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Introduction

It is a great pleasure to introduce Volume 12 of the *ANU Undergraduate Research Journal* (AURJ), an SSAF-funded[1] publication which once again showcases the high-calibre work produced by ANU undergraduate students. This volume's 11 articles not only critically engage with existing academic literature but present original perspectives on a host of topical issues. An impressive range of subjects is covered by this year's selection of papers, including music, law, philosophy, political science, international relations, and linguistics, along with several examples spanning multiple disciplines. These articles touch on some of the most challenging issues of recent times, from the legal system's handling of gendered violence to the constitutional recognition of the rights of Aboriginal and Torres Strait Islander people.

There is a distinct Australian focus to many of the articles included in this volume. The first two papers consider proposed changes to Australian legislation. Bernard Lao's paper concerns the Indigenous Voice to Parliament, offering a legal-theoretic justification for its implementation in the Australian legal system and political milieu. This is a timely piece; although the Indigenous Voice formed part of the Uluru Statement from the Heart from 2017, it was in 2022 that the proposal gained serious momentum in public discourse. Next, we have a paper by Clare Taylor, who examines the effectiveness of criminalising acts of genocide denial under specific genocide denial legislation as far as protecting victims and minimising harm. Using France as a case study, Clare puts pressure on the idea that existing genocide denial legislation achieves its goals, before considering whether or not similar legislation should be enacted in Australia.

The next three articles address other aspects of the Australian political landscape. Jeremy Tsuei undertakes a Foucauldian reading of the 1987 Australian film *Shame*, analysing its depiction of the law and gendered violence, and the projection of urban anxieties upon regional Australia. Jeremy's subject matter connects broadly to the global movement of #MeToo and, locally, to highly publicised legal trials of the past year. Elisheva Madar examines uses of the term 'un-Australian' in Federal Parliament over a 20-year period, exploring to what ideological ends this term has been deployed. Elisheva uses quantitative methods to analyse the ways in which the term has been used, with what frequency, and by what kinds of speakers, connecting these findings to the fluctuating politics of national identity in Australia. Following this, Alice Morgan's paper draws a different kind of connection between Australian politics and language, discussing the current state of Indonesian language teaching in Australian high schools. More specifically, Alice points to the significant political benefits Australia could reap both nationally and within the Asia-Pacific region by prioritising the study of Indonesian in secondary education.

The next articles relate to political and scientific issues that go beyond Australia and address global questions. Jessica Honan discusses the role of the European Court of Justice in facilitating European Union (EU) integration, arguing that specific enshrined aims and mechanisms of the institution contribute to coordination between EU states. Meanwhile, Francesca Lambert delves into the issue of how climate change interacts with global security, and more specifically whether climate change has shaped or increased interstate conflict in recent decades. Francesca argues for the importance of homing in on the complex interactional nature of this question, and the need to seek out interdisciplinary knowledge to accurately model the circumstances in which climate change phenomena increase the risk of conflict.

Next are two papers that concern more abstract questions about the political sphere. First is Effie Li's paper, which explores our behaviour around the moral and political content that we produce, consume and circulate, and the downstream effects of this behaviour on public discussion. More specifically, Effie considers the effects of moral grandstanding—the attempt to signal one's moral virtue or 'show off' one's moral qualities to others—upon the quality of and our trust in political discourse. Effie offers reason to question the idea that moral grandstanding necessarily undermines public discussion. Meanwhile, Tyler Williams delves into the question of what it means to say that a policy is feasible or

[1] SSAF: student services and amenities fee.

infeasible, putting forward a general model of feasibility in policymaking. That a proposed policy is feasible is surely necessary for it to be implemented successfully, so this conceptual understanding of what it takes to meet this condition may help us assess the quality of real-world policy proposals and better interpret their viability.

Reconsidering the views or body of work of important public figures is a theme that unites the final two papers presented in the volume. Lucy Aras's article centres on the Russian-American classical violinist Jascha Heifetz, analysing the impact of cultural and technological factors upon his fame and esteem. And finally, Cohen Saunders's article considers the best interpretation of Jean-Jacques Rousseau's political philosophy, investigating the divisive question of whether Rousseau should be classed as democratic or authoritarian. In responding to this question, Cohen approaches one of the central conceptual questions of our time: what exactly makes a state or political figure democratic, or in other words, what are the essential features of democracy?

The AURJ could not be produced without the hard work of many individuals. First and foremost, we thank the authors for their commitment to and perseverance in revising and enhancing their work. We would also like thank our dedicated peer reviewers for their contributions: Kate Butler, Asha Clementi, Gaia Ewing, Eleanor Foster, Emma Gerts, Bhavani Kannan, Bruna Contro Pretero, Jillian Schedneck, Manya Sinha, Elizabeth Spollard, Terra Starbird, Stefan Thottunkal, Thomas Weight, and Cinnamone Winchester. Thanks are also due to our copyeditor, Beth Battrick, and to the talented graduating artists Janet Jeffs and Laura Fenderson for contributing their striking art to the journal. Finally, we acknowledge the First Australians on whose traditional lands ANU operates and this journal was produced. In particular, we pay our respects to the Ngunnawal and Ngambri people of the Canberra region.

Dominie Dessaix, Dilnoza Ubaydullaeva, and Benjamin Kooyman

Editors

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Lucy is a second-year student studying a double degree Bachelor of Music (violin performance major) and Bachelor of Commerce (accounting major). Within the field of music, she is particularly interested in the development of the Western music performance tradition and its application to the classical music industry in a contemporary context.

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Ben has worked in the field of academic language and learning support for the past 13 years. Prior to joining ANU Library 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 from Flinders University, and has published in the areas of literature, film, and academic language and learning.

About the artists/artworks

Laura Fenderson

This girl loves to party (flowers), 2022.

I am a Canberra-based artist and a recent graduate from the School of Art and Design at The Australian National University. My work aims to explore 'structures of feeling' by painting photographs I have taken of my everyday experiences. The works are purposefully pushed into the painterly and abstracted realm, allowing unconscious mark making, colour combinations, and the materiality of paint to voice my subconscious responses to place, person, and thing. In this sense these works explore how a painting, separate to both the photographic reference and reality itself, can become a new form of reality.

Janet Jeffs

Wave, 2022, acrylic paint and enamel paint on canvas, 185 x 140 cm.

Wave is an exploration of my embodied relationship with the natural world through gestural abstraction. In the development of the work, my focus is on images read as both manifestations of energised paint and of inchoate matter within the natural world.

The works included in my series *Oceanic* are painterly, almost filmic illusions of sky and water. This comes from a lived experience of a rural home in Yuin country near the source of the Shoalhaven River. Sky and water have a strong connection with images of nature that are sensory and visual. Through gesture, chance, and disorder, I express emotions that embrace awe, delight, and foreboding. The title of the work *Wave* refers to a sensation of eternity, a feeling of being one with the external world.

Bodies of water, a precious resource, are so bound to our being and survival, particularly in the context of climate change. These ideas illustrate how my project has been contextualised over time, making large paintings with energy and ambition.

The First Nations Voice: Investigating constitutional reform through the lens of proceduralism

BERNARD LAO

Abstract

Law is dependent upon the collective consciousness of the people it governs. It is enacted in the legislatures of this country, elected by the people and enforced by the officials of the executive. For much of Aboriginal and Torres Strait Islander history since 1770, Indigenous Australians have lived outside the recognition afforded by the law while simultaneously being victims of its worst excesses. Yet, in spite of the progress we have made in combatting systemic injustice, Indigenous Australians continue to be left without constitutional recognition, without a voice, and without representation. This article will argue in favour for the establishment of a First Nations Voice ('FNV'), as proposed by the *Uluru Statement from the Heart*, arguably Australia's most critical constitutional law reform initiative in recent years. Rather than outlining all of its empirical benefits, of which there are presumably many, this article will instead seek to consider the FNV from a theoretical perspective of proceduralism and establish that its quality as a procedural right grants it special complementarity with the Australian legal–political framework. Ultimately, my hope is to offer a legally proceduralist rationale for the FNV and reiterate its necessity as the next step in constitutional law reform.

Introduction

> Australian governments have become comfortable with the idea of symbolic forms of Reconciliation. We have endured years of lemon myrtle-dusted morning teas, flag raising and screenings of *Rabbit Proof Fence*, yet institutionalised racism prevails everywhere I look.[1]

Since before Federation, Australian history has involved no shortage of systemic injustice experienced by Aboriginal and Torres Strait Islander peoples. The scale and impact of the Stolen Generations and their forced removal by Australian authorities throughout the twentieth century continues to leave a devastating imprint on our national consciousness.[2] Dishearteningly, the 'institutionalised racism' that Aboriginal lawyer Gemma McKinnon speaks of here has continued to persist today. With respect to incarceration rates, Indigenous Australians comprise 25 per cent of the national prison population despite accounting for only 3 per cent of the general population overall.[3] If we recognise the pattern that many of these crises find their roots in being facilitated by the operation of Australian laws, only a monumental effort in the reform of the law would be sufficient in combatting systemic discrimination. Without effective and politically viable constitutional reform, progress towards equality and justice for Indigenous Australians will continue to stagnate.

This essay will consider the First Nations Voice model ('FNV') as proposed by the *Uluru Statement from the Heart*.[4] At its core, the FNV consists of a deliberative body that advises the Australian

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[1] Gemma McKinnon, 'Symbolic Recognition Not the Way Forward', *National Indigenous Times* (online, 22 May 2020) <https://www.nit.com.au/symbolic-recognition-not-the-way-forward/>.

[2] It is estimated that as many as 1 in 7 Indigenous Australians presently aged 50 and over are members of the Stolen Generations. Empirical evidence shows that the long-term effects are persistent and pervasive, including, but not limited to, a widespread lack of access to health, housing, legal and community services. See also Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Stolen Generations* (Report, November 2018).

[3] Australian Bureau of Statistics, *Prisoners in Australia, 2016* (Catalogue No 4517.0, 8 December 2016).

[4] Referendum Council, *First Nations Design Report* (Report, June 2017) 47.

Commonwealth Parliament on matters relating to or impacting Aboriginal and Torres Strait Islander peoples. The body would be enshrined in the Australian Constitution by amendment and would have the benefit of shaping laws and policies on relevant issues with the input of the Indigenous community. While some of the specifics of the FNV are still very much up for debate, this essay will argue that the model is the optimal choice of constitutional reform from a theoretically legal perspective. In particular, I will argue for its effectiveness and political compatibility by reference to the doctrine of proceduralism —a doctrine that emphasises the importance of procedural rights as critical to the Australian democratic context. In doing so, this essay will emphasise the importance of political participation and political suitability to the current Australian legal context and justify how the FNV complements our current public law system.

Precursor: Why proceduralism matters

In order to understand the FNV as a function of proceduralism, we must first define the doctrine and highlight its relevance to the Australian body politic. In its broadest conception, proceduralism is the notion that 'no rule is acceptable apart from a formal method, and that the acceptable method yields an acceptable rule'.[5] For the purposes of state law, it would be helpful to refine this definition to read: 'no law is valid unless it is procured by an acceptable procedure'. What is an 'acceptable procedure' then? There is no singular conception among all nation states, but in most liberal democracies, we may assume that it entails some system of voting and some minimum level of democratic participation.[6] Therefore, a right possesses a procedural quality to the extent that it seeks to uphold or reinforce these standards. In any case, proceduralism focuses on the importance of the 'procedural element' of lawmaking in our society as opposed to the outcome or policy that is ultimately approved (i.e. the 'substantive element'). This is not a fundamentally new concept and the idea that members of a society might disagree on substantive matters yet 'respect the outcomes of democratic decisions in the public sphere' is a foundational given in many liberal states.[7] Yet, and as a result, we must appreciate its importance.

Practically, it could be argued that the legitimacy of the substantive element is in fact contingent upon that of the procedural element. This has been characterised as a sub-concept of 'fair proceduralism' whereby, in our lawmaking example, the legitimacy and authority of a law is derived from whether everyone had an equal role in determining the outcome.[8] In other words, the establishment and improvement of rights that enhance this procedural element will legitimise political authority, and conversely, the removal or undermining of them will subvert legitimacy.[9] Exploring the philosophies that underpin these concepts is beyond the scope of this essay, but we can recognise that history has been unkind to legal systems that are deficient in their procedural elements. The classical example (at its most extreme) concerns the laws passed by the National Socialist German Workers' Party during interwar Germany, facilitated by the abolishment of the procedural rights of free and fair electoral participation in 1933.[10] Relevantly, we may also question the legitimacy of Apartheid-era policies passed by the ruling National Party in South Africa (from a procedurally legal and not exclusively a

[5] Benjamin Gregg, 'Proceduralism Reconceived: Political Conflict Resolution under Conditions of Moral Pluralism' (2002) 31(6) *Theory and Society* 741.

[6] The right to vote is a necessary but not sufficient conceptualisation of what we may consider to be an 'acceptable procedure' of lawmaking and is also subject to its own qualifications. In *Roach v Electoral Commissioner* (2007) 233 CLR 162, the High Court considered whether Commonwealth legislation excluding prisoners from the franchise constituted an impermissible breach of this right. While the Court did not refer to the concept of 'proceduralism' by name, the case raised questions as to the delineation of what is an 'acceptable procedure'. The Court ultimately ruled that the arbitrary disenfranchisement of prisoners would not be acceptable as a matter of constitutional compatibility, but it is still an illustrative case nevertheless.

[7] Gregg (n 5) 742.

[8] David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2007) 66; Gerry Mackie, 'The Values of Democratic Proceduralism' (2011) 26(4) *Irish Political Studies* 439, 443.

[9] Alexander Kirshner, 'Proceduralism and Popular Threats to Democracy' (2010) 18(4) *Journal of Political Philosophy* 405, 409.

[10] Ron Levy, *Five Concepts of Rights in Australia* (ANU Course Materials, 2021) 5–6. Of course, a great number of other factors facilitated the policies passed under the Nazi Government, including before 1933. My intention is to highlight how no policy had the grounding of democratic legitimacy post-Enabling Act.

moral perspective), facilitated by the segregation and exclusion of the 'non-White' South African majority from the electoral process.[11]

In both cases, procedural rights were suppressed through a process of disenfranchisement, enabling the passage of subsequent racial laws. It is difficult to claim that such laws, operating at the detriment of a certain social group, possess the quality of procedural legitimacy if the disenfranchised are themselves the subjects of the law. Admittedly, these are extreme examples selected from history. However, my aim is to illustrate that, as a matter of principle, proceduralism may serve as a fundamentally useful ground in thinking about law reform. I would argue that the procedural element of a law is equally if not more important than the content of the law or decision, partly because the procedure may ultimately determine the content of that and future decisions.[12] As I will demonstrate, the FNV by design encapsulates the concept of proceduralism and its philosophy.

Political participation: An approach of representation reinforcement

By its nature and object, the FNV facilitates the political participation of the First Nations in the Commonwealth legislative process. To the extent that the matter in deliberation relates to Indigenous affairs, there will be at minimum some extent of enhanced political representation on the Commonwealth level. This equality in democratic participation is fundamental as a procedural right, although the FNV in particular adds a local–national dimension to this equality which must be appreciated. The design principle agreed upon at all First Nations Regional Dialogues was a 'bottom-up', grassroots representative structure, placing emphasis on the representation of *local* First Peoples over any national First Nations council.[13] Specifically, local First Nations would be politically empowered with decision-making and input, engaging directly with the Commonwealth where appropriate, while also vested with greater responsibility and accountability to their members and the public.[14]

While a smaller, national body could support First Nations in engaging productively with the Government and Parliament, it would likely function as an 'interface' for discussion as opposed to being the 'discusser' themselves.[15] If we view the legitimacy of any subsequent legislative decisions of concern to Indigenous Australians as dependent on its procedural quality, facilitating participation by a greater number and diversity of First Nations in the legislative process would enhance that legitimacy. As a procedural right in itself, an approach which emphasises a grassroots design for the FNV strengthens it as a procedural right. One may also describe the effect of this design as 'representation reinforcing', mitigating the tendency for local voices to be overwhelmed and effectively excluded from decisions by a larger, federalised body.[16]

Detractors could argue that the FNV would be ineffective due to its similarity to the Aboriginal and Torres Strait Islander Commission ('ATSIC'), which was abolished in 2005. However, the operation and structure of ATSIC, and its subsequent downfall, arguably reinforces the importance of local political participation rather than diminishing it. Several issues and limitations to ATSIC's effectiveness can be identified, in particular its emphasis on being an administrative body of the executive branch, 'answerable to the government of the day',[17] rather than a representative one where Indigenous

[11] The *Representation of Natives Act 1936* (South Africa), the *Separate Representation of Voters Act 1951* (South Africa) and similar electoral laws had the effect of complete or substantial disenfranchisement of 'black' and 'coloured' voters from the electoral process.

[12] From a 'Schumpeterian' perspective, the method in which political decisions are made, as opposed to the content or outcomes that may result, is in fact definitive of procedural democracy itself. It is the capacity of democracies to 'replace violence with votes', even future violence, by reference to the procedural element that gives them their 'normative defensibility': Maria Paula Saffon and Nadia Urbinati, 'Procedural Democracy, the Bulwark of Equal Liberty' (2013) 41(3) *Political Theory* 441, 455.

[13] Referendum Council (n 4) 30–31.

[14] Ibid.

[15] Ibid 32.

[16] Levy (n 10) 5.

[17] Referendum Council (n 4) 33.

participation in the actual governing process could be facilitated.[18] Problematically, ATSIC manifested as a body with two minds, tasked with administering government programs while being a public advocate for Indigenous 'self-sufficiency and self-management'—public servant and public interest representative simultaneously.[19] While similar in objectives, the FNV would be significantly distinguishable from ATSIC in design. The FNV would of course be proactive in deliberating and reviewing bills in the Commonwealth Parliament, representing the concerns of local First Nations, and therefore facilitating their involvement in the 'processes of Australian democracy'.[20] Secondly, the FNV would be entrenched as a constitutional body, rather than an executive one, protecting its independence.[21] Hence, the FNV's devolved nature and focus on the procedure of lawmaking and local representation makes it fundamentally distinct from ATSIC, likely avoiding the pitfalls that doomed the latter.

Political suitability: Advantages of a procedural right

I have endorsed proceduralism as grounds for law reform in general. However, I wish to return to some broader yet related principles in order to reinforce the second tenet of this essay: the FNV's suitability to the Australian legal–political context. The FNV's priority in improving access for the First Nations to the democratic and legislative process is, as discussed, consistent with the idea of proceduralism in general. A related principle is how the model embodies the idea of 'procedural fairness', or the fairness in the procedure in which a decision is made as opposed to the actual substance of that decision or law.[22] In this sense, 'justice comes not necessarily from the outcome' but from the 'opportunity to be heard'—a principle that, similar to fair proceduralism, should not be understated.[23] Speaking generally in *F.A.I. Insurances Ltd. v Winneke*,[24] Mason J stated that '[a] statutory authority having power to affect the rights of a person is bound to hear him before exercising the power'.[25] The FNV distinctively encapsulates this idea by providing an avenue for Indigenous Australians to 'be heard' in the governing process of Indigenous matters, in comparison to law reform in the mode of broader, more substantive rights.[26]

I would contend that such an approach as a mode of constitutional reform aids the FNV in its suitability with the Australian political system. A procedural right has the benefit of complementing and adapting to the current structure of the Australian government, a benefit that a substantive right (which may consist of a constitutional anti-discrimination provision or a quota for Indigenous representation in the Parliament, for example) may not hold, as I will consider later. Perhaps the most apparent example is the model's respect for the principle of 'parliamentary supremacy'. Prominent Indigenous land rights lawyer Noel Pearson suggested that,

> Indigenous people [can] get a fair say in laws and policies made *about us* without compromising the supremacy of Parliament. Perhaps we could consider creating a mechanism to ensure that Indigenous

[18] Kingsley Palmer, 'ATSIC: Origins and Issues for the Future: A Critical Review of Public Domain Research and Other Materials' (2004) 12 *AIATSIS Research Discussion Paper* 11; John Chesterman, 'National Policy-Making in Indigenous Affairs: Blueprint for an Indigenous Review Council' (2008) 67(4) *Journal of Public Administration* 419, 422.

[19] *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), s 9.

[20] Referendum Council (n 4) 34.

[21] Ibid 35.

[22] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report No 129, 2016) 393–394.

[23] François Kunc, 'The Case for Adopting the Uluru Statement on its Second Anniversary' (2019) 93(5) *Australian Law Journal* 339, 342.

[24] (1982) 151 CLR 342.

[25] Ibid 360.

[26] Kunc (n 23) 342.

> people can take more responsibility for our own lives, *within the democratic institutions already established*.[27]

This is a strong distinguishing factor between the FNV and the embedding of a more wide-ranging, substantive right. Decisions by the FNV are intended to be non-binding and therefore do not establish a 'veto point' on the 'inner workings of Parliament' and its lawmaking power.[28] Several legislative mechanisms have been considered, such as its constitutional enshrinement, to imbue the FNV with substantial 'political and moral authority'—authority and advice of which Members of Parliament are expected to not disregard without consideration.[29] As acknowledged by the *Uluru Statement from the Heart*, 'it is a request to be heard, not a demand to be obeyed'.[30] The deference accorded to the Parliament as the paramount lawmaking body, as expected by the Australian public and the Constitution, is an inherent quality in a body which focuses on the justness of the *procedure* in which a bill is consulted on and made, rather than the substantive *content* of the bill.

If we consider the nature of commonly proposed substantive rights as an alternative method of law reform (for example, a constitutionally enshrined right to be protected against discrimination from policing, additional land or property rights, minimum political representation, or a combination thereof), such methods would by their very nature be content-specific. Such a provision is not procedural and therefore renders parliamentary legislation 'justiciable under the jurisdiction of the High Court'.[31] In other words, judicial interpretation (and consequently legal uncertainty) over that right or provision is likely to be inevitable—interpretations that may not be entirely consistent and subject to the political convictions of judges.[32] Arguably, this is indicative of the main weakness of 'liberal constitutionalism', the maximalist practice of simply endorsing more rights and more protections.[33] Yet, it is important to be cognisant of the fact that legal guarantees, even on a constitutional level, do not necessarily and always translate into social justice or practical change. At minimum, this raises the persisting question and uncertainty of judicial interpretation. This uncertainty is not present with the FNV, which attends to the procedure of lawmaking, meaning its decisions are non-justiciable.[34] It is this deference to parliamentary supremacy that ensures the FNV's suitability when operating *as part of* the Australian system of government.

Federalism

I would like to conclude the discussion on political suitability by acknowledging the counterargument that the FNV, as a constitutional body affecting the affairs of Parliament, would diminish the principle of federalism (or the relationship between the Commonwealth and the states), and is therefore uncharacteristic of a 'de-centralised' Australian federation. I would argue that the opposite is true. The Australian Constitution upholds federalism through the division of powers between the states and the Commonwealth, 'guaranteeing fair representation of various constitutional constituencies … [and] protecting minority interests from majoritarian power'.[35] Historically, Australian public and constitutional law have developed in tandem with this principle, and a rich literature exists which justifies the benefits of federalism in comparison to a top-down unitary state. Indeed, even states with significantly disproportionate populations are guaranteed equal representation in the Senate, and

[27] Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 *Quarterly Essay* 66, 66–67 (emphasis in original).

[28] Shireen Morris, 'The Torment of Our Powerlessness: Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs' (2018) 41(3) *University of New South Wales Law Journal* 629, 652.

[29] Ibid 631.

[30] Ibid.

[31] Ibid 653.

[32] Levy (n 10) 4.

[33] Ibid 3.

[34] Morris (n 28) 653.

[35] Referendum Council (n 4) 23.

minimum representation in the House of Representatives.[36] The FNV as a body representing the First Nations greatly encapsulates the sentiment of this—the protection of a minority population against a centralised, federal power, both in its purpose as a voice for the First Nations and in its design with its local member prioritisation. If we consider a value-based perspective, in *New South Wales v Commonwealth of Australia*,[37] Callinan J stated that 'the whole Constitution is founded upon notions of comity, comity between the States [and] the Commonwealth … Federations compel comity, that is to say mutual respect'.[38] As a matter of righteousness, this 'comity' must extend to the First Nations. The FNV, encapsulating this sentiment of federalism, would ensure this.

Conclusion

Effective law reform is difficult to achieve when addressing a problem as systemic and potent as racial injustice. The unrelenting history of such injustice since 1770 simply cannot be resolved by efforts which Gemma McKinnon describes as merely 'symbolic'—that is to say nugatory.[39] However, the First Nations Voice as a method of constitutional reform would arguably be optimal in moving forward. As this essay has demonstrated, the FNV fundamentally enhances the quality of political participation in government and affirms Australia's high standards of procedural fairness. This type of political inclusion is an essential quality of proceduralism. Politically, the model is a viable method of reform that complements the operation of our current system of government, protecting parliamentary supremacy and minimising judicial uncertainty. Of course, it is certainly not the case that the FNV is the panacea to all systemic injustice in Australia, and far from it. However, it may very well represent the first effective leap towards reconciliation on a national level in this country in decades. Perhaps with a prospective referendum, as announced by the Albanese Government, the promise of an Indigenous Voice to Parliament may finally become a reality.

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To deny or not to deny: A comparison of genocide denial legislation in France and Australia

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Abstract

When discussing how to best combat genocide denial, denial legislation is all too often presented as the premier solution. However, as this article will showcase, a legal approach in the face of genocide denial is utterly inadequate. Real-world applications of denial legislation are plagued by issues like politicisation and potentially empowering denialists to the point that these policies are ineffectual or even counterproductive. I therefore posit that in light of denial legislation's ineffectiveness, as demonstrated by France's *Gayssot* law, that these policies should not be enacted in the case of Australia because they would prove ineffectual.

The article that follows is structured in five parts. The first two segments address the relevant definitions and literature. The third part evaluates the arguments for and against denial laws by using France's *Gayssot* law as an existing example in order to gauge denial legislation's effectiveness. The fourth section applies the earlier analyses to the case for denial laws in Australia, especially considering the *Racial Discrimination Act 1975* (Cth). Finally, the article presents a discussion of alternative approaches to combatting genocide denial, specifically truth commissions and confrontation. I conclude that in light of denial legislation in France and its overall ineffectiveness, Australia should not implement genocide denial laws as they would ultimately prove ineffectual.

Introduction

The most effective means of combatting genocide denial remains a highly elusive objective for most democratic societies. For many countries in the European Union (EU) such as France, genocide denial legislation is their chosen tool for deterring denial. In Australia, genocide denial laws, and indeed the question of what constitutes denial, remain a contested point. The central concern of this article is whether denial legislation is effective, namely in the case of France, and if it should be enacted in Australia. I argue that Australia should not pass genocide denial laws because they would prove ineffective, as is showcased by France's case of ineffectual legislation. This article is structured in five parts. The first two segments address the relevant definitions and literature. The third part evaluates the arguments for and against denial laws by using France's *Gayssot* law as an existing example to gauge denial legislation's effectiveness. The fourth section applies these analyses to the case for denial laws in Australia, while noting the impact of the *Racial Discrimination Act 1975* (Cth). Finally, the article presents a discussion of alternative approaches to combatting genocide denial, specifically truth commissions and confrontation. I conclude that, given the overall ineffectiveness of denial legislation in France, Australia should not implement genocide denial laws as they would ultimately prove ineffectual.

Definitions

In order to ascertain the efficacy of genocide denial laws in France, it is important to first consider how effectiveness is defined. Ultimately, this article will be utilising a qualitative definition derived from literature on law reform. This approach is appropriate in this context, as a qualitative definition recognises that the nuance of genocide denial cannot be comprehensively captured through quantitative

measures such as contrasting pre- and post-denial legislation hate crime statistics. Consequently, in this article, effectiveness is understood as 'the extent to which a law can do the job it is intended to do' (Mousmouti, 2014, p. 4). What is then required of genocide denial legislation for it to be considered effective? In line with this definition, I posit that effective denial legislation must deter genocide denial, especially in the public sphere, while avoiding unnecessary encroachments upon the rights outlined in the United Nations Universal Declaration of Human Rights (UDHR), such as freedom of expression (United Nations, 1948b).

In this article, genocide is defined in line with Article II of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, 1948a, p. 1). As for genocide denial, I used Roger Smith's understanding that denial consists of denying, trivialising, or relativising the facts relating to a case of genocide (Smith, 2010, p. 129). Genocide denial law is defined in this paper as legislation that criminalises public denial that demonstrates malicious intent (Garibian, 2008, pp. 484–486). Finally, hate speech is defined as any communication that uses pejorative, offensive, and/or discriminatory language with respect to an individual's actual or perceived identity factors such as race or religion (United Nations, 2019). Hate speech laws in turn use civil or criminal legislation to penalise the dissemination of hate speech.

Within the discussion of alternative means of combatting genocide denial, this article refers to the concept of 'transitional justice'. In this paper, transitional justice is defined as the aims and processes that societies use to holistically address past or ongoing mass atrocity violence, such as genocide, that are achieved through judicial or non-judicial means (Kaufman, 2014). In a related vein, a truth commission is understood in this article as a non-judicial body formed for the purpose of investigating specific episodes of mass human rights violations, namely genocide, and in turn developing a historical record of the events in question; importantly, these bodies utilise the accounts of both victims and perpetrators as part of their investigations (Lund, 1998, p. 282).

Literature review

The thematic scope of this review is limited to analyses of the effectiveness of genocide denial laws, especially with regard to the EU and member states such as France, as well as the appropriateness of similar legislation in Australia. As for the types of literature included within this article, the review includes peer-reviewed, academic articles and reports from the last two decades that explicitly relate to discussions of genocide denial legislation and its application within the EU and Australia.

Generally, the literature is highly critical of denial legislation's effectiveness, and instead suggests that denial laws may in fact cause, rather than prevent, harm. There are three main critiques that denial legislation scholars present. The first critique is concerned with issues such as politicisation that stem from allowing governments and their corresponding courts to define genocide in order to legislate denial (Hayden, 2008; Smith, 2010). In a similar vein, the second critique questions the effectiveness of French and EU denial laws in light of ambiguity within existing legislation (Gorton, 2015; Knechtle, 2008; Pégorier, 2018). The final critique considers the broad ramifications of denial law on human rights as well as the influence of denialist groups (Behrens, 2015; Gorton, 2015). Despite these critiques, these academics by no means intend to diminish the importance of countering genocide denial in Europe or any other context; rather, the central themes of their critiques are that denial would be better deterred by amending legislation or through nonlegal avenues. Furthermore, while these critiques are commonly presented by the literature, there are notable exceptions that stand by the importance of genocide denial law (Garibian, 2008; Pruitt, 2017).

Regarding literature on the appropriateness of genocide denial legislation in Australia, the search came across a gap in the field of genocide studies as I could not procure any published, scholarly articles that met the scope of this review. As will be expanded upon later in this article, I posit that some key factors relating to this lacuna are the political and societal discomfort with the concept of genocide in Australia, and the existence of hate speech legislation that can already be used to prosecute genocide denial.

Genocide denial laws in France

In order to gauge the effectiveness of genocide denial law, this article focuses on France and its legislation targeting Holocaust denial as a case study. France's key domestic sociohistorical foundations for denial laws include a long history enshrining both the protection and restriction of individual liberties as well as a difficult legacy regarding its role in the Holocaust (Gzoyan, 2019, pp. 83–84). For many European countries such as France, genocide denial laws stem in no small part from a societal desire to atone for their country's direct or indirect role in the Holocaust in addition to suppressing existing and future fascist movements (Smith, 2010, p. 134). The *Gayssot* law, instituted in 1990 as part of France's broader hate speech legislation, forms the foundation of French Holocaust denial law. In addition, EU frameworks that address hate speech and denial, namely the European Convention on Human Rights (ECHR), as well as the European Court of Human Rights (ECHR) and its case law all play key roles in the application of French denial legislation.

