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Justice with a vengeance: retributive desire in popular imagination

Abstract

The punishment of criminal behaviour has always been a hot topic in popular culture. Whether in fictional crime dramas or in mainstream news coverage, issues of law, justice, and punishment are constantly being refracted and reframed in a myriad of ways. We seem to like watching criminals not only being caught but also receiving the punishment they deserve. We love it when Sherlock Holmes or Patrick Jayne solves the crime on fictional television, and too often we hear stories in the media of a victim's family that is indignant and angry that the perpetrator is seemingly "getting away" with a light sentence. We seem to have such a desire for justice to be done that we cry out for it when it seems lacking. This cry for justice, I argue, comes from a desire to hold individuals responsible for their actions, and it is the major reason for a contemporary suggestion in Australia that the criminal justice system is experiencing a "crisis of confidence."

Keywords

retributive, desire, imagination, popular, vengeance, justice

Disciplines

Arts and Humanities | Law

Publication Details

Sharp, C. (2014). Justice with a vengeance: retributive desire in popular imagination. In M. Asimow and K. Brown (Eds.), *Law and Popular Culture: International Perspectives* (pp. 153-176). United Kingdom: Cambridge Scholars Publishing.

Keywords: justice, retribution, sentencing, punishment, public perception, just desserts, stories

JUSTICE WITH A VENGEANCE – RETRIBUTIVE DESIRE IN POPULAR IMAGINATION

Cassandra Sharp

The punishment of criminal behaviour has always been a hot topic in popular culture. Whether in fictional crime dramas or in mainstream news coverage, issues of law, justice, and punishment are constantly being refracted and reframed in a myriad of ways. We seem to like watching criminals not only being caught but also receiving the punishment they deserve. We love it when Sherlock Holmes or Patrick Jayne¹ solves the crime on fictional television, and too often we hear stories in the media of a victim's family that is indignant and angry that the perpetrator is seemingly "getting away" with a light sentence. We seem to have such a desire for justice to be done that we cry out for it when it seems lacking. This cry for justice, I argue, comes from a desire to hold individuals responsible for their actions, and it is the major reason for a contemporary

suggestion in Australia that the criminal justice system is experiencing a “crisis of confidence.”²

In the last 5 years or so, Australian quantitative research has demonstrated that public attitudes are punitive and “built on widely held misconceptions about crime and sentencing.”³ Furthermore, this statistical data indicates that mainstream media and popular culture heavily contribute to the “public having a ‘grossly inaccurate’ picture of crime and justice.”⁴ Yet there has been little qualitative research that seeks to explore what this “picture” actually looks like, and through which sources it might originate or be constructed. The Australian Institute of Criminology has argued that although frequently used cross-sectional survey instruments are valuable for criminal justice policy makers, these methodologies need to be augmented by qualitative in-depth analysis in order “to ensure we have a better understanding of the factors that influence perceptions and attitudes in the general community.”⁵ It seems prudent therefore

for researchers to attend to the interpretive expectations of the public, and to begin an exploration into the role popular stories and images might have to play in public (re)imaginings of “justice.” Of course, attempting to connect popular culture and public opinion is no mean feat. Eschholz has argued that this issue of causality remains unresolved in the literature, and that

[d]espite strong arguments and circumstantial evidence about [this] link between media and public perceptions ... empirical tests of the relationship between television viewing and perceptions such as crime, punitive attitudes and [ideas of justice] have proven to be a difficult challenge.... Researchers have long grappled with the question of whether or not watching television broadcasts has a causal link with public perceptions.⁶

This chapter therefore seeks to lay the groundwork for projects which could pursue the symbiotic connection between popular fiction and the transformation and (re)construction of popular

understandings of law and justice. The chapter will describe the first step in my recent project that has been designed to provide some meaningful dialogue about causality and to provide more information about the form and substance of public rhetoric surrounding issues of law and justice.

The project discussed in this chapter essentially seeks to explore the nature of a desire for retributive justice that is manifested within contemporary popular imagination. In particular, it explores whether a conception of justice, which pre-occupies *both* the public imagination and texts of media and popular fiction is one of retribution, and whether as a result this has a mediated effect on public expectations of the law itself. The project has incorporated a number of theoretical musings, including an evaluation of the superhero genre as an antidote to law's perceived failings,⁷ but it also involves an empirical intention to get to the heart of what members of the public are really thinking about what "justice" is and

how it (dis)connects with law – especially from the point of view of punishment. In this chapter I want first to describe my exploration into the way justice is publicly imagined by contextualising the pilot study; and second, to showcase some analysis from focus group research that will demonstrate a public retributive desire that is uncomfortable with the disconnect between law and justice, and concomitantly reflexively illuminate the slippery construct of public “perception.”

