

How Common - Sex, Malls, and Urban Parks

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Abstract: This autoethnographic narrative (Hesse-Biber and Leavy, 2006, Chiu, 2004, Smith, 2005, Wall, 2006) engages with three dimensions of our contemporary urban 'commons' through the lens of property rights and notions of right to the city. It draws on the research findings from a number of transdisciplinary research collaborations, and presents them as a perambulation through the perceived commons of the contemporary city, taking in a shopping trip, a relaxing couple of hours in a park, and some sex. The 'commons' of the mall, the park and the night time society are seen as essential to the urban experience, but they are constrained and controlled spaces in our contemporary city. There is a dynamic power and relationship tension between the libertarian city and the operational city. The broader findings in the projects explored in this research serve to provide clarity on those relationships, and expose the reality of the 'good neighbour' from a planning and legal geography perspective. This paper engages creative non-fiction to introduce challenging and politically charged issues. It navigates through such tensions by way of a narrative, to give meaning, depth and context by offering a more accessible engagement to the complex real property rights that confront us in the urban milieu. Drawing on several collaborations, the underlying research design is one of phenomenological transdisciplinarity (Nicolescu, 2006, 144), which implies the goal is to build models to connect theory to observed reality, informing potential policy outcomes.

Introduction

Today, I am going to ask you to join me as I take a perambulation through three of my current research sites in Sydney, Australia. We are going to navigate the real property rights of three contemporary urban commons, perceived public spaces profoundly interwoven into the tapestry of the urban environment. We will use, as a contextual lens, David Harvey's (2008) notion of a 'right to the city', which builds on the earlier work of Henri Lefebvre (1996). Lefebvre argued that the 'right to the city' is centred on the "demand... [for] a transformed and renewed access to urban life" (Lefebvre, 1996, 158).

I approach the urban commons as a milieu of complexity. As such, each of the projects that I am involved with is approached in the spirit of transdisciplinary collaboration (Nicolescu, 2006, Max-Neef, 2005) and aspires to find new ways of understanding the real property rights that lie between, around, and above my originating discipline and that of my co-researchers. This is because answers to complex problems associated with the urban commons do not lie with the individual disciplines of economics, law, sociology, planning, property theory, geography or political economy. Rather, solutions potentially lie at the boundaries, nexus, synthesis, or hybrid of these established ways of looking at the world. Our shared research design is one of phenomenological transdisciplinarity, which implies our goal is to build models to connect theory to observed reality, allowing us to inform potential policy outcomes. In this synthesis paper, I acknowledge the support and contribution of my collaborators, listed at the end of the paper, who have been an integral part of the journey.

We will start our journey in the Westfield shopping model at Bondi Junction. We will then take a short train ride into the city before walking around the Darling Harbour precinct. As evening falls, we will stroll across Hyde Park and into William Street to reflect on the nocturnal city. To enable the perambulation through these three parts of the city the methodological approach adopted for this paper combines creative non-fiction with a dialectic approach in the tradition of an allegory. An allegory offers a useful research tool as, whilst it is not opposed to truth, it presents an alternative and creative way of facilitating and audiences sense-making of the complex issues raised (Alvarez and Merchan, 1992) whilst moving beyond temporal constraints (Lämsä and Sintonen, 2006).

Let's go shopping

Sitting on a beautifully upholstered leather armchair that rests on a designer rug covering the polished marble flooring of the first floor of Bondi Junction shopping centre, there is a hubbub of busy pedestrian flow reflected in the ornate shop window displays all around. This is a cathedral to contemporary consumerism (Fiske, 1989). It is mid morning on a Thursday in late November. The dynamic of this space will change as the day progresses – at this time of the day, there are retail staff taking the opportunity for slipping out from their shop to grab a coffee whilst it is still quiet. There will

be a rush around lunchtime as business people take a break and head for one of the many cafes and food venues in the centre, whilst maybe picking up some essential items. During the afternoon the baby strollers and the elderly will be replaced by a flurry of after-school activity, and then, given the late evening opening in the lead up to Christmas the busiest time of day will be after work as people come in search of presents, dining opportunities or entertainment within the integral cinema complex.

