

5TH ANNUAL AUSTRALIAN and
NEW ZEALAND CRITICAL
CRIMINOLOGY CONFERENCE
PROCEEDINGS

July 7 and 8, 2011
James Cook University
Cairns Campus

Publishing Information

Title - Proceedings of the 5th Annual Australian and New Zealand Critical Criminology Conference

Editor(s) - Garry Coventry and Mandy Shircore

Conference Name – 5TH Annual Australian and New Zealand Critical Criminology Conference

Conference Date - July 7 and 8, 2011

Conference Location – Rydges Esplanade Resort, Cairns North Queensland

Conference Website Address -

Publisher and Place of Publication – James Cook University, Townsville, Queensland

Year of Publication – 2012

ISBN - 978-0-9808572-4-5

Copyright Statement

Authors who submit to this conference agree to the following terms:

- a) Authors retain copyright over their work, while allowing the conference to place this work under a Creative Commons Attribution License, which allows others to freely access, use, and share the work, with an acknowledgement of the work's authorship and its initial presentation at this conference.
- b) Authors are able to waive the terms of the Creative Commons license and enter into separate, additional contractual arrangements for the non-exclusive distribution and subsequent publication of this work (e.g., publish a revised version in a journal, post it to an institutional repository or publish it in a book), with an acknowledgement of its initial presentation at this conference.
- c) In addition, authors are encouraged to post and share their work online (e.g., in institutional repositories or on their website) at any point before and after the conference.

Peer Review

The peer review process for the papers submitted to these proceedings was independent to the author, the editorial committee of the conference proceedings and the conference organizing committee. All papers submitted and published in these proceedings are peer reviewed.

5th ANNUAL AUSTRALIAN and NEW ZEALAND CRITICAL CRIMINOLOGY CONFERENCE PROCEEDINGS

July 7 and 8, 2011

James Cook University

Cairns Campus

Sponsorship and support for the 5th Annual ANZCCC was generously provided by the Cairns Institute and the School of Arts and Social Sciences at James Cook University. Our thanks go to these important 'arms' of the University for both their funding and staff time contributions to enable JCU to continue the successful hosting of the critical criminology conference, for the first time out of Sydney or Melbourne. We trust that JCU has set a precedent for other universities and organisations to host future annual conferences beyond our two major east coast cities.

The 2011 conference maintained the ANZ Critical Criminology branch's tradition of providing scholars, whether they were academics, practitioners or students, with opportunities to present and engage with critical criminological theoretical perspectives, research approaches and social/criminal justice system policies. It was a lively two days of interactive engagement for conference attendees. The warm winter tropical Australia weather was a bonus.

2011 conference proceedings are available online through The Sydney eScholarship Repository. To view the Table of Contents, paper abstracts and links to each refereed conference paper click [here](#).

Also available are abstracts of the presentations given by the three keynote speakers at the conference: Professor James Austin, JFA Institute, Washington D.C., Professor Sharon Pickering, Monash University, Melbourne and Professor John Braithwaite, Australian National University, Canberra. The abstracts of these keynote addresses are included in the conference program.

Our thanks are extended to all paper contributors, those that refereed papers and provided comments and to Kylie Wilson for her efforts in bringing this collection of papers to its final closure for publication.

Finally, we once again thank the contributions of the Cairns Institute and School of Arts and Social Sciences staff for ensuring a most successful conference. Also, we wish the University of Tasmania good fortune in its hosting of the 6th Annual Conference.

Garry Coventry and Mandy Shircore (both of James Cook University)

Editors and Convenors of the 2011 ANZCC Conference

April, 2012

ANZCCC: The Australian and New Zealand Critical Criminology Conference 2011, Proceedings

Title: Contemporary Penalty in the Shadow of Colonial Patriarchy

Author/s: Eileen Baldry, The University of New South Wales & Chris Cunneen, James Cook University)

Abstract: Imprisonment in Australia has been a growing industry and large numbers of vulnerable people find themselves in a state of serial incarceration. Women and Aboriginal and Torres Strait Islander peoples in particular have experienced rapidly expanding imprisonment rates over recent decades. Our argument in this article is relatively straightforward: to understand contemporary penal culture and in particular its severity and excess in relation to Indigenous people and women, we need to draw upon an understanding of the dynamics of colonial patriarchy. Although at a micro level, specific legislation and policy changes have negatively impacted on the imprisonment of vulnerable groups, it is within a broader context of the strategies and techniques of colonial patriarchy that we can understand why it is that particular social groups appear to become the targets of penal excess.

Title: 'Minutes of Evidence': Raising awareness of structural injustice and justice

Author/s: Jennifer Balint, Julie Evans & Nesam McMillan, The University of Melbourne

Abstract: In 1881 a Victorian government colonial inquiry was established to inquire into Coranderrk, an Aboriginal reserve near Healesville. Lasting 4 months, the Commission of Inquiry was to determine the fate of the Coranderrk Aboriginal Reserve and its inhabitants. The Inquiry was the result of a long campaign, including walking to Melbourne to petition Parliament, by the Aboriginal residents to stay on Coranderrk, in the face of the push by the Board for the Protection of the Aborigines to close the Reserve.

In the past year, a verbatim theatre performance, *Coranderrk: We Will Show the Country*, based on the original records of this Inquiry, has been developed and performed. Developed in conjunction with Ilbjerri Aboriginal and Torres Strait Islander Theatre Company, La Mama Theatre, and the Koori Heritage Trust, together with researchers within and outside the University of Melbourne, it is aimed at promoting new ways of publicly engaging with current and past structural injustice faced by Indigenous Australians, as well as locating this historical injustice, and the official response to it, internationally within a broader 'transitional justice' framework.

Structural injustice is evident in the socio-economic gulf that continues to exist between Indigenous and non-Indigenous communities in Australia, and in particular the disproportionately high incarceration rate of Indigenous men, women and young people (Blagg 2008; Cunneen 2005). Yet, despite their significance, issues of structural injustice have not been adequately or successfully addressed in Australia or in the broader field of transitional justice. Thus, this paper reflects on the role of the Coranderrk performances so far in finding new ways of publicly engaging with structural injustice and creating opportunities for community-wide conversations about what structural justice might look like in Australia and elsewhere.

Title: Sentencing Indigenous and Non-Indigenous Women in Western Australia's Higher Courts: A Summary of the Main Findings of a Narrative Study

Author/s: Christine E.W. Bond & Samantha Jeffries, Queensland University of Technology

Abstract: This paper presents the main findings of a narrative examination of higher court sentencing remarks to explore the relationship between Indigeneity and sentencing for female defendants in Western Australia. Using the theoretical framework of focal concerns, we found that key differences in the construction of blameworthiness and risk between the sentencing stories for Indigenous and non-Indigenous female offenders, through the identification of issues such as mental health, substance abuse, familial trauma and community ties. Further, in the sentencing narratives, Indigenous women were viewed differently in terms of social costs of imprisonment.

Title: A Time to be Heard: Sudanese Australian Voices about Criminal and Social Justice Matters

Author/s: Glenn Dawes & Garry Coventry, James Cook University

Abstract: At the 2006 ANZ Criminology Conference, we challenged the pernicious claims of a few academics and others who hawked outrageous, unsubstantiated pronouncements about African refugees being a major crime and reintegration problem for settlement into Australia. The problem was collapsed into the 'other': characteristics of those that separate 'them' from 'us'. Then, we were most concerned about the 'deafening silence', absent from critical criminology and other

social science disciplines, which did not challenge such claims. To be fair, it was not until 2007 that key Commonwealth Government figures entered the fray and some critical criminology articles began to appear. Since, we have come to understand the difficulties in clearly establishing the boundaries and measurement of the contours of race/hate crime in Australia and, therefore, for critical criminology. But, these difficulties in assessing and possibly counting such incidents do not discount that these kinds of incidents do occur. The recent case under the Racial Discrimination Act, brought against the Victoria Police and the State of Victoria, points to the possibility that racial profiling, stereotyping and racist based practices do occur. Now, what we offer for consideration are some voices of Sudanese Australians regarding matters of criminal and social justice. It is time that their voices, whether they are referred to as oppressed, repressed or significantly disadvantaged sections of Australian communities, be given a recognized place in legitimate discourse regarding such matters. This paper, in part, is based on a major study of extensive field research in four main Queensland communities and a thorough examination of some mainstream print media sources.

Title: Pill Heads: Governance, Normalization & Risk in Prescription Drug Use

Author/s: George Christopher Dertadian, University of Western Sydney

Abstract: This paper will critically engage the discourses currently informing non-medical use and abuse of, and 'addiction' to prescription drugs. As part of the analysis of non-medical prescription drug use the article draws from journalist and prescription painkiller addict Joshua Lyon's successful 2008 autobiographical book, *Pill Head*. In particular, it will focus on the growing cultural assumption that an ever-increasing number of afflictions are pharmacologically treatable. This assumption sits behind the general normalization of taking pills, in opposition to the deep stigmatization of chemically similar illegal substances. However, there is new concern about this collective practice of non-prescribed pill-taking. This is a practice which has paradoxically been in part fostered by the pharmaceutical industry and the professional interests that it now appears to threaten. Furthermore, mental illness and addiction discourse ignores the individual agency of those who choose to take medications outside of conventional medical treatment. The paper discusses aspects of user risk-taking and the apparent clash between the practice of chosen pill taking and the deterministic official construction of the non-medical drug using subject.

Title: Moral Panic and Risk- A Working Model?

Author/s: Pota Forrest-Lawrence, University of Sydney

Abstract: This paper will examine the key principles of moral panic and evaluate its theoretical position in the twenty-first century. A modification of the perspective will be discussed in detail. Its relationship with social risk theory will be addressed to determine whether a hybrid configuration is the only way moral panic can maintain theoretical relevance in this postmodern era.

Since its inception, moral panic has become one of the most popularised and commonly utilised terms in the public and media lexicon. It has however come under intense theoretical scrutiny, described by critics as an unintelligible construct comprised of antiquated principles in need of modernisation. In particular, the folk devil, as the product of social fears and anxieties has been contested. Moral panic criticisms, albeit numerous, fail to recognise its contribution to social theory.

Risk, a multifaceted sociological concept has gained theoretical notability through the work of Beck, Douglas, Foucault and Rose. Various aspects of risk theory will be examined and their suitability to moral panic will be appropriately addressed. Can moral panic be rejuvenated in its current form or is a modification needed to address the changing role of the folk devil? Is the coalescing of risk and moral panic the answer?

Title: A Crime Worse than Murder? Colonial Queensland's Response to the Rape of European Women by Aboriginal men

Author/s: Geoff Genever

Abstract: Between 1859 (the year of Queensland's inauguration) and 1900, the young colony executed 12 Aboriginal men for the rape of white women and girls. It would have been 14 but for an attempted escape in which the man was shot dead, and a death in custody. This far exceeds the number executed for murder.

This paper looks at the public, political and legal impact of this crime on colonial Queensland's society. It does this by an examination of other authors' works, what the contemporary press had to say about this crime, circuit court trials of the period and the responses of the body politic. Where possible it has also tried to include the voices and attitudes of the perpetrators and their victims. Based on this research the work reaches conclusions about the judicial handling of these cases; the influence they had on proposed amendments to Queensland's penal code, and the frequency of rape across the racial divide during the colonial period.

Whether or not this particular crime was a rarity is arguable, but the reverse of the coin, the rape of Aboriginal women by white men was not; it was positively legion, but outside the scope of this paper.

Title: From States of Exception to the Governmentalised State: The Child Sex Offender as Governmental Object

Author/s: Liam Grealy, University of Sydney

Abstract: In a 2009 article, Dale Spencer argues that the paedophilic sex offender should be conceived through Giorgio Agamben's homo sacer, as per this figure's inclusive exclusion by the state of exception. At the conclusion of the criminal sentence, Spencer argues, regimes for continuing detention and technologies that tighten community supervision locate the sex offender in an ambivalent relation with the law, excluded from the rights of the citizen but subject to sovereign power.

In this paper I consider the utility of Agamben's framework for making sense of the paedophilic offender as a legal and cultural subject in the current N.S.W. context. In doing so, I suggest that an understanding of Michel Foucault's writing on governmentality, and the field it has inspired, offers a promising alternative. It is such both for the conception of a governmentalised state, and the competing forms of power described by Foucault, which are drawn upon in managing past offenders. I will aim both to describe the network of governmental authorities involved in sex offender management in N.S.W. and argue that antagonisms concerning what to do with dangerous sex offenders post-release can be attributed, in part, to competing governmental conceptions of the subject, its relation to the social, and the state.

Title: Problem Solving Justice and the Adversarial Paradigm

Author/s: Tyrone Kirchengast, University of New South Wales

Abstract: Problem solving justice allows a shift from traditional adversarial engagement between the accused and state for a therapeutic process that engages all participants in the justice system. The last decade has seen the rise of a multitude of problem solving courts, and most jurisdictions now contain versions of a drug court and an indigenous sentencing court. However, other courts based on this problem solving model may now deal with sex offences, mental health issues, domestic violence, and community prosecution. This paper considers this movement away from the adversarial criminal trial for a criminal process established around a stakeholder perspective that realises the importance of agency and participation between traditional and non-traditional participants in the criminal justice system, including victims, the police, the judiciary, defendants, the community and service providers.

Title: The Principle of Orality and the Posthuman Courtroom

Author/s: Carolyn McKay, University of Sydney

Abstract: Live witness testimony is the paradigmatic form of evidence in criminal trials. This 'principle of orality', meaning the privileging of live, physically present, embodied human testimony – the spoken word as evidence – is deeply embedded in our legal system. Testimony currently depends on the embodied presence of the witness: a direct relational engagement between the participants in an open, public courtroom is a necessary condition. A paradigm shift is seemingly occurring with the increasing use of video technologies in criminal proceedings, hinting at a future immaterial, digitized posthuman courtroom. I will examine the introduction of technologies into the courtroom, particularly videoconferencing, and the resulting mediation or replacement of the body of the witness. Is the human body being gradually removed from criminal law proceedings and, if so, are the underpinning values of criminal justice being safeguarded? My research will explore whether a radical departure from the oral tradition of live, present, embodied human testimony may serve expediency, economic rationalization and security concerns, but not necessarily the fundamental principles of criminal justice and rights of the defendant.

Through my inter-disciplinary research and creative practice between Sydney Law School and Sydney College of the Arts, I examine the essence and experience of live witness testimony – its polymorphous character, complexities and essential features, and the richness of intersubjective human experience. Reference will be made to concepts of phenomenologies of embodied voice, phonocentrism, liveness, laws of evidence, physiological reality and mutuality of experience within the courtroom space, and the technologized disembodied voice to explore the essence and value of orality.

Title: Understanding Victim Behaviour Through Offender Behaviour Typologies

Author/s: Wayne Petherick & Claire Ferguson, Bond University

Abstract: Criminology has long sought to define and understand criminal motivations. There has, however, been less attention paid to the motivations involved in "everyday" thought and behaviour that may place someone in harm's way. This

doesn't mean that victims are somehow motivated to become victims, but they may behave in such a way that victimisation happens as a matter of course.

In the parlance of victimity, victim behaviour has often been referred to as either "victim facilitated" or "victim precipitated". However, while some use these terms to explain the role of victim behaviour in relation to harm or loss, they actually do little to further our knowledge about the cognitive and behavioural milieu in which victimisation occurs. For example, a victim of homicide may precipitate the attack by violently confronting a partner (in retaliation for real or imagined wrongs). Another victim may facilitate domestic violence by not leaving their partner for financial reasons ("cannot afford to go out on my own").

Far from blaming the victim, understanding the motivational nature of victim behaviour can be accomplished by juxtaposing motivations for offender behaviour. This presentation applies offender motivations to victim behaviours, and presents anecdotal and research support for this approach.

Title: The Law on Corroboration and Documentary Evidence in Fiji and Vanuatu

Author/s: Sofia Shah, University of the South Pacific

Abstract: This paper will comment on the introduction of the law of corroboration in the South Pacific focusing on two main countries, Fiji Islands and Vanuatu. It will discuss what forms of evidence initially were admitted in courts in the Pacific and how the approach is changing due to the changing society and advancement in technology. It will look at the areas under Evidence Law and how the Courts in Fiji and Vanuatu have applied them to their own jurisdiction. Also the changes that have taken place due to the developments in the common law and whether these changes to the application of the rules on corroboration in Fiji and Vanuatu are beneficial in any ways. I will look at the advantages and disadvantages of the changes in the law on corroboration and what message it portrays for the future of the law of evidence in these countries. Legislation and case laws will be analyzed and compared in these two jurisdictions and how they had contributed towards the development in the law of evidence, in some instances moving away from the basic common laws and incorporating provisions in the Evidence Acts of the country. How the courts have used corroborative evidence and the criteria to admit them in the courts in Fiji and Vanuatu will be discussed in this paper.

Title: The impossibility of community justice whilst there is Intervention

Author/s: Mary Spiers Williams, Australian National University

Abstract: In 2007, the Wild Anderson Report recommended the introduction of community courts in the Northern Territory. There are currently many factors that inhibit the possibility of meaningful community participation in justice processes in the Northern Territory, particularly given the degree of externally imposed intervention and acts by governments to disempower and disenfranchise Aboriginal people in the Northern Territory. The paper explores the question of whether judicial attitudes to Aboriginal people and their communities have 'hardened', through an examination of community participation in sentencing processes. The paper discusses Commonwealth legislation introduced as part of the Northern Territory Intervention (and related Northern Territory legislation) that restricts the use that a sentencing court can make of evidence of "customary law" and "cultural practices", and questions whether it is now possible to conduct a community court sentencing hearing or for meaningful community participation in sentencing processes. This legislation, which magistrates are sworn to uphold, and a socio-political climate of 'Intervention', are affecting magistrates' attitudes and practices in relation to indigenous defendants that may be described as 'hardening'. This raises concerns that valuable opportunities for improving justice processes and outcomes are being undermined.

Title: Crime and the Night-Time Economy in Australia's Global City: Fear, Loathing and Neo-Liberal (Non) Governance

Author/s: Stephen Tomsen, University of Western Sydney

Abstract: Debates about night time leisure and crime reflect the contradiction between stimulation and regulation as twin strategies for policing, security and governance in cities competing for status as desirable cosmopolitan locations of nocturnal leisure. In the United Kingdom, the mix of industrial closure and rapid deregulation of the liquor industry, the rise of a poorly-regulated private security sector with bouncer violence and illegal activity in pubs and clubs, all contributed to the startling rise of a problematic night-time economy in many towns and cities. These concerns have been echoed in Sydney-based debates about disorder, late licensing hours, assaults in listed venues, regulation and behaviour of nightclub security, problems with transport and safety, and the increased resource pressures on police and emergency/medical services at night. A high proportion of revellers, night-time leisure workers and nearby residents are apprehensive about perceived rudeness and incivility as signs of serious threat and personal danger but hold individualised notions of risk management. Furthermore, the recent history of deregulation and divided policy making in relation to crime, violence and Sydney's nightlife signal the limits of social governance by fragmented neo-liberal states.

Contemporary Penalty in the Shadow of Colonial Patriarchy

Eileen Baldry, University of New South Wales & Chris Cunneen, James Cook University

Introduction

Understanding and explaining the rapid increase in the rate of imprisonment in Australia over the past two to three decades is occupying a number of criminologists and legal scholars, not least the Australian Prisons Project group (Baldry et al 2011). One aspect of this investigation is exploring why it is that particular groups of Australians (Indigenous Australians, women and especially Indigenous women) have developed a much higher risk than previously of being caught in the imprisonment cycle over this period. This paper opens a new perspective on this phenomenon by exploring it through the lens of patriarchy and colonialism.

Internationally various explanations have been posited for the increase in penal severity, and have included important new ideas, such as the 'new penology' (Feeley and Simon, 1992), the 'culture of control' (Garland, 2001a) and 'new punitiveness' (Pratt et al, 2005), and an emergent 'carceral state' (Gottschalk, 2008; Social Research, 2007). In reflecting on the US growth in imprisonment, Simon has argued that criminalisation and imprisonment have been used increasingly as a tool of social policy, which has resulted in a process of 'governing through crime' (Simon 2007). There is evidence that increased punishment has been targeted at those defined as high risk, dangerous and marginalised (Baldry et al 2006; Calma 2005; Harrington 1999; Markowitz 2010; NSW Legislative Council 2001). Furthermore, governance through crime has also focused on reducing the risk of crime and thus extended various modes of surveillance into a range of institutions previously outside the criminal justice system, including schools, hospitals, workplaces, shopping malls, transport systems and other public and private spaces. These changes have brought about a transformation in the civil and political order, which is increasingly structured around 'the problem of crime'. One outcome of this has been the reorientation of fiscal and administrative structures to deal with crime and a resultant level of incarceration well beyond historical norms (Simon 2007:6).

The advent of governing through crime, and the rise in penal severity, has been attributed to certain political configurations in some liberal democracies (Simon 2007, Lacey 2008). These include lower levels of public trust in politicians and a new populism, which distrusts 'experts'. Further, there is said to be a public lack of credibility specifically in the expertise of criminal justice professionals and less virtue and public good associated with judicial autonomy: judicial independence is seen as a problem to be contained rather than a basic democratic safeguard. Weaker ideological differentiation between major political parties has resulted in a greater focus on the 'median' voter and the exploitation of fear of crime as a strong consensus concern. There are certainly examples of this phenomenon in Australian states and territories where Liberal and Labor politicians have competed in the use of punitive crime control measures as a potential vote winner.

It has also been argued that in Australia, as elsewhere, a large number of policy and legislative changes over the past 20 years have had negative and disproportionate effects on Indigenous persons, and women who are poor, disadvantaged and racialised, thereby increasing their rates of imprisonment (Australian Prison Project 2009; Pratt et al 2005; NSW Legislative Council 2002; NSW Legislative Council 2001).

These various explanations illuminate the phenomenon of, and go some way to explaining, the growth in the prison population and a changed penalty. However, we argue that an analysis drawing on colonial patriarchy provides a new

perspective, particularly in explaining the specificity of the growth in Indigenous and women's imprisonment in Australia – in other words an analysis of colonial patriarchy assists in explaining why it is that certain social groups are identified as high risk, dangerous and marginalised. We argue that penal culture¹ is at least partially defined by patriarchal colonial relations. To begin with though, it is necessary to frame this discussion briefly with a consideration of the expansion of the penal estate in Australia over recent years.

The Penal Estate

The Australian Bureau of Statistics (ABS) estimated that in the decade between 1993 and 2003 the Australian rate of imprisonment increased by 22 per cent (ABS 2004). Between 2000 and 2010 the number of prisoners increased by 37 per cent from 21,714 to 29,700 and the rate of imprisonment had increased by a further 15 per cent to 172.4 per 100,000 of the adult population (ABS 2010a:33). This growth demonstrates that the prison population is increasing at a significantly faster rate than the general Australian population. Yet the problem is almost certainly worse than the increasing imprisonment rates would indicate. Census or daily average counts mask the number of people who flow through the prison system each year. As the majority of prisoners (sentenced and unsentenced) are incarcerated for less than 12 months, far more than the 29,700 counted on a census night move through the system. Extrapolations from various data sources suggest around 50,000 persons flow through Australian prisons annually (ABS 2010b; Baldry 2010). The national census picture also masks significant differences between states and territories: the Northern Territory's imprisonment rate is 662.6 whereas Victoria's is 105.5 (ABS 2010a:33).

The situation for Indigenous people in prison has progressively deteriorated. In the 20 years to 2008 Indigenous imprisonment rates rose from 1,234 to 2,492 per 100,000 of population, while non-Indigenous rates were both significantly lower and increased at almost half the rate (ABS, 2008; Carcach and Grant, 1999; Carcach et al, 1999). These increases occurred at a time when governments were responding to the Royal Commission into Aboriginal Deaths in Custody recommendations designed, *inter alia*, to reduce Indigenous incarceration (Cunneen 2007a). It is clear that punishment in Australia is highly racialised. The two jurisdictions in Australia, which have the highest imprisonment rates (the Northern Territory and Western Australia), are also the jurisdictions with the largest proportion of Indigenous people living within their boundaries. Indeed in Western Australia, Indigenous imprisonment rates are well beyond any meaningful comparison to other rates in Australia: whilst the non-Indigenous imprisonment rate in Western Australia in 2010 was 170 per 100,000 (ABS 2010a), the rate of Indigenous imprisonment (male and female) was 4309.6, and the Indigenous male rate was 7803.5 (ABS 2010b:23). By the first quarter of 2010 the number of Indigenous people imprisoned in Australia had reached 7613 and comprised 26 per cent of the total prison population. The Indigenous rate of imprisonment was 14 times higher than the non-Indigenous rate (ABS 2010b:6).

There has also been a changed environment in our cultural understanding of the appropriateness of gaol for women, reflected in the extraordinary growth in women's imprisonment. In 1983 women formed 3.9% of the Australian prisoner population, in 1993 the proportion was 4.8%, in 2003 it was 6.8% and in 2010 it was 8% (ABS 2010a; Biles, 1984; Walker, 1982-1990). Although the actual number of women prisoners remains small compared to men, their proportion of the total prison population has been increasing. Over the last decade (2000-2010) the number of women prisoners increased by 60% compared with 35% for men (ABS 2010a:16). However, this increase is not uniform across groups of women in Australia, with much of the increase accounted for by the increasing rate of imprisonment of Indigenous Australian women.

¹ See Baldry et al (2011) for a discussion of penal culture in the Australian context.

The proportion of Indigenous women prisoners increased from 21% of all women prisoners in 1996 to 30% in 2006 and steadied at around that percentage (29.3 per cent in 2010) (ABS 2006, 2010a). The rate of Indigenous women's imprisonment in 2010 was 374 per 100,000 of adult Indigenous females compared with 18 per 100,000 for non-Indigenous females (ABS 2010a:56). Thus the Indigenous women's rate of imprisonment was 21 times higher than the non-Indigenous women's rate. Changing sensibilities about both race and gender have clearly impacted on the propensity to incarcerate Indigenous women. The Australian Aboriginal and Torres Strait Islander Social Justice Commissioner severely criticized the over-representation of Aboriginal people and Aboriginal women in particular, in prison (Calma 2005). Well over a decade ago Cunneen and Kerley (1995:88) had pointed out that the increase in Aboriginal imprisonment had impacted disproportionately on Aboriginal women. The complexity of the intersection between 'race' and gender is shown by the fact that Indigenous women's rate of imprisonment is now more than 50 per cent higher than of the non-Indigenous male rate (ABS 2010a:56).

A closely allied factor in the growth in the rates of imprisonment has been the increase in the rates of imprisonment of people with mental health disorders. This has been a concerning trend across the western world (Harrington 1999). In Australia though, it has been most marked amongst women and Indigenous Australian prisoners (Butler et al 2006). Women with mental health disorders are more highly over-represented amongst the prison population than men and when compared with national norms, with Indigenous women the most highly over-represented (Butler & Allnutt 2003; Indig et al 2010; Tye & Mullen 2006). Indigenous Australians and women with dual diagnosis and co-morbidity (complex needs) in NSW prisons have higher numbers of offences and convictions but shorter sentences and incarceration periods than persons without these diagnoses and cycle in and out of prison quickly (Baldry, Dowse, Snoyman, Clarence & Webster 2008). There may not be a direct correlation between the closure of large psychiatric institutions and this rise in the rate of persons with mental health disorders in prison, but the link is well established (Harrington 1999).

It is important to recognise the cycle of self-reproducing higher imprisonment rates: although the various measurements used are recognised as flawed, it appears that between 35% to 41% of sentenced prisoners will be re-incarcerated in two years and around 66% to 70% re-incarcerated at some time in their lives (ABS 2010c, Payne 2007). The same phenomenon looked at from a different perspective shows that almost half (49%) of non-Indigenous prisoners, and almost three-quarters (74%) of Aboriginal and Torres Strait Islander current prisoners had a prior adult sentence of imprisonment (ABSa 2010:49). Furthermore, the situation is likely to be considerably worse than these static census figures suggest, particularly for Indigenous prisoners who tend to move in and out of the prison system relatively frequently. Indigenous prisoners are more likely to be re-imprisoned on multiple occasions, and many more Indigenous people will be imprisoned for short sentences over a twelve month period than the annual census figure would indicate (Lind and Eyland 2002). Women also form a higher proportion among those on remand and serving short-term sentences, than they do in the overall prison population.

We know then that there is a likelihood of multiple imprisonment experiences over a lifetime particularly for Indigenous people, that simultaneously there is a greater proportion of Indigenous people and women generally among those serving short sentences and that their rates of imprisonment have grown far faster than non-Indigenous people. They also have greater difficulty upon release from prison, in securing safe and secure housing, and appropriate assistance with mental health and drug and alcohol problems, and often continue to be subject to high levels of surveillance and control in a merged community-criminal justice space (Baldry 2010).

Although a number of vulnerable groups, as already noted, have experienced a rapid rise in their rates of imprisonment, we now focus on Indigenous Australians and Indigenous women in particular, to draw out our argument.

Penal Modernity and Postcolonial Penalty

The rapid increase in imprisonment rates, the excessive imprisonment of Indigenous Australians and the surveillance and control impositions just described have been explored through the development of new ideas around a 'culture of control', 'penal excess' and the 'new punitiveness'. These refer to aspects of severity and spectacle in punishment, which seem contrary to the values underpinning penal modernity. Three strikes sentencing and associated longer prison terms, special offender laws (for example aimed at sex offenders), pre-trial detention (remand) and post-sentence confinement, surveillance, compliance and breaching seem to lie outside of, or at least run counter to penal modernity, with its liberal values of parsimony and proportionality, and desired outcomes of rehabilitation.

However, do changes to penal modernity adequately explain the gendered and racialised outcomes of the current increases in penal severity? Why is it that Indigenous people and women have seen their imprisonment rates increase more rapidly than other groups? Discourses of modernity have been criticized by post colonial theorists for their Eurocentric bias and lack of consideration of the role of colonialism (Loomba 1998). More specifically, the application of postcolonial theory to criminology and penology may require us to re-evaluate the way we conceptualise particular problems. For example, the 'mass incarceration' argument (Garland 2001b) rests on an assumption there was a rupture or break between post war liberal welfare policies and the more recent prioritisation of retribution and incapacitation. Yet Blagg (2008) indicates that this periodisation does not necessarily transfer to colonial settings where Indigenous peoples were never fully included as citizens in the postwar welfare state. Following Said, Blagg (2008) argues for a 'contrapuntal' dynamic that stresses continuities in control over marginalised peoples, and an acknowledgment that radically divergent and bifurcated practices based on race, gender and colonial status have operated and continue to operate within criminal justice systems. The question for us is how do we understand racially bifurcated modalities of punishment through the lens of gendered colonial relations?

Drawing on an analysis of the British in colonial India, Brown (2002:403) has convincingly argued that the idea and practices of penal excess were central to the constitution of the colonial state. He demonstrates that what are seen as contemporary shifts in penal modernity towards penal excess are in fact well established aspects of penal modernity which were fundamental to the development of a modern colonial state.² Brown (2005) has argued that apparently new trends in penalty and the relationship between the individual and the state hark back to a colonial model of state-subject relationship. The 'logics and rationalities of colonial power are not separate from and antagonistic to those of modern state formations but are indeed available to them' (Brown 2005:44). We take this as a starting point for considering how contemporary penal culture, and in particular its severity and excess directed against particular subjects, can be understood within the specific dynamics of colonialism. Indeed we argue further that a colonial mode of penalty has underpinned racialised/gendered crime control in late modern states with their internal colonised Others.

Following Chatterjee (1993) and Brown (2005), we are interested in how the 'rule of colonial difference' has enabled the

² Finnane (1997: 35) also notes that the latter day large scale incarceration of Aboriginal people in Western Australia was 'conditioned' by the historical experience of 19th century Aboriginal imprisonment in that State.

state to represent the Other as inferior and radically different, and through the criminal justice system maintain a level of surveillance, intervention and control outside of, and in contradistinction to the 'universal' rights of liberal subjects. Chatterjee argued that the 'rule of colonial difference' operated to limit participation in governmental and civic life. According to Chatterjee (1993:20), the 'most obvious mark of colonial difference' was race and this mark was used to limit the application of universal and non-arbitrary rights. We consider in more detail below the rule of colonial difference in the context of penalty, and in particular how race and gender combined to differentiate modalities of punishment. But first we need to incorporate another element, that of patriarchy, into the framing of colonial penal relations. This reconceptualising, we argue below, provides a deeper dimension to our analysis of the turn, in contemporary penalty, to excessive imprisoning of vulnerable populations.

Patriarchal Colonialism

Here we follow Lerner's (1986) argument. We take it that early elemental patriarchy, the ownership and subjugation of women and children in familial contexts by dominant men in the family and then the state, was socially constructed as a means to achieve and maintain power³, but that patriarchy is not, by any means, simply male dominance over females. This social arrangement in the ancient near eastern world, argued Lerner (1986:36-53), was supremely successful, adaptive and persistent, transforming into an increasingly sophisticated ideological paradigm and blueprint for the development of institutions and ideologies such as patriarchal religion, the hierarchical state, classism, racism and, most relevant to the matter at hand, colonialism. The implication of Lerner's thesis, as well as work by others such as Mies (1998), Jaimes*Guerrero (2003) and Bannerji (2001), is that colonialism was not just tightly affiliated with patriarchy, but that it was and is an economic and political manifestation of patriarchy. Following the patriarchal paradigm, colonialism assumes ownership of and subjugates those being colonised; imposes a class structure in which the colonisers occupy the top rungs of the class ladder and the colonised the lower and bottom rungs; assumes ownership of all the colonised resources; deems the colonised culture, language and beliefs as inferior to the coloniser's; and imposes the coloniser's governance, laws and religion on the colonised. British colonialism also included the form of patriarchal subjugation of women particular to British society of the time. This patriarchal colonialism (Jaimes*Guerrero 2003) was transported, along with the convicts, to Australia by the invading British in 1788. Indigenous Australians were progressively subjected to this new social, economic and political structure from the moment Captain Arthur Phillip planted the colony at Sydney Cove.

Patriarchal colonialism as an ongoing historical and political process required the removal and remaking of Indigenous peoples. Institutional systems, both formal, such as the prison, the British law, the military, the church, the orphanage and the mission and informal such as the nuclear male headed family and the British class system, were part of the colonising package through which non-Indigenous and Indigenous alike were socially and culturally constructed (Green & Baldry 2002). Aboriginal peoples were variously murdered because they stood in the way of colonial acquisition, herded onto missions as irrelevant to the colonising project and so expendable, or relegated to the lowest servant class as useful workers. Indigenous women, experiencing the double jeopardy of being female and colonised (Payne 1992:68), suffered not only in these but also in other ways with their sexuality commodified via rape and sexual servitude (Chesterman & Galligan 1997).⁴ Legal institutions both civil and particularly criminal were fundamental to defining and enforcing patriarchal colonial relations. Law defined who was and was not Aboriginal and delimited a range of economic (eg who could work and for what

³ This is of course a gross oversimplification, but due to space, Lerner's theory cannot be rehearsed here.

⁴ This brief appraisal of the colonial project in Australia follows Jaimes*Guerrero's (2003) analysis of the British colonization of North American Native peoples as fundamentally patriarchal in nature.

wages), social (eg who needed to be institutionalized, who could live in which area, who could marry) and citizenship rights (eg who could vote, who was entitled to social security). The law enforced these patriarchal colonial relations through civil and criminal penalties. British colonial law constituted the white mythology that governed a gendered and colonial order; that placed Indigenous men and women in a particular relationship to the colonial state and colonial civil society.

Modalities of confinement and punishment

These patriarchal colonial understandings and constructions of Aboriginality and gender have permeated, from the beginning, the development of institutional forms of control of Indigenous Australians, including that of penalty. Penalty, in a variety of institutional forms, has been a central part of the operation of the colonial state in its governance of Indigenous peoples. As Rowley (1972:123) famously remarked in the early 1970s, 'it is still true... one can be incarcerated either for crime or for being Aboriginal'. Separate modes of confinement and punishment were introduced and justified on the basis of the coloniser's 'superior' race and 'rightful dominance' of the colonised race. While differing and often competing definitions of 'race' have operated across the broad historical terrain of European domination of Australia (McGregor 1997), racial discourses on Aboriginality have remained central to penalty (see also Purdey 1996; Hogg 2001). These racial discourses have been and remain gendered: Indigenous women were separated from other women because of perceived biological and culturally-defined racial differences: sexually promiscuous; incompetent mothers; and so forth.

Racial understandings, founded in colonial categorisations of difference and inferiority, played a constitutive role in defining the appropriateness of certain types of punishment. For example, public execution of Aboriginal offenders continued for decades after their cessation for non-Aboriginal offenders. Aboriginal onlookers were gathered to watch the events, and these were meant as salutary spectacles of punishment. Similarly the extended use of physical punishments and restraints (lashings, floggings, chaining) for Aboriginal offenders continued until well into the twentieth century, as did police punitive expeditions (Cunneen 2001). Modernity and the development of modes of punishment that disavowed corporal and capital punishment were seen as less suitable for Indigenous people because of their perceived racial characteristics (Finnane 1997: 115). Aboriginal people appeared to be well over-represented in death sentences (Finnane 1997: 37, 129-130). Senior members of the judiciary (such as Judge Wells from the Northern Territory Supreme Court) viewed flogging and execution as the most appropriate forms of punishment for Aboriginal people certainly until well into the 1930s (see Markus 1990; Cunneen 1993).

The formal and informal segregation of all institutions (schools, hospitals, employment, places of entertainment) along racialised lines was common place and applied also to places of detention, such as Rottneest Island (Finnane 1997:36). Historically these different modes of punishment were justified by (and reproduced) racialised understandings of Aboriginal difference, with the courts freely pronouncing on the degree to which individual Aboriginal offenders had reached a particular stage of civilization. After an extensive review of criminal cases involving Aboriginal people, McCorquodale argued,

[T]he courts seem to have accepted that there is a continuum which distinguished Aboriginals in various stages of sophistication... there is a pronounced judicial perception that Aboriginals are different from whites in a way that disadvantages Aboriginals... The courts have therefore adopted, as a proper test of sentencing, the extent to which an Aboriginal's mode of life and general behaviour approaches that of a white person (1987:43-44).

The development of 'protection' legislation from the end of the 19th century saw many Indigenous individuals and

communities, particularly those who were seen as unable to demonstrate the level of 'civilisation' required to exercise citizenship rights, segregated on reserves and missions. Under the protection legislation, reserves and missions administered their own penal regimes outside of, and essentially parallel to, existing formal criminal justice systems (Cunneen and Libesman 1995). Other semi-formal processes of racialised justice abounded through curfews and segregation (Cunneen and Robb 1987), while child removal policies created further generations of institutionalized Indigenous people (NISATSIC 1997). These policies and practices reflected various racial assumptions about Indigenous people, some built on 'science' like eugenics, others reflecting popular prejudices about the incapability of Indigenous people to live like civilized white folk.

Aboriginal women were subjected to criminal law and penal sanctions in both similar and different ways to Aboriginal men were in the early colonies. Both were for example governed by various nineteenth century protection legislation. Aboriginal women were also subjected to colonial patriarchal control by being locked up in disproportionate numbers in women's 'factories' and in mental asylums and punished further by having their children removed (Baldry 2010; Green & Baldry 2002). The removal of Indigenous children in the early part of the twentieth century relied on views that Indigenous parenting was negligent and, in particular, that Indigenous female sexuality was a threat that needed to be controlled by targeting pubescent girls (Goodall 1990:7). Still today Aboriginal women identify the removal of children through child protection legislation as a form of punishment (NISATSIC 1997).

Nowhere provides a better example of patriarchal-colonial state control of females, Aboriginal women in particular, via institutional means and the conflation of classism, racism and sexism than the Parramatta Female Factory and Girls Home in NSW (Parragirls undated). It began in the first decades of the colony as a welfare institute for convict women and their children; quickly became the Parramatta Female Factory where convict women were incarcerated and required to work (similar institutions were built around the country) but were also subjected to almost constant rape; morphed into a Lunatic asylum in 1848 and incarcerated women over its 130 years, a large number of them Indigenous (see Haskins 2001 regarding declaring Aboriginal women insane in order to institutionalise and control them). Next door to the Female Factory an orphanage was built in 1841 in which girls, many of them stolen Aboriginal children, were raised in punishing circumstances by the Catholic Church. In 1887 the orphanage became an Industrial School for Girls (a euphemism for a girls' detention centre) later known as the Parramatta Girls Home, only to be taken over in 1980 by the Department of Corrective services as a women's prison. This one geographical location and institution with its many manifestations, exemplifies the various institutional forms used to control Indigenous, poor, disadvantaged women and those with mental and cognitive disability and shows the elision of welfare and psychiatric institutions, and prisons.

That, from the beginning, most white colonists perceived and reported on Aboriginal societies' gender relations through their own sexist, classist cultural framework, has been established (for example see Berndt 1981; Gale 1974). Paternalistic as well as brutal colonial attitudes to Indigenous Australian women resulted in them being cast as the lowest on the class ladder with expectations of submissive servitude when in white society. These views linger in contemporary Australia. Dodson for example, noted that one justice in Western Australia stated that he sentenced Aboriginal women to terms of imprisonment to protect their welfare. 'Sometimes I sentence them to imprisonment to help them... They get cleaned up and fed then' (Dodson 1991: 136). The significantly greater extent to which Aboriginal women are brought before the courts and sentenced to imprisonment for minor offences compared with non-Aboriginal women maintains a view of Aboriginal women as a criminal class.

The Civil Rights Turn

The 1960s saw the repeal of significant sections of discriminatory state and territory legislation as part of the general move towards assimilation and integration, policies that were argued to be continuing the colonisation of Aboriginal Australians (Green & Baldry 2002). Laws, which enabled Aboriginal men in Western Australia and South Australia to be whipped for breaches of the criminal law or for false statements, were repealed. In the Northern Territory the criminal code was amended in 1968 so that Indigenous people convicted of murder could receive a 'just and proper' penalty instead of the death sentence.

This civil rights era also saw the referendum in 1967 that overwhelmingly approved changes to the Australian Constitution confirming the power of the Commonwealth to make laws for Australian Aboriginal people and their inclusion in national census. The 1967 referendum reflected a national mood for full citizenship rights for Indigenous people. The ten years following the referendum saw the abolition of Aboriginal Welfare Boards and the closure or handing over to Indigenous communities of the many dozens of missions and institutions across the country, for example the Cootamundra Girls Home, that had confined and detained them for decades (National Australian Museum Canberra undated).

During the 1960s – 1980s the process of the deinstitutionalisation of long term psychiatric patients gained pace along with the closure of psychiatric institutions and later of institutions for those with intellectual disability in Australia. Psychiatric hospital beds decreased from 281 per 100,000 in the 1960s to 40 per 100,000 in the 1990s (Petersen, Kokanovic & Hansen 2002:122) but without the concomitant support, particularly for the most vulnerable of these persons – Indigenous peoples, the poor and homeless – being established in the community.

By the 1990s the patriarchal colonial institutions that had confined and controlled Indigenous Australians had been dismantled but at the same time, mechanisms of colonial surveillance derived from more than a century and a half of colonisation (Cunneen 2001) did not disappear, rather they changed their focus and methods. Based on her research in Western Australia, Purdy (1996:414) argues that as the disciplinary regimes of the reserves, settlements, missions and pastoral stations were replaced by assimilation in the 1950s there began a significant increase in the imprisonment rates of Aboriginal people. In addition the movement of Indigenous people into urban areas brought an intensified focus to non-Indigenous racial concerns. From the limited national evidence on imprisonment levels from the early 1970s, it would appear that Indigenous people were increasingly appearing in the mainstream prison system (Hogg 2001), while for Indigenous children and young people, juvenile justice and child welfare played increasingly important interventionist roles structured by both race and gender (Carrington 1993, Cunneen 1994).

As we have identified elsewhere a penal expansionism was underway, beginning from the 1980s and picking up speed from the 1990s onwards, which was to see profoundly negative impacts on Indigenous imprisonment rates (Baldry et al 2011). Sentencing was and is one of these latter day means by which greater levels of control are imposed on Indigenous Australians, funnelling them into the prison in significantly greater proportions than non-Indigenous Australians.

Sentencing and Aboriginality

In contemporary Australia, understandings of both sentencing and punishment have been enlarged through concepts of race, gender and culture. Some of these understandings might be seen as positive affirmations of Indigenous cultures,

others may be seen largely in a negative light where being Indigenous brings with it certain disadvantages. An example where the consideration of the Aboriginality of an offender in sentencing is largely based on a set of negative characteristics is the Fernando principles (R v Fernando [1992] 76 A Crim R 58 at 62-63). In the Fernando case Justice Wood found that the Aboriginality of an offender does not necessarily mitigate punishment but may explain the particular offence or the circumstances of the offender. Wood J. noted that 'the problems of alcohol abuse and violence... to a very significant degree go hand in hand within Aboriginal communities' (R v Fernando at 62). The endemic problems in Indigenous communities including poor self-image, absence of education and work opportunities and 'other demoralizing factors' need to be recognized by the court when sentencing. The principles, and their interpretation in later case law, establish a hierarchy of Aboriginality, at least to the extent that they are seen as more appropriate in their application to Indigenous people from rural or remote areas - a familiar trope in judicial pronouncements on Aboriginality (see Behrendt, Cunneen and Libesman (2009) for more recent cases, and Cunneen (1993) for earlier cases referring to this well rehearsed distinction).

The Fernando principles also established that for an Indigenous person,

who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality (R v Fernando at 63).

On this point the court was reiterating, perhaps in more humane terms, what had been a common understanding and practice since the early days of the colony - that specific forms or modalities of punishment were applicable to Indigenous offenders. We materialize this cultural understanding of penalty today in a variety of ways, one of which is through de-facto Indigenous prisons, such as the Broome prison in Western Australia or through self-conscious attempts on the part of correctional services such as the Indigenous prisons and facilities at Balund-a and Yetta Dhinikal in New South Wales.

In the realm of penalty not all understandings of Aboriginality are negative. The growth in Koorie, Nunga and Murri courts, and circle sentencing courts over the last decade (Marchetti and Daly 2007) are the outcome of Indigenous activism and official accommodation. They provide an opportunity for Indigenous people to be involved in the sentencing process, albeit at least at a formal level on the terms set by the government and the judiciary. Importantly, punishment is understood as an outcome of decision-making by judicial officers and non-judicial Indigenous members of the court. In this context, Indigenous culture is seen as a positive contributor to the reform of Indigenous offenders.

No matter the accommodations made, the results of these initiatives over the past fifteen years have not halted the increase in the rate of Indigenous imprisonment, as detailed early in this article. Part of the reason for this is that they are essentially peripheral to the workings of the mainstream criminal justice system - with comparatively very few Indigenous people actually appearing before Aboriginal sentencing courts. And the theories posited to explain the broader increases in the prison population, also outlined earlier, do not explain the much greater growth in imprisonment rates of Indigenous and women prisoners compared with non-Indigenous and male rates. To shed light on this we come back to the pervasive ongoing effects of patriarchal colonialism.

Contemporary Penal Politics and the 'New Barbarism'

A useful way of considering the ongoing effects of patriarchal colonialism is to look at various ways of considering the problem of violence in Aboriginal communities. Within the dominant penalty, there is little understanding that the violence in Aboriginal communities can be 'sourced in the invasion and colonisation of Australia... [that] violence is inherent in the colonial project' (Watson 2007:97). Indigenous perspectives (there are clearly more than one) on violence against women are largely based on different understandings and explanations for the violence, and demand differing law and policy interventions. In contrast, the history of rape and frontier violence is absent from contemporary penal approaches to violence in Aboriginal communities. Indeed, Indigenous law is presented as part of the problem of violence. Indigenous women are presented as victims, and Indigenous men as inherently violent, thus confirming 'the superiority of white men' (Watson 2007:102). By way of comparison, Indigenous perspectives emphasise self determination and empowerment, community development and capacity building as aspects to dealing with domestic and family violence. Further, approaches that acknowledge the links between colonial experiences of violence, and contemporary approaches that emphasise individual and collective healing are paramount.

It is also worth reflecting here, on what has been referred to as the 'new barbarism', which presents a view of Aboriginal culture as a largely worthless male-dominated collection of primitive beliefs (Cunneen 2007b), evidence of the continuing pervasiveness of patriarchal colonial consciousness. The NT Emergency Response (the Intervention) as a governmental legislative and policy response to violence against women and child abuse brought together particular racialised and gendered understandings of Aboriginality: 'traditional' Aboriginal men were particularly to blame for abuse and violence, and Aboriginal women were seen as passive and hapless victims. Presented as a response to family violence in Indigenous communities, the Howard Government's Crimes Amendments (Bail and Sentencing) Act 2006, introduced just prior to the Intervention, restricted the courts from taking customary law into consideration in bail applications and when sentencing. The legislation clearly draws what is seen to be an incontrovertible link between Indigenous culture and gendered violence. As Moreton-Robinson (2009:68) has noted the 'impoverished conditions under which Indigenous people live [are] rationalised as a product of dysfunctional cultural traditions and individual bad behaviour' and it is Indigenous pathology 'not the strategies and tactics of patriarchal white sovereignty' which is to blame for the situation of violence and abuse.

The Intervention is also a clear example of Chatterjee's (1993) notion of the rule of colonial difference. Aboriginal people in the NT are placed outside the framework of civil society because of their racially-constructed difference. Their most important legal protection against racial discrimination, the Commonwealth Racial Discrimination Act 1975, was suspended by parliament to allow the racially discriminatory aspects of the Intervention to occur without challenge to the courts. In a further sign of Aboriginal removal from civil society, the Australian military was used to support the Intervention, which itself was based on criminalization and extensive forms of surveillance and control over a range of matters from medical records to school attendance to social security entitlements. A consistent criticism of the intervention has been its clearly neo-paternalistic approach and suspension of human rights (Altman 2007).

In this context it is not surprising that we have witnessed a new level of prison based state punitiveness. In the years following the Intervention imprisonment rates grew by 12 per cent between 2008 and 2010 (ABS 2010d:12). By way of contrast the NT is well out of step with the rest of the nation in its limited use of non-custodial, community-based corrections. Nationally there are nearly twice as many people on community-based correctional orders compared to the number of persons in prison. In the NT there are almost the same number of people in prison as there are in community-corrections.

Meanwhile as imprisonment rates in the NT have increased, the use of community-correctional orders has actually declined (ABS 2010d). The use of imprisonment in the NT remains a normalised response to Indigenous people and is constantly re-invented as an appropriate response to government identified 'crises'.

Conclusion: Maintaining Control

In all the examples above we are concerned to explicate the way the institutional frameworks of sentencing and punishment are imbued with cultural meanings and understandings of Aboriginality and continue to be informed by but also struggle with the ongoing influence of colonial patriarchy.

We have demonstrated the unbroken chain from 1788 into the twenty-first century, of discriminatory institutional methods of control of Indigenous Australians, with an emphasis on various forms of detention and punishment. We suggest that the rate of detention of Indigenous Australians has always been very high, but that a variety of different institutions not just the prison, have, in the past, been used and used explicitly, differentially and exclusively to exert control and to punish. Aboriginal girls' and boys' homes, mental asylums, missions, were all quasi prisons, using force, the police and legislation to detain Aboriginal people within their boundaries and segregate them from the rest of the community. When these institutions began to close – the missions and 'homes' following both changes in government policy towards assimilation and integration in the postwar period, the challenge of Indigenous claims to civil rights during the 1960s, and the psychiatric asylums over the 1960s to the 1980s with the deinstitutional movement – these methods of control were lost. It is, we argue, no coincidence that the rates of Indigenous Australians, and of Indigenous women in particular, being imprisoned over the past 30 years, have risen exponentially.

This increase in Indigenous imprisonment appears to be not the result of increasing crime, but rather, of more frequent use of imprisonment (Fitzgerald 2009), something the noted increases in cultural expressions and recognitions of Aboriginality have done little to ameliorate. We have argued in this paper that one understanding and explanation of this use of the prison in contemporary Australia is through the continuing pervasive effects of colonial patriarchy. As the NT example attests, civil and criminal law continue to be integral to the constitutive processes of patriarchal colonialism – as indeed they have been, in various guises, from the earliest days of colonisation. However, in recent decades we have seen a reconfigured Australian penalty which appears in the foreground of patriarchal colonial relations. To this extent, the church missionary and the reserve superintendent have been replaced by the correctional centre manager as a key figure in governing Indigenous people.

References

Altman, JC 2007 *The Howard Government's Northern Territory Intervention: Are Neo-Paternalism and Indigenous Development Compatible?* Centre for Aboriginal Economic Policy Research, Topical Issue No. 16/2007

ABS (Australian Bureau of Statistics) 2006 *Prisoners in Australia* ABS Canberra

ABS 2008 *Prisoners in Australia* ABS Canberra

ABS (2010a) *Prisoners in Australia* ABS Canberra. Catalogue No 4517.0

ABS (2010b) *Corrective Services, March 2010*. Canberra: ABS: Catalogue No 4512.0

ABS (2010c) *Repeat Imprisonment*. Australian Social Trends. March 2010. Canberra: ABS: Catalogue No 4102.0:

- ABS (2010d) *Corrective Services, December 2010*. Canberra: ABS: Catalogue No 4512.0
- Australia Prison Project 2009 <http://www.app.unsw.edu.au>
- Baldry E 2010 Women in Transition: from prison to ... *Current Issues in Criminal Justice* Vol. 22 No. 2: 253-267.
- Baldry E McDonnell D Maplestone P and Peeters M 2006 'Ex-prisoners, Homelessness and the State in Australia' *The Australian and New Zealand Journal of Criminology* vol 39 no 1 pp 20-33
- Baldry E Dowse L Snoyman P Clarence M and Webster I 2008 'Reconceptualising disability in the criminal justice system: People with mental health disorders and cognitive disability' *ANZSOC Annual Conference* Canberra 26-28th November
- Baldry, E., Brown, D., Brown, M., Cunneen, C., Schwartz, M. and A. Steel (2011) 'Imprisoning Rationalities', Special Issue on Prisons, *Australian and New Zealand Journal of Criminology*, vol 44, No 1.
- Bannerji, H. 2001 *Inventing subjects : studies in hegemony, patriarchy and colonialism* Anthem Press London
- Behrendt, L., Cunneen, C. and Libesman, T. (2009) *Indigenous Legal Relations in Australia*, Oxford University Press, Melbourne.
- Berndt, C H. 1981 "Interpretations and facts in Aboriginal Australia" in Dahlberg, F (ed) *Woman the Gatherer* Yale University Press, New Haven
- Biles D (1984) An Australian Perspective – Women in Corrections. In: Hatty S (ed) *Women in the Prison System, Seminar Proceedings No. 3* Canberra: Australian Institute of Criminology.
- Blagg, H. (2008) *Crime, Aboriginality and the Decolonisation of Justice*, Hawkins Press, Leichhardt.
- Brown, M (2005) "That heavy machine": Reprising the colonial apparatus in 21st century social control', *Social Justice*, 32, 41-52.
- Brown, M. (2002) 'The politics of penal excess and the echo of colonial penalty' *Punishment and Society: The International Journal of Penology*, 4, 403-423
- Butler, T. & Allnut, S. (2003) *Mental Health among NSW Prisoners*. Corrections Health Service; Sydney
- Butler T Andrews G and Allnut S 2006 'Mental disorders in Australian prisoners: a comparison with a community sample' *Australian & New Zealand Journal of Psychiatry* vol 40 pp 272-276
- Calma T 2005 *Social Justice Report 2005* Human Rights and Equal Opportunity Commission Sydney
- Carcach C, Grant A (1999) Imprisonment in Australia: Trends in Prison Populations & Imprisonment Rates 1982-1998. *Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* 130: 3.
- Carcach C, Grant A and Conroy R (1999) Australian Corrections: The imprisonment of Indigenous people. *Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* 137: 2.
- Carrington, K. 1993, *Offending Girls*, Allen and Unwin, Sydney.
- Chatterjee, P. (1993) *The Nation and Its Fragments. Colonial and Postcolonial Histories*, Princeton University Press, Princeton.
- Chesterman J and Galligan B 1997 *Citizens without Rights Aborigines and Australia citizenship* Cambridge University Press Cambridge
- Cunneen, C. and Robb, T. 1987, *Criminal Justice in North-West NSW*, NSW Bureau of Crime Statistics and Research, Attorney-General Department, Sydney.
- Cunneen, C. (1993) 'Judicial Racism' in McKillop, S. (ed) *Aboriginal Justice Issues*, Australian Institute of Criminology, Conference Proceedings No 21, Canberra.

