FOREWORD

SOCIAL INJUSTICE

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What exactly *is* social justice? It is an evocative word, a tautology perhaps; one could hardly be against it, although, as Brendan Edgeworth goes on to point out in his overview to the historical fortunes of the concept, there was a time when it was more of an oxymoron.[1] Yet the term is hard to pin down, and in that imprecision lies a real difficulty: social justice becomes an appeal to everything and nothing, and while it has powerful emotional weight, it is hard to specify and still harder to bring about. In reading this collection, I was from time to time frustrated by just how slippery it is.

Perhaps this is not altogether surprising. My recent research has taken me deep into the representations of justice in the arts. One of the things that has most struck me is how abstract and symbolic are images of justice, and how down to earth and material are images of injustice. Perhaps this is because we have so much more experience of the latter than the former; because social justice remains always a dream whereas injustice is a lived reality. Look at the *Virtues and Vices* by Giotto, for example, allegorical paintings from the early part of the 14th century. The image of *Justice* (Figure 1) is ethereal, symbolic, poetic, and otherworldly. Even the particularised scenes at the bottom of the fresco are largely symbolic or iconographic in character. They do not show justice: they only represent it. But *Injustice* (Figure 2) is a real person with a real character, and the scenes at the bottom of the fresco show real effects of violence, destruction, and cruelty. Injustice we can conjure up in our mind through any number of specific instances of abuse. The celebrated *Allegories of Good and Bad Government* by Ambrogio Lorenzetti[2] will bear a similar analysis. There too justice is a cloud-borne spirit and injustice an earthbound practice.

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1 Brendan Edgeworth, 'From Plato to NATO: Law and Justice in Historical Context' (2012) 35 *University of New South Wales Law Journal* 417.

2 Ambrogio Lorenzetti [c 1290–1348], *Allegories of Good and Bad Government* (Fresco, c. 1338–39, Palazzo Pubblico di Siena, Italy).

Figure 1: Giotto di Bondone [1266–1337], *Iustitia*
(Fresco, c 1306, Cappella degli Scrovegni, Padua, Italy).
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Figure 2: Giotto di Bondone [1266–1337], *Iniustitia*
(Fresco, c 1306, Cappella degli Scrovegni, Padua, Italy).
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To take another example almost at random, the 10-year-old Jane Eyre, mistreated by her cruel stepfamily early in that famous novel, hears her own inner voice cry out in intuitive revolt: 'Unjust! – Unjust!'[3] As is remarked somewhat later, the 'deepest impression' made on her heart, and the animating experience of the entire novel, is the very real *injustice* she has experienced.[4] Justice is a protest against the treatment meted out by the world. It remains, as Derrida says, *l'avenir, à venir*, a risky and unpredictable space we have not yet succeeded in filling.[5] And if this imaginative difficulty is true of justice, that we know it only in its absence, *social* justice seems perilously to pile abstraction on abstraction.

This Thematic Issue of the *University of New South Wales Law Journal* reveals the impressive diversity of commitments and approaches which social justice excites in contemporary Australian legal scholarship; or rather that social injustice incites. Substantively, almost half of the articles in this issue concern themselves directly with the legal system's treatment of Aboriginal people, a clear enough indictment of just where social injustice is most self-evidently to be observed in contemporary Australia. Of the rest, two address issues of economic regulation and two deal with theoretical frameworks for talking about justice in law. Methodologically, most of the articles engage in considerable detail with specific aspects of contemporary legal doctrine, whether in terms of legislation or judicial decisions. But for the most part this positivism, which has ironically long been subject to criticism precisely from those interested in social justice, is supplemented but not displaced by a range of other perspectives. Several of the articles show a strong interest in cultural and legal history as a way of both understanding social justice and revealing social injustice. Several draw on particular bodies of theoretical writing in order to ground their legal analyses. The authors are roughly evenly divided, between those who conceive social justice as a question of access, and those (drawing perhaps on the path-breaking work of Rod Macdonald[6]), for whom it is our legal ideas themselves and not our access to them that must be transformed. Yet beneath this wide range of objects and methods of study there is a dramatic convergence. Almost all of the authors featured in this Thematic Issue take a strongly reformist or normative approach to their work. The overwhelming message from this collection is that the ideals of social justice remain far removed from the realities of law and governance in Australia. Not surprisingly, the current collection is not so much about social justice as social injustice – about pointing out and criticising law's failure to respond to it. If there are many objects and many methods in this collection, there is really only one

3 Charlotte Bronte, *Jane Eyre* (Konemann, first published 1847, 1997 ed) 16.

4 Ibid 66.

5 The term is key to a great deal of Derrida's work and an adequate citation would take several pages: see, eg, Jacques Derrida, *Voyous* (Galilée, 2003); Jacques Derrida, *The Politics of Friendship* (George Collins trans, Verso, 2005) [trans of: *Politiques de l'Amitié* (first published 1994)].