While critics and advocates of denial law may disagree on its effectiveness, the seriousness of genocide denial is not disputed. There is an academic consensus that genocide denial constitutes a serious violation of individuals' rights and dignity (Garibian, 2008, pp. 482, 486). Furthermore, denial has grave consequences for victims, perpetrators, and democratic society as a whole, and is an inherent part of the process of genocide (Smith, 2010, p. 128; Stanton, 2016).

Advocates for the effectiveness of denial law present two central arguments. The first claim is that the prevention, suppression, and punishment of genocide denial is best achieved through legal avenues. Essentially, advocates argue that criminalising denial helps to protect the memory and victims of genocide in addition to discouraging future crimes of genocide (including denial) (Pruitt, 2017). Inherent to this argument is the belief that legal protections pertaining to freedom of expression must have inherent restrictions and responsibilities (Garibian, 2008, pp. 480–481). Restrictions on civil liberties in democratic societies must be carefully considered in order to maintain an appropriate balance between individuals' rights to freedom of expression and freedom from discrimination. However, in the case of French law, I contend that it adequately addresses this equilibrium by recognising that individuals' freedoms should only be curtailed in order to preserve the rights of others and in turn these liberties can only be limited by the law (The National Assembly (France), 1789).

Furthermore, the ECHR, the UDHR, and French case law all recognise the limitation of personal freedoms when they are used to infringe upon others' rights (Council of Europe, 1950, p. 12; The National Assembly (France), 1789; United Nations, 1948b, p. 8). French law also considers human dignity to be a 'principle of constitutional status' that must be considered throughout the legal process (Barroso, 2012, p. 339). As a consequence of this principle, the act of denial in France is framed not only as an attack on individuals' rights, but also on the dignity of the greater community affected by Holocaust denial such as descendants or survivors (Pruitt, 2017, p. 271).

The second argument of denial law advocates is that the public distribution of extremist, intolerant beliefs such as genocide denial actually undermine democratic values, and so denial laws are key to the preservation of democracy. Unlike an American 'absolutist' approach to freedom of speech, French law uses a conception of free speech that centres around the preservation of democracy as well as the rights of the individual (Garibian, 2008, p. 482; Viala-Gaudefroy, 2021). Therefore, the dissemination of anti-democratic, extremist ideas, such as genocide denial, are considered by France as threats to its democracy, and so they must be subject to legal restrictions and consequences (Garibian, 2008, pp. 482–483).

Before fully demonstrating denial laws' ineffectiveness, it is important to first note that I also believe that the removal of existing legislation would bring about far more harm than good by signalling to denialists that democracies are yielding to denial. The following discussions therefore do not call for the removal of current denial laws but rather are against relying upon existing laws to act as a meaningful deterrent. In light of this, I do not doubt that denial law advocates are correct in saying that genocide denial violates the rights of the individual and compromises democratic values. However, the crux of the issue is that denial laws are ineffective because they do not actually protect individuals' rights or democratic resilience. There is no strong evidence that denial legislation deters denialists,

especially public figures (Weaver, Depierre, & Boissier, 2009, pp. 516–517). Additionally, private denial, arguably the most prolific form of genocide denial, cannot be prosecuted in a democratic society because it would constitute a dangerous incursion on civil liberties (Behrens, 2015, p. 33). That is all to say that there is no meaningful evidence that denial legislation fulfils its purpose and deters genocide denial.

Instead, there is far more evidence supporting denial law critics' conclusion that denial legislation is fundamentally ineffective. The issues with genocide denial laws can be divided into two general categories. The first grouping relates to issues that stem from the legal and political process of enacting denial legislation. The second category is concerned with the issues associated with the ramifications of denial legislation. Regarding the legal and political process of denial legislation, the key problem is that in order to criminalise genocide denial, the government must first delineate which events are deemed to be within the scope of the legislation. That is to say, it becomes a task for politicians and the courts to decide what constitutes genocide and also what constitutes denial. This process presents many fundamental issues that ultimately undermine the effectiveness of denial law.

Firstly, genocide, and in turn denial, is a multifaceted and interdisciplinary phenomenon that cannot be adequately understood or addressed through a solely political or legal approach (Rosenberg, 2012; Smith, 2010, pp. 132–133). Moreover, by allowing politicians to determine which cases should be deemed genocide, denial legislation can be used to uphold political narratives about cases of genocide. For example, some academics posit that France is hesitant to further pursue Armenian genocide denial legislation because it could compromise the state's economic and political relationship with Turkey (Gzoyan, 2019, p. 87).

Secondly, like many other European denial laws, French denial legislation only criminalises outright denial of the occurrence of the Holocaust but does not cover the other aspects of genocide denial (Pruitt, 2017). This is problematic because forms of genocide denial that are trivialising or relativising in nature, such as minimising casualty counts, are not covered by the legislation (Jones, 2016, pp. 683–686). Furthermore, by only criminalising Holocaust denial, French denial laws are effectively privileging the protections of the rights and dignity of those affected by the Holocaust over other genocide victims (Behrens, 2015, pp. 30–31). This is in addition to the fact that comparatively novel modes of communication, such as the internet, are becoming increasingly major hubs for denial dissemination while also being notoriously difficult to regulate or sanction (Hare & Weinstein, 2009, pp. 539–540). Similarly, the ambiguity in relevant ECHR case law obfuscates the capacity of EU member states such as France to legislate denial (Gorton, 2015).

With respect to the consequences of denial legislation, it seems that these laws may cause more harm than good. Those found guilty under denial laws can actually become further entrenched in denialist ideology through prolonged exposure to radical ideas in prison (Behrens, 2015, pp. 40–41). Moreover, convicted denialists can come to achieve an elevated status among other denialists through their perceived sacrifice for 'the cause' and the media attention that often accompanies high-profile denial cases (Jones, 2016, p. 688). However, the ineffectiveness of France's denial laws is best highlighted in the rise and popularity of far-right politician Jean-Marie Le Pen, and his persistent Holocaust denial, even after the enactment of the *Gayssot* law. Despite being found guilty of denial twice in the 1990s, Le Pen continues to publicise blatantly Holocaust denialist comments ('Court upholds', 2018; 'French far-right', 2021). If French denial legislation was truly effective, Le Pen and other denialists should have been deterred by the *Gayssot* law; however, as is demonstrated by Le Pen's continued denialist remarks as well as the rise of other public figures who partake in Holocaust denial such as Éric Zemmour, this is not the case (Rose, 2021). As is demonstrated in the case of Holocaust denial laws in France, genocide denial legislation does not meaningfully deter denial, and it can in fact amplify the influence of denialists. That is to say, genocide denial laws are fundamentally ineffective because they do not function as intended.

The potential applicability of genocide denial laws in Australia

In view of Australia's domestic sociohistorical context, denial legislation related to general crimes of genocide or Australia's colonial history would be most appropriate. However, this same context means that Australian society and politics has an enduringly uncomfortable relationship with both the concept of genocide and its domestic applications (Lawrence, 2020). This article is discussing whether Australia *should* enact genocide denial legislation rather than whether Australia *could* implement these laws. Nevertheless, I would be remiss if I did not acknowledge the actual political and social context which would greatly influence the viability and capacity of genocide denial laws in Australia.

As it stands, mainstream Australian politics and society endorses a multitude of competing interpretations of Australia's colonial history and subsequent cases for genocide. For the most part, these viewpoints dismiss either the persisting effects of genocide against Australia's First Nations peoples or outright deny that genocide ever occurred (Tatz, 2016, p. 87). On the other hand, there is a broad array of credible academic and sociocultural sources, such as the 1997 *Bringing them home* report,[1] that attest not only to the occurrence of genocide in Australia, but also its enduring impacts (Human Rights and Equal Opportunity Commission, 1987, p. 190; Tatz, 2001). In spite of these facts, no federal government administration has acknowledged that genocide has occurred in Australia (Mays, 2020). Consequently, in the existing context where Australia's societal and political mainstream is already directly and indirectly denying their country's own case for genocide, criminalising genocide denial is unviable. However, considering this context, it is all the more crucial to meaningfully analyse whether Australia has an obligation to pass genocide denial legislation. I will now argue that Australia should not enact genocide denial legislation because it would prove ineffective.

When considering the appropriateness of denial legislation in Australia, most of the same arguments and considerations from the discussion of French denial law arise as the majority of the issues with denial legislation are universal. To reiterate these arguments briefly: denial legislation fails to deter public or private denial, in addition to potentially facilitating denialists and the governmental politicisation of genocide. These arguments, and the other points outlined earlier in this article that are not specific to France, remain true in Australia's case. However, a key additional element is that Australia has a framework of hate speech legislation that has already been used to prosecute genocide denial.

While there are state-level examples of hate speech laws in Australia, the most significant piece of hate speech legislation is the federal-level *Racial Discrimination Act 1975* and its Section 18C (Human Rights and Equal Opportunity Commission, 2002). As part of the *Racial Hatred Act 1995* (Cth), Section 18C was added to the *Racial Discrimination Act 1975* in order to recognise hate speech within Australian discrimination laws (McNamara, 2016). It is important to note that the *Racial Discrimination Act* is civil, not criminal, legislation and that it also includes reasonable exceptions to Section 18C, such as for educational purposes (McNamara, 2016). For example, in 2002, in the case of *Jones v Töben*, Dr Fredrick Töben was found guilty of breaching Section 18C by publishing Holocaust denial material online (Hare & Weinstein, 2009, pp. 534–536). Furthermore, although Section 18C in isolation may only provide civil recourse, it nonetheless serves the same theoretical function that advocates argue for denial law, in that it uses fear and consideration of legal consequences as a deterrence.

While Section 18C and its applications do certainly present their own flaws, these points fall beyond the remit of this article. The important fact is that Australia has an existing legal framework that prohibits hate speech in a manner that can be used to prosecute genocide denial (Hare & Weinstein, 2009, pp. 534–537). While arguments can certainly be made for amending Section 18C to better address genocide denial, separate denial legislation in Australia would fundamentally be ineffective (Sackville, 2016, pp. 636–638, 641–642).

[1] Formally known as the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*.

Alternatives to denial legislation

Two perspectives are often presented when engaging with the topic of combatting genocide denial, with one being the legal method already presented within this article, and the other being the societal approach (Smith, 2010). The societal approach uses education, academia, freedom of speech, and other social mechanisms through non-judicial strategies in order to counter denial. Therefore, as part of the societal approach, the mechanisms of truth commissions and confrontation present the most common alternatives to the legal method.

Truth commissions

In the wake of genocidal violence, many states such as Rwanda have used transitional justice strategies as means of addressing the aftermath (Kaufman, 2014). Truth commissions are often central to transitional justice processes, and in turn present an alternative path to combatting genocide denial. By acting as a forum for both victims and perpetrators of genocide to share their experiences, truth commissions can not only provide individual and societal catharsis, but also help to make the establishment of historical memory into a communal rather than political process (Behrens, 2015). Furthermore, the public act of perpetrators taking responsibility for their actions and establishing the facts contested by denialists, such as casualty counts, can weaken the core 'evidence' of common denialist strategies like relativisation (Behrens, 2015, pp. 44–45; Jones, 2016, pp. 791–793).

However, the practice of truth commissions is not without its faults. For one, victims and perpetrators alike can be unwilling to share their experiences, let alone in the public forum that is required of a truth commission (Behrens, 2017, 3.3 Confronting the deniers). Moreover, truth commissions require mediators to ensure that the provided accounts are factual and properly representative of the events in question. Without objective mediators and genuine intent to present a veracious account of the genocide in question, then truth commissions can be used to amplify, politicise, and validate particular or fictitious accounts of the genocide (Behrens, 2015, pp. 45–46). Consequently, while truth commissions have great potential for aiding in combatting genocide denial, they require careful practical application lest they become counterproductive.

Confrontation

When attempting to counter genocide denial, confrontation remains a controversial but nonetheless common alternative to denial legislation. In the context of genocide denial, confrontation takes many forms along the spectrums of individual and systemic focuses as well as direct and indirect approaches. Furthermore, it generally involves challenging denialist arguments through debate or the provision of education with the intention of discrediting their reasonings as well as convincing potential and actual denialists of the ideology's failings. While direct personal confrontation, often between academics or genocide victims and well-known denialists, presents the most sensationalist strategy, its premise is inherently flawed; meaningful debate intrinsically requires both parties to present factual arguments, which is not a requisite condition for the rationalisations of denialists (Behrens, 2017, 3.3 Confronting the deniers).

Alternatively, systemic indirect approaches that focus on providing accessible, appropriate genocide education to either the general public or 'moderate' denialists have been found to have far greater success (Behrens, 2017, 3.3 Confronting the deniers; Bilali, Iqbal, & Freel, 2019, pp. 301–302). Furthermore, an education-orientated approach has the additional benefit of being able to indirectly target private denial in a manner that laws simply cannot accomplish. However, radical denialists, especially those in public or leadership positions within denialist organisations, are far less likely to be swayed by such an approach (Behrens, 2017, 3.3 Confronting the deniers). The confrontation approach is ultimately most effective in preventing the creation of new denialists but fails in the face of the radicals who act as the vanguards of these beliefs.

Conclusion

While the question of how to best combat genocide denial is undoubtedly of great consequence, it is ultimately without a panacea. There is no approach without flaws or failings. Democracies cannot absolutely criminalise or stifle denial without politicising genocide and ultimately encroaching on human rights. Conversely, societies that function without any judicial or social checks invite the dissemination of genocide denial, and in turn the catastrophic consequences that can follow. A balance between rights, responsibility, and restrictions must be struck when attempting to counter genocide denial. However, in the question of denial legislation's effectiveness, the answer nonetheless remains the same: it ultimately does not fulfil its intended function.

The contentions at this article's heart concerned the effectiveness of genocide denial laws, their application within France, and their appropriateness in Australia. Each of the five parts that I addressed helped to construct and argue my central thesis. Consequently, in light of the ineffectiveness of existent denial laws such as the *Gayssot* law and Australia's existing hate speech legislation, Australia should not enact denial legislation because it would ultimately be ineffective. Genocide denial is an ever-evolving concept that demands relentless scrutiny and engagement from societies concerned with individuals' rights and democratic values. However, as I have demonstrated, denial legislation is neither the only approach to counteracting genocide denial nor an effective means of doing so.

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‘Pretty funny bloody barrister’: Gendered violence in *Shame* (1987)

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Abstract

Steve Jodrell’s *Shame* (1987) remains remarkably accurate in its depiction of gendered violence in rural/regional/remote (RRR) Australia. However, viewing the film as a normative statement reveals a complex relationship where the RRR becomes a constructed space giving credence to urban anxieties. Viewed through critical legal theory and a Foucauldian lens, the film depicts the RRR as a psychiatric space where the rule of law is deployed against a rule of unlaw, and legal technicians constitute and reconstitute the law from knowledge into legal discourse ready for reabsorption outside the RRR space. This approach renders the law as inert and constituted and overlooks the law’s own contribution to injustice, especially in issues of gendered violence, as highlighted in recent law reform and social justice developments. While the film’s allegorising of the RRR is disrupted in its ending, its final lines reveal an unshaken belief in law—another universalising technology.

Introduction

‘This town has a secret’,[1] announces the trailer to Steve Jodrell’s Australian thriller *Shame* (1987).[2] Asta Cadell (Deborah-Lee Furness)—a lone wanderer entering the fictional rural town Ginborak, armed not with *Yojimbo*’s[3] samurai sword but a Suzuki Katana motorbike, not with *Shane*’s[4] six-shooter but a law degree, not male but female[5]—will have none of it. Asta, a city prosecutor who takes a pit stop in Ginborak during a motorcycle road trip, encounters Lizzie Curtis (Simone Buchanan), a teenager who confides that she has just been sexually assaulted. When the town and the corrupt police force stand in the way of justice, Asta decides to take matters into her own hands.

Shame, shot over the course of six weeks in Toodyay in Western Australia, began as a treatment written by Beverley Blankenship and Michael Brindley inspired by *Mad Max* (1971), and was financed by the Woman’s Film Fund for a first draft.[6] Steve Jodrell was attached as director after the project was bounced around for a period. In his words: ‘It was not quite entertaining; it was a little bit too art-house; it was a message film, and yet Michael and Beverly Blankenship had always designed the film as a kind of B-grade drive-in movie.’[7] Upon its release in 1988, *Shame* performed credibly at the local box office, was released in several overseas markets despite distribution difficulties, and won the Film Critics Circle of Australia awards for Best Actress (Deborah-Lee Furness) and Best Screenplay (Beverly Blankenship and Michael Brindley).[8] An American remake was released in 1992 starring Amanda

[1] Umbrella Entertainment, ‘Shame – Trailer’ (YouTube, 22 August 2011) <https://www.youtube.com/watch?v=PcrZnmLocDw>.

[2] *Shame* (Umbrella Entertainment, 1987).

[3] *Yojimbo* (Kurosawa Production, 1961).

[4] *Shane* (Paramount Pictures, 1953).

[5] Jeff Strickler, ‘“Shame”: Justice, Not Preaching, for the Bad Guys’, *Star Tribune* (Minneapolis, 17 February 1989) 1.

[6] David Stratton, *The Avocado Plantation: Boom and Bust in the Australian Film Industry* (Pan MacMillan, 1990) 218–220.

[7] Interview with Steve Jodrell (*Signet*, 30 March 1998).

[8] Richard Kuipers, ‘Shame (1987)’, *Australian Screen* (Web Page, n.d.) <https://aso.gov.au/titles/features/shame/notes/>.

Donohoe.[9] The film was restored as part of the National Film and Sound Archive's NFSA Restores initiative, with the restored release premiering at the 2017 Melbourne International Film Festival.[10]

Since its initial release, *Shame*'s themes of violently performed male entitlement and community complicity seem more relevant than ever.[11] As Jodrell commented on the premiere of the restoration: 'There's a powerful message in the film—sadly, one that is even more relevant today than when it was first released.'[12] In a #MeToo era populated by figures such as Grace Tame and Brittany Higgins, and in the wake of Eurydice Dixon's murder in Princes Park and allegations against former High Court Justice Dyson Heydon, *Shame*'s exposure of familiar Australian locations as sites of gendered and sexual violence indeed resonates more urgently than ever. But how should it be read by viewers cognisant of the reality of its direct subject matter—lawyering in the rural, regional, and remote? I posit that rurality might not be what *Shame* is interested in, so much as an exaggerated worst case of what *Shame* is more interested in—which is gendered violence including sexual assault. Adopting a Foucauldian psychiatric hospital lens, we see *Shame*'s positioning of the RRR as a productive site where law is constituted as a retaliatory and imminent technology. However, this narrative of constitution—of law's activation—overlooks negotiations towards law reform that visualise law in a state of becoming rather than a state of deferred arrival.

The RRR and gendered violence

Following Howard et al., I adopt a broad and inclusive concept of rural, regional, and remote Australia (the 'RRR') speaking to '"regional", "rural" *and* "remote" Australia'.[13] While there is no single accepted definition of RRR, the RRR is conceptually differentiated from metropolitan settings by 'decreasing population size and relative ease of access to infrastructure and services'.[14] Despite the 'paucity' of sexual assault research in the RRR,[15] family violence—a largely gendered issue[16]—is considered 'particularly prevalent in RRR communities',[17] and both are significantly underreported.[18] Carrington and Scott contrast 'romantic images of rural life' with studies and data sets finding violent crime in rural NSW exceeded state averages, and higher rates of sexual assault and domestic violence in rural and regional Australia generally.[19] This is supported by recent NSW Bureau of Crime and Statistics Research statistics which reveal domestic assault and sexual offence rates in NSW tend to be significantly higher in areas away from capital cities.[20] Reports from service providers in RRR regions

[9] *Shame* (Lifetime Entertainment Services, 1992).

[10] National Film and Sound Archive, 'Deborah-Lee Furness to Celebrate NFSA Restoration of *Shame* in Melbourne', *National Film and Sound Archive* (Web Page, n.d.) <https://www.nfsa.gov.au/deborra-lee-furness-celebrate-nfsa-restoration-shame-melbourne>.

[11] Alexandra Heller-Nicholas, 'The NFSA Restores Collection – *Shame*' (January 2019) *Metro Magazine* 116; Jenny Valentish, '30 Years on, Shame's Portrayal of Toxic Australian Masculinity is as Relevant as Ever', *The Guardian* (online, 20 August 2018) <https://www.theguardian.com/tv-and-radio/2018/aug/20/30-years-on-shames-portrayal-of-toxic-australian-masculinity-is-as-relevant-as-ever>.

[12] National Film and Sound Archive (n 10).

[13] Amanda Howard et al, *Rural, Regional and Remote Social Work: Practice Research from Australia* (Routledge, 2016) 28.

[14] Sara Tomevska, 'Why Domestic Violence Rates Intensify the Further West you go in NSW', *ABC News* (online, 20 December 2019), <https://www.abc.net.au/news/2019-12-20/domestic-violence-rates-in-western-nsw/11807976?nw=0>.

[15] Sarah Wendt et al, *Seeking Help for Domestic Violence: Exploring Rural Women's Coping Experiences: State of Knowledge Paper* (Landscapes 4, Australia's National Research Organisation for Women's Safety, July 2015) 15.

[16] Ann Hunt et al, *Family, Domestic and Sexual Violence in Australia 2018* (Report FDV 2, Australian Institute of Health and Welfare, 2018) 1.

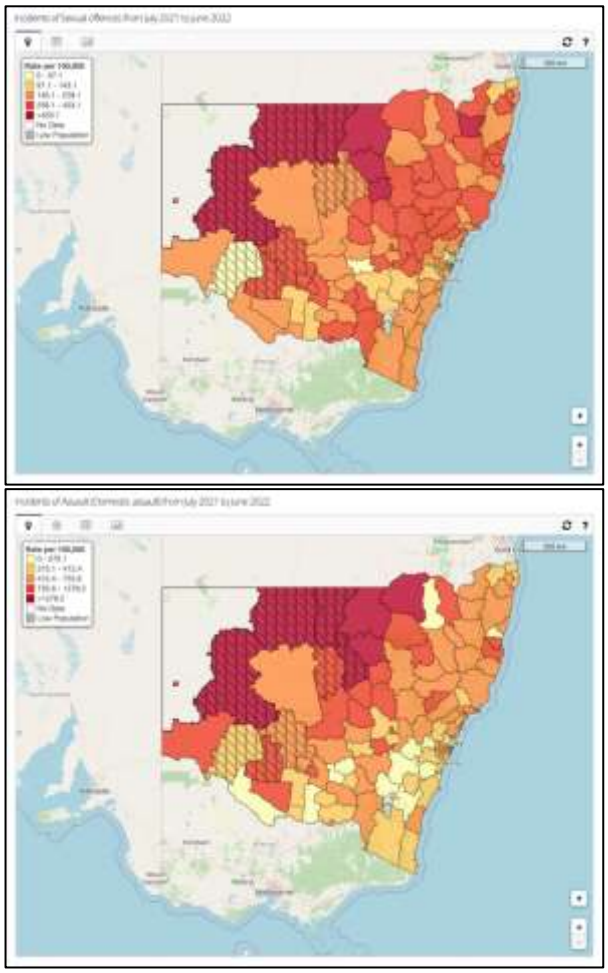
[17] Law Council of Australia, *The Justice Project: Final Report – Part 1: Rural, Regional and Remote (RRR) Australians* (Report, August 2018) 10.

[18] Kerry Carrington et al, 'Rural Masculinities and the Internalisation of Violence in Agricultural Communities' (2013) 2(1) *International Journal of Rural Criminology* 3, 7; Carolyn Neilson and Bonnie Renou, *Will Somebody Listen to Me? Insight, Actions and Hope for Women Experiencing Family Violence in Regional Victoria* (Report, Lodden Campaspe Community Legal Centre, April 2015) 15; Hunt et al (n 17) 6.

[19] Kerry Carrington and John Scott, 'Masculinity, Rurality and Violence' (2008) 48(5) *British Journal of Criminology* 641, 648.

[20] 'NSW Crime Tool', *Bureau of Crime Statistics and Research* (Web Page, 2022) <http://crimetool.bocsar.nsw.gov.au/bocsar/>.

suggest these differences are likely not due to poverty, race, or lack of education, but, true to our working definition, are more attributable to 'a lack of services to help both victims and perpetrators'.[21]



Figures 1 and 2. Bureau of Crime Statistics and Research data on sexual offences (above) and domestic assault (below) by region.

Source: 'NSW Crime Tool', *Bureau of Crime Statistics and Research* (Web Page, 2022) <http://crimetool.bocsar.nsw.gov.au/bocsar/>.

Shame is remarkably accurate in its depiction of gender in the RRR. We see 'mateship', 'revealed [in *Shame*] as the code which legitimizes sexual intimidation',[22] alive in the 'rural gender order',[23] which normalises a 'higher threshold for the tolerance of gendered violence … most of it … invisible to the outside world'.[24] Violence is not the only symptom.[25] Pubs are 'venues for the negotiation of frontier rival masculinities',[26] as seen in Asta's cold reception in the pub in the film's opening and the ritual passing of a hat for bail money, also in the pub: 'Hey fellas, reckon we better have a whip around, start a fighting fund!'[27] Pressures from 'family members, friends, police and health professionals' to 'deny or forgive men's violence'[28] are depicted in the gutless Sergeant Cuddy (Peter Aanensen) and Lizzie's

[21] Ibid.

[22] Verina Glaessner, 'Shame' (1 June 1989) *Monthly Film Bulletin* 188.

[23] Russell Hogg and Kerry Carrington, 'Policing the Rural Crisis' (2006) 38(3) *Australian and New Zealand Journal of Criminology*, cited in Wendt et al (n 16) 13.

[24] Hogg and Carrington (n 24) 181 in Wendt et al (n 16) 14.

[25] Carrington and Scott (n 20) 659.

[26] Carrington et al (n 19) 5.

[27] *Shame* (n 2).

[28] Debra Parkinson and Claire Zara, 'The Hidden Disaster: Domestic Violence in the Aftermath of Natural Disaster' (2013) 28(2) *Australian Journal of Emergency Management* 31, cited in Wendt et al (n 16), 9.

friend Lorna (Karen Hobson) being told by her brother 'for God's sake' to not pursue charges.[29] We see in Ginborak's Thatcher-esque matriarch Mrs Rodolph (Pat Skavington), who is 'of course' prepared to be generous in paying victim-survivor Lizzie off,[30] that '[i]nfluential families sometimes exert substantial pressure so that victims do not proceed with official complaints'.[31] And gossip networks and informal social controls[32] are shown through the women in the supermarket—'Oh bullshit, of course you're talking about her! She's the latest!'—and the scapegoating of Penny Ross (Allison Taylor), a victim-survivor who attempted to press charges, as remembered by Lizzie's father (Tony Barry)—'So people'd never talk to her in the streets! She was a joke!'—with Lizzie's reply: 'I remember you laughing.'[33] *Shame* does depict sexual assault over family violence and sidelines First Nations experiences (the only First Nations characters are background extras at the town's meat-processing factory),[34] but the film's overall picture—'fear', 'indifference', '"small town" attitudes of shame and judgement'[35]—is familiar and relevant.[36] In one woman's words: 'that's the way they were, the men go and they drink and they party and they sleep around and they can do whatever … It's not until you walk away from that, that you realise that's not a normal way to be.'[37]

Challenges with viewing *Shame* as a normative statement

However, 'It wasn't Lizzie Curtis, it was just a woman—anybody.'[38] The film's rallying call is the point at which we start contextualising the described problem with a view to responding. In a recent interview, Jodrell remarked 'Although a part of me would wish that the issue of the film were no longer pertinent, I am very glad that the film can still talk to people.'[39] I wonder *how* the film still talks to people, including myself. I posit that *Shame* is open to certain readings, where, as with sexual assault being a proxy for all gendered violence, rurality is not the thing that *Shame* is interested in, but an exaggerated worst case of the thing that *Shame* is interested in. This is a reading which does violence to Lizzie as the rural woman—now *we* discard Lizzie Curtis, seeing instead just a woman, anybody. It is a reading with consequences: although women living in the RRR 'are exposed to many of the same gendered cultural discourses as the wider community',[40] universalised[41] assumptions 'overshadow the nuances and complexities of gender relations and identities in rural contexts'.[42] Homogenising difference between the RRR and urban centres, between RRR communities, and within RRR communities themselves often leads to 'urban-centric' laws and policies with harmful effects.[43] One thinks of mandatory loss of licence for driving offences,[44] or the publicisation of a victim-survivor's

[29] *Shame* (n 2).

[30] *Shame* (n 2).

[31] Carrington et al (n 19) 9.

[32] Wendt et al (n 16) 28; Neilson and Renou (n 19) 88; Carrington et al (n 19) 9.

[33] *Shame* (n 2).

[34] Wendt et al (n 16) 9.

[35] Neilson and Renou (n 19) 88.

[36] National Wrap, 'Sexual Harassment "Ignored" in Rural Workplaces, Despite Global #MeToo Movement', *ABC News* (online, 18 November 2018) <https://www.abc.net.au/news/2018-11-18/sexual-harassment-in-rural-australian-workplaces-ignored-metoo/10505324>; Trish Mundy, 'Engendering "Rural" Practice: Women's Lived Experience of Legal Practice in Regional, Rural and Remote Communities in Queensland' (2014) 22(2) *Griffith Law Review* 481.

[37] Neilson and Renou (n 19) 89.

[38] Ibid.

[39] Interview with Steve Jodrell and Michael Brindley (Karina Libbey, National Film and Sound Archive, 10 July 2020).

[40] Jo Little, Ruth Panelli, and Anna Kraack, 'Women's Fear of Crime: A Rural Perspective' (2005) 21(2) *Journal of Rural Studies* 151, cited in Wendt et al (n 16) 6.

[41] Sarah Wendt, 'Constructions of Local Culture and Impacts on Domestic Violence in an Australian Rural Community' (2009) 25(2) *Journal of Rural Studies* 175, 175.

[42] Wendt et al (n 16) 6.

[43] Law Council of Australia (n 18) 4.

[44] Ibid.

family violence experience in taking their matter to court.[45] Particular issues in the RRR include isolation and distance,[46] anonymity and confidentiality,[47] and newer issues of telephone and internet connectivity.[48] As alluded to earlier, these are differences that are not experienced uniformly.[49]

To be clear, I am not suggesting that *Shame* should not be seen—it is probably not seen enough. However, I am interested in how it might be, against perhaps how it ought to be, *read*. 'Replace "Ginborak"', poses Heller-Nicholas,

> with 'Hollywood', 'small outback town' with 'large entertainment-industry-focused city', and 'pub' with 'boardrooms and cinemas', and no tidier description of the world in which Weinstein and other alleged long-term predators in positions of power were able to thrive for literal decades could be imagined.[50]

While Heller-Nicholas is herself aware of the pitfalls of casting a 'universalising light',[51] let us for a moment indulge this proposition and see what becomes of the small town setting we began in.

Shame's legal space

Ginborak—filmed in Toodyay, Western Australia[52]—is an RRR everytown: at least a day's train ride from Perth, and composed of scant more than its pub, police station, garage, small eatery, train station, and meatworks, where Lizzie and other women are employed by Mrs Rodolph to process pet meat. Its middle-of-nowhere-ness is made clear in the film's opening shot: a single house, a road, and green fields stretching to the horizon.[53] The film is unconcerned with penumbral cases and exacting definitions—the RRR is merely what we agree it to be. Already, we see an appeal not to a real space but an imagined one—an *affective setting*. It summons an aesthetic of 'Australian … open roads and wide landscapes',[54] thematically signalling the generic preconditions and expectations, ideals and upsets, of Ozploitation, the Australian pulp action, horror, and thriller cinema movement of the 1970s and 80s.[55] Although *Shame* has not been considered as emblematic of that movement as other films have, likely because of its distinct proto-feminism and release towards the end of the canonical Ozploitation era, we begin in the same place we begin when we sit down to watch *Mad Max* (1971)[56] or *The Cars That Ate Paris* (1974).[57] As discussed above, these other films inspired the film's treatment and situate its conception, release, and reception. Ginborak is like The Yabba from *Wake in Fright* (1971),[58] where, as Rayner describes, '[t]he situation of the town merely exposes, facilitates and intensifies … as the town's obsessions (drinking, gambling, hunting) can be seen simply as hyperbolic expressions of otherwise accepted, characteristic national pastimes'.[59] The 'realness' of Ginborak as a site for RRR experiences

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[45] Neilson and Renou (n 19) 44.

