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Introduction

The refereed papers contained in this set of conference proceedings will be presented at the 2nd International Conference on Crime, Justice and Social Democracy, hosted by the Crime and Justice Research Centre, Faculty of Law, QUT. Again, the conference has attracted an impressive list of internationally distinguished keynote and panel speakers from the United Kingdom, United States, Australia, New Zealand, Canada and this time Latin America, as well as high quality paper submissions.

The papers at this conference, some of which are contained in this compendium, reflect on the crucial links among social democracy, crime control and criminal justice policies. Why is it so important to engage in this critical reflection? Over the last 30 years, many Anglophone countries have been captured by penal populism, leading to burgeoning imprisonment rates and soaring crime control costs. The opportunity cost is the development of socially sustaining and inclusive societies of the kind Elliot Currie spoke about so persuasively in the opening keynote to the first conference. As public intellectuals, we will gather at this conference to engage with these politically and socially important tasks of reflection to re-imagine social democratic modes of crime control and criminal justice for the 21st Century.

We thank all those who made the effort to submit such high quality papers for review and the reviewers for taking the time to review the papers within tight timelines.

Juan Tauri  Conference Convenor, School of Justice, Faculty of Law, QUT
Kelly Richards  Conference Proceedings Editor, School of Justice, Faculty of Law, QUT
## Review Panel

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Crime, Justice and Social Democracy, 2nd International Conference, 2013
The Use of ‘Queer’ in Criminal Justice Discourses

Matthew Ball, Queensland University of Technology/Visiting Fellow, Durham University

Conference Sub-theme: Gender, Sexuality and Justice

Abstract

Within criminological literature, there are growing references to a 'queer/ed criminology'. To date, 'queer criminology' remains a loose collection of studies and criminal-justice related commentary that uses the term 'queer'. Amid the growing calls for the more substantial development of these criminological studies, it is timely to reflect on the ways that the term 'queer' has been used in these discourses, to what ends, and with what effects.

This paper considers the manner in which the term 'queer' has been used in these criminological and criminal justice discourses. It suggests that 'queer' has been used in two dominant ways: as an 'umbrella' term for lesbian, gay, bisexual, intersex, and queer-identified people; and to signify the use of theoretical tools with which to represent sexuality- and gender-diverse people more effectively within criminological research. The paper will argue that these ways of using 'queer' have a variety of implications and effects. Specifically, using 'queer' as an umbrella term has the potential to reinforce identity categories and the politics that surround identities (a critique that has often appeared in queer contexts), while using it as a theoretical tool potentially reproduces various investments in criminology and criminal justice institutions. Both uses may preclude other productive avenues for critique opened up by the term 'queer'.

The paper will conclude by suggesting that using 'queer' as a verb to signify a more deconstructive project directed towards criminology is a possible direction for these discussions. While this approach has its own effects, and articulates with existing deconstructive approaches in criminology, it is important to explore these possibilities at this point in the development of a 'queer/ed criminology' for two reasons: it highlights that multiple, and often competing, 'queer/ed criminologies' exist; and it expands the diverse possibilities heralded by the notion of 'queer'.

Introduction

The term 'queer' is being employed with greater frequency in research on particular criminal justice issues, as well as in broader theoretical reflections on how a 'queer/ed criminology' might proceed (Tomsen 1997; Groombridge 1999; Woods forthcoming; Ball forthcoming). However, ‘queer’ is a contested term, and there are numerous debates as to what it refers, and how it can and should be used (Sullivan 2003; Jagose 1996).

‘Queer’ largely refers to an intellectual approach that seeks to deconstruct binaries such as homosexual/heterosexual or male/female and their institutionalisation in a variety of social sites (see Butler 1990; Sedgwick 1990). These studies developed out of numerous radical political movements focused on HIV activism, as well as those that sought to critique the assimilationist and often essentialising tendencies of many gay and lesbian political struggles. Queer theorists critique essentialist understandings of identity – particularly in the context of
sexuality and gender – and prefer to explore the historical contingencies through which sexuality and gender are formed and regulated (see Foucault 1998; Sullivan 2003; Jagose 1996).

However, a substantial amount of queer theoretical work takes the view that ‘queer’ denotes an attitude or a position, especially in relation to what is taken to be ‘normal’. As Sullivan (2003: 52) highlights, dictionary definitions of ‘queer’ often define it as ‘to quiz or ridicule, to spoil, to put out of order’. While many authors focus on deconstructing or ‘queering’ norms of sexuality and gender (Duggan 2001: 223; Smith in Sullivan 2003: 43) – an approach that, as will be discussed below, is also dominant in criminological discourses – others suggest that the constituency of ‘queer’ is open-ended, and thus what connects those working in this area is their shared position vis-à-vis norms and normativity, not just sexuality and gender (Jagose 1996: 98; Sullivan 2003: 43; Giffney 2004: 73-74).

Thus, the primary strategy of many queer theorists is denaturalisation, and the confounding and unpacking of categories, pulling apart essences, oppositions, and foundational assumptions to understand how particular phenomena or questions about our social world have been constructed in the ways they have been (Jagose 1996: 98; Sullivan 2003: 50-51). In this vein, David Halperin suggests that ‘queer’ ‘...acquires its meaning from its oppositional relation to the norm. ‘Queer’ is by definition whatever is at odds with the normal, the legitimate, the dominant. There is nothing in particular to which it necessarily refers’ (Halperin 1995: 62, emphases in original). ‘Queer’ can therefore be a position in relation to the norm, rather than a positivity (Halperin 1995: 62). As such, for many theorists, ‘queer’ refers to more than simply deconstructing assumptions surrounding sexuality and gender, but extends to a wide variety of concepts.¹

Thus, it is clear that there is not one definition of ‘queer’, or that there is a shared understanding of what the proper object(s) of ‘queer’ might be. As these debates over what ‘queer’ refers to are unsettled and every citation of the term mobilises a particular understanding of ‘queer’, reproducing the specific effects that attend to that understanding along the way, this paper does not seek to pin down a definition of ‘queer’. Rather, it explores the ways that the term ‘queer’ has been used in criminal justice discourses, and charts some of the implications of these different uses.² It identifies two primary uses of the term ‘queer’ in criminal justice discourses: ‘queer’ as an umbrella term doing the work of an identity category (‘queer’ as noun); and ‘queer’ as signifying a set of theoretical tools mobilised to effectively understand and represent sexuality and gender diversity in criminological research (what might be thought of here as ‘queer’ as ‘sensitising concept’). It then explores the implications of each of these different citations of the term and concludes by highlighting that one use of ‘queer’ that is largely overlooked in these discussions is its use as a verb, to signify a position or attitude. It suggests that there is scope in criminological discussions to further utilise such an understanding of ‘queer’.

In offering this analysis, the paper does not seek to police the ways that the term ‘queer’ is used in criminal justice discourses, nor to be prescriptive in its use, but rather to extend the range of debate about its use, and, as Judith Butler puts it, ‘...make us consider at what expense and for what purposes [it is] used’ (Butler 1993: 229). Reflecting on, and articulating with greater precision, the understanding of ‘queer’ that is being mobilised must become a central part of any conversation about the use of the term in criminological and criminal justice discourses for two primary reasons: because it is apparent that there are multiple, and indeed competing, ‘queer/ed criminologies’ that ought not be confused; and it expands the diverse possibilities heralded by the notion of ‘queer’ and its use in criminology. This paper seeks to initiate a conversation on these issues.
The Uses of ‘Queer’

*Queer* as noun

The term ‘queer’ has been employed in some criminal justice discourses as a noun – that is, to refer to an identity category or umbrella of identity categories under which lesbian, gay, bisexual, transgender, intersex, and queer-identifying (LGBTIQ) people may be placed, or along the lines of which they might identify. Commonly, the term is used ‘almost simply’ (Sedgwick 2011: 200, emphasis in original) to refer to same-sex sexuality, but it is also used as a substitute for the unwieldy initialism of LGBTIQ (Duggan 2001: 224).

‘Queer’ is used in this way in academic research such as Queering Conflict: Examining Lesbian and Gay Experiences of Homophobia in Northern Ireland (Duggan 2012), Queer (In)justice: The Criminalisation of LGBT People in the United States (Mogul et al. 2011), and Intimate Partner Violence in LGBTQ Lives (Ristock 2011), to name a few. These works address criminological problems of relevance to LGBTIQ-identified people – whether this is a unique crime that is experienced by them (hate crimes, for example), a crime conventionally studied by criminologists but where these communities have been overlooked (such as intimate partner violence), or a particular (usually negative) experience of one aspect of the criminal justice system (such as the impacts of policing or prison). They comprehensively discuss the problems, forms of discrimination, inequalities, and experiences of LGBTIQ-identified people in their interactions with the justice system. And this research is often geared towards addressing these injustices, and reforming the practices that are understood as problematic.

This particular use of ‘queer’ also appears in recent attempts to forge a ‘queer criminology’. Jordan Blair Woods, for instance, has suggested that ‘queer criminology’ would provide a space in which ‘LGBTQ people’ can represent themselves within criminological conversations, be recognised as part of these conversations, and ensure that accurate and appropriate understandings of themselves are furthered in this field. The desire of such a project appears to be to ‘[reorient] the focus of criminological inquiry to give due consideration to the relationship between sexual orientation/gender identity and victimisation, offending, and desistance from crime’ (Woods forthcoming).

This use of ‘queer’ – as an umbrella identity category, or as a way of referring to a group of people – is productive. It allows for those with shared experiences by virtue of their existing outside of heteronormativity to be represented in research. It also allows researchers and others to bring criminological attention to bear on issues of injustice, or to important silences in these discourses, and open up a space for these injustices to be remedied, or these silences to be broken.

*Queer* as *sensitising concept*

‘Queer’ has also been used in these discourses to signify the application of some theoretical perspectives or conclusions from queer theory in criminological analyses. The variety of research projects here have utilised queer theoretical insights about non-essentialised identities and the fluidity of sexualities and genders – the primary focus of many queer theoretical analyses – to understand the subjects of the research, while also exposing the troubling binaries that underpin criminological thought or exploring the heteronormative regulation of sexuality and how this intersects with crime and justice.

For example, queer theoretical discussions about the government of sexuality through the norms embedded in various social sites have been used to explore the regulation and often criminalisation of those that live non-heteronormative or non-cisgendered lives, particularly as this occurs through the law and aspects of the justice system (Dwyer 2012: 18; Mogul et al. 2011: 23; Narrain 2008: 51; Duggan 1993: 75; Umphrey 1995: 26; Stychin 1995: 7; Moran et al. 1998; Robson 2011; Dalton 2007; Dalton 2006; Mason 2001; Backus 2009; Tomsen 2006: 393-394). Other works look at how forms of surveillance regulate the ‘normal’ use of public space...
and govern public sex (Conrad 2009; see also Johnson and Dalton 2012). And still others look at the regulation of other forms of sexual activity or sexual visibilities (Dalton 2007; Dalton 2006; Mason 2001; Lamble 2009), explore how criminology might engage with these concerns, and how criminal justice might be better achieved.

The queer theoretical analysis of essentialised identities has also been used to critique the understandings of victims and perpetrators (not to mention the binarised understandings of homosexual and heterosexual) that appear in knowledge about, and current approaches to address, hate crimes (Tomsen 2006: 394; Tomsen 2009: 10-13, 15; Tomsen 1997: 39, 40, 42; Lamble 2008: 29). Additionally, these theoretical tools have been used to understand and represent gender- and sexuality-diverse people in this context. For example, Chakraborti and Garland suggest that such work ‘... is important for developing a framework that can include some of those who are the victims of homophobic and transphobic violence ... [because s]uch a framework challenges commonly-held societal assumptions about the demarcation of gender, sexual desire and identity’ (Chakraborti and Garland 2012: 75). In this approach, it is assumed that queer theory can be used to assist in understanding particular groups of people and their lived experiences, representing them effectively within research and policy.

These ways of employing the term ‘queer’ – to signify a set of theoretical concepts that can be used in an analysis – are also apparent in some of the more explicit calls for the development of a ‘queer criminology’ that have been made since the mid-1990s. In 1997, for example, Tomsen suggested that the critique of binary thinking that queer theory offers could be put to productive use in criminology, particularly in exploring the way criminology perpetuates the homo/hetero binary and maintains ‘homophobic oppression’ – a task that he suggested was ‘... imperative in any sexually emancipatory politics’ (Tomsen, 1997: 34; see further Tomsen 2006; Tomsen 2009). Tomsen later developed this argument to suggest that such an approach would also include an ‘ongoing emphasis on the performativity of criminalised masculine identities and a progressive psychoanalytic stress on the tense proximity of homo and hetero desire that feeds much male aggression, misogyny and risk taking’ (Tomsen 2006: 403). Groombridge also recommended queer criminology should follow Seidman’s suggestion that any analysis informed by queer theory ought to study the ways that ‘... knowledges and social practices ... organise ‘society’ as a whole by sexualising – heterosexualising and homosexualising – bodies, desires, acts, identities, social relations, knowledges, culture and social institutions’ (Seidman in Groombridge 1999: 533).

While this paper can only begin to explore the way the term ‘queer’ has been employed in these discourses, it is apparent that one consistent feature of these uses is that they signify a mobilisation of the concepts of queer theory in ways that assume that these concepts offer accurate ways of understanding and representing gender- and sexuality-diverse people. Not only do these concepts allow researchers to appreciate the impact of heteronormative discourses and regulations in the field of criminal justice, but they offer researchers what might be considered ‘sensitising concepts’ in order to become attuned to the complexities of sexuality and gender diversity. In themselves, such analyses provide novel critiques of various criminal justice issues, and new directions for criminological discourses to follow.

**Implications of These Uses of ‘Queer’**

As discussed, each of these ways of using the term ‘queer’ is productive. However, they also have a variety of potential impacts – they can lead to particular courses of action and ways of thinking, and preclude others.

While the term ‘queer’ is often used productively as an umbrella term to signify a range of identities, this way of using the term has been critiqued as a ‘false but unifying umbrella’ (Giffney 2009: 2), producing the homogenisation of those that are considered to fit under it. It
can erase very important differences along the lines of race, ethnicity, and class that exist between those that might be considered ‘queer’ (Anzaldúa in Sullivan 2003: 44). Additionally, this use of the term as, for all intents and purposes, an identity category, can lead to essentialised understandings about people, and, by extension, lead to problematic forms of identity politics (Giffney 2009: 2; Anzaldúa in Sullivan 2003: 44; Sedgwick 2011: 200).

These questions about the political utility or strategic necessity of contingent identity categories is an ongoing (and perhaps unresolvable) issue in queer politics (see Gamson 1995; Butler 1993). A large part of queer theorising has developed as a response to and critique of essentialised understandings of sexuality, gender, and identity, with many people that identify as queer embracing this understanding (Jagose 1996: 77-78). Using ‘queer’ as an identity category in order to include these people in particular forms of research does allow for the production of knowledge about their experiences of a particular crime, but can effectively reintroduce essentialised understandings of identity into these discussions (Gamson 1995). This is partly because the deconstruction that attends many queer identities – and which is the basis for this stance against essentialism – is not carried further and directed towards other concepts in the research. Put simply, the people explored in the research are ‘queer’, but other aspects of the research are not (see further Ball and Scherer 2011: 1-2). This argument can be illustrated in the context of intimate partner violence. There is a growing body of research that charts the incidence of such violence in the lives of ‘queers’, and some of this work engages with queer theoretical insights insofar as they point out that our discourses about such violence are heteronormative, or that identities are not stable. However, in much of this research, the understanding of violence itself is not ‘queered’, and remains heteronormative or, indeed, homonormative (see Ball 2013; Holmes 2009).³

A related point can be made about the ways that ‘queer’ is used to signify the mobilisation of queer theoretical concepts and tools to understand sexuality and gender diversity in these criminal justice discourses. These queer theoretical concepts and tools are used primarily to assist in the understanding of, and the appropriate representation of, gender – and sexuality-diverse people. However, this representation and understanding takes place within what remain largely conventional criminological analyses. Thus, while queer theoretical insights are used here to guide research in theoretically sophisticated ways and allow for a critical examination of the problematic assumptions that have long characterised the engagement with these issues within criminal justice discourses, the deconstructive critiques that queer theory can offer may be restricted. These queer theoretical tools are used to assist in understanding the subjects of research, and to appreciate the forms of regulation and normalisation that impact upon them, thereby contributing to the development of knowledge about these people and their experiences, and to the development of more effective policies to address injustice. However, this deconstructive critique is not often turned towards criminology itself, its own project of producing such knowledge, and its attendant effects.

To illustrate this, consider, for example, Chakraborti and Garland’s statement (2012: 75) that in the context of hate crime, queer theoretical work ‘... is important for developing a framework that can include some of those who are the victims of homophobic and transphobic violence ...’. Here, queer theory allows for a more effective representation of victims of hate crime, and is mobilised in projects that seek both criminological knowledge production about this crime, as well as the development of more effective responses to it. Groombridge’s suggestion that queer criminological work be situated ‘... squarely within mainstream criminological concerns, not on the criminological margins’ (Groombridge 1999: 543), and be directed towards producing explanations about criminal justice issues, are further possible examples of this kind of dynamic (Groombridge 1999: 539).

Identifying the implications of these uses of ‘queer’ in criminal justice discourses is not intended to suggest that these are negative or undesirable uses of the term ‘queer’. The incorporation of
Queer theory into criminological research can allow for the development of interventions that respond more effectively to the injustices that are the concern of many of these researchers, and the use of ‘queer’ as an umbrella identity category can allow for criminological attention to be turned towards important injustices. The critique offered here is intended only to point out that these uses of the term have a variety of implications, and these can place limits on the critique and deconstruction that is possible in criminal justice discourses. It is also to point out that other productive uses of the term ‘queer’ are possible, along which ‘queer/ed criminologies’ might proceed.

**Queer as a Verb?**

One possible way of using ‘queer’, discussed above, is as a verb – as signifying a position or an attitude. To say that this particular approach is not widely apparent in criminology is not to say that the work discussed above is not critical or deconstructive. Rather, it is to argue that these analyses that use the term ‘queer’ often limit the deconstructive potential of ‘queer’ in some ways and thus still engage in what might be thought of as conventional criminological projects. This becomes apparent when one considers that regardless of whether ‘queer’ has been used as an identity category or as a set of ‘sensitising concepts’, it is continually connected to sexuality and gender, and these appear to remain the proper objects of these queer criminological analyses. So, criminological research most often mobilises ‘queer’ if the population of concern within the research are ‘queer’ people (experiencing hate crime or violence, for example), or if the focus is on the regulation of sexuality or gender identity, or if the particular activity explored has a sexual aspect to it (such as pornography, or sex work). Other aspects of the research are not ‘queered’, the attachment of ‘queer’ to gender and sexuality is not problematised (see Eng 2005: 3), and the possibilities of ‘queering’ other concepts in the research more broadly are not fully developed (see the example of intimate partner violence above).

By suggesting that the ways that ‘queer’ is used still engages to varying degrees in conventional criminological projects merely suggests that many of them are still tied to forms of knowledge production, or to achieving criminal justice, and often still invested in criminal justice institutions. They help to provide a ground for knowing about a particular topic, and do not use ‘queer’ to signify a more thoroughly deconstructive project that could shift more fundamentally the ground upon which such criminology – or, indeed, criminologists themselves – stand. Such an approach might not just use queer insights to argue that criminology is heteronormative, but also use ‘queer’ as a position from which to highlight the costs of investing in criminology in the interests of ‘queers’. Using ‘queer’ as a verb within these discourses could help avoid these kinds of investment.

Such a project would, of course, carry its own dangers, and certainly some are troubled by any move away from sexuality and gender within queer analyses (Halley and Parker 2011: 6). Using ‘queer’ as an impetus for deconstruction of this kind may push these criminal justice discourses in directions that criminologists may perceive as irrelevant, or outside the bounds of what is taken to be criminology. Deconstructive projects of this kind might also be perceived as being of little relevance to addressing immediate material injustices (for preliminary responses to this critique, see Ball forthcoming; Cohen 1998: 117). And, of course, articulating whether this way of using ‘queer’ interacts with, replicates, draws from, challenges, reinvigorates, or indeed ‘queers’ existing deconstructive approaches in criminology must be explored (Cohen 1998). However, this approach is potentially a fruitful direction for criminologists, and is certainly one among many possible ‘queer/ed criminologies’.

**Conclusion**

This paper has briefly explored the two dominant ways that the notion of ‘queer’ is utilised in criminal justice discourses, and pointed to some of the implications of these uses. It has highlighted that ‘queer’ is primarily used either to refer to an identity, or to signify a set of
conceptual tools. It has also identified the implications of these different uses of the term, and suggested that an alternative conception of ‘queer’ – where it signifies a disposition or attitude – could be productively utilised in this field.

These discussions contribute to the development of a ‘queer/ed criminology’ – or what might more appropriately be termed ‘queer/ed criminologies’ – by encouraging authors engaging in such projects, or employing the term, to reflect on how they use the term, and the various implications of doing so. As each use of the term carries with it particular assumptions and can preclude other ways of thinking or acting, ultimately producing different kinds of criminological analyses, being attendant to the effects of their use of the term can allow for a more informed discussion about the possibilities of ‘queer/ed criminologies’, and the ways that ‘queer’ might be most effectively mobilised.

The slipperiness of ‘queer’ highlighted in this paper is advantageous to criminal justice discourses, and not something that ought to be foreclosed. As Judith Butler points out, the term needs to ‘… be vanquished by those who are excluded by the term but who justifiably expect representation by it’, by those who use it in different ways, in order ‘… to let it take on meanings that cannot now be anticipated’, and also by those ‘… whose political vocabulary may well carry a very different set of investments’ (Butler 1993: 230). Perhaps the only thing that is certain among this variety of ways of using ‘queer’ is that ‘[q]ueer, if it names anything, names a critical impulse that can never, must never, settle’ (Kemp 2009: 22).

1 Here, the deconstruction of queer theorists can become difficult to untangle conceptually from other forms of deconstruction. This is the focus of ongoing work, and queer criminological work that takes this direction needs to explore this point.

2 Authorial sovereignty over the ways the term is used, or the effects produced, is not implied here. Instead, the focus is on the potential effects of these uses of the term, the assumptions implied in each of these uses, and the modes of thought they preclude. Further, while this paper primarily analyses academic criminal justice discourses, it does not exclusively consider those discourses.

3 As the purpose of this paper is to highlight the ways that ‘queer’ has been used in criminal justice discourses, and to identify where it might be used differently, there is not space to fully consider the potential, and limits, of using ‘queer’ as a position here. This remains an important aspect of queer criminological work.

References


Arguing the Autopsy: Mutual Suspicion, Jurisdictional Confusion and the Socially Marginal

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Conference Sub-theme: Courts, Law and Justice Institutions

Abstract

Vulnerable and marginalised populations are not only over-represented in the criminal justice system, but also in civil jurisdictions like the coronial system. Moreover, many of the personnel who deal with criminal matters, especially in rural and regional areas, are also those who manage the coronial death investigation. This movement back and forth between civil and criminal jurisdictions is difficult for the both professional personnel and the families, but especially for those families who may also have had dealings with these personnel in the criminal justice system, or who present as suspicious due to larger historical and global issues. While coronial legislation now allows families to raise cultural and religious concerns about the process, particularly to do with the autopsy of their loved one, this also requires them to identify themselves to police at the initial stage of the death investigation. This paper, part of a larger body of work on autopsy decision making, discusses the ways in which this information is gathered by police, how it is communicated through the system, the ways in which families are supported through the process, and the difficulties that ensue.

Introduction

The coronial investigation sits between civil and criminal jurisdictions, as an inquisitorial system which focuses on finding the facts of the matter without the allocation of blame or liability. For this reason, the coroner has wide powers of inquiry, and is not bound by the usual rules of evidence, being able to admit hearsay for example, and extend privilege to witnesses in inquests (Scott Bray 2010). Nevertheless, all of the key players in the coronial death investigation have experience (sometimes the majority of their experience) in criminal investigations and proceedings, and until 2003 in Queensland, a direct link between coronial and criminal investigations was in place, since Coroners could refer matters to trial (Freckleton and Ranson 2006). Moreover, Coroners are appointed as magistrates and many act concurrently – as coroners, investigating deaths, and as magistrates, ruling on criminal behaviour. Similarly, the vast majority of policing work is investigation of criminal matters with most police rarely investigating more than a few coronial deaths each year (Drayton 2011), while most pathologists who work in the coronial jurisdiction are forensically trained and appear in court as specialist witnesses in both inquests and criminal trials (Kramar 2006). The important issue here, which this paper seeks to address, is how wider social assumptions about the dangerousness of some populations and the visibility of others in the criminal justice space, can impact on assessments of suspicious deaths.

At the same time, research supports the fact that vulnerable populations are over-represented in coronial death investigations (predominantly the elderly, Indigenous people and those from low socio-economic status), some of whom are also over-represented in the criminal justice
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system (most notably those from low socio-economic and Indigenous communities) (Carpenter and Tait 2009). This means that many of the bereaved families who are caught up in a coronial death investigation also move between the criminal and coronial systems. This paper also seeks to engage with the implications of this, where families may bring with them pre-existing relationships (if the family is known to the local police or magistrate), as well as ‘innuendos of suspicion’ and the ‘general impression’ by both the bereaved family and the wider community ‘that it is wrongdoing rather than tragedy that is being investigated’ (Clarke and McCreanor 2006: 33).

A final consideration is the legislative requirement, variously enacted in all Australian states, that a family’s religious and cultural status and concerns about the autopsy – also a legislative requirement of a coronial investigation – be communicated to the police at the time of the death notification. In Australia, those cultures and religions with a known objection to autopsy are the Indigenous population and members of Islam and Judaism. This requires bereaved families to not only identify themselves to police but to understand and negotiate, in the traumatised state of a sudden bereavement, the medical and legal implications of a challenge to the internal autopsy of a loved one (Drayton 2011). This is complicated by the fact that the Coroner has the final determination as to whether or not an internal autopsy will proceed and that a family’s objection may, despite their strongly held beliefs, be over-ruled.

This involvement of families can be situated as a relatively recent addition to coronial legislation, influenced by an increasing multicultural tolerance of difference by public authorities, supported as a last resort through laws against discrimination (Humphrey 2007: 10). However, such adjustments to coronial law also fit with the ‘jurisdiction’s pro-therapeutic potential ... and its capacity to produce social benefits and restorative outcomes from tragic circumstances’ (Scott Bray 2010: 567). This is related to the evolution of the coronial investigation from a reactive to a proactive jurisdiction, with a statutory basis for the prevention of avoidable deaths through recommendations to relevant public authorities (Scott Bray 2010: 570-571). Embedded in a larger research project on autopsy decision making and interviews with key professionals in the Queensland coronial system, this paper explores these related ideas, especially the way in which a push toward therapeutic jurisprudence and ‘the wishes of the family’ creates a ‘dissonance between representing the dead body in medico legal discourse and remembering or memorialising the dead in culture’ (Scott Bray 2006: 42).

Vulnerable Populations

In coronial legislation, the expectation that religion and culture will serve as a means for objecting to an invasive internal autopsy, can bring vulnerable populations to the forefront of a death investigation. In Australia the three main groups in this regard – Indigenous, Jewish and Muslim – find themselves at different locations within both social and coronial assumptions about suspicious deaths.

Islam

... and I've found that Muslims have a tendency to object big time. It's not that I hate Muslims it's just that they are prominent on the objection side, 'oh you don't need to do this because you're cutting up the body' and well hang on, I immediately get suspicious when somebody, 'oh no you shouldn't you shouldn't'. What have you had to do with this death in that case, I think we need to look at this a little bit further if you're objecting so strongly and putting it under the guise of religious or cultural concerns. (Police Officer)

In general terms, Islamic objections to autopsy are based on the importance of body wholeness at death (Campbell 1998: 295). Three further beliefs support such a proscription against autopsy. The first is a general concern that the autopsy procedure will delay burial, which
According to Islamic law, the body should be buried within 24 hours of death. The second proscription comes from the Islamic belief in the sacredness of the body and is due to the religious belief that the body belongs to God. The third proscription is the perception that the dead perceive pain, with such a belief based on the words of the prophet Mohammed who claimed that ‘the breaking of the bone of a dead person is equal in sin to doing this while he is alive’ (Gatrad 1994: 523, see also Al-Adnani 2006; Lynch 1999).

While the Islamic objection to autopsy is well founded, the suspicion inherent in such an objection is also apparent, and in our interviews, missing from discussions of other cultural or religious objections. While it is convenient to point to the rising Islamophobia in western nations post 9/11 (Spalek 2008; Poynting and Mason 2006), it is also clear that Muslim immigrants have been seen as a problem community since Lebanese Muslims started arriving in Australia in significant numbers from the 1970s (Humphrey 2007: 12; Poynting and Mason 2007). There may be a number of reasons for this. First is the intertwining of religion and politics in Islam and its portrayal as in opposition to secular modernity, which correlates with political disloyalty to Australian national identity. Concerns over ‘Muslim first and Australian second’, speak to the ‘underlying expectation that all immigrants are on the journey to becoming Australian, at least across generations’ (Humphrey 2007: 12). Second is the focus on the cultural incompatibility of Islam to the West which is positioned as a cultural backwardness rather than just a cultural difference, and particularly in terms of their control and treatment of women. Such an understanding constructs Muslims as ‘trapped by tradition’ in contrast to the West which is ‘liberated from cultural constraints and individually autonomous’ (Humphrey 2007: 21). Finally, is the more recent moral panic around terrorism which has led to a situation where any expression of Islamic religious identity is suspicious, possibly indicative of an underlying and dangerous fundamentalism (Humphrey 2006: 13). This has led to the creation of ‘suspect communities’ who should be ‘monitored by state agencies, casting new questions about citizenship, identity and loyalty’ (Spalek 2008: 211). Such an understanding is now widespread in Australian society with the ‘Arab other’ constructed through a complex process involving recurrent negative media portrayals, prejudiced political pronouncements and racist populist rhetoric’ (White 2009: 366).

**Judaism**

_There is a liaison for the Jewish community. I think there is also for the Samoans and so on, through the Church. But they’re less proactive than the Jewish community. I think there’s a liaison fellow from the Jewish community, and he’ll get involved pretty quickly. It’s really just to ensure that the burial takes place as soon as possible. That’s not necessarily an objection to autopsy. I don’t think they mind autopsy so much, but it’s got to be done quickly._ (Coroner)

_He’s very much an advocate for the Jewish community in New South Wales and by default, now all of Australia, who was very, very active in issues of objections to autopsies, objections to retention of tissues, and was very active in changing initially, the way that the New South Wales Government operated and ultimately, the law._ (Pathologist)

In Judaism, it is considered a desecration to interfere with the body of the dead (Segal 2006: 102). This is because, according to Mittleman et al. (1992: 826), the Jewish faith never views a deceased person as a corpse. ‘Having housed God’s soul, the body, even after death, is considered a holy vessel. Furthermore, the soul remains in close proximity to the body immediately after cessation of physical life, thereby suffering a sense of separation anxiety. The dissection of the body can therefore be considered painful to the soul which should be treated with the highest level of dignity’. Despite the similarities between Judaism and Islam in terms of their location within the coronial death investigation, and the religious legitimacy of their
objection, the differences between the situation of Jewish advocacy and that of Muslim suspicion is stark and speaks to the different space that the Jewish community occupy in Australian society. Part of the reason for this, according to Stratton (2000) is that the 'Jew' is a socially constructed 'gentile, Western Other', homogenised and othered in much the same way as the 'Asian', but not to the same extent because the Jew is also white, European and Western. It is also consistently noted that prominent members of the Jewish community were part of the founding government of Australia, and continued to use their influence in policy and legislation regarding Jewish immigration after WWII (Rutland 2005). Research also demonstrates that anti-Semitism is on the decrease in Australia, unlike many other countries (Stobbs 2008; Rutland 2008) and that the Jewish community are neither over-policed nor over-criminalised in Australia (Stobbs 2008). Finally, the recasting of Judaism after the Holocaust as integral to the history of the West would appear to place Jewish objections against autopsy in a different location to either Muslim or Indigenous concerns (Mamdani 2004).

Indigenous

But interestingly we rarely have many issues concerning autopsies within the Aboriginal community and we should do, there should be more and I don’t know why. Now it could be that it’s more of an urban population and therefore it’s not a particular issue for them or it could be that no-one’s asking the questions. (Coroner)

There’s a fair few Aboriginal autopsies that we do as well and there’s never any sort of problems getting permission because they don’t have a problem with having an autopsy. There’s never been any protestation. So I don’t really know what all the hoo haa is about. (Pathologist)

Indigenous cultural proscriptions against autopsy are in place to protect the spirit of the deceased, which it is argued would be harmed by a mutilation of the body and thus prevented from entering the dreamtime (Lynch 1999: 72). As Vines (2007: 17) identifies ‘the relationship between Aboriginal people and their dead is one of custodianship. The body should remain whole so that the spirit will have somewhere to go. Autopsy is often seen as desecration and destructive of the spirit’. Unlike the space in which Muslim objections may find themselves – as inherently suspicious – it appears that Indigenous objections are all but invisible in the Queensland coronial system. There may be a number of reasons for this. First, a long and well documented history of poor relations between police and Indigenous people, including ‘volatile conflict’ and ‘police abuse and harassment’, ‘excessive force’ and ‘institutional racism’ (Cuneen 2006), may mean that Indigenous people do not wish to have their cultural identity known to police. Second, given the over-representation of Indigenous people in the criminal justice system – also well documented – it may be that if their cultural identity is known, this is through adverse dealings with police and magistrates. In such a context, Indigenous people may feel powerless to have their objections heard. Unfortunately, and as we have noted elsewhere, such silence and invisibility is in the context of Indigenous over-representation in the coronial system due in part to such factors as endemic violence, poor access to health care, low life expectancies and high rates of chronic disease. Moreover, over-representation is not an issue experienced by either the Muslim or the Jewish community (Carpenter and Tait 2009; Carpenter et al. 2011). Ironically, the silence and invisibility of the Indigenous community occurs against a backdrop of ‘the endemic losses of colonialism and the heightened mortality of ongoing alienation’, and which in other contexts, such as Maori in New Zealand, have been argued to increase rather than decrease the relevance of cultural practices in relation to loss and death (Clarke and McCreanor 2006: 27).
Grief Work

So the short answer is that you can’t be assured that they [the family] understand, you can’t actually have any confidence that people know what they’re even agreeing to. And this is an ethical dilemma we struggle with. (Counsellor)

Most people don’t object. I don’t know ... I suspect part of its due to the blankness of their minds and they just go along with whatever ... Some of them I suspect probably think they’re a bit powerless, you know, they’re unfamiliar with death, they’ve had the police rock up and say this is what’s going to happen. (Pathologist)

... and dealing with people who are suddenly thrust into a grieving process is totally different from dealing with somebody who’s had their house broken into or somebody who was drunk and belligerent. (Police Officer)

I get the feeling that it [the death investigation] is allocated to quite junior officers with little or no training. So I would say no; I would say that I wouldn’t be confident that it was really very carefully investigated. (Coroner)

These statements raise a number of relevant issues in the grief work required of Coronial personnel, which is replicated in the little research there is on families dealings with a coronial death, with most suggesting that coronial processes can cause further trauma to family members already suffering significant grief (Green 1992; Harwood et al. 2002; Biddle 2003; Robb and Sullivan 2004; Clarke and McCreanor 2006; Drayton 2011). While this has been noted in particular during the inquest (Biddle 2003; Green 1992), and in the scandals relating to the retention of organs (Robb and Sullivan 2004; Drayton 2011) and experimentation on bodies (Walker 2001), it is most keenly felt in the commonplace (and legislative necessity) of autopsy, where terms such as ‘mutilation’, ‘desecration’, and ‘barbaric acts’ have been used by families to describe images of the autopsy of their loved one (Robb and Sullivan 2004: 41). It has been argued that this demonstrates ‘a profound connection to the body of the deceased’ by those suffering from grief and loss (Drayton 2011: 231) in part because the dead body maintains a ‘social existence as a powerful representation of the self’ (Hockey 1996: 56) which is not immediately removed at death.

It is also the case that this connection between the bereaved and the body of the deceased is intensified during a coronial death investigation due to the added trauma of the unexpected and often violent nature of the death (Neria and Litz 2004). This is partly because decisions about autopsy occur when families are still in the grip of the shock and disbelief of the death notification, ‘when their ability to process and retain complex information may be severely compromised’ (Drayton 2011: 238). In such conversations, two competing representations of the dead body are evident: the medico-legal body which is ‘mechanistic’, ‘devoid of personality’, ‘tissue’; and the body as ‘beloved and lamented’ (Drayton 2011: 240).

Research has also shown that when cultural difference is added to the medico-legal inquiry, harm and trauma can be exacerbated by the ways in which coronial procedures interrupt culturally specific grieving practices, many of which focus on the presence of a body (Tatz 2005; Byard and Chivell 2005; Clarke and McCreanor 2006). Moreover, while the appearance of police at a death investigation may cause alarm in many families, with the innuendos of guilt and suspicion that they bring, this is particularly pronounced for those communities already over policed and over criminalised, like Aboriginal people in Australia, or Maori in New Zealand (Carpenter and Tait 2010; Clarke and McCreanor 2006; Tatz 2005). In stark contrast, the disruption of religious grieving practices is less researched in the context of a coronial death investigation. Despite this, such practices appear to be more familiar within the coronial
community generally, with religious objections influencing Coroners to make less invasive autopsy decisions (Carpenter et al. 2011). It is also the case, however, that such knowledge does not necessarily decrease feelings of suspicion and heightened trauma of grieving families, especially in Muslim communities, who are more likely to feel positioned as ‘outsiders’ (Yasmeen 2008).

**Therapeutic Jurisprudence**

_and I just think that's so important and I see the fallout of what happens if people aren't heard and you know if someone has a really strong objection because of religion and I can come back and explain why it has to happen regardless of that, they can accept that whereas if they're not heard it's like an assault on their belief. And that's an added trauma to them._ (Counsellor)

_In other words the coroners are really, really, really reluctant to go against a family objection no matter what the basis for it is, no matter what unsupported evidence that they provide._ (Pathologist)

_I really dislike it when coroners lean too much towards taking the religious objections on board, you know, I don't think religious objections should have any part to do with it._ (Police Officer)

_There has to be a bloody good reason to over-ride an objection to autopsy. A really good reason. Usually the only reason is if there's criminal behaviour involved._ (Coroner)

There is clearly a tension, evident in the statements above, between the medico-legal death investigation and the emotion and humanity of the family. It is perhaps not surprising that pathologists stand in opposition to what they perceive as this recent impost on the process of a death investigation – wedded as they are to science as the point of access for the truth of the death (Carpenter and Tait 2010) – and perhaps equally unsurprising that counsellors are able to accommodate and advocate for the family’s place in the investigation of the death of their loved one – positioned as they are ‘in an ethical framework which asserts the centrality of client self-determination’ (Drayton 2011: 238). What may be more curious is the diametrically opposed position of police and Coroners to the introduction of familial beliefs – who are both legal officers of the court and yet who offer either resentment or respect to the idea. While the valorisation of science in modernity may be able to accommodate the police officers views (Carpenter and Tait 2010), the views of the Coroner are of a different nature, recognising ‘the broader social implications of death’ (Scott Bray 2010: 568).

Since all coronial legislation now stresses ‘the rights of the family member to be involved in decisions concerning the deceased’ (Barnes 2003: 1.1), it is increasingly being suggested that a Coroner's work is intimately connected with ‘well being’ and thus fits squarely within the ambit of therapeutic jurisprudence (King 2009). While commentators are quick to point out that therapeutic values should not outweigh procedural fairness requirements (Wexler and Winick 1996; 2003) it is also acknowledged that sensitivity, clear communication, access to counselling and support and opportunities for families to express their distress and grief are crucial to an acknowledgement of their loss and the humanity of their loved one (Freckleton 2007). While we have argued elsewhere (Carpenter and Tait 2010) that the central debate within the coronial jurisdiction is between the pillars of law and medicine, it also seems likely that the bereaved views in relation to autopsy introduce a third discourse into the debate – ‘knowledge born of emotional attachment’ or ‘suffering’ (Drayton 2011: 236). Moreover this discourse of loss and bereavement has been shown to be particularly potent, motivating governments to instigate
public inquiries, and support changes in policy, practice and legislation (Drayton 2011: 236, see for example Walker 2001; Redfern 2001). It also appears to be influencing Coronal practice.

Conclusion

The introduction of bereaved families’ views into the medico-legal death investigation has added three central tensions to the process. The first is the different spaces occupied by the families, depending on their cultural or religious location in larger social and historical processes. It is clear that wider fears over Islamic fundamentalism post 9/11 has influenced suspicion in the minds of some coronial personnel, while Jewish political and social influence has been used to advocate more successfully for bereaved families. The silence and invisibility of Indigenous beliefs and concerns speaks to their ambiguous position in a coronial investigation often overseen by personnel who also act in the criminal justice space.

Second, these conflicting and contradictory engagements with bereaved families who have legitimate reasons for objecting to an autopsy is compounded by the nature of a reportable death – unexpected and often violent – and the ways in which coronial procedures disrupt traditional grieving practices. Specifically, it is the differing ways in which the dead body is perceived – corpse or beloved – and its forced removal for the purpose of the medico-legal process of death investigation that is most often cited as the cause of suffering and pain for the family. This is compounded by the role of police in the investigation of coronial deaths, which has been highlighted as particularly traumatic for those families who are part of communities already over-policed and over-criminalised.

Finally, the differences between coronial personnel’s attitudes to the role and place of families suffering through a medico-legal investigation, has indicated the importance placed by Coroners on the relation between their role in the prevention of avoidable deaths and the therapeutic potential of a death investigation for families. As the primary decision makers in a coronial death investigation, this convergence has the potential to undermine more traditional knowledges like science and medicine as the final arbiters in a death investigation. CSI not withstanding it appears that a discourse of emotion and suffering may be on the verge of entering the medico-legal space of a coronial investigation.

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Re-Imagining Youth Justice

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Conference Sub-theme: Policing, Security and Democratic Freedoms

Abstract
Persistent high levels of recidivism among young offenders (Luke and Lind 2002; Weatherburn et al. 2012) and the over-representation of Indigenous young people (Cunneen and White 2011; Snowball 2008; Tauri 2012) have long been features of youth justice in Australia. Other problems – such as the increased rates of young people committing sex offences (Dwyer 2011; O’Brien 2010), increasing numbers of young people criminalised for new offences such as ‘sexting’ (Lee and McGovern 2013), and increasing numbers of young female offenders being drawn into youth justice systems (Carrington 2006; Carrington and Pereira 2009) – have emerged more recently. In this paper, we draw on the concept of ‘imaginary penalties’ (Carlen 2010) to argue these chronic problems are partly informed by ‘imaginary’ understandings of how and why young people (re)offend; reflect ‘imaginary’ understandings of what works to address young people’s (re)offending; and reflect ‘imaginary’ ideals about the primary purposes of the youth justice system. We acknowledge up front that answers to these questions require a great deal of new empirical research. This paper is only a beginning that sets out exactly what such an ambitious project might look like.

Youth Justice Systems in Crisis
Recently described as ‘in crisis’ (The Australian, 9/01/13 p. 1), Australian youth justice systems have undergone little systemic change since the separation of children’s from adult courts at the beginning of the 20th century, and the subsequent removal of welfare offences in the 1980s (Carrington and Pereira 2009). Yet much has changed over the last century that shapes contemporary problems of youth offending and contemporary responses. Australia has eight jurisdictions, each with its own youth justice system, legislation, policy frameworks and statutory youth justice agency, operating within a national policy framework that includes strategic frameworks such as the National Youth Policing Model (Attorney-General’s Department 2010) and the National Youth Justice Framework (Australasian Juvenile Justice Administrators (AJJA) forthcoming). There are stark discrepancies in youth justice outcomes across Australia in rates of Indigenous over-representation, in the efficacy of interventions, in the age and sex of youth offenders involved in the system, and in rates of recidivism. For example, while Indigenous young people are overrepresented in youth detention in every jurisdiction, this varies from three times the rate of non-Indigenous young people in Tasmania to 69 times in Western Australia (Richards 2011). Moreover, policies such as diversionary measures produce highly varied results across jurisdictions. While youth justice conferencing has been legislated in every jurisdiction, the proportion of young offenders referred by police to a conference varies substantially across jurisdictions, from 2% of young offenders in the ACT to 25% in the Northern Territory (Richards 2010). Such markedly different outcomes require
investigation if we are to better understand why certain approaches are working well in some jurisdictions and seemingly not in others.

While much new research is required to undertake such an ambitious project, in this paper we simply provide an outline of the kind of research questions such a project might entail. Key questions include:

- To what extent are youth justice interventions achieving crime prevention, reducing recidivism, empowering practitioners to help develop the capacities required for young people to function adequately and responsibly in their communities, and enabling young people to make good judgments?
- What does effective policy and practice look like as opposed to how it is imagined?

Framing the Analysis

Our analysis is framed by a range of criminological and sociological theories of crime, ‘race’, youth and gender. It draws upon these theories to explain both how certain social factors predispose some marginalised young people towards criminalisation (Carrington and Pereira 2009) and how we develop and use ‘fictions’ of ‘criminals’, ‘justice’, and ‘young offenders’ as if they are real even when they have little bearing on the real (Carlen 2008; Vaihinger 1935). The concept of ‘imaginary penalties’ will also be used to frame our analysis. This refers to penal policies and practices that are unrealisable, yet those authorised to develop and implement them act ‘as if’ they are effective (Carlen 2008; Vaihinger 1935). As a result, a process of ‘institutional goal adaptation’ occurs, whereby the unrealisable goals that form the officially-recognised rationale for a criminal justice policy or practice are replaced with aims that are easier to achieve (Carlen 2008). Acting ‘as if’ policy works when it doesn’t is a phenomenon evident in many other domains from child protection to national and international economics (Argyris and Schön 1974; Heffernan 2011). A number of world-views referred to as neo-liberal penal regimes also underpin ‘imaginary penalties’ of this kind. These include perhaps most significantly, the institution of new modes of governance of crime through the paradigm of risk (O’Malley 2010). In what follows we consider four problems that underscore the crisis in youth justice and raise questions about how much this crisis is the product of imaginary young offenders and imaginary penalties.

Problem 1: Why do young people continue to reoffend despite youth justice interventions aimed at deterring reoffending?

Research consistently demonstrates that a small ‘core’ of young people is responsible for a disproportionate amount of crime, and that these young people repeatedly come into contact with youth justice systems (Hua et al. 2006; Weatherburn et al. 2012). While most young people who offend do not have contact with the justice system, more than half of those who proceed to a caution, conference or the children’s court do have further contact, and those who reoffend are, on average, prolific offenders (Weatherburn et al. 2012). Why do a small proportion of young offenders reoffend repeatedly, despite interventions aimed at preventing their offending? What role, if any, is played by youth justice systems in producing this effect by basing interventions on imagined constructs of young offenders?

Critical questions about the nature of young people’s recidivism therefore need to be addressed in any re-imagining of youth justice in the 21st century. Specifically these include an examination of the extent to which ‘imaginary penalties’ target ‘imaginary offenders’ (Carlen 2008). For example, restorative justice measures are premised on an ‘imaginary’ young person who is emotionally intelligent and articulate (Roche 2004), despite evidence that many young offenders do not have the cognitive and/or communication skills required to adequately comprehend the ‘rules of the game’ and engage in such processes (Shapiro 1999). Some of the critical questions that require further research if effective positive policy responses are to be
developed to meaningfully address problems of recidivism therefore include: To what extent are youth justice policies and programs premised on an 'imaginary' young offender who will desist from offending after contact with one of these interventions? To what extent do youth justice policies and programs 'imagine' a young offender who easily desists, rather than the persistent young offender who comprises the bulk of youth justice agencies' caseloads? Currently, program and policy responses to youth offending tend instead to exclude recidivists, leaving detention and now boot camps, as the only resort.

Problem 2: Why do Indigenous young people continue to be over-represented in Australia's youth justice systems, despite policies designed to address this?

Statistics reveal high levels of over-representation of Indigenous young people at all stages of the youth justice system, and particularly at the most severe end of the system, with Indigenous young people being 24 times as likely as non-Indigenous young people to be in detention (Australian Institute of Health and Welfare (AIHW) 2012). While the over-representation of Indigenous young people has increased steadily over the last two decades, this increase has been found to be primarily the result of decreasing rates of non-Indigenous young people in detention (Richards 2011).

This raises a critical question around why youth justice interventions have to some extent been successful in reducing the incarceration of non-Indigenous young people but have failed for Indigenous young people (Cunneen 2008). Moreover why have even those interventions designed specifically for Indigenous young people not been successful? We think that imaginary constructs of young offenders, based on Anglophone norms, are part of this problem. For example, why is it the case that most youth justice policies and programs 'imagine' an abstracted Anglo-Saxon offender (see Tauri 2012), and/or that the positivistic 'what works' approach to measuring program outcomes is Anglocentric? To what extent are youth justice policies and programs designed for non-Indigenous young people, despite the fact that nationally, half of all young people in detention are Indigenous? While we know and have known for two decades that Indigenous young people are over-represented in Australian youth justice systems, how and why their over-representation persists is yet to be fully understood and articulated, particularly from the perspective of Indigenous young people themselves.

Problem 3: Why are rates of young people convicted of sexual offences rising?

In recent years, the number of young people entering the youth justice system in relation to sexual and related offences has increased (O'Brien 2010). Youth justice stakeholders consulted during the development of the National Youth Justice Framework have expressed concern about this issue, as well as their lack of capacity to address it (see AJJA forthcoming). There has also been a decrease in the age of young people committing sexual offences and an increase in sexual offending by and against Indigenous young people (Dwyer 2011; O'Brien 2010). The criminalisation of teen sexting has created a new crime where young people's voices are largely silenced in the public and political debate about the harm or innocuousness of such antics (Lee et al. 2013). This criminalisation of adolescent sexting has occurred in the perverse context where adult sexting is a legitimate and legal adult activity (Lee et al. 2013). This is a classic example of how an imaginary young offender is created through social reaction and then how law creates deviance in its own image. This all begs the larger question of to what extent do rising rates of sexual offences reflect changes in young people's conduct or changes in the regulation of young people's sexual behaviours, as in the case of sexting, or changes to definitions of sex offences? To what extent are young people unwittingly criminalised in the justice system as a result of responses to sexual offending designed for adult offenders? Moreover, what interventions might better address young people’s sexual offending, much of which passes undetected and unregulated as it does in the adult population. There is a disjuncture between the 'imaginary' sex offender upon which many policies and programs are
based, and the experiences of young people who come into contact with the criminal justice system for sexual offences.

**Problem 4: Why are rates of young women drawn into the youth justice system rising?**

While males still dominate crime statistics as offenders and prisoners, a body of international and national trend data points to consistent narrowing of the gender gap for officially reported crime and violence for countries like the United States (US), Canada, the United Kingdom, and Australia (Arnull and Eagle 2009; US Department of Justice 2011;). In Australia, boys still far outnumber girls among those drawn into the youth justice system, but from 1960 to 2007 the gender gap narrowed significantly from around one in thirteen to around one in four females to males (Carrington and Pereira 2009). During this timeframe there were dramatic increases in the proportion of young women appearing before the courts charged with violence-related offences, more so over the last decade. Recently the New South Wales Bureau of Crime Statistics and Research released an analysis of increases in female offending based on police statistics of persons of interest for a 10-year period ending in June 2009. The study reports that the number of females who came to police attention over that period ‘increased by 15%, whereas the number of males remained stable’ (Holmes 2010: 2).

Explanations for the rising rates of female violence are under-researched, remain highly contentious, and raise a number of questions (Alder and Worrall 2004; Carrington and Pereira 2009). There is ongoing debate about whether statistical increases in female offences are generated by less serious offences being brought into the system or by decreases in male offending behaviour, or whether young women really are becoming more violent (Acoca 2004; Alder and Worrall 2004; Arnull and Eagle 2009; Brown, Chesney-Lind and Stein 2007; Carrington 2006; Muncer and Campbell 2001). Are these patterns the product of new forms of social control, scrutiny, and governance, changing methods of recording and reporting information, changes in styles of policing and policy, or changes in attitudes to female offending? Certainly the idea of the new female violent offender captivates the public imagination and is partly an effect of moral panics and attention-grabbing media shock jocks. One argument is that young women are not becoming more violent, but rather social and regulatory responses to their violent behaviour are changing, leading to a net-widening of offences defined as violent (Alder and Worrall 2004; Chesney-Lind and Shelden 2004; Steffensmeier et al. 2005).

We are interested in how the ‘imaginary’ constructs of (male) young offenders that underpin many youth justice programs and systems marginalise and fail young women. To what extent do criminal justice personnel act ‘as if’ youth justice approaches designed for young males should just work for young females, and what are the consequences of this? Significantly, the voices of young women themselves are largely absent from studies of youth justice. There is a need for research and policy responses that take account of the experiences of young women who have been in contact with the justice system to test the ‘imagined’ category of the youth offender. Other areas in dire need of more empirical research include:

- whether increases in girls’ violence reflect changes in the regulation and policing of girls’ behaviour, or changes in patterns of girls’ offending;
- whether rises in girls’ violence are linked to new cultural practices in new digital spaces like cyberspace, Facebook, and online social networking; and
- what can be done to address the rises in young female offending, given the imagined youth offender is usually ‘male’?

**Conclusion**

Youth justice systems in Australia appear to be affected by a growing gap between the ‘imagined’ way youth justice is conceptualised by policy-makers, practitioners and media workers, and the ways it actually operates. For example, while the principle of detention as a
last resort for young people is a principle espoused by a number of international conventions to which Australia is a signatory, and is a feature of every jurisdiction’s youth justice legislation, the number of young people actually in detention has increased substantially over the last decade (AIHW 2012). Some jurisdictions are placing more young people on custodial remand, despite evidence that detention for young people is criminogenic (see Richards and Renshaw forthcoming). Another critical ‘gap’ characterising youth justice systems across Australia has opened up between what the evidence tells us about effective interventions with young offenders, and certain legislative reforms. For example, the Queensland Government has recently introduced legislative amendments that will limit the use of youth justice conferences, despite evidence about their efficacy (Luke and Lind 2002), replacing them with boot camps (see Richards et al. 2013). These features of contemporary youth justice in Australia clearly illustrate the absence of an overriding coherent purpose and rationale that work to inform policy and practice. Rather what we have is a patchwork of diverse (sometimes competing and contradictory) rationales, discourses, policies and practices. It is timely to systematically investigate the rationale and effectiveness of Australia’s youth justice policies, and to re-imagine how in an ideal democratic world, youth justice actually delivers justice, rather than just imagining so.

References


Richards K et al. (forthcoming) *Putting the Boot into Boot Camps*. Paper presented at Queensland University of Technology’s Crime, justice and social democracy conference, July 2013.


Abstract
The current discourse surrounding victims of online fraud is heavily premised on an individual notion of greed. The strength of this discourse permeates the thinking of those who have not experienced this type of crime, as well as victims themselves. The current discourse also manifests itself in theories of victim precipitation, which again assigns the locus of blame to individuals for their actions in an offence. While these typologies and categorisations of victims have been critiqued as ‘victim blaming’ in other fields, this has not occurred with regard to online fraud victims, where victim-focused ideas of responsibility for the offence continue to dominate. This paper illustrates the nature and extent of the greed discourse and argues that it forms part of a wider construction of online fraud that sees responsibility for victimisation lie with the victims themselves and their actions. It argues that the current discourse does not take into account the level of deception and the targeting of vulnerability that is employed by the offender in perpetrating this type of crime. It concludes by advocating the need to further examine and challenge this discourse, especially with regard to its potential impact for victim’s access to support services and the wider criminal justice system.

Introduction
Compared to criminology, victimology is young, emerging at the end of world war two (Fattah 2000:18). Early explanations and typologies of victimisation were derived from positivism, which focused on individual notions of responsibility (Dignan 2005: 32; Walklate 2012: 174). Early victimisation theories argued that the behaviour and characteristics of victims contributed to their victimisation (Wilcox 2010: 983). While many researchers challenged the validity of these assumptions, victim blaming was strong and has had an enduring and damaging effect on victimology (Rock 2007: 42).

This paper focuses on victims of online fraud. The elements of online fraud are discussed with relevance to how victims are constructed by society and themselves. The current discourse surrounding online fraud victimisation is presented, using excerpts from interviews undertaken with 85 seniors (aged 50 years or older) who had received a fraudulent email request for money, personal details or passwords. The analysis will demonstrate that greed is internalised by the victims as a discourse about others rather than themselves. Such a perception is premised upon a societal understanding that attributes responsibility to victims for their own circumstances.

It is argued that despite criticisms leveled at typologies which seek to blame the victim in other fields, current discourses that surround online fraud victimisation are inherently premised on individual notions of blame and guilt. The strength of these assertions regarding the individual’s role and level of responsibility in their victimisation transcends those who have not responded to a fraudulent email as well as those who have.
Overall, this paper establishes the dominance of positivist theories underpinning current discourses surrounding online fraud victims. This is argued to lead to potentially devastating consequences, in that it fails to acknowledge the legitimacy of these individuals as victims, as well as to recognise ability of the offender to manipulate victims to elicit compliance (Drew and Cross forthcoming). It presents two cases which serve to rebuke the perceived greed of victims in responding to fraudulent requests. This paper concludes by asserting the need to examine the greed discourse in terms of its consequences for online fraud victims to access support services and the broader criminal justice system.

**Early Explanations of Victimisation**

In 1940, Benjamin Mendelsohn coined the term ‘victimology’, arguing that a new field should be dedicated to the study of victims (Burgess, Regehr and Roberts 2013: 76). All early victimological theories were based on acts of physical violence, such as homicide and rape. Mendelsohn proposed six distinct types of victims, from those who are completely innocent, with minor guilt and responsibility from their own ignorance, those who are as guilty as the offender and share equal responsibility, those who are slightly guiltier than the offender (in terms of provocation), those who are exclusively responsible for their victimisation, and lastly, imaginary victims, who suffer no actual harm but falsely accuse another party (Burgess et al. 2013: 77). This classification was primarily based on the attribution of guilt since ‘the ascription of guilt... tends to destroy victim status’ (Strobl 2010: 9). Later classifications of victims resemble this original typology, with Fattah proposing five categories of victims, including the nonparticipating victim, the predisposed victim, the provocative victim, the precipitating victim and the false victim (Burgess et al. 2013: 76). Both of these classifications focus their attention on the guilt and responsibility of the victim.

Hans von Hentig advocated a categorisation that focused on the victim-offender relationship (Dignan 2005: 32). He proposed thirteen distinct categories of victims, based on the degree of culpability exhibited by the victim (Dignan 2005: 32). Following this, Stephen Schaefer proposed seven categories of victims, being unrelated victims, provocative victims, precipitative victims, biologically weak victims, socially weak victims, self victimising victims and political victims (Burgess et al. 2013: 80). Schaefer’s typology draws attention to the notion of victim precipitation, which attributes a level of blame to the victim for their victimisation and therefore implies that victims can take actions to prevent their victimisation. It is evident that early victimisation theory focused heavily on the level of guilt and responsibility borne by victims in contributing to their victimisation. Each typology can be viewed as a continuum of blame, from the completely innocent to the fully culpable. However these typologies did not just ascribe blame to individuals who were seen to incite or provoke their victimisation, but also incorporated those who had become victims through unintentional actions of ‘carelessness, helplessness, negligence or poor judgment’ (Cook 2010: 970). Collectively, these typologies reinforced the perception that victims should be able to avoid victimisation, through modifying and regulating their own actions and interactions with potential offenders.

**The Current Study**

In order to substantiate this argument, the following analysis is based upon excerpts taken from interviews conducted with 85 seniors (aged 50 years or older) across Queensland, who had received a fraudulent email request for money, personal details or passwords. Semi-structured interviews were held with non-respondents (those who had received the fraudulent request and not responded) and respondents (those who responded in some way to the fraudulent request). This includes a number of individuals who incurred financial losses up to several hundred thousand dollars.
The remainder of the paper presents excerpts from these interviews\(^2\) to illustrate the prevalence of a discourse founded on victim typologies which ascribe blame and guilt to the victim for their actions. The existence of this discourse manifests itself through the construction of online fraud victims as motivated by greed. This is an individualistic characteristic, which leads to attributing blame and responsibility to the victim on the basis that if they were not greedy in the first place, they would not respond and become victims. It is derived from positivist thinking, which seeks to find causal explanations for both victimising and offending behaviours. The paper also demonstrates that greed is internalised by victims, however this is directed at other victims of online fraud and allows them to disassociate themselves from the negativity that such a discourse generates. Lastly, it presents evidence that opposes the perceived greed of victims, and seeks to highlight the complex reality of fraudulent approaches.

**Understanding Online Fraud Victimisation**

Online fraud can be defined as ‘any type of fraud scheme that uses email, web sites, chat rooms or message boards to present fraudulent solicitations to prospective victims, to conduct fraudulent transactions or to transmit the proceeds of fraud to financial institutions or to others connected with the scheme’ (Australian Federal Police 2012). While fraud is not new, the internet has facilitated an increase in the accessibility of potential victims. While there are an infinite number of possible fraudulent approaches (Cross 2012), the current study focused on advanced fee fraud (where a victim is asked to send a small amount of money with the promise of receiving a larger amount of money in the future) (Ross and Smith 2011: 1); phishing emails (where a victim receives an email from a legitimate institution asking for confirmation of personal details) (Choo 2011: 3); and romance fraud (where a victim is defrauded in what they believe to be a legitimate relationship) (Rege 2009: 497). Participants were asked why they responded to a fraudulent email request (where relevant) and their perceptions of why other people responded such requests.

The key element to any fraud offence is deception. Victims are presented with a situation they feel is plausible, based on the offender’s skillful manipulation of an individual weakness or vulnerability (Drew and Cross forthcoming). While the situation may seem obviously false by an outsider (such as family, friend or police officer), the victim believes in the legitimacy of their situation. Importantly, once trust and rapport is developed between the victim and the offender and a relationship is established (romantic or otherwise), the offender can successfully elicit compliance from the victim to their requests for money, personal details or passwords (Drew and Cross forthcoming). Therefore, it is not unusual for victims to carry out multiple money transfers over a period of time (weeks, months, or even years) before they either run out of money or come to realise that they have been defrauded. Although these victims willingly send money to their offender, it is essential to note that they do it under false pretenses and the level of deception perpetrated against them can be highly sophisticated and complex.

**Internalising the Social Construction of Greed**

It is evident that the notion of attributing responsibility to victims of online fraud and blaming them for their victimisation is a dominant discourse. This is primarily demonstrated through an overriding belief in the greed of online fraud victims. It is the most dominant explanation offered by non-respondent participants as to why individuals respond to fraudulent emails:

> The Nigerian scams, I mean the structure of the messages you know are clearly absurd, I’ve heard people say especially the police it’s just pure greed that draws them in and I would imagine it is just pure greed ... (Elliott, non-respondent, 72 years)
There is that incredible sense of greed that we all have when we think we can get something for nothing ... (Vince, non-respondent, 58 years)

Apart from my first thought that you have got to be a bloody idiot, all they can see is money. A quick way of getting money and all they can see if I do this I will get money and nobody will know about it. (Roberta, non-respondent, 69 years)

These comments from non-respondents indicate the idea that greed is the driving force behind a person’s decision to respond to a fraudulent email. It justifies an overriding focus on the individual actions of the email recipient and insinuates individual notions of blame towards the respondent. This is abundantly clear in the following comment from Russell:

Nobody’s making you do it are they. Nobody is holding a gun to your head saying you’ve got to do this. No it’s irresponsible, they thought it through, they must be thinking they are getting something for nothing. Could be the old greed thing, I don’t know. Everybody wants to win the lotto. (Russell, non-respondent, 66 years)

This comment explicitly articulates the view that responding to fraudulent emails is a choice people make that is motivated by greed. However, it was not just non-respondents who expressed greed as the prime reason for responding. Nicholas and Cynthia also cited greed as a factor, despite both of them having responded to fraudulent email requests with personal information:

Greed, opportunists but I think something for nothing sort of thing, they still believe in the free lunch or whatever it is, that we've been told does not exist. Is it greed, well maybe that’s a bit harsh, I think people get involved to see if there's really something in it for them ... Yeah I think that [it is] greed and I think people perhaps go down those paths, thinking that they're going to get all that money... (Nicholas, respondent, 62 years)

They are greedy. They are out for money that they don’t earn, they didn't earn. The money that they shouldn’t claim and really if they respond to them, they are being dishonest. (Cynthia, respondent, 65 years)

The above excerpts illustrate that although Nicholas and Cynthia hold strong views about the greed of those who respond to fraudulent emails, it did not stop them from participating in the process themselves. While neither Nicholas nor Cynthia sent money, they both sent personal information waiting to see how long until they were asked for money. While neither indicated a preparedness to send money, they were both willing to communicate with the offender until a request arrived, and would arguably have kept the money if it had come through as promised. This also illustrates the dilemma that exists whereby both Nicholas and Cynthia believe in the greed of other victims, but do not perceive their own actions in the same way. While they construct other respondents to be greedy, they disassociate themselves from the same discourse.

