sacrifice

YEMAYA 2019

Journal of Gender and Sexuality

Sydney University Law Society

ORIGINS OF THE JOURNAL'S NAME

BY **MARIANNA LEISHMAN**

Yemaya is the African-Yoruban, Afro-Brasilian and Afro-Caribbean Goddess of the Ocean, whose waters broke and created a flood that created the oceans. While she can be destructive and violent, Yemaya is primarily known for her compassion, protection and water magic. In Cuba, she is referred to as Yemaya Olukun, who can only be seen in dreams, and her name is a contraction of Yey Omo Eja: "Mother Whose Children are the Fish". Canonised as the Virgin Mary, and appearing as river goddess Emanjah in Trinidad, Yemaya rules the sea, the moon, dreams, secrets, wisdom, fresh water and the collective unconscious. In Brazil, crowds gather on the beach of Bahia to celebrate Candalaria: a Candomble ceremony on 31 December. Candles are lit on the beach while votive boats made from flowers and letters are thrown into the sea for Yemaya to wash away their sorrows.

ACKNOWLEDGEMENT OF COUNTRY

We acknowledge the traditional owners of the land upon which the University of Sydney is built, the Gadigal people of the Eora Nation. Sovereignty was never ceded.

We respect the knowledge that traditional elders and Aboriginal people hold and pass on from generation to generation. We acknowledge the ongoing fight for meaningful constitutional recognition. We regret that white supremacy has perpetuated dispossession, colonial rule and violence, and that to this day, the Australian legal and political system does not treat Aboriginal people with fairness or afford them justice.

ACKNOWLEDGEMENTS

EDITOR-IN-CHIEF

Eric Gonzales

EDITORS

Sarah Condie
Deaundre Espejo
Nicola Hughson
Diana Nsekela

DESIGN

Christina Zhang
(SULS Design Officer)

SPECIAL THANKS

Tom Manousaridis
(SULS Queer Officer)

Isabella Monardo
(SULS Women's Officer)

Jeffrey Khoo
(SULS Publications Director)

sacrifice

YEMAYA

Journal of Gender and Sexuality

Sydney University Law Society

2019

editor's foreword

ERIC GONZALES
ARTS (HONOURS)/LLB IV

Women and LGBTIQ+ people have historically been denied agency over their lives. They must conform to others' expectations or face ostracism from their families or communities. To exist as a minority is not without cost.

This year's edition of *Yemaya* invited contributors to consider the sacrifices made by people of marginalised genders and sexualities. The submissions illuminate a spectrum of experiences which, while diverse, speak to the profound emotional impact of sacrifice.

The judiciary, though revered as an institution of fairness, disregards the multifaceted identities of women and LGBTIQ+ individuals. Natan Skinner posits that the language of the law erases the complexity of transgender bodies by forcing them into traditional gender categories. Deaundre Espejo unearths judicial biases in the court's assessment of general damages: although a man's loss of sexual enjoyment is compensable, a woman must frame her loss in terms of reproductive function.

In a democratic society, the law should not perpetuate prejudice. Rather, those in power have a duty to disavow discriminatory laws and policies. Michael Albinowski proposes reforms to Australia's blood deferral policy, which precludes many gay and bisexual men from donating blood – a heroic act of self-sacrifice. Julia Saab critiques the infanticide provision in the *Crimes Act 1900* (NSW) because it enshrines an archaic belief that women are biologically predisposed to 'madness'. She argues that its repeal would bring the law one step closer to gender equality.

Indeed, this edition fearlessly confronts the gendered nature of sacrifice. Sophia Semmler scrutinises the 'motherhood penalty', whereby mothers, who are expected to assume primary parental responsibilities, are often forced to forgo career progression. Delving into the realm of fiction, Nicola Hughson and Nicolette Preketes-Tardiani propose that the Netflix series *Chilling Adventures of Sabrina* mirrors the pressures on women "to be everything to everyone at all times".

Finally, the journal features personal reflections on sacrifice. Juliette van Ratingen's visceral poem reveals that sacrifice need not compromise one's sense of self. Eric Gonzales ruminates on the irreconcilability of his race with the gay community's ideals of masculinity and muscularity. However, sacrificing conformity can lead to individual autonomy.

This edition would not have been possible without a passionate and industrious editorial board: Sarah Condie, Deaundre Espejo, Nicola Hughson and Diana Nsekela. We hope readers will find these pieces as moving and insightful as we did.

Many thanks must also be given to the Sydney University Law Society for seeing this publication to print. I am especially grateful to the Queer Officer, Tom Manousaridis; the Women's Officer, Isabella Monardo; the Publications Director, Jeffrey Khoo; and last, but not least, the Design Officer, Christina Zhang, whose boundless creativity enhanced the poignancy of these pieces immeasurably.

Eric Gonzales
Editor-in-Chief

contents

characterising gender: language, literature and the law

NATAN SKINNER
JURIS DOCTOR II

"Man exists... only through the 'character traits' which label him for society as the object of a more or less easy absorption, the subject of a more or less respectful submission" – Roland Barthes[1]

I. INTRODUCTION

Trans people are well accustomed to the trope of monstrosity frequently used to dehumanise them and legitimate their social, political, and legal discrimination.[2] There is a deep affinity between the trans experience and that of Mary Shelley's nameless creature dubbed 'Frankenstein's monster'[3] – "like the monster, [they are] too often perceived as less than fully human due to the means of [their] embodiment".[4] The attribution of monstrosity is a palpable characteristic of narratives surrounding trans bodies,[5] yet the law holds the capacity to provide protection from this barbaric tale. The law plays an essential role in the construction of gender by discursively translating certain characteristics into a legible gender identity. It can officially recognise gender identities, permit transition procedures in the case of minors, and enable trans bodies to be accepted as normal in all facets of life. It provides the *possibility* for trans bodies to indisputably 'pass' as their assumed gender and reclaim their humanity.

By considering three contemporary Australian judgments, this essay will explore the use of legal language in mediating the relationship between gender identities, sex and the law. It will adopt a traditional feminist approach which distinguishes between sex and gender. The case of *AB v Western Australia*[6] shows how language is used to characterise gender within an explicitly normative framework, requiring trans bodies to conform to traditional gender categories before their identity is recognised as human.[7] The 2015 case of *Re: Martin*[8] will then consider how the strict languages of consent and legitimacy regulate the capacity of minors to choose to undergo reassignment procedures, thereby portraying trans bodies as abnormal and requiring legal management. Finally, the language of *Norrie v NSW Registrar of Births, Deaths, and Marriages*[9] (*"Norrie"*) reveals how the law manages disruptions to the traditional male/female gender dichotomy by reducing gender into strict categories. These cases demonstrate the constitutive powers of legal language, subjecting trans bodies to narratives which dehumanise them and legitimate their discrimination.

II. IS IT A BOY OR GIRL?

Gender is instantly ascribed to newborns as the ontological basis by which they become intelligibly human.[10] In turn, gender becomes a prerequisite for humanity, meaning those who are not 'appropriately' gendered have their humanity put into question.[11] This attribution of gender to bodies – usually being a legal man or a legal woman[12] – is done for both legal and social purposes. A traditional feminist understanding differentiates sex and gender. 'Sex' means the naturally invariant anatomical features distinguishing males from females. 'Gender' means the social and cultural meanings ascribed to bodies which present them to the world within the traditional dichotomy of man or woman. Normatively, sex and gender are conflated within society and in the law, with gender being understood to be inextricably linked to a specific sex. Males are assumed men through their masculine lifestyles and, in turn, females are assumed to be women through their feminine lifestyles. By this understanding, gender becomes a social construct which is performed – a behavioural narrative producing the effect of recognition as either man, woman, or neither.[13] Trans persons often seek to have their sex reassigned to affirm their gender identity so that they may live their lives free from discrimination.[14] Normatively, genitals are focused on as a vehicle of truth which means these words become coextensive and a 'sex change' is seen as equivalent to a 'gender change'.[15] These notions of gender will be revisited in considering how legal language mediates gender identities through a normative framework.

III. RECOGNISING GENDER REASSIGNMENT

AB v Western Australia[16]

AB v Western Australia[17] offers a litmus test to determine whether a trans identity is officially recognised, involving a combination of biological and social features. The appellants, AB and AH, were natal females but had "identified as male from an early age"[18]. They had been medically diagnosed with "gender dysphoria"[19] and sought recognition certificates of their gender identity as males. The key question was the interpretation of the "reassignment procedure"[20] and "gender characteristics"[21] requirements before a certificate is granted, as prescribed by the *Gender Reassignments Act 2000* (WA).[22] That is, what gender threshold must be met before one becomes eligible as a legal man? While AB and AH underwent "bilateral mastectomies and testosterone therapy"[23] along with "adopt[ing] the lifestyle"[24] of male persons, both retained a female reproductive system. In defining 'gender reassignment procedure', the High Court engaged with Federal Court precedent[25] to narrate their standpoint that "gender" is both "a matter of chromosomes" and a "psychological question".[26] Clearly, the judges conflate the concepts of sex and gender. The language portrays 'gender' as a combination of anatomy and psychology, enforcing the normative conflation of masculinity with males and femininity with females. Anatomy thus becomes the first condition for legal recognition of a gender identity, revealing the genito-centrism of the law. The effect of this understanding is that a sufficient threshold of particular "gender characteristics",[27] taken to mean physical characteristics, must be satisfied through a "medical or surgical procedure".[28] Despite retaining their reproductive organs for what the Court determined to be legitimate reasons, the High Court found that the profound alterations to the appellants' genitals and other sexual characteristics through hormone therapy satisfied the meaning of 'reassignment procedure' in the Act.[29] This language represents sexual anatomy as a hallmark of gender – a precondition to true recognition by the law, and, in turn, society.

In addition to biological modifications, the law further requires transgender bodies to conform to normative characterisations of gender for their identity to be officially recognised. Once the "reassignment procedure" is satisfied,[30] the Act further requires the person to have "adopted the lifestyle and [have] the gender (sic) characteristics of a person of the gender to which the person has been reassigned".[31] Hence, the question of "whether a person is identified as male or female"[32] becomes "largely one of social recognition",[33] and the appearance and behaviour of gender is exhibited "to other members of society". Such an articulation of gender, as requiring a socially recognisable "lifestyle"[34] reflecting a person's "maleness or femaleness",[35] depicts gender within a normative framework requiring strict adherence for gender to be recognisable within the language of the law. It assumes the universality of gender norms and results in legal language portraying gender within the law "as it should be" and not "as it is".[36] This is analogous to Roland Barthes' essay Dominici, or the *Triumph of Literature*[37] insofar as Dominici was convicted using a logic of popular literature rather than facts, which assumed the "transparence and universality of language".[38] In subjecting the condition of "social recognition"[39] onto transgender bodies, recognition becomes contingent upon a discourse which has long disavowed and rejected them.[40] They are forced to 'pass' as their gender identity in specific *normative* ways which apparently enables them to "lead a more normal life than before".[41] However, this language prefigures that to be recognised as 'normal' they must already perform the 'normal' role of the gender to which they have been reassigned – AB and AH must *be* male before they can *become* male. The law determines whether they are viable sites of a particular gender subjectivity; whether they can be officially labelled in line with the 'character traits' which allow for their absorption into normative sex/gender binaries.

