives by judges and magistrates; thus, women deserved the violence bestowed upon them, and men received little to no punishment with leniency and inadequate sentences.[21] Heather Cyr illuminates the unjust and biased perspectives of judges and magistrates in her dissertation.[22] One judge stated, '[t]here are times when a wife irritates her husband to such an extent that he

[9] Cyr (n 4).

[10] Ibid.

[11] Hendrik Hartog, *Man and Wife in America: A History* (Harvard University Press, 2002) 116. pp. 65.

[12] David Peterson Del Mar, *What Trouble I Have Seen: A History of Violence against Wives* (Harvard University Press, 1996) 4.

[13] Ibid 4.

[14] Cyr (n 4) 28.

[15] Ibid 41.

[16] Ellen Ross, *Love and Toil: Motherhood in Outcast London, 1870-1918* (Oxford University Press, 1993) 84.

[17] Ibid 2.

[18] Reva B Siegel, 'The Rule of Love: Wife Beating as Prerogative and Privacy' (1996),2120.

[19] Cyr (n 4).

[20] Foyster (n 2).

[21] Ibid 19; 'Wife Beating (James Tate),' The Brooklyn Daily Eagle (webpage, 5 January 1861) 5 http://www.newspapers.com/image/50362042/?terms=wife-b.

[22] Cyr (n 4) 30.

cannot control himself and uses his hand or fist … as long as no serious harm is done'.[23] However, wife beating was not the only form of abuse women would receive from husbands; confinement was also prevalent to exert male dominance and patriarchal control, alongside marital rape.[24] Confinement further impacted women's freedom and liberties, with husbands confining their wives within the house or in private mental institutions.[25] As Siegel emphasises, there was a husbandly right to chastise 'as he did not inflict permanent injury'[26] though, wife beaters were almost exclusively known to be of the calibre of the lower class.[27] At this point, justifiable reasons for legal separation included the threat of murder to the wife or her children.[28] While some judges and magistrates openly opposed wife-beating, some publicly sympathised with the husband's violence as understandable and necessary.[29] Weiner highlights a prime example of leniency and inadequate justice: James Tate had 'the option to pay five dollars or spend ten days in jail for beating his wife, Hannah, with his fists' in 1861.[30] While marital chastisement and violence were mundane for marital affairs, divorce was difficult to obtain.

During the nineteenth century in England, divorce was a controversial legal debate considered time-consuming, expensive, complicated, and comprised of many double standards for women.[31] Divorce before 1857 consisted of the ecclesiastical courts combined with canon law from the Church of England that granted relief, compensation of marital rights, parliamentary divorce, and wife-selling was prevalent among lower social classes.[32] Also, religion and the Bible played a significant part in divorce reform, which resulted in relentless pushback from the Church of England.[33] Thus, marriage could only be resolved by an Act of Parliament, and church courts could not grant divorces. Literature suggests that social expectations forced on women hindered divorce progression during this time. [34] Alongside fears that divorce reform would drive moral disgrace, and it was a process only the wealthy could afford under the right

[23] Viola Gilbert, 'As to Wife Beating', *New York Times* (webpage, 13 April 1899) https://www.nytimes.com/1899/04/13/archives/as-to-wife-beating.html.

[24] Elizabeth H Pleck, *Domestic Tyranny: The Making of American Social Policy Against Family Violence from Colonial Times to the Present* (University of Illinois Press, 2004) 4; Foyster (n 1).

[25] Foyster (n 2).

[26] Reva B Siegel, 'The Rule of Love: Wife Beating as Prerogative and Privacy' (1996), 2118.

[27] Frances Power Cobb, 'Wife-Beating, *New York Times* (webpage, 28 April 28, 1878) https://www.nytimes.com/1878/05/05/archives/wifebeating.html.

[28] Ross (n 15).

[29] Cyr (n 4),

[30] 'Wife Beating (James Tate)', *The Brooklyn Daily Eagle* (online, January 5, 1861) 5 http://www.newspapers.com/image/50362042/?terms=wife-b.

[31] Cyr (n 4).

[32] Ibid.

[33] Kha and Swain (n 5) 312-319.

[34] Kelly Hager, 'Chipping Away at Coverture: The Matrimonial Causes Act of 1857' (2014) 1; Shanley, Feminism, Marriage, and the Law, 36).

circumstances, primarily men.[35] Double standards between genders can highlight the disparity of divorce being granted between men and women through Hager's work by recognising that the earliest divorce granted to a man was in 1670, while the first divorce awarded to a woman was in 1801.[36] The imbalance in gender is further highlighted with four women obtaining a divorce before 1857: two for adultery and two for bigamy.[37] However, there were many progressive changes to divorce before 1857 and judicial divorce after 1857. Regarding divorce, after 1857, there was increased press interest and social displeasure and ostracism concerning husbands' treatment of women and the double standards women faced, particularly with their grounds of divorce, maintenance, and custody of children upon divorce or judicial separation. As the social construct of divorce began to dismantle, the law of coverture still influenced social perceptions of the duties of wives and the justification behind physical abuse.[38] Slowly, societal conversations and changes around marital violence became less taboo, reflecting new laws such as the *Matrimonial Causes Act 1857*.[39]

The *Matrimonial Causes Act 1857* changed divorce law from litigation in the ecclesiastical courts and the House of Lords to the civil courts regarding matrimonial concerns in England.[40] Modern legislation enabled the creation of a court for divorce and marital causes to hear civil divorces on the grounds of adultery, cruelty, or desertion.[41] Secular divorces by court order were possible, and the Act modernised family law forever.[42] However, bias was still prevalent, and 'a man had only to prove his wife was an adulterer, a wife had to prove that her husband had an extramarital affair and acted cruelly, either toward her or her children'.[43] Additionally, legislation concerning divorce assisted women with the property during the latter half of the nineteenth century.[44]

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[35] Kha and Swain (n 5). 309.

[36] Kelly Hager, 'Chipping Away at Coverture: The Matrimonial Causes Act of 1857' (2014) 1.

[37] Kha and Swain (n 6) 305.

[38] Mar (n 11) 4.

[39] Agnes Sunley, 'The Divorce Laws,' The Woman's Herald 15, no. 1 (1889), 1543-1945 [ProQuest]; Cry (n4).

[40] W Cornish W & G Clarke *Law and Society in England 1750–1950. London* (Sweet & Maxwell, 1989) 382–398; Kha and Swain (n 4) 303-330.

[41] DM Shelby, 'The Development of Divorce Law in Australia' (1966) 29 (5) *The Modern Law Review*.

[42] Kha and Swain (n 5) 303.

[43] Cyr (n 4) 13.

[44] Ibid 1.

In conclusion, this essay has explored how women were left vulnerable after marriage under common law within the law of coverture, divorce, and marital chastisement in England in the nineteenth century. At the time, men were proportionately advantaged, and, for some judges and magistrates, wife-beating was an intolerable act. While wife-beating was socially acceptable in the nineteenth century, it is not acceptable today; however, domestic violence is still prevalent. This essay has highlighted the various issues married women faced while male dominance was exerted in the nineteenth century in England.

# LEGAL POSITIVISM

TIESHA NORFORD[1]

Legal positivism is a philosophical theory developed during the 18th and 19th centuries that identifies law as a social fact based on its formal qualities rather than moral values.[2] British positivists John Austin and Herbert Lionel Adolphus ('Hart') are two critical theorists who hold opposing views on legal positivism.[3] Austin is considered the pioneer of positivistic thought for developing British legal positivism.[4] In contrast, analytic philosopher Hart is now considered the most influential contemporary British legal positivist with his descriptive sociology and analytical jurisprudence theory.[5] In this essay, the primary critiques of Austin's sovereign command theory are examined, as well as Hart's arguments to rebut positivism's critique and how his idea of law theory of legal positivism is a preferred method of thinking about law.

## I LEGAL POSITIVISM

Positivists assert that humans make and practise laws through institutions and sources such as Parliament, monarchs, and dictators.[6] Legal positivists depend on the fundamental social truths necessary for the existence and content of law rather than merits to be recognised, validated, and enforced by humans.[7] As Ratnapala commented: '[l]egal positivists offer theories on how we may distinguish law "in the legal sense" from laws in the non-legal sense.'[8] Moreover, based on validation and obedience, the notion rejects natural law and requires a formal criterion for identifying legal rules allowing clear and specific utility.[9] Finally, popular views on law reveal the connection between law and morality; prominent issues in legal theory concern the law and morality.[10]

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[1] This paper was originally submitted as assessment for the subject *LAW2224 Theories of Law*.

[2] *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'positivism' (def 1); Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 29, 30; Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 3rd ed, 2017) 25.

[3] Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 29.

[4] Ibid.

[5] *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'analytical jurisprudence' (def 1); *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'legal positivism' (def 1); Roger Cotterral, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, (LexisNexis, 2nd ed., 2003), 63; Marett Leiboff and Mark Thomas, *Contexts and Practices*, (Thomson Reuters, 2nd ed, 2014) 2.

[6] Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 29.

[7] John Finnis, 'Describing Law Normatively', *Philosophy of Law: Collected Essays Volume IV* (2011) 32; Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 29.

[8] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 3rd ed, 2017) 25.

[9] Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 31.

[10] John Finnis, *Natural Law and Natural Rights* (New York University Press, 1980) 363-366; Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 8.

# II SOVEREIGN POWER

Considered one of the founders of contemporary political philosophy, the English political philosopher Thomas Hobbes is influential for his attributes surrounding the term 'sovereignty', which John Austin adopted.[11] Hobbes wrote that life requires security and protection; thus, power is based on the law rather than arbitrarily.[12] He further portrays law as the commands of an all-powerful ruler ordained from a social contract.[13] Moreover, Hobbes' obedience-based views have drawn a great deal of criticism, including a sense of dissatisfaction with fulfilment, legitimacy, and definitive tests or criteria for arbitration, security, and compliance.[14]

# III PRINCIPLE OF UTILITY

A notable mention within legal positivism is the originator of modern utilitarianism, Jeremy Bentham.[15] The English philosopher, jurist, and philanthropist developed the principle of utility that maximises happiness for the most significant number of people.[16] Thus, Bentham's notion entails that law is a socially constructed entity enacted by the sovereign and established by conception or adoption that should be declared and written to ensure transparency.[17]

# IV CONTEMPORARY LEGAL POSITIVIST THEORIST

Three eminent contemporary legal theorists are John Austin, Hans Kelsen, and HLA Hart. English legal theorist John Austin began with a legal theory of positivism with a methodological approach to jurisprudence by arguing against traditional methods of natural law and arguing against links between law and morality.[18] Austin instilled the command there and his rule of the sovereign.[19] Next, Germanic legal positivism Hans Kelsen's notions stemmed from Austin.[20] The Austrian jurist has had excessive sway in Commonwealth court decisions with his ideas.[21] While expressing a similar sentiment to Austin, Hans Kelsen has

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[11] *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'Hobbes, Thomas' (def 1).

[12] Duncan Stewart, 'Thomas Hobbes', *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition).

[13] John Austin, *Province of Jurisprudence Determined* (J Murray, London, 1832) 6-7.

[14] Duncan Stewart, 'Thomas Hobbes', *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition).

[15] Jeremy Bentham, *An Introduction to the Principles and Morals and Legisaltion* (1978) ch XVII Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 29; Tom Campbell, *The Legal Theory of Ethical Positivism* (1996) ch1.

[16] *Province of Jurisprudence Determined* (J Murray, London, 1832) 113; *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'Bentham, Jeremy' (def 1).

[17] Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 29.

[18] *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'Austin, John' (def 1).

[19] John Austin, *Province of Jurisprudence Determined* (J Murray, London, 1832) 7.

[20] Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 34, 44.

[21] Ibid 33.

viewed the law as a unique phenomenon emphasising the role of sanctions.[22] Finally, prominent Oxford University Professor Hart gave much criticism and sought to provide a simple contention of a theory of descriptive ethnography and comprehensive jurisprudence.[23]

# V ORIGINAL SOURCES

Austin's book *The Province of Jurisprudence Determined* (1832) and *The Philosophy of Positive Law* (1863) influenced jurisprudence's view and development in the British legal positivism field.[24] According to Austin's taxonomy of law, morals are properly so-called laws that it is a species of command based on authority set by humans by the sovereign is positive law, often called the command theory of law.[25] Austin asserted: '[t]he science of jurisprudence … is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness'.[26] He reasoned that the mere existence of legal regulations drives people to follow them rather than feeling compelled to do so.[27] Furthermore, according to Austin, political sovereignty, command, and sanction are the three parts of this law system.[28] Austin argues 'that the main distinguishing feature of positive law is the command of [the] sovereign'.[29] As a result, Austin argued against traditional 'natural law' approaches, believing that ties between law and morality were unnecessary.[30] The English legal thinker whose legal positivism theory and analytical jurisprudence affected British and American law after death.[31] However, Austin's command theory has been heavily criticised since its debut, most notably by Austin's former student Hart.

# VI RULE OF SOVEREIGN

According to Austin, the sovereign 'is a determinate human superior' that 'may consist of a single person, as in an absolute monarchy, or a group of persons'.[32] For Austin, the sovereign is distinguished because community members are generally obedient to mandates, and the sovereign is founded on the fear of sanctions.[33] Austin defines *law* as 'a command issued by a

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[22] Ibid 34, 44.

[23] Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 44.

[24] *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'Austin, John' (def 1).

[25] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 3rd ed, 2017) 40; John Austin, *Province of Jurisprudence Determined* (J Murray, London, 1832) 33, 106, 109.

[26] *Province of Jurisprudence Determined* (J Murray, London, 1832) 112.

[27] John Austin, *Province of Jurisprudence Determined* (J Murray, London, 1832) 117-18; Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 3rd ed, 2017) 41.

[28] *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'coercive theory of law' (def 1).

[29] John Austin, *Province of Jurisprudence Determined* (J Murray, London, 1832) 34.

[30] Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 33.

[31] Ibid.

[32] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 3rd ed, 2017) 41, John Austin, *Province of Jurisprudence Determined* (J Murray, London, 1832) 166.

[33] John Austin, *Province of Jurisprudence Determined* (J Murray, London, 1832) 34.

sovereign and backed by a sanction' whose unlimited power cannot be legally limited.[34] In Austin's view, a law is a command 'which obliges a person or persons to a course of conduct'.[35] Further, he also claims that the primary distinguishing aspect of positive law is the command of a sovereign.[36] While Austin's definition of sovereignty is convoluted, to say the least, he believes the sovereign has the following five characteristics: (a) a determined human superior; (b) most people instinctively obey the sovereign; (c) the sovereign does not instinctively obey any other human; (d) the sovereign's power is illimitable; and (e) the sovereign is indivisible.[37] Furthermore, Austin's concept of sovereignty presents challenges to persons who live in federations and for whom no single institution can be regarded as an indivisible or illimitable sovereign.[38]

# VII CRITICISM

In *The Concept of Law*, Hart sharply criticises Austin's command theory, founded on the presence of a sovereign commander whose authority is limitless and cannot be lawfully constrained.[39] Austin's command-based and excessively restricted definition of law, the function of sanctions in motivating legal compliance without considering all areas of law, and the sovereign having illimitable power within its jurisdiction are all issues that Hart challenges. In addition, the notion of an indivisible sovereign does not include considerate federations, British sovereigns including royal succession, separation of powers, or a guide to laws that empower or enable. According to Hart, Austin's command theory is supported by threats; Austin's sovereign could be likened to a gunman, backed by threats, directing its subjects to comply with its commands or face sanctions.[40] Consequently, Austin's theory has dramatically diminished and fallen into disrepute, although he is still widely studied for its influence on later authors.[41] In addition, Austin fails to consider morality; laws' persistence places a legal limitation on the sovereign.[42] Hart's problems with Austin are the sovereign and the succession of sovereigns.[43]

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[34] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 3rd ed, 2017) 41.

[35] John Austin, *Province of Jurisprudence Determined* (J Murray, London, 1832) 17.