I. Cries for Justice in the Public Imagination

Increasingly we live in an era where the public is extremely active in the process of consuming stories of popular culture as one stimulant to the production, transformation and perpetuation of meaning and desire in relation to law and justice. With its diverse offering of symbols, artefacts and objects that can be interpreted by each individual,⁸ popular culture provides an opportunity for a

reflectively active response in the exchange of meaning, and this is what makes audiences such an interesting focus of study. That law and culture are intimately entwined through the popular images and stories transformed by individuals is not a new argument. Sherwin has demonstrated the “highly porous”⁹ nature of the boundaries between law, culture and images and I have consistently argued that popular stories help individuals to frame and contextualise normative expectations of the legal system.¹⁰ Indeed, legal scholars have been encouraged for years to “be attentive to the imaginative life of the law and the way law lives in our imagination,”¹¹ and so it is of real importance to recognise that the intersection of law and popular culture is an active “shared social space wherein our perceptions, attitudes, and beliefs [about law] are developed and negotiated.”¹² Certainly, by exploring the discursive constructions of experience, it is possible to appreciate the nuanced ways in which members of the public see criminal punishment and the value of retribution.

Within this context, the chapter shines the spotlight on the cultural understandings of justice that are socially constructed and transformed in the public imagination. This work of the public imagination is one aspect of what Cover has conceptualised in his idea of the “nomos” (the cultural world of law). Cover recognised that law is more than just formal institutions and rules; law includes what people believe law is and the stories they tell about it.¹³ In this way the nomos can be viewed as the discourses that bring the law into being as something meaningful. Taking this even further, as law is a quotidian aspect of the social experience and “is inseparable from the interests, goals, and understandings that deeply shape or comprise social life,”¹⁴ it seems entirely appropriate to appreciate how individuals *produce, interpret, transform* and *exchange* meanings about law through popular stories (both fictional and those circulating within news media). This chapter outlines a project that conceptually explores this public transformation of meaning

specifically in relation to issues of justice, and it proceeds on the basis that it is through everyday stories that perceptions of law and justice are formed and maintained. This can be effectively illustrated with reference to the background of the project.

A. "Outrage of a Nation"

The genesis of the project was a small-scale study that sprang from a series of news stories on the "gang rape" of a young girl in the remote Australian indigenous community in Cape York, Queensland.¹⁵ These stories harshly criticised the sentencing of a District Court Judge in which the nine offenders were given non-custodial sentences. The media stories bemoaned the lack of justice for the victim and expressed the "outrage" of the nation that the legal system had seemingly abandoned the notion of justice altogether.¹⁶ The news reports repeatedly illuminated the salacious details of the case, focussing on the victim's personal encounter with the law.¹⁷ In using storytelling conventions, rhetoric and the use of news as a

framing device, the media weaved the (re)telling of this story into an evaluation of the efficacy of the justice system. So much of the media narrative surrounding this case was an emotive evaluation that there must be something wrong with the justice system if a decision like this could be handed down.¹⁸

The media frenzy surrounding the decision seemed to provoke a public backlash against both the Judge and the criminal justice system. The then Premier of Queensland was so alarmed that “the nature of these sentences in this case are so far from *community expectation*”¹⁹ that she kick-started a chain of events. This chain culminated in the resignation of the public prosecutor, an appeal by the Queensland Government of the sentences, and an investigation into all criminal sentences handed down in Cape York communities in the previous two years. But what was the “community expectation” in this case? In one letter to the paper a reader says:

The nine men all pleaded guilty to raping a little girl. That's sufficient evidence to indicate a *severe* sentence should be handed down....When a judge hears a man say he raped a child, that judge is duty bound to administer *justice* appropriate to the offence.²⁰

In this quote, and in other media reports about this particular sentence, it appeared that the “community expectation” was punishment – for the offenders to get what they deserve as the only way to ensure that “justice” would be done. The reader’s comment reflects the very nature of public imagination at work, stimulated by stories that evoke an instinctive retributive response. It represents a subjective desire to see the offenders getting what they deserve, spurred on by emotional storytelling, absent any contextualisation or awareness of procedural fairness. It is an intuitive first response to dealing with criminal behaviour – and this is what the media uses to advantage. Take for example the following concluding paragraph to an article from the *Adelaide Advertiser*, which makes this story a

foreground for a not so subtle attack on the processes and practices of our justice system:

The justice system is established to protect every Australian. It has a special responsibility to protect children and to punish those who commit particularly repugnant crimes against children. It is difficult to comprehend how something like this case could happen in modern Australian society.²¹

This paragraph followed the facts of the sentencing and a recounting of the rape itself. Embodied in this reframing of the story is an assessment that a young girl's tragic encounter with the law reflects a deep-seated problem with the way law is currently operating in Australia. In focusing on the victim in this narrative, this little girl's story becomes a personalised news event,²² one that contains a seemingly "truthful" judgment on the legal system. Yet, this is simply an example of Posner's "conversational objectivity," where "a critique of institutions such as the justice system, is negotiated through

narrative, through the public telling of stories”²³ and through a framing of facts that describe sentencing purely in terms of whether they appropriately redress elements of moral culpability. Implicit in this last paragraph of the Adelaide Advertiser article is a misleading concern for the protection of “every” Australian, which belies an undercurrent of penal populism. It is misleading in the sense that it is completely unbalanced – it actually provokes a desire for the public to *only* be concerned with “justice” for a portion of Australia (the victims), rather than *every* Australian; and as a result, it exposes a latent desire for retributive justice.