- Cunneen, C 1994, 'Enforcing Genocide? Aboriginal Young People and the Police' in R. White, R, and C. Alder (eds), *The Police and Young People in Australia*, Cambridge University Press, Melbourne.
- Cunneen, C. and Libesman, T. (1995) *Indigenous People and the Law in Australia*, Butterworths, North Ryde.
- Cunneen C and Kerley K 1995 Indigenous Women and Criminal Justice: some comments on the Australian situation in K. Hazelhurst (ed) *Perceptions of Justice* Aldershot England Avebury pp 71-94
- Cunneen C 2001 *Conflict, Politics and crime: Aboriginal communities and the police* Allen & Unwin Crows Nest
- Cunneen, C. (2007a) 'Reflections in Criminal Justice Policy since the Royal Commission into Aboriginal Deaths in Custody', in Gillespie, N. (ed) *Reflections: 40 Years on from the 1967 Referendum, Aboriginal Legal Rights Movement*, Adelaide, ALRM, pp, 135-146
- Cunneen, C. (2007b) 'Assimilation and the Re-invention of Barbarism' *Australia Indigenous Law Review*, Vol 11 Special Edition , pp42-45.
- Dodson, P. (1991) *Regional Report of Inquiry into Underlying Issues in Western Australia, Royal Commission into Aboriginal Deaths in Custody*, AGPS, Canberra, Volume 1.
- Feeley M, Simon J (1992) The new penology. *Criminology* 39: 449-74. Garland D (1991) *Punishment and Modern Society - a Study in Social Theory*. Oxford: Clarendon.
- Finnane, M. (1997) *Punishment in Australian Society*, Oxford University Press, Melbourne.
- Fitzgerald, J (2009). *Why are Indigenous Imprisonment Rates Rising?*, Issue Paper No 41. Sydney: NSW Bureau of Crime Statistics and Research.
- Gale, F (ed) 1974 *Woman's Role in Aboriginal Society* 2nd edition, Australian Institute of Aboriginal Studies, Canberra
- Garland D (2001a) *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.
- Garland, D. (ed) (2001b) *Mass Imprisonment. Social Causes and Consequences*, Sage, London.
- Goodall, H. 1990, 'Saving the Children', *Aboriginal Law Bulletin*, Vol 2, No 44, pp.6-11.
- Gottschalk M (2008) Hiding in plain sight: American politics and the carceral state. *Annual Review of Political Science* 11: 235-260.
- Green, S. & Baldry, E. 2002" Indigenous Welfare in Australia" *Journal of Societal and Social Policy* Vol1 No1:1-14.
- Harrington S 1999 New Bedlam: Jails -- Not Psychiatric Hospitals -- Now Care for the Indigent Mentally Ill *The Humanist* vol 59 no 3 pp 9-10
- Haskins V 2001 On the Doorstep: Aboriginal domestic service as a contact zone *Australian Feminist Studies* vol 16 no 34 pp 13-25
- Hogg, R. (2001) 'Penalty and Modes of Regulating Indigenous People in Australia' *Punishment and Society*, vol 3, no 3, 355-379
- Indig D, McEntyre E, Page J & Ross B. (2010) 2009 NSW Inmate Health Survey: Aboriginal Health Report. Justice Health, Sydney.
- Jaimes*Guerrero MA 2003 "Patriarchal Colonialism" and Indigenism: Implications for Native Feminist Spirituality and Native Womanism *Hypatia* vol. 18, no. 2, 58-69
- Lacey, N (2008). *The Prisoners' Dilemma. Political Economy and Punishment in Contemporary Democracies*. The Hamlyn Lectures. Cambridge: Cambridge University Press.

- Lerner G 1986 *The Creation of Patriarchy* New York Oxford University Press
- Lind, B and Eyland, S (2002). *The Impact of Abolishing Short Prison Sentences*, *Crime and Justice Bulletin No 73*. Sydney: New South Wales Bureau of Crime Statistics and Research.
- Loomba, A. (1998) *Colonialism / Postcolonialism*, Routledge, London.
- McCorquodale, J. (1987) 'Judicial Racism in Australia? Aboriginals in Civil and Criminal Cases', in Hazlehurst, K. (ed) *Ivory Scales. Black Australians and the Law*, New South Wales University Press, Kensington.
- McGregor, R. 1997, *Imagined Destinies. Aboriginal Australians and the Doomed Race Theory, 1880-1939*, Melbourne University Press, Carlton South.
- Marchetti E and Daly K (2007). 'Indigenous sentencing courts: Towards a theoretical and jurisprudential model'. *Sydney Law Review* 29: 416-443.
- Markowitz FE 2010 Mental illness, crime, and violence: Risk, context, and social control *Aggression and Violent Behavior* 16 (2011) 36-44
- Markus, A. (1990) *Governing Savages*, Allen and Unwin, Sydney.
- Mies, M 1998 *Patriarchy and Accumulation on a world scale* Zed Books, Melbourne
- Moreton-Robinson, A (2009) 'Imagining the Good Indigenous Citizen' *Cultural Studies Review*, 15 (2) 61- 79.
- National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC) 1997 *Bringing them home: report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Human Rights and Equal Opportunity Commission, Sydney
- National Museum of Australia undated *Collaborating for Indigenous Rights* retrieved from <http://www.indigenousrights.net.au/>
- NSW Legislative Council Inquiry into the Increase in Prisoner Population 2001 *Inquiry into the Increase in NSW Prisoner Population Final Report* NSW Parliament Sydney
- NSW Legislative Council Select Committee on Mental Health 2002 *Final Report* NSW Parliament Sydney
- Parragirls (undated) *Parramatta Female Factory Precinct*. retrieved from <http://www.parragirls.org.au/>
- Payne J 2007 *Recidivism in Australia : findings and future research* Research and public policy series no. 80, Canberra: Australian Institute of Criminology
- Payne, S. 1992, "Aboriginal women and the law" in *Aboriginal Perspectives on Criminal Justice*, ed. C. Cunneen, Monograph Series No 1, Sydney University Institute of Criminology, Sydney.
- Pratt J Brown D Brown M Hallsworth S and Morrison W (Eds) 2005 *The New Punitiveness: Trends, theories, perspectives* Willan Press Devon
- Petersen A Kokanovic R and Hansen S 2002 Consumerism and health care in a culturally diverse society In S Henderson & A Petersen (Eds) *Consuming Health: the commodification of health care* Routledge London pp121-139
- Purdy, J. (1996) 'Postcolonialism: The Emperor's New Clothes', *Social and Legal Studies*, 5 (3) 405-426
- Rowley, C.D. 1972, *Outcasts in White Australia*, Penguin, Ringwood.
- Simon, J (2007). *Governing Through Crime. How the War on Crime Transformed American Democracy and Created a Culture of Fear*. New York: Oxford University Press.
- Social Research (2007) Punishment: The U.S. Record. *Social Research: An International Quarterly of the Social Sciences* 74(2 – whole issue).

Tye CS & Mullen PE 2006 Mental disorders in female prisoners Australian and New Zealand Journal of Psychiatry Vol. 40, No. 3, Pages 266-271

Walker J (1982-1990) *Australian Prisoners*. Canberra: Australian Institute of Criminology.

Watson, I. (2007) 'Aboriginal Women's laws and Lives: How Might we Keep Growing the Law', *The Australia Feminist law Journal*, 26, 95-107.

'Minutes of Evidence': Raising awareness of structural injustice and justice

Jennifer Balint, Julie Evans & Nesam McMillan, University of Melbourne

Introduction

In 1881, an official commission was established to inquire into conditions at Coranderrk, an Aboriginal reserve near Healesville in the colony of Victoria. Lasting four months, the Commission of Inquiry was to determine the fate of the Coranderrk Aboriginal Reserve and its inhabitants. The Inquiry was the result of a long campaign by the Aboriginal residents to stay on Coranderrk, in the face of the push by the Victorian Board for the Protection of the Aborigines to close the Reserve. The 1881 Inquiry was unusual in that the Commissioners upheld the wishes of the residents. It was also unique in eliciting testimonies from 22 Aboriginal people (commonly such inquiries sought only one or two Aboriginal witnesses, if any at all). The archive produced by the Inquiry therefore provides a rich record of not only Aboriginal voices and activism, but also of the possibilities for both settlers and Aboriginal people to work together on issues of social justice, providing important models for collaboration in the present and future.

Over the past two years, a verbatim theatre performance has been developed based on the records of this Inquiry. Part of a broader Australia Research Council Linkage project, 'Minutes of Evidence project: promoting new and collaborative ways of understanding Australia's past and engaging with structural justice', the collaboration aims to generate new ways of publicly engaging with historical and structural injustice, in order to consider what structural *justice* may look like. The project is a collaboration between researchers from the University of Melbourne and Arts Victoria, La Mama Theatre, Ilbjerri Theatre Company, Koorie Heritage Trust, Regional Arts Victoria, State Library of Victoria, Victorian Aboriginal Education Association Incorporated, Victorian Department of Education and Early Childhood Development, and VicHealth, and in association with researchers from Deakin University, the University of Sussex, and Royal Holloway, University of London.

The broader project takes an interdisciplinary and comparative approach, drawing on the insights of history, criminology, socio-legal studies, education, public health, and the creative and community arts. It will document and analyse official responses to reports of injustice from the 19th to the 21st centuries, placing local initiatives (starting with the Coranderrk Commission of Inquiry) alongside historical and contemporary global ones (from British 19th century pan-imperial and colonial inquiries into the conditions of Aboriginal peoples, to League of Nations petition procedures, to more recent transitional and international justice initiatives, together with the latest attempts by settler states towards official 'reconciliation'). Through analysis of both personal testimonies to harm and the governmental responses to them, the project seeks to explore how notions of 'justice' have been formulated, invoked, and confronted across time and space. The Coranderrk story, however, constitutes the focal point of the collaboration, representing a meeting point for all the project partners and serving as the basis for one of the key project outcomes: the theatre production *Coranderrk: We Will Show the Country* (henceforth *Coranderrk*).¹

¹ The project will take *Coranderrk* to schools, provide research training for four Aboriginal policy officers to write associated curriculum modules about Kulin nation history, provide a PhD scholarship for an Indigenous research student to research related events at other reserves or missions in Victoria, and advance employment and creative opportunities for Indigenous

Coranderrk is a verbatim theatre performance, which is comprised of the actual testimonies delivered by Aboriginal and non-Aboriginal witnesses at the 1881 Coranderrk Inquiry. It was first performed at La Mama Theatre in Carlton. In August 2010, Ilbjerri Theatre Company, La Mama Theatre, and the Koori Heritage Trust, in association with the three authors of this paper (all researchers from the School of Social and Political Sciences at the University of Melbourne), historian and writer Giordano Nanni and the State Library of Victoria, piloted four small 'rehearsed readings' of *Coranderrk* at the La Mama Courthouse. Four performances were held, including one for a full class of pupils from Worawa (Aboriginal) College, Healesville. Two further rehearsed readings of *Coranderrk* were also held at the University of Melbourne and on-Country at Healesville in May 2011 – the latter performances attended by descendants of Coranderrk.

This paper focuses on the role of these performances, and the medium of verbatim theatre more generally, in engaging the public on the question of historical and structural injustice. From our perspective, a key role of these performances is to redirect public attention to experiences of state crime and historical injustices that have previously been recognised and acknowledged and yet largely remain outside the dominant public historical consciousness. As such, it is hoped that the performances will act as a catalyst for new public discussions about structural injustice in Australia – and elsewhere – and that this will lead to new conversations about what a structural *justice* may look like, what it may demand. The paper first provides some historical background to the Coranderrk commission of inquiry, before providing an overview of the *Coranderrk* production and some reflections on its potential contribution for thinking about both structural justice and structural injustice.

The History of Coranderrk

The history of Coranderrk provides a window onto the history of colonial dispossession and genocide in settler states more generally. Historian Patrick Wolfe understands settler colonialism as distinctive from other colonial formations in that colonisers come to stay, claiming the sovereign lands of Indigenous peoples as their own. Within this conceptual framework, settler colonialism is regarded as a 'structure' rather than 'an event' that begins and ends at the point of colonization (Wolfe, 1994:96). Settler societies proceed according to a 'logic of elimination' (Wolfe 1994: 93) that seeks continually to marginalize the significance of Indigenous sovereignty, thereby explaining enduring state discrimination against Indigenous peoples in contemporary settler states such as Australia, New Zealand, Canada and the United States of America. In the Australian case, the contemporary manifestations of such structural injustice stem from Aboriginal dispossession and a policy of genocide, the attempted destruction of a people and a persistent failure to accord them equal citizenship. Addressing structural justice such as this means remaining aware of its origins and of its causes – and its continuing legacies today.

In the south-eastern colonies of Australia, dispossession was relatively swift and comprehensive. Aboriginal peoples' early modes of resistance were soon overwhelmed not only by diseases and acts of violence but also by the massive disruption that pastoralism effected to traditional economies. The 1830s to 1860s saw a serious diminution in the numbers of Aboriginal peoples and widespread disruption to their hold on traditional lands and

actors and directors by extending the production of *Coranderrk* through larger public performances. Meanwhile, our team of local and international socio-legal and historical researchers will place the Coranderrk story in a much broader legal and historical context of official responses to reports of injustice from the 19th Century to the present, and disseminate findings through public and scholarly forums, academic publications, and a project website.

their capacity to maintain cohesive communities and cultures (see Barwick 1998; Broome 2010: 74-80; Critchett 1990; PROV 1993, Nelson et al 2002, Edmonds 2010).

Meanwhile, although rarely critical of colonialism *per se*, certain individuals amongst the settler population expressed concern about the plight of Indigenous peoples in the Australian colonies and elsewhere. A number of missionary societies became involved in an endeavour to protect, convert and educate Aboriginal peoples, and official 'Protectorates' being established in Victoria, South Australia and Western Australia. In the end, however, for Aboriginal people, the Protectorates proved to be little more than short-lived attempts to provide rations and places of refuge.²

From the 1840s in Victoria, a new phase of Aboriginal activism emerged. Kulin leaders such as Woiworung elder Billibellary, his son Simon Wonga and nephew William Barak, for example, saw the need for the Kulin clans as a whole to adopt a different approach if their peoples were to survive the dramatic consequences of the initial occupation of their lands, which now constituted much of the central regions of the colony. In 1859, Simon Wonga led a delegation of Kulin people to meet with government officials to request a grant of land to settle and farm in Acheron, in the hills beyond Melbourne. Coinciding with an 1859 parliamentary inquiry that recommended the creation of reserves in Aboriginal home lands under the supervision of missionaries, the delegation was one of several attempts by Aboriginal leaders in Victoria to establish a permanent and productive stake in the land in sites of their choosing, all of which struggled to succeed in the face of inadequate resources and concerted opposition from hostile settlers and officials (Barwick 1998: 38, 1-53; Broome 2010: 81-88).

The Kulin people were soon displaced from the Acheron station, and in 1863 Simon Wonga and William Barak led another deputation that successfully petitioned the government to grant a reserve of 930 hectares (extended to 1960 hectares in 1866) at a place they called Coranderk, after the small Christmas Bush that blooms there each December, beside the Yarra river near Healesville. This became one of six reserves that the government eventually established throughout the colony.³

The settlement at Coranderk proved particularly successful with most Kulin people choosing to reside there, along with several Bangerang people who traveled there from the Murray River, together with individuals and families from clans across Victoria who had been similarly displaced. By 1874, despite having no secure title, they had cleared over 1200 hectares for vegetable, crop and cattle farming, stretched seven kilometers of fencing, constructed 32 cottages plus outbuildings, raised families and built a thriving community that also made and sold cultural artifacts and mudbricks. The award-winning quality of Coranderk's hops attracted the highest market prices and by 1875 the settlement was 'virtually self-supporting' (Broome 2010: 84). A uniquely respectful relationship had developed between William Barak (Simon Wonga had died from tuberculosis in 1874) and John Green who, as well as acting as Inspector of stations across Victoria, had also been appointed as manager of

² The Port Phillip Protectorate lasted for just eleven years (1838-49) while the Protectorates in WA and SA were both wound up by 1857. In Victorian case, a sole Guardian of Aborigines was appointed until the establishment in 1860 of the Central Board Appointed to Watch Over the Interests of the Aborigines (Broome 2010: 51-56).

³ These were Framlingham & Lake Condah for the Gunditjmara & Kirrae-wurrung clans of the western district; Ebenezer mission at Lake Hindmarsh for the tribes of Wimmera and Lower Murray regions; Ramahyuk and Lake Tyers for the Kurnai tribes of Gippsland; and Coranderk for the Kulin clans (Barwick 1998: 52).

Coranderrk. Green strongly supported the continuation of Kulin laws and practices, and negotiated community agreement regarding the management of the farm and the punishment of offences (Broome 2010: 85-86).

Yet broader government indifference to the long-term welfare of the Aboriginal population either on or off the six Victorian reserves, along with outright hostility from settlers keen to acquire even more productive land, consistently worked against the achievement of a just settlement between Aboriginal and non-Aboriginal people in the colony. Aboriginal labour was either unpaid, paid in liquor, or severely underpaid, making it impossible for people to feed their families without seeking additional work, while paternalistic or authoritarian management on reserves led to beatings and withdrawal of rations (Broome 2010: 92). Residents were placed under additional surveillance and control following the 1869 legislation that established the Board for the Protection of Aborigines (known as 'the Board', or BPA, see PROV 1993: 49-69), which oversaw the movement of people between reserves and the removal of children, and required Aboriginal people to write for official permission to visit family and friends (Smith et al 2002). With respect to Coranderrk in particular, John Green eventually resigned his position after several altercations with the Board, including over the appropriation of the community's hard-earned profits to supplement state revenue and threats to close Coranderrk and relocate its people to the Murray River region and make the land available for private sale.

The Coranderrk community's sustained protests against these developments eventually became known as the Coranderrk 'rebellion', a designation indicating the strength of official fears that Aboriginal quests for self-determination might spread to other reserves. Under the leadership of William Barak, together with Robert Wandin and Tom Dunnolly, the people of Coranderrk mounted a long campaign to stay on their country, to maintain their productive self-supporting community there, and to reinstate John Green as manager. On two occasions they undertook the long walk to Melbourne to talk with government ministers in Spring Street, while also writing petitions, letters and interviews, and recruiting the assistance of influential supporters in the white community such as the redoubtable Scottish woman and friend of William Barak, Ann Bon. The campaign resulted in two official inquiries: a royal commission in 1877 and a parliamentary select committee inquiry into the management of Coranderrk in 1881 (the particular focus of this paper and the theatre performance).

The 1881 inquiry was unique in many ways. Appointed by Victoria's Chief-Secretary Graham Berry, the nine commissioners sat for four months. They traveled to Coranderrk to hear the views of residents who bravely delivered their testimony before officials despite the overwhelming repression to which their peoples had long been subjected. Residents also presented a petition to commissioners. Dated 16th November 1881, it was signed by William Barak and 44 men, women and children of Coranderrk. It asked for John Green to return as manager and for the station to be under the Chief Secretary rather than the Board – 'then we will show the country that the station could self support itself.' Aboriginal people made up 22 of the 69 witnesses who were examined and their statements are recorded in the official Minutes of Evidence. The inquiry's findings rejected the Board for the Protection of the Aborigines' intentions to dispose of Coranderrk, which was henceforth gazetted as a 'permanent reservation'. While John Green was not reinstated as manager, his replacement, the reviled Reverend Strickland, was dismissed.

Re-Staging Coranderrk

In more recent times, a verbatim theatre production, *Coranderrk: We Will Show the Country*, based on the original records of this Inquiry, has been developed in Victoria under the auspices of the broader 'Minutes of Evidence' project. The original idea for converting the Inquiry minutes into a theatrical performance was formulated by historian and writer Giordano Nanni, with the script co-written by Nanni and Indigenous dramaturg Andrea James. The pilot production of *Coranderrk* was directed by Rachael Maza Long (Ilbjerri Theatre Company) and developed in collaboration with Liz Jones at La Mama Theatre and performed by a cast of Indigenous and non-Indigenous actors. *Coranderrk* thus not only tells a story of Indigenous and non-Indigenous collaboration but also embodies the spirit of such a collaboration.⁴

Verbatim theatre, a form of so-called 'documentary theatre', involves the re-performance of the words used by certain people (as they were recorded in interviews, diaries, legal proceedings and so on) as a theatrical piece (see Martin 2006; Paget 1987).⁵ The *Coranderrk* production is a 90-minute theatre performance wholly constructed around the edited testimonies and statements, petitions and letters delivered in the context of the Coranderrk inquiry, as they were recorded in the official minutes of evidence.⁶ In total, the *Coranderrk* script comprises the testimonies of nine Indigenous witnesses and eleven non-Indigenous witnesses and the statements of two of the non-Indigenous commissioners who undertook the questioning at the Inquiry.

It is now widely acknowledged that different fictional and non-fictional representations of suffering and injustice, from memoirs to feature films to documentary films, offer different ways of connecting with such experiences (see Schaffer and Smith 2004; Botham 2009). As Derbyshire and Hodson (2008: 207) note, at a time when there is a generalised concern with the 'indifference' or 'compassion fatigue' of global audiences to stories of suffering (see, eg, Moeller, 1999; Tester 1997), mediums such as theatre have the ability to successfully engage spectators on an emotional and affective level. As such, as they note, theatre and performance provide a new way for audiences to relate to events, stories and experiences, one which foregrounds emotion, imagination and affect (Derbyshire and Hodson 2008).

As a distinct form of theatre, verbatim theatre innovatively connects the creative and emotive elements of theatre with the authority and authenticity of the archive (see Botham 2009). That is, verbatim theatre has an overt claim to truth, positioning itself as an expression, a reenactment, of actual testimonies and events (see Derbyshire and Hodson 2008; Botham 2009). Moreover, the power of verbatim theatre is inseparable from its claim to truth; the power of a performance such as *Coranderrk* stems from its self-representation and audience reception as a direct re-performance of the actual words spoken by Indigenous and non-Indigenous witnesses in late 19th century Victoria. It is the facticity of the testimonies in *Coranderrk* that is – at least, in part – what enables them to inspire emotions, such as shock, disavowal and respect, in the audience. As such, the *Coranderrk* production begins and

⁴ This dual character of the performance (as collaboration on- and off-stage) was highlighted by its creator, Giordano Nanni, as well as being mentioned in the historical introduction to the performance delivered by Tony Birch (see below).

⁵ The production could also be framed as a form of documentary theatre known as 'tribunal theatre'. Indeed, *Coranderrk* represents a blend of both tribunal and verbatim theatre – centred upon the testimonies delivered at a legal inquiry, rather than personal interviews or memoirs (resembling tribunal theatre), yet not striving theatrically to exactly replicate the physical conditions of this inquiry (thus departing from strict tribunal theatre and evincing the artistic license more associated with verbatim theatre) (see Forsyth and Megson 2009; Paget 2009).

⁶ These testimonies and statements are only supplemented by letters that were also submitted to the Inquiry - and some newspaper reports of the testimony/Inquiry.

ends with a historical introduction and conclusion provided by Indigenous academic Dr. Tony Birch, who discursively situates the Inquiry for the audience, as well as emphasising the authenticity of the testimonies the audience will hear.

The factual nature of the *Coranderrk* evidence is also particularly crucial in a context such as Australia, where there have been many destructive and divisive debates about the accuracy of accounts of Indigenous history and particularly Indigenous oppression (see Windschuttle 2002; Macintyre and Clark 2003; Manne 2003). It acts as an implicit rebuttal to the claims and speakers that have tried to downplay the actuality of Indigenous disadvantage, dispossession and discrimination both historically and in contemporary times.

It is the factual character of this production that allows it to also act as an educational and informative tool (see, more generally, Derbyshire and Hodson 2008; Paget 2009). A key contribution of the *Coranderrk* performance is its capacity to provide audiences with a substantiated picture of both the interactions between Indigenous and non-Indigenous communities in 19th century Australia and the discriminatory attitudes towards Indigenous people that prevailed – and their clear position as 'less than'. The performance, for example, includes evidence that the Board refused to provide material for fencing the land, so that the community could be self-sufficient. Aboriginal people should not 'own' the land.

Many overarching themes of colonialism, racism, oppression, exploitation, removal from land, surveillance, obstruction of self-determination, the move to assimilation and child removal and the use of law are found in this one Inquiry and performance. They highlight – firstly – the discriminatory attitudes and practices that prevailed and – secondly – the resistance of Aboriginal people to such oppression and – thirdly and importantly – the collaboration between Aboriginal and non-Aboriginal people during this unjust time.

Archives of Discrimination:

Excerpt 1: Testimony of Edward Curr, settler and member of the Board for the Protection of Aborigines

Q: Are they not men?

A: No, they are children. They have no more self-reliance than children.

Q: If they offend against the law are they punished like children?

A: No, like men.

Q: Is that just?

A: I did not make the laws

Excerpt 2: Testimony of Henry Jennings, member of the Board for the Protection of Aborigines

Q: Is a black permitted to leave the station without a pass?

A: "Certificate". We never have the word "pass". We do not attempt to *control* them!

Archives of Resistance:

Excerpt 3: Testimony of Alice Grant, resident at Coranderrk

A: I used to do Mrs Strickland's ironing, but I do not do it now. ...

Q: Were you receiving wages for doing it?

A: No

Excerpt 4: Testimony of William Barak, Coranderrk resident and elder, established station with John Green, led delegation to Melbourne

We would like it if the Government leave us here, give us this ground and let us manage here and get all the money. Why not let the people do it themselves?

Archives of Collaboration:

Excerpt 5: Testimony of John Green

'I always treated them as free men, and reasoned with them'

Excerpt 6: Letter submitted to Inquiry by Coranderrk residents

'We want the Board and the Inspector, Captain Page, to be no longer over us. We want only one man here, and that is Mr. John Green, and the station to be under the Chief Secretary; then we will show the country that the station could self-support itself'

The Contribution of *Coranderrk*

We would draw out three key contributions this performance can make. Firstly, one of the overarching aims of the 'Minutes of Evidence' project is to promote new modes of publicly engaging with historical and structural injustice. While structural injustice may be originally caused by a specific event or experience (such as colonialism), it also endures beyond the moment of violation, shaping and constraining the conditions of life experienced by particular groups (Wolfe 1994). In Australia, for example, structural injustice is evident in the socio-economic gulf that exists between Indigenous and non-Indigenous communities, and in particular the disproportionately high incarceration rate of Indigenous men, women and young people (Blagg 2008; Cunneen 2005). A first step towards redressing structural injustice is heightening public awareness of its existence—a difficult process given the controversy that has often surrounded attempts to acknowledge structural injustice in Australia, such as the apology to Stolen Generations and the ongoing debate about reparations.

In this context, the *Coranderrk* performance highlights the story of Coranderrk as one of historical injustice. As such, it is hoped that the performance can act as a catalyst for new public conversations about structural and historical Indigenous injustice in Australia and elsewhere. Such focused engagement can be an important adjunct to the pursuit of more formal legal avenues for redress and reform, effectively supporting the capacity of Australians 'to imagine new paths for moving forward and ... our willingness to overcome any political obstacles.' (Brennan, Gunn and Williams 2004: 352). Verbatim theatre thus can be a site and an opportunity for these 'new imaginings'.

In so doing, the performance becomes a 'meeting point'. Botham (2009: 36) explains how theatre can act as a 'meeting point' for audience members, whilst she and others note the historical role of the theatre (as well as the

courtroom, or tribunal venue) as a forum for putting forward claims relating to justice and injustice (see also Derbyshire and Hodson 2008). In this sense, the audience – who collectively experience the *Coranderrk* performance - is brought together to hear and respond to the claims for justice articulated as part of the 1881 Inquiry and the injustices of which they speak.

It also, through bringing historical figures so powerfully back to life, re-enacts the past, and thus enables audience members to experience the past in the present. This both facilitates a more direct connection between contemporary audiences and historical events, as well as providing ground for links and connections to be drawn between such events and current conditions (see Rokem 2000). In the context of the 'Minutes of Evidence' project, this places past Indigenous injustice and contemporary Indigenous disadvantage in relation, acknowledging what Cunneen and Baldry have referred to as the 'unbroken chain' (Cunneen and Baldry 2011). Such temporal connections have been drawn by people who have seen the production, who have related the *Coranderrk* experience to the ongoing Northern Territory Intervention.

Secondly, the performance reinvigorates hidden or secondary stories. What the *Coranderrk* performance does so powerfully is bring back to light a story that has been neglected in mainstream Australian society. It provides a picture that might not otherwise be seen. Critically, it brings *personal* testimonies and stories that have otherwise remained hidden, or secondary, back into dominant understandings of Australian history. *Coranderrk* reactivates the important testimonies delivered by the Indigenous witnesses at the 1881 Inquiry, highlighting the strength, agency and resistance of the local Indigenous community to colonial rule. *Coranderrk* also tells a story of Indigenous and non-Indigenous collaboration, which is still under-acknowledged even in Victoria until this day.

Thirdly, in so doing, it brings back into public discourse this official recognition of harm. This inquiry was a legal process that officially *recognised* the harm perpetrated in colonial Victoria, putting it on the public record. It made important findings and recommendations based on the testimonies heard. This is public and official recognition of harm suffered. The performance therefore brings back to light, and into public view, the testimonies given, and the official reaction – and recognition – of their veracity. Although the *Coranderrk* production is a selective slice of history, as choices are always made in verbatim theatre as to what to include (see Martin 2006), the testimonies and experiences that constitute the basis of the performance were delivered and did occur. As Simić (2010: 122) explains in another post-conflict context, '[a]lthough a representation of reality and not reality itself, in the performance the audience is reminded that what happened *was a reality*.

Bringing History Back to Life / Concluding Thoughts

Redress of structural and historical injustice requires recognition that it occurred. Recognition of harm is needed as a key plank of redress. In Australia, there is little public recognition of Aboriginal disadvantage and genocide. This is both among the general population as well as at the Federal state level. Victims have had to fight for recognition through the courts and through political processes. Unlike other, more contemporary instances of state harm where there has been official recognition of past injustices, and processes of redress that follow, here victims have had to fight for recognition of harm and of loss. The *Coranderrk* Inquiry is one example of such a struggle for recognition and redress, by the community at *Coranderrk*.

The Coranderrk inquiry also underscores the ephemeral nature of law and its public record – and raises the question, why and when certain events enter, and fade from, the public consciousness. There are many hidden stories that once were on the public record, yet are no more. This is one of them. We see many examples – more recently, a case heard at the ACT Supreme Court brought by members of the Aboriginal Tent Embassy in which the judge found: ‘There is ample evidence to satisfy me that acts of genocide were committed during the colonisation of Australia.’ (Supreme Court of the ACT 1998). An extraordinary judgment, with powerful testimony of enduring loss and destruction, that has failed to be integrated into public understandings of Aboriginal treatment and injustice.

What *Coranderrk* performance seeks to do, within the ‘Minutes of Evidence’ project as a whole, along with the pursuit of more formal legal and political avenues for redress and reform, is to integrate these historical realities back into public discourse, and thus to provide a basis for discussions about the necessity for redress and reform – a new structural justice. Bringing these hidden stories to light – recovering and reclaiming, and thus enabling a broader recognition of past and continuing structural injustice, is key to enabling redress and public thinking on what a structural justice might look like.

Reference List

Barwick, Dianne 1998 *Rebellion at Coranderrk* edited by Laura E Barwick and Richard E. Barwick Aboriginal History Inc. Canberra

Blagg, H 2008, *Crime, Aboriginality and the Decolonisation of Justice*, Hawkins Press, Sydney

Botham, Paola 2009 ‘Witnesses in the Public Sphere: *Bloody Sunday* and the Redefinition of Political Theatre’ in Susan C Haedicke, Deirdre Heddum, Avraham Oz, EJ Westlake (eds) *Political Performances: Theory and Practice* Rodopi Amsterdam pp 35-55

Brennan, Sean, Gunn, Brenda and Williams, George 2004 ‘“Sovereignty” and Its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments’ *Sydney Law Review* 26: 307-352.

Broome, Richard 2010 *Aboriginal Australians: A History Since 1788* Allen & Unwin Sydney

Critchett, Jan 1990 *A Distant Field of Murder: Western District Frontiers 1834-1848* Melbourne University Press Melbourne

Cunneen, C 2005, ‘Colonialism and Historical Injustice: Reparations for Indigenous Peoples’, *Social Semiotics*, 15(1): 59-80

Cunneen, C and Baldry, E 2011, ‘Contemporary Penalty in the Shadow of Colonial Patriarchy’, Paper presented at 5th Annual Australian and New Zealand Critical Criminology Conference Program, Cairns, July 7- 8 2011

- Derbyshire, Harry and Hodson, Loveday 2008 'Performing Injustice: Human Rights and Verbatim Theatre' *Law and Humanities* 2(2): 191-211
- Edmonds, Penelope 2010 *Urbanizing Frontiers: Indigenous Peoples and Settlers in 19th-Century Pacific Rim Cities* University of British Columbia Press Vancouver
- Great Britain House of Commons 1837, *Report from the Select Committee on Aborigines (British settlements); together with, minutes of evidence ; appendix and index*, 3 volumes, Irish University Press Shannon 1968, orig. 1834-37 House of Commons London
- Forsyth, Alison and Megson, Chris 2009 'Introduction' in Alison Forsyth and Chris Megson (eds) *Get Real: Documentary Theatre Past and Present* Palgrave MacMillan Houndmills pp 1-5
- Macintyre, Stuart and Clark, Anna 2003 *The History Wars* Melbourne University Press Melbourne
- Manne, Robert (ed) 2003 *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History* Black Ink Agenda Melbourne
- Martin, Carol 2006 'Bodies of Evidence' *TDR: The Drama Review* 50(3): 8-15.
- Moeller, Susan D 1999 *Compassion Fatigue: How the Media Sell Disease, Famine, War and Death* Routledge New York
- Nelson Elizabeth, Smith, Sandra and Grimshaw, Patricia eds 2002 *Letters from Aboriginal Women of Victoria, 1867 - 1926* History Department, University of Melbourne Melbourne
- Paget, Derek 1987 'Verbatim Theatre': Oral History and Documentary Techniques' *New Theatre Quarterly* 3(12): 317-336.
- Paget, Derek 2009 'The 'Broken Tradition' of Documentary Theatre and Its Continued Powers of Endurance' in Alison Forsyth and Chris Megson (eds) *Get Real: Documentary Theatre Past and Present* Palgrave MacMillan Houndmills pp 224-238
- Public Record Office Victoria [PROV] and the Australian Archives, Victorian Regional Office 1993 *'My Heart if Breaking': A Joint Guide to Records about Aboriginal Peoples in the Public Record Office Victoria and the Australian Archives*, Victorian Regional Office Australian Government Publishing Service Canberra
- Rokem, Freddie 2000 *Performing History: Theatrical Representations of the Past in Contemporary Theatre* University of Iowa Press Iowa City
- Schaffer, Kay and Smith, Sidonie 2004 *Human Rights and Narrated Lives: The Ethics of Recognition* Palgrave MacMillan New York

Simić, Olivera 2010 'Breathing Sense into Women's Lives Shattered by War: Dah Theatre Belgrade' *Law Text Culture* 14(1): 117-132

Supreme Court of the ACT 1998, In the matter of an application for a writ of mandamus directed to Philip R Thompson Ex parte Wadjularbinna Nulyarimma, Isobel Coe, Billy Craigie and Robbie Thorpe (Applicants), Tom Trevorrow, Irene Watson, Kevin Buzzacott and Michael J. Anderson (Intervenors), ACTSC 409, 18 December 1998.

Tester, Keith 1997 *Moral Culture* Sage Publications London

Windschuttle, Keith 2002 *The Fabrication of Aboriginal History: Van Diemen's Land 1803-1847* Macleay Press Sydney

Wolfe, Patrick 1994 'Nation and MiscegeNation: Discursive Continuity in the Post-Mabo Era' *Social Analysis* 36, 93-152

Sentencing Indigenous and Non-Indigenous Women in Western Australia's Higher Courts: A Summary of the Main Findings of a Narrative Study

Christine E.W. Bond & Samantha Jeffries, Queensland University of Technology

Introduction

Despite criticisms about its continuing relevance (e.g. Belknap, 2001; Curran, 1983), the chivalry hypothesis remains a key hypothesis in research on gender and criminal justice outcomes (e.g. Franklin and Fearn, 2008; Griffin and Woolredge, 2006; Hartley, Kwak, Park and Lee, 2011; Turner and Johnson, 2006). The chivalry hypothesis is generally traced back to Otto Pollak (1950) who argued that female offenders were likely to receive preferential treatment in the criminal justice system, due to the dominance of male decision-makers socialized to extend protection and chivalry to women and girls (Tjaden and Tjaden, 1981).

The universality of chivalry was later challenged by arguments that preferential treatment was only afforded to certain 'types' of women: whether or not women were afforded leniency depended on their fulfillment of gender role expectations (Herzog and Oreg, 2008, 49). Often called the 'evil woman' hypothesis, this perspective made benefit of chivalry conditional on the how female offenders were positioned within societal expectations of gender, and not just their crimes (Herzog and Oreg, 2008). These gendered expectations were based on an ideal of 'womanhood' which was white and middle class. This presents a problem for female defendants of racial/ethnic minority and Indigenous backgrounds, as they automatically fail to meet such expectations. Thus, Indigenous women and those from other racial/ethnic minority groups may not be extended preferential sentencing treatment, because they fail to behave in ways perceived as "deserving of protection" (Steffensmeier and Demuth, 2006).

However, current statistical research seems to provide little support for "evil woman" thesis, and the argument that leniency typically bypasses 'women of color'. Rather than findings of harsher sentencing outcomes, recent North American statistical studies show that 'woman of color' and white woman are treated equally (Steffensmeier and Deumth, 2006); while in Australia, sentencing leniency appears to be extended to Indigenous women (Bond and Jeffries, 2010). This counter-finding has resulted in calls for qualitative explorations of gender disparity to better understand these statistical findings (Steffensmeier and Demuth, 2006; Jeffries and Bond, 2009).

Thus, in this paper, we report the main findings of a larger study which investigates the impact of Indigenous status on higher court sentencing outcomes for female offenders in Western Australia, using a narrative analysis of judicial sentencing remarks.

Theoretical framework

Australian and North American sentencing researchers have been, particularly in racial/ethnic disparities research¹, relying increasingly on the focal concerns framework to explain judicial decision making. The focal concerns perspective looks toward the micro-social context of the court to understand how judges make decisions about sentencing. This approach argues that judges' sentencing decisions are driven by judicial assessments around three key focal concerns: blameworthiness, community protection and the practical constraints/consequences of sentencing decisions (Steffensmeier, Ulmer and Kramer, 1998).

¹ Although ironically, the focal concerns approach made an early appearance in a study of the impact of gender on imprisonment outcomes (Steffensmeier, Kramer and Steifel, 1993).

The first focal concern, *blameworthiness*, is associated with offender culpability and the amount of harm caused by their crime. It is punishment-focused and requires that the seriousness of an offence be balanced by the imposition of a punishment proportional to the criminal harm caused (Steffensmeier, Ulmer and Kramer, 1998). The second focal concern of *community protection* (or risk) requires the imposition of a sentence that protects the public through incapacitation of offenders that pose a risk to the community. The third, and final, concern—*practical constraints and consequences*—highlights the range of practical concerns that courts take into account in making sentencing decisions, including: organisational constraints (e.g. the need to ensure a regular case flow through the court); offender level constraints (i.e. the capacity of an offender to 'do time'); the social costs of sentencing the offender; and community or political expectations that may impact the court's general societal standing (Steffensmeier, Ulmer and Kramer, 1998).

The Current Research

Using the focal concerns perspective to guide our analyses, the current research extends past statistical research on gender and race-ethnicity-Indigeneity through a narrative exploration of Western Australian higher court sentencing transcripts. We rely on a matched-pair sample (n= 41) (drawn from the larger stratified sample see Bond and Jeffries, 2011 for details) of female offenders convicted in Western Australia's higher courts (District and Supreme) from 2003 to 2005. The pairs were matched exactly on offence classification, number of conviction counts, and numbers of prior arrests. If there was more than one match, pairs were first matched on plea, and then if necessary, the match was selected randomly.

In our sample of matched pairs (n=41), Indigenous women were imprisoned less often than non-Indigenous females. Overall, 12 non-Indigenous women were imprisoned compared with only six Indigenous women. Because each Indigenous/non-Indigenous pair were matched on offence type, conviction counts and criminal history (and sometimes plea), this finding suggests that any differences between the non-Indigenous-Indigenous pairs are due to reasons other than their current and past offending behaviours. In four cases, both the non-Indigenous woman and her Indigenous counterpart received a sentence of imprisonment. However, in eight cases, the non-Indigenous woman was sentenced to imprisonment when her Indigenous match was not. There were only two instances of an Indigenous woman being imprisoned when her non-Indigenous match received a non-custodial outcome.

We present the main findings of a narrative analysis that examines how Indigeneity and gender are expressed in the sentencing transcripts for all 41 pairs. We organise our findings around the three focal concerns of blameworthiness, community protection and practical concerns.

Blameworthiness

When making sentencing decisions, judges make assessments of offender blameworthiness (Steffensmeier, Ulmer and Kramer, 1998). In our sample, these appraisals were based on offence contexts, such as crime seriousness and the offenders' roles in the commission of the offence. Personal histories of familial trauma (e.g. domestic violence, childhood sexual abuse), poor mental health, and substance abuse were also noted. Each of these factors were seen in the sentencing transcripts of both Indigenous and non-Indigenous women, but differences by Indigenous status were found in the narratives around personal histories.

Offence Seriousness

All the sentencing transcripts contained detailed accounts of the crimes for which the defendants had been convicted and were now being sentenced. We considered whether Indigenous status impacted judicial narratives about the seriousness of defendants' current and past criminality, but no general differences were found.

Personal Histories of Familial Trauma, Mental Health and Substance Abuse

In contrast to Indigenous women, the precursors of non-Indigenous offending were more frequently positioned within discourses of mental instability (n=18 vs. n=7), substance abuse (n=31 vs. 26), familial trauma (including domestic violence) (n=28 vs. 19) and also coercion (n=15 vs. 8) (often at the hands of their domestically violent partners). However, greater trauma, chronic substance abuse and poorer mental health did not necessarily appear to mitigate blameworthiness. While noted to be a contributing factor in female offending, overall the judicial discourses constructed these factors as demanding, rather than disavowing responsibility.

Instead of denying individual agency, judicial narratives revealed an expectation that female defendants would take control of their lives by addressing the underlying causes of their criminality. Women who came before the court with histories of substance abuse, familial trauma (including coercion by violent intimate partners) and mental health problems were expected to understand the connection between these issues and their criminality, and actively pursue change in their negative circumstances (e.g. undertake drug rehabilitation programs, remove themselves from the coercive or 'bad' influences of deviant peer groups and partners, seek counselling for domestic violence and psychological problems). In general, women who did this were perceived positively in the judicial sentencing remarks.

On the other hand, judicial attributions of increased blameworthiness were seen in the transcripts of women who failed to 'get themselves more organised'. More non-Indigenous (n=18) than Indigenous women (n=10) were noted to have performed badly when sentenced to prior community based sentences. Further, judges more frequently expressed exasperation about the failure of non-Indigenous women to take advantage of the rehabilitative opportunities provided to them.

Remorse

In contrast to offenders who fail to express remorse, judicial perceptions of culpability may be more positive in cases where offenders express regret for their crimes. Comments about an offenders' feelings of compunction were more frequent in Indigenous (n=13) than non-Indigenous transcripts (n=8). Further, the failure of the defendant to express remorse was noted in seven of the non-Indigenous transcripts, but only one Indigenous transcript. Overall, and unsurprisingly, the judicial narratives noted remorsefulness as a mitigating factor, and the lack of expressions of remorsefulness was perceived negatively.

Community Protection/Risk

Sentencing judges make predictions about the risk offenders pose to the community, based on factors such as current crime seriousness and criminal history (Steffensmeier, Ulmer and Kramer, 1998). Offender characteristics such as familial situation, employment status, and drug abuse may also be considered (Jeffries, Fletcher and Newbold, 2003). In the sample of sentencing transcripts, judicial assessments of risk were associated with criminal history, familial ties, employment, and criminal antecedents (i.e. familial trauma, mental health and substance abuse): factors that were also reflected in judicial concerns about blameworthiness. However, in our sample, we found that crime seriousness was typically positioned against blameworthiness (and not risk) in the sentencing transcripts. Finally, community ties also emerged as linked to lower risk to the community, by providing a source of informal social control. However, this was only found in the sentencing narratives of the Indigenous female

offenders. In this section, we briefly highlight the discourses around substance abuse, criminal history, employment, familial ties and community ties.

Substance Abuse

In the prior section on blameworthiness, non-Indigenous defendants were shown to be more frequently identified as drug dependent and unwilling to address their addiction. Logically, if drug dependence is identified as a reason for a person's criminality then the likelihood or risk of re-offending will remain high so long as their drug addiction continues. Our exploration of the sentencing transcripts supported this assumption, but there was no evidence that was seen differently Indigenous status. Overall, judges identified nine non-Indigenous women as posing a high re-offending risk and in each case; on-going problems with substance abuse were present. In contrast, only three non-Indigenous women were noted to be at a high risk of re-offending and again, all three were also battling substance dependency.

Criminal History

Compared to defendants with minimal criminal histories, defendants with a long track record of offending were typically perceived as posing a greater re-offending risk. Few differences emerged in the frequency of judicial references to past offending behavior by Indigenous status.

Employment

Employment participation may mitigate sentencing outcomes, because it may exert a degree of informal social control over an offender's life and thus might reduce the possibility of re-offending (Jeffries, Fletcher and Newbold, 2003). In the sentencing transcripts, women who were either employed or committed to finding employment generally had positive judicial assessments. More Indigenous (n=15) than non-Indigenous women (n=10) were noted to be employed or committed to finding employment.

Familial Ties

Although familial ties (particularly childcare) were more frequently constructed within discourses of social cost (discussed later), they were also expressed in ways that denoted social control. Risk may be reduced for women who are subject to supportive, non-deviant, familial relationships because in these contexts levels of 'positive' informal social control increase.

Overall, the presence of strong 'healthy' familial ties were noted with similarly frequency in the Indigenous (n=29) and non-Indigenous (n= 30) sentencing transcripts. Further, there were no clear differences in the narratives around familial bonds by Indigenous status.

Community Ties

Unlike in the sentencing transcripts of non-Indigenous woman, the bonds between Indigenous female offenders and their communities were sometimes raised in the transcripts (n=7). In five cases, these bonds were described positively and as worthy of supporting. A typical comment in these cases is: "I think you need support from the community and I gather that at [Indigenous community] they have made some arrangements about that, so I don't want to upset that." Thus, maintaining community support and bonds appeared as an Indigenous specific mechanism through which informal social control was increased and perceptions of risk reduced. However, community dysfunction, which could be construed as a risk with regard to re-offending, was also noted in two Indigenous transcripts.

Practical Constraints and Consequences

The focal concern of practical constraints and consequences recognises the influence of organisational and offender level constraints and costs of sentencing outcomes. In our sample of sentencing transcripts, this focal concern was predominately expressed through the notion of social cost to defendants' children and communities.

Child care

Judicial concern about the detrimental impact of imprisonment on female defendants' children was common in the sentencing transcripts. The social cost of removing women from their children via imprisonment was frequently noted in the transcripts as an "independent sentencing consideration": for "the sake of the children", mothers often avoided incarceration.

In our sample, the number of Indigenous and non-Indigenous women noted to be responsible for children was similar: 25 compared to 24. Of the 49 women who were identified as having child care responsibilities, six received a prison sentence, but only one of these women was Indigenous. An explanation for this was found in the sentencing narratives. Compared to the non-Indigenous women, judges were more than twice as likely to express concern that incarceration would adversely affect Indigenous children (n=7 vs. n=15). Further, while never present in the Indigenous scripts, in some of non-Indigenous sentencing narratives, imprisoning the mother was seen as in the best interests of the child: prison was constructed as an environment in which these women could address their offending antecedents (e.g. drug dependency) more effectively, and in turn, improve their parenting.

Social Cost to the Community

In the sentencing remarks, judges sometimes referred to what can perhaps be loosely described as the social costs of imprisoning women who were either thought to be, or had the potential of making, a positive contribution to the community. However, these narratives were more common in the Indigenous (n=11) than non-Indigenous sentencing remarks (n=4).

Summary

Past research has argued that, in contrast to white females, 'woman of color' are likely to receive harsher sentences because they pose a challenge dominant ideals femininity (i.e. white, middle-class 'womanhood') (Steffensmier and Demuth, 2006). However, findings from recent statistical sentencing studies have found that incarceration is equally likely for Black and Latino women (Spohn and Beichner, 2000; Steffensmeir and Demuth, 2006; Freiburger and Hillinski, 2009). Further, previous statistical analyses suggest that imprisonment maybe less likely for Indigenous women (Bond and Jeffries, 2010).

The current research relied on qualitative methods to compare Indigenous and non-Indigenous female sentencing outcomes and narratives. We found that Indigenous women were less likely than their non-Indigenous counterparts to be sentenced to a term of imprisonment. Consistent with the focal concerns approach, differences in sentencing stories by Indigenous status showed that the lower likelihood of incarceration for the Indigenous women could be linked to judicial discourses of: (1) less blameworthiness, threat and risk; and/or (2) higher social costs attached to imprisonment.

Overall, in our thematic analysis of the sentencing transcripts, we found that judicial narratives of blameworthiness and risk based on assessments of mental health, familial trauma and substance abuse differed between Indigenous and non-Indigenous women. Employment participation and community ties (factors associated with risk reduction), as well as expressions of remorse (a factor that may mitigate blameworthiness) also varied between the Indigenous and non-Indigenous sentencing transcripts. Further, Indigenous females were viewed differently in terms of social cost (i.e. practical constraints and consequences).

Funding

This work was supported by a grant from the Australian Institute of Aboriginal and Torres Strait Islander Studies.

Acknowledgements

This paper is part of a larger project examining Indigenous sentencing in Western Australia. We acknowledge the Crime Research Centre (The University of Western Australia) and Department of the Attorney-General (Western Australia) for their assistance and support of this project.

References

- Belknap, J. (2001) *The Invisible Woman: Gender, Crime and Justice*, 2nd ed. Boulder: University of Colorado Press.
- Bond, C and Jeffries, S. (2010) 'Sentencing Indigenous and Non-Indigenous Women in Western Australia's Higher Courts', *Psychiatry, Psychology and Law*, 17 (1): 70-78.
- Bond, C and Jeffries, S. (2011) 'Indigeneity and the Judicial Decision to Imprison: A Study of Western Australia's Higher Courts'. *British Journal of Criminology*, 51 (1): 256-277.
- Curran, D. (1983) 'Judicial Discretion and Defendant's Sex'. *Criminology*, 21:41-58.
- Franklin, C. and Fearn, N. (2008) 'Gender, Race and Formal Court Decision-Making Outcomes: Chivalry/Paternalism, Conflict Theory, or Gender Conflict?'. *Journal of Criminal Justice*, 36(3): 279-290.
- Freiburger, T.L and Hilinski. C.M. (2009) 'An Examination of the Interactions of Race and Gender on Sentencing Decisions Using a Trichotomous Dependent Variable'. *Crime and Delinquency*, pre-published 24 February 2009, DOI:10.1177/0011128708330178.
- Griffin, T. and Wooldredge, J. (2006) 'Sex-Based Disparities in Felony Dispositions Before Versus After Sentencing Reform in Ohio'. *Criminology*, 44(4): 893-923. DOI:
- Hartley, R., Kwak, Park, and Lee. (2011). 'Exploring Sex Disparities in Sentencing Outcomes: A Focus on Narcotics Offenders in South Korea'. *International Journal of Offender Therapy and Comparative Criminology*, 55(2): 268-286.
- Jeffries, S. and Bond, C. (2009) 'Does Indigeneity Matter?: Sentencing Indigenous Offenders in South Australia's Higher Courts'. *Australian and New Zealand Journal of Criminology*, 42 (1): 47-71.
- Jeffries, S., Fletcher, G., and Newbold, G. (2003) "Pathways to Sex-Based Differentiation in Criminal Court Sentencing". *Criminology*, 41(2): 329-354.
- Pollack, O. (1950) *The Criminality of Women*. Philadelphia: University of Pennsylvania Press.

Spohn, C and Beichner, D. (2000) 'Is Preferential Treatment of Female Offenders a Thing of the Past? A Multisite Study of Gender, Race, and Imprisonment'. *Criminal Justice Policy Review*, 11: 149-184.

Steffensmeier, D and Demuth S. (2006) 'Does Gender Modify the Effects of Race-Ethnicity on Criminal Sanctioning? Sentences for Male and Female White, Black, and Hispanic Defendants'. *Journal of Quantitative Criminology*, 22: 241-261.

Steffensmeier, D., Ulmer, J., and Kramer, J. (1998) 'The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male'. *Criminology*, 36: 763-797.

Steffensmeier, D., Kramer, J., and Steifel, C. (1983) "Gender and Imprisonment Decisions", *Criminology*, 31:411-446.

Tjaden, P.G and Tjaden C.D. (1981) 'Differential Treatment of the Female Felon: Myth of Reality', in *Comparing Female and Male Offenders*, edited by M.O. Warren. Beverley Hills: Sage.

Turner, K. and Johnson, J. (2006) 'Effect of Gender on the Judicial Decision of Bail Amount Set'. *Federal Probation*, 70(1): 56-62.

A Time to be Heard: Sudanese Australian Voices about Criminal and Social Justice Matters

Glenn Dawes, and Garry Coventry; James Cook University

Introduction

The seeds for this research were sown when two north Queensland academics (Coventry and Dawes, 2006) responded to a raft of media reports about “community concerns” relating to Sudanese refugees and the problems they encountered while integrating into Australian society. Some of these reports by academics such as Associate Professor Andrew Fraser suggested that Sudanese were inherently more criminogenic and possessed lower IQS than other Australians. These assertions were supported by other academics like Dr Jim Saleam (linked to a group called the Concerned Citizens Collective and previously convicted of shooting another prominent African) who claimed that refugee migration into Australia was a recipe for widespread social upheaval because such peoples came from ‘utterly fractured societies where the use of the gun and the knife is the common way to settle disputes’ (ABC News, 2005). Within this context, Sudanese Australians were demonised and represented as a fundamental threat to law and order in Australian society (Colic-Peisker and Tilbury, 2008).

Most of the Australian studies about the criminal justice system and minority groups have focused on the intersections between police and Indigenous Australians (Cunneen 2001). By comparison there is limited research which analyses how immigrant minority groups interact with the Australian criminal justice system (Chan 1997; Collins et al 2000; Cunneen 1995; Poynting, 2002). Policing and criminal justice practices related to both ‘groups’ (Indigenous and other minority groups) have also been a staple of various inquiries dating back to the early colonial period (Finnane, 1997), for policing Indigenous communities and Chinese immigrants in the first half of the nineteenth century. More recent reports (e.g. DIAC, 2007) have identified concerns about problems encountered by African refugees such as variations in how police interact with these communities across regions, perceptions that police discriminate against black Africans and the limited attention by governments in combating racism within society. This has led for calls for a re-assessment of the justice system and ways of promoting good policing practices when dealing with African refugees.

It is clear that African Australians possess a high visibility in a “white nation” (Hage, 1998) and have found it difficult to assimilate into Australian society. Problems such as difficulty in learning English, attaching to education, finding employment and adapting to the ‘Australian way of life’ have impeded these peoples’ attempts at gaining social inclusion (Martinez, 2007; Weitzer and Tuch, 2005). Additionally, Colic-Peisker and Tilbury (2008) argue that African immigrants are often signalled out for police attention due to their stature, skin colour, and kinship-based social practices. For example, young Africans, in particular, are more prone to congregating in large numbers in public places which may render them more vulnerable to being targeted by standard police operational practices (Cunneen 1995; White 1996). This is despite ongoing doubts about the existence of so-called youth and/or ethnic gangs (White et al 1999). Nevertheless, the interactions of African refugees and the police are important considerations with regard to their resettlement into Australian communities. Relations between police and minority groups is a; “universal, pervasive and continuing problem” (Neyroud and Beckley, 2001:159).

The Research Project

While there are documented anecdotal case studies about some of the problems encountered by African people in various locations across Australia, there are few studies which have attempted to gain the perceptions of Sudanese Australians in terms of their interactions with the criminal justice system. We argue that most of the commentary has come from individuals

or institutions who hold privileged positions in society and who speak about, but not for, Sudanese people. By contrast the voices of the Sudanese community has been suppressed or silenced and have not had the opportunity to publicly respond to some of the claims made about them. This research attempted to address the imbalance by providing a comparison between the dominant images of Sudanese Australians portrayed in the media compared to the stories told by the Sudanese community about their lived experiences in Queensland.

The study was unique, in that it focused attention on four Queensland communities (Brisbane, Logan City, Toowoomba and Townsville), accessing data from a number of sources to produce a systematic understanding of Sudanese peoples' interactions with the criminal justice system. To this end, an analysis of media reports was undertaken, in terms of how Sudanese Australians are variously portrayed in the media. Data was also obtained from focus groups and surveys to capture Sudanese perspectives about their interactions with the criminal justice system. The remainder of this paper provides a comparison of the images generated by media coverage of Sudanese Australians compared to the data which captured the voices of these people.

The Media and the Social Construction of Sudanese as Criminogenic and Problematic

At the outset of the research some key parameters for the research had to be set. First, a time period had to be chosen (2000-2009). In part this time period was determined because of the large volume of ongoing reportage about Sudanese. In addition the research team were able to access newspaper archives for that period. In this study the selected sample was drawn from three major newspapers: *The Australian* and *The Age*, for their national coverage; and *The Courier-Mail*, for its coverage of Queensland.

For each newspaper a series of systematic database searches were conducted. Next, a data coding protocol, based on coding schema identified by Desmarais, Price & Read (2008) was developed to depict the content of newspaper articles containing references to Sudanese refugee/immigrants in Australia. The final data coding sheet contained items concerned with identifying the source and general content of the story; items about crime themes (e.g. offences and racial/ethnic identities of offenders and victims); items regarding 'racial stereotyping', criminogenic references to Sudanese Australians, slurs and calls for social exclusion; items which might 'pinpoint' significant changes in the nature of reporting about Sudanese Australians and alleged crime waves; and, other, arguably, positive reflections about Sudanese community members.