[46] Justine Adkins, 'Improving the NSW Justice System's Response to Rural Crime' (2017) 29(9) *Judicial Officers Bulletin* 75, 75; Michael Cain, Deborah Macourt, and Geoff Mulherin, *Lawyer Availability and Population Change in Regional, Rural and Remote Areas of NSW* (Report, Law and Justice Foundation of New South Wales, September 2014), cited in Law Council of Australia (n 18) 19.

[47] Angela Ragusa, 'Rural Women's Legal Help Seeking for Intimate Partner Violence: Women Intimate Partner Violence Victim Survivors' Perceptions of Criminal Justice Support Services' (2012) 28(4) *Journal of Interpersonal Violence* 685, cited in Wendt et al (n 16) 7.

[48] Law Council of Australia (n 18) 20; Christine Coumarelos et al, *Legal Australia-Wide Survey* (Access to Justice and Legal Needs Volume 7, Law and Justice Foundation of New South Wales, August 2012) 216.

[49] Trish Mundy, 'The Lone Wolf or Rural Justice Champion? Imagining "The Rural Lawyer"' (2016) 18 *Southern Cross University Law Review* 31, 54.

[50] Heller-Nicholas (n 11), 121.

[51] Ibid.

[52] Internet Movie Database, 'Shame (1988) – Filming and Production – Filming Location' (Web Page, n.d.) <https://www.imdb.com/title/tt0093952/locations>.

[53] *Shame* (n 2).

[54] James Caryn, 'Review/Film: A Macho Australian Arrives on Her Cycle', *New York Times* (New York, 19 March 1988).

[55] *Not Quite Hollywood: The Wild, Untold Story of Ozploitation!* (Film Finance Corporation Australia, 2008). Note, however, the 'Ozploitation' label has been doubted, see Mark Ryan, 'Towards an Understanding of Australian Genre Cinema and Entertainment: Beyond the Limitations of "Ozploitation" Discourse' (2010) 24(6) *Continuum* 843.

[56] *Mad Max* (Kennedy Miller Productions, 1979).

[57] *The Cars That Ate Paris* (Australian Film Development Corporation, 1974).

[58] *Wake in Fright* (NLT Productions, 1971).

[59] Jonathan Rayner, 'Gothic Definitions: The New Australian "Cinema of Horrors"' (2011) 25(1) *Antipodes* 91, 93.

to be explored is threatened with totalisation by its fictive nutriments from *Shame*'s opening—it is an extremified space where urban anxieties are given credence.

While he was not principally a legal theorist, sociologist Michel Foucault conceptualised power as it is exercised and was interested in law as an expression of power. His theories show how in modern society, 'law combines with power in various locations in ways that expand patterns of social control, knowledge, and the documentation of individuals'.[60] A key element of his contribution to legal theory is the concept of spatiality—the examination of how power operates and is transmitted within spaces, including how it gains new meanings and qualities in the interstitial areas *between* interacting spaces, such as the border between metropolitan and RRR. Foucault's treatment of the psychiatric hospital as a site of production is revealing:

> [T]he psychiatric hospital is indeed the institutional site in and through which the expulsion of the mad person takes place; … it is a center of the constitution and reconstitution of a rationality that is imposed in an authoritarian way in the framework of relations of power within the hospital, and that will be reabsorbed outside the hospital itself in some form of a scientific discourse that circulates outside as knowledge about madness, for which the condition of possibility of it being rational is, precisely, the hospital.[61]

Reading Ginborak as such a psychiatric space, the notion of 'madness' begins as unchecked masculinity. Adopting a critical legal lens alongside the dominant reading of the film, we begin to read into this madness. The town is overrun, governed by a hierarchical and repressive system that is not law. Waldron writes of the presumption of equal legal treatment, where, in contrast, '[a] system that embodied radical differences of legal dignity might be a sort of proto-legal system, but we should not call it a true system of law'.[62] In Ginborak, the legal dignity afforded to its citizens (and visitors) is demarcated depending on deep divisions in gender and class. Ginborak's is a system of specific *sanctioned desire*, where the legal dignity of its predatory male population is prized over the legal—and bodily—dignity of their female victims. It is not a system presided over by specialised technicians,[63] but rather run ad hoc by its beneficiaries, who are also its enforcers. Its rules are neither governed by secondary rules[64] nor by principles,[65] but rather by entitlement, making its claim to legitimacy plainly circular. At its peak is a matriarch, Mrs Rodolph; it is policed by some females such as the supermarket ladies; and we do see male victims like Lorna's brother and Tim Curtis—there is a complex web of complicity in which class must be implicated, rather than gender alone.[66] But the subjects enabled, even cultivated by the system—Andrew Rodolph (Douglas Walker) is egged on by Danny Fiske (David Franklin) throughout—are the young, sexually charged men. Their libido is the productive force of Ginborak's rule of unlaw. *Shame*'s projected anxiety begins to take shape.

But the RRR space is not only a habitat, but also a colluder. In the recent criminal case *Director of Public Prosecutions (Vic) v Strucelj*, Judge Hollingworth pronounced: 'This incident has affected their [the victim's family's] sense of personal safety, especially at night, and for those who live in more isolated [rural] locations.'[67] Trauma could only be explained by imbuing spatiality with the characteristics of the offender—isolation itself became the night-time bogeyman. *Shame*, like this case, positions the RRR space as murky, undefined, repressive—not through the legal technique of a written judgment but using cinematic techniques such as dark cinematography, on-location filming, and *Mad Max*-inspired set designs and sequences such as the finale. As Foucault's 'mad person' is located and produced in the psychiatric hospital, *Shame*'s RRR space is coded as a place where specifically gendered violence can happen, and does happen. Space and legal (or unlegal) character become intertwined, reciprocal. As Manderson writes: 'law both structures our understanding of certain spaces,

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[60] Gerald Turkel, 'Michel Foucault: Law, Power, and Knowledge' (1990) 17(2) *Journal of Law and Society* 170, 170.

[61] Michel Foucault, *The Punitive Society: Lectures at the Collège de France 1972–1973*, tr Graham Burchell (Picador, 2013) 4.

[62] Jeremy Waldron, 'How Law Protects Dignity' (2012) 71(1) *The Cambridge Law Journal* 200, 215.

[63] Ibid, 216; David Delaney, *Nomospheric Investigations: The Spatial, the Legal and the Pragmatics of World-Making* (Routledge, 2010) 157.

[64] HLA Hart, *The Concept of Law* (Clarendon Press, 1970) 15.

[65] Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1986).

[66] Heller-Nicholas (n 11) 120.

[67] *Director of Public Prosecutions (Vic) v Strucelj* [2020] VSC 140, [44].

while at the same time those spaces themselves radically transform the experience, application, and effect of law.'[68] Yet arguably we should be looking to more 'familiar' metropolitan spaces also, such as Central Park (Eurydice Dixon), the High Court (Dyson Heydon), Parliament House (Brittany Higgins), and The Australian National University.[69] In these spaces, gendered violence is just as real. While, as we have seen above, RRR communities still experience the attitudes and violence depicted in *Shame*, the film's interweaving of Ginborak's problems with its spatiality and identity as a rural location, and its codification as an 'othered' place, externalises what we see on the screen as something out there, but perhaps not something that could happen to us as (assumed) metropolitan viewers. Despite references made by Asta to the danger she experiences at home, the strong intertwining of space and threat, and the collusion of the RRR setting with the events of the film, gives metropolitan areas an effective pass, or at least defers a need to investigate them also given the more pressing and immediate threat. While, as discussed above, the problems depicted in *Shame* can and do exist in the RRR, we ought to take issue with how rurality is presented in *Shame* as a marker of difference which exonerates metropolitan spaces.

Per Foucault, diagnosis and prognosis—applied as 'nosography in the language of the doctor'[70] inside the hospital—is then 'reabsorbed' as scientific discourse outside. Asta confronts Cuddy: 'Charge *me*? And when will you start on the fun-loving boys? Driving underage, driving with blood-alcohol above the prescribed limit, negligent driving, conspiracy, oh attempted abduction, assault.'[71] Asta, as legal technician—'A barrister, as a matter of fact'[72]—diagnoses the conditions. Outside, in appeal to metropolitan sensibilities and frameworks, these become transmitted as legal (rather than scientific) discourse: a knowledge power exercised about madness, disorder, *unlaw*. The imagined RRR space is a reactionary chamber, where law is constituted and reconstituted: rendered *from* abstract ordering and instruction *into* necessary and rational truth.[73] Pruitt contends that 'judicial opinions create different expectations of formal or official law, marginalizing it, diminishing its potency, and further bolstering rural instincts towards self-reliance'.[74] Substitute 'judicial' for 'cinematic', and respectfully disagree—what if this was not the source of law's cession,[75] but rather intense retaliatory interest? Instead of suggesting a tendency of self-reliance, the vacuum of lawlessness might instead unfold as an ongoing moral panic, creating a more urgent and pressing need for legal intervention.

Law reform, however, becomes overlooked. Asta's diagnosis reveals that law already applies, indeed was already breached, in Ginborak; it is only yet to be realised. In Asta's narrative, the unrealised (future) and preconditional (past) contents are identical, and the missing present element of enforcement can only achieve a determined resolution. 'And when you rely on the law,' emphasises writer Michael Brindley, 'the police station is empty.'[76] The break in the chain is not in *what* will be enforced, but *whether* it—a presumed, constituted, likely perfect *it*—will be enforced at all. The legal system is unreliable not because of the law, but because of the police. This suggests that law, a participant in the dialogic field rather than the field itself, is *already* what it ought to be. However, contemporary research, such as scholarship from Coumarelos et al., shows 'the concept of "access to justice" has expanded from unidimensional to an increasingly multifaceted concept',[77] encompassing legal, nonlegal, and new legal solutions.[78] Larcombe advocates that 'the criminal law's monopoly on sexual assault must be

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[68] Desmond Manderson, 'Interstices: New Work on Legal Spaces' (2005) 9 *Law/Text/Culture* 1, 1, cited in Delaney (n 64), 39.

[69] Sarah Lansdown, 'Canberra Students Report Higher Rates of Sexual Harassment, Assault in National Survey', *Canberra Times* (online, 24 March 2022) <https://www.canberratimes.com.au/story/7670871/absolutely-no-good-news-canberra-students-report-higher-rates-of-sexual-harassment-assault/>.

[70] Foucault (n 62) 5.

[71] *Shame* (n 2).

[72] Ibid.

[73] Foucault (n 62) 5.

[74] Lisa Pruitt, 'The Rural Lawscape: Space Tames Law Tames Space' in Irus Braverman, Nicholas Blomley, and David Delaney (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (University Press Scholarship Online, 2014) 190, 205.

[75] Ibid, 207.

[76] Jodrell and Brindley (n 40).

[77] Coumarelos et al (n 49) 207.

[78] E.g. restorative justice, see Neilson and Renou (n 19) 120.

broken'[79] as it 'actively contribut[es]' to the minimisation and normalisation of violence and reproduces distorted ideas of 'real rape' and deviant 'sexual offenders',[80] further noting that 'legislative reforms … ha[ve] been hard-fought and hard-won'.[81] According to these readings, it is not that the police station needs to be populated (as Brindley implies), but that the law itself ought to change and adapt, specifically to a localised RRR context. *Shame*'s immunisation of law denies it as a site of contestation and places the responsibility on enforcement instead, precisely making it difficult for the reforms advocated for by those such as Larcombe to take place.

But Lizzie dies. The film is alive to the possibility that its subject will be appropriated, magicked into a spectral figure. In Asta, *Shame* becomes 'a deliberately failed rape-revenge movie'.[82] Although female, our protagonist 'may reinforce rather than defuse patriarchal constructs'.[83] She is coded as male, with the phallic dimension of the 'spare parts' that she needs to get back on her motorcycle expressly alluded to in the film's dialogue.[84] Asta is a leather-clad fetish object inhabited by the viewer, and we can see in her prepping of Lizzie for self-defence Mundy's individualistic 'Lone Wolf' rural lawyer archetype[85] and Imai's warning against imposing pre-packaged 'well-structured' problems onto diverse populations[86]—both describing phenomena where metropolitan lawyers attempt to apply their expertise in RRR contexts without shedding unhelpful assumptions. However, Lizzie asks Asta, 'What if there's six?'[87] The reality is always more complicated—Asta's sloganism and posturing only gets Lizzie killed.[88] A concluding shot focuses on Asta's eyes, making the viewer reflect on Asta's choice of an idealised victim, essentially a younger version of herself, whom she has now played a part in destroying. It is a testament to the horror that has been witnessed, but also the propulsive role of the witness towards the narrative and the many blind spots that have led to this result. Through Asta's narrow vision and in pursuit of this *Mad Max* revenge narrative we have been averted from the complexity of the RRR, including universalising metropolitan assumptions, the presence of domestic and family violence, and the reality of missing and murdered First Nations women. Our own gaze is implicated. The cinematic frame has destroyed the *actualness* of the object, whether Lizzie or the RRR space, as we have treated them not as things in themselves but as repositories for our own projections. This is why it is somewhat disappointing when Lorna delivers the last line of dialogue to Cuddy: 'I'll be at the police station nine o'clock, okay? I'll be laying charges.'[89] By the film's end, its faith in its allegorising frame has been disrupted. But its faith in inert, constituted law—another universalising technology—has not.

Bearing the shame

As a cultural trace, *Shame* enables us to genealogise archetypical narratives,[90] or come to grips with Eurydice Dixon in Princes Park, Dyson Heydon in the High Court, revelations from the #MeToo movement. However, the act of reading is a violent one of *what's yours is mine*. Captured by fictional Ginborak, the real RRR becomes threatened as a site upon which foreign (metropolitan) anxieties are

[79] Wendy Larcombe, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 143, 150.

[80] Ibid, 147.

[81] Ibid, 144.

[82] Heller-Nicholas (n 11), 119.

[83] Helene Shugart, 'Counterhegemonic Acts: Appropriation as a Feminist Rhetorical Strategy' (1997) 83(2) *Quarterly Journal of Speech* 210, 216.

[84] *Shame* (n 2).

[85] Mundy (n 50), 32.

[86] Shin Imai, 'A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering' (2002) 9(1) *Clinical Law Review* 195, 203.

[87] *Shame* (n 2).

[88] Heller-Nicholas (n 11), 120.

[89] *Shame* (n 2).

[90] Richard Sherwin, 'Nomos and Cinema' (2001) 48(6) *UCLA Law Review* 1519; Mundy (n 50), 32.

projected and played out; where law is deployed, transmitted as real, but also inert. As *Shame* engages, problematises, and settles, our foremost question should be, *where?*

An implied question so far has been whether *Shame* should still be seen—whether it is still relevant. My answer is that it absolutely should be, especially in its recently restored form thanks to the National Film and Sound Archive. Succeeding as a female-fronted answer to *Mad Max*, the film both participates in and expands the Australian film canon, where rural Australia is coded as a space of threat, drama, and adventure. Its explicit messaging as a story of sexual assault and empowerment, but also tragedy, and referencing of legal figures such as prosecutor Asta Cadell give the film a particular reach into today's context, where none of the issues raised by the film have gone away. But *Shame*'s afterlife ought to be critically examined. For metropolitan viewers, the issues depicted are not problems only or primarily encountered abroad in no-name towns out bush. To recognise and tackle the reality of gendered violence, we need to problematise our own spaces too.

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‘I am, you are, we are un-Australian’: National identity, political discourse and use of the term ‘un-Australian’ in Federal Parliament

ELISHEVA R. MADAR

Abstract

The term ‘un-Australian’ has long been a rhetorical device used in Australian politics and media to identify ‘in-’ and ‘out-groups’ within our society. Australia’s journey to develop a cohesive national identity, or ‘in-group’, following waves of colonial settlement and migration was utilised by political actors to formulate a sense of ‘Australianness’ that could trump the national, ethnic, or religious ties that its various citizens held. This article therefore seeks to uncover what meanings the term ‘un-Australian’ possesses in our political parlance, if its usage reflects that contention that Australian identity is partially based in an otherisation of non-white nationals and if the term’s connotations are influenced by a speaker’s political affiliation.[1] A random sampling of 50 uses of ‘un-Australian’ in Parliament between 1 May 2000 and 1 May 2020 were coded for this essay. Ultimately, this data reveals that while frequency of the term ‘un-Australian’ does not increase with a speaker’s political conservatism, there is some evidence to suggest that such political actors use the term with more xenophobic or racist connotations. Moreover, an unforeseen correlation between gender and frequency was observed, suggesting that women parliamentarians are less likely to employ the term ‘un-Australian’, possibly due to their own experiences of ‘otherisation’. While no single meaning of ‘un-Australian’ was revealed, it is perhaps the breadth and non-specificity of the term that is most thought-provoking, suggesting that it may simply be a catch-all pejorative used by political actors seeking to present themselves as Australia’s patriotic defenders.

> What’s a real Aussie? There is none. There’s no such thing as an actual Australian these days except for the bald-headed fuckwit politicians that actually believe they’re *it*.
>
> — Anonymous Respondent Seven[2]

Introduction

Attempts to define the term ‘Australian’ and its contents have a long and varied history in Australian journalism and politics. As a national entity born out of colonisation, made home by convicts, and followed by successive generations of foreign immigration, ‘Australia has long since supported a whole industry of image-makers to tell us what we are’.[3] The term ‘un-Australian’ has been utilised by politicians in Parliament since 1903, with its first recorded mention by Mr Henry Higgins. He argued it would be ‘un-Australian’ and ‘most derogatory to the dignity of Australia’ to create a High Court only to allow litigation to be appealed to the British Privy Council.[4] In a more recent parliamentary hearing in May 2022, Liberal MP Gladys Chiu called out racism against Chinese-Australians in discussions of foreign policy as ‘offensive, divisive and un-Australian’,[5] suggesting that the use of the term in conversations around xenophobia and racism is likely to continue. The term has long played a role in political discussions within Australia, and reflects a continued

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[1] Jehonathan Ben, et al., ‘Racism in Australia: A Protocol for a Systematic Review and Meta-analysis’, *Systematic Reviews* 11, no. 47 (2022): article 47.

[2] Kate O’Toole, ‘Vox-Pop: UnAustralian’, *Triple J* (ABC radio), 7 December 2006, quoted in Alice Brennan, ‘UnAustralia’, *Continuum* 21, no. 4 (2007): 513–17. Italics in original.

[3] Richard White, *Inventing Australia* (St. Leonards: Allen and Unwin, 1992), 160.

[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 July 1903, *Judiciary Bill: Third Reading* (Henry Higgins).

[5] ‘“Offensive and Divisive”: Gladys Liu Calls Out “Un-Australian” Attitudes’, *Sky News,* 13 May 2022.

struggle with the nation's self-professed 'multicultural' identity.[6] This essay seeks to determine if the adjective 'un-Australian' has any singular definition, or if it is a catch-all pejorative used by political actors seeking to paint themselves as protectors of some unspoken national identity.

The manner and undertones with which 'un-Australian' is used in the country's highest political body is critical, because it reflects its speakers' self-perception of Australian national identity. If it is used in racially motivated or otherwise xenophobic contexts, it suggests a deep-seated discomfort with Australian multiculturalism and an institutionalisation of the kind of racist rhetoric non-white Australians face daily.[7]

My initial hypothesis centred on the frequency of usage by conservative politicians, and whether they are more likely to employ the term in a xenophobic manner. However, additional research on the role of Australian political discourse in the formation of our national identity (discussed below) has illuminated the use of coded language in such discussions. Therefore, this essay also considers the frequency and correlation of the term 'un-Australian' with politicians' characterisations of Australian 'values' and 'identity'—masking terminology that is used to disguise more overt xenophobia in discussions of Australianness.

National identity and parliamentary discourse: Linguistic trends in defining 'Australian'

David Lowenthal proposed that a combination of Australia's fascination with military victories (and defeats) and predilection to paint colonialists as intrepid discoverers conquering the outback has led to a national obsession with the 'heroic and anti-heroic'.[8] This normalisation of binary judgements has predisposed us to accept the characterisation of people and events as either 'good or evil, fit to praise or blame' and, consequently, Australian or 'un-Australian'.[9] This is supported by Richard White's contention that while 'most new nations go through the formality of inventing a national identity', Australia relied on commentators 'throughout its white history' to curate and capture its national identity.[10] As discussed throughout this essay, there is huge diversity in the topics, items, and actions that have been called 'un-Australian' by federal politicians. If the Australian public is the consumer in this equation (and politics the industry), it is perhaps telling of our own uncertainty of what is 'Australian' that political actors feel comfortable in declaring any and everything its opposite. If the Australian public were more certain of their own definition of the term, they may not be so accepting of the frequency and randomness with which politicians employ it.

While not a political scientist, van Dijk's 'ideological square' theory provides an explanation for the manner in which politicians utilise language to discredit and 'other' their rivals (whether they be political opponents, foreign immigrants, unions, etc.) through the employment of 'us versus them' tactics.[11] His thesis, put simply, is that actors wish to present themselves (the 'in-group') favourably, and in order to do so, use linguistic tools to demonise or ridicule their opposition (the 'out-group').[12] This is referred to as the ideological 'square' because it comprises four key behaviours: 'emphasizing our good properties/actions; emphasizing their bad properties/actions; mitigating our bad properties/actions; and mitigating their good properties/actions'.[13] In the context of this essay, the term un-Australian is used to emphasise the 'bad actions' of the speaker's opponents—for example, 'Prime Minister Howard has turned his back on Australian workers … [as] part of a warped ideology … to destroy unions … Those attacks were un-Australian and Australians knew it'.[14] In using the term in this way, MP Tony Zappia sought to diminish the ruling Liberal–National Party and paint himself as a protector of workers, while simultaneously asserting that the defence of unions was something fundamental to Australia itself.

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[6] Australian Government Department of Home Affairs, 'Our Policy History', *Multicultural Affairs*, 17 March 2020. Accessed 11 October 2022, https://www.homeaffairs.gov.au/about-us/our-portfolios/multicultural-affairs/about-multicultural-affairs/our-policy-history.

[7] Ben et al., 'Racism in Australia'.

[8] David Lowenthal, 'Australian Images: The Unique Present, the Mythical Past', in *Readings in Australian Arts*, ed. M. Quatermaine (Exeter: University of Exeter Press, 1978), 86.

[9] Lowenthal, 'Australian Images', 91.

[10] White, 'Inventing Australia', 160.

[11] Teun van Dijk, 'Principles of Critical Discourse Analysis', *Discourse and Society* 4, no. 2 (1993), 249–83; Teun van Dijk, 'What is Political Discourse Analysis?', *Belgian Journal of Linguistics* 11, no. 1 (1997): 11–52.

[12] Teun van Dijk, *Ideology: A Multidisciplinary Approach* (SAGE Publications Ltd, 1998), 23.

[13] Sai-Hua Kuo and Mari Nakamura, 'Translation or Transformation? A Case Study of Language and Ideology in the Taiwanese Press', *Discourse & Society* 16, no. 3 (2005): 410.

[14] Commonwealth, *Parliamentary Debates*, House of Representatives, 15 February 2012, 1451 (Tony Zappia, Member for Makin).

Australian identity, as 'constructed for voters by political leaders', has long been 'a story of inclusion and exclusion'.[15] Younane Brookes and Wirth-Koliba have both identified a pattern of Australian political actors inciting fear or hatred of an 'other' in order to bind together a disparate national population.[16] During the nineteenth century, that 'other' was 'the Yellow Peril';[17] in World War I, the Central Powers; under the White Australia policy, non-white immigrants, and so on.[18] Struggling to create a unique identity in the aftermath of achieving statehood, politicians and other actors fought to establish a sense of 'Australianness', creating a nationalist identity with 'its roots in fear and hatred of the "Other"'.[19] In the absence of uniting features of race or religion, 'the myth of national homogeneity [was] sustained through … the explicit expulsion or rejection of difference'.[20]

Every and Augoustinos argue that in modern Australia this rejection of difference or 'un-Australianness' has become less explicitly racist, but remains racially motivated beneath the surface.[21] This has resulted in most major political parties adopting a 'categorical denial' that they possess racist motivations, while facilitating 'the simultaneous exclusion, oppression and demonization of minorities',[22] such as asylum seekers[23] and Indigenous Australians.[24] Consequently, any attempt to identify the frequency or connotations of the term 'un-Australian' must acknowledge and contend with the disparate forces that make up 'Australian' identity.

My hypothesis that conservative politicians (from parties such as the Liberals, Nationals, and One Nation) more frequently utilise the term 'un-Australian', and do so with racist undertones, is supported by Younane Brookes, and Every and Augoustinos' studies.[25] With the former focusing on election campaigns and the latter on parliamentary debates, both studies use mixed methodologies to identify Australian politicians' historical tendency to utilise language of 'exclusion and national identity' in the context of immigration policy, in order to strengthen their visage of patriotism and effective political action.[26] As Younane identifies, historically, the Liberal Party and its antecedents have been somewhat more concerned than their political opponents with the 'dangers' of racial diversity and immigration.[27] Alfred Deakin, Prime Minister and member of the Liberal Party's oldest ancestor, the Protectionist Party, called on voters in 1903 to 'exclude undesirable and coloured aliens'.[28] Deakin and many of his contemporaries utilised a definition of 'Australianness' that was 'reliant on "whiteness"' in their attempts to create a cohesive national identity through 'a clear construction of what it is not'.[29]

In the small pool of literature dedicated to usage of the term 'un-Australian', no academic, commentator, or journalist has even attempted to attribute a single distinct meaning to the word. Building on the above theories, 'un-Australian' could thus simply be a linguistic technique by which politicians are able to identify and decry an 'other', without having to define the indefinable, that which is 'Australian'. With our national identity being so mutable, usage of the term presents individuals (or their parties) an opportunity to define what is 'Australian'—if only in opposition to some perceived threat—and play a role in shaping that identity into the future.

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[15] Stephanie Younane Brookes, *Exclusion and National Identity: The Language of Immigration and Border Control in Australian Federal Election Campaigns* (University of Melbourne, 2012), 1.

[16] Younane Brookes, *Exclusion and National Identity*, 1; Victoria Wirth-Koliba, 'The Diverse and Dynamic World of "Us" and "Them" in Political Discourse', *Critical Approaches to Discourse Analysis Across Disciplines* 8, no. 1 (2016): 23–37.

[17] Multicultural Australia, 'Yellow Peril', *Multiculturalaustralia.edu.au*, 26 November 2004, http://www.multiculturalaustralia.edu.au/hotwords/unpack/Yellow.Peril.

[18] 'White Australia Policy', *National Museum of Australia*, accessed 6 May 2020, https://www.nma.gov.au/defining-moments/resources/white-australia-policy.

[19] Benedict Anderson, *Imagined Communities* (London: Verso, 1983), 129.

[20] Younane Brookes, *Exclusion and National Identity*, 12.

[21] Danielle Every and Martha Augoustinos, 'Constructions of Racism in the Australian Parliamentary Debates on Asylum Seekers', *Discourse & Society* 18, no. 4 (2007): 411.

[22] Every and Augoustinos, 'Constructions of Racism', 411.

[23] Bianca Hall, 'Lawyers Representing Asylum Seekers are "Un-Australian": Peter Dutton', *The Sydney Morning Herald*, 28 August 2017.

[24] Staff Reporter, 'Australia Remains Racist, Says Academic', *The Sydney Morning Herald,* 15 June 2007.

[25] Younane Brookes, *Exclusion and National Identity*, 1; Every and Augoustinos, 'Constructions of Racism', 411.

[26] Younane Brookes, *Exclusion and National Identity*, 1.

[27] Younane Brookes, *Exclusion and National Identity*, 5–6.

[28] Alfred Deakin, Policy Launch Speech, Her Majesty's Theatre (Ballarat, Victoria, 29 October 1903).

[29] Younane Brookes, *Exclusion and National Identity*, 7–8.

Methodology and data

As this essay sought to determine both the frequency and connotations of the term 'un-Australian' in a parliamentary context, a mixed methodology was employed in the form of qualitative and quantitative data analysis. The primary source was parliamentary Hansard, a transcription archive of all speeches made in Federal Australian Parliament, with additional secondary sources utilised to contextualise comments made by individual MPs.

Over the last 20 years (between the firsts of May 2000 and 2020) there have been 368 recorded usages of either 'un-Australian' or 'unAustralian' in Federal Parliament. For this report, a randomised selection of 50 sources was made. A combination of discourse and narrative document analysis was conducted. Discourse document analysis was used to decode the 'values, norms, ideologies, and other contextual factors' relevant to politicians' linguistic choices.[30] Narrative document analysis was employed to determine the 'story' that individual politicians sought to construct, identifying 'specific heroes, villains, and plotlines', particularly relevant in politicians' discussions of national identity and their protection of it.[31]

The speaker's name, political affiliation, and date of discussion were noted and helped contribute to the triangulation of each source, which helped to 'identify, explore, and understand different dimensions of the units of study, thereby strengthening [one's] findings'.[32] In the case of this essay, additional media and academic sources were used to contextualise the statements made by parliamentarians, especially where that context impacted their usage of the term in question. As Hansard provides only transcripts of the statements made, these additional sources were of utmost importance in developing 'thicker' characterisations of the MPs and their motivations.[33]

The Australian Electoral Commission's register of political parties and their party platforms was used to situate each party across a political spectrum.[34] It was concluded that the conservatively aligned parties in Australian politics include the Liberal Party, the Country Liberal Party, the National Party, One Nation, and the Bob Katter Party (with some combination of these parties often forming the governing bloc), while the Australian Labor Party (ALP), the Greens, and other minor parties formed the progressive minority for most of the period in question.[35]

While my hypothesis was based on a deductive methodology—attempting to determine if conservative politicians use the term 'un-Australian' more often, and/or with more racial connotations—during the process of coding, I was mindful of 'staying alert' to other, more inductive, insights.[36] As will be discussed below, the data revealed interesting correlations in regards to gender and other considerations that were unanticipated.

Results and discussion: The political weaponisation of Australian identity

In addition to determining the political alignment of each speaker, every use of the term 'un-Australian' was coded on two different axes. Firstly, what the subject being referred to as 'un-Australian' was: a (1) behaviour/action, (2) value, or (3) specific piece of legislation (see Figure 1). Secondly, the rationale behind the usage, or why the subject was denoted as 'un-Australian': the five major categories identified being (1) discriminatory, (2) anti-business, (3) anti-worker/anti-union, (4) criminal, or (5) a threat to Australian values

[30] Jared J Wesley, 'The Qualitative Analysis of Political Documents', in *From Test to Political Positions: Text Analysis Across Disciplines*, ed. Bertie Kaal, Isa Maks, Annemarie van Elfrinkhof (Amsterdam, John Benjamins), 137.

[31] Wesley, 'The Qualitative Analysis of Political Documents', 138.

[32] Paulette Rothbauer, 'Triangulation', in *The Sage Encyclopedia of Qualitative Research Methods*, ed. Lisa M Given (Los Angeles: Sage, 2008), 892.

[33] Joseph A Maxwell and Kavita Mittapalli, 'Thick Description', in Given, *Sage Encyclopedia of Qualitative Research Methods*, 880.