The existence of victim blaming beliefs related to individuals who respond to fraudulent emails is clearly prevalent. Participants in the current research project put forward a very compelling argument to support online fraud victims as greedy and therefore attribute blame and responsibility to them for their victimisation. Even victims themselves hold these same negative beliefs towards themselves and others. This is evident in the following example from Patrick, who was involved in an inheritance fraud, and flew to Europe to collect his money, jeopardising his safety and suffering financial losses through his travel:
In the back of your mind is probably that bit of extra money, that dollars and cents. We are ruled by the dollars and cents in the world and you know yourself if you haven’t got money, or you are out of work, no one wants to know you … But down the road we are only human beings and we think, yeah, righto, we are going to get a bit out of it and in the meantime we get burnt trying to get that extra dollar that we think we can. That’s why we go and buy lotto tickets … that bit of greed we get, and it depends how much [we] hunger for it and if you don’t look at the dollars and cents behind yourself, you are just gone. (Patrick, 61 years, respondent)

Patrick’s explanation demonstrates the existence of the greed discourse, albeit in a weaker sense compared to the comments by non-respondents. In contrast, the comments of Hazel, who lost several hundred thousand dollars through an investment fraud, indicate a very strong belief in the greed of respondents (herself included):

I think it is greed. I really think it is greed… It is absolute greed. And even to get a million dollars is not easy out here unless you win lotto so you are driven by greed. And anyone who says anything else is a liar. You just think oh no, it will work out. All along, because you are told the money will go in your account, you think they can’t dud you because the money has got to go in your account. But they do dud you because the money never gets into your account. (Hazel, respondent, 64 years)

Rather than her own experience mitigating or softening her views, Hazel provides evidence of the same discourse that exists amongst those who have not responded to fraudulent emails. In combination, each of these excerpts of respondents and non-respondents demonstrate the prevalence of greed as the explanation as to why people respond to fraudulent emails. This dominant discourse of greed can be seen as part of the wider discourse of victim blaming, which attributes guilt to victims for their actions and therefore holds them varyingly responsible for the negative consequences that arise.

However, not all victims believe themselves to be greedy or subscribe to the dominant discourse. Martha, who was involved in an inheritance fraud and lost over $50,000 across a six year period, introduces a different aspect to the greed discourse, implying that losing some money to access a larger amount is part of the process:

**Interviewer:** There are others as well who have said that responding to these types of emails, you are trying to get something for nothing, so to speak, despite the fact that you have sent a lot of money, how would you respond to that type of statement?

**Martha:** Getting something for nothing? No one can get something for nothing. I mean anyone has to pay for something. You can’t get something for nothing. You have to pay. You order something over the internet and you have to pay for it. It is the same type of thing. You are getting all this money so you have to pay for all the certificates and everything. I mean if I ordered another birth certificate over the internet I still have to pay for it. (Martha, respondent, 63 years)

Martha clearly refutes the argument that victims expect to get something for nothing and she denies greed as a reason why she responded. When she was informed of being a beneficiary to a large inheritance, she expected that she would need to pay costs and this was how she was defrauded. While this does not displace the greed discourse in its entirety, it may explain why some victims continue to send money over a sustained period of time.
Beyond Greed: The Reality of Victimisation

It is evident that greed is the dominant discourse surrounding online fraud victimisation, expressed by both respondents and non-respondents alike. However, despite the dominance of this rhetoric, the reality of victimisation detailed by victims of online fraud, presents no evidence to substantiate these claims of greed. Rather, the narratives provided by victims on how they became involved in fraud, illustrate the complexity by which offenders target victims and manipulate their weaknesses and vulnerabilities to increase the likelihood of a positive response.

For example, Hazel clearly articulated her belief in the greed of online fraud victims. However her circumstances do not fit with this discourse. Hazel was the owner of a small business with an online presence. She received an email to her business account asking her to tender for a contract, an accepted practice in her industry. She was awarded the contract and this was the entry point to her victimisation experience. The contract Hazel won concerned the construction of an orphanage in Africa and appealed to her long-held desire to help children in need. This is evident in the following excerpt as she reflects on how she became involved:

Interviewer: Do you think there is anything that could have stopped you back at the beginning from getting involved in this experience?

Hazel: I think the way that they came at it, mainly because I was so keen to go to Africa and work with the kids. And [offender] was keen to set up a, like an orphanage thing for children, so he got to me that way, you know he was clever. He was clever. That is probably what got me involved. (Hazel, respondent, 64 years)

Despite Hazel proclaiming the greed of all online fraud victims, this comment clearly indicates her involvement was initiated through a desire to help children in Africa rather than a self-centred desire to make money. The ability of the offender to target Hazel’s aspiration to help African children increased the likelihood of Hazel responding to the initial request and can be understood as the driving force behind her sustained involvement. It is not known if the offender knew this prior to contacting Hazel, or whether this was an educated move based on the generosity of many Australians to assist African orphans.

A similar situation exists for Frank. Frank had recently lost his wife to a brain hemorrhage. He had started using various social networking websites to chat to women across the globe and in particular, started communicating with a woman in Ghana. During their conversations, Frank had shared details about himself and more importantly, details about his wife's death. After a few months, Frank received a request for money from the brother of the woman he had been communicating with, after being advised she had been in a car crash and was suffering from the same illness that had taken his wife:

... Then her brother calls me, sends me an email under her name and said she got hit by a car, her brain's bleeding anyway, I just lost my wife with a brain hemorrhage, and they wanted $1000 for the doctor to operate, they won't do anything unless you pay, so I sent them $1000 [or] $1200, then it started ... (Frank, respondent, 73 years)

Frank was suspicious of the situation presented to him, but was willing to send the money on the off chance that the situation was legitimate and that this woman was sick. He had also been in phone contact with the alleged doctor who was treating her, which added to the plausibility of the situation:

... She got hit by this car ... I phoned the doctor and everything I phoned the doctor because I want to know. My wife had died from a brain hemorrhage you know and
I’d spent two one hour sessions, probably a long time with two different neurosurgeons down there I wanted to give them my brain. [I said to them] why don’t you try this and [this], and as it turned out a lot of the things I suggested had been tried and don’t work. She’d had a massive internal bleed in the brain, you could see the scan it was just black... the doctor said if it’s on the perimeter on the edge of the brain, yeah they can drain the pressure off and fix it up and I thought you know, and that’s how they got me with her. $1000 wasn’t much, but I didn’t really believe it but I said maybe if it is going to happen and she is going to die I said for a thousand dollars they can have it you know ... (Frank, respondent, 73 years)

Frank’s situation illustrates the insidious way that offenders will manipulate a person’s emotions and circumstances to obtain financial benefits. It demonstrates the way that Frank was presented with a situation that involved multiple actors (the woman, her brother and the doctor) in order to increase the likelihood that he would consent to the request for money. The use of the same illness that had claimed his wife also reinforces the ways that offenders will specifically target victims to gain compliance to financial requests.

Most importantly it demonstrates that the discourse of greed applied to victims, such as Hazel and Frank, does not fit with the actual reasons why these people became victims of online fraud. It shows a clear disjuncture between the perception that all victims are greedy and the reality whereby victims are targeted implicitly (such as Hazel through her wish to help African orphans) or explicitly (such as Frank, whereby his wife’s death was used as a means to manipulate and cloud his judgment) to send money to overseas offenders. It demonstrates the complexity and high level of sophistication that characterise many fraudulent approaches and the difficulties that victims have in identifying them as fraud. It clearly does not provide evidence to substantiate the perceived greed of victims, rather it shows how victims were led to believe in the legitimacy of their respective situations.

Conclusion

The above excerpts have clearly articulated the negativity currently associated with online fraud victimisation, one that firmly holds victims responsible for their own victimisation, through their decision to respond to a fraudulent email out of perceived greed. As mentioned earlier, the simplicity of this explanation fails to acknowledge many factors, including the ability of the offender to skillfully manipulate and exploit victim weaknesses and vulnerabilities and the dynamics of the relationship between the two (Drew and Cross forthcoming). While victim typologies which assign guilt and responsibility to the victim have sustained criticism for victim blaming in other fields (such as sexual assault and rape), this has not occurred for victims of online fraud. Rather, the dominance of a discourse that places victims of online fraud firmly responsible for the consequences of their actions includes individuals who have not responded to fraudulent email requests as well as those who have. The influence of this positivist paradigm is dominant in the ways in which online fraud victims are constructed by themselves and others. This paper also provided evidence that the internalisation of greed by victims as a discourse to explain other’s victimisation is not always internalised by themselves. Lastly, through the examples of Hazel and Frank, it has been argued that there is a disjuncture between the perceived greed of victims and the reality of how individuals become victims of online fraud. These are only two of the many victim stories which conflict with the dominant greed discourse perpetuated by both victims and non-victims alike. Further work needs to be done to document the reality of online fraud victimisation experiences against this discourse.

In addition, the presence of this discourse is likely to have significant consequences on victims of online fraud, in terms of their ability to access support services and the criminal justice system more broadly, given their lack of recognition as legitimate victims. Further analysis is required on the impact of current discourses about online fraud victims, (similar to what has
been achieved in other fields such as domestic violence, rape and sexual assault), with a view to challenging the victim focused explanations and instead, providing an account of this crime which adequately recognises the reality of the situation.

1 This research was undertaken while the author was employed with the Queensland Police Service. Appropriate permissions have been granted to use these data and present these research findings. The author gratefully acknowledges the support of the Queensland Police Service: however, the views expressed in this paper are purely those of the author and do not necessarily reflect those of the Queensland Police Service. All errors and omissions are solely the responsibility of the author.

2 It is important to note that pseudonyms have been used in the analysis to maintain the confidentiality of all participants.

References


The Law and Politics of Trial by Jury in Australian Counter-Terrorism

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Conference Sub-theme: Courts, Law and Justice Institutions

Abstract
Throughout the common law world trial by jury has achieved a totemic position. Interference with the right to jury trial is characterised as a deviation from the norm. However, trial by jury is consistently undermined and rolled back particularly in the context of organised crime and terrorism: Ireland, New Zealand, the UK and the United States have all adopted measures curtailing trial by jury in these contexts. In contrast the rhetorical support for jury trial in Australia is matched by an apparent unwillingness to interfere with the right to jury trial. This paper will argue that its resilience here is dependent on the extent of its political and cultural capital. The Australian counter-terrorism experience provides evidence in support of this contention.

Introduction
Historically seen as the 'bulwark of liberty' (Cornish 1968: 126) and the 'lamp that shows that freedom lives' (Devlin 1966: 164) the jury has achieved a totemic position throughout the common law world. However, trial by jury is consistently undermined and rolled back particularly in the context of organised crime and terrorism: Ireland, New Zealand, the UK and the United States have all adopted measures curtailing trial by jury in these contexts (Darbyshire 1991; Davis 2012; Donohue 2007). This paper will build on previous work by the author examining the role of the jury in the counter-terrorism context (Davis 2013). It will contrast the willingness of other jurisdictions to limit trial by jury in the terrorism context with the apparent reluctance of Australian policy makers to countenance any such suggestion.

The paper will begin by outlining the role of jury trial in the counter-terrorism context. It will then briefly examine the international experience. The paper will consider what, if any, underlying justifications for abandoning trial by jury in the counter-terrorism context have emerged elsewhere. It should then be possible to contrast the international practice with Australian experience. If, as is hypothesised the Australian experience is different consideration will be given as to why that might be the case. Finally, some conclusions will be drawn.

The Role of Trial by Jury
There are at least two ways of thinking about trial by jury. Traditionally, trial by jury has been closely associated with the right of the accused to a fair trial. As was noted in the introduction, Blackstone portrayed the jury as the 'bulwark of liberty' (Cornish 1968: 126). The US Supreme Court developed that view emphasising the role of the jury in fairly determining guilt or innocence. They stated that:

We do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections. We only say that it is the best protection for innocence and the surest mode of punishing guilt that has yet been discovered. (Ex parte Milligan 71 US 2, 65 (1866))
Thus the justification for maintaining trial by jury is that it is the best available means of ensuring a fair trial. Ironically, characterising the jury in this light might actually facilitate its removal – as will be considered in the next section.

An alternate approach, to casting jury trial as a mechanism for securing a fair trial, is to see the jury as an institution of our democracy. There is nothing innovative in such an approach. In the American Federalist debates ‘the question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights ... but whether it would fatally weaken the role of the people in the administration of government’ (Amar 1991: 1187). Alexis de Tocqueville argued that the jury was a ‘predominately republican institution’ which ‘entrusts the actual control of society into the hands of the ruled ... rather than into those of the rulers’ (de Tocqueville 2003: 317-18). And, as we shall see, Governor Macquarie and the Australian emancipists saw trial by jury as a means of integrating former convicts into free society (Bennett 1959-61: 465).

More recently, proponents of deliberative democracy have stressed the important contribution of the jury as means of involving the citizen in civil society:

> Members of a democratic society need to connect not just with each other but also with the state in ways that are inspiring, empowering, educational, and habit forming ... This perspective provides a new appreciation of the unique position of the jury through which a state institution brings private citizens together to deliberate on a public problem. (Gastil et al. 2010: 9)

The New Zealand Law Commission has argued that the ‘role of jury service as a cohesive force in society is clear’; noting that people who actually serve on juries overwhelmingly feel positive about the institution and feel 'satisfaction at having done their civic duty' (2001: para. 474). This ‘cohesive force’ is measurable: there is a demonstrable link between jury service and voter participation (Gastil et al. 2002: 593).

In keeping with the view of the jury as a communal means of political participation the High Court of Australia has stressed that the right to trial by jury is not solely a right of the accused, but is a ‘constitutional guarantee ... for the community as a whole’ (Brown v the Queen at 201). Similarly, the US Supreme Court emphasised the right of the individual to serve on a jury (Powers v Ohio, 499 U.S. 400 (1991)). These communal interpretations represent a reversal of the traditional hierarchy: ‘justifying juries not as an efficient form of dispute resolution, but as an important opportunity to inculcate civic virtue and induce political participation’ (Gastil et al. 2002: 586 fn1).

The value of the jury as a communal good becomes all the more important in the context of a terrorist threat (Davis 2013). The threat of terrorism weakens civil society – it can distort the political debate and impede parliamentary dissent (Ivie, 2002: 277). At the same time the executive claims to possess peculiarly sensitive information can have a negative impact on the ability of the courts to act as a restraint on executive power (de Londras and Davis 2010; Fenwick and Philipson 2011). In such circumstances the role of the jury as a democratic institution is all the more important.

**The Terrorism Context**

A number of reasons have been advanced to justify the international willingness to abandon trial by jury in the context of counter-terrorism. On a general level there have been question marks over the ability of jurors to perform the function of determining guilt or innocence. Juror comprehension was tested by Thomas in 2010. Jurors were asked to identify the two questions the judge had directed them to answer. Only 31% of jurors accurately identified both questions (Thomas 2010: 36). In mitigation Thomas noted that 20 of the 21 juries examined contained at
least one juror who correctly identified the questions (Thomas 2010: 37). More alarmingly, in New South Wales 277 jurors from 25 real cases were asked: ‘what was the verdict in this case?’ Surprisingly, the vast majority of jurors erred when recalling the verdict in their case. In only six cases did all participating jurors report the same verdict (Cashmore and Timboli 2006: 12). This demonstrates a significant problem with juror understanding of legal proceedings. Juror comprehension of complicated scientific evidence has also been seen as problematic (Myers et al. 1999: 150-56). There is evidence that jurors believe that they have understood the evidence presented (Matthews et al. 2004: 72-74). However, there remains a problem with assessing whether or not jurors in fact understand that evidence (UK House of Commons Science and Technology Committee 2005: 72-74). If jurors cannot understand the legal proceedings and the complicated evidence presented in court then they cannot be relied upon. Such arguments apply to all cases, including cases of suspected terrorism.

In the specific context of terrorism there are two additional concerns. Lord Diplock noted the vulnerability of juries to intimidation (1972: para. 36). The actual risk and extent of intimidation are difficult to assess. Indeed Diplock was criticised for adducing little evidence, ‘statistical or otherwise’, in support of his findings (Twining 1973: 413). Lord Diplock sidestepped that difficulty by arguing that it does not matter whether juror fears are well founded: a ‘frightened juror is a bad juror even though his own safety and that of his family may not actually be at risk’ (para. 36). If jurors are unable to comprehend the evidence presented or they are too intimidated to independently reach a verdict it calls into question their ability to fulfil the traditional function of a jury outlined above – namely to effectively determine guilt or innocence.

A further argument in support of the abolition of trial by jury in the terrorism context places an emphasis on the rights of the accused. The European Court of the Human Rights, for example, has stressed that ‘a tribunal, including a jury, must be impartial’ (Sander v the UK, para. 22). Accusations of bias on the part of jurors must be investigated unless they are ‘manifestly devoid of merit’ (Remli v France para. 48). In the terrorism context it has been argued that the potential for juror bias should operate as a barrier to trial by jury. For example, in Northern Ireland it was argued that widespread sectarianism meant that juries were an impediment to a fair trial (Diplock 1972: paras 35-41). Similarly, the Constitutional Court of the Russian Federation, referring to the European Court of the Human Rights jurisprudence, held that the right to trial by jury was not a prerequisite to a fair trial. As a result, it upheld the suspension of trial by jury in all terrorism cases because the existence of a terrorist threat would prevent juries from functioning effectively (Constitutional Court of the Russian Federation 8-P /2010, s. 2.1). This supposed inability of the jury to guarantee a fair trial rests, in part, on the fear that jurors will be biased against those accused of committing acts of terrorism. As Donohue argues, ‘those appalled at the latest acts of violence may be looking to find someone – anyone – responsible. Jurors may be biased against defendant sharing an ethnic or religious background of those engaged in violence’ (2007: 1324). This genuine fear of juror bias can be used to justify the suspension of trial by jury in the interests of a fair trial.

The Jury in Australia

Interference with the right to trial by jury in the context of counter-terrorism has been justified in Northern Ireland and Russia and by the European Court of Human Rights. There are other examples: Military Commissions at Guantánamo Bay (de Londras 2008); the Special Criminal Court in the Republic of Ireland (Davis 2007); non-jury trial in New Zealand (Davis 2012). In each of these jurisdictions some variation upon the argument that juries are incapable of effectively determining guilt or innocence, either due to bias, inability to comprehend the evidence or the risk of intimidation, has been used to justify the interference with the right to trial by jury in the context of counter-terrorism cases. Australia swims against this tide.
An atypical case

Australian history gives trial by jury an additional political significance: the jury is tied to the broader national narrative. Following the initial European settlement, trial by jury was deemed inappropriate by the colonial power. In the early half of the nineteenth century there was a concerted push by the emancipists for the establishment of trial by jury in NSW (Neal 1991, Chapter 7). Between 1810 and 1823 juries began to be used in coronial inquests and this began a process of gradual attainment of the right to trial by jury (Bennett 1959-61). Governor Macquarie believed that ‘once a convict has become a freeman … he should in all respects be considered on a footing with every other man in the colony’ and that this should extend to the right to sit on a jury (Bennett 1959-61: 465). Eventually, the New South Wales Act 1823 provided for a modified form of trial by jury, albeit one that suffered from executive influence. Trials were conducted by ‘the respective judges of the said courts and jury of seven commissioned officers of His Majesty’s sea or land forces’ accompanied by a gradual normalisation of trial by jury in civil cases. Civil juries were recognised as a success and over time the jury of seven officers of the defence forces was decried as the ‘rude experiments of rude times’ (Bennett 1959-61: 471). Just as the emancipists saw trial by jury as a means of integrating former convicts into free society, the steady spread of the jury was part of the rehabilitation of NSW from penal colony to free State (Thackery 2006: 276). That historical positioning of jury trial is somewhat unique.

The constitutional position

Arguably as a result of that history, the right to trial by jury was afforded explicit protection by section 80 in Chapter III of the Australian Constitution which states that ‘trial on indictment of any offence against any law of the Commonwealth shall be by jury’. This restricted form of the right to jury trial was present in all early drafts of the constitution – from the First Official Draft of the Constitution Bill, Sydney 1891 to the final Constitution (Williams 2005). At first glance section 80 appears to be a substantive guarantee but it actually only applies to ‘trials on indictment’. An ‘indictment’ is ‘a written accusation of crime made at the suit of the prosecution against one or more persons’ which ‘must be signed by a person authorised to do so’ (Ross 2010: para. 9.160). A ‘trial on indictment’ is the ‘opposite’ of a trial held summarily; it means a trial commenced by an indictment, with a jury deciding the guilt of the accused rather than a judge or magistrate sitting alone. Thus the description ‘the trial on indictment of any offence’ is a description of a certain procedure. Read literally, section 80 does not require that certain types of crimes be tried by jury, as one might expect. The High Court has endorsed that literal interpretation of section 80. It has refused to interpret section 80 so as to require ‘serious’ offences or offences attracting significant penalties to be tried on indictment: ‘if there be an indictment, there must be a jury, but there is nothing to compel procedure by indictment’ (R v Archdall and Roskruge; Ex parte Corrigan and Brown at [139-140]). These cases are somewhat at odds with Brown, referred to above, which denied the right of the accused to waive their right to trial by jury (Brown v the Queen). The limited interpretation of section 80 has been repeatedly re-affirmed by the High Court (Kingswell v the Queen; Cheng v the Queen) and there is no reason to suspect that this will change (Davis 2007: 86).

This Constitutional point is significant. It might have been supposed that the reason Australia has not eagerly followed Ireland, Russia, New Zealand, the UK and the US is limiting trial by jury for terrorism offences rests on the constitutional guarantee. That is not the case. In fact in every state and territory and at the Commonwealth level, many offences which are classified as indictable are nevertheless capable of being tried without a jury. The High Court has held that this does not alter the character of the offence and that the offence remains an indictable offence, even though it is tried summarily (Ross v R (1979) 141 CLR 432 at 439-40).
Commonwealth

The Crimes Act 1914 (Cth) enables indictable offences to be tried summarily in certain cases. The Act defines ‘indictable offences’ as offences ‘punishable by imprisonment for a period not exceeding 10 years’. All indictable offences – apart from a handful of exceptions – ‘may, unless the contrary intention appears, be heard and determined .. by a court of summary jurisdiction’, if both the accused and the prosecutor consent (section 4J). Section 4JA makes similar provision for the summary trial of indictable offences punishable by fine only. When an indictable offence is tried summarily, the sentence which the court can impose is lower than that which could be ordered if the matter were tried on indictment. The Crimes Act does not permit trial on indictment to be other than by jury.

States and territories

Similar provision is made in each state and territory. For example, in New South Wales, there is a distinction between ‘strictly indictable offences’ and indictable offences which may be tried summarily. The starting position is that an offence must be tried on indictment unless legislation provides that it may or must be dealt with summarily (Criminal Procedure Act 1986 (NSW) s 5). Also of note is section 42 of the Serious and Organise Crime (Control Act) 2008 (SA) – the ‘anti-bikie’ legislation, held invalid (on other grounds) in South Australia v Totani. This act created some criminal offences – for example, it made it an offence to associate with outlaw motorcycle gangs. These offences were punishable by up to five years imprisonment. Section 42 of the act then provided that all such offences were to be tried summarily. The provision was somewhat unusual; the offence could be tried summarily at the discretion of the prosecution (without any need for consent of the accused), but if the court determined that the accused should be sentenced to a term of imprisonment exceeding 2 years, the matter had to be committed to the District Court for sentence. It seems the rationale behind this provision was the fear that jurors would be threatened or intimidated by the accused (Government of South Australia, 2011).

In some states and territories, it is also possible for an indictable offence to be tried on indictment, but by judge alone. This does not affect the indictable/summary distinction; rather, it changes the procedure of a trial on indictment so as to remove the jury. This is possible in NSW (Criminal Procedure Act 1986 s 132), Queensland (Criminal Code 1899 ss 614, 615), SA (Juries Act 1927 s 7), WA (Criminal Procedure Act 2004 s 118) and the ACT (Supreme Court Act 1933 68B). There are restrictions on this; for example, a court may need to be satisfied that proceeding without a jury would be in the interests of justice, and if there are more than one accused all must consent to the application.

Additional restrictions on trial on indictment

In some states it is also possible for an accused to be convicted on the majority (rather than unanimous) verdict of the jury. This is a departure from the traditional process of trial on indictment and trial by jury which the High Court has said would not be permitted at the federal level (Cheattle v R at 552-3). Once again, this may mean that such provisions infringe section 80, if section 80 were held to apply with equal force to the states (Gray 2009). Majority verdicts are permitted in some circumstances in NSW (Juries Act 1977 s 55F), Queensland (Juries Act 1995), Victoria (Juries Act 2000 s 46), South Australia (Juries Act 1927 s 57) and Tasmania (Juries Act 2003 s 43). Unanimous verdicts for all criminal offences are still required in WA, the ACT and NT (Gray 2009; Jones 2005).

Discussion

It is obvious from the preceding sections that the constitutional guarantees to trial by jury are not a formal legal impediment to restrictions upon the right – even for trials on indictment. At state and territory level it is possible to circumvent the Commonwealth Constitution's
provisions. Furthermore, the jurisprudence of the High Court of Australia indicates that a Commonwealth government would be free to describe any counter-terrorism offences as summary – no matter how serious – and have them heard without a jury. Internationally, successful attempts at limiting the right to trial by jury in the counter-terrorism context have rested on the supposed inability of the jury as an institution to effectively deliver a fair trial – for the victims of terrorism or for the accused.

Since 2001 Australian governments have shown a willingness to adopt and adapt a range of counter-terrorism measures from other jurisdictions (Roach 2011: Chapter 6). Indeed some such measures have gone well beyond those adopted elsewhere (Roach 2011; Williams 2011). That Australia has not kept step with other states in abandoning the jury places it as an outlier in the common law world. It seems reasonable to suggest that the cultural capital attaching to the jury in Australian society is such that despite adopting a range of other draconian anti-terrorism measures the right to trial by jury remains peculiarly secure.

Conclusion

This paper is part of a broader project on trial by jury in the counter-terrorism context. At this point we can conclude that trial by jury occupies an unusual pace within Australian counter-terrorism laws. Precisely why the right has been so resilient is unclear. Commonwealth governments have adopted a range of measures which have gone little utilised but unlike other jurisdictions it would appear that the political cost associated with undermining the institution of the jury so publicly is too great. The next phase in this research will be to inquire into what it is about terrorism that has enabled the jury to survive here while withering elsewhere.

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3 Andrew Inglis Clark Draft Constitution, clause 65, p 89; First official Draft of the Constitution Bill, Sydney 1891, clause 13, (introduced the term ‘indictable’) p 152; Constitution Committee, Sydney 1891, clause 11, p 332; The Draft Constitution Bill, Adelaide 1897, clause 78, p 517; Sydney Session of the Convention 1897, clause 79 p 785; Melbourne Session of the Convention 1898, clause 79; Commonwealth of Australia Constitution Act, s.80, p1252.

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Domestic Violence and Family Law: Recognition and Appropriation

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Conference Sub-theme: Gender, Sexuality and Justice

Abstract
The battered women’s movement in the United States contributed to a sweeping change in the recognition of men’s violence against female intimate partners. Naming the problem and arguing in favour of its identification as a serious problem meriting a collective response were key aspects of this effort. Criminal and civil laws have been written and revised in an effort to answer calls to take such violence seriously. Scholars have devoted significant attention to the consequences of this reframing of violence, especially around the unintended outcomes of the incorporation of domestic violence into criminal justice regimes. Family law, however, has remained largely unexamined by criminologists. This paper calls for criminological attention to family law responses to domestic violence and provides directions for future research.

Introduction
The battered women’s movement in the United States contributed to a sweeping change in the recognition of men’s violence against female intimate partners. Naming the violence and arguing in favor of its identification as a serious problem meriting a public response were key aspects of this effort (Coker 2001-2002; Schneider 2000). Criminal and civil laws have been written and revised in an effort to answer calls to take such violence seriously, with most substantive changes on the order of reforms to policing and legal practice, especially around arrest and orders for protection (Buzawa 2012, Coker 2001-2002; Gerstenberger and Williams 2013; Schneider 2000).

Criminologists have devoted significant attention to the consequences of this reframing of violence. Scholars in criminology, law, and social work have investigated the operation and impact of legal responses to violence (See for example Bell et al. 2011; Breines and Gordon 1983; Pleck 1987; Pleck 1989). In addition to changes in criminal law and its application, criminologists have investigated the utilization and efficacy of civil legal remedies to domestic violence, (Connelly and Cavanagh 2007; DeJong and Burgess-Procter 1996; Fleury-Steiner, Fleury Steiner and Miller 2011). They have also highlighted the unintended outcomes of the incorporation of domestic violence into criminal justice regimes as new policies have variously been co-opted, resisted, and ignored in practice (Daniels 1997; Durfee 2012; Ferraro 1996; Goodmark 2011; Kim 2012; Miller 1989; Miller and Meloy 2006; Moore 2008; Ptacek 2010; Richie 2012). As a result, some scholars have called for a turn away from legal responses to violence against women (Bumiller 2010; Goodmark; 2011; Richie 2012). To date, however, this conversation has rarely broached the subject of family law and domestic violence.

Family Law and Domestic Violence
In addition to frequent engagement with the criminal law and civil orders for protection, family law is a central system of concern for abused women. Family law systems are located at the intersection of two sets of contradictory gendered expectations. In family court, abused mothers find themselves in a catch-22 situation where they are expected to separate from their abusers
and divorce for the sake of the children. If the child protection system is involved, mothers face removal of their children for ‘failure to protect’ if they fail to do so. However, at separation, married mothers are expected to facilitate, promote, and encourage ongoing contact between their children and their abuser, also for the sake of the children (Gill and Radford 2007; Hannah and Goldstein 2010).

A small body of research has begun to document what has been termed ‘paper harassment’, the use of legal institutions to retaliate against women and children who disclose abuse informally or report it formally, especially at divorce (Miller and Smolter 2011). This variety of harassment is the latest variation on the victim blaming and discrediting tactics that have cropped up in response to public acknowledgement of abuse by family members and intimates stretching back to the early twentieth century (Olafson, Cordwin and Summit 1993; Salter 2012; Smart 2000). While research in family studies, public health, and law have begun to document abuse that occurs at separation in the context of family law proceedings (Hardesty 2002; Hardesty and Chung 2006; Hardesty and Ganong 2006; Haselschwerdt, Hardesty and Hans 2010; McMurray 1997; McMurray et al. 2000), criminology stands to make a valuable contribution to this conversation. Such inquiries fit well within the remit of this conference.

Family Law and Criminology

The move to no-fault divorce in the United States in the 1970s facilitated rising divorce rates. It also contributed to uncertain child custody outcomes at divorce as a poorly defined best interest of the child standard was implemented at custody determination. Lobbying to influence which factors were deemed important in determining the best interest of the child intensified as the federal government encouraged U.S. states to offload the cost of supporting children from social systems onto individual fathers. The U.S. rewarded child support collection schemes as part of retrenchment of public welfare programs during the 1980s. The confluence of rising divorce rates, child support enforcement, and legal intervention into domestic violence resulted in the coalescence of organized resistance to interventions in violence against women in the form of antifeminist men’s and fathers’ groups (Dragiewicz 2008; Dragiewicz 2012).

But these were not the only groups to organize in the face of such changes. Increasing privatization of fact finding in the family court, another outcome of rising divorce rates, unclear criteria for custody determination, and efforts to offload the costs of state functions onto private citizens, contributed to the growth of a cottage industry of forensic psychologists, special masters, guardians ad litem, mediators, and parenting coordinators who assess, report, and testify for pay in child custody cases that shape child support and custody arrangements. These pseudo-legal personnel regularly invoke social science research on violence and abuse as part of their practice. They also increasingly contribute to the literature via their own peer reviewed journals and propose and promote theories that are useful in their consulting work.

Although a surprising amount of the divorce and custody literature refers to delinquency and criminality as a putative outcome of divorce and mother custody, criminology does not often engage with the field. As a result, claims about the criminogenic influence of single mothering and divorce go largely unchallenged. Concerns about the safety and well-being of abused women and their children are buried in individualizing discourses that gloss over the violence and structural inequalities that engender the social ills attributed to fatherlessness.

Recent federal reforms to child support enforcement mean that a greater number of adults and children than ever before will be drawn into the family law system. While these changes are explicitly intended to offload the cost of child maintenance from the state onto individual fathers, they also include provisions to decrease payment amounts relative to ‘parenting time’. Although motivated by austerity, these proposed changes cannot be understood without attention to gender, racism, and class due to their differential impact on different families.
‘Responsible fatherhood’ programs promote marriage and male breadwinning in minority communities in order to push children and mothers off of welfare rolls. At the same time, cutting child support payments in proportion to ‘parenting time’ is sure to please upper income divorced fathers. However, the earning ability of mothers is not altered by the percentage of ‘parenting time’ allocated to each parent. Nor is the cost of raising a child lessened proportionately to custody arrangements. Such facially neutral income support policies penalize all lower income parents, but are especially damaging for survivors of abuse who face increased pressure to promote easy access to fathers even when they are abusive. Often custody arrangements are made via ostensibly restorative and non-adversarial practices like mediation which many survivors of abuse experience as coercive and unsafe.

Privatisation of income support via responsibilising low income fathers on the one hand and appeasing high income fathers on the other presents a barrier to abused women who seek to leave an abuser who is the father of her children. Despite requirements to consider domestic violence as a factor at custody determination in nearly every state, the interests of abused parents and their children are left by the wayside in these schemes. In family law systems where violence is a salient factor, state interests in privatized patriarchies win out.

**Violence Against Women, Law and Social Democracy**

Recent critical criminological critiques of domestic violence policies and practices have called for a turn away from the law based on serious concerns for the ways in which criminal law, in particular, is deployed in ways that reproduce harm within the larger discriminatory social context. However, the focus on disempowering women by removing their agency via restriction of choices to not involve the law does not adequately account for family law. At divorce, women and men are forced into participation in family law processes which overwhelmingly fail to take violence and abuse into account. As part of divorce agreements, child custody and support orders increasingly force unwilling parties into heterosexual co-parenting regardless of the presence of violence and despite improvements in recognizing violence in other areas of civil law.

The possibilities of legal responses to violence in the family law system will be profoundly shaped by state approaches to a number of social and structural issues including income support for mothers and their children and the privatization of fact finding and legal orders enforcing heterosexual, patriarchal family structures. As the U.S. moves to tether child support to custody orders, abused women's need for safety and support stand to be subsumed by competing exigencies.

In addition to calls for police and court accountability, anti-violence advocates have addressed the need to improve housing, employment, wages and child care as part of efforts to decrease men’s violence (Menard 2001). Criminologists can contribute to this discussion by listening to the concerns and priorities of survivors of violence and thinking carefully about the persistent gender, class, and racialized inequalities that lead to violence and produce many of the shortcomings and inconsistencies of legal responses to violence against women. This includes investigating what is happening on the ground in the family courts, participating in debates about the nature of violence and abuse, and turning critical faculties toward the interests driving conflicting policy changes as well as resistance to them. As Postmus et al. (2009: 865) put it:

> Our intervention strategies must go beyond offering emotional support; we must offer survivors help locating and securing the types of tangible services (financial assistance, child care, transportation, housing, and educational assistance) that will support their survival and the termination of abuse. Perhaps, as some advocates are
doing, it is time to bring greater emphasis and awareness to economic justice and the self-sufficiency of survivors.

At the same time, critical criminologists cannot abandon the law. As Martha T. McClusky (2010: 363) argued:

Critical feminism rejects the fantasy that we stand outside law’s power in some neutral space free from imperfect empirical assumptions and imperfect political and social commitments. We always live embedded in law, privileged or penalized by legal institutions; all our actions or inactions work to reinforce or change a legal regime and the assumptions about the empirical world that legal regime helps shape. Refusing to know about, care about, or respond to the injustices that pervade our daily lives is itself and action with potentially far-reaching and complex effects on others.

Calls for expanded social programs to promote substantive equality are one important part of efforts to reduce the social harm caused by violence and abuse, but criminologists cannot abandon legal systems. People are much more likely to be pulled into family law systems than criminal legal systems. If 50% of marriages end in divorce, family law and policy have massive implications for substantive equality. Where the marriage has ended due to abuse, the potential for harm and healing are both multiplied within the system.

Conclusion

There is a pressing need for criminologists to contribute to building our understanding of what happens in family court, how people end up there, and what survivors need in order to develop short and long term strategies to promote safety and well-being. Survivors’ voices need to be at the center of this research agenda. A key part of this inquiry will be to develop an understanding of the different priorities and issues for different survivors. As same-sex marriage is adopted in more states in the United States, more survivors of violence by same-sex partners will undoubtedly play out differently in court. Likewise, the contradictory forces created by millions of dollars being poured into marriage and fatherhood promotion programs in under-resourced and racialized communities and welfare surveillance practices that discourage co-habitation create specific resource needs. For immigrant women whose visa and custody status is explicitly linked to their spouse, another set of concerns is at the fore.

Ultimately, the idealisation of patriarchal families and co-parenting post-separation will play out differently across lines of gender, sexuality, age, income, immigration status, ethnicity, and skin color. Empirical research on what happens in family court is almost non-existent in the United States. What does exist mostly ignores the possibility of violence and abuse due to incorrect assumptions about the nature of abuse in the field of family studies and the overwhelming involvement of scholars with financial and professional conflicts of interest. There is a real need for research from critical criminologists whose income is not linked to paid testimony and whose lines of inquiry are not dictated by federal funding which is increasingly focused on crude performance indicators.

It is essential that critical criminologists address epistemological issues as well. The creeping menace of poorly conceived ‘evidence based practice’, the continuing fetishisation of ostensibly representative sample surveys that are utterly unable to contribute to our understanding of violence and its effects, a lack of conversation with scholars in other fields that deal with violence and abuse, and criminologists’ unwillingness to acknowledge the politics of scholarly knowledge production are central concerns for those of us who seek to understand violence and responses to it. We need to have honest conversations about the persistent unwillingness to foreground consent in discussion about rape, the pervasiveness of sexism, reluctance to deal
with child sexual abuse in the family, idealization of heterosexual nuclear families, and the contradictory social norms promoting and proscribing men's and women's violence. We also need to be cognizant of the certainty that self-critique will be appropriated in the service of backlash efforts to eliminate those legal remedies and resources that are available, with specific risks for different survivors along the lines of established social hierarchies (Pleck 1987; Ptacek 2010). Attention to the history of antiviolence and anti-oppression social movements and the forms of resistance they have faced can provide a map of the perils and possibilities of multiple formal and substantive approaches to social justice.

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New Directions in the Social Scientific Study of Separation/Divorce Assault

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Conference Sub-theme: Gender, Sexuality and Justice

Abstract
Since the late 1980s, an international group of scholars has made some key empirical and theoretical contributions to a rich social scientific understanding of various types of separation/divorce. Still, there is much more research to be done and more theories to be constructed and tested. The main objective of this paper is to offer recommendations for future social scientific work in the field.

New Directions in the Social Scientific Study of Separation/Divorce Assault

Keeping up with the rapidly growing social scientific literature on woman abuse in intimate relationships is a daunting task. Nearly every week, most of our colleagues in the field, receive announcements from Sage Publications about new articles in the Online First version of the journal Violence Against Women. This is because it is one of the most successful scholarly outlets in the world, with 12 hard copy issues published each year. The editor, Dr. Claire Renzetti, recently told us that she receives over 400 submissions a year and the acceptance rate is roughly 12%. As well, hundreds of manuscripts on topics ranging from male-to-female psychological abuse to intimate femicide are submitted each year to other prominent academic periodicals, such as Journal of Family Violence, Journal of Interpersonal Violence, Aggression and Violent Behavior, and Trauma, Violence, & Abuse. Indeed, what Schwartz and DeKeseredy (1988) stated 25 years ago is still valid: advances in the social scientific study of woman abuse have been even faster-paced than those in some of the physical sciences.

Researchers around the world have generated a wide range of ground-breaking data over the past 40 years using a variety of methods, but one of the most important findings is that there are intimate relationship status variations in woman abuse. For example, close to 20 studies done in North America and New Zealand uncovered major differences in violence rates obtained from married people and cohabitators. In fact, the rate of violence for the latter is typically twice that of married persons, but the difference can be greater than four times. Cohabiting women are also more likely to experience more severe types of violence than their married counterparts (Brownridge and Halli 2001; DeKeseredy 2007).

It is also well known today that North American separated and divorced women are at significantly greater risk of being beaten, sexually abused, and even killed than are married women (Brownridge et al. 2008; DeKeseredy and Schwartz 2009; Rennison, DeKeseredy and Dragiewicz 2012). In fact, the process of exiting a marriage or cohabiting relationship is one of the most dangerous times for women (Brownridge 2009; Dawson Bunge and Balde 2009). Basile and Black (2011: 119) correctly point out in their review of the separation/divorce assault research that, ‘Rage, despair, loss of control, and patriarchal expectations of male rights and dominance are common motives behind lethal violence males perpetrate against their estranged female partners’.
Separation/divorce assaults are not restricted to North America. Consider that McMurray et al. (2000) found that 21% of the 146 separated Western Australian men in their sample were violent during separation. Hence, as Brownridge (2006: 517) observes in his in-depth review of the international social scientific literature on violence against women post-separation:

In short, studies that allow a comparison of violence among separated, divorced, and married women show a consistent pattern of separated and divorced women being at elevated risk for violence compared to married women, with separated women having by far the greatest risk for post-separation violence. It appears that separated women have as much as thirty times the likelihood, and divorced women have as much as nine times the likelihood, of reporting non-lethal violence compared to married women.

Brownridge’s statement and the research supporting it have major policy implications. Criminal justice officials, shelter workers, and scores of others assert that abused women’s most important tool in the struggle to end their victimization is to divorce or separate from their partners. Most battered women make ‘dangerous exits’, but separation or divorce alone often does not make them safer. Thus, women ‘fleeing the house of horrors’ require more effective and creative solutions (DeKeseredy and Schwartz 2009; Sev’er 2002). Developing such initiatives, though, requires a richer social scientific understanding of woman abuse during and after separation/divorce. The main objective of this paper, then, is to help achieve this goal by charting some new empirical and theoretical directions, some of which involve ‘going back to the future’.2

Conceptualisation of Separation/Divorce

New studies are being conducted and some new theories are being constructed, but one thing the social scientific community does not have is an agreed-upon firm definition of separation/divorce. Nonetheless, unlike debates about whether to use narrow or broad or to employ gender-neutral or gender-specific definitions of violence in intimate heterosexual relationships, the disagreements among scholars over conceptualizing separation/divorce are not as ‘old, fierce, and unlikely to be resolved in the near future’ (Kilpatrick 2004: 1218).3 Actually, those who study separation/divorce assault admire each other’s work and routinely exchange ideas and publications. Even so, they remain divided into two camps when it comes to defining the concept of separation/divorce. This is hardly a trivial concern because how relationships and behaviours are defined have major effects on the lives of many people. Further, definitions are used as tools in social struggles. Together with poverty, unemployment, terrorism, and other social problems, violence against women is a highly politicized topic of social scientific inquiry, and definitions of concepts related to this harm reflect this reality (DeKeseredy and Schwartz 2011; Dragiewicz and DeKeseredy 2012; Ellis 1987).

Most separation/divorce assault studies assume couples must live apart to be separated or divorced.4 Consequently, the large number of beatings, rapes, and other attacks that occur when a woman emotionally exits a relationship but remains in the home,5 decides to leave her partner, or when she makes an unsuccessful escape from a ‘dangerous domain’ are not measured (DeKeseredy in press; Johnson 1996; Ptacek 1999). For example, Brownridge (2009: 56) restricts his analysis to ‘post-separation violence’, which he defines as ‘any type of violence perpetrated by a former married or cohabiting male partner or boyfriend subsequent to the moment of physical separation’. The problems with definitions such as Brownridge’s are well documented elsewhere (see DeKeseredy in press; DeKeseredy and Schwartz 2009), but it is necessary to revisit two concerns. First, narrow conceptualizations contribute to the perennial problem of underreporting. Consequently, an entire survey can be discredited if researchers cannot discern if the separated/divorced women who reported having been abused are
representative of all the survivors in the sample. Struggles for effective social support services are also hindered because high levels of underreporting result in low estimates of abuse, and ultimately decrease the probability of mobilizing resources to curb separation/divorce assault and other variants of female victimization in intimate contexts (DeKeseredy 1995; DeKeseredy and Schwartz 1998; Smith 1994).

Also contributing to the problem of underreporting is the fact that a woman's decision to leave a relationship may be long and complex, as violence against women researchers have long known (Goetting 1999). She may feel simultaneously oppressed and trapped by an inability to leave a relationship right now. This may be for financial or economic reasons, or because she was unable to make adequate arrangements to care for her children, or for a variety of other reasons (Davies 2011; Renzetti 2011). As a result, some feminist scholars do not view separation and divorce as purely functions of proximity because exiting a relationship generally takes place over time (DeKeseredy et al. 2004; DeKeseredy and Schwartz, 2009; Mahoney 1991).

Though broader feminist definitions of separation/divorce generate higher estimates of abuse and help researchers more accurately describe the complex reality of women's dangerous exits, definitions like Brownridge's (2009) have a positive element that other feminist conceptualizations have so far not addressed, which is recognizing that dating breakups are also dangerous. In fact, to the best of our knowledge, every study of separation/divorce assault conducted to date has overlooked the fact that the termination of a dating relationship may also lead to physical and sexual violence (Brogan 2013; Compton 1991). Therefore, it is essential to acknowledge that women who were romantically and/or sexually involved with men but who never lived with them warrant inclusion. It is logical to assume that researchers would uncover a high rate of victimization during and after the process of leaving a dating relationship given the alarmingly high rates of various types of abuse in teen and adult dating relationships.

As Ball (2013: 186), puts it, 'The existence of intimate partner violence within non-heterosexual and/or non-cisgendered relationships is gaining greater recognition'. One would not know this from reading the separation/divorce assault literature. This body of knowledge is guilty of heteronormativity, but the same can be said about the bulk of the empirical, theoretical, and policy work on any type of intimate partner violence. Needless to say, there is violence in same-sex relationships, but there is little information about the abuse that occurs during and after exiting them. Exiting a relationship is, to be sure, not purely a heterosexual phenomenon and new conceptualizations should broaden to account for this reality.

The separation/divorce assault research community responded faster to critiques of narrow definitions of sexual assault than it has to narrow definitions of exiting. Why this is the case is an empirical question that can only be answered empirically. In spite of this, we suggest that it is because debates about defining abuse have a longer history, are more intense, and involve many more researchers. Moreover, there is much more published material on definitions of various types of abuse in intimate relationships.

**Beyond the Victimization Survey**

Since the early 1980s, over 150 scientific articles on the extent of male violence against female marital and/or cohabiting partners have been published, with most of them written by United States (US) social scientists (DeKeseredy and Schwartz 2014; Machado, Dias and Coelho 2010). This is not surprising because the US is the world's center of crime survey research. Certainly, measuring the incidence, prevalence, correlates, and consequences of a wide range of harms women endure in ongoing relationships and in the process of or after leaving intimate partners is now an international concern. Even so, the field would not be where it is today without the methodological advances made in the US Canadian work also had a major impact on survey research conducted around the world. Note that Statistics Canada's Violence Against Women
Survey (VAWS) is the world's first national survey specifically designed to investigate multiple types of male-to-female violence (Jacquier, Johnson and Fisher 2011). Consequently, the VAWS yielded much higher rates of violence and abuse than earlier surveys designed to measure crime or family conflict (Dobash and Dobash 1995).10 The impact of the path-breaking methodological developments made in this study is still felt today (DeKeseredy and Dragiewicz, in press), and the VAWS has been replicated in national studies in countries such as Australia, Finland, and Iceland (Walby and Myhill 2001), as well as in regional studies like the Chicago Women’s Health Risk Study (Block et al. 2000).

The Canadian national survey of woman abuse in university/college dating (CNS) is also the first country-wide study of its kind (DeKeseredy and Kelly 1993; DeKeseredy and Schwartz 1998), expanding on the scope of an earlier US study of campus sexual assault (Koss, Gidycz, and Wisniewski 1987). Additionally, Canadian scholars like Brownridge (2009) are at the forefront of examining violence against women during and after separation/divorce. In fact, the bulk of the research on this topic has thus far been done by Canadian sociologists (DeKeseredy and Dragiewicz, in press).

Despite some incredible methodological advances and regardless of where these tools are used, almost all separation/divorce studies used victimization survey technology. What accounts for this? Perhaps Jacquier et al. (2011: 26) provide the best answer:

> It is generally agreed that populations surveys, in which random samples of women are interviewed about their experiences of violence using detailed, behaviorally specific questions, yield more valid and reliable estimates of the prevalence of these phenomena in the population ...

Undeniably, due to social desirability effects and other factors, listening to women's voices and inviting them to fill out surveys enables researchers to uncover much higher estimates of any type of woman abuse than those derived from self-report surveys administered to men (DeKeseredy et al. 2004). Still, the research community is now at the point where it can confidently state that a substantial number of women experience separation/divorce assault and hence it is time to use some different techniques to yield better answers to some very important questions, such as ‘Why Does He Do That?’ (Bancroft 2002). This is not to say, though, that interviewing women or administering victimization surveys do not help achieve this goal. They certainly do and DeKeseredy and colleagues’ interviews with 43 rural southeast Ohio women uncovered some rich information on the characteristics of men who engage in separation/divorce assault. The women revealed that receiving patriarchal male peer support for abuse, the consumption of pornography, drugs and alcohol, and an adherence to the ideology of familial patriarchy were strongly associated with their ex-partners’ abusive behaviors (DeKeseredy and Joseph 2006; DeKeseredy and Schwartz 2009; DeKeseredy, Schwartz, Fagen and Hall 2006). Kurz’s (1995) interviews with 129 divorced Philadelphia women produced some similar findings. Nonetheless, interviews with men are in short supply and so are self-report surveys administered to men. Terry Arendell (1995: 3) is one of less than a handful of scholars to glean interview data from men about separation/divorce assault and what she stated 18 years ago still holds true today:

> Men are relatively neglected in divorce research. A dearth of information on men’s perceptions and actions persists even though divorce research increased dramatically over the past several decades, as the divorce rate remained strikingly high. This neglect of men, and particularly of divorced fathers, is not unique but is characteristic of fathers and fathering more generally ... Neither mothers’ reports nor survey findings, however, give expression to fathers’ views or experiences.
Another relevant point to keep in mind is that separation/divorce is a major determinant of intimate femicide in the US, which a country characterized by a vast amount of homicide research. Yet, Adams' (2007) interviews with 31 men who killed intimate partners constitute the first US study that elicited information directly from male perpetrators. Again, there is also a dearth of male self-report survey data. This is somewhat surprising because there is a sizeable portion of self-report surveys of men's experiences with other types of woman abuse in intimate relationships.

Self-report data from men will tell us much about what drives them to be abusive and enable researchers to more effectively test some of the theories of separation/divorce recently developed by DeKeseredy et al. (2004) and DeKeseredy, Donnermeyer, Schwartz, Tunnell and Hall (2007). Several hypotheses derived from them could easily be tested using measures of male peer support developed by DeKeseredy (1988), Smith’s (1990) familial patriarchal ideology items, as well as other measures. Much support for parts of the above theories are found in interview data collected in rural Ohio by DeKeseredy and his colleagues, but there has been no attempt to determine their explanatory power using quantitative techniques. Essentially, in recent years, Block and DeKeseredy (2007) and Brownridge (2009) are the only scholars to be guided by theoretical perspectives in the analysis of statistical data on separation/divorce assault. Block and DeKeseredy tested an element of Wilson and Daly’s (1992, 1993) male proprietariness theory of violence against wives, while Brownridge’s use of Canadian national victimization survey data was heavily informed by an ecological framework and Ellis and DeKeseredy’s (1989) DAD (dependency, availability, and deterrence) model, which is an attempt to explain marital status variations in woman abuse. Ecological models address multiple levels of influence and maintain that violence against women should be examined within a nested set of environmental contexts or systems (Graham-Berman and Gross 2008; Dragiewicz 2011).

In sum, a variety of methods enhances a social scientific understanding of separation/divorce and new techniques are always welcome. Then again, it appears that contemporary developments in woman abuse research methodology have ignored some innovative techniques developed nearly 30 years ago. A central argument of this paper is that they should be revisited.

**Back to the Future**

Regardless of what type of survey is used in future research, there are some important lessons from the past that should be taken into account. If the pioneering woman abuse survey researcher Michael D. Smith (1987: 185) were alive today, he would surely repeat what he said 26 years ago: ‘Obtaining accurate estimates of woman abuse in the population at large remains perhaps the biggest methodological challenge in survey research on this topic’. Regardless of how carefully a survey is crafted, many abused women and male offenders do not disclose incidents because of embarrassment, fear of reprisal, ‘forward and backward telescoping’, deception, and memory error (DeKeseredy and Schwartz 1998; Schwartz 2000; Smith 1994). Additional reasons for underreporting are the reluctance to recall traumatic incidents and the belief that abusive acts are too trivial or inconsequential to mention (DeKeseredy 1995; Straus, Gelles and Steinmetz 1981).

These problems still plague woman abuse researchers and they are perhaps getting worse because of the neglect to answer Smith’s (1987, 1994) call for the use of supplementary open- and closed ended questions. While a growing cadre of survey researchers employ multiple quantitative measures of abuse (see Jacquier et al. 2011), in numerous studies, many respondents are not given additional opportunities to disclose abusive experiences and this problem is endemic to survey research on separation/divorce assault. At the outset, people may not report incidents for reasons described previously (e.g., embarrassment, shame, fear of reprisal). Yet, there is ample empirical evidence showing that if respondents are probed later on
by an interviewer or asked to complete self-report, supplementary, open- and closed-ended questions, some silent or forgetful participants will reveal having been victimized or abusive.\textsuperscript{11} For example, Smith (1987) found that some silent or forgetful female victims ($N = 60$) changed their responses when asked again in different words by a telephone interviewer. Belated responses increase the overall violence prevalence rates by roughly 10\%, and 21 belated disclosures increased the severe prevalence rate.\textsuperscript{12}

Below is one example of a supplementary open-ended question. It was located at the end of the CNS questionnaire (see DeKeseredy and Schwartz, 1998) and can easily be tailored for use in a separation/divorce assault survey:\textsuperscript{13}

\begin{quote}
We really appreciate the time you have taken to complete this survey. And we'd like to assure you that everything you have told us will remain \textit{strictly confidential}. We realise that the topics covered in this survey are sensitive and that many women are reluctant to talk about their experiences. But we're also a bit worried that we haven't asked the right questions. So now that you have had a chance to think about the topics, have you had any (any other) experiences in which you were physically and/or sexually harmed by your dating partners while you attended college or university? Please provide this information in the space below.
\end{quote}

On top of giving respondents more opportunities to reveal information about abusive events, supplementary open-ended questions build researcher-respondent rapport and respond to well-founded concerns about the hierarchical nature of 'male-stream', positivist research (Schwartz 2000). According to Smith (1994: 115):

\begin{quote}
For one thing, an open format may reduce the threat of a question on violence, because it allows the respondent to qualify her response, to express exact shades of meaning, rather than forcing her to choose from a number of possibly threatening alternatives. For another, open questions may reduce the power imbalance inherent in the interview situation (the relationship between researcher and researched parallels the hierarchical nature of traditional male-female relationships) because open questions encourage interaction and collaboration between interviewer and respondent ... The less threatening the question and the more equal the power relationship, the greater the probability of rapport and, in turn, of eliciting an honest answer to a sensitive question on violence.
\end{quote}

Supplementary open-ended questions and other qualitative techniques used in surveys have proven to be successful. However, these approaches are typically given short shrift compared to quantitative ones in journal articles and book chapters that offer in-depth reviews of methods used to glean woman abuse data.\textsuperscript{14} It seems, at least in the North America, that Smith's path-breaking efforts to improve the quality of survey research are forgotten or dismissed. Even so, it would be remiss not to state that the US National Crime Victimization Survey (NCVS) includes 'incident narratives', which are open-ended responses to a final question at the end of the survey that asks participants to report what happened to them. Albeit qualitative in nature, the narratives are not the actual victims' verbatim accounts, but rather statements transcribed by NCVS interviewers (Jacquier et al. 2011). Moreover, the narratives lack rich contextual detail about events leading up to an assault or after an attack, and it is hard to determine from reading them why incidents were not reported to the police (Weiss 2009, 2011).

\textbf{Diversity Issues}

If the assaults on people leaving same-sex relationships are not adequately examined in the bulk of separation/divorce assault studies, the same can said about the victimization of female members of some racial/ethnic groups. For example, the only experiences of ethnic groups to be
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Examined in Brownridge’s (2009) Canadian study are those of Aboriginal peoples, and he does not specify which tribes they belong to. Additionally, he does not compare the aboriginal data with statistics gleaned from a variety of other racial/ethnic groups. Rather those who are not Aboriginal are simply clustered into one category referred to as ‘non-Aboriginal’.

A somewhat similar problem plagues US separation/divorce assault research. For instance, Fleury, Sullivan and Bybee (2000), as well as Block and DeKeseredy (2007), included categories like African American, White, Asian, Hispanic/Latina, in their interview schedules. Of course, almost every US study of any type of crime or other social problem takes the same approach. It is subject to much criticism because these and other ‘pan-ethnic categories’ are treated as homogenous groups but in reality include ‘diverse subpopulations that have very distinct ethnic, religious, historical, philosophical and social values that may have important roles in the dynamics of violence against women (Perilla et al. 2011: 205). Needless to say, not all Black people are the same and there are differences in rates of violence among African-Americans, African-Caribbeans, and Africans. As well, there are variations in rates of violence among different Aboriginal groups (Aldarondo and Castro-Fernandez 2011; Aldarondo and Fernandez 2008; DeKeseredy, Dragiewicz and Rennson 2012). As far as we know, the National Alcohol and Family Violence Survey is the only major US survey specifically designed to overcome or minimize these limitations and hopefully other large-scale studies will follow suit (Aldarondo, Kaufman Kantor and Jasinski 2002; Kaufman Kantor, Jasinski and Aldarondo 1994).

Additionally, the plight of immigrant and refugee women warrants better empirical scrutiny in US studies. These women are often classified as ‘White’ in large surveys, obscuring issues related to ethnicity and immigration status. Related to these pitfall is that some common types of abuse directed at immigrant and refugee women, such as using immigration status as a method of coercive control, are not measured in mainstream surveys or by widely used violence measures such as Straus, Hamby, Boney-McCoy, and Sugarman’s (1996) revised Conflict Tactics Scale (CTS) (Dutton, Orloff and Hass, 2000; Perilla et al. 2011). Likewise, national studies may hide important local factors determining separation/divorce assault victimization rates, pointing to the need for community-specific studies (DeKeseredy et al. 2012).

Obviously, too, it is vital to always avoid stereotyping or constructing perpetrators of any type of violence against ethnic/minority women as ‘Others’. As Aronson Fontes and McCloskey (2011: 152) remind us, ‘there are few forms of violence that belong exclusively to any particular culture’. Many would agree with DeKeseredy et al.’s (2012) assertion that the ubiquity of patriarchy is more important in shaping woman abuse than are location and race/ethnicity.

**Conclusion**

Noted earlier was the fact that, in this current era, members of the international woman abuse research community are fully aware that separated/divorced women are at very high risk of being killed, beaten, raped, subjected to coercive control, and hurt by a myriad of other brutal behaviors. Nevertheless, there is still much we do not know about dangerous exits. For example, there are still no conclusive, empirically informed answers to this question raised by Fleury et al. (2000: 1381): ‘Why do some batterers leave their ex-partners alone, whereas others do not?’. To be sure, there are many other questions that demand answers and readers could add more suggestions to our list of recommendations for new empirical and theoretical directions in the field. Such contributions would be well received because the only way to improve the current state of social scientific knowledge about separation/divorce assault is to use ‘a creative combination of measures and methods’ (Jacquier et al. 2011: 43).

No matter what research techniques, research sites, or samples are selected, it is equally important to develop and tests theories of separation/divorce assault because theoretical developments have not kept pace with the burgeoning empirical literature. On top of being tools
that help researchers make sense of data, theories of separation/divorce assault are practical. They can help inform the development of effective policies that prevent departures from intimate relationships from becoming dangerous exits (Block and DeKeseredy 2007).

Above all, when doing any type of social scientific work on separation/divorce assault, researchers should always remember that exiting an intimate relationship demands an incredible amount of energy and resolve, but leaving an abusive partner requires much more strength and bravery (Walker, Logan, Jordan and Campbell 2004). It is also vital to recognize that the people who are or who have been abused are more important than the data they provide. Since separation/divorce is a very dangerous time for many women, researchers should always consider the potential dangers associated with their projects and strive to gather, analyze, and disseminate their findings in a sensitive, ethical, and responsible manner.

References


The Cairns Abortion Trial: Deviance, Stigma and the 'Spoiled Identity'

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Conference Sub-theme: Gender, Sexuality and Justice

Abstract
In 2010 a couple in Cairns were charged, and later found not guilty, of illegally obtaining a medical abortion through the use of medication imported from overseas. The court case reignited the contentious debate surrounding the illegality and social acceptance of abortion in Queensland, Australia. Based on a critical discourse analysis of 150 online news media articles covering the Cairns trial, this paper argues that the media shapes perceptions of deviance and stigma in relation to abortion through the use of language. In this case, the Cairns couple were positioned as deviant for pursuing abortion on the basis that they were rejecting the social norm of motherhood. This paper identifies three key themes evident in the articles analysed which contribute to shaping the construction of deviance – the humanising of the foetus, the stereotyping of the traditional female role of mother, and the demonising of women who choose abortion. This paper argues that the use of specific language in media coverage of abortion has the power to disrespect and invalidate the experiences, rights, and health of women who choose to terminate pregnancies.

Introduction
On 20 March 2009, Cairns Police searched the North Queensland property of 19-year-old Tegan Simone Leach and her partner, 21-year-old, Sergie Brennan. As part of an ongoing murder investigation, police were routinely searching houses in the area for witnesses or informants (Betts 2009: 25). During the search, police found empty blister packets and instructions written in Ukrainian. The blister packets were of Mifepristone (commonly referred to as RU486), Misoprostol and painkillers. During a police interview with Leach and Brennan, Leach revealed that the drugs were used to induce a miscarriage, and indicated to police that she believed there to be no medical reason to undergo an abortion in order to preserve her life (Schwarten 2009). Subsequently, Leach and Brennan were charged under the Queensland anti-abortion laws and on 11 September 2009 they were committed to stand trial (Barry 2009; Schwarten 2009). There was some speculation at the time that the couple had obtained the drugs illegally, however they were never charged for illegally procuring medication to induce a miscarriage. Rather, they were charged for having an abortion. Leach was charged under Section 2251 and her partner, Brennan, was charged under Section 2262 of the Criminal Code Act 1899 (QLD) under Chapter 22: Offences against morality and state.

More than a year after the couple were charged, following intense media attention and a high profile trial lasting three days, it took a jury less than one hour to find the couple not guilty of both charges on 14 October 2010. While the couple were both acquitted, the court case reignited the contentious debate surrounding the illegality and social acceptance of abortion in Queensland. Public outrage over the case increased pressure on the Queensland Government to decriminalise abortion. Sections 225 and 226 have not been repealed or reformed since the acquittal of Leach and Brennan. However, eight days prior to the date when Leach and Brennan were due to stand trial, the Queensland Government rushed through an amendment to Section
282\textsuperscript{3} of the Criminal Code, giving doctors the same legal protection to carry out medical abortions as was already available for surgical procedures (Betts 2009: 26). The defence available under section for doctors performing surgery was reformed during the trial to extend to administering medical treatment. However, even if the abortion is performed and the doctor has protection under section 282, the woman is still at risk of being prosecuted.