Unsurprisingly, upon researching the transcript of the decision and completing an in-depth content analysis of these media reports, it became clear that the mass media coverage of the sentencing in this case focussed disproportionately on the dramatic and emotional aspects of the case, while selectively ignoring relevant information that actually informed the judge’s decision-making process.²⁴ As recent studies have shown, once individuals have been given “the facts” or further

information about sentencing, their perspectives on leniency alter.²⁵ With more information, many Australians might have softened their critique of this particular sentence. The context of this case included a long-term systemic dysfunction among remote indigenous communities where prison terms were proving ineffectual, as well as the judge's knowledge that the offenders themselves had long suffered from various forms of institutional abuse.²⁶ Yet, while media reporting is generally driven by emotion rather than information, we can expect that an instinctive penal populist reaction, which does not care for context or procedural fairness, will continue. Stories like this capture the public imagination because they resonate emotionally with a public desire to hold others responsible for their actions, and the clear message portrayed is that Australians should (if they don't already) instinctively view retribution as justice.

Doubtless, public attitudes to crime and justice are much more nuanced than this one news story demonstrates. As a result, the

current larger project was conceived in order to problematise this notion of penal populism as a cultural construct that is contingent upon a perceived need for “just desert.” Upon reflection of this small-scale media study, it seemed that the public imagination was only concerned with a perception of retribution as substantive justice for the *victim*, and so the empirical pilot study was conducted to test this hypothesis further. The next section of the chapter highlights analysis from this empirical study, which provided members of the public an opportunity to explain and discuss their perception of how justice works.

II. Public Desire for Just Desserts

Deploying the qualitative method of focus groups, the project sought to explore the nuanced ways that individuals interpret and use images to make sense of law and justice and to transform meaning into motivations, values and expectations. To this end, in

2010, discussion was facilitated around a series of open-ended questions in a pilot study of four different demographics – young adults, retirees, academics, and mothers. The central aim of the focus groups was to present opportunities for individuals to talk informally about issues of justice and to explore from their perspective what role the law plays in maintaining justice.

As a way of gaining insight into the transformed and shared meanings of individuals, I have previously found focus group discussions to be a fruitful mechanism for the articulation of ideas in a mutually stimulative and spontaneously reactive environment.²⁷ When individuals make comments on the activity and competence of the legal system in relation to justice, the group is then able to explore together the ideas that inform their views on the efficacy of the law.

Methodologically then, this research has a basis in cultural studies theory, which advocates the interpretive fluidity of making meaning

and contends that individuals are active producers of meaning from within a cultural context of their own.²⁸ The stories of justice in news media reports and popular culture contribute to an individual's subconscious expectations and attitudes in relation to the role of law in society. Conceptually, the project provided an opportunity to explore the production and transformation of these perceptions. As the group members articulated personal views (in response to general questions concerning the concept of justice),²⁹ their discussion became the fertile ground of analysis. The transcripts were therefore analysed using an interpretive literary method, where the discussion or "talk" became the text from which to unpack participant understandings, and the goal was to acknowledge that what is important is not what people *know* about the law, but how they *use* it to construct and transform meaning.

Conceptually this research adopted a constitutive perspective about the *nomos* that Gies recognises as a legal consciousness,

“which firmly situates the law at the heart of everyday life.”³⁰ As part of the cultural legal studies approach explained earlier in Part 1, this constitutive perspective is therefore key to recognising the interpretive nature of reading news media reports and watching pop cultural texts. This approach “is not simply a summary of a person’s attitudes and opinions about law and the legal system. Instead, legal consciousness is reflected in the stories people tell about their everyday lives and in their social practices – going to court, talking about problems, engaging in disputes, and avoiding conflict.”³¹ I have previously argued that legal scholars should become increasingly aware of this legal consciousness in the deployment of more “ethnographic” projects in this field.³²

Interestingly, several scholars have recently argued that “viewers are attracted to media sources that contain justice-oriented themes.”³³ They point out that news media and fictional dramas not only reflect social reality, but also negotiate, develop and shape the way we

respond to issues of justice.³⁴ By constructing meaning about law through stories, both heard in the media and then retold, individuals imagine what they believe the law should be and how law should function in society. Using participant comments from the pilot study, this section of the chapter will describe two connected themes that emerged from the discussions: (i) the failure of law to live up to expectations of providing “justice,” and (ii) the creation of a false dichotomy between procedural and substantive justice.

A. Law does not deliver “justice”

As I have described elsewhere, the initial analysis from these discussions was unsurprising in relation to the difficulty participants expressed at defining and explaining their understanding of “justice,” and how it actually “works” with law.³⁵ Yet, despite their definitional uncertainty, one clearly recurrent theme was that participants shared a strong belief that the function of law actually *is* to provide justice³⁶ and thus believing this to be the promise of law,

they were often quick to criticise its success in fulfilling it. That is, the participants regularly suggested that the law in fact does not deliver or live up to this promise of retributive provision or “just dessert.” Retributivism as a retrospective justification for punishment links justice with dessert – offenders deserve to be punished in proportion to the severity of the offending conduct. It is retribution’s underlying *lex talionis* philosophy of an “eye for an eye” that is prominent in the public imagination where the stories (re)told by participants reflect a strong tendency towards penal populism.