[34] 'Current Register of Political Parties', *Australian Electoral Commission*, accessed 5 March 2023, https://www.aec.gov.au/parties_and_representatives/party_registration/Registered_parties/.

[35] 'Current Register of Political Parties', *Australian Electoral Commission*, accessed 5 March 2023, https://www.aec.gov.au/parties_and_representatives/party_registration/Registered_parties/.

[36] Lucia Benaquisto, 'Codes and Coding', in Given, *Sage Encyclopedia of Qualitative Research Methods,* 86.

(see Figure 2). These categories were formulated inductively, in reaction to the particular connotations and terminology employed by MPs in the sample selection.

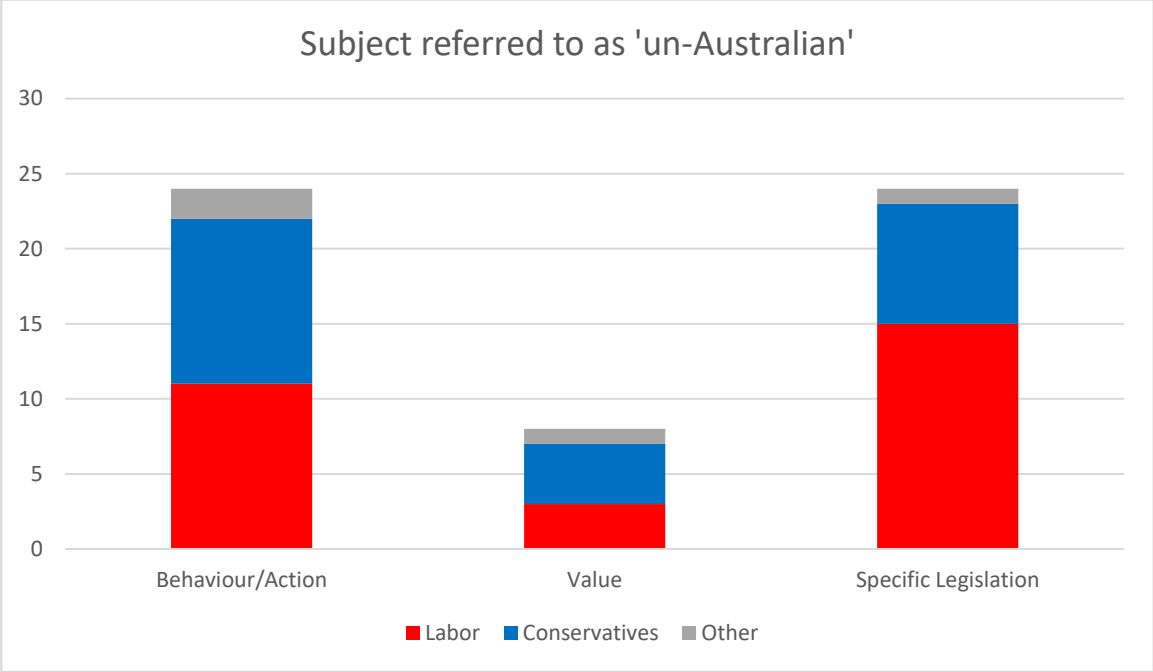

Figure 1: Subject referred to as 'un-Australian'

Source: Author's summary of findings.

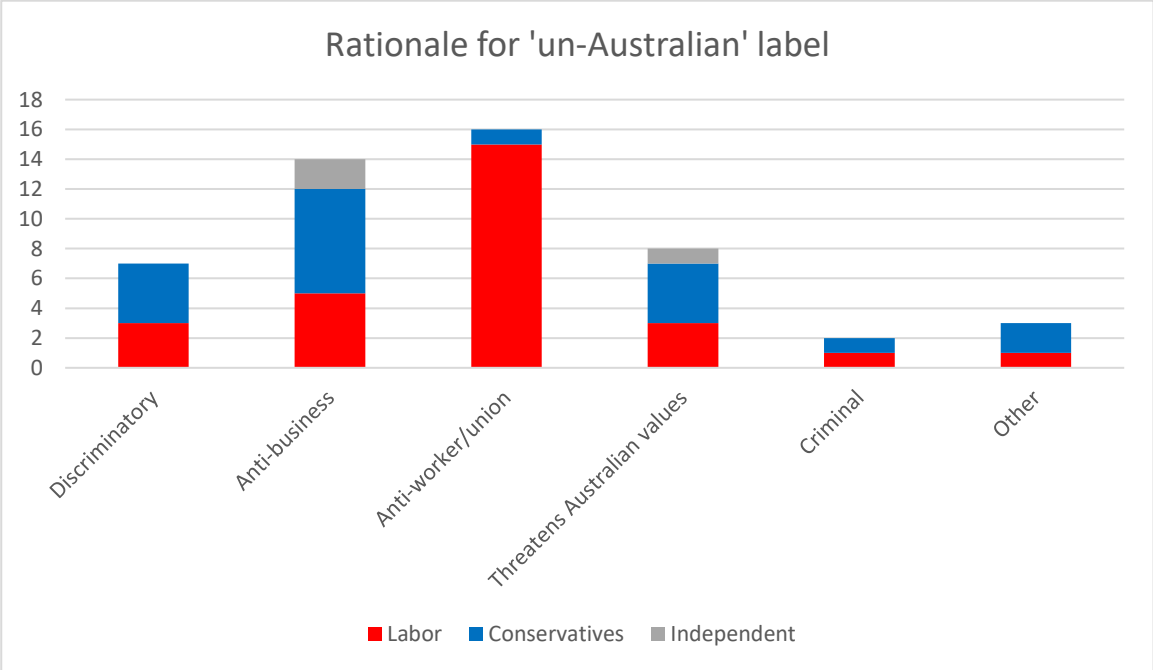

Figure 2: Rationale for 'un-Australian' label.

Source: Author's summary of findings.

The contention by Neumann that 'un-Australian' is nothing more than a synonym for another popular Australian colloquialism, 'bloody awful', is largely supported by the data.[37] Subjects of politicians' accusations of 'un-Australian'-ness included: vegetarianism,[38] not eating pie,[39] overly powerful unions,[40] attacks on

[37] Klaus Neumann, 'Unaustralian', (Presentation, Cultural Studies Association of Australasia Annual Conference, 2007), 6.

[38] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 March 2014, 2796 (Andrew Broad, Member for Mallee).

[39] Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2018, 5248 (Stephen Jones, Member for Whitlam).

[40] Commonwealth, *Parliamentary Debates,* House of Representatives, 11 September 2018, 8699 (Llew O'Brien, Member for Wide Bay).

unions,[41] insurance discrimination against truck drivers,[42] getting involved in the Iraq War,[43] arson,[44] and many others.

The connotations of the term do correlate with a speaker's political alignment, but seemingly reflect the major policy motivations of their respective parties (see Figure 2). Labor MPs were overwhelming more likely to refer to attacks on unions or attempts to lower wages as 'un-Australian' (these being major tenets of their party platform),[45] whereas conservative MPs were more concerned with bills being 'anti-business'[46] or activity which threatened key Australian 'values', such as protecting the rigorous process for gaining Australian citizenship,[47] or welcoming people of all faiths and races[48] (see Figure 3).

In regard to particular behaviours, all major parties identified discrimination as being 'un-Australian', and there is no evidence that conservative MPs were less likely do so. In fact, four of seven declarations of discriminatory behaviour as 'un-Australian' were made by Liberal or National MPs. Moreover, while I initially assumed Labor would be more aware of discrimination on the basis of certain disadvantaged identities, both Labor[49] and Liberal MPs[50] stated that religious discrimination was 'un-Australian', and the sole objection on the grounds of homophobia was made by a Liberal minister, Bruce Billson.[51]

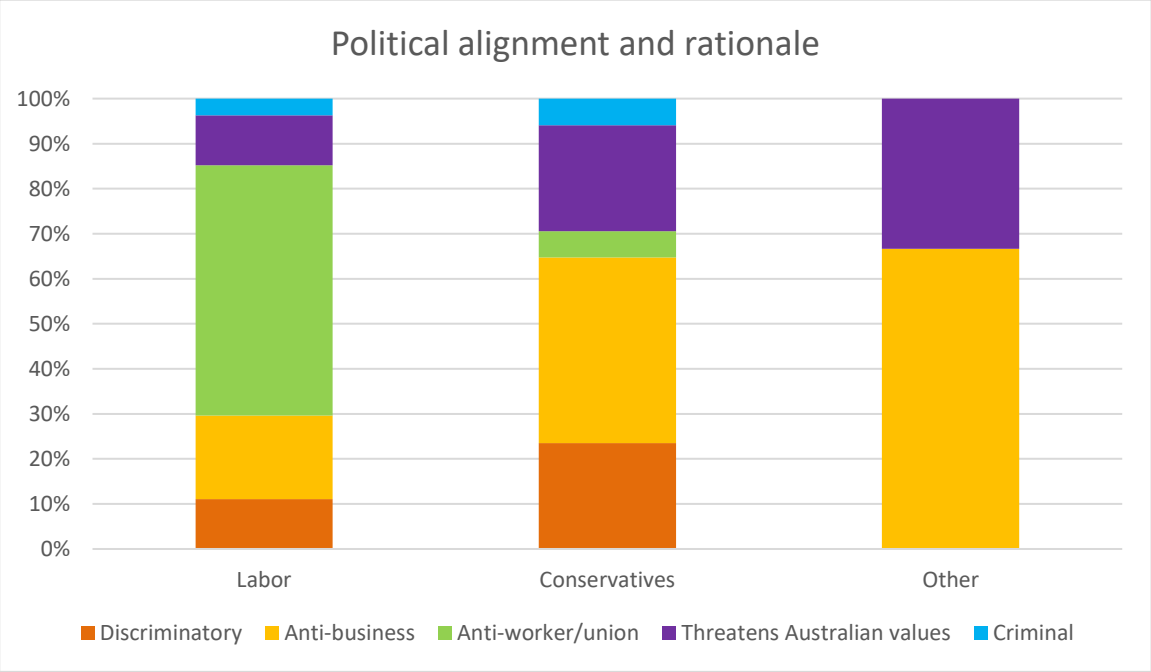

Figure 3: Political alignment and rationale for 'un-Australian' characterisation.

Source: Author's summary of findings.

[41] Commonwealth, *Parliamentary Debates*, House of Representatives, 15 February 2012, 1451 (Tony Zappia, Member for Makin).

[42] Commonwealth, *Parliamentary Debates*, House of Representatives, 18 April 2016, 3679 (Christopher Pyne, Member for Sturt, Leader of the House).

[43] Commonwealth, *Parliamentary Debates*, House of Representatives, 6 February 2003, 11110 (Anthony Windsor, Member for New England).

[44] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 February 2009, 1402 (Robert McClelland, Attorney-General).

[45] Australian Labor Party, *48th National Platform*, accessed 1 May 2020, http://web.archive.org/web/20211120033231/https://www.alp.org.au/media/1539/2018_alp_national_platform_constitution.pdf.

[46] Liberal Party, *The Federal Platform of the Liberal Party of Australia*, accessed 6 May 2020, https://cdn.liberal.org.au/pdf/FederalPlatform.pdf.

[47] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 September 2009, 9925 (Barry Haase, Member for Kalgoorlie).

[48] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 2014, 11181 (Dan Tehan, Member for Wannon); Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2015, 14130 (Mal Brough, Member for Fisher, Minister for Defence Material).

[49] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 March 2002, 1342 (Dr Carmen Lawrence, Member for Fremantle).

[50] Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2015, 14130 (Mal Brough, Member for Fisher, Minister for Defence Material).

[51] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2017, 12315 (Warren Entsch, Member for Leichhardt).

Relative frequency of use and political alignment

Based on this small-*N* study, there is no relationship between conservative politicians and more frequent usage of the term 'un-Australian'. Of the 50 randomly selected mentions of the term, there were 41 unique speakers: 53.7 per cent from the ALP, 41.5 per cent from a conservative party (Liberal, National, One Nation, or Bob Katter) and 1 per cent Independent. While making up 41.5 per cent of speakers, conservative MPs were under-represented, with 38.8 per cent of total uses of the term. In contrast, independent politicians (Anthony Windsor and Rebekha Sharkie), while making up only 4 per cent of speakers, used the term in over 8 per cent of the samples. These relationships could be more firmly defended if the selection was replicated. Moreover, over the 20-year period in question, six of eight Parliaments have been controlled by the Liberal–National Coalition. Consequently, those parties are likely over-represented in Hansard, due to having more members on the floor. This would need to be controlled for in a larger study. Finally, as each parliamentarian holds their position for a different period of time, a regression model would be necessary to determine average annual usage by each actor, rather than total usages across their career, as this obviously biases the results of long-standing MPs.

Interestingly, there are only three MPs who used the term more than 10 times across the entire 20-year period: Michael McCormack (a National MP), Graham Perret (Labor), and Martin Ferguson (Labor). This suggests the term is of limited popularity generally, is only popular among a limited set of individuals (seemingly not linked to their conservatism), or is reserved for matters of particular importance to MPs (although its use in the context of vegetarianism[52] and meat pies[53] belies this somewhat.).

Racial implications of the term 'un-Australian'

Of the sample selection, only six uses of the term explicitly refer to race, religion, or immigration, with four of those arguing racist or discriminatory behaviour itself is 'un-Australian' (twice by Liberal MPs, twice by Labor). Only Don Randall and Barry Haase (both members of the Liberal Party) use the term with arguably racist and/or xenophobic undertones. Barry Haase stated that:

> Australian citizenship [is] earned … by newcomers to Australia after a reasonable period of time, after having gained an understanding of our history and culture, after having qualified through a rigorous test in that regard and having an understanding of the English language so that they can attend to their responsibilities at law as Australians—is the most paramount value to maintain. If the passage of this legislation dilutes in any way the value of Australian citizenship or if it encourages values that I see as un-Australian, then it will be bad legislation.[54]

This is the most explicit definition made within the sample selection of what it takes to be 'Australian': time, understanding of history and culture, and a rigorous English language test. Haase fails to define what he deems as the type of 'un-Australian' values that endanger this process, but rather focuses on outlining those characteristics which are required to 'deserve' citizenship, implying that individuals who cannot/do not meet that bar are in some way 'un-Australian'. It is important to note that in 2009, discussion of the Australian Citizenship Amendment (Citizenship test Review and Other Measures) Bill was politically fraught. Many humanitarian organisations submitted recommendations and queries, concerned the amendments would harm already 'disadvantaged' groups.[55] Barry Haase argued that the then-Labor government was 'making a mockery of [Australia's] so-called border security',[56] and has repeated similar comments in the years since.[57] While this may suggest the term is used racially by certain individual politicians, rather than by parties as a whole, evidence suggests that progressive parties like Labor are more likely to demand retractions or punish members who express such sentiments.[58] The unwillingness of conservative politicians to call out their colleagues suggests an acceptance of, if not alignment to, those values.

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[52] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 March 2014, 2796 (Andrew Broad, Member for Mallee).

[53] Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 2018, 5248 (Stephen Jones, Member for Whitlam).

[54] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 September 2009, 9925 (Barry Haase, Member for Kalgoorlie).

[55] Susan Kneebone, Laura Healy, and Marisa Money, *Submission to the Legal and Constitutional Affairs Committee: Inquiry into the Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009* (Castan Centre for Human Rights: Law Monash University, 2009), 2.

[56] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2009, 12590 (Barry Haase, Member for Kalgoorlie).

[57] Jane Kennedy and Glenn Barndon, '"Protection Policy Not Coping with Asylum Seeker Influx"—Barry Haase', *ABC News*, 10 April 2013.

[58] Annah Fromberg, 'Labor Senator Pulls "All Lives Matter" Post After Social Media Backlash', *ABC News*, 8 June 2020.

Academics like Condor,[59] Reeves[60] and Wetherell and Potter[61] argue that 'new racism' in political discourse has normalised the technique of using discussions of national identity or immigration to conceal racial discrimination. Following accusations of racist fear-mongering post-Tampa in 2001, then-Prime Minister John Howard 'reject[ed] completely the inference that the whole policy is racially based', and instead focused discussion on issues of security and maintaining 'Australian' values.[62] This mirrors the language and terminology used by Barry Haase and Don Randall, evidencing that racial discrimination in Australian politics has continued to develop a coded language of its own.[63]

However, while it would be easy to assume this is a problem reserved for conservative parties, during their own election campaigns, both Julia Gillard and Kevin Rudd used similarly coded language to refer to 'boat people'. Gillard's assessment that unchecked immigration could result in Australia's 'way of life' being 'under threat',[64] and Rudd's promise to develop an 'orderly migration system' preyed upon similar societal fears.[65] This may suggest that discussions of Australian 'identity' and the dangers to it are more a political tactic used to win votes, than evidence of a particular party's predilection towards racism.

Taking into consideration the impacts of 'new racism' on political discourse, the category 'threatens Australian values' may be assumed to have some of the xenophobic/nationalist undertones identified in the above discussions. While conservative MPs were marginally more likely to identify a 'value' as 'un-Australian' (see Figure 1), it was only Barry Haase's characterisation that possessed such undertones. Independent Tony Windsor—who was instrumental in the formation of both the 1991 Liberal–National coalition government and the 2010 Labor government[66]—used the term 'un-Australian' to refer to any subservience of the Australian government, in the context of aiding US forces in Iraq.[67] Labor MP (and now Prime Minister) Anthony Albanese expressed sentiments that bowing to the monarchy is 'un-Australian' as it goes against Australia's 'egalitarian principles'.[68] This republican sentiment was shared by then-Labor MP Mark Latham.[69] Overall, language identified in this category was only marginally more likely to be used in a xenophobic manner than in the sample as a whole (that is, at a rate of 1/5).

Impact of gender on utilisation of the term 'un-Australian'

While Federal Parliament was made up of between 28 and 39 per cent women over the 20-year period in question,[70] women comprise only 12.2 per cent of speakers (5 of 50) in the sample selection. This is supported by evidence which suggests women are often less vocal in parliamentary discussions and avoid discussion during particularly aggressive debates.[71] Four of the women speakers were members of Labor, with the fifth being the lone representative of the Centre Alliance. While Labor had more women representatives in Federal Parliament (both in raw numbers and as a percentage of total representation) over this two-decade period,[72] the unequal presence of Liberal women in the sample limits the breadth and accuracy of this paper's discussion. In general, women MPs were far more likely to refer to a particular value as 'un-Australian' (see Figure 4),

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[59] Susan Condor, 'Pride and Prejudice: Identity Management in English People's Talk About "This Country"', *Discourse & Society* 11 (2000): 193.

[60] Frank Reeves, *British Racial Discourse. A Study of British Political Discourse about Race and Race-related Matters* (Cambridge: Cambridge University Press, 1983).

[61] Margaret Wetherell and Jonathan Potter, *Mapping the Language of Racism* (London: Harvester Wheatsheaf, 1992).

[62] John Howard, interview with Tony Jones, *Lateline* (ABC Television, 8 November 2001).

[63] Every and Augoustinos, 'Constructions of Racism', 431.

[64] Julia Gillard, Press Conference, Labour Caucus Room (Parliament House, 24 June 2010).

[65] Kevin Rudd, interview with Neil Mitchell (Radio 3AW, 15 November 2007).

[66] 'Mr Tony Windsor MP', *Senators and Members*, accessed 1 May 2020, https://www.aph.gov.au/Senators_and_Members/Parliamentarian?MPID=009LP.

[67] Commonwealth, *Parliamentary Debates*, House of Representatives, 6 February 2003, 11110 (Anthony Windsor, Member for New England).

[68] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2003, 17321 (Anthony Albanese, Member for Grayndler).

[69] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4373 (Mark Latham, Member for Werriwa).

[70] Dr Joy McCann and Janet Wilson, *Representation of Women in Australian Parliaments* (Politics and Public Administration Section, Australian Parliamentary Library, 2012).

[71] Elina Haavio-Mannila and Drude Dahlerup, 'Summary', in *Unfinished Democracy: Women in Nordic Politics*, ed. Elina Haavio-Mannila and T Skard (New York: Porgamon, 1985), 160–69.

[72] Anna Hough, 'The Gender Composition of the 45th Parliament', *Australian Parliament House*, accessed 10 May 2021, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2016/August/The_gender_composition_of_the_45th_parliament.

where their male counterparts prioritised specific pieces of legislation or actions. This is perhaps a result of women occupying issue areas which are seen as 'softer' (sociocultural over economic).[73]

Figure 4: Gender and rationale for 'un-Australian' characterisation.

Source: Author's summary of findings.

Notable is not only the frequency with which women MPs used the term, but also how it was employed. In three of the five uses of 'un-Australian', women used qualifiers in a manner that was not seen in their male counterparts. Annette Ellis 'suggest[ed]' the government's behaviour was 'un-Australian', and 'plead[ed]' with them to 'think carefully' on their actions.[74] Similarly, Deb O'Neill stated it was '*perhaps a little* un-Australian to crow about success [emphasis added]'.[75] Rebekha Sharkie couched her use of the term in a plural '*we* would go so far as to say it's un-Australian to take a free ride on the hard work of others [emphasis added]', referring to herself not as an individual but as a member of the Nick Xenophon Team.[76] Without further comparison, it is impossible to know if this is a general pattern in the gendered dynamics of parliamentary debate, or if the term 'un-Australian' carries a particular weight that results in such qualifications. Moreover, it is possible that as a group experiencing discrimination themselves, women politicians are more likely to paint an inclusive ideal of Australian 'identity',[77] but this too requires additional study.

Going forward

Ultimately, this essay was not able to prove that parliamentarians rely upon 'un-Australian' to denote any singular meaning. Indeed, it is perhaps the breadth and non-specificity of the term that is surprising, used to refer to anything from vegetarianism[78] to immodesty.[79] My hypothesis that conservative politicians utilised the term more frequently was not proven. However, the only two usages with arguably racist or xenophobic undertones were both made by conservative MPs, providing some support for my hypothesis. While this paper

[73] Victoria L Brescoll, 'Who Takes the Floor and Why: Gender, Power and Volubility in Organizations', *Administrative Science Quarterly* 56, no. 4 (2011): 625.

[74] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 March 2005, 127 (Annette Ellis, Member for Namadgi).

[75] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 May 2011, 4669 (Deborah O'Neill, Member for Robertson).

[76] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2017, 6779 (Rebekha Sharkie, Member for Mayo).

[77] Inter-Parliamentary Union, 'Women Parliamentary Leaders to Work for More Inclusive Politics', 23 April 2018, accessed 9 May 2021, https://www.ipu.org/news/press-releases/2018-04/women-parliamentary-leaders-work-more-inclusive-politics.

[78] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 March 2014, 2796 (Andrew Broad, Member for Mallee).

[79] Carole Vallone Mitchell, 'A Cautionary Tale for Tall Poppies and Women Leaders', *Huff Post*, 8 January 2016.

has failed to conclusively define 'un-Australian', Anonymous Respondent Six's characterisation may be closest to the truth, 'un-Australian' means whatever a politician needs it to mean.[80]

There are many pathways for improvement upon this research that could prove fruitful. This paper was limited by a small sample size and the non-replication of these findings. A rigorous assessment of a large sample of sources would likely reveal more reliable findings. Moreover, the randomisation of the samples used in this essay resulted in a large selection of sources from 2005, and very few from the years immediately following. Future studies could benefit from selecting a certain number of sources from each year, relative to the total number, to ensure a more even distribution. Finally, in order to determine whether or not women are less likely to utilise the term in question, a quantitative analysis over the entire time period would be necessary, so as not to bias certain genders through randomised selection.

Following in the footsteps of Every, Augoustinos, and Younane Brookes, comparing the term's frequency and subtext across election periods could provide additional insight, especially if mapped against major racially charged incidents in Australian history (e.g. the Tampa affair,[81] Cronulla riots,[82] and Lindt hostage crisis[83]). Additionally, charting frequency of the term's usage and its connotations in combination with the ethnic/familial background of parliamentarians could shed light on whether one's relationship with national identity impacts usage. Finally, Younane Brookes's method of assessing only policy launch speeches could be beneficial in ensuring stability of sources across a larger time period and ensuring that each source is equally representative of their party's opinions during that period.

Use of the term 'un-Australian' continued throughout the period of COVID-19, with everything from fraudulent pandemic leave payments to dobbing in your neighbour (or ex-PM) for not wearing a mask being slapped with the pejorative.[84] While this essay was unsuccessful in determining what, if any, is the real purpose behind politicians' uses of the term 'un-Australian', further study could help to clarify the impact and relevance of parliamentary discourse on a population whose national identity is as fluid as our own.

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[80] O'Toole, 'Vox-Pop: UnAustralian', 513–17.

[81] 'Tampa Affair', *National Museum of Australia*, accessed 5 March 2023, https://www.nma.gov.au/defining-moments/resources/tampa-affair.

[82] Paul Farrell, 'How Cronulla's Summer of Simmering Tension Boiled Over into Race Riots', *The Guardian*, 9 December 2015.

[83] Summer Woolley, 'Lindt Café Siege: A Look Back at Sydney's 2014 Hostage Crisis, Five Years On', *7 News*, 14 December 2019.

[84] Anthony Galloway, '"It's Un-Australian": Fraudster's Target $10 Million in Pandemic Leave Payments', *The Sydney Morning Herald*, 20 August 2022.

Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2018, 8699 (Llew O' Brien, Member for Wide Bay).

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Surviving rather than thriving: Indonesian language education in Australian high schools

ALICE MORGAN

Abstract

This paper examines the current state of, and potential opportunities for promoting, Indonesian language education in Australian high schools and the long-term strategic applications of such investment. This paper is presented in two parts. The first examines the decline in the study of Indonesian language, placing this trend in the broader context of issues affecting the efficacy of language planning policy and the praxis of language other than English (LOTE) education in the Australian education system. This section addresses the key limitations of established approaches to the formulation of LOTE education policy and its implementation in Australian schools. The second part of this paper cross-references the findings of linguists, academics and practitioners, and political actors to demonstrate how embedding Indonesian language studies into the Australian education system can deliver a range of benefits for students, Australian society, and the national interest. The introduction of Bahasa Indonesia into the linguistic ecology of Australian schools is an agent of intellectual enrichment for young Australians and equips them for prosperous working lives in the internationalised work cycle of Asia Pacific. Furthermore, Indonesian language is of the utmost importance to achieving subregional security and development as well as culturally embedding Australia with its neighbours. Thus, the paper evaluates present approaches to promote Indonesian languages. The reinvigoration of Indonesian language study needs greater investment into a range of areas including Indonesian language teaching in the early childhood/primary years; increased rigour and access to suitable testing systems; deeper institutional linkages and study abroad; and increased investment in teaching materials and teacher training. Through this more systematic approach to bolstering the study of Bahasa Indonesia, policymakers can secure a more prosperous future for the citizens of both countries and help realise a greater stability and prosperity in the Asia-Pacific region.

Introduction

Indonesian is struggling to thrive in the linguistic ecology of Australian schools. Since 1952, Indonesian has been among the most widely studied foreign languages in Australia but in recent years Indonesian language study has stagnated and the number of institutions that offer Indonesian classes is dwindling (Slaughter, 2007a). While approximately 200,000 primary and secondary students study Bahasa Indonesia, for the last decade it has remained an at-risk low candidature language that floats between 1,000 to 2,000 Year 12 scholars each year (Slaughter, 2007a). This paper argues that this is due to a multitude of factors, largely stemming from decades of neglect, particularly in the amount and ways funding and other support are allocated to language other than English (LOTE) education (Dunne & Pavlyshyn, 2013). Australian school students do not learn a language and consequently miss out on benefits that flow from language learning. A rise in monolingualism also has broader implications for the future of Australia and its place in the region and the world (Scarino, 2014). A more systematic approach to bolstering the study of LOTE, and Bahasa Indonesia in particular, is required. This involves greater investment in Indonesian language teaching in the early childhood/primary years; suitable testing systems; study exchange programs; and teaching materials and teacher training.

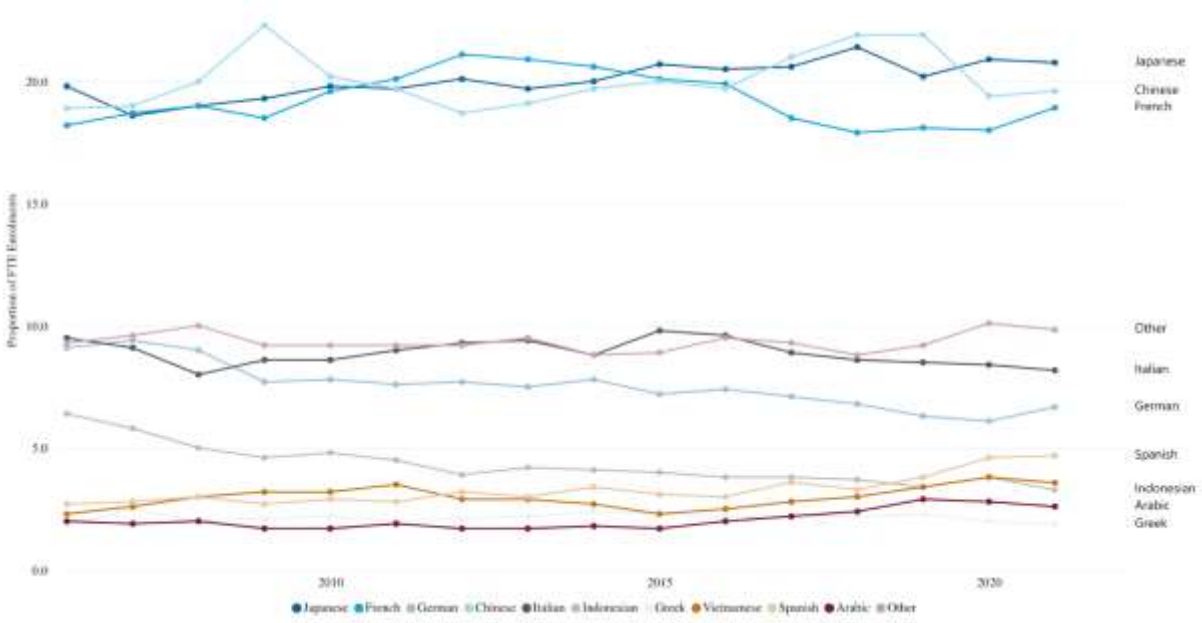

Figure 1: Year 12 enrolments in tertiary-recognised languages are calculated as a percentage of total full-time enrolments in Year 12 languages other than English (LOTE).

Sources: Australian Curriculum, Assessment and Reporting Authority, (n.d).

The benefits of Indonesian language study

Given Australia's proximity to the Indo-Pacific, the most super-diverse linguistic ecology in the world, and its increasingly multicultural population, diversification of the Australian linguistic ecology is achievable. Australian students spend half the hours of other OECD member state students studying language each week (Bonnor et al., 2021), putting Australian students at a distinct educational and sociocultural disadvantage. Language education, as explained most extensively by Firdaus, is an intellectual entitlement of the global citizen (Firdaus, 2013). Language study has been found to improve bilateral relations, cultural perceptions of other states and the cognitive abilities of students (Dunne & Pavlyshyn, 2013; Oliver, 2013; Rasman, 2021). However, the Australian federal government has continuously failed to intersectionally innovate educational policy on LOTE education. The implemented language planning policies and initiatives of Bahasa Indonesia have been static objects of policy, unlike the fluctuating diplomatic relationship and status of Australia and Indonesia.

