The officially unofficial newspaper of the students of Melbourne Law School

De Minimis

Tuesday, 25th of July *Volume 12, Issue 1* *www.deminimis.com.au*

Stop Worrying About Freedom of Speech:

Nationalise the Legal Profession

Ben Wilson

We're all aware of the brouhahah surrounding section 18C of the Racial Discrimination Act, about the tension between protecting racial minorities from abuse and protecting the public from censorship.

In fact, s18(c) protects no one (barring the rich or well connected) from anything, and here's why: either bringing or defending an action under the law could well make you bankrupt.

On the 28th of May, 2013, Cindy Prior, an indigenous woman working at the Queensland University of Technology, asked three white students to leave a computer room reserved for indigenous students. They did so, but posted Facebook comments critical of the policy, at points joking about being white supremacists.

Ms Prior brought an action under 18C seeking apology and damages from the university and eight students, claiming that the Facebook posts were reasonably likely to offend indigenous students. A number of the students settled out of court. Three of the students contested the claims.

On the 4th of November 2016, Judge Jarret summarily dismissed the actions against those students, finding that there was no reasonable prospect of success. Costs in the order of $200,000 were awarded against Ms Prior; she now has bankruptcy actions pending against her.

But was she unreasonable in bringing the action? The law prohibits public acts, done because of the race of a person or group of people, that are reasonably likely to offend members of that group. Were the comments criticising indigenous only spaces in the university 'because of' the race of indigenous people? It seems possible to think so, particularly in light of the purpose of the statute.

The University obviously believed that indigenous students were disadvantaged, and needed assistance in the form of exclusive computer spaces. Is it obviously unlikely that a member of that group would be offended by public comments attacking the policy – with the implication that the disadvantage suffered by the group is insufficient to justify it?

18D(c)(i) exempts 'fair' comments about matters of public interest. Was the criticism obviously 'fair'? One of the respondents had likened the indigenous-only space as 'segregation', invoking apartheid or the Jim Crow South; was this a 'fair' comparison?

As it is, I agree with the outcome. I don't want positive discrimination policies to be put beyond public comment, even though beneficiaries of those policies might find the criticism hurtful. However, given the text and context of the law, I don't believe it was unreasonable for Ms Prior to have brought the case. She certainly did not deserve to be bankrupted for bringing an action under a law specifically designed to protect her.

All of which makes the debate about the law somewhat surreal. Any question of whether removing 'offense' from 18C would unacceptably weaken the protection the law affords to racial minorities is ridiculous given that any person bringing an action under the law risks losing their home and their livelihood in costs. Likewise, any question of whether 18D satisfactorily protects freedom of speech seems absurd: defending any such action also risks financial ruin.

Clearly, and I write this without intending any irony or hyperbole, our whole legal system is a sham and an absurdity. That fees paid by lawyers defending a charge or a lawsuit frequently surpass any fine or damages that a judge might impose should be a source of inconsolable shame for everyone in the profession. In Victoria, for instance, costs are almost never awarded in criminal cases; the punishment our justice system imposes on an innocent person for the crime of proving their innocence can easily be the loss of their family home.

It is axiomatic that people have a right to justice. Our system of 'justice' depends on professional advice and representation. The only just solution I can see is to nationalise the profession of law, just as we've nationalised the profession of medicine.

Ben Wilson is a Third Year JD Student

Can an Anarchist Respect the Law?

Duncan Wallace

Identifying as an anarchist, I have often over the course of my law degree pondered how I should understand my subject - particularly given the common perception that an anarchist studying law is akin to an atheist joining a monastery.

Though there is not much intellectual guidance on this specific issue in the anarchist tradition, I have come to believe that this perception is wrong. In the following, I'll first explain why I think it's wrong - and why anarchists should in fact have a deep respect for the law, if that term is properly understood. I'll then describe the philosophy of law that has helped create this perception of a tension between anarchism and respectfor law.

In his Demanding the Impossible, a now classic text on the history of anarchism, Peter Marshall gives the following by way of a definition of anarchism:

"All anarchists reject the legitimacy of external government and of the State, and condemn imposed political authority, hierarchy and domination."

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"They seek to establish the condition of anarchy, that is to say, a decentralised and self-regulating society consisting of a federation of voluntary associations of free and equal individuals. The ultimate goal of anarchism is to create a free society which allows all human beings to reach their full potential".

This I think is best summarised in the ethic Chomsky defines anarchism as having: that any kind of authority is not self-justifying; that "the burden of proof has to be placed on authority, and that it should be dismantled if that burden cannot be met".

There's almost zero discussion of anarchism within formal institutions of education. An exception was in my first year of law school when we were given a reading in Legal Theory about it, but even this was misleading. The reading was In Defense of Anarchism, in which Paul Wolff states that anarchists consider that "all authority is equally illegitimate". Notice this is quite different to the definitions I gave above. The former definitions did not mention all authority. They stated that the burden of proof is on those in authority; that illegitimate authority is that which is imposed.