[36] Ibid 39.

[37] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 3rd ed, 2017) 42-6.

[38] John Austin, *Province of Jurisprudence Determined* (J Murray, London, 1832) 33.

[39] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 3rd ed, 2017) 42-6.

[40] HLA Hart, *The Concept of Law* (2nd ed, 1994) pp 19-20.

[41] John Austin, *Province of Jurisprudence Determined* (J Murray, London, 1832) 34.

[42] HLA Hart, (1958) *Positivism and the Separation of Laws and Morals*, (Harvard Law Review, 71), 593-629.

[43] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 3rd ed, 2017) 52–65.

# VIII HLA HART'S THE CONCEPT OF LAW

Hart is regarded as the most prominent thinker of the twentieth century and the primary figure in contemporary legal positivism.[44] Hart instead looked at the relationship between recognition, change, and adjudication rules, as well as the relationship between primary rules that impose responsibilities and secondary rules that provide powers.[45] Hart was concerned with defining law in a way that considers the diversity of legal principles, including those that impose duties and those that bestow authority.[46] In addition, Hart's version of soft positivism tries to explain why people regard laws as binding, which is a step forwards from Austin's emphasis on sanctions. He reasoned that the mere existence of legal regulations drives people to follow them rather than feeling compelled to do so.[47] According to Crowe, 'Hart draws a distinguishing between being obliged (may be obliged) to something and having an obligation (I had an obligation)'.[48] Hart maps out social rules as being rules, or games or obligation rules.[49] Once rules are established, he touches on morality and law, dividing law into primary and secondary rules.[50] Then, he demonstrates change rules, adjudication rules, and recognition within secondary rules.[51]

# IX COMMENTARY

Fuller's 'The Case of the Speluncean Explorers' is a legal philosophy dilemma that offers insight into jurisprudence surrounding the correlation between law and morals.[52] While the original convictions are upheld, and the men are sentenced to death, five possible solutions in judicial opinions are attributed to judges sitting on the imaginary court in a fictional decision.[53] Two judges uphold the convictions that emphasise the importance of the separation of powers

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[44] *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'Hart, Herbert Lionel Adolphus' (def 1); *Conceptions of HLA Hart* [2006] NZLJ 3.

[45] *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'Hart, Herbert Lionel Adolphus' (def 1).

[46] Joseph Raz, *The Authority of law* (1979) 45-52; H L A Hart, *The Concept of Law (*2nd ed, 1994) 250-254; Nicola Lacey, A *Life of H L A Hart: The Nightmare and the Noble Dream* (Oxford: Oxford University Press, 2004) 318.

[47] Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2009) 46.

[48] Ibid.

[49] HLA Hart, (1883) *Essays in Jurisprudence and Philosophy*, (Oxford University Press), 309; Leslie, Green, 'Jurisprudence for Foxes' *Oxford Legal Studies Research Paper* No. 22 (2012) 36.

[50] HLA Hart, (1883) *Essays in Jurisprudence and Philosophy*, (Oxford University Press), 309.

[51] Ibid.

[52] Lon Fuller, 'The Case of the Speluncean Explorers' (1949) 62(4) *Harvard Law Review* 629.

[53] Ibid 645.

and a precise interpretation of statutes.[54] In contrast, two other judges overturn the convictions, relying on common sense and public will.[55] On the other hand, the other emphasises the purposive approach using arguments from the natural law tradition.[56] Finally, a fifth judge recuses himself because he cannot decide.[57] While the original convictions were upheld, and the men were sentenced to death, the fictional case highlights that law and morals *can* and should be sharply distinguished, meaning law should not be enforceable by morals as per the agreeance of Hart.[58]

Further commentary by Aroney and Allan discusses the nationwide distribution of powers cases throughout the last century. They submit: 'disputes will fall into what the noted Oxford legal philosopher H L A Hart termed "the penumbra of doubt" or "the penumbra of uncertainty", when discussing Hart's 'uncommon law' as a parody common law. The article highlights how prominent Hart's theories remain in contemporary jurisprudence; Austin's ideas could not account for all law systems, such as federations.[59]

# X CONCLUSION

On the whole, Austin's work had a lasting impact on the study of jurisprudence by providing a command-based legal theory;[60] however, Hart's legal positivism is a preferable way of thinking about law. While not without its merit, Austin's rule of the sovereign provided a basis for a legal positivist theorist to expand, improve and change. On the other hand, Hart's soft positivism opposed Austin's emphasis on law and coercion or law and morality.[61] In conclusion, this research essay has illustrated that while Austin's command theory influenced the legal positivism influence in the field, his idea of a sovereign and having obedience that people must follow out of fear was challenged and criticised by Hart.

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[54] Ibid 627–628.

[55] Ibid 628–629.

[56] Ibid 637.

[57] Lon L Fuller, *The Morality of Law* (Yale, revised ed, 1969) 145-51.

[58] *Conceptions of HLA Hart* [2006] NZLJ 3.

[59] Nicholas Aroney and James Allan, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 1; Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 661-69.

[60] Tiverios, NA 'A restatement of relief against contractual penalties (I): Underlying principles in equity and at common law' (2017) *Journal of Equity* 11 (1) 7.

[61] *Encyclopaedic Australian Legal Dictionary* (online at 1 January 2022) 'Hart, Herbert Lionel Adolphus' (def 1).

# LIBERALISM, RIGHTS AND THE ROLE THEY PLAY IN INTERNATIONAL LAW

JAIDYN PAROZ[1]

## I INTRODUCTION

Throughout time, the jurisprudential theory of liberalism has played an important role in the development of international law. Liberalism and its focus on individual liberties and basic rights has led to the creation of many important international law treaties and documents such as the *United Nations Declaration of Human Rights* ('UNDHR') which, in turn, has resulted in the creation and enshrinement of more fundamental rights for all human beings under international law.[2] Therefore, it can be argued that liberalism played an important role in the development of rights in international law. This role has included expanding the number of rights enshrined to human beings at an international level and has contributed to the growth of international law.[3] This claim is despite many suggesting that liberalism has been ineffective in developing crucial rights and others suggesting that liberalism has gone too far in its protection of certain rights such as vilification.[4]

## II THE LEGAL THEORY OF LIBERALISM

The theory of liberalism is a school of legal thought based around upon morals and legal integrity that recognises the importance of individual liberty and rights that members of society hold.[5] There are several well-known figures that contributed to this theory including Ronald Dworkin, John Rawls and Robert Nozick with each philosopher contributing different elements to the philosophy.[6] Dworkin is best known for his work in his book, *Law's Empire* in which his philosophy of law is be established.[7] Within his works, Dworkin rejected other's attempts to define the law to a simple definition based purely on statutes and written rules but instead suggested that the law is derived from a constructive interpretation based upon the past history of a particular societies legal system.[8] Dworkin suggested that the law should be based on

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[1] This paper was originally submitted as assessment for the subject *LAW2224 Theories of Law*.

[2] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

[3] Anne-Marie Slaughter, 'International Law in the World of Liberal States' (1995) 6(3) *European Journal of International Law* 503, 504.

[4] Marcus O'Donnell, 'Hate Speech, Freedom, Rights and Political Cultures: An Analysis of Anti-Vilification Law in the Context of Traditional Freedom of Speech Values and an Emerging International Standard of Human Rights' (2003) 5(1) *University of Sydney Technology Law Review* 23, 24-27.

[5] Duncan Bell, 'What is Liberalism' (2014) 42(6) *Political Theory* 685, 686.

[6] Ibid.

[7] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 1.

[8] Ibid 52.

principles of integrity rather than ad hoc legal systems that are completely reliant on statute law and written rules.[9] He also was quite critical of H L A Hart's theory of legal positivism and derided the theory by implying that there is no strict separation of written laws and morals as Hart suggests.[10] Rather, Dworkin states that the two are intertwined as indicated in his constructive interpretation theory as the law should regard the particular morals of a society.[11] John Rawls, another liberalist, created the liberalist theory of justice as fairness.[12] This theory concerns the general concept of justice as a whole and is defined by Rawls as egalitarian in nature.[13] Within this theory, Rawls developed two principles of justice that need to be respected to ensure a fair and well balanced society with the first principle based concerning that all people should be entitled to their basic rights and the second concerning social and economic inequalities and how they should not arise and that.[14] Robert Nozick, also a liberalist philosopher, developed the entitlement theory of justice which centres on social contracts between a state and its people and the inalienable natural rights members of a state have.[15] Nozick argued that a minimalist state is the best form of government for the people and ensures the protection of their rights from the 'force, fraud, theft, and administering courts of law'.[16] He also strongly challenged Rawl's second principles of justice in his work.[17] Despite the different developed philosophies within the school of thought, it is important to consider that in all philosophies, liberalism centres on the premise of individual rights and liberties of members of a society.

## III RIGHTS

Rights are the inherent basic social, political, and ethical freedoms that all people should have and to deprive people of these rights would be cruel and immoral.[18] Examples of basic rights are the rights to food, water and adequate clothing and shelter with more complex rights being the right to freedom of religion, the right to freedom of information and the right to freedom of speech.[19] Many different philosophers and schools of thought debate over whether human beings are naturally entitled to these fundamental rights or whether rights are given to members of society by written laws and legislation, a government or a divine figure such as God.[20]

[9] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 183.

[10] Dworkin (n 7) 73.

[11] Dworkin (n 7) 98.

[12] John Rawls, *A Theory of Justice* (Belknap Press, 1971) 82.

[13] Ibid.

[14] John Rawls, *Political Liberalism* (Columbia University Press, 1997) 5-6, 291.

[15] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 61-63.

[16] Ibid 33.

[17] Ibid 70-83.

[18] William A. Edmundson, *An Introduction to Rights* (Columbia University Press, 3rd edition, 2004) 3.

[19] Alberto Qunitavalla, 'Priorities and Human Rights' (2019) 23(4) *The International Journal of Human Rights* 679, 680-690.

[20] Edmundson (n 18) 9.

Theories of law that are based around written rules generally tend to be theories that fall into the latter category with naturalistic principal theories falling into the former. The debate can further be divided into whether more complex rights fit within the context of a fundamental necessity or rather a privilege with certain states around the globe regularly denying their citizens certain rights based around this belief.[21] The theory of legal positivism is one such theory which relies upon written laws to govern society and those in the positivist belief believe that human rights are given to state citizens by the written rules and are not inalienable.[22] In comparison, the legal theory of liberalism recognises these basic rights are inalienable and are automatically given to humans with the theory placing high importance on these valuable liberties.[23] Rights are therefore, fundamental necessities that under the theory of legal liberalism, are inalienable meaning people should not be denied or be deprived of and to do so would be unethical and immoral.

# IV INTERNATIONAL LAW

The development of liberalism as a theory has contributed greatly to the system that is international law and has played an important role in enshrining and protecting basic rights in international law. The legal theory has resulted in the enshrinement of fundamental human rights at an international law level, replacing the previous belief held by many especially legal positivists that rights were only granted onto citizens by the statute they lived.[24] Pre-legal liberalism, the predominate theories of law that existed at an international level were theories that believed that rights were only given to citizens of a state by its government with these rights being strictly laid out in written law.[25] This lead to a very ineffective system which collapsed several times during times of war.[26] The development of legal liberalism challenged this belief system.[27] Liberalism was very present within the United Nations which is one of the most influential international law-making bodies, leading to the creation of the UNDHR in 1948. This document is one of the most well-known international law treaties its main purpose is to ensure that all huma beings are entitled to fundamental human rights under international law.[28] Liberalism is clearly present in the text of article 1 which reads as:[29]

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[21] Edmundson (n 18) 11.

[22] Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (UCL Press, 2004) 179.

[23] Bell (n 5) 685.

[24] Makau Mutua, 'The Ideology of Human Rights' (1995) 36(3) *Virginia Journal of International Law* 589, 589-591.

[25] Ignacio de la Rasilla, 'A Very Short History of International Law Journals' (2018) 29(1) *European Journal of International Law* 137, 144-150.

[26] Ibid 150.

[27] Ibid 151.

[28] John P. Humphrey, 'The Universal Declaration of Human Rights' (1949) 4(4) *Canada's Journal of Global Policy Analysis* 351, 351-361.

[29] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), art 1.

> *'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'*

This article acknowledges that all human beings are equal and are all entitled to basic rights and deserve to be treated as such which is built upon the theory of liberalism which focuses on individual liberties and rights.[30] In terms of its importance in international law, this article recognises people's inalienable human rights and clearly demonstrates the liberalist philosophy rather than the legal positivist belief which conveys rights as being granted only being only granted to citizens by their sovereign state.[31] The presence of liberalism in this first article is symbolic of its role of the declaration in general which was to enshrine fundamental human rights in an international law document.[32] Since the creation of the UNDHR, liberalism has continued to play an important role in international law and has resulted of the implementation and protect of other rights by resulting in the creation of other important international treaties such as *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.[33] Therefore, liberalism has played an important role in international law since the creation of the UNDHR and has led to the implementation of fundamental inalienable human rights in international law, meaning that many people from varying states from all over the world will have their rights protected under international law.

# V CRITIQUES

There are many within the international legal sphere who believe that liberalism has not helped in effectively developing rights.[34] This is due to the fact that while some rights are protected under the UNDHR, not all countries are signed up to this important treaty and suggest that rights need to be crucially protected in further documents.[35] On the other side of the spectrum, there are some who suggest that liberalism has gone too far in its pursuit to protect certain rights at an international level resulting in an infringement of others such as vilification and the right to freedom of speech.[36] As such, these philosophers suggest that liberalism take a more classic liberal approach and have a fewer number of core human rights that are completely focused on rather than larger extensive lists that are easily violated such as some rights protected under the UNDHR.[37] Despite many having differing opinions on the effectiveness of

[30] Ibid.

[31] Bell (n 5) 685.

[32] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948), art 1.

[33] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[34] Brian Z. Tamanaha, 'The Dark Side of the Relationship between the Rule of Law and Liberalism' (2007) *NYU Journal of Law and Liberty* 516, 516-519.

[35] Ibid.

[36] Qunitavalla (n 17) 683.

[37] Monique Deveaux, 'Normative liberal theory and the bifurcation of human rights' (2009) 2(3) *Ethics and Global Politics* 171, 171-174.

liberalism and its protection of rights in international law, it is clear to see that liberalism has an important role in the development and protection of rights in the international legal sphere.

# VI CONCLUSION

Liberalism as a theory of law has played a vital role in the development of rights in international law. This has led to the enshrining of fundamental rights in documents such as the UNDHR with the legacy of liberalism living on in these important documents and treaties. While some may contradict this belief stating that liberalism has been ineffective and others may claim that it has gone too far, it can clearly be seen that liberalism has caused a massive development in the implementation of fundamental rights at an international level and will likely continue to play a role in the protection of rights and freedoms in future.

# THE HIGH COURT OF AUSTRALIA'S JURISPRUDENCE UNDERMINES THE CONSTITUTION

PATRICIA RIDDLE[1]

A constitution reflects the rule of law.[2] However, it is not the source of law but the consequences of the rights of the individuals defined and enforced by the courts.[3] In this way, constitutional law is special, it is not constrained by precedent as other statutes might be[4] but wholly subject to the preferences and capabilities of the judicial members.[5] The jurisprudence of Australia's High Court has been described as eclectic[6] and has undermined the Constitution of Australia by gradually lessening its effectiveness and balance of power between the States and the Commonwealth.

## I CONSTITUTION

The prevailing constitution was passed into law by the British Parliament in 1900 and thus began Australia's constitutional jurisprudence.[7] In 1901 Australia officially became a federation.[8] The six self-governing colonies handed over some power to a centralised government in order to deal with matters more efficiently such as immigration and free trade.[9] Federation means forming a centralised government while maintaining some internal autonomy.[10] Draft constitutions were written, debated, and eventually voted on. After voting success, the Federation of Australia was formed with Western Australia to join later. The Constitution is a brief document, that includes how the new federal government powers would be conferred, separated, and kept in check.[11]

What was not included was how it was to be interpreted. In their article, Nicholas Aroney and James Allan identified two ways a constitution could be understood; the first is as an

[1] This paper was originally submitted as assessment for the subject *LAW2224 Theories of Law*.