The focus group participants consistently articulated this shared retributive perspective, which was clearly seen in several comments from participants who describe that substantive justice is the imperative for a truly effective legal system. Take, for example, this comment from Justin where he describes the innate “feeling” we have when we feel there has been an “injustice”:

Justin: I think ...there's a *lack of punishment* really, so you think, OK, the guy who raped somebody needs, has to, you know, go to gaol, or there has to be some kind of...*punishment paid for him to have met justice* ... I think we still have this *inbuilt capacity* to go, yeah, that's *not just*, there's a lack there.³⁷

This comment resonates clearly with the retributive rhetoric associated with the media reports surrounding the rape story discussed in part I – that is, to demand punishment as the only form of acceptable justice in response to the crime. Interestingly, the participants often described their awareness of “justice” by adopting this Kantian-like philosophy of concluding that punishment equates with justice.³⁸ They frequently stated that we have a natural, hardwired sense of what is just, such that an absence of punishment will signify a corresponding absence of justice.³⁹ Certainly, in the

focus groups, the participants indicated that it is only when the guilty are *actually* punished that justice is seen to be done, and these comments correlate nicely with the research of Gromet and Darley who “suggest that the desire for retribution is people’s initial, intuitive response to crimes.”⁴⁰ In one focus group discussion, Chris suggests that when confronted with intentional wrong-doing, our default is to focus on the justice goal of retribution:⁴¹

Chris: ... I think we have this capacity to go, there’s been wrong done here and the guy *hasn’t paid for it*, hasn’t been *punished enough* for it, so I think... [injustice] is when we see there hasn’t been an *equal opposite reaction* for an action.⁴²

Gromet and Darley suggest that “people’s intuition that the offender deserves punishment will be strong,”⁴³ and this certainly rings true for the participants in these focus groups. And again, this matches what was evident in the media report study discussed in Part

I. Yet this should not come as a surprise to us. Theories of human behaviour in psychology have long “identified justice as a core need for people” because we have a “strong desire to live in a fair world where people get what they deserve and deserve what they get.”⁴⁴

Indeed, this intuitive public desire for retributive justice is what seemed to be at the heart of these participant discussions. They consistently expressed the view that not only are retributive measures the primary focal point for determining the achievement of justice in any given case, but also that it is a way of delineating the efficacy of the law. At a fairly simplistic level, the participants explicitly articulated that if the law doesn’t do its job properly (i.e. punish the offender), then there is no justice. They regularly expressed a lack of confidence in the ability of the legal system to actually achieve justice through various comments that indicated a perception of the law as “weak” or “soft” or lacking in consistency.

Yet on a more sophisticated level, the participants also use their discussion to piece together a more implicit critique – that is, that the law and justice are often at odds with one another. In this next example, the participants of one group discuss the societal consequences of being too soft in sentencing discretion, and you can see them working together to understand the purpose of criminal justice:

Stuart: Like when they just get a slap on the wrist, like some of our youths. But then you really get to that stage where the judge just keeps letting them off and they keep getting worse...

Wal: See there was a case not that long ago. A young fellow, I forget what age... but he was on a bond for a crime and he committed another crime and he was put on a further bond.

Now, that should have been an automatic revoking of the bond and straight into jail (and) that would have been *just what he*

deserved, but letting them out again and letting them wreak more havoc is being more unjust on the community.

Patricia: But I wonder what we want from justice though. Do we want rehabilitation or do we want retaliation and punishment?

Jonathon: Well, we've got the greatest rate of recidivism anywhere in the country in our state...

Bill: I mean the court hasn't obviously... obviously the law hasn't dealt with them severely enough in the first place.⁴⁵

The implication of this conversation is that if the legal system actually dealt with offenders effectively (that is provided appropriate punishment) then there would be less recidivism and more confidence in the law to provide substantive justice. But as it stands the participants don't have any confidence that the law is able to achieve that with any consistency, especially as they recognise the

need for an escalating punitiveness as the crimes increase in severity.⁴⁶ This is further evident in the next example where the group critiques the law as being soft on crime in relation to capital punishment:

Stuart: However you feel about capital punishment they must... I think everyone would think... feel when somebody's charged with horrendous crimes against another person that we think that person is not worth anything, they've done a really bad thing and maybe they shouldn't be alive... to do it again...

Wal: Well that's where the inequality comes in, a life is taken and if it's a manslaughter charge, then they're probably only going to get 2 or 3 years maybe and they might even be out quicker than that. So their life is back on track but the other person is devastated by it...