The Cairns abortion case not only raises questions about abortion law in Queensland, but also about the ways in which the media depicts and discusses abortion and those who choose to abort. The couple involved in the Cairns case were faced with significant attention from the media, as well as being pursued by the police and the legal system. In addition to numerous media articles condemning their actions, the media published Leach and Brennan's names and addresses. They were forced to move house, and pay for security and a guard dog after their house was 'hit by a Molotov cocktail' and their car was vandalised (Viva Hyde 2009). Brennan said of the firebomb, 'Everyone in Australia knew who we were, and where we lived' (Viva Hyde 2009). Despite their acquittal of the charges against them, they were still victimised. This paper explores how media discourses socially construct and label those who abort, arguing that the use of language and key terms in media coverage during the Cairns Trial demonstrates that those who abort are frequently stigmatised as deviant. Firstly the importance of language and labelling in media coverage of social issues is discussed, followed by an examination of key terms and phrases consistently used in the media representation. It is argued that the choice of terms such as 'baby' and 'mother' align more closely with a pro-life ideology, and results in the condemnation of women for allegedly rejecting the motherhood role by committing violent crimes against their unborn children.

Language and Labelling in the Media Coverage of Abortion

Language, including conversation and textual practises, has a significant role in constructing social meaning and political identities, as they are shaped and reshaped through power struggles (Torfin 2011: 192-197). The social construction of women who choose to abort is thus strongly influenced by media discourses in which the choice of some terms over others can depict this action as justifiable or condemned, as normal or deviant.

Much of the existing literature on abortion in Australia focuses on the current state of abortion law in Australia (de Crispigny and Savulescu 2004; Petersen 2005; Pesce 2006; de Costa et al. 2007; Betts 2009; Douglas 2009) and the debate between pro-life and pro-choice beliefs (Coleman 1988; Singer 1993; Dean and Allanson 2004; Brown 2004; Wyatt and Hughes 2009). The overarching conclusion of the literature is that the variations in abortion law state to state create confusion and uncertainty, and that both policy and media representations have been heavily influenced by a pro-life ideology. A notable gap in the existing literature on abortion is the relation to deviance from a labelling perspective. While abortion has been linked to deviance (Rosen and Martindale 1980), the construction of the deviance has been framed within a feminist context rather than an implementation of labelling theory. This project attempts to address this gap in the literature.

This paper is drawn from research analysing 150 articles concerning the Cairns abortion case in order to determine how choices of language and terminology can contribute to these constructions. The articles examined cover a time period commencing with the first reporting of the committal hearing on 2 September 2009 up to 30 November 2010 (the ‘not guilty’ verdict was related on the 15th October 2010). The ‘media’ is represented in this project by online news material only. This choice was not a reflection on the lack of importance of television and print media in framing the discourse surrounding abortion. Instead, it was a reflection of two key points. Firstly, mainstream news articles available in papers are also being published online and the greater availability of online news websites has increased online sources becoming 'more influential sources of news and entertainment' (Department of Broadband Communications and
the Digital Economy 2011: 13). Secondly, the online archiving of news available in papers creates longevity of news sources which made the data set preferable as the study was conducted over two years. This data set was therefore the most relevant and accessible for this project.

The 150 articles were located with key terms in internet search engines as well as online databases with all duplications being removed. The majority of the articles (99 of the 150 total of articles) were published by the Cairns Post, Australian Associated Press, Sydney Morning Herald, ABC Online and The Australian. Qualitative content analysis was primarily used to analyse the data. A qualitative approach best aligned with this project because the examination of texts for analysis enabled a critique of the linguistic choices and how they carry ideological meaning (Fairclough 1995: 25). This preliminary content analysis identified key words in order to demonstrate what language was being communicated to the reader. The content analysis involved counting of key terms including abort/ion, miscarriage, procedure, baby, fetus/foetus, unborn, and mother. The findings of this content analysis were then interpreted using critical discourse analysis in order to discover patterns and meanings reflecting or reinforcing hierarchies of power, injustice, and political or social change (Champion 2006; Keating and Duranti 2011). This project interpreted the communication using critical discourse analysis informed by deviance theory focusing on how the language stigmatised abortion and created conceptions of deviance. The method of critical discourse analysis was therefore used to analyse how the media constructs and produces ideologies, contexts and power relations which can stigmatise abortion and construct it as deviant.

**Guardians of the Unborn Child**

Throughout the media coverage of the Cairns trial, articles frequently used the terms ‘foetus’, ‘baby’, ‘child’, or ‘unborn’ in discussing abortion. In the construction of women who abort, the impact and importance of these terms differs greatly as they connote competing social responses to the decision to terminate a pregnancy. The word ‘foetus’ appeared 45 times throughout the 150 articles. Meanwhile the more emotive terms ‘baby’ and ‘child’ appeared 45 times and 91 times respectively throughout the 150 articles. The use of the words ‘baby’ and ‘child’ are more likely to humanise the foetus and are often used to present a pro-life message, where abortion is not a clinical term to describe the termination of a pregnancy, but rather the killing of a baby/child (Singer 1993; Carey and Newell 2007). The taking of a human life is considered murder, which has been enacted into Australian law as a serious crime. Consequently, by choosing the words ‘baby’ and ‘child’ over ‘foetus’, the foetus is humanised and therefore this message of abortion as child murder is made clearer to the reader. It also has the power to ‘trigger or compound anxiety, distress or shame’ for those women who do not share this relationship with the foetus (Allanson 2008: 24). The use of the words ‘baby’ and ‘child’ over ‘foetus’ serves to amplify the stigma surrounding abortion contributing to the construction of deviance.

An example of how this negative construction is achieved is by associating the foetus with ‘unborn’. ‘Unborn’ appeared 26 times in the 150 articles. The phrase ‘unborn child’ appeared seven times, with ‘unborn baby’ appearing six times and ‘unborn infant’ appearing two times in the total 150 articles. An article which provides a clear example of humanising the foetus is from The Catholic Leader website titled ‘We are the guardians of the unborn’s silent innocence’ on 17 October 2010. One excerpt states ‘The existing Queensland law on abortion maintains a consistent message to adults that intentional violence against their offspring is never justified, whether before or after birth’ (Van Gend 2010). The use of the phrase ‘intentional violence against their offspring’ presents two key elements of a pro-life message. Firstly, the reference to ‘offspring’ elevates the foetus to the equivalent status of a child, establishing the humanising elements consistent with the choice of the word ‘baby’ in much of the media coverage. Secondly, the words ‘intentional violence’ labels the woman procuring the abortion as violent and
murderous. Other media stories also positioned women who abort as guilty of violent crimes against unborn children. The Salt Shakers, a Christian pro-life action group, published an article which critiqued the judge’s instructions that a not guilty verdict would require proof that the drugs ingested by Tegan Leach were not noxious and caused no ill effect to Tegan. The article proclaimed, ‘What about the baby – it certainly suffered an “ill effect”!’ (Salt Shakers 2010). By referring to the foetus as a baby and referring to the damaging effect of abortion on the foetus, the language is constructing this image of murder and therefore stigmatising those who choose abortion as murderers. This criminalises abortion and serves to further the construction of those who obtain an abortion as deviants.

While these two examples are from declared Christian news sites, and therefore predictably select emotive language to invoke a pro-life message, several examples can be found from mainstream news media sites. One article from The Australian on the 15th October 2010 quotes ‘the jury must be satisfied beyond reasonable doubt that the drugs Ms Leach took were noxious to her health, rather than to the health of her unborn child’ (Elks 2010). In this sentence, ‘unborn child’ could have been substituted with ‘foetus’. Another article from The Australian on the 16 October referred to the foetus as an ‘unborn infant’ and ‘unborn baby’ (Jane 2010). This was an opinion piece where the author wanted to argue how one could be pro-choice and not ‘anti-infant’. The article included ‘foetus’ four times and ‘infant’/‘baby’/‘child’ seven times. These two examples provide instances where journalistic choice could have resulted in the selective term of ‘foetus’ which is less emotive and not furthering the construction of abortion as deviant.

While there are clear instances where ‘foetus’ could be substituted, journalistic choice is limited when the legislation is being quoted. Several instances where ‘child’ was included in the articles involved quoting Section 225 of the Criminal Code Act 1899 (QLD) (for example Walker 2010; Petrinec 2010; Ackland 2009). The legislation refers to those who are liable as ‘women with child’ and that the charge is relevant to the woman whether she ‘is or not is not with child’. While an argument can be clearly made that the Queensland legislation criminalises women who abort, by including it in the legislation in the first instance, it can also be said that the legislation further stigmatises those who abort by referring to them as ‘with child’. Arguably, each time the media refers to the legislation without paraphrasing it to select less emotive language, the construction of abortion as deviant is subsequently amplified whether it is their intent or not.

**Rejecting Motherhood**

The casting of women who abort as committing violent, murderous acts against children not only acts to humanise the foetus, and criminalise women, but also further constructs abortion as a deviant act and as a rejection of the traditional expectations of motherhood. The language choice of many of the media articles serves to embed notions of femininity as intrinsically linked to motherhood by persistently using the term ‘mother’ instead of women when discussing abortion. ‘Mother’ is referred to 72 times in the 150 articles. In the 22 articles by a single source, the Australian Associated Press (which are published on multiple news sites), ‘mother’ appeared 12 times. It is not unusual, or unexpected, that declared pro-life news sources such as Salt Shakers or The Catholic Leader would select terms such as ‘baby’ and ‘mother’ in their coverage of the Cairns abortion case. However, these terms also frequently appeared in more mainstream media articles both in the reporting of events, and also in the reporting of pro-life activism and perspectives. One Australian Associated Press article reported on the sign of a pro-life activist that read ‘Thank your mother you were not aborted’ (Martin 2010). Referring to Tegan Leach in the articles as the mother humanises the foetus as a child waiting to be born. In this construction, the definition of a mother as one who has conceived a foetus, rather than one who has given birth, or one who is caring for a child, devalues the life of the woman, while simultaneously elevating their value as a mother, a value which is lost once they terminate the
pregnancy. In this perspective, Tegan Leach not only lost a child, but also the opportunity to be a mother. Rosen and Martindale (1980: 103) argue that this ‘rejection of motherhood’ is considered to be a deviation from the traditional role of womanhood enabling those who have abortions to be socially constructed as deviant.

An article that furthered the stereotyping of the traditional female role of motherhood was published by Cherish Life in October 2010 titled ‘Cairns abortion case restates principle of justice – a deterrent to unjustifiable abortion’. When describing the Cairns couple, they state ‘These were consenting adults who conceived a child and then allegedly ended the life of their child because, as they told the media, they were not “ready” for that child’. They then continue saying ‘Consenting adults who conceive a child have a duty of care to their child from which they cannot walk away’ (Cherish Life Queensland 2010). This excerpt provides an example where the woman choosing to have an abortion is critiqued for her choices and stigmatised for neglecting their ‘duty of care to their child’. This language that a pregnant woman has a ‘duty of care’ to continue with pregnancy assists in perpetuating the stereotype of the traditional role of women as mothers who protect their young. Kumar et al. (2009: 628) explain that while definitions of womanhood and therefore the traditional role of women in society is varied across cultures, ‘a woman who seeks an abortion is inadvertently challenging widely-held assumptions about the “essential nature” of women’. The decision to use the term ‘mother’, rather than ‘woman’, and the references to a woman’s duty of care constructs abortion and those who obtain one as deviants challenging the traditional role of womanhood by rejecting motherhood.

**Wounded Identity**

The use of language that demonises and isolates women who obtain an abortion can further position those who abort as ‘spoiled’ or ‘harmed’ and therefore deviant from the norm. In a Brisbane Times article published on the 14 October 2010, the Cherish Life Queensland President Teresa Martin was quoted as stating ‘We don’t believe that abortion ever helps a situation, it does harm, it harms physically, mentally, spiritually and emotionally’ (Trenwith 2010). Another example is from Van Gend, in his article published by The Catholic Leader on 17 October 2010, who describes women having an abortion as ‘good-hearted women whose inner lives have been wounded by abortion – having created a place of death in their body’. This language stigmatises the procedure of abortion as leaving women ‘wounded’ with their body now ‘a place of death’ which causes harm ‘physically, mentally, spiritually and emotionally’. This language positions these as the consequences facing women who have an abortion.

The impact of this negative talk describing the body of a woman having an abortion as ‘wounded’ and a ‘place of death’ is consistent with Engeln-Maddox et al.’s (2012) discussion of ‘negative body talk’ in which women talk about their own bodies by making comparisons with fellow women. Engeln-Maddox et al. argue that this negative body talk has become a social norm amongst women reflecting and perpetuating ‘body disturbance’ in women. This construction of women as ‘injured’, ‘wounded’, or ‘fallen’ as a result of certain experiences is consistent with the ways in which women’s bodies have been governed over the centuries. For example, women who engage in sex work are often positioned as ‘wounded’, or ‘fallen’, for rejecting expectations of femininity that protect sexual activity as something that should occur only in committed, heterosexual relationships where procreation is a possibility (Agustin 2007). In a similar way, women who have chosen to abort are positioned as ‘wounded’, for acting outside the expectations of women as mothers. In this instance, the decision to procure an abortion is not only a rejection of motherhood, but also a rejection of sexual activity primarily for the purposes of procreation. These actions challenge traditional conceptualisations of femininity, and also challenge the primacy of the state in the governing of women’s bodies.

The Queensland abortion law itself positions women who choose to abort as deviant, by demanding that this decision be justified on the basis of, essentially, life and death. As noted
previously, the current legal situation places abortion as legal to carry out by doctors through surgery or medical treatment if it is to preserve the mother’s life (Betts 2009: 26). The pregnancy can therefore only be terminated if a medical professional can be satisfied that the life of the mother is threatened by an ongoing pregnancy. This positions women who choose to abort for other reasons as ‘selfish’ and criminally deviant. This constructs Tegan Leach’s choice to abort as a further rejection of femininity where women are expected to become mothers that protect their child at all costs. This depicts women who choose to abort for reasons outside of life and death as rejecting the norm of motherhood and femininity. Kumar et al. (2009: 629) states over-simplifying abortion and not taking into account the complex circumstances possibly surrounding the decision to abort, assists in creating ‘a category of “women who abort” as deviant from the norm’. By creating this concept that abortion is a deviation from the norm of motherhood for women, the label of those who abort as spoiled is applied contributing to the construction of abortion as deviant.

**Conclusion**

The Cairns abortion case sparked a flurry of debate in Queensland over abortion law. Changes made to the legislation were minor, granting women no greater control over termination than they had before, while the media coverage of the Cairns case demonstrated that women who choose to abort are largely stigmatised for their choices. The choice of key terms such as ‘baby’ and ‘child’ versus ‘foetus’, and ‘mother’ versus ‘woman’ imply certain expectations about the acceptability of women’s decisions. In this paper we have argued that the use of the terms ‘baby’ and ‘child’ humanises the foetus, invoking a greater judgement over women’s decisions to end a pregnancy. This is clearest in articles by pro-life organisations, which talk about the violence of women against their unborn children, but is also perpetuated by mainstream media through the selection of the terms baby, child and mother. Elevating the foetus to the status of baby and child also instantly applies the label of mother to pregnant women. A decision to reject this role by pursuing a termination is constructed as a rejection of the ultimate role that women should play, resulting in a wounded body and a spoiled identity for women who abort.

This analysis of the media portrayal of the Cairns trial clearly demonstrates how media discourses contribute to the stigmatisation and social construction of abortion as deviant. If women are to be empowered, rather than criminalised, media representations must refrain from applying damaging labels which judge women and condemn their choices.

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1 Section 225: Any woman who, with intent to procure her own miscarriage, whether she is or is not with child, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a crime and is liable to imprisonment for 7 years.

2 Section 226: Supplying drugs or instruments to procure an abortionAny person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a misdemeanour; and is liable to imprisonment for 3 years.

3 Surgical abortions are carried out in Queensland each year under common law precedent set in the 1986 case of *R v Bayliss*. Under section 282 of the *Criminal Code Act 1899* (QLD), which was used as a defence in *R v Bayliss* and accepted by the Justice McGuire who was the presiding judge, “a surgical operation upon any person for the patient’s benefit, or upon an unborn child for the preservation of the mother’s life” is legal (Betts 2009, 26). While this created a situation where women were able to go to a private clinic for an abortion, it created ambiguity with medical abortion as section 282 only refers to a surgical operation, leading to a reform allowing doctors to carry out medical abortions through the prescription of drugs. Section 282 of the *Criminal Code Act 1899* (QLD) falls under Chapter 27: Duties relating to the preservation of human life and now states: 282: Surgical operations and medical treatment(1) A person is not criminally responsible for performing or providing, in good faith and with reasonable care and skill, a surgical operation on or medical treatment of—
   (a) a person or an unborn child for the patient’s benefit; or
   (b) a person or an unborn child to preserve the mother’s life;
if performing the operation or providing the medical treatment is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.

4 The spelling in this paper is ‘foetus’ as most media articles reporting on the Cairns abortion trial used this spelling. The Oxford Dictionary online definition of fetus/foetus is “an unborn or unhatched offspring of a mammal, in particular, an unborn human more than eight weeks after conception” (2013). In the context of the media articles analysed, when foetus was used, it was assumed to broadly refer to an ‘unborn human’ from conception to birth.

References


Hard-to-hear Covert Recordings used as Evidence in Criminal Cases: Have We Brought Back Police ‘Verballing’?

Helen Fraser,1 University of New South Wales

Conference Sub-theme: Courts, Law and Justice Institutions

Abstract

Covert recordings, from hidden listening devices and other sources, feature as evidence in increasing numbers of criminal cases. Due the manner of their recording, they are often of extremely poor quality, so much so that only those with background knowledge of the case can make out what is said. Current law allows police, in the role of so-called ‘ad hoc expert’, to provide their own transcripts of such material. As protection against inaccurate transcripts misleading juries, the judge is required to caution that the transcript should be used only as an aid, and the jury should come to their own opinion as to what is said in the recording. But is this caution a sufficient safeguard?

This paper outlines two experiments using hard-to-hear audio from a recent murder trial, along with an inaccurate police transcript that formed crucial evidence in the prosecution case. The results add weight to previous arguments that a caution from the judge is insufficient to prevent juries being ‘primed’ to hear words suggested by an inaccurate transcript. Transcripts must be properly verified before they are presented to a jury. However, these experiments go further, demonstrating that, in this particular case, the inaccuracy of the police transcript is readily apparent to people who are enabled to listen carefully to the audio. This raises the significant question: why did no one, from either prosecution or defence, challenge this manifestly inaccurate police transcript? The answers point to serious failings in our legal system’s handling of hard-to-hear covert recordings used as evidence in criminal cases. It is suggested that lawyers take a more critical attitude to police transcripts than is currently common. This paper aims to provide background knowledge to help them do so.

Introduction

The 1980s saw mounting concern about courts accepting – with no more evidence than a detective’s say-so – that a suspect had given a ‘verbal confession’ (Wood 1997). Widely publicised reforms in the 1990s prevented this kind of ‘verballing’, by requiring assertions about what a suspect may or may not have said to police to be backed up by an electronic recording (Dixon 2008). What is less well known is that the same era brought other changes with the unintended effect of creating a new path by which police can put words in suspects’ mouths – without even intending to do so. The context was increasing use of covert listening devices. These can provide very useful evidence. Unfortunately, however, the audio is often of extremely poor quality, to the extent background knowledge of the case is need to make out what is said. For this reason, current law allows police, in the role of so-called ‘ad hoc expert’ (Edmond and San Roque 2009), to provide their own transcripts of covert recordings obtained in their investigations.

Of course, it was never the intention of the legal system that police should be allowed simply to assert that a barely audible recording contains words only they can hear. To guard against this, the jury is required to receive a caution from the judge that the police transcript is only as an
aid; their decision as to what is actually said in the recording should be based on what they hear with their own ears (Wood 2012). However, well established findings of phonetic science (see Fraser 2003) suggest this caution is unlikely to be effective. This is backed up by experimental findings (Fraser, Stevenson, and Marks 2011) showing how easily juries, fully believing themselves to be obeying the judge’s caution, might still be heavily influenced by an inaccurate transcript.

The present paper puts the focus, not on the jury, but on the lawyers who allow misleading and/or inaccurate police transcripts to be accepted as reliable accounts of what was said. Based on experiments using a covert recording from a real murder case, it demonstrates how an inaccurate transcript can affect the perception of poor quality audio by everyone involved in a case.

The research
The case concerned a father, son and grandfather from a single family. One night the son visited the grandfather, drank some beer with him, and then shot him. The grandfather died the next day. After several weeks, police arrested the son, who eventually confessed to the murder, claiming the grandfather had repeatedly humiliated and abused him. A few days later, the father was arrested. A conversation between father and son, recorded by a covert listening device, was alleged by police to include a confession showing the father had been an accomplice in the murder. The half-hour recording was of extremely poor quality, but was nevertheless admitted unopposed as evidence – along with a police transcript, presented to the jury with a caution from the judge – and played an important role in convicting the father, now serving a lengthy sentence.

No phonetics expert was consulted at the time by either prosecution or defence. However, the audio and transcript were later provided to the present author, an expert in phonetics with long experience in forensic transcription, who found the transcript to be inaccurate, incomplete and misleading in a number of ways. A small section of the audio and transcript were used as the basis of two experiments. In the first, participants heard the audio without background knowledge of the case, while in the second, context was provided before the audio was presented.

The experiments used an online survey tool (Qualtrics) enabling participants to listen to the audio repeatedly, and indicate what they heard under various conditions. Here there is space only for a summary, the main aim being to use this case as an example to publicise common but little-known issues likely to be of concern to many in the criminal justice field.

Experiment 1
Experiment 1 aimed to explore how people would react to the audio and the transcripts if they knew nothing about the case.

Participants
Participants were recruited via personal and academic email lists, and comprised a wide cross-section of demographic characteristics. Experiment 1 had 56 participants, randomly divided into two statistically similar groups, of 30 and 26.

Materials
Audio
The audio was a 14-second excerpt from the half-hour covert recording described above. Like the entire recording, the excerpt – chosen for its crucial role in the trial – is of extremely poor quality. Voices can be made out, in which the father appears to speak five separate phrases in a
whispered, urgent tone, and the son responds several times with 'mm', but few words can be heard with any confidence. The material would likely have been evaluated by a phonetics expert, if called, as 'untranscribable'; i.e. while interpretations might be offered none can be verified with sufficient confidence for use as evidence in a trial (see Fraser, Stevenson, and Marks 2011).

Transcripts
The experiment also used the relevant section of the police transcript, which interpreted the five phrases as shown as Transcript 1 (Table 1).

<table>
<thead>
<tr>
<th>Phrase</th>
<th>Interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>I'm not saying you're going in... fucking... you know</td>
</tr>
<tr>
<td>2.</td>
<td>just in case mate</td>
</tr>
<tr>
<td>3.</td>
<td>at the start we made a pact (the pact phrase, or PACT)</td>
</tr>
<tr>
<td>4.</td>
<td>in it till the end</td>
</tr>
<tr>
<td>5.</td>
<td>you know what I mean</td>
</tr>
</tbody>
</table>

This transcript can readily be demonstrated by a phonetics expert to be unreliable. While a few words can be given some limited credence (notably Phrase 5, You know what I mean), none can be verified with full confidence, and some (notably Phrase 3 At the start we made a pact), are clearly contradicted by the acoustics.

The experiment also used an alternative interpretation of the audio, shown as Transcript 2 (Table 2). This differs from Transcript 1 only in Phrase 3. It is important in understanding the results of the experiments to be clear that this transcript is not suggested as an accurate interpretation of Phrase 3. In fact, it was intentionally made up for these experiments as a plausible but inaccurate distractor.

<table>
<thead>
<tr>
<th>Phrase</th>
<th>Interpretation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>I'm not saying you're going in... fucking... you know</td>
</tr>
<tr>
<td>2.</td>
<td>just in case mate</td>
</tr>
<tr>
<td>3.</td>
<td>it's fucking payback (the payback phrase, or PAYBACK)</td>
</tr>
<tr>
<td>4.</td>
<td>in it till the end</td>
</tr>
<tr>
<td>5.</td>
<td>you know what I mean</td>
</tr>
</tbody>
</table>

Method
Experiment 1 started by presenting the audio to both groups with no information beyond the fact it was a covert recording from a real murder trial, and asking participants what they heard. It then provided a suggested transcript, asking participants to listen again and state whether they agreed with each phrase of the transcript, and if they did not, what they heard. Finally, it provided an alternative transcript, drawing participants' attention to the fact the only difference was in Phrase 3, and again asked whether they agreed with each phrase, and if not, what they now heard. Group 1 saw Transcript 1 first, as their suggested transcript, and then Transcript 2, as their alternative transcript. Group 2 saw Transcript 2 first, then Transcript 1 (Table 3).

<table>
<thead>
<tr>
<th>Method of Experiment 1</th>
<th>Group 1</th>
<th>Group 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open condition (no transcript)</td>
<td>Open condition (no transcript)</td>
<td></td>
</tr>
<tr>
<td>Transcript 1 (with PACT phrase)</td>
<td>Transcript 2 (with PAYBACK phrase)</td>
<td></td>
</tr>
<tr>
<td>Transcript 2 (PAYBACK phrase)</td>
<td>Transcript 1 (with PACT phrase)</td>
<td></td>
</tr>
</tbody>
</table>
Results (Experiment 1)

The non-crucial phrases

It is useful to consider first the non-crucial phrases (1, 2, 4 and 5), recalling that both groups had the same experience of these phrases, which were each presented once in open condition (with no transcript), then twice with transcripts differing only in Phrase 3. Chart 1 presents the percentage of participants who agreed with each phrase of the transcript in open condition, and upon first and second presentation of the transcript. Phrase 5, You know what I mean, was heard by about one-third of participants in open condition, and by nearly three-quarters with the transcript. Phrases 1, 2 and 4 were heard by no one in open condition, but as soon as the transcript was presented, around half the participants claimed to hear the words suggested for each phrase. The latter is a typical ‘priming’ effect for hard-to-hear audio (Fraser 2003). With priming, by a transcript or context, material that seems uninterpretable on its own suddenly becomes ‘clear’ when a transcript seems to ‘aid’ perception. It provides a useful baseline with which to compare results for the crucial phrase, shown in Chart 1, and discussed below.

Chart 1: How many participants heard Phrases 1, 2, 4 and 5 exactly as in Transcript 1. Results for Phrase 3, shown with solid and dashed horizontal lines, are far lower (see text).

The crucial phrase (3)

Participants’ interpretations of the crucial phrase (3) were categorised as in Table 4.

Table 4: Categorisation of participants’ interpretations of Phrase 3.

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>PACT</td>
<td>The exact ‘pact’ phrase</td>
</tr>
<tr>
<td>PACT SIM</td>
<td>Anything similar to the ‘pact’ phrase</td>
</tr>
<tr>
<td></td>
<td>Any phrase including the word ‘pact’, or a similar-sounding word such as ‘pack’ or ‘fact’</td>
</tr>
<tr>
<td>PAYBACK</td>
<td>The exact ‘payback’ phrase</td>
</tr>
<tr>
<td>PAYBACK SIM</td>
<td>Something similar to the ‘payback’ phrase</td>
</tr>
<tr>
<td></td>
<td>Some examples: it’s f**ked you made it back, it’s nothing ... layin’ back, it’s fucking payback time, it’s stuck play back, it’s stuck/dark ... pay you back</td>
</tr>
<tr>
<td>OTHER</td>
<td>Something different from either PACT or PAYBACK</td>
</tr>
<tr>
<td></td>
<td>Some examples: it’s that plain bag there, it’s f**ked bloody bad, it’s not reliable, it’s back, try your best, it’s about the main advantage, it’s back I begged, yeah yeah it’s fine</td>
</tr>
<tr>
<td>NOTHING</td>
<td>No words could be made out</td>
</tr>
</tbody>
</table>
Open condition
Chart 2 shows how many participants offered interpretations of Phrase 3 in each category in open condition. Note that nearly half heard something quite unlike either PACT or PAYBACK (with a wide range of interpretations offered), while 13% were unable to decipher any words at all. The ‘pact’ phrase was offered by 0 participants, and no similar suggestion was made by any participant (PACT SIM = 0). PAYBACK was offered by 2 participants (4%), with similar phrases (PAYBACK SIM) suggested by 39%.

Chart 2: How participants interpreted Phrase 3 in ‘open’ condition, with no context and no transcript

Agree to suggestion and alternative
Having interpreted the audio in open condition, participants were shown their group’s suggested and alternative transcripts (which differed only in the crucial Phrase 3). In Group 1, who received PACT first, 27% agreed with that interpretation, while in Group 2, who received PAYBACK first, 35% agreed with their transcript. As shown in Chart 1, both PACT (solid line) and PAYBACK (dashed line) were far less plausible interpretations than any of the other phrases.

Participants’ reaction to their alternative transcripts confirmed the implausibility of the PACT interpretation. Group 1, having seen the PACT suggestion, preferred the PAYBACK alternative when it was presented (43% compared to 27%). However, Group 2, having seen the PAYBACK suggestion, was less impressed with the PACT alternative (21% compared to 35%). Whether presented first or second, PACT is a significantly less plausible interpretation of this audio than PAYBACK.

Disagree with suggestion and alternative
Participants who disagreed with the transcripts were invited to provide their own interpretation in a comments box. These interpretations were coded as described in Table 4. Chart 3 shows that all 27% of Group 1 who initially agreed to the PACT phrase when it was suggested, abandoned that interpretation when the PAYBACK phrase was suggested, with 57% offering the PAYBACK phrase or something similar (PAYBACK SIM), and none suggesting anything similar to the PACT phrase. For Group 2, 50% of participants initially either agreed with the PAYBACK suggestion (35%), or provided a similar interpretation (PAYBACK SIM = 15%). No one who disagreed with PAYBACK provided PACT. When this group was shown the ‘pact’ phrase in their alternative transcript, 79% disagreed with it. Of these, only one person offered a similar phrase (it's like ? we made a pack), while 25% offered the PAYBACK phrase or something similar (PAYBACK SIM).
Chart 3: How many participants in each group, who disagreed with suggested or alternative transcript, offered an interpretation similar to PACT or PAYBACK?

Discussion (Experiment 1)

The key observation from Experiment 1 is that PACT is not only an inaccurate but also an implausible transcription of Phrase 3. No one ever heard the ‘pact’ phrase without it having been explicitly suggested. Its priming effect is also remarkably low and non-persistent, with even those few who initially accepted it, readily abandoning it when an alternative was suggested. The relatively high acceptance of PAYBACK and PAYBACK SIM in all conditions (even in the face of priming with PACT) indicates this is a more plausible interpretation than PACT. That is not an indication that PAYBACK is an accurate transcription (it is not), but does add weight to the extreme implausibility of PACT.

In short, Experiment 1 shows the police transcript of Phrase 3 is so implausible that just listening to the relevant portion, is enough to demonstrate its inaccuracy to most listeners. This raises the serious question of why the manifest unreliability of the police transcript was not picked up by either prosecution (who have the duty of fairness in relation to evidence) or defence (who have the duty of protecting the accused person from false allegations). Some answers are suggested by the results of Experiment 2, which is a closer approximation to how hard-to-hear covert recordings are experienced in real legal cases.

Experiment 2

Experiment 2 had 43 (different) participants, in one group. They were recruited in a similar manner, and were similarly diverse in demographic characteristics, to Experiment 1 participants, and the same audio and transcripts were used, in a broadly similar survey-style method. The main difference was that, where Experiment 1 presented the audio ‘cold’, Experiment 2 participants were heavily primed with a story similar to the one given in the case description above, but with the following additional information.

Police allege this conversation refers to a pact made before the murder, in which the son agreed to kill the grandfather at a time the father had a clear alibi, and the father agreed to share the proceeds of the grandfather's will with him. If arrested, the son was to claim provocation, and serve a short sentence, getting his share of the money when he was released. Existence of such a pact of course would make the father an accomplice to murder, at least as guilty as the son who pulled the trigger. However,
the father denies the allegation, and claims the conversation shows him encouraging his son to turn himself in to police, and making a pact to stand by him no matter what. The listening device recording is crucial evidence in deciding which side is telling the truth. This experiment asks for your opinion as to what kind of pact is discussed in the recording.

Having read this story, participants were asked for a preliminary opinion as to the father's guilt, and then further primed with the following contextual information about the recording.

The full conversation is half an hour in duration. Here you hear just the 14 seconds in which the father discusses the pact. The recording is of very poor quality. You might not hear anything much except the word PACT, but try to make out the sentences in which the word appears, as these contain evidence as to whether the father is guilty or innocent.

Next, participants were enabled to listen to the audio, with no transcript, and asked what they heard. They were then shown Transcript 1 and asked whether they agreed with each phrase, and, if not, what they heard instead. Next, they were told that a phonetics expert had indicated Transcript 1 was inaccurate, invited to listen to just the crucial phrase (2.5 seconds), in isolation, and (with no alternative transcript) asked to indicate what they now heard. Finally, they were offered Transcript 2 as an alternative, with the (untrue) indication that it was endorsed by phonetics experts, and again asked to state whether they agreed with each phrase, and, if not, to say what they heard. At the very end, they were asked to re-rate their impression of the father's guilt.

Results (Experiment 2)

Effect of each condition on interpretation of Phrase 3

As shown in Chart 4, even with the very heavy contextual priming of Experiment 2, no-one heard the exact phrase alleged by police (PACT) before seeing the transcript. However, 37% claimed to hear a different phrase including the word 'pact' (PACT SIM). (It will be recalled that the audio contains no acoustic evidence to support perception of this word.)
When Transcript 1 was provided, 65% claimed to hear exactly the PACT phrase (recall again that the acoustics contradict this interpretation). A further 9% claimed to hear a different phrase including the word ‘pact’ (PACT SIM). When participants were invited to doubt Transcript 1, and listen just to Phrase 3 in isolation, the number hearing either PACT or PACT SIM fell to a total of 47% (from 74%). When a specific alternative (PAYBACK) was suggested, 7% still confidently claimed to hear PACT, while a further 12% heard a different phrase including the word ‘pact’ (PACT SIM).

Consider now the results for the alternative interpretation of Phrase 3, PAYBACK. Before any transcript was offered, a total of 21% heard either PAYBACK or PAYBACK SIM, despite the heavy contextual priming for PACT. After PACT was suggested, support for PAYBACK or PAYBACK SIM fell to a total of 9%. However, when doubt was cast on the PACT interpretation, PAYBACK or PAYBACK SIM reverted to 19%. When Transcript 2 was shown, the number claiming to hear PAYBACK or PAYBACK SIM rose to 33%, with several participants commenting ‘This is what I heard all along’ (apparently assuming PAYBACK to be an accurate interpretation of this audio, which it is not.)

Effect of audio on opinions about guilt
At the start of this experiment, and again at the end, participants were asked whether they thought the father was guilty. At first, as shown in Chart 5, 77% said they had no opinion. By the end, only 40% said they had no opinion, with 35% inclined to think he was guilty and 26% inclined to think he was not guilty (and various reasons offered in support of these opinions). In other words, listening to this audio (which is uninterpretable and thus incapable of demonstrating guilt or innocence) tended to give participants – even those who did not accept the transcripts – an opinion as to whether the father was guilty.

![Chart 5: Opinions about guilt.](image)

**Discussion (Experiment 2)**

Experiment 2 confirms the manifest implausibility of the inaccurate police transcript of the crucial phrase demonstrated by Experiment 1. However, it shows that knowing the context of the case makes listeners highly susceptible to overlooking that inaccuracy and accepting the police interpretation of what was said. Chart 6 demonstrates how the contextual priming provided in Experiment 2 increased acceptance of the police transcript in comparison with Experiment 1, in which participants listened with no background ‘story’.
Hard-to-hear Covert Recordings used as Evidence in Criminal Cases: Have We Brought Back Police 'Verballing'?

[Graph: Chart 6: Comparison of percentage of participants under each condition in Experiment 2 (with contextual priming) vs. Experiment 1 (without contextual priming) who accepted that Phrase 3 included the word 'pact' (PACT or PACT SIM).]

General discussion

Experiment 2 is a more realistic simulation than Experiment 1 of the experience of participants in the many Australian trials that feature hard-to-hear covert recordings. This may explain how even manifest inaccuracy of police transcripts in cases like this so often goes unnoticed.

Long before they hear the audio, all personnel, including both defence and prosecution teams, are heavily primed, first by contextual knowledge of the case, then by the transcript. An important difference from Experiment 2 is that it is rare for any alternative to the police transcript to be suggested, leaving listeners in a situation like that of ‘Experiment 2, PACT transcript’ (Chart 5), where three-quarters of listeners accepted the inaccurate police transcript. (It may be worth noting explicitly that simply having an alternative transcript is no panacea. Here, though seeing an alternative was useful in reducing confidence in the police transcript, many participants simply accepted the alternative, itself inaccurate, and many more were influenced by it. Remarkably few gave the right answer, which, in this case, is that the audio is uninterpretable. Listeners lacking training in phonetic science are unable to make reliable judgments on transcripts of poor quality audio.)

In fact, the position of lawyers is typically far worse than that of these participants. The experiment presented a tiny portion excised from the half-hour recording, with a special player enabling participants to focus on individual phrases, and a guided sequence of listening experiences. Such facilities, of course, are rarely available in legal cases. Without them, few untrained individuals can even locate relevant portions within a half-hour recording of this quality. Even 14 seconds of such audio initially rushes past in an unpleasant, confusing blur, with, at best, a word emerging here and there – and, as we know, what seems to ‘emerge’ may be a poor reflection of what is actually there. Listening critically takes a great deal of time and patience. These participants spent at least 10 minutes listening to the 14-second excerpt, many far longer. At that rate, checking the full half hour recording would take more than 20 hours.

It is surely understandable, then, if lawyers, lacking appropriate facilities and time for critical listening, simply accept the solution offered to them by the law itself, which says the police transcript, the result of many hours of listening by a so-called ‘ad hoc expert’, is likely accurate; and if it is not, the jury, cautioned by the judge to use the transcript only as an aid, are likely to
find that out. But is it really reasonable to expect a jury to be better able to critique transcripts of barely audible recordings than lawyers are?

Finally, even with the necessary facilities and time, careful listening results only in an interpretation not the correct interpretation. In the experiments, many participants expressed confidence in their own interpretations – unaware that others had come with equal confidence to very different interpretations. For all these reasons and more, evaluating transcripts of hard-to-hear audio requires specific, high-level expertise in relevant branches of phonetic science. Leaving this task to the jury is not fair to juries, let alone defendants.

Conclusion
Covert recordings and police transcripts are used as evidence in ever-increasing numbers of criminal cases. The process by which they are presented in court is deeply flawed, arguably more so than the earlier system which allowed traditional ‘verballing’. The power of priming to make even a radically inaccurate transcript seem believable means a caution from the judge is insufficient to prevent inaccurate police interpretations of barely audible recordings misleading juries. For this reason, hard-to-hear audio and associated transcripts should be fully evaluated by independent analysts with genuine expertise in relevant branches of phonetics before being admitted as evidence in legal cases – ideally before being circulated to legal teams. Preventing this new form of ‘verballing’ requires individuals at all levels and on both sides of our adversarial system to take a far more critical attitude to police transcripts than is currently common.

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The Rurality of Sex: Community Resistance and Objection to Prostitution in Rural and Regional Areas throughout Queensland

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Conference Sub-theme: Gender, Sexuality and Justice

Abstract

Queensland legislation currently defines two legally recognised forms of prostitution: sex work conducted in a licensed brothel; or, sex work conducted privately by a sole operator. Despite prostitution’s legality in these contexts, it continues to be heavily controlled and restricted by authorities, while also being rejected by surrounding communities. Such resistance towards prostitution is demonstrated in Queensland where over 200 towns with populations of less than 25,000 have been successful in applying for exemption from the development of licensed brothels in those jurisdictions (Prostitution Licensing Authority 2012). Queensland’s legislative acknowledgement of prostitution as a legal act, while simultaneously allowing small communities to reject such activity, seems somewhat contradictory. This paper will provide a theoretical examination of common community objections to prostitution in modern society, determining whether such attitudes are applicable to communities in rural and regional Queensland towns. Additionally, this paper will incorporate an analysis of rural and urban areas via the ‘gemeinschaft-gesellschaft’ dichotomy to understand the potential justification for opposing areas being subject to differential treatment under the law.

Introduction

Despite an existence that spans across numerous cultures and centuries, prostitution continues to be socially and politically positioned as the pinnacle of immorality, deviance and risk (Weitzer 2009; O’Neill et al. 2008; Hubbard and Sanders 2003; Saunders and Kirby 2011), and as a consequence, legislative frameworks enforced by governments to address prostitution activity are often dominated by elements of formal control and regulation. Ultimately, such regulatory regimes aim to minimise the prevalence and negative impacts of a vice like prostitution, whilst at the same time protecting surrounding communities where prostitution occurs (Hubbard et al. 2013). This is currently demonstrated in Queensland where the regulatory approach enforced through the legislation limits and contains prostitution to designated areas, partly based on community concerns and negative attitudes about such activity. Though two forms of legal prostitution are currently recognised in Queensland the legislation provides towns with populations of less than 25,000 with the right to apply for exemption from the development of legal brothels, thereby prohibiting such establishments in those jurisdictions (Prostitution Act 1999: s.155; Sustainable Planning Act 2009: sch1.5).

Queensland’s legislative acknowledgement of prostitution as a legal act, simultaneously aligns with the law’s acceptance of small communities rejecting or disallowing such activity, and thus seems somewhat contradictory. This paper will provide a theoretical examination of common community objections to prostitution in modern society, and examine the legislation in terms of its acceptance of the idea that prostitution is an act inherently associated with urban or gesellschaft activities, and in opposition to rural or gemeinschaft communities. A brief examination of current mining practices will also be conducted to identify how gemeinschaft
communities in rural Queensland are being disrupted by the influences of the industry, resulting in the increase of gesellschaft practices (such as prostitution) in those areas.

**Queensland Prostitution Legislation**

The foundation of Queensland's regulatory framework for the sex industry is enforced through the Prostitution Act (1999) which identifies legal and illegal forms of prostitution; lists requirements and provisions for such activity; and provides small towns with the right to apply for exemption from brothel development. The underlying principles of the legislation aim to:

- Ensure the quality of life for local communities;
- Safeguard against corruption and organised crime;
- Address social factors which contribute to the involvement in the sex industry;
- Ensure a healthy society; and
- Promote safety (Prostitution Bill Explanatory Notes 1999: 1)

When initially implemented, the Act provided provisions for the establishment of the Prostitution Licensing Authority, to be responsible for the strict licensing and monitoring of legal prostitution in Queensland (PLA 2012). Currently, the PLA manages and decides brothel licence applications, monitors the provision of prostitution through licensed brothels, receives complaints about prostitution from the community, liaises with the police service and other agencies regarding prostitution, and promotes sexual health care (Prostitution Act 1999 s.101).

The PLA (2012: 21-2) reported that as of June 2012, there were a total of 24 licensed brothels operating throughout Queensland, with the majority of establishments located in the greater Brisbane city region. The PLA (2012: 23) additionally reported that currently, there are over 200 Queensland towns with populations of less than 25,000 that are considered exempt from the development of legal brothels (PLA 2012: 23). This presents an interesting juxtaposition. Though diverse community reactions and opinions of various social vices can be present in and amongst differing environments and populations, it seems apparent that negative attitudes towards prostitution in smaller, rural or regional towns are given more weight than similar concerns in large regional and urban areas. Before examining potential explanations for the differential treatment of rural, regional and urban areas under the law, it is important to gain an understanding of the reasons why communities might stand in opposition to prostitution.

**Prostitution as a 'Problem'**

Negative community attitudes towards various social phenomena often centre on the principle presumption that the activity in question is inherently bad or problematic. In regards to prostitution, the most common community objections to such activity generally relate to factors of morality, public nuisance, safety, crime and health.

Though there are many configurations of sex work (such as male sex work, transgender sex work, or sex work between only females), prostitution most commonly involves a female sex worker selling sex to a heterosexual identified man (Hubbard 2012: 60). This commercial exchange of sex is therefore often socially contested because it deviates from the socially acceptable ‘norm’ of sex; with a loving partner or between spouses in a nuclear family (Agustin 2005: 67). Such an act is additionally portrayed as a threat to the institution of marriage as it breaks the link between sex, love and reproduction (Weitzer 2010: 70). Those who engage in prostitution are similarly condemned by society and considered morally degenerate as a result of their willingness to reduce sex to a simple commercial exchange (O’Neill et al. 2008: 76; Scott 2011: 54). However, this construction of deviance is largely directed toward female sex workers rather than male clients. Males are often assumed to have a 'biological need for sex' (Carpenter 2000: 19); therefore their engagement in such activity is often regarded as biologically normal.
In contrast however, the practice of prostitution highly conflicts with the constructed ideals of femininity, which are described as representing notions of purity and chastity (Sanders, O'Neill and Pitcher 2009: 2). Females who engage in prostitution are separated from those females who do not, and are positioned as being an abject 'other' in society (O'Neill and Campbell 2006: 39). They are considered deviant and psychologically damaged, with the ability to corrupt men and 'good’ women (Sullivan 1997: 100). Female sex workers are argued to symbolise an unacceptable form of femininity due to how their ‘deviant sexual behaviour’ diminishes overall levels of female ‘purity’ (Sanders, O’Neill and Pitcher 2009: 2) and undermines the ‘family’ character of the surrounding neighbourhood of where such behaviour occurs (O’Neill et al. 2008: 78). Through their positioning as the anti-social 'other' in society, sex workers are identified as engaging in behaviour that fails to positively contribute to surrounding communities (O’Neill and Campbell 2006: 38; O’Neill et al. 2008: 78).

Aside from being perceived as an act of immorality, prostitution is also considered to have strong association with other social problems. The proliferation of drugs, violence, disease and corruption in society are frequently considered to be largely influenced by the mere existence of prostitution (Scott 2011: 63; Scoular 2004: 344; Weitzer 2010: 71). Additionally, prostitution is often argued to be form of sexual exploitation that is fuelling global human trafficking on a large scale (Outshoorn 2005: 141; Hubbard, Matthews and Scoular 2008: 145; Raymond 2004: 1157). Communities therefore commonly express concern about the level of potential risk that is created, not only for those who engage in such activity, but also for individuals in the wider community. Sex workers are often portrayed as having a heightened risk of being subject to violence, abuse, homicide, sexual assault, robbery and sexually transmitted diseases (O’Neill 2008: 83; Hubbard and Prior 2012: 152; May and Hunter 2006: 178). Though community residents can be vulnerable to similar risks, the presence of prostitution in a neighbourhood is seen to expose residents to a number of negative impacts as a result of such activity.

Residents for example can often feel intimidated about leaving their homes for fear of witnessing sexual acts being conducted in public, or a fear of being harassed or propositioned by clients and sex workers (O’Neill and Campbell 2006: 34; O’Neill et al. 2008: 76; Sanders, O’Neill and Pitcher 2009: 133; Scoular et al. 2007: 12). Residents are also argued to be at risk of coming into contact with hazardous paraphernalia in public, such as used condoms and needles that have been discarded by those engaging in prostitution (Sanders, O’Neill and Pitcher 2009: 132). The existence of prostitution in communities is additionally argued to depreciate property values, impact the viability of businesses, as well as increase the traffic and noise in areas where public solicitation occurs (O’Neill et al. 2008: 76; Scoular et al. 2007: 12; Sanders, O’Neill and Pitcher 2009: 132; Shdaimah et al. 2012: 9). Overall, it is argued that prostitution negatively impacts on the quality of life for residents in surrounding communities (Anderson 2002: 748; Scoular et al. 2007: 12; Sanders, O’Neill and Pitcher 2009: 132; Shdaimah et al. 2012: 9; O’Neill et al. 2008: 78).

The preceding summary of common community objections to prostitution identifies two important points. Firstly, the majority of existing empirical research on community attitudes towards prostitution has been conducted in an urban context. Community objections to prostitution that have been identified within the literature therefore relate more closely to instances of sex work that are specific to urban environments, such as illegal street prostitution. While there is the assumption that these negative community attitudes can be applied to rural and regional communities, there is also a lack of knowledge and empirical focus toward investigating objection to legal prostitution within those contexts. Work that has been conducted on prostitution in a specifically rural context is limited (see Scott et al. 2006, 2008), and reinforces the requirement for further investigation into the area.

Secondly, a brief summary of relevant literature clearly identifies that objection to prostitution is indeed present in many urban contexts. From these findings it could be argued that such
attitudes towards prostitution are also likely prevalent in highly populated and urbanised locations throughout Queensland. Despite this, it is apparent through the exemption rule that Queensland legislation is more accommodating to the attitudes of those communities in smaller rural or regional areas. In order to understand the potential justification or explanation for the differential treatment of locations under Queensland’s prostitution law, an overview of traditional conceptualisations of rural and urban areas is required.

**Rural (gemeinschaft) vs. Urban (gesellschaft)**

Rural and urban areas are considered characteristically different (Bouffard and Muftic 2006: 57) and are often compared through Ferdinand Tönnies’ ‘gemeinschaft-gesellschaft’ dichotomy (Christenson 1984: 160; Kamenka 1965: 3; Donnermeyer 2007: 15). Tönnies’ dichotomy represents two opposing models of society: an organic, homogenous collective practicing shared values, moral obligations and natural wills (gemeinschaft), in opposition to a superficial mechanical order based on individualistic needs, interests and contractual/legal obligations (gesellschaft) (Tönnies 1957; Segre 1998: 413). Gemeinschaft is associated with smaller entities that share similar beliefs and ways of life, engage in frequent interaction, and experience strong emotional bonds – with gesellschaft contrastingly linked to larger entities that practice limited interaction, engage in high competition and hold dissimilar beliefs (Brint 2001: 2-3). Whilst originally not intended by Tönnies as a comparative distinction between specific geographical locations (Bonner 1998: 174), the gemeinschaft-gesellschaft dichotomy is considered a useful typology for comparing rural and urban areas.

The concept gemeinschaft most closely relates to rural areas, where such communities are thought to consist of small, socially intimate and cohesive populations that share social norms and are free from social conflict (Donnermeyer 2007: 15; Scott et al. 2006: 153; Scott, Carrington and McIntosh 2011: 148). A fundamental basis of gemeinschaft is family life; where communities consider themselves to be large families responsible for accepting or rejecting the membership of outsiders (Tönnies 1957: 228). ‘Gemeinschaftlich’ relations are identified as being sustained through these strong familial bonds that flourish within typical rural ‘ways of life’ (Bonner 1998: 175-4; Tönnies 1957). Individuals within gemeinschaft rural societies are not distinguishable from each other, as all work together for common tasks and experience enjoyment from this level of communality (Aldous 1972: 1195). Overall, the nurturing of this particular social organisation is what Tönnies considered most significant about gemeinschaft rural life (Bonner 1998: 175).

In contrast, gesellschaft is depicted as a mechanical society consisting of an artificial construction of an aggregate of human beings (Tönnies 1957: 64). It is argued that gesellschaft in its purest form can be observed in larger, urbanised metropolitan centres (Aldous 1972: 1195). The emphasis on commerce and large-scale capitalist industries within urbanised locations encourages ‘gesellschaftlich’ relations (Bonner 1998: 173; Aldous 1972: 1197), which are perceived as impersonal and formal and defined purely by contractual obligations (Donnermeyer 2007: 15-16). Within gesellschaft, an individual will not give, grant or produce anything for another person, unless it is for an exchange of a gift or labour deemed to be of an equivalent nature (Tönnies 1957: 65). Gesellschaft individuals thus only interact in the prospect of gaining some form of profit (Aldous 1972: 1195).

It is through this framework therefore that we can see how prostitution is generally situated as product of extreme gesellschaft relations and regarded as a distinctly urban phenomenon (Scott et al., 2006). The act of prostitution is argued to align with gesellschaft practices as it involves the contractual exchange of labour for a profit (see Tönnies, 1957). In contrast, prostitution conflicts with gemeinschaft ideals which perpetuate an understanding of a gendered division of labour; where women are placed into domestic duties within the home, in comparison to men who work closely together in farming and grazier roles (Tönnies 1957: 40; Scott et al. 2006: 1195).
153). Prostitution is not considered to be a productive form of labour within rural *gemeinschaft* communities; the image of a sex worker conflicts not only with the image of a farmer or grazier, but also with the acceptable female ‘wholesome homemaker’ role (Scott et al. 2006: 153). Whilst this dichotomy identifies a number of useful explanations for resistance to prostitution in rural vs. urban areas, can it be solely relied upon for such an investigation?

As expected, Tönnies’ *gemeinschaft-gesellschaft* dichotomy has been met with a number of criticisms. Overall, there is an apparent consensus that Tönnies' theory has failed to meet a standard level of neutral objectivity (Bonner 1998; Aldous 1972; Brin, 2001). The discussion of the two concepts is argued to convey a sense of favouritism or preference towards rural *gemeinschaft* communities (Aldous 1972: 1198). This is identified as problematic as the *gemeinschaft* concept is seen to portray a misrepresentative and overtly romanticised portrait of rural communities based upon assumptions and myths (Brin 2001: 2; Bonner 1998: 176). For Tönnies, there is a presumption that rural *gemeinschaft* communities are completely homogenous, with heterogeneity therefore being an intrinsic trait of urbanised *gesellschaft* areas (DeKeseredy et al. 2007: 298). However, Brint (2001: 3) argues that small numbers of people don't necessarily mean common ways of life and shared beliefs; nor do continuous relationships imply strong emotional bonds. *Gesellschaft* is therefore are no less natural or more artificial than *gemeinschaft* (Bonner 1998: 176).

In contemporary society, rural areas traditionally categorised as *gemeinschaft* are now being increasingly influenced by external cultural, social and economic *gesellschaft* forces (DeKeseredy et al. 2007: 298). An example of this is demonstrated through current mining industry practices within Australia. Contemporary mining work practices have resulted in a heavy reliance upon non-resident ‘Fly-In, Fly-Out’ (FIFO) or ‘Drive-In, Drive-Out’ (DIDO) workforces (Carrington, Hogg and McIntosh 2011: 337). Rural and regional mining towns previously familiar with traditional *gemeinschaft* dynamics are now being increasingly subject to influences from *gesellschaft* lifestyle. Such communities are experiencing increases in non-resident (predominantly male) visitors to the area, who impose significant burdens on local services and frequently engage in socially undesirable activities such as excessive alcohol consumption, gambling and prostitution (Carrington, Hogg and McIntosh 2011: 340, 402).

It is evident therefore that the seemingly simplistic distinction of rural and urban areas through the *gemeinschaft-gesellschaft* dichotomy needs to be used with caution when examining prostitution in contemporary society. However despite the identified limitations, the distinct categorisation of rural and urban areas portrayed through the dichotomy is deemed highly relevant for this specific investigation, as these ideas of such areas appear to be incorporated into the foundation of Queensland’s prostitution legislation. The brothel exemption rule afforded to small towns by the Act has been described as a means of ‘respecting the interest of local communities’ (Schloenhardt and Cameron 2009: 199). With such an exemption only applicable to towns who meet specific population criteria, it seems that respect for community attitudes towards prostitution is negated by the legislation if those communities are not representative of harmonious, cohesive areas where prostitution is considered to simply not belong.

**Conclusion**

Investigation into various social phenomena in specifically rural contexts is often largely ignored throughout most disciplines; however such focus is recently gaining more attention (see Hogg and Carrington: 2006; Scott et al.: 2007). This acknowledgement of the unique differences between rural and urban areas is vitally important to achieve a greater understanding of how community attitudes towards particular social issues are influenced. With regard to prostitution in Queensland, further investigation conducted into rural or regional community attitudes could provide an insight into whether objection to such activity is
influenced by stereotypical or generalised concerns expressed by those in urban contexts, or whether such opinions are reinforced by traditional rural customs, which ascribes commercial sex strictly to urban environments. The consideration of the impacts of current mining regimes to such community attitudes also needs to be further examined.

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Technologies of Biosurveillance: Bodily Regulation through the Lens of Ordinary Affection

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Abstract
There is a growing academic literature that scrutinises the effects of technologies deployed to surveil the physical bodies of citizens. Here, we consider the role of affect—that is, the visceral and emotive forces underpinning conscious forms of knowing that can drive one’s thoughts, feelings and movements. Drawing from research on two distinctly different groups of surveilled subjects, paroled sex offenders and elite athletes, this paper examines the mundane practices of biosurveillance in their lives and how their reflections reveal unique insight into how subjectivity, citizenship, harm and deviance become constructed in intimate and public ways vis-à-vis technologies of bodily regulation. ‘Ordinary affects’, we argue, reveal cultural conditions of biosurveillance, particularly how risk becomes embodied and internalised in subjective ways. This paper describes affective responses to biosurveillance as a mode of exploring the complexities of these regulatory tactics, which current debates, particularly in relation to civil liberties and social democracy, often negate.

Introduction
Criminological literature on the use of surveillance focuses primarily around two conversations. The first discusses the efficacy of surveillance systems for crime prevention. The second examines the rapid growth of surveillance systems within criminal justice policy as reflective of socio-political changes in liberal democracies. Exploring the links between the emergence of neo-liberal policies and actuarial, risk-based criminology, scholars have analysed them through the lens of governmentality, suggesting that surveillance evidences a ‘new means to render populations thinkable and measurable, through categorisation, differentiation and sorting into hierarchies, for the purposes of government’ (Stenson 2001: 22-23). Here, our aim is to highlight the affective contours of these practices—that is, the sensory encounters with these technologies and the emotive forces they index.

To do so, we consider commonalities between two distinctly different populations, paroled sex offenders on GPS under Jessica’s Law in California and elite athletes subjected various surveillance techniques under the World Anti-Doping Code (WADC). This paper specifically addresses the effects and affects of biosurveillance, which entails technologies that track or detect individual bodily activities, including physical movement and internal functions. The commonalities between these two seemingly divergent populations demonstrate how biosurveillance both relies upon and instills meanings of risk and risk management and its intimate implications. In both cases, biosurveillance renders people as risk-objects: that is, not only are they subjected to risk management strategies, they are also cast as the source of risk.

Administrative strategies of risk management have become central components of law and governance (Scott 2007). As Nikolas Rose (1998: 177) notes, this ‘risk frame’ channels ‘institutional practices and systems into the following mold: assess, predict and manage’ in ways
that transform 'pervasive uncertainties and indeterminacies' into 'calculable probabilities of harm to be managed by rational experts'. Managing risks disregards forms of resistance outside of the governing risk frame as unnecessary and irrational, carrying far-reaching effects. The emphasis on risk, write Norris and Armstrong (1999: 24), makes each person a legitimate target for surveillance because 'everyone is assumed guilty until the risk profile assumes otherwise'. Given the various 'risk logics' at play (Ericson and Doyle 2003), we embrace recommendations to attend to risk as a 'heterogenous' and 'variable' technique of governance by examining particular manifestations in two contexts (O'Malley 2004; Valverde, Levi and Moore 2005).

This analysis of parolees and athletes gleans insight into the perspectives of persons-as-risk objects. Its attention to affect highlights how acts and emotions register in visceral ways, enabling a critical analysis of bodily encounters with social forces (Seigworth and Gregg 2010). Affects, explains Kathleen Stewart (2007: 40), are not so much 'units of knowledge, as they are expressions of ideas or problems performed as a kind of involuntary and powerful learning and participation'. As surveillance is central to the everyday lives of both sex offender parolees and elite athletes, we focus on their sensory and emotive responses to surveillance in order to better grasp how they develop intimate relationships with technologies that surveil them and come to view themselves and others as 'suspect'. In attending to their experiences, we hope to move conversations about surveillance from questions concerning administrative and 'scientific' risk management to those of autonomy, subjectivity and ethics.

Relying upon narratives elicited through focus groups with parolees on GPS (N = 47) and interviews with athletes in Australia, New Zealand and the United States (N = 83), this paper, while acknowledging evident differences in regulatory objectives and environments, discusses affective consequences of surveillance. The following accounts illustrate how these persons-as-risk-objects cease to be seen as individuals in need of care and support, but, instead, emerge as suspect subjects—a complicated challenge to dwell on when considering how to deliver 'just' modes of regulation in these spaces.

**Research Background and Legal Context**

While we contend that biosurveillance similarly renders sex offender parolees and elite athletes as risk-objects, these regulatory environments are distinct. Jessica's Law, which mandated lifelong surveillance and stringent tracking of sex offenders on parole, was originally passed by the Florida legislature in 2005 (Fla. St. § 775.21) and has been adopted by 43 additional U.S. states. Most notably, this law created strict residency restrictions, limiting the location of where sex offenders may live or work and surveilling them for life. The anti-doping movement is a global regulatory regime spearheaded by the World Anti-Doping Agency (WADA), governed by the World Anti-Doping Code and backed by an international legal convention. Since its establishment in 1999, WADA has implemented a multifaceted approach crossing multiple geographic areas and sports. Random drug testing in and out of competition, monitoring high-level athletes’ whereabouts, and blood profiling have become common practice. WADA’s activities rely upon and actively encourage innovation to detect new substances and develop new methods of surveilling athletes.

The impetus for monitoring subjects is also distinct: Whereas the use of GPS targets paroled sex offenders after they have served their sentence for crimes committed, anti-doping regulation aims to deter the use of prohibited substances and methods in sport. Put another way, GPS monitors and delineates impure parolees from others in the community, while anti-doping regulation aims to preserve the purity of athletes. The composition of these populations is thus vastly different; however, their experiences are analogous in the surveillance regimes watching over them retain a shared tenet: their justification is to prevent future offending behaviour. A similar affective theme emerges: participants internalise regulatory messages by seeing
themselves and others like them as suspect subjects, while developing intimate, yet tenuous relations with mechanisms of surveillance targeting their bodies.

**Seeing the Self and Others as Suspect**

Parolees and athletes take deeper meanings from the forms of surveillance to which they are subject, seeing themselves as suspect in ways that reflect regulatory distinctions. Parolees internalise a shared negative suspect status, while athletes come to find their own bodies as well as their competitors suspect.

The shame and anxiety of occupying the legal category of ‘Sexually Violent Predator’ (SVP) brings with it a heightened awareness of parolees’ social exclusion and dehumanisation. Not only do they speak of being ‘stalked by the state’, they also feel like they are deprived of human qualities. To borrow the words of one interviewee, ‘It is very depressing. It robs a piece of my humanity. I am not trying to negate my crime; we are talking about the impact of GPS on us’. Overall, they are, as many participants reiterated, ‘shit’.

One parolee mentioned, ‘This thing [GPS] just keeps reminding us that we are bad, we are shit, we are outcasts in our community and we are shit in this society. That makes a tremendous impact on us, our self-esteem. It’s very hard’. Another explained, ‘We’re the worst thing in everybody’s eyes. We’re looked down on. We’re hated. People kill a baby and it’s not as bad. People shoot someone in the head, still, not as bad’. One participant expressed, ‘Now who’s America’s most wanted?’ to which another parolee answered, ‘We are!’ All parolees articulated deeply rooted feelings of social exclusion, and the struggle of being surveilled inscribed this negative subjectivity.

Many parolees paralleled wearing a GPS akin to individuals with life-long physical ailments or permanent visible marks. One participant declared, ‘It’s like a disease’, and ‘they might as well be tattoos’, while another explained, ‘You feel like you have the mark of Cain’. These were common sentiments, elaborated upon as being ‘like, [using both hands to point to himself], I’m Freddy Kruger mother f**ker! People perceive it like that. They see the monitor and they perceive me as a predator’. Other conversations discussed feelings of individual shame due to wearing GPS and how that shame prompts fear, as the unit symbolises a perceived risk to reoffend. One participant stated, ‘The crime you commit should not have this on your leg, and then you show it, and people think, “Dude, this is a fucking murderer, we should kill him!”’ Another agreed, ‘And the stigma everybody associates because they made such a big issue out of it—the whole GPS with child molesters’ thing. I don’t even want to go through that hassle of people thinking the worst of me’. One parolee also acknowledged, ‘I am fearful—everyone is after you’. Feelings of shame thus emerge as interconnected with internalised social stigma and concern about public consequences (i.e., vigilante justice).

This subjective interplay is so profound that it prevents parolees from enjoying the simplest pleasures. As explained by one participant, upon being released from prison:

> I wanted to go to Carl’s Junior—they had been advertising that mushroom burger for three years, and I was going to have one when I got out. That day, I couldn’t eat it. I was stunned. I felt so bad. I can’t remember the last time I felt that bad—that day was the worst day of my life. I was like, ‘Oh my God, they are looming over my shoulder constantly’, and I’m making sure my pant leg was down [to hide the GPS].

He was unable to enjoy a meal because of the nagging anxiety associated with his new legal status of SVP and the wearing of a visible GPS unit.
Athletes are not compelled to physically wear monitoring technologies on an everyday basis, but they do live regimented lives, focusing on the pursuit of modifying their bodies so as to competitively excel. Although many social inputs inform athletes’ beliefs and behaviors, ‘the horizons of an athlete’s world can never stray far beyond her body’ (Brownell 1995: 10). Anti-doping regulation shapes these horizons by mediating the boundaries of acceptable substances and methods athletes can use and requiring them to comply with various forms of surveillance, including drug testing and blood profiling as well as whereabouts reporting so that they are on call for unannounced sample collections. If an athlete tests positive for a banned substance or fails to comply with regulatory conditions, he or she is liable for an anti-doping rule violation (ADRV).

