

# The ANU Undergraduate Research Journal

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# Introduction

By most yardsticks, 2020 was a rough year; one that challenged our collective resilience. Bushfires blazing across Australia, widespread political and social unrest, and above all a global pandemic defined a truly tumultuous year.

The quest to develop a COVID-19 vaccine is a timely reminder of the importance of research for societal good. For many scientists and researchers across all fields, that journey begins as an undergraduate. As editors of the *ANU Undergraduate Research Journal*, we are proud to once again curate an outstanding selection of essays across multiple disciplines from undergraduate students at The Australian National University. Topical and ongoing concerns, from climate change to #MeToo to the welfare of Indigenous Australians, are discussed in the essays that follow.

Black Lives Matter and other protest movements dominated the headlines in 2020, so it is apt that the volume opens with two essays on this theme. Elizabeth Spollard's historical essay illuminates how acts of heroism and resistance—both major and minor—under the overwhelming machinery of the Third Reich helped sustain Germany's prewar moral traditions during the Nazi era. Meanwhile, Karen Zhang chronicles the emergence of the #MeToo movement in China and how advocates have navigated attempts to censor and contain this movement.

Question of gender—specifically how women are represented in art and how this reflects or informs the wider culture—are explored in the next two essays: Cinnamone Winchester analyses depictions of Snow White and the villainous Queen, and how these reflect the cultural contexts from which they emerged, in the Grimm Brothers' 'Little Snow White' and Disney's adaptation *Snow White and the Seven Dwarfs*, while Piper Keel explores representations of Medusa in art from Ancient Greece to the present, arguing that depictions of this mythical figure reflect wider attitudes about women in law, society, and under the justice system. The intersection of law and art is also central to Georgie Juszczuk's essay, which compares the High Court of Australia's architecture with that of the United States Supreme Court, demonstrating the power of this medium to communicate ideals of equality and justice. This theme is further reflected in Gaia Ewing's essay, which highlights the symbolism underpinning the architecture of the High Court of Australia and its pointed exclusion of Indigenous Australian notions of justice.

Exclusion of Indigenous Australians is also a theme in Kate Butler's essay, which discusses the mining boom of the 1960s–1970s and argues that the nation did not fully reap its socio-economic boons nor capitalise on the opportunities it presented for reconciliation. This era of local history also serves as backdrop to Eleanor Foster's essay on Cold War culture in Australia, which illustrates the various discourses surrounding European migration and the attitudes of those both left and right of the political spectrum. The themes of migration and displacement underpin the next essay by Sylvia Ghaly, which argues passionately for those displaced by climate change to be accorded proper refugee status. The notion of displacement is further reflected in Sarah Crosby's essay on the Aboriginal and Torres Strait Islander Child Placement Principle, and the difficulties involved in putting this principle into practice in Australia's East Kimberley region.

The year 2020 has been dominated by a global pandemic, and the ongoing journey to develop a vaccine has brought to the fore concerns surrounding public trust in science. Timothy Hibbins's essay explores this issue by building a case for the role of scientific consensus in the wider acceptance of scientific findings, arguing that this consensus must be active rather than passive in order to be heeded. While COVID-19 has understandably dominated the public health arena in 2020, the next essay by Stefan Thottunkal highlights another pressing health concern: the popularity of e-cigarettes among Australia's young adults and factors associated with their use. The next essay turns to more metaphysical concerns, with Thomas Weight explaining how we must rethink traditional views of the 'self' when our cognitive processes can be offloaded onto objects external to us.

The last group of essays addresses some pressing international issues, whose origins predate—and will likely extend beyond—this tumultuous year. Manya Sinha's essay builds a case for the existence of modern-day slavery, drawing parallels between the treatment of migrant workers in the Middle East

and the criteria for slavery. Vidit Thakkar then explores the potential causal relationship between hydrocarbon wealth and violent conflict, concluding that a country's possession of substantial hydrocarbon resources plays a causal role in the development of violent conflict, even after controlling for other variables. Finally, Asha Clementi and Rebecca Crisp report on research conducted on Myanmar's education system during a study tour to the country, arguing that features of this system may be perpetuating existing gender inequalities.

We wish to thank the authors for their time, work, energy, and passion in penning these essays and further shaping them for a wider readership. In addition, we thank the following for their contributions to the journal: Andrei Aksenov, Eleanor Armstrong, Beth Battrick, Greta Cooper, Thuy Do, Henriette Du Toit, Eleanor Gundry, Lucinda Janson, Bethany Jedlicka, Clare Langley, Daisy Leung, Daniel May, Brianna Muir, Alex Pan, Jillian Schedneck, Vivien Silvey, Zoe A. Smith, Tess Snowball, Tara Swanton, Emma Tindal-Clarke, Hannah Weston, and Zihan Yin. Your contributions are greatly appreciated.

Best wishes,

Benjamin Kooyman and Louisa Talipski

Editors

# About the authors

## Kate Butler

Kate is studying a Bachelor of Law (Honours) and has completed a Bachelor of Politics, Philosophy and Economics and a Diploma of Languages in Arabic. She is very interested in the energy industry and in issues that intersect law, economics, and politics, especially socio-political and socio-economic issues.

## Asha Clementi

Asha is a third-year Bachelor of International Security Studies/Master of Diplomacy student at ANU. She is the co-founder of The Girls Leadership Network and creator of the Girls Run the World Program.

## Rebecca Crisp

Rebecca is a third-year Bachelor of Laws/Bachelor of Politics, Philosophy and Economics student at ANU. She is ACT State Coordinator at ActionAid Australia and former intern at the Australian Institute of International Affairs National Office.

## Sarah Crosby

Sarah has recently completed her Bachelor of Law (Honours)/Bachelor of International Security Studies, with a minor in International Relations, at ANU. Sarah is particularly interested in access to justice issues facing Aboriginal children and communities and has spent time in Kununurra, Western Australia, as a legal intern at Kimberley Community Legal Services. She is currently working at the Chief Minister's Department for the Northern Territory Government in Darwin.

## Gaia Ewing

Gaia is a fifth-year law student. While she has always been fascinated by art, her interest in law is a more recent development. Growing up, Gaia spent many hours in the NSW Art Gallery with her Grandma—an artist herself—learning from her experiences and expertise. Now at university, Gaia is captivated by the intersection between law and art; the way the 'rational' and 'objective' interacts with the 'emotional' and 'subjective'. Going forward, Gaia hopes to conduct further research into the creative and emotional aspects of law.

## Eleanor Foster

Eleanor is a third-year Bachelor of Philosophy (Honours) student majoring in history at the ANU College of Arts and Social Sciences. She is the 2020 Regional Winner of the Undergraduate Awards for history and has co-authored papers in academic museum studies journals as well as presenting research at the ANU Student Research Conference. As recipient of the College of Arts and Social Science Travel Grant, she studied abroad at the University of Copenhagen in 2019. Eleanor will undertake honours in history in 2021.

## Sylvia Ghaly

Sylvia is a human rights and humanitarian advocacy and communication professional. She has experience in influencing public policy through political lobbying, policy analysis, research, advocacy, communications, managing media relations, campaigning, and promoting social justice. Sylvia has worked in Australia and overseas in South America, East and Central Africa, and the Middle East. She holds, among other degrees, a Master of International Law and International Relations from the University of New South Wales (UNSW). She commenced a Juris Doctor online with ANU in April 2016, which coincided with her deployment to Yemen to work with some of the largest humanitarian organisations on the ground. She graduated in June 2020, and was admitted to legal practice in the ACT in December 2020.

## Timothy Hibbins

Timothy is currently pursuing a Bachelor of Politics, Philosophy and Economics at ANU. While a humanities student, he is also interested in science. In particular, he is drawn to investigate the ways in which science is connected to the three areas of his degree, whether it be how scientific methodology is employed within the fields of politics and economics, or the philosophical underpinnings of science itself.

## Georgie Juszczyk

Georgie recently graduated from Law (Hons)/International Security Studies at ANU. Her principal areas of interest include international trade law, public international law, national security law, and constitutional and administrative law.

## Piper Keel

Piper is an undergraduate student studying a Bachelor of Laws and a Bachelor of Arts. She has published various creative pieces across multiple mediums; this is her first academic publication. Piper is passionate about women, literature, and the law, and hopes to use her passion to draw out women's voices in both fields.

## Manya Sinha

Manya is a later-year ANU student who is deeply passionate about intersectionality within academia.

## Elizabeth Spollard

Elizabeth is a second-year student with a keen interest in military history and European culture. She is undertaking a Bachelor of Laws (Honours) and Bachelor of Arts, majoring in both contemporary Europe and German language and culture. She has been the recipient of awards for her historical writing, including both the Simpson Prize and Young Historian of the Year for the ACT.

## Vidit Thakkar

Vidit is currently in his final year of Bachelor of Economics and Bachelor of International Relations at ANU. He maintains a keen interest in resource curse literature and its impact on the political economy of the countries affected by it.

## Stefan Thottunkal

Stefan is currently studying a Bachelor of Health Science at ANU. His research interests include health policy, Aboriginal and Torres Strait Islander studies, and anthropology. Stefan has produced work on a variety of topics such as sexually transmitted infection prevention, sugar tax policy, Indigenous notions of healing, global mental health interventions, and the PERMA (positive emotion, engagement, relationships, meaning, and accomplishments) psychological wellbeing model.

## Thomas Weight

Tom is a Bachelor of Philosophy (Honours)—Arts and Social Sciences student at ANU, undertaking his honours year. Under the supervision of Professor Robert Goodin, he is writing an honours thesis in the School of Philosophy on responsibility for remedying Indigenous over-incarceration. Concurrently, Tom is working as a research assistant at the ANU Centre for Social Research and Methodology with Dr Curchin and Professor Ritter (UNSW) on an exploratory project that examines the framing of drug testing in Parliamentary debate. Tom was also a research intern in the Office of Senator Rachel Siewert in 2019.

## Cinnamone Winchester

Cinnamone is a fourth-year Bachelor of Arts student. She is currently undertaking an English major with minors in history and archaeology, and is particularly interested in Victorian literature.

## Karen Xin Zhang

Karen is in the final year of her Bachelor of International Security Studies. She is interested in the intersections and interactions between culture, society, and security. Karen led the organisation of the ANU 2019 Asia Pacific Week conference on ‘New Horizons: Identities, Challenges and Opportunities’. In October 2019, she was selected to participate in the Australia China Youth Association MyLead Women’s Leadership Program held in Beijing, funded by the Australian Embassy in China. She has previously written for *The Monsoon Project* on entertainment censorship and women’s rights in China. After graduation, Karen hopes to pursue a career in the public sector, advancing Australia’s cultural and strategic interests in the Asia-Pacific region.

# About the editors

## Benjamin Kooyman

Ben has worked in the field of academic language and learning support for the past decade. Prior to joining ANU Academic Skills, he served as a Learning Adviser with a widening participation focus at the University of South Australia, and as an Academic Skills Adviser and Academic Integrity Officer at the Australian College of Physical Education. He has a PhD in English literature from Flinders University and has published in the areas of literature, film, and academic language and learning.

## Louisa Talipski

Louisa is a PhD candidate in the ANU Research School of Psychology. She has worked at ANU Academic Skills as a Writing Coach, tutored a number of undergraduate courses, and delivered several guest lectures. Her current research focuses on how social and symbolic cues in the environment guide attention, and part of her PhD work has been published in the *Quarterly Journal of Experimental Psychology*.

# Cover art

## Greta Cooper, Bachelor of Visual Arts

*Life after the Wildfires (1 of 16)*, 2020, ink, acrylic screen-print and monotype on paper, 56 x 76 cm.

Photograph taken by Prue Hazelgrove.

Greta Cooper grew up in a small rural town on the South Coast of New South Wales. She moved to Canberra to study visual arts at ANU in 2018. Due to the COVID-19 pandemic, Greta returned to her hometown where she continued studying remotely.

Moruya is surrounded by bushland on one side and the coastline on the other. It was one of the towns hit by the 2019–20 summer bushfires. Spending most of the year at home with her family gave Greta time to reflect on her feelings and emotions after the fires. While immersing herself in the local bushland, she saw the bush regrow and regenerate in front of her eyes.

Greta spent her days exploring bushland at the old Moruya Tip. This was her inspiration for the series of artworks showcased in the ANU School of Art's graduating exhibition, *Amplified Together*. The works were created on paper using brushes she made from things collected while spending time in the bush. The brushes she created became part of the final artwork and to accompany the drawings she recorded the sounds of the bush. The artwork on the cover of this volume features a burrawang fern regrowing and an eastern yellow robin.



# Finding the ‘other Germany’: Analysing the contested legacy of resistance to Nazism from within the Third Reich

ELIZABETH SPOLLARD

## Abstract

Hailing from long before the rise of the Third Reich, the concept of a so-called ‘other Germany’ is increasingly used to describe acts of resistance against Nazism undertaken by German individuals. Yet among the tussle of political agendas, a pendulum-swinging change in resistance historiography, and the rise of postwar mythology, the memory and legacy of such resistance has remained contested and incomplete. This paper distinguishes the common threads which link the fractured resistance landscape into one cohesive ‘other Germany’, demonstrating how acts of German resistance—irrespective of their limited effectiveness—maintained a moral and sociocultural legacy which prevailed well after the Second World War and the fall of the Third Reich.

By evaluating the various categorisations by which ‘resistance’ has been understood, the paper first utilises historiographical discourse to devise a multifaceted classification framework. When applied to historical examples, the framework assists in constructing a cohesive picture of German resistance. The second section pinpoints the true legacy of German resistance, accounting for the limited effectiveness of such efforts in light of the obstacles faced by resisters. Incorporating historiographical analysis, it pinpoints how the ‘other Germany’ was a tangible reality which remained faithful to the nation’s prewar moral tradition, and served a valuable role in preserving Germany’s non-Nazi national identity during the postwar era.

## Introduction

The concept of *Das andere Deutschland*—the ‘other Germany’—spans far back to the time and works of German philosophical greats such as Goethe, Kant, Schiller, and Heine. Its origins are rooted in a time where intellectual debate distinguished German idealism as belonging to an ‘other’ Germany, where national identity was not hallmarked by Prussian militarism and barbarity.<sup>1</sup> Acquiring a new meaning in the twentieth century, the concept was widely popularised by West German Chancellor and Nobel Laureate Willy Brandt. A resolute opponent of Nazism since adolescence, Brandt had been pursued by the Gestapo, deprived of his citizenship, and denounced by communists.<sup>2</sup> Yet even from exile, he still proclaimed: ‘I never renounced what I regarded as my duty towards the other Germany, the real Germany. Hitler had to be defeated so that Germany might live’.<sup>3</sup> In a life encompassing the defeat of his German Fatherland in two world wars, Brandt never lost sight of this ‘other Germany’, untainted by Nazi rhetoric and characterised by peace and tolerance. This concept has become increasingly synonymous with all acts of resistance against Nazism within Germany under the Third Reich; however, such an idealistic conceptualisation is ripe for contention. Historiographical debates have contested how to define and categorise various forms of resistance, intensely debating their nature,

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<sup>1</sup> Matthew D’Auria, *Visions and ideas of Europe during the First World War* (London: Routledge, 2019), 82.

<sup>2</sup> Willy Brandt, *In exile: Essays, reflections, and letters, 1933–1947* (Philadelphia: University of Pennsylvania Press, 1971), 264.

<sup>3</sup> *Ibid.*, 100.

extent, and effectiveness.<sup>4</sup> Here, a myriad of questions arise. Was the concept of an ‘other Germany’ the mere product of postwar mythology, perpetuated to address guilt in the tussle of East and West German agendas? Moreover, was this preserved national identity a tangible reality; if so, considering its effectiveness, what legacy does it retain?

Ultimately, this paper will distinguish the common threads which link the fractured resistance landscape into one cohesive ‘other Germany’, demonstrating how acts of German resistance under the Third Reich retain a key moral and sociocultural legacy, irrespective of their limited effectiveness. As the unique context of Nazi Germany ensured there was no coherent resistance movement, this article applies a multifaceted classification framework to historical examples, inspired by the various categorisations and typologies through which ‘resistance’ has been understood. Through this method, a cohesive picture can be formed, encapsulating dissent and civil resistance, more violent acts of sabotage, and efforts to liberate the persecuted. Moreover, this paper will highlight how the legacy of German resistance is far greater than strictly ‘physical outcomes’ such as the elimination of tactical targets, evacuation of oppressed individuals, or destruction of an entire regime. It will explore how the resistance retains an important moral and sociocultural legacy, overcoming the clamour of postwar mythology and political agendas. Overall, this paper will demonstrate how the ‘other Germany’ was a reality which lived on in the sacrifice of the few, preserving the values, morals, and national identity of Germany threatened by the Third Reich.

## Constructing a cohesive picture of German resistance

As resistance undertaken by German nationals is often overlooked, it is imperative to firstly acknowledge that the unique context surrounding such acts of resistance differed significantly to similar efforts observed in other, forcibly Nazi-occupied nations. Any efforts undertaken by German citizens repudiated the state doctrine by which their country functioned; as a result, resistors essentially operated against fellow citizens, committing high treason to act in accordance with personal beliefs.<sup>5</sup> So central to Nazism was *Gleichschaltung*, or ‘social coordination’, that even the most private forms of noncompliance carried the potential for grave consequences.<sup>6</sup> Moreover, the phrase ‘German resistance’ cannot be applied in a manner analogous to the coordinated movements witnessed in other occupied nations, as there was no united resistance movement within the Third Reich. As such, categorical frameworks are key to understanding how isolated efforts can be linked through their methods and motivations, assisting in the search for a tangible ‘other Germany’.

### Categorisations and typologies

Definitions of resistance largely reflect an organised movement, prompting imagery of a mass conspiracy or coup d’état. The absence of a singular, cohesive movement has prompted scholars to debate what methods, goals, or efforts constituted ‘resistance’.<sup>7</sup> Labels and typologies have played a critical part in the debate, with the German term *Widerstand*—simply, ‘resistance’—emerging in the late 1960s as the key label for all forms of resistance against Nazism from within the Third Reich.<sup>8</sup> Historians soon became preoccupied with *Alltagsgeschichte*, or the history of everyday life. Consequently, the ‘Bavaria Project’ by the Institute of Contemporary History instigated research into

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<sup>4</sup> Ian Kershaw, *The Nazi dictatorship: Problems and perspectives of interpretation* (London: Arnold Press, 2000), 183–184.

<sup>5</sup> Gedenkstätte Deutscher Widerstand, ‘German Resistance Memorial Centre: 1933–1945’, 2016, [www.gdw-berlin.de/en/site\\_of\\_remembrance/1933\\_to\\_1945/](http://www.gdw-berlin.de/en/site_of_remembrance/1933_to_1945/).

<sup>6</sup> Yale Law School Lillian Goldman Library, ‘Nazi conspiracy and aggression: Means used by the Nazi conspirators in gaining control of the German state’, 2020, [avalon.law.yale.edu/imt/chap\\_07.asp](http://avalon.law.yale.edu/imt/chap_07.asp).

<sup>7</sup> Leonidas Hill, ‘Towards a new history of German resistance to Hitler’, *Central European History* 14, no. 4 (1981): 369–399, [www.jstor.org/stable/4545942](http://www.jstor.org/stable/4545942).

<sup>8</sup> Danny Orbach, ‘Criticism reconsidered: German resistance to Hitler in critical German scholarship’, *Journal of Military History* 75, no. 2 (2011): 565–590, [scholar.harvard.edu/dannyorbach/criticism-reconsidered-german-resistance-hitler-critical-german-scholarship](http://scholar.harvard.edu/dannyorbach/criticism-reconsidered-german-resistance-hitler-critical-german-scholarship).

how individuals resisted through everyday actions; for instance, refusing to give the Nazi salute. The project's first director, Peter Hüttenberger, defined *Widerstand* as encompassing 'every effort to resist the claim of total domination, no matter how minor'.<sup>9</sup> The second director, Martin Broszat, opposed such an extreme typology, acknowledging that not every action rejecting the Nazi regime's total claims should be considered a form of *Widerstand*. Instead, he devised the concept of *Resistenz*, meaning 'immunity', whereby certain sections of German society maintained their pre-1933 values without fundamentally confronting Nazism.<sup>10</sup> The concept was criticised by many, including the German historian Klaus-Jürgen Müller, who argued that the term *Widerstand* should apply only to those with a 'will to wholly overcome the system'.<sup>11</sup> However, as noted by Hans Mommsen, through this concept 'even those who fought only for the rights of workers ... or as a powerless protest daubed slogans on walls at night-time ... all belonged to the resistance'.<sup>12</sup> Mommsen cautioned against unduly rigid terminology, promoting the utility of a *Widerstandspraxis*, or 'resistance practice', which acknowledges the vast spectrum of types and forms of resistance and places actions within a 'process' which increasingly rejected the Nazi system in its entirety.<sup>13</sup> Such an approach sought to remedy the rift in historiographical discourse, embracing the fragmented nature of the resistance landscape and acknowledging how the Nazi political system resulted in an extensive array of forms of opposition.<sup>14</sup>

Consequently, an array of multifaceted frameworks emerged. German historian Detlev Peukert created a typology designed to categorise various forms of resistance. Spanning from the private to the violent, his typology utilised a range of terms: 'nonconformity', referring to actions mostly done in private and not including total rejection of the Nazi system; *Verweigerung*, or 'refusal of cooperation'; acts of public protest; and finally, 'resistance' by those committed to the total overthrow of the regime. Most prominently, historian Sir Ian Kershaw promoted the use of a tri-faceted analytical framework, proposing the use of three bands ranging from dissent to opposition and resistance.<sup>15</sup> Any analysis of the effectiveness and value of resistance undertaken by German nationals would be incomplete without the consideration of historical examples. In building a picture of how the proposed 'other Germany' did indeed materialise, multifaceted frameworks provide the most ideal basis through which the wide-ranging forms of resistive action can be suitably assembled into a cohesive picture. Thus, this paper will adopt a tri-faceted framework, drawing from many of the common categories highlighted within such historiographical debate to cover acts of civil dissent, more violent acts of opposition or sabotage, and resistance through assisting those oppressed by the Nazi regime.

### a) Dissent and civil resistance

Dissent and civil resistance in Germany commonly sought to oppose the indoctrination and militarisation of individuals under the Nazi model, ranging from private nonconformist behaviour to public displays of ideological opposition.<sup>16</sup> Civil resistance directly violated the Reichstag Fire Decree, which allowed the Nazi state to restrict all rights of expression; however, religious convictions led individuals to offer some of the most trenchant public criticisms regarding the moral erosion occurring under the Third Reich.<sup>17</sup> Lutheran preacher Dietrich Bonhoeffer was notably influential within the clandestine resistance movement, while Catholic Bishop Clemens August Graf von Galen publicly

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<sup>9</sup> Kershaw, *The Nazi dictatorship*, 193.

<sup>10</sup> Martin Broszat, *Bavaria in the National Socialist era: Vol. I–VI* (Munich: R. Oldenbourg Verlag, 1983).

<sup>11</sup> Kershaw, *The Nazi dictatorship*, 195.

<sup>12</sup> Hans Mommsen, *German society and resistance against Hitler* (Blackwell: London, 1999), 267.

<sup>13</sup> *Ibid.*

<sup>14</sup> Hans Mommsen, 'The German resistance against Hitler and the restoration of politics', *The Journal of Modern History* 64, no.1 (1992): 112–127, [www.jstor.org/stable/2124972](http://www.jstor.org/stable/2124972).

<sup>15</sup> Kershaw, *The Nazi dictatorship*.

<sup>16</sup> United States Holocaust Memorial Museum, 'Resistance inside Germany', 2020, [www.ushmm.org/outreach/en/article.php?ModuleId=10007751](http://www.ushmm.org/outreach/en/article.php?ModuleId=10007751).

<sup>17</sup> Kairos Centre, 'The Widerstand: Religion and German resistance to Hitler', 2019, [kairoscenter.org/religion-and-the-german-resistance-to-hitler/](http://kairoscenter.org/religion-and-the-german-resistance-to-hitler/).

denounced the euthanasia program.<sup>18</sup> Pastor Julius van Jan was arrested following his sermon denouncing *Kristallnacht*, or ‘Night of the Broken Glass’, a pogrom against Jewish individuals carried out by both the *Sturmabteilung* (Nazi paramilitary force) and civilians. As he stated, ‘Where is the man who, in the name of God and justice, will cry: “Maintain righteousness, rescue those deprived of their rights from the hands of the transgressor?”’<sup>19</sup> Groups such as the ‘Edelweiss Pirates’ were also formed, comprised of anti-establishment youths motivated by a shared antipathy towards the grim uniformity of the Hitler Youth.<sup>20</sup> Similarly, the ‘White Rose’ group—founded in 1942 and led by University of Munich students Sophie and Hans Scholl—distributed six mimeographed leaflets explicitly denouncing public indifference to the oppressive acts of the Nazi regime.<sup>21</sup> Although the Gestapo eventually tried and executed the core members, Sophie reiterated: ‘What does my death matter, if through us, thousands are stirred to action?’<sup>22</sup> Such cases exemplify how civil resistance sought to oppose the indoctrination and militarisation of individuals under the Nazi model, as resisters hoped to wake their fellow countrymen from their passive slumber.

### b) Violent opposition and sabotage

By contrast, more violent aspects of the resistance movement in Germany centred around sabotage and assassination attempts, with resisters desperately seeking to hinder the regime from within. Over time, the essentially non-political activities of the ‘Edelweiss Pirates’ grew to some 30 gangs in the Rhine-Ruhr area, often acquiring firearms and explosives to fight the Hitler Youth and attack police stations.<sup>23</sup> Moreover, the infamous failed ‘Operation Valkyrie’ plot of 20 July, 1944—in which Colonel Claus von Stauffenberg planted a bomb in Hitler’s *Wolfsschanze* military headquarters on the Eastern Front—was the culminative work of the Kreisau Circle, a group of military officers who planned to initiate a coup following the assassination of Hitler.<sup>24</sup> In the aftermath, nearly 200 individuals were executed and 5,000 were arrested.<sup>25</sup> Many of the conspirators have been dismissed as aristocratic, opportunistic officers who assisted only when catastrophic defeat loomed in the Russian campaign; however, many acted through an unwavering moral conviction, including Major-General Henning von Tresckow, who declared: ‘When I go before God, I will be able to justify what I did. A man’s moral worth is established only at the point where he is ready to die in defence of his convictions.’<sup>26</sup> Yet such radical attempts were not undertaken only by those in positions of relative power. The story of carpenter Georg Elser represents one such account of extraordinary action. Executed just four weeks shy of the end of the war, Elser had been arrested for the attempted assassination of Hitler at the *Bürgerbräukeller* Beer Hall in 1939. Motivated only by a profound sense of moral accountability, he acted alone, informing his arresting officers: ‘I wanted to prevent by my act even greater bloodshed.’<sup>27</sup> During the four days of his interrogation in Berlin, Elser further articulated his motive to his interrogators: ‘I considered how to improve the conditions of the workers and avoid war ... for this, I was not encouraged by anyone.’<sup>28</sup> Moreover, five years later in Dachau concentration camp, Elser reiterated to SS officer Lechner: ‘I had to do it because, for his whole life, Hitler has meant the downfall of Germany.’<sup>29</sup> Although Hitler ended

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<sup>18</sup> Claudia Koonz, ‘Ethical dilemmas and Nazi eugenics: Single-issue dissent in religious contexts’, *Journal of Modern History* 64, no.1 (1992): 8–31, [repository.library.georgetown.edu/handle/10822/544863](https://repository.library.georgetown.edu/handle/10822/544863).

<sup>19</sup> Steven Candido, *Widerstand: Resistance to Nazism* (Boston: Boston College, 2011), 45, [www.bc.edu/content/dam/files/research\\_sites/cjl/pdf/StevenCandido\\_Thesis.pdf](http://www.bc.edu/content/dam/files/research_sites/cjl/pdf/StevenCandido_Thesis.pdf).

<sup>20</sup> Toby Axelrod, *Rescuers defying the Nazis: Non-Jewish teens who rescued Jews* (New York: Rosen Publishing Group, 1999).

<sup>21</sup> White Rose Studies, ‘The leaflets of the White Rose’, 2020, [www.white-rose-studies.org/The\\_Leaflets.html](http://www.white-rose-studies.org/The_Leaflets.html).

<sup>22</sup> Weiße Rose Stiftung, *The White Rose: Student resistance against Hitler* (Munich: Ludwig-Maximilians University, 2006), 34–35.

<sup>23</sup> Axelrod, *Rescuers defying the Nazis*.

<sup>24</sup> Ger Van Roon, *German resistance to Hitler: Count von Moltke & the Kreisau Circle* (London: Van Nostrand Reinhold, 1971), 517.

<sup>25</sup> *Ibid.*

<sup>26</sup> Eric Metaxas, *Bonhoeffer: Pastor, martyr, prophet, spy* (Nashville: Thomas Nelson Press, 2010), 521.

<sup>27</sup> Bundesarchiv Koblenz, *Gestapo interrogation report*, November 19–22, 1939, signature R 22/3100.

<sup>28</sup> *Ibid.*

<sup>29</sup> Hellmut Haasis, *Bombing Hitler: The story of the man who almost assassinated the Fuhrer* (New York: Skyhorse Publishing Company, 2013), 196.

his address early, avoiding the explosion which killed eight individuals, Elser's cause retains an unwavering validity.<sup>30</sup> Arthur Nebe, who led the investigation, even privately disclosed to Hans Bernd Gisevius in late 1939: 'This man of the people loved ordinary people; he laid out for me passionately and in simple sentences how ... Hitler is war—and if he goes, there will be peace.'<sup>31</sup> These select examples display how resistance also occurred through more violent means, as German citizens desperately sought to deliver a devastating blow to the regime from within.

### c) Resistance through assistance: Liberating the oppressed

German resisters also undertook efforts to liberate those persecuted by ethnocentric fascism, upholding the fundamental values of the 'other Germany' from the confines of their domestic circumstances. As Nuremberg Race Laws of 1935 institutionalised ethnocentric fascism, resistance to state-sanctioned oppression of minorities was limited in capacity and carried overwhelming risk.<sup>32</sup> Yet as early as 1933, a Quaker group in Berlin worked to shelter persecuted individuals, declaring: 'We must carry the little child on our shoulders through the floods of our time to the shore. We have to work, to bring a new spirit into the world.'<sup>33</sup> The aforementioned 'Edelweiss Pirates' also operated through the sphere of assistive resistance, aiding German deserters, Jews, and escaped Russian slave labourers.<sup>34</sup> Instigated by the non-Jewish wives and relatives of over 1,800 Jewish men awaiting deportation, the *Rosenstrasse* protest of 1943 saw nearly 6,000 individuals successfully protest for their release.<sup>35</sup> Through Yad Vashem, over 587 German individuals are commemorated amongst the 'Righteous Among the Nations', with many having provided shelter and falsified travel documents.<sup>36</sup> Prominent Minister Heinrich Grüber negotiated with British and Dutch authorities to secure visas, and Admiral Wilhelm Canaris brazenly utilised his position as head of the *Abwehr*—the German military intelligence service—to facilitate evacuations.<sup>37</sup> The remarkable legacy of Oskar and Emilie Schindler—popularised through the 1993 film *Schindler's List*—serves as a pivotal account of altruistic action, in which the couple facilitated the survival of 1,100 Jewish individuals interned in Kraków-Plaszów concentration camp.<sup>38</sup> Overall, resistance also notably manifested through efforts to liberate those persecuted by ethnocentric fascism, prompted by an altruistic will to preserve universal freedoms.

## Solving the contested historical legacy of the resistance

### Effectiveness: 'A few flashes of humanity'

Although discourse has often centred upon the 'immeasurability' of resistance, any consideration of effectiveness can at least appreciate limiting factors such as age, physical capacity, occupation, and access to centres of power.<sup>39</sup> There can be little doubt that between 1933 and 1945 in Germany, accommodation, collaboration, and passivity were the normal patterns of public behaviour. Active

<sup>30</sup> Smithsonian Institute, 'One man against tyranny', 2011, [www.smithsonianmag.com/history/one-man-against-tyranny-53850110/](http://www.smithsonianmag.com/history/one-man-against-tyranny-53850110/).

<sup>31</sup> Haasis, *Bombing Hitler*, 153.

<sup>32</sup> Peter Hoffmann, 'The good Germans: Inside the resistance to the Nazis', *Foreign Affairs* 93, no. 4 (2014): 190–196, [www.jstor.org/stable/24483571](http://www.jstor.org/stable/24483571).

<sup>33</sup> Candido, *Widerstand*, 55.

<sup>34</sup> Axelrod, *Rescuers defying the Nazis*.

<sup>35</sup> Mark Wolfram, 'Rediscovering narratives of German resistance: Opposing the Nazi 'terror-state'', *Rethinking History* 10, no. 2 (2006): 201–219. [www.tandfonline.com/doi/abs/10.1080/13642520600649382](http://www.tandfonline.com/doi/abs/10.1080/13642520600649382).

<sup>36</sup> Yad Vashem, 'Righteous among the nations', 2020, [www.yadvashem.org/righteous/statistics](http://www.yadvashem.org/righteous/statistics).

<sup>37</sup> Wolfgang Bialas, 'Nazi ethics: Perpetrators with a clear conscience', *Dapim: Studies on the Holocaust* 27, no. 1 (2013): 3–25, [www.tandfonline.com/doi/citedby/10.1080/23256249.2013.812821?scroll=top&needAccess=true](http://www.tandfonline.com/doi/citedby/10.1080/23256249.2013.812821?scroll=top&needAccess=true).

<sup>38</sup> Detlef Garbe, *Between resistance & martyrdom* (Madison: University of Wisconsin Press, 2008), 743.

<sup>39</sup> Frank McDonough, *Opposition and resistance in Nazi Germany* (Cambridge: Cambridge University Press, 2001).

opposition struggled to succeed in the political vacuum, as popular dissent was transformed into resignation, despair, apathy, and self-preservation.<sup>40</sup> The ruthless and systematic nature of Nazi surveillance and repression ensured that by June 1933, political opposition was driven underground and paralysed by mass arrests.<sup>41</sup> As Kershaw observed, ‘popular opposition broke down ... where conservative and Nazi values converged’, meaning dissent did not allow a permanent or overwhelming disintegration of consensus.<sup>42</sup> Ultimately, popular opposition among citizens remained scattered, isolated, and easily suppressed, while military resisters lacked unity, favourable access, and diplomatic support abroad.

It is important to note that although the extent of internal opposition was concealed, Gestapo records reveal nearly 800,000 Germans were imprisoned for active resistance during the 12-year reign of the Third Reich.<sup>43</sup> Moreover, the first concentration camps—notably Dachau, built in 1933—were intended for left-wing dissidents, and as far back as 1936 a recorded 11,687 Germans were arrested for illegal ‘socialist’ activities.<sup>44</sup> As historian Martin Gilbert noted: ‘We will never know how many Berliners had the decency and courage to save their Jewish co-citizens: 20,000, 30,000? We don’t need the number to recognise this admirable minority.’<sup>45</sup> While impressive considering the contextual limitations, the reality remains: German resistance was unable to overthrow the regime. Although determined, efforts were largely ineffective and incapable of overwhelming the masses, and are despairingly characterised by Kershaw as ‘a few flashes of humanity by individuals, lightening the general darkness’.<sup>46</sup> Any outcomes reflected the extent to which resisters were realistically able to overcome the comfortable coexistence of ‘complaint and compliance’.<sup>47</sup> Ultimately, physical outcomes were all greatly limited by contextual factors, explaining how general currents of discontent failed to translate into widespread resistance.<sup>48</sup>

## A pendulum-swinging change in resistance historiography

Delicate political sensibilities have contributed to the portrait of German resistance remaining somewhat incomplete. Following the war, the nation was burdened by the psychology of defeat, economic distress, occupation, and de-Nazification.<sup>49</sup> Within both the Federal Republic of Germany and the German Democratic Republic, the memory of German resistance was appropriated to provide legitimacy to the two rival German states. Historical memory was rewritten with Orwellian vigour. In East Germany, the Communist Party of Germany (KPD) was portrayed as the only anti-fascist force in the Third Reich, while non-communist resistance remained largely ignored or obscured.<sup>50</sup> In West Germany, discourse sought to rebut national ‘collective guilt’ accusations, hailing the heroism and martyrdom of resistance while denouncing all socialist resisters as traitors.<sup>51</sup> Here, the emergence of postwar mythology shrouded the memory and commemoration of resistance, causing much of its true value to be lost amidst the clamour of clashing ideologies.

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<sup>40</sup> Jo Fox, ‘Resistance and the Third Reich’, *Journal of Contemporary History* 39, no. 2 (2004): 271–283, [www.jstor.org/stable/3180725](http://www.jstor.org/stable/3180725).

<sup>41</sup> Michael Balfour, *Withstanding Hitler in Germany: 1933–45* (New York: Routledge Press, 1988).

<sup>42</sup> Fox, ‘Resistance and the Third Reich’.

<sup>43</sup> Shareen Brysac, ‘At last, recognition and praise for the resistance in Nazi Germany’, *New York Times*, October 7, 2000, [www.nytimes.com/2000/10/07/arts/at-last-recognition-and-praise-for-the-resistance-in-nazi-germany.html](http://www.nytimes.com/2000/10/07/arts/at-last-recognition-and-praise-for-the-resistance-in-nazi-germany.html).

<sup>44</sup> Peter Hoffman, *History of the German resistance: 1933–1945* (Canada: McGill-Queen's University Press, 1996), 121–127.

<sup>45</sup> Martin Gilbert, *The righteous: The unsung heroes of the Holocaust* (New York: Holt Publishing, 2004), 188.

<sup>46</sup> Fox, ‘Resistance and the Third Reich’, 283.

<sup>47</sup> Hoffman, *History of the German resistance*, 278.

<sup>48</sup> Fox, ‘Resistance and the Third Reich’.

<sup>49</sup> Hajo Holborn, *A history of modern Germany* (New Jersey: Princeton University Press, 1982).

<sup>50</sup> Suzanne Swartz, *Obstacles and stepping stones to the hero's pedestal: Reunified Germany's selective commemoration of resisters to National Socialism* (2007), 277, [digitalcommons.colby.edu/cgi/viewcontent.cgi?article=1276&context=honorstheses](http://digitalcommons.colby.edu/cgi/viewcontent.cgi?article=1276&context=honorstheses).

<sup>51</sup> Alan Merson, *Communist resistance in Nazi Germany* (London: Lawrence and Wishart, 1985), 91.

## An intrinsic moral legacy

Effectiveness is not the sole nor primary standard by which German resistance has been debated and evaluated. As reiterated by rabbi Harold Schulweis: 'In unearthing the crimes of villainy, the virtues of humanity must not be buried.'<sup>52</sup> Despite the reality of limited outcomes, isolated resisters who had no hope of succeeding did not make success the sole basis for their commitment. As German Chancellor Helmut Kohl noted, to entirely understand the legacy of the resistance, 'we have to ask what those who took part were for ... the true inheritance lies in the what for'.<sup>53</sup> Consequently, although it failed to dismantle the regime, German resistance is by no means historically irrelevant; rather, as Willy Brandt reminds us, the 'other Germany' was a reality which 'retains its validity, irrespective of its limited effectiveness'.<sup>54</sup>

Through the stories and voices of those involved, it is clear that resisters counted much more than just the prospect of success in their considerations; instead, they were motivated by a shared sense of ethical conviction. As noted by historian Peter Hoffman, 'to declare these individual or collective acts of heroism to have been ineffective is not a judgement on their moral value'.<sup>55</sup> Finding no excuse in youth, ignorance, or passivity, these individuals took upon themselves a responsibility for atonement on behalf of the German moral consciousness.<sup>56</sup> It is this exact pursuit of humanity which unites the fractured resistance landscape; moreover, it is the pursuit of these qualities of freedom, peace, and tolerance which aligns German resistance with the philosophical tradition of the 'other Germany'. Even during his trial, Professor Kurt Huber of the 'White Rose' remained loyal to the teachings of eighteenth-century German philosopher Immanuel Kant, concluding his defence with the words of Kant's disciple, Johann Fichte:

And thou shalt act as if  
On thee and on thy deed  
Depended the fate of all Germany  
And thou alone must answer for it.<sup>57</sup>

Two centuries later, his words were fulfilled. Determined not to let the fate of Germany be moral annihilation, resisters undertook the obligation 'to save Germany from self-inflicted spiritual collapse'.<sup>58</sup> They worked to demonstrate that the humane values of the 'other Germany' lived on; that ultimately, some portion of Germany remained morally untouched. Overall, the philosophical tradition of the 'other Germany' stands as a fitting label by which the fractured resistance landscape can be united, highlighting the shared defence of the very qualities tragically erased from the German identity during the catastrophic rule of the Nazi Party.

## Sociocultural legacy: A lesson from refugee scholars

Furthermore, the deeds of resisters laid a foundation stone for the rekindling of German identity in the post-Nazi sphere. This sociocultural value is most clearly observable through the experiences and works of German literary and intellectual figures who fled their homeland as Nazism took hold. Many wrote and campaigned from abroad, seeing themselves as custodians of the 'other Germany'; of Heine and

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<sup>52</sup> Eva Fogelman, *Conscience and courage: Rescuers of Jews during the Holocaust* (New York: Anchor, 1994), 12.

<sup>53</sup> Marjorie Miller, 'Germans mark glimmer of Nazi resistance', *Los Angeles Times*, July 21, 1994, [www.latimes.com/archives/la-xpm-1994-07-21-mn-18316-story.html](http://www.latimes.com/archives/la-xpm-1994-07-21-mn-18316-story.html).

<sup>54</sup> David Large, *Contending with Hitler: Varieties of German resistance in the Third Reich* (Cambridge: Cambridge University Press, 1994), 7–9.

<sup>55</sup> Frances Nicosia, *Germans against Nazism: Nonconformity, opposition and resistance in the Third Reich* (New York: Berghan Books, 1991), 60.

<sup>56</sup> Annedore Leber, *The conscience in revolt: Portraits of the German resistance: 1933–1945*, trans. Thomas McClymont (Mainz/Munich: Hase & Köhler, 1994).

<sup>57</sup> United States Holocaust Memorial Museum, 'White Rose', 2019, [www.ushmm.org/wlc/en/article.php?ModuleId=10007188](http://www.ushmm.org/wlc/en/article.php?ModuleId=10007188).

<sup>58</sup> Nicosia, *Germans against Nazism*, 4.

Goethe, rather than brownshirts and barbarism.<sup>59</sup> In the postwar sphere, this catastrophe of identity came to the forefront, requiring what émigré historian Hans Rothfels referred to as a task of ‘identity rehabilitation’.<sup>60</sup> Citizens strived for a clear national identity amongst the physical and moral rubble, struggling to reconnect with the pre-Nazi sociocultural tradition of Germany.<sup>61</sup> Many even spoke of the most basic need to distinguish between ‘German’ and ‘Nazi’, a definition which had become despairingly blurred during wartime.

One such émigré historian, Fritz Stern, stressed that while he did not wish to deny the responsibility of the German people for the horrors unleashed in their name by the Nazi regime, he could not hold them collectively guilty, or wholly reject his native land.<sup>62</sup> He reiterated the tragic truth: ‘their purposes had not been ours’.<sup>63</sup> Similarly, scholar Victor Klemperer did not dissociate with Germany after fleeing to serve in the United States forces, articulating his distinction between the Nazi enemy and the ‘other Germany’ of decency and urbanity: ‘The more the German nation became an accomplice of atrocious crimes, the more I held that among the wicked citizens of Sodom, there were righteous ones. Some, after all, were my friends.’<sup>64</sup> The discourse and writings of wartime émigrés offer insight into the value German resistance had for the sociocultural identity of post-Nazi Germany. For the many who held an exceptional yearning to return, knowing that individuals had conscientiously opposed the Nazi regime at the price of their lives had a positive influence on the complex attitudes they held toward their native country. In the post-1945 sphere, a new relationship with the German present was now possible. In 1946, recently returned leftist writer Alexander Abusch heralded the German resistance as ‘a beacon in the German darkness, whose light must be kept burning’ to guide the way to a democratic future for postwar Germany.<sup>65</sup> As noted by Chancellor Helmut Kohl, amid the tumultuous atmosphere marred by political agendas and postwar mythology, ‘the resistance helped Germans find a way back into the community of free peoples’.<sup>66</sup> Overall, as observable through the experiences of refugee historians, scholars, and other literary figures, the German resistance preserved an important sociocultural identity.

## A legacy for today

Even today, a national understanding of the cost of war continues to deeply affect contemporary German political culture. Since 1945, Germany has strived to remain steadfastly pacifistic. No country has placed more emphasis on stability and tolerance or been more welcoming to immigrants, from the Italian, Greek, Turkish, and Spanish *Gastarbeiter* (‘guest workers’) attracted during the economic boom of the 1960s, to the Middle Eastern refugees seeking safety in more recent years.<sup>67</sup> However, the rise of right-wing populism—particularly in former East German states—has seen the emergence of a multitude of far-right organisations, including the political party ‘Alternative for Germany’ (AfD), which received the third most votes in the 2017 national election.<sup>68</sup> Yet such a phenomenon has not managed to disturb the steadfast German culture of wartime memory. Although a radical minority seek to erase any sense of responsibility for the nation’s dark past, the stories of the resistance remind us there is no alternative for Germany regarding historical memory. Today, the values of the ‘other

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<sup>59</sup> Anna Carey, ‘When the other Germany was driven into exile’, *The Irish Times*, September 24, 2011, [www.irishtimes.com/culture/books/when-the-other-germany-was-driven-into-exile-1.608738](http://www.irishtimes.com/culture/books/when-the-other-germany-was-driven-into-exile-1.608738).

<sup>60</sup> Marjorie Lamberti, ‘The search for the “other Germany”’: Refugee historians from Nazi Germany and the contested historical legacy of the resistance to Hitler’, *Central European History* 47, no. 2 (2014): 408, [www.jstor.org/stable/43280442](http://www.jstor.org/stable/43280442).

<sup>61</sup> Carey, ‘When the other Germany was driven into exile’.

<sup>62</sup> Lamberti, ‘The search for the “other Germany”’.

<sup>63</sup> *Ibid.*, 402.

<sup>64</sup> *Ibid.*, 415.

<sup>65</sup> Alexander Abusch, *The wrong path of a nation* (Berlin: Aufbau-Verlag, 1946), 260.

<sup>66</sup> Miller, ‘Germans mark glimmer of Nazi resistance’.

<sup>67</sup> Richard Evans, ‘From Nazism to never again: How Germany came to terms with its past’, *Foreign Affairs*, December 12, 2018, [www.foreignaffairs.com/articles/western-europe/2017-12-12/nazism-never-again](http://www.foreignaffairs.com/articles/western-europe/2017-12-12/nazism-never-again).

<sup>68</sup> Manès Weiskircher, ‘The strength of far-right AfD in Eastern Germany: The East-West divide and causes behind populism’, *The Political Quarterly* 91, no. 3 (2020): 614–622, [onlinelibrary.wiley.com/doi/full/10.1111/1467-923X.12859](https://onlinelibrary.wiley.com/doi/full/10.1111/1467-923X.12859).



Germany' endure, demonstrating that there is no excuse found in passivity; that choices are always possible, whether in wartime or in peace.

## Conclusion

Although the Third Reich was not dismantled from within, the conceptualisation of the 'other Germany' stands to accurately embody the important moral and sociocultural legacy that German resistance retains. In the absence of a coherent resistance movement, a multifaceted classification framework allows for the construction of a more cohesive picture of German resistance, encapsulating acts of dissent and civil resistance, more violent attempts of assassination and sabotage, and efforts to liberate persecuted individuals. While unique circumstantial factors limited the effectiveness of resistance efforts, the legacy of German resistance is far greater than strictly physical outcomes; in particular, the intrinsic moral legitimacy of the resistance retains a fundamental validity. Furthermore, a clear sociocultural value prevails, as the resistance preserved and rekindled the non-Nazi values, moral traditions, and national identity of Germany. Ultimately, irrespective of its limited effectiveness, the 'other Germany' was indeed a tangible reality which lived on in the sacrifice of the few, maintaining a moral and sociocultural legacy well after the Second World War and the fall of the Third Reich.

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# The promises and pitfalls of digital activism: Fighting for #MeToo under the Great Firewall of China

KAREN XIN ZHANG

## Abstract

In 2017, the #MeToo movement swept across the globally interconnected digital sphere, exposing cases of sexual assault and harassment across a plethora of industries worldwide, with Hollywood in particular dominating the spotlight. However, little research has been conducted into how this movement translates in non-Western online domains, and the efforts of survivors and grassroots activists in sustaining change online in the face of digital censorship. This essay provides critical insight into how #MeToo has manifested in the Chinese digital sphere, and how these digital movements often struggle to operate and survive within an authoritarian context. It explores how Chinese netizens have thus articulated and cultivated a participatory presence online, carving out a malleable creative space for survivors and activists that is constantly circumventing and adapting to the boundaries of online censorship. Through the evaluation of tactics used by Chinese activists in the #MeToo movement, this essay highlights the complex and dichotomous utility of digital media, through its promises and pitfalls in generating tangible sociocultural transformation.

## Introduction

The innovative and tactful use of information and communication technologies (ICT) by Chinese netizens, in spite of heavy censorship, is emblematic of how ICT ‘doesn’t just supersize activism; it can change how it takes place’.<sup>1</sup> #MeToo activism first rose to prominence in October 2017, when actress Alyssa Milano called on victims of sexual harassment via Twitter to post ‘Me Too’—a phrase first coined by feminist activist Tarana Burke in 2006—as a sign of solidarity among survivors.<sup>2</sup> Within 24 hours, the post received 66,000 replies and the hashtag #MeToo had inspired more than 12 million posts, unveiling a global movement of activism that soon transcended China’s digital borders too.<sup>3</sup> However, little research has been conducted into how the #MeToo movement translates across non-Western online domains, and how Chinese survivors and grassroots activists sustain change online in the face of digital censorship. This essay aims to critically evaluate how #MeToo has manifested in the Chinese digital sphere, and how effectively these digital movements operate and survive within an authoritarian context.

The #MeToo chapter in China has come to represent a digital movement of determined creativity in the face of surveillance, calling for awareness and systemic change around sexual harassment. Most importantly, this essay highlights the complex and dichotomous utility of digital media in generating tangible sociocultural transformation. It begins by contextualising #MeToo in China’s unique digital environment, while adopting the theoretical framework of connective action to examine the movement. The essay will then explore how the Chinese #MeToo movement has been most successful in raising awareness and affective solidarity, as Chinese netizens have articulated and cultivated a strong participatory presence online. However, it also highlights the disadvantages of digital awareness-

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<sup>1</sup> Jennifer Earl and Katrina Kimport, *Digitally enabled social change: Activism in the internet age* (Massachusetts: The MIT Press: 2011), 29.

<sup>2</sup> Elizabeth Brunner and Sarah Partlow-Lefevre, ‘#MeToo as networked collective: Examining consciousness-raising on wild public networks’, *Communication and Critical/Cultural Studies* 17, no. 2 (2020): 3.

<sup>3</sup> *Ibid.*

raising, in marginalising vulnerable groups who do not share equality of access to such online platforms. The essay will then examine how Chinese activists have demonstrated ongoing resilience by carving out a malleable online space that circumvents and adapts to the boundaries of online censorship. Chinese survivors and activists have actively used creativity and international online exchanges to maintain the visibility of #MeToo in China. Finally, this essay will argue that the decentralised nature of #MeToo online has impeded its cohesion, but has also afforded freedom from online erasure. Through the evaluation of tactics used by Chinese activists in the #MeToo movement, this essay highlights the promises and pitfalls in generating sociocultural change through digital media outlets. It is evident that while the movement has successfully generated awareness and solidarity despite censorship, its capacity to create tangible ongoing transformation remains limited and has yet to fully crystallise.

## #MeToo arrives in China

Given the vast expansiveness of digital platforms that #MeToo was born out of, it was not long before the movement reached China, where sexual harassment and the stigmatisation of victims remains a widespread issue. A report critiquing China's sexual harassment laws found that across China's court judgements between 2010 and 2017, only 34 cases out of more than 50 million concerned sexual harassment.<sup>4</sup> This indicates not the absence of sexual harassment, but rather, a systemic challenge evident in underreported cases and silenced victims. In a first step towards change, on 1 January 2018, engineering student Luo Xixi posted her #MeToo experience of sexual harassment, exposing her former academic supervisor Chen Xiaowu on China's largest microblogging platform, Weibo.<sup>5</sup> The post received almost 4 million views and 16,000 shares by the following day.<sup>6</sup> It triggered flows of solidarity posts and allegations that swept over Chinese social media platforms. In a rare but inspiring turn of events, Beihang University sacked Chen within two weeks of Luo's viral post, and the Chinese Ministry of Education pledged zero tolerance to sexual misconduct, promising to combat sexual harassment in the sector.<sup>7</sup> The initial orientation of #MeToo around the Chinese education sector reflected not only a considerably youthful demographic of impassioned participants, but also the 'increasingly internationalised network' of students who, like Luo, were Chinese students based overseas and exposed to uncensored critical feminist theories.<sup>8</sup> Wu and Dong highlight how 'made-in-China feminism' is now largely led by young feminists, who are ready to employ their technological savviness to challenge gender inequalities, despite government surveillance against public collective activism.<sup>9</sup>

Given that the proliferation of information communication technologies (ICT) enables public participation in a plethora of public discussion forums, the internet has become 'not just a contested space, but a catalyst for social and political transformation'.<sup>10</sup> The number of Chinese internet users has rapidly grown to 904 million in the first quarter of 2020, signifying the internet's potential to shape a highly influential and inclusive public participatory space in China.<sup>11</sup> Thus, the rising number of active netizens using the internet has led to what the Chinese Academy of Social Sciences identifies as a 'new

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<sup>4</sup> Minghui Liu, Yili Lin, and Ying Li, 打破沉默，拒绝妥协——中国防治职场性骚扰法律与司法审判案例研究报告 [Breaking the silence and refusing to compromise: A case study report on China's laws and judicial trials to prevent workplace sexual harassment] (Beijing: Beijing Yuanzhong Gender Development Centre, 2018), [kuaibao.qq.com/s/20180726A1014U00?refer=spider](http://kuaibao.qq.com/s/20180726A1014U00?refer=spider).

<sup>5</sup> Xixi Luo, 我要实名举报北航教授、长江学者陈小武性骚扰女学生 [I want to report harassment of a female student by Professor Beihang and Changjiang scholar Chen Xiaowu], *Sina Weibo*, January 1, 2018, [www.weibo.com/ttarticle/p/show?id=2309404191293831018113](http://www.weibo.com/ttarticle/p/show?id=2309404191293831018113).

<sup>6</sup> Jason P. Abbott, 'Of grass mud horses and rice bunnies: Chinese internet users challenge Beijing's censorship and internet controls', *Asian Politics & Policy* 11, no. 1 (2019): 165.

<sup>7</sup> Simina Mistreau, 'China's #MeToo activists have transformed a generation', *Foreign Policy*, January 10, 2019, [foreignpolicy.com/2019/01/10/chinas-metoo-activists-have-transformed-a-generation/](http://foreignpolicy.com/2019/01/10/chinas-metoo-activists-have-transformed-a-generation/).

<sup>8</sup> Jing Zeng, '#MeToo as connective action: A study of the anti-sexual violence and anti-sexual harassment campaign on Chinese social media in 2018', *Journalism Practice* 14, no. 2 (2020): 179.

<sup>9</sup> Angela Xiao Yu and Yige Dong, 'What is made-in-China feminism(s)? Gender discontent and class friction in post-socialist China', *Critical Asian Studies* 51, no. 4 (2019): 479.

<sup>10</sup> Xiao Qiang, 'The battle for the Chinese internet', *Journal of Democracy* 22, no. 2 (2011): 60.

<sup>11</sup> 'Statistics: China internet users', China Internet Watch, 2020, [www.chinainternetwatch.com/statistics/china-internet-users/](http://www.chinainternetwatch.com/statistics/china-internet-users/).

opinion class'.<sup>12</sup> To contextualise #MeToo in China, we must first understand the 'Great Firewall of China': the strict censorship program that limits the operations of activism online.<sup>13</sup> King, Pan, and Roberts' study found that the primary purpose of Chinese censorship was not to suppress all criticisms toward the government, but to 'reduce the probability of collective action by clipping social ties' wherever collective organisations may materialise and threaten social stability.<sup>14</sup> Consequently, activism mostly occurs in fragmented digital spaces, and will rarely successfully overcome censorship to mobilise mass collective action. As noted by King, Pan, and Roberts, 'the Chinese people are individually free, but collectively in chains'.<sup>15</sup>

Given this unique context, this essay will evaluate the #MeToo movement through a connective action theoretical framework. Bennett and Segerberg (2013) first conceptualised connective action as the emergence of 'inclusive and diverse large-scale personal expression rather than through common group or ideological identification', due to a shift from group-based societies to networked individualism connected through ICT.<sup>16</sup> Connective action is propelled primarily by digital media, which act as 'organising agents' facilitating content distribution across social networks.<sup>17</sup> Therefore, given China's restrictive online environment, ICT has served as a 'critical, and sometimes sole conduit' through which #MeToo activists can facilitate networks of creative resources and connective action to generate awareness and social change.<sup>18</sup>

## Building awareness and solidarity

The most remarkable achievement of China's #MeToo movement is its use of social media platforms to generate widespread awareness, transform the public sphere, and foster a sense of solidarity. Social media platforms have become the preferred feminist activism tools because of their 'economical, convenient, and politically low-cost' nature.<sup>19</sup> Street-level collective engagement carries high risk in China, as shown by the infamous arrest of 'The Feminist Five' in March 2015 for 'disturbing public order' while protesting against harassment on public transport.<sup>20</sup> Supplanting Western social media platforms with their own equivalents, the Chinese Communist Party (CCP) tightly governs a 'hybridised "local" Internet'.<sup>21</sup> According to Lü Pin, founder of Chinese feminist group *Feminist Voices* (which was shut down by authorities in March 2018), China's #MeToo movement mainly used 'Weibo, which allowed broad outreach; and WeChat, which created private groups and more direct channels of communication'.<sup>22</sup> Jürgen Habermas's notion of a 'public sphere' describes a deliberative space of public debate between citizens online and offline.<sup>23</sup> However, feminist scholarship, notably 'cyberfeminism', challenges this concept, arguing that digital public spheres reflect offline exclusionary patriarchies, leveraging men's voices above women's in debate.<sup>24</sup> Feminist scholars have also long

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<sup>12</sup> Ibid, 58.

<sup>13</sup> Cara Wallis, 'Gender and China's online censorship protest culture', *Feminist Media Studies* 15, no. 2 (2015): 225.

<sup>14</sup> Gary King, Jennifer Pan, and Margaret E. Roberts, 'How censorship in China allows government criticism but silences collective expression', *American Political Science Review* 107, no. 2 (2013): 1.

<sup>15</sup> Ibid, 14.

<sup>16</sup> W. Lance Bennett and Alexandra Segerberg, 'The logic of connective action', *Information, Communication & Society* 15, no. 5 (2012): 744.

<sup>17</sup> Ibid, 752.

<sup>18</sup> Zeng, '#MeToo as connective action', 175.

<sup>19</sup> Qianying Zhou and Hongfeng Qiu, 'Predicting online feminist engagement after MeToo: A study combining resource mobilization and integrative social identity paradigms', *Chinese Journal of Communication* 13, no. 4 (2020): 3.

<sup>20</sup> Jia Tan, 'Digital masquerading: Feminist media activism in China', *Crime Media Culture* 13, no. 2 (2017): 171.

<sup>21</sup> Abbott, 'Of grass mud horses and rice bunnies', 163.

<sup>22</sup> Siodhbhra Parkin and Jiayun Feng, "'The government is powerful, but it can't shut us down": Lü Pin on China's #Metoo movement', *SupChina*, July 12, 2019, [supchina.com/2019/07/12/the-government-is-powerful-but-it-cant-shut-us-down-lu-pin-on-chinas-metoo-movement/](http://supchina.com/2019/07/12/the-government-is-powerful-but-it-cant-shut-us-down-lu-pin-on-chinas-metoo-movement/).

<sup>23</sup> Michael Salter, 'Justice and revenge in online counter-publics: Emerging responses to sexual violence in the age of social media', *Crime Media Culture* 9, no. 3 (2013): 225.

<sup>24</sup> Kimberly J. Lopez, Meghan L. Muldoon, and Janet K. L. McKeown, 'One day of #feminism: Twitter as a complex digital arena for wielding, shielding, and trolling talk on feminism', *Leisure Sciences* 41, no. 3 (2019): 207.

recognised how ‘affective solidarity’ in ‘frustration, rage, and the desire for connection’ form a necessary precondition for feminist activism to gain and maintain prominence in an inherently patriarchal public sphere.<sup>25</sup> Connective actions comprise of affective personal narratives within broader networks, where social media platforms become ‘conduits for connection’, facilitating a collaborative rather than collective identity.<sup>26</sup> For example, after publicising allegations against Chen on Weibo, Luo gathered victims with similar allegations in a WeChat group called ‘Hard Candy’—named after a film about a teenage female vigilante—to discuss further actions.<sup>27</sup> Campaign hashtags make effective vessels for disseminating ideas, discussions, and resources online. The #MeToo hashtag itself shapes an inclusive participatory culture, through which ‘online users are not passive receivers of information, but active creators of meanings’.<sup>28</sup> In China, waves of #MeToo stories perforated social media, exposing sexual harassment cases ranging from the media sector to the non-profit sector.<sup>29</sup> By late July, the phrase ‘xing sao rao 性骚扰’ (sexual harassment) had appeared on WeChat more than 30 million times.<sup>30</sup> Evidently, the #MeToo hashtag has transformed the traditional concept of a public sphere, placing women’s voices at the centre of their own experiences and placing the narrative power in their hands. The personalised nature of shared #MeToo stories contributes to an awareness-raising, ‘collectively authored’ text that is an integral element of connective action.<sup>31</sup>

However, the #MeToo movement has been criticised for excluding experiences of marginalised, less-privileged women, which is reflective of broader societal inequalities.<sup>32</sup> The online public sphere of feminist activism still remains relatively insular in China, with tertiary-educated urban Chinese women comprising its most prominent participants.<sup>33</sup> Urban women from a higher socio-economic background are more exposed to critical feminist theory through online channels or international exposure, whereas rural Chinese women with lower education and fewer resources are less likely or able to participate.<sup>34</sup> The criteria for a ‘credible and media-worthy victim’ in China’s #MeToo campaign also remains limited to educated and tech-savvy ‘elites’,<sup>35</sup> although this is not an isolated challenge in China alone. In November 2019, #MeToo founder Tarana Burke wrote, ‘in 2006, I launched the “Me Too” movement because I wanted to find ways to bring healing into the lives of black women and girls. But those same women and girls, along with other people of colour, queer people, and disabled people, continued to be marginalised in the movement’.<sup>36</sup> Given the online space that #MeToo predominantly operates in, it appears that access to media, limited by class and geography, continues to pose a challenge to the true inclusivity and accessibility of #MeToo globally.<sup>37</sup> As Rottenberg highlights, ‘when we think of #MeToo we not only need to think of whose voices are suddenly being heard, but also of which voices continue to be silenced’.<sup>38</sup>

<sup>25</sup> Zhou and Qiu, ‘Predicting online feminist engagement after MeToo’, 5.

<sup>26</sup> Zizi Papacharissi, ‘Affective publics and structures of storytelling: Sentiment, events and mediality’, *Information, Communication & Society* 19, no. 3 (2016): 314.

<sup>27</sup> Mistreau, ‘China’s #MeToo activists have transformed a generation’; Luo, ‘I want to report harassment’.

<sup>28</sup> Ying Xiong, Moonhee Cho, and Brandon Boatwright, ‘Hashtag activism and message frames among social movement organizations: Semantic network analysis and thematic analysis of Twitter during the #MeToo movement’, *Public Relations Review* 45, no. 1 (2019): 20.

<sup>29</sup> Javier C. Hernández and Iris Zhao, ‘A #MeToo reckoning in China’s workplace amid wave of accusations’, *The New York Times*, July 26, 2018, [www.nytimes.com/2018/07/26/world/asia/china-metoo.html](http://www.nytimes.com/2018/07/26/world/asia/china-metoo.html).

<sup>30</sup> Han Zhang, ‘One year of #MeToo: How the movement eludes government surveillance in China’, *The New Yorker*, October 10, 2018, [www.newyorker.com/news/news-desk/one-year-of-metoo-how-the-movement-eludes-government-surveillance-in-china](http://www.newyorker.com/news/news-desk/one-year-of-metoo-how-the-movement-eludes-government-surveillance-in-china).

<sup>31</sup> Brunner and Partlow-Lefevre, ‘#MeToo as networked collective’, 6.