Stuart: I don't think there's many people in NSW or Australia for that matter who wouldn't have liked to have seen Ivan Milat... go to the gallows.⁴⁷

Interestingly, as this conversation continued, nobody disagreed with Stuart that Ivan Milat should have been executed as an appropriate punishment for his crimes. Ivan Milat was an Australian serial killer who perpetrated the infamous “backpacker murders” in NSW during the 1990's. The bodies of seven young people aged between 19-22 were found in the Belanglo State Forest, five of whom were international backpackers. Milat was convicted and is currently serving 7 consecutive life sentences plus 18 years without parole. There is an interesting connection here between just desserts theory and the idea that the penalty should be proportionately severe in order to appropriately punish for this particularly heinous wrongdoing. It seems to represent a biblical retributive notion of an eye for an eye that is so familiarly embedded within populist notions

of justice that it is difficult for the public to conceive of justice as anything other than substantive retribution.

III. False Dichotomy

Connected with this first theme that the law does not adequately deliver justice is a second connected theme. The participants implicitly identify a dichotomy of procedural and substantive justice as played out in the law. While there was a recognised need for procedural justice (“[d]oing what’s right for the person charged – really finding out whether they were guilty or not”),⁴⁸ participants expressed concern that ensuring procedural justice is often times at the expense of substantive justice. That is, those elements of procedural fairness and rules of evidence that exist in order to reflect the belief that all human beings matter equally, sometimes actually prevent “true justice” from being achieved.

Chris: We also have this inbuilt capacity to recognise OK there hasn't been enough punishment or consequence for that person's actions so, I mean, look at the case of that serial paedophile from Queensland um, the police totally mucked up one of his cases and he was thrown out of court. And he was convicted but because of the way the police did the case, it was thrown out and he *got off* scot free for paedophilia, which I mean in our society is one of the most taboo crimes you could ever commit.⁴⁹

Justin: ...I think when we also see cases where there's no possible way he didn't do what he did, it was just through an error in the way it was investigated that he got off... *he didn't get what he deserved*, and so I think that's a big thing when we see that there's a lack of justice there... *he didn't get what he deserved*.⁵⁰

By creating this false dichotomy where procedural justice is not actually “justice” at all, the participants are legitimating a view of “justice” that the law can never fully achieve. And this is one of the difficulties with the public imagination being consumed with the notion of justice as desert – that it is essentially a subjective enterprise that can achieve at best an approximation of “justice,” or at the least a glimpse of what ought to be. As I have argued previously, the audience is therefore caught up in the trap of desire, thriving in the aporia “that forever separates the obtained satisfaction from the sought-for satisfaction.”⁵¹ And so, this puts law at odds with justice in the minds of the public. It is law’s procedure and the implementation of law (or at least the procedural aspects of law) that to the audience jeopardises the achievement of any justice at all.

Part of the perpetuation of this false dichotomy is that the participants aligned procedural justice and efficacy only if it was able to satisfy the greater need of substantive justice or just desert.

Evident in the previous and next examples, is the utilisation of the evocative descriptor “get off” to the outcome for an accused who has been released on what the participants feel is a lesser sentence than is deserved. This language indicates the passing of legal *and* moral judgment on the accused in contradistinction to the sentence passed down by the judge. For instance, look at these comments:

Jonathon: You only have to look at decisions where somebody *gets off* on a technicality or something isn’t applied or something hasn’t been done *quite* right...

Patricia: Yeah, but if they follow and do it properly in the beginning, then that’s how some people *get off* because the law hasn’t been followed properly. And that’s why you’ve gotta make...they have to do the right thing in the beginning, all the policeman, whoever arrests them, because they do *get off*...⁵²

Chris: ...I think they're the ones that do sort of stand out in the media because they're the ones people go "this is ridiculous, like, it was absolutely clear that he did stuff, how terrible is the justice system that *he got off*."⁵³

In these examples, the participants' legal evaluation of the accused provokes an attitude that there is no room for procedural justice if the guilty are treated to a decision that is less than they deserve. You can see in the language that the participants' concessional attitude to procedural justice belies not only their absolute belief in the guilt of the accused despite what the court has decided, but also the nature of their retributive desire. The infliction of intentional harm seems to provoke in the participants "moral outrage leading to a desire to inflict a just desserts punishment on the offender."⁵⁴ As stated above, the only measure of "true" justice according to participants is the achievement of just desserts (the

guilty get what they deserve and the innocent are set free) and procedural justice will thus only be important if a guilty party is appropriately punished as a result of its implementation.

It is the creation of this false dichotomy by participants that ensures they will never be fully satisfied with what the law can provide, and yet at the same time shows they implicitly acknowledge the futility of solely seeking substantive justice. While participants on the one hand, are clearly trying to understand the function of law and apply it within a social context that is bounded by community morality, they are at the same time inadvertently expressing the very tension that exists between the implementation of law and the goal of justice.