[2] Roger Michener and A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund Incorporated, 8th ed, 1982) 114.

[3] Ibid 115.

[4] *Queensland v Commonwealth* (1977) 139 CLR 585, 610.

[5] Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111(2) *Ethics* 278, 281.

[6] G F K Santow, 'Aspects of Judicial Restraint' (1995) 13 *Australian Bar Review* 116, 116.

[7] 'Australia's Federation' *Parliamentary Education Office* (Web Page 15 Jun 2022) https://peo.gov.au/understand-our-parliament/history-of-parliament/federation/australias-federation/.

[8] Ibid.

[9] Ibid.

[10] *Australian Law Dictionary* (3rd ed, 2017) 'federation'.

[11] *Australian Constitution*.

enumerated list of defined rights, a "locking things in" type of constitution.[12] The second is as a statement of our most important values, setting out guidelines that are to be updated and altered as our society grows and develops.[13]

To assist interpretation Parliament introduced various rules and doctrines.[14] Rules may be introduced by parliament and considered the heartland of the law but using them to create a coherent legal system is the Judge's role.[15] Judges use all their individual training, experience, knowledge, and bias to do this[16] but the law is more than just rules. Interpretations of statutes should take into context the complexities and totality of society.[17] They should be given contemporary not historical meaning.[18] Unsurprisingly then, the Constitution has been described as "constantly evolving"[19] and the law with it. It is always in flux[20] but also predictable.[21] Lawyers engage in the predictions of law to provide better certainty of potential outcomes to their clients,[22] relying on past cases and legal doctrines guide them. Therefore, all law is speculation until a judgement is made.[23] The Judges consider these rules and what would be just and deliver a balance between certainty and justice.[24]

# II AUSTRALIAN HIGH COURT'S JURISPRUDENCE

'Judges do not cease to be human because they wield a gravel.'[25] Karl Llewellyn discussed a Grand Style of judicial opinion writing, of using their own logic and experience to move the law ahead, as opposed to Formal style where judges attempt to use empirical formulas to show their reasoning.[26] By utilising Llewellyn's grand style of writing, the High Court has extended

[12] James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30(2) *Sydney Law Review* (2008) 245, 247.

[13] Ibid 249.

[14] *Acts Interpretation Act 1901* (Cth) ('*AIA'*).

[15] Karl Llewellyn, *Bramble Bush: Some Lectures on Law and Its Study* (Oxford University Press, 2008) 5 ('*Bramble Bush').*

[16] Ibid 31.

[17] W Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson, 1973) 382.

[18] BM Selway 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14(4) *Public Law Review* 234, 241.

[19] *Al-Kateb v Godwin* (2004) 219 CLR 562, 623.

[20] Llewellyn, *Bramble Bush* (n 15) 108.

[21] Anthony D'Amato, 'The Limits of Legal Realism' (1978) 87 *Yale Law Journal* 468, 471.

[22] Leiter (n 5) 281.

[23] D'Amato (n 21) 478.

[24] Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 111.

[25] Llewellyn, *Bramble Bush* (n 15) 31.

[26] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown, 1960) 36 ('*Common Law Tradition').*

the power of the Federal Government.[27] The following case studies regarding the extension of the 'external affairs'[28] power will demonstrate this.

The prescribed method of interpretation, the purposive approach, considers the enactor's intentions.[29] Meaning the intent of the Executive and therefore the reasons a statute was enacted are relevant considerations for judges.[30] While contemporary statute interpretations adopted this approach, constitutional interpretations remain literalist.[31] The problem with literalism is, unlike regular statutes, constitutions are meant to endure.[32] The level of detail contained in regular statute compared with the broad, less specific language of the Constitution means that it doesn't lend itself to literalist interpretations.[33] There is just not much there to interpret.

Each new Chief Justice has brought their own values, experience, and interpretation style to their judicial opinion writing. This is especially evident through the judgements of the external affairs, and trade and commerce powers, amongst others.[34] In the 1900's, state powers were favoured over the Commonwealth,[35] compared with current very wide interpretations that have allowed the Federal Government access to areas of law previously inaccessible to them.[36] The first court, led by Griffiths CJ maintained the doctrine of reserved state powers.[37] However, by 1920, this idea had been left behind.[38] Isaacs and Higgins JJ finally liberated, Griffith majority were able to interpret the Constitution within their own idiosyncrasies after years of opposition.[39]

Moving forward, we see the contrast between the strict legalism of the Dixon court and the judicial activism of the Mason court.[40] The Dixon court favoured a far more gradual and considered approach.[41] Judges of this era were far less interested in fortifying the Constitution

[27] Allan and Aroney (n 12) 246.

[28] *Australian Constitution* s 51(xxix).

[29] *'AIA'* (n 14) s 15AA-AB.

[30] Dan Meagher, "The Times are They A-Changin'? — Can the Commonwealth Parliament Legislate for Same Sex Marriages?" (2003) 17 *Australian Journal of Family Law* 134,150.

[31] Allan and Aroney (n 12) 252.

[32] *Australian National Airways Pty Ltd v Commonwealth (No 1)* (1945) 71 CLR 29, 81 ('*ANA'*).

[33] Allan and Aroney (n 12) 253.

[34] *Australian Constitution* s 51(xxix).

[35] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 ('*Haddart'*).

[36] Allan and Aroney (n 12) 247.

[37] *Huddart* (n 35).

[38] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' case'*).

[39] Allan and Aroney (n 12) 272.

[40] Michael McHugh, 'The Constitutional Jurisprudence of the High Court' (2008) 30(1) *Sydney Law Review* 5, 19.

[41] Meagher (n 30) 150.

than developing strict legal formulas,[42] owing to the fact that during this period there was intensifying conflict between the States and the Commonwealth.[43] Dixon J was conscious that the judiciary should maintain a clear separation from the Executive function to be seen as an effective arbitrator of these disputes.[44] The Mason court was a stark contrast to this philosophy, openly confirming the law-making role of the court.[45] That court is regarded as the most judicially progressive in Australian history.[46] Mason J stated that where the Constitution is not compelling, the court should look to social interest, values, and policies to know what needs to be done in modern Australia.[47] This is very reminiscent of the Grand style of writing championed by Karl Llewelyn.[48] A style that is associated with being described as judicial activism.[49]

Previous judiciary members often criticised this judicial activism as undemocratic because it removes the control of public policy from the community and places it in the hands of the unelected judiciary.[50] These claims while technically true are erroneous. It is far less outrageous than Barwick J implies when we consider the level of experience and legal knowledge required to be appointed as a member of the judiciary. The constitution is silent on specific qualifications; however, in reality, we now have various acts that mandate requirements.[51] Therefore, despite being unelected, members of the High Court bring a wealth of experience and education of the law to their judgements. The reverse might be said for the Executive who are responsible for making the laws, where no formal education or legal knowledge is required by the Constitution, only that they are elected, and not disqualified, [52] and yet this is not considered problematic. By utilising Llewellyn's Grand Style and writing with a clear vision for Australia's future,[53] the High Court extended the power of the Federal Government.[54] The following case studies show the progression and preferences of the High Court when interpreting the external affairs power.

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[42] McHugh (n 40) 6.

[43] Santow (n 6) 118.

[44] Ibid 118.

[45] Ibid 118.

[46] Ibid 120.

[47] McHugh (n 40) 9.

[48] Llewellyn, '*Common Law Tradition*' (n 30) 36.

[49] Garfield Barwick, 'Parliamentary Democracy in Australia' (1995) 25(1) *University of Western Australia Law Review* 21, 29.

[50] Ibid 25.

[51] *High Court of Australia Act 1979* (Cth) s 7.

[52] *Australian Constitution* s 44.

[53] McHugh (n 40) 12.

[54] Allan and Aroney (n 12) 294.

To begin with, the external affairs power was thought to mean matters that are of international character,[55] however after the decision of *Commonwealth v Tasmania*,[56] statutes passed under the external affairs power are valid as long as they give effect to a bona fide treaty, whether it imposes an obligation on Australia or not.[57]

## III KOOWARTA

The minority, consisting of Gibbs, Aickin, and Wilson JJ read the external affairs power narrowly.[58] They were concerned that reading it too widely would upset the balance of power between the States and Commonwealth.[59] Mason, Murphy, and Brennan JJ took the wide view, saying that the mere existence of treaty means it's an external affair.[60] Stephen J having the deciding vote agreed with wide view but narrowed it down by asking if the treaty needed to be of international concern.[61]

Even though there's a prescribed purposive approach and precedent, although not binding on Constitutional cases, the court modified the definition of external affairs despite common law saying otherwise.[62] The *Koowarta* decisions paved the way for the government to expand their reach even further.

## IV TASMANIAN DAMS

The Tasmanian State Government planned to build a hydroelectric scheme which would require the damming of Franklin below Gordon River in South-West Tasmania.[63] The Federal Government blocked the dam from being built because of an obligation arising from the international treaty, given effect by domestic statute.[64] The court held the law was valid because it gives effect to an international treaty whether an obligations arises out of the treaty or not.[65] This provided the Federal Government with an extremely wide constitutional power,[66] with

[55] *R V Burgess; Ex Parte Henry* (1936) 55 CLR 608.

[56] (1983) 158 CLR 1.

[57] *Commonwealth v Tasmania* (1983) 158 CLR 1, 5 ('*Tasmanian Dams'*).

[58] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 198, 153, 244 ('*Koowarta'*).

[59] *Koowarta* (n 58).

[60] Ibid 231, 237, 260.

[61] Ibid 217.

[62] D'Amato (n 21) 478.

[63] *Tasmanian Dams* (n 57).

[64] Ibid 4.

[65] Ibid 5.

[66] *Tasmanian Dams* (n 57).

Gibbs CJ stating the external affairs power is different to other powers mentioned in section 51,[67] because of its capacity for almost unlimited expansion.[68]

# V UNDERMINING THE AUSTRALIAN CONSTITUTION

The High Court's jurisprudence undermines the Constitution. The expansion of the External Affairs power,[69] and the loss of the reserved state powers doctrine,[70] have slowly eroded away the concepts of federation that the Constitution was built on. The States have been weakened beyond recognition by the expansion of constitutional powers.[71] States are unable to pass conflicting laws as inconsistencies with Commonwealth are held as invalid.[72] The Commonwealth passed several income tax statutes after World War II resulting in States being excluded from collecting income tax and charging excise.[73] Unable to raise enough funds on their own, the States must ask for funds via grants which the Commonwealth may add any condition onto.[74] This financial crippling also allows the Commonwealth to expand its influence into areas not available under a head of power, further undermining of the fundamental purpose of the Constitution: federation and the States' internal autonomy.

This is not a criticism of what the High Court has done, it simply confirms that it is what judges do, that makes the law. Undeniably, the judgements in *Koowarta*[75] and *Tasmanian Dams*[76] were beneficial to Australia's progress, but the ongoing effect is judges regularly re-examin legal concepts, and if the reason stops so too does the rule.[77] Past decisions by the courts are not wrong, they are just a product of external developments that impacted the court's decision.[78] This is what law is.[79] It would be a futile exercise to continuously shove the facts of today into the precedents of the early 1900's, or worse, attempt to consolidate contemporary case facts with the purpose of the writers of pre-federation Australia.

[67] *Australian Constitution* s 51.

[68] *Tasmanian Dams* (n 57) 100.

[69] *Tasmanian Dams* (n 57).

[70] *Engineers' case* (n 38).

[71] Allan and Aroney (n 12) 247.

[72] *Australian Constitution* s 109.

[73] Allan and Aroney (n 12) 247.

[74] *Australian Constitution* s 96.

[75] *Koowarta* (n 58).

[76] *Tasmanian Dams* (n 57).

[77] Llewellyn, *Bramble Bush* (n 15) 69.

[78] *Victoria v The Commonwealth* (1971) 122 CLR 353, 396.

[79] Llewellyn, *Bramble Bush* (n 15) 5.

# VI CONCLUSION

The Constitution is meant to endure,[80] that is its purpose. The law cannot sit stagnant, lest it ossify and become obsolete just as medieval writ. The law must be sturdy enough to provide order and comfort but fluid enough to stay relevant to the facts of the cases as years pass. The High court has achieved this by using broad general terms to accommodate the varying conditions and developments in our communities.[81]

[80] *ANA* (n 32) 81.

[81] *Jumbunna Coal Mine NL v Victorian Coal Miners' Assn* (1908) 6 CLR 309, 367.

# "MY EXPERIENCE OF COURTS IS YOU NEVER CAN TELL WHAT THEY'RE GOING TO DO."

NEIL MAHONEY[1]

## I INTRODUCTION

The titular declaration by John Mortimer's character, Terry Keegan, the protagonist's boyfriend, in his novel *Quite Honestly*,[2] is a satirical cry, complaining that the courts are unreliable, and unpredictable in decision making. Other authors have declaimed the courts, criticising the operation of the law courts, notably Dickens' *Jarndyce and Jarndyce*.[3]

One of the factors that allows the Common Law to be an effective judicial system, is the tenet of precedent, where past decisions lay foundations for future decisions.[4] This ordinarily means that there is, at some level, certainty in the outcome of court proceedings based on decisions previously made in matters of similar fact.[5]

This is not necessarily the way courts decide in reality, and is one of the essential processes through which Common Law makes progress, as public attitudes change, and new technologies affect potential legal interactions.[6]

Jerome Frank stated:

> I revert to my statement that it oversimplifies to ascribe the difficulty met in predicting a trial judge's decision to the subjectivity of his fact-finding: The subjectivity is more complex; it inheres in his total reaction to the trial. If the judge's own effort logically to explain his decision, after he reaches it, is so baffling because it results from an experience to which
>
> he cannot give complete expression in logical terms, it must also be true that any person other than the judge will seldom be able to know at all accurately, in advance, what the decision will be. For the judge's reaction is unique.[7]

[1] This paper was originally submitted as assessment for the subject *LAW3321 Evidence*.

[2] John Mortimer, *Quite Honestly* (Penguin Group, 2005) 152.

[3] Charles Dickens, *Bleak House* (Bradbury and Evans, 1853).

[4] W Blackstone, *Commentaries on the Laws of England: Of the Rights of Persons (1765) (A Facsimile of the First Edition of 1765-1769, 1979) vol 1* (Oxford University Press, 15th ed, 1982) 32, 69-70.

[5] Ibid.

[6] Oliver Wendell Holmes, 'The Path of Law' (1897) 10(8) *Harvard Law Review* 457, 459-463; Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 3rd ed, 2017) 119-122; Simon N. Verdun-Jones, 'The Jurisprudence of Jerome N. Frank' (1974) 7(2) *Sydney Law Review* 180, 183-186, 191-194, 198-199.

[7] Jerome N. Frank, *Courts on Trial* (Princeton University Press, 1st paperback ed, 1973) 176 ('Frank').

This statement intimates that even without societal change, the outcome of a trial is unable to be known as the reaction of each judge to each matter will be different to a point that outcomes are unable to be predicted accurately.

We discuss the impact that current Australian evidence law has on the predictability of courts, taking into consideration that only some Australian states have adopted the Commonwealth Uniform Evidence Law ('UEL'),[8] which has resulted in legal variation between the states, and between the states and the Commonwealth, in the way evidence is presented and interpreted in a trial setting, and whether evidence is admissible. This causes challenges on appeal, or when a matter crosses jurisdictional boundaries. This is compounded in the way an appeal judge may choose to handle evidence previously admitted.[9] The outcome is that a court case cannot be predicted with any accuracy.