<sup>32</sup> Jing Zeng, ‘You say #MeToo, I say #MiTu: China’s online campaigns against sexual abuse’, in *#MeToo and the politics of social change*, ed. Bianca Fileborn and Rachel Loney-Howes (London: Palgrave Macmillan, 2019), 78.

<sup>33</sup> Tan, ‘Digital masquerading’, 182.

<sup>34</sup> Xin Shi and Yong Zheng, ‘Perception and tolerance of sexual harassment: An examination of feminist identity, sexism, and gender roles in a sample of Chinese working women’, *Psychology of Women Quarterly* 44, no. 2 (2020): 226.

<sup>35</sup> Zeng, ‘#MeToo as connective action’, 186.

<sup>36</sup> Tarana Burke, ‘“Outing perpetrators doesn’t get to root of the problem”: MeToo founder’, *The Sydney Morning Herald*, November 13, 2019, [www.smh.com.au/national/outing-perpetrators-doesn-t-get-to-root-of-the-problem-metoo-founder-20191108-p538x0.html](http://www.smh.com.au/national/outing-perpetrators-doesn-t-get-to-root-of-the-problem-metoo-founder-20191108-p538x0.html).

<sup>37</sup> Tan, ‘Digital masquerading’, 182.

<sup>38</sup> Catherine Rottenberg, ‘#MeToo and the prospects of political change’, *Journal of Women’s Studies* 25, no. 2 (2018): 45.

## Creativity as a weapon against censorship

When the #MeToo hashtag was quickly banned in China after it first arose, Chinese netizens demonstrated immense resilience in continuing to distribute stories and resources online through a number of creative digital and wordplay tactics. Zeng highlights the tactic of ‘camouflaging’, in which censorship is evaded through diverse content modification.<sup>39</sup> #MeToo activists in China have been able to quickly adapt their online strategies by using wordplay and images. For example, when the #MeToo hashtag was first banned, netizens converted to using ‘#mi tu #米兔’ (‘rice bunny’), which is homophonous with ‘Me Too’; consequently, images and emoji symbols of a rice bowl and bunny became resistance symbols for Chinese women.<sup>40</sup> Similarly, posts relating to the accused CCTV host Zhu Jun used the hashtag ‘#猪菌’ (‘#zhu jun’) which sounds phonetically similar to his name, but also translates to ‘swine bacteria’.<sup>41</sup> The wordplay strategy is especially unique to Chinese digital activism, given the language’s dependence on tonality and context for meaning.<sup>42</sup> Censored phrases were also revived through strategic embedding in images, since China’s censorship identification mechanism is primarily text-based and slower at scanning images.<sup>43</sup> Activists have also modified images containing text by deliberately distorting or rotating the images to elude detection.<sup>44</sup> With social media closely monitored and topical feminist hashtags disabled on Weibo, prominent Guangzhou feminist activist Zhang Leilei describes the battle against censorship as an ‘arms race against the authorities’ image filtering techniques’.<sup>45</sup> Such innovative and creative practices are emblematic of ‘the persistence and dedication of Chinese netizens fighting censors’ in a highly surveilled environment.<sup>46</sup> Today, #MeToo remains censored in Chinese search engines, but its voice survives in malleable creative forms online.

The creativity of Chinese netizens in defying censorship is also evident through their use of ICT to connect with and distribute resources to Chinese activists abroad. ICT has enabled social movements to ‘break geographical boundaries to reach broad audiences’.<sup>47</sup> Chinese diaspora—especially in North America—have played pivotal roles as information ‘brokers’, linking the uncensored #MeToo movement abroad to their home country via the internet.<sup>48</sup> For example, Chinese students in New York City frequently translated domestic Chinese #MeToo resources into English, sharing Chinese stories on uncensored English-based media platforms.<sup>49</sup> The Weibo online group, JoinFeminism, also translated English resources from abroad to post on Chinese sites.<sup>50</sup> This demonstrates the constant flow of information both inwards and outwards from the Chinese #MeToo movement through ICT. Furthermore, Lü Pin highlights that the geographically boundless online nature of #MeToo meant 24-hour online traction in China because of overseas Chinese activists.<sup>51</sup> She recounts how in student petitions, 4,000 signatures were gathered from overseas through an internationally available Google form, which was then merged with domestic WeChat petitions.<sup>52</sup> The ability to communicate remotely through the sheer diversity of available platforms has become a pivotal advantage of digital activism today,<sup>53</sup> steering the domestic Chinese #MeToo movement outwards and enabling anyone around the

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<sup>39</sup> Zeng, ‘#MeToo as connective action’, 182.

<sup>40</sup> Mistreau, ‘China’s #MeToo activists have transformed a generation’.

<sup>41</sup> Zeng, ‘#MeToo as connective action’, 184.

<sup>42</sup> Kevin M. Deluca, Elizabeth Brunner, and Ye Sun, ‘Weibo, WeChat, and the transformative events of environmental activism on China’s wild public screens’, *International Journal of Communication* 10 (2016): 330.

<sup>43</sup> Tan, ‘Digital masquerading’, 176.

<sup>44</sup> Abbott, ‘Of grass mud horses and rice bunnies’, 166.

<sup>45</sup> Mistreau, ‘China’s #MeToo activists have transformed a generation’.

<sup>46</sup> Deluca, Brunner, and Sun, ‘Weibo, WeChat’, 330.

<sup>47</sup> Xiong, Cho, and Boatwright, ‘Hashtag activism and message frames’, 10.

<sup>48</sup> Zeng, ‘#MeToo as connective action’, 181.

<sup>49</sup> Shen Lu, ‘Silenced at home, finding a voice overseas: China’s feminists cultivate the expatriate community’, *South China Morning Post*, October 8, 2019, [www.scmp.com/news/china/society/article/3031924/silenced-home-finding-voice-overseas-chinas-feminists-cultivate](http://www.scmp.com/news/china/society/article/3031924/silenced-home-finding-voice-overseas-chinas-feminists-cultivate).

<sup>50</sup> Bin Wang and Catherine Driscoll, ‘Chinese feminists on social media: Articulating different voices, building strategic alliances’, *Journal of Media & Cultural Studies* 33, no. 1 (2019): 7.

<sup>51</sup> Parkin and Feng, ‘The government is powerful, but it can’t shut us down’.

<sup>52</sup> Ibid.

<sup>53</sup> Hester Baer, ‘Redoing feminism: Digital activism, body politics, and neo-liberalism’, *Feminist Media Studies* 16, no. 1 (2016): 18.



globe to participate regardless of locality. Ultimately, the Chinese #MeToo movement has shown astoundingly effective creativity towards censorship, in maintaining visibility locally and abroad.

## A fluid and decentralised movement

Rooted in the digital realm, #MeToo in China emerged as an amorphous and diversified movement, rendering tangible change difficult, but also helping #MeToo adapt and survive in the Chinese authoritarian context. It has been consistently found across multiple online campaigns that social media often creates ‘chaotic campaigns’ that are ‘diffused, messy, with differing agendas at play and differing influences’, which can hinder enduring success.<sup>54</sup> #MeToo originated from the connective actions of a ‘disparate and shifting, loosely connected collective of individuals’ sharing related goals but lacking united collective direction.<sup>55</sup> Many participants in #MeToo are momentary grassroots activists, building public awareness and affecting solidarity through the connective distribution of personal stories online. One can contribute as much or as little, as often or as infrequently, as they deem appropriate. Lü Pin argues that the ability of #MeToo to generate structural change beyond awareness-raising was unfortunately limited, due to its lack of steering organisers, coordinated responses, and collective agendas and goals.<sup>56</sup> The fragmentation of the movement meant, regrettably, that there was ‘no cohesive force to mobilise China’s #MeToo campaign into a broader collective action’.<sup>57</sup>

However, the very self-directed nature of this constantly shifting and fleeting movement has also worked in favour of #MeToo in China. Since the resistance manifests in a decentralised and fluid manner, it is difficult to target through censorship.<sup>58</sup> #MeToo is an ‘always incomplete text without discrete authorship or boundaries’ and operates without an identifiable core.<sup>59</sup> For this reason, one can never effectively silence or erase its voices. For movements to survive in China, they need to have flexibility, adaptability, and resilience, avoiding unified and coercive action frames that could be easier for the government to target.<sup>60</sup>

After 12 months of #MeToo campaigning in China, small glimpses of institutional hope began to glimmer, as the Supreme Court added sexual harassment to its ‘causes of action’, enabling victims to formally seek remedy.<sup>61</sup> Furthermore, the CCP announced a Civil Code which was adopted in May 2020, requiring employers to implement appropriate measures to address workplace harassment, although the Code only includes one article on this matter.<sup>62</sup> Remedial justice for individual #MeToo cases has also had little success so far.<sup>63</sup> Nonetheless, Zeng emphasises that activism in China requires patience and hope, as ‘while this disorderliness may lack momentum and efficiency on the surface, it accrues strength and meaning over time’.<sup>64</sup>

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<sup>54</sup> Peter Dauvergne, ‘Is the power of brand-focused activism rising? The case of tropical deforestation’, *Journal of Environment & Development* 26, no. 2 (2017): 140.

<sup>55</sup> Brunner and Partlow-Lefevre, ‘#MeToo as networked collective’, 6.

<sup>56</sup> Parkin and Feng, ‘The government is powerful, but it can’t shut us down’.

<sup>57</sup> Zeng, ‘#MeToo as connective action’, 186.

<sup>58</sup> Ibid.

<sup>59</sup> Brunner and Partlow-Lefevre, ‘#MeToo as networked collective’, 7.

<sup>60</sup> Zeng, ‘#MeToo as connective action’, 175.

<sup>61</sup> Yaqiu Wang, ‘#MeToo in the land of censorship’, *Human Rights Watch*, May 8, 2020, [www.hrw.org/news/2020/05/08/metoo-land-censorship](http://www.hrw.org/news/2020/05/08/metoo-land-censorship).

<sup>62</sup> Changhao Wei, ‘2020 NPC session: A guide to China’s civil code’, *NPC Observer*, May 21, 2020, [npcobserver.com/2020/05/21/2020-npc-session-a-guide-to-chinas-civil-code/](http://npcobserver.com/2020/05/21/2020-npc-session-a-guide-to-chinas-civil-code/).

<sup>63</sup> Lily Kuo, ‘“It is not hopeless”: China’s #MeToo movement finally sees legal victories’, *The Guardian*, November 4, 2019, [www.theguardian.com/world/2019/nov/04/it-is-not-hopeless-chinas-metoo-movement-finally-sees-legal-victories](http://www.theguardian.com/world/2019/nov/04/it-is-not-hopeless-chinas-metoo-movement-finally-sees-legal-victories).

<sup>64</sup> Zeng, ‘#MeToo as connective action’, 186–187.

## Conclusion

In assessing the effectiveness of digital activism in China's #MeToo movement, this essay explained China's censorship of cyberspace, adopting 'connective actions' as an appropriate theoretical framework to assess domestic activism. #MeToo's greatest success is elevating awareness of sexual harassment and generating solidarity among victims, through its participatory culture of connective action. To counter censorship, netizens have also creatively adapted media content and exchanged materials internationally. Additionally, this essay debated the diffused and decentralised essence of the #MeToo movement in China, recognising the limitations of social media-based campaigns in coordinating cohesive collective action, but also the merits of an elusive, dispersed campaign in navigating the authoritarian cyberspace of China. #MeToo's impact in China has been most profound in elevating public awareness and constructing solidarity, but very few institutional and structural changes have crystallised.

Due to the viral and widespread mobilising capacities afforded by social media, we often expect institutional changes to follow instantly, and blame social media for failing us when changes do not immediately ensue. In Papacharissi's exploration of digital activism, she highlights this fallacy in our reasoning, arguing that perhaps 'it is not social medias that have misled us, it is our own expectations'.<sup>65</sup> She shares her own understanding of the effectiveness of social media tools, 'not as a function of their affordances, but more so as the outcome of our own expectations from technology'.<sup>66</sup> Therefore, operating within contested public spheres, digital platforms utilised for activism are 'neither elixir nor poison'.<sup>67</sup> China's #MeToo movement has demonstrated that these digital platforms continue to be harnessed as mechanisms of sociocultural transformation by both government and impassioned activists, in a 'combative dance' of censorship and creative opposition.<sup>68</sup>

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<sup>65</sup> Papacharissi, 'Affective publics and structures of storytelling', 321.

<sup>66</sup> Ibid.

<sup>67</sup> Deluca, Brunner, and Sun, 'Weibo, WeChat', 324.

<sup>68</sup> Ibid.

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# ‘Whistle while you work’: A comparative study of gender representation in ‘Little Snow White’ and *Snow White and the Seven Dwarfs*

CINNAMONE WINCHESTER

## Abstract

This article employs comparative methods to explore gender representation and the depiction of female innocence and sexuality in two iterations of the ‘Snow White’ fable: the 1812 Brothers Grimm fairytale ‘Little Snow White’, and Walt Disney’s 1937 screen adaptation *Snow White and the Seven Dwarfs*.<sup>1</sup> By conducting literature-based research into the historical contexts of the texts, as well as into critical issues raised by adaptation, it will be made evident that both iterations clearly encourage traditional family values and call for women to take on a subservient role. This article argues that while Disney has more recently attempted to engage in a contemporary brand of ‘marketable’ feminism, *Snow White and the Seven Dwarfs* followed in kind from the Brothers Grimm by depicting the character Snow White as a personification of nineteenth and twentieth-century ideals surrounding gendered domesticity. Her stepmother, on the other hand, represents ‘harmful’ female sexuality. The remaining *dramatis personae*—particularly the prince and the seven dwarfs—are the Queen’s narrative foils, reinforcing patriarchal supremacy and reflecting the sensibilities of their historical audiences. Ultimately, it may be concluded that the two adaptations reflect disjunctions between traditional audiences of the nineteenth and twentieth centuries and contemporary liberal sensibilities concerning gender.

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For centuries, readers of literature have borne witness to the gradual development of gender representation in fiction. This formerly class-restricted observation broadened with the genesis of early motion pictures in the nineteenth century, which diverged from typically intellectual high culture in offering accessible experiences to a wider audience, and laid the foundations for what would soon become known as popular culture. With over 50 adaptations and crossovers extending to the present day, the 1812 Brothers Grimm fairytale ‘Little Snow White’<sup>2</sup> encapsulates much of this evolutionary process, particularly through its eponymous protagonist. ‘Little Snow White’—which is similar to Walt Disney’s animated adaptation *Snow White and the Seven Dwarfs* (1937) in its adherence to fairytale frameworks—portrays the dichotomy between innocence and ‘harmful’ female sexuality in the respective characters of Snow White and the Evil Queen. Disney’s adaptation, largely, reflected Hollywood’s conservative 1930 Production Code, which heavily censored salacious and controversial content onscreen while encouraging the perpetuation of the ‘ideal’ moral figure.<sup>3</sup> Furthermore, both iterations of the tale strongly encourage traditional family values, and call for women within them to take on a subservient role. Both interpretations of the ‘Snow White’ fable are intrinsically linked in their representation of gender, and exemplify the cultural dichotomies between nineteenth and twentieth-

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<sup>1</sup> While *Snow White and the Seven Dwarfs* has multiple credited directors and writers, within this essay I assign primary authorship, as do most commentators, to producer Walt Disney.

<sup>2</sup> Jacob Grimm et al., *The original folk and fairy tales of the Brothers Grimm: The complete first edition* (Princeton: Princeton University Press, 2014), [www.jstor.org/virtual.anu.edu.au/stable/j.ctt6wq18v](http://www.jstor.org/virtual.anu.edu.au/stable/j.ctt6wq18v).

<sup>3</sup> Annette Kuhn and Guy Westwall, ‘Production Code’, in *A dictionary of film studies* (Oxford: Oxford University Press, 2020), [www-oxfordreference-com.virtual.anu.edu.au/view/10.1093/acref/9780198832096.001.0001/acref-9780198832096-e-0558](http://www-oxfordreference-com.virtual.anu.edu.au/view/10.1093/acref/9780198832096.001.0001/acref-9780198832096-e-0558).

century traditionalism (the belief in upholding traditional ideals) and contemporary audiences through *Snow White*, the Evil Queen, and the supporting *dramatis personae* of each adaptation. By comparing the two iterations of the fairytale, this essay analyses how gender representation evolved between the original Grimm text and the Disney film, how it remained the same in other respects, and the ways in which the cultural settings of each historical period influenced both iterations in their portrayal of female protagonists.

For the purposes of this essay, 'gender' is defined as the socially constructed qualities of men and women,<sup>4</sup> and 'representation' refers specifically to the depiction of gender. Gender representation, therefore, is a powerful code within media which can be shaped to fit certain narratives and intentions.

As the first character in what would eventually become a lucrative twelve-character marketing franchise known as Disney's 'Princess Line', Snow White in *Snow White and the Seven Dwarfs* embodies many traditional perceptions of ladylike behaviour. Her youthful appearance lends credence to her innocence, she is kind and gentle, and her generosity stretches to the extent that it is taken advantage of by her stepmother. This is an exaggerated reflection of the princess in 'Little Snow White', who opens the door for the disguised Queen not once, as in the 1937 film, but three times; when she attempts to refuse, it is because she is 'not allowed to let anyone enter',<sup>5</sup> rather than because she knows better than to talk to strangers. Similarly, the seven dwarfs in the original fairytale establish themselves as patriarchal figures in their suggestion that she cook and clean for them in exchange for room and board. Disney reverses this notion in a bid to bestow Snow White with seven children: in the film, it is Snow White who takes initiative and acknowledges her strengths in order to present a mutually beneficial deal. While this transaction emphasises the early twentieth-century rhetoric of 'natural' gender-based interactions, Snow White is allowed comparative control over her fate. Nevertheless, both are silent representatives of 'ideal' gendered family compositions, with Disney taking inspiration from the seed that 'Little Snow White' plants within the story. In both iterations of the fairytale, Snow White serves as a mouthpiece for the encouragement of gendered domestic roles: cooking and cleaning are portrayed as the woman's duty. This is explicitly amplified in the Disney film, when Snow White determines that the dwarfs must have no mother to clean for them. Audiences watching Snow White's performance of the musical number 'Whistle While You Work' do not doubt that she accepts household chores as a woman's responsibility, as she chooses to teach animals—rather than the dwarfs who own and are responsible for the cottage—to clean.

While the dwarfs are in charge of the public sphere—or the 'non-state realm of associational life',<sup>6</sup> which unites individuals and has historically been conceptualised as a masculine space in contrast with the domesticity of the private 'home' sphere<sup>7</sup>—Snow White's duties are restricted to a private capacity, which she appears to enjoy. Simultaneously, however, she is clearly waiting to be rescued from this hardship, with Disney's characterisation of work suggesting that 'if individuals persevere in exploitative situations they will eventually be rescued by well-meaning and decent heroes'.<sup>8</sup> Disney's *Cinderella* (1950), for instance, portrays its eponymous protagonist as a martyr-like figure whose consistent adherence to the abusive demands of her stepmother and stepsisters is rewarded with a marriage proposal from Prince Charming. Similarly, while there is an argument to be made that 'Someday My Prince Will Come'—sung by Snow White midway through the film—is an expression of her wish to be saved from the Queen, it is an unlikely possibility; particularly in tandem with the number 'I'm Wishing', in which she expresses her desire to meet her true love. This willingness to wait for a prince is perhaps why *Snow White and the Seven Dwarfs* has not been included in Disney's recent slate of live-action remakes, which have gradually become more profitably 'progressive' to reflect the evolving moral values of audiences, but fail to address more contentious matters within their works. Recently included within this line of repurposed properties with marketable feminist changes was *The Lion King*

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<sup>4</sup> World Health Organization, 'Gender', 2019, [www.who.int/gender-equity-rights/understanding/gender-definition/en/](http://www.who.int/gender-equity-rights/understanding/gender-definition/en/).

<sup>5</sup> Grimm et al., *The original folk and fairy tales of the Brothers Grimm*, 175.

<sup>6</sup> Valentine M. Moghadam and Fatima Sadiqi, 'Women's activism and the public sphere: An introduction and overview', *Journal of Middle Eastern Women's Studies* 2, no. 2 (2006): 1, doi:10.1353/jmw.2006.0020.

<sup>7</sup> *Ibid.*, 2.

<sup>8</sup> Martyn Griffin, Nancy Harding, and Mark Learmonth, 'Whistle while you work? Disney animation, organizational readiness and gendered subjugation', *Organization Studies* 38, no. 7 (2017), doi:10.1177/0170840616663245.

(2019), which saw the hyena Shenzi undergo a feminist evolution, while existing controversy surrounding the encouragement of racial segregation and the doctrine of the divine right of kings—a political principle which posits that the monarchy is God’s chosen form of government<sup>9</sup>—went ignored.

As the Brothers Grimm chronicled ‘Little Snow White’—and the majority of the tales in their collection—after listening to oral storytellers, most descriptors in the text were allocated to the eponymous protagonist: the European storytelling tradition often depicted one main character and valued brevity in order to concisely convey lessons to children.<sup>10</sup> In translating the folktale into a filmic medium which reflected the popularity of the Hollywood musical, however, many visual cues throughout the narrative are indicative not only of Golden Age Hollywood tropes but of the cultural values which surrounded Walt Disney and his company in the 1930s. Walt Disney’s anti-Semitism, for instance, remains a highly contentious matter among contemporary scholars: amid the rise of the American-German Bund—a pro-Nazi organisation—across the United States in 1936,<sup>11</sup> Disney attended a story meeting for *Snow White and the Seven Dwarfs* in which he ‘referred to the dwarfs piling on top of one another ... as a n\*\*\*\*\* pile’.<sup>12</sup> One year after the film depicted the Jewish-coded dwarfs as having suspiciously large noses, hoarding precious materials, and intentionally leaving the key to their wealth beside the locked door of their vault, Disney personally led Nazi propaganda director Leni Riefenstahl on a tour of his studios.<sup>13</sup> Furthermore, the company’s regressive cultural values were not limited to racism and anti-Semitism: at least six months earlier, aspiring animator Mary Ford was informed that ‘women do not do any of the creative work [at Walt Disney Productions] ... that work is performed entirely by young men’.<sup>14</sup> The rejection letter—which had been typed and signed by a female administrative assistant—clearly reinforced *Snow White and the Seven Dwarfs*’ onscreen values involving the relegation of women to menial tasks.

It has been proven, however, that Snow White’s story can still be retold in a way which properly subverts the gender rules and racial issues which were present within the 1937 film, as well as the studio itself. Contemporary adaptations of the ‘Snow White’ fairytale from other Hollywood studios—such as *Snow White and the Huntsman* (2012), *Mirror Mirror* (2012), and *Revolting Rhymes* (2016)—have attempted to rework the dated aspects of the story to allow Snow White more agency without necessarily lapsing into the ‘safe’ trend of marketable feminism. It is apparent, however, that Disney has historically associated itself with the current zeitgeist in a move to market, rather than socially progress, as exemplified by former Disney CEO Michael Eisner’s 1981 statement that ‘we have no obligation to make history. We have no obligation to make art. We have no obligation to make a statement. To make money is our only objective’.<sup>15</sup> Thus, the politically charged portrayal of the seven dwarfs as the film’s ‘necessary’ interim source of masculinity—a notion which will be further discussed below—as well as the banishment of Snow White to the private sphere in alignment with Walt Disney Productions’ former views, is perhaps too incongruous with the studio’s current standards to be deemed worthy of readaptation. Snow White as written in 1937, after all, encourages the notion that women should self-monitor their emotions during the scene in which she apologises for ‘the fuss [she’s] made’ after mistakenly running away from harmless woodland creatures in the forest.<sup>16</sup> This maintenance of her outward appearance is placed in direct opposition to the Queen, who rarely self-manages her reactions and emotions—evident when she erupts in anger after the Magic Mirror informs her that Snow White

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<sup>9</sup> Oxford Reference, ‘Divine right of kings’, 2020, [www.oxfordreference.com/view/10.1093/oi/authority.20110810104754564](http://www.oxfordreference.com/view/10.1093/oi/authority.20110810104754564).

<sup>10</sup> Stephanie M. Curenton, ‘A cultural art that promotes school readiness’, *YC Young Children* 61, no. 5 (2006): 79.

<sup>11</sup> Leland Bell, ‘The failure of Nazism in America: The German American Bund, 1936–1941’, *Political Science Quarterly* 85, no. 4 (1970): 585, doi:10.2307/2147597.

<sup>12</sup> Neal Gabler, *Walt Disney: The triumph of the American imagination* (New York: Alfred A. Knopf, 2004), 1017, ePub.

<sup>13</sup> Manohla Dargis, ‘And now a word from the director’, *New York Times*, September 21, 2011, [www.nytimes.com/2011/09/25/movies/conflicting-voices-in-lars-von-triers-words-and-works.html](http://www.nytimes.com/2011/09/25/movies/conflicting-voices-in-lars-von-triers-words-and-works.html).

<sup>14</sup> Kevin Burg, ‘Disney rejection letter, 1938’, Flickr, June 7, 1938, [www.flickr.com/photos/polaroid/632255233/in/photostream/](http://www.flickr.com/photos/polaroid/632255233/in/photostream/).

<sup>15</sup> Griffin, Harding, and Learmonth, ‘Whistle while you work’.

<sup>16</sup> Lisbet Rosa Dam, ‘Fairy tale femininities: A discourse analysis of Snow White films 1916–2012’ (Master’s thesis, Victoria University of Wellington, 2014), 43.



has become the 'fairest one of all'—and who '[trembles] with rage'<sup>17</sup> in the original fairytale upon realising she has failed to murder Snow White.

These distinctions between Snow White and the Queen, as well as the relationship between the women throughout the tale—particularly in Disney's film—are intrinsically linked to the study of gender representation. The central concern in both *Snow White and the Seven Dwarfs* and 'Little Snow White', after all, springs from jealousy.<sup>18</sup> This is exemplified in the film's prologue, which quite literally sets the stakes in writing and serves to pit the two women against one another. The narrator explains that 'each day the vain Queen consulted her Magic Mirror, "Magic Mirror on the wall, who is the fairest one of all?" ... and as long as the Mirror answered, "You are the fairest one of all", Snow White was safe from the Queen's cruel jealousy'. This narrative conceit is far from unusual: instead of stepping in as practiced and wizened sources of guidance for younger women, older women in film are often demonised and pitted against those in their care.<sup>19</sup> In the case of *Snow White*, this discourse is representative of the strict dichotomy between innocence and corruptive sexuality which is present in stereotypical, dated perceptions of women. Feminist scholarship later interpreted this conflict as a reinforcement of 'the essential but equivocal relationship between the angel-woman and the monster-woman'<sup>20</sup> that occurs in the male imagination: an interpretation which ultimately serves to instate the Queen as the more complex and admirable character to contemporary viewers. In 'Little Snow White', the Queen makes three attempts to present Snow White with dangerous wares representing female sexuality, which can be linked to the fairytale's message regarding the value of virginity: stay laces, used to tighten corsets; a comb; and an apple—responsible for the downfall of Adam and Eve, and symbolic of perfection and beauty. Snow White is persuaded to eat the poisoned, 'beautiful red half' of the apple,<sup>21</sup> with the colour red often representing sexual feminine attributes. While narrative streamlining called for the removal of two of these encounters in Disney's film, ultimately leaving only the fatal apple, the physical appearances of the women function as exaggerated indicators of the original message. Where Snow White's features are soft and youthful, and audiences are told that her bright red lips are entirely natural, the Evil Queen's bold makeup and lavish garments were largely inspired by silver screen sirens like Helen Gaghan—who portrayed the similarly-dressed antagonist in the fantasy-adventure film *She* (1935)—and Joan Crawford, who had recently delivered a frank performance of sexuality in her role as a prostitute in *Rain* (1932).<sup>22</sup> This is entirely constructed by Disney, as there is no physical description of the Queen in the fairytale aside from her 'beautiful'<sup>23</sup> appearance. Furthermore, it is specifically love's first kiss that is required to revive Snow White: she could not have awakened if she had previously engaged in any consensual practices with Prince Charming, and her choices are thus taken away. Despite these virginal undertones, Snow White's beauty achieves a great deal throughout the film—note her dealings with the Huntsman, who quickly finds himself unable to carry out the Queen's orders; her interactions with the seven dwarfs; and the mirror's proclamation of her 'gentle grace'—as opposed to her stepmother's *femme fatale* approach to bending the wills of men to her whims.

A final facet of gender representation concerning the Evil Queen can be linked to the remaining *dramatis personae* of *Snow White and the Seven Dwarfs*. While the Queen's mirror in the original fairytale is never gendered, Disney's adaptation explicitly assigns a masculine persona to the enchanted object. Each time the Evil Queen is presented with an answer to her queries, the mirror's monotonous tone reminds audiences of its master's power with the suggestion that she has forced a soulless demon to do her bidding. This demonstration of power, however, is immediately negated with the implication

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<sup>17</sup> Grimm et al., *The original folk and fairy tales of the Brothers Grimm*, 175.

<sup>18</sup> Thomas M. Inge, 'Walt Disney's *Snow White and the Seven Dwarfs*', *Journal of Popular Film and Television* 3, no. 3 (2004): 137, doi:10.1080/01956051.2004.10662058

<sup>19</sup> Dafna Lemish and Varda Muhlbauer, "'Can't have it all!': Representations of older women in popular culture', *Women and Therapy* 35, no. 3–4 (2012): 171.

<sup>20</sup> Sandra M. Gilbert and Susan Gubar, *The madwoman in the attic: The woman writer and the nineteenth-century literary imagination* (New Haven: Yale University Press, 1979), 36.

<sup>21</sup> Grimm et al., *The original folk and fairy tales of the Brothers Grimm*, 176.

<sup>22</sup> Gilbert Colon, 'Ayesha, white as snow: H. Rider Haggard's *She* and Walt Disney's Evil Queen,' *TOR*, May 6, 2016, www.tor.com/2016/05/06/ayesha-white-as-snow-h-rider-haggards-she-and-walt-disneys-evil-queen/.

<sup>23</sup> Grimm et al., *The original folk and fairy tales of the Brothers Grimm*, 170.

that even a woman in absolute political control must turn to a man for affirmation of her physical appearance, and is influenced by his assessment to the point of murder. As Stam describes, source texts often ‘form dense informational [networks], a series of verbal cues which the adapting film text can then selectively take up, amplify, ignore, subvert or transform’.<sup>24</sup> In transforming previously ambiguous aspects of the Grimm fairytale and projecting an explicit sense of masculinity upon the mirror, the Queen’s ‘harmful’ sense of female sexuality is brought to its knees by early twentieth-century ideas of hierarchy and power. Ultimately, her position as the primary antagonist of the film is shadowed with hints of subservience to a male figure.

The toxic nature of the ‘unnatural family’<sup>25</sup> that the Queen provides is juxtaposed with Snow White’s interim family, found among the seven dwarfs. *Snow White and the Seven Dwarfs* is a twentieth-century culmination of the American Dream, and gender representation on both sides of the spectrum is indicative of this ideology. There is no way to differentiate between each dwarf in ‘Little Snow White’, though it should once again be noted that this was perhaps a residual indicator of the emphasis upon brevity within the practice of oral storytelling. In the film, however, all seven dwarfs are given names and corresponding personalities in a bid to endear them to audiences. This was also a result of production contexts: Disney largely found success in their conventionally ‘cute’ characters and animals during their stint producing animated shorts, and this trend was continued during their transition to feature-length films.<sup>26</sup> Also contrary to the Grimm fairytale—which portrays the dwarfs as patriarchal figures who ‘provide [her] with everything [she needs]’<sup>27</sup>—the dwarfs in Disney’s production are introduced as rowdy ‘bachelors’ who are ultimately tamed by the domesticity that Snow White brings into their household. Upon stepping into their cottage for the first time, Snow White is so shocked to find the space in such disarray that she determines its inhabitants must be orphans. While this conclusion is erroneous, the dwarfs display mannerisms largely akin to children throughout the remainder of the film. Grumpy, for instance, is initially reluctant to welcome Snow White into his home. Thus, the responsibility to build trust between them swiftly falls onto Snow White’s shoulders, in a kinder representation of stepmothers to properly correlate with the Production Code’s enforcement of traditional ideals surrounding nuclear families (defined as ‘a pair of adults and their socially recognised children’<sup>28</sup>) and the American Dream (an ideological ethos surrounding the growth of prosperity from hard work, in which the presence of the nuclear family was essential).<sup>29</sup> Grumpy’s eventual development, however—from proclaiming that ‘all females is [sic] poison!’ to being invested in Snow White’s safety—is representative of the notion that the seven dwarfs are an ‘appropriate’ familial unit, particularly in juxtaposition with the Queen. Similarly, the prince and dwarfs in ‘Little Snow White’ are symbolic devices, presented so that the dangerous shadow of the Queen’s wildly irresponsible parenting may be contrasted with strong, patriarchal alternatives. Rather than patriarchal, however, the dwarfs in the Disney production take Snow White into their home as a mother. This is apparent in interactions between Snow White and the dwarfs once she has begun to live in their cottage: being dirty is considered appropriately manly, and the infantilised dwarfs must slowly learn to perform menial tasks such as washing their hands before dinner each night. In the original tale, however, Snow White perceives their living space as ‘dainty and neat’.<sup>30</sup> Snow White’s familial dynamics with the dwarfs in *Snow White and the Seven Dwarfs* may thus be interpreted as an interim and ‘necessary’ relationship with a collective masculine figure until the prince makes his reappearance. Throughout the film, she evolves from having a stepmother to becoming a stepmother, and finishes her character arc by starting

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<sup>24</sup> Robert Stam, *Literature through film: Realism, magic, and the art of adaptation* (Malden: Blackwell Pub, 2005), 46.

<sup>25</sup> Inge, ‘Walt Disney’s *Snow White and the Seven Dwarfs*’, 141.

<sup>26</sup> Tracey Mollet, ‘“With a smile and a song ...”: Walt Disney and the birth of the American fairy tale’, *Marvels & Tales* 27, no. 1 (2013): 111, doi:10.13110/marvelstales.27.1.0109.

<sup>27</sup> Grimm et al., *The original folk and fairy tales of the Brothers Grimm*, 173.

<sup>28</sup> Encyclopaedia Britannica, ‘Nuclear family’, 2020, www.britannica.com/topic/nuclear-family.

<sup>29</sup> Kuhn and Westwall, ‘Production Code’.

<sup>30</sup> Grimm et al., *The original folk and fairy tales of the Brothers Grimm*, 172.

her own nuclear family with the prince, as was considered traditional at the time of development: as the Production Code explicitly stated, films should portray 'correct standards of life'.<sup>31</sup>

The Brothers Grimm fairytale 'Little Snow White' and Disney's *Snow White and the Seven Dwarfs* represent gender in a manner which exemplifies the disconnect between traditional audiences of the nineteenth and twentieth centuries, and contemporary standards of gender and gender representation. This is particularly apparent in the characters of Snow White, the Evil Queen, and the supporting *dramatis personae* of each adaptation. Through these fictional mouthpieces, both iterations portray the dichotomy between innocence and harmful sexuality, and encourage female subservience within nuclear family dynamics. While these values are considered foreign in a modern context, they each reflect the sensibilities of their respective historical contexts, and have shaped their representation of gender norms in order to properly fit conventional fairytale narratives.

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# The seen and unseen: How the image of Medusa in art reflects women in law and society

PIPER KEEL

## Abstract

This essay explores the importance of image and visibility within society, and how this equates to representation in the law, by exploring who is visible in art and the evolution of how they are represented. Representation in art is a reflection of representation in society—politically, socially, and legally—and thus representation, being seen, is ultimately linked with having a voice in society. This way of looking at art, and who is seen in art, can be used to trace the evolution of the representation of women and victims of sexual violence throughout history. Through a close study of the image of Medusa and the law during the period in which each image was produced, this essay explores how art reflects changes in our justice and legal systems and addresses women’s justice, primarily in relation to sexual assault. The development of Medusa’s story in art from Ancient Greece to #MeToo aids in tracking the development of the ‘rape narrative’ in the legal system. The exploration of this evolution highlights the link between image—the act of being seen by society—and law, and how those who are not given proper representation in art are often not given equal representation before the law.

## Introduction

To be a subject of the law, one must be visible to the law. To be abandoned by the law, to live outside of it, is to be invisible to our society. We can understand who is represented in our legal system by studying who, and what, is visible in the art of the period, particularly art representing law and punishment. For example, Klimt’s lost piece *Jurisprudence* explores this idea of the relationship between sovereignty and life.<sup>1</sup> The work equates law with punishment and, in the words of Desmond Manderson, often the law does not fail but ‘succeeds too well’.<sup>2</sup> *Jurisprudence* is a dream and dreams cannot be free, or so Manderson argues, and the price of this dream is shame. We see the paying of this price represented through the naked man invaded and corrupted by tentacled law in Klimt’s piece.<sup>3</sup> Ironically, *Jurisprudence* is an image filled with women but not about women, despite the issue of anxiety, arguably, applying most strongly to ‘women’s justice’. For women, there has been a constant shame in being visible to the law, particular in areas such as sexual assault: often, their own villainisation is the price of being seen. Rape accusations are so often heard alongside challenges to women’s legitimacy due to their sexuality—in the eyes of a traditionally masculine court and jury, a sexual woman cannot be an innocent one—as seen through various cases such as *R v Evans*, as will be discussed below.<sup>4</sup> These prejudices link back to the typical whore/Madonna dichotomy used to classify women when discussing sexuality; however, these archetypes only allow society to view women through the eyes of men.<sup>5</sup> These lenses show how being ‘seen’ by the law dictates how you are

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<sup>1</sup> *Jurisprudence*, along with its two accompanying pieces, *Medicine* and *Philosophy*, were seized by Germany in the Second World War and ultimately destroyed by a fire set by German SS forces; Gustav Klimt, *Jurisprudence*, 1900–1907, Austria.

<sup>2</sup> Desmond Manderson, ‘Klimt’s *Jurisprudence*: Sovereign power and bare life’, *Oxford Journal of Legal Studies* 35, no. 3 (2015): 524.

<sup>3</sup> Sigmund Freud, quoted in *Ibid.*

<sup>4</sup> David Gurnham, ‘Ched Evans, rape myths and Medusa’s gaze: A story of mirrors and windows’, *International Journal of Law in Context* 14, no. 3 (2018): 454–468.

<sup>5</sup> Anne Summers, *Damned whores and God’s police: The colonization of women in Australia* (Ringwood: Penguin Books, 1975).

represented, and thus brings us to the importance of art in establishing what these lenses are, how they change, and how these changing perceptions impact our legal system.

Art is a key way through which we can track the evolution of women's justice. By seeing what lenses women are represented through in images, we can gauge how they would be represented under the law. With a few exceptions—notably the image of Lady Justice, who ultimately represents a distinctively male form of justice—women's justice is an area rarely represented in legal artwork and, when done so, is often represented by men. In our example of Klimt's work, women are representations of justice, a violent sovereignty, but do not themselves experience justice, even though they dominate Klimt's painted world. Therefore, we must extend ourselves beyond the work of Klimt to other representations of women in art, to evaluate how their representation—particularly when depicted alongside men—reflects wider attitudes towards women's authority. By extension, this will assist in examining how the law has developed to include women's issues more centrally, as they become more visible in art and society. In order to evaluate this development effectively, we will focus on the image of one woman in particular, whose story could be argued to encapsulate the development of 'sexual assault narratives' across history: Medusa. Representations of Medusa have been used throughout history to both demonise and promote female authority, depending upon the period. In Cellini's sculpture *Perseus with the head of Medusa* (1554), Perseus stands victorious over the recently defeated Medusa: her naked body lies at his feet, her snake-ridden head held in triumph.<sup>6</sup> It is a classic image of male victory and the destruction of the 'female monstrous'. Cellini's rendition is arguably the most well-known interpretation of the myth of Medusa in art, and there have been various versions and reworkings of the piece throughout history.<sup>7</sup> However, it is not the only interpretation. Medusa is an image that has been interpreted and harnessed in a variety of ways: as a monster, a victim, a villain, a femme fatale, but most importantly, as a woman. The image of Medusa has been demonised by male artists but also reclaimed by feminists as a symbol of female power. Her form has been used as political propaganda against female authority, but also as a symbol for sexual abuse survivors and a representation of women's justice. This essay highlights how the law has developed alongside this image, shifting from the demonisation of sexual assault survivors to a feminist representation of survival.

## Feminisation of the monster

In order to understand how the image of Medusa has evolved, her original representation in the Ancient Greek myth must be examined alongside the legal status of women in the period. The myth of Medusa was first recorded in full by Ovid's *Metamorphosis* (AD 8).<sup>8</sup> Medusa, a beautiful woman, was raped by Poseidon in Athena's temple and, as punishment, was cursed to turn any man who looked upon her to stone.<sup>9</sup> She then became one of the 'Gorgons of Greece', three snake-haired sisters with various supernatural powers.<sup>10</sup> Later, Perseus was sent to kill Medusa and, aided by Athena, cut off her head and mounted it upon his shield. Due to her monstrous beginnings, early Ancient Greek artists showed Medusa as an almost comic figure; bearded, fanged, with contorted nose, and conventionally hideous.<sup>11</sup> Examples of her monstrous and androgynous figure can be found on terracotta stands from as early as 570 BC.<sup>12</sup> In fact, the majority of monstrous Greek hybrids were depicted as female, as the 'feminisation of monsters served to demonise women'.<sup>13</sup> Women's power becomes monstrous due to its association with the idea of the 'other', with demons and the unnatural.<sup>14</sup> There is no mention of justice for

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<sup>6</sup> Benvenuto Cellini, *Perseus with the head of Medusa*, 1545–1554, bronze, Florence.

<sup>7</sup> Antonio Canova, *Perseus holding Medusa's head*, 1800, marble, Vatican City; Camille Claudel, *Perseus and the Gorgon*, 1905, marble, France.

<sup>8</sup> Ovid, *Metamorphoses*, AD 8.

<sup>9</sup> Mary Beard, *Women and power: A manifesto* (United Kingdom: Profile Books, 2017).

<sup>10</sup> Ovid, *Metamorphoses*.

<sup>11</sup> Abigail Cain, 'What depictions of Medusa say about the way society views powerful women', *Artsy: Visual Culture*, May 20, 2018.

<sup>12</sup> Ergotimos and Kleitias, *Terracotta stand, ca. 570 BC*, terracotta, New York, The Metropolitan Museum of Art.

<sup>13</sup> Kiki Karoglou, *Dangerous beauty: Medusa in classical art* (New York: Metropolitan Museum of Art, 2018), 5.

<sup>14</sup> Jenny Sharpe and Gayatri Chakravorty Spivak, 'A conversation with Gayatri Chakravorty Spivak: Politics and the imagination', *Signs* 28, no. 2 (2003): 609–624.

Medusa's rape and this is, arguably, justified due to her monstrous appearance: she is not considered human and therefore does not deserve to be afforded the human concept of 'justice'. This denial of justice brings us back to the notion that how one is seen is how one is represented in law.

Throughout the fifth and fourth centuries BC, however, Medusa became increasingly feminised, like many other monstrous figures in the Classical era, as evident in various terracotta pottery pieces of the period.<sup>15</sup> Not only is Medusa now portrayed as powerful due to her superhuman abilities, but she is also dangerously sexualised, an early rendition of the *femme fatale*.<sup>16</sup> Contemporary filmic depictions of Medusa, such as 2010's *Clash of the titans*, still play on this sexualised image whereby Medusa's sexuality itself becomes the most monstrous part of her.<sup>17</sup> Despite her feminisation, however, Medusa is still a 'monster' and her hypersexualisation makes her 'both titillating and terrifying', a threat that 'invites male conquest'.<sup>18</sup> The slaying of this 'hyper-sexualised monster' evokes erotic, masculine notions of war and, in a sense, represents an early form of violent revenge pornography.<sup>19</sup> Rape narratives in Ancient Greece were often told through a male lens—not only in art or poetry, but within a legal framework as well—which explains why assault was often normalised or used to men's benefit.<sup>20</sup> Women in Greece 'could not bring cases ... and could not appear before the court or even give evidence in any direct way', thus most accounts of rape were conveyed second-hand.<sup>21</sup> Stories of rape were filtered through a male guardian and often recounted in a way that best suited male interest; consequently, the consent of a woman depended on the agenda of a man. The feminisation of the monster, however, had other benefits for a male-defined society beyond the justification of rape.

Kiki Karoglou argues that this beautification of monsters serves as a method of male control, where 'the monster becomes an ornament'.<sup>22</sup> Even today, these feminised images of Medusa are used by beauty industries—notably Versace, whose logo is the decapitated head of Medusa—that seek to control the perception of women in society, much in the same way as art.<sup>23</sup> In this way, the beautiful Medusa still carries a legacy of male control. In a male-dominated society such as Athens, the control of female sexuality and power was not unusual, and the demonisation of powerful women like Medusa and their deaths aided in that control.<sup>24</sup> Women's use of power in mythology was often destructive and served to justify the exclusion of women in real life.<sup>25</sup> Comparing powerful women to Medusa-like monsters is still a common trend and an image often repeated across social media, as evidenced by the demonisation of high-profile, powerful women such as Angela Merkel and Hilary Clinton. Not only does the monstrous depiction of these women play into the importance of looking/seeing in our society, but their representation in general by male artists adds to a culture of female voicelessness and male violence. Susan Sontag argues there is something 'violent' in representing others through art, a violence that is violating as it turns people into objects of possession.<sup>26</sup> This violation and ability to 'possess people' through art can arguably be characterised by the same basic qualifications as sexual assault. Catharine MacKinnon argues that 'looking, knowing, and fucking' are all associated, since each instance is defined by a male subject seeking 'to dominate the world and the objects (some ... being female persons) he finds in it'.<sup>27</sup> The male relationship to power as domination, as explored by both Sontag and

<sup>15</sup> Karoglou, *Dangerous beauty*; Attributed to Polygnotos, *Terracotta pelike (jar)*, ca. 450–440 BC, terracotta, New York, The Metropolitan Museum of Art.

<sup>16</sup> Sumi Hansen, 'Dangerous beauty in the ancient world and the age of #MeToo: An interview with curator Kiki Karoglou', *Met Museum*, November 21, 2018, [www.metmuseum.org/blogs/now-at-the-met/2018/dangerous-beauty-interview-with-kiki-karoglou](http://www.metmuseum.org/blogs/now-at-the-met/2018/dangerous-beauty-interview-with-kiki-karoglou).

<sup>17</sup> Louis Leterrier, dir., *Clash of the Titans* (United States: Warner Bros Pictures, 2010), film.

<sup>18</sup> Elizabeth Johnston, "'Let them know that men did this': Medusa, rape and female rivalry in contemporary film and women's writing", in *Bad girls and transgressive women in popular television, fiction, and film*, eds. Julie A. Chappell and Mallory Young (Springer, 2017), 184.

<sup>19</sup> *Ibid.*

<sup>20</sup> Rosanna Omitowoju, *Rape and the politics of consent in Classical Athens* (Cambridge: Cambridge University Press, 2008), 17.

<sup>21</sup> *Ibid.*

<sup>22</sup> Hansen, 'Dangerous beauty in the ancient world and the age of #MeToo'.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Beard, *Women and power*.

<sup>26</sup> Susan Sontag, *On photography* (New York: Picador, 1977).

<sup>27</sup> The expression 'fucking' implies heterosexual intercourse that may or may not be consensual. Catharine MacKinnon, quoted in Gurnham, 'Ched Evans, rape myths and Medusa's gaze', 458–459.

MacKinnon, is a central characteristic of the male gaze, which holds an unfortunate amount of power in a male-dominated legal system.<sup>28</sup> Thus, if art and male domination are so closely connected, it is clear how the notion of ‘seeing’ or ‘being seen’ and how one is looked upon became so intertwined with ideas of justice. Male depictions of female trauma in art, particularly the rape and punishment of Medusa, structure this type of violence into the male perspective, to make it subservient to male subjectivity, sexuality, and explanation to create a culture of female voicelessness.<sup>29</sup>

## The voicelessness of women

Representations of Medusa differ to reflect changing attitudes towards powerful women and femininity and how the voices of women are often silenced in the legal sphere and wider society. Medusa represents the voicelessness of women across history and the law, from her visage—lips locked, eyes closed—in Cellini’s *Perseus with the head of Medusa* (1554) to her silent scream in Caravaggio’s *Medusa* (1567).<sup>30</sup> Medusa’s severed head is the wound of powerful women: it is the destruction of her intellect, speech, and compassion. Her abandoned body represents a life un-lived, an existence that is now voiceless. As Cixous writes in ‘The Laugh of Medusa’, ‘censor the body and you censor the breath and speech’.<sup>31</sup> Corretti argues that the re-emergence of Medusa imagery during the Renaissance—the period in which Caravaggio worked—was in response to an increase in women’s growing political power and a further feminisation of Italy.<sup>32</sup> In this parallel, we see a direct connection to the use of Medusa by men to comment on women’s issues and masculine power as expressed through art. Unlike Cellini’s sculpture, Caravaggio’s painting shows Medusa’s head, mid-scream, mounted upon Perseus’s shield. The blood and physically terrified features create a much darker image of Medusa’s death, and could be argued to present a more sympathetic interpretation of the myth. However, Medusa is still a voice violently cut off, just like Cellini’s earlier depiction. Even Medusa’s powerful gaze is denied to her in Caravaggio’s reimagining, as she faces away from the spectator.<sup>33</sup> Recent legal scholars have explored notions of the visual and the gaze to understand responses to crime.<sup>34</sup> There is evidence of ‘no crime’ rape reports relying on a traditional, visual narrative; evidence of friendliness before or after the assault or a lack of physical markings may be considered evidence that a complaint was fabricated.<sup>35</sup> The case of *R v Evans*, in which two football players (Evans and MacDonald) were accused of rape, indicates the viewing of victims as inherently sexual removes the sympathy of the judicial system.<sup>36</sup> While Evans was originally convicted, it is the ordering of a retrial by the Court of Appeal that implies the undeniable linkage between innocence/guilt and appearance. The decisive evidence for the retrial was given by Mr Owens, who had a consensual sexual encounter with the woman assaulted (X).<sup>37</sup> Mr Owens was motivated by his view that X did not conform to the image of a rape victim, as she continued to go out and have casual sex ‘so soon after the rape’.<sup>38</sup> Mr Owen’s statement is compared to ‘collective voyeurism’ by David Gurnham, as it contained graphic descriptions of X’s sexual encounters and preferences.<sup>39</sup> X being *seen* by the justice system as sexual was enough to bring into question the entire assault. We can trace this systematic association of blameworthiness and female sexuality in ideas of criminology as early as nineteenth century.<sup>40</sup> Cesare Lombroso, a prominent nineteenth-century

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<sup>28</sup> Sontag and MacKinnon, quoted in Gurnham, ‘Ched Evans, rape myths and Medusa’s gaze’, 458–459.

<sup>29</sup> Gurnham, ‘Ched Evans, rape myths and Medusa’s gaze’.

<sup>30</sup> Cathy Ann Diorio, ‘The silent scream of Medusa: Restoring, or re-storying, her voice’ (PhD thesis, Pacifica Graduate Institute, 2010); Cellini, *Perseus with the head of Medusa*; Michelangelo Caravaggio, *Medusa*, 1567, oil on canvas, Florence.

<sup>31</sup> Hélène Cixous, Keith Cohen, and Paula Cohen, ‘The laugh of the Medusa’, *Signs* 1, no. 4 (1976): 880.

<sup>32</sup> Christine Corretti, *Cellini’s Perseus and Medusa and the Loggia dei Lanzi: Configurations of the body of state (Art and material culture in Medieval and Renaissance Europe)* (Copenhagen: Brill, 2015).

<sup>33</sup> Diorio, ‘The silent scream of Medusa’, 34.

<sup>34</sup> Gurnham, ‘Ched Evans, rape myths and Medusa’s gaze’.

<sup>35</sup> Anna Carline and Patricia Easteal, *Shades of grey – Domestic and sexual violence against women* (Abingdon: Routledge, 2014).

<sup>36</sup> Gurnham, ‘Ched Evans, rape myths and Medusa’s gaze’.

<sup>37</sup> *R v. Evans (Chedwyn)*, 2016. 4 WLR 169.

<sup>38</sup> *Ibid.*

<sup>39</sup> Gurnham, ‘Ched Evans, rape myths and Medusa’s gaze’, 456.

<sup>40</sup> *Ibid.*



criminologist, saw ‘exaggerated sexuality’ in a woman to mean she was a born ‘criminal more terrible than any man’.<sup>41</sup> These continued associations of sexuality with guilt create a culture of voicelessness and silence within our legal systems. Like Medusa, to be sexualised is to be voiceless.

Caravaggio further exploits this voicelessness in his 1567 piece by removing Medusa’s own features from her face, depicting instead his own on the lifelike, decapitated form.<sup>42</sup> It is an image concerned with man’s struggle with mortality, not with a woman’s relationship with power.<sup>43</sup> In his removal of Medusa’s face, leaving only her snake-haired curse, Caravaggio effectively removes women’s issues from history, leaving only what was given to her by her patriarchal punishment. Medusa’s snake hair is the feature most commonly associated with her today: she is defined by a punishment assigned by her masculine society. However, Caravaggio’s image—despite being one of the most famous Medusas—is not an image of Medusa at all, but a male appropriation of female punishment. Caravaggio and Cellini appropriate the image of Medusa to showcase male anxieties about women’s power in Italy. They, much like the curse and beheading described in Ancient Greek myths, take Medusa’s own image away from her, deploying it for patriarchal purposes.

Medusa’s voicelessness is paralleled to Athena, who acts as the mouthpiece of the patriarchy.<sup>44</sup> Athena adopts the voice of the patriarchy in order to be heard, but this ultimately still leaves women unheard and unseen. Unlike Medusa’s, this form of women’s voice is allowed to be represented as Athena, at least in this instance, does not actually represent women. We see this parallel represented in Klimt’s *Pallas Athene* (1898), where Athena stands looking directly at the viewer, the head of Medusa on her chest.<sup>45</sup> She is presented with traditional masculine qualities in her sharp, almost geometrical body type and defiant stare, her face hidden behind a helmet, suggesting a distinctly masculine presence. She wears Medusa’s head in its original monstrous form—a representation of a lack of feminine voice—as a trophy. Athena is given the power of vision—both to see and be seen—because she represents masculine punishment rather than equal justice. The asexual goddess is given a voice because she is an agent of the patriarchy and, some argue, becomes Klimt’s most powerful female figure. The idea that Athena’s asexuality gives her power is a continuation of the ideas of Lombroso, as discussed earlier, that sexuality cannot give one power, but rather takes it away, in this nineteenth-century context.<sup>46</sup> As Susan B. Anthony notes, ‘women ... must echo the sentiments of these men. And if they do not do this, their heads are cut off’.<sup>47</sup> Anthony’s statement is an idea true not only in art, as we have seen, but in the sphere of law and society.

## The Medusa-fication of women in politics

Medusa’s image has long been used in politics to demonise female authority. Even today, society’s cultural template for powerful leadership or persons remains overwhelmingly masculine.<sup>48</sup> Beard argues that Classical archetypes can often be used to understand how we represent women today, in contrast to an established male power; in mythology, for example, it often becomes male duty to save civilisation from female power.<sup>49</sup> We see this stem from a culture and history of mythology that is male-centric, as we have seen already from the few images explored above. Like Ancient Greece, images of corrupted female power seek to demonise women into silence. We see examples of this as far back as pre-Revolutionary France: *The two are but one* (1791), an anti-monarch propaganda pamphlet, where

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<sup>41</sup> Cesare Lombroso, quoted in Susan Ann Batchelor, ‘“Prove me the bam!” Victimisation and agency in the lives of the young women who commit violent offences’ (PhD thesis, University of Glasgow, 2017).

<sup>42</sup> Beard, *Women and power: A manifesto*.

<sup>43</sup> Paul Barolsky, ‘The ambiguity of Caravaggio’s Medusa’, *Source: Notes in the History of Art* 32, no. 3 (2013): 28–29.

<sup>44</sup> Diorio, ‘The silent scream of Medusa’, 4.

<sup>45</sup> Gustav Klimt, *Pallas Athene*, 1898, Austria.

<sup>46</sup> Lombroso, quoted in Batchelor, ‘Prove me the bam!’.

<sup>47</sup> Susan B. Anthony, quoted in Elizabeth Johnston, ‘The original “nasty woman”’, *The Atlantic: Culture*, November 6, 2016.

<sup>48</sup> Beard, *Women and power: A Manifesto*.

<sup>49</sup> Ibid.

Medusa's punishment—a head filled with snakes—is placed onto the head of Queen Marie Antoinette.<sup>50</sup> Since then, many women in power have suffered the same fate as Medusa, demonised into silence by male punishment and fear. As mentioned previously, Medusa's image inspires the desire of male conquest: associating modern women with Medusa subconsciously invites male violence upon those women.<sup>51</sup> During the 2016 US Presidential Election, the image *Trump and triumph* (2016), which depicted Clinton's head superimposed onto Cellini's statue in place of Medusa while Trump stands in victory, went viral.<sup>52</sup> Medusa's beheading remains a cultural symbol of a call for death to powerful women. Such associations constitute a powerful and pervasive form of socially approved symbolic discourse, which dramatises and promotes violence against women until it is so ingrained in our culture that we hardly recognise it.<sup>53</sup> As Medusa entered politics, her rape was erased from the cultural consciousness. This is reflective of our legal system as one that is oftentimes callous and ignorant of sexual assault; one that considers rape culture an innate part of womanhood, as discussed below. However, there is hope Medusa's voice may yet be liberated from its male constraints. Hélène Cixous uses Medusa as a representation of women's free speech and is an example of women adopting Medusa as symbol of female empowerment.<sup>54</sup> Thus, how we see Medusa in other powerful women highlights how they are seen in their own period. While contemporary women face the same threat as Medusa, as her image becomes a call to destroy powerful women, there is a hope she is being reclaimed by feminist scholars such as Cixous.

## Medusa, sexual assault, and justice

Roland Barthes, as discussed by Manderson, views the nature of myth as a 'meta-language' that strips the raw material from context.<sup>55</sup> Myth, according to Barthes, transforms 'historical intention into a natural justification' and is the adversary of change.<sup>56</sup> With regards to works such as Caravaggio's *Medusa*, Barthes' analysis seems to hold true. In Caravaggio's work, no crime is shown, only punishment, and the artist relies upon the myth for justification for his depiction of violence. The punishment, which holds its place throughout art history, normalises violence against Medusa and against women in general as a result. This incarnation of Medusa has committed no crime, other than being a woman with power: the promotion of myth takes away from the fact she is a survivor. This brings this analysis back to the question of the power of being seen and being seen in a particular way. If Medusa's punishment is always depicted, we ignore the reason for it. The normalisation of violence against women in our legal system and in issues of sexual assault is a reflection of this archaic image of the demonisation of women.

Our 'hero' in Cellini's *Perseus with the head of Medusa* raises Medusa's head to open-eyed spectators, while Medusa's own eyes are closed and her lips locked in a (literal) deadly silence.<sup>57</sup> It is this silence that has made Medusa a symbol for sexual abuse victims. In light of the #MeToo movement, the lack of visibility around sexual assault has been placed at the forefront of the popular media. Despite the criminalisation of rape, various scholars argue that we still exist in a society pervaded by rape culture based on the number of crimes unreported and unpunished.<sup>58</sup> The shaming and punishing of women for coming forward reinforces this idea of a rape culture socially legalising assault, linking into the idea Manderson presented regarding *Jurisprudence* and the taxation of shame.<sup>59</sup> Though less evident in the twenty-first century, there is a link between destruction and rape: it is a punishment associated with the

<sup>50</sup> Anonymous, *The two are but one*, late 18<sup>th</sup> C, hand-coloured etching, New York, The Metropolitan Museum of Art.

<sup>51</sup> Johnston, 'Let them know that men did this'.

<sup>52</sup> Unknown, *Trump and Triumph*, 2016, [www.zazzle.com/store/trumpandtriumph](http://www.zazzle.com/store/trumpandtriumph).

<sup>53</sup> William Kidd, 'Marianne: From Medusa to Messalina: Psycho-sexual imagery and political propaganda in France 1789–1945', *Journal of European Studies* 34, no. 4 (December 2004): 339.

<sup>54</sup> Cixous, Cohen, and Cohen, 'The laugh of the Medusa'.

<sup>55</sup> Desmond Manderson, 'The metastases of myth: Legal images as transnational phenomena', *Law and Critique* 26 (2015): 208.

<sup>56</sup> Roland Barthes, quoted in *Ibid.*

<sup>57</sup> Cellini, *Perseus with the head of Medusa*.

<sup>58</sup> Johnston, 'Let them know that men did this', 4.

<sup>59</sup> Desmond, 'Klimt's *Jurisprudence*', 3.

inherently patriarchal idea of purity. The violent killing of Medusa as she sleeps has been repurposed by feminist scholars to act as a representation for sexual abuse. Medusa's prone and naked body beneath Perseus's feet tells the story of many rape victims, silenced as their metaphorical head and voice are cut off. The crime of sexual harassment is also a story of silencing and, as we have seen, Medusa is a representation for the voiceless feminine and arguably most relevant in relation to discourse surrounding sexual assault.<sup>60</sup> Unlike Medusa, we no longer call for the death of women who have been assaulted, but they are punished by our society through silence nonetheless; untested rape kits, unreported assaults, nondisclosure agreements (NDAs) signed under duress.<sup>61</sup> According to the National Crime Victimization Survey (2010–2016), in America alone, for 1,000 sexual assaults, less than a third of assaults will be reported to police.<sup>62</sup> It is estimated hundreds of thousands of rape kits are left untested due to a lack of resources and funding.<sup>63</sup> In a justice system set on notions of viewing and looking to determine guilt or innocence, a lack of evidence that can be seen, such as a rape kit, could be detrimental. By extension, NDAs are often devices used to control victim's voices: John Bornstein states that many NDAs are signed under duress due to the 'very stark choice' many women are forced to make between silence and settlement.<sup>64</sup> Recent investigations into the Harvey Weinstein allegations are clear examples of the pervasive use of NDAs: Zelda Perkins, one of the women assaulted by Weinstein, claims that she, and other victims, felt they had no choice but to sign NDAs.<sup>65</sup> If the court system operates on the idea of who the law *sees*, and the law only sees the punished Medusa, there is no punishment for Perseus.<sup>66</sup> Gurnham argues that the court system must notice who is viewed and who is not and how this is overtly gender-based in our society.<sup>67</sup> A clear example of a recent shift in this notion of 'seeing' is the #MeToo movement, related to the Weinstein cases discussed previously. #MeToo has left women with a deep anger about the culture in which they live, where assault is 'shrugged off as an inevitable part of being a women', leading to the adoption of Medusa as a symbol for sexual assault victims.<sup>68</sup> As we have seen a movement away from the silencing of sexual assault in the law and the visibility of survivors, Medusa's image has shifted from villainy to victimisation.

## Reclaiming Medusa

The final artwork this essay will discuss is 2008's *Medusa* by Luciano Garbati, a modern, feminist interpretation of Medusa gaining attention due to the #MeToo movement.<sup>69</sup> The statue represents a 'what if?', where Medusa defeats Perseus and she stands holding his head in her hand, sword in the other, staring defiantly at her audience. A key aspect of the work, according to Garbati, is the difference between male and female victories:

The representations of Perseus, he's always showing the fact that he won, showing the head ... if you look at my Medusa ... she is determined, she had to do what she did because she was defending herself.<sup>70</sup>

It is interesting to note that in this interpretation of Medusa, she has beheaded Perseus much as he beheaded her. She has not used her punishment to paralyse him: Medusa will not use her own destruction to destroy him, but rather meet him on equal footing. We could argue that this acts to

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<sup>60</sup> Jennifer L. Airey, '#MeToo', *Tulsa Studies in Women's Literature* 37, no. 1 (2018): 7–13.

<sup>61</sup> Ibid.

<sup>62</sup> Rachel E. Morgan, *National Crime Victimization Survey, 2010–2016* (2017), [www.bjs.gov/content/pub/pdf/cv16re.pdf](http://www.bjs.gov/content/pub/pdf/cv16re.pdf).

<sup>63</sup> Airey, '#MeToo'.

<sup>64</sup> Alison Branley, 'Signing away their voice: How nondisclosure agreements silence Australian women', *ABC News*, February 25, 2020, [www.abc.net.au/news/2020-02-25/non-disclosure-agreements-silencing-sexual-assault-victims/11863450](http://www.abc.net.au/news/2020-02-25/non-disclosure-agreements-silencing-sexual-assault-victims/11863450).

<sup>65</sup> Michelle Kaminsky, 'The Harvey Weinstein effect: The end of non-disclosure agreements in sexual assault cases?', *Forbes*, October 26, 2017, [www.forbes.com/sites/michellefabio/2017/10/26/the-harvey-weinstein-effect-the-end-of-nondisclosure-agreements-in-sexual-assault-cases/?sh=8aa05952c11c](http://www.forbes.com/sites/michellefabio/2017/10/26/the-harvey-weinstein-effect-the-end-of-nondisclosure-agreements-in-sexual-assault-cases/?sh=8aa05952c11c).