Yet it is this single-minded preoccupation of the public imagination to seek retribution over and above anything else that popular culture uses to great effect. A quick survey of popular fiction currently on Australian television screens in any given week show a

high level of preoccupation with bringing offenders to retributive justice. For example, in series currently being aired in Australia, such as *NCIS*, *Arrow*, *Elementary*, *Blacklist*, *CSI*, *Revenge* and *The Mentalist*, the singular emphasis is to ensure offenders are caught and punished so that “justice” can be done. While this pilot study (with its primary goal of simply exploring the generic public “idea” of justice) did not establish a direct influence of television and film (as distinct from news media) on participant attitudes, it is clear that a retributive trend in popular television fiction is equally matched in public retributive desire. Research has indeed shown that “viewers exhibit a preference for narrative structures that equate punishment or retribution with justice,”⁵⁵ and it is suggested that such crime stories function as a stimulant to the transformation and perpetuation of retributive desire that is evident in these participants.⁵⁶

Indeed one might argue that “(v)engeance and punishment for wrongdoings and their association with justice, are common

narrative themes in television and film”⁵⁷ precisely because they tap into our individual emotive evaluation of what deserves punishment. In addition, embodied in the reframing of crime stories is an emotional association with the victim. In using familiar storytelling conventions that particularly focus on the victim’s encounters with crime, these popular stories depend on the viewer/reader’s emotional identification with the victim to convert responses into a critique of law’s ability to provide an appropriate retributive measure against crime.

This again resonates with the retributive narrative present in the rape news story discussed in part I, where the moral outrage leading to retributive desire is heightened all the more by a shared identification with the victim. Popular stories therefore capture the public imagination not only because of an assumed verisimilitude, but also because viewers place themselves in the shoes of the victim. If we were the victim, or a relative of the victim, we would want the

offender to pay – to be caught and to be appropriately punished.

Take for example these two comments from participants who imagine themselves as the victim:

Justin: ...I think it's also a bit about revenge I think you know, there is something you've done to me, *I have a right*, to have something done to you, or to see something done to you...⁵⁸

Lauren: Say if they got fifteen years for running me over with a car, then I don't think that's good enough, because I'd want them to die if they ran me over, or live in gaol forever...⁵⁹

As mentioned earlier it is this instinctive human reaction that prompts Justin and Lauren to desire retribution as payback for intentional harm, almost as though it is a natural right that exists outside law. Perhaps this is why we automatically find ourselves cheering on the hero or protagonist in popular fictions like *Law & Order*, *Elementary*, *Arrow*, and *The Mentalist* to solve the crime and find the killer – because we want justice for the victims, in the same

way we would for ourselves. And this is why news media reports frame stories from the victim's perspective. Individuals will endorse a retributive response to justice because they see themselves as sharing identity with the victim.⁶⁰ When crime stories are told in popular fictions or in news media – the public imagination is put to effect – and retribution as a “unilaterally determined punishment” becomes the dual goal of law and justice.⁶¹

IV. Justice with a Vengeance?

These few examples of the retributive desire for justice held by these participants provide a starting point for further discussion about the exploration of what may be (in)visible in both popular culture and public narrative. It has been argued that the participants' desire for justice is one that fully incorporates the idea of desert. Using popular fiction and crime stories, they are transforming and maintaining ideas of the way in which they perceive justice, and the way in which they believe the law should operate. It is important to

continue to explore the public imaginative life in relation to issues of justice, crime and punishment so that we can make more meaningful connections between popular cultural resources and the types of public desire and expectations that this research demonstrates exist. Popular fiction, media reports and public conversation each deploy the power of storytelling to provoke, engage and animate our imagination in relation to what we expect of the law. This chapter therefore seeks to commend the further utilisation of these stories as a dynamic window into the complexities inherent in public perception of “justice.”

¹ Sherlock Holmes is the main detective character in a number of films and television series based on Arthur Conan Doyle’s book series, including the most recent iteration, *Elementary*, airing currently on Australian Network Channel 10. Patrick Jayne is the main protagonist in the television series *The Mentalist* which airs on Australian Network Channel 9.

² Hon Thomas F. Bathurst, Chief Justice NSW, “Community Participation in Criminal Justice” (paper presented at the NSW Law Society Opening of Law Term Dinner 3, January 30, 2012).

³ Austin Lovegrove, “Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community,” *Criminal Law Review* October (2007): 769-781. This is not unique to Australia. Indermaur and Roberts

report that research conducted in Canada, the US and the UK has found a high incidence of respondents who believe courts are too lenient. David Indermaur and Lynne Roberts, *What Australians Think About Crime and Justice: Results from the 2007 Survey of Social Attitudes – Research and Public Policy Series no. 101* (Canberra: Australian Institute of Criminology, 2009), 1.

⁴ Karen Gelb, *More Myths and Misconceptions* (Melbourne: Sentencing Advisory Council of Victoria, 2008), 4.

⁵ Judy Putt GM Research AIC, foreword to Indermaur and Roberts, *What Australians think About Crime and Justice*.

⁶ Sarah Eschholz, “Crime on Television – Issues in Criminal Justice,” *Journal of the Institute of Justice and International Studies* 2 (2003): 13.

⁷ Cassandra Sharp, “Riddle Me This...? Would the World Need Superheroes if the Law Could Actually Deliver ‘Justice’?,” *Law Text Culture* 16 (2012): 353.

