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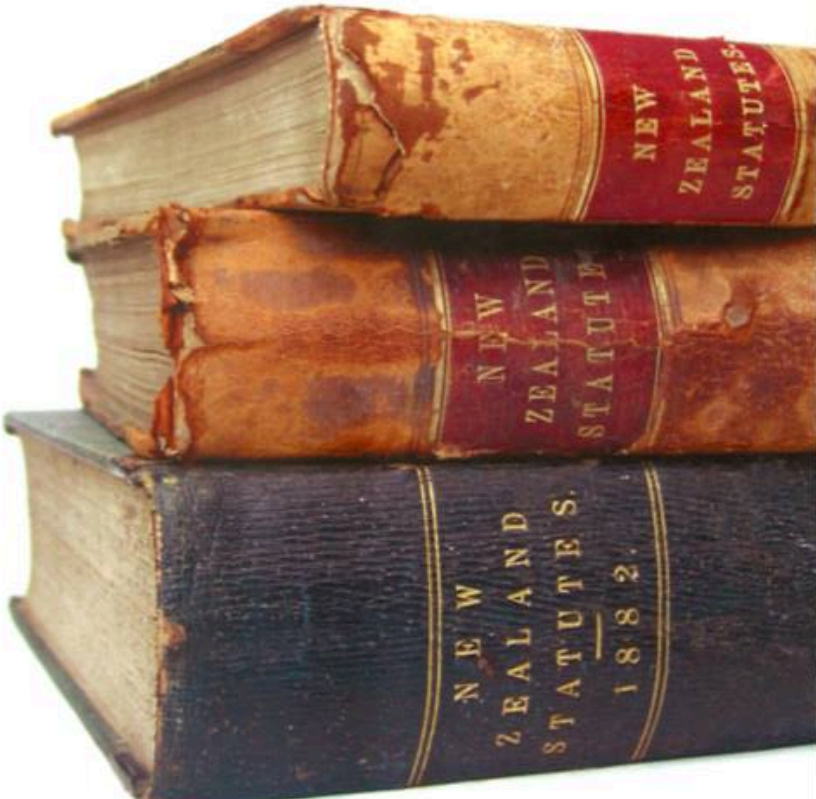

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FOREWORD

THE HONOURABLE JUSTICE HELEN WINKELMANN
JUSTICE OF THE COURT OF APPEAL OF NEW ZEALAND

Reading each of these articles in preparation for writing this foreword was a time-consuming thing to do. The size of this volume attests to the size of the task. But I found myself quickly absorbed by the interest of the subject matter the writers have tackled and the quality of their analysis. Each has written on a subject of pressing and wide public interest. None has strayed into the area of abstruse academic writing.

A theme running through many of the articles is the risks associated with the accumulation and use of information in a digital age and how to begin to attempt to manage those risks. In her article "Navigating New Zealand's Digital Future: Coding Our Way to Privacy in the Age of Analytics",[1] Mahoney Turnbull explains the concept of big data and the new digital terrain – or digital ecosystem – as she puts it. In her words, "big data has come. And it is trampling all over our privacy law".[2]

This drive toward 'big data' does not occur in a vacuum. In the new digital environment, we can know and therefore we want to know. Business and governments want access to 'big data'. Mahoney includes the lovely quote "In God We Trust. All others must bring data".[3] This article is an important contribution on the subject.

These articles elucidate just how complex and interconnected the policy and legal issues in the area of digital communication, data and terrorism are, and also how important it is that any legislative or judicial response

[1] Turnbull, at 418.
[2] At 467.
[3] Ibid.

be well-considered and constructed. The comparative analysis of existing regulatory frameworks utilised by the authors will be of interest and use to policy-makers and practitioners.

Although these articles are not all about technology and information, its use and collection continues as a theme throughout. Michael Finucane contributes to the important recent discussion as to whether reporting should be allowed of an individual's suicide.[4] Again he takes a comparative approach, describing how the issue is addressed in other jurisdictions, and assessing our own Law Commission's report on the subject.

In her article "The Needs of Young Women Offenders",[5] Allanah Colley describes how the particular needs of young women offenders are overlooked and so not adequately catered for in current youth justice and rehabilitative responses. She suggests the need for gender-specific programmes and, in any case, argues for better information so we can understand the drivers of crime for this group.

The title of Sarah Reese's article "Rebuilding Babel: Negotiating Meaning in Multi-Lingual Legislation" had me hooked.[6] Sarah Reese describes processes employed and difficulties encountered in jurisdictions where legislation is published in more than one language. However, the challenges and approaches she discusses are of relevance to all exercises of legislative drafting and interpretation, mono- or multi-lingual.

The Evidence Act 2006 has generated a lot of academic writing and case law in the nearly 10 years since its enactment. Many of the early controversies and uncertainties are now settled. One area which continues to develop is the continuing relevance of the common law,

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[4] Finucane, at 486.
[5] Colley, at 469.
[6] Reese, at 587.

and this is discussed in Megan Paterson's article "From the Evidence Act to the Comfort of the Common Law".[7]

I mention last James Tocher's case note on *Lewis Holdings v Steel and Tube Holdings Limited*.[8] James considers the history and theoretical rationale for the limited liability principle in corporations law. He argues that it should not apply in the case of wholly owned subsidiaries. I found particularly interesting how he places the emergence of the principle in *Salomon v Salomon* within its historical context.

Most of the issues discussed in these articles already come before the courts in one form or another. Cases concerning the operation of the digital "ecosystem" are beginning to appear and numbers will only increase. Judges will no doubt look to articles such as those in this publication as they translate the impenetrably technical into something which can be placed within a legal framework. I recommend the work of each of these diligent and original thinkers to you.

Helen Winkelmann

Justice of the Court of Appeal of New Zealand and
Former Chief High Court Judge of New Zealand

[7] Paterson, at 548.
[8] Tocher, at 599; *Lewis Holdings Ltd v Steel and Tube Holdings Ltd* [2014] NZHC 3311, [2015] 2 NZLR 831.

LETTER FROM THE EDITOR-IN-CHIEF

JAMES WATSON
BA/LLB (HONS), UNIVERSITY OF OTAGO

This issue marks the 10th edition of the New Zealand Law Students' Journal! This is some achievement as, for obvious reasons, continuity is one of the more difficult things for student ventures to achieve.

Since its inception the Journal has served a dual function: it is both a vehicle for law students from around the country to display their best work, and an opportunity for students to contribute to the production of a high quality legal text.

Past editors have likened the production of the Journal to pregnancy: after nine months gestation, each year's Journal emerges afresh. Perhaps that metaphor is inapposite: the production of the Journal is a much more *collaborative* and—surely!—less painful process than pregnancy.

Nevertheless, I like the idea of personifying the Journal. And now, as it has reached double-figures, and is edging towards its awkward tweenage years, I think it is appropriate to reflect on the fact that it has taken a village to raise this child. Over the past ten years there have been (approximately): 500 students who have submitted articles for consideration; 250 Student Reviewers; 175 Academic Reviewers; over 150 members of Editorial Teams and 10 esteemed legal personalities to write each year's foreword.

I would like to extend my personal thanks to this year's editorial team (in particular to Dino Bohinc and Jordan Grimmer), and to the University of Otago's Faculty of Law for generously sponsoring this year's prize for the best submission(s).

Thanks are also due to the many students (another record year) who submitted articles for consideration in this year's Journal. Alas, we could only select eight articles, but I must say that they are all of the highest calibre. For me, the quality and breadth of subject matter of this year's final eight (from Post-Modern art to multi-lingual legislation) confirms two things: that law is *ubiquitous*; and that law is *interesting*, especially when approached with the imagination and acumen that this year's authors so clearly display.

Finally, I would like to thank Justice Helen Winkelmann for taking time out of her busy schedule to write this year's foreword.

Enjoy.

James Watson

Editor-in-Chief
New Zealand Law Students' Journal 2015

APPROPRIATION IN THE FINE ARTS: FAIR USE, FAIR DEALING AND COPYRIGHT LAW

KARI SCHMIDT*

This article was chosen as first equal for best article by the Editor-in-Chief and the Academic Review Board.

I Introduction

In the 20th century, comprehensive and far-reaching theoretical shifts occurred in the Fine Arts, with Post-Modernism re-conceptualising the discipline and challenging its formal and philosophical boundaries. Artists sought to disassociate art from the notions of hierarchy and genius intrinsic to 17-19th century art[1] and Modernism,[2] with works characterised by the questioning of the role of the artist through, for example, techniques of appropriation. Through so doing, post-modern artists aimed to overthrow artistic convention and challenge the established capitalist, patriarchal and colonial narratives of Modernism, as well as its emphasis on 'high' and 'low' art. We see such practices in

* LLB (Hons), University of Otago; BA (Hons) (Art History), Victoria University. Kari is currently a solicitor at Simpson Grierson.

1 Throughout the 17th – 19th centuries, art maintained a hierarchy of genres and focussed on narrowly defined conceptions of beauty, with artists "using [a] perfect, seamless technique to execute very well-established subject-matter." Megan Gambino "Ask an Expert: What is the Difference between Modern and Post-Modern Art?" Smithsonian.com <http://www.smithsonianmag.com/arts-culture/ask-an-expert-what-is-the-difference-between-modern-and-postmodern-art-87883230/?no-ist>

2 A movement starting around 1860 in response to the art of the 17th-19th centuries, Modernism incorporated "personal expression… [putting] emphasis on the value of being original and doing something innovative." Gambino, Above.

the collages of Dada artists;[3] the Pop art appropriations of Andy Warhol and Robert Rauschenberg;[4] in the work of Neo-pop artists such as Jeff Koons, Keith Haring, Kenny Scharf and Rodney Allan Greenblat; [5] and in Richard Prince's 2008 'Canal Zone' series.[6] In New Zealand this approach is evidenced in the work of Michael Parekowhai who, in appropriating imagery from New Zealand modernist painters Colin McCahon[7] and Gordon Walters,[8] has engaged heavily with post-modern strategies.[9]

Appropriation such as this is important, as it enables artists and the viewing public to critique individual artists, art movements and artworks through appropriating and transforming their imagery. Such appropriation can also verge on the political, as we see in politically

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[3] Such as Hannah Hoch, Raoul Hausmann and John Heartfield.

[4] "Pop artists like Robert Rauschenberg, Claes Oldenburg, Andy Warhol, Tom Wesselman, and Roy Lichtenstein reproduced, juxtaposed, or repeated mundane, everyday images from popular culture—both absorbing and acting as a mirror for the ideas, interactions, needs, desires, and cultural elements of the times." "Pop Art" Museum of Modern Art Learning <http://www.moma.org/learn/moma_learning/themes/pop-art/appropriation>.

[5] Who "appropriated commercial images from comics and media along with collage and an effluvia of found materials" Margot Lovejoy *Digital Currents: Art in the Electronic Age* (3rd ed Routledge, New York: 2004) at 76.

[6] Which engendered the litigation in *Cariou v Prince* 714 F 3d 694 (2d Cir 2013).

[7] Compare Colin McCahon's *I Am,* 1954, 36.1 x 55.5 cm, available at <http://www.mccahon.co.nz/cm000828> with Michael Parekowhai, *The Indefinite Article*, 1990, 248.9 x 609.6 x 35.6 cm, available at <http://www.aucklandartgallery.com/the-collection/browse-artwork/16389/the-indefinite-article>.

[8] Compare Gordon Walters, *Kahukura*, 1968, 113.8 x 152.3 cm available at <http://apt5journal.blogspot.co.nz/> with Michael Parekowhai, *Kiss the Baby Goodbye*, 1994, 360 x 460 cm, available at <http://www.studyblue.com/notes/note/n/contemporary-art-final/deck/9174121>.

[9] Joanna McFarlane "Kiss the Baby Goodbye: Appropriation in New Zealand Art" ARTH2061 The Post-Modern Sublime Presentation Paper, Australian National University, May 2013).

oriented remixes regarding politicians such as Stephen Harper,[10] or the 2008 US election.[11] As evidenced in these examples, "transformative works often involve authorial creativity and social critique… values at the core of freedom of expression."[12]

That copyright could then limit this, that it could say an artist's work is their *property*, seems anathema to these trends and to the fundamental value of freedom of expression which is made manifest in the Fine Arts. On the other hand, copyright is not strictly in opposition to creativity and expression. In the United States this system of private property was actually established amid beliefs that it would facilitate freedom of expression through providing incentives to create.[13] Similarly, art is not an area entirely distinct from economics. In some

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[10] Graham Reynolds "Towards a Right to Engage in the Fair Transformative Use of Copyright-Protected Expression" in Michael Geist *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Irwin Law, Toronto, 2010) at 399-400.

[11] "[H]igh-profile mashups during the 2008 elections included hip-hop star will.i.am's "Yes We Can" video (a remix of Obama's New Hampshire primary concession speech in February 2008), the eponymous Obama Girl's "Crush on Obama" video, satirist Paul Shanklin's "Barack the Magic Negro" song (a remix of an *Los Angeles Times* column and the song "Puff the Magic Dragon") and Comedy Central's late night host Stephen Colbert's "John McCain's Green Screen Challenge" (a mashup contest centering around a speech given by Republican presidential candidate John McCain). Each of these mashups in turn encouraged or stimulated other users to create their own video mashups, such as the numerous user-generated videos on BarelyPolitical.com that remix video footage of Obama Girl, or users who submitted their own mashup creations into Colbert's remix challenge." Richard L. Edwards and Chuck Tryon, "Political video mashups as allegories of citizen empowerment" (2009) 14 First Monday 10, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2617/2305#p4>.

[12] David Fewer "Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canada" (1997) 55 Fac.L.Rev., U.Toronto175 at 201.

[13] "Thus, private property and liberty were viewed as complementary and not opposing forces." William Patry, *The Fair Use Privilege in Copyright Law* (2nd ed, BNA Books, Washington D.C., 1985, 1995), at 575.

cases artists can make millions of dollars from pieces which are based on overt appropriation and parodies are often created as a result of purely commercial motivations.[14] The most extreme example of this can be seen in Jeff Koons, whose work has been described as "the archetype of money-driven art production". [15] Employing 128 people, [16] Koons' studio is more akin to a factory than the traditional artist's studio. This reality suggests that art should not be deemed wholly distinct from copyright and that *some* line should be drawn as to when appropriation will and will not be legitimate. This line is found in fair use and fair dealing.

Fair use (in the United States) and fair dealing (in the United Kingdom, Australia, Canada and New Zealand) are legal exceptions to copyright. The exceptions permit the use of copyrighted work for purposes such as criticism and review, research and private study, news reporting, and in some cases parody, satire and education. All the jurisdictions appear to maintain a level of flexibility, treating the exceptions as highly qualitative analyses and fair use/fair dealing as a relatively open concept. Fair use is particularly flexible, being structurally much less specific than its fair dealing counterparts, with the provisions using the terms 'such as' and 'include'. The four part test from 17 United States Code § 107 is as follows: [17]

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[14] "… as opposed to being done purely for the purposes of criticism." Susy Frankel, *Intellectual Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2011) at 354.

[15] "Staff Picks: Beard-Burdened and Beer-Branded" (5 September 2014) The Paris Review <http://www.theparisreview.org/blog/2014/09/05/staff-picks-beard-burdened-and-beer-branded/>.

[16] Sixty-four employees in painting and forty-four in sculpture, Jed Perl "The Cult of Jeff Koons" (25 September 2014) The New York Review of Books <http://www.nybooks.com/articles/archives/2014/sep/25/cult-jeff-koons/?insrc=hpss>.

[17] Copyright Act 17 USC § 107.

> … the fair use of a copyrighted work…for purposes **such as** criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall **include** -
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The language of this section permits the courts to apply the exception to uses outside of what is specified in the provision, and to consider factors other than the four which it outlines. In comparison, the fair dealing provisions reference specific uses (research or study, criticism or review, reporting news and, in some cases, parody, satire and education generally) outside of which the courts are not allowed to go. However, fair dealing jurisdictions consider a variety of factors similar to fair use, including the impact of the use on the market of the original, the amount and substantiality of the taking, the nature of the copyrighted work, alternatives to the taking and the purpose of the secondary work.[18] Similarly, fair dealing is not absolute and does allow

[18] Canada considers "the purpose of the dealing, the nature of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work and the effect of the dealing on the work." *CHH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [60]. These factors are also applied under Copyright Act (NZ), s 43 ' research and private study', although practically the same considerations will be applied to s 42 'criticism, review and news reporting', as has occurred in previous case law such as *Television New Zealand Ltd v*

room for interpretation and adaptation in how the specified uses are analysed. As Lord Denning states in the United Kingdom case of *Hubbard v Vosper,* "It is impossible to define what is 'fair dealing'. It must be a question of degree."[19] In New Zealand Blanchard J has described fair dealing in similar terms as a "reasonable use".[20] This is especially the case in Canada, which has recently broadened the scope of fair dealing significantly, in *CCH Canadian Ltd v Law Society of Upper Canada*,[21] where the court held that fair dealing in regards to research must be given a "large and liberal interpretation in order to ensure that 'users' rights' are not unduly constrained."[22] *CCH* had a distinctly pro-user bent and has been affirmed in subsequent cases, having an impact on fair dealing generally.[23] It also stated that using all of a work may be fair in some instances as, for example, "there might be no other way to criticize or review certain types of works such as photographs".[24]

Fair use in the United States also applies the criterion of 'transformative use' under § 107(1), which allows for the use of elements of a copyrighted work when the secondary work is sufficiently different from its antecedent to be classed a new work. In this way the focus has shifted from § 107(3) and the 'amount and substantiality' of taking, to transformative use under § 107(1) – which makes sense, given the reality that visual images cannot be summarised or quoted from in the same way that other creative works can be. Thus, emphasis must

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Newsmonitor Services Ltd [1994] 2 NZLR 91. The same is true of fair dealing in Australia.

[19] *Hubbard v Vosper* [1972] 2 QB 84 at 94.

[20] *Television New Zealand Ltd v Newsmonitor Services Ltd,* above n 18, at 44.

[21] *CCH Canadian Ltd v Law Society of Upper Canada*, above n 18.

[22] *CCH Canadian Ltd v Law Society of Upper Canada*, above n 18, at [51].

[23] For example, we see *CCH* affirmed in *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2010] FCA 139 and *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* [2012] 2 SCR 345.

[24] *CCH Canadian Ltd v Law Society of Upper Canada,* above n 18, at [56].

instead be placed on determining the purpose and character of the use under § 107(1).[25]

In this way fair use and fair dealing recognise that a) in some circumstances a secondary work has modified a copyrighted original so significantly that it can be considered an entirely new, non-infringing work, and/or b) the secondary work should be permitted as it fulfils the important social uses of parody or satire. In recognising these uses, the exceptions are also a valuable starting point for analysing our system of copyright generally, as they have inherently to do with its fundamental purpose of maximising creativity and knowledge. Copyright achieves this in two ways – firstly, through facilitating economic incentives for artists to create through establishing a monopoly on the use of their works. Secondly, through allowing for new creative works to be spawned through restraining this monopoly via limited copyright durations and fair use and fair dealing. Copyright is oriented around a balancing of these two practices and conceptualised as a legal dynamic that, through this balance, "must work for the public good".[26]

However, it has been argued that throughout the last century copyright has increasingly focussed on copyright holders, rather than users. This can be seen in the extension of copyright durations, the strengthening of enforcement measures and the emergence of a 'permission' culture where permission via license is required to use any copyrighted work and where anxiety and caution characterise the use of copyrighted work generally. All of this has been said to have disrupted the copyright balance, resulting in fewer works being available for appropriation, and thus less creative works and criticism from which we as a society benefit. Fair use and fair dealing can serve to bolster this space and

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[25] As averred by Stephen E. Weil "Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood" (2001) 62 Ohio St.L.J. 835 at 840.
[26] Susan Ballard and Pamela McKinley, "Art at Risk: Copyright, Fair Dealings and Art in the Digital Age" (Otago Polytechnic, Dunedin, 2011) at 17.

facilitate a more flexible system of copyright. Simultaneously, their application also recognises that the Fine Arts shouldn't be removed from the sphere of copyright entirely as it also helps to facilitate their production.[27]

This essay will examine the relationship between the Fine Arts and copyright, and how fair use and fair dealing enable us to navigate this territory. Chapter one will examine the tensions between copyright law and the arts in greater depth, as well as the expansion of copyright generally, which fair use and fair dealing play an important role in both questioning and curtailing. Chapter two will consider transformative use as a valuable mechanism for conceptualising artistic practice and as a potential addition to current fair dealing practices. Finally, chapter three will consider the possibility of New Zealand expanding the categories to which fair dealing applies, given that it is lagging behind its counterparts in the United Kingdom, Australia and Canada in having no provision for parody or satire. This is especially pertinent given that New Zealand will soon be reviewing its copyright legislation.[28]

II The Tension between Art and Law in Copyright

An integral aspect of what makes a work capable of copyright is found in the distinction made between an idea and its expression. As stated in *Rogers v Koons*: [29]

> We recognise that ideas, concepts and the like found in the common domain are the inheritance of everyone. What is

[27] "Without such protection, artists would lack the ability to control the reproduction and public display of their work and, by extension, to justly benefit from their original creative work." *Friedman v Guetta* US Dist LEXIS 66532 (CD Cal 2011) at 19-20.
[28] Cabinet Paper "Delayed Review of the Copyright Act 1994" (15 July 2013).
[29] *Rogers v Koons* 960 F 2d 301 (2nd Cir 1992) at 308.

> protected is the original or unique way that an author expresses those ideas, concepts, principles or processes.

An example to demonstrate this can be found in the case of *Leibovitz v Paramount*[30] where the photographer's image of a pregnant and naked Demi Moore was imitated,[31] but replaced with the head of the actor Leslie Nielsen.[32] The 'idea' inherent in Leibovitz's work is that of photographing a naked, pregnant woman in the classical 'Venus Pudica' pose. Leibowitz does not have a monopoly on this idea. However, her expression of this idea in her choice of lighting, background, angle and choice of camera is capable of copyright protection.

The idea/expression dichotomy in this way acts as a justification for the particular way in which copyright limits freedom of expression, as ideas are still able to be accessed and used in creative works – it is only their expression which is curtailed. We see this approach in the United States,[33] Australia,[34] the United Kingdom,[35] New Zealand[36] and Canada.[37]

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[30] *Leibovitz v Paramount Pictures Corp.* 137 F 3d 109 (2nd Cir NY 1998).
[31] Annie Leibovitz, *Demi Moore*, 1991, available at <http://www.pinterest.com/pin/406168460113329794/>.
[32] Promotional poster for the film *Naked Gun 33 1/3: The Final Insult*, 1993, 68.6 x 104.1 cm, available at <http://en.wikipedia.org/wiki/Leibovitz_v._Paramount_Pictures_Corp>.
[33] E.g in cases such as *Sid & Mary Krofft Television v. McDonald's* 562 F 2d 1157 (1977) at 1170, *Schnapper v Foley* 471 F Supp 426 (1979) at 428, *Eldred v Reno* 239 F 3d 372 (2001) at 376 and finally in the Supreme Court case of *Harper & Row, Publrs. v Nation Enters.* 471 US 539 (1985) at 556: "The Second Circuit noted, correctly, that copyright's idea/expression dichotomy 'strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression" as cited in Robert Burrell and Allison Coleman *Copyright Exceptions: the digital impact* (Cambridge University Press, Cambridge, 2005) at 20, n 12.
[34] As in *Skybase Nominees v Fortuity* (1996) 36 IPR 529 at 531: "the fact that another work deals with the same ideas or discusses the same fact also raised in the work in respect of which copyright is said to subsist will not, of itself, constitute an infringement. Were it otherwise the copyright laws would be an

However, the work of appropriation artists is dependent on the overt use of another artist's expression. Post-Modern artistic practices in this way challenge central tenets of copyright, such as the idea/expression dichotomy, as well as 'originality'. While copyright generally aims to obviate the convoluted question of artistic merit, defining artistic works as such "irrespective of artistic quality",[38] works still need to be 'original'.[39] But what if the artist's very intention is for the two works to be similar, so as to question the concept of originality itself? Post-Modernism, for example, is "[a]ggressively and self-consciously derivative in its ideology."[40] Be it Ready-mades,[41] Found Objects, Object Art, or Collage, post-modern artists have appropriated visual elements from their environment prolifically. Fundamental to these practices is a questioning of the ideas of originality and authorship.

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impediment to free speech, rather than an encouragement of original expression". At 21, n 13.

35 As in *Ashdown v Telegraph Group Ltd* [2001] 4 All ER 666 at [12].

36 "The statutory monopoly is not granted in respect of information itself. It does not prevent the taking and reuse of knowledge itself. Copyright protects not ideas but the form in which they are expressed. Ideas can be appropriated so long as they are not expressed simply by copying the words of the author." *Television New Zealand Ltd v Newsmonitor Services Ltd*, above n 18, at 19.

37 As in *Ce G nrale des Etablissements Michelin -Michelin & C" v. CAWCanad* (1996) 71 CPR (3d) 348 (FCTD) at [112] where the court found defendants had "a multitude of other means for expressing their views."

38 In New Zealand, for example, an artistic work is defined as "a graphic work, photograph, sculpture, collage, or model, irrespective of artistic quality" per Copyright Act 1994 (NZ), s 2. The same is true of the United Kingdom per Copyright, Designs and Patents Act 1988 (UK), s 4(1)(a) and Australia Copyright Act 1968 (Aus), Part II

39 'Copyright in Original Works' Copyright Act 1994 (NZ), s 14; 'Works in which Copyright May Subsist' Copyright Act RSC C 1985 C-42, s 5; 'Nature of Copyright in Original Works' Australia Copyright Act 1968 (Aus), s 31; 'Copyright and Copyright Works' Copyright, Designs and Patents Act 1988 (UK), s 1; 17 USC §102

40 Lynne A. Greenberg "The Art of Appropriation: Puppies, Piracy and Post-Modernism" (1992) 11 Cardozo Arts & Ent.L.J. 1, at 1

41 "A commonplace artefact (such as a comb or bicycle rack) selected and shown as a work of art", Ballard and McKinley, above n 26, at 45.

Examples include simulationist photographers such as Sherrie Levine[42] and Richard Prince[43] (who re-photograph photographs), and simulationist painters such as Mike Bidlo[44] who re-paint original works. Through producing such works these artists aim to problematise the distinction between copy and original, and the market value that is attached to an original and to art generally.[45] Collage, a technique used by many of the artists mentioned here and fundamental to movements such as Dada and Pop Art, is similarly characterised by the appropriation of other images into a new work. Through this process artists may comment on the work of other artists or use "images fundamental to a culture… to make a point about that culture".[46]

These practices are *fundamental* to much contemporary art, which "depends upon direct appropriation as an instrument of critical expression."[47] Post-modern artists aim to challenge powerful, entrenched, often highly unfair norms, and the most effective way for them to do this is to utilise and subvert the imagery of established systems. For example, Barbara Kruger appropriates commercial

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[42] Levine's most famous work is likely her appropriation in 'After Walker Evans' where she re-photographed Evans' photographs from his series 'First and Last'. AfterSherrieLevine.com <http://www.aftersherrielevine.com/>

[43] For example, "Prince's 'Spiritual America' is an appropriation of Garry Gross's lascivious photo of a nude, ten-year-old Brooke Shields." Richard Biles "Richard Prince: 'Spiritual America' (1983)" 21 October 2011 freq.uenci.es <http://freq.uenci.es/2011/10/21/richard-prince-spiritual-america-1983/>

[44] Who "has created an entire exhibition of Bidlo Picassos including *Guernica*, the Gertrude Stein portrait, and *Les Demoiselles d'Avignon*." Lovejoy, above n 5, at 74.

[45] These artists "challenge concepts such as authenticity of the original, the primacy of the creative act… the mastery or genius of the artist… [and] the market system." At 74.

[46] Karen Lowe "Shushing the New Aesthetic Vocabulary: Appropriation Art under the Canadian Copyright Regime" (2008) 17 Dalhousie J. Legal Stud. 99 at 101.

[47] David Lange and Jennifer Lange-Anderson, "Copyright, Fair Use and Transformative Critical Appropriation", <http://law.duke.edu/pd/papers/langeand.pdf> at 132.

imagery in her feminist collages with the aim of problematising capitalism as well as the male-dominated voice in both Modernism and society generally.[48][49] Such critiques are important and necessary and it is simply impossible to communicate them in the same way if artists are not allowed to use appropriation techniques. At its very core appropriation art also questions the notion of authorship and the market system in relation to artworks. This is of course problematic when we consider that copyright is ultimately a system of property ownership.

An example of this in New Zealand can be seen in the case of CK Stead, who was required to obtain permission from Janet Frame's estate to be able to quote from her in his memoir. Although Stead believed he was able to publish the work without permission, he publically apologised to the estate in order to avoid litigation. Stead believed he could use the fair dealing defence for the purposes of criticism or review and that the Trust was simply using copyright as a weapon against his book which they disliked.[50] The Trust challenged this, asserting that the defence "could not be used when commenting on an author or when quoting from unpublished material."[51] Thus creators are aware of the defence, but there is still uncertainty as to whether and how it would be applied. This uncertainty leads to artists either not using copyrighted material or having to acquire permission to do so – but even then there are problems. Take the National government's use

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[48] See Barbara Kruger, *Untitled (Your Body is a Battelground)*, 1989, available at <http://imageobjecttext.com/2012/03/22/selling-a-message/> and Barbara Kruger, *Untitled (Pro-Life for the Unborn/Pro-death for the born)*, 2000 available at <http://imageobjecttext.com/2012/03/22/selling-a-message/>.

[49] Kruger places text over appropriated commercial images in a "deconstruction of Modernism… aimed at destroying a certain order of representation; the domination of the 'original which up to now has largely been male-identified." Lovejoy, above n 5, at 74.

[50] "CK Stead settles dispute with Frame's trust" *The New Zealand Herald* (online ed, Otago, 25 June 2010).

[51] Above.

of a riff from Eminem's 'Lose Yourself' song in their latest advertising campaign. The owners of the song have filed proceedings against the National Party, despite the fact that the licensor told National they could use it, the latter had paid the licensing fee and the track had been used in the past.[52] A similar incident occurred in regards to the Coldplay song 'Clocks' in 2008.[53]

Fair use and fair dealing are in this respect crucial to maintaining the copyright balance, as they act to moderate its application through allowing the use of "expression itself for limited purposes."[54] We see this, for example, in the explicit recognition of appropriation art practices in fair use's transformative use and in the inclusion of parody and satire provisions in fair use and some of the fair dealing jurisdictions. In order to authentically and freely practice, artists need a fair use and fair dealing doctrine which is relaxed and which takes their aesthetic and philosophical characteristics into account. This is especially the case in fair dealing which is currently a much narrower defence than fair use. The time is particularly ripe for discussing such issues in New Zealand as a review of the Copyright Act 1994 will soon be taking place – although only after the Trans-Pacific Partnership Agreement has been concluded. [55]

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[52] Hamish Rutherford "Eminem sues National over election ad" *Stuff.co.nz* (online ed, New Zealand, 16 September 2014).
[53] "National forced to recall DVD promoting Key" *The New Zealand Herald* (online ed, New Zealand, 3 December 2007).
[54] *Eldred v Ashcroft* 537 US 186 (2003).
[55] "Review of the Copyright Act 1994" (15 July 2013) Ministry of Business, Innovation and Employment <http://www.med.govt.nz/business/intellectual-property/copyright/review-of-the-copyright-act-1994>.

III Transformative Use

One of the main mechanisms the United States has developed to navigate the territory of fair use is the concept of transformative use under § 107(1). The concept originates from the case of *Folsom v March*[56] which applied to takings from a literary work. Although not articulated as transformative use the case considered whether the secondary work creates "an original and new work."[57] This reasoning was taken up much later in *Campbell v Acuff-Rose* which dealt with a rap group's parody of Roy Orbison's 'Pretty Woman' and is applied under §107(1) which examines the purpose and nature of the use. In adopting *Folsom* this case considered whether the secondary work:[58]

> … adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . , in other words, whether and to what extent the new work is 'transformative'.

As such, originality is a significant factor under transformative use - merely changing the content of a work from one form to another, for example, will not suffice.[59] Integral to these analyses is a consideration of the works formal aspects, and how the meaning or "expressive content"[60] of the work is distinct from that of the original.

Notably, transformative use is distinguishable from parody and satire – the work need not comment upon, criticise or parody the original. It need only "alter the original with 'new expression, meaning or

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[56] *Folsom v March* 9 F Cas 342 (CCD Mass. 1841).
[57] At 347.
[58] *Campbell v Acuff-Rose Music* 510 US 569 (1994) at 579.
[59] E.g. as in *Castle Rock Entertainment v Carol Publ'g Group* 150 F 3d 132 (2d Cir 1998), where a book with trivia questions about the TV show *Seinfeld* was not considered fair use.
[60] *Seltzer v Green Day, Inc US Dist LEXIS 92393 (C.D. Cal. 2011)* at 1177.

message'."[61] In this way transformative use also accounts for the fact that the line between parody and satire is so fine (see Chapter III), avoiding the uncertainty inherent in a parody/satire analysis by focussing instead on whether the work is transformative, with satirical works able to come under this head.[62] However, it is also more liberal than satire – the use of an original needn't engage in any criticism at all.[63] A work may also amount to transformative use if it serves a purpose other than those outlined in the preamble to § 107. The criterion is thus quite expansive.

Campbell also averred that transformative use, although not a pre-requisite for fair use, is central to its application: [64]

> … the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such transformative works thus lie at the heart of the fair use doctrine's guarantee of breathing space.

In this way decisions which reach an unequivocal finding of transformative use almost always also find fair use.[65] Thus, even if not

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[61] *Campbell v Acuff-Rose Music*, above n 58, at 579.

[62] Satire is not treated "differently from any other transformative use". *Cariou v Prince*, above n 6, at 707.

[63] This would allow, for example, transformative tributes such as Danger Mouse's *Grey Album*, a mashup of Jay-Z's *Black Album* and the Beatles' *White Album* which has been described as a "sincere, sophisticated homage to two acclaimed works and the musical celebrities who created them." Johanna Blakley, "The *Grey Album,* Celebrity Homage and Transformative Appropriation" (paper presented to the Norman Lear Center, University of Southern California, February, 2005) as cited in Reynolds, above n 10, at 406.

[64] *Campbell v Acuff-Rose Music*, above n 58, at 579.

[65] For example, "[t]he success rate of defendants claiming fair use went from 22.73% between 1995 and 2000, to 40.91% between 2001 and 2005, to 58.33% between 2006 and 2010. In other words there was a close correlation between the ascendancy of the transformativeness analysis and decisions favouring fair

recognising more extreme forms of appropriation, transformative use appears to be giving more weight to the creative process and increasingly allowing artists to utilise antecedent works. Recognition of transformative use also accounts for the reality that transformative works will hardly ever compete with the original in the market place.[66]

Conversely, the concept also recognises that it would be unfair if an artist were not able to dispute appropriation of their work where the secondary artist inordinately profits from the appropriation of a work where they have in no way re-contextualised, re-imaged or commented on it through their use. Practically, however, this is rarely the case – almost always appropriating artists will comment on the original or re-contextualise or transform it, to at least some extent. Where the line should be drawn on this is highly ambiguous and problematic, as the case law will show.

Under this principle we see a qualitative interpretation of artworks and a comparative analysis of works. For example, in the case of *Prince*, where appropriation artist Richard Prince utilised photographs taken by Patrick Cariou of Rastafarian culture. The judges in this case compared the aesthetics of the two artists. Cariou's series consisted of black and white, classical portrait and landscape photographs, where Prince's images were colourful, chaotic, cut-and-paste assemblages – fundamentally different from the originals in terms of "composition, presentation, scale, colour palette, and media."[67][68]Although elements of

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use." Neil Weinstock Netanel, *Making Sense of Fair Use,* (2011) 15 Lewis & Clark L. Rev. 715 at 752.

[66] For example, "Individuals looking to buy one of the games in the Halo series to play will not, instead, purchase DVDs… set in the Halo world. Someone who wants to read the original Harry Potter books will not be satisfied with one of the myriad Harry Potter fan fiction creations." Reynolds, above n 10, at 409.

[67] *Campbell v Acuff-Rose Music*, above n 58, at 706.

[68] We can see this in a comparison of the images in David Cariou, images from *Yes Rasta*, 2000, 32.3 x 25.7 cm, available at <http://www.patrickcariou.com/rasbook.html> and Richard Prince, *James*

the images from *Yes Rasta* have been used in Prince's work (e.g. the style of hair in the second and fourth figures), the two images are clearly distinct, with the former virtually unidentifiable in the latter. All of Prince's paintings are also massive in size, compared to Cariou's photographs included in his book *Yes Rasta*.

In *Prince* the Court of Appeal also conducted a formal analysis regarding the meaning of the work, as opposed to investigating the theory of Post-Modernism or artistic intention. This is perhaps because Prince made no claim to having any kind of intention stating that he doesn't "really have a message."[69] Though the lower court considered the artist's lack of concern for the 'message' or 'intent' in his work to be indicative of a lack of transformative use, the Court of Appeal overruled this, stating:[70]

> The fact that Prince did not provide those sorts of explanations in his deposition… is not dispositive. What is critical is how the work in question appears to the reasonable observer.

This seems coherent given that Prince's lack of intention is ostensibly in keeping with the way in which "contemporary artists often prefer to let the audience debate the multiplicity of meanings that may be attributed to a particular work of art that has recoded an earlier work."[71]

Brown Disco Ball, 2008, 255.3 x 392.4 cm, available at <http://www.gagosian.com/exhibitions/richard-prince--may-08-2014/exhibition-images>.

[69] *Cariou v Prince*, above n 6, at 707.
[70] *Cariou v Prince*, above n 6, at 707.
[71] David Tan "The Transformative Use Doctrine and Fair Dealing in Singapore" (2012) 24 *SAcLJ* 832 at [40].

However, under 17 U.S. Code § 107(1) (purpose and character of the use), artistic intention has been relevant in the past. [72] Dissenting judge Wallace J in *Prince*[73] also saw no reason to exclude the artist's intention from an analysis of transformative use. The defendant's lack of coherent intention in the recent case of *Morris*[74] was also considered under § 107(1). Although artistic intention may help to assist in the Court's analysis, the majority in *Prince* were correct in finding that the focus should be on the reasonable observer, as this is consistent with practices in contemporary art. One of the definitive facets of Post-Modernism has been the abandonment of the artist's monopoly on meaning, perhaps epitomised by Roland Barthes' 1967 essay *Death of the Author*, which contested the idea that "the author or artist is the arbiter of a work's meaning."[75] One of the best known examples of this approach is Andy Warhol – an artist notorious for refusing to posit the meaning of his works.

The courts should also consider the lineage of appropriation art, for example, through the paradigm of Post-Modernism. Because they refuse to do this, cases of overt appropriation will still not be sanctioned and thus copyright continues to conflict with the philosophy behind appropriation art. We see this in *Prince* where five of the secondary artist's images did not constitute transformative use. The judges acknowledged that there were significant differences between certain artworks, for example in *Graduation*.[76]

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[72] For example in *Blanch v Koons* 467 F 3d 244 (2nd Cir NY 2006) at 247.
[73] *Cariou v Prince*, above n 6, at 713.
[74] *Morris v Young* 925 F Supp 2d 1078 (CD Cal 2013).
[75] "So far as meaning is concerned… the author "dies" when the work is released to the public" Roland Barthes *The Death of the Author* 1967 as cited in Darren Hudson Hick "Appropriation and Transformation" (2013) 23 Fordham Intell. Prop. Media & Ent. L.J. 1155 at 1157.
[76] Richard Prince, *Graduation*, 2008, 185 x 133 cm (not fair use), available at <http://www.gagosian.com/exhibitions/richard-prince--may-08-2014/exhibition-images>.

> … [*Graduation*] is tinted blue, and the jungle background is in softer focus than in Cariou's original. Lozenges painted over the subject's eyes and mouth… make the subject appear anonymous, rather than as the strong individual who appears in the original. Along with the enlarged hands and electric guitar that Prince pasted onto his canvas, those alterations create the impression that the subject is not quite human. Cariou's photograph, on the other hand, presents a human being in his natural habitat, looking intently ahead. Where the photograph presents someone comfortably at home in nature, *Graduation* combines divergent elements to create a sense of discomfort.[77]

However, the judges could "not say with certainty at this point"[78] whether *Graduation* did amount to transformative use – as such, it was deemed not to be fair use.[79] This lack of certainty one way or another suggests a lack of clarity in this area of the law as a whole, also evidenced in the fact that there seems to be a very thin line between when a work is and is not transformative. Compare *Tales of Brave Ulysses* which was fair use[80] with *Graduation*[81] which was not, or *Back to the Garden*[82] which was fair use with *Charlie Company*[83] which was not – there does not appear to be a clear demarcation between them.

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[77] *Cariou v Prince*, above n 6, at 711

[78] *Cariou v Prince*, above n 6, at 711

[79] As the secondary user bears the onus of persuasion - fair use is an affirmative defence and the defendant has the burden of demonstrating it. This is established, for example, in *Campbell v Acuff-Rose Music*, above n 58, at 591

[80] See Richard Prince, *Tales of Brave Ulysses,* 2008, 335.3 x 213.4 cm, available at <http://artwelove.com/insights/archives/2009/02/11/news-roundup/>.

[81] Fn 76, above.

[82] Richard Prince, *Back to the Garden,* 2008, 203.2 x 304.8 cm, available at <http://www.gagosian.com/exhibitions/richard-prince--may-08-2014/exhibition-images>.

[83] Richard Prince, *Charlie Company*, 2008, 332.7 x 254cm, available at <http://blog.tcrobinsonlaw.com/wp-content/uploads/2014/02/charlie-company-2008.jpg>.

This could be ameliorated through considering the particular lineage of which the work is a part and how, given this lineage, it does re-contextualise and transform the original. For example, regarding *Prince* one could argue that Prince challenges the inherent colonialism in Cariou's work through his appropriation. Cariou, a white artist, has photographed in classical black and white format the culture of Rastafarianism. These images, as photographs, are authoritative and relate a narrative about the figures as 'natives', close to the earth, uncorrupted. However, in reality we do not know this culture and it is presumptuous for us to gaze upon it in this way, to presume that it is 'innocent'. Prince disrupts the narrative Cariou presents by corrupting these images, for example by including technological objects and thus challenging the culture/nature dichotomy that Cariou has implicitly set up. Questioning the kind of narratives that artists such as Cariou present in their work is a fundamental practice of Post-Modernism, which the courts no-where recognise in their judgments.

Despite the fact that courts do not consider appropriation art within its theoretical and historical contexts, and that the line between transformative and non-transformative works can be very fine, transformative use generally is expansive. The cases reveal that appropriation will only amount to infringement where the original imagery is *overtly* identifiable in the work. We see this in *Prince* as well as the case of *Friedman* where artist Thierry Guetta appropriated Glen Friedman's photograph of the band Run DMC[84] in four of his works. Two works ostensibly involved overt appropriation with little transformation – the banner[85] "which was made by hand-painting a projected altered reproduction [of] the photograph onto canvas"[86] and a stencil which was used to spray-paint the image on three canvases

[84] Glen E. Friedman, Photograph of Run DMC, 1985, available at <http://boingboing.net/2011/01/26/thierry-guetta-aka-m.html>.
[85] Thierry Guetta, "Banner Work", 2008, available at <http://boingboing.net/2011/01/26/thierry-guetta-aka-m.html>.
[86] *Friedman v Guetta*, above n 27, at 4.

with different backgrounds.[87] However, two of the images did involve at least some degree of transformation – the 'Old Photo' work[88] which combined the image with a scanned old-fashioned photograph of a 19th century couple, and 'Broken Records'[89] where the artist constructed the image through the use of broken vinyl records. While the judge's rejection of these works under the transformative use criterion appears problematic, the judge's decision was largely due to the fact that the figures from the original photograph were immediately recognisable in the appropriating works, with the figures making the same pose, wearing the same clothing and sporting the same facial expressions as in the original. Similarly, the commercial purposes of the work were also considered under § 107(1) - the photograph by Friedman is a pop culture image, and Guetta is an artist known for exploiting such images for commercial gain, rather than critical purposes. [90]

Thus, if there appears to be a patent lack of criticality in works, accompanied by a blatant exploitation of appropriated imagery, fair use is unlikely. Other cases which demonstrate that overtly identifiable imagery will likely amount to non-transformative use are *Morris* (regarding *Sex Pistols in Red*[91] where again the original subject-matter in

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87 *Friedman v Guetta*, above n 27, at 4.

88 Thierry Guetta, *Old Photo*, 2008, available at <http://boingboing.net/2011/01/26/thierry-guetta-aka-m.html>.

89 Thierry Guetta, *Broken Records*, 2008, available at <http://boingboing.net/2011/01/26/thierry-guetta-aka-m.html>.

90 This much is made clear in the film 'Exit Through the Gift Shop' by the artist Banksy, which documented Guetta's rise to fame. Guetta became successful largely as a result of his association with Banksy, who states "Warhol repeated iconic images until they became meaningless, but there was still something iconic about them. Thierry really makes them meaningless." Similarly, "I don't think Thierry played by the rules in some ways. But then, there aren't supposed to be any rules." Banksy "Exit Through the Gift Shop" (10 May 2013) Youtube <https://www.youtube.com/watch?v=K9rnyCyLFtE>.

91 Russell Young, *Sex Pistols in Red*, c.2005, available at <http://expresswrittendissent.com/2013/01/29/sid-johnny/>.

Sex Pistols at the Marquee Club[92] was too readily identifiable) and *Gaylord*. In the latter case, the Court of Federal Claims found that the work (a postage stamp, see below[93]) was transformative as it was made aesthetically distinct from the original sculpture[94] first by Alli's photograph[95] and then via further editing by the United States government.[96] However, the Court of Appeal disputed this. In their view, the postage stamp represented the clearly identifiable imagery of Gaylord's sculpture and did not reflect any new message or meaning, as "both the stamp and [the sculpture] share a common purpose: to honor veterans of the Korean War."[97] This reality was at least in part a reflection of the fact that the United States government were using the

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[92] Dennis Morris, *Sex Pistols at the Marquee Club*, 1977, available at <http://bureauofartsandculturesantabarbara.blogspot.co.nz/2014/03/the-beatnick-diaries-volume-one-by.html>.

[93] United States Postage Stamp featuring an image of Frank Gaylord's *The Column*, 2002, retrieved from *Gaylord v United States* 595 F 3d 1364 (Fed Cir 2010).

[94] Frank Gaylord, *The Column*, 1990, retrieved from *Gaylord v United States* 595 F 3d 1364 (Fed Cir 2010).

[95] John Alli, photograph of *The Column*, 1996, retrieved from *Gaylord v United States* 595 F 3d 1364 (Fed Cir 2010) .

[96] "Mr. Alli, through his photographic talents, transformed this expression and message, creating a surrealistic environment with snow and subdued lighting where the viewer is left unsure whether he is viewing a photograph of statues or actual human … The viewer experiences a feeling of stepping into the photograph, being in Korea with the soldiers, under the freezing conditions that many veterans experienced…. Mr Alli took hundreds of pictures of "The Column" before he achieved this expression, experimenting with angles, exposures, focal lengths, lighting conditions, as well as the time of year and day… Mr. Alli's efforts resulted in a work that has a new and different character than "The Column" and is thus a transformative work... The Postal Service further altered the expression of Mr. Gaylord's statues by making the color in the "Real Life" photo even grayer, creating a nearly monochromatic image. This adjustment enhanced the surrealistic expression ultimately seen in the Stamp by making it colder. Thus, the Postal Service further transformed the character and expression of "The Column" when creating the Stamp." *Gaylord v United States* 85 Fed Cl 59 (2008).

[97] *Gaylord v United States* 595 F 3d 1364 (Fed Cir 2010) at 1368.

postage stamp for a purely commercial purpose as compared to the criticism and commentary usually inherent in the work of artists.[98]

Thus, the second work must not only be formally distinct but must develop some further meaning than the original, with criticality and commentary rather than commerciality being inherent at its core. We see this, for example, in the work 'White Riot + Sex Pistols'[99] which was considered transformative in *Morris*. It was found that the distortion of the image through the inclusion of graffiti and the Union Pacific logo meant that it incorporated "images beyond the band itself and [arranged] them such that the composition may convey a new message, meaning or purpose beyond that of the [original]."[100]

In this way it appears that courts are trying to apply copyright in only the narrowest of cases and to avoid acting as the arbiters of the value of such works. However, although originality and artistic creativity are not explicitly requirements for fair use and fair dealing, in cases of artistic appropriation they will be integral to them in practice. Thus, in coming to these decisions, judges are determining the 'worth' of such works insomuch as they deem them to be transformative and thus new and original. Greater consideration of the lineage of appropriation art and Post-Modernism would again serve to ameliorate this.