IV. REGULATING GENDER IDENTITY: A STATE MATTER

Re: Martin[42]

Language used in the Family Court case of *Re: Martin*[43] regulates the capacity of transgender minors to undergo procedures which would align their sexual anatomy with their gender identity. *Re: Martin*[44] involved the parents of a 16 year old child, 'Martin', who identified as a man, applying to the Court for a declaration of their son's competence in consenting to "stage two cross-sex hormone treatment for Gender Dysphoria".[45] That is, a transgender child seeking approval from the Court to continue the process of anatomically transition to their medically and social recognised gender identity.[46] Justice Bennett, who presided over the case, considered that since the treatment is irreversible the child must display 'Gillick Competence' to consent to the procedure, "or if such competence is lacking, the court rather than the parents should give consent".[47] 'Gillick Competence' requires the child involved to have the "requisite intelligence and appreciation of the procedure contemplated to be able to give informed consent".[48] The Court's emphasis on the irreversibility of stage two treatment, and thus the "significant risk of making the wrong decision",[49] represents the desire of an individual to live as their gender identity as *always* the wrong potential decision. However, not receiving stage two treatment may also have irreversible effects on a child's body and mental state, causing significant distress and anxiety[50] about the child's gender to continue and potentially suicidal ideations.[51] In considering this, Justice Bennett stated that the masculinisation of the child's body would "lead to an improvement in the child's social experience",[52] whereas post-pubertal feminisation would lead to the deterioration of the child's emotional state.[53] But the language of 'irreversibility' in the judgment represents an inherent harm in the transition to an individual's gender identity, rather than a harm in not transitioning. Further, the focus on stage two as irreversible reinforces normative understandings of gender:[54] there is no space for an understanding of gender fluidity. Bodies are legally understood to statically embody a *specific* gender occurring at a *specific* anatomical threshold, and hence the focus on stage two as this threshold. Therefore, the capacity of transgender bodies to undergo sex affirmation procedures in line with concomitant genders is regulated by the law through a representation of transition as always being a potential harm.

The language of the common law, in controlling the capacity of minors to consent to stage two therapy, posits the diversity of gender as a field requiring legal regulation. While Justice Bennett criticised the *Gillick* competence approach, it was found to be binding precedent on the Court.[55] However, it does bring into question the

jurisdiction of the Family Court in regulating gender. The law forces a language of official pathology onto transgender bodies, decreeing the capacity to consent to gender alterations a language of legal regulation. *Re:Martin* inherently questions the legitimacy of gender dysphoria as a "bodily malfunction or disease"[56] by requiring court authorisation, despite *Gillick*[57] competence being ascertainable by medical professionals. This procedure of legal regulation begs the question as to why *this* form of medically recognised therapy is regulated and others are not. By questioning the legitimacy of the medically recognised psychiatric condition of Gender Dysphoria, the legitimacy of transgenderism is called into question. The language of *Re: Martin*[58] speaks to the broader regulation of gender identity within the law and how gender non-conforming bodies are represented within a normative framework of gender. This begs the question of how law represents, and therefore manages, genders that are radically non-conforming and cannot be viably categorised into the existing normative binaries.

V. CATEGORISING GENDER

Norrie v NSW Registrar [59]

Historically, the language of the law required that gender identities be categorisable to be legally legible. However, the case of *Norrie v NSW Registrar*[60] demonstrates how language can evolve for new gender identities to be legally recognised and understood. The case involved the appellant, dubbed Norrie with the female pronoun used,[61] seeking to have her sex officially recognised as "non-specific". Norrie had undergone surgery to eliminate her sexual ambiguity,[63] however, the surgery did not achieve its purpose. Therefore she sought official recognition of her "non-specific gender identity".[64] The judgment centred on the meaning of 'sex' within section 32D(2) of the *Births, Deaths and Marriages Registration Act 1995* (NSW) – whether 'sex' is to be confined to an alteration from '*male*' to '*female*' or "whether there is power to change the sex recorded to some other specification". The appeal Court judges concluded the case law to have "clearly recognised that sexual identification is no longer a recognition of 'male' or 'female' in the traditional sense".[66] That is to say, gender is more than a binary. This view was partially supported through academic material which illustrated the legitimacy of transgender and intersex identities – "that gender identity does not necessarily develop in concert with sexual anatomy".[67] This, in part, authenticated the potential for non-binary gender identities to exist within the law[68]. This decision was upheld in the High Court in 2014.[69] For institutional and procedural reasons, this requires a new gender classification to avoid Norrie, and others like her, blurring the boundaries between normative ideals of gender. The language used to construct a new gender category, or a 'third sex', aim to make Norrie's gender identity legible to the law. The law wishes to hear only the language it lends, and in this instance, the law granted Norrie the language to have her gender identity officially acknowledged – to label her character traits as an object within the law's domain.

In categorising Norrie's anatomical ambiguities as non-specific with regards to gender, there is an explicit reworking of language to allow for new meanings, and thus identities. The development of language is indicated to reflect "medical, scientific or technical advancements"[70] providing the legitimate means through which "a body of knowledge can be organised, classified and understood".[71] Language is a "dynamic process"[72] continually evolving with use. Despite the evolution of language to reflect changing understandings, there may be community resistance and rejection of the meanings of language with "matters that are considered to fall within a moral framework". This meditation directly parallels the approach taken by the Court that statutory interpretation should involve a question of context[73] and purpose rather than emphasising the ordinary meanings of words.[74] As such, gender becomes a function of medical, academic, and social context which have slowly come to represent Norrie's non-specific gender as legitimate.[75] The Court concluded that "that sexual identity is not dependant solely upon physical characteristics and is not necessarily unambiguous"[76] – there is room for movement beyond normative gender demarcations. While on the surface this seems to demarcate sex and gender in the traditional feminist sense, there is still a requirement to have undergone a medical procedure and thus anatomical sex remains a major consideration in the validity on a gender identity. In the vein of Dominici's trial,[77] a certain idea of psychology, of language, becomes the turning point for recognising ambiguous gender identities. In this way, despite anatomy remaining the determinative factor, the evolution of language – of popular literature – informs the capacity for gender identities to be recognised and understood within the law.

VI. CONCLUSION

How gender is characterised through legal language has profound impacts on the ability of trans bodies to exist as their gender identity. The law prescribes specific normative criteria for trans bodies to be recognised, which legitimates the management of gender diversity and requires trans persons to sacrifice the complexities of their identity to fit into the strict categories the language of the law provides. As shown by the cases considered, law is moving beyond biology as an immutable truth determining gender, yet surgery and genitalia remain the means by which gender identities are intelligible to the law. Language is beginning to change, although the traditional feminist sex/gender distinction is not yet recognised by the law. Rather, the law reinforces the popular psychology of gender, robbing the trans body of language in the very name of language itself. In the epigraph of her novel, Shelley poses the Miltonic question: "Did I request thee, Maker, from my clay to mould me man? Did I solicit thee from darkness to promote me?"[78] This is the dialogue between the trans body and the law, and the answer is a resounding 'no'.[79] Rather, through a knowledge that language is not transparent, that it construes our world and who we are,[80] the trans body is able to constitute itself beyond the law and assert a humanity in the face of a language which seeks to control its existence. ■

soggy desire: the suppression of female sexuality in australian courts

DEAUNDRE ESPEJO
ARTS /LLB III

"I can only lean enviously against the boundary and hate, hate, hate the boys who can dispel sexual hunger freely, without misgiving, and be whole, while I drag from date to date in soggy desire, always unfilled" – Sylvia Plath[1]

I. INTRODUCTION

A curious phenomenon in Western cultural history is the suppression of female sexuality. For centuries, women have been socialised to conceal their sexual desires and refrain from obscene behaviour. Yet for men, virility and carnal desire is integral to their masculinity. Such oppressive practices have become deeply ingrained in the Australian legal system, where judges possess the unique power to perpetuate representations of women and their lives as sexual beings. By considering several Australian judgements involving the assessment of damages for loss of sexual function and enjoyment, this essay will examine judicial constructions of sexuality and how they serve to control female bodies. It will first examine cases involving male plaintiffs, where discourse generally focuses on sexual enjoyment as fundamental to masculine identity and one's sense of self. It will then examine cases involving female plaintiffs, where sex is inextricably linked with reproduction and the duty of satisfying one's partner. Judicial commentary in these cases demonstrate that sexuality, a fundamental way in which human beings experience and express themselves, must be sacrificed by women in the eyes of the court.

II. THE 'PHALLIC FALLACY'

Judicial discussions about men's reproductive organs predominantly involve comments about loss of sexual ability or enjoyment, which highlights the importance placed on sex for the male body. In *St Margaret's Hospital for Women (Sydney) v McKibbin*,[2] the plaintiff had lost the glans of his penis due to a negligent circumcision. While there were some physical deformities, he suffered no loss in either urinary, reproductive or sexual function. Instead, the essential loss claimed was psychological: the plaintiff *believed* that the shape and size of his penis would prevent him from being able to find sexual partners. The Court accepted this as a basis for awarding general damages, acknowledging the value of the penis to the male identity:

> Throughout human history, the phallus has been seen as a symbol of power. Its identification with virility, power and male supremacy has been an enduring theme in the art and literature of many societies. An idea, so deeply rooted in human consciousness, is not easily eradicated.[3]

In his minority judgement, Mahoney JA called the plaintiff's condition a 'phallic fallacy', recognising that it depended upon a 'delusion' that penile size is related to sexual adequacy, but nonetheless conceded that it was a real psychiatric condition.[4] In another case, *Grant v Lun*[5], the Court accepted that impairments to sexual enjoyment, caused by the inability to ejaculate, was a legitimate basis for awarding general damages. The plaintiff suffered retrograde ejaculation after a urinary operation, and an integral aspect of his loss was that sexual intercourse without fluid did not invoke the same feelings of satisfaction. The plaintiff's evidence, which the Court accepted, was that he believed he was 'finished' as a man and that he had lost 'all the things which to him made life worthwhile'.[6] While White J acknowledged that the plaintiff's obsessional and narcissistic traits' led to his extreme response, his inability to accept his condition comprised part of his loss.[7]

While these judgements were handed down in the 1990s, credence has been given to 'phallic fallacy' in contemporary cases. In the 2015 case of *Baxter v Insurance Australia*,[8] a plaintiff who suffered back spasms due to a motor accident received an allowance for reduced enjoyment of sexual intercourse. The Court's primary evidence was that prior to the accident, the plaintiff was able to perform acts of sexual intercourse of 'extraordinary duration', and that due to his injury, he was no longer able to perform vigorous and prolonged sexual intercourse *in some positions*.[9] Further, in the 2014 case of *Re Thompson and Comcare*,[10] consideration was given to the plaintiff's sex drive fluctuating from time to time. These cases speak volumes as to the way that male bodies and sex are understood by the courts. For men, sex is integral to their sense of self and masculine identity. As the judgements have demonstrated, the penis, male libido, and sexual enjoyment are considered as legitimate factors in the assessment of damages. While outside the scope of this essay, such constructions of sexual performance as the telos of masculinity is harmful to men. When the Court countenances ideas such as the 'phallic fallacy', it compels men to sacrifice a multi-faceted identity in favour of sexual prowess and accordingly, men aren't encouraged to search for any fulfilment beyond carnal pleasure.