# II IDENTIFICATION EVIDENCE – FORENSICS

The Common Law has been applied as the main source of evidence law, with the benefit that these precedents are virtually identical across all Australian jurisdictions.[10] This however leaves room for procedural justice to be questioned.[11] In *Forbes v The Queen*,[12] forensic evidence alone was used in conviction of the Canberra cycleway sexual assault case and was appealed.[13] The Supreme Court appeal was dismissed, and was appealed to the High Court. Strong DNA evidence had been presented, but without support from other direct evidence. Only circumstantial and propensity evidence was available to support the conviction. Forbes had been identified as perpetrator of sexual assault in similar manner and place, but was not convicted. This left the court to make a ruling solely on the DNA evidence, which showed a strong link with the appellant, this evidence is still a probability.

By contrast, in *R v Button*,[14] an appeal successfully overturned a case decided on DNA evidence, and considered that someone other than the appellant had committed the crime. Justice Williams spoke of the certainty of DNA evidence, acknowledging its importance in establishing a person's guilty or innocence.[15] Further exculpatory DNA evidence was presented during the appeal that had not been identified during the original trial. The trial was plagued

[8] *Evidence Act 1995* (Cth) ('*UEA*').

[9] Frank (n 7).

[10] Standing Committee on Uniform Legislation and Intergovernmental Agreements, Parliament of Western Australia, *Evidence Law* (Eighteenth Report, November 1996) 1.

[11] David Hamer, '21st Century Challenges in Evidence Law' (2011) 33(3) *Sydney Law Review* 325, 329-330 ('Hamer').

[12] [2010] HCAASP 18 ('*Forbes*').

[13] *Forbes v The Queen* [2009] ACTCA 10, [4]-[7].

[14] [2001] QCA 133 ('*Button*').

[15] Ibid.

by conflicting prior statements from the victim and witnesses, and relied heavily on victim testimony, which the DNA evidence was used to support.[16]

This demonstrates the risk of using a single piece of evidence on which to support a conviction,[17] as seen in *R v Gallagher*.[18] In the appeal in *Forbes v The Queen*,[19] direction was taken from an earlier case, *Parker v The Queen*,[20] where the conviction rested solely on fingerprint evidence, and is the only other time in Australian legal history that a case has rested on forensic evidence alone.[21] Forbes' leave to appeal was denied, and the conviction stood. Eventually Forbes successfully appealed,[22] on the basis that it is not possible to prove guilt on DNA evidence alone on the basis of 'beyond reasonable doubt'.[23]

The appellate courts failed to apply the precedent set by *Button*,[24] in *Forbes*,[25] which creates confusion around which cases are significant enough to be used as precedent. The High Court failed to address the question of whether forensic evidence is able to sustain a conviction in the absence of other solid evidence in *Forbes*,[26] which leaves the interpretation and application of forensic evidence open to broad interpretation in subordinate courts, and allows the appellate courts to ignore and override previous decisions by shifting the weight that has been previously applied to evidence.[27]

## III APPLICATIONS OF PROPENSITY EVIDENCE

Another aspect of the *Forbes* case was propensity evidence which was a significant factor in convicting the defendant.[28] Forbes had not been previously convicted, but had been apprehended and charged, but the courts failed to find him guilty, yet this evidence was presented in the trial that resulted in his conviction.[29] This is at odds with precedent set in

[16] Tafadzwa Irvine Nzenza, 'Frank Button — Miscarriage of Justice within Australia' (Medium.com, 29 July 2019) https://medium.com/@taffyirvine_26157/frank-button-miscarriage-of-justice-within-australia-946e873371d2 ('Nzenza').

[17] Marcus Smith & Monique Mann, 'Recent developments in DNA evidence' (2015) 506 *Trends & issues in crime and criminal justice* 1.

[18] [2001] NSWSC 565.

[19] *Forbes* (n 12).

[20] (1912) 14 CLR 681.

[21] Hamer (n 11).

[22] *Forbes v The Queen* [2010] HCATrans 120.

[23] Andrew Ligertwood, 'Can DNA Evidence Alone Convict and Accused?' (2011) 33(3) *Sydney Law Review* 487, 492-493 ('Ligertwood').

[24] *Button* (n 14).

[25] *Forbes* (n 12).

[26] Ibid.

[27] Ligertwood (n 23) 498-502.

[28] *Forbes* (n 12).

[29] Ibid.

*Makin v Attorney General of New South Wales*,[30] where Lord Herschell found as a general rule, evidence of a prior similar event should not be admissible except under exceptional circumstances, and may only be admitted if the probative value outweighs the prejudicial effect.[31]

In *HML v The Queen*,[32] Gleeson CJ disagreed with the decision of Gaudron J in *Gipp v The Queen*,[33] which states that prior uncharged similar acts should be accepted as evidence of general sexual abuse, Gleeson CJ disagreed as this may create a false impression that could colour the assessment of the jury.[34]

The latitude that is provided by terms like, 'exceptional circumstances', and 'probative value outweighing prejudicial effect' may be interpreted in a different way by different judges, as, in according to Frank, interpretation of the evidence, and interpretation of the guiding terms will be made from their own subjective viewpoint.[35] Using the precedent from *Maxwell v DPP*,[36] where the appellant had been charged with a prior similar offence, but was acquitted, it was held by Viscount Sankey LC that the prior charge was not sufficient to be used to establish propensity, and the conviction was quashed as a result. It can be seen that this precedent was not applied in *Forbes*.[37] The High Court in *Pfennig*,[38] have established the approach of a special rule to allow admission of propensity evidence where it can be shown that the accused has a tendency to perform a particular type of act, or behave in a certain way, that has relevance to the facts in issue, and where there is no rational view of the evidence that is consistent with the innocence of the accused.[39] Even with the Pfennig test in place, propensity evidence has opportunity for broad interpretation, and it remains a contentious area of evidence law.[40]

The use of propensity evidence has been enacted in the *Evidence Act 1977* (Qld) ('EA (Qld)'),[41] and the UEL.[42] The EA (Qld) at s 16 states that, in criminal proceedings, witnesses may only be questioned as to whether they have prior convictions for indictable offences,[43] affirming the

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[30] [1894] AC 57 ('*Makin*').

[31] Ibid [65].

[32] *HML v The Queen; SB v The Queen; OAE v The Queen* [2008] HCA 16, [4]-[28] ('*HML v The Queen*').

[33] (1998) 194 CLR 106, [12].

[34] *HML v The Queen* (n 32) [9].

[35] Frank (n 7).

[36] [1935] AC 309 ('*Maxwell*').

[37] *Forbes* (n 12).

[38] (1995) 127 ALR 99.

[39] Ibid [135], [610].

[40] Wendy Harris, 'Propensity Evidence, Similar Facts and the High Court' (1995) 11 *Queensland University of Technology Law Journal* 97, 97-98 ('Harris').

[41] *Evidence Act 1977* (Qld) ss 15(2), 16 ('*EA(Qld)*').

[42] *UEA* (n 8) s 97.

[43] *EA(Qld)* (n 41) s 16.

decision in *Maxwell,*[44] and s 15(2) affirms the decision in *Makin*.[45] As these do not apply in New South Wales, they are not applicable to *Forbes,*[46] and the courts need to rely on Common Law precedent when determining this case. It can be postulated that, if this case was under Queensland jurisdiction, the propensity evidence may not have been admissible as it may not have met statutory requirements.[47] The UEL at ss 97-98 states simply that after giving notice tendency and coincidence evidence may only be admissible where the probative value of the evidence significantly outweighs any prejudicial effect.[48]

In *Ford v Inghams,*[49] admission of testamentary evidence from several witnesses were subject to objection by the respondent, on the grounds the evidence was unfairly prejudicial and misleading, and on relevance and hearsay grounds.[50] Collier J admitted tendency and coincidence evidence demonstrating a workplace culture that increased the likelihood of conduct claimed by the applicant, and meeting requirements laid out in UEL.[51] It was observed the weight of such evidence would need to be assessed against all the evidence admitted in the proceeding. Collier J further summarised the test to be applied in determining the admission of this type of evidence, which rests on the probative value of the evidence.[52] This admission is in line with the decision in *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd*, which decided that similar conduct displayed toward other parties was admissible.[53]

The question of probative value outweighing prejudicial effect remains to be determined by the subjective views of presiding judges. Judges can lean on precedent to assist making correct determinations, but as has been argued, a broad interpretation is available, and accordingly, the enactment of propensity evidence does not adequately provide the level of guidance required to allow accurate predictions of trial outcome.[54] It is observed miscarriage of justice has still occurred under the guidance of statute,[55] where as an example, in *Button*,[56] the fact that the appellant was indigenous and facing an all-white jury was a matter that would have introduced apprehension of bias with investigating police and jurors, and would have prejudicial effect.[57]

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[44] *Maxwell* (n 36).

[45] *Makin* (n 30); *EA(Qld)* (n 41) s 15(2).

[46] *Forbes* (n 12).

[47] *EA(Qld)* (n 41).

[48] *UEA* (n 8) s 97-98.

[49] *Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784 (‘*Ford*’).

[50] Ibid [88]-[109].

[51] *UEA* (n 8) ss 97, 98.

[52] *Ford* (n 49) [142]-[144], [166]-[167].

[53] (1981) 36 ALR 23.

[54] Harris (n 40).

[55] *EA(Qld)* (n 41).

[56] *Button* (n 14).

[57] Russell Goldflam, ‘The White Elephant in the Room: Juries, Jury Arrays and Race’ *Indigenous Law Bulletin*, 7 (26), 35–38; Nzenza (n 15).

Williams JA made little mention of this, but stated '… there are aspects of that investigation which do require some further investigation.'[58]

# IV HEARSAY – COMMON LAW AND STATUTORY CONFLICT

The UEL has provided exceptions to the hearsay rule at s 60.[59] This has extended the application of the hearsay exceptions beyond that of the Common Law operating in Queensland, which only permits use of firsthand hearsay. The UEL may allow the presentation of unreliable evidence due to the wider application.[60] In this situation, there is potential conflict between hearsay evidence admissible between jurisdictions that have adopted the UEL,[61] and those that rely on the Common Law.

In *Pollitt v The Queen*,[62] admission of hearsay evidence was called into question. The original trial judge ruled that some hearsay evidence was admissible, but on appeal was ruled inadmissible, as the original reason the evidence was submitted was to show the state of mind of Allen (deceased at the time of trial) was not relevant to the facts in issue. The appellate bench argued that there should be an exception to the hearsay rule to allow identification of persons during the course of a telephone call.[63] This is seemingly at odds with the decision in *Walton v The Queen*,[64] deciding that hearsay identification of a caller on the other end of the telephone line was inadmissible, as it was deemed that the purpose of the evidence was to prove an asserted fact, the identity of the caller. Mason CJ dissented on the grounds of reliability of evidence, and favoured a less rigorous application of hearsay exclusion.[65]

It is interesting to consider the precedent established by *Subramaniam v Public Prosecutor*,[66] where the Privy Council said:

> It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made.[67]

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[58] *Button* (n 14) 4.

[59] *UEA* (n 8) s 60.

[60] Andrew Hemming, '*Adoption of the Uniform Evidence Legislation: So Far and No Further?*' in Andrew Roberts and Jeremy Gans (ed), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 34, 38-40.

[61] *UEA* (n 8) ss 59-75.

[62] (1992) 174 CLR 558 ('*Pollitt*').

[63] Ibid (Mason CJ, Deane J).

[64] (1989) 166 CLR 283 ('*Walton*').

[65] Ibid [23]-[25].

[66] [1956] 1 WLR 965.

[67] Ibid [970].

This reasoning allowed the accused to present evidence that had been denied at trial. This is similar to the decision that was appealed in *Pollitt v The Queen*,[68] which was reversed in favour of the reasoning in *Walton v The Queen*.[69] It is worth noting that hearsay has many exceptions in the UEL,[70] which complicates the task of interpretation. It is possible to apply slight differences in ratio when evaluating hearsay evidence that may shift it from acceptance to exclusion depending on the subjectivity of the presiding judge.

# V JURY DIRECTIONS

One of the main areas for concern is around requirements for the judge to provide juries with directions in an expanding number of areas, as well as those provided by the UEL.[71] This is to provide warning to jurors regarding the dangers of unreliable evidence and lack of corroboration.[72] In *Pell v The Queen*,[73] the test set out in *M v The Queen*,[74] which states that the court is to make an independent assessment about the quality of the evidence, and whether it would be dangerous in all circumstances to let a guilty verdict stand, was recently affirmed and resulted in the conviction being overturned on appeal.[75] The reason for overturning the conviction was due to the jury misunderstanding the term 'beyond reasonable doubt'.[76]

Similarly in *IW v The Queen* the trial judge did not provide adequate direction to jury, that they were required to choose between the conflicting testimonies of the appellant, who denied claims of wrongdoing, and the Crown witnesses, as to which should be believed. The jury may have been left with incorrect direction, understanding it was only if the appellant was believed that they should have found reasonable doubt.[77] It is suggested that a model direction be provided on onus and burden of proof by the trial judge.[78] Also, in *Azzopardi v The Queen*,[79] the conviction was overturned on appeal as direction was not given to the jury that silence on the part of the appellant should not influence a commission of guilt, but that it is the burden of the prosecution to establish guilt to a standard of 'beyond reasonable doubt.'

[68] *Pollitt* (n 62).

[69] *Walton* (n 64).

[70] *UEA* (n 8) ss 59-75.

[71] Australian Law Reform Commission, *Uniform Evidence Law* (ALRC Report 102, 17 August 2010) [18.18]-[18.28] ('ALRC 102').

[72] Ibid [18.18].

[73] (2020) 94 ALJR 394 ('*Pell*').

[74] (1994) 181 CLR 487, 492-493.

[75] *Pell* (n 73).

[76] Andrew Hemming 'Do Juries Understand the Criminal Standard of Proof of Beyond Reasonable Doubt?' (2021) 30(3) *JJA* 103, 113 ('Hemming').

[77] [2019] NSWCCA 311, [282]-[287].

[78] Hemming (n 76) 119.

[79] [2001] HCA 25, [1], [8]-[11].

The notorious unreliability of identification evidence requires a trial judge to provide direction to the jury to treat such evidence with caution.[80] This was key in the appeal of *Festa v The Queen*,[81] allowing ground for appeal by Gleeson CJ.[82] Overall the appeal was not granted due to the overwhelming weight of other evidence therefore the appeal was dismissed by the majority of the bench.[83] In *IMM v The Queen*,[84] the jury was given direction that if they found the appellant had a sexual interest, and was willing to act on that interest, then that finding could be used to determine the appellants guilt. In this, the trial judge ignored the credibility and reliability of other evidence. As the complainant was the only direct evidence presented by the prosecution, it was ruled by the appellate court that the trial judge failed to correctly assess the probative value of the evidence resulting in a miscarriage of justice.[85]

# VI CONCLUSION

The state of conflicting evidence law in Australia, and the replacement of significant Common Law evidence rules with statutory requirements in only some states, makes the accurate prediction of the outcome of court cases difficult. There are numerous factors influencing the way evidence law is interpreted, the weight that is applied to evidence, and the way evidence may be presented, which in turn makes prediction difficult.

This has the unfortunate outcome of causing miscarriage of justice which, as stated by Williams JA in *Button*:

> This Court can do little so far as compensation to the appellant for the fact that he has had to suffer the ignominy of a conviction for rape which now proves to be entirely false. … no doubt in the small community in which he resided everyone would have been aware of the fact that he had been convicted.[86]

This miscarriage of justice has the potential to cause unnecessary struggles for those receiving an incorrect decision in Australian courts.

[80] ALRC 102 (n 71) [18.27].

[81] [2001] HCA 72, [26].

[82] Ibid [27].

[83] Ibid [28]-[31], [128], [214]-[215], [269].

[84] [2016] HCA 14.

[85] Ibid [3]-[7], [186]-[187].

[86] *Button* (n 14) 4.