Foreign language teaching is considered a fundamental right of students by linguists. Multilingualism can instil many benefits in the context of Australian secondary schools by promoting cultural literacy and increasing learning outcomes and employment prospects for a more diverse cohort of students. However, without the situational placement of children in a linguistically diverse environment, it is nearly impossible for a child to learn another language (Rasman, 2021), placing the onus on Australian schools to mirror the diversity of local communities. These benefits highlight the role Indonesian language can play in securing more equitable outcomes for diverse communities and access to tertiary education. Currently, there is a large disparity between classes offered to secondary students dependent on their socioeconomic status; within a larger context of disparity between private and publicly funded school students' placements in the Australian Tertiary Admission Ranks (ATAR). Diversity is a highly causal factor in the systematic disadvantage of urban public schools.

In 2013, the largest proportion of schools with ICSEA (Index of Community Socio-Economic Advantage) scores below 1000 was in south-western Sydney, schools which typically have a high Language

Background Other Than English (LBOTE) student population, at a staggering 72 per cent of students by 2021 (Dunne & Pavlyshyn, 2013). The largest language family is Asian, contributing upwards of 30 per cent of LBOTE students yearly (although Arabic is the largest 'uniform' language). Only 12.7 per cent of NSW teachers from the same data collection stated that they identified with LBOTE, compared to that 29.6 per cent of NSW students. In 2011, we saw public schools teeter over half (to 52 per cent) LBOTE students in NSW—whereas they only make up 37 per cent of Catholic schools and a measly 22 per cent in independent schools.

> In NSW, 83 per cent of students in fully selective schools came from language backgrounds other than English (LBOTE), while more than half of the 99 schools with **fewer than 10 per cent LBOTE students were private and in wealthy areas**. (Baker & Chrysanthos, 2019)

The promotion of LOTE can generally provide more accessible classes to linguistically diverse students who are familiar with learning a language. Nonetheless, Indonesian is among many often designated a 'community' language, for the fear it would give LBOTE students an 'upper hand' (by this estimation, an 'upper hand' would be possessed by English-language background students currently). It follows that it is the state's responsibility to affect change where students are not able to: it is the state's responsibility to diversify their students' linguistic and social capabilities at a young age, to intellectually and culturally enrich them. More importantly, the reform of LOTE intersects with a dire need for educational reform to close the racial disparity in ICSEA scores and ATAR rankings. By providing a comprehensive revitalisation of the initial launch of Bahasa Indonesia across schools, we can better integrate the educational outcomes and expectations across disparate income students in metropolitan areas—while offering employment opportunities remotely.

Bahasa Indonesia emerged as a technology to unite the Indonesian population through a mutually intelligible vernacularisation that shares a script. Unlike the three other priority languages stipulated by the National Asian Languages and Studies in Australian Schools (NALSAS) initiative—Hindi, Mandarin and Korean—the standardised and non-tonal dialect of Bahasa Indonesia is spoken across multiple borders in the Asia Pacific and is intelligible to the majority of the Indonesian population (Slaughter, 2007b, pp. 51–52). Korean, on the other hand, is limited to native speakers, and Hindi and Mandarin are not practised in their standardised forms countrywide. Bahasa Indonesia bears linguistic connection to the majority of popular LBOTE backgrounds found in Australian schools; particularly Chinese languages, Tagalog, Spanish, Dutch, Portuguese and Arabic. The number of students that natively speak Indonesian are greatly outnumbered by those that speak Indian, Chinese and Arabic languages, while they may still learn a new vocabulary of the formalised variety, as Indonesian is a diglossic language. As the Indonesian alphabet is also Roman, Indonesian education can coincide with the development of English literacy in children. Children's minds adapt to the semiotic nuance and phonological capacities of Bahasa Indonesia faster than older age groups studying the language (Rasman, 2021).

The sociolinguistic and morphological features of Bahasa Indonesia are identifiable to Australian students, lending to the increased effectiveness of its practical application and teaching. Bahasa Indonesia is a flexible lingua franca derived from the Riau variety of Malay in the Austronesian language family. It is mutually intelligible by many other dialect groups and exists in countless indigenised variants. For these reasons, Australian children reportedly thrive in learning environments that develop knowledge about Indonesian culture and language. Multicultural education that is accessible and beneficial to both English-speaking and LBOTE students is achievable, through its proximity to the Indo-Pacific, the most super-diverse linguistic ecology in the world, and an increasingly diverse culture.

National interest

The import–export structures of Australia and Indonesia are complementary. Australia is currently moving toward a service economy, in which tertiary education and mining exports are the largest sources of revenue,

whereas the Indonesian economy has a large agricultural and manufacturing labour force. Australia and Indonesia rarely compete to sell resources and could mutually benefit from the liberalisation of trade routes through the Torres Strait. Indonesia is on track to place among the world's 10 largest economies by 2025. After undergoing a recession as a result of the Covid-19 pandemic, Indonesia already boasts a higher economic growth rate than Australia in the second quarter of 2022 (LPEM University of Indonesia, 2021). In 2022, Indonesia presided over the G20 and was arguably the most influential actor in the Association of South-East Asian Nations. Indonesia's economic complexity rating is higher than that of Australia, while Australia's industries have historically competed against each other (to their demise) and outsourced their labour. It is imperative that Australia affirm ties between countries from which it receives specialised practitioners via the Skilled Migrant scheme, such as Indonesia, and revitalises the education of its own population to surpass labour shortages and procure sociocultural prosperity.

Determined cultures versus theoretical frameworks

Foundationally, Indonesian language education is undermined by the lack of cultural nuance, which was historically addressed in the National Policy on Languages (NPL) in 1987. Policies implemented to encourage the scholarship of Indonesian have consisted of static instalments, deprived of the complexity of the socially constructed nature of the NPL. Of the four aspects of typical language planning policy (LPP) —language-in-education planning, status planning, corpus planning, and prestige planning—the latter three are neglected, as mentioned in the 1987 National Policy on Languages (Lo Bianco, 1987; see also Firdaus, 2013). In fact, the policy (NPL) noted that language education is a nonpartisan project, as it is a technology conducive to both private and public interaction. Furthermore, it recognises language as ever-evolving and an instrument that can effect change and serve functions in a 'wide range of cultural, artistic, intellectual, personal and group identification, religious, economic and socio-political' contexts (Lo Bianco, 1987, p. 6). The rigid and muted nature of previous policy has created scepticism toward the effectiveness of foreign language teaching. The inconsistency of the NPL plagues each disciplinary approach to teaching Indonesian and fundamentally underscores its shortcomings.

The National Policy on Languages (1987) set out four goals to achieve the 'integration of foreign languages in domestic education'. The first goal, 'competence in English', was indicative of the cultural anxiety that English could be linguistically and culturally endangered by the introduction of a foreign language (Bostock, 1973). Monolingualism is so steeped in Australian culture that the Australian curriculum only considers students to be of three groups; second and first language learners as well as 'background' learners, all of which are at most bilingual (Scarino, 2014). Consequently, federal reports commissioned by the Department of Foreign Affairs and Trade (Hill, 2012), or those formulated by political actors like Kevin Rudd, have characterised the addition of Indonesian to the Australian school curriculum as a primarily economic endeavour, to deemphasise Indonesia's potential sphere of cultural influence (Kohler, 2018). Between the 1960s and 1990s, the Indonesian language was widely implemented in Australian schools as a result of staunch opposition to Communism, due to Indonesia's non-alignment with either the East or West during the Cold War (Mason, 2020). The popularity of the language continued to rise into the era of Paul Keating's administration, which had developed relatively strong diplomatic relations with the Suharto regime (Lindsey, 2010). Teaching Indonesian was in the political interests of both globalist thinkers, who wanted multiculturalism to begin to permeate Australian education, and nationalists, who feared the threat of communist ideology to domestic politics.

The centralisation of economic strategy in government and institute reports has prevailed, driving popular engagement with Indonesian language study before the Australian–Indonesian diplomatic relationship took a downward turn. The economic status of Indonesia, despite fiscal growth, has been in decline due to the overwhelmingly disparaging representation of poverty and crime during the Asian Financial Crisis of 1999 by the Australian press. This reporting amplified the downfall of diplomatic relations post-Keating administration due to events such as:

- A sequence of unlinked terrorist bombings at Australian tourist or working hotspots,
- Conflict as a result of the East Timorese referendum for independence (from Indonesian sovereignty) and the subsequent injection of Australian–UN peacekeepers in the region,
- Multiple high-profile cases of transnational drug trafficking (the 'Bali Nine' and Schapelle Corby) (Troath, 2019).

The characterisation of Indonesian language education as an economic venture conceptually linked its practice to these downfalls (Lawson, 1998). Slaughter (2007a) found a range of schools that cited media, political reputation, and economic status as the reasons they discontinued Indonesian courses after their initial popularity; they had mostly been installed due to the National Policy on Languages (1987) and the LLP. Classes across the nation were unstandardised and often took a separatist approach in teaching Indonesian, in which society and culture were given differing degrees of coverage. Training regarding the specific ways in which educators are to fulfil the learning outcomes through Indonesian language classes is paramount to the viability of the LPP (Naidu, 2018). This demands a bridging of (fluid) sociocultural and (static) economic interests and further research and analysis of the results of prior implementation. The combination of the LPP with educational reform is one of the most salient modes of cultural diplomacy, and rears individual and community benefits.

The widespread study of Indonesian language in the 1990s is one of the main factors producing the resilient diplomatic relations between Australia and Indonesia (Slaughter, 2007a). Research by Hill, Slaughter, and the Department of Foreign Affairs (Department of Foreign Affairs and Trade, 2013) all conclude that domestic political perceptions of Indonesia are positively influenced by the study of Indonesian language and exposure to Indonesian culture at a young age. The Lowy Institute has consistently reached similar conclusions through surveys tracking the enrolment in Indonesian in relation to political positioning (Firdaus, 2013). Little has been done to equip Indonesian language educators in the way of teaching interculturality in the past, but the efforts of Indonesian teachers and their political advocacy for the reform of language education have had a profound effect on Australia's transition to a multicultural education system. Despite the lows of the News Corp–influenced media characterisation of poverty and othering of the 2000s, the Australia–Indonesia relationship has stabilised (Lindsey, 2010). This has been greatly beneficial to both nations, although much could be done in establishing larger trade and economic engagement with one another.

Educational reform

Educational reform is a highly politicised arena, considering that ultimately it is for the public good and will enhance Australia's intellectual, economic, and social capacities to compete in the Asia-Pacific region. Stakeholders that have held a major influence over the prospect of challenging the current educational system range from teachers and institutions to consumer markets. Ultimately, party politics have seen the consistent underfunding of public secondary education over the last decade (Dunne & Pavlyshyn, 2013). The private consumers of Australian education—prospective students at private schools and foreign students—are beginning to dictate the educational facilities available to them through demand (Crouch, 2021). Meanwhile, in public education, where there is no consumer party, change in any form is often forgone due to the expenses it incurs. For this reason, most high schools that continue to offer Indonesian are non-metropolitan or publicly funded. Evidence shows that privately funded secondary schools regularly drop Indonesian programs beyond Years 7 and 8, as they have complete discretion to reallocate funding elsewhere. Half of the schools assessed by Slaughter did not introduce another language after the seizure of funding allocated to Indonesian teaching, while others pivoted to a more popular, and therefore more profitable, language (often Japanese) (Slaughter, 2007a). While language education infrastructure remains from the initial implementation of the NALSAS and National Asian Languages and Studies in Schools Program (NALSSP) initiatives, it is remarkably more convenient for both schools and regulatory bodies to improve policy and economic channels than to reintroduce the Indonesian language to Australian secondary

schools. However, bureaucracy and politicisation often divides the interests of those formulating the curriculum (ACARA) and those executing study program funding (the Department of Education, private investment funding, the Catholic Church and parents' 'voluntary contributions').

Indonesian language has lost popularity since the 2000s, primarily due to the 2002 travel advisory prompting Australians to 'reconsider the need to travel' following the Bali bombings, which has not since been lifted (Hill, 2013). With academic exchanges to Indonesia almost entirely eradicated, the appeal for parents to pursue Indonesian education for their children has declined (Slaughter, 2007a). The NALSAS strategy softened the blow of this loss by pledging A$ 30 million annually to support Indonesian and three other Asian languages. This program ceased funding in 2002. The NALSAS strategy was briefly revived as the NALSSP strategy from 2008 to 2012 under Kevin Rudd, which intended to address the failed target of 40 per cent of Year 12 students studying a foreign language (Department of Education, 2018). NALSSP committed $62.15 million to Chinese, Korean, Japanese and Indonesian to reach 12 per cent of Year 12 students having graduated with working proficiency in one of these languages by 2020. The program ceased in 2012 after Kevin Rudd left office. Only 9.5 per cent of Australian Year 12 students in NSW studied a foreign language in 2020 (ACARA, 2020). The provision of Indonesian languages in schools was inadequate in the context of consumer demand for more culturally engaging and immersive language study. In 2012 a study found that 'cultural immersion' programs were a pivotal factor in school choice, middle-class parents often citing a desire to attain 'positional goods' (Smala et al., 2012) from marketed international travel for their children. All of these were ceased for Indonesia but greenlit for countries like Japan or Spain.

Indonesian is unlikely to be studied past secondary education because of three main obstacles. The first is that Indonesian language is only taught by a handful of public universities. The second is that Indonesian is most taught in non-metropolitan or public schools, the students of which are less likely to pursue tertiary education. The third reason students do not continue to study Indonesian in university is due to the poor scaling of Indonesian as a subject, limiting the attainment of required university entrance exam marks. Prior to the advice of the McGaw Report (2002) against equal scaling, all languages were scaled the same as French. This report produced a hierarchy of languages to mitigate the '"unfair" advantage' that community language positive scaling brought about for lower socio-economic status (SES) schools' students (Sitou, 2018). The advantage that students perceivably had was cultural proximity to languages assessed in the Higher School Certificate exams, as 80 per cent of all studies of 'community languages' take place in lower-SES schools (Sitou, 2018). Therefore, this provision asserts the cultural dominance of particular languages taught in private education and penalises students from culturally and linguistically diverse backgrounds. Studying Indonesian has been a mechanism of social mobility. The delivery of Bahasa Indonesia in these diverse educational settings has the potential to reduce the cultural gentrification and stratification that typifies the public/private and metro/non-metropolitan school divide in Australia. The schools that did not cease funding Indonesian language programs boast high results that have put them on the academic map (Ardha, 2022; Curry, 2021). Language resources that were issued as part of the NALSAS strategy have granted equitable access to study material for many students from low-income backgrounds as private schools were granted access to the same resources (Solikhah & Budiharso, 2020). The strategy also provided cultural and language materials to culturally homogenous non-metropolitan areas (Abdellatif, 2021), which were somewhat inaccessible in the past. Public schools continue to dominate the field of Indonesian language in Year 12 exams, which has further influenced public schools to maintain the language and private schools to discard it.

A notable misstep that ensued in this application of teaching Indonesian was the transition of educational regulatory bodies toward a competency-based curriculum rather than a communicative approach to language teaching (CLT). By nature, competency-based assessment is quantitative rather than qualitative. Some faults of this ambiguous application manifested in gaps in anecdotal vocabulary necessary to engage with Indonesian youth (Wigglesworth & Storch, 2009). Most BIPA (Bahasa Indonesia Penutur Asing) resources used in high schools were developed by the Asian Studies Council, funded by the Commonwealth

Department of Employment, Education and Training (Erebus Consulting Partners, 2002). These consisted of 'modules, handouts, and worksheets … Passages to read, task-based activities, and exercises for speaking, reading and writing' that were suited to the former CLT teaching method (Solikhah & Budiharso, 2020). These texts have been diplomatically influential, as in these texts 'Indonesian negotiation [in Australian textbooks] is significantly characterised by the role of a good relationship' (Arafah & Mokoginta, 2022). Despite the new regulations in secondary education, CLT teaching approaches have been more likely to engage the interest of students with a wide variety of interests and learning styles. In tertiary education, where the teaching of the Indonesian language is delivered in an unadulterated CLT format, students develop a sense of contextual and situational application for Indonesian. By studying under a competency-based system, students grew in communicative competence at the expense of linguistic accuracy. Once again, the educational goals Indonesian teachers are to fulfil urgently need clarification to maximise the potential of their talents and materials provided through government grants.

It is of great priority to utilise these frameworks to increase the study of Bahasa Indonesia. The ongoing decline in national educational outcomes, combined with skilled and specialised labour shortages, point to the urgency with which Australian secondary education must be systematically reformed. Though they have ultimately unwound, the NPL and NALSAS initiatives were initially successful. The models of implementation and budgeting, resources, and staffing are all that remain of the Australian Federal Government's initial investment in LOTE education, particularly in Indonesian. The rollout of materials reached schools in a more comprehensive manner than following language education strategies. Scholars argue that the innovation of policymaking regarding language teaching could potentially offer opportunities for iterative investment of staff and resources between Australia and Indonesia. Revamping the administration of teaching materials and funding in such a way would build diplomatic relations and hedge Australia behind (literally and figuratively) a non-aligned economic powerhouse in the uncertain future. To achieve this, educational funding and development need to be prioritised in a bipartisan manner and in consultation with the Indonesian government.

Plans of action

Recommendations to address some key barriers to the growth of Indonesian language learning in Australian secondary schools are given below. These aim to address the insufficiency of educational policy and architecture that fail to support:

1. Language proficiency testing and accreditation,
2. The development of Indonesian language learning materials, and
3. Indonesian language educators.

Language proficiency testing and accreditation

Indonesian language education does not currently accredit students' language proficiency as there is no proficiency scale for a classroom-based relative assessment tool. This is not explicitly addressed in the plan. The last update to the content, learning outcomes, and tested capabilities of Indonesian language education at a federal level was in 2014. This established a second level of proficiency testing, although it did not introduce a relative scale of proficiency in the Indonesian language for students to place themselves on. Proficiency testing in languages typically denotes up to 12 points on a scale of fluency in writing, reading, and comprehension. In the Common European Framework of Reference, A1 denotes little proficiency, whereas C2 denotes fluency. The Australian government needs to mediate the unequal offering of differentiated proficiency levels (Bahasa Indonesia has 2 at most across states, while Mandarin and Japanese have the most—up to 5), by placing these class outcomes on a comparative scale for Asian language proficiency fulfilled by the curriculum of each level class. This method would be aligned with existing syllabuses and students would be further assessed by trained teachers. This could be supported by

the facilitation of the training of Indonesian teachers in standardised progression and assessment varieties and the development and trialling of an Indonesian learning progression test (similar to the internationally standardised Test of English as a Foreign Language or International English Language Testing System exams). Furthermore, work samples and validation testing of such progression will further cement the effective changes.

Indonesian language learning materials

It is vital to bridge the different approaches taken by Indonesian-funded BIPA institutes and domestic organisations. There is substantial overlap in the objectives of the BIPA teachers' new association (APPBIPA) or the Center for Strategy Development and Language Diplomacy (PPSDK) and the Australian Federation of Modern Language Teachers Association. BIPA initiatives are founded with the goal of instilling longevity in Indonesian language education by aiming for innovative training to increase the competency and tools of Indonesian teachers. With the consultation of these two interest groups, the Australian Curriculum, Assessment and Reporting Authority would be able to debut a suitable update to learning outcomes. Moreover, these bodies must increase their monitoring of these outcomes to continue to innovate language policy and materials provided to schools. It is necessary to update the itinerary of Indonesian teaching staff to teach culturally relevant and practically applicable language skills. Liaison with the PPSDK or Indonesian teaching consortiums is in itself an act of cultural diplomacy, which can help to imbue Australian educational standards with intersectional perspectives and innovative approaches.

Language planning must reflect upon empirical data, which Australia lacks regarding LOTE education. Education regulation authorities need to expand the collection of data regarding courses offered and their respective outcomes to serve the needs of policymakers and improve educational quality. Through the development of a central plan, the Educational Reporting Authority can operate coordinated interventions to promote Indonesian learning in schools and resource the development of Indonesian language learning materials. Greater government investment in developing curricula and materials is required. The potential for interdisciplinary approaches to teaching by using ICT and language learning apps should also be explored. Hopefully, we will see positive results from the joint efforts of Statistics Indonesia and the Australia Bureau of Statistics outlined in such a plan.

The shortage of Indonesian language educators

Indonesian language educators can be difficult to source. The biggest threat to the continuation of Indonesian teaching is referenced in the 'Joint Working Group meetings on Education, Training and Research', which notes a dire need for capacity building among educators and broader recruitment strategies. This is symptomatic of a larger staffing crisis in Australian (public) high schools. Realistically, the Australian government needs to fund the promotion of teaching degrees at public universities to expand the sector. To make this accessible and financially viable, the Department of Education (and federal Minister for Education, accordingly) needs to allocate the funding required by low-SES schools to hire tenured language staff. The low salaries relative to the high responsibilities placed upon teachers, cost of living rising during one's studies and limited offerings to study teaching all disincentivise young Australians from pursuing teaching careers. The allocation of long-term funding of scholarships for Bachelor degrees in teaching, especially language teaching, is a bare necessity to rectify the labour shortage. Moreover, tertiary institutions that employ teachers ought to offer teaching to students. Teacher-focused exchanges and flexible policy frameworks will render the best results among students. Through the establishment of an accreditation authority for specific languages (potentially on the same scale of language fluency as A1–C2), Indonesian language will be recognised in a formal capacity as a professional skill. Moreover, by this process teachers may be accredited for their tireless work, and schools can prioritise candidates for employment and upskill current staff. Little has been done to equip Indonesian language educators in the way of teaching interculturality in the past, but the efforts of Indonesian teachers and their

political advocacy to reform language education have had a profound effect on Australia's transition to a multicultural education system.

Conclusion

Language policy must be revisited as part of the reforms needed by the Australian education system if we are to put a stop to the decline in LOTE study. It is imperative that the federal educational authorities intervene in the downward spiral fuelled by the shortcomings of long-established approaches to LOTE education that overemphasise economic gain. The neglected sociocultural elements of language policy point to major opportunities for intellectual enhancement for young Australians and to equip them for prosperous working lives in the Asia Pacific. Indonesian language is of the utmost importance to promote in order to achieve subregional security and development as well as culturally embed Australia with its neighbours. Despite the progression of the NALSAS framework, it has faded into obscurity rather than been met with the innovation necessary to supply adequate testing, study programs and institutions, materials and educational training. By focusing on these foundational weaknesses, policy will address the sociolinguistic needs of students. Through the systemic bolstering of Bahasa Indonesia, Australian policymakers can secure a more prosperous future for educators and students from diverse linguistic backgrounds.

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The European Court of Justice as a tool of European integration

JESSICA HONAN

Abstract

'European integration' is the unification of European states into a continent with shared systems, institutions, and values. This article argues that there are four main ways in which the European Court of Justice ('ECJ' or 'the Court') facilitates integration. First, the ECJ has created a series of case law that unites the treaties of the European Union ('EU') into a single, 'constitutionalised' body of law that resembles a national constitution. Second, the human rights agenda of the ECJ aligns states to a single, set ideology the Court espouses. Third, the Court has enhanced EU power by giving the European Parliament power to be involved in ECJ litigation, and by articulating the principle that European law must be considered with respect to integration. Finally, the Court's preliminary ruling mechanism provides that the EU has supremacy over all legal matters that involve EU principles, effectively curtailing opposition to the expansion of EU law. In these ways, the ECJ is a significant contributor to European integration.

I Introduction

The European Court of Justice ('ECJ' or 'the Court') is considered a 'pro-integrative institution' due to its role in actively facilitating European integration.[1] 'European integration' refers to the unification of European states into a united continent with shared systems, institutions, and values.[2] This has historically been achieved by the creation and growth of the European Union (EU). Each of the EU's institutions, including the ECJ, play a unique role in facilitating integration. European integration can be categorised twofold. First, 'negative integration' involves the removal of barriers between EU member states, and is instigated by policies such as the sharing of goods, the removal of tariffs, and the opening of borders. Second, 'positive integration' is the increase in power of the EU through the creation and fortification of EU institutions including the European Parliament and the ECJ.[3] This article argues that the ECJ has facilitated both positive and negative integration, in four main ways.

First, the ECJ produces judgments that constitutionalise the EU's system of treaties.[4] 'Constitutionalisation' is the creation of a legal structure in the EU resembling a constitution rather than individual pieces of law.[5] Constitutionalisation institutionalises the hierarchy of EU law above member states' domestic law. Second, the human rights agenda of the ECJ has contributed to the cultural unity of member states, by aligning states to the set ideology the Court espouses. Third, the ECJ has interpreted treaties to give the European Parliament power to be involved in the Court's litigation, and has articulated a principle that EU law must

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[1] Domitilla Sartorio, 'The European Court of Justice: A Catalyst for European Integration' (2005) 1(4) *Rivista Internazionale di Studi Europei* 18, 19.

[2] *A Dictionary of Contemporary World History* (3rd ed, 2008) 'European integration'.

[3] Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford Scholarship Online, 2005) 1.

[4] Arjen Boin and Susanne Schmidt, 'The European Court of Justice: Guardian of European Integration' in Arjen Boin, Lauren Fahy and Paul Hart (eds) *Guardians of Public Value* (Palgrave Macmillan, 2021) 135, 145.

[5] Anne Peters, 'The Constitutionalisation of the European Union—Without the Constitutional Treaty' in Sonja Puntscher Riekmann and Wolfgang Wessels (eds), *The Making of a European Constitution* (Verlag fuer Sozialwissenschaften, 2006) 35, 35.

be must considered with respect to integration. The effect of these interpretations is to increase the power and role of the EU, thereby contributing to positive integration. Fourth, the Court's preliminary ruling procedure curtails any member state opposition to EU law and further proliferates EU law into the domestic systems of member states. The preliminary ruling procedure is the requirement that the ECJ hears all matters pertaining to EU law, even if they originate in a member state's domestic jurisdiction. For these four reasons, the ECJ is a significant contributor to European integration.

II History and role of the ECJ

The ECJ was established in 1952 to interpret and control EU legislation while maintaining and respecting state sovereignty—that is, the right of states to have power over their own affairs.[6] However, member states have allowed for the Court to adapt and evolve into an institution that goes beyond this initial mandate. Today, the Court plays a role in the cultural, legal, and political unification of the EU member states.[7] This evolution has been accepted by member states due in part to the Court's status as a non-political, neutral institution that should not inherently favour any one state.[8] As a result, despite the Court's initial mandate, its new function has included making judgments with broader implications on EU member states and the status of integration as a whole.[9] This article will illustrate that the ECJ has been an important tool in integrating EU member states, both through positive and negative integration, in four ways.

III Constitutionalisation as a tool of integration

First, the Court's constitutionalisation of European treaties has significantly contributed to the integration of Europe. The Court has achieved this constitutionalisation through its articulation of two legal principles—*direct effect* and *supremacy*. First, the principle of direct effect provides that some provisions of EU law will confer rights on individuals within the EU.[10] Domestic courts are then obliged to recognise and enforce these rights. Rather than creating duties on states, this empowers individuals in Europe with positive rights and recognises that laws of the EU directly apply to EU citizens.[11] In doing so, the principle of direct effect constitutionalises the treaty system by giving individuals a 'direct stake in promulgation and implementation of community law'. As such, it ensures that entities other than just member states play a role in the legal system of Europe.[12] In a case pertaining to the principle of direct effect—*Defrenne v Sabena (No 2)*—the Court made evident the role of individuals in binding member states to their obligations.[13] By holding that Article 119 of the *Treaty of the European Community* was enforceable between individuals and the government, the Court recognised the role of the individual in binding member states to their obligations.[14] Second, and in contrast to direct effect, the principle of supremacy purports that EU provisions and directives are superior to domestic law in cases of a conflict.[15] This clarifies a hierarchical

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[6] *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OCJ C 115/199 (entered into force 1 November 1993) art 19 sub 1 ('*FEU*').

[7] Yvonne Gierczyk, 'The Evolution of the European Legal System: The European Court of Justice's Role in the Harmonization of Laws' (2006) 12(153) *ILSA Journal of International and Comparative Law* 153, 156.

[8] Sartorio (n 1) 22.

[9] Ibid.

[10] *Van Gend en Loos v Nederlandse Administratie der Belastingen* (C-26/62) [1963] ECR 1.

[11] Geoffrey Garrett et al, 'The European Court of Justice, National Governments, and Legal Integration in the European Union' (1998) 52(1) *International Organization* 149, 175.

[12] Boin and Schmidt (n 4) 141.

[13] (C-43/75) [1976] ECR 455, 477.

[14] Ibid.

[15] *Costa v ENEL* (C-6/64) [1965] ECR 585, 594.

structure, with EU law ranking above the law of individual states. This is therefore how the principle of supremacy constitutionalises the treaty system.

This constitutionalisation has contributed to European integration, by transforming the European body of law from individual treaties to a system of law with the character of a 'constitutional charter'.[16] The treaties' character as a constitution moves it from being a series of legally binding documents to a system of crystalised rights and responsibilities that apply to all entities within Europe.[17] This is an example of negative integration, as a constitutionalised legal system removes the powers of interpretation away from states. This is because it articulates their clear obligations to the union as member states. It is also an example of positive integration, as the constitutionalised laws have supremacy over domestic laws. The hierarchy of laws exists such that member states cannot undermine EU laws they disagree with.[18] In this way, constitutionalisation facilitates positive and negative integration.

Constitutionalisation through direct effect and supremacy requires member states' judiciaries to accept and respect the constitutional nature of the EU treaty system. This is achieved through the ECJ's preliminary ruling procedure, which plays a fundamental role in ensuring there is sufficient cooperation between the ECJ and national courts.[19] Article 267 of the *Treaty on the Functioning of the European Union* establishes that it is within the Court's jurisdiction to make preliminary rulings on issues of EU law, when requested from a member state's domestic court or tribunal.[20] These decisions are binding on member states. This binding nature ensures national courts and tribunals respect and enforce decisions of the ECJ, and as a result, the preliminary ruling procedure enforces the hierarchy of law associated with constitutionalisation.[21]

IV Protecting the fundamental rights of citizens at the EU level

In protecting the fundamental rights of citizens in the EU, the ECJ creates cultural and moral unity across member states, which contributes to positive integration. Upholding certain human rights has been integral to the foundations of the EU. As a result, this ideological framework is reflected in the judgments of the ECJ.[22] A pro–human rights ideology is ensured by the concerted socialisation of ECJ judges to this ideology.[23] For example, in *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities,* the Court stated that fundamental human rights are an integral part of the general principles of the law that the ECJ is mandated and required to uphold.[24]

In applying a human rights framework to its decisions, the ECJ curates and standardises a specific set of morality in the EU. Human rights discourse centres on the ideas of individualism, liberty, and personal autonomy, which is the ideology reflected on ECJ decisions. For example, these three values are

[16] Joseph Weiler, 'The Transformation of Europe' (1991) 100(8) *Yale Law Journal* 2403, 2470.

[17] Michael Blauberger and Susanne K Schmidt, 'The European Court of Justice and its Political Impact' (2017) 40(4) *West European Politic* 907, 918.

[18] Rafal Manko, 'The EU as a Community of Law: Overview of the Role of Law in the Union' (Briefing, European Parliamentary Research service, March 2017) 4.

[19] Sartorio (n 1) 22.

[20] FEU (n 6) art 267.

[21] Sartorio (n 1) 22.

[22] Samantha Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32(83) *Utrecht Journal of International and European Law* 41, 68.

[23] Boin and Schmidt (n 4) 148.

[24] (C-4/73) [1974] ECR 491.

propounded in all decisions pertaining to the free movement of persons. An illustration of this is in *Metock v Minister for Justice, Equality and Law Reform.* In recognising the right of migrants to move from one member state to another with their European spouse regardless of their nationality, the Court's decision had a flavour of protecting individual's decision-making and personal autonomy.[25] This demonstrates how the ECJ applies a freedom and autonomy-based ideology to Europe.