III. CAN WOMEN ENJOY SEX?

By contrast with the importance ascribed to sex in men, female sexuality is given far less attention. It is extremely rare that a case involving injury to a female plaintiff will refer to the curtailing of their sexual enjoyment, let alone extensive discussions about orgasms or the size and shape of the vagina. In those rare cases where the non-economic loss or damage pertaining to sexual function is considered at all, it is often through the lens of the impact on the woman's partner. In *Peninsula and Torres Strait Regional Health Authority v Bovey* ('*Bovey*'),[11] the plaintiff experienced severe pain during menstruation and ovulation as a result of a negligent laparoscopy. In assessing damages for pain and discomfort, the evidence focused on her inability to perform sexual intercourse with her husband:

> sexual intercourse had previously occurred frequently but that because of pain, it was reduced to about once every six weeks.… she had sexual intercourse on three occasions…their wedding anniversary, her husband's birthday, and her husband's desire for sexual intercourse on another occasion.[12]

Their strained relationship was a significant aspect of her injury, but not once was the plaintiff's own sexual enjoyment or satisfaction mentioned. Further, in the 2019 case of *Rhodin v Coles Supermarkets Australia Pty Ltd*,[13] sexual enjoyment was not considered in the assessment of damages. The court was not satisfied that the plaintiff had a sexual 'disability' as the plaintiff did not suffer from feelings of 'worthlessness'.[14] However, besides her husband's statement that 'sex [was] pretty well gone out the door', no evidence was given of the plaintiff's own condition.[15] It is also extremely difficult to conceive that what constitutes feelings of worthlessness would be uniform between men and women, given the double standard in sexual morality.

In general, the cases involving female plaintiffs have a tendency to devalue the importance of women's sexual organs, reducing them to tools of reproduction. In other words, if sex is painful, but she can still have it, conceive and give birth, it is difficult for the Court to perceive any injury at all. In the case of *Higgins v Nankivell*,[16] the plaintiff received head injuries in a motorcycle. In its assessment of damages, the Court held that:

> On account of her difficulties with memory and concentration she is not attractive a companion as she used to be. It will be observed that she does not have a boyfriend at the present time. She nevertheless does retain a basic capacity for marriage and childbearing.[17]

It is by this reasoning that the Court found she retained the capacity to live a useful life. Further, in *Bovey*,[18] the plaintiff's laparoscopy resulted in pain when she menstruated, ovulated or had sexual intercourse. On appeal, the Court canvassed alternative treatments to overcome some of the problems, such as hysterectomy or the use of oral contraceptives since 'evidence shows that if ovulation and menstruation are prevented, the pain from those sources would be substantially, if not totally eliminated'.[19] The most striking feature of these cases is the relative absence of discussion about sex: unlike the detailed attention to men's sexual injuries, women's problems with sex don't waste many words. Sometimes there are as few as 'as a consequence she and her husband had a healthy sex life',[20] or even the eight word sentence 'she has lost her capacity for sexual relations'.[21] These cases demonstrate the subtle but powerful ways in which women's bodies are appraised by reference to what they offer men by way of sexual pleasure, or society by way of producing the next generation. For the purposes of accident compensation, what sex means to men seems to determine what sex means to women: it is not necessary that women enjoy sex, and unless women no longer have the ability to bear children, their sexual organs do not matter.

IV. CONCLUSION

Much is said about the importance of gender representation in the Australian courts. The suppression of female sexuality is but another form of oppression that arises where women are not holistically represented in judicial decision-making. Recognising sexual identity is about much more than simply sex. It does not attempt to prescribe a certain path or normality for women's sexuality. Instead, it is about reclaiming an aspect of human identity that has long been sacrificed and transformed into a subdued remnant of 'soggy desire'. As Audre Lorde states: 'When I speak of the erotic…I speak of it as an assertion of the lifeforce of women; of that creative energy empowered, the knowledge and use of which we are now reclaiming in our language, our history, our dancing, our loving, our work, our lives'.[22] Until the courts can bring themselves to face the reality of women's sexuality, women's lives will remain obscured and undervalued. ■

infanticide and the buried sexism within the crimes act 1900

JULIA SAAB
ARTS /LLB III

I. INTRODUCTION

Modelled after the United Kingdom's *Infanticide Act*, established in 1922,[1] NSW's own infanticide provision remains frozen within the medical, and societal, views of 20th century Europe. Section 22A of the *Crimes Act 1900* states:

"Where a woman by any wilful act or omission causes the death of her child, being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her *not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child*, then, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of such child." [emphasis added][2]

It seems strange that, despite years of advancements in medical knowledge, and breakthroughs in gender equality, NSW law continues to espouse the idea that a woman's body could be the cause of madness. As we shall see, the wording of s 22A reflects an essentially patriarchal theory dating back to the nineteenth century. Yet, because it is so rarely utilised, there are no protests, and no media outcry. The provision has long since been forgotten, and left out to rot. Still, where repeal seems arbitrary, and removal disadvantageous a pass cannot be given to allow such blatant sexism to remain buried within our legislation. Sacrifice is necessary, and inevitable, in order to realise a complete paradigm shift towards gender equality within our legal system.

II. INFANTICIDE AND VICTORIAN PSEUDOSCIENCE

The sexist view of women, which characterised the Victorian period, helped to construct the perceived nexus between the female gynaecological system and insanity underpinning s 22A. During the 1800s, and early 1900s, medical professionals agonised over the apparent frequency of madness brought upon by a woman's lactation.[3] In John Baker's 1902 paper on the female patients at Broadmoor State Asylum, he described lactation as an "exhausting process", leading to "melancholia….suicidal ideas" and eventually the killing of the infant.[4] In all his examined cases of infanticide, 60% were determined to have resulted from lactational insanity. Baker was not alone in his assumption. Another 1893 study detailed cases of female lunacy, ultimately advancing the notion that the "extra strain attendant upon the functions of reproduction" precipitated mental distress in women.[5] Further, numerous other papers reported on lactational insanity, seeking to document its symptoms and workshop possible cures.[6]

As Nancy Theriot explains, a key reason for the seemingly widespread connection between lactation and infanticide may be the patriarchal domination of the medical field, and the way "proper womanly behaviour" was defined by these men.[7] Societal judgements evidently coloured 'scientific' explanations of the reproductive process. Influenced by strict gender expectations of the Victorian era, women who displayed rebellious or disorderly behaviour, sexual promiscuity or laziness in the home were often diagnosed as mad;[8] completely overcome by the harrows of their gynaecology. Where coyness and patience disappeared from the temperament of a new mother, one could imagine how academics of the time might connect these acts of criminal horror to the puerperal period itself.

At the same time, the dominant medical knowledge began to shift. As early as 1901, academics were began to resist the notion of puerperal and lactational insanity as distinct mental diseases, as Edward F. Lane asserts: "when [asked] to speak tonight on the subject of puerperal insanity, I told him that I felt somewhat embarrassed, as I was asked to talk about something *which I believed did not exist*" [emphasis added].[9] While the effects of post-natal depression and "baby blues" have indeed been medically recognised,[10] the ability for lactation to cause "significant mental disturbance" has long since been disproven.[11] Yet, it's a stereotype we can't quite shake, even now. By the time NSW Parliament introduced s 22A in 1951, the patriarchal misconception of woman's bodies was deeply embedded into the wider social consciousness.

And so, we are left with a historically motivated infanticide provision which purports to reduce the culpability of women by explicitly tying their bodily functions to madness. The question remains: why not just abolish the provision? Since the turn of the century, there have been hardly a handful of women charged with infanticide. Between 2001 and 2008, only four convictions were decided under s 22A.[12] Since 2009, three cases have mentioned the provision in their judgments, but none have ultimately charged the accused women with, or utilised the defence of, infanticide.[13] Yet, despite the declining application and clear critical opposition,[14] the provision has remained, unaltered, within the *Crimes Act* for over fifty years.

III. THE PROVISION IN PRACTICE

So, what benefit did the provision confer onto these women? What grand advantage flowed from retaining s 22A? In the case of *R v Cooper*,[15] the mother involved suffered from post-natal depression, and experienced auditory hallucinations (primarily in the form of "voices"[16]) instructing her to "quieten the baby down".[17] Ms Cooper was charged with the suffocation of her seven-month-old daughter, Chloe, under s 22A.[18] She had, by all accounts, attempted to give her daughter a bottle when the child began to cry. Unable to soothe her, Ms Cooper placed her hands over Chloe's nose and mouth until she stopped breathing.[19] Ms Cooper was sentenced with a four-year good behaviour bond.

In *R v Pope*,[20] Mrs. Pope similarly suffered from a "post-natal psychotic episode of an essentially schizophrenic type", leading to the drowning of her twelve-week old daughter, Rachel.[21] The child was found lying, fully clothed, face down in her bath, whilst Mrs. Pope was unconscious.[22] Mrs. Pope was given a three-year good behaviour bond for this crime.