The data search identified a total of 756 separate articles. Of these, relevant content was identified in 222 articles which constituted the final sample. The year with the most articles was 2007 (94 articles, or 42.3% of the sample), and the years with the least were 2000 and 2001 (both with only one article each, or 0.5% of the sample). The analysis of the data revealed four distinct kinds of media reportage about Sudanese Australians over the nine year period. These included a humanitarian focus, the beginning of a focus on Sudanese and crime which then shifted to a more overt attempt to demonise Sudanese as a "problem" due to their supposed involvement in crime and anti-social behaviour. More recently there has been an attempt to provide coverage about aspects of Sudanese culture in a positive light.

1. A Humanitarian Focus

Earlier in the 21st century, the Australian press tended to convey messages about refugee intakes of Sudanese people, mainly from Southern Sudan, in a humanitarian way. There was noticeable emphasis on the plight of Sudanese entering Australia from a 'war torn' country. The essence of the public message, although not great in terms of volume in

press reports, was that these peoples 'should be afforded' safe settlement within Australian borders, with protection of UN refugee and humanitarian related conventions.

2. The Beginnings of a Crime Focus

But the tide soon turned away from humanitarian messages. A few right wing extremist spokespeople (including academics) began to use the Leader Press for local community newspaper reporting of Sudanese Australians as possessing low intelligence and being prone to crime (Coventry & Dawes, 2006). Behind the labelling and stereotyping there was often an underlying 'cultural determinism', captured by reference to an African 'culture of violence'. Victoria Police Assistant Commissioner Paul Evans was quoted as stating that police are "dealing with refugees who had come from a culture of boy soldiers and social violence" (Evans, 2007; p.3). Further, the Assistant Commissioner explained "...it is a cultural thing. A lot of these people are brought up as warriors in their own culture" (Mitchell, 2007; p.25).

3. The Demonisation and Perpetrator Focus

We witnessed a period after the height of the refugee intake when Sudanese peoples were being derided, at first relatively softly, as 'lucky to be in Australia' (*The Age June 21, 2006*). We argue that this shift in the focus of reporting, at first subtle and then more overt, was part of a process that generated 'images' of the drift toward a more punitive and less contextually theorised and socially inclusive way of reporting crime related news about Sudanese communities. For example, the Chief Commissioner of Victoria Police stated that Sudanese Australians represent a miniscule number of criminal cases as handled by the Victorian Police:

Cooke, D. (2007, *The Age*, October 4, 'Sudanese no more prone to crime than any other group in the community')

"When you look at the numbers we're talking about, the young Sudanese who actually come into custody or dealt with us, only really make up about 1 per cent of the people we deal with," Chief Commissioner Christine Nixon told 3AW radio. "When we look at the data, what we're actually seeing is that they're not, in a sense, representing more than the proportion of them in the population."

4. A Cultural focus

More recently, media reports have centred on secondary school educational scholarships for Sudanese Australians, the marketing of distinctly Sudanese (African spices) and the introduction of Sudanese young people into the music industry. Besides music, there was a story about the first Sudanese-born player, who was drafted into the Australian Football League in the 2009 rookie draft.

To sum up, the analysis of print media from 2000-2009 shows a pattern of prolonged negative media reportage that constructed Sudanese people as criminogenic and problematic. This type of reportage resulted in calls for the government to review their immigration policies to reduce the number of Africans entering Australia due to the perception that Sudanese in particular could not successfully integrate into the community. The demonization of Sudanese Australians produced a form of moral panic within the community with heightened concerns about the rise in youth gangs modelled on African-American gang culture. Despite the high number of print media stories about Sudanese there are very few which attempted to present the Sudanese perspective about these issues. In order to provide a counter-balance in the debate we obtained the perspectives of Sudanese Australians which puts their voices at the forefront and provides alternative understandings about these people and their interactions with the criminal justice system in Queensland.

Hearing the Voices of Sudanese Australians

A total of seven focus group interviews were conducted across the research sites. One group interview consisting of 11 males and females was conducted in Townsville. In Brisbane three focus interviews were conducted comprising of an all male elders group with 23 participants, one female group consisting of 8 participants and another group consisting of 12 people. Additionally, two focus group interviews were conducted in Toowoomba consisting of a mixed gender group of 10 participants and a group of 12 youth. The analysis of the data produced two broad themes focusing on state interventions in the private and public lives of Sudanese Australians.

Government Interventions within the Domestic Sphere

The focus groups shared concerns about how state interventions into their private lives resulted in a weakening of the social bonds and structure of the way traditional Sudanese families operated. For example, elders observed that their traditional roles as parents were undermined in terms of how they should discipline their children, since coming to Australia. There was also a perception that young people were more likely to challenge parental forms of authority due to their interactions with non-Sudanese young people which served to undermine the family unit as summed up by this parent:

Yeah. You know the new life here, it's not just only the kids because the youths from 15 to 18 years, they don't respect us anymore. Like before, when we live in Africa, they've got to respect us at home – if they want to do anything, they can do it by themselves but in Africa – when we are in Africa, if you want to go somewhere you come and tell first please Dad, I'm going somewhere, can I go? You can tell them yes go but you can't do that here.

Another source of family disruption occurred when parents attempted to instil authority over their children through the use of corporal punishment. This traditional form of discipline was challenged by young people who in some cases reported these incidents to their teachers, who in turn reported the incidents to the Department of Child Safety. The incursion into the family home by agencies such as Child Safety were interpreted by parents as an attempt by government agencies as destabilising families and undermining traditional Sudanese culture:

...When we discipline our children, the child will go to the school and will complain my mum hit me here, my mum did this and that and then later on the Child Safety will come to the home and they tell us we have to take this child away and you're not a good mum. We ask them, in Australia here, do you do this when you discipline your children? They said, we discipline them in a word like 'reasonable' way.

Changes to the dynamics of Sudanese families through challenges to the authority of parents over their children impacted negatively particularly on Sudanese males. Members of the male elder focus groups expressed a high level of concern about the challenges to their traditional patriarchal roles as husbands and fathers since arriving in Australia. In essence these challenges were interpreted as a direct threat to their masculinity. For example, some men identified that they felt disempowered since arriving in Australia due to their inability to be successful providers for the family unit which impacted on their self-esteem. Furthermore, the empowerment of Sudanese women in terms of gaining some economic independence through accessing Centre-link payments or finding paid employment outside the home were interpreted by men as a threat to their traditional roles as providers. Some men perceived that these factors contributed to acts of domestic violence against their partners. While acknowledging that domestic violence was an issue in some homes this phenomena was rationalized by some males as a symptom of the threat to their masculinity as highlighted by this man:

To start with domestic violence is something my colleagues say they have experienced. Especially in Australian culture, we men, especially, the African man is the black man, the Sudanese man – is looked upon as being violent. I remember one time someone put in the press in Australia, the women are Number 1. Someone said that this is how the Police look at people, that as an African, we (the men) are the dogs. And the other thing also I can say is this is because Australian culture encourages the women to fight to be equal to us. That's not the case in Africa although there are certain areas that are changing but still our women have that in their mind that once we are in Australia, they are equal to men so you don't need to ask for that respect whereas in Africa the man is still the family head.

While acknowledging that society should impose sanctions against the perpetrators of domestic violence, some Sudanese males interpreted police interventions as a factor for destabilizing their families. There was a perception from males that when police arrived at the family home to investigate a domestic disturbance they automatically labelled the adult male as the perpetrator of the crime. To this end males identified themselves as victims due to the process that police adopted when investigating cases of domestic violence:

I'm looking back to the beginning when I was at my house and indeed I was a victim of what had happened and I was in the marriage and because of that they call the police. They came to my house and sat down to have a cup of coffee and they did not even ask me what happened. They automatically talked to my wife and she told them. They then took me to the police station and I was charged. I was a victim of what had happened in Australia and this ended my marriage.

A number of interviewees interpreted police intervention as a form of harassment. Some interviewees argued that Sudanese families were often singled out for more police interventions due to the mistaken community perception that they were inherently more violent than other sectors of society. One male observed that there were more accounts of domestic violence committed by non-Sudanese in his suburb which were not investigated by the police:

It is just a matter of misconception from police because they are adhering to the law but they haven't been listening and when you say something to the police, the police will never listen to you. Like where I live now, the people who live around me, they have a lot of violence at night, they abuse each other and they don't even call in the police and the police don't come. We don't even abuse ourselves but when someone rings the police they always come to the Sudanese.

Having identified some of the factors which contribute to domestic violence in the Sudanese community the focus groups were asked to suggest a more appropriate strategy for managing this problem. There was consensus among the group that elders should accompany police or other agencies such as child safety when they visit Sudanese homes. It was felt that community elders would assist with interpreting the law to Sudanese family members and provide police with insights into Sudanese culture. In other cases there was a shared perception that Sudanese elders could assist in family mediations without directly involving the police or other government agencies:

What I am trying to say as a recommendation is that we Sudanese know what the justice system can do. The law should be applied equally but they should be aware of the Sudanese cultural background. In the case of domestic violence there are some cases that could be solved in the community by the elders which would not result in the break-up of a family. So what I mean is the Justice System should be aware of Sudanese culture and apply the law equally.

Sudanese Interactions with the Criminal Justice System in the Public Domain

The focus group interviews also yielded data relating to how Sudanese people experienced the criminal justice system within the public sphere. The data were categorized under a number of themes: young people public space and police, communication problems with police, understanding the law and Sudanese interactions with the court system.

There were numerous accounts whereby Sudanese people perceived that they were unfairly targeted by police as the perpetrators of crime. Most of these incidents took place in public spaces where groups of young Sudanese were more visible. Young people in particular perceived that they had more interactions with police than other young Australians due to their physical appearance and the way they dressed. A common experience for young people was to be stopped by police and searched for weapons or stolen property. A number of youth reported that police often accused them of being members of organised gangs based purely on their appearance and demeanour. In one case a group of Sudanese were accused of having links with criminal African-American gangs because of their style of dress. One young person observed that popular media images of African American gang culture influenced the way the community negatively viewed Sudanese youth in public spaces:

I think this is a problem and I think we are connected to the other black society like America. But we are living here in Australia and the culture you see in the movies is not the Sudanese culture here in Australia. So we should not be connected to American culture with gangs and that- that's American culture. Number two the judicial system is based on the media and that too is based on American culture and American popular culture. So Sudanese are seen as troublemakers, thieves and the like. We are not like that at all.

Another youth rationalized that police were more likely to intervene when they saw Sudanese youth in public spaces due to the tendency of young people to gather in large numbers which was a feature of the collective nature of Sudanese culture. He argued that Sudanese gathered in large groups for protection from other youth groups and not due to the popular conception that they were organized gangs who were threats to the rest of society:

Yeah. You know like back home, not just Sudanese as African, we live in like – we like to be together all the time so that doesn't mean if we are 5, 6 or 7 like we are a gang or something – that's our way of living, that's the way we live back home. We go out in big groups so we can look after each other in case we meet another group. We don't want to hurt anyone or cause trouble because we are not like that.

Yeah as far as I have lived in this country for 9 years so I went through this stuff-I never saw something called a gang. Because a gang is an organization and I'm an active member of this community and I never see any gangs of Sudanese. You can see a group of people walking down the street but that's not a gang.

The youth focus group members observed that inaccurate and inflated media reports in the local and national press had produced a moral panic about young Sudanese and their purported involvement in criminal activity. Sudanese young people perceived that public concerns which were whipped up by the media created a Sudanese “youth problem” which had resulted in higher police interactions with this cohort. Two young people from Brisbane described how heightened public perceptions about Sudanese youth was the catalyst for an incident involving an elderly female:

They should, they should not judge just our side, we're not a bad people or our youth are not bad, there's nothing to say that Sudanese are the worst people because the media always says that Sudanese they're this, they're this,

they're this, you know but actually we're not. My cousin and some other friends were walking down the road near our house one day and there was an old lady in front of us. She turned around and saw us and screamed and ran off into another house. Next the police car pulled us over and told us to get in the car and we ended up at the police station. I did not understand but they said we followed that old lady. But we did nothing but they don't ever believe us. They think we are all troublemakers. But this is not true.

Sudanese elders also identified inflammatory comments made in the media by prominent academics and politicians which also contributed to negative public responses about Sudanese people and their purported links to crime. There was a common perception that Sudanese lacked a voice to refute these claims which constituted an unequal balance of power relations in terms of responding to such criticisms:

Yes I'd just like to let you know that the problem of Sudanese crime has been like I said, the Sudanese are being targeted by the Australian community by saying that the Sudanese are the people who do crimes. For example it's happened in New South Wales in the University of Macquarie, the Professor wrote a sentence about Sudanese and made a comment about how Sudanese are bad.

The negative public perceptions that labelled these youth as criminogenic were further reinforced when young people from other African nations identified as Sudanese when interrogated by police. The focus groups were also critical of police because they did not scrutinize the non-Sudanese youths' statements about their identity. According to the Sudanese youth these cases reinforced the need for more Sudanese Police and liaison officers who would work with police in areas where there were high numbers of this cohort:

As far as I know, in the past, and we've addressed these issues with the police, I mean some Africans used to commit some other crimes or whatever and they used to call themselves Sudanese. So police and the public say yeah because you're black, you're Sudanese. But you tell me any black person walking, I can tell you straight away whether he's Sudanese or he's not Sudanese. That's where the lack of knowledge comes in with the Police – you know another person tells you he's Sudanese so that means he's Sudanese. What you can do is, all right that's when we have a liaison police officer. If the person's lying, they can identify, they can ask them a few questions to identify whether he's a Sudanese or not. All right, you can show your IDs, the name straight up will show you whether he's a Sudanese or not.

The young people were asked about the types of interactions they had with police in public spaces. A common perception among the group is that some police officers lacked an understanding of Sudanese culture and acted in an authoritarian manner when interacting with the young people. This often produced conflict between the youth and police resulting in some youth being charged for offensive language. There was agreement that the relationships between the Sudanese community and police would be improved if police adopted a more mediatory approach. The following scenario is one example as to how tensions between both groups escalated due to a breakdown in communication:

There's the misunderstanding between the cops and us, like between our youth so we're looking forward to working with them to understand our Sudanese youth. They're really good people but I think it's the way the Police approach us. So, the other day at the party, because I went to the party and then the Police actually she swore at me in the beginning, like she used the F word to me and I said 'sorry Police Officer can I have your name?' And she said 'I can't give you my name.' I said 'I'm a Sudanese Special Affairs worker you know like I work and I know this thing. If

you've got a problem I'll help you out because I'm here, I'll help you with these people' she said 'oh you F, F, F'. So I swore back to her like I was just so offended. In the end the police officer warned me that I could be charged for swearing at her.

Other case studies support the perception of Sudanese as victims of police intimidation. For example there were a number of cases where drivers were stopped by police for no apparent reason and had their cars examined for defects. These incidents were perceived as a form of police intimidation with the intention of provoking negative reactions from Sudanese people:

The policeman gets out of the car and looks over our car and he asked 'is this your car?' It happened to me when I was driving a friend's car and then the Police pulled me over and said that the car had been reported as a stolen car and I said 'okay, that's fine, I'm here with the owner of the car and if it was reported as stolen, who stole it?' and then from there, they said the number plate are not the owner's and that they came to find out and I said 'well here is the owner' and then they went back onto the tyres and they said 'now sir, your tyres are flat' But how did the whole thing get started? You see that's what provokes the situation whereby you get angry so the level of approach from the police matters sometimes. The police cannot be trusted because what they are taught is the thing about crime and how to catch a criminal, so that when they approach a person, they approach you as a criminal and that's how they are taught. In the police Force, everything is about the crime and how to catch a criminal so with that there's a lack of trust in between whereby they perceive you as a criminal.

When Sudanese people progressed further into the criminal justice system after being charged for offences they found court to be an alienating experience. The majority of those who attended court perceived that there was little chance that they would receive justice due to the unfamiliarity of the setting, the formality of the language as well as the limited representation they received. Members of the women's focus group in particular were critical because they could not afford private solicitors due to their economic situation and were dependent on the advice of court based solicitors. They perceived that this type of representation was not adequate due to the limited time they could prepare for cases, the failure of solicitors to adequately explain the charges as well as the likely outcomes of their court appearance. One female who was a victim of domestic violence perceived that she could not understand the duty solicitor or the court process:

F: The problem with lawyers is because we do not have money to do it.

I: So you have to have a duty solicitor?

F: Yeah we get legal aid with them.

I: So you have to go to anybody?

F: Yeah and they are not good. They lack the language and we do not understand what they mean sometimes. You say to the boy or whoever, there's too big a gap there so the story could twist around with one word and you know you can lose your rights. My court case fell to bits because they let my husband free and made me look like the problem.

The perceived inadequacy of representation led a number of people to question how fair the legal system was for people who came from disadvantaged social backgrounds such as Sudanese. Some people spoke about the inevitability of being found guilty and having to pay a fine despite maintaining their innocence. Others described how they were told by their solicitor to plead guilty in order to receive a lighter sentence. This young person's description of his negative experiences within the justice were indicative of the feelings of helplessness experienced by some Sudanese people:

I have been to court twice and at the end of the day there's no justice and because I appear they say you're inside a social institution and you have been charged for interfering in police affairs. And we have a young man who comes from Sudan and speaks good English but someone will take advantage of him and tell him he is supposed to be a criminal. They tell you to speak English because you are in their country and then they don't believe what you say. I don't think you use the language and it's so complex. Every young person believes that there's no not guilty verdict for young Sudanese. They're always guilty because it's mentioned in the hearing and after that you have to pay something. I have seen young people who don't want to accept the hearing but you go to court and you don't walk out of it so you say; " I plead guilty".

The focus group members were asked to suggest ways in which Sudanese people could be better supported when dealing with the criminal justice system. One suggestion was to employ more trained Sudanese people to work in an advocacy role with police when people were taken into custody. The advocates would be located in police watch houses and work with the detainee and liaise with their families to reduce the high levels of alienation and hopelessness experienced by many Sudanese when in custody. It was suggested that professional counsellors could be employed to reduce the rise in suicide attempts by Sudanese people as a result of their interactions with the criminal justice system. The following account details how one young person experienced a sense of hopelessness and shame culminating in a successful suicide attempt shortly after being released from custody:

I left the country because of war and came to a western country trying to be a better person. But the same treatment you have in your country is the same treatment that you have in this country. You better say that I have no choice to live in this world and that's why some make a choice to die and hang themselves up. That person hung himself just because he went to the police station, got charged. He stayed the whole night there in the watch house. In the morning when he came back home he hung himself in a tree. His parents were living inside the house. He hung himself and he was only a young guy 20 years old. And in this case nobody knows what the police have done to this person, nobody. Nobody knows and the person in charge of this problem, the police have not been charged because there is no evidence what happened, whether they abused the guy, no evidence. We tried to follow up the case but nothing. Yeah and the problem is the police are responsible for it because they took him to the watch house and then they discharged him from the watch house. They're supposed to bring him home and say to the family that you've got to keep him here. They didn't they said walk home and this person think ok. I'm a useless person

Conclusions

In summary, this research represents the outcomes of an 18 month study of Sudanese Australians' interactions with the criminal justice system in Queensland. The study is significant in that it provided a comparison of Australian print media which was conducted to ascertain how Sudanese Australians are constructed and how these representations may influence community attitudes and government policies towards these people. This study also elevates the voices of Sudanese

Australians which have often been silenced and marginalised from this debate. Data was derived from the Sudanese community through focus group interviews and surveys from a representative sample of young people, elders and women across each of the three sites.

A number of conclusions can be drawn from an analysis of this data. First, despite recent media reports from Victoria which continue to focus on Sudanese as a crime and justice problem, there is no tangible evidence from this research which suggests that Sudanese people are more criminogenic than any other group in Queensland.

However if we listen to the "voices" of Sudanese people it is clear that their views are at odds with the majority of media reportage. Data from the surveys and focus groups highlights concerns from Sudanese that they are the victims of over-policing in public places due to their appearance as well as their tendency to congregate in groups which are often misconstrued as gangs. Sudanese were also concerned about state interventions into their families which are interpreted as undermining the traditional values and mores of family life. The interview data suggests that there are gender issues pertaining to the rise in domestic violence in Sudanese families as well. Many of those interviewed suggested that domestic violence issues could be better dealt with in a culturally appropriate way if elders accompanied police when attending to these incidents.

The analysis of how the media have portrayed Sudanese since their arrival in Australia shows that the majority of stories are focused on the nexus between Sudanese and criminal activity. Of the four phases of reportage identified in this research two were primarily focused on stories attributing Sudanese as criminogenic. It can be argued that sustained negative reportage contributes to 'moral panics' in the community and results in an amplification of concerns about the perceived problems encountered by Sudanese as they attempt to integrate into Australian society.

Finally, despite ongoing concerns about Sudanese who come into contact with the criminal justice system, a broader analysis is required to reduce the feelings of exclusion encountered by these people as they attempt to integrate into Australia society. To this end a greater focus is required on the role that systematic racism and class disadvantage plays in producing social conflict both within and outside the Sudanese community.

References

ABC News. 2005, 'Police clear Sudanese refugees of crime wave', www.abc.net.au/news/stories/2005/01/20/1285299.htm, accessed June 2, 2008

Chan, J. 1997, *Changing Police Culture: Policing in a Multicultural Society*, Melbourne: Cambridge University Press

Cherney, A & Chui, W. H. 2010, 'Police auxiliaries in Australia: police liaison officers and the dilemmas of being part of the police extended family', *Policing and Society*, 20(3): 280-97

Colic-Peisker, V & Tilbury, F, 2008, "Being Black in Australia: a case study of intergroup relations", *Race and Class*, vol.49 (4), pp.38-56.

- Collins, J, Noble, G, Poynting, S & Tabar, P (2000) *Kebabs, Kids, Cops and Crime*, Melbourne: Pluto Press.
- Coventry, G. & Dawes, G. 2006, 'What all Australians Should Know about Race, Racism and Crime: A Beginning', The Australian and New Zealand Criminology Conference: Hobart.
- Cunneen, C. 1995, 'Ethnic Minority Youth and Juvenile Justice: beyond the stereotype of ethnic gangs', *Current Issues in Criminal Justice*, 6(3), p 387
- Cunneen, C. 2001, *Conflict, Politics and Crime, Aboriginal Communities and the Police*, Sydney: Allen and Unwin.
- DIAC (2007) Queensland: settlement trends and the needs of new arrivals 2007, Department of Immigration and Citizenship Australian Commonwealth Government, Canberra
- Evans, C. 2007, 'Two charged over teen bashing death', *The Age*, p3.
- Finnane, M. 1997, *Police and Government: Histories of Policing in Australia*, Melbourne: Oxford University Press.
- Hage, G. 1998, *White Nation*, Sydney: Pluto Press.
- Martinez, R. 2007, 'Incorporating Latinos and Immigrants into Policing Research', *Criminology & Public Policy*, 6(1): 57-64.
- Mitchell, N. 2007, 'Above the law in the suburbs', *Herald Sun*, Oct 4 p 25.
- Neyroud, P & Beckley, A. 2001, *Policing, Ethics and Human Rights*, Devon: Willan.
- Palmer, D (2009) *State Police in a State of Change: Remaking the entrepreneurial officer*. VDM Verlag, Saarbrucken, Germany.
- Pickering, S. 2008, 'The New Criminals: Refugees and Asylum Seekers', in Anthony, T & Cunneen, C Eds. *The Critical Criminology Companion*, Hawkins Press, pp.169-79.
- Poynting, S. 2008, "Ethnic Minority Immigrants, Crime and the State" in Anthony, T & Cunneen, C Eds. *The Critical Criminology Companion*, Hawkins Press, pp.118-128.
- Poynting, S. 2002, 'Bin Laden in the Suburbs: Attacks on Arab and Muslim Australians before and after 11 September', *Current Issues in Criminal Justice*, 14(1): 43-64.
- Sampson, R & Bartusch, D. 1998, 'Legal cynicism and (subcultural?) tolerance of deviance: The neighbourhood context of racial differences', *Law and Society Review*, 32:777-804.

VEOHRC 2009 (Victorian Equal Opportunity and Human Rights Commission) *Rights of Passage: The experiences of Australian-Sudanese young people*.

White, R. 1996, 'Racism, Policing and Ethnic Youth Gangs', *Current Issues in Criminal Justice*, 7(3): 302.

White, R, Perrone, S, Guerra, C & Lampugnani, R. 1999, *Ethnic Youth Gangs: do they exist? Overview Report*, Melbourne: Australian Multicultural Foundation.

Weitzer, R. & Tuch, J. 2005, 'Racially biased policing: Determinants of citizen perceptions', *Social Forces*, 83: 1009-1030.

Pill Heads: Governance, Normalization & Risk in Prescription Drug Use

George Christopher Dertadian, University of Western Sydney

Introduction

In August 2008, American investigative journalist and prescription painkiller addict Joshua Lyon distributed an initial proposal for his autobiographical book, *Pill Head*, to six publishing houses. Two days later, as a matter of sheer coincidence, the cover feature of *New York Times Magazine* was about the abuse of – and addiction to – prescription painkillers. The article initiated a bidding war for Lyon's book. On the 25th of June, 2009, twelve days before the release of Lyon's book, pop star Michael Jackson overdosed on the pharmaceutical drug Propofol. The controversy surrounding Jackson's death sparked huge interest in the impending release of *Pill Head*, which went on to sell with relative success. Lyon was invited to be part of the media coverage of Jackson's death by several media outlets, introduced as an 'expert' on pharmaceutical addiction, and his book promoted as yet another cautionary tale about prescription medication abuse. What follows in this article is a close reading of the anecdotal accounts presented in Lyon's book, with a specific focus on the stories of Lyon's acquaintances Heather and Caleb, as they relate to the growing public concern, medical cautioning and government regulation of prescription drugs. Importantly, this paper does not directly engage specific individuals who (ab)use prescription drugs, rather it provides a discursive analysis of the complex network of discourses that both inform and construct current debates about problematic use of pharmaceuticals. This however should not discount the applicability of the concepts presented to the material realities of the prescription drug user. While this paper will certainly engage the assumptions made by medical and psychological research, it does not seek to undermine work on drug science or mental illness. Indeed, part of the purpose of this article is to demonstrate the relevance and impact of the ways in which our culture approaches drug use, legality, medicine, psychology, and their interconnectedness.

Normalization & Stigmatization

Historically speaking, non-medical drug use is not a new phenomenon, especially within Australia. As far back as 1907 one observer points out: "What the drink habit is to men in Australia, the headache powder is among women."¹ Similar discourses surrounded women's controversial use of over-the-counter analgesics in the 1950 & 60's.² While there is an unambiguously gendered dynamic at work in these examples, one that would be difficult to address within the scope of this article, it is clear that non-medical drug use has a long and complicated history in Australia. Since the 1960's there has been a steadily growing neo-liberal trend in health promotion which Peterson suggests "...calls upon the individual to enter into the process of his or her own self-governance through processes of endless self-examination, self-care and self-improvement."³ Additionally Western cultures have undergone the 'medicalization of everyday life', where practices and behaviours such as diet, exercise, mood and pain (whether it be physical, psychological or social) now commonly fall under the domain of medical concerns. As a result of the 'medicalization of everyday life' a rapid proliferation of pharmaceutical therapy and pervasive normalization of pill-taking has occurred. In a seminal article on illegal amphetamine use in the 1960's, Bruce Jackson observes that "[the result of] ...faith in the efficacy of pills is [that] a lot of people take a lot more pills than they have any reason to. They think in terms of pills."⁴ More recently, in his substantive history of prohibition, author Richard Davenport-Hines observes that "This is the age of the all-powerful pill... today you can take a pill to put you to sleep,

¹ Murray, R. (1980) 'Minor Analgesic Abuse: The Slow Recognition of a Public Health Problem'. *BJA*, 75. p. 9

² Hennessey, E.M. (1992) 'Her Stand-by for Keeping Going' APC use during the boom decades'. *Journal of the Royal Historical Society of Queensland*, 15:5, 248-264.

³ Petersen, A. (1997) 'Risk, governance and the new public health', in Turner, B.S. (eds) *Foucault, Health and Medicine*, Routledge: London & New York p. 194

⁴ Jackson, B. (1966) 'White-Collar Party'. *Atlantic*, 218. p. 35

wake you up, put on weight, take it off, pep you up, calm you down, boost your confidence, [and] deaden pain.”⁵ Importantly, it must also be noted that the increase in pharmaceutical therapy has been accompanied by an increase in other forms of their usage. In a 2006 US study the authors make the following observation; “The conclusions reached in this study are that non-medical use of opioids is a predictable parallel phenomenon of their prescriptive availability...”⁶

The history of the growth of international pharmaceutical use has culminated in a tension-filled tripartite relationship between patients, doctors and drug companies. Today patients are constantly undergoing processes of self-regulation to identify uncomfortable/unwanted psychical and psychological states that doctors are then required to treat. Perhaps as part of the neo-liberal trend in health promotion, patients have also become more aware of what drugs are used to treat what conditions and what drugs work best for them. Patients who are highly knowledgeable about what drugs they require will frequently be approached by medical practitioners with much scepticism, and are often seen as a challenge to the professional authority of the doctor. Additionally, doctors have developed an increasing reliance on the products of drug companies, and often act as gate keepers between patients and drugs. A 2003 study highlights further tensions in this relationship, saying; “For physicians, the ideal of patient management is an unbiased analysis of what would be best for treatment of an individual patient... By contrast, the primary obligation of drug companies is to make a profit for their shareholders.”⁷ Drug company representatives have been known to visit doctors anywhere from weekly to daily, and have been – in varying degrees – found to significantly affect prescribing patterns.⁸ Broadly speaking the notion of the pill-cure takes on great significance for patients, doctors and drug companies, highlighting the general normalization of pill-taking.

Of course, sitting behind the normalization of pill-taking is the deep stigmatization of chemically similar illicit substances. In dominant discourse the distinction between legal and illegal drugs is made powerfully clear, with the full force of scientific precision; legal drugs are licit, sanctioned and safe, while illegal drugs are illicit, prohibited and dangerous. Typical scientific classifications are either based on chemical structure or mechanisms of action. However, problems undoubtedly arise with both as drugs with similar chemical structure often behave – in the body – in very different ways; and the opposite is also true. Due to the limitations of scientific approaches, drug classifications are ironically most often based on “...social categories like legality, therapeutic potential and potential for abuse.”⁹ Among dominant discourses there appears to be a cyclical justification that perpetuates the social perception and legal status of drugs under the guise of unbiased science, whose limitations ironically rely on already established social perception and legal status. Take for instance the drugs Vicodin and Heroin, the former is generally understood as a medication used legitimately to treat symptomatic pain, while the latter is regarded as a dangerous, illegal substance with the destructive potential to ruin (or end) lives. The trouble with this observation is that Vicodin and Heroin are both opiate-based substances that are chemically very similar. It is widely reported that in the case of chronic pain patients who are not able to obtain a steady supply of the appropriate opiate painkiller (like Vicodin), many seek out illegal drugs (like Heroin) in an attempt to self-medicate.¹⁰ Indeed, in chronic pain research it is relatively uncontested that “...self-medicating for pain has been identified as a possible contributing factor in

⁵ Davenport-Hines, R. (2001) 'The Age of Anxiety', *The Pursuit of Oblivion: A Global History of Narcotics*. W.W. Norton & Company: New York p. 302

⁶ Dasgupta, N., Kramer, E.D., Zalman, M., Carino, S.J., Smith, M.Y., Haddoxa, J.D. & Wright, C. (2006) 'Association between non-medical and prescriptive usage of opioids'. *Drug and Alcohol Dependence*, 82, 135-142. p. 141

⁷ Fisher, M.A. (2003) 'Physicians and the Pharmaceutical Industry: A Dysfunctional Relationship'. *Perspectives in Biology and Medicine*, 46:2, 254-272. p. 255

⁸ Fisher, M.A. (2003) pp. 258-259

⁹ Keane, H. (2002) *What's Wrong With Addiction?* Melbourne University Press. p. 20

¹⁰ Keane, H. & Hamill, K. (2010) 'Variations in Addiction: The Molecular and the Molar in Neuroscience and Pain Medicine'. *BioSocieties*, 5:1, 52-69. pp. 61-62

illicit drug use..."¹¹ While I do not wish to suggest that drugs like Vicodin are simply 'legal Heroin', or to encourage self-medication with Heroin, it is important to acknowledge the symbolic level at which dominant views tend to polarise drugs like Vicodin and Heroin.

Deterministic Discourse

New concern about the collective practice of non-prescribed pill-taking has emerged over the last decade, much of which has come out of North America. Still, in a September 2010 broadcast of the popular news program *Four Corners*, investigative journalist Matthew Carney declared that "...leading health professionals fear Australia could have a new drug epidemic, one based on legal prescription pills."¹² Much of the official explanations of the practice are highly deterministic, with a particular focus on brain neurology. Official explanations might suggest, for instance, if a person's neurological balance is thrown off they will become depressed and/or anxious¹³ and, due in part to the stigma attached to mental illness, the patient then resorts to pharmaceuticals in an attempt to self-medicate. In official discourse the regular 'non-medical' use of certain pharmaceuticals implicitly leads to further imbalances in the person's brain neurology, at which point drug use is assumed to become compulsive.¹⁴ In saying so, under official explanations, self-medication, mental illness and addiction discourses are used cyclically to explain both the cause and effect of non-medical drug use. By contrast, it is interesting to note that in official explanations, the regular 'medical' use of the same pharmaceuticals will serve to correct or enhance an imbalanced neurology. An important battle over what legitimately constitutes 'medical' as opposed to 'non-medical' use of pharmaceuticals is clearly occurring in and around official discourses.

In an attempt to demonstrate some of the limitations of official explanations I will draw from the example of Heather, who Lyon writes about in *Pill Head*. Heather tells Lyon that she had been depressed and anxious from a very young age, and that she often had panic attacks so severe that they made her vomit. When recalling her first encounter with prescription painkillers Heather says;

*...basically, a collapsed lung isn't that big of a deal. It happens to a lot of people. But because I'd always been so anxiety-ridden, I was convinced I was dying. And once the morphine drip was in, for the first time in my entire life, I didn't feel any of that anxiety... Obviously, I needed more right away.*¹⁵

Years later Heather visited a doctor for her anxiety and a back problem, about which she says;

*He gave me Xanax for stress and Vicodin for pain, and the combination was just magic. My anxiety was gone, the pain was gone, and everything felt awesome.*¹⁶

After another doctor was only willing to re-prescribe Xanax, this time at five times her previous dose, Heather still felt that the combination of Xanax and painkiller provided the most potent relief. She soon began to doctor-shop for painkillers. Eventually she became thoroughly dependent on the drug combination. A typical official line of explanation would declare that Heather's non-medical drug use was a manifestation of an imbalanced neurology, which made her depressed and

¹¹ Keane, H. & Hamill, K. (2010) p. 62

¹² Carney, M. (2010) 'Oxy - The Hidden Epidemic', *Four Corners*. ABC: Australia.

¹³ Sharpley, C.F. (2009) 'Malfunction in GABA and Glutamate as Pathways to Depression: A Review of the Evidence'. *Clinical Medicine: Therapeutics*, 1, p. 1512

¹⁴ Keane, H. (2002) p. 25

¹⁵ Lyon, J. (2009) *Pill Head: The Secret Life of a Painkiller Addict*. Hyperion: New York p. 44

¹⁶ Lyon, J. (2009) p. 46

anxious, prompting her to self-medicate. It might also be suggested that, in Heather's example, when used 'medically' pharmaceuticals corrected her neurological imbalance, and when used 'non-medically' the same drugs initiated a further imbalance which resulted in dependence.

As concise and containable as this explanation might be, it involves a series of problematic oversights that need to be clarified. Most significantly, it is problematic to assume that the sexual abuse Heather suffered / endured as a child did not contribute to her depression and anxiety at such a young age. An official explanation of Heather's drug use might also potentially ignore her family's long history of drug abuse, which, as she tells Lyon exacerbated her anxiety when medically instructed to take such potent drugs. Lastly, it is unlikely that any official explanation would consider that during the time in which she became dependent on the drug combination she was experiencing dire financial hardship, involving loss of employment and lack of medical insurance. Thus, it is important to note that while affective responses like depression, anxiety and addiction have important biological components, they are also created in and through a range of emotional responses and social contexts that widely circumscribe the ways in which people choose to (ab)use prescription drugs and how this is assumed as a form of rewarding risk-taking.

Risk Taking, Pill Taking

The deterministic discourse of official explanations has even more difficulty accounting for the purely recreational use of prescription drugs. Often thought of as safer than illegal drugs, a growing trend towards the recreational use of prescription drugs has begun to emerge – US studies in particular have consistently and clearly demonstrated the emergence of this trend.¹⁷ Any serious evaluation into recreation pill taking is often dismissed on the grounds that it is the practise of social delinquents and moral deviants. The common distinction between "...normal persons who have become addicted accidentally or... through medical treatment"¹⁸ and those who simply have "...immature, hedonistic, socially inadequate personality"¹⁹ is long standing in addiction discourse. The example of the recreational prescription drug user further highlights the largely moral rather than medial association of the prevalent physiological/psychological distinction in contemporary classifications of dependence. In saying so, discourses about recreational prescription drug use bear great similarities to that surrounding illegal drug use. Recreational prescription drug use has thus become widely associated with illicit practices and criminal supply.

To demonstrate the criminogenic association of recreational prescription drug use it is useful to draw from the example of Lyon's friend Caleb. Lyon writes that "As a teenager he [Caleb] did tons of drugs – acid, pot, speed, coke."²⁰ Just out of high school Caleb began taking Vicodin recreationally for a period of approximately two years, after which he switched to OxyContin. Caleb's first steady supply of OxyContin came from "...a friend of a friend... [who] knew a crew of people who were robbing trucks that delivered the pills to pharmacies."²¹ After approximately eight months the dealer which was involved in the robbing of the trucks overdosed and was arrested and imprisoned. Lyon also observes that "After he [Caleb]

¹⁷ Kelly, B.C. & Parsons, J.T. (2007) 'Prescription Drug Misuse Among Club Drug-Using Young Adults'. *The American Journal of Drug and Alcohol Abuse*, 33, 875-884.

Lankenau, S.E., Sanders, B., Bloom, J.J., Hathazi, D.S., Alarcon, E., Tortu, S. & Clatts, M. (2007) 'Prevalence and Patterns of Prescription Drug Misuse Among Young Ketamine Injectors'. *Journal of Drug Issues*, 37:3, 717-735.

Quintero, G., Peterson, J. & Young, B. (2006) 'An Exploratory Study of Socio-Cultural Factors Contributing to Prescription Drug Misuse Among College Students'. *Journal of Drug Issues*, 36:4, 903-930.

¹⁸ Kolb, L. (1962) *Drug Addiction: A Medical Problem*. Thomas Books: USA: Springfield, Illinois. p. 5

¹⁹ Kolb, L. (1962) pp. 5-6

²⁰ Lyon, J. (2009) p. 18

²¹ Lyon, J. (2009) p. 19

went through withdrawal, he could go weeks without physically needing pills, but he was *always* on the hunt for them"²², finding his next supply of OxyContin over the border in Mexico. With the example of Caleb it is clear that regular recreational use of prescription pills is inevitably (re)constructed to be 'risky', 'dangerous' and 'criminal'. However, much in the same way that official discourses might tend to ignore the emotional and social aspects of Heather's personal circumstances, a move towards the criminalization of recreational prescription drug users potentially ignores its social and cultural influences.

While it is not the purpose of this paper to encourage the recreational use of prescription drugs, the practise itself provides vital insight into the often contradictory elements of the power relations at work in contemporary prescription drug use. On the one hand regular recreational use of pharmaceutical substances is deterred by reason of the physical and social danger it poses to its user, while on the other hand use of the very same substances under medicalized everyday contexts is entirely expected and regarded as powerfully therapeutic. It is important to note that what becomes defined as 'legitimate' medical drug use is deeply interconnected with, for instance, the economic agenda of the pharmaceutical industry and the professional authority of medical practitioners. Indeed, broadly speaking, both the pharmaceutical industry and the medical profession have for years embraced increased use of pharmaceuticals in medical contexts, and encouraged the medicalization of an increasing number of behaviours and states of mind. However the new criminal associations of pill taking has begun to undermine, in varying degrees, the rapid growth of pharmaceutical therapies, their status as unambiguously curing, as well as their normalization in the face of deep stigmatization of chemically similar illicit substances. Moving forward, it needs to be noted that to address the rising concerns over the non-medical use of prescription drugs we need to apply a wider, particularly social and cultural lens to the issue, one that the important yet limited scientific and epidemiological research simply cannot provide.

Reference List

- Carney, M. (2010) 'Oxy - The Hidden Epidemic', *Four Corners*. ABC: Australia.
- Davenport-Hines, R. (2001) 'The Age of Anxiety', *The Pursuit of Oblivion: A Global History of Narcotics*. W.W. Norton & Company: New York
- Dasgupta, N., Kramer, E.D., Zalman, M., Carino, S.J., Smith, M.Y., Haddoxa, J.D. & Wright, C. (2006) 'Association between non-medical and prescriptive usage of opioids'. *Drug and Alcohol Dependence*, 82, 135-142.
- Fisher, M.A. (2003) 'Physicians and the Pharmaceutical Industry: A Dysfunctional Relationship'. *Perspectives in Biology and Medicine*, 46:2, 254-272.
- Hennessey, E.M. (1992) "Her Stand-by for Keeping Going' APC use during the boom decades'. *Journal of the Royal Historical Society of Queensland*, 15:5, 248-264.
- Jackson, B. (1966) 'White-Collar Party'. *Atlantic*, 218.
- Keane, H. & Hamill, K. (2010) 'Variations in Addiction: The Molecular and the Molar in Neuroscience and Pain Medicine'. *BioSocieties*, 5:1, 52-69.
- Keane, H. (2002) *What's Wrong With Addiction?* Melbourne University Press.
- Kelly, B.C. & Parsons, J.T. (2007) 'Prescription Drug Misuse Among Club Drug-Using Young Adults'. *The American Journal of Drug and Alcohol Abuse*, 33, 875-884.
- Kolb, L. (1962) *Drug Addiction: A Medical Problem*. Thomas Books: USA: Springfield, Illinois.
- Lankenau, S.E., Sanders, B., Bloom, J.J., Hathazi, D.S., Alarcon, E., Tortu, S. & Clatts, M. (2007) 'Prevalence and Patterns of Prescription Drug Misuse Among Young Ketamine Injectors'. *Journal of Drug Issues*, 37:3, 717-735.
- Lyon, J. (2009) *Pill Head: The Secret Life of a Painkiller Addict*. Hyperion: New York

²² Lyon, J. (2009) p. 23

- Murray, R. (1980) 'Minor Analgesic Abuse: The Slow Recognition of a Public Health Problem'. *BJA*, 75.
- Petersen, A. (1997) 'Risk, governance and the new public health', in Turner, B.S. (eds) *Foucault, Health and Medicine*,
Routledge: London & New York
- Quintero, G., Peterson, J. & Young, B. (2006) 'An Exploratory Study of Socio-Cultural Factors Contributing to Prescription
Drug Misuse Among College Students'. *Journal of Drug Issues*, 36:4, 903-930.
- Sharpley, C.F. (2009) 'Malfunction in GABA and Glutamate as Pathways to Depression: A Review of the Evidence'. *Clinical
Medicine: Therapeutics*, 1, 1511–1519. p. 1512s

Moral Panic and Risk- A Working Model?

Pota Forrest-Lawrence, University of Sydney

Introduction

Moral panic has become an obvious part of the public and media lexicon (McRobbie 1994: 298; Hunt 1997: 644; Goode 2008: 534). A commonly utilised term, it has largely been applied loosely by the media and other social agents to describe negative public events (Ben-Yehuda 2009: 2). Illicit drugs, ethnic minorities, comics, mugging, white collar crime, youth violence are only a small portion of issues that have been the subject of interest in what the media describes as a 'moral panic'. Its apparent popularity and application however have not shielded the concept of moral panic from ongoing conceptual and theoretical criticisms. Moral panic has been labelled an antiquated theoretical and conceptual perspective heavily influenced by the labelling theory of deviance. Attempts have been made to reconceptualise the theory, notably by social theorists such as Critcher, Goode and Ben-Yehuda and Hier, although these efforts are limited. Social risk theories, notably Beck's risk society, have emerged as possible solutions to address the limitations of moral panic. This paper will critically review the principles of moral panic and discuss a prospective modification drawing on aspects of social risk theories.

What is a moral panic?

Developed in the early 1970's by social theorist Stanley Cohen, moral panic is a conceptual and theoretical perspective that examines the interplay between various social agents. According to Cohen's model, moral panic is an orchestrated process centred on how the media constructs social problems. Cohen states that moral panic is a reaction to a deviant social or cultural phenomenon that is disproportionate to the actual threat that is offered. He claims that the threat to the moral order of society is presented in a stereotypical way by the mass media. Moral panic theory examines social anxieties by analysing influential underlying factors. It demonstrates that fears and anxieties can transcend reality and be cast as socially constructed problems. The media and other social agents, such as the moral entrepreneurs, experts and claims makers all play a pivotal role in the moral panic process. These protagonists create and disseminate moral panics.

Integral to the moral panic perspective is the concept of the folk devil. The folk devil according to Cohen is the supposed product of deviancy born from a "condition, episode, person or group of persons" that poses a moral threat to society (Cohen 1972: 1). Specifically in Cohen's work, it was the Mods and Rockers who were the new 'youth subculture', the wild ones who were symbols of terror. He states that folk devils are prone to immediate identification as unfavourable symbols.

The social consequences of labelling particular groups as folk devils include ostracising and penalising such groups simply on the basis of their supposed immoral and threatening behaviour (White and Perrone 2010: 43). Most notably groups of young people, in particular those from a culturally and linguistically diverse background, have been the target of media. Young people congregating in public spaces have become synonymous with negative and threatening images. These ethnically identifiable young people feed the "media's moral panics over gangs" and thus bolsters this stereotype that is simply based of physical appearances (White and Perrone 2010: 42).

Moral Panic models

A number of moral panic models have developed over the last four decades. Cohen's deviancy amplification model comprises four key phases: warning, impact, inventory and reaction. It focuses heavily on the media's role in the moral panic

process. In the warning phase, information is communicated by the media regarding an imminent threat. Following, the impact phase is where the supposed deviant behaviour is exposed and a disorganised response to the threat takes place. The inventory phase is where the media produces processed or coded images of deviants and/or deviancy. This phase is integral in the process and involves the exaggeration and distortion of the seriousness of the event, prediction that the problem will reoccur and symbolisation through the use of specific language. The final stage, reaction, is where action is taken to address the deviant behaviour (Cohen 1972: 22).

Cohen was able to describe deviancy as a form of rule-breaking ultimately challenging the social science orthodoxy that deviance is not an attribute of an act but a constructed category of social control agents (Citcher 2003: 11). His work also highlights that deviant action follows social reaction. Most importantly, he emphasises the key agents involved in the moral panic process and identifies their role in the social reaction and construction of deviance. The media plays a pivotal role in his model, who he describes as the creators of moral panic, constructors of social meaning and amplifiers of information (Cohen 1972).

A number of well documented theoretical adjustments and advancements of Cohen's model have emerged. The Hall et al (1978) study centred on the supposed 'new' kind of crime of mugging that took place in England in 1972-3. They described a moral panic as a method of distracting attention from a crisis that resonated in a capitalist state (Jones and Jones 1999: 146). They devised a spiral of signification, produced by politicians and the media. This spiral identifies the issue of concern and the subversive minority, links the issue to other problems in society through labelling noting that the threat could escalate if 'thresholds' were crossed and predicts doom and gloom should no action be taken to remedy the problem. The final element in the spiral involves the call for firm steps (Hall et al 1978: 223). This study emphasises the organised response of law enforcement and the media. It was also the first moral panic study to apply moral panic through the analysis of robbery statistics.

Goode and Ben-Yehuda (1994) in their book titled *Moral panics- the social construction of deviance*, devised three theories of moral panic. Their aim was to create theories that were void of any panic imagery (Goode and Ben-Yehuda 1994: 51-73). The grassroots model focuses on the widespread public concern regarding threats. The elite-engineered model outlines the role undertaken by elite-engineered groups to deflect attention from serious problems that may affect their own interest. The last theory, interest group model, notes middle rung groups such as the media play a role in the power and maintenance of a moral panic.

Goode and Ben-Yehuda also constructed an attributional model comprising five criteria to assist in the explanation of a moral panic. They note that a moral panic can only exist if all five attributes are present. Concern, hostility, consensus, disproportionality and volatility were devised; each criteria focusing on the threat to society and the reaction to this threat.

A plethora of unanswered questions, identifying gaps in Cohen's moral panic model were posed by Citcher. He critiqued Cohen's classic opening paragraph¹ and attempted to address its limitations by providing what he describes as a processual model of the moral panic process through seven 'loosely defined' stages. Other theoretical advancements include those by Hier (2002: 329) who introduced the notion of moral panic as a type of moral regulation, particularly as a temporary rupture in the moral regulation process. Citcher is quite critical of this placement and suggests that relocating moral panics into the context of moral regulation is in danger of encompassing potentially any topic within its remit (Citcher 2009: 24). Further, Citcher emphasised the importance of the disproportionality principle in the moral panic and was unsure whether a moral regulation analysis shares that agenda (Citcher 2009: 33).

¹ Refer to page 1 of Cohen's book (1972) *Folk Devils and moral panics: the creation of the Mods and Rockers*, for his highly cited opening paragraph.

Attempts have also been made to explain moral panic through risk society (Ungar 2001: 271-91). Ungar notes that moral panics have lost much of their utility due to the emergence of new sites of social anxiety, such as environmental, media and technological threats (Ungar 2001: 271). Ungar claims that risk society, unlike moral regulation, is able to answer news questions; the moral panic framework is inadequate in addressing issues and problem definition of the risk society. Garland however notes that "moral panics involve anxious disapproval of moral threats, whereas risk society threats involve fearful uncertainty about material hazards" (Garland 2008: 27). He sees merit in using research on risk and risk perception to deepen the understanding of moral panics (Garland 2008: 27).

Moral Panic criticisms

Various principles and components of moral panic theory have been criticised by social theorists and subject to extensive criticism. Although these criticisms focus on a number of theoretical, methodological and analytical issues, this paper will focus exclusively on disproportionality, the media and the folk devil.

Disproportionality

Disproportionality has come under intense scrutiny by a number of social theorists (Ungar 1992; Waddington 1986). The foremost criticism centres on the measurement of disproportionality, a task Ungar asserts is impossible as the nature of the objective threat cannot be determined (Ungar 1992: 492). Waddington (1986: 258) notes that disproportionality is too value laden to be scientifically functional and consequently ostensibly difficult to measure objectively. Cornwell and Linders (2002: 314) state that disproportionality is laden with ontological and methodological difficulties, in particular its emphasis on exaggerated and disproportionate social responses. Watney (1988) also notes that instances of identified social reactions that are deemed out of proportion are based on the subjective representation of the sociologist. Thus the sociologist is not measuring the social reaction against a reality but rather against his/her own representation of the situation. In this conception, there is no room for empirical fact.

The Folk Devil

The concept of the folk devil has been criticised because of its inability to deal effectively with 'empowered' folk devils. The fabric of ideological constructs must evolve to suit postmodern times, therefore an update of the folk devil concept is necessary (McRobbie and Thornton 1995: 572). In addition, a reconstruction of the theory itself is needed to recognise the changing role of the folk devil. The identification of pressure groups and commercial interests as emancipative agents suggest that the concept in its original form is incompatible with a contemporary society and thus requires modification. The folk devil who originally served as a cultural scapegoat throughout many decades, is adapting to its changing environment and contesting its role in a modern moral panic (Garland 2008: 25). The new web of relations needs to be recognised to enable its survival in this period of late modernity.

Cohen recognises the changing face of the folk devil although suggests young people still hold a recurrent role in modern moral panics (Cohen 2002: xxxiv). Young people, according to Cohen, still remain a focal area of interest and most likely to be involved in a modern day moral panic. Although not as identifiable as the Mods and Rockers who were described by Cohen as actors in a particular episode of collective behaviour, modern folk devils, according to Cohen (2002: 19) may be invisible and submerged into society. However, folk devils still exist and are subject to distrust and social control.

The media

Cohen (2002), in the introduction to the third edition of *Folk devils and moral panics: the creation of the Mods and Rockers*, does acknowledge that various key agents play a role in the moral panic process although he neglects to introduce or examine public opinion (Citcher 2003: 13). Tester (1994) has previously argued that there is no theoretical evidence to explain the public opinion and media relationship. The media proclaiming an event to be a moral panic does not necessarily

indicate that the public is of the same opinion. Hunt (1997: 645) concurs and proposes that moral panic is incapable of distinguishing between the media and social reality; it has positioned itself as a reflector of public opinion however whether it objectively fulfils this role remains questionable.

McRobbie and Thornton (1995) were the first to acknowledge the need to modernise and update the theory as a whole and the key agents in the process, notably the media. The plurality and divergence of opinions and the expansion of what encompasses the media needs to be carefully outlined in order to determine what role the media plays in a modern moral panic. In addition, Rowe (2009: 28) suggests that media audiences are disaggregated and fragmented thus making it difficult for moral panics to reach large audiences. He compares this to the restricted broadcast and print outlets of the 1960s, emphasising the degree of media outlet choice available to consumers. He does however state that the proliferation of media platforms may contribute to the "insinuation of moral panics into many more media spaces", as demonstrated in the SMS text messages sent to incite violence during the Cronulla Riots.

Although these approaches are not without merit and have undergone analysis and application, it is important to recognise the plurality of modern media and the divergence of not only public and media opinion but also that of the 'folk devil'. The media is no longer the monolithic body found in Cohen's or Hall et al.'s original work or the 'passive vehicle' utilised by primary definers such as claims-makers. The media has become a tool to be utilised by a wider net of players in the process. McRobbie and Thornton (1995) emphasised the inability of moral panic to account for greater complexity of social phenomena and the increase web of relations. A revised version of the moral panic framework must have the ability to conceptualise the new forms of mass media of the twenty-first century. This will specifically involve the analysis of claims made, contested and subverted by claims makers in the process.

Social risk theories

Social risk theories, notably Beck's risk society, have emerged as possible solutions to addressing the limitations of moral panic. This section of the paper will briefly address the main epistemological approaches to the social theorising of risk, in particular Becks' risk society thesis, Foucault's governmentality approach to risk and Douglas and Wildavsky's Cultural Theory of risk. It will also attempt to extract the most pertinent components of each theoretical perspective and address its relevance and applicability to an enhanced moral panic model.

Risk Society

Beck wrote his seminal work *Risk Society – Towards a New Modernity* in 1992, a literary perspective that revolutionised the discipline of sociology. Uncertainty and unpredictability are at the foundation of the risk society. Beck suggests that risks are a consequence of a threat to modernisation and fundamentally politically reflexive. Risks according to Beck are real and pervasive.

Pivotal to Beck's concept of the risk society is the politicisation of risk. Beck suggests that there is a struggle between those who define the risks, namely the experts, and those who experience the risks, the public. Sceptical of science, the public is aware that it is science that has produced many of the global risks. Consequently, scientific knowledge of risk is deficient and contradictory and thus incapable of solving the problems it has created. This leads to a society of ambivalence and insecurity where expertise is beginning to be undermined and risk has become highly politicised (O'Malley 2000: 461).

Beck, describes the 'risk society' as a media information society comprised of a proliferation of risks, an obvious outcome of modernisation. Beck identifies the media as an integral member of the risk society; it informs the social agenda and is the arena where knowledge and risk consequences are played out. The mass media according to Beck can influence political perceptions, is ideally positioned to perform a critical surveillance role and is a privileged site for the social construction,

contestation, definition and criticism of risks (Beck 1992: 22-23; Beck 1995: 101). The media is a knowledge centre that socially defines risks by making them visible. It is clear that Beck does award the mass media a privileged role in the social construction of risks (Cottle 1998: 8). Beck's account of the media however has been described as reductionist, particularly his analysis of the media and information society, which he describes as a society of non-knowledge and disinformation (Adam, Beck and Van Loon 2000).

Risk Society and Moral Panic

Expert knowledge has not fully been explored in moral panic. Although Cohen introduces experts in his opening paragraph stating "socially accredited experts pronounce their diagnosis and solutions" he does not elaborate on their role in the moral panic process (Cohen 1972: 1). As previously noted, there is a resonating cynicism amongst the general population regarding claims to progress. Insights into how knowledge and the words of experts are viewed in modern day moral panics can be obtained from examining the role of experts in the moral panic process, with particular emphasis on their interplay in the media world. Questions regarding whether experts carry any particular weight can be examined in addition to how much weight is potentially carried. Further emphasis can be placed on how the media depicts social expertise and whether they agree or disagree with the views that are presented.