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[98] "Works that make fair use of copyrighted material often transform the purpose or character of the work by incorporating it into a larger commentary or criticism. For example, in Blanch v. Koons, an artist incorporated a copyrighted photograph of a woman's feet adorned with glittery Gucci sandals into a collage "commenting on the 'commercial images . . . in our consumer culture.'"… Such transformation of a copyrighted work into a larger commentary or criticism fall squarely within the definition of fair use." At 1373, citing *Blanch v Koons*, above n 72, at 248.

[99] Russell Young, *White Riot + Sex Pistols*, c.2005, available at <http://expresswrittendissent.com/2013/01/29/sid-johnny/>.

[100] *Morris v Young,* above n 74, at 1088.

A Adopting 'Transformative Use' in Fair Dealing

Given that transformative use works so well in recognising the creative process and accounting for the more subtle forms of appropriation, it would make sense to adopt it within the fair dealing context – especially as many of the jurisdictions include a 'purpose' provision similar to § 107(1) in their respective legislation. That Australia considered adopting fair use, and Australia, Canada and (soon) the United Kingdom have extended fair dealing, suggests that these jurisdictions could be open to considering the transformative use approach. Various parties in Australia have already expressed their support for such a provision as they believe it would "encourage cultural production… [and] legitimise current artistic practices",[101] without unduly prejudicing the interests of copyright holders.

The Gowers Report in the United Kingdom supported adoption of this methodology in 2006.[102] Indeed, transformative use was once a part of the relatively liberal approach taken to fair dealing in the United Kingdom before the 1960s. In cases such as *Glyn v Weston Feature*[103] and *Joy Music v Sunday Pictorial Newspapers*,[104] emphasis was placed on the

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[101] Those in favour of a transformative use exception included Internet Industry Association, *Submission 253*; Pirate Party Australia, *Submission 223*; ARC Centre of Excellence for Creative Industries and Innovation, *Submission 208*; NSW Young Lawyers, *Submission 195*; R Wright, *Submission 167*; N Suzor, *Submission 172*; M Rimmer, *Submission 143*; K Bowrey, *Submission 94*" as cited in Australian Law Reform Commission "Copyright and the Digital Economy Discussion Paper" (DP 79, 2013) at fn 34 [10.32].

[102] "At present it would not be possible to create a copyright exception for transformative use (but see the discussion of parody below) as it is not one of the exceptions set out as permitted in the Information Society Directive [Article 5 of Directive 2001/29/EC]. However, the Review recommends that the Government seeks to amend the Directive to permit an exception along such lines to be adopted in the [United Kingdom]." Andrew Gowers, *Gowers Review of Intellectual Property* (HM Treasury, London, 2006) at [4.88].

[103] *Glyn v Weston Feature Film Company* 1915] 1 Ch 261.

[104] *Joy Music v Sunday Pictorial Newspapers (1920) Ltd* [1960] 2QB 60.

transformative nature of the use and whether the secondary artist had "bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result."[105] This approach was narrowed in the 1960s[106] where it was found that "[t]he sole test is whether the defendant's work has reproduced a substantial part of the plaintiff's copyright work." [107]

The expansion of fair dealing to allow for parody and satire means that, to some extent, appropriation art is already sanctioned. However, transformative use should also be recognised as it more adequately takes into account the theoretical underpinnings of creativity.

In regards to visual works, the Copyright Council of New Zealand offers guidelines as to how much a secondary artist can appropriate, stating:[108]

> Where an artist does not own copyright in an artistic work… they may still copy the work in making another artistic work, without infringing copyright, as long as the main design of the earlier work is not repeated or imitated. However, the artist is not permitted to commercialise the work.

These guidelines suggest that any appropriation art for commercial purposes is disallowed, which is highly restrictive in light of the appropriation cases in the United States litigation. One recent case

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105 *Glyn v Weston Feature Film Company,* above n 103, at [268].
106 E.g. in cases *Twentieth Century Fox Film Corp v Anglo-Amalgamated Film Distributors* [1965] 109 SJ 107 and the cases which followed it - *Schweppes Ltd v Wellingtons Ltd, Williamson Music Ltd v Pearson Partnership* [1984] FSR 210 (Ch) and *Williamson Music Ltd v Pearson Partnership Ltd* [1987] FSR 97(Ch).
107 *Schweppes Ltd v Wellingtons Ltd, Williamson Music Ltd v Pearson Partnership*, above n 106, at [212].
108 "Information Sheet Visual Artists and Copyright" (May 2007) Copyright Council of New Zealand <http://www.copyright.org.nz/viewInfosheet.php?sheet=341> at 3.

highlighting this is that of Wanganui artist Mark Rayner's 'Black Widow'.[109] This work was based on a photograph of Helen Milner in court during her trial for the murder of Phil Nisbet.[110] The artwork was entered in the Wallace Art Awards and came 49 of 524 works but is now potentially the subject of copyright infringement and could even be destroyed as a result.[111] Some parties considered this "a clear-cut case of copyright infringement."[112] Such sentiments were echoed by the New Zealand Herald which asserted that artists using its photographs must "ask for permission and consult on what they intended to use the work for."[113]

However, other parties disagreed, asserting the work was a legitimate "reinterpretation, and that is what art and artists do. If every artist was sued for re-interpretation, artists by the score would be found to be in breach of copyright."[114] Interestingly, the artist also noted the transformative nature of the work, averring that:[115]

> … the work was not trying to be an outright copy of a photograph but a reinterpretation of a well-circulated media image. "[I]t has been changed to such a degree that it makes it a completely new artwork in its own right. The original source

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[109] Martin Hunter of the New Zealand Herald, photograph of Helen Milner, 2013, available at <http://www.stuff.co.nz/national/crime/9537684/Mother-saw-Milner-as-spawn-of-Satan>.
[110] Mark Rayner, *Black Widow*, 2014, available at <http://www.stuff.co.nz/the-press/10490446/Black-widow-portrait-an-insult-to-victim>.
[111] Kurt Bayer "Image of killer queried by lawyer" *The Otago Daily Times* (Auckland, 13 September 2014).
[112] Above, quoting Intellectual Property litigation expert Kim McLeod.
[113] New Zealand Herald Editor-in-Chief Tim Murphy as quoted in Kurt Bayer and Anne-Marie MacDonald "Portrait Sparks Legal Wrangle" *Wanganui Chronicle* (online ed, Auckland, 17 September 2010).
[114] Above, quoting Bill Milbank, owner of WH Milbank Gallery and former director of the Sargeant Gallery.
[115] Bayer, above n 113.

> material has been manipulated, colour-changed and cropped and then reinterpreted as a large latch-hook rug.

Similarly divergent impressions were had in the case of artist Peter Vink reproducing in paint[116] a copyrighted photograph of artist Richard Sprangler.[117] One commentator asserted: [118]

> It [does] not matter what form the art took or how they were copied. If the paintings were identical or substantially similar to the photographs, Vink would be in breach of copyright if he didn't have permission from the original artist to reproduce it.

Although Sprangler believed copyright infringement did occur, he did not pursue an action "because of cost and [the fact that] at that time there didn't seem to be too many instances of copyright infringements being prosecuted successfully."[119] Conversely, other commentators believed that "Painting from photographs is acceptable practice - as soon as you paint from a photo [it] is your own interpretation therefore [there is] no copyright infringement."[120] These conflicting views suggest there is much uncertainty within New Zealand regarding visual works and copyright.

Although there are no cases in the fair dealing jurisdictions regarding copyright and appropriation art, there is still a fair deal of uncertainty as to how much material artists can use. A broadening of the defence

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116 Peter Vink, *Pohutukawa*, c.2005, available at <http://www.37south.com/stolenimage.html>.
117 Richard Spranger, *Pohutukawa Flowers*, 2005, available at <http://www.37south.com/stolenimage.html>.
118 Carmen Vietri, copyright expert from Copyright Licensing Ltd as quoted in Elizabeth Binning "Artist accused of copying photos" *The New Zealand Herald* (online ed, Auckland, 25 May 2005)
119 Email from Peter Vink to the author regarding the artist Peter Vink's appropriation of Sprangler's work (24 September 2014).
120 Binning, above n 118.

through incorporating transformative use would be beneficial to artists in that it would diminish the chilling effect and uncertainty regarding copyright generally. Philosophically, transformative use also goes to the heart of the creative process and has been shown in the United States to permit artistic works that previously would have been deemed to be infringing. The United States could act as a guide for the fair dealing jurisdictions in future cases, especially if they chose to adopt transformative use when analysing the purpose of the dealing. As Frankel states:[121]

> [Fair use is] of both salutary and practical importance in New Zealand. It is salutary because it emphasizes that the rights of copyright owners to prevent or charge for the reproduction of their work ought sometimes to be tempered to reflect the policy underlying the granting of the right. As there is a dearth of Commonwealth case law on the various fair dealing provisions, United States cases will often be a useful starting point.

IV Parody and Satire

Parody is the art of critiquing an original work through imitating that work. The artist uses aspects of the original in order to create a new work which must explicitly comment on the original. This is comparable to satire which involves a critique of or comment on society more generally – of which that original work is a part. Parody acts as a form of criticism or comment,[122] "[providing] social benefit,

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121 Frankel, above n 14, at 338.

122 As recognised in cases such as *Fisher* v *Dees* 794 F 2d 432 (CA9 1986) ("When Sonny Sniffs Glue," a parody of "When Sunny Gets Blue," is fair use); *Elsmere Music, Inc v National Broadcasting Co.* 623 F 2d 252 (CA2 1980) ("I Love Sodom," a "Saturday Night Live" television parody of "I Love New York," is fair use) and confirmed in the Supreme Court in *Campbell v Acuff-Rose Music*, above n 58.

by shedding light on an earlier work, and, in the process, creating a new one."[123] The same could be said of satire.

From a rights perspective, uses pertaining to criticism and commentary are justified in that they facilitate freedom of expression. The Canadian Supreme Court in *RJR Macdonald* stated that the principles on which the constitutional right of freedom of expression rest are "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process".[124] These principles are also inherent in the practice of creating artistic works and we should recognise and endorse the critical functions they entail. One way of doing this would be for fair dealing in New Zealand to include parody and satire, with criticality being inherent in both these practices.

A Parody and Satire in Fair Use

Fair use allows the use of works for the purposes of parody, even in cases where commercial value is to be gained[125] or even when this profit motive, as opposed to any creative purpose, is the sole motive for parodying the antecedent work.[126] In ascertaining the 'purpose and character of the use' under § 107(1), courts look at transformative use - "whether the new work merely supersedes the original work, or instead adds something new with a further purpose or of a different character".[127]

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123 *Campbell v Acuff-Rose Music*, above n 58, at 579.
124 *RJR Macdonald, Inc. v. Canada (Attorney General),* [1995] 3 SCR 199 at [72].
125 Recognised in common law cases such as *Campbell v Acuff-Rose Music*, above n 58.
126 As in *Eveready Battery Co. v Adolph Coors Co* 765 F Supp 440 (NDI11 1991) which involved a parody of the Eveready Battery 'Energizer Bunny' commercials for the purposes of a beer commercial.
127 *Brownmark Films v Comedy Partners* 682 F 3d 687 (7th Cir 2012) at [693] citing *Campbell v Acuff-Rose Music*, above n 58, at 576.

For example, when the artist Tom Forsythe created his 'Food Chain Barbie' photography series[128] depicting mutilated Barbie dolls being cooked as various dishes, Mattel were unable to succeed in copyright action against him on this ground. Barbie is a well-known symbol of American beauty, associated with glamour, wealth, and materialism generally (as evidenced by the various props and outfits that accompany the dolls). The court found that Forsythe:[129]

> … [turned] this image on its head… by displaying carefully positioned, nude and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations…. In other photographs, Forsythe conveys a sexualized perspective of Barbie by showing the nude doll in sexually suggestive contexts. It is not difficult to see the commentary that Forsythe intended or the harm that he perceived in Barbie's influence on gender roles and the position of women in society.

In this way Forsythe's works parodied everything that Barbie represents – he recognised the doll's associations (which the court called "ripe for social comment")[130] and these were integral to the meaning in his works.

Conversely, Jeff Koons' appropriation of Art Rogers' photograph 'Puppies'[131] in his sculpture 'String of Puppies'[132] was not considered a

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128 Tom Forsythe, *Fondue for Three*, 1997, available at <http://ec-dejavu.ru/b-2/barbie-12.html>.

129 *Mattel Inc. v Walking Mt. Prods.* 353 F 3d 792 (9th Cir 2003) at 802.

130 Above.

131 Art Rogers, *Puppies,* 1980. Available: <http://www.rifatsahiner.com/images/images/Art%20Rogers,%20Puppies,%201985.jp>

132 Jeff Koons, String of Puppies, 1998, 106.7 x 157.5 x 94 cm, retrieved from Glenwood at http://www.glenwoodnyc.com/manhattan-living/jeff-koons-whitney-musuem/.

sufficient parody as it did not explicitly comment on or critique the original. However, when placed side by side, Koons' work does seem to parody the original – a cheesy, kitsch photo made into an even cheesier sculpture through the use of colour, the insertion of daises and the blank stares of the figures. This is especially so in the context of the exhibition in which the work would feature, entitled 'Banality'. We can compare this to the facts in *Campbell* where 2 Live Crew's parody of Roy Orbison's 'Pretty Woman' "derisively demonstrates how bland and banal the Orbison song seems to them… [as] an anti-establishment rap group."[133] However, the court considered *Rogers* more of a satire of society generally than a parody. Some commentators considered this case "chilling"[134] in light of the nature of appropriation art.

In contrast parody could understandably not be found in *Steinberg*[135] where the producers of the movie 'Moscow' used an illustration by Saul Steinberg[136] in a promotional poster for the film.[137] Although such a use could potentially now come under transformative use, it was clearly not parody as the secondary work in no way engaged in a meaningful critique or comment on the original illustration – it "merely borrowed numerous elements from Steinberg to create an appealing advertisement to promote an unrelated commercial product, the movie."[138] This case is also an illustration of the way in which transformative use has changed analyses under fair use. Although the poster clearly does not parody the original, there would now be at least

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133 *Campbell v Acuff-Rose Music*, above n 58, at 582.
134 Susan Bielstein, Permissions (The University of Chicago Press, Chicago, 2006), above n 76, at 84.
135 *Steinberg v Columbia Pictures Industries, Inc.* 663 F Supp 706 (DNY 1987).
136 Saul Steinberg, *View of the World from 9th Avenue*, 1976, 22.9 x 30.5 cm available at <http://bhiscoxcmp.files.wordpress.com/2010/11/moscownewyork.jpg>.
137 Promotional poster for the film 'Moscow on the Hudson', 1984, 68.6 x 104.1 cm, available at <http://bhiscoxcmp.files.wordpress.com/2010/11/moscownewyork.jpg>.
138 At 715.

an argument for it being a transformative use, with the two using the same style but the former having changed much of the original and having included additional elements to create new meaning in the work. This new meaning was described as the "Muscovite protagonist's confusion in a new city"[139] as compared to the original which was "a humorous view of geography through the eyes of a New York city resident."[140]

Although parody may still be explicitly considered under fair use, transformative use under § 107(1) is a part of the analysis of parody and has also come to prevail in cases where the use of original material can be conceptualised more as satire or simply appropriation for creative purposes. For example, in *Blanch v Koons*. This case was the fourth one brought against Koons in regards to appropriation, involving the use of a fashion photograph taken for Gucci[141] in work by Koons.[142] The court considered Koons' use in this way:[143]

> By juxtaposing women's legs against a backdrop of food and landscape, [Koons] says, he intended to 'comment on the ways in which some of our most basic appetites -- for food, play, and sex -- are mediated by popular images.

Thus, the use of Blanch's photograph as an image from the mass-media was an essential aspect of the work. Such purposes were distinct from those of Blanch, who sought simply to eroticise the feet in the photograph. The court in this case found that the use was

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139 At 712.
140 "Summaries of Fair Use Cases" Stanford University Libraries <http://fairuse.stanford.edu/overview/fair-use/cases/#parody_cases>
141 Andrea Blanch, *Silk Sandals by Gucci*, 2000, available at <http://hyperallergic.com/23589/judging-appropriation-art/>.
142 Jeff Koons, *Niagara*, 2000, 304.8 x 426.7 cm, available at <http://www.guggenheim.org/new-york/collections/collection-online/artwork/10734>.
143 *Blanch v Koons*, above n 72, at 247.

transformative, as the two artists' objectives were so different in their use of the image.[144]

Generally, however, it will still be easier to find fair use in cases of explicit parody as opposed to satire. Such works by their very nature need to use a larger percentage of the original as compared to other uses "because [they] must ensure that the original is fully recognizable."[145] This is ameliorated in fair use by the recognition that the quantity of the work taken is a lesser factor in comparison to § 107(4) – whether the secondary work can be considered "a substitute for the original" within the marketplace.[146] In future cases, fair dealing could take the same approach. Generally, however, analyses under both parody and satire are necessarily qualitative affairs and will experience issues with ambiguity like any of the other uses under fair use and fair dealing.

B Parody and Satire in Fair Dealing

Both Canada and Australia have instituted a parody and satire exception.[147] The United Kingdom will also be instituting a fair dealing exception for 'parody, caricature and pastiche'[148] following the 2011 Hargreaves[149] and Gowers[150] Reports, after their findings of "concern

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144 The "sharply different objectives that Koons had in using, and Blanch had in creating, 'Silk Sandals' [confirmed] the transformative nature of the use." *Blanch v Koons*, above n 72, at 247.

145 Kim J Landsman "Does Cariou v Prince Represent the Apogee or Burn-Out of Transformative Use in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach" (2014) 24 Fordham Intell. Prop. Media & Ent. L. J. 321 at 362.

146 *Brownmark Films v Comedy Partners*, above n 127, at [693].

147 Via the Copyright Modernization Act SC 2012 c 20 and Copyright Amendment Act 2006 (Aus), respectively.

148 Rights in Performances (Quotation and Parody) Regulations 2014 (UK), reg 5.

149 "Implementing the Hargreaves Review" United Kingdom Intellectual Property Office.

that, at present, the [United Kingdom] exceptions, are too narrow and that this is stunting new creators from producing work and generating new value." [151]

Although there are no cases as of yet where we can see how these provisions would play out in these jurisdictions, their inclusion would likely allow for uses that were previously deemed infringement. Take the Canadian case of *Michelin* where a trade union parodied the logo of its employer – showing the Michelin cartoon logo crushing a worker underfoot. The case justified its finding of infringement on the basis of the idea/expression dichotomy and on the desire to protect private property. Regarding this latter point, the court refused to acknowledge the intangible nature of copyright and to treat it differently from other types of private property, despite the fact that the property in copyright is not a 'thing' but expression itself. Such findings undoubtedly hinder democratic speech - as the United Kingdom government has recognised in expanding its fair dealing, parodying a company's logo, slogan or brand is one of the most effective ways to "highlight questionable business practice."[152] However, the expansion of fair dealing to include parody likely means that such practices would now be allowed. Similarly, none of these jurisdictions define parody and satire, thus the United States case law will likely be helpful on both accounts in navigating these provisions into the future.

The inclusion of satire alongside parody in Australia and Canada also recognises that the line between the two is very fine. For example, in *Campbell*, the artists argued that their work was a parody of Roy Orbison's song 'Pretty Woman', as their version "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones

<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/types/hargreaves.htm >.
[150] Gowers, above n 102, at [4.90].
[151] Gowers, above n 102, at [4.68].
[152] (29 July 2014) GPBD HL 1556.

[to show] how bland and banal the Orbison song [is]".[153] However, it is at least arguable that the secondary work engaged in a broader criticism, specifically of "American values in a song that presented the reality of street life in urban America".[154] The same can be said of *Rogers v Koons* where it was again at least feasible that Koons' work could have been considered a parody, although the court considered it satire.

Prior to the inception of transformative use, the courts in the United States had found that the appropriated work "must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work."[155] However, the use of an original in a secondary work can also be integral in making it effective satire. It is this very 'conjuring up of the original' which enables a work to comment effectively on society generally. We see this logic play out in *Blanch v Koons*, with Koons' work 'Niagara' which the courts found "may be better characterized… as satire – its message appears to target the genre of which 'Silk Sandals' is typical, rather than the individual photograph itself."[156] Australia and Canada account for this reality in including satire in their exceptions; the United Kingdom and New Zealand do not.

In New Zealand we have the standard fair dealing provisions in our Copyright Act: however, we have yet to include a provision relating to parody or satire, even though public support for such a provision has been as high as 87%.[157] Such a provision is supported by the Creative

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153 *Campbell v Acuff-Rose Music*, above n 58, at 573.
154 Frankel, above n 14, at 355.
155 *Rogers v Koons,* above n 29, at 310.
156 *Blanch v Koons*, above n 72, at 247.
157 Louisa Hearn, "The Downfall of Hitler's YouTube parody," *Stuff* (online ed, accessed 10 August 2011). As cited in Bronwyn Holloway-Smith "Illegal Art: Considering our Culture of Copying" (2012) 15 Junctures 19, at 22.

Freedom Foundation in New Zealand[158] and there are cases where it could have been applied in the past, had the plaintiffs not dropped the case so as to avoid any more negative publicity. For example, in the Telecon parody of 2006, where a video on youtube was released parodying a Telecom commercial in response to a CEO's comments that they use "confusion as their chief marketing strategy".[159] Secondly, in 2009, Should-A.com created a poster using imagery from the Election Office in New Zealand to parody the referendum question released that year, regarding smacking.[160] Of course, both parties could simply have represented their concerns and criticism via other means, e.g. the written word. However, in the case of Should-A.com, for example, this visual appropriation of "the official referendum graphics made for a more successful and effective artwork that empowered the public to comment on the referendum in a clear and easy to understand manner."[161]

Alternatively, there is the potential for New Zealand and the United Kingdom to bring parody under the general fair dealing exception for purposes of 'criticism, review and reporting'. Sumpter asserts that "[t]here is no reason in principle why, if the tests under s 42 are satisfied, a work of parody could not qualify for the defence."[162] However, such application would undoubtedly be very narrow, as in the Australian case of *Network Ten v. Channel Nine*[163] where it was found that the parody had to involve a *de minimis* taking. So too, it would likely only apply to parodies that are critical of the original, and not to satire generally.

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158 "Parody and Satire" Creative Freedom NZ <http://creativefreedom.org.nz/goals/parody-and-satire/>.
159 Holloway-Smith, above n 155, at 19.
160 Holloway-Smith, above n 155, at 20-21.
161 Holloway-Smith, above n 155, at 20.
162 Paul Sumpter, *Intellectual Property Law: Principles in Practice* (2nd ed, CCH, Auckland, 2013), at 120.
163 *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* [2001] 108 FCR 235 at 288-289.

V Conclusion

The Fine Arts are a crucial source of creativity and criticality in our society. Their scope and direction have changed dramatically over the last century, necessitating the overt appropriation of original works in a questioning of established colonial, patriarchal and capitalist frameworks, as well as concepts such as 'originality' and the market value attached to art generally. Not being able to overtly appropriate source material would for many in the art world be anathema to the creativity and criticality inherent in art. This has naturally led to a clash with copyright, a system ostensibly concerned with property ownership. The fair dealing and fair use provisions help us to navigate the interaction between these two fields, particularly as they pertain to values fundamental to both, such as creativity and freedom of expression. They also recognise and reinforce the fact that copyright is not concerned with exclusive possession but is rather a limited monopoly on works so as to incentivise their production. This is especially important in an increasingly expansive system of copyright.

Both fair use and fair dealing face difficulties when it comes to navigating the terrain of art, particularly in cases of overt appropriation. As evidenced by the fair use cases, as long as visual art works are considered within the paradigm of copyright there will remain a tension between the two – especially given that copyright law fails to consider the specific lineage of appropriation art. Nonetheless, courts in the United States have become much more liberal in their application of the doctrine. This is evidenced, for example, in the adoption of 'transformative use' which explicitly recognises the nature of the creative process. Similarly, the courts should continue not to prioritise the intention of the artist (as in *Prince*) and should also consider examining works and their meanings via the lens of Post-Modernism. If the courts are considering not only change in form but the change in *meaning* of secondary works, such considerations seem highly applicable to their analyses.

However, overall the courts seem to be applying copyright to the Fine Arts in only the most obvious or borderline of cases – where imagery is overtly identifiable and the artist is appropriating it for highly commercial purposes. This case law and its application of the fair use factors – which are very similar to those under fair dealing – may serve to be very helpful if the fair dealing jurisdictions encounter cases pertaining to artistic works in the future.

Despite the fact that there is little to no common law in the various fair dealing jurisdictions pertaining to artistic works, expansive copyright laws do impact on artistic practice. Thus, liberal fair dealing provisions which recognise transformative use, and uses such as parody and satire should be adopted, as this would send a signal to artists and copyright holders that at least some degree of appropriation is legitimate in artistic works. As a result of expanding the uses to which it can apply and the manner in which it is conceptualised, the ambit of fair dealing has already widened over the past decade, particularly in Canada with its emphasis on users' rights and liberal interpretation of the doctrine. This already suggests a shift away from or at least a reconsideration of an entrenched system of copyright. New Zealand, however, is the exception to this development - yet it is clear such provisions *are* necessary given the uncertainty which attends the application of the fair dealing provisions to artistic works in this country. This is also evidenced by the review of our copyright legislation which will soon be taking place as a result of similar reviews in the United Kingdom and Australia, as well as "public perception that New Zealand consumers suffer from a lack of access to copyright content and flexibility to use this content how they wish in the digital environment."[164]

New Zealand should adopt both parody and satire, as this would obviate the problems associated in distinguishing between them and allow for a greater variety of critiques in artistic works, as opposed to

[164] Cabinet Paper, above n 28, at [3].

only allowing criticism in the very narrow circumstances of parody. Were New Zealand to follow the lead of countries such as Canada, Australia and the United Kingdom, fair dealing would better contribute to artists feeling able to create, uninhibited by excessive copyright restrictions. This would not only help to facilitate a culture of creativity and critical thinking, but a more meaningful copyright balance. Adopting the criterion of 'transformative use' would also assist in this – but is less likely given that the other fair dealing countries have not adopted it, and because fair dealing is generally interpreted more strictly than fair use.

In a society which values criticality, creativity, freedom of speech, the pursuit of knowledge and education generally, fair dealing has the potential to play a crucial role in maximising the public good. Although New Zealand will only be examining the Copyright Act after the Trans-Pacific Partnership Agreement, an analysis of the fair dealing provisions should be conducted and a widening of the defence implemented, especially in light of what will likely be more expansive copyright measures instituted via these international negotiations.

NAVIGATING NEW ZEALAND'S DIGITAL FUTURE: CODING OUR WAY TO PRIVACY IN THE AGE OF ANALYTICS

MAHONEY TURNBULL*

This article was chosen as first equal for best article by the Editor-in-Chief and the Academic Review Board.

I Introduction

We are now in the midst of a data revolution and New Zealand's digital future is uncertain. The data path we are steering towards is taking us into new cyber territory and is challenging fundamental concepts in privacy and data protection law. In this new digital terrain, big data represents a highly valuable reserve of personal information ripe for the picking. It is 'the new oil',[165] and the digital space that this sought-after commodity operates in is highly unregulated and open to exploitation. New Zealand's position on the extraction of this critical resource will be indicative of our commitment to enabling protected use of shared data to deliver a prosperous society. New Zealand's policy is suffering a critical regulatory disconnect, with technology fast outstripping the legislation that exists in the data protection domain. This dissertation addresses the question of how New Zealand's data stewardship should be governed, with a view to proposing how personal data management could benefit from clear national guidelines.

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[165] Bruce Schneier, Chief Security Technology Officer, British Telecom "Privacy in the Age of Big Data" (speech presented to the New Zealand Privacy Forum, Wellington, May 2012) available at <https://www.youtube.com/watch?v=L_UIdkbp3xo>.

Part II provides context to the burgeoning industry surrounding big data and the role that it now plays in the ever-evolving digital economy. First, I consider the ecosystem in which big data lives, and the positive outcomes from strategic use and reuse of the wealth of data available. This is balanced by an examination of the more disturbing uses of data that have the potential to cause devastating data 'oil spills' and privacy scares. Following on from the contextual analysis, Part III outlines New Zealand's current legal framework, and whether our data protection architecture can truly claim 'adequate' status. This will focus on the key features of the Privacy Act 1993 that arguably place New Zealand's data protection future in good stead. In contrast, this section will also elucidate the technical inconsistencies that have emerged, and make the Act outmoded. Expanding upon the evolving genre of what constitutes personally identifiable information, this analysis will probe into the current de-identification techniques and the shift towards personally 'predictable' information; both trends that challenge the efficacy and endurance of the Privacy Act. Furthermore, it will highlight the need to progress towards more relevant legal tools, to oversee responsible data disclosure behaviour.

Picking up on this concern, Part IV explores the regulatory remedy that New Zealand could pursue in order to create progressive mechanisms that enable a coherent data management framework. By analysing examples of Standards Authorities and recent legislative changes, this section lays out the potential scope of the proposed Data Standards Authority, and the administrative features that would need to be addressed in forming this body.

The final part elucidates the principles that ought to govern the Data Standards Authority. It offers concrete suggestions for two overarching principles that may serve as valuable touchstones for the resulting data standards that would be contained within industry-specific codes. The initial focus will be the Privacy by Design principle, involving clarification of de-identification protocols that reflect the importance of technological systems in tackling the legal issues at stake. The second

principle will address the core problem of data empowerment, and offer three ways in which consent can be enhanced, through informed and live consent. My proposal promotes a paradigm shift in privacy policies towards the idea of user-centricity, and the creation of consumer friendly privacy settings. It encourages a reshaping of the rules of engagement to secure a more responsive data ecosystem that can unlock the value of data within a more digitally relevant legislative landscape.

II The Seed from which Data Grew

This part establishes the potential benefits and risks that have arisen from the big data industry. It will shed light on the nature of the data ecosystem and the value that lies in effective use of personal data sets. It also lays out the inherent risks associated with this unregulated industry, which has the power to generate privacy breaches through adverse and discriminatory profiling. Exposing the harms that flow from data misuse, this part will underline the importance of effective data regulation, for New Zealand to maximise the value from granular analysis of people, behavioural patterns, and the environment.

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It is hard to imagine the world without the internet. A world without data and the ubiquitous connectivity that we as digital natives feel empowered to engage with. Our digital habitat is one where neither borders nor language appear as barriers to communication.[166] It is within this environment that we are witnessing the dawn of the data-driven era. A big data tsunami has risen, and is prompting a new industrial revolution driven by analytics, computation and automation.

[166] Ronald Deibert and Rafal Rohozinski "Beyond Denial" in Ronald Deibert, John Palfrey, Rafal Rohozinski, and Jonathan Zittrain (eds) Access Controlled, The Shaping of Power, Rights, and Rule in Cyberspace (Cambridge, MIT Press, 2010) at 9.
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The tracking of human activities, industrial processes and research is all leading to data collection and processing of an unprecedented scale, spurring new products and services as well as business opportunities and scientific discoveries.[167]

The term, 'Big data', refers to datasets beyond the scale of a typical database, which are held and analysed using computer algorithms.[168] It is the 'non-trivial extraction of implicit, previously unknown and potentially useful information from data'. [169] In essence, the concept of big data combines more data, faster computers and novel analytics which organisations, government and businesses use to extract both

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[167] European Commission *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Region: Towards a Thriving Data Driven Economy* (Brussels, July 2014) available at <http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=6216> at 2; Cisco, Cisco Visual Networking Index: Global Mobile Data Traffic forecast Update, 2012–2017 (Cisco, 2013) available at <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/white_paper_c11-520862.pdf>. The number of mobile connected devices has now exceeded the number of people on the planet. By 2020 an estimated 50 billion devices will be wirelessly connected.

[168] European Commission *Privacy and Competitiveness in the Age of Big Data* (Brussels, April 2014) available at <http://www.insideprivacy.com/international/european-union/the-new-edps-opinion-privacy-and-competitiveness-in-the-age-of-big-data/> at 6; McKinsey Global Institute *Big Data: The New Frontier for Innovation, Competition and Productivity* (1 May 2011) available at <http://www.mckinsey.com/client_service/telecommunications/latest_thinking> at 2; Wei Fan and Albert Bifet "Mining Big Data: Current Status, and Forecast to the Future" (2012) 14 ACM at 9. This references the first time the term 'big data' appeared in a 1998 Silicon Graphics slide deck by John Mashey.

[169] Usama Fayyad and others (eds) *Advances in Knowledge Discovery and Data Mining* (MIT Press, Cambridge, 1996) at 37 as cited in Tal Zarsky "Mine your own! Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion" (2003) 5 Yale J L & Tech 2 at 6, n 13.

hidden information and surprising correlations.[170] The newly discovered information that results is not only unpredictable but also results from a fairly opaque process.[171]

As its name implies, the hallmark of big data is its quantitative greatness. In juxtaposition to the gains made from shrinking scope in the field of nanotechnology, big data gains its force from its sheer magnitude.[172] Now estimated to be in the order of zettabytes,[173] the phenomenal production of data coupled with escalating storage capacity is enabling collection and sharing of information at unprecedented levels.[174] Although in the analogue age this kind of storage was costly and time-consuming, the current trend of 'datafication' and cloud-based servers is enabling rapid shifts. This change of scale has led to a change of state, and the quantitative growth is now prompting a qualitative one.[175]

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[170] Ira Rubenstein "Big Data - The End of Privacy or a New Beginning?" (2013) 3(2) International Data Privacy Law 74 at 1; Viktor Mayer-Schönberger and Kenneth Cukier *Big Data: A Revolution That Will Transform the Way We Live, Work and Think* (1st ed, Eamon Dolan, New York, 2013) at 7. Society will need to shed some of its obsession for causality in exchange for simple correlations.
[171] Tal Zarsky "Desperately Seeking Solutions: Using Implementation-Based Solutions for the Troubles of Information Privacy in the Age of Data Mining and the Internet Society" (2004) 56 (13) Me L Rev at 13.
[172] At 10.
[173] A zettabyte is equivalent to one sextillion bytes, or two to the seventieth power.
[174] Julie Brill, Federal Trade Commissioner "Reclaim your name" (speech presented at NYU Sloan Lecture Series: Privacy in the World of Big Data, NYU, October 2013) available at <http://engineering.nyu.edu/sloanseries/reclaim-your-name.php>.
[175] Mayer-Schönberger and Cukier, above n 6, at 5–10. The fact that 90 per cent of the world's data was only generated in the last two years, with this figure doubling every two years from now on, indicates the overwhelming pace at which big data is growing, as a wholly regenerative resource. If all the data today was placed on CDs and stacked up, it would stretch to the moon in more than five separate piles.

Compounding this issue is the Internet of Things (IoT).[176] This phenomenon reflects the 'machine-plus-human' hybrids that life in the digital age is making more mainstream.[177] Our lives are digitally disassembled, disaggregated and dispersed into a multitude of digital domains.[178] Within this space, we are seeing the rise of connected devices, which will push data accumulation to unparalleled levels.[179] The increasing number of people, devices, and radars that are now connected by digital networks has revolutionised the ability to generate, access and share data.[180] Mobile devices are not the only sensory gateway, as embedded technologies that are passively collecting data pervade the marketplace.[181] This trail of digital breadcrumbs, via the world of ambient intelligence, is creating an immense data ocean[182] in

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176 Mireille Hildebrandt "Who is Profiling Who?" in Gutwirth and others (eds) Reinventing Data Protection (Springer, Amsterdam, 2009) at 239.

177 Lisa Gitelman (ed) Raw Data is an Oxymoron (MIT Press, Cambridge, 2013) at 10.

178 Deibert, above n 2, at 9. In this sense, cyberspace is not such a distinct realm as it is the very environment in which we inhabit.

179 Larry Hardesty "Algorithm recovers speech from vibrations of potato-chip bag filmed through soundproof glass" (August 4, 2014) Phys.org <http://phys.org/news/2014-08-algorithm-recovers-speech-vibrations-potato-chip.html>. The emerging possibilities in gathering data on physical assets could also generate a new level of data signals. MIT researchers are now reconstructing audio signals by analysing vibrations of objects.

180 Jules Polonetsky and Omer Tene "Big Data for All: Privacy and User Control in the Age of Analytics" (2013) 11 Nw J Tech & Intell Prop 11 (5) 239 at 241.

181 Rubenstein, above at n 6, at 77. By 2020 the majority of data will be collected passively and automatically: Drew Olanoff, "Google wants to serve you ads based on the background noise on your phone calls" (21 March 2014) The Next Web <http://thenextweb.com/google/2012/03/21/google-wants-to-serve-you-ads-based-on-the-background-noise-of-your-phone-calls/>. To this end, Google has already patented targeted ads that listen to the background noise in your phone call to deliver targeted advertising.

182 Email from Mia Garlick, Head of Policy, Facebook Australia and New Zealand to Mahoney Turnbull regarding data governance structures (8 August 2014).

which the race to create new algorithms is pulling us in diverging directions.[183]

Whilst this data, hailed as the 'new oil', may be ripe for mining, it also poses considerable risks. Privacy expert Bruce Schneier has been a strong advocate of the data pollution problem reflecting our tendency to storm into a digital era whilst naively overlooking the deluge of data.[184] True to Moore's law,[185] a new landscape of data accumulation has emerged[186] giving rise to the infinite 'digital tattoo'.[187]

The business model of the digital ecosystem[188] is geared towards our commodification. In this sense, the users are the "products not the customers", and are responsible for generating the value as well as the by-product.[189] It is becoming clearer that big data poses significant challenges to the sanctity of the individual.[190] The data dependency is an inequitable one in which data assets are subject to market distortion which inhibits users from gaining true value for their data.[191] To facilitate this undemocratic process, a culture is developing in which

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183 Fan and Bifet, above n 4, at 1.
184 Schneier, above n 1.
185 Moore's law dictates how overall processing power for computing will double every two years. True to this phenomenon, there has been simultaneous reduction in storage costs and increase in data production.
186 OECD *Thirty Years After: The OECD Privacy Guidelines* (OECD, 2011) available at <http://www.oecd.org/sti/ieconomy/49710223.pdfAddress> at 8.
187 Juan Enriquez "How to think about digital tattoos" (podcast, December 2012) TedTalks <https://www.ted.com/talks/juan_enriquez_how_to_think_about_digital_tattoos>.
188 Andrew McAfee "Big Data: The Management Revolution" *Harvard Business Review* (online ed, Boston, December 2012).
189 Sive Vaidhyanathan *The Googlization of Everything (And Why We Should Worry)* (University of California Press, Berkeley, 2011) at 111. The data users not only provide the raw materials to determine and deliver relevant search ads, but are used to train its search algorithms to develop new data intensive services.
190 Mayer-Schönberger and Cukier, above n 6, at 17.
191 Schneier, at 21.

socio-technical systems are expertly configured to obscure privacy features. The veil that can be pulled over user's eyes promotes a sense of the unknown, to the extent that individuals are now signing over their children for access to desirable online platforms.[192] The issue of consent, or lack thereof, is addressed in part V.

The purchasing power of data has been hailed as a disruptive force to the current business model. The 'freemium'[193] model is a contentious element of the big data sensation, and highlights the core reliance on accessible data extraction to enable the data monetisation machine to run smoothly. Firms will not realistically provide free services for free unless doing so enhances their data harvest through valuable sets of personal data points.[194] This industry certainly has the potential to develop anti-competitive behaviour with data brokers mediating the trade in data and overseeing the increasing digital servitude.[195] The bewildering acceptance of the emptiness of 'free services' seems to

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[192] Tom Fox-Brewster "Londoners give up eldest children in public Wi-Fi security horror show" (29 September 2014) *The Guardian* <http://www.theguardian.com/technology/2014/sep/29/londoners-wi-fi-security-herod-clause>.

[193] The 'freemium' business model is one in which the company gives away the core product for free to the majority of users and sells premium products to a smaller fraction of this user base.

[194] Viviane Reding, Vice Commissioner European Commission "Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age" (speech presented to the Digital Age Innovation Conference, DLD Munich, January 2012) available at <http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm>.

[195] European Commission, above n 4, at 10. Data brokers collect personal information about consumers and sell that information to other organisations using a variety of public and non-public sources including website cookies, and loyalty card programs to create profiles of individuals for marketing and other purposes; Alexandra Suich "Special Report Advertising and Technology: Getting to Know You" *The Economist* (13 September 2014) at 5. Data broking firms may specialize in selling certain segments, such as eXelate, sells "men in trouble", whereas the IXI firm specialize in the "burdened by debt" segment.

indicate online platforms may well be as powerful a narcotic as the Soma was in Huxley's 'Brave New World'.[196]

It is against this backdrop of data wealth that we are witnessing a global call to embrace the digital data renaissance.[197] Industries are moving towards data-driven systems[198] with personal information now operating as the currency of the digital economy, which is growing at unprecedented levels. This is no ordinary asset, but one that can offer a steady stream of innovation and new services to those with the humility, willingness and the tools to listen.[199]

Yet in the face of this compelling movement, the New Zealand economy has shown a considerable lag in embracing the data revolution and could also be criticised for lacking sufficient R&D on data. Combined with a shortage of data experts, there is a definite lack of industrial capability when compared to countries like the United States. New Zealand should consider a similar approach to the UK, which announced the establishment of a world-class research centre for big data science in this year's budget.[200] Indeed new opportunities exist in a number of sectors where the application of these methods is still in its infancy and global dominant players have not yet emerged. New

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196 Aldous Huxley *Brave New World* (Harper Collins, New York, 2000); Alessandro Acquisiti "Why Privacy Matters" (podcast, October 18 2013) TEDtalks <http://www.ted.com/talks/alessandro_acquisti_why_privacy_matters>. These online 'free to download' games may expand our digital freedom, yet also carry the price of privacy invasion and exploitation.

197 Ian Fletcher, Director Government Communications Security Bureau "Privacy and Security: Identity, society and the state in the internet age" (speech at NZ Privacy Forum Week, Wellington, 7 May 2014) at 2.

198 Schneier, above n 1.

199 Mayer-Schönberger and Cukier, above n 6, at 5.

200 Department for Business Innovation and Skills "Plans for World Class Research Centre in the UK" (United Kingdom Government, 19 March 2014) available at <https://www.gov.uk/government/news/plans-for-world-class-research-centre-in-the-uk>.

Zealand has the chance to capitalise on this gap and ensure that a robust regulatory framework is created. Treating data as a strategic asset that benefits from clear governance machinery and legal protections will ensure that the data-use ecosystem can move with the pace of this industry.

A The 'Big' Benefits of Big Data

> *"The ability to see the details of the market, of political revolutions, and be able to predict and control them is definitely a case of Promethean fire – it could be used for good or for ill, and so Big Data brings us to interesting times. We're going to end up reinventing what it means to be a human society".*[201]

Whilst a lot of criticism has been levelled at the wave of big data flooding our digital environment, there is no doubt that the "dual use"[202] of big data can be readily harnessed to serve the public good in a multitude of ways. The increasing synonymy of big data with data analysis, which is the lynchpin of modern science, considerably constrains any argument against its fundamental value.[203] It is the new 'final frontier' for scientific data research and we seem to be at the beginning of a new era in which we are unearthing novel knowledge.[204] Big data will yield important benefits, whether applied to medicines, climate, food safety or geo-spatial mapping.[205] Moreover, in the

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[201] New Zealand Data Futures Forum (NZDFF) *Full Discussion Paper* (New Zealand, 2014) available at <https://www.nzdatafutures.org.nz/sites/default/files/first-discussion-paper_0.pdf> at 10.

[202] Executive Office of the President *Podesta Report: Big Data: Seizing Opportunities, Preserving Values* (Washington, 1 May 2014) available at <http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf> at 56. This refers to the "dual use" of data, as the contextual use can either be beneficial or harmful.

[203] At 340.

[204] Fan and Bifet, above n 4, at 4.

[205] Paul Ohm "The Underwhelming Benefits of Big Data" (2013) 161 U PA L Rev Online 339 at 339; Jan Eliasson, Deputy Security General "Remarks on a

commercial sphere, global studies show that it can create 'significant value for the world economy, enhancing the productivity and competitiveness, and creating substantial economic surplus for consumers."[206] The gains to be had from big data are certainly big, and have the power to generate new, life-enhancing outcomes.

Big data offers the capacity to unleash a wave of innovation through the 'featurization' of data.[207] As big data pioneer Sandy Pentland as noted, big data has the power to bring to light information about people's behaviour.[208] The most valuable class of big data does not originate from Facebook posts or RFID's for instance, but from the behaviour-based digital footprints like location data, credit card data and quantified-self data. Importantly, this data manages to operate free from the self-editing that underpins personal posts, on platforms like Facebook. Extrapolating certain behaviours derived from evidence not explicitly in the data enables a powerful flow-on effect of comparable analytics. Companies are no longer confined to averages, but have in their possession data that is opening up astounding changes in the granularity[209] of individual analysis.[210]

Data Revolution for Sustainable Development" (Speech presented to the United Nations Independent Expert Advisory Group for Big Data, 24 September 2014) available at <http://www.undatarevolution.org/2014/09/26/deputy-secretary-generals-data-revolution/>.

[206] McKinsey, above n 4, at 1–2.

[207] Tene and Polonetsky, above n 16, at 242. The 'featurization' refers to user-side applications and services based on access to personally identifiable information.

[208] NZDFF, above n 37, at 10.

[209] The 'granularity' of data refers to the customised breakdown of personal data sets that offers greater insights into an individual's behaviour patterns.

[210] NZDFF, above n 37, at 10.

The connecting force of big data offers "super wicked"[211] correlations between behaviours and outcomes. There are distinct advantages when compared to traditional forms of web science analysis, particularly when examining financial bubbles and recessions.[212] Recent research from Warwick and Boston Universities has produced fresh evidence of methods identifying search terms that precede stock market crashes.[213] The real value also lies in these predictive modelling techniques being applicable to other commercial factors, which could signal a new modus operandi for the financial industry.

The inherent human component of big data also enables the analysis to assume a more holistic form of knowledge discovery. For the public sector, 'smart data' can lead to stronger policymaking decisions by providing sophisticated evidentiary bases.[214] Smart data can then be used in real time to monitor the efficacy of policy decisions and allows for adjustments, which can make solutions even more effective.

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[211] Jonathan Boston "A New Global Climate Change Treaty – Can Humanity Deliver? Our Challenge after Durban for 2015" (paper presented at University of Otago, Dunedin, 14 March 2012) at 4. "A super-wicked problem has the following characteristics: the policy is complex and controversial, with competing problem definitions; all the available solutions are problematic; delay is costly; those most responsible for the problem have the least incentive to solve it' and the central control or enforcement mechanisms are weak".

[212] NZDFF, at 11.

[213] Alice Truoing, "How Google searches can predict the next stock market crash" (24 July 2014) Fast Tech Company <http://www.fastcompany.com/3033661/fast-feed/how-google-searches-can-predict-the-next-stock-market-crash>. By correlating the most valuable information in search engine data that have less obvious semantic connections to events, the potential exists for historic links to be gauged, and future falls anticipated.

[214] Spark "Submission to the New Zealand Data Futures Forum" (Wellington, July 2014). Spark chooses to use the term 'smart data' rather than big data. Smart data can provide deep analysis of a problem, help identify root causes to a problem and find correlations with other data. The use of this term emphasizes the latent value inherent in data sources, and also avoids the negative connotations of the harms connected to big data.