# INDIGENOUS SENTENCING COURTS ENLARGE THE DISCRETION OF JUDGES, LAWYERS, AND THERAPISTS DURING THE COURT PROCESS. DISCUSS WHETHER THIS IS EVIDENCE OF A CULTURAL SHIFT FROM THE HISTORICAL 'TRADITIONAL COURT PROCESS' TO THE 'COLLABORATIVE APPROACH' ARGUED BY MICHAEL KING. ARE CULTURAL CONSIDERATIONS IN JUDICIAL DECISION-MAKING BENEFICIAL TO AUSTRALIAN SOCIETY?

ADAM HARTLEY

## I INTRODUCTION

Indigenous Sentencing Courts were established in 1999; these courts have allowed a more contemporary method of Judicial interaction between the offender and the bench. This has allowed all those involved in the sentencing and rehabilitation of offenders to work in a collaborative, holistic manner, transcending into the betterment of society as the judicial decisions can now reflect cultural consideration. This essay will outline how the shift away from the traditional court process to the collaborative approach has made unreserved headway into the path of therapeutic justice and has shed new light on jurisprudence.

## II THE COURTS

Traditional mainstream courts have long focused on resolving legal problems and have measured the resolution's success by sentencing or judgment.[1] Traditionally in a regular courtroom, there is limited interaction between the accused and the judicial officer, with the

[1] Michael King, *'What Can Mainstream Courts Learn from Problem-Solving Courts'* (2007) 32 Alternative Law Journal 91.

majority of the communication being between the judicial officer and counsel.[2] This starkly contrasts the indigenous sentencing courts that have adopted a semi-formal approach. In the formal courts, lawyers filter the community context of the indigenous defendant. This causes the defendant to become disconnected from the community's response to the offending. Thus, the formal courts prevent the indigenous defendant from having their unique conditions understood and applied in sentencing.[3]

The distinction comes from the judicial officer's ability in the Indigenous Sentencing Court to form a rapport with the offender and often make inquiries about their welfare or other matters significant to the offender, such as a birthday or birth of a child.[4] Here, the first step in the therapeutic justice system commences. It allows the judicial officer to show an ethic of care towards the participant; it further shows the judicial officer has taken an interest in the participant.[5] This small but significant step automatically places the participant in an active role in their court process.[6]

# III SENTENCING WITH THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE.

With the introduction of the Indigenous Sentencing Courts, we have seen a shift both in the way the Court is run and the legislative methodologies that have now been passed by respective parliaments to ensure that the courts can achieve a measurable outcome. For example, in Queensland, the *Penalties and Sentences Act*[7] require the judicial officer to take submissions from a recognised elder or respected person.[8] In this respect, the approach of these sentencing courts considers the factors associated with the participant's Aboriginality.[9] This is exemplified in the case of *Neal v R*,[10] whereby Justice Brennan said that in sentencing offenders, the courts should apply the principles of equality to all groups. Still, any relevant factors arising from the offender's membership of an ethnic or racial group should be considered. These thoughts of Justice Brennan are echoed in the Case of *Munugurr v R*,[11]

[2] Ibid.

[3] Thalia Anthony and Will Crawford, *'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality'* (2013) 17(2) Australian Indigenous Law Review 79.

[4] King (n 1).

[5] Ibid.

[6] Ibid.

[7] *Penalties and Sentencing Act* (Qld) 1992 s9 (2)(p).

[8] Mark Harris, *'From Australian Courts to Aboriginal Courts in Australia - Bridging the Gap'* (2004) 16(1) Current Issues in Criminal Justice 26.

[9] Ibid.

[10] *Neal v R* (1982) 149 CLR 305.

[11] *Munugurr v R* (1994) 4 NTLR 63.

where the Northern Territory Court of Criminal Appeal found the 'wishes and views of the community's people are relevant as long as they don't prevail over what is the appropriate penalty.' Again, this highlights the actual change within the seven jurisdictions with Australia. The courts have now taken steps to withdraw from their traditionalist views and embrace the ideology of therapeutic jurisprudence and restorative justice.

The most evident effect of introducing the Indigenous Sentencing Courts is improving Anglo -Australian law and justice. This is achieved by the courts having the ability to access information on the individual's background.[12] The research of Marchetti and Daly has identified how the non-formal courts are proving a form of innovative justice and that these Indigenous Courts bend and change the dominant perspective of "white law."[13]

For all the good that the indigenous sentencing courts are doing in breaking down the barriers and providing more access to justice, the Aboriginal Court process can only represent the Indigenous systems of laws to the extent permitted by the Non-Indigenous Courts.[14]

# IV THE BENEFITS OF THERAPEUTIC JURISPRUDENCE AND RESTORATIVE JUSTICE ON THE COMMUNITY, THE EVALUATION OF INDIGENOUS COURTS.

As stated, Indigenous Sentencing Courts have been around since 1999, and unsurprisingly there has been some evaluation done, although the rigour of the assessments has differed.[15] With this said, the three types of assessment were conducted and used to measure the success of the sentencing courts.[16] The first test evaluated the extent to which the operation of the sentencing courts reflected how the court was intended to operate.[17] For Indigenous Courts, where therapeutic processes are perhaps less central than the formal requirement to pass sentences, this sort of evaluation might involve a consideration of how many offenders have been dealt with, the level of elder participation, and clearance rates.[18] Secondly, the specialist courts are subject to an outcome-based performance evaluation. This assesses the extent to which the court has obtained the goals it was set to achieve instead of the manner used to obtain these

[12] Anthony (n 3) 81.

[13] Ibid.

[14] Harris, (n 8) 35.

[15] Nigel Stobbs and Geraldine Mackenzie, *'Evaluating the Performance of Indigenous Sentencing Courts'* (2009) 13(2) Australian Indigenous Law Review 90 84.

[16] Ibid.

[17] Ibid.

[18] Ibid.

objectives.[19] This sought evaluation returned more quantitative analysis. Thirdly the sentencing courts were assessed on a cost basis focusing on the efficient use of resources.

Generally, all of the sentencing courts in all jurisdictions operate in an environment where law and order politics coupled with low levels of public confidence in the courts treat these innovative courts with scepticism.[20] Unfortunate sceptics and cynics view that the sentencing courts must perform better than the mainstream courts, given the ambitious objectives of restorative justice and therapeutic jurisprudence.[21]

However, with all the scepticism and cynics, there is no doubt that the Indigenous Sentencing Courts have produced an environment in which offenders, their support persons, and elders interact more with the judicial officer than the lawyers. This has facilitated a higher participation rate, and an increase in the participation of the Aboriginal community in the sentencing process.[22]

The essential benefits of a more culturally appropriate sentencing court are well established and have drawn positive commentary. For an indigenous person to face an adversarial court and be held accountable for unlawful behaviour, sometimes even if that conduct is customarily lawful, is confronting and both embarrassing. Furthermore, this experience can be devoid of meaning if there is little understanding of the court and its purpose.[23]

The innovation of these courts allows us to focus more on the therapeutic jurisprudence, which has been an undervalued aspect of how to humanise the law in these courts as it connects us with the emotional and psychological side of the legal process.[24]

# V CULTURAL CONSIDERATIONS

Whilst Indigenous Sentencing Courts are not the same as the restorative justice process; they are an advantageous alternative, especially when it comes to domestic and family violence matters.[25] Indigenous Sentencing Courts are not well equipped to eradicate power imbalances between the offender and victim, it has been found,[26] the courts can address the imbalance of power by 'shaming' the offender in a culturally appropriate manner. This is also bolstered by

[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] Ibid.

[23] Ibid.

[24] David Wexler, *'Therapeutic Jurisprudence: An Overview'* (2000) 17 Thomas M. Cooley Law Review 125.

[25] Elena Marchetti, *'Indigenous Sentencing Courts and Partner Violence: Perspective of Court Practitioners and Elders on Gender Power Imbalances During the Sentence Hearing'* The Australian And New Zealand Journal of Criminology vol 43 2 278.

[26] Ibid.

the use of a culturally relevant authority figure. The use of this respected and relevant figure is more meaningful and humbling than a mainstream court hearing.[27]

The cultural consideration in the Indigenous Sentencing Courts is paramount as to is the adjustment of practices by judicial officers, lawyers, and other participants. This was noted in The Law Reform Commission of Western Australia, where it was said that the change in practices promotes participants' wellbeing; the merits of the intervention programs are only measured by how the outcomes that are achieved are beneficial for the whole community.[28]

# VI THE CULTURAL SHIFT

As previously illustrated, the Indigenous Sentencing Court concept came to inception in 1999. In 2002 the Murri Court program started to operate out of the Brisbane Magistrates Court before expanding to 17 districts across Queensland.[29] However, in 2012 the Queensland government defunded the Murri Court program due to the cost and the failure to reduce recidivism and curb imprisonment.[30] Despite this, the Murri courts have continued to operate in 13 locations under the name 'Indigenous Sentencing List' but informally called Murri Court.[31]

This continuation was conditional that the defendants were required to engage with 'service providers' and 'cultural services.' These services included medical health checks, counselling, drug and alcohol rehabilitation, and employment training.[32] This method of providing justice is the polar opposite of what the mainstream courts offer. Again, this form of justice can be seen as what was previously described as blending and changing the dominance of "white law."

By far, the main benefit of the Murri Court is its provisions within *Penalties and Sentences Act 1992* (Qld), whereby Community Justice Group members can make submissions to the court regarding an Indigenous defendant's relationship with their community, any cultural considerations, along with any recommendations for referrals to services and programs.[33] Thus

[27] Ibid.

[28] Stobbs (n1 5) 90.

[29] Amelia Radke, '*Women's Yarning Circles: A gender-specific bail program in Southeast Queensland Indigenous sentencing court, Australia'* The Australian Journal of Anthropology (2018) 29 54.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

creating further engagement between the offender and the courts which leads to more and more success stories coming from the courts.

However, it can be noted that some people are raising some contentious issues with the running of the Indigenous Sentencing Courts. The way to inspire change is to create it by creating specialist jurisdictions within the existing courts for the sole purpose of dealing with Indigenous offenders.[34] It has been suggested that what is required is Indigenous Sentencing Courts operating within Indigenous communities and convened by Indigenous people themselves, rather than by magistrates or judges from the mainstream courts.[35]

It has further been questioned if alternative legal mechanisms should be established within the cities and towns where Aborigines are entirely subjected to white laws.[36] Those mechanisms should be run by Aborigines and give the Aboriginal person charged with the crime the option of being dealt with by their own people or the white courts.[37] However, the effect of this mechanism has yet to be determined or implemented.

# VII CONCLUSION

This paper has concisely illustrated that the introduction of the Indigenous Sentencing Court throughout Australia, has had a tremendous positive impact on the indigenous community and the broader community. This is due to the Court's ability to break away from the traditional black letter of the law methodology of dispensing justice and embrace a collaborative approach that resonates with the defendant. In this resonation with the defendant, using an individualised application of justice has caused a reduction in recidivism.

This individualised application of justice and the stepping away from traditional methodologies of the court have had the most significant impact on the indigenous communities. More importantly, the positive effects have been felt nationwide by both Indigenous and Non-Indigenous alike

[34] Stobbs (n 28) 91.

[35] Ibid.

[36] Ibid.

[37] Stobbs (n 14) 91.

# SELF-REPRESENTED LITIGANTS: RESOLVING THE PROBLEMS SURRODING SRL

EDDIE FRASER

Self-represented litigants ('SRLs') have been described as one of the most serious problems affecting common law civil courts. This raises the question of how the problem of SRL can be solved. The paper will aim to use the Queensland Uniform Civil Procedure Rules ('UCPR') to illustrate how SRLs may struggle to understand and comply with the required procedures and rules and attempt to draw on a section of the rules which will be redrafted in language with the hope would be more accessible for SRLs whilst providing a sound explanation for the selected strategy. Since SRLs are at a significant disadvantage in the court process from beginning to end and the writer is of the view that for access to justice to be provided to all individuals, more assistance is required for SRLs to navigate through the matters that progress through the Civil Courts.

While SRLs are often labelled as a problematic group seemingly coming from diverse cultural and economic backgrounds, they also share some common traits which assist in identifying an SRL. As a collective group, it is more likely that the population of SRL would be young, unemployed and have lower educational levels than that of the represented litigant.[1] SRLs can be defined by the lack of skills, abilities and lack of knowledge concerning relevant laws that ultimately leads to ignorance of the required issues that are necessary for achieving a resolution of their matter in court.[2] In addition, the lack of familiarity within and outside the court potentially leads to a sense of frustration at the legal system itself and the length of time that the proceedings take to finalise.[3] Whatever the individuals' reason for self-representation may be, the perceived stakes in litigation often mean that SRLs experience a myriad of emotions such as fear, ignorance, frustration, bewilderment and disadvantage. These emotions are likely to be exacerbated especially when appearing against a party who is represented. Subsequent behaviours deriving from such emotions like aggression may become prevalent and should be managed by the judge. Judges should also aim to maintain the balance between the assistance

[1] E Richardson, T Sourdin and N Wallace, *Self-Represented Litigants: Literature Review* (Australian Centre for Justice Innovation, Monash University, 2012) 10-12 [1.4]-[1.11]. http://www.law.monash.edu.au/centres/acji/projects/self-represented-litigants/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf ('Richardson').

[2] Australasian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) http://www.aija.org.au/online/LIPREP1.pdf ('Litigants in Person Management Plans') ('AIJA').

[3] ABC Radio National, 'Self Representing Litigants', *The Law Report*, 1 April 2014 (Elizabeth Pendlebury) http://www.abc.net.au/radionational/programs/lawreport/self-representatives-in-court/5355528.

of a SRL and protecting the represented party from problems that may arise from the SRL's lack of procedural and legal knowledge.[4]

It is estimated that 39 per cent of civil cases in Australia consist of at least one party that is self-represented and that in Queensland Court of Appeal's 2009-2010 report noted that SRLs in the jurisdiction had increased for civil matters.[5] The effects or associated impacts SRLs have included but are not limited to the length of the trial, understanding of practices and procedures of courts, creating lengthy delays and costs for other parties who are represented and the impact of the outcome of cases.[6] These effects would of course have varying effects on civil proceedings. Additionally, an SRL would generally require a greater need for information, support and advice and the process emotionally may vary between feelings of intimidation or preferential treatment.[7] SRLs also incur costs of running their matters which are not recoverable other than legal fees. The likeliness of an SRL to be successful in their claim over that of the represented litigant is not as likely as a represented litigant and matters are more likely to be dismissed, discontinued, or have costs awarded against them.[8]

The effects that SRLs have on judicial officers and registry staff throughout the handling of their matters before the court indicates that these judicial officers and registry staff experience high levels of stress and frustration when dealing with SRLs because they lack legal and procedural knowledge concerning their matters.[9] Additionally, it is reported that the difficulty of holding a fair balance between those SRLs and represented litigants' perceived tensions surrounding judicial impartiality and the need to assist litigants mean that the role of a judge or registrar as a presiding officer was compromised.[10] Questionnaires that were reportedly completed by judicial officers (that of judges, judicial registrars and registrars) noted that 59% of those cases were thought that SRLs were disadvantaged due to being unrepresented and that in 41% of cases the other (represented) party was disadvantaged due to the unrepresented party (or parties) being unrepresented.[11] Further statistics reveal that in only 34% of the cases the SRL participated in proceedings competently and in 73% of the cases, it was noted that the

[4] AIJA (n 2).

[5] Tony Woodyatt, Allira Thompson and Elizabeth Pendlebury,

'Queensland's self-representation service: A model for other courts and tribunals' (2011) *Journal of Judicial Administration* 225, 236 ('Tony').

[6] Tania Sourdin and Nerida Wallace, "The Dilemmas Posed by Self-Represented Litigants – The Dark Side" (2014) 7 *Access to Justice* 32. http://www.civiljustice.info/access/32.

[7] John Dewar, Barry Smith and Cate Banks, *Litigants in Person in the Family Court of Australia – Research Report No 20* (Family Court of Australia, 2000), 1 ('John').

[8] Ibid.

[9] Ibid.

[10] Ibid, 2.