As all these people come and go about their business, I wonder how many of them pause to think about what their actual rights to this part of the city are. No one has asked me to move on, and the space that I am in seems public. It seems like a new form of urban commons where I can come and go at my leisure – or is it? An enclosed super regional shopping centre on this scale (500 shops on 8 levels, with four levels of parking – over 126,000m² of retail space) is almost like a city within a city; only it is somewhat more fortified and constrained than the ordinary streetscape. To understand this connection to rights to the city I am going to take this opportunity to introduce the concept of real property rights.

Property rights are fundamentally about social relations (Gluckman, 1965, von Benda-Beckmann et al., 2006). Real property rights, obligations and restrictions can be found in and change across the full range of human societies, both in time and space (Emigh, 1999, Herskovits, 1940, Hoebel, 1954, Hunt, 2000, Hunt, 1998, Horwitz, 1977, Hann, 1998, Bell, 1998, Neale, 1998).

Property rights research has emerged from a broad range of disciplines including archaeology (Earle, 2000), anthropology (von Benda-Beckmann et al., 2006, Hann, 1998, Crocombe, 1975), ethics (Block, 1995), sociology (Swedberg, 2003, Fligstein, 2003, Sorenson, 2000), psychology (Jones, 1983, Nadler and Diamond, 2008), law (Arnold, 2002, Butt, 1999, Butt, 2006, Gray and Gray, 2005, von Benda-Beckmann et al., 2006, Zellmer and Harder, 2007), geography (Blomley, 2008), history (Libecap, 1986), philosophy (Anderson, 1989), economics (Alchian, 1965, Barzel, 1989, Bromley, 1991, Bromley, 2004, Bromley, 2006, Carter, 1989, Demsetz, 1967, Eggertsson, 1990, Furubotn and Pejovich, 1974, Gordon, 1954, Hardin, 1968, Kasper, 1998, Kasper, 2004, North, 1990, Pejovich, 1990), planning (Webster and Lai, 2003), and business studies (Barzel, 1994). My rationale for highlighting the diversity of disciplines associated with property rights research is to alert the reader to the fact that, with a few exceptions, the study of property rights has hitherto predominantly been studied in disciplinary 'silos' with scholars often oblivious to the complementary (or contradictory) research in other disciplines. Whilst it is not the purpose of this paper to analyse the different worldviews of property rights, their inclusion alerts the reader that by taking a transdisciplinary (as opposed to cross-disciplinary) property rights approach to our research collaborations we are striving to avoid falling into the trap that Cole and Grossman (2002, 317-8) explain as "divergent conceptions of property rights can lead to differences in analysis and confusions in cross-disciplinary scholarship".

The study of malls provides insights into how the cultural ideology of consumption is organised in contemporary cities, with the urban environment increasingly negotiated by consumer transactions (Davis, 1990, Sklair, 2010, Voyce, 2003, Voyce, 2006). Those that do not partake in this type of relationship are excluded. The city then is slowly enclosed on two fronts: by the emergence of malls that replace public space, as well as the emergence of what Dovey (1999, 162) describes as "pseudo-public space" which is expropriated public access space that is controlled privately. That is the case here in Bondi Junction, being a Westfield investment where shareholders and superannuants are the real beneficiaries of consumption. For Davis (1990), these are tightly controlled spaces that are under heavy surveillance. They become sites of power or what Klein (2004, 11) describes as 'scripted spaces': places where acts of gentle repression occur which are seen as free will. Such observations bring Blomley (2008, 320) to ascertain that, "private interests can use the language of the public good in relation to private land (mall owners, for example, justifying the exclusion of teenagers in the name of public well-being and security)" – something echoed by Grant (2000) and Morey (1999).

Inevitably, in relinquishing our power to developers, owners and managers, malls are being constructed to form a "predictable controlled environment that acts like a prison in reverse: to keep deviant behaviour on the outside and a consumerist form of citizenship inside" (Voyce, 2003, 259). This creates a hybrid form of property that is neither public nor private, rather a semi-privatised form of property that is the product of discourses on neoliberalism. Such spaces and property typologies do not embody principles of equality. Malls are not openly accessible places created through inclusive and democratic processes (Tyndall, 2010), rather mall creation is "restricted in most cases to a small political and economic elite who are in a position to shape cities more and more after their own desires" (Harvey, 2008, 38).