Harnessing big data for development is another strategic outcome. Humanitarian-orientated 'Born Digital' projects are indicating the transformative impact of data through real-time feedback and early warning capabilities.[215] Catalyst projects such as 'Global Pulse' and UN work in Asia, attest to the power of detecting emerging vulnerabilities.[216] Looking at its use in the developed world, the number of lives 'saved' by a Stanford professor pursuing data mining techniques and novel signal-detection algorithms, reinforces the significant gains in healthcare that can flow from big data.[217]

The economic benefits from geospatial data are equally optimistic. The flood of fresh sensing data, combined with 'smart grid' functionality is signalling a new era of 'sensing cities' as seen in the context of Christchurch.[218] Access to mobility data to track population trending patterns could help spur constructive outcomes in terms of Auckland's housing developments issues.[219] The working relationship between Auckland Council and citizens to enable strategic assessment of growth capacity is just the beginning of new data-driven methodologies for dynamic public engagement.

B The 'Big' Concerns of Big Data: The Era of Predictive Analytics

Big data poses serious privacy concerns that could stir a regulatory backlash, stifle innovation and dampen the data economy. The risks we

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215 Price Waterhouse Coopers *PWC Big Data: big Benefits and imperilled Privacy* (United States, June 2014) at 5.
216 Fan and Bifet, above n 4, at 2.
217 Tene and Polonetsky, above n 16, at 246. This data study showed the adverse effects of a diabetic drug by exposing the correlation of 27,000 cardiac arrests from using the drug. This led to the drug's withdrawal from the market.
218 Sensing Cities "Project to Create Sensing Cities Launches in Christchurch" (4 September 2014) Sensing City <http://www.sensingcity.org/stay-informed/project-to-create-%E2%80%98sensing-cities%E2%80%99-launches-in-christchurch>.
219 Interview with Cyrus Facciano, General Manager of Qrious (Mahoney Turnbull, 25 July 2014).

are seeing emerge have the potential to override the value to be gained from smart data.[220] Thus, stronger data protection and data management must be engineered. New Zealand's legal mechanisms that deal with privacy and data protection should be re-examined and refreshed to cope with the negatives of predictive analytics.

The prime cause for anxiety stems from how individuals can be profiled and targeted.[221] This poses a serious threat to data subjects being able to exercise inherent freedoms safeguarded in the New Zealand Bill of Rights, namely Freedom of Expression and Freedom of Thought, Conscience and Religion.[222] In the context of big data, this manifests in the restrictions on an individual's capacity to act with agency and consume online information without being subject to unjustifiable manipulation. The issue here is not aggregation, but rather disaggregation of personal insights that can be brokered and used against the individual.[223] There is no shortage of evidence for the ability of analysts to proactively anticipate, persuade and manipulate individuals and markets.[224] The criticisms directed at companies who "vampirically feed of our identities" should not be taken lightly, and highlights the looming 'dataveillance' that is casting big data in a darker light.[225] The most recent White House Report has reinforced this

[220] Jan Eliasson, above n 41.
[221] Rubenstein, above n 6, at 24; Ryan Calo "Digital Market Manipulation" Geo Wash L Rev (2014) (forthcoming).
[222] New Zealand Bill of Rights Act 1990, ss 13–14.
[223] Fletcher, above n 33.
[224] World Economic Forum *Rethinking Personal Data* (Geneva, May 2014) available at <http://reports.weforum.org/rethinking-personal-data/> at 24.
[225] Gitelman, above n 13, at 10. Surveillance in the context of big data is an expansive term, and not just limited to espionage or video monitoring, but "any collection and processing of personal data, whether identified or not, for the purposes of influencing and monitoring those whose data has been garnered." See David Lyon *The Surveillance Society* (Open University Press, Philadelphia, 2001) at 3.

sentiment and called for expanded technical expertise to halt the discrimination leading big data down a digitally manipulative track.[226]

The danger of predictive profiling is a persuasive factor in the appeal for a stronger data protection regime. The 'pregnancy score' formulated by Target provides one pertinent example of how the big data industry is encroaching on the personal realm and resulting in discriminatory profiling and constraining fundamental freedoms.[227] Corporates are becoming increasingly adept at executing profiling with alarming specificity and foresight. Target's capacity to employ time-tracking analytics on the types of purchases made by customers, enabled a timeline that predicted precise stages of their customers' pregnancy cycles.[228] It was against this backdrop that the 'creepiness' Panopticon-like threshold set in, [229] and customers began to question the extent of Target's consumer tracking systems.[230] This predictive analysis is disturbing when sensitive categories protected by New Zealand's rights-based legislative instruments, such as health, race and

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[226] Executive Office of the President, above n 38, at 30. The Report highlights the capacity to segment data subjects, and stratify customer experiences so seamlessly as to be almost undetectable.

[227] Charles Duhigg "How Companies Learn Your Secrets" *New York Times Magazine* (online ed, New York, 16 February 2012). This revealed the situation here the girl's father only discovered his teenage daughter was pregnant after Target had pre-determined this via her buyer behaviour and sent various pregnancy related promotional material to the home address.

[228] Tene and Polonetsky, above n 16, at 253.

[229] Jeremy Bentham *Panopticon; Or, The Inspection-House: Containing The Idea of a New Principle of Construction applicable to any Sort of Establishment, in which Persons of any Description are to be kept under Inspection: And in Particular To Penitentiary-Houses, Prisons, Houses of Industry, Workhouses, Poor Houses, Manufactories, Mad-Houses, Lazarettos, Hospitals, And Schools: With a Plan Of Management adapted to the principle: in a series of letters, written in the year 1787, from Crecheff in White Russia* (T Payne, London, 1791).

[230] Quentin Hardy "Rethinking privacy in an Era of Big Data" *The New York Times* (4 June 2012) <http://bits.blogs.nytimes.com/2012/06/04/rethinking-privacy-in-an-era-of-big-data/?_php=true&_type=blogs&_r=0>.

sexuality, are compromised.[231] It is one thing for a customer to be recommended books they may be interested in to enable more 'efficient' consumption patterns, but it is quite another to surreptitiously track when a customer is pregnant before her closest family even know. Alarmingly, the accumulation of knowledge organisations hold about users entitles them to infer desires before individuals even form them, and to buy products on their behalf before they even know they need them.[232]

The profiling problem and its threat to freedom from discrimination can also be seen in the automated decision-making assumptions.[233] This situation seems to have the hallmarks of Chomsky's 'manufactured consent',[234] where data controllers have enormous discretion in determining what the user 'wants' to see. The trend towards 'dynamic pricing' is shifting focus onto browser history and postcodes as the key pricing mechanisms in online shopping experiences.[235] Invisible decisions made on the basis of data-driven assumptions also run the risk that users, faced with increasing privacy intrusions, will decide to forgo online-enabled services. Not only does this deepen the digital divide,[236] and exacerbate issues around s 14 of the Bill of Rights Act,

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231 New Zealand Human Rights Act 1993, s 21.
232 Acquisiti, above n 32.
233New Zealand Bill of Rights Act 1990, s 14.
234 Noam Chomsky *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon, New York, 1988).
235 Thorin Klosowski "How Websites Vary prices Based on your Information (and what you can do about it)" LifeHacker (July 2013) <http://lifehacker.com/5973689/how-web-sites-vary-prices-based-on-your-information-and-what-you-can-do-about-it>. Dynamic Pricing encompasses the trend of price variability based on location data.
236 Statistics New Zealand "The Digital Divide" (Wellington, 2013) available at <http://www.stats.govt.nz/browse_for_stats/industry_sectors/information_technology_and_communications/digital-divide/introduction.aspx>; Joy Liddicoat *Association for Progressive Communications New Zealand Digital Freedoms Report* (Wellington, 2014) available at <https://www.apc.org/en/irhr/i-freedom-nz/about>.

but also spurs negative impacts on innovation and engagement in the digital economy.[237]

> *"Big data is coming, like it or not. We have an opportunity to shape it, to ensure it operates for us, not on us. The coming debate whether and how we might do this promises to be a vigorous one."* [238]

III New Zealand's Data Protection Architecture

> *"Code changes quickly, user adoption more slowly, legal contracting and judicial adaptation to new technologies slower yet, and regulation through legislation slowest of all.* [239]

This section outlines New Zealand's legal position on data protection that enables protection of personal information, the structure of our privacy architecture and the international influences at play. It then explains the technical inconsistencies concerning how the Privacy Act recognises personal information focusing on the legal loophole created by the outmoded rationale that de-identification techniques *can* ensure non-identifiability. This part will also expose the new category of personally *predictable* information, and will explore the issues regarding Principle 3 of the Act. It will begin to consider which legal tools may be required to tackle the divide between technological advancements and privacy safeguards.

A The Privacy Act: An 'Adequate' Instrument?

The New Zealand position on data protection has its origins in the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966, which both acknowledge

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[237] Barbara Daskala and Ionnis Maghiros *Digital Territories: Towards the Protection of public and private space in a digital and Ambient Intelligence environment* (Institute for Prospective Technological Studies, Seville, 2007) at 11.
[238] Ohm, above n 41, at 346.
[239] Ian Brown *Regulating Code* (MIT Press, Cambridge, 2013) at xv.

the right to privacy as a fundamental human right.[240] New Zealand's current data protection law has been strongly influenced by the 1980 OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data, which sets out eight core principles to protect data.[241] These principles are reflected in the New Zealand Privacy Act 1993.[242] Additional data protection rights are contained in the NZ Bill of Rights Act, which affirms rights against unreasonable search and seizure and liberty of the person.[243]

The influence of the OECD Principles and New Zealand's commitment to them is evidenced in the 2010 amendment of the Privacy Act.[244] These Guidelines, rooted in strong rights based ideal, reflect New Zealand's commitment to advancing human rights and the free flow of information and ideas.[245] The Privacy Act avoids taking a proscriptive approach and instead lays out twelve principles that apply to both the public and private sectors when they hold "personal information" about a natural person.[246] A positive feature of the Act is the latitude in application of the principles to suit the circumstances of a wide variety of different agencies.[247] The wider spectrum includes both persons and companies, yet excludes various branches of the

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[240] Interview with John Steadman, Legal counsel at Spark (Mahoney Turnbull, 8 July 2014).
[241] OECD *OECD Guidelines on the protection of Privacy and Transborder Flows of Personal Data* (Geneva, 1980) available at <http://www.oecd.org/internet/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm>.
[242] New Zealand Privacy Act 1993.
[243] *R v Jefferies* [1994] 1 NZLR 290 (CA).
[244] New Zealand Privacy Act 1993, Annex 5A; Michael Kirby "Legal Aspects of Transborder Data Flows" (1991) 11(3) Computer L J 233 at 234.
[245] Lee Bygrave *Data Protection Law: Approaching its Rationale, Logic and Limits* (Kluwer Law International, The Hague, 2002) at 113.
[246] Interview with John Steadman, Legal counsel at Spark (Mahoney Turnbull, 8 July 2014).
[247] New Zealand Law commission Questions and Answers to the Law Commission Review 2011 (Wellington, August 2011) at 1.

Executive (such as Ministers) and the news media.[248] This flexible approach also helps with adaptation to new technologies and shifts in privacy expectations.

From the Privacy Commission's perspective, the Act sits as a leading "jurisdictional benchmark" in its ability to manage the different values and interests in a data driven future.[249] Thus, it offers a competitive advantage and an excellent platform from which to strengthen and modernise in the age of analytics.

Such international repute prompted the European Union to recognise New Zealand's Act as offering an 'adequate' standard of data protection for the purposes of European Law. This recognition reflects Europe and New Zealand's common commitment to upholding human rights and is a claim only a handful of other countries can assert.[250] The ability for European businesses to transfer data to New Zealand without requiring special contractual provisions is an important commercial consideration for New Zealand companies wanting to offer data processing services on a global scale.[251] It is important to note that

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[248] At 4.

[249] John Edwards "New Zealand's Data Future: A View from the Privacy Commissioner" (Wellington, 4 July) at 1; See Bruce Arnold's analysis in Bruce Baer Arnold "Ending the OIAC and new frameworks for privacy law" (2014) 11(5) Privacy Law Bulletin 66 at 66.

[250] European Commission Directorate of General Justice Opinion 11/2011 on the level of protection of personal data in New Zealand (Brussels, 2011) available at <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp182_en.pdf#h2-13> at 5; New Zealand Office of the Privacy Commissioner "NZ Data Protection gets tick from EU Committee" (13 April 2011) <http://privacy.org.nz/news-and-publications/statements-media-releases/nz-data-protection-law-gets-tick-from-eu-committee/>.

[251] EU Data Protection Law "EU Data Protection Regulation Timeline" (13 May 2014) <www.eudataprotectionlaw.com>. The need for New Zealand and EU alignment highlights the need to take note of upcoming changes to the EU's Data Protection Directive, which will reach final agreement in 2015. The next phase will be the Council of Ministers meeting to revise the text in

although there are no specific provisions protecting data transferred to third countries, s 10 provides for situations when data is collected from New Zealand, and a New Zealand agency transfers information offshore.[252] In this instance, the New Zealand-based disclosing agency will remain liable for any subsequent breaches. The EU Working Party's report alerted the Privacy Commissioner (PC) to the need to maintain oversight of transfers to countries who do not have 'adequacy' status.[253] It is in the interests of New Zealand companies and policymakers to minimise risks of harm or loss by establishing strong data management frameworks. The value of New Zealand's alignment with OECD guidelines reinforces the need for both New Zealand and the EU to be acutely aware of advances in big data, to ensure the technical realities translate into privacy protection.[254]

B Two 'Key Features of the Act' from the Commissioner's Standpoint

In the recent submission to the NZDFF, the PC asserted two key features of New Zealand's privacy law that render it an effective model to address some of the big data challenges.[255]

October 2014. It will again be analysed at Forum Europe's 5th Annual Data Protection Conference on 9 December 2014; Hunton Williams "Privacy Law Update" (podcast, 16 September 2014) <www.hunton.com/media/20140916_privacy/20140916_privacyupdate2_Mono2.mp3>.

[252] New Zealand Privacy Act 1993, ss 10 and 3(4).

[253] Cabinet Social Policy Committee "Government Response to Law Commission Report: Review of the Privacy Act" (12 March 2012) SOC Min (12) 3/1 at 2. The issue of international interactions also prompted the Law Commission to recommend a new obligation to ensure overseas recipients are able and willing to observe acceptable privacy standards.

[254] The need for New Zealand to stay in line with the EU Data Protection Directive will help ensure a new approach does not lead to trading opportunities for "New Zealand Inc" being jeopardised. An entirely new approach for New Zealand's Privacy Act would only create medium to long-term uncertainty.

[255] Cabinet Social Policy Committee, above n 89, at 4.

The first is the breadth of the definition of 'personal information', which allows the Act to encompass de-identified and pseudonymous information.[256]

The most recent Law Commission Report explained that the definition of personal information only requires that the individual be 'identifiable', as opposed to 'identified'.[257] A test akin to the United Kingdom's 'reasonableness' criteria for identifiability was proposed, whereby identification must be "reasonably practicable" and not simply theoretically possible.[258] To adequately tackle this issue, the Commission considered it most fitting for the PC to release guidance material.[259]

The second aspect entails the broad exceptions to principles on collection, use and disclosure, where information will be used in a form in which individuals will not be identified.[260] This means if agencies have a lawful purpose for collecting personal information and do not intend to use it in a form in which individuals will be identifiable, then they are free to do so without having to obtain consents that apply to all future uses.[261]

The PCs confidence in the available exceptions[262] to cater for beneficial re-use of data echoes the Law Commission's conclusion. However the

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256 John Edwards, above n 85, at 3.
257 New Zealand Law Commission Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4 (Issues Paper, 2010) at 3.20.
258 At 2.53. Other jurisdictions such as the UK have required the Information Commissioner to release guidance elaborating on the EU Data Protection Directive that it must be more than a "hypothetical possibility" of identifiability.
259 Law Commission, above n 93, at 3.20; Cabinet Social Policy Committee, above n 91, at Attachment 1.
260 John Edwards, above n 85, at 3.
261 New Zealand Privacy Act 1993, s 6, Principle 3.
262 At s 6, Principles 10 (f)(i) and (ii), and 11 allow an agency to use the information as it wants, provided it is used in a form in which the individual

Commission failed to acknowledge the re-use issues related to aggregated data sets stemming from groups as opposed to single individuals.[263] The consensus was that if the uses of aggregated information as described by Gunasekara were a problem, they could be dealt with in other ways, such as through consumer legislation.[264]

The use that Gunasekara was referring to relates to the predictive profiling that may have discriminatory or otherwise adverse effects on individuals. This foresight was a valuable addition to the review, yet was largely sidelined for fear of casting the net too wide. While the issue of widespread aggregation may not have been so acute in 2011, the concern is much more real now. The technological advances since Gunasekara's comments now pose greater privacy risks and should be at the forefront of strategic planning for data regulation.

Not only does the Act afford the Use and Disclosure exceptions, but coupled with the technological capacity of re-identification, there cannot be a "reasonable belief" that the information will be used in a form in which "the individual concerned is not identified".[265] In light of such latitude, it is understandable why disparaging comments have been directed at the statute and suggests the law may be heading for a blunt head-on collision with big data.[266]

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concerned is not identified, or is used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned.

[263] New Zealand Law Commission, above n 93, at 2.50.

[264] At 2.50. Auckland University academic Gehan Gunasekara's submission was expressly mentioned. His point was that the de-identification techniques, which are prompting information to be aggregated so that it no longer relates to identifiable individuals, still enable classification into groups.

[265] New Zealand Privacy Act, s 6, Principles 10 (f)(i) and 11 (h)(i).

[266] Interview with Paul Roth, University of Otago Law Professor (Mahoney Turnbull, 7 August, 2014).

Even if the Act was to acknowledge that identifiable data should be recognised in the provisions regarding disclosure limits, another issue remains. This is due to a new subset of personal information which has emerged. Its emergence reinforces the Microsoft Privacy Summit's conclusion that "to limit personal data to what is recognized as 'personal' is too narrow".[267] The result is a class of 'personally predictable information', that does not even hinge on being personally identifiable let alone identified.[268] Recognising the inherent tensions in this nuanced category of personal information is critical in appreciating how big data can circumvent current notions of privacy law.

The Law Commission did pinpoint identifiability as a challenge, noting it would "become more acute over time". Yet the decision not to engage proactively in reframing the nature of identifiable material indicates a lack of foresight regarding the relevance of this class of data.[269] Accordingly, companies enjoy unbridled ability to leverage the exception, and justify the disclosure of effectively personal information. This implies that New Zealand's adequacy status is dubious in the context of big data. In assessing its suitability, let us now turn to explore some of the technical inconsistencies.

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[267] Fred Cate and Viktor Mayer-Schönberger *Notice and Consent in a World of Big Data: Global Privacy Summit Report and Outcomes* (Washington, 2012) at 10; Bernard Stiegler "Die Aufklärung in the Age of Philosophical Engineering" in Mireille Hildebrandt, Kieron O'Hara and Michael Waidner (eds) Digital Enlightenment Yearbook (IOS Press, Amsterdam, 2013) at 31.

[268] Andy Green "Personally Identifiable Information Hides in Dark Data (13 April 2013) Varonis <http://blog.varonis.com/personally-identifiable-information-hides-in-dark-data/>.

[269] NZ Law Commission, above n 93, at 54.

C The De-Identification Myth

Notwithstanding the lack of guidance on the process of anonymisation,[270] the technical inconsistencies that form potent threats to privacy hinge on two factors:

1. The concept of de-identification has become increasingly outdated.[271] Not only is de-identification now recognised as an illusory guard against privacy breaches, it is also subject to a re-identification arms race.[272]
2 We now have a new genre of 'personally identifiable information' which routes around the element of identifiability.[273]

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[270] New Zealand has refrained from incorporating into the Act any specific indications on de-identification protocols or how the de-linking of personal identifiers is meant to occur. The Australian Privacy Act with its recent changes to this sphere, now references the technique of de-identification, which is bolstered by numerous anonymisation guidelines and resources released by the National Statistical Service.

[271] Ann Cavoukian and El Emam *Big Data and Innovation, Setting the Record Straight: De-identification Does Work* (Ontario, June 2014) available at <http://www2.itif.org/2014-big-data-deidentification.pdf> at 3. This report defines de-identification as the process of removing or modifying of both direct identifiers and indirect or quasi-identifiers, unlike 'masking' which only involves the removal or modification of direct identifiers; See also Spark's submission to NZDFF ("data which has been treated to decrease the ability to be linked back to identify individuals").

[272] Paul Ohm "Broken Promises of Privacy: Responding to the Surprising Failure of Anonymisation" (2010) 57 UCLA L Rev 1701 at 1752; Paul Schwartz and Daniel Solove "The PII Problem: Privacy and a New Concept of Personally Identifiable Information" (2011) NYU L Q Rev 1814 at 1879–1883. This race is gaining traction with computational innovation which exposes individuals to "the database of ruin": The crossing of identity boundaries is not a new phenomenon but the ability to easily do so in the digital era is a significant innovation and represents a normative shift in social expectations of privacy.

[273] Andy Green, above n 104.

De-identification and its opposing force, re-identification**,** are disrupting the privacy landscape.[274] It is now well accepted that de-identified data sets can still be attributed to specific individuals, which casts doubt on the fundamental distinction between personal and non-personal data.[275] At the same time, re-identification has heightened the harms associated with invasive aggregation methodologies by allowing data controllers to link more information to an individual's profile.[276]

Whilst pro-market thinktanks may be producing evidence to prove that the risks of re-identification are grossly exaggerated,[277] the vast majority of computer scientists are consistently rebutting this claim.[278] Fresh evidence from Princeton scientists shows that attempts to quantify the efficacy of de-identification are unscientific and promote a false sense of security by assuming "artificially constrained models of what an adversary might do".[279]

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[274] Paul Ohm, above n 108, at 1704.

[275] The Sweeney Test, highlighted by Ohm, refers to the research pioneered by Latanya Sweeney and made accessible by Ohm. The results of the test marked a turning point in debunking de-identification as she was able to show that in 2000, 87 per cent of all Americans could be uniquely identified using only three bits of information: post code, birthdate and sex.

[276] Daniel Solove "A Taxonomy of Privacy" (2006) 154 Penn St L Rev 477 at 511. Big data makes aggregation of datasets more granular, more revealing and more invasive.

[277] Ann Cavoukian and Daniel Castro *Big Data and Innovation, Setting the Record Straight: De-identification Does Work* (Information and Privacy Commissioner, Ontario, 2014) <www.itif.org/2014-big-data-deidentifaction.pdff> at 2.

[278] Arvind Narayanan and Edward Felten "No silver bullet: De-Identification Still Doesn't Work" (unpublished manuscript, Princeton University, 2014) at 1. Relying on Protocols like anonymisation, pseudonymisation, encryption, key-sharing, data-sharing and noise addition, are insufficient.

[279] At 5. The 'penetrate-and-patch' method that has been recommended, in which systems are fielded with live data, broken through challenges and then revised, has been largely ineffective in both traditional information security development and in de-identification efforts.

It appears that de-identification, traditionally viewed as a silver bullet, has been debunked.[280] De-identified material is not a stable category, but rather a transition point to ultimate re-identification, a point which is becoming easier to reach.[281] This relates to the second technical inconsistency that is threatening the data dynamic: the personally predictable nature of data.

D Personally Predictable Genre

The Commission's 2011 Report recognised that an absolute ability to be 'identified' was no longer a reasonable standard to aspire to; the emphasis should be on being identifiable. This insight was supported by the PC recognising that over time, more information would start falling within the definition of personally identifiable information.[282]

Google and other similar companies made submissions opposing an expansive interpretation of personal information to the extent of identifiability. They clarified an unduly wide definition would subject service providers to "potentially unnecessary regulation regarding collection, notification and use of disaggregated and uncombined pieces of information". These 'pieces of information' serve as essential data points that determine the ability of companies like Google to provide 'freemium'[283] services. They would not, Google argued, necessarily be

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[280] Ira Rubenstein, Ronald Lee and Paul Schwartz "Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches" (2008) U Chicago L Rev 261 at 268–269.

[281] Colin Bennett and Christopher Parsons "Privacy and Surveillance" in William Dutton *The Oxford Handbook of Internet Studies* (Oxford University Press, Oxford, 2013) at 499. The ability to re-identify demonstrates the dangers of releasing granular information about search terms.

[282] New Zealand Law Commission Report, above n 93, at 2.48. Reference was also made to the International Institute of Communications' Report on Personal Data Management, which concluded a simplistic, binary and static data- management policy that dictates a priori whether data is considered personal, is insufficiently flexible for the rapidly evolving digital world.

[283] Freemium, above n 29.

"intended to identify a particular individual".[284] While reflecting the commercial realities of the data industry's business model, this resistance indicates a more nuanced understanding of re-identification forecasts. The Commission should have been more cognisant of this. Online service providers like Google foresaw the growing trend of inventive algorithms and the strategic significance of being able to engage in the 'necessary' relinking of "uncombined" data sets in ways that would not specifically subject them to privacy legal frameworks.

The ease with which 'recalibration' occurs has shifted. The reality is that personally identifiable information is in a state of flux.[285] By using the terminology of 'not personally identifiable', the Act makes no distinction between data entered into standardised fields and information entered as free text.[286] The development of the 'semantic web'[287] reflects the increasing flexibility with which data sets are interpreted to derive granular strains of value. This demonstrates that technologists are increasingly adept at interpreting free unstructured text and linking it back to a person.

The issue is that in the digital domain of 'dark data', invention of algorithms will not stop anytime soon. If Acquisiti's work concerning augmented reality and facial recognition is anything to go by, we are still in for some major upheavals. This trend is likely to see us progressing

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284 New Zealand Law Commission Report, above n 93, at 2.48.

285 Ohm, above n 110, at 1704. Ohm has been bold enough to disregard the concept of 'personally identifiable information' completely. He advocates instead for embracing the ever-expanding category, and focus on the risks of harm in specific contexts, weighed against the benefits of free flow of information in those contexts.

286 Green, above n 109; UK Anonymisation Network <www.ukanon.net>. The term 'identifiers' is often misunderstood to simply mean 'formal identifiers' such as the data subjects name, address etc. But identifiers could in principle include any piece of information, or combination of information, that makes an individual unique in a dataset and as such vulnerable to re-identification.

287 Green, above n 109. The 'semantic web' focuses on looking to the meaning of the data as a whole, rather than particular letters or numbers.

towards increasing fusion of offline and online.[288] On this basis, there can be no faith in the current definition of 'personal information' being able to cater for what is actually occurring in the big data domain.

E Repurposing in the Dark: Principle 3 and Unknown Purposes

The question whether big data increases or changes the risk to privacy, is a critical one. The fact that companies do not know in advance what they may discover, creates a tension in applying the Act to current big data patterns. The legitimacy of collecting data for its own sake, as opposed to a specific future purpose, is a grey area in the current framework. By its very nature, big data entails collecting personal information with a blank purpose. This fundamentally cuts against the Act's first privacy principle which places importance on the purpose connected to the core function of the company.[289] Furthermore, the inherent 'unknowns' of big data render it difficult for companies to genuinely comply with the requirement of Principle 3, and inform the individual concerned of the purpose for which it is being collected.[290] Since the majority of innovative secondary uses have not been imagined when the data is first collected, the question arises as to how individuals can give consent to an unknown scenario.[291]

Principle 3, which requires the agency to make known to the individual the future purpose of their data collection[292] is no longer fit for

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[288] Acquisiti, above n 32.

[289] Paul Roth and John Edwards "Structure and Overview of the Privacy Act" in Privacy Law: Where are we now?" (New Zealand Law Society, May 2013) at 3. NZPA Principle 1(a) requires that information must be collected for a purpose connection with a function or activity of an agency. This prima facie excludes an unrelated linking of that data to a novel purpose which may still have beneficial outcomes.

[290] New Zealand Privacy Act 1993, s 6, Principle 3.

[291] This issue will be expanded upon in the following Part IV (ii)(a) analysis.

[292] New Zealand Privacy Act, Principle 3(1)(a)–(b). Where an agency collects personal information directly from the individual concerned, the agency shall

purpose. This undermines the central role assigned to the data subjects under the current privacy framework. It also threatens the spirit of informational self-determination, which the German Federal Constitutional Court recognised can be crucial to the growth of society as a whole.[293] According to the Act's principles, of purpose,[294] collection, [295] and reuse,[296] individuals have an opportunity to agree to lawful data collection. It is this unease over user acquiescence to unknown future use and potential data exploitation that prompts closer analysis of the interface which should govern data-sharing initiatives. This pressing issue, which cuts across fundamental contractual, privacy and informational self-determination rights, will be further explored in the final part of this article.

F Towards more Progressive Legal Tools

Having preceded the advent of personally predictable information, the Privacy Act is now showing its age.[297] Whilst we know the benefits of data-sharing are undoubtedly significant, the legal loopholes enabling companies to capitalise on the expansive nature of the exceptions seems unjustified. Instead of playing catch-up to emerging technological capabilities, New Zealand's toolkit ought to demonstrate a more progressive approach, and lead the charge in coherent data governance.

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take such steps (if any) as are, in the circumstances, reasonable to ensure that the individual concerned is aware of the fact the information is being collected and the purpose for which the information is being collected.

[293] Mayer-Schönberger and Cukier, above n 6, at 154; Paul de Hert "Identity Management of e-ID, privacy and security in Europe. A Human Rights view" (2008) 13(2) Informational Security Technical Report 71 at 72.

[294] New Zealand Privacy Act, s 6, Principle 1.

[295] Principle 3.

[296] Principle 11.

[297] Christopher Kuner "The Challenge of 'Big Data' for Data Protection" (2012) 2 International Data Privacy Law 47 at 47–48.

Whilst it is important to examine the changing scope of information viewed as personally identifiable, and the repurposing inconsistency from a technical standpoint, this can mask a fundamentally normative question: whether the data should, and how the data ought, to be used.

It is therefore encouraging to see this issue coming to the forefront of the legislature's attention. Since the Law Commission Report's release in 2011, statements from the Minister of Justice have signalled the "need to develop new ways to achieve trust and privacy".[298] Emphasis has been placed on upcoming reforms, ensuring that the law better reflects the digital age, whilst bringing New Zealand into alignment with its major trading partners.[299] The expectation is that these proposals will put stronger incentives in place to ensure the private sector takes data protection seriously.

Effective legislative and regulatory action could place New Zealand at the forefront of big data stewardship and signal the country's capacity to drive data-led innovation in a principled, privacy-enhancing way. The following chapters will further develop this issue, and suggest measures New Zealand could take in this direction.

IV The Regulatory Remedy: A Data Standards Authority

This section clarifies the justification for a new body to regulate the wider uses of data and the standards that ought to govern data management. It will offer an example of an existing Standards

[298] New Zealand Parliament "Judith Collins Press Statement Privacy Act Changes" (Wellington, 28 May 2014) available at <http://www.beehive.govt.nz/release/privacy-law-changes-strengthen-protection>; Cabinet for Social and Policy Committee, above n 89, at 30.3. Taking an entirely new approach would take New Zealand out of line with major trading partners in the OECD.

[299] At 10. The Privacy Commissioner made the comment that the Act must remain internationally acceptable and continue to support innovation and responsible modern business.

Authority and relevant elements that the Data Standards Authority (DSA) could draw upon.[300] It describes the anticipated interface with the Privacy Act, and how an Amendment to the Act could enable this body to come to fruition. It then looks at the structure of- and composition of- the DSA, whilst also exploring the advisory role, in particular the oversight of industry-specific codes of practice. The chapter then looks at possible response mechanisms the DSA could exercise, ranging from infringement notices to pecuniary penalties. It touches on the possibility of overlaying these measures with publicity, and the prospect of compensatory and exemplary damages.

A The Call for a New Standards Body

> *"The time may have come to set up an independent body specifically focused on maximizing the benefits to New Zealand from data".*[301]

We should not take the PC's call for the establishment of a new body lightly. It is a powerful signal that the privacy scene has shifted, and the legislative instrument to tackle these changes needs a rethink. The Commissioner's recognition that his mandate fails to encompass 'wider uses of data' is a pertinent reminder of the danger in neglecting to account for the extending reach of personally identifiable material. Any policy response to this omission must acknowledge that the internet is a domain enmeshed in emerging forms of governance, which are still amorphous. What is needed to help cure the disjunction between the rapidly expanding data network and the laws that govern it is immediate clarification on personal data benchmarks. There is little doubt that the digital ecosystem could benefit from a clarified framework of standards to help guide New Zealand data holders and users towards greater data responsiveness.

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[300] In contrast to the NZDFF's proposal of a Data Council, this dissertation will use the terminology of a Standards Authority, to emphasize the standard-based regulatory powers which this body would possess.

[301] John Edwards, above n 85, at 3.

The best approach is to provide a transition point towards an international charter for Data Protection and Privacy standards.[302] This would take the form of a New Zealand-centric data standards framework, which would ensure that individuals remain protected, data processors embrace their responsibilities, and innovation is not artificially constrained.[303] Leveraging New Zealand's existing architecture and building a framework around this in an efficient regulatory manner would be the most sustainable way to future-proof against big data challenges.[304] Although there is a case for delaying major proposed changes to the Privacy Act until the upcoming amendments of the EU Data Protection regime are made official,[305] this factor would not have to impact on regulatory measures that are classified as Disallowable Instruments Not Regulatory Instruments (DINRI).[306]

The European Commission's recent announcement of 'Horizon 2020' and its focus on developing common standards to facilitate the data-

[302] International Conference of Privacy Commissioners *Madrid Resolution: Joint Proposal for a Draft of International Standards on the Protection of Privacy with regard to the processing of Personal Data* (Madrid, November 2009) at 29. New Zealand was one of ten countries who proposed the Resolution for International Standards.
[303] Fred Cate and Viktor Mayer-Schönberger, above n 103, at 15.
[304] In the same way that the Privacy Commissioner can create subordinate legislation, or Disallowable Instruments that are not legislative instruments (DINLI) through the code creation powers in Part 6 of the New Zealand Privacy Act, this body would have similar powers to create DINLI that pertain to the data standards.
[305] Assuming New Zealand wants the best chance at maintaining its 'adequacy' status and certainty with what European Standards, New Zealand commentary has been indicating major changes to the Privacy Act should wait until the EU amendments are implemented.
[306] Regulations Review Committee "Inquiry into the oversight of disallowable instruments that are not legislative instruments" (July 2014) I.16H <http://www.parliament.nz/resource/en-nz/50DBSCH_SCR56729_1/2dd6b5922847c918b02457adfb7e83f055a20f35> at 6. Unlike legislative instruments, these instruments as defined by s 38(1)(b) of the Legislation Act 2012 provide greater scope for change and industry-specific tailoring.

driven economy indicates the increasing lean towards this regulatory strategy.[307] The European Commissioner's plan to identify sufficiently homogenous sectors suggests New Zealand should take a similar route in creating a body to provide customised data protection. This would foster a stronger security culture, and help detect and respond to data mismanagement across sectors.[308]

The establishment of the New Zealand Data Futures Forum (NZDFF) earlier this year demonstrates exactly the sort of thoughtful discussion of data stewardship that is necessary. Moreover, it highlights the call from the business community for more certainty to enable data experimentation within well-understood and navigable boundaries.[309] Innovation ironically requires certainty.[310] It is clear that the requisite innovation has already begun. We now need to regulate the exchanges of data in a meaningful way and it seems best to begin this process with standard-based architecture.

The most suitable enabling Act for establishing the DSA would be the Privacy Act.[311] This would entail inserting an amendment into the Act, in accordance with the Crown Entities Act, echoing the amendment to the Broadcasting Act that established the BSA in 2005.[312] It would be appropriate for this amending provision to outline the key principles of data stewardship upon which the standards contained in the codes would be based. It would not present a radical departure from the

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307 European Commission, above n 4, at 9.
308 At 11.
309 New Zealand Data Futures Forum (NZDFF) *Second Discussion Paper* (New Zealand, 2014) available at <https://www.nzdatafutures.org.nz/sites/default/files/first-discussion-paper_0.pdf> at 15.
310 At 15.
311 New Zealand Privacy Act; Interview with John Edwards, Privacy Commissioner (Mahoney Turnbull, July 2014).
312 New Zealand Broadcasting Act 1989, s 20; New Zealand Crown Entities Act 2004, ss 7 and 200.

current system but rather a reboot of the Information Privacy Principles in alignment with data protection developments that require more nuanced principles. This interface with the Privacy Act would enable the confluence of personal data issues with the structure of an established system designed to endure changes in our digital landscape.

B Structure of the DSA

1 The Data Council

In line with the NZDFF's proposal of an independent data council to serve as 'guardians' of the data ecosystem, the DSA could encompass this form of strategic leadership from a mix of stakeholders.[313]

In terms of composition, the council could take its cue from recent developments in the domestic policy sphere. The inclusion of a 'Chief Technology Officer'[314] (CTO) would be a valuable addition as a neutral data arbiter.[315] The endorsement of a CTO in the NZDFF's discussion paper, bolstered by support from academics[316] and industry leaders, reinforces the value in creating this position to help identify and tackle emerging issues whilst encouraging a secure data environment.[317] In contrast to the traditional framework that tends to engender businesses

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313 New Zealand Data Futures Forum (NZDFF) *Third Discussion Paper: Harnessing the economic and social power of data* (New Zealand, 2014) available at <https://www.nzdatafutures.org.nz/sites/default/files/NZDFF_harness-the-power.pdf> at 16.

314 This concept was first incorporated in the Green Party's proposed Internet Rights and Freedoms Bill to supplement the role of the Privacy Commissioner and advise Parliament and Cabinet on the challenges and risks for New Zealand's digital ecosystem.

315 Internet Rights and Freedoms Bill available at <https://home.greens.org.nz/misc-documents/internet-rights-and-freedoms-bill>. This role has been likened to the Chief Science Advisor who is responsible for advising the

316 Interview with Hon Michael Kirby (Mahoney Turnbull, 5 August 2014).

317 New Zealand Data Futures Forum, above n 149, at 48.

working reactively on legislative action, this would enable a proactive engagement model to grow between the public and private sectors.

2 Code creation

Building upon the core principles outlined in the amending provision of the Privacy Act, the purpose of industry-specific codes would be to define best practice around data management. This would build upon the protocol already established in the Privacy Act for relevant industries to issue codes themselves.[318] Just as the Privacy Act already allows codes to be less or more stringent than the Information Privacy Principles,[319] the DSA codes could provide standards that are tailored to the particular requirements of different sectors operating in the economic and social fabric of New Zealand. Case studies of industry-led co-regulatory pursuits have consistently proven that the collaborative approach can be administratively efficient.[320] Combined with the lean towards expanded regulatory mechanisms for resolving market and enterprise related issues, New Zealand is well placed to draw upon these experiences and pursue a code-driven framework.[321]

In pursuing this consensus-based regulatory method, caution is needed to avoid soft data-sharing rules due to vested input from self-interested industry input.[322] The DSA would need to be aware of dubious regulatory commercial commitments that show more "public relations" impetus, than genuine precaution. To ward against this outcome, inclusion of privacy and consumer advocacy groups could be an essential component of the code-creation process. Against this threat

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318 New Zealand Privacy Act, s 47(3).
319 Section 46(2)(a)(i).
320 Dennis Hirsch *Dutch Treat? Collaborative Dutch Privacy Regulation and Lessons it holds for US Privacy Law* (Future of Privacy Forum, July 2012) at 44–45.
321 At 44.
322 At 81.

however, a "game-changing" opportunity[323] exists for New Zealand to use 'co-regulatory' muscle in creating the new regulatory system.[324]

V Principles to Guide the Data Standards Authority

This chapter outlines the guiding principles that would enable best data practice to develop. The principles would be reflected in the relevant industry codes, and incorporated into the amending provision of the Privacy Act. This chapter will propose two central principles that are fundamental to effective data stewardship. After highlighting the tension in strategic maximisation of data, it will assess the principle of prioritising Privacy by Design (PbyD),[325] with a focus on a de-identification protocol, as well as consumer friendly privacy settings. This will address concerns of data empowerment, and the underlying problems surrounding consent in the realm of big data. Whilst recognising the potential emptiness of the notice and consent construct, it will explore ways that could help formulate more effective rules of engagement.

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[323] NZDFF, above n 153, at 48.

[324] The White House *Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* (Washington, February 2012) at 32.

[325] 'PbyD' refers to Privacy by Design. See Ann Cavoukian "Personal Data Ecosystem: A Privacy by Design Approach to an Individual's Pursuit of Radical Control" in Mireille Hildebrandt, Kieron O'Hara and Michael Waidner (eds) Digital Enlightenment Yearbook (IOS Press, Amsterdam, 2013) at 96. The objectives of Ontario Privacy Commissioner Ann Cavoukian's Privacy by Design method, which she developed in the '90's to address privacy needs, are to ensure privacy and personal control whilst allowing organizations to gain a competitive advantage following the seven foundational principles. 'Radical control' refers to individuals having the tools to predict the outcomes of their actions when interacting with organisations.

A The Overarching Aim of Strategic Maximisation of Data

Simply stated, data minimisation is at odds with the essence of big data.[326] An inherent conflict exists in the non-retention impulse mandated by the Privacy Act,[327] and the maximisation of data that the big data business model demands. Whilst this chapter cannot delve further into the complexities and possible solutions for reconciling the minimisation versus maximisation struggle, it is important to recognise the tension. Knowing this pressure exists, the question is how to refine and repurpose data in the most strategic way.[328]

Given the potential 'pollution' of stale data, there is a need for structural incentives to streamline data sets. On this basis, stimulating the market for privacy enhancing services that prompt greater engagement in judicious data maximisation should be a core focus in the regulatory solution.

B Principle 1: Prioritising Privacy by Design (PbyD) and a De-Identification Protocol

1 Nimble analytics and the role of the algorithmist

The "architectures of vulnerability"[329] around big data are prompting regulatory swings in the PbyD direction. By focusing the first principle on PbyD and embedding privacy in the design specifications of the data lifecycle, weaknesses can be corrected and organisations motivated to show sound data stewardship.[330]

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326 Rubenstein, above n 6, at 5; Tene and Polonetsky, above n 16, at 260.
327 New Zealand Privacy Act, s 6, Principle 9.
328 Edgar Whitley "Towards Effective, consent-based Control of personal data" in Mireille Hildebrandt, Kieron O'Hara and Michael Waidner (eds) Digital Enlightenment Yearbook (IOS Press, Amsterdam, 2013) at 169.
329 William Dutton *The Oxford Handbook of Internet Studies* (Oxford University Press, Oxford, 2013) at 19.
330 NZDFF, above n 153, at 61.

Despite the contested futility in de-identification,[331] the 'call to keyboards' is still being heard on the international stage.[332] The algorithmist's ability to create scalable 'Privacy Enhancing Technology' is crucial in formulating effective data standards.[333] This does not mean an abdication by policymakers, or the DSA, but a recognition that algorithmists have the potential to make or break data protection protocol. In this way, PbyD moves beyond normative spheres of law and best practice, directly into emerging technology and the marketplace.

From a market-driven perspective, PbyD will grow a "vibrant marketplace for privacy-enhancing services" and further economic development.[334] Indeed, the World Economic Forum (WEF) attributes PbyD to unlocking the value of data.[335] New Zealand policy makers should demonstrate their support of the WEF's agenda and incentivise organisations to make privacy a key commercial priority.[336]

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331 Lars Backstron "Wherefore art thou r3579x? Anonymised social networks hidden patterns, and structural steganography" (paper presented at the 16th International Conference on the World Wide Web, Canada, 2007) at 181–190.
332 Edith Ramirez, Chair of the US Federal Trade Commission "Data Brokers: A Call for Transparency and Accountability: Opening Remarks" (speech presented to Federal Trade Commission, May 2014).
333 Simone Fischer-Hübner "Online Privacy - Towards Informational Self Determination on the Internet" in Hildebrandt, above n 103 at 137; European Commission, above n 4, at 7. Privacy-enhancing technologies has been defined as a "coherent system of information and communication technology measures that protect privacy without losing the functionality of the information system"; Brill, above n 10. The 'algorithmist' is the individual in the company who will understand the use of algorithms and their legal and ethical implications.
334 European Commission, above n 4, at 33.
335 World Economic Forum *Unlocking the value of Personal Data: From Collection to Usage* (Geneva, 2013) available at <http://www3.weforum.org/docs/WEF_IT_UnlockingValuePersonalData_CollectionUsage_Report_2013.pdf> at 4.
336 Claudia Diaz, Omer Tene and Seda Gurses "Hero or Villain - the Data Controller in Privacy Enhancing Technologies" (2013) 74 Ohio St L J at 959; Simone Fischer-Hübner, above n 169, at 9.

2 The DSA's clarification on de-identification

As recognised by the NZDFF and the various submissions to their study, a gap currently exists in specifying de-identification techniques expected from organisations. Looking at the UK and Australia, it is evident that New Zealand is lagging behind in establishing clear standards for this technological process.

New Zealand lacks an equivalent to the UK Information Commission Office's (ICO) disclosure considerations test, which aligns with the UK Anonymisation Network's resource for best practices in anonymisation of data sets.[337] The ICO justifies their effective de-identification protocol on the basis that a complacent approach, alongside an insufficiently rigorous risk analysis, causes inappropriate data disclosures.

On the contrary, New Zealand lacks a published anonymisation protocol. Statistics New Zealand currently does not offer companies seeking to follow its structure a useable framework.[338] Accordingly, companies such as Telecom[339] have called for publicising this methodology so it can be reviewed and used by the industry. Not only would this enhance awareness of the desirable standard, it would also enable data holders to plan for dealing with re-identification. The DSA

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337 Bendert Zevenbergen Ethical Privacy Guidelines for Mobile Connectivity Measurements (Oxford Internet Institute, 2013) at 10; European Commission *Article 29 Data Protection 05/2014 on Anonymisation Techniques* (Brussels, April 2014) at 25. The Article 29 Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

338 Statistics New Zealand <www.stats.govt.nz>. Reference is given to collapsing, aggregating, modifying values and suppressing data cells.

339 Spark, above n 50. At the time of receiving the document from Telecom's legal team, the company had not yet changed the name to Spark.

framework would benefit from taking the UK and Australian examples into account in order to de-mystify the de-identification process.

C Core Problems of Data Empowerment: Rules of Engagement

1 Issue of consent: an empty construct?

In a world of big data, the reality of collection is that we have shifted to a landscape of passive generation and collection. Although the need for consent is clear, it is impractical, if not impossible, for users to give express consent with respect to all collected data.[340] Big data thrives on surprising correlations that call into question laws that rely on traditional ideas of notice and consent.[341]

The backdrop for data-sharing is increasingly complex, as data flows are channelled through dense networks of platforms and applications. Back-handling or 'downstream' agreements[342] obscure this environment, which is aggravated by the opacity of decisional criteria.

The current model of stating purposes and obtaining data processing consent at the outset highlights an important fault line between law and technology, and the redundancy of the traditional paradigm.[343] Indeed, the unknown factors in data repurposing require a workable framework to help alleviate the artificial nature of the consent model.

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[340] See chapter 2 C, 'Repurposing in the Dark: Principle 3 and unknown purposes'.
[341] Paul Ohm "General Principles for Data Use and Analysis" in Lane and others (eds) *Privacy Big Data and the Public Good* (Cambridge University Press, Cambridge, 2014) at 100.
[342] Tene, above n 16, at 261.
[343] At 271; Fred Cate and Viktor Mayer-Schönberger, above n 103, at 14; Helen Nissenbaum and Solon Barocas "Big Data's End Run around Anonymity and Consent" in Lane and others, above n 177, at 60.

2 *Information asymmetries + poor understanding = lack of engagement*

The emptiness of the construct not only fails to create an ineffective contractual relationship between the parties, but also establishes an unacceptable power imbalance**.** This form of 'engineered' consent, where an illusion of free choice is proffered, plays to the hands of cognitive biases, which produce suboptimal results.[344] Behavioural studies have demonstrated the skewed nature of subjective utility, upon which the data subjects' decisions are based.[345] This is cogently illustrated by a recent performance art experiment where individuals gave away highly granular personal data in return for a Facebook biscuit.[346] The immediate experiential gains from 'free services' in contrast to the temporal distance of privacy losses, casts a shadow on the authenticity of privacy choices.[347]

Informational asymmetry is a critical issue, and when linked with intelligibility obstacles, creates an inadequately engaged data subject. Genuine informed consent has been rendered essentially impossible, due to the complicated fine print which deters users and creates social pressure to not appear awkward or confrontational.[348] Decoding vague,

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[344] Jason Millar "A Problem for Predictive Data Mining" in Ian Kerr, Valerie Steeves and Carole Lucock (eds) *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, Toronto, 2005) at 110.