6 Rod Macdonald, 'Access to Justice and Law Reform' (1990) 10 *Windsor Yearbook of Access to Justice* 287; Rod Macdonald and Martha-Marie Kleinhans, 'What Is Critical Legal Pluralism?' (1997) 12 *Canadian Journal of Law & Society* 25.

subject: the blindness of law, its head turned haughtily away from us as we see in Giotto's fresco.

The most striking diversity in this collection lies in the diversity of ideas that 'social justice' expresses. We could, in the spirit of the moment, happily say that social justice is 'for the 99 per cent'; that it wishes to 'occupy' the law in their name and for their interests. But beyond that one is struck above all by its range of connotations. Edgeworth, who pays the greatest attention here to the question of definition, distinguishes 'social justice' from justice understood as a language of recognition and identity.[7] Social justice, he argues, is bound up in citizenship and belonging, and in the responsibility of specific state institutions to improve the material welfare of disadvantaged people. For Edgeworth, social justice is a way of thinking through the justifications for, and the rise and fall of, the welfare state.

Elsewhere in this collection, social justice is fundamentally conceived in terms of substantive justice, and as opposed to orthodox legal thinking in terms of corrective or formal justice. Thus, in his article on tort theory, Emmanuel Voyiakis takes as his central concern the distinction between corrective and distributive justice and, by reconceiving of tort law as expressing a concern for social not distributive justice, seeks to defend such considerations – including, presumably, considerations of the material circumstances of the parties – in how we think about our duty of care to each other.[8] As distinct from other papers in this collection, Voyiakis is interested not in the social implications of personal inequality, but in the personal implications of social inequality. Writing in quite a different mode, both Thalia Anthony and Shelley Bielefeld look at the treatment of Indigenous Australians within the legal system and condemn how readily its rhetoric of formal equality masks substantive inequality, colonial domination, impoverishment, and discrimination. Bielefeld takes on the issue of compulsory income management under the rubric of the Northern Territory Intervention,[9] recently rebadged, in a somewhat Orwellian turn, as the 'Stronger Futures' legislation. In a most comprehensively researched and rigorously argued contribution, she is highly critical of these legal actions, and persuasively demonstrates the paternalism and discrimination that bloom under the patina of law's formal equality and good intentions.[10]

This concern with the concrete realities of fully contextualised individual experience, so removed from the facile abstractions of orthodox legal structure, illuminates a further dimension of what is meant by the term 'social justice' in these texts. In this respect, the essay by Thalia Anthony included here draws out

7 Edgeworth, above n 1, 429–38.

8 Emmanuel Voyiakis, 'Rights, Social Justice and Responsibility in the Law of Tort' (2012) 35 *University of New South Wales Law Journal* 449.

9 Shelley Bielefeld, 'Compulsory Income Management and Indigenous Australians: Delivering Social Justice or Furthering Colonial Domination?' (2012) 35 *University of New South Wales Law Journal* 522.

10 See Desmond Manderson, 'Crocodile Tears' (2012) 7(30) *Indigenous Law Bulletin* 8.

an unfortunate irony.[11] Quite contrary to the orthodox understanding of sentencing as a moment of judicial discretion that pays special attention to the concrete realities of the offender's experience, Australian courts are increasingly falling back on stereotypes and abstractions in their treatment of Indigenous offenders – concluding all too often that they are either not disadvantaged enough, or not Indigenous enough, or both. Remarkable historical and criminological work has been done in Canada by Mariana Valverde on these questions, on the racism of Canadian history, but also of ongoing Canadian legal practices, and the ways in which stereotypes about race and heritage form a kind of 'common knowledge' that law is invested in maintaining.[12] Valverde's brand of historical and theoretically inflected criminology would be both interested in the questions raised in Anthony's article, and at the same time have much to contribute to her analysis.