The purpose of a mall, like this Westfield example at Bondi Junction, is to entice us to consume. Our rights to the city are constrained. If we want to use the space, we have to act like good consumers. We can't post notices, undertake surveys, take photos, skateboard, ride a bike, lay out a rug and have a picnic, sing or dance freely in these pseudo-public spaces. Our rights are constrained. Moreover, to secure planning approval malls on this scale are developed 'in the public interest', normally after an extended and complex period of land consolidation. In the example of Bondi Junction, this was a ten-year process, which is common in redevelopment projects of this size.

Deciding to claim my pew in this cathedral to consumerism, I sit for more than an hour in the comfortable leather armchair, appropriately dressed so as to 'blend in' to the Bondi demographic. The consumers I observe seemingly remain oblivious to the fact they have given away their democratic right to the city as they carry their purchases through the pseudo-public space within the mall – or perhaps they choose not to care. It is time to stretch my legs and catch a train into the city centre, some 6km away.

Interestingly, there is no direct subway between the mall and the railway station, although they are effectively located directly opposite each other. This, presumably, is for security reasons and allows the fortress mall to keep out unsavoury citizens on the outside of its ramparts. As I sit on the train, I reflect that despite appearances, and perceptions of being an urban common, the enclosed mall is anything but an open access or shared space. For more than a century, the 'conventional wisdom' applied to property rights is that they can be represented as a 'bundle of rights' (drawing on Maine, 1861), akin to a bundle of sticks with each interest being dealt with largely in isolation of other interests. This normative and largely one-dimensional approach has provided some common ground for interdisciplinary dialogue on property. A synthesis of property rights, obligations and restrictions developed by Boydell (2007, 111) draws on a range of contemporary property rights literature (including Benda-Beckmann et al., 2006, Bromley, 1991, Crocombe, 1975, Farran and Paterson, 2004, Payne, 1997, Rigsby, 1998, Schlager and Ostrom, 1992, Sheehan and Small, 2002, World Bank, 2003). This synthesis provides significantly more detail than that provided by Schlager and Ostrom (1992), for example, who relied upon just four broad categorizations: access & withdrawal; management; exclusion; and alienation.

I reflect on this property rights synthesis in the context of the Westfield shopping centre in Bondi Junction. In this space, there is a right to shop, to consume, and thus a right of access and within the bounds of centre and shop marketing, as well as piped music and bustle, a limited right of quiet enjoyment. The retailers, as tenants, also have rights of direct use, control, and exclusivity, as well as indirect economic gain from their function, alongside a right of duration for the term of their lease (which details the quality of their title and lease covenants). Shoppers, retailers and centre management share in the rights of identification that draw the parties together in this cathedral of consumerism. The primary rights remain with the investors and shareholders, managed on their behalf by centre management. These property rights include alienation, management, access, superior title, flexibility, exclusion, indirect economic gain by virtue of rental income, transferability, duration, divisibility and control.

From Bondi Junction the train quickly passes through Edgecliff, Kings Cross and Martin Place stations before arriving after an eleven-minute journey at Town Hall, where I alight. This station opens directly into Queen Victoria Building, a bustling retail space and pedestrian thoroughfare in the heart of the city, adjacent to the Sydney Town Hall and just three blocks from the GPO. Originally opened in 1898, this Federation Romanesque style building was restored in the 1980s by Malaysian company Ipoh Ltd., who hold a 99-year head leasehold interest from Sydney City Council, the owner of the superior freehold property rights.

A walk in the park

Emerging in Market Street, I take the short walk down to Darling Harbour, where I will spend the afternoon and early evening. My thoughts return to the limitations of Henry Maine's (1861) explanation of property rights as a 'bundle of sticks'. The bundle metaphor does not adequately reflect the increasing sense of interconnection and coexistence that marks contemporary property rights such as those associated with, for example, fishery rights (Hannesson, 2005), native title (Sheehan, 2008), water (Zellmer and Harder, 2007) and more recently carbon (Boydell et al., 2009, Hepburn, 2009). These critiques of the bundle metaphor give rise to a need to create new models that establish and integrate new building blocks from which to visualise, imagine, understand, and problem-solve the complex relationships inherent in contemporary property. This thinking has been usefully expanded by

Arnold's (2002) reconstitution of property as a 'web of interests'. His work has been adapted and developed by Zellmer & Harder (2007) in their analysis of water property rights.