[345] Christopher Parsons "Putting the Meaningful into Consent" (16 October 2010) Technology, Thoughts & Trinkets <http://www.christopher-parsons.com/references-for-putting-the-meaningful-into-meaningful-consent/>.

[346] Rob Waugh "People are willing to trade private data for pistachio cookie" (2 October 2014) We Live Security <http://www.welivesecurity.com/2014/10/02/people-willing-trade-private-data-pistachio-cookies/>.

[347] Tene, above n 16, at 261; Joseph Turow and others "The Federal Trade Commission and Consumer Privacy in the Coming Decade" 3(3) J L & Policy for Info and Soc'y (2007) 723 at 724.

[348] Mindy Chen-Wishart "Contract Law and Uncertain Terms" (Staff Seminar given to University of Otago Law Faculty, 25 July 2014).

elastic terms about reuse that enables "improvement of customer experience" is not productive.[349] The participation deficiency stems from an overriding sense that users are "in the dark" and disabled from transparent and active engagement.[350]

Yet in terms of combatting information asymmetries, the tide is starting to turn. The establishment of New Zealand's Broadband Product Disclosure Code illustrates the drive to combat the 'fog of ignorance' that can enable unethical use.[351] This self-regulatory code, which outlines and compares broadband offerings to customers, could be used as a model to translate to the area of data protection.[352] However, the fact still remains that merely forcing data controllers to notify users of the risks they are taking could not only overwhelm them, but fail to nudge individuals into privacy-enhancing behaviours.[353]

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[349] European Commission, above n 4, at 34. This refers to the recent French Consumers Group which launched legal action against three of the largest social networks, criticising them of confusing 'elliptique et pléthorique' contractual terms; Alina Tugend "Those Wordy Contracts We All So Quickly Accept" The New York Times (online edition, New York, 12 July 2013) <www.nytimes.com>: Apple Mavericks Privacy and Terms of Service (2 September 2014). This policy was accessed by the author when downloading the latest OS X (10.9.4). This policy was at least half the length of this dissertation and offered an easy way to skip reading the policy and proceed to the "I agree" phase.

[350] Yannis Bakos, Florencia Marotta-Wurgler and David Trossen *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* (CELS 4th Annual Conference on Empirical Legal Studies Paper, 2009); Brill, above n 10.

[351] World Economic Forum Rethinking Personal Data, above n 60, at 7.

[352] New Zealand Telecommunications Forum *Broadband Product Code* (Wellington, 23 October 2013) available at <http://www.tcf.org.nz/library/d2225da1-d8b2-4e8e-8308-d025091fa2ac.cmr>.

[353] Ctrl-Shift "Mapping the Market for Personal Data Management Services" (20 March 2014) <https://www.ctrl-shift.co.uk/home/?CSRF_TOKEN=46c5c5922f666be1ab43e205168a86c64e51ec60>.

D Principle Two: Data Holders Must Create Consumer Friendly Privacy Settings

> *"We need a new commercial order in which data subjects are emancipated from systems built to control them and become free and independent agents in the marketplace.*[354] *- Doc Searls*

A second principle to guide the DSA is the creation of consumer friendly privacy settings. This requirement would aim to bridge the gap between ineffective command style privacy interfaces and a more desirable form of user engagement. The pivot point for this regulatory ecosystem must hinge on the concept of 'user-centricity'.[355] Opportunities do exist for liberating individuals from 'antihuman' systems that treat users as mere gadgets.[356] Provided there is a genuine shift towards a more humanised paradigm where the user becomes the nucleus in the ecosystem, then the goal of creating more consumer-friendly privacy policies may be within reach.

1 Informed consent

A core facet of the final principle concerning user-centricity is the ability to meaningfully 'inform' the data subject.[357] To achieve this, there needs to be a shift towards conceptualising consent in a self-determinative way. The mandate to provide privacy information to users in a form that clarifies the nature of the data capture, reuse and downstream sharing is becoming increasingly critical.[358] In recognising

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[354] Doc Searls "The Intention Economy: When Customers Take Charge" (Harvard Business Review Press, Boston, 2012) at 1: Ctrl-Shift "The New Personal Data Landscape" (22 November 2011) <www.ctrl-shift.co.uk>.
[355] Rubenstein, above n 6, at 9.
[356] Jaron Lanier "You are not a Gadget: An apocalypse of self-abdication" (Knopf, New York, 2010) at 26; Ann Cavoukian, above n 264, at 90; Ctrl-Shift, above n 305.
[357] Helen Nissenbaum and Solon Barocas "Big Data's End Run around Anonymity and Consent in Julia Lane and others, above n 177, at 59.
[358] Simone Fischer-Hübner, above n 169, at 134.

that informed consent may no longer be a match for the challenges posed by big data, the DSA measures should be more than just operationally-focused.[359] In pursuing this objective, we ought to transcend the notion that 'shedding sunlight' on personal data arrangements is adequate, and instead strive towards ensuring the user's 'ammunition' is more fitting for what Acquisiti hails the 'data gunfight'.[360]

One way in which informed and contextually-driven consent could display more granularity is through sliding scales.[361] In this respect, how the data is protected needs to be weighed against the sensitivity of the information collected. For the privacy settings to capture the texture of data stewardship, the decisional criteria behind data management choices also ought to be elucidated, including perhaps the disclosure of algorithms.[362] Greater exposure of how decisions are weighed would help users gain trust in the entities they interact with, and greater insight into the variables that influence data-sharing.[363]

Achieving true informed consent also requires evaluation of downstream sharing agreements. The challenges posed by the chain of data stakeholders involved in the data enterprise make this an important practice to bring to the attention of users.[364] Delving further into this issue prompts the question of when the data controller's obligation to inform should end. Should the duty to provide 'informed consent' be rendered complete in terms of the data that is explicitly

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[359] Nissenbaum and Barocas, above n 193, at 63. The distinction between operationalising informed consent and informed consent itself ought to be recognised.
[360] Rubenstein, above n 6, at 8; Acquisiti, above n 32.
[361] Paul Ohm "General Principles for Data Use and Analysis" in Lane and others, above n 177, at 105.
[362] Simone Fischer-Hübner, above n 169, at 133.
[363] Carolyn Nguyen "A User-Centered Approach to the Data Dilemma" in Hildebrandt, above n 103 at 23.
[364] Nissenbaum and Barocas, above n 193, at 60.

recorded? Or should the data controller adopt a more encompassing approach, explaining what further information the organisation may glean? There appears to be a strong case for arguing that consent should not only cover the information that can be directly derived from it, but also information from sophisticated analysis, including aggregation with other contextual or personal data.

In response to the trend towards increased downstream sharing, the Privacy Commission recently released privacy policy Guidelines for App Developers.[365] The guidelines place emphasis on integrating privacy from day one, which entails raising awareness of whether the data is being 'funnelled' to downstream third parties.[366] Whilst recognising the correlations between app developers, users and data miners, the announcement of these standards foreshadows the potential extension of the privacy benchmarks beyond the app domain to wider instances of data collection and manipulation.

2 Live consent

A final feature of Principle 2 that will help foster a culture of user-centricity is the aspect of 'living informed consent'.[367] Identified as a key strategy by privacy commentators and industry bodies, the submission from Spark to the NZDFF also highlights the need for dynamic privacy.[368] Rethinking privacy settings towards creating a living

[365] Kate Fay "Fitness Apps Can Help You Shred Calories and Privacy" (May 2014) Adage <www.adage.com>. Recent studies by the US Federal Trade Commission reveal the extent of downstream sharing, with the sample study of twelve health and fitness apps disseminating personal data with 76 third parties.
[366]New Zealand Office of the Privacy Commissioner, above n 313.
[367] Greenwood and others "The New Deal on Data: A framework for Institutional Controls" in Julia Lane and others (eds) Big Data, Privacy and the Public Good (Cambridge University Press, Cambridge, 2014) and others at 201.
[368] Spark, above n 50, at 8.

conversation between data holder and data subject re-envisions the traditional notion of rigid preferences.

To respond to the need for consent measures that value the dynamic pace at which data is being 'upcycled' and disseminated, the DSA ought to focus on the preference functions around personal data.

Firstly, it is plausible for coverall consent to be offered at the beginning of the data stewardship process.[369] Advocates for consent regimes of this genre challenge the prioritisation of active permissions, arguing that the value in live consent is overstated. The contention from data evangelists is that more data being used in unrestricted ways will always be beneficial, if only for reasons to be determined at a later date.[370] Privacy scholar Omer Tene argues an over-emphasis on consent may stifle innovation, and that neglecting to solicit consent actually results in more positive outcomes for all parties involved.[371] He cites examples such as Facebook's proactive News Feed Feature launch, and Google's 'wardriving'[372] to map out Wi-Fi networks as evidence of this. In the case of Google's geo-location orientated exploits, had they provided the choice for users to opt their routers out of the wardriving campaign, it is doubtful that many would have done so, considering the recognised value of Google's data use.[373] These cases highlight the potentially regressive effect of consent-based processing, which may ultimately result in less utility for data users.

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369 Edgar Whitley, above n 164, at 172.
370 Claudia Diaz, Omer Tene and Seda Gurses, above n 172, at 959.
371 Tene and Polonetsky, above n 16, at 262.
372 "Wardriving" refers to the act of searching for Wi-Fi wireless networks by a person in a moving vehicle, using a portable computer, smartphone or personal digital assistant.
373 Kevin O'Brien "Google Allows Wi-Fi Owners to Opt Out of Database" New York Times (online ed, New York, 15 November 2011) <http://www.nytimes.com/2011/11/16/technology/google-allows-wi-fi-owners-to-opt-out-of-database.html>.

Nonetheless the coverall approach has been condemned as excessive. Requiring data subjects to be 'stuck' with the initial choices would fly in the face of a living dialogue and emasculate the concept of informed consent.[374] This wholesale attitude diminishes the value of informed consent because it requires notice that fails to delimit future uses of data and its possible consequences.

Conversely, live consent would enable users to engage in real time through privacy triggers, an element that the NZDFF focused on in their final recommendations paper.[375] This system could use appropriate notification standards from the recent New Zealand App Guidelines. For instance, if a user wanted to change privacy settings themselves, they should be provided with information regarding who will be able to view their data after the change.[376] Since the timing of notification is also critical, icon-based notifications to indicate when vital attributes like geo-location data is being mined, could be useful. This is currently being explored through the 'VRM Project' at Harvard's Berkman Centre for Internet and Society. This project is pursuing a vision where an individual is in "complete control of her digital persona and grants permissions for vendors to access it on her own terms without vendor lock in".[377] This echoes the NZDFFs aim of more fine-grained control over personal profiles to achieve mutual gain in data exchanges. Striking the balance between open and active communication channels, and respect for an appropriate level of distance in the data relationship is challenging, and cuts to the core of achieving live consent.

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[374] Mayer-Schönberger and Cukier, above n 6, at 154.
[375] New Zealand Data Futures Forum (NZDFF) Third Discussion Paper, above n 149, at 20.
[376] Priv New Zealand Office of the Privacy Commissioner Guidance Note for App Developers 5 Point Checklist
(Wellington, 24 July 2014).
[377] Tene, above n 16, at 266.

Given the possibility that consent-based data acquisitions may not have been fully 'informed', updated prompts seem desirable. Looking at models of consent in the health sector, the Ministry of Health 'Guidelines on the Use of Human Tissue for Future Unspecified Purposes' provides useful insight into promising methods.[378] The option to "recontact the donor in order to gain further consent" is indicative of the 'living consent' approach. This mode of consent, combined with providing practical insights in real time, is a suitable cross-industry impulse for the DSA to draw upon.[379] Just as the guidelines offer indications about the nature of research carried out on tissue samples and implications for the donor, the live consent standards imposed by the DSA could require data holders to be notified on a similar basis. Empowering the user to know the types of proactive upcycling from the beginning could lead towards a more informed user base.

In response to concerns surrounding the intrusiveness of a live notification-based consent model, opt-out options must also be explored. To avoid initial bad bargains having long-term consequences, users should be able to retract consent and halt future use of their data at any point they feel is appropriate. Although we may presume the ability to opt-in and out is a reality, the harsh truth is that most privacy policies operate on a model of endurance. Apple's approach to the use of their Operating Systems (OS) is one relevant example. In response to the latest Mavericks OS 10.9.4 offering, users are presented with the option of termination, upon which the license becomes redundant. However, the express limitation enabling downstream sharing to survive such termination allows Apple to ensure that the dissemination of user's data is a permanent one.[380] This kind of agreement highlights

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[378] Ministry of Health Guidelines on the Use of Human Tissue for Future Unspecified Purposes (Ministry of Health, Wellington, March 2007) at 9.
[379] New Zealand Data Futures Forum (NZDFF) Third Discussion Paper, above n 149, at 6.
[380] Apple Mavericks Privacy and Terms of Service (September 2 2014).

the current artificiality of consent to data-sharing. Moreover it reaffirms how genuine consent is being constrained by the mainstream acceptance of wholly submitting to these less than desirable privacy policies.

It is against this backdrop that the NZDFF have recommended bolstering the right to opt-out. There is an obvious need for more clarity surrounding consent arrangements. The NZDFF suggests incorporating the right to opt-out in standard terms and conditions for consent to data services. While there are technical limitations to this, opting out could also be accompanied by 'best-efforts provisions' to delete all the relevant data.[381] Whilst it is not in the ambit of this dissertation to investigate the related issue of the 'Right to be Forgotten', this is a pertinent question that warrants serious discussion regarding its impact on information privacy law.

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The degree to which consumer friendly privacy settings can prevail as the norm which data holders must abide by depends to a large extent on the self-awareness of users. Once appropriate standards are in place, the responsibility is on users to maximise the dynamic interface that has the capacity to stimulate a living dialogue. Companies can extensively visualise, clarify and inform users, but if the data subject remains disengaged, then consumer friendly privacy settings will fail to get traction. For consent to be truly 'live', the continuing conversation must be valued. Like any fruitful relationship, this requires active listening to ascertain what each stakeholder wants out of the data exchange. Thus, the new guidelines must be founded on user-centric principles that balance regulatory certainty with flexibility so the dynamism of data can be accounted for.

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[381] New Zealand Data Futures Forum (NZDFF) Third Discussion Paper, above n 149, at 71.
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VI Conclusion

"In God we trust. All others must bring data."[382]

Big data has come. And it is trampling all over privacy law. The nuanced ways in which data analytics operate, and the vigour with which the technological landscape is changing, presents a unique time in societal development. In grappling with the question of how data can operate for us, and not upon us, this dissertation set out to explore how to shift New Zealand's privacy landscape towards more progressive legal tools.

The regulation around data stewardship is critical. This is evidenced by the national conversation which has already begun. Discussion papers from the NZDFF and the PC are offering support for changes in the data protection sphere. This dissertation has identified a fresh regulatory framework. With this body in mind, New Zealand's ability to navigate the information industry through relevant privacy protections is more assured. In light of the current power imbalances between data holders and users, a Data Standards Authority could be truly valued. This body would be well placed to provide a baseline of best practices for data stewards and downstream 'upcyclers', whilst offering robust accountability measures to encourage organisations to engage in a more responsible and responsive data-use ecosystem.

Paying heed to the notion that "cyberspace has no intrinsic nature. It is as it is designed,"[383] the strategy for overcoming the inadequacies of New Zealand's data protection law has focused on the formulation of guiding principles. I have suggested several that the proposed amendment to the Privacy Act could encompass, and which would lay the groundwork for the formulation of industry-specific codes. These

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[382] Hastie and others *The Elements of Statistical Learning* (2nd ed, Springer, New York, 2009) at vii.

[383] Lawrence Lessig Code 2.0 (Basic Books, New York, 2006) at 317.

not only stress the operational side of data protection and effective PbyD techniques, but also the behaviour-driven elements concerning user empowerment and engagement models. New Zealand need not only rely on regulatory reform to achieve its data protection goals – it can, and should, take advantage of emerging business models in which firms decide to empower consumers and enhance individual control over personal data.

We would be wise to avoid a tragedy of the data commons,[384] in which individualistic and exploitative pursuits by data holders override and deplete the potential value of the data resource. Not only would this be contrary to individual privacy rights and the orientation of data protection towards providing transparency, it would also be contrary to the long-term interests of society. There is little doubt that data is a highly strategic asset that has the power to be the new engine of our increasingly digitalised economy.

The cultural commentator McLuhan recognised that "we shape our tools, and our tools shape us".[385] Careful carving of this privacy toolkit, and close attention to the form our privacy messages take, will enable a sharper, more robust data ecosystem. The chosen tools to govern personal data will have a profound impact on New Zealand's capacity to be a world leader in delivering a trusted digital environment where the big data benefits can be realised. Big data can be harnessed to serve the public good. The only limitation will be deciding to what extent we want our digital future to be guided by an ever-changing petabyte-driven compass.

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[384] Jane Yakowtiz "Tragedy of the Data Commons" (2011) 25(2) Harvard J L & Tech at 4.

[385] Marshall McLuhan "Understanding Media: The Extensions of Man" (McGraw-Hill, New York, 1964) at xi.

AN INVISIBLE POPULATION? THE NEEDS OF YOUNG WOMEN OFFENDERS AND WHY GENDER DESERVES CONSIDERATION IN THE AOTEAROA NEW ZEALAND YOUTH JUSTICE SYSTEM

ALLANAH COLLEY*

I Introduction

Commentators frequently refer to the "gender ratio" gap: that young men commit crime more than young women.[1] This paper seeks to explore the relationship between gender and patterns of offending, as well as how young women offenders have historically been treated.[2] Aotearoa New Zealand's youth justice system must recognise that young women offenders have different needs to male offenders. Further, the life experiences and needs of young Māori women offenders must be recognised. The aim of this paper is to highlight that young female offenders (both Māori and non-Māori) are currently an invisible population in the New Zealand youth justice system. Further, avenues of remedying this invisibility will be probed; hopefully leading to reforms which may help to reduce young female offending generally.

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1 Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique* (LexisNexis, Wellington, 2014) at 46.

2 The terms "young women" and "girls" will be used interchangeably throughout this paper to refer to those females under the age of 17 years that fall within the ambit of the New Zealand youth justice system.

II Young Women Offenders: A Gendered Construction

The "gender ratio" gap is the phenomenon that most reported crime is committed by men rather than women.[3] In New Zealand's youth justice system, boys are responsible for approximately 80 per cent of all youth offending.[4] In 2013, young females accounted for 18 per cent of all young people charged in court, with 39 per cent of those females being Māori.[5] This begs the question: what is the relationship between gender and patterns of offending? Are women and girls less likely to offend because of their biology, pathology or social experiences? This paper takes a feminist approach to draw attention to young women offending in Aotearoa New Zealand. The aim is to understand the links between gender and offending and how young women offenders have historically been treated. Does the fact that girls represent a minority of young offenders mean that their specific needs are being overlooked, consequently rendering them "invisible" in government legislation and youth justice practices?[6]

Patterns of offending and the gender ratio gap have historically been explained through gendered constructions: classical studies of female criminality fixated on biology, psychology or social structures to rationalise a young woman's lack of offending.[7] In the nineteenth century, psychological studies such as that by Lombroso and Ferrero believed that the true, biological nature of women was antithetical to

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[3] Cleland and Quince, above n 1, at 46; Kerry Carrington and Margaret Pereira *Offending Youth: Sex, Crime and Justice* (Federation Press, New South Wales, 2009) at 55–56.

[4] Ministry of Justice *Trends in Child and Youth Prosecutions 2012/13* (June 2013).

[5] Statistics New Zealand "Children and Young People Charged in Court - All Offence Types" Statistics New Zealand <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7363>.

[6] Michele Burman and Susan A. Batchelor "Between Two Stools? Responding to Young Women who Offend" (2009) 9 Youth Justice 270 at 278.

[7] Cleland and Quince, at 27 and 50.

crime.[8] This biological determinism was supported by social-structural justifications of female behaviour.[9] Such theorising saw women as subject to social and family control in the private domestic sphere, which strictly regulated their behaviour and criminal potential.[10] This was unlike their male counterparts who operated, unregulated, in the public sphere.[11] Otto Pollak's study, in relation to the treatment of women by criminal justice actors, believed that the greater leniency shown to women by the police and courts "masked" the extent of crime committed by women.[12] Pollak's works influenced the "chivalry thesis": that women are "filtered out" of the criminal justice system by the "chivalrous discretion" of predominantly male judges and police.[13]

Women who offended were seen as transgressing gender expectations: the criminal woman was socially "abnormal", or indeed, "monstrous".[14] As Gelsthorpe and Sharpe stated, a dual image of girls was created: simultaneously thought to be more vulnerable than boys and in need of care and protection, whilst their delinquent behaviour was seen "as worse than that of boys."[15] Over the last two centuries, female pathways into crime have been viewed as a result of sexualised and immoral (mis)behaviour,[16] as a combination of waywardness and "dishonesty",[17] or as a consequence of the increasing liberation of

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[8] Carol Smart *Women, Crime and Criminology: A Feminist Critique* (Routledge & Kegan Paul, London, 1976) at 33.
[9] Loraine Gelsthorpe and Gilly Sharpe "Gender, Youth Crime and Justice" in Barry Goldson and John Muncie (eds) *Youth Crime and Justice: Critical Issues* (Sage Publications, London, 2006) at 53.
[10] Gelsthorpe and Sharpe, above n 9, at 53.
[11] Cleland and Quince, above n 1, at 28.
[12] Smart, above n 8, at 46–47.
[13] Cleland and Quince, at 50.
[14] Smart, at 29 and 35.
[15] Gelsthorpe and Sharpe, at 48.
[16] Carrington and Pereira, above n 3, at 62-63.
[17] Loraine Gelsthorpe and Anne Worrall "Looking for Trouble: A Recent History of Girls, Young Women and Youth Justice" (2009) 9 Youth Justice 209 at 213.

women, which had "given them the freedom to behave as nastily as boys."[18] In New Zealand, the 1950's Parker-Hulme murder of a mother by her daughter and her daughter's best friend sparked a media-driven moral panic about the nature of young female offending.[19] Whilst many of these theories and attitudes have since been discredited as "myths, muddles and misconceptions", the remnants of such gendered standards remain in contemporary society.[20] Greater attention is given today to girls' increased participation in gangs, with their violent behaviour fuelled by alcohol and drugs.[21]

Although the evidence about whether girls are becoming increasingly violent is distorted and inconclusive, these gender expectations are crucial in understanding the unique situation of young women offenders today.[22] Girls do offend less than young men and boys. However, they are still offending and in seemingly consistent numbers.[23] Despite this, young women's offending remains under-researched and ill-responded to, and this needs to be changed. In order for young female offending to be prevented and combatted, these gendered constructions must be acknowledged and factored into the New Zealand youth justice system's responses.

III The Needs of Young Women Offenders

Whilst many of the feminine stereotypes aforementioned have been disproved, it is recognised that young women offenders do have distinct needs that need to be addressed. Studies have identified that

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[18] At 219.
[19] Nessa Lynch "Girls Behaving Badly?" Young Female Violence in New Zealand" (2014) 45 VUWLR 509 at 513.
[20] Gelsthorpe and Worrall, above n 17, at 220.
[21] Carrington and Pereira, above n 3, at 67–68.
[22] Ibid; Gelsthorpe and Sharpe, above n 9 at 55–56; Lynch, above n 19, at 523.
[23] Statistics New Zealand, above n 5.

victimisation acts as a significant precursor to female offending.[24] Because of their younger age and stage of emotional development, Burman and Batchelor identified that young females are more affected by victimisation and related consequences such as parental absence, a sense of isolation and higher rates of self-harm than their male and adult counterparts.[25] Sharpe has noted that many poverty-driven circumstances and generational adversities affect both girls' and boys' pathways into crime.[26] Yet, Sharpe recognised that some causal factors tend to affect girls more, including dysfunctional family relationships, victimisation, and experiences of abuse as well as early pregnancy or motherhood.[27] Taylor identified a similar correlation between high levels of victimisation and young female offending, with 88 per cent of those female offenders interviewed in her study having experienced some form of childhood abuse.[28]

Whilst it is important not to essentialise the experiences of young women offenders based upon their gender alone, for many young women these risk factors do correlate with their offending. It is important that individual experiences are recognised and treated, as well as trends that exist for young women as a collective group.[29] Although boys also experience abuse, the combination of victimisation and other forms of disadvantage appears to accumulate for girls.[30] Hence, for this offending group in particular it is crucial that programmes are instituted which target the relationship between victimisation and its effects such

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[24] Burman and Batchelor, above n 6, at 278–279; Annabel Taylor "Women offenders in Aotearoa New Zealand: The impact of violence across the life course" (2007) 5 Te Awatea Review 18 at 18.
[25] Burman and Batchelor, at 278–279.
[26] Gilly Sharpe *Young Women and Youth Justice* (Routledge, London, 2012) at 149.
[27] Sharpe, above n 26, at 149-150.
[28] Taylor, above n 24, at 18.
[29] Tracey McIntosh "Marginalisation: A Case Study: Confinement" in Tracey McIntosh and Malcolm Mulholland (eds) *Māori and Social Issues* (Huia Publishers, Wellington, 2011) at 269.
[30] Taylor, at 20.

as lower self-esteem, mental health disorders, drug and alcohol misuse, and crime.[31]

IV The Needs of Young Māori Women

Whilst the needs of young women generally must be assessed in our youth justice system, the specific needs of young Māori women offenders also deserve consideration. There is a significant lack of information for this group. The typical focus of research and resources for Māori offenders is adult Māori men.[32] Although there is offending data based on ethnicity, age and gender separately, it is difficult to find research that combines these variables.[33] As Tracey McIntosh has commented, young Māori female offenders are a "socially submerged population", being "marginalised in the literature and public consciousness."[34] Māori women are more socio-economically disadvantaged on a number of levels than both Māori men and non-Māori women:[35] they are over-represented in their exposure to poverty, poor housing, income and employment disparities, domestic violence, mental health problems and lack of community support.[36] The combined variables of socio-economic oppression that Māori women face overexposes them to offending risk factors; being more easily "filtered in" to the criminal justice system than any other social group in New Zealand.[37] Despite this, as this paper will demonstrate, services are failing to account for the life experiences of young Māori women,

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31 Burman and Batchelor, above n 6, at 278–279; Sharpe, above n 26, at 126.
32 McIntosh, above n 29, at 265.
33 This can be seen in various reports of Statistics New Zealand, the New Zealand Police and the Ministry of Justice.
34 McIntosh, at 265.
35 Khylee Quince "The Bottom of the Heap? Why Māori Women are Over-Criminalised in New Zealand" (2006) 3 Te Tai Haruru: Journal of Māori Legal Writing 99 at 118–121.
36 Ministry of Women's Affairs *Māori Women: Mapping Inequalities and Pointing Ways Forward* (September 2001) at 120 and 126–128.
37 Quince, above n 35, at 127.

only conflating their negative experiences in the youth justice system further.[38] As Khylee Quince argues, an intersectional strategy is therefore needed in the Aotearoa youth justice system to respond to the differing needs and life experiences of young Māori women offenders alongside those of their non-Māori counterparts.[39] As Quince recognised, "We cannot hope to address the causes of social harm if we do not contextualise the experiences of the specific people involved in offending." [40]

V Existing Practice in the Aotearoa New Zealand Youth Justice System: an Invisible Population?

It must be assessed whether Aotearoa New Zealand's youth justice system is responding to the needs of young women offenders, both Māori and non-Māori. The aim being, as signalled above, to highlight that these young women currently exist as an invisible population in the New Zealand youth justice system, and to seek avenues of remedying this and reduce young female offending generally.

A International Standards and Obligations

New Zealand has ratified several international standards and obligations that are relevant to the treatment of young female offenders, and against which current practice must be judged. The right to freedom from discrimination is affirmed in the Convention on the Elimination

[38] At 121; Ministry of Women's Affairs, above n 36, at 121.
[39] Quince discusses the treatment and status of Māori women generally, rather than young Māori women specifically, however her analysis is still highly relevant to this group; Khylee Quince "Māori and the criminal justice system in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) at 18.
[40] Quince, at 128.

of Discrimination Against Women,[41] the International Covenant on Civil and Political Rights,[42] the Declaration on the Rights of Indigenous Peoples (UNDRIP),[43] and in the Convention on the Rights of the Child (UNCROC).[44] This principle is pertinent when considering the particular needs of young women offenders and the over-representation of young Māori women offenders in the youth justice system. If gender-neutral policies result in young women offenders receiving less care and attention than males, that would be discrimination, and a claim could be brought against the New Zealand Government. The Committee on the Rights of the Child has given examples of measures needed to ensure a non-discriminatory framework. These include:[45]

(1) training youth justice professionals;
(2) establishing rules, regulations or protocols which enhance equal treatment of child offenders and provide redress, remedies and compensation where needed;
(3) addressing the root causes of criminal behaviour including victimisation, psychological and socio-economic problems, pertinent to "girls and street children."

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41 United Nations Convention on the Elimination of Discrimination Against Women 1249 UNTS 13 (opened for signature 1 March 1980, entered into force 3 September 1981), art 2(d).
42 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976), art 2(1).
43 *Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/296 (2007), art 2.
44 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 2.
45 United Nations Committee on the Rights of the Child *General Comment No. 10 (2007): Children's rights in juvenile justice* CRC/C/GC/10 (2007) at [6]–[9].

The Beijing Rules, which are given legal status under UNCROC,[46] go further than non-discrimination and state that: [47]

> Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.

The Committee on the Rights of the Child echoes the sentiments of the Beijing Rules in its 2007 report: that girls in juvenile justice systems "may be easily overlooked" and special attention is to be given to their particular needs, particularly "in relation to prior abuse and special health needs."[48] UNDRIP also recognises the need to give "particular attention" to the special needs of indigenous women and youth in policy and practices.[49]

Although not binding, the Riyadh Guidelines emphasise that the institutionalisation of young offenders should be "a measure of last resort", with sexual, physical or emotional abuse suffered by the young person to be given adequate consideration in this decision.[50]

All of these international standards require that New Zealand's youth justice system operates using a non-discriminatory framework, with particular regard to the needs of young female offenders and young Māori offenders. These international standards certainly do not render young women offenders invisible.

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46 Cleland and Quince, above n 1, at 5.
47 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* GA Res 40/33, A/Res/40/33 (1985) at 26.4.
48 United Nations Committee, above n **Error! Bookmark not defined.**, at [40].
49 *UNDRIP*, above n 43, art 22.
50 *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)* GA Res 45/112, A/Res/45/112 (1990) at 46.

B The Legislative Framework

The Children, Young Persons, and their Families Act 1989 (the Act) forms the foundation of New Zealand's youth justice system; however, it does not specifically address young women offenders. There is no mention of gender in the Act. Yet, there are broader principles in the Act that could be applied to take account of gender and the needs of offending girls. Sections 4 and 5 of the Act emphasise the importance of whānau participation, both in decision-making processes that affect a child or young person,[51] and also in assisting that family where there is disruption.[52] The Act also seeks to take account of different cultural and ethnic groups by incorporating their perspectives in services and facilities in the community.[53] The particular needs of young Māori women could be supported under this section. Yet, such needs would be homogenised here as 'Māori needs' rather than being gender and culturally specific. The needs of young offenders are also seen as paramount and as warranting acknowledgement in responses to their behaviour.[54]

The specific youth justice principles in the Act reference the whānau unit (in terms of strengthening it), the importance of alternative means to criminal proceedings, welfare needs of offenders, and the need to "address the causes underlying the child or young person's offending."[55] Further, both age and the vulnerability of the offender are to be taken into account when determining sanctions.[56] References to needs, underlying causes, welfare and vulnerability have scope for factors such as victimisation and abuse to be taken into account for young women offenders.

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[51] Children, Young Persons, and their Families Act 1989, s 5(a).
[52] Section 4(c).
[53] Sections 4(a)(i) and (iii).
[54] Section 4(f)(ii).
[55] Section 208.
[56] Sections 208(e) and (h).

The upshot is that, whilst this statutory framework has the potential to meet the needs of offending girls, it must be recognised that all of these provisions are broad, sweeping principles only. They do not make specific provision for the needs of young women or young Māori women or directly address the international standards New Zealand has ratified. Instead, responses targeted to this group lie in the discretion and practice of key youth justice actors: the New Zealand Police, courts, corrections facilities and community service providers.

C Specific Responses to Date

Several key institutions, mechanisms and programmes will be analysed to determine whether they are serving the needs of young female offenders (Māori and non-Māori), or whether this group remains an invisible population in Aotearoa New Zealand's youth justice system.

1 Family Group Conference (FGC)

The FGC is the core decision-making process in New Zealand's youth justice system.[57] The core value driving the FGC process is achieving a proportionate response to offending, taking account of the seriousness of the behaviour as well as the causes and context of offending.[58] The diversionary aims of the Act further support rehabilitative practices being utilised where the needs of the offender warrant this response.[59] In theory, the individualised nature of FGCs in contrast to a formal court process means that the particular needs of young women (Māori or otherwise) should be taken into account in implementing a plan. Risk factors more prevalent amongst young females, including victimisation, abuse, and mental health, could in theory be addressed in an FGC plan.

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[57] Cleland and Quince, above n 1, at 147.
[58] Cleland and Quince, above n 1, at 149.
[59] Children, Young Persons, and their Families Act 1989, ss 208(a), (b) and (fa).

Although the symbolic value of such aims must be recognised, there is evidence that FGCs are less successful for girls and young women.[60] Maxwell and Kingi's research into FGCs and the difference in gender responses highlights this. The outcomes of their research identified that:[61]

(1) FGCs involving offending girls were less likely to reach agreement;
(2) over half the girls felt too intimidated to share their feelings;
(3) girls were less likely to feel that they had been treated fairly, considered trustworthy or that they could put the offending behind them;
(4) girls were only half as likely as boys to report that the FGC helped them to stop or reduce their offending; and
(5) in general, girls reported more negative experiences of FGCs than boys.

In the study sample, significantly more girls than boys had also been notified to the Department of Child Youth and Family Services as being in need of care and protection (58 per cent of girls; 41 per cent of boys); this is comparable with the research surrounding gender-based victimisation as aforementioned.[62] It is evident that girls and boys are responding differently to FGCs as they currently operate. Research by the Youth Court has also identified that girls are less responsive than boys to the restorative aspects of FGCs.[63] Therefore, the core process

[60] Gabrielle Maxwell and Venezia Kingi "Differences in How Girls and Boys Respond to Family Group Conference: Preliminary Research Results" (2001) 17 Social Policy Journal of New Zealand 171 at 175 and 181.
[61] Maxwell and Kingi, above n 60, at 175 and 178–179.
[62] At 174.
[63] Tim Hall and Linda McIver "Girls Offending" *Court in the Act* (New Zealand, February 2010) at 13.

of the youth justice system appears to be neglecting the needs and experiences of girls to some extent. As Maxwell and Kingi identified, it cannot be assumed that a FGC will provide a similar experience for everyone.[64]

It does deserve noting that Ngā Kooti Rangatahi has proved initially successful for young Māori. Ngā Kooti Rangatahi take place on marae and supervise young offenders during the completion of a FGC plan to support and reintegrate offenders back into the community.[65] By recognising Māori values, protocol and placing youth justice processes in a supportive community the causes of young people's offending behaviour are more likely to be addressed in a culturally appropriate context.[66] It is initiatives like this, which adapt the FGC process, that have the potential to succeed in meeting the needs of offenders, provided they are gender-specific when dealing with young Māori women.

2 Incarceration

With three women's prisons in New Zealand, young women offenders can receive some specialised treatment once incarcerated.[67] Prison staff do receive specific training for understanding female offenders, although it is unclear whether age and ethnicity are also addressed in such training.[68] It must be noted that research in this area is limited and narrow, making it difficult to accurately assess the adequacy of female prison units. Yet, a 2008 review conducted by the International Centre

64 Maxwell and Kingi, above n 60, at 181.
65 Cleland and Quince, above n 1, at 251 and 253.
66 At 255.
67 Department of Corrections "Women in Prison" Department of Corrections <http://www.corrections.govt.nz/working_with_offenders/prison_sentences/being_in_prison/women_in_prison.html>.
68 Ministry of Justice *New Zealand's 6th Periodic Report on the United Nations Convention against Torture* (12 July 2012) at [169].

for Prison Studies provided some enlightenment. The Report stated that New Zealand takes a traditionally male-based approach to women's imprisonment, reproducing the incarceration system used for men with only minor variations.[69] There are some beneficial initiatives aimed at female prisoners,[70] such as the Kōwhiritanga programme, which is based on Tikanga Māori values and addresses re-offending risk factors for women including victimisation and substance abuse.[71] However, the review concluded that despite these minor initiatives "serious reform has yet to occur."[72]

3 Rehabilitation and prevention programmes

As Lynch recently identified, there is a notable lack of female-specific preventative and rehabilitative programmes in New Zealand currently.[73] There is considerable frustration amongst youth justice professionals at the lack of gender-specific programmes available.[74] For example, there are rehabilitative programmes for violent men including 'Youth to Men' and 'Dove', yet, there are few examples of female equivalents.[75] One intervention available in Hastings for violent female offenders is "Wahine Toa" run by senior police officers and youth advocates.[76] Despite having limited resources, the programme has been successful for the bulk of the girls, building their self-esteem and targeting the causes of their offending.[77] More of these programmes are needed. Judge Zohrab has noted that incarceration is often the first real

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[69] McIntosh, above n 29, at 270.
[70] Ibid.
[71] Ministry of Justice, *6th Periodic Report*, above n 68, at [170].
[72] McIntosh, above n 29, at 270.
[73] Lynch, above n 19, at 523.
[74] Tim Hall and Linda McIver "Youth Justice Professionals Grow Frustrated at a Lack of Programmes for Violent Young Females" *Court in the Act* (New Zealand, May 2010) at 7.
[75] Hall and McIver, "Professionals", above n 74, at 7.
[76] Ibid.
[77] Ibid.

opportunity for many women to receive free ACC counselling for sexual abuse.[78] Dr Donna Swift's research suggests that young women have a different pathway into violence and crime "so they need a different pathway out."[79] The particular needs of young women, therefore, need to be addressed through different schemes from their male counterparts.

4 Police practice

Police practice currently appears to be failing this group of offenders also. Whilst the Youth Policing Plan from 2012–2015 references the upward trend in violence for female youth, it fails to mention any strategies that will combat this.[80] Responding to "youth risk factors" generally is mentioned, but not gender-specific policies.[81] There is a focus on early intervention, alternative action and joint initiatives with iwi as a means of meeting the needs of Māori youth. However, these also fail to be gender-specific.[82] Again, these gender-neutral, or indeed gender-blind, policies are too vague to ensure young women are directly supported.

5 Research

Finally, the lack of gender-specific research remains a pressing issue for the New Zealand youth justice system.[83] Whilst undertaking this study, it was clear that both the needs of young women offenders and any responses to them are not being thoroughly researched in New Zealand. The lack of research and empirical studies into young

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[78] Hall and McIver, "Girls Offending", above n 63, at 13.
[79] At 12.
[80] New Zealand Police *Youth Policing - Where Prevention Starts: Youth Policing Plan 2012-2015* (June 2012) at 4.
[81] New Zealand Police, above n 80, at 8.
[82] At 7.
[83] Lynch, above n 19, at 523.

women's offending means that this issue appears to be ignored at the policy level.[84] If policy makers are not tackling it, it is unlikely that gender-specific initiatives will filter down into the practice of youth justice actors.

Currently young women offenders exist as an invisible population in New Zealand. There are not enough targeted initiatives that meet their needs and respond to the causes of their offending. The policies and practices currently do not meet the international standards New Zealand has signed up to. Young women offenders are therefore left marginalised and their offending can only be expected to increase if the status quo remains.

D Ensuring Young Women are a Visible Population: Where to from here?

Young women offenders need to be made visible and responded to in order to reduce their re-offending and enhance their reintegration into society. The FGC process needs to be adapted to incorporate the views of sexual abuse and violence professionals to create plans that better target the needs of young women. Gender-specific programmes are needed, both rehabilitative and preventative. Police strategies need to recognise the needs of young women offenders (Māori and non-Māori) more explicitly and combat them. Tikanga Māori values need to be incorporated for young Māori women in a way that recognises the social roles of Māori women. Gender-blind policies and initiatives need to be exchanged for gender-specific ones. The first step is to increase the amount of research undertaken on young female offenders, and thus increase the pool of research that can inform the development of the youth justice system at a policy level. The more this issue is recognised, the easier the task of remedying it will become.

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[84] Ibid.

VI Conclusion

Young female offenders (both Māori and non-Māori) currently exist in the Aotearoa New Zealand youth justice system as an invisible population, whose distinctive needs remain chiefly undocumented and unaddressed. The international standards New Zealand has signed up to recognise the importance of non-discriminatory frameworks and meeting the needs of young women. However, the current legislative framework and practice of key youth justice processes and actors do not embody such aspirations. An intersectional strategy and gender-specific initiatives are needed to meet the differing needs and life experiences of young Māori women offenders alongside those of their non-Māori counterparts. In order for young female offenders to be rendered visible in Aotearoa New Zealand's youth justice system, these issues need to be prioritised.

MEDIA REPORTING OF SUICIDE: THE RISKS OF SUICIDE NEWS STORIES AND HOW RESPONSIBLE REPORTING CAN BE ACHIEVED

MICHAEL FINUCANE*

I Introduction

The recent apparent suicide of Robin Williams drew extended, worldwide media coverage. Differences in reporting style and level of detail emerged, as each nation's press grappled with media guidelines and health professionals urging caution in the face of the extreme interest in the story. Some media outlets rejected all calls for responsibility, reporting the method of suicide in extreme detail and establishing an aerial 'live feed' of the bereaved family's home.[1] In contrast, others explicitly declined to publish details of the method and sought insight from suicide support services.[2] New Zealand reporting, though generally responsible, was further complicated by the media's

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1 Catherine Taibi "ABC News apologises for streaming video of Robin Williams' home" *The Huffington Post* (online ed, United States of America, 12 August 2014).

2 "Robin Williams death: social media backlash over details of suicide" *The Sydney Morning Herald* (online ed, Sydney, 13 August 2014).

apprehension of the current statutory restrictions on the reporting of suicide. As the public awareness of suicide and depression develops, it is vital that the law regulating this area remains appropriate and justified by the evidence.

The question underlying this paper is how media reporting of suicide can most appropriately be regulated. The topic has recently been addressed by the Law Commission issues paper on suicide reporting,[3] whose views are referred to throughout this paper. The Government agreed to all of the Law Commission recommendations, leading to the introduction of the Coroners Amendment Bill on 31 July 2014.[4] Given these circumstances, this paper does not enter into detailed discussion of whether the law should change, but proceeds directly to a consideration of the evidence and recommendations on what the new law should be.

The scope of this paper is limited to the research and regulations around reporting of suicide by the news media, focusing on the Coroners Act restrictions as well as independently published media guidelines. The history of such guidelines in this country has been troubled, with previous attempts in 1999 and 2011 seeing little success.[5] While the current regulations are relatively brief and contained, the wider topic is a large and interconnected area of research. Issues which may be relevant but have been set aside include the emergence of social media and the internet, euthanasia, the history of the legislation, fictional accounts of suicide, and the more specific problems associated with youth and Maori suicide rates. It is important to note that the current restrictions apply beyond the media to the ordinary public, including bereaved families and friends recently affected by a suicide.

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[3] Law Commission *Suicide Reporting* (NZLC R131, 2014).

[4] Coroners Amendment Bill 2014 (239-1).

[5] Ministry of Health *Suicide and the media: The reporting and portrayal of suicide in the media* (2 September 1999); Media Roundtable *Reporting Suicide: A resource for the media* (Ministry of Health, 22 December 2011).

There are fundamental differences in the policy around these groups, and it may be appropriate for future regulations to differ in how they apply or are enforced against different types of person.

II The Problem of Suicide

Suicide is defined as the act of killing oneself intentionally.[6] A coronial inquest is often required to make this finding, and annual statistics on suicide tend to lag by several years due to the time that may be taken to complete all relevant inquiries. However, an examination of suicide statistics over the last decade suggests that rates in New Zealand are following relatively stable trends. The most recent official statistics on suicide in New Zealand are the 2011 figures released in a January 2014 report.[7] The suicide rate among the general population of New Zealand was reported as 10.6 per 100,000; equating to 478 deaths. More recent figures can be drawn from the provisional suicide statistics issued annually by the Chief Coroner,[8] which confirm the relatively static figure of roughly 500 deaths a year. While the press release described this statistic as 'stubborn', the coinciding rate of population growth means the overall suicide rate has in fact been incrementally falling since the most recent peak in 1997. New Zealand's national suicide rate is around the average among OECD nations,[9] although it should be noted that direct statistical comparisons with other countries are made difficult by differences in investigating and officially reporting on suicide.

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[6] Catherine Soanes and Angus Stevenson (eds) *Oxford Dictionary of English* (2nd ed, Oxford University Press, Oxford, 2003).
[7] Ministry of Health *Suicide Facts: Deaths and intentional self-harm hospitalisations 2011* (27 January 2014).
[8] Ministry of Justice "Chief Coroner releases provisional annual suicide figures" (press release, 20 August 2014).
[9] Ministry of Health, above n 7, at 26.

Suicide rates vary drastically between different groups in society. Male suicide rates are traditionally far higher than those for females; in 2011 the male rate being 3.5 times higher.[10] Māori suicide rates were 1.8 times higher than non-Māori rates. Finally, despite the general rate being unremarkable among OECD nations, New Zealand stands out as having the second highest rate of youth suicide.[11] The 2011 statistics place youth male rates at 28.1 deaths per 100,000 population, and female rates at 9.9. The general public might be surprised to learn that suicide is the leading cause of death among young people aged 15 – 24, with almost 50 per cent more fatalities each year than vehicle accidents.[12]

III The Coroners Act 2006

New Zealand is unusual among OECD nations in maintaining a general statutory restriction on publishing the details of a suicide. This restriction has been retained in various forms since the Coroners Act 1951. While an examination of the legislative history of the provision is not within the scope of this essay, reference can be made to the Law Commission report,[13] as well as Sam Blackman's detailed paper on the topic.[14]

It is important to note that there is no statutory restriction on the reporting of suicide as a general topic - the offence only relates to reporting of individual deaths within New Zealand. While guidelines on reporting will always be of relevance, the media is free under the Coroners Act to publish general articles on topics such as the incidence

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[10] At 3.
[11] At 29.
[12] At 8.
[13] Law Commission, above n 3, at 19.
[14] Sam Blackman "Suicide and the Media: Whether New Zealand's Statutory Restrictions on the Reporting of Suicide are Justified" (2012) 2 NZLSJ 746 at 748.

of suicide, methods commonly used, and the risk factors associated with suicidal behaviour. By way of example, student magazine 'Craccum' published an article on suicide in 2000 which provided a detailed and graphic list of potential methods (albeit with the praiseworthy intention of dispelling the myth that 'suicide is painless').[15] Without reference to a deceased individual, the Coroners Act offence could not be triggered.[16] As this paper goes on to argue, although awareness and enforcement of guidelines on this subject are of paramount importance, a statutory restriction alone cannot ensure responsible reporting. It should also be reiterated that the law only covers deaths which have occurred in New Zealand.[17] Naturally, many of the most high profile deaths within mainstream media culture occur overseas, reinforcing the importance of effective guidelines alongside the law.

The key restricting provision is at section 71 of the Coroners Act 2006, which draws a distinction between whether or not a coronial inquiry into the death has been completed. Section 71(1) holds that:

> No person may, without a coroner's authority, make public any particular relating to the manner in which a death occurred if—
>
> (a) the death occurred in New Zealand after the commencement of this section; and
>
> (b) there is reasonable cause to believe the death was self-inflicted; and
>
> (c) no inquiry into the death has been completed.

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[15] "Suicide Is Painless? – The Craccum Articles" *Scoop* (Online ed, New Zealand, 7 March 2000).

[16] An amalgamated complaint to the Press Council also failed: Case 786, *Health Waikato v Craccum* (2003).

[17] Coroners Act 2006, s 71(1)(a).

Under section 60(1)(a)(i) of the Coroners Act any death which appears to be self-inflicted must be the subject of an inquiry, a sometimes lengthy process. Once the inquiry has been completed and the death determined as a suicide, section 71(2) alters the restrictions:

> If a coroner has found a death to be self-inflicted, no person may, without a coroner's authority or permission under section 72, make public a particular of the death other than—
>
> (a) the name, address, and occupation of the person concerned; and
>
> (b) the fact that the coroner has found the death to be self-inflicted.