As the Court is tasked with ensuring equal application of its judgments to all member states, the Court is therefore projecting this ideology onto all member states.[26] This integrates states culturally and morally, as it ensures they are united by their obligation to the Court's judgments and, inherently, the ideology accompanying it. Arjen Boin and Susanne Schmidt articulate the Court's actions as having fostered 'a shared interpretation of mission and operations among a very diverse group of people'.[27] This demonstrates how the Court's protection of human rights has perpetuated an ideological framework that is being applied to all states and subsequently creating a united morality.

Ideological unity is a tool for integration. This may not be a clear example of negative or positive integration. However, this consistent pro–human rights agenda is, in fact, a positive integration tool through creating a European unity—European peoples converging on a standard of behaviour.[28] Unity in Europe—including cultural or moral unity—is a tool for positive integration. This is because when European peoples feel interconnected with each other, they are more likely to have a positive attitude towards the EU.[29] Subsequently, they will elect leaders or vote in ways that empower the EU. Hence, by providing for a uniform human rights model across Europe, the ECJ creates a universal standard of morality which contributes to the cultural integration of Europe.[30]

V Interpreting treaties in an integration-friendly manner

The Court has facilitated integration by interpreting the *Treaty on the Functioning of the European Union* (*FEU*) in a way that increases the powers of the Parliament. The *FEU* already provided for two institutions, the European Commission and European Council, to be counterparties before the Court.[31] However, through gradual ECJ jurisprudence—most notably in the case of *Parti écologiste 'Les Verts' v European Parliament*—the Court also interpreted the provision in the *FEU*, and the meaning of 'institution', to include the European Parliament as an institution that can be a counterparty to the Court.[32] This is a clear example of positive integration, as it gives the European Parliament greater powers to be involved in the EU's legal process. This is something that would otherwise have been outside the scope of Parliament's power, based on its originally mandated powers.[33]

Second, integration has been furthered by the ECJ's principle that the treaty system must be interpreted with respect to the state of integration. Rather than the rigid words of treaties alone, the Court interprets

[25] (C-127/08) [2008] ECR 6241.

[26] FEU (n 6) art 263.

[27] Boin and Schmidt (n 4) 148.

[28] Ibid 148.

[29] Arun Pokhrel, 'Eurocentrism' in Deen K Chatterjee (ed) *Encyclopedia of Global Justice* (Springer, 2011), 321.

[30] Kobenhavns Universitet, 'Unification Through Law: The Court of Justice of the European Union as a Cultural–Moral Agent', *Cordis* (Website, 26 July 2019) [1] <https://cordis.europa.eu/project/id/846070>.

[31] FEU (n 4) art 218(11).

[32] (C-294/83) [1986] ECR 1339.

[33] European Parliament, 'The Court of Justice of the European Union', *Fact Sheets on the European Union* (Webpage, December 2020) [15] <https://www.europarl.europa.eu/factsheets/en/sheet/26/the-court-of-justice-of-the-european-union>.

treaties to promote integration.[34] This is a clear example of the Court's role in European integration, as it is creating pro-integrative law and contributing to the development of future pro-integrative law through its precedent. In practice, ECJ decisions have precedential value even though as a matter of law, the doctrine of *stare decisis* (judgments being binding on other judgments) does not exist in EU law. Instead, the body of ECJ case law is a guide for judges to ensure consistency in judgments.[35] Courts are largely obedient to precedent as a matter of fact, and as such, previous ECJ decisions contribute substantially to the development of EU law.[36] In this way, the ECJ is contributing to a pro-integrative legal system.

VI Preliminary ruling procedure

The ECJ's preliminary ruling procedure has also been a tool for both negative and positive integration. Foremost, the preliminary ruling procedure makes a substantial contribution to negative integration, as it effectively reduces state sovereignty. The decisions the ECJ makes upon referral from a domestic court are binding on all other member states. This means that the preliminary ruling system removes any possible resistance from states who would rather not comply with EU law. This curtails some state sovereignty, as member states do not have free power to ignore EU law when it does not suit them: they are bound by the ECJ's decision.[37] In this way, the preliminary ruling procedure is a tool for negative integration.

Moreover, the preliminary ruling mechanism is a tool of positive integration because it increases EU law expansion in domestic law systems. As acknowledged in the case of *Schwarze v Einfuhr-Und Vorratsstelle Fuer Getreife und Futtermittel*, the ECJ's preliminary ruling mechanism establishes certain judicial cooperation between national courts or tribunals and the ECJ.[38] In situations where the court is not a recognised judicial body in the state's established legal system, this relationship between the ECJ and the tribunal is a significant legitimising factor of the tribunal's position in national legal hierarchies.[39] In some circumstances, member state courts and tribunals can determine whether the decision is a matter of EU law and subsequently whether it should be referred to the ECJ. These tribunals have an incentive to refer to ECJ wherever possible, as interacting with the ECJ strengthens their legitimacy.[40] Subsequently, there is an increased number of cases before the ECJ, resulting in a greater number of decisions being imposed on member states.[41] Member states are then faced with implementing the large number of ECJ's decisions. This is then necessarily how the preliminary ruling mechanism has resulted in the expansion of EU law in the member states' domestic law. The expansion of EU law is reflective of the expansion of EU power in member states, and it is in this way that the preliminary ruling procedure is a tool of positive integration.

VII European integration occurring separate to the ECJ

An important caveat of this argument is that European integration is not solely dependent on the ECJ. Rosato notes that European integration has been a long process, impacted by geographic, ideological, and

[34] Ibid.

[35] Marc Jacob, 'Precedents and Case-Based Reasoning in the European Court of Justice' (2014) 12(3) *International Journal of Constitutional Law* 832, 834.

[36] Ibid 832, 834.

[37] Sartorio (n 1) 23.

[38] (C-16/65) [1965] ECR 877.

[39] Daniel Kelemen and Susanne Schmidt, 'Introduction—The European Court of Justice and Legal Integration: Perpetual Momentum?' (2012) 19(1) *Journal of European Public Policy* 1, 6.

[40] Karen Alter, *Establishing the Supremacy of European Law* (Oxford Scholarship Online, 2003) <https://academic.oup.com/book/32940>

[41] Sartorio (n 1) 20.

cultural factors beyond the legal and political systems in place by the EU.[42] Trends of globalisation in the late twentieth century inherently facilitated integration. Hobolt and Vries argue that in the twenty-first century, popular sentiment for or against the EU plays a significant role in the progression of European integration.[43] Of particular note in a discussion on European integration is the European Single Market, an internal economic system guaranteeing free trade and movement of people. De Waele argues that the effect of the Single Market has been to generate an economic unity that means European states are inherently interrelated and interdependent.[44] The EU, acting as a proponent for the Single Market, necessarily grows in power as Europeans look for a mechanism for securing their common interest in the Single Market. Nonetheless, this article has demonstrated that there are four significant ways in which the ECJ has played an important, though not exclusive, role in European integration.

VIII Conclusion

The ECJ has played a significant role in reducing state sovereignty and increasing the power of EU institutions. Thus, the ECJ has been a substantial—but not sole—force in integrating Europe. This article contributed to the literature on EU integration by demonstrating that there are four important ways in which the ECJ integrates Europe. These four ways are by making decisions that continue to constitutionalise the treaty system; protecting fundamental rights of citizens at the union level; interpreting the constitutive treaties of the EU in an integrative-friendly manner; and reinforcing a hierarchy of EU law above domestic law through the ECJ's preliminary ruling mechanism.

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[42] Sebastian Rosato, *Europe United: Power Politics and the Making of the European Community* (Ithaca, NY: Cornell University Press, 2011).

[43] Sarah Hobolt and Catherine de Vries, 'Public Support for European Integration' (2016) 19 *Annual Review of Political Science* 413, 414.

[44] Henri de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6(1) *Hanse Law Review* 3, 7.

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C Treaties

Treaty on the Functioning of the European Union, opened for signature 7 February 1992, [2009] OCJ C 115/199 (entered into force 1 November 1993)

What have we learned about climate change and interstate conflict in the last decade?

FRANCESCA LAMBERT

Abstract

A review of the extant literature reveals little consensus on the relationship between climate change and global conflict. A general model of the relationship between climate and conflict is discussed. It is argued that pathways from climate change to interstate conflict are difficult to identify due to multiple stressors resulting from climate change occurring simultaneously, with an array of possible interactions that are relevant in specific contexts. In particular, the literature on trans-state water scarcity and variability demonstrates tendencies towards both conflict and cooperation. Directions for future research are proposed to assist policymakers to anticipate international tensions caused by climate change and design targeted interventions to address the risks.

Introduction

Identifying the pathways from climate change to interstate conflict is inherently difficult. There are multiple stressors resulting from climate change, occurring simultaneously, that pose a unique risk to interstate conflict. Furthermore, while much useful research has been done, its focus has been too narrow and insufficiently focused on possible interactions between simultaneous climate change phenomena and interstate conflict. This paper argues that the combination of multiple stressors occurring together, and the narrow and partial focus of the literature up until now, has limited the understanding of the nexus between climate change and interstate conflict. It also offers limited direction to security policymakers concerned about the implications of climate change effects and interstate conflict risk. The first section of the paper provides the theoretical and empirical background, and the rationale for increased attention to the climate change–interstate conflict relationship. This is followed by a snapshot of the literature on climate change and interstate conflict that contributes to our current, but limited, understanding of the relationship. Here it will be shown that the literature reveals a lack of focus on the interaction between multiple climate change factors and how such interactions impact on global security. The final section draws on the literature review to propose directions for future research that may assist policymakers to anticipate international tensions caused by climate change and design targeted interventions to address the risks.

Background and rationale

Expert opinion suggests that conflict risk from climate change will increase from 5 per cent at present, to up to 13 per cent, given a rise in global mean temperature of 2ºC above pre-industrial levels, and up to 26 per cent given a rise of 4ºC.[1] A review of the current literature reveals neither consensus on the relationship between climate change and conflict nor unequivocal empirical evidence to support any specific claims about their relationship. Indeed, Scartozzi has recently concluded that '(d)espite hundreds of published studies, there is still low confidence in the validity of the findings due to lack of consistency of evidence and low degree of agreement'.[2] The contingent nature of the relationship

[1] Katharine Mach et al., 'Climate as a Risk Factor for Armed Conflict', *Nature* 571, no. 7764 (2019): 193–97.

[2] Cesare Scartozzi, 'Reframing Climate-Induced Socio-Environmental Conflicts: A Systematic Review', *International Studies Review* 23, no. 3 (2020): 696–725.

between climate change and conflict, and the relative strength of climate change as a driver of conflict[3] suggest more focused study of the climate–conflict nexus is needed. Szayna et al. note, 'the most dire climate-change scenarios might … fundamentally change the extent of violent conflict'.[4] Given the potential security threats arising from climate change,[5] it is puzzling that so little research is being conducted in this area. Assuming that the framing of climate change as a security issue is not a self-fulfilling prophecy,[6] policymakers need to be better informed to anticipate international tensions caused by climate change and design targeted interventions to address the risks.

Focused study of the nexus between climate change and interstate conflict is warranted in order to develop a better understanding of what contributes to peace as well as conflict. While the frequency of interstate conflict has declined significantly in recent times,[7] the impact of climate change is increasing. However, there is likely to be a spurious negative association between the two.[8] Whether climate change is contributing to global peace cannot be assumed from the available evidence; rather, it requires a close examination of both multiple stressors occurring together and interactions between simultaneous climate change phenomena. For example, climate-related agriculture shocks that cause human migration can jointly reduce potential conflict risk in the absence of inter-group inequalities between identity groups at the destination. Furthermore, any tendency towards peace increases the importance of studying the relationship between states that experience climate-induced stressors and avoid conflict, to better assess contextual factors that contribute to peaceful environments.[9]

Greater emphasis on the study of the climate change–interstate conflict nexus is also necessary to develop a better understanding of climate change as a threat multiplier in an international context of great power competition. To the extent that climate change amplifies existing socio-economic, political, and/or institutional risks, it may expose security vulnerabilities that could lead to a change in the balance of power, with consequences for global conflict. For example, the transition to low carbon emissions renewable energy resources has obvious implications for fossil fuel–dependent states. Rising sea levels potentially compromise US naval assets in the Pacific and affect power relations in the Indo-Pacific region.[10] Similar risks are faced by alliances such as the North Atlantic Treaty Organization (NATO) in the Atlantic.[11] Moreover, climate change has the potential to elicit new motivations for interstate conflict. The melting of Arctic ice, for example, which reduces the costs of accessing oil and mineral deposits and increases shipping lanes, may contribute to future great power rivalries and interstate conflict.[12] These high-cost risks from multiple stressors occurring together cannot be underestimated.

Finally, it is reasonable to conjecture that an understanding of the ways in which climate change and global conflict interact will shed light on new arenas for interstate competition. Soft power potentially attaches to leadership on climate change with implications for the conflict–peace spectrum.[13] At a critical time in the global response to climate change, domestic climate policy can demonstrate a state's credentials as climate advocate, which can then be used to leverage its influence and networks towards achieving cooperation on global climate action. Whether soft or hard power, increased attention to the relationship between climate change and interstate conflict (or peace) is timely. The next section

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[3] Idean Salehyan, 'From Climate Change to Conflict? No Consensus Yet', *Journal of Peace Research* 45, no. 3 (2008): 315–26.

[4] Thomas Szayna et al., *Conflict Trends and Conflict Drivers: An Empirical Assessment of Historical Conflict Patterns and Future Conflict Projections* (Santa Monica, CA: RAND Corporation, 2017), www.rand.org/pubs/research_reports/RR1063.html.

[5] Nina Von Uexkull, and Halvard Buhaug, 'Security Implications of Climate Change: A Decade of Scientific Progress', *Journal of Peace Research* 58, no. 1 (2021): 3–17.

[6] Nils Petter Gleditsch, 'Whither the Weather? Climate Change and Conflict', *Journal of Peace Research* 49, no. 1 (2012): 3–9.

[7] Szayna et al., *Conflict Trends and Conflict Drivers*.

[8] Erik Gartzke, 'Could Climate Change Precipitate Peace?', *Journal of Peace Research* 49, no. 1 (2012): 177–92.

[9] Ayyoob Sharifi et al., 'Climate-Induced Stressors to Peace: A Review of Recent Literature', *Environmental Research Letters* 16, no. 7 (2021): article 073006.

[10] John Allen and Bruce Jones, 'What Climate Change Will Mean for U.S. Security and Geopolitics', *Order From Chaos* (blog), *Brookings*, 4 February 2021.

[11] Amar Causevic, 'Facing an Unpredictable Threat: Is NATO Ideally Placed to Manage Climate Change as a Non-Traditional Threat Multiplier?', *Connections: The Quarterly Journal* 16, no. 2 (2017): 59–80.

[12] Vally Koubi, 'Climate Change and Conflict', *Annual Review of Political Science* 22, no. 1 (2019): 343–60; Brian La Shier and James Stanish, 'The National Security Impacts of Climate Change', *Journal of National Security Law and Policy*, no. 10 (2019): 27–43.

[13] Marie Dejonghe, 'Will Only a Green Power Remain Great Power?' (Security Policy Brief no. 144, 2021), 144.

discusses the literature on climate change and interstate conflict that contribute to our current, but limited, understanding of their complex relationship.

Relationship between climate change and interstate conflict

It is inherently difficult to identify the pathways between climate change and interstate conflict. The relationships are indirect, with climate change a threat multiplier that requires consideration of multiple mechanisms, stressors, and interactions that are relevant in specific contexts.[14] Mis-specification or omission of the variables, their interactions, control variables, or the form of the relationship can all militate against finding a significant statistical result in empirical studies. Case studies have contributed to greater understanding of the contingent nature of the climate change–interstate conflict relationship but highlight a basic tension between generalisability and context specificity. One major achievement of recent research is to identify and link specific potential conflict hotspots to conflict minimisation mechanisms.

A general model of the relationship between climate and conflict is shown in Table 1. With three motivations for conflict (greed, grievances, and opportunism), climate is typically measured in its variability (temperature or rainfall) or by shocks (natural disasters), leading to changes in access to resources (scarcity and abundance), agricultural productive yields (food security), market forces (economic shocks), migration (displacement and population pressures) and state capacity (financial resources and administrative capability). Contextual variables identify the scope conditions under which climatic changes or events alter the likelihood of conflict (e.g. socio-economic development, history of conflict, and political stability). The interactions between drivers, shocks, and contextual variables increase the uncertainties surrounding the specification of the model[15] with the possibility of a feedback loop where a factor becomes both a cause and consequence of climate change.[16] According to expert analysis,[17] economic shocks are considered the most robust pathway from climate to armed conflict, followed by natural resource dependency, although their influence on conflict risk is judged to be relatively low.

Climate change →	Interacting with →	Mediated by →	Leads to conflict because of
Geophysical processes; Climate impacts	Resource base; Economy/trade/ markets; Human displacement; State capac- ity/governance	Socioeconomic factors; Environmental/ geographic factors; Institutional/political factors; Exposure/vulnerability; Culture/ethnicity; etc.	Greed; Grievances; Tactical opportunities

Table 1: Indirect causal pathways from climate change to conflict.

Source: Reproduced from Cesare Scartozzi, 'Reframing climate-induced socio-environmental conflicts', Table 2.

[14] Koubi, 'Climate Change and Conflict'.

[15] Katharine Mach and Caroline Kraan, 'Science–Policy Dimensions of Research on Climate Change and Conflict', *Journal of Peace Research* 58, no. 1 (2021): 168–76.

[16] Christopher Carleton, Mark Collard, Mathew Stewart, and Huw Groucutt, 'A Song of Neither Ice nor Fire: Temperature Extremes Had No Impact on Violent Conflict among European Societies During the 2nd Millennium CE', *Frontiers in Earth Science* 9 (2021): article 769107.

[17] Mach et al., 'Climate as a Risk Factor for Armed Conflict'.

Following the early work of Homer-Dixon,[18] in the last decade the literature has paid most attention to conflict arising from grievances over transboundary water shortages, with a distinct strand linking grievances to opportunities for cooperation and conflict resolution. The emphasis has been predominantly on *resource scarcity* involving shared water resources.[19] The contingent nature of the nexus is demonstrated by Schmidt, Lee and McLaughlin Mitchell,[20] who argue that changes in resource scarcity and environmental uncertainty increase the likelihood of both diplomatic and military force for states without sovereignty over disputed resources. On the other hand, Devlin and Hendrix[21] show that while scarcity arising from lower mean levels of rainfall and higher variability increase the likelihood of interstate conflict, shared scarcity reduces the short-term risk. Thus, renewable resource scarcity is not necessarily a zero-sum equation.

More generally, Bernauer and Böhmelt[22] identify 12 determinants of interstate water cooperation and conflict, which is indicative of the complexity of the potential causal pathways. The determinants include natural resource dependency, precipitation change variability, socio-economic development and food security, geographical characteristics, form of government and legal system, and various alliances and cooperative arrangements between states. The main area of debate concerns the extent to which market forces and social and technological innovations can ameliorate tendencies to conflict.[23] The neo-Malthusian argument that a more variable or scarcer water supply, together with greater consumption from economic development and population growth, is a catalyst for increasing international conflict has produced equivocal empirical findings of heightened security risks. Gartzke[24] argues that there is a reduced risk of interstate conflict as developed states face a declining utility from territorial conquest—the interdependence from trade cancels out the incentives for violent conflict. Risks can also be lowered by technological innovations and socio-political interventions. Tir and Stinnett[25] find the risk of escalation of interstate conflict from water scarcity can be lowered with tailored agreement and institutional arrangements that monitor behaviour, have conflict resolution and enforcement mechanisms, and delegate authority to third parties. Given this tendency towards cooperation, Koubi et al.[26] conclude that resource scarcity is less important than economic and political factors. While I accept that economic factors are likely to be a primary determinant of conflict and cooperation, our current state of knowledge concerning the effect of multiple stressors occurring concurrently, as well as their interactions, suggests caution in ranking and discounting possible determinants in the relationship between climate change and conflict.

Conversely, opportunities for conflict avoidance are not universally successful. Investigating *resource abundance*, Spijkers and Boonstra's case study of the mackerel dispute between the European Union, Norway, Iceland, and the Faroe Islands over fishing quotas began and endured despite a legal framework for sharing and conserving marine resources.[27] The mechanisms for allocation failed to promote agreement on the principles to be applied or the calculation of quotas, knowledge-based scientific information was contested, and there was an imbalance of power between the parties. The

[18] Thomas Homer-Dixon, 'Environmental Scarcities and Violent Conflict: Evidence from Cases', *International Security* 19, no. 1 (1994): 5–40.

[19] Von Uexkull and Buhaug, 'Security Implications of Climate Change'.

[20] Cody Schmidt, Bomi Lee, and Sara McLaughlin Mitchell, 'Climate Bones of Contention: How Climate Variability Influences Territorial, Maritime, and River Interstate Conflicts', *Journal of Peace Research* 58, no. 1 (2021): 132–50.

[21] Colleen Devlin and Cullen Hendrix, 'Trends and Triggers Redux: Climate Change, Rainfall, and Interstate Conflict', *Political Geography* 43 (2014): 27–39.

[22] Thomas Bernauer and Tobias Böhmelt, 'International Conflict and Cooperation over Freshwater Resources', *Nature Sustainability* 3, no. 5 (2020): 350–56.

[23] Nils Petter Gleditsch, 'This Time is Different! Or is it? NeoMalthusians and Environmental Optimists in the Age of Climate Change', *Journal of Peace Research* 58, no. 1 (2021): 177–85.

[24] Gartzke, 'Could Climate Change Precipitate Peace?'

[25] Jaroslav Tir and Douglas Stinnett, 'Weathering Climate Change: Can Institutions Mitigate International Water Conflict?', *Journal of Peace Research* 49, no. 1 (2012): 211–25.

[26] Vally Koubi, Gabriele Spilker, Tobias Böhmelt, and Thomas Bernauer, 'Do Natural Resources Matter for Interstate and Intrastate Armed Conflict?', *Journal of Peace Research* 51, no. 2 (2014): 227–43.

[27] Jessica Spijkers and Wiebren Boonstra, 'Environmental Change and Social Conflict: The Northeast Atlantic Mackerel Dispute', *Regional Environmental Change* 17, no. 6 (2017): 1835–51.

threat of spillover to agreements concerning other marine species eventually resulted in a bargain that favoured Norway.

Despite its achievements, the narrow research focus based on grievance related to resource scarcity,[28] and equivocal findings, leaves considerable scope for future research. Outstanding research questions concern the role and importance of other variables in understanding long-term variations in interstate conflict. There is also a case for expanding the motivations for conflict, in particular, greed. In any case, given the multiple stressors resulting from climate change occurring together, and their interactions, the unique risk they pose to interstate conflict demands an orientation relevant to security policymakers.

Directions for future research

Drawing on the literature just considered, I will now propose directions for future research that may assist policymakers to anticipate international tensions caused by climate change. If climate change simultaneously causes a rise in sea levels, lower agricultural yields, more frequent natural disasters, more and larger migration flows, and more stress on government resources, it is their simultaneous impact that is most relevant to security policymakers.[29] As the magnitude of climate change effects increases, however, past relationships are less likely to be relevant, magnifying uncertainties and conflict risk.[30] Scenario forecasting offers a theoretical option for examining future security issues although they will tend to be more speculative.[31] Moreover, major climate impacts could be felt simultaneously around the world, unlike conventional security threats that involve few states at a specific point in time.[32] The possibility of large-scale climate-induced migration likely to affect relations between states should be included in forecasts.[33] Future research could also examine greed as a motivator in the Arctic.[34] Contestation over non-renewable resources or protection of new shipping routes as a result of the ice melt has implications for military assets and personnel as well as new security vulnerabilities.[35]

In the long run, international governance institutions and changes in the world order will moderate the risk of armed conflict.[36] Climate-induced limits to a state's capacity to deter rivals by, say, diverting government resources away from security assets in order to cover the costs of severe weather events at home, could influence the incidence and duration of future interstate conflict.[37] The redistribution of power across states, as economic power shifts away from states with significant non-renewable resources and towards states with renewable resources or the inputs for clean energy technologies,[38] could see the former states lose leverage and suffer economic losses[39] creating new arenas for conflict. The possible impact on exclusive economic zones from loss of territory with rising sea levels could also have implications for world order. In understanding changes in geopolitical power, researchers should revisit the perception of threats emanating from these non-traditional sources, with a role for psychology in cross-disciplinary research.[40]

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[28] Gleditsch, 'This Time is Different! Or is it?'

[29] Von Uexkull and Buhaug, 'Security Implications of Climate Change'.

[30] Mach et al., 'Climate as a Risk Factor for Armed Conflict'.

[31] Joshua Busby, 'Taking Stock: The Field of Climate and Security', *Current Climate Change Reports* 4, no. 4 (2018): 338–46.

[32] CNA, *National Security and the Threat of Climate Change* (CNA Corporation, 2007).

[33] Ole Sending, Indra Øverland, and Thomas Boe Hornburg, 'Climate Change and International Relations: A Five-Pronged Research Agenda', *Journal of International Affairs* 73, no. 1 (2019): 183–94.

[34] Koubi, 'Climate Change and Conflict'.

[35] Joshua Goldstein, 'Climate Change as a Global Security Issue', *Journal of Global Security Studies* 1, no. 1 (2016): 95–98.

[36] Mach et al., 'Climate as a Risk Factor for Armed Conflict'.

[37] Emilio Morales, 'Global Climate Change as a Threat to U.S.', *Journal of Strategic Security* 8, no. 5 (2015): 134–48.

[38] Sending, Øverland, and Hornburg, 'Climate Change and International Relations: A Five-Pronged Research Agenda'.

[39] Marie Dejonghe, 'Will Only a Green Power Remain Great Power?'

[40] Se Min Suh, Daniel Chapman, and Brian Lickel, 'The Role of Psychological Research in Understanding and Responding to Links between Climate Change and Conflict', *Current Opinion in Psychology* 42 (2021): 43–48.

Extending current research on risk reduction interventions also has merit.[41] Without attempts to collaboratively manage approaching water shortages in South Asia where several states with large populations rely on water from the contracting Himalayan glaciers,[42] armed conflict may quickly follow from old antagonisms. Similar issues apply in other regions.[43] Investing in conflict-mitigation mechanisms and institutional capacity with neighbouring states orients the parties towards cooperation.[44] At the same time, new pathways to interstate conflict could arise from disagreements concerning mitigation or compensation for the shared resources[45] or the unintended consequences of adaptive responses.

To summarise what we have learned about climate change and interstate conflict in the past decade, I have shown that the risk of conflict from climate change, while small at present, appears likely to escalate with global warming. Second, I have argued that thus far, our understanding of the impact of climate change on conflict/peace is modest. The array of determinants of conflict, their relative strength, and their interactions with climate change, render it difficult to study and achieve consensus on the relationships. Nevertheless, as major climate effects are experienced more widely and frequently, a compelling case has been made for increased attention to the non-traditional security threat from climate change.

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[41] Mach et al., 'Climate as a Risk Factor for Armed Conflict'.

[42] Michael Klare, 'Climate Change, Water Scarcity, and the Potential for Interstate Conflict in South Asia', *Journal of Strategic Security* 13, no. 4 (2020): 109–22.

[43] Lucia De Stefano, Jacob Petersen-Perlman, Eric Sproles, Jim Eynard, and Aaron Wolf, 'Assessment of Transboundary River Basins for Potential Hydro-Political Tensions', *Global Environmental Change* 45 (2017): 35–46.

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Moral grandstanding and unhealthy cynicism: How unhealthy cynicism does not necessarily pervert public moral discourse

EFFIE LI

Abstract

Moral grandstanding occurs when one tries to promote one's reputation as morally respectable. A concern in philosophy, promulgated by Tosi and Warmke, is that *pervasive* moral grandstanding generates unhealthy cynicism that propels people to disengage from public moral discourse (2016, p. 210). Nevertheless, I argue that this worry is misguided, since excess cynicism triggers information consumers to employ self-correcting mechanisms that ultimately negate the purported impacts of moral grandstanding. In this paper, I outline two self-correction methods: passive correction through noise reduction and active correction through information verification. In the prior method, rational agents engage in 'mental handicapping' and discount grandstanding expressions. This enables people to sequester noises from quality contributions in moral discourse. For the latter method, agents conduct accountability checks and investigate the veracity of claims. This promotes listener participation in public debates. In all, the corrective consequences of amplified cynicism not only attenuate the apparent injurious effects of grandstanding but enhance the quality of public moral discourse.

Introduction

When former US President Donald Trump announced that he would issue a posthumous pardon for suffragist Susan B Anthony, some members of the public labelled him a moral grandstander (Stollznow, 2020). As Tosi and Warmke define it, moral grandstanding[1] relates to promoting one's reputation as morally respectable (2016, p. 199). According to these authors, a speaker grandstands when they have the desire to be recognised as being moral and produce an expression that signals their virtuousness (2016, pp. 200–201). In the literature, the concern is that grandstanding injures public moral discourse. Grubbs and colleagues highlight how grandstanding exacerbates political polarisation (2020, p. 1). Similarly, Tosi and Warmke also underscore polarisation as a negative consequence to grandstanding (2016, p. 210). In addition, the duo stipulates three other impacts of grandstanding on moral discourse: free-riding problems, outrage exhaustion, and unhealthy cynicism (Tosi and Warmke, 2016, p. 210). Unlike these authors, I will argue that not all forms of grandstanding pervert public moral discourse. In particular, Tosi and Warmke are exaggerating the effects of grandstanding in their unhealthy cynicism argument.

This contention will be crystallised in a fourfold manner. In Section I, I will explain the characteristics of moral grandstanding. Specifically, I will examine what moral grandstanding entails, why one grandstands, and how it is manifested. In Section II, I will decipher Tosi and Warmke's unhealthy cynicism argument by examining the purported damages *excess* cynicism brings to public discourse. Extending this thread of inquiry, I will illustrate how heightened scepticism gives rise to self-correcting mechanisms that ultimately

[1] Henceforth, grandstanding. It is also used interchangeably with virtue signalling, which is the more commonly used term in the literature.

counter the insidious effects of grandstanding. Finally, in Sections III and IV, I will delineate the passive and active self-correction arguments, raise potential counterclaims, and address lingering concerns. In this essay, I will use the climate change campaign on social media and the Volkswagen emission scandal as case studies to illustrate how the apparent effects of grandstanding do not occur in practice.

Section I: Characteristics of moral grandstanding

Tosi and Warmke identify two main characteristics of grandstanding: (i) the recognition desire and (ii) the grandstanding expression (2016, pp. 200–201). The first characteristic relates to the agent's *desire* to be acknowledged as being virtuous. According to the Cambridge Dictionary, being virtuous means 'having good moral qualities and behaviour' (Cambridge Dictionary, n.d.). For a grandstander, this means that they either meet a normative baseline or well exceed a minimum moral threshold (Tosi and Warmke, 2016, p. 200). Moreover, one's recognition desire can further be divided into two categories: altruistic and egoistic. Altruistic desires arise from people who *truly* care. For instance, a Greenpeace activist may signal their support for carbon neutral policies on social media because they genuinely believe that government intervention is beneficial. They signal their moral stance to garner more support for the issue. Egoistic grandstanders on the other hand, need not support the cause. They might be indifferent to or even deny climate change but merely wish to *appear* moral. In this essay, I will assume that grandstanders are egoistic and show that even egoistic intentions do not necessarily pervert public moral discourse.

The second component of Tosi and Warmke's characterisation of grandstanding is the grandstanding expression. In addition to having a recognition desire, an agent produces a *statement* that signals their morally respectable reputation. The duo lists five manifestations of such expressions: trumping up, emotional display, self-evidence, ramping up, and piling on (Tosi and Warmke, 2016, p. 203). For this essay, I will focus on piling on, which can be defined as adding to the discussion by reiterating what has already been said. An example would be climate strike post retweets that announce one's support for such events (often with identical phrases already seen in other reposts). In this case, the agent is not producing any novel opinions, but renewing what has already been discussed. With the characteristics of grandstanding elucidated, a definition of being virtuous provided, and the manifestations of virtue signalling expressions explained, we can now turn to understanding why the unhealthy cynicism argument is unfounded.