<sup>66</sup> Gurnham, 'Ched Evans, rape myths and Medusa's gaze'.

<sup>67</sup> Ibid.

<sup>68</sup> Airey, '#MeToo', 7.

<sup>69</sup> Luciano Garbati, *Medusa*, 2008, resin or bronze, Argentina.

<sup>70</sup> Annaliese Griffin, 'The story behind the Medusa statue that has become the perfect avatar for women's rage', *Quartz: She Slays*, October 4, 2018.

represent women finding their voice in traditionally male spaces: finding relief in a traditional male domain of violence, and a voice in a traditional male legal system. Medusa is naked but not sexualised: she is there to see and be seen, to take her place in our society and our justice system.<sup>71</sup> She exists without the shame associated with sexual assault and stands before us with the pride and bravery we should associate with members of #MeToo. It is the only piece discussed here where Medusa looks directly at her audience. This Medusa *sees* and understands what it means to be seen. Her gaze forces a male-dominated society, one so used to looking rather than being looked at, to face their own internal judgement process and address this wider issue of justice and law. Griffin considers her the ‘perfect avatar for ... female rage’ in her resolution.<sup>72</sup> Garbati’s Medusa represents a reclaiming of Medusa’s image by feminists, to enable the telling of a wider story of sexual assault in our society and its representation in our justice system.

## Conclusion

To live within the law, we must be seen by the law. Throughout history, many groups of people have been unable to rely on our legal systems for justice or compensation because they have not been seen as victims in society. This rings especially true for women. We see this reflected through images of Medusa in art over time: a representation of women in power, sexual assault victims, and women more generally. Through analysing images of Medusa we chronicle how her image has developed, and with it how ideas about women and sexual assault have changed from Ancient Greece to #MeToo. Medusa’s image has been pulled between meanings—from sexualised woman to victim, from aggressive monster to powerful woman—as society and law’s image of femininity has changed. However, with works like Garbati’s, we can hope that the image of Medusa—like the victims she represents today—rests safely in the hands of future generations of women.

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- Anonymous. *The two are but one*. Late 18<sup>th</sup> C. Hand-coloured etching. New York, The Metropolitan Museum of Art.
- Attributed to Polygnotos. *Terracotta pelike (jar)*. Ca. 450–440 BC. Terracotta. New York, The Metropolitan Museum of Art.
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<sup>71</sup> Rosalind Gill and Shani Orgad, ‘The shifting terrain of sex and power: From the “sexualization of culture” to #MeToo’, *Sexualities* 21, no. 8 (December 2018): 1313–1324.

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# Power on a pedestal: How architecture creates, reinforces, and reflects power structures in the legal system

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## Abstract

Architecture—the language of buildings—is a language of both beauty and function. Architecture creates, reinforces, and reflects power structures. It is both a form of art and a physical control. This paper seeks to explore the influence of architecture in the legal context by comparing the architecture of the High Court of Australia and the United States Supreme Court. Through their design and construction, each court tries to invoke certain ideologies and mythologies that justify and legitimise the role of the judiciary in our society as ‘impartial’ arbitrators. This paper reviews several architectural features of each court, explains how those architectural features contribute to the creation and maintenance of the aforementioned ideologies and mythologies, and then reflects on the utility of making such representations to society at large. Importantly, the paper explores more than just the symbology of the courts’ various ornamentation and artworks; instead, it looks to the meaning imparted by the structure of the buildings themselves, focusing the locus of research not on the *courtroom* but the court as a whole.

## Introduction

This paper argues that architecture creates, reinforces, and reflects power structures in the legal system in several ways. At the macro level, the symbology, imagery, and meaning imparted to the buildings by these architectural features is one means of consolidating ideologies that legitimise the exercise of judicial power. At the micro level, architecture allows for the physical control of courtroom users, reinforcing relationships of power. To demonstrate these phenomena and explain how architecture influences the dynamics of power and human behaviour, this essay explores the architecture of the High Court of Australia (‘High Court’) and the Supreme Court of the United States (‘Supreme Court’).

These case studies are useful for two reasons. Firstly, a *comparison* of their architectural features, and the ideologies those features appeal to, is useful in highlighting the extent of architecture’s influence. Secondly, both courts are the crown of the judicial trees in their respective jurisdictions, making them particularly ripe for examination, as it is in institutions of national significance that countries tend to vest the most symbolic intent.<sup>1</sup> Indeed, both courts are rich in architectural detail and have been recognised as significant feats of architecture.<sup>2</sup> Unfortunately, it is this very attention to architectural detail that makes it impossible to discuss every feature of the courts in its entirety. Because the structure and furnishings of *courtrooms* have been extensively discussed by other researchers this will not be discussed.<sup>3</sup>

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<sup>1</sup> ‘Unicorns and Urinals’ The Troubling History of Contemporary Court Design’, Podcast (Voice Republic, 2018) <<https://voicerepublic.com/talks/unicorns-and-urinals-the-troubling-history-of-contemporary-court-design>>.

<sup>2</sup> *High Court Documentary* (High Court of Australia, 2010) <<http://www.hcourt.gov.au/about/high-court-documentary>>.

<sup>3</sup> See Linda Mulcahy’s excellent book *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2010).

This paper will explore this argument in three parts. Part I conducts a brief literature review and defines the conceptual parameters of ‘architecture’ for the purposes of this paper. Part II examines the ‘macro’ architectural features—including location, construction, and outer shell—and Part III examines the ‘micro’ architectural features, or internal structure, of the courts. After reviewing the architectural features of each court in each section, the paper then explains how those architectural features contribute to the creation and maintenance of the aforementioned ideologies and mythologies, and then reflects on the utility of making such representations to society at large. Throughout, the paper draws on the scholarship of legal theorists, and works to apply previous observations about architecture and law to the context of the ‘highest courts’ in the Australian and American jurisdictions.

## I Defining ‘architecture’

There are many different definitions of architecture. It is a profession, process, product, building, ‘social art’, form of ideological expression, and a means of ‘coercive organization of social space’.<sup>4</sup> A common theme among these various classifications, however, is that the importance of ‘architectural objects’ goes beyond their physical form. Glenn argues that buildings are more than their mere physical form because they achieve some greater ‘social purpose’. Since built structures are not *only* used for shelter—there are examples of nomadic societies which thrived without them—she reasons that these ‘social purposes’, such as creating privacy and differentiating sacred places or places with particularised functions, must be the reason for their construction.<sup>5</sup> Foucault argues architecture’s ‘social purpose’ is control, since a building’s design dictates both the function that users derive from it and the way they interact with it.<sup>6</sup> Architecture is important because it can cause or prevent certain human behaviours.<sup>7</sup>

Others argue that architecture’s ‘social purpose’ is as a means of expression. As both a visual and textual (sensory) mode of communication, it often shares ideas more effectively than language. This is because it is more subtle and yet also more coercive than other modes of communication. For example, the design of a city is a persistent and pervasive, yet almost unnoticeable, influence on our daily lives and, as a form of social organisation, it is particularly effective because these ‘social rules’ are reinforced by *physical* boundaries.<sup>8</sup> Imagery is often better equipped than text to express concepts such as paradoxes and emotive appeal, as it can communicate ideas in a nonlinear fashion—meaning that unlike the written word, which must follow a singular and coherent narrative in order to be comprehensible,<sup>9</sup> imagery may present several conflicting narratives simultaneously. Like the written word, imagery may simultaneously offer different interpretations.<sup>10</sup> This is why art and law are effective vehicles for social critique: ‘[I]aw and art are the same thing ... they’re different vocabularies for criticising the same thing ...’.<sup>11</sup> As well as critique, which *reactively* influences society, architecture also offers a proactive opportunity for influence: ‘[i]f architecture depicts the nature of reality, then new ideas about reality can be demonstrated through manipulation of architectural symbolism’.<sup>12</sup>

In a judicial context, all of the above ‘social purposes’ apply. Courts are ‘differentiated’, not as a ‘sacred’ place in the religious sense, but as one that commands respect. Their very existence communicates a paradox about the nature of the law: both law and its buildings possess a public

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<sup>4</sup> Saul Fisher, ‘Philosophy of Architecture’, *Stanford Encyclopedia of Philosophy* (Web Page, 9 September 2015) <<https://plato.stanford.edu/entries/architecture/>>; see also Molly Glenn, ‘Architecture Demonstrates Power’ (Senior Thesis, Haverford College, 2003) <<https://scholarship.tricolib.brynmawr.edu/bitstream/handle/10066/714/2003GlennM.pdf?sequence=5&isAllowed=y>>.

<sup>5</sup> Glenn (n 4).

<sup>6</sup> Joseph M. Piro, ‘Foucault and the Architecture of Surveillance: Creating Regimes of Power in Schools, Shrines, and Society’ (2008) 44(1) *Educational Studies* 1.

<sup>7</sup> Paul Hirst, ‘Foucault and Architecture’ (1993) 26 *AA Files* 55; Linda Mulcahy, ‘Urinals and Unicorns’ (Speech, The Australian National University, 30 October 2018); Fisher (n 4);

<sup>8</sup> ‘Unicorns and Urinals’ (n 1).

<sup>9</sup> With the exception, perhaps, of some postmodern literature.

<sup>10</sup> Desmond Manderson, ‘Legal Theory: Art and Law’ (Lecture, The Australian National University, 31 July 2017).

<sup>11</sup> *Ibid.*

<sup>12</sup> Glenn (n 4).



character, but also exclude and control the public. Often, the courts are vehicles for social critique and change. However, the courts have an additional ‘social purpose’ unique from most other architectural objects.

## II The macro level: Ideological power structures

The power of the High Court and Supreme Court is legitimised by their implementation of ‘core Western value[s]’ of justice, such as impartiality, independence, and equality.<sup>13</sup> The public would not consent to arbitration if they believed the courts were arbitrary, unjust, biased, or corrupt—the ‘social contract’ would be broken.<sup>14</sup> There would also be no justification for undemocratic decision-making if the judiciary did not embody these ideologies.<sup>15</sup> The courts’ architecture, which acts as ‘monuments to legal tradition’,<sup>16</sup> reinforces this mythology, by promoting the image of the courts as keepers of these ideals.<sup>17</sup> But how?

### A Location

The High Court is situated at a lower elevation than (both new and old) Parliament House, manifesting in physical dimensions the power dynamic between the two branches of government written into the Constitution. This positioning represents the supremacy of the legislature, as height connotes power or dominance—think: the advantage of higher ground in a military battle, religious connotations of reaching toward the heavens, and the practicalities of mustering the resources needed to create grand structures.<sup>18</sup> The physical distance between the two buildings demonstrates the High Court’s independence and adherence to the separation of powers.<sup>19</sup> This is fitting, given the original design requirements stipulated the building should be:

visually related to the Parliament but at the same time must be seen to stand separate from, and independent of, the Parliament. In its constitutional independence, its objectivity of deliberation and freedom from political influence, the High Court can be seen as a powerful influence within this relationship.<sup>20</sup>

The Court’s position (Figure 1) halfway between Parliament and Constitution Avenue (the stretch of road on the opposite side of the lake, facing the Court) is symbolic of its role as an intermediary between the two—as the interpreter and enforcer of the Constitution on behalf of the Parliament—with one foot in the realm of statutory interpretation and the other in constitutional law. Thus, the High Court’s location is ‘a powerful expression of the basis of our democracy’.<sup>21</sup>

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<sup>13</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 2012), 3.

<sup>14</sup> Murray Gleeson, ‘Public Confidence in the Judiciary’ (Speech, Judicial Conference of Australia, 27 April 2002) <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj\\_jca.htm#\\_ftn1](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_jca.htm#_ftn1)>; Stephen J. Lee, ‘Impartiality in the Judiciary’ [1987] 14(2) *University of Queensland Law Journal* 136.

<sup>15</sup> Young (n 13), 3.

<sup>16</sup> ‘Unicorns and Urinals’ (n 1).

<sup>17</sup> Desmond Manderson, ‘Not Yet: Aboriginal People and the Deferral of the Rule of Law’ (2008) 29(30) *Arena Journal* 219.

<sup>18</sup> Roger Scruton, ‘Architecture’, *Encyclopedia Britannica* (Web Page, 2019) section ‘Symbols of Function’ <<https://www.britannica.com/topic/architecture/Symbols-of-function>>; Léopold Lambert, ‘Foucault and Architecture: The Encounter that Never Was’, *The Funambulist* (Web Page) <<https://thefunambulist.net/architectural-projects/foucault-foucault-and-architecture-the-encounter-that-never-was>>; Glenn (n 4).

<sup>19</sup> *High Court Documentary* (n 2).

<sup>20</sup> High Court of Australia, ‘The Building’, *High Court of Australia* (Web Page, 2010) <<http://www.hcourt.gov.au/about/the-building>>.

<sup>21</sup> *High Court Documentary* (n 2).

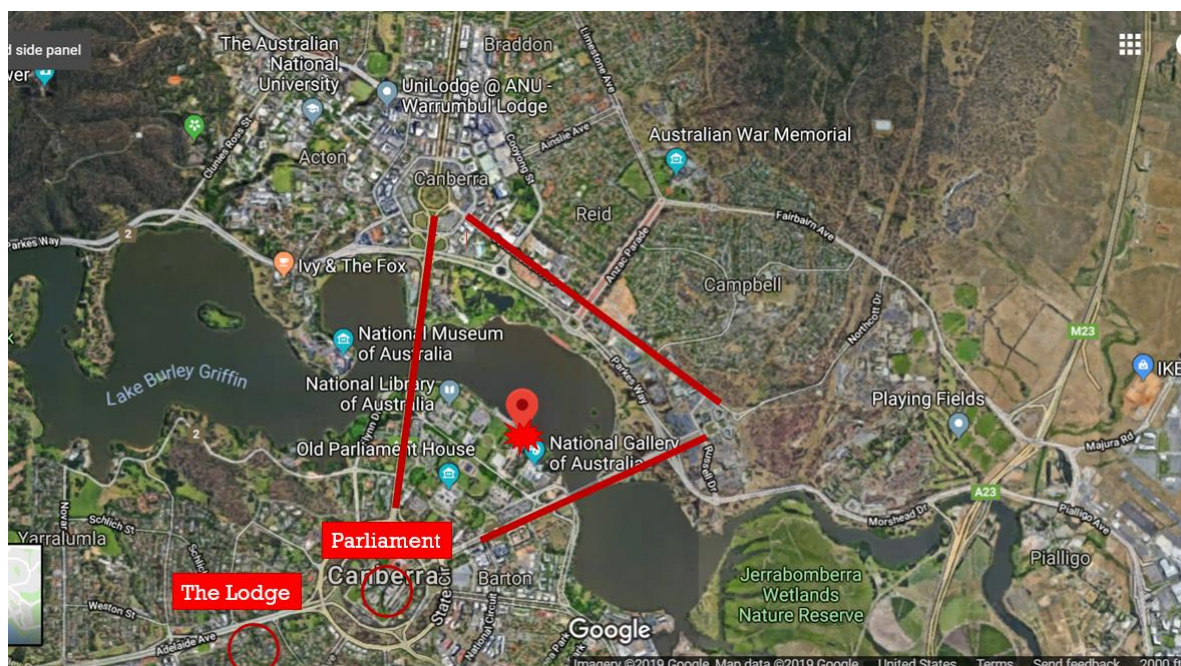


Figure 1: High Court location (indicated by red star-burst) relative to the position of Parliament House and the Lodge, the prime minister's Canberra residence.

Source: 'Canberra', *Google Maps* (Screenshot of Google Maps search result, 30 September 2020) <<https://www.google.com/maps/place/Canberra+ACT+2601/@-35.298769,149.1349945,4438m/data=!3m1!1e3!4m5!3m4!1s0x6b164d69b05c9021:0x500ea6ea7695660!8m2!3d-35.2809368!4d149.1300092>>.

By contrast, at first glance, the location of the Supreme Court (Figure 2) implies a diminutive role for the courts relative to other branches of government. Although the institution was founded in 1789 as one of three coequal branches of government, it was not until 7 October 1935 that the Court was given a permanent home.<sup>22</sup> This is because, initially, the court was thought to be the weakest branch, for it controlled neither 'the sword or the purse'.<sup>23</sup> Only in modern times has the Supreme Court gained the respect that would earn former Justice Anthony Kennedy the title 'most powerful man alive'.<sup>24</sup> Thus, when designing Washington, the architect L'Enfant's priorities were the White House and Capitol Building. Both buildings sit at the head of 'two great open allées' with 'the radials [of diagonal streets] intersecting these focal points'.<sup>25</sup> This positioning connotes their power, as a path is a 'location of movement' which emphasises the structure at its end.

Unlike the White House and Capitol Building, whose locations speak to their relative importance, the Supreme Court's location expresses obscurity or equality (depending on whether a negative or positive portrayal is made). The Supreme Court's location was decried by the court's architect, Cass Gilbert, because of its subordinate position to the Capitol and the 'baronial' Library of Congress.<sup>26</sup> It did not speak to the court's independence. It is but one building on a city block. No pathways lead to the

<sup>22</sup> Judith Resnik, Dennis Curtis and Allison Tait, 'Constructing Courts: Architecture, the Ideology of Judging, and the Public Sphere' in Anne Wagner, Richard K Shirwan (eds), *Law, Cultural and Visual Studies* (Springer, 2014), 515, 521; Supreme Court of the United States, 'The Supreme Court Building', *Supreme Court of the United States* (Web Page) <<https://www.supremecourt.gov/about/courtbuilding.aspx>>; Jackie Craven, 'About the U.S. Supreme Court Building', ThoughtCo (online, 28 December 2018) <<https://www.thoughtco.com/us-supreme-court-building-by-cass-gilbert-177925>>; Supreme Court of the United States, 'Architectural Information', *Supreme Court of the United States* (Web Page) <<https://www.supremecourt.gov/about/archdetails.aspx>>.

<sup>23</sup> Alexander Hamilton, *The Federalist Papers No. 78* (The Judiciary Department, 1788).

<sup>24</sup> Alexander Hamilton, *The Federalist Papers No. 78* (The Judiciary Department, 1788); The Common Constitutionalist, 'Justice Anthony Kennedy – More Powerful than Any President' *The Common Constitutionalist* (Blog Post, 16 May 2017) <<http://commonconstitutionalist.com/political-stuff/justice-anthony-kennedy-more-powerful-than-any-president/>>.

<sup>25</sup> Glenn (n 4).

<sup>26</sup> 'Architectural Information' (n 22).

building and it blends into the rest of the city’s orthogonal plan.<sup>27</sup> The symbolic effect is one of obscurity. Glenn argues, in a more positive interpretation, that ‘[t]he symbol of a grid, paradoxically, is its very lack of symbolism. Precisely because all places are alike, the grid was a uniquely appropriate choice for [expressing] ... democracy’.<sup>28</sup> Yet the courts are the least democratic branch of government—this is the counter-majoritarian difficulty. So perhaps the ‘equality’ of the city block instead represents equal access to the law and equality before it. The location was chosen for its proximity to Union Station, which allowed easy transit for out-of-state visitors.<sup>29</sup> This physical measure taken by the court to encourage public participation supports the ‘equality’-based interpretation of the Supreme Court’s location. As Mulcahy notes, such facilitative measures—for example, comfortable waiting areas and kitchen facilities—have a very real impact on signalling inclusion or exclusion of visitors from the courts.<sup>30</sup>



Figure 2: Supreme Court location (indicated by red star-burst) relative to the position of the Capitol Building, the White House, and Arlington National Cemetery.

Source: ‘Washington’, Google Maps (Screenshot of Google Maps search result, 30 September 2020)  
 <<https://www.google.com/maps/place/The+White+House/@38.8894621,-77.0488205,4357m/data=!3m1!1e3!4m5!3m4!1s0x89b7b7bcdecbb1df:0x715969d86d0b76bf18m2!3d38.8976763!4d-77.0365298>>.

## B Construction

Firstly, the very act of construction itself communicates the courts’ significance. The inside-outside distinction can focus a locus of power, as the act of enclosure itself identifies said structure as being of some social use distinct from the ‘other’ or ‘outside’, indicating ‘private or sacred areas and individual status’<sup>31</sup> and establishing the courts as residences of power. Also, the decision to build for courts a structure dedicated solely to the administration of justice signals to the public that the court’s ‘social purpose’ is a priority, and that they are powerful institutions to receive funding to sponsor their

<sup>27</sup> Glenn (n 4).

<sup>28</sup> Ibid.

<sup>29</sup> ‘Architectural Information’ (n 22).

<sup>30</sup> ‘Unicorns and Urinals’ (n 1).

<sup>31</sup> Glenn (n 4).

construction.<sup>32</sup> This is the point Glenn makes when saying that architecture signals cultural values via differentiation of ‘sacred’ spaces.<sup>33</sup> Their size further enhances this impression of importance. An architectural object’s size is uniquely positioned to communicate strength. This is because large buildings require wealth (or access to it) and a command over others and their labour. By creating such a building, a leader is demonstrating that they have ample reserves of both.<sup>34</sup>

Allocating the courts a discrete building also speaks to the courts’ independence. Instead of residing in multipurpose buildings, as was the case in medieval England, the status of judges as bureaucrats has been elevated above other administrative and executive functions.<sup>35</sup> This communicates both the importance and independence of the judiciary. Judges are no longer seen as ‘loyal subjects of the state’, and instead of being ‘on trial’ to the wider public, as Bentham supposes, their judicial function is hidden by a structure which segregates them from society.<sup>36</sup> Such allusions to independence and impartiality legitimise legal power. Young also adds that these ideologies create a different form of power, as the claim to impartiality masks the way the perspectives of dominant groups claim universality and that by ‘downgrading’ all of human experience into ‘unitary’ comparisons, it justifies hierarchical decision-making.<sup>37</sup> Not only are courts physically separated, however, but both the Supreme Court and High Court have been made into easily identifiable icons. This is an attempt to counter what Garapon calls ‘architectural silence’, wherein court houses become undistinguishable from other ‘regular’ buildings. Garapon says such ‘silence’ is ‘dangerous’ as it risks the ‘erosion of legal symbolism ... [that could] threaten the very foundations of the legal system’.<sup>38</sup> Striking architectural symbolism and features are thus used to differentiate the courts and highlight their significant role in society, distinct from other more ‘mundane’ administrative and/or bureaucratic functions.

Each court’s construction process communicates different assumptions about legal power—the design of the High Court is arguably democratic and participatory in origin, while the Supreme Court’s design was privately sourced.<sup>39</sup> The Supreme Court’s construction was instigated by the Chief Justice of the time, William Taft, who instructed Cass Gilbert to design ‘a building of dignity and importance suitable for its use as the [court’s] permanent home’.<sup>40</sup> By contrast, the High Court was built by the firm Edwards Madigan Torzillo and Briggs, who won a public competition with their design.<sup>41</sup> Their instructions were to create a building that ‘imparts a sense of strength and security. The visitor is made to feel aware of the rights, privileges and responsibilities of the Australian judicial system’.<sup>42</sup> It is ironic that the High Court, which has far less of a role in adjudicating rights-based conflicts, is then the one that appeals to the ‘rights’ of the people by requiring they have a say in the court’s construction. Given the current dialogue of income and racial inequality in the United States, and the fears of political court-stacking following the passing of the ‘Notorious RBG’,<sup>43</sup> comparable to the ‘shoulder-tapping’ process responsible for the court’s construction, this is one instance in which architectural interpretation perhaps *undermines* the Supreme Court’s judicial power or creates a different, less positive, perspective on it, depending on the user’s individual context.

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<sup>32</sup> Resnik, Curtis and Tait (n 22), 514.

<sup>33</sup> Glenn (n 4).

<sup>34</sup> Glenn (n 4).

<sup>35</sup> ‘Unicorns and Urinals’ (n 1).

<sup>36</sup> Resnik, Curtis and Tait (n 2222), 514; Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press, 2011), 720.

<sup>37</sup> Young (n 13), 3.

<sup>38</sup> Resnik, Curtis and Tait (n 22), 527.

<sup>39</sup> This may also be due to the different eras in which the buildings were made—the Supreme Court in 1935 and the High Court in 1980: *High Court Documentary* (n 2); High Court of Australia (n 20).

<sup>40</sup> ‘The Supreme Court Building’ (n 22); Craven (n 22); ‘Architectural Information’ (n 22).

<sup>41</sup> *High Court Documentary* (n 2); High Court of Australia (n 20); Gough Whitlam, ‘High Court Design Competition Winner’ (Press Statement, 136, 8 October 1973).

<sup>42</sup> High Court of Australia (n 20).

<sup>43</sup> The popular nickname for former US Supreme Court Associate Justice Ruth Bader Ginsberg.

## C Outer shell



Figures 3 and 4: Comparison between the High Court of Australia (above) and other examples of brutalist architecture (below).

Sources: (3) Alex Proimos, 'High Court of Australia', *Wikimedia Commons* (Image, 20 January 2012) <[https://commons.wikimedia.org/wiki/File:High\\_Court\\_of\\_Australia\\_\(6769096715\).jpg](https://commons.wikimedia.org/wiki/File:High_Court_of_Australia_(6769096715).jpg)>; (4) Rory Hyde, 'Denys Lasdun—Royal National Theatre, South Bank, 1967–76' (*Flickr*, 10 March 2009) <<https://www.flickr.com/photos/roryrory/3757071005/>>.

The High Court successfully coopts the architectural style of brutalism (Figures 3 and 4) to convey authenticity and strength, implying the judiciary occupying the Court possesses the same qualities.<sup>44</sup> While brutalism has been described as a ‘model of bad taste’ and criticised as ‘cold’ and ‘austere’ because of its connotations of urban decay (the blank walls are a canvas for graffiti and it is expensive to maintain raw concrete),<sup>45</sup> its use in the High Court creates ‘a building of strength’ that ‘shows its raw meaning and ... intent’.<sup>46</sup> The court relies heavily on the brutalist practice of revealing natural materials<sup>47</sup> as a means of speaking ‘honesty’ through structure and material—a theme that is common among architects.<sup>48</sup> This has been achieved largely by a technique called ‘bush hammering’ in which a percussion instrument is used to ‘flake’ the surface of the concrete and expose the grains within.<sup>49</sup> The exposure of these materials is comparable to the court’s willingness to expose the reasoning in their judgments to the public. The building’s strength is a reference to the judiciary’s resoluteness and immovable impartiality, no matter the public opinion of the day. The history of the High Court holds many examples of handing down the correct *legal* ruling in the face of great public opposition—think, for example, of the *Communist Party Case*.<sup>50</sup> Interestingly, the High Court makes no further appeals to the weight of legal history, instead preferring to privilege its own relatively young history. Because of this youth, appeals to the ‘great weight of history’ (excluding appeals to Britain, which have gradually been discarded as Australia sought to forge its independence), are much less prominent in the Australian national discourse, and it is fitting that this tone is reflected in the design of its highest court.

Underpinning this overarching narrative of authenticity and strength are several more secondary narratives introduced by secondary architectural features.<sup>51</sup> Another possible interpretation is that brutalism’s reputation as a relic of a bygone era is reminiscent of the judiciary’s own gerontocratic reputation—speaking to a historical power that is increasingly challenged by progressive political narratives. Another interpretation/observation is how the intensity of the court’s brutalism is softened somewhat by the cascade waterfall which runs parallel to the ceremonial ramp at the Court’s forefront, with the moving water symbolising freshness and a willingness to change.<sup>52</sup> The waterfall is also made of South Australian speckled granite—many of the court’s materials are sourced locally. The use of these materials is an attempt to capture a unified national voice, appealing to an ideological ‘universality’ that Young says is essential to legitimise power.<sup>53</sup> Alternatively, it could be a reference to the federal compact underpinning Australia’s constitutional structure. The possibility that reasonable minds may differ as to the correct interpretation speaks to architecture/imagery’s capacity to convey subtle yet complex relationships of power—it is possible for the court to possess/exert all of these ideas of legal power at once.<sup>54</sup>

The 4,000 square metres of glass which dominate the High Court’s façade convey a similarly nuanced message about legal power. On the one hand, the same façade evokes ideas of transparency, accountability, and accessibility.<sup>55</sup> This is because glass lets in light, and light has long been a symbol of justice, from the Egyptian Sun Gods of Justice, to the Christian God of Light.<sup>56</sup> Glass has been used

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<sup>44</sup> *High Court Documentary* (n 2).

<sup>45</sup> Jessica Stewart, ‘Brutalism: What Is It and Why Is It Making a Comeback?’, *My Modern Met* (Web Page, 4 December 2018) <<https://mymodernmet.com/brutalist-architecture/>>.

<sup>46</sup> *High Court Documentary* (n 2).

<sup>47</sup> *Ibid.*

<sup>48</sup> ‘Unicorns and Urinals’ (n 1).

<sup>49</sup> High Court of Australia (n 20).

<sup>50</sup> *Communist Party v Commonwealth* (1951) 83 CLR 1.

<sup>51</sup> The High Court’s architectural style is a ‘primary’ feature because the style contributes to both the viewer’s initial impression and because it dominates every feature of the building. Individual components of the building—such as a water feature and walkway—are considered ‘secondary’ features because they do not constitute the ‘building blocks’ of architectural analysis (pun intended).

<sup>52</sup> High Court of Australia (n 20).

<sup>53</sup> Young (n 13), 3.

<sup>54</sup> Stewart (n 45).

<sup>55</sup> High Court of Australia (n 20); *High Court Documentary* (n 2); ‘Unicorns and Urinals’ (n 1); Resnik, Curtis and Tait (n 22), 514.

<sup>56</sup> Resnik and Curtis (n 36), 720.

in other courthouses, such as the Nantes Palais de Justice and the German Constitutional Court, to the same effect.<sup>57</sup> Glass also means the court is open to scrutiny from the public and Parliament alike. Moreover, the court has an unblemished view of the current Parliament house and can supervise it, as befits its constitutional role. Proponents of Canada's 'dialogue theory' of constitutional law might say the glass allows discourse between the two bodies, as the law continues to be reformed while it is batted between the two bodies like a shuttlecock. On the other hand, the downside to the 'voyeuristic control' granted by glass is that, just like a person looking in through a window, the court remains too far away to 'engage meaningfully and reciprocally' with Parliament or the public.<sup>58</sup> An alternative interpretation is that it is the public, not the judiciary, who are put under scrutiny, as the latter are sequestered in their private offices and court rooms.<sup>59</sup>

In contrast to the bold brutalism of the High Court, the neoclassical style of the Supreme Court (Figures 5 and 6) is a 'quieter, more reserved style' which evokes a legal power legitimised by elegance and age. The grand, timeless<sup>60</sup> nature of neoclassical architecture is especially evident relative to the 'flamboyant Beaux Arts style' of the Library of Congress which flanks the court.<sup>61</sup> Neoclassical architecture focuses on simple geometric forms, counterbalanced by dramatic flanking columns.<sup>62</sup> A 252-foot wide (roughly 77 metres) oval plaza and sweeping steps frame the entrance.<sup>63</sup> These arrangements, combined with height and the building's grand sense of scale (the foundations are 385 by 304 feet, about 117 by 91 metres<sup>64</sup>) intimidate visitors to the 'temple-like' building.<sup>65</sup> Stairs, in particular, are renowned for their ability to communicate 'monumentality'.<sup>66</sup>

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<sup>57</sup> Resnik, Curtis and Tait (n 22), 530.

<sup>58</sup> Ibid, 531.

<sup>59</sup> 'Unicorns and Urinals' (n 1).

<sup>60</sup> Unlike concrete, marble is known for its longevity: 'Architectural Information' (n 22).

<sup>61</sup> Resnik and Curtis (n 3636), 720; 'Architectural Information' (n 22); Craven (n 2222).

<sup>62</sup> Resnik, Curtis and Tait (n 22), 521; Editors of Encyclopedia Britannica, 'Neoclassical Architecture', *Encyclopedia Britannica* (Web Page, 2019) <<https://www.britannica.com/art/Neoclassical-architecture>>; 'Architectural Information' (n 22); Craven (n 22).

<sup>63</sup> 'Architectural Information' (n 22).

<sup>64</sup> 'Architectural Information' (n 22).

<sup>65</sup> 'Unicorns and Urinals' (n 1).

<sup>66</sup> Scruton (n 18), section 'Symbols of Function'.



Figures 5 and 6: Comparison between the Supreme Court (above) and other neoclassical architecture (below).

Sources: (5) Kjetil Ree, 'The Supreme Court of the United States', *Wikimedia Commons* (Image, 8 March 2007) <[https://commons.wikimedia.org/wiki/File:US\\_Supreme\\_Court.JPG](https://commons.wikimedia.org/wiki/File:US_Supreme_Court.JPG)>; (6) Marcus Cyron, 'Wiesbaden, Neoclassical Architecture', *Wikimedia Commons* (Image, 16 June 2013) <[https://commons.wikimedia.org/wiki/File:Wiesbaden,\\_Neoclassical\\_architecture\\_\(9066879713\).jpg](https://commons.wikimedia.org/wiki/File:Wiesbaden,_Neoclassical_architecture_(9066879713).jpg)>.



On both the western and eastern facades of the Supreme Court are pediments, carved by Robert Aiken and Herman A. McNeil respectively.<sup>67</sup> The pediments are saturated with democratic allusions and classical symbols of justice. The western architrave reads ‘Equal Justice Under Law’, while the eastern one reads ‘Justice the Guardian of Liberty’.<sup>68</sup> The scenes depict Liberty, guarded by Order and Authority, as well as lawmakers from different ages and civilisations, including Moses, Confucius, and Solon.<sup>69</sup> Two seated marble figures, named ‘Contemplation of Justice’ (Figure 7) and ‘Guardian of Law’ (Figure 8), sit atop the stairs on the western façade.<sup>70</sup> These repeated references to legal history aim to create a shared history and narrative for visitors by recalling figures of centuries past, rather than recalling America’s more recent and more controversial past.<sup>71</sup>

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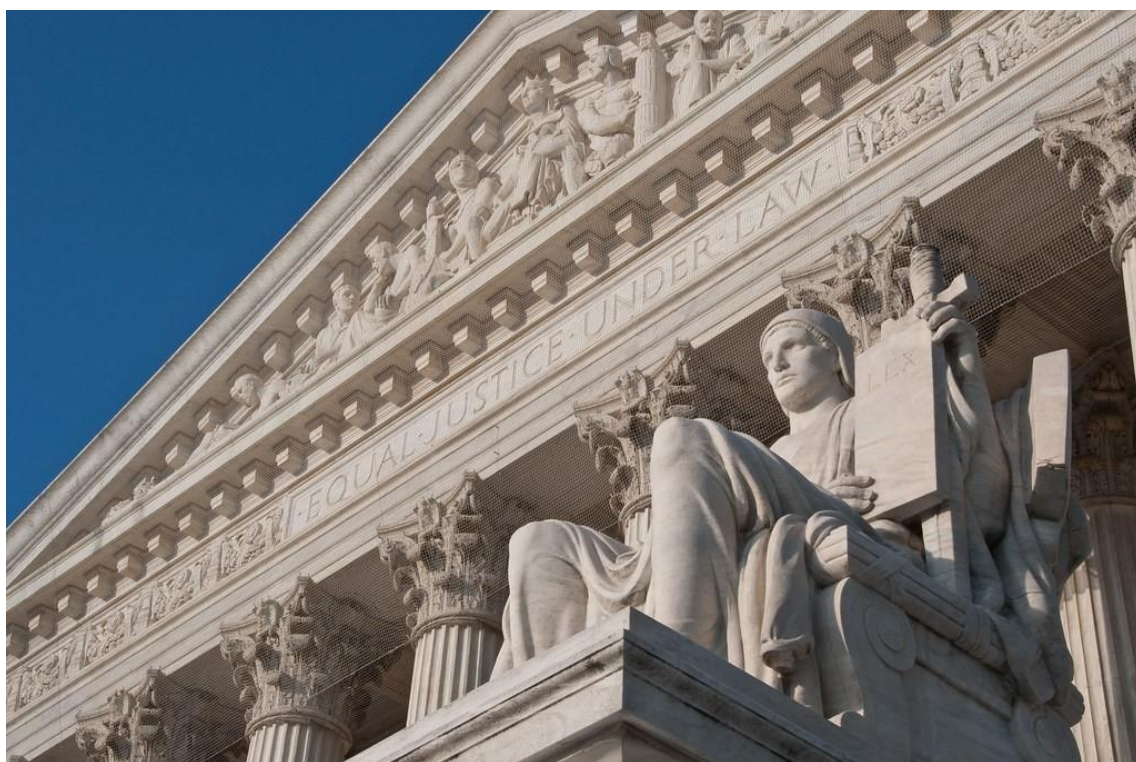
<sup>67</sup> Craven (n 2222).

<sup>68</sup> ‘The Supreme Court Building’ (n 22).

<sup>69</sup> Craven (n 22); ‘The Supreme Court Building’ (n 22).

<sup>70</sup> Craven (n 22).

<sup>71</sup> Although there is some question as to whether it adequately represents the 13.7 per cent of immigrants (Migration Policy Institute, ‘U.S. Immigrant Population and Share over Time, 1850-Present’, *Migration Policy Institute* (Web Page) <<https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time>>) or the 38.8 per cent of non-whites (United States Census Bureau, ‘Quick Facts’, *United States Census Bureau* (Web Page, 2018) <<https://www.census.gov/quickfacts/fact/table/US/PST045218>>) in the American population.



Figures 7 and 8: The Contemplation of Justice (above) and the Guardian of the Law (below) statues at the western façade of the Supreme Court.

Sources: (7) Matt Wade, 'The Contemplation of Justice', *Wikimedia Commons* (Image, 9 September 2005) <<https://commons.wikimedia.org/wiki/File:ContemplationOfJustice.JPG>>; (8) Mark Fischer, 'Supreme Court', (*Flickr*, 7 June 2009) <<https://www.flickr.com/photos/fischerfotos/7526267232>>.

### III The micro level: Physical power structures

This section focuses on the courts' internal structures and the way they influence movement. This analysis goes beyond the 'primarily visual and static' experience of architecture to examine the 'sensation of movement' and 'rhythm in spatial patterns'.<sup>72</sup> Society is replete with examples of 'political' structures which regularly use these 'sensations' and 'rhythms' to exert social control or influence.

An obvious example of social control is detention facilities, which often employ 'axial' architecture—and features such as fences, doors, and/or (Foucault's) panopticon<sup>73</sup>—for its ability to direct and subordinate people to the seat of power controlling the structure.<sup>74</sup> A less obvious example is churches, whose pews and narrow aisle lead focus to the altar, maximising the use of pathways/hallways/aisles to focus the flow of movement in one direction.<sup>75</sup> The Egyptian pyramids are another example of this phenomenon—the closer the visitor gets to the inner sanctum of a tomb, the more restrictive the pathway becomes as 'the columns in the halls take up more space, closing in and creating varying degrees of darkness ... the ceilings get lower and the space becomes more contained and darker' (Figures 9 and 10).<sup>76</sup>

By contrast, 'non-axial' architecture transfers agency to the user and gives them a choice about how to interact with the landscape, inviting participation. In giving users that choice, non-axial architecture also denotes equality.<sup>77</sup> These structures are characterised by open spaces, conflicting focal points, and circular or spiral pathways. Examples include the temple of the Sumerian Ziggurats and the fictional Jedi Temple (Figures 11 and 12).<sup>78</sup>

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<sup>72</sup> Fisher (n 4).

<sup>73</sup> Piro (n 6).

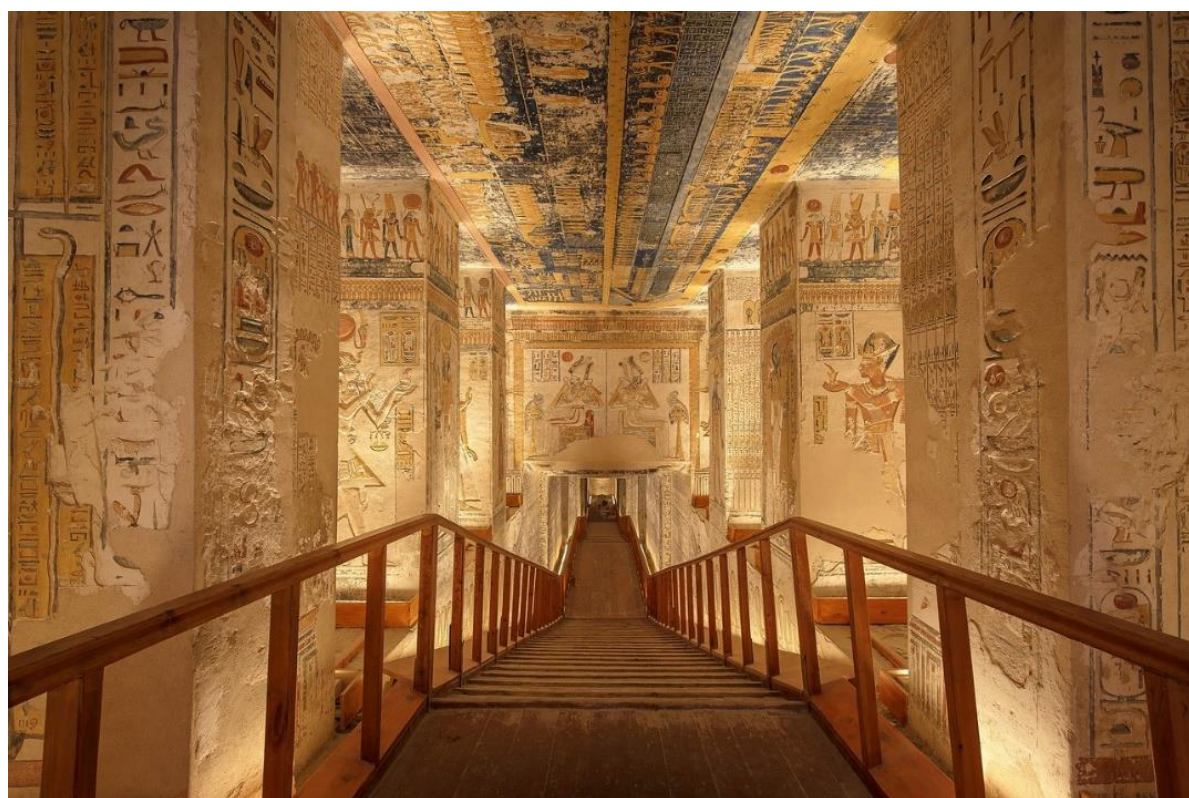
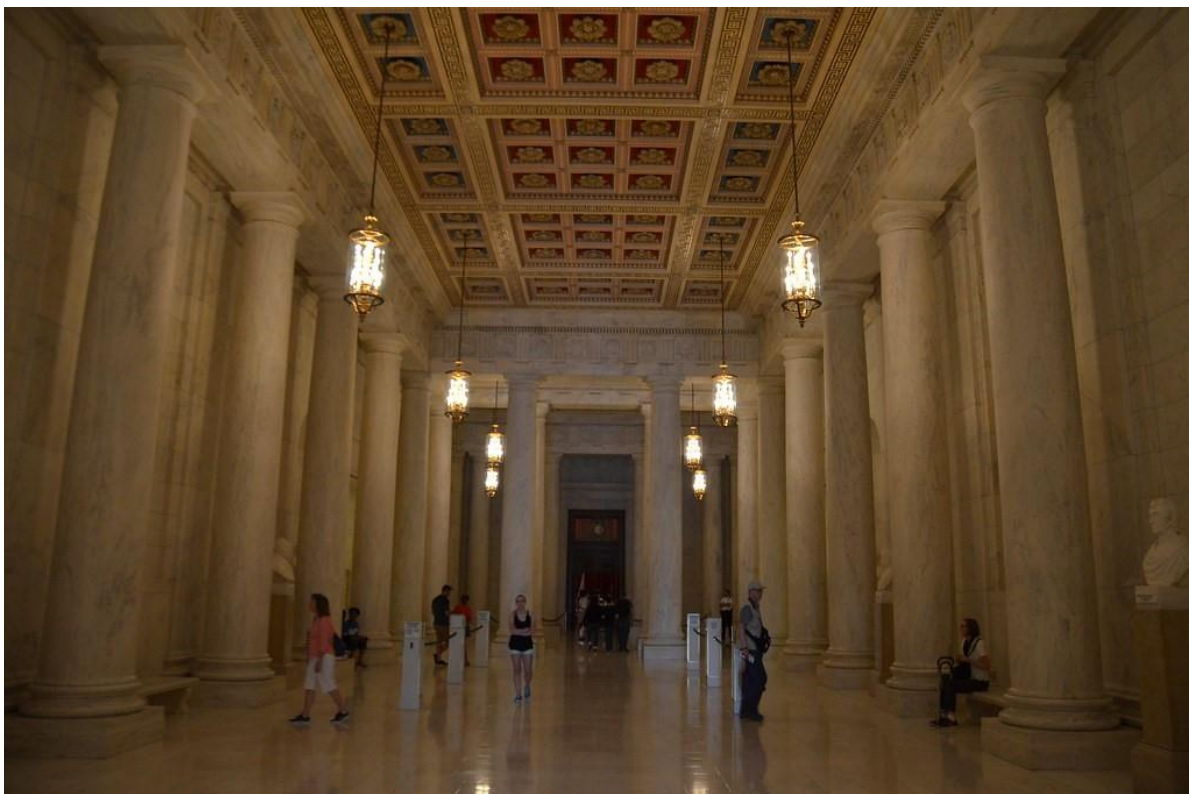
<sup>74</sup> Ibid.

<sup>75</sup> Glenn (n 4).

<sup>76</sup> Ibid.

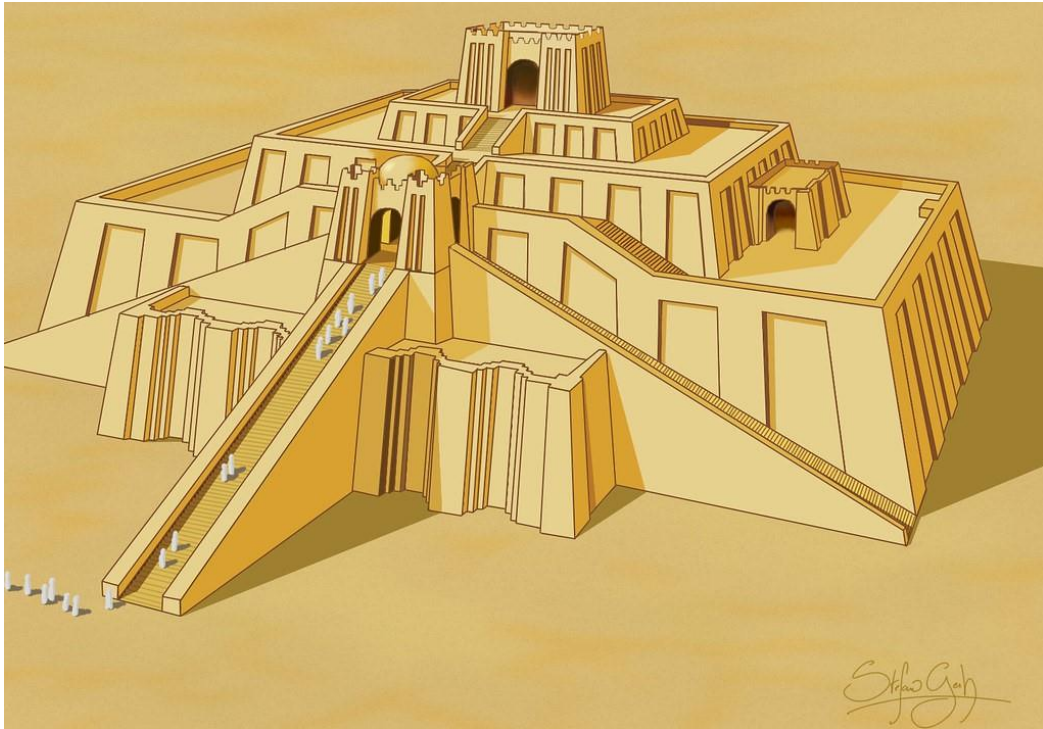
<sup>77</sup> Ibid.

<sup>78</sup> Ibid.



Figures 9 and 10: The Supreme Court Great Hall (above) with another example of axial architecture, the inner sanctum of an Egyptian tomb (below).

Sources: (9) Adam Fagen, 'Great Hall' (*Flickr*, 31 May 2016) <<https://www.flickr.com/photos/afagen/37645246345/>>; (10) Aldboroughprimaryschool, 'Egyptian Tombs', *Pixabay* (Image, 26 June 2019) <<https://pixabay.com/photos/tomb-egypt-ancient-brown-tomb-4300251/>>.



Figures 11 and 12: Examples of non-axial architecture—the Ziggurat, Ur (above) and the Jedi Temple (below).

Sources: (11) Stefano Gesh, 'Ur' (Flickr, 12 July 2020) <<https://www.flickr.com/photos/stefanogesh/5476471419/>>; (12) Lucas, 'Jedi Temple and Gandharan Stupa Reliquary' (Flickr, 16 January 2016) <[https://www.flickr.com/photos/ancientartpodcast/24888804042](https://www.flickr.com/photos/ancientartpodcast/24888804042/)>.

The Supreme Court is also a clear example of axial architecture and uses similar features as the above examples to exert control and influence over its occupants. The ‘Great Hall’ (contrast this to the High Court’s name for their foyer, the ‘Public Hall’) is entered via bronze doors. They weigh 6.5 tons each and their panels depict law’s development, with scenes depicting lawmakers as old as Achilles and as recent as Chief Justice Marshall.<sup>79</sup> Once again, both the size of the doors and references to legal history are used to impress. The hall is ‘clearly oriented in one direction, emphasising opposite walls that are far from one another, and provoking those who use the building to walk longitudinally within it’.<sup>80</sup> At the end of this hall is the courtroom itself.<sup>81</sup> The focus on the courtroom as the locus of power is reinforced by the colonnade. Since their use in Grecian temples, colonnades have been used to imply that something of significance lays behind them.<sup>82</sup> Such features both control visitors—in itself, an exercise of power—while also emphasising the court’s prestige and ideological power.

The High Court, however, is an example of non-axial architecture, demonstrating that the architects wish users to engage with the Court in a more participatory, and thus more empowered, fashion. Upon entry into the ‘Public Hall’, visitors are greeted by a ‘vast internal volume’ of space, arranged around the three ‘dimensions’ or courtrooms. The 24-metre high ceiling and glass wall add to the sense of spaciousness.<sup>83</sup> Upper levels are accessible via a broad ramp that directly faces the user upon entry.<sup>84</sup> As well as being a physical bridge, the ramp was intended to be the ‘bridge’ that links citizens to the courts, demonstrating accessibility and inclusion.<sup>85</sup> The building’s co-architect said the purpose of the design was to make it:

immediately obvious to a visitor that this is a place where they can freely walk around. The ramps invite access without being told what they do or going to a lift or going to a stair immediately.<sup>86</sup>

So, although visitors are not usually there by choice, since there is no other High Court they can turn to, it is significant that once inside the structure the architects deliberately avoided exerting control. The area is thus more ‘civic space’ than court and is frequently the venue for community gatherings.<sup>87</sup> Thus, the architectural experience of the High Court is one of exploration, rather passive reception, once more encouraging public participation.

## Conclusion

In conclusion, the courts partake in what Foucault calls ‘resemblance’ or ‘sympathy’, where architecture seeks to imitate their ideological ideal (for example, a church echoing the majesty of God).<sup>88</sup> In doing so, all the allusions to ideologies such as impartiality, equality, and justice, consolidate and legitimise the High Court’s and Supreme Court’s power, effectively creating, reinforcing, and reflecting power structures of the legal system. In short, just as ‘[w]hatever good things we build end up building us’, so too do the courts.<sup>89</sup>

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<sup>79</sup> ‘The Supreme Court Building’ (n 22); Craven (n 2222).

<sup>80</sup> Glenn (n 4).

<sup>81</sup> ‘The Supreme Court Building’ (n 22).

<sup>82</sup> Scruton (n 18), section ‘Symbols of Function’.

<sup>83</sup> High Court of Australia (n 20).

<sup>84</sup> *High Court Documentary* (n 2); High Court of Australia (n 20).

<sup>85</sup> Glenn (n 4).

<sup>86</sup> *High Court Documentary* (n 2).

<sup>87</sup> For example, concerts: High Court of Australia, ‘Sunday Concert Program 2020’, *High Court of Australia* (Web Page, 2020) <<http://www.hcourt.gov.au/about/concert>>; *High Court Documentary* (n 2).

<sup>88</sup> For a concise summary of Foucault’s opinions/theories on architecture, see Hirst (n 7).

<sup>89</sup> Jim Rohn, untitled, *A Yenny for My Thoughts* (Blog Post, 30 July 2017) <[https://ayennyformythoughts.wordpress.com/2017/07/30/whatever-good-things-we-build-end-up-building-us-jim-rohn](https://ayennyformythoughts.wordpress.com/2017/07/30/whatever-good-things-we-build-end-up-building-us-jim-rohn/)>.

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# Law, art, and time in the architecture of the High Court: A chronotopic analysis

GAIA EWING

## Abstract

Law does not exist in the abstract. Rather, it is performed and experienced within spaces: for example, in parliaments, courthouses, and prisons. Each of these spaces tell a story. How high a judge sits in a courtroom, which flags are flown above the parliament, and the thickness of bars on a prison cell all contribute to shaping a certain narrative. In buildings of national significance, the story told is that of a nation: its values, ideals, and history. Analysis of these narratives can provide deeper understanding of what a nation deems important and how the law treats its legal subjects.

This essay analyses the narrative produced by the art and architecture of Australia's High Court. It applies chronotopic theory to examine the spatial and temporal features of the Court and its effect on Australia's constitutional narrative. In literary scholarship, a chronotope refers to the forms of time and space that characterise particular genres: the 'distant future', for example, is definitive of the sci-fi genre. Chronotopic theory more broadly conceives these feelings of time and space to be interconnected and influential upon the overall tone of a narrative. This essay uses chronotopic analysis to explore the tension between past, present, and future within the High Court. It argues that the Court's art and architecture convey a story of Australia's colonial past as 'finished', erasing the past injustices of the law. The remedy, this paper suggests, is a larger and more critical body of artwork in the High Court, specifically works that reflect on the law's treatment of Aboriginal and Torres Strait Islander people.

## Introduction

The relationship between law and art is complex. Traditionally viewed as dichotomous, a growing body of literature now recognises the two as intricately interwoven; art critiques law, and law has a distinctly visual presence.<sup>1</sup> One of the clearest examples of this intersection is the study of legal architecture. In court buildings, law, art, and time fuse together.<sup>2</sup> Courts visually represent ideas about justice, looking to the past with the vision of creating a better future.

This essay examines the role of the High Court building in constructing Australia's 'constitutional imaginary'—defined as the narratives, myths, and customs that comprise a nation's cultural image.<sup>3</sup> It argues that while the Court has been central in expounding certain constitutional narratives, more can be done to ensure that these stories present an accurate, compassionate, and constructive reflection of Australian history. The essay argues that the High Court is a chronotope of the Australian constitutional narrative. It posits that as a chronotope, the Court has the power to imagine a better future through spatially representing the past. In addition, it analyses how successful the architecture of the High Court has been in exercising this spatio-temporal ability to encourage positive developments in the Australian constitutional narrative. The essay draws upon the work of Linda Mulcahy to argue that there are several aspects in which the Court's design rhetoric diverges from how it is corporeally experienced.<sup>4</sup> It argues

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<sup>1</sup> Costas Douzinas and Lynda Nead, 'Introduction' in Lynda Nead (ed), *Law and the Image* (University of Chicago Press, 1999) 1; Desmond Manderson, *Law And The Visual* (University of Toronto Press, 2018).

<sup>2</sup> Linda Mulcahy, *Legal Architecture* (Routledge, 2011).

<sup>3</sup> Chiara Bottici, *Imaginal Politics: Images Beyond Imagination and the Imaginary* (Columbia University Press, 2014).

<sup>4</sup> Mulcahy (n 2).

that these divergences shed light on differences between what the law is and what it perhaps should be. Finally, the essay suggests specific ways in which more may be done to bring the past into the present, to inform a better future through expanding the art collection of the Court. The example of the Constitutional Court of South Africa is used to illustrate this point.

## The High Court as a chronotope of the Australian constitutional narrative

In literary theory, the term ‘chronotope’ refers to the time-space features that characterise genres.<sup>5</sup> First termed by Mikhail Bakhtin, chronotopic analysis emphasises the ‘intrinsic connectedness’ of time and space.<sup>6</sup> Bakhtin argues that in a narrative context, space and time are inseparable.<sup>7</sup> They should not be viewed as two distinct dimensions, but as cohesive parts of space-time units.<sup>8</sup> A story set in a provincial town, for example, evokes not just a certain sense of place, but a specific feeling of time: as Bakhtin writes, ‘time, as it were, thickens, takes on flesh, becomes artistically visible; likewise, space becomes charged and responsive to the movements of time, plot, and history’.<sup>9</sup> In narratives, we see time and space involved in intimate discourse. Each endlessly informs the other. This same idea translates to a legal context.<sup>10</sup> Kant, in his *Critique of Pure Reason*, identifies time and space as the lenses through which the whole world is experienced.<sup>11</sup> Law, like everything else, is known and felt only through time-space.

While the term ‘chronotope’ is relatively new to the architectural sphere, theorists such as Eisenstein and Alexander have applied it to describe ‘visual storytelling’, where architectural elements contribute to a broader narrative or enhance the drama of actors within the space.<sup>12</sup> The architecture of the High Court of Australia is thus open to chronotopic analysis. It is a ‘point in the geography of a community where time and space intersect and fuse’.<sup>13</sup> The space of the High Court sees judges look to the past to construct the future. Laws made there extend in spatial and temporal directions simultaneously. They stretch outwards to the edges of Australian territory, while reaching crossways in time, informing both the mythical moment of colonisation and the not-yet-lived future.<sup>14</sup> The space projects this collective memory. While explicitly designed with certain constitutional narratives in mind,<sup>15</sup> these stories are interpreted and shaped by the way individuals interact with the visual field. Moving through the building, we find ourselves projecting onto the concrete, wood, and glass the landmark cases that have gone before, and envisioning those still to come.

In *Chronotopes of Law*, Mariana Valverde explicitly identifies the courtroom as a legal chronotope.<sup>16</sup> Valverde’s focus is on how specific points in legal time create or shape different legal spaces and vice versa,<sup>17</sup> such as how the space of a court is transformed into a court of law when it is pronounced ‘in

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<sup>5</sup> Mikhail Bakhtin, *The Dialogic Imagination: Four Essays* (University of Texas Press, 2017).

<sup>6</sup> Ibid 84.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid 84–85.

<sup>10</sup> See, eg, Mariana Valverde, *Chronotopes Of Law* (Routledge, 2015); Desmond Manderson, ‘Chronotopes in the Scopic Regime of Sovereignty’ (2017) 32(2) *Visual Studies* 167.

<sup>11</sup> Immanuel Kant, and Paul Guyer (ed), *Critique of Pure Reason* (Cambridge University Press, 1998); Valverde (n 10) 32.

<sup>12</sup> Lily Alexander, ‘Storytelling in Time and Space: Studies in the Chronotope and Narrative Logic on Screen’ (2007) 37(1) *Journal of Narrative Theory* 27, 28.

<sup>13</sup> Keith Basso, ‘Stalking with Stories: Names, Places, and Moral Narratives among the Western Apache’ in Edward Bruner (ed), *Text, Play and Story*, (Waveland Press, 1984), 19, 44–45.

<sup>14</sup> See, eg, *Mabo v Queensland [No 2]* (1992) 174 CLR 1, 204.

<sup>15</sup> See, eg, Christopher Kringas (EMTB Architects), ‘A Building for the High Court of Australia: Conditions for a Two Stage Design Competition’ in *High Court of Australia (Stage I Competition) Report*, December 1972, (National Capital Development Commission, July 1972), 13–14, 20.

<sup>16</sup> Valverde (n 10) 16.

<sup>17</sup> Ibid.

session'.<sup>18</sup> This essay adopts a slightly different approach. Whereas Valverde's focus is synchronic, analysing single given points in time,<sup>19</sup> this essay attempts to analyse the High Court's narrative across time. It understands the architecture of the High Court as a work of art participating in anachronic discourse.<sup>20</sup> That is, it embodies different temporalities within a single spatial representation to speak across time. This essay examines not just what the space of the High Court says about Australia's constitutional imaginary when it was designed, but what it means when interpreted now, and may come to mean in the future.

## The High Court's cross-temporal narratives

The High Court was designed by architects Kringas and Madigan. The two intended the Court to be a neutral space, embodying the idealised objectivity of the Court.<sup>21</sup> However, architecture and art are inherently subjective disciplines and reflect certain times and tenses.<sup>22</sup> Legal scholar Mulcahy observes that 'legal architecture can associate law with tradition and conservatism, or can equally well symbolise a commitment to change and innovation'.<sup>23</sup> I argue that while the architecture of the High Court is progressive and committed to change, the artwork is firmly grounded in conservatism with colonial undertones.

The High Court's brutalist ideology commits itself to the future.<sup>24</sup> Born out of a postwar desire for societal renewal, brutalism reflects progress, innovation, and a radical vision of a better tomorrow.<sup>25</sup> The High Court's aesthetic is futuristic and unpretentious. Simple bold geometric shapes characterise the space. The exposed metal scaffolding and use of raw materials such as concrete and glass give the court a scientific aura. It revolts against the prewar frivolity of traditional courthouses.<sup>26</sup> The High Court appears anachronistic next to the classicism of Old Parliament House, like a building transported from the future to the present. The Court's design is informed primarily by ideas about what the law should be.<sup>27</sup> In the courtroom, the judge's platform is raised only slightly. Justice is visually represented as cooperative rather than conflict-based.<sup>28</sup> A public ramp zigzags its way through the space. The law is shown to aspire to accessibility, with representative democracy intended to be visualised as the foundation of the law's legitimacy.<sup>29</sup> The culmination of the court's architectural design aspects give the space a distinctly future tense.

The art of the High Court stands in stark contrast to its architecture. While the building looks to the future, the art imagines the past. The Court's art collection is limited. Conventional black and white portraits of previous judges adorn the walls. A granite slab embossed with the words used to inaugurate the first High Court bench hangs outside Court 1.<sup>30</sup> Emphasis is placed upon ritual and tradition. The *States Wall Mural* stretches through the vertical space. Being 18 metres high by 8 metres wide, the mural dominates the visual field. It represents Federation as the mythical moment in which the nation of Australia was born, casting a nostalgic glow over this coming together of the states.

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Manderson (n 1); Georges Didi-Huberman, 'Before The Image, Before Time' in Claire Farago and Robert Zwijnenberg (eds) *Compelling Visuality: The Work of Art In and Out of History* (University of Minnesota Press, 2003), 31.

<sup>21</sup> Kringas (n 15).

<sup>22</sup> Ibid.

<sup>23</sup> Mulcahy (n 2), 1.

<sup>24</sup> Oli Mould, 'Brutalism Redux: Relational Monumentality and the Urban Politics of Brutalist Architecture' (2016) 49(3) *Antipode* 701.

<sup>25</sup> Reyner Banham, 'The New Brutalism' [1955] (December) *Architectural Review*.

<sup>26</sup> Mould (n 24).

<sup>27</sup> Kringas (n 15).

<sup>28</sup> Mulcahy (n 2).

<sup>29</sup> Kringas (n 15).

<sup>30</sup> High Court of Australia, 'Artworks of the High Court', *High Court of Australia* (Web Page, 18 October 2019) <<http://www.hcourt.gov.au/artworks>>.

The history of Australia before white settlement is largely unacknowledged within the High Court. There is only one artwork by an Indigenous artist. The nine panel series *Today now ... we all got to go by same laws* by Rosella Namok (2003) tells a complicated story of law and time.<sup>31</sup> It is a hopeful image, depicting traditional Indigenous law and culture as continuing to operate within contemporary Australian law.<sup>32</sup> The law, through the display of this artwork, retrospectively inserts itself into this tale of cultural preservation. Australia's colonial past is depicted as a finished story, rather than an ongoing reality. The law's contribution to eroding Indigenous law and culture is not represented. This same nostalgic temporalisation is carried through the art of the court. The past is represented in warm sunny hues, while representations of the law's failings and injustices are absent.

As Mulcahy highlights, there is a 'conflict between the future-oriented modernist discourse of growth and improvement' of the architecture and 'nostalgic temporalisation' of the artwork of the court.<sup>33</sup> While the Court's brutalist ideology depicts Australia as a nation committed to change and progress, the artwork reveals a tendency to adorn Australia's sordid past with a rosy-coloured hue.