Many interviewees acknowledged that regulation shifted their perspectives toward what they ingested—and their bodies more generally. As one rugby league athlete reflected, ‘It changed the way I look at what I eat. I have to be smart about what [supplements] I take... I can’t be smoking that shit [marijuana], either’. Like many other athletes, he acknowledged that rules held athletes individually responsible for contaminations detected through testing (even if unintentional) and that many drugs used primarily for recreational purposes, such as cannabis, would result in sanctions if detected during competition. Similarly, a rugby union player stated,

> I never used to think about what I ate being bad or if I’d test positive for something. Now I look at my body differently. When I look at stuff [supplements] on the shelf and after I take something, I am always worried about it—even when they [support staff] tell me it’s okay to use.

As most first-time sanctions result in a two-year ban from sport, many athletes recognised that an ADRV could end their athletic careers and jeopardise their livelihoods. Regulation thus compelled them to take responsibility for these risks to avoid punishment. Of the athletes who shared these anxieties, none expressed a fear of others cheating or the need to catch athletes cheating. Instead, they internalised the regulatory gaze cast onto their bodies, and their narratives prioritised feelings of self-consciousness about what they consumed.

Not all athletes conveyed this sense of responsibilisation. In fact, many who competed in sports with documented histories of doping, such as cycling, weightlifting and track and field, projected suspicions onto other competitors. One former sprinter who narrowly missed qualifying for the Olympics explained that he was naïve for not using performance-enhancing drugs:

> I still just want to know just how fast I could’ve been. So many of those guys I competed against went on to the next level. They were Olympians, and almost all of them were on something. Well, at least that’s what everyone says. I guess I really don’t know if they did, but, by the looks of them, I am pretty sure they were! I just know that I didn’t, and I don’t know how fast I could’ve been.

He disclosed that some of his friends had used performance-enhancing drugs, prompting him to presume that the most successful runners had as well, even though he admittedly relied on anecdotal evidence.

Other interviewees reflected competing in a sport ‘plagued by widespread doping’. One participant felt so strongly about the pervasiveness of doping in her sport that she competed for another country. (She was born in another country and therefore eligible to do so.) She expressed frustration that she failed to qualify for the Olympics, stating that she could not believe others were that much better than her—unless they were doping. Her evidence? Beyond her competitors’ improved performances, she responded bluntly, ‘Well, I could tell just by looking at them. It just didn’t look right, you know?’ With no evidence of cheating available, seemingly unnatural female muscularity served as proof.
Gendered transgressions are longstanding grounds for rendering particular women suspect. As a retired athlete explained, ‘[S]ome of those [Soviet bloc] women weren't women any more. You could tell back in those days who was cheating. Today, with all that’s out there, it’s not so easy. You really can’t trust anyone’. This participant, among others who did not share his opinion, acknowledged that regulatory messages advance a climate of suspicion, reiterating to ‘clean’ athletes that they are ‘under attack’ by those who cheat by doping.

Some athletes perceived anti-doping regulation as an extension of state surveillance. This was especially prevalent among male athletes from marginalised ethnic backgrounds (young Māori and Pacific Islander men in New Zealand and Australia, mostly Latino men in the United States). Though particularities varied, all relayed that it was ‘normal’, as they were already viewed as suspect in other facets of social life. One player of Samoan heritage said that he expected higher levels of scrutiny:

I expect it. I should expect it, ‘cos they’re always looking out anyways. You know, it’s like this, they know I’m going to do good, ‘cos I am good at what I do [sport]. And, I gotta watch my back ‘cos of it. . . . I got it, though.

Rather than admitting to or describing frustrations, he, and many others, iterated how to handle it, paralleling it to other challenges they faced as immigrants (here, to New Zealand). As discussed in the following section, these shared suspect subjectivities took shape through intimate relations with regulatory technologies.

**Intimacies of Surveillance Technologies**

Both parolees and athletes maintained close, albeit conflicted, relationships with the technologies of surveillance aimed at their bodies.

Once released from prison, paroled sex offenders are equipped with a GPS unit worn around the ankle, then told briefly how the technology works (that it ‘tracks’ them), to charge the unit regularly, not to get it wet or tamper with it (otherwise a parole violation would ensue). Parolees are therefore constantly concerned with the maintenance of their GPS unit, even though their technological knowledge of GPS and how it ‘tracks’ them varies. What is common is how the GPS unit becomes both inconvenient and risky.

Participants described how GPS was a daily hindrance that impacted how they navigated their life, thus making many ‘normal’ activities impossible. In speaking about always being aware of the unit, a parolee, like many others, mentioned, ‘You can’t wear shorts, because you have to try to hide it. It’s a stigma. People look at you so you have to hide it’. Feeling physically uncomfortable in public, parolees often changed their outward appearance for two primary reasons: First, parolees acknowledged the need to cover and safeguard the GPS unit so as to not receive violations for tampering. Secondly, they hid the unit to safeguard themselves and minimise public shame. Several participants also commented on changes in physical activity, and many elucidated that their feelings of freedom and mobility changed drastically: ‘You’re not as free to go places once you’re invited to do different things. You can’t do as much. . . . It’s a big life stopper’. Relationships with personal GPS units directly informed the changing nature of parolees’ identity: from being active, social individuals to inactive, suspect subjects.

Being equipped with GPS prompted changes to daily hygiene routines and physical leisure activities as well as concerns about physical injuries/harm. One participant explained that parole agents ‘tell you that you can’t take a bath, we can’t go swimming, we can’t take a long shower even if you like long showers’. In discussing problems with GPS units, the following conversation occurred:
Participant 4: [Laughs] Once it came up with a technical violation. They [Parole] thought I was tampering with it. They came out, looked at it, opened it up and found water.

Participant 3: See, these things can't be too accurate. It seems like they're more apt to get you into trouble without you doing anything.

Through their experiences with fragile, inconsistent GPS units, parolees interpreted conditions placed upon them as not being about helping them succeed as individuals but about helping the GPS remain active and functioning. The relationship between man and machine became one of co-dependence—so much so that it hindered parolees’ personal physical and emotional preservation.

Interviewees expressed intense frustration over not being able to appropriately cleanse themselves or engage in social activities. They longed for normalcy. One said, 'I just want to take a long soak in the bathtub!' Another mentioned, 'Since the first day they put that [GPS] on, I couldn’t take a bath. I had wanted one since prison'. Despite attempts to preserve devices, units caused personal injury. Burns, lesions, scabs and scars were common, as was apprehension about long-term health consequences. As one described,

I almost broke my leg getting it snagged up. But one thing I’ve always thought about, you know cell phones and microwaves? What affect do these have over the long term with cellular structure and microwaves? You’re being exposed to something you don't want to be exposed to.

One parolee even asked, 'What does this button mean [pointing to his GPS]? It says, “Don't touch.” Does it blow you up?' Their remarks highlighted a catch-22: though promoted as a safe and effective tool for the supervision of parolees, GPS, its limitations and physical hazards preoccupied participants.

In addition to injuries, some parolees revealed anxieties about meeting health care practitioners. One stated, 'I am embarrassed. I haven't been to a doctor since I got it'. Two other participants discussed how they normalised conversations while visiting their doctor, one lying that the unit was an mp3 player and another stating that it was a condition of bail for vehicular manslaughter, not a sex offense. Several others shared similar stories, including one that resulted in a delayed surgery because he had to go through an extended process to temporarily remove the GPS unit. In sum, the risks of the anklets had far-reaching effects.

Anti-doping surveillance also exacerbated risks for athletes, prompting criticisms that such methods incentivise more dangerous doping products that evade detection. For interviewees, risk gave way to fear of authorities, not doping. Many athletes characterised anti-doping regulation as a monitoring system in place to 'catch'—not help—them. Even more expressed resentment toward being monitored 'like criminals', rarely acknowledging that some anti-doping agencies try to help them avoid inadvertent ADRVs. Instead, on more than one occasion, athletes asked if authorities wanted access to interview transcripts, explaining regulators ‘wanted to know everything else’.

Most participants complained about restricted mobility due to the Whereabouts Program, which requires athletes to provide information regarding where they are in or out of competition. Although surveillance was not always present (compared to how sex offenders endure GPS units), anxieties around the scope and power of surveillance were still prevalent. For example, although anti-doping agencies provide information regarding substances, many participants were reluctant to call. One Australian athlete stated, 'If I call the hotline, they may start tracking
me’. Even though he did not think he was doing anything wrong, he became increasingly suspicious of sport staff when high-profile doping accusations surfaced. Other athletes shared this suspicion after being ‘treated like lab rats’ for research studies and performance evaluations. Overall, they retained a common distrust but did not express these feelings to authorities, because they were nervous about possible consequences or ‘just didn’t see the point because it won’t change things’.

Gendered distinctions also emerged, particularly regarding resistance to surveillance. For five female participants, it crystallised around urine sample collection for drug testing, which, as described by one athlete, requires ‘being naked from the nipple down’. Almost all athletes came to accept it as a ‘tradeoff’ for being elite competitors, but many women reflected on the shock of their first sample collection. As one stated, ‘They tell you what it’s going to be like, but you don’t get it until you are there peeing in front of someone’. Another affirmed, ‘The first time felt like I was being violated’. Others described programs that sent adolescents home with cups to ‘practice’. Overall, interviewees often normalised biosurveillance, suggesting that regular bodily scrutiny and intrusion are tacitly accepted duties of elite competitors today.

Conclusion
The focus on affect attests how these surveilled subjects respond to feeling as though they are continuously watched. They internalise messages about themselves and others seemingly like them as being ‘suspect’. Despite evident differences between paroled sex offenders and elite athletes, they emerge as ‘at risk’ for future offending behavior, thus justifying and perpetuating surveillance. Though preventative in aim, biosurveillance exacerbates risk and risk-taking in ways that subjects both internalise viscerally and negotiate actively. This analysis reveals some of participants’ complex relationships with mechanisms of surveillance that govern their mobility, bodily behaviors and desires.

Perspectives featured here provide insight into how biosurveillance entails and relies upon co-constitutive processes, complicating depictions of paroled sex offenders as undeserving and predatorial subjects and those of elite athletes as privileged and archetypal subjects. Everyday surveillance practices as understood through an affective lens demonstrate that such regulatory tactics shift risk and responsibility onto individuals, carrying profound effects on embodied subjectivity. Not only do the boundaries between human and surveillance become blurred, confounded and interrelated, so too do the boundaries of regulation. Participants’ intimate feelings about their engagement with surveillance evidence how regulation feels constant and pressing. They also point to a more general concern around justice: the use of biosurveillance both transcends and forecloses the possibility of more democratic forms of governance and the recognition of rights to privacy and bodily integrity.

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2 This is to distinguish our focus from the increasingly common medical practice of documenting vital signs of citizens, which is among the practices analysed here.

3 Under current rules, doping is a broad category that encompasses many more substances and methods than those believed to have performance-enhancing qualities, including drugs used primarily for recreational purposes.

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The Analytic Possibilities of ‘Culture’ in a Post-prison Context

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Conference Sub-theme: Penal Policy and Punishment

Abstract
This paper is focused on the use and usefulness of ‘culture’ as an analytical tool, in the context of prisoners’ return to the community. Whereas the analytic dimensions of the culture concept have been explored in anthropological circles, its criminological applications have been limited. While the growth of ‘cultural criminology’ signifies a resurgent interest in ethnography, subjectivity, lived experience and the phenomenological, for instance, it can be argued that its concept of culture lacks explanatory or analytical power. This paper considers the analytic possibilities of ‘culture’ as a tool for uncovering aspects of the post-imprisonment experience. It draws on interviews with released prisoners and post-release support workers, conducted for PhD research on the post-release experience of men in Victoria, to illustrate how culture applied in this way can illuminate processes underpinning and constituting the cycle of reimprisonment, or what Halsey (2006) has termed the ‘reincarceration assemblage’. Seeing culture as both a ‘product and producer’ (Sampson and Bean 2006) of this assemblage reveals elements which contribute to the continuation of the cycle, and which can counteract efforts – on the part of ex-prisoners themselves and society more broadly – towards reintegration and reduced reoffending. A cultural perspective can thus provide a way of understanding men’s experience of getting out and staying out of prison, and how penological thinking may make use of such a lens.

Introduction

Offenders emerge from prison afraid to trust, fearful of the unknown, and with a vision of the world shaped by the meaning that behaviours had in the prison context. ... [T]he system we have designed to deal with offenders is among the most iatrogenic in history, nurturing those very qualities it claims to deter. (Miller 2000 in Liebling and Maruna 2005: 1)

In a recent news article in the Hobart Mercury (Smith 2013), ‘James’, a long-term prisoner and resident at the newly opened transitional units at Risdon Prison, makes plain why prisoners need help to adjust to life on the outside: ‘You want people to go out better, not worse.’ Yet, as Miller (2000) observes, prisoners often emerge from prison marked by the very qualities the correctional system is meant to ‘correct’, qualities that can make life in the community unsustainable and reimprisonment inevitable. Striking is that since the birth of the modern prison, despite two hundred years of penal advancement and knowledge, so little has changed: in 1831, in France, 38% of men were reimprisoned following their release (Foucault 1979); today, in Australia, the figure is almost identical (ABS 2010).

The hardening, damaging effects of imprisonment and its endemic cultural codes are well established. That the culture of the prison leaks out into the post-prison sphere is axiomatic. Yet analyses of the factors associated with recidivism and cyclic imprisonment frequently leave culture, and the cultural components of prisoners’ experience, unexamined. This paper critically
engages with the idea of culture as a useful tool for understanding men's post-release experience and how and why so many become ensnared in cycles of imprisonment. The focus is on men in particular since they comprise the majority of prisoners released and hence the bulk of the 'post-release problem'. It begins with the concept of 'culture' which, as an analytic device, has been embraced in anthropological circles yet remains underdeveloped in criminology. A distinction is drawn between 'culture' as a socially bounded frame and 'culture' as a meaning-making 'toolkit'. The ensuing section explains the cultural lens applied in the PhD research on which this paper draws, and briefly outlines the study. Finally, research findings illustrate the analytic possibilities of culture in a post-prison context.

**Conceptualising Culture**

Culture is a complicated and contested term. It has been defined, rejected and elaborated since its earliest anthropological formulation as 'that complex whole which includes knowledge, belief, art, morals, law, custom, and any capabilities and habits acquired by man as a member of society' (Tylor 1871 in Eagleton 2000: 34). Notwithstanding an ongoing lack of consensus, the anthropological concept of culture as a way of life peculiar to a social group – the collected ideas and habits learned, shared and transmitted; its material and symbolic aspects – has seeped into other disciplines as a nascent theoretical concept and burgeoning analytical approach.

Criminology, however, has been slow on the uptake. Until very recently, penological research conceived cultural forms narrowly, if at all (Garland 2006). The growth of 'cultural criminology' (e.g. Ferrell 1999; Hayward and Young 2004; Ferrell, Hayward and Young 2008) embodies a resurgent interest in ethnography, lived experience, and the phenomenological. It foregrounds 'cultural' aspects of crime and its control: 'the subjective, affective, embodied, aesthetic, material, performative, textual, symbolic and visual relations of space ... recognising that the settings of crime are ... relational, improvised, contingent, constructed and contested' (Campbell 2012 in Hayward 2012: 450). Yet O'Brien (2005) argues cultural criminology undertheorises its concept of culture and thus lacks explanatory or analytical power, indeed that it is political rather than analytical in orientation. Cultural criminology then, despite its promise, offers little in the way of analytic tools.

So what are the analytical possibilities of 'culture' as a concept? Critics argue that 'culture is essentialised, reified, and overhomogenised' (Brumann 2004: 199). It is either conceptualised so broadly as to render it meaningless, or so narrowly as to limit its theoretical validity; it appears 'torn between an empty universalism and a blind particularism' (Eagleton 2000: 44). Rational choice theorists have rejected cultural accounts as 'tautological, untestable, or beside the point' (Wedeen 2002: 714). Sewell (2004: 202), however, draws an important distinction between the use of the plural form ('cultures'), describing 'concrete and bounded worlds of beliefs and practices', and the singular concept denoting a 'semiotics of social life'. Sewell argues that it is the elision of these two distinct meanings of culture that causes confusion and gives rise to criticism of the latter concept based on the shortcomings inhering in the former. For instance, Larmour (2007: 228) refers to three common misuses of culture as a concept: as an 'uncaused cause'; as an 'explanation of last resort'; and as a 'veto on comparison', which seem to illustrate Sewell's contention. Certainly culture used in this way appears 'outmoded and unhelpful' (Wedeen 2002: 714). Sewell's distinction is therefore useful to differentiate culture as an analytic concept from its use as a 'totalising term' (Garland 2006: 423).

Prison culture epitomises this 'totalising' form: the closed setting where hegemonic masculine norms are exaggerated into extreme models of hypermasculinity; where violence and intimidation become normalised, legitimised. The ways of being that Miller (2000) describes – 'afraid to trust, fearful of the unknown' – are entrenched in prison culture. This conception of culture, as located within a particular bounded set of social relations, provides rich descriptive
insight. It is limited, however, in its capacity to explain how culture functions. Miller’s ‘world shaped by the meaning that behaviours had in the prison context’ gives an important clue as to how culture might take on an analytic function; how we might think about culture in terms of meaning and behaviour.

**A Culture-in-action, Semiotic-practical Lens**

Building on Sewell’s ‘semiotics of social life’ definition, Wedeen (2002: 720) argues for a conceptualisation of culture as ‘the practices of meaning-making through which social actors attempt to make their world coherent’. Cultural analysis from this perspective involves studying the relations between peoples’ practices and their signifying systems of language and other symbols, an approach characterised as ‘semiotic practices’ (Wedeen 2002: 714). Culture in these terms refers to what people do, how those things are invested with meaning, and how those meanings produce effects. Thus culture refers not to essential values or particular traits isolating one group from another; rather, a cultural view obliges ‘an account of how symbols operate in practice, why meanings generate action, and why actions produce meanings, when they do’ (Wedeen 2002: 720). This approach builds on Swidler’s (1986) ‘culture-in-action’ model.

Swidler (1986: 273) views culture as a ‘toolbox’ – a ‘repertoire’ of habits, skills, and styles which shape people’s problem-solving and decision-making, and from which they construct ‘strategies of action’. ‘Strategy’ here means ‘a general way of organising action’ rather than a conscious plan (Swidler 1986: 277). Culture is causative in that it ‘shapes the capacities from which such strategies of action are constructed’ (Swidler 1986: 277). Importantly in the context of post-prison experience, Swidler (1986: 278) distinguishes between how culture affects action in ‘settled lives’ and ‘unsettled lives’ in terms of sustaining continuities and constructing new patterns. In ‘unsettled lives’, she explains, ‘people developing new strategies of action depend on cultural models to learn styles of self, relationship, cooperation [and] authority’, and that these models ‘make explicit demands in a contested cultural arena’ (Swidler 1986: 279). It is this contested space that emerges so palpably in sociological accounts of the prison world. The initial experience of imprisonment and adaptation to prison life may be viewed in this way, as a period during which competing ways of organising behaviours contend for dominance (the prison regime, officers’ culture, prisoners’ social hierarchies, individual histories and identity), and new strategies of action are constructed from an available repertoire of ‘symbols, rituals, stories, and guides to action’ (Swidler 1986: 77).

In contrast, settled cultures claim ‘authority of habit [and] normality’ yet ‘constrain action by providing a limited set of resources out of which individuals and groups construct strategies of action’ (Swidler 1986: 281). In prison, for instance, ‘masculinity resources are severely limited’ (Karp 2010: 66). The process of settling into prison life or into a ‘prisoner’ identity can similarly be seen as constraining future action, due to what Swidler calls the ‘high costs of cultural retooling’ (Swidler 1986: 284) involved in crafting new ways of being, particularly when post-release cultural resources are limited; if an ex-prisoner’s friends and family share habits, skills and styles oriented towards violence and drug abuse, for example. Thus Swidler’s culture-in-action model can explain how culture influences behavioural choices in prison, as well as ways of being upon release and return to community.

Wedeen’s (2002) semiotic-practical approach clearly draws on Swidler’s (1986) formulation of the relations between meaning and action. From this relational perspective, culture is seen as:

... an inter-subjective *organising mechanism* that shapes unfolding social processes and that is constitutive of social structure ... *C*ulture is simultaneously an emergent product and producer of social organisation, interaction, and hence structure.  
(Sampson and Bean 2006: 27)
To focus on meanings (via language and symbols) and how they relate to behaviour (practices) is useful because it emphasises the observable. Further, it enables analysis of the relationship between ‘narratives of identification and everyday activities’ (Wedeen 2002: 724) which, if left uninterrogated, serve to perpetuate themselves. This works on a micro (prisoner) and macro (societal) level, in what Arrigo and Milovanovic (2009: 101) describe as ‘the coproduction of penological reality’. In this way culture is seen as cause (producer) and effect (product) of the carceral assemblage. Taking up Garland’s (2006: 438) challenge to ‘show how culture relates to conduct’ by examining how meanings relate to actions allows insight into how this process unfolds.

The Study

This cultural approach forms a key theoretical component of the PhD research on which this paper draws. The study sought to qualitatively map men’s subjective experience of release from prison in Victoria, by interviewing released prisoners and post-release support workers. The Victorian Department of Justice funds ‘Link Out’, and its Indigenous equivalent, ‘Konnect’, which offer twelve months intensive post-release support to prisoners deemed at high risk of reoffending post-release. The agencies delivering these programs were the starting point for the snowball sampling strategy employed. Link Out and Konnect workers were briefed about the study and invited to recruit voluntary participants. Other services identified during the research process included WISE Employment’s Ex-offender Program and Five8, a community-based restorative approach to building ‘micro-communities’ of support around individual prisoners. Workers in these programs were included in the sample. Released prisoners were recruited through the workers, word of mouth, and flyers in local employment agencies. Twelve released prisoners and fourteen workers were interviewed. The ex-prisoner participants (only) were offered a twenty dollar Coles voucher to acknowledge their participation.

Semi-structured in-depth interviews were conducted individually, face-to-face, in settings that were familiar and convenient to participants. Interviews were transcribed verbatim and analysed phenomenographically. This involved careful reading and re-reading of the interviews to gather the range of qualitatively different ways of understanding and experiencing the phenomenon of release from prison. The conceptions and ways of experiencing were organised, through subsequent aggregation of the data, into ‘categories of description’ which encapsulated the various ways of experiencing across the sample. The aim of this methodological approach is to capture variation in the collective, rather than individual, experience of a phenomenon (Trigwell 2006), and to portray relationships between conceptions and experience. Illustrative quotes from the data attest to the categories and themes being rooted in participants’ own words and understandings. Thus the focus is firmly on the subjective and the relational, a logic connecting phenomenography to the study’s cultural lens.

Findings

So what can a culture-in-action model of semiotic-practices reveal about the effects of imprisonment on post-release experience? Two themes emerging from the research findings are illustrative. Firstly, the data reveal that there is an embodied way of being an ex-prisoner. A set of habits and acculturations which manifest in physicality: a man’s walk, his posture; his way of observing those around him without looking at them; the rolling of a cigarette. Indeed, smoking a particular brand of tobacco is indicative of how prison habits persist post-release as symbols of a prison-inflected identity:

They'll roll cigarettes like they are still in prison, like pencil thin. They will smoke a particular brand of tobacco called White Ox that everyone smokes that has ever been in jail ... they all smoke the one type of tobacco. (SW08)
The men interviewed attest to the universality of ‘Ox’ as prison tobacco, and how it identifies people as having been inside. As well as its strength – ‘it’d be milder smoking tree bark ... and gum leaves, god it nearly knocked me out!’ (RP21) – and hence its addictive quality, cigarette smoking represents a punctuating rhythm in the daily routine of prison life, a physical and psychological habit which – through frequent repetition – becomes entrenched. As RP21 recounts:

I tried to stop smoking when I was in there and I gave that up for a month, and that was just torture, because that’s all you’ve got in there is coffee and cigarettes ... [Are you still smoking?] Yes, guess what, I’m smoking this stupid pouch [of] White Ox, yeah, that’s what I did when I got paid, I bought two pouches of that, and I bought a couple of papers and four train tickets ...

Implying it is one of his daily necessities – along with newspapers and train tickets – RP21 links smoking Ox to prisoner ways of being which, despite ‘trying to move away from that’ and admitting ‘cringing’, is a hard habit to break:

I’m on the outside and I’m smoking whatever it is mild or something, all these people smoking Super Mild, Ultra Mild, and they go to prison and everyone’s making these [thin ‘roll-your-owns’ with Ox] ... you can get [other brands] ... [but people] say if you have this it’s stronger, and you get used to it, and you don’t even want another cigarette as quickly. I said Christ I don’t need a cigarette for six hours after that one! I said I’d be in an iron lung before I have one of these again! ... But yeah that’s about the only thing that I’ve got a prison culture on me, as much as I cringe ... yeah I don’t have to buy Ox, I don’t know why I keep buying it, I think just out of habit ...

Though RP21 shielded himself from the absorption of prison mores or the development of a prison identity through his sense of passing through, of never belonging in prison, he nevertheless took on the habit of smoking Ox, without really being aware of how or why.

Just as prison tattoos inscribe the skin, ways of being in prison can thus permeate thinking and inhabit prisoners’ bodies. As SW08 describes:

... when the guys come out of prison and they meet up here for instance they will often pace up and down in their little basketball yard at the back, have you ever seen men in a prison walking up and down just doing laps? They will go this way, and then they turn right, and then go back and then turn left and go that way, and you see them pacing like that, and they won’t even know they’re doing it. They are conditioned to that sort of way of communicating with one another. They’ll pace up and down; they’ll dress like they are still in prison. They’ll carry themselves like they’re still in prison.

Evoked is a robotic return to the way physical space is navigated and traversed in prison, as though its spatial patterns are – like a tobacco habit – ingrained through repetition. Though these physical cultural imprints are subtle, minor, they nevertheless signify the degree to which prison ways of being leak out into the post-prison world. Other ways are more extreme in their intensity of experience and destructive potential.

Years spent in and out of prison are shown to limit men’s cultural resources to those available within the prison setting. Violence is normalised, indeed honed as a skill. ‘Friends’ are prison ‘associates’, ‘jailbirds’ and ‘druggies’. Adapting to prison life clearly involves the forging of a prison identity – ‘you’re a prisoner and you’re one of the boys’ (SW12) – and the destabilising of men’s pre-prison identity, their social place. While different prison-selves manifest – arising
from individual circumstances, causes and conditions – a common thread links their emergence into post-prison light: ‘when they get out they don’t have a [social] place ... and they lose whatever sense of self they had ... which can cause that out of control spiral’ (SW09). This is conceived by workers as relating to the length of time spent in prison: ‘probably up to twelve months is not so bad, but when it gets into two, three years, it becomes a little more freaky for them’ (SW13); yet the men’s pre-prison sense of self appears to shape the degree to which their prison identity becomes ‘ingrained’ (RP07).

RP07, for example, has a clearly demarcated prison identity and describes the choosing and crafting of implements his prison role entails:

I prefer ... [to] snap open a razor blade and melt the blades into a toothbrush, shave the toothbrush bit off and melt the blades into it, melt about three or four blades in, all different ways, so no matter which way you get them ... it will open up in two spots so it’s harder for ’em to sew back together, and leaves a bigger scar, and you get ’em straight down the face and that way everyday they look in the mirror they know that it was you who done it.

RP07 conveys a sense of asserting his prison identity through his attack strategy, as though by leaving his mark on his victim, so ‘they know it was you who done it’, his reputation of being ‘a bit fucked in the head’, and hence not to be messed with, is underscored.

Notwithstanding the matter-of-fact way RP07 relates this experience, implying its normality, he also recognises that – while functional in prison – such behaviour is dysfunctional and unacceptable outside: ‘that’s the type of thing that I bring outside with me, and then I’ve gotta try and not be like that out here, you know?’ He describes how being ‘like that’ is ‘just ingrained in me now’, implying that violence is an automatic response:

... it’s like ... over twenty bucks the other day I was gonna go to my mate’s place and kick his front door in, with three other people, and ... just wreck him over twenty bucks, man, you know? (RP07)

His sense of dismay at being ‘like that’ is palpable. Yet the costs of ‘cultural retooling’ (Swidler, 1986) for RP07 are high, possibly too high to contemplate. Without any ‘straight friends’, with limited family support, and only a case worker to rely on, his social and cultural resources are limited. And in his ‘unsettled’ post-release life, where cultural models compete in a ‘contested cultural arena’, the familiarity of his ‘old life’ and his ‘druggie mates’ vie for ‘authority of habit [and] normality’ (Swidler, 1986: 279). A battle is evoked for ‘crims’ like RP07, who:

... have had their whole life destroyed when they were kids, ... they’ve been trained into this is what your life will be more or less and then having to battle every time they turn around, battle and battle and battle... (RP18)

Conclusion

These themes illustrate how meanings and behaviours which function in a prison context can shape and inflect men’s post-prison experience, their identity and interactions. In this way, as Sampson and Bean (2006) contend, culture can constitute social structure, manifesting in the constraints which militate against ex-prisoners’ post-release integration. Whether these take the form of subtle cultural imprints that are hard habits to break, and which shadow a man’s sense of self: Or habits, skills and styles – such as prison cultural norms of violence – learned, honed, incorporated and which mark out a prisoner identity. Clearly, ‘there is continuity between what occurs within the prison environment and what occurs outside of it’ (Arrigo and Milovanovic 2009: 39). A cultural perspective provides a way of understanding this continuity and its impact on men’s experience of getting out and staying out of prison.

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The speakers are designated 'RP' ('released prisoner') or 'SW' ('support worker') with a numeric tag.

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Justice for Pollution Victims in China and Australia

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Conference Sub-theme: Eco-Justice, Corporate Crime and Official Corruption

Abstract
The concept of environmental justice is well developed in North America, but is still at the evolutionary stage in most other jurisdictions around the globe. This paper seeks to explore two jurisdictions where incidents of environmental justice are likely to be seen in the future as a result of manufacturing and mining practices. The discussion will centre upon avenues to environmental justice for both private citizens and the public at large. The first jurisdiction considered is China, where environmental liability claims brought by Chinese citizens have increased at an annual average of 25% (Yang 2011). Manufacturing is at the core of the Chinese economy and is responsible for some of the unprecedented economic growth in the region. Less discussed are the industry impacts on water and air pollution levels and the associated implications of these pollutants on local communities. China introduced the Tort Liability Law (TLL) in 2010, which may provide avenues to justice for private citizens. In terms of public at large, public interest litigation in China is developing, though at a restricted level. The other jurisdiction considered by the paper is Australia, where the mining boom has buffered the Australian economy from the global financial crisis. There is some limited case law in Australia where private citizens have made a claim in toxic torts. However, the framework is under-developed in contrast to the risk presented to many communities by, for example, toxic chemical leakage from unconventional gas extraction. Public interest litigation in Australia is supported by expansive legislative provisions, but systemic barriers are proving challenging. This paper traces the regulatory responses to the affects of major industries on communities in China and Australia. From this it examines the need for environmental justice avenues that align with rule of law principles.

Background
Primarily, this paper is about unequal exposure to environmental pollution impacts in Australia and China experienced by vulnerable people or communities. It examines methods of pursuing environmental justice by affected parties. The following will introduce the goal and concept of environmental justice as a frame for distributional justice issues. From this starting point, the paper will compare and consider the Chinese and Australian legal responses to situations involving environmental justice issues. This work concludes by advocating for environmental justice avenues that provide clear, enforceable rights, which approach aligns with rule of law principles.

Environmental justice
Environmental justice focuses on the equitable distribution amongst people of natural resources and environmental harms (Low and Gleeson 1998: 2). Yet what defines environmental justice has escaped uniformity and instead been left open for interpretation depending on the context (e.g. Walker 2012: 11). It is clear though that environmental justice has the objective of ‘... equitable treatment of people of all races, incomes and cultures with respect to environmental
law, regulations, policies and decisions’ (Slater and Pedersen 2008). Consequently, environmental justice stems from the right to live in a healthy environment with access to adequate natural resources (Bullard 2005:43).

A large body of research consistently illustrates that environmental and social inequalities are linked (e.g. Bullard 1990: 23). Research contends that disadvantaged groups are more likely to be located in polluted neighbourhoods or in risk areas, and so these communities are more likely to have health issues related to toxins exposure (e.g. Banzhaf 2012: 14). For instance, Burningham and Walker (2011: 220), using a geographical information system and statistical methods, determined that, ‘... if you are highly deprived you are more likely to live in a flood risk area, than others who are much less deprived’. In addition, studies reveal that vulnerability to environmental hazards increases in marginalised communities due to social conditions such as inability to access health care (e.g. Cutter 2012: 126-127). In line with this, Walker (2012: 46) acknowledges the role of vulnerability and explains that ‘... not all people are necessarily equally affected by an environmental burden’. For instance, studies suggest children in low-income communities are often more vulnerable to air pollution, as illustrated through the numbers of asthma attacks (Brown et al.2003). Importantly though, some scholars have highlighted that much empirical uncertainty still surrounds geographic patterns of unequal distributions and their health effects on disadvantaged groups (e.g. Bowen 2002).

Role of the law in achieving environmental justice

The rule of law is an ideal that requires clear, enforceable rights and the supremacy of law over all other institutions (e.g. Flores and Himma 2012: 23). It is acknowledged that, while law at national and international levels can foster environmental justice, it has not reached its full potential (UNEP 2013).

Public law creates environmental protection legislation that is vital for addressing environmental justice objectives, for example, through requiring by law pollution control tools. Arguably though, these legislative tools have not been designed to meet distributional justice issues, such as the unequal distribution of environmental harms (e.g. Lazarus 1993: 787).

Private law, such as litigation, provides a critical medium for compensating victims, pursuing environmental justice and deterring future environmental harms (Kroll-Smith and Westervelt 2004: 183). However, private law can pose difficulties for vulnerable people and communities as, for example, legal costs and evidentiary burdens often create insurmountable barriers.

This paper explores the ability of current laws in China and Australia to pursue environmental justice objectives. It suggests that precisely drafted, legally binding rules and institutional enforcement of the rules in practice is required in both Australia and China. This response aligns with rule of law principles and remains just one facet of working towards environmental justice.

Aims

1. What are the legal avenues to environmental justice in China?
2. What are the legal avenues to environmental justice in Australia?
3. How do the legal responses to environmental justice issues in China and Australia compare?
4. What is needed for Australia and China to effectively work towards environmental justice objectives?
China

*What environment related issues are evident?*

Since large-scale economic reforms in the late 1970s, China has experienced breakneck growth towards a highly competitive market economy. Over the past 30 years, China's economy has doubled in size every seven to eight years and accounts for 15% of global GDP (The Australian Treasury 2012). Chinese citizens have benefited from the economic growth through improved standards of living, for example, on average increases in food consumption and access to education (Nolan 2007: 5). It is estimated that this economic growth resulted in 250 million Chinese people no longer living in poverty (Stalley 2010: 1).

But this accelerated rate of economic growth has also resulted in significant challenges with regard to pollution. China's industrialisation is a causal factor in a range of severe environmental damages to air, water and soil quality. It is also contributed to losses of biodiversity, wet lands and agricultural land. As an example, it has been estimated by the Chinese ministry that industries cause 40% of water pollution and 80% of air pollution in China (Wang Hua et al. 2004).

The adverse impacts on health of Chinese citizens from environmental damage profoundly reveal the connection between humans and the natural world. The World Bank placed the number of Chinese people dying prematurely due to air and water pollution at 760,000 each year, yet some scholars have estimated that the figure is actually two million (The World Bank 2007; Orts 2002: 555). China's State Environmental Protection Agency (SEPA) has revealed that 70% of the water in five of the seven major river systems is unsuitable for human contact (Briggs 2006). Additionally, a government report found that 10% of China’s farm soil has been contaminated with toxins, including lead, arsenic and mercury (Phillips 2013).

*What is the legal framework for environmental regulation in China?*

China’s Government has a constitutional obligation to improve the living environment and control pollution (Article 26). This commitment, coupled with international pressure, have resulted in a variety of measures being taken, which aim to reduce the impact of pollution on health and environment. These measures are largely based on *Five-Year* plans that involve environmental and resource conservation targets; improved pollution monitoring, and increased investment in green technology (e.g. Shen 2013; National People’s Congress of the People's Republic of China 2013). It has been suggested that there remains a significant gap between environmental regulations and the quality of the environment (Francesh-Huidobro et al. 2012). This gap is perhaps illustrative of the limited rule of law in China.

A key regulator of Government initiatives is the SEPA, which was established in 2008 as a ministry (Li 2012: 29). SEPA are involved with policy drafting and implementation and compliance activities (Briggs 2006). Another main enforcement body are the specialised environmental courts of which a hundred such courts were setup in 2011 (Zhang 2012).

In terms of sources of law, China has a broad range of regulations, law and policy instruments that has been largely developed over the last thirty years. It is observed that, ‘China’s environmental protection regime ... is comprised of approximately twenty laws, forty regulations, five hundred standards, and six hundred other legal norm-creating documents related to environmental protection and pollution control’ (Stalley 2010: 23).

*What are the legal avenues to environmental justice in China?*

Imposing liability for environmental harm forms part of China’s multifaceted legal approach to environmental issues. A claim can be brought against a polluter either by a person directly
impacted or by an organisation seeking to promote environmental law. These two avenues to environmental justice will now be addressed.

**Environmental Justice for Chinese Pollution-victims: Private Interest Litigation**

Before the TLL, provisions in Chinese law potentially allowed citizens to seek compensation from polluting companies. However, the law was applied inconsistently and created confusion for both judiciary and those involved in a claim (Yang and Moster, 2011). Main struggles experienced by pollution-victims included meeting the standard of proof required and overcoming ambiguous provisions (Faure and Weiqiang 2011). These struggles were aggravated by the power imbalance between the polluter's resources, such as, money and political favour, and the pollution-victim's relative poverty and poor health.

The TLL was a response to these issues and the consistently growing number of environmental lawsuits. The legislation explicitly outlines environmental liability, rights and obligations. In this way, as will be discussed, China's approach to environmental justice is far more developed than in Australia.

**Strengths of the TLL**

For China, the TLL is the first comprehensive legal avenue for victims of harm suffered by the actions of another. The legislation provides a range of rights and remedies for victims of not just environmental harm, but also, for example, those damaged by traffic accidents. It is explained that, ‘Torts law adoption is acclaimed in China as a significant modern legislative achievement in civil rights protection’ (Zhang 2011: 418). Consequently, its introduction may reflect the increasingly significant role of rights-defending litigation and the rule of law in China.

The TLL has three main attributes that work towards environmental justice objectives. The first attribute, contained in Article 1 of the TLL, provides that its purpose is to 'prevent and punish'. By including punishment as an objective, the TLL is potentially creating a strong deterrence effect, and this is particularly so when compared with Australian law in which the focus remains on compensating victims.

The second attribute, contained in Article 65, creates strict liability, that is, the polluter will be liable for pollution-damage even if it does not breach an environmental standard. While negligence imposes liability for a failure to exercise reasonable care, strict liability means that the polluter defendant would have to pay the victim for any harm (Coman 2012: 145). This approach contrasts with Australian law where a pollution-victim may need to prove that the polluter had intention or was careless before they could potentially access a remedy.

The third attribute, contained in Article 66, shifts the burden of proof from the pollution-victim to the polluter. After a victim plaintiff has proved that they have incurred damage by pollution, then it falls on the defendant polluter to disprove that their project caused the harm to the victim plaintiff (Peel 2009: 23). In some ways, this helps address the inequality between the polluter and pollution victim, as it is easier to prove harm suffered by providing, for example, a Doctor’s certificate, than it is to prove the cause of the harm. This point will now be expanded upon.

It has been found that the lower-socioeconomic groups and rural communities of China are the most likely to experience severe harm from pollution (The World Bank 2007). A victim plaintiff is very unlikely to be anywhere near as informed, influential or wealthy as the polluter defendant. By requiring the polluter defendant to produce evidence, the pressure and responsibility is placed on the party who has better access to information and other resources (Crannor 1999: 81). Accordingly, the pollution victim no longer has to prove complex legal causation elements and this may enhance their ability to bring an action. As an example, in April
2009, a textile mill was ordered to pay compensation to a fish farm for harm that occurred over 15 years previously, as the textile mill could not disprove the allegations (Percival 2010: 44).

Additionally, the burden of proof shift reflects the use of international environmental law principles being adopted in China (Kelly 2012: 544). The precautionary principle is a method of decision-making first recommended at the Rio Conference in 1992. In the following declaration, Principle 15 described that, 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'. Given the difficulties with establishing that an environmental harm caused damage, the shift in burden of proof can help prevent uncertainty being used as a tool for polluters seeking to be unaccountable (Whiteside 2006). Moreover, it has been suggested that if a defendant polluter has the burden of proof they are more motivated to reduce the threats posed by their activities (Crannor 1999: 81).

Australia places the burden of proof on the alleged pollution-victim to prove complex legal causation matters. In this way, Australia can learn from China's legislative response to the power imbalances between polluters and pollution-victims.

Alleged defects for TLL

While the TLL in theory provides effective justice for pollution-victims, in practice China's systemic barriers to justice continue to hinder progress. A key barrier is that enforcement of the TLL. This issue reflects the overall weakness in China's governance system, in which enforceability is limited by corruption and an overriding desire for economic growth (Gang 2009). For the purposes of this discussion, these issues can be divided up into lack of independent court systems, local protectionism, mediation and transparency.

Lack of an Independent Court System

Various factors result in China lacking an independent court system to enforce the TLL. Due to a historical and cultural focus on social values, collectivism and moral persuasion, China only relatively recently began to implement laws (e.g. Feng 2009). As a result, there is a lack of trained judges and legal professionals to assist in resolving disputes. For example, it was not until mid-2005 that 50% of judges in China held Bachelor Degrees (Liebman 2007: 625).

In addition, corruption is generally regarded as influential in civil court decisions. Courts are accountable to the section of government that created them, and are thus subject to supervision by Party Committee and Party organisations (Peerenboom 2002: 280). In a similar vein, the funding system impacts on the independence of courts. Local courts are funded by and dependent on local governments for all expenses, including salaries and insurance for judges (Peerenboom 2002: 281; Kelley 2012: 539). This increases the likelihood of judges being influenced by the desires of others.

Moreover, lack of enforcement of court decisions is a major, persisting issue due to the ‘...continued intervention by party-state officials and administrative departments, an undeveloped credit system, and weak punishment for non-compliance with court orders’ (Liebman 2007: 625). Importantly, the Chinese government has made recent, critical improvements to judiciary by, for example, requiring new judges to sit a bar exam (Ding 2010).

Local protectionism

Environmental rights, such as those contained in the TLL, are often not enforced due to a desire to protect local economic growth and to provide favouritism to enterprises with government connections (e.g. Wang 2011: 10895). Local leader's job performance and future promotion potential is measured according to economic growth of the region, and this creates a disincentive for promoting environmental protections that may interfere with industry (e.g.
Further, the local governments provide the funding for the environmental protection agency specific to their area, thus increasingly the likelihood that local government agendas will take priority (e.g., Gang 2009: 22; Francesch-Huidobro et al. 2012). Recent research in the Kunming region revealed that, while the local government purports to support strict law enforcement, it will continue to allow industries to operate even though they are not complying with the law, as the industries present an important source of local income (Van Rooij 2009: 27).

Preferences for mediation

A cultural and historical focus on mediation for resolving disputes exists in China (Jieren 2011: 1068). This preference can present a barrier to justice for pollution-victims. Mediation does not have a binding outcome. Moreover, there is unequal bargaining power between a highly-resourced industry and an individual, likely disadvantaged victim. It has been noted that often ‘...the stronger party may offer some money in exchange for the victims’ acceptance of pollution’ and that this settlement tends to be ‘...far less than proper compensation’ (Zhao 2004: 160). In contrast to confidential mediation, litigation in the Chinese environmental law arena, can serve an important public awareness raising role, pressure administrative response, enhance deterrence effect on industries and expose legal gaps and injustices (Zhao 2004: 174-175; Wang 2011).

Transparency

Access to information about pollution and the encouragement of public participation is largely restricted in China, which in turn affects the enforceability of the TLL (e.g., Martin 2011: 160). It was not until 1996 that environmental issues entered mainstream discourse in China (Li 2012: 29). Nevertheless, issues in relation to transparency are improving due to internet access as, for example, local environmental protection agencies have websites that contain information relating to the relevant region. Additionally, mainstream media and activist groups are increasingly drawing attention to climate change and the need for environmental protection (Gang 2009: 158). However, there are widespread instances of environmental activists being arrested for reasons such as, being a threat to national security (e.g., Watts 2010). As an example, Chinese activist Liu Futang was arrested last October for publishing information without a license when he distributed books about environmental protection (Richburg 2012). Additionally, transparency and accountability is severely hampered by the de-centralised nature of China’s system of governance. A small, central government creates policy, and the implementation is left to the discretion of provinces and local governments (Rong 2011). Consequently, the local resistance to environmental justice claims may prevent progress.

It seems then that environmental justice requires rule of law ideals such as law as the supreme power over government. For the TLL to be an effective avenue to environmental justice, China’s institutional and regulatory framework needs to be significantly acknowledged and improved. These changes may gradually unfold with the help of the emerging legal culture in China that emphasises rule of law principles (Delmas-Marty 2003: 28).

Environmental Justice in Public Interest Litigation

Public interest litigation is defined as a ‘...lawsuit which is brought to the court by an individual, organisation or agency to prevent harmful behaviour which may unreasonably damage public social or personal interests’ (Mingde 2011: 218). It differs from cases that involve a specific victim, for example, a person who is ill. Accordingly, Tang and Sun (2012: 186) comment that this avenue provides the ‘...means of achieving environmental justice and environmental democracy, this litigation inspires public participation, giving opportunity, means and ways to public participation in environmental affairs’.
A number of China’s environmental courts have allowed organisations and government agencies to bring a claim in the public interest (Wang et al. 2011: 10899). Non-governmental organisations (‘NGO’s’) in China have a particular advantage over pollution-victims in terms of their finance and knowledge. However, unlike provisions for government bodies, there are no provisions granting NGOs or concerned citizens the right to bring an action against a polluter (Mingde and Fengyuan et al. 2011: 230). Accordingly, in 2010, of the very limited number of public interest cases brought to the environmental courts, all were brought by agencies affiliated with the government as opposed to independent bodies (Yang and Moser 2011: 10900). As an example, members of the Law School of Peking University filed a lawsuit when a factory explosion resulted in large quantities of carcinogenic materials leaking into a river; however, their claim was rejected by the court’s clerk as they were not considered to be an aggrieved party (Wang 2007).

Progress in China’s public interest litigation has been restricted. Yet, significant potential exists for positive developments due to the increasing awareness of pollution impacts, along with rises in rights-based litigation (Dai 2003). These trends continue to fuel Chinese scholars, the media and NGO’s demands for expanding public interest litigation.

**Australia**

*What environment related issues are evident in Australia?*

In contrast to China’s manufacturing focus, Australia’s economic growth is largely due to export revenue from mineral and energy sources. Mining contributes 11% of Australia’s GDP and employs over 220,000 Australians (DFAT 2012).

In recent years, unconventional gas extraction has become a large focus of the mining industry, particularly in Queensland where 40,000 new wells are forecasted for the next 30 years. Unconventional gas includes coal seam gas (CSG) and shale gas. To extract unconventional gas, drilling into the ground to loosen pressure and release gas is required, and stimulation techniques, like hydraulic fracturing (fraccing) can be used. Fracciing, a process increasingly used in Queensland, involves pumping a mix of water, sand and chemicals into the ground to form cracks in rock formations which helps release gas and water.

Generally, impoverished people in Australia are the most exposed to and harmed by, pollutant qualities. Millner (2011:192) outlined that, in Victoria, often toxic and hazardous waste sites have populations of lower socio-economic status and high unemployment.

In terms of environmental liability, public health concerns tend to focus on the chemicals used in the extraction process that can contaminate water used for both drinking and agriculture (Hunter 2011: 10). In fact, there has been a string of contaminations in Queensland from CSG industries. As an example, in 2010 the Queensland Government gave environmental approval to a CSG company operating near Chinchilla to discharge the equivalent of eight Olympic sized swimming pools of ‘treated water’ into the nearby Condamine River. It has been established that this ‘treated water’ breaches EPA standards, as it is potentially toxic to aquatic organisms (Carlisle 2012). Moreover, in 2011, the Queensland Government investigated a gas field west of Brisbane after cancer-causing chemical traces were found at fives bores (Agius 2011).

The impact of unconventional gas extraction on air quality is also becoming a concern, particularly after the findings of a Colorado School of Public Health Study (McKenzie 2012). The data, based on three years of examinations, revealed that fracciing released potentially toxic hydrocarbons into the air, which have the potential to cause health problems ranging from headaches to acute childhood leukaemia to nearby residents (Kirkeleit et al. 2008).
What is Australia’s approach to environmental justice?

In contrast to China, Australia does not have a constitutional right for state protection of environment; nor do Australian pollution-victims have a legislative avenue to bring a claim against a polluting company causing harm. Moreover, no common law action exists for a concerned citizen or NGO to prevent or remedy actions from a polluter that harm the environment. It seems then that Australian laws may lack clarity, uniformity and participation in decision-making, which are all components of the rule of law (e.g. UN Secretary-General 2004).

Environmental Justice for Australian Pollution-victims: Private Interest Litigation

Toxic torts are the only legal avenue private Australian citizens have to prevent or remedy pollution caused harm. The term ‘toxic torts’ is used to describe a variety of actions created by the courts to protect a private citizen’s rights or interests and the protection of the environment is an unintended benefit (Mahncke 2013). Unlike China, Australia does not have a specific cause of action or particular evidentiary rules that provide for pollution-plaintiffs. As a result, pollution-plaintiffs are forced to manipulate their claim into one of the following actions: torts of private or public nuisance, trespass to person or property and negligence.

An often undefeatable issue pollution-plaintiffs face across these torts is establishing legal causation (Rychlak 1989: 681). As a result, Lindgren (2010: 24) points out that pollution-victims ‘may be denied judicial redress due to the complex and controversial nature of their claims’. Proving causation can be problematic both in making out an action and in calculating sufficient compensation. Collins (2008: 133) explains that, ‘Because of the profound scientific uncertainty associated with toxic substances in the environment, it is frequently impossible for plaintiffs in toxic tort actions to prove causation of harm on a balance of probabilities’. This is particularly so where damage by disease is being claimed.

With this in mind, let’s consider the industrial town of Gladstone, where CSG projects are underway and the rate of leukaemia is 108% higher than the whole of Queensland (Moran 2010). Could a person with leukaemia seek redress from the nearby industries? The answer is: probably not. Due to the lack of scientific evidence, a Gladstone resident would struggle to establish that a toxin caused their leukaemia (Moon 2012). Even if the Gladstone resident were able to identify a toxin as capable of causing leukaemia, the fact that the polluter’s release of that toxin had caused leukaemia in that particular resident would still have to be established. It has been observed that, while medical science can confirm that exposure to particular toxins increase the risk of disease, it cannot confirm whether a toxin caused a person’s disease in a particular case or even confirm whether the polluter’s actions materially caused an illness (e.g. Adeney 1993).

Finally, it is likely that the Gladstone resident would have been exposed to other intervening factors, such as, living with a partner who smoked or having a family history of cancer. Collins (2008) outlined difficulties of proof experienced in toxic tort and these included that sickness often has multiple factors and there is potential for a long period between exposure and symptoms. Moreover, it can be difficult for a pollution-plaintiff to identify which polluter is to blame, and this is particularly so where a number of polluters could have contributed, as is the case of industrial towns or climate change incurred damage (Preston 2009).

Pollution-plaintiffs will experience particular difficulties when trying to mould their pollution-caused harm into one of the specific toxic torts. For example, the elements of trespass to land require an interference with an owner’s rights; however, the quality of groundwater or air has been held to not interfere with exclusive possession of property (Moon, 2012: 126). Another example is the tort of battery, where it must be shown that the polluter intended to release the
toxins or had failed to exercise due care. This can be a difficult element to prove, and particularly where legislative requirements have not been breached.

In addition to these issues, as torts law is shaped by common law, it often takes a long time for the courts to adapt forms of liability. Moreover, unless decided by the High Court of Australia, any judicial decision that evolves toxic torts will only be of persuasive value outside its jurisdiction.

It seems then that improving access to justice for Australian pollution-victims largely relies not in tort law but in novel legislative reforms. In this regard, China’s TLL, particularly in relation to the burden of proof and strict liability, may provide an effective model. Australia should look to adopting a comprehensive liability system clarified in legislation that extends both private and public legal mechanisms (e.g. Lee 2002; Rosenberg 1984). This approach would provide legal certainty and address the unequal application of current environmental protection laws, thus moving Australia towards environmental justice aligned with rule of law principles.

**Environmental Justice in Public Interest Litigation**

Australia has removed significant barriers to public interest environmental groups who want to bring legal challenges against polluting companies. The types of plaintiffs who can bring an action have been broadened. As an example, a decision of the High Court allowed an Environment Council to bring an action against developers. Additionally, specific legislative provisions allow environmental groups or concerned citizens to bring an action against polluters for breaches of the legislation (Douglas 2006).

As an example, the Environmental Protection Act 1994 (Qld) (`EPA`) allows a Court to grant leave to a person seeking to remedy or restrain an offence or anticipated offence against the EPA. Importantly, it is an offence under the EPA to cause environmental harm, but the polluter need not be the sole cause. On this basis, Green and Ruddock (2008: 6) have suggested that Torres Strait Islanders affected by climate change may be able to bring an action against companies emitting greenhouse gases. This contrasts with China then, as Australian NGOs can potentially bring an action to prevent or remedy environmental harm.

However, significant barriers exist for NGOs or concerned citizens seeking to implement environmental laws (e.g. Marseille and Jan 2010). A key barrier is the cost of litigation, and particularly the risk of having to also pay the polluter’s legal fees if the NGO loses the case. Recently, an environmental organisation, Blue Wedges lost a case they brought to obtain judicial review of a Minister’s decision to allowing dredging in Port Phillip Bay. The Government pursued a substantial cost order against Blue Wedges, even though the community group had only $2700 in its bank account (Gregory, 2008). Godden et al. (2008:199) commented that, ‘In view of the necessity of engaging the public in a more meaningful way in an era of strong environmental concern, and given the importance of public interest litigation to a viable democracy, a more holistic and systematic approach to costs awards should pertain’.

**Conclusion**

The major industries in Australia and China are impacting on the health and well-being of citizens. As a result, environmental justice issues are likely to become a focus of both countries in the future. In terms of clear legal rules and addressing power imbalances, China has a highly developed legal response to environmental justice issues. However, this progress is perhaps limited by systemic issues in China’s governance that reflect a weakness in rule of law principles. The failing in Australia’s legal response lies not so much in enforcement, but more so in the clarity of laws and accessibility to courts. These problems emphasise the importance of the rule of law in achieving environmental justice. To pursue environmental justice then clear legal rules and enforceable rights are vital.
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Addressing Vulnerability and Human Rights in Disaster Response Mechanisms in Oceania

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Abstract
The Oceania region is an area particularly prone to natural disasters such as cyclones, tsunamis, floods, droughts, earthquakes and volcanic eruptions. Many of the nations in the region are Small Island Developing States (SIDS), yet even within wealthy states such as Australia and New Zealand there are groups which are vulnerable to disaster. Vulnerability to natural disaster can be understood in human rights terms, as natural disasters threaten the enjoyment of a number of rights which are guaranteed under international law, including rights to health, housing, food, water and even the right to life itself. The impacts of climate change threaten to exacerbate these vulnerabilities, yet, despite the foreseeability of further natural disasters as a result of climate change, there currently exists no comprehensive international framework for disaster response offering practical and/or legally reliable mechanisms to assist at-risk states and communities. This paper sets out to explore the human rights issues presented by natural disasters and examine the extent to which these issues can be addressed by disaster response frameworks at the international, regional and national levels.

Introduction
The Oceania region is an area particularly prone to natural disasters such as cyclones, tsunamis, floods, droughts, earthquakes and volcanic eruptions. Many of the nations in the region are Small Island Developing States (SIDS), which are geographically vulnerable to natural disasters, being low-lying and often reliant on the natural environment for subsistence. Even within wealthy states such as Australia and New Zealand there are groups which are vulnerable to disaster, including indigenous peoples and communities which lack the economic resources to prepare for or respond adequately to such disasters. Further, there are often strong cultural links between communities and their natural environment, meaning that natural disasters threaten cultural and social, as well as economic harm.

Vulnerability to natural disaster can be understood in human rights terms, as natural disasters threaten the enjoyment of a number of rights which are guaranteed under international law, including rights to health, housing, food, water and even the right to life itself. The impacts of climate change threaten to exacerbate these vulnerabilities, yet, despite the foreseeability of further natural disasters as a result of climate change, there currently exists no comprehensive international framework for disaster response offering practical and/or legally reliable mechanisms to assist at-risk states and communities.

This paper sets out to explore the human rights issues presented by natural disasters and examine the extent to which these issues can be addressed by disaster response frameworks at the international, regional and national levels.
the international, regional and national levels. The paper will begin by outlining the extent of vulnerability to natural disaster in the Oceania region, including the predicted influence of climate change. It will then seek to elaborate on the human rights issues associated with this vulnerability, noting that the effects of climate change also raise issues of justice, given the comparatively low contribution to global greenhouse gas emissions by many states in the region and their relative lack of adaptive capacity.

The paper will then evaluate the current regulatory frameworks which are in place to respond to natural disaster in terms of their ability to address these issues of vulnerability and human rights. It will consider the international, regional and national mechanisms which are in place to assist in responding to natural disaster in the region, including the roles of various state and non-state actors, in order to identify gaps, overlaps and ambiguities within the current framework. It will also assess various response mechanisms in terms of their potential impact on human rights, noting that human rights issues can arise in the deployment of disaster responses as well as during the disaster itself. The paper will conclude by making some recommendations as to how disaster policy can be improved to better meet the needs of vulnerable communities and to ensure the protection of human rights.

**Vulnerability to Natural Disaster in Oceania**

The Oceania region¹ is susceptible to a wide range of natural disasters including tropical cyclones, floods, landslides, droughts, bushfires, volcanic eruptions, earthquakes and tsunamis (Gero, Meheux and Dominey-Howes 2011a; Gero, Meheux and Dominey-Howes 2011b; Chung 1995). It has been reported that in the period from 1980-2008 around 4500 people were killed in 380 different disasters in the Oceania region, while nearly 20 million people were affected (Prevention Web 2013). The most common forms of disaster in the region are storms and floods, followed by earthquakes and bushfires.

The United Nations Development Program Pacific Centre reports that more than 3.4 million people have been affected by natural disasters in the Pacific since 1950, including nearly 2000 fatalities. While the number of individuals affected is relatively small compared to other regions, the scale of social and economic impacts is significant (UNDPPC).

Recent examples which highlight the particularly destructive character of natural disasters in the Pacific include tropical cyclones Ofa and Val which struck Samoa in 1990 and 1991 respectively, resulting in damage equivalent to four times GDP. The Samoan earthquake in 2009 led to a tsunami which devastated Samoa, Tonga and American Samoa, causing the deaths of over 200 people and widespread damage to infrastructure. Widespread flooding in Fiji in 2009 and 2012 caused a number of deaths and cost millions in damage and lost tourism revenue (Gero, Meheux and Dominey-Howes 2011a). In Australia, floods, droughts and bushfires have caused extensive damage and economic loss (Prevention Web 2013).

While the exact nature of environmental hazards, their frequency and seasonality may differ from one country to the next, all countries in the region are impacted to some extent (Mearns 2007). The regional climate generally exhibits tropical characteristics, with countries vulnerable to tropical cyclones, high swell events, floods and droughts, often driven by El Nino Southern Oscillation patterns (Gero, Meheux and Dominey-Howes 2011a). Many countries in the region are island states, which range in geography from high volcanic islands to low-lying atolls, although populations are typically located around the coastline, meaning that most islands are vulnerable to some extent (Gero, Meheux and Dominey-Howes 2011a).

A number of factors determine the degree of vulnerability for each state. These include the extent to which island economies are dependent on environmental assets or are resilient to environmental hazards. Other factors include the condition of infrastructure, awareness of
hazards and disaster risk management systems (Mearns 2007), insularity and remoteness and demographic factors (Gero, Meheux and Dominey-Howes 2011a).

Many of the island states in the Oceania region are classified as Small Island Developing States (SIDS), in consideration of the constraints they confront in pursuing their development, including:

... a narrow resource base depriving them of the benefits of economies of scale; small domestic markets and heavy dependence on a few external and remote markets; high costs for energy, infrastructure, transportation, communication and servicing; long distances from export markets and import resources; low and irregular international traffic volumes; little resilience to natural disasters; growing populations; high volatility of economic growth; limited opportunities for the private sector and a proportionately large reliance of their economies on their public sector; and fragile natural resources (UNOHRLLS).

Further, a number of these states are also listed by the United Nations as Least Developed Countries (LDCs), such as Kiribati, Samoa, Solomon Islands, Tuvalu and Vanuatu.

The dependence of many nations in the region on highly vulnerable primary resources from land and seas as the basis of their economies means that natural disasters can impact on societies at a very basic level and cause damage to a range of sectors. The financial costs for these nations of dealing with natural disasters amounts to a waste of development efforts as well as human resources, compounding existing social and economic problems and setting back disaster planning and relief activities even further (Chung 1995).

As well as assessing vulnerability at the national level, it is important to note the particular vulnerabilities of sub-groups within these populations, including indigenous communities, children, and people from lower socio-economic areas.

**Climate Change and Justice Impacts**

The vulnerability to natural disasters and the economic impacts they can have are exacerbated by the effects of climate change. Already prone to natural disasters due to their geographical and meteorological profiles, many countries in Oceania also possess characteristics which make them especially vulnerable to the effects of climate. These characteristics include their small size, low adaptive capacity and high adaptation cost-to-GDP ratio. There are a number of effects of climate change which threaten to expose these countries to greater harm from natural disasters. Most obviously, climate change is predicted to result in more frequent and severe extreme weather events, including cyclones and storms. A number of other factors are projected to impact on small islands like those in the Pacific, compounding the effects of extreme weather and further hindering their adaptive capacity.

Sea-levels are likely to continue to rise on average during the century around the small islands of the Northern and Southern Pacific Ocean (IPCC 2007; Mimura et al. 2007). Sea-level rise and increased sea-water temperature are projected to accelerate beach erosion and degradation of natural coastal defences such as mangroves and coral reefs (IPCC 2007; Mearns 2007). Depletion of natural coast defences exacerbates effect of storm surges and threatens human settlements (Mearns 2007). The Inter-Governmental Panel on Climate Change has predicted that ‘port facilities at Suva, Fiji and Apia, Samoa, are likely to experience overtopping, damage to wharves and flooding of the hinterland following a 0.5m rise in sea-level combined with waves associated with a 1 in 50-year cyclone’ (Mimura et al. 2007: 6.4.7). They have also forecast significant impacts on transportation, as international airports and road networks tend to be located close to the coast. ‘Under sea-level rise scenarios, many of them are likely to be at
serious risk from inundation, flooding and physical damage associated with coastal inundation and erosion’ (Mimura et al. 2007: 6.4.7).

Rising sea-levels combined with increased storm surges are likely to cause contamination of freshwater supplies, while reduction in average rainfall is likely to reduce the size of the freshwater lens. Many small islands in the Pacific are likely to experience increased water stress as a result of climate change (IPCC 2007).

A range of economic impacts is also anticipated, with impacts on agriculture and fisheries (IPCC 2007; Mimura et al. 2007). Damage to beaches and reefs is predicted to have a negative impact on tourism (IPCC 2007). These economic impacts will exacerbate states’ vulnerabilities to natural disasters, hampering efforts to prepare for or respond to disasters. Other forms of environmental degradation, including deforestation or erosion can aggravate the effects of a natural hazard. As Mearns has identified, environmental degradation ‘can be the factor that transforms a climate extreme, such as a heavy downpour, into a disaster’ (2007: 30).