Interestingly, the judgments heavily centred around the diagnoses of post-natal depression as the reasoning for their reduced culpability, leaving lactation and the generally stated "effect[s] of giving birth" stipulated in the provision to be pushed into the background. Simpson J "accept[ed] that the balance of Ms Cooper's mind was disturbed by reason of her not having fully recovered from the birth of her child",[23] and then proceeded to speak exclusively of her depression for the remainder of his judgment.[24] James J similarly noted that it was Mrs. Pope's post-natal depression which "affected the balance of her mind to the extent that in wilfully causing the death of the child she was not guilty of murder".[25]

IV. SIAM: A POSSIBLE ALTERNATIVE

Though post-natal depression is a crime inherently linked to childbirth, and thus establishes the elements of infanticide, this condition likely could be deemed substantial enough to satisfy the requirements under the substantial impairment by abnormality of the mind (SIAM) defence instead.[26] The infanticide provision offers no greater reduction of liability to these women, nor does it simplify the sentencing process more so than SIAM. In fact, infanticide remains the only defence and/or offence that requires an exploration into the *cause* of the offender's illness.[27]

Judges and medical experts may even be tempted to stretch diagnoses to satisfy the causal link between childbirth and insanity.[28] In the recent case of *R v MB*,[29] MB caused the drowning of her daughter after experiencing "prodromal symptoms of schizophrenia" following childbirth.[30] The mother suffered from extreme anxiety and obsessive thoughts, which substantially impaired her ability to "judge whether her actions were right or wrong".[31] During the proceedings, MB's counsel referred the court to the cases of *Cooper* and *Pope*, clearly intending for them to be utilised as sentencing precedent.[32] Though, even as he acknowledged that the defence of Infanticide would be available to MB, Beech-Jones J ultimately chose to set aside the possibility. MB pleaded to and was charged with manslaughter, her culpability reduced by way of the SIAM defence. Her "schizophrenic mental illness"[33] clearly satisfied the requirement that the accused be suffering from a "pre-existing mental or physiological condition, other than a condition of a transitory kind",[34] and substantially impaired her ability to both "understand events and control her actions".[35]

In applying the same test to the cases of *Cooper* and *Pope*, it seems highly probable that a similar conclusion could be drawn; both women suffered from pre-existing mental conditions, which likely impaired their ability to distinguish between right and wrong, or control their conduct. The four-year good behaviour bond imposed upon MB was also extremely similar to the sentences Ms. Cooper and Mrs. Pope recieved. Even the NSW Law Reform Commission recommended that s 22A be abolished in 1997, conditional upon "there being a defence of diminished responsibility in some form in New South Wales",[36] which now exists under s 23. Though a subsequent report in 2013 believed repeal to be the more pragmatic alternative, it was still recommended that the so-called "biological nexus between childbirth and mental illness", and any reference to a woman's lactation, be removed.[37]

V. CONCLUSION

The continued existence of the law in statute serves as a monument to blatant sexism in Australian history. Oppression and gendered stereotypes can never truly be abolished until all remnants of these notions are removed from the legal system. Though it may not be a "hot topic" of interest in the media at the moment, these sexist undertones remain, and we should not merely have to accept a medically false and systematically oppressive representation of women in statute. Women have sacrificed a sense of equality within the law, looking towards a future that cannot currently accept their power and autonomy. Alternatives already exist in the form of SIAM, and legal authority have since begun shifting in that direction. Once legislation follows, be it through a yell or whisper, we will be able to take another step towards equality. Until then, the provision remains, buried in silence. ■

no queer heroes: the flaws in australia's blood donor deferral policies

MICHAEL ALBINOWSKI
ARTS /LLB II

I. INTRODUCTION

In 2012, the World Health Organisation wrote a public letter titled 'Every blood donor is a hero'. They proclaimed that by choosing to donate blood, one performs a 'gesture of human solidarity with the power to save lives.'[1] Indeed, donating blood is an act of altruism that is vital to the survival of many Australians, with as many as one in three Australians requiring a blood transfusion at some point in their lives.[2] However, due to shortages in national blood supplies, the Australian Red Cross (ARC) calls for thousands of donors each year to come forward. In August 2019, the ARC urgently pleaded for 5000 people with an O Negative blood type to donate, due to levels reaching their lowest point in the year.[3] Despite the fact that Australia's blood supply relies on the consistent generosity of donors, men who have sex with men (MSM)[4] are ineligible to donate blood and are deferred from donating for twelve months from their last sexual encounter. The following essay will consider this policy as it impacts MSM in Australia. It will outline the genesis of the policy during the AIDS crisis of the 1980s. This is followed by an examination of how the current policies could be reformed to add exceptions for MSM in monogamous relationships and to remove the overextension to oral sex. The length of the current deferral period is also scrutinised and compared to other nations. Finally, the essay will consider how gay and bisexual men are denied access to the positive connotations of being a blood donor. It ultimately concludes that the outdated nature of current policies preclude Australian MSM from engaging in a commendable and heroic act of self-sacrifice.

II. THE ORIGINS AND DEVELOPMENT OF BLOOD DEFERRALS

Many blood donation centres around the world began to tighten restrictions on those who could donate blood once it was realised that HIV could be transmitted via blood transfusions. As the HIV/AIDS crisis emerged in the 1980s, the virus was quickly dubbed "gay-related immune deficiency", frequently shortened to GRID, or a "homosexual disorder"[5] as many cases of the disease were initially found in gay men.[6] This was despite the fact that even when HIV/AIDS was nascent, it was already accepted that transmission through heterosexual sex was possible.[7] As HIV/AIDS began to be constructed as a disease largely impacting gay men, blood donation centres implemented policies which deferred MSM from donating blood. These policies meant that MSM were barred from donating blood for a specified time period following their last sexual encounter, with many states adopting permanent deferrals. Australian states quickly followed the fervour that surrounded the beginning of the AIDS crisis, with all states implementing either permanent or five year deferrals for MSM throughout the 1980s and early 1990s.[8]

While Australia was one of the first nations to relax deferral periods for MSM, with all state blood services reducing it to twelve months between 1999 to 2000,[9] this progressivism was short-lived, as many nations have since relaxed deferral periods to a greater extent. In 2017, the UK (excluding Northern Ireland) reduced its deferral period from twelve months to three months,[10] and in July 2019, France announced that it would reduce its deferral period from twelve months to four months beginning in 2020.[11] Other states have abolished deferrals entirely for certain subcategories of MSM, with Denmark announcing in 2018 that it will allow gay or bisexual men in monogamous relationships to donate blood beginning in 2019.[12] Italy and Spain both adopted a system of screening donors based on individual risks, regardless of the gender of their sexual partners.[13] It must be noted that the ARC applied to have the deferral period in Australia reduced to six months in 2012, though its request was denied by the Therapeutic Goods Administration (TGA).[14] At the time of writing, the ARC is currently undertaking another review of its deferral policy, which is yet to be completed and submitted to the TGA.[15]

III. A "HIGH-RISK" GROUP?

Australia's caution towards MSM donors rests on concerns about the safety of both the national blood supply and transfusion recipients. In 2017, MSM constituted 63 per cent of new diagnoses of HIV, whereas heterosexual sex was only identified as a causal factor in 25 per cent of new diagnoses.[16] Such evidence was relied upon in *Cain v The Australian Red Cross Society* ('*Cain*').[17] The ARC argued that a twelve-month deferral period was justified given the high incidence of HIV/AIDS in MSM, which the Tribunal held was satisfactory reasoning.[18] The same reasons were used by the TGA in rejecting the ARC's request to reduce the deferral period to six months in 2012.[19]

Indeed, most studies analysing the prevalence of HIV/AIDS among MSM have indicated that MSM are a high-risk group.[20] However, many of these studies have been criticised for containing representative flaws, as they tend to focus on men who engage in high-risk activities.[21] According to Croome and Bartl, one study that is frequently used in Australia to justify maintaining a deferral specifically targetted men who were strongly involved within the gay community (i.e. those who were part of gay community networks and regularly attended events), to the exclusion of a significant number of gay men who were less active. Because the sample was unrepresentative, that same study found that a high proportion of gay men either paid for sex or engaged in sex work.[22] Similarly, social desirability bias is another key problem in research, as some men might avoid disclosing aspects of their sexual activity which are often stigmatised, such as being the recipient of anal sex.[23] This is part and parcel of attempting to sample a historically oppressed and often hidden group. Since MSM are often stigmatised, the use of some methods of sampling such as household surveys become unreliable.[24] This not only suggests that further research on HIV/AIDS incidence is required, but also that the evidence which has been used to justify harsh deferral periods is unrepresentative and unsatisfactory.

IV. SETTING THE RECORD 'STRAIGHT'

Since scientific research often focuses on groups at a high risk of HIV transmission, it is worth noting that there are certain subgroups of MSM that are at a lower risk of transmission. This introduces the potential for exceptions in deferral policies which would allow more gay and bisexual men to engage in such an important act of self-sacrifice. Despite evidence supporting these exceptions, blood deferral policies in Australia have lagged behind on three notable fronts.

Monogamy

It was accepted in *Cain* that MSM in monogamous relationships are at an extremely low risk of HIV transmission.[25] Despite this, it was held that maintaining deferrals for MSM in monogamous relationships was justified due to the inherent unreliability in assessing whether a relationship is truly monogamous.[26] In contrast to this, heterosexual couples are not subject to the same doubts as to their honesty. As Edward Davis has suggested, the fact that the ARC is willing to accept the word of a heterosexual couple, and not that of a homosexual couple, perpetuates the notion that gay or bisexual men are promiscuous and dishonest.[27] Due to the low risk of HIV transmission among MSM in monogamous relationships, it would be preferable if Australia's blood donation policies instead mirrored that of Denmark, which recently began to allow MSM in monogamous relationships to donate blood.

Oral sex

The maintenance of a ban on MSM who engage in oral sex is particularly questionable and in need of reform. The twelve-month blood deferral policy for MSM in Australia extends not only to either protected or unprotected anal sex, but also to oral sex.[28] This is despite the fact that the risk of HIV transmission via homosexual oral sex is so low that studies have struggled to quantify the exact level of risk.[29] This was even acknowledged by the Tribunal in Cain, and yet the inclusion of oral sex in the deferral period was held to be justified.[30] The Tribunal found that the "precautionary principle inherent in blood banking" justified the policy,[31] as it was biologically plausible that HIV could be transmitted through homosexual oral sex.[32] Mere biological plausibility is an extremely low bar for the implementation of a discriminatory policy. Deferral periods should be based upon an informed risk analysis and not the lone existence of a biological plausibility. Considering the fallibility of the evidential support that was relied upon in *Cain*, the continuance of this policy has long been untenable, and its continued enforcement raises questions as to whether the ARC is simply applying scientific evidence or erring on the side of caution in a veiled acceptance of stereotypes.

The deferral length

There is evidence which suggests that the risk of HIV transfusion-transmission would not be markedly increased by reducing deferral periods below twelve months. One recent study suggests that the window period (the period in which HIV may be undetectable in testing) is only one week, with the lengthiest window period being just over 17 days for HBV.[33] As a precaution, the window period is generally doubled, which results in a three-month deferral period being adequate to safeguard Australia's national blood supply.[34] In fact, subject to further research, it is possible that three-month deferral periods are also overly conservative.[35] It follows that Australia should, at the very minimum, consider reducing the deferral period to three months. This may have the additional benefit of fostering greater adherence to the deferral period itself, as people are more likely to follow policies which they consider to be fair.[36]

V. THE ULTIMATE SACRIFICE

There is a fine line between policies that serve to guarantee public health and policies that discriminate against groups of people. Unfortunately, the ARC's overzealous precaution in regards to gay sex suggests that fear and prejudice underlie the policy to some extent, a common factor in any policy that has discriminated against LGBTQ+ people. This is also seen in the ARC's approach to monogamy in homosexual relationships. In *Cain*, the ARC argued, with evidence, that homosexual men are more promiscuous than heterosexual men. It is therefore clear that the policy not only perpetuates stereotypes about gay and bisexual men being dirty or promiscuous, but that these representations have been used to justify the policies themselves.