## Art as a means of bridging the gap between the Court's conflicting tenses

The concern with the conflicting tenses of the art and architecture of the High Court is that the law looks to the future without proper regard for the past. In *The Right to Look*, visual culture theorist Nicholas Mirzoeff criticises governments that visually represent their authority as self-evident.<sup>34</sup> He speaks of the 'performative right to look'; that is, the right to question what is visually common and why.<sup>35</sup> In *Representing Justice*, legal scholars Resnik and Curtis observe that it is common practice for modern courts to leave out 'less-upbeat' representations of justice.<sup>36</sup> Why is it that only one side of justice is being represented in the High Court, and what do we stand to gain from giving visual place to less-upbeat stories of justice?

By representing the legal injustices of the past, we can aspire to a higher degree of judicial consciousness. In 'South Africa's Blue Dress', Eliza Garnsey remarks upon the ability of art to evoke a deeper understanding of the corporeal effects of the law beyond the courtroom.<sup>37</sup> South Africa's Constitutional Court houses an extensive and emotionally charged collection of artworks. To access their chambers, judges must walk past the photo series *Twenty-Six Punishment Cells and Lavatory*. This series of photographs taken by David Goldblatt in 1999 show the isolation cells that held black male prisoners during the apartheid era. The images hold judges accountable, serving as a reminder of the law in its less majestic form, and the way it impacts on human dignity and is felt upon a body in a cell.

If our concern is with undermining the legitimacy and authority of the law through giving visual presence to judicial failings in a public courthouse,<sup>38</sup> then perhaps this style of work, which privately reminds judges of the impact of the law, offers a compromise. Unlike more visceral works, like that of the *Judgement of Cambyzes*—a 1498 painting which shows a corrupt judge being skinned alive—Goldblatt's photo series is not aimed at inciting fear in judges.<sup>39</sup> It instead attempts to provide a quiet place for judicial introspection. It is for the gaze of judges rather than the public. In her 2019 study on the effect of the art collection in South Africa's Constitutional Court, law and art theorist Eliza Garnsey recorded one judge's description of the collection as making him 'softer, more human, and able to

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Mulcahy (n 2), 3.

<sup>34</sup> Nicholas Mirzoeff, 'The Right To Look' (2011) 37(3) *Critical Inquiry* 473.

<sup>35</sup> Ibid 478.

<sup>36</sup> Judith Resnik and Dennis Curtis, *Representing Justice* (Yale University Press, 2011).

<sup>37</sup> Eliza Garnsey, 'South Africa's Blue Dress: (Re)imagining Human Rights Through Art' (2019) 24(4) *Angelaki* 38.

<sup>38</sup> Resnik and Curtis (n 36).

<sup>39</sup> Ibid.

understand human beings a lot better'.<sup>40</sup> He continues that 'if there was no work of art at the Court, I would imagine that would not happen'.<sup>41</sup> The decisions of judges made within the space of the High Court are felt far beyond its walls. Art can work to remind judges of these potential effects on people and society, and so contribute to a heightened degree of judicial consciousness. It can also, as Resnik and Curtis note, remind the public of the burden that having to pass judgment may have upon judges.<sup>42</sup> The heightened judicial consciousness inspired by critical court artworks thus contributes to constructing a narrative of learning from the errors of the past, to create a better future.

Similarly, giving a more human face to justice and the law can re-empower the legal subject. Legal art and architecture affect spatial power dynamics. As noted by Mulcahy:

Each time a section of floor is raised, a barrier installed or a segregation route added it has the potential to create insiders and outsiders in a space ostensibly labelled 'public'.<sup>43</sup>

The ramp acts as the court's main circulation route.<sup>44</sup> While the public appears central to the workings of the court, they enter through the lowest part of the court building: a separate entrance beneath the first floor of the court. The ceremonial entrance on the first floor that leads directly to the public hall is closed off. A series of safety checks are carried out before entering, which in one sense illustrates a distrust of the public.<sup>45</sup> As intended by High Court architect Christopher Kringas, '[p]rivacy increases as the space rises'.<sup>46</sup> The upper levels are inaccessible, experienced only as a barred staircase. As famed architect Le Corbusier writes, 'a staircase separates, a ramp connects'.<sup>47</sup> From the outside, a member of the public can see through the main section of the court, but the topmost section remains visually impenetrable. Le Corbusier observes '[a]rchitecture is experienced as one roams about in it',<sup>48</sup> moving through the High Court space, the legal subject is largely disempowered.

Art has the potential to bridge this gap, re-empowering the legal subject. A comparison which helps to highlight this point is the difference in emotional affect between the National Gallery of Australia and the High Court. While both follow similar design laws—both were designed by the same firm and follow a new brutalist aesthetic—the emotional affect of each space is very different. In his article on 'new brutalism', Banham writes that a brutalist design is incomplete without a human presence 'almost overwhelming' the architecture.<sup>49</sup> Brutalism needs vivid images of human association—that is, 'dressing by the art of inhabitation'—to infuse life and colour into the spaces and achieve its ethic of social progress.<sup>50</sup> This is the difference between the space of the court and gallery. The art of the gallery in and of itself infuses this life, colour, and human association into the space, also works to attract people to the space to further invest it with human association. In the gallery, the people overpower the space, whereas in the court the large open spaces overpower the people. By populating the court with art that tells very human stories of the past, the space can work to empower the legal subject, reaffirming the role of the public in Australia's constitutional narrative.

Visual representations of past injustices and more hopeful futures also work to make the space, and by extension the law, feel more empathetic for litigants. In a study of how survivors of violence interact with judicial spaces, Barb Teows observed a common remark of litigants that court spaces feel cold and distant. One litigant described the courtroom as 'a dead place ... there's no warmth there, no emotion'.<sup>51</sup> While our court processes appear to be shifting to become more understanding of human needs and

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<sup>40</sup> Garnsey (n 37).

<sup>41</sup> Ibid.

<sup>42</sup> Resnik and Curtis (n 36).

<sup>43</sup> Mulcahy (n 2) 1.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Kringas (n 15).

<sup>47</sup> Kenneth Frampton, *Le Corbusier: Architect of the 20th Century* (Thames and Hudson, 2001) 141.

<sup>48</sup> Flora Samuel, *Le Corbusier and the Architectural Promenade* (Routledge, 2003).

<sup>49</sup> Banham (n 25).

<sup>50</sup> Mould (n 24).

<sup>51</sup> Barb Teows, 'It's A Dead Place: A Qualitative Exploration of Violence Survivors Perceptions Of Justice Architecture' (2018) 21(2) *Contemporary Justice Review* 208.

dignity by emphasising alternate dispute resolution, and cooperation and settlement, courthouse aesthetics are still catching up. The 2003 *Body Maps* series in the South African Constitutional Court presents self-portraits of 12 Cape Town women with HIV. The visual stories conveyed are vivid and deeply personal. Ncedeka Mbune's portrait shows her holding the daughter she lost to the virus in her arms as blisters cover her body. The image is visceral, with its display in the court giving significance to the subjective individual experiences that the law's stubborn objectivity does not acknowledge. Art that depicts people's subjective experiences with the law gives legal subjects who move through the space a chance to regain the individuality that they lose for the sake of objectivity and anonymity before the law. Art can inject empathy, emotion, and understanding into the space where the law is carried out, promoting more human treatment of litigants within judicial spaces.

## Conclusion

This essay has argued that the High Court building plays a central role in constructing Australia's constitutional imaginary. As a chronotope of the Australian constitutional narrative genre, the building has the unique ability to offer symbolic acknowledgement and reparation of past injustices in order to encourage a more just future. However, more can be done to spatially bring the past into the present: in particular, a realignment of the tenses of the art and architecture of the courthouse. While the architecture of the court looks to the progressive future, the art romanticises and misrepresents the past. Contemporary examples, including the Constitutional Court of South Africa, demonstrate the ways in which the proliferation of empathetic art can be used to ensure the Australian constitutional narrative evolves in a positive direction.

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# The 1960s–1970s mining boom in Australia: A missed opportunity for socio-economic gain

KATE BUTLER

## Abstract

The 1960s–1970s mining boom was of great importance to Australia for various reasons, including the resulting shift of Australia’s trade focus from Britain to Asia. However, as this essay highlights, many opportunities presented by Australia’s great mineral wealth were not fully capitalised upon during this boom. The essay draws upon two existing arguments to illustrate this. Firstly, despite reforms towards the end of the boom, Australia’s taxation and foreign ownership laws lead to the economic gains being realised largely offshore. Secondly, Indigenous Australians were often excluded from the benefits of mining activity on their country. The essay does not dispute these arguments; however, it also contends that the mining boom played a role in fuelling the land rights movement, which has seen approximately one third of Australian land recognised as subject to native title. While this boom occurred roughly 50 years ago, it is important to reflect on such missed opportunities in order to better manage the approach to new economic prospects presented by Australia’s natural resources, such as the growing renewable energy sector. This essay surveys and builds upon existing scholarship on these subjects to highlight crucial lessons from the mining boom, some of which remain applicable to Australia today.

## Introduction

Donald Horne’s remark that ‘Australia is a lucky country run mainly by second-rate people who share its luck’, published in his famous book *The lucky country*,<sup>1</sup> was written at the very beginning of the first major mining boom since Federation. It can nevertheless be aptly applied to the second boom, which occurred in the late 1960s and early 1970s (hereafter ‘the mining boom’). In Horne’s later edition of *The lucky country*, updated during the mining boom, he notes that this boom was ‘an extraordinary stroke of luck—a second chance to shape [Australia’s] economy’.<sup>2</sup> Unfortunately, while Australia is incredibly lucky in its endowment of natural resources, its governments failed to maximise the potential economic and socio-economic benefits offered by these resources.

The mining boom was arguably fuelled by a combination of factors, in particular substantial mineral discoveries, policy changes, and the rapid economic growth of Japan. Australia’s embargo on iron ore exports, in place since 1938, was fully lifted in 1966 after the discovery of vast deposits of the mineral in 1961–62 and the balance of payments crisis<sup>3</sup> in the 1950s.<sup>4</sup> The extraction of other minerals—such as nickel, coal, tin, lead, and zinc—also grew rapidly during the mining boom, with production increasing fourfold and exports increasing sevenfold.<sup>5</sup> Japan, which overtook Britain as Australia’s main export trading partner during the mining boom—until the most recent boom, when China overtook

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<sup>1</sup> Donald Horne, *The lucky country* (Adelaide: Penguin Books, 1966), 239.

<sup>2</sup> Donald Horne, *The lucky country* (Hong Kong: Penguin Books, 1986), 235.

<sup>3</sup> This crisis was caused by Australian imports far exceeding exports.

<sup>4</sup> David Lee, *The second rush* (Redland Bay, Queensland: Connor Court Publishing Pty Ltd, 2016), 80, 106–107.

<sup>5</sup> Sarah Burnside, ‘Mineral booms, taxation and the national interest’, *History Australia* 10, no. 3 (2013), 174.

Japan<sup>6</sup>—experienced high rates of economic growth during its postwar recovery, which coincided with Australia’s mining boom,<sup>7</sup> particularly its later period.

By the late 1960s, Australia had experienced two decades of economic growth, but this growth was slowing, causing concern that this long boom would end and trigger an economic downturn in Australia.<sup>8</sup> However, the mining boom brought undeniable economic benefits to Australia, with mineral exports during the boom accounting for an extremely large proportion of Australia’s exports (24 per cent in 1970).<sup>9</sup> Australia achieved a surplus in its balance of payments in late 1975,<sup>10</sup> a feat not achieved again until 2019.<sup>11</sup> In addition, foreign investment strengthened the Australian dollar during this time.<sup>12</sup> Nevertheless, the overall economic effect of the mining boom is still debatable: in 1970, Dr HC Coombs, who had previously been the first Governor of the Reserve Bank of Australia, questioned whether it had in fact improved the economy as a whole.<sup>13</sup>

Importantly, opportunities for socio-economic gain were not realised. This was largely due to Australia’s policies regarding taxation of mining companies and the rates of foreign ownership of mining companies. Attempts by the Labor Government to reform these policies to ensure the economic gains from the mining boom would be enjoyed by the Australian public largely failed, due to government scandal and legislative changes introduced by the subsequent Liberal Government. Furthermore, while some socio-economic gains for Indigenous Australians<sup>14</sup> were in part attributable to this mining boom, they were actively excluded from employment opportunities in this sector, and traditional land-owners were denied access to their land. Looking forward, some of the lessons from the mining boom can be applied to Australia’s renewable energy potential, especially as the technological capacity to export such energy increases.

## Taxation and foreign ownership

As indicated above, two significant missed opportunities for reform which would have advanced the socio-economic wellbeing of Australians were taxation policies and foreign ownership regulations. The many tax concessions—combined with an already low tax rate—meant the mining companies’ contribution to Australia’s economy was negligible. Moreover, the large rate of foreign ownership meant that the majority of profits were realised overseas.

### Taxation: Special treatment for negligible gain

Taxation policies for the mining industry ultimately left the government ‘in the red’ according to Thomas Fitzgerald, who was appointed in 1973 by Rex Connor—the minister for the newly created Department of Minerals and Energy—to report on the mining industry’s contribution to Australian welfare (‘the Fitzgerald Report’).<sup>15</sup> Fitzgerald’s analysis showed that the taxes paid by mining

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<sup>6</sup> ‘Trends in Australia’s balance of payments’, Education section, Reserve Bank of Australia, [www.rba.gov.au/education/resources/explainers/trends-in-australias-balance-of-payments.html](http://www.rba.gov.au/education/resources/explainers/trends-in-australias-balance-of-payments.html).

<sup>7</sup> Lee, *The second rush*, 17–18.

<sup>8</sup> Michael Keating, ‘The evolution of Australian macroeconomic strategy since World War 2’, in *The Cambridge Economic History of Australia*, ed. Simon Ville and Glenn Withers (Cambridge: Cambridge University Press, 2014), 441.

<sup>9</sup> Kylie Tennant, *Australia: Her story* (London: Pan Books Ltd, 1971), 292.

<sup>10</sup> Ric Battellino, ‘Mining booms and the Australian economy’, address to The Sydney Institute, 23 February 2010, transcript [www.bis.org/review/r100224d.pdf](http://www.bis.org/review/r100224d.pdf).

<sup>11</sup> ‘Trends in Australia’s balance of payments’.

<sup>12</sup> Pierre van der Eng, ‘European integration and Australian manufacturing industry: The case of Philips Electronics, 1960s–1970s’, *Australian Economic History Review* 57, no. 2 (2016): 228.

<sup>13</sup> Tennant, *Australia*, 295.

<sup>14</sup> Note that the label ‘Indigenous Australians’ covers both Aboriginal and Torres Strait Islander peoples. This essay predominantly uses the term ‘Aboriginal Australians’ as the mining boom did not occur on the Torres Strait Islands, although many Torres Strait Islanders did move to the mainland during the 1960s and 1970s. See Jeremy Beckett, ‘From island to mainland: Torres Strait Islanders in the Australian labour force’, in *Indigenous participation in Australian economies*, ed. Ian Keen (Canberra: ANU Press, 2010), 63. Substantial amounts of the data available apply to Indigenous Australians generally, hence this term is used when appropriate.

<sup>15</sup> Burnside, ‘Mineral booms’, 178.

companies to state and federal governments were less than the net worth of concessions and deductions afforded them by the federal government. Furthermore, mining companies paid tax rates substantially below the standard company income tax rate of 47.5 per cent, instead paying only approximately 12 per cent.<sup>16</sup> The principal conclusion of the Fitzgerald Report ‘was that the provisions remaining had “cost the national exchequer some \$140 million in each of the last two financial years”’.<sup>17</sup> While individual states profited from taxing mining companies, Fitzgerald concluded that, overall, Australia ‘had made negligible gains from the mineral developments of the 1960s and early 1970s’.<sup>18</sup>

## Foreign ownership: Gains realised offshore

In addition to the negligible tax paid by mining companies, the high rate of foreign ownership of these companies meant that a significant portion of profits was sent offshore. In 1971–72, almost half (47.8 per cent) of the mining industry was foreign-owned and over half (54.3 per cent) was foreign-controlled.<sup>19</sup> The mining industry at the time had the highest rate of foreign ownership of any industry in Australia.<sup>20</sup> Foreign capital was arguably required, with then-treasurer Harold Holt arguing in 1964 that the capital was necessary to develop Australia’s resources and that, were it not for this foreign capital, Australia’s resources would be unused.<sup>21</sup> Nevertheless, historian Manning Clark, in his work *A short history of Australia*, stated that some Australians in 1967 ‘were disturbed by the quantity of Japanese and American investment in Australia’.<sup>22</sup> Even the Australian Minerals Council noted the public concern about foreign ownership in 1971, and not all politicians were convinced of the merits of foreign ownership: deputy prime minister Sir John McEwen affirmed that the increased foreign ownership meant Australia was ‘selling off the farm’.<sup>23</sup>

According to the Fitzgerald Report, the surplus accrued to foreign direct shareholders of the main mining companies totalled AU\$1.024 billion between 1967–73,<sup>24</sup> accounting for almost half of the mining companies’ profits before tax, which totalled AU\$2.072 billion.<sup>25</sup> This meant that almost 50 per cent of company profits were not realised within Australia, and thus did not contribute directly to the Australian public’s economic prosperity.

## The Whitlam Government’s reform attempts

In the Labor Party’s successful 1972 leadership campaign, which ended a 23-year run of Coalition governments, leader Gough Whitlam promised to ‘buy back the farm’.<sup>26</sup> Once in power, the Whitlam Government commissioned—and relied upon—the Fitzgerald Report to reform the mining industry. Whitlam claimed Australia had ‘been paying to be exploited’, and that the findings of the Fitzgerald Report would be ‘the starting point for the formation of policies aimed at maximising the return to Australia of her natural endowments’.<sup>27</sup> The Whitlam Government’s proposed reforms of taxation and foreign ownership in the mining sector would have provided capital to fund a number of the proposed socio-economic reforms through welfare expansion, such as the introduction of Medicare and the

<sup>16</sup> Ibid, 180–81.

<sup>17</sup> Thomas Fitzgerald, *The contribution of the mineral industry to Australian welfare: Report to the Minister for Minerals and Energy, the Hon. R.F.X. Connor MP* (Canberra, April 1974) (the ‘Fitzgerald Report’), 11–13, quoted in Burnside, ‘Mineral booms’, 180. Note that AU\$140 million in 1973 is equal to AU\$1.34 billion in 2019 (using RBA’s inflation calculator: ‘Inflation calculator’, Reserve Bank of Australia, accessed 19 May 2020, [www.rba.gov.au/calculator/annualDecimal.html](http://www.rba.gov.au/calculator/annualDecimal.html)).

<sup>18</sup> Burnside, ‘Mineral booms’, 181.

<sup>19</sup> Ibid 176–77.

<sup>20</sup> Fitzgerald Report, quoted in Jim Cairns, *Oil in troubled waters* (Victoria: Hedges & Bell Pty Ltd, 1976), 30.

<sup>21</sup> *The Financial Review*, 15–16 October 1964, cited in Brian Fitzpatrick and Edward Wheelwright, *The highest bidder: A citizen’s guide to problems of foreign investment in Australia* (Melbourne: Lansdowne, 1966), 146, cited in Burnside, ‘Mineral booms’, 177.

<sup>22</sup> Manning Clark, *A short history of Australia* (New York: NAL Penguin Inc., 1987), 66.

<sup>23</sup> Burnside, ‘Mineral booms’, 177.

<sup>24</sup> Note that AU\$1.024 billion in 1970 is equal to AU\$12 billion in 2019 (using RBA’s inflation calculator: ‘Inflation calculator’, Reserve Bank of Australia, accessed 20 May 2020, [www.rba.gov.au/calculator/annualDecimal.html](http://www.rba.gov.au/calculator/annualDecimal.html)).

<sup>25</sup> Cairns, *Oil in troubled waters*, 30–1.

<sup>26</sup> The Australia Institute, *Mining the truth: The rhetoric and reality of the commodities boom* (Institute Paper No. 7, 2011), 31.

<sup>27</sup> Burnside, ‘Mineral booms’, 182.

single-mothers' pension, which 'increased [government] expenditure considerably'.<sup>28</sup> However, the reforms were largely unsuccessful, due largely to both the subsequent Fraser Government's legislative changes and government scandal due to the 'Overseas Loans Affair'.

The Whitlam Government successfully amended the taxation legislation and introduced a production excise for crude oil. These amendments included repealing both exemptions on some or all of the tax payable for certain products, and deductions that allowed for capital raising and company formation.<sup>29</sup> However, it is difficult to ascertain the effect of these legislative changes as they occurred in 1974, and the Fraser Government reversed some of these taxation reforms in 1977–78.<sup>30</sup>

The Whitlam Government's attempts to reform foreign ownership were far less successful than its taxation reforms. The revelation in Fitzgerald's Report that many of the profits from the mining industry was realised overseas 'was scandalous', according to Whitlam.<sup>31</sup> The government's subsequent attempt to increase Australian ownership of the mining companies in order to ensure profits were realised onshore became known as the 'Overseas Loans Affair'. The scandal that ensued led to the sacking of Rex Connor from Cabinet, and Jim Cairns' removal as treasurer, and was used by the Opposition to block supply, resulting in the Whitlam Government's dismissal.<sup>32</sup> Cairns stated that the mining boom had presented 'an exceptional opportunity for improving standards of welfare and wellbeing' for Australians, which was wasted by the Coalition.<sup>33</sup> While some of Whitlam's reforms did change the economic impact of the mining boom, these reforms were ultimately short-lived and other reform attempts failed altogether.

Arguably, the issue of whether Australians derive the benefits from our natural resources is of greater importance than who owns the companies operating in—and profiting from—Australia.<sup>34</sup> Greater taxation rates and the creation of a sovereign wealth fund in the mining boom, as discussed below, would have created immense economic and socio-economic benefits for Australians, not only from this boom but also subsequent booms.<sup>35</sup> However, Whitlam's attempts at reform show that Australia did not enjoy bipartisan support for higher taxation rates for the mining industry. To extend Horne's comments, Australia's great luck from its mineral wealth did not translate into a reshaping of Australia's economy to bring about economic and socio-economic gains for present and future generations, due to the politicians and political landscape of the time.

## Norway's oil fund and lessons for Australia

One way of evaluating the socio-economic impact of the mining boom is to consider what could have been, by examining the mineral wealth management of countries with similar natural resources. One such country is Norway, which experienced an oil boom in the 1970s. After the price of oil quadrupled in 1973, Norway instituted a special tax of 40 per cent to be paid by oil companies in addition to both the 50 per cent corporate tax and royalty rates required for large fields. Although the special tax was soon lowered to 25 per cent, the Norwegian Government still received up to 57 per cent of profits, dramatically higher than Australia's tax rate at the time.<sup>36</sup> Crucially, and in stark contrast to Australia's politics at the time, this policy—and later increases in the special tax rate to 35 per cent—was supported

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<sup>28</sup> Shaun Wilson, 'The limits of low-tax for social democracy? Welfare, tax and fiscal dilemmas for Labor in Government', *Australian Journal of Political Science* 48, no. 3 (2013): 289. Note that Medicare was ultimately funded from general revenue: see Amanda Biggs, 'Medicare—background brief', Parliament of Australia, last updated 29 October 2004, [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/archive/medicare](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/medicare).

<sup>29</sup> Burnside, 'Mineral booms', 186.

<sup>30</sup> Ibid 189.

<sup>31</sup> Gough Whitlam, *The Whitlam Government 1972–1975* (Ringwood, Vic: Penguin, 1985), 248, quoted in Burnside, 'Mineral booms', 190.

<sup>32</sup> Editorial, 'How the loans scandal became an affair to remember', *The Age*, 1 January 2005.

<sup>33</sup> Jim Cairns, Speech, House of Representatives, 7 August 1974, quoted in Burnside, 'Mineral booms', 183.

<sup>34</sup> 'Who benefits, not who owns, is what matters', *The Age*, 4 July 2011.

<sup>35</sup> Note that in 2012, the Mining Resource Rent Tax was passed which placed a nominal tax rate of 22.5 per cent on mining profit of companies whose profit is greater than AU\$75 million. This was repealed in 2014. 'Mineral resource rent tax (MRRT)', Australian Taxation Office, Australian Government, last modified 25 February 2016, [www.ato.gov.au/Business/Minerals-resource-rent-tax/](http://www.ato.gov.au/Business/Minerals-resource-rent-tax/).

<sup>36</sup> Paul Cleary, 'Poles apart: Comparative resource sector governance in Australia and Norway', *Australian Journal of Political Science* 51, no. 1 (2016): 155.

by both sides of politics: Norwegian economic historian Einar Lie stated that ‘everyone was in favour of the Norwegian society prospering and that we should get maximum benefit from the oil resource’.<sup>37</sup> The higher taxation rates on oil companies were seen as a way of furthering the socio-economic wellbeing of Norwegians. By the 1990s, Norway had created a fund for oil revenues to be invested for future generations, which today is worth approximately AU\$1.5 trillion.<sup>38</sup> Since 2011, the government has been allowed to spend some of the returns of the fund, thus benefiting Norwegians in the present as well as the future.

Had Australia established a similar regime during the mining boom,<sup>39</sup> it is easy to imagine how this wealth, properly managed, would have benefited all Australians.<sup>40</sup> It would have afforded greater economic certainty in times of downturn by providing capital to retain welfare programs, such as unemployment benefits, government education, Medicare, and pensions, without either diminishing them or increasing government debt. Australian economist W Max Corden has suggested that a sovereign wealth fund similar to Norway’s, in which the fund’s assets are invested overseas, would ‘compensate for the loss of Australian government revenues’ when mining industry prices—and therefore profits—decline.<sup>41</sup> Instead, Australia’s actual management of this and subsequent mining booms saw governments ‘simply ... spend the windfall as it passes through the tax office’.<sup>42</sup> Furthermore, such a fund could have helped Australia prepare for the global energy transition from coal and other fossil fuels to renewable energy, by investing in both renewable energy and the research required to replace fossil fuel exports with renewable sources of energy.<sup>43</sup>

## Indigenous Australians’ exclusion from mining sites and the land rights movement

The missed opportunities for economic and socio-economic gain from the mining boom were particularly troubling for Indigenous Australians, who achieved constitutional recognition towards the beginning of the boom but were often excluded from their land when that land was on mining sites. However, Indigenous Australians’ response to the mining boom contributed to Aboriginal land rights recognition to a degree that cannot be understated, ultimately culminating decades later in native title recognition.

### The socio-economic situation of Aboriginal Australians in the 1960s–1970s

It is important to note, before discussing the exclusion of Aboriginal Australians from their traditional land, that the referendum to count Indigenous Australian as part of Australia’s population occurred in

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<sup>37</sup> Ibid 156.

<sup>38</sup> ‘The fund’, Norges Bank, accessed 19 May 2020, [www.nbim.no/](http://www.nbim.no/).

<sup>39</sup> Note that, in 2006, Australia established a Future Fund to ‘strengthen the Commonwealth’s long-term financial position’ and ‘make provision for [the Commonwealth’s] unfunded superannuation liabilities that will become payable during a period when an ageing population is likely to place significant pressure on the Commonwealth’s finance’: *Future Funds Act 2006* (Cth) s 3. More recent calls for Australia to establish a Sovereign Wealth Fund drawing from mining profits have been met with resistance due to the Future Fund, despite the Future Fund not specifically drawing from mining profits. See Peter Costello, ‘Whether sovereign wealth or future, the fund needs funds’, *The Age*, 14 September 2011.

<sup>40</sup> As opposed to the Future Fund, which benefits only Commonwealth government employees.

<sup>41</sup> W Max Corden, ‘Dutch Disease in Australia: Policy options for a three-speed economy’, *The Australian Economic Review* 45, no. 3: 296. This was in the context of discussing Dutch Disease which, according to Corden (at 290), refers to the ‘adverse effects through real exchange rate appreciation that the mining boom can have on various export- and import-competing industries’. Note that, at 296–97, Corden states that a Sovereign Wealth Fund, in tying national savings and international diversification to the revenue from a source that is uncertain, may not have a large effect in reducing the effects of Dutch Disease. However, he specifies at 297 that ‘this is *not* an argument against taxing the mining sector’.

<sup>42</sup> James Goodman and David Worth, ‘The minerals boom and Australia’s “resource curse”’, *Journal of Australian Political Economy* 61 (June 2008): 211–12.

<sup>43</sup> This is especially pertinent given the increase in Australia’s trading partners pledging to reach net zero emissions, such as China, and the current technological limitations in exporting renewable energy which demand investment in research and technology.

1967,<sup>44</sup> at the beginning of the mining boom. However, the national policy of assimilation—which aimed to eradicate Indigenous culture, including ties to traditional lands—was still in place in the 1960s.<sup>45</sup>

As Indigenous Australians were excluded from the census until the 1967 referendum, reliable socio-economic data on these Australians exists only from the 1971 census onwards. This 1971 census provides an important insight into the socio-economic situation of Aboriginal Australians at that time, which was far worse than conditions for non-Indigenous Australians, as shown in Table 1: see, for example, the vast differences in employment, education, and life expectancy.<sup>46</sup>

Table 1: Socio-economic Indicators for Indigenous and non-Indigenous Australians in 1971.

	Indigenous Australians	Non-Indigenous Australians
Full-time employment (% adults)	32.9%	48.7%
Unemployment rate (% labour force)	9.0%	1.6%
Never attended school (% adults)	22.7%	0.6%
Male life expectancy at birth (years)	50	68
Female life expectancy at birth (years)	50	75
Home owner or purchasing (% population)	26.1%	70.5%

Source: Jon C Altman, Nicholas Booth, and Boyd H Hunter, 'A historical perspective on Indigenous socioeconomic outcomes in Australia, 1971–2001', *Australian Economic History Review* 45, no. 3: 284.

Moreover, as noted by Jon Altman—the previous Director of the Centre for Aboriginal Economic Policy Research (CAEPR) and one of the researchers who compiled the above data—Indigenous Australians were excluded from 'mainstream provisions of the Australian welfare state and associated legacies' at the time, including education facilities, voting rights, and home ownership and award rates.<sup>47</sup> Evidently, the socio-economic status of Indigenous Australians was markedly worse than non-Indigenous Australians at the time of the mining boom.

## Exclusion from mining sites

In addition to lack of access to Australian welfare programs, Aboriginal Australians experienced exclusion from the regional economies of their traditional lands when those lands were on potential and actual mining sites. For example, in the Pilbara region of Western Australia—a predominant region of the mining boom—Aboriginal Australians were excluded from employment opportunities and evicted from their lands,<sup>48</sup> which served to marginalise—or at worst exclude—them from the regional economy of the Pilbara.<sup>49</sup> As noted by Dr Sarah Halcombe, a visiting fellow at CAEPR, employment opportunities for Aboriginal people did not exist, despite the mining industry's need for non-skilled labour, Aboriginal people's prior experience with mining, and the 1,400 per cent increase in the Pilbara region's population from 1961–81.<sup>50</sup> Studies from the 1980s have shown that Aboriginal people

<sup>44</sup> Matthew Thomas, 'The 1967 referendum', Parliament of Australia, posted 25 June 2017, [www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2017/May/The\\_1967\\_Referendum](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/May/The_1967_Referendum).

<sup>45</sup> JC Altman, 'The economic status of Indigenous Australians' (Centre for Aboriginal Economic Policy Research, Discussion Paper No. 193/2000), 12.

<sup>46</sup> Jon C Altman, Nicholas Booth and Boyd H Hunter, 'A historical perspective on Indigenous socioeconomic outcomes in Australia, 1971–2001', *Australian Economic History Review* 45, no. 3: 284. This data includes a more complete overview of relevant socio-economic factors.

<sup>47</sup> Altman, 'The economic status of Indigenous Australians', 8–9.

<sup>48</sup> Sarah Holcombe, 'Indigenous organisations and mining in the Pilbara, Western Australia: Lessons from a historical perspective', *Aboriginal History* 29 (2005): 113 and Lewis P Hinchman and Sandra K Hinchman, 'Australia's judicial revolution: Aboriginal land rights and the transformation of liberalism', *Polity* 31, no. 1 (Autumn 1998): 33.

<sup>49</sup> Benedict Scambray, *My country, mine country: Indigenous people, mining and development contestation in remote Australia* (Canberra: ANU Press, CAEPR Monograph No. 33 2013), 156.

<sup>50</sup> Holcombe, 'Indigenous organisations', 113.

received very minimal benefits from mining activities on or adjacent to their land.<sup>51</sup> This economic exclusion had the additional consequence of cementing ‘the oppositional character of black and white in geographic and demographic, as well as social terms’.<sup>52</sup> Therefore, the exclusion of Indigenous Australians from mining sites not only prevented them from accessing employment and economic opportunities, but also furthered societal differences between Indigenous and white Australians.

## Claims to land rights and the positive effects from the mining boom

While this essay has so far focused on the mining industry’s negative impact on Indigenous Australians, one crucial socio-economic gain Indigenous Australians eventually achieved was recognition of traditional land ownership. The land rights movement gained momentum during the mining boom,<sup>53</sup> and some historic achievements can be traced back to this period. This is due, however, to the actions of Aboriginal Australians rather than the mining industry; in fact, the Australian Mining Industry Council ‘strongly opposed land rights in the 1970s’ and later ‘mounted a very effective campaign ... against Western Australian land rights’.<sup>54</sup> Despite this, in 1971, the Yolngu people—from Yirrkala in north-eastern Arnhem Land in the Northern Territory—presented the first land rights claim to an Australian federal court in an attempt to stop Nabalco, a mining corporation, from mining bauxite on their land. They sought declarations that they were entitled to the ‘occupation and enjoyment of the subject land free from interference’, and that the compulsory acquisition of the land for mining was void.<sup>55</sup> While Justice Blackburn of the Supreme Court of the Northern Territory acknowledged their proprietorship of the land, he did not go so far as to find native title existed, nor grant the declarations.<sup>56</sup>

This case led to the establishment of the Aboriginal Land Rights Commission in 1973, and the creation of the *Aboriginal Land Rights Act 1976* (NT) (‘ALRA’), which provided economic and socio-economic benefits to some Aboriginal Australians and influenced the development of native title legislation.<sup>57</sup> The ALRA allowed Crown land in the Northern Territory to be granted to traditional owners, on the recommendation of the Minister for Aboriginal Affairs. In addition, it stipulated how mining was to be conducted on such lands, including requiring the mining company to consult the traditional owners, who were able to decide if the company will be allowed to explore the land. It also provided for royalty payments to Land Councils, to be held in trust in the Aboriginals Benefit Account (ABA) by the Councils, for the traditional owners.<sup>58</sup> In 2005, the ABA held approximately AU\$100 million.<sup>59</sup> The ALRA is not without problems; notably, decisions of a Land Council can be overridden if the Governor-

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<sup>51</sup> See studies by Cousins and Nieuwenhuysen (1984) and Edmunds (1989). Direct sources unavailable at this time. Cited in Scambary, *My country, mine country*, 141 and Jon Altman and David Martin ed., *Power, culture, economy: Indigenous Australians and mining* (ANU Press, CAEPR Monograph No. 30, 2009), ix.

<sup>52</sup> Scambary, *My Country, Mine Country*, 141 citing M Edmunds, *They get heaps: a study of attitudes in Roebourne Western Australia* (Canberra: Aboriginal Studies Press, 1989).

<sup>53</sup> ‘The Indigenous civil rights movement in Australia’, *Australians Together*, accessed 19 May 2020, [australianstogether.org.au/discover/australian-history/civil-rights-movement/](http://australianstogether.org.au/discover/australian-history/civil-rights-movement/).

<sup>54</sup> Altman and Martin, *Power, culture, economy*, 48.

<sup>55</sup> *Milirrpum and Others v Nabalco Pty. Ltd and the Commonwealth of Australia* (1970) FLR 141, 150 (‘*Milirrpum v Nabalco*’).

<sup>56</sup> *Milirrpum v Nabalco* 143 cited in Hinchman and Hinchman, ‘Australia’s judicial revolution’, 35. Note that, in 2019, the Yolngu people began legal processes seeking compensation for loss of culture from Nabalco’s bauxite mining: Paul Daley, ‘What price spiritual connection? Yolngu seek compensation for cultural destruction’, *The Guardian*, 1 December 2019.

<sup>57</sup> This legislation was largely derived from the recommendations of the Woodward Royal Commission, which was commissioned by the Whitlam Government in 1973. Justice Edward Woodward, the Land Rights Commissioner, had acted for the Yolngu people in *Milirrpum v Nabalco*. The Whitlam government’s bill, the Aboriginal Land (Northern Territory) Bill 1975, had passed the House of Representatives (although Malcolm Fraser voted against it) and was on the notice paper in the Senate on the same day that both houses of Parliament were dissolved, in November 1975. The later Act that was successfully passed by the Fraser government was ‘significantly amended and restricted’ compared to Labor’s original bill. Jenny Hocking, ‘“A transforming sentiment in this country”: The Whitlam government and Indigenous self-determination’, *Australian Journal of Public Administration* 77 (2018): S10.

<sup>58</sup> See the ALRA and ‘The Aboriginal Land Rights Act’, Central Land Council, accessed 20 May 2020, [www.clc.org.au/articles/info/the-aboriginal-land-rights-act/](http://www.clc.org.au/articles/info/the-aboriginal-land-rights-act/).

<sup>59</sup> Scambary, *My country, mine country*, 14.

General determines it in the national interest,<sup>60</sup> and there are questions over the management of the ABA and use of the funds.<sup>61</sup> Nevertheless, it does afford traditional owners control over their lands and allows them to negotiate economic benefits with mining companies.<sup>62</sup> Furthermore, as Jon Altman notes, the ALRA has been influential and ‘used as a benchmark, in negotiating native title legislation’.<sup>63</sup> While ownership of land cannot guarantee economic development, the ALRA crucially provides Aboriginal people the opportunity for regional development.<sup>64</sup>

Therefore, while the mining boom excluded Aboriginal Australians from economic opportunities at the time, the actions of Indigenous Australians helped propel the land rights’ movement and, later, the historic judgment in *Mabo*<sup>65</sup>—which followed the fact-finding of the *Milirrpum* case<sup>66</sup>—and native title legislation. Not only did these developments provide economic benefits to Indigenous Australians, they allowed for greater self-determination, which is a positive indicator of socio-economic development.<sup>67</sup> Despite this, Indigenous Australians still rank far below non-Indigenous Australians for socio-economic indicators such as employment, income, and home ownership.<sup>68</sup> Ultimately, the real positive legacy of the mining boom for Indigenous Australians was the momentum it gave to the land rights movement and the advances made through this movement.

## Looking to the future: Lessons from the mining boom for Australia’s renewable energy industry

It is easy to criticise the handling of the mining boom with the gift of hindsight, especially in reflecting upon the strategies of other countries such as Norway, whose resource boom occurred following Australia’s 1960s–70s mining boom. Nevertheless, it remains important to engage in critical evaluation of the missed opportunities from this mining boom, in order to better manage future resource booms. Some lessons, such as the economic benefits from taxing super-profits in the mining sector, were drawn upon in the most recent mining boom; see, for example, Prime Minister Rudd’s 2010 attempt to tax mining super-profits at a 40 per cent rate.<sup>69</sup> Had this tax been successful, it could have raised AU\$100 billion over the span of one decade.<sup>70</sup>

Looking forward, there are undoubtedly lessons to be learnt from Australia’s handling of mining booms in how we manage the transition to our abundant renewable energy potential. It is important to note that the finite nature of our mineral resources is a key reason people such as Paul Cleary advocate so strongly for a sovereign wealth fund drawn from profits from the mining industry.<sup>71</sup> Our renewable energy potential is infinite, so the same argument—of ensuring future generations also benefit from such natural resource booms—is not equally applicable. Nevertheless, the increasing investment in

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<sup>60</sup> Susan Bambrick, *Australian minerals and energy policy* (Canberra: ANU Press, 1991), 73. See also Michael Dodson and Diana McCarthy, ‘Communal land and the amendments to the Aboriginal Land Rights Act (NT)’ (Australian Institute of Aboriginal and Torres Strait Islander Studies, Research Discussion Paper No. 19, 2006), 10, 12.

<sup>61</sup> Dodson and McCarthy, ‘Communal land’, 10, 19.

<sup>62</sup> *Ibid* 11.

<sup>63</sup> Jon Altman, ‘Land rights and Aboriginal economic development: Lessons from the Northern Territory’, *Agenda* 2, no. 3 (1995): 291.

<sup>64</sup> *Ibid* 298.

<sup>65</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1. At [45], Justice Toohey discusses the ALRA, stating it speaks of Aboriginal traditional occupation of land, and recognises that traditional occupation may not be exclusive.

<sup>66</sup> Paul Patton, ‘Sovereignty, law and difference in Australia: After the Mabo case’, *Alternatives: Global, Local, Political* 21, no. 2 (April–June 1996): 154.

<sup>67</sup> Australian Human Rights Commission, *Native Title Report 2005* (Australian Human Rights Commission, 2005); see particularly ‘Chapter 1: Background—the origin of land rights and barriers to economic development through naïve title’, 14–15, [humanrights.gov.au/our-work/native-title-report-2005-chapter-1-background-origin-land-rights-and-barriers-economic](http://humanrights.gov.au/our-work/native-title-report-2005-chapter-1-background-origin-land-rights-and-barriers-economic).

<sup>68</sup> *Ibid* 15.

<sup>69</sup> John Kehoe, ‘Henry blasts mining tax “stupidity”’, *Australian Financial Review*, 3 August 2020, [www.afr.com/policy/tax-and-super/henry-blasts-mining-tax-stupidity-20200803-p55hzj](http://www.afr.com/policy/tax-and-super/henry-blasts-mining-tax-stupidity-20200803-p55hzj).

<sup>70</sup> Paul Cleary, ‘What Australia could have learnt from Norway’s sovereign wealth bonanza’, *ABC News*, 31 August 2016 [www.abc.net.au/radionational/programs/latenightlive/what-australia-could-have-learnt-from-norway-sovereign-wealth/7797560](http://www.abc.net.au/radionational/programs/latenightlive/what-australia-could-have-learnt-from-norway-sovereign-wealth/7797560).

<sup>71</sup> Stephen Kirchner, ‘Has the mining boom given us “too much luck”? Hardly’, *The Conversation*, 22 November 2011, [theconversation.com/has-the-mining-boom-given-us-too-much-luck-hardly-4376](http://theconversation.com/has-the-mining-boom-given-us-too-much-luck-hardly-4376).



renewable energy, as well as the growing potential to export it, suggest that now is a crucial time to consider the regulations and taxation of the industry. For example, a planned solar farm project by Sun Cable in the Northern Territory aims to export renewable energy to Singapore by 2026 via underwater cable.<sup>72</sup> The potential to export green hydrogen—hydrogen energy that is created using renewable energy, such as wind and solar—to Japan is another promising possibility, as Japan seeks to move away from nuclear energy to renewable power.<sup>73</sup>

Another key distinction between the consumption of fossil fuel resources and renewable energy—one that should inform Australia’s approach to taxation and foreign ownership issues—is that fossil fuels create negative externalities in emitting greenhouse gases which cause climate change; renewable energy, on the other hand, does not.<sup>74</sup> This is important, as climate change affects Australia’s economy on a ‘scale, persistence and systemic risk’ that can be matched by few other forces,<sup>75</sup> with the potential to exacerbate socio-economic inequalities in Australian society.<sup>76</sup> Therefore, increasing taxes on renewable energy to the extent that this disincentivises investment may cause more harm than good, insofar as renewable energy will reduce the reliance on fossil fuels, therefore reducing greenhouse emissions and the acceleration of climate change.

Lessons from the 1960s–70s mining boom—and subsequent mining booms—may be of greater relevance in relation to the intersection of renewable energy projects and Indigenous rights. It is important to note that the *Native Title Act (1999)* (Cth) does not afford Indigenous people the right to negotiate in renewable energy projects: although afforded the right to be notified of such projects, they do not have the right to alter, or stop, renewable energy projects.<sup>77</sup> This has the effect of putting ‘the renewable energy industry in a better legal position than traditional owners’.<sup>78</sup> However, as noted by numerous academics at The Australian National University in a submission to the Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia, ‘renewable energy developments proposed on native title land presents a unique opportunity to amplify the scale of potential and actual benefits for Indigenous people, and form the basis of economic futures for First Nations’.<sup>79</sup> Given the current lack of legal rights afforded to Indigenous people in relation to such projects, unambiguous policies and legislation that support the participation of—and ownership by—Indigenous people in these developments would be required,<sup>80</sup> to ensure they have rights in relation to, rather than being excluded from, these resources.

## Conclusion

This essay has canvassed two areas that the mining boom impacted in key ways but failed to impact in others. First, taxation and foreign ownership, and the missed opportunity to create vast economic and socio-economic gains for Australians due to a failure of political will and foresight. Second, the case of Aboriginal people who, while excluded from the economic gains of the mining boom, benefited from

<sup>72</sup> Rick Hind, ‘“World’s largest solar farm” near tiny NT town could help power Singapore via 4,500km undersea cable’, *ABC News*, 30 July 2020, [www.abc.net.au/news/2020-07-30/nt-sun-cables-australia-project-awarded-major-project-status/12506516](http://www.abc.net.au/news/2020-07-30/nt-sun-cables-australia-project-awarded-major-project-status/12506516).

<sup>73</sup> Australian Renewable Energy Agency, ‘Can we export renewable energy?’ *ArenaWire*, 23 July 2017, [arena.gov.au/blog/can-we-export-renewable-energy/](http://arena.gov.au/blog/can-we-export-renewable-energy/).

<sup>74</sup> Although the building of renewable energy farms often uses resources and processes that do emit greenhouse gases: for example to be built, wind farms require cement which is a source of 8 per cent of the world’s CO<sub>2</sub> emissions: Lucy Rodgers, ‘Climate change: The massive CO<sub>2</sub> emitter you may not know about’, *BBC News*, 17 December 2018, [www.bbc.com/news/science-environment-46455844](http://www.bbc.com/news/science-environment-46455844). However this is outweighed by the savings from avoiding fossil fuels: Simon Evans, ‘Solar, wind and nuclear have “amazingly low” carbon footprints, study finds’, *CarbonBrief*, 12 August 2017, [www.carbonbrief.org/solar-wind-nuclear-amazingly-low-carbon-footprints](http://www.carbonbrief.org/solar-wind-nuclear-amazingly-low-carbon-footprints).

<sup>75</sup> Will Steffen, Karl Mallon, Tom Kompas, Annika Dean and Martin Rice, *Compound costs: How climate change is damaging Australia’s economy* (Climate Council of Australia, 2019), 1.

<sup>76</sup> Sharon Friel, ‘Climate change will widen the social and health gap’, *The Conversation*, 15 August 2014, [theconversation.com/climate-change-will-widen-the-social-and-health-gap-30105](http://theconversation.com/climate-change-will-widen-the-social-and-health-gap-30105).

<sup>77</sup> L O’Neill, K Thorburn and J Hunt, ‘Ensuring Indigenous benefit from large-scale renewable energy projects: Drawing on experience from extractive industry agreement making’ (Centre for Aboriginal Economic Policy Research, Working Paper 127/2019), 10.

<sup>78</sup> *Ibid* 17.

<sup>79</sup> Ken Baldwin et al., ‘Submission to the Joint Standing Committee on Northern Australia: Inquiry into the opportunities and challenges of the engagement of Traditional Owners in the economic development of Northern Australia’, Submission no. 33, 6.

<sup>80</sup> *Ibid*.

its impact as a catalyst for land rights, leading to formal recognition of native title and economic and socio-economic benefits for Indigenous Australians.

This essay has touched on only some of the socio-economic factors relevant to the 1960s–70s mining boom. It has not considered in detail its important impact on climate change, which is predicted to have unprecedented socio-economic impacts in the coming decades. Nor has it examined how rises in revenue from mining cause inflationary pressure—which is managed through cutting government welfare programs—as well as weakening and displacing non-resource sectors.<sup>81</sup> Had the opportunity for economic gain presented by the mining boom not been wasted, the socio-economic impacts of such issues may well have been better managed by subsequent governments. Ultimately, it remains to be seen if we can learn from the missed opportunities over the past half century, in relation to both the existing mining industry and the developing renewable energy industry.

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<sup>81</sup> Goodman and Worth, ‘The minerals boom’, 203–5.

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# The cultural conditions of Cold War Australia: Conventions of and challenges to the 'Australian Way of Life' from 1947 to 1972

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## Abstract

This essay explores the role of the Cold War in Australian cultural life from 1947 to 1972 and the extent to which the encroachment of polarising politics on the domestic sphere transformed ideals of the supposed 'Australian Way of Life'. Through analysis of the social expressions of 'Old' and 'New' Australians during the Cold War period, I chart the trends and transitions in Australian cultural identity and the shift from traditional fixations on national isolation and ethnic homogeneity toward a more diverse population and global outlook. While historiographical analysis has traditionally categorised the Cold War era by decades of dissimilarity—with the 1950s considered a time of anxious conformity and the 1960s associated with progressive social change—considerable cultural debate concerning the character and stability of the 'Australian Way of Life' endured throughout the period. Questioning the widespread assumption of Australian cultural life as a derivative backwater, this essay argues that demographic, social, and intellectual transitions generated by the Cold War forced the growing populace, and both sides of the ideological spectrum, to confront their place in the world and imagine the nation anew into the second half of the twentieth century.

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The cultural conditions of the Cold War exacerbated pre-existing anxieties concerning the character and stability of the supposed 'Australian Way of Life', as experiences of the 'everyday' for citizens 'Old' and 'New' were expanded, challenged, and debated across ideological lines. Notwithstanding the ebb and flow of the global Cold War conflict, the period from 1947 to 1972 was marked by the mass arrival of migrants to Australia's shores and 23 years of conservative government following Robert Menzies's second appointment as prime minister in 1949. Categorisations of dissimilarities in these decades nevertheless abound: the 1950s, historians are quick to maintain, was not the decade of suburban tranquillity often depicted in popular culture, but rather a time of paranoid conformity and deep-seated division.<sup>1</sup> Conversely, the 1960s have taken on a mythical status associated with progressive social change administered at the hands of baby-boom youth.<sup>2</sup> These neat assessments oversimplify the multilayered cultural concerns aired by politicians, social commentators, and Australians both 'Old' and 'New' during the period, as society was transformed by the encroachment of Cold War politics into the domestic sphere.

This essay surveys shifts in political leadership, migration, and Australian cultural outlook to argue that, together with demographic transformation and economic stability, Cold War cultural conditions manifested in expressions of national identity that lauded a unique 'Australian Way of Life', however ill-defined. Broadly conceived, this 'Way of Life' was linked to what Richard White sees as the

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<sup>1</sup> Stephen Alomes, Mark Dober and Donna Hellier, 'The social context of postwar conservatism', in *Australia's first Cold War*, ed. Ann Curthoys and John Merritt, vol. 1, *Society, communism and culture* (Sydney: Allen & Unwin, 1984); Nicholas Brown, *Governing prosperity: Social change and social analysis in Australia in the 1950s* (Cambridge: Cambridge University Press, 1995).

<sup>2</sup> Robin Gerster and Jan Bassett, *Seizures of youth: The sixties and Australia* (Melbourne: Hyland House, 1991); Shirleene Robinson, Julie Ustinoff, and Tanja Luckins, *The 1960s in Australia: People, power and politics* (Cambridge: Cambridge Scholars Publishing, 2012).

perceived Australian cultural 'type' that lauded the nation as a paradise for the working man.<sup>3</sup> Conceptions of the 'Australian Way of Life' had roots in the colonial era and entailed isolationist anxieties generated by Australia's location in the Asia-Pacific region, racial discourses maintaining the supremacy of white Anglo-Saxons, and an avowedly masculinist ideal of 'mateship' and 'a fair go', evident through cultural archetypes such as the bushman, larrikin, and Anzac. This 'Way of Life' was believed to be under threat by the postwar Displaced Persons migration scheme and rising influence of the Communist Party of Australia, with prime minister Menzies harnessing these fears in his articulation of middle-class Australia as the 'Forgotten People'. Economic stability bolstered claims of Australia as a classless society, with representatives of both the cultural Left and cultural Right inspired to stake their claims for an independent Australian identity. While the impulse of critics evinced throughout this essay shows that to view Australia's cultural identity as a derivative backwater is perhaps endemic to the history of national self-identification, a new progressivism emerged to reimagine Australia away from assumptions of apathy and indifference. This shift was embodied in the termination of the White Australia Policy and the country's increasingly global outlook. Drawing upon a range of primary sources, this essay argues that the Cold War forced the growing populace and both sides of the ideological spectrum to confront their place in the globalising world and imagine the nation anew into the second half of the twentieth century.<sup>4</sup>

The advent of the Cold War in 1947 coincided with the Displaced Persons immigration scheme, which aided European postwar migration and accelerated cultural anxieties over the expansion and diversification of Australia's population. While Australia was yet to recover from the crisis mindset of the Second World War, migration was deemed essential under the postwar mantra of 'populate or perish', and the arrival of hundreds of thousands of Europeans from war-ravaged nations heightened vulnerabilities regarding the stability of the 'Australian Way of Life'.<sup>5</sup> This 'Way of Life' was recognised at the time and subsequently to be rather nebulous, with a *Sydney Morning Herald* article from 1950 admitting 'five men stopped at random in Sydney streets said they didn't know what constituted the Australian Way of Life'.<sup>6</sup> Richard White nevertheless argues that the term's usage accelerated in the postwar era, as the Cold War required a 'presupposed homogeneity and a status quo which had to be defended'.<sup>7</sup> One commentator from the University of Sydney, Professor FA Bland, saw isolation as a keen tenet of Australian identity, stating: 'From our isolation we tend to develop irresponsibility and indifference to matters beyond our own shores. That makes us very harsh to foreigners and intolerant to their habits'.<sup>8</sup> Isolationist anxieties grew alongside a new cultural fixation on the strength and expansion of the Soviet Union, with the Cold War reinforcing fears of foreign influence.

The tendency to conflate Displaced Persons with nearly escaping a communist fate—irrespective of country of origin—was rife. As one newspaper wrote in 1950, 'where Communism rules, the terror, the fear and the propaganda make the reason for life the State itself. This is the territory whence the D.P.'s [Displaced Persons] are coming'.<sup>9</sup> Fears of the domestic threat of communism were bolstered by the ideological conviction of the Communist Party of Australia (CPA). While Australian Leftists were by no means monolithic in their beliefs, the CPA was dogmatic in toeing the Soviet line until 1968, and did little to allay anxieties in 1949 by claiming workers would welcome the arrival of the Red Army onto Australian shores.<sup>10</sup> Menzies was elected prime minister on the promise to outlaw the CPA and evoked—both during his campaign and subsequently—age-old fears concerning invasion, as

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<sup>3</sup> Richard White, 'The Australian way of life', *Historical Studies* 18, no. 73 (1979): 528–45.

<sup>4</sup> The primary sources that inform this essay include a selection of newspaper articles, photographs and public commentary concerning Australian cultural life from 1947 to 1972. These sources underpin my analysis and complement the insights of contemporary historical scholarship.

<sup>5</sup> 'Populate or perish', *The Argus* (Melbourne), 4 August 1945, 1.

<sup>6</sup> 'People give their opinions on the Australian way of life', *Sydney Morning Herald*, 30 January 1950, 2.

<sup>7</sup> White, 'The Australian way of life', 550.

<sup>8</sup> 'People give their opinions on the Australian way of life', 2.

<sup>9</sup> 'D.P.' was a popular abbreviation for those migrants in the Displaced Persons Scheme. A Hamory, 'Behind the Iron Curtain', *Border Watch* (Mount Gambier), 10 August 1950, 9.

<sup>10</sup> "'Welcome" for Red troops', *The Daily Telegraph* (Sydney), 5 March 1949.

communists were described as ‘an alien and destructive pest’ capable of swarming en masse to infiltrate the nation’s borders (see Figure 1).<sup>11</sup> While the 1951 referendum to ban the Communist Party was narrowly defeated, Australians were conditioned to remain anxious of the threat of communism and the potential challenge to national life provoked by the arrival of foreign migrants.



Figure 1: ‘Yes’ Referendum campaign poster (1951).

Source: Ephemera collection PR8680/1951, State Library of Western Australia.

Menzies maintained power by monopolising this fear, continuously relaying the threat of a Third World War and moulding Australian identity away from class identification toward a sense of moral individualism. Stephen Alomes identifies the consolidation of postwar conservatism in the ‘language of crisis, threat and invasion [that] had dominated Australian politics during the war years ... replay[ing] continually over the next ten years’.<sup>12</sup> Menzies’ warnings in 1950 that Australia must ‘gear for war’ and prepare for a ‘tremendous threat’, and could not ‘dismiss the trouble in Korea’, were bolstered by Australia’s entry into the Korean War, sustaining his victory in the 1951 election.<sup>13</sup> Judith Brett explains the electoral appeal of Menzies over the next 16 years was in his ability to conjure the ‘Australian Way of Life’ in the vision of middle-class, non-unionised individuals characterised as the ‘Forgotten People’.<sup>14</sup> In his 1954 federal election speech, Menzies articulated his belief that the archetypal Australian should be the antithesis to socialist thought, arguing:

<sup>11</sup> ‘Communism in Australia: “A destructive pest”’, *Cairns Post*, 11 November 1949, 5.

<sup>12</sup> Alomes, Dober and Hellier, *The social context of postwar conservatism*, 8.

<sup>13</sup> “‘Gear for War’—Menzies’, *Newcastle Morning Herald*, 10 August 1950, 3.

<sup>14</sup> Judith Brett, *Robert Menzies’ forgotten people*, new ed. (Melbourne: Melbourne University Press, 2007).



We believe in the individual, in his freedom, in his ambition, in his dignity. If he becomes submerged in the mass ... we have tyranny ... the dull, unproductive, Socialist philosophy, is merely the definition of stagnation and death.<sup>15</sup>

Nicholas Brown maintains that this 'common-sense individualism' was attractive to many Australians whose experiences in the Great Depression and Second World War made them 'uncomfortable with the change they associated with post-war affluence [and] the moral character of people'.<sup>16</sup> Indeed, Cold War cultural concern 'resembled a religious fervour in its intensity'.<sup>17</sup> This provoked some representatives of traditional pillars of society—including figures from the Presbyterian and Methodist Churches, rabbis, the Australian President of the World Council of Churches, and several Supreme Court Justices—to pen Australians an open letter in 1952 warning that the country's 'moral and intellectual apathy' lacked the 'strength and moral unity sufficient to save our country and our liberties' from unnamed threats.<sup>18</sup> This sentiment supported Menzies' belief that Australians need to cultivate a liberal individualism in order to protect the sanctity of the nation's perceived 'Way of Life'.

By urging Australians to identify themselves in the personal rather than political sphere, Menzies created cultural conditions that venerated domestic life as 'Old' and 'New' Australians were encouraged to embrace the material prosperity of the economic long boom. Despite the social strife generated by Cold War ideological divisions, the 'everyday' for many Australians was more prosperous in the 1950s and 1960s than ever before.<sup>19</sup> While migrants known as the 'New Australians' were subject to racism and the government's demanding labour schemes, material conditions flourished as home ownership reached a rate of 70 per cent—an all-time high—and many enjoyed the proliferation of new technology.<sup>20</sup> Peter Conrad remembers his childhood in 1950s Tasmania as one of self-conscious stability:

We huddled in a mock-up of suburban England, remorselessly bright and bland. Spatial paranoia made us thankful for our isolation from the world. Back then, Europe was a scrabble board of unlucky countries—the sources of wars and food that tasted too spicy.<sup>21</sup>

Where migrants were shown to defy these stereotypes and become assimilated into the suburban, domestically oriented 'Australian Way of Life', they were celebrated. Hundreds of photographs of migrant success stories are located in the National Archives of Australia. One image shows a Dutch mother and daughter smiling in their suburban Sydney home and posing in front of their new 'modern kitchen'. The caption argues that the pair 'love the Australian way of life' (see Figure 2).<sup>22</sup> A declaration that 'the Australian way of life is the best' was similarly echoed by a cheerful Italian family photographed picking fruit in Western Australia (see Figure 3).<sup>23</sup> Even migrants such as Ludwig Schaumuller (see Figure 4), pictured smiling over a stovetop, were now said to be 'contented connoisseur[s] of Australian foods' with the British 'steak and eggs replac[ing] Vienna Schnitzel as [the Chef's] favourite dish'.<sup>24</sup> Attention to these images demonstrates that migrants who were seen to reject former national loyalties for the materially prosperous 'Australian Way of Life' were clear and powerful visual signifiers that upheld Menzies's ideal of Australian individualism during the Cold War years.

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<sup>15</sup> Robert Menzies, 'Australian federal election speech', delivered 5 May 1954, transcript at: Museum of Australian Democracy, [electionspeeches.moadoph.gov.au/speeches/1954-robert-menzies](http://electionspeeches.moadoph.gov.au/speeches/1954-robert-menzies).

<sup>16</sup> Brown, *Governing prosperity*, 11.

<sup>17</sup> George Williams, 'The suppression of communism by force of law: Australia in the early 1950s', *Australian Journal of Politics & History* 42, no. 2 (1996): 225.

<sup>18</sup> 'A call to the people of Australia', *Advertiser* (Adelaide), 11 November 1952, 2.

<sup>19</sup> Mark Peel and Christina Twomey, *A history of Australia*, 2nd ed. (London: Palgrave, 2018).

<sup>20</sup> Peel and Twomey, *A history of Australia*, 222.

<sup>21</sup> Peter Conrad, 'Down under', 28 November 2004, in *Boyer lectures: Tales of two hemispheres*, produced by Andrew Forrest, transcript [www.abc.net.au/radionational/programs/boyerlectures/lecture-3-down-under/3433490](http://www.abc.net.au/radionational/programs/boyerlectures/lecture-3-down-under/3433490).

<sup>22</sup> 'Immigration—Migrants in their homes—Dutch migrants have a modern kitchen ...', photograph, 1960, Migrants in their homes series, Immigration photographic archive, A12111 1/1960/21/3, National Archives of Australia, Canberra.

<sup>23</sup> 'Immigration—Migrants in employment—Commercial/clerical—Former Bergamo man, Giovanni Imberti ...', photograph, 1967, Migrants in employment series, Immigration photographic archive, A12111 1/1967/16/82, National Archives of Australia, Canberra.

<sup>24</sup> 'Immigration—Migrants in employment in Australia—Former Austrian chef Ludwig Schaumuller ...', photograph, 1959, Migrants in employment series, Immigration photographic archive, A12111 1/1959/16/88, National Archives of Australia, Canberra.



Figure 2: Photograph of Dutch mother and daughter from the Migrants in their homes series (1960).

Source: 'Immigration—Migrants in their homes—Dutch migrants have a modern kitchen ...', photograph, 1960, Migrants in their homes series, Immigration photographic archive, A12111 1/1960/21/3, National Archives of Australia, Canberra.



Figure 3: An Italian family shown in the Migrants in their homes series (1967).

Source: 'Immigration—Migrants in employment—Commercial/clerical—Former Bergamo man, Giovanni Imberti ...', photograph, 1967, Migrants in employment series, Immigration photographic archive, A12111 1/1967/16/82, National Archives of Australia, Canberra.



Figure 4: A Viennese Chef shown in the Migrants in their homes series (1954).

Source: 'Immigration—Migrants in employment in Australia—Former Austrian chef Ludwig Schaumuller ...', photograph, 1959, Migrants in employment series, Immigration photographic archive, A12111 1/1959/16/88, National Archives of Australia, Canberra.

While 'New Australians' were encouraged to see such representations as the nation's cultural identity and view Australia as a 'classless' society, for members of the Australian Left, the postwar world inspired many to look collectively toward the future, ushering in a new sense of cultural nationalism. Despite surviving the 1951 referendum, attempts to ban the Communist Party are described by Frank Cain and Frank Farrell as a deeply traumatic period that split the Australian Labor Party (ALP) and sidelined the political Left for decades.<sup>25</sup> Fears of communist infiltration in the cultural sphere nevertheless ensued, manifesting in attacks on intellectuals and the Commonwealth Literary Fund (CLF) by bipartisan politicians.<sup>26</sup> McKernan points out that accusations of communist sympathy directed toward works of socialist realism—such as those sponsored by the CLF—were more complex than political rhetoric of the time conveyed. Many communist writers 'could see socialist realism was but another form of the Australian tradition', and wrote works that valorised the Australian worker, often a bushman or labourer, rather than any Soviet motif.<sup>27</sup> Indeed, historian Russel Ward's *The Australian Legend*, published in 1958, was an archetypal work of Leftist cultural nationalism.<sup>28</sup> He admitted in an interview years later that he and fellow members of the CPA were 'just as keen on Australian nationalism and literature as they were on any social change'.<sup>29</sup> Leftist cultural outputs therefore supported some conventional attributes of the 'Australian Way of Life', as they built on the labours of the working man.