The high vulnerability of states in the Oceania region to the effects of climate change must be considered in the context of their generally low comparative contribution to global greenhouse gas emissions. With the exception of Australia, and to a lesser extent New Zealand, countries in the Oceania region contribute among the lowest levels of greenhouse gas emissions (UNFCCC 2005). This discrepancy between cause and effect raises concerning questions of justice, as states with low levels of responsibility for climate change take an unfairly large share of the burden, yet benefit little from the industrialisation and development outcomes which generally flow from the burning of fossil fuels. The international community is currently seeking to create a legally binding instrument that will limit emissions with the aim of agreeing on the substance of this instrument by 2015, and commitments being undertaken from 2020 onwards (UNFCCC 2012). One of the most contentious aspects in the negotiation of this instrument is determining the application of the international environmental principle of ‘common but differentiated responsibilities’ and how this principle should inform emission reduction commitments. While there is some general acceptance of the idea that LDCs and SIDS should not bear onerous emission reduction commitments, it is essential that the 2015 instrument recognise the minimal contribution of SIDS to current emission sources, their current vulnerability to climate change impacts and set reasonable emission reduction goals in light of these circumstances as a matter of justice.

Human Rights Implications of Natural Disasters

The environmental and economic impacts of natural disasters described above can be analysed in terms of their impact on the enjoyment of human rights. The rights which may be affected by a natural disaster are included in the major United Nations human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). They include the right to an adequate standard of living, including the rights to food and water, (ICESCR art 11); the right to a livelihood (ICESCR art 6; Lewis 2006); the right to housing (ICCPR art 11; Barber 2008; Lewis 2006), and the right to the highest attainable standard of health (including mental and emotional health) (ICESCR art 12). They also include the right to liberty and security of the person (ICCPR art 9), freedom of movement (ICCPR art 12) and the right to political participation (ICCPR art 25). Also relevant are rights to non-discrimination (ICCPR art 2) and the right to participate in the planning and management of return or resettlement after displacement (Lewis 2006).

Human rights obligations under international law are generally understood to encompass three levels of obligation: the duties to respect, protect and fulfil human rights. While national governments are generally not responsible for causing the natural disasters and consequent human rights impacts, they nonetheless bear a responsibility for protecting their citizens from
negative human rights impacts and ensuring that their human rights can be fully enjoyed (Lewis 2006).

Human rights considerations are not only relevant in examining the impacts of natural disasters. They are also crucial in the development of appropriate responses to disaster. Fundamental is the recognition that even in the worst case of disaster or displacement, people remain entitled to the fundamental human rights which are guaranteed to them under international law (Ferris 2010). Furthermore, in the fulfilment of these rights they are entitled to assistance which does not discriminate on the grounds of aid, sex, disability, religion, ethnicity or social status (Inter-Agency Standing Committee 2011; Lewis 2006). Non-discrimination in the deployment of post-disaster aid has been one of the major issues of concern in recent disasters, including the 2004 Asian tsunami, where there were widespread reports of discrimination on the basis of sex, disability and economic class (Lewis 2006; Ferris 2010).

The Inter-Agency Standing Committee (IASC), the key organisation for coordination of humanitarian responses involving both UN and non-UN agencies, released a set of Guiding Principles in 2011 in recognition of the need to protect human rights in the aftermath of a natural disaster and in the response and rebuilding phase. It makes the point that, while human rights must be protected, for practical reasons it may be difficult to simultaneously guarantee all rights to all individuals. The guidelines therefore divide human rights into four categories, which may be prioritised in order to ensure the fundamental needs of all persons are met in the immediate response. The four categories are:

- Rights related to the protection of life, security, physical integrity and family ties;
- Rights related to basic necessities, such as food, health, shelter and education;
- Rights related to more long-term economic and social needs, such as housing, land, property and livelihoods; and
- Rights related to other civil and political protection needs (such as documentation, movement, re-establishment of family ties, freedom of expression and opinion and participation in elections).

The first two categories are understood to be most relevant during the initial emergency phase, but the Guidelines make clear that all four categories are essential in order to ensure that human rights are adequately protected for all those affected by natural disaster (IASC 2011: 10).

As noted above, the obligation for protecting and fulfilling human rights rests with the nation state, pursuant to international treaties and customary international law. However, states which provide aid or assistance, be it economic or practical, should still ensure that such assistance is delivered in a manner which is compatible with human rights standards. This is particularly important given that the nation state with primary responsibility may be incapable of meeting those obligations without international cooperation (Venturini 2012: 50).

**Evaluation of Current International Disaster Response Framework**

The IASC Guidelines referred to above are one instrument designed to provide practical guidance for the implementation of disaster response in a manner which ensures protection of human rights. There are however no comprehensive and binding international agreements which formalise the responsibilities of affected and assisting states in responding to natural disasters. Instead, a number of international, regional and bi-lateral instruments, both treaties and soft-law, have been developed by a range of international actors which attempt to address what was once described as a 'yawning gap' in the disaster response framework (IFRC 2000). These mechanisms have been developed in an ad hoc fashion, often in response to a particular typology of disaster or to address a particular aspect of disaster response (de Guttry 2012: 2).
They propose various means of defining and contextualising natural disaster within the context of international law but have so far fallen short of establishing a binding and comprehensive framework of international disaster response law (IDRL).

The multitude of principles, frameworks, guidelines and treaties can be taken to indicate a general willingness to address the problem of international disaster response, but at the same time they demonstrate both a lack of consensus on basic issues and the patchwork nature of the current disaster response framework (Reinecke 2012; Miller 2012). De Guttry has described the ‘anarchic accumulation’ of instruments, where mechanisms have been drafted without reference to each other, resulting in many inconsistencies, contradictions and overlaps between the various instruments (2012: 3). He points to instances where multilateral, regional and bilateral agreements purport to regulate identical issues, resulting in contradictory rules relating to matters such as the status of personnel, sharing of costs, access to affected territories and claims for compensation (2012: 40). This inconsistency and incoherence has been compounded by the proliferation of actors engaging in humanitarian assistance, which poses challenges related to the design, implementation and coordination of disaster response field mechanisms (de Guttry, Gestri and Venturi 2012: ix; de Guttry 2012: 38).

Despite the plethora of instruments, two major contributions can be identified in the work of the International Federation of Red Cross and Red Crescent Societies (IFRC) and the recent work of the International Law Commission (ILC). In 2001 the IFRC launched the International Disaster Response Laws, Rules and Principles Programme, investigating the role of legal frameworks in improving disaster response (IFRC 2011). As a result of the work of the Programme, in November 2007 at the 30th International Conference the IFRC adopted the ‘Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance’. (IFRC 2011). Subsequently, the UN General Assembly passed three resolutions encouraging States to incorporate and adhere to the guidelines (UNGA 2009a, 2009b, 2009c). The guidelines address both response and risk reduction and continue to serve as a reference point for responding to natural disaster.

Whilst expressly non-binding the guidelines nonetheless suggest a framework for domestic disaster relief, and have been widely incorporated into regional and national disaster relief plans and frameworks. The guidelines address the responsibilities of actors in immediate disaster response (Part I) and suggest legal, policy and institutions frameworks for effective early-warning and preparedness (Part II) (IFRC 2011). It should be noted that the primary purpose of the guidelines is to ‘contribute to legal preparedness by providing guidance to states interested in improving domestic legal, policy and institutional frameworks concerning international disaster relief’ (IFRC 2011: 93). As such the foremost concern of the guidelines is on the capacity of domestic governments rather than the international community to respond to disaster.

Another important recent development has been the work of the ILC which, in the aftermath of the 2004 Indian Ocean tsunami, began work on a multi-year project to develop rules governing international disaster relief for the purposes of protection of persons in the event of disasters (Heath 2010). The ILC handed down its Preliminary Report on the Protection in the Event of Disasters in 2008, thereafter reporting annually on the development of draft articles for a proposed set of disaster response laws or principles to the UN General Assembly (Valencia-Ospina 2008). Notably, the ILC made efforts to distinguish its work from the IFRC guidelines, recognising that it was pertinent to avoid encroaching upon an instrument that had already proved effective and that repetition of those guidelines already established would serve to further dilute and hinder the development of IDRL (Valencia-Ospina 2008).

At present the ILC has drafted 15 articles on the protection of persons in the event of disasters (Valencia-Ospina 2012). These draft articles are notable for a number of reasons. First, Article 2
('purpose') situates IDRL within a human rights context, with an emphasis on the rights of individual persons (ILC 2009). This marks a departure from traditional conceptions of IDRL which tend to avoid any such contextualisation. Further, Articles 6, 7 and 8, expressly bring humanitarian principles and human rights into the draft. Second, in defining ‘disaster’ the ILC has omitted to distinguish between slow- and sudden-onset disaster or between natural or manmade events. The ILC has avoided limiting the scope of the articles and instead opted to focus on the human rights implications (ILC 2010).

Articles 9 and 10 impose explicit duties on states to protect populations and to seek assistance (ILC 2011). These obligations are consistent with the duties imposed on states under international human rights law, and their articulation by the ILC sets the draft articles apart from existing guidelines (IFRC 2011). It remains to be seen whether the work of the ILC will be adopted in any formal way by the international community, but it nonetheless represents the contemporary position on IDRL and, moreover, comprehensively deals with the complex development of IDRL.

In addition to the ‘soft-law’ instruments developed by the IFRC and the ILC, a number of treaties exist which have some application to disaster response, although none which provides comprehensive coverage (Valencia-Ospina 2008). Two multilateral treaties provide rules for international assistance in specific areas in the event of disaster. The Framework Convention on Civil Defence Assistance and the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operation (the ‘Tampere Convention’). The former addresses the coordination between national civil defence entities and is not largely considered an exemplar of IDRL development. The latter is a comprehensive legal framework for the provision of telecommunications assistance during disaster relief operations (Valencia-Ospina 2008).

The Tampere Convention, despite having limited scope, is regularly cited as an example of a working IDRL-related treaty, despite having proved ineffective in the field and having failed to attract wide participation. The Convention has garnered such attention largely because it provides a comprehensive legal framework for providing telecommunications assistance during natural disaster, focussing on the reduction of regulatory barriers including those regulations that restrict import or export, movement of personnel, and delays in administration of such regulations (art 9). Whilst the Tampere Convention certainly provides an example of how an IDRL treaty could work, its specific scope and unproven efficacy undermine its applicability.

In addition to these two multilateral treaties, a number of regional treaties exist which have some application in the event of natural disaster. These mostly focus however on planning and disaster risk reduction, rather than on disaster response. Further, there are no regional treaties which apply in the Oceania region. There are some soft-law instruments, such as the Pacific Disaster Risk Management Partnership Network’s Framework for Action 2005-2015. The Association of Small Island States has also contributed guidelines which are applicable to island nations within Oceania. These instruments focus primarily on planning, disaster risk reduction and capacity building, with a particular interest in addressing the problems of climate change (de Guttry 2012: 26). Consequently there appears to be a gap of legally binding mechanisms which would address disaster response in the Oceania region.

One of the principal difficulties in identifying a comprehensive disaster response mechanism is that there is currently no accepted definition of what a natural disaster is or how natural disaster should be contextualised within international law. Particularly problematic is the distinction between slow- and sudden-onset disasters. Given that climate change will result in increasingly severe effects on vulnerable states, the problem of how to address slow-onset disasters is becoming one of increasing visibility and urgency (Schipper and Pelling 2006). This challenge is most obviously related to the framework for disaster risk and reduction, as it
involves a consideration of the steps states should take in preventing and preparing for disasters. However, it remains germane to the issue of disaster response as well, especially when it is considered that many of the human rights impacts of natural disaster can be present even where they occur more gradually.

Conclusions
An examination of the current international framework for disaster response reveals a number of challenges in terms of improving our ability to address the vulnerability of at-risk States, communities and individuals in the Oceania region.

Eburn (2011) argues that without a specific legal instrument relating to disaster response there will remain questions about who can provide disaster relief. The primary obligation for providing assistance in the case of natural disaster rests with the home state. This is consistent with human rights law, which imposes obligations on States to respect, protect and fulfil the human rights of those persons within their territory or under their control (McCorquodale and Simons 2007: 601). It is also largely dictated by the principles of State sovereignty which requires that States not intervene following a disaster unless their assistance is requested by the affected state (Eburn 2011; Miller 2012). These principles impose limitations on the likelihood that a new international instrument could be developed which is both comprehensive and legally binding, as States are typically unwilling to agree to any new law which might encroach upon their sovereignty or impose new obligations requiring positive action.

With respect to addressing the vulnerability of affected individuals and communities, human rights principles can be useful in highlighting the needs of those most affected and helping to establish priorities for the deployment of assistance (Bizzarri 2012: 389). This role is explicitly noted in the IASC guidelines and the ILC report. Existing obligations under human rights law can potentially be used to plug a gap in the absence of a dedicated international legal instrument for disaster response. Where a State is able to respond to a disaster internally, either independently or with the assistance of NGOs or IGOS, they will be obliged to comply with any human rights treaties to which they are a party. Human rights obligations will also attach to any foreign state which is providing assistance, as its obligations will extend to the activities which it carries out within the territory of another state (McCorquodale and Simons 2007).

It is less clear however that human rights law imposes any obligation on States to provide assistance to another country which is affected by disaster, especially where the affected state has not sought help from the international community (Heath 2010; Eburn 2011; Miller 2012). It is also unclear that States would bear any international responsibility for human rights impacts caused by the actions of their nationals who might be engaged in work through NGOs, unless those actions can be shown to be somehow attributable to the State (McCorquodale and Simons 2007). While human rights principles are therefore important in governing the way that disaster assistance is deployed, there are some limitations to the applicability of human rights law in the context of international disaster response.

In conclusion, and with respect to the question of whether a new legally binding and comprehensive international instrument is required in the area of natural disaster response, a number of points should be made. First, natural disasters are largely unpredictable, and the extent of their impact is determined by a number of variables, as outlined above. Similarly, a State’s capacity to respond to a disaster and the nature of any cooperative assistance from other States will also depend on a range of factors, including the financial capacity of the States concerned, relevant regional agreements or relationships and domestic aid mechanisms. In such a context, it is evident that international response frameworks need to be flexible and responsive to the circumstances of each situation. It is unsurprising then that the international
framework for disaster response has developed in an ad hoc fashion and has been described as being a 'patchwork of instrument' (Reinecke 2012).

It is questionable whether it would be possible to develop a single instrument which is both comprehensive and legally binding. States generally consider their responsibilities towards each other in times of disaster as being humanitarian or moral in nature, not legal. It is unlikely that States would consent to be legally bound by a new treaty which would impose greater obligations to provide assistance in times of disaster (Eburn 2012). Further, Fidler (2005) has noted that the significant contribution which is made by NGOs and IGOs in providing disaster response assistance may indicate that no international legal instrument is required.

The current framework, comprised of instruments such as the IASC and IFRC guidelines, provides detailed guidance on the way to provide disaster response assistance in a manner which is consistent with human rights law. Those instruments rely on existing legal obligations to guarantee certain minimum standards and make clear that whenever a State is engaged in disaster response activities, those activities are subject to existing international human rights law. It is submitted that, while there are some limitations to the applicability of human rights principles, given that a new legally binding instrument is unlikely to gain the support of States, utilising existing human rights law to help address vulnerability in situations of natural disaster is an appropriate approach. The problems of confusion, ambiguity and inefficiency remain however, and will persist so long as the disaster response area is governed by such a wide range of international and regional instruments.

1 Although there are a number of different understandings of the extent of the Oceania region, this paper adopts the definition used by the United Nations, which includes Australia as well as the regions known as Micronesia, Melanesia and Polynesia. As such, it comprises the following states and dependent territories: American Samoa, Australia, Cook Islands, Fiji, French Polynesia, Guam, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, New Caledonia, New Zealand, Niue, Norfolk Island, Northern Mariana Islands, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu and Wallis and Futuna Islands.


References


The Politics of Disgust: Paedophilia, Retributive Violence and the Im/Possibilities of Hate Crime

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Conference Sub-theme: Social, criminal and Indigenous justice

Abstract
Since the 1970s the prevalence of child sexual assault has become increasingly recognised as a widespread form of social harm. Alongside this, the category of the paedophile has gained a new salience. One consequence of these two interrelated trends is the now apparently universal disgust for, and repudiation of, child sex offenders. This is evidenced through more and more punitive responses to these offenders, as well as new legislative regimes that seek to ameliorate the apparent risk they are said to pose. Both post-sentence preventative detention and supervision regimes are now a feature of several Australian states. This signals an increased willingness on the part of legislators to pre-emptively engage with possible recidivism by this class of offenders. This paper uses such legislative regimes as a background through which to contextualise contemporary social, cultural and legal preoccupations with the category of the paedophile. This is explored through a recent case in New South Wales in which the Court of Criminal Appeal was required to consider whether offences of arson motivated by hatred for, or prejudice against, paedophiles, could give such acts the character of a hate crime. Exploring this case alongside scholarly responses to it, the paper investigates the contemporary disgust for paedophilia, and the political dimensions that underpin the question of whether prejudice-motivated crimes against paedophiles should be recognised as constituting a hate crime.

Introduction
Between 1979 and 1980, Brian Keith Jones – more widely known as Mr Baldy – abducted six young boys. This alias is explained by the fact that Jones shaved the heads of his victims, dressed them in girls' clothing and makeup, before sexually assaulting them. In 1981, he was sentenced to 14 years imprisonment. In 1989, three weeks following his release on parole he raped a nine-year-old boy, and indecently assaulted the boy's younger brother. Jones was subsequently sentenced to a maximum of 14 years imprisonment for these offences. In 2005, the conclusion of his sentence was imminent. This occasion was marked by several newspaper articles about his release, coupled with an announcement by the State Government of Victoria that it would move to legislate a new regime enabling the supervision and control of so-called 'serious sex offenders' beyond the period of their sentence. Newspapers devoted pages and columns to his release, citing the excessive risk that he was said to constitute. Described variously as a 'monster' (Buttler and Anderson 2005a: 2), a 'sex fiend' (Hodgson 2005: 2), a 'pervert' (Bolt 2005: 23), and 'scum' (Buttler and Anderson 2005b: 3), the Herald Sun's editorial asked 'all Victorian parents: Where will your children play now?' (Editorial 2005: 84).

Twenty-four hours after his release from prison on 13 July 2005, the address nominated by correctional staff for him to reside at was publicly identified (Buttler and Anderson 2005c: 1). Following this, he was moved to another secret location, leading to persistent rumour and innuendo. When radio broadcaster Derryn Hinch publicly named the alleged street that Jones...
had been moved to, the house was attacked and vandalised by vigilantes. Hinch, it was subsequently revealed, incorrectly identified the residence (Buttler and Anderson 2005d: 3).2

The subject of widespread concern – or perhaps, panic – and ultimately, misdirected vigilante ‘justice’, Brian Keith Jones’ experience is in many respects not unique. On the contrary, this episode bears striking similarities to the response to other so-called monstrous paedophiles elsewhere. Events surrounding the United Kingdom’s News of the World campaign in 2000 in which paedophiles’ names and addresses were published, attests to this, as does a burgeoning body of literature demonstrating the potential consequences of ‘naming and shaming’ laws.3 On one level this demonstrates the contemporary and seemingly universal disgust paedophilia elicits. It seems self-evident that paedophiles are monstrous and that there are no alternative ways of conceiving of such subjects. However, this has not always been so.

This paper explores the trajectory through which paedophilia has increasingly become figured as monstrous and disgusting. While appearing to be universal and ahistorical, child sexual assault has previously been understood in quite distinct terms to today’s manifestation. The paper uses this trajectory to contextualise a 2007 case brought before the New South Wales Court of Criminal Appeal where a judge was required to consider whether paedophilia may give an act the character of a hate crime.4 The purpose of the paper is to critically examine the im/possibility of understanding paedophilia as a category of hate crime. In doing so, the paper explores the politics of disgust that has come to be associated with paedophilia.

A Trajectory of Disgust

The assumption that paedophilic monstrosity is inevitable and natural stands in contrast with recent historical shifts influencing how child sexual assault has been conceived. While figures such as ‘Mr Baldy’ tend to suggest the innateness of paedophilia’s monstrosity, this configuration has not always occupied such a central position within public and legal consciousness. Scott (1998: 65) writes that ‘the appearance of a new identity is not inevitable or determined, not something that was always there simply waiting to be expressed’. Instead, categories of identity (such as the paedophile) are contingent upon particular political or historical movements.

In her critique of the jurisprudence of child pornography, Adler anchors her argument by reference to the ‘explosion’ of child pornography in the 1970s and 80s. As she demonstrates, the social concern or panic about child pornography in the 1970s and 80s. As she demonstrates, the social concern or panic about child pornography ‘is a modern phenomenon that has grown significantly just over the last two decades’ (2001: 217-8). Scholars, child advocates and others now routinely talk of the ‘recent discovery’ of child sexual assault. As Adler writes, ‘declared a “national emergency” in [the United States] in 1990, the crisis over child sex abuse has taken centre stage in our culture and politics, as the worst of all possible evils’ (2001: 218). These relatively recent developments substantiate the fact that the ‘problem’ of child sexual assault has been malleable or contingent over time. Putting to one side the fact that debates about the incidence of this problem are indelibly fraught, for Adler one thing remains clear: ‘There has been a dramatic explosion in discussion about child sexual abuse in the last [three] decades’, whereas prior to this, ‘it was barely recognised as a problem’ (Adler 2001: 220; original emphasis).

This point is further underscored by Jenkins’ account of evolving conceptions of child sexual assault (1998). Of import to Jenkins’ work is the cyclical nature of public interest in child sexual assault over different historical contexts (1998: 2-3). He argues that the current formulation of child sexual exploitation is presented as an evolutionary stage in social development: whereas previously it has been conceived as a problem of overstatement or infrequency, the current widespread acceptance of child sexual assault as a problem is marked by its statistical prevalence. Specifically, the contemporary orthodoxy is that child sexual assault is an
overwhelmingly prevalent phenomenon, and this orthodoxy is a measure of ‘reality’. Further, to the extent that the ‘reality’ of child sexual assault is conceived as a prevalent one, it follows that the fear or panic attached to it is amplified.

Reading this as a cyclical pattern over different historical periods, linked to an overstated fear or panic, Jenkins draws on Stanley Cohen’s authoritative work on moral panics (1973). For Jenkins, this assists in understanding how concern about child molestation has fluctuated widely over the twentieth century. For him, these changes reflect the shifting role of interest groups over time, such as child protection movements, feminists, psychiatrists and therapists, as well as politicians and other officials. As he writes, ‘this impressive range of interest groups stood to benefit from claims about threats to children, and the number of beneficiaries increased as each crisis developed’ (1998: 219; see also Angelides 2004).

Paedophilia and the Punitive Turn
Changing understandings and discussions of child sexual assault and paedophilia have occurred in tandem with broader shifts in penology since roughly the 1960s and 70s. David Garland, for example, historicises a comparatively recent movement away from penal welfare and rehabilitation towards a much more punitive response to crime (2001). In this context, principles of retribution, incapacitation and risk management have taken precedence over the rehabilitative ideal. It is this shift that marks the 'new punitiveness', alongside the rise of penal populism (Brown and Pratt 2000; Pratt 2000, 2006, 2007, 2008; Pratt and Clark 2005; Simon 1995, 2007). These penal shifts can be witnessed in an Australian context by a range of new mechanisms for dealing with sex offenders in general, and child sex offenders in particular. Mechanisms such as 'Working With Children Checks' and sex offender registries have become standard. In a custodial context, several Australian states have also enacted post-sentence preventative detention and supervision schemes enabling the continued detention of eligible sex offenders at the conclusion of a custodial sentence.

Post-sentence preventative detention and supervision schemes have generally been met with little political or public resistance. This is in spite of the fact that they suspend long-held legal protections such as principles of double jeopardy, retrospective punishment, finality of sentencing, and the rule of law (Douglas 2008; Keyzer and Blay 2006; Keyzer, Pereira and Southwood 2004; Keyzer and O’Toole 2006; McSherry 2005, 2007). In the context of community-based initiatives such as sex offender registries and the move toward public accessibility of such information, such measures exist in spite of the risk of retributive violence that public notification can pose (Ashenden 2002; Critcher 2002; Cross 2005; Evans 2003; Lawler 2002; McAilinden 2005). The relative lack of concern about this, I would suggest, is explained by the trajectory of disgust identified above. While the 'new punitiveness' and penal populism have more generally altered the landscape of sentencing and punishment, in the context of paedophilia these have occurred alongside an increased social and cultural aversion for such offending behaviour.

Retributive Violence and the Question of Hate Crime
Against this backdrop, in 2007 the New South Wales Court of Criminal Appeal was required to consider hate crime on the basis of paedophilia. In 2005, Darren Brian Dunn and Ibrahim Arja were neighbours in a complex of public housing units in the Sydney suburb of Riverwood. In the early hours of 29 August 2005, while Arja was overseas, Dunn set fire to chairs on the porch of Arja’s unit. The fire destroyed the chairs, as well as the window of the unit’s front room. On 30 October 2005, around two months after the initial fire, Dunn again set fire to Arja’s unit. Though Arja had returned from overseas, he had not been home at the time. This fire resulted in significant damage to the complex of units, subsequently deemed uninhabitable.
Although Dunn did not give evidence at trial, his sentencing judge sought to establish a motive for his attacks. In doing so, the judge relied on evidence provided by a police informant about a conversation he had with Dunn, along with a report provided to the court by a psychiatrist for the prisoner. The police informant gave evidence that, three days after the second fire, Dunn stated that he had lit the fire because Arja was a ‘rock spider’.\(^7\) This term is used predominantly by prisoners to hierarchically distinguish paedophiles from other imprisoned offenders. The psychiatrist further recorded a conversation in which Dunn stated that the fires were intended as a ‘scare tactic’ because Arja was a ‘rock spider’.\(^8\)

While Dunn’s belief that Arja was a paedophile was found to be wrong, the sentencing judge held that a significant factor motivating Dunn was his ‘feelings of antipathy towards his neighbour Mr Arja who he believed without justification at all, was a paedophile’.\(^9\) These findings, the judge ruled, constituted a significant aggravating factor in line with s 21A(2)(h) of the Crimes (Sentencing Procedure) Act (NSW) 1999. This section provides that sentencing judges may have regard to whether an offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged. Specifically, it constitutes the means by which New South Wales courts distinguish hate crimes from other forms of offending behaviour.

Dunn appealed against this sentencing, requiring the Court of Criminal Appeal to give consideration to whether paedophilia may constitute grounds for hate crime. The court’s ruling was unambiguous. It found that:

> Applying s 21 A(2)(h) it is clear that the offences come fairly and squarely within it. The offence was motivated by a hatred or prejudice against Mr Arja solely because the applicant believed him to be a member of a particular group, ie paedophiles. The examples given in parentheses\(^10\) are merely that, ie examples, they do not comprise an exhaustive list of the groups envisaged by the subsection.\(^11\)

The consequence of this finding was the recognition that a belief an individual is a paedophile is sufficient to constitute an aggravating factor in sentencing: that is, the belief an individual is a paedophile may give an act the character of a hate crime.

For the purposes of this paper, it is how this judgment has been received that is of significance. Legal scholar Gail Mason has written extensively on hate crime (2001, 2007, 2009a, 2009b). In response to this case, Mason writes ‘this decision appears to be a world first. The protection offered by hate crime laws has never before been extended to paedophiles as a group’ (2009a: 254). Elsewhere she describes it as a ‘provocative and unique decision’ (2009b: 337). Considering the recent history of the concept of hate crime, Mason emphasises how it has typically been deployed in order to place ‘discriminatory violence on the public agenda as a recognisable social problem’ (2009a: 254). Hate crime laws, she argues, aim to ‘make a broad moral claim that prejudice is wrong and thereby reinforce prosocial values of tolerance and respect for marginalised and disadvantaged groups’ (Mason 2009a: 254). Because of their expressive function in denouncing intolerance and violence toward traditionally underprivileged groups, ‘hate crime laws have tended to mimic the kinds of “social fissure lines” also protected under discrimination law: race, religion, ethnicity, colour, age, sexuality, physical and mental disability and so on’ (2009a: 254-5).

If prejudice is the crucial factor that hate crime laws seek to address, then according to Mason, this prejudice must be *irrational* or *unjustifiable*: ‘prejudice by very definition denotes an irrational or unjustifiably negative attitude towards members of a particular group’ (2009a: 255). However, she regards paedophilia as something of a limit when it comes to hate crime. Whereas other forms of prejudice are irrational and unjustified, the attitude lacks these qualities when applied to the paedophile. As she writes:
Adults who engage in sex with children inflict a clear and identifiable harm upon others, namely children. Condemnation of such behaviour is neither unwarranted nor unjustified. Indeed, many would argue we have a moral imperative to denounce exploitative conduct of this nature. (2009a: 255).

Elsewhere Mason has examined the political dimensions that can underpin what is or is not labelled as hate crime. In her compelling analysis of the Snowtown case, she highlights the way hate crime can engender ‘emotional thinking’, including compassion for victims and disgust for perpetrators (2007). As she writes, the question of whether an act is labelled a hate crime is not simply determined by whether it meets a requisite legal definition. Drawing on Nils Christie’s ‘ideal victim’, in the context of Snowtown she demonstrates how a sense of moral failure on the part of victims precludes a broader public recognition of these acts as constituting a hate crime. Her examination of the legal case alongside public reportage reveals that while hatred towards homosexuals and paedophiles was the primary (albeit not exclusive) motive for these deaths, because of the broader moral judgment that is socially ascribed to homosexuality and paedophilia, this case has rarely if ever been properly labelled as a hate crime.

Returning to the case of Dunn, for Mason prejudice against paedophilia is not irrational or unjustified, therein precluding such violence from being understood as a category of hate crime. While I am broadly indebted to Mason’s extensive and insightful work on hate crime, I take issue with two particular consequences of her argument as it relates to paedophilia: first, the assumption that hatred of paedophilia is neither irrational nor unjustified; and second, the need, I would emphasise, to distinguish between social attitudes regarding paedophilia and the phenomenon of child sexual assault itself.

As I have argued, the cultural aversion for paedophilia is not a direct correlation of the objective reality of child sexual assault. While increased recognition of the prevalence of and repudiation for child sex offending is to be welcomed, this should not preclude critique of the manner in which paedophilia has come to constitute monstrosity and hatred par excellence. Following Jenkins’ (1998) identification of a moral panic surrounding paedophilia, this panic itself may be misplaced or out of proportion. By delegitimising the potential for paedophilia to constitute a category of hate crime, recognition of the irrational or unjustified moral panic surrounding paedophilia is foreclosed. Indeed, growing vigilantism against paedophiles is one key consequence of our moral panic surrounding the category of the paedophile. While Mason recognises that such vigilantism is not warranted, I would nonetheless maintain that vigilantism arises from the same site of hate itself. It is difficult in practice to decry vigilantism at the same time that we delegitimise the potential for retributive violence on the basis of paedophilia to be legally defined as a hate crime.

My second point of departure from Mason’s argument is borne from need to distinguish between paedophilia and child sexual assault. Throughout this paper I have used the terms ‘child sexual assault’ and ‘paedophilia’ deliberately. One consequence of the moral panic surrounding the paedophile is to cast this category or type of person as emblematic for, and synonymous with, child sexual assault. The alarming prevalence from child sexual assault however demands that the category of the paedophile cannot stand in for this troubling phenomenon. Through our aversion for the paedophile, we lose sight of the more routine, normative reality of child sexual assault. In this respect my argument parallels Hannah Arendt’s in the context of Adolph Eichmann trial (1963). For Arendt, what characterised Eichmann was not monstrosity or extraordinary exceptionality. Instead, it was his very ordinariness; his banality. For her, this made his crimes much more terrifying. In the same way, I would suggest that our increased fixation on ‘the paedophile’ functions to disavow the routine or prevalent nature of child sexual assault, therein losing sight of those child sex offenders amongst us, or who indeed may be us.
In this respect, what is often left unspoken within the cultural aversion for paedophilia is the complex relation of self and other that underpins this disgust. Broadly speaking debates about criminal justice tend by their nature to construct community. As Young observes, ‘the mere existence of an offender is set up as turning everyone (else) into victims. Thus the lines are rigidly drawn between those who belong to the law (and the community) and those who do not: the outlaws’ (1996: 9). Hate crime itself has been examined by reference to the complex manifestation of this dichotomy between self and other, offering a complex insight into the construction of identity (and community) through the infliction of retributive violence. Specifically, it reveals a rather novel manifestation whereby prejudice-motivated crimes function to construct a community of ‘us’ through the enactment of violence upon an ‘other’. In the context of, for example, homophobic violence, such acts can constitute a performative arena through which to construct oneself as heterosexual. As Mason recognises, the naming of these acts as hate crimes provides an important expressive statement about community that resists this sort of heteronormative excision of sexual difference. Similarly, I would argue that child sexual assault demands the recognition that such offending cannot be reduced or collapsed to the monstrous and abject category of the paedophile. What needs to be instead recognised is the very communal nature of such harm, alongside a rejection of the impulse to delegate this to an abject other (‘the paedophile’).

By foreclosing paedophilia from legal definitions of hate crime, there is a risk that we re-entrench this cultural preoccupation for paedophilia and, in doing so, obscure from consideration that reality that child sexual assault is not synonymous with paedophilia. Indeed, most child sex offenders are not ‘paedophiles’, as properly understood (Ardill and Warlde 2009: 258). Naming an act as a hate crime is, following Mason, an important emotional statement that serves to de-legitimise the motivation that underpins such acts. In the case of racism, sexism, homophobia and so on, the import of this is obvious. However, in a context in which paedophilia as a category of criminality has come to be understood as abject par excellence, there are dangers that arise from denying that acts motivated by prejudice against this class of offenders should meet the requirements of legal definitions of hate crime. This need only be witnessed via the array of harms child sex offenders released back into the community can experience. At the same time that we repudiate child sexual assault, I contend that there remains a need to resist the urge to simultaneously foreclose a capacity to understand retributive violence of the basis of paedophilia as a legally recognised form of hate crime.

**Conclusion: The Im/Possibility of Naming Paedophilia as a Category of Hate**

Earlier in this paper I quoted Scott, who speaks of the way in which the appearance of a new identity is neither inevitable nor predetermined. By chronically a trajectory of disgust associated with paedophilia, I have sought to offer a context through which to make meaningful the contemporary aversion for paedophilia. Since the 1970s, during which time child sexual assault was all too often silenced or trivialised, the child protection lobby and feminists have made important strides in bringing to light the all-too-prevalent nature of this form of victimisation (Angelides 2004). One consequence of this has been an increased aversion for those who have been responsible for such conduct. However, while denunciation for paedophilia is both important and necessary, a growing moral panic surrounding this is not without consequence. This can be witnessed via retributive violence that many convicted child sexual offenders experience upon their release from prison, as with the misdirected actions by people such as Darren Brian Dunn. Further, increased hysteria regarding convicted child sex offenders is often itself misplaced, instilling a false sense of security to the public: as Barnes notes, this diverts attention from the ‘individual who presents as a decent law-abiding family man’ (cited in Ardill and Warlde 2009: 258). My argument is not that paedophilia should be condoned, but that a more troubling consequence arises from the trajectory of disgust chronicled throughout the paper. Foremost amongst these is the risk of re-affirming a cultural obliviousness to this otherwise law abiding and ‘respectable’ family man.
1 See McDonald (2012) for an analysis of the enactment of post-sentence preventative detention and supervision regimes relating to so-called ‘serious sex offenders’.

2 Derryn Hinch has become renowned in Australia for his campaign naming and shaming sex offenders. He has previously been convicted and imprisoned for breaching court orders prohibiting the naming of offenders.

3 This led to vigilante attacks against both actual convicted sex offenders, as well as those bearing the same name as those published. On the potentially injurious consequences of naming and shaming laws, with a particular focus on the News of the World’s campaign, see Ashenden 2002; Critcher 2002; Cross 2005; Evans 2003; Lawler 2002; McNall 2005.

4 See section 21A(2) of the Crimes (Sentencing Procedure) Act 1999 (NSW); Dunn v R [2007] NSWCCA 312.

5 Western Australia became the first Australian state in 2012 to enable public access to information held in such registries. Reports suggest that Victoria and New South Wales are considering following suit.


7 The term ‘rock spider’ is an epithet for paedophiles, and is most commonly deployed by prisoners to refer to their fellow inmates convicted of child sex offences. Dunn had previously been imprisoned for robbery offences, and was on parole at the time of his malicious damage offences.

8 Dunn v R [2007] NSWCCA 312 at para 12. Dunn had reported to the psychiatrist that he was sexually assaulted as a child, however this was found to conflict with statements made by Dunn elsewhere.


10 The examples provided in the Act are as follows: people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability.


12 In 1999 eight bodies were initially discovered in barrels in an unused bank vault in the town of Snowtown. John Bunting and Robert Wagner were convicted of eleven and seven murders respectively, while two other men, James Vlassakis and Mark Heydon, were convicted of having accompanied the men in a number of these murders.

References


Justifications and Limits in the Politically Motivated Lawbreaking of Environmental Activist Groups

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Conference Sub-theme: Eco-Justice, Corporate Crime and Official Corruption

Abstract
In recent events, notions of political protest, civil disobedience, extremism, and criminal action have become increasingly blurred. The London Riots, the Occupy movement, and the actions of hacking group Anonymous have all sparked heated debate about the limits of legitimate protest, and the distinction between an acceptable action and a criminal offence. Long before these events, environmental activists were challenging convention in protest actions, with several groups engaging in politically motivated law-breaking. The emergence of the term ‘eco-tage’ (the sabotage of equipment in order to protect the environment) signifies the important place environmental activists hold in challenging the traditional boundaries between illegal action and legitimate protest.

Many of these groups establish their own boundaries of legitimacy, with some justifying their actions on the basis of civil disobedience or extensional self-defence. This paper examines the statements of environmental activist organisations that have engaged in politically motivated law breaking. It identifies the parameters that these groups set on their illegal actions, as well as the justifications that they provide, with a view to determining where these actions fit in the vast grey area between legal protest and violent extremism.

Introduction
Politically motivated lawbreaking has long been a protest tactic across many movements for social justice. On a continuum between civil disobedience and terrorism exists many forms of action that defy laws, and labels. For instance, terms such as eco-tage (the sabotage of equipment in order to protect the environment) have emerged in an effort to define just one form of direct action favoured by radical environmental and animal rights activists. Many of the actions favoured by these groups exist somewhere in the grey area between legitimate protest and violent extremism. Increasingly, however, environmental protest actions that involve some acts of lawbreaking are being tagged as ecoterrorism, resulting in significant attention from law enforcement, as well as condemnation from the public. This is despite ongoing protest from many activists that their actions, while illegal, are justified within a framework of civil disobedience, and do not amount to terrorism.

This ‘grey area phenomenon’ (Hoffman 1998: 28) poses a significant challenge to both scholars and policy makers in attempts to define terrorist acts, and distinguish between legitimate protest and illegitimate actions. This paper examines the ways in which the lawbreaking actions of environmentalist and animal rights groups are positioned and justified. The first section provides an examination of efforts to categorise politically motivated lawbreaking in order to identify the key factors that establish the borderlines between civil disobedience, terrorism, and acts in between. The second section is an examination of justifications offered by groups for acts of lawbreaking via a content analysis of press releases from five activist groups. These justifications for illegal behaviour offer some insight into how activist groups self-define and
categorise their own behaviour on a continuum between legal protest and violent extremism. The data analysed includes press statements put out by Trident Ploughshares, Greenpeace, Sea Shepherd Conservation Society, Stop Huntingdon Animal Cruelty (and associated group Smash HLS), and Rising Tide between January 2010 and December 2012. The analysis involved the coding of each statement to identify recurring themes in the justifications provided for actions. This method is informed, in part, by Liddick’s (2013) analysis of individual statements from the Animal Liberation Front. Liddick sought to identify evidence of neutralisation strategies employed by activists to assuage feelings of guilt for committing socially deviant acts. This study uses a similar content analysis approach to identify thematic justifications for criminal acts based on traditional justifications for political lawbreaking found in the literature, as well as allowing for the coding to be driven by the data in the identification of new or alternative justifications.

This paper argues that great uncertainty remains over where the lawbreaking activities of radical environmentalists and animal rights activists are positioned on a spectrum between civil disobedience and terrorism. The justifications offered by activists rely in part on a discourse of civil disobedience, but demonstrate that activists are willing to go beyond passive resistance, or non-violent protest, in a pursuit of immediate change.

Defining Acts of Politically Motivated Lawbreaking

Much of the debate about the definition of terrorism revolves around three key factors: the actor, the target, and the act. Of these categories, the actor appears to be the least determinant factor in justifying a label of terrorism. The State Department of the USA defines terrorism as acts perpetrated by ‘sub-national groups or clandestine agents’ (US Department of State 1998: vi), however some argue that this definition is too limiting, and does not take account of the terrorist actions of nation-states (Jaggar 2005: 203). The presence of a uniform, or title of power, conveys an element of legitimacy to many acts such as the destruction of infrastructure through targeted bombings, and the killing of civilians in drone strikes that, if perpetrated by a non-state group, would be condemned as terrorism (Jaggar 2005: 204). Others suggest that the focus on the political motivations of actors may unfairly define their actions as terrorism, thus punishing them for having a cause for their crime. Amster argues that, ’It appears to be precisely the political and ethical rationale for the act that turns a garden-variety crime like vandalism into a purported act of ecoterrorism’ (Amster 2006: 299). This is evident in the definitions of terrorism adopted by a number of nation-states, particularly the United States of America, which has imposed harsher penalties for crimes such as vandalism and arson through ‘terrorism enhancements’ (Gibson 2010: 142). It is, however, not the actor, but rather the target of the act (human or non-human), and the act itself (violent or non-violent) which most frequently guide the establishment of societal boundaries rendering some acts of political lawbreaking as legitimate and others as condemned.

The target

The targets of terrorist acts are both primary and secondary (Vanderheiden 2005: 428). The primary target is the person, or object, on which the act, or attack, is directly inflicted. The secondary target is considered to be the more important target, the ‘real’ audience for the attack. It is typically the populace, government or institution intended to experience ‘terror’ at the prospect of future actions. There are several ways in which the selection of these primary and secondary targets can serve to distinguish acts of terrorism from other forms of illegal political action for environmental reasons. Firstly, acts of terrorism are broadly considered to be especially evil because they do not discriminate between ‘innocent’ and ‘non-innocent’ victims. While the terrorists responsible for the attack on the World Trade Centre in 2001 chose a symbolic target for destruction, they killed thousands of people indiscriminately. By contrast, environmental activists are very discriminating in selecting targets for their actions, choosing individuals and organisations that they believe to be directly responsible for environmental
degradation such as SUV dealers, property developers, logging companies, and bio-medical companies utilising animal testing (Liddick 2006: 8).

A second way in which illegal actions by environmentalists may be differentiated from terrorist attacks is in the intended secondary target for their actions. Radical environmentalists tend to favour more direct tactics, with actions taken against the secondary target, or audience, themselves. For example, the Environmental Liberation Front has claimed responsibility for acts directly targeting corporations they believe to be responsible for acts of environmental degradation or animal cruelty. These acts include the burning of buildings and ski lifts at Vail, Colorado and the vandalism of ATMs and bank branches at the Bank of New York in protest of their relationship with animal testing corporation Huntingdon Life Sciences (Liddick 2006: 5). While these acts may be differentiated from terrorism on the basis that the primary target was the most important target, the impact on a secondary target cannot be discounted altogether. Those responsible for these acts often publicise their activities, which indicates that while the primary aim may be to disrupt environmentally damaging activities such as logging, a secondary aim may be to dissuade other companies from engaging in such activities. This would certainly be true of several of the actions taken by members of animal rights activist group Stop Huntingdon Animal Cruelty (SHAC). Several press releases by the group report on protestors visiting the neighbourhoods of corporate leaders or businesses associated with Huntington Life Sciences, promising more appearances at people’s homes and workplaces. One release states:

You’ll never know what will be coming next – but we’re dying to expose the sick lengths that you’re willing to go to in order to make your blood money. The plague is spreading but you have the cure – cut your ties with HLS or your headache has only just begun. (SHAC 22 August 2011)

This clearly conveys a threat of future action.

The vast majority of radical environmental or animal rights groups engaging in direct action target corporations as both their primary and secondary targets, rather than governments, which could preclude them from the label of terrorism under some definitions. For instance, the definition of terrorism under US law is an act ‘calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct’ (Anti-Terrorism and Effective Death Penalty Act 1996). Despite this guiding principle that an act should be directed at the state (whether as primary or secondary target), perpetrated by a non-state actor in order to be classified as terrorism, many acts directed at corporate interests have been declared to be eco-terrorism. For example, the burning of buildings and ski lifts at Vail Colorado in 1998 was an act clearly directed against the property developers and resort owners. However, in 2005 when Earth Liberation Front activists were arrested for this crime, then-Attorney General Alberto Gonzalez said, ‘Today’s indictment proves that we will not tolerate any group that terrorises the American people, no matter its intentions or objectives’ (FBI 1006).

It is not the symbolic institution, but rather the actual object that most dominates and influences debate about what constitutes a terror attack. The mass killing of humans for political ends by non-state actors is widely accepted as a terrorist act, while the destruction of inanimate objects muddies the definitional waters. This ethical boundary is the one most frequently erected by radical environmentalists in setting parameters on their protest activities. Dave Foreman, environmentalist leader, advocates the use of ‘monkeywrenching’ (typically the sabotage, or eco-tage, of industrial equipment used in environmentally damaging acts such as bulldozers or timber saws) as a form of ‘non-violent resistance to the destruction of natural diversity and wilderness. It is never directed against human beings or other forms of life. It is aimed at inanimate machines and tools that are destroying life’ (Foreman and Haywood 1993: 9).
In recent times, however, several nation-states have expanded the definition of terrorist act to include actions against non-human targets. Following the terrorist attacks of September 11 2001, the definition of terrorism was effectively expanded under the Patriot Act to include acts that destroy or attempt to destroy, 'any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce' (US Patriot Act). This definition therefore includes almost any action against any for-profit enterprise, effectively removing the requirement that acts be directed against the state as a target. The Animal Enterprise Terrorism Act (AETA) introduced in 2006 further lowered the threshold for an act to be defined as terrorism specifying that acts such as causing 'physical disruption to the functioning of an animal enterprise' would also be considered terrorist, and thus subject to enhancement penalties. Several scholars and activists have argued that these expansions of the definition of terrorism were intended to capitalise on the increased fear of terrorism in a post 9-11 environment, and to suppress dissent from activists for social justice including environmental groups, as well as cyber-activists, or ‘hactivists’ (Eddy 2005; Best 2007; McCoy 2007; Potter 2008; Amster 2006).

The act
Definitions of terrorism based on the target of an act are inherently linked to the act itself. Attempts to categorise the illegal actions of environmentalist and animal rights activists on a continuum between civil disobedience and terrorism have centred on these two main variables, largely disregarding the relevance of the actor. Miller, Rivera and Yelin suggest that illegal actions by environmentalist groups can fall within three categories. Firstly, civil disobedience ‘would encompass actions of peaceful protest and speech’ and would be distinguished from other acts due to the lack of ‘significant security threat’ posed by the protest. Secondly ‘antagonistic disobedience’ is defined as ‘actions that are semiviolent or violent’ such as ‘tree spiking, individual acts of violence or assault, and minor destruction of property and/or resources’. Finally, ‘terrorism’ would include ‘all actions openly violent and destructive to people, property, and/or resources’ (Miller, Rivera and Yelin 2008: 118-119).

These proposed categories distinguish between acts of civil disobedience and acts of terrorism primarily on the basis of the use of violence. The middle-ground category of ‘antagonistic disobedience’, however, creates significant ambiguity in the basis on which distinctions are made. In this casting both ‘antagonistic disobedience’ and ‘terrorism’ are violent actions, and both result in harm to people and property. The distinction between the two, therefore, seems to be the scale of the action, with the authors providing examples of terrorism including the Oklahoma City bombing, alongside ‘excessive violence against individuals or groups’. The point at which a violent act becomes ‘excessive’ is implicitly, rather than explicitly defined.

Liddick also offers a way of categorising the actions of environmental activists through distinguishing between different acts. His typologies are:

- **Type I**: Minor crimes involving little or no property damage (less than $10,000, the limit to invoke federal law) and no threat of human injury

- **Type II**: Significant acts of property damage, including arson and bombings, whose damages exceed $10,000, no intended violence against humans but with an indirect threat of physical harm

- **Type III**: Threatening behaviour directed against people, including minor physical assaults producing no injuries

- **Type IV**: Physical attacks against persons in which injury actually occurs or is intended (Liddick 2006: 72).
Similar to Miller et al.’s categories, Liddick’s typologies rely on a distinction between targeting humans versus property, and the degree of violence, or scale, of the activities. However, Liddick rejects the idea implicit in Miller et al.’s categories that targeting humans always causes more harm than targeting property. He argues that, ‘Legal statutes, and most persons with an opinion on the topic, would not consider throwing a tofu pie in someone’s face’ (Type III) to be more serious than a multi-million dollar arson (Type II) (Liddick 2006: 72). As such, the Liddick typologies distinguish actions on the basis of both the target and the act, establishing two subgroups of action. Type I and Type II describe acts against non-human targets, while Type III and Type IV refer to acts against individuals and groups of people. While Type I actions are clearly not terrorism, and Type IV actions clearly are, there is significant debate about the appropriate label for many of the acts falling under the categories of Type II and III.

**Justifications for Political Lawbreaking**

So far this paper has examined the key variables that influence definitions of terrorism, in order to identify where actions by radical environmental and animal rights activists may fit in the spectrum between civil disobedience and terrorism. In so doing, more questions have been found than answers, indicating that while some acts are easily identified as terrorism (for example, physical violence against humans), other actions are less easily categorised. We now turn to an examination of the ways in which these groups position their own actions, based on the justifications they offer for lawbreaking. An analysis of the statements of five organisations that engage in illegal actions as part of their protest indicated that there are three primary justifications offered for their actions: necessity; a higher moral principle; protection of others or ‘extensional self-defence’. It should be noted that the statements analysed are not the guiding principles or mission statements released by these organisations about their overall campaigns or tactics. Rather, they are the press releases about the individual acts, which primarily describe the target of the groups, and the impact the action had (i.e. the success, or achievement). As such, the justifications provided for actions rarely explicitly appeal to traditional justifications for civil disobedience, but provide an important insight into the perceived or implied justification for day to day actions.

**Necessity**

The first justification frequently offered by organisations for their actions is one of necessity on the basis that all other legal avenues for change have been exhausted. The exhaustion of all legal avenues also assumes that the activists in question are able to work within the existing power structures to achieve change. Martin Luther King Jr., in his landmark *Letter from Birmingham Jail* justifies the breaking of laws on the basis that ‘the city’s white power structure left the Negro community with little alternative’ (King 1964: 77-99). While the challenge for environmental and animal rights activists is distinctly different to the civil rights movement of the 1960s, Gibson argues that some activists have rejected institutionalised structures for change due to a belief that ‘questions of environmental degradation could no longer be separated from critiques of state power, corporate overreach and neoliberal capitalism’ (Gibson 2010: 136). This may be compounded by the diminishing traditional avenues through which dissent can be expressed, as a result of the restrictive permit regimes governing mass public protests, and the dominance of corporate interests in government decision-making (White 2009: 56).

Statements by Rising Tide position the organisation as acting on behalf of those ignored or suppressed by those in power. One release states:

‘TransCanada didn't bother to ask the people of this neighbourhood if they wanted to have millions of gallons of poisonous tar sands pumped through their backyards’, said Almonte, one of the protestors now inside the pipeline. ‘This multinational
corporation has bullied landowners and expropriated homes to fatten its bottom line'. (Rising Tide 3 December 2012)

A Rising Tide activist declared in one statement, 'I climbed this tree in honor of all the landowners who have been bullied mercilessly into signing easement contracts and who were then silenced through fear by TransCanada’s threat of endless litigation’ (Rising Tide 19 November 2012).

Greenpeace also argues that their action is upholding democratic principles, while government structures ignore the wishes of the public. They criticise Brazil’s President Dilma, arguing that, ‘In failing to completely block new “forest code” legislation yesterday, President Dilma has turned a blind eye to the destruction of the Amazon and a deaf ear to the people of Brazil’ (Greenpeace 26 May 2012).

Trident Ploughshares also invokes democratic principles as justification for their trespassing and blockading activities at the nuclear weapons base at Faslane, Scotland. In a release issued on 13 May 2011 activist Janet Fenton is quoted as saying:

Our actions here are not illegal, and are in support of the new Scottish Government. Once again the Scottish people have voted overwhelmingly in opposition to nuclear weapons. This time, there is a clear parliamentary majority for a single party with a manifesto promise to put pressure [on] the UK Government to remove these illegal weapons from Scotland. (Trident Ploughshares 13 May 2011)

A justification for illegal action on the basis of necessity is also drawn from a belief not only in the failing of established processes for change, but also in the lack of ability or willingness of those in power to fulfil their roles. For instance, Vanderheiden (2005) poses several case studies of ecotage questioning whether illegal action might be justified on the basis of the failure of governments to enforce laws against illegal logging and development, thus making them complicit with environmental degradation (Vanderheiden 2005: 442-443). Nagtzaam and Lentini (2008) also consider a version of this justification as the basis for actions by the Sea Shepherd Conservation Society, labelling them as ‘vigilantes’ acting to enforce a law that they believe should be enacted (Nagtzaam and Lentini 2008).

Captain Paul Watson from the Sea Shepherd Conservation Society has said they are acting to prevent ‘illegal whaling activities’ (SSCS 5 July 2012). Trident Ploughshares also declare that they are acting to prevent illegal action. In many of their press releases they characterise the existence of the Trident nuclear weapons programme as illegal and in breach of the Nuclear Non-Proliferation Treaty. They say, ‘As long as the UK government threatens the peace with weapons of mass destruction members of Trident Ploughshares and Faslane Peace Camp are committed to non-violent direct action to disrupt the deployment of these illegal and immoral weapons’ (Trident Ploughshares 2 July 2012).

A higher moral principle

A second justification offered for illegal acts by organisations is on the basis of morality – the moral justification for action being that to fail to act is immoral. Liddick’s recent study of statements by the Animal Liberation Front also found that an ‘appeal to a higher moral principle’ was frequently invoked to justify illegal actions. Statements from Trident Ploughshares activists regularly reflected this theme. A press release from 2011 declared that ‘As long as the government fails to fulfil their responsibilities under international law citizens have right and duty to intervene in order to prevent crimes against humanity and war crimes’ (Trident Ploughshares 13 May 2011). Daniel Viesnik, a Trident Ploughshares activist, defended his actions which resulted in a stay in prison saying, ‘I feel it is my civic, moral and legal duty to
help stop the next generation of nuclear weapons and prevent nuclear crimes against humanity and the planet’ (Rising Tide 12 February 2010).

Activists from Rising Tide also explained their lawbreaking activists as an exercise of moral responsibility. Activist Benjamin Franklin said:

As someone who has a religious dedication to nonviolence, I have a duty to assist nonviolent tactics. This is a path to change that works. Despite everything that happened at the direction of TransCanada, I don’t regret my involvement at all. I encourage everyone to persevere in the fact of this type of sheer brutality. To follow one’s moral compass in spite of extreme challenges is the way we move forward towards a more humane, tar sands-free planet. (Rising Tide September 2012)

R.C. Saldana-Flores, also from Rising Tide, said, ‘As a mother and step-grandmother, I want to be able to tell my children that I did something when the time came’ (19 September 2012). One statement from the group Smash HLS (associated with the Stop Huntingdon Animal Cruelty group) made reference to their conscience in explaining their actions. They declared, ‘people with a conscience will always be there to speak for the defenceless animals enslaved in places such as Primate Products’ (October 23 2011). This statement also hints at a further justification offered by several groups – that their actions are in defence of those who are defenceless.

Protection or ‘extensional self-defence’

Environmentalist leader Steven Best coined the term ‘extensional self-defence’ to describe the justification for illegal actions such as sabotage and violence. He argued that:

If animals are under violent attack and cannot defend themselves, if the state protects only their oppressors, and if animal rights activists are the only ones who can defend animals, do they not have the right to use sabotage and even violence against exploiters as proxy agents adhering to the principle I call ‘extensional self-defence’. (Best)

Such direct action would seem, on face value, to be contrary to the more traditional aims of civil disobedience. Rawls (1971: 383) argues that the primary aim of civil disobedience is not to effect change in and of itself, but to mobilise mass support as a catalyst for change. Generating public support is certainly one priority of the organisations examined here (especially Greenpeace which engages in many legal protests as well as public theatre designed to bring attention to environmental issues), but this justification for illegal acts serves to circumvent processes of legal change in favour of more immediate change.

The justification for illegal actions on the basis of protection of others, and extensional self-defence of animals, is a frequently used element in several of the organisations’ statements about their actions. None of the statements explicitly invoke a right to extensional self-defence. They do, however, imply this justification through declarations that they are breaking laws in order to protect animals or the environment.

Protection of animal life was a frequent feature of statements from the Sea Shepherd Conservation Society about their anti-whaling activities. For example, Captain Paul Watson said, ‘It has been a successful campaign. There are hundreds of whales swimming free in the Southern Ocean Whale Sanctuary that would now be dead if we had not been down there for the last three months’ (8 March 2012). In the same press release Watson declared, ‘If the Japanese whalers return, Sea Shepherd will return. We are committed to the defense of the Southern Ocean Whale Sanctuary’ (8 March 2012). Greenpeace also declared that some lawbreaking activities by their activists were in an effort to prevent harm to the environment: ‘In an effort to
prevent destructive oil drilling in the Arctic, dozens of Greenpeace Nordic activists have boarded and occupied a Shell-contracted icebreaker in Helsinki harbour as it prepared to leave for the Alaskan Arctic’ (1 May 2012).

Activists from Rising Tide, and Stop Huntingdon Animal Cruelty also spoke of their role as defenders of others. Rising Tide activist Diane Wilson said, ‘Me? I’m healthy. They’re the ones I’m fighting for. We have to be prepared to fight for those who can’t fight for themselves or who are too afraid to fight for themselves. That’s why I’m here’ (28 November 2012). SHAC declared in many statements that they were acting to prevent the torture and death of animals, with one Smash HLS release declaring, ‘It is our right to make our voices heard for all those who suffer inside. Their lives depend on us. This corrupt “justice” system will not protect them’ (26 January 2012). These statements move beyond the idea of passive resistance, and seek to justify organisations taking direct, and illegal, action.

**Conclusion**

The justifications offered by the environmental rights groups analysed here demonstrate that while there is some adherence to the parameters in which civil disobedience is acceptable, activists are going beyond political performance aimed at garnering public support. This positions them clearly within the grey area of political lawbreaking. This paper has demonstrated that despite efforts to categorise acts of political lawbreaking that exist between civil disobedience and terrorism, little progress has been made. While some activists continue to establish their own ethical parameters in relation to targets, and the act (such as being highly discriminate in selecting targets, and refraining from committing violence against humans), the definition of terrorism has expanded to cover much activity that, while illegal, may not intuitively seem to deserve the label of terrorism. Radical environmentalists and animal rights activists seek to define themselves out of the category of terrorism by appealing to a tradition of civil disobedience in which illegal actions are sometimes justifiable, but in their own statements clearly stray from the boundaries of civil disobedience by offering justifications for direct action and extensional self-defence.

In moving forward, the challenge is to attempt to understand why the label of terrorism is applied to some actions and not others. Is the actor, act, or target the most important variable? Do the justifications offered by activists mitigate the seriousness of their illegal actions? What are the preconditions for social acceptance of some politically motivated lawbreaking activities and not others? In asking these questions, perhaps the boundaries of terrorism can be re-established, disrupting a binary between legal and illegal protest that is beginning to render nearly all acts of politically motivated lawbreaking as terrorism.

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Troubling Trends in Mainstream Discourse: Feminism and Punitive Justice

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Conference Sub-theme: Gender, Sexuality and Justice

Abstract

Mainstream opinion writers and policy makers have always had a difficult relationship with criminal justice. Much commentary discusses the issues in a manner which conflates several objectives of criminal justice, when each warrants separate consideration. This confluence has come to a head particularly in recent debates about violence against women. Recently, sex discrimination Commissioner Elizabeth Broderick has called for tougher sentencing for people convicted of intimate partner violence. Commissioner Broderick argues that these incidents should not be treated as ‘just a domestic’, but should attract ‘a premium penalty.’ This call has been echoed simultaneously by other mainstream feminist writers who have expressed frustration over the apparent failure of the judiciary to address this problem seriously, using key high profile examples. These are dangerous trends which are gaining momentum in mainstream discourse. Calls for tougher sentencing gloss over the complexities of this criminal behaviour and ignore the rigidity of the process established to address it. It belies a simplistic attitude to the law that does little to advance the cause of the disempowered and oppressed. It also resets mainstream opinion about criminal conduct and contributes to a culture of pre-emptive guilt and minimal sympathy for the accused. Commentary which demonises offenders leaves little room for analysis of the social causes of crime and fails to recognise the role of prison in marginalising certain sections of the population. These attitudes add feminist fuel to the fire of contempt for criminals; an inferno which hardly needs stoking. There are plenty of useful alternative theoretical frameworks that are worth considering in this context. Restorative justice and therapeutic justice both have much to offer; both in respect of returning the victim to the centre of the process and providing flexibility that has the potential to provide better outcomes for the accused. The process is not right for all cases, but policy makers should be encouraged to provide alternative processes, with appropriate safeguards.

Introduction: Feminist Punitive Justice

Mainstream opinion writers have always had a difficult relationship with the criminal justice system. Much commentary discusses the social and political issues raised by crime in a manner which conflates several objectives of criminal justice, including deterrence, public safety and punishment. Each of these objectives warrant separate consideration, particularly with an understanding of the ability of the criminal justice system to deliver them. This is not a quandary unique to commentators; judges also contend with complex and sometimes competing objectives. But the judiciary does this in a structured and transparent way, using methods established by statute and common law. The mainstream media is not similarly bound by such authorities; it represents an alternative set of interests in the discussion about public policy in respect of crime. As the traditional interface between the justice system and the public, it plays a profoundly important and influential role. To that end, this type of commentary has
traditionally had dangerous political consequences for mainstream understandings of crime and its causes.

This confluence has come to a head particularly in recent debates about violence against women, particularly intimate partner violence. The contemporary manifestation of feminism in recent years has sharpened the focus on this social problem. Rightly so: male intimate partner violence is found to be the leading contributor to death, disability and illness for women aged 15 to 44 years (VicHealth 2011: 8). There is a growing sense that this is a problem that has been seriously neglected by policy makers and is significantly widespread and insidious. To that end, the Federal Sex Discrimination Commissioner Elizabeth Broderick has recently called for tougher sentencing for people convicted of intimate partner violence. Commissioner Broderick argues that these incidents should not be treated as 'just a domestic', but should attract 'a premium penalty' (Hansen 2013). Though this was only one of many policy initiatives suggested by the Commissioner, it has attracted considerable attention from the mainstream press.

This call for punitive justice has been echoed simultaneously by other mainstream feminist writers. In Australia, writers have expressed frustration over the apparent failure of the judiciary to address the problem of violence against women seriously, using key high profile examples (Ford 2013b). There is a basis in truth for these concerns: in Australia, it is statistically easier to be acquitted of rape than other violent offences (ABS 2004). These commentators see criminal justice as squarely about punishment and deterrence. That is, the punishment of individual offenders is necessary to send a message that violence against women will not be tolerated.

This particular trend is reflective of a larger movement amongst many Western feminists. The treatment of Oscar Pistorius provides an instructive example; particularly as the circumstances of the alleged crime remain far from clear. Prominent feminist Jessica Valenti, in discussing the killing of Reeva Steenkamp by her partner Pistorius, referred to ‘the misogynist response to the crime [which] has become a familiar theme here in the United States’ (Valenti 2013). Trying to make an example of Pistorius for feminist purposes, particularly in a context where much of the circumstances are unknown, is fraught. Valenti clearly assumes that Pistorius is guilty (or perhaps she simply harbours an indifference to the matter) – so much so that if he is acquitted, the result will be perceived as the yet another example of society's tolerance for violence against women. The allegations of lenient sentencing and selective justice are cited as yet further examples of public institutions failing women by allowing their misogynistic tendencies to remain unchecked. What these trends illustrate is a troubling tendency to do away with legal principles such as innocence until proven guilty in order to promote a separate social cause – in this case violence against women.

**The Troubling Nature of These Trends**

These are particularly dangerous trends which are gaining momentum in mainstream discourse. Such deficiencies in public commentary are hardly new; but significantly, these calls are coming from traditionally progressive voices. These are individuals who have a history of setting trends in public discourse in favour of the oppressed or, in the case of Commissioner Broderick, are the regulator of human rights legislation designed to protect the vulnerable. Their appeals to law and order policy are becoming infused with progressive politics, which poses a new and distinct problem for policy makers and critical thinkers alike.