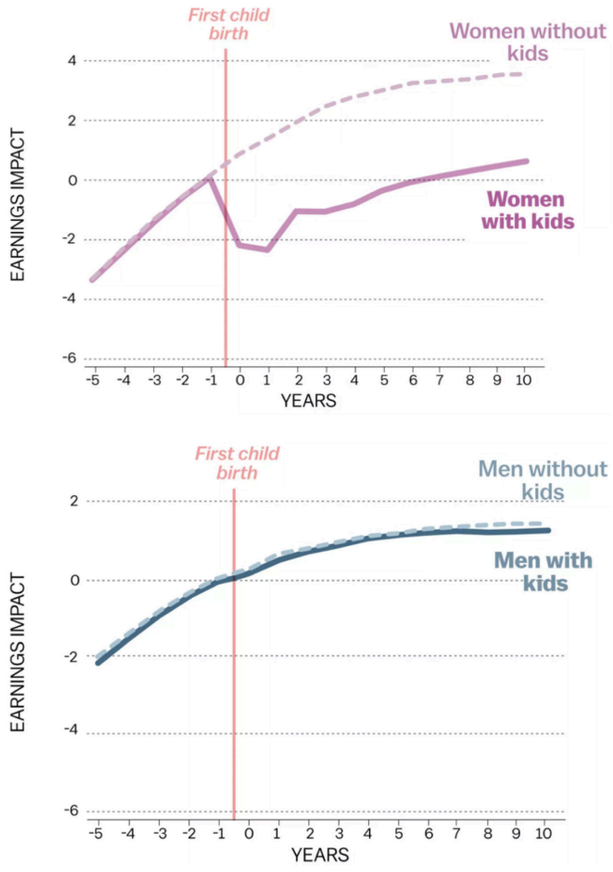
It is vital that these stereotypes are severed entirely when considering the legitimacy of current blood deferral policies, as exclusionary policies have a profound impact on self-perception and wellbeing in the LGBTQ+ community. As the policies currently stand, gay and bisexual men are forced to sacrifice their participation in an act of vital community engagement simply due to living their lives as any other person would.[38] Gay and bisexual men also lose the ability to identify with what it means to be a blood donor; to be a 'hero' performing 'the simplest and most generous thing you can do for another human being'.[39] There is no doubt that blood donation represents the pinnacle of self-sacrifice. However, gay and bisexual men are forced to choose between living their lives or being celibate for a year in order to donate blood. Given the extremity of the latter, it is unfortunate that most would be forced to forgo donating blood altogether. This deprives gay and bisexual men of the ability to feel included in their communities by engaging in an act of sacrifice. While some precaution in blood donation policies is understandable given that human lives are at stake, their unjustifiable severity continues to inflict injustice upon gay and bisexual men.

VI. CONCLUSION

Whereas at the dawn of the AIDS crisis, gay men were often accused of being unreasonable when protesting permanent deferrals,[40] an abundance of scientific studies shows that the status quo, in fact, is unreasonable. At the very least, a three-month deferral period for MSM, which has been implemented in the UK, should be adopted in Australia. Ideally, this policy would remove the exclusion of those who engage in oral sex as well as MSM in monogamous relationships, as evidence suggests these groups are at a far lower risk of HIV. The reluctance of blood donation centres, regulatory bodies and the courts to consider reductions or exceptions in the deferral period suggests that these policies are being formed based on prejudiced understandings of queer bodies. The act of blood donation is a rare exhibition of human selflessness and compassion that transforms the lives of many. Any steps that can be taken to ensure that gay and bisexual men can do the same should be taken, as this will not only benefit the lives of donors, but also recipients. ■

the motherhood penalty: parental leave, choice and the gender pay gap in australia

SOPHIA SEMMLER
ARTS /LLB IV



Source:

Data from Kleven et al. 2018, graph by Sarah Kliff, "A Stunning Chart Shows the True Cause of the Gender Wage Gap," *Vox*, 19 February 2019, https://www.vox.com/2018/2/19/17018380/gender-wage-gap-childcare-penalty, accessed 20 August 2019.

The woman who 'has it all' is one of the most misplaced stereotypes of our modern collective consciousness. Though glorified for defying the choice between career and motherhood, the stereotype falsely suggests that there is a genuine choice afforded to women in assuming primary parenting responsibilities. The 'motherhood penalty,' as it is known, refers to the systematic disadvantage faced by women in the workplace, as opposed to men, for having children. It reflects the fact that a majority of the career cost of parenting is still carried by women. In Australia, 95% of primary parental leave is taken by mothers, and only 5% by fathers, which is skewed even by global standards.[1] The sacrifice of time at work, and of the earning potential and opportunities to progress through executive ranks that attach with that time at work, continues to be made by women, even as gender equality has steadily become more embraced by society as a whole. It is an especially high price for female professionals, like lawyers, for whom time off and flexible work arrangements come at a much greater cost to career progression. At the same time, there are persistent barriers to fathers taking primary or even equal parental leave, which is due to both the deficiencies of the federal legislative framework, as well as to the enduring effects of traditional gender expectations surrounding paid and domestic work.

In 1993, my mother was an aspiring young solicitor at Blake Dawson & Waldron, now Ashurst. After she married in 1996, however, she took up flexible work as a specialist consultant in a much smaller firm, so that she could assume primary responsibility for the care of her children. This meant one parent was often around for races and speech days, school concerts or on sick days in primary school, or to help whip up some baked goods for the bake sale we only remembered to tell her about the night before. The sacrifice she made in order to be around for us meant that she couldn't commit to the billable hours of some of her colleagues who would become senior associates and even partners during the time she was mothering us. "There was one way up," she says, which was: "that time sheet had to be full." Those demands of course still exist in corporate law firms today, and similar sacrifices would have to be made by a parent regardless of gender. When asked whether many of her male colleagues took extended parental leave or whether any of them shared parenting duties equally with their spouses, she expressed that she didn't know of a single one, and that it was "probably a generation too early." Yet even now, I can't help but wonder how much has changed.

The gender pay gap in Australia remains, as of August 2019, at 14.0%.[2] The 'superannuation balance gap' between men and women aged 55-64 is estimated as being between 20 and 34%.[3] Several reasons for stubbornness of the disparity are now widely accepted. One is industry segregation, of women in less highly paid industries such as healthcare, social assistance and education. Another is that discrimination in the recruitment process for corporate roles, leading to a US$30,000 difference in average compensation midpoints for men and women in top executive positions.[4]

But the variable between men and women which prevails across industries and between income brackets is the cost of parenthood. A 2018 study led by Princeton economist Henrik Kleven found that after the birth of their first child, women's earnings drop dramatically and plateau compared to women who have not had a child.[5] In contrast, the earning trajectory for men who have had a child barely differs from that of men who have not.

A study of German data had a similar finding: whereas men's average earnings increase steadily with age, women's increase until age 27 and then decrease, only beginning to increase again after 38. In Australia, time-use data from the Australian Bureau of Statistics indicates that the birth of a child has little impact on the employment of coupled fathers, as a majority of them remain in full-time work.[6] As a result of having a child, women are shown to have a 64% loss of lifetime wages, and three quarters of that loss is attributed to their lower workforce participation.[7] It makes sense, then, that women earn less than men if they spend less time in paid work and are less able to ascend into higher executive positions. On this assumption, the 'motherhood penalty' would simply be aggregate of women's 'choices' to take primary parenting responsibilities.

It is problematic, however, to regard the decision as truly a function of 'choice.' Why does the expectation persist for mothers, rather than fathers, to assume the role of primary parental caregiver?

The parental leave system in Australia, in its current form, fails to provide for equal assumption of either primary or shared leave between male and female biological parents. The *Paid Parental Leave Act 2010* (Cth) created a federally funded paid parental leave arrangement to work in conjunction with unpaid parental leave entitlements under the National Employment Standards. However, the scheme assumes that women will be primary carer of a newborn, as of the child's biological parents only the mother can be the primary claimant, unless the person satisfies 'exceptional circumstance requirements.'[8] The 'Dad and Partner Pay' (DAPP) entitlements, similarly, are non-transferable and cannot be taken concurrently with employer-paid leave, unlike for primary claimants who can 'top up' their government entitlements with employer-funded options. As solicitor Sandra Hu argues, the "mechanics of the system" of DAPP entitlements discourage their very use.[9] With limited employer-funded leave options, it makes little financial sense for fathers to take the primary parenting role of newborns. In broader scope, Parents at Work chief executive Emma Walsh argues, the lack of a legislated approach to shared parental leave further serves to label men as secondary carers.

Secondly, gender expectations pose a significant challenge to the equal sharing of parenting responsibilities throughout the stages of child rearing. The male breadwinner and female homemaker gendered stereotypes, which are manifest in the division of unpaid labour, further influence decisions to take leave and, in turn, decisions to adopt flexible work schedules. In Australia, women continue to perform the majority of domestic work and childcare in male-female partnered households, even where the female is the main breadwinner.[10] Fathers also face difficulties in access to parental leave and flexible work arrangements, either due to the lack of options or the perceived impact on their jobs and career progression.[11] Notably, in May, the American Civil Liberties Union in the US reached a landmark settlement with JP Morgan Chase in a class action by male employees who allege they were unlawfully denied access to the company's paid primary caregiver leave on the same terms as female employees.[12]

In Australia, though there was a considerable increase in men taking up flexible work options between 1996 and 2008, this increase has since stagnated, which Dr Jennifer Baxter suggests is the result of some workplaces remaining unsupportive and the enduring stigma associated with men assuming family-friendly work arrangements. Men may also be less likely to exercise these options if they cannot see their male colleagues taking the same action.[13] Additionally, the barrier fathers face in seeking flexible work is even more significant the more highly paid they are in their position.[14]

In professional employment, remuneration is aligned with productivity, which inherently reduces with temporal flexibility.[15] In business, financial and legal occupations, earnings have a nonlinear relationship to hours because hours of work are worth more when given in particular moments and when the hours are more continuous.[16] Discontinuity and 'career interruptions,' such as having a baby, contribute further to the gender pay gap in these sectors because of these compensation differentials.[17] As a result, even mothers who return to work after extended leave are 'systematically segregated' into smaller and low-performing firms and hold lower tiered positions than those who had not left in the first place.

At the moment, it often makes little economic sense for both parents to take a pay cut or compromise their career progression particularly for workers professional and executive roles. When someone's got to give, therefore, the presumption that women should make the sacrifice is already in place.