Australian conservatism had traditionally centred on expressions of Anglocentrism and found common ground with the nationalist Left in critiquing 'Americanisation' as degrading to Australia's 'Way of Life'. As British allegiance waned, new generations of conservatives were supported by American hegemony in attempts to contain communist influence among the Left. Described by the communist *Tribune* in 1953 as 'a menace to Australia', the influence of American popular culture was thought to

<sup>25</sup> Frank Cain and Frank Farrell, 'Menzie's War on the Communist Party, 1949–1951', in Curthoys and Merritt, *Australia's first Cold War*.

<sup>26</sup> Susan McKernan, 'Literature in a straitjacket', in Curthoys and Merritt, in *Australia's first Cold War*.

<sup>27</sup> McKernan, 'Literature in a straitjacket', 142.

<sup>28</sup> Drew Cottle, 'A bowyang historian in the Cold War Antipodes: Russel Ward and the making of the Australian legend', *Journal of Australian Colonial History* 10, no. 2 (2008): 171.

<sup>29</sup> Russel Ward, oral history interview by Neville Meaney, 1986, Neville Meaney collection, ID 756347, National Library of Australia, Canberra.

‘undermine genuine Australian democratic culture and patriotism’.<sup>30</sup> Australia had a long history of censorship, and some of the strictest measures across democratic nations, and it was advocated across the political spectrum as a means to preserve what was considered the uniquely Australian ‘Way of Life’.<sup>31</sup> Associations of American culture with crime and delinquency dominated the pages of the press and echoed conventional demands that Australian culture ought to remain based upon British mores.<sup>32</sup> These arguments took a more Antipodean spin in the pages of *Meanjin* in the 1950s, as editor Clement Christensen defended the regime of censorship by arguing, ‘surely any country has a right to protect its own culture from being perverted and corrupted by debased forms of a foreign culture’.<sup>33</sup> While this defence was in favour of uniquely Australian cultural expressions, Richard White argues that ‘in the confusion of uncertain loyalties in the Fifties ... Americanisation could still elicit a common response’ from those maintaining adherence to the British tradition.<sup>34</sup> British loyalties nevertheless diminished as new strategic alliances were drawn with the United States, and cultural initiatives including the Congress of Cultural Freedom—later found to be sponsored by the United States’ Central Intelligence Agency—were established within Australia. Aimed at the ‘defence of ordinary people against the encroachments of the creative and critical spirit of mankind’,<sup>35</sup> the Congress nominally worked to counter the communist Left and promote a uniform notion of Australian culture to the public amid increasing polarisation.<sup>36</sup> The attempted containment of all cultural and social expressions deemed threatening to the status quo was further upheld by the Australian Security Intelligence Organisation, with masses of information on individuals and groups collected through invasive and often unfounded surveillance.<sup>37</sup> Australia’s cultural outlook could therefore be identified in both British and American cultural genealogies, with the Right harnessing both lineages as a common ally in the Cold War’s ideological conflict.

Ironically, one of the most prominent early recorded criticisms levelled by European migrants against the ‘Australian Way of Life’ was its lack of cultural maturity. A 1949 *Daily Telegraph* article on ‘The migrant—His problem with adjustment’ revealed the experiences of four recent migrants and their impressions of Australian life.<sup>38</sup> A Hungarian artist who had fled Budapest ‘soon realised that Australians were not much interested in art at this time, especially his modern European-style art’, and reflected that ‘I miss many things European like cafes, music [and] theatre’.<sup>39</sup> An Englishman was more critical in his summation:

Anyone with a foreign-speaking voice or who looks different is branded as a reffo, a dago, or a pommy: and this is the only country in the world where strangers are referred to in these ways ... I think Australia is culturally a long way behind.<sup>40</sup>

Despite the expressions of cultural nationalism nurtured by the Left and emerging on the Right during the postwar years, Brown argues that ‘in the fifties perhaps more than ever’ there was an assumption that Australia was ‘a derivative, impressionable society, aping the mere styles imported from elsewhere and unable to invest them with a content of our own’.<sup>41</sup> While critiques aired by migrants were dismissed in favour of an assimilation regime aimed more at publicity than wellbeing, as the Cold War progressed

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<sup>30</sup> ‘A menace to Australian culture’, *Tribune South Australia* (Sydney), 21 October 1953, 1.

<sup>31</sup> Nicole Moore, *The censor’s library* (St Lucia: University of Queensland Press, 2012).

<sup>32</sup> Richard White, “‘Combating cultural aggression’: Australian opposition to Americanisation”, *Meanjin* 39, no. 3 (1980).

<sup>33</sup> Clement Christesen, ‘The law grapples with Koka-Kola Kulture’, *Meanjin* 13, no. 1 (1954): 2.

<sup>34</sup> White, “‘Combating cultural aggression’”: 280.

<sup>35</sup> Peter Snodgrass, ‘Congress of Cultural Freedom is new body. but very necessary one’, *The Land* (Sydney), 6 August 1954, 5.

<sup>36</sup> Frank Bongiorno, ‘New Progressivism: Anthony Crossland and the coming of the Australian sixties’, in Robinson, Ustinoff and Luckins, *The 1960s in Australia*.

<sup>37</sup> David McKnight, ‘How to read your ASIO file’, in *Dirty Secrets: Our ASIO files*, ed. Meredith Burgmann (Sydney: NewSouth, 2014).

<sup>38</sup> Ronald McKie, ‘The migrant—His problems with adjustment’, *Daily Telegraph* (Sydney), 29 January 1949, 14.

<sup>39</sup> McKie, ‘The migrant’, 4.

<sup>40</sup> *Ibid.*, 4.

<sup>41</sup> Nicholas Brown, “‘Sometimes the cream rises to the top, sometimes the scum’”: The exacting culture and politics of style in the 1950s’, *Australian Historical Studies* 27, no. 109 (1997): 54.

few could ignore their cultural contributions in every facet of Australian life.<sup>42</sup> There began a gradual shift in how the 'Australian Way of Life' should be understood, precipitated by those such as Judith Brett—later an influential political scientist—whose position as a university-educated youth during the period gave her the impression that 'Australian cultural life seemed frozen by smugness, fear and indifference, and dominated by the values and assumptions of a bygone age'.<sup>43</sup> Mass migration precipitated the decline of this cultural 'smugness, fear and indifference' as a diversification of Australia's demographic composition extended the parameters of who was believed to belong within the national 'Way of Life'.

The 1960s brought a 'New Progressivism' to Australia as the Cold War's global politics—and the influence of demographic change—encouraged society to engage with issues, including race, as they garnered international attention and tarnished Australia's image abroad. In assessing the rise of Aboriginal activism in the 1960s, Jennifer Clark argues that while steps to decolonise society did not sweep Australia as they did Africa following the Second World War, Australia could not ignore nor escape the 'winds of change'.<sup>44</sup> While Indigenous affairs and the White Australia Policy had long been criticised by the Soviet Union and other international representatives at the United Nations, it came to the attention of middle-class progressives at the turn of the decade as many Australians began to see racist policies as outdated and damaging to the country's international image.<sup>45</sup> The Melbourne-based Immigration Reform Group argued in their public pamphlet—which was circulated in newspapers across the country—that 'the notion of White Australia is poisoning our relations with Asia, indeed with the whole non-European world', maintaining that 'we believe [prejudice] is gradually diminishing'.<sup>46</sup> Reformist sentiment was echoed in the mainstream media, as the *Canberra Times* argued:

Australians are still thin skinned in their acceptance of criticism by anyone who comes from overseas or who dares to return to Australia with overseas ideas ... there is a little too much readiness to talk in terms of the Australian way of life when so much in the pattern of Australian behaviour remains unexplained and inexplicable.<sup>47</sup>

South Australia's Don Dunstan, one of a new generation of Labor politicians, had been agitating for reform in his own party since 1959, when he had failed to mobilise support to remove the 'White Australia' policy from the ALP platform.<sup>48</sup> The desire for a new progressive Australian identity more concerned with the view of its neighbours is seen by Tanja Luckins as indicative of a growing cosmopolitanism during the 1960s. This coincided with 'the material culture generated by migrants becoming integrated into the mainstream',<sup>49</sup> as activism against Australia's involvement in the Vietnam War—among other social issues—was precipitated by youth 'against the dominant culture of the Cold War'.<sup>50</sup> Indeed, the fragility of Australian culture continued to be a priority in need of address for social commentators as well as the general populace. As Donald Horne popularly vocalised in 1964, despite Australia's prosperity, there were 'frustrations and resentments of a triumphant mediocrity and the sheer dullness of life for many of its ordinary people'.<sup>51</sup> While struggles against racism on the domestic front and in migration and foreign policy would continue well into the 1970s, the contemporaneous success

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<sup>42</sup> Andrew Markus and Margaret Taft, 'Postwar immigration and assimilation: A reconceptualisation', *Australian Historical Studies* 46, no. 2 (2015): 234–51.

<sup>43</sup> Brett, *Robert Menzies' forgotten people*, 19.

<sup>44</sup> Jennifer Clark, *Aborigines & activism: Race, aborigines & the coming of the sixties to Australia* (Western Australia: University of Western Australia Press, 2008).

<sup>45</sup> 'Soviet attack on White Aust. Policy', *Daily Advertiser* (NSW), 21 April 1949; 'Australia strongly criticised', *The Canberra Times*, 12 November 1966, 1.

<sup>46</sup> The Immigration Reform Group, 'Control or colour bar? A proposal for change in Australia's immigration policy', pamphlet, 1960, vi, 2.

<sup>47</sup> 'New Australian influences in national thinking', *The Canberra Times*, 1 August 1960, 2.

<sup>48</sup> Gwenda Tavan, 'Immigration: Control or colour bar? The immigration reform movement, 1959–1966', *Australian Historical Studies* 32, no. 117 (2001): 181–200.

<sup>49</sup> Tanja Luckins, 'Cosmopolitanism and cosmopolitans: Australia in the world, the world in Australia', in Robinson, Ustinoff and Luckins, *The 1960s in Australia*, 62.

<sup>50</sup> Shirleene Robinson, '1960s counter-culture in Australia: The search for personal freedom', in Robinson, Ustinoff and Luckins, *The 1960s in Australia*, 123.

<sup>51</sup> Donald Horne, *The lucky country*, 6th ed. (Victoria: Penguin, 2009), 10.

of Horne's *The Lucky Country* and its scathing assessment of Australian orthodoxy was indicative of the 'New Progressivism' that Frank Bongiorno argues operated as 'an antidote to [the] national mediocrity' that was felt to have dominated Australian life.<sup>52</sup>

Many of these concerns regarding Australia's cultural image became mainstream in the 1960s, as political priorities recognised the need for Australia to foster a unique and independent identity away from the conservatism of the past. The retirement of Robert Menzies in 1966 was an important break in many of Australia's political and cultural stalemates. Harold Holt came to the post of prime minister with a more expansive view of the cultural value of migration. As the key architect of Australia's postwar migration scheme in his role as immigration minister under the Menzies Government, Holt argued at the 1952 Australian Citizenship Convention that the nation

will take advantage of this great influx of new settlers to this country to build a more secure, a more prosperous and a happier Australia for the generations which are to follow.<sup>53</sup>

Holt's election was followed by a sweep of reforms that reinforced Australian cultural life as independent from that of Britain. Foremost among these policies was the Australia Council for the Arts, considered a major innovation and tool of 'cultural revival', ushered in just days prior to Holt's disappearance at Cheviot Beach in Victoria in December 1967.<sup>54</sup> Such cultural policy developments were thought not only to bolster domestic self-confidence, but were an important tool in furthering Australia's global image. As Raymond Sherry declared in the House of Representatives in 1970:

The image of Australia abroad as a land of koala bears and gum trees no longer applies. The image we should try to establish abroad in the eyes of our neighbours and friends is of an Australia that is vibrant and artistically and culturally creative ... If we can create this image abroad we will have gone a long way towards achieving true and full nationhood.<sup>55</sup>

This sentiment embodied Australia's movement towards a perceived cultural maturity and the increasing significance of an international outlook in Australian self-identification.

Cold War conflict and its cultural manifestations urged Australians to reconsider what the 'Australian Way of Life' was and how it could best be articulated, as 'Old' and 'New' constituents transformed the contours of society and broadened its global vision. While the first decade of the Cold War accelerated the fears of invasion that had traditionally dominated Australian isolationist anxiety, the influx of postwar migration forced a demographic diversification that challenged homogenous understandings of national life. Years of conservative governance were bolstered by economic prosperity and moulded a new cultural type as Australians were encouraged to look inwards to individualism, and backwards to a quiet conformity, in order to uphold notions of a stable 'Way of Life'. Despite efforts to erode Leftist cultural nationalism and nurture new expressions of Australian identity on the Right, both emerged in the mid-twentieth century to confront Australia's 'Way of Life' and to explore how it could be expanded in the increasingly globalised world. These ambitions reached politics by the latter half of the 1960s, and by 1972 the election of the ALP's Gough Whitlam revealed that the majority of Australians had decided 'It's Time' for a reformist political agenda that could dismantle many of the cultural legacies hindering social relations. While fears about Australia's place in the world and concerns over the condition of cultural life have never entirely passed, the years spanning 1947 to 1972 and the constant presence of Cold War tension inspired significant and fruitful debate over what the 'Australian Way of Life' ought to be.

The implications of these findings for contemporary understandings of Australian identity reveal that geographic isolationism, demographic diversity, and ideological contestations about how these factors should be understood are recurring features of Australian national life. While the transitions enacted

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<sup>52</sup> Bongiorno, 'New Progressivism', 181.

<sup>53</sup> Harold Holt, WEH Stanner, RD Huish, AE Monk, and Geoffrey Thomas, 'What do we mean by assimilation of migrants?', interview, *Nation's Forum of the Air*, ABC, no. 2, 1952: 12.

<sup>54</sup> Stuart Ward, "'Culture up to our arseholes": Projecting post-imperial Australia', *Australian Journal of Politics & History* 51, no. 1 (2005): 53–66.

<sup>55</sup> Raymond Sherry, Australian Film Development Corporation Bill 1970, Second reading speech, House of Representatives, 22 April (1970).

during the Cold War period charted throughout this essay have in many cases progressed, with Australia embodying a firmer place in the Asia-Pacific region and undoubtedly remaining a self-professed multicultural country, racial tensions continue to play a significant role in determining the perceived 'Australian Way of Life'. The 2005 Cronulla Riots and dismissal of the 2017 Uluru Statement from the Heart are just two manifestations of the outcomes of Australian anxieties and ideological polarisations reminiscent of Cold War-era cultural disputes. Demonstrating the persistent saliency of historical analysis in understanding the complexities of present national identities, the Cold War period spanning 1947 to 1972 provides a unique opportunity to consider the orthodoxies and transitions that have shaped Australia's cultural outlook.

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# Climate displacement and the need for legal protection

SYLVIA GHALY

## Abstract

This paper explores the discrepancy between the protection available to traditional refugees—as defined in art 1A(2) of the Refugee Convention<sup>1</sup>—and other displaced people, including migrants and internally displaced people (IDPs), and the protection available to people displaced due to climate-related factors. This paper proposes changes to the current definitions as a way to secure protection rights for those displaced due to climate-related factors,<sup>2</sup> without having to change the current legal framework or create a new one. The paper begins by examining the current legal definitions, highlighting precedents for changing the legal definitions of refugees over the years. It then presents the rationale for the proposed changes, describing three common scenarios to demonstrate the plight of those displaced due to climate-related factors, before offering recommendations to secure their protection under both international and domestic law.

## Introduction

The *Convention Relating to the Status of Refugees* ('Refugee Convention') was developed in 1951 to respond to the growing need to protect people at risk of persecution in their own country.<sup>3</sup> It was developed as a reaction to the massive displacement that took place during and after the Second World War across Europe.<sup>4</sup> While the causes of displacement have varied significantly over the years, governments still rely on the definition outlined in art 1A(2) of the Refugee Convention. However, this definition falls short of recognising the myriad reasons that force people to move within their own country, or to other countries, in search of protection. Presently, climate-related factors are among the main reasons for displacement. This paper argues the need for a legal framework to protect those who are displaced because of climate-related factors. It explores the current legal definitions and precedents for changing the definition without having to change the legal framework governing the protection of displaced people. Finally, the paper proposes changes to afford those who are displaced because of climate-related factors the protection they deserve.

## Examination of existing legal definitions

Article 1A(2) of the Refugee Convention defines a refugee as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it.<sup>5</sup>

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<sup>1</sup> *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 1A(2) ('Refugee Convention 1951').

<sup>2</sup> 'Those displaced because of climate related factors' is used generically to cover those who would qualify as 'climate refugees', 'migrant refugees' and 'internally displaced people because of climate related factors', should a definition for these categories exist.

<sup>3</sup> Refugee Convention 1951 (n 1) art 1A(2).

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

This definition limits protection rights to those persecuted because of one of the five predetermined reasons, which are race, religion, nationality, membership of a particular social group, or political opinion.<sup>6</sup> This definition does not cover other reasons, such as civil war, natural disasters, or climate-related factors. The other main criteria to qualify as a refugee is based on being outside of one's own country due to lack of protection within the country.<sup>7</sup> Again, this definition does not include many other categories of displaced people, such as those who are forced to migrate,<sup>8</sup> or those who move within their own country to escape violence or climate-related factors.<sup>9</sup>

There is no special legal status or definition for internally displaced people (IDPs) in international law because IDPs remain inside their countries. The United Nations Commission on Human Rights' (UNHCR) *Guiding Principles on Internal Displacement* describes IDPs as:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-induced disasters, and who have not crossed an internally recognised state border.<sup>10</sup>

Similarly, there is no legal definition for migrants under international law. The United Nations (UN) International Organization for Migration (IOM) uses 'migrant' as 'an umbrella term' to describe:

a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.<sup>11</sup>

In addition to the categories mentioned above, there are two additional categories of people that are protected under international law. These are returnees<sup>12</sup> and stateless people.<sup>13</sup> One aspect all these categories have in common, irrespective of their legal status or the reasons behind their displacement, is that they are all protected under international human rights laws.<sup>14</sup> Each of these categories is governed by a specific legal framework.<sup>15</sup> For example, refugees are protected under the 1951 Refugee Convention<sup>16</sup> and the *Protocol Relating to the Status of Refugees* (the '1967 Protocol'),<sup>17</sup> while IDPs are protected as citizens,<sup>18</sup> and migrants are treated under national migration law of the country where they are based.<sup>19</sup> Despite the many existing definitions, none is broad enough in scope to encompass climate-related refugees. This is why this paper suggests that the definitions need to change, to adapt to new circumstances as they did in the past.

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Forced migration is a general term used to describe the movement of refugees and internally displaced people (IDPs) who are fleeing from conflict, as well as those displaced because of natural, environmental, or chemical situations, nuclear disasters, or other factors such as famine. Those displaced under this category usually qualify for migration under a humanitarian stream which is governed by international law. This concept is explored further later in this paper.

<sup>9</sup> United Nations Commission on Human Rights (UNHCR), *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2, 1998, 1[2] <<http://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>>.

<sup>10</sup> Ibid.

<sup>11</sup> International Organization for Migration (IOM), *Glossary on Migration* (International Migration Law Series No. 34, 2019) 132 <[https://publications.iom.int/system/files/pdf/iml\\_34\\_glossary.pdf](https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf)>.

<sup>12</sup> 'Returnees', *UNHCR.org* (Web Page) <<https://www.unhcr.org/returnees.html>>.

<sup>13</sup> 'Statelessness', *UNHCR.org* (Web Page) <<https://www.unhcr.org/statelessness.html>>.

<sup>14</sup> Carlos Pascual, 'Displacement and Human Rights: A Continuing Challenge', *Brookings* (Op Ed, 16 October 2008) <<https://www.brookings.edu/opinions/displacement-and-human-rights-a-continuing-challenge/>>.

<sup>15</sup> The legal framework applicable to each category will be outlined in details later this paper.

<sup>16</sup> Refugee Convention 1951 (n 1).

<sup>17</sup> *Protocol Relating to the Status of Refugees*, signed 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx>> ('1967 Protocol').

<sup>18</sup> *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (n 9).

<sup>19</sup> For example, in Australia, the *Australian Migration Act 1958* (Cth) applies to those seeking settlement in Australia as migrants: <<https://www.legislation.gov.au/Details/C2018C00337>>.

## Precedents in changing or expanding the legal definition of refugees

The first definition of refugees was developed by the League of Nations in 1921.<sup>20</sup> However, even before the First World War, there had been variations to the legal definition of refugees to accommodate changes to global needs.<sup>21</sup> For example, in 1924, during the Ottoman Empire, the mandate of the League of Nations<sup>22</sup> was expanded to include the Armenians, and in 1928 to include other categories of refugees such as the Assyrians, the Chaldeans, the Syrians, the Kurds, and some Turks.<sup>23</sup>

Similarly, the development of the 1967 Protocol<sup>24</sup> is considered an amendment to the 1951 Refugee Convention, which was mainly developed to deal with the aftermath of displaced people from Europe post-Second World War.<sup>25</sup> The 1967 Protocol removed the geographical and time limits stated in the Refugee Convention and broadened its application to refugees other than those who came from Europe prior to 1951.<sup>26</sup> The term ‘refugee’ had been reserved mainly to ‘political refugees’ and those who met the five criteria for persecution, as previously defined.<sup>27</sup> However, in 1990, sexual persecution, which includes the systematic persecution of a gender or of sexual minority, was accepted by some countries as a legitimate category for asylum claims.<sup>28</sup>

Unfortunately, climate change did not attract the same attention or sympathy as sexual minorities, despite the increased use of the terminology since 1990,<sup>29</sup> and despite associating the term ‘climate refugees’ with the conflict in Darfur in 2007.<sup>30</sup> Instead of paving the way for incorporation in the definition, the term ‘climate refugees’ attracted more criticism than acceptance.<sup>31</sup> The main criticism was based on the fear that the use of the term ‘climate refugees’ might dilute the rights and protection available to ‘genuine’ refugees, as per the definition in the Geneva Convention.<sup>32</sup> The second criticism argued that the displacement of a population usually depends on multiple interlinked factors, such as political and economic factors, and cannot simply be attributed to climate or environmental factors alone.<sup>33</sup> The third argument highlighted that the extent of displacement usually depends on the resilience of the population and the adaptation and mitigation factors available to them, mostly by their own governments, and therefore should not be a question of international law.<sup>34</sup>

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<sup>20</sup> Gilbert Jaeger, ‘On the History of the International Protection of Refugees’ (2001) (September 83(843)) *International Review of the Red Cross* 727 <[https://www.icrc.org/ar/doc/assets/files/other/727\\_738\\_jaeger.pdf](https://www.icrc.org/ar/doc/assets/files/other/727_738_jaeger.pdf)>.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> 1967 Protocol (n 17), 1.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid, 4

<sup>27</sup> Refugee Convention 1951 (n 1) art 1A(2).

<sup>28</sup> UNHCR, *UNHCR’s Views on Asylum Claims Based on Sexual Orientation and/or Gender Identity: Using International Law to Support Claims from LGBTI Individuals Seeking Protection in the US* (Note, UNHCR Asylum Lawyers Project, November 2016) 3 <<https://www.unhcr.org/5829e36f4.pdf>>.

<sup>29</sup> Norman Myers, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Report, The Climate Institute, Washington DC, June 1995) 14–21 <<http://climate.org/archive/PDF/Environmental%20Exodus.pdf>>.

<sup>30</sup> Heather Croshaw, ‘Darfur, Conflict, and Climate Change: Identifying Opportunities for Sustainable Peace’ (Masters Thesis, Duke University, 25 April 2008) 27–28 <[https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/554/MP\\_hrc4\\_a\\_200805.pdf](https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/554/MP_hrc4_a_200805.pdf)>.

<sup>31</sup> Stephan Faris, ‘The Real Roots of Darfur’ [2007] (April) *Atlantic Monthly* 67 <<https://www.theatlantic.com/magazine/archive/2007/04/the-real-roots-of-darfur/305701/>>.

<sup>32</sup> Betsy Hartmann, ‘Rethinking Climate Refugees and Climate Conflict: Rhetoric, Reality and the Politics of Policy Discourse’ (2010) 22(2) *Journal of International Development* 236.

<sup>33</sup> Olivia Dun and François Gemenne, ‘Defining “Environmental Migration”’ (2008) 31 *Forced Migration Review* 10 <<https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/climatechange/dun-gemenne.pdf>>

<sup>34</sup> Kate O’Brien et al, *Disaster Risk Reduction, Climate Change Adaptation and Human Security* (GECHS Report 2008:3, 2008) 17–21 <[https://www.preventionweb.net/files/7946\\_GECHSReport3081.pdf](https://www.preventionweb.net/files/7946_GECHSReport3081.pdf)>

It is therefore not surprising that UNHCR—which is considered the custodian of the Refugee Convention and the 1967 Protocol<sup>35</sup>—does not endorse the term ‘climate refugees’.<sup>36</sup> Instead, it refers to them as ‘persons displaced in the context of disasters and climate change’.<sup>37</sup> It also refers to the ‘nexus dynamics’ when ‘drought-related famine is linked to situations of armed conflict and violence’.<sup>38</sup> In doing so, this brings famine-related displacement—which can be the consequence of droughts caused by climate change—under the umbrella of the traditional definition of refugees, as a way to deal with climate-related displacement under the current framework.<sup>39</sup> This indirect acknowledgement of climate-related displacement highlights the need for acknowledging climate change in its own right as a cause of displacement, without having to link it to one of the traditional causes of displacement that warrants protection under current definitions.

## Rationales for the proposed changes

Why, then, is it important to make a case to expand the definition of refugees to include climate refugees?<sup>40</sup> And why is it important to ensure there is adequate protection for climate refugees and other climate-related displaced people, similar to that granted to political and sexual refugees, migrants, and IDPs under international and domestic laws? The proposed changes can be attributed to many reasons, but this paper will limit the discussion to three main arguments. The first argument focuses on equity, shifting the focus from the cause for displacement to the impact of displacement on the affected population.<sup>41</sup> The second argument focuses on justice and the responsibility of developed countries to protect the affected population in developing countries, given that there is a strong assumption that climate change is linked to human activities mainly undertaken by developed countries and hardly benefiting developing countries.<sup>42</sup> The final argument focuses on humanitarianism and neighbourly compassion: the sense that ‘we are all in this together’ and we ought to help each other through this crisis.<sup>43</sup> Each of these rationales will be discussed in detail below.

### Rationale 1—Equity, focusing on the impact of displacement on the affected population

Irrespective of the causes for displacement, the experience of ‘climate refugees’ is not dissimilar to that experienced by ‘traditional’ refugees fleeing from conflict or violence, or those who are displaced because of natural disasters.<sup>44</sup> Climate refugees often experience loss of housing because of flooding or mudslides, along with loss of water, electricity, food supply, livelihood, and employment.<sup>45</sup> Those who rely on agriculture, for example, might lose their livelihood because of climate-induced drought.<sup>46</sup> Also,

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<sup>35</sup> UNHCR, *The Legal Framework for Protecting Refugees* (UNHCR, 2012) 6 <<https://www.unhcr.org/en-au/legal-protection.html>>.

<sup>36</sup> ‘Climate Change and Disaster Displacement’, *UNHCR.org* (Web Page) <<https://www.unhcr.org/climate-change-and-disasters.html>>.

<sup>37</sup> Sanjula Weerasinghe, *In Harm’s Way: International Protection in the Context of Nexus Dynamics Between Conflict or Violence and Disaster or Climate Change* (UNHCR Report, Legal and Protection Policy Research Series PPLA/2018/05, December 2018) 30–35 <<https://www.unhcr.org/protection/globalconsult/5c1ba88d4/39-harms-way-international-protection-context-nexus-dynamics-conflict-violence.html>>.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> The emphasis is on changing the legal definition for ‘climate refugees’ because there is no legal definition for migrants or IDPs. That said, the argument expands the need for protection to all categories of displaced people because of climate related factors, not just ‘climate refugees’.

<sup>41</sup> Walter Kälin, ‘Displacement Caused by the Effects of Climate Change: Who Will be Affected and What Are the Gaps in the Normative Framework for Their Protection?’ *Brookings* (Web Page, 10 October 2008) <<https://www.brookings.edu/research/displacement-caused-by-the-effects-of-climate-change-who-will-be-affected-and-what-are-the-gaps-in-the-normative-framework-for-their-protection/>>.

<sup>42</sup> GermanWatch, ‘The Role of “Developing Countries” in the Climate Regime’ (GermanWatch Working Paper No. 16, March 1999) <<https://germanwatch.org/en/2881>>.

<sup>43</sup> UN Office for the Coordination of Humanitarian Affairs, ‘Climate Change and Humanitarian Action: Key Emerging Trends and Challenges’ (OCHA Occasional Policy Briefing Series No. 2, August 2009) 3–4 <<https://www.uncclearn.org/sites/default/files/inventory/ocha703.pdf>>.

<sup>44</sup> Kälin (n 41).

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

they experience loss of social and cultural resources including cultural properties and community networks.<sup>47</sup>

Other common factors include the inability of climate refugees to return to their home, or sometimes to their country, because it may have disappeared completely.<sup>48</sup> Those who are displaced because of climate-related factors usually migrate collectively in large numbers, similar to those fleeing from political violence and unrest.<sup>49</sup> Sometimes they migrate because climate-related factors lead to increased violence and unrest.<sup>50</sup> These common elements experienced by climate refugees and traditional refugees alike provide a justification to expand the current definition of refugees to include climate-related refugees. It is evident that irrespective of the cause for displacement, the impact is very similar on the affected population, particularly on the most vulnerable.

## Rationale 2—Justice and responsibility, given the link between climate change and human activities

While there is no agreed definition for climate change or its causes, the *United Nations Framework Convention on Climate Change*<sup>51</sup> focuses in its definition on changes that can be attributed directly or indirectly to human activities. Also, the Intergovernmental Panel on Climate Change (IPCC) defines climate change as ‘any change in climate over time, whether due to natural variability or as a result of human activities’,<sup>52</sup> reinforcing that climate change is linked to human activities, particularly the emission of greenhouse gases.<sup>53</sup>

For this reason, there is always an emphasis on mitigation and adaptation as a solution for climate-related displacement.<sup>54</sup> However, adaptation and mitigation alone will not always be sufficient to address the problem facing the affected population, due to the speed of change and limited resources of the affected country.<sup>55</sup> There is a case to be made for the responsibility of developed countries—the biggest contributors to greenhouse gas emissions—to protect developing countries and their affected populations against the impact of climate change by reducing their greenhouse gas emissions, among other factors.<sup>56</sup>

## Rationale 3—Humanitarianism and neighbourly compassion

Just as there is a humanitarian reason to support those displaced because of human-induced and natural disasters,<sup>57</sup> so there is a humanitarian reason to support those displaced because of climate-related factors.<sup>58</sup> The United Nations Framework Convention on Climate Change (UNFCCC) has a provision stating that developed countries will assist developing countries to address the adverse effects of climate change.<sup>59</sup> Thus far, this provision has been limited to financial assistance to introduce adaptive

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<sup>47</sup> Ibid.

<sup>48</sup> Maxine Burkett, *In Search of Refuge: Pacific Islands, Climate-Induced Migration, and the Legal Frontier* (Asia Pacific Issues No. 98, January 2011) 4–5 <<https://www.eastwestcenter.org/system/tdf/private/api098.pdf?file=1&type=node&id=32472>>.

<sup>49</sup> Ibid 3.

<sup>50</sup> Ibid 2–4.

<sup>51</sup> *United Nations Framework Convention on Climate Change*, signed 4–14 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) <<https://unfccc.int/resource/docs/convkp/conveng.pdf>> (‘UNFCCC’).

<sup>52</sup> Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, ed Martin Parry, Osvaldo Cansiani, Jean Palutikof, Paul van der Linden and Clair Hanson (Cambridge University Press, 2007) 6 <[https://www.ipcc.ch/site/assets/uploads/2018/03/ar4\\_wg2\\_full\\_report.pdf](https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg2_full_report.pdf)>.

<sup>53</sup> Ibid 8–15.

<sup>54</sup> Rafael Leal-Arcas, ‘Climate Migrants: Legal Options’ (2012) 37 *Procedia: Social and Behavioral Sciences* 87, 87–88.

<sup>55</sup> Jo-Ellen Parry and Anika Terton, ‘How are Vulnerable Countries Adapting to Climate Change?’ *IISD.org* (Web Page, 21 November 2016) <<https://www.iisd.org/articles/adapting-to-climate-change>>

<sup>56</sup> GermanWatch (n 42).

<sup>57</sup> UN Office for the Coordination of Humanitarian Affairs (n 43) 5–6.

<sup>58</sup> Ibid 7.

<sup>59</sup> UNFCCC (n 51) art 4[4].

measures. However, as a humanitarian action covers many aspects beyond financial assistance, responding to climate-related displacement requires a holistic approach to support the affected population. This holistic approach needs to include settlement options, particularly for small island nations at risk of disappearing.<sup>60</sup>

Collectively, these arguments indicate the importance of expanding the definition for refugees to include those displaced due to climate-related factors. After all, there is agreement that no one factor alone is the cause of displacement and by the same token, there is a multitude of reasons why it is important to provide adequate protection for climate refugees, commensurate with that provided to ‘political’ and ‘sexual’ refugees. The next section will look at the three likely scenarios of climate change, and how to deal with those displaced according to each scenario.

## Three likely scenarios of climate-related displacement

Climate-related displacement can manifest in many scenarios. However, this paper will only focus on three central scenarios<sup>61</sup> that correlate to one or more of the arguments for change offered under the rationale section, and the recommendations offered later in the paper.

### Scenario 1—Deforestation and land degradation

The first scenario to explore is that resulting from desertification and land degradation, which mainly affect sub-Saharan African nations and the West African Sahel.<sup>62</sup> The destruction of arable lands and agriculture in underdeveloped countries—particularly countries with high birth rates such as Nigeria<sup>63</sup>—is leading to conflict, which in turn is leading to displacement.<sup>64</sup> In the sub-Saharan and Sahel regions, while climate change is considered one of many factors impacting on displacement, the main reason is usually attributed to armed conflict and terrorism. This is what UNHCR refers to as the ‘nexus dynamics’. Attributing the displacement to conflict allows UNHCR to support the population affected by the drought and climate change, as per its current mandate under international law.<sup>65</sup>

Similar conditions of deforestation and land degradation are facing the populations of North America.<sup>66</sup> It is reported that these conditions have caused the displacement of close to 1 million people from Mexico, mainly internally but also across the border into the United States (US).<sup>67</sup> In this scenario, despite similarities in the conditions facing the populations in Africa and North America, only those in Africa usually fit the ‘nexus dynamics’ due to other factors such as armed conflict and terrorism. The ‘nexus dynamics’ grants those who are displaced from Africa protection under international law. Meanwhile, those in North and Central America do not fall into this category, even though they might be experiencing narco-trafficking and gang-related violence. Consequently, they do not benefit from the same level of protection granted to their African counterparts: those affected by this type of crime-related violence might have recourse to justice under national law but are not granted protection under

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<sup>60</sup> Myers (n 29) 150–53.

<sup>61</sup> Benoit Mayer, ‘The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework’ (2011) 22(3) *Colorado Journal of International Environmental Law and Policy* 357 <[https://www.colorado.edu/law/sites/default/files/Mayer%20\(Corrected\)-S.pdf](https://www.colorado.edu/law/sites/default/files/Mayer%20(Corrected)-S.pdf)>.

<sup>62</sup> *Ibid* 364.

<sup>63</sup> Chioma Ezegwu, ‘Climate Change in Nigeria: The Impacts and Adaptation Strategies’ *SSRN* (Preprint, 20 December 2014) 5, 8 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2543940](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543940)>.

<sup>64</sup> Johan Schaar, ‘The Relationship Between Climate Change and Violent Conflict’ (Green Tool Box/Peace and Security Tool Box Working Paper, Sida, 2018) 7–11 <<https://publikationer.sida.se/contentassets/c571800e01e448ac9dce2d097ba125a1/working-paper---climate-change-and-conflict.pdf>>.

<sup>65</sup> Weerasinghe (n 37) 29.

<sup>66</sup> Livia Wagner, Diana Siller and Rosalba Landa, *People and Forests at Risk: Organised Crime, Trafficking in Persons and Deforestation in Chihuahua, Mexico* (Report, Global Initiative Against Transnational Organised Crime, 2020) 13–22 <[https://globalinitiative.net/wp-content/uploads/2020/04/Mexican\\_Illegal.Logging.22.04.v1.final\\_.pdf](https://globalinitiative.net/wp-content/uploads/2020/04/Mexican_Illegal.Logging.22.04.v1.final_.pdf)>.

<sup>67</sup> Adriana Abdenur, ‘Climate Migration Hotspots in Mexico and Central America’ (News Release, Igarapé Institute, 24 January 2019) <<https://reliefweb.int/report/world/climate-migration-hotspots-mexico-and-central-america>>.

international law. This scenario highlights great inequalities in the treatment of people affected by deforestation and land degradation, which leads to displacement. Limiting the protection to the ‘nexus dynamics’ fails to recognise that climate change—not just conflict—is the underlying factor for displacement in this scenario. As highlighted earlier, the fact that the impact on the affected population is similar—irrespective of cause of displacement—reinforces the need to recognise as climate refugees those displaced because of deforestation and land degradation, irrespective of whether the ‘nexus dynamics’ apply or not.

## Scenario 2—Extreme weather conditions and rising sea levels in coastal areas

The second scenario is related to extreme weather conditions and rising sea levels in coastal areas.<sup>68</sup> The Mekong Delta in Vietnam, for example, is home to 18 million people, and half of the nation’s rice production, which represents 10 per cent of the world rice market, comes from this region.<sup>69</sup> The climatic changes in this region are affecting people’s ability to secure sufficient food, due to changes to the weather conditions and the risk of flooding. Consequently, this is affecting the population of the Mekong Delta’s resilience and ability to cope with the changes.<sup>70</sup> Similarly, Bangladesh is one of the most densely populated countries in the world and most of its territory is near the current sea level, which is rising, causing coastal cities to become uninhabitable.<sup>71</sup> This is pushing the population of these coastal cities inland, seeking refuge in other parts of the country.<sup>72</sup> Unfortunately, the country is unable to absorb its internally displaced population because of the high density and poor economic conditions in all parts of the country.<sup>73</sup>

Some of the coastal cities in the US and the European Union (EU) are facing similar threats. Miami<sup>74</sup> and other areas of Florida<sup>75</sup> are experiencing coastal floods, rising sea levels, tsunamis, and other environmental disasters.<sup>76</sup> It is expected that, in less than a century, coastal US states will face the same fate as Tuvalu and Kiribati.<sup>77</sup> It is also predicted that Hamburg, Amsterdam, Lisbon, and other European cities will experience similar conditions by the end of the century.<sup>78</sup> The difference between the internally displaced population in countries such as Vietnam and Bangladesh and the populations in the US or any of the EU countries is the latter are likely to have the capacity and resources to absorb their own people, whereas the former do not. This pushes the population of countries such as Vietnam and Bangladesh to seek refuge outside of their own country as a matter of survival, not just as a matter of livelihood.<sup>79</sup>

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<sup>68</sup> Mayer (n 61) 364.

<sup>69</sup> CD Woodroffe et al, ‘Landscape Variability and the Response of Asian Mega-Deltas to Environmental Change’ (Archive, Paper 1-1-2006, 2006) 13–17 <<https://ro.uow.edu.au/cgi/viewcontent.cgi?article=7204&context=scipapers>>.

<sup>70</sup> Ibid 19–30.

<sup>71</sup> Nour Mohammad, ‘Climate Change and Displacement in Bangladesh: Issues and Challenges’, in W Leal Filho (ed), *Handbook of Climate Change Adaptation* (Springer-Verlag Berlin Heidelberg, 2015) 177, 179–83 <[https://link.springer.com/content/pdf/10.1007%2F978-3-642-38670-1\\_4.pdf](https://link.springer.com/content/pdf/10.1007%2F978-3-642-38670-1_4.pdf)>.

<sup>72</sup> Ibid 183–85.

<sup>73</sup> Ibid 189–91.

<sup>74</sup> Robert Meyer, ‘Miami and the Costs of Climate Change’, *Risk Management and Decision Processes Centre, University of Pennsylvania* (Web Page, 2014) <<https://riskcenter.wharton.upenn.edu/miami-and-the-costs-of-climate-change/>>

<sup>75</sup> Megan Mayhew Bergman, ‘Florida is Drowning. Condos are Still Being Built. Can’t Humans see the Writing on the Wall?’, *The Guardian* (15 February 2019) <<https://www.theguardian.com/environment/2019/feb/15/florida-climate-change-coastal-real-estate-rising-seas>>.

<sup>76</sup> United States Environmental Protection Agency, *Climate Change Indicators in the United States* (Report, 2016) <<https://www.epa.gov/climate-indicators>>.

<sup>77</sup> Ibid.

<sup>78</sup> ‘Climate Change Impacts on European Cities’, *Climate ADAPT* (Web Page) <<https://climate-adapt.eea.europa.eu/knowledge/tools/urbanast/step-0-2>>.

<sup>79</sup> Elizabeth Ferris, Michael M Cerna and Daniel Petz, *On the Front Line of Climate Change and Displacement: Learning from and with Pacific Island Countries* (Report, The Brookings Institution – London School of Economics Project on Internal Displacement, September 2011) 17–20 <[https://www.brookings.edu/wp-content/uploads/2016/06/09\\_idp\\_climate\\_change.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/09_idp_climate_change.pdf)>.

As mentioned above, in developed countries, when faced with extreme weather conditions, the population usually moves to another part of the country, and their government is usually in a position to support them as internally displaced citizens.<sup>80</sup> However, in some developing countries, where resources are limited and human rights records might be questionable, IDPs risk losing all rights available to them.<sup>81</sup> Therefore, it is recommended that the international community intervene under a framework similar to that of their ‘responsibility to protect’ against mass crimes to protect internally displaced populations in these contexts.<sup>82</sup>

Also, when these IDPs attempt to cross borders to seek refuge in ‘safer’ countries as a last resort, they usually fall victims of trafficking, forced labour, and other forms of modern-day slavery. This is in part due to lack of a legal definition for this category of displaced people, which makes them even more vulnerable than other categories. This scenario highlights the inequity between countries at the global level, and their varying abilities to cope with their own IDPs. It is apparent that greater protection is needed for those who are internally displaced in countries that have no capacity to cope with the consequences of climate change. They, therefore, ought to be protected the same way people who are fleeing from other human-induced disasters are.

### Scenario 3—Submergence of low-lying islands

The third scenario is that of low-lying islands that are at risk of being submerged.<sup>83</sup> Research has shown that many of the Pacific Islands such as Tuvalu, Fiji, the Marshall Islands, and Kiribati are the most endangered and most likely to be impacted to the extent of disappearing in the next half century due to climate-intensified storms, floods, sea-level rise, and desertification.<sup>84</sup> These island nations risk becoming economically non-viable and uninhabited in the next generation due to fear of being submerged.<sup>85</sup> This, of course, will lead to massive displacement, of whole nations in some cases.<sup>86</sup> The lack of a legal definition for these refugees—combined with the absence of a political will to confront the issue—exacerbates the problem for climate-related displaced people who have no legal recourse to seek protection, despite the fact that they are at high risk of becoming stateless, or more accurately, ‘nationless’.<sup>87</sup> There is a moral argument to be made given that climate refugees, particularly from small island nations, contribute very little to global greenhouse gas emissions.<sup>88</sup> The same cannot be said about climate refugees from developed nations such as the US, Australia, and many European countries. There is also neighbourly obligation to be considered in this context. Just as Jordan, for example, absorbed many of the refugees from Palestine who were at risk of being stateless,<sup>89</sup> one can argue that Australia, New Zealand, and other countries have an obligation to welcome the populations of neighbouring island nations who are at risk of being submerged.

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<sup>80</sup> *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (n 9).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> Burkett (n 48) 2–5.

<sup>84</sup> Ilan Kelman and Jennifer J West, ‘Climate Change and Small Island Developing States: A Critical Review’ (2009) 5(1) *Ecological and Environmental Anthropology* <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.611.8076&rep=rep1&type=pdf>>.

<sup>85</sup> *Ibid.*

<sup>86</sup> Ilan Kelman, ‘Difficult Decisions: Migration from Small Island Developing States under Climate Change’ (2015) 3(4) *Earth’s Future* 133 <<https://agupubs.onlinelibrary.wiley.com/doi/full/10.1002/2014EF000278>>.

<sup>87</sup> IOM, *Compendium of IOM’s Activities in Migration, Climate Change and the Environment* (Report, IOM, 2009) 66–69 <[https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env\\_degradation/compendium\\_climate\\_change.pdf](https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/compendium_climate_change.pdf)>.

<sup>88</sup> Burkett (n 48) 6–7.

<sup>89</sup> Tianshe Chen, ‘Palestinian Refugees in Arab Countries and Their Impacts’ (2009) 3(3) *Journal of Middle Eastern and Islamic Studies (in Asia)* 42 <<https://www.tandfonline.com/doi/abs/10.1080/19370679.2009.12023136>>.



## Is a new definition for climate-related displacement needed?

This section will draw a comparison between those displaced because of climate-related conditions, as highlighted in the abovementioned scenarios, and existing legal frameworks and definitions. As will become apparent, it is possible to provide protection to those displaced because of climate-related conditions without changing the existing legal frameworks that are available to refugees, IDPs, and migrants. However, in order to do so, there is a need to recognise climate change as a cause for displacement, independent from all other causes, and to change the legal definition to reflect this recognition.

### Refugees

As mentioned above, the current legal framework does not recognise climate refugees, or those displaced because of climate-related factors. In addition, with the exception of ‘refugees’, there is no legal definition for ‘migrants’ or ‘internally displaced people’ in international law. Hence, technically speaking, refugees and other categories such as returnees and stateless people are the only categories that benefit from the legal framework for protection, as outlined in the 1951 Refugee Convention and its 1967 Protocol.<sup>90</sup> This definition does not need to be changed in order to include those who are displaced because of climate-related factors. All that is needed to extend the protection to this group is to recognise they are members of ‘a particular social group’.<sup>91</sup> In this case, the group can be defined as ‘people who are displaced because of climate-related factors, and who fear being persecuted (by nature or climate change) if they return to their country of origin’. All it takes is a recognition of climate change as a genuine cause of fear for one’s life.

### Internally displaced people (IDPs)

Even though there are *Guiding Principles on Internal Displacement*, which were developed in 1998,<sup>92</sup> the protection of the internally displaced is governed by domestic law.<sup>93</sup> In addition, the internally displaced are protected under international human rights law, which guarantees the right to life, food, water, and shelter, among others basic rights.<sup>94</sup>

The abovementioned guiding principles apply to:

persons or groups of persons who have been forced to or obliged to flee or to leave their homes or place of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights, or natural or human-made disasters, or who have not crossed an internationally recognised State border.<sup>95</sup>

This definition should also cover people ‘whose place of origin has become uninhabitable’. The above definition can easily be applied to climate-related displacement, as severe climate conditions can and often do lead to natural disasters. Efforts have been made in the last decades to ensure the protection of IDPs, especially when their governments failed to do so due to conflict, war, poor human rights records, or other factors.<sup>96</sup>

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<sup>90</sup> Refugee Convention 1951 (n 1) art 1A(2).

<sup>91</sup> Refugee Convention 1951 (n 1) art 1A(2).

<sup>92</sup> *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (n 9).

<sup>93</sup> Leal-Arcas (n 54) 91.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (n 9).

<sup>96</sup> *Ibid.*

## Migrants

National migration laws usually permit people to settle under one of the following three categories: economic and skilled migration, family reunion, or humanitarian.<sup>97</sup> In general, national migration laws do not have provisions to accommodate climate-related migrations. However, there are some exceptions. For example, New Zealand migration policy has a ‘Pacific Access Category’, which allows residents of threatened islands such as Kiribati and Tuvalu to settle in New Zealand.<sup>98</sup> Similarly, Finland and Sweden have climate-related provisions in their national migration laws.<sup>99</sup> While other countries might not have specific provisions for climate-related migrants, they have temporary protection provisions that could be used for people displaced due to environmental and climate-related factors, should they choose to.<sup>100</sup> Migration under the humanitarian category is usually covered by international law. Australia and New Zealand, despite their generous policies in relation to the settlement of migrants from neighbouring nations, have already rejected claims of refugee status for a citizen of Kiribati for climate-related reasons, based on the international definition of a refugee.<sup>101</sup> They did that as part of a wider policy that aims at curbing migration and reducing the intake of refugees and asylum seekers. This highlights the controversies surrounding refugees and migrants’ policies at the domestic level, and the struggle governments face when they try to reconcile their domestic and international obligations.

## Recommendations to protect climate-related displaced people under the law

Despite the limitations of the definitions mentioned above, it is possible to widen their use to provide protection to climate-related displaced people under existing legal frameworks. In the last two decades, the number of natural disasters worldwide has doubled, with 90 per cent of these events considered climate-related.<sup>102</sup> IOM estimates that by 2050 there will be between 200 million to 1 billion displaced people due to climate change.<sup>103</sup> Also, there is increased realisation that the world is not in an adequate position to address the situation in an effective manner.<sup>104</sup>

## Nexus dynamics (conflict and climate change)

Scholars have developed a myriad of recommendations to address climate-related displacement. There is already acknowledgement of the existing link between climate-related displacement, peace and security, and ‘nexus dynamics’.<sup>105</sup> There is no doubt that forced displacement because of climate change will lead to increased violence in countries that are already suffering from poor governance and weak

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<sup>97</sup> Jane McAdam and Ben Saul, ‘An Insecure Climate for Human Security? Climate-Induced Displacement and International Law’, in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens* (Cambridge University Press, 2010) 357, 357.

<sup>98</sup> Jane McAdam, ‘Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer’ (2011) 23(1) *International Journal of Refugee Law* 2, 20–21.

<sup>99</sup> Emily Hush, ‘Developing a European Model of International Protection for Environmentally – Displaced Persons: Lessons from Finland and Sweden’ (2017) *Columbia Journal of European Law*.

<sup>100</sup> Erol Yayboke and Janine Staguhn, *A New Framework for US Leadership on Climate Migration* (Centre for Strategic and International Studies Brief, 23 October 2020).

<sup>101</sup> *New Zealand: ‘Climate Change Refugee’ Case Overview* (Legal Report, The Law Library of Congress, July 2015) <<https://www.loc.gov/law/help/climate-change-refugee/new-zealand.php>>.

<sup>102</sup> Asian Development Bank, ‘Global Increase in Climate-Related Disasters’ (Topical Paper/Independent Evaluation/Working Paper, Asian Development Bank, November 2015) 3 <<https://reliefweb.int/sites/reliefweb.int/files/resources/global-increase-climate-related-disasters.pdf>>.

<sup>103</sup> Frank Laczko and Christine Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence* (IOM, 2009) 5–6 <[https://publications.iom.int/system/files/pdf/migration\\_and\\_environment.pdf](https://publications.iom.int/system/files/pdf/migration_and_environment.pdf)>.

<sup>104</sup> *Ibid* 23–24.

<sup>105</sup> Stellina Jolly and Nafees Ahmad, ‘Climate Refugees under International Climate Law and International Refugee Law: Towards Addressing the Protection Gaps and Exploring the Legal Alternatives for Climate Justice’ [2018] (January) *International Humanitarian and Refugee Law* 216, 222–27 <[https://www.researchgate.net/publication/322568935\\_Climate\\_Refugees\\_under\\_International\\_Climate\\_Law\\_and\\_International\\_Refugee\\_Law\\_Towards\\_Addressing\\_the\\_Protection\\_Gaps\\_and\\_Exploring\\_the\\_Legal\\_Alternatives\\_for\\_Climate\\_Justice](https://www.researchgate.net/publication/322568935_Climate_Refugees_under_International_Climate_Law_and_International_Refugee_Law_Towards_Addressing_the_Protection_Gaps_and_Exploring_the_Legal_Alternatives_for_Climate_Justice)>.

law and order structures.<sup>106</sup> This is likely to have a ripple effect on festering terrorist activities and can lead to the destabilisation of countries, or even regions.<sup>107</sup> Therefore, it is in the best interests of developed countries and global powers to intervene and help find solutions, including structured resettlement, to avoid long-term negative consequences of climate-related displacement.<sup>108</sup>

The below will focus on two main recommendations: *in situ* adaptation, which would be effective to deal with the displaced population in-country, and *ex situ* nationhood, which offers a solution for the population of small island nations at risk of disappearing.

## In situ adaptation

Nationally focused solutions depend heavily on in situ adaptation. This falls broadly under global development and climate resilience programs.<sup>109</sup> The Copenhagen Agreement only mentions ‘adaptation’ as ‘the solution’ for climate change, without considering resettlement options, disregarding the limitation of adaptation and the limited capacity of national solutions.<sup>110</sup> In situ adaptation might be an effective solution to mitigate climate-related factors, as they impact IDPs in developed countries who have the means to adapt.<sup>111</sup> However, it falls short of recognising that adaptation might be too expensive, too dangerous, or have limited impact when trying to address the situation in developing countries.<sup>112</sup>

Adaptation also disregards the fact that the actions of developed countries disproportionately and negatively affect the populations of the least-developed countries, or that developed countries are disproportionately contributing to the emission of greenhouse gases.<sup>113</sup> Some countries, such as Canada and Russia, might even benefit from the global warming.<sup>114</sup> Unfortunately, many countries are reluctant to take responsibility for their own actions, as evidenced by the US withdrawal from the Paris Agreement in November 2019.<sup>115</sup> Also, adaptation disregards the fact that climate change is a human-induced disaster. Therefore, unless global mitigating factors are identified and agreed to, it is possible to draw parallels between climate change and mass crimes such as ‘genocide, war crimes, ethnic cleansing and crimes against humanity’, which invoke a responsibility to protect from the international community.<sup>116</sup> This approach acknowledges that climate change affects entire populations, such as the populations of small island nations.

## Ex situ nationhood

Ex situ nationhood allows the continued existence of a sovereign country after its physical disappearance.<sup>117</sup> This recommendation is particularly relevant to small island nations at risk of totally disappearing. Ex situ nationhood addresses the challenge of continuing to exist as a sovereign nation without having a physical mass of land, which is one of the main criteria for sovereignty.<sup>118</sup> One of the main challenges of implementing this recommendation is the need to establish a governance structure

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<sup>106</sup> Ibid 220–22.

<sup>107</sup> Mayer (n 61) 370.

<sup>108</sup> Ibid 361.

<sup>109</sup> Ibid 370–71.

<sup>110</sup> ‘A Copenhagen Climate Agreement’, *Centre for Climate and Energy Solutions* (Web Page, November 2009) <<https://www.c2es.org/document/a-copenhagen-climate-agreement/>>.

<sup>111</sup> Mayer (n 61) 370.

<sup>112</sup> Ibid.

<sup>113</sup> Keith Wade and Marcus Jennings, ‘Climate Change and the Global Economy: Regional Effects’, *Schroders* (Web Page, 26 July 2015) <<https://www.schroders.com/en/us/insights/economic-views/climate-change-and-the-global-economy-regional-effects/>>.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> *Implementing the Responsibility to Protect: Report of the Secretary-General*, UN Doc A/63/677 (12 January 2009) 8[11(a)] <[https://www.un.org/ruleoflaw/files/SG\\_reportA\\_63\\_677\\_en.pdf](https://www.un.org/ruleoflaw/files/SG_reportA_63_677_en.pdf)>.

<sup>117</sup> Maxine Burkett, ‘The Nation Ex-Situ: On Climate Change, Deterritorialised Nationhood and the Post-Climate Era’ (2011) 2(3) *Climate Law* 345, 353–55 <<https://www.law.hawaii.edu/files/content/coliver/345-374%20Burkett.pdf>>.

<sup>118</sup> Ibid 355–60.

which will have authority over diffused people.<sup>119</sup> One might argue that the UN or the State of Israel provide successful legal structures of how *ex situ* nationhood could be adopted and modified to accommodate populations of submerged nations.<sup>120</sup>

## Proposed expansion of legal definitions as a solution for the climate-displaced dilemma

In general, law strives for consistency, universality, and predictability. However, given the multitude of reasons behind modern displacement, there is a need for international and domestic laws related to displacement to be flexible, responsive, and customised.<sup>121</sup> Given there have been variations to the definition of refugees since the beginning of the last century, as outlined earlier in this paper, it would be possible to expand the current definitions to include climate change as a legitimate factor for displacement. This would be the simplest and most straightforward solution to offer protection for climate-related displaced people under the current legal framework.<sup>122</sup> For example, those who are experiencing the ‘nexus dynamics’ as described by the UNHCR—which links ‘drought-related famine to situations of armed conflict and violence’—could be labelled as ‘climate refugees’ and treated as ‘refugees’.<sup>123</sup> Similarly, the populations of underdeveloped countries experiencing similar conditions—who are unable to seek protection in their own country due to low levels of resilience, poor human rights records, and limiting economic factors—should be granted protection as ‘climate refugees’, or at least protection under the ‘nexus dynamics’.<sup>124</sup> This is also likely to reduce their vulnerability and the likelihood of them being exploited as they cross borders—sometimes using dangerous means and putting their lives at risk—to seek refuge in other countries.

By contrast, the population of developed countries that are experiencing rising sea levels in coastal areas and extreme weather conditions such as floods, bushfires, and hurricanes, and those who seek refuge within their own country, should be considered ‘climate-related internally displaced people’.<sup>125</sup> In these circumstances, the recovery efforts and the humanitarian assistance are usually provided by their own government.<sup>126</sup> Furthermore, the *in situ* adaptation recommendations above could be deployed to support the protection efforts. The same could apply to populations of countries with high level of resilience and ability to cope with climate change.

Finally, the populations of island nations at risk of disappearing over the next half century due to rising sea levels<sup>127</sup> might be labelled ‘climate migrants’<sup>128</sup> if they migrate as individuals or as family units. However, should the whole population be forced to leave as their islands become gradually or totally submerged, they should be treated as ‘climate refugees’ and be given priority to settle in neighbouring countries. If the law does not change to include this category of displacement, neighbouring countries

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<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Mayer (n 61) 379.

<sup>122</sup> Ibid 388–98.

<sup>123</sup> ‘Climate Change and Disaster Displacement’ (n 36).

<sup>124</sup> Caitlin Werrell and Francesco Femia, ‘Climate Change, the Erosion of State Sovereignty, and World Order’ [2016] (Spring/Summer, 22(2) *Brown Journal of World Affairs* 221, 226–30 <[https://climateandsecurity.files.wordpress.com/2012/04/werrell\\_femia\\_final-article\\_climate-change\\_state-sovereignty\\_world-order.pdf](https://climateandsecurity.files.wordpress.com/2012/04/werrell_femia_final-article_climate-change_state-sovereignty_world-order.pdf)>.

<sup>125</sup> *Climate Change and Internal Displacement* (Report, The Brookings Institution – London School of Economics Project on Internal Displacement, October 2014) <<https://www.brookings.edu/wp-content/uploads/2016/06/Climate-Change-and-Internal-Displacement-October-10-2014.pdf>>.

<sup>126</sup> Angela Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’ (2008) 30 *Law & Policy* 502 <<https://onlinelibrary.wiley.com/doi/full/10.1111/j.1467-9930.2008.00290.x>>.

<sup>127</sup> Kelman (n 86).

<sup>128</sup> According to the IOM, climate migrants are those who, ‘for compelling reasons of sudden progressive changes in the environment that adversity affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad’. While this definition opens the door to call for the introduction of environmental persecution as a new category under the definition for refugees, the challenge it presents is that it demands that climate become the only reason for displacement. However, as it has been demonstrated, climate is seldom the only reason for displacement (IOM, <<https://www.iom.int/key-migration-terms>>).

should exercise neighbourly compassion towards the populations of these island nations.<sup>129</sup> Furthermore, the ex situ nationhood recommendation mentioned above could be considered to find a more permanent solution.

## Conclusion

There are three obvious scenarios that can apply to climate-related displacement. The first is resulting from desertification and land degradation, which is also linked to famine and violence in developing countries, and to internal displacement in developed countries. The second results from the rise of sea levels in coastal areas and extreme weather conditions, which leads to massive internal displacement in developed countries and cross-border displacement linked to trafficking and exploitation in poorer and overpopulated countries. The third and most pressing scenario is that of low-lying islands at risk of being submerged and completely disappearing. This scenario is linked to discussions about climate-related migration, remote sovereign protection, neighbourly compassion, and the mitigating factors available to these nation islands to combat climate-related displacement.

The rationale for protecting climate-related displaced people is multifaceted. There is an argument to be made about focusing on the impact of the affected population, rather than the reasons for displacement. A second argument can be posed about climate justice, and developing countries taking responsibility for their contribution to climate change, which is subsequently contributing to climate-related displacement in and from developing countries. A third argument can be presented about humanitarianism and neighbourly compassion, which is embedded in a belief in our common humanity and common fate.

Recommendations presented in this paper to ensure the protection of climate-related displaced people can be divided into two broad categories: in situ adaptation based on existing commitments and frameworks, and the creation of a new category of ex situ nationhood to accommodate populations of submerged island nations. This latter recommendation requires a robust framework to protect the identity and legal status of the displaced population. In the meantime, there is a need to consider expanding current definitions to include climate-related factors as a cause of protection. The legal definition of refugees should be expanded to include ‘climate refugees’, and so should the definitions of migrants and IDPs.

There is an urgent need to recognise climate change as a primary contributor to displacement, and to develop relevant legal protection frameworks to protect the most vulnerable and most affected. While the impact of climate-related factors on the displaced population will vary significantly based on the ability of each country to mitigate or adapt, it is evident that no one will be spared from it.

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<sup>129</sup> Tiffany Duong, ‘When Islands Drown: The Plight of “Climate Change Refugees” and Recourse to International Human Rights Law’ (2010) 31(4) *Journal of International Law* 1239, 1244–46  
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# Children in out-of-home care in the East Kimberley: How the child protection system is failing Aboriginal communities

SARAH CROSBY

## Abstract

Since the introduction of child welfare legislation in Australia in the early colonial era, the separation of Aboriginal children from their parents has extended over several generations leading to significant displacement and intergenerational trauma. Today, there continues to be a significant over-representation of Aboriginal children in the welfare system, and Western Australia has the highest rate of Aboriginal children in out-of-home care nationally. This paper will discuss the Aboriginal and Torres Strait Islander Child Placement Principle and the difficulties associated with its implementation, particularly in the East Kimberley. The main conclusion drawn from this paper is that there is a need to rethink the interaction between child protection services and Aboriginal children, families, and communities. There is a need for culturally appropriate practices and consultation with communities to address systemic problems and disadvantages. Increased funding for Aboriginal-controlled organisations and a focus on strength-based rather than deficit-driven systems would go a long way towards addressing the over-representation of Aboriginal children in out-of-home care.

*This paper was written while undertaking an ANU College of Law internship with the Kimberley Community Legal Service. The views expressed are those of the author.*

## Introduction

In the late 1980s a survey of 600 Aboriginal people<sup>1</sup> in the Kimberley found that one quarter of the elderly people and one in seven middle-aged people reported having been removed in their childhood.<sup>2</sup> The trauma resulting from these policies of separation and assimilation have produced lifelong effects, not only for the survivors of the Stolen Generations, but also for their children and their children's children. The enduring legacy of child separation and the psychological distress caused by child placement policies is intrinsically connected to the endemic rates of Aboriginal children in out-of-home care today. In Western Australia ('WA'), 49.5 per cent of children in out-of-home care are Aboriginal, despite making up only 5 per cent of the population.<sup>3</sup>

This paper argues that the Aboriginal and Torres Strait Islander Child Placement Principle ('Child Placement Principle') and the difficulties associated with its implementation, particularly in the remote East Kimberley, has led to the continued systematic disadvantage of Aboriginal children. The Child Placement Principle is a legal framework which ensures that Aboriginal children can maintain a connection to their culture, community, and customs. This is achieved through a placement hierarchy defined in child protection legislation across the Australian jurisdictions. In WA, when a child is placed in out-of-home care, priority is first given to the child's relatives, then within the child's community, then an Aboriginal family, and only then, if no other option is available, a non-Aboriginal family. To

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<sup>1</sup> The term 'Aboriginal' is inclusive of Aboriginal and Torres Strait Islander people.

<sup>2</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997) ch 1 ('*Bringing Them Home Inquiry*').

<sup>3</sup> Secretariat of National Aboriginal and Islander Child Care, *Family Matters: Western Australia Issues Paper* (Report, 2013) 6.

provide context, this paper will outline a brief history of the removal of Aboriginal children. This is followed by a discussion of the ‘best interests of the child’ principle and will explain how this fits in with the Child Placement Principle. The paper will analyse compliance with the Child Placement Principle and the complexities with its implementation in remote areas. It is clear that policymakers need to critically evaluate the way in which the current system operates and make changes that conform more closely with best practice guidelines. This should involve focusing on Aboriginal strengths and solutions rather than emphasising the narrative of deficit and disadvantage.