This means that anarchists are not required to reject all formal organisational forms. Indeed, anarchists have not only thought very carefully about the design of, but have also developed, formal organisational forms that create a politics in which individuals have power over the outcome of some decision in proportion to the extent that they will be affected by that decision. This is what Marshall references when he speaks of the "federation of voluntary associations of free and equal individuals" that would exist in an anarchist society. Anarchists in fact see formal organisational forms as an unavoidable feature of society, agreeing with Aristotle that "we are above all social beings, and have a need to associate, and to care for our own kind". Anarchism simply provides an ethic for how to do so if a society is to be a free one.

So what about law? Even ardent legal positivists (positivists in effect represent the liberal strand of jurisprudential thought) such as Raz agree that laws are a different kind of thing than "an order or threat of a gangster who cares for and considers only his own good". They agree that law is ultimately a mechanism for coordination - about what a legal system's "subjects should do". Anarchists, however, will only understand law as a useful measure for coordination so far as it is a mechanism for cooperation, for helping to achieve the federated networks of voluntary associations.

Indeed, it is when law is treated as a mechanism for cooperation that it is most successful. For example, it has been substantiated that laws that are designed for the purpose of imposing punitive sanctions on deviants have the effect that cooperators will rebel and general compliance in the population as a whole will be reduced. It is for this reason that philosopher Philip Pettit suggests using measures which are supportive of spontaneous or virtuous compliance, for the achievement of which cognitive scientist Robin Dunbar recommends mechanisms "that create a sense of communality". As such, says Pettit, "laws should serve for most people as signals", rather than as mechanisms for sanction.

So how do we create a sense of communality which leads to spontaneous or virtuous compliance with law? Murray Bookchin, one of the most influential anarchist thinkers in the post WWII period, held that "selfhood" is not merely a personal dimension but also a social one: "The self that finds expression in the assembly and community is, literally, the assembly and community that has found self-expression – a complete congruence of form and content". This occurs through politics, which Bookchin defines as an organic activity of a public body, just as "flowering is an organic activity of a plant". This in turn occurs through a participatory politics, with participating citizens operating at a "humanly scaled" level. The "authentic unit of political life" is, therefore, according to Bookchin, the municipality. The mainstream understanding of politics – that of attempting to win and retain control of government – Bookchin says is properly understood as mere Statecraft. Statecraft does not involve politics; rather, it involves violence and bureaucracy.

According to an anarchist, therefore, law, properly understood, is a product of communal self-expression attained through a process of politics, which has the function of facilitating the cooperative activities of freely associating individuals. So far as law has these characteristics, anarchists have a deep respect for it.

So why does anarchism appear antithetical to law? One reason is that anarchists themselves have promulgated this idea. Emma Goldman, for example, has said that anarchism involves "liberty unrestricted by man-made law". I believe, however, that this makes the mistake made by all people who associate too closely their concept of law with the laws created by States. As stated by Bookchin, Statecraft is a practice based on

bureaucracy and violence rather than on politics, and so laws created by State systems are better understood as bureaucratic rules and commands, perhaps more comparable to Raz's notion of "an order or threat of a gangster who cares for and considers only his own good" than to a system of laws.

Indeed, that positivists are arguing for a system of orders and threats, rather than a system of laws, is shown by the extraordinary extent to which law is tied to coercion in the positivist mind. Indeed, one of its most influential early proponents, John Austin, held that laws couldn't exist at all without sanctions. This stemmed from the Hobbesian defence of monarchy as against democratic rule, which argued that all laws were coercive such that a polity with the least laws had the most liberty. And, as said by Sir Robert Filmer, a 17th century defender of the 'divine right of kings', since "there are more laws in popular estates than anywhere else", there is consequently more liberty under a monarchy. Monarchy is therefore preferable to democracy.

Despite these less than erstwhile foundations for their tradition, the legal positivists have been hugely successful in their bid to associate law with the institution of the State. One of the most respected legal philosophers of the contemporary period, Ronald Dworkin, described the unquestioning acceptance of this positivist thesis as "curious". But when one considers the tremendous power – bordering on omnipotence – of the modern Nation State, perhaps it is understandable.

I believe that if we are to truly respect the law, however, we must escape the intellectual grip of the State. We must move away from ideas put in place to protect kingly rule, towards a more accurate philosophy which can help us towards freedom.