There are basic fallacies which underpin these calls for tougher penalties for crimes which are easily contradicted with readily available evidence. Most obviously, the idea that sentencing is too lenient is illusory. Research indicates that the more people know about the facts of a criminal trial, the more likely they are to agree with the sentence given (Warner et al. 2011; Gelb 2006: 2-5). This is not to say that the judiciary always get it right or deal with such matters
sensitively. But research such as this makes it difficult to sustain the argument that sentencing frameworks or judges’ decisions are out of line with community expectations. These false assumptions are no doubt easier to maintain given the treatment of these crimes by journalists. The sound bite nature of this reporting and its reflection of traditional gender stereotypes do little to ameliorate this problem (VicHealth 2012). The complexity of the problem of intimate partner violence in a context of a simplistic public debate makes unpicking these issues difficult. But conflating the desire to treat the problem seriously with assumptions about the failures of the judicial process add feminist fuel to the fire of contempt for criminals; an inferno which hardly needs stoking.

Moreover, this kind of feminist approach to criminal justice ignores the very significant problems presented by the legal processes set up to deal with intimate partner violence which affect all parties. Feminist legal critiques of the treatment of intimate partner violence have traditionally focused on the failure to prioritise the interests of the victim. But on further examination, this objective is sidelined in the politics of law and order: the inflexibility of the legal process is likely to give little comfort to victims, who often find adversarial treatment of these crimes confronting, or may have specific needs, like maintaining an ongoing relationship with the accused (Gentleman 2013). Ford does seem to accept this, albeit somewhat superficially, saying: ‘perhaps a rehabilitation of the system itself is in order, one in which we remind legal practitioners of the rights of victims’ (Ford 2013b). But this in turn seems to misunderstand the role of lawyers in the current system, which is to advocate for their client against the full might of the state apparatus seeking to punish them. Tellingly, Ford also claims that: ‘[incarceration] may do nothing to eradicate the pain caused to the victims – but I’d wager it wouldn’t hurt’ (Ford 2013b). This represents a classic conflation of deterrence and punishment, belying a dangerous ignorance of some of the basic social features of the criminal justice system. If policy makers are to consider ways to prioritise the interests of the victim, it is impossible to ignore the inflexibility of the process.

This commentary is obviously the product of a laudable desire to ameliorate the problem of intimate partner violence and restructure public attitudes symbolically about victims of domestic violence. But it is also marked by logical laziness and procedural ignorance; with rhetorical flourish that is difficult to pin down. Though this is hardly novel, it warrants careful consideration: the regeneration of conservative political tropes from the moral high ground has the potential to recalibrate progressive attitudes to the criminal justice system and the people caught within it.

The key feature of these current trends is the power of such commentary to reset mainstream progressive opinion about the social causes of crime and our response to criminal conduct. As has been well documentary, prison acts as a gateway to further social marginalisation and disenfranchisement of the offender and can lead to recidivism rather than rehabilitation. In a piece discussing a recent criminal trial, Ford describes frustration at reporting which focused on the ‘effect the judicial outcome would have on the perpetrators’ lives’, something she sees as ‘the least relevant part of any case involving rape and sexual abuse’ (Ford 2013a). While Ford acknowledges that this effect is ‘devastating’, there is arguably a hint of sarcasm in this: ‘CNN and its concerned commentators can cry me a fu*king river.’ As one commentator has pointed out, her criticism is more of the media than the legal system itself, even if Ford herself may not see it in those terms (Kelsey-Sugg 2013).

While these may be valid critiques of journalistic reporting of sexual offences, these approaches contribute to a culture of pre-emptive guilt and minimal sympathy for the accused, with problematic results. The attitude of zero sympathy for the accused ignores a key potential of the criminal justice system: to operate as a tool of social control. Michelle Alexander eloquently describes how mass incarceration is a practical contradiction of the American myth of social mobility (Alexander 2010). Alexander suggests we imagine the criminal justice system ‘not as
an independent system but rather as a *gateway* into a much larger system of racial stigmatisation and permanent marginalisation’ (Alexander 2010: 12). Alexander’s research is focused on the experience of African Americans, but her conclusions arguably extend to the poor in general. There is little doubt that grinding poverty and ceaseless oppression can give rise to reprehensible behaviour. But to suggest that an efficient criminal justice system and a growing prison population is a reflection of a just society ignores the broader, more insidious aspects of these social processes.

This trend in modern feminist discourse to focus on punitive justice belies a simplistic attitude to the law and does little to advance the cause of the disempowered and oppressed. The attention directed at the problem of intimate partner violence may be welcome, but there is a clear lack of theoretical analysis behind both the critique and the solutions posed. Equally, simply dismissing the court system as a patriarchal mess promotes cynicism and risks encouraging vigilantism. So doing dispenses with some of the fundamentals of the rule of law and due process.

**Alternatives: Theoretical and Practical**

Calls for tougher sentencing gloss over the complexities of this criminal behaviour and ignore the rigidity of the process established to address it. There are obvious structural reasons for why the legal system is not always the best structure for addressing the problem of intimate partner violence. Legal processes are often awkward and inappropriate in such situations. Probability suggests that the two people at the centre of this violence will share a life, a home, or relatives and sometimes children (VicHealth 2007:10; VicHealth 2011: 3). Even law enforcement with the best of intentions (a rare beast to say the least) cannot create respectful ongoing domestic relationships.

Nonetheless, there are plenty of useful alternative theoretical frameworks that are worth considering in this context and deserve consideration. Restorative justice and therapeutic justice both have much to offer; both in respect of returning the victim to the centre of the process and providing flexibility that has the potential to provide better outcomes for the accused. The process is not right for all cases, but policy makers should be encouraged to provide alternative processes, with appropriate safeguards.

There are more imaginative and logical ways for the criminal justice system to play a role in ending violence against women. Bronwyn Naylor, from Monash University explains the problem succinctly: ‘the key to making the trial process meaningful to victims is the early acknowledgement of guilt by defendants who are in fact guilty. All of the current features of the trial militate against this’ (Naylor 2010). As an alternative, Naylor advocates a therapeutic and restorative approach to justice, which involves conferencing with support people, with a prerequisite being an admission of guilt. A facilitator then assists the parties to come to an agreement about reparations for the victim. The sacrifice of this reform would be an absence of a public and transparent declaration of guilt which would ordinarily take place in a court of law. The benefits are that it puts control in the hands of the victim and invites a flexible response to crime, rather than the rigidity of a court process.

Restorative justice initiatives also focus on processes like conferencing, with a motivation is to identify and redress harm through a process that is more attentive to the needs and experiences of both parties. In appropriate situations, according to expert criminologist Professor John Braithwaite, a restorative justice approach tends to achieve much higher levels of satisfaction for all parties involved (Braithwaite 2008). It sits in stark contrast to the adversarial system, in which alleged victims are pitched against alleged perpetrators in a battle for a binary, zero-sum-game verdict. Restorative justice processes, in contrast to that of punitive justice, accommodate interests beyond simply vengeance. While harm may have occurred and must be addressed,
restorative justice approaches appreciate that this may not always have been intended or understood. As Professor Braithwaite notes, this process is 'exactly the opposite of that of a criminal trial' (2008).

**Beyond Law and Order**

Taking a step back, it is clear that focusing on the criminal justice system to address gendered violence approaches issue from too narrow a perspective. The assumption, of course, is that if these offenders are treated with an iron fist, it will send a message to others that this conduct is unacceptable. Rigid approaches to deterrence or criminalisation have not worked in relation to drugs, prostitution or countless other forms of criminal behaviour. But when all you have is a hammer, everything starts to look like a nail.

In many ways, looking to legal processes to address intimate partner violence fails to recognise their historical role in reinforcing privilege and disempowerment. This has been the subject of feminist legal theory for decades. Placing too much emphasis on law and its ability to punish reinforces the very structures of power we should be seeking to challenge. It is at best unimaginative, it is at worst, socially regressive. It is an issue where social and punitive justice intersect and it is all too easy to confuse one with the other (Mason 2009).

There are plenty of other ways to send a message to the community that intimate partner violence is unacceptable. A primary objective should be to empower the victims of such violence. Therefore, the policy response to this issue should focus on early intervention strategies that are consistent with an evidence based approach to the problem (VicHealth 2007). This means more funding for women’s refuges, so they can escape abuse immediately. It also means better funding of legal aid. Recent reductions to eligibility guidelines in Victoria have meant, by Victoria Legal Aid’s own admission, that people with family law disputes will be ‘the most affected,’ therefore disproportionately affecting women (Victoria Legal Aid 2013). People with family disputes will no longer be represented at hearings, unless the other side has a lawyer. If there is a history of family violence, this can mean alleged perpetrators of domestic violence cross-examining the alleged victims (and vice versa) (Sara 2013).

Strategies to end intimate partner violence must also challenge the traditionally ‘private’ nature of this harm. This means linking accessible and affordable childcare to the problem of domestic violence. Such assistance can help women to escape violence, seek employment or relocate. For example, over 300,000 workers are currently covered by workplace agreements or awards with domestic violence entitlements (Domestic Violence Workplace Rights and Entitlements Project 2011: 3). These protections should be available to all Australian workers as standard. This recognition of the problem, without judgment, provides dignity for victims and practical support. Finally, we need to talk about more systemic changes, such as equal pay for work of equal value, so when women try to build a new life separate from their partner, there are not economically disadvantaged purely because of their gender. Making the problem public in these ways also contributes to breaking down cultural norms generally and challenges the conditions that have historically helped entrench this violence.

Moreover, the problem of intimate partner violence invariably demands a broader questioning of social values. VicHealth has identified ‘a cultural ethos condoning violence as a means of settling disputes’ as one key social or structural contributing factors to violence against women (VicHealth 2011: 8). Violence that is punitive or vengeful is not something that is just experienced on an individual level, it is often practiced in the highest political echelons of our society. If a collective message is sent that violence solves problems it is no surprise this is replicated on an individual level.
Importantly, however, VicHealth also found that the overwhelming majority of Australians do not condone violence against women, do not think it should be dealt with privately and would intervene to stop it (VicHealth 2011: 10). This is an important social foundation for progressive, considered policy, unafraid to tackle the complexity of the problem.

This not to suggest there is a simple guide to ‘solve’ these problems. The causes and effects of gendered violence are multiple and complex; but the problem itself is a symptom of entrenched oppression. To that end, we should be looking to material strategies to relieve the poverty imposed on women.

**A Way Forward: Meaningful Informed Debate**

The law has traditionally done a poor job of protecting vulnerable sections of society; in this case, women who are subject of domestic violence. This has generated a call from modern feminism for more muscular protection for these women by the law.¹ But the call for the criminal justice system to treat intimate partner violence with the same seriousness as the other crimes in the system measures justice with the wrong yardstick. It relies on the progressives adopting the politics of law and order: a high stakes, toxic political game, which is rarely focused on the needs of the victims and is indifferent to the effect on the offender. It glosses over the problems inherent in the system and ignores other more compelling and creative ways of achieving justice for the vulnerable. The scale of the problem of intimate partner violence demands a serious response, and the attitude of the general public suggests that there is an opportunity to craft this.

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A Cisgender Girl in a Transgender World: The Methodological Challenges of Researching in the Transgender Community

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Abstract

The available research literature on intimate partner violence is often centred around a heteronormative understanding of gender, relationships and violence. When it comes to intimate partner violence in the transgender community, the research is limited or non-existent due in part to the methodological issues of visibility and access by those outside this community. Drawing from Renzetti (1992, 1995), McClennen (2003), and the feminist participatory research model, this paper examines the techniques for overcoming the methodological barriers as a cisgender or ‘normatively gendered’ woman in a transgender community. Throughout the research with the transgender community, five strategies for overcoming methodological barriers were developed: Cultural Immersion, Commitment and Visibility, Sensitivity and Acceptance, Honesty, and Communication. This paper explores how utilising these strategies enabled access to the transgender community in order to conduct effective research.

Introduction

Research into intimate partner violence (also called domestic violence) is often focused on heteronormative understandings of violence, whereby women are victims and men are perpetrators (Ball and Hayes 2010: 163). These commonsense understandings of intimate partner violence often exclude or deny the experiences of others. Violence does not discriminate and intimate partner violence can be experienced irrespective of sexuality or gender. Most research literature focuses on the experiences of cisgender women (Carrington and Phillips 2003); however research regarding intimate partner violence within GLBTT1 relationships treats these respondents as a homogenous group (Pitts et al. 2006; Leonard et al. 2008). Very little research to date has sought to unpack the experiences of intimate partner violence within the context of transgender relationships.

The term transgender refers to a diverse group of individuals whose biological sex does not match their gender. The meaning of the term transgender has developed over time and is an umbrella term that refers to a wide range of sex and gender diverse groups and individuals. Transgender can refer to an individual who is at any stage of a transition; however also includes many different groups including cross-dressers, transsexuals, intersex individuals, androgynes and genderqueers (Tauches 2009; Papoulias, 2006). The term cisgender (sometimes called cissexual) is used when a person's biological sex matches or is aligned with their gender identity. People who are not transgender may identify as cisgender, as the sex they were assigned at birth (male or female) is aligned with their gender portrayal (masculine or feminine) (Queensland Association for Healthy Communities Inc 2008).

Although there have been few studies on transgender intimate partner violence and estimates on the prevalence vary, it is thought that the levels of intimate partner violence within the transgender community are high (Pitts, et al. 2006: 13; Couch et al. 2007; Courvant and Cook-
Daniels 2000; Xavier 2000). As I felt that transgender intimate partner violence was worthy of further investigation, I faced various methodological challenges as I am neither transgender nor part of the transgender community. The purpose of this article is to discuss my strategies for overcoming the methodological challenges in accessing the transgender community for research purposes. Drawing from Renzetti (1992, 1995) and McClennen (2003) and utilising the feminist participatory research model, I developed five strategies to conduct effective research as a cisgender woman in the transgender community.

Methodological Challenges

Transgender communities are often perceived as private and closed communities. There is little research available on transgender communities and even less on intimate partner violence within transgender communities. The existing literature and quantitative research available on the topic of intimate partner violence within same-sex relationships briefly reports on intimate partner violence within transgender relationships. However, major limitations include an amalgamation of results with those who identify as gay, lesbian and bisexual (Pitts et al. 2006; Leonard et al. 2008). These studies focus on sexual orientation and not gender identification, which is another flaw within the available literature. To date, no in-depth qualitative interviews have taken place in Australia in order to determine the experiences of violence among those who identify as transgender.

At first I was apprehensive about research in this area as I am not transgender, nor have I experienced intimate partner violence. I feared I would be rejected because of my gender identity (cisgender). I had assumed I would not be accepted by the community and I would not be able to research this topic. Accessing the community was my first challenge, in which I had no previous connections or networks. Due to limited visibility of the community and societal transphobia, creating a means to access the community was vital. Another challenge was the assumption that transgender people may not want to discuss transgender intimate partner violence. As a way of navigating these challenges I chose a feminist participatory research model, as this methodology allows for an ‘outsider’ to gain access to the community and provide a voice to the people (McClennen 2003).

Participatory Research

Participatory research follows an ethnographic approach and seeks to learn from people rather than ‘study’ them (Rice and Ezzy 1999: 157). Participatory research (also referred to as participatory action research) differs from other research methods in that I participate and involve myself in the community (Jones 2006: 318). Participatory research ‘challenges a scientific method of inquiry based on the authority of the outside “observer” and the “independent” experimenter, and it claims to reconstruct both the practical expertise and theoretical insights on a different basis of its own inquiry procedures’ (Winter 1989: 2). This research model through its participatory nature moves away from the notion of an ‘outsider’ coming in to examine and theorise (Jones 2006: 320). Where a research project presents various methodological challenges (such as access, ethics and theories), participatory research models have demonstrated effective results in qualitative research by breaking down the barriers between the researcher and the minority or oppressed population (Denzin and Lincoln 1998; Stoecker and Bonacich 1992).

The feminist participatory research model allows members of an invisible or oppressed group (such as the transgender community) to voice their experiences. This method allows the researcher to share their professional skills and also learn during the research process, improving the quality of the research (Renzetti 1995: 29). In contrast to traditional positivist social science research, the feminist participatory research model allows researchers to reject the dichotomy of researcher/subject and see the research process as a collaborative effort.
between humans. This relationship is reciprocal rather than hierarchical (Renzetti 1995: 32-33).

As Renzetti (1992, 1995) was one of the first researchers to utilise the feminist participatory research model within the context of lesbian intimate partner violence, my research adopted her guiding principles. These principles include: (1) a critical examination of cultural insensitivity within the research process; (2) giving voice to the members of the marginalised population; (3) rejecting the hierarchical relationship between the researcher and the researched in favour of acting in mutual relationship; (4) making a political and moral commitment to reducing social inequality; and (5) taking action on this commitment (Cancian 1992 as cited in Renzetti 1995). Drawing upon Renzetti’s (1992, 1995) guiding principles (as defined above) and the feminist participatory research model, I developed five strategies that were effective when accessing and researching intimate partner violence within the transgender community.

Strategies

In her essay *Researching Gay and Lesbian Domestic Violence: The Journey of a Non-LGBT Researcher*, McClennen (2003) discusses her experiences as a cisgender heterosexual woman and as an ‘outsider’. McClennen (2003) details eight strategies to overcome methodological barriers when researching GLBTI issues: (1) becoming educated about the culture (including forming an advisory committee); (2) preparing for objections; (3) incorporating instruments designed by those being researched; (4) implementing various sampling techniques; (5) engaging affiliated members for assistance; (6) becoming immersed in the culture; (7) collaborating with scholars and other professionals; and (8) triangulation in data collection (McClennen 2003: 36). These strategies suggested by McClennen (2003) were adopted and adapted appropriately in my research project.

Drawing from both Renzetti (1992, 1995) and McClennen (2003), I developed and implemented five strategies in order to access the transgender community and overcome methodological barriers. These five strategies were effective in accessing the transgender community and obtaining a sample and collecting data. These strategies include: (1) cultural immersion; (2) commitment and visibility; (3) sensitivity and acceptance; (4) honesty; and (5) communication. These five strategies are discussed in detail below.

*Cultural immersion*

Cultural immersion first began with education. For my research, this meant educating myself about transgender culture. Definitions, historical context and appropriate language were all vital parts of cultural immersion. Without educating myself on issues regarding or concerning the transgender community, the cultural immersion would fail. Education started with researching the issues that were important to the transgender community. However, education was not only self-taught. It was vital when educating myself that I engaged with members of the community, as they had a wealth of knowledge. The transgender community are often teaching people about their lives. Transgender people not only have to educate members of the public on a regular basis, they also have to educate medical professionals and service providers, which can be a frustrating but necessary process to avoid future prejudice and transphobia. Education is an ongoing process and a long term commitment. Following the education phase, there were various ways in which my cultural immersion took place (Cancian 1992; Renzetti 1995).

Becoming known and subsequently trusted within the transgender community was of great importance. Renowned for being very closed and private, becoming known in the transgender community was the next step in my cultural immersion. Cultural immersion began with my affiliation with agencies that offer support to transgender people, such as Healthy Communities (previously known as QAHC3), PFLAG3 and ATSAQ. I associated myself with these leading
GLBTI organisations and through Healthy Communities I became a member of the health action group Many Genders One Voice, a collective of people who identify as transgender, sex and gender diverse or their allies. I began to network with people via this group and also volunteer for various events, such as Brisbane Pride Festival and Big Gay Day. At these events I would fundraise for the organisation and also spread awareness of the support groups available. Being affiliated with other groups such as PFLAG was also beneficial in the cultural immersion. Launches, conferences, equal rights marches were all part of cultural immersion. Here my research differs from McClennen’s (2003) research, in that her cultural immersion was done whilst collecting her data. It is likely that her cultural immersion was a by-product of her data collection, whereas my cultural immersion began more than a year prior to collecting data. Once data collection started I was already known within the community and I had built a rapport with the community and key organisations.

**Commitment and visibility**

Commitment and visibility follow on from cultural immersion. Commitment refers to the long term dedication it takes when participating in the transgender community (Cancian 1992; Renzetti 1995). Cultural immersion is a role that is carried out over a long period of time and it was necessary to follow through with these commitments. Attending events, fundraising and volunteering were obligations that must be tended to. Showing commitment to these activities is a means of proving that you are willing to work with the community. I continued to show my commitment through regularly volunteering via fundraising and safe-sex outreach within the transgender community.

Visibility refers to having and maintaining a visible presence within the community. This visibility included talking to new people, maintaining friendships and actively participating within the community (Cancian 1992; Renzetti 1995). This strategy is about establishing that you are trustworthy, reliable and a committed ally to the transgender community. I maintained my visibility through attending various GLBTI social events such as social dinners, bake sales and picnics.

**Sensitivity and acceptance**

It is of great importance in the transgender community that those who are considered ‘outsiders’ are educated on transgender issues and more importantly, respectful of the people within the community. It is expected that you will make mistakes and the appropriate course of action is to acknowledge your mistakes, apologise and move on. Making an active effort to be respectful and sensitive of preferred pronouns was one key area of importance. I would never assume someone’s pronoun and if I was unsure of their preferred pronoun, I would ask. Sensitivity also refers to respecting the boundaries of others and ensuring that their consent is obtained before engaging in various activities (such as body contact or hugging).

Acceptance refers to being accountable of social privileges (such as white and cisgender privilege) (Cancian 1992; Renzetti 1995). I acknowledge that I am aware of these social privileges and that I cannot truly empathise with transgender experiences, however I endeavour to be a supportive ally. Some people in the transgender community may not agree with my research or research methods and an open dialog is important. People are entitled to express their opinions and having these opinions voiced is an important part of my research process (McClennen 2003). It is important that I am open to other ideas and suggestions are welcome. As a means of keeping myself ‘in check’, I have support from a group of academics who identify as transgender, who I can engage and consult with regarding my research.

**Honesty**

The fourth strategy implemented in accessing the transgender community was honesty. If I was not honest in my beliefs and intentions, I would not be successful in conducting research within
the transgender community. Honesty began with being open about who I am and what I hoped to achieve in my research. Being open about my position as a cisgender, heterosexual researcher and being honest about my research aims ensured that no one was misled about my involvement within the community (McClennen 2003). My research served the purpose of achieving mutual goals, not selfish desires to exploit and ‘study’ the community through a pathological lens. Honesty also refers to being honest with myself. As the feminist participatory research model can span across many years, I had to genuinely hold a passion in the area of research, otherwise I would not be effective in recruiting participants or collecting data (McClennen 2003).

**Communication**

Communication was a multifaceted strategy and involved communicating with various groups (McClennen 2003). Firstly, I openly communicated with those around me, whether they were members of the community, colleagues or supervisors. Communication with the community helped in the snowball sampling of participants, as the people I spoke with may not have been eligible to participate in my research, but may have known someone who was. It was beneficial to also consult people within the community (including transgender academics), who acted as advisors to my research (McClennen 2003; Cancian 1992; Renzetti 1995).

Speaking with other academics was also beneficial, as they shared similar research interests and had networks that were useful to my research. Communicating with my supervisors ensured that my research was on track and had focus and direction. Finally, communicating with my close friends (while maintaining the privacy and confidentiality of my research and participants) assisted with my mental well-being. As the feminist participatory research model is so in-depth, it can be mentally exhausting and speaking about this relieved any pressure felt by this research method.

**Overcoming the Barriers and Benefits of Being a Non-affiliated Member**

To date, the above strategies have been effective in overcoming my methodological barriers in accessing the transgender community. So far my fears of rejection have been unfounded. The transgender community are kind, welcoming and accepted me as part of the community. This acceptance stemmed from collectively serving in the mutual goal of bringing transgender issues to light and promoting visibility of a community that is often left in the shadows.

There are various benefits of being a non-affiliated member of the transgender community. The first is that I can utilise my social privileges (white and cisgender privilege) to highlight social injustices and bring visibility to issues concerning the transgender community. Often the transgender community is invisible and not given sufficient attention and using what little social power I have may benefit the transgender community in the future. Another benefit of being a non-affiliated member is that I can distance myself from personal conflicts within the community, be objective and provide non-bias opinions. I am able to connect with various different people and groups without intruding on personal relations. Being an ‘outsider’ is also advantageous in that I can make observations that insiders may not be aware of, such as relationships and correlations between variables.

**Conclusion**

These five strategies were effective in gaining access to the transgender community. To date, there is no literature that specifically discusses successful strategies to gaining access to the transgender community or the methodologies they have employed. Due to the lack of visibility of the transgender community, it was necessary to develop and implement strategies to gain access to the transgender community as a cisgender woman or ‘outsider’. Cultural immersion ensured that I was educated about the community and involved myself in events, activities and organisations that support the transgender community. Commitment and visibility refer to the
long term presence I must maintain within the transgender community. Sensitivity and acceptance includes an overall respect for transgender people and their preferences and boundaries. Honesty refers to being truthful about my aims, intentions and my research. Honesty is also about being truthful with myself, my beliefs and objectives. Finally, communication involves an open dialogue with community members, colleagues and supervisors as a means of increasing productivity. Communication also refers to discussing personal pressures as a way to alleviate personal mental health issues. Overall, these five strategies for accessing the transgender community and overcoming methodological barriers were effective in my quest to produce meaningful research on intimate partner violence in the transgender community.

References
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Fear of Crime and Avoidance Behaviour of Older People in Contemporary Urban China

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Elsie CW Yan, University of Hong Kong

Conference Sub-theme: Policing, Security and Democratic Freedoms

This study investigated the prevalence of fear of crime and its impact on avoidance behaviour of older people living in urban China. A total of 453 older adults aged 60 or above, recruited from urban communities of Kunming, Yunnan using stratified sampling methods, were individually interviewed. In the sample, more than half of participants (57.0%, n = 258) reported fear of crime and the majority of them (87.6%, n = 397) reported avoidance behaviours. The results of path analysis showed that fear of crime predicted more avoidance behaviours ($\beta = .168, p < .001$) when gender, age, education, household finance, perceived neighbourhood disorder and direct and indirect victimisation by crime were controlled as covariates. Fear of crime mediated the effect on avoidance behaviour of gender ($\beta = .031, p = .007$), age ($\beta = -.021, p = .028$), direct victimisation by crime ($\beta = .019, p = .039$) and indirect victimisation by crime ($\beta = .020, p = .037$). It was concluded that fear of crime provoked avoidance behaviour among older Chinese which might have detrimental impacts on their physical and social functioning. This study provided a rational basis for service planning and policy making to improve the wellbeing of older Chinese through addressing their fear of crime.

Introduction

Fear of crime has been recognised as a major social problem in the West since the mid-1960s. Research has demonstrated that older people report disproportionately high levels of fear of crime (Oh and Kim 2009; Powell and Wahidin 2008; Quann and Hung 2002). As a coping strategy, old people tend to constrain their daily activity, keep housebound, avoid places (Yodanis 2002), withdraw from social activities (Abbott and Sapsford 2005), refuse home visits and reduced community involvement (Moore and Trojanowicz 1988). Though helpful to keep criminals at bay to some extent, this lifestyle is especially detrimental for older persons which could impair their physical health due to lessened outdoor physical activities (Lorenc et al. 2012; Jackson and Stafford 2009), impaired mental health (Abbott and Sapsford, 2005, Beaulieu et al., 2002), decrease social support because of reduced interpersonal interaction (Estina and Neal 1998; Ditton and Innes 2005; Jackson and Stafford 2009) and ultimately intensify their social isolation (Warr 2000).

China has been experiencing the rapid population ageing. In 2010, there were 0.178 billion people aged 60 years or above in Mainland China accounting for 13.26 per cent of the country’s total population (National Bureau of Statistics of China 2011). According to Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat (2009), by the mid-21st century, China will have the oldest population around the world.

Since the reform and opening-up policies were launched in the late 1970s, China has witnessed a sharp rise in crime, especially in its urban regions (Liu and Messner 2001). The unbalanced economic development leads a large number of rural populations to migrate into cities for
better income. However, the institutional barriers of the hukou registration system have obstructed them from integrating into the city and getting reasonable income and social welfare. Under the pressure of survival and dissatisfaction with inequality compared to urban residents, some migrant workers turn to a life of crime. Stereotyped as ‘trouble maker’ or even ‘motivated criminal’, migrant workers have been perceived as the primary concern of the government and urbanites about public security (Nielsen and Smyth 2009). Along with this change in demographic composition of urban population, the social disorganisation caused by urbanisation (De Donder et al., 2005) and the decline of informal social control of tradition culture with modernisation (Nielsen and Smyth 2009) have constituted the major social transition which breeds increasing crime, social instability and perceptions of insecurity in urban China. A recent survey sampling 25,000 urban residents in 38 cities of China showed that 39.9% of respondents were afraid to go out at night and 38.7% were worried about burglary when they were away from home for a long time (Hou et al. 2011). Perceived as vulnerable and ‘suitable target’ of crime (Nielsen and Smyth, 2009) and apt to social isolation and withdrawal (Warr 2000), old population fast expanding in China deserve special attention of academia, practitioner and policy maker for their fear of crime and the subsequent impact on their physical and social functioning.

The present study defined fear of crime as a daily non-pathological emotional state (Ferraro 1995) and aimed to investigate the prevalence of fear of crime and the resulting avoidance behaviour among older Chinese and examine the association between fear of crime and avoidance behaviour.

Methodology

Sampling

Kunming, the capital city of Yunnan province was chosen as the sampling site. According to the Sixth National Population Census Data Gazette (Kunming Municipal Bureau of Statistics 2010), by the end of 2010, Kunming had 0.78 million residents aged 60 years or older, accounting for 12.1% of its total resident population (6.43 million). At the end of 2009, Kunming ranked the 9th in population ageing rate among all 31 capital cities in Mainland China (Min 2010). A representative sample of 453 older Chinese aged 60 years or over were recruited from urban communities of Kunming during June to August, 2011 using the multi-stage sampling method from the district, city-street office and neighbourhood committee. The total response rate was 74.0%. After giving written consent, participants were interviewed individually in their dwelling for about half an hour.

Instruments

Participants provided information on socio-demographic characteristics, neighbourhood disorder perception, direct and indirect victimisation experiences, fear of crime and avoidance behaviour.

Socio-demographics

Four demographic variables were included. Age was a continuous variable measured in years. Gender was a dummy variable coded in the direction of female (= 1). Education was an ordinal measure ranging from 1 (nil or minimum education) to 4 (college or above level education). Household finance was an ordinal-scaled variable with three categories: ‘well-off’ (1); ‘average’ (2); and ‘poor-off’ (3).

Perceived neighbourhood disorder

The disorder participants observed in the local neighbourhood was measured by the Perceived Neighborhood Disorder Scale (Ross and Mirowsky 1999). This 15-item scale measures four domains, namely physical order and disorder, social order and disorder. The internal consistency was very high in past research with an alpha of .92 (Ross and Mirowsky 1999).
Participants indicated on a 4-point scale the degree to which they agreed with each statement, with higher scores indicating more perceived disorder. For this study, the internal consistency coefficient of this scale was .77.

Direct and indirect victimisation by crime
Eight types of crimes were included, i.e. cheat, theft, burglary, snatch, robbery, attack, rape/sexual assault and murder. For direct victimisation by crime, participants were asked to report whether they had experienced any one of these crimes in the past. For indirect victimisation by crime, participants were asked whether they had seen, heard of, or personally known someone who was a victim of these crimes. The internal reliability of this scale was .60 and .83 for the two components, respectively.

Fear of crime
Fear for crime was assessed by the culturally-adapted fear of crime scale which was originally developed by Ferraro (1995). Participants were asked to rate their fear for 10 types of crimes i.e., cheat, theft, burglary while away, burglary while home, vandalism, snatch, robbery, attack, rape or sexual assault and murder. Their response categories ranged from 1 (not afraid at all) to 10 (very afraid). The responses for each item were recoded into mean to serve as the scale score in the present study, with higher scores representing stronger fear of crime (Cronbach's alpha = .94).

Avoidance behaviour
Participants were asked whether they had adopted avoidance behaviour due to fear of crime. The culturally-adapted Ferraro's (1995) avoidance behaviour index was used, which consisted of nine items. The response was dummy-coded (1 = yes, 0 = no). The total score on this scale was generated by synthesising each item score. Higher scores revealed more constrained behaviour (Cronbach's alpha = .87).

Results
Participants' profile
The final sample consists of 198 males (43.7%) and 255 females (56.3%) and ranged from 60 to 100 years of age, with a mean of 72.29 (SD = 8.27). About three in every 10 (n = 134, 29.6%) participants had received no or minimal education, 30.4% (n = 138) primary education, 30.5% (n = 138) secondary or vocational education and approximately one tenth (n = 43) college or above level education. Majority of them (n = 338, 74.6%) rated their financial status at average level compared with 12.6% (n = 57) well-off (sufficient or very sufficient) and 12.8% (n = 58) poor-off (insufficient or very insufficient).

Prevalence of fear of crime
More than half of participants (n = 258, 57.0%) reported fear of crime at the total level, that means they felt fearful for one or more types of crime. Concerning the specific type, theft (n = 234, 51.7%), cheat (n = 221, 48.8%) and burglary when away from home (n = 215, 47.5%) were the most prevalent crime invoking fear while attack (n = 126, 27.8%), murder (n = 62, 13.7%) and rape or sexual assault (n = 57, 12.6%) were the least prevalent.

Prevalence of avoidance behaviour
The majority of participants (n = 395, 87.2%) employed avoidance behaviours to ensure their safety. The prevalence of specific avoidance behaviour ranged from 77.9% to 42.2% with avoiding opening door to strangers (n = 353, 77.9%), avoiding talking to strangers (n = 349, 77.0%) and avoiding offering help to strangers (n = 341, 75.3%) as the most prevalent ones.
Path analysis for the effects of fear of crime on avoidance behaviour

Presented in Figure 1 is the path model proposed in this study which reflects the hypotheses that 1) the exogenous variables, gender, age, education, household finance, neighbourhood disorder, direct and indirect victimisation experience of crime are associated with fear of crime; 2) Higher levels of fear of crime along with older age and more perception of neighbourhood disorder would provoke avoidance behaviour; and 3) the exogenous variables have indirect effects on avoidance behaviour through fear of crime.

![Path Analysis Diagram]

Figure 1: Standardised maximum likelihood parameter estimates for a recursive path model of the impacts of fear of crime on avoidance behaviour and physical health. The standardised estimates and standard error (enclosed in parentheses) of the parameters are presented. The disturbance variances indicate the percentage of unexplained variance.

Edu: education; HFinan: household finance; Dorder: neighbourhood disorder; DirVic: direct victimisation; IndVic: indirect victimisation; FearC: fear of crime; AvoidB: avoidance behaviour.

The recursive model is identified with degrees of freedom greater than zero ($df_M = 5$). A correlation matrix is shown in Table 1. The ML estimation of Mplus 7 was used to fit the model. The analysis converged to an admissible solution. The values of the model fit statistics indicate the data provided an acceptable overall fit. Selected fit statistics is reported as follows. The lower and upper bounds of the 90% confidence interval based on RMSEA is presented in parentheses:

$\chi^2 (5) = 7.268, p = .202, \text{RMSEA} = .032 (0-.078), p_{\text{close-fit H0}} = .688, \text{CFI} = .976; \text{SRMR} = .017$

Table 1: Bivariate correlation among major variables

<table>
<thead>
<tr>
<th>Variable</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age</td>
<td>-.08</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Education</td>
<td></td>
<td>-.29***</td>
<td>-.10*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Household finance</td>
<td>.03</td>
<td>-.08</td>
<td>-.09</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Neighbourhood disorder</td>
<td>-.02</td>
<td>-.19**</td>
<td>-.04</td>
<td>.16***</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Direct victimisation by crime</td>
<td>.00</td>
<td>-.02</td>
<td>.01</td>
<td>.13**</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indirect victimisation by crime</td>
<td>-.02</td>
<td>-.14**</td>
<td>-.03</td>
<td>.01</td>
<td>.20***</td>
<td>.32***</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fear of crime</td>
<td>.17***</td>
<td>-.19***</td>
<td>.02</td>
<td>.09*</td>
<td>.16***</td>
<td>.17***</td>
<td>.19***</td>
<td></td>
</tr>
<tr>
<td>Avoidance behaviours</td>
<td>.11*</td>
<td>-.08</td>
<td>-.08</td>
<td>-.02</td>
<td>.23***</td>
<td>.11*</td>
<td>.14**</td>
<td>.22***</td>
</tr>
</tbody>
</table>

Note. N = 451.

* p < .05. ** p < .01. *** p < .001.
As shown in Table 2, 12.1% of variance in fear of crime was explained by exogenous variables among which female gender, younger age, greater perception of neighbourhood disorder, more experience of crime either direct or indirect were found to be significant but education and household finance were not. Fear of crime, gender and neighbourhood disorder accounted for 9.3% of variance in avoidance behaviours but the effect of gender was not significant as hypothesised. Fear of crime mediated the effects of gender, age, direct victimisation by crime and indirect victimisation by crime on avoidance behaviour.

Table 2: Maximum likelihood estimates for a path model of the effects of fear of crime on avoidance behaviour

<table>
<thead>
<tr>
<th>Parameter</th>
<th>Unst.</th>
<th>SE</th>
<th>p</th>
<th>St.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Direct effect</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>On fear of crime</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gender</td>
<td>0.779</td>
<td>0.198</td>
<td>&lt;.001</td>
<td>.183</td>
</tr>
<tr>
<td>Age</td>
<td>-0.032</td>
<td>0.012</td>
<td>.006</td>
<td>-.125</td>
</tr>
<tr>
<td>Education</td>
<td>0.157</td>
<td>0.102</td>
<td>.125</td>
<td>.072</td>
</tr>
<tr>
<td>Household finance</td>
<td>0.283</td>
<td>0.188</td>
<td>.134</td>
<td>.067</td>
</tr>
<tr>
<td>Neighbourhood disorder</td>
<td>0.693</td>
<td>0.325</td>
<td>.033</td>
<td>.099</td>
</tr>
<tr>
<td>Direct victimisation by crime</td>
<td>0.195</td>
<td>0.079</td>
<td>.013</td>
<td>.116</td>
</tr>
<tr>
<td>Indirect victimisation by crime</td>
<td>0.110</td>
<td>0.044</td>
<td>.012</td>
<td>.120</td>
</tr>
<tr>
<td>On Avoidance behaviour</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gender</td>
<td>0.535</td>
<td>0.278</td>
<td>.055</td>
<td>.087</td>
</tr>
<tr>
<td>Neighbourhood disorder</td>
<td>2.049</td>
<td>0.465</td>
<td>&lt;.001</td>
<td>.204</td>
</tr>
<tr>
<td>Fear of crime</td>
<td>0.242</td>
<td>0.066</td>
<td>&lt;.001</td>
<td>.168</td>
</tr>
<tr>
<td>Disturbance variances</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fear of crime</td>
<td>3.940</td>
<td>0.262</td>
<td>&lt;.001</td>
<td>.879</td>
</tr>
<tr>
<td>Avoidance behaviour</td>
<td>8.362</td>
<td>0.556</td>
<td>&lt;.001</td>
<td>.907</td>
</tr>
<tr>
<td>Indirect effect</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>On avoidance behaviour through fear of crime</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gender</td>
<td>0.188</td>
<td>0.070</td>
<td>.007</td>
<td>.031</td>
</tr>
<tr>
<td>Age</td>
<td>-0.008</td>
<td>0.004</td>
<td>.029</td>
<td>-.021</td>
</tr>
<tr>
<td>Education</td>
<td>0.038</td>
<td>0.027</td>
<td>.157</td>
<td>.012</td>
</tr>
<tr>
<td>Household finance</td>
<td>0.068</td>
<td>0.049</td>
<td>.165</td>
<td>.011</td>
</tr>
<tr>
<td>Neighbourhood disorder</td>
<td>0.168</td>
<td>0.091</td>
<td>.065</td>
<td>.017</td>
</tr>
<tr>
<td>Direct victimisation by crime</td>
<td>0.047</td>
<td>0.023</td>
<td>.040</td>
<td>.019</td>
</tr>
<tr>
<td>Indirect victimisation by crime</td>
<td>0.027</td>
<td>0.013</td>
<td>.038</td>
<td>.020</td>
</tr>
</tbody>
</table>

Note. N = 450. Unst: unstandardised; St: standardised.

Discussion

The crime-specific prevalence rates revealed that property crime such as theft, cheat or burglary was more prevalent among respondents than personal crime such as attack, murder or rape/sexual assault. It was noted that the ranking pattern of these crimes in the prevalence for fear was analogous to that for direct victimisation and indirect victimisation. This study confirmed Hentig’s (1948) argument that old people were easy victims of property crimes rather than personal crimes. Their fear was actually based on the real risk of victimisation. In other words, the crimes they felt fearful of were the ones more risky for them in reality while those crimes seldom targeting at them did not make them fearful correspondingly.

This study further evidenced that fear of crime was a gendered phenomenon with females expressing higher levels of fear than males. Disadvantage in physical strength (Killias and Clerici 2000) and social power (Yodanis 2002) increased women’s perception of likelihood to be targeted by perpetrators and incompetence to defend themselves and hence fear of crime. The situation aggravates for old females who tend to rate their vulnerability higher.
Contrary to the hypothesis, older age was associated with lower levels of fear of crime. The reason might be that the declined mobility with advancing age reduced their exposure to the threats outside their dwelling place and thus decreased their fear for crime to victimise them.

The non-emergence of a significant relationship between lower levels of education and higher levels of fear of crime might be because that the higher vulnerability old people with less education attainment perceived were counteracted by the lower odds for them to be indirectly victimised. Consequently, there was no significant difference in fear of crime between them and their counterparts with higher education.

The hypothesis that old people from a poor-off household would report more fear of crime was not supported. In spite of a higher chance for them to expose to neighbourhood disorder (Hope 1995; Covington and Taylor 1991; Hale 1996) and a lower resilience from the damage caused by either physical injury or property loss (Pantazis and Gordon, 1997), poor people might think they are less ‘attractive’ to potential offenders who were more driven by high reward and low risk (Ferraro, 1995).

As established in previous work (Covington and Taylor 1991; De Donder et al. 2005; LaGrange and Ferraro 1987; Lewis and Salem 1986; Skogan 1990; Skogan 1999; Taylor 2001), physical and social disorder signs as the graffiti, noise, vandalism, abandoned properties, loitering people, drug use, alcohol use or crime in the neighbourhood revealing lack of formal or informal control or regulation, induced greater risk perception of victimisation and fear of crime.

This study provided evidence for the assumption that direct or indirect victimisation of crime has a positive impact on higher levels of fear of crime. As prior research demonstrated, personal experience of victimisation increases one’s feeling of vulnerability, lack of confidence for self-protection, risk perception of victimisation and consequent fear of crime (Dull and Wint 1997; Lawton and Yaffe 1980; Skogan and Maxfield 1981; Wittebrood 2002; Weinrath and Gartrell 1996). Vicarious experience of victimisation is deemed to intensify one’s sense of vulnerability and negative appraisal of living environment which heighten the degree of fear of crime (Covington and Taylor 1991; Salmi et al. 2004; Stafford and Galle 1984).

The fearful emotion had an impact on participants' life through shaping their behaviour into a more constrained manner. They tend to think if they stay at home and avoid interactions with strangers, the possibility for theft, deception, burglary or other more severe crimes to occur to them will be minimised. The marked effect of gender on fear of crime did not exert to avoidance behaviour at a total level though females were more vigilant as for opening door for, chatting with or offering help to strangers than males. Considering outdoor activities, physical vulnerability to deal with the complicated situations and possible threats in the environment might worry both genders equally. The disorder clues in the neighbourhood could cause old people to perceive higher risk of being victimised so as to reduce their mobility and interpersonal interaction. Females at a younger age and having experienced direct or indirect victimisation by crime were inclined to conduct avoidance behaviour if they feel fearful for crime.

**Conclusion**

This study was among the first attempts to explore the fear of crime experienced by older Chinese and examine its impacts on their daily life through addressing avoidance behaviour. It is suggested that if old people internalise this behavioural pattern as a life style, it will have long-run negative impacts on their wellbeing through impairing physical health, social functioning and finally mental health. For the purpose of prevention, efforts should be made to improve the neighbourhood environment by reducing physical and social disorder signs and crime incidence. Females, the ‘young old’ and victims who have experienced crime directly or
indirectly should be the special targets for the intervention on fear of crime. More proactive strategies and skills for self-defence should be advocated among them to replace the passive avoidance behaviour. The current study limited in neglecting participants’ worries about financial security and physical health which might be of greater importance for most of old Chinese. It is recommended for future study to pinpoint the interaction between fear of crime and these two concepts and examine their joint impacts on the quality of life of old Chinese.

References


Australian Aboriginal English and Cultural Conceptions – Can They Affect Policing?

Antonia Randles, Queensland University of Technology
Mark Lauchs, Queensland University of Technology

Conference Sub-theme: Social, Criminal and Indigenous Justice

Abstract
It is well established that there are inherent difficulties involved in communicating across cultural boundaries. When these difficulties are encountered within the justice system the innocent can be convicted and witnesses undermined. A large amount of research has been undertaken regarding the implications of miscommunication within the courtroom but far less has been carried out on language and interactions between police and Indigenous Australians. It is necessary that officers of the law be made aware of linguistic issues to ensure they conduct their investigations in a fair, effective and therefore ethical manner. This paper draws on Cultural Schema Theory to illustrate how this could be achieved. The justice system is reliant upon the skills and knowledge of the police, therefore, this paper highlights the need for research to focus on the linguistic and non-verbal differences between Australian Aboriginal English and Australian Standard English in order to develop techniques to facilitate effective communication.

Introduction
This paper attempts to determine if cultural difference in language could be negatively affecting communication between Aboriginal people and the police of South East Queensland. Findings from this research are significant in determining if miscommunication is adding to the already unequal standing of Aboriginal people within the criminal justice system, and encouraging the volatile relationship between Aboriginal people and police.

Communication between cultures that do not share similar values, beliefs and experiences has long proven to be a difficult exercise (Balsmeier and Heck 1994). These difficulties can have serious consequences when the miscommunication happens in the justice system; the innocent can be convicted and witnesses undermined. Much work has been carried out on the need for better communication in the courtroom (Eades 1993; Lauchs 2010; Supreme Court of Queensland 2010; Supreme Court of Western Australia 2008), including the development of educational packages to promote cultural awareness within the courts (Lauchs 2010). Far less work has been conducted on language and interaction between police and Indigenous Australians (Powell 2000). It is necessary that officers of the law be made aware of linguistic issues to ensure they conduct their investigations in a fair, effective and therefore ethical manner. Despite years of awareness raising, clashes between police and Indigenous peoples are still prevalent (Heath 2012; Remeikis 2012). This paper will attempt to explain a possible reason for this volatile relationship and, in doing so, suggest possible solutions.

Background
Within each culture there are established values and behavioural patterns. Learning to understand these, and, in the process, accepting that one’s own culture may differ from another, is a vital ingredient in effective cross-cultural communication. An important aspect of cross-
cultural communication is the understanding that there may be barriers to effective communication due to cultural difference (Balsmeier and Heck 1994). Keeping an open mind in regards to these differences is an important step in preventing the development of stereotypical attitudes and prejudiced opinions. Basic awareness of difference may not make the cross-cultural communication process easy, but it has the potential to reduce conflict.

The multi-cultural nature of Australian society brings to the fore issues surrounding effective cross-cultural communication (Balsmeier and Heck 1994). Miscommunication between the speakers of Australian Aboriginal English (AAE) and Australian Standard English (ASE) (Sharifian 2009) has been given less attention. It has been suggested that the majority of Australia’s Aboriginal population, numbering some 450,000 people, speak some form of AAE, and it is probable that it is the first and only language of a large number of Aboriginal children (Butcher 2008).

Indigenous languages developed in isolation for 50,000 years. At least 200 separate Indigenous languages were spoken on the Australian continent at the time of settlement in 1788 (Butcher 2008), including more than 100 Indigenous languages in the area covered by the current state of Queensland (McConvell and Thieberger 2001). For the 50,000 years prior to colonisation, Aboriginal people developed highly sophisticated conceptual systems; and although there has been a widespread language shift from traditional language to English, the distinctive dialect of AAE has been maintained (Malcolm and Sharifian 2002; Sharifian 2009). In 2006, Queensland had 146,429 Indigenous residents – 28% of the Australian Indigenous population, but only 3.6% of the Queensland population. Of these, 77% identified as Aboriginal, 14% identified as Torres Strait Islander and the remainder identified as both of Aboriginal and Torres Strait Islander origin (ABS 2006: 16). Almost one quarter (22%) of Indigenous Queenslanders were living in remote or very remote locations in 2006 (ABS 2006: 19). These are the target group for traditional language interpreters and Aboriginal English services.

AAE is the term given to the dialects of English spoken by Aboriginal people; this dialect differs from ASE in ways such as: phonology, lexicon, and pragmatics (Eades 2004; Malcolm and Kaldor 1991). Although there are variations in the varieties of AAE, with ‘heavier’ varieties drawing strongly on native language and meaning spoken in remote areas, and ‘lighter’ varieties more similar to ASE in suburban areas; AAE should not be mistaken as a form of Pidgin English (Eades 2004). Pidgin languages combine words from two different languages, with the speakers of pidgin retaining the ability to speak their native tongue (McConvell and Thieberger 2001). On the other hand, AAE is considered by linguists to be a distinctive dialect in its own right which ‘reflects, maintains and continually creates Aboriginal culture and identity’ (Eades 1991: 57). In fact, Harkins (1994) refers to AAE as the most truly Australian form of English.

Issues with miscommunication arise due to the similarities between AAE and ASE (Eades, 1988). Even when grammatical differences are not great between AAE and ASE, pragmatic differences have implications for miscommunication (Eades 1984, 1988, 1991, 1993). Due to these perceived similarities, it is not uncommon for speakers of AAE to be unaware that they are in fact not speaking ASE (DJAG,2000). Miscommunication between an uniformed listener and a speaker of AAE can occur due to unfamiliarity with the cultural conceptualisations AAE strongly draws upon (Sharifian 2009).

Linguistic research on the topic of AAE has used the term ‘cultural conceptualisations’ as a collective term to describe ‘schemas’ and ‘categories’ which embody one’s cultural experiences (Sharifian 2008). These cultural conceptualisations are not static, but are ‘negotiated’ and ‘renegotiated’ by members of a culture through their interpersonal experiences. In the case of Aboriginal culture, these cultural conceptualisations are not only found in language, but also through cultural practices such as dance, painting and rituals (Sharifian 2010). AAE is influenced by all of these cultural conceptualisations that are derived from the beliefs and
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experiences specific to Aboriginal people (Malcolm and Rochecouste 2000; Malcolm and Sharifian 2002; Sharifian 2010). For example, the complexity of Aboriginal kinship could influence the meanings of words such as family, home and brother to include meanings which reach far beyond the simplistic meanings which ASE would credit them with (Sharifian 2006). For example, to an AAE speaker 'family' could encompass a wide variety of people, who may or may not be biologically related to each other, whereas to an ASE speaker ‘family’ would generally refer to a nuclear-like family. It is the lack of awareness of these potential differences in meaning and application that can lead to breakdowns in the communication process.

Cultural Schema Theory

Cultural Schema Theory draws on cultural conceptualisations and schemas to explain the factors which may either facilitate or debilitate cross-cultural communication (Sharifian 2001). Schemas are described as cognitive blocks used for the organisation of information (Rumelhart 1980). Schema theory suggests that humans make sense of their personal experience based on these cognitive blocks (Sharifian, Rochecouste and Malcolm 2004). Therefore, schemas are used to interpret, predict and organise experience (Rumelhart 1980). Many disciplines have used schema theory to explain human cognition. These include psychology, artificial intelligence, linguistics and anthropology (Sharifian 2001). Palmer (1996: 63) applies this theory in a cultural context by suggesting 'it is likely that all native knowledge of language and culture belongs to cultural schemas and the living of culture and the speaking of language consist of schemas in action'. Cultural Schema Theory regards schemas as largely dwelling in cultural experience, influenced by such factors as innately programmed behaviour or people's own distinct worldview (Sharifian et al. 2004). Put simply, personal experience and knowledge of culture form cultural schemas which are consequently organised and employed to interpret future interactions. In regards to Aboriginal English, this involves Aboriginal people taking traditionally English words and applying their own culturally influenced schemas to them. This process was exemplified with the word family earlier. Therefore, cultural schema theory provides an explanation for the link between culture, cognition and language in AAE (Sharifian 2001).

In this model, cultural schemas are not equally shared between cultural groups but are distributed across the group depending on each individual's personal experience (Sharifian 2003). This model supports findings from a study of Aboriginal words and concepts in Australian English, conducted by Leitner and Sieloff (1998) which found that younger Aboriginal people were less aware of meanings of such terms as land rights, woman's business and dreaming than their older counterparts. Therefore, cultural schemas are said to exist on somewhat of a continuum, rather than on an 'all or none' basis with factors such as age, gender and education responsible for such knowledge distribution (Sharifian 2003). Although originally an anthropological theory, the relevance of Cultural Schema Theory to the understanding of AAE has been a dominant theory in recent research. Studies conducted by Malcolm and Rochecouste (2000), Malcolm and Sharifian (2002) and Sharifian (2001, 2002) all emphasise that understanding the cultural conceptions which make up AAE is a vital ingredient in facilitating effective cross-cultural communication.

Research Approaches

Trends in sociolinguistics, discourse analysis, applied linguistics and pragmatics dominated research on Australian Aboriginal English prior to the 1990s (Harkins 1994; Malcolm 2000; Sharifian 2006). Early research into AAE conducted by Eagleson, Kaldor and Malcolm (1982) and Malcolm (1977) explored AAE in a descriptive sense as well as drawing on trends in sociolinguistics. More recently, Aboriginal English studies have looked at discourse strategies employed by its speakers (Malcolm 1994) as well as the pragmatic norms which govern communication in AAE (Eades 1982, 1992, 1993, 1994, 1995, 1996). Two dominant applications have emerged from previous research into AAE, one being the practical implications in the
classroom, which predominately draws on schema-based theory (Lowell and Devlin 1998; Malcolm 1994; Oliver, Rochecouste, Vanderford, and Grote 2011; Sharifian 2001, 2008) and the second being implications of miscommunication in a legal setting, which draws more on criminological theories of power and post-colonialism (Cooke 1995, 1996, 2002; Eades 1993, 1994, 1996). Research exploring the implications of linguistic difference between AAE and ASE predominately involves the collection and analysis of oral narratives from Aboriginal people to determine the linguistic features and underlying cultural conceptualisations, all finding that understanding cultural conceptions is key to effective communication (Lowell and Devlin 1998; Malcolm 1994; Malcolm and Sharifian 2002; Sharifian 2001, 2006, 2010).

All research which explores the implications of Aboriginal English in the classroom acknowledges that Aboriginal students are at a disadvantage (Lowell and Devlin 1998; Malcolm 1994; Oliver et al. 2011; Sharifian 2001). Communicative difficulties exist between Aboriginal students and their non-Indigenous teachers arising from a lack of shared communicative assumptions, cultural discontinuity between the home environment and school, differences in perspectives, expectations, understandings and interpretations, differences in pragmatics, differences in length of pause time and listening and attention patterns (Christie and Harris 1985; Harris 1977; McConvell 1991). Lowell and Devlin (1998), Oliver et al. (2011), Sharifian et al. (2004) and Sharifian (2008) all highlight that effective, culturally competent educational programs should rely on understanding Aboriginal cultural schemas.

Malcolm (1994: 150) found that speech is ‘always associated with the presence of Aboriginal communicators in a setting or speech event which is defined by non-Aboriginals. The key, if there is a key, to how Aboriginal people communicate, seems to me to lie in who defines the setting and determines the discourse pattern’. Lowell and Devlin (1998) recommend that Aboriginal perspectives be privileged, in the hope of creating a dominant framework which will inform the educational needs of Aboriginal children in the future. Most studies involving AAE in the classroom conclude that awareness of cultural and linguistic difference is the most important ingredient in ‘developing and implementing more inclusive and accommodating educational programmes’ (Sharifian 2001: 132). Teachers in urban areas are less likely to be aware of the dialect of AAE as opposed to teachers in rural areas, which demonstrates the need for ongoing professional development about AAE (Oliver et al. 2011). This could be applicable to not only the classroom, but law courts, government offices, or in fact anywhere which communication takes place in which the non-Aboriginal participant defines the terms of communication (Malcolm 1994).

Eades studies of Indigenous experiences in the courtroom have shown that ‘even where the grammatical differences between ASE and AAE are not great, there are significant pragmatic differences which have implications for intercultural communication’ (D Eades 2004: 492). Specific implications for the legal setting include the different ways in which Aboriginal people seek information, usually avoiding direct questioning, as well as the positive value which Aboriginal people place on silence; silence being found as an important contribution to conversation, rather than failure to communicate (Eades 2004). Although communication difficulties involving Aboriginal people in the legal setting has been noted for many decades (Elkin 1947; Strehlow 1936), Eades has addressed the widespread ignorance to the language variety used by Aboriginal people and shown how this linguistic diversity has an overflow affect on to Indigenous over-representation (Eades 2004). Similarly, Cooke explores the use of traditional Aboriginal languages to demonstrate how linguistic power can affect Aboriginal people in situations like the police interview, the courtroom examination and cross examination (Cooke 1995, 1996, 2002). Although Cooke’s work presents a convincing analysis of the ways in which language can influence power in the legal context, Eades (2002, 2003) highlights that an analyses of the social and political processes, such as police interaction, the judiciary and the history of police intervention into the lives of Aboriginal people needs to occur to gain a broader understanding of the power discourse.
Communication issues are likely to play a part in Indigenous over-representation. Despite only being 2.5% of the Australian population in 2008, Indigenous people represented 24% of the prison population, meaning Indigenous people are currently 13 times more likely than non-Indigenous people to be imprisoned (HREOC 2008). The majority of explanations for the vast over-representation of Indigenous people within the criminal justice system, and the volatile relationship which exists between Indigenous people and police draw on explanations rooted in the historical context of colonisation (Behrendt, Cunneen, and Libesman 2008; Cunneen 2001; Eades 2009; Jennett 1999; Kamira 1999). Conversely, language difficulties can also have significant consequences for Indigenous victims of crime. Most of Eades’ work shows that Indigenous witnesses can be discredited in court through manipulation of the ASE speaking jury’s perception of an AAE speaking witness (Eades 2009).

AAE has been recognised by the courts and positive steps have been taken to address and prevent communication issues (DJAG 2000; Supreme Court of Queensland 2005, 2010; Supreme Court of Western Australia 2008, 2009). There have also been attempts to improve the recognition of Aboriginal English in non-criminal matters such as native title hearings (Byrne 2003). Awareness has increased but communication issues still remain. No studies have been undertaken of the prevalence of Indigenous language use – Aboriginal English or traditional languages – in Queensland courts, or in other Australian jurisdictions; thus there are no indicators of whether the raising of awareness has produced more just outcomes. Also, courts have discovered procedural difficulties when trying to acknowledge AAE (Lauchs 2010); for example, judges not being able to advise a jury on possible language differences due to the possibility of unfairly influencing the jury, and lack of interest in programs developed to train AAE speakers to assist in court proceedings.

Language: An Issue

One of the most publicised cases focusing on issues of cultural difference and Aboriginal English is that of the Pinkenba Six (Eades 2006). In this case, the defence council set out to show that three Aboriginal boys aged 12, 13 and 14, after being approached by six armed police officers, voluntarily got into three separate police vehicles, which were then driven 14 kilometres out of town to an industrial area at Pinkenba (Eades 1995). The police officers abandoned the boys there (Eades 2006). The case centred on whether or not the boys had got into the police vehicles of their own will, with the defence’s case being that the boys ‘gave up their liberty’ and that ‘there’s no offence of allowing a person to give up his liberty’ (Eades 2006). Therefore, the legal strategy of the defence was to attempt to transform the boys’ experience of being ‘abducted’ into one of a voluntary car ride (Eades 2006). Dianna Eades has extensively explored how aspects of Aboriginal English such as gratuitous concurrence, the role of silence and eye contact in fact helped the defence to culturally disadvantage the Aboriginal boys and to position their accounts as unreliable and inaccurate (Eades 1995, 1996, 2004, 2006, 2009). There is often a focus on the exploitation of aspects of Aboriginal English by defence counsels within literature centred on Aboriginal English in the legal context. This alleged presence of malice is not always the cause of ineffective communication between speakers of ASE and AAE in the legal context. The same results can arise through ignorance, even with the best of intentions, as is the 1993 case of Robyn Kina.

In 1988, an Aboriginal woman by the name of Robyn Kina was found guilty of the stabbing murder of her de facto husband and was sentenced to life imprisonment (Eades 2004). At no point during the trial did Kina have the opportunity to give any evidence of the circumstances which led up to her stabbing her husband (Eades 2004). Evidence from Kina’s appeal in 1993 revealed that her husband had a history of extreme violence and on the morning of his death had threatened to rape Kina’s 14 year old niece, therefore the stabbing occurred in self defence as a result of provocation (Eades 1996). Eades (1996) highlights that the lawyers who
interviewed Kina originally were not aware that the difficulties they were experiencing communicating with Kina were due to serious cultural differences. Not being able to gather critical evidence lead to one of the shortest trials in Queensland history, with less than three hours of evidence and the jury only requiring 50 minutes to return a guilty verdict (Eades 1996). A few years later, public interest in the case resulted in the Queensland Attorney General contacting Kina and an appeal was initiated (Eades 1996). Kina successfully appealed against the conviction on the grounds that her lawyers did not gather from her the information necessary to defend her effectively (Pringle 1994). The conviction was quashed and Kina was subsequently released from prison (Eades 2004). Unlike Pinkenba, Kina was failed by her own lawyers; therefore highlighting that cultural difference in communication can lead to gross miscarriages of justice, even when the best of intentions are present. Thus, as shown by Eades (1996), the communication difficulties present were not about personalities but about cultural difference in language usage. The case of Robyn Kina highlights the importance of understanding cultural difference when communicating in the courtroom setting; therefore it would be logical to assume that this cultural awareness would also be beneficial in other legal settings, such as policing.

Aboriginal English and Policing

So far the literature has demonstrated that the dialect of Australian Aboriginal English not only exists, but it is spoken by the majority of Aboriginal people (Butcher 2008), and shows that the lack of awareness and acknowledgement of this dialect has far reaching detrimental consequences for its speakers. As Eades (2002, 2003) points out, how linguistic differences affect the broader social and political discourses needs to be analysed in order to fully understand its consequences on AAE speakers. These issues are just as relevant for Indigenous-policing interactions. If the majority of Aboriginal people speak some form of AAE, and that the communicative patterns of Aboriginal people are influenced by cultural schemas and who defines the setting of the interaction, it would not be unreasonable to draw the conclusion that AAE could in fact have an effect on the relationship between Aboriginal people and the police (Butcher 2008; Malcolm 1994).

Police are at the frontline of the justice system. They have the discretion to charge and the responsibility to investigate criminal offences. The courts and correctional stages of the justice system play no part until the police have concluded their engagement with an accused. Thus the system is reliant upon the skills and knowledge of the police in its interactions with the Indigenous community. Given the predominantly minor nature of Indigenous offending, mainly encompassing public order-related offences, an AAE speaker is most likely to have contact with a uniformed beat officer – the least experienced, skilled and knowledgeable of the service. It is extremely unlikely that they are aware of AAE let alone skilled in the techniques of recognising and addressing communication breakdowns.

Literature which draws on post-colonial theory argues that the role which police played throughout colonisation, from violence towards Aboriginal clans to enforcing the state policies of protectionism and assimilation, is the driver behind the continuing volatile relationship between Aboriginal people and the police today (Kamira 1999). This role, which often involved control over the social and familial relationships, has enforced the superiority of the colonising power and the inferiority of the colonised culture (Cunneen 2001). Neo-colonial theorists would argue that these beliefs have been used to justify the creation of current policy which extends the power of the Western culture over Indigenous culture (Eades 2009).

Racism and racial prejudice are often put forward, particularly in regards to policing, as explanations for the continuing Indigenous disadvantage. In other words, the events of colonisation have created a power structure which disadvantages Aboriginal people; and further, this disadvantage is continuing, in particular within the police service, due to ingrained
Racist, prejudiced beliefs (Cunneen 2001). Racism clearly existed in the Queensland Police Service. The Royal Commission into Aboriginal Deaths in Custody produced some damning findings in regards to the policing of Aboriginal people (RCADI 1990), including that the abuse of police discretionary powers was a major contributor to the overrepresentation of Aboriginal people in custody. Problems continued, despite the work that was done to address these issues in the 1990s. Recognising an increase in tension between the Queensland Police Service (QPS) and Aboriginal peoples following the death of Cameron Doomadgee and riots in Aurukun, the Queensland Government requested the Crime and Misconduct Commission (CMC) to conduct an independent inquiry into policing and Aboriginal peoples (CMC 2009). The CMC's report recognises the importance of effective cross-cultural communication between Aboriginal people and the police, highlighting that 'we are all culturally programmed throughout our lives – we learn ways of seeing the world through our own culture, therefore cross-cultural encounters can be difficult' (CMC 2009: 181). The report goes on to state that cultural training can lead to more effective relationships, and most importantly acknowledges that:

... in the area of policing, law, crime and justice, there is much at stake in cross cultural encounters – breakdowns in communication can lead to injustice ... in Queensland’s indigenous communities it is impossible to police effectively without some knowledge of the complex cultures and social relationships within a community. (CMC, 2009: 182)

Interestingly, the report goes on to mention AAE, but does not mention the different linguistic issues between ASE and AAE. Although the QPS are taking steps to address issues of cultural competency by encouraging cultural training, Indigenous recruitment and establishing the Cultural Advisory Unit, the report concluded that the 'QPS must step up its efforts' (CMC 2009: 189) to address cultural competency.