## History of removal of Aboriginal children

The removal of Aboriginal children has a long history, underpinned by policy debates about the parenting capacities of Aboriginal people and belief in the need for institutional interventions to safeguard the wellbeing of Aboriginal children. Past child removal policies sought to ‘eliminate or assimilate Indigenous peoples in the making of a white Australian nation’.<sup>4</sup> Successive governments since European settlement have forcibly separated Aboriginal children from their families. Under welfare legislation implemented in each state and territory in the 1940s, Aboriginal children had to be found to be ‘neglected, destitute or uncontrollable’ in order to be removed.<sup>5</sup> The term ‘neglect’ was reflective of the systematic disadvantage and poverty that many Aboriginal people faced.<sup>6</sup> As a result, its broad application resulted in the removal of large numbers of Aboriginal children.

Child removal policies were defined using Western understandings of child-rearing practices and did not consider Aboriginal approaches to parenting, resulting in courts failing to understand cultural differences and favouring the removal of Aboriginal children. This lack of cultural understanding persists today and Aboriginal family life is positioned as dysfunctional compared to Anglo-Australian ideals, which reinforces a paternalistic policy setting.<sup>7</sup> Kimberley Stolen Generation Aboriginal Corporation Chair Mark Makar told the WA Parliament ‘the psyche has not changed in how you think of Aboriginal people since colonisation’.<sup>8</sup> Mr Makar explained how current child protection policies and controls imposed on Aboriginal people continue to deprive children of their language, identity, and culture.<sup>9</sup> The Bringing them Home Inquiry documents the effects of forcible removal and recognises how past laws and practices continue to compound the trauma and ongoing disadvantage Aboriginal people face.<sup>10</sup> It acknowledges the failure of existing systems to reduce the number of Aboriginal children placed in out-of-home care.<sup>11</sup> Over two decades on from the Bringing them Home Inquiry, the removal of Aboriginal children from their families continues and Australia’s child protection framework fails to respect international human rights obligations to protect children and in particular Indigenous children, as will be discussed in the following section of this paper.

## The best interests of the child

Article 3(1) of the *Convention on the Rights of the Child* (‘CROC’) states that in all actions concerning children ‘the best interests of the child shall be a primary consideration’.<sup>12</sup> Australia ratified the CROC

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<sup>4</sup> Sana Nakata, ‘The Re-Making of Nation and Indigenous Australian Children’ (2017) 76(4) *Australian Journal of Public Administration* 397, 397.

<sup>5</sup> Bringing Them Home Inquiry (n 2) ch 1.

<sup>6</sup> Ibid.

<sup>7</sup> Laura Dunstan, Belinda Hewitt and Sana Nakata, ‘Indigenous Family Life in Australia: A History of Difference and Deficit’ (2019) 55(3) *Australian Journal of Social Issues* 1, 1.

<sup>8</sup> Mark Bakar, ‘Selected Reading About Western Australia’s Stolen Generations’, *Kimberley Stolen Generation* (Web Page) <<https://www.kimberleystolengeneration.com.au/resources/readings/>>.

<sup>9</sup> Ibid.

<sup>10</sup> Bringing Them Home Inquiry (n 2) ch 1.

<sup>11</sup> Ibid ch 26.

<sup>12</sup> *Convention of the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).

on 17 December 1991 and has incorporated treaty provisions into domestic legislation.<sup>13</sup> In WA, the best interest principle can be found in s 7 of the *Children and Community Services Act 2004* (WA) which mirrors art 3(1) of the CROC. In order to determine the child's best interests, the legislation provides a number of factors be considered, such as the need to protect the child from harm and the capacity of the parents to provide for the child's needs and to protect the child from harm.<sup>14</sup> An additional principle implemented into legislative frameworks in Australian jurisdictions, which applies specifically to Aboriginal children, is the Child Placement Principle. The principle grew from a grassroots community movement in the 1970s initiated by Aboriginal and Torres Islander Child Care Agencies.<sup>15</sup> The movement sought to establish distinct child welfare legislation aimed at reducing rates of child removal and preserving children's cultural identity and was inspired by the success of similar legislation in the United States.<sup>16</sup> In WA, the principle is found in s 12(2) of the Act.<sup>17</sup> The Act states that in making a decision about the placement arrangement of an Aboriginal child, the principle to be observed is that any placement of the child must, so far as is consistent with the child's best interests and is otherwise practicable, be in accordance with the following order of priority:

- (a) placement with a member of the child's family;
- (b) placement with a person who is an Aboriginal person in the child's community in accordance with local customary practice;
- (c) placement with a person who is an Aboriginal person;
- (d) placement with a person who is not an Aboriginal person but who, in the opinion of the CEO, is sensitive to the needs of the child and capable of promoting the child's ongoing affiliation with the child's culture, and where possible, the child's family.<sup>18</sup>

## Child Placement Principle: Issues and compliance

The objective of s 12(2) of the Act is to enable children who are the subject of placement arrangements to maintain a connection with their family and culture.<sup>19</sup> This is consistent with the CROC and the best interests of the child principle. In terms of compliance with the Child Placement Principle, according to the Productivity Commission, 68.7 per cent of Aboriginal children are placed in accordance with s 12(2) of the Act.<sup>20</sup> However, this figure is likely to be misleadingly high 'given the poor understanding of the principle and inadequate commitment to the efforts necessary for its realisation'.<sup>21</sup> The Aboriginal Child, Family and Community Care State Secretariat notes there are no requirements about what steps must be taken in order to comply with the principle.<sup>22</sup> Consequently, the principle can be viewed as being satisfied even if a child ends up in a placement with a non-Aboriginal foster carer because the welfare agency has seen to have worked through the hierarchy.<sup>23</sup> There are no practical guidelines regarding the implementation of the principle and as a consequence, decisions are made by individual caseworkers with no standardised test or consistency.<sup>24</sup> As a result, compliance with international norms and best practice is limited.

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<sup>13</sup> Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 28 July 2010) [3.14].

<sup>14</sup> *Children and Community Services Act 2004* (WA) s 8 ('the Act').

<sup>15</sup> Fiona Arney et al, *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle Policy and Practice Considerations* (Report No 34, August 2015) 4.

<sup>16</sup> *Ibid.*

<sup>17</sup> The Act s 12(2).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* s 12(1).

<sup>20</sup> Senate Community Affairs References Committee, Parliament of Australia, *Inquiry into Out of Home Care* (Report, 19 August 2015) 20 ('*Senate Inquiry into Out-of-Home Care*').

<sup>21</sup> Secretariat of National Aboriginal and Islander Child Care, Submission No 93b to Senate Community Affairs References Committee, *Inquiry into Out of Home Care* (June 2013) 8.

<sup>22</sup> Senate Inquiry into Out-of-Home Care (n 20) 237.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

The Senate Inquiry into Out-of-Home Care notes Australia's child protection system is too narrowly focused on legislative requirements to stop child abuse rather than focusing on overall outcomes for children and the child's best interests.<sup>25</sup> This risk-averse approach to child protection that favours removal over supportive strategies creates an overcrowded out-of-home care system which struggles to provide safe and stable placements for children with multiple and complex needs.<sup>26</sup> Child welfare advocate Frank Hytten says that 'Aboriginal children are being removed from their families unnecessarily and over-zealous child protection workers are misinterpreting Aboriginal culture'.<sup>27</sup> Systematic discrimination relating to misinterpretation across the cultural interface acts as an initial barrier to children being cared for on country by their communities. Removal of children from their families causes significant distress and trauma and there is a need for a more holistic approach that looks at the best long-term outcomes for children. This includes therapeutic models of care that address trauma and abuse in order to improve the wellbeing of children in out-of-home care.<sup>28</sup>

## The Aboriginal carer shortage: The youth dependency ratio and cultural child-rearing practices

The shortage of suitable Aboriginal carers and the challenge of recruiting Aboriginal people to become foster carers acts as a significant impediment to the successful implementation of the Child Placement Principle.<sup>29</sup> In June 2015, non-Aboriginal carers cared for 49 per cent of Aboriginal children in out-of-home care.<sup>30</sup> This shortage of kinship carers stems from the insufficient number of adults in communities who are able to provide care, systematic barriers, and the eligibility criteria that excludes some carers. Compared with non-Aboriginal children and adults, there is a high youth dependency ratio among Aboriginal people.<sup>31</sup> This is calculated by dividing the number of children by the number of working adults. While the youth dependency ratio for non-Aboriginal people is 0.27, the ratio of Aboriginal children to the proportion of Aboriginal adults is 0.6.<sup>32</sup> This has implications for the capacity of Aboriginal communities to meet the needs of children who require out-of-home care and to maximise adherence to the Child Placement Principle. There is a greater proportion of Aboriginal children to the proportion of adults who may be potentially available to care for them.

State and federal policy frameworks reveal an enduring and negative conceptualisation of Aboriginal family life.<sup>33</sup> For example, many Aboriginal carers provide multiple forms of care to children including foster care, kinship care, and care for their own children as well as informal care for biologically related or unrelated children.<sup>34</sup> Shared care-giving within families for children who are not biologically related 'does not fit with Anglo-centric assessment models based on concepts of biological nuclear family being the "safest" configuration'.<sup>35</sup> However, kinship care, which is care provided by relatives such as grandparents or close community members, is at the top of the Child Placement Principle hierarchy and is the most preferred option. There is a need for child protection services to develop culturally sensitive

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<sup>25</sup> Ibid 74.

<sup>26</sup> Ibid 75.

<sup>27</sup> Gillian Bennett, 'Top NT Magistrate Says Placement Policy Neglects Human Rights of Indigenous Children' *Australian Broadcasting Corporation* (Sydney, 21 July 2013).

<sup>28</sup> Senate Inquiry into Out-of-Home Care (n 20) 125.

<sup>29</sup> Secretariat of National Aboriginal and Islander Child Care, *Reviewing Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle Western Australia 2019* (Compliance Review) ('WA Child Placement Principle Compliance Review') 6.

<sup>30</sup> Family Matters, 'What is the Aboriginal and Torres Strait Islander Child Placement Principle?', *Family Matters* (Web Page, 2 November 2016) <<https://www.familymatters.org.au/aboriginal-torres-strait-islander-child-placement-principle/>>.

<sup>31</sup> Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, June 2011).

<sup>32</sup> Ibid.

<sup>33</sup> Dunstan, Hewitt and Nakata (n 7) 1.

<sup>34</sup> Arney et al (n 15) 11.

<sup>35</sup> Ibid.

practices and consult with Aboriginal communities to develop models informed by the needs and practices of Aboriginal communities.

## Entrenched social and economic barriers to kinship care

Systematic barriers to the recruitment of Aboriginal carers include high levels of disadvantage experienced by Aboriginal people.<sup>36</sup> This includes structural risk factors affecting Aboriginal families, such as poverty and poor housing, which substantially account for the over-representation of Aboriginal children in the welfare system.<sup>37</sup> Relative and kinship carers are more likely to be disadvantaged than other types of carers yet they receive lower rates of financial reimbursement than foster carers.<sup>38</sup> The financial burden placed on kinship carers is unreasonable and unsustainable, particularly where the relative carer faces prior financial disadvantage. Chronic housing shortages and overcrowding can often lead to Aboriginal or kinship carers being deemed unsuitable, limiting adherence to the Child Placement Principle.<sup>39</sup>

To address the systemic disadvantages Aboriginal communities face, funding and support is required to assist potential carers and families. In the East Kimberley, the Binari-Binya Yarrowoo organisation and the MG Corporation, representing the Miriuwung and Gajerrong people, have developed programs to generate employment opportunities as well as address ‘alcohol and substance abuse, support for victims of domestic violence, support for men to support women, educational programs, on-country programs for children and on-country healing’.<sup>40</sup> Family violence and drug and alcohol abuse tend to compromise the ability of parents to properly care for their children and feature prominently in Child Protection and Family Services (‘CPFS’) reports of children removed from their families. However, parents often have little opportunity to object to CPFS orders and are given limited opportunities and resources to address the root causes of their issues, such as alcohol and drug dependencies. Engaging Aboriginal communities to develop support networks and organisations to assist parents to better care for their children can help families avoid prolonged engagement with the child protection system and lower the rates of Aboriginal children in out-of-home care.

## The intersection between criminal justice and the child protection system

High rates of imprisonment among the Aboriginal population, criminal records, and allegations of child maltreatment means many potential kinship carers are viewed unfavourably by welfare agencies.<sup>41</sup> A barrier that can prevent family reunification in child protection matters is that all adult members of a household in which a child is placed are required to have working with children checks. Criminal offending would preclude an individual from obtaining a working with children check. This disproportionately affects Aboriginal people, who in WA are 17 per cent more likely to be imprisoned than their non-Aboriginal counterparts.<sup>42</sup> Funding and policies which aim to reduce Indigenous incarceration would, in turn, enable more children to stay out of the child protection system. In one case at Kimberley Community Legal Services, a child was unable to be reunified with his mother because

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<sup>36</sup> Ibid 10.

<sup>37</sup> John Fluke et al, ‘Placement Decisions and Disparities among Aboriginal Groups: An Application of the Decision Making Ecology through Multi-Level Analysis’ (2010) 34(1) *Child Abuse and Neglect* 57, 58.

<sup>38</sup> Senate Inquiry into Out-of-Home Care (n 20) 165.

<sup>39</sup> Ibid.

<sup>40</sup> Western Australian Coroner, *Inquest into the Deaths of Thirteen Children and Young Persons in the Kimberley Region* (Report, 7 February 2019) 37 [144] (‘*Kimberley Inquest*’).

<sup>41</sup> Bennett (n 27).

<sup>42</sup> Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (Report, 13 October 2016) [4.7].



he resided with two family members who had committed alcohol and family violence–related offences. In other cases, Aboriginal people with criminal records for issues such as not paying parking fines or not turning up to court appearances for unregistered cars preclude them from becoming carers.<sup>43</sup> Minor criminal offences in Aboriginal communities that occur due to financial barriers, such as being unable to understand or pay fines or vehicle registration fees, means there are fewer Aboriginal carers available. This acts as a barrier to compliance with the Child Placement Principle.

## Children with complex needs in out-of-home care

Another difficulty associated with children in out-of-home care is the psychological demands and financial burdens of providing for children with high needs. Many children have complex needs, particularly mental health and behavioural problems stemming from their traumatic abuse experiences.<sup>44</sup> According to the Senate Inquiry into Out-of-Home Care, young children are generally placed in home-based care; however, older children with complex needs are more likely to be placed in residential care.<sup>45</sup> Anglicare, in its submission to the Out-of-Home Care Inquiry, acknowledged that for children with challenging behaviour, residential care becomes the ‘default’ option.<sup>46</sup> One example of this is as follows. Sophie was placed in a group home in the East Kimberley after being assaulted by her mother.<sup>47</sup> CPFS’s efforts to find an appropriate carer in accordance with the Child Placement Principle failed as Sophie’s proposed family carers did not have capacity to care for her. For example, one family member was assessed as unsuitable as her own children were in the care of CPFS. Sophie has Foetal Alcohol Spectrum Disorder, which

contributes to her exhibiting violent and eruptive symptomology that causes her to engage in violent criminality, self-destructive and aggressive oppositional defiant behaviour. This poses a threat to the physical, psychological and emotional wellbeing of [herself] and of others.<sup>48</sup>

Sophie’s placement at the group home was characterised by absconding and engagement in criminal behaviour. As a result, Sophie was moved off country to a location over 3,000 kilometres from her family.

During her placements, Sophie has had limited contact with her immediate and extended family. Due to her complex needs, Sophie has been placed a significant distance from her country and community. It is clear that Sophie’s development of a sense of belonging has been compromised by being raised in out-of-home care, an issue outlined by Aboriginal Family Law Services WA.<sup>49</sup> Sophie’s primary language is Gurindji, which is spoken in the Victoria River region. By being placed off country, Sophie is geographically separated from her language and culture. This has inhibited her connection to family and community and her sense of cultural identity, a primary facet of the Child Placement Principle.

On 28 November 2019, the Children and Community Services Amendment Bill 2019 (WA) was introduced to the legislative assembly, which would amend s 12 of the Act to better implement the Child Placement Principle to enhance and preserve Aboriginal children’s connection to family, community, and culture.<sup>50</sup> The Bill amends s 12(2) as follows:

- (c) placement with a person who is an Aboriginal person who lives in close proximity to the child’s Aboriginal community;
- (d) placement with a person who is not an Aboriginal person but who—

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<sup>43</sup> Bennett (n 27).

<sup>44</sup> Arney et al (n 15) 10.

<sup>45</sup> Senate Inquiry into Out-of-Home Care (n 20) 206.

<sup>46</sup> Anglicare Australia, Submission No 87 to Senate Community Affairs References Committee, *Inquiry into Out of Home Care* (November 2014) 15.

<sup>47</sup> Name changed to protect the child’s identity.

<sup>48</sup> Paediatrics Report from the client’s file.

<sup>49</sup> Aboriginal Family Law Services WA, Submission No 46 to Senate Community Affairs References Committee, *Inquiry into Out of Home Care* (October 2014) 5.

<sup>50</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 November 2019, 2 (Simone McGurk).

- (i) lives in close proximity to the child's Aboriginal community; and
  - (ii) is responsive to the cultural support needs of the child and is willing and able to encourage and support the child to develop and maintain a connection with the culture and traditions of the child's family or community;
- (e) placement with a person who is an Aboriginal person;
- (f) placement with a person who is not an Aboriginal person but who is responsive to the cultural support needs of the child and is willing and able to encourage and support the child to develop and maintain a connection with the culture and traditions of the child's family or community.<sup>51</sup>

If applied in Sophie's circumstances, the amendments may mean Sophie would not have been moved off country where she struggles to maintain a connection to her culture and community. If passed, the amendments will mark a positive step towards the full implementation of the Child Placement Principle.

## The continued impacts of intergenerational trauma and displacement on Aboriginal families

Aboriginal families and communities are working towards healing the trauma of removal as well as displacement from country, institutionalisation, and abuse.<sup>52</sup> However, 'trauma, premature death and grief are experienced at disturbingly high rates in Aboriginal communities'.<sup>53</sup> The Aboriginal Legal Service WA surveyed 483 clients who had been forcibly removed and found that one third of those clients reported that their children had been taken away in turn.<sup>54</sup> Children born into communities that suffer from intergenerational trauma are more likely to experience prolonged exposure to trauma arising from illness, exposure to violence, family disintegration, and financial stress.<sup>55</sup> These effects of child removal policies are intergenerational and the experiences of dispossession impact the ability of families to seek or accept help from a system perceived to have caused or contributed to their problems in the first place.<sup>56</sup> The Senate Inquiry into Out-of-Home Care identified the reluctance of some Aboriginal communities to engage with those authorities responsible for past and present practices of child removal.<sup>57</sup> This affects people's choice to become carers for Aboriginal children in their communities and limits the effectiveness of the Child Placement Principle.

The Senate Committee is concerned that current child protection practices risk creating another 'Stolen Generation'.<sup>58</sup> It is acknowledged that the practices for child removal are different to that of previous generations; however, if adequate supports and services for Aboriginal communities and families are not provided the results will not be dissimilar. In order to achieve better outcomes for Aboriginal children living in remote areas such as the East Kimberley, the welfare system needs to be resourced to engage in culturally appropriate means, which will increase trust that child protection agencies are helping rather than harming Aboriginal children. For example, the Northern Territory government has funded the expanded use of interpreters to ensure families can engage in planning and reunification in their first language.<sup>59</sup> These types of initiatives increase trust and confidence that Aboriginal children and families are being supported in culturally safe ways. The out-of-home care system must be trauma-

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<sup>51</sup> Children and Community Services Amendment Bill 2019 (WA) s 12(2).

<sup>52</sup> Kimberley Inquest (n 40) 48 [182].

<sup>53</sup> Ibid 11 [18].

<sup>54</sup> Aboriginal Legal Service WA, Submission No 127 to Human Rights and Equal Opportunity Commission, *Bringing Them Home Inquiry* 44.

<sup>55</sup> Kimberley Inquest (n 40) 48 [182].

<sup>56</sup> Arney et al (n 15) 3.

<sup>57</sup> Senate Inquiry into Out-of-Home Care (n 20) 239.

<sup>58</sup> Ibid 243.

<sup>59</sup> Government of Northern Territory, Department of Chief Minister, *Safe, Thriving and Connected: Generational Change for Children and Families 2018–2023* (Plan Report, April 2018) 38 <[https://rmo.nt.gov.au/\\_\\_data/assets/pdf\\_file/0005/498173/Safe,-Thriving-and-Connected-Implementation-Plan-Web.pdf](https://rmo.nt.gov.au/__data/assets/pdf_file/0005/498173/Safe,-Thriving-and-Connected-Implementation-Plan-Web.pdf)>.

informed and CPFS must empower communities to enter into genuine partnerships with Aboriginal communities to support children and their families.

## Self-determination and community participation in decision-making processes

The principle of self-determination is an important aspect of the Child Placement Principle. The Act states that Aboriginal people ‘should be allowed to participate in the protection and care of their children with as much self-determination as possible’.<sup>60</sup> Self-determination involves ‘Aboriginal peoples’ right to determine and develop policies and services, and to participate in decisions that impact their children, families and communities’.<sup>61</sup> However, the continuing tendency to identify issues and solution in terms of Western social norms and frameworks remains a major impediment to progress towards self-determination.<sup>62</sup> Approaches to out-of-home care that fail to ensure community engagement, empowerment, and responsibility corrode the foundations for improving outcomes for Aboriginal children.<sup>63</sup>

The Secretariat of National Aboriginal and Islander Child Care advocates for the introduction of ‘holistic, integrated Aboriginal controlled services’ across all jurisdictions.<sup>64</sup> Aboriginal community-controlled organisations are the most effective and best-placed to support Aboriginal children and families.<sup>65</sup> Policymakers see a deficit-driven rather than a strength-based system that recognises the capacity in Aboriginal-led organisations to achieve positive outcomes in their communities.<sup>66</sup> Maureen O’Meara, CEO of Aarnja, the Kimberley Regional Authority, says that millions of dollars have been ‘thrown’ at programs in the Kimberley that are set out to help Aboriginal people.<sup>67</sup> However, ‘families haven’t been consulted about the effectiveness of these programs on-the-ground or consulted as to whether the programs are needed at all’.<sup>68</sup> Between 2010 and 2019 the number of Aboriginal children in care in WA increased from 1,492 to 2,942.<sup>69</sup> Reversing this trend requires investment into programs which empower Aboriginal communities and provide opportunities to strengthen the family and community’s capacity to offer the best possible care for their children.

The lack of consultation and Aboriginal voices within the child protection system, as well as funding shortages for early-intervention programs and family support services, prevents communities from tackling the disproportionate rate of Aboriginal children in out-of-home care in WA. In 2019, WA continued to have the lowest level of expenditure on intensive family support services and family support services in relation to total child protection spending in Australia.<sup>70</sup> In 2017 to 2018, spending on family support services decreased from 6.7 per cent to 4.8 per cent.<sup>71</sup> Following the Kimberley Inquest, CPFS funded 26 Aboriginal Community-Controlled Organisations to deliver placement

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<sup>60</sup> The Act s 12(2).

<sup>61</sup> Government of Western Australia Department of Communities Child Protection and Family Support, *Aboriginal Services and Practice Framework 2016–2018* (Framework Report, 2016) <<https://www.dcp.wa.gov.au/resources/documents/aboriginal%20services%20and%20practice%20framework.pdf>>.

<sup>62</sup> Healing Foundation, Submission No 7 to Senate Community Affairs References Committee, *Inquiry into Out of Home Care* (20 October 2014) 4.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid 9.

<sup>65</sup> Secretariat of National Aboriginal and Islander Child Care, Submission No 93 to Senate Community Affairs References Committee, *Inquiry into Out of Home Care* (25 November 2014) 7.

<sup>66</sup> Senate Inquiry into Out-of-Home Care (n 20) 245.

<sup>67</sup> Aarnja, ‘Aarnja calls for an Urgent Kimberley Aboriginal Led Response to Coronial Inquest’, *Aarnja.org.au* (Web Page, 11 February 2019) <<https://aarnja.org.au/news/2019/2/11/aarnja-calls-for-an-urgent-kimberley-aboriginal-led-response-to-coronial-inquest>>.

<sup>68</sup> Ibid.

<sup>69</sup> Government of Western Australia Department of Communities ‘Out-of-Home Care Reform’ (Web Page) <<https://www.communities.wa.gov.au/projects/out-of-home-care-reform/>>.

<sup>70</sup> WA Child Placement Principle Compliance Review (n 29) 5.

<sup>71</sup> WA Child Placement Principle Compliance Review (n 29) 5.

services and supervision of Aboriginal children in out-of-home care in WA.<sup>72</sup> This is a significant step towards the provision of culturally appropriate services; however, the lack of cultural competency persists in CPFS, which reduces the accessibility and effectiveness of the service for Aboriginal people.

Currently only one quarter of child protection and family support services in the East Kimberley are run by Aboriginal corporations.<sup>73</sup> The presence of Aboriginal-controlled organisations is therefore still clearly lacking. In October 2019, WA's Aboriginal Affairs Minister Ben Wyatt announced new appointments to the Aboriginal Advisory Council of WA.<sup>74</sup> The members represent a diversity of regions, expertise, and genders and play a role working towards better social, economic, health, and cultural outcomes for Aboriginal people incorporating Aboriginal views, voices, priorities, and aspirations. Included on the Council are five members from the Kimberley region.<sup>75</sup> These appointments represent a positive step toward developing an inclusive and contemporary partnership between regional Aboriginal community leaders and the WA government. However, at the community level, consultation with Aboriginal people on child protection challenges and reform is lacking.

## Conclusion

There is a strong over-representation of Aboriginal children in the out-of-home care system in WA and there are several barriers to the implementation of the Child Placement Principle that inhibit its best practice. These issues include the lack of guidelines on the application of the Child Placement Principle as well as systematic problems such as the shortage of Aboriginal carers and the high levels of disadvantage they face. Additional challenges include the complex needs of Aboriginal children in out-of-home care, stemming from their traumatic experiences and the effects of intergenerational trauma on Aboriginal families. Other issues include Aboriginal communities' lack of trust in child protection services, as well as a strong emphasis on Anglo-centric models for assessing CPFS involvement in care for Aboriginal children, which fails to consider cultural differences in child-rearing practices. The main conclusion drawn from this paper is that the state governments must re-evaluate the interaction between child protection services, Aboriginal children, and their families and communities. To address systematic problems and disadvantages that face Aboriginal children in remote areas, increased consultation with Aboriginal communities as well as culturally appropriate practices are required. Increased funding for Aboriginal-controlled organisations and a focus on strength-based rather than deficit-driven systems would go a long way towards addressing the over-representation of Aboriginal children in out-of-home care. There is evidence of some positive developments, such as the amendments contained in the Children and Community Services Amendment Bill 2019 (WA) and the new appointments to the WA Aboriginal Advisory Council. However, in order to reverse the trend of increasing numbers of Aboriginal children being placed in out-of-home care in WA, further support for remote Aboriginal communities is essential.

## Acknowledgements

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<sup>72</sup> Education and Health Standing Committee, Parliament of Western Australia, *Learnings from the Message Stick: Report of the Inquiry into Aboriginal Youth Suicide in Remote Areas* (Report No 11 November 2016) 65.

<sup>73</sup> Government of Western Australia Department of Communities Child Protection and Family Support, 'Services in the Community' (Web Page) <<https://www.dcp.wa.gov.au/servicescommunity/Pages/Location%20of%20services.aspx>>.

<sup>74</sup> Government of Western Australia, 'Appointments to the Refreshed Aboriginal Advisory Council Announced', *Media Statements* (Web Page, 22 October 2019) <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2019/10/Appointments-to-the-refreshed-Aboriginal-Advisory-Council-announced.aspx>>.

<sup>75</sup> Government of Western Australia Department of Premier and Cabinet, 'Aboriginal Advisory Council of Western Australia', *WA.gov.au* (Web Page, 31 January 2020) <<https://www.wa.gov.au/organisation/departments-of-the-premier-and-cabinet/aboriginal-advisory-council-of-western-australia>>.

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# Why we should trust scientific consensus: An extension of Naomi Oreskes's argument

TIMOTHY HIBBINS

## Abstract

Since the very beginnings of modern science, findings that have challenged various aspects of the social status quo have been met with extreme resistance. Even after ideas such as heliocentrism, natural selection, vaccination, and global warming achieved consensus support within their respective fields, many opponents have continued to deny them on the grounds that the scientific consensus is corrupt, mistaken, dogmatic, or some combination thereof. It was in response to contemporary manifestations of this concern that the historian of science Naomi Oreskes wrote an article for *Time* magazine titled '*Science isn't always perfect—But we should still trust it*' (2019). In the article she presents a nuanced case for why non-scientists can and should trust in scientific consensus. The purpose of this essay is to delve deeper into her argument and ultimately to strengthen it with the addition of new premises. I start by offering a brief reconstruction of the original argument before examining some key objections to it. After assessing the strengths of these objections, I suggest a way of addressing them that involves introducing a new distinction between two different types of consensus. I conclude that consensus only carries epistemic weight when it emerges from the process of scrutiny described by Oreskes, but that when it does, we are obliged to heed it.

## Introduction

With regards to the relationship between science and society, there can be no doubt that we live in a rather unsettling historical moment. As we face a deadly global pandemic alongside the growing existential threat of irreversible climate change, the importance of science to the choices of both governments and individuals has perhaps never been greater. At the same time, however, an alarmingly large number of people are distrustful towards science, even on matters of life and death. In September of this year, a full 49 per cent of American adults said they would *not* get a COVID-19 vaccine if it were available, and only 21 per cent said they definitely would (Tyson et al. 2020). It is clear to me that building public trust in science is absolutely essential if we are to overcome these monumental challenges. I imagine it was a similar concern that motivated the distinguished historian of science Naomi Oreskes to pen her article for *Time* magazine titled '*Science isn't always perfect—But we should still trust it*' (2019). While she is a historian, this particular article focuses on the present, and possesses a somewhat urgent tone. In it, she laments public distrust in science, its increasing politicisation, and the disinformation campaigns over the past decades that have led up to it. Despite this unfair playing field, Oreskes feels—and I concur—that if we are to get people to trust in science, then communicators in the media need to be able to provide a satisfactory and easily understandable account of *why* scientific consensus is worthy of their trust. Appeals to authority ('you should believe it because this professor in the lab coat said so!') and bandwagon fallacies ('you should believe it because everyone else already believes it!') will not do. Instead, Oreskes presents what I consider to be a novel argument for the reliability of scientific consensus. Before scientific claims can reach the status of consensus, she says, they must withstand an intense process of scrutiny. According to her, only true claims are able to survive this scrutiny—false claims will eventually get thrown out. Hence, the few claims that do become accepted as consensus are almost guaranteed to be correct.

This argument was obviously designed to be convincing to the general public, and in that I hope it succeeded. For the purposes of this essay, though, I am more interested in its philosophical content. I already think that Oreskes's argument is remarkably strong, and I will explain why, but my ultimate purpose in this essay is to suggest a way to make it even stronger. I will begin by offering a reconstruction of her case for trusting scientific consensus, before introducing two possible objections, assessing them, and finally explaining how I think the argument could be amended to address them.

## Oreskes's argument

According to Oreskes, the story of the scientific method as written in textbooks will not do as an answer on its own, both because it fails to capture the variety of real scientific practice and because it wouldn't be sufficient grounding for trust regardless. She points out that even if an experiment returns a positive result, this cannot ever fully *confirm* a theory, as there will always be other possible theories that fit the result just as well. Furthermore, she adds, if an experiment returns a negative result, this cannot fully *falsify* a theory either, because the fault could lie with the experiment or with the interpretation rather than the theory itself. By highlighting these issues, she implicitly rejects many traditional accounts of science, at least to some degree. Instead, she argues, it is the way in which claims are evaluated by the *community* of scientists that is of primary importance. Specifically, Oreskes posits that science is defined by the requirement that all claims be subjected to a process of critical scrutiny.

### Oreskes's criteria for scientific scrutiny

The concept of scrutiny is central to Oreskes's argument. For her, proper scientific scrutiny possesses three essential characteristics which make it, in her view, extremely reliable at rejecting false claims. Firstly, it is *tough*: scientists are intensely scrupulous when looking for faults in others' research and are not averse to giving harsh criticism. This happens both before publication, when papers are submitted for peer review, and afterwards when other scientists in the field write response papers providing counterevidence and objections. Secondly, scrutiny is *public*: work being exposed to a large and diverse group of other scientists means that claims are assessed from many different angles. Thirdly, and most importantly, scrutiny is *ongoing*: claims always remain fully vulnerable to rejection on the basis of new evidence. To build on the courtroom analogy that Oreskes employs to explain this aspect of scrutiny, not only is there no protection against double jeopardy in science, but there is also no statute of limitations. On her account, any scientific consensus that is subject to this process of scrutiny is thus fundamentally different from, say, religious dogma, in that it is always open to revision.

To describe how this tough, public, and ongoing scrutiny paves the way for scientific understanding, Oreskes borrows Helen Longino's (1990) term 'transformative interrogation'. To both Oreskes and Longino, science is an 'interrogation' because it involves questioning every claim rigorously, and 'transformative' because, in so doing, our understanding is transformed for the better. Oreskes readily concedes that, in the real world, there are often flaws in the process of scrutiny. However, she argues it is extraordinarily unlikely for a claim that hasn't survived *rigorous* scrutiny to become what could reasonably be called scientific consensus—so, scientific consensus is extraordinarily unlikely to be false. Therefore, she says, when scientists are all loudly saying the same thing, be it about the climate, vaccines, or anything else, *we should listen*.

## Objections to Oreskes's argument

I believe there are two related but distinct objections one can raise against Oreskes's case for trusting science. I shall refer to these as the *historical objection* and the *systemic objection*.

### Historical objection

The historical objection is an application of a famous argument in the philosophy of science known as the *pessimistic meta-induction*. The meta-induction was first postulated by Larry Laudan (1981) as a



refutation of scientific realism, or the attitude that scientific theory accurately represents underlying reality rather than merely being useful. It applies induction over the population of scientific theories accepted throughout history and concludes that, since most of them were later proven wrong, currently accepted theories are likely to suffer the same fate. Accordingly, we should thus be *pessimistic* about the truth of currently accepted theories. Proponents of this argument have an abundance of examples at their disposal. In chemistry—or rather, prior to the advent of modern chemistry—it was believed that combustion was caused by the presence of ‘phlogiston’, which escaped burning objects in the form of fire and smoke (Yudkowsky 2007). In physics, light was long thought to be dependent on an invisible, omnipresent substance called ‘luminiferous ether’ (Torretti 2007). In biology, phenomena such as the appearance of maggots within animal carcasses were attributed to ‘spontaneous generation’; under the right conditions, organisms supposedly materialised out of thin air without connection to any kind of life cycle (Corrington 1961). In all three of these examples, the consensus opinion was completely incorrect. These are not isolated examples either; the history of every field in science is littered with such cases. The pessimistic meta-induction thus directly challenges Oreskes’s contention by highlighting the fallibility of consensus. After all, if her argument could be made at any point in history, even when we *know* the consensus was wrong, then why should we trust it today?

## Systemic objection

Where the historical objection directly refutes Oreskes’s *conclusion*, the systemic objection focuses on undermining the argument’s *premises*. Specifically, it sows doubt in Oreskes’s narrative of scientific scrutiny by pointing out systemic flaws in modern scientific practice that could lead to the formation of false consensus.

One of the most important principles in scientific research is *statistical significance*, which is typically expressed by what are known as ‘*p*-values’. Supposing we carry out a study and obtain some result, the *p*-value is the probability that we would see that result by random chance if the hypothesis we were testing was false. The lower the *p*-value, the higher the statistical significance, and the more confidence we can have that our result is not a false positive.

To guard against false positives, most journals will only publish results that meet a maximum *p*-value requirement called an *alpha* value, which is usually set at 5 per cent. In other words, only results that would occur by chance less than 1 time in 20 are allowed. Intuitively, one might infer from this that around 1 in 20 of research findings are false positives, but not more than that. As it happens, that would be a reasonable inference if exactly half of the hypotheses being tested were true, and half false. However, as Pashler and Harris (2012) prove by mathematical means, the expected proportion of false positives is much higher if the majority of hypotheses being investigated in the first place are false, and this is the far more realistic scenario.

The problems don’t stop there. Because negative results typically aren’t even *submitted* to journals, the expected rate of false positives as a proportion of *published* findings is even higher—this issue is referred to as publication bias. On top of this, since researchers face huge institutional pressures to find surprising and novel results in order to get published, many set up their studies in such a way that they can cherry-pick combinations of variables that happen to yield impressive *p*-values *after* they have all the results—this is known as *p*-hacking. Some go even further and commit fraud by fabricating data.

Of course, scientists aren’t ignorant of the problem of false positives. One of the most powerful bulwarks against the proliferation of false ideas in science is also one of the oldest: replication studies. In essence, these involve a group of scientists testing the validity of a published study by conducting a new study following the same procedure and seeing if they come to the same result. If a hypothesis survives multiple replication studies, then it is much more likely to be correct. If it fails replication, then it must be discarded. What is worrying is that many fields are currently experiencing what has been dubbed a ‘replication crisis’, wherein landmark result after landmark result has been overturned as long overdue replication studies have been conducted (Aschwanden 2015).

In addition to false positives, there is a related problem of hidden cultural biases influencing the way research is actually conducted. Lloyd (1993) offers an illustrative example from primatology. In that field, it was once widely held that female orgasm in various species of primates *must* have evolved in

order to fill some kind of reproductive function. There wasn't actually any evidence for this idea—in Lloyd's words it was a *pre-theoretical assumption* rooted in researchers' subconscious beliefs about female sexuality (it was, at the time, a male-dominated field). In fact, there was significant evidence to the contrary: female stump-tail macaques almost always had orgasms when they mounted other females, but only occasionally had them during heterosexual coitus, indicating that it likely served a non-reproductive evolutionary function (Goldfoot et al. 1980). Despite this, at least one later study *intentionally* confined itself to the latter category of orgasms because of this unfounded assumption (Lloyd 1993: 142).

Publication bias, *p*-hacking, and even outright fraud have all contributed to many false hypotheses being wrongly accepted. In addition, pre-theoretical assumptions linked to conscious and subconscious bias contribute to many true hypotheses being wrongly denied. Taken together, the systemic objection maintains that these flaws in the process of scientific scrutiny *as it stands* are worrisome enough to cast severe doubt upon even the most seemingly well-established cases of scientific consensus.

## Responses to the objections

While the historical objection has strong intuitive appeal, I believe it is the weaker of the two objections I've presented. There are at least three ways it can be significantly mitigated. Firstly, when you investigate the false theories used as evidence in the pessimistic induction, it doesn't always appear that they enjoyed the same level of consensus approval as, say, the theory of natural selection enjoys today. For example, some claim that there was a consensus in the 1970s that the Earth was cooling, but while a 'global cooling' hypothesis did exist, it was never more widely accepted than global warming—that is simply a myth (Peterson et al. 2008). Secondly, I contend that some of the examples offered by those making this objection, such as the humoral theory of medicine (Laudan 1981), cannot be deemed 'scientific' theories, at least in the sense that Oreskes describes, because they didn't undergo a comparable process of scrutiny during their heyday. Including them in an inductive argument against Oreskes's conclusion would thus be an effective straw-man. Thirdly, of the remaining false theories used in the induction, almost all were *less empirically successful* than any theory accepted by scientific consensus today (Park 2011). With these considerations in mind, Park (2011) uses the same inductive argument to reach an *optimistic* view of present scientific theories—if this does not provide independent support for Oreskes's conclusion, then it at least shields it to a meaningful degree against the pessimistic induction.

I contend that the *systemic* objection is actually much more problematic for Oreskes's argument because, unlike the historical objection, it specifically targets *current* scientific practice. The field of psychology, for example, is currently facing a crisis because many of its most famous ideas have been thrown into question by replication studies which have failed to find the same results (Aschwanden 2015).

## A proposed amendment to Oreskes's argument

To address the aforementioned objections, I propose that Oreskes's argument be amended by introducing an additional condition for trust in consensus. Part of what makes her argument so strong already is its relatively narrow scope, and it can be made even stronger by being narrowed further. Oreskes doesn't try to explain exactly how scientists come up with their ideas or even the statistical methods they use to test them. Instead, she outlines a process of scrutiny that prevents false claims from reaching the status of consensus *regardless* of the methods used in a particular field. She then argues that this rigorous scrutiny justifies public trust in scientific consensus—nothing more, nothing less. But while she does a good job of defining 'scrutiny', and 'trust' is fairly self-explanatory, her precise notion of 'consensus' remains somewhat vague. The only thing she clarifies is that scientific consensus can only exist among experts *within* a specific field (that is to say, the opinion of neurobiologists cannot affect consensus amongst particle physicists, and vice versa). However, I believe that pinning down precisely what we mean by consensus is key to strengthening Oreskes's argument and neutralising these

two objections. I believe this because, in my view, scientific consensus can actually take on two very different forms, and Oreskes's argument only applies to one of them. My amendment is therefore to add the following important caveat to the original argument: consensus may be either *active* or *passive*, and only the former kind warrants trust.

## Active and passive: The two kinds of consensus

To count as *active* consensus, a claim must survive rigorous scrutiny to be *actively endorsed* by an overwhelming majority in a given field. An example of *active* consensus would be the widespread agreement among climate scientists—on the basis of incredibly robust evidence—that global warming exists and is caused by human activity. I contrast this with *passive* consensus, which occurs when a shared assumption is deemed scientific because it happens to be *believed* by most scientists in a field, but hasn't actually ever faced the kind of tough, public, and ongoing scrutiny that Oreskes describes. An example of *passive* consensus would be the myth of 'spontaneous generation' in biology which I mentioned earlier. While it was certainly widely believed, it wasn't actually based on anything but supposition—unsurprisingly, it quickly fell apart when it was finally subjected to proper scrutiny (Corrington 1961). I would also label as *passive* consensus the previously cited example discussed by Lloyd (1993) of faulty pre-theoretical assumptions about female orgasm in primates.

By explicitly restricting itself to *active* consensus, this modified argument resists both the historical and systemic objection to a greater degree. That is because the examples of consensus used by both the historical and systemic objections almost all fall under the *passive* category, while the examples of consensus that Oreskes has in mind are *active* because they only came about after being subjected to rigorous scrutiny.

There does remain a significant problem, which is that laypeople will naturally have difficulty differentiating between *passive* consensus and *active* consensus. After all, almost by definition, laypeople are not able to directly observe whether the process of scrutiny was adequate when deciding whether to trust the scientific consensus on a given issue. This problem seems somewhat unavoidable, though I argue it is not a weakness in the argument I've presented so much as an indication that we need better reporting on science. It's one thing to talk about trusting consensus when it exists, but polling shows that a large number of Americans do not believe in the *existence of consensus* on climate change, and that appears to be largely due to the way the issue is covered in the media (Sanders 2019). I do think this problem is mitigated by the fact that *passive* consensus will likely fall apart if it becomes central to an issue of public importance. If a particular scientific consensus has survived mainstream news coverage and political debate for a significant period of time, then it is more likely than not to be *active* consensus.

## Conclusion

In her article, Oreskes succeeds in presenting a novel argument that is not only convincing, but philosophically robust. She outlines in simple but effective terms the nature of scientific scrutiny with the three fundamental criteria of being *tough*, *public*, and *ongoing*. She demonstrates how this kind of scrutiny inevitably works to remove false claims from scientific discourse while allowing true claims to build on one another in accordance with Helen Longino's (1990) notion of transformative interrogation. Ultimately, Oreskes uses this to show why scientific consensus is so reliable, and hence trustworthy, even for laypeople.

However, in its original form Oreskes's argument was vulnerable to two major objections. The historical objection points to a myriad of examples of past scientific consensus being overturned to infer that even current scientific consensus is likely to be wrong, and hence not trustworthy. The systemic objection goes one step further and highlights the ways in which even contemporary science fails to live up to Oreskes's standards for scrutiny. Both objections can be responded to, but in order to properly neutralise them I propose we need to slightly amend the original argument. Specifically, we must distinguish between *active* consensus that was born from a process of tough, public, and ongoing scrutiny, and *passive* consensus that would be better described as pre-theoretical assumption than

theory. If we discard the latter and specify that our argument applies only to the former, then I believe both the historical and systemic objections are satisfied. In the end, I thus concur with Naomi Oreskes that even modern science is far from perfect, but that we laypeople should still put our trust in *active* scientific consensus when it exists—especially when it is a matter of life and death.

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# Perceptions of, factors underlying, and reasons for e-cigarette use among Australia's young adults

STEFAN THOTTUNKAL

## Abstract

Recent studies have found that the use of electronic cigarettes (e-cigarettes) is on the rise among non-smokers and that vaping may potentially be a gateway to smoking (Romijnders et al. 2018). In order to combat rates of e-cigarette initiation and use among young adults, the aim of this paper is to understand how young adults view e-cigarettes and the reasons behind their use. A systematic review of the Australian literature on adolescent e-cigarette use was conducted. It was found that this demographic of individuals was unsure of how they felt regarding legislation of e-cigarettes but were against restrictive regulation. Australian young adults were found to be largely misinformed regarding the efficacy of e-cigarettes as smoking cessation devices. A considerable number were unaware of the health risks associated with e-cigarette use. Factors associated with use included being male, alcohol and cigarette use, financial instability, and younger age. Furthermore, evidence was found against the use of e-cigarettes in smoking cessation and it was discovered that a large reason for usage is enjoyment. It is believed that this review will identify key areas for scientists, public health professionals, and regulators to develop effective interventions against e-cigarette use among young Australian adults.

## 1 Introduction

Electronic cigarettes (also known as e-cigarettes) are battery-powered devices which release vapour by heating various types of liquids (Scott et al. 2019). These devices are often used in conjunction with nicotine liquid and come in flavoured or non-flavoured varieties (Scott et al. 2019). Those that are used with nicotine liquids are sometimes referred to as ENDS (electronic nicotine delivery systems) (Yong et al. 2015). E-cigarettes are commonly advertised as an alternative to smoking and a harm reduction strategy for smokers to quit smoking, although the literature is conflicting in terms of support for these purposes (Yong et al. 2015). The act of using such devices is known as 'vaping' and this practice is known to be associated with a variety of ill health effects such as nicotine addiction, acute nicotine poisoning, and increased risks of cardiovascular events (Rom et al. 2015). In Australia, the legislation around the use of these devices varies between states and is riddled with complexity (Scott et al. 2019). E-cigarettes are sold under the category of tobacco or consumer product law, whereas the nicotine liquid which is used within these devices is labelled as a restricted drug and is categorised under the Australian Poisons Standard as Schedule 4 with a prescription, or a Schedule 7 dangerous poison substance without a prescription (Scott et al. 2019). Despite this, any individual, including minors, can purchase both the e-cigarette and nicotine liquid products online (Scott et al. 2019). Scheduling is a national categorisation system that regulates the availability of substances to the public. Medicines are classified into various schedules depending on the threat the compound poses to public health and safety. Due to the online availability of e-cigarettes, users are able to circumvent the regulations that exist to protect the health of individuals.

Recent research has found that e-cigarette use is on the rise among non-smokers and that vaping may potentially be a gateway to smoking (Romijnders et al. 2018). Because the appeal of e-cigarettes is increasing among those who have no interest in smoking cessation, it is important to study the reasons for e-cigarette use (Romijnders et al. 2018). Young adults are of high concern, due to this age bracket being associated with increased curiosity and experimentation (Wolfenden et al. 2018). Furthermore,

the marketing of e-cigarettes is designed and flavoured to attract this audience (Wolfenden et al. 2018). Recent evidence shows that the main reason for use of e-cigarettes among young adults in Australia is simply enjoyment and/or social influences (Jongenelis, Brennan, et al. 2019). This suggests that young adults are potentially underestimating the negative health effects associated with the use of these devices (Wolfenden et al. 2018).

In order to combat rates of initiation and e-cigarette use among young adults, it is necessary to understand what drives this activity. The aim of this paper is to examine how e-cigarettes are perceived, the factors associated with vaping, and the reasons behind vaping in young Australians. A systematic search of the Australian literature on adolescent e-cigarette use was conducted. Its findings provide an overview of young adult e-cigarette users in Australia. Young adults were defined as individuals aged between 18 and 25, as this was the most common age range used for studies on this population in the literature (Jongenelis, Brennan, et al. 2019; Jongenelis, Kameron, Rudaizky and Pettigrew 2019; Jongenelis, Kameron, Rudaizky, Slevin, et al. 2019). It is believed that this overview will highlight key areas for scientists, public health professionals, and regulators to develop effective interventions to curb e-cigarette use among young Australian adults.

This review begins by describing the search strategy used to select articles for inclusion in the analysis. It then details the characteristics of the articles selected and their limitations. The paper then goes on to describe the perceptions of, factors associated with, and reasons behind e-cigarette use (as identified in the studies included). In the discussion, the results are put into context using global comparisons. The paper then addresses the practical implications of the results, the limitations of the review, and avenues for future research.

## 2 Methodology

A systematic approach was employed to find relevant articles in the literature (see Figure 1). The key words 'e-cigarette', 'electronic cigarette', 'vaping', and 'young adult' were used in multiple databases (Scopus, Web of Science, and PubMed), with most articles being obtained through PubMed. These key terms were combined with the terms 'perceptions', 'reasons', and 'factors', as these allowed the results to become more specific to the research question. The results of these searches were further filtered to studies which focused on young adults by adding the search terms 'young' and 'youth'. Search filters were employed to find Australian studies.

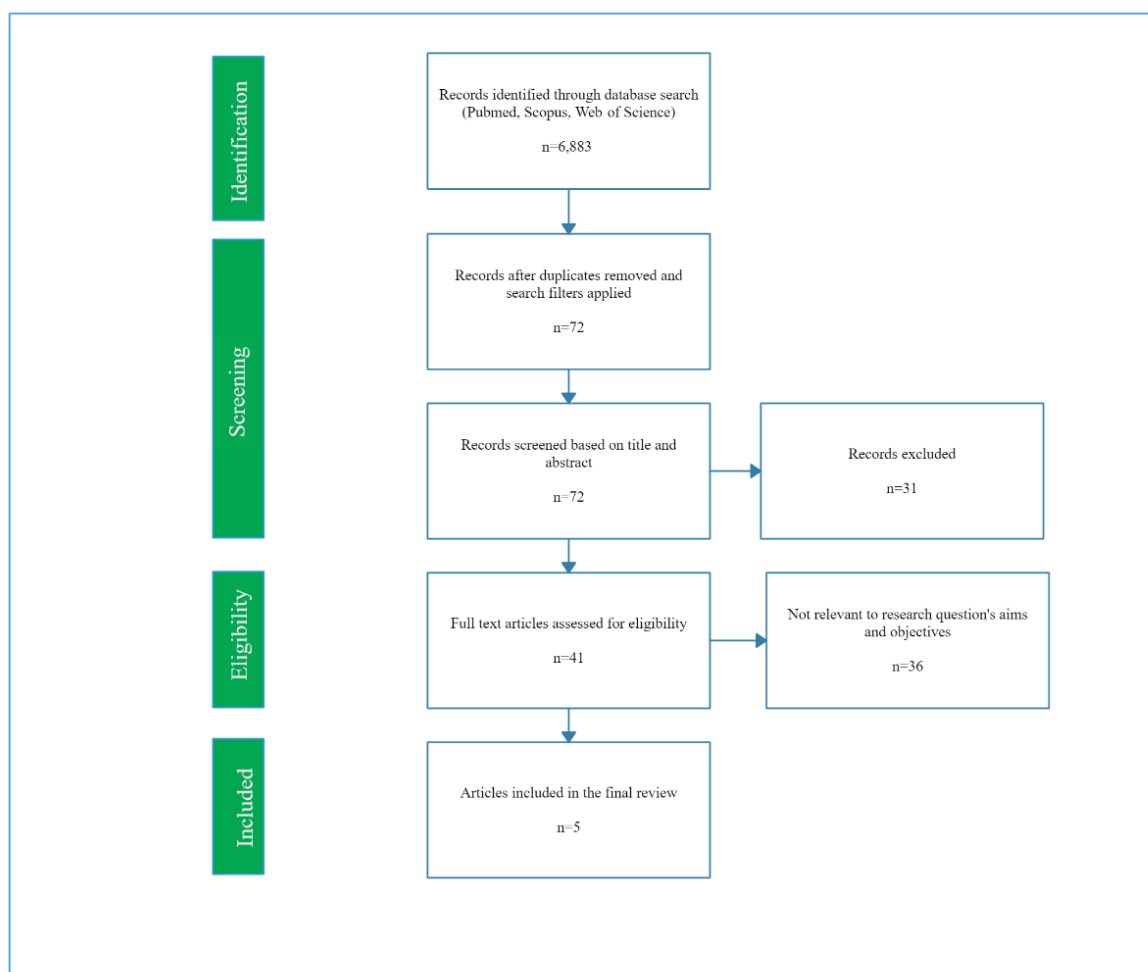


Figure 1: Flow chart of research process with inclusionary and exclusionary criteria

Source: Author's summary of process.

Articles which were deemed to not be reputable scientific sources were excluded. Articles were limited to those published within the last five years; however, no articles were ineligible due to widespread e-cigarette use being a recent occurrence. Other types of articles that were excluded were those which focused on toxicology/health effects, marketing, regulation, or harm reduction of e-cigarettes. Finally, studies which focused on 'youth', but conducted the study using age brackets outside of 18–25, were excluded. The databases used included Scopus, Web of Science, and PubMed, as these are reputable collections of articles within the health arena. Initial searches produced 6,883 results, which were narrowed down to 278 using the term 'Australia'. By adding the search terms 'youth' and 'young', this was further reduced to 95. Duplicate articles were removed, leaving 72 records.

Articles were narrowed down further based on relevance; the title and abstract were used to find 41 studies. These articles were critiqued after analysing the full text to ensure compatibility for comparison with each other, leading to 5 eligible studies. Factors that made articles incompatible included a limited focus on youth, those that centred on toxicology, and those that did not use Australian participants. The key features of each article were noted, including study design, focus, results, strengths, and weaknesses. Overarching themes and recurring trends were identified, allowing a consensus on the literature pertaining to the research question to be developed. This furthermore allowed gaps in the literature to be discovered.

## 3 Results

### 3.1 Article features

Five studies were identified as exploring the factors associated with e-cigarette use among youth in Australia. Cross-sectional online surveys are the main forms of data collection in all five studies. Four studies were conducted in Australia and one analysed data from Australia and the United Kingdom. Three studies utilised a recruiting platform known as PureProfile to find participants (Jongenelis, Brennan, et al. 2019; Jongenelis, Kameron, Rudaizky and Pettigrew 2019; Jongenelis, Kameron, Rudaizky, Slevin, et al. 2019). One study used participants from the 1989–1995 cohort of the Australian Longitudinal Study on Women’s Health to recruit respondents for its own study (Melka et al. 2019). Another analysed data from the 2010 and 2013 rounds of the International Tobacco Control Four Country Survey (Yong et al. 2015). PureProfile is known to employ methods that ensure diverse geographical and socio-economic backgrounds in the participants it recruits to the study (Jongenelis, Brennan, et al. 2019). The three studies that used this platform to recruit participants were all contributed to by the same author (to some degree), and furthermore utilised similar statistical analyses and methods (Jongenelis, Brennan, et al. 2019; Jongenelis, Kameron, Rudaizky and Pettigrew 2019; Jongenelis, Kameron, Rudaizky, Slevin, et al. 2019).

The sample sizes of the participants in these studies varied greatly. Three studies had 1,116 participants and one had 1,500 participants, which is relatively low in comparison to the population of young adults in Australia. A study specifically focusing on young Australian women had 8,915 participants, which is significantly greater than other studies, but still not enough to be representative of all young Australians (Melka et al. 2019). The specific states/areas in Australia in which the participants lived was not mentioned in any of the five included studies. This makes it difficult to discern how generalisable these results are to the whole of Australia.

Overall it is clear that there is a severe lack of research in this field. Only one form of data collection (online surveys) has been used in the entirety of the literature and there is a great need for longitudinal studies due to the nature of the topic. This is most likely a result of general public access to e-cigarettes being a somewhat recent event. Additionally, there are no studies observing Indigenous participants. This is important as the rate of smoking among Indigenous individuals is three times greater than that of the general population and it is possible that this may also be true for e-cigarettes (Clough et al. 2018). Additionally, a notable absence in the Australian literature for young adults is the role of flavourings in e-cigarette use (Jongenelis, Kameron, Rudaizky, Slevin, et al. 2019). This is important as studies conducted in the United States have determined that flavourings are a significant reason for e-cigarette use in youth (Ambrose et al. 2015).

### 3.2 Perceptions of e-cigarettes

It is important to understand how e-cigarettes are perceived by young adults in order to discover the potential reasons for usage. In the literature, the perceptions of the harms of e-cigarettes is mixed. A study conducted by Jongenelis, Kameron, Rudaizky, Slevin, et al. (2019) found that 25 per cent of respondents believed that e-cigarettes had no negative health effects and only just over 50 per cent believed that they were addictive. Furthermore, a sizeable portion of participants were unsure whether e-cigarettes were more or less harmful (20–26 per cent) or addictive (20–37 per cent) than cigarettes. Interestingly, the study also found that those who were e-cigarette users were more likely to report that these devices were harmful and addictive than non-users (Jongenelis, Kameron, Rudaizky, Slevin, et al. 2019).

Other studies have found that participants were unsure about their perception of the legality of e-cigarettes (Jongenelis, Kameron, Rudaizky and Pettigrew 2019). One study measuring the responses of participants to various forms of e-cigarette legislation found that 32–58 per cent of respondents chose the ‘neither agree nor disagree’ or ‘I don’t know’ option for the presented statements (Jongenelis, Kameron, Rudaizky and Pettigrew 2019). The greatest amount of support (although only moderate in extent) was for treating e-cigarettes as tobacco products, with nearly a third of respondents agreeing



with this notion (Jongenelis, Kameron, Rudaizky and Pettigrew 2019). It was observed that those who believed e-cigarettes to be more harmful were more likely to support restrictive policies against e-cigarettes. Even though the evidence of e-cigarettes as an aid for smoking cessation is conflicting in the literature, a study conducted by Jongenelis, Kameron, Rudaizky and Pettigrew (2019) found that almost 50 per cent of respondents believed that e-cigarettes could help smokers quit smoking or reduce their intake.

### 3.3 Factors associated with e-cigarette use

Gender was a factor associated with e-cigarette use, with males having overall higher rates of use (Jongenelis, Brennan, et al. 2019; Melka et al. 2019). Jongenelis, Brennan, et al. (2019) found that both male smokers and non-smokers were more likely to use e-cigarettes than their female counterparts.

E-cigarette use was associated with a plethora of factors ranging from financial stability, past cigarette use, alcohol use, and urban residence. A study by Melka et al. (2019) specifically focusing on women found that those who felt that it was difficult to manage their available income were more likely to have used e-cigarettes in the past year than those who felt it was easy to manage their available income. Ex-smokers had a 5 times greater likelihood of using e-cigarettes in the past year and those who currently smoked cigarettes had 10 times higher odds of past-year e-cigarette use when compared to those who were never cigarette smokers (Melka et al. 2019). Furthermore, women who reported consuming unsafe levels of alcohol (drinking greater than two standard drinks on any single day), had a greater probability of using e-cigarettes in the past year than participants who did not (Melka et al. 2019). Results for those who had ever used e-cigarettes further revealed positive correlations with urban residence, binge drinking, and intimate partner violence (Melka et al. 2019).

Age was a factor that was highly correlated with e-cigarette use (Melka et al. 2019; Yong et al. 2015). Awareness of e-cigarette devices was higher in those who were younger than older (Yong et al. 2015). Furthermore, it was found that in both the United Kingdom and Australia, younger people were more likely to have tried e-cigarettes than those who were older (Yong et al. 2015).

### 3.4 Reasons for use

The review of literature revealed mixed evidence around the use of e-cigarettes as devices to help quit smoking. A study focusing on young Australian women found that more than one quarter of individuals who reported using e-cigarettes in the past year and those who had ever used an e-cigarette, had never smoked a cigarette. These results demonstrate that smoking cessation was in no way a reason for use among this population (Melka et al. 2019). Furthermore, Jongenelis, Brennan, et al. (2019) found that only 14 per cent of smokers and 11 per cent of non-smokers reported using e-cigarettes to quit smoking. These statistics show that a clear majority of e-cigarette users are not using the device for the purpose of smoking cessation.

One study found that the most frequent reason for the use of ENDS (electronic nicotine delivery systems) among smokers (23 per cent) and non-smokers (26 per cent) was because it was fun, enjoyable, and/or cool (Jongenelis, Brennan, et al. 2019). These findings are striking as e-cigarettes have the perception of being used as aids to help quit smoking. However, nearly twice as many smokers and non-smokers are using them for enjoyment as opposed to smoking cessation (14 per cent vs 23 per cent among smokers and 11 per cent vs 26 per cent for non-smokers), when comparing the results of the two studies conducted by Jongenelis, Brennan, et al. (2019). Yong et al. (2015) noted the importance of researching the role of flavours in reasons for e-cigarette use. While this is an area widely accepted as a key factor in use of e-cigarettes in the United States and internationally, it was absent in the Australian literature. Overall, the results have demonstrated a lack of studies which have identifying reasons for e-cigarette use within an Australian context.

## 4 Discussion

A key strength of the literature is documentation of the perceptions of e-cigarettes among young adults. Nearly all of the studies reviewed analysed the positions held by young adults on e-cigarette legislation and perceptions of harm that these devices hold (Jongenelis, Brennan, et al. 2019; Jongenelis, Kameron, Rudaizky and Pettigrew 2019; Jongenelis, Kameron, Rudaizky, Slevin, et al. 2019; Romijnders et al. 2018). Moreover, a large portion of young adults in Australia are unsure of the harms of these devices and a significant number oppose restrictive legislation. Jongenelis, Kameron, Rudaizky, Slevin, et al. (2019) found that those who were e-cigarette users were more likely to report that these devices were harmful and addictive than non-users. This suggests that there is a disconnect around the way e-cigarettes are perceived by non-users, as non-users underestimate the real dangers they hold. It is important to understand the perceptions of e-cigarettes among young adults in order to create educational programs and interventions which protect them from the harms of vaping.

There were numerous factors positively associated with e-cigarette use including being male, increased alcohol and cigarette use, lower financial stability, and lower age (Jongenelis, Brennan, et al. 2019; Melka et al. 2019). Further research must be conducted to determine if these factors are causal agents or are just correlated with e-cigarette use. Lower ages and being male are factors that may increase rates of e-cigarette use due to increased risk-taking behaviours (Jongenelis, Brennan, et al. 2019). Cigarette use may correlate with greater e-cigarette use due to individuals utilising them to quit smoking, however this is debated heavily within the literature (Jongenelis, Brennan, et al. 2019).

Originally marketed as tools to quit smoking, smoking cessation is perceived to be a primary factor for their use (Wolfenden et al. 2018). However, the World Health Organization and a multitude of government and health organisations do not endorse this use. This is due to concerns around the evidence for their effectiveness as a cessation aid, safety, and the potential for e-cigarette experimentation in youth to heighten subsequent cigarette use (Wolfenden et al. 2018). The current review of the literature found evidence against the use of e-cigarettes as an aid for smoking cessation, thus supporting this position.

Smoking cessation is believed to be a key reason for use of e-cigarettes; however, the literature opposes this perception. A study specifically focusing on young Australian women found that more than one quarter of individuals who reported using e-cigarettes in the past year and those who had ever used an e-cigarette, had never smoked a cigarette (Melka et al. 2019). Additionally, Jongenelis, Brennan, et al. (2019) found that only 14 per cent of smokers and 11 per cent of non-smokers reported using e-cigarettes to quit smoking. This is in great contrast to the perceptions of young Australian adults of the role of e-cigarettes as smoking cessation devices with Jongenelis, Kameron, Rudaizky, Slevin, et al. (2019) finding that nearly half of all respondents believed that e-cigarettes could help smokers quit smoking or reduce their intake. This suggests that greater action must be taken in informing young adults of the mixed evidence around e-cigarettes and smoking cessation. Furthermore, it was found that e-cigarette use could potentially increase rates of smoking, causing a gateway effect (Soneji et al. 2017). Evidence for this gateway hypothesis is lacking in the current literature; however, a recent meta-analysis of nine longitudinal studies (17,000 participants) discovered that the use of e-cigarettes among non-smokers was correlated with a four times increased odds of past 30-day cigarette use (Soneji et al. 2017). Although this is merely a correlation and was not conducted on young adults, further studies in this area could determine the legitimacy of the gateway hypothesis within Australia. The paper ultimately concluded by stating that strong e-cigarette regulation could lower use among youth and limit the burden of smoking in the future population of young Australian adults (Soneji et al. 2017).