Duncan Wallace is a Fourth Year JD Student

On Difficult Readings

Ed Worland

The psychological effects of total boredom are well documented, but perhaps have to be experienced to be appreciated. And sooner or later you are going to be faced with a tough-but-necessary reading, a three-hundred page, densely cross-referenced monster on some tricky constitutional point of such extreme specificity that it boggles the mind to imagine how it could ever actually be relevant to anyone, a straight up, take-no-prisoners sort of judgment for which no secondary reading or explanation or Anesti precis could ever possibly suffice and which must be dealt with first-hand—grappled with and absorbed and ultimately, God-willing, understood.

After a certain point there's no more room to manoeuvre and you've just got to read the bastard. So you'll set yourself up in the law student study area with your laptop, your highlighters and the hardcopy printed off from AustLII—a hundred trees silently scream—to get the whole unpleasant business over with.

At first you'll probably find you almost kind of enjoying being there (you might take comfort in the small sounds of a couple dozen people like you turning pages and breathing and concentrating) and you'll faff about on your laptop or maybe you were smart and brought snacks — so have an almond — but you're not actually reading yet, and it's only after you've exhausted whatever distractions the study area has to offer that the effects of boredom begin to make themselves known.

An early symptom is often that a particularly twisty piece of legal jargon or term of art will, through its incessant overuse in the judgment, seem to cease to have any meaning (semantic saturation, it's called), if you power through this stage soon enough you'll start to experience the sort of dizzy weightlessness more commonly associated with oxygen deprivation (and it could, for example, suddenly seem inordinately funny that the verbal crucible you've spent the last hour and change trapped in is a joint judgment of the High Court, although is that really even funny and there's no one nearby to share it with anyway), this giddiness will in turn give way to something like a borderline dissociative state whereby you might be unable to look at the words on a page without being acutely aware that you are seeing things through your eyes—but ultimately, the overwhelming sensation is an ever-increasing pressure as the boredom builds within you like some colossal ocean wave, and you'll be desperate to give up the reading and get up and go somewhere to do literally anything, but you mustn't break your concentration or look up from the page even though it hurts — and it does hurt, you're crushed beneath the sheer weight of it — because when the great wave within you crests and breaks and rolls back (and it inevitably must) it will rip you up and wash away everything and what is left is a pure and perfect joy.

This is no mere Csíkszentmihályian state of 'flow'; it's joy, real joy, joy burning through every molecule of your body—your peripheral vision blurs and your nerves sing with it. All else falls away. There's just the text. It's the only psychological anaesthetic or nourishment or crutch available, and so it's the joy that must sustain you. It's almost kind of wonderful. Although it's a creepy sort of transcendence, sure, a sense of being so completely and 100% present in a particular place and time and task because maybe there's nothing left of you there at all.

Ed Worland is a Second Year JD Student

PARDON OR PROSECUTE?

OFFENDERS' SPECIAL CIRCUMSTANCES AND THE LAW

Nathan Grech

Crimes are reported at all hours of the day online, on television and in print. Often, background information is provided about the offenders themselves. In recent times, one group of characteristics among offenders has emerged as an influential factor on deciding the outcome of criminal cases – that is, special circumstances related to substance addiction, mental health, and cognitive impairment.

A justice system that acknowledges the impact special circumstances may have upon offending is one well-attuned with reality and contemporary attitudes about diversity. But is taking such an individualised, proactively tolerant approach appropriate in criminal proceedings, when the aim of the game is to protect the public and seek justice by holding offenders responsible for their behaviour?

Obviously, all parties should have the same rights to submit their perspectives to courts, no matter what their circumstances. Further, such a sensitive topic is difficult to raise without coming across as flippant or ignorant to the struggles of those caught up in the criminal justice system.

I think, though, that the question of lessening sentences or pardoning criminal behaviour for offenders with special circumstances needs closer scrutiny. Because no matter who an offender is, or how crimes are committed, is it not true that serious and uniform consequences of some severity are needed to set an example and maintain faith in criminal law and justice?

Place yourself for a moment in the shoes of the judiciary. Would it be appropriate to leniently prosecute someone with addiction-related mental health issues who stole clothing from a department store to fund their drug addiction? Arguably, this sort of crime lacks the same impact that a crime against a person would have, because a shop is a commercial entity and a person is clearly an emotional being. So then, what if you're presented with a more moral-based example?

This time, you're faced with considering sentencing leniency for an adult offender who suffered years of childhood trauma, abuse and neglect, who repeatedly raped and molested children. Do you feel comfortable lessening the term of imprisonment or severity of punishment for this offender? After all, they've got special circumstances that have caused them to have an altered sense of what is lawfully acceptable and what isn't. And you have some level of empathy for the fact that they too have had a turbulent, negative upbringing.

What is the best approach here, to ensure public safety and faith in the criminal justice system be maintained?

How should criminal trials be handled when special circumstances complicate the submissions and facts surrounding a case? The more you attempt to consider how you yourself might approach these sorts of issues, the harder it becomes to treat both parties to a case with the same, uniform, impartial approach.