Governmentality and Risk

Governmentality is the study of the government of others and the government of one's self, emphasising the present and encouraging an unrestricted "positive account of practices of governance in specific fields" (Garland 1997: 174). It is an approach inclined to observe "the present as contingent and the future therefore as open and malleable" (O'Malley 2010: 13). Garland (1997: 174) states that governmentality "anatomizes contemporary practices, revealing the ways in which their modes of exercising power depend upon specific ways of thinking (rationalities) and specific ways of acting (technologies)."²

From a Foucauldian perspective, risk is constructed as a phenomenon through strategies, discourses, institutions and practices. It is only through these identifiers that risk can be known and become the basis for action. Risk from this perspective is not a thing but rather a way of representing events in order to make them governable (Dean 1999: 131). It is a governmental strategy of regulatory power invariably monitoring the management of individuals and populations through a neo-liberal style of risk governance.³ Key governing strategies, discourses, institutions and practices govern risk; information regarding various risks is collected, sorted and analysed by researchers, lawyers, social scientists, economists and other professional bodies. This process allows risk to be problematised, calculated and subsequently governable. Risks are subsequently deemed as 'high risk' or 'at risk' and the groups which fall under said categories require intervention. Thus risk from a Foucauldian perspective can be viewed as a "moral technology where to calculate a risk is to master time, to discipline the future" (Lupton 1999: 207).

Governmentality and Moral Panic

The governmentality of risk approach to policy formulation provides conceptual tools to investigate how particular discourses influence certain policy outcomes. This approach is able to focus analytically on the produced legislative and policy outcomes. As a conceptual tool it is able to investigate and expose the rationality of government through which governable subjects are managed and responsabilised. Governmentality interrogates the discursive techniques involved in the creation of reality and how the operations of knowledge and power are created.

² Technologies of the self are referred to by Foucault as governmentality. Refer to Michel Foucault, "Technologies of the Self" in *Technologies of the Self: A Seminar with Michel Foucault* ed. Luther H Martin, Huck Gutman, and Patricia H Hutton (Massachusetts: University of Massachusetts Press 1988), 19.

³ A neo-liberal style approach to governance involves minimal government intervention, with an emphasis on economic growth.

A governmentality based analysis, as demonstrated by Rose and Miller (1992: 179), focuses on an investigation of a particular discursive space allowing for reality to be thought of in a particular way that is amenable to political debate. This approach is uniquely placed to invent new techniques of self government and the government of others, where responsibility is assigned accordingly (O'Malley 2008: 61). Government initiatives can thus be framed as outcomes that address the social risk identified by the media and other players in the moral panic process. The responsabilised and prudential individual is framed as the self-managed subject. The outcomes stage of the moral panic process can thus examine how various discourses influence and produce policy and legislative outcomes.

Cultural Theory of Risk

Douglas and Wildavsky introduced the idea of risk and culture in 1982 in their highly publicised work '*Risk and Culture*'. Building on Douglas's earlier work on purity and danger, they were able to provide tools to develop the idea of risk and culture.⁴ Contrary to Beck's notion that the risk society has produced a proliferation of risks, Douglas and Wildavsky (1982) state there is no actual increase in risks but rather an increase in the perception of risks. Douglas and Wildavsky emphasise that these risks, specifically the ecological, are constructed by social actors who claim that an increase in risks is evident, consequently creating the perception of an increase in risks. Influenced by Durkheim and Kant, Douglas is able to dictate a comprehensive cultural/symbolic analysis of risk, focusing on risk perception and the risk selection process. By emphasising the importance of culture, Douglas incorporates morality into her theoretical approach.

Douglas and Wildavsky devised a 'risk culture' where they identify a hierarchical-institutional culture which tends to select social risks as focal points of concern. This risk selection process is a defining element in the cultural theory of risk and is operationalised through their grid/group model. This model attempts to demonstrate how culture is organised; it differentiates particular modes of organisation and their response to risk. A Cultural Theory of risk perception provides insight into why particular dangers are selected whilst others are ignored. Further, it enables us to recognise that different cultures accentuate or downgrade different risks. Although this approach attempts to intimately unpack risk through a cultural lens, the grid-group model is plagued with notions of cultural relativism and reductionism and ultimately neglects the social and political context within which individuals function (Bal 1995: 264).

Cultural Theory and Moral Panic

Douglas suggests that certain risks are ignored while others are elevated to a level of significance both on a social and media platform. This approach can provide a deeper understanding of the risk selection process involved in the moral panic process by highlighting the focal issues that are elevated by the media through the use of particular discursive terminology. Further, this approach can assist in the investigation of social agents involved in the moral panic process, with emphasis on how different cultures accentuate or downgrade different risks.

Conclusion – So what now?

This paper has attempted to provide an overview and critique of moral panic as well as outline its potential coalescing with certain components of social risk theories. From its inception in 1972, moral panic has undergone various transformations and advancements. These attempts at revitalising the theory have marginally contributed to its survival. However, moral panic in its original form struggles to be considered a sound and working theoretical position worthy of theoretical inclusion. The concept of the folk devil in particular has been criticised by McRobbie and Thornton (1995) as unable to appropriately deal with empowered folk devils. Therefore in order for moral panic to survive in a contemporary society, its limitations must be addressed. Social risk theories are thus able to address some of these limitations and contribute to a reconceptualised theory of moral panic. This paper identified key components of Beck's risk society (the role of experts as noted by the

⁴ This is in reference to *Purity and Danger* (1966). It is a book which explores the working of taboos in culture. Douglas's analysis explicitly focused on the ideas and rituals pertaining to pollution and cleanliness within a broad spectrum of society.

media); Douglas and Wildavskys' Cultural Theory (the focus on some risks rather than others) and Foucault's work on risk and governmentality (to assist in analysing outcomes) that when applied can produce a more advanced and working moral panic theoretical framework. This will ultimately enable moral panic to remain a useful conceptual, theoretical and analytical tool able to be utilised in twenty-first century research.

Reference List

- Adam B. Beck U. Van Loon J. (2000) *The Risk Society and Beyond: Critical Issues for Social Theory* London: Sage.
- Bal R. (1995) 'Book Reviews: Mary Douglas. Risk and Blame: Essays in Cultural Theory', *Organization and Environment* vol 9 no. 2 pp. 262-65.
- Beck U. (1995) *Ecological Politics in an Age of Risk* Cambridge: Polity Press.
- Beck U. (1992) *Risk Society: Towards a New Modernity* London: Sage.
- Ben-Yehuda, N. (2009) 'Moral panics- 36 years on' *British Journal of Criminology* vol 49 pp. 1-3.
- Cohen S. (1972) *Folk Devils and Moral Panics- the Creation of the Mods and Rockers* London, Granada Publishing Limited.
- Cohen S. (2002) *Folk Devils and Moral Panics* 3rd ed, *Moral Panics as Cultural Politics: Introduction to the Third Edition*. London: Routledge.
- Cornwell B & Linders A. (2002) 'The Myth of 'Moral Panic': An Alternative Account of LSD Prohibition', *Deviant Behavior* vol 23 pp. 307-30.
- Cottle S. (1998) 'Risk Society' and the Media- a Catastrophic View?' *European Journal of Communication* vol 13 no. 1 pp. 5-32.
- Critcher C. (2003) *Moral Panics and the Media* Philadelphia: Open University Press.
- Critcher C. (2009) 'Widening the focus- moral panics as moral regulation' *British Journal of Criminology* vol 49, pp. 17-34.
- Dean M. (1999) 'Risk, Calculable and Incalculable' In Lupton D. (ed) *Risk and Sociocultural Theory: New Directions and Perspectives* pp. 131-59. Cambridge: Cambridge University.
- Douglas M & Wildavsky A. (1982) *Risk and Culture- an Essay on the Selection of Technical and Environmental Dangers* California: University of California Press.
- Foucault M. (1988) 'Technologies of the Self ' In Martin H L. Gutman H. & Hutton P H. (ed) *Technologies of the Self: A Seminar with Michel Foucault* pp. 16-49. Massachusetts: University of Massachusetts Press .
- Garland D. (1997) 'Governmentality' and the Problem of Crime: Foucault, Criminology, Sociology' *Theoretical Criminology* vol 1, no. 2 pp 173-214.
- Garland D. (2008) 'On the Concept of Moral Panic' *Crime Media Culture* 4 no. 9 pp. 9-30.
- Goode E. (2008) 'Moral panics and disproportionality: the case of LSD use in the sixties' *Deviant Behavior* vol 29 pp. 533-43.
- Goode E & Ben-Yehuda N. (1994) *Moral Panics- the Social Construction of Deviance* Massachusetts: Blackwell Publishers.
- Goode E & Ben-Yehuda N. (2008) *Moral Panics: The Social Construction of Deviance* 2nd ed. Oxford: Wiley-Blackwell.
- Hall S. Critcher C. Jefferson T. Clarke J. Roberts B. (1978) *Policing the Crisis- the State, and Law and Order* London: The Macmillan Press Ltd.
- Hier S P. (2002) 'Conceptualizing Moral Panic through a Moral Economy of Harm' *Critical Sociology* vol 28 no. 3 pp. 311-334.
- Hunt A. (1997) ' Moral Panic and Moral Language in the Media' *British Journal of Sociology* vol 48 no

4 pp. 629-648.

Jones E. & Jones M. (1999) *Mass Media* London: Macmillan Press.

Lupton D. (1999) *Risk* New York: Routledge.

McRobbie A. & Thornton S L. (1995) 'Rethinking "Moral Panic" for Multi-Mediated Social Worlds' *British Journal of Sociology* vol 46, no. 4 pp. 559 -74.

O'Malley P. (2010) *Crime and Risk*. London: SAGE Publications Ltd.

O'Malley P. (2008) 'Governmentality and Risk' In Zinn J O. *Social Theories of Risk and Uncertainty* pp. 52-75. Canterbury: Blackwell Publishing.

O'Malley P. (2000) 'Uncertain Subjects: Risk, Liberalism and Contract' *Economy and Society* vol 29 no. 4 pp. 460-84.

Rose N. & Miller P. (1992) 'Political Power Beyond the State: Problematics of Government' *The British Journal of Sociology* vol 43 no. 2 pp. 73-205.

Rowe D. (2009) 'The Concept of the Moral Panic: An Historico-Sociological Positioning' In Lemmings D. & Walker C. *Moral Panics, the Media and the Law in Early Modern England* pp. 22-41. London: Palgrave MacMillan.

Tester K. (1994) *Media, culture and morality* London: Routledge.

Ungar S. (2001) 'Moral Panic Versus the Risk Society: The Implications of the Changing Sites of Social Anxiety' *British Journal of Sociology* vol 52 no. 2 pp. 271-91.

Ungar S. (1992) *The rise and fall of nuclearism: fear and faith as determinants of the arms race* Pennsylvania: Pennsylvania State Press.

Waddington, P A J. (1986) 'Mugging as a Moral Panic: A Question of Proportion' *British Journal of Sociology* vol 37 no. 2 pp. 245-59.

Watney S. (1988) 'Aids, 'Moral Panic' Theory and Homophobia' In Critcher C. 2006 (ed). *Critical Readings: Moral Panics and the Media* Berkshire: Open University Press.

White R. & Perrone S. (2010) *Crime, criminality and criminal justice* Melbourne: Oxford University Press.

A Crime Worse than Murder? Colonial Queensland's Response to the Rape of European Women by Aboriginal men

Geoff Genever

Introduction

During the second half of the 19th Century, courts in Queensland convicted and hanged 16 men for the crime of rape. One was European, three were Pacific Islanders and twelve were Aboriginal. The Aboriginal total would have been 14 but an additional two evaded the gallows: one by dying in custody, the other was shot while attempting to escape. In all instances the victims were European women or girls.

During this period, Queensland executed more Aboriginal men for rape than were hanged for murder. These statistics have attracted the attention of authors with an interest in crime, and issues of race. However, some of the conclusions they reached, invite re examination. It is claimed for example, that some 19th Century Queenslanders considered rape a more serious crime than murder;¹ that the rape of white women by Aboriginal men was a rarity that invariably attracted a death sentence; and that the moral character of the victim was not questioned if the rapist was black.² In other words, that 19th century criminal justice for Aboriginal people was tempered by racism, rather than mercy.

Documents from this period, provide some evidence to support such claims, but it is unreasonable to believe that injustice for Aboriginal men charged with rape, was the norm in colonial Queensland courts. Indeed, research leaves one with an impression that in general, the law was correctly observed. To support my assertion, I would point out that 19 Aboriginal men facing rape indictments that would have seen them hanged, had them reduced to charges that attracted two years imprisonment.

I argue then, that rape across the racial divide was not rare, that the moral character of the victim was quite frequently questioned, and that Aboriginal defendants were not invariably executed. Nevertheless, I do not deny there are some glaring examples of injustice. Most importantly, while questioning whether the rape of white women by Aboriginal men was rare or not, I fully acknowledge that the rape of black women by white men, was positively legion. It is however, outside the scope of this paper.

The laws governing sexual offences prior to the amendments of 1865 awarded the death penalty for rape, unlawful carnal knowledge of a girl under ten,³ bestiality, and sodomy, but it was normally only applied in cases of rape. The legal conditions for a rape conviction demanded that the offence be reported as rape, and that evidence of vaginal penetration and emission of semen be provided (although if penetration was accepted, ejaculation was normally assumed). Importantly, it was a legal requirement that a judge warn the jury against accepting the uncorroborated evidence of a complainant. In the absence of any of these conditions, the charge was generally reduced to attempted rape, for which the penalty, as already stated, was two years imprisonment with hard labour.

As most people are aware, in December 1859 the Northern District of NSW became the colony of Queensland. Almost immediately there was a push to amend the laws governing capital punishment. Public executions had already been banned, and some people were campaigning to end capital punishment completely. The Moreton Bay press for example pleaded "let Queensland be the first colony to lay aside this relic of barbarous days and adopt a practice more worthy of the age".⁴

This was a wishful plea. It would take another 40 years to remove the death penalty for rape and 100 to abolish it altogether. Even so, there were attempts within the colony to have rape made non-capital. This makes it difficult, despite what some politicians said, to believe there was any widespread view that rape was considered a more serious crime than murder.

In September 1860, the Queensland government debated the possibility of becoming the first Australian colony to follow the British example and remove rape from the list of capital crimes. The argument to support this, was that although the UK had made rape non-capital, there had been no increase in its incidence. Further to this, C. Blakeney (a barrister and member of parliament) maintained, "There exists an abundance of evidence to show that many an innocent man had been convicted and executed on the evidence of one designing woman."⁵ It is an unlikely claim, and he offered no evidence to support it. Seven other parliamentarians spoke on the subject and all opposed any amendment, citing, among other reasons,

¹ Courier, 1 September 1860.

² I. Lincoln, *The Punishment of Crime in Colonial Queensland*, p.20.

³ The legal age of consent was 12, and it remained so until 1891.

⁴ MBC, 8 December 1860.

⁵ Cited in MBC, 1 September 1860.

Queensland's large Aboriginal population whose men, according to the Honourable Richard Gore MLA, "could not be deterred by any other punishment than that of death."⁶ In this he was supported by Henry Jordan who added, "If capital punishment is to be enforced ... it ought to be enforced in the case of rape which is even worse than murder"⁷.

Queensland's Attorney General apparently held a similar view. He told the Assembly that "...a child so treated would be better off dead, and so long as capital punishment is retained, I will enforce it...". In support, The Hon H. Fitz told the house that all Aboriginal men were potential rapists," particularly those who have been exposed to white civilising influences."⁸

The proposed amendment failed. But it was far from being dead and, a couple of years later, The Offences Against The Person Bill was debated and passed. Under this new legislation, death ceased to be the punishment for attempted murder, sodomy, bestiality, and the carnal knowledge of a girl under ten. However the death penalty was once again retained for rape. Speaking for the Government, J. Bramston explained that,

Capital punishment will be kept for rape because the women in this colony are in a more defenceless position ... because of our limited population and scattered habitation....they are liable to assaults by the Aborigines. For the Aborigines, I believe that hanging is the only thing that brings home to them the terror of the law⁹

Whether rape was rare or not cannot be determined simply by the number of trials or the times it was reported, one must also consider population numbers, and the times it may have gone unreported. There were around 30,000 white people living in Queensland when it separated from NSW,¹⁰ about the same number that now inhabit the combined towns of Atherton and Mareeba, and about 40% were female.¹¹ So there were approximately 12,000 European females living in an area, roughly six times the size of Great Britain. It seems then, that outside the major towns, white women were as rare as hen's teeth. Over the period under review this small but increasing population, experienced 35 confirmed cases of sexual assault by Aboriginal men. If this were an accurate total, one would be justified in believing that rape across the racial divide was rare, but we know that rape, then as now, often went unreported.

The FBI believes that only one in five women report rapes. In her book Against Our Will, Susan Brownmiller suggests the true figure is one in twenty.¹² So, apparently does the Australian Bureau of Statistics, and there is no reason to believe that women in Colonial Queensland were any different. If Brownmiller and the ABS are right, we would be looking at 680 sexual assaults. Furthermore, there is evidence given under oath, confirming that the rape of white women by Aboriginal men, frequently went unreported.

In her article The Terror of the Law as Applied to Black Rapist, Carmel Harris says that this kind of rape was rare, and then goes on to state,

...it had been reported, quite without supporting evidence that in 1861 in the Logan river district, employers would no longer employ married shepherds because the wives were constantly being ravished by blacks.¹³

Here, Harris is referring to the evidence that John Hardie gave to the 1861 Select Committee on Native Police, in which he tells of the rape by an Aboriginal man, of a young white woman who asked as a special favour that the authorities not be notified.¹⁴ This Committee was told of several other rapes involving white women and Aboriginal men that went unreported.

It was also maintained that the crime was increasing "as Aborigines became more civilised."¹⁵ One assumes that what was meant by this apparent contradiction, was that rape was escalating as white settlement spread and Aboriginal men came into increased contact with white women. Brisbane's sheriff John Brown, also commented on the frequency of the crime.

This does not prove that inter-racial rape was frequent, but it does indicate that some people believed it to be, and there was supporting evidence. Two Aboriginal men had already been hanged for the rape of a shepherd's wife when this report was made. In consideration of these factors, my contention is that rape across the racial divide in colonial Queensland may not have been rare, and Harris' claim is doubtful.

⁶ Ibid

⁷ Queensland Parliamentary Debates (OPD) 1865, p.394.

⁸ Ibid

⁹ Ibid, p.393

¹⁰ D. Murphy & R Joyce (Eds) Queensland Political Portraits, 1859 -1952 , UQ Press, 1978, p.3.

¹¹ Queensland Census ,1871.

¹² S. Brownmiller, Against Our Will, Penguin, Ringwood,1991, p.148.

¹³ Harris, "Terror of the Law" p.25

¹⁴ Native Police Report p. 99.

¹⁵ Ibid, p. 32.

Let's look at some of the trials that impinge on my argument regarding rarity, the inevitability of execution, and the absence of inquiry into the victim's character. The case of Regina v Dick and Chamery went to trial just prior to Queensland's inauguration. It is mentioned because I believe the conviction was dubious and the execution illegal. Dick and Chamery were accused of raping Mary Ann Treatroff, the wife of a Logan district shepherd. The two men, it was said, went to Treatroff's hut, asked for food, then committed the offence. They worked on an adjacent station, but were unknown to her. Their arrest by Lt. Williams of the Native Police was based on her description of them. She spoke no English and required an interpreter. Dick and Chamery also needed one, who was as usual during this period, the pardoned ex-runaway convict, James Davis, a man whose interpretative skills were frequently questioned.

The defendants pleaded "Not Guilty" and their defence, by politician and barrister C. Blakeney,¹⁶ centred around a case of mistaken identity. It is significant that Blakeney found it necessary to ask the jury to set aside any racial prejudice they might harbour. It was stated in evidence that Treatroff and the two men sat and attempted to converse for some time before the offence was committed. What apparently secured the conviction was Chamery's statement to Lt. Williams in which he said "What stupid head mine to ravish white mary". This was seen as a confession however, given his poor English, what Chamery might have been trying to say was, "Do you think I'm stupid enough to rape a white woman". In view of the lack of mutual language it is possible that misunderstanding played a part in this conviction.

Dick and Chamery were hanged, but the execution was illegal because by that time public executions were unlawful. This however, did not appear to concern Brisbane's Sheriff Brown, who wrote in his letterbook,

There were thirty to forty Aborigines looking on from windmill hill and in order that they might get a good view I caused the top part of the scaffold to be left open... It is hoped that having a knowledge that their lives will be forfeited, they will cease to perpetuate a crime, which of late has been so frequently perpetrated in the Logan district.¹⁷

In January 1865 Wilhelmina Kachell was attacked in her home by Aboriginal Jemmy. She initially reported the assault as an attempted rape, only after three days did she inform her husband that she had been raped. During Jemmy's trial she told the court "...for 3 days I did not state the full extent of the prisoners offence. I was too ashamed to tell anyone before then, I felt unclean." This case is interesting because it was another trial involving a perpetrator and a victim who did not speak much English, but one, where observance of the letter of the law kept an Aboriginal man from the gallows. Kachell informed the Court (via an interpreter) "... he entered my private parts with his penis to some extent before I could get away". She told, how the struggle had lasted about 15 minutes and that Jemmy had threatened to kill her adding, "I threw him off twice... and it was in consequence of my struggling that the prisoner did not complete the connection".

By today's standards, Kachell was raped, but not under the legal requirements of 1865, even though medical evidence was produced which supported a charge of rape. Several legal anomalies kept Jemmy from the gallows, among them was Kachell's failure to report the attack as a rape, and her assertion that "the prisoner did not complete the connection".

Justice Lutwyche told the jury that if they had any doubts they could bring in a verdict on the lesser charge. They declined to accept his advice and returned a guilty verdict on the capital charge and Jemmy was sentenced to death. Lutwyche considered the verdict and sentence to be just. He said as much in a letter to the Governor. He also pointed out that Jemmy had just been released from Toowoomba gaol after a similar offence.

There was however, an interesting twist that may have helped influence the Executive to commute his sentence. The foreman of the jury was an alien and as such un-entitled to serve on a jury. Accordingly, Jemmy's sentence was reduced to two years hard labour. It would therefore be a distortion to claim that Aborigines were invariably treated unjustly. In the 1862 case of Regina v Georgie, his assault on Bridget Ryan was particularly brutal. It put her in hospital for three weeks. She was medically examined on the night of the attack but attention was paid only to her other injuries. At the start of the trial the Court believed itself to be trying a case of attempted murder. There had been no medical examination for rape because Ryan had told no one that she had been raped. It was only admitted when she stood in the witness box under oath, where she stated that she had not told anyone because she was too ashamed to tell her husband.¹⁸

After admitting that she had been raped, she gave details, but as no supportive evidence was presented, as it then stood, she had not been raped, and Justice Chambers was legally obliged to have drawn attention to this. Instead he left the matter to the jury. The charge was changed to one of rape and it took the jury only three minutes to return a guilty verdict.

Georgie was executed three months later. It is virtually certain Ryan was raped and had she informed anyone of this fact, the conviction and sentence would have been legal, but as it happened it was probably a mistrial.

The 1870 case of Regina v Jacky Whitton was a travesty. He stood trial for rape before Justice Lutwyche at Toowoomba Circuit Court. Whitton made no attempt to deny that he had attempted to have sexual intercourse with Henrietta Reis but

¹⁶ Blakeney was the member for Brisbane.

¹⁷ Letterbook of the Brisbane Sheriff, Prisons Dept, 59101, QSA.

¹⁸ Regina v Georgie (an Aborigine) 22 November 1861, 2727 Col, A/21 Queensland State Archives (herein after QSA)

denied that he had been successful, making this at worse, a case of attempted rape. Addressing the jury the defence counsel pointed out that,

...no medical evidence had been adduced in this case as there might have been and always should be when a man's life was at stake. Aborigines of this country were not aware that rape was a capital crime, and from the confession of the prisoner it was evident that he was not aware of it, and he was anxious to have it known that he had not assaulted the girl...believing that assault was the more serious charge.

It took the jury only minutes to reject an attempted rape charge and convict on the capital one. Jacky Whitton's statement in reply to the usual question of whether he had anything to say was "...I did not knock the girl down ... She played with me and laughed with me, she ran away. I ran after her we both fall down laughing". The most damning evidence appears to have been that the back of Henrietta's dress was covered in mud.

Whitton's evidence clearly suggests that he tried to have sex with Henrietta but his remarks about her playing and laughing with him give rise to the possibility that their "play" may have progressed no further than consensual foreplay. He spoke fairly good English but she was German with hardly any English at all. She was a foster child, and her foster mother did not know how old she was. She was about 14 and if so, capable of giving consent, but she may not have understood the difference between consenting sexual intercourse and rape. Had Whitton been white, it is unlikely that he would have received a death sentence and even more unlikely that it would have been carried out.

As it happened, the execution was botched and Jacky Whitton took half an hour to die. The much vaunted "blind justice and presumption of innocence" which made British law one of mankind's great achievements was often ignored by the colonial press when the defendant was black however, it would be unreasonable to apply the same criticism across the board to 19th century courts. The following case provides one of several examples where a white woman's character was questioned, and an Aboriginal man on a rape charge acquitted.

In March 1871, The Darling Downs Gazette reported,¹⁹

A Wide Bay blackfellow named Dr Dawson was yesterday committed for trial for having committed an aggravated assault on an elderly married woman. This scoundrel had just been released from gaol after undergoing a term of imprisonment for committing a similar crime in Mackay.

"Dr Dawson" faced execution if convicted. The evidence show that a woman named Bridget Slater, was returning home alone at night after attending the Rockhampton races. She alleged that Dawson came up behind her, knocked her to the ground then raped her. The crime was reported, and Dawson was arrested on her description of him. Slater picked Dawson out by some scratches on his face. He denied the charge, attributing the scratches to a fight with another Aboriginal man. Slater was physically examined some time after the incident by Dr Salmond, who expressed the non-committal opinion that "it was quite possible that the offence might have been committed"²⁰. Slater apparently antagonised Chief Justice Cockle by refusing to answer questions about how much alcohol she had consumed at the races. She demanded to know what right the defence had to ask such questions when she had been "so ill treated; worse than murder, by a blackfellow"²¹. She constantly referred to Dawson as "a black brute" from whom she might have caught some disease. It came out in evidence that she had previously been tried for theft, and Cockle stressed to the jury the importance of knowing something of the woman's character. This was a case where a directed jury declined to convict on the uncorroborated evidence of a woman with a criminal history. Dawson went free.

The Court's attitude towards Slater is significant because at the same sitting, with the same judge, another Aboriginal man was convicted and sentenced to death. Aboriginal George was convicted of raping a woman named Ellen Manning. George was said to have dragged Manning to the roadside, then raped her. Like Slater she made a complaint and was examined by Dr Salmond who found her "much Bruised and complaining of pain". Also like Slater, there was no witness to the offence, so it became a question of an uncorroborated white woman's word against that of an Aboriginal man. In many ways the two cases were similar, except that Manning did not antagonise the court. Nevertheless, the "Guilty" verdict in George's case, raises some questions, particularly as it was only the previous day that Chief Justice Cockle had stressed the importance of always considering the victim's reputation. In Manning's case there was no reference to her character, and it took the jury only a few minutes to convict.

In 1892 in a demonstration of leniency and blaming the victim Justice Real declined to try Aboriginal Donald for the rape of Eva Scott insisting that he be charged only with "attempted rape". In passing sentence Real said,

...There was this woman wandering about in the bush alone, putting temptation in his way. He will be imprisoned for six months, and as I notice that he has been in gaol for over two months awaiting trial, that is to be counted as part of his sentence. Therefore he will serve four months.

So to conclude, the frequency of sexual assaults perpetrated by Aboriginal men on the small population of white women makes, I believe, the claim of rarity untenable. Clearly, the legal processes sometimes demonstrated discrimination, yet it

¹⁹ Darling Downs Gazette, 9 Mar 1871.

²⁰ Cited in the Rockhampton Bulletin 7 January 1871.

²¹ Ibid, 28 March 1871.

would be wrong to believe that this was invariable, and that Aboriginal men charged with rape were always hanged. Equally flawed is the belief that the moral character of the victim always went unquestioned when the offender was black. However, whether the woman's character was questioned or not, seems to have sometimes been determined by the impression they created. This meant that then, as now, the victim was also on trial.

Bibliography

Government of New South Wales

Book of Trials Moreton Bay
Colonial Secretary Office: Letters relating to Moreton Bay
Legislative Council: Report of Select Committee on Police & Gaols
Report of Sherriff, Moreton Bay 1854 - 1892

Government of Queensland

Queensland parliamentary Debates 1860 - 1901
Debate on Rape Amendment Bill, 1860
Debate on Offences against the Person Act, 1865
Queensland Police Gazettes 1864 - 1901
Report from the Select Committee on the Native Police force and the condition of the Aborigines generally

Queensland Justice Dept

Queensland Criminal Trials: Bowen, Mackay, Ipswich, Normanton, Port Douglas, Roma.
Prisons Department
PRI/18 Record of Death Sentences 1865 - 1920
PRI/19 Record of Executions
EXE/16 Review of Prisoners Under Sentence of Death

Unpublished Theses

Collins, A., *Like Roaring Lions Seeking Whom They Could Devour: Rape in Queensland 1880 - 1919*, Hons Dissertation, Griffith University, 1987

Connors, L., *The Birth of the Prison and the Death of Convictism: The Operation of the Law in Pre-Separation Queensland*, University of Queensland, 1990.

Genever, T.G., *The Road to Lotus Glen: Aborigines, the Law, and Imprisonment in Colonial Queensland*, PhD Thesis, James Cook University, 1996.

Lincoln, I., *The Punishment of Crime in Queensland 1860 - 1890 BA (Hons) Thesis*, University of Queensland, 1996.

Queensland Newspapers

The Courier
Moreton Bay Courier
The Darling Downs Gazette
The North Australian
The Queenslander
The Rockhampton Bulletin

Books and Journal Articles

Barber, R., "Rape as a Capital Offence in 19th Century Queensland" in *Australian Journal of History and Politics*, No. 21, 1975.

Brownmiller, S., *Against Our Will*, Penguin, Ringwood, 1991.

Harris C. "The Terror of the Law as Applied to Black Rapists in Colonial Queensland", in *Hecate*, Vol 3, No.2, 1982.

Murphy, D., & Joyce, R., (Eds), *Queensland Political Portraits*, UQ Press, 1978.

Reynolds, H., *Frontier*, Penguin, Ringwood, 1987.

©Dr T.G Genever

From States of Exception to the Governmentalised State: The Child Sex Offender as Governmental Object

Liam Grealy, University of Sydney

Introduction

In a recent article published in *Australian Psychologist*, Dominic Doyle, James Ogloff and Stuart Thomas produce a demographic overview of Australian sex offenders serving Extended Supervision and Continuing Detention Orders (ESOs and CDOs). In their words,

The findings describe a group of demonstrably dangerous men who exhibited an early onset of sexual offending, high rates of mental disorder, sexual deviance, and antisociality. Their developmental histories are characterised by early deprivation, disadvantage, abuse, early exposure to substance abuse, and social and psychological dislocation (2011, 41).ⁱ

This study is the first of its kind in Australia due to the relative youth of ESOs and CDOs as strategies for managing sex offenders who have served their criminal sentences but who are deemed to embody significant risks to community safety. In NSW – from which I will draw my examples – ESOs and CDOs are underpinned by the *Crimes (Serious Sex Offenders) Act 2006*, passed following the High Court decision in *Fardon v Attorney General* (2004) 223 CLR 575 to uphold Queensland's comparable *Dangerous Prisoners (Sex Offenders) Act 2003*. In these jurisdictions, and within Western Australia and Victoria, the state's power to civilly detain a past offender beyond the criminal sentence can be understood, broadly, as prioritising community safety above individual rights, whether or not we think CDOs in particular constitute punishment.

In the following article I largely ignore the criticisms that might be brought to current legislative regimes by a legal discourse. The CSSOA, for example – which specifies community protection as its primary objective and its secondary objective as offender rehabilitation – can be differentiated from past laws such as the *Habitual Offenders Act 1957* (NSW) in applying to a specific group of offenders and in terms of the point in time at which a “disproportionate” sentence is identifiable. Numerous commentators have suggested that the CSSOA sits uncomfortably in relation to retributive legal principles, such as proportionality of sentence, no double punishment, and finality of sentence; that it addresses propensities rather than punishes past acts; and that there are procedural problems with its application, as well as limitations to currently available sex offending programs and techniques for risk assessment.ⁱⁱ In this article, however, I am concerned with assessing the utility of two philosophical frameworks for conceptualising the networks of relations established by such laws and their related governmental practices, between the state, past offenders, and the communities to which they will eventually return.

In short, I examine Dale Spencer's application of Giorgio Agamben's concepts of the state of exception, sovereign power, and homo sacer, in thinking about the situations of sex offenders with regard to their post-sentence management. Although there is interesting grounds for assessing the relevance of these concepts to the *Housing Amendment (Registrable Persons) Act 2009* (NSW) – established following community protests at Dennis Ferguson's accommodation in North Ryde in order to evict him – I limit my comments in this context to continuing detention orders as an obvious limit case.ⁱⁱⁱ By limit case I mean both that the detention of sex offenders beyond the end of the criminal sentence challenges our discursive framing of detention as punishment, and that if Agamben's concepts are applicable to the post-sentence management of sex offenders at all, one would expect them to be most relevant where CDOs are concerned. Following this, and by way of addressing NSW's Community Offender Support Program centres (COSPs), I outline a number of considerations we might accept from Michel Foucault's writing on governmentality, and from the field this has inspired. These considerations include an alternate version of the state to that provided by Agamben, the significance of non-state,

governmental actors, and the simultaneous functioning of competing rationalities and techniques employed to differentiate offending populations. I suggest that adopting the governmental framework to think about COSPs allows us to more clearly identify the complex and ambivalent relationships of this institution that manages offenders on ESOs to the competing governing logics of punishment, community reintegration and security.

Sex Offender as Homo Sacer

The work of Giorgio Agamben, especially *State of Exception* (2005) and *Homo Sacer: Sovereign Power and Bare Life* (1995), examines, inter alia, coercive relations between states and individuals. Within these texts he outlines an ontology of state power which he argues is common to modern constitutional democracies, one which has the potential to exclude both citizens and noncitizens from the legal sphere. As such, and in the wake of 9/11, it has become fashionable to use Agamben as a touchstone for thinking about the language of exception and the limits to humanity within nation-states.^{iv} What I would like to examine is the utility of Agamben's theory of the state of exception and his descriptions of bare life for understanding the relations between sex offenders and the state that continually detains or supervises them, where the reassuring discourse of punishment appears insufficient. In other words, where thinking about this practice in terms of punishment becomes a matter of debating competing justifications, or a definitional issue – Is continued incapacitation necessarily punishing? Is the presence of punishment determined exclusively by the law or should the experience of the punished and the technologies employed be taken into account? – is it useful instead to employ Agamben's conceptual framework on extra-legal incapacitation?

In *State of Exception* Agamben draws on the work of German legal theorist Carl Schmitt to examine emergency measures adopted by states during political crises, which override the operation of conventional legal norms for that period. He cites George W. Bush's executive order of November 2001, which allowed the ongoing detention of people at Guantanamo Bay, as exemplary of the suspension of the rule of law in order that certain persons could be subject to extra-judicial state violence on behalf of national security (Bull, 2004). Such individuals were neither prisoners of war nor criminals; rather, their judicial status was erased and so they became "objects of pure factual sovereignty" (Agamben 2003). In the state of exception, the previous restrictions on sovereign power, such as the separation of powers and the rule of law, are temporarily suspended as a decree with "force-of-law" is actualised.^v

In *Homo Sacer: Sovereign Power and Bare Life*, Agamben extends Foucault's writing on biopolitical government to suggest that the relationship between sovereign power and bare life depends upon the decision by which the sovereign determines the life, or lives, that will be incorporated into the politico-judicial order.^{vi} However, such an inclusion necessarily requires a decision as to what is excepted and Agamben suggests that "In Western politics, *bare life has the peculiar privilege of being that whose exclusion founds the city of men*" (1995, 7). The life that is abandoned by the law is bare life, or the life of *homo sacer*, a figure appropriated by Agamben from Roman law that is characterised by "*the unpunishability of his killing and the ban on his sacrifice*" (73). As the product of the state of exception rather than something that pre-exists it (Agamben 2005, 87-88), *homo sacer* is differentiated from life as it exists, for example, in Thomas Hobbes' state of nature (1968). *Homo sacer*, via the exception, or the ban, exists in an extra-legal relation to the sovereign, or sovereign power. The sovereign withdraws his protection of *homo sacer*, who is made subject to killing that constitutes neither murder nor sacrifice.

Bringing all of this theoretical speculation to bear on sex offenders in the present, Dale Spencer (2009) has recently adopted Agamben's understanding of sovereign power and its relation to bare life to examine the legal and popular positions of sex offenders. He does this in relation to civil commitment orders, and other surveillance and management technologies, such as offender registries,

GPS tracking devices, and chemical and surgical castration. In his analysis, Spencer cites media-led campaigns protesting the housing of sex offenders within communities – such as the 2000 *News of the World* name-and-shame campaign (see Critcher 2002; Bell 2005) – as evidence of their status as homo sacer. In the *News of the World* episode, and in comparable Australian instances, such as the repeated expulsion of Dennis Ferguson from communities in Queensland and NSW, there is clearly evidence of a collective (but not uncontested) sentiment expressing the desire that sex offenders be expelled from communities. However, while it might have been the case that Agamben's wolf-man was subject to a medieval ban that meant he could be killed without murder taking place, this is simply not the case for the past sex offender, even where popular media has incited vigilantism. Neither media institutions, nor communities established during such events – which could never function as coherently as Agamben imagines the state to function – constitute examples of what Agamben might term sovereign power, and it is thus that they are unable to effect a state of exception in which sex offenders are made bare life. Here, then, Spencer inappropriately makes popular protests equivalent to a state of exception.

Given its legal relevance, Spencer's analysis of the continuing detention of past sex offenders might be more appropriately Agamben's terrain. Spencer applies Agamben's concepts to the well-known US case of *Kansas v Hendricks* 521 U.S. 346 (1997), in which Leroy Hendricks continued to be held beyond his criminal sentence by the state on civil grounds, under Kansas' *Sexually Violent Predator Act 1994*. Hendricks was held with regard to his diagnosis of paedophilia, a "mental abnormality" or "personality disorder" specified by that Act as grounds for continuing detention. Spencer argues that

By juridical/institutional decision, the laws protecting [Hendricks'] constitutional rights are suspended so that the sovereign can act upon the sex offender. The sex offender is abandoned by constitutional laws in order for the production of bare life (2009, 29)

He makes the case that by holding Hendricks on civil rather than criminal grounds we witness the suspension of constitutional protections and the state of exception in action. Following Agamben, Spencer suggests this case demonstrates that "in order to apply a norm, it is ultimately necessary to suspend its application, to produce an exception" (2005, 40). It is unclear that this is the case, in Australian jurisdictions at least, for two reasons.

First, it is not apparent, in NSW specifically, that a dissolution of the separation of powers that characterises the state of exception has taken place. This was found to be the case in NSW's repealed *Community Protection Act 1994*, which applied to Gregory Wayne Kable alone, in order to extend his detention on behalf of social protection. Michelle Edgely suggests this act was repealed because the High Court found that "it imposed a function on the NSW Supreme Court which was incompatible with the exercise of Commonwealth judicial power because it undermined the integrity of that court" (2007, 364-365). While sex offender Robert John Fardon cited this precedent in his High Court challenge to Queensland's *DPSOA*, this law was found not to compromise the institutional integrity of the courts (see *Fardon v Attorney-General*).

Second, it is unclear how we might understand the constitution as being suspended, as takes place in the state of exception, if continuing detention orders are found to be constitutional. Part of the confusion here lies in the status Agamben attributes to constitutional law, as something that both appears immutable and is always able to be clearly interpreted. It seems unconvincing to suggest that a state of exception exists where the constitution is not suspended and is able to incorporate legislation that may appear prima facie unconstitutional. In such cases, an exceptional place is produced for past sex offenders *within the law*, rather than there being a state of exception.

Regarding CDOs in NSW, while certain rights of past sex offenders are clearly not recognised by the state, and thus an exceptional status is attached to past sex offenders, a state of exception in Agamben's sense cannot be said to exist. Nor can we figure such individuals as *homo sacer*, as fully without rights and standing before "pure factual sovereignty". It is important that Agamben's framework for conceptualising the legal foundations of constitutional democracies not be inappropriately extended to discuss public protests or media campaigns; to do so undermines the credibility of the application of *homo sacer*, in particular, as an analytical and political concept for recognising extra-legal forms of sovereign violence. As an alternative to this framework for thinking through the relations between the state, communities and past offenders, I turn now to Foucault on governmentality. In order to elucidate this framework, and to demonstrate its utility, I consider another institution involved with the post-release management of sex offenders in NSW, Community Offender Support Program centres.

Community Offender Support Program centres (COSPs)

Foucault's writing on governmentality and the fields it has inspired is incredibly diverse, the more so for the recent publication of multiple lecture series, especially *Security, Territory, Population, The Birth of Biopolitics*, and *The Government of Self and Others*. The comments that follow are limited to what Foucault has described as "technologies of domination" rather than their counterpart in "technologies of the self". Rather than beginning with Foucault's writing on governmentality and assessing its possible application, I proceed here by sketching a portrait of NSW's Community Offender Support Program centres (COSPs), as a relatively new institution tasked with, inter alia, the management of some past sex offenders post release. In doing so, indebted to work by Denise Weelands and Justice Action, I hope to draw out some key points from Foucault's writing on the relationships between the state, the law, past offenders, and the communities that incorporate them.

Under the *Crimes (Serious Sex Offenders) Act 2006* (NSW), within the last six months of an offender's sentence the Attorney General, acting on behalf of the State, is able to apply to the NSW Supreme Court for either an extended supervision or continuing detention order. Offenders on ESOs, specifically, are liable to be subject to a number of conditions, relating to visits from Corrective Services staff, reporting obligations, participation in treatment programs, surveillance through electronic monitoring equipment, restrictions on employment, movement and social engagement (see *CSSOA* section 11). A number of authorities function in relation to this law, including the Serious Offender Review Council, the Sex Offender Assessment Unit, Forensic Psychology Services, and the Community Compliance Monitoring Group.

Between 2008 and 2009 Community Offender Support Program centres were opened across NSW in order to provide stable, temporary accommodation for offenders both following release from prison, on parole and on ESOs, and for some individuals serving Intensive Corrections Orders (Weelands 2009, 486-487).^{vii} As residential centres for released offenders on community based orders, Corrective Services NSW (before 2008-09 the NSW Department of Corrective Services, or DCS) stated that "Apart from providing temporary accommodation, COSPs also help offenders establish links with community services and program providers, vital to helping an offender settle down in the community" (Corrective Services 2009, 7). In doing so, the centres are justified by the well-known relationship between the difficulties of finding supportive and stable accommodation post-imprisonment and increased recidivism (Weelands 2009, 485; Baldry et al. 2006). Individuals subject to ESOs – while not the majority population of the centres – will usually be required to spend time in a COSP centre.

Residents of COSPs are supervised and supported by accommodation support workers as well as Throughcare and Placement Officers. They have access to a number of substance abuse, education and life management programs designed to reduce offending

behaviour, including "Getting SMART", TAFE's "Pathways to Education, Employment and Training Program", and the "Life Management Program". However, COSPs have been subject to a number of criticisms. Residents are subject to alcohol bans and curfews, with instances of mobile phone confiscations reported (Justice Action 2009, 8). Concerns have been made about staff training and capacities, especially in relation to high-risk offenders (Knox 2008). Both Weelands and Justice Action are critical of the funding secured by DCS to run COSPs, which might have been used to fund non-government organisations that already support past offenders, such as the Community Restorative Centre and Homelessness NSW. They question the legitimacy of an institution tasked with individuals' rehabilitation and community reintegration being run by DCS, whose primary role is custodial, a point highlighted by the location of many COSP centres adjacent to prison grounds (including at the Emu Plains Correctional Centre, the John Moroney Correctional Complex, and at Long Bay Correctional Complex).

Melinda Sotiri (2003) makes the point that punishment is absent in the lexicon of the NSW Department of Corrective Services, which prefers to articulate its function as concerned with control, achieved through rehabilitation, deterrence and incapacitation.^{viii} Sotiri contends that "DCS argues that punishment *occurs* in the courts and is the preserve of the judiciary. However, the judiciary constructs its role as sending people to prison *as* punishment" (2003, 334). This managerial self-perception allows DCS to justify its management of COSPs, while underpinning outside criticisms of this arrangement. Such confusion has manifested in COSPs, in disjunctures between the program's community reintegration justifications and certain techniques employed day-to-day.

The Government of Sex Offenders as Others

Reflecting on this brief sketch of COSPs, as they have been justified and as they have operated, I would like to offer five points we might take up in thinking about alternative frameworks for conceptualising relationships between state authorities, local communities and past sex offenders, than that offered by Agamben.

First, an obvious and much quoted point from Foucault is that, contrary to Nietzsche's thinking, "The state is not a cold monster; it is the correlative of a particular way of governing" (2008, 6).^{ix} This is a central tenet for studies in governmentality, and one that demands a rendering of state power in more detail than Agamben's ontological, and only broadly historical, explanation of sovereign power, if we are to understand technologies as they function, the assumptions that underpin them, and the specificity of practices for managing particular offender groups.

Second, what we might call "the state" should be conceived as an assemblage of authorities, the rationalities governing each not necessarily congruous with one another (Rose and Miller 1992, 176).^x Sotiri's work on the disjuncture between external (judicial) and self-perceptions of NSW Department of Corrective Services is illustrative here. With regard to sex offenders accommodated within COSPs the tendency of Corrective Services NSW to territorialise post-release services perhaps undermines this point about competing state authorities. However, whether extended supervision orders continue to be applied, and whether these typically entail spending time in a COSP centre, depends on how well Corrective Services manages external perceptions of its intentions with COSPs; in other words, whether COSPs continue to be viewed by the judiciary as an effective technology for supervision, crime prevention and community reintegration.

Third, a particular governmental authority will likely incorporate aims that are, or appear to be, incompatible. COSPs are managed by an institution otherwise charged with the task of imprisoning offenders as punishment; in COSPs, this includes offenders serving ICOs. However, where offenders serving ESOs are concerned, COSPs are tasked with offender reintegration on behalf of community safety

and individual rehabilitation. At the interface of COSPs, a number of internal Corrective Services authorities converge, such as the Sex Offender Assessment Unit, Forensic Psychology Service, and the Community Compliance Group. In order to achieve its goals, COSPs combine a number of therapeutic and punitive techniques, including disciplinary techniques such as curfews and penalties for breaches, and programs aimed at responsabilising, or up-skilling, past offenders. Where assessments made by psychological and psychiatric authorities contribute to determining the continuing detention or supervision of past offenders, there is a potential that inappropriate responsibilities are made the burden of such professionals (see Hayes et al. 2009). In addition, COSPs, as one strategy within Corrective Services, should be considered in relation to the highly punitive tactics of the Community Compliance Monitoring Group, a related internal Corrective Services authority charged with community surveillance of "serious offenders" and individuals serving ESOs.^{xi} Clearly, then, there are multiple relationships involving an individual serving an ESO and the various bodies operating within Corrective Services NSW, which can undermine competing ends simultaneously pursued.

Fourth, the government of sex offenders, where this concerns the normative conduct of conduct, is the object of both state and non-state authorities.^{xii} COSPs can be conceived as embodying a net-widening tendency of the criminal justice system, especially Corrective Services NSW. However, this tendency has been subject to criticism from other community organisations working with released sex offenders, and from community groups; the location of most COSP centres adjacent to prison grounds or within industrial zones, as well as ongoing protests concerning centres in Dubbo and Wagga Wagga, testifies to the difficulty of selling community reintegration to *particular* communities. While it has not been my interest here, I might also have unpacked the significant influence of child advocacy group Bravehearts, in influencing public debates about offender release and management, in their submissions concerning legislative change and policy, and in both their engagement with state governmental authorities and the development of their own programs concerning technologies of the self, such as the "Ditto's Keep Safe" program.

Fifth, and finally, it is important to recognise the diversity of the population that is denoted by the term "sex offenders", which comprises individuals subject to a broad range of governmental techniques. This article has been interested in those individuals serving CDOs, in order to challenge the application of Agamben's framework to these cases, and those serving ESOs, as residents of COSPs. A larger population of past sex offenders is subject to reporting obligations to NSW Police, and monitored under the *Child Protection (Offenders Registration) Act 2000* (NSW) and the Australian National Child Offender Register (ANCOR). This is an obvious point as well, but it is important in determining the particular sub-group of which an individual is a part, and hence the particular technologies of domination to which he (usually) will be subjected. And it is one that is forgotten in Spencer's conflations of paedophilia and sex offending, and public condemnation and legal status.

From States of Exception to the Governmentalised State

The continuing detention and extended supervision of sex offenders at the end of the criminal sentence is a site at which a retributivist, or justice-based, approach to punishment comes into conflict with a utilitarian approach to community protection. The question of whether continuing detention orders in particular constitute punishment beyond the criminal sentence has been a subject of legal debate, in *Fardon v Attorney-General* and elsewhere. The ambiguous constitutionality of this practice provides grounds for considering the application of Agamben's theory of the state of exception and its relation to bare life, or homo sacer. However, I have shown above that Agamben's framework is of limited utility for considering sex offenders serving continuing detention orders in NSW who, rather than made bare life, are defined by an exceptional place within the law. In other words, although these individuals are subject to an exceptional form of continuing detention, this situation is importantly different to that described by Agamben as the life of the Muselmann of the German labour camps in World War Two (see Agamben 1999, 41-87). Agamben's framework has much to offer in

thinking through instances of extra-legal state violence however its analytical and political significance is undermined where it is inappropriately applied, such as in discussions about media-led community protests at past sex offenders' housing.

By sketching some notes on NSW's Community Offender Support Program centres, I have attempted to elucidate some of what Foucault's writing on governmentality and the field inspired by this has to offer our conceptual analysis of the relationships between past sex offenders and the authorities that manage them at the end of the criminal sentence in NSW. This is important both in terms of identifying the rationalities that underpin such relationships, and on behalf of tracking these multiple trajectories in future empirical research. The governmentality literature reminds us of the historicity of the state and the law, encouraging us to analyse relations between subjects as they exist in and are constituted by policy and through the exercise of particular technologies, rather than at the level of ontology. Of course, greater empirical detail than has been provided here would be required to establish conclusive positions as to the particular contradictions, if any, present in the management of sex offenders serving ESOs in COSPs. I have sought to show, rather, that in thinking about the specific positions of sex offenders serving both CDOs and ESOs in NSW, as individuals subject to both judicial power and disciplinary techniques, Foucault's writing on government offers a number of malleable, historically sensitive concepts that can be put to good use.

Notes:

ⁱ Doyle et al.'s findings are based on analysis of fifty such individuals from Victoria (21), WA (15) and NSW (14) (Queensland declined to participate in the study).

ⁱⁱ See McSherry (2006), Edgely (2007), McSherry and Keyzer (2009) and the NSW Sentencing Council (2008, 2009) for discussions about the CSSOA and similar Australian legislation relevant to the non-punitive detention of sex offenders.

ⁱⁱⁱ See Grealy, L. (forthcoming).

^{iv} In the essay "Indefinite Detention" in *Precarious Life: The Powers of Mourning and Violence* (2004), Judith Butler attempts to outline sovereign power as it is invoked within a governmental state, in relation to Guantanamo Bay.

^v For Agamben "Force of law" denotes a relative relationship between state acts of various forms. It refers to various acts that are not law, but that acquire the force of law during states of exception (see 2005, 32-40).

^{vi} Foucault wrote most famously on biopower in *The History of Sexuality Vol. 1* (1978). However the final lecture in his series *Society Must Be Defended* (2004, 239-264) has been popular with theorists concerned with biopolitics as "thanatopolitics", for example in state racism and eugenics (see Ben Golder 2010).

^{vii} Intensive Correction Orders are designed as a substitute for sentences of full-time imprisonment of two years or less. They are grounded in the *Crimes (Administration of Sentences) Regulation 2008* (NSW) and have, in part, replaced periodic detention as a sentencing option in NSW since late 2010 (Weeland 2009, 486; Miralis).

^{viii} In its recent statement of purpose, NSW Corrective Services claims it "delivers professional correctional services to reduce re-offending and enhance community safety" (website, accessed 11.3.11). Its mission is described as to "Manage offenders in a safe, secure and humane manner and reduce risks of re-offending", its vision being to "Contribute to a safer community through quality correctional services" (ibid).

^{ix} Nietzsche described the state as "the coldest of all cold monsters . . . [It] lies in all languages of good and evil; and whatever it says, it lies – and whatever it has, it has stolen . . . only there, where the state ceases, does the man who is not superfluous begin" (1978, 75).

^x Rose and Miller do also suggest that although governmentality studies like to imagine a diffuse network of authorities managing populations (in contrast to the state as cold monster), government does invoke “centres”, and the law is important in establishing centres, in directing flows of power and establishing interests (1992, 189-190).

^{xi} In addition to this monitoring, the CCMG is tasked with the case management of offenders on ESOs and is required to make unannounced home visits, conduct drug tests, implement curfews and supervise past offenders’ social lives. Former Minister for Corrective Services, John Robertson, stated that those supervised under ESOs “must submit a weekly schedule of movements to be approved by the monitoring team and any changes to that schedule must be submitted more than 24 hours in advance” (Robertson 30.8.2009). Such approval involves Corrective Services officers conducting interviews and criminal background checks on any individual the offender wishes to visit (ibid).

^{xii} Government is both normative in terms of directing individuals towards certain desired ends, and in terms of governing the real in relation to an ideal (Rose and Miller 1992, 178; 181). Government responds to such questions as: “Who or what is to be governed? How should they be governed? To what ends should they be governed? [. . .] Who governs what? According to what logic? With what techniques? To what ends?” (Rose, O’Malley and Valverde 2006, 85). While government occurs through both state and non-state authorities, David Garland points out that this distinction remains important (1997, 195).

Works Cited:

- Agamben, G. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Stanford: Stanford University Press.
- Agamben, G. 1999. *Remnants of Auschwitz: The Witness and the Archive*. New York: Zone Books.
- Agamben, G. 2003. “The State of Exception – Der Ausnahmezustand”. Lecture presented at the European Graduate School. Accessed at <http://www.egs.edu/faculty/giorgio-agamben/videos/the-state-of-exception-der-ausnahmezustand/> 19.8.2011
- Agamben, G. 2005. *State of Exception*. Chicago: Chicago University Press.
- Baldry, E., D. McDonnell, P. Maplestone, & M. Peeters. 2006. “Ex-prisoners, Accommodation and the State: Post-release in Australia” in *Australian and New Zealand Journal of Criminology*. 39(1): 20-33
- Bell, V. 2005. “The Vigilant(e) Parent and the Paedophile: The News of the World Campaign 2000 and the Contemporary Governmentality of Child Sexual Abuse” in *Economy and Society*. 34(2): 83-102.
- Bull, M. 2004. “States don’t really mind their citizens dying (provided they don’t all do it at once): They just don’t like anyone else to kill them” in *London Review of Books*. 26(24): 104.
- Butler, J. 2004. *Precarious Life: The Powers of Mourning and Violence*. London: Verso.
- Corrective Services New South Wales. 2009. *Annual Report 2008/09*
- Critcher, C. (2002). “Media, Government and Moral Panic: The politics of paedophilia in Britain 2000-2001” in *Journalism Studies*. 3(4): 521-535.
- Doyle, D., J. Ogloff and S. Thomas. 2011. “Designated as Dangerous: Characteristics of sex offenders subject to post-sentence orders in Australia” in *Australian Psychologist*. 46(1): 41-48.
- Edgely, Michelle. 2007. “Preventing Crime or Punishing Propensities? A purposive examination of the preventive detention of sex offenders in Queensland and Western Australia” in *University of Western Australia Law Review*. 33: 351-386.
- Foucault, M. 1978. *The History of Sexuality Vol. 1: An Introduction*. New York: Random House.
- Foucault, M. 1994. “Governmentality” in J.D. Faubion (ed.) *Michel Foucault: Power*. London: Penguin Books. 201-222.
- Foucault, M. 2003. *Society Must Be Defended: Lectures at the College de France 1975-1976*. New York: Picador.
- Foucault, M. 2007. *Security, Territory, Population: Lectures at the College de France 1977-1978*. New York: Palgrave Macmillan.