For years, e-cigarette use has been on the rise in young adults in Australia, with flavourings being suspected to be a root cause. In the 2016 National Drug Strategy Household Survey, it was found that 7.1 per cent of young Australian adults had ever used e-cigarettes (Wolfenden et al. 2018). This is a great increase from that reported in 2013 (4.3 per cent) (note that changes in classification of e-cigarettes between surveys make this comparison difficult) (Wolfenden et al. 2018). Youth are especially at risk of using these devices as nicotine e-cigarettes are marketed to young people through the novelty of vaping and the various fluid flavours available (Dai and Hao 2016). Companies have produced a wide range of flavours such as fruits, desserts, and coffee, which resemble familiar treats (Dai and Hao 2016).

A key gap in the current literature is an analysis of the role of flavouring e-cigarette use in Australia (Jongenelis, Kameron, Rudaizky, Slevin, et al. 2019). A study conducted from 2013 to 2014 by Ambrose et al. (2015) discovered that the availability of appealing flavours was the leading reason for e-cigarette use in the United States with 81 per cent of young adult users citing this reason. Therefore, it is important to establish whether flavourings also hold a significant role in use among young adults in Australia.

## 5 Applications

Based on these findings, awareness campaigns communicating the risks and dangers of e-cigarette use can be tailored to young adults, resulting in more effective campaigns. As mentioned, it is clear that a large portion of the population are misinformed and/or unaware of the negative health effects associated with e-cigarette use. If campaigns highlighted the possible risks of nicotine addiction, acute nicotine poisoning, increased risks of cardiovascular events, and the fact that there is unclear evidence supporting e-cigarettes as smoking cessation devices, young adults may be less inclined to initiate or continue e-cigarette use.

## 6 Limitations

A key limitation is the lack of variety in the studies used. There is a clear lack of overall number of studies and furthermore the studies that have been conducted have all used online surveys in order to collect data. This is not ideal, as it does not allow for those who have poor access to the internet to participate. This can result in participation bias, in which participants that possess certain traits become over- or underrepresented in the data. Cigarettes are used in higher rates by those in lower socio-economic classes and this may hold true for e-cigarettes. Thus, individuals who are unable to afford computers or phones and pay for internet may be unable to participate in online surveys. Furthermore, of the five included studies in this review of the literature, three have been conducted by the same team of researchers. In order for results to be valid, they must be reproducible by other groups of researchers in order to overcome potential biases in data collection and analysis. This is especially important for the included studies that used coding of qualitative data.

## 7 Future research

Multiple gaps in the literature were identified. No studies to date within the databases explored have examined the use of e-cigarettes among young Indigenous Australians or the role flavouring plays in reasons for use. Moreover, there is a lack of studies analysing the factors associated with, perceptions of, and reasons for use of e-cigarettes among young Australian adults. More studies must be conducted on the negative health effects associated with e-cigarette use, as this information could prove to be highly useful in creating awareness campaigns. Additionally, the role of flavourings in the use of e-cigarettes among young Australian adults is an important gap in the literature that must be filled.

## 8 Conclusion

This review of the literature into perceptions, factors associated with, and reasons for e-cigarette use among young Australian adults revealed much information. Overall, this population of individuals are unsure of how they feel regarding legislation of e-cigarettes, but are against restrictive regulation. Australian young adults are largely misinformed regarding the efficacy of e-cigarettes as smoking cessation devices, and a portion are unaware of the health risks associated with e-cigarette use. Factors associated with e-cigarette use include being male, alcohol and cigarette use, financial stability, and age. Evidence was found against the use of e-cigarettes in smoking cessation and it was discovered that a large reason for use was enjoyment.

Ultimately, information about e-cigarette use in young adults is necessary to combat misperceptions and educate these individuals on the risks and dangers of e-cigarette use. In the current literature, a gap was identified in the impact of flavouring of e-cigarettes and how this might affect their use by young adults in Australia. For scientists, public health professionals, and regulators, this review provides insight into the use of e-cigarettes among Australian young adults.

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# An implication of cognitive conjointment: From individual to dividual conceptions of self

THOMAS WEIGHT

## Abstract

There is a long tradition of individualism in philosophical conceptions of self. My aim in this paper is to demonstrate that we ought to consider a departure from conceiving of selves in a strictly individual fashion. The extended mind thesis forms the theoretical basis for this claim. This thesis allows for the possibility of cognitive conjointment, wherein two people share (to some degree) cognitive processes. This possibility, so I shall argue, undermines the individualism presupposed by most conceptions of self. Taking the bundle theory of self as my starting point, I demonstrate that cognitive conjointment results in a degree of self conjointment. To account for this possibility, I formulate a dividual conception of self which is compatible with bundle theory and has the added benefit of accounting for cases of ‘split brain’ patients. As cognitive conjointment seems to lead to self conjointment in other theories of self, I suggest that we ought to consider dividual conceptions of self.

## 1 Introduction

The traditional view of cognition as something that occurs solely in the brain is increasingly scrutinised. Many argue that we should not limit our understanding of cognition to the brain because some phenomena indicate that cognising actively (as opposed to passively) implicates non-brain parts of the body. For example, when we gesture, we are not merely expressing ourselves through a non-verbal avenue. Verbal communication often relies on gestures in order to formulate thought and its expression.<sup>1</sup> This implies that cognition is constituted by non-brain parts of the body. Proponents of this school of thought argue that we should have an *embodied* understanding of cognition.

Some take it further. Clark and Chalmers argue that there is a sort of biochauvinistic prejudice built into the logic of embodied cognition.<sup>2</sup> Why, they argue, is there a distinction between the body and its environment? If there are phenomena that indicate that cognising actively occurs outside of the body, why should we restrict our understanding of cognition to the human form? Traditionally, cognitive scientists have acknowledged that cognising can ‘lean heavily’ on various parts of the environment. For instance, parallel distributed processing models of cognising suggest that long multiplication tables function as an important extension for cognising about long multiplication.<sup>3</sup> But proponents of those models fell short of claiming that it played a key *constitutive part* of cognising. Clark and Chalmers presumed they did not do this because of ‘biochauvinistic prejudice’—because traditional cognitive scientists arbitrarily understand cognition to be an embodied phenomena, and long multiplication tables are not a part of the body, they arbitrarily conclude that it cannot be a constitutive part of our cognitive process.<sup>4</sup> To avoid this prejudice, Clark and Chalmers suggested a veil-of-ignorance style test called the parity principle:

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<sup>1</sup> David McNeill, *Hand and mind: What gestures reveal about thought* (Chicago: University of Chicago Press, 1986).

<sup>2</sup> Andy Clark and David Chalmers, ‘The extended mind’, *Analysis* 58, no. 1 (1998): 7–19; Andy Clark, *Mindware: An introduction to the philosophy of cognitive science*, 2nd ed. (Oxford: Oxford University Press, 2014), 195.

<sup>3</sup> James McClelland, David Rumelhart, and Geoffrey Hinton, ‘The appeal of parallel processing’, in *Parallel distributed processing*, vol. 2, ed. James McClelland and David Rumelhart (Cambridge: MIT Press, 1986).

<sup>4</sup> Clark, *Mindware*, 195.

If, as we confront some task, a part of the world functions as a process which, *were it done in the head*, we would have no hesitation in recognizing as part of the cognitive process, then that part of the world *is* (as we claim) part of the cognitive process.<sup>5</sup>

An application of the parity principle to various cases, they contend, suggests that cognising actively occurs outside of the body. From this, they claim that the mind can extend into external physical objects.<sup>6</sup> This is the extended mind thesis (hereafter EMT). In the next section, I shall further explicate the EMT and demonstrate how, in its lights, cognitive conjointment is a distinct possibility. This possibility, and its implications for strictly individual conceptions of the self, is the primary focus of this paper.

## 2 Extended minds and cognitive conjointment

Clark and Chalmers use two cases in their original argument for the EMT.<sup>7</sup> One of them compares Inga, a ‘normal’ person who stores standing beliefs<sup>8</sup> in their memory, and Otto, a person with Alzheimer’s who stores standing beliefs in their notebook.<sup>9</sup> A slight modification to this case brings out the possibility of cognitive conjointment in the lights of the EMT.

Inga hears that there is a good exhibition at the Museum of Modern Art (MoMA), so she develops a desire to go see it. Using her memory, she recalls that MoMA is on 53<sup>rd</sup> street. This now occurrent belief is then combined with her desire to go to MoMA, which leads to her walking to the exhibition. Otto has Alzheimer’s, which means his memory is unreliable. Therefore, Otto always carries on him a little notebook in which he records information. When he needs to remember information, he consults the little notebook. He hears that there is a good exhibition at MoMA, so he also develops a desire to go see it. He consults his notebook, which says that MoMA is on 53<sup>rd</sup> street. This now occurrent belief is combined with his desire to see the exhibition and leads to him walking to the museum.

In this example, Otto’s notebook and Inga’s memory serve a completely analogous function: storing standing beliefs for immediate recall. Per the parity principle, we ought to consider the notebook as a constitutive part of Otto’s cognitive process. Therefore, Clark and Chalmers suggest that this case shows that cognition (and by extension, the mind) can be extended into the world. Extrapolating from this case, they suggest four criteria to govern whether nonbiological candidates should be included in an individual’s standing belief system:

1. That the resource be readily available and typically invoked;
2. That any information thus retrieved should be more or less automatically endorsed. It should not usually be subject to critical scrutiny. It should be deemed about as trustworthy as something retrieved from biological memory;
3. That information contained in the resource should be easily accessible as and when required;
4. That the information in the notebook has been consciously endorsed at some point in the past, and indeed is there as a consequence of this endorsement.<sup>10</sup>

A modification of this case can show how cognitive processes can become shared.

Suppose that Otto has a wife, Matilda. Matilda and Otto were diagnosed with Alzheimer’s at similar times. Because they are married, they decide that rather than having their own notebooks, they will share a notebook. Because they spend almost all of their time together, they store the same standing beliefs in the book. For both of them, the shared notebook could constitute a part of their standing belief system, and so by extension, their cognitive process. It seems it does, for Otto and Matilda’s shared

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<sup>5</sup> Clark and Chalmers, ‘The extended mind’, 8, emphasis original.

<sup>6</sup> Some contest the jump from cognition to mind. In this paper, I shall simply assert that this is a valid move.

<sup>7</sup> Clark and Chalmers, ‘The extended mind’, 7–8, 12–17.

<sup>8</sup> Standing beliefs are beliefs that you are not currently entertaining, but still hold. These stand in contrast to occurrent beliefs, which are beliefs you are currently holding. For instance, you know that you are breathing. This was a standing belief until you read the previous sentence, for it is now occurrent.

<sup>9</sup> Clark and Chalmers, ‘The extended mind’, 12–16.

<sup>10</sup> Clark, *Mindware*, 197.

notebook satisfy all criteria. Firstly, as they are always together and both have Alzheimer's, they have easy access to the notebook and use it often. Secondly, Otto and Matilda consult it without hesitation. Thirdly, they normally keep it in their satchel. When they don't, it is (without fail) in the right bedside drawer. Therefore, it is accessible when required. Finally, they were both diagnosed with Alzheimer's at the same time and their Alzheimer's progresses at the same rate. Their doctor (who they see together) suggested the idea to both of them before the disease began affecting their memory. They endorsed the idea and began recording standing beliefs in the book. Hence, it has been consciously endorsed by both of them at the same point.

Otto and Matilda, in the case just described, have the same notebook as a constitutive part of their cognitive process. This implies that they share parts of their cognitive processes; they have the same standing belief system. Let us call this *cognitive conjointment*. This paper argues that cases of cognitive conjointment suggest that strictly individual conceptions of the self might not be tenable, for cognitive conjointment can lead to, as the next section demonstrates, self conjointment.

### 3 The bundle theory of self

In analytic philosophy,<sup>11</sup> the problem of the self (let us assume that there is indeed one), is concerned with providing an answer to the question 'what is the self?' To put it more formally, the problem is to fill the proposition 'x is y's self if and only if ...' whereby the ellipsis denotes some logically equivalent phrase.<sup>12</sup> In this paper, I take the psychological bundle answer to this question (hereafter bundle theory) as my starting point. The implication of cognitive conjointment for this account is that self conjointment is a distinct possibility.

Bundle theory says that 'we' are comprised of a unified system of mental states: occurrent and standing beliefs, desires, sensations, etc. More specifically, bundle theory says that we are 'our own' mental states. This begets the question, what constitutes 'our own' mental states? The most common answer to this is that:

simultaneous mental states belong to the same subject just when they are in some sense unified. The reason why the mental states of an ordinary human animal are all the thoughts of a single person is that they are unified in the right way. But if they were sufficiently disunified, they might be the thoughts of two different people.<sup>13</sup>

Mental states are unified in the right way if they are disposed to interact with each other. For instance, desires have the characteristic of being disposed to interact with beliefs to create action. Inga's desire to go to MoMA, for example, is disposed to interact with her belief that MoMA is on 53<sup>rd</sup> street, but not with Otto's belief that it is. The bundle view suggests that these mental systems are what constitutes a self. What follows from this is that the number of selves is necessarily equal to the number of unified mental systems. Olson terms this the *psychological individuation* principle.<sup>14</sup>

Now in Otto and Matilda's case, their notebook constitutes a part of both of their mental systems. This is because it stores standing beliefs, and these interact with *both* of their desires to produce action like walking to MoMA. To put it another way, standing beliefs in these notebooks such as 'MoMA is on 53<sup>rd</sup> street' are disposed to interact with *both* Otto *and* Matilda's desires. From this, it follows that their mental systems have become slightly conjointed. Now, this is not to say that their own mental systems are no longer unified—they are. What it means is that Otto and Matilda's mental systems are now (to a degree) unified, and by extension, not entirely disunified. So, the psychological individuation principle seems to suggest that Otto and Matilda are both separate selves, and not. Otto and Matilda are, to a

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<sup>11</sup> I am using this term in a rather broad, and only descriptive, way to refer to that somewhat unified philosophical research program which makes reference to thinkers such as Kant, Quine, Frege, Russell, Rawls, and others.

<sup>12</sup> Eric Olson, 'There is no problem of the self', *The Journal of Consciousness Studies* 5, no. 5–6 (1998): 645–57, reprinted in *Arguing About the Mind*, ed. Brie Gertler and Lawrence Shapiro (London: Routledge, 2007), 263.

<sup>13</sup> Eric Olson, *What are we? A study in personal ontology* (Oxford: Oxford University Press, 2007), 136.

<sup>14</sup> Olson, *What are we?*, 46.

degree, the same self.<sup>15</sup> I will call this arrangement ‘self conjointment’ because they still retain some sense of personal identity.

## 4 Individualism and self conjointment

The strict individualism presupposed by bundle theory does not allow for the possibility of self conjointment. Bundle theory, like most philosophical theories of self, presupposes a certain individualism. Descartes, in his *Meditations*, proposed that the self, the ultimate referent of the term ‘I’, is the foundational cornerstone of philosophical investigation. For him, philosophy ought to begin with an understanding of the self and then progress to an understanding of the world around it.<sup>16</sup> Broadly speaking, the analytic philosophical tradition has accepted this metaphysical thesis. While most have moved past Descartes’ characterisation of the self as *res cogitans*, most accept there is some unified, distinct, individual entity—a self—to which our analyses must make ultimate reference to. As Strawson argues, the self is ordinarily conceived as ‘a single entity’.<sup>17</sup> Correspondingly, contemporary articulations of bundle theory presuppose that the bundle of mental states (or unified mental system as I have characterised it) is only identical with one self.<sup>18</sup>

The possibility of self conjointment is incongruent with this individualism, as elements of Otto and Matilda’s bundle of mental states are identical with two selves. What is the implication of this incongruence? As I see it, there are three possibilities. First, that we ought to adopt a non-individualist bundle theory of self. Second, that we ought to reject bundle theory altogether and adopt another theory of self under which self conjointment does not result from cognitive conjointment. Or third, that we ought to reject the EMT, thereby demonstrating that cognitive conjointment is not, in fact, a possibility. I will investigate the latter two possibilities at a later point (to foreshadow, I do not think they are apt), so I shall assume for the time being that we should neither reject bundle theory nor the EMT and instead formulate a non-individualist bundle theory. As far as I can tell, there is no such conception in the philosophical literature. Therefore, I have turned to the cognate discipline of anthropology to supply the theoretical means to inform such a conception. What I have in mind is a dividual conception of self. The rest of this section shall formulate it and demonstrate its compatibility with bundle theory.

Anthropologists often make a distinction between understanding selves as individual or dividual.<sup>19</sup> In the simplest terms, individuals are indivisible selves while dividu-als are divisible selves. Individuals are self-contained (e.g. unified mental systems in the bundle conception) while dividu-als are comprised of a variety of related but ultimately separable features. A dividual’s self is defined in a relational way: they are ‘frequently constructed as the plural and composite site of the relationships that produce them’.<sup>20</sup> In contrast, an individual’s self is defined in a more voluntary way as they are a more autonomous actor.<sup>21</sup> Anthropologists have traditionally made this distinction to conceptualise

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<sup>15</sup> At this point, I would like to note that this sort of arrangement can occur even without the EMT. For instance, there are cases of conjoined twins who share various pieces of brain structure. These twins therefore have (to various degrees) conjoined cognitive systems. In the psychological bundle account of the self, presumably they too would be considered conjoined selves. In the penultimate section of this paper, I will discuss cases like these and highlight how they vindicate my central thesis: that we should conceptualise selves in a more dividual way. For more on ‘conjoined twinning’, see Julian Savulescu and Ingmar Persson, ‘Conjoined twins: Philosophical problems and ethical challenges’, *The Journal of Medicine and Philosophy* 41, no. 1 (2016): 41–55.

<sup>16</sup> René Descartes, *Meditations on first philosophy with selections from the objections and replies*, trans. Michael Moriarty, Oxford World’s Classics Series (Oxford: Oxford University Press, 2008).

<sup>17</sup> Galen Strawson, ‘The self’, *Journal of Consciousness Studies* 4, no. 5–6 (1997): 412.

<sup>18</sup> For example, Compiani posits a neo naturalist bundle account which holds that the experience of ourselves is identical with all physical objects which constitute the bundle of our experiences. He conceives of this identity relation in singular fashion; he writes, ‘identity is not between a postulated subject and her subjective mental representations, neither between subject and the alleged phenomenal character of experience, or between subject and neural activity, but it is between experiences and the objects of these experiences, they are identical among them because of their immanent relation, their relative existence’. See Lucrezia Compiani, ‘The chimeric self: A neo naturalist bundle theory of the self’, *Frontiers in Psychology* 10, no. 202 (2019): 8.

<sup>19</sup> See Karl Smith, ‘From dividual and individual selves to porous subjects’, *The Australian Journal of Anthropology* 23, no. 1 (2012): 50–64.

<sup>20</sup> See Sabine Hess, ‘Strathern’s Melanesian “dividual” and the Christian “individual”’: A perspective from Vanua Lava, Vanuatu’, *Oceania* 76, no. 3 (2006): 285.

<sup>21</sup> Smith, ‘From dividual and individual selves’, 53.



differences in selfhood between traditional, more socially rigid societies and more modern ones. For those purposes, for a variety of reasons that I will not get into here, it is a problematic distinction.<sup>22</sup> However, to capture how cognitive extension might diffuse the self, it is useful to bring this distinction in, albeit without its social connotations. The dividual conceptualisation of the self that I have in mind is concerned with the same proposition as the original problem of the self—*x* is *y*'s self if and only if ... —but it does not view that identity relation in a monistic way. In the dividual conception, it is perfectly legitimate to fill the proposition *x* is *y*'s and *z*'s self if and only if ... (whereby the ellipsis denotes some logically equivalent phrase).

A dividual understanding of the self is not incompatible with bundle theory. Hume, the theory's original exponent, expressed dissatisfaction with bundle theory. In *Treatise*, he notes that he is unable to give an explanation of what binds together our bundle of mental states:

when I proceed to explain the principle of connexion, which binds them together, and makes us attribute to them a real simplicity and identity; I am sensible, that my account is very defective ... we only *feel* a connexion of thought ... all my hopes vanish, when I come to explain the principles, that unite our successive perceptions in our thought or consciousness. I cannot discover any theory, which gives me satisfaction on this head.<sup>23</sup>

In a sense, Hume is expressing a degree of permissivism about mental experience being disunified. He suspects that our ascription of an individual self to this experience is only a matter of convention. There seems to be no principled reason for *not* ascribing the same mental states to different selves; just as there is no reason that the term 'self' cannot attach to non-human physical entities, there is no reason that a non-human entity cannot attach to a dividual self. The dividual conception of the self, which ascribes the same mental states to different selves, is therefore not, in principle, incompatible with bundle theory. It is therefore a plausible solution to the incongruence of cognitive conjointment and bundle theory. I think it is also a desirable solution as it has the added benefit of accounting for cases of 'split brain' patients.

## 5 Dividuals and split brain patients

Recent neurological research suggests that we might not be able to know how many selves are present in the normal human body.<sup>24</sup> Dissociative identity disorder (DID) is a condition in which a single body appears to be animated by two or more selves.<sup>25</sup> The core phenomenon at play in DID is a lack of connection among conscious states associated with a single body.<sup>26</sup> There is a surgical procedure known as *cerebral commissurotomy* where the corpus callosum (a thick bundle of nerves that connect the two hemispheres of the brain) is cut. In cases where patients have undergone a cerebral commissurotomy, there are mental states which do not interact with each other in a similar way to individuals with DID.<sup>27</sup> For example, a patient looks at the centre of a wide screen whose left half is red, and the right half is blue.<sup>28</sup> On each half are the words 'how many colours can you see?' In this test, the patients would write with both hands, 'Only one'. When the words were changed to read 'Which is the only colour you can see?' with the left hand, patients would write 'Blue', and the right hand, 'Red'. This has to do with the disconnect between the two hemispheres, which are operating independently of each other due to the

<sup>22</sup> See Harri Englund and James Leach, 'Ethnography and the meta-narratives of modernity', *Current Anthropology* 41, no. 2 (2000): 225–48.

<sup>23</sup> David Hume, *A treatise of human nature*, ed. Lewis Selby-Bigge, 2nd ed. (Oxford: Clarendon Press, 1978), 634, emphasis added.

<sup>24</sup> Thomas Nagel, 'Brain bisection and the unity of consciousness', *Synthese* 22, no. 3/4 (1971): 396–413, reprinted in *Arguing about the mind*, ed. Brie Gertler and Lawrence Shapiro (London: Routledge, 2007), 214–28; Derek Parfit, 'Divided minds and the nature of persons', in *Mindwaves*, ed. Colin Blakemore and Susan Greenfield (Blackwell: Oxford, 1987), reprinted in *Arguing about the mind*, ed. Brie Gertler and Lawrence Shapiro (London: Routledge, 2007), 229–36.

<sup>25</sup> MM McAllister, 'Dissociative identity disorder: A literature review', *Journal of Psychiatric and Mental Health Nursing* 7, no. 1 (2000): 25–33.

<sup>26</sup> McAllister, 'Dissociative identity disorder', 26–27.

<sup>27</sup> Nagel, 'Brain bisection and the unity of consciousness', 215.

<sup>28</sup> This example is taken from Parfit, 'Divided minds and the nature of persons', 229.

commissurotomy. Per the principle of psychological individuation, in these cases, there would be two selves inhabiting the one body.

However, when the patients leave the experimental situation, their behavioural disassociation disappears and they function normally.<sup>29</sup> This suggests that mental unity, which is central to the bundle understanding of the self, is not absolute. Rather, our mental systems are only integrated to a greater or lesser degree. And this is even in the case with patients who have a functioning corpus callosum. As Nagel puts it:

The ultimate account of the unity of what we call a single mind consists of an enumeration of the types of functional integration that typify it. We know that these can be eroded in different ways, and to different degrees. [Therefore] the belief that even in their complex version they can be explained by the presence of a numerically single subject is an illusion.<sup>30</sup>

This leads Nagel to conclude that ‘it is possible that the ordinary, simple idea of a single person will come to seem quaint some day, when the complexities of the human control system become clearer’.<sup>31</sup> The EMT suggests that the human control system extends even out of its environment and that the self can be conjoined (at least in the bundle conception). Both of these cases would be accounted for within a dividual conceptualisation of the self.

If the correct implication of cognitive conjointment is that a dividual conceptualisation of the self is required, then cases of cognitive conjointment may require rethinking in many areas of philosophy. For example, most analytic moral thought is underpinned by a relatively strict metaphysical individualism that holds that the ultimate moral subject is the individual; all moral judgements ultimately have to make reference to the individual. In a world of dividuials, it is unclear whether such moral thought is appropriate. These questions are ultimately outside of the remit of this paper but are nonetheless worth considering; a dividual conceptualisation of the self might pose more problems than it solves. Therefore, before we accept this implication, let us consider the alternate implications of cognitive conjointment, that: (a) we ought to reject the EMT, and by extension the possibility of cognitive conjointment; or (b), we ought to adopt another theory of self under which cognitive conjointment does not result in self conjointment. The next two sections shall demonstrate that neither seem apt.

## 6 A defence of the EMT

I do not think the apt implication of Otto and Matilda’s case is that we ought to reject the EMT because, simply put, the EMT is a strong thesis. To demonstrate as such, this section will evaluate the soundness of this thesis using a reconstruction of Clark and Chalmers’s original argument for the EMT in propositional logic by Brie Gertler:

1. ‘What makes some information count as a [standing] belief is the role it plays’ (p. 14).
2. ‘The information in the notebook functions just like [that is, it plays the same role as] the information constituting an ordinary non-occurrent belief’ (p. 13).
3. The information in Otto’s notebook counts as standing beliefs (from (1) and (2)).
4. Otto’s standing beliefs are part of his mind.
5. The information in Otto’s notebook is part of Otto’s mind (from (3) and (4)).
6. Otto’s notebook belongs to the world external to Otto’s skin—that is, the ‘external world’.
7. The mind extends into the world (from (5) and (6)).<sup>32</sup>

In this logically valid reconstruction, (1), (2), and (4) are the potentially objectionable premises as (3) and (5) follow from others and (6) is a given. Therefore, to evaluate the strength of the EMT, I shall, in turn, analyse (1), (2), and (4) below.

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<sup>29</sup> Nagel, ‘Brain bisection and the unity of consciousness’, 222.

<sup>30</sup> Nagel, ‘Brain bisection and the unity of consciousness’, 225.

<sup>31</sup> Nagel, ‘Brain bisection and the unity of consciousness’, 226.

<sup>32</sup> Brie Gertler, ‘Overextending the mind?’, in *Arguing About the Mind*, ed. Brie Gertler and Lawrence Shapiro (New York: Routledge, 2007), 193.

(1) is a functionalist premise; it defines a mental state (i.e. standing beliefs) in terms of its functional role. Rejecting this premise is tantamount to rejecting functionalism. Therefore, the flaw in the EMT could be its functionalist underpinnings. The debate between Clark and Adams and Aizawa on the EMT is largely a debate on this point.<sup>33</sup>

Adams and Aizawa argue that the functional coupling of a physical object with an agent's cognitive process does not mean that that object partially constitutes that agent's cognitive process. Rather than its functional role, they claim that we should look to the nature of that object to determine whether it qualifies as a constitutive part of a cognitive process. They propose that: 'a first essential condition on the cognitive is that cognitive states must involve intrinsic, non-derived content'.<sup>34</sup> Therefore, for a process to be cognitive, it must necessarily involve non-derived content. They claim that Otto's notebook does not involve non-derived content and is therefore not a part of his cognitive process.

Clark counterargues that Adams and Aizawa are missing the point. The point of coupling, he writes, is not to make the object cognitive per se, but rather:

it is intended to make some object, which in and of itself is not usefully (perhaps not even intelligibly) thought of as *either cognitive or noncognitive*, into a *proper part of some cognitive system*, such as a human agent.<sup>35</sup>

In other words, Clark is arguing that functionally speaking, it is still the case that the notebook constitutes a part of Otto's cognitive system, irrespective of whether the notebook itself is cognitive. Therefore, this debate, in large part, reflects Clark's commitment to a functionalist theory of mind and Adam and Aizawa's rejection thereof.

I do not wish to make any substantive contributions to this debate except to say that, on the weight of the literature, rejecting functionalism does not seem like a tenable move. Among other things, rejecting functionalism leads us back to the infamous problem of multiple realizability. Put simply, the problem is that it seems very plausible that the same mental state can be realised by different physical kinds—for example, there seems no principled reason that a robot and a human could not both experience the mental state of pain<sup>36</sup>—so we have to have a conception of mental happenings that accounts for multiple realisation. Functionalism does this quite well.<sup>37</sup> Given that, unless we can account for multiple realisation with some other theory of mind, it seems we ought to accept functionalism.

Consider next (2). Clark and Chalmers's four criteria govern what constitutes a nonbiological standing belief. Under these criteria, the notebook constitutes a nonbiological standing belief. Perhaps these criteria are insufficient, and so (2) is false. Weiskopf argues that the notebook lacks a key feature that is part of the normal functional role of standing beliefs: informational integration. He points out that internal standing beliefs are *automatically revised* in light of new information.<sup>38</sup> While Otto and Matilda might revise the entries in their notebook in this way, this revision is not automatic—that is, it requires deliberation. Therefore, their notebook does not constitute the same functional role as an internal standing belief. However, that is not to say that it *cannot be the case* that a nonbiological entity could fill the same role.

Imagine Ada, an individual in the (cyberpunk) future who decides to have a neural chip implanted in her brain. Suppose that almost everyone has this chip. This chip gives them access to a massive databank of standing beliefs, ranging from locations of certain things to complex mathematical formulas. This

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<sup>33</sup> See Fred Adams and Ken Aizawa, 'Defending the bounds of cognition', in *The extended mind*, ed. Richard Menary (Cambridge, Massachusetts: MIT Press, 2010), 67–80.

<sup>34</sup> Fred Adams and Ken Aizawa, 'The bounds of cognition', *Philosophical Psychology* 14, (2001): 48.

<sup>35</sup> Andy Clark, 'Coupling, constitution, and the cognitive kind: A reply to Adams and Aizawa', in *The extended mind*, ed. Richard Menary (Cambridge, Massachusetts: the MIT Press, 2010), 83.

<sup>36</sup> Some reject this, arguing that there is a strict identity between mental states and physical states such that no one mental state can be realised by a different physical state. See Tom Polger, 'Are sensations still brain processes?', *Philosophical Psychology* 24, no. 1 (2011): 1–21

<sup>37</sup> It is worth noting that in later works, Putnam did use multiple realizability arguments *against* functionalism. This in direct contrast to earlier works where she used multiple realizability to argue *for* functionalism. See Hilary Putnam, *Representation and reality* (Cambridge, Massachusetts: MIT Press, 1988).

<sup>38</sup> Dan Weiskopf, 'Patrolling the mind's boundaries', *Erkenntnis* (1975-) 68, no. 2 (2008): 267–69.

bank is not like the internet; it is a private databank that is updated in light of new information and automatically ensures internal consistency between beliefs. In other words, it is informationally integrated. This bank serves to complement their memory which now no longer has to store banal beliefs. Suppose that this neural chip satisfies Clark and Chalmers's four criteria: Ada has instant access to the bank; she considers it as trustworthy as her memory because she knows it is constantly updated and internally consistent; it is easily accessible because it is implanted in her brain; and she consciously endorsed it when she decided to implant it. Ada, it would seem, has an extended mind. Therefore, what Weiskopf's critique shows is not that nonbiological entities cannot have the same functional role as standing beliefs, but that no nonbiological entities *existing today* can. Presumably, as our technological capacity to offload cognitive processes onto external objects increases, there will be more candidates for mind extension. This suggests that, temporally speaking, cognitive conjointment will become an increasingly distinct possibility.

Consider now (4). To reject it, Gertler suggests that

the internal equivalents of notebook entries and external computing processes—namely, internal standing beliefs and nonconscious cognitive processes—are not, strictly speaking, part of the mind. On this view, the mind is made up entirely of occurrent states and conscious processes.<sup>39</sup>

If Otto and Matilda's standing beliefs do not constitute a part of their mental system, then they are not cognitively conjoint. This would also be true of Ada and her cyberpunk compatriots.

But this seems like a deeply implausible claim: what are standing beliefs, if not part of the mind? Contending that they are not would require an untenable distinction to be drawn between the mind (in Gertler's view, a succession of occurrent states) and whatever the standing beliefs constitute. An analogy will help here. There are five elements to a computer: a primary memory, central processing unit (CPU), a control unit, and input and output units.<sup>40</sup> A computer functions in a similar way to the mind (let us assume), hence it can also be considered as having those five components. Contending that standing beliefs are not a part of the mind would be like saying that a computer is only the CPU, the control unit, and its input/output units. Redefining the notion of a computer to only include those components means the concept of a computer itself has limited use, for such a machine would not work (i.e. compute). Likewise, saying that the mind only consists of occurrent states makes the concept itself almost useless. If desires cannot be combined with standing beliefs, then action cannot happen.

Unless we want to reject functionalism, it would seem that the EMT is sound. Therefore, I do not think we ought to reject this thesis just because it implies that cognitive conjointment may occur; cognitive conjointment may (as Ada's case suggests) become commonplace in the future. The next section shall consider the third possible implication: that we ought to adopt another theory of self.

## 7 Alternative theories of self

This section will consider whether cognitive conjointment will lead to self conjointment in two other prominent theories of self: Dennett's narrative theory, and Zahavi's minimal self. If it does not, perhaps the apt response to Otto and Matilda's case would be to reject bundle theory and opt for whichever theory does not. However, in both theories of self, I suspect cognitive conjointment will lead to self conjointment.

Consider first Dennett's narrative theory of self, which conceives of the self as a 'centre of narrative gravity'.<sup>41</sup> A centre of gravity is an *abstractum*: a theoretical property which helps characterise the behaviour of certain objects. Dennett proposes that the self is a similar, albeit much more complicated, theoretical fiction.<sup>42</sup> As the notion of a 'centre of gravity' was developed to explain the behaviour of

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<sup>39</sup> Gertler, 'Overextending the mind', 202.

<sup>40</sup> I am roughly understanding a computer here as a Von Neumann machine.

<sup>41</sup> Daniel Dennett, 'The self as a centre of narrative gravity', reprinted in *Arguing about the mind*, ed. Brie Gertler and Lawrence Shapiro (London: Routledge, 2007), 237–47.

<sup>42</sup> Dennett, 'The self as a centre of narrative gravity', 238.

certain objects, so too was the notion of the self developed to explain and interpret complicated biological things (let us term them here people). Critically, this is a process of interpersonal and intrapersonal creation, for we have to posit selves to ourselves as well.<sup>43</sup> Essentially, in this narrative account, the self is a story that people tell themselves.

At least initially, this narrative account seems to avoid the problematic implications of cognitive conjointment for strictly individual understandings of the self. If Otto and Matilda are posited *abstractum*, then different stories can be posited for them even if they share some cognitive processes. However, there has to be some material entity that posits the self. In the case of Otto and Matilda, to a degree, they materially constitute each other. Therefore, it is not clear that we can posit different selves for cases of conjointment, for two stories about one conjoined person is explanatorily superfluous. Presumably, this issue becomes more prevalent the more that cognitive processes are offloaded onto objects that are shared by people.

Consider next a minimal account of the self, like the kind advocated by phenomenologists such as Zahavi. Phenomenologists argue that to understand the notion of a self, we have to analyse the structure of conscious experience. There is, phenomenologists claim, a first-person *givenness* in conscious experience. While the content of this experience varies dramatically, one commonality amongst them 'is the quality of mineness'.<sup>44</sup> This, Zahavi argues, 'consequently entails a primitive form of intrinsic self-reference'.<sup>45</sup> This form is what they term the minimal self. That minimal self reflects on and interprets the content of that experience to form a certain identity (let this be termed the reflective self). The reflective self, Zahavi argues, is the self that Dennett's theory refers to, and possibly the self that bundle theory refers to.

Again, at first glance, it seems that such a conception avoids the problematic implications of cognitive conjointment for strictly individual understandings of the self. While Otto's reflective self seems undoubtedly conjoined with Matilda's reflective self, for they both interpret and reflect on a similar standing belief system (i.e. memory), their more minimal selves seemingly remain individualised. However, given that the subject of conscious experience is, if we accept the physicalist thesis, some physical object (or collection thereof), and the EMT shows that physical objects can constitute more than one cognitive system, it is possible that even the minimal self could become conjoined. Ultimately, time will tell whether cognitive processes can be offloaded to such a degree that the minimal self may become conjoined.

## 8 Conclusion

The EMT, a thesis which I have argued is sound (unless we want to reject functionalism, which does not seem tenable), entails a possibility of cognitive conjointment. In this paper, I have analysed the implications of this possibility for our conceptions of self. Taking as a starting point the bundle conception, I have argued that cognitive conjointment implies a degree of self conjointment. Self conjointment is incompatible with the individualism presupposed by bundle theory. To account for the possibility of self conjointment within bundle theory, I formulated a dividual conception of self which is compatible with bundle theory and has the added benefit of accounting for cases of 'split brain' patients. To conclude, I contended that we either ought to consider a dividual conception of self or reject bundle theory. As cognitive conjointment seemingly leads to self conjointment in other theories of self, I propose that we ought to consider a departure from the long-held tradition of individualism in our conceptions of self.

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<sup>43</sup> Dennett, 'The self as a centre of narrative gravity', 238.

<sup>44</sup> Dan Zahavi, 'Self and other: The limits of narrative understanding', in *Narrative and Understanding Persons*, ed. Daniel Hutto, Royal Institute of Philosophy Supplement 60 (Cambridge: Cambridge University Press, 2007), 189.

<sup>45</sup> Zahavi, 'Self and other: The limits of narrative understanding', 191.

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# Treatment of migrant workers in the Middle East: Modern-day slavery?

MANYA SINHA

## Abstract

This article aims to establish that the treatment of migrant workers in the Middle East is a form of modern-day slavery. This area of research has not been written about extensively in academia, thus it is important to address this gap by writing about these lived experiences. Research in this area predominantly focuses on ill-treatment without acknowledging that maltreatment fulfills the criteria of slavery. This essay used a top to bottom societal analysis of academic, social media, and entertainment sources in order to ascertain its findings. This article found empirical and conceptual validity to the claim that treatment of migrant workers in the Middle East is akin to modern-day slavery. This was established through determining that abuse, exploitative working conditions, and denial of freedom are the prevalent forms of maltreatment, which correlate with the criteria that is used to establish slavery. This essay also found that legal and economic vulnerability, as well as racial bias, allow slavery-like practices to continue with impunity in the Middle East. These findings are valuable for the field of social science as they widen the scope of academic discourse on this issue, and shed light on marginalised groups like migrant workers that do not often have their experiences studied.

## Introduction

‘Throw them in the desert’—Hayat Al-Fahad<sup>1</sup>

More slaves exist now than at any other time in history—this fact is startlingly evident when looking at the ill-treatment of migrant workers in the Middle East. The oil boom of the 1970s in the Middle East transformed economies of oil-rich states, increasing the infrastructural demands of the burgeoning economy.<sup>2</sup> The need for a larger labour workforce led to the Middle East relying on foreign migrant workers.<sup>3</sup> As the wealth of these countries increased, this trend for labourers shifted to a demand for luxury domestic services.<sup>4</sup> The globalised world replied to this demand with a huge supply, numbering 54 million foreign domestic workers, entrenching the export of low-paid and unskilled migrant workers into the global economy.<sup>5</sup> While maltreatment of migrant workers is not specific to the Middle East, this exploitation is normalised, institutionalised, and extremely widespread.

This essay argues the treatment of migrant workers in the Middle East is a form of modern-day slavery. While the label ‘slavery’ has a sensationalist element to attract publicity to the issue, it does have conceptual and empirical validity. Firstly, this essay will define slavery and explore its application to migrant workers in the Middle East. Then, it will outline what forms maltreatment takes that warrant the label ‘slavery’. Thirdly, it will show the legal conditions that institutionalise the mistreatment. Finally, it will lay out the economic and, more importantly, racial factors that amplify and enable slavery-adjacent practices to be widespread in society. It will demonstrate this through a top-down

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<sup>1</sup> Emma Day, “‘Put them in the desert’: Kuwaiti actress Hayat Al Fahad under fire for telling expatriates to go home”, *The National*, 2 April 2020, [www.thenational.ae/arts-culture/film/put-them-in-the-desert-kuwaiti-actress-hayat-al-fahad-under-fire-for-telling-expatriates-to-go-home-1.1000595](http://www.thenational.ae/arts-culture/film/put-them-in-the-desert-kuwaiti-actress-hayat-al-fahad-under-fire-for-telling-expatriates-to-go-home-1.1000595).

<sup>2</sup> Maryam Ali Al Beshri, ‘Legalizing intersectionality: Class, race and female migrant workers in Qatar’. Master's thesis, Hamad Bin Khalifa University, 2019, 3.

<sup>3</sup> Al Beshri, ‘Legalising intersectionality’.

<sup>4</sup> Yara Jarallah, ‘Domestic labor in the Gulf countries’, *Journal of Immigrant & Refugee Studies* 7, no. 1 (2009): 3–15.

<sup>5</sup> Phillip Connor, ‘Middle East’s migrant population more than doubles since 2005’, *Pew Research Center*, 18 October 2016.



societal analysis of this issue, through academic sources, social media, and entertainment mediums in the Middle East.

## Slavery

### Definition

The institution of slavery is not a relic harmlessly consigned to history. It has evolved with the needs and demands of modernity and globalisation, entrapping over 27 million people worldwide, more than at any point in history.<sup>6</sup> Modern slavery is present in every facet of our lives; new slavery focuses on vast profits at the cost of cheapening human life. The *1956 United Nations Convention on the Abolition of Slavery* defined slaves as, ‘persons’ whom ... powers attaching the rights of ownerships are exercised’, in such that the ‘slave has no legal rights or freedoms’.<sup>7</sup> The conditions used in identifying slavery consisted of three major aspects, ‘abuse ... threat of violence, restriction of freedom of movement and economic exploitation or exploitative working conditions’.<sup>8</sup> In the Middle East, migrant workers are often working under all three conditions, which is enough to establish their positionality as slaves. The disproportionately poor treatment of migrant workers is exemplified in the Gulf Cooperation Council states, containing 27.7 million people of which migrant workers constitute 10.6 million.<sup>9</sup> In the following paragraphs the elements of abuse, restriction of freedom of movement, and economic and workplace exploitation will be used to establish the empirical validity of the existence of slavery in this context.

While this essay seeks to establish that the label of slavery applies to maltreatment of migrants, it is important to note there have been critiques against the labelling of migrant workers as slaves, due to it enabling the problematic ‘good worker or poor slave’ dichotomy. The label of slavery is said to dominate the public debate in a way that can obscure the actual source of the infringement of workers’ rights.<sup>10</sup> The focus of discourse on ‘the evils of slavery ... victims and villains’ can in actuality ‘hide the ... role that immigration controls and the state’ play in perpetuating slavery.<sup>11</sup> Furthermore, the establishment of slavery in a Middle Eastern context can easily channel latent orientalist narratives of employers as the uncivilised ‘barbaric foreign’ other.<sup>12</sup> Additionally the slavery narrative relies often on the existence of extreme cases of human rights abuses, rather than giving credence to the indignities of more mundane abuses and exploitative work conditions migrant workers are subject to.<sup>13</sup> While this essay acknowledges that the label of slavery can obfuscate these realities and perpetuate orientalist discourse, this essay will attempt to establish the existence of slavery with a focus on institutional issues rather than singular instances of human rights abuses. It will utilise indignities like workplace exploitation and cultural sensitivity in reframing what slavery has the potential to look like.

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<sup>6</sup> Barbara Degorge, ‘Modern day slavery in the United Arab Emirates’, in ‘Modern perspectives on slavery’, ed. Barbara Degorge, special issue, *The European Legacy* 11, no. 6 (2006): 657–66.

<sup>7</sup> Degorge, ‘Modern day slavery’.

<sup>8</sup> Ray Jureidini, ‘Trafficking and contract migrant workers in the Middle East: Trafficking contract migrants’, *International Migration* 48, no. 4 (2010): 142–63; Ray Jureidini and Nayla Moukarbel, ‘Female Sri Lankan domestic workers in Lebanon: A case of “contract slavery”?’ *Journal of Ethnic and Migration Studies* 30, no. 4 (2004): 581–607.

<sup>9</sup> Nasra Shah, ‘Gender and labour migration to the Gulf countries’, *Feminist Review* 77, no. 77 (2004): 183–85.

<sup>10</sup> Bridget Anderson, ‘Migrant domestic workers: Good workers, poor slaves, new connections’, *Social Politics: International Studies in Gender, State & Society* 22, no. 4, (2015): 636–52.

<sup>11</sup> Anderson, ‘Migrant domestic workers’, 644.

<sup>12</sup> Bridget Anderson, *Us and them? The dangerous politics of immigration control* (Oxford: Oxford University Press, 2013), 175.

<sup>13</sup> Anderson, ‘Migrant domestic workers’.

# Maltreatment

## Abuse

The forms of maltreatment affecting migrant workers in the Middle East are varied, depending on race, gender, age, and societal position. Widespread abuse migrants encounter entail violence, rape, beating, and starvation. Between 2001 and 2002, physical beatings, verbal abuse, and food and sleep deprivation experienced by migrant workers rose by 194 per cent.<sup>14</sup> Terms like *Hmara* ('ass') are commonly used to refer to workers.<sup>15</sup> It is reported that one in three do not have enough food, have to ask for permission to eat, and are only fed once a day.<sup>16</sup> Employers install 'locks and alarms on refrigerators that further symbolise the slave-like' living conditions.<sup>17</sup> Although sexual abuse of migrant workers is hard to quantify due to stigma, press coverage purports extensive sexual harassment, groping, rape, and trafficking of housemaids into the sex trade.<sup>18</sup> Perpetrators were predominately male employers, older children, and relatives.<sup>19</sup> In one insidious case, Filipino domestic worker Angelica<sup>20</sup> reportedly,

Hid in the bathroom to escape sexual assault by her male Qatari employer, eventually jumping out ... the window and fracturing her spine. The employer called for help, only after committing a violent sexual assault on her as she lay on the floor bleeding.<sup>21</sup>

## Exploitative conditions

The imposition of exploitative workplace conditions is another aspect of maltreatment, in the form of excessive working hours, wage theft, and inadequate living conditions for live-in workers. On average, workers were subject to no food breaks and disproportionate work duties, with the expectation of 'being on call at all times' and denial of leave.<sup>22</sup> As seminal academic Bales astutely put it, 'the value of slaves lies ... in the volume of work squeezed out of them ... all their waking hours may be turned into working hours'.<sup>23</sup> Additionally, 56 per cent of live-in workers did not have their own quarters, sometimes sleeping on the balcony,<sup>24</sup> and those who did, were seen no different to furniture and permitted no privacy.<sup>25</sup> The issue of economic exploitation runs rampant; 93 per cent of workers were deceived regarding 'salary, hours of work, nature of job, and overtime pay'.<sup>26</sup> Moreover, 60 per cent reported employers withholding or stealing wages, for as long as 'three years', and were often forced to sign false statements about receiving wages to retrieve their passport.<sup>27</sup> This illustrates the utilisation of workplace exploitation as a mechanism for maintaining control over migrant workers.

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<sup>14</sup> Jarallah, 'Domestic labor in the Gulf countries'.

<sup>15</sup> Jureidini and Moukarbel, 'Female Sri Lankan domestic workers in Lebanon'.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid, 600.

<sup>18</sup> Fassil Demissie, 'Ethiopian female domestic workers in the Middle East and Gulf states: An introduction', in 'Ethiopian female domestic workers in the Middle East and Gulf states', ed. Fassil Demissie and Sandra Jackson, special issue, *African and Black Diaspora: An International Journal* 11, no. 1 (2018): 1–5.

<sup>19</sup> Jureidini and Moukarbel, 'Female Sri Lankan domestic workers in Lebanon'.

<sup>20</sup> Given that the perpetrators of slavery were mentioned by name this author feels it is only fair that the victims do not remain nameless.

<sup>21</sup> Amnesty International, *Qatar: 'My sleep is my break': Exploitation of migrant domestic workers in Qatar* (Amnesty International, 2014), 47–49.

<sup>22</sup> Jarallah, 'Domestic labor in the Gulf Countries'; Jureidini and Moukarbel, 'Female Sri Lankan domestic workers in Lebanon'.

<sup>23</sup> Kevin Bales, *Disposable people: New slavery in the global economy*, 3rd ed (California: University of California Press, 2012), 9.

<sup>24</sup> Samantha McCormack, Hacqueline Joudo Larsen and Jana Abul Husn, *The other migrant crisis: Protecting migrant workers against exploitation in the Middle East and North Africa. Protecting Migrant Workers against Exploitation in the Middle East and North Africa* (Geneva: International Organisation For Migration, 2015), 33.

<sup>25</sup> Jureidini and Moukarbel, 'Female Sri Lankan domestic workers in Lebanon'.

<sup>26</sup> Bassina Farbenblum and Justine Nolan, 'The business of migrant worker recruitment: Who has the responsibility and leverage to protect rights?' *Texas International Law Journal* 52, no. 1 (2017): 1.

<sup>27</sup> Jureidini and Moukarbel, 'Female Sri Lankan domestic workers in Lebanon', 602.

## Deprivation of freedom

The final aspect of maltreatment is the abject denial of freedom of movement, using strategies like confiscation of passports and identification documents, deprivation of socialisation, and entrapment in the house, often leading to suicide and death. Most migrant workers are confined to the household, with half being locked in and forbidden to go anywhere without express permission.<sup>28</sup> Furthermore, 84 per cent of workers are barred from visiting friends, resulting in limited social support networks and heightened psychological isolation.<sup>29</sup> Exemplifying this, 72 per cent were prohibited from using a telephone unless ‘supervised’.<sup>30</sup> The phenomenon ‘Balcony Talk’ was devised as a sidestep strategy, with workers taking to balconies of apartments, to glean socialisation with other workers. However, employers locking doors and windows leading to balconies to prevent this is not uncommon.<sup>31</sup> Fasika Sorssa, an Ethiopian worker, highlights the reality of confinement asserting,

I worked like a slave ... and was treated like one. They beat me regularly. The son of Madame tried to rape me several times. They always kept me locked inside. I couldn’t go out for three years.<sup>32</sup>

Her story perfectly illustrates the intersecting backdrop of abuse and isolation workers experience, as well as the insidious alliances between employers and agencies who cultivate these practices. Employers restrict movement through illegal practices of withholding passports and identity documents of employees.<sup>33</sup> More than two thirds of workers have their documents taken.<sup>34</sup> Oftentimes agencies encourage employers, one employer stating, ‘the agency gives us instructions ... lock her in, take her passport’.<sup>35</sup> Agencies often inflict serious abuse on workers sent back: one maid recalled an agent telling her she would die if, ‘[she did] not go back to madame’.<sup>36</sup> Without identity documents, workers cannot escape their employers for fear of arrest, deportation, or beatings by agents. Respite from maltreatment is found only in seeking shelter at embassies or committing suicide. The embassies in Saudi manage thousands of complaints yearly; similarly, Kuwaiti embassies recorded ‘four-hundred Sri-Lankan, eighty Indian and Filipino’, workers seeking refuge from employers.<sup>37</sup>

An illustration of workers seeking refuge in an embassy is the brutal case of 33-year-old Ethiopian female domestic worker Alem, who sought refuge outside the Ethiopian consulate in Beirut.<sup>38</sup> A group of men silently watched and filmed as she was ‘savagely beaten and dragged into a BMW’; this video went viral in 2012.<sup>39</sup> After the incident, Alem’s tormentors were not arrested; instead Alem was admitted into a psychiatric facility, where she ‘committed suicide by hanging herself using ... bedsheets’.<sup>40</sup> Sadly, Alem’s case is just one of many, an estimated suicide occurring every four days<sup>41</sup> and migrant workers recording 12 times higher suicide rates than the national average.<sup>42</sup> This trend is illustrated by ‘jumping syndrome’, a phenomenon where workers attempt escape or suicide by

<sup>28</sup> Ibid; McCormack, Larsen and Husn, ‘The other migrant crisis’.

<sup>29</sup> Jureidini and Moukarbel, ‘Female Sri Lankan domestic workers in Lebanon’; Shah, ‘Gender and labour migration’.

<sup>30</sup> Jureidini and Moukarbel, ‘Female Sri Lankan domestic workers in Lebanon’.

<sup>31</sup> Ibid.

<sup>32</sup> Demissie, ‘Ethiopian female domestic workers in the Middle East and Gulf states’, 4.

<sup>33</sup> McCormack, Larsen and Husn, ‘The other migrant crisis’.

<sup>34</sup> Jureidini and Moukarbel, ‘Female Sri Lankan domestic workers in Lebanon’.

<sup>35</sup> Ibid, 601.

<sup>36</sup> Ibid, 15; McCormack, Larsen and Husn, ‘The other migrant crisis’, 31.

<sup>37</sup> Jarallah, ‘Domestic labor in the Gulf countries’; Shah, ‘Gender and labour migration’, 184.

<sup>38</sup> Demissie, ‘Ethiopian female domestic workers in the Middle East and Gulf states’.

<sup>39</sup> FitsFit, ‘Alem Dechasa kidnapped and dragged into a car’, April 16 2012, YouTube video, 2:30, [www.youtube.com/watch?v=4AqY1tjGllk](http://www.youtube.com/watch?v=4AqY1tjGllk); Demissie, ‘Ethiopian female domestic workers in the Middle East and Gulf states’, 1.

<sup>40</sup> Demissie, ‘Ethiopian female domestic workers in the Middle East and Gulf states’, 1.

<sup>41</sup> Padam Simkhada, Edwin van Teijlingen, Manju Gurung and Sharada P Wasti. ‘A survey of health problems of Nepalese female migrants workers in the Middle-East and Malaysia’, *BMC International Health and Human Rights* 18, no. 1 (2018): 4–7.

<sup>42</sup> Ziad Kronfol, Marwa Saleh and Maha Al-Ghafry, ‘Mental health issues among migrant workers in Gulf Cooperation Council countries: Literature review and case illustrations’, *Asian Journal of Psychiatry* 10 (2014): 109–13; Jarallah, ‘Domestic labor in the Gulf countries’; Shah, ‘Gender and labour migration’.

jumping from balconies.<sup>43</sup> Three serious fractures and 95 deaths a week are attributed to jumping syndrome: 40 of these ruled suicides and 24 considered bids to escape.<sup>44</sup>

Overall, widespread maltreatment affecting migrant workers that fulfills the conceptual requirements of slavery has been established. Migrant workers endure flagrant and widespread abuse in the forms of violence, rape, beating, and starvation. Additionally, migrants face exploitative workplace conditions that subject them to wage theft, excessive workplace hours, and inadequate living conditions. Lastly, deprivation of migrant workers' basic freedom of movement is a pervasive phenomenon. Thus, it is clear the criteria of slavery does apply to the plight of migrant workers.

## Institutionalisation

### Law

Underlying legal instruments and structures, like the Kafala system and illegitimate workers contracts, institutionalise the mistreatment and societal injustice towards migrant workers. The majority population of Gulf states is constituted by migrants, totalling numbers as high as 87 per cent of Qatar, and the lowest totalling 70 per cent in the United Arab Emirates (UAE) and Kuwait.<sup>45</sup> Yet there has been a refusal by legal institutions and labour laws in these countries to reflect and acknowledge this population's existence, due to prevailing 'othering' of migrants, excluding them from adequate protective labour law and thus rendering them susceptible to institutionalised inequity, exploitation, and marginalisation.

A key structure which perpetuates the modalities of injustice is the widespread Kafala (الكفالة) sponsorship system. This system operates in several Middle Eastern countries, namely, 'the Gulf, Jordan, and Lebanon'.<sup>46</sup> Under the Kafala system, the house visa, distributed for domestic jobs, enables a high degree of abuse by the *Kafeel* (sponsor), who assumes control over the worker's physical freedom, labour, and rights as a legal person to authorities.<sup>47</sup> This sponsorship dynamic empowers practices of servitude and slavery. The system ensures that natives have leverage over 'migrant workers to the detriment of their human rights'.<sup>48</sup> These policies create, and in turn exploit, migrants' dependent and volatile immigration status. This system creates 'hidden populations';<sup>49</sup> migrant workers are relegated to the privacy and four walls of their employer's house. Accordingly, the state becomes reluctant to intervene in the private domain, and domestic work becomes excluded from the public domain, remaining unregulated in the labour laws of these countries.<sup>50</sup> Kafala enforces a systemic structural set of circumstances that force migrant workers to accept unfair slave-like working conditions and treatment, and give up their right to 'withdraw their labour from employers without being rendered illegal, liable to arrest or deportation'.<sup>51</sup>

Kafala has come under fervent international criticism. Human Rights Watch, Amnesty International, and the International Labor Organization proposed the Kafala system be changed so that 'the state of Kuwait sponsored ... all foreign workers as opposed to individual sponsors',<sup>52</sup> identifying the vulnerability to exploitation that workers currently face. Similarly, the United Nations Human Rights

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<sup>43</sup> Jarallah, 'Domestic labor in the Gulf countries'.

<sup>44</sup> Jarallah, 'Domestic labor in the Gulf countries'; Demissie, 'Ethiopian female domestic workers in the Middle East and Gulf states'.

<sup>45</sup> David Weissbrodt and Justin Rhodes, 'United Nations treaty body monitoring of migrant workers in the Middle East', *Middle East Law and Governance* 5, no. 1–2 (2013): 71–111.

<sup>46</sup> Weissbrodt and Rhodes, 'United Nations treaty body monitoring of migrant workers in the Middle East'.

<sup>47</sup> Jarallah, 'Domestic labor in the Gulf countries'.

<sup>48</sup> Rooja Bajracharya and Bandita Sijapati, 'The Kafala system and its implications for Nepali domestic workers', Policy Brief 1, Centre for the Study of Labour and Mobility, 2012: 1–16.

<sup>49</sup> Jane Nady Sigmon, 'Combating modern-day slavery: Issues in identifying and assisting victims of human trafficking worldwide', *Victims & Offenders: Controversial and Critical Issues with Crime Victims* 3, no. 2–3 (2008): 248.

<sup>50</sup> Sigmon, 'Combating modern-day slavery'.

<sup>51</sup> Jureidini and Moukarbel, 'Female Sri Lankan domestic workers in Lebanon', 596.

<sup>52</sup> Jarallah, 'Domestic labor in the Gulf countries', 12.

Council has expressed concern, after Qatar was to host the 2022 Football World Cup, that the ‘tournament would be built on the blood of innocents’.<sup>53</sup> The poor publicity associated with the Kafala system led to acceleration of migrant workers’ rights in Qatar,<sup>54</sup> which has kickstarted the recent trend of increasing legal protections throughout the Gulf. Bahrain is the first country to purportedly abolish the Kafala system altogether.<sup>55</sup> Qatar and Kuwait respectively blacklisted hundreds of agencies and four thousand sponsors for ‘severely violating labor laws and abusing workers’.<sup>56</sup>

However, while these changes seem promising, the reality is that these legal measures often do not translate into the execution of justice and often employ tokenistic approaches not comprehensive enough to instil fundamental change in society. Despite these reforms to labour laws, there is a distinct lack of enforcement mechanisms to implement laws, or ensure adherence.<sup>57</sup> It is unclear whether blacklistings result in permanent law-enforced closure of agents and sponsors, as many were reinstated previously.<sup>58</sup> Additionally, there remains judicial reluctance to charge employers and agents, authorities instead preferring to deport migrant workers.<sup>59</sup>

To illustrate the failure of legal reform, in the UAE, Qatar, and Saudi Arabia, wage and rights protections were introduced to create better living and health conditions for workers.<sup>60</sup> In reality, however, the reform has not challenged intrinsic societal inequity; rather, it has been used as a tool to quell international rage and improve public relations.<sup>61</sup> In Saudi Arabia and Qatar, for example, reforms have been criticised for leaving out millions of the most vulnerable workers.<sup>62</sup> For example, in Saudi Arabia, ‘domestic workers, farmers, gardeners and guards’, have all been excluded intentionally in new labour reforms.<sup>63</sup> Gulf society favours the current status quo of exploiting workers due to economic interests, which in turn restricts genuine reforms.<sup>64</sup> The reforms have acted as a distraction from overwhelming policy change, promoting workforce nationalisation with ‘employer subsidy programs, quotas and fees’.<sup>65</sup> These faux reforms do not represent genuine change to migrant workers’ regulations.

Another issue which exemplifies difficulties in legitimating legal protections is the lack of legitimate legal contracts between employer and migrant workers. Although required by law, 71 per cent of workers do not sign a contract.<sup>66</sup> The other 29 per cent sign contracts that are nothing more than ‘legal fictions rather than [being] legally binding’, containing inaccessible language that is only in Arabic.<sup>67</sup> Hence, most are unaware of the terms they sign up to and are easily deceived. Moreover these contracts rarely specify the responsibilities of the employer but instead explicitly outline employee obligations.<sup>68</sup> Once again, the enforceability of these contracts is questionable, and breaches seldom translate into an avenue facilitating legal recourse. Deception regarding the legality of faulty contracts entrenches workers firmly within the category of being trafficked.

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<sup>53</sup> Ben Rumsby, ‘Qatar 2022 World Cup chief claims national government is committed to tackling abuse of migrant workers’, *The Telegraph*, 3 October 2013.

<sup>54</sup> Farbenblum and Nolan, ‘The business of migrant worker recruitment’.

<sup>55</sup> Azfar Khan and Hélène Harroff-Tavel, ‘Reforming the *Kafala*: Challenges and opportunities in moving forward’, *Asian and Pacific Migration Journal* 20, no. 3–4 (2011): 293–313.

<sup>56</sup> Jarallah, ‘Domestic labor in the Gulf countries’, 10.

<sup>57</sup> Al Beshri, ‘Legalising intersectionality’.

<sup>58</sup> Jureidini, ‘Trafficking and contract migrant workers in the Middle East’.

<sup>59</sup> *Ibid.*

<sup>60</sup> Abdoulaye Diop, Trevor Johnston and Kien Trung Le, ‘Reform of the *Kafala* system: A survey experiment from Qatar’, *Journal of Arabian Studies* 5, no. 2 (2015): 116–37.

<sup>61</sup> *Ibid.*

<sup>62</sup> ‘Qatar: Reform efforts fail to remedy rights abuses’, *Human Rights Watch*, 14 January 2020, [www.hrw.org/news/2020/01/14/qatar-reform-efforts-fail-remedy-rights-abuses](http://www.hrw.org/news/2020/01/14/qatar-reform-efforts-fail-remedy-rights-abuses).

<sup>63</sup> Tom Allinson, ‘Saudi “Kafala” labor reforms leave devil in the detail’, *DW*, 7 November 2020, [www.dw.com/en/saudi-kafala-labor-reforms-leave-devil-in-the-detail/a-55511689](http://www.dw.com/en/saudi-kafala-labor-reforms-leave-devil-in-the-detail/a-55511689).

<sup>64</sup> *Ibid.*

<sup>65</sup> Diop, Johnston and Trung Le, ‘Reform of the *Kafala* system’, 120.

<sup>66</sup> Jureidini and Moukarbel, ‘Female Sri Lankan domestic workers in Lebanon’.

<sup>67</sup> *Ibid.*, 583.

<sup>68</sup> Jureidini and Moukarbel, ‘Female Sri Lankan domestic workers in Lebanon’; Jarallah, ‘Domestic labor in the Gulf countries’.

## Amplification in society

### Economic

Sadly, there is no economic motivation for countries to change their market practices and enact permanent legal changes. There is a collective economic interest to not threaten market demand for migrant workers for both labour-sending and labour-receiving countries. Labour-sending countries are confronted with a paradoxical stance between ‘promotion’ and ‘protection’ of their citizens in the face of human rights abuses, as these migrants represent a major source of income that these countries depend on. For example, the remittances of Nepalese and Ethiopian domestic workers make up a quarter to 20 per cent of each country’s total GDP.<sup>69</sup> Economic vulnerability is the decisive factor in enabling slavery to flourish: ‘in the new slavery ... the common denominator is poverty ... adapting an ancient practice to the new global economy ... focusing on weakness, gullibility and deprivation’.<sup>70</sup> The economic vulnerability and poverty domestic workers work to avoid is often the reason they migrate to the Gulf, as they can earn ‘ten times the income level available at home’.<sup>71</sup>

Likewise, the neoliberal economic policies and deregulated privatisation that characterise global labour markets means that the exploitative conditions in domestic work are something countries are not economically incentivised to change, due to fear of stopping market demand. To illustrate this reluctance, the Nepalese ambassador to Qatar was quoted describing the Gulf states as ‘open jails [for migrants]’, yet shortly afterwards backtracked and insisted that ‘Nepalese workers were safe and fully respected [in the Gulf]’.<sup>72</sup> The sending country’s enablement of abusive practices depends on the degree to which states are economically dependent on the stream of income domestic workers bring in. This is evident when looking at countries with stronger approaches to campaigning for rights of their workers, like the Philippines, who have passed explicit regulation such as the *Migrant Workers and Overseas Filipinos Act (1995)*, which states, ‘the state does not promote overseas employment as a means to sustain economic growth and achieve national development’.<sup>73</sup> It is clear that in order to galvanise labour-sending and -receiving countries to truly campaign for the rights of their workers in stopping the perpetuation of slavery-like practices, the allure of profitable market economics must stop having precedence over the sanctity of human life.