The standard libertarian view (that was criticised above by Schlager and Ostrom, 1992) regards ownership as the highest level of right to act, and that property rights vest only with the individual. In contrast, Lyons et al. (2007) suggest that with property rights - at any level - come roles, obligations and restrictions. This perspective is especially crucial in considering challenges concerning the maintenance and development of the urban commons, where spaces are potentially under threat of conflict over the roles and obligations of the various stakeholders, who see themselves as asserting certain property rights over the commons.

Darling Harbour provides a laboratory where contemporary mixed-use contemporary commons can be explored. Originally the main port area of Sydney until the 1980s, when such activities relocated to Port Botany, the subsequent redevelopment of Darling Harbour has seen the formation of an urban parkland, leisure and recreation space. This has created a complex and uneven landscape of property rights, in which public 'rights' vary from site to site depending on the particular institutionally-driven micro-history of each land 'parcel'. To try to understand these varying property rights, the notion of a Arnold's web was expanded into a 'mosaic' (Boydell et al., 2007) to assist in the analysis of the interrelationship of multiple rights, and perceptions of rights. This mosaic essentially comprises a spectrum of property rights, resulting in a variety of contemporary 'commons' that range from spaces with unrestricted public access to private leasehold property with limited public access rights. In an earlier SOAC conference, Boydell et al. (2007) identified several distinct types of commons at Darling Harbour.

The first type of commons is the classic version of a space that is publicly owned and open for general public use. This type is found in the open space of Tumbalong Park (a multi-use grassed area) and the promenades around the harbour. Whilst accepted as commons, it is still a 'panoptic' space (Oc and Tiesdell, 1999, 272) that is monitored by a range of security cameras and patrolled by park 'rangers'.

The second type of commons are a shared space on the land side of the promenades, where cafés and restaurants 'spill' over onto the commons to provide popularised 'al fresco' dining. This commercial spill-over is variously labelled "brasserie bulge, café creep or trattoria trickle" (Németh, 2009, 2477), where the non-consuming public is prohibited from utilising the tables and chairs that are often fences off. This is achieved through a clear demarcation of space for which the cafés and restaurants pay a significant licence fee.

A third type of commons is a public garden with an entry fee – the Chinese Gardens. In this case, the public right to use the commons requires a payment, but the public space is indirectly controlled via the Authority.

A fourth type is an extension of the second type. It involves areas set aside for public spectacle that require an entry payment, but which are privately leased and operated. Darling Harbour has several such 'commons', including the Aquarium, Maritime Museum, and Australiana Zoo. The "management approaches differ from space to space, the publicness of publicly accessible space is constantly formulated and reformulated" (Németh, 2009, 2464).

A fifth type of commons is the public space in private facilities on land leased from the Authority, such as in the Casino in particular. These are a genuine commons insofar as they are on publicly owned land that allows, to all outward appearances, free and unrestricted access. However, these quasi 'fortressed environments' are in fact leased by the Casino company and are patrolled by security guards who do not have the right to exclude entry to anyone. They thus represent a version of the privatised commons.

In addition to the above, but continuing the same logic, two additional types of commons can be identified as follows:

A sixth type of commons are the commodified public spaces in private facilities on land leased from the Sydney Harbour Foreshore Authority, and for which an entry fee is charged. These include the exhibition spaces and conference facilities that are hired for use and for which individuals typically pay for entry. These are a commons insofar as they physically offer the same level of common access as the third and fourth types, but are managed by private business, rather than public entities. They provide a social space at a fee, but with common access to the corridors, toilet and eating facilities. To

the extent that they provide a social space they are a type of commons, however the measure of their commonality is inversely related to the level of the charge for access. They thus represent a version of the privatised commons.

A seventh type of commons are employment spaces in private or public facilities on land leased from the Authority, to which only limited entry is possible. "These territorially controlled spaces are intended for resident or tenant use only; at commercial establishments, these spaces entertain use by building employees only" (Németh, 2009, 2475). These are perhaps the most limited commons, in that access to them is restricted to certain persons, however the persons admitted are not the lessees, but persons who derive their livelihood from using them as employees, albeit that there is public access to foyers and circulation spaces. For these people, these spaces provide the physical context for the social interaction of employment, and they rely upon its free provision. They represent a valid, though restricted form of the privatised commons.