[11] Ibid.

courts, including the judge or registrar and other judicial officers, would have been assisted if one or more of the parties had been represented.[12]

A host of other issues arise with SRLs including increased workload for the court or tribunal to handle the issue of bias or perception of unfairness in the represented party stemming from a perception that SRLs are more likely to get away with non-compliance with orders and directions. Trials involving SRLs take longer than those where parties are represented due to administrative issues of incorrect forms being filled out, incorrect modes of applications, submissions, and requests by way of correspondence and requests for extensions of time and requests for relief wrongly worded or framed.[13]

Some recommendations were made concerning SRLs which include but are not limited to more and better-timed assistance and information for SRLs running their matters, development of clearly articulated policy that is to apply to all Court personnel and judicial officers dealing with the balance required between providing information and providing assistance which guides judicial officers, judges and registrars on a wider range of ethical, procedural, and other matters of importance whilst reflecting best practice principles.[14] The research report also recommended a better coordination at a local level regarding the information on support services (Court networks, duty lawyer schemes or support programs sponsored by community legal centres) relevant to the needs of the SRLs. Additionally, a better coordination and funding of the services requiring management and funding of federal government and legal bodies as well as a more substantive investment in legal aid funding will inevitably have cost-saving results for the court system. Some of these services and support programs will be revisited later in the paper.

It is prudent to ask the age-old question of why people would opt to self-represent if a successful solution is to be ascertained. This question would have produced responses such as the affordability of seeking representation and in certain cases, the value of the dispute is seen to be disproportionate to the legal fees.[15] Other responses include the disenchantment of a person with the legal profession and holding a view that involving a lawyer would only make a more acrimonious dispute rather than the person believing that the dispute could be resolved more amicably.[16] Despite the reasons for litigants to be self-represented the available data on SRLs coupled with the challenges they face and present to the court system and judicial officers should be an indication of collaborative thinking into how and what can be done to tackle these

[12] Ibid, 3.

[13] Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System Research Report* (2004) 15.

[14] John (n 7).

[15] Justice Faulks 'Self-Represented Litigants: Tackling the Challenge' (paper presented at Managing People in Court Conference, National Judicial College of Australia and the Australian National University, February 2013), 5.

[16] Ibid.

challenges and ensure that the proper administration of justice is administered as well as the access to justice provided to all litigants in the matters before the courts.

What is needed in this process is to ensure that SRLs are better equipped to navigate through their matters. In an ideal situation, this will alleviate some of the issues faced by SRLs and those issues and concerns faced by the courts and judicial officers concerning process and procedure, as have been discussed above concerning issues that are faced both by SRLs and Courts. It is evident that an opportunity exists to ensure that all parties in the debate surrounding SRLs can be accommodated. For this paper, the writer has redrafted part 3 of the Uniform Civil Procedure Rules 1999 (Qld)[17] ('UCPR') in the hope that this new wording would assist SRLs when drafting claims, what a claim is and the requirement for a statement to be included about filing a notice of intention to defend the claim as well as the duration and renewal of a claim which are subsequently found in ss 21, 22, 23 and 24 of the UCPR.[18]

| Amended Part 3 |
| --- |
| **21 Application of Part 3**<br><br>**This part of the Uniform Civil Procedure Rules 1999 herein referred to as ('UCPR') applies to claims made in the courts.**<br><br>**22 Claim**<br><br>(1) **A claim must be in the approved form.**<br>(a) **The approved form can be located on** http://www.courts.qld.gov.au/about/forms then select display these forms: UCPR submit and select Form 2.<br>(2) **You, as the plaintiff (person wishing to make the claim), must –**<br>(a) **State as briefly as possible the claim and issues regarding the matter as well as the relief which the plaintiff is seeking from the proceeding; and**<br>(b) **Attach the statement of claim which can be located on http://www.courts.qld.gov.au/about/forms** then select display these forms: UCPR submit and select Form 16; and |

[17] *Uniform Civil Procedure Rules* 1999 (QLD) Part 3.

[18] Ibid.

(c) **For a claim filed in the District Court or a Magistrates Court, show that the court has jurisdiction to decide the claim.**

(d) **The Magistrates Court has jurisdiction for claims for amounts up to $150,000; and**

(i) **A claim and statement of claim can be used to start proceedings for amounts from $150,000 - $700,000 in the District Court: and**

**(ii) A claim and statement of claim can be used to start proceedings for an unlimited amount in the Supreme Court.**

(3) **The claim and statement of claim must be filed at the court registry and a copy served on each of the other parties.**

**(a) The service rules can be found under Section 27 of the UCPR.**

*(4)* **Subrule (3) does not require service on the defendant (the other party or parties) personally if the claim and statement of claim are served in accordance with *the Motor Accident Insurance Act 1994***, the repealed WorkCover Queensland Act 1996 or ***the Workers' Compensation and Rehabilitation Act 2003***.

**23 Claim must include a statement about filing the notice of intention to defend**

**You, as the plaintiff (person wishing to make the claim), must ensure that a claim has a statement on it telling the defendant (the other party or parties)—**

**(a) the relevant time limited for filing a notice of intention to defend being 28 days after the claim is served; and**

***Note—***

**See rule 137 (Time for notice of intention to defend).**

**(b) that if the defendant (the other party or parties) does not file a notice of intention to defend within the time, a default judgment may be obtained against the defendant without further notice.**

***Note—***

**See rule 130J Restriction on power to enter default judgment if a certificate of service filed**

**24 Duration and renewal of claim**

**(1) A claim remains in force for 1 year from the day it is filed.**

**(2) If the claim has not been served on the other party and the registrar is satisfied that reasonable efforts have been made to serve the claim or that there is another good reason to renew the claim, the registrar may renew the claim for further periods, not more than 1 year at a time, starting on the day after the claim would otherwise end.**

**(3) The claim may be renewed whether or not it is in force.**

**(4) the court's leave must be obtained before a claim may be renewed for a period any part of which falls on or after the fifth anniversary of the day on which the claim was originally filed.**

**(5) Before a claim renewed under this rule is served, it must be stamped with the court's seal by the appropriate officer of the court and show the period for which the claim is renewed.**

**(6) Despite sub-rule (1), for any time a claim that is renewed is taken to have started on the day the claim was originally filed.**

As can be seen by the redrafted Part 3 of the UCPR the strategic approach from the writer in this instance is to address the numerous difficulties SRL face whilst attempting to navigate around a bulky piece of legislation that in the eyes of a well-versed legal practitioner would be easily understood. The strategic approach aims to direct SRLs clearly and concisely to the relevant information and forms within the text of the revised legislation. As can be seen, s 22(1) inserts a hyperlink to the Queensland Courts website and directs them to the Form 2 Being the currently approved format of a claim and s 22(2) directs the SRL (or plaintiff if they are not an SRL) to the currently approved format of the statement of claim. By simply making this amendment the SRL can link to the correct area and ensure that the proceedings commence on foot correctly as the forms are formatted with instructions and example text.

The author acknowledges that the self-help component of the forms would benefit from the amendment which will ensure that the proposed amendments of the UCPR work effectively. It can be seen from the amendments that the aim is to direct the SRLs, while at the same time reducing the risk of error or noncompliance by attempting to provide as much practical information as possible within the ambit of the legislation. It would be the writers' strategic approach to have these amended rules throughout the entirety of the UCPR and in addition to external assistance for SRLs which of course would have the benefit of assisting the burdens

that SRLs place on the courts and judicial officers due to the lack of legal and procedural knowledge they have. As a supplement to these expanded rules, it would be conducive to the process that a subsequent SRL handbook is established to further bolster the assistance required by SRLs. This handbook would ideally accompany the redrafted UCPR and provide comprehensive assistance to SRLs in running the matters which hopefully assists all parties involved in ensuring that the proper administration of justice is swiftly and fairly achieved. These suggestions would have meaningful impacts on the desired outcomes, however, in the authors' view, other factors will need to be considered jointly with this strategic potential solution in order to obtain the best outcome. Overall, consequently achieving a best practice model for SRLs to represent themselves in the courts in terms of the judicial processes and procedures to effectively present their legal matters would also be beneficial in considering other areas of law.

Those that refute that SRLs should not have the right of self-representation would contend that any support should be granted and the recent decision of the Full Court of the Federal Court of Australia in *Arifin v Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs*[19] ('Arifin'), the appellant Arifin did not comply with rule 36.01 (2)(c) of the Federal Court Rules[20] clearly stating that the appellant was required to state *"briefly but specifically, the ground relied on upon support of the appeal*".[21] In this matter, the court observed that at times it may be appropriate to ignore a non-compliance and cast its mind on the merit of the application however what this shows is that other parties who are represented are put in a difficult position and it can be perceived that the court lacks impartiality.[22] The courts emphasised in this case that the rules had been designed for the benefit of all parties as well as public interest in ensuring that the proper administration of justice occurred and as such urged that before judges readily depart from the relevant court rules when self-represented litigants are before them that they apply "great hesitation and caution".[23]

Whilst the findings in Arifin encapsulate that rules of a court should bind all parties equally whether they are represented or SRLs, in the matter of *SZRUR v Minister for Immigration and Border Protection*[24]('SZRUR') confirmation is made that courts have an overriding duty in ensuring that trials are conducted fairly and lawfully. The matter of SZRUR was one that the Courts allowed the appeal because the primary Judge failed to explain that the Court would not act on the statements made from the bar table and that the allegation of fraud against the former

[19]*Arifin v Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs* [2014] 61 FCAFC; Rohan White, *Do unrepresented litigants require special treatment?* (November 2014) Mills Oakley http://www.millsoakley.com.au/do-unrepresented-litigants-require-special-treatment/.

[20] Federal Court Rules 2011 (Cth) s 36.01(2)(c).

[21] Ibid.

[22] Richardson (n 1).

[23] Ibid.

[24] *SZRUR V Minister for Immigration and Border Protection [*2013] 146 FCAFC; Rohan White, *do unrepresented litigants require special treatment?* (November 2014) Mills Oakley http://www.millsoakley.com.au/do-unrepresented-litigants-require-special-treatment/.

migration agent would fail due to the absence of evidence.[25] The appellate court found no difficulty concerning a matter of fairness in the primary judge advising SZRUR that if he intended to rely on the statements that were made at the bar table then he would have to enter the witness box to make those statements formally after being sworn in.[26] Also the court took with the primary judge the fact that SZRUR was unrepresented and could not speak or read English, as well as the importance of the subject matter of his statements to the success of the application.[27] Subsequently, the court determined that the failure of the primary judge to explain the procedure to AZRUR was not fair and the outcome could have been affected by this.[28] In allowing this appeal Robertson J along with Allsop CJ and Mortimer J cited the approval of the principles set out in *Hamod v State of New South Wales and Anor*[29] the principles that were approved by their Honours were;

- The duty to ensure a fair trial is positioned on the individual judicial officer hearing the case.[30]
- That duty requires that a person does not suffer a disadvantage from exercising the recognised right to be self-represented.[31]
- The court's duty is not solely to the unrepresented litigant but to ensure a fair trial for all parties.[32]
- The Court must take the appropriate steps in ensuring that the unrepresented litigant has sufficient information about the practice and procedure of the court, so far as it is reasonably practicable, to ensure a fair trial depending on the circumstances of the case.[33]
- The duty is to put the unrepresented litigant in the position of being able to make an effective choice.[34]
- The duty is cast in active terms but does not extend to advising the unrepresented litigant as to how his or her rights should be exercised or how to conduct the case.[35]
- The court is entitled to reprimand an unrepresented litigant if the judge believes that the litigant is trifling with the court.[36]

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] *Hamod v State of New South Wales and Anor* [2011] NSWCA 375,306-16.

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Ibid.

- There may be a fine tension in striking the balance between providing assistance to an unrepresented litigant and ensuring a fair trial for all parties and it is the judge's task to strike that balance.[37]
- The judge must remain at all times the impartial adjudicator of the matter, measured against the touchstone of fairness.[38]

Guidelines for SRLs were also provided in Re F[39] after the guidelines of Johnson v Johnson[40] in noting internal tensions between the guidelines and other legislative provisions and rules of court the court observed that whilst they did not disagree with the guidelines they determined in *Re F* to revise the guidelines and as such the guidelines were revised to reflect as follows –

> *1. A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person to ensure a fair trial;*
>
> *2. A judge should inform the litigant in the person of how the trial is to proceed, the order of calling witnesses and the right which he or she has to cross-examine the witnesses;*
>
> *3. A judge should explain to the litigant in person any procedures relevant to the litigation;*
>
> *4. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation;*
>
> *5. If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;*
>
> *6. A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise;*
>
> *7. If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights;*
>
> *8. A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated. (Neil v Nott [1994] HCA 23; (1994) 121 ALR 148 at 150);*
>
> *9. Where the interests of justice and the circumstances of the case require it, a judge may:*
> *• draw attention to the law applied by the Court in determining issues before it;*
> *• question witnesses;*
> *• identify applications or submissions which ought to be put to the Court;*
> *• suggest procedural steps that may be taken by a party;*
> *• clarify the particulars of the orders sought by a litigant in person or the bases for such orders.*

[37] Ibid.

[38] Ibid.

[39] *Re F: Litigants in Person Guidelines* [001] FamCA 348 (4 June 2001).

[40] *Johnson v Johnson* (1997) FLC 92-764.

> *The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.*

These principles ensure that access and fairness to justice are provided to not only SRLs but to all parties in actions before the courts. It is indeed difficult to achieve balance however given the services that are available. It may also be appropriate to continue to review the functions that these services have as well as the needs and requirements for these services to ensure the best possible assistance be available for SRLs in the matters that they face, whilst also the issues that are faced by judicial officers and courts of the like are being addressed.

The writer is of the view that these principles, if adopted, concerning civil matters and all other matters where SRLs engage in litigation, would indeed be useful. However, the question would raise the issue of the fact that Australia has an adversarial legal system; could these principles be signalling the end of a purely adversarial system and the move to a hybrid of adversarial/inquisitorial legal system in Australia? One would need to conduct further research. However, turning to information and services as a problem area, the research indicates a gap in the information and services available to SRLs. In Queensland, the functions of a quasi-legal body known as the Queensland Civil and Administrative Tribunal ('QCAT') have a vision of fair and just outcomes and a mission to actively resolve disputes in a way that is fair just accessible, quick and inexpensive.[41] Whilst QCAT hears minor civil disputes valued up to and including $25,000 as well as other administrative matters, the writer suggests that further research could be undertaken as to the values to SRLs if the Quantum of claims in the QCAT jurisdiction would have a specific flow on effects with assisting those higher courts with case management, administration of justice and relieving pressure on the judicial staff in that context. An interesting feature of QCAT is that the act that QCAT administers makes it explicitly clear that the purpose of s 43[42] is to have the parties represent themselves unless the interest of justice requires otherwise.[43]

A clear example of this would be that a majority of available resources to SRLs are focused on that litigation which provides some assistance in navigation through a complex court system. There are few resources available that include information surrounding the benefits of alternative dispute resolution methods such as those of mediation and conciliation.[44] Of course, raising these additional methods and the benefits they have would assist in closing the gap in the existing information available to SRLs. Not only will the current information gap be closed but the incorporation of settlement and alternative dispute resolution will increase awareness of such knowledge. It will also provide the SRLs with a wider choice of options to handle their matters. However, whether or not this will succeed will be dependent on the support and tools

[41] Queensland Civil and Administrative Tribunal, *About QCAT* (1 October 2015) Queensland Civil and Administrative Tribunal http://www.qcat.qld.gov.au/about-qcat.

[42] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 43.

[43] Ibid.

[44] Productivity Commission, 'Access to Justice Arrangements', Productivity Commission Inquiry Report No 72 (2014), 27.

that SRLs are provided with including reassurance of the value of such programs that promote alternatives for litigation.