So then, should we actually somewhat "excuse" this group of offenders because we see the impact mitigating circumstances can have when criminal behaviour is involved? Or are we better off, in the interests of public safety and harmony, painting all offenders with the same strict brush, irrespective of their personal characteristics?

Ultimately, this issue is contentious and ripe for independent review and investigation. Only through competent management and forethought does the criminal justice system have a hope to resolve the matter sooner rather than later.

Nathan Grech is a First Year JD Student

Big Data: Challenges to the Freedom of Political Communication

Nicholas Parry-Jones

On May 1st of this year The Australian wrote a since redacted article saying that Facebook claimed it could recognise, in real time, anxiety in teens and use this for advertising. Facebookdid this, claiming its aggregate data 'intended to help marketers understand how people express themselves... never used to target ads'. Assume what Facebook said is true and they don't have targeted ads, but what's stopping them?

Let's backtrack to the story of a small UK based research team.

Michal Kosinski attended Cambridge University to do his PhD at the Psychometrics Centre. He began working with fellow student David Stillwell about a year after Stillwell had launched the MyPersonality app. The app allowed users to fill out different psychometric questionnaires, including a handful of questions from the classic Big Five personality questionnaire. Users received a "personality profile" and had the option to share their Facebook profile with researchers.

They expected a small sample size based on friends and their students, but millions of people ended up using the app, and giving away their likes and data. The app had gone viral.

The team used their data set to make a profile consisting entirely of likes, testing against psychometric results and the hard data provided by the user. For example, men who "liked" the cosmetics brand MAC were slightly more likely to be gay; one of the best indicators for heterosexuality was "liking" Wu-Tang Clan. While each piece of such information is too weak to produce a reliable prediction, with individual data points aggregated en masse, the model produces a chillingly precise doppelganger.

In 2012, Kosinski proved that on the basis of an average of 68 Facebook "likes" by a user, it was possible to predict their skin colour (with 95 percent accuracy), their sexual orientation (88 percent accuracy), and their affiliation to the Democratic or Republican party (85 percent). By 2014, he was able to evaluate a person better than the average work colleague, merely on the basis of ten Facebook "likes;" 150 were enough to outdo what a person's parents knew about them, and 300 "likes" trumped their partner. The same analytics were used by Cambridge Analytica, first for Brexit, then by Ted Cruz, then by the eventual 46th President of the United States.

This is just Facebook. Consider: Google knows when you're hungry by what you search for. Other companies know your typing style. They know that you're quick on the shift key and occasionally miss the space bar. Advertisers know this too, because the platforms they utilise package it as demographic data.

Facebook is sticky, it wants to keep you on the platform, and it wants you to scroll slowly. It can stop you dead in your tracks with a well placed article (which by the way, opens within the Facebook app) Think about what you click on. Your Facebook isn't an echo chamber, you're smart. Hell, you're a JD! It's true, people don't want to read just stuff they agree with, they want to be challenged.

This proves salient when you look to your feed. You'll see articles that nudge you. Some of them will ask you if you're progressive enough, others might show you a great injustice. You'll want to click. Facebook knows this because you know this. Youtube knows it too. Watch a video on vegetarianism. It will show you a recommended video for veganism. Its that nudge that keeps us interested, in the most classical sense of the word.

Anyone in an appropriate radius of Evvia will tell you it's not their fault, it's how customers choose to use their product. That's a facile argument. Autoplay of videos is not a user choice, it is the default. The default position is the stickiest. It is Sisyphus and his rock: Silicon Valley execs assure us, "he is happy".

What does that mean for advertising? With real time emotional data and accurate personality profiles, Facebook can populate your feed with exactly what you need – what it wants you to need. You can see completely tailored content, that is possibly so unique it won't be seen by the anyone else.

Expanding this analysis to the political sphere, we face a challenge to the traditional orthodoxy. In the old days of television (the thing you stream to your laptop), political communication was open to the public and broadcast widely. This means things must be in broad strokes. It also gives your opponent right of reply. Its competitive. It keeps them honest.

Facebook has the potential to ignore the standard procedure. Articles and ads can be targeted and pinpointed, eliminating the wide berth of political messages and leaving critics with only slivers to respond to.

As most readers will know, and some will learn come week 9 of consti, Australia has an implied right of political communication. McGinty v Western Australia shows that this balance between communication and information is key to this right.

A curated, digital news delivery will hamper this. To apply the two pronged test of Langer is no longer enough as the majority in that case notes its application must be to "what is necessary for the effective operation of the system of representative and responsible government.".

A lack of this seems to cut through the dearth of the political noise: without equality of platform, how can we be sure citizens are well informed when they step into the voting booths?

Using mass psychology and the data we hand them, large tech companies can go unfettered into creating a decidedly polemic political landscape. I don't know about you, but I'd give that an angry react.

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