The penalty for breach of such provisions consists of a maximum fine of $5000 for body corporates or $1,000 in any other case.[18]

A Particulars of Death

Section 71(1) is most relevant to reporting by the news media, as urgent deadlines and commercial competition demand the publishing of newsworthy suicides well before any inquiry is complete. There is considerable ambiguity as to the actual extent of the restriction, and the meaning of the term 'any particular relating to the manner in which the death occurred'.[19] The Law Commission suggested that the most crucial distinction is whether the prohibition covers only reporting of the method, or extends to all details including the bare fact of a suicide.[20]

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[18] Section 139(a).
[19] John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2010) at 500.
[20] At 19.

'Making public' is defined to include broadcasting, newspapers, and journals, among other publications.[21] The same section defines 'particular' as "a detail relating to the manner in which the death occurred, to the circumstances of the death, or to an inquiry into the death", which does little to clarify what may or may not be published. Read in isolation the words suggest that a wider interpretation is the intended one, extending even to the existence of the inquiry itself. But in the context of section 71(1), which itself restricts 'any particular relating to the manner in which a death occurred', it could be argued that only the first element of the extended definition is included.

Insofar as the author can find, no case exists which deals directly with the interpretation of this section. The Chief Coroner is reported as taking a wider interpretation of the provisions, treating 'particular' as including the method of suicide, cause of death and preceding circumstances, and the restrictions being breached even by describing a death as an 'apparent' or 'suspected' suicide.[22] This has resulted in the media resorting to euphemisms to indicate the suspicion of a suicide without saying the specific prohibited words. The Law Commission report did not come to a final conclusion on whether a wider or narrower interpretation of the statutory provision is correct, setting the question aside given the lack of clarity and need for a new provision anyway.[23] Given the statements of the Chief Coroner and use of euphemisms by the media, it would appear that the wider approach is the one which has been 'adopted' by those whom the provision actually concerns.

The problems associated with this lack of clarity extend beyond the media. Coroners are placed in a difficult position of conflict, the

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[21] Coroners Act, s 73. This definition adequately covers the mainstream media considered in this paper, and the Law Commission has recommended that it be preserved.
[22] Media Roundtable, above n 5, at 10.
[23] At 24.

unclear restrictions clashing with their statutory duty to issue recommendations and advice on the prevention of further deaths.[24] Although coroners are empowered under section 71 to authorise an exception, the statutory test states that the 'only ground' on which an exception may be made is where the release is unlikely to be detrimental to public safety.[25] Accordingly there may be cases where coroners wish to make an important recommendation, but the unclear wording of the Act prevents them from making an exception even for their own publication.

Despite the apprehension of both the media and coroners, the restriction provisions have seen a complete lack of enforcement over their long history. An examination of New Zealand reporting reveals a willingness to report in clear breach of the provision, however uncertain its extent may be. The Law Commission's own review of 83 articles in the course of its report found that nearly a third did not comply with the provisions.[26] Despite this, no judgment on the prosecution of this offence could be found. Interestingly, however, media representatives do occasionally refer anecdotally to prosecution.[27] It may be that rare prosecutions do occur but attract very little attention due to the strict liability of the offence, relatively minor penalty, and the disincentive to report anything further. Whether or not this is the case, the overall situation appears to be one of uncertainty and non-enforcement.

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[24] Coroners Act, ss 3(1)(b) and 4(2)(b).
[25] Section 71(3).
[26] At 34.
[27] See for example the summary of facts in *M v Radio 531 PI* BSA 2001-028, 26 April 2001; and the comments in Jim Tully and Nadia Elsaka *Suicide and the media: A study of the media response* (Ministry of Health, 1 April 2004) at 11.

IV Overseas Restrictions

Safe reporting overseas is sought primarily through use of guidelines rather than statutory restrictions. However, some relevant international legislation does exist. The New South Wales Coroners Act 2009 provides coroners with a power to suppress any report of the proceedings, or any report which identifies a person (or relative of a person) whose death may have been self-inflicted.[28] If there is a finding of suicide, then a report of the proceedings must not be published unless the coroner makes an exception.[29] The coroner may not make such an exception unless they are 'of the opinion that it is desirable in the public interest'.[30] These provisions appear to have been adopted from New Zealand's early restrictions, their origin lying in a 1975 Law Reform Commission paper which recommended that in relation to suicide "a more specific power of controlling what is published may be an advantage and in the public interest".[31] The report later referred to the purposes of avoiding distress to relatives, as well as preventing imitative suicides which the Commission described as "undoubtedly a phenomenon which has been noticed here".[32] Although this provision appears to establish a positive constraint on reporting, in reality any restriction will be almost completely obsolete. It is the law which applies prior to the conclusion of an inquiry which matters most to the time-pressured media, and the New South Wales restriction would have no effect on the vast majority of reporting occurring shortly after death. It is therefore unsurprising that, as in New Zealand, there is a distinct lack of case law and commentary on the application of these restrictions.

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[28] Coroners Act 2009 (NSW), s 75(2).
[29] Section 75(5).
[30] Section 75(6).
[31] New South Wales Law Reform Commission *Report on the Coroners Act, 1960* Report No 22 (1975) at 9.
[32] At 94.

Further references to suicide in overseas legislation exist as discretionary powers rather than positive presumptions. The Saskatchewan Coroners Act 1999 provides that, where it appears at an inquest that a death may have been self-inflicted, the coroner may order that no evidence of proceedings be published or broadcast until a finding is returned.[33] Though based on a discretionary suppression order rather than a presumption of restriction, the provision is another example of an overseas Parliament recognising a specific need to control reporting of self-inflicted deaths.

Even if New Zealand were completely alone in maintaining a statutory restriction on reporting of suicide, this would not necessarily mean that our law is outdated or unjustified. One suggestion is that enacting these provisions in the modern era is impossible, given the extensive media opposition to restrictions of this sort.[34] New Zealand also has sufficiently unique circumstances in relation to suicide to justify its own laws, most notably our very high rates of suicide among young persons - who have been identified as a group more vulnerable to contagion effects.[35]

V Justifying the Restrictions

Suicide is a sensitive topic, and reporting in this area is subject to a number of competing interests and factors. The Coroners Act restrictions on reporting are based on the public health concern of contagion effects, the integrity of the coroner's inquiry, and the protection of families recently bereaved by suicide.

Despite the common perception of a 'taboo' around the discussion of suicide, media reporting on the topic is relatively common. A 2012

[33] The Coroners Act SS 1999 c C-38.01, s 36(1).
[34] Blackman, above n 14, at 769.
[35] Madelyn Gould, Patrick Jamieson and Daniel Romer "Media Contagion and Suicide Among the Young" (2003) 46 ABS 1269 at 1270.

study commissioned by the Ministry of Health found that in a 12 month period a total of 3,483 media items on suicide were published in New Zealand.[36] Over half of these publications were newspaper articles, and another 40.2 per cent were found on the internet, leaving relatively few radio and television items. Discussion of the risks of such articles in New Zealand is accordingly not purely hypothetical; reporting of suicide does occur here and is likely to carry the same risks as have been demonstrated worldwide.

A Contagion

The primary justification for the restriction provision is the prevention of contagion effects and copycat suicides through reporting. This is strongly suggested by the statutory test for an exception being based on 'public safety'; as well as the Parliamentary debate on the restrictions' preservation in the Coroners Act 2006.[37]

There are a number of terms for the effects of media reporting on suicide, including 'contagion', 'mass clusters' and 'copycat effects'.[38] Different effects and terms seem to easily be conflated with one another, but the overarching issue is that reporting on suicide in certain ways appears to increase the rate of suicides for a period afterwards. The size of the effect varies: meta-analysis reports have found average increases in suicide rates from 0.26 per cent,[39] to 2.51 per cent over the subsequent month.[40] Case studies on major figures such as Marilyn

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36 Katey Thom and others "Reporting of Suicide by the New Zealand Media" (2012) 33 Crisis 199 at 200.
37 See Law Commission, above n 3, at 23.
38 Merike Sisask and Airi Värnik "Media Roles in Suicide Prevention: A Systematic Review" (2012) 9 Int J Environ Res Public Health 123 at 123.
39 Thomas Niederkrotenthaler and others "Changes in suicide rates following media reports on celebrity suicide: a meta-analysis" (2012) 66 J Epidemiol Community Health 1037 at 1041.
40 S Stack "Media coverage as a risk factor in suicide" (2003) 57 J Epidemiol Community Health 238 at 238.

Monroe have found far greater effects.[41] The effect has generally been found to peak within three days of the report and attenuate over two weeks,[42] and appears to be heavily dependent on the type and content of reporting, as well as the qualities of the deceased who is focused on.[43] The actual impact of reports around an individual death may therefore be significantly higher or lower for some vulnerable groups than is reflected by the suicide rate of the general population. While in past decades the evidence for such effects was contentious and plagued by criticism of methodology,[44] more recent studies have added to the dominant consensus that reporting on suicide in certain ways will produce a greater risk of further deaths.[45]

There is some disagreement as to the underlying psychological basis for different contagion effects. Social learning theory is one of the main theoretical explanations, suggesting that vulnerable persons exposed to reporting of suicide which is sensationalised, simplistic and/or high in volume can internalise the idea that suicide is an acceptable response to adverse life circumstances and imitate that behaviour.[46] This effect is amplified in role models, such as entertainment celebrities and political figures who receive high levels of coverage and idealisation. The Law Commission report provides a detailed exploration of the way contagion can proliferate through 'advertising', 'normalising' and 'sensationalising' the death.[47] Other researchers have based their

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41 Steven Stack "Suicide in the Media: A Quantitative Review of Studies Based on Nonfictional Stories" (2005) 35 Suicide and Life-Threatening Behaviour 121 at 122.
42 Jane Pirkis and others "Media Guidelines on the Reporting of Suicide" (2006) 27 Crisis 82 at 83.
43 At 83.
44 See Stack, above n 41, for a wide-scale review on the debates and problematic differences in methodology at that time.
45 Sisask and Värnik, above n 38; Niederkrotenthaler, above n 39; Pirkis, above n 42.
46 Warwick Blood and Jane Pirkis "Suicide and the Media: Part III: Theoretical Issues" (2001) 22 Crisis 163.
47 At 13.

analysis on three distinct effects: 'imitation', 'contagion' and 'normalisation'.[48] For the purposes of this discussion (based on the research and guidelines assessed) it is sufficient to deal with the two broad issues of normalisation and actual imitation. The former concerns the more social aspects, relating to the suggestion of suicide as being an acceptable behaviour or 'answer', and could be transmitted through reporting which glorifies suicide without any mention of a method. The latter relates to more direct imitation and learning, where detailed descriptions of a particular method of suicide are taken up by vulnerable individuals who might otherwise not have the necessary means or knowledge. While an irresponsibly written report could easily give rise to both risks, it is useful to distinguish between them for the purpose of directing law and policy on the matter. The distinction emphasises that preventing publication of suicide methods will not resolve all risks, and must be supported by responsible standards of reporting.

The Law Commission concluded that the risks arising from reporting of the method were greater than any other factor, such that only they warranted a statutory restriction.[49] However, this author's examination of the cited research did not come to the same conclusion – rather, it seems that the studies support the conclusion that a number of similarly dangerous risk factors (such as high volumes of sensationalist reporting) contribute to the overall effect. That said, reports of the method have been demonstrated to have some of the most extreme effects in significant case studies.

One vivid example of the dangers of reporting a novel suicide method is that of the 'charcoal burning' phenomenon, which originated in Hong Kong and is now spreading in East Asia. The original study on the event found that prior to 1998 there had been no reported deaths

[48] Thom, above n 36, at 199 made a similar distinction of 'imitation', 'contagion' and 'normalisation' effects.
[49] At 38.

using the method (involving carbon monoxide poisoning through the burning of barbecue coal in an enclosed space).[50] In November of 1998 a high profile suicide using the method was followed by extensive sensationalist reporting of the death, including detailed descriptions of the means used. Within the subsequent twelve months, 56 more deaths had occurred using the exact same method. A recent 2014 review revealed that the method now accounts for around 17 per cent of suicides in Hong Kong, down from a peak of 24 per cent in 2003, and has spread to Taiwan where the method is used in 31 per cent of suicides.[51] The review also noted that the rise in deaths by this method was not met with an equivalent fall in deaths by other methods. This strongly indicates that knowledge of this new technique has significantly raised suicide rates in at-risk groups, who would otherwise not be completing the act.

B The Coroner's Role

As discussed above, it is currently uncertain whether "particulars of the death" include bare statements that a death is suspected to be a suicide, though this is the interpretation which appears to have been adopted. As the Law Commission explained, media reporting of a death as a suicide or suspected suicide prior to that determination by a coroner is problematic.[52] The Coroners Court has been established by Parliament to determine the cause of sudden or otherwise reportable deaths, and make recommendations in the public interest to reduce the occurrence of those deaths.[53] Coroners are judicial officers and carry out their duties with authority and powers equivalent to those of a District Court

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[50] Wai Sau Chung and Chi Ming Leung "Carbon Monoxide Poisoning as a New Method of Suicide in Hong Kong" (2001) 52 Psychiatric Services 836 at 836.
[51] Ying-Yeh Chen and others "The diffusion of a new method of suicide: charcoal-burning suicide in Hong Kong and Taiwan" (10 June 2014) Springer Link <http://link.springer.com>.
[52] At 17.
[53] Coroners Act, ss 3 and 4.

Judge.[54] It is important that the coroner's role and the integrity of their inquiry are not undermined by inappropriate media prejudgment or misrepresentation of a death.

C Privacy

Privacy is an important value upheld by the courts of New Zealand. The privacy of those bereaved by suicide is a significant factor to account for in restrictions of media reporting on the topic. However, there are existing remedies for breaches of privacy by the media. New Zealand common law recognises a privacy tort of disclosure, providing a remedy where 'facts in respect of which there is a reasonable expectation of privacy' are given publicity which would be highly offensive to an objective reasonable person.[55] The courts have also more recently recognised a privacy tort of intrusion, actionable where there is an intentional and unauthorised intrusion into seclusion, infringing a reasonable expectation of privacy and being highly offensive to the reasonable person.[56] Regulatory bodies for the media provide another avenue to remedy breaches of privacy. Both the Broadcasting Standards Authority (BSA) and the Press Council have incorporated privacy principles into their codes, and deal with complaints on a frequent basis. The BSA's incorporated 'advisory opinion' on privacy is particularly detailed, distinguishing between intrusions into solitude and disclosure of offensive facts, and had a prominent role in the development of the law in this area.[57] However, both complaints procedures can only be initiated once a publication has already been released;[58] there is no power for intervention in

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[54] Section 117(1).
[55] *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [117].
[56] *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [94].
[57] John Burrows and Ursula Cheer, above n 19, at 350.
[58] Rosemary Tobin "Media Regulation: The Press Council and the Broadcasting Standards Authority" in Stephen Penk and Rosemary Tobin (eds) *Privacy law in New Zealand* (Brookers, Wellington, 2010) at 207.

anticipation of a damaging report. The regulatory bodies essentially provide a low-cost way for complainants to ensure they are heard, and have an important role in setting expectations of responsible reporting.

It should be emphasised that the privacy interest to be protected is that of the bereaved family, not the deceased. Though there is uncertainty in the matter, the law does not appear to extend privacy rights to the dead - primarily due to the loss of dignity interests upon death.[59] Law and policy on this issue are best focused on the experiences of and risks to the family itself, rather than on a general sense of privacy around the matter as a whole. The aim is to encourage responsible reporting and reduce harm, rather than to chill valid media discussion of suicide.

Beyond the remedies above, there is an argument that those bereaved or otherwise affected by suicide warrant further protection of privacy under the law than the ordinary person. Strong support for this position lies in the evidence that those friends and family who have recently experienced a suicide are at higher risk of attempting suicide themselves.[60] A restriction on the reporting of suicide can assist in reducing these risks by limiting the harmful details which the media may publish, such as recorded images and suicide notes.

Other research indicates that while policy and guidelines on suicide are generally focused on the prevention of copycat effects, bereaved family members are more concerned with 'hounding' by journalists and inaccuracies in later reporting.[61] Interviews by the Law Commission identified a difficult conflict within the policy on this matter, in that

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[59] Stephen Penk "Future Directions and Issues" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (Brookers, Wellington, 2010) at 369.
[60] John Jordan "Is Suicide Bereavement different? A Reassessment of the Literature" (2001) 31 Suicide and Life-Threatening Behaviour 91 at 95.
[61] Alison Chapple and others "How people bereaved by suicide perceive newspaper reporting: qualitative study" (2013) 203 British Journal of Psychiatry 228 at 230.

some families have extremely high expectations of privacy (including privacy over information published on public forums), while others deliberately seek publication of their circumstances.[62] These issues may be best dealt with through media standards rather than legislation, being based on the more discretionary topics of responsible reporting and sensitivity.

The privacy of families of certain cultures with a significant taboo against suicide requires additional consideration. Inappropriate media speculation can be seriously harmful to surviving family members, ostracising them from their community and inflicting further emotional distress. In one noteworthy decision the Broadcasting Standards Authority dealt with a complaint wherein a 20 year old Tongan man was falsely reported as having committed suicide.[63] The Authority noted that suicide in the Tongan community is considered "a major crime" and would be highly objectionable to the reasonable person, upholding the complaint and awarding $500 in compensation to the family. Where circumstances demand it, both the media and coroners must refer themselves not only to the interests of the general public, but to more specific cultural factors relevant to the case.

D Media Responses to the Evidence for Harm

There are several common arguments raised against suicide reporting restrictions which this paper can address. There is a continued reluctance on the part of the media to acknowledge the strong evidence for contagion effects and imitative suicide.[64] Articles are still published

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[62] At 17.
[63] *M v Radio 531 PI*, above n 27.
[64] S Collings and C Kemp "Death knocks, professional practice, and the public good: The media experience
of suicide reporting in New Zealand" (2010) 71 Social Science and Medicine 244 at 246.

by mainstream media outlets which reject the evidence altogether.[65] The position of this paper is that there is conclusive evidence for a contagion effect by which inappropriate media coverage can increase the rate of suicide. This has been recognised by researchers and governments across the OECD,[66] by the World Health Organisation,[67] and by the Law Commission in their recent report.[68] Contagion effects are moderated by the context and elements of reporting,[69] suggesting a blanket restriction is inappropriate and can be replaced with a targeted set of restrictions or guidelines. However, it is no longer credible to assert that the effect simply does not exist or that the evidence is inconclusive.

One persistent claim is that the research has not established causation between media reporting and subsequent increases in suicide. It is argued that this would require proof that persons who have committed suicide actually saw the media reports in question.[70] While in cases of completed suicide this is difficult to establish, some studies have found strong links to media articles on suicide in coroners' reports,[71] while others have interviewed survivors of suicide attempts.[72] In one leading study, researchers gauged the relationship between different mediums of reporting and increased rates of suicide by criteria including consistency, strength and temporality.[73] They found it was reasonable

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[65] Dan Satherley "Suicide reports won't inspire copycats – expert" *3 News* (online ed, New Zealand, 13 August 2014).
[66] Sisask and Värnik, above n 38, at 131.
[67] *Preventing suicide: A global imperative* (World Health Organisation, Geneva, 2014) at 32.
[68] At 16.
[69] Stack, above n 41, at 123.
[70] Law Commission, above n 3, at 12.
[71] Paul Yip and others "The effects of a celebrity suicide on suicide rates in Hong Kong" (2006) 93 Journal of Affective Disorders 245 at 250.
[72] Kathy Chan and others "Charcoal-burning suicide in post-transition Hong Kong" (2005) 186 British Journal of Psychiatry 67 at 69.
[73] Jane Pirkis and Warwick Blood *Suicide and the news and information media: a critical review* (Commonwealth of Australia, 2010) at 2.

on the evidence to conclude that there was a causal relationship between reporting and the harm, although the findings were stronger for print newspapers than for broadcasting. The weight of the research supports the conclusion that irresponsible reporting of suicide plays a causal role in pushing further vulnerable people to complete the act.

Another frequent misconception is that policy makers and health professionals seek to reinforce a 'taboo' of silence around suicide as a topic in general. It must be emphasised that modern calls for caution and media guidelines are focused on particular elements of reporting which generate risk. Guidelines exist around the world to encourage responsible, informed reporting of suicide, not to bar discussion altogether. The reason for this perception probably lies with the significant uncertainty around the provisions of the Coroners Act. While the current restrictions do not prevent reporting of suicide as a general topic, reviews of New Zealand journalists' attitudes on the subject have found that the statutory restrictions, guidelines, and general silence on the topic are often conflated with one another.[74] As the Law Commission has suggested, any entrenched views that the media is under 'under attack' may not be shifted until the provisions are clarified.[75]

Media representatives are sometimes eager to point out that the New Zealand suicide rate remains 'high' despite the unique provisions, and that they therefore must not be working.[76] This argument fails to account for the multifactorial nature of suicide – media contagion is only one of a number of risk factors. Were the provisions having an impact, other circumstances in New Zealand could be such that the final suicide rate is balanced out. It is also possible that with the law unenforced and guidelines largely ignored, the New Zealand restrictions

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[74] Collings and Kemp, above n 64, at 246.
[75] At 51.
[76] "Editorial: Media can help fight this scourge" *The Dominion Post* (online ed, New Zealand, 1 January 2009).

carry far less weight than one might assume. This was certainly the view of some journalists in a recent set of interviews, one of whom commented that "the rules as they are might as well not exist anyway".[77]

Finally, there is sometimes a claim within the media that discussion and reporting of suicide can only be beneficial and therapeutic, and that the current restrictions are preventing the suicide rate from improving.[78] It should be emphasised that this assertion is based on media values and viewpoints, rather than the research on the topic. While responsible media reporting of suicide can minimise contagion effects and may provide an outlet for bereaved family members, there is no evidence that public attention has a positive effect on risks of suicide.[79] There are indications that 'protective' reporting can be achieved - one study found that media articles may be beneficial where they avoid emphasising death and instead provide positive accounts of surviving or coping with suicidal thoughts.[80] However, a high volume of reporting (even where responsible) was identified as a risk factor rather than having any positive effect. Public awareness of related issues such as mental health may be important, but merely discussing suicide more openly and frequently has not been shown to help.

VI Freedom of Expression

Media reporting on important public health topics such as suicide is protected by freedom of expression under the New Zealand Bill of

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[77] Collings and Kemp, above n 64, at 246.
[78] See, for example, Michael Cummings "Editorial: Opening our eyes to suicide" Manawatu Standard (online ed, New Zealand, 2 December 2010).
[79] Annette Beautrais and David Fergusson "Media reporting of suicide in New Zealand: "more matter with less art (Hamlet, Shakespeare)" (21 September 2012) New Zealand Medical Journal <www.nzma.org.nz/journal> at 2.
[80] Thomas Niederkrotenthaler and others "Role of media reports in completed and prevented suicide: Werther v. Papgeno effects" (2010) 197 British Journal of Psychiatry 234 at 241.

Rights.[81] Prima facie, the right extends to all communication however distasteful it may be.[82] The question is whether in the given case it is appropriate to place a restriction on freedom of expression, weighing the public interest and value of free speech against the harm that may be caused.

As discussed above, the strongest justification for the restriction provision is the protection of vulnerable members of the public against contagion effects. The aforementioned lack of case law on the Coroners Act provisions provides little judicial guidance on the balancing of freedom of expression against this particular risk of harm. However, some reference can be made to the comments of Williams J in *Board of Trustees of Tuakau College v Television New Zealand Ltd.*[83] There the Court granted a rare permanent prior injunction against the broadcasting of a current affairs item dealing with two school suicides. The decision was based primarily on concerns about the triggering of a cluster suicide, either within the school or among youths across New Zealand,[84] and the court 'drew assistance' from the Coroners Act provisions in reaching its conclusion.[85] Given the extended discussion of prior injunctions and freedom of speech under the Bill of Rights, the implication here is that the Coroners Act indicated greater weight be placed on the side of restraint and public safety in the given circumstances. The decision was a highly controversial one, criticised for enforcing a very strong prior injunction on grounds that were largely speculative.[86] On the other hand, it is somewhat remarkable in its foresight and early weighing of the issues around suicide and contagion effects in relation to young New Zealanders. The balancing

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[81] New Zealand Bill of Rights Act 1990, s 14.
[82] Grant Huscroft "Freedom of Expression" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 312.
[83] *Board of Trustees of Tuakau College v Television New Zealand Ltd* (1996) 2 HRNZ 87 (HC).
[84] At 16.
[85] At 17.
[86] Huscroft, above n 84, 335.

of freedom of expression for any future legislation should be more carefully assessed against modern standards, but the *Tuakau College* judgment stands as judicial support for one view of where the balance lies.

The Attorney General is required to advise Parliament on whether an introduced Bill is inconsistent with the Bill of Rights.[87] It is noteworthy that the Crown reviews of both the Coroners Bill 2004 (now the current Coroners Act 2006) and the Coroners Amendment Bill 2014 referred to the restrictions on freedom of expression, and concluded that they were justifiable.[88] Focus was placed on the balancing interests of protecting the privacy of bereaved persons, as well as the coroner's power to allow an exception.

VII Law Commission's Recommendations

The Law Commission recently surveyed much of the above evidence and made recommendations on how the law should be balanced. In relation to the restriction provision, the Commission found that only a narrow provision preventing publication of the method of suicide could be justified by the evidence.[89] Any wider considerations such as sensationalist or otherwise irresponsible reporting were better dealt with through guidelines and education. Reporting of deaths as 'suspected suicides' was held to be preferable to the current use of euphemisms to communicate the exact same information, though to maintain the integrity of the coroner's inquiry no death should be referred to as a 'suicide' until that finding has been made. Finally, it was

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87 New Zealand Bill of Rights Act, s 7.

88 Letter from Joanna Davidson (Crown Counsel) to Margaret Wilson (Attorney General) regarding consistency with the New Zealand Bill of Rights Act 1990: Coroners Bill (2 November 2004) at [4.2]; Letter from Peter Gunn (Crown Counsel) to Chris Finlayson (Attorney General) regarding consistency with the New Zealand Bill of Rights Act 1990: Coroners Amendment Bill (29 July 2014) at [15].

89 At 39.

suggested that the power to make an exception to the provisions be confined to the Chief Coroner only, promoting consistency in decisions which otherwise could markedly differ across regions. On a separate note, the Law Commission recommended that a new set of guidelines be drafted and presented.[90] Despite the failure of previous guidelines, the Commission argued that co-operative discussion alongside the changes to the law could finally achieve a satisfactory level of awareness and compliance with agreed standards.

It should be noted that, due to time pressure, the Law Commission report was released following limited consultation and without any call for submissions.[91] While a large proportion of this paper's recommendations align with those of the Commission, several of their suggestions are found by this paper to be inappropriate. Given the need for dialogue and compromise between the various groups involved, it is vital that the Select Committee discussion of the upcoming Coroners Amendment Bill 2014 be as open and informed as possible.

VIII This Paper's Recommendations on the Restriction Provision

As discussed above, freedom of expression is one of the fundamental rights enshrined in s 14 of the New Zealand Bill of Rights. These rights may be subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[92] In testing a law against this requirement, the Supreme Court has found that four central issues must be determined:[93]

> (i) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?

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[90] At 51.
[91] At 7.
[92] New Zealand Bill of Rights Act, s 5.
[93] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

(ii) Is the limiting measure rationally connected with its purpose?
(iii) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
(iv) Is the limit in due proportion to the importance of the objective?

Drawing on the evidence and arguments discussed above, the conclusion of this paper is that a statutory restriction on the reporting of suicide is justified by the public health risks and privacy issues of certain types of reporting. Preventing harmful contagion to vulnerable members of the public and protecting the privacy of bereaved families are 'sufficiently important' objectives to justify such restrictions. Restrictions on media reporting have been rationally linked to these purposes of public safety by the considerable research on the topic. However, to ensure the restriction limits freedom of expression no more than is necessary, it must be kept within the bounds of what is clear and can be appropriately regulated by legislation.

A Restricted Details

Any restriction provision should be clear in defining what details are not to be published. A major issue with the current provision is the varying interpretations which can be taken of it, leading to confusion among both media and coroners as to what exactly is prohibited. On a similar note, legislation should not attempt to strictly control matters which are too vague to be adequately described or regulated. Issues such as sensationalism, 'responsible reporting' and sensitivity for the bereaved are better left to guidelines and education than state enforcement.

The evidence makes clear that descriptions of the method of death are one of the clear elements in a report which carry a distinct risk of imitative suicide. These details are easily identifiable and confined, and

are suitable for legislative intervention. Accordingly, a restriction on publishing the method of suicide is a reasonable limitation on the right to freedom of expression. The prohibition should be extended to details of the cause of death, images, recordings, and descriptions of the location which would suggest the method of suicide, as these carry a similar risk and could otherwise be published to defeat the legislation's purpose. The 'cause' of death, photographs and recordings were not addressed by the Law Commission's recommendation, though upon prosecution they would be likely to satisfy the suggested test of 'indirectly make public the method of death'. In the interests of clarity these should be explicitly stated. Unlike the Law Commission recommendation,[94] the analysis here is not based on the method of death being the only detail which carries sufficient risk to justify a prohibition. There is equally clear evidence that sensationalist, repetitive and 'glorifying' reports of suicide can result in further harm among vulnerable members of the public. However, these matters cannot be adequately regulated through legislation without extending a restriction provision beyond what is workable, proportional and justifiably open.

This paper agrees with the Law Commission on several subsidiary points. The definition of 'make public' is comprehensive and should be maintained.[95] Any distinction between reporting before and after an inquiry should relate only to whether a death may be described as a 'suicide'; there is no evidential support for a confusing shift in the restrictions on details.[96]

B 'Suspected Suicide'

The importance of maintaining the integrity of the coroner's inquiry was discussed above. This paper is in agreement with the Law Commission that descriptions of a death as a 'suicide' prior to the

[94] At 6.
[95] At 42.
[96] At 41

coroner releasing their determination should be prohibited, but the term 'suspected suicide' should be explicitly permitted.[97] As is evident from current media practice, this is an area of reporting where euphemisms can be used in place of any prohibited words. Even responsible adherence to guidelines could indicate the suspicion of suicide to readers, most obviously in articles where the contact details of self-harm support groups are provided. Though the distinction may seem inconsequential, reporting of a death as a 'suspected suicide' is less likely to infringe on the coroner's jurisdiction. Both the law and the media's language could be clarified, with no further disclosure or speculation than currently occurs anyway, by allowing the term 'suspected suicide' to be used prior to the release of the coroner's determination.

C Authorised Exceptions

In ensuring a provision limits protected rights as little as possible, it is beneficial to reserve a power to make an exception in appropriate cases. The current provisions allow for the relevant coroner to make an exception and allow publication, but only on the grounds that it is 'unlikely to be detrimental to public safety'.[98] This test is remarkably unhelpful, potentially excluding important considerations such as the family's wishes or public interest in release. Considerable inconsistency has resulted: while some coroners have admitted a practice of declining requests for exceptions out of hand,[99] others have released full details primarily on the basis that the method was already widely used.[100] Given both the evidence for wider contagion effects and importance of

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97 At 39.
98 Coroners Act 2006, s 71(3).
99 *Board of Trustees of Tuakau College v Television New Zealand Ltd*, above n 85, at 10.
100 Stacey Kirk "Obsessive man took own life" *Stuff* (online ed, New Zealand, 2014).

freedom of expression, neither of these positions is satisfactory.[101] Requests for exceptions appear to be very rare; as of December 2010 the Chief Coroner was reported as having never had an application come before him.[102] On the other hand, some commentators report that applying for and gaining such an exception can be very difficult,[103] possibly due to the infrequency with which individual coroners are called upon to deal with these requests.

To resolve the lack of clarity and ensure the exception provision functions, a change in wording is necessary. The Law Commission recommended that the new test require an assessment that 'the risk of copycat suicidal behaviour is small and outweighed by other matters in the public interest'.[104] This wording remains somewhat restrictive, and still runs the risk of being misinterpreted by parties who have not carefully investigated the phenomenon. Instead, this paper recommends the wider test that 'the coroner may authorise an exemption to the restriction, provided they are satisfied that the public safety risk of publishing the restricted details is outweighed by legitimate public interest in those details being known'. This wording is phrased in terms of positive authorisation ('may' rather than 'must not unless') sufficiently wide to allow considerations of the family's interest, and provides a mandatory consideration of public interest against the contextual issues of public safety. The lack of reference to 'copycat effects' or 'contagion' is deliberate, avoiding misinterpretation of those terms or an unnecessarily narrow assessment. The current exemption provisions require mandatory reference to a practice note issued by the

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[101] Contrast with the example of highly appropriate release and news coverage in Ian Steward "Law process criticised in jail suicide" *Stuff* (online ed, New Zealand, 18 May 2009).
[102] Steven Price "Ask and ye shall receive?" (2 December 2010) Media Law Journal <www.medialawjournal.co.nz>.
[103] Graeme Edgeler "Suicide Reporting; or, The System Doesn't Work" (20 June 2014) Legal Beagle <http://publicaddress.net/legalbeagle>.
[104] At 43.

Chief Coroner,[105] and it is through this that coroners should be referred to the issues, evidence and guidelines on the risks of reporting of suicide. Unlike legislation, such a practice note could be updated appropriately as research and attitudes in this area advance, providing a valuable point of co-operation between coroners, health professionals and media representatives.

The Law Commission recommended that the power to make exceptions should be confined to the Chief Coroner in order to promote consistent and educative practice in reporting of these potentially harmful details.[106] The Coroners Court is a system of judicial officers, and it would be unusual for the Chief Coroner to be assessing the evidence and making the decision to release information on a case currently before another coroner. While the Chief Coroner should provide the 'interface' with the media, it is more appropriate for applications to then be referred to the relevant coroner and decided in accordance with the Coroners Act and practice note. This would provide the desired consistency and informed decision making, maintain the Chief Coroner's position as spokesperson for the Court, and ensure the decision-maker is the relevant coroner with the evidence (and family) before them.

The Law Commission raised the issue of timeliness in responding to applications, suggesting that a request could be made by phone call or video conference under a statutory requirement of urgency.[107] This is not appropriate in light of the above recommendation that the actual decision be referred to the relevant coroner. Applications should be written and describe which details are requested for an exemption, with brief reasons as to why the public interest outweighs the risk. This will contribute to consistency, ensures both media and coroner engage with

[105] Coroners Act, s 71(4)(b); unfortunately such a practice note has never been issued despite the specific statutory reference.
[106] At 43.
[107] At 40.

the core issues, and is a more appropriate format for a judicial officer to make a balanced decision on the public interest. Given the narrower scope of the recommended restrictions, the media's need for an urgent exemption to be able to 'tell the story' should be greatly reduced. The urgency of the application should be a matter explained by the applicant and communicated by the Chief Coroner, rather than incorporated as a highly specific mandatory requirement under the Act.[108] An established process and greater clarity in both the test and the accompanying practice note should ensure decisions are made with reasonable timeliness.

In anticipation of greater use of the exemption provision, it may be appropriate to allow the publication of a press release by the Chief Coroner explaining which details may be published following a high profile case. Studies on the 'newsworthiness' and subsequent report rates of suicide stories suggest that while reporting of suicide is relatively high, it tends to occur in tight clusters following high profile deaths rather than being spread evenly throughout the year.[109] A single considered press release would allow for a consistent and efficient exercise of the exemption power in circumstances where a large volume of exception requests are made in relation to the same newsworthy death.

IX Guidelines

Guidelines, rather than statutory restrictions, are the primary means used internationally to encourage safer reporting of suicide. While this paper's conclusion is that a narrow statutory restriction on reporting is still justified and necessary, this must be supported by a system of

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[108] Note the Coroners Act, s 5 already requires coroners to 'perform their duties without delay'.

[109] Anna Machlin, Jane Pirkis and Matthew Spittal "Which Suicides Are Reported in the Media – and What Makes Them "Newsworthy"?" (2013) 34 Crisis 305 at 307.

guidelines and education which can reduce risky elements of reporting otherwise unsuitable for statutory control.[110]

Following a wide examination of overseas standards, this paper argues that the fundamental guidelines on the reporting of suicide have remained essentially the same across the international community for more than a decade. The key issue in ensuring responsible reporting by the media is not the existence or wording of guidelines, but the extent of media awareness and education. Any development of 'new' guidelines should therefore be undertaken with the primary purpose of achieving media acknowledgement and compliance, rather than breaking any new ground in the substance of the recommendations.

The reasons for this position become clearer upon examination of guidelines on the topic across the world. A comprehensive 2006 study examined nine leading guidelines from nations including New Zealand, Australia, the UK, the US, Canada and Hong Kong.[111] They found that the guidelines were all "remarkably similar",[112] sharing (but not being limited to) seven fundamental points:

(i) Avoid sensationalising or glamorising suicide.

(ii) Avoid giving undue prominence to stories on the subject.

(iii) Avoid providing specific detail about the method or location of the death.

(iv) Consider the importance and influence of role models and celebrities.

(v) Take the opportunity to educate the public.

(vi) Provide help and support to vulnerable readers.

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[110] This conclusion broadly tallies with the recommendations of the Law Commission's, at 51.
[111] Pirkis, above n 42, at 83.
[112] At 84.

(vii) All guidelines besides the Canadian set (described as 'briefer than most') urged media professionals to consider the aftermath of suicide and privacy of the bereaved.

Since then, several further guidelines have been published overseas. The World Health Organisation 2008 resource shares all 7 points,[113] as do the 2013 Samaritans guidelines for the UK media,[114] and the Australian 2014 Mindframe Initiative resource.[115] Shared new developments in these guidelines include the advice that media avoid 'simplistic explanations' of suicide, and consider the emotional effects of suicide reporting on journalists themselves. The indication is that despite differences in consultation, resources and cultural context, the core recommendations of media guidelines are shared across the world.

A New Zealand Guidelines

In 2011 the most recent set of guidelines for the New Zealand media was released by the Ministry of Health, following a 'roundtable' consultation with leading media bodies.[116] Reviews of effectiveness had criticised the previous 1999 guidelines for failing to consult the media, and attributed their failure to a lack of media 'ownership'.[117] The new media-friendly guidelines were more successful in being adopted by both the Media Freedom Committee and the Newspaper Publishers Association. Though they received criticism from health experts for downplaying the evidence of harm,[118] the new guidelines otherwise retained the basic structure of the general international body discussed

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113 *Preventing Suicide: A Resource for Media Professionals* (World Health Organisation, Geneva, 2008).
114 *Media Guidelines for Reporting Suicide* (Samaritans, United Kingdom, 2013).
115 *Reporting suicide and mental illness: A Mindframe resource for media professionals* (Hunter Institute of Mental Health, Newcastle, 2014).
116 Media Roundtable, above n 5.
117 Tully and Elsaka, above n 27, at 14.
118 Beautrais and Fergusson, above n 80, at 2.

above. The resource shared only six of the seven 'fundamental' guidelines, failing to refer to the importance of care around influential role models and celebrities, but included additional guidance on cultural appropriateness and social networking. Despite the initial appearance of acceptance, anecdotal evidence suggests that these guidelines have also largely been ignored by the media.[119]

The strong implication is that whether the guidelines are successful depends more on how aware the media are of the guidelines, and less on the content of the guidelines or the circumstances of their creation. As suggested by the Law Commission,[120] inspiration can be drawn from the Australian Mindframe Initiative, which is highly proactive in developing and disseminating advisory resources in cooperation with the media. The Initiative receives funding by the Australian Government through their National Suicide Prevention Program, and is linked to the SANE Media Centre, an expert advisory program specifically created for aiding media professionals in preparing stories on mental health and suicide.[121] Subsequent reviews of Mindframe have found significant improvements in certain areas of media reporting: in the six year period following its inception the number of individual articles on suicide doubled, but reporting of the method of suicide fell from 49.6 per cent to 14 per cent of articles.[122]

The New Zealand guidelines have not seen this level of ongoing support from the Government or regulatory bodies. While a major focus of the government funded Suicide Prevention Action Plan 2008 – 2012 was ensuring safe reporting of suicide by the media, the

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[119] Law Commission, above n 3, at 28.
[120] At 27.
[121] Mindframe National Media Initiative "About Mindframe" (2014) <www.mindframe-media.info>.
[122] Jane Pirkis and others "The Media Monitoring Project: Changes in media reporting of suicide and mental health and illness in Australia: 2000/01 – 2006/07" (2009) 30 Crisis 25 at 29.

recommended systems for ongoing support and education for journalists do not appear to have materialised. The current Suicide Prevention Action Plan 2013 – 2016 is focused on other objectives and makes next to no mention of the media. Perhaps most disappointing is the failure of the Press Council or Broadcasting Standards Authority to incorporate the guidelines, or otherwise adopt a comprehensive policy in relation to suicide and mental health reporting. The attitude of these self-regulatory bodies will undoubtedly have an influence on what the media considers to be responsible reporting. The Broadcasting Standards Authority provides under principle 2(e) of the Free-to-Air code that "programmes should not glorify suicide and should not give detailed descriptions around methods of suicide", but does not appear to have heard any complaints addressed to this standard. The Press Council standards make no reference to suicide, but have heard multiple complaints on the subject. In one disappointing case the body bluntly stated that a breach of the 1999 guidelines could not be a valid ground on which to uphold a complaint.[123] In a later case however, the Press Council developed its position in directing that on a major topic such as suicide a newspaper must commit all its resources to reporting responsibly, including reference to the 1999 guidelines.[124] While the current position is therefore not one of total neglect, it falls short of the educative and supportive role required of these bodies in this matter. It is imperative that, alongside changes to the restrictions and guidelines, a set of comprehensive standards be developed by all relevant regulatory bodies to inform journalists on what constitutes responsible reporting on this matter.

The majority of this paper has been somewhat critical of the media's position. However, despite the apparent rejection of guidelines by both the media and their regulatory bodies, much reporting of suicide in New Zealand is undertaken relatively responsibly. This is likely due to a

[123] Case 910, *Canterbury Suicide Project v The Dominion Post* (2003).
[124] Case 1084, *Kapiti College v Kapiti News* (2007).

large proportion of the guidelines, relating to educating the public and avoiding sensationalism, simply being matters of responsible reporting. Studies on the effectiveness of guidelines in New Zealand have noted that although the media tend to either be unaware of guidelines or conflate them with the restrictions,[125] they largely report in accordance with them anyway.[126] Some of the above evidence indicates that the current restriction provisions have resulted in our media developing a real 'distaste' for the gratuitous reporting of suicide methods undertaken by overseas tabloids. While this position may be reassuring in the short term, given the fickle nature of media outlets, for long-term change what is needed is for reporters to understand and acknowledge what weight of evidence suggests: that reporting certain details of suicide in an irresponsible way can generate risk.

X Conclusion

With the proposed changes to the law, New Zealand society is moving towards a more open discussion of suicide than has been permitted in the past 60 years. The evidence conclusively establishes that irresponsible reporting of suicide can cause further deaths among vulnerable members of the community, but this paper has argued that the area is not suitable for full regulation by way of statute. The Government has indicated its willingness to create a detailed system of regulation involving specific restrictions, public interest exemptions, and wider guidelines backed by the evidence. If this is to succeed in impacting positively on suicide rates it demands the willing and engaged participation of the media, both in accepting their responsibility and the potential for harm, and in contributing their position on how responsible reporting can best be conducted.

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[125] Collings and Kemp, above n 64, at 246.
[126] Thom, above n 36, at 204.

COUNTER-TERRORISM, STING OPERATIONS AND ENTRAPMENT

FINN LOWERY*

I Introduction

A Creating Terrorists to Catch

James Cromitie became the subject of FBI attention in 2008 when an undercover informant engaged him in conversation about jihad outside a mosque in Newburgh, New York. The informant, Shahed Hussain, had been frequenting the mosque to identify potentially radical individuals; Cromitie was a former drug addict and mental patient.

Hussain massaged Cromitie's personal frustrations over several months, before offering him $250,000 to participate in a terrorist plot. The plan was to fire rocket-propelled grenades at Stewart Air Base and to bomb a synagogue in New York. Although Cromitie objected to the use of violence, and repeatedly tried to break contract with Hussain, he agreed to the plan almost a year later after losing his job and becoming desperate for money.

Thus, on 20 May 2009, Hussain drove Cromitie and three other men to a mosque and directed them to place explosives (which were not real) in the trunks of two cars parked outside. However before they could do so, the police arrived to arrest them.[127] Cromitie was charged with

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127 See generally Center for Human Rights and Global Justice *Targeted and Entrapped: Manufacturing the "Homegrown Threat" in the United States* (New York: NYU School of Law, 2011) at 21–23.

conspiracy to use weapons of mass destruction in the United States as well as conspiracy to acquire and use anti-aircraft missiles. He was convicted and sentenced to 25 years in prison.[128]

While the investigation and conviction of Cromitie might be mistaken for a chapter in George Orwell's *1984*, his experience has become increasingly common. Indeed, his case illustrates a new method in the United States' fight against terrorism. Directed by "radicalization theory"[129] the United States has supplemented its foreign war on terror with aggressive domestic sting operations.[130] The rationale is that the path to terrorism is fixed, with individuals exhibiting a series of identifiable developments which eventually culminate in a terrorist attack.[131] According to the theory, it is thus possible to monitor and incubate these developments by exposing Americans to radical ideologies and ultimately the opportunity to commit terrorist acts. This technique has been instrumental to almost half of the 500 counter-terrorism convictions in the United States since 2001.[132]

B This Paper

This paper has two objectives with respect to that theory and practice. First, it demonstrates the major failings of counter-terror sting operations and advocates appropriate change. In brief, the strategy is based on a dubious theory of terrorism; probably provides for discriminatory targeting of Muslims; and has a counter-productive

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128 *United States v Cromitie et al* 2011 WL 1663618 (SDNY May 3, 2011).
129 For the purposes of this paper, 'radicalization' is in its original American spelling.
130 See generally Faiza Patel and the Brennan Center for Justice *Rethinking Radicalization* (New York, NYU School of Law, 2011).
131 Mitchell D Silber and Arvin Bhatt, New York Police Department Intelligence Division *Radicalization in the West: The Homegrown Threat* (2007).
132 Columbia Law School Human Rights Institute *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions* (New York, Columbia Law School, 2014) at 2; Sahar Aziz "Policing Terrorists in the Community" (2014) 5 Hard Nat'l Sec LJ 147 at 273.

impact on the war against terror overall. The Attorney-General should therefore amend the FBI's investigative guidelines so that agents may no longer carry out sting operations where there is no articulable basis for suspicion. This change would maximise the positive outcomes of sting operations while ensuring the FBI does minimal harm to parallel counter-terrorism efforts.

The second objective is to explain why the entrapment defence must be altered in order to properly function in prosecutions following counter-terrorism stings. At present, it is effectively impossible to prove entrapment in terrorism trials because the prosecution may defeat it by establishing that the defendant was "predisposed" to commit the crime before the government became involved. In an era of intense "Islamophobia" and fears of "lone wolf terrorism", jurors are inclined to accept that predisposition is established where defendants have acceded to a terror plot. Accordingly, the federal courts should drop the predisposition requirement and adopt an objective approach to entrapment which focuses on the propriety of the investigation instead of the general character of the accused. In addition, the courts should recognise entrapment as a matter of procedural criminal law for determination by judges rather than a substantive defence to be decided by juries.

II Radicalization and Sting Operations

The perceived nature of terrorist threats in the United States and the reaction to those threats has changed since 9/11. In addition to wars in far-off lands, American counter-terrorism policy now includes prevention of attacks within the country's borders. As a result, the state has re-directed considerable resources to the detection and neutralisation of domestic terror threats.[133] Among other strategies, the FBI and local police departments now carry out aggressive sting

[133] Jessica A Roth "The Anomaly of Entrapment" (2014) 91(4) Wash U L Rev 979 at 981.

operations to root out individuals who are putatively predisposed to radicalism and terrorism. Following the relaxation of restrictions on the FBI's investigative powers, sting operations have become more widespread, more aggressive and apparently more successful.