### Race

The explosion of topical cases of immense maltreatment heralding from the Middle East and Gulf is not an anomaly, but a manifestation of structural racism. Racial societal stratification and the open espousal of racism by high-profile celebrities towards migrant workers normalise and desensitise maltreatment. Racism is instrumental in generating widespread and pervasive maltreatment of migrant workers in the Middle East. Migrant workers make up an enormous percentage of the labour force of these countries, constituting numbers as high as 90 per cent in Qatar, to the lowest—yet still substantial—56 per cent in Saudi Arabia.<sup>74</sup> This astronomically unbalanced proportion of low-skilled migrant workers to generally high-skilled, white-collar naturalised citizens in the Gulf states has led to an extremely prevalent dependence on migrant workers, yet has also solidified a societal racial hierarchy wherein foreign migrant workers are relegated to positions of subservient slaves.

Indeed, the constructed racialised otherness that instils dehumanising attitudes towards migrant workers can be illustrated through the construction of words like ‘*Sirilankeyeh*’ and ‘*Sri Lanky*’ coming to mean

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<sup>69</sup> Shah, ‘Gender and labour migration’; ‘And still they come: The abuse of migrants’, *The Economist* 411, no. 8883, 19 April 2014, 54; Weissbrodt and Rhodes, ‘United Nations treaty body monitoring of migrant workers in the Middle East’.

<sup>70</sup> Bales, *Disposable people*, 10–11.

<sup>71</sup> Jureidini and Moukarbel, ‘Female Sri Lankan domestic workers in Lebanon’.

<sup>72</sup> ‘And still they come’, 54.

<sup>73</sup> Jarallah, ‘Domestic labor in the Gulf countries’, 11.

<sup>74</sup> Weissbrodt and Rhodes, ‘United Nations treaty body monitoring of migrant workers in the Middle East’.

‘servant’ in colloquial Arabic.<sup>75</sup> Mistreatment stems from normalised racism and xenophobia manifest in entertainment, news, contemporary discourse, and social media content being produced in the region, which reproduces racist beliefs about the perceived inferiority of workers. Often there is an overt racist fear of ‘contamination from the bodies of these others’: workers are asked to wash their clothes separately, they are fed only ‘left overs’, and are told to ‘scrub the whole bathroom down with anti-bacterial products if they dare using shower or toilet amenities at their employers’ house’.<sup>76</sup> The racist fear of ‘contamination’ by migrant workers often extends beyond the physicality of their bodies to the realm of their religion, language, and customs.<sup>77</sup>

This phenomenon is illustrated in the rap song by Saudi entertainment network Telfaz11, titled ‘Sponsor’ (كفيل).<sup>78</sup> The song puts a comedic spin on the abuse migrant workers face in Saudi. The video focuses on South Asian workers in a construction site passionately rapping about the racialised slave status imposed on them by society. The lyrics point out the ironic co-dependent relationship shared by Gulf society and the migrant workers they dearly need yet detest: ‘If I leave you won’t survive ... who does everything in Saudi ... who built the infrastructure? ... then you say “bengalis are low-class”’.<sup>79</sup> The video ends with a worker exclaiming, ‘I do my sponsor’s work ... then ... get deported, I’m not afraid of my sponsor! The Saudis keep making me more of a slave!’<sup>80</sup> This paradoxical reliance yet racialised detestation migrant workers face is succinctly explored in the music video, amassing over 13 million views and garnering mass support.

Conversely, however, dehumanised racialised mistreatment of migrant workers is so normalised that Gulf celebrities openly publish their disapproval of policies preventing the abuse of workers. A popular Kuwaiti Instagram influencer, Sondos Al-Qattan, in an infamous viral video espoused her disapproval of new Kuwaiti laws that ensured better working conditions for Filipino domestic workers, ranting:

How can ... a servant ... keeps their own passport? What’s worse is they have one day off every week! If they run away and go back to their country, who will refund me? I disagree with this law. I don’t want a Filipino maid any more.<sup>81</sup>

Migrante International, an advocacy group for workers, compared Al-Qattan’s words to, ‘a slave owner clinging to [an] outlook which ... belong[ed] to the dark ages’.<sup>82</sup> Al-Qattan confidently claimed ‘criticism of her position was akin to an attack on Kuwaiti society itself’.<sup>83</sup> Al-Qattan’s comments underline and illustrate the existence of a preferential racial hierarchy for migrant workers, with Filipino workers often commanding the highest monthly salary at ‘\$350’ in comparison to the market rate of US\$100–150 for Ethiopians and Sri Lankans, as racist beliefs deem Filipinos have superior levels of ‘cleanliness, trustworthiness and are more civilised than the other races’.<sup>84</sup>

The disposable nature of migrant workers was similarly illustrated in the wake of the COVID pandemic when Hayat Al-Fahad, the supposed ‘Meryl Streep of the Gulf’,<sup>85</sup> declared in a television interview that Kuwait was fed up with the foreign workers who comprise two thirds of the population and advocated for ‘throwing them in the desert’.<sup>86</sup> These videos caused an international media storm, with talk shows,

<sup>75</sup> Jureidini and Moukarbel, ‘Female Sri Lankan domestic workers in Lebanon’; Jarallah, ‘Domestic labor in the Gulf countries’.

<sup>76</sup> Jureidini and Moukarbel, ‘Female Sri Lankan domestic workers in Lebanon’, 586.

<sup>77</sup> Jarallah, ‘Domestic labor in the Gulf countries’.

<sup>78</sup> Telfaz11, ‘الجسر | عبدالخالق - كفيل’, 24 February 2015, YouTube video, 3:05, [www.youtube.com/watch?v=J7MHRRcHah0&feature=emb\\_title](http://www.youtube.com/watch?v=J7MHRRcHah0&feature=emb_title).

<sup>79</sup> Telfaz11, ‘الجسر | عبدالخالق - كفيل’.

<sup>80</sup> Ibid.

<sup>81</sup> Guardian News, ‘Kuwaiti Instagram influencer causes uproar with comments on Filipino “servants”’, 23 July 2018, YouTube video, 0:18, [youtu.be/SjPwAiG0rJY](http://youtu.be/SjPwAiG0rJY).

<sup>82</sup> ‘Kuwaiti star faces backlash over Filipino worker comments’, *Yerepouni Daily News*, 2018.

<sup>83</sup> Punna Munyal, ‘Sondos Al Qattan says criticism of her is akin to attack on Kuwait and the hijab in latest video’, *The National*, 26 July 2018.

<sup>84</sup> Patrick Ireland, ‘The limits of sending-state power: The Philippines, Sri Lanka, and female migrant domestic workers’, *International Political Science Review* 39, no. 3 (2018): 344.

<sup>85</sup> Tamara Abueish, ‘Coronavirus: The fall of the Gulf’s own Meryl Streep who called for a ban on expats’, *Al Arabiya News*, 1 April 2020.

<sup>86</sup> ‘Covid in the camps’, *The Economist* 435, no. 9191, 25 April 2020: 41–42.

press, and news outlets covering the incident, and many Kuwaitis and non-Kuwaitis taking to the internet to denounce both celebrities and criticise their stances. However, contrary to these efforts, some defended their position. One popular Emirati YouTuber in particular posited:

Did [al-Hayat] mean Egyptians? Of course not. Do you expect in Saudi, Kuwait or UAE, we would equate ... an Indian worker with [one] from any ... Arab country? God Forbid!<sup>87</sup>

The intrinsic security in the Gulf's systematic structural racism is evidently what empowers these celebrities to publicly advocate for the mistreatment of migrant workers.

In contrast, *The Joe Show*, a topical Egyptian talk show, exemplified the wider and more complex positionality of non-Gulf states on the treatment of migrant workers. The host ironically thanked the YouTuber for the shoutout to Egypt, but implied his specified hatred towards non-Arabs was worse than al-Hayat's own more generalised hatred of foreign migrants.<sup>88</sup> Sadly, maltreatment of migrant workers rooted in systemic racism ultimately remains characteristic of Gulf society. The flagrant racism responsible for normalisation of slave-like treatment of migrant workers is an attitude that pervades deep into Gulf society, as evidenced from the wide range of media examined above.

## Conclusion

In summary, this essay has argued that the treatment of migrant workers in the Middle East meets the requirements of abuse, exploitative work conditions, and denial of freedom. This establishes their treatment as warranting the label of modern-day slavery. Lack of legal recourse, economic vulnerability, and racial bias foster dehumanisation and set the stage for slavery-like treatment and practices to proliferate. This issue is mammoth and continues to operate with relative impunity in many countries. This essay recommends governments, advocacy groups, and civil society work to end these practices through heightened legal and economic protections. There should be increased international pressure from multinational corporations, organisations, and countries which profit from immigrant labour in the Middle East. International awareness and public outcry would help to dismantle the Kafala system which institutionalises the systematic exploitation of migrant workers in the Middle East, in turn ending this form of modern-day slavery.

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<sup>87</sup> Middle East Eye, 'UAE vlogger arrested for "racist remarks" against Indian, Bengali migrants', 17 April 2020, YouTube video, 2:23, [www.youtube.com/watch?v=7IUZCUBUhtM&feature=youtu.be](https://www.youtube.com/watch?v=7IUZCUBUhtM&feature=youtu.be).

<sup>88</sup> Best of *The Joe Show*, 'جو شو - حياة الفهد', 12 April 2020, YouTube video, 13:04, [www.youtube.com/watch?v=DnAh7zwJrCc](https://www.youtube.com/watch?v=DnAh7zwJrCc) [video unavailable].



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# The Middle East and North Africa's natural resource curse: A causal nexus between oil and conflict

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## Abstract

The effects of natural resource wealth on conflict in the Middle East and North Africa (MENA) region is explained through resource curse theory. The resource curse theory posits a relationship between non-renewable natural resource wealth and multiple issues, including conflict, authoritarianism, decreased economic stability, and economic growth. The aim of this paper is to test a specific part of the resource curse theory, the relationship between hydrocarbon wealth and conflict. The validity of this theory is tested through the use of a framework of causal analysis proposed by Kellstedt and Whitten. Using the case studies of Khuzestan, the Iran–Iraq War, Libya, Tunisia, Norway, and Qatar, each hurdle within the framework of causal analysis puts the resource curse theory through a rigorous test. The use of Kellstedt and Whitten's framework will allow for a qualitative analysis of the resource curse theory, revealing a causal relationship between hydrocarbon wealth and conflict. Establishing this causality will be paramount in the discussion of relevant reforms in the region to prevent the onset of future conflict. The crux of this paper is that if confounding variables like pre-existing strong governing institutions and equitable resource rent distribution are controlled, there exists a causal relationship between hydrocarbon wealth and violent conflict. The effect of the aforementioned confounding variables on the causal relationship between hydrocarbon wealth and conflict was identified during the examination of oil-exporting countries such as Norway and Qatar.

## 1 Introduction

Natural resource endowment has characterised the political economy of the Middle East and North Africa (MENA) region throughout the twentieth century. It is the aim of this paper to address the hypothesis that an abundance of hydrocarbon wealth leads to violent conflict and popular unrest in the MENA region. Wherein, hydrocarbon wealth is identified as an independent variable and violent conflict as a dependent variable. In order to examine causality, this paper will utilise the following framework proposed by Kellstedt and Whitten:<sup>1</sup>

8. Is there a credible causal mechanism that connects the two variables?
9. Can the possibility of reverse causality be overcome?
10. Is there covariation between the two variables? and
11. Has the analysis controlled for all confounding variables that might make the association between the two variables spurious?

Each step in the framework will be examined through various case studies, including Khuzestan, the Iran–Iraq War, Libya, Tunisia, Norway, and Qatar. Applying Kellstedt and Whitten's framework to this paper's hypothesis will reveal that an abundance of hydrocarbon wealth has certainly been a contributory factor towards instability in the region, if other confounding variables are controlled. Ultimately, this paper will aim to address the hypothesis in a multivariate format, wherein it implies that the dependent variable of this hypothesis can ultimately be caused by more than one factor.

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<sup>1</sup> Paul M Kellstedt and Guy D Whitten, *The fundamentals of political science research*, 2nd ed. (Cambridge: Cambridge University Press, 2013), 54.

## 2 Evaluating the causality between non-renewable resource abundance and conflict

To analyse the association between oil and conflict, hydrocarbon wealth and the frequency of conflict are identified as the independent and dependent variables, respectively. Controlling these variables will yield whether they are indeed related.

### 2.1 Is there a credible causal mechanism that connects the two variables?

This section will explore how an allocative governance apparatus can encourage violence if the resource rents are not equitably distributed back to the population. The case studies of Khuzestan and the Iran–Iraq War will be used to examine whether the distribution of oil rents is a credible causal mechanism that connects the variables of hydrocarbon wealth and conflict.

According to rentier state theory, natural resource wealth is a key determinant in the type of governance apparatus a state seeks to implement. Resource-poor countries focus on extracting revenue from their constituencies through taxation, referred to as an extractive governance apparatus.<sup>2</sup> Contrarily, states dependent on resource rents focus on allocating them back to their constituencies, in exchange for quiescence and loyalty.<sup>3</sup> This is referred to as an allocative governance apparatus.

Inequitable distribution of rents from ‘lootable’ resources (resources that attract unscrupulous actors) such as oil incentivise non-state actors to engage in armed rebellion in order to seize a significant source of wealth.<sup>4</sup> As Lay and Basedau argue, ‘oil production ... is often associated with drastic negative externalities for the resident population’,<sup>5</sup> through the immense environmental pollution and large-scale land expropriation it causes. According to Nicholson and Snyder, a negative externality is the negative ‘effect of one party’s economic activities on another party that is not taken into account by the price system’.<sup>6</sup> Additionally, extracting hydrocarbons does not reward the local population with employment, since it is not a labour-intensive industry, further contributing to the greed of rebellious non-state actors.<sup>7</sup> Therefore, if the local population is not equitably compensated through rents for the negative externalities they face, this will incentivise popular unrest and secessionist movements in that region, as will be illustrated through the case study below.<sup>8</sup>

The Khuzestan separatist movement in Iran is a real-life example of why disproportionate distribution of oil rents to oil-producing regions can lead to popular unrest.<sup>9</sup> Khuzestan houses approximately 6 per cent of Iran’s total population (including most of the country’s Arab minority) and almost all of its oil and natural gas reserves.<sup>10</sup> Khuzestan’s vast oil reserves acted as a ‘honeypot’, attracting not only non-state actors but also their neighbour Iraq, precipitating the Iran–Iraq War.<sup>11</sup> Saddam Hussein’s goal of establishing Iraq as a ‘regional superpower’ required him to take control of Khuzestan, to liberate the Arabs from Persian rule, and to administer one of Iran’s most economically lucrative regions.<sup>12</sup>

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<sup>2</sup> Giacomo Luciani, ‘Oil and political economy in the international relations of the Middle East’, *International Relations of the Middle East*, ed. Louise Fawcett (Oxford: University of Oxford Press, 2005).

<sup>3</sup> *Ibid.*

<sup>4</sup> Matthias Basedau and Jann Lay, ‘Resource curse or rentier peace? The ambiguous effects of oil wealth and oil dependence on violent conflict’, *Journal of Peace Research*, no. 6 (2009): 757–76.

<sup>5</sup> *Ibid.*, 368.

<sup>6</sup> Walter Nicholson and Christopher Snyder, *Intermediate microeconomics and its applications* (Boston: Cengage Learning, 2015), 325.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> Nigel Ashton and Bryan Gibson, *The Iran–Iraq War: New international perspectives*, Cold War History (New York: Routledge, 2012).

<sup>10</sup> Amir Ahmadi Arian, ‘Iran’s government cannot afford to ignore Khuzestan anymore’, *Al Jazeera*, 9 December 2018, [www.aljazeera.com/indepth/opinion/iran-government-afford-ignore-khuzestan-anymore-181207133849863.html](http://www.aljazeera.com/indepth/opinion/iran-government-afford-ignore-khuzestan-anymore-181207133849863.html).

<sup>11</sup> Will D Swearingen, ‘Geopolitical origins of the Iran–Iraq War’, *Geographical Review*, no. 4 (1988): 405–16.

<sup>12</sup> *Ibid.*

Consequently, this put Khuzestan at the forefront of a violent conflict between the Arabs and the Persians, damaging critical infrastructure in the region.<sup>13</sup>

Another negative externality imposed upon Khuzestan by its hydrocarbon wealth is pollution; it is currently 'Iran's most polluted state'.<sup>14</sup> This polluted, war-torn region has also been largely neglected by Tehran since the war, contributing to Khuzestan's poor economic performance. According to the Statistical Centre of Iran, Khuzestan's unemployment rate in 2016 was around 13 per cent, ranking fourth highest in the country at that time.<sup>15</sup> To further illustrate the asymmetric nature of provincial development in Iran, Pourfaraj et al. use the Theil index:<sup>16</sup> the Theil index is used to measure economic inequality, measuring the distance of the population from perfect equality.<sup>17</sup> In the case of Khuzestan, it is the furthest away from perfect equality relative to every other province, making it the most economically unequal province in the country. This demonstrates a failure of Tehran's allocative apparatus, wherein inequitable distribution of oil rents in Khuzestan has stimulated popular unrest among those that fail to be compensated for the negative externalities imposed on them.

Therefore, there exists a credible causal mechanism that connects hydrocarbon wealth and conflict, if 'oil is extracted in the settlement area of territorially concentrated ethnic groups'<sup>18</sup> that are not equitably compensated. Distribution of oil rents becomes the causal mechanism linking the prevalence of hydrocarbons with conflict. The first of the four hurdles to establishing causality has been surmounted. Now that a causal link has been established between the two variables, reverse causality will be explored in the next section, which is the next step towards examining the causal relationship between hydrocarbon wealth and violent conflict.

## 2.2 Can the possibility of reverse causality be overcome?

This section will explore whether the causal arrow associating hydrocarbon wealth with conflict can be reversed. Does conflict cause more (or less) oil production in the MENA region? Investors in general are very risk-averse to the prevalence of violence, hence 'the mere anticipation of conflict may deter prospective investors from financing oil exploration and extraction projects'.<sup>19</sup> This undermines the validity of the idea that hydrocarbon wealth leads to more violence because conflict-prone countries will consequently have less oil production. During the Iran–Iraq War, for example, oil production in both countries declined significantly.<sup>20</sup> A more recent example of this mechanism comes from events in Libya.

As a result of the conflict that ensued to oust Muammar al-Qaddafi, Libya's hydrocarbon production reduced drastically.<sup>21</sup> The 42-year reign of the al-Qaddafi regime hindered the development of Libya's public sector institutions. This is because Colonel al-Qaddafi espoused his ideology of 'Jamahiriya', a political philosophy wherein direct popular rule by the ruler is preferred over republicanism.<sup>22</sup> According to Boduszyński, this led to the creation of a country where the only encompassing governing 'institution' was Colonel al-Qaddafi himself and his clutch of advisers.<sup>23</sup> This ensured Libya's development as a 'weak' state, with constant conflict between warring tribes and factions in the

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Statistical Centre of Iran, 'Khuzestan', (Tehran, 2019), [www.amar.org.ir/english/Iran-at-a-glance/Khuzestan](http://www.amar.org.ir/english/Iran-at-a-glance/Khuzestan) (accessed 21 September 2019).

<sup>16</sup> Alireza Pourfaraj, Nader Mehregan, Saeed Karimi Potanlar and Mohammad Reza Eskandariata, 'Regional inequality in Iran and the impact of economic factors: A spatial econometric approach', *Iran Economic Review*, no. 2 (2019): 1–23.

<sup>17</sup> United States Census Bureau, 'Theil index', *Census.gov*, 24 May 2016 (Washington DC, 2019), [www.census.gov/topics/income-poverty/income-inequality/about/metrics/theil-index.html](http://www.census.gov/topics/income-poverty/income-inequality/about/metrics/theil-index.html).

<sup>18</sup> Philipp Hunziker and Lars-Erik Cederman, 'No extraction without representation: The ethno-regional oil curse and secessionist conflict', *Journal of Peace Research*, no. 3 (2017): 367–69.

<sup>19</sup> Ibid., 366.

<sup>20</sup> Ashton and Gibson, *The Iran–Iraq War*, 76.

<sup>21</sup> Toni Johnson, 'Oil's trouble spots', *Council on Foreign Relations*, 20 January 2012, [www.cfr.org/backgrounder/oils-trouble-spots](http://www.cfr.org/backgrounder/oils-trouble-spots).

<sup>22</sup> Mieczysław P Boduszyński and Duncan Pickard, 'Tracking the "Arab Spring": Libya starts from scratch', *Journal of Democracy*, no. 4 (2013): 86–96.

<sup>23</sup> Ibid.

country.<sup>24</sup> Paradoxically, the power vacuum left by the demise of Colonel al-Qaddafi has since maintained conflict in the country, as new leaders compete for power.<sup>25</sup> According to Reuters, before al-Qaddafi's demise, Libya was pumping more than 1.6 million barrels of oil per day.<sup>26</sup> In February 2018, seven years after al-Qaddafi's death, the country was producing around 1.28 million barrels per day, representing a 20 per cent decline in oil production.<sup>27</sup> Therefore, the constant presence of conflict in the post-al-Qaddafi era in Libya has deterred oil production in the region.

Production generally reduces during conflict due to the 'honeypot effect'; rebels and other actors are incentivised to capture oil fields to attain the source of the state's wealth.<sup>28</sup> According to Reuters, non-state actors in Libya have exercised their desire to control oil fields. Through control, these groups are able to threaten production cuts as bargaining chips to press financial and political demands, which negatively affected Libya's overall supply of oil.<sup>29</sup> Therefore, the presence of this phenomenon prevents the omission of reverse causality. This is because the presence (or possibility) of conflict can consequently affect the level of oil production. While this weakens the relationship between hydrocarbon abundance and conflict, the relationship between the two variables still cannot be discounted. The third hurdle to establishing causality can still be examined, while maintaining the possibility that the 'causal arrow might be reversed'.<sup>30</sup>

### 2.3 Is there covariation between the two variables?

This section will examine the covariation between hydrocarbon abundance and conflict. Covariance examines the interdependent relationship between two random variables.<sup>31</sup> In simpler terms, this section will consider whether there is a simple association/correlation between hydrocarbon wealth and violent conflict.<sup>32</sup> To examine this relationship, the independent variable (hydrocarbon wealth) will be controlled. This will reveal any changes that occur in the dependent variable (conflict) as a result of controlling the independent variable. The aforementioned case study of Khuzestan already demonstrates a region where an increased incidence of hydrocarbons leads to more conflict. For this relationship to be reaffirmed, lowering the amount of the independent variable (hydrocarbons) should consequently yield a lower incidence of conflict in another case study as well. Therefore, the case study of Tunisia will be explored.

Citizens of countries with little or no oil, such as Tunisia, still face an increased incidence of conflict.<sup>33</sup> According to Hinds, 'Tunisia was the first Arab country in modern history to overthrow its government',<sup>34</sup> which subsequently instigated the Arab Spring. Many factors contributed to this popular unrest, but the most significant were socio-economic indicators: 'high rates of unemployment and a slowdown of the economy have led to economic suffering and contributed to the growing antagonism toward the government'.<sup>35</sup> According to the World Bank, the Tunisian gross domestic product (GDP) had stagnated around US\$45 billion since the global financial crisis in 2008, reaffirming the aforementioned quote by Hinds.<sup>36</sup>

Furthermore, the period when Tunisia recorded its highest unemployment rate of 18 per cent also coincided with the Arab Spring in 2011, providing further reaffirmation to the socio-economic

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Aidan Lewis, 'How unstable is Libya's oil production?' *Reuters*, 17 July 2018, [www.reuters.com/article/us-libya-oil-explainer/how-unstable-is-libyas-oil-production-idUSKBN1K61Y6](http://www.reuters.com/article/us-libya-oil-explainer/how-unstable-is-libyas-oil-production-idUSKBN1K61Y6).

<sup>27</sup> Ibid.

<sup>28</sup> Silje Aslaksen, 'Oil and democracy: More than a cross-country correlation?' *Journal of Peace Research*, no. 4 (2010): 422.

<sup>29</sup> Lewis, 'How unstable is Libya's oil production?'

<sup>30</sup> Kellstedt and Whitten, *The fundamentals of political science research*, 55.

<sup>31</sup> Ibid., 56.

<sup>32</sup> Ibid.

<sup>33</sup> Michael L. Ross, 'Will oil drown the Arab Spring? Democracy and the resource curse', *Foreign Affairs*, no. 5 (2011).

<sup>34</sup> Róisín Hinds, 'Conflict analysis of Tunisia', (Birmingham, UK: GSDRC, University of Birmingham, 2014), 5.

<sup>35</sup> Ibid.

<sup>36</sup> The World Bank, 'Tunisia', *The World Bank*, [data.worldbank.org/country/tunisia](http://data.worldbank.org/country/tunisia) (accessed 23 September 2019).

argument.<sup>37</sup> Therefore, despite Tunisia's relatively low resource wealth, it still suffers from the resource curse. This contradictory case study demonstrates that while there is an association between an abundance of hydrocarbons and conflict, there exists no significant covariation between the two variables. Since altering the level of hydrocarbon wealth yields different results for conflict, confounding variables will be explored in the next section.

## 2.4 Has the analysis controlled for all confounding variables that might make the association between the two variables spurious?

In identifying confounding variables, this section will ascribe to Waldner and Smith's heterodox school of thought on conditionality in the resource curse.<sup>38</sup> According to Herb, 'the heterodox view holds that rents have a mediated (or conditional) effect on outcomes'.<sup>39</sup> A confounding variable is defined by Kellstedt and Whitten to have an effect on both the independent and dependent variables.<sup>40</sup> As such, this section will explore any such third variables that might make the bivariate causal relationship between hydrocarbon wealth and violent conflict spurious.

On analysing these conditional effects on the outcomes of the resource curse under the heterodox school of thought, Herb asserts that:

the usual assumption, when analysing the political and economic consequences of rent wealth, is to suppose that the consequences are monotonic: an increase in rentierism (however measured) results in an increase in authoritarianism or economic stagnation. Rents, however, might better be thought of as having a conjunctural causal impact. That is, rents in conjunction with one variable may cause one outcome, but in combination with another variable may cause an entirely different outcome.<sup>41</sup>

The confounding variable that will be examined in this section is the type of pre-existing institution in the country, before the discovery of immense hydrocarbon wealth.

To illustrate how pre-existing institutions affect the incidence of conflict in oil-rich regions, the case study of Norway will be explored. Norway is one of the largest exporters of oil in the world, yet it is relatively peaceful. This poses a challenge to the hypothesis of this paper. According to the Institute for Economics and Peace, Norway ranks 20<sup>th</sup> out of 163 countries in the Global Peace Index (GPI), compared to Iran's GPI rank of 139, Iraq's rank of 159, and Libya's rank of 156.<sup>42</sup> In fact, the MENA region, responsible for a majority of the world's oil production is 'the world's least peaceful area'.<sup>43</sup> Furthermore, despite Norway's immense hydrocarbon wealth, it has maintained extractive institutions (taxing the population) in the country. According to the Economist Intelligence Unit's (EIU) democracy index, Norway has maintained the most robust democracy in the world, scoring a 9.87 out of 10.<sup>44</sup> Contrarily, the MENA region on average scored 3.54 out of 10, which makes it the least democratic region in the world.<sup>45</sup> These indices demonstrate how Norway has remained relatively unscathed by the effects of the resource curse, unlike its oil-exporting peers in the MENA region.

To justify the absence of the resource curse in some countries, Herb asserts that the 'resource curse does not operate in countries which had well-developed political institutions before exporting oil'.<sup>46</sup> This implies that rents in conjunction with well-developed, democratic political institutions will yield a peaceful outcome. However, rents in conjunction with undemocratic institutions will not yield a

<sup>37</sup> The National Institute of Statistics (Tunisia), 'Employment', [www.ins.tn/en/themes/emploi#1909](http://www.ins.tn/en/themes/emploi#1909) (accessed 23 September 2019).

<sup>38</sup> David Waldner and Benjamin Smith, 'Rentier states and state transformations', in Stephan Leibfried et al. (eds), *The Oxford handbook of transformations of the state* (Oxford: Oxford University Press, 2015), 714.

<sup>39</sup> Michael Herb, *Ontology and methodology in the study of the resource curse* (London: London School of Economics Kuwait Programme, 2017), 7.

<sup>40</sup> Kellstedt and Whitten, *The fundamentals of political science research*, 63.

<sup>41</sup> Michael Herb, *The wages of oil: Parliaments and economic development in Kuwait and the UAE* (Ithaca: Cornell University Press, 2014).

<sup>42</sup> Institute for Economics and Peace, *Global Peace Index 2018: Measuring peace in a complex world* (Sydney, 2018).

<sup>43</sup> *Ibid.*, 6.

<sup>44</sup> The Economist Intelligence Unit, *Democracy index 2018: Me too?* (The Economist Intelligence Unit, 2019).

<sup>45</sup> *Ibid.*

<sup>46</sup> Herb, *Ontology and methodology in the study of the resource curse*, 6.

peaceful outcome. Ergo, the level of institutional development, as well as the type of institutions, have a conjunctural causal impact on the incidence of conflict in oil-rich regions.

The case study of Qatar will be explored to counter the aforementioned notion that undemocratic institutions yield a violent outcome in oil-rich regions. EIU's democracy index ranks Qatar 133<sup>rd</sup> out of the 167 countries analysed, effectively making it authoritarian in nature.<sup>47</sup> Contrarily, it is ranked 31<sup>st</sup> out of 163 countries on the GPI, making Qatar the most peaceful country in the MENA region.<sup>48</sup> Even the onset of the Arab Spring, which caused violence across the MENA region, barely had an impact on peace in Qatar.<sup>49</sup> The orthodox explanation for this is rentier state theory, wherein the per capita distribution of rents is associated with acquiescence.<sup>50</sup> This is an appropriate assertion to make since Qatar's per capita GDP, adjusted by purchasing power parity as of 2018, is at US\$126,597, a figure that balloons to well over US\$700,000 per capita when the country's large expatriate population is excluded.<sup>51</sup> This is further reaffirmed through an extrapolation from Moritz's fieldwork, where interviews of Qatari citizens reveal their passive acceptance of the rentier bargain.<sup>52</sup>

I think Qatar has been stable for many reasons. First of all, the indigenous population is very small. So there is not a critical mass ... Number two: normally, if you look at all the countries where actually they had a problem, it was primarily an economic problem, that turned into revolution ... they revolted because they had nothing to lose, I mean they could not have been worse than what it was then.

Then if you look at Qatar—I can't talk about other countries but in Qatar—you don't see this. So you had good income, you had good government support—you had free electricity for example, free education, free healthcare ... So basically there were no good reasons to change the system. Plus people had witnessed what happened [in Egypt and Syria]. It's not a good example ... nobody wants to replicate that.<sup>53</sup>

This demonstrates the success of Qatar's allocative governance apparatus in 'buying off' loyalty from citizens. Therefore, hydrocarbon wealth, in a 'weak' state where institutional development is limited and rents are not equitably distributed, will result in a violent outcome. Controlling for these confounding variables will allow for a vindication of the initial hypothesis that an abundance of hydrocarbon wealth leads to violent conflict and popular unrest in the MENA region.

### 3 Conclusion

In conclusion, oil and gas wealth does lead to violent conflict and popular unrest in the MENA region, if the confounding variables are controlled. To achieve this result, Kellstedt and Whitten's framework for examining causality was used. The causal mechanism that connects hydrocarbon wealth and conflict is the distribution of rents to the population from oil production. Furthermore, the possibility of reverse causality cannot be omitted, given that in countries such as Libya, the presence of conflict prevents the country from exploiting its hydrocarbon wealth. While the Libya case study weakens the causal link between hydrocarbon wealth and conflict, the presence of a weaker effect justifies moving forward with the causal analysis. In terms of the presence of covariation, mixed results emerge. While the case study of Khuzestan shows a region where the simple association between increased hydrocarbon wealth and an increased incidence of conflict holds, Tunisia presents a contradictory case study where reduced hydrocarbon wealth does not decrease the incidence of conflict. Mixed results in the covariation section reveals that an examination of confounding variables is necessary to see whether hydrocarbon wealth in conjunction with another variable leads to increased conflict. In the confounding variables section of

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<sup>47</sup> The Economist Intelligence Unit, *Democracy index 2018: Me too?*

<sup>48</sup> Institute for Economics and Peace, *Global Peace Index 2018: Measuring peace in a complex world*.

<sup>49</sup> Ibid.

<sup>50</sup> Jocelyn Sage Mitchell and Justin J Gengler, 'What money can't buy: Wealth, inequality, and economic satisfaction in the rentier state', *Political Research Quarterly*, no. 1 (2019): 75–89.

<sup>51</sup> The World Bank, 'GDP per capita, PPP (current international \$)', *The World Bank*, data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?most\_recent\_value\_desc=true (accessed 22 September 2019).

<sup>52</sup> Jessie A Moritz, 'Slick operators: Revising rentier state theory for the modern Arab states of the Gulf' (PhD thesis, The Australian National University, 2016), 107–12.

<sup>53</sup> Ibid., 108.



this paper, a ‘weak’ state with limited institutional development and an inequitable distribution of oil rents were identified as the confounding variables between hydrocarbon wealth and conflict. Therefore, the causal relationship between hydrocarbon wealth and conflict is only valid if those confounding variables are controlled for.

The analysis presented in this paper implies that in order to reduce conflict in resource-rich areas, having strong governing institutions and equitable distribution of resource rents is necessary. However, given the Libya and Tunisia case studies, the causal association between resource wealth and conflict is weak. As such, it will be important in future research to identify more confounding variables that help strengthen the causal association between resource wealth and conflict. Revealing a stronger causal association will help strengthen the argument for reform in resource-rich countries to prevent conflict in the future.

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# Reality or rhetoric: The role of education in achieving gender equality in Myanmar

ASHA CLEMENTI AND REBECCA CRISP

## Abstract

United Nations Secretary-General António Guterres recently declared gender equality to be ‘the unfinished business of our time’.<sup>1</sup> Equality of opportunity, regardless of sex, seems a clear and accepted goal for policymakers. However, in most countries, progress remains slow. This report explores how, and why, some strategies for pursuing gender equality are failing to achieve progress.

For decades, education has been promoted as an invaluable tool for promoting gender equality.<sup>2</sup> However, research into education in Myanmar challenges this assumption. Women outnumber men at every stage of education, yet remain economically repressed and politically underrepresented. Our research explores why traditional education reform is failing the women of Myanmar. Through policy analyses and interviews conducted in schools, communities, and political arenas, we investigate the disjunction between increased participation of women in education and improvements in post-education outcomes. By affirming existing gender inequality, the current education system is creating an unbroken cycle of discriminatory attitudes and outcomes.

We recommend integrated reform of Myanmar’s school curriculum, examination structure, teacher training, and resourcing. By redefining children’s experience in school, Myanmar’s government can transform education into a tool to empower, not repress, the women it shapes.

*This research was conducted on an ANU undergraduate study tour to Myanmar in 2019. All views expressed are those of the authors.*

## I Introduction

Gender equality in Myanmar entails a complex interplay between historically embedded norms and contemporary outcomes. This report explores the relationship between education and gender equality in Myanmar through qualitative research conducted in Nyaungshwe Township in Shan State. We evaluated the accessibility, quality, and outcomes of education to determine whether the education system is failing to result in positive long-term development, and, if so, why. Through primary research and contemporary data, this paper resolves disparities in previous literature which displayed inconsistent accounts of the state of education in Myanmar.

This report begins by outlining Myanmar’s pedagogic history. We then examine the existing literature, analysing how our data corroborates or contradicts previous hypotheses. Our research identified four areas in which education is actively contributing to women’s economic and social disempowerment: a gendered curriculum, lack of teaching of transferable skills, opportunity cost of girls staying in school compared to their male counterparts, and bureaucratic barriers to implementing reform. Future reform should leverage existing high levels of participation by women in education to achieve cultural change

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<sup>1</sup> ‘Secretary-General declares “time is now” for gender equality, women’s empowerment, in remarks on international day’, *United Nations meetings coverage and press releases*, 8 March 2018, [www.un.org/press/en/2018/sgsm18928.doc.htm](http://www.un.org/press/en/2018/sgsm18928.doc.htm).

<sup>2</sup> Azza Karam, ‘Education as the pathway towards gender equality’, *United Nations*, accessed 4 October 2020, [www.un.org/en/chronicle/article/education-pathway-towards-gender-equality](http://www.un.org/en/chronicle/article/education-pathway-towards-gender-equality).

through curriculum reform, examination reform, teacher training, and work transition programs. This will lead to improved outcomes for women, creating a more sustainable future for Myanmar long-term.

## II History of education

Understanding the state of education in Myanmar requires close reference to its unique history. Prior to British colonisation, Myanmar's education system was primarily administered through a predominantly male monastic education system.<sup>3</sup> Female education was considered 'unimportant or, at best, secondary'.<sup>4</sup> In 1868, the new colonial administration introduced a co-educational system of secular schooling.<sup>5</sup> Between 1910 and 1930, female representation in educational institutions saw a dramatic growth. By the mid-twentieth century, Myanmar was regarded as having one of the leading education systems in South-East Asia.<sup>6</sup>

Subsequently, the imposition of military rule in 1962 drastically reduced the quality of schooling.<sup>7</sup> Schools were starved of resources and curriculum reform replaced critical thinking with rote, military-controlled, learning. Throughout the regime's rule, girls' participation in education was low.<sup>8</sup>

In 2008, the newly formed government announced their intention to make quality education widely available once again. Article 28 of the new Constitution stipulated the Republic of the Union of Myanmar would 'strive to improve education'<sup>9</sup> and 'implement a modern education system'.<sup>10</sup> Between 2008 and 2013, a number of sweeping education reforms were implemented, including the 'Higher Education Law' and 'National Education Law'.<sup>11</sup> Education expenditure more than doubled by 2017.<sup>12</sup> The number of girls in education began to climb, with current data showing women outnumbering men at every level of education.<sup>13</sup> Table 1 describes the 2018/19 data released by the Ministry of Education indicating higher levels of educational participation by women at every level of schooling.

Table 1: Table of education enrolment and completion rates, 2017/18.

Education indicator	Male (% total age population)	Female (% total age population)	Total (% total age population)
Primary net enrolment	97	97	97
Middle net enrolment	61	66	64
High net enrolment	41	50	46
Primary level completion rate	66	69	67
Middle level completion rate	74	81	77

<sup>3</sup> Martin Hayden and Richard Martin, 'Recovery of the education system in Myanmar', *Journal of International and Comparative Education (JICE)* 2, no. 2 (2013): 47–57.

<sup>4</sup> Elizabeth King and Andrew Mason, *Engendering development: gender equality in rights, resources, and voice*, Policy Research Reports (The World Bank, 2001).

<sup>5</sup> Hayden and Martin, 'Recovery of the education system in Myanmar'.

<sup>6</sup> Hayden and Martin, 'Recovery of the education system in Myanmar'.

<sup>7</sup> 'Burma: Education for sale', *Asian Human Rights Commission*, 21 June 2010, [www.humanrights.asia/news/ahrc-news/AHRC-ART-063-2010/](http://www.humanrights.asia/news/ahrc-news/AHRC-ART-063-2010/).

<sup>8</sup> Sara Olk, 'Recent improvements to girls' education in Myanmar', *The Borgen Project*, 19 June 2018, [borgenproject.org/girls-education-in-myanmar/](http://borgenproject.org/girls-education-in-myanmar/).

<sup>9</sup> Constitution of the Republic of the Union of Myanmar, Article 28(d) (2008).

<sup>10</sup> Constitution of the Republic of the Union of Myanmar.

<sup>11</sup> Union Parliament (Union of the Republic of Myanmar), *National Education Law*, Published Law No. 41 (2014).

<sup>12</sup> Olk, 'Recent improvements to girls' education'.

<sup>13</sup> Chie Ikeya, *Refiguring women, colonialism, and modernity in Burma*. Southeast Asia: Politics, meaning, and memory (Honolulu: University of Hawai'i Press, 2011).

High level completion rate	32	35	34
Primary level retention rate	68	71	69
Middle level retention rate	78	82	80
High level retention rate	77	89	83

Source: 'Myanmar 2018 education budget brief', Ministry of Finance and Planning (Myanmar) (Ministry of Education and UNICEF, 2018).

### III Secondary research

Policymakers worldwide generally assume that increasing the number of women in education improves post-educational outcomes, increasing labour force participation, employment, and improving political representation.<sup>14</sup> However, in Myanmar, the high levels of female participation in education outlined above coexist with systemic economic and political disempowerment.

An analysis of secondary literature showed a clear picture of the existing inequality. Labour force participation is 55 per cent for women, as opposed to 83 per cent for men.<sup>15</sup> A report by the McKinsey Global Institute found that when women do engage in the workforce, their employment is concentrated in lower growth sectors and lower-paying jobs, with 3.2 times more women than men in clerical or administrative support roles.<sup>16</sup> Even within the same industries, an Oxfam study found that women earned 20 per cent less than men for the same work.<sup>17</sup> For example, *The Irrawaddy* found the average daily wage for a male farm worker was 3,000 to 3,500 kyats, as compared with 2,000 to 2,500 kyats for a female farm labourer.<sup>18</sup> This is the case despite women typically spending longer in school and graduating with higher qualifications.

Recognition of these discrepancies began with a seminal report by the Ministry of National Planning and Economic Development and UNICEF (the United Nations International Children's Emergency Fund) in 2012, which explored anecdotal evidence from parents describing cultural traditions surrounding gender.<sup>19</sup> The report proposed that the opportunity cost of paid labour for boys is higher than it is for girls, which leads to boys dropping out of school to pursue a more immediate income. A similar report by the Borgen Project asserted that higher education retention rates for women reflected the greater ease men had in finding employment, which caused them to leave schooling.<sup>20</sup> Finally, a recent report by the Asian Development Bank (ADB) notes:

considering the gender parity in enrolment at the primary and secondary school levels and the larger proportion of women in higher education, the differences in the male–female labour participation rates and women's underemployment are concerns.<sup>21</sup>

The ADB called for more rigorous explanation and policy development to better optimise women's transition between education and the workplace, but made no specific recommendations to this effect.<sup>22</sup>

<sup>14</sup> United Nations Children's Fund, Save the Children (UK) and Qatar Government, *The central role of education in the millennium development goals* (UNESCO, 2010), [unesdoc.unesco.org/ark:/48223/pf0000190587](https://unesdoc.unesco.org/ark:/48223/pf0000190587).

<sup>15</sup> *The global gender gap report*, Insight report (World Economic Forum, 2018).

<sup>16</sup> Heang Chhor et al., *Myanmar's moment: Unique opportunities, major challenges* (McKinsey Global Institute, 2013).

<sup>17</sup> Jodie Thorpe, 'Delivering prosperity in Myanmar's dry zone' (Oxfam briefing paper, 24 August 2014).

<sup>18</sup> Samantha Michaels, 'Myanmar women in agriculture face pay disparity, discrimination', *The Irrawaddy*, 30 August 2014, [www.irrawaddy.com/business/burmese-women-agriculture-face-pay-disparity-discrimination.html](http://www.irrawaddy.com/business/burmese-women-agriculture-face-pay-disparity-discrimination.html).

<sup>19</sup> The Government of the Republic of the Union of Myanmar Ministry of National Planning and Economic Development and UNICEF, *Situation analysis of children in Myanmar 2012* (Nay Pyi Taw: UNICEF, July 2012).

<sup>20</sup> Olk, 'Recent improvements to girls' education'.

<sup>21</sup> Asian Development Bank et al., *Gender equality and women's rights in Myanmar: A situation analysis* (Mandaluyong City, Metro Manila, Philippines: Asian Development Bank, 2016) 40.

<sup>22</sup> Asian Development Bank et al., *Gender equality and women's rights in Myanmar*, 201.

Ultimately, the existing secondary literature consistently fails to explain the paradoxical state of education and gender equality in Myanmar. By providing primary research and contemporary data, this paper aims to resolve this gap, answering the question: Why is education failing the women of Myanmar?

## IV Our research

Our research was conducted through qualitative data collection, primarily in Shan State. Data collection included interviews with a range of subjects, including families, teachers, and academics, and non-government organisations (NGOs). These were conducted through home visits, school visits, panel interviews with academics, and meetings with local politicians, community leaders, and international representatives.

### Research methods

Questions targeted each stakeholder's experience with education, with the aim of exploring implicit and explicit factors affecting the translation of education to long-term empowerment.

#### *Families*

Twelve interviews were conducted with families. Parents were asked about the availability of education, their perception of its quality, and any differences between current and their own educational experiences. Students were asked to discuss their experiences of education, barriers to attendance, and goals for the future.

Questions included:

- How important is education to you?
- What percentage of your income is spent on costs related to your children's schooling?
- Do you consider school to be affordable for your family?
- What career do you/your child want to pursue?

#### *Teachers*

Interviews were conducted with teachers from a primary school in Hsison and the Mudita Foundation (monastic educational institution). Teachers were asked to provide perspectives on girls' engagement in class, learning methods, and safety at school.

Questions included:

- How many girls leave school (for any period of time) to work? How many boys?
- How many students do you have enrolled at the school? How many regularly attend?
- How many teachers work at this school?
- Has the content you teach changed since 2008 and, if so, how?
- What are your thoughts on the current course content and teaching methods?

#### *Academics/policymakers*

Academics and policymakers from Taunggyi University and the University of Yangon were interviewed to gain an academic perspective on Myanmar's education policy. These interviews gave insight into the political landscape of educational reform, and the experience of those advocating for further changes.

Questions included:

- Why is the implementation of the 2012 Comprehensive Education Sector Review so far behind schedule?
- What is the greatest challenge facing policymakers in implementing these reforms?
- What feedback mechanisms are in place for staff and students to comment on these reforms?

- Do you see any gendered norms within tertiary education enrolment?

### NGOs

NGOs including the Norwegian Refugee Council, Gender and Development Institute, and ICEI (the Italian *Istituto Cooperazione Economica Internazionale*, or Institute of International Economic Cooperation) were interviewed about their understanding of recent policy reform and barriers to future development.

Questions included:

- What are the greatest barriers faced in accessing education?
- How does Myanmar's education system differ from others in South-East Asia?
- Is gender stereotyping present in Myanmar's education system and how?

## Findings

### *Access to education*

Consensus throughout interviews with teachers was that education was broadly accessible, particularly since primary schooling was made free in the 2010 constitutional reforms. However, many parents still reported financial barriers which prohibited access to high school. These included the cost of resources and the opportunity cost of lost working hours from their child while at school. Converse to secondary research outlined above, higher opportunity cost of education for boys meant they were more likely to leave school to join the workforce. Most parents believed the difficulty of financing education disproportionately affected boys, with boys more likely to leave school to support their families. Notably, lack of interest in education by children was cited as the predominant reason for dropping out, whether or not affordability was also an issue.

Even where education was accessible, higher levels of schooling were seen as a relative luxury and thus a low priority for poorer families. Despite valuing education 'very highly', parents self-identifying as of lower socio-economic status ranked stable income and access to food as being of greater importance than education. Those parents who attributed a high value to education, when asked why, reasoned that for girls a higher level of education was 'impressive', 'good for the family', and 'important for the future'.<sup>23</sup> When asked about their male children, education was 'sometimes helpful' if 'good for [a] job'.<sup>24</sup> Broadly, education for girls seemed to be valued as a social tool and class indicator, rather than a reflection of knowledge.

### *Quality of education*

Three main elements were discovered, within the education system, which separated and disadvantaged girls. Firstly, the curriculum itself was implicitly gendered. For example, an English workbook for kindergarten students depicted female illustrations alongside verbs like 'cook', 'clean', 'eat'.<sup>25</sup> Traditionally male activities, including farming and sport, were depicted with images of men.<sup>26</sup> From a young age, children are associating these actions and concepts with particular genders. Interviewees from the Gender and Development Institute and Norwegian Refugee Centre both reported that this gender stereotyping was commonplace in the curriculum across age groups.<sup>27</sup> Both groups expressed concern that exposure to this seemingly trivial stereotyping at such a young age provides the basis for children's world view.

Secondly, interviews indicated that the content learned in education did not contribute to the development of workplace-relevant skills. All respondents reported that, even at a tertiary level, the skills gained in education were rarely used in the workforce. Only two respondents worked in the

<sup>23</sup> Group interview with parents from Hsisone, 29 June 2019.

<sup>24</sup> M Minn Thu, interview, 2 July 2019.

<sup>25</sup> Headmistress of primary school in Hsisone, Southern Shan, interview, 1 July 2019.

<sup>26</sup> Gender and Development Institute interviews, 15 July 2019.

<sup>27</sup> Gender and Development Institute and Norwegian Refugee Council interviews, 14 July 2019.

occupations they studied at university, both teachers.<sup>28</sup> This demonstrates how the skills students learn in school are not helpful to advancing graduates' careers or increasing income potential.

Instead, teaching staff encouraged students to look for employment based on their gender, as opposed to academic qualification. Interviews with staff members at schools revealed a focus on encouraging girls to pursue traditionally female-dominant industries like teaching. In contrast, the teachers felt boys were more suited to politics or management.<sup>29</sup> Promoting these ideas throughout the education system leads to the social conditioning of women that pushes them to pursue low-income careers.

Thirdly, as a consequence, higher education did not consistently correlate to a higher future income. For most low- to mid-socio-economic status families, occupations such as farming yielded the greatest returns. One parent stated she had a university degree in history but returned to farming for a higher salary. Respondents typically spoke of their time in tertiary education disparagingly, their expectation of future reward for their hard work unfulfilled.<sup>30</sup> Even when they possessed the qualifications of higher education, girls did not expect to receive higher incomes. This supported secondary research which reported extensive discrepancies in wage rates between female and male-dominated industries.

### *Effect of reform*

Questions with a policy focus were asked in each interview to gauge the efficacy of recent reforms. No parents interviewed were aware of curriculum changes having occurred. Responses from teachers often mentioned curriculum changes aimed at promoting higher level critical thinking skills but identified their lack of effect. However, no evidence of these changes was observed in textbooks, the majority of which were published before 2010. Furthermore, classroom observation revealed teaching which still centred on rote learning.

Local politicians and academics were asked about barriers they felt existed in implementing educational reform. These interviews revealed that a lack of adequate curriculum review system, and lack of regional nuance in educational administration performed by a central government, were central barriers to effective reform.<sup>31</sup> Besides Myanmar's Ministry of Education, there are 12 other ministries that are responsible for the provision of higher education.<sup>32</sup> Miscommunication between these ministries, and a lack of responsibility taken by any individual institution, was reported to create issues in policy implementation. One academic also raised the issue of competing priorities, as resources continue to be directed away from education due to a political focus on conflict resolution and infrastructural development.<sup>33</sup>

### *Summary of results*

Our results revealed girls consistently had equal access to, and high levels of participation in, education. However, this education was of low quality and perpetuated traditional social attitudes towards gender roles. Paradoxically, jobs which require higher education attract little prestige and are poorly paid. Careers which do not require university education, including politics and farming, attract higher pay and are typically male-dominated. These outcomes affected gender inequality by creating low-income, female-dominated industries, such as finance and teaching. This meant women's educational qualifications are not contributing to their long-term empowerment, or gender equality more broadly. These trends seem to remain from a historical legacy wherein professions such as law and finance were part of largely irrelevant institutions. With the rule of law controlled by an authoritarian power, and corruption rife in finance and administration, these roles were redundant.

This phenomenon has a dual effect. Firstly, it means the long-held belief that education results in long-term economic empowerment, in this context, is false. More insidiously, it means that the longer girls

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<sup>28</sup> Group interview with parents from Hsison; Celine Margontier-Haynes, 2 July 2019.

<sup>29</sup> Headmistress of primary school in Hsison, interview.

<sup>30</sup> Group interview with parents from Hsison; teacher from the Mudita Foundation (monastic school), interview, 7 February 2019.

<sup>31</sup> Managing challenges during Myanmar's transition, education reform and innovation conference, University of Yangon, 5–6 July 2019.

<sup>32</sup> 'Appendix 8.1: Structure of educational institutions in Myanmar', in *Dictatorship, disorder and decline in Myanmar*, ed. Monique Skidmore and Trevor Wilson (Canberra: ANU Press 2008), [press-files.anu.edu.au/downloads/press/p102401/mobile/ch08s08.html](http://press-files.anu.edu.au/downloads/press/p102401/mobile/ch08s08.html).

<sup>33</sup> Professors from Taunggyi University, interview, 30 June 2019.



remain ‘stuck’ in school, the less they are earning compared to their male counterparts. A high proportion of boys, typically in rural areas, drop out at the end of primary school to enter the workforce, often in a trade or on their family’s farm. This creates an economic gap between the sexes before they even reach adulthood. Thus, the barriers to effective education in Myanmar do not lie in the issue of access, but rather in the quality of the curriculum. The need for policy reform predominantly centres around improving the quality of the curriculum, towards more vocational training.

Secondly, better job outcomes for women can be ensured by teaching of workplace-relevant skills, increasing the utility of higher education qualifications. This can be used to incentivise girls to pursue careers which use their educational qualifications, hopefully leading to increased prestige and greater income opportunities in these industries long-term.

## Limitations

### *Barriers to information*

One limitation faced was the lack of continuous data. A lack of data collection throughout the military-controlled periods in the latter half of the nineteenth century has resulted in little statistical understanding of education, gender equality, or the intersection of the two. Similarly, the lack of access afforded to NGOs and civil society organisations has resulted in a lack of comprehensive understanding of education throughout this time. This lack of comparable quantitative data makes tracking developments in education or gender equality difficult.

### *Subjectivity*

One limitation faced was the subjective nature of interviews and the value-based nature of our enquiries, including questions which asked respondents to define the importance they awarded to differing priorities. These value judgements are hard to measure and make comparison between respondents difficult. Furthermore, all interview subjects were aware of the purpose of this research project. Those who volunteered to be involved in the project were arguably more likely to be interested in education themselves. They may be families for whom education is valued highly and warrants discussion.

### *Translation*

The majority of interviews were conducted in Burmese and Burmese research assistants were used for translation. This process is subject to misinterpretation between all parties: researchers, research assistants, and interview subjects. Particularly as the assistants were untrained and inexperienced in professional translation, the internal biases of research assistants themselves may be evident in their translations. Further, their relay of relevant questions to respondents likely lacked appreciation for the nuances of the questions if they had been asked in English. Finally, aspects of an interviewee’s response were sometimes repeated in order to better explain it in English. This had the effect of emphasising some aspects of a response, which may have affected how the overall response was interpreted.

## Addressing these limitations

Techniques were developed throughout the research project to maximise its reliability, accuracy, and validity. To minimise interpretative misunderstandings, multiple questions on similar subject matters were asked. If responses differed dramatically from the same respondent, it was clear one of these questions had not been understood. Similarly, the use of multiple data points, including teachers, parents, and students, on similar topics allowed discrepancies in perspective to be revealed where not based on facts. For example, the same question regarding the cost of schooling, directed to families versus politicians, has very different responses. This ensured these opinions were evaluated as perspective, rather than fact. Once identified, areas of high subjectivity could be examined further through secondary research and investigation of statistical data. Triangulation using mixed methods of primary and secondary data sources allowed claims to be more accurately verified.

## V Policy proposal

Our research found two main areas where social attitudes inhibit progress towards gender equality: the education system and the workplace. Sustainable improvement will require social change in both of these sectors. Analysis of the drivers of attitudinal change has been the subject of extensive research,<sup>34</sup> and a thorough list of recommendations in this regard will require further research.

The following recommendations target areas in which government policy has the power to effect substantive and lasting change. Through curriculum development, examination reform, and teacher training, the government can ensure children are exposed to a balanced and equitable understanding of gender roles throughout their schooling. This should be supported by updated resources, and gender sensitivity throughout the National Education Policy. These changes target the root cause of discriminatory attitudes to promote broader social change. This social change can drive development across multiple sectors, including gender equality and education, resulting in positive outcomes throughout.

### Recommendations

Our research shows that engendering sustainable social change requires more than just parity in educational participation. Improving outcomes requires thoughtful development of the education itself. Curriculum reform leverages existing high levels of participation in education to ensure improvements in post-education outcomes. This is necessary both to remove existing gender stereotyping and ensure that the education system fulfills its role as a place to learn work-related skills.

#### *Curriculum reform*

The curriculum, as it stands, focuses on rote learning, with emphasis placed on memorisation and repetition.<sup>35</sup> While this matches the current format of the national matriculation (end of high school) exam, it does not support learning of skills beneficial in the workplace. Instead, students fail to learn critical thinking skills or how to apply their knowledge in a real-world environment. In Brazil and Uganda, the expansion of subject choice and introduction of practical components to provide a more balanced curriculum has led to increased school retention and better educational outcomes.<sup>36</sup> This knowledge should be incorporated in education reform policies in Myanmar.

The establishment of the National Education Law (NEL)<sup>37</sup> in 2014 and the formation of the National Curriculum Committee (NCC)<sup>38</sup> in 2016 indicates the government has recognised the deficiencies in their education system, and steps are being taken to make this change. However, many of the weaknesses found in the Comprehensive Education Sector Review in 2012 (CESR), preceding these laws, have not been addressed in the NEL. Gender-specific recommendations made in the CESR, such as autonomous training programs which target professional development for women, were never adopted, seemingly due to lack of political will, despite their potential benefits.<sup>39</sup>

Furthermore, curriculum reform recommendations in the NEL remain years behind schedule.<sup>40</sup> Implementation of these reforms must be accelerated in line with those of comparable regional partners. However, better consultative mechanisms are required to ensure reform is effective. Lack of

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<sup>34</sup> Ronald Inglehart and Pippa Norris, *Rising tide: Gender equality and cultural change around the world* (Cambridge: Cambridge University Press, 2003).

<sup>35</sup> Headmistress of primary school in Hsione, Southern Shan, interview.

<sup>36</sup> Barbara Herz and Gene B Sperling, *What works in girls' education: Evidence and policies from the developing world* (Council on Foreign Relations, 2004), 79.

<sup>37</sup> Union Parliament, *National Education Law*.

<sup>38</sup> *Globalization and living together: The challenges for educational content in Asia* (Final Report of the Sub-Regional Course on Curriculum Development, New Delhi, India, 9–17 March 1999) 136.

<sup>39</sup> Union Parliament, *National Education Law*.

<sup>40</sup> Thomas Kean, 'Inside the National Education Strategic Plan', *Frontier Myanmar*, 29 March 2017, [www.frontiermyanmar.net/en/inside-the-national-education-strategic-plan/](http://www.frontiermyanmar.net/en/inside-the-national-education-strategic-plan/).

collaboration in curriculum development has consistently antagonised student groups and staff unions.<sup>41</sup> Consultation programs should be established to facilitate more effective dialogue between the NCC, teachers, and students. Contributions from students and teachers would ensure that the new curriculum truly addresses existing concerns and works effectively to improve the current system. Reevaluating and reassessing the curriculum is the first step towards improving the quality of the education system and transforming it into a powerful asset. Implementation of these reforms will ensure Myanmar's workforce is able to remain domestically and internationally competitive.

### *Transition-to-work programs*

Transition-to-work programs should be developed to complement this new curriculum. Janet Raynor developed an effective mechanism for improving post-education outcomes for women in Bangladesh. The policies adopt transition-to-work programs with 'an agenda of empowering girls and women, rather than merely aiming to extend existing gendered roles'.<sup>42</sup> Raynor's research indicates that an effective transition from school to work ensures that participation in education translates to employment, and long-term empowerment. Similarly, transition-to-work programs can also increase the value of graduates with higher educational attainments to their potential employers. This works to raise the profile and prestige of sectors which require higher levels of education. In the long term, this can change social attitudes surrounding the value of education, leading to positive flow-on effects for those women who have gained high levels of education.

### *Examination reform*

Current legislation has not addressed the need for changes in examination format to accompany and support curriculum reform. The current system remains fixed on knowledge-based examinations which encourage memorisation, as opposed to learning. Curriculum reform must be reinforced through new examination policies. Examinations themselves must have greater emphasis on applied learning and higher-order thinking skills, to encourage students' development in these areas. Only then will there be changes in teaching styles and technique.

### *Resources*

Textbooks and teaching resources must be reviewed and modernised. Revising textbooks to reduce the gendered nature of content will assist in promoting more equitable attitudes and reduce gender stereotyping. This involves gender-neutralising examples that don't enforce gender roles, and promoting equality in all aspects of teaching materials. Some positive steps have been taken to review textbooks in urban centres; however, the breadth of this process needs to be extended to regional areas.<sup>43</sup>

### *Teacher training*

Curriculum and examination reform must be matched by training for teachers. This training should involve increasing teachers' understanding of their role in empowering women, and how existing cultural attitudes can be counteracted. For example, in Peru, teachers' 'low expectations of girls' was targeted as a way to combat a 'cycle of low achievement [in schools] which reinforces girls' low social status'.<sup>44</sup> Inclusion of diversity and inclusion training for staff at schools helped to regulate the gender stereotyping which had previously worked to deter girls from pursuing careers in high-income sectors.

### *Gender mainstreaming*

Finally, creation of a gender-specific advisory role within the National Education Policy Commission would ensure gender mainstreaming in policy development. Although gender-disaggregated membership within the board is unavailable, pictures indicate a vast majority of male members.

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<sup>41</sup> Nobel Zaw, 'Students protest education law in downtown Yangon', *The Irrawaddy*, 14 November 2014, [www.irrawaddy.com/news/burma/students-protest-education-law-downtown-rangoon.html](http://www.irrawaddy.com/news/burma/students-protest-education-law-downtown-rangoon.html).

<sup>42</sup> Sheila Aikman and Elaine Unterhalter, *Beyond access: Transforming policy and practice for gender equality in education* (Oxfam, 2005).

<sup>43</sup> El Thae Thae Naing, 'Textbooks to get kids to "think for themselves"', *The Myanmar Times*, 1 December 2013, [www.mmtimes.com/national-news/8919-textbooks-to-get-kids-to-think-for-themselves.html](http://www.mmtimes.com/national-news/8919-textbooks-to-get-kids-to-think-for-themselves.html).

<sup>44</sup> Aikman and Unterhalter, *Beyond access*.

Secondly, gender awareness programs should be incorporated into existing teacher training programs, to ensure conscious promotion of gender-equitable attitudes in classrooms. This will allow the development of positive and empowering cultural norms throughout the current generation. These reforms will help to combat systemic discrimination in the education system, with the goal of creating broader social change.

## VI Further research

A wide array of policy reforms will be needed to effectively address the factors perpetuating gender inequality in Myanmar's education system. While it is beyond the scope of this paper to fully develop these recommendations in consultation with local authorities, these examples illustrate the breadth of reform which is required. Already, the government's desire to bring about change is evident. So long as this momentum is maintained, ongoing development of the education sector will notably affect the state of gender equality more broadly. The evolving nature of education in Myanmar warrants consistent objective reanalysis as new policies are implemented. The relationship between gender equality and education in Myanmar is heavily complex, and certainly a subject for further research.

## VII Conclusion

It is well documented that increased gender equity can aid economic growth and sustain peace. Gender equality is also widely regarded as one of the leading indicators of development.<sup>45</sup> However, education as a tool for empowerment works only if that education is informed and well developed. For Myanmar, traditional policy approaches focusing on achieving gender equity through girls' access to education are not working. The years Burmese women spend in school are limiting, not supporting, their long-term empowerment.

However, there are some positives. High participation in education can be used to encourage gender-balanced social attitudes in younger generations. A push for change must come from national and local levels, meeting in the middle to drive progress. At a grassroots level, the communication of new ideas must come from the teachers who are currently perpetuating old, sexist stereotypes. Nationally, the government should push to raise the status of traditionally female careers, by formally recognising these inequalities and publicly committing to creating change. In practice, these commitments can be operationalised through curriculum and examination reform, teacher training, and policies which improve the prestige and financial value of tertiary qualifications.

Myanmar's complex history presents a challenge to the accepted norms of development and gender equality. Inequality persists despite high levels of educational participation for women. Solving this paradox requires solutions appropriate to Myanmar's unique sociocultural context, using close investigation of in-country realities and the development of targeted solutions, as opposed to reform based on broad assumptions. Through curriculum and examination reform, teacher training, and work transition programs, Myanmar's government can capitalise on high enrolment and use education as a tool to actively empower, not repress, the women it shapes.

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<sup>45</sup> King and Mason, *Engendering development*.

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