⁸ Dominic Strinati, *An Introduction to Theories of Popular Culture* (London: Routledge, 1995), 35.

⁹ Richard K Sherwin, introduction to *Law, Culture and Visual Studies*, ed. Anne Wagner and Richard K Sherwin (Springer 2014): xxxv.

¹⁰ Cassandra Sharp “‘Represent a Murderer...I’d Never do That!’” How Students Use Stories to Link Ethical Development and Identity Construction,” in *The Ethics Project in Legal Education*, ed. Michael Robertson et al. (London: Routledge, 2011), 33-51; Cassandra Sharp “The ‘Extreme Makeover’ Effect of Law School: Students Being Transformed by Stories,” *Texas Wesleyan Law Review* 12 (2005): 233.

¹¹ Austin Sarat and Thomas R Kearns, *Law in the Domains of Culture* (Ann Arbor: University of Michigan Press, 1998), 6.

¹² Andrew Welsh, Thomas Fleming and Kenneth Dowler, “Constructing Crime and Justice on Film: Meaning and Message in Cinema,” *Contemporary Justice Review: Issues in Criminal, Social and Restorative Justice* 14/4 (2011): 458. doi: 10.1080/10282580.2011.616376.

¹³ Robert M. Cover, “Nomos and Narrative,” *Harvard Law Review* 97 (1983): 4.

¹⁴ Sarat and Kearns, *Law in the Domains of Culture*, 6.

¹⁵ See e.g: “The Justice System Fails a Little Girl,” *Adelaide Advertiser*, 11 December 2007; and “World Aghast at ‘Appalling’ Aurukun Case,” *The Australian*, 14 December 2007.

¹⁶ See e.g., “Academic Calls for Judge to Step Aside,” *Australian Associated Press General News* 10 December 2007; “When is Justice for the Victim?,” *Townsville Bulletin* 11 December 2007.

¹⁷ See e.g. headlines such as: “No Charges Laid in Another Vile Rape,” *The Courier Mail* 12 December 2007; and “No Justice in Laws Clinging to Savagery” *The Gold Coast Bulletin* 11 December 2007.

¹⁸ Ironically, before the Australian public had an opportunity to react “naturally” to the sentence as the story broke, the media emotively reported that the nation was already “outraged.” Immediately, the Australian public is “informed” by the media that based on the facts as being reported, we should be outraged at such a decision. Such a desire for “justice” was seemingly universal too, with international outrage at this case further adding fuel to an already blazing fire of anger and shock. *The New York Times*, CNN, the British Press, Russian newspaper *Pravda* and the Arabic News Service *Al-Jazeera*, all reporting on the issue, contributed to the emotive evaluation that with such a sentence, the Australia legal system has failed a young girl. See “World Aghast at ‘Appalling’ Aurukun Case,” *The Australian*, 14 December 2007. The *New York Times* reported that heads were rolling as “outrage and disbelief continued to spread across Australia over the decision of (Sarah Bradley),” 12 December 2007.

¹⁹ “Queensland: Govt to Review Cape Sentences after Rape Case,” *Australian Associated Press General News*, 10 December 2007.

²⁰ “Legal System is Part of the Problem,” *Talking point, The Courier Mail*, 21 December 2007 (emphasis added).

²¹ “The Justice System Fails a Little Girl,” *Adelaide Advertiser*, 11 December 2007.

²² Barbie Zelizer, “Achieving Journalistic Authority Through Narrative,” *Critical Studies in Mass Communication* 7/4 (1990): 366. doi: 10.1080/15295039009360185.

²³ Judge Richard A. Posner, *The Problems of Jurisprudence* (Harvard University Press, 1990), 7.

²⁴ For the vast majority of the public, the media is the major source of information about what happens in court cases, and much research has shown that the media distorts the realities of sentencing. “The media reports only a very small proportion of sentencing outcomes, focusing almost exclusively on ‘soft’ sentences. This creates a public perception that the courts are generally too soft on criminals, which in turn has the potential to reduce public confidence in the courts.” J. M.

Robertson, "Are the Courts Too Soft on Crime? How Media Reports Distort the Realities of Sentencing," *Proctor* 25/9 (2005), 15.

²⁵ Kate Warner et al, "Public Judgment on Sentencing: Final Results from the Tasmanian Jury Sentencing Study," *Trends and Issues in Crime and Criminal Justice* 407 (2011): 1; Austin Lovegrove, "Public Opinion, Sentencing and Lenience."

²⁶ The public is not made aware that in sentencing judges are often legislatively directed to take into account certain factors. In fact, the court transcripts reveal that the defendants' lawyer argued that "the families are in such crisis that they create a negative environment (and) place additional pressures upon my young clients to move out, to move away, to involve themselves in nefarious activities, drinking or smoking or sniffing or stealing." "Arunkun Rapists Thought Behaviour 'Normal'" *The Age*, 14 December 2007.