A Radicalization Theory

There is widespread agreement among policy-makers that international organisations such as Al-Qaeda no longer represent the most significant terrorist threat to American security. Attacks such at 9/11 seem unlikely to recur.[134] Instead, events like the near-detonation of a car-bomb in Times Square in 2010 and the Boston bombings in 2013 have reinvigorated fears about "home-grown terrorism". That is, there is major concern that foreign terrorist organisations will recruit and radicalize American citizens (generally Muslims) to conduct terrorist attacks on their behalf.[135] The fear is that "lone-wolf terrorists" will go undetected in American society before orchestrating devastating attacks against the civilian population.[136]

In line with this view, "radicalization theory" has emerged as a significant school of thought that conceptualises the problem and offers a solution. As the major protagonist of the theory, although there are others,[137] the New York Police Department (NYPD) explained in

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134 Patel and the Brennan Center for Justice, above n 3, at 1.
135 Columbia Law School Human Rights Institute *Illusion of Justice,* above n 5, at 16.
136 YouTube "Terror Factory: Inside the FBI's Manufactured War On Terrorism" (2 March 2013) <http://www.youtube.com/watch?v=10Q40sjL6g0>.
137 In 2011, the Homeland Security and Governmental Affairs Committee demanded that the National Security Council and Homeland Security Council develop "a comprehensive national approach to countering homegrown radicalization to violent Islamist extremism.": Homeland Security and Governmental Affairs Committee "A Ticking Time Bomb: Counter terrorism Lessons from the U.S. Government's Failure to Prevent the Fort Hood Attack" (February 2011) at 43. Similarly, the theory has been explicitly endorsed by President Barack Obama, the FBI, the Department of Homeland Security and

its 2007 report *Radicalization in the West: the Homegrown Threat* that there is a uniform process by which American citizens are transformed into terrorists. It reasoned that "the path to terrorism has a fixed trajectory and each step of the process has specific, identifiable markers" which are "inextricably linked to Muslim religious behaviour".[138] In other words, there is a "religious conveyor belt" that leads from grievance or personal crisis, to religiosity, to the adoption of radical beliefs, to terrorism.[139]

Apparently, each of these steps is identifiable to law enforcement officials, meaning the best way to stop home-grown terrorism is to identify individuals as they begin the radicalization process.[140] The task of FBI agents is therefore to monitor the development of would-be terrorists and intervene before they execute their plots. In addition, agents must sometimes stimulate the radicalization process in the first place by exposing people to the start of the conveyor-belt or by helping them along it. Put another way, sting operations have become vital.

B Removing Barriers to Counter-Radicalization Strategies

To facilitate this strategy, successive Attorneys-General have relaxed the FBI's internal guidelines on how agents may conduct undercover investigations.[141] In 2002, Attorney-General Ashcroft permitted indefinite pre-investigation assessments about individuals without any

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the National Counter-terrorism Center: Center for Human Rights and Global Justice *Targeted and Entrapped,* above n 1, at 7-8.

138 Patel and the Brennan Center for Justice *Rethinking Radicalization,* above n 3, at 1.

139 Ibid.

140 Patel and the Brennan Center for Justice *Rethinking Radicalization,* above n 3, at 1.

141 In the United States, sting operations are regulated principally by the Attorney-General's "Guidelines on Federal Bureau of Investigation Undercover Operations". Pursuant to federal statute, the Attorney-General may modify these guidelines in accordance with the broadest discretion recognized by the courts: 28 USC §§ 509, 533 (Supp 2003).

suspicion of wrongdoing or threat to national security.[142] More particularly, Ashcroft provided that agents may attend religious services or political events for the purpose of gathering information despite there being no factual nexus between those activities and suspected criminal conduct.[143] Attorney-General Gonzales then supplemented this in 2007 by removing an explicit prohibition on FBI agents and informants engaging in entrapment.[144] Finally, Attorney-General Mukasey altered the guidelines in 2008 to allow the recruitment of informants from particular communities without any articulable suspicion of criminal wrongdoing within those communities.[145]

C Sting Operations in Practice

Taken together, the FBI restrictions on investigating and preventing domestic terrorism have been eviscerated to such an extent that they may as well not exist.[146] Law enforcement agents and informants have become opportunistic and aggressive in their efforts to catch individuals part-way through their supposed development into terrorists, with numerous cases proceeding on similar lines to those in

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[142] John Ashcroft, United States Department of Justice "The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection" (2003) at § II.A. This stands in marked contrast to an earlier restriction that preliminary investigations could only take place where there were "allegations or other information that an individual or group may be engaged in activities which involve or will involve the use of force or violence and which involve or will involve the violation of federal law": Edward H Levi, United States Department of Justice "Domestic Security Investigation Guidelines" (1976) at § II.C.

[143] John Ashcroft, United States Department of Justice, "The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations" (2002) at § II.A.

[144] United States Department of Justice "Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources" (2006) at V.B.3.a.ii.

[145] Michael B Mukasey, United States Department of Justice "The Attorney General's Guidelines For Domestic FBI Operations" (2008) at § II.A.4.e, f, j.

[146] Center for Human Rights and Global Justice *Targeted and Entrapped,* above n 1, at 14.

the Cromitie case.[147] In fact, nearly 50 per cent of all federal counter-terrorism convictions have resulted from informant-based investigations and in almost 30 per cent of those cases the informant played a central role in creating the underlying plot.[148] Not surprisingly, both government officials and the mainstream media have touted these figures as evidencing the value of stings.[149]

III Problems with Radicalization and Sting Operations

However, there are several reasons to doubt the wisdom of this increasing emphasis on stings. First, the strategy is founded on a dubious theory of radicalization which in turn leads to an implementation which is probably discriminatory against Muslims. Moreover, the strategy's benefits have probably been exaggerated while some of the costs have not been properly accounted for.

A There is no Clear Pathway to Terrorism

The first reason to hesitate before applauding the increased use of sting operations is that it is based on a theory of terrorism which does not stand up. To begin with, the NYPD theory is based on reductionist conclusions from only ten terrorist cases.[150] Equally, a number of more rigorous empirical studies have found that there is no linear progression

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147 Columbia Law School Human Rights Institute *Illusion of Justice,* above n 5, at 23.

148 At 2.

149 US Department of Justice "Remarks of Attorney General John Ashcroft" (press conference, 4 October 2002). See also Matt Apuzzojuly "Holder Urges Europeans to Step Up Antiterrorism Tactics" *The New York Times* (online ed, New York, 8 July, 2014).

150 Patel and the Brennan Center for Justice *Rethinking Radicalization,* above n 3, at 7.

between different phases of terrorist development.[151] Rather, as John Horgan explains:[152]

> The reality is that there are many factors (often so complex in their combination that it can be difficult to delineate them) that can come to bear on an individual's intentional or unintentional socialization into involvement with terrorism.

State institutions in the United Kingdom have been similarly reluctant to endorse grand narratives about the causes of terrorism and who is most likely to commit terrorist acts. For example, the state security service MI5 conducted a thorough empirical study on terrorism in 2008 and found that:[153]

> there was no typical profile of the British terrorist and that the process by which people came to embrace violence was complex. It emphasized that "there is no single pathway to extremism," and that all those studied "had taken strikingly different journeys to violent extremist activity".

Similarly, in 2010, the United Kingdom Homeland Security Commissioner explicitly rejected the idea that individuals move along a "conveyor belt" from normality to eventually presenting a terrorist threat.[154]

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151 Marc Sageman *Leaderless Jihad: Terror Networks in the Twenty-First Century* (Pennsylvania, University of Pennsylvania Press, 2008) at 23; Brian Michael Jenkins, RAND Corp *Would-Be Warriors: Incidents of Jihadist Terrorist Radicalization in the United States since September 11, 2001* (Santa Monica, RAND Corporation, 2010). See also Patel and the Brennan Center for Justice *Rethinking Radicalization,* above n 3, at 8–9; Aziz, above n 5, at 166.

152 John Horgan *Psychology of Terrorism (Political Violence)* (London, Routledge, 2005) at 105–106.

153 Patel and the Brennan Center for Justice *Rethinking Radicalization,* above n 3, at 8.

154 Peter King, Homeland Security Commissioner "What's Radicalizing Muslim Americans?" (press release, 19 December 2010).

Even within the United States, there has been some rejection of radicalization theory. For example, officials at the Department for Homeland Security have consistently stated that there "are diverse pathways to radicalization" and have rejected the idea that radicalization is a "one-way street".[155] Similarly, the Office of the Director of National Intelligence has asserted that "radicalization is a dynamic and multi-layered process involving several factors that interact with one another to influence an individual."[156] Equally importantly, the latter office has specifically rejected the notion that each stage of radicalization is objectively discernible to law enforcement officers.[157]

B Sting Operations Strategy may be Discriminatory

A closely related reason for objecting to the United States' current use of sting operations is that that it may be discriminatory against Muslims.[158] The present strategy is predicated on the idea that radicalization begins in Muslim beliefs and thus that terrorists are most likely to emerge from Muslim communities. As a result, the FBI and state police forces have directed the overwhelming bulk of their undercover resources to infiltrating Muslim communities.[159]

However, the presumed link between Islam and terrorism has never been corroborated by proper empirical research. On the contrary, academic review has indicated that "violent jihad is discordant with the values, outlook and attitudes of the vast majority of Muslim Americans, most of whom reject extremism."[160] Thus, there is probably no rational connection between targeting Muslims for investigation and the

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155 Patel and the Brennan Center for Justice *Rethinking Radicalization,* above n 3, at 13.
156 At 13.
157 Ibid.
158 Aziz, above n 5, at 183.
159 Center for Human Rights and Global Justice *Targeted and Entrapped,* above n 1, at 41.
160 Columbia Law School Human Rights Institute *Illusion of Justice,* above n 5, at 18.

achievement of national security. While it is beyond the scope of this paper to fully address the issue, the possibility of substantive discrimination is corroborated by the recent filing of law suits by Muslim communities against the New York and New Jersey police departments based on the Equal Protection Clause of the American Constitution.[161]

C Aggressive Sting Operations are not Effective Overall

The third reason for objecting to the increased use of sting operations is that the strategy – at least in its most aggressive form – is not helpful in the fight against terrorism overall. The supposed benefits have been exaggerated while the costs have been largely overlooked.

1 The security benefit is overstated

As mentioned earlier, government officials and the media have celebrated the convictions of defendants like Cromitie. Apparently, their imprisonment has made the United States safer. For example, after the arrest of Hemant Lakhami then-United States Attorney Chris Christie proclaimed:[162]

> Today is a triumph for the Justice Department in the war against terror. I don't know that anyone can say that the state of New Jersey, and this country, is not a safer place without Hemant Lakhani trotting around the globe attempting to broker arms deals.

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[161] First Amended Complaint, *Hassan v City of New York* (United States District Court for the District of New Jersey, 3 October 2012); see also "Raza v City of New York – Legal Challenge to NYPD Muslim Surveillance Program" (June 2013) American Civil Liberties Union <https://www.aclu.org/national-security/raza-v-city-new-york-legal-challenge-nypd-muslim-surveillance-program>.

[162] Rick Perlstein "How FBI Entrapment is Inventing 'Terrorists' – and Letting Bad Guys Off the Hook" *Rolling Stone* (online ed, New York, 15 May 2012).

Yet such assertions are hard to believe when one has regard to the finer details of many of the cases producing such sound-bites. In Lakhami's case, the defendant had no real grasp on the terror plot in question and was so delusional that he promised to provide full-size submarines to his co-conspirators.[163] Similarly, in Siraj's case, the defendant felt he needed to seek his mother's permission before participating in a terrorist attack.[164] In Cromitie's case, the Judge remarked:[165]

> I suspect that real terrorists would not have bothered themselves with a person who was so utterly inept … Only the government could have made a terrorist out of Mr. Cromitie, whose buffoonery is positively Shakespearean in scope.

Thus, the national security risk posed by some – but of course not all – of the defendants arrested in sting operations is suspect. Indeed, some of "the alleged terrorist masterminds end up seeming, when the full story comes out, unable to terrorize their way out of a paper bag without law enforcement tutelage."[166]

2 There is no imperative to choose between stings and surveillance

Proponents of sting operations also commonly argue that they are justified as a better alternative to other counter-terror techniques such as intrusive domestic surveillance.[167] On this view, there is "an inevitable trade-off between stings and surveillance" such that a reduction in sting operations would necessarily result in heightened

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163 Ibid.

164 Center for Human Rights and Global Justice *Targeted and Entrapped,* above n 1, at 36.

165 *United States v Cromitie* 09-CR-00558 (SDNY June 30, 2011).

166 Perlstein, above n 35.

167 Samuel J Rascoff "Guest Post: Sting Operations and Counterterrorism: What's Really at Stake?" (23 July 2014) Just Security <http://justsecurity.org/13178/sting-operations-counterterrorism-whats-stake/>; Dru Stevenson "Entrapment and Terrorism" (2008) 49 BC L Rev 125 at 185.

surveillance.[168] According to Rascoff, stings are preferable as the primary response to terrorism because surveillance interferes with the civil liberties of all citizens.

Again, though, the argument is overstated. It is not the case that any reduction in one counter-terrorism strategy necessarily results in the increased use of another. One need not replace a particular strategy if, in fact, that strategy was not effective in the first place. In my view, this is probably true of sting operations that are directed at vulnerable, clueless and largely benign individuals. If the sting operations policy were refined to only target truly dangerous individuals, there would be no need to increase other counter-terror measures because there would be no security loss to compensate.

Furthermore, even if such substitution were necessary, surveillance is not the only, let alone the best, alternative.[169] As the United States government has recognised, another means of preventing terrorist attacks is to build respectful communication channels with Muslim communities as a means of gathering intelligence.[170]

3 Sting operations undermine parallel counter-terror strategies

On the other side of the equation, sting operations come with significant costs to the broader fight against terror. In particular, they undermine the purpose of a community outreach program called Countering Violent Extremism ("CIE"). The idea of CIE is to build trust and cohesion between law enforcement agencies and American

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168 Rascoff, above n 40.

169 David Cole "The Problems with Counterterrorism Stings: A Response to Samuel Rascoff" (24 July 2014) Just Security < http://justsecurity.org/13211/problems-counterterrorism-stings-response-samuel-rascoff/>.

170 Homeland Security "Countering Violent Extremism" (15 October 2014) <https://www.dhs.gov/topic/countering-violent-extremism>.

Muslim communities in order that the latter might serve as effective sources of information regarding terrorist activity. [171]

Yet aggressive sting operations alienate the very communities to which the government hopes to reach out.[172] Not surprisingly, Muslims feel a sense of demonisation, betrayal and fear when they learn that the FBI has paid informants to build relationships with their peers for the express purpose of luring them towards crime.[173] As a result, Muslims are much less willing to engage with law enforcement officers even if only to provide non-incriminatory information.[174]

4 Conclusion

Despite the inherent difficulty in measuring the value of sting operations, it is clear that the costs outweigh the benefits in at least the most extreme cases. Where an individual poses a particularly low risk to national security by virtue of naivety or incapacity, the security benefit from neutralising him through an aggressive sting is minimal while the loss to community confidence is significant.

IV Solution: Articulable Suspicion a Prerequisite to Investigation

In light of the foregoing, the FBI investigative guidelines should be altered to restore the requirement that covert surveillance and the use of informants only take place where there is an articulable suspicion of wrong-doing or a criminal threat which justifies such an inquiry. This

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171 The White House "Empowering Local Partners to Prevent Violent Extremism in the United States" (August 2011).
172 Aziz, above n 5, at 198; Roth, above n 6, at 986; Samantha Henry "NYPD Monitoring Damaging Public Trust" (7 March 2012) Associated Press <http://www.ap.org/Content/AP-In-The-News/2012/NJ-FBI-NYPD-monitoring-damaging-public-trust>.
173 Columbia Law School Human Rights Institute *Illusion of Justice,* above n 5, at 3.
174 Patel and the Brennan Center for Justice *Rethinking Radicalization,* above n 3, at 23.

restriction would respond to the three key problems discussed in the previous section, meaning its adoption would help to justify any continued use of sting operations.

Requiring an articulable suspicion of wrong-doing would prevent the "fishing expeditions" which have come to define the FBI's undercover operations. Instead of random virtue testing on the basis of colour, ethnicity or religion, law enforcement officers would only be able to pursue communities and individuals once an objectively reasonable basis for doing so is formed. This would lessen the scope for illegal discriminatory conduct.

In addition, restoring the restriction would hopefully mean the state would only lure towards crime and conviction those who pose a significant threat to national security. In turn, this targeted approach would better maintain the cooperative relationships that the United States government is trying to build with Muslim communities. Thus, readopting the restriction would increase the benefits of sting operations (neutralising dangerous individuals) while minimising the cost (jeopardising effective intelligence channels).

V Entrapment Fails in Terrorism Cases

Unfortunately it appears unlikely that the foregoing recommendation will be adopted. Attorney-General Eric Holder has recently implored European states to adopt more American-style counter-terrorism strategies, including the use of aggressive sting operations.[175] One can infer from this that things are unlikely to change in the United States.

Accordingly, it is especially important that there are proper protections for defendants involved in such operations. In particular it is essential that the entrapment defence, which has been described as "the primary

[175] Matt Apuzzojuly "Holder Urges Europeans to Step Up Antiterrorism Tactics" *The New York Times* (online ed, New York, 8 July, 2014).

mechanism […] for policing undercover investigations", provides a realistic avenue for relief.[176]

This section outlines the rationale of entrapment in the United States before explaining why it is essentially worthless to defendants charged with terror crimes. In brief, the United States federal courts have adopted a subjective approach to entrapment whereby juries focus predominantly on the predisposition of defendants to commit the relevant crime, rather than on the conduct of the authorities involved in the sting. This means the question of guilt or innocence is determined largely on the basis of character evidence, which makes it exceptionally difficult for would-be terrorists to successfully deny predisposition and thus establish entrapment.

A Competing Rationales

1 Background

The contours of entrapment emerged in the United States in the late 19th century as the law began to regulate previously private matters such as sex, drugs and morality. Given that 'wrong-doing' in these spheres was exceptionally difficult to detect, police resorted to sting operations to catch people out. Defendants argued in response that although they had fulfilled the material elements of the relevant crimes they could not be held accountable because the government had effectively made them commit them. In some early decisions the courts accepted this argument, holding that convictions could not stand if the origin of criminal intent was properly attributable to the government, not the defendant.[177]

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[176] Roth above n 6, at 987, 1027; See also Waddie E Said "The Terrorist Informant" (2010) 85 Wash L Rev 687 at 687, 711, 732.
[177] Thomas Frampton "Lombroso's Ghost" (7 March 2013) The New Inquiry <http://thenewinquiry.com/essays/lombrosos-ghost/>.

2 Objective and subjective tests

From the very beginning, wherever entrapment has been formally recognised as a defence the jurisprudential discussion has centred on whether it should be objectively or subjectively oriented. In *Sorrells v United States*, the first Supreme Court case to decide the issue, the Bench was unanimous in holding that the defence applied but was divided between those two perspectives.[178] In *Sorrells* the defendant was a World War I veteran who had been visited by a government informant at his home. After repeated requests, the defendant agreed to sell the informant half a gallon of whisky, thus ostensibly violating the Prohibition Act.

According to Justice Hughs for the majority, however, the defendant had not fallen foul of the Prohibition Act. In his view, the Act when properly construed did not extend to the defendant's conduct because the legislature could never have intended to criminalise conduct resulting from government inducements of a defendant who "had no previous disposition to commit it".[179] In his view, the statute was not intended to apply to the conduct of persons who were "otherwise innocent".[180]

By contrast, Justices Roberts, Brandeis and Stone argued that their power to enter an acquittal stemmed from the public policy requirement that courts be able to protect their processes from executive abuse. On their approach, the defendant's disposition towards criminality was irrelevant because the court in this context was solely concerned with the need to maintain the purity of the justice system.[181] While the difference in reasoning was inconsequential to the result in *Sorrells,* it has defined the debate on entrapment in the United States ever since.

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178 *Sorrells v United States* 287 US 435 (1932).
179 At 448–489.
180 At 451.
181 At 457.

The majority's view is described as the subjective approach because of its focus on the defendant's predisposition. Under this approach, the defendant must establish two elements: first, that on the balance of probabilities the government "induced" him to commit the crime; second, that there is reasonable doubt that he was not predisposed to commit the crime before the government became involved. As a general rule, inducement requires proof that the executive went beyond the mere presentation of an opportunity to commit the crime and effectively implanted the criminal design in the mind of the defendant.[182] Predisposition is established where the defendant was "mentally ready and willing" to commit the crime if invited to do so.[183]

The minority's view is labelled the objective approach because it focuses exclusively on the propriety of executive conduct, albeit in light of the defendant's actions and the seriousness of the offence. Under this test the prosecution must be stayed if the executive's impropriety is so significant that allowing it to proceed would undermine the integrity of the justice system and the public's confidence therein. Importantly, though, the objective test is not only distinguished from the subjective approach merely by its elements, but also by its characterisation as a matter of procedural law rather than a substantive defence. This is significant because it means entrapment is decided by judges, whereas under the subjective approach it is decided by juries.[184]

The debate about which test should prevail continued for decades after *Sorrells*. Although the objective test was never endorsed by a majority of the Supreme Court, it was forcefully advocated in a number of

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[182] While the threshold for "inducement" is drawn slightly differently across the different courts, no further discussion is required for present purposes; See generally Center for Human Rights and Global Justice *Targeted and Entrapped,* above n 1, at 102-104.

[183] *Jacobson v United States* 503 US 540 (1992) at 561; *Unites States v Ulloa* 882 F 2d 41 (2d Cir 1989) at 44.

[184] Roth, above n 6, at 988.

dissents.[185] In 1988, however, even the dissenting voices accepted that the subjective approach had become a matter of *stare decisis*.[186] Since then, all federal courts have applied the subjective approach,[187] which is essential in the counter-terrorism context because almost all terror crimes are tried in federal court.[188]

B Entrapment is Effectively Useless in Terror Trials

In practice, entrapment is remarkably ineffective in counter-terrorism prosecutions. Hundreds of defendants have pleaded the defence yet not one has done so successfully.[189] While the jury's rejection of entrapment can sometimes be explained by the merits of the case, this conclusion is often dubious. Where FBI informants aggressively lead vulnerable individuals towards crime, as occurred in the Cromitie and Siraj cases, it is reasonable to ask whether the defence should really be rejected.[190] In fact, a number of judges have explicitly raised this concern while stopping short of disturbing the jury's findings. In the Cromitie case, for example, the judge questioned the rejection of entrapment, noting that "the government [had come] up with the crime, provided the means, and removed all relevant obstacles".[191]

C Proposed Solutions

The practical inapplicability of entrapment to terrorist defendants has attracted some academic attention. Most of that commentary argues that the defence should be altered to make it more favourable to

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185 *Sherman v United States* 356 US 369 (1958) at 379–385; *Hampton v United States* 425 US 484 (1976) at 490–496.
186 *Mathews v United States* 485 US 58 (1988) at 66–67.
187 *Mathews v United States,* above n 59; *Jacobson v United States*, above n 56.
188 Stevenson, above n 40, at 133.
189 Frampton, above n 50.
190 William Glaberson "Newburgh Terrorism Case May Define When Sting Operations Become Entrapment" *The New York Times* (online ed, New York, 16 June 2010).
191 *United States v Cromitie* 727 F 3d 194 (2d Cir 2013) Transcript (8 July 2011),

defendants in terror trials; however, a minority also argues that the balance should swing further in favour of the prosecution. This section briefly canvases those views before setting out my own proposed solution to the problem.

1 Academic debate

Among those who advocate change in favour of defendants, Margulies argues that the subjective approach should be abandoned in favour of the objective test. However, Margulies interestingly maintains that the defence should still be decided as a matter of substantive criminal law by jurors rather than a procedural matter for judges.[192] Conversely, others argue that judges should have some oversight in deciding the issue but that the subjective approach should remain. Roth, for example, suggests judges should make pre-trial rulings on whether or not the substantive elements of entrapment – most importantly predisposition – should be put to the jury in the first place.[193]

Others would endorse absolute judicial resolution, albeit by working outside the entrapment doctrine. Although not writing in the counter-terrorism context specifically, Donald Dripps[194] and Paul Marcus[195] argue that the outrageous government misconduct defence should replace entrapment so that the determination is made by judges, not jurors. According to *United States v Russell*, a prosecution must be stayed irrespective of the defendant's predisposition if the executive misconduct is so extreme that it violates fundamental fairness or is "shocking to the universal sense of justice" mandated by the Due

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[192] Peter Margulies "Guantanamo by Other Means: Conspiracy Prosecutions and Law Enforcement Dilemmas After September 11" (2008) 43 Gonz L Rev 513 at 556.
[193] Roth, above n 6, at 1027.
[194] Donald Dripps "At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace the Outrageous Government Conduct Defense" (1993) U Il L Rev 261.
[195] Paul Marcus "The Due Process Defense in Entrapment Cases: The Journey Back" (1990) 27 Am Crim L Rev 457.

Process Clause of the Fifth Amendment.[196] According to Dripps and Marcus, this doctrine provides sufficient protection for defendants who are wrongfully ensnared in the criminal justice process by government impropriety.

Laguardia similarly advocates a remedy that does not alter the substantive entrapment principles. In her view, judges should enter vastly shorter sentences if they consider that predisposition should not have been found on the facts or if they are particularly perturbed by the executive's impropriety in the investigation or prosecution.[197] Again, under this approach entrapment pleadings would be heard entirely as they are now but the courts would then resort to alternative principles to do justice.

Finally, some recommend piece-meal solutions. Sherman, for instance, recommends that the government should be required to show that the defendant initiated contact with the informant; and that prosecutions should automatically be barred where government agents continued to pressure the defendant despite refusal to participate, or where they misrepresented the illegality of the conduct. In addition, Sherman suggests that evidence of the defendant's political and religious views should only be admissible where it is probative of whether or not the defendant actually committed the crime.[198]

On the other side of the debate, Stevenson promotes a rebuttable presumption of predisposition in all prosecutions of terrorism crimes. In his view, the inherent distinctiveness of terrorism offences, coupled with the vital importance of sting operations to the war on terror,

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196 *United States v Russell* 411 US 423 (1973) at 431–432.

197 Francesca Laguardia "Terrorists, Informants, and Buffoons: The Case for Downward Departure as a Response to Entrapment" (2013) 17(1) LCLR 171 at 179.

198 Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*" (2009) 11 U Pa J Const L 1475 at 1500–1504.

justifies narrowing the application of entrapment in terrorist trials as much as possible.[199] According to him, "the stakes are plainly higher for deterring or incapacitating perpetrators of terrorism as opposed to the traditional "victimless" crimes", which makes special standards appropriate.[200] Failing such special standards, Stevenson claims, the jury wields a dangerously wide discretion to determine predisposition and thus to return terrorists to the streets.[201]

2 My proposal

None of the foregoing proposals sufficiently identifies and addresses the practical inapplicability of entrapment in terrorism prosecutions. First, the suggestions from Dripps, Marcus and Laguardia are unacceptable because they fail to address the area of law which should properly respond to this problem. Entrapment is the one doctrine which is expressly designed to achieve justice in the kinds of terrorism cases which are now appearing before United States courts.[202] It is therefore inappropriate to simply accept entrapment's deficiencies and look for an alternative legal solution.

Although the proposals of Margulies and Roth are better, they still fall short. For reasons described more fully below, I suggest that entrapment in the United States is hamstrung by two distinct problems which must both be remedied to revitalise the defence. The first problem is that by adopting a subjective approach, the jury is required to focus on the character of the accused. This invariably ensures a conviction when the accused looks and sounds like a terrorist.[203] The second closely related problem is that in an era of intense fear and racialisation of terrorism, juries are not an appropriate body to decide the question of entrapment. Thus, the appropriate solution is to adopt

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[199] Stevenson, above n 40.
[200] At 139.
[201] Ibid.
[202] Roth, above n 6, at 987, 1027; Said, above n 49, at 687, 711, 732–733.
[203] Aziz, above n 5.

the objective approach to entrapment and to have the matter decided by judges.

3 Superiority of the objective test

According to the subjective test, once inducement is established the jury must determine whether or not the defendant was predisposed to commit the crime before the government became involved. By definition, this requires jurors to analyse the defendant's character: indeed, the very preference for the subjective approach in the first place was rooted in the positivist assumption of the time that all human beings fell into – or somewhere in between – two inherently different species, namely, the law-abiding and the criminal.[204]

In pleading entrapment, defendants are said to "open the door" to otherwise inadmissible character evidence.[205] Thus, the prosecution offers evidence about the defendant's background, opinions, beliefs and reputation, essentially arguing that the government induced a bad person, not a good one.[206] Jurors are presented with violent jihadist videos and inflammatory speeches and are told by prosecutors and expert witnesses that the fact the defendant consumed this content proves an inherent attraction to terrorist activity.[207] Taken together, this evidence is highly problematic for Muslim defendants because in a climate of "Islamophobia" jurors tend to equate Islamic beliefs with general bad character.[208]

To make matters worse, jurors often resolve the character inquiry by assuming that only a predisposed person could possibly agree to a

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[204] Frampton, above n 50.
[205] Federal Rules of Evidence, 404(a)(1).
[206] Columbia Law School Human Rights Institute *Illusion of Justice,* above n 5, at 58.
[207] "Terror Factory: Inside the FBI's Manufactured War On Terrorism", above n 9, at 56 minutes 40 seconds.
[208] Center for Human Rights and Global Justice *Targeted and Entrapped,* above n 1, at 18.

terrorist plot. As Cole explains, jurors place themselves in the position of the accused and ask whether, if confronted with the same opportunities and pressure, they too would join a terrorist enterprise.[209] Insofar as jurors can never imagine themselves agreeing to violent terrorist attacks, they resolve that the defendant must have been predisposed to the crime. Coupled with the highly prejudicial evidence discussed above, this invariably leads to a finding of bad character and predisposition to crime, and thus rejection of entrapment.

Yet this cuts across the fundamental principle that criminal liability is determined on the basis of actions, not character. As Frampton explains, Anglo-American criminal law is premised on the notion that criminals and non-criminals are distinguished merely by contingent events. Only where rational actors voluntarily engage in conduct proscribed by the State are they properly regarded as criminals and must face the appropriate legal sanction.[210] That the subjective approach cuts across this ideal is unacceptable. It is the principal reason why in the United Kingdom[211] and Canada[212] courts have explicitly

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[209] Cole, above n 42.

[210] Frampton, above n 40.

[211] In the United Kingdom, entrapment is considered as a particular manifestation of abuse of process, for which the ultimate question is always "whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute": *R v Loosely* [2001] UKHL 53, [2002] 1 Cr App R 29 at [25]. Moreover, the House of Lords has specifically rejected predisposition, describing it as "inherently speculative" and "an inadequate tool" for deciding entrapment cases because the defendant's bad character cannot "make acceptable what would otherwise be unacceptable conduct on the part of the police or other law enforcement agencies": *Loosely* at [24].

[212] Similarly in Canada, the Supreme Court has characterised entrapment as a form of abuse of process which, when established, necessitates a permanent stay of proceedings. In doing so, the Canadian Supreme Court has explicitly sided with the dissenting voices in the early United States decisions, adding that a focus on the defendant's predisposition would avoid the central question of the propriety of the executive's conduct: *R v Mack* [1988] 2 SCR 903 at [97]; *R v Babos* [2014] 14 SCC 14.

rejected it in favour of the objective approach and it is also the most significant reason why the United States courts should follow suit.

In doing so, it bears noting that the United States would not abandon predisposition altogether. First, entrapment under the objective approach would turn on the propriety of executive conduct, one aspect of which is the initial decision to investigate and pursue an individual. Here, as the United Kingdom and Canadian authorities have explained, there must be a reasonable basis for pursuing a particular individual, which can often be established by that person's past history and character.[213] Furthermore, predisposition would remain relevant in a policy sense because the underlying rationale of sting operations – which entrapment is charged with regulating – is to neutralise individuals with who have a predisposition towards crime. By permitting the police to present opportunities to commit crime, while prohibiting aggressive inducements, the law would allow them to weed out only the truly predisposed.[214] Accordingly, predisposition would remain relevant to the inquiry but would be treated as an underlying intellectual concern rather than a legal element to be proved.

4 The need for judicial resolution

Arguably, the adoption of an objective test would also neutralise the second problem with the current law of entrapment: namely, the tendency of jurors to enter a conviction on the basis of a defendant's Islamic background viewed against sensationalised fears about terrorism. Perhaps, by avoiding the invasive character inquiry and the presentation of inflammatory evidence, the scales would tip back adequately in favour of the accused.

However, it is insufficiently clear that this would occur, for which it is remains necessary to transfer jurisdiction over entrapment from juries

[213] *R v Mack,* above n 85, at [156]; *R v Loosely*, above n 84, at [27], [58].
[214] Lord Nicolls and Lord Hutton expressed a similar view in *R v Loosely,* above n 84, at [28] and [101] respectively.

to judges. As Roach explains, the significance of acquittals raises a serious possibility that the "remedial tail may wag the dog": that is, convictions may be entered merely because the spectre of an acquittal is unpalatable.[215] I suggest the courts should be particularly alive to this concern in the counter-terrorism context. Given that terrorism crimes are generally regarded by the public as extremely serious offences, there is probably considerable reluctance among jurors to acquit and to be responsible for a terrorist walking free. Accordingly, even without the predisposition inquiry making it easier for jurors to convict, jurors might still work backwards from their desire to convict to the conclusion that no improper inducement has occurred. This is an unacceptable risk when determining charges that carry extraordinarily long prison sentences.

5 Justifying pro-defendant measures

Some will inevitably object to my proposal. Most likely, they will argue that entrapment cannot be recast simply because it is effectively inapplicable to one narrow form of crime. However, even if the federal courts will not abandon the subjective approach absolutely, this does not preclude them from recasting entrapment for terrorism proceedings alone.

Many have argued that the counter-terrorism paradigm is fundamentally distinct to others the law has managed to date. In particular, some have suggested that effective counter-terrorism requires the application of different legal standards in various contexts including the design of terrorism crimes and the rules relating to detention and trial. Even entrapment has become the subject of such suggestion, with Stevenson arguing that "terrorism is a special category

[215] Kent Roach "Be Careful What You Wish For?: Terrorism Prosecutions in Post 9/11 Canada" (2015) 34 Queens Law Journal at 32 (forthcoming).

of crime, something particularly horrific" which justifies a narrower reading of traditional defences.[216]

While it is questionable whether this view is actually correct,[217] it is worth entertaining it to illustrate that converse conclusions also flow from the premise that counter-terrorism is an inherently special paradigm. If nothing else, the United States government has responded *as if* terrorism offences were a special type of crime. For example, the nature of terrorism has demanded the suspension of traditional defence rights, while statutes demand exceptionally long sentences for terrorism crimes. Thus, even if terrorism crimes are not inherently special, the United States government has created an environment in which, for practical purposes, they are.

The key, though, is that terrorism crimes are 'special' from both the State's and the defendant's perspective. In the same way that "the stakes are plainly higher" for the government and the public, the spectre of maximal sentences equally raises the stakes for defendants. So if anything, the counter-terrorism paradigm has simply raised the stakes for all those involved. Accordingly, the war on terror is not something that only the state can invoke to justify the extension of state power and the abrogation of defendants' rights. It would be highly dangerous to assume that it did. But, by the same token, the nature of the war on terror should also necessitate greater, not lesser, protections for defendants. In my view, recasting entrapment is just one example of this broader imperative.

VI Conclusion

In the years since 9/11 the terrorist threat to the United States has changed. As a result, the Government has developed various new

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[216] Stevenson, above n 40, at 140.
[217] See for example Mathew Palmer "Counter-Terrorism Law" [2002] NZLJ 456.

counter-terrorism strategies. One of those has been to closely monitor communities, most often Muslim, and to stimulate the "radicalization" of its members in a controlled environment. This strategy has been implemented with extraordinary aggression in some cases, with FBI agents and informants creating the plot, providing the logistics and moulding otherwise clueless individuals into 'dangerous' terror suspects.

This paper has criticised that strategy on a number of grounds and suggested that the FBI investigative guidelines be redrawn to ensure that sting operations are reserved for only the most appropriate cases, namely, where there is already an objective reason to suspect the subject.

However, such reform probably will not occur. Accordingly, this paper has also called for changes to the law of entrapment to ensure terrorism suspects are provided proper protection from the misuse of state power during sting operations. In particular, it has advocated a shift from the subjective approach to an objective approach, by which the finder of fact would decide the issue of entrapment by reference to the conduct of the executive, not the character of the accused. It has also suggested that the finder of fact should be a judge, not a jury, because there is too great a risk that jurors might reject the defence for fear that they might be allowing a potential terrorist to walk free.

While there is every possibility that these recommendations will fall on deaf ears, at the very least they will hopefully serve as a counter-current to the increasingly conservative attitude to the rights and interests of terror suspects. If the criminal paradigm really has changed as a result of 9/11, the law must respond appropriately to guarantee *all* the values underlying the criminal justice system. This means that in addition to changes facilitating effective criminal investigation, the United States must also make changes to ensure that defendants' rights are upheld.

FROM THE EVIDENCE ACT TO THE COMFORT OF THE COMMON LAW

MEGAN PATERSON[*]*

I Introduction

> Mr King: "[M]y submission is that the Evidence Act does not seek to depart from [the] common law practice. Had it done so, it would have done so expressly…"
> Elias CJ: "There's a general provision that was inserted late into the Evidence Act, which refers to the common law. Is that relevant? I can't remember. Do you remember –"[1]

In New Zealand's highest appellate court, uncertainty persists as to the proper role of the common law in light of the Evidence Act's enactment.[2] Indeed, ss 10 and 12 do refer to the common law, yet the Act's relationship with previous case law is unclear. This article explores the gestation of ss 10 and 12, highlights confusion around their desired effect, and argues for their proper contribution to the success of the Act's objects.

II Claims of a Code

In August 1989, the Minister of Justice asked the Law Commission to review the law of evidence because it was disorganised, unclear, and existed "through a conglomerate of statute and common law, with the

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[1] *Aaron Mark Wi v The Queen* [2009] NZSCTrans 25 (18 August 2009) at 41-42.
[2] Evidence Act 2006.

Evidence Act of 1908 at the distant centre".[3] The Commission recognised the need to make the law of evidence as "clear, simple and accessible as is practicable, and to facilitate the fair, just and speedy judicial resolution of disputes".[4] In 1991 the Commission published *Evidence, Reform of the Law*.[5] Its preliminary intention was for a 'true' codification,[6] whereby an Act would "replace the previous collection of case law and statute with a single consistent code".[7] In the Commission's view, "[o]ne of the major features of a code is that it

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[3] Butterworths Legislation Series, *The Evidence Code, with a foreword by Greg King* (LexisNexis, Wellington, 2007) at Foreword. (23 November 2006) 635 NZPD 6638 per Christopher Finlayson MP. The last substantial amendment to the Evidence Act 1908 was the Evidence Amendment Act (No 2) of 1980; see also Geoffrey Palmer "Law Reform and the Law Commission in New Zealand After 20 Years –We need to try a little harder" (address to the New Zealand Centre for Public Law, Victoria University of Wellington, Thursday 30 March 2006) at 20, [57] where he compares difficulties in New Zealand with the Statute Book in the United Kingdom (and finds it is even more inaccessible than ours).

[4] Law Commission *Evidence: Volume 1 – Reform of the Law* (NZLC R55, 1999) at xviii and 2. According to Elisabeth McDonald *Hearsay Evidence –an Options Paper prepared for the Law Commission by an Advisory Committee on Evidence Law* (NZLC PP10, Wellington, 1989) this came about as a consequence of the publication in June 1989. McDonald discussed this in *Going Straight to Basics*: the role of Lord Cooke in Reforming the Rule against Hearsay from *Baker* to the Evidence act 2006' (2008) 39 VUWLR at 143. Note that it primarily consisted of exclusionary rules: Chris Gallavin, *Evidence* (LexisNexis, Wellington, 2008) at 10: in practice, the law of evidence was "difficult to access, at times uncertain and lacking consistency". See also DL Mathieson *Cross on Evidence* (8th ed, LexisNexis, Wellington, 2005) at [1.1].

[5] Law Commission *Evidence: Principles for Reform – a Discussion Paper* (NZLC PP13, Wellington, 1991). Note that this name itself suggests that the 'code' would be more than merely a compilation of the existing law.

[6] At 3. See also Law Commission *Evidence: Codification – a Discussion Paper* (NZLC PP14, Wellington, 1991) at 1.

[7] Helen Cull "Overview" (paper presented to the New Zealand Law Society "Evidence Act 2006" Intensive Conference, June 2007) 5 at 6. See also NZLC PP13, above n 5, at [77]. Accordingly, the Law Commission saw the need to "break out of the complexity and incoherence which, over the years, the sheer number of cases and a technical approach to the rules of evidence ha[d] created".

supercedes existing law and makes a fresh start".[8] It pointed out that "[r]eferences to earlier judicial decisions can obstruct that objective".[9] Acknowledging that the term 'codification' had many meanings, the Law Commission took it to mean the development of a set of rules that were "comprehensive, systematic in structure [and] pre-emptive of the common law".[10] This would induce more than a mere legislative consolidation[11].

A What is meant by 'Codification'?

Bentham introduced the word into the English language.[12] He contemplated one universal code, as a complete, self-sufficing entity, unmodifiable bar legislative enactment. He sought to limit judicial discretion and prescribe definite answers to legal problems.[13]

Codification may conjure semblance to the various continental codes,[14] which are comprehensive and gap-free in scope, providing a

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[8] NZLC R55, above n 4, at 10, see also NZLC PP14, above n 6, at 3 and 12; and NZLC R55, above n 4, at [35].
[9] NZLC R55, above n 4, at 10.
[10] NZLC PP14 1991, above n 6, at 1.
[11] See NZLC PP14 1991, above n 6, at 3. This definition is viewed as correct by Chris Gallavin, above n 4, at 15; and Bergel *Principles and Methods of Codification* (1988) 48 Lou LR 1073.
[12] Letter from Jeremy Bentham to Tsar Alexander I (June 1815) in Stephen Conway (ed) *The Correspondence of Jeremy Bentham* (Oxford, 1988) 464; also discussed in Leslie George Scarman "Codification and Judge-Made Law: A Problem of Coexistence" (1967) 42(3) art 3 Indiana Law Journal 355 at 357.
[13] John Armour *Codification and UK Company Law* in Association du Bicentenaire du Code de Commerce (ed), *Bicentenaire du Code de Commerce 1807-2007: Les Actes des Colloques* (Paris: Dalloz, 2008) 287-310 at 3; see also Dean Alfance Jr "Jeremy Bentham and the Codification of Law" (1969) 55 Cornell Law Review 58 at 65-73.
[14] See for example the Napoleon Bonaparte's *Code Civil* 1804 (translation: French Civil Code) and the German *Bürgerliches Gesetzbuch* 1900 (translation: German Civil Code).

"systematic approach" and "generality" to their rules.[15] This is because codification has been an eminent feature of the European legal landscape since pre-Roman times, as a process that achieves the "recension of the sources of law into a single instrument".[16]

Although the modern concept of codification has several stable components, there is no definitive, canonical model. [17] In the common law realm, a statute traditionally acts "as a sword stabbing into the body of the common law to excise and rectify certain unwanted case-law developments".[18] The common law approach to codification has been described as "conservative, preferring to wait until the relevant principles have been thoroughly worked out in case law before codifying, rather than seeking to use the codification itself as a means of guiding the development of jurisprudence".[19] In part this is because "consolidation and uniformization, as well as doctrinal codification (i.e. restatement and text-book writing) represent in common law a genuine substitute for codification",[20] neutralising the demand for codification in the fullest reforming and exhaustive sense.

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[15] Dan Svantesson "Codifying Australia's Contract Law –Time for a Stocktake in the Common Law Factory" (2008) 20(2) art 5 Bond Law Review at 3.
[16] Expert Group on the Codification of the Criminal Law *Codifying the Criminal Law* (Department of Justice, Equality and Law Reform, Dublin, November 2004) at [1.06].
[17] There are analytically many accepted uses of codification. See generally; Helmut Coing "An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries" in Samuel Jacob Stoljar (ed) *Problems of Codification* (Canberra: The Australian National University, 1977) at 16, 22-24; Csaba Varga *Codification as a Socio-Historical Phenomenon* (Akadémiai Kiadó: Budapest, 1991) at 318-328; John Armour, above n 13, at 3.
[18] Andreas Rahmatian "Codification of Private Law in Scotland: Observations by a Civil Lawyer" (2004) 8(1) EdinLR 28-56, at 52. This was discussed in comparison to a Civil Law statute, described as "a skeleton around which the flesh of the case-law and doctrine can grow".
[19] John Armour, above n 13, at 1-2.
[20] Csaba Varga, above n 17, at 166.

The psychology in common law systems, nourished by judicial overlay and commentary on the statutes, militates against codes. A deep ambivalence towards writing is part of our constitution, matched with a reluctance to abandon the principle of Parliamentary sovereignty.[21] In general therefore, common law codification "still seems deformed compared to the classical model of European continental codification: particularly because it neither attempt[s] nor carrie[s] out the replacement of case-law with, and the reduction of law to, the code-text".[22]

In New Zealand, 'code' in its true sense supposedly details "a single Act that abolishes the common law on a specific topic and replaces it with a set of statutory rules that henceforth become the exhaustive and exclusive source of the law on that topic".[23]

The upshot is that although codes vary widely in their form, the common theme among code-makers is an intention to replace the existing common law to some extent.

III This Act is Not a Code

Mahoney et al unequivocally assert that "[t]he Act is not a code".[24] For the following key reasons, I conclude that it is indeed inaccurate to view the Act as a code, to any strength of the term.

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[21] Vernon Bogdanor *The New British Constitution* (Oxford: Hart, 2009) at 14. The author found that correspondingly, striving for a written constitution would be pointless unless one is prepared to abandon the principle of the sovereignty of Parliament, for a codified constitution is incompatible with this principle.
[22] Csaba Varga, above n 17, at 166.
[23] New Zealand Law Commission, *Presentation of New Zealand Statute Law – in conjunction with Parliamentary Counsel Office* (NZLC R104, Wellington, October 2008), at [8.9].
[24] Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014) at 69, [EV10.01].

A Usual Code Terminology is Not Employed

The Act is not framed in accepted code terminology. It itself does not claim to be a code, nor does it seek to explicitly override or exclude the common law. Although the Select Committee made no direct acknowledgement of the change from the Law Commission's expressed intentions of codification, this silence should not permit the label to persist.

Had the Select Committee or Parliament wanted to codify the Evidence Act, it could have done so explicitly. In *Re Greenpeace*,[25] the Supreme Court considered whether s 5(3) of the Charities Act amounted to a codification of the limits when political purpose is permissible in the charities context. The Court found that codification by "the side-wind of a parenthetical illustration" is implausible.[26] It argued that if Parliament had intended to codify a prohibition, its nature and scope would have to be better articulated.[27] The Minors' Contract Act exemplifies this, with its provision in s 15 for the "Act to be a code",[28] as does s 4 of the Property (Relationships) Act.[29] In a similar vein, section 5 of the Contractual Mistakes Act is specifically designated to

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[25] *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105.

[26] At [54] per Elias CJ. Her Honour discussed the implausibility of codification of a prohibition on political purpose by parenthetical illustration, when other core concepts, such as "public benefit" or "charitable purpose", have been left in the statute to be construed in accordance with the common law in the particular context. As discussed at [56], s 5 and the Act as a whole "assumes the common law approach to charities" made evident by the Select Committee report, which thus "points away from codification" and instead towards mere restatement.

[27] For example, as discussed in *Re Greenpeace*, at [54] by giving some definition of 'advocacy' (in light of the nuanced and subtle application of the principles identified in *Bowman v Secular Society Ltd* [1917] AC 406 (HL) and *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA)).

[28] Minors Contracts Act 1969, s 15(1) which states that provisions of the Act shall have effect in place of the rules of the common law and of equity.