**Application of Cultural Schema Theory to prevent Racism**

Ridley et al. have shown that CST can be used to prevent racism (Ridley, Chih, and Olivera, 2000). They use a specific definition of racism that covers both antagonistic and ‘unintentional racism’:

... any behavior or pattern of behavior that tends to systematically deny access to opportunities or privileges to members of one racial group while perpetuating access to opportunities and privileges to members of another racial group. (Ridley et al. 2000: 66)

They define unintentional racism as that which allows ‘racism when the perpetrator has good intentions’ (Ridley et al. 2000: 66). Thus, a police officer who acts in the indigenous offender's 'own good', but proceeds from a position of ignorance can produce an unjust outcome which harms the Indigenous person. Assumptions can also be made through miscommunication that misidentifies offenders, thus multiplying harm by charging the innocent and not protecting the victim.

To put this problem into perspective, any clinician, regardless of race, background, or motives, can engage in unintentional racism. Clinicians may inadvertently sabotage their own well-intended actions and perpetuate the very problems they endeavour to overcome. To eliminate their unintentional racism, clinicians need to gain insight into their operational practices and change behaviour that interferes with a helpful intervention. (Ridley et al. 2000: 66)
In other words, a person needs to be aware of his or her own cultural schemas and remain receptive to any stimuli. The only way to do this is through awareness of the cultural schemas at play.

**Conclusion**

We have shown that the communication difficulties between AAE and ASE speakers not only lead to misunderstanding but have contributed to unjust outcomes for Indigenous Queenslanders. Cultural Schema Theory has been used to show how the different cultural histories of both Indigenous and migrant populations have guided how each group sees the world. These differences both produce the problem and have played a part in how each group has responded to the outcomes of that difference. That is, the language spoken by each group is a product of their cultural schema. But the social response to this linguistic difference has also been produced by the same schema. Historically, and to a lesser extent presently, racism has been a common reaction. This has been recognised in both RCADIC and CMC reviews. But laying the blame at the feet of racism does not produce a solution. Similarly, Ridley et al. show that simply acknowledging difference will not bring an answer, as ignorance of the nature and means of difference will still lead to unjust outcomes. We need to discover the specifics of difference so that they can be recognised and worked around. Eades and Cooke have already commenced this work in the courts but no one has undergone similar research in the policing context. Future research has to discover the linguistic and non-verbal differences in communication to contribute greater understanding and development of techniques, such as those developed for courtroom communication.

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Constructions of Asylum Seekers and Refugees in Australian Political Discourse

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Conference Sub-theme: Social, criminal and Indigenous justice

Abstract

Immigration to Australia has long been the focus of negative political interest. In recent times, the proposal of exclusionary policies such as the Malaysia Deal in 2011 has fuelled further debate. In these debates, Federal politicians often describe asylum seekers and refugees as ‘illegal’, ‘queue jumpers’, and ‘boat people’. This paper investigates how the political discourse constructs asylum seekers and refugees during debates surrounding the Malaysia Deal in the Federal Parliament of Australia in 2011. Hansard Parliamentary debates were analysed to identify the underlying themes and constructions that permeate political discourse about asylum seekers and refugees. This paper argues that a dichotomous characterisation of legitimacy pervades their construction with this group constructed either as legitimate humanitarian refugees or as illegitimate ‘boat arrivals’. These constructions result in the misrepresentation of asylum seekers as illegitimate, undermining their right to protection under Australia’s laws and international obligations. This construction also represents a shift in federal political discourse from constructing asylum seekers as a border or security threat, towards an increasing preoccupation with this categorisation of people as legitimate, or illegitimate.

Introduction

In May 2011, the Australian Prime Minister Julia Gillard announced that the Australian Federal Government had plans to strike a deal with the Malaysian Government to swap 800 asylum seekers for 4000 refugees. The proposed ‘Malaysia Deal’ was the latest in a long history of policies designed to manage the arrival of ‘irregular’ migrants to Australia. The White Australia Policy saw the restriction of non-European migration for more than 70 years until the 1970s when the policy was formally abandoned (Crock and Berg 2011: 113; Grewcock 2009). Following the end of the Vietnam War, the arrival of more than 50 boats carrying asylum seekers from South East Asia prompted an increase in concern regarding people arriving by boat and as a result the term ‘boat people’ emerged in the media, public and political discourse (Grewcock 2009; Phillips and Spinks 2011). This concern and anxiety has captured the attention of successive governments and resulted in the Federal Government’s introduction of restrictions and exclusionary measures towards unauthorised arrivals, most notably the establishment of mandatory detention for all unauthorised arrivals introduced under Prime Minister Paul Keating in 1992 (Grewcock 2009; Phillips and Spinks 2011). The last two decades have increasingly been characterised by negative attitudes towards asylum seekers, crystallising around major events such as the Tampa Crisis, and resulting in exclusionary political agendas and policies such as the introduction of the Pacific Solution under former Prime Minister John Howard (Every 2006: 10).

The proposed Malaysia Deal emerged within an ongoing maelstrom of public debate about asylum seekers, and sparked significant discussion in Federal Parliament. While the Malaysia
Deal was ultimately declared unconstitutional by the High Court in August 2011, and the policy largely abandoned by the Labour Government, the parliamentary discourse surrounding this recent event offers significant insights into the social construction of asylum seekers and refugees in Australian politics. This paper examines Hansard transcripts of the Federal Parliamentary debates about the Malaysia Deal in both the Senate and House of Representatives. Specifically, the data collection was limited to the time period from 1 May 2011, until 1 October 2011, which included several months of negotiation, the signing of the agreement on 25 July 2011, and the aftermath of the High Court ruling declaring the swap invalid and unlawful.

Previous research examining the constructions of asylum seekers and refugees in Australia has identified that notions of legitimacy, illegality, threats to national identity and threats to border security are the themes dominating public discourse (Grewcock 2009; Klocker and Dunn 2003; O'Doherty and Augoustinos 2008; Gale 2004). In particular, politicians’ statements in the media have previously been found to focus on these themes, and represent asylum seekers and refugees as either legitimate or illegitimate (Pedersen, Attwell and Heveli 2005; Klocker and Dunn 2003; Pedersen et. al. 2006).

Questioning whether certain groups of asylum seekers deserve protection and resettlement is often at the centre of the construction of legitimacy, while nationalism and border protection themes are evoked in order to construct this group as threatening to society. While all of these themes are evident in the parliamentary debates around the Malaysia Deal, we argue that notions of legitimacy and genuineness have come to dominate the discourse. In the past, debates on issues such as the Tampa focused more heavily on the need for border security, which may have been particularly resonant with the public in an immediate post 9/11 environment. The discourse around the Malaysia Deal indicates that while concerns about national interest, identity, and border protection are still evident, the focus has begun to shift.

In this paper, we argue that Parliament’s preoccupation with legitimacy has led to the construction of implicit criteria through which legitimacy is determined. This results in the establishment of a dichotomy of asylum seekers as either legitimate humanitarian refugees or illegitimate ‘boat arrivals’, based on their mode of arrival, their respect for the ‘queue’, and their ability to pay to secure a new life in Australia.

Labelling ‘Legitimate’ Asylum Seekers and Refugees

The issue of asylum claims and resettlement is an intensely political issue in the Australian context, with asylum seekers and refugees consistently labelled using stereotypical and deceptive language by the media and politics, particularly since the Tampa incident in 2001 (Klocker 2004: 3; Mares 2002a; Klocker and Dunn 2003; Pickering 2001). Political and public concerns about immigration have centred on who is coming to this country, how they are arriving, and for what reasons (Crock and Berg 2011: 3). There is also an overt focus on their religion, ethnicity, and reasons for seeking asylum leading to misrepresentations (Mares 2002a; Klocker 2004).

Pickering (2001) argues that the language used in relation to asylum seeker and refugees is most often binary in nature. The use of terms such as ‘genuine’ versus ‘non-genuine’, ‘legal’ versus ‘illegal’, and ‘refugees’ versus ‘boat people’ contribute to a delineation between two groups of people. The use of such language polarises the issue of asylum seeking and refugee determination (Pickering 2001: 172). The choice of these terms over more accurate terms such as ‘asylum seeker’ and ‘refugee’, can have a significant impact on depictions as they are misleading and hostile (Klocker 2004: 3).
The 1951 United Nations (UN) Convention relating to the Status of Refugees defines ‘refugees’ as a person who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality’ and is unwilling or unable to ‘avail himself of the protection of that country’, or return to this country for fear of persecution (UNHCR 2010; Karlsen 2011: 3; Phillips 2011: 2). An asylum seeker is an individual who is seeking protection and their refugee status is yet to be determined (Phillips 2011: 2). Asylum seekers may enter Australia without a valid visa and the Refugee Convention prohibits states from penalising and criminalising those who are fleeing persecution. Most notably, in the Australian context there is no law that criminalises the act of arriving without a valid visa for the purposes of seeking asylum (ASRC 2011; Phillips 2011: 3). Irregular maritime arrival (IMA) is the most accurate term when referring to those travelling to Australia by boat, due to the clandestine nature of their transit. Conversely, offshore arrivals or applicants are those who reside in overseas refugees camps pending relocation to Australia.

The analysis of the Parliamentary debates on matters related to the Malaysia Deal revealed considerable inconsistency and variety in the terms and language used to refer to asylum seekers and refugees in Federal Parliament. The most frequent misleading and misrepresented terms used in the political debate were ‘illegal arrivals’, ‘genuine refugee/s’, ‘boat people’, and ‘queue jumper/s’ or simply ‘queue’. The analysis revealed a construction of two distinct groups of asylum seekers and refugees emerging through the use of terms such as ‘genuine’ and ‘illegal’, perpetuating the dichotomous construction of legitimacy. The term ‘genuine’ was consistently used in order to make the distinction between irregular maritime arrivals (IMAs) and offshore applicants, ultimately constructing two distinct groups of asylum seekers and refugees. Similarly, politicians in Federal Parliament used the term ‘illegal’ in reference to irregular maritime arrivals to contrast this group against offshore applicants. This consistent depiction of two separate and distinct groups is associated with the theme of legitimacy, such that those referred to as ‘non-genuine’ and ‘illegal’ asylum seekers are constructed as illegitimate.

Despite it not being illegal to arrive in Australia without a valid visa and subsequently apply for asylum (Pedersen et al. 2006), IMAs were continuously depicted as ‘illegal’ in the Parliamentary debates in 2011; for example Leader of the Opposition, the Honourable Tony Abbott MP stated:

... we have had 241 boats and 12,000 illegal arrivals. ... Since the Malaysia people swap was announced we have had more than 1,000 illegal arrivals. Since it was signed we have had 400 illegal arrivals. (House September 22, 2011)  

Prime Minister Gillard also demonstrates this dichotomous construction by evoking an image of a ‘non-genuine’ refugee with the use of binary language constructing offshore applicants as more ‘genuine’:

As part of that transfer agreement, we would bring to Australia people who are genuine refugees, who are processed in Malaysia and who are already there now and are waiting a resettlement opportunity. (House May 23, 2011)

The Australian Government has a history of constructing asylum seekers and refugees as illegitimate and unlawful, with policy responses endorsing the notion of ‘illegitimate refugees’ (Grewcock 2009: 9). Between 1989 and 1998 the official representations of ‘legitimate’ asylum seekers and refugees were narrowed when the Government introduced offshore processing and mandatory detention of ‘unlawful non-citizens’ (Grewcock 2009: 120). The Australian Federal Government detained those considered ‘unlawful’ (without a valid visa) in detention centres in excised Australian territory or even in other countries (Mares 2002a: 5). Contrastingly, asylum seekers who entered Australia ‘lawfully’, usually via tourist or student visas, were not detained and were able to live in the community (Mares 2002a: 5).
The construction of a particular group of asylum seekers and refugees as 'illegal' and 'non-genuine' found during this current analysis is consistent with past research (Saxton 2003; Klocker and Dunn 2003; Pedersen et al. 2006). The political construction of asylum seekers as 'non-genuine' and 'illegal' disconnects the asylum seekers from the reasons for seeking asylum. Instead of highlighting the need for protection of asylum seekers, the 'illegal' label applied to them criminalises their actions and positions them as a threat. Furthermore, this distinction between IMAs and those processed in overseas refugees’ camps informs the significant negative attitudes towards asylum seekers and refugees in the Australian public and politics (Pedersen et al. 2006: 106). The need to seek asylum from persecution and threat, as the motivation for irregular migration, is no longer associated with those constructed as 'illegal' and 'illegitimate'. Rather, Federal politicians construct this group as a threat due to their perceived illegality (Every 2006: 24) as well as threatening to the interests and livelihood of ‘genuine’ refugees. Such negative connotations toward IMA’s further enhance offshore applicants’ perceived legitimacy (Lynn and Lea 2003: 432).

The Parliamentary discourse constructed two separate categories of asylum seekers through the positioning of IMAs as 'illegal' and a threat to 'genuine' refugees. Moreover, these categories seemed to be determined through discussions on the mode of arrival of asylum seekers, the notion of a 'queue', and the wealth of irregular arrivals, thus creating implicit criteria, which were used to delineate some asylum seekers as legitimate, and others as illegitimate.

**Mode of Arrival**

'Boat people’ is a term often used to describe asylum seekers and refugees who arrive in Australia by boat. Throughout the Parliamentary discussions held during 2011, Federal politicians frequently used the term 'boat people' to distinguish between IMAs and offshore applicants. Comparable to the use of 'genuine' and 'illegal', the term 'boat people’ creates an image of two distinct groups of people seeking resettlement in Australia and demonstrates the overwhelming focus on this mode of arrival. An example of this occurred throughout a speech by Abbott debating the Malaysia Deal. Abbott did not use the terms ‘asylum seeker’ and ‘refugee’ once, with ‘boat people’ the dominant term used to describe asylums seekers and refugees travelling by boat:

> When it comes to border protection, the Prime Minister firstly announced that she would be sending boat people to East Timor. She made this announcement before the East Timorese government even knew about it. Then the Prime Minister announced that she would be sending boat people to Manus Island. She made this announcement before the PNG government had agreed to it. Finally, on the Saturday before the budget and in a state of desperation over the constant flow of boats to our borders, she rushed out – gazumping the Treasurer’s own budget – and announced that boat people would be sent to Malaysia. (House June 14, 2011)

The term 'boat people’ delegitimises the legal entitlements and rights to asylum of this group of people and depicts this group solely through their association with boat travel (O’Doherty and Augostinos 2008: 581). In addition, this language challenges the status and legitimacy of asylum seekers and refugees who arrive by boat (Pickering 2001: 183). Coalition Senator Mathias Cormann further demonstrates this fixation on an individual's mode of arrival:

> The Prime Minister used to say that detaining boat people on Pacific islands was ‘costly, unsustainable’ and wrong in principle. ... She used to insist that boat people couldn’t be sent to Nauru because Nauru wasn’t a signatory to the UN convention on refugees. Last Saturday she announced that 800 boat people would be sent to
Malaysia, which isn’t a signatory either, and that 4000 of Malaysia’s arrivals would come here. (Senate May 12, 2011)

Research done by O’Doherty and Lecouteur (2007) has suggested that the inconsistency in language and terms used to describe asylum seekers and refugees will cause blurring between these various terms. Subsequently, this blurring may result in the political and social acceptance of the various misleading terms describing asylum seekers and refugees (O’Doherty and Lecouteur 2007: 10). Additionally, the hostile political rhetoric emerging during the discussion and debates of the Malaysia Deal in 2011 has the potential to create negative and deviant images of a group of people who are seeking help and protection in Australia (Gatt 2011: 215).

Jumping the Queue
Delineating legitimacy according to the mode of arrival of asylum seekers is directly linked to the idea of a ‘queue’ in the application and acceptance process for refugees. In public debate, the political discourse often constructs the ‘queue’ as a concrete entity that asylum seekers and refugees should join in order to be resettled to another country (Grewcock 2009; Mares 2002b). The current analysis revealed that the image of the ‘queue’ is connected with notions of genuineness, such that those who join the ‘queue’ are ‘genuine’ asylum seekers and refugees. Alternatively, IMAs are depicted as ‘non-genuine’ because they acted in the wrong way by not joining the ‘queue’. By using this language Federal Parliamentarians are constructing ‘good’ and ‘bad’ asylum seekers and refugees:

The message to people smugglers and to asylum seekers would be that if you risk your life and spend your money on getting on a boat trying to come to Australia, you risk being taken to Malaysia and being put to the back of the queue. Malaysia is a country with tens of thousands of refugees who have genuine claims which have been processed and with no prospect of resettlement. (Gillard, House May 10, 2011)

These depictions were prevalent in the Parliamentary discourse, with politicians from both the governing Labour Party and Opposition Liberal National Coalition Party consistently emphasising the importance of the ‘queue’, ‘waiting’ and orderliness of the migration system. The analysis revealed that the political discourse constructed offshore applicants as adhering to the ‘organised and balanced system of migration’ and appropriately ‘waiting’ in the ‘queue’ (Marles, House September 22, 2011). Contrastingly, IMAs are constructed as bypassing this proper process and seeking asylum through inappropriate channels. Federal Parliamentarians often contrasted these two groups of people against each other during the discussions of the Malaysia Deal. Coalition Senator Back demonstrates the delegitimisation of those considered ‘queue jumpers’:

… people who have been through the UNHCR process, the very people who have been accepted as humanitarian refugees to come to Australia, are languishing in refugee camps in Africa, Asia and elsewhere, whilst others jump the queue. In the event that these people are genuine, let them be processed in the genuine way and let them join the queue – but at the end of the queue. (Senate June 16, 2011)

In this statement, Back constructs an image of two distinct groups of people, ‘legitimate’ offshore applicants and ‘illegitimate’ IMAs. ‘Waiting’ in refugee a camp overseas is consistently constructed as the only legitimate way of seeking asylum and resettlement in Australia (Mares 2002a; Phillips 2011; Grewcock 2009: 119).

The concept of a ‘queue’ is used constantly in discussions on asylum seekers and refugees, designed to represent a tangible and orderly entity that is joined by ‘legitimate’ asylum seekers...
and refugees (Grewcock 2009: 130; Every 2006: 173). The 'queue' is constructed as an impartial decision making process which is unaffected by social and economic characteristics of individuals (Every 2006: 173; Gelber 2003: 25). As was found in this analysis of the Parliamentary discourse, an individual’s deservedness of resettlement to Australia is dependent on their place and preparedness to wait in the ‘queue’, and not on their ethnicity, class, gender, health or level of fear (Gelber 2003: 25). The consistent emphasis on ‘waiting’ and the ‘queue’ in Australian political discourse during discussions of the Malaysia Deal is consistent with the wider body of literature suggesting that IMAs are often constructed as different from offshore applicants in terms of their status as ‘legitimate asylum seekers’ (Grewcock 2009; Gelber 2003; Every 2006; Pedersen et al. 2006; Every and Augoustinos 2008).

**Ability to Pay**

A third implicit criterion for legitimacy established in the construction of asylum seekers and refugees concerned the wealth of arrivals, resting on the assumption that only those considered to be poor were ‘genuine’ refugees. Federal parliamentarians from the two major parties consistently questioned whether IMAs were ‘legitimate’ refugees by depicting them as ‘wealthy’ individuals, highlighting their ability to pay people smugglers for passage to Australia, while asylum seekers and refugees who cannot afford to pay were constructed as ‘legitimate’ and more deserving of protection. For example, the Leader of the Opposition in the Senate, the Honourable Eric Abetz uses the notion of payment to delegitimise IMAs and increase the legitimacy of those in refugee camps overseas:

> We heard from the Greens that we are dealing with allegedly the most vulnerable people, those who are paying literally thousands and thousands of dollars to people-smugglers to come to Australia. They freely enter Indonesia, they travel there freely with no problems at all and then pay a criminal people-smuggler to get them to Australia, having thousands of dollars at their disposal. (Senate September 21, 2011)

By using the words ‘allegedly’, ‘freely’, ‘rich’, and ‘force’, Abetz is questioning the vulnerability of IMAs because they have the ability to pay people smugglers to facilitate their journey to Australia. Abetz simultaneously constructs offshore applicants as ‘legitimate’ because they do not pay for passage. Labor MP Chris Bowen again demonstrates the delegitimisation of IMAs through the distinction between those who pay people smugglers and those who do not:

> Five to one is a very good outcome because it means that Australia is resettling more people who have been waiting a very long time in difficult circumstances and who do not have the money or the inclination to get on a boat. They should not be forgotten in this debate. These are the forgotten people of this debate... (House May 15, 2011)

What is occurring in the Federal political discourse, through the emphasis on the supposed wealth of IMAs, is the construction of two distinct groups of asylum seekers and refugees: legitimate and illegitimate. ‘Legitimate’ asylum seekers are those who cannot afford to pay people smugglers to facilitate their journey to Australia and languish in horrible conditions in overseas refugees camps. ‘Illegitimate’ asylum seekers are wealthy individuals who use this to their advantage to travel to Australia ‘unlawfully’. Notably, this focus on wealth was limited to discussions on irregular maritime arrivals, attaching another layer of illegitimacy to this group. Federal parliamentarians never discussed the wealth of offshore applicants and other types of onshore arrivals, for example, those arriving by plane.

The implication of this construction is that IMAs are perceived as acting unfairly, and gaining unwarranted advantage (Every and Augoustinos 2008: 574). Those who have the ability to approach people smugglers may be more fortunate in some ways than those who cannot pay,
but this does not necessarily increase their sense of safety, reduce their vulnerability or their legitimacy as an asylum seeker (Mares 2002a). Through emphasising an individual’s ability to pay their way to Australia via people smugglers, Federal parliamentarians from the major political parties are creating an image of wealthy asylum seekers. This perception of wealth is juxtaposed against the widely held image of poverty, persecution and suffering that causes an individual to originally seek asylum (Crisp 2003: 75). A dichotomy is thus created where ‘good’ asylum seekers and refugees are those that are resettled from overseas and did not bypass the formal system, and ‘bad’ asylum seekers and refugees are those that travel to Australia “under their own steam” (Mares 2002a: 25).

Conclusion
Throughout discussions on asylum seeking and refugees held in Federal Parliament surrounding the Malaysia Deal, their categorisation as belonging to two distinct groups, legitimate or illegitimate, dominated the political discourse. The use of inaccurate and misleading language labelling some asylum seekers as ‘illegal’, and others as ‘genuine’, perpetuated this construction. The application of these labels was determined according to an implicit criteria based on the mode of arrival of asylum seekers, their place in the queue, and their ability to pay for their passage to Australia.

Through Parliamentary debates, the Australian Federal Government has conveyed a message that the only ‘good’ and ‘genuine’ asylum seeker or refugee is one that is rescued from a UNHCR camp, while ignoring the legitimacy of those who flee persecution and seek asylum and arrive onshore irregularly (Green 2003: 9). The term ‘illegal’ was most often linked with boats, further delegitimising this mode of arrival and the people who travel this way but Federal parliamentarians also used this term to represent ‘queue jumpers’ and those who have the ability to pay people smugglers to facilitate their journey to Australia by boat. By depicting IMAs as illegal, Federal parliamentarians are also creating an image of an alternative and distinct group of people who are portrayed as ‘legal’.

These informal criteria for determining the legitimacy of asylum seekers and refugees bears little relation to the actual criteria by which refugee status are granted. While it is widely acknowledged that it is not illegal to seek asylum, nor is it illegal to travel to this country in an irregular manner to do so, Australian Federal politicians continue to create a perception to the contrary. Through repeated references to ‘queue jumpers’, and the suggestion that only poor people can be victims of political persecution, Federal politicians further delegitimise those who arrive by boat. In this discourse, politicians are guilty of applying their own exclusionary pre-conditions for legitimacy, and establishing a false dichotomy in which only some people fleeing persecution deserve protection.

1 The ‘White Australia’ policy refers to historical immigration policies that favoured immigrants from certain countries. Under this policy only Europeans and more specifically, northern Europeans could immigrate to Australia, with the intention of promoting a homogenous population (Crock and Berg 2011; DIAC 2009).
2 In August 2001 the Howard Government refused a Norwegian freighter, the MS Tampa carrying over 400 rescued asylum seekers, entry to Australian waters (Phillips and Spinks 2011). This resulted in a standoff between the Norwegian freighter, the Norwegian Government and the Australian Government, ending with Australian SAS troops boarding the Tampa and taking control of the ship (Phillips and Spinks 2011; O’Doherty and Augoustinos 2008, 577)
3 The Pacific solution allowed some of Australia’s territory to be excised from the migration zone to deter asylum seekers and refugees from arriving on-shore unlawfully, and implemented offshore processing in these excised nations (Phillips and Spinks 2011, 13)
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Access to Safe Justice in Australian Courts: Some Reflections upon Intelligence, Design and Process

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Conference Sub-theme: Courts, Law and Justice Institutions

Abstract
In the last decade there have been great strides taken in making courts and judicial processes less intimidating for those who come into them, principally through the provision of CCTV (to enable evidence-giving from remote rooms), volunteer court visitor information services, victim assistance programs, duty solicitors offering legal aid, and training of court staff. Good security science, too, has made courts more secure, physically, for those who visit them. Whether security services have been drawn from a sheriff's department or have been contracted ‘in’, the end result has been a strong (and growing) emphasis upon risk management of courts and the safety of those who enter them. After all, governments and courts have a responsibility to protect those who work in, or who visit, court precincts, as visitors, as clients or as administrative or legal professionals. But the upshot of this is to paint a general picture of defendants as security risks. The question thus arises: to what extent is it possible to secure courtrooms to an optimal degree without jeopardising the important feature of curial ‘openness’? By examining the way in which courts now operate on a daily basis around Australia, and by looking at some new ideas regarding court structure and processes, this paper seeks to answer this enduring question.

Introduction
Developments in security awareness, risk assessment and safety preparedness have come about in response to the fact that courtrooms and their environs are dangerous places (Sarre and Prenzler 2012). For example, there are each month, on average, three hundred ‘security incidents’ in NSW courts (NSW Attorney-General 2009). There is, thus, in Australian courts, an ever-present threat to the safety of judicial officers, court staff, litigants, legal aid officers, court volunteers, the public and accused persons on trial. There is, concomitantly, a moral duty resting on the state to ensure that the courts are operated in such a manner as to prevent or forestall harm to anyone in or around them. Indeed, there are legal risks associated with poor security, namely potential civil liabilities attached to any government that does not secure persons adequately while they are in courtrooms or court precincts (Sarre and Prenzler 2012).

There are three discernible ways that courts’ departments (and the government ministers responsible for them) have undertaken the task of assessing and alleviating risk.

The first is improving the process of collecting data and the quality of information used in decision-making, whether that involves a focus upon security levels, processes (such as prisoner transfer and security screening), placement of witnesses and families, judicial officers, and prosecutors. This can be referred to as ‘intelligence’.

The second is the organisation of court spaces, which become the focus of attention after any security breakdown. This involves separating warring factions, having suitable entrances and
exits, having a flexible range of rooms available, and protecting magistrates or jurors from being spat at or insulted. There is growing evidence that particular layouts of courts improve comfort, access, and feelings of protection and safety. This can be referred to under the rubric ‘design’.

The third is a focus upon staff training and management, detailing, for example, how court users move through a building and into and out of courts or what they may require to feel less anxious. This can be referred to as ‘process’.

Each of these issues was examined in a qualitative study that was completed by a research team in 2012. The authors have been a part of this research project investigating how court safety in Australia could be enhanced by managing people, processes and places.¹

Methodology

Several methods were used in this study, including activity maps (tracing flows of people through court spaces across the day), analysis of incident reports, interviews with key informants and user juries (groups of advocates walked around courts, recording their impressions and comparing notes in a debrief). This paper draws on the third of these sources, interviews with registry staff, security officers and victim support officers in the participating jurisdictions.

The data collected from these interviews provided information from those who have knowledge and experience of the court environment, its historical and cultural contexts, specific encounters and different types of court users and personnel. It provides a useful insight into the way security and safety issues are understood by those at the front line of service delivery.

Findings: Intelligence

Four safety and security aspects were identified as most important to addressing and managing risk: i) improving the communication and the sharing of information across security personnel within courts and across jurisdictions and states; ii) security personnel working collaboratively and cooperatively with court staff and the judiciary on ‘safety planning’; iii) encouraging more thorough reporting of critical incidents; and iv) implementing proactive (not just reactive) approaches to reducing or avoiding incidents in or around the courts.

The aim of improving communication and the exchange of information across security personnel involve developing better technologies and systems for data collection and dissemination, employing specialised security analysts to assess the data collected, as well as establishing strategic and coordinated security across all court jurisdictions. In Victoria, this last objective has required the formation of a court security operations committee with operations managers from each jurisdiction represented, along with representatives from the police, corrections, the Judicial College of Australia and others deemed appropriate to discuss security strategies. Similar meetings among state representatives was said to be important not only to establish Australian standards for court safety and security but to also share information about how each security unit responds to or prevent incidents and risks.

One of the reasons given for the importance of developing better communication methods and security strategies arises from the fundamental differences between state and criminal and family or federal law courts (Security officer 2012). A one policy or ‘one size fits all’ approach was said to be inappropriate and ignore the complexity of the justice system and the different degree or type of security required:

Security – it’s multi-jurisdictional ... there's a lot of spread there in terms of security issues and safety issues ... along with the resources. There are flagship buildings like this [the Federal Family Court] at the higher end and then a circuit in a country town
where there's no security guarding presence at all, so that's quite a challenge to cater for all of these issues and responsibilities across the board. (Security officer 2012)

This perspective ties in with security personnel wanting to work collaboratively and cooperatively with court staff and the judiciary on 'safety planning'. This involves court staff providing information to security, reporting on incidents or possible risks, and understanding the role security can have in improving the operations of the court. Related themes emerged from interviews with court staff. They also expressed the relevance of working with security personnel and managing information appropriately in order to ensure court users' security and safety:

From there we developed our security database, so when we make a security plan, we then sent a copy of that plan to security. So if we'd gotten [a client] coming in tomorrow and she needs a secure escort and we're putting her in a secure room, they have all of that notification sent to them as soon as we've made a plan. ...We also sent it to what we'd call the event owners. An event owner is a court staff member who could be dealing with that issue. It could be one of our family consultants, if it was a children's matter or it could be a post coordinator who is assisting in the management of the matter that's going before a judicial officer. ... A copy of that plan goes to anybody and everybody involved in that, so that they're all aware of what's going on. (Registry officer 2011)

Interviewees also highlighted the importance of written notifications:

We've got our case track database on which you can make what are called operational task notes. Anybody can do it. And that would alert anyone looking at that case that particular attention needs to be given to security planning. We might notify our security staff of the case when it's next listed. We might actually ask for additional resources, as in guards. We might post a photo of a particular person in the security control room so they know to look out for that face. (Registry 2012)

Court staff also said that they are more able to concentrate on their work and to better address issues that arise with court users once they know their personal security is guaranteed:

So from that perspective I think it makes us more calm, as staff members knowing that you'd be very unlucky for something to get through to harm us. And I think that helps us get on with the business of what we need to do, rather than worrying about our personal security. (Registry officer 2011)

To implement a proactive approach to security and safety required personnel and court staff to consider similar types of training in customs type profiling, the reporting of incidents and dealing with confrontational behaviour. In this way, fostering a shared knowledge of protocols (not only the sharing of information) could support a concierge or a very implicit security approach by all personnel within the court system. The other significant feature of a proactive approach was the collection of information that could enable the development of a profile or picture of what is happening over time that could aid in minimising or preventing incidents occurring:

... we can be proactive not just in bringing in personnel to address the issues but also being proactive in treating the individuals who are coping the abuse ... We can also proactively minimise the number of incidences likely to occur at court [by developing] solutions to [identified] problems by consulting with the CEO of the court, the police, and court staff ... (Security officer 2012)
Planning ahead and developing methods to improve the courts operations were directly linked to improving how all personnel reported incidents. Although there was confidence that most ‘aggravated serious incidents’ were being reported, it was ‘difficult’ to get people to report [general] security incidents. These incidents were those related to subtle intimidation actions by polarised groups of people (such as hand gestures, menacing stares, walking or standing close to the ‘other side’).

Some of the examples given by security to minimise or prevent risks were to i) change court listings or times to reduce the numbers of court users coming to the court at one time and ii) to consider specific jurisdictional problems and the use of the most appropriate court in terms of facilities and personnel. A marshal of a federal court strongly expressed that, if a matter to be heard involved heightened emotions, then secure state courts should be available and utilised if no secure federal courts are available in a particular jurisdiction:

In many cases, we have arrangements behind the scenes where we make a note of problem people and proactively make sure there’s a guard in the presence when they come before a court the next time. And, most often, the vast majority of cases, that’s all we need to do. (Security officer 2012)

Other important considerations that emerged from the interviews related to the nomenclature used by security personnel and risk management specialist which signal some of the changes in approach discussed above. There is a greater focus on the use of the word ‘safety’ rather than ‘security’. The former can be the preferred term because it was determined that people are more likely to respond affirmatively and to accept advice in relation to their safety rather than their security. There is also a greater emphasis given to the psychological safety of court users and staff. If not preferred, the addition of safety in defining the operations of security personnel has occurred. For instance, the new position of a Safety and Security Manager for all courts and tribunals in Victorian was created in 2010. Both security and safety components are to be considered by this manager which involves not only attending any security incident that impacts (or may impact) on the good order and running of a court or on court staff, but also being attentive to anything including anyone else coming into the court environment:

… In relation to [our] duty of care … I think [there has been] a subtle shift in court thinking in that, once upon a time, we primarily thought about staff security and safety, but now we increasingly think about safety and security for everyone coming on to the premises. So that’s a subtle but significant shift. (Security officer 2012)

Findings: Design

Today, in and around Australian courts, security systems and other security tools such as duress alarms, CCTV monitoring, hand held scanners and metal detectors are now commonplace. Courts administrators have taken extraordinary (and expensive) steps to ensure that those entering their courts pass through a secure point of entry, and that corridors, conference rooms, meeting places and bathrooms in and around courtrooms are designed with safety and security in mind. To do this effectively, they have engaged the assistance of design experts, and newer courts have reaped the benefits of modern design expertise. This work has been designed to ensure that those who enter courts are not intimidated by the process. Given that the security screens may quell some concerns about physical security, the redesigning of how people are located in space and the type of encounters they have with staff, can enhance their feeling of psychological safety. Passive surveillance in the waiting area alongside accessible staff are methods to enhance having court matters dealt with more effectively.
It was revealed that, somewhat counter-intuitively, court registry counter staff were less likely to be harassed or vilified by visitors when (glass) barriers were removed from and replaced with interview desks, where clients could be seated to discuss matters:

... We found that here, that clients are far better behaved when we're more open and accessible. (Registry officer 2011)

A similar view was expressed by a security officer:

We used to have four to five counters here where we had constant security incidents at the counter. If you look outside now, the counters have gone and we don't have security incidents. (Security officer 2012)

When we had the bank teller-style counters with the plate glass, ... the behaviour of the staff member, the demeanour of the client, is profoundly affected by standing up and talking through a slot in plate glass as compared to sitting down ... as equal partners, getting the transaction done, sharing the screen when necessary, and the papers. I think the effect is not only [improved] security and risk management, but just the dignity that that affords the public is quite profound. (Registry Manager 2012)

The change from the 'bank-teller counter' to new arrangement is described as a 'sit-down counter service'. From the perspective of security, this arrangement has been 'highly effective', but only in courts where roving security are present along with competent trained court staff at the desk. The other elements that contribute to this type of arrangement feeling safe for court staff is the inclusion of a duress button (situated under the desk, if required) and knowing that court users are screened for weapons. It was also stated that the sit-down counter service generally requires an improved understanding of the respective roles played by security and court staff, and the importance of the sharing of intelligence between them.

This cooperation and consideration also extends to court staff and security being consulted by court designers in regards to the use of space, and the furniture, interior colours and finishes chosen. The Dandenong Court in Victoria was mentioned as a good example of a new refurbishment and one that was based on a consultation between court staff, security and designers:

[The waiting area] is a relaxing place visually [with] a combination of leather furniture that can be moved, bucket chairs, ottomans and sofas, with low wooden screening, and it sort of stays in all its constellations, but during the day, people will actually move it slightly in order to speak to each other or confer with their lawyer. It's carpeted. The colours were chosen with a high level of thought. There were psychological considerations given to the colours chosen. (Registry staff 2012)

There has been a view long held that furniture should not be of the type that can be employed as a weapon. That view is now being challenged:

People say, 'You can't have moveable chairs. Someone might pick it up and hit each other with it'. They won't. If you create a dignified, respectful environment, complemented by the presence of roving security officers and capable staff, the likelihood of someone picking up a chair is so low, and the advantages of having that flexibility and the amenity of that sort of seating is overwhelming to me. (Registry staff 2012)
We want access to justice for all of our clients so to give them proper access and to get those court matters dealt with efficiently and effectively, clients should feel comfortable and feel safe coming into our building, and we should be doing our utmost to make sure that happens. (Registry officer 2011)

However, there was concern from a security perspective that architects believe that they know how a court can function, ‘without consultation or due diligence’ and that their approach can have an ‘impact on the safety of a victim or court users’ generally (Security officer 2012). This security officer questioned whether you can have ‘court design 101’ that will work in all locations and for all purposes considering the variety of court buildings that exist. It was states that there is a tendency to miss the point ‘that security does have to stand alone sometimes and can impact [on the] final design’. Getting the architecture right and the security concern was said to be very delicate. It was very important to consult and engage a whole range of people from ‘Heads of the Jurisdiction, to the police’.

It’s a real balancing act … [because] we have [different] demands and we have what’s not negotiable and what's going to compound the security risk exposure. (Security officer 2012)

The example of where to place security screening either before or after the registry illustrates this tension of different demands. For security, to have the screens after the registry all the time would require a concierge type service that may not be available in all courts (mainly due to resource difficulties). There is also a concern that there can still be security incidents with this type of service. The other factor is the volume of people of the court and this was said to be ‘something that needs to be factored into all of this’ (Security officer 2012). For registry, the positioning of the screens can make a big difference to the court user’s experience as well as how they navigate the court building:

The building wasn’t designed to accommodate that infrastructure. We are a flagship building but the whole setup is quite bad; it’s squasy, we get bottlenecks, and the noise is appalling when people come through. [This] affects people's sort of psychological status as they move into the buildings. (Registry officer 2012)

The desirability of a concierge desk or reception desk is an interesting one. We've just systematically gone around, taking funding away from that, or re-allocating that resource in our security staffing, and then some of us more recently have been persuaded, maybe that was counter-productive [because there is no staff to help people navigate the court building]. (Registry officer 2012)

With the variety of court buildings that exist, it was acknowledged that the older court precincts were generally designed more for functionality than safety and continued to give rise to concerns:

On this floor, the men's [toilets] are over here and the ladies’ are over there ... you have to go down a dead end to get to the toilet. So you get cornered in that area – and that’s one of the things that the previous registry manager had a real issue with ... And a lot of it isn't about what is going to happen, it's what may happen. And in your mind – if you’re fearful of that person because something's happened before, just the possibility of something happening is enough. It doesn't have to manifest itself in anything. You'd be pretty silly to start anything physical in this place, because there’s a million people around. But ... the possibility of that is enough. (Victim support officer)
With heritage buildings and addressing security issues, changes in technology is said to be of assistance such as installing wireless CCTV cameras in courts or investigating hardware that allows swipe access for staff which has improved their everyday work environment and security.

Newer courts have been able to use the research into design that has been undertaken in the past decade. With court design there was said to be an ‘interesting dichotomy’ between creating open spaces (like larger foyers, using glass walls for transparency) and turning our courthouses into fortresses. Although for some, the court design should ‘communicate the authority of the jurisdiction’ (Registry 2011) and contribute to the ‘respect for the jurisdiction’ (Judicial officer 2012). For others, this did not have to be at the expense of court users’ feeling a sense of ‘confidence and dignity’ whilst in the courtroom, feelings that were said to enhance their sense of safety (Registry 2011).

Findings: Process

Generally speaking, the last decade has seen the development of significant policies and procedures manuals concerning safety and security in and around courts. These procedures attempt to reconcile the need for risk amelioration and appropriate security with curial openness. It is simply not appropriate to turn any courtroom or court building into a fortress. In dealing with the strains that will emerge from a state taking this stance, courts departments have determined, accurately, that staff recruitment and training is vital. The key areas of training have been identified as the development of a strong culture, matching the security to the environment, and reminding all staff to be constantly security aware. It is, according to the court employees with whom the researchers spoke, not simply a question of force or power, but an appropriate and intelligent use of that power, and careful selection of staff and staff attributes:

When I first started about ten years ago, the sheriff’s officers were mostly ex-military men, usually just before retirement. They were in their 50s, or 60s. They’d come out of the military with a bit of power but didn’t want to retire and they were very firm. They ... were very brusque and they were very militarised. And then slowly ... the entry qualifications changed ... and a lot of quite small ... women and small much older men were hired and I asked somebody one day about this and he said, ‘It’s a psychological thing’. He said, ‘the more these big bruiser guys tried to intervene in brawls the more they brawled ...You send in a little guy with white hair and about five foot five ... No problems, the little fragile women were going to go ‘oh, this is disgraceful, stop immediately’ and they go, ‘Oh, well, sorry madam’ ... They also have a sixth sense about when trouble’s brewing. (Victim support worker 2012)

The implementation of the ‘management of difficult people’ in the court environment has not occurred due to a singular policy document per se. According to many security personnel interviewed, progress in security and safety have come about by recognising the significance of attitude and on-going training:

We can rely on technology and practices and procedures all you like, and it’s certainly very helpful. But at the end of the day, if we’ve got staff who are working as a team, looking after each other and professionally trying to do what's expected of them, they do wonders. And I can remember coming to the court many years ago, before we had guards in a lot of places, and you’d often have a staff member do courageous things. You’d have Grizzly Adams walk in and threaten everyone, and in a loud, booming voice say he’s going to blow up the court. And a petite little staff member would walk out and say, ‘Listen, mate, just calm down. Do you want a cup of tea and I’ll give you a hand with the forms?’ (Security manager 2012)
There is an expectation of the guards that they will de-escalate heated situations as distinct from being authoritarian and ‘showing people the door’ or too quickly resorting to a phone call to the police. There is a greater focus on employing a security company with the right attitude and to have them undertake in-house training. This training may involve all security staff and court staff. The type of training identified ranged from reporting on incidents to dealing with confrontational behaviour and mental health issues. Other training involved detecting behaviour and being aware of possible risks:

Customs type of profiling (which is different to ‘social profiling’) and is about understanding a range of body language, how [a person] is presenting … how they carry themselves … their nervousness, [observing] their type of attire, whether things could be hidden [like a glass knife that cannot be detected by screening]. (Security manager 2012)

There was also a greater appreciation of the distress that attending court can have on court users and that security staff needed to be attentive to what could cause or exacerbate anxiety, aggression and abuse:

If anger, aggression and abuse aren’t treated, [the court user will] end up in a threatening situation which may, if it’s not treated, result in an act of violence. I think it’s inculcating the staff with the spirit that people come to us under times of great personal stress getting staff to appreciate that people are walking in under already heavy personal pressure and may have difficulty with quite convoluted forms and processes and terminology. (Security manager 2012)

Some of our best staff are the staff that simply operate at the level of the person walking in the door and communicating with them and who assist cooperatively with the person to try and get through whatever the task is at the time. And you see that in country courthouses all the time with appalling security. There’s no barriers. (Security officer 2011)

The emphasis on training has also been designed to decrease any inappropriate comments at entry screening. Staff, it was said, need to be professional and speak in a courteous manner and not belittle a person. It was acknowledged that not having these skills could cause a major incident. The importance of communicating well was also due to security personnel needing to be able to work with all types of people at the court including the administrators, the judiciary, the Attorney-General (who attends the courts regularly for meetings with ministers), and the Executive Directors.

Training in being respectful provides another level of safety beyond physical barriers and metal detectors:

Look at [the way] some of our horror clients [have been managed]. When they started they were really stormy and horrid. And as we got to know them, and we built up a – I’ll say a level of respect with each other. They’re not so horrid when they come in. They’re actually quite approachable, they’re angry at the decisions that have been made in court, but they’re not blaming us. In the early days of coming in, it was all our fault. No matter what happened in life it was our fault. Whereas now they come in, and they’ll be a bit huffy but – I’m going to say we got used to it because it’s not a nasty narky-ness, it’s just they’re fed up with the process, they’re here to follow something else. But we can deal with it. And they’re quite polite with us now, in their own way. (Registry officer 2011)
With the advent of courts hiring private security guards, the court administrators, security managers and marshals commented on how this arrangement is continuing to evolve and that this requires further discussion about practices, processes and results:

We’re a very interesting outfit in terms of contract security guards because increasingly the guards are being used in more and more ways that they weren’t used in the past. The police won’t do anything about those lower-level matters [in the courts], which may very well amount or escalate to a more serious security incident. We deal with a variety of incidents through in-house treatment management options. (Security manager 2012)

Having some uniformity across all the courts despite the different security providers was also said to be important. One way that this may occur is to have ‘the same standards, same KPIs, same contract requirements and standard training’. Such an approach could also contribute to security personnel having ‘clearer career paths’ which may assist security companies in ‘retaining their staff’ (Security officer, 2012).

In sum, and generally speaking, there has been a commitment by governments in the field of training to embrace performance measurement and evaluation with a view to continuous improvement.

Aside from recruitment and training, there are also strict procedures in relation to emergencies. For example, there may be a notification of a siege, a hold-up, an evacuation, a power failure or in the event that someone with a disability needs entry screening. This also extends to what arrangements are not appropriate for staff in their interactions with clients:

And he said ‘I want to go into a room with you. I want to discuss this in a room’. And he’s a big, big man. And I just said to him ‘No, we’re going to talk at one of the other counters. We’ll sit down, face to face and we’ll talk’. And I think he must have sensed that I was a bit frightened of him, because I didn’t want to go into a room alone with him. Just in case it got a bit out hand, how would I get myself out? And when we sat down, he goes ‘I apologise, if I’ve intimidated you in any way I’m sorry’. And I said ‘It’s okay, I’m a big girl, I can handle it’. ... We don’t have to be that private that my security is compromised. [So we stayed at the counter] And so he understood that, and he accepted it. And I think he was very sorry that he’d frightened me a little bit, because he – just physically, he had that physical presence and I didn’t like it, but ... I could say ‘no’ without it being a ‘no’. (Registry officer 2011)

Over the last quarter century many of these security processes have shifted from public to private hands. This has been part of a wider and broader trend towards privatisation of security functions generally (Sarre 2005; van Steden and Sarre 2007) and is a consequence of continuing pressure by governments to involve non-state actors in their own security (Prenzler 2000; Johnston 2003; Button and George, 2006; Stenning 2009).

While the employment of private staff to undertake security measures used to be referred to, colloquially, as contracting ‘out’ of such services, the more favoured term is now contracting ‘in’. The importance of this distinction cannot be overstated. When some function is contracted out, there is usually a corresponding outsourcing of legal responsibility. When a function is contracted in, the legal responsibility rests firmly with the principal, in this case the various courts authorities. The debate over legal authority, responsibility and liability in this process is not an unimportant one (Sarre and Prenzler 2009) but it falls outside the parameters of this paper.
The handing over to the private sector of responsibility for court security, however, does have the potential for risk:

The delegation of powers and duties to private interests to meet particular social needs does give rise to a series of potential management, cooperation and accountability problems, especially when private correctional and custodial and related services operate without adequate inspection and proper democratic oversight. (Baldino, Drum and Wyatt 2010: 418)

How does one ensure that those who are contracted ‘in’ to undertake such tasks do so with the care, attention and responsibility that befits the role? The Inspector of Custodial Services, who reviewed this issue in the context of the Western Australian correctional contracts in 2007, concluded that the shift to private operators had been without difficulty:

It is now justifiable to say that the court custodial services aspect of the contract is working reasonably well. The judiciary by and large accept the privatised service model; persons in custody though not universally laudatory are on the whole appreciative of the considerate way in which they are treated; AIMS personnel have good working relationships with both Corrective Services and Police; and the costs to the State for the provision of these services is almost certainly markedly lower than if they were being provided in the previous ways ... (Office of the Inspector of Custodial Services 2007: iii)

Indeed, the security model developed in Western Australia was perceived as the result of a strategic approach designed to assess risk and avert incident by gathering and sharing of intelligence. It involved a roving workforce (which included plain-clothed officers) who worked in concert with the formally placed authorities.

**Conclusion**

Reflecting upon three decades of security developments in the United States in 2007, Cooper wrote as follows:

No longer is ‘court security’ a function to be delegated primarily to the sheriff’s department or other law enforcement agency, but it is rather a critical responsibility of judges and court administrative staff, who must work in partnership with law-enforcement and other professionals to ensure the safety, security, and integrity of the judicial process and the full range of personnel, facilities, systems, and other components upon which it relies. The implications of this shift in definition for judicial administration are also significant. Court security is now an integral part of the responsibilities of court administration, reflecting the increasing recognition that the issue of ‘court security’ and the responsibility for ensuring ‘continuity of court operations’ are inextricably intertwined. (Cooper 2007: 45)

In other words, in the last three decades especially, there has grown a heightened awareness of the risks in and around court buildings, and security has been addressed accordingly, not just by means of barriers and officers’ presence, but by intelligence gathering, informed design work, appropriate training of staff, and the development of manuals and protocols in line with optimal practice models.

There are competing interests here. The security arrangements that are in place should not threaten nor jeopardise the openness of the courts, for to do so strikes at the heart of the notion of the fair trial. The principles of open court, and a fair trial have been a hallmark of our legal tradition for centuries. By the same token, people who use the courts should not be exposed to
unreasonable risks. Finding the most appropriate balance between these two aims is a crucial issue facing legislators, administrators and policy-makers alike.

At the end of the day, what should be our goal?

To me, if I was a client – I look at it from a client’s perspective – I should feel comfortable and confident knowing I can come into a court building, no matter how bad my life has been outside of this place, I should be able to come in here and know that I can put my case before the court and have it heard, and not feel intimidated or have anything restraining or threatening me from doing that … to come in here knowing that I’m going to get my matter heard and it’s going to be heard with nobody interfering with me or how I feel or what I’m doing. (Federal court registry officer)

With the appropriate intelligence-gathering done, the right design work completed and processes in place, this task should be straightforward and productive.

It is clear that not all risks of harm can be prevented, but good governance strategies identify possible risks and minimise their impact. Identifying reasonably foreseeable risks is a duty that remains constantly with administrators. These tasks are to get up-to-date information, training staff to act on it, and monitoring the impact of any staff action or inaction. We should safely be able to demand these responsibilities from those to whom they have been given.

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1 Professor David Tait is the Lead Investigator in this research funded by an Australian Research Council Linkage Grant. The research project is titled Fortress or Sanctuary? Enhancing court safety by managing people, processes and places. LP0882179. The project collected data from three Australian state jurisdictions (Victoria, South Australia, Western Australia) and one federal jurisdiction (Family Court of Australia) over a three year period (2009-2012). The Magistrates and federal jurisdictions were also industry partners on the research. Other industry partners included two architecture firms, PTW and Lyons Architects, one security firm, Conley Walker, and one training organisation, Myriad Consulting. Professor Rick Sarre is one of seven Chief Investigators of the research project. Dr Alikki Vernon became the project manager of the research in 2011.
Regulating Bereavement: Inquests, Family Pressure and the Gate Keeping of Suicide Statistics

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Abstract
This study of English Coronial practice raises a number of questions, not only regarding state investigations of suicide, but also of the role of the Coroner itself. Following observations at over 20 inquests into possible suicides, and in-depth interviews with six Coroners, three main issues emerged: first, there exists considerable slippage between different Coroners over which deaths are likely to be classified as suicide; second, the high standard of proof required, and immense pressure faced by Coroners from family members at inquest to reach any verdict other than suicide, can significantly depress likely suicide rates; and finally, Coroners feel no professional obligation, either individually or collectively, to contribute to the production of consistent and useful social data regarding suicide—arguably rendering comparative suicide statistics relatively worthless. These issues lead, ultimately, to a more important question about the role we expect Coroners to play within social governance, and within an effective, contemporary democracy.

Introduction – the Coronial Gate-keeping of Suicide Statistics
Much is often made of changes in our suicide rates. As a society, we are relieve when we are informed that fewer people are ending their own lives (Australian Bureau of Statistics 2012), confused when we are told exactly the opposite (Haesler 2010), and concerned when our own rates are compared unfavourably with other nations and peoples (Georgatos 2013). It is often difficult to ascertain the precise trajectory of our suicide rates, let alone where we stand in relation to anyone else.

The difficulty here is that suicide statistics are notoriously unreliable. Most research in the area estimates that suicide is significantly more common than our statistics would have us believe (Harrison, Abou Elnour and Pointer 2009). This systemic under-counting may be for a range of reasons. Walker, Chen and Madden (2008) contend that factors such as disparities between jurisdictions, lack of standardisation in the reporting of Coronial deaths, and issues over forms for police reports contribute to inaccuracies in the coding of our data. They also point to the reluctance of some Coroners to reach a finding of suicide in the first place. It is this final factor which forms the focus of this paper.

The central role of the Coroner has always been to investigate deaths ‘considered worthy of inquiry’ (Burney 2000; 3). This would include deaths such as those by accident, where there was some suspicion of wrongdoing, and those by suicide. This became seen as a largely administrative task, conducted in a non-adversarial environment, as part of the effective administration of the populace. However, in addition to the recording, assessing and categorising of death, the Coroner’s role has more recently expanded to incorporate elements of social management and prevention of harm (The Victorian Institute of Forensic Medicine, 2013):
Much of the operation of the office of Coroner or Coroners courts in Australia is centered on injury and death prevention, with the Coroner empowered to make recommendations on matters of public health and safety and judicial administration.

Consequently, the Coroner is not only an essential part of our legal system—in that they manage the relationship between the State, and the death of its citizens, and in particular, those deaths deemed to warrant investigation—now they are also an important element of the process by which the State accumulates social data, data which is used to identify problems and shape policy. The problem here is clear: if Coroners are reluctant to reach a finding of suicide, as Walker, Chen and Madden (2008) contend, then their role in production of valid statistics, which in turn direct social policies and programs (targeting, for example, suicide prevention), becomes significantly compromised.

**Democracy and the Coronial Inquest**

This research seeks to investigate the English and Welsh Coronial Inquest, particularly as it relates to the accurate investigation of potential suicides. In doing so, it also seeks to make some comparisons with how similar deaths are managed in Australia. There are a number of important differences between the two systems. The most significant concerns the role played by the inquest. In England and Wales, all deaths that are considered worthy of inquiry—which includes potential suicides—are necessarily the subject of a public inquest. In Australia, the same deaths are assessed solely on the basis of the documentary evidence, unless specific circumstances dictate otherwise.

It is important to note that the role of the Coroner, and the functioning of the Coronial Inquest, is not just matters of abstract social and administrative interest. It has been argued that, historically, both are central to how English democracy came to be shaped and understood, and as such, questions about how well the Coronial system works, and about how different former British colonies have chosen to refract this original office for their own purposes, continue to be asked.

In *Bodies of Evidence*, Burney (2000) examines the historical role played by the public inquest in placing important checks on State abuse of power, by insisting that all prison deaths—and most famously, the deaths of 18 protesting workers killed by in the Peterloo Massacre in 1819—face public scrutiny and judgment. This notion, that questionable deaths be the subject of public investigation, an investigation accessible to, and readily understood by, all interested parties within the community, became central to English conceptions of justice and democracy. Indeed, much of Burney’s book examines the complex tension that arose within the Coronial Inquest, between the voices of this participatory tradition, and the bearers of new, scientific knowledge that sought to bring medical expertise to the Inquest process, often at the expense of public understanding and involvement.

... the benefit of expert governance, particularly in an era of mass democracy, was that it could draw upon advanced, universalising knowledge in the service of public well-being and, ultimately, public education. Its shortcomings, however, lay in its tendency to stifle the very instruments of civic education—the local, participatory institutions in which an active, informed, and morally elevated citizenry was forged. (Burney 2000: 9)

Arguably, this tension—or at least a modern variant on it (ie. between medicine and the law)—can still be clearly seen within the fabric of contemporary death investigation (Carpenter and Tait 2010). Certainly, there was some expectation that this tension would be evidenced within this study, and there were some minor examples of this. However, what was uncovered was a
far more significant tension, a tension between the pastoral and the governmental functions of the Coroner; between what appears to be a therapeutic role (in looking after the well-being of bereaved families), and an investigative and preventative role (investigative, in delivering an appropriate finding, and preventative, in contributing accurate data to inform social policy). This paper will address this specific issue in some detail.

Coronial Inquests and Interviews
This study was conducted within one geographic area in England. The research consisted of observations made at twenty public inquests into possible suicides, followed by hour-long, semi-structured interviews with six of the coroners who had presided over the above inquests.

From the observations made at inquest, three relevant conclusions were drawn. First, there appears to be no single model for running a Coronial inquest. Far from being a uniform and consistent element of the English legal system, the Coronial Inquest takes a wide range of different forms. Though the Coroners are uniformly professional, patient, and skilled at managing grieving families, each Coroner seems to organise their own courtrooms as they see fit. Second, to be able to reach a finding of suicide, the standard of proof is extremely high. In England, suicide determination is based around the criminal standard of 'beyond reasonable doubt', rather than the Australian model, which has adopted the civil standard of 'on the balance of probabilities'. Finally, the Coroners are often placed under significant pressure throughout the proceedings by the deceased’s family not to bring in a finding of suicide. Almost all inquests are attended by family members, and even where they appear inclined to accept a finding of suicide, attempts are still continually made to control the general narrative.

From interviews with Coroners, four further issues emerge, issues which are both tied to the above observations, but which also raise some important questions about just what is going on in Coronial suicide investigations.

Inconsistency between Coroners
First, there exists considerable slippage between different Coroners as to what is likely to be considered suicide, and what is not. There are likely to be a number of reasons for this. As mentioned previously, there has always been a tension within Coronial death investigations between those who regard the process as a useful application of the scientific quest for truth—often exemplified by a different approach to the use of invasive autopsy—and those who place far more weight upon legal processes, and information gathered at the scene of death. This tension extends to disagreement of who ought, and who ought not, be eligible to be a Coroner:

I have nothing against my medical colleagues, but I do think it's a job for a lawyer ... I think that Inquest law is now becoming so complex—it's nothing to do with intellectual ability, but I think you need legal training, and to have performed in the court system to really be able to deal with it. (Coroner 4)

A further reason for a seeming lack of consistency in reaching findings of suicide involves considerable differences in experience, ability, and levels of training of Coroners.

When I started, there was no training whatsoever for Coroners ... the Coroner Society of England and Wales established some training for Coroners; it was pretty limited with a very small budget. There's no requirement for us to have that training ... so there is inevitably a lack of consistency, and there are some people who do not go on any training at all. (Coroner 2)
There are also variations in funding and responsibilities. Some Coroners are well-funded and well-resourced; others are not, which affects their ability to complete the work effectively and consistently:

You go and see Coroners in some other parts of the country and they’re working out of the back kitchen, they’re working out of a Portacabin ... there was one Coroner starting to hold an inquest, could only have the village hall for the day, had to move to the next town to actually conclude the inquest. (Coroner 3)

While these are interesting and relevant in their own right, for the purposes of this paper, one final reason why there appears to be significant slippage between Coroners over findings of suicide is perhaps more important, and more telling, than the others. That is, there appears to be a difference of opinion over the central role of the Coroner; some Coroners take a fairly hard line over their determinations—understanding their role as fundamentally administrative—while others see their role in a more pastoral light, pertaining first and foremost to helping the grieving family.

I’m not a social service. I’m supposed to be making an inquiry on behalf of the State, not on behalf of the family, and if this person has taken their own life, and the evidence satisfies me beyond a reasonable doubt that this is the case, what verdict can I possibly come to other than that that they have taken their own life? (Coroner 6)

Which can be directly contrasted with:

I often engage the family and will say, 'I'm thinking along these lines. What's your view?' Sometimes if you carry the families with you, it's more cathartic—it's totally wrong, but it's a more cathartic experience for them ... you put the family at the heart of the inquiry. (Coroner 4)

It's all about enabling people to get on with their lives ... giving them closure, actually lifting them up and explaining things ... it's not what the law tells us it's about, but that's the reality of what it should do ... (Coroner 3)

### Underestimating Rates of Suicide

The second issue to emerge from the interviews involves the general admission by the Coroners that the Coronal inquest process acts to depress suicide rates, an observation supported by most research in the area (Harrison et al 2009; Walker et al 2008). The Coroners note that the standard of proof is at the very highest end of 'beyond reasonable doubt'. That is, the notion of 'beyond reasonable doubt' is not a singular measure; it is a continuum, with the finding of suicide placed at the furthest end.

The standard of proof of beyond a reasonable doubt as applied in the public prosecution services is quite a lot lower really ... I doubt many people would be prosecuted if you needed the level of sureness you need for a suicide verdict ... Don't misunderstand that there's only one standard of proof, which is beyond a reasonable doubt, but then of course it's up to you to interpret what's beyond a reasonable doubt. (Coroner 1)

Consequently, findings of suicide can be relatively hard to attain, which means that many suicides are classified as something else—even when most impartial observers might have reasonably concluded otherwise. This results in a significant reduction in the numbers of suicides recorded each year.
Every Coroner does things differently, and like I say, a rough rule of thumb—if you’re looking at statistics, I can guarantee that suicide is under-represented. Roughly, I say you could add a third onto the figure ... (Coroner 4)

We’re left with about 300 cases a year which we inquest ... I would say we do 50 suicides a year out of 300—genuine suicide verdicts. Then there are probably about another 30 odd, which probably are. (Coroner 1)

**Family Pressure and the ‘Therapeutic’ Coroner**

The third issue emerging from the interviews explains, at least in part, why many Coroners appear reluctant to reach a finding of suicide. Historically, the desperation of the family not to have a suicide finding by the coroner is perfectly understandable:

If you go back in English law 150 years or so, suicide was an absolutely dreadful thing to do to yourself. You were cheating on God; you would not have any hope of resurrection ... At that stage Coroners had been giving burial orders which said that the deceased must be buried at the junction of four roads with a stake through their body—and no, I’m not getting mixed up with Transylvania here, this is really what it said—where beggars could spit upon their graves as they went past. (Coroner 5)

While some Coroners profess relative immunity to the wishes of family members, others are aware that such wishes often factor into their overall decision-making process.

I think a lot of Coroners—me included—sometimes take a sympathetic view of the family, and perhaps, well, you know ... why leave the family with the stigma of this, when we can actually make their situation better? ... So, I think Coroners, to some extent, are softies, and might not necessarily bite the bullet and say, yes, this is suicide. (Coroner 4)

They tend to come in numbers. If you’ve got 10 members of the family with their eyes burning on you, and they really don’t want that verdict, it is very, very hard ... (Coroner 4)

This can be contrasted with the standard stated approach:

A Coroner has to divorce his own sensibilities from his legal responsibilities. (Coroner 5)

It boils down to evidence as far as I’m concerned. It boils down to evidence, and if there’s doubt ... I wouldn’t be persuaded just because they’re all shouting [the family] ... I’m afraid you’ve just got to be robust about it and stick by your guns. (Coroner 2)

Clearly, there is a division here between those Coroners who see their principal task as providing comfort and closure to grieving families, and those for whom the job remains steadfastly administrative. Interestingly, this tension may well be relatively new, as there is little sign of it in Burney’s excellent book mentioned earlier, on the English Coronial inquest during the late nineteenth and early twentieth centuries. What may have happened here are the effects of what Freckelton (2008: 576) refers to as the rise of ‘therapeutic jurisprudence’—defined as ‘the study of the role of the law as a therapeutic agent’.