-
- Foucault, M. 2008. *The Birth of Biopolitics: Lectures at the College de France 1978-1979*. New York: Palgrave Macmillan.
- Foucault, M. *The Government of Self and Others: Lectures at the College de France 1982-1983*. New York: Palgrave Macmillan.
- Garland, D. 1997. "'Governmentality' and the Problem of Crime: Foucault, Criminology, Sociology" in *Theoretical Criminology* 1(2): 173-214.
- Golder, Ben. 2010. "The Differential Distribution of Death: Criminal Law as Biopolitics". Paper presented to the Australian and New Zealand Critical Criminology Conference, Sydney Institute of Criminology, University of Sydney.
- Grealy, L. (forthcoming). "Inappropriate Powers under the *Housing Amendment (Registrable Persons) Act 2009* (NSW)" in *Current Issues in Criminal Justice*. 23(3).
- Hayes, R., M. Barnett, D. Sullivan, O. Nielssen, M. Large and C. Brown. 2009. "Justifications and Rationalisations for the Civil Commitment of Sex Offenders" in *Psychiatry, Psychology and Law*. 16(1), 141-149.
- Hobbes, T. 1968 [1651]. *Leviathan*. London: Pelican Books.
- Hudson, B. (1998). "Punishment and Governance" in *Social and Legal Studies* 7(4): 553-559.
- Justice Action. 2009. "Prisoners Set Free into Prison? Community Offender Support Program (COSP) Centres". Accessed at <http://justiceaction.org.au/cms/images/stories/CmpgnPDFs/cospanalysisppr21009.pdf> 1.7.2011.
- Knox, M. 9.12.2008. "Offender Release Programs Don't Deliver, Court Told" in *Sydney Morning Herald*. Accessed at <http://www.smh.com.au/news/national/offender-release-programs-dont-deliver-court-told/2008/12/08/1228584743344.html> 2.7.11
- McSherry, B. 2006. "Sex, Drugs and 'Evil' Souls" in *Monash University Law Review* 32(2): 237-274.
- McSherry, B. and P. Keyzer. 2009. *Sex Offenders and Preventive Detention: Politics, Policy and Practice*. Sydney: The Federation Press.
- Miralis, D. "Intensive Correction Orders – A New Dawn in NSW Sentencing Law?" Accessed at <http://www.notguilty.com.au/criminal-offence-article.asp?ID=8484&ppracarea=4190> 2.7.2011
- Nietzsche, F. 1978. *Thus Spoke Zarathustra: A Book for All and None*. New York: Penguin Books.
- NSW Sentencing Council. 2008. *Penalties Relating to Sexual Assault Offences in NSW: Volume 1*.
- NSW Sentencing Council. 2009. *Penalties Relating to Sexual Assault Offences in NSW: Volume 3*.
- Robertson, J. 30.8.2009. "Media Release: Sex Offender Monitoring Program Doubled". *Minister for Corrective Services*.
- Rose and Miller. 1992. "Political Power Beyond the State: Problematics of Government" in *The British Journal of Sociology*. 43(2): 173-205.
- Rose, N. 1996. "Governing 'Advanced' Liberal Democracies" in *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government*. (eds.) A. Barry, T. Osborne and N. Rose. Chicago, The University of Chicago Press: 37-63.
- Rose. 2000. "Government and Control" in *British Journal of Criminology*. 40(2): 321-339.
- Rose, N., P. O'Malley and M. Valverde. 2006. "Governmentality" in *Annual Review of Law and Social Science*. 2(83): 83-104.
- Rose, N. "Governing 'Advanced' Liberal Democracies" in A. Barry, T. Osborne and N. Rose (eds.) *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government*. Chicago: Chicago University Press: 37-63.
- Sotiri, M. 2003. "Punishment and Imprisonment in New South Wales: Towards a Conceptual Analysis of Purpose. Sydney, UNSW. *Doctorate of Philosophy*.
- Spencer, D. 2009. "Sex Offender as Homo Sacer" in *Punishment and Society*. 11(2): 219-240.
- Weelands, D. 2009. "Residential Centre or Day Prison? The case of COSP" in *Current Issues in Criminal Justice*. 20(3): 485-489.

Legislation and Cases:

Child Protection (Offenders Registration) Act 2000 (NSW)

Community Protection Act 1994 (NSW)

Crimes (Administration of Sentences) Regulation 2008 (NSW)

Crimes (Serious Sex Offenders) Act 2006 (NSW)

Dangerous Prisoners (Sex Offenders) Act 2003 (Qld)

Fardon v Attorney-General (Qld) (2004) 223 CLR 575

Habitual Offenders Act 1957 (NSW)

Housing Amendment (Registrable Persons) Act 2009 (NSW)

Kable v Director of Public Prosecutions for NSW (1996) 189 CLR 51

Kansas v. Hendricks 521 U.S. 346 (1997)

Sexually Violent Predator Act. Kansas. Stat. Ann. 59-29a01 (1994)

Problem Solving Justice and the Adversarial Paradigm

Tyrone Kirchengast
Senior Lecturer, Faculty of Law, UNSW

Introduction

Problem-solving justice may be defined as an attempt to depart from conventional court processes for alternative solutions that engage stakeholders and an array of service providers in a particular area or jurisdiction. Stakeholders may be defined as any individual with a vested interest in proceedings. Nominal stakeholders would vary from offence to offence, but would usually include the defendant, police, prosecutors, victims, the broader community, lawyers, service providers, the judiciary and the courts. Thus we see the rise of specialty courts that depart from the conventional interaction between state and accused before an impartial judge or magistrate for courts as a site of therapy and welfare intervention that encourages the interaction between victim, accused, police, prosecutors, the judiciary and service providers, mainly during pre-trial and sentencing processes. The advent of drug courts in the late 1980s provides the first signs of specialty courts that sought to purposefully depart from the normative constraints of the adversarial criminal trial. The popularity of such departures became evident in the new ways in which drug dependant offenders were able to be diverted from standard sentencing processes for treatment programs supervised by the courts themselves. Controversial at first, these programs soon evidenced new ways of sentencing that challenged the tenets of adversarialism as requiring an independent, removed and somewhat disinterested judge, for one that sought to continuously monitor the health and wellbeing of the accused, along with the prosecution, defence counsel and service providers.

Problem-solving courts first appeared in Florida in the United States in 1989 in the form of a drug court. Since then, problem-solving courts have emerged throughout the United States and the common law world. Certain states, such as the State of New York, have significantly developed their use of problem-solving and specialist courts (Berman and Feinblatt, 2005; Kaye, 2004; Berman, 2000). Therapeutic justice takes a divergent path to traditional legal problem-solving, which is more concerned with the argumentative nature of orthodox processes (Wexler, 1999). The rise of problem-solving courts in the State of New York as a means of including all agents of justice, specifically, the defendant, state, community, victim, and support organisations, provides a case in point. Problem-solving courts thus vary depending on the needs of offenders or victims and the therapeutic outcomes sought (see King, Freiberg, Batagol, and Hyams, 2009). Some courts are available only where the offender pleads guilty, while others are constituted as trial courts that seek to divert all offenders from normal adversarial proceedings. As a starting point, problem-solving courts seek to use the authority of the court to address a range of practical and policy issues, specifically, the needs of individual defendants, and the structural issues of the criminal justice system, in the context of the broader problems of communities (Berman and Feinblatt, 2001).

The community court of the State of New York is one such example. This style of court provides for an interesting case study that focuses on the how this type of court dislocates and fragments traditional or 'narrow' judicial functions in order to better serve its local community. King, Freiberg, Batagol, and Hyams (2009) remark that such courts can be complex and tenuous, in that such courts may be linked to the community by focussing on specific offences or by problems within the community generally (see Berman and Feinblatt, 2001: 158). Such programs have been piloted in England and Wales, and form the basis of the case study towards the end of this paper (Ministry of Justice, 2005; as to the Melbourne experience, see King, Freiberg, Batagol, and Hyams, 2009: 160). Problem-based justice may be seen as an important complement or adjunct to orthodox adversarial processes and

should not be seen as replacing such processes within the broader criminal justice system (Feldthusen, 1993). It is therefore important that we examine the processes that bring adversarial and problem-solving justice together into the one judicial system as alternating pathways to justice.

This paper details the rise of the therapeutic courts in the context of innovative approaches to justice that see the specific needs of offenders and victims dealt with in a non-adversarial way. This paper begins by assessing the normative context of the criminal trial by reference to the problem-solving methods inherent in historical trial processes, together with the rise of a modern summary process as an arena for 'experimental justice'. The rise of problem-solving justice and its general principles are then considered with a view to understanding the latest developments in community prosecution, as a recent iteration of a problem-focussed court model. This case study will be assessed as departing from the normative context of the criminal trial. Issues and limitations of community prosecution will also be considered.

Courts and Problem-Solving Justice: Challenging Normative Assumptions

It is arguable whether the problem-solving method is foreign to courts of law generally, whether statutory or common law in origin. Courts that deal with criminal cases in common law jurisdictions utilise an adversarial process as the means by which the parties are afforded a due process that allows them to prosecute and defend a matter, and to test evidence against recognised standards of proof. However, it is possible that many of the courts recognised as courts of adversarial justice already utilise problem-solving approaches and this is a point that may reside in the business of such courts historically. The Assize of Eyre, an itinerant court utilised initially in the twelfth century to trial several recognised felonies important to the King, not only travelled to each county to hear and determine matters before a presenting jury, but the royal justices also administered the gaols, sought to recover local taxes, and inspected bridges, the King's highways and other buildings important to the sovereign (see Baker, 1990: 16–19). The general eyre, as it came to be known, was in fact feared because the justices would essentially take over the county when they arrived. Arguably, this was a quintessential feudal form of problem-solving justice, distinct from the forms of problem-solving justice we see today. However, it does make the point that courts were not always concerned with an adversarial process that excluded certain parties and service providers that have since been redressed in the modern form of twenty-first century problem-solving justice.

The early English courts, and their transformation from altercation between bench and accused to adversarial engagement between counsel before an independent magistrate or judge, remind us that courts change and transform to meet new and pressing social needs (see Langbein, 2003). Another more recent example of common law courts engaging problem-solving justice is the modern Magistrates' or Local Court. Most common law jurisdictions have a magistracy that sits in such courts, charged with the duty to dispose of cases summarily, without a jury. These courts have always departed from the adversarial method at least in so far as justice is mete out without a jury. However, such courts, in their duty to dispose of minor or trivial offences, have been the place where novel diversionary programs have been trialled in order to encourage the rehabilitation of an accused outside of the criminal justice system. Such courts have been places of 'experimental justice' to the extent that innovative programs for the treatment of offenders may be preferable to traditional sentencing options of a fine, a bond or imprisonment. Such innovative programs include drug diversion programs, driver education, counselling, or community and victim based restoration orders. Certain offences, including graffiti for instance, are commonly remedied by requiring the offender to make amends to the victim and community by restoring property to its prior form. The argument that follows is that problem-solving justice may be no more of a

departure from conventional common law and statutory courts of justice given the intervention programs that are available to offenders across a range of lower to intermediary courts across the common law world.

Problem Solving Courts: Departing from Adversarial Engagement

Problem-solving justice may have its origins in problem based policing (Goldstein, 1987). Such practices seek to engage community members in the pursuit of crime, by examining patterns of crime within community areas and by utilizing the community as a crime prevention entity and as a site of restoration following an offence. Such perspectives helped give rise to concepts such as community prosecution, community courts, and problem-solving punishments, including the first generation of problem-solving courts, such as drug courts. These courts, generally only available to an accused who enters a guilty plea, sought to keep drug dependant offenders out of gaol by enrolling them into a course of supervised treatment that may also involve a community reparation or service order. Offenders who would otherwise face a custodial sentence would thus be directed out of prison by attending to their drug rehabilitation needs while making amends to the community in which their offending took place (Goldstein, 1987: 138-139).

These first problem-solving courts gained popularity throughout the 1990s and sought to make new and innovative connections between the court, judiciary, the community, and service organisations. Rather than simply turn the offender over to corrections, these courts sought the continued supervision of the offender. Offenders engaging in such alternative treatments would ordinarily come back before the supervising court several times before the program of treatment was deemed completed. Such perspectives are far removed from the notion of the trial judge 'handing down' a final sentence, perhaps never to see the prisoner again. Problem-solving courts may thus become a vital part of the recovery of the offender, including the reintegration of the offender back into the community (see *Lee v State Parole Authority of New South Wales* [2006] NSWSC 1225, [69]).

Problem-solving courts, or problem-solving justice more broadly, seeks to utilise the positioning of the court in the community. Rather than understand the court and the sentencing of the accused as a sovereign institution of control, which corrects the conduct of the accused by threat or force, problem-solving courts seek to place themselves amongst other services and service providers to provide for an integrated approach to the management of all agents of justice in the disciplinary arena of the criminal justice system. Thus, in sex offence courts, the offender is referred to relevant treatment programs that refer the offender back to the court, who may also organise referral of the victim to counselling and welfare services to aid in their recovery. A different perspective is thus promulgated – one which distances the court from a strict adversarialism that constitutes the court as a removed arbiter of law and fact.

Problem Solving Justice: The General Principles

Several principles guide a problem-solving approach to justice. Enhanced information, community engagement, collaboration, individualised justice, accountability and an outcomes focus are important policy markers for problem-solving courts. Problem-solving courts will seek to reverse the tendency to dehumanise the justice experience by making connections with service providers and the community to reconnect offenders and victims with professionals from relevant disciplines (King, Freiberg, Batagol, and Hyams, 2009: 139-142). Judith S Kaye, the Chief Judge of the State of New York, indicates:

Conventional case processing may dispose of the legal issues in these cases, but it does little to address the underlying problems that return these people to court again and again. It does little to promote victim or community safety. In too many cases, our courts miss an opportunity to aid victims and change the behaviour of offenders (Kaye, 2004: 129).

Most criminal courts hear a range of matters and the magistrate or judge may not have a specialised knowledge of the issues facing victims or defendants throughout the range of offences they deal with. Sexual assault complaints, for instance, may be affected by a range of factors, including the trauma of proceeding with a prosecution and giving evidence, or of the problems such a prosecution will cause to a relationship, especially where the victim is in a relationship with the offender. A detailed knowledge of the range of issues facing sexual assault offenders and their victims, including the gross under reporting of such offences, may assist the problem-solving court by increasing the pre-trial monitoring of the defendant and to encourage the prosecution to seek corroborating evidence in support of the victim's claims. A case manager may be appointed to collect information about the defendant, their victim, and counsel to draft a service plan for the defendant to assist the court when making decisions as to appropriate treatment. King's study of non-adversarial approaches in the higher courts, however, suggests that such approaches requires further development and it is altogether rare to find such courts giving significant weight to therapeutic or problem-solving approaches (King, 2006a; King, 2006b).

Community engagement also features as a significant rationalising principle of problem-solving justice. Engaging members of the community in the rehabilitation of offenders or the support of victims may also reconnect the business of the courts with the local community. Offenders and victims who can relate to others in a supportive environment are more likely to overcome or move beyond the effects of the crime. Offenders are less likely to re-offend when constructively supported. Community engagement may also be important on an informational basis, specifically in terms of the expectations of the community and the courts when dealing with specific types of offences. Community courts, for instance, may have advisory panels of members of the local community who may inform the court of the types of offences that concern the community. This information may then assist the court in forming appropriate community based sentences, such as graffiti removal.

The courts are well positioned to connect a variety of key agencies. The role of a problem-solving court as a collaborative agent is significant to its successful placement of the offender and victim in a therapeutic and community context (Gil, 2008: 501). Courts have access to other government agencies and community groups. Courts may also bring stakeholders together in an official way, for instance, judges, prosecutors, defence counsel, corrections, and probation, may each play a role in the management of the offender. Court officers may also be brought together to offer their expertise. These officials may then further engage others in the community, such as social services, victims groups, and support networks. Such connections may encourage trust in the judicial process, and foster new outcomes for offenders, including placement programs or interventions support.

Problem-solving courts do not mete out standardised sentences, such as imprisonment, only then to leave the nature of the confinement of the prisoner to corrections alone. Such courts seek to use evidence-based risk and needs assessment to link an offender to suitable community based services. These may include intervention programs, counselling, job training, drug treatment, safety planning, and mental health counselling (see, for instance, the focus on mediation between key agents in Western Australia) (see ss 27-30 Sentencing Act 1995 (WA)). The key here is the realisation that the offender is an individual who needs to be engaged in networks of care and assistance that reconnect and restore the offender within their community.

By engaging the offender within a matrix of community stakeholders, a problem-solving court can emphasise personal accountability, raising the consciousness of the offender to the outcomes of their offending (Gil, 2008: 501). Even minor offences will have consequences, especially on the community, and offenders ought to be aware of them. By maintaining a high level of person accountability, the offender can also approach their treatment with responsibility and purpose, with the aim of successfully completing their program. Offenders can be actively engaged in their own recovery and rehabilitation, although this will invariably be supported by the requirement that offenders undergo monitoring and compliance testing, such as regular drug testing. These strategies combined will ensure that offenders have a better idea of the consequences of non-compliance. Guiding offenders toward a specific outcome of a set therapy or treatment is an important goal of problem-solving justice. The court is also guided by outcomes, in particular, the outcomes of particular intervention programs or courses of treatment, including their costs and benefits to all stakeholders involved.

Case Study: The Community Court

The community court provides a venue for 'community prosecution'. In the State of New York, community prosecution is based on the notion that although prosecutors ought to respond to particular cases, they continue to have a broader responsibility to public safety, crime prevention, and to develop public confidence in the justice system. Community prosecution requires prosecutors to work differently, and with different people, than is traditionally the case. Prosecutors thus work with residents, victims, community groups and other government agencies (Berman and Fox, 2001; King, Freiberg, Batagol, and Hyams, 2009: 158-163). The main difference involves the accountability of the prosecutor. Rather than report success in terms of cases disposed of, or length of sentence, community prosecutors measure the effect of their work on neighbourhood 'quality of life', community attitudes and crime rates.

The English pilot 'Engaging Communities in Criminal Justice' was rationalised on the basis of making new connections between key criminal justice stakeholders, within a community context. The Ministry of Justice provides that the scheme be established:

To ensure that all the agencies in the criminal justice services engage with the public in a way that is joined up, better co-ordinated and more productive by better understanding their needs. To ensure that the service delivered to local communities is based on the needs of, and issues faced, by those communities, and contributes towards solving local problems. To better inform and involve local people, in particular to encourage more people to become involved through various types of community engagement including volunteering. The intended effects are to improve confidence (Ministry of Justice, 2005: 1).

The consultation document Engaging Communities in Criminal Justice follows the Cabinet Office Review 'Engaging Communities in Fighting Crime' by Louise Casey ('the Casey Review'), which determined that:

It is important that citizens are engaged in ways that are quick, easy and reasonable. The public should not be expected to understand the 'system' – police, local authorities and the Criminal Justice System should be expected to understand the public. In order to achieve this across so many different and disparate organisations, it is reasonable to expect that there are some common and nationally recognisable structures that everyone can understand and use (Casey, 2008: 78).

In *Engaging Communities in Criminal Justice*, Casey centres on four primary aims of stronger, community focused partnerships; community justice projects and the problem-solving approach; intensity and visibility of community payback; and keeping the public better informed. Respectively, these aims seek to bring criminal justice services together to facilitate 'two way' communication between the criminal justice service and local people; to solve problems for the community and to assist in the reform of offenders to reduce re-offending, and enable offenders to make amends; to increase forms of reparation and compensation, so that justice is delivered and seen to be delivered; and by improving the information the community receives on case outcomes, so that the community may understand that a real connection between crime, consequences, and punishment is made.

The pilot sought to introduce community prosecutors to work with the CPS, together with the police, the courts and other community partners. Community prosecutors engaged directly with their communities, to be aware of local concerns such that they better reflect local concerns when making case decisions, which may include local business priorities. Some of this engagement work is already undertaken by the CPS, although community prosecutors are encouraged to further engage with their local community than is currently the case. Local communities will be able to provide the community prosecutor with information and details of local crime conditions in the form of a community impact statement. The pilot envisaged that local prosecution 'team leaders' will take on a more visible proactive community prosecutor role within the geographical area assigned to them.

This approach, arguably, will increase community participation in the decision to prosecute, albeit the formalities of this process are still opaque. Engage community interaction, in the form of a community impact statement, together with other criminal justice agencies, seeks to raise community involvement in prosecution related decisions. For instance, if offenders are identified pursuant to the Prolific and Priority Offender Program, prosecutors will liaise with probation and police teams to capture the intelligence and information these agencies have on that individual. This pilot thus seeks to move toward Integrated Offender Management, where information sharing will become a routine approach to prosecution decision-making. Local prosecution teams will seek to work with Neighbourhood Policing Teams, Neighbourhood Crime and Justice Coordinators, and probation officers, so as to garner information on community concerns and to also provide feedback to communities. The pilot also calls for prosecutors to live in the area in which they work, to heighten their awareness of local concerns. Community prosecutors engage in local problem-solving, advising the police on priority problems in the community; on evidential issues related to such concerns; and on ancillary orders or out of court disposals which may be suitable in the circumstances. Community prosecutors will be responsible for providing advice on charging for crime and disorder offences, providing continuity of advice and case handling targeting underlying problems, to decrease the harm to the community. Informed decisions as to anti-social behaviour, domestic violence, problematic drug and alcohol use, prostitution or youth crime, will assist communities by harnessing the experience of a prosecutor dealing with like cases, in a particular locality. Community prosecutors will use information gathered from the community and other agencies to help them consider the public interest when making prosecution decisions. This pilot thus seeks to complement the CCP, which establishes principles to assist prosecutors make key decisions in the case management and prosecution process.

The use of community impact statements will seek to facilitate an understanding of local issues amongst the police, the CPS, the courts, the judiciary and the probation service. Each stakeholder should understand the concerns of their local community to better inform the decisions they make. Community impact statements provide locals the ability to raise concerns as to offences, offence

prevalence, and access to criminal justice services in their particular area. It is envisaged that the community impact statement will be a short report on offences and their contexts, compiled by the police but may include other partner agencies.

The pilot also required increased interaction between the magistrates' courts and the community. Magistrates' courts were encouraged to develop their knowledge and understanding of their local community; to maintain regular direct contact with the community; to provide feedback on the work of the courts, to integrate the activities of the court are integrated with other agencies and the community; to strengthen links to community payback schemes to raise awareness and increase visibility of service orders within the community; and to encourage opportunities for local residents to be involved in criminal justice services (including opportunities for volunteer magistrates, members of courts boards, mentors, special constables, or as employed staff).

The Casey Review found that communities held a widespread concern that criminals are largely subject to 'soft' justice, and that many offenders are not punished sufficiently. The pilot also sought to utilise community payback sentences and to afford communities a say in the work undertaken by offenders in their local areas. This was achieved by instituting citizens' panels to provide locals the opportunity to discuss appropriate work that ought to be undertaken as community payback. The use of such panels enabled members of each community to attend meetings and participate in the identification of relevant work for offenders. The pilot also sought to make information on crime more available to the public. This controversially included the publication of individual court outcomes but did not include out of court disposals, such as penalty notices or cautions.

Problem Solving Justice and the Adversarial Milieu

Despite widespread support for problem solving initiatives, not all approaches have been embraced. While some studies have heralded drug and indigenous sentencing courts as successful, community prosecution as a mode of local or magistrates' court reform has been less well received. Studies focussed on the result of the English community court pilot suggest that recourse to the normative context of the institutions of adversarial justice mandated that several aspects of the pilot be modified or abandoned. The main aspects of the pilot, community engagement, the consideration of community impact statements, and the development of discourse between judicial officers, prosecutors and the community, were generally not implemented but abandoned as incompatible with the function and purpose of criminal justice professionals, and the adversarial criminal process more generally:

It is apparent that concern about judicial independence and neutrality is one of the primary reasons for the community's limited influence over the court's operations. Individual cases are not discussed at advisory boards or public meetings, to avoid the appearance of partiality, and study participants reported that some magistrates have expressed reservations about travelling to areas to meet residents and/or attend meetings where neighbourhood problems are discussed. For example, in one area, it was reported that magistrates used to go on visits to local areas to gain an insight into the problems being experienced in particular neighbourhoods and to speak with residents. However, the magistrates discontinued this practice, as they were concerned about being seen to be influenced by local residents (Donoghue, 2012: 599).

Community impact statements, as a novel form of community input that sought to empower members of the community from passive bystanders to potential contributors to the sentencing decision-making process, was also limited:

Interestingly, community impact statements (CIS) were not mentioned by any of the 17 units during the study period, nor were they present in any of the cases observed for the research study (Donoghue, 2012: 600).

Tensions between the normative context of adversarial engagement and the modification of court processes and institutions to accommodate new information and relationships from agents otherwise outside the common law led to the reconsideration of the ambit of the pilot scheme. Seen specifically in terms of jeopardising the independence of magistrates and prosecutors from undue community influence, the community prosecution pilot was wound back out of consideration of the maintenance of the normative constraints of the criminal process of the magistrates' court. These constraints prescribe who may be heard but importantly how ought to be silenced, or at least limited to a mode of participation that accords with the assumption that judicial officers and even prosecutors ought to inform themselves solely of facts and information relevant to a criminal matter. The community, empowered through the potential use of community impact statements, was also limited in accordance with their former role as passive onlooker with no real connection between the views held within or by them, and the decisions made within their local courts. Novel as this pilot may be, community prosecution courts have emerged in other comparative jurisdictions with more success. In the case of New York State, community prosecution courts were established as discrete courts with predicated on a problem solving approach. This may be the defining factor common the success of most drug courts, the establishing of problem solving courts as new, discrete entities within an otherwise adversarial system of justice. The nuance of problem solving justice is arguably left for a jurisdiction that does not limit nor threaten the normative basis of the adversarial system, but can be dismissed as experimental justice by those defending a system that is increasingly criticised as unable to deliver outcomes to communities and victims as important stakeholders in the criminal justice system. Arguably, a solution lies in acknowledging the differences between the two pathways to justice which may mean that successful problem solving courts need to be granted with own space away from the normative constraints of criminal process. The New York approach shows that adversarial and problem-solving justice may be brought together into the one judicial system so long as they are seen to be alternating pathways to justice.

References

- Baker, J.H. (1990) *An Introduction to English Legal History*, Butterworths: London.
- Berman, G. (2000) 'What is a Traditional Judge Anyway? Problem-solving in the State Courts', *Judicature*, 84, 2, 78-85.
- Berman, G. and Feinblatt, J. (2001) 'Problem-Solving Courts: A Brief Primer', *Law and Policy*, 23, 2, 125-140.
- Berman, G. and Feinblatt, J. (2005) *Good Courts: The Case for Problem-Solving Justice*, The New Press: New York.
- Berman, G. and Fox, A. (2001) 'From the Margins to the Mainstream: Community Justice at the Crossroads', *Justice System Journal*, 22, 2, 189-207.
- Casey, L. (2008) *Engaging Communities in Fighting Crime*, Crime and Community Review, Prime Ministers Cabinet Office, UK.
- Donoghue, J. (2012) 'Anti-Social Behaviour, Community Engagement and the Judicial Role in England and Wales', *British Journal of Criminology*, 52, 3, 591-610.
- Feldthusen, B. (1993) 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence', *Ottawa Law Review*, 25, 205.

- Gil, DG. (2008) 'Toward a 'Radical' Paradigm of Restorative Justice', in Sullivan, D. and Tiff, L. (eds.) Handbook of Restorative Justice, Routledge: London, pp. 499-511.
- Goldstein, H. (1987) 'Toward Community-Oriented Policing: Potential, Basic Requirements, and Threshold Questions', Crime and Delinquency, 33, 1, 6-30.
- Kaye, JS. (2004) 'Delivering Justice Today: A Problem-Solving Approach', Yale Law and Policy Review, 22, 1, 125-151.
- King, M.S. (2006a) 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education', Journal of Judicial Administration, 15, 3, 129-141.
- King, M.S. (2006b) 'The Therapeutic Dimensions of Judging: The Example of Sentencing', Journal of Judicial Administration, 16, 2, 92-105.
- King, M., Freiberg, A., Batagol, B., and Hyams, R. (2009) Non-Adversarial Justice, The Federation Press: Sydney.
- Langbein, JH. (2003) The Origins of the Adversary Criminal Trial, Oxford University Press, Oxford.
- Lee v State Parole Authority of New South Wales [2006] NSWSC 1225.
- Ministry of Justice (2005) Making a Difference: Taking Forward Our Priorities, United Kingdom.
- Ministry of Justice (2009) Engaging Communities in Criminal Justice – Green Paper, UK Government.
- Sentencing Act 1995 (WA).
- Wexler, DB. (1999) 'Therapeutic Jurisprudence and the Culture of Critique', Journal of Contemporary Legal Issues, 10, 263.

The Principle of Orality and the Posthuman Courtroom

Carolyn McKay, University of Sydney

Introduction

Live witness testimony is the paradigmatic form of evidence in adversarial criminal trials. This 'principle of orality', meaning the privileging of live, physically present, embodied human testimony is deeply embedded in our legal system. A paradigm shift is seemingly occurring with the increasing use of video technologies in criminal proceedings, hinting at a future immaterial, digitized posthuman courtroom. It seems that the human body is being gradually removed from criminal law proceedings and replaced with video facilities in correctional centres and two-dimensional screen images in court.

Video conferencing is increasingly used in Australian correctional centres for appearances and communication between inmates, courts and legal representatives, and in cases involving vulnerable and remote witnesses. The technology allows two or more people in separate sites to see, hear and interact with one another and it was introduced into the New South Wales justice system in 2001.¹ Globally, there is a rapid uptake of courtroom technologies accompanied by significant political and corporate spin, with other common law jurisdictions, particularly the United States of America and England, trialing various forms of virtual court systems. Considerable attention is being devoted to the development of "virtual courts" and "technology-augmented trials" seemingly focusing on the availability of technology, expediency and cost benefits.

My research explores whether a radical departure from the oral tradition of live, present, embodied human testimony may serve expediency, economic rationalisation and security concerns, but how does video conferencing impact upon the *experience* of criminal proceedings from the defendant's perspective? My interest is in the defendant in a remote video conferencing booth and the defendant as a disembodied screen-based image in a courtroom. Criminal defendants frequently remain speechless in adversarial trials, and I interrogate whether the defendant is becoming not only silenced but also physically removed from participation. While it may be that the formal values of criminal justice are being maintained and justice may still be 'seen to be done', I wish to delve into the more intangible and experiential implications of video conferencing that may impact upon a fair, humane and dignified legal experience. An exploration of issues including embodiment and presence in the twenty-first century, confrontation, witness demeanour, fair and open trials, dignity and humanity in legal process is vital. Technology cannot necessarily replicate "that intangible 'soul' that so inspires people's acceptance of our legal system."² My overriding aim is to delve into the philosophical framework of the live embodied spoken word-as-evidence, and distill the essence of orality, that is, a phenomenology of face-to-face human communication and intercorporeal relations in the courtroom, along the lines of philosophers Adriana Cavarero and Don Ihde.³ I aim to explore the qualitative experience of live testimony, an area filled with assumptions and largely uninterrogated, as it relates to the fundamental values of criminal proceedings and the rights of the defendant.

Research Methodology

Through my inter-disciplinary research and creative practice, co-supervised by Sydney Law School and Sydney College of the Arts, I examine the polymorphous, phenomenological essence and experience of live criminal proceedings – the richness of intersubjective human co-presence and the mutuality of a shared experience from the defendant's viewpoint. My research methodology will include qualitative fieldwork as an observer of video-linked proceedings. As a non-legal practitioner, I wish to observe and reflect with critical eyes that have not been habituated to the culture and practices of courtroom proceedings. I have

a particular interest in the defendant's experience of videolinks – what they sense, see, hear and feel when remote and disembodied from the courtroom. The outcomes of the qualitative fieldwork will be analysed through a theoretical framework based upon phenomenology and feminist embodiment theories. Additionally, I will filter my observations and findings through my digital video art practice as a nuanced response and informant to my academic research, a means to produce fresh insights and a focal point for the presentation and communication of my final outcomes. I find there is a circular relationship between conventional research and my aesthetic practice, with each revealing a more profound understanding of the other.

From a visual arts perspective, my research finds resonance in several recent exhibitions such as Canadian video installation artist Judy Radul's *World Rehearsal Court* 2009, a large-scale video piece and installation focusing on her research into the role of technology in the courtroom.⁴ Scottish artist Nathan Coley explored the Lockerbie Trial in his work *Lockerbie Witness Box* 2003⁵ and *Criminal Case 40/61: Reverb*, 2009 is a video installation by German-born, New York-based Andrea Geyer based upon the trial of Adolf Eichmann.⁶

The Principle of Orality

The High Court of Australia has stated: "The adducing of oral evidence from witnesses in criminal trials underlies the rules of procedure ... Oral evidence is public ... Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witnesses."⁷ It is this notion of the *intangible* atmosphere, in particular, that I seek to flesh out.

The principle of orality is deeply embedded in our legal system and by orality, I refer to live, embodied testimony in an open court, with the right to confront and cross-examine witnesses. It is closely aligned with the principle of immediacy, speaking in the here-and-now. The principle of orality necessitates fact-finders being able to see and hear witnesses in order to assess their demeanour, credibility and evidence.⁸ It is submitted that live unmediated verbal and nonverbal expression allows for a fluid, nuanced and visible speech act, enhancing full human communication and comprehension. Orality is a manifestation of our biology, sentience and psychology, delivered by a living, expressive, sensorial organism, a "phenomenal body."⁹

In very general terms, the principle of orality originated in Ancient Greece - its tradition of oratory and rhetoric in a public forum before a pantheon of gods and its philosophers who lay the foundations for Western philosophical thought, to ecclesiastical justice implicating the human body with proof sought via tortuous ordeals and divine intervention, through to secular proceedings with oral testimony presented in a centralized, established space, the gradual development of rational laws of evidence leading to the contemporary adversarial system.

The Right to Silence

Stemming from my genealogical analysis of the principle of orality, I have become aware of the gradual silencing of the defendant through what legal historian John Langbein refers to as the 'lawyerization' of criminal proceedings.¹⁰ Alexandra Natapoff states that "Criminal defendants rarely speak"¹¹ and posits that the silent defendant is denied the participatory benefits of expressive engagement in their own trial and values of dignity.¹² I query if this participation is being further compromised through the increasing usage of video conferencing technologies in court, removing the biological body of the defendant from proceedings. Does the courtroom of the future entail a defendant, disempowered verbally and physically, both silenced and absent?

The Paradigm Shift: Posthuman Courtroom?

The steady encroachment of technology, such as video conferencing, challenges the traditional, fundamentally corporeal nature of criminal proceedings. While my thesis will consider the benefits and disadvantages of video technologies in criminal courtrooms, I am not necessarily setting up a binary opposition of traditional proceedings versus technology-mediated forms. There may, indeed, be a complementary or symbiotic relationship given we are culturally attuned to disembodied and mediated

telepresence, screen-based representations of humans, avatars and virtual reality interfaces. Presence, co-presence and proprioception (the bodily sense of position, posture and movement¹³) are concepts to be explored. Much literature deals with these notions within the sphere of collaborative computer interfaces where the virtual body acts as an extension of the physical body immersed within an artificial space.¹⁴ Is it still valid to argue that the physical speaking body is actually necessary in discerning veracity of experience? Perhaps shifts in technology create “.. new configurations of embodiment ...”; a new materiality¹⁵ and what we lose in immediacy, do we gain in intimacy?¹⁶ I seek to reveal and articulate the subtleties inherent in both forms. It is a quest to define human presence in traditional and mediated courtroom environments from the perspective of maintaining fair and dignified proceedings.

From a review of relevant literature, cogent reasons for video technologies in criminal proceedings include protection for vulnerable and child witnesses and access for remote witnesses.¹⁷ Reports and considerable research highlight the benefits of video conferencing in terms of expediency, procedural flows, reduced security risks and costs in minimising transport of inmates to courts.¹⁸ Such economic, security and procedural benefits are, of course, all important factors, yet it is submitted that economic rationalisation should not be the exclusive framework in matters of criminal justice. As Anne Bowen Poulin writes: “We should not sacrifice the quality of justice to achieve the efficiency that the use of videoconferencing seems to offer.”¹⁹ In terms of disadvantages, consideration must be given to the presentation in court of 2D screen based images versus 3D humans and the inherent the lack of scale and physicality; the framed, mediated and objectified image; the digitization and compression of voice; communication temporal lags; the denial of multi-sensory feedback; the lack of transparency in terms of coercion and privacy; isolation of the defendant from legal representatives and family support; and the impersonal, synthetic, dehumanized and disembodied experience.²⁰ Cameras and screens do not automatically perceive or display the many details that humans subliminally and peripherally experience. Within the space of the courtroom, every gesture of the witness can be seen and given its full weight of meaning and the spectator can choose their point of focus.²¹ By contrast, in a mediated or virtual environment, the points of view are currently pre-selected and fixed, controlling and manipulating the spectator’s viewing experience. Luna Dolezal notes “Physical contact and proximity between human subjects constitutes an important qualitative aspect of intersubjective relations that may never be obviated by technological mediums.”²² With this in mind, I will be further researching this question of the phenomenology of the screen,²³ and associated questions of virtual, synthetic embodiment.²⁴

Spatial Realities and Liveness in the Courtroom

The courtroom is traditionally a place of live enactment, interaction and narrative. It is an energised, dynamic space where there is simultaneous presence and shared experience between participants and spectators, where the space is rendered meaningful through human presence, the live evocation of absent people and places, with the immediacy of verbal communication. Within the conventional physical reality of the courtroom, we are subliminally aware of the gravitas of our surroundings, the corporeality of our neighbours and the materiality of the space, with human presence creating an emotionally charged event.²⁵ As well as a physical spatial reality, there is an “an auditory atmosphere, an auditory aura”,²⁶ relevant to the sound issues that arise with audio visual links, modifying or compromising holistic human communication.

The notion of liveness is explored by Philip Auslander who notes that live performance is central to the practice of law, noting that “... the legal arena may be one of the few remaining cultural contexts in which live performance is still considered essential.”²⁷ The introduction of videolink technologies presents a paradigm shift in established practice, procedure and ideology and brings into question the value of ‘liveness’. Auslander contends that the debate over liveness has been provoked by mediatisation, with liveness having no inherent value except as binary opposite in relation to technology. He considers that despite the considerable mediatisation of courtrooms, the trial appears to remain deeply embedded as “an ontologically live

event" with all the subtle nuances of ephemeral, unrepeatable performance.²⁸ The essence of the live trial is about *how* evidence is presented – live, spontaneously, physically and visibly and Auslander concludes that the mediatised trial is unlikely to become the dominant form, suggesting that the body may remain.

The Body

Criminal proceedings have traditionally involved corporeality. The body of the witness has always been implicated within truth-seeking discourses, from the violent ordeals of ecclesiastical justice through to the display of power and authority upon the body in contemporary secular justice systems. Testimony currently depends on embodied presence: a direct performative engagement in an open, public courtroom is a necessary condition.²⁹ Effectively, witnesses offer themselves as guarantor, suggesting that the body has remained the locus for the extortion of truth.³⁰

Intrinsic to truth-seeking in the adversarial criminal trial is the persuasive presentation of evidence orally, and the ability to test the reliability of that evidence by direct questioning and cross-examination. Cross-examination claims to test accuracy, credibility, and veracity,³¹ relies upon physically observing the witness and their spontaneous verbal and nonverbal responses and allows the accused to confront and eye-ball the accuser. How will video technologies manage these multi-sensory issues?

The new forms of presence presented by video technologies may be explored through feminist theories of embodiment. Elizabeth Grosz suggests that the Western philosophical split between mind and body is so pervasive that philosophy struggles with the notion of the existence of the body. She writes: "Philosophy has always considered itself a discipline concerned primarily or exclusively with ideas, concepts, reason, judgment – that is, with terms clearly framed by the concept of mind, terms which marginalize or exclude considerations of the body."³² I question whether there is an underlying notion of Cartesian mind/body duality at play in the introduction of video technologies in criminal proceedings. Alternatively, is there a covert gender issue embedded in the move from body to digital image: technology/science as rational, objective and masculine, distinct from the body seen as irrational, subjective and feminine?

The work of artist Stelarc is relevant to a consideration of the tension between Cartesian and phenomenological bodies.³³ He questions what it means to have a body, posits redesigning the obsolete body and proposes models of the posthuman. Perhaps the future defendant will be an augmented body "... an anaesthetized body with the Internet becoming its external nervous system. Remote bodies spatially separated but electronically connected."³⁴

The Embodied Voice

The principle of orality privileges direct embodied speech; an aura of truth is perceived within the tenor, immediacy and proximity of the live voice. Intent and emotion are embedded within spontaneous spoken words, the most direct manifestation of the experiential memory of the witness, while meaning is derived from gesture and context.

It may be argued that videoconferencing still allows for oral evidence with the evidential content remaining intact. Yet cultural historian Walter J. Ong suggests that articulated words are events the meaning of which is negotiated through the holistic human situation.³⁵ Speech infers the presence of another, a verbal exchange, a chance for interpretation and an empathetic interchange. With video conferencing in criminal proceedings, I explore the severance of spoken words from a human intersubjective environment, the interpersonal face-to-face³⁶ and question whether a rupture in meaning, intent and basic human communication necessarily follows.

Given the primacy of live speech, oral evidence may be referred to as *phonocentric*. Phonocentrism, a term used by Jacques Derrida³⁷, refers to the western cultural bias for speech over the written word – a bias that can be traced back to Plato.³⁸ In the context of his critique of the hierarchy of speech and writing, Derrida critiques oral testimony in terms of the western cultural bias towards the oral as the manifestation of an ontological truth of the soul.³⁹ Speech is traditionally seen in western philosophy as a pure, unmediated form of communication, given its immediate expression of thought and intent, and the *presence* of the speaker and the listener to the utterance simultaneously, without temporal or spatial distance.⁴⁰

More contemporary theorists, in rejecting Derrida's conflict between writing and speech as overly simplistic, offer new thoughts on voice.⁴¹ Steven Shaviro asserts that the voice is more slippery and uncanny than Derrida acknowledges: "The voice always stands in between: in between body and language, in between biology and culture, in between inside and outside, in between subject and Other, in between mere sound or noise and meaningful articulation."⁴²

Exploring the human voice, both as primal sound and as spoken word, is an inquiry into the ontology of the voice. The primal human voice is a fleshy, visceral emission from the throat, a combination of saliva and vibrations signaling the unique vocal imprint and existence of the speaker. Spoken words are sound waves, given personal form, an acoustic emission and conduit between one person's mouth and another's ear. ⁴³ Live human witnesses bring to court an entire corporeal and sensorial experience of the crime scene, expressed with a singular, embodied voice through the mouth. Roland Barthes also focused on the oral cavity – "the quintessential erotic locus" in his writings about the materiality of the voice, breath and the *grain* of the voice - the grain of the voice being the materiality of the body speaking. ⁴⁴

Adriana Cavarero builds upon the work of Hannah Arendt who wrote, in *The Human Condition*, that "in acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world."⁴⁵ That is, it is through the voice that speakers can distinguish themselves from others and establish their distinctive existence and embodied singularity – "a vocal phenomenology of uniqueness".⁴⁶ The speech act is about reciprocal communication between the vocal emission of one and acoustic perception of another person, reflecting the relationality of humans.⁴⁷ There is a process of intersubjectivity with the meaning of the spoken words being deduced through gestural usage and context⁴⁸ as voice binds the interiority of one with another.⁴⁹ Speechlessness and gesture encircle human communication and my research will explore how these elements may be framed, erased or exaggerated by audio visual technology.

Conclusion

Courtrooms already embrace video technologies, the immaterial and the digital, yet it is timely to focus attention upon the fundamental values that underpin criminal proceedings and question the presence or absence of the biological body. At what point did economic rationalization become the overriding philosophy or conceptual framework by which justice is delivered? Criminal justice has not been immune from economic rationalization and efficiency probing, and the evaluation of legal procedure through a purely pragmatic, outcomes-driven perspective has been referred to as creating "technocratic justice."⁵⁰ I argue that a solely economic approach ignores philosophical and ideological aspects and has limited validity given the tried-and-tested nature of live and embodied evidence, cross-examination, confrontation, a societal belief in the open physical trial, and a need to maintain dignity for participants in fair proceedings.

While compelling circumstances may dictate the need for video-augmented evidence, such as for vulnerable witnesses, technological developments do not necessarily question the validity of virtual justice in terms of the fundamental values of the adversarial trial system and the rights of the defendant. 'Virtual' means (1) "not physically existing as such but made by software to appear to do so" and (2) "almost or nearly as described, but not completely ..."⁵¹ An unquestioning replacement of organic human presence may indeed result in virtual justice.

¹ http://www.correctiveservices.nsw.gov.au/information/video_conferencing accessed online 20/12/11 9:08 PM

² Fredric Lederer, 'Introduction: What have We Wrought?' (2004) 12 *William & Mary Bill of Rights Journal* 637 p. 648

³ Adriana Cavarero, *For more than one voice: toward a philosophy of vocal expression* (Stanford Univ Pr, 2005); Don Ihde, *Listening and voice: phenomenologies of sound* (State University of New York Press, 2nd ed, 2007)

⁴ <http://worldrehearsalcourt.com/> accessed 17/05/11 9:30 PM

⁵ http://www.haunchofvenison.com/en/gallery.php?item_id=19&src=/media/2221/coley_hv09007.jpg&page=home.artists.nathan_coley accessed 17/05/11 9:35 PM

⁶ http://www.andreageyer.info/projects/criminal_case/CriminalCase.htm accessed 17/05/11 9:41 PM

⁷ *Butera v DPP (Vic)* (1987) 164 CLR 180 per Mason, CJ, Brennan and Deane JJ

⁸ Jill Hunter and Kathryn Cronin, *Evidence, Advocacy, and Ethical Practice: a Criminal Trial Commentary* (Butterworths, 1995) p.326 referring to Re, L, Oral v Written Evidence: The Myth of the Impressive Witness, (1983) 57 ALR 679

⁹ Maurice Merleau-Ponty, *Phenomenology of Perception* (Routledge & Kegan Paul, 1962)

¹⁰ John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003) p. 145

¹¹ Alexandra Natapoff, 'Speechless: The Silencing of Criminal Defendants' (2005) 80 *New York University Law Review* 1449

¹² *Ibid* pp. 1451, 1456

¹³ Luna Dolezal, 'The Remote Body: The Phenomenology of Telepresence and Re-Embodiment' (2009) p. 218

¹⁴ Michael Gerhard, David Moore and Dave Hobbs, 'Embodiment and copresence in collaborative interfaces' (2004) 61(4) *International Journal of Human-Computer Studies* 453

¹⁵ Brandon LaBelle, 'Raw Orality: Sound Poetry and Live Bodies' in *Voice: vocal aesthetics in digital arts and media*, Leonardo. (MIT Press, 2010) p. 147

¹⁶ Virginia Madsen and John Potts, 'Voice-Cast: The Distribution of the Voice via Podcasting' in Norie Neumark, Ross Gibson and Theo Van Leeuwen (eds), *Voice: vocal aesthetics in digital arts and media*, Leonardo. (MIT Press, 2010) p.49 referring to Dearman and Galloway, *Putting Podcasting into Perspective*, 2005, p. 536

¹⁷ Louise Ellison, *The adversarial process and the vulnerable witness* (Oxford University Press, 2001)

¹⁸ Shari Seidman Diamond et al, 'Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions' (2010) 100(3) *The Journal of Criminal Law and Criminology*; New South Wales Department of Justice and Attorney General, 'Annual Report 09/10' (New South Wales Department of Justice and Attorney General 2009-2010) pp. 14, 28, 75;

http://www.correctiveservices.nsw.gov.au/information/video_conferencing accessed online 20/12/11 9:11 PM

¹⁹ Anne Bowen Poulin, 'Criminal Justice and Videoconferencing Technology: The Remote Defendant' (2003) 78 *Tulane Law Review* 1089

²⁰ Ian Dennis, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights ' (2010) 4 *Crim. L.R.* 255 p. 261

²¹ Gay McAuley, *Space in performance: making meaning in the theatre*, Theater-theory/text/performance. (University of Michigan Press, 1999) p. 36

²² Dolezal p.222

²³ Lucas Introna and Fernando Ilharco, 'Phenomenology, screens, and the world: a journey with Husserl and Heidegger into phenomenology' (2004) *Social theory and philosophy for information systems* 56

²⁴ Ruth M. Rettie, 'Presence and embodiment in mobile phone communication' (2005) 3(1) *PsychNology Journal* 16

²⁵ McAuley p. 279

²⁶ Ihde p. 195

²⁷ Philip Auslander, *Liveness: performance in a mediatized culture* (Routledge, 2nd ed, 2008) pp. 8-9

²⁸ *ibid*, pp. 131, 144, 186

²⁹ Roger Hallas and Frances Guerin, 'The Image and the Witness: Trauma, Memory and Visual Culture' (2007) p. 11

³⁰ Michel Foucault, *Discipline and punish: the birth of the prison* (Vintage Books, 1995) pp. 40-3

³¹ Hunter and Cronin pp. 376-7 citing the High Court in *R v Wakeley* (1990)64 ALJR 321 at 325

³² Elizabeth Grosz, *Volatile bodies: toward a corporeal feminism* (Allen & Unwin, 1994) p.4

³³ Ross Farnell, 'In Dialogue with Posthuman Bodies: Interview with Stelarc' (1999) 5(2-3) *Body & Society* 129

³⁴ Stelarc, 'Prosthetic Head: Intelligence, Awareness and Agency' (2005) *CTheory* <<http://www.ctheory.net/articles.aspx?id=490>> His *Prosthetic Head* 2003 interactive installation states: "Reductionism is the philosophy that all psychology reduces to biology, all biology to chemistry, chemistry to physics and finally physics to mathematical logic. Therefore, according to Reductionism, I can understand you by means of logic alone without having a human brain."

³⁵ Walter J. Ong, 'Before Textuality: Orality and Interpretation' (1988) 3/3 *Oral Tradition* 259 at pp. 265-266

³⁶ Ian Hacking, 'Between Michel Foucault and Erving Goffman: between discourse in the abstract and face-to-face interaction' (2001) 33(3) *Economy and Society* 277

³⁷ Raoul Mortley, *French philosophers in conversation: Levinas, Schneider, Serres, Irigaray, Le Doeuff, Derrida* (Routledge, 1991) pp 96-97

³⁸ Plato, 'Phaedrus' (c. 370 BCE)

³⁹ Douglas E. Litowitz, *Postmodern Philosophy and Law* (University Press of Kansas, 1997)p. 90

⁴⁰ Pierre Legrand, *Derrida and Law*, Philosophers and law. (Ashgate Pub., 2009)

⁴¹ Norie Neumark, Ross Gibson and Theo Van Leeuwen (eds), *Voice: vocal aesthetics in digital arts and media*, Leonardo. (MIT Press, 2010) p.

XX

⁴² Steven Shaviro, *A voice and nothing more* (02/05/11 at 4:35 PM 2006) <<http://www.shaviro.com/Blog/?p=489>> A review of Mladen Dolar's book *A voice and nothing more* 2006

⁴³ Cavarero 2005 pp. viii, 4

⁴⁴ *ibid.*, p. 15

⁴⁵ *ibid.*, pp. vii-viii referencing Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), p. 179

⁴⁶ *ibid.*, p. xvii, 7

⁴⁷ *ibid.*, p. 13

⁴⁸ Merleau-Ponty pp. 202-232

⁴⁹ Neumark, Gibson and Van Leeuwen p. xix

⁵⁰ David Brown et al (eds), *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5th ed, 2011) p. 117

⁵¹ Dictionary Version 2.1.3 (80.4) Apple Inc.

BIBLIOGRAPHY

Auslander, Philip, *Liveness: performance in a mediatized culture* (Routledge, 2nd ed, 2008)

Brown, David et al (eds), *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5th ed, 2011)

Cavarero, Adriana, *For more than one voice: toward a philosophy of vocal expression* (Stanford Univ Pr, 2005)

Dennis, Ian, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (2010) 4 *Crim. L.R.* 255

Diamond, Shari Seidman et al, 'Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions' (2010) 100(3) *The Journal of Criminal Law and Criminology*

Dolezal, Luna, 'The Remote Body: The Phenomenology of Telepresence and Re-Embodiment' (2009)

Ellison, Louise, *The adversarial process and the vulnerable witness* (Oxford University Press, 2001)

Farnell, Ross, 'In Dialogue with Posthuman Bodies: Interview with Stelarc' (1999) 5(2-3) *Body & Society* 129

Foucault, Michel, *Discipline and punish: the birth of the prison* (Vintage Books, 1995)

Gerhard, Michael, David Moore and Dave Hobbs, 'Embodiment and copresence in collaborative interfaces' (2004) 61(4) *International Journal of Human-Computer Studies* 453

Grosz, Elizabeth, *Volatile bodies: toward a corporeal feminism* (Allen & Unwin, 1994)

Hacking, Ian, 'Between Michel Foucault and Erving Goffman: between discourse in the abstract and face-to-face interaction' (2001) 33(3) *Economy and Society* 277

Hallas, Roger and Frances Guerin, 'The Image and the Witness: Trauma, Memory and Visual Culture' (2007)

Hunter, Jill and Kathryn Cronin, *Evidence, Advocacy, and Ethical Practice: a Criminal Trial Commentary* (Butterworths, 1995)

Ihde, Don, *Listening and voice: phenomenologies of sound* (State University of New York Press, 2nd ed, 2007)

Introna, Lucas and Fernando Ilharco, 'Phenomenology, screens, and the world: a journey with Husserl and Heidegger into phenomenology' (2004) *Social theory and philosophy for information systems* 56

Justice and Attorney General, New South Wales Department of 'Annual Report 09/10' (New South Wales Department of Justice and Attorney General 2009-2010)

LaBelle, Brandon, 'Raw Orality: Sound Poetry and Live Bodies' in *Voice: vocal aesthetics in digital arts and media*, Leonardo. (MIT Press, 2010)

Langbein, John H., *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003)

-
- Lederer, Fredric, 'Introduction: What have We Wrought?' (2004) 12 *William & Mary Bill of Rights Journal* 637
- Legrand, Pierre, *Derrida and Law*, Philosophers and law. (Ashgate Pub., 2009)
- Litowitz, Douglas E., *Postmodern Philosophy and Law* (University Press of Kansas, 1997)
- Madsen, Virginia and John Potts, 'Voice-Cast: The Distribution of the Voice via Podcasting' in Norie Neumark, Ross Gibson and Theo Van Leeuwen (eds), *Voice: vocal aesthetics in digital arts and media*, Leonardo. (MIT Press, 2010)
- McAuley, Gay, *Space in performance: making meaning in the theatre*, Theater-theory/text/performance. (University of Michigan Press, 1999)
- Merleau-Ponty, Maurice, *Phenomenology of Perception* (Routledge & Kegan Paul, 1962)
- Mortley, Raoul, *French philosophers in conversation: Levinas, Schneider, Serres, Irigaray, Le Doeuff, Derrida* (Routledge, 1991)
- Natapoff, Alexandra, 'Speechless: The Silencing of Criminal Defendants' (2005) 80 *New York University Law Review* 1449
- Neumark, Norie, Ross Gibson and Theo Van Leeuwen (eds), *Voice: vocal aesthetics in digital arts and media*, Leonardo. (MIT Press, 2010)
- Ong, Walter J., 'Before Textuality: Orality and Interpretation' (1988) 3/3 *Oral Tradition* 259
- Plato, 'Phaedrus' (c. 370 BCE)
- Poulin, Anne Bowen, 'Criminal Justice and Videoconferencing Technology: The Remote Defendant' (2003) 78 *Tulane Law Review* 1089
- Rettie, Ruth M., 'Presence and embodiment in mobile phone communication' (2005) 3(1) *PsychNology Journal* 16
- Shaviro, Steven, *A voice and nothing more* (02/05/11 at 4:35 PM 2006) <<http://www.shaviro.com/Blog/?p=489>>
- Stelarc, 'Prosthetic Head: Intelligence, Awareness and Agency' (2005) *CTheory* <<http://www.ctheory.net/articles.aspx?id=490>>

Understanding Victim Behaviour Through Offender Behaviour Typologies

Wayne Petherick & Claire Ferguson, Bond University

Introduction

This paper presents a theory of victimisation based on offender motivational typologies. That is, the proposed motivational typology can be applied to victim behaviour in all crimes and behaviours, and represents an attempt to explain the social, emotional and cognitive milieu in which victimisation occurs. Throughout this paper, the term victim will be used to describe anyone who suffers harm or loss, either at their own hands or at the hands of others.

Over time, numerous attempts have been made to answer the question, what causes criminal behaviour? This includes the “lumps and bumps” theories of the phrenologists, and the body typing of the Sheldons (see Seigel, 2008), through to socio-cultural explanations like labeling and strain theory (see White and Haines, 2004 for these and other perspectives). More modern attempts to understand the motivational forces behind criminality include Men Who Rape by Nicholas Groth (1979), Groth, Burgess and Holmstrom (1977), and the first adaptation of the “Groth typology” in Practical Aspects of Rape Investigation (Hazelwood, 2009).

As with these attempts to understand offenders, victim behaviour has come under the spotlight. For example, Rhodes and McKenzie (1998) asked the question “why do battered women stay?”, Koziol-McLain, Webster, McFarlane, Block, Ulrich, Glass and Campbell (2006) examined victim factors in femicide-suicide, and Mechanic, Weaver and Resick (2000) considered victim factors in stalking. These are, obviously, but a few examples among many.

Though most studies have improved our understanding of the contextual factors involved in victimisation, even those purportedly studying motivation mostly describe behaviour and not the cognitive components that initially compel that behaviour (see Felson and Krohn, 1990; Beech, Ward and Fisher, 2006 as examples). What is more, quantitative analyses of specific crime types may only provide an insight into that particular crime, and not apply to other crime types, even if of a similar nature. For example, Mullen, Pathe and Purcell (2009) provide an excellent typology of stalking, though it is not designed for use in domestic violence, despite the overlap that may exist between these two crimes. It should be noted that this may be an artifact of the sample under study, in that a study of stalkers will not inherently include domestic violence victims, though it may, and vice versa. This chapter differs in that it provides a typology of victim needs that can be used in a variety of contexts, independent to the crime type. It is therefore more useful in a general sense for understanding motivational elements.

First, this article will broadly define motivation, before going on to discuss the so-called “Groth typology” that was originally developed to understand rapist motivations and treatment in a clinical setting. Following this, the investigative adaptation of this typology by Hazelwood (2009) will be presented. The difference between motivations and victim precipitation will then be provided, leading into the main focus of this piece: the way that the offender motivation typologies apply to victim behaviour. Some research support for the motivational typologies will be presented to close out the discussion.