I remember clearly what Mum had said of her four years in a big corporate firm. A 'utilisation rate' would be stamped on the timesheets of each worker, indicating the percentage of hours worked which were billed, which is common practice in professional services. A firm's interest in maximum productivity meant that longer hours, full-time commitment and the ability to 'drop everything' were predictors of employees' success, particularly in the early years of their employment. But it worked both ways. It was frustrating when preparing for a case with a rigid timeline to call another lawyer who was constantly off work or who had left unexpectedly for childcare reasons. Rather than a product of legal practice, the relationship between continuity of hours and career progression is a feature of professional practice. In moving to a consultancy role, she admits: "I felt like I was just marking time." While she was paid at a higher rate, her hours were worth less in terms of career progression than those of her full-time colleagues who had not left. As she observed, "I guess they were just the demands of the big-business model."

One day I will likely be faced with the same decision that my mother made shortly before I was born. As a soon-to-be law graduate, however, I hope the conditions surrounding our 'choices' will be different. Why are the possibilities for 'equal parenting,' as they already exist, yet to be realised? The deficiencies in the legislative framework offer some guidance. The more insidious answer, however, is our enduringly gendered concept of sacrifice. Whereas fathers are expected to forego hours at home with family in order to provide for them, women, even those who 'have it all,' are still expected to give up career opportunities for the sake of their children. Only now, those 'opportunities' are the potential to earn equally to men, and in that way, they reflect the tremendous increase in the human capital of women across the workforce which has brought us this far today. ■

the heroine we didn't know we needed: lessons on sacrifice with sabrina spellman

NICOLA HUGHSON
ARTS /LLB IV

NICOLETTE PREKETES-TARDIANI
MEDIA /LLB IV

Since her comic creation in 1962 in *Archie's Mad House*, the story of Sabrina Spellman and her half-witch-half-human existence has been retold on screen many-a-time in animated and live-action form. Her latest incarnation, however, in Netflix's *Chilling Adventures of Sabrina* (CAOS), is a version of Sabrina that is powerful in more ways than one.

While CAOS is set in an undefined time, in a world that transcends the mortal realm of everyday adolescence, Sabrina still grapples with issues that resonate with those faced by the modern female. Sabrina must make tough decisions about how to live her life and whom to surround herself with; she must come to terms with who she is and who she wants to be; and she must confront her failures and mistakes. However, central to these issues is that sacrifice, whilst inevitable and intimidating, does not always produce harmful outcomes.

Psychological researcher John Gottman proposed that women experience fear in a way that men simply cannot empathise with, because they are creatures of a different kind, as a result of both nature and nurture.

> High stress causes men to get less fearful, but when women feel high stress they get more fearful and are more likely to be afraid in the future. Women are more likely to feel fear in a stressful situation than men are. Women also experience much more fear over the course of a lifetime, and once they feel fear in a situation, they will be even more afraid when the situation arises again in the future.

Perhaps it is women's unique relationship with fear, exacerbated by societal conditioning, that renders Sabrina more relatable than ever to the women of today.

Regarding physical stress, Sabrina is not conditioned to feel fear in the face of physical danger as women are today. Instead, she embarks on life-threatening escapades without so much as a second thought. Perhaps the extreme extent of Sabrina's nonchalance is not quite what should be encouraged, but it is certainly refreshing to see a female lead so at ease in the dark woods at night. In this way, CAOS sheds light on what life might be like for a woman who doesn't feel the need to sacrifice her physical freedom to walk in public because she wasn't consistently blamed for bringing peril upon herself.

Regarding emotional stressors, however, Sabrina experiences an intense fear of sacrifice when facing decisions, which immediately resonates with female viewers who also respond to stress with feelings of fear. Sabrina is a confident, stubborn, rebellious young woman, and she wants to have it all and on her terms only. It is this blind defiance however, informed by the fear of sacrifice, the fear of losing out, that leads her to disappointment and disaster in her endeavours.

Sabrina's defiance stems from her struggle to choose between her moral compass which is inherently human, and her witch powers, which, in the series, are inherently immoral. She refuses to choose between these binary opposites, feeling the potential sacrifices on either end to be simply too much and too unfair to ask of her. Unwilling to compromise, Sabrina decides to merge her two worlds only to be faced with dire consequences. For example, Sabrina consistently attempts, with varying success, to bring human rights, human laws and the basic morality of the non-witch world to the witch coven, the Church of Night. At the same time, in typical teenage fashion, she uses her ever-strengthening powers of 'evil' when it suits her, to assist her and her mortal friends when she feels she can 'fix' a situation. Again, this is where her mortal moral compass bleeds into her supernatural essence.

Her unwillingness to choose or sacrifice one path for the other leads us to the turning point of Season 1 and Sabrina's biggest mistake yet.

As Sabrina walks this amalgamated path, however, we see the error of her ways as we begin to recognise ourselves in her actions. We see that as she tries to do it all, as many of us ladies who work to "have it all" often do, she inevitably sacrifices parts of herself. In attempting to balance the conflicting commitments and traditions of each world, she often misses the mark in both, causing calamity and quite often, irreversible physical and emotional damage. When her boyfriend's brother, Tommy, is killed, Sabrina performs a resurrection spell which requires her to murder a fellow witch, Agatha, as in Witch law, the logic demands an "eye for an eye." However, using the mortal concept of a loophole, Sabrina successfully returns Tommy and Agatha back to life, sacrificing neither with little consequence… or so she thinks. With Tommy no more than a walking corpse, and Agatha's body deteriorating each day because she was meant to have died, Sabrina is forced to tell her boyfriend what she did, leading him to mercifully kill his own brother.

Sabrina's resistance to sacrifice, which causes others pain and suffering, speaks to the pressures on women to find a solution to every problem, to be everything to everyone and everywhere at all times. The Witch world insists on quid pro quo. Even astral projection (the ability to teleport your soul to another location) has limits: stay more than a few minutes on the astral plane and risk death, the proverbial pound of flesh. Similarly, the mortal world demands sacrifice: in straddling two paths, mastering one necessitates compromising the other. Hence, by electing to embrace both sides of herself, she unwillingly sacrifices her ability to achieve her full potential in either world.

Additionally, while Sabrina's stubborn refusal to follow the advice that she must make sacrifices are annoying to any viewer, it is this very trait which makes her the most relatable heroine to female audience members. Sabrina is caught in a web of her own making because she always fronts that she has everything under control and that everything will always work out in her favour. Nary a blond lock out of place, Sabrina curates her life to appear as if she has it all together, much the same way we do today both in person and on social media. A parallel can be drawn between Sabrina's picture-perfect outfits and the grids of our Instagram accounts depicting a life without compromise, where everything is achieved with a smile and a mischievous wink. Seeing Sabrina's failures remind us that while we, and others, can appear without scratch or scar, suffering and struggle are part of our contract with life.

Perhaps it was roaring Feminism, or advertisers with an agenda, but young women today have been conditioned to believe in an ideal that is simply another one of society's fictions. Today's young women were told again and again throughout our adolescence that we could do anything, and be everything. How ironic, we were once expected to achieve nothing, and now we are overloaded --expected to bake the bread and win it too.

Now suddenly we have arrived, we are big and grown and educated and yet when we struggle, when we look in the mirror and don't see the superwoman we were always told we could be, we wonder how all the other women are doing it all. The truth? They aren't! Everyone is struggling, everyone is making sacrifices. This implied need to front perfection, which underlies the rhetoric of strong, capable women, is completely turned on its head by CAOS, because while Sabrina looks picture-perfect, we watch her fail again and again (and again!) Each time, however, she picks herself up, and moves forward.

Sacrifice need not be feared, for it is embedded in every decision. Moreover, the extent of the sacrifices involved in a choice can never be fully determined before that choice is made. For example, a meaningful moment in CAOS is when Sabrina bites into the Malum Malus - a fruit of knowledge which ostensibly grants her insight into the future. However, despite the fact that it stands out as the obvious choice among the other regular apples, she is unaware that it is cursed when she bites into it, and therefore believes that her horrible visions truly represent the future. This moment crucially indicates that the apparently obvious choice may not be the best one in hindsight. But it also reminds us that when we make our decisions, there's no real way to know whether they're the best ones until later. Hence, we may choose the path that we think will involve less sacrifice, and later find out that it actually requires more sacrifice than the other. Nothing is certain and nothing is stable, and that is okay.

Reconceptualising sacrifice as being part and parcel of life's reality is extremely powerful because it helps remove the fear attached to making the choices which we have been conditioned to think we cannot make because we supposedly can do it all. We see through Sabrina's stubborn efforts to be the best friend, daughter, niece, cousin, student, feminist, witch, activist, protector… how comically impossible the expectations she places on herself are. Much like the modern woman, Sabrina attempts to juggle all the parts of her life: friendship, family, romantic relationships, school, the Academy, fighting the Devil, reinstating 'unjustly' banned books, and maintaining her sense of self. It is this keen attitude to have her hand in all pies so to speak, that makes her a complex, multi-layered heroine. And it is Sabrina's unwavering obstinacy in the face of sacrifice which makes her the ultimate embodiment of the 21st century woman who wants to work to have it all.

Yet, it becomes increasingly clear to us viewers that rather than juggling everything, she should choose one path and carry it comfortably --however, that wouldn't be good TV now would it!

It is in the moments when Sabrina must forego one path in order to travel further down another, such as when she broke up with Harvey or signed the Book of the Beast, that we truly see her come into her own. It is through life's compromises that growth can actually happen. We see that sacrifices challenge her, humble her, and cause her to reflect on who she is and what she truly wants.

While it doesn't seem that Sabrina will ever let go of the dream to live in both worlds, hopefully her female audience members can learn from her mistakes. CAOS shows us that it's often better to make the hard choices, choose a path, embrace sacrifice and grow in response to challenges, because you can't live more than one life in your lifetime, unless you're Salem, then of course you can do it nine times. ■

did something happen in first year?

JULIETTE VAN RATINGEN
COMMERCE / LLB IV

i can't tell you
i wish i could
its a mockery of my memory-
i know i should

me, me, eighteen
silly girl, lost in thought
with your bright smile
no trust, naught

mum, dad,
drunk, but never black
never disappointed, i'm
fine, i got back

white dress, red, red
not sacred, not holy.
God, i wish you were there with me
not fine, i should have

stopped, no
you, why, it hurts
for you to take such liberty
without a care, its been three

years, and i still
i still.
i feel the red between
not natural, no, not me.

you did that.
now, i know, yes
that night, you did,
i was less.

now its me, not forgotten,
not lost, not hidden.
just hurt, ignored,
respect? just censored.

it happened, i don't.
remember it, please
but yes, i'm whole.
i'm still me

- did something happen in first year? ■

fitness is next to godliness

ERIC GONZALES
ARTS / LLB IV

At midnight, three people congregate at my gym. Alone together, they pump iron to pulsating electronica, seeking forgiveness for their imperfections and paving the path to athletic apotheosis. As the titan beside me drops his barbell with an excruciating grunt, I realise that it's disingenuous to brand the gym-goers as 'they', as an abstract and segregated group. Because you'll find me slaving away too.