Through the difficulties and challenges posed by unrepresented litigants, the Public Interest Law Clearing House Incorporated (formally QPILCH now known as LawRight) being Australia's only specialist court-based self-representation service found that different approaches from traditional methods for dealing with self-represented litigants and assisting these SRLS with better equipping these litigants to navigate the complexities of the court systems.[45] This service would assist the problems the SRLs may encounter by providing services that differ from duty lawyer schemes.[46] The service and assistance provided goes so far as drafting and amending pleadings, disclosure and evidence advice as well as settlement negotiation and preparation for trial concerning the civil litigation matters that they may face in operating with an initial hour-long consultation. However, the provision of ongoing assistance is limited to those who have financial difficulties in affording private representation.[47] One would advocate that this type of service would indeed assist SRLs with obtaining information and knowledge. The service in its operational function also acts as a pro bono mediation service which encourages clients to resolve disputes without the need for litigation when this is a practical possibility.[48] From the research gathered it is apparent that those who seek free legal services experience multiple legal and non-legal problems and initially seek help with problems from non-legal sources.[49] There is also indication through research that legal problems impact a person's physical and mental health and thus reinforce the need for multiple legal and non-legal responses to SRLs problems, particularly in the development of coordinated and integrated responses.[50] It should be noted that QPILCH sees this need and is developing the appropriate links to support clients in a more holistic approach.

This provision of free, impartial legal advice by the service provides judicial officers and the courts and the SRL themselves with the required information, Also the provision discourages those SRLs from commencing proceedings that may not have merit, rather directs them in the courts to more appropriate avenues of assistance once the needs of the client have been identified.[51] The work that this service offers indicates that LawRight are tackling some of these issues effectively in that through the diversionary methods of the 100 clients that they supported in the 2008-2010 period 82 of those clients were diverted away from the District and Supreme Court systems and an indication from the registry notes that 18 of those clients have since commenced proceedings.[52] A rough estimate of $800,000 has been saved merely through

[45] Tony (n 5), 225.

[46] Ibid, 226.

[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] Ibid, 227.

the diversion of those 82 clients from the court system and of these 18 clients who commenced proceedings 13 have been counselled to pursue alternative dispute resolution to resolve and determine their disputes.[53]

Research indicates that the courts were the predominant referral link to QPILCH with a 44% referral rate and QPILCH note that they have not increased awareness of their services within the legal profession.[54] The writer of this paper submits that it would be advantageous for QPILCH to indeed promote their services both within the legal profession and through other methods. The research and statistics identified that the client profile of the service had already obtained legal advice through other avenues such as a private practitioner (30%), Legal Aid Queensland (3%) or a community legal centre (9%) with a total of 55% of clients indicating prior legal advice had been sought.[55] The evidence suggests that primarily ongoing costs for private representation or the inability of other services to provide ongoing assistance with ongoing proceedings were reasons why SRLs approached LawRight for assistance.[56] This is an indication of a service that is successfully filling the gap that exists between SRLs and the courts by resolving some of the problems that are in play when dealing with SRLs and reducing unnecessary litigation in a society that one asserts is becoming litigious. It should be noted that despite the age range of SRLs discussed above QPILCH noted that 50% of their client base is aged between 45 and 46 years of age[57] which indicates a need to attract those in the younger age bracket to better utilise the services that are offered. It is the view of the writer that, should more funding be offered to assist this service, it is likely to see growth and be in a better position to continue to effectively fill this gap.

This paper has looked at what SRLs are and what type of person would likely be an SRL and the issues that SRLs pose to not only themselves but to courts and other judicial officers in their self-proclaimed pursuit of justice and writing a wrong they believe has occurred to them. The paper has made some observations that would require much further research to assess the viability and practicality of the suggestions made regarding SRLs. Additionally, a redrafted section of the UCPR is meant to be placed to encourage thought on the specific wording of the legislation in the hope that in an ideal world for SRLs that if the legislation that the courts administer is simple yet effective enough for an SRL to comprehend then they will be in a better position to assist judicial officers and the courts as well as themselves in achieving fair and just outcomes specifically for those SRLs.

[53] Ibid.

[54] Ibid, 228.

[55] Ibid.

[56] Ibid.

[57] Ibid, 230.

# EVIDENTLY NOT SO EVIDENT

MAI MARIE VOET[1]

## I INTRODUCTION

Dramatised and sensationalised, movies and television series encapsulate audiences with simplistic illusions as to how legal systems are operated. Audiences have become acquainted to the ideology that justice will always prevail which more often than not, is achieved through the appearance of an "unexpected" witness who miraculously connects all the dots. In reality, such witnesses and their evidences must fulfil the requirements of admissibility as stipulated by various legislations. The act of giving evidence may appear straightforward; however, it is a tedious task for the Courts to decipher which evidences ought to be accepted as admissible and which are inadmissible or mere opinions. Identification evidence can be powerful evidence in a trial when given by a confident witness. It is however notoriously unreliable, as human memory is often reconstructed and influenced by factors such as the nature of police questioning. This article aims to develop a more thorough understanding of identification evidence and the regulations surrounding its admissibility under the Uniform *Evidence Act 1995*.[2] In addition, this article provides a brief explanation on the difference between identification evidence and recognition evidence. With the assistance of Dean Mildren's book R v Murdoch – The Falconio Case: A Study in Identification and Circumstantial Evidence, this article will highlight how the nature of police questioning along with DNA identification evidence can impact witness evidences and potentially adduce injustice for the accused.

## II IDENTIFICATION EVIDENCE UNDER THE UNIFORM EVIDENCE ACT 1995

Identification evidence is a classification of evidence that commonly refers to "eyewitness" testimony or visual identification.[3] Although branded as a visual identification, identification evidence also encompasses the other senses of smell, taste, touch and sound.[4] Heydon J in *AK v Western Australia* explains at [66], that although the most common form of identification is visual, other common forms include aural and touch identification whilst smell and taste were characterised as rarer forms of identification evidence.[5] It is important to understand that whilst it may appear simple, identification evidence is actually complex in nature, for the human memory is easily reconstrued and manipulated.[6]

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[1] This paper was originally submitted as assessment for the subject *LAW3321 Evidence*.

[2] *Evidence Act 1995.*

[3] Andrew Hemming and Robyn Layton, *Evidence Law in QLD, SA and WA* (Thomson Reuters, 2017) 537.

[4] Ibid.

[5] *AK v Western Australia* (2008) 232 CLR 438, 460-461 at [66].

[6] *Alexander v The Queen* (1981) 145 CLR 395, 426.

Identification evidence is defined under the Uniform *Evidence Act 1995* as an assertion by a person to the effect that a defendant was, or resembles whether visually, aurally or otherwise, as a person who was present at or near a place where an offence or an act connected to an offence, was committed.[7] It should be noted that under subsection 13.10[8], the assertion is required to be an "assertion by a person" and excludes the identification of persons other than the defendant, evidence regarding an item and/or object and civil proceedings. Further reiterating assertions, all assertions must be made by a person thus any evidences of security surveillance footages and machine-based identification devices are to be excluded from admissibility.[9] A misconception that occasionally occurs is the lack of distinguishment between resemblance evidence and identification evidence. Resemblance evidence refers to a person who shares certain features or attributes as with that of the accused. Unlike common law, the *Evidence Act 1995* includes evidence that the defendant resembles the person in question, who was present or near the place where an offence was committed.[10]

As forementioned, rules governing the admissibility of identification evidence do not extend to civil proceedings.[11] The rules of identification evidence admissibility replace the common law and only apply to evidences that are adduced by the prosecution.[12] The rules also stipulate exclusionary rules for visual and picture evidences which need to be evaluated for credibility as the admissibility of such evidence creates a pivotal shift from a questionable analysis of weighting to that of admissibility.[13] As a result, identification parades are the primary methods of identification evidence whilst pictural methods such as photo-boards are considered secondary methods.[14] This is supported under subsection 114(2) which stipulates identification evidence that is adduced by a prosecutor is not deemed admissible unless (a) an identification parade that included the defendant was held before the identification was made or (b) it was deemed unreasonable to hold such a parade or (c) the defendant refused to take part in such a parade.[15] In addition, the identification should be made to the best of abilities, without intentional influences that may prompt a person to identify the defendant.[16] Subsection 114(3) lists: offence gravity, importance of evidence and practicality and/or appropriateness of holding an identification parade as reasonable considerations as to why identification evidence can still

[7] *Evidence Act 1995* ss13.9.

[8] Ibid, ss13.10.

[9] Australian Law Reform Commission, 'Uniform Evidence Law – Identification Evidence', ALRC Report 102, 13.

[10] *Evidence Act 1995* ss13.11.

[11] Identification Evidence (ss113-116), *Judicial College*, (Web Page, 1 January 2022) https://www.judicialcollege.vic.edu.au/eManuals/UEM/28603.htm.

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] *Evidence Act 1995* ss114(2)(a)(b)(c).

[16] Ibid (c).

be admissible despite the lack of identification parade.[17] This subsection was applied to *R v Murdoch* as it was impractical to hold an identification parade given the witness resided in England; however, the admissibility of Joanne Lees' identification evidence was not without controversy.

## III RECOGNITION EVIDENCE

Recognition evidence can be defined as evidence that is given by a witness who holds prior familiarity with the accused.[18] This arguably differs from identification evidence as it is evidence of recognition as opposed to perception at the time of the offence.[19] Cases such as *R v Gee* support this argument;[20] however, Spigelman CJ in *Trudgett v R* at [31] opposes this argument as he deconstructs the *Evidence Act 1995* to prove that although recognition evidence is not "wholly" based on what a witness perceives at the time of the offence, it is a perception of a "partly" nature.[21] Spigelman CJ reiterated the High Court's judgement in *Davies and Cody v The King*, where his honour noted the importance of extending the rules of direction to recognition evidence and not just identification evidence.[22] It is important to understand that although recognition evidence may be more reliable than that of the identification of a stranger, it is not immune to mistake or error as supported by Lord Widgery CJ in *R v Turnbull* at [228][23] thus requiring the same directions afforded to identification evidence. An issue that can arise is special weight or consideration to recognition evidence by the jury as it would be instinctive to believe that someone with prior familiarity would be less likely to err in identifying the accused at the time and place of the offence.[24] It is therefore crucial for Judges to give directions to the jury to avoid situations of complaint as observed in *Gardiner v R*[25]. It is evident that although recognition evidence has the misconception of being more accurate, it too is treated like identification evidence and continues to present an unsolvable conundrum for the Courts as the human memory is not as reliable as society likes to give it credit for.[26]

## IV DNA IDENTIFICATION EVIDENCE

DNA identification evidence arguably generates an instinctive and firm belief that such evidence would be of undisputable and incriminating nature against an accused; however, this

[17] *Evidence Act 1995* ss114(3)(a)(b)(c)(d).

[18] Andrew Hemming and Robyn Layton, Evidence Law in QLD, SA and WA (Thomson Reuters, 2017) 538.

[19] Ibid.

[20] *R v Gee* (2000) 113 A Crim R 376 at [37-38].

[21] *Trudgett v R* [2008] NSWCCA 62 at [31].

[22] *Davies and Cody v The King* [1937] 57 CLR 170.

[23] *R v Turnbull* [1977] QB at [228].

[24] *Trudgett v R* [2008] NSWCCA 62.

[25] *Gardiner v R* (2006) 162 A Crim R 233; [2006] NSWCCA 190.

[26] 4.13 Identification Evidence, *Judicial College*, (Web Page, 1 January 2022) https://www.judicialcollege.vic.edu.au/eManuals/CCB/28075.htm.

is incorrect.[27] Against common belief, DNA identification evidence is rather unreliable and can be quite detrimental to a criminal proceeding depending on how it is portrayed.[28] The analysis of DNA identification requires a sample to be obtained and tested from which a DNA profile is then created.[29] It may seem straightforward, however profiling results can be sketchy and indefinite of revealing an individual person let alone the "correct" person.[30] Despite these inaccuracies, DNA identification evidence is still admissible in criminal trials which have led to countless wrong convictions and injustices.[31] Contributing to wrongful convictions are the submissions that accompany DNA identification evidence such as "occurrences of 1 in 10 billion chances" or projected confidence that the sample originated from someone within a certain bloodline or family as depicted in *R v Milat*.[32]

The issue with DNA sampling is it does not address the question of "how" the sample got to be where it was. Quite frankly, it could just be unfortunate that a person was somewhere at the wrong time or place. The human body sheds DNA daily in forms such as hair, human tissue and fingerprints,[33] all of which can be unintentionally present at a crime scene whether it be left prior to the crime occurring or through the transferring of objects or items.[34] The transfer of blood and other bodily fluids can also occur unintentionally through residue transfer from contact with specific surfaces as depicted in the Adam Scott Manchester rape case.[35] In 2017, there was a controversial miscarriage of justice when a state-run pathology centre mistakenly identified the wrong person as a result of negligently not checking the dates of birth of two men with the same name.[36]

Like identification evidence, there are also rules that govern the admissibility of DNA identification evidence as well as how it is obtained. In order to legally obtain such evidence, an application is required to be made to a magistrate stipulating how positive findings have narrowed it down to a certain suspect. A prime example of this rule was observable in *Orban v Bayliss* where conditions had to be met before an order could be made. Additionally, the case

[27] Dealing with DNA in Court: Its Use and Misuse, *Andrew Haesler SC,* (Web page, 1 January 2022) https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_dna_itsuse_andmisuse.aspx.

[28] Ibid.

[29] Ibid.

[30] Ibid.

[31] Naomi Elster, 'How Forensic DNA Evidence Can Lead to Wrongful Convictions, JSTOR Daily, (Web Page, 1 January 2022) https://daily.jstor.org/forensic-dna-evidence-can-lead-wrongful-convictions/.

[32] Dan Howard, *R v Milat: A Case Study in Cross-Examination*, (LexisNexis, 2014) 164 150, 171, 293.

[33] Brian Hancock, 'DNA evidence considered, *The Public Defenders of NSW*, (Web Page, 1 January 2022) https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_dna_evidence_considered.aspx.

[34] Ibid.

[35] Ibid.

[36] Eliza Laschon, 'PathWest DNA Mix-up: Investigation Launched After Wrong Man Convicted, ABC News, (Web Page, 1 January 2022) https://www.abc.net.au/news/2017-04-27/man-wrongly-convicted-over-pathwest-dna-bungle-govt-wants-answer/8475888.

highlighted that the granting of such an order was a facilitation of the procurement of evidence against an already suspected person and not a tactic to enable investigative police to identify a person as a suspect.[37] Even with a matching result, Judges must give directions to the jury that it is not conclusive and thus should not be considered as incriminating evidence.[38] It should be noted that despite specific directions regarding DNA identification evidence, bad character evidence and identification evidence, jurors are still swayed and more likely to agree with what has been suggested.[39] This further supports the notion that the human mind is easily reconstructed and manipulated from both a witness and juror's perspective and memory.

# V R V MURDOCH – THE FALCONIO CASE

The Falconio murder case is a prime example of the power of identification evidence and prejudice against the accused. From media publications to Lees' original statement being lost[40], this case was unfair and biased from the beginning. Although another statement was obtained, factors such as lack of sleep and prolonged questioning hours would have jeopardised Lees' recollection and consequently the new statement.[41] Additionally, the police had now heard her series of events which created the opportunity for unintentional leading questions or statements to influence details. Furthermore, the second statement would have increased the time elapsed between the alleged offence and memory recollection. This is referred to as the effect of the passage of time on memory and like all other types of original human memories, becomes impossible to retrieve once susceptible to reconstruction and assimilation.[42]

Other factors that can make memory recollection difficult include high levels of stress, weapons focus and exposure duration.[43] It is safe to assume that Lees was under a large amount of stress thus affecting her ability to recall and perceive details accurately. Furthermore, the fear and focus upon the presence of a gun would impact her recollection on surrounding or "less-focussed"[44] details in conjunction with the extremely limited lighting and exposure time with the accused.

Over the next few days Lees gave statements to the police; however, one statement that highlights memory manipulation was the description of Murdoch's dog. Originally, Lees had provided a description of the dog but after seeing a similar dog at the Barrow Creek Hotel, adjusted her statement to include that it was a "blue-heeler", a breed that Lees would continue to use to describe the accused's dog. Further proof of Lees' memory reconstruction was

[37] *Orban v Bayliss* [2004] NSWSC 428.