It should be noted that while the application of the typology discussed in this paper has some strong empirical and anecdotal support, it is a work in progress. Further research is currently being conducted to empirically validate this approach, and the specific application to victim behaviours to increase understanding and awareness of the psychological milieu in which victimisation occurs.

Motivation

Motivation refers to the general needs, whether physical or psychological, that drive behaviour. According to the Elsevier's Dictionary of Psychological Theories (Roeckelein, 2006, p. 406) motivation:

Comes from the same Latin stem "mot-" (meaning move) as does the term emotion. The term motive applies to any force that activates and gives direction to behaviour...The concept of motivation, as a fundamental influence in many phenomena, cuts across the various areas in psychology of intelligence, learning, personality, and thinking.

Inherent within this definition is the link between motivation and emotion. Essentially, emotion is one of the many forces that provides motivation, which is then expressed through behaviour, and it is the behaviour from which motive is interpreted. For the purpose of the rest of this discussion, there will be no debate as to whether this is biological, psychological, or social in origin. That issue is sizable enough to warrant a thesis in its own right.

The Groth Typology

In 1979, Nicholas Groth published *Men Who Rape: The Psychology of the Offender*, identifying rape as an aggressive act, which constitutes "a discharge of anger; it becomes evident that the rape is the way the offender expresses and discharges a mood state of intense anger, frustration, resentment, and rage" (1979, p. 12). In this text, Groth first presented the idea that rape has three main components: power, anger and sexuality, resulting in three rapist types. In anger rape, sexuality becomes a hostile act. In power rape, sexuality is an expression of conquest. In sadistic rape, there is a fusion between violence and sex wherein anger and power become eroticised (see Groth, 1979).

Published earlier, Groth collaborated with mentor Ann Burgess and Lynda Holmstrom to carry out research on a sample of 133 convicted rapists at the Massachusetts Center for the Diagnosis and Treatment of Sexually Dangerous Persons. Also included was a sample of 146 [alleged] rape victims who presented to a Boston hospital with the claim "I've been raped". Of this sample, 92 adult rape victims were included in the study. According to Groth, Burgess and Holmstrom (1977), the impetus for this study was an increasing awareness of rape victims coupled with a lack of understanding of rapists and their motivations. This study represents a more advanced understanding of rapist behaviour, including greater depth within the types.

The idea behind the typology is that while there is significant variation between offenders, there are identifiable themes that can be used to identify the motive behind the crime (Groth, Burgess and Holmstrom, 1977, p. 1240):

One of the most basic observations one can make about rapists is that they are not all alike. Similar acts are performed for different reasons or different acts serve similar purposes. Our clinical experience with convicted offenders and with victims of reported sexual assault has shown that in all cases of forcible rape three components are present: power, anger, and sexuality. The hierarchy and interrelationships among these three factors, together with the relative intensity with which each is experienced and the variety of ways in which each is expressed, may vary, but there is sufficient clustering to indicate distinguishable patterns of rape.

From this research, Groth and colleagues developed the typology along two general axes. The first, power, has two subtypes: power reassurance and power assertive. The second, anger, also has two subtypes: anger retaliation and anger excitation. This typology served as the basis for the expanded work of Hazelwood and Burgess and is presented in *Practical Aspects of Rape Investigation* (2009).

Taking this typology one step further, Petherick and Turvey (2008) suggest it is not restricted only to sexual crimes, but is useful for understanding the motivation in virtually all offenses, including stalking, homicide, domestic violence, assault, and fraud, among others. This typology can also be applied to more esoteric understandings, such as membership of gangs, and in this paper, to

victims of crime. The following section briefly describes the offender motivational typologies by way of background before looking at the application of these types to victim behaviour.

Power Reassurance

The Reassurance Offender has low self esteem, and the offence is an attempt to stabilise doubts about his masculinity and sexual adequacy. The offender wants to place the victim in a position in which they cannot be rejected, thereby shoring up a failing sense of worth (Groth, Burgess and Holmstrom, 1977). Because the offender has constructed a fantasy scenario in which the victim is somehow consenting, reassurance motivated offenders are the least likely to use physical force (Hazelwood, 2009).

Power Assertive

The Assertive Offender also has a low self esteem, and the offense is an attempt to restore stability through mastery and domination. In short, this offender makes themselves feel better by making others feel bad. Fantasy plays a minor role in these crimes, with this type of rapist being responsible for date, spousal, or acquaintance rapes as well as stranger rapes (Hazelwood, 2009). The victim is a vehicle through which virility is expressed, and they do not care if the victim is hurt or injured (Hazelwood, 2009). While outwardly appearing macho and confident, the rape is a reflection of the inadequacy experienced in identity and effectiveness (Groth, Burgess and Holmstrom, 1977).

Anger Retaliatory

Also known as Revenge, this category is an expression of hostility towards women (Groth, Burgess and Holmstrom, 1977). Rape is a punishing act, and may have a cathartic effect, leaving the offender feeling as though their cause has been justified. This feeling may be temporary however, with anger rising when the situation returns or worsens. This may see the anger generalised to other groups or institutions. These offenders are usually physically violent (Hazelwood, 2009), though are less common than the other types.

Anger Excitation

While the least common type, the excitation offender is the most brutal in their physical attacks and has the most capacity to kill their victims. These attacks are usually prolonged, and may involve the use of complex apparatus. This offender received gratification not necessarily from the infliction of physical pain, but in the victim's response to it. As such, these offenders are best off thought of as sexual sadists (Hazelwood, 2009; Groth, Burgess and Holmstrom, 1977).

The Hazelwood Adaptation

Following Groth, Holmstrom and Burgess (1977), Hazelwood (2009) was perhaps the first to modify Groth's typology in a significant way. Building upon earlier work, Hazelwood was to further advance the typology by categorising the verbal, sexual and physical behaviour of the offender, as well as the addition of two types: Opportunistic and Gang. These will not be discussed further as they are contexts in which criminal behaviour occurs, and not motives in their own right.

Understanding Victim Behaviour

While there will be differences between victim and offender behaviour, such as the use of force and coercive tactics (but not necessarily in all cases), there is benefit in applying this motivational typology to victims. As with offender behaviour, victim behaviour can be classified according to needs and wants, and this typology serves as a useful and practical guide for this purpose.

Before moving forward, the following rationales are provided for approaching victim behaviour in this way:

Provisioning crime prevention techniques requires a detailed understanding of the psychological state of the victim.
Threat management, as a form of crime prevention, requires a detailed understanding of the psychological state of the victim.
Victim's services need to develop an accurate accounting of the psychological state of the victim.
Understanding motivations provides context to victim precipitation
Investigating any given crime will be more complete when the motivation of the victim is understood.
Understanding behavioural motivation will enable a more complete understanding of the circumstances involving missing persons.
Providing victims with insight into behaviours that places them in harms way with a view to reducing or eliminating these behaviours, potentially reducing criminal and other victimisation.
From a mental health point of view, understanding the motivational backdrop will assist in designing effective therapeutic interventions.

When applying this typology to victim behaviour, it is also necessary to consider the role of situation and context in victimisation as this provides useful insight into the circumstances surrounding the event. The motivational typologies build upon this because they provide the psychological backdrop to why the victim ended up in these circumstances.

Victim precipitation argues that the dynamics of a criminal act cannot be understood solely by looking only at the offender, and that the role of the victim must be examined also (Diaz, Petherick and Turvey, 2009). Wolfgang (1957) first used the concept of victim precipitation to explain situations where the victim of a crime first initiated the use of physical violence. The concept has since been expanded to include any provocation or facilitation of the crime by the victim (Timmer and Norman, 1984).

Concern has been raised by a number of authors that victim precipitation involves blaming the victim for the harm or loss. Doerner and Lab (2002, p. 9) state that "victim precipitation deals with the degree to which the victim is responsible for his or her own victimisation". Furthermore, Timmer and Norman (1984) suggest that focus on the situational and not structural variables leads to a preoccupation with the victim-offender relationship and to blaming the victim. While a legitimate concern, the reality of precipitation is that it provides a necessary context to the victim-offender interaction constituting the criminal event.

Perhaps a more pertinent concern about victim precipitation is an adaptation of Timmer and Norman's, in that a focus on situational variables does little to aid our understanding about how a victim came to be in that situation. Put another way, what cognitive or emotional processes underpin a person repeatedly getting into relationships where they suffer domestic abuse, or placing themselves in environments where they can be victimised? In overriding an instinctual response to disengage from a relationship where there is stalking and/or harassment? Or in getting involved in a cult at significant financial, personal, or emotional cost? The answer to these questions is the province of victim motivations.

Siegel (2008) suggests that precipitation can take two forms. Passive precipitation involves situations in which characteristics of the victim somehow evoke a response from an attacker. This may be in the form of an actual attribute, (passivity or emotional withdrawal), it can be symbolic (membership to a group), or imagined (mistaken belief about an attitude or philosophy).

Passive precipitation requires no conscious action or decision on the part of the victim to raise the ire of the offender. This occurs simply because the victim exhibits some characteristic or personality feature that causes a degree of dissonance in the offender, resulting in some sanction. Actively precipitated events involve actual actions. This can be in the form of verbal threats, as in the case of posturing, or it can be an actual physical assault. In some situations, it may be difficult to determine which party was the aggressor and which the victim.

Within the context of this discussion, this is the point at which precipitation ceases and an attempt to understand the cognitive milieu of victimisation must occur. With the exception of purely opportunistic elements, it is these cognitive forces that drive behaviour, and it is these elements that will ultimately put a person in harm's way.

It should be noted that, as with the offender motivation typologies, there is no bright yellow line between the following victim motivations. They are also not mutually exclusive, and any given person may exhibit multiple behaviours in a single instance, or multiple motivations over multiple instances. This reflects the many and varied nature of human behaviour and its subsequent determinants. It is important to recognise any change within the event, or between events, and to determine what caused these changes.

The following motivations are in no way intended to blame the victim or paint the victim in a negative light. They are intended only to provide circumstantial bearing to situations involving harm or loss. Nor should the following discussion on concordant personality disorders be used to suggest that all victims have personality disorders, though it should be acknowledged that victims may form part of a clinical sub-sample where disorder is higher than that of the general population (see Sansone, Reddington, Sky and Widerman, 2007; Boudreaux, Kilpatrick, Resnick, Best and Saunders, 1998; McCulloch, Emmons, Kilpatrick and Mooney, 2003). It is therefore important to understand any relationship between motivation and disorder, and the degree to which this may play a role in the perception and presentation of victimisation to afford as holistic an insight into the event as possible.

Reassurance Oriented Victims

Reassurance Oriented victims have low self esteem, and engage in behaviour that is intended to restore or reinforce their self worth. They tend to have low confidence, feel inadequate, and have little idea about socially appropriate interactions. They may have been previously victimised, sometimes repeatedly, because they are willing to accept abuse thinking it is deserved, or because they put more emphasis on their partner's value when in a relationship. Reassurance oriented victims most often passively precipitate events through their passive nature and willingness to be subservient.

Reassurance victims have a poor self image, fearing that their appearance is never good enough, or that their social skills are wanting, leading to difficulty in social situations. When challenged or confronted, or if in fear of abandonment, they will beg and plead, bargaining with others to restore what they perceive is the status quo.

Over time, a reassurance oriented victim may become so acculturated to violence or abuse that they come to accept it as part of any given relationship. They are willing to accept the abuse because the personal injury is less than the emotional cost of being alone. The abuse then becomes so ingrained in their existence, there is concern they will lose their identity without it (see Few, 2005). In extreme and chronic cases of dependent behaviour, repeated rejections may have such a profound impact that compensatory behaviours of avoidance surface.

Because this motivation is the result of low self esteem, it may be the result of personality disorders where low self esteem is a factor. This would include Borderline Personality Disorder, Dependent Personality Disorder, Avoidant Personality Disorder and Histrionic Personality Disorder.

Borderline personality disorder is characterised by a chronic fear of abandonment and/or rejection (American Psychiatric Association, 2000), with a pervasive instability in self image, interpersonal relationships and mood (Oltmanns and Emery, 2006). The borderline both wants an intimate relationship and fears the abandonment that may result from it, and becomes anxious over realistic time-limited separations.

Dependent Personality Disorder involves a pervasive pattern of dependent and submissive behaviour (Oltmanns and Emery, 2006). Dependent individuals rely excessively on others, even for mundane input into such things as clothing choice. Because so much emphasis is placed on others, dependents have a problem being autonomous. This may result in frantic efforts to establish new relationships immediately upon the termination of old ones, or in seeking out potential relationships prior to old ones ending.

The Avoidant Personality is marked by a pervasive pattern of social discomfort, fear of negative appraisal, and timidity (Oltmanns and Emery, 2006). Concerns over negative appraisal do not necessarily need to be real. As stated by Gertzfeld (2006, p. 223), "[individuals] with Avoidant Personality Disorder are fearful of the possibility of criticism, rejection, or disapproval and, therefore, will usually not engage in social relationships unless they are assured of being liked".

Histrionic Personality Disorder is characterised by attention seeking and gross emotionality. Their attention seeking is such that if they are not the centre of attention, they become uncomfortable (Gertzfeld, 2006), which may result in increasingly raucous behaviour to acquire attention. While their emotions are extreme, they tend to be superficial yet blown out of proportion.

Assertive Oriented Victims

Assertive victims engage in behaviours that reinforce self esteem through domination, authority, control, humiliation, and derogation, among others. In essence, they make others feel bad to make themselves feel better. In their attempts to dominate and control others, assertive victims actively precipitate events through their own aggressive interactions, which creates stress, frustration and anxiety in others.

These victims often have dominant personalities, and repeatedly try to impart their own wishes and desires onto others, regardless of reception. As a result of their interactions with others, they may get reputations of being unpleasant to be around. They will be constantly at odds with romantic others, as they engage in a battle of wills, often over trivial or meaningless matters.

Because this motive is associated with a low self esteem, like the assertively oriented offender, these victims may be suffering from Narcissistic Personality Disorder.

The features of Narcissistic Personality Disorder include a pervasive pattern of grandiosity, a constant need for admiration, and a lack of empathy that begins by early adulthood (American Psychiatric Association, 2000). A presumed etiology for this disorder is positive praise by the parents. Too little, and the individual over compensates by developing a desire for adoration, an excess of underserved praise, and the individual comes to believe the positive press.

Retaliatory Oriented Victims

Retaliatory or Revenge victims harbour a great deal of rage towards individuals, groups or organisations. Their behaviour is driven by anger, taken out on others blamed for personal inadequacies, failures, or loss. Because these victims are driven by anger, they may act impulsively whenever the level of anger is enough to evoke a response.

This individual may become a victim because their overt aggressiveness may bring about stress, anxiety, and aggression in others. For example, they may inhibit the opportunities of significant others out of hatred and anger resulting from perceived or imagined wrongs. This may begin a never ending cycle of power struggles, creating tumultuous relationships.

Retaliatory victims blame others for failures, and they have an inability to take blame or responsibility. Because of this, they blame others for their own problems. In psychological terms this is called projection, which involves imparting one's own feelings onto others. In a study by Vaillant (1994), the ego defense of projection was found in those with Narcissistic Personality Disorder in 100% of the cases examined.

A revenge orientation may arise as a result of Paranoid Personality Disorder, Passive-Aggressive Personality Disorder, and in some cases, Borderline Personality Disorder.

Paranoid Personality Disorder involves a pervasive suspiciousness and distrust of others, to the point they see themselves as blameless for their faults and mistakes (Gertzfeld, 2006). Despite persecutory thoughts having no basis in reality, they suspect that others are always looking to exploit them, and they will always see good or positive interactions as having some hidden agenda. Because they view others with suspicion, it may be difficult for them to form new relationships.

Passive-Aggressive Personality Disorder may bring about retaliatory behaviour owing to their resistance to fulfilling routine social and occupational tasks, their complaints about being misunderstood by others, being argumentative, and the expression of envy and resentment towards others who are apparently more fortunate (all diagnostic criteria, see American Psychiatric Association, 2000).

While not discussed anywhere in the extant literature on these motivations, not all anger behaviour comes from a retaliatory or excitation origin. In some instances, the anger is the result of a generalised state that is pervasive. As a result, these authors suggest the addition of a Pervasive Anger motivation to this classification.

Excitation Oriented Victims

The Excitation Oriented victim axis is the most difficult to adapt from their offender counterparts, because excitation behaviour is related to sadism, an act requiring at least two individuals. In order to be able to link the motivational typologies to the victim motivation typologies, slight modification is required. Admittedly, the proportion of excitation motivated victims is small, as is the proportion of excitation oriented rapists (Hazelwood and Burgess, 2009). Sadistically oriented behaviour is difficult to gauge in terms of its prevalence because it is largely hidden from view, with a commensurate dearth of research literature as a result.

For the purpose of this paper, excitation could take one of two forms. The first being actual sadism, and the second being masochism. The former is usually directed externally, while the latter is directed internally. In a small number of cases, both disorders may be present and expressed in sexual and other aspects of behaviour. According to the DSM-IV-TR (American Psychiatric Association, 2000, p. 573), Sexual Sadism involves:

Acts (real, not simulated) in which the individual derives sexual excitement from the psychological or physical suffering (including humiliation of the victim)...Others act on the sadistic urges with a consenting partner (who may have Sexual Masochism) who willingly suffers pain or humiliation. Still others with Sexual Sadism act on their sadistic sexual urges with nonconsenting victims. In all of these cases, it is the suffering of the victim that is sexually arousing. When Sexual Sadism is severe, and especially when it is associated with Antisocial Personality Disorder, individuals with Sexual Sadism may seriously injure or kill their victims.

In those cases involving sadism with either compliant or non-compliant partners, active precipitation assault or homicide may ensue when the victim fights back, realising the danger of the situation. According to the DSM-IV-TR (American Psychiatric Association, 2000, p. 572), Sexual Masochism involves:

Acts (real, not simulated) of being humiliated, beaten, bound, or otherwise made to suffer...Others acts on the masochistic sexual urges by themselves (e.g. binding themselves, sticking themselves with pins, shocking themselves electrically, or self-mutilation) or with a partner. One particularly dangerous form of Sexual Masochism, called "hypoxyphilia", involves sexual arousal by oxygen deprivation obtained by means of chest compression, noose, ligature, plastic bag, mask, or chemical (often a volatile nitrite that produces temporary decrease in brain oxygenation by peripheral vasodilation).

In those cases involving Sexual Masochism, either alone or in company, persons are at risk of harm or loss, usually at their own hand. This may be a result of hypoxyphilia as suggested above, or in extreme cases where the victim engages in other forms of self harm, such as cutting or piercing.

It should be noted that not all self harm behaviour is sexual in nature, and may be more common than believed. Klonsky, Oltmanns and Turkheimer (2003), in their review on prevalence and psychological correlates, note that approximately 4% of the general population self harm (see Briere, 1998), 14% of college students engage in this behaviour (see Favazza, DeRosear and Contrerio, 1989), with as high as 35% of college students reporting at least one self-harm incident in their lifetime (Gratz, 2001). They also note that psychopathology runs the full gamut of personality disorders, but most notably Borderline, where self harm is one of the diagnostic criteria.

In the context of victim behaviour, self harm is a form of affect regulation. This position is supported by Klonsky (2006, p. 226), who identifies four correlates between emotion and self-harm behaviour:

Acute negative affect precedes self-injury;

Decreased negative affect and relief are present after self-injury;

Self-injury is most often performed with intent to alleviate the negative affect; and

Negative affect and arousal are reduced by the performance of self-injury proxies in laboratory settings.

Essentially, self-harm functions by converting psychological or emotional pain into physical pain. It transforms the internal pain, for which there may be little insight and therefore no perceived solution, into external (physical) pain, for which little insight is needed, and where the solution is perceived to be simple.

Materially Oriented Victims

A Materially Oriented victim engages in behaviour that results in some kind of material benefit (monetary, goods, etc). In victim motivations, this is not identified as Profit as with offenders. While it is true that in some cases individuals will engage in behaviours that provide significant financial benefit (staying with a wealthy but controlling or abusive partner), in other situations, it may be all an individual can do but to meet even the smallest of financial commitments (staying with a controlling or abusive partner who militantly controls access to financial resources). In the latter case, there may be no such profit to be had.

Victims of this orientation may also increase their risk of harm or loss by engaging in activities such as prostitution or drug dealing. These victims may also open themselves up to exploitation where the offender knows the victim is seeking monetary gain. Their lack of financial resources may be the result of poor financial decisions, controlling partners, or a lack of education to attain sufficiently lucrative employment. They may also have gambling or drug habits. Any or all of these situations can result in depression, anxiety, frustration and stress that may exacerbate their situation.

In cases where feelings create dissonance, any behaviour on the part of the victim may be minimised or rationalised as somehow necessary, or that the short term cost is worth the long term gain. This may lead them to engage in increasingly risky behaviours, placing them at greater and greater risk. In reality, any gain is usually short lived, and the cycle will start again.

Preservation Oriented Victims

Many of the processes and behaviours of the human condition are intended to restore or maintain homeostasis. According to Oltmanns and Emery (2006), people attempt to strike a balance between too little stimulation and too much negative stimuli, such as stress and anxiety. For an individual with too little stimulation, the balance may be restored by engaging in extreme sports, for individuals who are long term victims of domestic abuse, their homeostasis may be restored by eliminating the source of the stress: an abusive spouse or partner (the so-called case of battered woman syndrome or various self defence claims).

Attempts to regulate physical or psychological integrity not only involve the primary party, but also others within their care or supervision. Preservation victims may also behave in ways that ensure the safety or survival of others, such as children or others under their direct care. In cases where victims may strike back against oppressors, there is generally some allowance under the law wherein the punishment is mitigated or criminal responsibility absolved where claims of self defense are legitimate.

For some, staying in an abusive relationship may be seen as the more viable alternative, as to leave would mean certain death. This mental state is supported in the research on domestic homicide, suggesting that women are most at risk of violence within the immediate time of their departure (Burnley, Edmunds, Gaboury and Seymour, 1996).

Research Support

In attempting to develop a general model that would explain victim behaviour, the first author began to apply the behaviour-motivation typology (see Petherick and Turvey, 2008) to casework with good anecdotal support. While further research activity is being undertaken on specific applications, the following research support provides some indirect support for the victim-motivational typology.

In 2005, McCabe and Wauchope studied the Behavioural Characteristics of Men Accused of Rape. The study was designed to “determine whether the behavioural characteristics demonstrated by rapists clustered together into groups that were similar to the common rapist described in the literature: anger, power exploitative, power reassurance, and sadistic” (2005, p. 241). As a result, this could be seen as a proxy validation study for the typology. This first study found some validity to the characteristics usually associated with each of the four types, especially reassurance oriented and sadistic. The results of study 2 closely replicated the results of study 1.

A study conducted in Jordan by Gharaibeh and Oweis (2009) regarding the reasons that Jordanian women stay in abusive relationships provides some further implicit support. Gharaibeh and Oweis used a qualitative approach in developing five main reasons why women stay in abusive relationships. These are Inherited Social Background, Financial Dependency, Lack of Family Support, Sacrificing Self for the Sake of Children, and Social Consequences of Divorce. While some of these juxtapose neatly onto the victim-motivational typology, others require some level of interpretation on which to make a judgement. As they used self report in their research, more rationalisation than motive is explored, suggesting further work is necessary in understanding the base behaviours before attribution can be undertaken.

In another work, Buel (1999) discusses 50 reasons why abuse victims stay. Many of these are representative of victim behaviour motivations. This includes reassurance oriented reasons such as Low Self Esteem, Gratitude, and Denial. Materially Oriented

reasons such as Financial Abuse, Financial Despair, Homelessness and No Job Skills were uncovered in this research as well. The identified Preservation needs Believes Threats, Children's Best Interest, Fear of Retaliation, and Safer to Stay. There is no implicit connection to Assertive, Retaliatory or Excitation victims. It is noted that the author, while drawing on studies in the area of domestic violence, has not conducted any empirical research of her own, citing instead "some reasons I have either witnessed among the thousands of victims and with whom I have had the honour of working with over the past twenty-two years" (p. 19). This means that the distribution of these motivations within the studied sample is unknown, and the degree to which these results are generalisable to larger victim samples is also unknown.

Conclusion

The application of the above typology is useful in understanding the psychological condition of victims (and potential victims), so as to provide a more holistic understanding of their behaviour before, during, and potentially after, a crime. Far from the victim blaming accusations leveled at the concept of victim precipitation, identifying the operative motives in victimisation has similar benefits to that of identifying motive in criminal behaviour. With a victim population, this may help in the provision of crime prevention, informing various types of victim services, providing context to victim precipitation, and informing victims about various behaviours they exhibit that may put them in harm's way, among others.

There is so far strong anecdotal evidence for the practical utility of the offender typology through a meta-analysis of studies proposing similar typologies. Additional research will be conducted to validate the use of this typology in offender behaviour and to identify discrete categories and the distinguishing behaviours peculiar to each type.

References

- American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed. Text Revision). Washington: American Psychiatric Association.
- Beech, A. R., Ward, T., & Fisher, D. (2006). The identification of sexual and violent motivations in men who assault women: Implications for Treatment. *Journal of Interpersonal Violence, 21* (12), pp. 1635 - 1653.
- Boudreaux, E., Kilpatrick, D. G., Resnick, H. S., Best, C. L., & Saunders, B. E. (1998). Criminal victimisation, posttraumatic stress disorder, and comorbid psychopathology among a community sample of women. *Journal of Traumatic Stress, 11* (4), pp. 665 - 678.
- Briere, J. G. (1998). Self-mutilation in clinical and general population samples: prevalence, correlates, and functions. *American Journal of Orthopsychiatry, 68*, pp. 609 - 620.
- Buel, S. (1999). Fifty obstacles to leaving, AKA, why abuse victims stay. *Colorado Lawyer, 28* (10), pp. 19 - 28.
- Burnley, J. N., Edmunds, C., Gaboury, M. T., & Seymour, A. (1996). *National Victim Assistance Academy Textbook*. Washington D.C: U. S. Department of Justice, Office for Victims of Crime.
- Diaz, J., Petherick, W. A., & Turvey, B. E. (2009). Victim lifestyle exposure. In Petherick, W., and Turvey, B. E. (eds.). *Forensic Victimology: Examining Violent Crime Victims in Investigative and Legal Contexts*. San Diego: Elsevier Science.
- Doerner, W., & Lab, S. (2002). *Victimology* (4th ed.). Cincinnati: Andersen Publishing.

- Favazza, A. R., DeRosear, L., & Contrerio, K. (1989). Self-mutilation and eating disorders. *Suicide and Life Threatening Behaviour*, 19, pp. 352 - 361.
- Felson, M., & Krohn, M. (1990). Motives for rape. *Journal of Research in Crime and Delinquency*, 27, pp. 222 - 242.
- Few, A. (2005). Model helps determine why women stay in abusive relationships. *Obesity, Fitness and Wellness Week*, 16 April.
- Gharaibeh, M., & Oweis, A. (2009). Why do Jordanian women stay in an abusive relationship: Implications for health and social well-being. *Journal of Nursing Scholarship*, 41 (4), pp. 376 - 384.
- Gertzfeld, A. R. (2006). *Essentials of abnormal psychology*. New Jersey: John Wiley and Sons.
- Gratz, K. L. (2001). Measurement of deliberate self-harm: Preliminary data on the Deliberate Self-Harm Inventory. *Journal of Psychopathology and Behavioural Assessment*, 23, pp. 253 - 263.
- Groth, A. N. (1979). *Men who rape: The psychology of the offender*. New York: Plenum Press.
- Groth, A. N., Burgess, A. W., & Holmstrom, L. L. (1977). Rape: Power, anger and sexuality. *American Journal of Psychiatry*, 134 (11), pp. 1239 - 1243.
- Hazelwood, R. R. (2009). Analysing the rape and profiling the offender. In Hazelwood, R. R., and Burgess, A. W. (ed.). *Practical Aspects of Rape Investigation: A Multidisciplinary Approach* (4th ed.). Boca Raton: CRC Press.
- Hazelwood, R. R., & Burgess, A. W. (2009). *Practical aspects of rape investigation: A multidisciplinary approach*. (4th ed.). Boca Raton: CRC Press.
- Klonsky, E. D., Oltmanns, T. F., & Turkheimer, E. (2003). Deliberate self-harm in a nonclinical population: Prevalence and psychological correlates. *American Journal of Psychiatry*, 160 (8), pp. 1501 - 1508.
- Klonsky, E. D. (2007). The functions of deliberate self injury: A review of the evidence. *Clinical Psychology Review*, 27 (2), pp. 226 - 239.
- Koziol-McLain, J., Webster, D., McFarlane, J., Block, C. R., Ulrich, Y., Glass, N., & Campbell, J. C. (2006). Risk factors in femicide-suicide in abusive relationships: Results from a multisite case control study. *Violence and Victims*, 21 (1), pp. 3 - 21.
- McCabe, M. P., & Wauchope, M. (2005). Behavioural characteristics of men accused of rape: Evidence for different types of rapists. *Archives of Sexual Behaviour*, 34 (2), pp. 241 - 253.
- McCullogh, M. E., Emmons, R. A., Kilpatrick, S. D., & Mooney, C. N. (2003). Narcissists as "victims": The role of narcissism in the perception of transgressions. *Personality and Social Psychology Bulletin*, 29 (7), pp. 885 - 893.
- Mechanic, M. B., Weaver, T. L., & Resnick, P. A. (2000). Intimate partner violence and stalking behaviour: Exploration of patterns and correlates in a sample of acutely battered woman. *Violence and Victims*, 15 (1), pp. 55 - 72.

- Oltmanns, T. F., & Emery, R. E. (2006). *Abnormal psychology*. (5th ed.). New Jersey: Prentice Hall.
- Petherick, W. A., & Turvey, B. E. (2008). Criminal motivation. In Turvey, B. E., and Petherick, W. A. (eds.). In *Criminal Profiling: An Introduction to Behavioural Evidence Analysis*. (3rd ed.). San Diego: Elsevier Science.
- Rhodes, N. R., & McKenzie, E. B. (1999). Why do battered women stay? Three decades of research. *Aggression and Violent Behaviour*, 3 (4), pp. 391 - 406.
- Roeckelein, J. E. (2006). *Elsevier's Dictionary of Psychological Theories*. San Diego: Elsevier Science.
- Sansone, R. A., Reddington, A., Sky, K., & Wiederman, M. W. (2007). Borderline personality symptomatology and history of domestic violence among women in an internal medicine setting. *Violence and Victims*, 22 (1), pp. 120 - 126.
- Seigel, L. (2008). *Criminology: The core*. Belmont: Thomson Wadsworth.
- Timmer, D., & Norman, W. H. (1984). The ideology of victim precipitation. *Criminal Justice Review*, 9 (2), pp. 63 - 68.
- Vaillant, G. E. (1994). Ego mechanisms of defense and personality psychopathology. *Journal of Abnormal Psychology*, 103 (1), pp. 44 - 50.
- White, R., & Haines, F. (2004). *Crime and Criminology* (3rd. ed.). Melbourne: Oxford University Press.
- Wolfgang, M. E. (1957). Victim precipitated criminal homicide. *Criminal Law, Criminology, and Police Science*, 48 (1), pp. 1 - 11.

The Law on Corroboration and Documentary Evidence in Fiji and Vanuatu

Sofia Shah, University of the South Pacific

Introduction

Evidence law is the most important area in the legal arena. According to Murphy, the rules of evidence emerged with the purpose not to enable a party to bring evidence to court that might help his case but to prohibit a party from bringing evidence if his opponent objects to it.¹ The need to draw rational inferences from accumulated evidence is the accepted method of modern systems of evidence. These principles or rules developed on a case by case basis. As the common law developed there were more rules about evidence being introduced such as the law on corroboration, whereby certain forms of evidence would not be admitted unless there was some evidence to corroborate it. Also came in the need to introduce some rules when challenges came in regarding caution interviews and the manner in which they were recorded and obtained.

A similar need for new rules arose regarding documentary evidence and post mortem records and whether they should be admissible or not in evidence. These were common law rules which extended to be applied in the British colonies which later gained independence. Fiji and Vanuatu fall under this category whereby Fiji was a colony of Britain and Vanuatu was ruled by the British and the French as a condominium. After independence, Fiji enacted its own Evidence Act and Vanuatu is yet to enact their Evidence Act, thereby solely relying on the common law regarding its rules of evidence.

This paper will comment on the law of corroboration and documentary evidence in the South Pacific focusing on two main countries, Fiji Islands and Vanuatu. It will discuss the law of corroboration in Fiji and Vanuatu and in what instances corroboration was required initially and how the Court has changed the need for corroborative evidence. This paper would discuss with awareness of human rights provisions and its effects on the law of corroboration. It will look at requirement of corroboration in sexual cases, in instances of unsworn evidence of the child and evidence of accomplice and how the Courts in Fiji and Vanuatu have applied them to their own jurisdiction. This paper would also discuss the benefits brought in by these changes in the law of evidence for Fiji and Vanuatu and also its disadvantages if any.

This paper tries to evaluate what changes can be brought into the law of corroboration in Vanuatu in comparison with Fiji, so it will discuss what changes can be brought in for Vanuatu after looking at the changes brought in by Fiji to its laws of evidence especially in upholding fundamental human rights of the individuals. It also discusses the law regarding admissibility of typed record of caution interviews and how the courts have developed laws to cater for development in technology especially moving away from hand written caution interviews to admissibility of typed caution interviews. This paper also discusses how the law of evidence extended its perimeters to admit documentary evidence which otherwise would have required a very lengthy process to be qualified as admissible evidence. Together

¹ Peter Murphy, *Murphy on Evidence* (11th ed, 2009).

with documentary evidence post mortem reports which initially were not admissible evidence as it did not fall under the accepted rules became admissible evidence and the law was extended to cater for it. Reference has been made to legislation and case laws while comparing these two jurisdictions and how they had contributed towards the development in the law of evidence, in some instances moving away from the basic common laws and incorporating provisions in the Evidence Acts of the country.

Therefore, in a nutshell this paper examines the laws of evidence regarding admissibility of corroboration evidence, admissibility of typed records of caution interview, admissibility of documentary evidence and admissibility of post mortem reports as evidence.

The Law of Corroboration

(a) Definition

According to Murphy, the word 'corroboration' means support or confirmation². Corroboration refers to any rule of law or practice which requires that certain kinds of evidence be confirmed or supported by some other independent evidence in order to be sufficient to arrive to a verdict.

Corroboration is mostly required in sexual offence cases, unsworn evidence of the child cases, evidence by accomplice cases, treason cases and perjury cases.

There was initially no general requirement for corroboration under common law. However, corroboration came in to be a requirement as a matter of law where the statute or law specifically stated that some evidence had to be corroborated and corroboration also became a matter of practice where Judges would direct juries and assessors in certain cases the danger of convicting a person on uncorroborated evidence.³

An example of corroboration required as a matter of law is the unsworn evidence of a child. In England, **Section 38(1) of the Children and Young Persons Act 1933** required that in order to find an accused guilty of a crime on the basis of the unsworn evidence of a child, the evidence had to be corroborated or supported by some other material evidence implicating the accused. The Courts could not convict a person only on the unsworn evidence of the child. This requirement for corroboration in cases of unsworn evidence of the child was abrogated by **Section 34(1) of the Criminal Justice Act 1988**. Similarly, in England the law of corroboration regarding sexual offences was repealed by **Section 33 of the Public Order Act 1994**.

An example of corroboration which became a matter of practice is when an accomplice gives evidence as a prosecution witness. The Judge would warn the jury to exercise caution when considering the evidence of an accomplice as he had an interest to serve in a manner which adversely affected the co-accused.⁴

² Peter Murphy, *Murphy on Evidence* (11th ed, 2009).

³ Peter Murphy, *Murphy on Evidence* (11th ed, 2009).

⁴ Loveridge (1982) 76 Cr App R 125

These laws regarding corroboration from England were also applicable to the colonies such as Fiji and condominium such as Vanuatu. However, after independence both Fiji and Vanuatu enacted their own laws and the changes in the English laws were no longer applicable. Thus to have these changes that have occurred in English laws incorporated in their own laws, Fiji and Vanuatu need to amend its own laws in the proper way as required by the legislature. This paper will now look at Fiji and Vanuatu and what laws they have regarding corroboration and if there has been any changes to it.

(b) The Law in Fiji

In Fiji, corroboration is recognised and provided for by the **Evidence Act**⁵, the **Crimes Decree 2009**⁶ and the **Criminal Procedure Decree 2009**⁷. Initially Fiji followed the laws of England regarding corroboration and **Section 3(3) of the Criminal Procedure Code** of Fiji provided for this:

“(3) Provided, however, and notwithstanding anything in this Code contained, the Supreme Court may, subject to the provisions of any law for the time being in force in Fiji, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise such jurisdiction according to the course of procedure and practice observed by and before Her Majesty's High Court of Justice in England at the commencement of this Code.”⁸

The **Criminal Procedure Code** was repealed by the **Criminal Procedure Decree 2009**.

The **Evidence Act, Cap 41** of Fiji provides that if a statement is provided by the maker of the statement and is admissible it is not to be treated as corroboration. The Crimes Decree provides that corroboration is required in cases of perjury or subornation. The following considers the law of corroboration in Fiji and how that has changed over the years.

Complains in sexual cases has been an area where corroboration has been a requirement by the Courts before a person could be convicted of the charge.

In the case of *Khan v R* (1973) 19 FLR 133 the accused had allegedly raped his 14 year old daughter. The accused had confessed regarding the allegation. The Court took into account the evidence of the victim, which required corroboration. The Court after listening to the evidence and considering it held that the evidence of the complainant needs to be corroborated and in this case it is taken to be corroborated by the confession of the accused. Thus corroboration of the victim's evidence in rape cases could only be used to convict the accused if it was corroborated. This was a very unfair requirement which indirectly implied that women could fabricate stories.

⁵ *Evidence Act* [Cap 41] (Fiji)

⁶ *Crimes Decree 2009* (Fiji)

⁷ *Criminal Procedure Decree 2009* (Fiji)

⁸ Section 3(3) *Criminal Procedure Code* [Cap 21] (Fiji)

Such a requirement made it very difficult for the prosecution to prove its case against the Accused as corroborative evidence is very difficult to get in sexual offences since they are committed in isolation or usually when the accused finds the victim alone in a place. Not only was this requirement for corroboration belittling for women but it also violated their Constitutional rights of equality and the right to protection against all forms of discrimination under **Section 38 of the Constitution**⁹. This requirement of corroboration regarding sexual offences was a form of discrimination based on their gender and this trend of acquitting accused persons in sexual offences for lack of corroborative evidence where the only evidence implicating the accused was the evidence of the victim herself continued till 2004.

In 2004 in the case of *Balelala v State* [2004] FJCA 49, the accused was charged with the offence of rape and he appealed his conviction. One of the grounds was that there was no corroboration of the victim's evidence and it was dangerous to convict the accused on her uncorroborated evidence. The Court of Appeal reviewed the law of corroboration and stated that this "rule of practice which required corroboration, or a warning that it is dangerous to act on the uncorroborated evidence of the complainant, in cases of sexual assault, depended on a generalization that female evidence in such cases is intrinsically unreliable"¹⁰. The Court of Appeal went ahead to consider that Australia, New Zealand, England and many other countries had abolished this requirement in their countries and found that this rule is counter productive, confusing and both discriminatory and demeaning of women¹¹.

The Court of Appeal also noted that **Section 21(1) of the Constitution** provides that Chapter 4 of the Constitution regarding the Bill of Rights bound the Judicial branch of government and also that **Section 43(2) of the Constitution** required Courts to promote the values that underlie a democratic society while interpreting provisions from this Chapter on Bill of Rights. The Court of Appeal also considered the United Nations Convention on the Elimination of All Forms of Discrimination against Women stating that Courts must also have regard to public international law applicable to the rights of women as set out in the Bill of Rights of the countries Constitution¹².

⁹ Section 38(2) of the Constitution Amendment Act 1997 of Fiji Islands :

"38.-(1) Every person has the right to equality before the law.

(2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:

(a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or

(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others;

or on any other ground prohibited by this Constitution.

¹⁰ *Balelala v State* [2004] FJCA 49 <http://www.paclii.org> (Accessed 10 March 2012)

¹¹ Above, n 9.

¹² Above, n 9.

The Court of Appeal considered the above and stated that “the rule of practice should be abrogated, not only by reason of the fact that it represents an outmoded and fundamentally flawed view, but also by reason of the need to give full force and effect to the Constitutional principle of equality before the law. By reason of the Constitutional Provisions, **Section 3(3) of the Criminal Procedure Code** would not require continued adherence to the former corroboration rule, even though it represented the practice in force in England at the time of the Code’s commencement in 1944”¹³.

Thus the Court of Appeal in Fiji dismissed the requirement of corroboration in sexual offences as it was discriminatory against women and contradicting the Bill of Rights manifested in the Constitution.

This was then legislated and **Section 129 of the Criminal Procedure Decree 2009** of Fiji states that there is no requirement of corroboration in sexual cases. That where a person is charged for a sexual offence, no corroboration of the complainant’s evidence shall be necessary for that person to be convicted and neither the Judge or the Magistrate are required to give any warning to the assessors relating to the absence of corroboration.

The above shows how Fiji has dealt with the requirement of corroboration in sexual offences. This paper will now view the requirement of corroboration in regards to cases of unsworn evidence of a child in Fiji.

Corroboration in cases of unsworn evidence of a child has been a requirement by the law in Fiji. According to **Section 10 of the Juvenile Act** of Fiji any unsworn evidence given by a child needs to be corroborated in criminal cases or civil cases before the accused is convicted of the offence or the case is decided against the Plaintiff¹⁴. This rule which restricts the acceptance of evidence of child witnesses is founded on the widespread belief that children are fickle, untrustworthy and unreliable, particularly when they are giving evidence about sexual assault¹⁵. That **Section 10 of the Juveniles Act** places children in the same group as women whose evidence required corroboration warning in cases of sexual assault.

The child’s unsworn evidence had to be corroborated by some other material evidence that would implicate the accused in criminal cases. In some cases where there was no other independent material evidence to corroborate the unsworn evidence of the child even considered a lie by the accused to be taken as corroboration. In the case of **AG v Gopal** (1967) 13 FLR 65 the Court held that the child gave unsworn evidence and identified the accused therefore corroboration of the child’s identification of the accused was required. The Court did not state the reason why it required corroborative evidence of the identification of the accused but it can be presumed that at that time the Juveniles Act had the specific requirement under **Section 10** that no accused was to be convicted solely on the unsworn evidence of a child. The court stated that the accused had lied to the police when he said before his arrest

¹³ Above, n 9.

¹⁴ *Juveniles Act* [Cap 56] (Fiji): “**10.**-(1) Where in any proceedings against any person for any offence or in any civil proceedings any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may proceed not on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and to understand the duty of speaking the truth;...Provided that where evidence is admitted by virtue of this section on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated.”

¹⁵ *State v AV* [2009] FJHC 18, <http://www.pacii.org> (Accessed on 10/03/2012)

that he had no opportunity to commit the offence and this lie by the Accused was taken to corroborate the unsworn evidence of the child.

The Court in *AG v Gopal's* case considered the case of *Credland v Knowler* (1951) 35 Cr. App. R 45 where the court took a lie to work as corroboration. The Court stated:

"[A] lie told to the police may be corroboration if it gives rise to an inference in support of the complainant's evidence or if it gives a different complexion to the opportunity to commit the offence. The magistrate should therefore have decided whether the lie was proved and then determined if it was corroboration."

The Court used the common law to see what forms of evidence could be used as corroboration in relation to unsworn evidence of a child.

However, as per the requirement for corroboration in relation to complainants of sexual offences this requirement for corroboration regarding unsworn evidence of the child could also be argued to be discriminatory. The Constitution of Fiji under **Section 38** provided for equality and protection from all forms of discrimination which protected a person from being discriminated on their age. This issue of discrimination against children was addressed at length by the Court in the case of *State v AV* [2009] FJHC 18.

Justice Goundar went on to review **Section 10 of the Juveniles Act** of Fiji. According to him such a restriction regarding unsworn evidence was only imposed on children and not on adults. He went on to elaborate that according to **Section 136 of the Penal Code, Cap 17** of Fiji, receiving evidence on oath or affirmation was a statutory right of every person. Evidence received on affirmation in Fiji had the same effect and force as the evidence taken on oath under **Section 2 of the Oaths Act, Cap 42** of Fiji. Justice Goundar also considered that this provision for reception of evidence on affirmation was consistent with the Constitutional right to freedom of conscience, religion and belief and the right not to be compelled to take an oath, or to take an oath in a manner, that is contrary to his or her religion or belief under **Section 35 (1) & (6) of the Constitution**. Thus **Section 10 of the Juveniles Act** deprived children under the age of 14 years of these constitutional rights. The Court considered that England had abrogated the requirement for corroboration in cases of unsworn evidence of the child and that this reform was inspired in England by the **Report of the Home Office's Advisory Group on Video Evidence, December 1989** chaired by Judge Pigot QC. According to this report a Judge may declare a witness incompetent and direct the jury to ignore such a witness's evidence if he finds them to be of unsound mind, failing to make sense or becoming incoherent in their evidence.¹⁶

The High Court also held in *State v AV* [2009] FJHC 18, that **section 10 of the Juveniles Act** was discriminatory against children because of their age and that it deprives them the equality before the law as guaranteed by the Constitution.

¹⁶ Report of the Home Office's Advisory Group on Video Evidence, December 1989

Justice Goundar held :

"that if a child of a tender age appears in court as a witness, the only obligation the magistrate or the judge has is to remind the child of the importance of telling the truth before receiving his or her evidence and that evidence should be assessed like the evidence of any other witness without the need for corroboration or a warning."¹⁷

Thus any provision of the legislation which contradicts the rights provided under the Constitution would be rendered void and **Section 10 of the Juvenile Act** of Fiji is void as it contravenes the constitutional right of a child. Therefore Fiji has followed the footsteps of England and abrogated the requirement of corroboration in cases of unsworn evidence of a child.

Another area of law where corroboration is required in Fiji is when dealing with evidence of an accomplice.

First of all one has to understand who all fall within the category of an accomplice. In the case of *Davies v DPP* [1954] 38 C App R 11, 32 the House of Lords stated who would fall within the definition of an accomplice:

"On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in case of misdemeanours). This is surely the natural and primary meaning of the term "accomplice"."

Therefore, any person who participates in any way in a crime whether before the commission of the crime or after the commission of the crime or who aids and abets the commission of a crime in any manner is an accomplice to the crime. The contribution of the accomplice to the crime may be minimal yet they would be regarded by law as accomplice to the crime.

It is the duty of the Judge to warn the Jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. Secondly, that this rule has been a rule of practice but now has the force of law. Thirdly, where the Judge fails to warn the Jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice.

In the case of *Jenkins* [2004] 211 ALR 116, 121 the court stated that the evidence of accomplice can be unreliable therefore there is a need for corroboration.

This approach was followed in Fiji, in the case of *Swadesh Kumar Singh v State* [2006] Crim App CAV 7/05, 19 October 2006, where the Court relied on the reasoning by the Jenkins case and stated that accomplice are regarded by the law as a notoriously unreliable class of witness, having a special lack of objectivity and the assessors needs to be warned for the protection of the accused.

¹⁷ *State v AV* [2009] FJHC 18, <http://www.pacii.org> (Accessed on 10/03/2012)

Therefore evidence of an accomplice still needs to be treated with caution and a warning has to be given by the Judge to the assessors where no corroboration is provided before a person is convicted of an offence in Fiji. Again the corroboration may come from any other independent material or witnesses which would make the story of the accomplice sound more probable. This area has also developed and Courts have found lies by an accused to amount to corroboration. In the case of *Armogam v State* [2003] FJCA 32, the Court of Appeal accepted that lies could constitute corroboration by revealing a consciousness of guilt and that this lie which constitute corroboration need to be specifically identified. Therefore if a lie had to be treated as corroboration it was imperative first of all to establish that what the accused said was a lie. Once it is confirmed that the accused has lied to the court, then that lie can be taken and treated as corroboration of some other evidence.

Thus the law regarding corroboration has changed significantly in Fiji regarding sexual offences and unsworn evidence of a child and has also developed new categories regarding evidence of accomplice such as lies by accused amounting to corroboration. This paper would now view the law on corroboration in Vanuatu.

(c) The Law in Vanuatu

In Vanuatu, there is no legislation that specifically deals with corroboration, however some reference to corroboration has been made by the **Criminal Procedure Act, Cap 136** of Vanuatu. **Section 83 (2) and (3)** of the **Criminal Procedure Act** make reference to circumstances where corroboration would be necessary and in the absence of corroboration the Judge must warn the assessors or himself before convicting accused on uncorroborated evidence. Also under **section 173** of the **Evidence Bill** of Vanuatu 2003 there is provision for corroboration in respect of perjury cases and where evidence is given by unsworn evidence of someone lacking capacity. Corroboration is required under **Section 59 of the Penal Code** of Vanuatu in cases of treason. The common law is being followed mainly in relation to when and how corroboration is required and applied. In the case of *Walker v Public Prosecutor* [2007] VUCA 12, the court stated in paragraphs 10 and 11 that the legal position at common law is that one witness is sufficient however assessors and judges need to be warned of the dangers of convicting without corroboration in cases of evidence by accomplice, evidence by complainant in sexual offence case and unsworn testimony of a child.

Sexual offences are an area of law in Vanuatu where corroboration is a requirement as it had been initially in Fiji. This has been a practice of the Court in Vanuatu to corroborate a women's evidence before finding the accused guilty of the charge in sexual offences.

The courts in Vanuatu considered corroboration in sexual offences in the case of *Public Prosecutor v Michael Mereka* [1989-94] VLR 613. This was an appeal by the prosecution on the decision of the Magistrate who had dismissed the charge at the prima facie stage on the grounds that there was no recent complaint and no corroboration, both of which he considered were mandatory. In fact neither is required although both are admissible. The error of the Magistrate shows how a no case submission is not about proof but only the existence of a prima facie case with some evidence going to each element of the offence. The Court went on length to deal with the issues of recent complaint and corroboration.

Firstly, that a person can be convicted of a sexual offence in the absence of corroboration.

Secondly, that the requirement for convicting without corroboration is that the Trier of fact be warned of the danger of doing so. Thirdly, the evidence of recent complaint cannot be corroboration. Fourthly, the compliance with the requirement that the corroborative evidence must come from a source which is independent of the witness whose evidence is to be corroborated. Fifthly, corroborative evidence must be independent testimony which affects the accused by connecting or tending to connect him with the crime. This has been based on the practice that the Courts have been following in Vanuatu.

As in Fiji, the Courts found the statement of the accused to be corroborating the story of the victim, a similar approach was taken by the court in the case of *Public Prosecutor v Toka* [2001] VUSC 59, whereby the Judge stated the importance of corroboration in sexual offences and that he must warn himself that it is dangerous to convict on the uncorroborated evidence of the complainant. He found the statement made by the accused to the police as corroboration. Thus the law was extended to include the accused's statement to police as corroborating the victim's story. However, it first has to be ascertained that the accused gave the statement voluntarily. The issue of this corroborative requirement being discriminatory has not been addressed yet by the Courts in Vanuatu.

There is another interesting development in the law of corroboration in Vanuatu when dealing with sexual offences. The courts have taken one victim's story to corroborate another victim's story where there were two victims of sexual assault in the same case with one accused. This was in the case of *Public Prosecutor v Benny* [2009] VUSC 99, where the court considered the evidence of the two victims as corroborating each other. Justice Clapham dealt with evidence of the child as well as evidence of the victim as both victims were children aged 7 and 8 respectively who had been sexually abused by their grandfather. The court warned itself that there was no independent corroborative evidence but yet found the accused guilty. The reasons for the courts decision was that the Judge found that the victims were telling the truth and the Judge used each victim's evidence as corroboration for the other victim's story as they were present when the other got abused. The Judge noted that victims of such tender age could not make up such stories against their grandfather and were telling the truth. It has to be noted that in this case the court was not at all reluctant to treat the other victim's evidence as corroborative even though both victims were children of very tender age.

This brings one to the next category where the courts in Vanuatu require corroboration which is where unsworn evidence of a child is concerned. The case of *Public Prosecutor v Benny* will be further discussed here.

As **Section 10 of the Juveniles Act** in Fiji required a child's unsworn evidence to be corroborated, **Section 83(3) of the Vanuatu Criminal Procedure Code** provides for the requirement of corroboration in the case of unsworn evidence of a child. It states:

"(3) Where evidence admitted by virtue of subsection (2) is given on behalf of the prosecution in any proceedings, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by other material evidence."

In the case of *Public Prosecutor v Benny* [2009] VUSC 99 the court took evidence of the victims to corroborate each child's evidence. It is applicable where the Court regarded each complainant's evidence as corroboration of the unsworn evidence of each child. The Court did consider that the children were telling the truth and the court believed their evidence. It has to be noted that the constitutional rights of a child has not been considered in relation to requirement of corroborative evidence in Vanuatu yet. As in Fiji, this rule for corroboration in cases of unsworn evidence of the child should be found to be unconstitutional and **Section 83 (3) of the Vanuatu Criminal Procedure Code** should be declared to be unconstitutional and void. There should not be any discrimination against children who give unsworn evidence as unsworn evidence by adults and affirmations by adults are acceptable to the courts in Vanuatu as they have the protection against any form of discrimination which covers age.

This brings one to view the third category in Vanuatu which requires corroboration, namely evidence of an accomplice. As per the approach taken by the Courts in Fiji the courts in Vanuatu also consider that Judge and assessors should always treat accomplice evidence against the co-accused with much caution and care as the accomplice has a direct interest in the case in relation to adverse impact on the co-accused by his evidence.

The need for corroboration is given grave importance in relation to accomplice evidence and even where the accused has confessed to the crime. The courts in Vanuatu treat confessions of accused with so much caution that in cases where the accused retracts his confession the court requires corroboration before they can convict the accused. In the case of *Vanuatu (New Hebrides) Procurator General v Jaques Pala* District Court No. 654 of 1979, the accused was charged with theft of food from a house. When arrested the accused made a confession in Bislama. It was later translated in French. **Under Section 151 of the Criminal Procedure Code Rules** confessions that are not written in the language they are given in are to be excluded. The Court noted that in the case where the accused retracts a statement, even if it was given voluntarily, it is dangerous to convict on the basis of the statement alone without corroboration. Such is the significance of corroboration in the courts of Vanuatu.

Independent evidence is always welcomed by the courts of Vanuatu as corroborating evidence. In the case of *Vanuatu Public Prosecutor v James Samuel* Cr 375/82, there was conflicting evidence by the complainant and the accused and the Magistrate used the dentist's evidence as corroboration to the complainant's evidence. There was no need for corroboration in this case, however the court went ahead and used it to give more weight to the victim's evidence. If it was a sexual offence or where the victim was a child giving unsworn evidence, the dentist's evidence would have been very crucial before the accused could be convicted by the court. Thus one can see that corroboration is still very much crucial to sexual offences and cases whereby a child's unsworn evidence is an issue in Vanuatu.

Admissibility of Typed Records of Caution Interview

Initially both in Fiji and Vanuatu the caution interviews of accused persons were hand written and recorded by the Police Officer. Errors, mistakes and changes to the interview could be seen clearly as words would be crossed out or substituted. With computers it is easier to just delete words and substitute them without it being visible that changes have been made at all. In the case of *Public Prosecutor v Adams* [2008] VUSC 12, Criminal Case 73, 74 of 2007 (8th

April 2008) accepted the typed record of interview which was signed by the accused as admissible. This was a move from the standard hand written interviews to an advanced form of record of interviews and courts recognised the use of technology. The issue that still governs this however is that the record of interview must be signed voluntarily otherwise it would go for a *voire-dire* or trial within a trial.¹⁸

There is a similar approach taken by the Courts in Fiji regarding caution interviews and the voluntariness factor. In the case of *State v Alifereti* [2008] FJHC 208 the Court recognised that discretion existed to withhold confessional evidence, though voluntary. His Lordship Justice Mataitoga stated that the legal principles with regard to the admissibility of interview statements given to police by the accused was established in the Court of Appeal case of *Ganga Ram & Shiu Charan v R* FCA Crim. App. Case No. 046 of 1983, after reviewing the House of Lords decision in *Ibrahim v R* [1914] AC 599, the Privy Council decision in *DPP v Ping Lin* [1976] AC 574 and the House of Lords decision in *R v Sang* [1980] AC 436. The principle was stated to have two matters for consideration. Firstly, it had to be established by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage described as 'the flattery of hope or tyranny of fear'. Secondly, if voluntariness is established then one needs to consider whether the more general ground of unfairness exists in the way in which the police behave, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or unfair treatment.¹⁹ Once these two considerations had been fulfilled then the statements would be admitted in court as evidence. With development in technology the courts in Fiji and Vanuatu have accepted the new modes of recording interviews by using computers and it is good to see that this reduces the time it would have taken for the interviewing officer recording the interview by handwriting. Computers and typed recording of caution interviews have made it more efficient and saves time for the police which can be utilised in investigating other cases. However they must bear in mind that the confession should be given voluntarily and the accused should sign the typed record of caution interview voluntarily and not under any threat or inducement.

Once the confession is challenged the court will immediately order a *voire dire* to determine admissibility of the confession. In the case of *Sakeo v The State* [2006] FJCA 58 the accused appealed their convictions using the ground of abuse and assault by the police and involuntariness of their confessions in the caution interview which they had signed under duress. The court referred to the case of *Sakiusa Rokonabete v The State*, Criminal Appeal AAU00048, 2005 where the Court ruled on the need to hold a trial on the *voire dire* if the admissibility of caution interviews is challenged. Prior to this, Courts were using the Practice Direction 1 of 1983 and which was enforced in Rokonabete's case stating to conduct a trial within a trial to decide on the admissibility of confessions.