²⁷ Cassandra Sharp "Changing the Channel: What to Do with the Critical Abilities of Law Students as Viewers?" *Griffith Law Review* 13/2 (2004): 185-199; Cassandra Sharp "'Represent a Murderer...I'd Never do That!' How Students Use Stories to Link Ethical Development and Identity Construction," in *The Ethics Project in Legal Education*, ed. Michael Robertson et al. (London: Routledge, 2011): 33-51; Cassandra Sharp "Let's See How Far We've Come: The Role of Empirical Methodology in Exploring Television Audiences," in *Law and Justice on the Small Screen*, ed. Peter Robson and Jessica Silbey (Oxford: Hart Publishing, 2012): 111-132. For other focus group methodology, see Chris Barker and Julie Andre, "Did You See? Soaps, Teenage Talk and Gendered Identity," *Young: Nordic Journal of Youth Research* 4/4 (1996), 23. doi: 10.1177/110330889600400403.

²⁸ David Morley, *Television, Audiences and Cultural Studies* (London: Routledge, 1992).

²⁹ Questions of the focus group on file with the author.

³⁰ Lieve Gies, "The Media and Public Understanding of the Law," in *Readings in Law and Popular Culture*, ed. Steve Greenfield and Guy Osborn (Oxon: Routledge-Cavendish, 2008): 74.

³¹ Anna-Maria Marshall and Scott Barclay, "Symposium: In Their Own Words: How Ordinary People Construct the Legal World," *Law and Social Inquiry* 28(3) (2003): 618.

³² Cassandra Sharp, "Let's See How Far We've Come," 111-132.

³³ Welsh A, Fleming T and Dowler K “Constructing Crime and Justice on Film,” 460.

³⁴ “The role of media in public perceptions and understandings of crime and justice issues cannot be underestimated. Far from the objective lens of events, the media are platforms wherein our social reality is not only reflected but to some extent negotiated and developed.” Welsh, Fleming and Dowler, “Constructing Crime and Justice on Film,” 471. Nicole Hahn Rafter, *Shots in the Mirror: Crime Films and Society* (Oxford University Press, 2006), 3.

³⁵ For some early analysis of this research which demonstrates a public dissatisfaction with the law, see Sharp, “Riddle Me This...?” 353.

³⁶ Focus Group 2, p. 8, Emily: “...the justice system is upholding the law because then you say look you’ve broken this law and so then you face these consequences.” Hereafter Focus Groups are referred to by number of group (FG #) and then the corresponding page number of the quote. Transcripts on file with the author.

³⁷ FG 2, p. 2.

³⁸ Research has shown that people often equate punishment with justice. Welsh, Fleming and Dowler, “Constructing Crime and Justice on Film,” 460.

³⁹ Phoebe: “So, if justice is done we might not necessarily think yes, that was good and just but if justice isn’t done, we’re more likely to notice.” FG 2, 2. Welsh, Fleming and Dowler, “Constructing Crime and Justice on Film,” 460.

⁴⁰ Dena M. Gromet and John M. Darley, “Retributive and Restorative Justice: Importance of Crime Severity and Shared Identity in People’s Justice Responses,” *Australian Journal of Psychology* 61(1) (2009): 51.

⁴¹ Gromet and Darley argue that: “... when people are initially confronted with wrongdoing, their default orientation is to focus on the offender and be retributive.” Gromet and Darley, “Retributive and Restorative Justice,” 51.

⁴² FG 2, 7-8.

⁴³ Gromet and Darley, “Retributive and Restorative Justice,” 51.

⁴⁴ Gromet and Darley, “Retributive and Restorative Justice.”

⁴⁵ FG 4, 6-7.

⁴⁶ Dena M Gromet and John M Darley, “Restoration and Retribution: How Including Retributive Components Affects the Acceptability of Restorative Justice Procedures,” *Social Justice Research* 19(4) (2006): 399.

⁴⁷ FG 4, p. 11-12.

⁴⁸ FG 4, p. 2 and FG 4, p. 3 “You’ve got to be fair when you listen to people and get all the evidence.”

⁴⁹ FG 2, 7.

⁵⁰ FG 2, 14.

⁵¹ Sharp, “Riddle me this...?,” 353; Slavoj Žižek, *On Belief* (New York: Routledge, 2001): 90.

⁵² FG 4, 9.

⁵³ FG 2, 12-13.

⁵⁴ John M. Darley and Thane S. Pittman, “The Psychology of Compensatory and Retributive Justice,” *Personality and Social Psychology Review* 7 (2003): 329.

⁵⁵ Welsh, Fleming and Dowler “Constructing Crime and Justice on Film,” 458.

⁵⁶ To test the hypothesis of a direct correlation between television/film and public retributive desire is the natural progression of this particular research project. I am currently undertaking research that attempts to achieve this, and encourage other researchers to take up a similar challenge.

⁵⁷ Welsh, Fleming and Dowler “Constructing Crime and Justice on Film,” 460.

⁵⁸ FG 2: 6

⁵⁹ FG 3, 1 & 2.

⁶⁰ Gromet and Darley, “Retributive and Restorative Justice,” 52.

⁶¹ Gromet and Darley, “Retributive and Restorative Justice,” 52.

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