Section II: Deciphering the unhealthy cynicism argument

As Tosi and Warmke stipulate, grandstanding results in unhealthy cynicism, which leads to the 'devaluation of the social currency of moral talk' (2016, p. 210). Upon further dissection, the authors' position is fundamentally concerned with the impact of '*pervasive*' grandstanding (Tosi and Warmke, 2016, p. 217), and how it subsequently generates *excess* distrust among the public. When grandstanders start to pile on in masses—as evident in social media when one's feed is filled with the 'let's stop climate change' infographic with '#bethechange'—cynicism breeds. That is, information consumers become increasingly sceptical of and disillusioned with the intention of speakers. While the scholars do not explicate how cynicism differs from *unhealthy* cynicism in their writing, it is implied that the latter concerns *excess* scepticism. Knowing that some egoistic speakers are merely trying to grandstand, information consumers become *more* dismissive of climate change discourse and engage less with the issue. Tosi and Warmke further contend that this distrust creeps into normal discourse even when grandstanding is absent (2016, p. 211), highlighting the extent of damage. Thus, the aggregated effect of grandstanding through piling on is heightened distrust, which subsequently leads to disengagement, which decreases the quality of public discourse.

Nevertheless, I argue that the very nature of *excess* cynicism negates the injurious impacts of virtue signalling. This is due to the self-correcting mechanisms information consumers employ in their cognitive process. If we accept Tosi and Warmke's stance on the prevalence of grandstanding (and how this generates unhealthy cynicism), then we should realise that people discount signalling behaviours more often by employing corrective actions. This contention crystallised below:

P1: Grandstanding is pervasive.
P2: The pervasiveness of grandstanding leads to excess cynicism.
P3: Excess cynicism reflects an awareness of grandstanding behaviour.
P4: Awareness of grandstanding behaviour results in corrective actions.
P5: Corrective actions negate the negative impacts of excess cynicism.
C: Excess cynicism that arises from pervasive grandstanding does not lead to negative outcomes as such impacts are negated by corrective actions.

The critical components that are missing from the duo's argument are premises 3 and 4. They overlook the listener's rational response (i.e. acting optimally based on known information) to grandstanding. Given that information consumers *know* the manifestation of piling on and its consequence, it is reasonable to infer that they would act on such knowledge. This consequently offsets the harmful effects of grandstanding.

To recap, I have examined Tosi and Warmke's unhealthy cynicism argument in this section. Their main worry is how pervasive grandstanding leads to an increased disengagement from public discourse due to heighted scepticism in information consumers. Though cynicism is integral to their argument, Tosi and Warmke do not explicate what *unhealthy* cynicism means. This gap in definition gave rise to my 'excess scepticism' interpretation, which ultimately enabled me to build a case against the scholars. Agreeing with them on the pervasiveness of grandstanding, and how this leads to unhealthy cynicism, I have underscored the fact that heightened cynicism reflects some level of awareness of grandstanding behaviours. Assuming rationality in information recipients, the knowledge of grandstanding acts would likely prompt corrective actions. In the following sections, I will demonstrate how listeners may react by exercising passive and active corrective mechanisms, and how these methods counteract the consequences of grandstanding through noise reduction and information verification.

Section III: The passive self-correction argument and its counterclaim

The passive self-correction argument is fundamentally concerned with noise reduction in information processing. Noise in this context refers to a 'distorted mixing of information flows' (Hilbert, 2012, p. 5). If genuine contributions to climate change discourse are the quality input that is crucial for an agent to engage with the topic, then egoistic self-promoting statements are the noise that distract listeners from the real debate. Such noise clouds the judgment of information recipients. Notwithstanding, knowing that noise is present, listeners are likely to react by filtering out insubstantial grandstanding statements. For example, people might discount the value of virtue signalling expressions on social media mentally as they scroll past such posts. This form of 'mental handicapping' in effect declutters the information-scape for the listener. Tosi and Warmke might argue that this is exactly how disengagement culminates. However, what I have illustrated is not the total dismissal of information, but the *isolation* of *irrelevant* ones. Indeed, passive self-correction through noise reduction actually enhances the quality of public discourse.

To explain this point further, I have devised the 'Pathological Liar' example below.

> Suppose people are either pathological liars or truth tellers. Upon meeting a person and having had a conversation with them, I am instantly aware that they say questionable things and might be a pathological liar. Consequently, I discount the believability of their words. Nonetheless, this is not to say that I am distrusting of *all* people. I can still engage meaningfully with truth tellers.

As seen, the sequestration of pathological liars from truth tellers preserves my ability to retrieve relevant information from the latter. I will not be disillusioned with widespread lying to the extent that I cease engagement with all people. Relating this back to grandstanding, awareness of piling on leads to information filtering, which underweights the value of immaterial signalling statements. Thus, not only is public discourse not perverted, but its quality is strengthened as the information-scape is tidied.

Opponents to the passive correction argument, however, might repudiate the awareness assumption in premise 3 by lodging two attacks. The first attack is on the idea that the pervasiveness of grandstanding guarantees awareness. Just because there are many pathological liars does not necessarily mean I know that they exist. I might not have come across one or am simply ignorant about the issue. The second attack is on the presupposition that awareness results in *identification*. People may be disillusioned with grandstanders but still be incapable of spotting one in action. The same pro–climate action statement might stem from people with varying intentions (some more egoistic than others). Furthermore, knowing that reputation is at stake, and being called out for grandstanding only injures it, rational virtue signallers would try their best to conceal their motives (thus hindering identification). Ultimately, to summarise the awareness counterclaims, passive correction cannot transpire if: (i) I am *unaware* of the signalling phenomenon or (ii) I *cannot identify* the grandstander.

Indeed, both are convincing challenges to my position. However, endorsing these counterclaims would also jeopardise Tosi and Warmke's case. Regarding (i), people unaware of the grandstanding circumstance would *not* be cynical about it. How could one have a strong emotional response to a phenomenon that they are oblivious to? The very formation of cynicism requires awareness. Dismantling this premise is like dismissing the fundamental law of gravity in physics—we cannot proceed in the grandstanding debate if not for some baseline assumption. Concerning (ii), a false dichotomy is presented—identification is reduced to a yes/no distinction. Nevertheless, there exists a third possibility: spotting *some* virtue signallers. Linking this point back to Tosi and Warmke, the duo recognises that grandstanders are hard to spot. Despite this, they also contend that identification *is* possible with examples from contemporary US politics (Tosi and Warmke, 2016, pp. 198–199). Along the same vein, my position advocates a scalar notion of grandstander identification. Recognising *some* signalling behaviour (thus passively correcting it) is sufficient to prove that grandstanding does not *always* lead to a perversion of public discourse.

To recap, I have explained how the passive self-correction mechanism (through noise reduction) can bring about a positive impact to public discourse. It is evident in the Pathological Liar example that listeners can isolate statements inconducive to moral discourse while still maintaining engagement. Additionally, I have also addressed the awareness counterclaim and allayed its two-pronged concerns. Regarding the point on pervasive grandstanding not guaranteeing awareness, I have argued that such a foundational assumption is necessary for the grandstanding discourse to unfold. Rejecting this assumption would also cripple Tosi and Warmke's thesis. Moreover, on the link between awareness and identification, I have introduced the scalar notation of spotting grandstanders. Particular cases of well-concealed grandstanders do not preclude the identification of *some* grandstanders. These responses ultimately dispel the awareness counterclaim and point to the plausibility of the passive self-correction argument.

Section IV: The active self-correction argument and its counterclaim

Active self-correction through information verification is the other method listeners use to counteract the injurious effects of grandstanding. In this case, information recipients are likely to actively conduct accountability checks upon receiving information. They might resort to self-initiated research or investigations led by others to probe into the veracity of statements. This type of cross-checking is reconcilable with Tosi and Warmke's analysis too. The duo emphasises that their argument is restricted to discourse in the *public* domain (Tosi and Warmke, 2016, pp. 208–209). Given this public nature of

grandstanding, the probability of information verification increases, as the audience base within the public domain is larger than if grandstanding occurred privately. In fact, as the following case study will show, information authentication promotes the health of public discourse by increasing listener engagement.

The Volkswagen greenwashing incident epitomises the valuable effect of active self-correction. Between 2011 and 2015, Volkswagen attempted to greenwash their brand (i.e. to present the façade of being sustainable) by promoting the idea that their vehicles had extremely low emissions when the opposite was the case (Hotten, 2015). This action is clearly egoistic grandstanding—the company is trying to advance their environmentally reputable image through echoing positions that are favoured by consumers. Because of the public nature of this statement, wary listeners conducted investigations and emission tests that ultimately exposed the scandal (Kretchmer, 2015). The consequence for the grandstander is a hefty fine and damaged reputation (Colvin, 2020). This example illustrates that heightened cynicism *propels* active engagement with grandstanding expressions. Information consumers took the initiative to verify the authenticity of Volkswagen's claims. Thus, contrary to Tosi and Warmke's beliefs, excess cynicism may lead to the active correction of grandstanding behaviours and the improvement of the quality of public discourse with extended participation.

Opponents to this contention might target premise 4, which highlights that awareness incites corrective action. They may advance the ideas that (i) awareness simply does not translate into action and (ii) the plethora of information renders active correction impossible. Nonetheless, the two counterclaims are misguided as (i) runs into a contradiction and (ii) is susceptible to the slippery slope fallacy. With regards to the first point, denying that people take action is fundamentally rejecting the very definition of good public discourse. Healthy discourse is concerned with the effective discussion of topics of moral concern (Tosi and Warmke, 2016, p. 198). Given that information verification enables effective debate, it is in the listeners' interest to do so. The second point, that the sheer amount of information leads to inaction, is too significant a jump. Indeed, manual verification of *all* information in the public domain is time-consuming and near impossible. However, listeners need not cross-check all information. They may opt to prioritise the verification of information produced by *salient* individuals, whose statements carry more influence on the discourse. Linking back to the Volkswagen case, the stature of the corporation no doubt played a role in prompting action. Furthermore, this case is demonstrative of the fact that information consumers *do* actively correct signalling behaviour in practice, despite said challenges to verification.

I have highlighted in this section the importance of information verification in the active self-correction argument. Due to the public nature of grandstanding expressions, statements are more likely to be subjected to checks by the public. As the Volkswagen case illustrates, unsubstantiated claims may be investigated by information consumers. This active and increased participation promotes the quality of public discourse. An opponent to this contention may allude to the disjunction between awareness and action, and the challenges to verifying information that hinder active correction. Nonetheless, I have addressed these concerns by underscoring the implicit contradiction in the prior and the exaggerated causal effect in the latter.

Conclusion

In this essay, I have demonstrated that Tosi and Warmke's unhealthy cynicism argument is unfounded. Not only does excess cynicism not pervert public discourse but it enhances discussion in some instances. This contention was made possible by firstly examining how grandstanding (through piling on) leads to unhealthy cynicism. Following this, I identified a gap in their definition of *unhealthy* cynicism (which I interpreted as *excess*). Consequently, I was able to illustrate how heightened cynicism reflects awareness of grandstanding behaviour, and how it is plausible that this awareness prompts corrective action due to rational thinking. Once this position was established, I then examined the two forms of self-correction that negate the harmful impacts of grandstanding.

Passive self-correction is one of these two forms and is concerned with reducing noise in the information-scape. Agents might engage in 'mental handicapping' by discounting the value of known grandstanding statements. They mentally sequester grandstanders from non-grandstanders and adjust their engagement accordingly. Although opponents raise the awareness counterclaim, citing that not all agents possess awareness and that mere knowledge does not guarantee identification, I have shown that the awareness assumption is critical to the grandstanding literature and that identification rests on a scalar notion. In the active self-correction argument, I presented the possibility that people engage in information verification. The public nature of grandstanding necessitates checks by listeners. Counterclaims that question the link between awareness and action, and the plausibility of information verification are shown to be the victim of contradiction or the slippery slope fallacy. Ultimately, both corrective consequences of amplified cynicism result in improved public discourse outcomes, rendering Tosi and Warmke's case specious.

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What do you mean by 'infeasible?' An exploration of feasibility in policymaking

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Abstract

We often hear policy proposals dismissed on grounds of infeasibility, but what do we actually mean when we call something 'infeasible?' Is feasibility simply a matter of what's possible? Should we consider policies as categorically feasible or infeasible, or rather more feasible and less feasible, relative to one another? Is it feasible for a nation to achieve economic stability by opening mines, which randomly strike an abundance of gold? In this essay, I aim to answer these questions, and provide a definitive framework of feasibility to be used in the assessment of government policies. Three main frameworks of feasibility will be explored—the PA (possibility account), SPA (simple probability account), and CPA (conditional probability account). I will conclude that the CPA is the strongest of these and should be put to use when deliberating policies. Furthermore, I will assert that instead of categorising actions and thus policies as simply 'feasible' or 'infeasible', they must be categorised as more or less 'feasible' in relation to one another.

Introduction

Considerations of feasibility are thought to be integral to policymaking, as they balance fanciful philosophical ideals with the practical constraints of implementing these ideals (Brennan, 2013). This is especially important in an age of climate concerns, as environmental policies which seem desirable may be largely infeasible (Jewell & Cherp, 2019; Nielsen et al., 2020). However, exactly how we should conceptualise the feasibility of a policy is widely disputed, as it is not entirely clear exactly what is meant by the term 'feasible'. Intuitively, it may be thought that for something to be feasible it must simply be possible. However, as Southwood and Wiens (2016) point out, this leads to some unintuitive conclusions regarding policymaking: for example that it is feasible to eliminate violent crime by implementing a policy that 'people will be nicer to one another', as this is technically possible, despite being very unlikely. Contrarily, Brennan and Southwood (2007) argue that for a policy to be feasible, it must be not only possible but likely to occur. However, there are some policies which are unlikely to occur and yet still seem feasible. For example, it seems unlikely the Australian government would ban sport, yet if they truly tried to, they probably could, making it seem feasible for the Australian government to ban sport. This implies there is an element of intention or 'trying' when we use the word 'feasible'. In other words, for an action to be feasible, it must be likely, assuming the agent is trying to perform said action. Hence, the main thesis of this essay will be that feasibility should be conceived as follows: an action is highly feasible if is likely to occur, assuming the agent tries to perform it. Furthermore, I will argue that actions are best conceived in degrees as more or less feasible, rather than categorically feasible or infeasible.

In this essay, I will elucidate three accounts of feasibility: the *possibility account* (PA), the *simple probability account* (SPA), and the *conditional probability account* (CPA). The first of these, the PA, states that for a policy to be feasible, it must be possible. I will argue that this is a necessary condition for feasibility, but it is not sufficient, and hence the PA is an incomplete theory. Secondly, the SPA states that a policy must not only be possible, but also probable, to be classed as feasible. If the SPA were correct, then policies which states simply do not want to implement would be deemed infeasible, which seems counterintuitive. The third account, the CPA, resolves this, stating that for a policy to be feasible, it must

be reasonably likely to occur, assuming the state tries their hardest to implement it. I will then outline the 'can't try' objection to the CPA; the argument that if an agent cannot try, it is infeasible for them to do something, which contradicts the conclusion of the CPA. I propose that the CPA can successfully overcome this, by arguing that if an agent truly cannot try, then this qualifies as a *hard constraint*—a constraint which makes an action totally infeasible. The CPA has a further advantage over its competitors in that it provides an intuitive distinction between desirability and feasibility. It may be objected, however, that desirability and feasibility cannot be disentangled so easily. I argue this objection incorrectly conflates desires of an agent with desires of non-agents, and hence is not problematic for the CPA. I conclude that since the CPA adequately answers these objections, it is the best way to conceive of the feasibility of a policy proposal. But before I begin, I must emphasise that I will include a plethora of examples in my discussion, some of which are directly related to policy, while others are not. These non-policy examples will function to provide clear-cut examples for the sake of clarity but will then be extrapolated to be more specific to policymaking.

The possibility account (PA)

To begin, I will outline one possible account of political feasibility: the *possibility account.* A proponent of this view would argue, reasonably straightforwardly, that feasibility should be understood in terms of what is possible (Southwood & Wiens, 2016). To characterise exactly what is possible and impossible, I must introduce the notion of *hard constraints.* Hard constraints are defined as any constraint which is not malleable depending on circumstances (Gilabert & Lawford-Smith, 2012). For instance, two plus two cannot equal five, and people cannot levitate, regardless of when or where they are. Circumstances refers to a broad category of factors, including location, political stability, economic situation, and so forth. Usually, hard constraints will be physical or logical, but they do not need to be, so long as they prevent an action from occurring in any context. This applies equally to policy: we cannot have a policy that all carbon emissions should simply disappear from the universe, since the laws of physics disallows it regardless of circumstances. It does not matter if this policy is proposed now or one hundred years ago, or if it is proposed in Australia or the United States, it simply cannot occur. Hence, feasibility is categorised as follows:

> *The PA:* It is feasible for agent A to perform x if it is not incompatible with any hard constraint (Gilabert & Lawford-Smith, 2012).

Under the PA, all previous examples would be categorised as infeasible, and this seems to be the correct conclusion. Hence if a policy proposal is incompatible with a hard constraint, it is impossible, and accordingly, infeasible.

However, while the possibility account constitutes a necessary condition for something to be feasible, it is not a sufficient condition. Under the possibility account, anything which is not restricted by a hard constraint would be categorised as feasible, but this simply does not seem to be the case. Consider the case of a hypothetical country C, which is in a serious economic crisis, with catastrophic growth rates and starving citizens. The government of country C decides to introduce a policy whereby mines will be opened in order to strike gold and save the country from economic collapse. Should we say it is feasible for country C to achieve economic stability by striking gold? The possibility account would conclude that it is. After all, striking gold is not incompatible with any hard constraint (Southwood, 2016). However, intuitively most would say it is infeasible for country C to simply opt to strike gold. This is because despite it being possible, it is extremely improbable, and country C has no control over the outcome. Accordingly, it seems that feasibility is contingent on more than simple possibility, and something having no hard constraints is not sufficient to categories it as feasible. Hence, the possibility account, while necessary, is not a complete account of political feasibility.

The simple probability-based account (SPA)

As I have stated, it seems that a policy passing the binary test is not sufficient to categorise it as feasible, since it may be extremely unlikely. A possible solution to this is to adopt the *simple probability account* of feasibility. The simple probability account characterises feasibility as the following:

> *The SPA:* It is feasible for agent A to perform x action if and only if and because A is reasonably likely to perform x (Brennan & Southwood, 2007).

This account resolves the issue of country C striking gold, as it is not reasonably likely that this occurs, and hence is infeasible. However, I do not think it is entirely accurate to categorise country C's action as infeasible. It is certainly not infeasible in the same way as levitating, or two plus two equalling five. In my view the simple probability account should be somewhat modified, so that instead of actions being classed as feasible or infeasible they should be categorised as less feasible or more feasible (Cohen, 2007). This is to say that feasibility should be conceived in degrees. This idea could be devised as follows:

> *The SPA*$_2$: It is more feasible for agent A to perform x action than for A to perform y action if and only if and because it is more probable for A to perform x than y.

With this wording, we can categorise country C striking gold as less feasible, rather than simply infeasible. This seems to be compatible with everyday speech about feasibility—we would say it is more feasible for country C to strike oil (a more abundant resource) than gold. This model is also useful from a policy perspective, as it seems easier to compare the feasibility of one policy to another, when they are conceived as more or less feasible than one another.

How then, do we determine the probability of an action? To answer this, I must introduce the notion of *soft constraints*. Soft constraints, contrary to hard constraints, do not make an action categorically impossible, instead they make it less probable, and they may vary depending on context (Gilabert & Lawford-Smith, 2012). They may be cultural, economic, technological, or any other kind of constraint which does not apply in all contexts. For instance, it is difficult, though not impossible, to ban guns in the United States, since many of its citizens are adamantly pro-guns. This cultural attitude constitutes a soft constraint on the policy of banning guns in the US. Conversely, Australians have less strong attitudes about guns, and hence a much weaker soft constraint. Accordingly, banning guns in Australia is more feasible than doing so in the US.

Initially, the SPA seems to provide the right answers in many cases. Presumably, if the Australian government implemented a policy which decreed that the number of pupils in a high school class should triple, it would be very poorly received by the population, and hence quite infeasible. However, there are some cases where the SPA provides dubious answers. Consider the US continuous bombing of the Middle East (Brennan & Southwood, 2007). The US government has the option of ceasing to bomb the Middle East at any point and has had this option for decades. For whatever reason, the US has chosen to continue its attacks, and it seems unlikely it will stop at any point in the near future. In other words, the probability of the US ceasing bombing in the Middle East is extremely low, meaning under the SPA, we would classify it as highly infeasible. Yet, it seems obviously feasible for the US to cease bombing. There are no obvious military or economic factors making it necessary for them to do so, and if they wanted to, they could simply stop. Since the SPA arrives at a very counterintuitive conclusion, it seems also to be an incomplete account of political feasibility.

The conditional probability-based account (CPA)

When we talk about what is feasible for an agent, we seem to be talking about what an agent *can* do, not what they *want* to do. This is why we deem it highly feasible for the US to cease bombing of the Middle East—because even though they don't, they *can* (Gilabert & Lawford-Smith, 2012). This principle is obvious in other, hypothetical policies—just because a country won't donate 5 per cent of its budget to

foreign aid does not make it infeasible for them to do so (Estlund, 2011). As such, an accurate account of feasibility must explain why it is feasible for an agent to do something, despite them not *doing* so. To solve this problem, I present the final account of feasibility, which I believe to be the best conception of political feasibility: the *conditional probability account* (CPA). The CPA states that feasibility should be conceived as follows:

> *The CPA:* It is more feasible for agent A to perform x action than y action if and only if it is more probable for A to perform x than y, AND A tries their hardest and does not give up.

The added caveat of 'trying' establishes the assumption that agents can try, and feasibility is determined by the likelihood of them succeeding, given they try. This produces the right outcome in the aforementioned cases: It is highly feasible for the US to cease bombing in the Middle East if they try and do not give up, and it is highly feasible for a government to donate 5 per cent of their budget to foreign aid if they try and do not give up. Accordingly, I believe the CPA provides the most consistent and accurate account of political feasibility.

The 'can't try' objection

However, what about in cases where an agent *can't* try? I have based my account of feasibility on the presupposition that agents 'try their hardest', but how should I deal with agents who literally cannot try? To illustrate this point, Nic Southwood proposes the case of Alarice. Alarice is an extremely talented pianist who has the technical skills to play any piece of music with ease (Southwood, 2022). However, she never plays the song *Chopsticks*, because she associates *Chopsticks* with an unspeakably traumatic event from her youth. Alarice has a pathological aversion to *Chopsticks* which is so strong that the mere thought of playing it strikes fear into her heart. Alarice then, cannot even try to play *Chopsticks*, because her psychology will not allow her to. Despite this, if she were to try, given her incredible talent, she would easily succeed. Most would conclude that it is infeasible for Alarice to play *Chopsticks* due to her psychological aversion. Under the CPA however, it is perfectly feasible for Alarice to play *Chopsticks*, contradicting our intuitions. David Estlund points out that this is relevant in the context of groups, and hence for policy: if any individual within the group cannot perform a certain action needed for a certain outcome, then that outcome is infeasible (Estlund, 2011). One could imagine, for instance, a policy which required country C to cull 30 per cent of the population in order to stop climate change. This may be possible if the government of country C tried their hardest, but perhaps the individuals within the government cannot bring themselves to even try to perform such an act. As such, this constitutes a serious objection to the CPA as an account of political feasibility.

I believe the CPA has an adequate defence to this objection. I will argue that if an agent truly cannot try in any context, then this constitutes a *hard constraint* on that outcome. Previously I defined hard constraints as any constraint which is not malleable depending on circumstances. In country C's case, it is asserted that the individuals within the government cannot even try to commit mass genocide, as they have a psychological aversion to doing so. If this is true of them in any context, then we can classify this psychological aversion as a hard constraint (Gilabert & Lawford-Smith, 2012). If this psychological aversion persists in any thinkable circumstance, then we can say it constitutes a hard constraint, and it is infeasible for country C to cull 30 per cent of their population. Some may object that there are conceivable circumstances wherein country C could cull 30 per cent of their population—for instance, if the members of its government were unempathetic psychopaths, or if they underwent complex neurosurgery which removed all sense of empathy. However, the question is whether those currently in government can implement a policy now. If we followed the aforementioned logic, we would be led to conclude that it is feasible for Australia to reverse the effects of climate change with some complex, not-yet-invented piece of technology, since that may be feasible in the future. However, it seems clear that when we talk about the feasibility of a policy, it is implicit we mean its feasibility *now*, and with the current individuals who are in government. Hence, it seems that a psychological aversion to mass genocide does, or at least could, constitute a *hard constraint* and would be deemed infeasible under the CPA. Hence, the CPA can adequately

accommodate the 'can't try' argument and will provide the right answer in the case of Alarice, and in the case of a government committing mass genocide.

Desirability and feasibility

A further advantage of the CPA is that it treats desirability and feasibility as largely independent, which seems to align with our intuitive conception of feasibility (Southwood, 2019). Something desirable may be extremely improbable, and hence very infeasible under the CPA, or vice versa. Consider a government which implements a policy to exterminate all pet guinea pigs. This is clearly undesirable but very feasible, and, importantly, the fact that it is undesirable does not make it infeasible. In contrast, the SPA would conclude that the extermination of guinea pigs is infeasible, since it is unlikely to occur in virtue of its undesirability, which seems unintuitive. Moreover, it seems consistent for two people to disagree about the desirability of a policy, while agreeing about its feasibility, further indicating two are independent. Initially, it seems as if desirability and feasibility are obviously distinct concepts, and that this is a clear advantage of the CPA.

However, it is sometimes objected that desirability and feasibility cannot be cleanly distinguished in this manner, and the feasibility of a policy is in part constituted by its desirability (Raikka, 1998; see also Miller, 2008). It certainly seems true that there is an inescapable feedback loop between desirability and feasibility. If a policy is desirable, it becomes more feasible as people will work harder towards it, and if it is feasible, people will desire it more, since it will be easier to bring about (Gilabert & Lawford-Smith, 2012). Hence, it would be asserted that the concepts of feasibility and desirability cannot be disentangled from one another in the way required for the CPA to be cohesive. To respond to this objection, I will emphasise the distinction between how desirable a policy is to government from how desirable it is to citizens, and feasibility is only impacted by the latter. A government may desire to fund oil fracking, and ignore the associated environmental degradation, while the citizens may desire that the government preserves the environment. As I have established, it is irrelevant whether the agent (in this case the government) desires fracking or not, because it is presumed that they 'try their hardest and do not give up'. Conversely, the desirability of a policy according to citizens may factor into feasibility since they can protest or vote against fracking. As such, desirability to citizens constitutes a soft constraint on feasibility, since it reduces the probability of a policy being successful, but not desirability of a government (Gilabert & Lawford-Smith, 2012). This is not problematic at all for the CPA, since the CPA can incorporate the attitudes of citizens as a soft constraint when determining the probability of a policy proposal.

Practical applications of the CPA

The CPA, if correct, has two main practical applications: firstly, it allows policymakers to compare potential policies within a given country to one another, and evaluate which is more feasible. Secondly, it allows policymakers to examine (un)successful policies from other countries and compare the relevant soft constraints between that country and their own, hence determining whether a foreign policy could be useful for their own policymaking. In the first instance, a policymaker may have one goal in mind—for example, to reduce environmental degradation, and compare the following three policies: (i) to put harsher restrictions on factory farming, (ii) to introduce a broad carbon tax, or (iii) to implement nuclear energy more widely. A policymaker could then evaluate the relevant soft constraints, such as cultural attitudes towards nuclear energy and meat eating, the economic impact of a carbon tax and nuclear energy, and accurately rank these three policies based on their feasibility. Secondly, the CPA also allows a given government to compare policies which have succeeded or failed in other countries and evaluate more accurately whether they would succeed or fail in their own. For instance, the policy of high taxes and welfare has been tremendously successful in Sweden (Svallfors, 2011). This may be accredited to more positive cultural attitudes towards taxation, constituting a lesser soft constraint than in other countries, such as the US, which has very negative cultural attitudes towards higher taxation. Hence, a policymaker may

conclude that such a policy would succeed in Sweden, but not in the US, given the relevant hard constraints, and discard it as a policy option for the US. Accordingly, the CPA has real practical application and value in a policymaking setting and should be used as a guide to determine the feasibility of different policies.

Conclusion

To conclude, I believe the CPA is the best way to conceive of the feasibility of a policy proposal, and that it provides a useful tool to compare the feasibility of multiple policies. The CPA can adequately overcome the challenges of the PA, as it provides a more complete framework of feasibility, which accounts for very improbable policy proposals. Furthermore, the CPA is conditional upon trying, meaning it produces the correct result in cases where an agent 'won't try'. The CPA also produced the correct results in cases where an agent 'can't try', by construing 'can't try' as a hard constraint on feasibility. Furthermore, the CPA is intuitive insofar as it treats desirability and feasibility as conceptually independent. As the CPA can adequately overcome all the above objections, I believe the CPA is the best and most accurate conception of the feasibility of a policy proposal.

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Was Heifetz the greatest virtuoso? A meta-analysis of Heifetz as a performer

LUCY ARAS

Abstract

Contemporary classical performance is characterised by unprecedentedly high standards. International fame is achieved by only a select few, yet records of the twentieth-century violinist Jascha Heifetz remain synonymous with technical perfection among numerous critics and elite violinists. Over his career, Heifetz's extraordinary technique saw him acclaimed as being 'the greatest violin virtuoso since Paganini'.[1] But what places Heifetz—in the eyes of many rival luminaries, international-level soloists, and high-calibre critics—on a pedestal above the rest? This essay offers a meta-analytical insight into Heifetz's musical profile based on unmediated critiques, newspaper articles, and biographical accounts. While undeniably a proficient violinist, his technical superiority becomes less obvious in the context of modern mass audio communication and heightened violinistic competition. It is Heifetz's career as a pioneer of audio recording—further characterised by his idiosyncratic stage demeanour and unusual technical prowess—that propelled his enduring legacy. The emergence and proliferation of recorded discs secured Heifetz's indelible mark on the classical music industry, and it is through similarly novel innovations that an adept violinist today may expand the avenues for virtuosic artistry.

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Deified as 'the greatest violin virtuoso since Paganini' in the *Los Angeles Times* on his death,[2] Jascha Heifetz (1901–82) stunned the world with his technical brilliance, extensive tonal palette, and immediately recognisable sound. This acclaim is undeniably the product of a prolific recording career and an indelible stage presence coupled with astounding technical finesse. Compared to his rival luminaries, who also demonstrated exceptional musicianship, Heifetz outshone them due to his unparalleled technical standards, as testified by numerous unedited recordings and recounts from eminent critics and musicians. His recordings are still synonymous with flawless performance and are frequently used as a violinistic reference, yet rising instrumental standards, heightened competition, and globalisation render Heifetz's title of the 'greatest violin virtuoso' more difficult to verify in a contemporary context. Regardless, Heifetz was undeniably a brilliant technician and recording artist who quintessentially transformed the standard of violin playing through his performances.

From the nineteenth century, the term 'virtuoso' has become associated with technical facility in musical performance and is commonly applied to those 'whose technical accomplishments were so pronounced as to dazzle the public'.[3] Heifetz's distinction rests on his interpretation of the romantic repertoire, which is characterised by the famous 'Heifetz slide'[4] and his distinctly rapid spitfire tempi. Growing up in an era that valued personal interpretative expression,[5] his playing often diverged from the conventions in which the work was conceived. Instead, Heifetz allowed his personality to pervade other composers' works, an idiosyncrasy which was particularly noticeable in his Bach renditions.[6] The

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[1] Lois Timnick, 'Jascha Heifetz, 86, Hailed as Greatest Violinist, Dies', *Los Angeles Times*, 12 December 1987, www.latimes.com/archives/la-xpm-1987-12-12-mn-6735-story.html.