Within this approach, the law is not simply a set of codes to be followed without reflection, much in the manner of Legal Positivism; such codes have consequences for all those caught up
in the proceedings. As such, our legal institutions, and those charged with making them work, are now deemed to have some responsibility for the mental and emotional wellbeing of all participants. King (2008: 4) is quite explicit in his call for an increasingly therapeutic approach to Coronial practice:

Coroners’ work is intimately connected with well-being—a concern of therapeutic jurisprudence. Part of the Coroner’s role is to determine whether there are public health or safety issues arising out of the death and whether any action needs to be taken to remedy any problems, particularly those that may cause future deaths ... Moreover, the dead person’s family suffer grief and, depending upon circumstances of the death, significant trauma.

Coroners vs. Statisticians

Such ‘therapeutic’ concern for the wellbeing of the grieving family leads on to the fourth and final issue emerging from the interviews. It is clear that Coroners feel under no obligation to make their findings amenable to the production of accurate and useful suicide statistics. As can be seen, most see their task as a fundamentally administrative function concerning the management of particular kinds of death, as well as helping families deal with the passing of a loved one. They do not see their job as making life easy for those charged with turning such deaths into meaningful numbers, and by adopting this approach, Coroner’s become—consciously or otherwise—the principal gatekeepers of our suicide statistics.

The statisticians will try and drill down, and sometimes we’ll get psychological surveys of my files ... they go through and the try and figure out what the file means so they get the true suicide picture. So I said: ‘Hang on a second; I sit in court, I’ve heard the evidence, I’ve made a judgment on what’s happening here, and you want to go through the same material to see if you come to the same judgment or a different judgment?’. They said ‘Yeah’. ‘That’s fine’ I said, ‘what you’re doing is meaningless, but just do it if you want to’. (Coroner 3)

We’ve now introduced narrative verdicts which are here to stay as far as I’m concerned, and are a huge boon for the public, and a huge benefit to the Coroner’s court. So I’m not very sympathetic to somebody coming along and saying: ‘well, you’re disturbing our statistics’. Coroner 6

Those Coroners who place greater emphasis upon the non-governmental, non-administrative elements of their job—that is, who emphasise more pastoral, therapeutic approaches to running an inquest—appear to have even less concern for the difficulties faced by those coding statistical data for later interpretation:

You know, I do the job as I think fit, and by trying to put families first. I think I’m as guilty as anyone sometimes of being a softy. I appreciate that it must rankle statisticians completely, but in terms of perhaps the way people can live with themselves thereafter, I think that probably is a better aim. (Coroner 4)

You can make a difference because one of the non-statutory functions which is not recorded anywhere but a lot of us do it, is to try and help the family in closure, without being paternalistic. It can be a cathartic exercise and to that extent I think you’ve justified your own existence, never mind the State’s work which you do. (Coroner 5)

This relative disregard for the governmental aspects of the Coronial role—governmental in a Foucaultian (1977) sense of the word, the effective sketching out of the contours of community
life; numbers and types of deaths being a very important contour—raises questions about just what Coroners’ principal functions ought to be. If the statistics their actions give rise to bear only a passing resemblance to any reasonable ontology of suicide, perhaps that governmental responsibility should be dealt with elsewhere.

Or perhaps it raises questions about which elements of governance Coroners actually contribute to. Rather than simply managing the data of death, do Coroners now form part of the governance of subjective experience? That is, particularly on the issue of suicide, are they now a component of the administrative apparatus that manages the emotional wellbeing of the population? Rose (1990) refers to the notion of a ‘therapeutic community’; it may well be that Coroners have allocated themselves a role within that.

That said, it is important to avoid describing a binary, where none necessarily exists. In his book on education, Hunter (1994) notes that attempts to ascribe simple, two-sided logics to the fabric of the modern school, ignore the complex relationship between its bureaucratic components, and it’s long history of pastoral guidance. The English Coronial inquest appears to have an equally complex relationship between its bureaucratic and pastoral functions, a relationship that has yet to be fully, or even partially, resolved.

Conclusion
This study leads to three central observations: first, given the evidence assembled here, if the British inquest is any measure of the idiosyncratic and locally-organised way in which potential suicides are addressed and adjudicated upon, then comparative suicide statistics (both local and international) are, at best, problematic, at worst, all but meaningless.

Second, while the UK Coroners expressed near unanimous support for the stringent standard of proof required (in spite of the statistical inaccuracies this most certainly produces), and unanimous support for the continued existence of a compulsory inquest for all potential deaths by suicide, there appears to be few advantages in Australia adopting the same protocols and procedures. The only argument that could run counter to this would involve a greater emphasis upon therapeutic models of Coronial practice, which would lean towards emphasising the benefits of suicide inquests in aiding the grieving process of bereaved families. Given the problems outlined above, and given we have no historical expectation of an inquest, let alone the high costs involved and the extra workload placed upon our already taxed Coroners, this seems highly unlikely.

Finally, the important question arises: what is the principal role of the inquest in suicide investigations? There seems to be little agreement among the English coroners interviewed. While most understand and accept their role within the governmental regulation of death, this often seemed secondary to their less tangible pastoral role in helping the families deal with bereavement. The disagreement and relative confusion over their responsibilities may eventually need formal clarification.

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Criminological Research and Institutional Ethics Protocols: Empowering the Indigenous Other or the Academy?

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Conference Sub-theme: Social, Criminal and Indigenous Justice

Abstract
Indigenous commentators have long critiqued the way in which government agencies and member of academic institutions carry out research in their social context. Recently, these commentators have turned their critical gaze upon activities of Research Ethics Boards (REBs). Informed by the reflections on research processes and by Indigenous Canadian and New Zealand research participants, as well as the extant literature, this paper critiques the processes employed by New Zealand REBs to assess Indigenous-focused or Indigenous-led research in the criminological realm.

Introduction
Indigenous peoples from across various Settler Societies have long expressed concern at the impact social research carried out by government agencies and academic institutions have on them and their communities (see Battiste 2000; Smith 1999). More recently, Indigenous commentators have focused their critical gaze specifically upon the activities of Research Ethics Boards (REBs). Thus far, much of the critical Indigenous analysis demonstrates that a considerable amount of REB activity impinges on the ability of First Nation researchers and participants to pursue knowledge construction in ways that suit the epistemological ‘requirements’ of them and their communities. Informed by the author’s reflections on the institutional ethics process and research with First Nations, those of Indigenous Canadian and New Zealand research participants, and the extant literature, this paper critiques the processes employed by New Zealand REBs to assess Indigenous-led criminological research. Key issues identified include a) a general lack of experience and expertise amongst REB members in researching with Indigenous peoples and a lack of knowledge of the research methodologies (including ethics protocols) of First Nation peoples; b) the tendency of REBs in Settler Societies to privilege the ‘liberal’ notion of the autonomous research subject as the focus of their deliberations on ‘right research’ at the expense of communitarian notions of research participation; and c) an reliance on formulaic, tick-the-box assessment processes that inhibit the development of socially contextualised, culturally specific ethics protocols.

For researchers, new and important discoveries, changes in perspective and practice are often the outcome of reflexivity on both research and the research process (Watt 2007). A significant amount of reflective exploration relating to the research processes has focused on the issue of ethics (see Hallowell et al. 2004). This paper seeks to add to the reflexive tradition by reporting on the ethics process in research at a NZ tertiary institution, in particular to explore the tensions that arise in REBs imposing upon First Nation researchers and their advisors and participants, institutionally-focused ethics protocols.
The Research Ethics Board Experience

To assume that the Aboriginal past or knowledge can be adequately explained from a totally foreign worldview is the essence of cognitive imperialism and academic colonisation. (Henderson 1997: 23, emphasis added)

In late October 2009, the author and then supervisor submitted the requisite ethics forms to the REB at the institution where he had recently enrolled for his doctorate. The research project was developed to explore criminal justice policy for indigenous peoples in the NZ and Canadian contexts. The design utilised direct engagement with First Nation advisors, elders' and participants. This is approach is considered ethical conduct within indigenous research practices (Battiste 2007, Smith 1999). As part of the institutional requirements that have arisen in New Zealand universities, ethics applications are required to explain, amongst other things, how consent will be gained from participants. Pre-constructed forms for individual participants to sign are a standard component the application requirements of the majority of Settler Society REBs. However, some REBs note the importance of recognising consent is culturally informed (e.g. Health Research Council 2010). The researcher had recognised and valued the ethical protection of indigenous communities, and sought their advice on ethical research practice.

Directed by the advice of First Nation advisors in both New Zealand and Canada, the protocols were constructed through direct collaboration with participants, elders' councils and experienced First Nation researchers in both jurisdictions. As a result of this collaborative process, a research protocol was developed that privileged collective strategies for eliciting informed consent and gathering data. In contrast to the collaboratively constructed, community-centred and contextualised research protocols developed by the author and his potential participants, the REB in question followed a heavily standardised process for assessing the ethicality of both a researcher and specific project. It was evident from even a cursory glance at the relevant background documents issued by the REB, supplemented by communications between the author, his supervisor and members of the committee, that the focus of their ethics deliberations centred on institutionally-defined risk avoidance and thus, the empowerment of the institution to which they belonged (see for example, www.aut.ac.nz/research/research-ethics for the core documents, guidelines and protocols of the REB in question). The researcher's previous experience with REBs in New Zealand, and as an occasional advisor to Maori post-graduates applying to REBs and their processes, meant that resistance to the ethics protocols he had presented in the application was highly anticipated. This was due in the main to the decision to privilege the ethics protocols favoured by Maori and Canadian First Nation participants in the first instance.

The REB in question had already rejected a previous version of the proposal submitted in August 2009, in which the author had already informed the REBs that privileging of individual-focused protocols for eliciting informed consent was not appropriate for the research. Subsequently, the author and his supervisor carried out further consultation and discussions with research advisors and participants before resubmitting the application in late October of that year. The revised submission included a thorough critique of the REB rationale for rejecting the previous submission, while offering a dual-consent process that ensured the researcher would avoid behaving ‘unethically’, as defined by First Nation participants. The author and his supervisor also sought to placate the REB by offering to use their preferred, individualised process; as set out in this extract from the second submission:

Discussions between the primary researcher and First Nation advisors for this project indicate that the consent-related processes preferred by ... University are unethical and culturally inappropriate for research engagement with these First Nations. It would appear then that a compromise is required, and so the following
process will be used to satisfy the requirements of ... with regards confirmation of informed consent: All individual participants in the research will be informed of the purpose of the research either verbally, or through receipt of a written copy of the PIS, which will be offered to them prior to primary researcher reading out the document ... The process required by ... University will be explained to all participants, who will be informed that the requirements of the institution privileges informed consent evidenced through written, signed documents ... research participants will be provided an opportunity at this stage of the process to respond to the request for written confirmation ... If they do not assent [sic] to the ... process then the primary researcher will acknowledge this fact in their research notes from that particular session.

As anticipated, the REB rejected the compromise offered by the author and continued to attempt to force upon him and the research participants their preferred, individualised consent and ethics process. As a result, many more months were lost by the author and his supervisor negotiating with the REB in question, before we finally received formal institutional ethical approval in April 2010. As indicated in endnote two, the author added questions relating to the issues arising from the REB process to his research schedule. The responses of Canadian and Maori research participants to these questions form an important part of the critical analysis offered in the second part of this paper. However, before this analysis is presented, the growing Indigenous critique of the institutionalised ethics process is explored.

The Indigenous Critique of Research Ethics Boards
Recently, a number of First Nation researchers have criticised the role some REBs operating in Settler Societies play in stifling Indigenous-led, community-centred research, whether in criminology or other social sciences. A common theme of the Indigenous critique has been the contribution made by REBs in the colonising project that was, and is, ‘Western’ research (e.g. Absolon 2008; Bishop 1998; Ellis and Earley 2006; Glass and Kaufert 2007; Schnarch 2004; Smith 1999a; Wax 1991). Indigenous and non-Indigenous academic critique of REBs covers a broad range of issues, including (but by no means exclusively):

- **Individualism**: marked by the privileging of the autonomous research participant, and informed consent processes that force individualised protocols upon collectives (see Ellis and Earley 2006; Glass and Kaufert 2007: 32-33; Piquemal 2000).

- **Limited expertise**: members of REBs often lack adequate disciplinary, epistemological and methodological expertise in Indigenous research/issues, resulting in an over-reliance on tick-the-box approaches that ensure the hegemony of institutionally-acceptable protocols (see Smith 1997).

- **Universalistic tendencies**: characterised by a propensity for utilising research and ethics processes based on Eurocentric notions of ‘right’ (research) conduct, and essentialist notions of what does/does not constitute an ethical researcher which, when combined, result in the eulogising of the ‘individual’ participant and the marginalisation of social groups that utilise collectivist processes for guiding knowledge construction and dissemination (see Battiste and Henderson 2000; Ermine 2000; Wilson 2004).

- **Formulism**: a reliance on standardised, formulaic, ‘tick-the-box’ approaches to research and ethics that mask the complexity of the social context within which research takes place (see Hammersley 2006).

In essence, as a researcher, the experience of REB conduct and the experiences of similar processes shared by other First Nation researchers, correlates with the issues identified in the extant literature. This is especially true of issues relating to consent and preference of Settler Society REBs for privileging individual-focused research protocols. This paper will focus solely
on the issue of the dominance and impact upon the Indigenous research context, of Settler Society REBs privileging of universalistic notions of ‘right’ conduct.

**Universalism**

[T]he white man takes his own mythology, Indo-European mythology, his own logos, that is, the mythos of his idiom, for the universal form that he must still wish to call Reason. (Jacques Derrida 1982: 213)

Universalism refers in the research context to ideological presentations that portray Western ‘social scientific’ research methods and methodologies as applicable to any and/in all social and cultural contexts. The philosophical principles underpinning research-related universalism are presented by Battiste and Henderson (2000: 134) as follows:

Eurocentric thought would like to categorise Indigenous knowledge and heritage as being peculiarly local, merely a subset of Eurocentric universal categories ... It suggests one main stream and diversity as a mere tributary ... [t]ogether mainstreaming and universality create cognitive imperialism, which establishes a dominant group's knowledge, experience, culture, and language as the universal norm.

It is argued here that the research-related universalism presents as a key operating principle for REBs operating in Settler Societies such as New Zealand. This claim is evidenced through the type of case study that forms the basis of this paper, as well as other Indigenous commentaries (Battiste 2007; Coram 2011). Universalism works as a dominant operational principle in the Settler Society context despite the fact that the majority of REBs operating in the context offer guidelines with instructions that exhort researchers (and, one presumes, the REBs themselves) to ‘respect difference’ (e.g. see the ethics guidelines offered by the Health Research Council 2010; the Ministry of Social Development 2002; and AUT University).

The universalism that appears inherent in institutionalised ethics processes is based on a foundational myth of contemporary Western scholarship: that ‘White knowledge’ is the only knowledge worthy of consideration and only ‘white approaches’ to gathering knowledge can be ‘ethical’. It appears, as Best describes it (cited in Ermine 2000: 62) to be a ‘...a dictatorship of the fragment, the privileging of Eurocentrically-derived protocols, leading to the marginalisation of the “Other”’. Furthermore, it is founded on an assumption that ethical research conduct is only possible when overseen by institutionally-driven, formalised processes. Arguably, this situation exists because of the mistaken assumption that the morals necessary for governing ‘ethical’ research activity can be separated from ‘real life’ and reduced to a standardised list of rules. In contrast, Christians (2007: 438) argues that ‘[e]thics is located in the sociocultural first of all, instead of in rational prescriptions and impartial reflection’. From this position, because it is organic and socio-culturally centred, ‘research ethics’ or what constitutes ‘right conduct’ is founded on the process, and within the site, of engagement between researcher(s) and participant(s). In comparison, the ethics process confronted by the author in late 2009 ‘assumes that one model of research fits all forms of inquiry ... [which] presumes a static, monolithic view of the human subject; that is someone upon whom research is done’ (Denzin 2008: 104).

Perhaps the best summation of the risk posed to Indigenous research, Indigenous researchers, and Indigenous participants, from the foundational principle of (research and ethics-based) universalism, is found in the views of one of the author’s key informants, who stated that:

*The issue seems to me to be about their [the REBs] authority, and not about the best way of going about this business. As Maori we have the right to determine how both...*
**The Condescending Ethics of Research Ethics Boards**

'Condescending ethics' – positions participants as the 'Other', reinforces powerlessness, and further marginalises them with knowledge production processes. (Reid and Brief 2009: 83)

We might begin to understand the current situation by analysing institutionalised ethics processes in New Zealand, and other Settler Societies, as a contemporary manifestation of the *condescending ethos* that has informed the practice base for the academies research activities regarding First Nations, since the beginning of colonisation (Agozino 2003; Smith 1999). The condescension of institutionalised REBs and their processes relates directly to their preference for individualised research ethics, and the categorisation of the 'subject' as an autonomous entity to be engaged in meaningful ways after the institutionally-focused review process has been undertaken. And it is in this subjugation of the research subject that we find the basis of the institutional form, which according to Eikeland (2006: 42) is coloured by '... a condescending attitude following almost logically from its own point of view, that is, position, and implied in its research techniques, be they observation, experimentation, interviews, or surveys'.

Butz's invocation of Habermas' concept of *communicative action* in relation to his own experiences of REBs, provides a helpful schema for understanding the condescending ethos of the institutionalised ethics processes discussed here. According to Butz, Habermas distinguishes between two principle forms of 'action' in late modernity, Instrumental and Communicative. Instrumental action is 'oriented to technical manipulation and control, and communicative action to the ideal of intersubjective understanding and consensus among individuals' (Butz 2008: 250). As Butz states (2008: 250, emphasis his):

> The former is outcome oriented, the latter process oriented. For Habermas, communicative action *is ethically prior to* instrumental action, in that the justice of an outcome is contingent on the justice of the process that yielded it. In contemporary modernity, he argues, the communicative effort to reach consensus is frequently sacrificed to the imperative of bureaucratic efficiency.

It is easy to view the author's experience of REBs in New Zealand (and, according to the extant literature, other Settler societies), in this vein, especially:

> ... [w]hen it is assumed that the problem of voluntary informed consent is solved by asking participants individually to sign written consent agreements regardless of the research context, then a fully communicative appreciation of the adjectives voluntary and informed are subordinated to the instrumental purposes of the monitoring and controlling attached to the noun consent. (Butz 2008: 251 – emphasis his)

Central to our understanding of the condescending nature of REB process and Indigenous research, is the concept of power. In the mythology of the development of contemporary research ethics, REBs arose from concerns of power imbalances between the researcher – all powerful, and therefore 'potentially dangerous' – and the research subject – powerless and in need of protection, provided, of course, by REBs as the independent arbiter of 'righteous
research conduct’ (Juritzen, Grimen and Heggen 2011). Juritzen et al. argue in favour of expanding the conceptualisation of power in the researcher-research subject relationship to critically encompass ‘ethics committees as one among several actors that exert power and that act in a relational interplay with researchers and participants’ (2011: 640). Thus, given the considerable power REBs wield, they cannot be exempt from critical commentary. Let us now turn to explaining how and why condescending ethics processes manifest themselves through institutionally-derived REBs.

**Lack of Expertise, REBs and Condescending Ethics**

The reported experiences of First Nation commentators and researchers points consistently to one key source of discontent with REBs which, in the author’s experience, is key to understanding the condescending nature of the interactions between these institutional bodies and First Nation people: that the membership of REBs is often lacking experience and knowledge of First Nation communities, and the core principles and practices related to research (Smith 1999). Too often committees dominated by non-Indigenous academics and external advisors who then decide what is/is not an appropriate set of ethics protocols, without the requisite socio-cultural experience and authority (Glass and Kaufert 2007).

In similar vein, van den Hoonaard (2006: 269) contends that the issue for many researchers are not the ethics protocols and guidelines developed by REBs to guide post-graduate and researcher conduct, but rather how these protocols are interpreted and employed by committee members; especially where members clearly have little experience of the context within which proposed research is to take place. This argument is supported by significant literature (e.g., Anthony 2004; Bradley 2007; Haggerty 2003) and backed by comments made by the author’s research participants, including one who stated that:

"In my dealings with IRBs, I find they will have a standard ethics guidelines; go to the bibliography and all the usual experts are there, Henderson, Smith ... they [REBs] say the right things, consult, engage, privilege [the Indigenous], but the practice is different. Mainly white committees, no experience of us, who revert to their ways, to what they understand to be right. (CII3)"

Arguably, in the case of Indigenous-focused research, the lack of knowledge and experience of the research context is of greater risk to both researcher and participants than lack of disciplinary expertise. Hammersley (2006: 4) describes the dangers thus: ‘Researchers' decisions about how to pursue their inquiries involve weighting ethical and other considerations against one another, and this requires detailed knowledge of the contexts concerned’.

By drawing conclusions on the ethics of research situations they have little expertise in or knowledge of, and ignoring advice from those with the relevant experience, REBs place Indigenous researchers and their research participants in danger of carrying out or experiencing ‘unethical institutionalised research’. Hammersley (2006: 6) summarises the key issue thus:

"What is involved here, to a large extent, is a great pretence: ethics committees are to operate as if making research decisions were a matter of applying a coherent [standardised] set of ethical rules that do not conflict with any other considerations, or that override them, and that good decisions can be made without having much contextual knowledge."
Conclusion

One of the key motivators for the rise of Indigenous commentators’ critique of Western modes of knowledge construction, especially ethics processes, was the role that research activity has played in both the colonial and neo-colonial contexts process in marginalising First Nation peoples (Tauri 2009). If we are to successfully challenge Eurocentric hegemony over knowledge construction, then it is imperative that we challenge the power and authority the academy has over the knowledge production process; a process, and authority that is centralised within institutionally-centred bodies such as REBs. One response is quite clear: for First Nations to develop their own ethics processes that provide support to Indigenous researchers and to First Nation peoples confronted by the condescending ethos of the Academy (although it is beyond the scope of this paper to provide greater detail on how such bodies might work and what they might look like). This ‘radical’ call to action should not be interpreted as an attempt to marginalise institutionally-based REBs. Instead, it should interpreted as a call to construct Indigenous-dominated processes that have as their first duty, the protection of our researchers and research participants from the well documented problems First Nation peoples have with institutionalised ethics processes in Settler Societies. ‘Doing it for ourselves’ is an essential response to the well-recorded issues with REBs, and is our right under the banner of self-determination. For while we might grudgingly acknowledge that the stated intentions of REBs and their members are ‘to do good’ and to protect the vulnerable, it must also be acknowledged that in the first instance REBs will always be wedded to the institutions from which they derive and which they serve; for as Bradley (2007: 341) relates:

By controlling the models of research, who gets to speak and how subjects get to represent themselves, IRBs are in a powerful position as part of the institutional structure. In this position they can, and often do, silence the voices of the marginalised and perpetuate an academic political economy and a traditional top-down research and professional model that quantify and objectify human lives by keeping them nameless, faceless and voiceless.

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1 The title by which institutional ethics review boards are known can vary depending on geographic location, for example in the US they are often referred to as RECs and IRBs, while in Canada they are designated REBs or GREBs. The term REB is used here to refer to all committees of this kind.

2 The author carried out thorough, community-level negotiations to ensure the development of protocols deemed ‘ethical’ by Maori and Canadian First Nations participants. The negotiations took place over a sixteen month period via phone, email and during two visits to the region of Canada where part of the research project was to take place. For the New Zealand context, the author was advised on appropriate research ethics by three prominent Maori researchers, and relied in part on extensive research and engagement with Maori communities over the previous 15 years working in the academy and as a government official working directly with Maori communities.

3 At around the same time, other Maori commentators were carrying out projects focused on concerns with institutional ethics processes, including the protocols of REBs and their impact on Maori researchers and research participants (e.g Palmer 2009).

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Panem et circenses: Law, Law and Power in The Hunger Games

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Abstract

Like many cautionary tales, The Hunger Games takes as its major premise an observation about contemporary society, measuring its ballistic arc in order to present graphically its logical conclusions. The Hunger Games gazes back to the panem et circenses of Ancient Rome, staring equally cynically forward, following the trajectory of reality television to its unbearable end point – a sadistic voyeurism for an elite of consumers. At each end of the historical spectrum (and in the present), the prevailing social form is Arendt's animal laborans. Consumer or consumed, Panem's population is either deprived of the possibility of, or distracted from, political action.

Within the confines of the Games themselves, Law is abandoned or de-realised: law – an elided Other in the pseudo-Hobbesian nightmare that is the Arena. The Games are played out, as were gladiatorial combats and other diversions of the Roman Empire, against a background resonant of Juvenal's concern for his contemporaries' attachment to short term gratification at the expense of justice and caring which are (or would be) constitutive of a contemporary form of Arendt's homo politicus.

While the Games are, on their face, 'reality' they are (like the realities presented in contemporary reality television) a simulated reality, de-realised in a Foucauldian set design constructed as a distraction for Capitol, and for the residents of the Districts, a constant reminder of their subservience to Capitol. Yet contemporary Western culture, for which manipulative reality TV is but a symptom of an underlying malaise, is inscribed at least as an incipient Panem. Its public/political space is diminished by the effective slavery of the poor, the pre-occupation with and distractions of materiality and modern media, and the increasing concentration of power/wealth into a smaller proportion of the population.

Man ... nor woman neither ... never is, but always to be, blessed. (Alexander Pope, 'Essay on Man', with assistance from Hamlet)

Survivor is evil ... because it's a revival of the Roman Colosseum. People are doing each other in just to entertain a bunch of boobs. ('Mimetic and Monstrous Act in the Hunger Games')

Introduction

The Hunger Games – the first of three novels in Suzanne Collins’s trilogy – presents a stark rendition of life in a reconstructed post-Apocalyptic North America, the nation-state of Panem. Panem has been rebuilt to the extremes of conspicuous consumption, self gratification, the vapid celebration of youth and beauty, and a decadent and sadistic voyeurism – at least for the residents of Capitol, who mirror the Ancient Roman elite, supported by a ruthlessly exploited population in 'the Districts'. Their occupations seem, so far as they appear, to be dedicated to aims which reflect those of makeover reality TV and the cult of celebrity, a life which is 'utterly
artificial, deeply superficial, a triumph of exterior presentation over inner content,’ (Dixon 2007: 60) and where ‘mindless vanity meets amoral medical technology’ (Dixon 2007: 59).

At the core of this cautionary tale are the Games themselves: a hi-tech gladiatorial last-child-standing battle staged annually. Twenty four adolescents, two from each of the 12 Districts, are chosen at random in a public ceremony styled the ‘reaping’ – the survivor’s District will be showered with gifts for the coming year, and the survivor is guaranteed a life of ease back home, ‘untroubled by the financial cares of the everyday world’ (Dixon 2007: 53). Is it beginning to sound familiar, resonating as it does with the foundational, if illusory, promises of much reality TV.

For Jameson, text is a surface on which is written a continuous and collective narrative of the struggle to wrest ‘a realm of Freedom from a realm of Necessity’ (Jameson 2002: 3). For Arendt, the struggle is conceived as the transcendence of the mere existence of animal laborans (Arendt 1968: 199) into the realm of homo politicus. The residents of the Districts are quintessentially animal laborans, their lives consumed ‘with the acquisition of food’ (Collins 2012: 378), immiserated to ‘the biological process of the human body, whose spontaneous growth, metabolism and eventual decay are bound to the vital necessities … fed into the life process by labour’ (Arendt 1959: 9). The residents of Capitol, who do not seem to labour in any conventional sense, are nonetheless equally animal laborans. Futility is their labour and life as ‘dedicated followers of fashion’ (see Levin 1979: 528).

As labourer or fashionista, each is denied Arendt's redemption from labour through the ‘free life of political action’ (Levin 1979: 528), reserved to the shadowy power within Capitol who control Panem – a perverse homo politicus, since their co-option of political power is exercised, not as Arendt would optimistically suggest, to ‘inspire admiration in the present and future ages’ (Arendt 1959: 176) or to ‘prove themselves … of a “divine” nature’ (Arendt 1959: 19), but simply to retain the ‘absolute domination of the political’ (Hirvonen 2011: 102; cf Orwell 2004: 329-49).

**Panem’s circenses**

The Games are a brutal and brutalising demonstration of Capitol’s power. Having crushed the rebellious Districts in the Dark Days, Capitol’s power is articulated in the Treaty of Treason as a reminder to the Districts of their total subjugation to Capitol – a political artefact to discipline and punish those who would rise up against authority. Symbolically, the Games are Orwell's dystopian vision of a 'boot stamping on a human face, for ever' (Orwell 2004, 334).

District 12’s tributes, Peeta Mellark and Katniss Everdeen, are a unique pairing. When her twelve year old sister, Prim, is selected at the Reaping, Katniss instinctively volunteers in her place. Peeta, the male tribute, just happens to have carried an unrequited infatuation with Katniss from their first day at school. Superficially, Katniss's reaction calls to mind that of Theseus, who takes the place of an Athenian tribute selected to be sacrificed to the Minotaur. Her self-sacrificial act, however, is not premeditated. It is, in fact, neither a moral nor a political decision, nor is it intended as a direct challenge to Capitol. It is a spontaneous, emotional reaction to her sister's selection. Theseus's insinuation into the Athenian tributes was a planned attempt to end Minos's continuing domination of Athens – both moral and political acts.

The Games themselves present, in the starkest of settings, a physical and cultural space in which tributes are reduced to savagery, wrestling with a panoptic and manipulated Nature, their co-tributes and themselves, for the mere possibility of survival. Each is, despite alliances such as that formed between Katniss and Rue from District 11, ultimately reduced to a singular/atomistic entity, decoupled from any form of the social since the shifting alliances
which form and reform are captive to the zero-sum rule of the Games, which renders all such alliances futile.

Katniss’s predicament metaphorises the imposition of a ‘dominant cultural logic or hegemonic norm’ (Jameson 1991: 6) that, despite dramatic shifts in cultural aesthetics, political structures and modes of interpretation between Rome, today and the dystopic future, constantly refocuses on the same essential struggle for power, and the inevitability of oppression as an instrumental artefact of power. This, from the reader’s perspective, is the Jamesonian social and historical nightmare, ‘a vision of the horror of life specifically grasped through History itself’ (Jameson 1986: 72) ... across three time zones.

Panem exhibits a class divide not simply on conventional socio-political lines, but a tyrannical division between the largely faceless individuals exercising power, and those whose lives are labour (in the Districts) and those in Capitol whose life is apparently no more than conspicuous consumption, their labour a version of ‘immateriality’ (Hesmondhalgh 2010: 272), but labour nonetheless. Whether in the Districts or in Capitol, each is, in their own way, a manifestation of animal laborans, living out an existence which, though disparate in terms of security and comfort, remains unified as ‘unredeemable futility’ (Arendt 1968, 1999). Such ‘work’ parallels modern Western liberalism’s valorisation of labour – a social dynamic where work becomes ‘more than just earning a living’, but ‘incorporates and takes over daily life’, encroaching into ‘every corner of everyday life’ (McRobbie 2002, 99).

Past, Present and Future – Reality TV in Transition
The Games, set in the pseudo-Hobbesian nightmare constructed for the amusement of Panem’s fatuous elite and the terrorisation of the Districts, offer the opportunity to grasp the historical past and a speculative post-Apocalyptic future, envisioning them within the politico-cultural imaginary of the present. One of the 21st century’s manifestations of that struggle, the debasement of media culture to forms of ritual humiliation and exploitation, presents the spectre of an (ever) transitional present whose socio-political roots lie in the gladiatorial games and whose trajectory points seemingly inevitably towards the world of the Games.

At the far reaches of manipulative but ‘authentic’ reality TV lies the Survivor-style program. These construct a personal war of attrition offering ‘a well produced version of reality apparently more convincing than the transparently manipulative episodes of Big Brother’ (Wright 2004: 10), while remaining faithful to the tradition of ‘humiliation and extreme behaviour’ (Mittel 2004: 89) – all contained in a highly packaged cultural form (Enzensberger 1982: 74). The battle between oppressor and oppressed is, for the contemporary reader, buried in this culturally comfortable trope of Survivor-style reality television, snuggled in a cultural space as familiar to them as Roman gladiatorial combat or the survivalist mentality of a post-Apocalyptic world seem alien.

The qualities of control and cruelty in programs like Survivor (Brenton and Cohen 2003: 114) are reflected and magnified in the dehumanisation of the Hunger Games and the panoptic technology which renders them possible and visible in public space. In doing so, they answer McDonald’s rhetorical ‘What if we kept pushing [the envelope] ... What if the ethos of Survivor and American Idol were taken to its logical extreme?’ (McDonald 2012: 19). Yet the only people ‘we’, the affluent West, can relate to are the residents of Capitol, ‘glutted with food, fashion and reality television’ (Schaffer 2012: 75), distanced from the realities of (or the need for) the political by the same distractions satirised by Juvenal: silently, apathetically or even inadvertently relinquishing political action to the few who seek or seize power. While we are not yet wholly enmeshed with the bio-reconstruction of the Capitol-fashionista, surgically altered and wildly-maquillaged into a citizenry conflating Lady Gaga and Jocelyn Wyldenstein,
the commodification of beauty – the space where ‘mindless vanity meets amoral medical technology’ – is underway and accelerating (Dziemianowicz 2004-03-31).5

For the Games, the tributes are pushed and prodded, draped and depilated at the hands of the Capitol-fashionista to provide thematically titillating but commodified images for the perverse delight of Capitol’s viewers. For an American Idol-style pre-Games interview, Katniss is rebuilt as a ‘freakish’ un-made parody of what Katniss understands as being human (what Reiff would call ‘de-creation’ (Reiff 2006: 98). The sexualisation of Glimmer mirrors the threat to civilised culture bequeathed to the West by the glamorisation and premature inscription of adult images onto children. This phenomenon, starkly embodied in the murder of JonBenet Ramsay, reads as a ‘flash point’ signalling the social threat posed by certain aspects of mass culture (Giroux 1998: 34).

The Games materialise and perfect the observation that reality TV ‘anticipates the exploitation of ... the work of being watched, a form of production wherein consumers are invited to sell access to their personal lives’ (Hesmondhalgh 2010 268), although for the tributes, the invitation is an offer they can’t refuse. The Games valorise a self-destructive performativity of teenagers for the perverse entertainment of Capitol: the disruption of childhood, fitted to the quintessentially adult world of competition and death.

The Games: Modernity and Civilisation

It is, perhaps, a comfortable assumption that we – humanity? Western liberalism? – are in some substantial way different from the barbarity displayed in Ancient Rome. Such a claim lies in the decline of death or torture as punitive/public spectacles (see e.g. Foucault 1991: 116), or the (largely) successful sublimation of both the massed individual and the collective id into civilised and civilising social phenomena, possessing a ‘relatively higher cultural value’ (Deri 1939: 325; Hart 1948: 390). Sublimation thus channels human aggression into socially positive and productive actions conducive to civilisation, less dominated by the sadistic impulses of the ‘primitive’ psyche (Oesterdiekhoff 2009: 186-7).

The true rulers of Capitol are a visible, yet invisible force (Arendt 1985: vi). Government appears largely as the uncivilised traces inscribed on the bodies and minds of both the residents of Capitol and the Districts through the sadistic mechanisms of oppression. Capitol culture seemingly cannot ‘be comprehended by the Western liberal mind’ (Etlin 2002: 2), defying Foucault’s ‘universal juridicism of modern society’ (Foucault 1991: 223) which seems to fix limits on the exercise of power. The population is humiliated and degraded, separated from their authentic selves, rendered ‘resistless’ (Reiff 2006: 100).

Yet the world of Capitol is, of course, not wholly inconceivable to the Western mind. Its conceptualisation, however, must be defused by defensive strategies differentiating the oppositional forms of civilised|primitive and buttressing assumptions of a significant discontinuity ‘between ancient [primitive] and modern modes of thinking’ (Friedlander 1965: 500). Lapses from civilisation are thus relegated to the nightmare Other, the product either of a non-Western temper which have not wholly passed from the primitive to the civilised (the Oriental or pre-modern ‘savage other’ (Springer 2009: 306), or to modern Western regimes like Nazism, or indeed Capitol, which have regressed, exhibiting atavistic impulses of [non-Western and non-modern] irrationality, expressed in an ‘orgy of mass savagery’ (Douglas 1998: 63; Haberer 2005: 493).

If Capitol’s culture is determined by the ‘commanding truths’ it holds sacred (Reiff 2006: 80), it is expressed as an inverted anticulture celebrating the perversity of suffering, an abandonment of aesthetic mimesis paralleling the abandonment of ethical values (McDonald 2012: 15) and the monstrous realisation of self-referential power. To this extent, Capitol (as a political entity)
resonates with Arendt’s characterisation of the twentieth century manifestations of totalitarianism as more than mere extensions of previous regimes, but a new evil, for whom power is an end in itself.7

Capitol’s power enlivens Marx’s observation that ‘[c]apital is dead labour which, like a vampire, only becomes alive by sucking out living labour, and the more it sucks, the more it is lively’ (Marx 1968: 247). It embodies the ‘meanker’ face of capitalism developing towards the end of the 20th and into the 21st Century, which ‘industrializes the mind’ (Enzensberger 1982: 3ff) and in which the worker must ‘sell not only her or his labour ... but personality, self and ultimately perhaps also soul’ (Vandenbergh 2008, 880). Within such an architecture of power, the possibilities of a civil politics and the choice to be homo politicus are occluded by the eradication of alternative means of livelihood, civic life [such as it is] and culture’ (Mitchell and Rosati 2006: 145).

Law – Law Unmade

Through the law imposing function, the ‘original and fundamental form of violence that is in itself beyond the law and is thus neither legal nor illegal’ (Hirvonen 2011: 102), Capitol seemingly rejects any juridical notion of humanity as an abstraction insofar as it would obscure what are, for Capitol, more instrumental signifiers. Under Nazi rule, as Lichtenberger suggests, the meaningful terms were ‘compatriot’, ‘citizen’, ‘Jew’ and so on (Lichtenberger 1937: 248). For Capitol, the signifiers are the neat numerical and hierarchical fragmentation of Districts 1-12, the salutary lesson of the obliterated District 13, and the ‘consumers’ of Capitol.

The Arena is a place abandoned by Law, reconstituting the tributes as the ‘ultimate limiting case against which law is constituted’ (Fitzpatrick 2002: 80). Here is a place where no Law is – indeed a place where Law is a marginalised or absent Other: Law. From any positivist perspective, there is no superordinating or inaugurating statement of fiat lex. Paradoxically, the Arena is, as a locus of bellum universale, the place of Law unmade. And to add irony to paradox, Law’s unmaking is the direct product not just of any law, but of the foundational law – the Treaty of treason (the first product validated by Panem’s Grundnorm). Here, in the constitutive pre-legal document of Panem, is the dominant legal phenomenon that grounds the existence of legitimate authority: fiat non lex.

The narrative of Law provides precisely the ‘dramatised narrative’ (Leiboff 2012: 387) that conforms not simply to chronological events, but to the twin aims of entertainment and control. As an apparatus of punitive justice, the panoptic world (both within and without the Arena) ‘bite[s] into this bodiless reality’ (Foucault 1991: 16) – the world of shadow, facelessness, impalpable surveillance and retribution. Capitol thus harvests the strategic micro-physics of power implied by panoptic insinuation (Foucault 1991: 26), the techno-physics of the armaments supporting power, and a perverse metaphysics transcending jurisprudence itself, embodying the wholesale invasion of the domains of ‘person, culture and nature in order to control and commodify them’ (Vandenbergh 2008: 886). Yet the ‘slackening of the hold on the body’ – observed by Foucault as accompanying the decline of public execution (Foucault 1991: 10) – is reversed. Total surveillance and self-disciplinarity are coupled with a re-institution of the most primitive forms of liturgical torture and death.

Subversion and Imagination – The Birth of Homo Politicus

Katniss’s battle differs from the Survivor-on-steroids demanded by Capitol. She displays a capacity for the ‘imagination of attunement’ (Antaki 2012: 13) or a ‘transformative imagination’ (Unger 1996: 6), embodying the potential for relating with others, even in the most brutal of surroundings, through an aesthetic dimension incommensurate with the conceptualised rigour of the ‘rules of the game’. Cradling Rue as she lies fatally pierced with a spear, Katniss sings her to death – a concept which we might imagine is inconceivable to the Gamemakers, and
demonstrates a level of empathy that would seem inconsistent with the possibility of survival, as she takes Rue's hand and clutches it 'like a lifeline ... [a]s if it's me who's dying, not Rue' (Collins 2012: 162). Katniss subtly rewrites death in an aesthetic modality – *ars mortem* bringing enchantment into the brutal death of a young girl. Into this anti-Eden, compassion has insinuated itself, more 'subtil than any beast'.

Kant, one might say, has triumphed over Hobbes.

At the climax of the Games, when an arbitrary and disingenuous rule change allowing two victors if the last two standing are from the same District is (equally arbitrarily) reversed, Katniss and Peeta are faced with the inevitable zero-sum equation. Only one of them can survive. But as Peeta re-iterates Capitol's political truth – 'they have to have a victor' – Katniss's imagination is engaged as *homo politicus*. Instead of its winner take all paradigm, Katniss offers an unthinkable alternative – that the Games should have no winner. Ironically, the very ambivalence of the freedom which exists within the Arena bounded by Law provides for the possibility of (political) action, the very embodiment of Arendt's freedom. Freed from the constraints of survival (or embracing the possibility of death), she is free to explore the 'infinite novelties of action' which constitute the 'central category of political thought' (McGowan 1998: 56) in order to reinvent the future out of 'new horizon[s] of possibilities mapped out by new radical alternatives' (Santos 1995: 572).

Katniss's solution is to threaten a suicide pact. Both she and Peeta will eat the poisonous nightlock berries rather than fight it out, confronting Capitol with an unresolvable paradox. The outcome might as readily be their deaths as it is the re-reversal of the amended rule and their survival. That, though, is conceptually insignificant. Katniss's action is political in itself ... 'nothing justifies it, or is (necessarily) accomplished by it' (McGowan 1998: 61), its political nature lying in its defiance and destabilisation of the paradigm itself.

**Conclusion**

It is, of course, possible to read *The Hunger Games* as a perverse hymn to love – more agape than *eros*, despite the obvious undercurrents of a tentative sexuality between Katniss and Peeta. Peeta's act of charity in sharing the bread with Katniss bears a Eucharistic resonance in their nascent relationship. One might project a Christological persona onto Katniss at the moment of apparent self-sacrifice inherent in her volunteering to take Prim's place, although Peeta (pieta?) might wear the mask of Christ more comfortably. Katniss-as-Diana, demonstrating survivalist skills which defeat all-comers, a latter-day Theseus challenging King Minos and slaying the Minotaur, stands to become a feminist icon.

Returning, then, to the Jamesonian axiom that all tropes are envisioned on a stage delimited only by the eternal struggle between oppressor and oppressed, Arendt offers two answers to the question of oppression enmeshed with poverty, and the consequent condemnation of the oppressed to life as *animal laborans* (McGowan 1998: 42ff, 50ff).

One is not palatable – that political freedom is necessarily achieved only by a small proportion of the population at the expense of the remainder. Such a solution was embraced squarely by the Greek democratic project, relegating a substantial proportion of the population to life outside the political domain (McGowan 1998: 112). The other solution is implausible – that the efficiencies of production which twenty-first century technology can bring to bear on production now creates the possibility of equal prosperity (and thus an open field for the possibility of freedom in Arendt’s terms). Yet even were the political will to equality emerge, its administrative implementation is, itself, problematic (McGowan 1998: 51-2). The problem of freedom in Arendtian terms is, for Panem, clearly resolved in terms of the former, unpalatable, possibility: that the price of political action is the ruthless relegation of not merely the
conventional working class, but the seemingly pampered elite of Capitol itself, to the status of animal laborans.

For Katniss Everdeen (oh! so nearly anagrammatically ‘never end’), battle resumes. Man ... nor woman neither ... never is, but always to be blessed: freedom is eternally deferred. Even in her moment of triumph, her inspired and anathematic reconstruction of the Games reconstitutes the battlefield in a broader landscape ‘so much worse than being hunted in the Arena’ (Collins 2012: 246). As an act of homo politicus, it deprives Capitol, in its own political imagination, of the possibility of total power. Katniss now functions as a focal point for the redrawing of the battlescape: a localised episode perhaps, but one to be ‘inscribed in history ... [through] the effects which it induces on the entire network in which it is caught up’ (Foucault 1991: 27).

2 The illusory nature of the claims of reality TV is, perhaps, best demonstrated by their association with suicide: the first recorded reality TV associated death in the US was that of Najai Turpin, one of 16 contestants in The Contender, who committed suicide after being eliminated in 2005 (see http://www.funtrivia.com/askft/Question110693.html). The following year, Nathan Clutter died after falling from a phone tower just after being eliminated (same website). The Wrap TV details eleven contestants in US reality TV shows who have committed suicide between 1997 and 2008: http://www.thewrap.com/tv/article/thewrap-investigates-11-reality-show-players-have-committed-suicide_3409?page=0,0, accessed July 2012.
3 The Marxian cast of the observation is apparent from Jameson’s reference to Marx’s: ‘beyond [the realm of necessity] begins the development of human energy which is an end itself, the true realm of freedom, which, however, can blossoms forth only with this realm of necessity as its basis’, K Marx, Capital, New York, International Publishers, 1977, III: 81.
4 The text of the Treaty of Treason, imposed after the uprising, is not set out in The Hunger Games itself: ‘In penance for their uprising each district shall offer up a male and female between the ages if 12 and 18 at a public ‘Reaping.’ These tributes shall be delivered to the custody of the Capitol. And then transferred to a public arena where they will Fight to the Death, until a lone victor remains. Henceforth and forevermore this pageant shall be known as The Hunger Games.’
5 Television advertising by plastic surgeons specifically directed at breast augmentation has begun to appear for the first time: see www.breast.com.au, who now present an advertisement during Channel 7’s ‘Sunrise’ program in which two bras discuss how wonderful the one looks, now that they have had cosmetic surgery: 21 August 2012. The extent of this commodification is apparent from the observation that ‘[t]he body has, in a sense, become just another consumer purchase ... Banks now offer loans for plastic surgery. American families with annual incomes under $25,000 account for 30 per cent of all cosmetic surgery patients. Americans spend more each year on beauty than they do on education’, Nelson Z, (2009) Love Me: Cross-Cultural Manufacturing of Beauty, Contrasto, Milan: Introduction, available at http://www.zednelson.com/?LoveMe:text.
6 The decline of the public spectacle associated with, for example, torture and execution, and its replacement in most Western democracies with the deprivation of liberty and rights, rather than the infliction of punishment or execution is a singular trope of, for example, Foucault’s analysis of the phenomenon of punishment in Discipline and Punish: The Birth of the Prison, (1991) London, Penguin.
7 As such, Arendt’s characterisation of Nazism and Stalinism as totalitarian regimes dedicated solely to the retention of power for its own sake is at odds with, for example, O’Brien’s dismissal of German and Soviet dictatorships as delusional: ‘The German Nazis and the Russian Communists came very close to us in their methods, but they never had the courage to recognize their own motives. They pretended, perhaps they even believed, that they had seized power unwillingly and for a limited time, and that just round the corner there lay a paradise where human beings would be free and equal’ (G Orwell, Nineteen Eighty-Four: 340).
8 Genesis 3:1: ‘Now the serpent was more subtil than any beast of the field ...’ (KJV).

References


The Revival of Comparative Criminology in a Globalised World

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Conference Sub-theme: Penal policy and punishment

Abstract

While Downes (2011) rightly points out that criminology was born comparative, this comparative focus seems to have been lost until the late twentieth century. A waning belief in the post war penal welfare state, rising crime rates and increasing prison populations have altered this. Over the last two decades, comparative criminological research has been studying various dimensions of punitiveness. Therefore, it is timely to critically examine the extent to which the current evidence is capable of explaining convergences and divergences in penal practice. Important in this respect is to test the validity of the global explanatory models against local models in countries that appear to resist the dominant trend, such as the Netherlands and Canada. However, it is also important to compare differences between autonomous jurisdictions in one country, for example, the states and territories within Australia. Further, regardless this wealth of contemporary comparative research, some questions and issues have not been resolved yet and are subject for further analysis. Finally we discuss new directions in explaining penal policies and possible optimistic signs for penal reform in the future.

Introduction

We argued in a previous article (Tubex 2013), that comparative criminology is a rather young discipline, as crime and justice were not hot topics in the optimistic, generous and positive decades following the Second World War. However, the global economic crisis of the seventies, the subsequent decline of belief in the penal welfare state, and the increase in crime rates and prison populations dramatically changed this picture. Criminologists started to look across borders in an attempt to understand what the causes of increasing prison populations were. David Garland’s pioneering ‘Culture of Control’ (2001) set the benchmark for an understanding of the recent trends in penal policy. Partly as a reaction to his work, comparative criminologists have produced a wealth of evidence and information over the last two decades, providing insight into what is impacting on prison populations. But despite the impressive output of comparative criminology over recent years, it is an ongoing struggle to understand what is driving penal policies and practices. Using imprisonment rates\(^1\) as a measure for international comparison, we see that there is great diversity not only in the way countries have been responding to global trends, but also in the reasons for these responses. In this contribution, we first evaluate the viability of comparative research in a globalised world, we discuss the lessons of comparative research, but we also identify gaps and anomalies before looking at new directions in this area of research.

The Sense of Comparative Research in a Globalised World

The impact of globalisation on crime and criminal justice is an important consideration from the perspective of comparative research. As Nelken (2011) has asked, to what extent does it still make sense to take the nation state as the object of comparison in a globalised world? An initial reason for asking this question is that globalisation, of itself, presents specific challenges to the credibility of nation states: as crime increasingly displays international dimensions, it is
becoming more and more difficult for nation states to deal with it. Globalists claim that we need a global criminology instead of comparative criminology to understand what is happening in this field (Larsen and Smandychn in Nelken 2011). Another reason is the link between globalisation and punitiveness, the main point of interest of comparative criminology. Baker and Roberts (2005) point to the various reasons why ‘new punitiveness’ is associated with globalisation. They argue, however, that globalisation does not necessarily cause punitiveness, as it is not a universal trend. Globalisation is a complex phenomenon, which has definitely affected penal policies, privileging punitive responses, and facilitating ‘policy transfer’.

Comparative criminologists have defended their discipline, pointing to differences between countries, due to local features, values and cultures. According to Nelken (2011), globalism is too often confused with Americanism, whereby trends in the US are supposed to lead the way of what is going to happen elsewhere (Garland 2001; Wacquant 2009), while, as it has been stated by several authors, it is actually the US that should be considered as being ‘exceptionalist’ and an ‘outlier’ (Downes 2011; Lacey 2011). Further, it has been argued that for every global model explaining levels of punitiveness, there are exceptions. The question is to what extent they ‘confirm the rule’? Globalisation doesn’t spell convergence, according to Lacey (2011), therefore, comparative research, on a national and regional level, is crucial to understand the mechanisms by which master narratives affect penal policy in different ways in different countries. Meaningful comparative research needs to move back and forth between the global and the local, refining the global model with local empirical data and findings, as features within individual countries might explain how and why they deviate from the leading pattern. Along the same lines, Savelberg (2011) concludes that both globalisation and cross-national comparative research is needed, and that they need to be closely linked, as global trends are translated in a nation-specific way and filtered through local institutions. Nelken (2011) agrees with this view, pleading that comparative research is particularly well placed to study the interaction between the global and local forces and the ways how to best do this. Therefore, despite globalisation, comparative research still has a place within criminology, identifying local dynamics and ways out of the doom scenario of mass imprisonment (Lacey 2008).

**What We Do and Don’t Know**

To critically examine the extent to which the current evidence is capable of explaining convergences and divergences in penal practice, we discuss in the following paragraphs two deep-rooted explanatory models of punitiveness, and test their validity against the situation in two countries that appear to resist the dominant trend: the Netherlands and Canada.

**Welfare and punitiveness**

First, a well established and solidly evidenced relationship is the one between welfare and punitiveness. Strong welfare states see criminality as a societal problem that needs to be addressed with a social policy instead of a penal policy. They are more inclusive and have lower prison numbers (Beckett and Western 2001; Downes and Hansen, 2006). Nevertheless, it is remarkable, as Nelken (2009, 2010) observes, that the welfare model only has an impact on the reaction towards crime, but not on crime itself, as crime was going up at a time that the welfare model was still intact and generous to everyone. So the question remains why the welfare state failed in preventing increases in crime? Further, the welfare model as a protection against increasing prison rates only seemed to work in certain countries, such as Scandinavia. Others saw their prison populations going up while their welfare model was still in place. Downes (2011) points in this respect to the example of the Netherlands as being an anomaly, quintupling its prison population rate while retaining many of the features that should have protected it them against penal excess, being a social democracy and a relatively substantial welfare state. We will have a closer look at the Dutch case.
**A Dutch case study**

The Netherlands has always been a tricky country for criminological analysis, and maybe therefore a good test case for the validity of explanatory models. For very many years the shining example of penal moderation, with imprisonment rates as low as 18 per 100,000 inhabitants in 1973, the Netherlands were about the only country that could keep pace with the US in the way it multiplied its prison population (up to 134 per 100,000 in 2005). But even more interesting is the recent evolution and the fact that the prison population has been on the decrease since 2005 (down to 87 per 100,000 in 2011) (van Swaaningen 2013). The explanations given for this rather remarkable trend are diverse and contradictory. According to Van Dijk (2011), it has all to do with the registration of crime and developments in the crime pattern. Using correct data and similar definitions as other countries do, the Dutch fluctuations would have been a lot less distinctive: they were initially deflated by the exclusion of mentally ill convicts held in private clinics, and later inflated by the inclusion of illegal immigrants held in administrative detention centres and juveniles placed in institutions as a civil protection measure. After adjusting for these two, the imprisonment rate in 2007 would decrease by 30% – from 113 to 72 – far below the European mean of 119. Further, he claims – relying on data from the International Crime Victims Survey – that the growing / declining imprisonment rates are much more closely related to changes in (serious) crime instead of changes in punitiveness. This claim is partly confirmed in other studies, as Vollaard and Moolenaar (2009) also attribute the increase in the prison population to an increase in drug and violence related cases brought before the judges. But, as Boone and Moerings (2007) indicate, this does not mean that these offences have increased, as the number of cases sent to the prosecutor remains stable, it is the number that is sent to the courts that has increased, and as such, it is an expression of increased punitiveness. The decrease is, according to Vollaard and Moolenaar (2009), due to milder sentencing practices in these cases, and a more frequent use of community based sentences for less serious violent acts. Van Dijk (2011) disagrees with the latter, as alternative sentencing in his view only had a marginal impact and milder sentences have more to do with an effective drop in the number of serious crimes instead of the judges’ practices. According to him, judges in the Netherlands are less influenced by external pressures because they are quite conservative, appointed for life, and recruited from the upper layers of religious pillars. In other words the Dutch judges are an elite group shielded against penal populism, while in the UK and US, the judiciary is more responsive to political pressure. Vollaard, Versteeg and van den Brakel (2009) confirm the drop in, particularly, property crimes and acts of violence, due to demographic and economic factors, while, at the same time there develops a more stringent penal policy towards both categories of crimes / offenders. As a result of this lower tolerance and changed police practices, less serious cases were being brought before the judges and therefore resulted in lesser sentencing (Boone and Moerings 2007; Vollaard and Moolenaar 2009). Other authors (Boone and van Swaaningen 2012; van Swaaningen 2013) contextualise both developments in a broader framework: prison numbers increased because of a more punitive approach throughout the sentencing process (more reporting of crime, more people sent to court, also for less serious offences, more use of imprisonment and longer sentences). They see these changes as a result of the pressure of a changing public opinion expressing less tolerance towards some minor forms of crime (cf. anti social behaviour orders) and towards people who are different in any way (mentally ill, juveniles and illegal immigrants). The recent decrease in the imprisonment rate is according to these authors related not only to changes in the crime pattern, but also to policing priorities and changing penal policies towards the most vulnerable groups. In addition, there is a growing criticism of the punitive approach. Due to miscarriages of justice, the media are picking up on this trend and increasingly call in expert advice, and this is influencing the judiciary. At the same time crime is pushed down on the electoral agenda as other concerns, as the economic crisis and healthcare, have become more important. However, as van Swaaningen (2013) points out, this does not mean that the Netherlands has become less punitive, as there are various examples of very punitive measures that have been taken since 2005: they are directed towards specific groups of offenders,
implemented in the community, or introduced under the banner of crime prevention. According to van Swaaningen (2013) it is not a matter of less punishment, but of different forms of punishment, along the lines of Foucault’s ‘penal-welfare complex’, in which welfare provisions serve to discipline the population. Imprisonment has been replaced by other strategies of crime control, which are not less repressive than a prison sentence.

From this case study we see how complex the explanation of prison populations can be, as perceived changes in crime can also be the result of changed police performance, prosecution practices and sentencing, which in their turn can be an expression of increased punitiveness. Using victim surveys can act as a corrector for this sort of analysis, but also perceptions of crime and victimhood can affect reporting and signal decreasing tolerance. So it seems that, despite their welfare model still being in place, the Netherlands has lost some of its ‘inclusionary’ character over time. Decreasing tolerance towards some categories of crimes and offenders results in higher numbers of these ending up in the criminal justice system. Failings of that system raise critical voices, but nonetheless it seems to expand in new forms of punishment, outside of prison, but still a feature of a punitive society, despite the fact that the imprisonment rates are decreasing. After all, Lacey (2011) comments, welfare provisions are not solely the result of humanity, they are embedded in political and economical dynamics that are required for their ongoing support. This leads us to the second explanatory model.

Neo-liberalism and punitiveness

A second overarching theme that has gained rapid interest in criminological discourse is the relationship between neo-liberalism and punitiveness. As Brown (2011) indicates, this has been firmly put on the criminological agenda by Wacquant (2009) who identifies neo-liberalism as the root cause of punitivism, challenging the predominance of ‘late modernity’ in Garland’s (2001) work. While Brown (2011; 2012) considers this approach a welcome contribution to the debate, he fears that Wacquant’s interpretation of a specific form of neo-liberalism might overstate its impact and lead to a lack of attention being paid to counterbalancing factors, such as justice reinvestment. The theme has been picked up in recent work in comparative criminology, like the analysis of Cavadino and Dignan (2006) and Lacey (2008), bringing the impact of political economies back in the limelight. However, while both analyses are starting from the idea of a political economy, they reach different conclusions. Lacey (2008, 2011) identifies two main separate models: liberal market economies and co-ordinated market economies, putting them in the broader context of their political and economical institutions, as well as specific legal and constitutional structures, their relationship with the bureaucracy and judiciary, as well as with the media and public opinion. Building on their earlier work, Cavadino and Dignan (2011) explore reasons for the relationship between neo-liberalism and punitiveness. They see as the main explanations the political culture and the interaction with political and state institutions that derive from the different political economies, as well as the impact of public opinion and the media within these political economies, which shape punishment. In doing so, they consider Lacey’s (2008) emphasis on the political institutions’ susceptibility to penal populism in the neo-liberal political economy as too limited. In regard to the association between neo-liberalism and punitiveness, we also find exceptions and, again, it is Downes (2011) who brings this up with regard to Canada. In the following we zoom in on the Canadian situation.

A Canadian case study

Commenting on the Cavadino and Dignan model (2006), Webster and Doob (2011) point to the fact that – while Canada was not included in their analysis – it would most probably have been categorised alongside the Anglo-Saxon neo-liberal countries (with the US, England and Wales, Australia, New Zealand and South Africa), while their prison population has been stable and a lot lower than in the other countries belonging to this group. Actually, based on their imprisonment rate, Canada would be closer to the conservative corporatist countries (such as
Italy, Germany, France, Netherlands). On various occasions Doob and Webster have criticised the fact that Canada is too easily thrown in the same basket as the other Anglo-Saxon countries they have historical and institutional connections with, and that criminologists have been mainly looking at change, ignoring the interesting example of Canadian stability in the prison population for over about 50 years (Doob and Webster 2006; Webster and Doob 2007, 2011). According to these authors the stable prison population in Canada is explained by – using Tonry’s (2007) dichotomy – reduced risk factors at one side and the availability of protective factors on the other side. According to them, the protective factors in Canada are to be found on the following levels:

- Structural / political: Canada has a two tiered system, with the criminal law being a federal responsibility, while the administration of justice is a provincial responsibility, this structure protects the federal level from local, populist reactions. Further, victim advocacy groups don’t have strong power, politicians show great reluctance towards the use of referenda but are relying on career civil servants and experts instead, there is no politisisation of crime, and the judiciary is independent and has great discretionary power.
- Cultural: public opinion in Canada doesn’t have the moral taste for harsh punishment and politicians don’t believe in it, further, Canadians want to be seen as different from the US, and they adhere to different values.
- Historical: there is a long tradition of a ‘culture of restraint’ and scepticism of what can be achieved by imprisonment.

According to Webster and Doob (2011), penality is more complex than the political economy that Cavadino and Dignan (2006) describe, simple political or economical models are insufficient as an explanatory framework. As both Cavadino and Dignan (2006) and Lacey (2008) are focussing on a limited number of theoretically relevant factors, the explanatory power of their approach is incomplete. They conclude that it is not only the number of factors that is fundamental, but also the conceptual approach to the analysis of these (multiple) factors. It is particularly the interaction between these structural, cultural, historical and institutional factors that explains Canadian penalty. The same factors, but in another context might result in a different penal reality. The latter might be happening in Canada at this very moment, as the political climate seems to have hardened towards a more punitive discourse and the prison population has been going up since 2006 (Webster and Doob 2011).

According to this case study, it seems that Brown is right in warning against overstating the role of neo-liberalism in driving punitiveness. The relationship between both seems to be much more loose and indirect, and depending on the sort of neo-liberalism that is adopted and imposed (Karstedt 2012, 2013). This is confirmed in the analysis of O’Mally (2002), where he compares neo-liberalism in the US and Australia. Neo-liberalism in the US is more entangled with conservatism, while in Australia it is rooted in a more socio-democratic tradition, and welfare models can remain intact in the latter. According to Brown (2012) imprisonment rates in Australia and other leading neo-liberal political economies might have more to do with race and colonialism / post-colonialism, than with neo-liberalism. This claim would fit with the fact that in Australia, as well as in other federal states with a comparable first nation, such as Canada, the imprisonment rates are the highest in the jurisdictions with large Indigenous populations.

Indeed, the same variance as we see on a global scale can be found within Australia. But even accounting for their different historical origins and demographic composition, recent changed cannot be fully covered: where Victoria traditionally has low imprisonment rates at about 100 per 100,000, they recently witnessed an increase from 94 in 2004 to 112 in 2012. New South Wales on the other hand, has always been on the high end of the scale with imprisonment rates
that are almost double the Victorian ones, but decreased since 2009 from 204 to 171 in 2012. While these jurisdictions share many of the characteristics that have been identified as being important determinants for the size of the prison population, local features of these societies result in significant differences in quantity and form of punishment. Therefore, there is a need for Australian interstate comparative research, analysing the differences in imprisonment rates between states and territories and their evolution over time, defining different penal cultures and testing the validity of the global explanatory models on the local level (cf. the Australian Prison Project and the current Future Fellowship).

**New Directions in Comparative Research**

As comparative research has developed over the last decades, the main focus has been on the rather depressing evolution of increasing prison populations and their causes. An exception to this rule is the work of Pratt who has extensively studied ‘Scandinavian exceptionalism’, claiming that egalitarianism and homogeneity have saved the Nordic countries from the move to mass imprisonment. Nevertheless, punitive forces appear to endanger this exceptional position, with Sweden being at the biggest risk (Pratt and Eriksson 2013).

However, there seems to have emerged a more positive perspective in this field, sometimes coming from unexpected corners. One example is the US, for recent decades considered as the archetype of penal expansionism, with a peerless imprisonment rate of 743/100,000, but recently – since 2009 – the prison population has been going down. The imprisonment rate decreased in half of the states, it has stabilised in many others and only increased in a handful (Green, 2013). According to Green (2013), there is reason for penal optimism and, in contradiction with the dominant focus on American punitiveness, it is time to notice and appreciate various signs of penal reform.

To understand the trajectories described above, deviating from the master narratives that have been defined over the last decades, which are now well documented in various studies, we need to broaden our lens and investigate factors other than the ‘usual suspects’. Behind the more tangible global models of political structures and economic models, lie fundamental values and cultural norms, rooted in local historical backgrounds. In more recent work, investigating anomalies and unexpected changes, we see an increasing emphasis on the importance of the local, national, and even regional dynamics. Investigating differences, and more particularly strengths to form a bulwark against increasing punitiveness, promises to be a fruitful future for comparative criminology.

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1 The number of prisoners out of 100,000 inhabitants. For a discussion regarding the advantages and disadvantages of using imprisonment rates as a proxy for punitiveness, see Tubex (2013).

**References**