[29] Property (Relationships) Act 1976, s 4.

have effect in place of the common law and of equity in the particular circumstances.[30] Some statutes explicitly abolish parts of the common law,[31] or codify only a specific area.[32] On a larger scale, the Crimes Act 1961 is also considered a code, as it provides an exhaustive list of crimes in New Zealand.[33]

B Comprehensiveness

Nor is the Act comprehensive or exhaustive, despite claims to the contrary during its legislative passage.[34] To be comprehensive, the code would have had to replace all earlier common law and statutes on the same subject. However, our common law jurisdiction does not encourage the idea of a glorious legal bonfire. Section 5(1) states that if there are any inconsistencies between the provisions of the Evidence Act and another enactment, the other's provisions prevail.[35] The inclusion of this policy shift was not accompanied by any accessible rationale.[36] In addition, ss 10 and 12 together provide access to the common law authorities for interpretation or where gaps may exist in

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[30] Contractual Mistakes Act 1977, s 5. Additionally, see Sale of Goods (United Nations Convention) Act 1994, s 5 which states that the provisions of the convention are to be a code, and thus have effect in place of any other law in New Zealand relating to contracts of sale of goods.

[31] Property Law Act 2007, s 3, which details the Purpose of Subpart 7 of that Act (Abolition and modification of common law rules relating to property); see also Immigration Act 2009, s 124(b) which details that Part 5 of that Act purports to codify certain obligations.

[32] Succession (Homicide) Act 2007, s 3.

[33] Crimes Act 1961, s 9; see also Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA9.01].

[34] (23 November 2006) 635 NZPD 6802, per Mark Burton MP; he claimed that they "now have a comprehensive piece of legislation that brings together many existing statutory and common law rules and principles relating to evidence, giving this are of law clarity and accessibility of a type that it has not had for many, many years".

[35] Evidence Act 2006, s 5(1).

[36] Richard Mahoney and others *The Evidence Act 2006: Act and Analysis (*Brookers, Wellington, 2007) at n 84.

the Act. In particular, the wording of s 12 demonstrates a drafting awareness that some evidential matters are not provided for.

IV A Confused Landscape

Several other features exacerbated the uncertainty as to what the Act was intended to achieve, and which have arguably marred its reception into the Statue Books.

A A Lengthy Gestation

"This is, of course, a bill that has been lurking about in gestation for a very long time."[37] The Bill first came before Parliament in May 2005.[38] The Act received royal assent one year later[39] and came into force in August 2007, almost 20 years after the Law Commission was charged with its evidentiary mission.[40] Often common law developments had failed to align with the direction of the Act, leaving a dissonance between the preceding law and the outcome of the legislative process.

Consider, for example, the area of hearsay. Exceptions to the rule against hearsay developed for over 17 years between Cooke P's call to go "straight to basics" (and focus primarily on the reliability of the evidence)[41] and the eventual birth of the Act in 2006.[42] After this

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37 (10 May 2005) 625 NZPD 20417.
38 Evidence Bill 2005 (256-3).
39 It received Royal Assent on 4 December 2006.
40 Evidence Act (except section 203-214) brought into force on 1 August 2007 by Evidence Act 2006 Commencement Order (SR 2007/190), cl 2(2). Sections 203-214 brought into force on 18 July 2007, by Evidence Act 2006 Commencement Order 2007 (SR 2007/190), cl 2(1).
41 *R v Baker* [1989] 1 NZLR 738, 741 (CA) per Cooke P. His Honour considered it "more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards".

period of divergent legal developments, the Act ended up being "both faithful to and contrary to [Cooke's] vision".[43] Even despite his visionary approach, Cooke's foresight in the area of hearsay was not truly adopted by the Act.

Had the Act been passed sooner, this scope for disparity could have been minimised. As it was, the common law developed in this interim for a further two decades after the original draft code; this could not be ignored. Rather than prolong the enactment while bringing the Bill in line with the most recent developments, ongoing recourse to the common law permitted this to happen on a case-by-case basis. This may explain why the drafters of the Bill altered the Law Commission's proposed ss 10 and 12. However, if this was its intention, the Select Committee could helpfully have said so.

B Drafting

When drafting a piece of legislation, it is impossible to accurately assess or predict the direction of future legal development.[44] Attempting to freeze fragments of existing case law is unrealistic, for "nothing short of omniscience would suffice to enable the draftsmen to conceive and provide for every possible contingency".[45] By the very nature of cases

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[42] Note that his Honour's initial proclamation coincided with the Law Commission's 1989 Report.

[43] Elisabeth McDonald *Going Straight to Basis*, above n 4, at 164.

[44] Grant Gilmore "On the Difficulties of Codifying Commercial Law" (1948) 57(8) Yale Law Journal Faculty Scholarship Series, Paper 2677, 1341 where the author discusses that no matter how admirably executed, this idea limits the benefits of codification.

[45] MacMillan Committee on Income Tax Codification (Cmnd. 5131, 1936) at 17 discussing the relationship of code and judges, found that it is not practicable to pursue any given topic to its last details; Aristotle once remarked, "no piece of legislation can deal with every possible problem", both cited in Michael Zander *The Law-Making Process* (6th ed, Cambridge University Press, 2004) at 485; see also, Grant Gilmore, where the author discussed the conundrum between being overly general or abstract (and thus of not much use) or being overly detailed.

that come before court, not all situations in which the rule is later applied will neatly fit the envisaged pattern.[46]

Added to this, the Commission sought to strike a balance between excessive detail and bare statements of principle. Ideally, it would strive to "maximise predictability and uniformity in the application of the principles of the code, while endeavouring to avoid the distortion of the policies and principles which can so easily result from rules which are overly specific".[47] This was vital in light of the previous evidence legislation, which had been designed to create certainty in the law by being overly technical.[48] Yet paradoxically, this created confusion and facilitated excess use of judicial discretion, often inconsistent with the underlying principle on which admission of evidence ought to be focused.[49] Learning from this misfortune, the Law Commission sought to "avoid stating the law so tersely that its meaning cannot be readily elucidated".[50]

He notes that attempting to account for everything by loading excessive amounts of detail into the statute would cause it to "wither on the vine".

[46] HLA Hart *The Concept of Law* 124 (1961) at 125 -26. Hart wrote about the "indeterminacy of aim" in legislation, asserting that when "the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us". See also David P. Leonard "Power and Responsibility in Evidence Law" (1989-1990) 63 S. Cal. L. Rev. 937 at 937.

[47] NZLC PP14 1991, above n 6, at 10.

[48] NZLC PP14 1991, above n 6, at 9, [23]: "Our present rules of evidence are characterized by their specificity. As we have seen, much of the law is expressed in terms of relatively detailed and technical rules …The aim may originally have been to minimise uncertainty in the law but, as the analysis in the principles paper indicates, the result has been the opposite. Rather than being clear and understandable, the law is complex, confusing and difficult to apply."

[49] The Law Commission discussed a similar situation that arose in Canada: N Brooks "The Law Reform Commission of Canada's Evidence Code" (1978) 16 Osgoode Hall LJ 241, 306; cited in NZLC PP14 1991, above n 6, at 9.

[50] NZLC PP14 1991, above n 6, at 10.

C Shifts But No Signal

Unfortunately there is a lack of substantive discussion of the changes effectuated during Parliamentary debates on the Bill.[51] All that is available on the point is a briefing from the Ministry of Justice to the Justice Minister, which simply noted that the "Bill adds reference to the status of the common law with respect to the Bill that did not appear in the Code. This was thought to be a helpful addition to aid interpretation."[52] This does not provide sufficient explanation. The amendments leave the status of the Law Commission's commentary unclear.[53]

In the Bill's journey through the House, the Select Committee and other Members of Parliament avoided specifics, saying generally that the proposals of the draft Code had mostly been carried forward, without directly justifying the reasons for the new relationship with the common law.[54]

During the first reading, Stephen Franks MP stated that the Bill could not claim to be a codification. He observed: "I do not think the Minister used that term in his introduction, and the precise words are not used in the explanatory note that the Government has attached to the bill … in fact, all it is doing is listing the factors that judges look at, without making the likely outcome any more obvious than before to

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51 Evidence Bill 2005 (256-1).

52 Letter from Gordon Hook (Manger of the Criminal and International Law Team, Ministry of Justice) to the Hon Phil Goff (Minister of Justice) regarding the Evidence Bill (8 February 2005), quoted in Elisabeth McDonald *Principles of Evidence in Criminal cases* (Brookers, Wellington, 2012) at 15, and in Richard Mahoney and others *The Evidence Act 2006: Act & Analysis* (2nd ed, Wellington, 2010), at [EV10.01], and Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 23, [2.24].

53 Also observed in NZLC R127, [2.26].

54 See also NZLC R127 at [2.24] where it found that scarce rationale for the change exists.

the lay reader or the reader who is not a specialist in the area."[55] He makes a valid point.

During the second reading, Russell Fairbrother MP proclaimed that the Bill "is not a codification of the law of evidence, but [rather] an attempt to bring into statute, in a clear, concise, and accessible way, the laws that must be followed".[56] Richard Worth MP contended that a degree of codification had been achieved, in that "the opportunity for judge-made law and other influences to intervene will be starkly limited by the passage of this legislation".[57]

As noted by Mahoney et al, there was no submission on s 10.[58] It passed unamended by the Select Committee without explicit acknowledgement of the significant alteration to the Law Commission's proposals.[59] In the third reading, Mark Burton (the then Minister of Justice) misguidedly claimed that we now have a "comprehensive" piece of legislation, that "brings together *many* existing statutory and common law rules and principles … giving this area of law clarity and accessibility of a type that it has not had for many, many years".[60]

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[55] (10 May 2005) 625 NZPD 20418.
[56] (15 November 2006) 635 NZPD 6561.
[57] At 6562.
[58] Mahoney and others (3rd ed), above n 24, at [EV10.01].
[59] Given the lack of explanation, it may be that some members of the Select Committee were unaware of the change.
[60] (23 November 2006) 635 NZPD 6803, my emphasis added. This echoed the findings of the Select Committee in Evidence Bill 2005 (256-2) (Select Committee report) at introduction, my emphasis in italics added. Also, the Law Commission submitted that the Code would "replace *most* of the existing common law and statutory provisions on the admissibility and use of evidence in court proceedings (italics added). NZLC R55, above n 4, at xviii, and 3. It still thought the Act was a code: later, in its discussion, the Committee dismissed the suggestion that some provisions be dealt with by regulation, to make the bill less prescriptive. This was because the members found it appropriate that the content of the bill be contained in statute, as a comprehensive evidence code is too important to be relegated by regulations;

The members exhibited a lack of certainty as to what was being achieved, even if they were positive about the supposed update of the law. In the absence of explicit justifications, it is unclear whether the shift was deliberate or merely a by-product of some other oversight.

Without any justification by the Select Committee to acknowledge the change from a 'code' to a mere Act, and reflag this to the judiciary, arguably the Act was received by a judiciary whose outlook was overshadowed by a residual mistrust in what the Act was able to achieve.[61] In *New Zealand Institute of Chartered Accountants v Clarke*, the court suggested that the possibility that "if the common law were to have a place s 57 would surely have said so, as s 53(5) does as to one field of legal professional privilege."[62] It adds that "of course, the Act itself says that it is not a code and ss 10 and 11 allow the common law a definite place."[63] It is clear that the Act alone would not suffice to govern the evidentiary privilege rules. The Court in *Sheppard Industries Ltd v Specialized Bicycle Components Ltd* found that aside from s 57(3), "plainly, however, there are other recognised exceptions to the 'without prejudice' rule" and "in respect of other exceptions… resort must be had to the common law."[64] Quite simply, there "is no suggestion that Parliament considered that the exceptions not mentioned in ss 57(3) and 67 should no longer be available."[65]

Select Committee in Evidence Bill 2005 (256-2) (Select Committee report) at Part 5 Miscellaneous Regulations'.

[61] See *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29 at [30].

[62] *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) at [37].

[63] At [37].

[64] *Sheppard Industries Ltd v Specialized Bicycle Components Ltd* [2011] NZCA 346, [2011] 3 NZLR 620 at [15(c)].

[65] At footnote n 4.

V Assessing the Act's Prosperity

Undoubtedly, the door to the common law has been left ajar and judges have been looking back to old cases.

Such recourse need not always be problematic. In *Bank of England v Vagliano Brothers*, Lord Herschell considered that if a provision were of doubtful import, resort to the common law would be legitimate to aid in the construction of the relevant provision.[66] However, the occasions when a judge may view the import of a section as 'doubtful' are, quite possibly, endless. Judges are not strangers to finding flexibility in legislation to assist their decision-making. Although ss 6, 7, 8, 10 and 12 seek to establish legal order based on principle, in reality their combined force directly undermines the establishment of any defined boundaries within which that search for legal order may be conducted.

Some judges consciously foster a substantive relationship between the Act and the common law. An example is the discretion to reject improperly obtained evidence, contained in s 30. In *Fan v R*, Asher J concluded on behalf of the Court of Appeal that "the common law discretion survives the Evidence Act, although s 30 governs those cases to which the section applies".[67] The same Court (although differently constituted) in *Dabous v R*[68] echoed this: "there is no difference in the assessment of unfairness, whether it is addressed under s 30(5)(c), or under the common law".[69] This suggests that reliance on the common law is a continuing possibility, even though s 30 could suffice alone. However, this strategy of approaching the Act and the common law as

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[66] *Bank of England v Vagliano Brothers* [1989] AC 107, 145, [189 -4] All ER Rep 93, 113 (HL).
[67] *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 2 at [31].
[68] *Dabous v R* CA618/2013, [2014] NZCA 7 per Harrison, Hansen, Dobson JJ, whereas the Court in *Fan* consisted of Harrison, Miller and Asher JJ.
[69] *Dabous*, at [18].

a co-extensive regime is not feasible for all sections[70] and may entrench an inconsistent approach to the Act as a whole, in turn bolstering judicial reluctance to accept the Act as the authoritative, primary source of evidence law in New Zealand.

As Ellen France J noted, "… having started with the Act it may occasionally be necessary in a particular case to refer back to the common law".[71] Yet exactly when the situation requires this is unclear. In *Mohamed v R*, despite finding it appropriate to "focus firmly on the terms of the Act",[72] the Court observed that "the application or interpretation of a particular provision in the Act may sometimes benefit from a consideration of the previous common law".[73] In *Institute of Chartered Accountants v Clarke* Keane J considered that "the Act itself says that it is not a code …[as] ss 10 and 11 [sic] allow the common law a definite place".[74] *Clarke* found a continuing role for the common law in interpretation, for if "an issue of admissibility cannot be resolved under the Act, or resolved completely, s 12 makes the common law a mandatory consideration, … in much the same way as 10(1)".[75]

The Law Commission noted in 2012 that "judges have shown some willingness to place greater emphasis on a broad reading of the interpretation aids in the Act than on the Commission's recommendation that the Act should be a code".[76] For example in *R v*

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[70] See for example Evidence Act 2006, s 21 which was designed to negative the existing common law; See discussion in Richard Mahoney and others (2nd ed) above n 52, footnotes 543-4.
[71] *R v Healy* CA414/07, [2007] NZCA 451 at [54].
[72] As is consistent with Evidence Act 2006, s10(1).
[73] *Mohamed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [4].
[74] *New Zealand Institute of Chartered Accountants v Clarke* [2009] 3 NZLR 264 (HC) at [37]. Presumably the correct reference should be to s 12.
[75] At [40].
[76] Law Commission *Civil Pecuniary Penalties -an Issues Paper on Civil Penalties* (NZLC IP33, 2012) at [6.67]; For example, the Commission suggests that

Moffat,[77] Baragwanath J commented: "Parliament recognised that in codifying the law of evidence questions of interpretation would arise where the purposes and principles would best receive effect by retaining rather than discarding rules of the common law."[78] Admittedly the old cases can be learned from, and can be used to positively advance the direction of the law. However the drafters already considered the existing cases when composing the Act. 'Aiding judicial interpretation' can veil what is, in effect, direct resort to the former law. As Judge Burns stated *Police v Stevenson*,[79] "[i]nsofar as ss 10(1)(c) and 12(b) are concerned, when a Judge has regard to the common law, the result will usually be a direct application of the common law".[80]

A Shortcomings with Pivotal Sections

The dissonance between the initial code status of the reform and the eventual Act derogates from the clarity and consistency that the reform sought. As the Law Commission observed in its 2013 review of the Act's operation, numerous cases have "given rise to concern about the way courts are interpreting ss 10 and 12".[81]

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privilege in respect of civil penalties has not been retained (its intention was to abrogate the privilege; NZLC R55, above n 4, at 76) but that it could be re-established). See also *New Zealand Air Line Pilots Association Inc v Jetconnect Ltd (No 2)* [2009] ERNZ 207 at [23] where Chief Judge Colgan proposed that the 'privilege' under the Evidence Act relates only to criminal liability exposure, and thus that the common law of privilege affecting civil claims is left untouched; see also *John Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, ARC 23/12 at [48].

[77] *R v Moffat* CA 196/2009, [2009] NZCA 437.

[78] At [20]. This related to the interpretation so s 42(1)(b); s 10 was used to justify a construction of (b) that accorded both with the fundamental purpose of the Act in s 7(3) and the pre-existing common law.

[79] *Police v Stevenson* DC Waitakere CRN-0809-003-987, 26 November 2008.

[80] At [58].

[81] NZLC R127, 2013 above n 59, at [2.35].

Realistically, cases form the prelude to a code, as well as its subsequent continuation.[82] Therefore, forging an appropriate and reasoned connection between cases and the Act was crucial. Initially, the Law Commission saw no need to include a provision detailing how to construe the "Code".[83] The principles and policies were to suffice as an overarching guide alongside the Acts Interpretation Act 1924 (which promoted a purposive approach to interpretation).[84]

Nevertheless, the Commission eventually recommended the inclusion of s 10 (as it was then) providing for the "Code to be liberally construed". Despite initially viewing such a section as unnecessary,[85] the Commission's consultations acknowledged that "a lifetime of training has ingrained into both bench and bar an almost automatic reaction of referring to case law to resolve evidential issues".[86] Hence s 10 served as a necessary reminder that the Code should be construed by reference to its purpose and principles, rather than relying on the common law.[87]

As for matters not provided for, s 12 was included in the initial draft because the Commission had predicted that some developments, "especially of a technological nature, may not be contemplated or fully evolved when the code is being drafted".[88] The Law Commission explicitly stated in s 12 that in any unanticipated situations "the courts should look to the purpose and principles of the Code to resolve the matter".[89]

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82 Discussed in Samuel Jacob Stoljar (ed), above n 21, at 11.
83 NZLC R127, above n 52, at 20, [2.11].
84 See now Interpretation Act 1999, s 5(1) which states that "The meaning of an enactment must be ascertained from its text and in the light of its purpose".
85 Law Commission *Evidence Law: Codification* (NZLC PP14, 1989) at [29].
86 NZLC R55, above n 4, at [32].
87 Don Mathieson QC (ed) *Cross on Evidence* (9th ed, LexisNexis, Wellington, 2013), at 79.
88 NZLC R55, above n 4, at [37].
89 NZLC R55, above n 4, at [38].

Although most of the Act stayed close to the structure envisioned under the Commission's Preliminary Paper,[90] changes to ss 10 and 12 were substantial. By the time of the Bill's introduction, these two provisions were scarcely recognisable.[91]

B Principles and Purpose: Weak and Only Decorative

The Act sets out the general purpose and principles applicable to the law of evidence, no matter what its source.[92] These purposes and principles are "of paramount importance in determining what influence case law will have"[93] because they also influence the interpretation of the Act (s 10), and the making of admissibility determinations in cases where the Act does not comprehensively cover the matter (s 12).[94] This reflects the Law Commission's originally desired approach to resolve any ambiguity within the purposive context prescribed by the Act.[95]

The Act's purpose is to help secure the just determination of proceedings, by keeping in mind six important considerations: logic, rights, fairness, confidentiality and other public interests, efficiency, and access.[96] These factors can be incompatible. For example, adhering to fairness and rights can be at the expense of efficiency. It means, for example, that an interpretation should promote fairness for parties and witnesses[97] whilst also protecting public interests.[98] Prima facie, this sets a troublesome judicial task.[99]

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[90] This observation is reinforced by Chris Gallavin, above n 4, at 8, referring to NZLC PP14 1991, above n 6.
[91] See generally, Evidence Bill 2005 (256-1).
[92] This is generally accepted. See for example, NZLC R55, above n 4, at [38].
[93] Chris Gallavin, above n 4, at 12.
[94] Evidence Act 2006, ss 6, 7, 8, 10, and 12.
[95] NZLC R55, above n 4, at 10, [36]. The objective was to ensure that the law developed in a principled way, thus improving its moral quality and credibility.
[96] Evidence Act 2006, s 6. These purposes are not substantive in detail. For further discussion see Mahoney and others (3rd ed), above n 24, at 37-39.
[97] Evidence Act 2006, s 6(c).

Together ss 7 (relevance) and 8 (test of probative value against unfair prejudice) provide an absolute test of admissibility and if proposed evidence does not satisfy both sections, it must be excluded. There is no residual judicial discretion to admit in the face of such inadequacy.

C Operational Issues

In such a "corpus of law", where it is nearly impossible to provide for every eventuality, "recourse to underlying principle is of paramount importance".[100] The establishment of principle should empower judges to exhibit genuine statutory interpretation when applying and developing the law, as opposed to "painfully hacking their way through the jungles of detailed and intricate legislation".[101]

However, the mere existence of these principles does not automatically assure them any high degree of influence or value. It is submitted that they may have only a minor effect, via strategic but largely totemic use by counsel to progress an argument. In *Police v Stevenson*[102], Judge Burns found that although ss 10 and 12 give priority to the Act's purpose and principles, "that does not provide a barrier to application of the common law."[103] Recourse to the common law is easily justifiable, thanks to the evasive nature of the Act's statement of purpose and principles.

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98 Evidence Act 2006, s 6(d).
99 Mahoney and others (3rd ed), above n 24, at [EV10.02].
100 Chris Gallavin, above n 4, at 16. These principles have developed at common law over time, and thus mirror the existing values of evidence law. Therefore, unfamiliarity is not the issue.
101 (1April 1965) 264 GBPD HL 1965, columns 1175-6 per Lord Wilberforce; cited in NZLC PP14 1991, above n 6, at 4; cited in Letourneau and Cohen "Codification and Law Reform: Some Lessons from the Canadian Experience" [1990] Stat LR 183, 194. The authors also point out that the virtues of codification are the virtues of all competent legislation.
102 *Police v Stevenson* DC Waitakere CRN-0809-003-987, 26 November 2008.
103 At [58]. In turn, this justified his statement that "the Act cannot be described as a complete code".

Justice Asher's discussion in *R v Fan*[104] exemplifies the malleability of the purpose section of the Act and demonstrates that its range of subsections provides sufficient interpretive flexibility. Arguably, resort to the common law is inconsistent with subs (f), which refers to "enhancing access to the law of evidence" as it undermines the ability of the Act being the sole, instructional source of evidence law. However his Honour noted that it would be "inconsistent with the common law and the purpose of the Evidence Act, which is to promote fairness to parties, to construe s 30 as excluding the common law discretion".[105] Helping to secure the "just determination of proceedings" can be achieved by other methods beyond the promotion of fairness to parties, via the other subsections in s 6.[106]

D All's Well that Appears Well?

Prima facie, the Act appears to hold authority wherever possible. But issues around the principled basis of accessibility to the common law still brew behind its surface.

The Court of Appeal has indicated that if a section of the Act offers adequate guidance, reference back to the common law will not be necessary.[107] Moreover it considered that although the Evidence Act was not expressed as a complete code,[108] the focus should still be on the statute.[109] Similarly the Court of Appeal in *R v Timbun* took the view

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104 *Fan v R* [2012] NZCA 114, [2012] 3 NZLR 29.
105 At [31].
106 Evidence Act 2006, s 6. Note that each of the six subsections provides a different way in which the just determination can be assisted.
107 *R v Taea* (CA 442/07, 31 October 2007); [2007] NZCA 472.
108 As was the Law Commission's initial proposal in NZLC R55, above n 4, at 36, 38.
109 Discussed in *R v Healy* (2007) 23 CRNZ 923, [2007] NZCA 451 at [46] per Ellen France J. Her Honour illustrates the preferred approach by referring to the decision of *R v Taea* [2007] NZCA 472, where the Court of Appeal had earlier found it unnecessary to refer back to the law in force before the advent

that when interpreting, the statutory words must be focused on, not earlier authorities.[110] In *Queen v Barlien*,[111] Glazebrook J found that "s 10 should not be given an expansive interpretation in the face of clear wording in the Act".[112] Thus her Honour was adamant that s 10 "cannot override explicit exclusionary wording in the Act itself".[113]

In the Supreme Court in *R v Hart*,[114] Elias CJ considered the Act to be the "first stop when questions of admissibility arise. And in many cases it will be the last stop."[115] The other judges agreed;[116] "the Courts

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of the Act. Thus at [48] her Honour used the statutory provisions as the starting point for interpretation. This is in line with a plain reading of s 10. See also *The Governor and Company of the Bank of England v Vagliano Brothers* [1981] AC 107 at 144-145 (HL) per Lord Herschell who held that "the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previous state of the law stood …". This was the approach taken in relation to the Criminal Justice Act 2003 (UK), discussed in *Healy* at [53].

110 *R v Timbun* (CA 370/07, 27 February 2008). [2008] NZCA 4 at [26]; see also *R v Weir* [2005] EWCA Crim 2866; [2006] 2 All ER 570 at [35] where the proposition that the statute be read in light of the pre-existing common law was rejected.

111 *R v Barlien* CA505/2007, [2008] NZCA 180 per Glazebrook J.

112 At [55]. Section 35 was considered to be final, given that no common law authority was referred to.

113 At [54]. This was justified by contrast to s 12A which was included to directly preserve the common law co-conspirators rule, as differentiated from the rule in s 27(1). No such section was included to preserve the common law in relation to s 35.

114 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1.

115 At [1]. The case turned on the admissibility of a previous consistent statement under s 35(2) of the Evidence Act 2006. At [1], the Court described this topic as one of "conceptually unsatisfactory case law at common law", and thus saw the need to promote a careful approach to not to stray from the text and principles of the new Act. At [9] it recommended that "[c]are therefore needs to be taken to ensure that authorities under the former law … do not distort the application of s 35". This approach echoes that of making a fresh start, or new slate, as in *Wi* the year prior.

116 The other judges were Blanchard, Tipping, McGrath and Wilson JJ: the judgment was delivered by Tipping J.

should not follow the general common law approach … when that is not mandated by the statutory language".[117] This was supplemented with a footnote: "Indeed the Act is designed to make a break from the common law: see s 10."[118] It took a consistent approach in *Mohamed v R*,[119] commenting: "We do not consider a great deal is now to be gained from an examination of pre-Evidence Act case law."[120] The Supreme Court in *Wi v R*[121] acknowledged the limited function of the common law by virtue of s 10(1)(b), presuming that this was included "to emphasise that the Act marked a new departure in the law of evidence and Judges should not interpret it restrictively on account of any hankering for the old common law or instinctive resistance to change".[122]

Although the context of each examination varies, it appears clear that the Act is accepted as the starting point. Yet beyond this point, confusion persists.

E What is the Meaning of 'Common Law'?

The Evidence Act is the single piece of New Zealand legislation containing the most references to 'common law', a term that is present in and central to the understanding of ss 10 and 12. [123] Yet it is not defined in the Act's interpretation section.[124]

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[117] *Hart,* above n 114, at [52]-[53]. This was discussed in relation to the timing of a prior consistent statement.
[118] At footnote 58 of the judgment. Thus the Supreme Court takes the inclusion of section 10 as permitting, if not encouraging, judges to anchor themselves firmly in the statutory concepts, before resorting to pre-Act case law.
[119] *Mohamed v R* [2011] NZSC 52, [2011] 3 NZLR 145.
[120] At [4].
[121] *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11.
[122] At [26]. The Court considered section 10 and 12 in relation to the admissibility of a defendant's lack of previous convictions.
[123] New Zealand Legislation "Search Results: 'common law'" <www.legislation.govt.nz>.
[124] Evidence Act 2006, s 4.

Generally, this phrase refers to the law developed by judges. Under the doctrine of stare decisis, such judge-made common law binds the courts when adjudicating similar disputes in the future. This characteristic of New Zealand's legal system derives from England, where the common law originated in the 13th century. Over time, the decisions of judges became the basis of the modern common law system.[125] "Conceptually, the common (judge-made, or classically, judicially *articulated*) law is the legal foundation, [126] and covers seamlessly all questions. Superimposed upon this are particular statutes. Where a statute does not cover the question, then the common law supplies an answer."[127] This principle is well established.

In an evidentiary setting, the leading texts suggest that 'common law' is taken to mean the law of evidence prior to the Act.[128] Chief Justice Elias stated that "[r]eference in statute to the common law without more is to the common law as it develops from time to time".[129] Arguably, ss 10 and 12 would permit or require reference to judicial

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125 Daniela Muth "Basic Conceptions of the Legal System: A Critical Comparison Between New Zealand and Germany" (2004) 10 Canterbury L. Rev. 152 at 154.

126 The traditional theory is that judges do not make, but simply declare, the law. See William Blackstone *Commentaries on the Laws of England*, Vol 1 (Clarendon Press, Oxford, 1765), 54, 70; see also *Willis & Co v Badeley* [1982] 2 QB 324, 326 where Lord Esher MR found that there is "no such thing as judge-made law…". In contrast, the Modern acceptance is an open acknowledgement that this is not the reality, and indeed judges change the law when overruling earlier precedents; see *In Re Spectrum Plus Ltd* [2005] UKHL 1; [2005] 2 AC 680, esp. at [34] and [35].

127 John Armour, above n 13, at 5.

128 Mahoney and others consider that the 'common law' refers to the law of evidence as it was before the Act. See Mahoney and others (3rd ed), above n 24 at 71, [EV10.03]; see also Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [EA10.02], who predicted that it is likely that "the common law" is likely to be taken to refer simply to the law of evidence as it existed prior to the Act, which could thus include reference to judicial interpretations of earlier statutes, where those statutes are now outdated.

129 *Re Greenpeace* at [56] per Elias CJ. However, its weight for this argument is perhaps limited to future legal development, to which it likely refers.

interpretations of earlier statutes which themselves have since been reformed by the Evidence Act of 2006. As it stands, reference to such prior case law would be seen as authorised.[130]

Admittedly, the drafters had the difficult task of replacing some common law and accounting for that which remained.[131] Given that the Act took over 16 years to eventuate, numerous cases came before the courts in the interim. Judges were faced with either anticipating the Act's birth or simply ignoring it. Problematically, the legislative solution adopted in ss 10 and 12 is illogical and achieves flexibility at the expense of clarity and order. Moreover, it makes no distinction between instances where the common law is assumed, as opposed to cases where it had been expressly stated. It is problematic to leave an overhang of cases that are not directly accounted for by the statute. Such decisions can lie dormant until counsel offers them as justification for an approach not anticipated by the Act. If the cases from 1989 to 2006 had to be accounted for, the Act could have limited recourse to the 'common law' to this period of time.

The Supreme Court in *Wi v R* found that "[t]he common law approach in England fortifies the appropriate construction of the Act".[132] This is troubling, as reference to common law in the Evidence Act may not extend to include the common law of England. Yet this is only an assumption, as the Act provides little guidance on the point.

For the sake of clarity and simplicity (two objectives of the Act), a legislative attempt ought to be made to clarify the distinction between judicial decisions rendered from interpreting current New Zealand statutes, as opposed to the pre-existing mass of common law.

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[130] This is so long as the constraints of ss 10(1)(c) and 12(b) of the Evidence Act are followed.

[131] As discussed in J F Burrows *Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2003) at ch 16.

[132] *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11, (2009) 24 CRNZ 731 at [32].

F The Distorted Power of New Terminology

Judges may tend to treat a legal statement as evincing a fresh approach when it is described in 'new' terminology. In *Healy* the court found that provisions relating to 'propensity' evidence offered "the opportunity of a clean slate … that should be grasped".[133] The opportunity to start afresh in relation to 'similar fact' evidence was easier to grasp given the explicit intention illustrated in the alteration of the terminology to using the descriptor 'propensity'. This reinforces a break with the existing law.

Such explicit change in terminology may not be required to achieve reform. Yet realistically, where provisions appear to use the same terminology, logically lawyers continue to refer to old common law cases. Moreover, when no mention is made of an intended legal development, prior lines of precedent continue to be relied on, even if passively rather than actively. In discussing whether the Act intended to alter a longstanding common law position,[134] Tipping J noted that nothing in the Commission's published material or in the Parliamentary materials suggests this is so.[135] Parliament could have expressly altered this, but refrained from doing so, thus cultivating uncertainty and excess scope for discretion. The strength of the correlation between new terminology and reform of the law is indicative of the inherent reluctance to adopt new lines of reform without direct prompting.

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[133] *Healy* at [54]. See also Law Commission *Evidence Law, Character and Credibility* (NZLC PP27, 1997) at [268]–[270]. It reminded that the Act is the product of a long and considerable history of reforms and that one of the objectives in terms of the law relating to propensity evidence was to reduce the previous uncertainty as to the likely approach to the admissibility of this sort of evidence.

[134] The position being that evidence of lack of previous convictions was admissible.

[135] *Wi*, above n 132, at [27].

G Determining Parliament's Intent

Added to the lack of direction and justification in Hansard for the inclusion of ss 10 and 12, seeking to assess Parliament's intent is a difficult, if not impossible task. It may be doubted whether a cohesive intention would regularly be gleaned from a group of often polarised legislators.[136] Seeking to justify an interpretation upon the basis that it was intended by Parliament is a somewhat flawed (if not fatal) basis for principled development of the law.

H Addressing Gaps in the Act

If the Act is not comprehensive, the issue then arises as to how legislative crevices might be identified, and whether they can be forged afresh.

The original draft Code included a version of s 12 which stated "Matters of evidence that are not provided for by this Code are to be determined consistently with the purpose and principles of this Code."[137] The Law Commission made it clear that "any ambiguity in the meaning of a provision of the Code must be resolved by reference to the purpose and principles of the Code rather than to the pre-existing common law".[138] It also asserted that the problem of gaps in a code "is somewhat illusory" because "[i]f in a given case the code appears insufficiently specific, reference to the general policies and principles will enable the code to be interpreted appropriately".[139] That said, it conceded that reference back to the old cases might be helpful

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136 This idea was raised and discussed by Justice Susan Glazebrook: "Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21st century" (Guest Lecture, University of Otago, 13 August 2014). Bills will not always have cross party support for their statutory text, yet it is still possible.

137 NZLC R55, above n 4.

138 At at [36]; the same idea was discussed in NZLC R55, above n 4, at [C68].

139 NZLC PP14 1991, above n 6, at vii.

in elucidating the Code's principles.[140] However, this is not the section that eventuated in the Act.

Under s 12(b), as it now stands, the judge is required to have regard to the common law when determining the admissibility of evidence influenced by rules not provided for in the Act. This is no small requirement. As noted by Mahoney et al, there are numerous occasions when the Act does not deal completely with all admissibility issues regarding a particular class of evidence.[141]

The Ministry of Justice said that the purpose of cl 12 was "to provide the Act with some flexibility in cases where courts are faced with new developments in technology … not contemplated at the time the Act was drafted".[142] However, as noted by Mahoney et al, "if new technologies are at issue, the common law will presumably offer no insights into how they should be used, except at the level of principle".[143] That being the case, the principles contained within the Act ought to be sufficient to guide the development of the Act in future, unanticipated areas, as was the original express view of the Law Commission.[144]

However, the cases show that it is not technological developments that have called s 12 into use. The judiciary exhibits a continued reliance on s 12 as a gateway back to the pre-Act cases.

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[140] NZLC R55, above n 4, at [36].
[141] Mahoney and others (3rd ed), above n 24, at 72, [EV12.01] For example, see admissibility of reputation evidence under section s 37 or 40, discussed at [EV37.03(4)] and [EV40.02(5)].
[142] Ministry of Justice *Evidence Bill: Part 1 – Preliminary Provisions Departmental Report for the Justice and Electoral Committee* (June 2006) at 13, in relation to the draft Bill.
[143] Mahoney and others (3rd ed), above n 24, at [EV12.01].
[144] NZLC PP14 1991, above n 6, at [33] and [36].

VI Finding Gaps: Dubious Justifications

The Court of Appeal found that there is no automatic preservation of the common law.[145] If the Evidence Act abrogated the rationale for an earlier rule, then the Act is inconsistent with that rule.[146] In *R v Healy*, the Court of Appeal reiterated the primacy of the Act, finding that s 12 "deals with the situation where there is a lacuna because matters are not provided for".[147] In *R v Mata*[148] the Court of Appeal adopted *R v Carnachan* in rejecting the appellant counsel's proposition, and held: "We see no place for s 12 in the analysis of the issue raised on this aspect of the appeal."[149] Added to this, the Supreme Court noted "resort is not to be had to the common law when statute covers the ground".[150] But the limits of what the statute covers are not black and white.

Practitioners and judges have grown to expect that if an aspect of the common law is to be changed substantively, it will be unequivocally stated. To this end, Mr King, counsel for the appellant in *R v Wi*, submitted that the Evidence Act does not seek to depart from the common law practice regarding adducing evidence of good character.

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145 *R v Carnachan* [2009] NZCA 196. In contrast to the common law position, the Evidence Act 2006 changed so that it is now not improper for a party to call as a witness, a person known to be hostile. Therefore the court assumed that changes brought about by the Evidence Act show that the common law is not automatically reserved.

146 At [39]. This was the rule in *R v O'Brien* [2001] 2 NZLR 145, which the Court in *Carnachan* considered had been overridden.

147 *Healy* at [49].

148 *R v Mata* [2009] NZCA 254.

149 As noted at [2], the issue was calling a hostile witness at trial. Judge Blackie's decision granting the Crown's application under Crimes Act 1961, s 344A (to permit the prosecution to call Mr Alex Mata at trial). The Court in *Mata* held at [25]-[25] that the rationale underpinning *O'Brien* no longer applies in cases governed by the 2006 Act.

150 *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] 2 NZLR 709; [2008] NZSC 24 at [71].

He reasoned that "[h]ad it done so, it would have done so expressly, had it been intended to then it would have been the subject of widespread debate, discussion and consultation, which it clearly was not".[151]

Taking a contrary view, the Court of Appeal in *R v Kant*[152] found that despite no express heralding of the change, the Act *did* intend to alter a common law principle. It noted that the cases prior to the commencement of the Evidence Act 2006 "now need to be treated with circumspection".[153] This approach is refreshing, yet it was not followed in *Wi v R*, where the Supreme Court considered that "the Act may well have done so … but the lack of any suggestion that the law was to change in this significant respect is surprising if that is what was intended".[154]

Clearly, as explicitly stated by the Court of Appeal in *Singh*, the common law can legitimately continue to inform evidentiary decisions.[155] Despite concluding for other reasons that the statements should not be excluded, Asher J in *Fan* was keen to observe "there remains a general common law discretion to exclude evidence where its admission would be unfair".[156] In *New Zealand Institute of Chartered Accountants v Clarke*, [157] Keane J considered that the common law has "a continuing place in setting the boundaries to the privilege conferred".[158]

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151 *Aaron Mark Wi v The Queen* SC 28/2009, [2009] NZSCTrans 25 at 42.
152 *R v Kant* [2008] NZCA 269 (31 July 2008).
153 At [20]. The Law Commission materials show a clear distinction between veracity and propensity evidence "in a way which has altered the previous approach under the common law."
154 *Wi*, above n 132, at [27].
155 *Singh v R* [2010] NZCA 133 at [52]. The Court footnoted sections 10 and 12.
156 *Fan*, above n 70, at [52].
157 *Clarke*, above n 74.
158 *Clarke*, above n 74, at [44]. This was based upon the opinion expressed in *Cross on Evidence*, 3613, EVA 57.9 rather than reference to sections 10 or 12, and

Sometimes, even though the Act does sufficiently cover a particular area, judges appear dissuaded from using the Act's wording as the determinative instrument and often refer back to previous cases. Judges can label an area where they wish to justify moving beyond the language of the Act as being 'not provided for' rather than being directly rescinded by the statute. In *R v Fan*[159] s 30(5)(c), the court examined how the ground of impropriety based on unfairness could be kept in check.[160] The pre-Evidence Act cases appeared to exclude evidence on the ground of general unfairness but could not be relied upon, given the specific description of "obtained unfairly" in s 30(5). The Court found that its inclusion centred on the notion of 'obtaining', rather than on general impropriety.[161] Despite the 'fairness' of this 'obtaining', it considered it necessary to "look further to whether it was in fact the intention of the drafters of the Act to limit the considerations of unfairness only to the act of 'obtaining'",[162] and thus explored the common law.

The Court in *Fan* discussed three cases since the enactment of the Evidence Act in which the general discretion to exclude on fairness grounds was relied upon.[163] However, those cases had not explicitly considered whether the general discretion survived the Act, thus the Court felt the need to look further. Despite acknowledging that s 30 provides an obstacle to the argument that admitting the evidence is unfair (as opposed to the argument that it had been unfairly

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thus avoided giving an explanation of the extent to which continual referral to case law would be helpful. Note that this was considered in the context of section 57.

[159] *Fan* , above n 104.

[160] At [17]. Thus the Court of Appeal was tasked with determining whether to exclude evidence on grounds of unfairness.

[161] At [20]. It was the giving, rather than the receiving, which was at issue in this case (as it was alleged to have been unfair).

[162] At [23].

[163] At [28]. The three cases are *R v Petricevich* [2007] NZCA 325 at [18]; *R v Cameron* [2009] NZCA 87 at [41]; and *R v Simanu* [2011] NZCA 326.

obtained),[164] the Court subsequently found no indication from the Law Commission of an intention to exclude this common law discretion.[165]

The fundamental source of unease about s 12 is the lack of guidance as to what constitutes a perceived substantive gap, and when the common law could be used to fill this. Taking the view (as the Court did in *Fan*) that s 30 deals with unfairness grounds only in part, thus provoking recourse to the common law via s 12 to fill the gap, is questionable. That section deals with improperly obtained evidence, not the general concept of unfairness; hence its coverage of unfairness is arguably limited to that context. According to the Law Commission, "this is not the type of gap at which s 12 is targeted".[166] However, the Act provides no clear qualification of exactly what type of 'gap' s 12 is aimed at, thus permitting its creative or direct misuse.

In *Fan*, given that the Court found s 30 could not be interpreted as including general unfairness, s 10(1)(c)(i) ought to have barred the conclusion that a general common law discretion to exclude evidence may remain.[167] Moreover *Fan*'s reliance on s 12 to endorse the continued existence of a part of the fairness discretion exemplifies the

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[164] *Fan*, above n 104 at [29] and footnote 16 of that case; Donald L Mathieson (ed) *Cross on Evidence* (online looseleaf ed, LexisNexis) at [EVA30.10]; Richard Mahoney and others (2nd ed), above n 52, at [EV30.10(1)]; and Bruce Robertson (ed) looseleaf, above n 33, at [EA30.10].

[165] *Fan*, above n 104, at [30]. The Court mentioned the following two publications: NZLC R55, above n 4, at [105]; and Law Commission *Criminal Evidence: Police Questioning* (NZLC PP21, 1993) at [44], [56]. However it did not refer to the Law Commission *Police Questioning* (NZLC R31, 1994) which stated at 34 (with regard to the improperly obtained evidence rule) that "the rule provides for the exclusion of improperly obtained evidence" and that the "lack of clarity in the guiding principles behind the current fairness discretion (i.e. to exclude evidence on the ground of unfairness) has, therefore, been addressed by the proposed rule". At 101 it stated "the new rule replaces the fairness discretion". Had this clear statement been located, it may have been difficult to avoid.

[166] NZLC R127, above n 52, at 29.

[167] NZLC R127, above n 52, at 29.

potential strength of s 12. Any viable interference with s 7(1) was not discussed, thus arguably placing s 12 on something of a pedestal above relevance.

In *Sheppard Industries Ltd v Specialized Bicycle Components Ltd* the Court of Appeal used s 12 to import a common law exception to the settlement negotiation privilege,[168] as a means to remedy a perceived problem with the scope of s 57 itself.[169] Again, this exemplifies the capacity for s 12 to be invoked to find a route back to the common law, with little guidance on when this actually is appropriate.

A When is the Act Sufficient?

It is not always clear whether parts of the Act were intended to exclude common law authorities. Justice Glazebrook's discussion in *R v Barlien* illuminates the difficulty of gauging the Select Committee's intentions regarding common law exceptions that were not included in the Act.[170] Excessive esteem for previous common law developments needs to be moderated more explicitly.

Together, ss 10 and 12 present a formidably accessible path to the common law. However, excessive and casual referral undermines the values of consistency of approach, predictability, and accessibility intended by the statute, and is contrary to the principled approach that the Act ought to achieve. The more that the focus is on the common

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168 *Sheppard Industries Ltd v Specialized Bicycle Components Ltd* [2011] NZCA 346, [2011] 3 NZLR 620 at [15(c)].

169 This is the view of the Law Commission, per NZLC R127, above n 52, at 29 at [2.40].

170 *Barlien*, above n 111, at [36]. This is discussed in relation to recent complaint evidence in sexual offences, where a submission from the Law Society was not adopted, but no explanation was given by the Committee in its report. Similarly at [37] Glazebrook J discusses the lack of explanation for the non-inclusion of the *res gestae* exception.

law, the less weight and prominence the Act itself has as the main source of evidence law in New Zealand.

B Looking Forward: Law Commission Recommendations

The Act requires the Law Commission to conduct a review every five years to "help ensure it is working as intended and that it remains up-to-date".[171] The mechanism alludes to the inevitable difficulty associated with an attempt to codify common law. Such a periodic review feature is rare,[172] indicating that the possibility of transitional problems was recognised.[173]

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171 Cabinet Paper "Amendments to the Evidence Act 2006" (12 November 2013) CAB 100/2008/1 at [7]. Note that the Law Commission was considered to be the appropriate body to undertake these reviews, (CAB 100/2008/1 at [24]). It has been the Law Commission's duty to keep watch over the Acts of Parliament, recommending correction where judicial interpretation reveals omission or ambiguity, and to suggest renovation and repair of the law. For more discussion on the role of a Law Commission in an institutionalised setting, see Indiana Law at 365 Leslie George Scarman, above n 12.

172 The following are the only New Zealand Acts containing a mechanism for review: Walking Access Act 2008, s 80 (Minister must review Act); Veterans' Support Act 2014, s 282 (Review of operation of Act); Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, s 56 (Review of the Act); Motor Vehicle Sales Act 2003, s 163 (Review of operation of Act); Psychoactive Substances Act 2013, s 106 (Ministry must review Act); Members of Parliament (Remuneration and Services) Act 2013, s 67 (Review of Act); Canterbury Earthquake Recovery Act 2011, s 92 (Annual reviews of Act); Plumbers, Gasfitters, and Drainlayers Act 2006, s 187 (Review of Act). The following have review mechanisms for isolated parts of the legislation; Interpretation Act 1999, s 28 (Review of this Part 4 –Application of Legislation to the Crown); Food Act 2014, s 138 (Review of Operation of s 137; The Intelligence and Security Committee Act 1996, s 21 (Requirement to hold periodic reviews in accordance with the terms of reference specified under s 22(3)(a)).

173 Moreover the mechanism acknowledges the historic difficulty in updating legislation, bearing in mind the legislative history of the Evidence Act, "which was first enacted in 1908 then amended three or four times…" see (23 November 2006) 635 NZPD 6638.

In 2006, Sir Geoffrey Palmer observed that there is a "direct and dynamic relationship between pre-legislative and post-legislative scrutiny".[174] The 2013 Cabinet Paper gives explicit reasons why five-yearly reviews are appropriate and required:[175]

- the extensive nature of the 2006 reforms;
- the short existence of the Act, with several provisions yet to be considered by the higher courts;
- that many provisions are still being monitored by the Law Commission; and
- "the need to maintain a single source of evidence law".[176]

Christopher Finlayson MP reported that, given it was the first time in a century that there had been a comprehensive reform of the Evidence Act, providing for periodic review was necessary.[177]

C Review of Sections 10 and 12

In its 2013 Review, the Law Commission agreed with Elisabeth McDonald's observation that it is difficult to see how the addition of reference to the common law was necessary.[178] Moreover, the mandatory form of s 12 presents an invitation to judges to refer to the case law to solve evidential issues in an "almost automatic reaction", and place heightened reliance on the common law to achieve justice in

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[174] Geoffrey Palmer address, above n 3, at [101]. The author suggested consideration should to be given to imposing some requirements in both phases, to avoid the common syndrome 'we have a problem, let's pass a law'.
[175] CAB 100/2008/1, above n 171, at [23]. It was produced subsequent to the Law Commission's R127 Review, above n 52.
[176] At [23.4].
[177] (28 June 2007) 640 NZPD 10334, per Christopher Finlayson MP. He noted the balance between ensuring the new legislation is kept up to date, whilst warning against regular amendments as soon as a case arises on a particular aspect; "In other words, the legislation will need to have time to settle down."
[178] Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 16; discussed NZLC R127, above n 52 at [2.64].

a particular case, "or to avoid a problem with a particular provision of the Act".[179]

However, despite these clear issues, the Law Commission did not recommend any alteration to ss 10 and 12:[180] "We recommend that ss 10 and 12 be kept under review with any problems identified to be considered at the next five year review." This was for three central reasons.