Moreover if the confession is obtained by trick, the court would consider if the prejudicial effect of admitting such evidence would outweigh the probative value the evidence adds to the fact in issue. In the case of *Khan v R* [1973] FJCA 2, the accused has made a confession to his wife which was secretly tape recorded by the police. It was admitted under the ordinary rules of statement against interest because it was voluntary. However the court examined

¹⁸ Public Prosecutor v Adams [2008] VUSC 12, Criminal Case 73, 74 of 2007 (8th April 2008)

¹⁹ State v Alifereti [2008] FJHC 208

if the confession should be excluded under the fairness discretion but decided despite the trick, admitted the confession after referring to the case of *Callis v Gunn* [1963] 3 All ER 677 where Lord Parker CJ stated that this “discretion would certainly be exercised in excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, or anything of that sort.”²⁰ Therefore, the courts in both Fiji and Vanuatu have shown emphasis on the need to record caution interviews and to ensure that the statements made by accused are obtained voluntarily and the confession to be signed voluntarily before it can be admitted as evidence. Admitting involuntarily obtained confessions or confessions obtained with tricks, false representations or threats would deny the principle of fairness to the accused and may cause immeasurable prejudice. This also may lead to an innocent being convicted if the courts are not careful in examining the involuntarily obtained confessions. The court must always consider any other independent evidence before deciding what weight to be put on the confession to ensure that justice is done and also seen to be done.

Admissibility of Documentary Evidence

Documentary evidence has mostly been legislated and forms an exception to the rule of hearsay evidence. In Fiji, any document which is shown to form part of a business record or public authority may be received in evidence without the need for further proof.²¹ Initially under the Evidence Act, Cap 41 of Fiji, a document would be taken to include books, maps, plans, drawings, photographs and any other device by means of which information is recorded.²² This has been widened and now a document under the Decree includes anything in which information of any description is recorded.²³ Hard copy paper evidence has now been extended to electronic forms of evidence such as emails and the court accepts every email printout as original.²⁴ Similarly in Vanuatu a document is admissible as evidence if it forms part of a record relating to any trade or business and compiled in the course of that trade or business by persons who are reasonably supposed to have knowledge of the matters dealt with therein²⁵.

The effect of having such documentary evidence legislated and acceptable is that it saves the courts time and the parties time during trial in court otherwise so much time would be wasted in complying with the rules of admissibility of such business records trying to establish how is it part of the trade or business and recorded by the people who have knowledge in that area. There would be the need to call five or six witnesses to establish it was business records and recorded by people who had knowledge. By legislating and making business records admissible per se, these records can now be admitted in evidence without the need to establish the pre-requisites. This saves time, resources and energy of the judiciary and the parties which could be used elsewhere.

Admissibility of Post Mortem Records

Post mortem reports have been for years a matter of dispute whether they should be admissible evidence or hearsay. In Fiji in the case of *State v Singh* FJHC 142 Justice Pain looked at the Evidence Act to see if a post mortem report

²⁰ *Callis v Gunn* [1963] 3 All ER 677

²¹ Section 11, Civil Evidence Decree 2000, Fiji

²² Section 2, Evidence Act, cap 41, laws of Fiji

²³ Section 2(4) Civil Evidence Decree 2000, Fiji

²⁴ Mark D. Robins, “Evidence at the Electronic Frontier: Introducing E-mail at trial in Commercial litigation” (2003) 29 Rutgers Computer & Tech. L.J. 219.

²⁵ Section 1 Criminal Evidence Act 1965 (Vanuatu)

would fit in any of the provisions there. The ground that had been submitted to the Court was that a post mortem report was a business record therefore it should be admitted in evidence. A business record under **Section 4 of the Evidence Act** of Fiji states:

"4. In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact, shall on production of the document, be admissible as evidence of that fact if-

- (a) the document is, or forms part of, a record relating to any trade or business and compiled, in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have, personal knowledge of the matters dealt with in the information they supply, and
- (b) the person who supplied the information recorded in the statement in question is dead, or beyond the seas, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied."²⁶

Business has been defined under the Evidence Act as to include any "public utility or undertaking carried on by any city or town council or by any other board or authority established under the provisions of any Act, and any of the activities of the Permanent Secretary for Posts and Telecommunications."²⁷

Therefore, the Court has to decide if the operations of a hospital will fit in the definition under the Evidence Act. The definition of business originated from the **1965 Criminal Evidence Act of England** which was passed in response to the House of Lords decision in *Myers v DPP*²⁸ whereby they held that the records of a car manufacturer showing serial numbers allocated to mass produced motor vehicles were inadmissible hearsay. Now under the definition of business records, such evidence would easily be admitted in Court.

In order to determine if post- mortem records form part of business records it is also important to determine if health services or medical services fall under the definition of business. In the case of *R v Crayden*²⁹ it was held by the Court of Appeal that a national health service hospital was not a "business" within the **1965 Criminal Evidence Act of England** because it provided health service and did not have a commercial connotation. However, in *R v TJW*³⁰ the Royal Women's Hospital in Brisbane was held to be a business within the **1965 Criminal Evidence Act of England** because it came within the extended definition of business as being carried on by a statutory body. The Fiji courts decided that Hospital was a public utility as it provided services for public at large and that the provisions of the **Public Hospitals and Dispensaries Act (Cap110)** vested the control and management of public hospitals in the Minister of

²⁶ Section 4, Evidence Act (Cap 41), Laws of Fiji

²⁷ Above n 2

²⁸ [1965] AC 101

²⁹ [1978] 2 All ER 700

³⁰ 1989 1 Qd R 108

Health which is to be exercised by the Permanent Secretary for Health and the Department of Health. Then the court decided if the Minister can be an "authority" under **Section 2 of the Evidence Act** and held that an authority is the person or body in whom particular power is vested and that the Minister can be an authority under the definition of business in the Evidence Act. Then the final determining factor for the court was to consider if the post mortem report was compiled in the course of business at CWM Hospital and stated that pathological services was an essential part of the hospital's business and held that the post mortem report was compiled in the course of business.³¹ These cases have made the law on admissibility of post-mortem reports very clear and again the State and courts save time now when dealing with post-mortem reports in trials as they can go straight to the content of the report rather than wasting time on establishing how it falls under an exception to the rule of hearsay evidence.

In Vanuatu, report of a Government analyst or prescribed expert is provided for under **Section 86 of the Criminal Procedure Code, Cap 136**. It clearly provides that any document which purports to be a report of a Government analyst or any prescribed expert regarding any matter submitted to him for examination or analysis and report, may be used as evidence of the facts stated in the trial³². This would include post-mortem reports as they are a document prepared by the pathologist who is a qualified government expert in this area. There are not many cases which challenge the admissibility of post mortem reports as was initially done in Fiji before the law became clear regarding post-mortem reports. Vanuatu seems to have accepted that post-mortem reports form part of business records and are prepared by experts thus they are usually admissible without much challenges.

Discussion

When comparing the approaches taken by the Courts in Fiji and the Courts in Vanuatu it can be seen that the issues are very similar in nature or even the same, however the approaches are different as yet. The law regarding corroboration in sexual offences in Fiji has been abrogated mainly because it was found to be unconstitutional by the court in the case of *Balelala v State*. The Constitution of Vanuatu also awards that same right to the women of Vanuatu. The women of Vanuatu under **Section 5 of the Constitution** of Vanuatu have the right to be protected from all forms of discrimination³³. However, it is yet to be given effect in terms of this corroborative requirement in sexual

³¹ State v Singh[1997] FJHC 142

³² Section 86 of the Criminal Procedure Code, Cap 136

³³ Constitution of the Republic of Vanuatu : **5. Fundamental rights and freedoms of the individual**

(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –

- (a) life;
- (b) liberty;
- (c) security of the person;
- (d) protection of the law;
- (e) freedom from inhuman treatment and forced labour;
- (f) freedom of conscience and worship;
- (g) freedom of expression;
- (h) freedom of assembly and association;
- (i) freedom of movement;
- (j) protection for the privacy of the home and other property and from unjust deprivation of property;

offences. In *Balelala's case* the prosecution submitted that the requirement for corroboration was unconstitutional in sexual offences. There has been no such submission by the prosecution in sexual offence cases in Vanuatu yet, but one may question whether the Courts can exercise their revisionary jurisdiction and review the requirement of corroboration in sexual offence cases and declare this requirement to be unconstitutional. Vanuatu is faced with the challenge to abrogate this requirement of corroboration in sexual offences, and whether it would follow the approach taken by England, Australia, New Zealand and Fiji or continue to require corroboration in sexual offence cases is yet to be seen.

The advantages of abrogating such a discriminatory rule would be that women would in essence be given equal treatment under the law and not just on paper. It would also save a lot of time of the police officers while investigating sexual assault cases as they would not have to spend days looking for corroborative evidence. This would also save the courts time and resources during trial by cutting down on unnecessary challenges and objections regarding corroborative evidence and the courts would have more time to hear other cases and effectively and efficiently deal with other cases.

One may argue that a disadvantage of abrogating such requirement of corroboration in sexual assault cases would be putting more pressure on the Judges and Assessors when evaluating evidence and deciding what weight to attach to it. However, a counter argument would be that Vanuatu will not be the only country doing this, England, Australia, New Zealand and Fiji have already taken this step and their cases are being heard and disposed off without any problems therefore it should not be a problem for Vanuatu.

Similarly, in cases where unsworn evidence of the child is concerned, the same advantages would apply. Fiji having abrogated this requirement of corroboration in cases of unsworn evidence of a child by regarding it unconstitutional again has actually enforced the constitutional rights of the child and protection of the child from all forms of discrimination before the law. Thus trials with unsworn evidence of child are much faster and save time and resources that used to be used up previously in looking for corroborative evidence and presenting it before the court. The people also know that their children are being treated equally before the law and victims of crime are not being further belittled by the requirement of corroboration. It is good to see that these rights are being enforced by the courts and the country has progressed in eliminating discriminatory laws.

Although there is no reference in the Constitution of Vanuatu to protection against discrimination on the grounds of age, **Section 5 of the Constitution** makes it clear that the rights and freedoms awarded under the Bill of Rights apply to all the people of Vanuatu therefore children are deemed to be included in this protection. The child also has a right to equal treatment before the law under **Section 5(1) (k) of the Constitution** which shows that children should not be

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.

discriminated before the law by having different standards applied to them in regards to admissibility of unsworn evidence. Therefore, Vanuatu also needs to declare the requirement of corroboration in relation to unsworn evidence of the child as discriminatory and depriving the child from equal and fair treatment before the law. The Courts in Vanuatu should exercise their revisionary jurisdiction and declare such a law which contravenes the fundamental rights of the child as null and void. The State Counsels Office and Attorney-General's Office in Vanuatu should make submissions to the legislature to repeal such discriminatory provisions which directly breach the rights of the individual provided for under the Constitution of Vanuatu. It does not need to be mentioned that such an action on the part of the government would boost the people's confidence in the government of Vanuatu and the importance it places on their individual rights. This would also be a message and encouragement to all other Pacific island countries that one does not only place these rights in their Constitutions and declare they respect these rights but also give effect to it by regarding other conflicting laws null and void.

Fiji and Vanuatu have both also made developments regarding corroboration in cases where evidence is being given by an accomplice. They have treated lies by an accused as corroboration and statements made by an accused as corroboration. However courts must exercise caution when deciding admissibility of caution interviews as they must be satisfied that the confession was obtained voluntarily and fairly. Having unfairly obtained confessional evidence would again be a breach of the accused person's constitutional rights of having a fair trial under the Constitution. If such cases where confession is obtained by trick, oppression, inducement or threat are heard and accused is convicted on that evidence alone then the decision is usually overturned on appeal and it wastes further valuable time and resources of the State and the courts in hearing the appeal and sending the case for re-trial. The State would have to bear the expenses twice for the one case which costs a valuable portion of tax-payers money. On top of that if the court does find that the rights of the accused were infringed then the State would end up paying costs and damages to the accused person for breaching their constitutional rights.

Documentary evidence in both countries Fiji and Vanuatu has saved a lot of the courts, and parties' time and sped up the trial process. The disadvantage for allowing documentary evidence without establishing the pre-requisites or exceptions to hearsay rule is that documents could have been tampered with or were not authentic. Thus courts also need to exercise caution in relation to documents which could have easily been tampered with or where the source of the information in the document is not known, or how the information contained in the document was supplied or received³⁴. Documents can also be self serving or prepared in anticipation of trial by the parties or forged or its authenticity may be difficult to establish. Therefore even though documentary evidence and post mortem reports are made admissible by the law, the courts need to ensure the source of information is reliable and authentic and that the document has not been tampered with or forged. This is an added pressure upon the Judges and assessors when evaluating the evidence and considering it.

Conclusion

From the above it is apparent that the law of evidence has developed significantly in Fiji and Vanuatu in respect of the requirement of corroborative evidence, typed records of interview and confessions, documentary evidence and post-

³⁴ Peter Murphy, *Murphy on Evidence* (11th ed, 2009)

mortem reports in evidence. Similar laws apply to all other common law jurisdictions which are faced with old rules of evidence while criminals are using new technologies. Fiji started off with the common law on the law of corroboration and now has done away with the corroboration requirement in sexual offence cases as per *Balelala's case* and unsworn evidence of the child as per the case of *State v AV* as the corroboration requirement is discriminatory and inconsistent with the provisions of the Constitution of Fiji. Vanuatu however still applies the common law and has included those common law principles in its legislation and applying them case by case. It does seem however from the recent decisions from the courts of Vanuatu such as *Benny's case* that they too may very soon follow the footsteps of Fiji and declare any law regarding corroboration unconstitutional if it is discriminatory against the women or children of Vanuatu but it has not yet been addressed by the Courts. These jurisdictions can amend and alter the law to make it suitable to the circumstances of the country or as the need arises due to advancement in technology and crimes.

Vanuatu needs to abrogate discriminatory laws and rules of evidence which conflict with the constitutional rights of the individual be it an adult or child and develop more laws in relation to these areas of corroborative evidence, caution interviews, documentary evidence and post-mortem reports bearing in mind the development in technology and the need to admit such evidence.

It can be clearly seen from the above how the common law approaches to different forms of evidence have been applied in the Pacific Island countries specifically Fiji and Vanuatu and how Fiji and Vanuatu have changed their approaches or the law over the years by giving priority to the fundamental rights of the individual under the Constitution and enforcing these rights which is creating a precedent for the other common law countries in the South Pacific region. The advantages gained by Fiji, and to be gained by Vanuatu by amending their laws and developing their laws clearly outweigh the disadvantages and encourages other nations to uphold the rights of their women and children and individuals which is fundamental, moral and socially essential for the Pacific communities if they want to be recognised as guardians of human rights.

Bibliography

Books

1. Peter Murphy, *Murphy on Evidence* (11th ed, 2009).
2. Julius Stone and W.A.N Wells, *Evidence, Its History, and Policies*, (1991).
3. Hodge M Malek, *Phipson on Evidence* (16th ed, 2005).
4. Collin Tapper, *Cross and Tapper on Evidence* (8th ed, 2009)

Legislation

5. *Constitution Amendment Act 1997 of Fiji* <http://www.pacii.org> (Accessed 10/3/2012)
6. *Constitution of the Republic of Vanuatu* <http://www.pacii.org> (Accessed 10/3/2012)

7. *Evidence Act* [Cap 41] (Fiji)
8. *Crimes Decree 2009* (Fiji)
9. *Penal Code* [Cap17] (Fiji)
10. *Criminal Procedure Code* [Cap 21] (Fiji)
11. *Criminal Procedure Decree 2009* (Fiji)
12. *Juveniles Act* [Cap 56] (Fiji)
13. *Oaths Act* [Cap 42] (Fiji)
14. *Evidence Bill 2003* (Vanuatu)
15. *Criminal Evidence Act 1965* (Vanuatu)
16. *Penal Code* [Cap 135] (Vanuatu)
17. *Criminal Procedure Code* [Cap 136] (Vanuatu)

Cases

18. *AG v Gopal* (1967) 13 FLR 65 <http://www.paclii.org> (Accessed 28 July 2011)
19. *Ali v State* [2011] FJCA 28 <http://www.paclii.org> (Accessed 28 July 2011)
20. *Ashwin Chand v The State* Criminal Appeal No. AAU0056/2006 <http://www.paclii.org> (Accessed 28 July 2011)
21. *Armogam v State* [2003] FJCA 32 <http://www.paclii.org> (Accessed 28 July 2011)
22. *Balelala v State* [2004] FJCA 49 <http://www.paclii.org> (Accessed 10 March 2012)
23. *Butera v Director of Public Prosecutions* (Vic) [1987] HCA 58; 164 CLR 180
24. *Callis v Gunn* [1963] 3 All ER 677
25. *Credland v Knowler* (1951) 35 Cr. App. R 45
26. *Davies v DPP* [1954] 38 C App R 11, 32
27. *DPP v Ping Lin* [1976] AC 574
28. *Durston v Mercuri* 1969 Victorian Reports 507
29. *Foraete Epinisi Jione v The State* Criminal Appeal No. CAV 0003 of 2007 <http://www.paclii.org> (Accessed 28 July 2011)
30. *Ganga Ram & Shiu Charan v R*, FCA Crim. App. Case No. 046 of 1983
31. *Ibrahim v R* [1914] AC 599
32. *Jenkins* [2004] 211 ALR 116, 121
33. *Kajala v Noble* [1982] 75 Cr App. R 149.
34. *Khan v R* (1973) 19 FLR 133 <http://www.paclii.org> (Accessed 28 July 2011)

35. Loveridge (1982) 76 Cr App R 125
36. *Myers v DPP*[1965] AC 101
37. *Nanise Wati v The State* [2003] Crim App AAU 6/95, 19 March 2004
38. *Public Prosecutor v Adams* [2008] VUSC 12, Criminal Case 73, 74 of 2007 <http://www.paclii.org> (Accessed 28 July 2011)
39. *Public Prosecutor v Michael Mereka* [1989-94] VLR 613 <http://www.paclii.org> (Accessed 29 March 2011)
40. *Public Prosecutor v Benny* [2009] VUSC 99 <http://www.paclii.org> (Accessed 21 March 2011)
41. *R v Crayden* [1978] 2 All ER 700
42. *R v Sang* [1980] AC 436
43. *Reg v Lucas* (Ruth) (1981) QB 720
44. *R v TJW* 989 1 Qd R 108
45. *Sakeo v The State* [2006] FJCA 58 <http://www.paclii.org> (Accessed 28 July 2011)
46. *Sakiusa Rokonabete v The State*, Criminal Appeal AAU00048, 2005 <http://www.paclii.org> (Accessed 28 July 2011)
47. *State v Alifereti* [2008] FJHC 208 <http://www.paclii.org> (Accessed 28 July 2011)
48. *State v AV* [2009] FJHC 18 <http://www.paclii.org> (Accessed 21 March 2011)
49. *State v Maika Soqonairi* Criminal case No. 0002 of 1996 <http://www.paclii.org> (Accessed 28 July 2011)
50. *State v Singh* [2005] FJHC 723 <http://www.paclii.org> (Accessed 28 July 2011)
51. *State v Swamy* [2010] FJMC 165 <http://www.paclii.org> (Accessed 21 March 2011)
52. *Swadesh Kumar Singh v State* [2006] Crim App CAV 7/05, 19 October 2006 <http://www.paclii.org> (Accessed 28 July 2011)
53. *Vanuatu (New Hebrides) Procurator General v Jaques Pala* District Court No. 654 of 1979 <http://www.paclii.org> (Accessed 29 March 2011)
54. *Vanuatu Public Prosecutor v James Samuel* Cr 375/82
55. *Walker v Public Prosecutor* [2007] VUCA 12 <http://www.paclii.org> (Accessed 29 March 2011)
56. *Zafir Ali & Others v The State* Criminal Appeal no. AAU 0041 of 2010 <http://www.paclii.org> (Accessed 28 July 2011)

The impossibility of community justice whilst there is Intervention

Mary Spiers Williams, Australian National University

Introduction

Australian governments have had an inconsistent approach to Indigenous peoples, customary law and cultural practices. Delineation of general eras since first contact can help in a limited way to understand the relationship. Intersecting and overlapping, European contact with indigenous Australians can be categorised generally into four eras: genocide, assimilation/protection, welfare and criminalization. These eras are not fixed throughout Australia: local conditions differ and categories were, and remain, unstable. For example, Musharbash describes the significant “historical waypoints” of European contact for Warlpiri people (with whom this paper is primarily concerned) as: sedentisation and institutionalisation (from the 1940s-1960s onwards), ‘integration’ into the cash economy (1960s-1970s), and ‘self-determination’ (1980s-1990s) (Musharbash, 2010). These ‘waypoints’ or ‘eras’, while helpful, do not reflect the complexity of the engagement in which there is a tension between the desire to reconcile modern settler Australia with Indigenous Australians and the self-interest that fuels anti-Indigeneity. It is also important to recognise that there is a difference between the bigotries of “racism” and “anti-Indigeneity”: anti-Indigeneity is a bigotry that intersects racism with an imperative to de-legitimise the connection of Indigenous people to the lands that the settler State occupies. It is, like racism, a slippery phenomenon, which reinvents itself and can mask itself as well-meaning, despite being rooted in self-interest and fear.

In her consideration of increasing Indigenous incarceration rates in Australia, Anthony traces the ‘hardening’ of judicial attitudes towards Aboriginal customary law and cultural practices (Anthony, 2008). Anthony’s starting point is Garland’s analysis of penal modernism (Garland, 2001, but see also Garland, 1995, 1996). Garland identifies a late 20th century trend that privileges victim’s interest, retribution, protection of the wider community. Anthony analyses Supreme Court of the Northern Territory (and NSW) sentencing remarks concerning Indigenous offenders, and finds that Garland’s thesis does not sufficiently explain judicial discourses, finding that the trend in Indigenous sentencing has to be understood as part of the ongoing “post-colonial” narrative, that contextualizes Indigenous offenders in a dysfunctional community, that is “is both condemned and in need of rescue” thereby justifying greater use of crime control mechanisms (Anthony, 2008). I suggest that there are further complicating elements that compound this anti-Indigeneity. One is the rationality of ‘risk’ (O’Malley, 2000), which further helps to explain why judicial attitudes towards Indigenous people have hardened. That is, evidence which in the past may have justified mercy, now instead indicates a risk of future offending, which then seems to justify a more punitive response. Another is the phenomenon of ‘Intervention’. Intervention is one current in the stream of anti-Indigenous post-colonial discourse. Whilst I have reservations about placing a marker in history whilst we are still ‘in’ it, there is now sufficient evidence to suggest that the phenomenon of Intervention, in contradistinction to the previous more tolerant environment and discourse of self-determination, now aggravates anti-Indigeneity. I suggest that one set of court cases and their surrounding events which from September to December 2010 dominated media coverage of the Intervention and Indigenous issues in Australia, marks another low point in settler Australia’s engagement with Indigenous Australians, demonstrating the deleterious impact that Intervention has, giving us some insight into the powerlessness, hopelessness and disenfranchisement that many Warlpiri people are experiencing.

This paper considers whether there is evidence of hardening of judicial attitudes in the Magistrates Courts in the Northern Territory, and considers specifically judicial attitudes to the community of the Indigenous offender. Like Anthony’s findings regarding the Supreme Court of the Northern Territory, I find that there is also evidence of such hardening in the Magistrates Court, including a tendency to locate the offender within a dysfunctional community, which is both “condemned and in need

of rescue" - or Intervention. I find that in a post-colonial phase of Intervention that the opportunity for community participation in justice processes, such as in community courts, is so limited as to be rendered tokenistic.

A note on methodology. Magistrates Court cases are rarely analysed as, unlike the Supreme Court, their decisions are not usually reported and transcripts are not readily or cheaply available.¹ Case studies of Magistrates Courts decisions require a lot of time and resilience to boredom on the part of the researcher, and, in remote courts, a large fuel budget. The observations in this paper are drawn from doctoral field work research undertaken in 2010 and 2011 in courts of summary jurisdiction in central Australia, interviews with current and former legal practitioners, magistrates and other court workers (who worked and/or work in the Northern Territory in the 1980s to the present); and some Warlpiri people from the communities of Lajamanu, Yuendumu and Ali Curung. I am very grateful for both their information and their insights many of which I have been persuaded to adopt. I am sorry that the size of this paper does not permit me to fully acknowledge their input.

Magistrates' engagement with community members: 1980s to 1990s

I begin now by describing the engagement of magistrates with community members and the reasons for this cooperation, outlining some of the limited information that is available about practices in the 1980s until the present day. I consider also the changing environments and explore whether there has been a hardening of attitudes not only to offenders and their culture, but also to the communities from which they come, and if so, how to explain it.

In the 1980s some magistrates sought the assistance of senior clansmen [sic] or 'Elders' in their sentencing processes. The magistrates offered many different objectives for these experiments in community justice:

- a) to demonstrate respect for those who really enforced law and justice in the absence of the visiting court,
- b) to improve information (quality of evidence), either through taking judicial notice of information shared with the senior person/s or through that person's ability to elicit more - and more reliable - evidence from an offender or victim;
- c) to improve the manner in which evidence was construed (that is, to understand better how local Aboriginal people would interpret that evidence);
- d) to educate the judicial officer about the way of being and understanding of the community in which she or he is called upon to pass judgement (reflecting democratic principles) in order that community values can be more meaningfully reflected and expressed by that judicial officer;
- e) to understand better the impact of a sentence on the community, for example, to ensure that it does in fact protect the community (a purpose now reflected under section 5(1)(e) *Sentencing Act* (NT))
- f) to ensure that the court order was communicated and understood by the offender
- g) to strengthen community support for court orders: in the court room through the simple presence of community members but also through the community member's engagement with the offender and other relevant people during and after court;
- h) to ensure that there are others in the offender's community who understand the court order, who may facilitate the offender completing the court order.
- i) to educate community generally through the education of community leaders about court processes
- j) to support those who are responsible for local justice practices and that maintain law and order in the absence of the court (and perhaps also police) in the intervening months before the court returns to the community
- k) to support and enhance local justice mechanisms to strengthen shared values, such as justice, discipline, responsibility and respect.

¹ I note that since the beginning of 2012 the NT Magistrate Court now make some transcripts of judgments available online.

At least since the 1980s, magistrates in the Northern Territory have attempted to better inform themselves about the conditions and circumstances of the offending behaviour of Indigenous defendants that appeared before the court. This is particularly so in Aboriginal settlements to which circuit courts travel, where the magistrates acknowledged they did not fully understand the everyday life of the local people that they were called upon to judge. This would only occur in relation to sentencing and sometimes bail matters. Some magistrates would adjust conventional court processes so that they could consult from the makeshift bench with a local person whom they believed was senior, reliable and authoritative, inviting the senior person to join the magistrate on the bench. This served many other purposes as well: if the "right person" were selected it bolstered the authority of the court, as well as that of the senior clansman. It was hoped that this would encourage offenders to follow the orders of the court and be dissuaded from re-offending. It also expressed the court (and perhaps the Northern Territory Government's) respect for the community member and his community. Some magistrates met outside the court sitting times with community members, sometimes in meetings, sometimes informally. Community engagement was supported by several former Chief Magistrates, and practiced by them and other magistrates (Blokland, 2010; S. Brown, 2010; Cox, 2010; Gray, 2010; Little, 2010; MacCormack, 2010; Pauling, 2010).

There remain unanswered questions about the effectiveness of these practices, and also about possible unforeseen negative impacts, as to my knowledge these were never evaluated in any way. Some magistrates had misgivings about the process and persisted with the customary (traditional) process inherited from English criminal law courts without modification. According to the magistrates and lawyers who did modify process or engaged in extra-curial engagements with communities at this time, the intention of the magistrates was to constructively engage with community members in order to learn about local practices and attitudes and to share knowledge about the non-Indigenous criminal justice system. From one point of view this engagement could be construed as an ad hoc process that suffered for not being grounded in theory or empirical evidence. From another point of view, it was a positive, exploratory engagement that permitted flexibility and allowed the process to be reflexive to local circumstances, which are different in each community, language group and clan.

Influences on judicial attitudes

Up until the 1980s, courts had been permitted to give special consideration to 'Aboriginal natives' who appeared before them. For example, until 1983 in the Northern Territory there were special provisions which effectively exempted some offenders from mandatory sentencing provisions (section 6(1C) of the *Criminal Law Consolidation Act 1935* (SA)) and were required to "receive and consider any evidence which may be tendered as to any relevant native law or custom and its application to the facts of the case and any evidence which may be tendered in mitigation of penalty" (section 6A). This legislation was intended to protect Aboriginal offenders from the excesses of the criminal justice system, in recognition that time was needed for Aboriginal people to 'progress' from their tribal state, and assimilate the values and expectations of the colonising justice system (Australian Law Reform Commission, 1986); see also (Douglas, 2002, 2004, 2006a, 2006b, 2009). It is not clear whether it achieved its protectionist aims; it may instead have worked against Aboriginal defendants' interests, as for example Auty found in her examination of the Western Australian Courts of Native Affairs (Auty, 2000). It is clear however that courts were not only permitted to adjust process and rules of evidence and to dispense with sentencing mandatories in relation to Indigenous defendants, they were required to.

The innovations in court practices in the 1980s and 1990s may have emerged from a legislative imprimatur that embodied protectionist policies, but by the 1980s the momentum of the political reforms of the 1970s meant that such judicial practices were supported by an intellectual and political environment that was conducive to self-determination and respected legal pluralism. As such these innovative court practices can be perceived as endorsement of cultural relativism rather than adopting a universalist position regarding rights. Such an endorsement attracts the criticism from those who perceive that it

can support existing, or engender the development of, unhealthy power imbalances, for example, by exacerbating inter-clan rivalry or violence of men against women. It seems more likely that both cultural relativism and human rights influenced judicial officers, but their application was and still is affected by a pragmatic view of the limitations of the criminal justice system. Most experienced criminal justice practitioners recognise that the criminal justice system is not the primary vehicle through which to effect positive social change, and are consistently dismayed at expectations otherwise. Judicial officers are required to apply general rules and principles of law and justice as effectively as they can on an individual case basis, the context of which should be relevantly considered.

In the Supreme Court this manifested in a preparedness to accept that there are other systems of laws operating in the Northern Territory, although the laws are usually characterised as “cultural practice” or custom (see Anthony’s review of such cases for example: 2008) This was also inflected by a recognition that Aboriginal people, their laws and practices had been egregiously undermined by aggressive colonization of their lands in a gross breach of their universal human rights as well as their Indigenous rights, and that the criminal law had played a part in their colonisation (Bird, 1987). In some cases, courts also recognised that many offenders who came before the criminal law courts to be sentenced also breached Aboriginal law. Courts recognised that Aboriginal law had deteriorated through colonial practices – because of individuals’ choices and because of direct impact of official government agency. In their small way, lawyers and judicial officers were attempting to wrestle with the legacy of their forebears to help strengthen and support Aboriginal people who were still struggling to overcome intergenerational trauma, at a time when government policy was directed to rebuilding, supporting and strengthening. There is no doubt that the judgments of the Supreme Court of the Northern Territory had considerable influence of the magistrates of the lower courts, if only because of the principle of *stare decisis*, but also because their judgments were susceptible to review in that court if appealed.

The Supreme Court cases concerned violence used by or on the offender as punishment for a breach of Aboriginal law.² The Supreme Court could take into account evidence, such as the spearing of an offender in the leg, a mitigation being extra-curial punishment (for example *R v Minor*), and recognised that in some of these cases the offender had broken Aboriginal law (for example *R v Gondarra*). Alternatively, the Court could take into account the views of the offender’s tribe (the views also being held by an offender), that the offender-husband had legitimately “punished” his wife for transgressing Aboriginal law and could include sexual violence (for example, *R v Narjic*). In some cases, this appears to have been used as evidence mitigating sentence. The numbers of cases in which customary law was raised appear to have been few in number – from 1994 to 2006 as little as two per cent of Indigenous offenders, or three per year (Martin, 2007).

Many of the customary/traditional/tribal laws practices remain as unpalatable to mainstream Australians then as now (Cowlshaw, 2003), and the Supreme Court judges’ efforts were subject to trenchant academic criticism. During the 1990s, from the unsteady alliance of feminism with Indigenous women (Behrendt, 1993; Bell, 1991; Howe, 1994; Larbelestier, 1980, 1990; Pettman, 1992) emerged a furious denunciation of “bullshit law” (Atkinson, 2006). Courts were criticised for apparently condoning violence against women and children by mitigating sentences (Bolger, 1991). They were not placated by the fact that convictions were recorded and the conduct denounced in the judgements, such as in *Hales v Jamilmira* in which Justice Mildren stated:

² Martin provides a useful summary of cases in which customary law (Martin, 2007). See also Watson (2009).

It should be made clear that wherever there is a direct conflict between the law of the land and Aboriginal customary law, the law of the land must prevail. ... However that does not deny that social pressures brought to bear on an Aboriginal defendant as a result of Aboriginal customs are not relevant to moral blame and therefore to sentencing. The weight to be given to the effect of customary law or cultural factors by a sentencer will vary according to the circumstances. Those circumstances will include the strength of the customary law in the area in which the offender lives and the degree of punishment or social ostracism the offender is likely to suffer should he or she refuse to conform to the rules of the community in which he or she lives.

There is concern that Aboriginal law is misrepresented in court, and that insufficient evidence is brought before the court regarding the content of Aboriginal law, its status in the relevant community and in particular whether only one perspective (that of the offender) on laws which may be contested is brought before the court (Atkinson, 1990a, 1990b, 2006; Greer, 1994; Payne, 1992; Selfe & Thomas, 1992). Prosecutors, for example, have been criticized for failing to challenge the quality of evidence presented in sentencing pleas in mitigation and to counter with other evidence (Rogers, 1999). Some saw this as a function of colonialism (and post or neocolonialism) which replicated its own modes of repressions against women (Scutt, 1990), particularly as Aboriginal women rarely gave evidence of Aboriginal law (Bolger, 1991). Others rejected any mitigation on the basis of Aboriginal law - even where it was accurately represented in court - where it was inconsistent with universal (individual) human rights law (Kimm, 2004), asserting that it should override any community rights or Indigenous rights (see Davis and McGlade for a comprehensive overview: 2005). Atkinson and others have been dismayed - after years of advocacy for their right to live free from violence and to also live as Indigenous people - that the simplistically drawn conclusion of populist writers such as (Nowra, 2007) that family violence was inherently part of traditional Aboriginal and that therefore this is the cause of the violence in post colonial, modern Australia have had greater influence on current social policy (Chandler, 2007).

In 2007, the former Chief Justice of the Supreme Court of the Northern Territory delivered a colloquium that describes the challenges facing judicial officers attempting to deal with interpersonal violence by Aboriginal men against Aboriginal women and children (Martin, 2007; see also Mildren, 2008). Concurrent with the critique of judicial sentencing practices and the related shift in judicial sentencing practices, the informal involvement of Aboriginal community leaders in Northern Territory courts of summary jurisdiction seems to have fallen into abeyance in the late 1990s, perhaps paradoxically as other jurisdictions began enthusiastically to embrace the opportunities presented by engagement with senior and respected community people (Auty, 2010, ND; Auty & Briggs, 2004; Boxall, 2005; Dick, 2006; Harris, 2004; Marchetti & Daly, 2004; Popovic, ND; Temby, ND). This is despite some Aboriginal women suggesting that the way forward was through community involvement, rather than less (Atkinson, 2001; McGlade, 2006). In the Northern Territory, though, the views of the NPY Womens Council seems to be have had greater influence on Government policy; while asserting that their law and culture was valued and practiced, with respect to violence against women and children they argued for the "protection from law enforcement agencies and state and territory legislation" (Lloyd, 2004; Lloyd & Rogers, 1993). The Northern Territory's prosecution guidelines arguably reflect this, stating that "Aboriginal women's individual human rights to live free of violence must prevail over the minority rights of Indigenous people to retain and enjoy their culture", and "A prosecutor must ensure as far as possible that Aboriginal customary law is not used to curtail an Aboriginal woman's or child's right to individual safety and freedom from violence. Aboriginal women and children are Australian citizens and, as such, are entitled to the protection of the law" (Northern Territory Director of Public Prosecutions, 2005, Guideline 20).

The desistance of community member involvement in Magistrates Court together with increasing imprisonment rates can in this sense be seen to be consistent with Garland's analysis of the shift towards victim's interests, coupled with the trend towards greater punitiveness.

Revival of community participation in court: 2000s

This is not to say that other forms of communitarian justice were not practiced from this time. From the mid-1990s to early 2000s, the Aboriginal Law and Justice Strategy supported the initiatives from the Law and Justice Groups of Yuendumu, Lajamanu and Yuendumu (which also formed a collective committee called the "Kurduju Committee"). The objectives of this group were to engage and develop strong positive relationships with *kardiya* (non-Aboriginal) government agencies so that the "two laws" could work together to support each other to achieve safety and well-being in their respective communities (Ali Curung Law and Justice Committee, 2003; Martin, 2007; Spiers Williams, 2007a; Wild & Anderson, 2007). The object of this was to encourage police, corrections, community services, health workers, etcetera to consult properly and seek advice from the local "law men and women" in order to ensure that their actions did not have negative unintended consequences, consequences that were foreseeable by community leaders but not by the fly in / fly out policy makers. This was called "participatory planning" (Ryan, 2004; Ryan & Antoun, 2001). A small part of the work of the Kurduju Committee was to conduct pre-court conferences, where they would discuss the upcoming bi- or tri-monthly sittings of the Magistrates Court, sometimes talk to the trouble makers about their charges, and prepare a report for the court that provided information about the person charged and recommendations for disposition.³ The Community Corrections officer participated in these meetings and provided the report to the court. The impact of these committees was such that, as one former magistrate remarked, "they did themselves out of a job": the programme was terminated without explanation to the communities in particular, or in general, by the Department of Justice in 2004 (Ryan, 2004; Spiers Williams, 2007a; Wild & Anderson, 2007). After that time, community corrections officers continued to assist the Lajamanu Law and Justice Committee, however it is not clear that the successive visiting officers from Katherine understood the purpose or the context of this practice. Corrections desisted this practice in Lajamanu in 2008 (Spiers Williams & Tangentyere Council, 2008a, 2008b). The practice was revived in mid-2009 when the North Australian Aboriginal Justice Agency started a visiting community outreach programme (Crawford, 2011; Grimes, 2010, 2011; Hunyor, 2010). In Yuendumu, after ceasing in 2004, the practice recommenced in 2007 when a non-Aboriginal interstate law graduate began working for the Yuendumu Justice Mediation Group in 2007 (Teh, 2010). In Ali Curung, since 2004, only one court report was prepared by their Law and Justice Group in December 2008 (Spiers Williams & Tangentyere Council, 2008a).

In the top end of the Northern Territory, since the early 2000s, some magistrates, influenced by therapeutic jurisprudence and principles of restorative justice, began to consult with court workers and community members to involve those directly involved with the offence (that is, victims and family members) as well as senior and respected community members. The community courts that have developed in the Top End at Nhulunbuy and Tiwi originally relied heavily on the facilitation of a community corrections officer that was from the local community and the cooperation of the prosecution, police and defence lawyer. Both of these courts echo a circle court model, and can involve the victim (if any) and the offender with their respective support people, and may include senior members of the community and social services workers (Blokland, 2005, 2007b, 2009; Spiers Williams, 2007b).

³ I note that there are issues arise concerning the court reports, however I do not address this in this paper.

In 2005, the then Chief Magistrate Hugh Bradley issued guidelines in 2005 for the Darwin Community Court (Bradley 2005). These guidelines were developed in consultation with interested government agencies and legal service providers in Darwin. The final guidelines were specifically for the Darwin Community Court, but they reflected practices that had developed *ad hoc*. The guidelines required an assessment process and report to the magistrate, and a role for defendants, victims, and other community members; the community courts were conducted only in the summary jurisdiction for sentencing matters; the magistrate retained control over proceedings and the disposition, and Northern Territory law was ordinate. Customary law therefore appears to have the status of evidence of cultural practice and beliefs. Reflecting perceived community antipathy to Indigenous-specific courts (Spiers Williams, 2007), the guidelines clarify that the community court is an option for any member of the community.

The shift in the public perceptions about 'Aboriginal culture'

In 2000, Peter Sutton first delivered his paper on "The Politics of Suffering", triggering a heated debate amongst anthropologists and beyond regarding their impact on social policy regarding Australian Indigenous people (Sutton, 2001). In the mid-2000s this debate percolated into the critiques against 'bullshit law' (and then fed into the media exposes in 2006 discussed below), and began to have an impact on legislation and Government social policy. Whilst policies and practices of criminal justice agencies (notably police and courts) more and more reflected concerns about protection of Aboriginal women and children from violence, it was not until 2006 that the Coalition of Australian Governments agreed to give effect to the following principle: "...that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment" (Coalition of Australian Governments, 2006).

An enactment of this policy decision should have been to simply codify this principle, and rely upon judicial officers to apply it in the circumstances of their case. Instead both the Northern Territory and Commonwealth Governments chose to restrict the discretion of judicial officers and, purporting to give effect to the policy determination, amended the rules of evidence in relation to sentencing. Unlike the rules of evidence in contested hearings, evidence in sentencing hearings is not usually subject to rules of evidence. The rules that each Government introduced however were quite different. Both rules however present considerable difficulties for practitioners and in the case of the Commonwealth reform are both conceptually and legally highly flawed.

The Northern Territory Government response was to amend the *Sentencing Act* (NT), introducing requirements that evidence of Aboriginal customary law and cultural practice be in the form of sworn testimony (oral or written) and therefore subject to testing in cross-examination (section 104A *Sentencing Act* (NT);(Northern Territory Parliament, 2006), and that advance notice in writing of the details of evidence be provided to the parties.

This section had the potential to impede all future community courts. If a community member's participation were to be characterised as "evidence", then this would create challenges for the community member, who is typically in a remote under-resourced traditional community where English is spoken as a second (or third, etcetera) language, and would struggle to comply with the written notice provisions. Community members are not aligned with the Crown or the Defence, and the typical lack of resourcing and support for community courts members means that there is little chance of the court proceeding (Goldflam, 2010). It appears, though, that section 104A of the *Sentencing Act* (NT) had no impact on community courts after 2006. This suggests perhaps that community court members, who participate having 'standing' or as quasi-judicial officers (perhaps considered similar to Justices of the Peace). Section 104A has been applied in at least one community court hearing, but not in relation to the community participants, rather in relation to ceremonial obligations of the

offender: former Chief Magistrate Blokland describes a case in which she required affidavit evidence regarding the sentencing of a man who was required to participate in an important ceremony (Blokland, 2005; Blokland 2010).

It does not appear that the Northern Territory Government wished to silence or exclude Aboriginal law, customs or culture from discussion within the legal processes, and specifically did not contemplate community courts when passing this legislation. Their aim was to create a system that brought rigour to the consideration of evidence of Aboriginal law and custom, not to exclude it or denigrate it.

The Commonwealth Government's response to the COAG agreement was to amend the *Crimes Act 1914* (Cth), limiting the use that judicial officers could make of evidence of 'customary law' and 'cultural practices' with respect sentencing (s16A(2A) *Crimes Act 1914* (Cth)) and bail.⁴ This introduction of section 16A(2A) attracted wide ranging criticism (Lorimer & Rimmer, 2006).

Section 16A (which otherwise codifies sentencing factors) states that "[i]n determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence ... " but that the court:

(2A) ... must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for:

(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or

(b) aggravating the seriousness of the criminal behaviour to which the offence relates.

(2B) In subsection (2A):

"criminal behaviour" includes:

(a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and

(b) any fault element relating to such a physical element.

The Act does not define the 'customary law' or the 'cultural practice', and it specifically does not 'target' Indigenous people; at that time it would have breached its own *Race Discrimination Act 1975*. Whilst there are statutory interpretation mechanisms for interpreting customary law, 'cultural practice' is extremely broad. I do not extrapolate in this paper regarding the concept of 'culture', but note only that the concept of 'culture' is no longer a means to classificatory system of Linnaean inspired race differentiation (Boas, 1940). Since modern scholarship, culture is no longer a knowable, 'bounded' category (Bourdieu, 1986), rather it is unstable and changeable, not easily determinable, understood instead in terms of emergence, change, divergence within groups (Bhabha, 1994; Geertz, 1985; Latour, 2005). Significantly, no longer is European 'culture' whitewashed (Baudrillard, 1993), and 'Western culture' is subject to as much scrutiny as that of the 'other'.

In sentencing law, the greater part of the evidence that affects mitigation can be characterised as 'cultural practice': for example, obligations, expectations or values that relate to family, recreation, employment, standards of behaviour, ways of interacting. The sentencing inquiry is quite different from that into the question of guilt or innocence. Once a person has been convicted, the judicial officer has a duty to explore and understand why an act of deviance was committed in order to denunciate, explain that to the community and ensure that the outcome best protects the community. The application of

⁴ At the time, the then Northern Territory Opposition Leader, Carney, had proposed a Bill in similar terms (Sentencing Amendment (Cultural Practice and Customary Law) Bill 2006 (NT)) however it was not supported by the Northern Territory Government.

section 91 would result in the exclusion of highly relevant evidence that may explain why an offence was committed. This would result in a predominance of evidence that tends towards aggravation of a sentence, and inevitably miscarriage of justice. Section 16A (2A) fundamentally undermines the sentencing process. Behrendt expressed related concerns:

The proposal to legislate to exclude customary law from the factors that can be considered in sentencing is dangerous. Like any attempt to restrict a judicial officer's capacity to weigh up all the relevant factors when sentencing, the inability to consider customary law at all will impede the capacity to ensure that a just sentence is given in each particular circumstance before the court. It is also a serious infringement on the judicial process by the legislature and as such has implications for the principle for the separation of powers. (Behrendt, 2006a, 2006b)

The reform was made to address the concerns of Aboriginal women yet (Behrendt continues),

[n]owhere in the calls from Aboriginal women for the judiciary to reject so called customary defences or to value the rights of victims more highly than cultural practices that breach human rights, was there a call for the blanket exclusion of customary law from the judicial decision-making process when determining a sentence. (Behrendt 2006).

The Inquiry into the Protection of Aboriginal Children from Sexual Abuse (Wild & Anderson, 2007) later also rejected the myth on which this reform appears to be based, that is, that "Aboriginal law is the reason for high levels of sexual abuse" and that "Aboriginal law is used as an excuse to justify abuse", noting that these myths are also "rejected by many other authoritative sources," citing (Gordon, Hallahan, & Henry, 2002; Human Rights and Equal Opportunity Commission, 2006; Law Reform Commission of Western Australian, 2006).

The Australian Human Rights Commission, in its submission objecting to the introduction of section 16A(2A), observed that this section would have serious implications for community involvement in mainstream justice processes:

"The Bill will undermine important initiatives, such as circle sentencing, that have sought to engage with aspects of Indigenous customary law and practice in a positive way." (Australian Human Rights Commission, 2006)

At the time that the section was introduced, it would have seemed that the provision, whilst conceptually problematic, would have limited practical impact, as Commonwealth criminal cases (examples of which include cross border offences, social security fraud, illegal fishing, telecommunications offences and pornography) are few in number, and would rarely, if at all, trigger the use of the provisions.⁵ The advocacy may not have been as forceful or as persistent if advocates had realized that this section would be replicated and imposed upon the Northern Territory in 2007.

Momentum for Intervention gathers: the impact of media and the Wild/Anderson Report

Media also had an effect on the minds of those in central Australia. The Northern Territory rarely receives serious national attention. The impact of the interview of Nanette Rogers' on the Australian Broadcasting Corporation's *Lateline* in 2006 (Jones, 2006), in which she disclosed a dossier of horrifying child abuse cases perpetrated by Aboriginal men, and then a later report regarding controversial allegations of paedophilia the community of Mutitjulu (Smith, 2006a, 2006b), was dramatic. When it occurred, there was considerable discomfort that such strong criticism was being levied from across the

⁵ In Australia, the States and Territories have carriage of the greater number of criminal cases and administer the mechanisms of the criminal justice system, including prisons.

spectrum of Australian society. In response, on 8 August 2006 the Northern Territory Government commissioned Rex Wild and Pat Anderson to conduct an inquiry into the protection of Aboriginal children from abuse.

The report of the Inquiry, often referred to as the *Little Children are Sacred Report* (Wild & Anderson, 2007), was released in early 2007. It does not disclose new or precise information regarding widespread abuse but called for a whole of government response to the disadvantage and marginalization underlying offending behaviour, the inquiry methodology having been more that of compiling existing research, conducting meetings and consultations with Aboriginal people and their communities as well as government and non-government agencies, and to consider strategies to address this. It did not gather data or evidence (on details, time or place), for example, of the many of the painful experiences disclosed by Aboriginal people the report, as this was not the aim of the Inquiry. Rather its aims and methods were more analogous to the truth and reconciliation inquiries held in South Africa (for similar observations see (Jawoyn Association Aboriginal Corporation & Sunrise Health Service Aboriginal Corporation, 2008)). The report can be broadly described as a compassionate text that sought to give Aboriginal people a voice, and that urged participatory engagement with communities to help them to address the problems of violence with which they live. For example, it endorsed the “rules of engagement” set out by the Western Australia Law Reform Commission report on the recognition of customary law (LRCWA 2006).

The Report recommended the introduction of Aboriginal Courts in the Northern Territory:

[Recommendation] 74. That, having regard to the success of Aboriginal courts in other jurisdictions in Australia, the government commence dialogue with Aboriginal communities aimed at developing language group-specific Aboriginal courts in the Northern Territory.

The report writers had discussed the community courts, but specifically recommended their preference for the introduction of “Aboriginal courts”. They also recommended that Community Justice Groups, such as the Law and Justice Committees, “[a]ssist in any establishment of Aboriginal courts and provide a suitable panel from which Elders could be chosen to sit with the magistrate”. In late 2007, the Chief Minister’s response to these recommendations was an undertaking to introduce ten community courts (not Aboriginal courts) throughout the Northern Territory. The response in relation to recommendation 74 read:

“The Northern Territory will expand the use of Community Courts in remote communities. This model is based on community participation in sentencing, rehabilitation and reintegration for matters heard in the Magistrates Court. Aboriginal interpreters play a key role in the Community Court process.” (Dept. of the Chief Minister of the Northern Territory, 2007)

In 2007, the Northern Territory Department of Justice apparently intended that the ten new community correction officers (one for each of ten selected remote communities) would assist in the facilitation of community courts in their communities. There was also a commitment to have two centralised community court facilitators located (one each) in Darwin and Alice Springs (Spiers Williams, 2007b). The Government’s response suggests a move away from specialist responses to Aboriginal concerns.

The Commonwealth Government Intervenes

By then, however, the Australian Federal Government had launched the Northern Territory National Emergency Response, referred to as the 'the Intervention', pre-empting any Northern Territory Government response.⁶ The enabling legislation was passed by August 2007.⁷ Within that legislation was section 91 of the *Northern Territory National Emergency Response Act 2007*, which replicated the provisions of section 16A(2A) of the *Crimes Act 1914* (Cth) (discussed above). Section 91 read:

Matters to which court is to have regard when passing sentence etc.

In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:

- (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
- (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

It was not immediately clear how the community courts would be affected by this reform, despite concerns expressed about the section's forbear, section 16A(2A) *Crimes Act 1914* (Cth). The then Chief Magistrate did not issue special Rules in relation to the manner in which all magistrates were to conduct their proceedings, supporting judicial independence and non-interference in the manner in which each magistrate conducted their own court (Spiers Williams, 2007b). During the time, some attempts were made in central Australia to develop other models of community involvement that were negotiated with community members. For example, in 2007 Magistrate Melanie Little met regularly with senior community members when the court travelled to Yuendumu and then later with the "Yuendumu Justice Mediation Group" to develop separate guidelines to conduct court there.⁸ That Group recommenced the previous practices of the Kurduju Committee of preparing a report before court sat, and also began to sit in on proceedings in the courtroom, physically located behind a table in a position similar to that of a jury box. The magistrate would occasionally ask for information and assistance from them in the course of proceedings. An interpreter was rarely or never used, usually because of the scarcity of interpreters rather than unwillingness to use them. (Blokland, 2007a; Little, 2007, 2010; Teh, 2010).

In all other places, the 2005 Darwin Community Court Guidelines (Bradley, 2005) appear to have been applied in circle court type processes conducted elsewhere in the Territory, including Nhulunbuy and Tiwi, where the first circle-type courts were conducted, and later in Yuendumu from mid-2008 (Spiers Williams & Tangentyere Council, 2008a) until end 2010. Any community members who participated could be said to have 'standing' in the customary summary court process.

In 2008, community courts began to be held in the remote central Australian community of Yuendumu. Although there had been consultation with community members about their preferred model, this was not implemented. When the community court commenced, the magistrate explained the limited cases in which it would be available and those for which it would specifically not be available (that is charges involving violence) and the procedure, and it proceeded thus. This procedure can be summarised as the conventional procedure for conducting a plea with some variations. After taking the plea, all

⁶ There is also an Intervention northern Queensland however this has attracted relatively little national media interest, and has been run in a more participatory manner than that of the Northern Territory Intervention.

⁷ The Australian Federal or Commonwealth Government has the Constitutional power to make laws in relation to the Northern Territory (s122 Constitution 1901 (Cth)), and to make laws with respect to race (s51(26) Constitution 1901 (Cth).)

⁸ These guidelines have not been formally endorsed by the Yuendumu community (Teh 2010).

parties remained seated; prior to defence submissions the community members had an opportunity to speak directly to the offender; after all submissions were heard from legal representatives, the offender was given an opportunity to speak; the magistrate would then tell the community members how he was planning to sentence and ask them for their comments; finally, the magistrate would proceed to sentence (Spiers Williams & Tangentyere Council, 2008a).

Some legal practitioners and magistrates had doubts about whether community involvement served any practical benefit, and were concerned instead about causing unintended negative consequences arising from such proceedings. Unsurprisingly then, when the Northern Territory government agreed in 2007 to institute 'community courts' throughout the Northern Territory, the response of some magistrates was to be cautious and to be slow to implement them; they were either reluctant to hold community courts or only heard matters that concerned relatively minor traffic and *Liquor Act* (NT) offences. One reason for this cautious approach may have been that magistrates were concerned they had insufficient knowledge about the local circumstances to judge the proceedings' impact, which is related to the lack of resourcing for community court workers. Some participants suggested that another reason may have been that Magistrates after some years in practice or on the bench had formed opinions about the local Aboriginal cultural practices and beliefs, and believed that holding a community court would more likely result in negative consequences (Court observations and interviews, 2010-2011). Magistrates in central Australia, for example, determined that they would not hear any domestic violence charges in a community court (Court observations and interviews, 2010-2011). The practice of prosecutors from the Alice Springs Office of the Director of Public Prosecutions was to oppose any applications to have such matters heard (Barson, 2010). This appears to have been due to concerns that there may be reprisals against the victim or their family, or because they did not believe that a victim was able to fully and freely participate due to pressure, which may in turn result in lenient responses. In the absence of an appropriate level of resourcing for community court support it is unlikely this will change (Goldflam 2012).

Impact of 'The Intervention' enabling legislation begins to be felt

Three years after the commencement of the legislation, the legal infrastructure that enabled the Northern Territory Emergency Response (or 'The Intervention') did not seem to have been fully realised nor assimilated by legal practitioners. The *Northern Territory Emergency Response Act*, after all, proclaimed itself to be a piece of benign legislation, and implicitly stated that all acts that the legislation empowered were of benefit to Aboriginal people.⁹ The legislation was supposed to positively affect social policy regarding nutrition, health, housing, education. It was assumed that the protection of little children would be effected through the use of existing criminal laws and police powers, and that this would be facilitated simply through increasing the numbers of police officers. Initially, it was not generally perceived that the Intervention legislation had that great an impact on the practice of criminal law nor on police powers. When asked, for example, about the application of section 91, all the practitioners (bar one) in Alice Springs who were approached said that it had not been referred to in any of their cases, as it did not have any application. The NTNER's legislative framework's provisions are large, complex and unwieldy. There are stand-alone rules, rules that amend other pieces of legislation and rules that must be read with other pieces of legislation. Compared to the lengthy provisions that relate to welfare payments, leases,

⁹ The Race Discrimination Act has been described as being "suspended" by the *Northern Territory National Emergency Response Act 2007* (Cth) (s132 as at 22 August 2007). This does not accurately describe the mechanism nor the character of the provision. The Acts unilaterally declared the legislation and all powers exercised by virtue of the legislation to be "special measures", that is, an act of positive discrimination that is supported by the ICCPR. This is test that courts apply when assessing the discriminatory impact of legislation, policy and action. The deep concern about this is that if that were the case, then the Commonwealth Government should have been allowed this to be tested and indemnified by an independent court; this was both conceptually and morally flawed and in breach of international commitments. The provision was not repealed effectively until 1 January 2011 (more than one year after a change of government).

community shops, etc, the provisions that affect the administration of the criminal law in the Northern Territory are short and few in number.