So an interest in economic and material inequality is a further fundamental distinguishing feature of the idea of social justice. As well as in the contributions on Indigenous Australians, we see this in Therese Wilson's article on a right to easily accessible credit.[13] But Wilson explores the question of this lack of access not only in terms of its economic consequences for low-income families, but its social consequences. Thus, economic inequality is connected to a broader vision of social inclusion and social capital. So too do Binh Tran-Nam and Michael Walpole examine practices and procedures of tax dispute resolution in Australia, a little-known area of access to justice which is nevertheless of enormous importance to many Australians.[14] What might assist the further development of this research is a broader sense of tax regimes not only as procedural structures, but also as critical platforms in the fight for social justice. Their article points the way, although it does not continue in this direction, towards the work which has been done, for example, by Canadians Kim Brooks and Rebecca Johnson, on rethinking the study and teaching of taxation not merely as a technical minefield but as the potential agent of a far-reaching reformist agenda.[15]

The sense that social justice is an economic issue is very strong throughout these articles, but at the same time it is undeniably connected to a broader vision of social inclusion and social capital. What is *social* about 'social justice' – what distinguishes it, ultimately, from economic justice or substantive justice – is

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11 Thalia Anthony, 'Is There Social Justice in Sentencing Indigenous Offenders?' (2012) 35 *University of New South Wales Law Journal* 563.

12 Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press, 2003).

13 Therese Wilson, 'Consumer Credit Regulation and Rights-based Social Justice: Addressing Financial Exclusion and Meeting the Credit Needs of Low-Income Australians' (2012) 35 *University of New South Wales Law Journal* 501.

14 Binh Tran-Nam and Michael Walpole, 'Independent Tax Dispute Resolution and Social Justice in Australia' (2012) 35 *University of New South Wales Law Journal* 470.

15 See, eg, Kim Brooks, 'Global Distributive Justice: The Potential for a Feminist Analysis of International Tax Revenue Allocation' (2009) 21 *William & Mary Journal of Women and the Law* 267; Kim Brooks, 'Tax Sparing: A Needed Incentive for Foreign Investment in Low Income Countries or an Unnecessary Revenue Sacrifice?' (2009) 34 *Queen's Law Journal* 505; Rebecca Johnson, *Taxing Choices* (University of British Columbia Press, 2002).

essentially the question of collective responsibility. How we allocate that responsibility – personally, institutionally, ethically – affects whether communities are built up or undermined, strengthened or destroyed. Social justice, like social capital, is a justice that *belongs* to, and ultimately constitutes, the social.[16] The dichotomy that I sometimes sensed in this volume, explicitly in some articles and implicitly in others, between social justice as a question of economic outcomes and social justice as a question of symbolic recognition, might prove in the end to be false. Certainly the articles in this collection that addressed law's treatment of Indigenous people each exhibited a common concern with the history of Australian colonialism and with the effects of that history, not just on the material life of Aboriginal people, but on their symbolic life, their ability to participate in the narratives of and about Australia. 'Social injustice' is not simply about perpetuating economic disadvantage; it is equally about practices of cultural representation that find no place and permit no dialogue about visions of law, or society, or justice. Anthony, for example, speaks of the transformative, rather than merely ameliorative, potential of social justice.[17] She treats it as requiring a real dialogue about visions and structures of law; she imagines it as a subject that is about law but which is by no means limited to legal regulation. Social and economic discourses of justice – we might even say legal and literary discourses of justice – are therefore not inimical but deeply connected, in the experience of Aboriginal lives in particular.

In the essay by Honni van Rijswijk in particular, literature is not the 'other' of law but an essential component of it.[18] Her analysis of Alexis Wright's novel *Carpentaria* invites us to imagine social justice not only in legal terms as a way of remedying material disadvantage, but in literary terms as a way of remedying a cultural silence. Without some new imaginary, social justice, social inclusion, and a full social existence cannot take place. Thus, the argument and the methodology of this article move together. Its normative argument being about the importance of imagination, voice, and literature to a resolution of the fundamental crisis of social justice in relation to Australian Aboriginal people, its method takes aim straight at those issues, and through those approaches. This ambitious approach will be familiar to those who have worked on law as a form of cultural representation,[19] but also to a variety of writers on Indigenous issues around the world. In Canada for example, Indigenous social justice, through the

16 David Halpern, *Social Capital* (Polity Press, 2005).

17 Anthony, above n 11.

18 Honni van Rijswijk, 'Stories of the Nation's Continuing Past: Responsibility for Historical Injuries in Australian Law and Alexis Wright's *Carpentaria'* (2012) 35 *University of New South Wales Law Journal* 598.