[38] Judge Penelope Wass SC, *Would I Lie to You?*, Legal Aid Conference, 2016 23.

[39] Ibid, 18.

[40] Dean Mildren, *R v Murdoch The Falconio Case: A Study in Identification and Circumstantial Evidence*, (Lexis Nexis) 5.

[41] Judge Penelope Wass SC, (n37) 16.

[42] Ibid 15-16.

[43] Ibid 16, 17 and 18.

[44] Ibid 17.

observed when Lees' received affirmation from the solicitor, that the dog in the photograph belonged to Murdoch before the court trial.[45] However, this was not the most significant ground of appeal by Murdoch's defence.

Murdoch's defence firmly appealed the admissibility of Lees' identification evidence of Murdoch on the grounds of prejudice and displacement. The murder of Falconio was sensationalised by the media which resulted in the plastering of Murdoch's face in newspapers and articles. When Murdoch was acquitted for the rape allegations in South Australia, the media were quick to report on his extradition to the Northern Territory. These publications caught the attention of Lees' friend thus resulting in Lees viewing these articles online. It was argued that by viewing these articles, Lees' memory was distorted, and the imagery of Murdoch displaced and replaced Lees' memory of the accused.

Eventually the police made contact with Lees, and it was agreed that she would participate in identifying Murdoch.[46] An identification parade was not utilised due to Lees' location however a photo-board was, instead, presented to her. It is the defence's argument that Lees' ability to identify Murdoch from the photo-board was due to the influence and displacement of viewing, albeit unintentionally, Murdoch's image in media publications.[47] It was noted in *Alexander v The Queen* at [17], that the mind had tendencies to respond to suggestions and replace hazy recollections of a person with a "clear" image of a person in a photograph that they may have seen.[48] In *Festa v The Queen*, likened to Lees, a witnessed was asked to identify an accused from photographs of an accused that the witness had not seen in months.[49] It was noted in this case that police possession of the photographs could unintentionally suggest that the accused was of bad character thus the existence of such photographs in police possession. The same ideology could be applied for Murdoch as there was a pre-existing stigma that he was of bad character due to the media's publication of the rape allegations. Not discrediting Lees' evidence, it is worthwhile to understand that whilst what may be relayed was truthful, it may not necessarily be accurate, for the human memory does make mistakes and reconstrue details.[50]

The prosecutions ploy to utilise recognition evidence through Hepi and Allan was a smart strategy as the jury would instinctively believe in the credibility of someone with prior familiarisation to Murdoch. Put blatantly, the CCTV footage was of poor quality,[51] and the imagery that was derivable was of generalised value and thus should have been considered

[45] *Murdoch v The Queen [2007]* NTCCA 1, 50.

[46] Johanna Bell, '*The Peter Falconio Murder Case'*, (Web Page, viewed 1 January 2022) https://www.theguardian.com/world/2016/jul/08/we-know-who-did-this-how-solving-peter-falconios-changed-a-detectives-life.

[47] Mildren, (n 40) 303.

[48] *Alexander v The Queen* (1981) 145 CLR 395, 426 at [17].

[49] *Festa v The Queen* (2001) 208 CLR at 602-603 [22].

[50] *Mackenzie v R [1996]* HCA 35.

[51] Mildren, (n 40) 315.

circumstantial evidence rather than recognition. Furthermore, the vehicle itself was of normal appearance and did not exhibit registration plates nor any unique or distinguishable characteristics.[52] In *R v Goodall*, recognition evidence was utilised and based upon security photographs of the accused.[53] Likened to this case, the petrol station security footage and photograph was analysed to "recognisable" features such as the flannelette, thongs and cap worn by the accused in comparison to that owned by Murdoch.[54] This appears to be another form of persuasive evidence in the conviction of Murdoch by the jury.

The final piece of identification evidence was the unexplainable blood stain on the back of Lees' shirt in conjunction with the prosecutor's "credible" explanation of the DNA profiling. Furthermore, it was asserted by admissible expert evidence that Murdoch's blood had the statistical probability of being 150 quadrillion times likely an exact match.[55] The most intriguing detail about Murdoch's DNA was that it was only found in that blood stain and nowhere else upon Lees' or the Kombi Van. There was some complexed and low-level DNA on the manacle handcuffs; however, it is debatable whether that was transferred when they were taken into Yatala Prison in 2002 by Superintendent Colleen Gwynne.[56] But despite directions from the Judge stating DNA evidence ought not be considered conclusive and incriminating, it played its influential role in swaying the jury.

# VI CONCLUSION

Although life is not a movie, *R v Murdoch* received a Hollywood like ending where the "villain" is behind bars and "justice" is served. Stepping away from the big screen and back to reality, this article has provided a deeper understanding of identification evidence under the Uniform *Evidence Act 1995.* In addition, a more distinguished and comparative understanding of DNA, recognition and resemblance identification evidence has been achieved. The vulnerable nature of the human memory was also highlighted through examples of case law that demonstrated how memory can be reconstructed and manipulated whether intentionally or unintentionally by factors such as perception, time, police questioning, photographs and/or the media. As such, this article is of the firm opinion that *R v Murdoch* was a criminal case that was burdened with prejudice and tainted with failure before it even began. It is therefore fair to conclude that facts, especially those in criminal trials, may be coloured by the personalities of the people who present them.[57]

[52] Ibid 316.

[53] *R v Goodall* [1982] VR 33.

[54] Mildren (n 40) 315.

[55] *Murdoch v The Queen [2007]* NTCCA 1, 129.

[56] Bell, (n 46).

[57] *12 Angry Men* (Orion – No v Productions, 1957).

# THE FLIPPED CLASSROOM ACROSS AUSTRALIAN LAW SCHOOLS AND THE UNIVERSITY OF SOUTHERN QUEENSLAND

MATTHEW ENDO

## I BACKGROUND OF TEACHING METHODOLOGIES

In an analysis of different teaching methodologies, Kylie Burns et al begin with an explanation of the various models of legal education that have been used in Australia. The traditional model of legal education has been focused on the teacher, who imparts their knowledge to students. This is achieved through lectures where students take notes of the material being presented by the teacher. Active learning, on the other hand, is student centred. The student takes an active role in learning the material before the lectures. Blended learning is where different modes of delivery are used, such as 'a combination of face-to-face classes with technology-enabled activities', [1] such webcasts, podcasts, webinars or online quizzes, not recorded lectures.[2] The 'flipped classroom' is a blended learning model where students independently study materials online using various technologies instead of attending traditional lectures before participating in face-to-face activities, such as workshops or tutorial sessions.[3]

The traditional model has been criticised since the 1990s.[4] Melissa Castan and Ross Hyams argue that it is 'assumed' that Australian law schools will teach in a 'student centred "active" manner',[5] citing Kyle Burns et al. However, there does not seem to be a uniform approach to 'student centred' teaching methods nor do all law schools in Australia provide instruction in a student-centred manner.

[1] Kylie Burns et al, 'Active Learning in Law by Flipping the Classroom: An Enquiry into Effectiveness and Engagement' (2017) 27(1) *Legal Education Review* 163, 163.

[2] Michael Blissenden, 'Law Teaching in an Ever Changing World: Are We on the Right Track?: Some Reflections and a Case Study from Western Sydney University' (2017) 48 *University of the Pacific Law Review* 875, 880.

[3] Burns (n 1) 163.

[4] Ibid.

[5] Melissa Castan and Ross Hyams, 'Blended Learning in the Law Classroom Design, Implementation and Evaluation of an Intervention in the First Year Curriculum Design' (2017) 27 *Legal Education Review* 143, 148.

# II E-LEARNING AND THE FLIPPED CLASSROOM IN AUSTRALIAN LAW SCHOOLS

The use of e-learning is 'pervasive' in Australian law schools, according to a study conducted by Stephan Colbran and Anthony Gilding in 2013.[6] E-learning utilises electronic media and Internet technologies to deliver content using asynchronous (temporal shifted, not occurring at the same time) and synchronous (real time) communication.[7] A literature review of blended learning in Australian law schools discovered several universities that have experimented with blended learning and the flipped classroom. Monash University, University of Adelaide and Western Sydney University conducted first year courses while Griffith University has piloted first, second and final year courses using the flipped classroom model. While almost all the articles detailing the pedagogy used in these courses have been written by academics or educators, this article may be the first that has been written from the point of view of a law student enrolled in a course at the University of Southern Queensland (USQ) that used both traditional and flipped classroom methods.

In one of the most recent published articles, using the flipped classroom pedagogy at the University of Adelaide Law School resulted in 'deeper student engagement and active learning'.[8] By replacing traditional didactic lectures with short videos on discrete topics, in class activities became interactive and helped to develop critical thinking and problem solving skills.[9] At Monash University, for class readings, videos, podcasts and other technologies were used to deliver content 'in a more engaging and interactive manner'.[10]

One reason to utilise the blended learning or flipped classroom approach is to reduce the amount of materials covered within a fixed class lecture time period due to an 'overstuffed' course that covers more material than 'reasonable'.[11] By decoupling some lecture material from class time, students can read materials or watch videos and then use class time for 'teacher-facilitated active learning'.[12]

One course at the USQ offered both the traditional and flipped classroom methods, used side by side. While no empirical data was collected, informal feedback from students was used to gauge the reaction to the flipped classroom, a new and different methodology compared to the traditional instructor driven lecture and tutorial system.

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[6] Stephan Colbran and Anthony Gilding, 'E-Learning in Australian Law Schools' (2013) 23(1) *Legal Education Review* 201, 201.

[7] Ibid 202.

[8] Eamonn Carpenter, Cornelia Koch and Matthew Stubbs, 'Really Engages Students: Flipped and Inquiry Learning in Law in the 21st Century' (2022) 8 *Canadian Journal of Comparative and Contemporary Law* 38, 54.

[9] Ibid 51.

[10] Castan and Hyams (n 5) 148.

[11] Ibid 144.

[12] Ibid.

# III THE FLIPPED CLASSROOM AT THE UNIVERSITY OF SOUTHERN QUEENSLAND

At the USQ, LAW3311/5311 Company Law is a third year LLB and JD course and a Priestley 11 law subject. Its course examiner Dr Aaron Timoshanko transformed the course into a flipped classroom, using new technologies to provide students with a different and enhanced learning environment. At the USQ, there is an overwhelming majority of law students who study online as they are working full time or have other commitments during the day and cannot attend classes in person or online in real time. The use of new technologies offered a chance for engagement to this cohort of online students who would not have been able to attend in-person lectures which were normally scheduled during business working hours during the weekdays. Flipped classroom workshops were conducted face-to-face on the Ipswich campus and simultaneously cast over Zoom on Mondays. The course was also conducted in the traditional manner with face-to-face lectures on the Toowoomba campus and simultaneously cast over Zoom on Fridays, with a one-hour tutorial immediately following the two-hour lecture. This allowed students who attended campus in person to choose which experience they preferred, and online students to select the type of lecture in which to engage or which lecture recording to watch.

For the flipped classroom, there were a variety of technologies used. Lectures were delivered using VoiceThread, a collaborative multimedia slide show tool which enabled students to record text, audio, and video comments or questions to each segment which was divided into separate topics of a one-week module, rather than being a full length of two-hour lecture. Students could watch one segment or all segments for that week's module. The segments ranged from 5 minutes to over one hour, with most in the 10-, 20-, or 30-minute duration. For a first-year course at Monash University, videos of less than 10 minutes length were preferred,[13] but as this was a third-year course, the length was dependent upon the concept and the length varied rather than being a consistent, limited duration. The ability to record text, audio or video comments allowed students to participate at their own convenience and engage with the course, as each comment attracted a response by the course examiner. Students could engage with asynchronous communication where they left comments and received responses at a later time.

VoiceThread supplemented the standard lecture capture and recording platform Panopto. Pre-recorded lectures as well as recorded lectures of the actual live classroom sessions including lectures and tutorials were made available on both platforms. There was no disadvantage for students as they were free to utilise the respective Ipswich, Toowoomba, or online materials in either platform as well as any combination of materials from any location to supplement learning.

The Ipswich cohort used the flipped classroom model where students were expected to come prepared to the face-to-face sessions. The sessions started out with a 20-minute explanation of

[13] Ibid 154.

the highlights of the module before starting the tutorial/workshop session where the exercise problems were discussed and worked through. Michael Blissenden argues that a 'mini-lecture' or a 're-cap' at the beginning of face-to-face contact time is 'a mistake' because it 'defeats the purpose' of students to study and understand the material before the class.[14] However, it seems that the goal of the review time was to highlight the important concepts or the principles of company law before embarking on problem solving in the workshop. For example, if the problem set involved certain provisions of the *Corporations Act 2001* (Cth), the students would know exactly which ones would be used in the tutorial.

According to Eamonn Carpenter, Cornelia Koch and Matthew Stubbs, the flipped classroom changes the focus of the 'group lecture space', or tutorial, into 'actively answering problem questions with real world depth and complexity'.[15] For Company Law, the tutorial problem questions ranged from simple concepts or definitions to an issue of sufficient complexity that a graduate lawyer would handle in legal practice.

The flipped classroom experiment created 'opportunities for discussion and consultation',[16] when the course examiner polled all the students in the course to determine whether to use the traditional lecture model or the flipped classroom method. The Toowoomba cohort may have had some resistance to the flipped classroom method, as they chose to stay with the traditional lecture model. In this instance, having both methods available provided a good comparison at how the different methodologies looked side by side as students could attend both Ipswich and Toowoomba lectures in person or online to see which one they preferred.

For each cohort of students, Ipswich, Toowoomba and online, exercises were made available on StudyDesk, the learning management system (LMS), using Padlet software, an online tool to create 'walls' of Padlets, which were virtual bulletin boards where students could brainstorm, collaborate and post answers to the exercise problems. There was also a Padlet dedicated to student reflection on the module and how it related to the course and learning. The uptake of student usage of the Padlets on the LMS varied depending on the cohort, and had mixed results. Some students embraced the new technology, while others did not participate, but this was not dissimilar to the participation on other media such as online forums.

# IV OBSERVATIONS OF THE FLIPPED CLASSROOM AT USQ

The flipped classroom experiment at the USQ was a useful way to gauge how blended learning could supplement existing technologies used for online learning. While articles written by academics attempted to link learning outcomes by comparing student grades or student satisfaction to determine the success of the flipped classroom, most results were not

[14] Blissenden (n 2) 881.

[15] Carpenter, Koch and Stubbs (n 8) 41.

[16] Kylie Burns et al, 'Active Learning in Law by Flipping the Classroom: An Enquiry into Effectiveness and E/'ngagement' (2017) 27(1) *Legal Education Review* 163, 181 citing Anne E Mullins 'The Flipped Classroom: Fad or Innovation?' (2015) 92 *Oregon Law Review Online* 27, 29.

comparable.[17] Similarly, the academic results or participation ratios of the different cohorts, Ipswich, Toowoomba or online, would not be directly analogous. What was apparent was that at the USQ, similar to other law schools, barriers still exist for student participation, and there remain challenges to use the flipped classroom.[18]

The Company Law course utilised the flipped classroom and different technologies which created more opportunities for USQ students to increase engagement. Students who adopted the new technologies were able to engage with the course and participate, even if they were studying online, via VoiceThread or Padlet. In that regard, the flipped classroom experiment may be considered a success and hopefully there will be another opportunity to see whether the flipped classroom is used at the USQ in the future.

[17] Melissa Castan and Ross Hyams, 'Blended Learning in the Law Classroom Design, Implementation and Evaluation of an Intervention in the First Year Curriculum Design' (2017) 27 *Legal Education Review* 143, 149 citing Lutz-Christian Wolff and Jenny Chan, *Flipped Classrooms for Legal Education* (Springer, 2016) 61.

[18] Burns (n 1) 168.


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