I spend my afternoon meandering through the Aquarium, before taking tea in the Chinese gardens and then sitting observing the passers by. Some, judging by their cameras and desire to maximise photo opportunities, are obviously tourists. Others are taking time out of a conference session at the Convention Centre, whilst many are just enjoying the ambience of calm from the hubbub of the city in the afternoon sun or in waterside cafes – seemingly oblivious to their contested rights to the city as they stroll on the boardwalk.

As darkness falls, I reflect that thus far the Rights-Obligations-Restriction model has been limited in its articulation by its two-dimensionality. Yet, looking at the mosaic of seven typologies of property rights in Darling Harbour there is a need to attempt to describe them terms of a 'matrix', which infers multiple dimensions. The complexity of property rights is multidimensional and interconnected. The metaphor of a constellation of property rights has been adopted by von Benda-Beckmann et al. (2006), and Hepburn (2009) who draws on Carmichael's earlier (1975, 751) natural resource work that appropriately referred to a 'constellation of highly complex adjustments to entitlements and expectations' over land.

Navigating the nocturnal city

It is time to move on. Darling Harbour has been filling with after-work revellers, out to enjoy an office party or couples looking for a waterside dinner venue. I want to now head towards a part of the city that changes its use come mid evening. I walk back across the quietening city and through Hyde Park to William Street. During the day, this street is busy with office workers and visitors to high-end car dealerships. By night, the well-illuminated car dealerships with their video security systems afford both visibility and a modicum of safety to street based sex workers. Moreover, the 'safety house' brothels in adjoining streets provide rooms with a 30-minute rate.

The sex industry has a long tradition in the Inner Sydney suburbs of East Sydney, Darlinghurst, Potts Point (which includes Kings Cross) and Woolloomooloo, spanning more than 150 years. But with the gentrification of these East Sydney suburbs, the property rights for nocturnal activities has become hotly contested – not just for street based activity, but also for brothels, massage parlours, gay bathhouses and sex clubs. Whilst the history of the legislation that makes sex work a legitimate business in New South Wales is well documented (Prior et al., 2012), the legitimisation of brothels and sex industry premises to be located at a distance from sensitive land uses such as day-care or child minding centres, primary and secondary schools, churches, parks, playgrounds, and any other place frequented by children. The legitimisation of the sex industry expects existing laws that regulate businesses (such as planning law, environmental health and taxation laws) and property rights to be sufficient to regulate brothels and other uses. Given the concentration of such activities, the City of Sydney established a 'zone of tolerance' along William Street, and in the Kings Cross precinct, to concentrate activity.

As car borne clients pull up in front of office buildings to negotiate with sex workers who are soliciting, I observe that we are still in the 'commons' of the city. Compared to the constraints predicated in the shopping centre or urban parkland, here in the sexual commons of the nocturnal city such activity is legitimised. As with the mosaic of rights in Darling Harbour, the sex industry has a similar diversity of property rights typologies ranging from solicitation in the commons, through to privatised commons where a fee is charge for entry or are restricted premises limited to adult entry.

The first type of privatised sex industry common is 'restricted premises'; areas set aside for public to access restricted sexual material but are not newsagencies or pharmacies. These commons have restricted access or require an entry payment.

The second type of privatised sex industry common is the 'brothel', a type of sexualised common that includes 'commercial brothels' and 'local business brothels'. These privatised sexual commons provide access for clients to a closed market of sex workers who are either employed in house or contracted to provide service for fee. Access to this type of sexualised common is restricted.

The third type of privatised sex industry common is the 'Sex on premises venue'. Sex on premises venues provide, with restricted access or requiring an entry payment, provide opportunity for consensual sexual encounters with others (often strangers). To the extent that they provide a social space they are a type of commons, however the measure of their commonality is inversely related to the level of the charge for access. They thus represent a version of the privatised commons. There is a distinct difference between the consensual nature of the sexual acts within these commons and the etiquette surrounding sexual services provided in a brothel. They are privately leased or owned, and privately operated. These commons include gay saunas, backrooms, SM clubs and swingers clubs that all provide a privatised common for consensual sexual acts between strangers.