19 An area in which Australians are well represented: see, eg, Alison Young, *Judging the Image: Art, Value, Law* (Routledge, 2006); William MacNeil, *Lex Populi: The Jurisprudence of Popular Culture* (Stanford University Press, 2007); Desmond Manderson, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* (Routledge, 2012).

work of John Borrows, Jim Tully and others, has been powerfully connected to the recognition of narrative and historical identity.[20]

If the dichotomy between law and other forms of cultural representation is too often overdrawn, so perhaps is the dichotomy between domestic and global concerns. Edgeworth ties the appeal of social justice to a rhetoric of collective responsibility bound up with ideas of nationhood and citizenship.[21] This orientation is strongly borne out by the papers in this collection, which focus to a very great extent on domestic Australian issues. Yet as Edgeworth argues, and he is surely right, the recent re-emergence of the language of social justice after its apparent defeat (at least in the Western world) at the hands of neoliberalism has been due to the ways in which globalisation has changed as well as internationalised the forces of social disadvantage, constituting new communities of social resistance across national borders. Indigenous communities, environmental groups, workers' alliances, even the various 'Occupy' movements, have begun to see themselves as societies *sans frontières*, just as globalisation has seen the growth of a capitalism *sans frontières*. In this regard, the real question for social justice in the world is surely the issue of north-south relations and the global divide between rich and poor. It is surprising to see the continuing absence of these dimensions in much Australian legal scholarship, including this collection. In research such as that by the remarkable Portuguese sociologist of law Boaventura de Sousa Santos, for example, these issues do not override or transcend domestic questions of social justice, but form part of their complex tapestry, creating serious new challenges but holding out the hope of serious new possibilities for social action and legal reform, too.[22] This is categorically not about the mere reductive internationalisation of human rights. It is rather about what legal pluralism means in the 21st century, and how legal regimes and social constituencies overlap and transform the multiple *layers* of legal ordering that remain in play, local, national, international and transnational alike. These layers of legal ordering form, in the broadest sense, the framework in which law operates and through which we make sense of our world. They are not limited to particular levels of scale, boundaries or legal traditions, and neither are they limited to particular institutional sites, or indeed self-consciously 'legal' discourses.

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20 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press, 2002); John Borrows, 'With or without You: First Nations Law (in Canada)' (1996) 41 *McGill Law Journal* 629; James Tully, *Strange Multiplicities: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995); James Tully, 'Struggles over Recognition and Distribution' (2000) 7 *Constellations* 469.

21 Edgeworth, above n 1, 421–9.

22 Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalisation and Emancipation* (Cambridge University Press, 2nd ed, 2012); Boaventura de Sousa Santos (ed), *Another Knowledge Is Possible: Beyond Northern Epistemologies* (Verso, 2007); William Twining, *Globalization and Legal Theory* (Cambridge University Press, 2000); Boadventura de Sousa Santos and César Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmoplitan Legality* (Cambridge University Press, 2005).

If social justice has been granted a new lease on life through the experience, forces, and responses to globalisation, this is as true in the academic context as the economic or political one. In our time, intellectual currents and movements are themselves increasingly international, global, and dialogic. It is for this reason that I have attempted throughout the present discussion to connect the work of the scholars to be found in this volume with Canadian academics, with whose work I am reasonably familiar having only recently returned after a decade abroad. The dialogue amongst the articles in this Thematic Issue of the *University of New South Wales Law Journal,* but also between them and work being done in other countries, shows how vital and productive the critique of social injustice remains. The movement to 'occupy' academia, finding and invigorating new commonalities, new alliances, and new forms of resistance, continues apace. For we are not and never were alone. If social justice is a dream, as I began this essay by suggesting, let us describe it more vividly and share it more widely. And if justice is still, as it was in the days of Giotto and Lorenzetti, a distant image way up there in the clouds, a cloudy image, let it rain.

Let it rain
As I walk these streets unknown
To no one named
Not even myself
When I'm low

Give me hope
That help is coming
When I need it most
Give me hope
That help is coming

When I need it most
Let it go
No mother no father no home
Forget as all others
Have forgotten.[23]

23 Tracy Chapman, 'Let it Rain', *Let it Rain* (Elektra Records, 2002).