First, it found that "mostly the courts have adopted an appropriate interpretation of s 10".[181] Although this is accurate, it leaves unanswered the persistent issues surrounding the meaning of the 'common law', the distortion of 'new technology', and the pretence of determining Parliament's intent.

Secondly, the Commission found that in most cases the problems with ss 10 and 12 are because "the court has struggled with the interpretation of a substantive provision".[182] This suggests that solving the issues with disputed sections would reduce the need to amend ss 10 and 12. However this still leaves ss 10 and 12 as a gateway. As suggested by the Supreme Court, that possibility still persists: "[t]he experience of the common law should not … be completely ignored".[183]

Thirdly, the Law Commission took the view that there has not yet been enough judicial consideration of s 12 to assess the extent of any difficulties. It suggested that problems are "most likely to arise in

[179] NZLC R127, above n 52, at [2.64].
[180] At [2.65].
[181] At [2.65].
[182] NZLC R127, above n 52, at 34 [2.65]
[183] *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11, (2009) 24 CRNZ 731 at [25].

assessing what amounts to a 'gap' under the provisions".[184] Clearly, s 12 was included for the unforeseen case, rather than instances where a provision is silent on a previously existing rule of common law.[185]

Where the wording of a provision deals with a question 'only in part', this facilities the reintroduction of admissibility rules on which the Act appears to be silent. However, silence can be intentional, as for example under s 57.[186] If this were not so, then the drafters' intentions to reconceptualise the law in a given area, without altering it substantively, could always be undermined.

Nonetheless, the Law Commission found that "a gap-filling provision for the unforeseen case is desirable" despite the potential for misuse of an all-encompassing Act.[187] It seems as though the Commission surrendered to the ongoing difficulty of limiting judicial access to common law authorities, as there are "other routes for judges to employ pre-existing common law rules", such as the flaws of the purpose and principles.[188] "Changes to ss 10 and 12 would [in its view] only result in the amendment of one of those routes."[189] Thus its

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184 NZLC R127, above n 52, at 34 [2.65] as is illustrated by *Fan*. It considered that in that case, the Court used s 12 to revive "what it considers to be a useful pre-existing rule". However, if such an approach is taken, usefulness is a justification that can be emulated in many courts at the expense of treating the Act as applicable sufficient.

185 At [2.66].

186 This section arguably reforms the law relating to settlement negotiation privilege. It simplifies the prior common law authorities, and states only those exceptions to the rule which have survived the enactment.

187 At [2.67].

188 At [2.67]. As commentators have noted, and I have discussed, the purpose and principles in ss 6-8 are sufficiently flexible to accommodate much of the common law; see also Richard Mahoney and others (2nd ed) above n 52, at [EV10.03].

189 NZLC R127, above n 52, at 34 [2.67].

preference is to retain the current wording at this time, and to keep the provisions under monitoring and review over the next five years.[190]

That said, the Commission admitted that amendment to both ss 10 and 12, to revert to the form originally proposed by the Law Commission, would serve a useful signalling purpose.[191] Yet as this suggestion has not been adopted, nothing in the statute gives notice to the judiciary that the overuse of common law authorities ought not to continue.

On the contrary, this practice has the potential to persist, especially with cases such as *Clarke* and *Sheppard* setting a trend of allowing the common law to proliferate at the expense of the Act. Arguing that there is a gap in the Act to be filled by reference to s 12 provides an easier route to what is familiar, rather than taking the particular substantive section at face value. This is detrimental. It stokes the fire of 'satellite litigation',[192] leaving the Act in an uneasy mélange with former common law authorities.

D Confronting the Dissatisfaction

Despite comments in *Barlien*[193] and *Hart*,[194] judges are slipping into references to the pre-existing common law, beyond what the Law Commission and Parliament appear to have envisioned. Unless a new approach is adopted this trend will continue, burying the Act in a quilted overlay of cases, old common law precedents and case law from foreign jurisdictions - thus ironically reinvigorating the very issues that prompted the Act's initial conception. The common law's continuing

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190 At [2.67].
191 At [2.67].
192 Nina Khouri *Privilege for settlement negotiations and mediation: Law Commission acknowledges the elephant in the room* (17 May 2013) NZLawyer 14. The author gives this name to litigation about litigation.
193 Above n 111.
194 Above n 114.

influence derogates from the indigenous effort to start afresh that was a hallmark of the 2006 legislation. The judicial tendency to veer back to the common law as a familiar authority upon which to rely undercuts the opportunity to make use of this "clean slate". [195] Thus my view of the cases on point echoes that of Mahoney and others. Care is needed to ensure that "wholesale reversion to the pre-2006 Act law does not occur".[196]

Judges must accustom themselves to not only beginning with the Act, but also actually staying with it wherever possible. At present, consideration of ss 10 and 12 appears to be merely ritualistic as these sections themselves provide a permeable barrier to resorting to common law authorities.

VII Concluding Remarks

As Heath J observed in *Jung*; "It is possible that a problem has arisen because Parliament modified the recommendations of the Law Commission".[197] The Law Commission was only established in 1985, just three years before being tasked with an overhaul of the evidence law.[198] While aspirational in its approach, it was perhaps naïve about the effect of claiming that a codification of the law of evidence would eventuate.

Underlying this, a systemic issue may persist between law reform drafters and those in Parliament who do not carry forward all the suggested changes, but are not obliged to give explanations. Already

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[195] *Messenger v Stanaway Real Estate Limited* CIV-2012-404-7205, [2014] NZHC 2103 at [20]. See also *Body Corporate 191561 v Argent House Ltd* (2008) 19 PRNZ 500 (HC) at [31].

[196] Mahoney and others (3rd ed), above n 24, at [EV10.03].

[197] *Jung v Templeton* (HC Auckland CIV-2007-404-5383, 30 September 2009), at [60].

[198] It was established by the Law Commission Act 1985; see also NZLC PP14 1991, above n 6, at ii.

there have been "difficulties in accepting the Act as the sole governing body of law".[199] This is unsurprising, given that the Law Commission warned that significant reform proposed would not achieve its purpose unless accompanied by a change in approach by the judiciary and practitioners.[200] Accepting that the Act is not a Code is only one step. A clear signal needed to be given, to allow habituation, so that the Act could be adopted in a way to best serve its purpose.

At present, the cases from 2006 - 2014 display uncertainty as to whether some evidence law has been reformed, simply consolidated, or completely ignored by the Act. [201] Dispelling the existing confusion surrounding the Act's relationship with the common law is a necessary step towards ensuring that it fulfils the original reform goals.[202]

[199] This was also noted in Andrew Beck "Evidence Act of Civil Litigators" (New Zealand Law Society Continuing Legal Education, November 2012) at 7.
[200] NZLC R55, above n 4, at 3, [8].
[201] This piece was substantively finished in October 2014, and thus only deals with case and statute law up to that point.
[202] NZLC R104, above n 23, at [8.16].

REBUILDING BABEL: NEGOTIATING MEANING IN MULTILINGUAL LEGISLATION

SARAH J REESE

I Introduction

All law is, to an extent, a process of translation. Even when operating within the same language, the enactment and enforcement of any given piece of legislation requires first that the legislature, after determining what it means to enact, gives the relevant instructions to the drafters for them to 'translate' or 'transform' into written text.[1] That legislation must then be promulgated, and applied to the real world by the judiciary through interpretation. In both cases, what occurs is in the broadest sense a translation, in that the communication of ideas between individuals can never be performed with complete precision: there is always some small gap between what is said and what is meant, and what is meant and what is understood, and the aim of good legislative drafting can only ever be to reduce these gaps as much as possible.[2] In a way, then, many of the problems of law and legal interpretation find their echo in those which have preoccupied translators since the Classical period—the tension between the literal or "word-for-word" adherence to authority, and the more figurative (or purposive) "sense-for-sense" translation, which in legal terms implies the spirit rather than the letter of the law.[3] This inherent conflict is

[1] Robert Stanton, *The Culture of Translation in Anglo-Saxon England* (D S Brewer, Cambridge, 2002) at 4: "all translation is transformation."

[2] For further discussion on the idea that communication involves gaps, see John Berger and Jean Mohr, *Another Way of Telling* (Vintage International, New York, 1995).

[3] Susan Bassnett *Translation Studies* (Revised Edition, Routledge, London and New York, 1994) at 43ff.

made particularly clear by the issues faced by multilingual jurisdictions, where translation is not only implicit but an explicit part of the legislative process.

II Defining Multilingualism

The concept of multilingualism is in itself a complex one, but for our purposes it is sufficient to define it as "the use of two or more languages by an individual speaker or a community of speakers."[4] A multilingual legislature is one which 'speaks' two or more languages in the drafting and interpretation of its legislation, as opposed to a monolingual legislature which employs only one language. The professed aim of most bilingual and multilingual legislatures is to provide better access to justice for their citizens, particularly those who are part of a minority or colonised culture, although the practical outcome tends more to reflect an underlying aspiration towards community amalgamation than it does a desire to give everyone a better grasp of the law.[5]

In most cases, multilingualism is achieved by means of an official language policy, which determines what languages will be part of the legislative repertoire and establishes the ground rules of their relationship to one another. The precise nature and content of this language policy is, of course, context-dependent, and runs the gamut from jurisdictions such as the European Union, which produces legislation in most or all of the languages of its various member states, to those like Canada and Hong Kong, which each employ only two

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[4] Janny Leung "Statutory Interpretation in Multilingual Jurisdictions: Typology and Trends." (2012) 33(5) Journal of Multilingual and Multicultural Development 481 at 482.

[5] Leung, "Statutory Interpretation", at 481; By contrast, Ruth Sullivan argues that multilingualism assumes greater linguistic unity within the general population, and may thus be seen as promoting community more than accessibility ("The Challenges of Interpreting Multilingual, Multijural Legislation." (2003) 29 Brook J Int'l L 985 at 1009).

languages. To be truly multilingual, however, mere explanatory translation is not sufficient; a legislature must give equal weight to the legal text of each language.[6] In Canada, for example, s 133 of the Constitution Act 1867 establishes that members of the Dominion of Canada have the right to use English or French in the Parliament of Canada and the Legislature of Quebec, as well as in any proceedings before a federal court or a court of Quebec (s 133(1)).[7] It also provides that the Acts of the Canadian Parliament and the Legislature of Quebec shall be printed and published in both languages (s 133(2)). This was later reinforced by the Official Languages Act 1969 and again in 1988, the latter of which provides not only that "all Acts of Parliament shall be enacted, printed and published in both official languages" (s 6) but that both versions are equally authentic and have equal legal force (s 13).[8]

By contrast, in Hong Kong prior to 1989 all legislation was enacted in English. After the handover to China, the Hong Kong Official Languages Ordinance amended this to establish both English and Chinese as official languages in Hong Kong (s 3(1)), and to require that all legislation be enacted in both English and Chinese (s 4(1)). Since then, Hong Kong statute law has become fully bilingual, and under s 10B of the Hong Kong Interpretation and General Clauses Ordinance both the English and Chinese texts have (in theory) the same authenticity and legal force.[9] Despite this, however, because most of the Chinese texts were post-hoc translations of existing laws in English,

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[6] Leung, "Statutory Interpretation", at 482–483.

[7] Originally the British North America Act 1867, renamed in 1982. University of Ottawa, "The Constitution Act of 1867 and the Language Question" Site for Language Management in Canada <http://www.slmc.uottawa.ca/>.

[8] For discussion as to how this differs in each province, see Sullivan, "Challenges" at 1006.

[9] Deborah Cao "Chapter 3: Judicial Interpretation of Bilingual and Multilingual Laws: A European and Hong Kong Comparison" in Dr. J. Jemielniak and Dr. P. Miklaszewicz (eds), *Interpretation of Law in the Global World: From Particularism to a Universal Approach* (Springer, Heidelberg, 2010) at 80.

where the two versions differ the courts will frequently regard the Chinese text as being in error, and defer instead to the English meaning:[10]

> if the Ordinance was initially enacted in English, the English text was the original official text from which the Chinese text was subsequently prepared and declared authentic. In ascertaining the ordinance's legal meaning, the English text should be taken as more accurately reflecting the legislature's intent at the time it was originally enacted.

The meaning of the English text is thus prioritised over the Chinese one, suggesting that, while a legislature may be multilingual by virtue of the fact that it employs multiple languages, some legislatures are (for lack of a better phrase) more multilingual than others.

III Multilingual Drafting Processes

For any degree of legal multilingualism, however, translation plays an explicit role in the creation of legislation. There are two basic methods by which multilingual legislation may be drafted: first, through the drafting of a statute in one or more of the official languages, which is translated into the other(s) after it has reached its final form, and second, through co-drafting.[11] Co-drafting is a difficult and involved process, and relatively uncommon in practice. In Canada, public law statutes are typically co-drafted in English and French simultaneously, a unique system which was adopted by the Department of Justice in 1978. Since then, all government bills have been drafted by teams of two drafters, typically including one English-speaker (trained in

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[10] *HKSAR v Lau San Ching and Others* HCMA 98/2002; See also *Chan Fung Lan v Lai Wai Chuen* HCMP4210/1996.

[11] Michael J B Wood "Drafting Bilingual Legislation in Canada: Examples of Beneficial Cross-Pollination Between the Two Language Versions." (1996) 17(1) Stat LR 66 at 69.

common law) and one French-speaker (trained in civil law).[12] In this case, translation is close to immediate and serves as a practical tool to ensure that both the English and the French texts resemble one another as closely as possible. Both drafters share the same information, and work in close collaboration together, such that each version of the text is to some degree informed by the other.[13] It is therefore necessary for both drafters to be sufficiently fluent in both languages to be able to participate in meaningful discussion as to the implications and interpretations of both legal texts. They are also assisted by bilingual support departments, whose job is to approve both versions of the legislation.[14] While in practice one or the other of the drafters may take the lead for pragmatic reasons, and finish their draft first before passing it on to the other for subsequent translation and mutual revision, both versions are to some extent created together on computer screens in the co-drafting rooms.[15] The end result is a bilingual text which is enacted as a coherent whole, and the subsequent promulgation of the legislation in both languages at the same time.

More commonly, other jurisdictions tend to use translation as a means of replicating an already-drafted text into one or more other official languages, similar to the procedure in Hong Kong. In the European Union, for example, legislation is first proposed by the European Commission, and a draft prepared by technical experts in English and/or French, depending on the language of the department in which the law is made.[16] It is then submitted to other Commission departments for internal consultation, where the Commission's Legal Service and legal reviewers examine it for appropriate form and presentation. Only then is it translated into the rest of the official

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[12] Lionel A Levert "Bilingual and Bijural Legislative Drafting: To Be or Not to Be?" (2004) 25(2) Stat LR 151 at 155.
[13] Ibid.
[14] Ibid at 156.
[15] Levert, "Bilingual and Bijural Legislative Drafting", at 155–156.
[16] Cao, "Judicial Interpretation", at 74.

languages by the Directorate-General for Translation, and, after further revision, submitted to the European Parliament and Council for internal pre-adoption procedures.[17] The effectiveness of the resulting legislation therefore depends predominantly on the ability of the European Court of Justice to "harmonise the different versions of its multilingual texts."[18]

IV Translation as Interpretation

Explicit in the methodology of multilingual drafting, then, is a clear process of negotiation for meaning. Translation is seldom a one-to-one equivalence between one language and the next: not only the formal structure but also the conceptual content of words and phrases requires frequent adjustment to accommodate linguistic differences.[19] Michael Wood, in his survey of 'beneficial cross-pollination' between French and English drafting in Canada, gives the example of the English word "any" as a source of potential ambiguity, as it can mean either "all" or "one" depending on how it is used in a sentence.[20] When translated into French, the English rendering:

> (1) The report shall include **any** document specified in the schedule.

could become either of the following alternatives: [21]

> (1) La rapport comprend **l'un des document** énoncés à l'annexe ("one of the documents"); or
> (2) La rapport comprend **les documents** énoncés à l'annexe ("the documents").

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[17] Ibid.
[18] Ibid at 75.
[19] Wood, "Drafting Bilingual Legislation", at 70.
[20] Ibid.
[21] Wood, "Drafting Bilingual Legislation", at 70.

French in this sense is more precise than English, using articles to indicate number in a way that renders the two potential meanings of "any" disparate rather than convergent. Similarly, the rules of grammar and syntax in French may require that which is elided in an English statute to be made explicit in the French version. Thus:

> (1) The rules may provide for the refusal to grant or renew or the suspension or revocation of a permit.

becomes: [22]

> (1) Les regies peuvent prevoir le refus de délivrer ou de renouveler **un permis** ou la suspension ou la révocation d'un permis.

What this ultimately points to are the underlying conceptual and cultural differences between the languages themselves. Semiotic theory suggests that the conception of language as constituting a one-to-one equivalence between signifier (that which is said) and signified (that which is meant) fails to account for a key component of linguistic meaning which is contingent on factors extrinsic to the sign itself. Roland Barthes' conception of three-dimensional semiotics posits that signs are made up not only of signifier and signified but also a third dimension, which he calls "myths."[23] These myths serve as a second-order semiological system or metalanguage (language about language) insofar as the sign consisting of the straight-forward linguistic term and its associated concept serves as a mere signifier for some additional cultural implication making up the myth itself.[24]

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[22] Ibid at 72.
[23] Roland Barthes *Mythologies* (Vintage Books, London, 2009) at 131–187.
[24] Ibid.

Barthes gives the example of a phrase in a Latin textbook: *quia ego nominor leo*.[25] The literal translation is simply "because my name is lion," taken from a text by Phaedrus. However, it has in context an additional meaning as a grammatical example, intended to demonstrate a specific grammatical rule (the agreement of the predicate).[26] Meaning, for Barthes, is thus inherently dependent on cultural and historical context, which the myth acts to naturalise or de-politicise, presenting as fact what is in actuality a system of value.[27] A similar principle inheres in the syntactic and grammatical structures of language, insofar as the way in which a language system orders itself and prioritises content (subject-object-verb versus subject-verb-object, topic-oriented sentences versus subject-oriented sentences and so forth) necessarily says something about the priorities and perspectives of the culture to which it belongs.[28]

Taking this to its logical conclusion, it may be said that language shapes thought and thought language, to the extent that some linguists maintain it is impossible to acquire a second language with sufficient facility to think the same way as a native speaker, because the backgrounds and processes are simply too different and too subtle to be learned.[29] The act of transferring even the most straightforward information from, for example, English to French, or vice versa, thus inevitably becomes deeply complex. In some cases, the differences between two languages may be irreconcilable,[30] suggesting that

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[25] Ibid at 138–140.
[26] Ibid at 139.
[27] Ibid at 168–172.
[28] Lourdes Ortega *Understanding Second Language Acquisition* (Routledge, London and New York, 2013) at 44–46.
[29] Ibid at 47.
[30] Chinese, for example, has no articles and a different system of plural markers, causing problems with interlingual translation: Deborah Cao "Interlingual Uncertainty in Bilingual and Multilingual law." (2007) 39 Journal of Pragmatics 69 at 79.

translation must incorporate an element of interpretation or 'transformation' beyond mere formal or semantic equivalence.

V Interpreting Translation

Of course, this disconnect between appearance and sense can be, and frequently is, exploited in a multilingual context. Deborah Cao, for example, makes note of the ambiguous use of the word 'sorry' in the United States response to China in April, 2001.[31] After a US spy plane collided with a Chinese jet and was forced to land in Lingshui, the Chinese Government demanded an apology, feeling that the incident reflected badly on its sovereignty and would affect its standing in the eyes of its people. The American Government, meanwhile, insisted it would not apologise as it had done nothing wrong.[32] In the end, the US wrote to China expressing 'sincere regret' over the missing pilot and aircraft, adding that it was 'very sorry' that the US plane had entered China's airspace and landed in China without the verbal clearance of the authorities. As Cao herself writes, "'sorry' in English can mean both 'regret' and 'apology.' In translating 'sorry' into Chinese, two different words have to be used, *vihan* for the former and *daoqian* for the latter. It seems that the American 'sorry' letter intended the former meaning 'regret,' but the Chinese government chose to interpret and translate the second meaning 'apology.'"[33]

Likewise, at the level of drafting, there may be good reasons to allow certain elements of vagueness or generality to remain in the legal text.[34] For the law to be applicable to specific facts, however, it requires that some consensus as to meaning be reached, and the influence of translation can thus also be seen in the methods of multilingual

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[31] Cao, "Interlingual Uncertainty", at 71.
[32] Ibid.
[33] Cao, "Interlingual Uncertainty", at 71.
[34] See LL Fuller *The Morality of Law* (Revised Edition, Yale University Press, New Haven, 1969) at 33–94.

interpretation. In Classical antiquity, early translation theory suggested that poetic translation should be approached by the translator *non verbum de verbo, sed sensum exprimere de sensu*,[35] which included adapting the original text into a unique piece of literature in its own right. Yet embracing free interpretation in this way became problematic when the text to be translated was something of great inherent authority, such as Biblical scripture. In his translation of the Vulgate, St. Jerome suggested that Biblical language possessed "a numinous character far more important than its communicative function"[36] and therefore ought to be preserved as closely as possible. As translation of scriptural texts into the vernacular became more common, a balance had to be struck between the evangelical necessity of translation on the one hand, and the preservation of the inherent sacredness of the text on the other: the "word-for-word" or "sense-for-sense" dichotomy which continues to be debated amongst translators today.[37]

If law is indeed "something close to secular scripture",[38] then it is hardly surprising to find that this tension also resides in the 'translation' or interpretation of legislation, both in monolingual and in multilingual contexts. As noted earlier, the Equal Authenticity Rule by which most multilingual jurisdictions abide entails that each language version has equal status as law. In addition, most multilingual jurisdictions follow some variation of the Shared Meaning Rule, the presumption that all versions of a multilingual legal text share the same meaning unless otherwise demonstrated.[39] Taken together, these two interpretative rules essentially entail that "an interpreter cannot know the substance of the law declared by Parliament until he or she has considered [all]

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[35] That is, "expressing not word for word, but sense for sense": Susan Bassnett *Translation Studies* (Revised Edition, Routledge, London and New York, 1994) at 44.
[36] Stanton, "The Culture of Translation", at 112.
[37] Bassnett, "Translation Studies", at 45–46.
[38] Roderick A MacDonald "Legal Bilingualism" (1996) 42 McGill LJ 119 at 132.
[39] Sullivan, "Challenges", at 1012ff.

versions and resolved any discrepancies between them."[40] The literal interpretation of a word or phrase may thus be at odds with its 'sense-for-sense' interpretation, entailing that one must read *across* the various versions of the text to divine the ultimate (perhaps even transcendental) meaning of which the 'true' legal text is comprised.[41]

In *Fonden Marselisborg Lystbådehavn v Skatteministeriet*, for example, the question arose in relation to Article 13(b)(2) of the Six Directive as to what was encompassed by the word 'vehicle.'[42] A Danish company, which provided leases to boats, argued that a boat was not a 'vehicle' and therefore did not fall within the provision. While some versions of the legislation supported this distinction, however, using a term which related specifically to land-based transport, a substantial number used generalised terms which encompassed all forms of transportation, including boats. In its decision, the Court held that the word 'vehicle' as it ought to be understood took the second meaning, citing what Cao refers to as "the purpose and scheme of the relevant law."[43] In a similar vein, the European Union has also made it clear that words can have their own independent meanings in Community law incorporating all the extant language versions, and in cases of interlingual ambiguity the established solution is to favour that interpretation which ensures the effectiveness of the legislature's purpose—that is, one which follows the spirit rather than the letter of the law.[44]

VI Conclusion

The chief insight of bilingual and multilingual legislation therefore lies in its ability to demonstrate that linguistic uncertainty in the law is not

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[40] Ibid at 1007.
[41] Bassnett, "Translation Studies", at 44–45.
[42] Case C-428/02 *Fonden Marselisborg Lystbådehavn v Skatteministeriet* [2005] ECR I-1527.
[43] Cao, "Judicial Interpretation", at 75.
[44] Ibid at 77.

confined solely to any one language. While law does depend on precision and unitary meaning to operate, language is intrinsically indeterminate and requires the use of rules of construction to resolve its inherent ambiguities, the more so when it involves establishing meaning between two or more different languages.[45] Multilingual legislation may involve a greater degree of complication than monolingual legislation, but the two are in many ways deeply connected, inasmuch as the latter does explicitly what the former does implicitly: it engages in an explicit process of translation or dialogue between two separate systems of communication, both in the process of drafting and in the process of interpretation. In this way, a deeper understanding of multilingual jurisdictions reveals that the law itself is a constant process of negotiation, from the moment of its inception through its promulgation and application by the courts. Whether monolingual or multilingual, therefore, the law is in some sense a process of translation.

[45] Ibid at 84.

CONTRIBUTION ORDERS – A CASE NOTE ON *LEWIS HOLDINGS v STEEL AND TUBE HOLDINGS*

JAMES TOCHER*

I Introduction

"Piercing seems to happen freakishly. Like lightning it is rare, severe, and unprincipled."[1] However, there is unanimity amongst academics that some form of piercing is appropriate in the parent-subsidiary context.[2] New Zealand was the first country in the world to introduce statutory 'contribution orders' into legislation, which are found in s 271(1)(a) of the Companies Act 1993.[3] These orders allow the court to pierce the corporate veil when a subsidiary is insolvent.[4] The section is related to 'pooling orders' under s 271(1)(b), which allow the combining of assets of related companies when they are all in liquidation. The section had never fully been explored until this case.[5] By considering the theoretical justifications for limited liability in the parent-subsidiary context, this essay concludes that the approach to s 271(1)(a) requires certainty, and the best means of achieving that is to establish distinct tests for the different sub-categories of piercing to be used as a guideline by judges in future cases.

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1 Kurt A Strasser "Piercing the Veil in Corporate Groups" (2004) 37 Conn L Rev 637 at 641.

2 Strasser, above n 1, at 637.

3 John H Farrar "Legal Issues Involving Corporate Groups" (1998) 16 C & SLJ 184 at 185.

4 Technically the section applies to any "related company" which is defined in s 2(3) of the Companies Act 1993.

5 There are a few earlier cases which use s 271(1)(a), but none of them discuss it for more than a few pages.

II Lewis Holdings Ltd v Steel and Tube Holdings Ltd[6]

Lewis Holdings Ltd ("Lewis") were owners of a property which was subject to a perpetually renewable ground lease originally granted under the Public Bodies Leases Act 1969. The lessee was Stube Industries Ltd ("Stube"), a wholly owned subsidiary of Steel and Tube Holdings Ltd ("Steel"). Stube was originally an operating subsidiary, but after a restructuring it was left without a business or employees; its sole purpose was as owner of the lease. The lease was perpetually renewable in 21-year periods. In 2009 the lease was renewed by accident, as the Public Bodies Leases Act stipulated that unless notice is given that renewal is not accepted, it is deemed to be accepted. Steel did not wish to continue paying for the lease, so in 2013 Stube was put into liquidation by a shareholders' resolution. Lewis sought an order under s 271(1)(a) of the Companies Act that Steel be required to pay the remainder of the lease to the liquidator.

MacKenzie J noted several factors under s 272(1)(a) which indicated that it was appropriate to pierce here: Stube did not hold formal board meetings;[7] Stube's directors were acting in their capacity as CEO and CFO of Steel;[8] there were no formal intercompany arrangements, such as contracting for the services of Steel's employees;[9] Stube's lawyer acted for Steel not Stube;[10] a proposed sale document of the property was in Steel's name;[11] Stube had no separate bank account and its transactions were accounted for by Steel;[12] and finally invoices for rent on the lease were sent directly to Steel.[13] Under s 272(1)(b) MacKenzie

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6 *Lewis Holdings Ltd v Steel and Tube Holdings Ltd* [2014] NZHC 3311, [2015] 2 NZLR 831.
7 At [34].
8 At [39].
9 At [42].
10 At [44].
11 At [47].
12 At [51].
13 At [52].

J reused many of the same facts and arguments, and discussion under (c) and (d) was minimal.

III Analysis and Critique

MacKenzie J explicitly refrained from discussing the competing principles behind s 271, preferring a straight application of the guideline factors outlined in s 272 to the facts.[14] To assess his approach, it will be useful to first address those principles.

A General Justifications for Limited Liability

Ultimately we give limited liability to companies to encourage economic activity, by incentivising risk taking by shareholders. Holding shareholders liable for any losses resulting from their business ventures would act as a "very strong deterrent to investment".[15] This is exacerbated by the typical separation of ownership and control in modern corporations, as shareholders would have to constantly monitor risks taken by directors to know their investment is safe, which increases the cost of investment.[16] Monitoring the wealth of other shareholders to ensure they could assist you in paying the company's debts imposes a further cost.[17] Arguably, these transaction costs make the capital market less efficient, as more information would be required to make informed investments.

Limited liability also enables high risk projects because "even risk neutral investors, it is suggested, will not undertake projects at the risk of losing their fortunes".[18] The same is true of large scale projects,

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[14] At [22].
[15] Damien Murphey "Holding Company Liability for Debts of its Subsidiaries: Corporate Governance Implications" (1998) 10 Bond LR 241 at 251.
[16] Strasser, above n 1, at 637.
[17] Ibid.
[18] Murphey, above n 14, at 251.

which require large numbers of investors, only made possible by the efficient capital markets above. Both these potentially socially desirable outcomes would not occur but for the existence of limited liability companies. It has been said that "the limited liability corporation is the greatest single discovery of modern times…"[19]

These risky projects are achieved by "externalising some of the risk of loss to the company's creditors and other external stakeholders".[20] The justification is that creditors are the 'cheapest cost avoider' because of their capacity (in theory) to protect ex ante against risk of loss. Creditors are expected to self-protect against risk of non-payment by the company, for example, by charging more for their goods."[21] Further protection mechanisms include:[22]

> loan covenants that restrict the company's ability to sell or further pledge its assets, security over the corporation's major assets, retention of title clauses or personal guarantees from the directors.

Finally, "creditors are also expected to diversify away their risk of loss by dealing with many different debtor companies."[23]

However, not all creditors will be able to protect themselves against risk. Firstly, directors can increase the company's risk after a contract has been secured, providing no opportunity to incorporate it into their bargain.[24] Secondly, there might be a "lack of incentive to bargain due to the small size of the contract" because the "cost of obtaining

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[19] Bernard F Cataldo "Limited Liability with One-man Companies and Subsidiary Corporations" (1953) 18 LCP 473 at 473.
[20] Helen Anderson "Veil Piercing and Corporate Groups – An Australian Perspective" (2010) NZ L Rev 1 at 10.
[21] Anderson, above n 19, at 12.
[22] Ibid.
[23] Ibid.
[24] Anderson, above n 19, at 13.

information about the risk may be prohibitive".[25] Thirdly, "some trade creditors may lack the knowledge and expertise to make accurate assessments of risk and would be unable to calculate an appropriate premium to compensate for it."[26] Fourthly, smaller parties might lack the bargaining power to successfully negotiate good risk protection.[27] Employees fall into this category. Finally, "the involuntary tort creditor has no ability to self-protect ex ante against the risk of non-payment."[28]

Arguably though, limited liability is actually better for creditors. Firstly, in the typical case, where there are a lot of shareholders, there would be significant litigation costs involved in pursuing each of them individually.[29] Secondly, with unlimited shareholder liability fewer people would be willing to be shareholders, so companies would have less capital generally. "By encouraging equity investment, the limited liability doctrine actually makes it easier for all creditors to be compensated."[30]

The classic justification for limited liability is based on 'legal entity theory': [31]

> The corporation is a separate entity; hence the obligations incurred in the operation of the business are those of the corporation itself, and the shareholders are not personally liable on those obligations.

However, it is possible to have a separate identity, yet still have personal liability for shareholders, for instance when a personal guarantee is signed. Limited liability is just a "majoritarian default": a

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[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Murphey, above n 14, at 253.
[30] Anderson, at 16.
[31] Cataldo, above n 18, at 474.

"default rule that most people would agree to - it saves the majority the cost of having to negotiate such a term expressly."[32] Thus, all section 271(1)(a) does is reverse the default in particular circumstances, which requires us to examine said circumstances.

B Why Allow Limited Liability Subsidiaries?

Limited liability subsidiaries are a natural consequence of allowing corporations to own shares in other companies, combined with the effect of the *Salomon* principle, reflected in New Zealand in s 15 of the Companies Act. However, at the time *Salomon v Salomon* was decided, it was ultra vires for companies to own shares in other companies.[33] It is therefore worth considering the justifications for applying this doctrine to subsidiaries.

Subsidiaries are formed for a variety of different reasons.[34] A business acquired by a merger or takeover is kept separate to retain goodwill and other intangibles associated with the pre-existing corporate identity. Multinational corporations often incorporate domestic branches, usually required by the jurisdiction itself. Some subsidiaries separate one aspect of a business from the rest. This could be to avoid application of specific regulatory regimes to the whole business, to increase transferability of portions of the business, for tax advantages, to attract finance to part of the business without releasing control over the rest and finally for general advantages of decentralised management. This is especially useful for conglomerates (corporate groups involved in a variety of different industries). Finally there are non-trading subsidiaries which solely act as a legal owner of particular assets, for the purpose of

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[32] Anderson, at 10.
[33] Robert B Thompson "Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors" (1999) 13 Conn J Int'l L 379 at 381.
[34] Murphey, above n 14, at 249.

securing finance, or for tax purposes. Banks can be more willing to lend if they receive priority over a particular subsidiary upon liquidation.[35]

Many commentators have argued that the theoretical justifications are not applicable to the subsidiary context. Unlike typical companies, subsidiaries have a high coincidence of ownership and control, which eliminates the 'agency costs' involved in investment, and the litigation costs involved in pursuing shareholders directly.[36] This is especially true given that the vast majority of subsidiaries are wholly-owned (based on an Australian statistic).[37] Additionally, funds can be gathered from a large group of shareholders at the parent level.[38] Furthermore, [39]

> a holding company is more likely to be profit maximising than risk averse. A holding company will also have more extensive resources and the capacity to diversify such risks because of its greater resources.

This calls into question whether the creditor is still the 'cheapest cost avoider' in the subsidiary context.

"Limited liability does remain a strong source of encouragement in corporate groups for the risk-taking necessary to pursue large-scale, high-risk projects."[40] The parent company can isolate itself from the risks of its subsidiary's business: [41]

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[35] Companies and Securities Advisory Committee *Corporate Groups: Final Report* (May 2000) at 3.
[36] Murphey, at 252.
[37] Anderson, above n 19, at 19.
[38] Murphey, at 252.
[39] Ibid.
[40] Edwina Dunn "James Hardie: No Soul to be Damned and No Body to be Kicked" (2005) 27 SLR 339 at 346.
[41] Cataldo, above n 18, at 488.

> a corporation which wishes to risk only a portion of its assets in a particular sphere of the business may form a subsidiary for this purpose and may, through the additional limited liability thus attained, dedicate only a portion of its assets to that particular segment of the business.

Limited liability for subsidiaries incentivises companies to start new businesses, perhaps in new fields or locations. It is unlikely that a stable company would otherwise risk its primary business engaging in risky new markets. Corporations hold substantial wealth and resources in modern society, making them prime candidates to start new businesses. Therefore limited liability subsidiaries contribute to economic growth, justifying its application to them.

The following quote from Easterbrook and Fischel illustrates the trade-off being made by the law:[42]

> If limited liability is absolute, a parent can form a subsidiary with minimal capitalisation for the purpose of engaging in risky activities. If things go well, the parent captures the benefits. If things go poorly, the subsidiary declares bankruptcy, and the parent creates another with the same managers to engage in the same activities. This asymmetry between the benefits and costs, if limited liability were absolute, would create incentives to engage in a socially excessive amount of risky activities. ... It does not follow that parent and affiliate corporations routinely should be liable for the debts of those in which they hold stock. Far from it. Such general liability would give small or unaffiliated firms a competitive advantage.

It is important to reach a balance between furthering the economic function of company law and preventing the above abuses:[43]

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[42] Anderson, above n 19, at 21.
[43] Strasser, above n 1, at 639.

> A decision by corporate law to allow shareholders limited liability is a decision to allow them, as investors, to allocate some of the risks of doing business to third parties. Piercing the veil rules are one of the traditional ways that courts have supervised that risk allocation decision.

In New Zealand s 271 serves that purpose, by establishing limited liability as the default position, but allowing particular circumstances where it will be ignored. The question then remains how these circumstances ought to be determined.

C The United States Approach

John Matheson argued that a broad consideration of factors is likely to result in "results-oriented decisions", which raises concerns of legal certainty.[44] In his paper, he performed a statistical analysis of United States veil piercing cases to determine the relative weight judges were placing on particular factors. They can be divided into factors of form and factors of substance, which align with the two key criteria used in United States piercing cases. Form is whether "the subsidiary [had] a separate existence", and the substance is "wrongful conduct".[45]

Factors of form include: "overlap" of personnel, property and business; "commingling of funds"; and "non-existent" or "non-functioning" directors, officers and records.[46] The two issues of substance are 'misrepresentation' and 'undercapitalisation'. 'Misrepresentation' is where a creditor acts under the assumption that they are dealing with a parent company, when they are legally only actually dealing with a subsidiary. This could be anything from outright fraudulent representations to unclear situations where the parent's conduct, such

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[44] John H Matheson "The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context" (2009) 87 NCL Rev 1091 at 1100.
[45] Strasser, at 640.
[46] Matheson, above n 43, at 1124.

as making direct payments, blurs the line. Fraud is close to a sufficient condition, with piercing occurring in 92.3 per cent of cases where it was present.[47] 'Undercapitalisation' occurs when a subsidiary is not given sufficient financial support from its parent to establish a functioning business. This could come in a number of different forms, including initially establishing a subsidiary with insufficient assets, or removing assets from a subsidiary rendering them financially unviable.[48]

D Certainty vs Flexibility

It is unclear from MacKenzie J's judgment whether form or substance was the primary factor, as he discusses both the substance of the undercapitalisation abuse at [81] and of the misrepresentation abuse at [71], as well as the lack of separate commercial identity at [39]. This results from merely following the guidelines in s 272(1). Those guidelines are mandatory considerations; however, they do not provide for how much weight is to be given to the various factors. So while MacKenzie J's judgment was particularly useful in providing details for companies on which matters of form would be required (for example, his discussion of overlapping employees/directors at [41]), it does not elaborate on how those factors compare to the substantive abuses. This leaves open two questions: would the result have been different if Stube held formal meetings and kept its dealings separate, but still had no capital? And, what if they had the same issues of form, but they were a fully capitalised trading company which nevertheless became insolvent?

MacKenzie J's approach allows for greater flexibility, but at the cost of certainty. In support of his position, Robert Thompson has argued that the "safe limits of a reasonable field of action" are still well defined.[49] Bernard Cataldo claims that "rigid rules and fixed formulas are futile in

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[47] At 1128.
[48] At 1130.
[49] Thompson, above n 32, at 395.

this area of hazy equities and judicial retrospections."[50] Conversely, Baragwanath J recognised the need for "commercial certainty" under s 271(1)(b).[51] Uncertainty in approach might hinder corporate lending and other corporate dealings.[52]

A certain approach ensures that the law serves some meaningful preventative function. This section is designed to prevent abuses of the corporate form, but corporate groups have a profit incentive to push the boundaries as much as they think they can get away with. Leaving the section vague might give us a feeling of satisfaction by achieving 'justice' in individual cases, but it really results in a lottery, where some companies play it safe and others push a bit too far. Both scenarios result in loss to society: reduced beneficial risk taking in the former, and excessive social harm in the latter. Outlining clear standards enables the market to react, and ideally the majority of companies will toe the line of balance, which the courts have set up, for how much social harm society is willing to accept in order to receive the benefits of risky entrepreneurialism.

E Separating Form and Substance

The emphasis on one of either form or substance is hard to place, because company law is contractual in nature, usually only concerned with form, but this section is equitable, which typically means disregarding form to find the substance behind it. Academics have also disagreed: Thompson argued for a focus on substance to avoid "splitting hairs" over form,[53] while Justice Learned Hand argued for form.[54] Some United States judges only relied on one of either form or

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[50] Cataldo, above n 18, at 496.
[51] *Mountfort v Tasman Pacific Airlines of NZ Ltd* [2006] 1 NZLR 104 at [67].
[52] Vicky Priskich "CASAC's proposals for reform of the law relating to corporate groups" (2001) 19 C & SLJ 360 at 371.
[53] Thompson, above n 32, at 395.
[54] Cataldo, above n 18, at 494.

substance in deciding whether to pierce, disregarding the other entirely.[55] The archetypal case of form-based "single factor" piercing is where a "subsidiary has no assets or personnel of its own and has no independent business objective, or no independent decision-making authority."[56] For cases of substance only, if a parent is "evading pre-existing duties, misrepresenting the entity or assets available to perform contractual duties, as well as draining or commingling the available assets" then "the court does not require a finding of lack of separate existence."[57] Both these results appear to be justified, however they utilise distinct reasoning: formalities are only "tangentially related" to the existence of substantive wrongdoings.[58]

Given that separate considerations exist when piercing for form or substance, it would be clearest to address these separately. They actually match up nicely with s 272(1). Paragraph (a) – "the extent to which the related company took part in the management of the company in liquidation" – covers matters of form. Paragraph (b) – "the conduct of the related company towards the creditors of the company in liquidation" – covers matters of substance. MacKenzie J did not use them in this manner, instead he essentially decided the case under (a), and then repeated the same reasoning in a rephrased manner under (b). However, treating (a) and (b) as two alternative limbs for applying s 271(1)(a), either of which are sufficient on their own to justify using the section, would result in clearer precedents.

I have intentionally excluded reference to (c) – "the extent to which the circumstances that gave rise to the liquidation of the company are attributable to the actions of the related company". MacKenzie J's consideration of (c) was limited to saying "STH … passed a

[55] Strasser, above n 1, at 642.
[56] At 643.
[57] Ibid.
[58] At 656.

shareholders' resolution to appoint a liquidator."[59] Therefore the causation requirement appears redundant, as if all that is required is that the parent places the company into liquidation, then voluntary liquidation will always be attributable. For involuntary liquidation, if either (a) or (b) are satisfied, then necessarily the parent can be regarded as the cause of the liquidation, as either they were effectively in control or their misconduct left them insolvent. The one exception might be cases of misrepresentation.

Additionally, the presence of (d) which allows consideration of "such other matters as the court thinks fit" seems to indicate against a restrictive interpretation of the court's discretion. Therefore, the suggested approach of treating (a) and (b) as separate self-sufficient limbs should only be seen as a guideline for judges, which can be followed in the majority of cases, but which courts would be free to depart from it if the particular facts required. This might seem to twist the natural meaning of the mandatory considerations, however having a guideline is not restrictive, and does not prevent considering all four paragraphs; but, the certainty of having it is better than using pure discretion in every case, without explanation of how the different factors were weighed against each other.

F Form – s 272(1)(a)

The suggested test for piercing under this 'limb' would be 'total control' by the parent, or in MacKenzie J's words, when the subsidiary is "devoid of any capacity to conduct its own affairs".[60] This stems from the concept of the price of limited liability.[61] To be recognised as a separate legal entity a subsidiary must be treated like one – to have what MacKenzie J called a "separate commercial existence".[62] All the factors

[59] At [86].
[60] At [65].
[61] Cataldo, above n 18, at 484.
[62] At [32].

which MacKenzie J discussed in *Lewis Holdings* are good indicators going towards the ultimate test above, although none should be decisive in and of itself. Other factors include those used in the US case law above. 'Total control' is as opposed to "normal legal incident of shareholdership".[63] In other words, the court should be looking for behaviour outside the usual realms of what would be expected of natural person shareholders. The key thing to note is that this should be independent of any matters of asset stripping or misrepresentation. If a company is treated as a façade by the parent company, then it should be treated as such by the court; however, as in all veil piercing cases this is likely to be rare. Stube would probably meet this test, because it completely lacked any formal independent existence.

G Substance - s 272(1)(b)

The suggested test for piercing under this 'limb' depends on whether it is a case of undercapitalisation or misrepresentation. For undercapitalisation, it would stifle business if parents always had a perpetual duty to recapitalise their subsidiaries, which is why it cannot be sufficient simply that the subsidiary is insolvent. The required level of capitalisation must be related to the purpose for which the subsidiary was established – for instance, Damien Murphey talks about the "minimum level of resources" which a company needs to fulfil its function.[64] This test would permit a parent to allow a trading subsidiary to fail, but would prevent the establishment of non-trading subsidiaries unless they are continually financed, even if they have adequate formalities. This is because the trading company would have sufficient assets to run an independent business if properly capitalised, whereas the non-trading company would always be dependent on the parent (unless it had been given room to use that asset to gain income of its own). This fits with the justification for allowing limited liability. It is an

[63] Cataldo, at 494.
[64] Murphey, above n 14, at 254.

abuse to artificially sever liabilities using subsidiaries, but there is economic gain from independent trading subsidiaries. In *Mountfort* Baragwanath J noted that "cash sweeps" will not be wrong if both companies are solvent, as this is a usual part of business practice.[65] Stube would classify as undercapitalised using this test as it was a non-trading company which was left to fail.

For misrepresentation, there are the obvious cases of fraud (holding out as though the creditor is dealing with the parent when they are not), which should always be covered. However, for less clear cases the test should be related to the expectations of the contracting party. Kurt Strasser argues that contractual principles are relevant when dealing with piercing in contracts cases.[66] This aligns with the justification for limited liability that creditors voluntarily assume risk. If a party is fully aware that they are dealing with a limited liability subsidiary, they ought not to have any expectation that the parent will cover their liabilities, so courts should not pierce the veil. Doing so would alter the risk assumptions which a party makes when they decide to contract.[67] Creditors should not be able to get a better deal through the courts than what they bargained for.[68]

In *Lewis Holdings* it was clear who was being dealt with, but it was unclear what the risk implications were of that. Lewis was transacting directly with Steel, rather than Stube, meaning Lewis could reasonably claim they expected Steel to stand behind the contract. Parties' expectations need not be purely legal if the conduct of the parent is to disregard those legal distinctions in its interactions with the creditor. However, s 272(3) does require the reliance to be based on more than the mere fact the companies were related.

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[65] *Mountfort*, above n 50, at [86].
[66] Strasser, above n 1, at 657.
[67] Priskich, above n 51, at 370.
[68] Strasser, above n 1, at 654.

This leaves the issue of torts cases, where different considerations apply.[69] Hansmann and Krakmann argue that such cases should be dealt with as a torts problem, not a company problem.[70] Other academics argue that limited liability generally is not applicable to torts claims.[71] However, this is a complex issue, and this case was not a torts case, therefore it is appropriate to leave this issue for another day.

IV Conclusion

There are theoretical arguments both for and against granting limited liability to subsidiaries, but Parliament has decided to allow it. The role of the courts, therefore, is to interpret s 271 in line with Parliament's position: limited liability as the default, with specific exceptions. It would further the purpose of the section to have clear and certain criteria for when it applies. The approach suggested recognises that there are distinct situations requiring different legal tests. Those tests are based on the justifications for limited liability, which fits with the role of s 271 in providing the limitation on limited liability. *Lewis Holdings* seems to be a clear case where s 271 would apply, because it independently satisfies all three of the suggested tests. This allowed MacKenzie J to simply conclude on the facts without addressing each of these factors distinctly, which missed an opportunity to clarify the law in this under-litigated section, thereby leaving uncertainty for parents of subsidiaries which match some but not all of the factors in this case.

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[69] At 658.
[70] Dunn, above n 39, at 350.
[71] Strasser, at 638.