I first stepped foot in a fitness club at the age of eighteen to unwind after a sedentary day of classes. But at twenty-one, when I began to peruse the virtual marketplaces of gay dating apps, I noticed the sexual premium placed on masculinity. On these apps, men advertised themselves as 'masc' and sought the same in potential partners. I couldn't help but become self-critical. What did I need to change about myself to *look* and *act* masculine?

The ideal male physique is a portrait of neo-classical perfection – a towering torso with rippled abdominals. Muscularity signifies precepts of discipline, strength and health, distancing gay men from the gaunt and pallid bodies in grainy snapshots of the AIDS crisis. It is a key to a sliver of social capital in many areas of the world where homosexuality continues to be viewed as a perversion of the heteronormative gender order.

But this portrait is Caucasian. My own pursuit of masculinity is perpetually at odds with the normative emasculation of Asian men. In Hollywood, we are portrayed as cerebral and desexualised – ousted to the periphery and seldom the romantic interest. In pornography, we are fetishised as lithe 'twinks': young, hairless and submissive. The mantra of the 'masc4masc' cult on gay dating apps – 'no fats, no fems, no Asians' – relegates us to the realm of feminine undesirability. Our bodies become devalued; unrecognised as deeply complex beings capable of the whole gamut of human experience.

The proportions of my body may change but its colour will not, no matter how far I run or how much I lift. Ironically, reclaiming my individuality from racial stereotypes demands conformity, each rep sublimating me into a more acceptable caricature of male queerness. However, muscular Asian bodies occupy a liminal space in gay nomenclature – not hirsute enough to be 'bears' and 'otters', not slender enough to be 'twinks' – unwittingly resisting classification.

Conformity is tempting because it promises one the power to navigate incredibly hierarchical gay circles. However, we have everything to lose by aspiring to shallow, one-dimensional modes of self-representation. When we try to embody narrow cultural notions of masculinity in speech, behaviour and dress, we sacrifice our energy, our money, and most importantly, our happiness.

My youth wasn't mine to live. As the son of Catholic Filipino immigrants, my self-expression was limited by familial duty and faith. Dad dismissed my interest in the performing arts as a pansy's pastime. Mum urged me to vote 'No' during the same-sex marriage plebiscite, erring on the side of religious freedom.

I dreamt of living openly as a gay man and reaping the solidarity of a rainbow community. I'm unsure if that dream will ever come true.

However, standing on the periphery of categorisation allows me to carve out my own niche. By existing outside of the frame, my body can constitute more than a projection of another's desires. I am beginning to welcome my changing physicality – not because it brings me closer to an external ideal, but because it signals agency, growth, rebellion.

And so at midnight you'll still find me at the gym, forging new possibilities of queerness. ■

references

CHARACTERISING GENDER: LANGUAGE, LITERATURE AND THE LAW — NATAN SKINNER

[1] Roland Barthes, Mythologies (Paladin, 2013) 45.
[2] Sheila McLean and Noreen Burrows, *The Legal Relevance Of Gender: Some Aspects Of Sex-Based Discrimination* (Macmillan, 1998) 12-8.
[3] Mary Wollstonecraft Shelley, *Frankenstein, or the modern Prometheus* (Bodleian Library, 2008) 108.
[4] Abigail W Lloyd, 'Defining the Human: Are Transgender People Strangers to the Law' (2013) 20(1) *Berkeley Journal of Gender*, Law & Justice 150, 159.
[5] Susan Stryker, 'My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage' (1994) 1 QLQ: *A journal of Lesbian and Gay Studies* 237.
[6] *AB v Western Australia* [2011] HCA 42.
[7] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1999).
[8] [2015] FamCA 1189.
[9] *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145.
[10] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1999).
[11] Damien A Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2014) 29(4) *American University International Law Review* 797, 798.
[12] Carol Smart, *Feminism and the Power of the Law* (Routledge, 1989) 93.
[13] Judith Butler (2011) *Bodies That Matter: On the Discursive Limits of Sex* (Taylor and Francis, Hoboken), at 95-8.
[14] Sheila McLean, Noreen Burrows (1988) *The Legal Relevance Of Gender: Some Aspects Of Sex-Based Discrimination* (Macmillan, Basingstoke), at 4, 43-6.
[15] Damien A Gonzalez-Salzberg, 'The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights' (2014) 29(4) *American University International Law Review* 797, 799-802.
[16] *AB v Western Australia* [2011] HCA 42.
[17] Ibid.
[18] Ibid [14].
[19] Ibid.
[20] *Gender Reassignments Act 2000* (WA) s 14(1).
[21] Ibid s 15(b)(ii).
[22] *Gender Reassignments Act 2000* (WA) s14(1).
[23] *AB v Western Australia* [2011] HCA 42 [12].
[24] Ibid.
[25] *Secretary, Department of Social Security v "SRA"* [1993] FCA 573.
[26] *AB v Western Australia* [2011] HCA 42 [2].
[27] *Gender Reassignment Act 2000* (WA) s 14(1).
[28] Ibid s 3.
[29] *AB v Western Australia* [2011] HCA 42 [15].
[30] *Gender Reassignment Act 2000* (WA) s14(1).
[31] Ibid s15(1)(b)(ii).
[32] *AB v Western Australia* [2011] HCA 42 [35].
[33] Ibid.
[34] Ibid [28].
[35] Ibid [28].
[36] Roland Barthes, *Mythologies* (Paladin, 2013) 44.
[37] Roland Barthes, *Mythologies* (Paladin, 2013) 43-6.
[38] Ibid.
[39] *AB v Western Australia* [2011] HCA 42 [34].
[40] Sheila McLean and Noreen Burrows,*The Legal Relevance Of Gender: Some Aspects Of Sex-Based Discrimination* (Macmillan, 1998) 48.
[41] *AB v Western Australia* [2011] HCA 42 [37].
[42] *Re: Martin* [2015] FamCA 1189.
[43] Ibid.
[44] Ibid.
[45] Ibid [1].
[46] Ibid [15-8].
[47] Ibid [23].
[48] *Re: Martin* [2015] FamCA 1189, [24].
[49] Ibid.
[50] Ibid [44].
[51] Ibid.
[52] Ibid [43].
[53] Ibid [44].
[54] Felicity Bell, 'Children with Gender Dysphoria and the Jurisdiction of the Family Court' (2015) 38(2) *University of New South Wales Law Journal* 426, 443.
[55] *Re: Martin* [2015] FamCA 1189.
[56] Ibid [39].
[57] *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7.
[58] *Re: Martin* [2015] FamCA 1189.
[59] *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145.
[60] Ibid.
[61] Ibid.
[62] Ibid [3].
[63] Ibid [6].
[64] Ibid.
[65] *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145, [10].
[66] Ibid [193].
[67] Ibid [108].
[68] Ibid [114].
[69] *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 (2 April 2014).
[70] *Norrie v NSW Registrar of Births, Deaths and Marriages* [2013] NSWCA 145, [177].
[71] Ibid [176].
[72] Ibid [176].
[73] Ibid [62].
[74] Ibid [63], [176-7].
[75] Ibid [182-3].
[76] Ibid [182].
[77] Roland Barthes, *Mythologies* (Paladin, 2013) 44.
[78] Mary Wollstonecraft Shelley, *Frankenstein, or the modern Prometheus* (Bodleian Library, 2008).
[79] Susan Stryker, 'My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage' (1994) 1 QLQ: *A journal of Lesbian and Gay Studies* 237, 251.
[80] James Boyd White, *The Legal Imagination* (University of Chicago Press, 1985).

SOGGY DESIRE: THE SUPPRESSION OF FEMALE SEXUALITY IN AUSTRALIAN COURTS — DEAUNDRE ESPEJO

[1] *The Journals of Sylvia Plath* (Anchor, 1998) 15.
[2] (1987) Aust Torts Reports 80-130.
[3] Ibid 6.
[4] Ibid 4.
[5] (Supreme Court of Queensland, White J, 1 July 1994).
[6] Ibid 2.
[7] Ibid.
[8] (2015) 72 MVR 403.
[9] Ibid 407 [9].
[10] (2014) 141 ALD 478, 491 [31].
[11] (Queensland Court of Appeal, Macrossan CJ, Pincus and Lee JJ, 8 March 1995).
[12] Ibid.
[13] [2019] ACTSC 207.
[14] Ibid [245].
[15] Ibid [247].
[16] (Supreme Court of South Australia, Anderson J, 2 March 1992).
[17] Ibid 5.
[18] (Queensland Court of Appeal, Macrossan CJ, Pincus and Lee JJ, 8 March 1995).
[19] Ibid.
[20] *Nair-Smith v Perisher Blue Pty Ltd* [2013] NSWSC 727, [217].
[21] *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd* (No 7) [2014] VSC 542, [310].
[22] Audre Lorde, *The Uses of the Erotic* (Kore Press, 2000) 89.

INFANTICIDE AND BURIED SEXISM WITHIN THE *CRIMES ACT 1900* (NSW) — JULIA SAAB

[1] *Infanticide Act 1922* (UK).
[2] *Crimes Act 1900* (NSW) s 22A.
[3] Lansdowne, Robyn, 'Child Killing and the Offence of Infanticide: The Development of the Offence and Its Operation in New South Wales, 1976-1980' (LLM Thesis, University of New South Wales, 1987).
[4] Ibid, citing Baker, John, 'Female Criminal Lunatics' (1902) 48(200) *Journal of Mental Science* 13.
[5] Menzies, W. F, 'Puerperal insanity: an analysis of one hundred and forty consecutive cases' (1893) 50(2) *American Journal of Psychiatry* 147.
[6] Rohe, George H, 'Lactational Insanity. Rohe, George H. "LACTATIONAL INSANITY. Read in the Section of Obstetrics and Diseases of Women, at the Forty-fourth Annual Meeting of the American Medical Association' (1893) 21(10) *Journal of the American Medical Association* 325; Barrus, Clara, 'Gynaecological disorders and their relation to insanity' (1895) 51(4) *American Journal of Psychiatry* 475.
[7] Theriot, Nancy, 'Diagnosing Unnatural Motherhood: Nineteenth-century Physicians and 'Puerperal Insanity'' (1989) 30(2) *American Studies* 69, 74-6.
[8] Lansdowne (n 2) 83.
[9] Lane, Edward B, 'Puerperal insanity' (1901) 144(25) *The Boston Medical and Surgical Journal* 606, 606.
[10] New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, (Report No 138, May 2013) 117-8.
[11] New South Wales Law Reform Commission (n 10) 117-8.
[12] New South Wales Law Reform Commission (n 10) 114.
[13] *R v MB* [2017] NSWSC 619; *R v Rees* [2012] NSWSC 922; *R v Lane (No 17)* [2010] NSWSC 1544.
[14] New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (Report No 83, October 1997); New South Wales Law Reform Commission (n 10).
[15] *R v Cooper* [2001] NSWSC 769.
[16] Ibid [9], [12].
[17] Ibid [12].
[18] Ibid.
[19] Ibid [14].
[20] *R v Pope* [2002] NSWSC 397.
[21] Ibid [24].
[22] Ibid [22].
[23] *R v Cooper* [2001] NSWSC 769, [3].
[24] Ibid [10], [20], [22]-[4].
[25] *R v Pope* [2002] NSWSC 397, [2].
[26] *Crimes Act 1900* (NSW) s 23.
[27] New South Wales Law Reform Commission (n 10) 118.
[28] Ibid.
[29] *R v MB* [2017] NSWSC 619.
[30] Ibid [23].
[31] Ibid [27].
[32] Ibid [69].
[33] Ibid [23].
[34] *Crimes Act 1900* (NSW) s 23A(8).
[35] Ibid s 23A(1); *R v MB* [2017] NSWSC 619 [34].
[36] NSW Law Reform Commission (n 13) Recommendation 3.
[37] New South Wales Law Reform Commission (n 10) 122-3.