A fourth type of privatised sex industry common is the 'Safety House Brothel' mentioned above, and which are distinct from conventional brothels. Safety house brothels are premises that provide short-term room rental to the clients of street-based sex workers for the provision of sexual services resulting from solicitation. These privatised commons operate with a manager and receptionist on duty to improve safety and security for both sex workers and their clients. These are the only common of their type in the world that have been legally recognised by a Consent authority (Carrick, 2002). Safety House Brothels encourage the reduction of sexual activity in the streets and cars were it impacted on the amenity of local residents and provided a safer location for sex workers for the provision of services (Carrick, 2002). Safety House Brothels are supported by the majority of local residents, street based sex workers and their clients (Carrick, 2002), although some groups such as the Eastern Sydney Neighbourhood Association dispute their location (East Sydney Neighbourhood Association, 2000).

In the nocturnal city, property rights have particular relevance because they facilitate human life and its sexual dimensions. The analysis presented within this section provides an insight into the emergence of a complex constellation of sex industry property rights – conceptualised as public and privatised sex industry commons - within Inner Sydney in the later 20th and early 21st century. This constellation - which as we show is constantly in transformation - represents the outcome of a complex set of relations ranging from broader ideological shifts within western cities about both sexuality and property rights through to the intricacies of territorial conflicts between residents and street based sex workers within the streets of Darlinghurst and East Sydney.

Ending the perambulation

As the day draws to a close, I think about the complex nature of the property rights that I have observed in these urban locations. What insights have been gained from my Flâneur-like impressions of the city? Perhaps most obvious is how most people I observed appeared oblivious to the concept of a 'right to the city' – unless, of course, their rights are impinged, withdrawn, or adversely affected by the actions of others. As I head for home, I reflect on the von Benda-Beckmann et al. (2006) lens of Categorical Property Relationship at the Legal-institutional Layer, Concretised Social Relationships, and Property Relations at the Layer of Ideology.

In each location, I observed 'categorical' relationships, where 'property relations are constructed by specifying property-holders, property objects, and the rights and obligations attached to these' (von Benda-Beckmann et al., 2006, 16). This is where legal-institutional arrangements articulate the rules and procedures in connection with the rights, obligations and restrictions of the various stakeholders – be they a shopper/retailer relationship, a café/boardwalk relationship, or a client/brothel relationship. Each of these relationships incorporates rights to regulate, supervise, control as well as rights to use and economically exploit.

The 'concretised' ownership rights within social networks create a multiplex relationship that has the potential to be analysed using the synthesis of property rights, which was elaborated on for the shopping centre. Given the overlapping nature of the property rights, this can be analysed on a stakeholder-by-stakeholder basis, and each party may have multiple rights over the same part of the

pseudo-public or quasi-privatised commons. With these accumulated property rights by some parties, we see a relationship with economic and political power.

At the 'ideological' layer, we find a plurality of relationships that can deviate from the legal-institutional understanding. Property rights regimes evolve over a long period, being dynamic and responsive to the changing needs of a given society at a given point in time. This explains why tenants accept the tight lease covenants of a landlord to enable them to trade in a shopping centre, or café's operate within their allocated intrusion onto the boardwalk in Darling Harbour. Likewise, in the sexualised commons we have seen an evolving range of approaches to the criminalisation of sex work through to its contemporary legitimisation, albeit some community detractors remain as lobby groups. Such evolution and divergence from the categorical and concretised layers provides justification for articulation of the ideological layer as a separate phenomenon.

Thus, as my perambulation ends, I easily accept the limitations of the bundle (Maine, 1861), and the four conventional categories articulated by Schlager and Ostrom (1992), as they reduce the essential complexity that I have observed. Likewise, the venues I have visited lend themselves to find multidimensionality beyond the bundle-web-mosaic-matrix continuum and demonstrate the attributes of a constellation of property rights, obligations and relationships that control, constrain and conflict our understanding of the right to the city.

Acknowledgements

My thanks are extended to the diversity of aspirant transdisciplinaryians that I have had the privilege to collaborate with on the three projects detailed herein. All are members or friends of the UTS: Asia-Pacific Centre for Complex Real Property Rights. They include, in no particular order, James Arvanitakis, Glen Searle, Garrick Small, Jason Prior, Phil Hubbard, Penny Crofts, Andrew Jakubowicz, John Sheehan, and supporters at the City of Sydney, the Sex Workers Outreach Project (SWOP) and the Aids Council of New South Wales (ACON), Andrew Miles, Lance Schema, Rachel Sandford, Jo Holden, Maria McMahon, and Li Zhou. Thanks also for the supportive and useful feedback from the two SOAC blind reviewers. The usual caveats apply.

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