By the end of 2010, its effects were clearly starting to be felt. Greater number of police in a greater number of places led to a marked increase in Aboriginal people being charged with offences, notably for driving offences (North Australian Aboriginal Justice Agency, 2009). The imprisonment rate was increasing markedly (Australian Bureau of Statistics, 2010). Anecdotally, practitioners and community members had an impression that there were a greater number of charges for public order offences of “affray” and “riot” coming before the courts¹⁰, and that in some places, police were exercising their discretion to intervene where there were fights between feuding families. Until the mid-2000s (and depending on the discretion of the senior community police officer), these were tolerated provided they remained within limits that police prescribed. Court resources were becoming severely strained. Aboriginal legal aid services successfully secured funding for more solicitors. (At one legal aid agency, the number of criminal lawyers doubled between 2006 and 2010).

It became clearer that in central Australia Aboriginal people and non-Aboriginal people were being policed differently. Police powers to randomly stop, search and seize alcohol (section 95 of the *Liquor Act* (NT)), which previously had only been applied in remote communities, were now introduced into urban areas as town camps were classified “prescribed areas” (section 12(1) *Northern Territory National Emergency Response Act 2007* (Cth)). As the powers were intended to stop alcohol going into Aboriginal land, police only used these powers against Aboriginal people. Police were observed to stop, search and seize alcohol from Aboriginal people outside liquor stores while ignoring people who appeared to be non-Aboriginal (Field observations 2010; (Finnane, 2011b)), without any legal preconditions to be met to exercise this power.¹¹ Aboriginal informants describe the humiliation of having their car searched on the way home from work, or of having erected outside their communities big blues signs that suggested that pornography was rife in their homes and communities. (Some community members naively believed this meant that they were not supposed to watch SBS). (Field notes 2010). The message was becoming clearer, especially to Aboriginal people: Aboriginal communities were sources of dysfunction. Offending behaviour (accurately or inaccurately) was being generalised to the community from whence they came, without any consideration to the systemic or historic forces that had impacted negatively upon them.

There were other legislative, social and policy reforms that intervened into Aboriginal people’s lives and undermined what ownership and control they had established through the self-determination era that also fed into the momentum of Intervention. At the same time as the Intervention was “rolling out”, there were two policy changes that had and are having a significant impact on the everyday lives of Aboriginal people in remote communities. The first was the centralisation of local governance, as the community councils were superceded and their resources subsumed into Shires in 2007. Its effect on Aboriginal people’s sense of disempowerment in remote communities cannot be understated. The other was that in 2010 the Northern Territory Government ceased bilingual education in remote schools. In the Warlpiri communities at least, the community schools were important sites of negotiation and exchange of knowledge and information, and were a basis for inter-community cultural connection (Baarda, 2011). For Warlpiri people, language is intimately connected to law, land, ceremony and relationship (skinname): spirituality, identity, roles and responsibilities (Pawu-Kurpurlurnu, Holmes, & Box, 2008). Such ownership and control of their lives that they had was being taken from them.

¹⁰ The Northern Territory Justice Department does not report on public order offences.

¹¹ The powers to stop, search and seize alcohol are triggered merely by a suspicion [sic – not reasonably suspicion] that the alcohol may be taken into a prescribed area, even when the power is exercised outside the prescribed area. This is the effect of section 12(1) of the NTNERA in conjunction with powers found under Part VIII Division 3 of the *Liquor Act* (NT), especially section 95 – note the use of the phrase “whether or not it is the general restricted area” and “random”.

The impact of Intervention on community justice mechanisms and community participation in criminal justice processes is realised

Dickenson & Ors¹²

In 2010, a series of cases came before the Alice Springs Court of Summary Jurisdiction in which it became clearer how enmeshed the criminal justice system had become in the process of Intervention. Through the application of law, justice was impeded and it became clear that community justice for Aboriginal people - in the various forms that it can take - was rendered impossible.¹³

In late 2010, a young man was killed after he was stabbed in a fight in an Alice Springs town camp with other young men from his community of Yuendumu. Community members had anticipated that a few days after the death that those who were considered responsible would receive traditional punishment in Yuendumu. Details of what occurred are contested. What is known is that the situation degenerated into alcohol fuelled personal violence and damage to property, and that police intervened. There are some who claim that police prevented traditional punishment from taking place (before the lawlessness broke out), which is why the incident got out of hand. Whatever its naissance, the scale of the incident was unprecedented. It attracted considerable media attention. The media pursued this story, 'fetishising' Aboriginal customary law and cultural practice, as the aggrieved family gave them unprecedented access: 'vision' and interviews, including photographs in sorry camp (for a nuanced insight into this see (Hinkson, 2010)). The family of the accused men left the community for two months. The day after they returned, the two sets of feuding families fought. Arising from this, numerous participants were charged with offences, mainly riot and carrying an offensive weapon in public, the weapons typically were nulla nulla (heavy wooden fighting sticks typically used by women) and spears. The minimal facts read in court said that there was fighting and that participants refused to move on when requested to by police.

One detail of the fight that emerged was that the mother of the one held responsible for the death offered her head to be hit by the mother of the deceased, which she did twice, so that the blood would show. In the court hearing, her lawyer related her instructions, "Now I have no feeling of anger against her," that she now felt satisfied and that this was finished according to Aboriginal law.

At court, all the defendants were represented by one lawyer.¹⁴ The lawyer's submissions were comprehensive: detailed, respectful and heartfelt. They were also imbued with a sense of futility. Over the course of over an hour he outlined the complex case and its context from his clients' perspective.

Speaking from the bar table (as is customary when outlining relevant evidence in sentencing hearings) he described the inconsistent approach of courts to customary dispute resolution practices of Warlpiri people, including police practice and

¹² Police v Dickenson & Ors (No. 20920499 etc) Alice Springs Court of Summary Jurisdiction, various dates, including 30 November 2010 (submissions) and 1 December 2010 (sentencing remarks), which are cited in this paper. All citations are the author's transcription audio recordings.

¹³ The following information about the background to the cases of Dickenson & Ors (2010) is a compilation of information drawn from media reports that was able to be confirmed and added to by reference to information in court proceedings and observations and interviews in Alice Springs and in the communities of Yuendumu and Lajamanu in 2010 and 2011, and interviews conducted in 2012.

¹⁴ The legal aid agency who represented the man accused of stabbing the deceased represented most of the accused who were related to the deceased; another legal aid agency represented the family of the deceased who were charged.

courts practices of granting bail in order to receive traditional punishment. The cases were being heard by a magistrate with considerable experience representing Aboriginal people in central Australia in criminal matters as the principal lawyer of the Aboriginal legal aid service. In 2002, he had successfully applied for bail so that a Warlpiri man could travel to the community of Nyrripi to receive traditional punishment (Morrison, 2002, 2003; *Police v Kevin Webb* (2002) Alice Springs Court of Summary Jurisdiction 20214130 (unreported) ")

The lawyer also explicitly referred to pragmatic police practices of supervision of fighting in communities and occasional intervention, for example, to facilitate medical attention. He also attempted to impart a sense of the tremendous and rapid social upheaval being experienced by Aboriginal people in central Australia, referring to recent social commentary in national media.

In relation specifically to these events, he related his instructions verbatim which explained the practice in which his clients were engaged and its importance to them. As his clients' mouthpiece, he attempted to explain, the rationality of their behaviour and the practice in which they were engaged, its legitimacy and its authenticity. He emphasised the consensual nature of the violence, and that the police witnessed this. This was not challenged by the prosecutor. He quoted his clients in relation to their belief that this fight was necessary in order for their community to achieve equilibrium, put this incident behind them, and to achieve harmony. He quoted his clients in relation to their use of wooden traditional weapons.

In the course of these submissions, the Magistrate asked the defence lawyer if he was seeking to call [sworn] evidence, referring to section 104A of the *Sentencing Act* (NT). The defence lawyer responded, "No. No I'm not. And one reason is that what would be the point? - given section 91 of the [*Northern Territory National Emergency Response Act 2007* (Cth)]."¹⁵ As discussed above, the section does not permit a sentence to be aggravated or mitigated on the basis of "customary law" or "cultural practice". The lawyer was advising the court that he understood that any evidence he would otherwise have led could not be used by the court. Before the introduction of section 91, it is likely that he could have led that evidence – to stress the inconsistency of application of law, to indicate the state of mind of those involved, and also perhaps to challenge a non-Warlpiri person's preconceptions about the events that took place. Given the prevailing legislative restrictions, however, the lawyer did not see any value in going through a lengthy process of meeting the notice requirements or distressing his clients or other witness by leading evidence from then when, because of section 91, it could not be used to serve a mitigatory purpose.¹⁶

The day after hearing sentencing submissions, the Magistrate opened his sentencing remarks by responding with three points to the defence lawyer's submissions that those who participated were frustrated that they were no longer being permitted to continue with their means of resolving disputes which they have been permitted to do for so long. Firstly, he spoke briefly of the impact this would have had on children in the community, concluding:

¹⁵ The lawyer also referred the court to the judgment of *The Queen v Wunungmurra* [2009] NTSC 24 in which the Supreme Court has applied the section. This paper does not analyse this case, but I note here only that I believe there are weaknesses in this judgement's analysis of s 91 Northern Territory National Emergency Response Act 2007 . An appeal, however, would not have succeeded as the sentence ordered was appropriate for the offence with which it was concerned.

¹⁶ There are many questions that arise about the use to which the defence law hoped this evidence would be used, and its nebulous status given that he had not complied with s104A Sentencing Act (NT) and there was no ruling made in relation to it. This paper does not analyse closely the complex evidentiary and sentencing law issues and strategic motivations of the advocates that arise in this case

I am concerned about what effect this sort of behaviour will have on young children as they grow up and it concerns me that the people here are not primarily concerned with that rather than in some sense that they have to have payback.

Then he remarked that he "had sentenced Warlpiri people in relation to at least six riots in the last two years. I would have much rather heard words of shame and remorse."

Finally, he summarised his position in this unadorned value statement:

The message, if it is not clear, needs to be made clear: violence begets violence. There is no place for violent retribution. The days of payback with violence should end. The Elders should be concerned with changing their law. They should be working out ways to deal with disputes without violence, rather than feeling aggrieved with whitefella law preventing them from carrying out their old punishments.

The magistrate sentenced most of the people involved in the dispute to imprisonment, and in the case of the mother of the deceased, who was otherwise of good character, to a total effective sentence of five months suspended after two months imprisonment had been served.¹⁷

The magistrate delivered a clear, unequivocal message that times have changed, to indicate that this case is a 'watershed', to reflect the larger policy shift that is occurring across agencies that is against Aboriginal law and cultural practice, and that the crude tool of the criminal law will be enlisted where other agencies chose to bring such cases before the courts.

Impact of the decision

On release from prison, the mother of the deceased said that she was no longer satisfied (Field work observations 2011). One can speculate that sending her and her family to prison undid any restoration that had been achieved through that fight. The disputes and violence in that community are still breaking out more than one year later. Police were regularly called in from the new police stations that had been established nearby in order to help conduct regular searches of community houses for weapons. Rumours and text messaging, including a spike in allegations of sorcery, trigger further outbreaks of fighting. (One participant suggested that the reason for the increase in sorcery claims is that this at least is something the Warlpiri can own, and that the *kardiya* law cannot reach: Turner-Walker, 2011). After the situation had already escalated, government officers and police attempted to use Aboriginal law men and women to meet and resolve the dispute. Aboriginal organisations have hosted a meeting of law men from across the region in an attempt to facilitate the resolution of peace (S. W. Patrick, 2011). Yet the disputes are ongoing, and now senior and respected people from that community and other closely connected communities are concerned about the lawlessness: those in the middle of the maelstrom are now ignoring both laws (Field observations, 2010-2011). There have been further charges of riot and related offence and one offence of attempted murder laid against Yuendumu community members up until the present time.

Prior to these troubles, Yuendumu Justice Mediation Group had been participating in community courts every two months when the Magistrate visited, the only community court to run in central Australia. When the troubles started late in 2010, community members declined to participate in the community court in that community. At the August 2011 sitting, they were

¹⁷ This paper does not set out a comprehensive analysis of the question of whether the magistrate's sentencing discretion miscarried. I note here only that it is my opinion that the magistrate did err, as he effectively stated that his sentence was intended to carry a message of general deterrence against pursuing traditional punishment. On this basis (that is, by reference to customary law and/or cultural practice) he thereby aggravated the sentence, and - paradoxically for our purposes - was in contravention of s 91 Northern Territory National Emergency Response Act 2007, which resulted in a sentence that was manifestly excessive.

ready to recommence, but were told informally on the day of court that there would be no more community courts. I speculate whether magistrates had become concerned that the community courts they had held had encouraged people in that community to believe that Aboriginal law was supported and they no longer wished to perpetuate that misapprehension.

Was an alternative response possible?

Criminal courts have a very limited role to play in relation to effecting social reform. The role that courts have to play should be impartial to politics, taking the 'long view', reflecting the truisms that social change will occur over time and that better social reforms are those that are willingly adopted by community members as a whole. It is important that courts facilitate this to the limited extent that they are able. This Yuendumu 'riots' case represents a lost opportunity to engage strongly with the community, to be concerned about the impact of a court's sentence, to identify what aspects of Warlpiri culture could support the mainstream justice system and vice versa in order to achieve peace and protect the community. This is particularly so as it comes from a community that had an existing infrastructure for community participation in courts. This was a case in which community knowledge and expertise was needed to affect the sentence of offenders in order to meet principles of protection of the community. Instead, section 91 inhibited any such engagement.

Whilst section 91 is the legal excuse for not engaging with community members, it is only part of an environment of anti-Indigeneity, where the reason for offending is found to be Aboriginal law or culture. Aboriginality itself has become an indicator of 'risk' for committing future offending. Despite best intentions of those involved, this case instead has alienated many Warlpiri people further from the criminal justice system and the values of mainstream Australia (including many Warlpiri who consider the behaviour of the Yuendumu 'rioters' lawless and wrong (Interviews and Field notes 2011), and specifically may have exacerbated the excesses it sought to crush through an excessively punitive response. Given the violence of the punishment of imprisonment, some Warlpiri people see this as hypocritical.

Aboriginal culture or customary law is not only about traditional punishment, yet section 91 suggests that all Aboriginal culture now is a manifestation of barbaric violence against women and children (Baarda, 2011; G. Brown, 2010-2012; Field observations, 2010-2011; Lawson, 2011; Limbiardi, 2010-2012; Long, 2010; J. Patrick, 2011; S. W. Patrick, 2011; Sims, 2011; Tasman, 2011). Aboriginal customary law concerns how law/land (country) /language/ceremony/skin (relationship or kin) are intended to restore balance. It is true however that Warlpiri people hold strong beliefs about the availability of controlled violence to resolve disputes (Barnes, 2011; Carlton, 2010; Field observations, 2010-2011; Jigili, 2011; Loy, 2010). Having identified that there is another system of law operating in Australia, however, is the 'solution' to this 'problem' to "crush it"?¹⁸ Warlpiri people are currently struggling to adjust quickly enough to cope with the external forces of Intervention for fear that they will lose everything (S. W. Patrick, 2011). Through targeting Aboriginal people who are still connected to country,²⁰ Intervention is now directed to eliminating all of 'ngurra-kurlu': the other four aspects of identity and way of being and knowing: Law, Language, Ceremony, and Skin (Kinship) (Pawu-Kurlpurlurnu et al., 2008). Intervention cannot externally impose such deep internal change in a person or a people without causing tremendous damage and pain.

¹⁸ Paraphrasing Goldflam (Personal Communication 2011), the lawyer, who represented Dickenson and others: "Well one good thing about this case that they now recognize that there is another system of law operating. And what is their response to it? To crush it."

²⁰ Prescribed areas (as defined and scheduled) are parcels of land in the Northern Territory over which Aboriginal people have some form of control, in particular Aboriginal land rights, native title, Aboriginal leasehold, Aboriginal corporations.

In 2011, the Chief Justice of the Northern Territory observed about section 91:

Aboriginal offenders do not enjoy the same rights as offenders from other sections of the community. It seems to me this is a backwards step.

As we move into the second century of the Supreme Court we must continue to strive for an ever improving understanding of the Indigenous people of this Territory. Whilst the same law must apply to all, we as a community must be conscious of our differences and make appropriate allowance for those differences. (Riley CJ, 2011).

In 1997, Cunneen and MacDonald observed this about policing and court practices up until that time:

"Distinct cultural patterns may also lead to intervention and eventual criminalisation. ... A central problem is whether non-Indigenous criminal justice institutions fail to recognise and value Indigenous methods of social organisation or whether they in effect treat cultural difference as a social pathology and criminalise it. " (Cunneen & McDonald, 1997)

Section 91 clearly has implications for the sentencing of individual offenders before courts. It also sets back attempts to engage community members in criminal justice processes and the potential cooperation and reconciliation that represents. Intervention legislation effectively categorises all Aboriginality / Aboriginal 'culture' as deviant and a source of deviance. When Intervention is expressed in courts then it empowers and emboldens Police to police against (not for) Aboriginal people, resulting in over policing and offence generation (for example, charging for highly contrasted, discretionary public order offences such as 'riot'), and excessively stopping and searching Aboriginal people (Finnane, 2011b). It also creates a space for a private citizens to denunciate even the presence of Aboriginal people in public spaces, including the formation of an action group (Finnane, 2011a), town council by-laws that stringently restrict use of public space (*Alice Springs (Management of Public Places) By-Laws 2009, 2010*), and racially discriminatory TV advertising (Sleath, 2011).

Concluding comments

For some time, some magistrates in the Northern Territory have attempted to engage constructively and imaginatively with community members in sentencing processes. This persisted for some time, until the effect of the Intervention's legislative infrastructure could not be avoided. Limits on the use of sentencing meant that it was not possible for community members to share customary law or insights about cultural practices that would mitigate - or aggravate - a sentence. The effect however went deeper than that. As an increased police presence resulted in more and more Aboriginal people being brought before the courts, this generated an impression of greater criminality and that the source of this was to be found in their dysfunctional communities. Ultimately, after years of Northern Territory Police tolerance of Aboriginal ways of being (whether it be turning a 'blind eye' or actively supporting it), police decisions to instigate offences against Aboriginal people are resulting in longer sentences of imprisonment, as magistrates, reacting against the violence before them and influenced by a milieu of Intervention, and are forced to 'solve' social problems, problems in which they should have only a limited role to play.

Garland's thesis suggests that the State legitimates law and order responses on the basis of victim and community interest. This may in part be true in relation to non-Aboriginal community, however it does not satisfactorily account for the processes of criminalisation taking place now in the Northern Territory. The act is labeled deviant and extracted from its historical, social and political context, sufficiently so to allow the individual who committed the act together with his/her dysfunctional community and culture to wholly explain the deviance, and the offender's Aboriginality becomes a risk factor and an indice

of future offending. This occurs in a milieu of externally enforced social change, that change being enforced upon people who are identified on the basis of their relationship to Aboriginal land title (in the 'prescribed areas').

It cannot be said that magistrates are not well-intentioned nor that their sentencing dispositions are consistently harsh. What can be said however is that the criminal cases that arise from Intervention should be understood as part of an ongoing post-colonial process that is animated by an underlying and systemic anti-Indigeneity. In this sense, there is evidence that suggests that there is a hardening of judicial attitudes to Aboriginal people, their communities and their ways of being. This is resulting in the further alienation of many traditional Aboriginal people from criminal justice processes.

Important opportunities for improving justice processes and outcomes are being undermined. This is a time of radical social transition for many desert people - regardless of Intervention - and they require support, not only in relation to community engagement in justice processes with which we are here concerned. The legislative structures that enable aggressive Intervention in the lives of Aboriginal people render impossible opportunities for positive engagement, consultation and reconciliation that community participation in justice processes represent.

References

- Ali Curung Law and Justice Committee. (2003). *Jinta marni jaku: Social and Cultural Protocols at Ali-Curung*.
- Anthony, T. (2008). Late Modern Developments In Sentencing Principles For Indigenous Offenders: Beyond David Garland's Framework. *Proceedings of the 2nd Australian & New Zealand Critical Criminology Conference, 19 - 20 June 2008 Sydney, Australia*.
- Atkinson, J. (1990a). *Beyond violence : finding the dream*. Barton, A.C.T. :: Aboriginal and Islander Sub-program, National Domestic Violence Education Program, Office of Status of Women.
- Atkinson, J. (1990b). Violence in Aboriginal Australia: Colonisation and Gender. *Aboriginal Islander Health Worker, 14*(2 & 3), 5-27.
- Atkinson, J. (2001). Violence against Aboriginal women: Reconstitution of community law – the way forward. *Indigenous Law Bulletin, 5*(11), 19–23.
- Atkinson, J. (2006). Traditional Violence and Bullsh*t Law. *newmatilda.com*.
- Australian Bureau of Statistics. (2010). *Prisoners in Australia, 2010* (Issue 4517.0).
- Australian Human Rights Commission. (2006). Submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Amendment (Bail And Sentencing) Bill 2006.
- Australian Law Reform Commission. (1986). *The recognition of Aboriginal customary laws*. (31). Canberra :: Australian Government Publishing Service Retrieved from <http://www.austlii.edu.au/car/carother.html#alrc>.
- Auty, K. (2000). Western Australian Courts of Native Affairs. *University of New South Wales Law Journal, 23*, 148.
- Auty, K. (2010, 6 December 2010). [Interview].
- Auty, K. (ND). *We teach all hearts to break – but can we mend them? Therapeutic jurisprudence and Aboriginal sentencing courts*. Paper presented at the The Therapeutic Role of Magistrate's Courts, E-Law Series Special Vol 1.
- Auty, K., & Briggs, D. (2004). Koori Court Victoria: Magistrates Court (Koori Court) Act 20021. *Law Text Culture, 8*(7).
- Baarda, W. (2011, 13 September 2011). [Interview].
- Barnes, G. (2011, October - December 2011). [Interview and Personal communications].
- Barson, R. (2010, 23 September 2010). [Interview].

- Baudrillard, J. (1993). *Operational Whitewash The Transparency of Evil: Essays on Extreme Phenomena*. London and New York: Verso Books.
- Behrendt, L. (1993). Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse. *Australian Feminist Law Journal*, 1.
- Behrendt, L. (2006a). Customary law and sentencing. *Bar News, Winter*.
- Behrendt, L. (Producer). (2006b). No quick fix. *Australian Police Online*. Retrieved from <http://apo.org.au/commentary/no-quick-fix>
- Bell, D. (1991). Intra-racial rape revisited : On forging a feminist future beyond factions and frightening politics. [doi: DOI: 10.1016/0277-5395(91)90043-H]. *Women's Studies International Forum*, 14(5), 385-412.
- Bhabha, H. (1994). *The Location of Culture* (Vol. 214).
- Bird, G. (1987). *The 'civilizing mission' : race and the construction of crime / Greta Bird*. Clayton, Vic. :: Faculty of Law, Monash University.
- Blokland, J. (2005). Territory Trials in Alternative Sentencing Methods – Credit Court and Community Courts. *Criminal Lawyers Association of the Northern Territory Conference, Bali, 2-7 July 2005*
- Blokland, J. (2007a). *The Northern Territory Experience*. Paper presented at the National Indigenous Courts Conference, Mildura, , Mildura.
- Blokland, J. (2007b). *Remote Justice*. Paper presented at the Criminal Lawyers Association Of The Northern Territory Annual Conference 2007, Bali
- Blokland, J. (2009). *Current Legal Issues in the Northern Territory Concerning Indigenous People and the Criminal Justice System*. Paper presented at the National Indigenous Legal Conference, Adelaide. 2552431105JennyBlokland.pdf
- Blokland, J. (2010, October 2010). [Interview].
- Boas, F. (1940). The Aims of Anthropological Research. In G. Stocking. (Ed.), *Race, Language and Culture (first published 1932)*. Chicago: University of Chicago Press.
- Bolger, A. (1991). *Aboriginal women and violence: A report for the Criminology Research Council and the Northern Territory Commissioner of Police*. Darwin: Australian National University North Australia Research Unit
- Bourdieu, P. (1986). The Force of Law: Toward a Sociology of the Juridical Field. *Hastings Law Journal*, 38, 805.
- Boxall, K. (2005). *The Nunga Court*.
- Bradley, H. B. (2005). *Community Court Darwin Guidelines* Darwin: Retrieved from http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf.
- Brown, G. (2010-2012, December 2010; July 2011; October - December 2011). [Personal Communications].
- Brown, S. (2010, 16 December 2010). [Interview].
- Carlton, M. (2010, September 2010, December 2010). [Personal communications].
- Chandler, J. (Producer). (2007, 16 March 2007). Not just a black problem. *The Age*. Retrieved from www.antar.org.au/node/160
- Coalition of Australian Governments. (2006). Communique regarding meeting held 14 July 2006, from <http://www.cag.gov.au/meetings/140706/index.htm#indigenous>
- Court observations and interviews (2010-2011).
- Cowlshaw, G. (2003). Disappointing Indigenous people: violence and the refusal of help. *Public Culture*, 15(1), 103.
- Cox, S. (2010, October 2010). [Interview].
- Crawford, W. (2011). [Solicitor, North Australian Aboriginal Justice Agency, Personal communication].
- Dick, D. (2006). *"Circle sentencing of Aboriginal offenders"*, . Paper presented at the Sentencing Conference on Principles, Perspectives and Possibilities., Canberra.

- Douglas, H. (2002). Justice Kriewaldt, Aboriginal Identity and the Criminal Law. *CRIMINAL LAW JOURNAL-SYDNEY*, 26(4), 204-222.
- Douglas, H. (2004). Assimilation, Lutheranism and the 1950s Justice of Kriewaldt. *Australian Journal of Legal History*, 8(2), 285.
- Douglas, H. (2006a). Assimilation and authenticity: The 'ordinary Aboriginal person' and the provocation defence. *Adelaide Law Review*, 27(2), 199-226.
- Douglas, H. (2006b). Customary Law, Sentencing and the Limits of the State. *Canadian Journal of Law and Society*, 20(1), 141-156.
- Douglas, H. (2009). Justice Martin Kriewaldt: Frontier Justice, Aboriginal people, Assimilation and the Law in the 1950s. Field observations, i. a. p. c. (2010-2011).
- Finnane, K. (2011a). "Big problems" in Alice Springs. *Inside Story* Retrieved 17/2/2012, from <http://inside.org.au/big-problems-in-alice-springs/>
- Finnane, K. (2011b). Problem drinkers and the rest of us. *Inside Story* Retrieved 17/2/2012, from <http://inside.org.au/problem-drinkers-and-the-rest-of-us/>
- Garland, D. (1995). Penal modernism and postmodernism. In S. Cohen & D. Blomberg (Eds.), *Punishment and social control* (pp. 181-209). New York: Aldine.
- Garland, D. (1996). The limits of the sovereign state. *British Journal of Criminology*, 36, 445-471.
- Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.
- Geertz, C. (1985). *The Interpretation of Cultures*: Basic Books.
- Goldflam, R. (2010, 8 December 2010). [Interview].
- Gordon, S., Hallahan, K., & Henry, D. (2002). Putting the picture together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities. Perth: WA Department of Premier and Cabinet,.
- Gray, I. (2010, 6 December 2010). [Interview].
- Greer, P. (1994). Aboriginal women and domestic violence in New South Wales. In J. Stubbs (Ed.), *Women, male violence and the law* (Vol. The Institute of Criminology Monograph Series, pp. 64-78).
- Grimes, B. (2010). [Solicitor, North Australian Aboriginal Justice Agency, Personal communication].
- Grimes, B. (2011). [Solicitor, North Australian Aboriginal Justice Agency, Personal communication].
- Harris, M. (2004). From Australian courts to Aboriginal courts in Australia – bridging the gap? *Current Issues in Criminal Justice*, vol 16(1), 26-41.
- Hinkson, M. (2010). Media images and the politics of hope. In J. Altman & M. Hinkson (Eds.), *Culture Crisis: Anthropology and Politics in Aboriginal Australia* (pp. 229-247). Sydney: University of New South Wales.
- Howe. (1994). White Western Feminism meets International Law: Challenges/Complicity, Erasure/Encounters. *Australian Feminist Law Journal*, 4.
- Human Rights and Equal Opportunity Commission. (2006). Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities – Key Issues: An overview paper of research and findings by the Human Rights and Equal Opportunity Commission, 2001–2006. Sydney: HREOC
- Hunyor, J. (2010). [Principal Solicitor, North Australian Aboriginal Justice Agency, Personal communication].

- Jawoyn Association Aboriginal Corporation, & Sunrise Health Service Aboriginal Corporation. (2008). Joint Submission To The Northern Territory Emergency Response Review Board, from http://www.nterreview.gov.au/subs/nter_review_report/184_jawoyn_sunrise/184_Submission_2.htm
- Jigili, P. (2011, October - December 2011). [Personal communications].
- Jones, T. (2006). Crown Prosecutor speaks out about abuse in Central Australia, *Lateline*. Retrieved from <http://www.abc.net.au/lateline/content/2006/s1639127.htm>
- Larbelestier, J. (1980). Feminism as Myth: Aboriginal Women and the Feminist Encounter. *Refractory Girl*, 20(31-39).
- Larbelestier, J. (1990). The Politics of Representation: Australian Aboriginal Women and Feminism *Anthropology Forum*, 143-157.
- Latour, B. (2005). *Reassembling the social*: Oxford University Press.
- Law Reform Commission of Western Australian. (2006). Aboriginal Customary Laws Final Report. Perth: LRCWA.
- Lawson, R. (2011, October - December 2011). [Interview and Personal Communications].
- Limbiardi, M. (2010-2012, December 2010; July 2011; October - December 2011). [Personal Communications].
- Little, M. (2007). *The View from the Northern Territory*. Paper presented at the National Indigenous Courts Conference, Mildura, , Mildura.
- Little, M. (2010, 16 December 2010). [Interview].
- Lloyd, J. (2004). Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council welcomes State and Territory legislation that will protect Aboriginal children from abuse. . *Indigenous Law Bulletin* 6(1 Mar - Apr 2004), 28-29.
- Lloyd, J., & Rogers, N. (1993). *Crossing the last frontier: problems facing Aboriginal women victims of rape in Central Australia*. Paper presented at the Without consent: Confronting adult sexual violence, Canberra.
- Long, S. (2010, December 2010). [Personal Communications].
- Lorimer, C., & Rimmer, S. H. (2006). Bills Digest Crimes Amendment (Bail and Sentencing) Bill 2006 Information analysis and advice for the Parliament 27 November 2006, no. 56, 2006-07, ISSN 1328-8091 . In P. L. Law and Bills Digest Section (Ed.). Canberra: Department of Parliamentary Services, Parliament of Australia, .
- Loy, D. (Writer). (2010). Bush Law: (an edited version was shown on ABC TV's Message Stick).
- MacCormack, B. (2010, 16 December 2010). [Interview].
- Marchetti, E., & Daly, K. (2004). Indigenous Courts and Justice Practices in Australia. *Trends and Issues in Criminal Justice* , AIC, No 277(May 2004), 3.
- Martin, B. R. H. (2007). *Customary Law - Northern Territory*. Paper presented at the JCA Colloquium
- McGlade, H. (2006). Aboriginal women, girls and sexual assault. *ACSSA Newsletter September, 12*, 6-13.
- Mildren, D. (2008). Aboriginals and the Crimiinal Justice System. *Adelaide Law Review*, 29, 7-27.
- Morrison, G. (2002). Magistrate sends man to be bashed *Centralian Advocate*, 8 October 2002.
- Morrison, G. (2003). No end to payback *Northern Territory News*, 18 November 2003, Page 4.
- Musharbash, Y. (2010). Marriage, love magic, and adultery: Warlpiri relationships as seen by three generations of anthropologists. *Oceania*, 80(3), 272. Retrieved from <http://search.proquest.com/docview/808577957?accountid=8330>.
- North Australian Aboriginal Justice Agency. (2009). Aboriginal Communities and the Police's Taskforce Themis: Case studies in remote Aboriginal community policing in the Northern Territory / by James Pilkington October 2009 for NAAJA North Australian Aboriginal Justice Agency.
- Northern Territory Director of Public Prosecutions. (2005). Guidelines as at 2005 (First issued 30 September 1991). Retrieved 2 January 2012 http://www.nt.gov.au/justice/dpp/html/guidelines/aboriginal_customary_law.shtml

- Northern Territory Parliament. (2006). Hansard, from <http://notes.nlgov.au/iant/hansard/hansardd.nsf/WebbyDate/9DIOC7COEFBOICFC69257236000299EF>
- Nowra, L. (2007). *Bad dreaming: Aboriginal men's violence against women & children*: Pluto Press Australia.
- O'Malley, P. (2000). Criminologies of Catastrophe? Understanding Criminal Justice on the Edge of the New Millennium. *Australian & New Zealand Journal of Criminology* 33, 153.
- Patrick, J. (2011, October-December 2011). [Interview and Personal communications].
- Patrick, S. W. (2011, September - December 2011). [Interviews and Personal Communications].
- Pauling, T. (2010, October 2010). [Interview].
- Pawu-Kurlpurlurnu, W. J., Holmes, M., & Box, A. (2008). *Ngurra-kurlu : a way of working with Warlpiri people*. Alice Springs, N.T. :: Desert Knowledge Cooperative Research Centre.
- Payne, S. (1992). Aboriginal Women and the Law *Aboriginal Perspectives on Criminal Justice* (pp. 13-40): Institute of Criminology.
- Pettman, J. (1992). Gendered knowledges: Aboriginal women and the politics of feminism. *Journal of Australian Studies*, 16(35), 120-131.
- Police v Kevin Webb* (2002) Alice Springs Court of Summary Jurisdiction 20214130 (unreported)
- Popovic, J. (ND). *Court Process and Therapeutic Jurisprudence: Have we thrown the Baby out with the bathwater?*. Paper presented at the The Therapeutic Role of Magistrate's Courts, E-Law Series Special Vol 1.
- Ryan, P. (2004). *Submission to the Review on Indigenous Law and Justice*. Retrieved from <http://www.aph.gov.au/house/committee/jcpaa/atsis/submissions/sub24.pdf>.
- Ryan, P., & Antoun, J. (2001). A Model for Social Change: The Northern Territory's Aboriginal Law and Justice Strategy (1995–2001). Darwin: Department of Community Development, Sport and Cultural Affairs, Northern Territory Government.
- Selfe, J., & Thomas, C. (1992, 23-25 June 1992). *Aboriginal Women and the Law*. Paper presented at the Australian Institute of Criminology Conference Aboriginal Justice Issues, Cairns.
- Sims, O. (2011, October 2011). [Interview and Personal communications].
- Sleath, E. (2011). TV ad complaint. *ABC Alice Springs* Retrieved 17/2/2012, from <http://www.abc.net.au/local/stories/2011/03/03/3153973.htm>
- Smith, S. (2006a). Indigenous community expresses thanks for exposing child abuse. *Lateline*: Australian Broadcasting Corporation.
- Smith, S. (2006b, 21/6/2006). Sexual abuse reported in Indigenous community. *Lateline*, from <http://www.abc.net.au/lateline/content/2006/s1668773.htm>
- Spiers Williams, M. (2007a). *The Kurduju Committee and The Warlpiri Law and Justice Committees. A Report for Tangentyere Council Inc Concerning the Reinvigoration of the Aboriginal Law and Justice Strategy in the Communities of Ali Curung, Lajamanu, Willowra and Yuendumu*. . Alice Springs, Northern Territory, Australia: Tangentyere Council.
- Spiers Williams, M. (2007b). The Proposed introduction of Community Courts in Warlpiri Communities. An Options Paper prepared for Tangentyere Council Inc. Alice Springs, Northern Territory of Australia: Tangentyere Council.
- Spiers Williams, M., & Tangentyere Council. (2008a). *Community Courts in Ali Curung, Lajamanu and Yuendumu. Annual Report 2008 prepared for Tangentyere Council Inc*. Alice Springs, Northern Territory of Australia: Tangentyere Council.

- Spiers Williams, M., & Tangentyere Council. (2008b). *The Kurduju Committee and The Warlpiri Law and Justice Committees. 2008 Annual Report prepared for Tangentyere Council Inc.* Alice Springs, Northern Territory, Australia: Tangentyere Council.
- Sutton, P. (2001). The politics of suffering: Indigenous policy in Australia since the 1970s. *Anthropological Forum*, 11(2), 125-173.
- Tasman, L. (2011, September - December 2011). [Interview and Personal Communications].
- Teh, J. (2010). [Former Coordinator, Yuendumu Justice Mediation Group; Personal communication].
- Temby, D. (ND). *Yandeyarra Community Court Project*. Paper presented at the The Therapeutic Role of Magistrate's Courts, E-Law Series Special Vol 1.
- Turner-Walker, J. (2011, 5 September 2011). [Personal Communication].
- Watson, I. (2009). Aboriginality and the Violence of Colonialism. *Borderlands e-journal*, 8(1), 1-8.
- Wild, R., & Anderson, P. (2007). Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse chaired by Rex Wild and Patricia Anderson. Darwin: NT Govt Printer.

Acts and subordinate legislation

- Alice Springs (Management of Public Places) By-Laws 2009, 2010* (NT)
- Crimes Act 1914* (Cth)
- Criminal Law Consolidation Act 1935* (SA)
- Liquor Act* (NT)
- Northern Territory National Emergency Response Act 2007* (Cth)
- Race Discrimination Act 1975* (Cth)
- Sentencing Act* (NT)

Cases

- Hales v Jamilmira* (2003) 13 NTLR 14 at 38
- Police v Dickenson & Ors* (2010) Alice Springs Court of Summary Jurisdiction No. 20920499 & ors (Unreported)
- Police v Kevin Webb* (2002) Alice Springs Court of Summary Jurisdiction No. 20214130 (Unreported)
- R v Dennis Narjic* (1988) NTSC (Unreported)
- R v James Goutjawuy Gondarra* (2005) NTSC (Unreported)
- R v Minor* (1992) 2 NTLR 183; (1992) 59 A Crim R 227

Crime and the Night-Time Economy in Australia's Global City: Fear, Loathing and Neo-Liberal (Non) Governance

Stephen Tomsen, University of Western Sydney

Introduction

In the last two decades, developed nations have restructured as post-industrial societies with reduced reliance on manufacturing and heavy industry and a fostering of expanded finance and leisure consumption to drive economic growth and social change. Neo-liberalism advocated a central focus on free markets and marketisation, individual self-reliance, and cuts to welfare alongside the bolstering of state sectors dealing with criminal justice and warfare (Harvey 2005). This was most strongly associated with the policies of Thatcher, Reagan, and a line of conservative leaders with major implications for national state structures, yet the specific urban implications of the rise of the neo-liberal state are a key aspect of this history. In Anglo-American political science, neo-liberal state institutions have been described as 'steering' with more developed audit and regulatory capacities rather than service delivery (Rhodes 2006). They shore up revenue sources as their primary goal of governance, and are frequently typified by value free, short term and conflicted policy-making in which considerations of social wellbeing are subordinated to fundamental guarantees of private profit.

Neo-liberalism has further fostered disruptive effects on the economic and social life of cities that have entered accelerating cycles of inner urban gentrification alongside decay and marginalisation of specific locales. Socially and financially cities are described as publically unsafe and alienating places of 'fear and loathing' (Hubbard, 2003). In particular, the British cities where the industrial revolution first originated, have experienced workplace closures, reduced social spending, a rise of privatised housing, and a reconfiguration of policing along reduced lines that are more reliant on private security (Hobbs et al 2003).

Against a backdrop of globalisation, multiculturalism, and the frequently rapid growth of city scale and population, urban diversity is often experienced as division and the breakdown of shared values and community. The anonymity and normlessness of city life is an old theme in urban sociology. Nevertheless, a new neo-liberal ideal of individualisation and the apparently fluid nature of citified global identities are now negatively apprehended through concerns about crime, incivility and urban strangers. In the neo-liberal epoch, cities have rivalled each other more openly to attract global finance and investment, as well as cultural status in the promotion of new creative industries. City life is seen as both inducing anxiety and excitement. It is the paradoxical locus of collective threat, risk, pleasure, opportunity, and desired and disavowed social identities. The antinomies of this urbanism are reflected most clearly in the prevailing discourses about the night-time economy (NTE) and in the lived experience of this in the neo-liberal era.

Sydney's night leisure and new global imagery

From its beginnings as a small convict colony Sydney had a history of official and bourgeois concern regarding disorder and drinking. Waves of moral panic about collective public leisure focused especially on such typical night-time activities as hard and rowdy drinking, sexual vice, and gambling (Homel & Tomsen 1992). Despite its inextricable link with public taxation, public drinking was the most notable example of the struggle over respectable leisure. State and political divisions over the requirements of social order and public revenue always underlay debates, and ran alongside widespread police corruption around night time leisure with an unreliable monitoring of breaches of liquor law.

The late 19th century compromise around the demands of Temperance and concern with this form of leisure was strict regulation hours that divided drinking from the night and its dangerous associations. The 'six o'clock swill' was a defining characteristic of Sydney leisure until the more liberal extension of drinking hours from the 1970s. This increasingly reflected a view that drinking leisure could be promoted among Sydney drinkers to maximise consumption without the threats of violence, disorder and public nuisance.

A characteristic aspect of the post-industrial restructuring of cities such as Sydney has been the encouragement of urban night-time leisure as new sphere of consumption, employment and exchange. In the 1980s and 1990s, this was heralded as the financial and economic promise of the NTE and the forthcoming '24 hour city'. Cities seeking branding as cosmopolitan and as 'tourist meccas' planned the revival of scenic waterfront/canal areas and previously discouraged or ignored night-time diversity (eg. ethnic enclaves, gay and red light areas). They also envisaged a new mix of city night leisure including arts, music, dining, and more cultivated styles of drinking attracting a broader mix of night goers. The utopian vision celebrated the NTE as a new realm of free sociality between people, marked by relaxed interaction to enhance natural surveillance and security and with any gaps in public safety covered by a provision of security from new private sources.

The rival critical vision draws on disappointment with the actual patterns of stimulated night leisure in most cities around the globe. Drinking has different individual, collective and situational effects but there is strong evidence of its general criminogenic character in night leisure. In reality, many homicides, public and domestic assaults, robberies, vandalism, and cases of drink driving flow from this. In the United Kingdom, rapid deregulation and new rise of urban alco-leisure expanded police work with assaultive crime and disorder, as well as setting off a spike in accident and emergency admissions (Hayward & Hobbs 2007).

It is unsurprising that Australian urban nightlife has similar problems, but these have mostly appeared across a less dramatic three decades of neo-liberal change. In the 1980s, extensive late night drinking followed the landmark deregulation of the Melbourne and Sydney night scenes. Sydney is the Australian city that is vying most determinedly for global status and fostering nightlife is understood as a key element of attaining this.¹ Furthermore, it is this sphere that appears to be more easily addressed in policy and is within the immediate influence of the City Council - unlike more intractable city problems with failing transport, health and education that remain unresolved.

The City After Dark study

From 2008-2010 the author was a chief investigator on an Australian Research Council funded research study (*City After Dark*) examining the expansion and governance of the night-time economy in Sydney city.² This focused on analysis of the imagery, debates, planning, and the lived experience of participants and onlookers (including revellers, venue staff, residents, police and security) in night leisure. The study investigated three principal areas of extended night-time leisure activity in Sydney. These locations were:

1. Darling Harbour/Casino: a leisure and tourist area created since the 1980s in a former Harbour wharf district featuring theatres, new apartments, bars and nightclubs. Its creation exemplified deliberate attempts to revive city nightlife in revived

¹ Sydney is the nation's financial capital and as the most populous city it has over 4 million residents. The inner city/CBD had a 48% residential growth in a recent decade rising from 128,000 in 2001 to 177,000 in 2009 (<http://www.cityofsydney.gov.au>).

² DPO877906 2008-2010 Investigators: Stevenson, D., Tomsen, S. & Rowe, D.

post-industrial space for city visitors and new inner city residents;

2. George St./Circular Quay CBD: a recently expanded strip ranging from Central station with takeaways, game parlours, sex shops, mass cinemas and pub venues with open admission, to a zone of mid-town bars and clubs that include exclusive or expensive venues, to the mixed night use of the Harbour front with elite and less elite leisure forms including public drinking, high end dining, Opera and outdoor concerts;

3. East Sydney/Darlinghurst/Kings Cross: the long-term 'red light/entertainment' district with mobilised local opposition to specific very late night/early morning venues, debates about the gay and 'post-gay' character of Oxford Street, and divided expectations of public police regarding such matters as drug searches and sniffer dog use against deployment around disorder, street violence and hate attacks.

The general study findings concerning a decade of change in the NTE were that Sydney has experienced a major recent growth of night leisure districts against a backdrop of very uneven planning. This unplanned change is most obvious in the new strip running along the CBD, and in all locations there is a close proximity of NTE activity with city apartments and local residents. Despite concerns with countering excessive alco-leisure, there is a general centrality of collective drinking across all locations in more and less exclusive venues that include restaurants, bars, nightclubs, and the pre-existing pubs that have either gentrified or chosen the 'gaming' pathway to generate extra revenue.

The most distinctive features of clientele are that alongside the expected very masculine atmosphere of nightlife and group drinking, the presence of young male groups is now being matched by female groups of drinkers and night goers and mixed groups of friends and work colleagues. The NTE appears to have a high ethnic mix along class lines; Anglo and South-East Asian professionals, office workers and tourists in city hotels, blue collar and lower income visitors from the outskirts of the city that include more Indigenous and Islander night goers, South Asian students and groups of young Middle Eastern men from the suburbs. Around Oxford Street/Darlinghurst, and to a lesser extent around Kings Cross/East Sydney, the expanded and mixed influx of night-goers can be perceived as a threat to the previous bohemian/alternative or gay character of a locality and this is controversially also seen as likely to result in violence, disorder and episodic disruptive drug dealing around specific very late night venues.

In addition to the historical shift to more female night-goers, there is clearly a new market for white-collar workers and middle class professionals in the early night and later night and early morning economy. These middle class patrons are attracted by the popularity of aesthetic vista drinking around waterfronts, the new growth of small bars selling wine, boutique beers, mixed drinks, cocktails, and restaurants that are characterised by high levels of drinking. Across Sydney's NTE, there has been a consumption of more drink products and a growth of smaller wine bars with a significant expansion more and less sophisticated drinking practices among large numbers of people that are now more noticeably gender mixed and middle class. The long term and steady middle classing of the city at night reflects deliberate and unintended exclusionary practices, the high costs of much night leisure, and failing or non-existent public transport all serve to restrict open access to urban night leisure for lower income groups.

The related NTE public policymaking has been volatile and divided. Over the last decade, Sydney night goers have witnessed the further major deregulation of hours and venue locations. Alongside concerns about corruption, New South Wales (NSW)

police have been in part sidelined (with the temporary abolition of licensing officers) and re-involved to assuage public concerns about disorder and violence from public drinking venues. Mixed approaches by NSW governments with close funding links to industry bodies, have included the showcase *Liquor Summit* (2003) (see Haber et al 2003), semi-autonomous local Liquor Accords, the advocacy of RSA (responsible service of alcohol) provisions, reforms around private security recruitment, and the development of new education and prevention campaigns around drink driving and youth drinking.

State politicians have had mixed responses to the results of various 'linkage' and 'last drink' studies that trace the ties between offending and specific hot spots. The more recent introduction of controversial venue listings and imposed conditions on service (eg. no glass after 12 pm, 2 am lockouts, 10 minute service time outs etc.) in specific venues with higher numbers of reported incidents suggest underlying divided state goals. Full venue closure is an unusual circumstance and this calibrated set of conditions on certain venues does not challenge the underlying logic of generally expanded access and increased taxable consumption. The advocacy of such local strategies has cherry-picked research regarding environmental (see Graham & Homel 2009) controls but disregards calls for more restricted licensing hours.

The mix of individual, market/industry and official State, NSW Police and more planned City Council initiatives are distinctive and opposed. Evolving versions of the NSW Office of Liquor, Gaming and Racing (OLGR) have been remote from community and public interests groups but working closely with industry lobbyists to defuse criticism and shore up the image of expanded night-time alco-leisure. The private market expansion and protection of tax income remain paramount concerns. The revival of hotel revenue via use of gambling machines from the late 1990s made these venues even more significant to state revenue. The expanded NSW state dependence on drinking and gambling is most evident in the status of Star City Casino and its legislative protections.

Against the fragmentation between NSW governments, police, security providers, health officials, and local planners and authorities, Sydney City Council has assumed a new role of trying to lead NTE policy and open public consultation (see <http://www.cityofsydney.gov.au>). This patchwork of interests and aims has left public police in a situation where they must appear to balance the mobilised interests of industry, night users, vulnerable groups and local residents. With limited resources to meet the pressures of an expanded and large private security directed NTE, they have favoured the adoption of high profile, media directed campaigns against night crime (notably the nationwide *Operation Unite*) with spasmodic effects on levels of offending and perceptions of public safety.

Night use questionnaire, method and results

The *City After Dark* research team conducted a survey questionnaire to gauge night-time leisure practices and views about their impact. Respondents were asked a mix of questions about the experience of living near to or participating in nightlife; different leisure patterns, drinking and forms of night socialising; views about areas and locations; policing, regulation and management of licensed venues; personal security and safety and experiences of crime and threat in the NTE. This was conducted as an online survey from June 2009 to May 2010. Overall, the survey attracted 314 respondents with 79 identified as resident to the NTE study areas. This sample was 54% female and 46% male, and 14% identified as gay, lesbian or queer. The age of these respondents was notably young adult to middle aged with 38% in the 18-24 year and another 40% in the 25-34 year groups. A high 90% of respondents noted that they 'normally feel safe in the city at night'. Nevertheless, this finding about normal experiences cannot be understood as meaning that a sense of being unsafe was infrequent or rare. 24% of

respondents suggested they were familiar with places where they felt unsafe. 19% had experienced direct victimisation from some crime while engaged in nightlife mostly comprising assaults from a range of sources including security staff, theft of personal property, and serious verbal threats and abuse.

Interestingly, the majority of respondents had little faith in either the police or private security. Forty four percent did not think that private security was doing enough to prevent danger around city nightlife. This is unsurprising, as very negative views and depictions of this occupational group and their frequently disruptive or violence role in nightlife are quite common (Thurmala et al 2011). Nevertheless, a poor result for image conscious NSW police was that a very similar 43% of respondents also thought public police were not doing enough to prevent night danger. From the qualitative sections of the questionnaire results it can be understood that this latter view of police was not so much stating a perceived urgent need for higher levels of official night supervision. It does appear instead to signal a view about the overall irrelevance of such forces in much of the night leisure realm that is experienced as an alluring mix of threat, risk and excitement.

Most respondents were confident about their general ability to protect themselves and that safety was a factor that must be individually addressed. There were significant levels of fear expressed about very specific locations. The experience of negative incidents across a broad range was high among avid night users, and the majority of residents had experienced negative impacts (62% - 47/76) from night leisure (see diagram). Furthermore, although not experiencing direct victimisation from predatory crime, most had seen or experienced a great deal of public nuisance or threat in the NTE. In fact, the qualitative sections of the survey results outlined a number of dangerous incidents within a tone of fatalistic resignation among most respondents.

Other research by the author has drawn out the youthful masculine apprehension of risk as real and significant factors in determining the level of subjective pleasure of a night out, but this is also misleadingly understood as a matter that can be directed by reasoning individuals (Tomsen 2005). There are clearly masculine aspects of this in the qualified individual and collective willingness to be involved in unpredictable episodes of violence in night-time drinking settings. The *City After Dark* study results do not suggest that such night violence is commonplace in Sydney. There is credible evidence of modest recent drops in the levels of NTE assaultive violence in Sydney that might be partly due to intensive preventive measures (Burgess & Price 2009). However, both young males and the newly expanded cohort of young female drinkers have become accommodated to the personal incorporation of risk from violence and the necessity to endure threat in their engagement with semi-regulated and semi-policed night spaces.

Night users who had such negative experiences themselves were vocal in their rejection of an alternative possibility of crime prevention and enhanced public safety via high levels of regulation with more controls of consumption, venue access and hours of operation. They were heavily opposed to public regulation, and naively constructed other users as 'the problem' and with a frequent tone of irritation or loathing also suggested types or groups of people to be controlled with reference to such factors as social class, urban location, race/ethnicity, and sexuality. Residents were angry over the disruption from specific venues and locations. But like the night users, they were suspicious of suburban outsiders and there was an underlying sense of cynicism about what can be achieved by public debate and the role of various authorities.

Conclusion

How do such attitudes relate to broader social and cultural shifts around night leisure? Neo-liberalism in relation to the urban NTE has unfolded as the sharp conflicts between pro-market expansion and stimulation of mass consumption in alco-leisure alongside mixed efforts to govern forms of nightlife. At the individual and collective personal levels neo-liberalism is lived out as a heightened form of individualistic identity (Bauman 2001). This has echoes of the classicist understanding of the liberal subject making rational calculations about decisions to commit or avoid crimes. Such calculations are made in an amoral social environment with limited trust in state authorities and private marketers of goods and services.

Consumption is a frequently dividing social practice among purchasers of paid leisure in relation to aspects of wealth and style, and uneven degrees of cultural capital are displayed, attained and reproduced in the NTE.³ This sense of division from other people and groups dovetails with attitudes to safety when night users opposed to stricter venue regulation also espouse a view that they can personally calculate and deal with risk as wholly self-responsible individuals. Against a backdrop of contradictory state initiated campaigns and imagery to both deter and promote drinking, the ideal neo-liberal night users are consumerist, hedonistic and self-governing divided selves oscillating between the uncertain polarities of dangerous and safe consumption.

If taken literally, the 'individualisation thesis' of contemporary social theorists including appears to vindicate the neo-liberal vision of ideal market selves by downplaying both the ongoing significance of class inequalities in the sphere of consumption (Bauman 2001; Atkinson 2007). The idea of individual equality in the sphere of expanded leisure consumption is a chimera. Such consumption appears at face value to be an open, equal and free liminal zone in new urban zones that profess to welcome all and promote diversity, but it is fundamentally built around social sorting in lines with uneven cultural capital. A widespread but only semi-conscious collective awareness of this is a probable reason why so many are loathing rather than fearful. Indifference and incivility rather than overt fear are more evident as the collective resentful emotional responses to this situation of pseudo-equality among Sydney's night users.

Neo-liberal states cannot wholly disavow responsibility for crime and disorder by fostering privatisation of security and promoting practices of responsabilisation (Garland 2001) via public health campaigns to build self-governance and responsibility for the risks of NTE drinking leisure. Current public policymaking for the night-time economy is contradictory and public crime concerns are hard to fend off and dismiss. Paradoxically, NSW politicians have tried to hose down projected fear and anxiety over the NTE and then also generally threat to law and order and the harsher punishment and higher levels of incarceration for sentenced offenders in that state (Hogg & Brown 1998). Furthermore, symbolic campaigns to address violence cannot fully alleviate widespread concerns with public nuisance and incivility. Debates about the deregulation and night-time safety are the embodiment of the deeper irrational aspects of neo-liberalism. This irrationality is built on an alignment of state cuts, private security, and the stimulation of commodified mass night leisure reflecting flawed public governance. It is likely that future conflicts over Sydney's NTE will be unresolved in policymaking and police responses and in community and media debates.

³ Views of rival night-time leisure also reflect contests for cultural capital. These distinctions made between the urbane and vulgar, chic and suburban, queer and straight, are social oppositions and cultural exclusions that are anathema to the original utopian vision of an inclusive NTE.

References

- Atkinson, W. (2007) 'Beck, individualization and the death of class: critique' *The British Journal of Sociology* 58/3 pp: 349-366
- Bauman, Z. (2001) 'Identity in the globalizing world' *Social Anthropology* 9/2/ pp: 121-129
- Burgess, M. & Price, B. (2009) *Sydney Local Government Area Crime Report* NSW Bureau of Crime Statistics and Research
- Garland, D. (2001) *The Culture of Control* Oxford, Oxford University Press
- Graham, K. & Homel, R. (2009) *Raising the Bar* Devon, Willan Publishing
- Haber, P., Conigrave, K., & Wodak, W. (2003) 'NSW Alcohol Summit: getting a better grip on our favourite drug' *Medical Journal of Australia* 179/10 pp: 521-522
- Harvey, D. (2005) *A brief history of Neo-Liberalism* Oxford, Oxford University Press
- Hayward, K., & Hobbs, D. (2007) 'Beyond the binge in 'booze Britain': market-led liminalization and the spectacle of binge drinking' *The British Journal of Sociology* 58/3 pp: 437-456
- Hogg, R. & Brown, D. (1998) *Rethinking Law and Order* Melbourne, Pluto Press
- Hubbard, P. (2003) 'Fear and Loathing at the Multiplex: Everyday Anxiety in the Post-Industrial City' *Capital and Class* 80 pp: 51-75
- Hobbs, D., Hadfield, P., Lister, S. & Winlow, S. (2003) *Bouncers: Violence and Governance in the Night-Time Economy* Oxford, Oxford University Press
- Homel, R. & Tomsen, S. (1992) 'Public Drinking and Violence: not just an alcohol problem' *Journal of Drug Issues* 22/3 pp: 679-697
- Rhodes, R. (2006) 'The New Governance: Governing without Government' *Political Studies* 44/4 pp: 652-667
- Thurmala, A., Goold, B., & Loader, I. (2011) 'A tainted trade? Moral ambivalence and legitimation work in the private security industry' *The British Journal of Sociology* 62/2 pp: 283-303
- Tomsen, S. (2005) 'Boozers and Bouncers' Masculine Conflict, Disengagement and the Contemporary Governance of Drinking-Related Violence and Disorder' *The Australian and New Zealand Journal of Criminology* 38/3 pp: 283-297