[2] Timnick. 'Jascha Heifetz'.

[3] Richard Taruskin and Pier Weiss, *Music in the Western World* (New York: Schirmer Books, 1984), 340.

[4] Henry Roth, *Violin Virtuosos from Paganini to the 21st Century* (Los Angeles, California: California Classics Books, 1997), 108.

[5] Richard Dyer, 'Heifetz Unrivaled on Violin', *Boston Globe*, 12 December 1987; Roth, *Violin Virtuosos*, 109.

[6] Herbert Glass, 'Jascha Heifetz on Compact Disc', *Los Angeles Times,* 3 April 1988, www.latimes.com/archives/la-xpm-1988-04-03-ca-944-story.html.

second half of the twentieth century saw a heightened rigour towards historically informed tradition with an ever-increasing emphasis on ostensibly following the composer's expectations.[7] Thus, Heifetz's deviation from the composer's intentions has attracted criticism and would, by many proponents of informed performance practices, still elicit disapproval today, whereas it is his unique interpretation that gives him a distinguishable personal brand.

Just as the printing press catapulted Martin Luther from local rebel to a European phenomenon, the proliferation of Heifetz recordings established his international celebrity status and ensured a lasting legacy. It was his successful 1917 Carnegie Hall debut, in the presence of the most renowned violinists of the time, that marked the epoch of Heifetz's recording career and attracted the attention of Calvin Child, who was involved in the Victor Talking Machine Company (VTMC). Within two weeks after his debut, he produced a highly successful series of recordings as a recruit of the VTMC which, by 1924, amounted to 50 recorded compositions. By the time Heifetz delivered concerts in England six months following his Carnegie Hall recital, His Master's Voice had already sold 70,000 copies of his records.[8] These early recordings were unedited and required a final, single take performance. Any mistakes could only be corrected by rerecording the entire piece, thereby providing a true, unaltered representation of his performed renditions and impeccable technique. The proliferation and accessibility of Heifetz's solos prior to delivering live concerts across the globe further propelled his worldwide prominence. Through the medium of the gramophone, his music impacted and interested individuals from remote countries with minimal prior exposure to Western music.[9] Those who heard his recordings eagerly attended his concerts and were impressed, as illustrated by one concertgoer's assertion that 'He is quite as good as his records'.[10] Heifetz self-reportedly catered his repertoire towards the audience's preference for virtuosic showpieces, including the Tchaikovsky Concerto or Bruch's G Minor Concerto.[11] He also incorporated miniatures, a choice which some critics asserted as 'play(ing) down to an imagined poverty of taste and knowledge'.[12] One such piece, Herbert's *Valse,* was denigrated as a 'trifle' and deemed 'quite simply ludicrous' in the *Boston Herald*,[13] yet it was this miniature that was likely performed as an encore,[14] suggesting the audience's approval of his program choice. In another instance, he was accused of choosing repertoire too serious for his audience through the inclusion of works such as newly commissioned violin concerti.[15] However, among the sea of glowing reviews, the occasional critical remark about Heifetz's program can be deemed subjective and does not reflect *how* Heifetz performed. Furthermore, his ability to infer his audience's tastes and preferences was an important factor in his popularity. Increased publicity opened opportunities for more performances and a myriad of reviews followed, several of which praised him for being the 'greatest' and a substantial number of which emphasised his technical finesse and entrenched the connection between Heifetz and violinistic perfection into the public consciousness. His entire recording career spanned an impressive 61 years.[16] The publicity and substantial critical attention his recordings and live performances attracted elevated Heifetz's international presence. Their durability and timeless nature facilitated a new benchmark for violinistic instrumental standards, to which many of today's violinists aspire.

Recordings of his contemporaries, including Fritz Kreisler and Mischa Elman, testify that they also possessed a formidable violinistic command; however, unmediated accounts confirm that Heifetz's

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[7] John Butt, *Playing with History: The Historical Approach to Musical Performance* (Cambridge: Cambridge University Press, 2002), 74.

[8] Michael Dervan, 'Too Perfect for this World', *Irish Times,* 24 February 1995; John Anthony Maltese, 'Acoustic Recordings for Victor Records—Jascha Heifetz (1917–1924)', National Registry, 2008, www.loc.gov/static/programs/national-recording-preservation-board/documents/JaschaHeifetzAcousticRecordings.pdf, 2.

[9] 'Last Recital by Jascha Heifetz: Great Reception', *The Times of India,* 30 January 1932.

[10] Dario Sarlo, 'Investigating Performer Uniqueness: The Case of Jascha Heifetz' (PhD diss., University of London, 2011), 238.

[11] Frederick Herman Martens, *Violin Mastery: Talks with Master Violinists and Teachers, Comprising Interviews with Ysaye, Kreisler, Elman, Auer, Thibaud, Heifetz, Hartmann, Maud Powell and Others* (New York: Frederick A. Stokes Company Publishers, 1919), 89.

[12] Richard Aldrich, 'Music: The New York Symphony Orchestra. Jascha Heifetz's Recital', *New York Times,* 17 November 1919.

[13] Sarlo, 'Investigating Performer Uniqueness', 81.

[14] Sarlo, 'Investigating Performer Uniqueness', 82.

[15] Sarlo, 'Investigating Performer Uniqueness', 82.

[16] Tim Page, 'A Genius Who Demanded Respect: Jascha Heifetz', *Newsday,* 12 December 1987.

technique remained superior. Kreisler's performances were tainted with technical flaws. He was not known to warm up before his concerts, thus in the first few minutes his playing could be riddled with mistakes. Nonetheless, he compensated for such inaccuracies through an opulent tone, tremendous charisma, and a deft and convincing recovery.[17] Kreisler himself believed that the importance of sincerity and personality outweighed that of technical perfection. This tempered attitude was perceived by violinist Karl Flesch, who stated that 'Kreisler had a divine carelessness for all matters technical'.[18] Furthermore, Kreisler's intonation became consistently unreliable in his later years, partially due to impaired hearing. Similarly, Elman's technique lacked the reliable flawlessness of Heifetz's.[19] While there is no conclusive evidence to demonstrate that Heifetz never had an off night, critical first-hand reviews indicate that Heifetz consistently displayed extraordinary technical confidence. There was one rare example in which Heifetz experienced a memory lapse performing the third movement to Sibelius's Violin Concerto. After reattempting the movement Heifetz completed the concerto successfully. This seemingly minor incident generated a myriad of shocked reviews, among them the *New York Times* article titled 'Why Did Heifetz Fluff?'[20] However, it is the blatant bewilderment and breadth of articles on this single incident that illustrates Heifetz's otherwise habitual accuracy. Moreover, Flesch provides further insight into the source of Heifetz's greatness, beyond his instrumental mastery. He notes that the most reputable performers played with the 'inner participation of their personalities'.[21] Heifetz's impassive stage manner and personality, which so intriguingly pervaded his performances, juxtaposed the markedly charismatic personas of his contemporaries. This 'enlivening touch of vulgarity'[22] provoked a myriad of conjectures and assertions, generating helpful publicity. Consequently, violinists such as Kreisler, Milstein, or Elman, who had a similarly solid careers, never acquired the enduring popularity and fame of Heifetz.

The technical brilliance and adamantine intensity of Heifetz's live concerts was curiously contrasted by an austere platform demeanour. He thereby imparted the aura of an invisible performer whose personality did not intrude on the music. The convention of applying bodily gestures and facial expression to convey emotion and meaning was entirely replaced by a statuesque immobility and stoicism onstage. This idiosyncrasy was entrenched in Heifetz's ethos and teaching method: he emphasised to his students 'not to express your emotions through external means, but convey them through your music, and let the audience emote'.[23] The absence of physical contortions led detractors to perceive emotional disengagement and thus criticise him for his glacial manner and lack of profundity. Composer-critic Virgil Thomson pejoratively remarked upon Heifetz's 'machine tooled finish and empty elegance'.[24] A deemed lack of engagement due to few and restrained discernible gestures by critics such as Thompson was perhaps inevitable. The visual aspect of performance plays a substantial role in projecting the emotional engagement of the musician to the audience, as concluded Jane Davidson's study of performance gestures and expressivity.[25] In this study, she found that in a comparison of a violin performance played in three manners—deadpan, projected, and exaggerated—visual aspects ranked the highest in expressivity while sound and related aspects ranked lowest. However, it would be hyperbolic to presume complete motionlessness in Heifetz's performances and thereby deem him emotionally unresponsive to the music. A video of a concert featuring Saint-Saëns' 'Introduction and Rondo Capriccioso' reveals that Heifetz does demonstrate subtle reactions through a slight swaying of his torso;[26] however, he does so significantly less than other performers such as Ray

[17] Roth, *Violin Virtuosos*, 38.

[18] Boris Schwarz, *Great Masters of the Violin,* (London: St Edmundsbury Press, 1984), 305.

[19] Schwarz, *Great Masters of the Violin*, 427.

[20] 'Why Did Heifetz Fluff?', *New York Times,* 11 January 1954.

[21] Terry Teachout, 'Fiddlers Three', *Commentary,* April 2004.

[22] Teachout, 'Fiddlers Three'.

[23] Ayke Agus, *Heifetz as I Knew Him* (Portland, Oregon: Amadeus Press, 2001), 43.

[24] Teachout, 'Fiddlers Three'.

[25] Jane Davidson, 'Visual Perception of Performance Manner in the Movements of Solo Musicians', *Psychology of Music* 21, no. 2 (1993): 109.

[26] Nelson Zapata, 'Introduction and Rondo Capriccioso—Jascha Heifetz,' *YouTube*, 9:52, 13 October 2017, youtu.be/AmiazjeaLVA.

Chen [27] or Itzhak Perlman [28] performing the same work. Heifetz manifests an individuality of interpretation and inherent musicianship, particularly in more lyrical passages that are enriched by carefully constructed phrasing, flexible use of vibrato, and his idiosyncratically frequent and liberal use of *portamenti,* such that the music transcends the notes that Saint-Saëns imparted to the score.

Reviews demonstrate that many critics revered him as the epitome of perfection and eminent violinists openly expressed their fervent, unwavering admiration: Max Smith in the *New York American* wrote that he had 'never heard any violinist approach as close to the loftiest standards of absolute perfection as did Jascha Heifetz'.[29] Critic Henry Roth praised Heifetz for possessing innately superior muscle reflexes.[30] Itzhak Perlman regards him as the King of Violinists for his distinctive, pellucid tone. Pinchas Zukerman declared him the King of Virtuosos. David Oistrakh asserted 'There are violinists and then there is Heifetz'.[31] Karl Flesch lauded Heifetz to be 'the high priest of our profession'.[32]

In 1982, Heifetz was rightly compared with Paganini, but how would this assertion fare in the current era? Violin performance today is pitted against an unprecedented availability of professional recordings. These provide a wide variety of interpretations to take into consideration, but also serve as a standard musicians strive to meet to succeed in the international market. Especially in famous and familiar compositions that are frequently performed by virtuosi, such pieces are now met with high and narrow expectations, emphasising the importance of understanding and mastering the composer's and audience's demands. It is noteworthy that the globalisation of performance has resulted in an increased homogeneity of sound recordings, as they serve to establish historically informed conventions for repertoire and periods. Conversely, pre-1940s performers experienced a much smaller range of influences, which paradoxically generated a greater diversity of interpretations, since virtuosi had to resort to their own imagination to develop their own musical philosophy and unique playing style. Heifetz's debut in Carnegie Hall occurred when recorded music was only in its infancy, therefore each performance was a unique experience for both the musicians and the audience. Mistakes and roughness were soon forgotten.[33] These circumstances, combined with his unique and extraordinary talent, allowed Heifetz to ride the first wave of mass audio communication. It provided a platform to market his technical talent and become a high-profile public figure. Schoenbaum illustrates the point: 'It naturally helped that the profession enjoyed a visibility and cachet hardly imaginable today, only a generation or two later.'[34]

Classical music is no longer a rarefied entity but has become commoditised through mass production. Recordings are no longer presented in full but as individual tracks that are accessible on platforms such as Tidal, Spotify, and YouTube through subscriptions or even free of charge. Access to audiences is now subject to social media campaigns, artificial intelligence recommendation algorithms, and professional promotion and advertising. The world of mass digital communication has rendered traditional word-of-mouth less effective and changed the calculus of what determines greatness. In today's climate, saturated with prerecorded classical repertoire and a concurrent ubiquity of mobile phones, it is worth noting the dilution of the classical music experience, where it is often listened to as background sound. Prior to the recording era, classical concerts were comparatively rare events. Even during the early recording period, listeners would dedicate their full attention to the radio or vinyl, elevating the value of the live concert-going experience. With a declining prominence of live classical performances, and an audience which has become used to perfectly edited renditions and higher technical standards than ever before, Heifetz would still be considered an adept musician based on his

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[27] Malta Philharmonic Orchestra, 'Introduction and Rondo Capriccioso Op. 28, Saint-Saëns—Ray Chen & Malta Philharmonic Orchestra', *YouTube*, 10:01, 24 November 2020, youtu.be/8UTq1eZrDkI.

[28] Abner Silva, 'Itzhak Perlman—Introduction & Rondo Capriccioso', *YouTube*, 10:21, 4 October 2013, youtu.be/BnsPnyiLdrw.

[29] Sarlo, 'Investigating Performer Uniqueness', 82.

[30] Roth, *Violin Virtuosos*, 106.

[31] Roth, *Violin Virtuosos*, 106.

[32] David Schoenbaum, 'Heifetz at 100: Both Thrilling and Chilling', *New York Times,* 23 December 2001.

[33] Philip Robert, *Performing Music in the Age of Recording* (New Haven and London: Yale University Press, 2004), 12.

[34] Schoenbaum, 'Heifetz at 100'.

intrinsic ability and be placed in the ranks of Perlman, Hahn, or Ehnes. But his talent would be crowded out by a larger number of highly accomplished violinists who have equal access to mass media.

One must also question what virtuosity really entails in the modern age. André Rieu is a primary example of commercial success in the contemporary classical music industry, but in contrast to Heifetz, his performances demonstrate a hefty emphasis on flamboyance and exuberant showmanship rather than virtuosic technical aptitude. Though the combined talent and effort of producers, directors, and sound engineers as well as the musicians themselves, his concerts manifest the élan and flair associated with virtuosity. Cinematographic techniques further enhance these qualities through video editing, camera angles, colour, and lighting. With his 2014 international tour outselling Metallica, Ed Sheeran, and Beyoncé,[35] Rieu's website reveals the sizeable importance of marketing and advertising. In addition to tickets and DVDs it offers complete tour packages and sells André Rieu-themed merchandise and souvenirs. Furthermore, his concerts are regularly promoted on his highly popular social media platforms—including YouTube, Twitter, Facebook, and Instagram—across which he has amassed a massive following. The popularity of his concerts—which feature an unusual blend of classical, pop, and folk genres—reflects an apparent change in audience entertainment preferences, revealing that it would be more difficult to attract concertgoers with Heifetz's understated body language. His success today would depend more heavily on marketing than it would on his sheer technical talent.

Heifetz was an outstanding virtuoso whose tonal palette was of superlative dimensionality and variety so that any informed listener could easily discern his unique sound. Fundamentally, the claim of his unparalleled technical superiority was true during Heifetz's career: his violinistic ability was unmatched at the time and thus he came to represent the paragon of twentieth-century violin playing. His technical prowess, which was novel and remarkable in the early twentieth century, has today become requisite to any international soloist career. The concomitant proliferation of uneditable audio recordings during Heifetz's early career precipitated his status as a pioneering recording artist and enhanced his impact on audiences. Therefore, the emergence of a novel performance medium was a pivotal factor in his enduring success. This event highlights the reality that entertainment relies on novelty. An adept violinist today, to stand out among the rest, would accordingly seek such opportunities and ride the first wave of a novel innovation such as virtual reality performances or, like Rieu, tailor classical music to the change in popular musical tastes. It is phenomena like these that allow the expansion of musical horizons. They provide opportunities for a musician to establish a new dimension of virtuosic greatness, just as Heifetz created his enduring legacy with his extraordinary skill, unique performance persona, and the concurrent commercialisation of sound recordings.

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[35] Alfred Hickling, 'André Rieu: "I Spent £34m on Fountains, Ice Rinks and Gold Carriages"', *The Guardian,* 21 December 2015, www.theguardian.com/music/2015/dec/20/andre-rieu-violin-superstar-king-of-waltz-interview.

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Rousseau's general will as a tool of democracy

COHEN SAUNDERS

Abstract

Jean-Jacques Rousseau's idea of the general will, the governing force in his political system, has led some to label him as an authoritarian. Herein I will analyse his writings in *The Social Contract*, and argue against this conception of the text, instead showing that this work supports the characterisation of Rousseau as a democrat. I will do this by building on Sreenivasan's interpretation of the general will, which shows that Rousseau developed a system of deliberation to accord the common interest of the people with their democratic vote. I will argue that this deliberative mechanism, along with Rousseau's conflation of the general will with the people's vote supports the idea that Rousseau upheld a substantive form of democracy.

Introduction

Jean-Jacques Rousseau is a polarising figure in political philosophy, not least because he has been widely depicted as both an authoritarian and a democrat. Rousseau's concept of the 'general will' prompts much of this discussion. This seemingly ambiguous concept is fundamental to his core argument that, outside of the state of nature, everybody should rule and be a subject at the same time. Rousseau says that the general will dictates the laws of a sovereign nation, but each individual obeys only themselves in following these laws. Here I will focus on the issue of how the general will is derived, a controversial topic which has sparked arguments for and against Rousseau's democratic credentials. I will argue that the idea of the general will better supports the view of Rousseau as a democrat, rather than an authoritarian, because he explicitly links the general will with the majority vote of the people, specifying constraints on voting and deliberation that aim to make the general will truly representative of the people's common interest.

I will draw almost all of the textual evidence for this paper from *The Social Contract*, as this text contains Rousseau's most complete and detailed account of the general will (Bertram 2017). Since the focus of the paper is on the interpretation of this key idea, it is reasonable to focus on the text that contains Rousseau's most thorough treatment of it; however, my conclusions are certainly open to criticism on a more complete analysis of Rousseau's work. I will first outline the argument characterising the general will as fundamentally authoritarian. This idea relies on what Bertram calls the 'transcendent conception', which 'conceives of the general will as a transcendent fact about the society which may or may not be reflected in actual legislative decisions' (Bertram 2012, 403). Since such a transcendent fact could not possibly be realised through democratic means, a system that follows this conception of the general will is vulnerable to capture by authoritarian leaders posturing as knowers of the general will. I will then argue against this conception and outline the view of Rousseau as a democrat in line Bertram's 'democratic conception' of the general will, which 'identifies the general will with the decisions of the sovereign people as they legislate together' (Bertram 2012, 403). I will argue that this conception of the general will is better supported by *The Social Contract*, despite Rousseau's failure to properly recognise the difficulties of deriving the 'common interest' of the people from their democratic vote. Though his political system is not practicable, Rousseau can be upheld as a democrat.

Before I move on, I think it is necessary to note that the authoritarian–democrat dichotomy is not perfect. To avoid confusion, I will define authoritarianism as a system of government in which power is concentrated in the hands of a few people who are not accountable to those who they rule. I will use

two definitions of democracy which are derived from Rawls' idea of procedural and substantive justice (Rawls 1999, as cited in Miller 2021). The procedural definition defines democracy broadly as a political system in which the people have the ability to hold the government to account through free and fair elections, and the second, more substantive definition adds that a democratic system will realise the common interest of the people governed by it (Miller 2021). I will also intermittently refer to Rousseau's idea of the social contract, which is the agreement between people that allows the general will to rule, and which all people must become signatories to in order to join civil society.

Rousseau as an authoritarian

Rousseau's dissenters argue that his writings in *The Social Contract* better support the transcendent conception of the general will rather than the democratic conception. This is the idea that the general will is a fact that exists independently of deliberation, supposedly manifesting in policy that represents the common interest of the people. Under this conception the general will is not dissimilar to the word of a transcendent, godlike being, who is believed to hold only people's true interests at heart. A few important moments in the text support this view. Rousseau clearly differentiates the democratic vote of the people from the general will when he states that there is often 'a great deal of difference between the will of all and the general will' (Rousseau 1987, 155). Further, he creates no ambiguity over whose guidance he believes to be superior, saying that' the general will is always right and always tends toward the public utility [but] it does not follow that the deliberations of the people always have the same rectitude' (Rousseau 1987, 155). It is not hard to see how these moments could support the argument that Rousseau places no importance on the democratic vote of the people, and instead believes that the general will exists independently of deliberation. The question then arises: who shall interpret the general will?

For Rousseau, the state is led by 'the legislator', who is the original organiser of the political state as people leave the state of nature, and who must have 'superior intelligence that [beholds] all the passions of men without feeling any of them' (Rousseau 1987, 162). Rousseau is clear that the legislator is not a ruler in the sense that they dictate the law—that is the job of the general will—but he does place emphasis on the need for the legislator to be persuasive, and use these powers to convince the public that they can rule themselves through the general will (Rousseau 1987, 162–65). Paired with a transcendent conception of the general will it seems practically unlikely that the legislator will not be able to abuse their power, because, if the general will cannot be realised through democratic vote then it must be interpreted by some other apparatus or person, presumably the legislator. To add to this problem, Rousseau does not specify any particular mechanism for the separation of powers in government, since he believes that there should be only one supreme power: the general will. While Rousseau is critical of leaders with too much power, writing that 'when one has force at hand, there is no art to making everyone tremble and not even very much to winning over people's hearts' (Rousseau 1987, 118), his political system seems vulnerable to capture by an authoritarian leader.

Perhaps Rousseau's most controversial idea in *The Social Contract* is that individuals who neglect to follow the general will must be forced to do so, or as Rousseau puts it, be 'forced to be free' (Rousseau 1987, 150). Freedom is not usually conceived as a state that can be forced upon someone, and so Rousseau's statement here can feasibly be interpreted as overly authoritarian, particularly by those with a republican conception of freedom: freedom as the absence of a power that can arbitrarily control individuals. I believe that Rousseau's idea of freedom can be partially reconciled with republican freedom, though only in terms of interpersonal relationships, not an individual's relationship to the state. The kind of freedom that Rousseau believes the state must, at times, force upon people is the freedom that is upheld by the general will: the freedom from depending on any other individual for the provision of one's needs. This is a decidedly republican view of freedom, but to achieve it, each individual is required to give 'all his rights to the entire community' (Rousseau 1987, 148) and therefore be entirely unfree from arbitrary interference by the state. In regards to the state's relationship with individuals, Rousseau prefers a positive conception of freedom: freedom as one's ability to realise their true interests. Embedded deep in the general will is a notion that all citizens should be favoured equally, and that people should be prevented from pursuing their own interests if this detracts from the common

interest. This entails a degree of state intervention in the economic and social lives of people that easily surpasses the practices of any modern democratic government, and is intuitively unjust for many people living in such societies. This argument against Rousseau's conception of freedom and the previous argument that the general will is a transcendent fact both contribute to a conception of Rousseau as an authoritarian philosopher, a conception which I will now refute.

Rousseau as a democrat

I believe that those who pin Rousseau as an authoritarian are mistaken in their diagnosis, because his writings in *The Social Contract* better support a democratic conception of the general will. Bertram states that the democratic conception of the general will 'identifies the general will with the decisions of the sovereign people as they legislate together' (Bertram 2012, 403). At first take this idea seems hard to reconcile with Rousseau's aforementioned conviction that the general will always works for the public good and yet the outcome of the people's deliberation does not. I will argue that this is not a contradiction, but rather aligns with Rousseau's ideas that 'the populace is never corrupted, but it is often tricked' (Rousseau 1987, 155), and that the people can overcome this deception by establishing a constrained form of direct democracy.

Gopal Sreenivasan outlines this point in his paper *What Is the General Will?* Sreenivasan believes that the two conceptions of the general will (roughly mapping to the ones that I have outlined) can be accommodated to form a wholistic view of the general will in which the democratic conception dominates, and through which Rousseau can be conceived as a democrat (Sreenivasan 2000, 546-47). Sreenivasan's argument can be outlined simply as such:

> Premise 1: 'The general will is the constrained deliberative decision of the community' (Sreenivasan 2000, 554).
> Premise 2: 'The community's constrained deliberation always promotes the common interest' (Sreenivasan 2000, 555).
> Conclusion: 'The general will always promotes the common interest' (Sreenivasan 2000, 556).

The first premise is supported by a handful of key moments in *The Social Contract*. Rousseau states that 'there can never be any assurance that a private will is in conformity with the general will until it has been submitted to the free vote of the people' (Rousseau 1987, 164), and he believes that 'the general will, to be really such … must derive from all in order to be applied to all' (Rousseau 1987, 157). Here Rousseau seems to favour a democratic voting process in order to determine the general will, but we still must reconcile his musings on the difference between the general will and the 'will of all' with these statements. Rousseau thinks that the general will only differs from the majority vote when the people are deceived, an idea which is related to his view of what people are really being asked when they vote on issues. He believes that people should not vote with their private interest in mind (for that would be deception from the realisation of their true interests), but rather prioritise 'whether or not [the proposal] conforms to the general will that is theirs' (Rousseau 1987, 206). If people were to do this, 'declaration of the general will [would then be] drawn from the counting of votes' (Rousseau 1987, 206). This is a highly idealised form of democracy, and one that has never manifested on a state level. However, this account of how the general will can be derived from a vote of the people seems enough evidence to argue for premise 1, and even goes some way to showing that Rousseau was at least a procedural democrat.

This is encouraging, but does nothing to accord the general will with the common interest, and therefore the social contract with a substantive conception of democracy. Before showing the ways in which premise 2 could be true, therefore proving the conclusion, I will point out that Rousseau supports the conclusion directly on at least four occasions in *The Social Contract* (Sreenivasan 2000, 575), with variations on the line: 'the general will is always right and always tends toward the public utility' (Rousseau 1987, 155). This shows that Rousseau believed that the general will would always promote the common interest, but it is not this relationship that I am solely interested in. Rather, to align Rousseau's thought with substantive democracy, we should also look to the question of how he believes the deliberation of the community can lead to a general will that promotes the common interest. To

answer this question, I will follow Sreenivasan in deriving Rousseau's four practical constraints on deliberative democracy that accord the people's vote, and therefore (accepting premise 1) the general will, with the common interest. These four constraints are that the community's deliberative decision expresses the general will only if:

1. The subject of deliberation does not refer to individuals explicitly.
2. The conclusions of the deliberation can apply to all members of the community equally.
3. All members of the community partake in the deliberation.
4. All members of the community think for themselves in the deliberation process (Sreenivasan 2000, 565).

I will now discuss each of these constraints in turn and highlight the textual evidence that supports Rousseau's conviction in each of them. Firstly, Rousseau argues that laws made under a system that is guided by the social contract and the general will will not refer to individuals explicitly (Sreenivasan 2000, 566). Rousseau highlights this need multiple times, saying that the law 'cannot bestow [privileges] by name on anyone' (Rousseau 1987, 161) and that 'there is no general will concerning a particular object' (Rousseau 1987, 161). This constraint instils a deep egalitarianism into the general will: it serves to make sure that no individual or group is being specially treated, for better or worse, by any state that adopts the general will as their guiding principle.

Rousseau's second constraint is highly related to his first, and states that the conclusions of the community's deliberation should apply to all members of the community equally (Sreenivasan 2000, 567). He expresses this in saying that 'every authentic act of the general will … obligates or favours all citizens equally' (Rousseau 1987, 158). There are two possible ways of interpreting the equality requirement here: equality of result and equality before the law (Sreenivasan 2000, 567). To distinguish between these two conceptions of equality, consider a law stating that four-wheel-drive vehicle owners must pay extra tax on each four-wheel-drive that they own, to account for the social cost of the extra pollution that these vehicles emit compared to smaller cars. This law would not be considered egalitarian under an 'equality of result' conception of equality because the subset of the population that owns four-wheel-drives would have a higher tax obligation than those outside of this subset. The 'equality before the law' conception, however, would uphold this tax as egalitarian because every member of the population may theoretically join this subset if they choose. I believe that Rousseau refers to the latter definition of equality in establishing this constraint because he explicitly states that 'the law can perfectly well enact a statute to the effect that there be privileges, but it cannot bestow them by name on anyone' (Rousseau 1987, 161). Privileges here can be negative or positive, but Rousseau believes that they can be justified as long as every member of the population can choose to enter and exit from the subset of the population that they apply to. Together with the first constraint, this constraint goes some way toward preventing individuals or groups legislating with their own selfish interests in mind, because any benefit they gain for themselves in passing favourable legislation will be passed on to others in similar circumstances.

The third constraint that Rousseau believes must be placed on the community's deliberation holds that all members of the community must partake in the deliberation for the outcome to express the general will (Sreenivasan 2000, 568). This is supported by familiar moments in *The Social Contract*, where Rousseau says that the general will must 'must derive from all in order to be applied to all' (Rousseau 1987, 157), and that 'the will is [either] general or it is not. It is the will of either the people as a whole or of only a part' (Rousseau 1987, 154). While Rousseau believes that the community can be deceived as to what their interests actually are, it is hard to argue that the general will will not be closer to representing the common interest of the people if all of the people that it governs are consulted in deriving what the general will is (Sreenivasan 2000, 568). Even though the general will aims to represent what is actually best for people, not what they think is best for them, these two notions will usually have some positive relationship to each other.

This is especially true when the fourth constraint on the community's deliberation is obeyed, that being that all people should think for themselves and vote accordingly (Sreenivasan 2000, 570). This constraint is derived from Rousseau's statement that, for the general will to act in the common interest of the people 'there should be no partial society in the state and … each citizen [should] make up his

own mind' (Rousseau 1987, 156). This constraint contributes to realising the common interest (and the truth of premise 2), due to the idea that the common interest will be the aggregate of all interests when every person accurately represents their true interests. This constraint aims to eliminate the problem of people being deluded as to their true interests, and almost certainly falls short.

Here we are finally faced with the gaping hole in the general will: if everyone were to think for themselves, most would still fail to realise their true interests. One's true interests are so difficult to determine that it is near impossible to realise them. Even if it were relatively simple to realise one's true interest, it would still be near impossible for enough people to do so such that the common interest of the people was the democratic outcome. Therefore, it is impossible for the general will to be reliably derived from the majority vote of the people (even under these four constraints) and concurrently represent the perfect common interest of the people as a whole. Premise 2 is not true. People are simply too unique for the fourth constraint (i.e. that all people should think for themselves and vote accordingly) to reliably result in legislation that promotes the common interest. Nevertheless, I do not believe that this defeats my argument that Rousseau should be conceived as a democrat. Rousseau not only accorded the general will with the common interest of the people, but even attempted to spell out exactly how free and fair elections, the most important element of democracy, could reliably lead to a governmental system which promoted this common interest. Here, he fell short, but I think that it would be disingenuous not to label Rousseau as a democrat simply because his view underestimated the difficulties of realising one's true interests.

Conclusion

The political system of Jean-Jacques Rousseau has understandably been interpreted as one which places too much power in the hands of a few, and allows these few to govern in their own interest. However, I do not believe that Rousseau would have thought such a situation to be just. Despite his failure to recognise the difficulty of deriving the common interest of a group from the vote of the people, Rousseau intended the general will to promote the common interest and for this general will to be derived through democratic processes. Rousseau, at a time when no fully formed democracies existed, crafted an almost perfectly democratic governmental system based on the common good of the people, a claim that no authoritarian philosopher, to the best of my knowledge, can make.

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