NO QUEER HEROES: THE FLAWS IN AUSTRALIA'S BLOOD DONOR DEFERRAL POLICIES

MICHAEL ALBINOWSKI

[1] 'Every blood donor is a hero', *World Health Organisation*, (Web Page, 14 June 2012) <https://www.who.int/worldblooddonorday/wbdd_2012/en/>.
[2] Australian Red Cross Blood Service, 'O Negative Blood Donors Urgently Needed' (Media Release, 5 August 2019) <https://www.donateblood.com.au/media/news/o-negative-blood-donors-urgently-needed>.
[3] Ibid.
[4] The term 'MSM' is inclusive and does not specifically denote gay or bisexual men. However, given that gay and bisexual men are logically more likely to engage in male-to-male sex, this essay will focus on gay and bisexual men. Of course, not all MSM necessarily identify as gay or bisexual.
[5] Lawrence Altman, 'New homosexual disorder worries health officials', *The New York Times* (online, 11 May 1982) <https://www.nytimes.com/1982/05/11/science/new-homosexual-disorder-worries-health-officials.html>.
[6] Ibid.
[7] Ibid.
[8] Rodney Croome and Benedict Bartl, 'Cain v Australian Red Cross Society: the case for universal blood donation reform" (2013) 20(3) *Journal of Law and Medicine* 671, 674.
[9] Ibid.
[10] National Health Service Blood and Transplant, 'Blood donation rules have changed' (Media Release, 28 November 2017) <https://www.blood.co.uk/news-and-campaigns/news-and-statements/blood-donation-rules-have-changed/>.
[11] Benjamin Dodman, 'France to ease restrictions on blood donations from gay men', *France 24* (online, 17 July 2019) <https://www.france24.com/en/20190717-france-12-month-deferral-blood-donations-homosexual-gay-men-four-months>.
[12] Samuel Leighton-Dore, 'Denmark to allow gay men to donate blood', *SBS News* (online, 27 August 2018) <https://www.sbs.com.au/topics/sexuality/agenda/article/2018/08/27/denmark-allow-gay-men-donate-blood>.
[13] Croome and Bartl (n 8) 685. Note that while some have advocated for a system of individual risk assessment in Australia, there is currently a lack of risk modelling on the subject. As such, it will not be discussed in this essay.
[14] Australian Red Cross Blood Service, 'Sexual activity deferral review' (Media Release, June 2019) <https://www.donateblood.com.au/sexual-activity-deferral-review>.
[15] Ibid.
[16] Kirby Institute, *HIV in Australia: annual surveillance short report* (Report, 2018) 3.
[17] [2009] TASADT 3, [351]-[354] ('Cain').
[18] Ibid [380].
[19] Letter from Professor John Skerritt to Jennifer Williams, 13 December 2013, 1 <https://www.tga.gov.au/sites/default/files/foi-322-1415-01.pdf>.
[20] Chris Beyrer et al, 'Global epidemiology of HIV infection in men who have sex with men' (2012) 380(9389) *Lancet* 367, 375.
[21] Croome and Bartl (n 8) 681.
[22] Ibid.
[23] Ibid.
[24] Beyrer et al (n 20) 368.
[25] *Cain* [177].
[26] Ibid [376].
[27] Edward Davis, 'Blood libel: An analysis of blood donation policy as it affects gay men in Australia' (2017) 24(4) **Journal of Law and Medicine** 915, 933.
[28] 'LGBTQI donors', Australian Red Cross Blood Service (Web Page) <https://www.donateblood.com.au/lgbtqi-donors>.
[29] Bridget Haire, Kate Whitford and John Kaldor, 'Blood donor deferral for men who have sex with men: still room to improve' (2018) 58(3) *Transfusion* 816, 817.
[30] *Cain* [373].
[31] Ibid.
[32] Ibid.
[33] Haire, Whitford and Kaldor (n 29) 818.
[34] Ibid 819.
[35] Beattie Sturrock and Stuart Mucklow, 'What is the evidence for the change in the blood donation deferral period for high-risk groups and does it go far enough?' (2018) 18(4) *Clinical Medicine* 304, 306.
[36] Pippa Grenfell, 'Views and experiences of men who have sex with men on the ban on blood donation: a cross sectional survey with qualitative interviews' (2011) 343(5604) *British Medical Journal* 1, 5.
[37] *Cain* [182].
[38] Davis (n 27) 915.
[39] '42 reasons you will feel amazing every time you donate blood', *Australian Red Cross Blood Service*, (Web Page, 7 June 2018) <https://www.donateblood.com.au/blog/lifeblog/42-reasons>.
[40] Paul Sendziuk, 'Bad blood: the contamination of Australia's blood supply and the emergence of gay activism in the age of AIDS' (2001) 25(67) *Journal of Australian Studies* 75, 79.

THE MOTHERHOOD PENALTY: PARENTAL LEAVE, CHOICE AND THE GENDER PAY GAP IN AUSTRALIA

SOPHIA SEMMLER

[1] Jennifer Baxter, 'Fathers and Work: A Statistical Overview', Australian Institute of Family Studies, 28 May 2019, https://aifs.gov.au/sites/default/files/4_fathers_and_work_1905.pdf, accessed 30 May 2019.
[2] Workplace Gender Equality Agency, "Australia's Gender Pay Gap Statistics," WGEA, 15 August2019, https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics, accessed 30 May 2019.
[3] ABS, "Economic Security," *Gender Indicators* Report 4125.0, September 2018, https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4125.0~Sep%202018~Main%20Features~Economic%20Security~4; Lisa Martin, "Nothing to Show: How Australia's Gender Pay Gap is Harming Older Women," *Guardian*, 16 August 2019, https://www.theguardian.com/world/2019/aug/16/nothing-to-show-how-australias-gender-pay-gap-is-harming-older-women, accessed 20 August 2019; Rob Pradolin, "Women Over 55 Now the Fastest Growing Homeless People in Australia," *Australian Financial Review*, 20 August 2019, https://www.afr.com/property/women-over-55-years-now-the-fastest-growing-homeless-people-in-australia-20180820-h146r2, Accessed 20 August 2019,
[4] Andy Kiersz, "This Chart Shows the Gender Pay Gap Extends All the Way to the Top of the Corporate Ladder," *Business Insider*, 5 April 2019, https://www.businessinsider.com.au/gender-pay-gap-for-top-corporate-executives-2019-4?r=US&IR=T, accessed 20 August 2019.
[5] Henrik, Kleven, Camille Landais & Jakob Egholt Søgaard,"Children and Gender Inequality: Evidence from Denmark," National Bureau of Economic Research, Working Paper 24219 (January 2018), https://www.nber.org/papers/w24219, accessed 30 May 2019. A similar trend was exhibited in Australia: Jennifer Baxter, 'Fathers and Work: A Statistical Overview', Australian Institute of Family Studies, 28 May 2019, online, https://aifs.gov.au/sites/default/files/4_fathers_and_work_1905.pdf, accessed 30 May 2019.
[6] Jennifer Baxter, *Stay at Home Fathers in Australia*, Research Report 2018, Australian Institute of Family Affairs, https://aifs.gov.au/sites/default/files/publication-documents/stay-at-home_fathers_in_australia_0.pdf, accessed 30 May 2019.
[7] Jérôme Adda, Christian Dustmann and Katrien Stevens, *The Career Cost of Children*," Journal of Political Economy 125, no. 2 (April 2017): 293-337.
[8] *Paid Parental Leave Act 2010* (Cth) s 54.
[9] Sandra Hu, "Emergency C-Section Required: Improving the Delivery of Male Parental Leave Entitlements," *Workplace Review* 9, pt. 2 (April 2019): 61-63.
[10] Roger Wilkins, Inga Laß, Peter Butterworth and Esperanza Vera-Toscano, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings From Waves 1 to 17*, 30 July 2019, Melbourne Institute: Applied Economics & Social Research, University of Melbourne, cited in Geoff Gilfillan, "Findings of the 14th Annual Statistical Report of the HILDA Survey," 30 July 2019, Parliament of Australia, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/SatisticalSnapshotHildaSurvey.
[11] Michael Bittman, Sonia Hoffman and Denise Thompson, *Men's Uptake of Family-Friendly Employment Provisions*, Australian Government Department of Family and Community Services, Policy Research Paper No. 22, February 2014, https://www.dss.gov.au/sites/default/files/documents/03_2013/prp22_0.pdf, accessed 20 August 2019.
[12] American Civil Liberties Union, "ACLU, Dads Reach Historic Paid Parental Leave Class Action Settlement with JP Morgan Chase," ACLU, 30 May 2019, online, https://www.aclu.org/press-releases/aclu-dads-reach-historic-paid-parental-leave-class-action-settlement-jpmorgan-chase, accessed 30 May 2019.
[13] Australian Institute of Family Studies.
[14] Julie Coffman and Russ Hagey (2011). Flexible Work models: How to Bring Sustainability to a 24/7 World, Bain & Company study, 18 October 2010, https://www.bain.com/insights/flexible-work-models-how-to-bring-sustainability-to-24-7-world/, accessed 20 May 2019.
[15] Claudia Goldin, "A Grand Gender Convergence: Its Last Chapter," *American Economic Review* 104, no. 4 (2014): 1091-1119.
[16] Marianne Bertrand, Claudia Goldin and Lawrence F. Katz, "Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors," *American Economic Journal: Applied Economics* 2 (July 2010): 228-255.
[17] Ibid.

SYDNEY
UNIVERSITY
LAW SOCIETY